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- (ii) Short Articles not exceeding 5,000 words including footnotes;
- (iii) Case Notes not exceeding 3,000 words including footnotes; and
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Editorial

Ana Júlia Maurício* and Naomi Hart**

Editors-in-Chief

It has been a pleasure to steward the *Cambridge Journal of International and Comparative Law* through its fourth year. The *Journal* has the unusual distinction among academic journals of being both peer reviewed and student-run—harnessing the expertise of established scholars, as well as training those who will succeed them.

The *Journal* has always endeavoured to make a meaningful and holistic contribution to the legal academic landscape, and this year we have maintained many of the traditions that enable us to do so. In May, we held a conference attracting 150 international participants. Keynote speakers included former President of the International Court of Justice, Dame Rosalyn Higgins DBE QC, the recently appointed Judge James Crawford AC SC, and a Judge of the Court of Justice of the European Union, Christopher Vajda QC. We continue to operate a blog, publishing dozens of posts a year. Of course, the core of our work remains our published volumes, in which we strive to feature diverse contributions by legal academics and practitioners, from distinguished authors to their more junior colleagues. This edition is no exception, with pieces canvassing international and comparative legal issues as diverse as sporting discipline, maritime delimitation, climate change-induced migration, and accessorial criminal liability, drawing on jurisdictions as far-flung as Finland, Singapore, Brussels and islands of the Pacific.

The *Journal* also prides itself on its dynamism, seeking to innovate every year. In 2015, we were delighted to hold the inaugural *CJICL* Young Scholar's Lecture at the Lauterpacht Centre for International Law. We hope that this annual event will furnish early-career academics with a platform to present their work to a critical audience and to publish cutting-edge research. Our first Young Scholar Lecturer, Eirik Bjorge, contributed his piece on the margin of appreciation in international law to this volume.

This year, we have also sought to professionalise the *Journal* by entering into a long-term sponsorship arrangement with an academic publisher, and by arranging publication through a project management company. We trust that these arrangements will facilitate our ongoing commitment to publishing high-quality, independent scholarship.

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Like all Editors-in-Chief of the *Journal*, our gratitude extends to a great many people. We are immensely appreciative of the assiduity and tireless commitment of our Managing Editors—Chintan Chandrachud, Catherine Gascoigne, Nino Guruli, Soterios Loizou, John Magyar and Barry Solaiman. They have managed teams of editors who have miraculously managed to carry out their duties alongside rigorous academic and extra-curricular schedules. Jake Rylatt, our Blog Manager, has diligently maintained our digital presence. Clara Rauchegger and Anika Seeman made convening our annual conference look easy. This Editorial Board has been the real machine behind the *Journal*.

As ever, we are grateful to the members of the Academic Review Board for bringing their expertise to our publication. In particular, our thanks go to our outgoing Senior Treasurer, James Crawford AC SC, as well as the members of our newly appointed Faculty Advisory Board, Professor Catherine Barnard, Professor John Bell and Dr Kate Miles.

We are fortunate to have received high calibre submissions to this volume and thank our authors for their hard work in refining their pieces. This year, the *Journal* has relied on the generous sponsorship of Hart Publishing, and we thank Sinéad Moloney for her efforts in forging this relationship. The publication process has been managed by Forewords, with the particular assistance of Nick Allen.

Finally, we are in the enviable position of having a cadre of predecessor Editors-in-Chief who have liberally assisted us throughout the publication of our first edition. We thank them for their contribution to creating the *Journal* as it is today, and for their invaluable advice over the past year.

Reviewing Disciplinary Sanctions in Sports

*Rosmarijn van Kleef**

Abstract

International and national sports federations create, apply and enforce rules in order to regulate their sports. If an associated member or club does not comply with these rules, disciplinary sanctions—such as fines, exclusion from participation in certain matches, or even exclusion from the federation—can be imposed. From the outset, the national or international sports federations create their own regulations and enforce them through an internal—private—sanctioning system. However, in the review of the sanction, national law takes up a prominent place. A federation's decision to impose a sanction can be subject to review either by a national court or in arbitration, for example, before the Court of Arbitration for Sport. The arbitral award, whose goal is to reach a final decision, can nevertheless be challenged before a national court. In the review of disciplinary sanctions, different legal frameworks—the private rules of sports federations and national law—cross each other's paths. The aim of this article is to map out the interrelation between these frameworks by analysing the two different paths that exist for the review of a disciplinary sanction. As the regulation of sport naturally crosses national borders, this analysis is structured using a comparative approach to find out whether there is any coherence at the international level regarding the review of disciplinary sanctions. The countries included in the comparison are England, France, Germany, the Netherlands and Switzerland.

Keywords

Disciplinary Sanctions, Sport, Review, Arbitration, Court of Arbitration for Sport, Comparative Law

1 Introduction

International and national sports federations¹ create, apply and enforce rules in order to regulate their sport. Associated athletes and clubs are required to comply with these

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¹ A national sports federation is the governing body for sport(s) in a certain country. An international federation governs the sport on a global level and exercises a monopoly position.

rules, which are laid down in the federations' regulations. If they do not abide by the rules, a disciplinary sanction can be imposed. These sanctions can range from a fine, to the exclusion of participation in certain matches, and in extreme cases even to exclusion from the federation.

The creation and enforcement of the rules that athletes and clubs need to adhere to takes place on different levels. From the outset, the national or international sports federation creates its own regulations and enforces them through an internal—and thus private—sanctioning system. However, in the review of the sanction, rules of national law have a prominent place. The federation's decision to impose a sanction can be subjected to review either by a national court or in arbitration—a form of private dispute resolution. The arbitral award, the goal of which is to reach a final decision, can in turn be challenged before a national court. In the review of disciplinary sanctions, different legal frameworks—the private rules of sports federations and national law—thus cross each other's paths. The aim of this article is to map out the interrelation between these frameworks by analysing the two different paths that exist for the review of a disciplinary sanction.

As the regulation of sport, by its nature, crosses national borders, this analysis is structured using a comparative approach to find out whether there exists any coherence on an international level regarding the review of disciplinary sanctions. The countries chosen for this exercise are the Netherlands, England, Germany, France and Switzerland.² In practice, the latter jurisdiction is especially important, as Switzerland is the seat of the Court of Arbitration for Sport (CAS), as well as of the large majority of international sports federations.³ As a result, Swiss law applies to virtually all decisions made by international federations, including the disciplinary sanctions they impose upon athletes or clubs.

This article is structured as follows. Section 2 focuses on the review performed by national courts. When an athlete or club is faced with a disciplinary sanction from its sports federation, this decision can be reviewed in court. In this review, the private regulations of the sports federation, or at least their concrete application, are tested against rules of national law. The scope of review applied in these cases is discussed per country. This is followed by an overview of the review of disciplinary sanctions in arbitration. The regulations of a sports federation can provide that the federation's decisions, including disciplinary sanctions, are to be reviewed in arbitration instead of by

² The selection is based on the following reasons. In the Netherlands, only very little research has been performed on disciplinary regulations in sports. Both Germany and France were chosen as the legal discourse in these countries is strongly developed thus allowing for a high level of analysis. Finally, England and Switzerland have been chosen for their practical importance. England has played a profound role in the development of organised sports in general and football in particular. Switzerland is home to most international sports federations, including the International Olympic Committee, UEFA and FIFA, which results in the applicability of Swiss law to virtually all decisions made by international federations.

³ The International Association of Athletics Federations (IAAF), which resides in Monaco, being the most notable exception.

a national court. Although this review technically stays in the private sphere, arbitration proceedings are governed by national private law. The first part of Section 3 analyses the requirements national law sets in regard to this arbitration procedure. The second part of Section 3 discusses the option of challenging the arbitral award by a national court. The analysis includes the requirements and issues related to overturning arbitral awards in general, and awards by the Court of Arbitration for Sport (CAS) specifically.

2 The scope of review of disciplinary sanctions before national courts

In principle, whenever a sports federation imposes a sanction, this decision can be challenged before a national court. The primary jurisdiction of the courts can only be ousted when a valid arbitration agreement exists. This situation is discussed in Section 3.

When disciplinary sanctions are reviewed by national courts, the private regulations of sports federations, or at least their concrete application, are tested against rules of national law. This section provides an overview of the scope of this review. In other words, how and under what circumstances can the courts intervene in the decision-making of the federations? The goal is to explore how the interrelation between national law and the enforcement of sports federations' regulations compares between the different legal frameworks.

2.1 The Netherlands

In the Netherlands, most cases in which the review of a disciplinary sanction is at issue are brought before the summary proceedings judge (*kortgedingrechter*) of one of the district courts. Generally, these decisions are not appealed.⁴ The legal basis upon which the review is founded is ambivalent as two different approaches can be discerned. Nevertheless, both approaches require that the claimant has exhausted all available internal appeal measures that the sports federation provides.⁵ An example of such a measure is found in the regulations of the Royal Dutch Football Association (KNVB), which after a sanction is imposed by the disciplinary commission, provides for an internal appeal before the appeals commission.⁶

The first approach has its basis in legal entity law. Based on articles 2:14 and 2:15 of the Dutch Civil Code (BW), a resolution (*besluit*) of an association's organ can be challenged if it is contrary to the law, the articles of association, an internal regulation

⁴ R J J Eshuis, N E de Heer-de Lange and B J Diephuis (eds), *Rechtspleging Civiel en Bestuur 2010* (WODC 2011) 98 <<http://www.cbs.nl/NR/rdonlyres/4C7557DA-0BC6-4D77-BB92-EFAD904970A0/0/2011civielbestuur2010pub.pdf>> accessed 21 April 2014.

⁵ P L Dijk and T J van der Ploeg, *Van Vereniging en Stichting, Coöperatie en Onderlinge Waarborgmaatschappij* (5th edn, Kluwer 2007) 150; H J Snijders, C J M Klaassen and G J Meier, *Nederlands Burgerlijk Procesrecht* (Kluwer 2011) 87.

⁶ *Reglement Tuchtrechtspraak Betaald Voetbal*, arts 13–17, <www.knkvb.nl> accessed 21 April 2014.

or if it conflicts with the standards of reasonableness and fairness imposed by article 2:8 BW.⁷ The second approach, which seemingly prevails in practice, is to regard the decisions of the bodies of associations as a binding opinion (*bindend advies*).⁸ Under Dutch law, the binding opinion is a decision on an uncertainty or dispute taken by a third party.⁹ This legal figure falls under the scope of the contract of settlement, which is governed by article 7:900–910 BW. A binding opinion can be challenged solely on the ground that ‘it would be unacceptable for a party to be bound to it, in connection with the content or the manner of its establishment in the given circumstances, according to standards of reasonableness and fairness’.¹⁰ It should be noted that this formula is almost identical to that contained in article 2:8 BW, which requires the legal entity and those involved in its organisation to act according to the standards of reasonableness and fairness in all their relations.¹¹ Regardless of the approach taken,¹² the ability of the reviewing instance is marginal as it is limited to the assessment of whether the deciding body could reasonably have come to the decision.¹³

2.2 England

According to English law, the jurisdiction of the disciplinary bodies of sports associations is generally based on contract. Disciplinary sanctions are therefore to be controlled by the ordinary remedies for breach of contract.¹⁴ The available remedies depend on the

⁷ Art 2:14 BW only states that a resolution is null and void when it is contrary to the law or the articles of incorporation. However, in parliamentary debates it has been argued that the norm of art 3:40 BW—the general provision concerning juridical acts that are contrary to the law, public policy or good morals—also applies to resolutions of associations. See C J van Zeben, *Parlementaire Geschiedenis van het Nieuw BW. Boek 2. Rechtspersonen* (Kluwer 1962) 152.

⁸ Rechtbank Utrecht (Utrecht District Court), LJN: AC3512, 14 April 1978 reported in (1978) NJ 496; Rechtbank Arnhem (Arnhem District Court), LJN: AH0828, 11 September 1985 reported in (1985) KG 296; Rechtbank Arnhem (Arnhem District Court), LJN: AH3134, 17 May 1990 reported in (1990) KG 193; Rechtbank Utrecht (Utrecht District Court), LJN: AH5649, 9 July 1996 reported in (1996) KG 259; Rechtbank Utrecht (Utrecht District Court), LJN: AY5200, 26 July 2006; Rechtbank Utrecht (Utrecht District Court), LJN: BA1595, 21 March 2007; Rechtbank Zutphen (Zutphen District Court), LJN: BN1808, 21 July 2010; Rechtbank Utrecht (Utrecht District Court), LJN: BQ6349, 18 May 2011; Rechtbank Zwolle-Lelystad (Zwolle-Lelystad District Court), LJN: BU4893, 16 November 2011 reported in (2012) RN 19.

⁹ A C van Schaick, *Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht, 7-VIII, Bijzondere Overeenkomsten* (Kluwer 2012) 170.

¹⁰ Art 7:904 BW, which codified the case law rule from *Hoge Raad* (Dutch Supreme Court), 29 January 1931, reported in (1931) NJ 1317.

¹¹ For an overview of the differences and their consequences, see R H C van Kleef, ‘Samenloop Bij de Rechterlijke Toetsing van Tuchtrectelijke Sancties in de Sport’ (2013) 6965 WPNR 161.

¹² In case law regarding disciplinary sanctions in sports it is not unusual to see appeals based on both grounds: Rechtbank Utrecht (Utrecht District Court), LJN: BA1595, 21 March 2007; Rechtbank Zutphen (Zutphen District Court), LJN: BN1808, 21 July 2010; Rechtbank Zwolle-Lelystad (Zwolle-Lelystad District Court), LJN: BU4893, 16 November 2011 reported in (2012) RN 19.

¹³ *Hoge Raad* (Dutch Supreme Court), 2 December 1983 reported in (1984) NJ 583.

¹⁴ W Wade and C F Forsyth, *Administrative Law* (10th edn, OUP 2009) 538–39.

nature of the right invoked by the claimant and are generally open after internal remedies are exhausted.¹⁵ Traditionally, in common law, there is a primacy of damages. However, in most sports cases, damages will not be a suitable solution as disciplinary sanctions often have an effect on the eligibility of an athlete or club to participate in competitions. Therefore, an injunction—a court order that requires a party to perform or refrain from performing a particular act—is often a more suitable remedy.

Despite the undisputed contractual basis of the relationship between athletes, clubs and sports federations,¹⁶ there has been a long-standing debate about whether sports federations are subject to the public law remedy of judicial review, under which the legality of the decision-making process of a body exercising a public function is reviewed, instead of the merits.¹⁷ This debate was settled in *Bradley v Jockey Club*. Graham Bradley was a successful steeplechase jockey who was charged with breaching the 'Racing Rules' for allegedly passing racing information to a gambler. The Jockey Club Disciplinary Committee imposed multiple sanctions, including disqualification for a period of eight years. The court developed a so-called private law supervisory jurisdiction.

The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any

¹⁵ A Lewis and J Taylor, *Sport: Law and Practice* (Tottel 2008) 292–93.

¹⁶ See R van Kleef, 'The Legal Status of Disciplinary Regulations in Sport' (2014) 14 Intl Sports L J 24, 31–35.

¹⁷ Historically, the remedies of administrative law were reserved to authorities whose powers were granted for governmental purposes but over time have been extended to other bodies. However, despite the creation of a broader 'public function test' (in *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815), the English courts have held consistently that challenges to actions of sports governing bodies should be brought in private law proceedings and not by way of judicial review. Landmark decision: *R v Jockey Club ex p Aga Khan* [1993] 1 WLR 909. See also *R v Football Association of Wales ex p Flint Town United Football Club* [1991] COD 44; *R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy* [1993] 2 All ER 207; *R v Jockey Club ex p RAM Racecourses Ltd* [1993] 2 All ER 225; *R v Football Association Ltd ex p Football League* [1993] 2 All ER 833. The contractual relationship between a sports federation and its members stands in the way of this remedy. Existing criticism of this case law is mainly based on the fact that the virtually monopolistic powers of national sports federations result in the situation that a person who wishes to practice a certain sport cannot avoid submitting to its jurisdiction. See M J Beloff and T Kerr, 'Why *Aga Khan* is Wrong' (1996) 1 Judicial Rev 30; D Pannick, 'Judicial Review of Sports Bodies' (1997) 3 Judicial Rev 150. According to Gardiner and others, 'the monopoly positions held by many of these bodies have been acknowledged as being reason enough to supervise their activities': S Gardiner and others, *Sports Law* (4th edn, Routledge 2012) 134. Accordingly, the courts have intervened on multiple occasions to ensure disciplinary bodies apply the minimal standards of natural justice. *Davis v Carew-Pole* [1956] 1 WLR 883; *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329; *Modahl v British Athletic Federation Ltd (No 2)* [2002] 1 WLR 1192. See also P McCutcheon, 'Sports Discipline, Natural Justice and Strict Liability' (1999) 28 Anglo-American L R 37, 39; Lewis and Taylor (n 15) 171.

exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth.¹⁸

Nevertheless, as in the judicial review procedure, the court's assessment is largely restricted to procedural elements:

The court's role, in the exercise of its supervisory jurisdiction, is to determine whether the decision reached falls within the limits of the decision-maker's discretionary area of judgment. If it does, the penalty is lawful; if it does not, the penalty is unlawful. It is *not* the role of the court to stand in the shoes of the primary decision-maker, strike the balance for itself and determine on that basis what it considers the right penalty should be.¹⁹

Since *Bradley*, it can be argued that sports governing bodies owe broadly the same obligations as a matter of private law as they would if their decisions were susceptible to the public law remedy of judicial review.²⁰ The court only assesses the legal aspects of a decision and not the content of policy choices. In other words, a court cannot interfere when an association's decision is 'reasonably arrived at'.²¹ This approach stems from the idea that sports associations, similarly to public bodies, have wide autonomy in decision-making as long as they observe the law.²²

2.3 Germany

In Germany, there is no disputing that a disciplinary sanction imposed by a sports federation is anything other than an association's decision. The review of disciplinary sanctions, however, has been a constant theme of debate in German legal doctrine since the first review under the new German Civil Code (BGB) took place in 1902.²³ Historically, the review of associations' decisions has been restricted to a limited test, in recognition of the autonomy of an association.²⁴ This autonomy notwithstanding, associations cannot escape external control of their decisions, as the exclusion of such

¹⁸ *Bradley v Jockey Club* [2004] EWHC 2164 (QB) (Richards J) para 37.

¹⁹ *Bradley* (n 18) para 43.

²⁰ cf J Anderson, 'An Accident of History: Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review' (2006) 35 Common L World Rev 173, 189. Lewis and Taylor have even suggested that the distinction between the private law and public law process has now become irrelevant. Lewis and Taylor (n 15) 164.

²¹ *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, 333 (Denning LJ).

²² cf *Dawkins v Antrobus* (1881) 17 Ch D 615; *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329.

²³ Bürgerliches Gesetzbuch (German Civil Code). W Hadding and F van Look, 'Zur Ausschließung aus Vereinen des Bürgerlichen Rechts' [1988] Zeitschrift für Unternehmens und Gesellschaftsrecht 270–71. cf K Vieweg, 'The Appeal of Sports Law' (2010) 13 <<http://www.irut.jura.uni-erlangen.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrechtEnglisch.pdf>> accessed 21 April 2014, who calls the extent of judicial review a classic problem.

²⁴ Bundesgerichtshof (German Court of Federal Justice), II ZR 17/53, 27 February 1954 reported in (1954) 13 BGHZ 5; Bundesgerichtshof (German Court of Federal Justice), II ZR 142/65, 20 April 1967 reported in (1967) 47 BGHZ 381.

a review is ineffective.²⁵ As to the types of decisions that are susceptible to review, somewhat of a distinction can be made.

First, it is opined that factual decisions taken by arbitrators on the field generally should not be reviewed.²⁶ In the words of Pfister, 'courts ought to apply legal rules only'.²⁷ However, disciplinary sanctions are always susceptible to review. A review is generally only permitted after the internal appeal remedies have been exhausted. The German Court of Federal Justice (BGH) has given two reasons for this approach. Pending the final decision of the competent bodies of the association, it must be avoided that the courts (1) are unnecessarily called upon and (2) prematurely intervene in the autonomy of the association.²⁸ Over time, the scope of the review has been developed in case law and now extends to whether the imposed measure has a legal basis in the articles of association, whether the prescribed disciplinary procedure has been complied with, whether the respective regulations are consistent with state law and good morals, and whether the imposed sanction is not grossly unreasonable or arbitrary.²⁹ Additionally, in order to prevent associations from basing their decisions on underlying facts that, according to the law, could not have been objectively determined, the establishment of facts is also subjected to review.³⁰

Another important development with regard to sports is the further extension of the scope of review of decisions taken by associations holding a monopoly position.³¹ Despite the view that the disciplinary sanction is based upon the free subordination of the members, the BGH has acknowledged that there are numerous situations in which this freedom is actually a fiction, including in the case of regional and national

²⁵ Bundesgerichtshof (German Court of Federal Justice), II ZR 137/57, 26 February 1959 reported in (1959) 29 BGHZ 352, 354; Bundesgerichtshof (German Court of Federal Justice), II ZR 11/94, 28 November 1994 reported in (1994) 128 BGHZ 93, 109.

²⁶ S Krieger, *Vereinsstrafen im Deutschen, Englischen, Französischen und Schweizerischen Recht. Insbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden* (Duncker & Humbolt 2003) 133–38; B Pfister, 'Sportregeln vor Staatlichen Gerichten' [1998] Sport und Recht 221; J Rärer, *Grundrechtliche Beziehungen Juristischer Personen im Berufssport* (Duncker & Humbolt 2008) 221–23.

²⁷ Pfister (n 26) 222.

²⁸ Bundesgerichtshof (German Court of Federal Justice), II ZR 17/53, 27 February 1954 reported in (1954) 13 BGHZ 5, 16; Bundesgerichtshof (German Court of Federal Justice), II ZR 231/64, 6 March 1967 reported in (1967) 47 BGHZ 172, 174; Oberlandesgericht Köln (Cologne Court of Appeal) 19 U 19/05, 23 September 2005 <<http://www.justiz.nrw.de>>.

²⁹ Bundesgerichtshof (German Court of Federal Justice), II ZR 138/82, 30 May 1983 reported in (1983) 87 BGHZ 337, 343; Bundesgerichtshof (German Court of Federal Justice), II ZR 17/53, 27 February 1954 reported in (1954) 13 BGHZ 5; Bundesgerichtshof (German Court of Federal Justice), II ZR 121/55, 4 October 1956 reported in (1956) 21 BGHZ 370; Bundesgerichtshof (German Court of Federal Justice), II ZR 137/57, 26 February 1959 reported in (1959) 29 BGHZ 352; Bundesgerichtshof (German Court of Federal Justice), II ZR 231/64, 6 March 1967 reported in (1967) 47 BGHZ 172; Bundesgerichtshof (German Court of Federal Justice), II ZR 142/65, 20 April 1967 reported in (1967) 47 BGHZ 381.

³⁰ Bundesgerichtshof (German Court of Federal Justice), II ZR 138/82, 30 May 1983 reported in (1983) 87 BGHZ 337.

³¹ Specifically named in Staudinger Kommentar as one of the issues in association law: G Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung* (De Gruyter 2005) Vorbem zu §21, Rdnr. 5.

sports federations.³² In order to tackle this issue, the BGH ruled that, in cases where an association holds a preponderance of power in a specific economic or social field and the member is dependent on the membership, decisions and/or sanctions do not only have to be in accordance with good faith (§242 BGB) but also be justified by objective reasons.³³

2.4 Switzerland

In Switzerland, the main remedy against a decision or sanction taken by a sports organisation is a complaint based on article 75 of the Swiss Civil Code (CC).³⁴ According to this provision, decisions that breach the law or the articles of association can be challenged by each member who did not consent within a month. This right of action is by law and replaces certain legal effects if the appeal is successful.³⁵ However, the reviewing instance can only quash the decision and not amend it. As in Germany and France, decisions made on the field of play are generally beyond review.³⁶ In addition, as in all other jurisdictions, this action is only open after internal appeal remedies have been exhausted.³⁷

The purpose of article 75 CC is to protect members and otherwise adhered athletes and clubs³⁸ from the abuse of the autonomy that is granted to associations.³⁹ In this light, the scope of the review is limited to a test of whether the decision breaches the law or the articles of association. Hereto, the court first reviews whether the sanction has a legal basis in the articles of association and whether the prescribed disciplinary

³² Bundesgerichtshof (German Court of Federal Justice), II ZR 138/82, 30 May 1983 reported in (1983) 87 BGHZ 337, 344; Bundesgerichtshof (German Court of Federal Justice), II ZR 54/98, 23 November 1998 reported in (1998) 140 BGHZ 74.

³³ Bundesgerichtshof (German Court of Federal Justice), II ZR 43/87, 19 October 1987 reported in (1987) 102 BGHZ 265; Bundesgerichtshof (German Court of Federal Justice), II ZR 311/87, 24 October 1988 reported in (1988) 105 BGHZ 306; Oberlandesgericht Frankfurt (Frankfurt Court of Appeal), 13 W 29/00, 18 May 2000; Landgericht Freiburg (Freiburg District Court) 14 O 46/12, 15 May 2012.

³⁴ This provision is a *lex specialis* of the general provision contained in art 20 Swiss Code of Obligations (CO), according to which a contract is null and void if against the law or morality. Legal action can be based on art 20 CO independently of art 75 CC. See H M Riemer, *Die Vereine. Berner Kommentar, Band I/3, 2er Teilband* (Stämpfli 1990) art 75, para 113.

³⁵ H Fenners, *Der Ausschluss der Staatlichen Gerichtsbarkeit im Organisierten Sport* (Zurich 2006) 65; D Oswald, *Associations, Fondations, et Autres Formes de Personnes Morales au Service du Sport* (2010) *Savoirs Sportifs* vol 2 113ff.

³⁶ Bundesgerichtshof (Swiss Federal Supreme Court), 118 II 12, 25 March 1992. See also Oswald (n 35) 151–54.

³⁷ Bundesgerichtshof (Swiss Federal Supreme Court), 118 II 12, 25 March 1992, para 3.

³⁸ In the *Gundel* case, the Swiss Federal Supreme Court held that this remedy is also open to so-called indirect members, ie an athlete or club who is a member of the national, but not the international, federation. *Gundel*, Bundesgerichtshof (Swiss Federal Supreme Court), 119 II 271, 15 March 1993, para 3b. See also Fenners (n 35) 71–73. See for indirect membership, van Kleef (n 16) 35–37.

³⁹ Oswald (n 35) 114.

procedure has been complied with.⁴⁰ Regarding the merits of the decision, doctrinal opinion states that the court can only review whether the sanction is *rechtsmissbrauchlich*, ie whether there is a manifest abuse of a right.⁴¹ There is manifest abuse if an association acts contrary to general principles of law, such as equal treatment or proportionality.

Independently from the remedy of article 75 CC, a sanction can be challenged if it breaches certain other legal provisions, most notably articles 27 and 28 CC. Based on these provisions, a member can take legal action if the sanction wrongfully infringes his personality rights. In general, a disciplinary sanction that suspends an athlete, for breaching doping regulations for example, infringes his personality rights. The term personality rights refers to fundamental rights of an individual that are intrinsic to his being such as the right to life, physical integrity, religion, privacy, honour and also to freely choose one's profession—for instance to be a professional athlete.⁴² However, a violation of personality rights is only sanctioned if the violation is unlawful. A violation is deemed legal if the breach is justified by the consent of the victim, a predominant private or public interest or by the law. In the sports context, the fight against doping has been considered to be such a predominant interest that it justifies the violation of the personality rights of an athlete through a sanction.⁴³

2.5 France

Unlike in the other countries researched, in France a disciplinary sanction imposed by a national federation is qualified as an administrative act and can therefore only be reviewed by the administrative courts. Traditionally, this review has been quite restrained with the courts only reviewing whether the associations' rules were not unreasonably applied.⁴⁴ However, before the court proceeds to the review of the sanction, a number of formal requirements are applied in a rigorous manner. First, the person submitting the request for review has to have sufficient interest. Naturally, the person sanctioned will meet this requirement. However, in some cases, a disciplinary sanction imposed can seriously affect third parties such as an athlete's club or the league. Nevertheless, the *Conseil d'Etat* has limited the circle of appellants to the person subjected to the sanction.⁴⁵ In addition, the French courts will not review referees' field of play decisions.⁴⁶ As with all administrative acts, the decision to impose a disciplinary sanction must also be taken by the competent

⁴⁰ Riemer (n 34) art 75, para 96ff.

⁴¹ *ibid* art 75, para 25. See also C Fuchs, *Rechtsfragen der Vereinsstrafe: Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (Zurich 1999) 144 and authors cited there.

⁴² A Büchler and M Frei, *ZGB Kommentar* (2011) art 28, para 3ff.

⁴³ Bundesgerichtshof (Swiss Federal Supreme Court), 134 III 193, 23 August 2007, para 4.6.3.2.2.

⁴⁴ J P Karaquillo, 'Le Pouvoir Disciplinaire dans l'association Sportive' [1980] *Rec Dalloz* 115, 122.

⁴⁵ *Conseil d'Etat* (French Administrative Court), 3 April 1987, no 80239, <www.conseil-etat.fr> accessed 20 April 2015. See also G Simon, *Puissance sportive et ordre juridique étatique* (Paris 1990) 284.

⁴⁶ *Mantes-la-Ville*, *Conseil d'Etat* (French Administrative Court), 13 June 1984 reported in [1984] *Rec Lebon* 218.

body and meet the applicable procedural and form requirements.⁴⁷ Finally, French administrative courts will only proceed to a review after the internal appeal remedies have been exhausted.⁴⁸ Part of this internal appeal remedy is conciliation by the *Comité national olympique et sportif français* (CNOSF).⁴⁹

The merits of the decision are reviewed in a somewhat stricter manner than in the other jurisdictions. Under French law, the scope of review not only includes the facts underlying the sanction (*contrôle de l'appréciation des faits*), but also the adequacy of the measure taken.⁵⁰ In cases where a sanction is based on a so-called '*faute sportive*', the court only verifies the facts and whether the sanction complies with the law.⁵¹ However, in cases where the sanction is based on actions that are deemed contrary to a sport's ethics or the interests of the association, the court's review extends further, as it has to interpret the facts for itself. With regard to the adequacy of the measures taken, the court reviews whether these are not manifestly disproportionate or excessive in relation to the goals pursued.⁵² For example, in a case where a young judoka had received a life-time ban on joining a judo club after sexually assaulting two other minors, the *Conseil d'Etat* held that considering the age of the athlete at the time of his crime and the severity of the penalty, the sanction was disproportionate.⁵³ In addition, as administrative acts, disciplinary sanctions are reviewed against the general norms and principles of administrative law, including *abus de droit* and *détournement de pouvoir*.

2.6 Summarising remarks

The scope of review of disciplinary sanctions in sports is similarly limited in all five countries. Sports organisations—whether governed by private law or public law—are granted a large margin of appreciation in the application of their regulations. The specific wordings differ across the jurisdictions, but decisions that are reasonably arrived at and not contrary to the law, which includes good morals, good faith, etc, seem to be virtually untouchable. Even in Germany, where monopoly organisations such as national sports federations are controlled in a stricter manner, the test remains marginal. Only

⁴⁷ *Hechter*, Conseil d'Etat (French Administrative Court), 19 December 1980 reported in [1980] Rec Lebon 488. See also Simon (n 45) 287–89; Krieger (n 26) 124–27.

⁴⁸ Landmark decision: *Association Hand-ball Club de Cysoing*, Conseil d'Etat (French Administrative Court), 13 June 1984 reported in [1984] Rec Lebon 217, note Morange. See also *Toulouse Football Club*, Conseil d'Etat (French Administrative Court), 25 June 2001 reported in [2001] Rec Lebon 281; *Fédération Française de Judo, Kendo, Jujitsu et Disciplines Associées*, Conseil d'Etat (French Administrative Court), 28 November 2007 reported in [2007] Rec Lebon 457.

⁴⁹ Code du Sport (France) art R.141-5: 'La Saisine du Comité à Fin de Conciliation Constitue un Préalable Obligatoire à Tout Recours Contentieux, Lorsque le Conflit Résulte d'une Décision, Susceptible ou non de Recours Interne, Prise Par Une Fédération dans l'exercice de Prérogatives de Puissance Publique ou en Application de ses Statuts.'

⁵⁰ Simon (n 45) 291.

⁵¹ *Bentejac*, Conseil d'Etat (French Administrative Court), 16 January 1985 reported in [1985] Rec Lebon 11.

⁵² Simon (n 45) 296.

⁵³ Conseil d'Etat (French Administrative Court), 28 November 2007 reported in [2007] Rec Lebon 457.

in France, perhaps, does the scope of the review extend a little further, as it also tests against general principles of administrative law and interpretation of the facts. However, whether this seemingly stricter test would lead to different results in concrete cases than in the other countries is very difficult to foretell.⁵⁴

When a sanction is reviewed by a national court, the interrelation between national law and the private enforcement of the regulations of sports organisations has proved to be subtle. Nevertheless, the rules of national law form a safeguard for athletes and clubs against arbitrary and unlawful application of sports federations' regulations and ensure that fundamental principles of law are applied.

3 Arbitration of disputes relating to disciplinary sanctions in sports

Although review before a national court is a logical default option for an athlete or club to challenge a disciplinary sanction, practice shows it is often required to take another path. Many national sport federations and virtually all international sport federations provide that disputes are to be settled in arbitration. The first part of this section therefore analyses the requirements for arbitration in sports-related matters. In 'international' cases—where the sanction is imposed by the international sports federation—it is generally the CAS that reviews the sanction. The goal of arbitration is to render a final decision. However, in order to supervise this form of private dispute resolution, national laws provide that an arbitral award can be challenged before a national court. The second part of this section discusses the circumstances under which arbitral awards—CAS awards in particular—can be overturned by a national court.

3.1 Requirements for arbitration in sports-related matters

Arbitration is a complex legal concept, which is exemplified by the lack of a single definition. There is, however, more or less of a consensus about what constitutes arbitration. It is 'a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case'.⁵⁵ The following will focus on the various requirements that national laws impose on the review of sports disciplinary sanctions in arbitration.⁵⁶

⁵⁴ Krieger made an attempt at such an analysis on the basis of the *Modahl* case. See Krieger (n 26) 173–75.

⁵⁵ G B Born, *International Arbitration: Law and Practice* (Kluwer 2012) 4.

⁵⁶ See, for in depth studies of arbitration of sports-related disputes in general, F Oschütz, *Sportschiedsgerichtsbarkeit. Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen und Deutschen Schiedsverfahrensrecht* (Duncker & Humblot 2005); A Rigozzi, *L'arbitrage International en Matière de Sport* (Helbing & Lichtenhahn 2005).

(i) The arbitration law

An arbitration procedure is governed by national private law in the form of the applicable arbitration law, which is not to be confused with the substantive law that governs the dispute. Although virtually every state has its own individual arbitration law, they generally all govern the same issues, including the validity of the arbitration agreement, the arbitration procedure and the award.⁵⁷

The question as to which arbitration law applies usually does not arise when the dispute is between parties in the same jurisdiction. For example, an arbitration between a German football club and the German Football Association (DFB) will be governed by the German arbitration law, which is set out in Book 10 of the German Code of Civil Procedure (ZPO). With regard to international arbitration procedures, however, the applicable arbitration law is virtually always the law of the seat of the arbitration.⁵⁸ The seat is the geographical location to which the arbitration is tied and is often specified in the arbitration clause, for example 'this arbitration will be governed by Dutch law'.

When a sanction is imposed by an international sports federation, the regulations of those organisations generally provide that the decision can be reviewed by the CAS. The CAS is an independent institution that resolves legal disputes in the field of sport through arbitration or mediation. It was originally conceived to deal with disputes arising during the Olympics and was established as part of the IOC in 1984. After the impartiality and independence of the CAS were called into dispute in the famous *Gundel* case, the CAS was reformed to become an independent institution.⁵⁹ Its jurisdiction is limited to ruling solely on disputes connected with sport, which can be of a disciplinary or a commercial nature. In disciplinary cases, it acts as an appeal instance, whereas in commercial disputes, it acts a court of sole instance.⁶⁰ Without exception, the seat of the CAS and each arbitration panel is Lausanne, Switzerland.⁶¹ This results in the applicability of Swiss arbitration law, articles 176–94 of the Swiss Private International Law Act (PILA), on all cases that are brought before the CAS.

⁵⁷ B Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer 2001) 26–28; Rigozzi (n 56) 193.

⁵⁸ G Kaufmann-Kohler and A Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP* (2nd edn, Weblaw-Schulthess 2010) 45; Born, *International Arbitration: Law and Practice* (n 55) 112. See also F Russell, J Gill and D St John Sutton, *Russell on Arbitration* (22nd edn, Thomson Sweet & Maxwell 2003) s 2-099.

⁵⁹ *Gundel*, Bundesgerichtshof (Swiss Federal Supreme Court), 119 II 271, 15 March 1993. The Swiss Federal Supreme Court recognised the CAS as a true court of arbitration, noting that the CAS was not an organ of the federation that had imposed the sanction at issue and that it did not receive instructions from this federation. However, the court noted the strong links between the CAS and the IOC, therefore the independence of the CAS could be questioned in cases where the IOC would be one of the parties.

⁶⁰ CAS Code, art R27.

⁶¹ *ibid* art R28.

(ii) The arbitration agreement

The legal foundation for arbitration is formed by contract, ie the arbitration agreement. Such an agreement expresses the will of the parties to arbitrate their current or future disputes while at the same time renounces the right to bring the case before a state court. This last function is very important as the constitutional right of effective access to the courts has to be relinquished voluntarily.⁶² Arbitration agreements are often formed by a separate provision or clause in a contract. In organised sports, the arbitration agreement ordinarily takes the form of an arbitration clause in the regulations of the sports organisation. Many national and almost all international sport federations impose such arbitration clauses upon their adhered clubs and athletes who are bound through their membership or a license. The validity of such a clause must be reviewed under the applicable arbitration law. Naturally, this test is influenced by the prevailing views on general concepts of law in each country.

Generally, the validity of arbitration clauses in the regulations of sports federations is accepted in four of the five researched jurisdictions.⁶³ This is in line with European case law and the dominant view in the literature, according to which adhering to an association—or other legal entity—implies the acceptance of an arbitration clause incorporated in the regulations of the said entity.⁶⁴ In France, however, a disciplinary sanction imposed by a national sports federation is qualified as an administrative act, which cannot be reviewed in an arbitration procedure.

However, the validity of these agreements between sports organisations and their adhered athletes and clubs can potentially be affected by two issues. The first issue is caused by the fact that in many cases clubs and/or athletes are not directly subordinated to the regulations of their international federation. As a result, the arbitration clause is often part of the regulations of the international federation that the club or national federation only refers to. This raises the question of whether the written form requirement of the arbitration agreement—which applies in all countries—has been met. In England, the law expressly provides that a reference to a written document containing an arbitration clause, constitutes an arbitration agreement.⁶⁵ Current case law seems to suggest, however, that a general reference, without expressly mentioning the arbitration clause is not sufficient, unless special circumstances exist. Such circumstances

⁶² ECHR, art 6; Grondwet (Netherlands Constitution), art 17. See also H J Snijders, *Groene Serie Burgerlijke Rechtsvordering*, Boek IV (2011) n 1.

⁶³ England: *Stretford v Football Association Ltd* [2007] EWCA Civ 238. Germany: §1066 ZPO; Weick (n 31) §25, para 24; Landgericht Dortmund [Dortmund District Court], 13 O 113/08 Kart., 16 October 2008 <<http://www.justiz.nrw.de>>. Netherlands: Dutch Code of Civil Procedure (*Rv*), art 1020(5); Snijders (n 62) art 1020, notes 8–9. Switzerland: Rigozzi (n 56) 414.

⁶⁴ Case C-214/89 *Powell Duffryn v Petereit* [1992] ECR I-01745. See also Kaufmann-Kohler and Rigozzi (n 58) 117; Jochen Kotzenberg, *Die Bindung des Sportlers an Private Dopingregeln und Private Schiedsgerichte* (Nomos 2007) 128–29.

⁶⁵ Arbitration Act (UK), 1996 s 6(2).

can, however, be formed by industry use of standard documents.⁶⁶ It can be assumed that arbitration clauses in sports regulations constitute such industry use.⁶⁷ Similarly, German law does not always require a specific reference, for instance when parties are conscious of the arbitration clause in the referenced document.⁶⁸ In the Netherlands, this issue has yet to be addressed,⁶⁹ while in Switzerland, consistent case law of the Federal Supreme Court holds that a global reference to an arbitration clause contained in the regulations of a sports federation suffices to create a valid arbitration agreement.⁷⁰ Nevertheless, many international sports federations seated in Switzerland now make use of competition entry forms and licenses that include an arbitration clause. This practice further safeguards the risk of a foreign court declaring itself competent to settle the dispute because it considers the arbitration agreement void for not meeting the written form-requirement.⁷¹ This holds true especially for courts outside of Europe as, in light of the legal systems discussed above, it seems unlikely that a European court would declare itself competent based on this ground.

The second issue, which has been debated extensively in the literature, is whether arbitration agreements incorporated into regulations or competition entry forms still qualify as consensual.⁷² In other words, if so-called ‘forced’ arbitration—or in German: *Schiedszwang*—is not contrary to the law. As mentioned above, the concept of arbitration traditionally involves an agreement between parties to have disputes decided by a third person. However, modern arbitration has evolved beyond this notion and there are now many forms of arbitration where there is a prominent inequality between the parties, for instance in labour and consumer matters. With regard to clubs and athletes, they are generally bound through a subordinate membership or other relationship and not by contract.⁷³ Nevertheless, with regard to the arbitration agreement between an athlete or

⁶⁶ See Russell, Gill and St John Sutton (n 58) ss 2-059–2-061 and the cases cited.

⁶⁷ cf, for instance, Sir A Clarke MR who stated: ‘[a]n arbitration clause has become standard in the rules of sporting organisations like the FA’: *Stretford v Football Association Ltd* [2007] EWCA Civ 238, para 49.

⁶⁸ In case the referenced document is considered to contain general terms (AGB), a separate document is nevertheless needed. See Bundesgerichtshof [German Court of Federal Justice], III ZR 30/91, 3 December 1992 reported in [1993] NJW 1798; Oschütz (n 56) 194–95.

⁶⁹ However with regard to an arbitration clause in a collective labour agreement (CAO), the Dutch Supreme Court ruled that an untied employee was bound to this clause as it was agreed that the CAO rules were applicable on his individual contract. No express consent was necessary. *ABN AMRO/Teisman*, Hoge Raad (Dutch Supreme Court), 17 January 2003 reported in [2004] NJ 280.

⁷⁰ *Nagel v FEI*, Bundesgerichtshof (Swiss Federal Supreme Court), 4C.44/1996, 31 October 1996; *Roberts v FIBA*, Bundesgerichtshof (Swiss Federal Supreme Court), 4P.230/2000, 7 February 2001. However, a reference to a document containing an arbitration clause in a competition entry form does not extend to disputes outside of this specific competition: *A v WADA*, Bundesgerichtshof (Swiss Federal Supreme Court), 4A_358/2009, 6 November 2009.

⁷¹ Rigozzi (n 56) 420.

⁷² See for an overview on this debate, Rigozzi (n 56) 422ff and references cited.

⁷³ Only in England is the relationship between sports organisations and their members qualified as contractual. However, it has been suggested that this contract is in reality a fiction, as there is no choice but to enter into it (see further: van Kleef (n 16) 33–35). In addition, there are situations where an athlete or club is bound by a (competition) licence contract.

club and their governing bodies, it can be argued that the consent stems from the ‘*pacte social*’ with the sports organisation that is formed when one chooses to become affiliated.⁷⁴ In the Netherlands, no sports-specific case law on this issue exists. Nevertheless, Meijer has suggested that the act of accession to an association implies the acceptance of the arbitration clause.⁷⁵ In English case law, it was considered that ‘[such clauses] have to be agreed to by anyone (...) who wishes to have a players’ licence, but it does not follow that the arbitration agreement contained in them was required by law or compulsory.’⁷⁶ The same view can be found in Swiss literature, where it is maintained that the practice of incorporated arbitration clauses is in principle not an obstacle to the voluntary character of arbitration. According to both Baddeley and Rigozzi, ‘*l’objet de la relation sociale étant, en règle général, un droit à la disposition des parties, il s’ensuit qu’il peut être soumis à l’arbitrage*’.⁷⁷ According to German case law, an arbitration agreement laid down in an organisation’s regulations is considered binding as all members are subordinate to them.⁷⁸ Moreover, the acceptance of this practice in German literature is based on the fact that it does not obstruct the member’s right to end his membership.⁷⁹ Furthermore, in the commentary on the Bill that modernised the arbitration chapter in the ZPO, it is argued that inequality of the parties is not by itself reason enough to deem an arbitration agreement void.⁸⁰ However, in a recent decision of the Munich District Court on a claim for damages resulting from a doping ban, the arbitration agreements between German speed skater Claudia Pechstein and the national and international skating federation were found invalid based on the structural imbalance (*strukturelles Ungleichgewicht*) between the athlete and the federations who formed a monopoly. The Court considered that, without signing the agreements, the athlete would have been unable to pursue her career and the agreements were thus not entered into voluntarily.⁸¹ This view was, however, nuanced by the Munich Appeal Court, who considered in an interim judgement that the issue is not the imbalance between the parties as such, but rather whether this imbalance prevents the athlete from access to a truly neutral arbitration procedure.⁸² Pending a

⁷⁴ cf Rigozzi (n 56) 426.

⁷⁵ G J Meijer, *Overeenkomst tot Arbitrage* (Kluwer 2011) 503.

⁷⁶ *Stretford v Football Association Ltd* [2007] Bus LR 1052 [49].

⁷⁷ Rigozzi (n 56) 367, citing M Baddeley.

⁷⁸ Landmark decision Bundesgerichtshof (German Court of Federal Justice), II ZR 124/95, 29 March 1996 reported in (1996) 132 BGHZ 278, 284–285, para 5. See also Oberlandesgericht Düsseldorf (Dusseldorf Court of Appeal), I-16 U 95/98, 14 November 2003.

⁷⁹ H Hilpert, *Das Fußballstrafrecht des Deutschen Fußball-Bundes (DFB)* (De Gruyter 2009) 253, citing Haas in E Reschke, U Haas and T Haug (eds), *Handbuch des Sportrechts* B II, Rn. 186.

⁸⁰ German parliamentary documentation, BT Drucksache 13/5274, 34.

⁸¹ Landgericht München (Munich District Court), 37 O 28331/12, 26 February 2014.

⁸² Oberlandesgericht München (Munich Appeal Court), U 1110/14 Kart, 15 January 2015. According to the Court, at the time of the *Pechstein* procedure the CAS did not meet this requirement with regard to the selection of arbitrators where the national governing bodies were favoured. Since 2012, the CAS Code no longer requires that the ICAS establishes the list of arbitrators according to a so-called distribution of arbitrators proposed by the sport governing bodies, effectively removing the structural imbalance criticised by the German court.

final decision from the BGH, it seems that as long as sports arbitration constitutes a valid alternative to the national justice system it will remain the default option for the review of disciplinary sanctions.

(iii) Arbitrability

There are disputes that involve such sensitive public policy issues that it is felt that they should only be dealt with by state courts.⁸³ A dispute can be deemed 'non-arbitrable' because of its perceived public importance or a felt need for formal judicial procedures and protections. For example, various countries refuse to allow arbitration of disputes concerning employment, intellectual property, real estate or family law.⁸⁴

As with the assessment of the validity of the arbitration agreement, the question of whether disciplinary sanctions can be the subject of an arbitration procedure is answered according to the applicable arbitration law. The provisions in the arbitration laws of the four countries provide, however, no clear answer. In Germany, the Netherlands and Switzerland, the respective provisions are formulated in very general terms.⁸⁵ The English Arbitration Act 1996 lacks a provision on this subject altogether and the English courts approach issues of arbitrability case by case, considering whether the matters in dispute 'engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process.'⁸⁶ However, there are no disputes that will automatically fall outside of this scope.

In the literature, the arbitrability of the review of disciplinary sanctions has mainly been debated in Switzerland.⁸⁷ Opponents argue that these disputes are, in principal, contrary to public policy as a result of the monopoly position of sports organisations who unilaterally enforce their rules.⁸⁸ Nevertheless, case law, legal literature and practice show that the review of disciplinary sanctions imposed by sports federations upon their members or otherwise affiliated clubs or athletes by means of arbitration is generally accepted in Switzerland, as well as in England and Germany.⁸⁹ In the Netherlands, it remains unclear whether disciplinary sanctions of sports organisations

⁸³ L A Mistelis, 'Is Arbitrability a National or an International Law Issue?' in L A Mistelis and S L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer 2009) 1, 4.

⁸⁴ Born, *International Commercial Arbitration: Commentary and Materials* (n 57) 244.

⁸⁵ Germany: ZPO, §1030. Netherlands: Rv, art 1020. Switzerland: Swiss Code of Civil Procedure (CPC), art 354 (for national arbitrations) and Swiss PILA, art 177 (for international arbitrations).

⁸⁶ *Fulham Football Club Ltd v Richards* [2011] EWCA Civ 855, para 40.

⁸⁷ See, for an extensive overview of the debate, Rigozzi (n 56) 367ff.

⁸⁸ P Meier and C Aguet, 'L'arbitrabilité du Recours Contre la Suspension Prononcée par une Fédération Sportive Internationale' [2002] *Journal des tribunaux* 155.

⁸⁹ England: *Stretford v Football Association Ltd* [2007] EWCA Civ 238, paras 49–54. Germany: Kotzenberg (n 64) 114–22; Oschütz (n 56) 155. Switzerland: M Baddeley, *L'association Sportive Face au Droit. Les limites de son Autonomie* (Helbing & Lichtenhahn 1994) 261; Fenners (n 35) 187–97; Rigozzi (n 56) 367, 382. Another indication of this acceptance is provided by the various sports arbitration tribunals that have been set up in the respective countries.

can be reviewed in arbitration since the Dutch Supreme Court ruled that a claim to void a legal entity's resolution cannot be decided by arbitrators.⁹⁰ This case dealt with very specific circumstances and the general wording of the court, effectively applying this rule to all legal entities, including (sports) associations, has been scrutinised in the literature.⁹¹ Regardless of this ruling, the regulations of most national sports federations in the Netherlands completely lack provisions on how to appeal disciplinary sanctions, automatically leaving jurisdiction to the ordinary courts.⁹²

(iv) Applicable procedural rules

National arbitration laws impose hardly any specific procedural requirements on the arbitral proceedings.⁹³ Therefore, in most cases the parties are entirely autonomous in deciding the procedural rules that apply. Sometimes, however, procedural rules are imposed. For example when parties opt for institutional arbitration—such as before the CAS—the procedural rules are often imposed by the institution. In the absence of agreement between the parties regarding the applicable procedural rules, national arbitration laws provide the arbitrators with the discretion to establish these.⁹⁴ When an arbitration procedure takes place before the CAS, it is the Code of Sports-related Arbitration (hereafter: the Code) that provides the applicable procedural rules. The Code was first enacted in 1994. With its first revision in 2004, certain long-established principles of CAS case law and practices consistently followed by the arbitrators and the Court Office were incorporated.⁹⁵

(v) Applicable substantive rules

To settle the dispute, the arbitrators will generally decide according to the law chosen by the parties, or in absence thereof, in accordance with the laws of that country to which the subject matter of the proceedings has the closest connection.⁹⁶ In many jurisdictions,

⁹⁰ *Groenselect*, Hoge Raad (Dutch Supreme Court) 10 November 2006 reported in NJ 2007, 561, note H J Snijders.

⁹¹ See H M de Mol van Otterloo, 'Arbitrabiliteit van Vennootschapsrechtelijke Geschillen; het Groenselect-arrest' [2010] *Ondernemingsrecht* 3; E R Meerdink and S Vermeulen, 'Arbitrage Over Besluiten van Organen van de Vennootschap: Hoog Tijd voor Wetgeving' [2012] *Tijdschrift voor Arbitrage* 2012/59.

⁹² M van Koolwijk, H van Egdome and B Dubois-van Kleef, *Tuchtrecht bij Sportbonden: Inventarisatie, Ambitie en Aanbevelingen* (Disciplinary law of sports federations: inventory, ambition and recommendations) (2013) <<http://www.nocnsf.nl/stream/07.b.-rapportage-tuchtrecht-bij-sportbonden.pdf>> accessed 21 April 2014. Only with regard to doping offences, some Dutch federations provide for an appeal to the CAS.

⁹³ Born, *International Arbitration: Law and Practice* (n 55) 147. England: Arbitration Act 1996 (UK), s 34. Germany: ZPO, §1042(3). Netherlands: Rv, art 1036. Switzerland: CPC, art 373(1); PILA, art 182(1).

⁹⁴ England: Arbitration Act 1996 (UK), s 34. Germany: ZPO, §1042(4). Netherlands: Rv, art 1036. Switzerland: CPC, art 373(2); PILA, art 182(2).

⁹⁵ The latest version of the Code of Sports-related Arbitration entered into force on 1 March 2013.

⁹⁶ Germany: ZPO, §1051. Netherlands: Rv, art 1054. Switzerland: CPC, art 381 (2) (the laws that a court would have applied) and PILA, art 187. In England, the wording of Arbitration Act 1996 (UK), s 46, is a little different, but in conjunction with art 4 of the Rome I Regulation, comes to a similar result. See also J D M Lew and others (eds), *Arbitration in England* (Kluwer 2013) s 11-11, 209.

parties are also allowed to agree that their disputes will be settled according to fairness or equity. However, in CAS cases, arbitrators are not allowed to rule according to fairness or equity, even though the Swiss PILA provides for this option.⁹⁷

In cases where the sanction is imposed by a national sports organisation and no choice of law has been made, the applicable law will generally be the law of the country where the organisation is seated, as it will have the closest ties to the dispute, in addition to the applicable regulations. In contrast to the review before a national court, an arbitration panel can be given the power to review the decision of the federation in full, if this follows from the arbitration agreement.

In cases regarding disciplinary sanctions before the CAS, the position of national law is different, as article R58 of the Code emphasises the primary application of sports regulations rather than national law.

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

The formulation of this provision in the old edition of the Code, which lacked the word ‘subsidiarily’, led Hascher and Loquin to promote the idea that these regulations can be applied exclusively from any national law.⁹⁸ This view is supported by certain CAS rulings in which the respective panels decided that in the case at hand they did not need national law to come to their decision.

*Si les parties n'ont pas déterminé un droit national applicable, elles sont, en revanche, soumises aux statuts et règlements de la FIBA (...). Le droit fédératif adopté par la FIBA constitue une réglementation de droit privé, ayant une vocation internationale, voire mondiale, à s'appliquer dans le domaine des règles de sport régissant le basketball. Pour résoudre le présent litige, le tribunal arbitral appliquera donc ce droit fédératif, sans recourir à l'application de telle ou telle loi nationale au fond.*⁹⁹

However, according to Rigozzi, the suggestion that sports regulations prevail over the parallel applicable national law is difficult to reconcile with the text of the provision. In order for regulations to be exclusively applicable, a supplementary choice of law in favour of these regulations would be needed.¹⁰⁰ Article R58 of the Code also bears the important consequence that in the absence of a choice of law, it is Swiss substantive law

⁹⁷ See PILA, art 187(2) and CAS Code, art R.45 *a contrario*. Contrary to disciplinary cases, arbitrators are allowed, upon the parties' wish, to decide according to equity and fairness in commercial cases that are brought before the CAS.

⁹⁸ D Hascher and E Loquin, ‘Tribunal Arbitral du Sport (TAS). Chronique des Sentences Arbitrales’ [2004] *Journal du droit International* 289, 312.

⁹⁹ *IAAF v CADA and Witteveen*, CAS 2002/A/417 §82–83; and repeated in *Amadou Diakite v FIFA*, CAS 2011/A/2433 §14.

¹⁰⁰ Rigozzi (n 56) 609.

that will be applied. As the large majority of international sports organisations are seated in Switzerland, Swiss law is applicable in a majority of cases.

With regard to the applicability of EU law, it must be noted that EU rules that have a direct effect are part of the law of EU Member States and must be applied by the CAS if the chosen law is the law of one of these countries. In sporting matters, such rules include internal market and competition law prohibitions.¹⁰¹ When the applicable law is Swiss law, in principle EU law does not need to be considered since Switzerland is not a member of the European Union. However, in case an award is to be executed in an EU Member State or if it affects the EU market, EU law does play a role, considering that the execution of an arbitral award can be stopped if it is contrary to public policy.¹⁰² Arbitrators have the obligation to ensure an executable award and should thus apply those rules of EU law that constitute rules of public policy in any case in which an award may be required to be enforced in an EU Member State.¹⁰³ In addition, according to the Swiss Federal Supreme Court, 'it is generally recognised that Swiss civil courts and arbitrators should examine the validity of a contractual agreement affecting the EU market in the light of EU law, even if the parties have contractually agreed to apply Swiss law'.¹⁰⁴

(vi) The scope of review in CAS cases and the arbitral precedent

In cases where disciplinary sanctions are reviewed before the CAS, the scope of review is not limited. The CAS performs a full review, which is not only based on the applicable regulations and substantive law, but also on arbitral precedent. This notion is paradoxical given that arbitration generally lacks a doctrine of precedent or *stare decisis*.¹⁰⁵ Each arbitrator or arbitration panel decides cases autonomously and is not bound by previous decisions from other panels. Nevertheless, the approach in sports arbitration is different; CAS arbitration panels have demonstrated a consistent practice of referring to earlier CAS decisions.¹⁰⁶

This practice already existed in the early days of the CAS. In 1996, a panel considered that, '[a]lthough we are not obliged to follow the reasoning of a previous Tribunal (especially where it was not essential to the decision which they reached), we are disposed to do so, both out of a sense of comity and because of the desirability of

¹⁰¹ Case C-36/76 *Walrave and Koch v UCI* [1974] ECR I-01405; Case C-415/93 *Bosman* [1995] ECR I-04921; Case C-519/04 *Meca-Medina* [2006] ECR I-06991.

¹⁰² New York Convention 330 UNTS 38 (1968) art V(2)(b).

¹⁰³ Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-03055.

¹⁰⁴ BGER I Civil Court, 13 November 1998, reported in (1999) 17 ASA Bulletin 529, para 1a. See also M Coccia, 'Applicable law in CAS Proceedings: What to do With EU law?' in M Bernasconi and A Rigozzi (eds), *Sport Governance, Football Disputes, Doping and CAS Arbitration* (Weblaw 2009) 69, 88; A Rigozzi, 'Arbitrage, Ordre Public et droit Communautaire de la Concurrence' (1999) 17 ASA Bulletin 455, 464–65.

¹⁰⁵ G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture' (2007) 23 *Arbitration International* 357, 357.

¹⁰⁶ L Casini, 'The Making of a *Lex Sportiva* by the Court of Arbitration for Sport' (2011) 12 *German L J* 1317, 1331. As well as to advisory opinions, for instance in *AC v FINA*, CAS 96/149, 8, para 28.

consistent decisions of the CAS, unless there were a compelling reason, in the interest of justice, not to do so.¹⁰⁷ In another case, the respective arbitration panel stated that:

in arbitration there is no *stare decisis*. Nevertheless, the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthening legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into attentive consideration by subsequent CAS panels, in order to help to develop legitimate expectations among sports bodies and athletes.¹⁰⁸

Since 2003, nearly every award contains one or more references to earlier awards.¹⁰⁹ This has resulted in the situation that even though there is no such thing as formal ‘CAS case law’, practice shows that earlier decisions are carefully studied and can therefore influence later cases.

As a result, a virtually coherent body of law seems to have emerged, which various authors have labelled as *lex sportiva*.¹¹⁰ Although the definitions vary in scope,¹¹¹ *lex sportiva* seems to cover ‘anational’ rules and general principles of law that fill in the lacunas that the sports regulations leave and which often have a specific connotation in sports law cases. The most significant rule of the so-called *lex sportiva* is arguably the strict liability rule for doping offences. This rule provides that a doping offence occurs whenever a prohibited substance is found in an athlete’s body, irrespective of the athlete’s intention or negligence in ingesting the banned substance, for example through a contaminated supplement. Moreover, the application of this rule is so consistent, that any difference with *stare decisis* has become trivial. The strict application of certain *lex sportiva* rules results from the need for a uniform and coherent application of the regulatory framework of sports.

As a result of this consistent rule of precedent, the CAS exercises a strong influence on the rules and regulations of sports organisations, most notably on doping regulations but also on rules regarding player transfers and eligibility for international competitions. Furthermore, aside from this—perhaps more implicit—influence on regulations through its awards, the CAS also does not seem to hesitate to give explicit ‘advice’ on regulations

¹⁰⁷ *AC v FINA*, CAS 96/149, 7, para 19.

¹⁰⁸ *UCI v Jogert & NCF*, CAS 97/176, para 40. See, for similar wording, *IAAF v USA Track & Field and Jerome Young*, CAS 2004/A/628, para 73.

¹⁰⁹ Kaufmann-Kohler (n 105) 357, 365.

¹¹⁰ E Loquin, ‘L’utilisation par les Arbitres du TAS des Principes Généraux du droit et le Développement d’une *lex Sportiva*’ in A Rigozzi and M Bernasconi (eds), *The Proceedings Before the Court of Arbitration for Sport* (Schulthess 2007) 99; K Foster, ‘Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport’s Jurisprudence’ in Ian S Blackshaw and others (eds), *The Court of Arbitration for Sport 1984–2004* (TMC Asser 2006) 420; J A R Nafziger, ‘Lex Sportiva’ (2004) 1–2 Intl Sports L J 3; J Adolphsen, ‘Eine *lex Sportiva* für den Internationalen Sport?’ [2002] *Die Privatisierung des Privatrechts—rechtliche Gestaltung ohne staatlichen Zwang* 281; Casini (n 106) 1317.

¹¹¹ From including only those principles that are developed by the CAS, according to Nafziger, to ‘l’ensemble des règles de droit anational qu’il convient d’appliquer pour affranchir le droit applicable au fond dans les litiges sportifs de tout emprise des différents droits nationaux’, according to Rigozzi: see J A R Nafziger, ‘Lex Sportiva and CAS’ in Ian S Blackshaw and others (eds), *The Court of Arbitration for Sport, 1984–2004* (n 110) 409.

it deems unsatisfactory. For example, in *AC v FINA*, the CAS noted that ‘it would clearly be desirable if the FINA Medical Rules were revised so as to attach a flexible sanction to a failure to comply with an important and mandatory obligation of this character.’¹¹² Nevertheless, in their reasoning, the CAS arbitrators have to take into account the fact that their award—like all arbitral awards—runs the risk of being challenged in court.

3.2 Challenging the arbitral award

The purpose of arbitration is to obtain a final and binding decision. Nevertheless, most national arbitration laws provide the option to challenge or annul an arbitral award in court.¹¹³ National law thus interferes with the completely private regulatory framework of sports organisations when an arbitral award, in which the disciplinary sanction is confirmed or quashed, is being reviewed by a national court. The following discusses the rules according to which an arbitral award can be overturned, showing the limits of the review of private regulations in the private sphere. At the same time, it becomes apparent that on an abstract level, the review of arbitral awards bears close similarities to the marginal review of disciplinary sanctions by national courts.

(i) Grounds for overturning an arbitral award

When an award is annulled or set aside, the case will generally be referred back to either the arbitration instance or, if the arbitration panel lacked jurisdiction, to the national court that should have reviewed the sanction in the first place. Unlike the arbitration laws in England, Germany and the Netherlands, the Swiss PILA provides only one instance to challenge the award—the Swiss Federal Supreme Court.¹¹⁴ The available grounds upon which an award can be challenged logically depend on the applicable arbitration law. In most countries, arbitral awards can only be reversed by a national court if they are fundamentally flawed.¹¹⁵ Such fundamental flaws are mainly flaws of a procedural nature and are similar across the laws of the four jurisdictions.

First, an arbitration award may be annulled if there is no valid arbitration agreement or if the tribunal wrongly assumed jurisdiction to decide on the matter.¹¹⁶ A second ground for appeal is if the constitution of the arbitral tribunal was irregular.¹¹⁷ For

¹¹² *AC v FINA*, CAS 96/149, 6, para 9.

¹¹³ Some arbitration laws provide for an opt-out of the possibility to challenge the award. For instance in England: Arbitration Act 1996 (UK), s 69. In Switzerland the appeal can be excluded only if both parties are non-Swiss: PILA, art 192(1).

¹¹⁴ Since in France disciplinary sanctions by sports federations cannot be reviewed in arbitration, the overturning of arbitral awards according to French law will not be discussed.

¹¹⁵ Born, *International Arbitration: Law and Practice* (n 55) 302.

¹¹⁶ England: Arbitration Act 1996 (UK), s 67. Germany: ZPO, §1059(2)(1)(a). Netherlands: Rv, art 1065(1)(a). Switzerland: PILA, art 190(2)(b); CPC, art 393(b).

¹¹⁷ Germany: ZPO, §1059(2)(1)(d). Netherlands: Rv, art 1065(1)(b). Switzerland: PILA, art 190(2)(a); CPC, art 393(a). In England, irregular constitution of the tribunal can be challenged under the lack of substantive jurisdiction provision in Arbitration Act 1996 (UK), s 67.

example, if circumstances led to a doubt surrounding the independence of one of the arbitrators. A third ground for appeal common to all jurisdictions is if the tribunal ruled on matters beyond the claims submitted by the parties or if it failed to rule on one of the claims.¹¹⁸ Finally, all four jurisdictions include one general or multiple specific grounds regarding the arbitration procedure. For example, both Swiss arbitration laws include a reason for appeal if the equality of the parties or their right to be heard in an adversarial procedure were not respected. In the Netherlands, a separate ground exists if the award has not been signed or motivated.¹¹⁹ In England, the failure to comply with the form requirements of the award is mentioned as one of the kinds of serious irregularity.¹²⁰

(ii) A restrictive review of the merits of the award

In three of the four jurisdictions, the sole substantive ground to overturn an arbitration award is when the award or its results are contrary to public policy.¹²¹ Only the English Arbitration Act allows for a wider appeal on the merits on points of English law.¹²² However, such an appeal is only admissible with the agreement of all other parties to the arbitration proceedings or with leave of the court.¹²³ Often the parties opt out of this possibility to appeal in the arbitration agreement.¹²⁴

The notion of public policy (or in French: *ordre public*) is both abstract and complex. In the context of this article it suffices to mention that public policy entails the most fundamental principles—both formal and substantive—of a legal order.¹²⁵ For example, fundamental breaches of due process, which most notably include the right to be heard, are generally thought of as being contrary to public policy.¹²⁶ Other fundamental principles of public policy include *pacta sunt servanda*, rules of good faith and prohibition of discriminatory measures.¹²⁷

In European Union Member States, public policy also includes the fundamental provisions of EU law. In a case where EU competition rules were at issue, the Court of

¹¹⁸ England: Arbitration Act 1996 (UK), s 68(2)(b), (d). Germany: ZPO, §1059(2)(1)(c). Netherlands: Rv, art 1065(1)(c). Switzerland: PILA, art 190(2)(c); CPC, art 393(c).

¹¹⁹ Rv, art 1065(1)(d).

¹²⁰ Arbitration Act 1996 (UK), s 68(2)(h).

