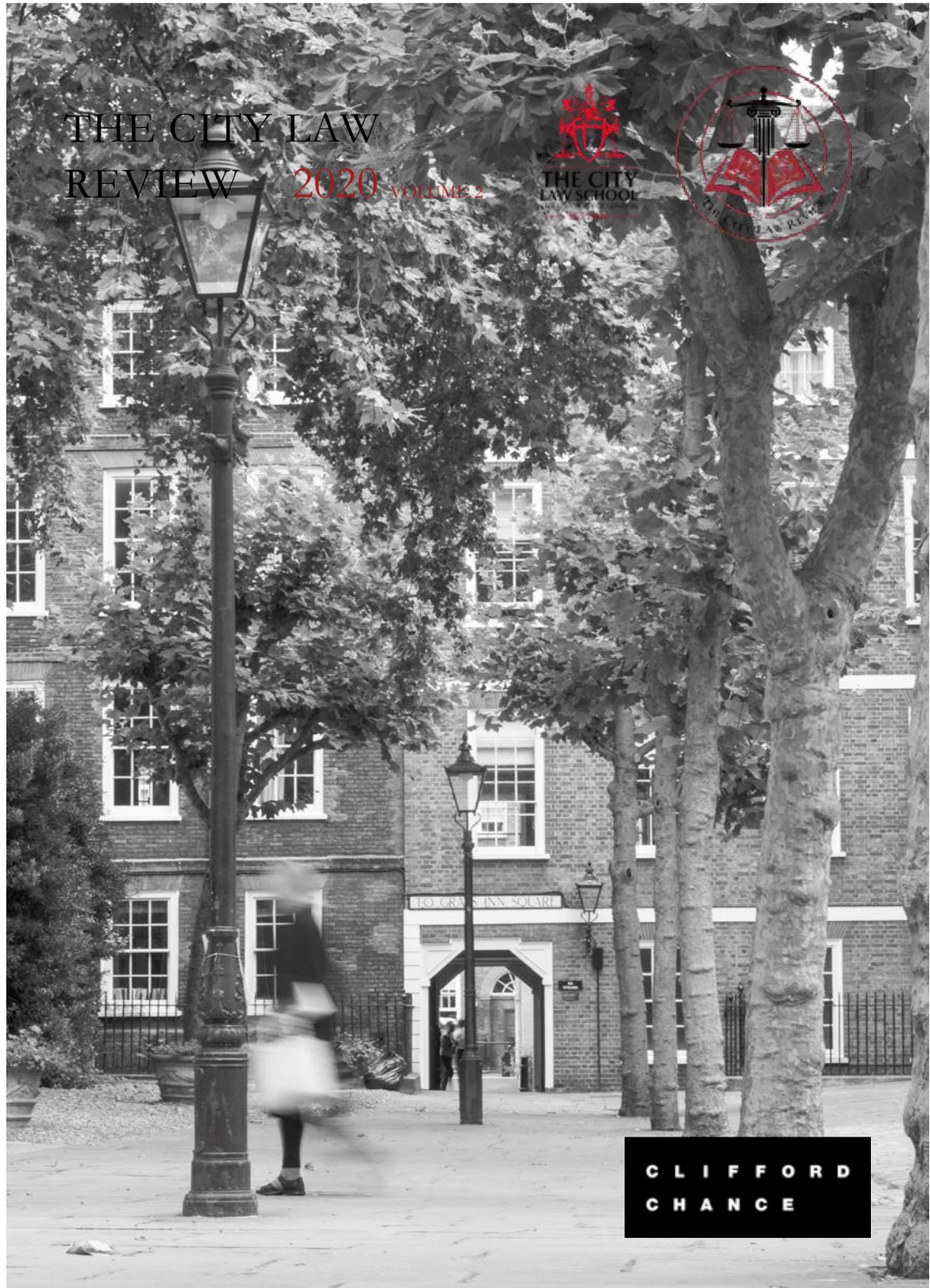
ISSN 2516-2160

THE CITY LAW REVIEW 2020 VOLUME 2



City Law Review
Volume II

The City Law Review

EDITORIAL BOARD 2019/20

Editor in Chief
Sophia Evans

Publishing Editor
Shubhkarman Deol

Senior Article Editors:
James Taylor
Jonathon Lynch

Article Editors:

Andrea Kong
Emily Wolf
Hampus Malmberg
Isabella Aders
June Ong
Priya Sohanpal
Teya Fiorante
Vladyslav Shutko

CITY LAW REVIEW

Volume II

Proudly endorsed by the City Law School

The City Law Review (the 'CLR') is City, University of London's student-managed, peer-reviewed journal of legal scholarship. We are proud to be sponsored by both Clifford Chance and Blackstone Chambers.

The CLR's primary objective is to create a high-quality journal through which students are able to have work published and recognised. We are committed to maintaining a robust peer- review process, which is why this year we have opted to operate a double-blind peer review process
with three stages, so that all articles receive multiple rounds of input and oversight. Prizes have been awarded in the same fashion, voted on by the Editorial Board based on merit alone. The categories are Best Contemporary Piece and the Award for Writer's Excellence.

The views expressed by the contributors are not necessarily those of the CLR, the Editorial Board, the City Law School or our sponsors. This publication is intended to be a conduit for the scholarship of the student body. While every effort has been made to correct and develop the
articles, the accuracy and completeness of information is the duty of each author individually. The CLR does not assume responsibility for any factual errors, misquotations, misleading representations or inconsistencies.

The CLR uses the Fourth Edition of Oxford University Standard for Citation of Legal Authorities ('OSCOLA').

Published in the United Kingdom
By the City Law Review City,
University of London
Northampton Square
London, EC1V 0HB

TABLE OF CONTENTS

6	Editor's Note	*Sophia Evans*
8	Foreword	*Richard Ashcroft*
9	Drone Warfare in the United States: Examining the Lawfulness of the CIA Drone Programme Under the Jus in Bello	*Zahrah Latief*
28	The 'Third Direction' in the Age of Miller/Cherry: Lex Suprema Lex?	*Elijah Garnet*
45	Legal Animal Rights and Animal Welfare Legislation	*John Groom*
60	The ICC and Africa: a neo colonial tool?	*Tamanna Arora*
62	Protest as anti-social behaviour? A new case on human rights and Public Spaces Protection Orders	*Odette Chalaby*
68	Exploring how domestic law might evolve to deal with copyright concerning creative works that are generated by an Artificial-Intelligence Program	*Isaac Sachdev Pereira*
79	Arbitration	*Ridhima Sharma*
92	Balancing the principles of international law on acquisition and management of territory in the Polar regions with competing rights of sovereign states, Indigenous peoples and the need for environmental protection: will cooperative foundations endure?	*Elana Kaymer*
102	'Combating Youth Offending: a short-term sedation?'	*James Gilroy*
105	"Human flytipping": Shamima Begum and the problem of statelessness	*Alice Baxter*
114	In Light of the Ruling in Shell UK Ltd v Total UK Ltd [2010] EWCA Civ 180, Can A Beneficiary, Joined By His Or Her Trustee, Recover For Foreseeable Consequential Economic Loss?	*Imogen Todd*
120	The Issue of an Enhanced Reliability Test in Expert Evidence Submissions in Criminal Proceedings in England and Wales and New York	*Mohindar Doodnauth*
127	Oblique Intention, Moral Elbow Room and Mens Rea in Murder	*Robert Palmer*
145	Modern Slavery Act 2015: The Silence Around Labour and the Failure to Protect	*Ann-Marie Debrah*
151	Case Gravity at the International Criminal Court	*Rhiannon Richards*
161	Autonomous Machines and the Law	*Brian Gannon*
178	Contract Formation in the era of E-Commerce	*Simona Ovcarike*
184	"Hard-Soft-Hard": Rethinking the Enforcement of Equator Principles III through Legal Mechanisms	*Sneha Shrestha*
205	How easy is it to deploy the break clause in a commercial lease? An exploration of the legal lessons for both landlord and tenant.	*Christian Fox*
225	Predictive Policing and International Human Rights Law	*Seun Adekoya*
241	Shamima Begum, Statelessness and the Case for Proportionality as a Ground for Judicial Review	*Mahnoor Javed*
249	Trial By One's Superiors – Rationales For Rank Restrictions On UK Court Martial Boards	*Nicholas Fryer*
260	Effects of Overlapping Maritime Zone Claims Over The Offshore Oil And Gas Law: The Joint Development Agreements	*Çağatay Doğan*
269	*Perduellio* and Legal Authority in the Trial of C. Rabirius	*Jenn Lawrence*
278	Afterword	*The City Law Review Team*

EDITOR'S NOTE

We are proud to present to you the second volume of the *City Law Review*.

The *City Law Review* is the product of an extraordinary group of both former and current students of City, University of London whose initiative, innovation and ingenuity is demonstrated throughout the history of this publication. The genesis of the *City Law Review,* formerly known as the *City Law Society Journal,* can be dated back to 2013 with each and every Editorial Board playing an integral role in its evolution. This year's edition serves as both a consolidation and continuation of the extensive rebranding of the *City Law Review* as City's first and sole student-led publication of legal scholarship. As the Editor-In-Chief of Volume II, it is both my honor and privilege to have contributed to this growing legacy.

This year's publication saw the outbreak of the Covid-19 pandemic just a matter of days prior to our annual launch event. The event was scheduled for March 24th, 2020 with the Right Honorable Justices Lord Briggs, Lord Sales and Lord Hodge as our most distinguished guest speakers. The cancellation of our launch event was unfathomable as far off reports of a virus began circulating in London. In only a matter of days our editorial board saw its members, along with the rest of the university, begin quarantining all over the world. I am addressing this experience as an attempt to convey how truly remarkable the perseverance, patience and most of all adaptability is that I have witnessed from not only my editorial board, but from members throughout the City Law School. In the face of such unprecedented and uncertain times, I am truly proud of this year's publication and all those who made it possible.

Our gratitude for the continued support of the City Law School and its Executive Committee cannot be emphasized enough. I would like to thank Dean Professor Andrew Stockley and Deputy Dean Professor Richard Ashcroft in particular for their faith in this project. It is their support in this endeavor that has offered the students of the City Law School the opportunity to engage as writers and editors in the publication of legal scholarship. A very special thanks is owed to Dr. David Seymour, a true champion of the *City Law Review* and its longest standing supporter. He is single-handedly responsible for not only the creation of a formalized academic board for the Law Review but also the organization of the academic commentary provided by the faculty members at the City Law School. The enthusiasm and dedication to student learning of these faculty members showcase the finest aspects of this university in every way. Furthermore, I would like to personally thank Dr. David Seymour for his invaluable advice and guidance in navigating me through my role Editor-In-Chief as well as taking the time to meet with me on numerous occasions himself. The support of the faculty members of the City Law School throughout various student initiatives is truly incredible for all its students.