¹²¹ England: Arbitration Act 1996 (UK), s 68(2)(g). Germany: ZPO, §1059(2)(b). Netherlands: Rv, art 1065(1)(e). Switzerland: PILA, art 190(2)(e). However, CPC, art 393, instead speaks of ‘manifest error of law or equity’.

¹²² Arbitration Act 1996 (UK), ss 69, 82.

¹²³ Arbitration Act 1996 (UK), s 69.

¹²⁴ For example, when the parties agree to submit disputes to ICC arbitration, rules of which exclude an appeal on a question of law: see ICC Rules, art 34(6).

¹²⁵ See, on the definition of public policy, H Arfazadeh, *Ordre Public et Arbitrage International à L'épreuve de la Mondialisation*, (Bruylant 2006) 263–73.

¹²⁶ Netherlands: Snijders (n 62) art 1065, n 7. Germany: S M Kröll and P Kraft, ‘Commentary on the German Arbitration Law’, in K-H Böckstiegel, S M Kröll and others (eds), *Arbitration in Germany: The Model Law in Practice* (Kluwer 2007) 436, 453, para 42. Switzerland: Bundesgerichtshof (Swiss Federal Supreme Court), 132 III 389, 8 March 2006, para 2.2.

¹²⁷ Kaufmann-Kohler and Rigozzi (n 58) 534–35.

Justice of the European Union (CJEU) considered that it is in the interest of efficient arbitration proceedings that the annulment of an award should only be possible in exceptional circumstances. It then stressed, however, that article 105 (formerly article 85) constitutes a fundamental provision of community law which, as such, must be regarded as a matter of public policy. As a result,

where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.¹²⁸

In short, this entails that when national law provides for annulment of an award because of its incompatibility with public policy, the notion of public policy includes article 105. According to doctrinal opinion, it can be assumed that this case law is not limited to EU competition law and, on the contrary, entails that all fundamental rules of European community law are part of the public policy of the Member States.¹²⁹ Thus, if an arbitral award results in a situation that is contrary to a fundamental provision of European law the award could be annulled in court based on the violation of public policy.¹³⁰

In comparison, according to Swiss law, the concept of public policy with regard to appeals against arbitral awards is even narrower. The Swiss Federal Supreme Court considers that an award is contrary to public policy, '*si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique*'.¹³¹ In other words, public policy covers only those fundamental principles that are widely recognised and that should, according to the prevailing conceptions in Switzerland, be the foundation of any system of law. In contrast to the view of the CJEU, according to the Swiss Federal Supreme Court these fundamental principles do not include provisions of competition law, whether European or Swiss.¹³²

This restrictive review of the merits of an arbitral award seems similar to the equally marginal review that national courts apply when they perform the review of a disciplinary sanction. Both the sports federation and arbitral panel are granted wide discretion to decide as they see fit, as long as they stay within the fundamental boundaries of the law.

(iii) The Swiss Federal Supreme Court: the final instance in CAS cases

Article 191 of the Swiss PILA provides that an arbitral award handed down in Switzerland can be challenged solely before the Swiss Federal Supreme Court. As a result, CAS

¹²⁸ Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-03055, para 37.

¹²⁹ Snijders (n 62) opschrift, aant. 8; F de Ly, Case note [1999] *Tijdschrift voor Arbitrage* 100, para 17; Assimakis P Komninos, 'Case note on Case C-126/97 *Eco Swiss v Benetton*' (2000) 37 *CML Rev* 459, 473–75.

¹³⁰ See, on the debate on whether rules of competition law should fall under the scope of public policy, N Shelkopyas, *The Application of EC law in Arbitration Proceedings* (Europa Law Publishing 2003) 368–69.

¹³¹ Bundesgerichtshof (Swiss Federal Supreme Court), 132 III 389, para 2.2.3.

¹³² *ibid.*

awards are only subjected to a single test before a national court. According to the Swiss PILA, an arbitration award can be challenged: (a) if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; (b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction; (c) if the arbitral tribunal ruled on matters beyond the claims submitted to it or failed to rule on one of the claims; (d) if the equality of the parties or their right to be heard in an adversarial proceeding were not respected; or (e) if the award is incompatible with Swiss public policy. Blackshaw states that ground (d) is probably the most important, seeing that ‘the CAS bends over backwards in each case to ensure that the parties are properly heard and receive a fair hearing’.¹³³ The opportunity of appeal notwithstanding, the number of appeals against CAS awards remains limited.

The reticence to appeal is not unlikely to result from the fact that appeals to annul arbitral awards are very rarely accepted when based on the sole substantive ground of infringement of public policy.¹³⁴ In the early days of the CAS, some awards were annulled based on procedural errors. However, as the CAS nowadays pays great attention to its procedure, practically the only ground left to challenge an award is incompatibility with public policy. As mentioned above, in order for an award to be deemed contrary to public policy, it must be breaching a fundamental principle that is deemed to be part of the foundation of the system of law. This is a very high standard to meet and so far only one appeal has ever been successful on this ground.

In the *Matuzalem* case, football player Matuzalem and his club Real Zaragoza were ordered to pay compensation to the player’s former club Shaktar Donetsk for breach of contract after the player’s transfer to Real. After both failed to pay on time, the player was banned from any activity in connection with football until the compensation was paid. The Swiss Federal Supreme Court held that such an open-ended playing ban constitutes a severe infringement on the player’s personality rights as laid down in article 27(2) of the Swiss Civil Code.¹³⁵ In the absence of legitimate interests by which this infringement could be justified, a breach of public policy was recognised. The case has had a large response from scholars who, among other things, discussed whether *Matuzalem* has opened the door for further annulments of CAS awards. The majority agree, however, that it seems unlikely that such a door has been opened in light of the exceptional circumstances of this case.¹³⁶ Nevertheless, the CAS has been reminded that

¹³³ I S Blackshaw, *Sport, Mediation and Arbitration* (TMC Asser 2009) 174.

¹³⁴ Kaufmann-Kohler and Rigozzi (n 58) 523. See, for a statistical overview, F Dasser, ‘International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis’ (2007) 25 ASA Bulletin 444.

¹³⁵ According to this provision, ‘no person may relinquish his freedom or restrict the use of it to a degree which is contrary to law or morals’.

¹³⁶ Note: *Francelino da Silva Matuzalem v FIFA*, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_558/2011, 27 March 2012’ (2012) 4 *Revue de l’Arbitrage* 860; R Levy, ‘Swiss Federal Tribunal overrules CAS award in a landmark decision: FIFA vs Matuzalem’ (2012) 1–2 *Intl Sports L J* 36; L Burger, ‘For the First Time, the Supreme Court Sets aside an Arbitral Award on Grounds of Substantive Public Policy’ (2012) 30 ASA Bulletin 603.

the legitimacy of arbitration requires that the most fundamental principles of the legal order be respected at all times.

3.3 Summarising remarks

Arbitration is often the mandatory path for athletes or clubs to have a disciplinary sanction legally reviewed. The review itself technically stays in the private sphere, but the proceedings are governed by national law in the form of the arbitration law. Except for in France, the national laws of the countries studied allow disciplinary sanctions to be reviewed in arbitration. With regard to the application of national concepts of private law, such as the validity of the arbitration agreement and the question of arbitrability of the disciplinary sanction, there are no significant differences across the jurisdictions. Disciplinary sanctions can be subjected to arbitration and an agreement between athletes or clubs and sports federations, even if forced, is generally valid. However, it must be noted that the recent developments in Germany could signify a shift in appreciation of such arbitration agreements if confirmed in appeal. The arbitration law also provides guidance as to which regulations and substantive law an arbitration panel ought to decide. In CAS cases, a full review is being performed, not only based on the applicable regulations but also on so-called arbitral precedents from earlier CAS decisions.

Even when a disciplinary sanction is being reviewed through private dispute resolution, there is still the possibility of involving public justice. National arbitration laws provide the option to challenge or annul an arbitral award in court. However, it has become clear that this is not an easy feat. In all countries, grounds for appeal are limited, with the merits of the award only being tested against rules of public policy, which is a very high standard to meet. Finally, in CAS cases, there is only one chance to have the arbitral award reviewed by Switzerland's highest court. However, considering the restrictive grounds for review, the CAS is left with ample room to decide as long as it stays within the boundaries of the fundamental principles of the law.

4 Concluding remarks

The creation and enforcement of disciplinary rules in sports takes place on different levels. Although a sports federation can autonomously create its own regulations and enforce them through a private sanctioning system, this application of the rules in the form of a sanction can be tested either before a national court or in arbitration. Upon a closer look at this specific context it has become apparent that in the review of disciplinary sanctions different legal frameworks—of both private rules of sports federations and national law—are connected and interrelate in many ways.

When a disciplinary sanction is imposed, there are two ways to have an external body review the sanction. Unless an arbitration agreement exists, this review is performed by a national court. In this review, the sanction is tested against the regulations and

the applicable national substantive law. The scope of the review is limited in all the researched countries and generally only checks whether decisions are reasonably arrived at and not contrary to the law. Only in France, perhaps, does the scope of the review extend a little further. In general, however, sports federations are allowed a large margin of appreciation to make decisions.

The alternative is to have the sanction reviewed in arbitration, which is often the mandatory path imposed by the regulations of the sport federation. Although arbitration is a form of private dispute resolution, the proceedings are almost completely governed by rules of national law. This entails the applicability of national concepts of private law, for example regarding the validity of the arbitration agreement and the question of arbitrability of the disciplinary sanction. In addition, the arbitration law prescribes how to determine the procedural and substantive rules that the arbitration panel ought to apply when it reviews the sanction. In contrast to national courts, the arbitration panel can be given the power to carry out a full review, which is the case, for example, when a disciplinary sanction is brought before the CAS.

The arbitral award is not the final step in the process though, as it can still be challenged before a national court. However, in all researched countries grounds for appeal are limited. The restrictions to this review turned out to bear close similarities to the review of national courts when they perform the review of the disciplinary sanction in cases where arbitration is excluded. When an arbitral award is challenged, further interrelations between national law and the regulations of sports federations become apparent. Rules of national law can influence the regulations of sports federations. For example, when an arbitral award is overturned there might be a need to adapt the regulations. In this regard, the significance of the Swiss Federal Supreme Court in the regulation of international sport is undeniable. It is the only institution in the position to exercise direct influence on the CAS through its case law. This observation is reinforced by the fact that the CAS seems indeed willing to comply and to act on criticism from the Court.¹³⁷

Finally, this article demonstrated that the legal protection against disciplinary sanctions in sport is approached in much the same manner in the five European legal systems that were included in this exercise. In the Netherlands, England, Germany and Switzerland the dual system of review of disciplinary sanctions takes the same form. Furthermore, the connection between the frameworks of national law and the regulations of sports federations proves to be virtually identical in these countries. France remains the exception where, unlike in the other countries, disciplinary sanctions in sport cannot be reviewed in arbitration. However, regarding the scope of review, French law is not substantively different. After all, in France too, sports federations are allowed considerable discretion to make their own decisions, including decisions in disciplinary matters.

¹³⁷ See Rigozzi and others, who note that one of the amendments to the Code seems to be the result of a critical remark from the Court (A Rigozzi, E Hasler and B Quinn, 'The 2011, 2012 and 2013 Revisions to the Code of Sports-related Arbitration' [2013] *Jusletter* 16).

Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights

*Armin Steinbach**

Abstract

The wearing of religious symbols has been subject to more or less restrictive national regimes. In Europe, the European Convention of Human Rights sets transnational conditions in this regard and has recently been interpreted to give great leeway to national states. Open-face communication is now being accepted as an indispensable requirement of 'living together' that qualifies as 'rights and freedoms of others' within the meaning of article 9(2) ECHR. In *SAS v France*, the ECHR created a new ground to justify interference with the freedom of religious expression. This article questions the Court's expansion of existing grounds of justification as no sufficient legal basis exists and sociocultural considerations do not protect individual rights as required under the term 'rights and freedoms of others'. To that end, the basis for grounds of justification is examined in light of the evolution of the Court's jurisprudence on the wearing of religious symbols. While public security and order, health and improper proselytism are well-established reasons for interference, the Court's acceptance of secular orders highlights the ambiguity of the terms 'pluralism' and 'tolerance' as referred to in case law. The article finds that this jurisprudence has given significant leeway to Member States in regulating religious expression and paved the way for the Court's new approach under which behavioural social norms may be used to ban face-covering religious cloth. In addition, the doctrine of the margin of appreciation does not justify the expansion of the legitimate aims pursued under article 9(2) ECHR.

Keywords

European Convention of Human Rights, Article 9, Religious Symbols, Margin of Appreciation

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1 Introduction

The wearing of religious symbols has been controversially discussed both from a socio-political¹ as well as legal² perspective. There is rarely any area in which the tension between cultural context and legal requirements becomes as prominent as in the case of religious freedom.³ In the jurisprudence of the European Court of Human Rights (ECtHR),⁴ the focus of adjudication has not been so much the question of internal freedom of religion (ie the right to believe or not believe),⁵ but rather, the freedom of religious expression. In particular, the wearing of religious symbols has been the subject of adjudication before the ECtHR on many occasions, which are not limited to the wearing of the famous headscarf.⁶ The question of the lawfulness of a ban on the wearing of religious symbols has been ruled on in different contexts allowing distinctions to be

¹ A Levede, 'Epilogue d'un Débat Juridique: l'Interdiction de la Dissimulation du Visage dans l'Espace Public Validée!' (2010) *Semaine Juridique*, Éd. Générale, No 1043, 1978; P Weil, 'Lifting the Veil of Ignorance' [2004] *Progressive Politics* 3, 2; G van der Schyff and A Overbeeke, 'Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans' (2011) 7 *European Constitutional Law Review* 424; M Vink, 'Dutch "Multiculturalism" Beyond the Pillarisation Myth' (2007) 5 *Political Studies Review* 337.

² E Howard, *Law and the Wearing of Religious Symbols* (Routledge 2012); A Vakulenko, 'Islamic Headscarves and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social and Legal Studies* 183; for the French situation see M Hunter-Henin, 'Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom' (2012) 61 *ICLQ* 613; for the Italian situation see P Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*' (2011) 13 *Ecclesiastical Law Journal* 287; for the German situation see J Thielmann, 'Burqa in Germany—Not really an Issue: A Short Note' in A Ferrari and S Pastorelli (eds), *The Burqa Affair Across Europe* (Ashgate 2013) 189; for the situation in the UK see M Hill, 'Legal and Social Issues Concerning the Wearing of the Burqa and Other Head Coverings in the United Kingdom' in A Ferrari and S Pastorelli (eds), *The Burqa Affair Across Europe* (Ashgate 2013) 77.

³ M Schefer, 'Religionsfreiheit aus gemeineuropäischer Sicht' in B Ehrenzeller and others (eds), *Religionsfreiheit im Verfassungsstaat* (Dike und Schulthess 2011) 106.

⁴ Religious symbols have frequently been contested before national courts. See for Germany Bundesverfassungsgericht 93, 1—*Kruzifix*: more recently in relation to wearing a 'Burkina' during co-educative swim classes, Bundesverwaltungsgericht, No 6 C 25.12, 13 September 2013; in Italy related to crucifixes in schools, Tribunale Amministrativo Regionale Veneto, No 1110/2005, 17 March 2005, para 16.1; in Spain related to crucifixes in schools, Tribunal Superior de Justicia de Castilla y León, No 3250/2009, 14 December 2009.

⁵ For the scope of protection of religious belief under the ECHR see the overview of the jurisprudence provided by P Taylor, *Freedom of Religion* (CUP 2005) 204.

⁶ See the assessment by A Ferrari and S Pastorelli in Ferrari and Pastorelli (n 2) 225; D McGoldrick, 'Religion in the European Public Square and in the European Public Life—Crucifixes in the Classroom?' (2011) 11(3) *Human Rights Law Review* 451; L Garlicki and M Jankowska-Gilberg, 'Religiöse Aspekte im öffentlichen Schulsystem vor dem Hintergrund der Rechtsprechung des EGMR' in Ehrenzeller (n 3) 121; Howard (n 2) 30.

placed on the addressee of the ban (teachers,⁷ pupils,⁸ or students⁹), the place of religious expression (public place,¹⁰ state-run educational institution,¹¹ or work place¹²) as well as the cultural¹³ and religious character of state principles.¹⁴

The jurisprudence on the wearing of religious symbols has reached a new stage in the latest judgment of the ECtHR, *SAS v France*,¹⁵ in which the Court upheld France's ban on full-face veils in public.¹⁶ The applicant, SAS, was a practising Muslim living in France who from time to time wore religious clothing to conceal her face, such as a burqa or a niqab. In April 2011, a law prohibiting the concealment of a person's face in public entered into force in France.¹⁷ The applicant claimed that the law prohibited her from wearing religious clothing of her choosing and violated her rights, particularly under article 9 of the ECHR. The Court, however, accepted the French Government's argument that French citizens reject practices which question the possibility of open and interactive relationship and that open-face communication constitutes an indispensable requirement of 'living together' in society. The ECtHR found that

⁷ *Dahlab v Switzerland* App no 42393/98 (ECtHR 15 February 2001); this can be different at institutions for higher education, eg professors at university: see *Kurtulmuş v Turkey* App no 65500/01 (ECtHR 24 January 2006); *Köse v Turkey* App no 26625/02 (ECtHR 24 January 2006).

⁸ *Dogru v France* (2009) 49 EHRR 8; *Kervanci v France* App no 31645/04 (ECtHR 4 December 2008); *Aktas v France* App no 43563/08 (ECtHR 30 June 2009); *Bayrak v France* App no 14308/08 (ECtHR 30 June 2009); *Gamaleddyn v France* App no 18527/08 (ECtHR 30 June 2009); *Ghazal v France* App no 29134/08 (ECtHR 30 June 2009); *Jasvir Singh v France* App no 25463/08 (ECtHR 30 June 2009); *Ranjit Singh v France* App no 27561/08 (ECtHR 30 June 2009).

⁹ *Leyla Sahin v Turkey* (2005) 41 EHRR 8, *Leyla Sahin v Turkey* (2007) 44 EHRR 5, para 53. See also *Karaduman v Turkey and Bulut v Turkey* (1993) 74 DR 93.

¹⁰ *SAS v France* (2015) 60 EHRR 11; *Ahmet Arslan v Turkey* App no 41135/98 (ECtHR 23 February 2010); due to security reasons see *Phull v France* App no 35753/03 (ECtHR 11 January 2005), security checkpoints at the airport; *El Morsli v France* App no 15585/06 (ECtHR 4 March 2008) regarding access to a consulate; *Mann Singh v France* App no 24479/94 (ECtHR 13 November 2008) for the making of pictures; pending procedures before the Court: *Barik Edidi v Spain* App no 21780/13 (ECtHR 12 March 2013).

¹¹ See *Aktas v France* App no 43563/08 (ECtHR 25 May 2010); *Lautsi v Italy* (2012) 54 EHRR 3; *Lautsi v Italy* (2010) 50 EHRR 42.

¹² *Eweida and Others v United Kingdom* (2013) 57 EHRR 8; pending procedure *Ebrahimian v France* App no 64846/11.

¹³ This refers to cases where the safeguarding of secular principles is at stake, see *Leyla Sahin v Turkey* (2007) (n 9) para 115; *Dogru v France* (n 8) para 72.

¹⁴ Garlicki and Jankowska-Gilberg (n 6) 131.

¹⁵ *SAS v France* (n 10).

¹⁶ For a legal assessment on the basis of the ECHR see S Pei, 'Unveiling Inequality: Burqa Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights' (2013) 122 Yale Law Journal 1089; Van der Schyff and Overbeeke (n 1) 436; Hunter-Henin (n 2) 634; P Hector, 'Zur Religionsfreiheit in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte' in W Meng, G Ress and T Stein (eds), *Europäische Integration und Globalisierung, Festschrift zum 60-jährigen Bestehen des Europa-Instituts* (Nomos 2011) 260.

¹⁷ The basis was the French law, Loi No 2010-1192 du 11 Oct. 2010 interdisant la dissimulation du visage dans l'espace public, Journal Officiel (JORF) 12 Oct. 2010. More provisions in Circulaire du 2 Mar. 2011 relative à la mise en oeuvre de la loi no 2010-1192 du 11 Oct. 2010 interdisant la dissimulation du visage dans l'espace public, JORF 3 Mar. 2011.

under certain conditions the ‘respect for the minimum requirements of life in society’ referred to by the Government—or of ‘living together’, as stated in the explanatory memorandum accompanying the Bill (...)—can be linked to the legitimate aim of the ‘protection of the rights and freedoms of others’.¹⁸

Surprisingly, there is no analysis by the Court as to how the term ‘freedoms and rights of others’ captures notions about ‘living together’. Instead of establishing a link between these concepts and the individual rights of others, the Court confined itself to one example, that of the citizens’ unease when communicating with face-covered women.

It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.¹⁹

Unlike previous case law, the rationale behind the judgment does not concern questions of public security or public order, nor whether the ban is required by secular principles of a state. Also, the judgment does not concern the case law of improper proselytism through the wearing of the burqa. The main issue is about a state’s right to make obligatory for its citizens a certain behaviour that it deems an element of an essential consensus of society and, on that basis, to declare illegal religiously-motivated dressing customs.²⁰

The central thesis of this article addresses precisely the Court’s recent expansion of grounds for justification. By recognising indispensable requirements of ‘living together’ as a valid ground for interference with the freedom of religion, the ECtHR creates a new justification which goes beyond those previously recognised, thereby extending the ground of justification to general public interest considerations. Hitherto, the justification for interference with article 9(2) ECHR has been confined to the grounds of justification exhaustively enumerated therein. The Court considers the new category of indispensable requirements to fall under the established ground of justification, namely the ‘protection of rights and freedoms of others’ under article 9(2) ECHR. This approach is not convincing, as it abandons the requirement of rights granting individual protection and instead extends this notion to capture mere sociocultural norms rooted in considerations of the general public interest which, in turn, is not covered by the ‘rights of others’ in the sense of article 9(2) ECHR as argued by the Court. The subject of protection within the meaning of the ‘rights of others’ are individual rights, while vague notions of behavioural norms of society or considerations related to the general public interest do not qualify. Finally, the well-established jurisprudence on the margin

¹⁸ *SAS v France* (n 10) para 121.

¹⁹ *ibid* para 122.

²⁰ A Posener, ‘Gericht für Menschenrechte stärkt Diktatur des Wir’ (Die Welt 2 July 2014) <<http://www.welt.de/kultur/article129709143/Gericht-fuer-Menschenrechte-staerkt-Diktatur-des-Wir.html>> accessed 4 May 2015.

of appreciation granted to states parties to the Convention does not allow the expansion of the grounds of justification under the ECHR.

The Court's recent extension of grounds of justification can be seen as the next step of an evolutionary process. There is a well-established line of jurisprudence reflecting the Court's defensive stance vis-à-vis the impact religious expression has on other persons. At its origin, the ECtHR developed the category of 'improper proselytism' under which it shields the negative freedom of religion (ie the right to remain unaffected by religious influences) against religious expressions. Further, case law on secularism suggests that the Court generously accepts national concepts of secularism prohibiting various forms of religious expression on behalf of separation of state and religion and thereby precluding religious expression from the public sphere. The jurisprudence on improper proselytism and secularism thus provides the ground for the recent recognition of notions of living together as legitimate aim for interference with freedom of religion.

Against this backdrop, the structure of this paper is as follows. Part II addresses the system of justifications under article 9(2) of the Convention and examines the extent and limitations of possible grounds for banning the wearing of religious symbols. In particular, it considers the categories of improper proselytism and secularism with a view to highlighting the evolutionary process and the difficulties in applying these grounds of justification. Indeed, the origins of the recent expansion of grounds of justification can be traced in the Court's prohibition of improper proselytism and the recognition of secular order of society. On that basis, Part III focuses on the justification based on the 'protection of rights and freedoms of others' as ground invoked by the Court to use sociocultural considerations for the justification of interventions against religious expression. The article explores the compatibility of the mandatory character of sociocultural behavioural rules with the concept of freedoms protecting individual rights of others. Finally, Part IV considers how the doctrine of the margin of appreciation will potentially leave wide discretion to Member States to interfere with the freedom of religion.

2 The grounds of justification for interferences with the freedom to wear religious symbols under the ECHR

Under article 9(2) ECHR, the freedom of religion is a qualified right—it can be subject to limitations prescribed by law and pursuing legitimate aims. In that sense, the provision has similar qualifications to articles 8, 10 and 11 of the ECHR. However, article 9(2) ECHR enumerates only a limited number of grounds restricting the legitimate aims for interference and expressly stipulates that the article 'shall be subject only to such limitations'. The wording is restrictive.²¹ Legitimate aims under article 9(2) ECHR are

²¹ C Evans, *Freedom of Religion Under the European Convention on Human Rights* (OUP 2001); K Sahlfeld, *Aspekte der Religionsfreiheit* (Schulthess 2004) 205; article 9(2) ECHR refers to 'the protection of public

the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others. In addition, article 18 ECHR stipulates the exclusive character of the legitimate reasons to restrict the freedoms of the ECHR.²²

2.1 Public security and public order

Interferences with the freedom of religion can be justified on grounds of interests of public security and public order. Public security does not have a uniform scope throughout all provisions of the ECHR.²³ It is understood not to be identical to the term public security commonly referred to under police law, nor can a uniform meaning be deduced from the various language versions of the Convention.²⁴ Generally, however, public security can be defined to cover the security of the state and its institutions as well as the protection of the life and health of its population. Concerning the term public order, the Court stated in *obiter* that this term should be defined as '*ordre public*'.²⁵

In relation to the wearing of religious symbols, public security has been a relevant ground of justification on various occasions. In the public space, interference can be permitted where sensitive security interests are at stake and thus a person must be easily identifiable. In this category fall the cases *Phull v France*, where a religious Sikh was obliged to remove his turban at airport security checkpoints,²⁶ and *El Morsli v France*, where a woman was denied access to the French consulate when refusing to take off the veil covering her face. The Court could not identify any violation of the Convention and stressed that such security checks are part of public security.²⁷ In this vein, the suit

order' in a reactive sense, while other provisions refer to 'the prevention of disorder' in a preventive sense. The latter meaning is more extensive as preventive measures apply at a time before reactive measures; there is a similar ground for justification laid down in article 18(3) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. According to article 18, an interference is justified if it is 'prescribed by law' and 'in pursuance of one of the listed legitimate aims'. Legitimate aims within the meaning of article 18(3) are 'public safety, order, health, or morals or the fundamental rights and freedoms of others'.

²² Previously, it had been argued that the legitimate aims under article 9(2) ECHR should be interpreted to cover a general caveat to the protection of general public interest, see U Hoffmann-Remy, *Die Möglichkeiten der Grundrechtseinschränkung nach den Article 8–11 Abs. 2 der Europäischen Menschenrechtskonvention* (Duncker Humblot 1976) 32. Against this view one can put forward the clear wording of article 18 ECHR, see F G Jacobs, *The European Convention on Human Rights* (OUP 1980) 196; N Blum, *Die Gedanken-, Gewissens- und Religionsfreiheit nach Article 9 der Europäischen Menschenrechtskonvention* (Duncker Humblot 1990) 114.

²³ See C Grabenwarter, 'Article 9' in K Pabel and S Schmahl, *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (Carl Heymanns Verlag 2012) para 83.

²⁴ While articles 8(2), 10(2) and 11(2) ECHR refer to 'national security' ('*sécurité nationale*') and 'public safety' ('*sûreté nationale*') as legitimate aims, article 9(2) ECHR mentions 'interests of public safety' ('*sécurité publique*'), see Grabenwarter (n 23).

²⁵ *Engel and Others v Netherlands* (1976) Series A no 22, para 98; W J Ganshof van der Meersch, 'Fragen von allgemeinem Interesse, die sich für einen Gedanken- und Informationsaustausch eignen' (1978) *Europäische Grundrechte-Zeitschrift* 37, 39.

²⁶ See Howard (n 2) 107; van der Schyff and Overbeeke (n 1) 446.

²⁷ *El Morsli v France* (n 10).

brought by *Mann Singh v France* was rejected too. He claimed a violation of his freedom of religion as he was required to remove his turban for taking a picture. The ECtHR found this requirement to be a proportionate interference to protect legitimate public security interests.²⁸

While the above cases concerned sensitive security areas in which citizens are commonly subject to measures in an indiscriminate manner, the ECtHR applied more restrictive standards where security interests in the public space are concerned. Outside of selective security zones the Court sets higher requirements for a situation to constitute a risk to public security. In line with this restrictive standard, in its recent decision in *SAS v France*, the Court viewed the ban on the wearing of religious symbols to be unjustified in public areas although this did not involve a sensitive security situation. In the only case in the Court's jurisprudence prior to *SAS v France* which concerned the public sphere outside of sensitive security zones, *Ahmet Arslan v Turkey*, the Court found an infringement of article 9 ECHR. Turkey had not produced sufficient evidence for a risk to public security that could justify the prohibition of a parade of religious persons wearing religious clothes which, in addition, did not hinder the identification of persons.²⁹ This case was distinct from the more recent *SAS v France*, as in *Ahmet Arslan v Turkey* there was no covering of the face, that is, no barrier to identifying the person and because Turkey's prohibition was 'expressly based on the religious connotation of the clothing in question'.³⁰ However, the Court confirmed its restricted stance vis-à-vis public security as grounds for permitting interferences by stressing the significant encroachment on the freedom of the woman resulting from the obligation to cover her face for religious purposes. Therefore, a *general* ban of covering the face can only be justified if it creates a *general* threat to public security. The ECtHR viewed the interests of the woman as outweighing security interests. Otherwise, she would be forced to give up an essential element of her religious identity, while the Member States could request the uncovering of the face on individual basis whenever a threat to public security exists.³¹

Consequently, one can infer a generally restrictive application of public security as grounds for encroaching on people's freedom to religion. A general ban of religious symbols from the public sphere is impermissible, as the wearing of clothes covering the face does not constitute a source of threat to public security. Accordingly, the banning of such clothes may only be proportionate in cases of concrete and imminent threats.³²

²⁸ *Mann Singh v France* (n 10). The same plaintiff was later successful before the UN Human Rights Committee which found a violation of article 18(2) of the International Covenant on Civil and Political Rights. See Human Rights Committee, *Shingara Mann Singh v France*, Communication No 1928/2010, Views of 19 July 2013.

²⁹ *Ahmet Arslan and Others v Turkey* (n 10). See van der Schyff and Overbeeke (n 1) 447; Hunter-Henin (n 2) 636.

³⁰ *SAS v France* (n 10) paras 136, 151.

³¹ Van der Schyff and Overbeeke (n 1) para 139.

³² For a different view see P Hector (n 16) 262, arguing that the French ban on the burqa may well be justified for reasons of public security.

2.2 Preventing improper proselytism

From the perspective of the protection of others, such as those possibly affected by the exercise of religious expression, the Court's case law on the prevention of improper proselytism is highly relevant and needs to be discussed in order to illustrate the Court's concern about the negative freedom of religion. Indeed, the origins of the recent expansion of grounds of justification can be traced in the Court's prohibition of improper proselytism and the recognition of a secular order of society. The jurisprudence reflects the defensive stance the Court adopts vis-à-vis the impact religious expression has on other persons.

Converting others to his or her own belief is an essential element of the freedom of religion. Many religions consider active conversion of others to be a duty of believers.³³ It is obvious that this can generate conflicts with the freedom of others, namely with the negative freedom of religion, namely, the freedom *not* to have a religion. The line between legitimate and acceptable attempts to convert others and improper proselytism are however thin and blurry,³⁴ and this makes it even more important to seek delineations between these two aspects of freedom of religion.

The negative freedom of religion in terms of the freedom to remain unaffected from the beliefs of others is a 'right of others' within the meaning of article 9(2) ECHR.³⁵ In *Dahlab v Switzerland*, the ECtHR identified the right of pupils to remain unaffected by the proselytising impact of the teacher's headscarf. Consequently, the Court affirmed the ban of the headscarf in that context, as the ban protected the children's right in a proportionate manner, although the ECtHR recognised the difficulties in determining the influence resulting from an external symbol on the freedom of religion and conscience of the children.³⁶ However, for the Court it was decisive that wearing a headscarf *could* potentially have a proselytising effect which, according to the Court, would hardly be compatible with values such as tolerance, equality and the rights of others. The teacher's freedom of religion thus had to be subrogated.³⁷ Therefore, the religious feelings of children and their parents as elements of the negative freedom of religion prevailed over the teacher's positive freedom of religion. Similarly, the alleged negative influential power inherent in the wearing of religious symbols were also at stake in *Leyla Sahin v Turkey*.³⁸ In this case, the Court accepted Turkey's argument that in Turkey a large proportion of the population belonged to one religion and that the university consequently had to take measures aimed at reducing the influence that fundamental religious groups could

³³ *Kosteski v the Former Yugoslav Republic of Macedonia* (2007) 45 EHRR 31.

³⁴ Dissent of Judge Howard, *Kokkinakis v Greece* (1994) 17 EHRR 397, para 15.

³⁵ See *Buscarini and Others v San Marino* (2000) 30 EHRR 208; *Dimitras and Others v Greece* App no 42837/06 (ECtHR 3 June 2010); *Sinan Isik v Turkey* App no 21924/05 (ECtHR 2 February 2010).

³⁶ *Dahlab v Switzerland* (n 7).

³⁷ Howard (n 2) 60.

³⁸ In that case a female student was banned from taking the exam because she ignored the ban on wearing a headscarf imposed by the university.

possibly exert on non-religious students. In such situations, the ban on religious symbol would pursue the goal of peaceful co-existence between students of distinct beliefs.³⁹

The Court's jurisprudence concerning the proselytising effect of the wearing of headscarves has been subject to criticism, because it rests on a certain stereotype of headscarf-wearing women. This stereotype would characterise these women as fundamental and attempting to proselytise others.⁴⁰ In this vein, Judge Tulkens refers in her dissenting opinion in *Leyla Sahin v Turkey* to a judgment of the German Constitutional Court of 24 September 2003,⁴¹ in which the German Court stated that the wearing of a headscarf does not have a uniform and clear meaning and should be perceived rather as a neutral object.⁴² Moreover, the Court bases its findings regarding the religious proselytism on empirical arguments without offering the necessary evidence. Although the Court identified a potentially proselytising effect of the headscarf, there were no sufficient indicators supporting this view. In neither *Dahlab v Switzerland* nor in *Leyla Sahin v Turkey*, was it established that the claimants sought to influence others of their belief, nor was there an indication that they would be a threat to gender equality or secularism. However, statements regarding the impact of religious symbols are always empiric by nature because they imply an assessment of reality. The evidence supporting the Court's statement on the adverse impact of the claimants on others persons can only be considered as insufficient.⁴³ By contrast, in *SAS v France* the Court adopted a more cautious stance on this issue. Unlike in *Dahlab v Switzerland* and in *Leyla Sahin v Turkey* where the Court stressed the negative influence of the religious symbols, in *SAS v France* the Court observed 'that it did not have any evidence capable of leading it to consider that women who wear the full-face veil were seeking to express a form of contempt against those they encounter or otherwise to offend the dignity of others.'⁴⁴ This statement reflects more reluctance in giving religious symbols a meaning that is not sufficiently supported by empirical evidence.

From the above, it can be deduced that there has been a general inclination in the Court's jurisprudence to view religious symbols as a threatening element to the freedoms of others. There seems to be a presumption of improper influence originating in these symbols without sufficient supporting evidence. This supports the view that there is a

³⁹ *Leyla Sahin v Turkey* (2005) (n 9) para 99. Another relevant aspect of the Court's reasoning is the potential effect that wearing religious symbols may have not only on other non-religious persons but also on believers of the same religion, which may even push the latter to adapt the religious wearing habits: P Weil (n 1) 19. Similarly, there was the concern that other Muslim girls would be pushed to wear headscarves as well, see L Gies, 'What not to Wear: Islamic Dress and School Uniforms' (2006) 14 *Feminist Legal Studies* 377, 379.

⁴⁰ Evans (n 21) 15.

⁴¹ Bundesverfassungsgericht 108, 282, in (2003) 56 *Neue Juristische Wochenschrift* 3111

⁴² Howard (n 2) 44.

⁴³ Evans (n 21) 11; Howard (n 2) 44; B Rainey, E Wicks and C Ovey, *The European Convention on Human Rights* (6th edn, OUP 2014) 418.

⁴⁴ *SAS v France* (n 10) para 120.

kind of ‘presumption of indoctrination’⁴⁵ associated with religious symbols. However, while this may explain the Court’s bias in favour of shielding non-religious persons from religious influence, the Court’s approach still seems compatible with the notion of protecting the ‘rights of others’ within the meaning of article 9(2) ECHR. The negative freedom of religion is one core right, as it shields the individual from religious influences.⁴⁶ The negative freedom of religion is often relevant in the relationship between state and citizens, particularly within state-owned institutions. Similarly important though is the public space in which individuals encounter each other and thus call for striking a balance between the positive (or extroverted) religious freedom on the one hand and the negative (or introverted) religious freedom on the other hand. One can view a horizontal application of the freedom of religion as only the relations between private persons is concerned. Assigning horizontal effect to the negative freedom of religion implies the protection from improper proselytism.⁴⁷ In that sense, the jurisprudence on improper proselytism is connected to the established state obligation to protect against infringements of freedoms committed by other individuals.⁴⁸ The state actively protects the rights and freedoms of others against the impermissible invocation of freedoms.⁴⁹ On that basis, a link can be established to a further line of the Court’s jurisprudence on justification grounds which is secularism and the safeguard of secular society to be discussed in the next section.

2.3 The safeguard of a secular society

The Court’s general line of shielding persons possibly affected by religious expression is also reflected in its recognition of secularism as a ground to encroach on religious freedoms. Accepting wide notions of secularism permitting states to intervene and ban religious expressions from public space is the conceptual basis to even accept sociocultural considerations as ground for justification. The notion of secularism as applied by the Court is thus essential for understanding the Court’s recent case law.

The Court’s jurisprudence on secularism as valid ground for justifying infringements of religious freedom lies at the gateway between protecting negative religious freedom and protecting public order.⁵⁰ Bans on the wearing of religious symbols can be necessary to safeguard the secular order of states. For example, in *Leyla Sahin v Turkey*, the Court

⁴⁵ Ronchi (n 2) 294, in relation to the Muslim headscarf.

⁴⁶ The Court previously stated that the protection of the ‘rights of others’ also serves the protection of the negative freedom of religion: see *Kokkinakis v Greece* (n 34).

⁴⁷ R A Lawson and H G Schermers, *Leading Cases of the European Court of Human Rights* (2nd edn, Nijmegen Ars Aequi Libri 1999) 535.

⁴⁸ *Dink v Turkey* App nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR 14 September 2010); *Marckx v Belgium* (1975) Series A no 31; *X & Y v Netherlands* (1980) Series A no 91.

⁴⁹ For the state’s duty to protect from aggressive proselytism see also C Grabenwarter, *European Convention on Human Rights, Commentary* (Hart 2014) para 41.

⁵⁰ Hunter-Henin (n 2) 635; van der Schyff and Overbeeke (n 1) 429; McGoldrick (n 6) 453.

agreed with Turkey that there were 'extremist political movements' in Turkey which sought to impose their religious symbols and notions upon the society as a whole.⁵¹ A secular state may, under such circumstances, implement prohibitions in order to ensure the rigorous separation of state and religion. The ECtHR adopted the notion of secularism of the Turkish Constitutional Court and observed that secularism played a predominant role in the Turkish constitution.⁵² The Court applied a similar reasoning in *Dogru v France* where the French ban of headscarves worn by pupils was confirmed. According to the Court's view, the French ban is rooted in the specificity of the French constitution, namely the high priority of secularism.⁵³ The ECtHR underscored that secularism—similar to Turkey and Switzerland—constitutes a constitutional principle recognised by French citizens, the protection of which enjoys a high value. However, the Court failed to examine the characteristics of secularism and the criteria it has to meet in order to be a valid ground to interfere with religious expressions.

After all, secularism as ground for justification lacks clarity in its concept and, consequently, produces legal uncertainty in its application. This is rooted in the protean nature of the term secularism. Generally, two distinct and opposing notions of secularism can be distinguished. This distinction is necessary for the purpose of this analysis because the ban on religious symbols appears to be compatible with only one of the notions of secularism. First, secularism can be interpreted as passive imperative of neutrality or non-intervention of the state. Thus, when interpreting secularism as 'passive neutrality',⁵⁴ there is no room for an active role of the state as long as it acts without discriminating between religions. In this vein, secularism only requires neutrality from the state but not from its citizens.⁵⁵ In line with this reasoning, the Court's decisions against Greece⁵⁶ and Moldova⁵⁷ show that national systems giving preference and privileges to one group of religion can be in conflict with the Convention.⁵⁸

In contrast to this understanding, secularism can also be interpreted as active secularism, according to which all aspects of political and public life must be free from any religious influence. Under this concept, the notion of *ordre public* allows the

⁵¹ *Leyla Sahin v Turkey* (2005) (n 9) para 108, *Leyla Sahin v Turkey* (2007) (n 9) para 155.

⁵² *Leyla Sahin v Turkey* (2007) (n 9) para 99.

⁵³ *Dogru v France* (n 8) para 72; for a discussion of the French notion of secularism see Hunter-Henin (n 2) 613, making clear that initially this notion was confined to ensuring state neutrality and has been widened through the recent ban on face-covering. See also J Rivero, *La Notion Juridique de Laïcité* (Dalloz 1949) 137; van der Schyff and Overbeeke (n 1) 430; Conseil d'État, 'Étude Relative aux Possibilités Juridiques d'Interdiction du Port du Voile Intégral', 25 March 2010, 18. The Italian interpretation of secularism allows for a privileged role of Christianity, see Ronchi (n 2) 290.

⁵⁴ S Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17(1) *Oxford Journal of Legal Studies* 43, 50; N Nathwani, 'Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights' (2007) 25(2) *Netherlands Quarterly of Human Rights* 221, 229.

⁵⁵ Howard (n 2) 48.

⁵⁶ *Kokkinakis v Greece* (n 34) para 31.

⁵⁷ *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13, para 10.

⁵⁸ Pabel and Schmahl (n 23) 15.

minimisation of religious influences.⁵⁹ This notion of an ‘irreligious neutrality’⁶⁰ or ‘active secularism’⁶¹ creates a wide margin of state intervention, in particular for public institutions including schools and universities.⁶² The cases *Dogru v France* and *Leyla Sahin v Turkey* appear to be compatible with this wide concept of secularism. The French notion of secularism seems to rest on the principle that the state should not only be prevented from being religiously influential itself and act without discrimination but should also ensure that religion remains out of the public space.⁶³ In accordance with this concept of secularism, the Court accepted the active intervention of the state against certain form of religious expression.⁶⁴ In *Leyla Sahin v Turkey*, the Court adopted the Turkish concept of active secularism by considering the Turkish measures as proportional instrument safeguarding the secular basic order of the Turkish state.⁶⁵

The fact that the ECtHR considers the French and Turkish characteristics of active secularism to be compatible with the freedom of religion does not exclude other—possibly more passive—forms of secularism to be in conformity with the Court’s wide notion of secularism.⁶⁶ But how can the compatibility of secularism with the Convention be assessed? In this regard, the Court limits its assessment of compatibility to vague criteria. The central parameter is ensuring pluralism.⁶⁷ According to the Court, the state has the obligation to maintain a climate of plurality and tolerance between the various religions.⁶⁸ The relevance of tolerance has been reiterated in the Court’s jurisprudence by stating that

the role of the authorities (...) is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.⁶⁹

⁵⁹ Poulter (n 54) 50; C Rumpf, ‘Das Laizismusprinzip in der Rechtsordnung der Republik Türkei’ (1987) 36 *Jahrbuch des Öffentlichen Rechts* 179, 183. There are two distinct meanings of state neutrality in public schools. First, neutrality can be understood as inclusive neutrality implying that symbols of all religions would be allowed in schools as expression of pluralism and tolerance. Second, neutrality can be understood in schools as irreligious neutrality, which strictly separates religion and education in order to avoid conflicts, see Nathwani (n 54) 228.

⁶⁰ Nathwani (n 54) 229.

⁶¹ Poulter (n 54) 50; McGoldrick (n 6) 457.

⁶² M Mazher Idriss, ‘Laïcité and the Banning of the “Hijab” in France’ (2005) 25(2) *Legal Studies* 260, 262; Howard (n 2) 48.

⁶³ Mazher Idriss (n 62) 261.

⁶⁴ Howard (n 2) 38.

⁶⁵ *Leyla Sahin v Turkey* (2007) (n 9).

⁶⁶ For different concepts of secularism see A Ferrari, ‘De la Politique à la Technique: Laïcité Narrative et Laïcité du Droit. Pour une Comparaison France/Italie’ in B Basdevant-Gaudemet and F Jankowiak (eds), *Le Droit ecclésiastique en Europe et à ses Marges XVIIIe–XXe Siècles* (Peeters 2009) 333–45; M Troper, ‘Sovereignty and Laïcité’ (2009) 30 *Cardozo Law Review* 2561.

⁶⁷ See also Hunter-Henin (n 2) 620.

⁶⁸ *Refah Partisi and Others v Turkey* (2003) 37 EHRR 1, para 91; *Otto-Preminger-Institut v Austria* (1994) Series A no 295, para 47.

⁶⁹ *Serif v Greece* (2001) 31 EHRR 20, para 53.

By referring to the rather vague terms of pluralism and tolerance, the Court refrains from defining what is meant by a secular system which it has to employ to ensure pluralism. It only generally presupposes that every state would independently choose the secular principles it deems appropriate and identify the measures suitable to attain them.⁷⁰ Since one purpose of secularism is to protect freedom of religion, the ECtHR considers secularism to be compatible with the principles of the Convention.⁷¹ This highlights the Court's reluctance in carefully reviewing whether and to what extent the secular system of the respective state does actually meet these standards. Not surprisingly, the restraint has led to the granting of wide leeway to French and Turkish authorities in intervening in public space on behalf of the secular order. The notion of active secularism is thus used in a fashion similar to the above ban of improper proselytism.

Against this background, the question is whether acceptance of the national notion of secularism without judicial scrutiny sufficiently accounts for those wearing religious symbols in exercise of the freedom of religious expression. Put differently: whose freedom of religion would ultimately be protected?

If an active secularism pursued by the state is being accepted by the Court, this would eventually imply an absence (or at least reduction) of religious expressions in the public sphere. Based on this understanding, it is no longer the freedom of religion of the individual which is at the core of the active secularism, but rather the attempt to free the public sphere from all possible religious symbols and connotations. However, this would ultimately decouple the freedom of religion from the individual, and absence of religious symbols in the public sphere would be central to this notion of secularism. The positive role of a state would lie in curbing those forms of religious expression that seek to penetrate the public space.

A notion of secularism accepting bans of religious symbols in the public sphere (and beyond bans in state-owned institutions)⁷² evokes criticism from the view of 'pluralism'. Based on the standards set out by the French *Conseil d'État*, secularism rests on three basic principles: state neutrality, religious freedom and the respect for plurality. On this line, the ECtHR states 'that a society cannot be a democratic society without pluralism, tolerance and broadmindedness.'⁷³ Is pluralism thus sufficiently accounted for in a public sphere freed from religious symbols? As has been stipulated by the Court under article 10 ECHR, a democratic society exercises tolerance not only vis-à-vis religious expressions which are in conformity with social standards, but also if they are challenging and disturbing for the state and society.⁷⁴ This line of reasoning has also been alluded to in the Court's recent judgment *SAS v France* in relation to religious symbols. The Court views the wearing of religious symbols as an expression of cultural identity, which is part of a

⁷⁰ *Refah Partisi et al v Turkey* (n 68) para 93.

⁷¹ *Leyla Sahin v Turkey* (2007) (n 9) para 105.

⁷² See the cases referred to in n 7–9 concerning pupils, students and teachers who are strongly connected with the state's obligation to neutrality.

⁷³ *Handyside v United Kingdom* (1979–80) 1 EHRR 737, para 49.

⁷⁴ *ibid*; van der Schyff and Overbeeke (n 1) 443.

pluralistic system within a democratic society. Even if religious clothes may be perceived by some with strange feeling, this would demonstrate the variability of cultural norms and notions.⁷⁵ Would not such reasoning suggest granting religious values incorporated in the wearing of religious clothes access to public space, even if this may deviate from the strict notion of active secularism? And would not tolerating religious symbols in the public sphere rather than banning them correspond to the notion of an open and pluralistic society?⁷⁶ In this vein, the Court had found in *The Moscow Branch of the Salvation Army v Russia* that ‘pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of (...) religious beliefs.’⁷⁷ Likewise, on a number of occasions, the Court has underscored that it is the genuine obligation of states to foster respect and tolerance between confessions and must not diminish plurality as source of potential conflicts.⁷⁸ Tolerating religious symbols in the public sphere corresponds to recognition and respect for diversity and tolerance.⁷⁹

In spite of the foregoing, there is no doubt that secularism both in its active and passive conceptualisation has a connection to protecting individual rights. Reducing the prevalence of religious symbols in the public sphere does not only serve an abstract and vague public goal of secularism seeking to delineate the public and religious spheres. In addition, secularism has an individual-oriented dimension and recognises the negative freedom of religion of the individual who is part of the public sphere where individuals bear both positive and negative freedom of religion. The concept of active secularism is not limited to minimising religious influences originating in state conduct (such as the wearing of headscarf by teachers in school). It also identifies the need to apply secularism in a horizontal fashion between private persons requiring the public sphere to remain free of religious symbols.⁸⁰

On balance, the Court’s approach towards accepting secularism as a ground for justification raises doubts as it subjects national claims of secularism to hardly any judicial scrutiny. In particular, the Court refrains from examining whether the central requirement of pluralism is sufficiently accounted for in the secular order at stake. The Court’s restraint has led to the recognition of concepts of secularism, in which the balance between positive and negative freedom of religion is tilted towards the latter and at the detriment of religious expression in the public sphere. The consequence is vagueness and ambiguity of secularism as ground of justification. However, a connection

⁷⁵ *SAS v France* (n 10) para 120.

⁷⁶ For the critics that the Court fails to sufficiently determine the scope of secularism see Rainey, Wicks and Ovey (n 43) 418.

⁷⁷ *The Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46, para 49.

⁷⁸ *Fáber v Hungary* App no 40721/08 (ECtHR 24 July 2012) para 37. See Grabenwarter (n 23) 301.

⁷⁹ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 14: ‘By banning the full-face veil, the French legislature has done the opposite. It has not sought to ensure tolerance between the vast majority and the small minority, but has prohibited what is seen as a cause of tension.’

⁸⁰ See also *Refah Partisi v Turkey* (n 68) para 103; however, the Court has been reluctant to accept a positive state obligation to protect: D Ottenberg, *Der Schutz der Religionsfreiheit im internationalen Recht* (Nomos 2009) 131.

to the justification based on ‘rights of others’ within the meaning of article 9 persists as secularism also intends to protect the individual’s negative freedom of religion.

3 Notions of ‘living together’ considered as ‘rights of others’ within the meaning of article 9(2) ECHR

Based on the foregoing and the Court’s stance on how to balance the interests between positive and negative freedom of religion, different considerations may apply to the newly developed category of justification put forward by the Court in *SAS v France*. The ground for justification invoked by the Court for banning the wearing of religious symbols is the ‘protection of the rights and freedoms of others’ within the meaning of article 9(2) ECHR. The argument of this article is that, while the Court’s line of reasoning concerning secularism and improper proselytism upholds—as we have seen above—a connection to individual rights, this connection vanishes when accepting notions of ‘living together’ to justify violations of the freedom of religion.

Therefore, first, we give account of how the Court arrived at its finding and, second, shed light on the conditions to be fulfilled under the term ‘rights of others’ and, on that basis, demonstrate that the Court’s finding goes beyond the boundaries of article 9 ECHR. Third and finally, even a wide margin of appreciation for Member States does not allow the creation of grounds of justification not provided for in the Convention.

3.1 The Court’s reasoning on ‘rights of others’ and requirements of living together

The starting point of the Court’s new line of jurisprudence is the argument put forward by France to justify the ban of face covering to which the Court referred to as ‘respect for the minimum requirements of life in society’ referred to by the Government—or of ‘living together’.⁸¹

There is no explanation provided by the Court on how such minimum requirements may be rooted in general public interest and how they result from the ‘rights of others’. Instead, the ECtHR simply asserts that such values could, under certain circumstances, constitute a ground of justification under article 9(2) ECHR. The Court shows comprehension of the view that some citizens would reject practices in the public space which could question the relationships between persons and are an indispensable element of ‘living together’. The main critique towards this reasoning is that, unlike the justification grounds discussed above, reference to social considerations lack a connection to the ‘rights of others’ as required under article 9(2) ECHR.⁸²

⁸¹ *SAS v France* (n 10) para 121. The debate in the Belgian parliament showed that there is a majority view that the covering of the face creates barriers for usual communication and should thus not be allowed, see Chambre des Représentants de Belgique, Proposition de Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage, DCO 52 2289/005, 9 April 2010, 6.

⁸² See also dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 5.

The Court seems to accept views on social behaviour somehow linked to the general interest but does not investigate the link to the individual right concerned.⁸³ Which social considerations could justify the interferences with the wearing of religious clothes? One possible argument could be found in the role of the face in social interactions:

It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.⁸⁴

The Court thus recognises that a faceless communication would be tantamount to a violation of the 'right' to live in an environment facilitating living together.⁸⁵ This implies an active role for the state:

Moreover, the Court is able to accept that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places. (...) From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society (...). It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.⁸⁶

On that basis, the Court views the ban on face covering as justified provided that it aims at facilitating and ensuring the conditions of 'living together'.⁸⁷ It accepts the alleged protection of 'rights of others' without having analysed what this term would require in the sense of what kind of nature the protected right must have.

3.2 Notions of living together lack the protection of 'rights of others'

Is the Court's reasoning compatible with the requirements of 'rights of others' within the meaning of article 9(2) ECHR? The 'rights of others' protect rights and positions conflicting with the freedom of religion. These rights of others include rights granted by national legal norms (both constitutional and other norms of lower rank) and rights

⁸³ See Hunter-Henin (n 2) 630, who refers to a new 'ordre public social' interfering with fundamental freedoms; similarly van der Schyff and Overbeeke (n 1) 430.

⁸⁴ *SAS v France* (n 10) para 122.

⁸⁵ The view of parts of French society is illustrated by the words of the French Minister of Justice that 'le port volontaire du voile intégral revient à se retrancher de la société nationale, à rejeter l'esprit même de la République, fondée sur le désir de vivre ensemble': Session of Senate, 14 September 2010, 6732.

⁸⁶ *SAS v France* (n 10) paras 141, 153 (emphasis added).

⁸⁷ *ibid* para 142.

accruing from the ECHR,⁸⁸ they must be stipulated by law.⁸⁹ There is thus no caveat for considerations rooted in general public interest⁹⁰ making a restrictive interpretation of the grounds of justification necessary. In this vein, the ECtHR stressed even in *SAS v France* 'that the enumeration of the exceptions to the individual's freedom to manifest his or her religion or beliefs, as listed in article 9(2), is exhaustive and that their definition is restrictive'.⁹¹ It can thus be deduced that in order for a measure to be compatible with the Convention the pursued aim of interference must be in line with one of the grounds enumerated in article 9(2) ECHR.

The subject of protection within the meaning of the 'rights of others' are individual rights, while vague notions of behavioural norms of society or considerations related to the general public interest do not qualify. Are grounds for interferences with the freedom of religion thus limited to individual rights? The clear and restrictive wording of article 18 ECHR is a strong argument in the affirmative.⁹² In addition, the evolutionary history of these norms suggest that the specific design of justifications grounds assigned to individual freedoms sought to prevent a role for the general public interest.⁹³ This finding is confirmed by a systematic comparison of the jurisprudence regarding article 8 ECHR which provides for the same ground of justification.⁹⁴ The case law of article 8 ECHR concerning 'rights of others' rests on the assumption that encroachments on the freedom can only be justified where the protection of predominant individual rights require this.⁹⁵

This raises the question whether and to what extent in the above cases there is a sufficiently strong link to individual rights as required under the notion of 'rights of others' or, if not, whether this would constitute a new category of justification developed by the ECtHR going beyond the borders of article 9(2) ECHR? The foregoing has highlighted the ambivalence of different notions of secularism allowing a variety of interpretations ranging from active to passive secularism. In addition, we can now observe a similar vagueness as regards the concept of pluralism. One possible interpretation of pluralism is to exercise tolerance vis-à-vis religious symbols placed and worn in the public sphere. The Court's reasoning suggests the contrary view though. The Court invokes pluralism

⁸⁸ Grabenwarter (n 23) para 86; A von Ungern-Sternberg, 'Article 9' in U Karpenstein and F Mayer (eds), *EMRK: Kommentar zum Schutz der Menschenrechte und Grundfreiheiten* (Beck 2011) para 37.

⁸⁹ Von Ungern-Sternberg (n 88) para 37.

⁹⁰ Blum (n 22) 114.

⁹¹ *SAS v France* (n 10) para 113, with reference to *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR 14 June 2007) para 132.

⁹² See also Jacobs (n 22) 196.

⁹³ Blum (n 22) 114.

⁹⁴ According to article 8(2) ECHR, the right to respect for private and family life, home and correspondence can be interfered with for the 'protection of the freedoms and rights of others.'

⁹⁵ See L Wildhaber and S Breitenmoser, 'Article 8' in Pabel and Schmahl (n 23) para 650; I Fahrenhorst, *Familienrecht und Europäische Menschenrechtskonvention* (Ferdinand Schönigh 1994) 119. The protection of youth and children can justify the deprivation of child custody (*Eriksson v Sweden* (1990) 12 EHRR 183); a blood test may be required from a person being suspected to be drunk (*X v Netherlands* (1978) DR 16, 184).

and tolerance as being enshrined in ‘face to face’ communication. Society’s preference for a communication based on ‘open face’ where identification of the face is an indispensable element for a pluralistic society can, according to the Court’s view, constitute a ‘right of others’ in the sense of article 9(2) ECHR.

This reasoning raises doubts, as a choice of society in favour of open-face communication can barely qualify as an individual right as argued by the Court. There is no indication that an individual or subjective element is able to support the requirement of an open-face communication. Identifiability of one’s face is not a precondition for the functioning or the exercise of communicative basic rights such as the freedom of speech. Availing of rights of communication does not require the identification or open face of the subject of communication. In this connection, Judges Nußberger and Jägerblom argue in their dissents in *SAS v France*:

Even if it [the concept of ‘living together’] could arguably be regarded as touching upon several rights, such as the right to respect for private life (Article 8) and the right not to be discriminated against (Article 14), the concept seems far-fetched and vague.⁹⁶

There is no right of communication that would establish the necessity of open-face communication as a right to be invoked by one of the individuals participating in communication. And if no connection can be made between the need for open-face communication and the individual rights of the participants of communication, there cannot be any ‘rights of others’ allowing the violation of freedom of religion.

Furthermore, it remains doubtful whether an open-face communication constitutes an indispensable requirement of living together in European society. This claim must rest on an empirical observation of a society’s choice. Such societal choices requiring the visibility of the subject’s face can hardly be considered to exist. It can be conceded that clothes covering the face can create a barrier to communication as non-verbal signal cannot be transferred and verbal signals might be less clearly pronounced.⁹⁷ It should also be recognised that living together depends on the possibilities of interpersonal communication. Indeed, communicative barriers in relation to the wearing of religious symbols have played a role in the past on various occasions. In the Netherlands, the Commission for gender equality (Commissie Gelijke Behandeling, CGB) accepted a ban on students wearing veils covering the face (niqab) on the basis that the open face would improve communication.⁹⁸ Similarly, veils covering the face were at stake in the British case *Azmi*⁹⁹ where a language teacher had worn a niqab. It was observed that when the pupils sought to receive visual signals from Ms Azmi’s face, this was complicated by the covered face. Also, the pronunciation of the teacher was found to be less clear,

⁹⁶ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 5.

⁹⁷ *Chambre des Représentants de Belgique* (n 81) 6.

⁹⁸ *Commissie Gelijke Behandeling*, Judgment 2003-40, para 4.10.

⁹⁹ *Employment Appeal Tribunal, Azmi v Kirklees Metropolitan Borough Council*, 30 March 2007, EAT/0009/07, IRLR 484.

leading ultimately to a ban of the face-covering veil.¹⁰⁰ This case illustrates that in certain circumstances the effectiveness of communication must be ensured without limitations. Schools or other educative institutions where communication and comprehensibility are essential could be such cases. However, apart from that, it can hardly be argued that interpersonal communication would be hindered or deprived by a covered face. Examples such as skiing, biking, or the wearing of carnival costume illustrate that common activities do not require open faces.¹⁰¹ Likewise, common practice in the age of Internet questions the need of identifiability of persons or recognisability of faces as indispensable requirement of communication. On the Internet, recognisability is certainly not a common habit of communication, rather anonymity is the rule. It is common that communication partners are not visible nor identifiable. The use of invented synonyms and user names are a widespread phenomenon. It is not apparent why different considerations should apply only because an open-face communication is a sociocultural behavioural customs adapted in the majority part of the society. In sum, behavioural norms deduced from notions of 'living together' do not constitute an individual right as required for interference with the freedom of religion to protect the 'rights of others'. Also, there is no basis to argue that the identifiability of the face would be 'essential for the tolerance and broadmindedness'.¹⁰²

3.3 Margin of appreciation of Member States and limited judicial control

The ECtHR generally accords Member States a wide margin of appreciation both in factual and legal terms. The doctrine of the margin of appreciation¹⁰³ is based on a political philosophy, according to which decisions produced by democratic societies are in principle well suited to ensure respect for human rights. Judicial control exercised by

¹⁰⁰ Howard (n 2) 43.

¹⁰¹ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 9.

¹⁰² There is no space to delve into the discussion on whether and how the rejection of the burqa and other religious symbols generally reflects negative associations with these symbols. See dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 6:

It seems to us, however, that such fears and feelings of uneasiness are not so much caused by the veil itself, which—unlike perhaps certain other dress-codes—cannot be perceived as aggressive per se, but by the philosophy that is presumed to be linked to it. Thus the recurring motives for not tolerating the full-face veil are based on interpretations of its symbolic meaning. The first report on 'the wearing of the full-face veil on national territory', by a French parliamentary commission, saw in the veil 'a symbol of a form of subservience'. The explanatory memorandum to the French Bill referred to its 'symbolic and dehumanising violence'.

See also Ronchi (n 2) 294, who refers to a 'presumption of indoctrination' in the case of a Muslim headscarf.

¹⁰³ See J Schokkenbroek, 'The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1998) 19 Human Rights Law Journal 23, 30; E Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 Heidelberg Journal of International Law 240; S Koutnatzis and A Weilert, 'Fragen der menschlichen Reproduktion vor dem EGMR—Zugleich eine kritische Würdigung der Lehre vom staatlichen Beurteilungsspielraum' (2013) 51 Archiv des Völkerrechts 72, 88.

the ECtHR must give due account to measures taken as a result of democratic decision-making processes.¹⁰⁴ Respect and tolerance vis-à-vis the democratic origin of measures contested before the ECtHR require judicial restraint to a certain degree. This concept is further strengthened by the subsidiarity principle: judicial restraint can be deduced from the function of the ECtHR as an international court which by enforcing human rights performs only a subsidiary function in relation to Member States.¹⁰⁵ Finally, respect for cultural diversity is another strong argument for judicial restraint. The legal community reflects cultural and ideal diversity. In performing its task of interpreting the Convention, the Court should contribute to maintaining this diversity or, at least, not to diminish it by imposing uniform solutions applicable across all democratic societies.¹⁰⁶

There are, however, limitations to the margin of appreciation. The terms of the ECHR are generally autonomous, that is, to be interpreted independently from national legal orders.¹⁰⁷ In this vein, the Court frequently states that the margin of appreciation granted to national authorities ‘goes hand in hand with a European supervision.’¹⁰⁸ Under no circumstances must the ECtHR do away with its genuine obligation to develop criteria of interpretation for the rights of the Convention.¹⁰⁹

An important parameter for the determination of Member States’ margin of appreciation is normally the degree of homogeneity or heterogeneity of the legal situation of the dispute at stake. Legislative conformity between Member States indicates a rather limited margin of appreciation. The existence or non-existence of conformity thus determines the scope of the margin.¹¹⁰ Against this background, a comparative analysis of legal orders may help to specify the scope of margin.¹¹¹ Whenever the area of

¹⁰⁴ P Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) 19 Human Rights Law Journal 1, 2; also *SAS v France* (n 10) para 129 with reference to *Maurice v France* (2006) 42 EHRR 42, para 117.

¹⁰⁵ *Leyla Sahin v Turkey* (2007) (n 9) para 100; C Tomushcat, ‘Individueller Rechtsschutz: Das Herzstück des “Ordre Public Européen” nach der EMRK’ [2003] EuGRZ 95, 97.

¹⁰⁶ Mahoney (n 104) 2; F Matscher, ‘Methods of Interpretation of the Convention’ in J Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1994) 63, 76.

¹⁰⁷ C Grabenwarter and K Pabel, *Europäische Menschenrechtskonvention* (5th edn, Beck 2012) 5, para 9.

¹⁰⁸ *Handyside v United Kingdom* (n 73) para 48:

Article 10, para 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (...) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. (...) Nevertheless, Article 10, para 2 does not give the Contracting States an unlimited power of appreciation. The Court (...) is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.

¹⁰⁹ Koutnatzis and Weilert (n 103) 89.

¹¹⁰ W Ganshof van der Meersch, ‘Le Caractere “Autonome” des Termes et la “Marge d’Appreciation” des Gouvernements dans l’Interprétation de la Convention Européenne des Droits de l’Homme’ in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension—Studies in Honour of Gerard Wiarda* (Carl Heymanns 1988) 209; Mahoney (n 104) 5.

¹¹¹ K Pabel, ‘Die Rolle der Großen Kammer des EGMR bei Überprüfung von Kammer-Urteilen im Lichte der bisherigen Praxis’ [2006] Europäische Grundrechte-Zeitschrift 3, 4.

law relevant to the infringement of the individual right is addressed in a heterogeneous fashion, the Court exercises judicial restraints giving wide leeway to Member States.¹¹² In relation to the wearing of religious symbols in the Member States, the ECtHR has repeatedly stated that these issues have been addressed by individual Member States in very different ways, therefore not allowing a uniform European standard to be set over all national legal orders.¹¹³ The Court continued on this line of reasoning in its recent decision in *SAS v France*:

It observed that the rules in this sphere would consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. It concluded from this that the choice of the extent and form of such rules must inevitably be left up to a point to the State concerned, as it would depend on the specific domestic context.¹¹⁴

Judicial restraint in a situation of legal heterogeneity in Member States is compatible with the general considerations supporting the margin of appreciation discussed above. Respecting decisions that were adopted in democratic societies and reflecting cultural diversity militates against the idea of imposing uniform standard and alignment, especially in cases where Member States deal in very different ways with an issue. This is plausible but also has to be seen in light of the effectiveness of the Convention. The margin of appreciation is effective only within the borders of the Convention and must not lead to an interpretation or application of the Convention that is no longer compatible with its clear wording. This implies that the grounds of justification under article 9(2) ECHR may not be loosened nor be extended.¹¹⁵ The margin of appreciation thus becomes effective especially in instances where the wording is vague or unclear. Not surprisingly, the margin of appreciation has been considered wider in cases concerning 'national security'¹¹⁶ issues related to police,¹¹⁷ which is linked to the vague legal term of 'public security' under article 9(2) ECHR.