As a testament to the success of her own creation, our former Editor-In-Chief Shabana Elshazly went above and beyond as a Patron of the *City Law Review*. As the writer of our Operations Manual and the person responsible for last year's incredibly successful rebranding, her contributions to this project have led us to where we are today. A special thanks must also be given to former Editor-in-Chief Shabbir Bokhari who was always there to provide support and guidance whenever necessary. It was my absolute pleasure to work with and learn from these two inspiring individuals whom I now call my closest friends.

To the members of this year's Editorial Board, I am so very proud of you all. These are students whose attention to detail, willingness to go the extra mile and dedication to the importance of quality can be seen throughout this publication. Andrea Kong, James Taylor and June Ong, worked tirelessly despite their demanding workload as BPTC students. Priya Sohanpal and Hampus Malmberg exceeded the expectations of their role providing additional support in various areas whenever and wherever possible. Vladyslav Shutko quickly became an asset by not only providing valuable insight but through his capability to effectively network on behalf of the Law Review. Teya Fiorante, who began her work as an articleeditor in her first year, proved more than capable in every aspect. Emily Wolf, whose editorial board application was so bold as to include constructive criticism, was an irreplaceable member of our team with her advanced knowledge of citations and legalscholarship.

Jonathon Lynch deserves special praise for his contributions and work ethic. His ability to anticipate and complete whatever needed to be done without asking made him one of the most dependable members of our team. Lastly, I would like to thank this year's Publishing Editor Shubhkarman Deol for taking on the considerable amount of responsibility he did in his final year. His practical approach to difficult situations and positive attitude makes him most deserving of thanks. It has been a joy to work alongside you all.

The role of Editor-In-Chief has been as challenging as it was rewarding. I would like to once again thank my team, the university and all who were involved in this year's publication for placing their trust in me. I am truly grateful to have had the opportunity to lead such an incredible team and to have collaborated with such talented writers. And finally, I must thank my family. Especially my father Donald Evans, whose brilliance inspired me to pursue a legal career. As one of the most talented attorneys in my home state of Georgia, he could not have set a better example.

It is my sincere hope that you enjoy reading the second volume of the *City Law Review*.

Yours faithfully, Sophia Evans Editor-In-Chief

FOREWORD

It gives me great pleasure to write the foreword for this year's City Law Review. I warmly congratulate the student editorial team, and all the contributors, for putting together such a fascinating issue. It does them, and the wider City Law School community, great credit.

Since I joined City Law School in September 2019 I have really enjoyed getting to know the students and staff. Their dedication and enthusiasm for the law and legal education gives the School an amazing energy. The fact that this is a law school which provides the full range of legal education, scholarship and research makes it a special place. We take great pride in the diverse and inclusive student and staff community here, and in the talent, hard work and success they demonstrate every day. The work presented here reflects that.

This is an important year for City Law School. In summer 2020 all our staff are moving into a dedicated new building on Sebastian Street. At the same time we are opening new dedicated teaching space for all our programmes in the newly refurbished Whiskin Street Building. This will be the first time staff from both departments, Academic Programmes and Professional Programmes, will be in the one building. It will mark the end of an era, as the Professional Programmes leave their current Gray's Inn Place home after so many years, but also the beginning of a new one, as new opportunities for collaborative education, scholarship and research open up in the new building. Excellent new facilities for our law clinic activity and mooting will be available. We want this to be a welcoming space for all staff, students and visitors to City Law School.

Early this year we hosted a City 125 lecture by Cherie Booth QC, as part of the university's celebrations of its 125th anniversary. We look forward to the next 125 years!

Richard Ashcroft MA PhD FHEA FRSB
Deputy Dean, City Law School

March 2020

DRONE WARFARE IN THE UNITED STATES: EXAMINING THE LAWFULNESS OF THE CIA DRONE PROGRAMME UNDER THE JUS IN BELLO

***Zahrah Latief* ***

ABSTRACT

In recent years, a growing number of nations have begun to develop and proliferate unmanned aerial vehicles (UAVs), or drones, as weapons of war. None, however, have dominated the market quite as prolifically as the United States, who have embraced drone warfare with disquieting fervour, both in and out of the traditional theatre of war. Under former-President Bush, the events of September 11th 2001 triggered the expansion of drone operations in ostensibly 'friendly' nations like Pakistan, Yemen, and Somalia by the CIA – a programme that was only accelerated by the successive Obama and Trump Administrations. In light of this, this Article is concerned with assessing the legality of the CIA-led drone programme, and in particular, the extent to which it is compliant with the jus in bello principles of proportionality and necessity, respectively. In brief, the argument is put forth that the US has been surreptitiously circumventing the strictures of the jus in bello – also known as the laws of armed conflict (LOAC) – and eliding the boundaries between lawful and unlawful strikes. This paper concludes that the US not only erodes the legitimacy of its own wartime conduct, but, more troublingly, sets a dangerous precedent for future drone warfare. Ultimately, it must be acknowledged that unlawful drone strikes conducted for short-term gains will surely precipitate long-term harms.

INTRODUCTION

"No place is safe…the war comes through the air; bombs drop in the night. Quiet people go out in the morning, and see air-fleets passing overhead – dripping death!" – HG Wells[1]

The military use of unmanned aerial vehicles – 'UAVs', or, 'drones' – has long been deeply divisive. Armed with sophisticated missile and surveillance technology, modern military drones serve multiple functions: they can loiter over targets for extensive periods of time, gather critical intelligence, establish an algorithmic pattern of behaviour, and fatally eliminate the enemy – all while keeping the pilot out of the arena of war. On a surface level, drones are the perfect weapon of war – and their allure has certainly not gone unnoticed. A market once monopolised by the United States and Israel[2] has gone global as nations across the world have begun to develop,

* I have recently completed my LLM in International Human Rights at the City Law School. My principle areas of research include international human rights law, minorities and indigenous peoples in the law, and international environmental law. I completed this work in the context of a summative assignment for my LLM Law and War class in April 2019, and for it, received the City Law School Prize for Law and War.

1 HG Wells, *The War in the Air* (Penguin Classics, 2005)

2 Joanna Frew, 'Drone Wars: The Next Generation' *Drone Wars UK* (May 2018) <https://dronewarsuk.files.wordpress.com/2018/05/

export, and proliferate their own drone technologies.[3] Given, however, that the US remains seated at the apex of military drone usage, this Article limits its scope to the legality of the US drone programme – or rather, the CIA-led drone programme.[4] It particularly seeks to analyse the extent to which the CIA's usage of drones is consistent with the distinction and proportionality principles of the *jus in bello* – also known as the laws of armed conflict (LOAC). In other words, do drone operators accurately distinguish between civilians and lawful targets when conducting strikes, and in the event of collateral damage to civilians and civilian objects, is the lethal force used offset by the military advantage anticipated by the strike?

To be sure, the following discussion does not concern itself with the *inherent* and *theoretical* legality of drone warfare; the International Committee of the Red Cross (ICRC) has confirmed that drones are not expressly prohibited under international humanitarian law (IHL)[5] nor are drone missiles any 'different from weapons launched from manned aircraft'.[6] Rather, at question is the lawfulness of the CIA's *practical* conduct; by classifying the exact nature and scope of its operations, the CIA has an overbroad discretionary latitude when carrying out strikes, allowing for laxer compliance with the distinction and proportionality principles and disintegrating the legitimacy that accrues to the lawful use of drones. Surely, this does not bode well for a future in which drones are set to dominate modern warfare.

The remainder of this paper will be organised as follows: Part II will map the post-9/11 trajectory of US drone warfare, examining, *inter alia*, the pro-drone polemic endorsed by Bush during his war on terror, the acceleration of the drone wars under the subsequent Obama and Trump Administrations, some of the ethical implications pillaring drone warfare, and the extent to which the technical efficiency of drones – touted by a number of US officials as the most convincing rationalisation for their deployment – has impelled a disturbing overreliance on them. Part III engages with the core debates surrounding drone warfare in the context of international humanitarian law, and analyses whether the CIA's drone programme is, in practice, compliant with the principles of distinction (subsection A) and proportionality (subsection B). Finally, in concluding this Article, Part IV summarises the core findings of this paper vis-à-vis the legality of US drone strikes under the *jus in bello*, and briefly discusses tentative predictions for the future of drones in war.

THE RISE OF DRONE WARFARE

Much has been written on the military usage of drones by the United States government, who, since the events of September 11, 2001, have operated two (seemingly interminable) drone programmes. The first, run by the US military, is relatively uncontroversial; the programme is

dw-nextgeneration-web.pdf> accessed 19 April 2019

3 ibid

4 The fundamental distinction between US military drone operations and CIA drone operations is made clearer in Part II; for the time being, it is sufficient to state that the US military conducts its programme within the traditional theatre of war, while the CIA helms its operations outside conventional armed conflict, in otherwise 'friendly' nations like Pakistan, Yemen, and Somalia. As such, the legitimacy of the CIA's conduct is comparatively more dubious than that of military.

5 'The Use of Armed Drones Must Comply with Laws' *International Committee of the Red Cross* (10 May 2013) <https://www.icrc.org/en/doc/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm> accessed 19 April

6 ibid

overt and publicly acknowledged, and the drone strikes are launched in conventional theatre of armed conflict in Afghanistan and Iraq.[7] The second is America's worst kept secret. Run by the Central Intelligence Agency (CIA) it's aim is targeting terror suspects in nations with which the US is not formally at war[8] – namely, Pakistan, Yemen, and Somalia. This latter programme is as controversial as it is clandestine, and has spawned much academic, public, and political debate. Before examining the extent to which the use of UAVs is compliant with international humanitarian law, it would perhaps be sensible to map the seismic rise of drone warfare in the United States and analyse the potency of the pro-drone polemic.