If the borderline of the margin of appreciation is the wording of the Convention, the most convincing area of relevance of the doctrine of margin is the judgment of the proportionality of a certain measure. Under the proportionality test, a measure must be suitable to reach a legitimate aim (which is mentioned in the Convention); it must be necessary to reach this aim and ultimately proportional in light of all interests

¹¹² *Leyla Sahin v Turkey* (2007) (n 9). The judicial restraint in cases where European minimum standards are lacking played an important role in the British cases of transsexualism. See *Rees v United Kingdom* (1987) 9 EHRR 56, para 37; *Cossey v United Kingdom* (1991) 13 EHRR 622, para 40; *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163.

¹¹³ *Leyla Sahin v Turkey* (2007) (n 9) para 101; *Otto-Preminger-Institut v Austria* (n 68) para 50; *Dahlab v Switzerland*, (n 7).

¹¹⁴ *SAS v France* (n 10) para 130; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143, para 44.

¹¹⁵ The scope of the margin of appreciation also depends on the gravity of the interference, the nature of the protected rights that is interfered with and the kind of state obligation at stake.

¹¹⁶ *Leander v Sweden* (1987) 9 EHRR 433.

¹¹⁷ *Buckley v United Kingdom* (1997) 23 EHRR 101.

concerned.¹¹⁸ The Court undertakes only an evidence review of the proportionality.¹¹⁹ This is in line with a broader trend in the Court's case law on interpreting the subsidiarity principle which has been identified by Judge Spano as the Court's 'qualitative, democracy-enhancing approach'.¹²⁰ This approach reflects the Court's willingness to defer to the reasoned assessment by national authorities of their Convention obligations. It was particularly manifest in *Hirst*¹²¹ and *Animal Defenders*¹²² underscoring the proposition that when examining whether and to what extent the Court should grant a Member State a margin of appreciation, as to the latter's assessment of the necessity and proportionality of a restriction on human rights, it takes particular account of the quality of decision-making.¹²³ This implies a wide discretion granted to national parliaments if the issue at stake has been examined extensively.¹²⁴ In this vein, a violation of the Convention would then only be found if a Member State evidently exceeds the boundaries of the margin of appreciation.¹²⁵

According to the ECtHR, Member States do not enjoy a margin of appreciation in matters related to religious freedom and outside of the proportionality issue, especially where the question is whether or not an act by an individual can claim religious legitimacy or not. The legitimacy of religious belief or religious acts do not fall in the scope of the margin of appreciation.¹²⁶ This underscores the fact that the margin should indeed be limited to the proportionality judgment: the state cannot claim a judgment on the legitimacy of religious acts (and thus on the question of whether article 9 has been interfered with), nor can the margin expand the legitimate aims as enumerated under article 9(2) ECHR. Only if one of the legitimate aims can validly be claimed to be pursued, the margin of appreciation under proportionality issues offers leeway to the Member State. By contrast, if a measure cannot be convincingly based on one of the legitimate aims under article 9(2) ECHR, there is no basis to enter the proportionality questions due to the lack of a valid ground for justification.

In addition, the Court's application of the facts to the legal standards in *SAS v France* raises serious doubts. The Court refers to the above mentioned parameter for the margin

¹¹⁸ Similarly F Matscher, 'Methods of Interpretation' in MacDonald, Matscher and Petzold (n 106) 79; J Frowein 'Preliminary Remarks to Articles 8–11' in J Frowein and W Peukert (eds), *EMRK-Kommentar* (3rd edn, Beck 2009) para 13; Koutnatzis and Weilert (n 103) 91.

¹¹⁹ Pabel and Schmahl (n 23) 14; P Van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006) 85.

¹²⁰ R Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiary' [2014] *Human Rights Law Review* 487, 487.

¹²¹ *Hirst v United Kingdom* (2006) 42 EHRR 41, paras 79–80.

¹²² *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21, para 108.

¹²³ See also D Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 13 December 2013, 8.

¹²⁴ Spano (n 120) 498.

¹²⁵ *Dahlab v Switzerland* (n 7); E Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9 *Human Rights Law Review* 359–65.

¹²⁶ *Manoussakis and Others v Greece* (1997) 23 EHRR 387.

of appreciation, according to which legal heterogeneity between Member States suggests wide leeway for Member States. According to case law, three factors are usually accounted for the legal comparison: international treaty law, comparative law and international 'soft law'.¹²⁷ Judges Nußberger and Jägerblom observe in their dissent in *SAS v France* that 45 of 47 Member States of the Council of Europe have not legislated in this area.¹²⁸ Even the ECtHR states that no consensus between legal order in Member States exists as to the banning of face covering clothes.¹²⁹ However, the Court only looks at the fact that there is a controversial debate on this issue in a number of Member States. This approach can be questioned by the Court's own standards.¹³⁰ First, the degree of homogeneity of the legal order should be determined on basis of the legal standardisation, ie whether or not states have legislated on an issue or not. This standard allows much more certainty and legal security than an approach referring to the political and public debate on a specific topic which can hardly be judged with clarity. Based on the degree of legislation, one can observe that there is a consensus between the Member States of the Council of Europe (with the exception of France and Belgium) *not* to address this issue by law and thus not to impose restrictions on the wearing of religious symbols. Hence, there is a prevalent legislative consensus *against* the banning of face covering. Consequently, one can barely argue in favour of a wide margin of appreciation but rather the margin should be limited given the overwhelming majority of countries that have not deemed it necessary to legislate on this issue.

4 Conclusions

The jurisprudence of the ECtHR on the wearing of religious symbols has been long been discussed. One reason may be the multifaceted interests at stake. The criticism commonly raised is widespread reaching from the Court's alleged misinterpretation of religious symbols, the development of female or Muslim stereotypes, an overvaluing of the negative freedom of religion and the lack of sufficient judicial review where secularism is used as ground for interference. While some of the criticism seems to be biased by ideological controversies, there is merit to the observation that the freedom of religious expression has been clearly ranked lower than the negative freedom of religion. This is partly due to the Court's generous acceptance of national secular orders. Active and intervention-

¹²⁷ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 19 with reference to *Marckx v Belgium* (n 48) para 41.

¹²⁸ Dissenting Judges Nußberger and Jägerblom, *SAS v France* (n 10) para 19 with reference to *Bayatyan v Armenia* (2012) 54 EHRR 15, paras 103, 108.

¹²⁹ *SAS v France* (n 10) para 156; for a similar reasoning to that of the ECHR in *Lautsi v Italy* see Ronchi (n 2) 295 and the dissent of Judge Malinverni in *Lautsi v Italy* (n 11) para 1.

¹³⁰ See also the critical view of Koutnatzis and Weilert (n 103) 92, who point at the questionable deduction from the descriptive to the normative. They argue that a margin of appreciation should only exist for preminent reasons. See also M O'Boyle, 'The Margin of Appreciation and Derogation Under Article 15: Ritual Incantation or Principle?' (1998) 19 Human Rights Law Journal 23, 29.

oriented notions of secularism have been accepted by the Court and thus giving leeway to Member States to adopt restrictive policies related to the wearing of religious symbols. In particular, secular orders seeking to remove religious symbols in the public sphere not only between the state and the individual but also among individuals have only vaguely been reviewed against the standard of pluralism and tolerance.

The Court's judicial restraint has resulted in the recent decision in *SAS v France*, which extends the justification under article 9(2) ECHR to an extent hardly reconcilable with the wording and objective of this provision. According to the Court's latest case law, an alleged consensus about interpersonal behavioural norms on communication may qualify as 'rights of others' within the meaning of article 9(2) ECHR. Notions such as the 'living together' are sufficient to push a specific expression of religion out of public space. This may be plausible in some instances, especially in areas where state neutrality is at stake or effective communication is essential such as the educational sphere and could be jeopardised due to the face-covering. However, in the context of the general public sphere accepting a uniform behavioural rule on the basis of considerations related to notions of 'living together' lacks sufficient legal ground. Such considerations do not meet the requirement of the 'right of others' pursuant to article 9 ECHR. The subject of protection within the meaning of the 'rights of others' are individual rights, while vague notions of behavioural norms of society or considerations related to the general public interest do not qualify. In addition, doubts arise as to whether any choice of society demanding an open-face communication as an indispensable requirement of living together can be demonstrated. In any case, a vague normative concept of what communication standards in a society should apply cannot be the ground to justify infringements of the freedom of religious expression.

Finally, the doctrine of margin of appreciation has been misinterpreted in *SAS v France*. Although this doctrine plausibly accords leeway to Member States in determining the proportionality of a measure, the margin cannot be used to extend the wording of the Convention and, more specifically, create a new category of justification for violations of basic rights. Apart from that, taking the Court's previous jurisprudence on legal heterogeneity in Member States as a parameter for the margin of appreciation, there is no basis for granting the Member States a wide margin of appreciation where bans of wearing religious symbols are at stake. In sum, the recent judgment of the ECtHR implies a strong pleading in favour of Member State's leeway in regulating religious affairs in the public sphere—at the expense of the freedom of religion.

The ICJ and its Lip Service to the Non-Priority Status of the Equidistance Method of Delimitation

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Abstract

Since the first maritime boundary delimitation dispute before the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases* in 1969 to the most recent maritime delimitation judgment in Maritime Dispute (*Peru v Chile*), the Court has maintained that the equidistance method of delimitation is not the preferred method for delimiting international maritime boundaries. Yet a close examination of the Court's decisions shows that by insisting that the equidistance method does not have priority over other methods of delimitation, and yet continuing to apply it in the first instance to maritime delimitation cases before it, the Court has been paying lip service to its stance regarding the equidistance method. In reality, the former is the preferred method of delimitation, and States who submit their disputes to the Court may well expect that this is the method that would be applied by the Court in delimiting their boundaries. In order to prove this position, this article will consider closely how the equidistance method has been and is being applied by the ICJ. It thus traces the life cycle of the equidistance method, from its non-mandatory status at the beginning to its present pre-eminent status in light of the ICJ's maritime boundary delimitation decisions. It also assesses the rationale behind this development, and argues that the ICJ has by its application of the equidistance method elevated it to *the* method for international maritime boundary delimitation.

Keywords

Equidistance, Maritime Delimitation, International Court of Justice, Equitable Principle

1 Introduction

In the jurisprudence of the International Court of Justice (ICJ or Court) relating to maritime boundary delimitation, beginning with the *North Sea Continental Shelf (Federal*

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Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)¹ in 1969 to the present day, the Court has maintained that the equidistance method of delimitation is just one of the methods applicable to the delimitation of maritime boundaries in the quest for an equitable solution. In particular, the ICJ has taken the approach that the equidistance method of delimitation has neither an automatic priority over other methods of delimitation nor a presumption in its favour. Yet a close examination of the Court's decisions shows that, by insisting on the non-priority status of the equidistance method and yet continuing to apply it in the first instance to maritime delimitation cases before it, the Court has been paying lip service to its stance on the non-preferential status of the equidistance method of delimitation.² In reality, there is a presumption in favour of the equidistance method, and States who submit their disputes to the Court may well expect that this is the method that would be applied by the Court in delimiting their boundaries. In order to prove this position, this article, divided into four sections, will consider in the first how the equidistance method has been, and is being, applied by the ICJ. It thus traces the life cycle of the equidistance method, from its non-mandatory status at the beginning to its present preminent status in light of the ICJ's maritime boundary delimitation decisions. The second section examines the reasons that have contributed to the present elevated status of the equidistance method in the jurisprudence of the Court. The third section looks at the implications of this jurisprudence and the last section concludes the discussion.

2 Equidistance method and its application in decided cases

According to the 1958 Convention on the Continental Shelf, the equidistance method of delimitation consists of drawing a line, every point of which is equidistant (equally distant) from the nearest points of the baselines from which the breadth of the territorial sea is measured.³ It can also be described as a line 'which leaves to each of the parties concerned

¹ *North Sea Continental Shelf (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* (Merits) [1969] ICJ Rep 3 (*North Sea Continental Shelf* cases).

² It is noteworthy that there is a dearth of knowledge about other delimitation methods; they are less frequently spoken about in and outside of delimitation cases, contributing to the point this article is trying to make. Examples include the angle bisector method, the equiratio method, the thalweg, perpendicular lines, among others. See generally for a discussion on methods of delimitation, Chris Carleton and others, *Developments in the Technical Determination of Maritime Space: Delimitation, Dispute Resolution, Geographical Information Systems and the Role of the Technical Expert* (International Boundaries Research Unit 2002); Nuno Antunes, 'Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process' (Durham University 2002) <<http://etheses.dur.ac.uk/4186/>> accessed 20 January 2015.

³ Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311, art 6. The Minerals Management Service of the United States Department of Interior similarly defined an equidistance line as 'one for which every point on the line is equidistant from the nearest points on the baselines being used': Federal Register, Volume 71 Issue 1 (3 January 2006) <<http://www.gpo.gov/fdsys/pkg/FR-2006-01-03/html/05-24659.htm>> accessed 10 March 2015.

all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other Party'.⁴ The term 'median line' is sometimes substituted for 'equidistant line' as they are regarded as being synonymous.⁵ Article 6 of the Convention on the Continental Shelf provides that in the case of delimitation between States with opposite coasts, the boundary shall be determined by agreement and in the absence of agreement, by a median line, unless the existence of special circumstances necessitates the drawing of another line. For adjacent coasts, the Convention employs the term 'equidistance' in place of 'median line' which, as has been noted, is used synonymously. In the *Maritime Delimitation in the Black Sea (Romania v Ukraine)* case, the Court noted that '[n]o legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation is the same for both'.⁶

Article 6 was called into question in the *North Sea Continental Shelf* cases, where the parties (Germany and the Netherlands, and Germany and Denmark) requested the Court to make a pronouncement on the rules and principles that were applicable between them in the delimitation of their continental shelf in the North Sea. The Netherlands and Denmark argued that article 6 of the Convention on the Continental Shelf contained the applicable rule and, as such, the continental shelf should be delimited by means of an equidistance line.⁷ For them, insofar as entitlement to the continental shelf was based on the notion of appurtenance (which they interpreted to mean 'proximity'), any delimitation method used must leave to a State all those parts which are closer to it.⁸ Germany, on the other hand, which had not ratified the Convention, contended that the equidistance method was not customary international law and therefore was not applicable.⁹ In addressing the issue, the Court held that article 6 had not attained the status of customary international law. It further held that, although the equidistance method is a convenient method of delimitation, which had been used in a number of instances by States, the practical advantages thereof did not transform it into a mandatory rule of law.¹⁰ As the Court had maintained that the fundamental rule relating to the continental shelf was that of natural prolongation (of the land territory of a State into and under the sea), it found that the equidistance method was irreconcilable with the notion of natural prolongation. This was because the former, if applied, would have the effect of attributing to one State areas that are the natural prolongation of another State.¹¹

Tracing the history of the equidistance method in international law, the Court noted that, during discussions of the International Law Commission (ILC) on delimitation, the

⁴ *North Sea Continental Shelf* cases (n 1) 17.

⁵ Hiran Jayewardene, *The Regime of Islands in International Law* (Martinus Nijhoff 1990) 334.

⁶ *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Merits) [2009] ICJ Rep 61 (*Black Sea* case) 101.

⁷ *North Sea Continental Shelf* cases (n 1) 10.

⁸ *ibid* 29.

⁹ *ibid* 11.

¹⁰ *ibid* 23.

¹¹ *ibid* 31.

equidistance method was neither considered an inherent necessity in the doctrine of the continental shelf,¹² nor was it regarded as having priority over other methods that could be employed.¹³ Moreover, at the time, the ILC was considering equidistance within the context of territorial sea delimitation; it only transposed the equidistance approach to continental shelf delimitation as an afterthought and in a haphazard fashion.¹⁴ The Court thus concluded that the equidistance method was neither obligatory nor applicable to the dispute,¹⁵ holding that the delimitation had to be effected by agreement between the States concerned which had to employ equitable principles to arrive at such an agreement.¹⁶ In the words of the Court,

the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied,—for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved.¹⁷

As far as the Court was concerned, delimitation by agreement and in accordance with equitable principles were the two concepts that had underlain all the subsequent history of maritime delimitation since the Truman Proclamation, which was the start of the positive law on the continental shelf, being reflected in subsequent proclamations and later work on the subject.¹⁸

This decision was confirmed in subsequent cases brought before the ICJ. In the case, *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)*, even though the parties, Canada and the United States of America, were parties to the 1958 Convention, the Chamber of the Court held that article 6 was not general international law.¹⁹ It held further that, as it could not apply article 6 to disputes involving non-parties to the 1958 Convention, it could also not apply article 6 to parties to the

¹² *ibid* 35.

¹³ *ibid* 34.

¹⁴ *ibid* 34–35.

¹⁵ The Court, however, stated that, regarding delimitation between States with opposite coasts, in the absence of islets and rocks which may cause disproportionate results, the equidistance line would be appropriate for delimitation since it was the case that either of the two opposite States could claim the same continental shelf as the natural prolongation of its land territory. The Court stated, ‘These prolongations meet and overlap, and can therefore only be delimited by means of a median line’: *ibid* 36. It may be added here that this pronouncement was made within the context of both States being entitled to the same continental shelf as the natural prolongation of their land territories. The Court’s reasoning shows that, where the continental shelf is the natural prolongation of the land territory of just one of the two States—or put differently, where there are two natural prolongations—then any delimitation method should respect the principle of non-encroachment on the natural prolongation. In such a situation, the equidistance principle would be inapplicable: *ibid* 31, 53.

¹⁶ *ibid* 46.

¹⁷ *ibid* 47.

¹⁸ *ibid* 33.

¹⁹ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Merits) [1984] ICJ Rep 246 (*Gulf of Maine* case). Recall that in the *North Sea Continental Shelf* cases, Germany had not ratified the Convention.

Convention that sought to delimit both the fisheries zone and the continental shelf.²⁰ As the Court put it, '[i]n short, the Chamber does not believe that there is any argument to justify the attempt to turn the provisions of Article 6 of the 1958 Convention into a general rule applicable as such to every maritime delimitation.'²¹ Commenting on this decision, Mark Igiehon argues that, by coming to this conclusion, the Court denied that there was a general international rule to apply the equidistance-special circumstances method or even a special rule applicable as between parties to the 1958 Convention.²²

These decisions were concerned with the 1958 Convention, particularly article 6. However, in 1982, the United Nations Convention on the Law of the Sea (UNCLOS) was signed and, even though it did not come into force until 1994, the Court took it into consideration in delimitation cases before it, where it considered the Convention reflective of customary international law, and accordingly applicable to the determination of the disputes.²³ The provision of the UNCLOS relating to the delimitation of the continental shelf is contained in article 83(1).²⁴ This article states that:

The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

In the absence of agreement after a reasonable period of negotiations, the States concerned shall resort to the procedures provided for in part XV.²⁵ From this article, the following properties can be gleaned:

- (a) States shall determine where their continental shelf boundaries lie by agreement.
- (b) This agreement shall be done on the basis of international law. Article 38 of the Statute of the ICJ sets out the sources of international law—international conventions, international custom, the general principles of law recognised by civilised nations; judicial decisions²⁶ and the teachings of the most highly qualified publicists of the various nations.
- (c) The aim of a maritime boundary delimitation exercise is the achievement of an equitable delimitation.

²⁰ *ibid* 303.

²¹ *ibid*.

²² Mark Igiehon, 'Present International Law on Delimitation of the Continental Shelf' (2006) 8 IELTR 208, 211.

²³ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November, 1994) 1833 UNTS 3. *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (Merits) [1982] ICJ Rep 18 (*Tunisia v Libya*) 38; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Merits) [1985] ICJ Rep 13 (*Libya v Malta*) 29; 30.

²⁴ Delimitation of the EEZ is provided for in article 74(1) and this is identical to article 83 on delimitation of the continental shelf.

²⁵ Part XV sets out the dispute resolution options available under the Convention.

²⁶ This is subject to the provisions of article 59, which states that the decision of the Court only has binding force between the parties and in respect of that particular case.

Article 83(1) of UNCLOS, unlike article 6 of the 1958 Convention on the Continental Shelf, provides no method for delimitation. It has been described as empty or meaningless as it provides no guidance as to the delimitation method to be employed, leaving the gap to be filled by States or by an adjudicatory body whenever a dispute comes before it.²⁷ In the *Continental Shelf (Libyan Arab Jamahiriya v Malta)* case, the Court acknowledged this issue, stating that '[t]he Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves or to the courts, to endow this standard with specific content'.²⁸ The reason for this empty formula was the difference in positions between two groups at the Third United Nations Conference on the Law of the Sea (UNCLOS III) where UNCLOS was adopted. One group favoured the prescription of the equidistance method, while the other group argued for the application of equitable principles. To resolve the deadlock and achieve a compromise, article 83 was drafted as it is presently, requiring only that any delimitation carried out must lead to an equitable solution. This confirmed again that the equidistance method neither had priority nor precedence and was just one of the many methods States (and adjudicatory bodies) could employ in the delimitation of boundaries. In this respect, Degan asserts that the division in views between delegates at the Conference as to the delimitation method to be codified in UNCLOS and the outcome of article 83 proves that there was no general international law on maritime delimitation.²⁹

The first case to consider article 83 was the *Tunisia v Libya* case. The Court held that it did not have to apply the equidistance method unless it found that this method was inequitable, following which it would then be at liberty to consider another method. Therefore, the Court would only find in favour of the application of the equidistance method after evaluating and balancing all relevant circumstances, 'since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods'.³⁰

In 1985, the Court was once again in a position to develop the law relating to maritime boundary delimitation through its interpretation of the law. The Court, commenting on state practice surrounding the application of the equidistance method in the *Libya v Malta* case, noted that 'state practice, however interpreted, falls short of proving the existence of a rule prescribing the use of equidistance, or indeed of any

²⁷ In his dissenting opinion in the *Gulf of Maine* case (n 19), Judge Gros referred to article 83 of UNCLOS as providing an 'empty formula' that had the effect of destroying all previous gains achieved through the 1958 Convention, the 1969 *North Sea Continental Shelf* cases: *Gulf of Maine* case (n 19) 365. See Pål Jakob Aasen, *The Law of Maritime Delimitation and the Russian-Norwegian Maritime Boundary Dispute* (Fridtjof Nansen Institute 2010) 13.

²⁸ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Merits) [1985] ICJ Rep 13 (*Libya v Malta*) 30–31.

²⁹ Vladimir-Djuro Degan, 'Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic' (2007) 6 CJIL 601, 606.

³⁰ *Tunisia v Libya* (n 23) 79.

method, as obligatory.³¹ It also rejected Malta's argument that, since entitlement to the continental shelf was based on distance from the coasts, the equidistance method was applicable to the delimitation of the continental shelf or at least as a first step towards delimiting the shelf. Deciding that the distance criterion of entitlement to the continental shelf did not confer primacy on the equidistance method, the Court held:

The Court is unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used, or that the Court is 'required, as a first step, to examine the effects of a delimitation by application of the equidistance method'. Such a rule would come near to an espousal of the idea of 'absolute proximity', which was rejected by the Court in 1969, and which has since, moreover, failed of acceptance at the Third United Nations Conference on the Law of the Sea. That a coastal State may be entitled to continental shelf rights by reason of distance from the coast, and irrespective of the physical characteristics of the intervening sea-bed and subsoil, does not entail that equidistance is the only appropriate method of delimitation, even between opposite or quasi-opposite coasts, nor even the only permissible point of departure. The application of equitable principles in the particular relevant circumstances may still require the adoption of another method, or combination of methods, of delimitation, even from the outset.³²

It further added that 'the equidistance method is not the only method applicable to the present dispute and it does not even have the benefit of a presumption in its favour'.³³

The Court, in drawing the boundary line between Libya and Malta, nevertheless employed the equidistance method as a provisional line which could only become the final line if it could be demonstrated (through an application of equitable principles to the relevant circumstances) that the equidistance line would lead to an equitable result. This decision was based on the Court's recognition that 'the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts'.³⁴ Still the Court added:

The fact that the Court has found that, in the circumstances of the present case, the drawing of a median line constitutes an appropriate first step in the delimitation process, should not be understood as implying that an equidistance line will be an appropriate beginning in all cases, or even in all cases of delimitation between opposite States.³⁵

In spite of this pronouncement that the equidistance method did not even qualify to be used as a compulsory, first-step, provisional line, the Court in the *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* held that it was appropriate to begin with a provisional median line which

³¹ *Libya v Malta* (n 23) 38.

³² *ibid* 37–38 (emphasis in original; internal citations omitted).

³³ *ibid* 47.

³⁴ *ibid* 47.

³⁵ *ibid* 56.

could be adjusted if necessitated by the presence of special circumstances.³⁶ Although Denmark argued that previous decisions of the Court had rejected the compulsory drawing of a provisional equidistance line, the Court held that the case before it was governed by article 6 of the 1958 Convention, which required the application of the equidistance method. More importantly, the Court went further to endorse the decision of the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (United Kingdom v France) (Anglo-French Arbitration)*.³⁷ It cited the opinion of that tribunal as authority for the proposition that article 6 actually meant that, where special circumstances exist, the equidistance line that would ordinarily apply should be varied or modified. Article 6 did not require that another delimitation method be used in place of the equidistance method. The Court also found that, inasmuch as the equidistance/special circumstances rule prescribed in article 6 of the 1958 Convention could be regarded as expressing a general norm based on equitable principles, there was no material difference between the effect produced by the application of article 6 and the effect of the customary rule requiring delimitation to be based on equitable principles.³⁸ A provisional equidistance line was thus drawn as the first step, since the Court had convinced itself that it was in accord with precedents to begin by drawing a median line and then asking whether special circumstances required the shifting or adjustment of the line.³⁹

This decision had the effect of placing the equidistance method on a higher pedestal than other methods of delimitation; of a presumption in favour of the equidistance method. As one learned scholar analysing this decision observed, '[e]quidistance, after having been for many years assigned to mistrust and disrepute, has been unfrozen and recommissioned'.⁴⁰ The interpretation of article 6 that the Court borrowed from the *Anglo-French Arbitration* indicated that an equidistance line would always be drawn, albeit it may be modified or varied, but in substance, it would not have changed drastically or significantly from the original equidistance line. In fact, Judge Fischer, dissenting, opined 'that the Court, when deciding to use a median line as a provisional line, has accorded a preferential and unwarranted status to the median line'.⁴¹ The Court had also not taken into consideration the developments in international law brought about by article 83 of UNCLOS that was to come into force the next year; developments that indicated that the median line was no more than one of the methods to be used to arrive at an equitable delimitation of the continental shelf.⁴²

³⁶ *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Merits)* ICJ Rep 38 (*Jan Mayen*), 59–60.

³⁷ *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK v France) (1977–1978)* 18 RIAA 3, 116.

³⁸ *Jan Mayen* (n 36) 58.

³⁹ *ibid* 61.

⁴⁰ George Politakis, 'The 1993 Jan Mayen Judgment: The End of Illusions?' (1994) 41 NILR 1, 17.

⁴¹ *Jan Mayen* (n 36) 306 (Dissenting Opinion of Judge Fischer).

⁴² *ibid*.

The reasoning in the *Jan Mayen* case was applied in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* case where the Court, after reviewing its earlier delimitation decisions, decided that it was in accordance with precedents and State practice to begin with an equidistance line, which may be adjusted if special circumstances required.⁴³ The Court proceeded to hold that the rule requiring that delimitation be carried out by employing equitable principles, taking account of all relevant circumstances, to the end that an equitable result is attained (equitable principles/relevant circumstances rule) and the rule requiring the drawing of an equidistance line subject to modification due to special circumstances were closely interrelated.⁴⁴

By so pronouncing, the Court subtly confirmed the elevation of the equidistance method to a special status without glaringly holding that the equidistance method was *the* method of delimitation. It also blurred the line between the equitable principles/relevant circumstances rule of delimitation and the equidistance/special circumstances method when it described them as closely interrelated. In fact, in the case, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)*, the Court described the two methods as very similar and went on to explain that the equitable principles/relevant circumstances method involved first drawing an equidistance line and then asking whether any circumstances required shifting or adjusting the line.⁴⁵ Essentially, therefore, the Court merged the two methods, for its explanation of what the equitable principles/relevant circumstances method involved had the effect of declaring it one and the same thing as the equidistance/special circumstances method.

In accordance with this pronouncement, therefore, the Court in the *Cameroon v Nigeria* case applied the equidistance method.⁴⁶ Ironically, the Court still thought it necessary to quote from the judgment in the *Libya v Malta* case that:

the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question.⁴⁷

In the reasoning of the Court, once it has taken into consideration any factor necessary for adjusting (or shifting or modifying) the equidistance line, then it has satisfied the condition requiring it to demonstrate that the 'equidistance method leads to an equitable result in the case in question'.⁴⁸ In other words, any such adjustment of the equidistance line will necessarily result in an equitable solution. Noteworthy is the fact that the

⁴³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40, 74–75.

⁴⁴ *ibid* 75.

⁴⁵ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* (Merits) [2002] ICJ Rep 303 (*Cameroon v Nigeria*), 441.

⁴⁶ *ibid* 442.

⁴⁷ *ibid* 443.

⁴⁸ *ibid*.

Court did not consider that demonstrating that the equidistance method will lead to an equitable delimitation in a particular case may be better satisfied by comparing its outcome with those of other equally applicable methods.

A better interpretation of the quoted passage from the *Libya v Malta* case would require that satisfying the condition of equitableness be done early in the delimitation exercise when different applicable methods are weighed against each other, rather than after a preliminary equidistance line has been drawn. This line of reasoning is evident in the case, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*.⁴⁹ The Court listened to arguments about why starting with a provisional equidistance line would lead to inequitable results, and in the end found that the construction of an equidistance line was not feasible, so it opted to delimit the boundaries using the bisector method.⁵⁰ Due to the peculiarities of the area to be delimited, 'neither Party [had] as its main argument a call for a provisional equidistance line as the most suitable method of delimitation.'⁵¹ Honduras only argued for a provisional equidistance line in the event that the Court rejected the 15th parallel line that it considered applicable.⁵² Nicaragua stated the advantages of the bisector method of delimitation thus:

the equitable character of the bisector method is confirmed by the independent criteria of an equitable result: (a) the method produces an effective reflection of the coastal relationships; (b) the bisector produces a result which constitutes an expression of the principle of equal division of the areas in dispute; (c) the bisector method has the virtue of compliance with the principle of non-encroachment; (d) it also prevents, as far as possible, any cut-off of the seaward projection of the coast of either of the States concerned; and (e) the bisector method ensures the exercise of the right to development of the Parties.⁵³

Although the Court did not dispute these advantages, it did mention that the reason why the equidistance method is widely used in the practice of maritime delimitation is because of its scientific character, endowing it with certain intrinsic value and because it can be applied with relative ease.⁵⁴ It did not fail to mention (as it usually does and which this article argues amounts to lip service), however, that the equidistance method did not have priority over other methods.⁵⁵ In analysing this decision, Lathrop highlights the Court's departure from its two-step⁵⁶ process which it had used to delimit maritime boundaries for over twenty years;⁵⁷ that is, the drawing of a provisional equidistance

⁴⁹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Merits) [2007] ICJ Rep 659.

⁵⁰ *ibid* 745.

⁵¹ *ibid* 742.

⁵² *ibid* 690.

⁵³ *ibid* 747.

⁵⁴ *ibid* 741.

⁵⁵ *ibid*.

⁵⁶ Although Lathrop refers to the process as two-step, now the ICJ calls it the three-stage process.

⁵⁷ Coalter Lathrop, 'International Decisions, *Nicaragua v Honduras*' (2008) 102 AJIL 113, 119.

line and the adjustment of same depending on the presence of special circumstances. He adds that the decision ‘might allow more flexibility in the choice of method in future delimitations.’⁵⁸

Elizabeth Kirk does not agree that using the bisector method was a departure from the jurisprudence of the Court.⁵⁹ She rather argues that it was in fact a confirmation of the law insofar as UNCLOS and the jurisprudence of the Court require the taking into consideration of geographical features of the relevant area to be delimited. Reiterating the non-priority status of the equidistance method, Kirk adds that, although the equidistance method is a convenient starting point, ‘[b]oth equity and special circumstances can dictate the use of other means to determine the boundary’ and the peculiar geographical features in question necessitated the adoption of a method different from the usual equidistance method.⁶⁰ As persuasive as this may sound, Kirk does not consider that, in spite of the Court’s insistence on the non-priority of the equidistance method, its jurisprudence about the methodology applicable to delimitation favours only the shifting or adjusting of the equidistance line and not the employment of a totally different method. As the Court in the *Jan Mayen* case stated:

it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to *seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation*.⁶¹

More so, the Court will now not consider any relevant circumstances at all during the first stage of the delimitation process; it will consider relevant circumstances only in the second stage after it has already drawn the provisional equidistance line.⁶² Again, this shows the presumption in favour of equidistance. If relevant circumstances are only considered after the drawing of the provisional line, meaning that no question of equitableness of the result arises at this point, how does the Court assess whether a particular case is one in which it is inappropriate to start with a provisional equidistance line? Is not a case in which it would be inappropriate to start with an equidistance line one where it would not be possible to achieve an equitable result by the use of the equidistance method?⁶³ Therefore Kirk’s view that ‘equity and special circumstances can dictate the use of other means to determine the boundary’ does not find place in the Court’s jurisprudence. Indeed, commenting on this decision, the Vice President of the Court agreed that the use of the bisector method was a necessary exception to the ‘well-established equidistance method. And the Court made sure that it was absolutely clear

⁵⁸ *ibid* 118.

⁵⁹ Elizabeth A Kirk, ‘Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v Honduras*), Judgment of 8 October 2007’ (2008) 57 ICLQ 701, 708.

⁶⁰ *ibid* 708–09.

⁶¹ *Jan Mayen* (n 36) 61 (emphasis added).

⁶² *Black Sea case* (n 6) 101.

⁶³ *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2012] ICJ Rep 624, 746 (Declaration of Judge Xue).

from the text of the judgment that the general principle of equidistance remains firmly in place.⁶⁴

In light of this, then, Lathrop's prediction of flexibility for future maritime delimitation did not hold true. In fact, by the time the Court handed down its decision in the *Black Sea* case, it boldly declared that, when called upon to effect a delimitation of the continental shelf, it would proceed in defined stages. That is, delimitation would begin with the drawing of an equidistance line, before the Court would move to decide whether that line should be adjusted due to the presence of special circumstances necessitating such adjustment. The final stage would involve testing whether the result of the exercise is equitable in light of a reasonable degree of proportionality between the areas attributed to the parties and the length of their coasts.⁶⁵ This has now acquired the status of the Court's three-stage delimitation methodology.⁶⁶ As such, certain scholars have praised this as bringing consistency and predictability to the law of maritime boundary delimitation.⁶⁷

The Court has thus taken advantage of the gap in article 83 of UNCLOS to rewrite article 83 but it has also ensured that the equidistance group that could not force its views into UNCLOS are the winners in the end. This is true in spite of the Court's opinion that the equitable principle/relevant circumstances method is the same as the equidistance/special circumstances method. One is made to question if they really are the same, why the delegates at UNCLOS III were so sharply divided about the issue, and why the deadlock was only broken following the drafting of the compromise article 83 of UNCLOS that deliberately omits to prescribe a delimitation method.⁶⁸

⁶⁴ Bernardo Sepulveda-Amor, 'The International Court of Justice and the Law of the Sea' 19 <<http://biblio.juridicas.unam.mx/revista/pdf/DerechoInternacional/11.5/art/art1.pdf>> accessed 5 November 2014.

⁶⁵ *Black Sea* case (n 6) 101–03.

⁶⁶ *Nicaragua v Colombia* (n 63) 695.

⁶⁷ Ki Beom Lee, 'The Demise of Equitable Principles and the Rise of Relevant Circumstances in Maritime Boundary Delimitation' (PhD Thesis, University of Edinburgh 2012) 8 <<https://www.era.lib.ed.ac.uk/bitstream/handle/1842/7576/Lee2012.pdf?sequence=2>> accessed 5 November 2014; Igiehon (n 22) 215; Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Hart 2006) 130. Tanaka asserts that the equidistance method is the only method applicable that will ensure the predictability of results because, once the baselines have been determined, the delimitation (equidistance) line is mathematically determined. See also Gilbert Guillaume, 'Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations' <<http://www.icj-cij.org/court/index.php?pr=81&pt=3&p1=1&p2=3&p3=1>> accessed 6 November 2014. There, Judge Guillaume stated, 'the law of maritime delimitations, by means of these developments [deciding to always begin with a provisional equidistance line that may be adjusted in the light of special circumstances] in the Court's case law, has reached a new level of unity and certainty'.

⁶⁸ Surely, in spite of the emptiness of article 83(1), the Court is still required, in a case before it, to apply a method for the delimitation of the area in dispute. Noting this in the *Libya v Malta* case, the Court stated that the Convention sets a goal to be achieved and it behoves on States and the Court to endow that standard with specific content: See *Libya v Malta* (n 23) 30. So in endowing this standard with specific content, the ICJ has equated the equitable principles method to the equidistance method (albeit artificially) to hold that the equidistance method is the starting point of any delimitation. One may simply accept that the Court, whatever method it adopts, is only bound by article 83 to ensure that its decision leads to an equitable solution. See also *Tunisia v Libya* (n 23) 49.

3 Rationale for development in this direction

A number of reasons account for why the Court's jurisprudence has developed in the manner set out above. First is the need for consistency and a degree of predictability. When the Court insisted on the application of equitable principles as the method of delimitation, it came under criticism for failing to set out objective rules by which delimitation should be governed. Judge Oda was quick to point out that that position of the Court 'appears simply to suggest the principle of non-principle' and did not display the much needed qualities of consistency and predictability.⁶⁹ Judge Schwebel also noted that 'equitable principles' as a method of delimitation opens considerable room for differences of opinion in their application to problems of maritime delimitation.⁷⁰ Further, he stated that '[i]f what is lawful in maritime delimitation by the Court is what is equitable, and if what is equitable is as variable as the weather of The Hague', then one is faced with an 'anything goes' situation.⁷¹ Igiehon also alludes to the fact that there may not be any material difference between a decision based on equitable principles and one decided *ex aequo et bono*.⁷² Following the need to fill this gap, the Court's jurisprudence has developed in such a way that applying the three-stage methodology provides some degree of consistency and predictability.

The rise of the distance criterion as a basis for entitlement to the continental shelf and the Exclusive Economic Zone (EEZ), and the increasing desire of States for a single line to delimit both the EEZ and the continental shelf (single maritime boundary) have also contributed to the development of the Court's jurisprudence in favour of equidistance. As Judge Evenson notes in his separate opinion in the *Tunisia v Libya* case, when States, whether opposite or adjacent, base their claims to the continental shelf or the EEZ on the 200 nautical mile distance criterion open to them, '[t]his very fact seems to strengthen the equidistance/median line principle as an equitable approach for delimiting overlapping areas'.⁷³ Similarly, Kwiatkowska remarks:

it seems possible to conclude that the principle of distance, being already a rule of customary international law governing the entitlement to the EEZ/[Continental Shelf (CS)] within 200 miles, enhanced the role of equidistance as an equitable principle applicable to delimitation of these areas in general, and delimitation between opposite states in particular.⁷⁴

Another reason for the rise of the equidistance method is the Court's acceptance of the advantages of this method and its preconceived notion that the equidistance method generally leads to an equitable solution. The Court accepts that there is 'impressive

⁶⁹ *Libya v Malta* (n 23) 125 (Dissenting Opinion of Judge Oda).

⁷⁰ *ibid* 187 (Dissenting Opinion of Judge Schwebel).

⁷¹ *ibid*.

⁷² Igiehon (n 22) 211, 214.

⁷³ *Tunisia v Libya* (n 23) 296 (Dissenting Opinion of Judge Evenson).

⁷⁴ Barbara Kwiatkowska, 'Equitable Maritime Boundary Delimitation—A Legal Perspective' (1998) 3 *Intl J Estuarine & Coastal L* 287, 301.

evidence that the equidistance method can in many different situations yield an equitable result.⁷⁵ In another case, the Court noted that no other method of delimitation has the combined advantages of certainty of application and practical convenience,⁷⁶ as well as the fact that the equidistance method is capable of being employed in almost all circumstances.⁷⁷

4 Implications

What are the implications of this article's position for States involved in maritime boundary disputes? First, it means that any State that argues for the non-application of the equidistance method is likely to face difficulties defending that argument, for the Court already has decided that it will start with a provisional equidistance line and only adjust it if need be. It is not inclined to search for a different delimitation method. This was confirmed by the President of the Court when he addressed the International Law Commission recently. Judge Peter Tomka reiterated the three-stage delimitation methodology of the Court, which he referred to as the 'usual' method.⁷⁸ Nowhere in his expatiation can room be found for the application of a method other than the equidistance method. It is an equidistance line or an adjustment of it, as all the Court is required to ask itself is whether there are special circumstances requiring the line to be adjusted, not whether there is another method more suitable to the achievement of an equitable solution.⁷⁹

Before a State can argue for the application of another method, it would have to consider the following views: in the *Barbados v Trinidad and Tobago Arbitral Award*, the Tribunal, seeking to align itself with the case law of the ICJ stated that, although the equidistance method is not compulsory, any application of a 'different method would require a well-founded justification'.⁸⁰ Or, as the Court in the *Black Sea* case noted, unless there are 'compelling reasons' which make the equidistance method unfeasible in the particular case, it will apply the equidistance method.⁸¹ This clearly shows the presumption in favour of equidistance and places an onerous burden of proof on the State opposing the application of the equidistance method. The standard of proof described as 'compelling' must be met, or else the equidistance method would be applied. Thus

⁷⁵ *Libya v Malta* (n 23) 38.

⁷⁶ *North Sea Continental Shelf* cases (n 1) 23.

⁷⁷ *ibid* 23.

⁷⁸ Peter Tomka, 'Speech by HE Judge Peter Tomka, President of the International Court of Justice, at the Sixty-Sixth Session of the International Law Commission, 22 July 2014' <[http://legal.un.org/ilc/sessions/66/Statement\(Pres.Tomka\).pdf](http://legal.un.org/ilc/sessions/66/Statement(Pres.Tomka).pdf)> accessed 6 July 2014.

⁷⁹ Guillaume (n 67).

⁸⁰ *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them (Barbados v Trinidad and Tobago)* (2006) 27 RIAA 147, 230.

⁸¹ *Black Sea* case (n 6) 101.

from the beginning, this State is disadvantaged in spite of the Court's insistence that no presumption exists in favour of the equidistance method.

This point is clearly evident in the decision in the *Nicaragua v Colombia* case where, although Nicaragua presented geographical evidence to prove the inequitableness that would result from the application of the equidistance method, the Court insisted on applying it. Thus Judge Keith opined that the particular geographical circumstances of the case 'immediately demonstrate for me the difficulty, or really the impossibility, of beginning with a provisional median line even if it is adjusted or shifted by reference to relevant circumstances'.⁸² And Judge Xue expressed her reservation as to whether 'it is necessary for the Court to proceed with the three-stage method in the present case simply for the sake of standardisation of methodology'.⁸³ Judge Abraham also stated that the provisional equidistance line was not fit for purpose.⁸⁴ He further stated that the case was one in which compelling reasons made it unfeasible to construct the provisional median line. In his words, 'it is obvious that the construction of a provisional median line as a starting-point for the delimitation is not only highly inappropriate in this case, but that it is even virtually impossible'.⁸⁵ More pointedly, Judge Abraham noted that 'it would have been clearer and more honest of the Court to acknowledge that it could not follow the so-called "standard" method in this case because the geographical framework did not at all lend itself to the application of that method'.⁸⁶ He concluded by noting that cases exist in which it is 'preferable to acknowledge that the Court needs to depart from its usual technique, and to explain why, rather than to sacrifice clarity and intelligibility to the semblance of an illusory continuity'.⁸⁷

The next question becomes: what might adjusting the provisional equidistance line come to for a State that vehemently argues against the equidistance method? It means that the outcome of the adjudicatory process will produce an equidistance line or something quite similar to it, because adjustments or shifting of the line usually do not involve a substantial departure from the provisional equidistance line.⁸⁸ That is why Judge Gao warned in the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v Myanmar)* regarding the use of the equidistance method thus:

⁸² *Nicaragua v Columbia* (n 63) 743–44 (Declaration of Judge Keith).

⁸³ *ibid* 749–49 (Declaration of Judge Xue).

⁸⁴ *ibid* 739 (Separate Opinion of Judge Abraham).

⁸⁵ *ibid* 736 (Separate Opinion of Judge Abraham).

⁸⁶ *ibid* 739 (Separate Opinion of Judge Abraham).

⁸⁷ *ibid*.

⁸⁸ Although the Court stated in the *Nicaragua v Columbia* case (*ibid*) that it was not precluded from substantially adjusting the line, it came under criticism that what it did in the name of adjusting the provisional equidistance line could not be regarded at all as an adjustment: 738 (Separate Opinion of Judge Abraham); 744 (Declaration of Judge Keith); 748 (Declaration of Judge Xue). Furthermore, evidence from previous cases casts doubts on the Court's inclination to substantially adjust the provisional equidistance line; so it is safe to conclude that the provisional line is not usually subject to a substantial adjustment.

First, the selection of the type of provisional line, and the base points for it, is absolutely critical, given the tendency of the ICJ and arbitral tribunals to be cautious in recognizing the effect of relevant circumstances. The importance of the selection phase of the delimitation process is plain, in that, afterwards, no drastic change (which is to say nothing beyond limited adjustments) has ever been made to the provisional line in the case law or State practice.⁸⁹

What does this last sentence imply, if not that the provisional equidistance line actually governs the whole delimitation and is in essence, *the* (not one of the many possible) delimitation methods? Though the Tribunal ‘adjusted’ the provisional equidistance line substantially in favour of Bangladesh, which did not support the application of the equidistance method in the first place, one is compelled to question the basis upon which this ‘adjustment’ was made. The Tribunal stated that there was reason to support the adjustment of the provisional equidistance line by drawing a geodetic line starting at an azimuth of 215°. ⁹⁰ Notably, Bangladesh had, on the basis of the angle-bisector method it proposed, constructed a line from the azimuth of 215°—a method which the Tribunal rejected. Yet the Tribunal gave no reason at all to justify the adjustment of the provisional equidistance line starting at the azimuth of 215°. ⁹¹

Thus it might be argued that the Tribunal was aware that the equidistance method would not lead to an equitable delimitation but it was so intent on applying it that, what it claimed to be an adjustment of the equidistance line, was in essence the adoption of another method. This led Judge Lucky, dissenting, to state:

I cannot agree with the view that the decision to use the 215° azimuth line to determine the direction of the adjustment to the provisional equidistance line is not based on the angle-bisector methodology either in principle or in the adoption of the particular azimuth calculated by Bangladesh. ⁹²

Similarly, Judges Nelson, Chandrasekhara Rao and Cot in their Joint Declaration cautioned that ‘[o]ne should not try to reintroduce other methods of delimitation when implementing the equidistance/relevant circumstances rule.’ ⁹³ Although not specifically stated, this was in obvious reference to the fact that the 215° Azimuth line was in reality a super-imposition of the bisector method on the equidistance method. Judge Wolfrum also chided the Tribunal for the opaqueness of its conclusion on the adjustment of the line, noting the Tribunal’s unwillingness to consider other alternatives when there was actually merit in considering alternatives. ⁹⁴ And Judge Ndiaye noted that, since the

⁸⁹ *Bangladesh v Myanmar* (Judgment, 14 March 2012) ITLOS Reports 2012, 16 (*Bangladesh v Myanmar*) 23 (Separate Opinion of Judge Gao).

⁹⁰ *ibid* 100.

⁹¹ *ibid* 5 (Declaration of Judge Wolfrum). See also Robin Churchill ‘The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation’ (2012) 1 CJICL 137, 144.

⁹² *Bangladesh v Myanmar* (n 89) 54 (Dissenting Opinion of Judge Lucky).

⁹³ *ibid* (Joint Declaration of Judges Nelson, Chandrasekhara Rao and Cot) 2.

⁹⁴ *ibid* 5–6 (Declaration of Judge Wolfrum).

Tribunal had opted to apply the equidistance method, changing approach amounted to an ‘inherent contradiction, a logical paradox’.⁹⁵

Judge Gao was emphatic in asserting that the equidistance method ought not to have been used at all in that case, even as a provisional line. He said:

The final and overall conclusion on the delimitation method in the present case is that the decision by the Tribunal on the equidistance method and the results of its application in both the first and second stages cannot be right, because it has deliberately ignored the most important and unique features that define the geographical and geological context in which this delimitation case is taking place. What the adjustment did in the present case is to put feathers on a fish and call it a bird. If there is ever a case in the world in which the equidistance methodology should not be applied because of the special geography of a concave coastline, it must be this present case in the Bay of Bengal.⁹⁶

And Judge Lucky similarly stated:

I have found that the angle-bisector method of delimitation is the most suitable in this matter for the reasons set out above. Most importantly, the requirement in the law set out in Articles 74 and 83 of the Convention—‘to achieve an equitable solution’—is paramount in these circumstances. By using the angle-bisector method, I have been able to achieve a just and equitable solution.⁹⁷

In view of this, one is minded to ask that if the objective of the delimitation process is the achievement of an equitable solution, and the angle-bisector method could achieve that solution (as Judge Lucky and the Tribunal’s results proved), why did the Tribunal insist on the equidistance method even when it was aware that no reasonable adjustment of same could provide the equitable solution it sought? The Tribunal’s considerable display of subjectivity in its adjustment of the provisional equidistance line leads one to wonder where the much touted advantages of objectivity of the equidistance method on the maritime delimitation process can be located in the case.⁹⁸ Indeed, the Tribunal tried so hard to stay within the mainstream of the jurisprudence in previously decided cases⁹⁹ that it found that jurisprudence has developed in *favour* of the equidistance/relevant circumstances method.¹⁰⁰

A similar treatment of the equidistance method was carried out in *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* where, again, the Tribunal rejected the angle-bisector method proposed by Bangladesh, holding that the equidistance method was applicable.¹⁰¹ The Tribunal, in order to prevent a cut-off effect

⁹⁵ *ibid* 33 (Separate Opinion of Judge Ndiaye).

⁹⁶ *ibid* 21 (Separate Opinion of Judge Gao).

⁹⁷ *ibid* 54–55 (Dissenting Opinion of Judge Lucky).

⁹⁸ *ibid* 8 (Separate Opinion of Judge Cot).

⁹⁹ *ibid*.

¹⁰⁰ *ibid* 75 (emphasis added).

¹⁰¹ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v India)*, Award (7 July 2014) <http://www.pca-cpa.org/showpage.asp?pag_id=1376> accessed 12 March 2015.

on Bangladesh's access to the continental shelf beyond 200 nautical miles adjusted the provisional equidistance line by a line with an initial azimuth of 177° 30' 00".¹⁰² Here again, the Tribunal gave no concrete reasons for why the line was adjusted to reflect in essence, the angle-bisector proposal of Bangladesh, whilst claiming to reject that method in favour of the equidistance method.¹⁰³ Thus in highlighting the identicalness of the Tribunal's adjusted line approach with that constructed by Bangladesh, Judge Rao opined: 'This is, in my view, arbitrary and intrinsically runs counter to the majority's own reasoning which effectively rejected a bisector as a matter of law.'¹⁰⁴ In order words, the Tribunal applied the bisector method, not the equidistance method.

The foregoing analysis lends support to the position that the equidistance method is now the method of delimitation, and even where unsuitable, there is an unwillingness to depart from it, with the Court preferring only to adjust the equidistance line. In the most recent maritime delimitation judgement of the ICJ, the Court gave expression to the priority of the equidistance method when it held that '[t]he methodology which the Court *usually* employs in seeking an equitable solution involves' beginning with an equidistance line.¹⁰⁵ Although the Court added that beginning in this manner is subject to 'compelling reasons'¹⁰⁶ which may preclude the drawing of an equidistance line, it had already formed a general opinion that an equidistance line *prima facie* leads to an equitable result,¹⁰⁷ making it difficult to depart therefrom. Thus, in the words of the Vice President of the ICJ, '[t]oday, [the] adjusted equidistance line is (...) firmly established in the Court's jurisprudence as the *preferred* method for delimitation for the EEZ and continental shelf'.¹⁰⁸ Scholars and States may now discontinue any further rejection of the obligatory nature of the equidistance method expressed consistently in delimitation cases as amounting simply to lip service. They may further discontinue similar assertions expressed by leading scholars that the 'provisional equidistant line does not imply a legal presumption in its favour'.¹⁰⁹

As this is now the case, States that desire the delimitation of their maritime boundaries with neighbouring States on the basis of the equidistance method can expect a somewhat favourable outcome of the adjudicatory process.¹¹⁰ For States like China arguing fervently for why the equidistance method is inapplicable to its dispute with Japan in the East China Sea or Australia, in its dispute with Timor-Leste in the Timor Sea, the ICJ (and, it might be added, any other Tribunal with jurisdiction) is not an attractive

¹⁰² *ibid* 147.

¹⁰³ *ibid* 7, 12–13 (Concurring and Dissenting Opinion of Judge Rao).

¹⁰⁴ *ibid* 7 (Concurring and Dissenting Opinion of Judge Rao).

¹⁰⁵ *Maritime Dispute (Peru v Chile)* (Merits) [2014] ICJ Rep 137, 62 (emphasis added).

¹⁰⁶ *ibid*.

¹⁰⁷ *Jan Mayen* (n 36) 62.

¹⁰⁸ *Sepulveda-Amor* (n 64) 14.

¹⁰⁹ David Colson, 'The Delimitation of the Outer Continental Shelf between Neighbouring States' (2003) 97 AJIL 91, 101.

¹¹⁰ This will hold true where complications such as territorial disputes and disputes as to the precise location of baselines are absent.

medium through which the disputes might be resolved. This is because their contentions are weak in the light of the Court's jurisprudence set out in this article.¹¹¹ Nevertheless, the constant denial of the priority of the equidistance method might be a slight ray of hope for flexibility that indicates that States which argue against the equidistance method may succeed in persuading the Court to employ another delimitation method. This is a dangerous gamble though, as it is more probable that the Court will apply the equidistance method; more so, the standard of persuasion to be attained (styled as 'compelling') may be out of reach for such States. This means that these States may be more inclined to heed the warning by Burke that 'the devil you don't [know]' might be better than the devil you know.¹¹²

Another implication of the jurisprudence of the Court is that the equidistance method is unable to become a rule of customary international law. In spite of wide state practice favouring the method, the Court always denies its obligatory status, which in turn has a negative effect on its passage into customary international law.¹¹³ And as rightly noted by Judge Schwebel,

[t]he content of customary international law (...) may be influenced or even determined by a judgment of the Court. The Court's decisions thus enjoy, as Lauterpacht has put it, an 'intrinsic' authority within the international community. (...) The 'intrinsic' authority of the Court's decisions and the coherence of its case-law are fundamental factors which enable it to contribute to the development of international law.¹¹⁴

5 Conclusion

This article has examined the ICJ's decisions pertaining to the use of the equidistance method for the delimitation of international maritime boundaries. In the earliest cases, the Court was insistent on the non-compulsory nature of the equidistance method.

¹¹¹ Certainly, this calls into question the strength of the claims of China and Australia. Both States claim an entitlement to the continental shelf based on the natural prolongation principle, and accordingly, hold that the equidistance method will not lead to an equitable solution. On the other hand, Japan and Timor-Leste advocate for the application of the equidistance method. Although much has been written on the validity or otherwise of the natural prolongation principle within 200 nautical miles from the coasts in view of the decision in the *Libya v Malta* (n 23) case, the debate does not seem to be over. See Jianjun Gao, 'The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea' (2010) 9 (1) CJIL 143, 169–75.

¹¹² Naomi Burke, 'Nicaragua v Colombia at the ICJ: The Devil You Don't?' (2013) 2 CJICL 314.

¹¹³ Charney notes that negotiated boundaries which should act as evidence of state practice for the development of customary international law as one source of the law governing delimitation is less influential than adjudication. Consequently, the pronouncements of Courts take on salience as far as maritime boundary delimitation is concerned. Jonathan Charney, 'Progress in International Maritime Boundary Delimitation Law' (1994) 88 AJIL 227, 227–28.

¹¹⁴ S Schwebel, 'The Contribution of the International Court of Justice to the Development of International Law' in W Heere (ed) *International Law and The Hague's 750th Anniversary* (TMC Asser Press 1999) 405, 407.

Today, the Court insists on following its now established method of delimiting maritime boundaries, namely by drawing an equidistance line which it may adjust due to the presence of special circumstances. According to one author, '[t]he Court has thus, over the years, become less allergic to the use of equidistance—the “Cinderella” among delimitation methods’.¹¹⁵ Therefore, the equidistance method has gone through a life cycle rising from obscurity to a place of pre-eminence. Consequently, any State contending for the application of a delimitation method other than the equidistance method is in a hard place from which it is unlikely to emerge victorious. Even though the Court maintains that the equidistance method neither has priority over other methods, nor any presumption of use, this article has shown that that assertion amounts only to lip service as the equidistance method both has priority and a presumption in its favour. Accordingly, the equidistance method is now *the* method of international maritime boundary delimitation. Therefore, any maritime boundary is simply the outcome of checks or adjustments made to the equidistance line, and these checks and adjustments are not usually sufficiently significant to constitute any major change to the equidistance line.¹¹⁶

¹¹⁵ Politakis (n 40) 29. The term ‘Cinderella’ was used first by Judge ad hoc Valticos in his Separate Opinion in the *Libya v Malta* case to indicate a method that is undeservedly ignored and neglected: *Libya v Malta* (n 23) 106.

¹¹⁶ *Barbados v Trinidad and Tobago* (n 80) 233.

Case C-414/11 *Daiichi*: The Impact of the Lisbon Treaty on the Competence of the European Union over the TRIPS Agreement

Isabelle Van Damme*

Abstract

This article analyses the impact of the Lisbon Treaty on the competence of the European Union over the content of the TRIPS Agreement, based on a discussion of the judgment of the Court of Justice of the European Union in the *Daiichi* case, in which the Court decided in essence that exclusive external competence for the common commercial policy covers the whole of the TRIPS Agreement.

Keywords

Daiichi, Common Commercial Policy, European Union, TRIPS Agreement, Intellectual Property

1 Introduction

The competence of the European Union (EU) to act externally, in particular to conclude agreements with one or more third countries or international organisations, may be either shared with the Member States or exclusive. It must always be conferred on the EU but it may be explicit or implied. Other than in the circumstances whereby the Treaties expressly provide for it, external competence may result from other provisions of the Treaties, notably where this is necessary for the attainment of a specific objective with respect to which the Treaties have established internal competence—especially where that competence has already been used.¹

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¹ See especially the judgment in Case 22/70 *Commission v Council* [1971] ECR 263, para 16; Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977] ECR 741, paras 3–4, and case law cited therein; Opinion 1/03 Competence of the Community to conclude the

The common commercial policy is an exclusive competence of the EU. As a result, Member States no longer have competence over this area of their foreign policy.² But what does the common commercial policy entail? In its judgment of 18 July 2013 in Case C-414/11 *Daiichi*,³ the Grand Chamber of the Court of Justice of the European Union (Court or CJEU) decided, in essence, that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),⁴ which is one of the World Trade Organization (WTO) agreements, falls fully within the scope of the common commercial policy, and, therefore, within the EU's exclusive competence. The content, background, and consequences of the judgment are the subject of this article.

2 Before entry into force of the Lisbon Treaty: mixed competence

Article 113 of the Treaty establishing the European Economic Community (Treaty of Rome) and, after amendments brought about by the Treaty of Nice, article 133 of the Treaty establishing the European Community provided that the common commercial policy was to be based on uniform principles particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

According to case law prior to the entry into force of the Lisbon Treaty, the competence of the EU over the common commercial policy was exclusive⁵ and included (what were at the time) Community measures specifically focusing on international trade. This was because they primarily had the goal of promoting, facilitating or regulating trade, and had a direct and immediate effect on trade in the goods concerned.⁶

The TRIPS Agreement was concluded by both the (then) European Community and the Member States as a mixed agreement,⁷ the Court having held in Opinion 1/94 that apart from the provisions prohibiting the release into free circulation of counterfeit

new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] ECR I-1145, para 114, and case law cited therein.

² See Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), arts 2(1) and 3(1)(e).

³ Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* [2013] ECLI:EU:C:2013:520.

⁴ The TRIPS Agreement is attached as Annex 1C to the Agreement establishing the World Trade Organisation (WTO Agreement). The European Community approved of the WTO Agreement by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994) [1994] OJ L 336/1. The EU and all of its Member States are WTO Members.

⁵ Opinion 1/75 Opinion of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty [1975] ECR 1355.

⁶ Case C-411/06 *Commission v Parliament and Council* [2009] ECR I-7585, para 71, and case law cited therein.

⁷ See also, inter alia, the judgment in Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-1344, para 33, and the judgment in Case C-431/05 *Merck Genéricos-Produtos Farmacêuticos Merck & Co* [2007] ECR I-7001, para 33. The TRIPS Agreement, however, was signed on 15 April 1994, and thus prior

goods,⁸ the TRIPS Agreement did not fall within the field of the common commercial policy.⁹ Likewise, the remaining provisions of that agreement did not fall within the (implied) external competence of the European Community. As a result, the Community and the Member States shared competence.¹⁰ The principle, therefore, as was apparent also from the later judgment in the *Merck Genéricos* case, was that the Member States enjoyed competence with regard to the protection of intellectual property rights as long as the Community had not already passed legislation.¹¹

The Court's position in Opinion 1/94 was based on an analysis of the content of the TRIPS Agreement. The Court found that the Community had exclusive competence to conclude international agreements concerning the means of enforcement of intellectual property rights and, thus, measures which prohibit the release into free circulation of counterfeit goods.¹² As regards other provisions of the TRIPS Agreement, the Court accepted that 'there is a connection between intellectual property and trade in goods.'¹³ However, that was an insufficient basis for concluding that those other provisions fell within the scope of article 113 EC because intellectual property rights do not relate specifically to international trade, and they affect internal trade just as much as international trade.¹⁴ The Court did accept that the holders of intellectual property rights could prevent third parties from carrying out certain acts and that measures, such as the prohibition of the use of a trade mark, the manufacturing of a product, the copying of a design or the reproduction of a book, disc or videocassette inevitably have effects on trade. Those effects, however, were insufficient. The Court proceeded on the basis that the common commercial policy could cover intellectual property rights only where those rights have a specific link with international trade, that is to say, trade with non-Member States or third countries. An important factor in this respect was, also, the fact that a decision which confirmed the exclusive competence of the Community over agreements

to Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property—Article 228 (6) of the EC Treaty [1994] ECR I-5267.

⁸ Special requirements related to border measures in Section 4 of Part III of the TRIPS Agreement correspond to EC law prohibiting the release into free circulation of counterfeit goods. The latter was based on art 113 EC, and the Community therefore was competent for concluding international agreements concerning provisions which corresponded to measures falling within the internal exclusive competence over trade policy. See Opinion 1/94 (n 7), paras 55, 71. Originally, the negotiating mandate as regards 'trade-related aspects of intellectual property rights, including, trade in counterfeit goods' was rather limited and focused on the need for principles, rules and disciplines dealing with international trade in counterfeit goods: see Ministerial Declaration of the Uruguay Round of 20 September 1986. The negotiations were significantly widened in part as a result of the European Communities (see, for example, European Communities, 'Draft Agreement on Trade-Related Aspects of Intellectual Property Rights' MTN.GNG/NG11/W/68, 29 March 1990). For a detailed history, see Daniel Gervais, *The TRIPS Agreement—Drafting History and Analysis* (4th edn, Sweet & Maxwell 2012) 11–31.

⁹ Opinion 1/94 (n 7) para 71.

¹⁰ *ibid* para 105.

¹¹ Case C-431/05 (n 7) para 34.

¹² Opinion 1/94 (n 7) para 55.

¹³ *ibid* para 57.

¹⁴ *ibid* para 57.

with third countries for the purpose of harmonising protection of intellectual property could have resulted in the Community institutions being able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting.¹⁵ Furthermore, the Court's position was that the measures that could be taken in response to a lack of protection of Community undertakings' intellectual property rights in third countries concerned the field of the common commercial policy, and were unrelated to the harmonisation of intellectual property protection, which is the primary objective of the TRIPS Agreement.¹⁶

That case law of the Court relates to Treaty provisions which, in setting out the common commercial policy in a non-exhaustive manner, did not refer to intellectual property.¹⁷ Neither article 113(1) EC (applicable at the time of the TRIPS Agreement's conclusion) nor article 133 EC (after amendment) referred to the commercial aspects of intellectual property in setting out the uniform principles of the common commercial policy.¹⁸ Despite developments in General Agreement on Tariffs and Trade (GATT)/WTO law, the Court was cautious in expanding the scope of the common commercial policy without any treaty basis.

3 After entry into force of the Lisbon Treaty: exclusive competence

3.1 Background

Since the entry into force of the Lisbon Treaty on 1 December 2009, article 207(1) of the Treaty on the Functioning of the European Union (TFEU) now provides that the common commercial policy is to be based on uniform principles including those relating to 'the commercial aspects of intellectual property'. Under article 3(1)(e) TFEU, the EU has exclusive competence over the common commercial policy. As a result, the issue of competence depends on the scope of the concept of 'commercial aspects of international property' rather than on the exercise of internal competences.

Following the broadening of the definition in the Treaty of the concept of 'common commercial policy' (and thus of the EU's explicit competence), the Court has now decided that the competence over the content of the TRIPS Agreement has changed.

¹⁵ *ibid* para 60.

¹⁶ *ibid* para 63.

¹⁷ Opinion 1/78 Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty—International Agreement on Natural Rubber [1979] ECR 2871, para 45.

¹⁸ Specific provisions of art 133 EC did refer to international agreements concerning commercial aspects of intellectual property. Art 133(5) EC provided, *inter alia*, for a procedure for negotiating and concluding international agreements relating to commercial aspects of intellectual property in so far as these agreements did not fall within the scope of arts 133(1) to (4) EC and without art 133(1) describing this subject matter as one of the subjects of the common commercial policy.

That decision was taken despite the fact that, with the exception of article 31(f) TFEU,¹⁹ the content of the TRIPS Agreement remains unchanged.

The *Daiichi* case came before the Court following a request for a preliminary ruling, pursuant to article 267 TFEU, from a Greek court before which a dispute was pending concerning the placing onto the market of a generic medicinal product whose active ingredient was protected by patent rights.²⁰ That court requested a preliminary ruling primarily on questions involving article 27 of the TRIPS Agreement. That provision defines patentable subject matter as ‘inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application’. Article 27(1) further provides that, in principle, patents are available and patent rights are to be enjoyed ‘without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced’. Article 27(2) and (3) determines the conditions under which WTO Members are entitled to exclude inventions from patentability. The referring court essentially asked whether the Member States are still competent for that which is covered by article 27, and if so, whether they can decide to accord direct effect to that provision. The remaining two questions concerned the substantive meaning of article 27 and the temporal scope of the TRIPS Agreement. The Court’s answer to the first question is the concern of this article.

The argument of the parties to the main proceedings and of the Member States that submitted observations was based both on the fact that the TRIPS Agreement is a mixed agreement and on the case law of the Court involving such agreements according to which, where the EU has exercised powers and adopted legislation to implement obligations deriving from the agreement, the EU is competent.²¹ According to the Commission, that argument was no longer relevant since the whole of the TRIPS Agreement now fell within the concept of ‘commercial aspects of intellectual property’, and therefore was subject to the EU’s exclusive competence.²² The Member States disagreed with the Commission in that respect, arguing that the majority of the provisions of the TRIPS Agreement concern international trade only indirectly.²³

3.2 Exclusive competence of the EU with regard to the content of the TRIPS Agreement

The Court’s conclusion that the common commercial policy includes the content of article 27, as well as all other provisions of the TRIPS Agreement, is based on reasoning made up of four elements.

¹⁹ *Amendment of the TRIPS Agreement*, WTO Doc WT/L/641 (8 December 2005) (Decision of 6 December 2005).

²⁰ *Daiichi* (n 3). The underlying facts of the dispute are set out in paras 23–31 of the judgment.

²¹ See *Daiichi* (n 3) paras 41–42, and case law cited therein.

²² *ibid* para 43.

²³ *ibid* para 44.

First, the Court distinguished between this case, which concerns article 207 TFEU and the case law concerning the earlier article 113 EC (ie, Opinion 1/94) and the later article 133 EC (ie, the judgment in *Merck Genéricos*). Taking into account the new article 207 TFEU, the Court found the case law on the latter two articles to be no longer relevant.²⁴

Second, the Court stressed that article 207 TFEU deals with trade between the EU and third countries, and not trade within the internal market.²⁵

Third, the Court repeated that on the basis of earlier case law, an EU act falls within the common commercial policy, if it is intended in essence to promote, facilitate or govern such trade, or has direct and immediate effects on international trade. Thus, a specific link to international trade is needed.²⁶

Fourth, the Court found that, without distinguishing between provisions, the provisions of the TRIPS Agreement exhibit a specific link with international trade because: (i) the TRIPS Agreement forms an integral part of the WTO system, and is one of the key multilateral agreements on which that system is built—this is apparent from the fact that Annex 2 of the WTO Agreement entitled ‘Understanding on rules and procedures governing the settlement of disputes’ (DSU) permits the suspension of concessions between the TRIPS Agreement and the other main agreements comprising the WTO Agreement, the right of so-called ‘cross-retaliation’; and (ii) the drafters of the TFEU could not have ignored the almost identical wording used in article 207(1) TFEU and in the title of the TRIPS Agreement.²⁷

The Court subsequently rejected the position that at least the provisions of Part II of the TRIPS Agreement regarding ‘Standards concerning the availability, scope and use of intellectual property rights’ concern subject matter, such as that set out in article 27, which falls within the field of the internal market. In the Court’s view, this position was incompatible with the objective of the TRIPS Agreement in general and of Part II thereof in particular. That general objective, according to the Court, is ‘to strengthen and harmonise the protection of intellectual property on a worldwide scale.’²⁸ The Court referred to the preamble of the TRIPS Agreement which states that that agreement aims to ‘reduc[e] distortions of international trade by ensuring, in the territory of each member of the WTO, the effective and adequate protection of intellectual property rights.’ Part II sets out the rules for each of the principal categories of intellectual property rights. The context of those rules is the liberalisation of international trade, not the harmonisation of the laws of the Member States—the EU remains free to adopt rules concerning intellectual property rights on the basis of competences in the field of

²⁴ *ibid* para 48.

²⁵ *ibid* para 50. See also the judgment in Case C-137/12 *Commission v Council* [2013] EU:C:2013:675, para 56.

²⁶ *Daiichi* (n 3) paras 51–52. See also Case C-137/12 *Commission v Council* (n 25) paras 57–58.

²⁷ *Daiichi* (n 3) paras 53–55.

²⁸ *ibid* para 58 referring to the judgment in Case C-89/99 *Schieving-Nijstad and Others* [2001] ECR I-5851, para 36.

the internal market. In exercising such competences, the EU must 'comply with the rules concerning the availability, scope and use of intellectual property rights in the TRIPS Agreement'.²⁹

In the Court's view, the EU therefore has exclusive competence, because article 27 of the TRIPS Agreement is a part of the common commercial policy.³⁰ In view of the wording of the preliminary question, the Court's answer refers only to article 27 of the TRIPS Agreement, even though the Court's reasoning shows in essence that it considered the TRIPS Agreement as a whole to fall within the EU's exclusive competence. Based on that answer, the Court found it unnecessary to answer the question on direct effect.³¹ The implication here is that the EU has competence to determine the direct effect of the TRIPS Agreement; it is no longer a competence of the Member States. As a result, national courts might need to revise their case law in this respect. However, the Court did not go any further into this in its judgment.

3.3 Confusion over the definition of 'commercial aspects of international property'

The starting point of the Court's reasoning was that the case law in the area of the relevant Treaty provisions before the Lisbon Treaty was no longer relevant. This position is not problematic in itself. The amendments of the Treaties support the conclusion that the exclusive competence over the common commercial policy has been widened. The wording of article 207(1) TFEU shows that the negotiators of the Lisbon Treaty chose to add commercial aspects of intellectual property as a subject matter falling within the common commercial policy. Presumably, the Member States made a choice in this respect to transfer at least the competence over the TRIPS Agreement, or a part thereof, to the EU. After all, the TRIPS Agreement is the principal multilateral agreement on intellectual property protection and, as a matter of WTO law, its content is described as concerning trade-related aspects of intellectual property. This is also apparent, as the Court observed, from the analogy between 'commercial aspects of intellectual property' in article 207(1) TFEU and 'trade-related aspects of intellectual property rights' in the full title of the TRIPS Agreement.³² Several language versions use similar, although not identical, wording; others use identical wording. The choice of such broad formulation, however, suggests that the intention was not merely to confirm the Court's case law, in particular Opinion 1/94. Rather, the use of a term that closely resembles that used to characterise all of the content of the WTO Agreement concerning intellectual property rights shows the intention to recognise an exclusive competence broader than

²⁹ *ibid* paras 56–60.

³⁰ *ibid* para 61.

³¹ *ibid* para 62.

³² So far, no WTO panel or Appellate Body report has interpreted the meaning of 'trade-related aspects of intellectual property rights'. This is perhaps not surprising, taking into account that similar issues of competence and scope do not arise between WTO Members with regard to the TRIPS Agreement.

that established in the case law. The Court, however, did not make reference to the negotiations on article 207 TFEU and the gradual and progressive broadening of the common commercial policy, which was a result both of the Court's case law and further developments in the international legal framework on international trade,³³ in order to determine whether the changes made to the scope of the exclusive competence over the common commercial policy had the aim of, *inter alia*, bringing all WTO agreements—or specifically the TRIPS Agreement or a part thereof—within that competence.

Although this reasoning could have been sufficient to justify the Court's answer to the first preliminary question, the Court nevertheless examined the content of the TRIPS Agreement to establish that the whole agreement concerns the common commercial policy. Even if the outcome of Opinion 1/94 was no longer valid, a specific link with international trade was still required. However, in contrast to earlier case law the Court did not examine the substantive character and content of the TRIPS Agreement's provisions. Its analysis was limited to the TRIPS Agreement's more general and formal characteristics, and in particular, to the general objectives and the structural relationship between the TRIPS Agreement and the other agreements forming part of the WTO Agreement. These characteristics were already known when Opinion 1/94 was delivered. At that time, it would appear that the Court considered them to be neither relevant nor sufficient in order to conclude that there was exclusive competence.

The Court attached importance to the fact that the TRIPS Agreement is an integral part of the WTO system. It is doubtful as to whether this fact shows that the substantive content of the TRIPS Agreement necessarily exhibits a specific link with international trade. It is regrettable that the Court did not provide any explanation in this regard. This element of the Court's reasoning seems to suggest that every agreement which, as a matter of WTO law, forms part of the WTO Agreement necessarily corresponds to what constitutes the common commercial policy under EU law. If this is the case, the content of a concept under EU law is determined by the political choices of the WTO Members (including the EU and its Member States). This would be a very strong form of co-adaptation between the EU and the WTO.³⁴

In this context, the Court did not take into consideration that the inclusion of the TRIPS Agreement to the WTO Agreement was the outcome of a compromise between developing and developed countries during the Uruguay Round, and that uncertainty remains regarding the legal and policy considerations for this decision.³⁵ It is similarly unclear to what degree the Court accepted that the content of the TRIPS Agreement or parts thereof is solely trade-related, or also exhibits a specific link with for example, the protection of public health.

³³ See also Geert De Baere and Isabelle Van Damme, 'Co-adaptation in the International Legal Order: The EU and the WTO' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (vol 111, Hart Publishing 2012) 320–24.

³⁴ Regarding the 'co-adaptation' hypothesis, see *ibid* 311–25.

³⁵ See, for example, Antony Taubman, *A Practical Guide to Working with TRIPS* (OUP 2011) 2, 11, 35.

According to the Court, the specific character of the link between the TRIPS Agreement and international trade was apparent, *inter alia*, from the fact that article 22 DSU provides for the possibility that in the event of a multilateral determination that a WTO Member has not implemented recommendations or rulings of the WTO dispute settlement bodies within a reasonable period of time, another WTO Member authorised by the Dispute Settlement Body (DSB) can take measures to induce compliance. One type of measure that can be applied is the suspension of concessions or other obligations under the WTO covered agreements.³⁶ In identifying a specific link between the TRIPS Agreement and international trade, the Court found it relevant that the suspension of obligations under the TRIPS Agreement was possible in the event of a breach of obligations under the other agreements, which form part of the WTO Agreement. Such cross-retaliation is indeed available under article 22(3)(c) DSU if '[the] party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough'. However, it is unconvincing to determine the existence of the specific connection between intellectual property and international trade on the basis of the relationship between the measure authorised with the aim of inducing a WTO Member to end the breach of an obligation and the obligation under another agreement which is the reason for that measure to be applied. Although the DSU lays down specific principles, measures such as the suspension of obligations are permitted under international law. Their objective is to end the breach by the responsible State of obligations under international law, which includes WTO law. This is also the objective of the measures permitted under the DSU under specific conditions.³⁷ Just like under general international law, the relationship between such a measure and the original breach of an obligation under WTO law is independent of the fact that the obligation that is the subject of the measure relates substantively to the obligation which has been breached and has given rise to responsibility.³⁸ Moreover, the Court has accepted in earlier case law that the grant of tariff preferences is a commercial policy measure, as is their suspension.³⁹ The content of the obligation breached by a particular measure thus determines the content of the measure taken in retaliation. This parallelism is perfectly acceptable, where the retaliation measures are taken in the same sector and are covered by the same agreement (and possibly regarding similar obligations) as those which are

³⁶ See in particular arts 22(2) and (6) DSU. Compensation is the other type of measure.

³⁷ See for example, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, WTO Doc WT/DS320/AB/R (16 October 2008); *Canada—Continued Suspension of Obligations in the ECHormones Dispute*, WTO Doc WT/DS321/AB/R (16 October 2008) paras 382–84.

³⁸ See, *inter alia*, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 282; International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UNGA res 56/83, Annex, 12 December 2001, arts 49–54.

³⁹ Case C-45/86 *Commission v Council* [1987] ECR I-1493, para 21; Opinion 1/94 (n 7), para 65.

the cause of those measures being taken. But its logic is perhaps more difficult to defend in the event of cross-retaliation.

The Court thus applied primarily formal criteria in characterising the substantive relationship between the TRIPS Agreement as a whole and international trade. In this way, the Court avoided giving effect to the text of article 207(1) TFEU which suggests that a distinction can be drawn between the commercial and non-commercial aspects of intellectual property—a distinction that was the basis of the Advocate General's analysis.⁴⁰ The same limitation can be found in the title of the TRIPS Agreement despite the fact that the content of this agreement contains few limitations regarding scope.⁴¹

The Advocate General's analysis illustrates the difficulty in distinguishing between the provisions of the TRIPS Agreement that relate to commercial aspects of intellectual property and those that do not. Without defining the autonomous concept of 'commercial aspects of intellectual property', the Advocate General appears to have distinguished between provisions that specifically relate to trade in goods and provisions whose content relates to the establishment of intellectual property rights which may then be commercially exploited and produce commercial effects.⁴² Article 27 falls within the second category. For this category, it is less obvious whether the provisions relate to commercial aspects of intellectual property. Based on this distinction, the Advocate General agreed with the Member States that not all of the provisions of the TRIPS Agreement fall within the EU's exclusive competence and that, accordingly, the rule developed in *Merck Genéricos* was still valid.⁴³ The Advocate General also appeared reluctant to take a position on the exclusive competence over the entire TRIPS Agreement because of the risk of indirect harmonisation.⁴⁴ His position was limited to the EU's exclusive competence in relation to article 27.⁴⁵ In order to determine which substantive provisions (the second category) fall within the EU's exclusive competence, the Advocate General proposed exploring whether such provisions 'may (...) occasionally assume a "strategic" position, on account of their impact on trade'.⁴⁶

Even if the terminology in article 207(1) TFEU is derived from the terminology used in WTO law for setting out the content of the TRIPS Agreement, the fact remains that, as has already been mentioned in this article, the use of the concept 'trade-related' in the

⁴⁰ As regards WTO law, this link was already recognised in the provisions of the General Agreement on Tariffs and Trade 1947 55 UNTS 194 (entered into force 1 January 1948) (GATT 1947) and after the entry into force of the WTO Agreement, the General Agreement on Tariffs and Trade 1994, 1867 UNTS 187 (entered into force 1 January 1995) (GATT 1994) (see for example, arts XII:3(c)(iii), XVIII:10, IX and XX(d) of GATT 1994).

⁴¹ See also Holger P Hestermeyer, 'The Notion of "Trade-related" Aspects of Intellectual Property Rights: From World Trade to EU Law—and Back Again' (2013) 44(8) ICC—International Review of Intellectual Property and Competition Law 925.

⁴² See Opinion of AG Cruz Villalón in *Daiichi* (n 3) paras 52, 61, and fn 15.

⁴³ *ibid* para 62.

⁴⁴ *ibid* para 60.

⁴⁵ *ibid* para 73.

⁴⁶ *ibid* para 66.

WTO is based on a political compromise between developing and developed countries during the Uruguay Round. With regard to the TRIPS Agreement itself, this choice was initially made in the so-called *Punta del Este* Declaration by which the Uruguay Round of negotiations was launched and which, ultimately, resulted in the establishment of the WTO.⁴⁷ The content of that declaration largely corresponds to the first recital in the preamble to the TRIPS Agreement.

The requirements under the TRIPS Agreement go further than those in existing multilateral agreements on intellectual property rights at the time of the WTO's establishment and to which the TRIPS Agreement itself makes reference. The TRIPS Agreement is also an agreement of which the content is partially determined by treaties that have been negotiated and signed outside the context of trade liberalisation and the GATT 1947 or the WTO, such as provisions of the Paris Convention for the Protection of Industrial Property of 20 March 1883 or the Berne Convention for the Protection of Literary and Artistic Works.⁴⁸ Through cross-referencing, provisions of such treaties constitute an integral part of the TRIPS Agreement, and therefore of WTO law.⁴⁹ In the TRIPS Agreement, those provisions are trade-related, but what is the position of the identical or similar provisions in a different multilateral or regional intellectual property agreement or in a trade agreement that is not part of the WTO system?⁵⁰ The Court's reasoning suggests that the type of agreement is relevant. As regards the TRIPS Agreement, the Court appears, for understandable reasons, not to have questioned whether that agreement is part of a trade agreement. It was therefore unnecessary to clarify whether it suffices that provisions on intellectual property rights be part of a trade agreement and what the essential characteristics of that type of agreement are.⁵¹

In WTO law, however, no substantive distinction is made according to whether a provision of the TRIPS Agreement is trade-related or not. The outcome of the Uruguay Round was an agreement that protects two kinds of interest: the potential trade barriers resulting from the application of the measures to protect and enforce intellectual property rights and trade barriers resulting from the lack of or inadequate protection

⁴⁷ General Agreement on Tariffs and Trade (GATT) Punta del Este Declaration, MIN(86)/W/19, 25 ILM 1623 (1986) (20 September 1986).

⁴⁸ Paris Convention for the Protection of Industrial Property, signed 20 March 1883, as revised 14 July 1967, 828 UNTS 305 (entered into force 19 May 1970); Berne Convention for the Protection of Literary and Artistic Works, signed 9 September 1886, as revised 24 July 1971, 1161 UNTS 3 (entered into force 15 December 1972).

⁴⁹ For example, art 2(1) of the TRIPS Agreement provides: '[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)'.

⁵⁰ Hestermeyer (n 41) 930. For a discussion of the protection of intellectual property rights in more recent trade agreements between the EU and third countries, see, inter alia, Josef Drexler, 'Intellectual Property and Implementation of Recent Bilateral Trade Agreements in the EU' (2014) Max Planck Institute for Intellectual Property and Competition Law Research Paper No 12/09 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102530> accessed 1 June 2015.

⁵¹ See also, for example, Pierre Pescatore, 'Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?' (1999) 36 CML Rev 387, 389.

of intellectual property rights.⁵² The fact that the TRIPS Agreement does not relate to all aspects of intellectual property that may have trade implications does not affect this description. From the WTO's perspective, the whole of the TRIPS Agreement is trade-related despite the fact that the content of provisions in that agreement may correspond to that of identical or similar provisions in an agreement not part of the WTO system. The distinction between trade-related and other aspects of intellectual property under EU law does not appear to play any role in WTO law. It would appear that it was the political decision to add such provisions to the WTO treaties that gave rise to the characteristic of trade-relatedness. From this perspective, the Court's reasoning in *Daiichi* is, thus, consistent with the reality in the WTO. Its result equally ensures consistency between the different fields of the EU's external action in the WTO and exclusive representation by the Commission.⁵³

The rather formal test applied to the TRIPS Agreement differs from the more substantive test applied in Case C-137/12. In that case, the Court decided that the contested decision, which had the aim of authorising the signing on behalf of the EU of a convention between the Member States of the Council of Europe concerning the legal protection of services based on or consisting of conditional access, has a specific connection with international trade in services.⁵⁴ The Court held that that Convention is intended to introduce similar protection to Directive 98/84, which is aimed at ensuring an adequate legal protection for the services concerned in order to promote trade in those services within the internal market.⁵⁵ The Court referred in this context to paragraphs 58 and 60 of the judgment in *Daiichi*. It examined the preamble and the explanatory report on the Convention in order to determine its objectives. These showed that the Convention establishes a regulatory framework, almost identical to that of a European directive, which ensures the minimum level of protection of the services concerned across Europe and, therefore, beyond the borders of the EU. This objective was sufficient to hold that the primary aim of the contested decision shows a specific link with international trade in the services concerned, and thus justified bringing that decision under the common commercial policy.⁵⁶

It follows that the substantive definition of the common commercial policy and the criterion of a specific link with international trade are still valid. In *Daiichi*, however, the Court opted for a solution, which does not call into question the characterisation of the TRIPS Agreement in WTO law, and that recognises the gradual expansion of the common commercial policy under the Treaties. There are undoubtedly contradictions

⁵² See, for example, the first recital in the preamble to the TRIPS Agreement.

⁵³ See also, for example, Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon: The *Daiichi Sankyo* and *Conditional Access Services* Grand Chamber Judgments' (2014) 41(2) *Legal Issues of Economic Integration* 193, 200; Mirjam Abner, 'Les compétences exclusives en matière de politique commerciale commune' (2013) 3 *RAE—LEA* 589, 594.

⁵⁴ Case C-137/12 *Commission v Council* (n 25) para 65.

⁵⁵ *ibid* para 64.

⁵⁶ *ibid* paras 59–65.

between this judgment and the Court's earlier case law on the TRIPS Agreement. The Court in *Daiichi* could have used a large number of the considerations in the analysis of the competence issue in Opinion 1/94. The decision of the Court to put earlier case law aside for the sake of the new definition of the common commercial policy in article 207(1) TFEU, therefore, lacks persuasiveness. A full analysis on the basis of the meaning of the new definition and the historical background of the development of the scope of the common commercial policy, as opposed to the content of the TRIPS Agreement, and the relationship between this agreement and WTO law in general, was perhaps a more suitable choice for justifying the outcome of *Daiichi*.

3.4 The use of *Daiichi* for resolving the issue of competence as regards other intellectual property agreements

It is unclear whether *Daiichi* has consequences for the competence issue regarding the EU's external action concerning other non-WTO intellectual property agreements, possible new (plurilateral) WTO agreements or provisions on intellectual property in other trade agreements (and potentially in investment agreements).

The Court's reasoning in *Daiichi* suggests both a preference for pragmatism and an intention to offer legal certainty on the competence over the TRIPS Agreement. It provides no decisive answer on whether the common commercial policy can cover provisions on intellectual property rights that do not form part of the TRIPS Agreement. The Court does not rule out this possibility, but it seems probable that other considerations will factor in the analysis on a similar question of competence over another agreement. The formal criteria applied in *Daiichi* are perhaps difficult to apply in other, possibly regional or bilateral, agreements. A more substantive analysis of the specific link of a different agreement or an individual provision of a non-trade agreement with international trade may be needed. It is, therefore, doubtful whether the reasoning in *Daiichi* may be applied to other (trade) agreements and in the context of current or future negotiations of such agreements containing provisions on intellectual property. The same observation is applicable to potential new plurilateral WTO agreements because these do not necessarily correspond to the Court's definition of what forms an integral part of the WTO Agreement.

So it is now a matter of waiting for a case before the Court in which the competence question regarding especially a non-WTO agreement in relation to the concept of 'commercial aspects of intellectual property' in article 207(1) TFEU is raised. In such a context, the clarification on where the dividing line in the EU's external action regarding commercial and other aspects of intellectual property lies is perhaps inevitable.

3.5 Commercial aspects of intellectual property and internal competences

Implied exclusive competence for external action is the consequence of the existence and the exercise of internal competence. By contrast, explicit exclusive competence for

external action can have consequences for the internal distribution of competences between the EU and the Member States. These consequences of determining an exclusive competence of the EU are set out in article 2(1) TFEU: ‘only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts’. However, that article must be read in conjunction with article 207(6) TFEU, which states that the exercise of the competences conferred by article 207:

shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

It follows that the distribution of external competences for the TRIPS Agreement does not, in principle, alter the distribution of internal competences for the same subject matter.⁵⁷ Despite the exclusive competence regarding the TRIPS Agreement, the Member States may retain internal competence in respect of the internal market as long as the EU has not exercised its internal competences. However, Member States’ competences are limited indirectly because the Member States, in exercising their competences, must comply with an international agreement whose content or validity they can no longer influence.⁵⁸

The Court has not looked further into the specific relationship between the exercise of external and internal competences as regards the subject matter of the TRIPS Agreement. If the exercise of the EU’s exclusive competence over the common commercial policy can have an indirect impact on the exercise of internal competences that still belong to the Member States, it nevertheless seems that it may be assumed that, by virtue of the principle of sincere cooperation in article 4(3) of the Treaty on European Union (TEU), a mild degree of cooperation between the EU and the Member States is appropriate. According to this principle, the EU and the Member States are to respect and support each other in carrying out the duties arising from the Treaties.⁵⁹ Because of the potential consequences of EU external action in the WTO for the exercise of Member State competences, the principle can mean that the EU must engage in dialogue with the Member States without presupposing of course that the Member States have

⁵⁷ Art 207(6) TFEU thus prevents a so-called reverse ERTA effect. See, inter alia, Markus Krajewski, ‘The Reform of the Common Commercial Policy’ in Andrea Biondi, Piet Eeckhout (eds), *EU Law After Lisbon* (OUP 2012) 305; Jan Wouters, Dominic Coppens and Bart De Meester, ‘External Relations after the Lisbon Treaty’ in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty—EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 174; Marise Cremona, ‘A Constitutional Basis for Effective External Action? An Assessment of the Provisions of EU External Action in the Constitutional Treaty’, (2006) EUI Working Papers LAW No 2006/30, 32 <<http://cadmus.eui.eu/handle/1814/6293>> accessed 1 June 2015.

⁵⁸ In this context, it must be noted that decisions of the various committees or other bodies of the WTO (of which all WTO members are also part) are increasingly used in dispute settlement as a relevant factor in treaty interpretation. See, for example, *US—Tuna and Tuna Products (Mexico)*, WTO Doc WT/DS381/AB/R (16 May 2012), paras 370–78.

⁵⁹ See, inter alia, Markus Krajewski (n 57) 305–06.

a decision-making right or that the principle of sincere cooperation requires the same degree of cooperation in this context as in the case of a mixed agreement.

4 Conclusion

The EU's external competence is dynamic and evolves as a result of developments both in EU law and international law. With regard to EU law, this competence changes according to revisions of primary law concerning the definition of internal and external competences, and the exercise of internal competences. With regard to international law, the external competence of the EU grows according to the expansion of primarily treaty law in new substantive fields of which some fall within the shared or exclusive competence of the EU. In that sense, treaty amendments concerning the external action of the EU are, often, rather reactive. The amended definition of the common commercial policy seems to illustrate this. In the Court's view, this amendment justifies the description of the TRIPS Agreement as falling within the EU's exclusive competence. The Court's reasoning, however, was primarily based on considerations concerning the content of the TRIPS Agreement and other WTO treaties. In so doing, the Court applied article 207(1) TFEU in a manner which allows only the competence question concerning the TRIPS Agreement to be resolved. Nevertheless, it remains unclear whether and, if so, how article 207(1) TFEU must be applied to other agreements or individual provisions concerning intellectual property rights.

The Specific Direction Requirement for Aiding and Abetting: A Call for Revisiting Comparative Criminal Law

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Abstract

The 'specific direction' saga has been dominating the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia for nearly two years, and the end is yet to be seen. The story centres on the correct interpretation of liability for aiding and abetting, while, at the same time, exposing broader concerns of international criminal law. The saga started with unexpected acquittals of defendants in the *Perišić*, *Stanišić*, and *Simatović* cases due to a lack of specific direction in their aid and assistance towards specific offences. More specifically, the Tribunal found that the traditional test—the provision of aid with the awareness that it would have a substantial effect on the crimes committed in the context of war—was insufficient to create individual criminal responsibility in these cases. The response to this new and heightened interpretation of aiding and abetting followed quickly, as the *Šainović et al* appeal judgment rejected the novel requirement. After this judgment, the prosecution filed a motion to reconsider the acquittal in *Perišić*, which the Appeals Chamber denied. In sum, these developments diluted and mischaracterised the standard of aiding and abetting. Accordingly, this article has two purposes. First, it demonstrates that the innovative element of the specific direction lacks a proper foundation in international law. Second, the article discusses several conceptual difficulties with the specific direction requirement, some of which go beyond the issues of accomplice liability. This article concludes by finding that comparative criminal law is essential to resolving the legal conundrum that this standard causes.

Keywords

Aiding and Abetting, Specific Direction, Comparative Criminal Law, Sources of Law, General War Effort

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1 Introduction

This article critically assesses recent developments in the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In particular, it examines the acquittals of General Momčilo Perišić, the former state security chief Jovica Stanišić, and the former paramilitary leader Franko Simatović based on a lack of specific direction in their aid and assistance towards various crimes.¹ The novel interpretation of the conduct requirement of aiding and abetting as containing a specific direction element quickly became a contentious issue.² The words of Judge Picard—the dissenting voice in the *Stanišić and Simatović* case—reflect the level of controversy attached to this new restrictive formulation of accessory liability: ‘[i]f we cannot find that the Accused aided and abetted those crimes, I would say we have come to a dark place in international law indeed.’³ Concerns regarding this enhanced standard ultimately led to its rejection by the majority in *Šainović et al.*⁴ Indeed, the Appeals Chamber held that specific direction is not an element of aiding and abetting liability under customary international law.⁵

There is merit in briefly tracing the evolution of the problem. The specific direction saga started in the *Perišić* case, when the Appeals Chamber interpreted the *actus reus* of aiding and abetting to require that the assistance is specifically directed towards the crimes.⁶ The justification for this additional element was the need to address situations where the accused’s individual assistance is remote from the actions of principal perpetrators or when such assistance could be used for both lawful and unlawful activities.⁷ In such circumstances, the Chamber reasoned, it is necessary to establish ‘a *direct link* between the aid provided by an accused individual and the relevant crimes committed by principal perpetrators’.⁸ In line with this restrictive formulation of

¹ *Prosecutor v Perišić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-81-A, 28 February 2013); *Prosecutor v Stanišić and Simatović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-03-69-T, 30 May 2013). Compare *Prosecutor v Taylor (Judgment)* (Special Court of Sierra Leone, Appeals Chamber, Case No 03-1-A, 26 September 2013) 473.

² Kevin Jon Heller, ‘Why the ICTY’s “Specifically Directed” Requirement Is Justified’ (*Opinio Juris Blog*, 2 June 2013) <<http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/>> accessed 21 March 2015. Compare Jens David Ohlin, ‘Why did the ICTY Acquit Stanisic and Simatovic?’ (*Lieber Code Blog*, 1 June 2013) <<http://www.liebercode.org/2013/06/why-did-icty-acquit-stanisic-and.html>> accessed 21 March 2015; James G Stewart, ‘The ICTY Loses its way on Complicity’ (*Opinio Juris Blog*, 3 April 2013) <<http://opiniojuris.org/2013/04/03/guest-post-the-icty-loses-its-way-on-complicity-part-1/>> accessed 21 March 2015.

³ *Stanišić and Simatović* (n 1) (Judge Michèle Picard in dissent) 2406.

⁴ *Prosecutor v Šainović et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-05-87-A, 23 January 2014) 1649. See also *Prosecutor v Popović et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-88-A, 30 January 2015) 1758.

⁵ *ibid* 43, 47 (Judge Tuzmukhamedov dissented on this point).

⁶ *Perišić* (n 1) 44.

⁷ *ibid* 44, 73.

⁸ *ibid* 44 (emphasis added).

accessory liability, the Appeals Chamber overturned Perišić's conviction for aiding and abetting the Army of the Republika Srpska (VRS) in his capacity as Chief of the Yugoslav Army General Staff. The Appellate Chamber made this decision notwithstanding that Perišić, as the most senior figure in the Yugoslav Army, knowingly provided logistical and personnel assistance to the VRS, which was then committing serious crimes in Sarajevo and Srebrenica.⁹

The factual findings of the *Perišić* Appeals Chamber on the relationship between the Yugoslav Army and the VRS differ from the previous jurisprudence of the ICTY.¹⁰ The earlier *Tadić* appeal judgment concluded that these two entities did not constitute two different armies, but rather one entity that shared military objectives. For this reason, there was no need to prove that the Yugoslav Army authorities specifically charged the VRS with committing crimes, since these forces were of the same mind.¹¹ The rationale for the *Perišić* acquittal was the Chamber's reluctance to find that the accused's assistance was specifically directed to supporting criminal activities, and not just towards the general war effort.¹² The VRS was conceptualised as 'an army fighting a war' rather than an organisation whose actions were criminal *per se*.¹³ Thus, the judges concluded that since not all of the VRS activities were criminal in nature, the policy of providing assistance to the VRS's general war effort did not, in itself, demonstrate that the assistance facilitated by Perišić was specifically directed towards aiding these crimes.¹⁴

The same type of reasoning surfaced in the *Stanišić and Simatović* trial judgment.¹⁵ The accused in this case organised and directed a special unit within the Serbian state security service, which they knew committed crimes of murder, deportation, forcible transfer, and persecution.¹⁶ The special unit operated covertly and was involved in a number of military operations.¹⁷ The Chamber fell short of declaring it a criminal organisation due to the fact that not all of its activities were criminal or resulted in the commission of offences. The extensive involvement of the accused with the operation of the unit led the judges to conclude that their contributions assisted in the commission of the crimes by the unit members.¹⁸ However, since the accused were not physically present in the field during operations, the judges found that their assistance may have been directed towards the legitimate military objective of establishing and maintaining Serb control and not the criminal goals.¹⁹

⁹ *ibid* 44, 62, 68.

¹⁰ Lelia Nadya Sadat, 'Can the ICTY *Šainović* and *Perišić* cases be Reconciled?' (2014) 108 *AJIL* 3, 475–485.

¹¹ *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) 151–53.

¹² *ibid*.

¹³ *ibid* 53.

¹⁴ *ibid*.

¹⁵ *Stanišić and Simatović* (n 1) 2360.

¹⁶ *ibid* 2318, 2323.

¹⁷ *ibid* 1423, 1426.

¹⁸ *ibid* 2359.

¹⁹ *ibid* 2360.

The new and stricter standard of aiding and abetting liability quickly reemerged in the ICTY Appeals Chamber. Here, Vladimir Lazarević's defense team contested his conviction for aiding and abetting deportation and forcible transfer on the grounds that the Trial Chamber had failed to determine whether his alleged acts and omissions were specifically directed to assist the commission of these crimes.²⁰ The Appeals Chamber subsequently rejected the specific direction requirement finding a clear divergence between the *Perišić* standard and the previous jurisprudence of the ICTY.²¹

The specific direction saga did not end with the dismissal of the contentious criterion in the *Šainović et al* appellate judgment. Following this judgment, the ICTY Office of the Prosecutor attempted to reverse the acquittal in *Perišić* by filing a motion seeking reconsideration.²² The Appeals Chamber denied this request, finding that there were not 'cogent reasons in the interests of justice' to reconsider a final judgment.²³ It is disappointing that this brief decision does not elaborate on what constitutes 'cogent reasons in the interests of justice' and why the present circumstances do not meet this test. Moreover, the *Šainović et al* rejection of the specific direction requirement does not necessarily dispose of the issue in its entirety because the pronouncement by one Appeals Chamber does not formally overrule the conflicting statement on the same issue furnished by the different Appeals Chamber.²⁴ Accordingly, it is important to furnish a complete set of arguments against this problematic interpretation of aiding and abetting. Comparative criminal law is an essential instrument in this exercise, as it helps to uncover the unclear foundation of the new standard.

The aim of this article is to investigate the validity of the restrictive interpretation of *actus reus* for aiding and abetting. This inquiry proceeds in two parts. The first part

²⁰ *Šainović et al* (n 4) 1617.

²¹ *ibid* 1621. Similarly, the Vinko Pandurević defense team argued in *Popović et al* that the defendant's lawful actions were not specifically directed towards the unlawful removal of civilians from their residence. The Appeals Chamber dismissed this claim maintaining that specific direction is not an element of aiding and abetting under customary international law. See *Popović et al* (n 4) 1758, 1761, 1765.

²² Statement of Prosecutor Serge Brammertz in relation to the motion for reconsideration submitted by the Prosecution in the *Perišić* case, 3 February 2014 <<http://www.icty.org/sid/11447>> accessed 21 March 2015.

²³ *Prosecutor v Perišić (Decision on Motion for Reconsideration)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No 04-81-A, 20 March 2014). Sadat raises questions about the appropriate standard of review on appeal in international criminal law cases: Sadat (n 10) 484.

²⁴ Art 25(2) of the ICTY Statute (SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009)) establishes the hierarchy between the trial and the appeal stages by providing that '[t]he Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers', but it is silent on the interaction between the two conflicting appeal judgments. The general rule established in *Aleksovski* is that the Appeals Chamber should follow its previous decisions for the reasons of legal certainty and predictability, unless the previous decision has been decided based on a wrong legal principle or the judges were ill informed about the applicable law. This rule does not however regulate the situations when the judgements are already in conflict with each other. *Prosecutor v Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) 107–08. See also William A Schabas, 'Prosecutor Applies to Reverse Final Acquittal in *Perišić*' (*PhD Studies in Human Rights Blog*, 7 February 2014) <<http://humanrightsdoctorate.blogspot.co.uk/2014/02/prosecutor-applies-to-reverse-final.html>> accessed 21 March 2015.

examines whether the additional requirement of specific direction has any foundation in the sources of international law, while the second part illustrates several conceptual problems with the specific direction requirement. This enhanced standard for aiding and abetting presents difficulties in terms of both legality and application. Moreover, this recent development has far-ranging implications that go beyond the difficulties of attaching liability to the accused when removed from the scene of the crime and raises a crucial question for modern international criminal law: what are the legal boundaries of the ‘general war effort’?

2 The specific direction requirement in the sources of international law

The approach of the *Perišić* Appeals Chamber and the *Stanišić and Simatović* Trial Chamber raises several concerns. Foremost, this interpretation of aiding and abetting rests on a very tenuous legal foundation. The majority in the *Šainović et al* Appeals Chamber recognised this point and rejected specific direction as an element of *actus reus* in aiding and abetting for this very reason.²⁵ This rejection is not surprising, since one finds almost no trace of the specific direction requirement within the primary sources of international law, listed in the article 38(1) of the Statute of the International Court of Justice.²⁶

2.1 The lack of recognition of specific direction in the ICTY Statute and customary international law

Article 7(1) of the ICTY Statute addresses individual criminal responsibility. It states:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The Statute is thus silent on the legal requirements for each form of responsibility. The ICTY Appeals Chamber clarified that the Statute only provides an *a priori* jurisdictional framework *ratione personae*, and that customary international law determines the existence of a particular form of liability as well as its legal requirements.²⁷ Custom is a notoriously ambiguous source for defining human rights obligations and international

²⁵ *Šainović et al* (n 4) 1650.

²⁶ These sources comprise international conventions, international custom, and the general principles of law recognised by civilised nations. See Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 38(1).

²⁷ *Prosecutor v Milutinović et al* (*Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-37-AR72, 21 May 2003) 9–10 (quoting Report of the Secretary-General Pursuant to para 2 of Security Council Resolution 808 (1993) 21). See also *Prosecutor v Delalić et al* (*Čelebići Case*) (*Judgment*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-

criminal law provisions.²⁸ One reason for this ambiguity is that tribunals often avoid making a distinction between the two constituent elements of custom: *opinio juris* and state practice.²⁹ This approach is understandable because international criminal law is a peculiar field of law and the state practice element of custom often points to an undesirable outcome (ie, a violation).³⁰

It should be noted that the International Committee of the Red Cross (ICRC) developed a list of customary rules of international humanitarian law accompanied by practice.³¹ Some provisions are generally relevant for interpreting international criminal law. For example, Rule 151 stipulates that individuals are criminally responsible for war crimes they commit. Extensive practice cited to support this rule includes treaty provisions, decisions of the UN organs, jurisprudence of international and national courts, and domestic legislation.³² Nonetheless, it is difficult to discern particular elements of individual criminal responsibility from the plethora of divergent approaches and formulations presented as practice. This is, in part, due to the distinctive objectives pursued by international criminal law and international humanitarian law.

Is then the specific direction as an *actus reus* element of aiding and abetting part of customary international law? The *Perišić* Appeals Chamber and the *Stanišić and Simatović* Trial Chamber answered this question in the affirmative, while the *Šainović et al* Appeals Chamber strongly rejected this position.³³ In *Perišić*, the judges ruled that there are no cogent reasons to depart from the first appeal judgment setting out the parameters of aiding and abetting liability, namely the *Tadić* appeal judgment.³⁴ *Tadić* held that '[t]he aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime'.³⁵ This interpretation of 'aiding and abetting', stated in *Tadić* and restated in *Furundžija*, proved authoritative,

96-21-A, 20 February 2001) 178, and commentary in Guénaél Mettraux, *International Criminal and the Ad Hoc Tribunals* (OUP 2005) 270.

²⁸ Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–1989) 12 AYIL 82, 82–108.

²⁹ Boas, Bischoff and Reid argue that the most worrying characteristic of the *Tadić* decision is the methodology used to establish the rules of customary international law. International judgments pursuant to Control Council Law No 10—supporting in *Tadić* the existence of common purpose liability—do not amount to state practice. See Gideon Boas, James L Bischoff and Natalie L Reid, *International Criminal Law Practitioner Library: International Criminal Procedure* (CUP 2007) 21–22.

³⁰ Michael Wood, Special Rapporteur, *First Report on Formation and Evidence of Customary International Law*, UN Doc A/CN.4/663 (17 May 2013) para 70. See also L van den Herik, 'Using Custom to Reconceptualise Crimes Against Humanity' in Shane Darcy and Joseph Powderly (eds) *Judicial Creativity at the International Criminal Tribunals* (OUP 2010) 93, 101.

³¹ International Committee of the Red Cross, *Customary International Humanitarian Law* (2005) Volume I: Rules <<http://www.refworld.org/docid/5305e3de4.html>> accessed 21 March 2015.

³² 'Practice Relating to Rule 151: Individual Responsibility' (ICRC 2005) <https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule151> accessed 21 March 2015.

³³ *Perišić* (n 1) 28; *Stanišić and Simatović* (n 1) 1264; *Šainović et al* (n 4) 1649. See also Kai Ambos and Ousman Njikam, 'Charles Taylor's Criminal Responsibility' (2013) 11 J Intl Crim Justice 789.

³⁴ *Perišić* (n 1) 26, 28.

³⁵ *Tadić* (n 11) 229.

and subsequent jurisprudence merely clarified the elements established by these first two cases.³⁶ Nonetheless, the *Perišić* understanding of the *actus reus* for aiding and abetting differs substantially from that of the *Tadić* appeal judgment. The *Šainović et al* Appeals Chamber pointed exactly to this inconsistency, concluding that the *Perišić* approach significantly diverges from previous ICTY jurisprudence.³⁷

Due to their authoritative value in international criminal law and for the sake of clarity, it is worth summarising the elements of aiding and abetting as established by the *Tadić* and *Furundžija* judgments. An aider or abettor is an individual who provides 'practical assistance, encouragement, or moral support' to the principal.³⁸ Further, these actions must have a substantial effect on the perpetration of a crime.³⁹ The *Tadić* Trial Chamber borrowed this formulation of aiding and abetting from the International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind (ILC Draft Code), which called for criminal responsibility of the individual who 'knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime'.⁴⁰ The commentary to the ILC Draft Code does not define 'substantially', but notes that the assistance of the accomplice must facilitate the commission of a crime in some *significant* way.⁴¹ Based on these considerations, the *Tadić* Chamber clarified that the substantial contribution requirement presupposes a contribution that in fact has an effect on the commission of the crime.⁴² The *Furundžija* Chamber further elaborated on the effect of assistance, holding that the acts of the accomplice need not 'bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal'.⁴³ This finding underlines the derivative nature of aiding and abetting as an accomplice can only influence the conduct of the principal perpetrator to a certain extent and the final decision to commit or not to commit a crime rests with the perpetrator and not with the accomplice.⁴⁴

³⁶ Boas, Bischoff and Reid (n 29) 303–04.

³⁷ *Šainović et al* (n 4) 1621.

³⁸ *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) 235; *Čelebići* (n 27) 352; *Tadić* (n 11) 229.

³⁹ *Furundžija* (n 38) 223, 224, 249.

⁴⁰ Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission in 1996, UN Doc A/51/10 (1996), art 2(3)(d).

⁴¹ Commentary to the Articles of Draft Code of Crimes Against the Peace and Security of Mankind, ILC Ybk 1996/II(2), 21, art 2(3)(d), para 11 (emphasis added).

⁴² *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 688.

⁴³ *Furundžija* (n 38) 233. See also Judgment, *Prosecutor v Simić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-9-A, 28 November 2006) 85; *Prosecutor v Blaskić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) 48.

⁴⁴ Sanford H Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 Cal L Rev 2, 323.

In addition to making a 'substantial' contribution, the ILC requires that an aider and abettor make a 'direct' contribution to the crime.⁴⁵ At the same time, the commentary to the ILC Draft Code does not offer a precise meaning of 'direct contribution'. This lack of clarity contributed to the confusion that followed. First, the *Tadić* Trial Chamber embraced the directness requirement by treating the accused as culpable when his participation 'directly and substantially affected the commission of the offence'.⁴⁶ In contrast, the *Furundžija* Chamber rejected the term 'direct' to describe the proximity between the assistance and the principal act as misleading since 'it may imply that assistance needs to be tangible, or to have a causal effect on the crime'.⁴⁷

It is noteworthy that post-Nuremberg criminal trials of war criminals, which informed the early *Furundžija* and *Tadić* cases, along with the provisions of the ILC Draft Code do not support the requirement that aid must be specifically directed towards the crimes. For example, in the trial of *Gustav Becker, Wilhelm Weber and Eighteen Others*, the Permanent Military Tribunal at Lyon convicted the former German customs officers in French Savoy for the illegal arrest and ill treatment of French citizens, which resulted in the death of the three victims later in Germany.⁴⁸ The tribunal found the accused responsible, as their acts were instrumental to the death of the victims. In addition to the illegal arrest and ill treatment, the judges found all of the defendants guilty of causing death. The tribunal made this pronouncement regardless of whether the injuries sustained in France were the direct cause of the subsequent death of the victims in Germany. The court did not evaluate whether the accused by abusing persons trying to cross the border specifically intended this result.⁴⁹ In *Zyklon B*, a similar and more widely cited case, the British Military Court in Hamburg convicted the owner of the firm supplying poison gas to concentration camps and the firm's proxy of war crimes and sentenced them to death. The defendants argued that the gas was to be used for lawful purposes, such as disinfection. The court disregarded these arguments holding that the accused knew that the gas was to be employed for killing people because they trained the SS officials to use it in a manner consistent with this purpose.⁵⁰ The court referred in its assessment to the defendants' *mens rea*, but not the conduct element.⁵¹

While the *Tadić* trial judgment set out the elements of aiding and abetting, the *Tadić* appeal judgment focused primarily on defining the notion of the joint criminal

⁴⁵ Commentary to the Articles of Draft Code of Crimes Against the Peace and Security of Mankind (n 41) 11, 21. For the discussion of this provision see also *Šainović et al* (n 4) 1647.

⁴⁶ *Tadić* (n 11), 692. The *Tadić* Appeal Chamber later used the 'specific direction' criterion to delimit aiding and abetting and participation in the joint criminal enterprise. See *Tadić* (n 31) 229.

⁴⁷ *Furundžija* (n 38) 232.

⁴⁸ *France v Becker* (1948) 7 LRTWC 67 (Permanent Military Tribunal at Lyon) 67–70.

⁴⁹ *ibid.*

⁵⁰ *United Kingdom v Tesch (Zyklon B Case)* (1947) 1 LRTWC 93 (British Military Court) 93–101. This case is referenced in the *Perišić* Appeal Judgment (n 1) n 115 and the *Šainović et al* Appeal Judgment (n 4) 1628.

⁵¹ Coco and Gal share this assessment of the *Zyklon B Case*. Antonio Coco and Tom Gal, 'Losing Direction: The ICTY Appeals Chamber's Controversial Approach in *Perišić*' (2014) 12 J Intl Crim Justice 345.

enterprise (common design).⁵² The *Tadić* appellate panel used the phrase ‘acts *specifically directed* to assist’ to compare responsibility for aiding and abetting to responsibility for joint criminal enterprise, which presupposes that the acts are in *some way directed* to the furtherance of a common design.⁵³ Thus, the emphasis was not on the physical proximity of the accomplice’s aid to the offence in question, but rather on the existence of the crime-specific relationship between the aider and abettor and the principal perpetrator. Importantly, the crime-specific relationship between the aider and abettor and the principal differs significantly from the group-specific relationship that characterises joint criminal enterprise.

In contrast, *Perišić* employed the terminology to stress the directness of the link between the aid and the crime.⁵⁴ In support of the specific direction requirement, *Perišić* cited a number of judgments emanating from the ICTY and the International Criminal Tribunal for Rwanda (ICTR) that either reproduce the wording of the *Tadić* appeal judgment verbatim or follow it very closely.⁵⁵ None of these judgments, however, elaborate on the original *Tadić* verdict.⁵⁶ As such, the *Perišić* Appeals Chamber evidently misinterpreted the *actus reus* element by misunderstanding the specific direction wording in the *Tadić* appeal judgment or by applying this wording out of context.⁵⁷ Moreover, on at least two occasions, the ICTY Appeals Chambers expressly rejected the idea that specific direction is an essential component of the *actus reus* for aiding and abetting.⁵⁸

The majority of the *Šainović et al* Appeals Chamber highlighted this point by noting that there is a clear divergence on the specific direction issue between the *Perišić*

⁵² *Tadić* (n 11) 229. The same point is being made in the *Šainović et al* Appeal Judgment (n 4) 1623.

⁵³ *ibid* (emphasis added).

⁵⁴ *Perišić* (n 1) 44.

⁵⁵ *ibid* 28–29.

⁵⁶ For example, in *Blagojević*, the Appeals Chamber simply acknowledged that the Trial Chamber did not err in restating the formulations and principles of aiding and abetting contained in the previous ICTY judgments. *Kvočka* and *Vasiljević* discussed the difference between perpetration by means of the joint criminal enterprise and aiding and abetting. *Simić* specified that the accused need not know ‘either the precise crime that was intended or the one that was, in the event, committed’, while *Orić* merely reiterated the minimum basic elements of aiding and abetting for the purposes of conviction for omission. See *Prosecutor v Blagojević and Jokić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-02-60-A, 9 May 2007) 127–28; *Prosecutor v Kvočka, (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-T, 28 February 2005) 89–90; *Prosecutor v Vasiljević (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32-A, 25 February 2004) 102; *Simić* (n 43) 85–86; *Prosecutor v Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-03-68-A, 3 July 2008) 43.

⁵⁷ To that effect see *Taylor* (n 1) 475.

⁵⁸ *Prosecutor v Mrkšić and Šljivančanin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No T-95-13/1-A, 5 May 2009) 159; *Blagojević and Jokić* (n 56) 189; *Furundžija* (n 38) 232; *Prosecutor v Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-68-T, 30 June 2006) 285. Judge Liu argued to this effect in his partially dissenting opinion: ‘Given that specific direction has not been applied in past cases with any rigor, to insist on such a requirement now effectively raises the threshold for aiding and abetting liability’: *Perišić* (n 1) 3 (Partially Dissenting Opinion of Judge Liu).

approach and the ICTY's previous jurisprudence.⁵⁹ The judges in *Šainović et al* resolved this issue by assessing the legality of specific direction.⁶⁰ After an extensive review of the jurisprudence from the ad hoc criminal tribunals and the relevant post-World War II case law, they concluded that specific direction is not an element of aiding and abetting liability under customary international law or the Statute of the Tribunal.⁶¹

In the recent *Taylor* Appeal judgment, the Special Court for Sierra Leone (SCSL) also rejected the *Perišić* interpretation of the specific direction requirement.⁶² The SCSL did not, however, directly engage with custom. The *Taylor* Appeals Chamber circumvented this issue by framing its discussion of specific direction not along the lines of shaping the custom, but as a rejection of the ICTY precedent that is binding only internally.⁶³ The SCSL Appeals Chamber concluded that the definition of the *actus reus* of aiding and abetting under customary international law is established by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided.⁶⁴ Further, the *Taylor* appellate panel found no reason to depart from settled principles of law or to introduce the novel element of the specific direction in the definition of *actus reus* of aiding and abetting because the requirement that the acts of the accused have substantial effect on the commission of the crime establish sufficient causal link.⁶⁵ The judges further noted that the question of physical proximity between the accused and the crimes may be relevant on a case-by-case basis, but that proximity is not a legal requirement.⁶⁶

In modern international criminal law, a uniform approach by different courts and tribunals to a particular issue may serve as the evidence of consensus on a given topic, thus allowing for the possible formation of customary law. The international criminal law judgments referred to in the *Perišić* case do not support customary status of the specific direction component of *actus reus* for aiding and abetting. Moreover, the *Šainović et al* and the *Taylor* Appeals Chambers certainly weakened—if not disposed of—any possible emerging customary rule requiring the specific direction element. Nonetheless, the fate of this contested criterion has not yet been decided. It will reemerge in the *Stanišić and Simatović* appeal judgment.⁶⁷ Moreover, there are signs that the International Criminal

⁵⁹ *Šainović* (n 4) 1621.

⁶⁰ *ibid* 1622.

⁶¹ *ibid* 1649. Compare Judge Tuzmukhamedov argued that the case at hand did not merit consideration of the issue of the 'specific direction' for factual reasons—Lazarević's assistance was not remote—and reasons of legal certainty, stability and predictability. The majority did not provide cogent reasons for deviating from the *Perišić* judgment. See *Šainović* (n 4) 43, 45, 47 (Dissenting Opinion of Judge Tuzmukhamedov).

⁶² *Taylor* (n 1) 486.

⁶³ *ibid* 476.

⁶⁴ *ibid* 475.

⁶⁵ *ibid* 490.

⁶⁶ *ibid*.

⁶⁷ See, for example, Stuart Casey-Maslen (ed), *The War Report: Armed Conflict in 2013* (OUP 2013) 552.

Court (ICC) might in the future assess the significance of individual contributions to the crime committed by a group in light of the specific direction requirement.⁶⁸

2.2 Failure to qualify as a general principle of law

The problematic nature of custom within international criminal law inevitably shifts the focus to the third source of international law, namely the general principles of law deriving from the multitude of domestic legal systems.⁶⁹ The silence of the treaty and the uncertainty over custom make comparative criminal law crucial for resolving the question as to whether the definition of aiding and abetting includes the requirement of the specific direction. Article 38(1)(c) of the Statute of the International Court of Justice refers to the general principles of law recognised by civilised nations as one of the sources of international law. This is not to suggest that the meaning of ‘general principles of law’ is exceedingly clear in public international law. While this term receives different meanings depending on the context, there is some convergence in understanding that reference must be made to various domestic legal systems.

The *Šainović et al* Appeals Chamber took initiative to ‘probe’ this third source of international law to establish whether domestic law may help resolve the issue of specific direction.⁷⁰ The Chamber made brief reference to national law, correctly stating that the variations among national jurisdictions do not allow for the deduction of a common principle for the issue at hand.⁷¹ Accordingly, the substantive conclusion regarding the lack of a uniform rule for this aspect of aiding and abetting is also correct. However, the methodology that the Chamber used to assess domestic law is unclear. The judgment adopted a reductionist approach when grouping countries together without taking into account the specific features of different legal families and individual legal systems.⁷² To appreciate the judgment’s conclusion, it is important to understand the features of the law on aiding and abetting for each country. This individualised approach also adds credibility to the argument that the specific direction requirement is not rooted in domestic law.⁷³

Methodologically, there is no agreement on the number of countries that need to recognise a legal principle in *foro domestico* for it to qualify as a source of international

⁶⁸ *Prosecutor v Katanga (Judgment)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 8 March 2014) 287 (Dissenting Opinion of Judge van den Wyngaert). See also Sadat (n 10) 483.

⁶⁹ See Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 99; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1987) 2; Fabian Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff Publishers 2008) 1.

⁷⁰ *Šainović* (n 4) 1643.

⁷¹ *ibid* 1644.

⁷² The overview of national case law is cramped together in three paragraphs and several lengthy footnotes. *ibid* 1643–46.

⁷³ It is peculiar that neither *Perišić* nor *Stanišić and Simatović* refer to the domestic law in support of the specific direction requirement. See *Perišić* (n 1) and *Stanišić and Simatović* (n 1).

law.⁷⁴ The jurisprudence of the ad hoc tribunals does not require universal acceptance of the legal principle by all states, but it is essential that the 'general principle' is *representative* of the variety of nations.⁷⁵ The legal systems under consideration below are the United States, England, Germany, France, Italy, and Poland, as these legal systems represent some of the major parent legal systems in the world.⁷⁶ The aim of this overview is to determine which, if any, of these legal systems recognise the specific direction requirement as part of the *actus reus* for aiding and abetting.⁷⁷

The US criminal law began as the 'common law' of England, which the American colonies adopted in the eighteenth century.⁷⁸ Much more recently, numerous US states introduced or reformed their criminal codes based on the 1962 Model Penal Code (MPC). The American Law Institute promulgated this code as a part of a major criminal law revision.⁷⁹ Neither the common law nor the MPC support the specific direction requirement as part of the *actus reus* of complicity. Under the common law, an accomplice is a person who, with the requisite *mens rea*, assists the primary party in committing an offence by physical conduct, psychological influence, or omission (assuming that there is a duty to act).⁸⁰ Once it is determined that the accomplice assisted the primary perpetrator, the degree of aid or influence is immaterial.⁸¹ A secondary party is accountable for the conduct of the primary party even if the assistance was causally unnecessary or the primary party would have committed the offence without the assistance of the secondary party.⁸² The required *mens rea* is 'dual intent', meaning the accomplice or secondary party must have the intent to assist the primary party and the intent that the primary party commits the offence charged.⁸³

The MPC provides that the accomplice satisfies the objective element of an offence through the perpetrator's conduct by solicitation, aiding, or failing the legal duty to prevent the commission of the offence.⁸⁴ Under the MPC, the mere knowledge of the

⁷⁴ Cheng (n 69) 25; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Frederick A Praeger 1950) 533.

⁷⁵ Fabian Raimondo, 'General Principles of Law, Judicial Creativity, and the Development of International Criminal Law' in Darcy and Powderly (eds) (n 30) 45, 52.

⁷⁶ Konrad Zweigert and Hein Koetz, *An Introduction to Comparative Law* (Tony Weir (tr), 3rd edn, OUP 1998) 40–41. For more empirical data see James Stewart, "'Specific Direction' is Unprecedented: Results from Two Empirical Studies' (*EJIL Blog*, 4 September 2013) <<http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/>> accessed 21 March 2015.

⁷⁷ Historically, domestic law nurtured international criminal justice, making resort to national law provisions relevant even outside the context of the discussion on the sources law. See Richard Overly, 'The Nuremberg trials: international law in the making' in Phillippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (CUP 2003).

⁷⁸ Paul H Robinson, 'Comparative Summary of American Criminal Law' in Kevin Jon Heller and Marcus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 563, 564.

⁷⁹ *ibid* 565.

⁸⁰ Joshua Dressler, *Understanding Criminal Law* (4th edn, LexisNexis 2006) 506.

⁸¹ *ibid* 508.

⁸² *ibid* 509.

⁸³ *ibid* 511.

⁸⁴ Model Penal Code, ss 2.06(2)(c), (3)(a) (US).

crime does not satisfy the fault requirement for complicity; rather, the accomplice must intend to participate in the crime's commission.⁸⁵ In *United States v Peoni*, the US Supreme Court held that the complicity doctrine requires the defendant to 'in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed'.⁸⁶ The MPC accords with this standard, but it features a less stringent fault requirement. Here, the accomplice's assistance does not need to be necessary or even substantial for the successful completion of the offence; instead, even the least degree of assistance suffices to satisfy the fault requirement.⁸⁷

The Polish Penal Code defines aiding and abetting as facilitating the commission of the prohibited act by providing the instrument or means of transport, giving counsel or information, or failing to act when a duty to act exists.⁸⁸ The accomplice must act with the intent that another person will commit a prohibited act (*zamiar*).⁸⁹ The code defines the objective element as 'facilitates by his behavior the commission of the act'.⁹⁰ For the subjective element, aiding and abetting must be intentional, yet in contrast with instigation, the intention may be expressed as direct or indirect intent.⁹¹ Even if the aider is not fully informed about the intent of the primary perpetrator but only foresees the possibility of the crime, the aider agrees to that crime by virtue of providing assistance.⁹² For example, the Polish Supreme Court held that forging invoices with the knowledge that they would be used to obtain an unlawful tax refund amounts to complicity in fraud.⁹³ Further, the court clarified that even if the aider and abettor does not necessarily want to commit an offence, it is sufficient that he reconciles himself with the idea. Thus, the aider and abettor must be aware of the legal characteristics of the offense, intend to facilitate it by a non-causal contribution, and be aware of the impact that his behavior will have, namely, that his behavior will facilitate the commission of the offense by the primary perpetrator.⁹⁴

In French law, the accomplice either facilitates the preparation or commission of the crime by aid and assistance, or incites its commission by means of a gift, promise, threat,

⁸⁵ Model Penal Code (US) s 2.06(2)(3)(a) provides that an accomplice acts with 'the purpose of promoting or facilitating the commission of the offence'. The same standard had been previously confirmed in *Nye & Nissen v United States*, 336 US 613 (1949).

⁸⁶ 100 F 2d 401, 402 (2d Cir 1938).

⁸⁷ *People v Durham*, 70 Cal 2d 171, 185 (1969); *Commonwealth v Murphy*, 844 A 2d 1228, 1234 (Pa 2004); *Commonwealth v Gladden*, 665 A 2d 1201, 1209 (Pa Super 1995).

⁸⁸ Penal Code, art 18(3) (Poland).

⁸⁹ *ibid.*

⁹⁰ Tadeusz Bojarski and others (eds), *Kodeks karny; Komentarz do cz OGÓLNA roz II art 18*, 2013, (wydanie VI 2013).

⁹¹ *ibid.*

⁹² Leon Tyszkiewicz and others (eds), *Kodeks karny. Komentarz do cz OGÓLNA roz II art 18* 2012, (wydanie III 2012).

⁹³ Wyrok Sądu Najwyższego—Izba Karna (Judgment of the Supreme Court), III KK 184/2013.

⁹⁴ *ibid.*

order, an abuse of authority or powers, or gives the directions to commit it.⁹⁵ Criminal liability of the accomplice presupposes that the underlying act is objectively punishable.⁹⁶ Complicity requires a positive act, inaction is not sufficient.⁹⁷ The aid of the accomplice does not need to be indispensable for the commission of the offence.⁹⁸ The emphasis of French law is on the mental element: it must be established that the accomplice furnished the aid with the knowledge that it supports the crime.⁹⁹ Thus, the French commentaries specify that while knowledge of the illegal enterprise and voluntary participation are essential, it matters little whether the objectives of the accomplices are different from those of the primary perpetrator.¹⁰⁰

German law defines an aider and abettor (*Gehilfe*) as 'any person who intentionally assists another in the intentional commission of an unlawful act'.¹⁰¹ At minimum, an aider and abettor must have indirect intent or possess the knowledge of the risk or likelihood for the effect to occur and the will to bring it about.¹⁰² The intent for aiding and abetting is 'double' (*doppelter*). Accordingly, demonstrating intent requires fulfilling two elements. First, the act of assistance must have a supportive effect on the commission of the offence. Second, the aider and abettor must direct the act towards the illegal action, although he or she does not need to detail every element of the offence.¹⁰³ Because the aider and abettor does not have the will to exercise certain influence on the offence, the requirement for the specificity of his knowledge is less stringent compared to instigation.¹⁰⁴ The standard linking the act of the aider and abettor and the offence is quite low. Once the aider and abettor furthers the actions of the principal in some way, German courts consider the standard met.¹⁰⁵ Further, German commentaries define assistance from the aider and abettor as a causal contribution that enables, enhances, or facilitates the commission of the offence, but that *does not* amount to perpetration or incitement. These commentaries also hold that whether the act would have been committed without the help of the aider and abettor is irrelevant.¹⁰⁶

⁹⁵ Penal Code, art 121.7 (France).

⁹⁶ Herve Pelletier and Jean Perfetti (eds), *Code Penal* (14th edn, LexisNexis 2002) 29.

⁹⁷ *ibid* 30–31.

⁹⁸ *ibid* 32.

⁹⁹ Yves Mayaud and Emmanuelle Allain (eds), *Code Penal* (104th edn, Dalloz 2007) 126.

¹⁰⁰ *ibid* 123.

¹⁰¹ Penal Code, art 27(1) (Germany) (official translation provided by Federal Ministry of Justice and for Consumer Protection <http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0148> accessed 5 May 2015).

¹⁰² BGH NJW1998 (Federal Supreme Court) 2835 as cited by Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 169.

¹⁰³ Karl Lackner and Kristian Kühl, *Strafgesetzbuch: StGB Kommentar* (25th edn, C H Beck 2004) 195.

¹⁰⁴ *ibid*.

¹⁰⁵ BGHSt2, 130 (Federal Supreme Court); BGH NJW 2001 (Federal Supreme Court) 2410 as cited by Bohlander (n 102) 172.

¹⁰⁶ Lackner and Kühl (n 103) 191.

The accomplice in English law (sometimes called an ‘accessory’ or a ‘secondary party’) is anyone who aids, abets, counsels, or procures a principal.¹⁰⁷ ‘Procuring’ implies bringing about an offence, as by deceiving another so that he or she commits an offence.¹⁰⁸ Procuring is the only act that requires a causal relationship between the accomplice’s act and the commission of the crime, namely the act of procurement and the resulting execution of the offence.¹⁰⁹ The remaining three acts do not require a causal relationship. The term ‘counsels’ presupposes that the accused is responsible if he persuades the principal to commit an offence, not by threats or bribes, but by detailing the advantages of the proposed course of action or by giving advice to the principal offender.¹¹⁰ Abetting entails encouraging the principal to commit the offence.¹¹¹ Here, there must be some connection between abetting or counseling and the execution of the crime, but the connection does not require causality in the sense of being *conditio sine qua non*, in a sense that the assistance need not be indispensable for completing the offence.¹¹² Complicity requires proof of intention, but not purpose, and *dolus eventualis* (or ‘adverted recklessness’) may be sufficient.¹¹³ Importantly, the test for accessorial knowledge is whether the offence committed was within the contemplated range of offences, and if not, then whether it was of the same type as any of those offences contemplated.¹¹⁴

In Italy, the all-encompassing term ‘participation’ (*concorso di persone*) expresses the notion that any involvement whatsoever on the part of an actor in any offence establishes his connection to the crime.¹¹⁵ The acts of each co-participant are his or her own. These acts are attributed to all of the other participants if two conditions are met. The first condition is objective and requires that there is a causal link between the acts and the criminal result. The second condition is subjective and requires that each participant is aware of the final purpose of all the actions. Accordingly, each participant must deliberately and consciously give his or her contribution—material or intellectual—to the commission of the crime.¹¹⁶ Thus, for a person to qualify as a party to a crime in Italy, it is sufficient that the person willingly contributes to the commission of the offence

¹⁰⁷ Andrew Ashworth, *Principles of Criminal Law* (2nd edn, OUP 1995) 410. See also Accessories and Abettors Act 1861, as amended by s 65(4) Criminal Law Act 1977.

¹⁰⁸ Andrew J Ashworth, ‘UK Criminal Law’ in Heller and Dubber (eds) (n 78) 531, 539.

¹⁰⁹ J C Smith and Brian Hogan (eds), *Criminal Law* (10th edn, LexisNexis 2002) 145; Ashworth (n 107) 422.

¹¹⁰ HLA Hart and T Honoré, *Causation in the Law* (Clarendon Press 1985) 380.

¹¹¹ Ashworth (n 107) 414.

¹¹² *Wilcox v Jeffery* [1951] 1 All ER 464 as cited by Ashworth (n 107) 416.

¹¹³ *Blakeley v Chief Constable of West Mercia* [1991] RTR 405 as cited by Ashworth in Heller and Dubber (eds) (n 108) 539.

¹¹⁴ KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press 1991) 167–169, referring to *Maxwell v DPP* [1978] 1 WLR 1350 and *R v Bainbridge* (1960) 1 QB 129.

¹¹⁵ Penal Code, art 110 (Italy).