In a historic address to Congress, nine days after the terrorist attacks on New York and Washington D.C., former US President George W. Bush declared a global war on terror;[9] this was a war that, as he proclaimed, would not end with al-Qaeda – in fact, 'it [would] not end until every terrorist group of global reach [had] been found, stopped, and defeated'.[10] Under Bush, Congress passed the Authorisation to Use Military Force (AUMF) bill, which effectively authorised the President to use force against 'those nations, organisations, or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001…'.[11] Almost two decades later, the war on terror rages on now under a new identity. Unlike his predecessor, Obama sought to distance himself from the polarising and nebulous 'war on terror' language. Instead, he presented his counterterrorism strategy as benign, ethical, pillared by foundational American values[12] and proclaimed that his war was only with al-Qaeda and the Taliban. Yet, while he eschewed the narrative, Obama did not eschew the underlying policy and rather than decelerating the CIA-run drone programme, or finding alternatives to combat terrorism in friendly States like Pakistan, he escalated the drone wars with unparalleled fervency and rapidity. In his first year in office, the Bureau of Investigative Journalism reported that Obama oversaw more drone strikes than Bush did throughout the entire length of his presidency.[13] To be precise, a startling 563 strikes were carried out in Pakistan, Somalia, and Yemen during Obama's two terms in office, compared to the 57 strikes authorised by Bush.[14] In so doing, McCrisken has argued, Obama revealed himself as '…a highly deliberative and careful president who contrasts favourably not only with Bush, but also with other predecessors who were caught in difficult wars, such as Lyndon Johnson during Vietnam'.[15]

7 Jane Mayer, 'The Predator War' The New Yorker (19 October 2009) <https://www.newyorker.com/magazine/2009/10/26/the-predator-war> accessed 22 April 2019

8 ibid

9 'Sept 20, 2001: Bush Declares War on Terror' *ABC News* <https://abcnews.go.com/Archives/video/sept-20-2001-bush-declares-war- terror-10995502> accessed 22 April 2019

10 ibid

11 United States Congress, Joint Resolution to Authorise the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, 107th Cong, SJ Res 23 (2001)

12 Trevor McCrisken, 'Ten Years On: Obama's War on Terrorism in Rhetoric and Practice' (2011) 84(4) Royal Institute of International Affairs 781, 783 <https://www.jstor.org/stable/pdf/20869759.pdf> accessed 22 April 2019

13 Jessica Purkiss and Jack Serle, 'Obama's Covert Drone War in Numbers: Ten Times More Strikes Than Bush' *The Bureau of Investigative Journalism* (17 January 2017) <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush> accessed 22 April 2019

14 ibid

15 ibid

Most recently, the Bush administration's legacy has been inherited by Trump, who, across 2017 and 2018, has already launched 238 fatal drone strikes in Yemen, Somalia, and Pakistan[16] and continues to use AUMF to justify executive orders to launch drone strikes. Given the vaunted space drones have now come to occupy in US national security policy, it is unsurprising that their employment for targeted killings has been fiercely defended. Leon Panetta, the former director of the CIA, has famously declared that drones are 'the only game in town'.[17] Michael Deegan, a Colonel of the US Army Reserve has similarly written that drones have been highly effective in dismantling al-Qaeda and its affiliates[18] and Panetta's successor, John Brennan, has argued that 'drones dramatically reduce the danger to US personnel and to innocent civilians, especially considered against massive ordnance that can cause injury and death far beyond the intended target…[civilian deaths are] exceedingly rare, and much rarer than many allege'.[19]

But how much weight do these claims hold? It is conceded that there are certainly a number of discernible advantages to using drones, particularly when conducting intelligence, surveillance, and reconnaissance (ISR) missions. First and foremost, drones are immune to the foibles of man
– they do not feel, nor fatigue, nor bleed. By virtue of their remote operation, drones distance the operator from the battlefield, not only eliminating the risk to his life, but also ensuring that his decision-making is not clouded by the fog of war, and the raw human emotion that often accompanies active combat.[20] This 'tactical patience'[21] as Sehrawat has put it, allows for an unprecedented degree of deliberation and circumspection that is, at its core, antithetical to the conventional exigency and pandemonium of war. Further, distance means that the operator is not left to his own devices when making targeting decisions, and that he can rely on crew members, intelligence analysts, and other personnel linked to the operation for crucial oversight.[22] Moreover, unlike manned aircraft, drones are able to independently loiter over an objective for extended periods of time. Equipped with advanced surveillance gear, including '1.8 giga-pixel cameras, infrared cameras, electromagnetic spectrum sensors…biological sensors…and equipment for eavesdropping…',[23] persistent surveillance allows operators to engage in sustained, continual

16 John Halitwanger, 'Trump Inherited Obama's Drone War and He's Significantly Expanded It in Countries Where the US is Not Technically at War' *Business Insider* (27 November 2018) <https://www.businessinsider.com/trump-has-expanded-obamas-drone-war-to-shadow-war-zones-2018-11?r=US&IR=T> accessed 22 April 2019

17 'Director's Remarks at the Pacific Council on International Policy' *Central Intelligence Agency* (18 May 2009) <https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html> accessed 22 April

18 Michael J Deegan, 'Unmanned Aerial Vehicles: Legitimate Weapons Systems or Unlawful Angels of Death?' (2014) 26(2) Pace International Law Review 248, 252 <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1345&context=pilr> accessed 22 April 2019

19 Chris McGreal, 'John Brennan Defends Drone Attacks as He Prepared for Tough Senate Hearing' *The Guardian* (7 February 2013) <https://www.theguardian.com/world/2013/feb/07/john-brennan-drones-senate-hearing> accessed 22 April 2019

20 David Akerson, 'Applying Jus in Bello Proportionality to Drone Warfare' (2014) 16(2) Or Rev Int'l 173, 182 <https://heinonline.org/HOL/P?h=hein.journals/porril16&i=183> accessed 22 April 2019

21 Vivek Sehrawat, 'Legal Status of Drones Under Law of Armed Conflict and International Law' (2017) 5(1) Penn St JL & Int'l Aff 164, 172 <https://heinonline.org/HOL/P?h=hein.journals/pensalfaw5&i=167> accessed 22 April 2019

22 Aaron M Drake, 'Current US Air Force Drone Operations and their Conduct in Compliance with International Humanitarian Law – An Overview' (2011) 39 Denv J Intl' L & Pol'y 629, 634 <https://heinonline.org/HOL/P?h=hein.journals/denilp39&i=651> accessed 22 April 2019

23 Frederik Rosén, 'Extremely Stealthy and Incredibly Close: Drones, Control, and Legal Responsibility' (2014) 19(1) J Conflict & Sec L 113, 116 <https://heinonline.org/HOL/P?h=hein.journals/jcsl19&i=114> accessed 22 April 2019

surveillance of a target for several hours[24] and amass an extensive amount of intelligence before striking. Finally, as Graham has pointed out, the usage of drones is also economically prudent; compared to the $140 million price tag attached to modern fighter aircraft, the loss of a $4.5 million Predator drone[25] is reasonably palatable.

That said, it is worth examining some of the most commonly cited criticism of drones. The above listed merits paint a picture of a weapon that is sophisticated, efficient, and, most importantly, necessary. It is precisely because of the allure of drone warfare, however, that many commentators have been critical of their over-use. Technical efficiency, as Kaag and Kreps have argued, is being erroneously conflated with vague ideas about morality[26] and in offering distance and safety to the operators, there is reason to believe that drones have mechanised the act of killing. The horrors of Vietnam were manifold, and left US citizens in a state of intensifying disillusion and cynicism. Since that time, the United States government has made a concerted effort to protect its troops from returning home in body bags, turning to technology to mitigate the perils of war.[27] Unlike the wars that have gone before it, the contemporary war on terror, waged by Bush and extended – albeit under a different name – by Obama, is not characterised by the rhetoric of heroism, sacrifice, and 'transcendence and moral achievement through the negative destruction of the body and ultimately death'.[28] Today, a successful war is one in which the enemy can be watched, struck, and defeated from afar – a war fought by a 'cubicle warrior' in an office in Virginia. To be sure, it is not objectionable to desire to shield one's own military from casualty. The concern, rather, is that with the safety of its own citizens guaranteed, the US has become needlessly over-reliant on drones. In other words, is targeted killing via drone strike now *too* accessible? For O'Connell[29] and Takemura[30] the answer to this question is in the affirmative. Both writers have put forth arguments in support of some variation of the PlayStation effect, under which 'the person controlling a remote drone will [be less likely to] hesitate to use lethal force because physical distance can break the psychological barrier that inhibits one person from killing another human being'.[31]

Indeed, even the general US populace has expressed a general indifference to the practice of targeted killing abroad. Kaag and Kreps have reported that only 9% of American citizens surveyed objected to drone strikes in foreign territories, with 90% objecting to the use of drones

24 Drake (n 22)

25 David E Graham, 'The US Employment of Unmanned Aerial Vehicles (UAVs): An Abandonment of Applicable International Norms' (2015) 2(4) Tex A&M L Rev 675, 677 <https://heinonline.org/HOL/P?h=hein.journals/twlram2014&i=1119> accessed 22 April 2019

26 John Kaag and Sarah Kreps, 'Drones and Democratic Peace' (2013) 19(2) Brown J Word Aff 97, 105 <https://heinonline.org/HOL/P?h=hein.journals/brownjwa19&i=345> accessed 21 April 2019

27 ibid

28 Bianca Baggiarini, 'Drone Warfare and the Limits of Sacrifice' (2015) 11(1) Journal of International Political Theory 128, 140 <https://doi.org/10.1177/1755088214555597> accessed 21 April 2019

29 Mary Ellen O'Connell, 'Seductive Drones: Learning from a Decade of Lethal Operations' (2011) Journal of Law, Information and Science (Notre Dame Legal Studies Paper No 11-35) 1, 8 <http://ssrn.com/abstract=1912635> accessed 21 April 2019

30 Hitomi Takemura, 'Unmanned Aerial Vehicles: Humanization from International Humanitarian Law' 32(3) Wisconsin International Law Journal 521, 526 <http://hosted.law.wisc.edu/wordpress/wilj/files/2019/10/Takemura-Final.pdf> accessed 21 April 2019

31 ibid

for domestic surveillance.[32] Similarly, Cronin has found that, in a 2012 survey, '51 percent of Poles, 59 percent of Germans, 63 percent of French, 76 percent of Spanish, and a full 90 percent of Greeks noted their disapproval of U.S. drone strikes. The only publics that even approach the positive attitudes of the United States – where 70 percent of respondents to a recent *New York Times* poll approved of drones…'[33] Admittedly, it is difficult to gauge whether this apathy is the result of a considerable dearth of information on how the US conducts drone strikes abroad, or mere apathy to issues that US citizens are not directly harmed by.