¹¹⁶ CCC, 1st division (Supreme Court of Cassation), n 8084, 4 July 1987.

and that his input constitutes necessary support for its commission.¹¹⁷ Finally, the contribution need not be *conditio sine qua non* and may take many different forms.¹¹⁸

This brief survey of national laws shows that several important legal systems do not embrace the idea that accomplice aid must be directed towards the specific offence in the meaning that the *Perišić* Appeals Chamber adopted. When it comes to the specificity of the assistance furnished by the accessory, the domestic law assessed above emphasises the *mens rea* rather than the *actus reus* as the link between the assistance and the offence. This link is established through the mental state of the accomplices, rather than the directness of their aid. The level of contribution required to attach criminal responsibility for complicity varies depending on the legal system. Still, none of the legal systems reviewed above require that the assistance is a precondition for the predicate offence. Finally, these legal systems suggest that a higher *mens rea* threshold for aiding and abetting results in a lower conduct requirement.

3 Conceptual problems

The specific direction requirement lacks a solid foundation within the sources of international law as well as the domestic legal systems discussed above. In addition, including the specific direction requirement as part of the *actus reus* for aiding and abetting presents a number of conceptual difficulties. First, the new requirement undermines the use of accomplice liability to address situations where the accused is removed from the scene of the crime. The specific direction requirement creates an enhanced version of aiding and abetting that purports to bridge the temporal and/or spatial gap between the accomplice and the principal perpetrator. In *Perišić*, the judges justified including the specific direction element in the *actus reus* of aiding and abetting to expressly establish the link between the accomplices' contribution to the offence and the wrongdoing in cases when the accused is removed from the offence. The *Perišić* judges contrasted this situation with instances where the accomplice is physically close to the crime and the link is implied.¹¹⁹ However, physical proximity is often a false friend for establishing this connection. For example, even if an accomplice is present at the scene of the crime, he may not directly participate in its perpetration, thus prosecutors often infer his contribution to the offence from the available evidence.¹²⁰

Linking the assistance and the crime via the directness and the specificity of the aid is misplaced. This argument is partially due to the lack of a well-defined causation

¹¹⁷ Sergio Beltrani, Raffaele Marino and Rossana Petrucci, *Codice Penale: Annotato con la Giurisprudenza* (Simone 2003) 429.

¹¹⁸ CCC, 1st division (Supreme Court of Cassation), n 8084, 4 July 1987.

¹¹⁹ *Perišić* (n 1) 38. Compare *Prosecutor v Brđanin (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No 99-36-T, 1 September 2004) 151, 273, 277, 348.

¹²⁰ For example, Furundžija's contribution was inferred from his position of authority: *Furundžija* (n 38) 209.

standard for complicity in international criminal law.¹²¹ Domestic criminal law teaches us that the causal link between the accomplice and the crime is always constructed and that the connection stems more from the risk that the secondary party envisages and undertakes rather than the actual harm produced by their actions.¹²² Hence, it is the mental state of the accomplice that grounds his or her relationship to the offence rather than the conduct. If one accepts that distance is not dispositive for establishing the effect of the accessory's contribution to the offence, then the whole reason for the specific direction requirement falls away because there is no longer a need to compensate for the distance by adding additional requirements to the *actus reus* of complicity. Importantly, this misinterpretation is more than an academic debate, as the enhanced specific direction standard may lead to impunity gaps, where culpable actors exert a substantial effect on the crime, but do not attract criminal responsibility for the mere lack of physical proximity between the crime and their assistance. As a result, the leadership of the criminal conduct becomes nearly immune from prosecution for aiding and abetting because persons in charge are frequently removed from the offence.

Second, the additional criterion requiring a direct link between the contribution and the crime brings aiding and abetting into the vicinity of commission because it conflates assistance with performing part of *actus reus* of the offence itself—the former, in contrast with the latter, need not be the direct cause of the crime. Judge Liu, who partially dissented in *Perišić*, noted this problematic aspect of the specific direction requirement.¹²³ The essence of ‘committing’ the offence, as opposed to being an accomplice, is bringing about its material elements.¹²⁴ This is done by the direct engagement in the crime. Thus, the qualitative criterion of ‘direct contribution’ is better suited to describe the *actus reus* of co-perpetration, while the quantitative criterion of ‘substantial contribution’ serves to assess the impact of the accomplice’s aid, which does not need to be a precondition for the offence.¹²⁵

Third, the specific direction requirement is superfluous and lacks independent standing. One can view this requirement either as an implied element of substantial contribution, in the sense that an accomplice’s actions have some impact on the conduct of the principal and are thus *directed* towards the crime, or as part of the accused’s *mens rea* for aiding and abetting, which in the ICTY jurisprudence is the knowledge that the accomplice’s acts assist in the commission of the offence.¹²⁶ If the accused knew about the crime and still provided assistance, then logically his acts are directed towards the

¹²¹ Mettraux (n 27) 281.

¹²² Christopher Kutz, ‘The Philosophical Foundations of Complicity Law’ in John Deigh and David Dolinko (eds), *The Handbook of Philosophy of Criminal Law* (OUP 2011) 157.

¹²³ *Perišić* (n 1) n 9 (Partially Dissenting Opinion of Judge Liu).

¹²⁴ See *Prosecutor v Mathieu Ngudjolo Chui* (International Criminal Tribunal, Trial Chamber II, Case No 01/04-02/12-4, 18 December 2012) 44 (Concurring Opinion of Judge van den Wyngaert).

¹²⁵ *ibid.*

¹²⁶ For example *Furundžija* (n 38) 249; *Blagojević and Jokić* (n 56) 127; *Prosecutor v Gotovina and Markač (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-06-90-A, 16 November 2012) 127.

offence.¹²⁷ Further, the previous survey of domestic laws on complicity supports the idea that it is the specificity of accomplice's knowledge, rather than the specific direction of his acts, that establish his connection to the offence.

Fourth, the two constituent elements of aiding and abetting are interconnected. As such, judges should interpret the *actus reus* and *mens rea* of aiding and abetting not as two separate inquiries, but as two interdependent parts of one analysis. The *Perišić* Appeals Chamber attempted to consider these elements separately by stressing that it would only focus on the *actus reus* of aiding and abetting.¹²⁸ A better approach is to balance the two elements based on the facts of the particular case.¹²⁹ By making the conduct requirement more stringent without simultaneously lessening the fault requirement or removing the requirement that the contribution of the accused must be substantial skews the construction of complicity. The *Taylor* Appeal judgment hinted towards adapting a more balanced approach to assessing the two elements of aiding and abetting by drawing on the example of the MPC. The MPC requires 'purpose', instead of the more widely accepted 'knowledge', as the mental element for aiding and abetting because this approach allows for *any* contribution to the crime to qualify as the conduct element.¹³⁰ In contrast, international criminal law requires a 'significant' or 'substantial' contribution to satisfy the conduct requirement.

Finally, to require that aid is specifically directed towards the crime, and not just to establishing effective control or other military objectives—even when the assistance is provided with knowledge and facilitates the commission of offences—raises an uncomfortable question that goes beyond the legal technicalities of a particular mode of liability, namely, what are the conditions that turn the 'general war effort' into a 'crime' attracting individual criminal responsibility? Relatedly, what is the standard of behavior that we expect from senior military and political leadership during armed conflict?

Here, the recent acquittals on appeal of General Ante Gotovina and Croatian Police Operation Commander Mladen Markač are relevant.¹³¹ The rationale for their acquittals was the reversal of the Trial Chamber's finding that the artillery attacks planned and ordered by the accused were unlawful. In these cases, the Prosecution maintained that even if the attacks were lawful, the Appeals Chamber should find Gotovina and

¹²⁷ Judges Meron and Agius, in their joint separate opinion in *Perišić*, noted that 'whether an individual specifically aimed to assist relevant crimes logically fits within our current *mens rea* requirement': *Perišić* (n 1) 2–3 (Joint Separate Opinion of Judges Meron and Agius). See also *Perišić* (n 1) n 7 (Partially Dissenting Opinion of Judge Liu).

¹²⁸ *Perišić* (n 1) 48: 'The Appeals Chamber also underscores that its analysis of specific direction will exclusively address *actus reus*.'

¹²⁹ KJM Smith, who studied complicity in depth, noted 'complicity's derivative quality must convincingly reside at least in either *mens rea* or *actus reus* components (...) diminution in demands on the *mens rea* side have repercussions for the causal element as part of the *actus reus*; and vice-versa': Smith (n 114) 195 (emphasis added). See also *Taylor* (n 1) 715 (Concurring Opinion of Justice Shireen Avis Fisher on Aiding and Abetting Liability).

¹³⁰ *Taylor* (n 1) 447. Smith pointed out that American jurisdictions requiring purposeful accessorial attitudes experience less problems with specificity: Smith (n 114) 171.

¹³¹ *Gotovina and Markač* (n 126).

Markač guilty of aiding and abetting deportation and persecution because they ordered these attacks knowing that they would substantially contribute to deportation of the civilian population.¹³² The Appeals Chamber rejected this argument, claiming that the departure of civilians is concurrent with lawful artillery attacks and cannot be qualified as deportation.¹³³

The grounds for the acquittals of Perišić, Stanišić and Simatović, on the one hand, and Gotovina and Markač, on the other, are different. The former failed to qualify as accomplices because their assistance was not specifically directed towards the crimes, and thus could have been interpreted as aiming at achieving lawful military purposes. The latter were acquitted because the Appeals Chamber overturned as arbitrary the 200-meter yardstick for measuring the lawfulness of an artillery attack. The trial judges based convictions in the *Gotovina* case on an expert opinion holding that all impact sites located further than 200 meters from the legitimate military target serve as evidence of an unlawful attack. The rejection of this standard led the appellate judge to the conclusion that the attacks were lawful and any incidental damage to civilians resulting from them does not entail individual criminal responsibility.¹³⁴

Despite factual and legal differences in these rulings, the underlying logic is analogous. In each case, the judges adopted an objective approach to military activities, while shifting the emphasis from the mental state of the accused to the objective and gruesome reality of armed conflict. The acquittals share this expansive view of the 'general war effort', which does not attract individual criminal responsibility. Accepting that armed conflict is an ugly affair that inevitably affects civilians or results in some level of criminality is a reasonable position. And this view likely framed the legal discourse around the recent ICTY acquittals. Nonetheless, the question remains as to whether international criminal law should focus on the individual contribution and the mental state of those in charge or the externalities accompanying military activities. Depending on the answer to this question, we can form better expectations of those persons vested with authority during armed conflict.

4 Conclusion

Interpreting the *actus reus* for aiding and abetting to require that assistance must be specifically directed towards the crimes and not just geared to the general war effort is problematic for several reasons. Foremost, this requirement violates the principle of legality because it does not find support in the sources of international law. As this article demonstrates, this requirement lacks recognition within customary international law or as a general principle of law. Instead, the specific direction requirement is the result of

¹³² *ibid* 111.

¹³³ *ibid* 114.

¹³⁴ *ibid* 25.

a creative interpretation of the early *Tadić* appeal judgment, which contrasted criminal responsibility for aiding and abetting with criminal responsibility for common design.

This interpretation of the *actus reus* element of aiding and abetting also undermines the intended purpose of accomplice liability as the mode of criminal responsibility best suited to address situations where the accused accomplice is removed from the scene of the crime. While this interpretation attempts to bridge the temporal or spatial gap between the accomplice and the principal perpetrator by requiring a showing of a direct and specific contribution to the offence, this interpretation distorts the *actus reus* element and disregards settled ICTY jurisprudence. Indeed, the interpretative emphasis should not be on compensating for the gap between the accomplice and the perpetrator by adding additional requirements to the *actus reus* of complicity, but on the level of knowledge of the accused and the effect that his assistance has on the crime. The specific direction requirement also brings aiding and abetting into the vicinity of commission, thereby confusing the legal standard for both crimes. Finally, this restrictive interpretation of aiding and abetting highlights a fundamental concern for international criminal law, as judges continually lower the expectations for persons vested with authority during armed conflict. This outcome raises serious concerns regarding the justness of international criminal law practice and undermines the core value of international criminal law: ending impunity.

Tackling Age Discrimination against Older Workers: A Comparative Analysis of Laws in the United Kingdom and Finland

*Alysia Blackham**

Abstract

The European Union is experiencing a period of dramatic demographic change. As individuals live longer, and the proportion of 'prime age' workers decreases, governments are increasingly seeking to extend working life, particularly by encouraging older workers to remain in employment for longer. This has encouraged a greater focus on reducing age discrimination in employment to enable older workers who wish to continue to work to do so, including through the introduction of age discrimination legislation at the EU and domestic level. However, despite the presence of a general framework for equal treatment in employment and occupation at the EU level, there are still significant differences across national provisions. This paper considers how age discrimination laws affecting employment differ between EU Member States, focusing particularly on the United Kingdom and Finland.

Keywords

Age Discrimination, Comparative Law, Equality Law, United Kingdom, Finland, European Union Law, Labour Law

The European Union (EU) is experiencing a period of dramatic demographic change. As individuals live longer, and the proportion of 'prime age' workers decreases, governments are increasingly seeking to extend working life, particularly by encouraging older workers to remain in employment for longer.¹ This has prompted a greater focus on reducing age discrimination in employment to enable older workers who wish to continue to

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¹ European Commission, *Active Ageing and Solidarity between Generations: A Statistical Portrait of the European Union 2012* (Publications Office of the European Union 2011) 10; Dagmar Schiek, 'Age Discrimination before the ECJ—Conceptual and Theoretical Issues' (2011) 48 CML Rev 777, 779.

work to do so, including through the introduction of age discrimination legislation at the EU and domestic levels.² However, despite the presence of a general framework for equal treatment in employment and occupation at the EU level, in the form of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Directive),³ there are still significant differences across national provisions, particularly as they relate to the treatment of older workers.

In this context, this paper considers how age discrimination laws affecting the employment of older workers differ between EU Member States, focusing particularly on the United Kingdom (UK) and Finland. Finland has the longest history of legal intervention in age discrimination in the EU,⁴ and is notable for the relative success of its labour market interventions relating to older workers.⁵ As a result, it is an interesting and worthwhile comparator for other EU countries. In this paper, I identify four key differences between age discrimination laws in the UK and Finland, relating to: the development and structure of the legislation; the duties placed on public authorities; the use of retirement ages; and enforcement mechanisms. I argue that these differences may be attributed to contrasting national attitudes to age and age equality, conceptions of 'equality' more broadly, and the degree of individualism or collectivism evident in the laws and their means of enforcement.

Thus, despite EU legislative intervention in the area of age equality, there are still substantial differences between the laws adopted in different Member States. On the face of it, age discrimination laws that adopt collectivist measures, like those in Finland, have the potential to improve outcomes for older workers by facilitating enforcement at the macro or societal level. There are therefore worthwhile lessons for the UK from the Finnish legislative model, and these are explored in the paper.

1 EU Regulation

1.1 Age discrimination

Instruments to prevent age discrimination were first introduced at the EU level in 2000. In 1997, the Treaty Establishing the European Community was amended by the Treaty

² See Regulatory Impact Assessment for the Employment Equality (Age) Regulations 2006 (UK), SI 2006/1031, para 3.

³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303.

⁴ Nick Adnett and Stephen Hardy, 'The Peculiar Case of Age Discrimination: Americanising the European Social Model?' (2007) 23 *EJLE* 29, 35.

⁵ Hedva Sarfati, 'Social Dialogue: A Potential "Highroad" to Policies Addressing Ageing in the EU Member States' (2006) 59 *Intl Soc Sec Rev* 49, 63.

of Amsterdam to include a new article 6a⁶ that empowered the Council of the European Union to take action to combat discrimination on a number of grounds, including age. Empowered by the now article 19 of the Treaty on the Functioning of the European Union (TFEU), in 2000 the Council of the European Union adopted the Directive which established a general framework for equal treatment in employment and occupation, including on the grounds of age.⁷ Further, the Court of Justice of the European Union (CJEU) has held (controversially) that non-discrimination on the grounds of age is a general principle of EU law,⁸ which is given specific expression by the Directive.⁹

The Directive prohibits direct and indirect discrimination based on age in employment and occupation, and applies to conditions for access to employment, access to training, employment and working conditions and involvement in work organisations. Direct age discrimination is defined as treating a person less favourably than another in a comparable situation on the grounds of age.¹⁰ Indirect age discrimination is defined as a situation where:

an apparently neutral provision, criterion or practice would put persons (...) [of] a particular age (...) at a particular disadvantage compared with other persons unless (...) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹¹

A number of specific exceptions to the principle of equal treatment are provided for in the Directive. First, the provisions in relation to age discrimination do not apply to the armed forces. Second, Member States may provide that a difference of treatment does not constitute discrimination where ‘such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’.¹² Third, and perhaps most significantly, article 6(1) of the Directive provides that Member States may

provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

⁶ Treaty Establishing the European Community (Nice Consolidated Version) [2002] OJ C325/43, art 13; now Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/01, art 19.

⁷ Directive.

⁸ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, para 75; Case C-555/07 *Kücükdevici v Swedex GmbH* [2010] ECR I-365, paras 21, 50.

⁹ *Kücükdevici* (n 8) para 21. See further Dagmar Schiek, ‘The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation’ (2006) 35 *Ind LJ* 329; Marlene Schmidt, ‘The Principle of Non-Discrimination in Respect of Age: Dimensions of the ECJ’s *Mangold* Judgment’ (2006) 7 *German LJ* 505.

¹⁰ Directive, art 2(2)(a).

¹¹ *ibid* art 2(2)(b).

¹² *ibid* art 4(1).

The Directive provides examples of differences of treatment that might fall within the provision, including

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for (...) older workers (...) to promote their vocational integration or ensure their protection (...) (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Fourth, article 7(1) of the Directive makes provision for Member States to take positive action to achieve equality, by noting that ‘the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to [age] (...) with a view to ensuring full equality in practice’. While this raises the possibility of equality of outcomes, it does little to encourage Member States to address disadvantages: rather, such measures are merely not ‘prevented’ by the Directive and need to be positively adopted by Member States. It is therefore unsurprising that there has been limited use of positive action measures in European countries.¹³

Within the Directive there is a fundamental tension between the principle of equal treatment (and human rights objectives) and the justification of exceptions to the principle (driven by economic objectives). The Preamble to the Directive explicitly acknowledges this tension:

The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.¹⁴

The Directive attempts to strike an appropriate balance between these competing objectives through the use of the objective justification test: exceptions are acceptable where they are ‘objectively and reasonably justified by a legitimate aim (...) and if the means of achieving that aim are appropriate and necessary’.¹⁵ As a consequence, it is the responsibility of courts to determine the ‘ultimate boundaries’ of what is justified.¹⁶

This approach has two key limitations. First, the test is unclear and provides insufficient certainty for when an exception will be acceptable. In particular, determining what will constitute a ‘legitimate aim’ and be ‘appropriate and necessary’ provides

¹³ See Bob Hepple, ‘Equality at Work’ in Bob Hepple and Bruno Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945–2004* (Hart 2009) 151–54.

¹⁴ Directive, Preamble, recital 25. See also Directive, art 6.

¹⁵ *ibid* art 6(1).

¹⁶ Malcolm Sargeant, ‘Distinguishing between Justifiable Treatment and Prohibited Discrimination in Respect of Age’ (2013) 4 JBL 398, 401.

significant scope for judicial discretion and different interpretations. By leaving these issues to be resolved by the courts, the Directive makes frequent legal challenges nearly inevitable, necessitating significant time and cost to achieve a level of clarity.

Second, the test provides significant scope for Member States to undermine the principle of equal treatment on the grounds of age. It may therefore limit significantly the protection available to older workers by effectively legitimising discrimination on the grounds of age.¹⁷ Indeed, article 6 has been described as being so broad that it allows governments ‘to tolerate most forms of age discrimination indefinitely’.¹⁸ As a result, the test is not an adequate means of striking an appropriate balance between competing objectives.

1.2 Mandatory retirement

EU legislative instruments provide little protection for workers who do not wish to retire:¹⁹ indeed, the Directive is explicitly made without prejudice to national provisions laying down retirement ages.²⁰ EU case law has explicitly endorsed the use of compulsory retirement ages if the provisions are objectively and reasonably justified by a legitimate aim (such as legitimate employment policy, labour market and vocational training objectives) and the means of achieving that aim are appropriate and necessary, in accordance with article 6(1).²¹

To be ‘legitimate’, the aims underlying retirement provisions must have a public interest nature beyond purely individual reasons particular to an employer’s situation.²² However, in pursuing legitimate aims, a national rule may allow a degree of flexibility for employers.²³ These aims do not need to be explicitly specified in legislation so long as the general context of the provision allows for the aims to be identified.²⁴ Further, the

¹⁷ Malcolm Sargeant, ‘Age Discrimination’ in Malcolm Sargeant (ed), *The Law on Age Discrimination in the EU* (Kluwer Law International 2008) 3; Malcolm Sargeant, ‘The European Court of Justice and Age Discrimination’ (2011) 2 JBL 144, 148.

¹⁸ House of Commons Education and Employment Committee, ‘Age Discrimination in Employment’ (2001) app 17.

¹⁹ Schiek (n 1) 790.

²⁰ See Directive, Preamble, recital 14. However, this has not acted to exclude retirement ages from review under the Directive.

²¹ See, for example, Case 411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531; Case C-388/07 *R (Age Concern England) v Secretary of State for Business Enterprise and Regulatory Reform* [2009] ECR I-1569; Case C-45/09 *Rosenblatt v Oellerking Gebäudereinigungsges* [2011] ECR I-9391; Case C-250/09 *Georgiev v Tehnicheski universitet—Sofia, filial Plovdiv* [2011] ECR I-11869; Joined Cases C-159/10 and C-160/10 *Fuchs v Land Hessen* [2011] ECR I-6919.

²² *Age Concern* (n 21) para 46.

²³ *ibid.*

²⁴ *Palacios* (n 21) paras 54–57; Case C-141/11 *Torsten Hörnfeldt v Posten Meddelande AB* [2012] ECLI:EU:C:2012:421, para 24; Case C-286/12 *Commission v Hungary* [2013] ECLI:EU:C:2012:687, para 58.

aims underlying a provision may change over time without affecting the validity of the law itself.²⁵

In the context of retirement provisions, the CJEU has held that legitimate aims might include:

- the creation of a ‘favourable age structure’ to establish a balance between generations;²⁶
- distributing work and professional opportunities between generations;²⁷
- planning for staff departures and recruitment;²⁸
- encouraging recruitment and promotion of young people²⁹ and other categories of workers;³⁰
- avoiding legal disputes with older employees over their ability to perform their duties³¹ or the need to dismiss older employees on performance grounds,³² particularly in ‘situations which are humiliating for elderly workers’;³³ and
- standardising the age-limit for compulsory retirement in a specific sector.³⁴

However, ensuring air traffic safety is not a legitimate aim in this context, being beyond the scope of legitimate employment policy, labour market and vocational training objectives.³⁵ Budget savings are also not considered a legitimate aim,³⁶ though Member States may take budgetary constraints into account when justifying a retirement age if they are considered alongside other factors (such as social, political or demographic issues).³⁷

The idea that the distribution of work and professional opportunities between generations could be a legitimate aim to justify age discrimination reflects the ‘fair innings’ argument, and the idea that mandatory retirement will open up jobs for (younger) workers.³⁸ This is concerning, as there is increasing evidence and recognition that the ‘fair innings’ argument is based on flawed assumptions and reasoning.³⁹ The

²⁵ *Fuchs* (n 21) paras 41–42.

²⁶ *Fuchs* (n 21) paras 47, 49; *Georgiev* (n 21) para 46; *Commission v Hungary* (n 24) para 62.

²⁷ *Palacios* (n 21) para 53; *Georgiev* (n 21) para 42; Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47, para 65; *Rosenbladt* (n 21) para 43.

²⁸ *Rosenbladt* (n 21) paras 60–62.

²⁹ *Georgiev* (n 21) para 45; *Fuchs* (n 21) paras 47, 49; *Hörnfeldt* (n 24) para 29.

³⁰ *Palacios* (n 21) para 65; *Rosenbladt* (n 21) paras 43, 60–62.

³¹ *Fuchs* (n 21) paras 47, 50.

³² *Rosenbladt* (n 21) para 43.

³³ *Hörnfeldt* (n 24) para 34.

³⁴ *Commission v Hungary* (n 24) para 61.

³⁵ Case C-447/09 *Prigge v Deutsche Lufthansa AG* [2011] ECR I-8003, para 82.

³⁶ *Fuchs* (n 21) para 74.

³⁷ *ibid* para 73.

³⁸ Richard Posner, *Aging and Old Age* (University of Chicago Press 1995) 355; Bob Hepple, ‘Age Discrimination in Employment: Implementing the Framework Directive 2000/78/EC’ in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart 2003) 90–91.

³⁹ See, for example, Performance and Innovation Unit, ‘Winning the Generation Game: Improving Opportunities for People Aged 50–65 in Work and Community Activity’ (April 2000) 39–40 <<http://www.>

legitimate aims identified by the CJEU reflect and endorse a number of collective assumptions around age and the ageing process, particularly the institutionalisation of the life course and decline theory of ageing. Thus, there are strong grounds to question the 'legitimate aims' identified in CJEU case law.⁴⁰

Once a legitimate aim has been identified, the Court must determine whether the differences in treatment are appropriate and necessary to achieve that aim. Member States have a broad discretion in defining measures to achieve a legitimate aim.⁴¹ However, in exercising this discretion, Member States must not frustrate the prohibition of age discrimination in the Directive.⁴² Member States are required to balance the desirability of older workers remaining in employment with other (possibly divergent) interests, such as an individual's desire to retire and the need to promote young people's entry into the labour market.⁴³ For a measure to be appropriate and necessary it must not appear unreasonable in the light of the aim pursued and must be supported by evidence.⁴⁴

In applying the proportionality test, the Court will often consider whether workers are entitled to a 'not unreasonable' pension following retirement.⁴⁵ If a sufficient pension is available, the Court generally accepts that retirement rules will not 'unduly prejudic[e] the legitimate claims of workers.'⁴⁶ However, even if retirement income is deemed to be inadequate, this will not prevent termination at a standard retirement age if an employee is able to continue working, either with their current employer or with a different company⁴⁷ or with a different type of employment arrangement, such as a fixed-term contract.⁴⁸ This reflects the desire to ensure adequacy of income for the elderly—if not through a pension, then through the later possibility of paid employment. Some older workers have been found to experience substantial difficulties in recruitment, and may fail to return to the labour market once they have lost their job.⁴⁹ As a result, it is unrealistic to assume that retired workers will have the chance to return to work to secure an adequate income. Further, this argument implicitly acknowledges that older workers have no right or entitlement to remain in employment, meaning that a retirement rule cannot 'unduly prejudic[e]' their 'legitimate claims', as they have no legitimate claim to participate in the labour market. Thus, the CJEU has implicitly endorsed potentially

donaldhirsch.com/generation.pdf> accessed 14 July 2015.

⁴⁰ See Alysia Blackham, 'Extending Working Life for Older Workers: An Empirical Legal Analysis of Age Discrimination Laws in the UK' (PhD thesis, University of Cambridge 2014) ch 3.

⁴¹ *Palacios* (n 21) para 68.

⁴² *Age Concern* (n 21) para 51.

⁴³ *Palacios* (n 21) paras 69, 71.

⁴⁴ *ibid* para 72; *Fuchs* (n 21) para 83.

⁴⁵ *Palacios* (n 21) para 73; *Rosenblatt* (n 21) paras 43, 48; *Georgiev* (n 21) para 54; *Fuchs* (n 21) paras 66–67; *Hörnfeldt* (n 24) para 42.

⁴⁶ *Palacios* (n 21) para 73; *Georgiev* (n 21) para 54; *Fuchs* (n 21) para 66.

⁴⁷ *Rosenblatt* (n 21) paras 73–76; *Fuchs* (n 21) para 66.

⁴⁸ *Hörnfeldt* (n 24) paras 40–41.

⁴⁹ See, for example, Malcolm Sargeant, 'United Kingdom' in Malcolm Sargeant (ed), *The Law on Age Discrimination in the EU* (Kluwer Law International 2008) 224.

ageist views regarding the allocation of work and professional opportunities on the grounds of age.

If a retirement rule has been collectively bargained and/or is tailored to the circumstances of the case, it is also more likely to be regarded as proportionate.⁵⁰ This reflects the argument that retirement ages:

should not be regarded as blanket age discrimination, but rather as part of a mutually agreed company personnel policy, or collective agreement, generally negotiated by individuals with reasonable bargaining power. [They] should only be banned if there are explicit reasons for governments to override such private contractual arrangements.⁵¹

As a result, it appears that age equality can be ‘trumped’ by freedom of contract, majority rule or bargaining,⁵² so long as the retirement rule is appropriately negotiated between the parties.

That said, the quality of individual consent to a retirement provision is often limited. Many employees have no choice but to accept the terms on which employment is offered, and will have little or no opportunity to bargain or amend a retirement age specified in an employment contract.⁵³ Further, union members are likely to have only a ‘diluted influence’ over the terms of a collective agreement, limiting the meaningfulness of their consent.⁵⁴ Finally, a retirement age is unlikely to be a primary concern or consideration of many (particularly younger) employees at the time a contract is signed. As a result, consent to a retirement age is ‘largely illusory’ in many cases,⁵⁵ undermining the argument that retirement ages should be seen as a negotiated private contractual arrangement.

Retirement rules are also more likely to be proportionate if they apply to professions with a limited number of posts where individuals cannot be promoted without a vacancy.⁵⁶ This reflects a generally unsubstantiated belief that retirement rules help to facilitate the distribution of work and professional opportunities between generations.

Overall, the application of the proportionality test does not subject retirement provisions to rigorous scrutiny or require substantial proof or evidence of necessity from Member States. As a result, it appears likely that a retirement provision that reflects any of the above considerations will be deemed valid by the CJEU, providing little protection for workers who do not wish to retire. That said, *Commission v Hungary* may mark a shift towards more rigorous scrutiny of the proportionality of mandatory retirement ages. In that case, which involved the lowering of compulsory retirement ages for judges, prosecutors and notaries in Hungary from 70 to 62 years of age, the CJEU ruled that Hungary had ‘failed to provide any evidence’ that more lenient provisions could not have achieved

⁵⁰ *Palacios* (n 21) para 74; *Rosenbladt* (n 21) paras 49–50, 67–69; *Hörnfeldt* (n 24) para 32.

⁵¹ Morley Gunderson, *Banning Mandatory Retirement: Throwing out the Baby with the Bathwater* (Background No 79, CD Howe Institute 2004) 6.

⁵² Michael Connolly, ‘The Coalition Government and Age Discrimination’ (2012) 2 JBL 144, 158.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ See *Georgiev* (n 21) para 52.

the same aims,⁵⁷ particularly given other changes to increase public service retirement ages were being introduced via a 'gradual staggering'.⁵⁸ Therefore, the provisions were not necessary to achieve the standardisation of retirement ages across the public service. Further, the provisions were not appropriate to achieve a more balanced age structure among judges, prosecutors and notaries.⁵⁹ the sudden retirement of those aged between 62 and 70 would create a 'very significant acceleration' of turnover in positions in 2012, and a 'radical slowing down' thereafter, particularly as the retirement age would then be progressively increased (with the rest of the public service) to 65.⁶⁰ Therefore, the change would not create a balanced age structure in the medium and long term.⁶¹

Commission v Hungary demonstrates that the CJEU will carefully examine the proportionality of retirement ages in some circumstances. However, that case is exceptional for three reasons. First, it was not a preliminary ruling, meaning the CJEU was not limited to providing guidance to national courts.⁶² Second, the case involved the abrupt *lowering* of compulsory retirement ages, rather than the maintenance of established retirement provisions. Unlike in other cases, the change therefore failed 'to protect the legitimate expectations of the persons concerned'.⁶³ Third, the broader impact of the case may be limited by its particular political circumstances: prior to the CJEU's decision, the Venice Commission had condemned Hungary's changing of judicial retirement rules as potentially 'open[ing] the way for undue influence on the composition of the judiciary',⁶⁴ and raised concerns that the rules could be used 'as a means to put an end to the term of office of persons elected or appointed under the previous Constitution'.⁶⁵ The new retirement rules potentially undermined the independence of the judiciary and the rule of law. It is therefore unsurprising that the CJEU adopted a more rigorous approach in this case, as age discrimination law was being used to secure broader political ends. However, this more rigorous approach is unlikely to be extended to subsequent cases, particularly where a retirement age has already been in place for some time.

⁵⁷ *Commission v Hungary* (n 24) para 71.

⁵⁸ *ibid* paras 73–74.

⁵⁹ *ibid* para 79.

⁶⁰ *ibid* para 78.

⁶¹ *ibid* para 77.

⁶² See further Elaine Dewhurst, 'Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance between the Generations?' (2013) 50 CML Rev 1333, 1345.

⁶³ *Commission v Hungary* (n 24) para 68.

⁶⁴ European Commission for Democracy Through Law, 'Opinion on the New Constitution of Hungary' (Opinion No 621/2011, 20 June 2011) para 108 <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e)> accessed 14 July 2015.

⁶⁵ *ibid* para 140.

2 UK Regulation

The EU Directive was adopted in the UK by the Employment Equality (Age) Regulations 2006 (the Regulations).⁶⁶ The Regulations were expressed as being designed to encourage the labour market participation of groups previously subject to age discrimination, while still being mindful of the need to allow 'employers to manage their businesses effectively'.⁶⁷ In 2010, the various UK anti-discrimination provisions, including the Regulations, were consolidated into the Equality Act 2010 (the Act) to simplify the law, remove inconsistencies and strengthen equality protection.⁶⁸ The Act specifies nine protected characteristics, including age, which cannot be used as a basis for unfair treatment. The Act defines age as a protected characteristic as 'a reference to a person of a particular age group', being 'a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages'.⁶⁹

2.1 Age discrimination

The Act prohibits direct and indirect discrimination, harassment and victimisation on the grounds of age in the workplace, during recruitment, in setting the terms of employment, deciding to award promotions and provide training, and in dismissal.⁷⁰ Direct discrimination is defined as a person treating another person less favourably than they would treat others because of a protected characteristic.⁷¹ However, in relation to age, less favourable treatment is not discrimination if the treatment is shown to be 'a proportionate means of achieving a legitimate aim'.⁷² This limitation does not apply to any other protected characteristic.

Indirect discrimination is defined as applying a provision, criterion or practice that is discriminatory in relation to a relevant protected characteristic.⁷³ Applying a provision, criterion or practice will be discriminatory if:

- it is, or would be, applied to people who do not share a protected characteristic;
- it puts, or would put, persons sharing a protected characteristic at a particular disadvantage when compared with persons who do not share a characteristic;
- it puts, or would put, a particular individual at that disadvantage; and

⁶⁶ Employment Equality (Age) Regulations 2006, SI 2006/1031.

⁶⁷ Department of Trade and Industry, *2005 Compendium of Regulatory Impact Assessments* (Employment Relations Research Series 48, Department of Trade and Industry 2006) vol 2, 42 <<http://webarchive.nationalarchives.gov.uk/20060715200838/dti.gov.uk/files/file31178.pdf>> accessed 14 July 2015.

⁶⁸ Explanatory Notes to the Equality Act 2010, paras 10–11.

⁶⁹ Equality Act 2010 s 5.

⁷⁰ *ibid* s 39.

⁷¹ *ibid* s 13(1).

⁷² *ibid* s 13(2).

⁷³ *ibid* s 19(1).

- the provision, criterion or practice is not shown to be a proportionate means of achieving a legitimate aim.⁷⁴

In addition to exempting age discrimination that is 'a proportionate means of achieving a legitimate aim', the Act makes a number of specific exceptions to the prohibition of age discrimination in employment, including for:

- occupational requirements which are a proportionate means of achieving a legitimate aim;⁷⁵
- benefits based on length of service that:
 - relate to a period of service of up to five years duration; or
 - relate to a period of service exceeding five years duration and which the employer reasonably believes fulfil a business need;⁷⁶ and
- enhanced redundancy payments.⁷⁷

The Act also established a public sector equality duty, requiring public authorities or people exercising public functions, in the exercise of their functions, to have 'due regard' to the need to:

- eliminate discrimination, harassment, victimisation and conduct prohibited by the Act;
- advance equality of opportunity between persons who share and do not share a protected characteristic, including by:
 - removing or minimising disadvantages suffered by persons who share a protected characteristic that are connected to that characteristic;
 - taking steps to meet the particular needs of persons who share a protected characteristic; and
 - encouraging persons who share a protected characteristic to participate in public life or activities in which their participation is disproportionately low; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it, including by tackling prejudice, and promoting understanding.⁷⁸

A review of the public sector equality duty was conducted in 2013 'to establish whether the Duty is operating as intended'.⁷⁹ The Steering Group concluded that it was too early to make a final judgement about the impact of the duty, as it was only introduced in April 2011, and the available evidence was as yet inconclusive, particularly in relation to

⁷⁴ *ibid* s 19(2).

⁷⁵ *ibid* sch 9, s 1(1).

⁷⁶ *ibid* sch 9, s 10.

⁷⁷ *ibid* sch 9, s 13.

⁷⁸ *ibid* s 149.

⁷⁹ HM Government, 'Review of Public Sector Equality Duty' <<https://www.gov.uk/government/policy-advisory-groups/review-of-public-sector-equality-duty-steering-group>> accessed 22 June 2015.

the associated costs and benefits of implementing the duty.⁸⁰ The Group recommended that the government consider conducting a formal evaluation of the duty in 2016.

Finally, the Act allows positive action that is a proportionate means of achieving the aim of:

- enabling or encouraging persons who share a protected characteristic to overcome or minimise disadvantage connected to that characteristic;
- meeting the needs of persons who share a protected characteristic which are different from the needs of persons who do not share the characteristic; or
- enabling or encouraging persons who share a protected characteristic to participate in an activity in which their participation is disproportionately low.⁸¹

Similarly, positive action may be taken in recruitment and promotion to address a disadvantage or disproportionately low participation.⁸² However, a person may only be treated more favourably than another in recruitment and promotion because of a protected characteristic if: they are as qualified as the other person (the so-called tie-break); the employer or company does not have a policy of treating persons who share the protected characteristic more favourably in recruitment or promotion; and the action is a proportionate means of overcoming or minimising the disadvantage, or promoting participation in the activity.⁸³

While positive action is allowed under the Act, most employers are unlikely to take advantage of the provisions: positive action is seen as too risky and resource-intensive to be beneficial, and may lead to a 'potential minefield' of legal action if employers 'get it wrong'.⁸⁴ Rather than being helpful to employers, the sections are a 'trap for the well intentioned'.⁸⁵ The drafting of the sections makes them 'too dangerous [for employers] to use safely',⁸⁶ limiting any possibility of positive action in the UK.⁸⁷

⁸⁰ Government Equalities Office, 'Review of the Public Sector Equality Duty: Report of the Independent Steering Group' (6 September 2013) 25 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237194/Review_of_the_Public_Sector_Equality_Duty_by_the_Independent_Steering_Group.pdf> accessed 14 July 2015.

⁸¹ Equality Act 2010 s 158(1)–(2).

⁸² *ibid* s 159.

⁸³ *ibid* s 159(3)–(4).

⁸⁴ Adrian Hoggarth and Louise Taft, 'Positive Action: Tie Breaks in the Recruitment Process' (*Prolegal*, 2 May 2012) <<http://www.prolegal.co.uk/employment-lawyer/tie-breaks-in-the-recruitment-process.htm>> accessed 14 July 2015.

⁸⁵ Adrian Hoggarth and Louise Taft, 'Legal Insight: Positive Discrimination—A Trap for the Well Intentioned?' (*HRZone*, 10 May 2012) <<http://www.hrzone.com/topic/recruitment/legal-insight-positive-discrimination-trap-well-intentioned/120274>> accessed 22 June 2015.

⁸⁶ Kingsley Napley, "'Positive Action"—Will It Make Any Difference?' (*Employment Law Blog*, 12 May 2011) <<http://www.kingsleynapley.co.uk/news-and-events/blogs/employment-law-blog/positive-action-will-it-make-any-difference>> accessed 22 June 2015.

⁸⁷ See further Lizzie Barmes, 'Navigating Multi-Layered Uncertainty: EU Member State and Organizational Perspectives on Positive Action' in Geraldine Healy and others (eds), *Equality, Inequalities and Diversity: Contemporary Challenges and Strategies* (Palgrave Macmillan 2010).

Age discrimination claims under the Act in relation to employment are heard by employment tribunals⁸⁸ that can make declarations, award compensation and recommend action.⁸⁹ The Act contains a provision shifting the burden of proof in discrimination cases: if there are facts from which the court could decide, in the absence of any other explanation, that a person has contravened the Act, the court must hold that the contravention occurred, unless it can be shown that the person did not contravene the Act.⁹⁰ The Act may also be enforced by the Equality and Human Rights Commission, which is empowered by the Equality Act 2006 to take enforcement action spanning investigations, unlawful act notices, action plans, agreements, applications to restrain, conciliation, and legal proceedings.⁹¹

2.2 Mandatory retirement

Prior to the introduction of the Regulations, employers choosing to implement a normal retirement age (NRA) for their workforce were protected by legislation, with employees dismissed on the ground of retirement after reaching the NRA or age 65 being unable to claim unfair dismissal or redundancy payments.⁹² In drafting the Regulations, the government conducted extensive consultation on whether the UK should introduce a national default retirement age (DRA) and, if so, what age it should be.⁹³ It was decided to include a DRA of 65 in the Regulations, while still allowing employers to retain a lower NRA if it could be objectively justified. Kilpatrick describes this decision as a ‘pragmatic concession to employer lobbying’ in which the government ‘buckl[ed] before employer pressure’ to introduce a DRA.⁹⁴ The introduction of a DRA was criticised extensively for placing age equality secondary to business performance.⁹⁵

Under the Regulations, employers were required to consider an employee’s request to work beyond the retirement age and could only retire an employee in accordance

⁸⁸ Equality Act 2010 s 120.

⁸⁹ *ibid* s 124.

⁹⁰ *ibid* s 136.

⁹¹ See also Linda Dickens, ‘The Road is Long: Thirty Years of Equality Legislation in Britain’ (2007) 45 Br J Ind Relat 463, 474.

⁹² Employment Rights Act 1996 (UK) s 109.

⁹³ Department of Trade and Industry, ‘Equality and Diversity: Age Matters’ (Age Consultation 2003) <<http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file24331.pdf>> accessed 14 July 2015; Department of Trade and Industry, ‘Towards Equality and Diversity: Report of Responses on Age’ (June 2003) <<http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file25939.pdf>> accessed 14 July 2015; Department of Trade and Industry, ‘Equality and Diversity Coming of Age: Report on the Consultation on the Draft Employment Equality (Age) Regulations 2006’ (March 2006) <<http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file26479.pdf>> accessed 14 July 2015.

⁹⁴ Claire Kilpatrick, ‘The New UK Retirement Regime, Employment Law and Pensions’ (2008) 37 Ind LJ 1, 23.

⁹⁵ Matthew Flynn, ‘The United Kingdom Government’s “Business Case” Approach to the Regulation of Retirement’ (2010) 30 Ageing and Society 421, 423; Mark Harcourt and others, ‘The Effects of Anti-Age Discrimination Legislation: A Comparative Analysis’ (2010) 26 Intl J Comp LLIR 47, 451.

with complicated procedural provisions.⁹⁶ Employers' failure to comply with these provisions resulted in a number of legal challenges to dismissals.⁹⁷ An employer could also refuse to offer employment to an applicant who was over the employer's NRA or, if the employer did not have a NRA, over the age of 65, or an applicant who would turn that age within six months.⁹⁸ Thus, the Regulations (and, later, the Act) effectively endorsed age discrimination in employment, in the form of mandatory retirement ages.

From 1 October 2011, with the passage of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011,⁹⁹ it has no longer been possible to retire an employee in the UK using the national DRA. Under the Regulations, employers may still implement an Employer-Justified Retirement Age (EJRA) if the requirement can be objectively justified as a proportionate means of achieving a legitimate aim. Maximum recruitment ages will also need to be objectively justified.

The case of *Seldon v Clarkson Wright & Jakes (A partnership)*¹⁰⁰ provides some clarification of what will be sufficient to justify an EJRA. In that case, the UK Supreme Court considered an appeal in which a lawyer claimed he was subjected to direct age discrimination when he was compulsorily retired from the partnership at age 65 in accordance with the partnership deed. In considering the CJEU case law, the UK Supreme Court categorised legitimate aims as falling within two broad classes: first, *inter-generational fairness*; and, second, *dignity*.¹⁰¹ In relation to the actual aims identified by the Employment Tribunal (ET) as justifying the retirement provision in this case—ensuring associates were given the opportunity of partnership after a reasonable period; facilitating workforce planning; and limiting the need to use performance management to remove partners, thereby contributing to the firm's 'congenial and supportive culture'—the Court noted that each of these aims had been recognised by Luxembourg as legitimate social policy aims. The aims could also be related to the circumstances of the firm, making them legitimate in this particular case.¹⁰² In his additional comments, Lord Hope noted that while the aims were directed to the firm's own best interests, this did not prevent them being legitimate social policy aims. This implies that employers will be able to fairly readily identify legitimate aims to support a retirement policy.

The *Seldon* case was referred back to the ET to consider whether a retirement age of 65 was proportionate, as opposed to a retirement age more broadly: 'there is a difference between justifying *a* retirement age and justifying *this* retirement age'.¹⁰³ In May 2013, the ET held that the retirement age of 65 was appropriate and reasonably necessary for

⁹⁶ Employment Equality (Age) Regulations 2006, SI 2006/1031, reg 47, sch 6. For further description and critique of these provisions, see Kilpatrick (n 94).

⁹⁷ See, for example, *Compass Group Plc v Ayodele* [2011] IRLR 802; *Howard v Campbell's Caravans Ltd* [2011] UKEAT 0609_10_1205; *Bailey v R & R Plant (Peterborough) Ltd* [2011] UKEAT 0370_10_1805.

⁹⁸ Employment Equality (Age) Regulations 2006, SI 2006/1031, reg 7(4).

⁹⁹ Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, SI 2011/1069.

¹⁰⁰ [2012] UKSC 16.

¹⁰¹ *ibid* paras 56–57.

¹⁰² *ibid* para 67.

¹⁰³ *ibid* para 68.

achieving the aims of staff retention and planning for the future of the firm.¹⁰⁴ It was important that associates ‘should see that upon the retirement of partners opportunities were created for succession to partnership’, and that there was a ‘realistic long-term expectation as to when and where vacancies will arise.’¹⁰⁵ In deciding whether the age of 65 was proportionate, the Tribunal considered the importance of consent, the existence of the DRA, the state pension age, and the fact that the CJEU had considered 65 to be a proportionate age in the past. However, the ET also noted that the position ‘might have been different’ if Mr Seldon had been retired after abolition of the DRA and planned changes to the state pension age.¹⁰⁶ The ET’s decision on proportionality was upheld by the Employment Appeal Tribunal (EAT) in May 2014.¹⁰⁷

As it stands, *Seldon* indicates that employers will be able to justify an EJRA with relative ease. It appears that employers will be easily able to identify legitimate aims to justify a retirement age, so long as these aims are relevant to the employer’s particular circumstances. This will be particularly straightforward where the organisation has a hierarchy with limited senior positions, as is the case in a law firm or university. However, it may be more challenging to prove that the actual retirement age adopted is a proportionate means of achieving these aims, particularly given the government has deemed a DRA of 65 to no longer be appropriate for the general workforce. The ET and EAT’s further consideration of the *Seldon* case has provided very limited guidance on this issue, as the DRA was still in place at the time of Mr Seldon’s retirement.

2.3 Summary

In sum, the UK Act provides less protection for age discrimination in employment than other forms of discrimination, as both direct and indirect age discrimination may be justified as a ‘proportionate means of achieving a legitimate aim.’¹⁰⁸ This provides significant scope for employers to undermine the principle of equal treatment on the grounds of age. Given these limitations, it is informative to consider comparative perspectives on how legislation to combat age discrimination may be structured. In this context, the legal framework in Finland, which is regarded as a successful example of legislative intervention to support older workers,¹⁰⁹ is a useful point of comparison.

¹⁰⁴ The collegiality aim was not raised due to a lack of evidence: *Seldon v Clarkson Wright & Jakes* [2013] UKET 1100275_2007 paras 8, 36.

¹⁰⁵ *ibid* paras 76, 77.

¹⁰⁶ *ibid* para 92.

¹⁰⁷ *Seldon v Clarkson Wright & Jakes* [2014] UKEAT 0434_13_1305.

¹⁰⁸ Equality Act 2010 ss 13(2), 19(2).

¹⁰⁹ Hedva Sarfati, ‘Social Dialogue: A Potential “Highroad” to Policies Addressing Ageing in the EU Member States’ (2006) 59 *Intl Soc Sec Rev* 49, 63.

3 Finnish Regulation

3.1 Age discrimination

Non-discrimination on the basis of age is a core idea in many pieces of Finnish legislation. The Finnish Constitution provides: '[n]o one shall, without an acceptable reason, be treated differently from other persons on the ground of (...) age'.¹¹⁰ Further, under the Constitution: 'Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice'.¹¹¹ By defining discrimination as differential treatment *without an acceptable reason*, the Constitution raises the possibility that direct discrimination may be justified.¹¹²

These rights are further developed in the Employment Contracts Act (55/2001) (Finland) (Employment Contracts Act), which prohibits 'any unjustified discrimination [by employers] against employees on the basis of age'.¹¹³ Employers must also generally 'treat employees equally unless there is an acceptable cause for derogation deriving from the duties and position of the employees'.¹¹⁴

The Non-Discrimination Act (21/2004) (Finland) (the Non-Discrimination Act) was introduced to 'foster and safeguard equality and enhance the protection provided by law to those who have been discriminated against'¹¹⁵ and to implement the Directive in Finnish law. The Non-Discrimination Act prohibits discrimination on the basis of age in relation to:

- conditions for access to self-employment or means of livelihood;
- recruitment conditions, employment and working conditions, personnel training and promotion;
- access to training and vocational guidance; and
- membership and involvement in work-related organisations.¹¹⁶

Further, authorities are required to seek to

purposefully and methodically (...) foster equality and consolidate administrative and operational practices that will ensure the fostering of equality in preparatory work and decision-making [and] alter any circumstances that prevent the realization of equality.¹¹⁷

¹¹⁰ Constitution of Finland ch 2, s 6.

¹¹¹ *ibid* ch 2, s 18.

¹¹² Rainer Hiltunen, 'Report on Measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC—Country Report 2012 Finland' (2013) 72–73 <http://www.non-discrimination.net/search/apachesolr_search/hiltunen?page=1&filters=> accessed 14 July 2015.

¹¹³ Employment Contracts Act (55/2001) (Finland) ch 2, s 2.

¹¹⁴ *ibid*.

¹¹⁵ Non-Discrimination Act (21/2004) (Finland) s 1.

¹¹⁶ *ibid* ss 2, 6.

¹¹⁷ *ibid* s 4.

'Authorities' are defined broadly to include: central and local government authorities; independent bodies governed by public law; and societies governed by public law, individual actors and non-incorporated state enterprises when discharging public administrative functions.¹¹⁸

Different treatment on the grounds of age is exempt under the Non-Discrimination Act where 'it has a justified purpose that is objectively and appropriately founded and derives from employment policy, labour market or vocational training or some other comparable justified objective' or where it relates to qualification for retirement or invalidity benefits.¹¹⁹ The Non-Discrimination Act also exempts 'justified different treatment, in due proportion, that is founded on a genuine and decisive requirement relating to a specific type of occupational activity and the performance of said activity'.¹²⁰ The Non-Discrimination Act explicitly states that it does not prevent positive discrimination 'aimed at the achievement of genuine equality' so long as it is appropriate to its objective.¹²¹ Further, the Non-Discrimination Act exempts 'a procedure based on an equality plan, and intended to implement the intention of this Act in practice'.¹²²

Unlike the Directive, section 7 of the Non-Discrimination Act does not explicitly require actions to be 'appropriate and necessary' to be exempt from the scope of the Act. However, proportionality is regarded as a general principle of the Finnish legal system, meaning proportionality should be automatically taken into account when applying the Non-Discrimination Act, making the Act consistent with the Directive in practice.¹²³ That said, Hiltunen argues that the law would be clearer if the Non-Discrimination Act had incorporated an express requirement that exemptions be 'appropriate and necessary'.¹²⁴

Occupational safety and health authorities are responsible for supervising the prohibition of discrimination in employment.¹²⁵ Authorities may receive communications from employees, carry out inspections, and report cases of probable discrimination to a public prosecutor.¹²⁶

Under the Non-Discrimination Act, a court may award compensation for suffering as a result of discrimination (up to €16 430, or more 'where special cause exists'),¹²⁷ amend discriminatory contractual terms or declare a contract or any part of it to be void.¹²⁸ Further, the Discrimination Board may prohibit specific discriminatory conduct

¹¹⁸ *ibid.*

¹¹⁹ *ibid* s 7(3).

¹²⁰ *ibid* s 7(2).

¹²¹ *ibid* s 7.

¹²² *ibid* s 7(1).

¹²³ Hiltunen (n 112) 28.

¹²⁴ *ibid* 72–73.

¹²⁵ Non-Discrimination Act (21/2004) (Finland) s 11.

¹²⁶ See Act on Occupational Safety and Health Enforcement and Cooperation on Safety and Health at Workplaces (44/2006) (Finland).

¹²⁷ This may be inconsistent with EU law: see Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority (II)* [1993] ECR I-4367.

¹²⁸ Non-Discrimination Act (21/2004) (Finland) ss 9, 10.

and impose a conditional fine.¹²⁹ Individuals may also seek damages if they incur loss due to an employer ‘intentionally or through negligence [committing] a breach against obligations arising from the employment relationship’ or the Act, including the obligation to treat employees equally.¹³⁰ Discrimination in employment is also subject to criminal sanctions, with employers liable to a fine or imprisonment for up to six months for discriminating in recruitment or in employment ‘without an important and justifiable reason’.¹³¹

Given discrimination legislation was in place in Finland prior to the Directive coming into effect, it is unsurprising that the Finnish provisions occasionally deviate from the terms of the Directive. Hiltunen argues that the legislation now reflects ‘a certain dualism’, with older acts prohibiting discrimination in ‘rather general terms’ and more recent legislation following the framework of the Directive.¹³² However, preparatory works that guide the interpretation of the legislation have indicated that the law should be interpreted in accordance with the wording of the Directive and the case law of the CJEU.¹³³ This has arguably alleviated the significance of any discrepancy between the provisions.¹³⁴

3.2 Mandatory retirement

Finland has a default retirement age of 68 for the general workforce. Under the Employment Contracts Act, chapter 6, section 1a, employment relationships for employees other than civil servants are terminated without notice at the end of the month in which the employee turns 68, unless the employer and employee agree to continue the relationship, including on the basis of a fixed-term extension.¹³⁵ Similar arrangements are in place for civil servants and municipal workers.¹³⁶ Employers and employees may also agree to a different retirement age, either in an employment contract or through collective agreement. Negotiated retirement ages must comply with the Non-Discrimination Act—that is, they must have ‘a justified purpose that is objectively and appropriately founded and derives from employment policy, labour market or vocational training or some other comparable justified objective’.¹³⁷ Contractual provisions may be ‘adjusted or ignored’ if they are ‘contrary to good practice or otherwise unreasonable’.¹³⁸ According to Hiltunen, many employers have

¹²⁹ *ibid* s 13.

¹³⁰ Employment Contracts Act (55/2001) (Finland) ch 12, s 1.

¹³¹ Criminal Code of Finland (39/1889) (Finland) ch 47, s 3.

¹³² Hiltunen (n 112) 5.

¹³³ *ibid* 9.

¹³⁴ *ibid*.

¹³⁵ See further *ibid* 12.

¹³⁶ See further *ibid* 77.

¹³⁷ Non-Discrimination Act (21/2004) (Finland) s 7(3).

¹³⁸ Employment Contracts Act (55/2001) (Finland) ch 10, s 2.

adopted internal rules relating to retirement ages, and employers and employees often agree to include these rules in employment contracts.¹³⁹

4 Comparison and critique

While both the UK and Finland operate within the EU legal framework, the countries' approaches to age discrimination laws vary markedly. This is consistent with Bell's analysis of the extent to which EU Directives have encouraged the convergence of anti-discrimination law: while the Directives may have encouraged Member States to take action in the equality field,

deeper scrutiny suggests that national models have not withered away under the influence of EU law. Europeanisation may have modified national practices, but there is still ample evidence of local diversity.¹⁴⁰

The sections that follow consider four aspects of local diversity evident in UK and Finnish age discrimination laws, relating to: the development and structure of the legislation; the duties placed on public authorities; the use of retirement ages; and available enforcement mechanisms.

4.1 Development and structure of legislation

First, the Finnish legislation reflects 'a certain dualism', with older acts prohibiting discrimination in 'rather general terms' and more recent legislation following the framework of the Directive.¹⁴¹ In contrast, all UK legislation closely follows the terms of the Directive. As noted above, preparatory works that guide the interpretation of the Finnish legislation have rightly indicated that the law should be interpreted in accordance with the wording of the Directive and the case law of the CJEU.¹⁴² This has arguably alleviated the significance of any discrepancy in the Finnish provisions¹⁴³ and, indeed, any discrepancies between the law in Finland and the law in the UK.

However, while discrepancies between the provisions are likely to have limited practical impact, the different way the national provisions have developed is likely to have more significant ramifications. The 'certain dualism' in Finnish legislation reflects the fact that Finland has a longer history of promoting age equality than most other EU Member States: age discrimination was prohibited in Finland well before the

¹³⁹ Hiltunen (n 112) 78.

¹⁴⁰ Mark Bell, 'The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?' (2008) 79 *Pol Q* 36, 43.

¹⁴¹ Hiltunen (n 112) 5.

¹⁴² *ibid* 9.

¹⁴³ *ibid*.

implementation of the Directive,¹⁴⁴ meaning the terms of older acts sometimes do not accord with the Directive. However, as a consequence of this long history, measures to prevent age discrimination are now well established in Finland.

In contrast, the UK has no real tradition of age equality measures: age discrimination legislation was only adopted in response to the passing of the Directive. Prior to this, the UK government had launched a non-statutory code of practice to encourage employers to adopt non-discriminatory policies.¹⁴⁵ However, there was a significant reluctance to adopt legislative age equality measures.¹⁴⁶ As Sargeant notes, 'it is (...) impossible to know whether the UK Government would have progressed to [legislative intervention] without the need to transpose the Directive.'¹⁴⁷ Despite impetus for change from the EU level, Dickens rightly recognises that the UK's 'receptiveness to European influence is not always wholehearted', particularly in the area of age equality.¹⁴⁸ That said, the Coalition's support for the abolition of the DRA in 2011 might reflect a shift in governmental attitudes towards age equality in the UK.¹⁴⁹

Difficulties in implementation can be experienced where the main stimulus and motivation for change originates from outside sources,¹⁵⁰ particularly where there is an incongruence between law, politics and society.¹⁵¹ As a result, despite adopting age discrimination legislation, it is unsurprising that some UK decision makers continue to view age and age discrimination with a degree of ambivalence or uncertainty. While age discrimination is generally viewed as undesirable in the UK, it is seen as less undesirable than other forms of discrimination and, indeed, potentially beneficial in an array of circumstances. Discriminating on the basis of age is often viewed as reasonable¹⁵²

¹⁴⁴ James Arrowsmith and Mark Hall, 'Industrial Relations and the Ageing Workforce: A Review of Measures to Combat Age Discrimination in Employment' (*European Industrial Relations Observatory*, 28 October 2000) <<http://www.eurofound.europa.eu/eiro/2000/10/study/t0010201s.htm>> accessed 22 June 2015.

¹⁴⁵ *ibid.*

¹⁴⁶ Malcolm Sargeant, 'The Employment Equality (Age) Regulations 2006: A Legitimisation of Age Discrimination in Employment' (2006) 35 *Ind LJ* 209, 211–12.

¹⁴⁷ *ibid* 214. This arguably also reflects a liberal democratic reluctance to interfere with market mechanisms: see further Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990) 62. See also Posner (n 38) 319; Richard Allen Epstein, *Equal Opportunity or More Opportunity? The Good Thing about Discrimination* (Civitas 2002) 19–20.

¹⁴⁸ Dickens (n 91) 468.

¹⁴⁹ It is arguable, though, that this change was prompted by the decisions in Case C-388/07 *R (Age Concern England) v Secretary of State for Business Enterprise and Regulatory Reform* [2009] ECR I-1569 and *R (Age UK) v Secretary of State for Business, Innovation & Skills* [2009] IRLR 1017.

¹⁵⁰ See, for example, Karoliina Ahtela, 'Promoting Equality in the Workplace: Legislative Intent and Reality' in Eva-Maria Svensson and others (eds), *Nordic Equality at a Crossroads: Feminist Legal Studies Coping with Difference* (Ashgate 2004) 75.

¹⁵¹ Gunther Teubner, 'After Legal Instrumentalism? Strategic Models of Post-Regulatory Law' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter 1986) 310–11.

¹⁵² Malcolm Sargeant, 'Mandatory Retirement Age and Age Discrimination' (2004) 26 *Employee Relations* 151, 154; Stephen McNair and Matthew Flynn, 'The Age Dimension of Employment Practices: Employer Case Studies' (Employment Relations Research Series No 42, Department of Trade and Industry 2005) 11 <<http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file11436.pdf>> accessed 14 July 2015.

and, at the very least, easily justifiable in the interests of society more broadly. As a consequence, age is afforded the least protection of any ground of discrimination,¹⁵³ with broad ranging exceptions to the principle of age equality.

In summary, then, the UK and Finland demonstrate dissimilar attitudes to age and age equality, which are reflected and embodied in their different legislative instruments and legislative history.

4.2 Duties on public authorities

Second, the Finnish legislation places a broad duty on authorities to ‘foster equality’.¹⁵⁴ In contrast, the duty in the UK is far more limited, requiring authorities to merely have ‘due regard’ to the need to advance equality.¹⁵⁵ It is questionable to what extent the ‘due regard’ standard in the UK will be effective in advancing equality in practice. Indeed, Fredman argues that the duty may be ‘too flimsy’ to encourage organisations to develop their own solutions to equality issues.¹⁵⁶ The duty is arguably insufficiently prescriptive and too open-ended in its pursuit of ‘equality’ to allow a determination of when it has been complied with or breached in practice, impairing its efficacy.¹⁵⁷ The duty may therefore encourage ‘mere procedural compliance’ and ‘box ticking’ by public sector organisations,¹⁵⁸ rather than promoting real change. Thus, the UK duty may have significant limitations in promoting equality in practice.¹⁵⁹ A more robust duty on public authorities with a stronger standard of review, such as that in Finland, may overcome some of these limitations. However, a Finnish-style duty may still be inefficient in practice, relying on judicial review to monitor and enforce compliance, and generally forcing public bodies to seek judicial determinations of whether they have complied with the duty.¹⁶⁰ Thus, even a stronger standard of review would not resolve all the issues associated with imposing positive duties on UK public authorities.

The differences in the duties placed on public authorities in Finland and the UK may reflect a more fundamental distinction between the conceptions and importance

¹⁵³ Helen Meenan, ‘Age Discrimination in the EU and the Framework’ in Malcolm Sargeant (ed), *The Law on Age Discrimination in the EU* (Kluwer Law International 2008) 18; Sargeant, ‘Age Discrimination’ (n 17) 3, 5; Sargeant, ‘The European Court of Justice and Age Discrimination’ (n 17) 146.

¹⁵⁴ Non-Discrimination Act (21/2004) (Finland) s 4.

¹⁵⁵ Equality Act 2010 s 149.

¹⁵⁶ Sandra Fredman, ‘The Public Sector Equality Duty’ (2011) 40 Ind LJ 405, 419.

¹⁵⁷ Sandra Fredman, ‘Breaking the Mold: Equality as a Proactive Duty’ (2012) 60 Am J Comp L 265, 271, 274. See also Hazel Conley, ‘Using Equality to Challenge Austerity: New Actors, Old Problems’ (2012) 26 Work Employment Society 349, 357–58; Sandra Fredman, ‘Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty’ (2014) 43 Ind LJ 349, 354–55.

¹⁵⁸ Fredman, ‘The Public Sector Equality Duty’ (n 156) 420; Fredman, ‘Breaking the Mold’ (n 157) 276.

¹⁵⁹ Despite these limitations, the duty may have had positive impacts on the behaviour of public bodies in practice: see the examples presented to the government review of the PSED, as described in Mary-Ann Stephenson, ‘Misrepresentation and Omission—An Analysis of the Review of the Public Sector Equality Duty’ (2014) 85 Pol Q 75, 77.

¹⁶⁰ Fredman, ‘Breaking the Mold’ (n 157) 281.

of 'equality' in Finnish and UK laws. There is limited agreement as to what 'equality' entails at both the domestic and EU level:¹⁶¹ 'equality' is not a unitary concept, and what it entails in practice is not straightforward.¹⁶² While the choice between different conceptions of equality is ultimately a matter for policy and value judgments, not logic,¹⁶³ governments do not always make a choice between competing interpretations. Indeed, Hepple identifies seven meanings of 'equality' evident in the Equality Act 2006 (UK) and government equality reviews, including:

- respect for equal worth, dignity and identity as fundamental human rights;
- eliminating status discrimination and disadvantage;
- consistent treatment/formal equality;
- substantive equality of opportunity;
- equality of capabilities;
- equality of outcomes; and
- fairness.¹⁶⁴

Alternatively, equality could be defined as encompassing:

- consistency (eg like individuals being treated alike, 'formal equality');
- individual merit (eg treating individuals according to merit, free from stereotypical assumptions);
- treating individuals differently according to their needs;
- achieving a fair distribution of social resources (eg preventing certain groups from bearing particular burdens on the grounds of group membership);
- equality of opportunities (eg giving individuals an equal set of alternatives from which to choose to pursue their idea of the 'good life');
- treating individuals with equal dignity and concern; and/or
- full participation and inclusion in social institutions.¹⁶⁵

These varied interpretations of equality continue to be evident in both UK and Finnish government policies. Equality is a fundamental principle within Finnish law, and has a long history of legislative expression and protection.¹⁶⁶ Indeed, Larja and others describe

¹⁶¹ Colm O'Cinneide, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 IJ Discrimination and the Law 7, 10–11.

¹⁶² See Sandra Fredman, 'The Age of Equality' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart 2003) 37–46.

¹⁶³ Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 2.

¹⁶⁴ See further Bob Hepple, *Equality: The New Legal Framework* (Hart 2011) 13–24.

¹⁶⁵ See Fredman, 'The Age of Equality' (n 162) 37–46. See also Fredman, *Discrimination Law* (n 163) 8–19.

¹⁶⁶ Ministry for Foreign Affairs of Finland, Finland's Permanent Representation to the European Union, 'Equality' <<http://www.finland.eu/public/default.aspx?nodeid=45375&contentlan=2&culture=en-US>> accessed 22 June 2015. See also 'Equality of Rights in Finland' (1913) 48 The Review of Reviews 364; Jon Kvist and others, 'Changing Social Inequality and the Nordic Welfare Model' in Jon Kvist and others (eds), *Changing Social Equality: The Nordic Welfare Model in the 21st Century* (Policy Press 2012) 6.

equality as the ‘cornerstone of the Finnish legal system’.¹⁶⁷ While Finnish legislation has increasingly come to reflect an individualised, Anglo-Saxon ‘rights-based model’ of equality, equality in Finland is still often focused on achieving social cohesion and the even distribution of resources, rather than an individual right not to be discriminated against,¹⁶⁸ reflecting the Nordic communitarian legal tradition.¹⁶⁹ This is evident in the Finnish Constitution, which provides that ‘[n]o one shall, without an acceptable reason, *be treated differently* from other persons’,¹⁷⁰ but does not establish an individual right not to be discriminated against.

Since ratifying the European Convention on Human Rights and joining the EU, Finnish legislation has increasingly come to reflect an individualised ‘rights-based model’ of equality,¹⁷¹ as embodied in the Non-Discrimination Act. A key challenge for contemporary Finnish discrimination law is reconciling a traditional emphasis on collective labour institutions (such as a trade-union regulated labour market) with the new push to achieve individual equality of opportunities.¹⁷² Perhaps as a result of this challenge, Pylkkanen criticises the ‘meek and half-hearted implementation of equality legislation’ in Finland, calling into question the practical efficacy of the prevailing equality rhetoric.¹⁷³ According to Pylkkanen, in Finland:

The efficient legal framework of anti-discrimination, surprisingly, is not regarded in general as being a vital component of an equal society. This fact can perhaps be best explained with the thin historical layer of rights discourse as well as with the prevailing myth of an already achieved equality.¹⁷⁴

However, while Finland does not have a strong rights discourse, the need to achieve ‘equality’ through social cohesion and the even distribution of resources is an enduring focus of government¹⁷⁵ and government intervention. Therefore, imposing a broad duty on authorities to ‘foster equality’ is entirely consistent with the Finnish conception of equality and the importance of equality in Finland.

In contrast, the UK has a more limited tradition of equality, with inequality forming

¹⁶⁷ Liisa Larja and others, ‘Discrimination in the Finnish Labor Market: An Overview and a Field Experiment on Recruitment’ (Ministry of Employment and the Economy, Employment and Entrepreneurship No 16/2012) 12 <http://www.tem.fi/files/32827/TEMjul_16_2012_web.pdf> accessed 14 July 2015.

¹⁶⁸ Anu Pylkkanen, ‘Transformation of the Nordic Model: From Welfare Politics to Gendered Rights’ (2007) 19 *Can J Women & L* 335, 340.

¹⁶⁹ Eva-Maria Svensson and others, ‘Introduction: Nordic Feminist Legal Studies at a Crossroads’ in Eva-Maria Svensson and others (eds), *Nordic Equality at a Crossroads: Feminist Legal Studies Coping with Difference* (Ashgate 2004) 3.

¹⁷⁰ Ch 2, s 6 (emphasis added).

¹⁷¹ Svensson and others (n 169) 3; Pylkkanen (n 168) 340–41.

¹⁷² Svensson and others (n 169) 3.

¹⁷³ Pylkkanen (n 168) 341.

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid* 340.

a fundamental historical feature of UK society.¹⁷⁶ According to Thane, age discrimination is 'embedded in British culture and is only recently and slowly beginning to shift'.¹⁷⁷ However, UK government documents now recognise equality as a key characteristic of a democratic society—'[a]t our best, we are defined by our tolerance, freedom and fairness'.¹⁷⁸ Similarly, the Discrimination Law Review stated:

Our vision is of a society where there is opportunity for all and responsibility from all, regardless of age, disability, gender, race, religion or belief or sexual orientation; as well as background. Everyone should have an equal chance to make the most of natural ability; equitable access to public provision; equal status as a citizen; and equal responsibility back to society.¹⁷⁹

This reflects a highly individualised notion of equality of opportunities, which contrasts markedly with the collective notion of equality evident in Finland. Further, UK law is grounded in a notion of equality driven by financial and efficiency considerations, and which is designed to ensure employers get 'the best performance out of their business'.¹⁸⁰ '[equality] is fundamental to building a strong economy'.¹⁸¹ As a consequence, the notion of 'equality of opportunities' pursued by UK laws is firmly bounded and driven by organisational efficiency. Therefore, laws to promote equality are also focussed on ensuring that 'the labour market is both strong and efficient',¹⁸² and that regulation does not impair organisational efficiency or progress. As a consequence, equality policies seek to reduce and limit government intervention in business,¹⁸³ and seek to adopt:

a light touch implementation that strikes the right balance between tackling age discrimination effectively by giving important new rights for individuals, whilst allowing business to continue to operate productively but fairly.¹⁸⁴

¹⁷⁶ Pat Thane, 'Introduction' in Pat Thane (ed), *Unequal Britain: Equalities in Britain since 1945* (Continuum 2010) 1. See also Margaret Otlowski, 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain' (Discrimination Law Review, Consultation Paper, 12 June 2007) 6 <<http://webarchive.nationalarchives.gov.uk/20120919132719/www.communities.gov.uk/documents/corporate/pdf/325332.pdf>> accessed 14 July 2015.

¹⁷⁷ Thane (n 176) 1.

¹⁷⁸ Department for Culture, Media and Sport and Government Equalities Office, 'Creating a Fairer and More Equal Society' (*Inside Government*, 30 April 2013) <<https://www.gov.uk/government/policies/creating-a-fairer-and-more-equal-society>> accessed 22 July 2013.

¹⁷⁹ Otlowski (n 176) 8.

¹⁸⁰ Department of Trade and Industry, 'Equality and Diversity Coming of Age' (n 93) 6.

¹⁸¹ HM Government, 'The Equality Strategy—Building a Fairer Britain' (December 2010) 5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85299/equality-strategy.pdf> accessed 14 July 2015. See further, Department of Trade and Industry, 'Equality and Diversity Coming of Age' (n 93) 6.

¹⁸² Department for Business Innovation and Skills, 'Flexible, Effective, Fair: Promoting Economic Growth through a Strong and Efficient Labour Market' (October 2011) 2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32148/11-1308-flexible-effective-fair-labour-market.pdf> accessed 14 July 2015.

¹⁸³ See, for example, *ibid*.

¹⁸⁴ Explanatory Memorandum to the Employment Equality (Age) Regulations 2006, para 2.

This limited conception of equality is reflected in the duties placed on authorities in the UK: by merely requiring public authorities or people exercising public functions to have ‘due regard’ to the need to ‘advance equality of opportunity’,¹⁸⁵ the legislation has created a limited role for government in achieving equality, leaving scope for organisations and business to operate with limited government intervention, and has reemphasised the prevailing individualised idea of equality.

4.3 Retirement ages

Third, while Finnish legislation establishes a default retirement age of 68 for the Finnish workforce, the UK abolished its national DRA in 2011, though employers may still justify mandatory retirement in limited circumstances.¹⁸⁶ The retention of a national default retirement age of 68 in Finland arguably reflects a more collectivist focus to equality laws. By retaining a national retirement age, and automatically terminating contracts at that age unless alternative provision is made, the Finnish provisions reflect a reification of retirement as a social institution and an orderly means of shifting older workers out of employment.¹⁸⁷ While the Finnish provisions make some allowance for individual desires and needs, by allowing employers and employees to contract out of the provisions, the default rule reflects a collective understanding of wellbeing and social good, rather than an acknowledgement of individual diversity.

Conversely, the UK’s more individualistic focus is reflected in the reasons for abolishing the national default retirement age in 2011. In abolishing the DRA, the UK government declared that:

We believe strongly in the freedom of people to work on for as long as they want and are able to. (...) These changes do not mean that individuals can no longer retire at 65—simply that the timing of that retirement becomes a matter of choice rather than compulsion.¹⁸⁸

Removing a national retirement age was therefore seen as an exercise in promoting individual choice and freedom, and reducing government intervention in the activities of employers and employees. This is entirely consistent with an Anglo-Saxon model of individual rights and freedoms: while employees may still retire, this is ultimately an individual or employer decision, which must be negotiated or arranged at an individual (not governmental) level. However, employers may still adopt an EJRA where that is a proportionate means of achieving a legitimate aim, indicating that an individualistic focus will not always take priority over business needs.

¹⁸⁵ Equality Act 2010 s 149.

¹⁸⁶ See further *Seldon v Clarkson Wright & Jakes (A partnership)* [2012] UKSC 16.

¹⁸⁷ Robert Atchley, ‘Retirement as a Social Institution’ (1982) 8 *Annual Rev Sociology* 263, 264–65.

¹⁸⁸ Department for Business Innovation and Skills, ‘Phasing out the Default Retirement Age: Government Response to Consultation’ (January 2011) 2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79303/11-536-phasing-out-default-retirement-age-government-response.pdf> accessed 14 July 2015.

4.4 Differences in enforcement mechanisms

Finally, age discrimination legislation in Finland may be enforced by occupational safety and health authorities, individual claimants and the police, with age discrimination being regarded as both a civil and criminal wrong. In the UK, while the Equality and Human Rights Commission may take enforcement action in age discrimination matters, the majority of enforcement occurs via individual complaints and enforcement in courts and tribunals.¹⁸⁹ This may reflect fundamental differences in the degree of individualism or collectivism evident in the laws and their means of enforcement.

Finnish law is grounded in a Nordic communitarian legal tradition, with a strong focus on pursuing substantive equality between social groups and a belief that individual rights are subservient to societal goals and norms.¹⁹⁰ As the Finnish welfare state has become increasingly orientated towards a liberal rights framework and market forces,¹⁹¹ an individualistic focus may destabilise this communitarian tradition.¹⁹² However, Finland still regards itself as having a prevailing 'sense of common responsibility' which is '[one] of the cornerstones of [its] success'.¹⁹³

This collectivist orientation is reflected in how equality legislation is enforced in Finland and, in particular, the primary enforcement of age discrimination laws by collective measures. First, the criminalisation of discrimination in employment implies that discrimination is viewed as a social wrong, rather than an individual concern. As a result, discrimination is more frequently investigated and punished by central authorities, rather than relying on individual enforcement mechanisms. Second, the use of occupational health and safety authorities as complaints and enforcement bodies for discrimination matters implies that discrimination is perceived as having health and wellbeing implications¹⁹⁴ and reflects the broader Finnish policy emphasis on collective wellbeing at work.¹⁹⁵

Given the enduring collectivist focus to the enforcement of discrimination legislation, it is unsurprising that few individual age discrimination cases have been brought under the Non-Discrimination Act (Finland).¹⁹⁶ However, it is also revealing to consider the limited utilisation of more collective forms of enforcement: across all regional divisions in Finland in 2010, only 13 requests for information were sent to employers in cases of

¹⁸⁹ Dickens (n 91) 475.

¹⁹⁰ Pylkkanen (n 168) 336.

¹⁹¹ *ibid.*

¹⁹² Heikki Ervasti, 'Class, Individualism and the Finnish Welfare State' (2001) 11 J Eur Soc Policy 9.

¹⁹³ Martti Ahtisaari, 'Finland's Leap Forward' (1999) 8 Presidents and Prime Ministers 7, 7.

¹⁹⁴ See Elizabeth A Pascoe and Laura Smart Richman, 'Perceived Discrimination and Health: A Meta-Analytic Review' (2009) 135 Psychol Bull 531.

¹⁹⁵ See Hannu Piekola, 'Nordic Policies on Active Ageing in the Labour Market and Some European Comparisons' (2006) 58 Intl Soc Sci J 545.

¹⁹⁶ See, for example, Lassi Koto and Petteri Viljakainen, 'Finland' in Nicky ten Bokum and Paul Bartelings (eds), *Age Discrimination Law in Europe* (Kluwer Law International 2009) 112.

alleged age discrimination.¹⁹⁷ Further, the District Courts and Courts of Appeal heard no cases of age discrimination reported to police between 2005 and 2010.¹⁹⁸ This implies that collectivist enforcement mechanisms are being utilised to a very limited extent to address age discrimination. It is possible that discrimination is instead being addressed via negotiations between unions and employers at the local level.¹⁹⁹ However, there is no firm evidence of this occurring. Further, equality measures are mostly contained within and advanced by legislation, rather than being negotiated via collective bargaining.²⁰⁰

The limited use of criminal penalties in Finland as a means of addressing age discrimination is consistent with other studies on the use of penal sanctions. Previous research has found that criminal sanctions are 'remarkably underuse[d]' in the field of discrimination.²⁰¹ Writing in 2006, Waaldijk and Bonini-Baraldi noted that there had been no reported case law on the use of penal sanctions in discrimination cases since 1985 in France, 1992 in the Netherlands, 1995 in Finland and Spain, and 1997 in Luxembourg.²⁰² This may be attributable to the higher burden of proof in criminal matters (and the inappropriateness of shifting the burden of proof, unlike in civil cases), the higher psychological cost of criminal proceedings, the greater separation of criminal proceedings from individual citizens, and the greater potential for political control of prosecutions.²⁰³ As a result, many Member States view the criminal law as being 'of limited use' in discrimination matters.²⁰⁴

However, even if rarely utilised, criminal measures may be necessary to ensure that available remedies are 'effective, dissuasive and proportionate'²⁰⁵ and to 'send out a clear signal of the state's abhorrence of acute and the most severe discrimination.'²⁰⁶ Moon therefore concludes that:

¹⁹⁷ Larja and others (n 167) 102.

¹⁹⁸ *ibid* 109.

¹⁹⁹ Ministry of Labour, 'For Equality, Against Discrimination' (2004) 26 <https://www.tem.fi/files/18446/equality_discrimination2004.pdf> accessed 14 July 2015.

²⁰⁰ See, for example, *General Agreement between TT and SAK for the Technology Industry, Collective Agreement of Employees in the Technology Industries* (24 October 2011–31 October 2013) <https://teknologiateollisuus.fi/sites/default/files/file_attachments/02082012_collective_agreement_2011-2013.pdf> accessed 14 July 2015.

²⁰¹ Kees Waaldijk and Matteo Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (TMC Asser Press 2006) 134.

²⁰² *ibid*.

²⁰³ Gay Moon, 'Race and Employment Directives: Remedies' (Academy of European Law Conference: The Fight against Discrimination in Daily Practice, Trier, 4–5 June 2004) 3 <http://www.era-comm.eu/oldoku/Adiskri/04_Remedies/2004_Moon-EN.pdf> accessed 14 July 2015; Waaldijk and Bonini-Baraldi (n 201) 134.

²⁰⁴ Waaldijk and Bonini-Baraldi (n 201) 134.

²⁰⁵ Christa Tobler, 'Remedies and Sanctions in EC Non-Discrimination Law' (European Commission, Employment and Social Affairs 2005) 34 <http://www.non-discrimination.net/content/media/Remedies%20and%20Sanctions%20in%20EC%20non-discrimination%20law%20_en.pdf> accessed 14 July 2015; Waaldijk and Bonini-Baraldi (n 201) 134.

²⁰⁶ Moon (n 203) 3.

In order to be truly effective, both as a norm for societal behaviour, and as a readily accessible and enforceable remedy, both civil and criminal procedures, should co-exist and complement one another.²⁰⁷

Therefore, while collective mechanisms are rarely utilised in Finland, they perform an important function in communicating and setting standards of behaviour for the community generally. In this way, Malmberg argues that collective enforcement mechanisms may facilitate macro-level enforcement of discrimination laws.²⁰⁸

In contrast to the situation in Finland, the UK's individualistic focus has meant that equality legislation is primarily dependent on individual litigation in ETs for enforcement. The UK is often regarded as one of the most individualistic countries in the world. In ranking countries based on an 'individualism index', Hofstede listed the UK as the third most individualistic nation (behind the United States of America and Australia).²⁰⁹ In contrast, Finland was listed seventeenth (behind Norway, Sweden, and Denmark).²¹⁰

Reflecting the UK's individualistic focus, while the Equality and Human Rights Commission may take enforcement action in age discrimination matters, the 'weight of enforcement' has fallen on individual complaints and enforcement in the courts.²¹¹ This has a number of substantial limitations, including the inherent reliance upon individuals' awareness of their rights and their willingness or capacity to enforce them.²¹² Dickens notes:

The role of collective enforcement is very weak in Britain. Trade unions have no standing to bring cases on behalf of a group of members; the equality commissions generally cannot initiate cases in their own name that a respondent is engaging in a discriminatory practice.²¹³

This has the potential to severely impair the enforcement of age discrimination legislation in the UK.²¹⁴

5 Conclusion

In the quest to extend working lives in the EU, the prohibition of age discrimination has

²⁰⁷ *ibid.*

²⁰⁸ Jonas Malmberg, 'Effective Enforcement of EC Labour Law: A Comparative Analysis of Community Law Requirements' (2004) 10 *Eur JIR* 219, 223.

²⁰⁹ Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations across Nations* (2nd edn, Sage 2001) 215.

²¹⁰ *ibid* 215.

²¹¹ Dickens (n 91) 475.

²¹² Fredman, *Discrimination Law* (n 163) 165; Dickens (n 91) 479.

²¹³ Dickens (n 91) 481.

²¹⁴ See further Fredman, *Discrimination Law* (n 163) 161–74; Linda Dickens, 'Introduction—Making Employment Rights Effective: Issues of Enforcement and Compliance' in Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart 2012); Gillian S Morris, 'The Development of Statutory Enforcement Rights in Britain and Enforcement Mechanisms' in Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart 2012).

been a key focus of many legislative initiatives. However, despite the existence of a broad legislative framework at the EU level, Member States have adopted divergent approaches to the task of achieving age equality. The laws in place in Finland and the UK demonstrate differences in the development and structure of age discrimination legislation, the duties placed on public authorities, the use of retirement ages and available enforcement mechanisms. These disparities reflect more fundamental national differences in attitudes toward ageing and age equality measures, conceptions of 'equality' and prevailing levels of individualism and collectivism.

These legal differences are an intended and desirable consequence of adopting such a broad framework at the EU level, which allows Member States to adapt and implement EU edicts in a way that is consistent with national traditions and differences. Further, it demonstrates the potential for 'mutual learning' and communication between EU Member States in the areas of non-discrimination and labour law,²¹⁵ and the possibility of useful comparisons on the relative effectiveness and accessibility of different national approaches.²¹⁶

However, in order to facilitate effective and appropriate mutual learning between Member States that optimises outcomes for older workers, it is necessary to analyse the practical impact of these laws in more detail, to assess the relative merits of the different approaches. On the face of it, a more collectivist approach to age discrimination laws, like that evident in Finland, has the potential to improve outcomes for older workers by facilitating enforcement at the macro or societal level. As Malmberg notes, relying on individual claims alone is unlikely to facilitate effective macro-level enforcement.²¹⁷ However, an individualist approach may facilitate better outcomes for older workers at a micro or personal level. For example, the abolition of the national DRA in the UK (which arguably reflects a more individualistic approach to age equality) may be advantageous for older workers who wish to remain in employment beyond the default retirement age.

While legal doctrinal and comparative analysis, like that undertaken in this paper, can lay the foundation for exploring the impact of collectivist and individualist approaches, it can only investigate the impact of these differences to a limited extent. This paper highlights the need for additional, complementary research deploying other, non-doctrinal methods, to further analyse how these legal differences are playing out in practice, and whether legal differences are actually creating different employment outcomes for older workers.

²¹⁵ Dagmar Schiek, 'Enforcing (EU) Non-Discrimination Law: Mutual Learning between British and Italian Labour Law?' (2012) 28 Intl J Comp LLIR 489, 507–08.

²¹⁶ Mark Bell, *Anti-Discrimination Law and the European Union* (OUP 2002) 190.

²¹⁷ Malmberg (n 208) 223.

Planned Relocations in the Context of Climate Change: Unpacking the Legal and Conceptual Issues

Jane McAdam and Elizabeth Ferris***

Abstract

Over the past six or so years, a wealth of research has sought to analyse conceptually, and document empirically, the links between climate change and human migration and displacement. However, considerably less attention has been given to planned relocations made necessary by the effects of climate change. This article seeks to contribute to the emerging policy debates over relocation as a form of adaptation to climate change. It begins by examining conceptual issues related to 'relocation' in light of existing normative frameworks, before turning to policy challenges about how relocations are—or could be—used in practice. Indeed, the challenges raised by relocation are closely linked to how it is conceptualised, since this impacts on how particular movements are understood, who takes responsibility for them, over what timeframe, and in what manner. Many of the examples are drawn from the Pacific, a region where the impacts of climate change are already being felt and movements are already occurring. In particular, historical cases of relocation in the Pacific, whether for environmental or other reasons, provide insights and analogies that may be useful for contemporary policy deliberations.

Keywords

Relocation, Resettlement, Climate Change, Disasters, Law, Conceptualisation, Displacement, Migration

1 Introduction

Climate change is expected to make certain areas of the earth uninhabitable, which in turn will lead to new patterns of population movements. As conditions deteriorate, some people will leave before they are forced to do so. Some will move in anticipation

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or in response to a sudden-onset disaster. Those without the means to migrate will likely experience worsening conditions until at some point they have no other option but to leave their communities. In yet other cases, governments will decide that certain communities must be relocated for their own safety, or some communities will decide to move on their own.

While the relationship between climate change and mobility has been a growing concern among humanitarian, development, and human rights groups for some time, governments have been slow to consider mobility as a strategy to adapt to climate change. Instead, they have tended to focus on the importance of mitigation measures which (if successful) would make such movements unnecessary.

There were indications that this might be beginning to change at the international climate change negotiations in Cancún in December 2010 (COP 16), when states adopted the Cancún Adaptation Framework. Paragraph 14(f) invited states to 'enhance action on adaptation' by undertaking '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels'.¹

Although the provision is not legally binding, it has already had some operational significance. Indeed, the intergovernmental Nansen Initiative on Disaster-Induced Cross-Border Displacement was launched in 2012 as a direct response, with the aim of gathering and collating data from five regions especially affected by disasters and climate change, to guide the development of legal and policy responses at the national, regional and international levels. Its methodological approach to information-gathering follows the three modes of mobility identified in the Framework (displacement, migration, planned relocation) and the levels for action (national, regional and international, although local is added as well).² In this sense, the Cancún resolution has already had a 'catalytic role'.³

Over the past six or so years, a wealth of research has sought to analyse conceptually, and document empirically, the links between climate change and human migration and displacement. However, considerably less attention has been given to planned relocation made necessary by the effects of climate change. For example, a review of governments' National Programmes of Action (NAPAs) reveals only a smattering of references to planned relocation as an adaptation strategy. Even in cases where relocation is mentioned, it is usually only in passing with no indication of the scale, timing, or areas

1 UNFCCC (9th Plenary Meeting), 'The Cancún Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' (10–11 December 2010) UN Doc FCCC/CP/2010/7/Add.1.

2 Nansen Initiative on Disaster-Induced Cross-Border Displacement, 'Human Mobility, Natural Disasters and Climate Change in the Pacific' (Report from the Nansen Initiative Regional Consultation, Rarotonga, 21–24 May 2013) (Nansen Initiative Pacific Report) <<http://www.nanseninitiative.org/pacific-consultations-intergovernmental/>> accessed 3 June 2015.

3 Koko Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations' (2011) UNHCR Protection Policy Research Series, PPLA 2011/02, 17 <<http://www.unhcr.org/4df9cc309.html>> accessed 4 August 2015.

where it may be needed.⁴ Fiji is a rare example of a country that has created national guidelines on planned relocations made necessary by the effects of climate change.⁵ At the international level, policymakers are only just beginning to consider the issue, as evidenced by meetings held in Sanremo in March 2014 and Bellagio in May 2015.⁶

This article seeks to contribute to the emerging policy debates about relocation as a form of adaptation to climate change. As the Nansen Initiative explains, planned relocation may be an adaptive strategy in three contexts. First, it may be used as a preventative measure within a country to move people out of particularly hazardous areas, and thereby reduce the risk of future displacement. Secondly, it may be used as a durable solution within a country to enable people who have already been displaced to rebuild their lives elsewhere if it is not safe for them to return home. Thirdly, and exceptionally, relocation in another country may be a durable solution if large parts (or the whole) of the country of origin are rendered unfit for habitation.⁷

The article begins by examining conceptual issues related to 'relocation' in light of existing normative frameworks, before turning to policy challenges about how relocations are—or could be—used in practice. Indeed, the challenges thrown up by relocation are closely linked to how it is conceptualised, since this impacts on how particular movements are understood, who takes responsibility for them, over what timeframe, and in what manner. Many of the examples are drawn from the Pacific, a region where the impacts of climate change are already being felt and movements are already occurring. Further, historical cases of relocation in the Pacific, whether for environmental or other reasons, provide insights and analogies that may be useful for contemporary policy deliberations. Finally, it should be noted that most of the discussions about relocation

⁴ See Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012) app. The following countries mention that relocations may be necessary as part of their country's adaptation strategies: Bhutan, Eritrea, Gambia, Kiribati, Malawi, Maldives, Mauritania, Mozambique, Samoa, São Tome and Príncipe, Senegal, Solomon Islands, Tanzania, Tuvalu, Uganda and Vanuatu.

⁵ Catherine Wilson, 'Fiji Leads Pacific Region on Climate Adaption Efforts' (*Inter Press Service*, 25 May 2014) <<http://www.ipsnews.net/2014/05/fiji-leads-pacific-region-climate-adaptation-efforts/>> accessed 3 June 2015.

⁶ Sanjula Weerasinghe and others, 'Planned Relocations, Disasters and Climate Change: Consolidating Good Practices and Preparing for the Future' (UNHCR, Brookings and Georgetown University, Sanremo Report, 12–14 March 2014) (Sanremo Report) <<http://reliefweb.int/sites/reliefweb.int/files/resources/54082cc69.pdf>> accessed 3 June 2015; Sanjula Weerasinghe and others, 'Planned Relocations in the Context of Climate Change' (UNHCR, Brookings and Georgetown University, Bellagio Consultation, 18–22 May 2015) (Bellagio Consultation) <<http://www.brookings.edu/about/projects/idp/planned-relocations>> accessed 3 June 2015. See also the background report prepared for the Sanremo meeting: Elizabeth Ferris, 'Planned Relocations, Disasters and Climate Change: Consolidating Good Practices, Preparing for the Future: Background Document: Sanremo Consultation' (UNHCR Brookings and Georgetown University, Sanremo Consultation, 12–14 March 2014) <<http://www.unhcr.org/53c4d6f99.pdf>> accessed 3 June 2015.

⁷ Nansen Initiative on Disaster-Induced Cross-Border Displacement, 'Cross-Border Displacement in the Context of Disasters and Climate Change: A Protection Agenda' (8 April 2015) para 62 (Nansen Initiative Draft Protection Agenda) <<http://www.nanseninitiative.org/global-consultations/>> accessed 3 June 2015.

as an adaptation strategy relate to internal, rather than cross-border, movement.⁸ This is mainly because it is incumbent on national governments to ensure that people are not living in precarious environments, but also because there is currently no political appetite to formulate policies on the relocation of communities across international borders. Additionally, cross-border relocation is unlikely to be required except in very limited and extreme cases, such as small island states whose long-term habitability is uncertain. Even then, migration (by individuals and households) rather than relocation (by communities) is likely to be a more common strategy.

2 The irksome issue of definitions

‘Relocation’ and ‘resettlement’ are terms frequently used in the literature, but there is a striking lack of clarity about their meaning.⁹ Slippages between terms such as ‘relocation’, ‘planned relocation’, ‘resettlement’, ‘evacuations’ and ‘displacement’ are common, even though the contexts in which they are discussed reveal that they are not necessarily synonymous. While the distinctions may seem purely semantic, they matter when terms are used by policymakers and advocates to make decisions about where people will live or what legal status they will have. It is also important to be clear about how these terms relate to one another. As the report of an expert meeting held in Sanremo in March 2014 makes clear, even those who have worked in related fields for decades do not agree on the usage of the terms ‘relocation’ and ‘resettlement’.¹⁰

We suggest here that the term ‘relocation’ generally refers to the physical process of moving people and can be voluntary or forced, large-scale or small-scale.¹¹ Unlike ‘evacuations’, relocations are intended to be permanent. For the past 50 years or so, most planned relocations have occurred in the context of development projects and, largely at the initiative of the multilateral development banks, have included a process of resettlement, discussed below. There are also cases where communities have taken the initiative to relocate, petitioning their government or local authorities for support.

⁸ As McAdam has noted, historical examples of cross-border relocation amplify its challenges: Jane McAdam, ‘Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change’ (2014) 49 *J Pac Hist* 301.

⁹ Thus, for example, the World Bank’s Global Facility for Disaster Reduction and Recovery defines relocation as ‘a process whereby a community’s housing, assets, and public infrastructure are rebuilt in another location’: Abhas K Jha and others, ‘Safer Homes, Stronger Communities: A Handbook for Reconstructing after Natural Disasters’ (World Bank Global Facility for Disaster Reduction and Recovery 2010) 77, 365 <<http://www.gfdr.org/sites/gfdr/files/publication/SaferHomesStrongerCommunitites.pdf>> accessed 4 June 2015.

¹⁰ Sanremo Report (n 6).

¹¹ Elizabeth Ferris, ‘Protection and Planned Relocations in the Context of Climate Change’ (2012) UNHCR Legal and Protection Policy Research Series, PPLA/2012/04, 11 <<http://www.brookings.edu/~media/Research/Files/Papers/2012/8/protection%20climate%20change%20ferris/protection%20climate%20change%20ferris.pdf>> accessed 3 June 2015.

The concept of 'resettlement', as used by those working with communities relocated as part of a development project, refers to a process to assist relocated persons to replace their housing, assets, livelihoods, land, access to resources and services; to maintain their communities; and to enhance, or at least restore, their living standards.¹² In other words, the term 'resettlement' connotes not just the physical transfer of people, but also the process of restoring (and, where possible, improving) socio-economic conditions.¹³

Thus, this article distinguishes between 'relocation' as the physical movement of people and 'resettlement' as the process of restoring communities and socio-economic conditions. Relocations can be carried out without resettlement (for example, when a government transports urban squatters to the outskirts of a city and leaves them there without providing housing or ensuring access to public services),¹⁴ but resettlement (in our context) is only carried out when people are relocated.

We note that this conceptualisation differs from that used in both the report of the 2014 Sanremo consultation and the May 2015 Bellagio consultation. The latter defined 'planned relocation' as:

a planned process in which persons or groups of persons move or are moved away from their homes, settled in a new location, *and* provided with the conditions for rebuilding their lives. Planned Relocation is carried out under the authority of the state, takes place within national borders, and is undertaken to protect people from risks related to disasters and environmental change, including the effects of climate change.¹⁵

Planned relocations differ from 'evacuations', which were described by the Sanremo meeting as follows:

in situations of urgency where risk is imminent, [an evacuation describes] the rapid physical movement of people away from the immediate threat or impact of a hazard to a safer place. The purpose is to move people as quickly as possible to a place of safety and shelter. It is commonly characterized by a short timeframe (from hours to weeks) within which

¹² World Bank, 'World Bank Operations Manual' (December 2001, revised April 2013) OP 4.12—Involuntary Resettlement (World Bank Operations Manual) <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>> accessed 23 July 2015; Asian Development Bank, 'Safeguard Policy Statement' (2009) ADB Policy Paper <<http://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf>> accessed 3 June 2015. Note that the Asian Development Bank stipulates that the poor and vulnerable should be able to improve their living standards, not just restore them to pre-project vulnerability.

¹³ Note that this is distinct from the concept of refugee resettlement, which refers to refugees who are transferred from first countries of asylum to settle permanently in a third country (such as the United States, Canada or Australia).

¹⁴ Anna Kajumulo Tibaijuka, 'Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issue in Zimbabwe' (United Nations, 18 July 2005) <<http://ww2.unhabitat.org/documents/ZimbabweReport.pdf>> accessed 3 June 2015; International Organization for Migration, 'Dimensions of Crisis on Migration in Somalia' (2014) Working Paper, Department of Operations and Emergencies Report <<http://www.iom.int/files/live/sites/iom/files/Country/docs/Dimensions-of-Crisis-on-Migration-in-Somalia.pdf>> accessed 3 June 2015.

¹⁵ Bellagio Consultation (n 6).

emergency procedures need to be enacted in order to save lives and minimize exposure to harm. Evacuations may be mandatory, advised, or spontaneous.¹⁶

Planned relocations are presently used in both developed and developing countries and in a variety of situations, ranging from the permanent resettlement of tens of thousands of people following the Japanese earthquake/tsunami/Fukushima disaster, to smaller-scale efforts to move several hundred people from areas at risk of landslides in Uganda, and the resettlement of communities from the slopes of Mount Merapi in Indonesia.

This article focuses on government-led planned relocations in the context of climate change. Many scientific studies have documented the effects of climate change, including an expected increase in the frequency, intensity and unpredictability of natural hazards; acidification of oceans; desertification; coastal erosion; sea-level rise; and so on.¹⁷ As migration scholars have emphasised, it is the *interaction* between the effects of 'natural' phenomena—such as floods—and socio-economic factors—such as impoverishment—that will make relocation necessary.¹⁸ For example, landslides may be due to both heavy rainfall and deforestation. It is impossible to attribute movement to climate change or disasters alone. Rather, it is a multi-causal phenomenon.

Ironically, the implementation of measures to mitigate the impacts of climate change may also increase the need for planned relocation. Most obviously, the construction of a hydroelectric plant intended to reduce reliance on fossil fuels may mean that communities need to be moved. In some countries, such as Colombia and Indonesia, a major cause of displacement has been palm oil cultivation, which is heralded as a way of decreasing carbon emissions through biofuels.¹⁹

Finally, as noted above, most planned relocations made necessary by the effects of climate change are expected to occur *within* an affected country's own borders. While international relocations may be necessary in some regions, such as the Pacific, these

¹⁶ Sanremo Report (n 6) 10, drawing on Global Camp Coordination and Camp Management Cluster, 'The MEND Guide: Comprehensive Planning Guide for Mass Evacuations in Natural Disasters' (2014) (MEND Guide) <<http://www.globalccmcluster.org/tools-and-guidance/publications/mend-guide>> accessed 3 June 2015.

¹⁷ Leonard A Nurse and others, 'Small Islands' in *Intergovernmental Panel on Climate Change, Climate Change 2014: Impacts, Adaptation, and Vulnerability* (CUP 2014) ch 29 <https://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-Chap29_FINAL.pdf> accessed 3 August 2015.

¹⁸ See eg Government Office for Science (UK), 'Foresight: Migration and Global Environmental Change: Future Challenges and Opportunities: Final Project Report' (London 2011) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/287717/11-1116-migration-and-global-environmental-change.pdf> accessed 3 June 2015.

¹⁹ Internal Displacement Monitoring Centre, 'Resisting Displacement by Combatants and Developers: Humanitarian Zones in North-West Colombia' (November 2007) <http://www.abcolombia.org.uk/downloads/Resisting_Displacement_-_Humanitarian_zones_in_NW_Colombia.Nov07.pdf> accessed 3 June 2015; Kimberly M Carlson and others, 'Committed Carbon Emissions, Deforestation, and Community Land Conversion from Oil Palm Plantation Expansion in West Kalimantan, Indonesia' (2012) 109 *Proc National Academy of Sciences* 7559.

will be on a relatively small scale.²⁰ Nevertheless, they raise particular legal issues that are addressed briefly below.

3 Conceptual issues

3.1 The nature of relocation: forced or voluntary movement?

Relocations can be forced or voluntary, although the distinction is not a true dichotomy. Movement occurs somewhere along a spectrum, with forced movement at one extreme and voluntary movement at the other. Walter Kälin notes:

‘Voluntary’—contrary to what the term suggests—does not mean to be able to decide in complete freedom. Rather, voluntariness exists where space to choose between realistic options still exists. ‘Forced’ on the other hand characterizes situations where realistic options to choose from are no longer available. Thus, we can speak of voluntary movements where the element of choice is preponderant, whereas displacement or forced relocation takes place where the space for choice is [more limited].²¹

Paragraph 14(f) of the Cancún Adaptation Framework uses the term ‘planned relocation’ to emphasise the importance of preparation, with the objective that those who move will be resettled and have their livelihoods and incomes restored.²²

Even if relocation is planned, people may not move ‘voluntarily’ but may be required to do so by government authorities.

In other cases, communities themselves may petition their governments or local authorities for support with relocation, such as in the Carteret Islands in Papua New Guinea and Newtok in Alaska.²³ In these cases, although relocation is not imposed by an external authority, a coercive element is nonetheless present: deteriorating environmental conditions make moving away more viable than staying put.

²⁰ No state is presently advocating relocations across national borders. Even states that recognise that international movement may at some point be necessary tend to emphasise voluntary migration, as in Kiribati’s ‘migration with dignity’ initiative: see McAdam, *Climate Change, Forced Migration, and International Law* (n 4) 40–44.

²¹ Walter Kälin, ‘Changing Climates, Moving People: Distinguishing Voluntary and Forced Movements of People’ in Koko Warner and others (eds), *Changing Climates, Moving People: Framing Migration, Displacement and Planned Relocation* (2013) UN University Policy Brief No 8, 38, 40 <<http://collections.unu.edu/eserv/UNU:1837/pdf11213.pdf>> accessed 24 July 2015.

²² Elizabeth Ferris, ‘Planned Relocation and Climate Change’ in Koko Warner and others (eds), *Changing Climates, Moving People: Framing Migration, Displacement and Planned Relocation* (2013) UN University Policy Brief No 8, 31–32 <<http://collections.unu.edu/eserv/UNU:1837/pdf11213.pdf>> accessed 24 July 2015. Potentially, it could also be used to differentiate between planned and spontaneous movement (which might otherwise be described simply as ‘displacement’), or between longer-term, organised movement and temporary, organised movement (ie ‘evacuation’).

²³ Robin Bronen, ‘Community Relocations: The Arctic and South Pacific’ in Susan F Martin, Sanjula Weerasinghe and Abbie Taylor (eds), *Humanitarian Crises and Migration: Causes, Consequences and Responses* (Routledge 2014) 221.

It is perhaps unsurprising that relocated communities are more likely to regard their move as ‘successful’ when they are well-informed, able to participate in all stages of the decision-making process, given adequate compensation (in the form of assets, incomes and economic opportunities),²⁴ and have a sense of control over the choice of destination and the process of movement.²⁵

An interesting illustration is provided by two cross-border relocations to Fiji in the mid-1940s: the relocation of the Banabans from Ocean Island in present-day Kiribati to Fiji in 1945, and the partial relocation of the Vaitupians from present-day Tuvalu to Fiji from 1947. Ever since the early 1900s, when phosphate deposits were discovered on Ocean Island, the Banabans had been regarded as an ‘awkward obstacle’ to phosphate mining operations (jointly carried out by the UK, Australia and New Zealand).²⁶ In 1942, Rabi Island in Fiji was purchased on the Banabans’ behalf as a ‘second home’—essentially as an insurance policy against the time when Ocean Island might be rendered uninhabitable on account of the mining. Later that year, Ocean Island was occupied by Japan, who dispersed most of the Banabans across the colony. At the end of the Second World War, the British colonial authorities considered it expedient to move the Banabans straight to Rabi rather than back to Ocean Island. To this day, the Banabans claim that they were misled about the conditions in Rabi and the nature of the move, and that this was an unjust, forced relocation.²⁷

By contrast, the Vaitupians voluntarily purchased the island of Kioa in Fiji as a safeguard against future overpopulation. They were not motivated by imminent land scarcity or extreme environmental conditions, nor coerced by the authorities. Their choice to relocate has led to a very different, and much more positive, self-story, in which

²⁴ Craig A Johnson, ‘Governing Climate Displacement: The Ethics and Politics of Human Resettlement’ (2012) 21 *Environmental Politics* 308, 313, referring to Clionadh Raleigh, Lisa Jordan and Idean Salehyan, ‘Assessing the Impact of Climate Change on Migration and Conflict’ (2008) World Bank Working Paper, 26–27 <http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/SDCCWorkingPaper_MigrationandConflict.pdf> accessed 3 June 2015; Michelle Mitchell, ‘Relocation after Disaster: Engaging with Insured Residential Property Owners in Greater Christchurch’s Land-Damaged “Residential Red Zone”’ (Brookings Institution 2015) <<http://www.brookings.edu/research/papers/2015/06/planned-relocations-climate-change-new-zealand-mitchell>> accessed 3 June 2015; Elizabeth Ferris, ‘Planned Relocations, Disasters and Climate Change’ (Paper prepared for the Conference on Climate Change and Migration in the Asia-Pacific: Legal and Policy Responses, Sydney, 10–11 November 2011) <<http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Elizabeth%20Ferris%20paper.pdf>> accessed 3 June 2015; Michael M Cernea and Kai Schmidt-Soltau, ‘Poverty Risks and National Parks: Policy Issues in Conservation and Resettlement’ (2006) 34 *World Dev* 1808; Michael Cernea, ‘The Risks and Reconstruction Model for Resettling Displaced Populations’ (1997) 25 *World Dev* 1569; Peter Penz, Jay Drydyk, and Pablo S Bose, *Displacement by Development: Ethics, Rights and Responsibilities* (CUP 2011).

²⁵ Jon Barnett and Saffron J O’Neill, ‘Islands, Resettlement and Adaptation’ (2012) 2 *Nature Climate Change* 8, 10, referring to Roli Asthana, ‘Involuntary Resettlement: Survey of Voluntary Experience’ (1996) 31 *Eco & Pol Wkly* 1468.

²⁶ HC Deb 18 December 1975, vol 902, col 1857 (Sir Bernard Braine), referring (at col 1856) to notes of a meeting held in October 1945 between the British colonial authority and representatives of the British Phosphate Commission.

²⁷ For a detailed analysis of the Banaba and Vaitupu cases, see McAdam, ‘Historical Cross-Border Relocations in the Pacific’ (n 8).

they cast themselves as pioneering ‘settlers’ rather than forced migrants.²⁸ As Teresia Teaiwa has observed that ‘while Rabi Island’s settlement (...) has become something of a historical controversy, Kioa was clearly settled by the choice of islanders by Vaitupu, and without as much drama.’²⁹

Today, both communities have very similar living conditions and both groups acknowledge that they are better off in material terms than if they had remained at home.³⁰ However, for the Banabans, socio-economic gains are overshadowed by a sense of injustice and disempowerment about the initial move.³¹ This element of coercion is key to their ongoing perceptions about the success or otherwise of relocation.

More generally, the availability of livelihoods in the destination, the degree to which vulnerabilities are mitigated, and the wellbeing of the community after relocation may all impact on the community’s own perception of whether or not their movement was voluntary or forced—and this may shift over time. For instance, if promised benefits are not forthcoming, or people feel that an injustice has been done to them, then these conditions may start to vitiate the consent given (at least psychologically). Connell argues that resettlement can create a particular kind of poverty if land, services and infrastructure are inadequate, factors which are likely to be exacerbated if communities move to unfamiliar environments with different kinds of livelihoods (such as from an atoll to a high island). Indeed, relocation may spur further displacement if resources for resettlement services are insufficient.³² The ‘success’ of a relocation also seems tacitly to shape the language that scholars use to describe it. It seems that when long-term needs have not been factored into the move, or have failed, people are more likely to be described (and describe themselves) as ‘displaced’, rather than resettled.³³

3.2 Consent

Who decides when relocation is needed and how it should occur? Sometimes affected communities will suggest the relocation themselves (as did the Newtok in Alaska and the Carteret Islanders in Papua New Guinea), while at other times decisions will be made by external actors, such as state authorities or developers.

²⁸ *ibid.*

²⁹ Teresia K Teaiwa, ‘Rabi and Kioa: Peripheral Minority Communities in Fiji’ in Brij V Lal and Tomasi R Vakatora (eds), *Fiji in Transition: Research Papers of the Fiji Constitution Review Commission* (University of the South Pacific 1997) 132.

³⁰ This was reinforced during the Pacific consultations held by the Nansen Initiative. Comparisons between different relocation experiences in the Pacific showed that the ability of affected communities to choose to relocate greatly impacted the success of the relocation effort: see Nansen Initiative Pacific Report (n 2) 21.

³¹ McAdam, ‘Historical Cross-Border Relocations in the Pacific’ (n 8) 325. See also John Connell, ‘Population Resettlement in the Pacific: Lessons from a Hazardous History?’ (2012) 43 *Aust Geographer* 127, 139.

³² Connell (n 31) 138–39.

³³ Ferris (n 22) 32. See also Michael M Cernea and Christopher McDowell, ‘Introduction: Reconstructing Resettlers’ and Refugees’ Livelihoods’ in Michael M Cernea and Christopher McDowell (eds), *Risks and Reconstruction: Experiences of Resettlers and Refugees* (World Bank 2000) 5.

There is widespread recognition that relocation should only occur with the free and informed consent of the communities concerned. This describes the process of finding out information about a proposed course of action and then weighing up the benefits and risks involved. Having accurate, up-to-date and culturally relevant information is essential. Affected communities should be fully informed of the reasons and procedures of movement, be able to propose alternatives to relocation that authorities 'should duly consider',³⁴ and be compensated for any losses.³⁵ If their consent cannot be obtained, then relocation should 'take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned'.³⁶

While consent is not the same as consultation and participation, these are necessary precursors to it. 'Consultation' refers broadly to the process of soliciting and listening to the opinions and perceptions of affected populations. 'Participation' implies a deeper engagement that may include control over decision-making. Both form part of a process in which key stakeholders influence and share control over initiatives and decisions that affect them.³⁷ This can be best understood as a 'participation spectrum':

- *Passive participation* or information sharing in which the affected population is informed, but not heard (eg dissemination of documents or public briefings by officials).

³⁴ Office of the High Commissioner for Human Rights, 'Basic Principles and Guidelines on Development-Based Evictions and Displacement: Annex 1 of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living' (2007) UN Doc A/HRC/4/18 para 38 (Basic Principles and Guidelines on Displacement).

³⁵ United Nations High Commissioner for Refugees (UNHCR), 'United Nations Guiding Principles on Internal Displacement' (2001) UN Doc E/CN.4/1998/53/Add.2, principle 7(3); ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 2 February 1995) 1650 UNTS 383, art 16(2) (ILO Convention No 169); United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (7 September 2007) UN Doc A/61/L.67, art 10; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention). Guidelines relating to safeguarding human rights in forced evictions are also relevant and practical: Basic Principles and Guidelines on Displacement (n 34) paras 56(e), 56(h), 56(i), 60. The Nansen Initiative's Draft Protection Agenda (n 7) para 65 notes that planned relocation processes must be implemented 'in full respect for the rights of affected people, including host communities, taking into account the potential of planned relocation to achieve development goals'.

³⁶ ILO Convention No 169 (n 35) art 16(2). In the context of forced evictions, it is suggested that 'an independent body having constitutional authority, such as a court of law, tribunal or ombudsperson should mediate, arbitrate or adjudicate as appropriate': Basic Principles and Guidelines on Displacement (n 34) para 38.

³⁷ Brookings-Bern Project on Internal Displacement, 'Moving Beyond Rhetoric: Consultation and Participation with Populations Displaced by Conflict or Natural Disasters' (October 2008) 4 <http://www.brookings.edu/~media/research/files/reports/2008/10/internal%20displacement/10_internal_displacement.pdf> accessed 3 June 2015. See also Nansen Initiative Draft Protection Agenda (n 7) para 65, which notes the importance of '[e]ngaging both relocated and host communities in consultation, planning, implementation and evaluation of such measures, taking into account community ties, cultural values, traditions and psychological attachments to their original place of residence'.

- *Information transfer*—affected populations supply information in response to questions but do not make decisions and do not influence the process. (This often takes the form of field visits and interviews.)
- *Consultation*—affected populations are asked to offer their opinions, suggestions, and perspectives but are not involved in decision-making or implementation of projects (and there is no guarantee that their views will influence the process.) Consultations can take multiple forms, including focus group discussions and interviews.
- *Collaboration*—the affected population is directly involved in needs analysis and project implementation. They may also contribute to agency-led projects with labor and other skills. (eg displaced persons supply labor for the construction of their new houses in an agency-sponsored project.)
- *Decision making and control of resources*—the affected populations are involved in project assessment, planning, evaluation and decision making. (This may involve, for example, a working group or joint-committee of agency and local leadership.)
- *Local initiative and control*—the affected populations take the initiative; the project is conceived and run by the community, potentially with the support of agencies (eg a community-based organization may organize professional training classes while receiving funding from another agency.)³⁸

The extent to which local communities participate in the decisions about relocation and resettlement vary enormously. An example of a community-led initiative is in Alaska, where the Newtok Traditional Council has developed a detailed relocation plan with both short- and long-term objectives and projects (partly because there is insufficient funding to implement a single, streamlined plan).³⁹ In 2009, the Council unanimously approved a set of guiding principles to underscore the relocation process. These outlined the community's desire to:

- Remain a distinct, unique community—our own community.
- Stay focused on our vision by taking small steps forward each day.
- Make decisions openly and as a community and look to elders for guidance.
- Build a healthy future for our youth.
- Our voice comes first—we have first and final say in making decisions and defining priorities.
- Share with and learn from our partners.
- No matter how long it takes, we will work together to provide support to our people in both Mertarvik and Newtok.
- Development should:
 - Reflect our cultural traditions.
 - Nurture our spiritual and physical wellbeing.
 - Respect and enhance the environment.
 - Be designed with local input from start to finish.
 - Be affordable for our people.

³⁸ Brookings-Bern Project on Internal Displacement (n 37) 4.

³⁹ Robin Bronen, 'Climate-Induced Community Relocations: Creating an Adaptive Governance Framework based in Human Rights Doctrine' (2011) 35 NYU Rev L and Soc Change 357, 388.

- Hire community members first.
- Use what we have first and use available funds wisely.
- Look for projects that build on our talents and strengthen our economy.⁴⁰

In order for there to be consent to relocation, consultative, participatory structures need to be in place to enable all sectors of the community to make informed choices, and to communicate these through a transparent process.⁴¹ For example, residents of Newtok undertook a relocation survey and voted in three separate processes about relocation options.⁴² As a small community of only 360 people, a detailed and individualised information-gathering process was possible. In larger communities, it is essential that all relevant agencies and community groups are identified so that fine-grained information can be fed through. For instance, in the Pacific, the importance of engaging churches, traditional leaders and civil society has been noted.⁴³ In New Zealand, the government agency charged with overseeing recovery from the 2010–11 Christchurch earthquakes implemented a series of measures targeting different groups affected by the disaster, ranging from a telephone hotline, to community-wide informational sessions, to one-on-one sessions with individual homeowners.⁴⁴

Prior to any decision on relocation being taken, there should be contingencies for different possible outcomes. For instance, will a majority decision in favour of relocation bind the community as a whole? Does it have to be a majority by a particular margin? What happens to those who have not consented if a majority has?⁴⁵ Are there any alternatives to relocation?

3.3 Timing: ‘relocation’ versus ‘evacuation’

The relationship between relocations and evacuations has generated considerable discussion, as noted above in describing the definitions developed at the Sanremo consultation. The argument made here is that the term ‘planned relocations’ should only refer to movement of people which is intended to be permanent, rather than to the often short-term movements made necessary by sudden-onset disasters.

⁴⁰ Agnew Beck, *Strategic Management Plan Newtok to Mertarvik* (Anchorage 2012), cited in Bronen (n 23) 229.

⁴¹ For example, see abbreviated consultation procedures in World Bank Operations Manual (n 12).

⁴² See Arctic Slope Consulting Group, ‘Newtok: Background for Relocation Report’ (Newtok Traditional Council, January 2004) 15–20 <<http://commerce.alaska.gov/dnn/Portals/4/pub/NewtokBackgroundRelocation2004.pdf>> accessed 3 June 2015. See also app F (pros and cons of different relocation sites); app I (relocation survey documentation, including details of the voting process and detailed results).

⁴³ Nansen Initiative Pacific Report (n 2) 27.

⁴⁴ See Mitchell (n 24).

⁴⁵ This may depend on the extent to which governments can compel people to move. For instance, in the United States, the government can enforce mandatory evacuation orders in a wide variety of disasters: *Thames Shipyard and Repair Co v United States*, 350 F 4d 247 (2003).

In contrast to a permanent relocation, an evacuation describes the temporary movement of people out of harm's way. While there are cases when evacuations become long-term (as in the case of those evacuated after the Fukushima nuclear disaster), the difference with relocations is that they were not planned, nor intended to be permanent. Many states have domestic laws authorising police or other authorities to forcibly evacuate people in emergencies, such as imminent natural disasters.⁴⁶ Guidance on carrying out evacuations suggests that people should not be evacuated against their will unless this:

- (a) Is provided for by law;
- (b) Is absolutely necessary under the circumstances to respond to a serious and imminent threat to their life or health, and less intrusive measures would be insufficient to avert that threat; and
- (c) Is, to the extent possible, carried out after the persons concerned have been informed and consulted.⁴⁷

In all cases, people must be evacuated in a non-discriminatory manner that fully respects their rights to life, dignity, liberty and security.⁴⁸

When it comes to evacuations in the event of disasters (either before or after they occur), the International Organization for Migration, through its leadership of the cluster on Camp Coordination and Camp Management, has worked with governments to develop a pilot manual on mass evacuations in natural disasters.⁴⁹

While evacuation in the face of imminent harm is an accepted practice, relocation in anticipation of slow-onset hazards is more complex. The Chairman's Summary of the Nansen Conference on Climate Change and Displacement noted that 'moving communities in anticipation of climate-related hazards may precipitate vulnerability rather than avoiding it, and should only be considered when adequate alternatives that enable people to rebuild their lives is available'.⁵⁰

However, the Nansen Initiative has highlighted how 'proactive, pre-disaster' relocations can help to prevent future 'cross-border disaster-displacement, or dangerous,

⁴⁶ See eg Amy L Fairchild, James Colgrove and Marian Moser Jones, 'The Challenge of Mandatory Evacuation: Providing for and Deciding for' (2006) 25 Health Aff 958.

⁴⁷ Inter-Agency Standing Committee, 'IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters' (Brookings-Bern Project on Internal Displacement, January 2011) principle A.1.4 <<https://docs.unocha.org/sites/dms/Documents/Operational%20Guidelines.pdf>> accessed 3 June 2015.

⁴⁸ *ibid* principle A.1.5. See also International Law Commission, 'Protection of Persons in the Event of Disasters: Texts and Titles of the Draft Articles adopted by the Drafting Committee on First Reading' (15 May 2014) UN Doc A/CN.4/L.831, arts 5–8 (ILC Draft Articles).

⁴⁹ See eg MEND Guide (n 16).

⁵⁰ Chairperson's Summary, 'The Nansen Conference: Climate Change and Displacement in the 21st Century' (Oslo, 5–7 June 2011) para 12 (Nansen Conference) <<http://www.unhcr.org/4ea969729.pdf>> accessed 24 July 2015, drawing heavily on Jon Barnett and Michael Webber, 'Migration as Adaptation: Opportunities and Limits' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 53.

undocumented migration that could arise in the context of hardships associated with a disaster.⁵¹

3.4 'Group' versus 'community'

Whereas evacuations generally apply to individuals in a given geographic area at a particular moment in time—and can include tourists or visitors who happen to be caught in a disaster or emergency—the planned, permanent resettlement of groups tends to be associated with the movement of an identifiable community from one place to another.⁵² In contrast to the displacement or migration of individuals, it implies the movement of a group, usually with some kind of administrative or organisational structure that is to be recreated (in some form) in the new site.⁵³

Campbell describes this process as:

the permanent (or long-term) movement of a community (or a significant part of it) from one location to another, in which important characteristics of the original community, including its social structures, legal and political systems, cultural characteristics and worldviews, are retained: the community stays together at the destination in a social form that is similar to the community of origin.⁵⁴

Although it is possible to catalogue the issues that require careful consideration prior to any move, the longer-term impact of relocation on a particular community cannot be predicted. For instance, a 1977 study of ten relocated communities in the Pacific showed that resettlement outcomes could be entirely different, notwithstanding very similar conditions and macro relationships.⁵⁵

Past experiences in the Pacific reveal the potentially deep, inter-generational psychological consequences of planned relocation and resettlement,⁵⁶ which may explain why it is considered an option of last resort in that region. According to Connell, wherever relocation has occurred in the Pacific, social tensions have followed.⁵⁷ Typically, this has been expressed through local opposition and resentment towards the relocated group,

⁵¹ Nansen Initiative Draft Protection Agenda (n 7) para 38.

⁵² Michael D Lieber, 'Conclusion: The Resettled Community and its Context' in Michael D Lieber (ed), *Exiles and Migrants in Oceania* (University Press of Hawaii 1977) 342.

⁵³ Note, however, that there may be cases in the future where communities need to be relocated but there is insufficient land to resettle them all permanently as a community, and they may need to be dispersed across various sites.

⁵⁴ John Campbell, 'Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 58–59. Of course, over time, that original community may splinter and new groups may emerge.

⁵⁵ Martin G Silverman, 'Introduction: Locating Relocation in Oceania' in Michael D Lieber (ed), *Exiles and Migrants in Oceania* (University Press of Hawaii 1977) 2–3; Lieber (n 52) 350.

⁵⁶ McAdam, 'Historical Cross-Border Relocations in the Pacific' (n 8); Nansen Initiative Pacific Report (n 2) 15, drawing on the views of Pacific representatives.

⁵⁷ Connell (n 31) 138.

with particular concerns about access to land, resources (such as food, water, education and healthcare) and jobs.⁵⁸ While this has been especially marked when resettlement has occurred across cultural boundaries (including internal boundaries),⁵⁹ even land transfers within a single cultural area have proven to be ‘complex and challenging.’⁶⁰ This is why Pacific Islanders have emphasised the importance of learning lessons from past experience to inform future responses and policies.⁶¹

3.5 ‘Relocation’ versus ‘resettlement’

As noted at the outset of this article, planned relocation refers to the physical movement of people. With respect to planned relocations, however, simply transporting people to a new location will not be a sufficient response. Rather, resettlement—in the sense of recreating the community and re-establishing (or, better still, improving) social and economic conditions which existed prior to the relocation—is an essential complementary action. This is true in the context of climate change as well as in other cases, such as urban renewal schemes or resettlement of communities made necessary by sudden-onset disasters that are not related to climate change, such as volcanoes or earthquakes.

Resettlement, as evidenced by the long experience of resettling communities in the context of development projects, is a much more complex and costly process than arranging for the physical movement of communities alone. Essential to the resettlement process is finding suitable land for the community, which includes tasks such as finding comparable land, judging it as acceptable, and paying for it. Land issues raise a host of difficult questions, particularly in cases where land ownership is either customary or communal, or both.⁶² Indeed, difficulties in finding suitable land have been major impediments to previous resettlement efforts. For example, negotiations to acquire land for the resettlement from the Carteret Islands to Bougainville have dragged on for years.⁶³ Some of the practical suggestions for acquiring land to be used to resettle people after disasters are provided in the UN-Habitat’s Handbook on Land and Natural

⁵⁸ *ibid* 135–37. For instance, many Solomon Islanders viewed Gilbertese settlers as having taken ‘their’ land and jobs. See Kennett E Knudson, ‘Sydney Island, Titiana, and Kamaleai: Southern Gilbertese in the Phoenix and Solomon Islands’ in Michael D Lieber (ed), *Exiles and Migrants in Oceania* (University Press of Hawaii 1977) 223, cited in Connell (n 31) 136.

⁵⁹ Connell (n 31) 136.

⁶⁰ *ibid*.

⁶¹ Nansen Initiative Pacific Report (n 2) 16.

⁶² Nansen Initiative on Disaster-Induced Cross-Border Displacement, ‘Background Paper: “Human Mobility, Natural Disasters and Climate Change in the Pacific”’ (Nansen Initiative Pacific Regional Consultation, Rarotonga, 21–24 May 2013) <<http://www.nanseninitiative.org/pacific-consultations-intergovernmental/>> accessed 24 July 2015. See also Daniel Fitzpatrick and Rebecca Monson, ‘Climate Change and the Legal Framework for Settlement Relocation in the South Pacific’ (FIG Paper Pacific Small Island Developing States Symposium in Suva, Fiji, 18–20 September 2013) <https://www.fig.net/resources/proceedings/2013/fiji/papers/ts%201b_daniel_6742.pdf> accessed 4 June 2015.

⁶³ Campbell (n 54) 68–71; Connell (n 31). See also Bronen (n 23).

Disasters.⁶⁴ However, there are not many case studies of the process by which good resettlement plans have been implemented for people relocated in the aftermath of sudden-onset disasters. A collection of case studies from four Latin American countries of 'preventive resettlement' found that even when resettlement was carefully planned, land was acquired, and adequate funds were available, a major challenge was to prevent (poor) people from settling on the land vacated by those who were resettled.⁶⁵

In addition to securing suitable land, major difficulties have been encountered in re-establishing sustainable livelihoods for people relocated after disasters as well as provision of necessary infrastructure and access to public services. In planning resettlement, the experiences of the multilateral development banks in working with those resettled as a result of development projects may be particularly useful.⁶⁶

The basic principles on which existing guidelines for development-induced displacement and resettlement (DIDR) are based can be summed up in a few sentences. Involuntary resettlement should be avoided where feasible.⁶⁷ Where it is not feasible to avoid resettlement, the scale of displacement should be minimised and resettlement activities should be conceived and executed as sustainable development programmes based on meaningful consultation with displaced persons. Displaced persons should be assisted to improve their livelihoods and living standards at least to the levels they enjoyed before the displacement.⁶⁸

People who are forcibly relocated by development projects, and hence considered to be displaced, risk a sharp decline in their standards of living. Michael Cernea's impoverishment and reconstruction model, which is discussed in more detail below, identifies the common risks of such displacement: landlessness, joblessness, homelessness, marginalisation, food insecurity, increased morbidity and mortality, loss of access to common property, and social disintegration.⁶⁹ If left unaddressed, these embedded risks result in massive impoverishment. Particular groups may be especially

⁶⁴ United Nations Human Settlements Programme, 'Land and Natural Disasters: Guidance for Practitioners' (2010) <http://disasterassessment.org/documents/land_and_natural_disasters_guidance4practitioners.pdf> accessed 4 June 2015. See also Ian Christoplos and others, 'Learning from Recovery after Hurricane Mitch: Experience from Nicaragua' (International Federation of Red Cross and Red Crescent Societies and ProVention Consortium 2009) <http://www.recoveryplatform.org/assets/publication/Learning_from_Mitch_summary.pdf> accessed 3 June 2015.

⁶⁵ Daniel Fitzpatrick, 'Housing for the Landless: Resettlement in Tsunami-Affected Aceh, Indonesia' (2007) Asia Research Institute and Oxfam International Aceh Working Paper No 1, <http://www.ari.nus.edu.sg/docs/downloads/aceh-wp/acehwp07_001.pdf> accessed 3 June 2015; Elena Correa, 'Resettlement as a Disaster Risk Reduction Measure: Case Studies' in Elena Correa (ed), *Preventive Resettlement of Populations at Risk of Disaster: Experiences from Latin America* (World Bank Global Facility for Disaster Reduction and Recovery 2011) 19 <http://www.gfdr.org/sites/gfdr.org/files/preventive_resettlement_LAC_experiences.pdf> accessed 3 June 2015.

⁶⁶ World Bank Operations Manual (n 12).

⁶⁷ Some forms of DIDR may be forced, and the term 'development-forced displacement and resettlement' (DFDR) is consequently used by many working in the field.

⁶⁸ World Bank Operations Manual (n 12) para 15.

⁶⁹ Michael M Cernea, 'Risks, Safeguards, and Reconstruction: A Model for Population Displacement and Resettlement' in Michael M Cernea and Christopher McDowell (eds), *Risks and Reconstruction: Experiences*

affected, as noted in the World Bank's Operational Manual: 'Bank experience has shown that resettlement of indigenous people with traditional land-based modes of production is particularly complex and may have significant adverse impacts on their identity and cultural survival'.⁷⁰

3.6 Relocation as adaptation

The 1992 United Nations Framework Convention on Climate Change begins by noting that the 'ultimate objective of this Convention (...) is to achieve (...) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' (article 2), but article 4(1) goes on to make the case that adaptation measures, as well as mitigation, are needed.

The need for the development of national adaptation plans was reaffirmed in the 1997 Kyoto Protocol (articles 10 and 12), and the Conference of the Parties (COP 7) at Marrakesh highlighted the importance of developing a national action plan based on assessments and evaluations. The 2009 Copenhagen Accord set up a Green Climate Fund, including a fast-start finance fund approaching \$30 billion for 2010–12 to be followed by a fund of \$100 billion in 2020 for both adaptation and mitigation.

Since the beginning of international discussions on climate change, the issue of funding of adaptation measures has been a central and contentious point of discussion and a complex array of international adaptation funding mechanisms now exist.

Despite the emphasis on climate change adaptation funds in the framework of the international climate change negotiations, it has proven difficult for many states to access adaptation funding⁷¹—and perhaps just as difficult for donors to ensure that the funds pledged do in fact materialise.⁷² The fact that there is an eight-year gap between the pledges of \$30 billion from 2010–12, to \$100 billion per year beginning in 2020, is an indication of the likely difficulties in funding adaptation strategies.

As mentioned above, the Cancún COP 16 meeting called on states to develop national adaptation plans (NAPs), building on earlier work to support the development of NAPAs. The fact that very few governments included migration, displacement and relocation in the NAPAs—and that migration and relocation are not mentioned at all in the technical guidelines⁷³—is perhaps a sign that states have not yet properly considered

of Resettlers and Refugees (World Bank 2000); Michael Cernea, 'Public Policy Responses to Development-Induced Population Displacements' (1996) 31 *Eco & Pol Wkly* 1515.

⁷⁰ World Bank Operations Manual (n 12) para 9.

⁷¹ Mary Jane Mace, 'Funding for Adaptation to Climate Change: UNFCCC and GEF Developments since COP-7' (2005) 14 *Rev of Eurpn Comm & Intl Enviro Law* 225.

⁷² See eg 'Aid Policy: Climate Change and Adaptation Funding Equally Unpredictable' (*IRIN News*, 11 February 2010) <<http://www.irinnews.org/report/88070/aid-policy-climate-change-and-adaptation-funding-equally-unpredictable>> accessed 3 June 2015.

⁷³ While displacement is mentioned, it is in the context of assessing the potential impact of climate change on the country.

mobility as a form of adaptation to climate change. And yet, one of the principal lessons learned from past relocations and resettlements is the need for planning, which requires a long lead time.

With respect to planning, the Nansen Initiative has identified a number of ‘effective practices’, which include (inter alia):

- Identifying and setting aside land for temporary and permanent relocation as a disaster preparedness activity;
- Developing national and local level guidelines and public policies to support effective and sustainable planned relocation processes, adapted to the local context and building upon existing global guidance;
- Ensuring that planned relocation sites do not expose relocated people to greater disaster risks and provide for disaster risk management measures in the event of future disasters; and
- Developing adequate mechanisms and safeguards to prevent and solve conflicts over land and other resources due to factors such as cultural diversity or population growth.⁷⁴

It may well be that some governments are unwilling to consider relocation—or any form of mobility—as an adaptation measure because of a fear that by doing so, they will be seen by their populations as having ‘given up’ on mitigation measures. Sometimes, past poor experiences of relocation may impede the government’s willingness to view it as a suitable future policy option. For instance, in Bangladesh, the state-driven resettlement of up to 600,000 Bengali settlers into the Chittagong Hill Tracts during military rule in Bangladesh provoked violence which was only settled by a Peace Accord in 1997 (although unrest continues).⁷⁵ The government remains wary of repeating the mistake, and there is accordingly a sense among some officials that movement should be a matter of individual choice rather than dictated by state policy.⁷⁶

While migration experts recognise that movement away from vulnerable areas can be a form of adaptation by facilitating livelihoods elsewhere, stimulating the flow of remittances and helping to alleviate pressure in the community of origin, the reality seems to be that the process of deciding to move is a complex one. A recent study by Koko Warner and others showed that when it comes to individual/household migration, some people will move as an adaptation strategy to enhance their resilience to climate change, while more vulnerable groups will use it merely ‘to survive, but not flourish’.⁷⁷

⁷⁴ Nansen Initiative Draft Protection Agenda (n 7) para 65. See also the Draft Guidance on Protecting People through Planned Relocations, developed at the May 2015 Bellagio Consultation (n 6) which provides extensive guidance on the planning process when relocations are considered.