INTERNATIONAL HUMANITARIAN LAW

IHL governs the conduct of parties to an armed conflict, and is principally concerned with reducing suffering and mitigating the effects of war on persons who are not participating in the hostilities.[34] Contrary to *jus ad bellum*, which regulates when States may resort to the use of force, the *jus in bello* principles of distinction, proportionality, and necessity may only be applied once the armed conflict – whether of an international or non-international nature – is already underway. Briefly, an international armed conflict (IAC) is one in which hostilities take place between two or more States[35], and a non-international armed conflict (NIAC) arises where hostilities are taking place in the territory of a State 'between its armed forces and dissident armed forces or other organised armed groups'.[36] Outside of armed conflict and during peacetime, State actions must act consistently with international human rights law (IHRL), which, unlike IHL, imposes significant restrictions on the use of lethal force against individuals. Thus, characterising the nature of a given conflict is crucial in determining the governing regime, and examining the legality of particular conduct.

With regards to drones, much has been written on the characterisation of the conflict between the United States and nations like Pakistan, Yemen, and Somalia, with which the US is not formally at war. Whether or not the LOAC is the appropriate legal regime to monitor the targeted killing of remote terror operatives is highly contentious. For its part, the US has insisted that its war on terror is unconstrained by geographical boundaries and that in response to the events of 9/11, it is engaged in a transnational domestic armed conflict with al-Qaeda, the Taliban, and associated forces.[37] Former legal advisor to the Obama administration, Harold Koh, has emphatically stated that the US has authority to 'use force consistent with the right to self-defence under international law' and under the aforementioned AUMF.[38] This is a dubious position. Maqbool

has convincingly argued that the US has averred the existence of a global war against al-Qaeda and associated organisations precisely because IHL is more permissive than IHRL, and empowers

32 Kaag and Kreps (n 26)

33 Audrey Kurth Cronin, 'Why Drones Fail: When Tactics Drive Strategy' (2013) 92(4) Foreign Aff 44, 50 <https://heinonline.org/HOL/P?h=hein.journals/fora92&i=860> accessed 22 April 2019

34 'What is International Humanitarian Law?' *International Committee of the Red Cross* <https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf> accessed 22 April 2019

35 Common Article 2 to the Geneva Conventions 1949

36 Article 1 of Additional Protocol II 1977 Geneva Convention

37 Harold Hongju Koh, 'The Obama Administration and International Law: Keynote Speech at the Annual Meeting of the American Society of International Law' (25 March 2010) <https://www.state.gov/documents/organization/179305.pdf> accessed 22 April2019

38 ibid

State armed forces to launch drone strikes without the risk of criminal prosecution.[39] For Boyle, the problem with the US argument is that 'its interpretation is essentially that it can be at war with non-state actors in foreign countries and strike them without being in a state of war against the government…US policy creates a grey area between war and assassination that enables a variety of different forms of informal violence…'.[40] Vogel, on the other hand, has suggested that 'location matters, but it is not overly prohibitive'[41] as al-Qaeda is a transnational non-state actor that has waged war from across the world[42] and the US need not confine itself to a narrow approach such as geographic delineation of a battlefield. Notably, these issues are not relevant with regards to the drone strikes conducted in Afghanistan and Iraq, which are established combat zones manned by US troops.

It is worth mentioning that the scope of this paper is limited to an evaluation of the extent to which the usage of drones is consistent with the *jus in bello* principles of proportionality and distinction. As such, the US position will not be examined in any further detail, and two weighty assumptions, adopted from the writings of Akerson, will be made before progressing. First, for the purposes of the following analysis, it is accepted that a non-international armed conflict does indeed exist between the US and non-State actors like al-Qaeda.[43] Second, and following from the first, it is also accepted that IHL is the relevant framework for an analysis of drone warfare and the legality of targeting suspected terrorists in 'friendly' States.[44]

As to the lawfulness of targeting killings, one further point should be clarified: in the context of armed conflict, it appears that the 'intentional, premeditated and deliberate use of lethal force, by States or their agents acting under the colour of law, or by an organised group in armed conflict, against a specific individual…'[45] is not inherently unlawful. Quite the contrary, Graham has rightfully pointed out that the usage of drones would be considerably more problematic were the strikes not targeted at identified individuals[46] and were instead launched indiscriminately at the general population. The quandary, rather, is whether those that are being struck are, in fact, lawful targets; whether they have been adequately distinguished from the civilian population; whether the use of lethal force against them is necessary and proportional; and whether the criteria being used to designate them as lawful targets are transparent and accurate.

39 Sahiba Maqbool, 'Implications of the Use of Drones Under International Law' (2016) 25 Sri Lanka J Int'l L 157, 169 <https://heinonline.org/HOL/P?h=hein.journals/sljinl25&i=166> accessed 22 April 2019

40 Michael Boyle, 'The Legal and Ethical Implications of Drone Warfare' (2015) 19(2) IJHR 105, 116 <https://doi.org/10.1080/13642987.2014.991210> accessed 22 April 2019

41 Ryan Vogel, 'Drone Warfare and the Law of Armed Conflict' (2010) 39(1) Denv J Int'l L & Pol'y 101, 113 <https://heinonline.org/HOL/P?h=hein.journals/denilp39&i=101> accessed 22 April 2019

42 ibid

43 Ak7.2014.991210 rfare'ry 128, Akerson (n 20)

44 ibid

45 United Nations, General Assembly, Study on Targeted Killings: A Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, A/HRC/14/24/Add.6 (28 May 2010) <https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A. HRC.14.24.Add6.pdf> accessed 22 April 2019

46 Graham (n 25) 8

A. Jus in Bello Distinction

Distinction, as Crawford and Lewis have written, 'is one of the most fundamental philosophies that underpin the modern law of armed conflict'.[47] Expressed in Article 48 of the first Additional Protocol to the 1977 Geneva Convention (AP I), one iteration of the principle reads as follows:

"In order to ensure respect for and protection of the civilian population and civilian objects, *the parties to the conflict shall at all times distinguish between the civilian population and combatants* and between civilian objects and military objectives and accordingly *shall direct their operations only against military objects*."

This concept is further articulated in Article 51(2) of AP I, which states that 'the civilian population as such, as well as individual civilians, shall not be the object of attack'.[48] The sacrosanctity of distinction is reflected by its preservation in customary international law, which prescribes that 'the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians'.[49] Though the principle of distinction is rather straightforward in the abstract, its operation in practice has been challenging to say the least. With regards to the drone strikes conducted by the US, two related inquiries warrant further examination: first, can members of al-Qaeda and other terrorist groups be lawfully targeted as combatants under IHL, and if so, are these actors being adequately distinguished from civilians in practice?

As to the first question, while it is established that members of the armed forces of a State are bona fide combatants[50] and thus, entitled to the privileges that accompany combatant status, the precise status of members of armed opposition groups remains unclear. Generally, such individuals might be considered civilians who have forfeited their immunity against direct attack by taking a 'direct part in hostilities', pursuant to Article 51(3) of AP I. It is unclear what this phrase encompasses as it has not been categorically defined in any international treaty, and is thus subject to interpretation. In the absence of authoritative criteria, attempts have been made to fill this lacuna elsewhere, with varying levels of success.

In its Interpretive Guidance on the Notion of Direct Participation in Hostilities, the ICRC has espoused the view that, in a non-international armed conflict, civilian status is conferred only upon those who are neither members of a State's armed forces, nor members of organised armed groups of a party to the conflict.[51] Per the Guidance, members of organised armed groups retain

47 Michael W Lewis and Emily Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones' (2013) 44(3) Geo J Int'l L 1127, 1154 <https://heinonline.org/HOL/P?h=hein.journals/geojintl44&i=1155> accessed 21 April 2019

48 Article 51(2), International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 <https://ihl-databases.icrc.org/ihl/WebART/470-750065> accessed 21 April 2019

49 'Rule 1: The Principle of Distinction Between Civilians and Combatants' *IHL Database, Customary IHL* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1> accessed 22 April 2019

50 Article 4A Geneva Convention II 1977

51 Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities' *International Committee of the Red Cross* (May 2009) <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> accessed 22 April 2019

a 'continuous combat function' (CCF), and are by virtue of this membership, targetable at all times.[52] On the contrary, civilians who sporadically and temporarily participate in hostilities may only be the object of lawful attack *for such time* as they DPH.[53] The ICRC has indicated that 'recruiters, trainers, financiers, and propagandists may continuously contribute to the general war effort of a non-state party, but they are not members of an organised armed group belonging to that party unless their function…includes activities amounting to [DPH]'.[54] Thus, it appears that, by itself, support does not beget membership, which is only derived from an active 'fighting' role within the group. The ICRC has also laid out three cumulative elements for an act constituting DPH:

The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[55]

Predictably, the ICRC's position has attracted criticism; Vogel has argued that *all* supporters of al-Qaeda –financiers and propagandists included – countenance their illicit objectives. As such, 'to allow a state to target a terrorist only for such time as he is engaged in an actual hostile act is to give the terrorist the best of both worlds – the protections of a civilian and the rights of a combatant'.[56] This 'revolving door' of protection[57], as it has been termed, means that based upon their actions, civilians may periodically lose and gain their protection from targeted attack. Given that State armed forces may not enjoy the luxury of temporal immunity, such an approach not only creates a legal disparity between State and non-State actors, but also opens the doors for potential abuse by civilians, who might, for instance, openly strategize their future involvement in hostilities while remaining protected from attack.[58]

Circling back to the first question, the above discussion appears to indicate that if an individual is either (a) a member of an organised armed group with a CCF, or (b) a civilian directly participating in hostilities, that individual will be targetable in accordance with the LOAC. It is worth noting that Cronin has cast some doubt on al-Qaeda's status as an organised armed group. She points out that over time, al-Qaeda has 'become an ill-defined shorthand, loosely employed

52 ibid
53 ibid
54 ibid
55 ibid
56 Vogel (n 41) 21
57 Damien van der Toorn, 'Direct Participation in Hostilities: A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance Through Afghanistan' Austl Int'l LJ 7 <http://www.austlii.edu.au/au/journals/AUIntLawJl/2010/1.pdf> accessed 22 April 2019
58 ibid

by terrorist leaders, counterterrorism officials, and Western pundits alike'[59], and is an 'amorphous and geographically dispersed foe'[60] with only a tangential connection to the 9/11 attacks. Perhaps the ambit of this paper is not wide enough for a fuller analysis of al-Qaeda's organisational structure. For the time being, it is accepted that so long as an individual is observed as DPH, drone strikes launched against them are lawful.

As to the second question, it is difficult to gauge whether suspected terror operatives and individuals directly participating hostilities are being accurately distinguished from civilians in practice. Adherence to the principle of distinction has been markedly challenging in situations where, absent external indicia of group membership, armed belligerents often hide among civilian populations, don the same garb as them, and deeply ensconce themselves into local communities.[61] The Federally Administered Tribal Areas (FATA) in Pakistan, for example, is a hotbed for terrorist activity, as militant groups have assumed territorial control over large swathes of the North and South Waziristan tribal areas.[62] Yet, FATA is also home to thousands of innocent civilians and tribespeople, who have little to do with the conflict between the US and its enemies. Many residents of the area believe themselves to be caught between 'the Taliban on one side, the army on the other, and drones above'[63] and it appears that these sentiments are not misplaced. The Bureau of Investigative Journalism has reported that, since 2004, US-launched drone strikes have caused somewhere between 424 to 969 civilians fatalities in Pakistan alone, with between 172 to 207 of these victims being children.[64] In Yemen, between 174 to 225 civilians have been killed[65] and in Somalia, the figure is between 10 and 58.[66] To be sure, the contention here is not that drones are to blame for the increasingly blurred boundaries between civilians and armed actors; indeed, culpability in this regard lies exclusively with the militants who have taken to unlawfully using human shields to obfuscate their own belligerent status. By so doing, it is militants – not drones – who put civilians at greater risk of death.

Nevertheless, it is equally true that the blameworthiness of one party cannot, and should not, diminish the responsibility of the other. To this effect, the ICRC has emphasised that the 'use of civilians as human shields does not release the attacker from his obligations with respect to the civilian population'.[67] If anything, the intermingling of terrorist and civilian populations

59 Cronin (n 33)
60 ibid
61 Jelena Pejic, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications' (2014) 96(893) 67, 74 <https://heinonline.org/HOL/P?h=hein.journals/intlrcs96&i=69> accessed 22 April 2019
62 Christopher Rogers, 'Civilian Harm and Conflict in Northwest Pakistan' *Centre for Civilians in Conflict* (20 October 2010) <https://civiliansinconflict.org/wp-content/uploads/2017/09/Pakistan_Report_2010_2013.pdf> accessed 22 April 2019
63 Tom Hussain, 'FATA: Terrorists or Victims of a Covert War?' *Al Jazeera* (14 September 2016) <https://www.aljazeera.com/indepth/ opinion/2016/09/fata-terrorists-victims-covert-war-160912084500746.html> accessed 22 April 2019
64 'Strikes in Pakistan' *The Bureau of Investigative Journalism* <https://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&location=pakistan&from=2004-1-1&to=now> accessed 22 April 2019
65 'Strikes in Yemen' *The Bureau of Investigative Journalism* <https://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&location=yemen&from=2002-1-1&to=now> accessed 22 April 2019
66 'Strikes in Somalia' *The Bureau of Investigative Journalism* <https://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&location=somalia&from=2007-1-1&to=now> accessed 22 April 2019
67 'Rule 97: Human Shields' *IHL Database, Customary IHL* <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule97> accessed 22 April 2019

necessitates the exercise of heightened vigilance on the part of drone operators; given the oft-extolled discriminatory capacity of drone technology, this is certainly not an unreasonable demand. In his 'paradox of precision'[68] theory, Mégret has suggested that collateral casualties caused by drone strikes enflame resentment precisely *because* drones have been touted as weapons of proximity and endurance.[69] Logic dictates that, since they benefit from laser-guided missiles, sophisticated surveillance apparatus, and, unlike manned weaponry, the rationality and security of their pilots, drones should be held to a standard commensurate with their technological prowess. If the precision of drones, as Singer has argued, 'can lessen the number of mistakes made, as well as the number of civilians inadvertently killed'[70], why must mistakes be made at all? To name but a single example, the home of tribal elder Malik Gulistan Khan was erroneously struck by a drone missile in 2009 in place of an identified Taliban hideout, and the attack claimed the lives of five member of the Khan family.[71] Could, perhaps, the drones not have loitered for a little longer, or more robust intelligence have been gathered prior to the launch? Surely, one cannot attribute mistakes to the distress of the battlefield; such urgency 'springs solely from the risk of missing the chance of killing a suspected or confirmed target.'[72] Mégret draws the conclusion that, in the absence of any further information about the decision-making process behind CIA-run drone operations, 'the only logical conclusion may be that the strikes reflected an anti-humanitarian callousness about collateral damage'.[73]

Indeed, it is precisely this absence of information that has become the Achilles' heel of the CIA's drone programme. Owing to the highly classified nature of the programme, it is impossible to ascertain whether casualties have been rightly identified, whether they were acting (voluntarily or involuntarily) as human shields, and, most importantly, what the precise number of civilian lives lost in the affray is.[74] Contrary to John Brennan's earlier-quoted – and woefully idealistic

– proclamation about the effectiveness of drone technology in minimising harm to civilians, Boyle has pointed out that, in ungoverned and ill controlled lands, like the FATA and regions of Somalia and Yemen, the true civilian death toll is virtually inaccessible.[75] Not only is verification of casualties and investigation following a strike difficult, but casualty numbers are subject to spin, with either side of the conflict endeavouring to bolster the potency of their own narratives by tweaking the numbers, either to attract new recruits or to legitimise their counterterrorism operations.[76]

The most damning blow to the legality of the CIA drone programme is not secrecy, however, but emergent allegations that alongside personality strikes – where the identity of the target is

68 Frédéric Mégret, 'The Humanitarian Problem with Drones' (2013) 2013(5) Utah L Rev 1283, 1297 <https://heinonline.org/HOL/P?h=hein.journals/utahlr2013&i=1329> accessed 22 April 2019
69 ibid
70 Peter W Singer, *Military Robots and the Law of War* (Oxford University Press, 2010)
71 oion in YemenWarfare'ry 128, Rogers (n 62)
72 Rosén (n 23)
73 Mégret (n 68)
74 Robert P Barnridge Jr, 'A Qualified Defence of American Drone Attacks in Northwest Pakistan Under IHL' (2011) 30(409) 410, 416 <http://www.bu.edu/law/journals-archive/international/volume30n2/documents/article_barnidge.pdf> accessed 22 April 2019
75 Michael J Boyle, 'The Costs and Consequences of Drone Warfare' (2013) 89(1) International Affairs 1, 7 <https://doi.org/10.1111/1468-2346.12002> accessed 22 April 2019
76 ibid

known to the drone operator – the US is also conducting signature strikes, targeting 'suspicious compounds in areas controlled by militants'[77] and individuals who display a certain 'pattern of life'.[78] The targets of signature strikes are therefore individuals who 'exist as digital profiles across a network of technologies, algorithmic calculations, and spreadsheets'[79], and whose involvement with, and affiliation to, terrorist groups is tenuous at best, and entirely unknown at worst. Indeed, reports on US drone policy have even indicated that signature strikes render targetable 'any military-aged male in a drone strike zone'.[80] If these reports are to believed, then the US is in direct contravention of the principle of distinction, and the LOAC in general. In and of itself, 'mere presence in a given locality can never…amount to [DPH]. Some specific act would need to be engaged in for the person to be considered to be taking a part in hostilities'.[81] The objections to a signature strike policy are threefold: first, it imputes upon individuals an unsubstantiated

– and fatal – presumption of guilt[82]; second, it runs counter to the presumption of civilian status contained in Article 50(1) of AP I, which states that, 'in case of doubt whether a person is a civilian, that person shall be considered to be a civilian'; and, finally, it critically betrays the underlying philosophy of IHL – namely, the idea that non-combatants must be immune to direct attack.[83] Signature strikes cannot be justified in situations where an individual is bearing arms; in the FATA region of Pakistan, for example, guns are culturally pervasive, and are often carried openly by tribesmen and civilians.[84] The operator's 'soda straw' perspective of the battlefield[85] and lack of exposure to local cultural norms is no excuse: indeed, the purpose of the drone is defeated if it is not being used to carry out basic ISR missions before launching missiles. Chillingly, one senior State Department official has *joked*: 'when the CIA sees three guys doing jumping jacks, the agency thinks it is a terrorist training camp'.[86] In 2002, a Predator drone launched by the CIA struck three men near a derelict mujahideen complex near Khost, Afghanistan.[87] The only information relied upon by the drone operators was that one of the three men was tall, and that 'the others were supposedly acting reverently toward him'[88]; the expectation, of course, was that the taller man was Osama bin Laden. After all the men were killed, it came to light that they were merely innocent civilians, caught in all ill-timed and deadly situation.[89] For the families

77 Jo Becker and Scott Shane, 'Secret 'Kill List' Proves a Test of Obama's Principles and Will' *The New York Times* (29 May 2012) <https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=0> accessed 1 May 2019

78 Baggiarini (n 28)

79 ibid

80 Cameron Davis, 'Innocent Until Proven Guilty: A Solution for America's Failed Military Transparency' *The Roosevelt Institute* <http://rooseveltinstitute.org/wp-content/uploads/2017/06/504.pdf> accessed 1 May 2019

81 Christof Heyns and Dapo Akande and Lawrence Hill-Cawthorne and Thompson Chengeta, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65(4) Int'l & Comp LQ 791<https://heinonline.org/HOL/P?h=hein.journals/incolq65&i=819> accessed 22 April 2019

82 Davis (n 80)

83 Boyle, 'The Costs and Consequences of Drone Warfare' (n 75)

84 Rogers (n 62)

85 ibid

86 Becker and Shane (n 77)

87 Kevin Jon Heller, 'One Hell of a Killing Machine: Signature Strikes and International Law' (2013) 11(1) J Int'l Crim Just 89 <https://heinonline.org/HOL/P?h=hein.journals/jicj11&i=91> accessed 22 April 2019

88 ibid

89 ibid

of the deceased, the CIA's signature strike policy is surely not a laughing matter. Heller has formulated three categories of signature strikes: legally adequate, never legally adequate, and either adequate or inadequate based upon how the signature is interpreted.[90] Targeting killings directed at military-aged males in established strike zones fall into the second category, and cannot be accepted under any circumstances.