⁷⁵ Chittagong Hill Tracts Accord (Chittagong Hill Tracts—Bangladesh) (adopted 2 December 1997) <<http://www.chtdf.org/index.php/cht-issues/peace-accord>> accessed 24 July 2015.

⁷⁶ Jane McAdam and Ben Saul, ‘Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh’ (2010) 53 *Germ Yrbk Intl L* 233, 276, referring to an interview with SM Munjurul Hannan Khan, Deputy Secretary, Ministry of Environment and Forests and National Focal Point for the UNFCCC and IPCC, Bangladesh (Dhaka, 15 June 2010).

⁷⁷ Koko Warner and Tamer Afifi, ‘Human Migration: Patterns and Emerging Understanding’ in Koko Warner and others (eds), *Changing Climates, Moving People: Framing Migration, Displacement and Planned Relocation* (2013) UN University Policy Brief No 8, 21.

Similarly, the Foresight report concluded that some people seem to be moving from areas that are less vulnerable to the effects of climate change towards areas that are more vulnerable (particularly cities which are more vulnerable to disasters), suggesting that mobility may not always be adaptive—but rather can be maladaptive as well—a theme also picked up by Barnett and O'Neill.⁷⁸

Sou's research on post-disaster resettlement in urban Bolivia shows how ill-conceived relocation schemes can 'leave people living in uncomfortable and precarious living conditions which increase their vulnerability'.⁷⁹ She attributes part of the problem to 'a reductive understanding of human behaviour that (...) does not account for the many reasons why people choose to live in "risky" areas, nor (...) the indirect and detrimental effects that resettlement can have on people who choose to stay put'.⁸⁰ Thomas' analysis of post-disaster resettlement in the Philippines reveals similar problems. She argues that 'insufficient advance planning and slow implementation' have not only prolonged displacement, but have also potentially increased the vulnerability of hundreds of thousands of people, many of whom are poor and landless.⁸¹

Forward-planning by states is crucial, since the mechanisms they put in place will be key to determining the extent to which relocation can be utilised as a form of adaptation, rather than signalling a failure to adapt.⁸² Planned relocations, it is argued here, can be a form of adaptation to climate change, and states likely to be affected by climate change should be encouraged to consider: (a) the extent to which relocations might be necessary; (b) under what conditions they might need to occur; (c) under what modalities they might occur; and (d) their possible costs. Given that planned relocations have a long history in relationship to development projects, this would seem to be an area where development actors could play a supportive role.

Central to the issue of adaptation strategies is the question of who should pay. Significantly, the Cancún Adaptation Framework recognises migration as a form of adaptation, and this means that international adaptation funding may be directed towards preventing displacement and developing relocation and migration schemes. Indeed, funding relocation through international mechanisms may be one of the main ways in which the international community can play a meaningful role in addressing climate change and disaster-related movement. In fact, the Nansen Initiative consultation

⁷⁸ Government Office for Science (n 18); Barnett and O'Neill (n 25); Jon Barnett, 'On the Risks of Engineering Mobility to Reduce Vulnerability to Climate Change: Insights from a Small Island State' in Kirsten Hastrup and Karen Fog Olwig (eds), *Climate Change and Human Mobility: Global Challenges to the Social Sciences* (CUP 2012) 169.

⁷⁹ Gemma Sou, 'Post-Disaster Resettlement in Urban Bolivia' (2015) 49 *Forced Migration Rev* 33, 33.

⁸⁰ *ibid* 34.

⁸¹ Alice R Thomas, 'Post-Disaster Resettlement in the Philippines: A Risky Strategy' (2015) 49 *Forced Migration Rev* 52, 52.

⁸² Koko Warner, 'Assessing Institutional and Governance Needs Related to Environmental Change and Human Migration' (Study Team on Climate Induced Migration, Climate Change and Migration, June 2010) 8 <http://archive.unu.edu/africa/activities/files/Warner_K_2010_Assessing_Institutional_and_Governance_Needs_Related_to_Environmental_Change.pdf> accessed 24 July 2015.

identified this—rather than the creation of new legal frameworks—as one of the areas where meaningful international cooperation could be useful.⁸³ But, as yet, there is no clear guidance from the many adaptation funds enumerated above about how their resources can be used to support migration, displacement and planned relocations as adaptation strategies. For example, can adaptation funds be envisaged to pay for physical elements of relocation and resettlement expenses to ensure that livelihoods/services are restored, and also for compensation/restitution? Can adaptation funds be used to support planning, including consultations with communities likely to be affected, for relocations?

4 Policy challenges

4.1 On what basis are decisions made? Data

The question of what data will be relied upon to make decisions about planned relocations raises a host of complex issues. How will a state determine that an area is uninhabitable and that communities must be moved? For example, the absence of a sustainable fresh water supply is expected to render some Pacific Island countries uninhabitable long before they are submerged by rising seas.⁸⁴ What indicators should be used to determine that an area is uninhabitable? When fresh water supplies are unavailable for a significant proportion of the population? When agricultural production is no longer viable? When livelihoods are no longer feasible? When coastlines become increasingly battered by storms and water intrusion? The involvement of the scientific community would seem to be essential in determining that an area is uninhabitable and that its inhabitants should therefore be relocated.

Consideration must also be given to the relationship between these indicators and the coping capacity of the population. For instance, a given area may be uninhabitable for the present population but may be habitable for a smaller population. Thus, a decision to relocate only a portion of the population may be a legitimate response to the pressures of climate change. However, this raises a host of other questions, particularly if some of the population to be moved would rather remain and conversely if those slated to remain would rather be relocated. There are also questions about the extent to which a minimum population is necessary below which life becomes unsustainable—a question raised by Jon Barnett in the case of Niue.⁸⁵

A second issue relating to data is that of trust in the competent authorities who make the decision. The UN Guiding Principles on Internal Displacement emphasise that such decisions must be made by competent authorities on the basis of law, in consultation

⁸³ Nansen Initiative Pacific Report (n 2) 18.

⁸⁴ Nurse and others (n 17) ch 29; McAdam, *Climate Change, Forced Migration, and International Law* (n 4) 124, 131.

⁸⁵ Barnett and O'Neill (n 25).

with affected communities.⁸⁶ Even when governments have been elected through democratic means, building and sustaining trust with the community is essential. Simply put, if people do not trust the government, then they are likely to be sceptical about any governmental decision that requires them to move. For example, there may be a perception that governments are more responsive to business interests than to those actually living in a given community, or there may be suspicions that governments have ulterior motives in wanting people to move off a particular piece of land.⁸⁷

A third area of difficulty concerns the extent to which an area's uninhabitability is due to the effects of climate change rather than other factors, such as (human-caused) deforestation. As noted above, it is impossible to isolate climate change as the sole cause of displacement; it will always result from a combination of factors that interact with each other in different ways in different contexts. However, if financing for relocation is to be secured through dedicated climate change adaptation funds, then the link between the need for relocation and climate change needs to be clear. In cases where the causal relationship is not straightforward, the spectre arises of negotiations to determine the percentage of uninhabitability due to climate change and the percentage attributable to other factors. As McAdam has argued, this may shift the focus away from the need to protect those at risk to a scientific determination that is likely impossible to make.⁸⁸

A fourth area of difficulty concerns 'counting' the number of people to be relocated. No existing legal or bureaucratic categories 'count' those who move in response to the impacts of climate change. This means that even where climate change plays a role in mobility decisions, it will not necessarily be understood as 'climate change' migration/displacement/relocation. Accordingly, the data on such movement is also fraught with methodological problems.⁸⁹ Which groups should be included in such an enumeration—just those that are assisted to relocate, or those that relocate on their own to the new resettlement site, or those that choose to move elsewhere because they do not like the alternative? Some of the development-related resettlement guidelines on determining eligibility for compensation might be relevant in this regard.⁹⁰ For example, is someone who moved into the area the year before—or the week before—entitled to the same level of relocation assistance as someone who has lived there all his/her life?

⁸⁶ UN Guiding Principles on Internal Displacement (n 35).

⁸⁷ See eg Ferris (n 24) 34, referring to Michael M Cernea and Hari Mohan Mathur, 'Compensation and Investment in Resettlement: Theory, Practice, Pitfalls, and Needed Policy Reform' in Michael M Cernea and Hari Mohan Mathur (eds), *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-Sharing* (OUP 2008) 15; Thayer Scudder, *The Future of Large Dams: Dealing with Social, Environmental, Institutional and Political Costs* (Earthscan 2005) 53. Even in colonial times, relocation was not just 'a function of the colonial administration's perception of an impending emergency', but was also related to the administration's plans for 'ethnic integration of larger administrative districts': Lieber (n 52) 346.

⁸⁸ McAdam, *Climate Change, Forced Migration, and International Law* (n 4) 196–97.

⁸⁹ *ibid* 24ff, 36ff.

⁹⁰ See eg World Bank Operations Manual (n 12).

4.2 Legal bases for decisions

States bear the primary responsibility under international law to ensure that the human rights of those within their territory or jurisdiction are respected. This includes the obligation to take preventative as well as remedial actions to uphold such rights, and to assist those whose rights have been violated.⁹¹

In 2014, the International Law Commission adopted draft articles on the protection of persons in the event of disasters.⁹² These provide that states have a duty to reduce disaster risk 'by taking the necessary and appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.'⁹³ If a disaster overwhelms a state's national response capacity, then the state has a duty to seek assistance from other states, international organisations or NGOs.⁹⁴ All disaster-related responses should be underpinned by the principles of dignity, cooperation, humanity, neutrality and impartiality, and '[p]ersons affected by disasters are entitled to respect for their human rights.'⁹⁵

In some cases, states' obligations to take preventative measures to safeguard life, physical integrity, health and so on may require the relocation of individuals or groups out of harm's way. Whereas this would ordinarily constitute arbitrary displacement, it may be justified if there is no other viable alternative and it is necessary to safeguard 'the safety and health of those affected.'⁹⁶ For instance, the European Court of Human Rights has recognised that environmental damage can affect the rights to life, property, home, and private life,⁹⁷ and, as such, a state's obligation to protect the right to life may also include protection from environmental harm.⁹⁸ In *Budayeva v Russia*, the court held that this duty encompassed an obligation to protect communities from foreseeable natural disasters, which included informing the population about possible dangers and risks, evacuating potentially affected populations, and compensating surviving relatives of victims killed as a consequence of neglecting these duties.⁹⁹

⁹¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 26 March 1976) 999 UNTS 171, art 2; Inter-American Court of Human Rights *Velasquez Rodriguez v Honduras* (1988) 28 ILM 291, paras 174–75.

⁹² See ILC Draft Articles (n 48). The ILC is the international body responsible for the progressive development and codification of international law. The draft articles are currently with governments and international organisations for comment by 1 January 2016.

⁹³ *ibid* art 11. See also Nansen Principle II, in Nansen Conference (n 50) 5.

⁹⁴ ILC Draft Articles (n 48) art 13.

⁹⁵ *ibid* arts 5–8.

⁹⁶ UN Guiding Principles on Internal Displacement (n 35) principle 6(2)(d).

⁹⁷ See cases cited in Loukis G Loucaides, *The European Convention on Human Rights: Collected Essays* (Martinus Nijhoff 2007) ch 10, including *Arrondelle v United Kingdom* (1980) 19 DR 186 (noise pollution cases offensive smells); *Sergio Euben Lopez Burgos v Uruguay* (29 July 1981) Comm No R.12/52, Supp No 40, UN Doc A/36/40 176; *Guerra v Italy* (1998) 26 EHRR 357; *Fadeyeva v Russia* (2007) 45 EHRR 10.

⁹⁸ See *Öneryildiz v Turkey* (2005) 41 EHRR 20, paras 71–72.

⁹⁹ *Budayeva v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 (ECtHR, 20 March 2008). See further Walter Kälin and Claudine Haenni Dale, 'Disaster Risk Mitigation: Why Human Rights Matter' (2012) 31 *Forced Migration Rev* 38, 39; Elizabeth Ferris, 'How Can International Human Rights

It is widely acknowledged that most movement stimulated by environmental conditions (including climate change) will take place within countries, rather than across international borders.¹⁰⁰ Accordingly, internal movements, including relocations, will be governed by domestic laws. Of course, these must comply with international human rights law and other applicable international law norms (in cases of conflict, for example, this will include international humanitarian law), both in substance and in practice. Many of the relevant international legal principles have been identified in the preceding discussion, and are synthesised in the UN Guiding Principles on Internal Displacement.¹⁰¹ Ferris has also compiled a list of Preliminary Understandings for Planned Relocation of Populations as a Result of Climate Change, which draws out particular additional considerations in the context of relocation and climate change.¹⁰²

Since relocation has implications for a whole range of rights—civil, political, economic, social and cultural—it necessarily concerns a wide range of domestic laws relating to such apparently disparate issues as land, housing, property, insurance, employment, anti-discrimination, minorities, restitution, and so on. Laws relating to evictions, for instance, may be highly relevant.¹⁰³ Using Cernea's 'impoverishment hazards' tool, one can identify the kinds of domestic laws that will be relevant.¹⁰⁴

As can be seen from Table 1, civil and political rights intersect with socio-economic and cultural rights, and indeed the enjoyment of one may be contingent on another. Further, having secure access to shelter and employment is likely to enhance food security and health, whereas homelessness and unemployment will increase further

Law Protect us from Disasters?' (Paper prepared for the American Society of International Law, Annual Meeting, 10 April 2014) <<http://www.brookings.edu/~media/Research/Files/Papers/2014/04/22%20natural%20disasters%20ferris/EFerris%20ASIL%20Human%20Rights%20and%20Disasters%2020140410.pdf>> accessed 3 June 2015.

¹⁰⁰ Government Office for Science (n 18) 37.

¹⁰¹ In contrast, the policies and principles developed to guide DFDR provide comprehensive operational guidance for relocations and resettlement: see particularly World Bank Operations Manual (n 12). Whereas the focus of the UN Guiding Principles on Internal Displacement (n 35) is upholding the rights of the displaced, the focus of the Operational Policy is preventing the impoverishment of those who move. See also Scott Leckie, 'Climate-Related Disasters and Displacement: Homes for Lost Homes, Lands for Lost Lands' in Jose Guzman and others (eds), *Population Dynamics and Climate Change* (International Institute for Environment and Development, UNFPA 2009) 119; Michael Cernea, 'Understanding and Preventing Impoverishment from Displacement' in Chris McDowell (ed), *Understanding Impoverishment: The Consequences of Development-Induced Displacement* (Berghahn Books 1996) vol 2, 13.

¹⁰² Ferris (n 11) 26–30. Further guidance is provided by the Draft Guidance on Protecting People through Planned Relocations, developed at the May 2015 Bellagio Consultation (n 6).

¹⁰³ See eg Jean du Plessis, 'Olympic Scale of Sport-Induced Displacement' (2007) 28 *Forced Migration Rev* 54. See also Mariya Gromilova, 'Revisiting Planned Relocation as a Climate Change Adaptation Strategy: The Added Value of a Human Rights-Based Approach' (2014) 10(1) *Utrecht L Rev* 76 for a broad application of a rights-based approach for those facing relocations.

¹⁰⁴ Michael M Cernea, 'Impoverishment Risks, Risk Management, and Reconstruction: A Model of Population Displacement and Resettlement' (UN Symposium on Hydropower and Sustainable Development, Beijing, 27–29 October 2013) <http://www.un.org/esa/sustdev/sdissues/energy/op/hydro_cernea_population_resettlement_backgroundpaper.pdf> accessed 4 June 2015. See also the discussion of applicable laws in McAdam and Saul (n 76).

Table 1

Risk	Reconstruction	Relevant areas of law	Key government agencies
Landlessness	Land-based reestablishment	Land law, property law, anti-discrimination law, restitution, labour law, environmental law, disaster law	Land management agencies; interior ministry; environment ministry
Joblessness	Re-employment	Labour law, anti-discrimination law, land law, property law, education	Labour ministry; labour unions
Homelessness (which may include loss of 'cultural space')	House reconstruction	Property law, planning law, housing law, law relating to evictions, anti-discrimination law, restitution, insurance law, disaster law	Housing ministry; urban planning/agriculture ministry
Marginalisation	Social inclusion	Anti-discrimination law, law relating to minorities, labour law, land law, property law, education, freedom of religion, voting rights	National human rights institutions; justice ministry; specific agencies charged with working on minority issues
Food insecurity	Adequate nutrition	Agricultural law, access to services, access to distribution networks, anti-discrimination law, labour law, land law, property law, disaster law	Food/agriculture ministry; environment ministry
Increased morbidity and mortality	Better health care	Health law (including for children), land law, labour law, anti-discrimination law	Health ministry and related agencies
Loss of access to common property and services	Restoration of community assets and services	Restitution, property law, anti-discrimination law, land law	Justice ministry and other related ministries
Social disarticulation	Community reconstruction	Protection of family and private life, law relating to minorities, protection of cultural heritage (including language), anti-discrimination law, education, freedom of religion, freedom of association, marriage law, land law	Justice ministry; ministries concerned with social welfare; ministries concerned with cultural heritage

marginalisation in other areas. This is why 'labour law' is also relevant to 'health', and why comprehensive resettlement planning requires the engagement of different government agencies and relevant civil society organisations.

As yet, there has been no systematic analysis of state practice relating to relocations and the legal issues involved.¹⁰⁵ This has been identified as an important area for future research.¹⁰⁶ At present, the legal framework for decisions about relocations varies from state to state, and very few states have developed laws or policies relating specifically to relocations made necessary by the effects of climate change.¹⁰⁷ In some countries, constitutional provisions may restrict the state's ability to relocate specific communities, such as indigenous groups. Existing laws and policies from the context of development-forced displacement and resettlement may provide some general guidance, as may national policies on eminent domain, evictions, and natural disasters.¹⁰⁸ But even where legal guidance exists, it requires implementation and enforcement to be effective.

The Nansen Initiative on Disaster-Induced Cross-Border Displacement's 2013 Report on the Pacific concluded that '[e]xisting guidelines are insufficient for effectively planning and implementing planned relocation in the context of disasters', and that:

[n]ational authorities should consider developing relocation guidelines that are consistent with relevant international resettlement standards (eg SPHERE, World Bank), incorporate alternative or innovative adaptation measures, and take into account customary land tenure systems.¹⁰⁹

A review of a number of the Pacific's national disaster risk reduction and climate change adaptation policies and planning instruments 'shows weak, almost non-existent reference or inclusion of human mobility challenges in the context of natural disasters and climate change (eg displacement, relocation, evacuation, protection, etc)'.¹¹⁰

There will usually be different decision-making structures in place depending on whether a movement is conceived of as a temporary 'evacuation' or a permanent 'relocation'. For example, the police and emergency services may have extensive powers during sudden-onset events such as cyclones, and are often key actors in evacuating people. However, they are not the appropriate actors to be making decisions for planned relocations, especially where these are envisaged as permanent. In some African countries like Uganda, district disaster commissioners make many of these decisions, but when situations become hot political issues, the national government takes over.

¹⁰⁵ Ferris (n 11) 32.

¹⁰⁶ See eg Sanremo Report (n 6); Global Knowledge Partnership on Migration and Development (KNOMAD), *Thematic Working Group on Migration and Environmental Change: Symposium Report* (14–15 May 2014) (forthcoming).

¹⁰⁷ Fitzpatrick and Monson (n 62); Sanremo Report (n 6).

¹⁰⁸ See International Federation of Red Cross and Red Crescent Societies, 'Disaster Law Database' <<https://ifrc.org/en/publications/disaster-law-database/>> accessed 16 July 2015.

¹⁰⁹ Nansen Initiative Pacific Report (n 2) 21.

¹¹⁰ *ibid* 25.

While in many cases the 'state' makes the decision and engineers the relocation, it is important to remember that states are not monolithic creatures.¹¹¹ Indeed, there is a striking lack of coordination between government agencies and departments, and across different levels of government. To ensure that all the rights of relocating communities are addressed, a whole-of-government approach is not only desirable, but necessary. This requires coordination across different government departments as well as different government levels (local, provincial, and national), and the cooperation of various operational agencies.¹¹² As stated in Nansen Principle X, policies relating to planned relocation must 'be implemented on the basis of non-discrimination, consent, empowerment, participation and partnerships with those directly affected, with due sensitivity to age, gender and diversity aspects'.¹¹³

4.3 Specific legal issues for cross-border relocations

There are very few instances of cross-border relocations of whole communities, and most of these relate to Pacific examples: the Gilbertese movement to the Solomon Islands between 1955 and 1964 (via the Phoenix Islands from 1937); the relocation of the Banabans from present-day Kiribati to Rabi in Fiji in 1945; and the relocation of a group of Vaitupuans from present-day Tuvalu to Kioa in Fiji from 1947 (the latter two discussed above). In 1856, the whole population of Pitcairn Island (around 200 people) was resettled on Norfolk Island, some 6,000 kilometres away.¹¹⁴ Historical records reveal that the Western Pacific High Commissioner, who governed, inter alia, present-day Kiribati and Tuvalu until the 1970s, actively sought to resettle communities on account of land shortages, but struggled to find available land.¹¹⁵

While the international relocation of whole Pacific Island communities has been mooted from time to time, there are no moves afoot to facilitate this. There is acknowledgement by Pacific leaders that the likelihood of any state ceding land to it is

¹¹¹ See eg Mark Bevir and RAW Rhodes, *The State as Cultural Practice* (OUP 2010), where the authors coin the idea of the 'stateless state'. For them, the state is neither monolithic nor a causal agent, but consists of the actions of specific individuals (such as civil servants and politicians). Reflecting on the collection Cris Shore, Susan Wright and Davide Però (eds), *Policy Worlds: Anthropology and the Analysis of Contemporary Power* (Berghahn Books 2011), Prince says that policy is conceived of as 'taking shape through the arrangement of people and things in relation to one another across space and time'. Further, if we 'conceive of policy as assemblages or networks that take shape across social space the challenge becomes how to understand the way power works within these arrangements to make our critique': Russell Prince, 'Review Essay: Disaggregating the State: Exploring Interdisciplinary Possibilities for the Study of Policy' (2013) 34 *Political Geography* 60, 62.

¹¹² See Nansen Principles III, IV, VI, in Nansen Conference (n 50) 5.

¹¹³ Nansen Principle X, in Nansen Conference (n 50) 5.

¹¹⁴ Connell (n 31) 127; McAdam, 'Historical Cross-Border Relocations in the Pacific' (n 8); Gil Marvel Tabucanon, 'The Banaban Resettlement: Implications for Pacific Environmental Migration' (2012) 35 *Pacific Studies* 343.

¹¹⁵ HE Maude, 'The Colonization of the Phoenix Islands' (1952) 61 *J Polynesian Society* 62; McAdam, 'Historical Cross-Border Relocations in the Pacific' (n 8).

remote, and while Kiribati has purchased a tract of fertile church-owned land in Fiji, this is not (contrary to media reports) to secure a new homeland for the people of Kiribati, but rather to provide food security and possible employment opportunities for its citizens.¹¹⁶ There is a Pacific notion that blood and mud mix together to create identity. Most Pacific Islanders are resistant to group relocation because they perceive it as a permanent rupture with home, land and identity.¹¹⁷ They fear it may impact negatively on nationhood, control over land and sea, sovereignty, culture and livelihoods.¹¹⁸

Hence, in cases of cross-border relocations, additional issues may arise about the ongoing status of the group once it moves (for instance, whether it can retain statehood or acquire a self-governing status in the new territory—issues which remain under examination by international lawyers).¹¹⁹ Further, immigration and citizenship rights need to be negotiated. A recommendation from the Nansen Initiative's Pacific Consultations was that any planned relocation to another country should:

- i) define the legal status of the relocated community within the new state, ii) help communities adapt to local customs and laws, iii) include consultation with potential host communities, and iv) contain measures to facilitate the diaspora community maintaining cultural ties, such as allowing dual citizenship.¹²⁰

Even these measures provide no guarantee that the relocated group will simply 'assimilate'; as the example of the Banabans in Fiji shows, innovative inter-generational constitutional protections of rights to land and nationality may not overcome feelings of disenfranchisement, dislocation and displacement.¹²¹ This is because permanent relocation can have highly pragmatic and deeply spiritual ramifications for the community concerned. It involves complex logistical considerations, as well as profound challenges and anxieties relating to identity, social coherence and culture. In some cases, these have legal dimensions, relating to, for example, self-determination, citizenship and social and cultural rights.

4.4 International institutions

It was noted above that there is a greater need for whole-of-government approaches to

¹¹⁶ Jane McAdam, Interview with Anote Tong, President of Kiribati (Kiribati, 11 September 2013).

¹¹⁷ Nansen Initiative Pacific Report (n 2) 10–11, 17.

¹¹⁸ *ibid* 6.

¹¹⁹ See eg the International Law Association's Committee on International Law and Sea-Level Rise, which is currently examining these questions; McAdam, *Climate Change, Forced Migration, and International Law* (n 4) 119–60; Rosemary Rayfuse, 'International Law and Disappearing States: Maritime Zones and the Criteria for Statehood' (2011) 41 *Enviro Policy & L* 281; Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2013) 14 *Melbourne J Intl L* 346; Susin Park, 'Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States' (Legal and Protection Policy Research Series, UNHCR, May 2011) <<http://www.unhcr.org/4df9cb0c9.html>> accessed 4 June 2015.

¹²⁰ Nansen Initiative Pacific Report (n 2) 21.

¹²¹ See further McAdam, 'Historical Cross-Border Relocations in the Pacific' (n 8).

relocation at the national level. At the international level, too, there is also a need for a cross-pollination of ideas, action and responsibility. The specialist expertise of institutions across the areas of humanitarian assistance, human rights, development, disaster risk reduction, the environment and climate change is needed, but the end goal should be a holistic appraisal of the needs of particular communities, which necessarily requires information-sharing and coordination. Yet, there remains a problem of 'policy silos', reinforced by inconsistent budget/funding cycles, operational and mandate constraints, and the cumbersome UN bureaucracy which makes large-scale change slow to achieve. While there has been some useful and effective collaboration, such as the work of the Inter-Agency Standing Committee in the international climate change negotiations, which resulted in paragraph 14(f) of the Cancún Adaptation Framework, considerable disconnection between the various agencies remains. This risks the issues being dealt with in an ad hoc and fragmented manner.¹²²

Difficulties already exist within some of the sectors mentioned above. The system of disaster management alone is 'highly fragmented, increasingly specialised, and marred by institutional rivalries'.¹²³ At times, agencies have resisted centralised control in the field, and there are vast differences in the nature and timeliness of their responses. This was apparent in the response to the 2004 Asian tsunami, where, notwithstanding significant resources,

the basic needs of displaced people were compromised by difficulties in coordinating the delivery of the US\$6.8 billion worth of assistance that was pledged, and the activities of the 16 UN agencies, 18 Red Cross response teams, 160 or more international NGOs, hundreds of private and civil-society groups, and 35 armed forces.¹²⁴

The proliferation of many new actors in today's international humanitarian system means that good coordination is even more imperative.

Further, while the conversation has at least begun between the humanitarian and development communities, it is still largely disconnected from agencies like UN-Habitat (now part of the Inter-Agency Standing Committee), which are working on climate change- and disaster-sensitive housing. Without a coordinated approach, there is a danger that communities may end up rebuilding in areas which lack sustainable livelihood opportunities and so on. These might not be issues to which an organisation like UN-Habitat would turn its attention.

The fact that planned relocation, like disaster response, is primarily the concern of individual governments may explain the absence of a concerted international

¹²² For detailed analysis of the relevant actors in this area, see McAdam, *Climate Change, Forced Migration, and International Law* (n 4) ch 8.

¹²³ François Gemenne, 'Environmental Changes and Migration Flows: Normative Frameworks and Policy Responses' (PhD thesis, Institut d'Etudes Politiques de Paris and University of Liège 2009) 231.

¹²⁴ Jon Barnett and Michael Webber, *Accommodating Migration to Promote Adaptation to Climate Change* (Commission on Climate Change and Development 2009) 34 <http://www.preventionweb.net/files/11872_AccommodatingMigration1.pdf> accessed 4 June 2015, referring to UNHCR, *State of the World's Refugees: Human Displacement in the New Millennium* (OUP 2006) ch 4.

humanitarian effort on this front. However, there is clearly a need for the international community to support and monitor the need for and the execution of planned relocations, and to hold states accountable to their international human rights obligations in carrying out such actions.

Finally, if international institutional responses are not well coordinated, then ad hoc humanitarian assistance may become the default response of the international community. This is unlikely to be adequate in terms of its scale, timeliness, durability or comprehensiveness. It may also mean that the most vulnerable are not sufficiently protected.

5 Conclusion

Unpacking the term ‘planned relocations’ is a bit like unlocking Pandora’s box: a host of complex issues emerge. In this article, we have suggested that the term ‘relocation’ refers to the process of physically moving communities, and this can be either voluntary or forced in nature, or somewhere in between. In contrast, the term ‘resettlement’, we suggest, is the process of re-establishing the community and living standards at least to the level which existed before the relocation. While relocation can occur without resettlement, resettlement cannot occur without relocation.

We have concentrated on relocations planned by state authorities, recognising that the degree to which particular governments can forward-plan, and actually implement such plans, varies enormously. We have noted some of the challenges of obtaining full and informed ‘consent’, arguing that community involvement in making decisions about relocation is essential—not only to distinguish between voluntary and forced movement, but also in its direct impact on the community’s adjustment to life in the new location.

Overall, we have been struck by the lack of empirical evidence about the range of relocation efforts that has surely occurred in all regions. While there is a rich literature on relocations and resettlement in the context of development projects, the evidence base for communities relocated because of the effects of disasters or environmental conditions is more scattered.¹²⁵ While a number of studies have been carried out on Pacific Island countries, and indeed reference has been made to them in this article, it is difficult to know if the experiences of Pacific Islanders can be applied to other regions. A few academic researchers have examined specific cases of disaster-induced relocations, and the World Bank has collected cases in which communities have been relocated as a preventative measure.¹²⁶ But the number of cases of planned relocation is certainly far larger and warrants further attention. For example, the Chinese government is reported

¹²⁵ For a review of the literature, see Daniel Petz, *Planned Relocations in the Context of Natural Disasters and Climate Change: A Review of the Literature* (Brookings Institution 2015) and other background materials prepared for the May 2015 Bellagio Consultation (n 6); case studies in various articles contained in (2015) 49 *Forced Migration Rev.*

¹²⁶ Correa (n 65).

to have relocated millions of people for ‘environmental reasons’, but these cases are not widely known outside that country. African governments have relocated populations from flood plains, at least a few US towns and cities have moved in response to environmental factors, and Asian governments have been involved in relocating populations. Not only is further academic work needed on these specific cases, but efforts should also be made to compile existing research to serve as a resource for those working on planned relocations in the context of climate change. Indeed, McAdam argues that contemporary relocation should be understood within a much longer, global history of movement. She prompts us to consider eighteenth- and nineteenth-century settler colonialism and twentieth-century population transfers as exercises in planned relocation, noting that, for the first half of the twentieth century, the international community was preoccupied with elaborate resettlement plans as a means of redistributing global population to alleviate overcrowding and resource scarcity (and thereby, it was assumed, the risk of conflict).¹²⁷

There are other conceptual issues that have not been addressed in this article which need further exploration. For example, to what extent does terminology shape understandings of the processes underway, and in turn affect policy development? For example, some Alaskan and Pacific communities that have relocated, or wish to relocate, view themselves as pioneers or settlers, which conveys a very different meaning compared to when people consider themselves to be displaced or forcibly relocated. The issue of planned relocation also emphasises the importance of governmental intentions in relocating communities, particularly when it means appropriating property or imposing restrictions on freedom of movement.

Moreover, most of the existing research on relocation focuses on its impact on those who move, rather than on the receiving or host communities, or on those who remain behind. These communities are also necessarily affected by relocations.

In the context of climate change, planned relocation highlights the thorny intersection between science and policy. How can the impact of climate change on habitability of land be assessed, particularly when it almost always interacts with human action? To what extent should scientists be involved in determining when an area becomes uninhabitable? And should decision-makers wait until the evidence is clear that people can no longer survive where they live, or do they have a responsibility to move people before the situation reaches that point?

Finally, planned relocation is an issue of justice. Those who are able to migrate will likely do so before the situation becomes desperate, while those without the necessary financial or social means will be dependent on governmental assistance to support their relocation. If that is not forthcoming, then they will be stuck.

¹²⁷ Jane McAdam, ‘Relocation and Resettlement from Colonisation to Climate Change: The Perennial Solution to “Danger Zones”’ (2015) 3 *London Rev of Intl Law* 93.

Sir Stafford Northcote's Ode to the Fourth Article: An Insight into the Negotiation of the 1871 Treaty of Washington

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Abstract

This short note introduces a piece of mild historical interest to international lawyers, namely a lengthy poem written by Sir Stafford Northcote, one of the members of the 1871 Joint High Commission that negotiated the Treaty of Washington that formed the basis of the *Alabama* arbitration. The poem provides some insight into the spirit of the Joint High Commission and the process by which the Treaty—a watershed of international law—was negotiated.

Keywords

American Civil War, History of International Law

1 Introduction

The purpose of this short note is to introduce a piece of mild historical interest to international lawyers, namely a lengthy poem written by Sir Stafford Northcote, one of the members of the 1871 Joint High Commission that negotiated the Treaty of Washington¹ that formed the basis of the so-called *Alabama* arbitration,² inaugurating thereby the

* PhD candidate, Trinity Hall, University of Cambridge (UK). The poem on which this article is based was uncovered in the course of related research on international law during the American Civil War undertaken on behalf of HE Judge James Crawford AC, to whom thanks is owed. The author also wishes to thank the extremely helpful staff at the Concord Free Public Library in Concord, Massachusetts, which maintains the Hoar Family Papers. The usual caveat applies.

¹ Treaty between Great Britain and the United States for the Amicable Settlement of all Causes of Difference between the Two Countries (adopted 8 May 1871, entered into force 17 June 1871) 143 CTS 145, extracted in Christian J Tams and Antonios Tzanakopoulos (eds), *Basic Documents on the Settlement of International Disputes* (Hart Publishing 2013) 7.

² *Alabama Claims (United States v United Kingdom)* (1872) 29 RIAA 125. See generally John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*,

present era of international dispute settlement. The poem in question has, to the author's knowledge, never been published, and provides some insight into the spirit of the Joint High Commission and the process by which the Treaty—a watershed of international law—was negotiated. Moreover, it sheds some light on the *personalities* of the individual members of the Commission and the spirit in which their negotiations were conducted. Although this does little to either enhance or diminish the Commission's work, it serves to highlight the fact—often neglected by lawyers—that the law does not create itself, and that behind its often sterile and forbidding façade lurk the qualities and idiosyncrasies of individual participants in the lawmaking process. To this end, the note does not seek to mount an argument as such, but rather to ensure that Northcote's poem is made known to readers and contextualised against the mass of historical material that already surrounds the *Alabama* arbitration.

2 The cruise of the CSS *Alabama*

Although the facts of the case are notorious, it is worth giving a brief refresher of the subject of the *Alabama* claims, the CSS *Alabama* itself.³ A Confederate commerce raider under the command of Captain Raphael Semmes (remembered as a sort of maritime Robert E Lee), the *Alabama* captured some 62 Union vessels in a little under two years, before being engaged and sunk by the USS *Kearsage* off the coast of Cherbourg (as immortalised by Manet). The *Alabama*'s predations caused considerable friction between the Union and Great Britain due to the fact that she was not constructed in Pensacola or any of the Confederacy's other major shipyards, but in Birkenhead near Liverpool. This situation was rendered necessary by the success of 'Scott's Great Snake', the Northern blockade of the Atlantic and Gulf State ports, designed to slowly choke the life from the South's war machine.⁴ Deprived of access to the sea, the Confederacy sent agents—in particular the ingenious Captain James Bulloch⁵—to Britain to procure the construction of warships, with a view to using a small number of vessels to attack Union commerce at sea.

vol 1 (Government Printing Service 1898) 495–682; Adrian Cook, *The Alabama Claims: American Politics and Anglo-American Relations, 1865–1872* (Cornell University Press 1975); Tom Bingham, 'The Alabama Claims Arbitration' (2005) 54 ICLQ 1; Stephen C Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Harvard University Press 2010) ch 10.

³ For an account of these and other Confederate predators, see Raphael Semmes, *The Cruise of the Alabama and the Sumter* (Carleton 1864); Warren Armstrong, *Cruise of a Corsair* (Cassel & Co 1963).

⁴ Abraham Lincoln, 'Proclamation by the President of the United States, declaring the Ports of the Confederates under Blockade' (1861) 51 BFSP 185.

⁵ See generally Captain James D Bulloch, *The Secret Service of the Confederate States in Europe, or How the Confederate Cruisers Were Equipped*, vols 1 and 2 (GP Putnam's Sons 1884). In some sources his surname is spelled 'Bullock'.

There was, however, a problem. Owing to Britain's declared neutrality,⁶ and its willingness to enforce that neutrality through the provisions of the Foreign Enlistment Act 1819,⁷ the Confederate vessels had to be built in secret. To this end, Bulloch (on the instructions of Stephen Mallory, the Confederate Secretary of the Navy) set upon a plan to procure the construction of civilian vessels under false names in shipyards of the Wirral Peninsula and to refit them as commerce raiders at sea. The *Alabama* (to be originally christened the *Enrica*) was not the only vessel built in this way—also commissioned were the CSS *Florida* (originally the *Oreto*) and the CSS *Georgia* (originally the *Japan*). Bulloch also arranged for the purchase of two further vessels and their armament as commerce raiders: the CSS *Rappahannock*, previously HMS *Victor*; and the CSS *Shenandoah*, formerly an East India trader known as the *Sea King*. A number of blockade-runners and other vessels were also procured.⁸ Grouped together, the predations of these vessels would come to be referred to as the *Alabama* claims.

American ire at the procurement of the *Alabama* and her sisters arose through a purported failure of British due diligence. Liverpool and the surrounding area was full of Union spies reporting on Bulloch's activities to Charles Adams, the American Minister in London for most of the Civil War. Adams, in turn, would pass any such information onto Lord Russell, the then-Foreign Secretary in Palmerston's government. The difficulty was that Russell and his colleagues at the Treasury were hamstrung by the wording of the Foreign Enlistment Act, which set an extremely high threshold for seizure.⁹ As such, British authorities were effectively forced to watch as first the *Oreto* and 'hull 490' (the *Enrica*) left port and escaped into the Atlantic, where they were quickly refitted as the *Florida* and *Alabama*, respectively.¹⁰

To Union eyes, British inaction on these points seemed to be negligence at best and tacit support for the Confederate cause at worst.¹¹ Not only had the British allowed the

⁶ HRH Queen Victoria, 'British Proclamation, for the Observance of Neutrality in the Contest between the United States and the Confederate States of America' (1861) 51 BFSP 165.

⁷ 59 Geo 3, c 69. Section 7 of the Act was particularly relevant, forbidding as it did any British national to: equip, furnish, fit out or arm or endeavor to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out or armed, or shall knowingly aid or assist, or be concerned in, the equipping, furnishing, fitting out or arming of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince [against a power with which Her Majesty is at peace].

⁸ Montague Bernard, *Historical Account of the Neutrality of Great Britain during the American Civil War* (Longmans, Green, Reader and Dyer 1870) 352–61; Bingham (n 2) 7–8. See further and generally Frank Lawrence Owsley, *The CSS Florida: Her Building and Operations* (University of Pennsylvania Press 1965); Tom Chaffin, *Sea of Gray: The Around the World Voyage of the Confederate Raider Shenandoah* (Hill & Wang 2006).

⁹ Following the conclusion of the Civil War, the Foreign Enlistment Act was the subject of a Royal Commission review that recommended the complete redrafting of the Act: see Letter from Moran to Seward, 3 June 1868, in (1868) I Foreign Relations of the United States 209 ff. The result was the conclusion of the Foreign Enlistment Act 1870, 33 & 34 Vict, c 90, which remains in force today.

¹⁰ Bernard (n 8) 337ff.

¹¹ Certainly, large segments of the British population supported the Confederate cause, such as John Laird, former senior partner of the firm that built the *Alabama*, who later became the Conservative MP for

Alabama and her sisters to escape, it was argued, but they had also displayed insufficient enthusiasm in pursuing the vessels once their escape was made known. In 1865, with the Civil War won, the (re-)United States made very clear that it intended to hold Britain to account, with Moore noting that '[a]t no time since the year 1814 had the relations between the United States and Great Britain worn so menacing an aspect as that which they assumed after the close of the civil war'.¹² After a prolonged discourse,¹³ it was decided that a Joint High Commission composed of American and British delegates would meet to draw up a treaty by which the *Alabama* claims could be submitted to binding international arbitration.

3 The Joint High Commission

3.1 The composition of the Commission

That the Joint High Commission itself was able to meet was itself a minor diplomatic miracle, and the result of some 20 months of secret negotiation—occasionally at arm's length—between Stanley Fish, Secretary of State in the Grant and Rutherford administrations, on the one side, and Gladstone's Foreign Secretary, the Earl Granville, on the other. The principal—and, as it happens, essential—intermediary between the two was the Anglo-American businessman and sometime Canadian Minister of Finance Sir John Rose, who developed the proposal for the Joint High Commission and the appropriate method by which to approach the British government at a dinner with Fish and his Assistant Secretary, John Bancroft Davies, on 9 January 1871.¹⁴

The Joint High Commission convened in Washington, DC, on 8 March 1871. Over nine weeks and 37 meetings, it discussed a wide range of issues connected to the predations of the *Alabama* and other Confederate commerce raiders.¹⁵ Great Britain and

Birkenhead. Laird was cheered when he informed the House in 1863 that he 'would rather be handed down to posterity as the builder of a dozen *Alabamas* than as a man who applies himself deliberately to set class against class and to cry up the institutions of another country': *Parliamentary Debates*, 27 March 1863, vol 170 cc 71–72 (John Laird).

¹² Moore (n 2) 495.

¹³ *ibid* 495–536.

¹⁴ The best extended account of this process appears in Moore (n 2) 507–36. For Bancroft Davies' personal recollections, see John Chandler Bancroft Davies, *Mr Fish and the Alabama Claims: A Chapter in Diplomatic History* (Riverside Press 1893).

¹⁵ Notably the *Florida* and *Shenandoah*. Although the *Georgia* had the potential to be a fearsome predator in her own right, this was never realised. The *Georgia* was not procured by Bulloch, but by her commander, Matthew Fontaine Maury, from builders in Dumbarton. She was not constructed as a warship, but as a new civilian steamship with an iron bottom. As anti-fouling coatings were not yet available, this forced the vessel into dry dock frequently, and made her an inadequate raider, leading to her rather poor record of prizes and her sale in Liverpool in 1864 for £15,000. Shortly after leaving Liverpool, however, she was taken by the USS *Niagara* and condemned by the prize court in Boston: Bingham (n 2) 7.

the United States also took the opportunity to attempt to resolve several other persistent points of controversy involving US-Canadian relations.¹⁶

The American delegation was to be led by Fish, supported by the Democrat Samuel Nelson, the senior associate justice of the Supreme Court. They were assisted by General Robert C Shenk (the American Minister to London), Ebenezer Rockwood Hoar (a former judge, US Attorney-General and Republican nominee to the Supreme Court) and George Williams (formerly Senator for Oregon and soon to be US Attorney-General). The British delegation, for its part, was headed by the Earl de Grey and Ripon (a prominent Liberal politician) and further included Montague Bernard (the inaugural Chichele Professor of International Law at the University of Oxford),¹⁷ Sir John A Macdonald (the inaugural Prime Minister of Canada), Sir Edward Thornton (the British Minister in Washington) and Northcote. The secretaries of the commission were to be Bancroft Davis¹⁸ for the American side, and Lord Tenterden (later Permanent Under-Secretary at the Foreign Office) for the British. Rose, despite being instrumental in the brokering of the Joint High Commission, declined to serve—to the regret of both sides.¹⁹

3.2 Sir Stafford Northcote

It is worth pausing here to provide a more involved biographical note on Northcote.²⁰ Born in London in 1818 to Henry Stafford Northcote and Agnes Mary Northcote (*née* Cockburn), Northcote was educated at Eton and Balliol College, Oxford, where he was affected only marginally by John (later Cardinal) Newman's Oxford Movement, despite his sympathy towards High Church Anglicanism. He graduated in 1839, and entered the Bar at Inner Temple the following year (though he was not formally called until 1847), taking up chambers at 58 Lincoln's Inn Fields (now Garden Court Chambers). In 1843, he married Cecelia Frances Farrer, the daughter of a London solicitor, with whom he eventually had seven sons and three daughters.

In 1842, whilst Northcote was productively occupied at the Bar, Gladstone, then-Vice President of the Board of Trade, wrote to Edward Coleridge, then-headmaster of Eton, asking him to recommend a private secretary from amongst his former pupils. Of the three candidates put forward, Gladstone chose Northcote, largely removing him from

¹⁶ Namely rights to the Atlantic fisheries, questions of riparian navigation between the US and Canada and lumber tariffs, as well as the settlement of the US-Canadian border in Manitoba and what would shortly become British Columbia: Moore (n 2) 539.

¹⁷ Bernard was an intriguing figure in his own right. The year previous, he published *A Historical Account of the Neutrality of Great Britain during the American Civil War* (n 8), which basically served as a blueprint for the British submissions during the *Alabama* claims.

¹⁸ See further Davis (n 14) 70.

¹⁹ Cook (n 2) 170–71. Rose's reluctance was principally due to his fear of being seen—through his wife, friends and other business connections—as partial to the United States.

²⁰ See generally Andrew Lang, *The Life, Letters and Diaries of Sir Stafford Northcote, First Earl of Iddesleigh*, vols 1 and 2 (Blackwood 1890); WD Rubenstein, 'Northcote, Stafford Henry (1846–1911)' in *Oxford Dictionary of National Biography* (online edn, OUP 2009).

the law and placing him on a political path for the rest of his life. He served Gladstone directly until 1850 and rose with him (even as he became increasingly conservative in his views, as Gladstone became increasingly liberal), becoming legal secretary of the Board of Trade in 1845 and a secretary of the Great Exhibition (and a favourite of Prince Albert) in 1850, before penning in 1853 with Sir Charles Trevelyan the famous Northcote-Trevelyan Report that advocated the reorganisation of the British civil service along meritocratic lines.

Northcote entered Parliament as the Member for Dudley in 1855 as a 'Liberal Conservative'. In reality, occupancy of the seat was controlled by Lord Ward, who agreed to Northcote's candidacy on Gladstone's recommendation. In 1857, however, he attempted to escape Ward's influence by standing for the seat of North Devon. He lost this election, and returned to private life until asked by Benjamin Disraeli to stand as a Conservative for the seat of Stafford in 1858. This he duly won, and he became Disraeli's most trusted deputy on financial matters for some 23 years. Though he switched to the seat of North Devon in 1866 and was appointed to the House of Lords as Earl of Iddesleigh and Viscount St Cyres in 1885, he remained in Parliament until his death in 1887. He occupied several high government and private offices in the intervening period, including President of the Board of Trade (1866–67), President of the Hudson's Bay Company (1869–70), Chancellor of the Exchequer (1874–80) and Foreign Secretary (1886–87).

3.3 Northcote and the working of the Commission

Northcote was a somewhat unexpected addition to the Joint High Commission. He was also a late adornment, being appointed on 13 February 1871, after the other British members of the Commission had already departed for Washington.²¹ He left England on the steamer *Russia* five days later, and landed in New York on 1 March, where he was met by the rest of the British representatives.

Northcote's recollections of the Commission reveal an atmosphere of collegiality between the British and American commissioners. When they were not sitting, the British commissioners were entertained by their American counterparts and other officials, filling their time with dinner parties, dances, and a foxhunt in the Virginia countryside.²² Although friction emerged on certain points—notably the question of whether Britain could be held liable for indirect losses resulting from its recognition of Confederate belligerency in 1861²³—the days before signing of the final Treaty on 8 May were accompanied by considerable goodwill, recorded by Northcote as follows:

May 3 (...)—This is a big day with fate. We have this day finally settled the treaty, and have sent it to be engrossed with our signature Monday next. Our part is now nearly done

²¹ Lang (n 20) 1–2.

²² *ibid* 12.

²³ See further Cook (n 2) ch 10.

(...) [I]t is a matter for thankfulness that we have brought it thus far, and we shall at least have the satisfaction of knowing thinking that we have won our spurs as negotiators. De Grey deserves even more credit than he is likely to receive. None but those who have worked with him can appreciate his merits.

May 6—Held our last conference to-day. Confirmed the protocol, and then made flattering speeches to one another. Read over the treaty, and saw the ribbons put in, ready for sealing on Monday. Five ribbons drawn through each copy (red and blue), so that one English and one American commissioner may seal upon each copy. Something like the mode of assigning partners in the cotillion. We all carried off some of the ribbon as a memorial. *Gave Mr Fish a copy of my Ode to the Fourth Article*. Signed a number of copies of our photographs, the Americans signing theirs at the same time. A framed copy of each is to be presented to us.²⁴

The day of the signing itself confirmed the good feelings within the Commission.

May 8—A brilliant morning. Breakfasted at nine, and walked up to the State Department at ten. The American Commissioners had arrived, and we spent some time in talk, and in exchanging a prodigious number of autographs, while the seals were being affixed to the two copies of the treaty,—a slow process, as the unfortunate clerk who prepared them was both awkward and nervous, and Tenterden did not help put him at ease by dropping quantities of burning sealing wax on his fingers. The poor man was so much excited that he burst into tears at the conclusion of the affair. (...) The signing seemed to generate great interest in the department, and all, or almost all, of the employees were present. A great quantity of flowers were sent up by different ladies, and we were abundantly supplied with strawberries and iced cream, with which we relieved our feelings after shaking hands all round. And now the breaking up begins.²⁵

Northcote emerges from the Washington negotiations as an indefatigable supporter of De Grey, confirming the assessment of Disraeli's biographer that he was 'a born second-in-command'.²⁶ There is no doubt that his task was extremely difficult. The British delegation faced greater difficulties than their American counterparts, being forced to play a trilateral or even quadrilateral game. With Fish—who was given a relatively free hand by President Grant—in charge, the American delegation did not need to worry about supervision from further up the political food chain, or deal with dissenting opinions within its own ranks. The British were not so lucky. In the first place, Macdonald, perhaps understandably, campaigned aggressively within the delegation in relation to those issues that touched on Canadian interests and was on occasion opposed by the other British commissioners.²⁷ Aware that strong separatists movements were afoot in the young confederation, Macdonald needed to demonstrate the benefits of unity through a strong showing in the final treaty. This he largely achieved, and whilst there were some cries

²⁴ Lang (n 20) 16–17 (emphasis added).

²⁵ *ibid* 17–18.

²⁶ Robert Blake, *Disraeli* (St Martin's Press 1967) 545.

²⁷ Cook (n 2) 171–72.

of treachery from Nova Scotia in relation to the fisheries settlements contained in the Treaty (articles XVIII–XX), these did not amount to much in the final balance.²⁸

A second problem arose from further afield. In 1866, Isambard Kingdom Brunel's SS *Great Eastern* laid the first enduring transatlantic telegraph cable, to be swiftly followed by duplex and quadruplex counterparts in the early 1870s that permitted multiple messages to be conveyed simultaneously.²⁹ It also permitted Granville to send constant, harrying cables to De Grey demanding updates on the negotiations and attempting to micromanage his delegation. Northcote was known to remark that the British commissioners were unable to respond to the question 'How do you do?' from those opposite without first seeking instructions from London.³⁰ The telegraph bill overall for the nine weeks of the Commission's negotiations reached £5,000—roughly £3.4 million in today's money.³¹ One particularly memorable cable, which came at the end of the negotiations when the text of the agreement was being finalised, instructed De Grey that the Cabinet would not tolerate the inclusion of any split infinitives in the concluded treaty—'[t]he purity of the English language,' Northcote's biographer notes, 'they nobly and courageously defended.'³² Northcote appears to have sympathised with De Grey in this respect, writing a brief poem that summarised his trials:

The US Commissioners give him some trouble;
Don't blame them for *that*—it's their duty, you know;
And his Cabinet colleagues, they give almost double,—
They do it from love, and he likes it—so, so!³³

4 The Fourth Article

The short verse that Northcote penned in support of De Grey was not the only poetic contribution that he made to the Commission. As revealed in his diary entry from 6 May 1871 (extracted above), he also wrote a more extensive poem concerning what he referred to as 'the Fourth Article'. He appears to have been quite proud of his work, and gave a copy of the *Ode to the Fourth Article* to Fish towards the close of the Commission's work. At least one other copy of the *Ode* was made and given to another of the American commissioners, Hoar.³⁴ From there, it found its way into the Hoar family papers, which

²⁸ Margaret Conrad, *A Concise History of Canada* (CUP 2012) 152–53.

²⁹ See generally Arthur C Clarke, *Voice Across the Sea* (Harper 1958).

³⁰ He further hypothesised that the response of Her Majesty's Government was that the preferred response to such a question would be 'Pretty well' as opposed to 'Not at all well': Lang (n 20) 15.

³¹ *ibid* 16.

³² *ibid* 13.

³³ *ibid* (emphasis in original).

³⁴ It is not beyond the realms of possibility that Fish's copy somehow fell into Hoar's hands, making it the sole known reproduction of the poem. The whereabouts of the original are unknown. Lang, Northcote's biographer, was more than willing to extract other samples of his subject's forays into poetry (eg Lang

were gifted to the Public Library in Concord, Massachusetts in 1999³⁵ where it was stumbled upon by the author in the course of related research.

What, then, was the Fourth Article? To understand this, one must examine the final content of the Treaty of Washington, and particularly the content of article VI of the agreement, which set out the rules of international law to be applied by the arbitral tribunal in the determination of the *Alabama* claims. This, in turn, contains three rules of international law:³⁶

A neutral government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, or any vessel which it has a reasonable ground to believe is intended to cruise or carry on such war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to war-like use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

These rules are to a large extent based on a proposal made by the American commissioners on 14 March 1871,³⁷ which happened to include an additional, fourth rule, which provided that:

A vessel which has departed from the jurisdiction of a neutral government in violation of the neutrality thereof, if afterward found to be within the jurisdiction of that government, and lawfully commissioned as a public vessel of war, ought to be detained unless she have in the interval been duly and lawfully commissioned as a public vessel of war; but if she have been thus commissioned as a public vessel of war, and be not detained, the national responsibility of such neutral government continues in respect of injuries and losses occasioned to the aggrieved belligerent subsequent to such departure, and until the original offence be deposited by the *bona fide* termination of the cruise.

This provision—the fourth article—was clearly intended to deal with precisely the situation generated by the *Alabama*, that is, where a vessel leaves the port of a neutral state as a putatively civilian vessel in violation of said state's neutrality, but is later

(n 20) 27–28) and the absence of the *Ode* from his account of Northcote's life may mean that it did not find its way into Northcote's collected Iddesleigh papers.

³⁵ Leslie Perrin Wilson, 'Papers of the Legendary Hoar Family Come to the Concord Library', *Concord Magazine* (August/September 1999) <<http://www.concordma.com/magazine/augsept99/hoar.html>> accessed 18 September 2014.

³⁶ Moore (n 2) 543.

³⁷ Extracted in *ibid* 542–43. As noted expressly in art VI of the Treaty of Washington, Britain expressly did not admit that these constituted valid rules of international law at the time of the *Alabama's* career, but nonetheless 'in order to evince its desire of strengthening the relations between the two countries and of making satisfactory provision for the future' agreed to submit to them as the relevant applicable law.

commissioned into the armed forces of a belligerent. In such a case, the article provides, the neutral state is to be held liable for all acts of destruction perpetrated by the escaped vessel, even after it has been commissioned as a naval vessel of a belligerent, until such time as its cruise has ended, such as through calling at a port of her own government. The clear injunction of the article is that it is in the best interests of the neutral state to capture or sink the vessel, as the fact that it has been commissioned at sea (as were both the *Florida* and the *Alabama*) will not serve to sever the thread of liability.

The fourth article, it quickly became apparent, was not acceptable to the British Commissioners. Minor amendments in the interests of clarity followed, and the results were sent to the Cabinet on 14 March.³⁸ Following further deliberation, an alternative was proposed, which read:

Also, that if a vessel has departed from its jurisdiction in violation of the obligation under Articles One, Two, and Three, a neutral government is bound to detain such vessel if afterwards found within any port or place within its jurisdiction if the local authority of such port or place has, upon representation made, reasonable and probable grounds for believing that such vessel has departed as aforesaid, unless such vessel has in the interval been commissioned as a ship of war.³⁹

De Grey presented this alternative to Fish, noting that the changes so made—and the removal of the vital provision that commissioning at sea would not save a recalcitrant state from liability—were designed to remove potential opposition in Parliament. Fish did not take the bait, leading De Grey to comprehend an impasse.⁴⁰ At this point, Granville intervened in order to fight a rearguard action, authorising certain concessions be made in the wording of the first three articles whilst proposing a further amendment to the fourth that abandoned British attempts to remove liability for a commissioned raider calling at a neutral port.⁴¹ Fish more or less accepted this proposal, only to be confronted with a late-breaking concern from Granville that the fourth article did not cover situations in which a neutral state, despite its best efforts, did not possess sufficient manpower to prevent a vessel from leaving. Fish saw here an opportunity, thinking that the United States might do just as well—if not better—if the fourth article were removed entirely, and the first three rules applied globally to a raider's entire cruise. Following the extraction of further concession regarding the first article (the insertion of the term 'specially adapted'), Fish agreed to scupper the fourth.⁴² By 4 April, the most contentious aspect of the Treaty of Washington—the rules to be applied by the tribunal—was settled.

Northcote, apparently motivated by these exchanges, penned his *Ode* as a memorial, and in so doing wove in the wider narrative of the *Alabama*'s escape. One suspects his efforts were a tongue-in-cheek attempt to celebrate the fact that the most difficult part

³⁸ Cook (n 2) 181.

³⁹ *ibid* 182.

⁴⁰ *ibid*.

⁴¹ *ibid* 183.

⁴² *ibid* 184.

of the negotiation was behind the Commission, and to send up the sense of seriousness that whilst temporarily stifling to the Commission's work, had now evaporated. It stands today as an insight into how the Commission saw its work, and how its British and American members interacted on a daily basis. The fact that the poem was passed to a member (or members) of the American delegation arguably demonstrates that Northcote felt a sense of collegiality—or at the very least common cause—with those opposite, a feeling further reaffirmed in his description of the Commission's work overall: 'If we have not built a castle, we have laid the foundations of a very nice cottage, which may be turned into a castle at some future day.'⁴³

Northcote's *Ode* is accordingly presented without further ado, together with some explanatory notes for the reader.

5 Ode to the Fourth Article

1

Oh where and oh where is my little Fourth Article?
Where is it gone?
It is not in the Protocol, not in the Treaty;
Vainly each stone I turn, vainly each bush beat I;
Vainly, despairing, in every party I call;
Making my moan;
Nobody shows me my little Fourth Article;
It is gone.

2

Oh who shall paint that vanished beauty;
What still born rule of Britain's duty,
What flower which blushed unseen,
What Ocean gem serene,
That snow-flake on the river
So bright, so lost for ever,
Vanished, like Belinda's hairs
When they felt the Baron's shears?⁴⁴
'Tis with awe
I endeavour to render in language that's rational
That would-have-been pillar of International Law!⁴⁵

⁴³ *ibid* 185–86.

⁴⁴ See Alexander Pope's *The Rape of the Lock* (1712), a mock-epic satirising the upper middle class in London. The story focuses on the central character, Belinda, whose lock of hair is cut off at a social gathering. Although trivial to most, Belinda is outraged that her lock of hair has been cut by the Baron.

⁴⁵ At this stage, Northcote could not have known that Fish's long time *bête noir*, Senator Charles Sumner of Massachusetts, planned to amend the rules when ratification of the Treaty was sought in the Senate. Fish,

3

See what a commotion!
 All over the Ocean
 The British fleet must be set in motion.
 Open the port-holes, and close the posts;
 Fire on the rascal from all the forts;
 That saucy cruiser,
 The pest Arethusa,⁴⁶
 As she passed the Isles of Scilly,
 (Home of the great Augustus Smith),⁴⁷
 Took on board Tom, Dick, and Willy,
 Cornishmen of mighty pith.⁴⁸
 Up, up, and pursue,
 Capture vessel and crew,
 That's what the Fourth Article says we must do.

4

In caucus on K Street,⁴⁹ the High Joints are closeted;
 With straws to their two lips
 They sip their Mint Juleps,
 They shake their heads, and they close their eyes,
 And they try to look exceedingly wise,
 While Professor Bernard

recognising that any attempt to amend the Treaty would cause its collapse, ensured that his proposals were never subject to a vote. The Treaty eventually passed the Senate by a vote of 50 to 12: Cook (n 2) 197–98.

⁴⁶ Arethusa in Greek mythology was a nymph who gave her name to a spring in Elis and to another on the island of Ortygia near Syracuse. She is depicted occasionally on coins as a girl with a net in her hair and dolphins around her head. In one of London's humorous illustrated weeklies, the *Comic News*, lyrics celebrating the victories of the *Alabama* were set to the tune of a popular air, *The Saucy Arethusa*: Gary L. Bunker, 'The Comic News, Lincoln and the Civil War' (1996) 17 *J Abraham Lincoln Association* 53.

⁴⁷ Augustus Smith (1804–1872) was Governor of the Scilly Isles for over 30 years, and largely responsible for the economy of the islands as it is today.

⁴⁸ This may have been an invention by Northcote, or a mistake as to the course taken by 'hull 290' after its escape. As Semmes notes, after escaping Birkenhead 'hull 290' proceeded west to Moelfre in Wales before turning to starboard and entering the Atlantic via the northern end of the Irish channel. There is no indication that the vessel ever visited Cornwall or the Scilly Isles: Semmes (n 3) 100–01.

⁴⁹ The US Department of State at that time was housed in the Washington City Orphan Asylum, on the southeast corner of Fourteenth and S Streets Northwest. This was a temporary arrangement between 1866 and 1875. It proved singularly unsuitable in terms of both size and layout and was furthermore a considerable fire hazard—an unwelcome attribute in an orphanage. It was traded in for the State, War and Navy Building in 1875, which housed the Department until 1947: See US Department of State Office of the Historian, 'Buildings of the Department of State: Washington City Orphan Asylum, November 1866–July 1875' <<https://history.state.gov/departmentshistory/buildings/section26>> accessed 22 September 2014. Early meetings of the Commission were held there (Cook (n 2) 169) and there is no reason to believe that the location changed midway through the proceedings. It therefore seems likely that this passage refers to the British Commissioners alone, who would have conducted their deliberations at the British Embassy, then located on K Street.

In his language hard
Says 'Suppose the offence be deposited?'

5

Then they gazed at one another,
'Let us take,' they said, 'this creature,
Let us alter every feature,
So that e'en its tender mother
Would not know her child.'
And they laid their heads together
In intense deliberation;
Changing what was white to black;
Changing what was stern to mild;
Each proposed his alteration,
Trembling lest it prove the feather
Which should break the camel's back.
And they turned it inside out,
And they turned it outside in,
And they turned it round about,
And their brains began to spin.

6

But conceive the consternation
In the sacred street of Downing,⁵⁰
Where the Cabinet sat frowning,
Glowing hot with indignation
Pishing, pshawing, wond'ring, guessing,
Doing everything but blessing,
That unlucky High Commission
For this awkward proposition.
Vainly they try its defects to amend,
Vainly they tinker beginning to end,
Vainly they wonder,—
May I dare to add?—blunder.
The poor Fourth Article,
Innocent particle,
Finds in that stately assembly no friend.

⁵⁰ Clearly a reference to the Cabinet Room at 10 Downing Street.

7

At length a noble Viscount⁵¹ rising
Puts a period to the quarrel,
'Quit', he says 'this weak revising,
List my tale and draw the moral

'There was once upon a time a physician,
(The story perhaps you may know,)
There came a dyspeptic Apician,⁵²
His embarrassed position to show.

"Dear doctor, I want a suggestion;
How may I avoid the distress,
Which a cucumber gives my digestion?
Oh teach me the viand to dress".

'Says the doctor, "I have a prescription,
Which your case I feel certain will suit;
With pleasure I'll give a description
Of the way you should handle the fruit.

"Be careful to cut it up thin;
Do not fail to add oil that is sweet;
Then some pepper, then open the window,
And throw the thing into the Street".

8

O! My Fourth Article,
Innocent particle,
Wanting a friend,
Projected, suspected,
Convicted, rejected,
This was thine end!

SHN
May 1871

⁵¹ The only person bearing this title in the First Gladstone Cabinet was Charles Wood, 1st Viscount Halifax (1800–1885), who sat as Lord Privy Seal. The intervention was presumably his.

⁵² An Apician is one belonging to Apicius, a notorious Roman epicure. The term is thus applied to whatever is peculiarly refined or dainty or expensive in cookery.

Been There, Done That: The Margin of Appreciation and International Law

Eirik Bjorge*

Abstract

The margin of appreciation, as a doctrine of international law, has a great future behind it. It was once thought to be the panacea that would solve international law's problems, but has in fact diminished in importance in international law. Contrary to what is often argued, the doctrine of the margin of appreciation originated in early public international law, not in Continental domestic public law. In the course of the twentieth century, international law discarded the doctrine. The preferred standard of review, as the International Court set out in *Whaling in the Antarctic*, is 'an objective one'. In the sphere where the margin of appreciation is most famously in operation, the law of European human rights, it is being supplanted by the doctrine of subsidiarity. The margin of appreciation is, in international law, an aberration. It is time we treated it as such.

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Keywords

Margin of Appreciation, Deference, Standard of Review, International Courts and Tribunals, European Convention on Human Rights

1 Introduction

Until recently, the doctrine of the margin of appreciation was widely thought to be something of a panacea, a quick fix to many a problem in public international law. It has been conceived of as a doctrine to be given application in practically all spheres of international law, at least in the sense that it should be recognised as having general application in international law. Those who have made this argument have told us that international law ought to take inspiration from the jurisprudence of the European Court

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of Human Rights (ECtHR). For it is there that the margin has had the greatest impact and enjoyed the greatest success and longevity. The margin of appreciation is a form of legal discretion granted by an international court to the respondent, recognising that the respondent state can be presumed to be best qualified to appreciate the necessities of a particular situation affecting its jurisdiction.¹

One leading commentator, Yuval Shany, argued that the doctrine should be given full recognition by the International Court of Justice (ICJ) in the types of case in which it has, famously, been applied by the ECtHR.² To the extent that the jurisprudence of the ICJ is not aligned, in this respect, with the application of the doctrine by the European Court, Shany argued, the International Court should take steps to rectify this state of affairs.³ He was hopeful that the International Court would, by adopting the doctrine, 'eventually join the prevailing trend, and replace the façade of objective normative guidance adopted in several of its recent decisions with a more nuanced and conducive approach.'⁴ Other leading publicists have taken much the same view.⁵

Taking issue with this account, I will set out to demonstrate why, in the recent past, international courts and tribunals have resisted the doctrine. The argument is very simple. The leading publicists I just mentioned have argued that international law should take a leaf out of the book of the ECtHR and accord to respondent states a margin of appreciation in relation to determinations made by the state under international law.