Per the principle of distinction, parties to a conflict are also required to distinguish between civilian objects and military objectives, and may only direct their attacks against military objects. Pursuant to Article 52(2) of AP I, 'military objects are…objects which, by their *nature, location, purpose, or use* make an effective contribution to military action and whose total or partial destruction, capture, or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'.[91] While it is theoretically easy to distinguish between military objects (i.e. terrorist training camps) and civilian objects (i.e. mosques or hospitals), in reality, the boundaries between civilian and military objects are often difficult to extricate. In 2012, for instance, a Predator missile was launched at a convoy of cars and trucks in a wedding procession in the city of Rad'a, Yemen.[92] The strike took the lives of twelve men – including the son of the groom – all of whom Human Rights Watch have identified as civilians.[93] In the aftermath of the attack, US government officials attempted to justify the attack by claiming that the members of the Al-Qaeda in the Arabian Peninsula (AQAP) were part of the procession, and further that all members were carrying military rifles.[94] To date, neither US nor Yemeni officials have adduced evidence to back the contention that AQAP militants were present in the convoy of vehicles.[95] The critical question in this case is whether the wedding procession, by virtue of its nature, location, purpose, or use, was targetable as a military object. On a purely preliminary and surface-level reading of the case, it appears that this question must be answered in the negative. It would be difficult to defend the position that a wedding procession was contributing meaningfully to the military ends of the AQAP, or that its destruction would offer a tangible military advantage. Even if one were to accept the US position that members of AQAP were present, it is unclear how this would render them as directly participating in hostilities.

Ultimately, it cannot be said that drones are unable to discriminate between militants and civilians. On a purely technological level, armed drones are vastly more advantageous than manned aircraft, which widen the scope for more collateral civilian casualties and erroneous striking decisions. Regrettably, the practical usage of drones has not reflected their vast potential. As it stands, the US drone programme is overly clandestine, riddled with incidences of miscalculation, and seemingly indifferent to the high numbers of civilian deaths that are being reported by organisations like the Bureau of Investigative Journalism. Admittedly, while the assimilation tactics of militant groups

90 ibid

91 Article 52(2), ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750067?OpenDocument> accessed 22 April 2019

92 'A Wedding That Became a Funeral – US Drone Attack on Marriage Procession in Yemen' *Human Rights Watch* (19 February 2014) <https://www.hrw.org/report/2014/02/19/wedding-became-funeral/us-drone-attack-marriage-procession-yemen#page> accessed 22 April 2019

93 ibid

94 ibid

95 ibid

are making it increasingly difficult for operators to draw the line between targetable and non-targetable individuals, emerging accusations of signature strikes do not paint a promising picture for the legitimacy of the CIA's programme.

JUS IN BELLO PROPORTIONALITY

The *jus in bello* principle of proportionality, contained in Article 51(1)(b) of AP I, prohibits:

"…an attack which may be expected to cause *incidental loss of civilian life,* injury to civilians, damage to civilian objects, or a combination thereof, which would *be excessive in relation to the concrete and direct military advantage anticipated*."

Proportionality is further reaffirmed in Article 57(2)(a)(iii) of AP I, and, like the principle of distinction, is considered a norm of customary international law.[96] Before moving on to assess whether drone strikes have been conducted in compliance with the proportionality standard, there are a number of elements that must be unpacked from the wording of this principle: first and foremost, Article 51(1)(b) appears to indicate that the *incidental* loss of civilian life is not, in and of itself, prohibited. The requirement of 'incidental' harm is in line with the principle of distinction, which prohibits direct attacks against civilians. Akerson has suggested that incidental harm has two limbs: first, harm must be unintentional, and second, it must be subordinate or non-essential.[97] Essentially, incidental harm must be a by-product of the attack, and must be 'located outside the boundaries of 'obvious' military objectives…civilians who happen to to be in the same mosque [as belligerents] do not take on the same character as civilian employees at the Pentagon'.[98] Evidently, the aim is to minimise the deleterious consequences of armed conflict on civilians as far as possible, while at the same time, recognising IHL's duty to account for the realities of war. In the context of drone warfare, Mégret has pointed out that though they are better able to distinguish between militants and civilians, drones cannot eradicate threat to civilians entirely. He writes, 'there may be military opportunity costs involved in a decision to not strike at a certain point that require a rapid reaction because it is possible that the combatants will become unreachable afterwards'.[99] If proportionality calculations are undertaken in good faith, and on a case-by-case basis[100] as Wright suggests, then there is no reason why drone strikes should be inherently lawful, even where they result in collateral civilian casualty.

Of course, Article 51(1)(b) also prescribes that incidental damage to civilians is permissible only to the extent that it offers a 'direct and concrete military advantage' – but what are the criteria for such an advantage, and how might a calculation of this nature be carried out in

96 'Rule 14: Proportionality in Attack' *IHL Database, Customary IHL* <https://ihldatabases.icrc.org/customaryihl/eng/docs/v1_rul_rule14> accessed 22 April 2019
97 Akerson (n 20) 183
98 ibid
99 Mégret (n 68) 28
100 Jason D Wright, 'Excessive Ambiguity: Analysing and Refining the Proportionality Standard' (2012) 94(886) Int'l Rev Red Cross 819 <https://heinonline.org/HOL/P?h=hein.journals/intlrcs94&i=824> accessed 22 April 2019

practice? The ICRC Commentaries to AP I suggest that 'military advantage can only consist in ground gained and in annihilating or weakening enemy armed forces'[101] and further that any attack that results in collateral civilian casualty must produce a measured and known outcome.[102] Indeed, while this is theoretically sound, ascertaining military advantage in the real world is invariably more complex. The proportionality equation – which positions human lives on one side and the abstract notion of a 'military advantage' on the other – attempts to counterpoise two highly incongruent values.[103] Moreover, one must be cognisant of the risk that, under the pretext of an ostensibly 'concrete' military advantage, the true cost of the damage to civilians will be downplayed, or the pursuit of a particular target will colour the decision-making of the operator, thus skewing the weighting of the proportionality equation. This risk is certainly not mitigated by the fact that the concept of 'annihilating or weakening enemy armed forces' is itself rather nebulous, and encourages parties to a conflict to unilaterally decide whether human life is an adequate price to pay for the perceptible advantage gained by a particular attack. It is also worth bearing in mind Cronin's argument that targeted killings do not impede 'the group's ability to replace dead leaders with new ones…not only has al-Qaeda's propaganda continued uninterrupted by drone strikes, it has been significantly enhanced by them'.[104]

Certainly, this argument might be countered by the fact that the principle of proportionality refers to the military advantage *anticipated*; in other words, proportionality assessments are conducted prospectively, based on circumstances prevailing at the time.[105] Regardless of what comes to light following an attack, 'the appropriate analysis under AP I proportionality would revert to the time of the contemplation of the attack to evaluate the commander's state of mind on the anticipated 'direct and concrete' military advantage'[106], turning on the strength of the intelligence available at the time and the predicted harm to civilians. Even if militant groups were able to use civilian casualties to bolster their narrative and attract more adherents to their cause, it does not follow that this would render an attack disproportionate – so long as the attacking party took all feasible steps to minimise harm to civilians and had reason to believe a direct military advantage would be gained.

Troublingly, the usage of drones, particularly by the CIA, do not seem to reflect strict adherence to the standards of proportionality in practice. Given that 'drone strikes are purportedly among the most thoroughly researched, contemplated, and reviewed decisions in the history of warfare'[107], it is difficult to conceive of a situation in which a high number of civilian casualties may be justified,

101 'Commentary of 1987 Precautions in Attack' *International Committee of the Red Cross* <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/d80d14d84bf36b92c12563cd00434fbd> accessed 22 April 2019
102 ibid
103 Rebecca Barber, 'The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan' (2010) 15(3) J Conflict & Sec L 467 <https://heinonline.org/HOL/P?h=hein.journals/jcsl15&i=473> accessed 22 April 2019
104 Cronin (n 33) 46
105 Wright (n 100) 832
106 Akerson (n 20) 195
107 Joshua Andresen, 'Due Process in the Age of Drones' (2016) 41(1) 155, 187 <https://digitalcommons.law.yale.edu/yjil/vol41/iss1/5/> accessed 22 April 2019

even where the military advantage is substantial. 'The more protracted a campaign', Akerson has written, 'the more experiential knowledge a military commander would be expected to acquire about past civilian harm'.[108] In theory, live video feeds, sophisticated intelligence gathering, and persistent stare capabilities should enable drone operators to track the movement of targets and strike when – and only when – they are confident that as few civilians will be harmed as possible.

The practice of targeting civilian events does not reconcile neatly with this ideal. Boyle has argued that a drone strike targeted at a funeral procession in 2009, which resulted in the death over sixty people (including members of the Taliban) has contributed to erosion of the proportionality standard.[109] One might reasonably question the extent to which the targeting of civilian events is truly necessary. Contrary to Obama's proclamation that no strike is greenlighted absent 'near-certainty that no civilians will be killed or injured'[110], the deliberate targeting of civilian gatherings guarantees at least *some* collateral fatalities; that the death of a few Taliban members can be used to justify the death of considerably more civilians is rather unconvincing. Indeed, the same analysis may be applied to the attack launched on the wedding procession in Yemen, discussed in the previous section. Not only did the strike fail to distinguish between a military object and a civilian one, but the twelve civilian deaths were manifestly disproportionate relative to the military advantage gained – assuming, of course, that such an advantage was gained at all. Enshrined in Article 57(2)(a)(iii) of AP I is the principle of precaution, which stipulates that those who plan an attack shall 'refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects… which would be excessive in relation to the concrete and direct military advantage anticipated'.[111] Article 57(2)(b) goes on require that an attack be suspended where, *inter alia* it becomes clear that injury to civilians would be excessive in relation to the military advantage anticipated. Directing targeted drone strikes towards civilian events does not appear to be consonant with either of these provisions; far from minimising the risk of harm to civilians, attacks of this nature *amplify* it, all in service of a vague military advantage that may or may not come to fruition. Boyle has gone as far as to suggest that, if conducted in the active theatre of war, such strikes would constitute war crimes.[112]

Admittedly, it is true that no authoritative information is available in the public domain regarding the military advantages anticipated by the CIA, the risk to civilians envisaged, and the wider strategic goals of the drone programme.[113] It may conceivably be the case that the drone strikes that have yielded a high – but not excessive – quantity of civilian casualties have been carried out

in order to eliminate an otherwise elusive, high-level target. To elaborate, whether the target is

108 Akerson (n 20) 196
109 Boyle, 'The Costs and Consequences of Drone Warfare' (n 75) 8
110 Scott Shane, 'Drone Strikes Reveal Uncomfortable Truth: US is Often Unsure About Who Will Die' New York Times (23 April 2015) <https://www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will- die.html> accessed 22 April 2019
111 Article 57(2)(a)(iii), ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750073?OpenDocument> accessed 22 April 2019
112 ibid
113 Maqbool (n 39) 167

high-level (HVT) or low-level (LVT) fundamentally alters the weighing of the proportionality equation. A HVT may be described as an individual with a leadership position or a high rank within an organised armed group, and an LVT is a 'rank-and-file fighter who poses little threat to the United States'.[114] Though both are lawful targets, the relative military advantage conferred by the killing of an LVT is vastly inferior to that gained by the killing of a HVT; while the former might only momentarily disturb a militant group, the death of the latter has the potential to destabilise and disintegrate it. Nevertheless, at this juncture, we must temper our expectation of the utility – and frequency – of HVT eliminations. While Vogel has argued that the elimination of a senior belligerent leader would permit a higher number of civilian casualties, particularly where this will 'lead to a quicker cession of hostilities'[115], Boyle has countered this by arguing that, in reality, drone strikes have killed far fewer high-value targets than the US claims.[116] Rather than weakening enemy forces in any perceptible sense, targeting low-level targets may in fact swell the ranks of Al-Qaeda and associated groups, and cause them to flee to Yemen, Iraq, and Syria; 'these operatives bring with them the skills, experience and weapons needed to turn these wars into fiercer, and perhaps longer-lasting, conflicts'.[117] Boyle's assertions are backed by the comments of senior Pakistani officials, who have insisted that, thus far, the CIA has only successfully eliminated low-level foot soldiers.[118] Similarly, the director of the New American Foundation has revealed that a staggering 94% of all militants killed by drone strikes are, in fact, low-ranking soldiers.[119] Taken in conjunction with the alarmingly high civilian casualty statistics cited elsewhere in this paper, the prognosis for US compliance with *jus in bello* proportionality looks bleak.