Conventional wisdom is that the ECtHR took the doctrine of the margin of appreciation from German and French public law.⁶ The received wisdom as to the genealogy of the doctrine, repeated by practically everyone who has written on the topic, is: continental domestic public law, European Court, and then, they have been and remain hopeful, international law.

As I will argue, however, there are at least two problems with this genealogy. The institutions of the European Convention, in the 1940s, 1950s, and 1960s never in the first place took the doctrine from domestic Continental law, for the simple reason that the doctrine never existed there. The doctrine came instead from public international law, the public international law of the early twentieth century. And, importantly, at

¹ J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 666.

² Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 EJIL 907, 939. See, however, the early criticism—from which the present contribution draws inspiration—by R Higgins, 'Derogations under Human Rights Treaties' (1976–77) 48 BYIL 296–97.

³ Y Shany (n 2) 931.

⁴ Y Shany (n 2) 939–40.

⁵ E Cannizzaro and B Bonafè, 'Beyond the Archetypes of Modern Legal Thought: Appraising Old and New Forms of Interaction between Legal Orders' in M Maduro, K Tuori and S Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (CUP 2014) 78, 84–88; Dissenting Opinion of Judge Cot, *The Volga (Russian Federation v Australia)* (Application for Prompt Release) (2002) 126 ILR 433, 469–70.

⁶ See SD Murphy, 'Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?' in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP 2009) 76; B Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP 2001) 1001–05; A Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012) 3.

the time when the Strasbourg organs, principally its Commission and Court, adopted the doctrine, public international law was about to jettison the margin of appreciation altogether.

The conclusion which, for me, arises from this messy picture, then, is that we should not be surprised that the ICJ recently in *Oil Platforms*⁷ and *Whaling in the Antarctic*,⁸ but also other international tribunals such as the International Tribunal for the Law of the Sea and *ad hoc* arbitral tribunals, have resisted adopting the doctrine. To international law—or what we could with a contested term call *general* international law—the slightly tired idea of the margin of appreciation is decidedly old hat. International law has been there, it has done that.

2 Putative domestic law ancestry of the margin of appreciation

It is, as I just explained, often claimed that the Strasbourg doctrine of the margin of appreciation was a concept taken from national law, both in the late 1940s when it was first suggested that the margin of appreciation should be inserted into the Convention itself, and in the late 1950s, when it actually appeared in the jurisprudence of the European Commission of Human Rights.

Many authors have held that the doctrine of the margin of appreciation originated from French and German administrative law.⁹ It is no exaggeration to say that this has become the conventional wisdom. It is far from clear, however, that this assertion withstands any serious scrutiny. Several factors at least suggest that the doctrine of the margin of appreciation was taken not so much from domestic law as from general international law.

First of all, the drafting history of the European Convention on Human Rights (ECHR) seems to point in that direction. During the drafting of what would become the European Convention, the Maxwell-Fyfe and Teitgen Committee, chaired by Sir David Patrick Maxwell-Fyfe, later Lord Kilmuir LC, and Pierre-Henri Teitgen, professor of international law and later French Minister of Justice, raised the idea of devolving responsibility to member states for agreeing on detailed definitions. Rapporteur Teitgen thus suggested that an international convention was to establish and give no more than *general definitions* of a list of guaranteed freedoms.¹⁰ Each state had the right to determine, in respect of itself, the practical means for the exercise of the liberties guaranteed by the Convention.

This approach he explained in terms of, in the French original, ‘liberté d’appréciation’:

Each country shall, through its own legislation, determine the conditions in which these guaranteed liberties shall be exercised within its territory, and, in defining the practical

⁷ *Oil Platforms (Iran v US)* [2003] ICJ Rep 2003 161.

⁸ *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* [2014] ICJ Rep 2014.

⁹ See n 6 above.

¹⁰ Travaux préparatoires to the ECHR, Seventeenth Sitting, 7 September 1949 (M Teitgen) 1150.

conditions for the operation of these guaranteed liberties, each country shall have a very wide freedom of action (*une très large liberté d'appréciation*).¹¹

In the end the framers decided not to include any mention of any *liberté* or *marge d'appréciation* in the provisions of the Convention. It was dealt with systemically instead, through generic terms.

The phrase would instead make its first appearance in the jurisprudence of the European Commission of Human Rights in the 1958 *Cyprus Case*.¹²

As I adumbrated above, many leading authors have asserted, usually I fear with no more than threadbare proof that the *marge d'appréciation*, came from Continental administrative law. This is the assertion put forward by the great AWB Simpson in his *Human Rights and the End of Empire*,¹³ later unblushingly repeated by margin-of-appreciation scholars of renown.

On the European Commission in 1958 sat, among others, the German lawyer, Adolf Süsterhehn, a domestic constitutional lawyer, who, having joined the Commission just before it adopted the margin-of-appreciation approach to the question of whether the respondent state in *Cyprus* could derogate under article 15, is alleged to have introduced into the jurisprudence of the Strasbourg organs the margin of appreciation. *Post hoc ergo propter hoc* seems to be the conclusion that Simpson draws in this connection.

But is it a hallmark of German administrative and constitutional law that the courts accord to administrative agencies margins of appreciation? No. There are in my view two reasons why this conclusion should be resisted.

First comes the reason that, in general, judicial review in German administrative and constitutional law is perhaps the most searching of all European legal systems.¹⁴ Secondly, it is not correct that a doctrine similar to the margin of appreciation was ever allowed to take root in German law, and certainly not by the time, in the late 1950s, when Süsterhehn and his Commission colleagues in the *Cyprus Case* adopted it.¹⁵

As Birgit Schlütter has concluded in relation to German law in this regard, 'the margin of appreciation doctrine of the [European Court] finds no parallel at the national level'.¹⁶ Against this background, the conclusion that the doctrine was taken from German law should perhaps cautiously be resisted.

It has also been suggested that the concept of the margin of appreciation is of specifically French origin. After all, a French word. Some authors have claimed that the

¹¹ *ibid.*

¹² *Greece v United Kingdom (Cyprus Case)* App no 176/56, (1958) 2 Yearbook of the European Convention on Human Rights 174, 174–76. See the foresight shown in this connection by the critical remarks of Higgins (n 2).

¹³ See n 7 above.

¹⁴ See eg G Nolte, 'General Principles of German and Administrative Law: A Comparison in Historical Perspective' (1994) 57 MLR 191, 197.

¹⁵ See 15 BVerwGE 207, 208; 23 BVerwGE 194, 200–01; 24 BVerwGE 65; 31 BVerwGE 149, 152; 35 BVerwGE 67, 72–73. See further M Singh, *German Administrative Law in Common Law Perspective* (2nd edn, Springer 2002) 177–78.

¹⁶ B Schlütter, 'Germany's Dialogue with Strasbourg' (2012) 13 GLJ 757, 769.

Conseil d'État had used in its jurisprudence the phrase *marge d'appréciation*, and that this jurisprudence was the inspiration for the Strasbourg institutions taking up this doctrine. It can be stated with certainty that that last assertion is not entirely correct. The term appeared in the jurisprudence of the *Conseil d'État* for the first time in 1977,¹⁷ after the Strasbourg organs had begun relying on the margin of appreciation and after the ECHR had begun to make its presence felt within French law.

Even more importantly, however, as the Cambridge Professor of Comparative Law CJ Hamson explained to English-speaking audiences in his classic 1954 treatise comparing English and French administrative law *Executive Discretion and Judicial Control*:¹⁸ French administrative law is probably the least promising of all possible jurisdictions to look to for those who seek inspiration as to ways in which to broaden deference and discretion granted by courts to the government. Such a doctrine simply did not exist in French law.

On the whole, there is little evidence that the ECHR institutions received the doctrine of the margin of appreciation from German and French administrative law. A number of factors point towards a different genealogy.

3 The margin of appreciation and its actual international law ancestry

The origins of the concept of the margin of appreciation lay not so much in domestic law as in international law. This could be thought to be borne out already by the way in which Rapporteur Teitgen explained the approach chosen for the drafting of the European Convention referred to above:

*elle consacre le principe traditionnel, et même fondamental en droit international public, selon lequel chaque pays a compétence pour organiser sur son territoire les modalités d'exercice et les conditions quotidiennes de fonctionnement des droits et des libertés garantis.*¹⁹

Teitgen here seems to be saying that, in his view, the principle was adopted from his own field of scholarship—*droit international public*. Teitgen makes no mention of the putative domestic law ancestry.

He was right, in the late 1940s, to refer to the margin of appreciation as being 'traditional' and 'fundamental' in public international law. If one scrutinises the language adopted—and the tradition in the international law of the first half of the twentieth century of granting to states margins or powers of appreciation—it seems likely that the Strasbourg institutions took the inspiration for the margin of appreciation from general international law.

What then did that law say? The doctrine of *liberté d'appréciation* in international law surfaced perhaps most prominently in *Spanish Zone of Morocco Claims*,²⁰ where

¹⁷ *Conseil d'État*, 7 October 1977, *Sieur Gaillard Yves*.

¹⁸ CJ Hamson, *Executive Discretion and Judicial Control* (Stevens & Sons 1954).

¹⁹ *Travaux préparatoires* to the ECHR (n 10) 1150.

²⁰ *British Claims in the Spanish Zone of Morocco (Great Britain v Spain)* (1925) 2 RIAA 615.

the Tribunal was made up by Sole Arbitrator Max Huber, President of the Permanent Court of International Justice. As students of state responsibility will know, this classic of international law contains multitudes. But strangely, to my knowledge at least, no one has pointed to what the case has to say about the margin of appreciation.

The Tribunal determined that the appraisal of the necessity of certain impugned military actions at issue in the case lay, to a very large extent, not with the Tribunal but with the domestic authorities that had carried out those military actions. The Tribunal both explicitly used the terminology *liberté d'appréciation* and in actual fact deferred to national authorities in its necessity inquiry. The Tribunal concluded: "The appreciation of necessity should be left in large measure to those who are called upon to act in difficult situations, and to their military superiors."²¹ This was due to the fact that "[a] civilian court, and especially an international one, cannot intervene in this domain except in cases of manifest abuse of this liberty of appreciation."²² The Tribunal underscored that both the fact that the domestic authorities in question possessed greater expertise than the Tribunal, and the fact that the Tribunal was an international one, led to the conclusion that a 'liberty of appreciation' must be accorded to the Spanish authorities. Both in terms of the terminology used and in the reasons relied on this looks like nothing if not the precursor to the doctrine of the margin of appreciation.

Huber's approach in *Spanish Zone of Morocco Claims* of the issue of the applicable standard of review, in relation to standards of necessity or urgency, was relied upon by the Permanent Court of International Justice in *Lighthouses Case between France and Greece*, where it was determined that:

any grant of legislative powers generally implies the grant of a discretionary right to judge how far their exercise may be necessary or urgent. (...) It is a question of appreciating political considerations and conditions of fact, a task which the Government, as the body possessing the requisite knowledge of the (...) situation, is alone qualified to undertake.²³

Other incidences of the doctrine of the margin of appreciation in the jurisprudence of *ad hoc* Tribunals in the 1920s–40s abound.²⁴

And as late as in 1948, the ICJ in *Admissions* determined that, while article 4 of the Charter of the United Nations²⁵ exhaustively prescribes the conditions for the admissions of new members, that provision did not 'forbid the taking into account of any factor which

²¹ *ibid* 645 ('L'appréciation de ces nécessités doit être laissée dans une large mesure aux personnes mêmes qui sont appelées à agir dans des situations difficiles, ainsi qu'à leurs chefs militaires').

²² *ibid* ('Une juridiction non militaire, et surtout une juridiction internationale, ne saurait intervenir dans ce domaine qu'en cas d'abus manifeste de cette liberté d'appréciation').

²³ *Lighthouses Case between France and Greece (France v Greece)* (Judgment) PCIJ Rep Series A/B No 62, 22 ('faculté discrétionnaire d'apprécier la nécessité et l'urgence').

²⁴ *Acquisition of Polish Nationality* (Advisory Opinion) PCIJ, 1923 PCIJ Rep Series B No 7, 9; *Affaire de la dette publique ottomane* (1925) 1 RIAA 529, 566–68; *Différend SAIMI (Società per Azioni Industriale Marmi d'Italia)—Decisions* No 4, 11, 19, 38 et 70 13 (1948–50) RIAA 43, 45; *Georges Pinson (France v Mexico)* (1928) 5 RIAA 327, 412.

²⁵ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119.

it is possible reasonably and in good faith to connect with [those] conditions', article 4 thus allowing for 'a wide liberty of appreciation' ('une large liberté d'appréciation').²⁶ These early incidences of the doctrine in the jurisprudence of international courts and tribunals are mirrored by the extensive reliance upon the doctrine of the margin of appreciation found in the writings of leading international lawyers in the 1920–30s.²⁷

4 The doctrine's disappearance in general international law

Public international law would, however, from the end of the Second World War and onwards, undergo substantial change in respect of issues of sovereignty and the view of how acceptable doctrines of margins of appreciation really were in the intercourse of states. Like with many other changes in international law, the change happened incrementally and through accretion. Thus, as was seen above, the 1948 *Admissions* judgment still relied on the margin of appreciation.

Setting out what could be thought to be a new direction post Second World War, one major ruling that decisively moved away from the *Spanish Zone of Morocco Claims* approach was the *Nuremberg* judgment.²⁸ The defendants had, in connection with the charge of German aggression against Norway, pleaded that Germany alone could decide as to whether the action 'was a necessity, and that in making her decision her judgment was conclusive.'²⁹ The *Nuremberg* Tribunal, however, determined tersely that 'whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.'³⁰ Gone was the *Spanish Zone of Morocco Claims* approach, according to which '[t]he appreciation of necessity should be left in large measure to those who are called upon to act in difficult situations, and to their military superiors.'³¹ In *Nuremberg*, no such margin of appreciation was left to the decision makers, or to their military superiors. As I will show, the same is the case in other postwar cases.

It could be asked, on this background, why the latter half of the twentieth century witnessed this emergent move away from the margin-of-appreciation approach?

Max Huber, having himself presided over *Spanish Zone of Morocco Claims*, observed in 1958 that, if international law was to develop, notions of sovereignty must inevitably in

²⁶ *Conditions of Admission of a State Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57, 64.

²⁷ See eg A Verdross, *Les principes généraux du droit dans la jurisprudence internationale* 52 *Hague Recueil* 195, 248 (1935); M Bourquin, *Stabilité et mouvement dans l'ordre juridique international* 64 *Hague Recueil* 354, 400 (1938); R Ago, *Le délit international* 68 *Hague Recueil* 419, 471 (1939).

²⁸ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Judgment*, reproduced in (1947) 41 AJIL 172, 207; *In re Goering* (1946) 13 ILR 203, 210.

²⁹ *Trial of the Major War Criminals before the International Military Tribunal* (n 28) 207.

³⁰ *ibid.*

³¹ *British Claims in the Spanish Zone of Morocco* (n 20) 645.

some measure give way. He underlined how in the chancelleries of the world exaggerated ideas of sovereignty had outlived themselves, at the expense of international cooperation:

Nobody will venture to assert that the international law of today, in spite of new directions in 1920 and 1946, is able to cope with the present world situation. The responsibility of all concerned with international law in the widest sense of the term, whether as politicians or scientists, is all the heavier. There is only one way to a new solution: coexistence.³²

The former Judge concluded that ‘the idea of sovereignty, which flattered and served the sense of power in big states and the desire for independence in small ones, must make way for an efficient and active community of nations.’³³ It is against this background that we should understand the development of the jurisprudence of the International Court in connection with the margin of appreciation, as the Court moved to disavow its deferential approach from earlier decades, preferring instead a more objective approach. The clearest examples of this development would come in *Oil Platforms* and *Whaling in the Antarctic*.

To stand on its head the exhortation by Shany quoted in the introduction, the International Court would move away from what Shany dubbed a ‘nuanced and conducive approach’ to what he saw as being no less than a ‘façade of objective normative guidance’.³⁴ Thus, in an assessment of military necessity, the same consideration as had been at issue in *Spanish Zone of Morocco Claims*, the International Court in *Oil Platforms* did not accept the suggestion by the United States that the decision should not ultimately be subject to investigation and adjudication by the Court. On the US view, in the context of the case, ‘a measure of discretion (“une certaine liberté d’appréciation”) should be afforded to a party’s good faith application of measures’. The Court, for its part, simply stated that:

the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any ‘measure of discretion’ (*une certaine liberté d’appréciation*).³⁵

In opting for a ‘strict and objective test’ instead of leaving room for a ‘measure of discretion’, or a margin of appreciation, the International Court in *Oil Platforms* plainly took the modern course of the *Nuremberg* Tribunal rather than the outmoded one of the Tribunal in *Spanish Zone of Morocco*.

A important concomitant development in the decline of the margin of appreciation in international law is the emerging focus on the *reasons* for which the respondent state had made its determination or applied the measure at issue.

³² M Huber, ‘On the Place of the Law of Nations in the History of Mankind’ in *Symbolae Verzijl* (Martinus Nijhoff 1958) 194–95.

³³ *ibid* 195.

³⁴ See n 2 above.

³⁵ *Oil Platforms* (n 7) 196.

This is clear from *Whaling in the Antarctic*.³⁶ At issue there was the interpretation of article VIII of the Whaling Convention,³⁷ which provides that:

Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research [*en vue de recherches scientifiques*] subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention.

Japan had in its oral pleadings before the Court argued that there existed in international law a general doctrine of the margin of appreciation. Another whaling state, Norway, had taken a particularly strong stance in this regard, its Minister of Fisheries and Coastal Affairs, Lisbeth Berg-Hansen, arguing in a statement to the Norwegian Parliament that, on the Norwegian view, the state of nationality must have a ‘very broad margin of appreciation.’³⁸

Rejecting the argument that the Court should advert to a general doctrine of the margin of appreciation, the Court held that article VIII gave discretion to a state party under the convention to reject the request for a special permit or to specify the conditions under which a permit would be granted. Nonetheless, observed the Court, whether the killing, taking and treating of whales pursuant to a requested special permit was for purposes of scientific research ‘cannot depend simply on that State’s perception.’³⁹ As is clear from the Court’s choice of words, there is scope within this approach for more or less latitude accorded to the state; the analysis below explains where on the continuum of more or less latitude the Court decided to ground its review of the impugned determinations.

The Court observed that in reviewing the grant of a special permit authorising the killing, taking and treating of whales, the Court would assess, first, whether the program under which these activities occurred had involved scientific research. Secondly, the Court would consider if the killing, taking and treating of whales was ‘for purposes of’ scientific research by examining whether, in the use of lethal methods, the program’s design and implementation were ‘reasonable in relation to achieving its stated objectives.’ The Court pointed out that ‘this standard of review is an objective one.’⁴⁰

³⁶ *Whaling in the Antarctic* (n 8).

³⁷ International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

³⁸ Norwegian Minister of Fisheries and Coastal Affairs, ‘Scientific Research on Whales’ (2013) <http://www.regjeringen.no/en/arkiv/Stoltenbergs-2nd-Government/Ministry-of-Fisheries-and-Coastal-Affair/Nyheter_og_pressemeldinger/nyheter/2013/scientific-research-on-whales.html?id=731449> accessed 12 April 2015: ‘The terms of Article VIII are unambiguous. The decision-making powers in this matter rest with the State party concerned. (...) The State Party concerned retains a very broad margin of appreciation (deciding such restrictions as the State “thinks fit”). The discretion to be exercised is not qualified by references to criteria of “necessity”, “proportionality” or other similar requirements.’

³⁹ *Whaling in the Antarctic* (n 8) para 61.

⁴⁰ *ibid* para 67.

Thus the Court decidedly declined to accept Japan's proposed margin-of-appreciation approach to asking, instead, whether the design and implementation of the program at issue were 'reasonable in relation to achieving its stated objectives'.⁴¹

Why did the Court choose this approach? It seems that, in the first place, the Court needed to avoid saying that Japan had acted in bad faith, simply because a finding to this effect by 'the principal judicial organ of the United Nations'⁴² would be very difficult for a sovereign state to accept. In the second place, clearly did not want to get embroiled in defining what is 'science'. The Court, in the third place, and I think most importantly, wanted to avoid giving its imprimatur to the doctrine of the margin of appreciation.

The answer to why, in the postwar period, international courts and tribunals have taken this approach, could be summed up in the answer given by the *Nuremberg Tribunal* when it observed that whether the measure taken in that case was lawful or not 'must ultimately be subject to investigation and adjudication if international law is ever to be enforced'.⁴³ International courts and tribunals' according to states a margin of appreciation simply undermines, in the context of a treaty such as the Whaling Convention, the regulations the convention sets out, thus weakening the obligations, and concomitant rights, undertaken by, and accorded to, the member states. In international law, the granting of a margin of appreciation to one state may, by effectively giving to that state a free rein vis-à-vis another state, runs the risk of enlarging the sovereignty of the former by encroaching upon the sovereignty of the latter. Against this background, it could be concluded that, as regards public international law, the ground has been pulled away from under the doctrine of the margin of appreciation. The doctrine, originating in the public international law of the period of approximately 1900–50, has, in the period approximately 1950–2000, been reduced to vanishing point.

5 Conclusion

I have ventured to show that, as a doctrine of international law, the margin of appreciation has a great future behind it. To international law, the margin of appreciation is decidedly old hat. International law, having originated the doctrine, jettisoned it in the early postwar years. Those who think they have something to teach international law by arguing that it adopt the by now fairly hackneyed doctrine of the margin of appreciation are late by approximately 60 years.

⁴¹ *ibid* paras 67, 97.

⁴² Charter of the United Nations (n 25) art 92.

⁴³ *Trial of the Major War Criminals before the International Military Tribunal* (n 28) 207.

Investor-State Arbitration before the High Court of Singapore: Territoriality, Nationality and Arbitrability

Naomi Hart* and Sriram Srikumar**

Abstract

This case note analyses the recent jurisdictional decision of the High Court of Singapore in *Laos v Sanum Investments*, concerning an alleged expropriation by the Laos government of an investment made by an entity incorporated in Macau. The Court's key finding was that the bilateral investment treaty between China and Laos was not intended to extend to Macau. This note questions the Court's focus on the territorial scope of the bilateral investment treaty, as opposed to the nationality of the investor, and appraises whether this case represents a departure from the 'pro-arbitration' reputation of Singaporean courts in international investment disputes.

Keywords

International Investment Law, Investor-State Arbitration, Territorial Application of Treaties, Nationality

The High Court of Singapore handed down its decision in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* ('*Sanum Investments*') on 20 January 2015.¹ The dispute concerned a claim brought by a corporate investor domiciled in Macau against the government of Laos under the bilateral investment treaty between China and Laos (China-Laos BIT).² The decision, reversing the jurisdictional ruling of a tribunal constituted under the rules of the United Nations Commission on International

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¹ [2015] SGHC 15 (20 January 2015).

² Agreement Concerning the Encouragement and Reciprocal Protection of Investments between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic (China-Laos BIT) (adopted 31 January 1993, entered into force 1 June 1993) 1849 UNTS 109, art 1(2).

Trade Law (UNCITRAL), featured several findings which are significant for international commercial arbitration under bilateral investment treaties (BITs). The central conclusion was that the China-Laos BIT was not intended to protect Macanese investors—a point of potential relevance for BITs of China and other states with non-metropolitan territories. In dicta, the High Court also adopted a restrictive reading of the arbitration clause in the China-Laos BIT that represents a departure from the liberal interpretations preferred in other recent cases.

1 Facts and procedural history

The dispute arose out of investments made by an investor incorporated under the laws of Macau, a Special Administrative Region of China. The investor, Sanum Investments, claimed that the Lao government had improperly expropriated its investments in Laos' gaming and hospitality industry. In 2012, Sanum Investments referred the dispute to arbitration, citing expropriation protections and a dispute resolution clause in the China-Laos BIT. This agreement had been signed on 31 January 1993, nearly seven years prior to China regaining territorial sovereignty over Macau. At the time of signing, Portugal exercised administrative power over the Chinese territory under the terms of a joint declaration issued by China and Portugal in 1987 (China-Portugal Joint Declaration), which stipulated the future date of transfer of Macau back to Chinese administration.

On 13 December 2013, the UNCITRAL tribunal, seated in Singapore, delivered its ruling on jurisdiction, finding that the territorial scope of the China-Laos BIT was intended to include Macau, that the definition of an 'investor' in the China-Laos BIT encompassed entities incorporated in Macau, and that the arbitration clause covered Sanum Investments' expropriation complaint.³ The Lao government appealed the tribunal's jurisdictional decision to Singapore's High Court, pursuant to s 10(3) of Singapore's International Arbitration Act (IAA).⁴ The primary issue upon appeal was whether the protections enshrined in the China-Laos BIT applied to investors incorporated in Macau.

Separately, the parent company of Sanum Investments, incorporated in Netherlands Antilles, instituted arbitral proceedings against the Lao government under the BIT between Laos and the Netherlands.⁵

³ *Sanum Investments Limited v Government of the Lao People's Democratic Republic (Jurisdiction)* (Permanent Court of Arbitration, 13 December 2013) (*Sanum Investments (PCA)*).

⁴ *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed) ('IAA').

⁵ *Lao Holdings NV v Lao People's Democratic Republic* (ICSID Case No ARB(AF)/12/6) (*Lao Holdings v Laos*).

2 The judgment

The High Court reached a preliminary conclusion that the interpretation of a treaty concluded between two foreign states was justiciable before a Singaporean court where that interpretation is an incidental but necessary step in giving effect to the right conferred by a Singapore domestic law—in this case, the right of review under section 10(3) of the IAA.⁶ It also dismissed Sanum Investment's submission that the standard of review for jurisdictional challenges under the IAA, recently articulated by the Singapore Court of Appeal,⁷ was lower for investor-state arbitrations than for private arbitration agreements. It found that *de novo* review is appropriate regardless of the type of investment.⁸ The Court then proceeded to consider three key questions.

2.1 The admissibility of evidence not available to the UNCITRAL tribunal

The Lao government adduced as evidence a pair of letters, written in January 2014, exchanged between the Lao Ministry of Foreign Affairs and the Chinese Embassy in Vientiane. The letters, reproduced in full in the judgment, ostensibly express confirmation from Chinese and Lao officials that the China-Laos BIT does not extend to Macau. These letters had not been filed during the arbitral hearing. The investor objected to their admission in the High Court proceedings, alleging contravention of a test established in the English case of *Ladd v Marshall* and subsequently adopted by Singaporean courts concerning the admissibility of fresh evidence in a case in which a judgment has already been delivered.⁹ The Court dismissed this submission, finding that the pair of letters satisfied the test laid out in *Ladd v Marshall* for evidence that is admissible despite not having been tendered in earlier proceedings: the party seeking to admit the evidence demonstrated why evidence was not adduced at the arbitral hearing; the evidence would probably have an important influence on the case; and the evidence was sufficiently credible.¹⁰ While the Court asserted that its findings would be supported even in the absence of these letters, it also characterised the letters as a 'key plank' of evidence.¹¹

2.2 Territorial application of the China-Lao BIT to Macau

The High Court accepted that customary rules of treaty interpretation entail a presumption that treaties apply to the entirety of a state party's territory.¹² Under article

⁶ *Sanum Investments* (n 1) paras 21–31.

⁷ *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV* [2014] 1 SLR 372, 428 (*Astro*).

⁸ *Sanum Investments* (n 1) paras 31–36.

⁹ *Ladd v Marshall* [1954] EWCA Civ 1, [1954] 1 WLR 1489.

¹⁰ *Sanum Investments* (n 1) paras 43–56.

¹¹ *ibid* paras 38, 111.

¹² *ibid* paras 59–61.

29 of the Vienna Convention on the Law of Treaties (VCLT), this presumption can be rebutted by the establishment of a contrary intention of the parties.¹³ Under the Vienna Convention on Succession of States in Respect of Treaties, the presumption is displaced if it appears from the treaty or is otherwise established that such a territorial application would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.¹⁴ Taking these provisions into account, the Court considered an array of evidence to assess whether the parties had intended to exclude Macau from the China-Laos BIT's operation.

The High Court found that the pair of letters between China and Laos evidenced a 'subsequent agreement' between the parties that their BIT did not extend to Macau,¹⁵ qualifying as an acceptable source of interpretive guidance under the VCLT.¹⁶ The Court found that evidence concerning the intended territorial application of China's BITs with other states was of little use in interpreting the China-Laos BIT.¹⁷ For example, it rejected the investor's submission that the absence of an express exclusion of Macau from the China-Laos BIT, as exists in the BIT between China and Russia, implied Macau's inclusion.¹⁸

The Court based its finding on two other pieces of evidence. First, it accepted expert evidence that the China-Portugal Joint Declaration foresaw that China's existing treaty obligations would, upon its resumption of sovereignty over Macau, extend to that territory only following a formal implementation process for each treaty, which had not yet occurred in relation to the China-Laos BIT.¹⁹ Secondly, it considered that a policy document published by the World Trade Organization in 2001 which stated that Macau had no BITs other than one with Portugal. The Court found that this report was inconclusive but 'suggest[ed] to a limited extent' that the China-Laos BIT did not apply to Macau.²⁰

2.3 The scope of the arbitration clause

Finally, in dicta, the High Court addressed whether the investor's claim fell within the scope of the investor-state arbitration clause in the China-Laos BIT. The relevant clause, article 8(3), read in part: 'If a dispute involving the amount of compensation

¹³ Vienna Convention on the Law of Treaties (adopted opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 29 (VCLT).

¹⁴ Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3, art 15.

¹⁵ *Sanum Investments* (n 1) para 70.

¹⁶ VCLT (n 13) art 31(3)(a).

¹⁷ *Sanum Investments* (n 1) para 86.

¹⁸ *ibid* para 80.

¹⁹ *ibid* para 92.

²⁰ *ibid* para 109.

for expropriation cannot be settled through negotiation (...) it may be submitted [to arbitration] at the request of either party.⁷

The High Court constructed the phrase ‘dispute involving the amount of compensation’ narrowly so as to cover only disputes over the quantum of compensation and not other aspects of an expropriation. It noted that article 8(3) was more restrictively worded than a similar phrase in article 8(1) (which referred simply to ‘[a]ny dispute’ between an investor and a state being settled by negotiation), which suggested the state parties had intentionally narrowed the scope for investor-state arbitration. The Court criticised the reasoning of an ICSID Tribunal in *Tza Yap Shum*,²¹ a case which also concerned a BIT to which China was a party and which had concluded that such an exclusionary interpretation would conflict with a BIT’s purpose of promoting investment. The High Court noted that a narrow interpretation did not rule out arbitration altogether, but rather struck an appropriate balance between the rights of investors and the sovereign choices of states to limit the disputes which could be submitted to arbitration, reflected in the language of their agreement. It further speculated that two communist states were likely to have intended to limit the range of disputes exposed to arbitration.²²

3 Analysis

3.1 Territorial application of the China-Laos BIT

The High Court’s exclusive focus on the territorial application of the China-Laos BIT, as opposed to the nationality of the Macanese investor, is somewhat puzzling. After critiquing this approach, this note appraises the High Court’s reasoning in relation to the China-Laos BIT’s territorial application.

(i) The BIT’s territorial application and the investor’s nationality

BITs typically cover only investments ‘in the territory’ of one of the contracting parties. The China-Laos BIT is no exception.²³ In *Sanum Investments*, however, there was no dispute that the company’s investments were located in Lao territory. Therefore, whether the Macanese company enjoyed the BIT’s protection should have turned on the company’s nationality. Under the China-Laos BIT, a company will possess the nationality of a contracting state if it is ‘established in accordance with the laws and regulations’ of that state.²⁴ Curiously, this is not the inquiry on which *Sanum Investments* was based.

²¹ *Tza Yap Shum v Republic of Peru (Decision on Jurisdiction and Competence)* (ICSID Case No ARB/07/06) (*Tza Yap Shum*), certified English translation available in (2010) 1 Transnational Dispute Management <<http://www.transnational-dispute-management.com/article.asp?key=1576>> accessed 20 April 2015.

²² *Sanum Investments* (n 1) para 125.

²³ China-Laos BIT (n 2) art 1(1).

²⁴ *ibid* art 1(2)(b).

Instead, the applicability of the China-Laos BIT was assessed with reference to the treaty's territorial application.

It is accepted in academic writing that a treaty's coverage of persons (natural and legal) protected as investors may differ from its coverage of the territory in which investments are protected.²⁵ This position was supported in another case concerning an investor residing in Hong Kong. In *Tza Yap Shum*, the ICSID arbitral tribunal explicitly found that the question of whether the BIT between Peru and China applied to the investor rested not on whether Hong Kong formed part of China's territory for the purposes of the treaty, but whether the individual in question held Chinese nationality.²⁶ In a similar vein, in *Feldman v Mexico*, an ICSID tribunal held that an investor's geographical location performs only 'a subsidiary function' in determining its nationality.²⁷ In a parallel proceeding to *Sanum Investments*, between Sanum Investment's Dutch parent company and the Lao government,²⁸ the ICSID tribunal considered only the nationality of the investor, devoting no attention to the relevant BIT's territorial application (despite the fact that the investor was incorporated in Aruba in the Netherlands Antilles, not in Dutch metropolitan territory—akin to Sanum Investment's incorporation in Macau).

In *Sanum Investments*, the High Court described Sanum Investments as 'a company incorporated in Macau'.²⁹ It did not address whether this meant that the company qualified as a Chinese investor. The arbitral tribunal, in considering this question, had quickly reached a conclusion that an entity incorporated in Macau did satisfy the definition of an investor protected under the China-Laos BIT.³⁰ This fact alone, irrespective of the China-Laos BIT's territorial scope, would have animated the arbitral tribunal's jurisdiction.

Sanum Investments is to be distinguished from the *Review Publishing* case, which the High Court cited in its analysis of the territorial application question and which was decided by the same court.³¹ That case concerned not the identity of the claimant party, but the location of the alleged wrongdoing.³² In contrast, the jurisdictional dispute in *Sanum Investments* should have turned on the nationality of the investor.

The assumption implicit in the High Court's approach in *Sanum Investments* is that an investor's entitlement to invoke a BIT's protection rests on both its nationality *and* whether the BIT extends to the territory in which it is incorporated. This appeared to be the view taken by both the High Court and the arbitral tribunal (which stated that

²⁵ Wenhua Shan and Norah Gallagher, 'China' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 131, 154–55.

²⁶ *Tza Yap Shum* (n 21) paras 54–61, 72–75.

²⁷ *Marvin Roy Feldman Karpas v United Mexican States (Interim Decision on Preliminary Jurisdictional Issues)* (2003) 18(2) ICSID Review 469, 477.

²⁸ *Lao Holdings v Laos* (n 5).

²⁹ *Sanum Investments* (n 1) para 2.

³⁰ *Sanum Investments (PCA)* (n 3) paras 301–15.

³¹ *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453, 479–81 (*Review Publishing*).

³² *ibid.* This claim concerned whether an allegedly defamatory article published by a publisher incorporated in Hong Kong could be said to be published in the territory of China for the purposes of a judicial assistance treaty between China and Singapore. The nationality of the parties was not at issue.

the territorial application issue was ‘central’ to its jurisdiction)³³ and, for that matter, accepted by both parties. Arguably, it also resolves one dilemma of the *Tza Yap Shum* case. In that case, the tribunal decided that Hong Kong investors investing abroad could invoke the relevant BIT’s protections based on the nationality test, but it was not clear that foreign investors investing in Hong Kong, who would need to prove territorial application, would be so protected.³⁴ This asymmetry could be removed by following the approach in *Sanum Investments* where investors are protected only if the territory in which they are incorporated is subject to the provisions of a treaty.

(ii) Territorial application of the China-Laos BIT

Aside from the separate question of nationality, the High Court’s ruling on whether the China-Laos BIT extended to Macau merits comment. The Court’s analysis rested primarily on an analysis of article 29 of the VCLT. Regrettably, the Court elucidated no standard of proof required to establish that the parties harboured an intention to exclude certain territory from a treaty’s operation, and devoted no attention to the form in which, or the time at which, such an intention must be expressed. Already, the arbitral tribunal had complained about the paucity of evidence concerning the parties’ intention as to the China-Laos BIT’s territorial scope.³⁵ The High Court also noted that much of the evidence before it suggested only ‘to a limited extent’ that Macau was to be excluded from the treaty’s operation.³⁶ Where evidence is so palpably lacking, a statement by the Court as to the standard of proof required to establish an intention to exclude territory would have given its decision a stronger conceptual foundation. This is especially so where the most decisive piece of evidence, the pair of letters, was challenged on multiple grounds by the investor: its dubious authenticity as an expression of the views of the Chinese government, its provenance after the arbitral proceedings had commenced, and its admission to the Court without having been tendered to the arbitral tribunal.³⁷

Another significant piece of evidence was the China-Portugal Joint Declaration.³⁸ While this note, at best, revealed the Chinese government’s intentions over the territorial application of treaties to which it is a party, it did not speak to the Lao government’s intentions. The Court did not explain the extent to which both parties’ intentions must be captured. Moreover, the China-Portugal Joint Declaration was not expressed contemporaneously with the creation of the China-Laos BIT. The weight attributed to this evidence reflected an uncertainty arising from the finding of the High Court in *Review Publishing* that parties’ intentions concerning territorial application must be established at the time at which they signed an agreement.³⁹ In that decision, the Court had also

³³ *Sanum Investments (PCA)* (n 3) para 205.

³⁴ *Tza Yap Shum* (n 21) para 73.

³⁵ *Sanum Investments (PCA)* (n 3) [232], cited in *Sanum Investments* (n 1) para 67.

³⁶ *Sanum Investments* (n 1) paras 88, 109.

³⁷ *ibid* paras 42, 53–56.

³⁸ *ibid* paras 89–93.

³⁹ *Review Publishing* (n 31) para 112.

expressed doubt that states would agree to treaties that could be interpreted according to unilateral expressions of intention by another party.⁴⁰ Despite these pronouncements, the Court in *Review Publishing* had proceeded to take into account the Chinese government's unilateral intention as expressed in a note announcing the applicability of its existing treaty obligations to the territory of Hong Kong.⁴¹ Both *Review Publishing* and *Sanum Investments* indicate that unilateral declarations may contribute to establishing a party's intention as to territorial scope. Perhaps relevant criteria for such declarations should be that they be made publicly and, as the High Court in *Sanum Investments* considered, the governments in question should 'have been fully aware of the implications' of a declaration 'worded in general terms'.⁴² This approach broadly accords with the practice of the United Nations Secretary-General, who has published a policy of accepting declarations and reservations concerning territorial exclusions provided that they are made public and do not undermine the fundamental purpose of the treaty in question.⁴³

(iii) Impact on other BITs

Sanum Investments claimed that a finding against it could 'deprive Macanese investors and foreign investors in Macau of the protections of nearly 130 [China] BITs and disrupt a stable legal framework for investment'.⁴⁴ The repercussions of this decision may not be as significant as this forecast suggests. The High Court made clear that intentions expressed in relation to a state's BIT with one state will not always permit inferences to be drawn in relation to its other BITs.⁴⁵ In this case, the Court gave little weight to territorial intentions expressed in connection with four of China's other BITs, despite their 'very similar provisions'.⁴⁶ Thus, the letters exchanged in relation to the China-Laos BIT will have little salience for the interpretation of other BITs in future disputes. In contrast, statements expressing intentions regarding territorial application in general terms, such as the China-Portugal Joint Declaration, may carry more enduring weight.

3.2 The High Court's departure from arbitration-friendly decisions

Singaporean courts are renowned for their 'pro-arbitration' bent. This reputation, acknowledged by members of Singapore's own judiciary,⁴⁷ is based on a pattern of

⁴⁰ *ibid* para 113.

⁴¹ *ibid* para 116–17.

⁴² *Sanum Investments* (n 1) para 76 (emphasis in original).

⁴³ United Nations Office of Legal Affairs, Treaty Section, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, UN Doc ST/LEG/7/Rev 1 (1999) paras 284–85.

⁴⁴ *Sanum Investments* (n 1) paras 21, 75.

⁴⁵ *ibid* paras 85–86. See also *Sanum Investments (PCA)* (n 3) para 299.

⁴⁶ *Sanum Investments* (n 1) paras 79–88.

⁴⁷ *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732, 745 para 28; Sundares Menon, 'International Arbitration: The Coming of a New Age for Asia (and Elsewhere)' (ICCA Congress 2012, Opening Plenary Session) <http://www.globalarbitrationreview.com/cdn/files/gar/articles/AGs_Opening_Speech_ICCA_Congress_2012.pdf> accessed 6 March 2015.

courts respecting the finality of arbitral decisions,⁴⁸ and liberally interpreting arbitration clauses.⁴⁹

Sanum Investments stands apart from this trend. It bears noting that the High Court declined to consider whether the interpretive task should be informed by a 'pro-' or 'anti-' arbitration stance. In previous decisions, the same Court has explicitly recognised the 'pro-arbitration stance' expressed in the IAA.⁵⁰ Courts in America and England have informed their interpretation of arbitral agreements with a similar proclivity to promote arbitration.⁵¹

The Court introduced two propositions into Singaporean jurisprudence which may have a stultifying effect on arbitration clauses. The first proposition is that arbitration clauses in bilateral investment treaties should not be interpreted based on an assumption that the parties' intent was to promote investments. The Court emphasised the need to assess faithfully the degree to which states had intended to balance the promotion of investments with curtailments of their sovereignty.⁵² This aspect of the Court's ruling ran counter to the ICSID decision in *Tza Yap Shum*, which saw the promotion of investments as an informative intent of the parties.⁵³ The High Court's second proposition is that a state's communist orientation can support a restrictive reading of an arbitration clause. This proposition did not appear to be based on the parties' submissions or substantial external evidence. The Court did refer to statements in *Tza Yap Shum* that communist states are likely to have been concerned about the decisions of international tribunals over which they had little control. Despite such statements, the ICSID Tribunal in that case adopted a broad interpretation of the arbitration clause, informed by the assumption that the parties intended to promote investment. The High Court in *Sanum Investments* arguably placed unwarranted weight on the communist character of the Chinese and Lao governments in 1993.

3.3 The future of this complaint

Under Singaporean law, *Sanum Investments* may appeal the High Court's jurisdictional decision to the Court of Appeal, provided that the High Court grants it leave to do so.⁵⁴ If that occurs, the Court of Appeal may favour a more liberal interpretation of the arbitration clause, in light of its arbitration-friendly decisions in recent years. This would not, however, assist the investor unless it could first establish that the BIT relevantly included Macau or Macanese investors.

⁴⁸ *BLC v BLB* [2014] 4 SLR 79.

⁴⁹ *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 (19 February 2013).

⁵⁰ *Astro* (n 7) paras 398–99.

⁵¹ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 626 (1985); *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] UKHL 40, [2007] Bus LR 1719.

⁵² *Sanum Investments* (n 1) para 124.

⁵³ *Tza Yap Shum* (n 21) para 103.

⁵⁴ IAA s 10(4).

Alternatively, the investor may turn its attention to the ICSID proceeding instigated by its Dutch parent company, in which the claimant has already passed the jurisdictional phase.⁵⁵ In the meantime, we can watch for further clarification from China and its bilateral investment partners about the status of Macau and Hong Kong in their BITs.

⁵⁵ *Lao Holdings v Laos* (n 5).

The Sources of International Law

By Hugh Thirlway. Oxford, Oxford University Press, 2014.
272 pp, £70 (hardcover), £24.99 (paperback).

*Sir Michael Wood KCMG**

To have an up-to-date and practical work on the sources of public international law as set out in article 38(1) of the Statute of the International Court of Justice, 18 April 1946 (ICJ Statute) is more than timely.¹ Hugh Thirlway's book,² which adopts an avowedly 'traditional approach',³ will be welcome to all who are called upon to apply international law in practice, as well as to students coming new to the subject. This is a highly readable, entertaining and elegant book. Although concise, it takes time to read and digest. It is worth pausing over almost every sentence, each word sometimes, usually to agree, or to reflect on the challenge that is raised.⁴

Thirlway is particularly well placed to write on the sources of public international law.⁵ He knows of what he writes, through long experience of the inner workings of the International Court of Justice (the Court). Between 1968 and 1987 he was Secretary, then First Secretary in the Registry of the Court. Between 1987 and 1994, and again between 2003 and 2007, he was Principal Legal Secretary, a post specially created to take

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¹ Some 50 years after Clive Parry's classic text, Clive Parry, 'The Sources and Evidences of International Law' (1965), reproduced in Anthony Parry (ed), *Collected Papers of Professor Clive Parry*, vol 2 (Wildy, Simmonds and Hill 2012) 1–105.

² Hugh Thirlway, *Sources of International Law* (OUP 2014).

³ '[T]he primary aim of this book is to convey an understanding of the traditional approach': *ibid* 9.

⁴ The footnotes should not be ignored. They contain some gems, for example: 'In much of the discussion in [one recent concurring opinion], as in quite a lot of areas where *jus cogens* is invoked, the term is used as though it meant "very important": *ibid* 163, footnote 69.

⁵ He has done so before, more briefly, in successive editions of *International Law*, most recently the fourth edition (Hugh Thirlway, 'The Sources of International Law' in Malcolm Evans (ed), *International Law* (4th edn, OUP 2014) ch 4). See, also, in respect of particular aspects, Hugh Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Brill Academic Pub 1972), which was awarded the John Westlake Prize (1971) of the *Institut de droit international*; Hugh Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning' (2002) 294 *Recueil des cours* 269; and, the relevant sections of Hugh Thirlway, *The Law and Practice of the International Court of Justice: Fifty Years of Jurisprudence* (OUP 2013).

account of his increased role as a legal adviser within the Court and in the preparation of the Court's decisions. It thus comes as no surprise that his overall approach reflects international law as it is practised. Yet just as the reader begins to feel comfortable with the presentation, the author questions his own assumptions, only to return swiftly to his original position with reinforced conviction.

Thirlway nails his colours to the mast early in the book. On page 2 we read that:

All law has ultimately to be put to the test of 'How would a court decide?' (*ubi judex, ibi jus*), even when, as in the case of disputes between many members of the international community, there exists no mechanism for judicial examination and settlement unless and until the parties so agree.

A particularly important assumption, reflecting the essential unity of international law, is also stated at the outset:

it is assumed here that the available sources are the same for all branches of international law, even though the extent to which each specific source (treaty, custom, general principle) has in fact operated in, or affected, that branch will vary, sometimes quite markedly.⁶

The book has ten chapters, though the last is no more than a page or so of 'concluding reflections'. After an introductory chapter addressing the nature of international law and the concept of sources, Chapters II to V consider in turn each of the sources set out in subparagraphs (a), (b) and (c) of article 38(1) of the ICJ Statute (treaties and conventions, custom and general principles of law) as well as the subsidiary sources set out in article 38(1)(d) (judicial decisions and writings). Each chapter provides a rich, convincing and reliable introduction to the source in question, without sidestepping controversial issues. The author deals clearly and in a thoroughly practical and realistic manner with issues that may initially perplex student and practitioner alike. He does not ignore theory—about which he knows a great deal—though he is clearly impatient (in an understated manner) with academic questioning of the continuing relevance of article 38(1).

The same basic approach is to be seen in the following three chapters, which deal with issues that cut across the various sources: hierarchy (Chapter VI); *jus cogens*, obligations *erga omnes* and 'soft law' (Chapter VII); and certain 'subsystems' (Thirlway's term) of international law: human rights law; humanitarian law; trade and investment law dispute settlement; international environmental issues; and international criminal law (Chapter VIII).

Chapter IX addresses three 'alternative approaches' to the sources of public international law. While full of insights, this chapter is the least satisfactory part of the book, and appears to be something of an afterthought. It does little more than introduce the reader to three 'modern' theories, which are shown not to be particularly helpful in the real world. As the author says, 'in face of some of the subtle and intricate (to use only positive adjectives) arguments underpinning some modern theories, one may wonder

⁶ Thirlway (n 2) 9.

how useful they will be to the perplexed Foreign Minister dealing with an international dispute.⁷

The author's own approach may be illustrated by looking in a little more detail at a central chapter of the book, Chapter III ('Custom as a Source of Law'). This is a subject over which a great deal of ink has been spilt, unnecessarily one might think. Academic speculation and theorising, often far removed from the day-to-day experience of states and practitioners, has cast a long shadow over the subject, and has led some to question the role and legitimacy, the utility and even the existence, of customary international law. Thirlway cuts through all this, and brings the reader back to basic principles, encapsulated in the much maligned but farsighted wording of article 38(1)(b) of the ICJ Statute: 'international custom, as evidence of a general practice accepted as law'.

By some degree the longest at 39 pages, the chapter begins with the realistic assertion that custom 'is a form of development of law of which the outcomes are often not as "tidy" as those that a far-seeing lawgiver might lay down'; and the statement that '[t]he precise nature and operation of the process have (...) always presented obscurities'.⁸ Such admonitions are not entirely encouraging for anyone aspiring to seek to clarify matters, though they could be read as a challenge to do so, a challenge Thirlway amply meets.

Thirlway's starting point is that, subject to two exceptions (the 'persistent objector' and local custom), 'a rule of customary international law is binding on all States, whether or not they have participated in the practice from which it sprang'.⁹ There is a clear account of the basic approach reflected in the language of article 38(1)(b) of the ICJ Statute, the two constituent elements, 'general practice' and 'acceptance as law' (*opinio juris*). This is followed by a separate section on the role of General Assembly resolutions in the possible establishment or determination of a customary rule. The author then tackles the difficult subject of how customary international law changes, followed by a somewhat sceptical account of what the author terms 'the relevance of ethical principles to customary law'. The final sections of Chapter III deal with the two very different exceptions to the generality of customary international law, the 'persistent objector' notion and 'local customary law'.

There is much in this work, indeed, virtually all that is self-evidently correct, though better expressed than elsewhere. There is also much that is quite bold. The author apparently does not mind raising a few hackles. Take for example the observation on the notorious 1966 *South West Africa Cases* judgment¹⁰ that 'the unpopularity at the time of this decision should not blind the reader to the force of its general arguments'.¹¹

Thirlway's central thesis is that the listing of sources in article 38(1) is not in need of expansion (just as well for the International Court of Justice and other courts and

⁷ *ibid* 221. For the genesis of Chapter IX, see preface, vii.

⁸ *ibid* 54.

⁹ *ibid*.

¹⁰ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase, Judgment) [1966] ICJ Reports 6.

¹¹ Thirlway (n 2) 201, footnote 8.

tribunals bound by similar provisions). Nor may the list be expanded, according to the author, except through the sources therein listed, a point made as early as 1972 in his monograph *International Customary Law and Codification*.¹² As he then wrote:

we must be on our guard against allowing the desirability of a given development to blind us to the obstacles it will have to overcome, and against assuming that they have been overcome. In particular, it is clear that no new source of law can come to exist except through the operation of the law flowing from one of the existing and recognised sources.¹³

Thirlway proceeded to defend article 38 from all quarters, not least from the world of academe. Over 40 years later, this same theme is summarised in the ‘concluding reflections’ of the present book:

Respect for that text [article 38 of the ICJ Statute] has been shown, by the work of the Court, not to prevent development of the law, but merely to limit—or, rather, perhaps to guide—the way in which such development is to be looked for, and looked at.¹⁴

The book assumes, and demonstrates, that the doctrine of sources continues to play a central role in the discipline of public international law. In this reviewer’s opinion, what practitioners (including those not specialising in public international law) need above all else is a sound understanding of the sources of international law. A study of the sources of public international law should form part of modern judicial studies around the world. It is, or should be, central to student education, as it is, for example, in the Jessup and other international law moots. The present book will go a long way to supplying this need for an up-to-date and accessible work on the subject.¹⁵

Malcolm Evans and Phoebe Okowa capture the essence of Thirlway’s achievement, when they write by way of introduction:

The existing body of literature tends to focus on exploring the theoretical foundations of the sources of law, or ‘reconceptualising’ it in some way in the light of the challenges which it is said to face. There has for some time now been a need for an authoritative, measured, and informed exposition and analysis of the subject as a whole.¹⁶

This book is highly recommended. If read by future—and indeed present—generations of lawyers, it will contribute greatly to the sound understanding and development of public international law. The publishers too have contributed to this cause first by suggesting that the author write this important book, and then by making it available immediately in paperback.

¹² Thirlway (n 5).

¹³ *ibid* 145.

¹⁴ Thirlway (n 2) 231.

¹⁵ There are good expositions in French, including the relevant sections of Patrick Daillier, Mathias Forteau and Alain Pellet (eds), *Droit international public* (9th edn, LGDJ 2015). See also Alain Pellet, ‘Article 38’ in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012).

¹⁶ Thirlway (n 2) ‘Series Preface’.

戦争と平和の間——発足期日本国際法学における『正しい戦争』の概念とその帰結、易平著、

Sensou to Heiwa no Aida

By Yi Ping. Beijing, Torkel Opsahl Academic EPublisher, 2013, 259 pp, £17 (hardcover).

*Hitomi Takemura**

This book by Chinese scholar Yi Ping, at Peking University Law School, critically examines the views of war among Japanese international law scholars and practitioners between the late 19th century and the early 20th century. The book is written in Japanese and is entitled *Sensou to Heiwa no Aida*. This title may be translated into English as *Between War and Peace: The Concepts and Corollaries of 'Just War' in the Early Period of International Legal Studies in Japan*.

Sensou to Heiwa no Aida analyses the views of Japanese scholars on the restriction or denial of wars immediately after the opening of Japan to the West in the 19th century. From 1639 to 1854, Japan had an isolationist policy. In 1854, Japan was forced to reverse her isolationist policy due to political pressure from the United States. After arriving on the international stage, Japan tried to 'civilise' itself and sought to be treated as a 'civilised' nation as it hastened to adopt Western legal systems and cultures in the latter part of the 19th century. Japan also experienced two decades of war, which is the period studied by Yi in this book. This period begins with the Sino-Japanese War in 1894 and ends with the beginning of the First World War in 1914. During this time, Japan was also involved in the Russo-Japanese War between 1904 and 1905.

Sensou to Heiwa no Aida is divided into four chapters, in addition to the introductory chapter and the conclusion: 'The Formation of the Japanese Conception of War', 'The Conception of War in International Legal Theories (1)', 'The Conception of War in International Legal Theories (2)', and 'The Conception of War in International Legal Practices'. In each chapter, the author analyses then-existing Japanese legal consciousness regarding the restriction of war, as espoused by scholars and practitioners.

* Associate Professor at Aichi Prefectural University (Japan). This book is published in the form of an e-book that readers may access online for free on the website of the publisher. Hard copies of the book are available from major book vendors. An English summary of the monograph by the author of this book review is also made freely available: <<http://www.prio.org/JPR/BookNotes/?x=13>> accessed 30 March 2015.

In modern Japanese international law textbooks, the period analysed by Yi is popularly known for the dominant notion of 'Indiscriminate War'. This paradigm superseded the dominance of the 'Just War' notion (*bellum justum*) that can be traced back to medieval times. This 'Indiscriminate War' notion of the 19th and early 20th centuries was then followed, in more recent decades, by the popularising of the 'outlawry of war' notion. Discussion of the 'Indiscriminate War' concept, however, is not found in contemporary European and American textbooks.¹ After the Second World War, with the establishment of the principle of outlawry of war and the prohibition of the use of force by the United Nations, Japanese scholars began to describe the period, analysed in *Sensou to Heiwa no Aida*, as the time when the 'Indiscriminate War' notion dominated. Most Japanese scholars agree that the 'Indiscriminate War' notion implies the extralegal nature of war (*jus ad bellum*) and the non-discriminatory application of *jus in bello*.² It is generally understood that, by stressing the period of 'Indiscriminate War', Japanese scholars underscore the fact that the international community was committed to the development of *jus in bello* rather than pursuing just causes of wars.

Yi challenges such an over-simplified categorisation. Instead, Yi argues that the discussions conducted during that time are best described and understood using a 'Just War' conceptual framework. Yi identifies and examines different discussions about war during this period and highlights how they incorporated a 'Just War' element. She identifies three types of discussions being conducted by three groups: (1) the 'extralegal faction', (2) the 'adjudicating faction', and (3) the 'implementing faction'. Though these categories each had a 'Just War' element, Yi examines how they were manipulated during their application to justify the Russo-Japanese War (1904–1905), despite their potential to restrict war.

The first chapter examines the period in which Japan tried to establish her sovereignty by adopting textbooks on the law of nations written by European and American scholars. Yi describes how Japan adopted pragmatic and positivistic approaches to learning and using the law of nations. Yi observes that since the 1890s, most textbooks of the law of nations, translated into Japanese, held views that did not question the causes of war.

Nonetheless, Japanese international legal theories were formulated and adapted to Japan's particular situation, despite her amenable reception of Western international legal theories. Chapter one describes the biographies and academic backgrounds of a few famous Japanese international law scholars: Professors Tsurutaro Senga (千賀鶴太郎), Toru Terao (寺尾亨), Nagao Ariga (有賀長雄), Sakue Takahashi (高橋作衛), and Shingo Nakamura (中村進午). These scholars studied law in Europe and wrote primarily in the field of the laws of war, sometimes in English. Their writings show how Japanese armies respected the laws of war, especially in the Sino-Japanese War.

¹ Masaharu Yanagihara, 'The Idea of Non-discriminating War and Japan' in Michael Stolleis and Masaharu Yanagihara (eds), *East Asian and European Perspectives on International Law* (Nomos 2004) 179, 180.

² *ibid* 182.

The second chapter considers why the period under study came to be regarded as an era dominated by the 'Indiscriminate War' notion. Yi argues that present-day scholars have misunderstood two then-existing theories: the 'disregard of war rationale' theory and the 'war as a state' theory. Both theories still require various justifications for resorting to war, such as protecting national interests. Therefore, Yi concludes that the 'Indiscriminate War' notion is not the only possible logical derivative of these theories being discussed by Japanese scholars and practitioners at this time. Yi examines the legal discussions ongoing during this time, with the aim of identifying and explaining three categories of discussions that included 'Just War' elements. The third chapter elaborates on these three categories. The first was undertaken by the 'extralegal faction'.³ According to this faction, wars were inherently restricted by extralegal factors such as an outrageous and apostate cause as a recourse to war. Wars may be justified when ignited for the development of the national interests and interests of the state. Here 'extralegal' means that a violation of the rights and obligations of 'international law in peace' time was not required for igniting a war.⁴ For instance, Ariga, one of the proponents of the extralegal faction, presupposed that the laws of war applied in war time. *Jus in bello* restricts the way wars are conducted, for instance, with a requirement for the disclosure of reasoned causes of war upon the waging of war. In contrast, the other factions required a violation of the rights and obligations of international law in peacetime before resorting to war.⁵ These factions are the 'adjudicating faction' and the 'implementing faction.' The 'adjudicating faction' viewed war as a means of arbitration, as a way of adjudicating between the warring parties, and determining a contested issue in accordance with the outcome of war. The 'implementing faction' viewed war as a means of law enforcement; therefore, the outcome of the law did not determine the lawfulness of war.

In the fourth chapter, Yi considers how these three categories, which had 'Just War' elements, were applied to the Russo-Japanese War. Yi observes that these different theories were all used to defend Japan's military operations in the Russo-Japanese War based on the right of self-defence. In the end, Japanese scholars used their respective just war theories to justify the Russo-Japanese war, although these 'Just War' theories in reality denied and restricted wars to some extent.

In the last part of the fourth chapter, Yi summarises the factors that enabled these various 'Just War' theories to be used to justify war and that obscured these theories' various distinctions. First, Yi highlights the problem of condition setting. Japanese legal

3 'Extralegal faction' is described by Yi as an argument espoused by those who do not require another state's internationally wrongful act under international law in peacetime as a precondition for launching a war. Since they thought that a cause of war was a matter of state policy, they approved and justified even a war for lucrative ends as a legal war under international law in peacetime without questioning its cause. Yi Ping, *Sensou to Heiwa no Aida* (Torkel Opsahl Academic EPublisher 2013) 103.

4 Yi Ping, 'The Contemporary Relevancy of the "Just War" Concept in the Early Years of International Legal Studies in Japan' (2013) 12 FICHL Policy Brief Series 3.

5 These factions are categorised into the 'legal faction' as opposed to the 'extralegal faction' by Yi. The 'legal faction' required legal causes of wars under international law in peacetime whenever states initiate a war. This faction is further divided into the 'adjudicating faction' and the 'implementing faction'.

scholars in those days did not set specific and objective conditions for measuring the justness of any war. Second, individuals distorted facts to fit political purposes. Yi cites as an example, Professor Takahashi (高橋作衛), who was aware that the Liaotung Peninsula was a leased territory between Russia and China, and that the latter had sovereign rights to it.⁶ After the outbreak of Russo-Japanese War, however, he asserted that the Liaotung Peninsula was a territory of Russia, so that Japan could seize it.⁷ The same distortion is found in the essays by Mr Ninagawa Arata (蜷川新) in which he insisted that there was a treaty on the withdrawal of troops between Russia and Japan—a treaty which in fact did not exist. Third, the Japanese international law scholars, at the time, simultaneously held positions as both scholars and public counsels for the then-Japanese government. These dual positions resulted in the contradictions in the principles and policies of Japanese scholars regarding wars before and after the Russo-Japanese war.

The final chapter summarises the monograph by concluding that '[t]he very nature of war must be questioned constantly in the context of complicated relationships between law and force, justice and security, state values and human values.'⁸ Yi stresses that the purpose of the monograph is not to criticise erstwhile Japanese views of war from the viewpoint of current international law. Rather, the book strives to display a historically sensitive understanding of the 'Just War' discussions of the time and to reveal the dangerous ideas underlying its concepts.

Thus far Japanese mainstream scholars and media have studied Japanese compliance with international law during the Russo-Japanese war from the standpoint of *jus in bello* (eg Japan's proper treatment of Russian POWs). In seeking to facilitate the West's acceptance of Japan as a civilised nation, Ariga and Takahashi published books about Japan's compliance with international law during the Russo-Japanese war from the standpoint of *jus in bello*,⁹ and contemporary Japanese international law scholars display non-critical attitudes toward the fact that these publications were highly praised by Westerners,¹⁰ mainly because of the lack of information on the real situation of the POW treatment outside Japan.¹¹ Yi studies this period of Japan's history, however, from the standpoint of *jus ad bellum*. The book focuses on contradictions in the principles

⁶ See Convention for the Lease of the Liaotung Peninsula Between Russia and China Convention for the Lease of the Liaotung Peninsula Between Russia and China (adopted 27 March 1898), official translation reproduced in (1910) 4 AJIL Supp 289, art 1: 'This act of lease, however, in no way violates the sovereign rights of H M the Emperor of China to the above-mentioned territory.'

⁷ Yi (n 3) 196–97.

⁸ Yi (n 4) 4.

⁹ See: N Ariga, *La Guerre Russo-Japonaise au point de vue Continental et le Droit International d'après les Documents Officiels du Grand État-Major Japonais* (A Pedone and Stevens & Sons 1908); S Takahashi, *International Law Applied to the Russo-Japanese War with the Decisions of the Japanese Prize Court* (A Pedone and Stevens & Sons 1908).

¹⁰ Kinji Akashi, 'Japan-Europe' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 724, 738–39.

¹¹ Masaharu Yanagihara, 'Japan's Engagement with and Use of International Law: 1853–1945' in Thilo Marauhn and Heinhard Steiger (eds), *Universality and Continuity in International Law* (Eleven International Publishing 2011) 447, 458–59.

and policies of Japanese scholars towards war before and after the Russo-Japanese war. Indeed, Yi demonstrates that these contradictions were mainly caused by the vague conditions for resorting to just war and the arbitrary nature of fact-finding conducted. Such factors are still relevant to today's international law scholars and practitioners. For example, one of the factors cited by the United States and the United Kingdom to justify the use of force against Iraq in 2003 was the information that Iraq possessed weapons of mass destruction. Eventually, weapons of mass destruction were not found in Iraq, and the intelligence services of these countries came under scrutiny and criticism.¹²

A few critiques can be made about the fundamental questions considered by Yi in her book. First, it is arguable whether there was an established *jus ad bellum* between the late 19th century and the early 20th century. If the content of *jus ad bellum* is not axiomatic, then the arbitrariness of its contents and its application is almost always inevitable. Nonetheless, there had been incidents which implicated the concept of *jus ad bellum* in the 19th century and which offered opportunities for clarification, specifically the *Caroline* incident.¹³ Yi highlights the *Caroline* incident as an example of necessity, in agreement with Japanese Professor Ryoichi Taoka (田岡良一), because of its lack of a premise of a wrongful act by another state. She criticises Professor Takahashi's understanding of the requirements of self-defence, that do not include the requirement of another state's wrongful act, by referring to the *Caroline* incident.¹⁴ It is widely recognised that the aftermath of the *Caroline* incident set the precedent for the requirements of self-defence, and Takahashi's understanding may not be entirely improper especially in the early 20th century.

Secondly, as described above, Yi's focus tends to be on extralegal factors. Yi tries to uncover dangerous pitfalls of the Japanese 'Just War' concept, such as the intention of politicians to obtain *quid pro quo* from defeated nations (eg Liaodong island from China and Russia after Sino-Japanese war and Russo-Japanese war, the game of great power politics, and the pro-war propaganda underlying the 'Just War' theories). These pitfalls relate to the ethical beliefs of international lawyers in the midst of wars and provide fodder for developing interdisciplinary studies on ethics and 'Just War' theories.

Thirdly, the book does not offer a critical evaluation of the status of the civilised nation as advocated by the Western powers at that time. Such an evaluation would offer an indirect measure of the successful reception of the law of nations, both *jus ad bellum* and *jus in bello*, in Japan at the time. In the case of the Sino-Japanese War, it has often

¹² Commission on the Intelligence Capabilities of the United States regarding Weapons of Mass Destruction, *Report to the President of the United States* (31 March 2005); De Onafhankelijke Commissie van Onderzoek Besluitvorming Irak (Commissie-Davids), *Rapport Commissie van Onderzoek Besluitvorming Irak* (12 January 2010). The United Kingdom's Iraq Inquiry has not published its report as of January 2015, and there is 'no realistic prospect of delivering the report before the General Election in May 2015'. See: Letter from Sir John Chilcot to the Prime Minister (20 January 2015).

¹³ Letter from Daniel Webster, Secretary of State of the United States, to Henry S Fox, Esq, Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (24 April 1841).

¹⁴ Yi (n 3) 174.

been pointed out by Japanese scholars that the Western academic circle has praised Japan's conduct of the war.¹⁵

Despite all these comments, Yi's message is clear: we cannot stop thinking about the relationship between war and peace, and between law and politics. Yi's book constitutes a good starting point to critically analyse Japanese history of international law, especially to reflect on Japanese understanding of the law of nations and international law from 1894 to 1914.

¹⁵ Kinji Akashi, 'Japanese "Acceptance" of the European Law of Nations: A Brief History of International Law in Japan c 1853–1900' in Stolleis and Yanagihara (n 1) 1, 20.