Not only do civilians sustain physical damage as a result of drone strikes, but there is growing concern that psychological damage incurred as a consequence is both long-lasting and profound. In an attempted defence of the CIA's drone programme, Sehrawat has suggested that, contrary to popular belief, residents of Pakistani tribal regions are accepting of drones, and consider strikes to be 'preferable to the artillery barrages of the of the Pakistani military'.[120] Respectfully, Sehrawat's account is naive and idealistic. The psychological trauma resulting from the presence of drones in tribal areas is well-documented: a 2012 report published by the International Human Rights and Conflict Resolution Clinic has been unequivocal in its assertion that civilians living under drones are forced to live an anxiety-ridden existence, burdened by a constant fear of the next fatal strike and rendered powerless by the knowledge that they have little means to protect themselves.[121] One shopkeeper in Miranshah, North Waziristan, has said: '[we see drones]

114 Akerson (n 20) 196
115 Vogel (n 41) 127
116 Michael J Boyle, 'The Legal and Ethical Implications of Drone Warfare' (n 40)
117 ibid
118 Greg Miller, 'Increased US Drone Strikes in Pakistan Killing Few High-Value Militants' Washington Post (21 February 2011)<http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html?wpisrc=nl_natlalert&noredirect=on&sid=ST2011022104355> accessed 22 April 2019
119 ibid
120 Sehrawat (n 21) 169
121 'Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan' *International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law)* (September 2012) <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/313671/doc/slspublic/Stanford_NYU_LIVING_UNDER_DRONES. pdf> accessed 22 April 2019

hovering…we don't know when they will strike…People are afraid of dying…Children, women, they are all psychologically affected'.[122] In light of this, Boyle is of the opinion that a calculation of proportionality concerned only with physical damage is insufficient to account for the actual consequences of drone warfare.[123] In his view, it is not just fatalities that may render an attack disproportionate, but also 'the degree of fear inflicted on the wider population'.[124] Though there is considerable merit to widening the scope of the proportionality test to include *psychological* injury to civilians, this would be inordinately difficult to apply in practice. Plainly, the wounds of the body are measurable – the wounds of the mind are not.

Jus in bello proportionality compels parties to a conflict to quantify the value of a human life relative to the value of a military gain, the precise contours of which may be ill-defined and ambiguous. Any examination of compliance with such a convoluted principle necessarily requires holistic knowledge of (a) the military advantage sought, and (b) the number of civilians injured or killed. It is only upon the fulfilment of these criteria that one can adequately determine whether the harm caused to civilians was excessive or proportionate. Sadly, this information is markedly absent with regards to the CIA drone programme. Not only is there dispute regarding the identities – and hence, target value – of the belligerent combatants, but it is difficult to verify the number of civilian casualties resulting from each attack. In these circumstances, gauging the proportionality of the drone strikes is far from straightforward; we must either repose faith in the United States' claim that, in spite of the number of civilians that have lost their lives, it is winning the war on terror, or we must resort to cynicism, and assert that a number of its drone strikes are disproportionate and ineffectual. Certainly, the available evidence appears to indicate that the CIA has made far more poor targeting decisions than it would care to admit. Unfortunately for Pakistan, Yemen, and Somalia, these poor decisions have cost lives. To make matters worse, President Trump has recently repealed an executive order adopted under the auspices of the Obama administration, which required government intelligence officials to publish the number of civilian casualties caused by drone strikes.[125] Calling the order 'superfluous'[126], Trump has plunged the war on terror deeper into the shadows, casting an even thicker veil over the lawfulness of the CIA's operations.

CONCLUSION

Drones are a marvel of modern technology. They have allowed wars to be fought from further away, at a lesser cost, and with a superior degree of accuracy. The stakes are surely low – but has the killing become too easy? Belying the allure of stealth, speed, and resilience is the irrefutable truth that drone warfare is neither costless nor bloodless; the lives spared are of those of the drone operators, but what of the foreign civilians caught in the crosshairs of armed conflict? The Bureau of Investigative Journalism has reported that, since 2004, between 769 to 1725 civilians have

122 ibid
123 Boyle, 'The Legal and Ethical Implications of Drone Warfare' (n 40)
124 ibid
125 'Trump Revokes Obama Rule on Reporting Drone Strike Deaths' BBC (7 March 2019) <https://www.bbc.co.uk/news/world-us- canada-47480207> accessed 1 May 2019
126 ibid

been killed by US-led drone strikes across Afghanistan, Pakistan, Somalia, and Yemen.[127] The US estimate is somewhere between 64 to 116.[128] Amidst the chaos of competing narratives, troubling allegations, and the CIA's own silence, truth is lost. In any case, the above analysis does not lend itself well to a positive assessment of the United States' compliance with the *jus in bello*. In inheriting the legacy of his predecessors, Trump's continued strategy of exchanging transparency for secrecy casts an ever-greater pall of doubt on the legitimacy of the CIA's operations, and, more importantly, injures any suggestion that the US is, as a cadre of officials in Washington would suggest, completely compliant with the *jus in bello*. Going forward, 'Washington needs to better establish and follow a publicly explained legal and moral framework for the use of drones, making sure that they are part of a long-term political strategy that undermines the enemies of the United States'.[129]

Current US drone policy also has far-reaching global implications. As has been mentioned elsewhere, nations across the world have begun to engage in a contemporary arms race to develop, manufacture, and export their own drone technology. China, for example, has already become one of the world's foremost producers of UAV systems, and has exported drones to Egypt, Nigeria, Iraq, and Pakistan.[130] Additionally, the Turkish Air Force has begun to deploy drones against the Kurdish Workers' Party (PKK)[131]; Saudi Arabia is now the biggest spender on drone systems[132] and Pakistan has developed its own drone technology in response to the strikes launched on its territory by the US.[133] These are merely a selection of examples as drones promise to become a more mainstream feature of war in the near future, it is not inconceivable to suggest that other states will look to the precedents set by the US when formulating their own policies and, perhaps most troublingly, similarly neglect the parameters of the *jus in bello*. For the US and other parties of the Geneva Convention, an increasingly saturated drone market should serve as a powerful reminder that compliance with the LOAC is not a matter of executive grace, but of absolute necessity.

127 'Drone Warfare' *The Bureau of Investigative Journalism* <https://www.thebureauinvestigates.com/projects/drone-war> accessed 21 April 2019
128 'Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities' *Office of the Director of National Intelligence* (2016) <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF> accessed 21 April 2019
129 Cronin (n 33) 54
130 Frew (n 2)
131 ibid
132 ibid
133 ibid

THE 'THIRD DIRECTION' IN THE AGE OF MILLER/ CHERRY: LEX SUPREMA LEX?

Elijah Granet

THE SO-CALLED 'THIRD DIRECTION': THE LITTLE THAT IS PUBLICLY KNOWN

The 'Third Direction' is a direction issued by the Prime Minister to the Investigatory Powers Commissioner (IPC) under the Investigatory Powers Act (IPA) 2016, s 230. Its name derives from the fact that it is the third such direction to be publicly known.

On 1 March 2018, in a written statement to the House of Commons, the then- Prime Minister, Theresa May, announced that she was publishing a direction issued to the IPC, instructing him to monitor authorisations for Security Service (commonly known as MI5) agents who engaged in criminality.[1] Such publication was required by the IPA 230, s 230(4), unless the publication would harm the general public interest of the UK or any one of a series of specific public policy interests detailed in s 230(4)(a-d). The direction itself is predictably but frustratingly laconic, giving no detail about the guidelines for agent criminality, when authorisations have been given, or, for that matter, anything else.[2]

In the context of the Security Service, 'agents,' *contra* the term's vernacular usage, does not refer to the Service's employees (who are referred to internally as 'officers').[3] Instead, 'agents' is a colloquial term for 'Covert Human Intelligence Sources' (CHIS), who are defined in the Regulation of Investigatory Powers Act (RIPA) 2000, s 26(8-9). As the name implies, a CHIS is a source of human intelligence (HUMINT), who covertly discloses to a relevant authority private information obtained via a relationship with a third party. The Security Service has used juveniles as CHIS; however, such usage is 'very rare'.[4]

There is no statutory basis for the authorisations of criminal behaviour outlined in the Third Direction. As part of ongoing litigation over the policy's lawfulness and secrecy by campaign groups including Privacy International (which prompted the publication of the direction in

1 GDL Candidate at the City Law School (City, University of London). BA (summa cum laude, Phi Beta Kappa) 2017, Columbia University; BA (summa cum laude) 2017, The Jewish Theological Seminary; MPhil 2018, University of Cambridge... Conflicts of interest:

the author is applying for pupillage at the chambers of advocates involved in the litigation discussed in this article (viz Blackstone Chambers).. The author further discloses that he has accepted hospitality from this set at an event organised by the City Law School, and that he will accept hospitality from Blackstone Chambers at the launch event for this journal, whose printing is sponsored by said chambers.. Neither the author nor the editor have discussed the contents of the article with any members of these chambers..

1 T May (Prime Minister), 'Oversight of investigatory powers' (Written Statement HCWS502, 01 March 2018)

2 'Investigatory Powers Commissioner (Additional Directed Oversight Functions) (Security Service agent participation in criminality) Direction 2017'quo (Direction of Prime Minister, 22 August 2017) https://www.ipco.org.uk/docs/20180301%20PM%20direction%202.pdf, accessed 29 November 2019

3 The Security Service, 'COVERT HUMAN INTELLIGENCE SOURCES' (mi5.gov.uk) https://www.mi5.gov.uk/covert-human-intelligence-sources, accessed 29 November 2019

4 Investigatory Powers Commissioner's Office, *Annual Report 2017* 'Annual Report of the Investigatory Powers Commissioner 2017' (HC 1780), para 3.55

2018),[5] an extremely heavily redacted report of the Intelligence Services Commissioner (ISC; the predecessor to the IPC) from 2016 has been released, which notes that the Security Service has been authorising criminality by CHIS since the 'early 1990s'. While the ISC acknowledged that the Security Service had no power to exempt certain acts from the criminal law, he noted that he was content to allow the authorisation of agent criminality when it was in the 'public interest', as defined by the Security Service's guidelines on the matter.[6]

These guidelines were released to the public in highly redacted form as part of the same litigation, and indicate that the primary utility of these authorisations is to demonstrate to prosecutors that prosecuting the agent's criminal activity would not be in the public interest, since such criminal behaviour was itself in the public interest.[7] However, there are circumstances in which the Security Service will not disclose to prosecutors the existence of authorisations for criminal behaviour, including *inter alia* where 'national security considerations' weigh against doing so.[8] There are, of course, no concrete data indicating how many crimes are not referred to prosecutors.

Similarly, there are no concrete data on how often criminality itself is authorised. The only information publicly available is that authorisations may be granted only when:

the criminality will likely allow the CHIS to obtain information relating to 'serious crime', and

'the required information cannot be readily obtained by any other means', and
The benefit from the information likely to be obtained by the criminality is greater than the detriment caused by the criminal behaviour and proportionate to the severity of the criminality.[9]

SHARPLY DIVERGENT PERSPECTIVES

While most of the facts in the preceding section are accepted by both sides in the fierce debate, their interpretation is highly disputed, with the Security Service and government taking a categorically different view than the campaigners suing them. This confounds any academic legal analysis, because the disagreement between the two sides in the litigation is as much one of fact as of law. There is, simply put, no common ground view of the 'Third Direction', and the positions of the two sides are sufficiently distant that a 'compromise' position is logically impossible. As a consequence, any study of the policy must present these two radically different views.

5 *Privacy International & Ors v Secretary of State for Foreign and Commonwealth Affairs & Ors* [2019] UKIPTrib IPT_17_186_CH (*Third Direction Case*)

6 Intelligence Services Commissioner, *Report of the Intelligence Services Commissioner for 2015* (confidential report, July 2016) https://privacyinternational.org/sites/default/files/2019-11/Tab%2059%20-%20ISC%20Report%20Confidential%20Annex%202015%20%28highlighting%29.pdf, accessed 29 November 2019.

7 'Guidance on the use of Agents who participate in Criminality' (official guidance, March 2011), para 9 https://privacyinternational.org/sites/default/files/2019-11/Tab%2032%20-%20Guidelines%20on%20Use%20of%20Agents%20who%20participate%20in%20criminality%20%28official%20guidance%29.pdf, accessed 29 November 2019

8 *Third Direction Case* (n 6), Witness Statement of MI5 Witness 4, para 11 https://privacyinternational.org/sites/default/files/2019-11/Tab%2043%20%282%29%20-%20MI5%20%284%29.pdf, accessed 29 November 2019

9 'Guidance on the use of Agents who participate in Criminality' (n 7), paras 7-8

THE GOVERNMENT VIEW: LEGAL, NORMAL AND ESSENTIAL

The government's view (or, at least, the portion of the government's view that escaped redaction) is that the policy, whle necessary, is not particularly unusual or noteworthy. This perspective emphasises that the policy is *not* a grant of immunity from prosecution for criminal behaviour. Indeed, both the government and the campaigners agree that nothing in law authorises the Security Service (nor, for that matter, any part of the government) to issue indemnities for crime, and that even if any government agency proposed to give such an indemnity, it would not be binding on any of the UK's public prosecution services, nor the police, nor on any private prosecutors, and certainly not on the courts or judiciary.[10] The executive has no power to set the law aside by fiat, as confirmed by the Bill of Rights 1689 and the Claim of Right 1689. The two sides part ways, however, on the question of whether the 'Third Direction' is *ipso facto* an illegal grant of immunity.

Counsel for the government placed great weight on the distinction made in *R (Pretty) v DPP*[11] by Lord Bingham of Cornhill (at para 39) between a forbidden 'proleptic grant of immunity' and permitted statements of prosecutorial policy.[12] This holds *a fortiori* with regards to the indicative authorisations given by the Security Service to agents, because these authorisations, from a strictly legal perspective, merely serve as an indication to prosecutors that a prosecution may not be in the public interest.[13] 'Third Direction' authorisations are thus viewed as making a prosecution less likely, by indicating to the relevant prosecutor that the criminality in question was ultimately beneficial to the public interest. Authorisations are thus cast not as sordid licences for crime, but, instead, a note in a file ultimately passed to prosecutors.[14]

The government further argues that, as confirmed *inter alia* in *Smedleys Ltd v Breed*,[15] there is no rule that every crime must be met with punishment.[16] In other words, *nulla poena sine leges* does not equate with *nullum crimen sine poena*. The discretion of prosecutors not to pursue cases outside the public interest, far from undermining the rule of law, is a bedrock of it. While the government accepts Lord Sumption jsc's *dicta* in *R (Nicklinson) v Ministry of Justice*[17] (at para 241) that executive discretion 'cannot be allowed to prevail over the law enacted by parliament,' it is not Parliament's intention to force the police and prosecutors to deal with every single crime.[18]

This emphasis on the ultimate authority of prosecutors, rather than the Security Service, to make

10 The Royal Prerogative of Mercy, is distinguished from prospective grants of immunity in that it is retrospective (it cannot be granted for crimes that have not happened), and does not erase the pardonee's conviction, instead only removing any of the accompanying legal effects (*R v Foster* [1985] QB 115 (CA), 130 *per* Watkins lj).

11 [2002] 1 AC 800 (HL)

12 *Third Direction Case* (n 6), Respondents' [REDACTED] Skeleton Argument, para 9 https://privacyinternational.org/sites/default/files/2019-11/Respondents_%20Skeleton%20-%20November%202019%20Hearing-MPS20191025161419712.pdf accessed 29 November 2019

13 ibid, para 13

14 ibid, para 40

15 [1974] AC 839 (HL), 856 per Viscount Dilhorne of Greens Norton

16 Third Direction Case, Respondents' [REDACTED] Skeleton Argument (n 13), para 46

17 [2014] UKSC 38; [2015] AC 657

18 *Third Direction Case*, Respondents' [REDACTED] Skeleton Argument (n 13), paras 48-59

decisions on charging sits uncomfortably with the fact that, as noted earlier, not all instances of agent criminality are disclosed to the relevant prosecuting authority. The failure to disclose robs prosecutors of any ability to exercise the discretion conferred on them by Parliament. The government's response is simple: the Security Service has the discretion to keep information from prosecutors. In England & Wales, following the abolition of the old common law offence of misprision of felony, concealing a crime is an offence under the Criminal Law Act 1967, s 5 only when the information is concealed in exchange for consideration, making it thus inapplicable to the Security Service.[19] In Northern Ireland, the same offence is set out by the Criminal Law (Northern Ireland) Act 1967, s 5, which lacks any consideration requirement, but provides that it is a defence if the concealer has a 'reasonable excuse'. The act further provides that the offence of concealing information regarding a crime is only realised if the information is likely to be of 'material assistance' to the authorities. The government argues that the Security Service has a reasonable excuse, on account of its essential mission, and that the information on crimes committed by CHIS is unlikely to be at all useful to a prosecutor.[20] Finally, the government asserts that, in Scots law, there is no offence of concealing information from the authorities.[21]

More tenuously, the government goes further to argue that the criminal acts conducted by CHIS may not themselves actually constitute crimes, because the CHIS, notwithstanding the fact of committing the *actus reus*, will not have a *mens rea*, since the offence will have been committed 'to enable plans for and acts of terrorism and serious crime to be detected and prevented.' It is unclear how a noble purpose would vitiate the *mens rea* for, say GBH, if a CHIS stabbed someone in order to foil a terrorist plot. Perhaps the government's argument would appear stronger if it had provided an example; unfortunately, the example given in its skeleton argument is completely redacted.[22] Similarly, the government argues that certain strict liability offences, particularly those related to terrorism, might not apply to a CHIS who was, for example, working to apprehend terrorists.[23] Again, this argument appears weak (and is undermined by redaction), not least given that elsewhere in its submission, the government cites with approval Lord Hoffmann of Chedworth's remarks (at para 70) in *R v Looseley (A-G's Reference №3 of 2003)*[24] that an undercover police officer offering to sell heroin *technically* committed an offence.[25] As none of these arguments have been tested in the criminal courts, they cannot be conclusively refuted, but if they were accepted, it would indicate that any state actor (or indeed, non-state actors in the case of CHIS) could commit any criminal act with impunity.

Notwithstanding its doubts over the legal existence of CHIS criminality, the government is certain that the authorisations for such behaviour are, far from being a covert and *ultra vires*

19 ibid paras 66-67

20 ibid paras 67-69

21 ibid para 62.-Strangely, the government's only stated source for this claim is the argument of counsel for the appellants in the English case of Sykes v DPP [1962] AC 528 (HL), 536, rather than the Scots law authorities cited by counsel in that same case.

22 ibid para 5(a)

23 ibid para 5(b)

24 [2001] UKHL 53; [2001] 1 WLR 2060

25 Third Direction Case, Respondents' [REDACTED] Skeleton Argument (n 13), para 97

example of state overreach, expressly authorised by statute.[26] The principal authority to which the government points is the Security Service Act (SSA) 1989, ss 1(2–4), which provides (as subsequently amended):

1 The Security Service

- There shall continue to be a Security Service (in this Act referred to as 'the Service') under the authority of the Secretary of State.
- The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.
- It shall also be the function of the Service to safeguard the economic wellbeing of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.
- It shall also be the function of the Service to act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.

While there is thus no explicit authorisation for the commission of crimes in the SSA 1989, the government asserts that the ambit of the statute and the intent of parliament is and was, respectively, sufficiently broad to allow the Security Service to authorise unlawful conduct. In doing so, the government relies on the unusual legislative history of the Security Service. For much of its history, the agency existed purely through the Royal Prerogative, deriving its authority from ministers' exercise of the ancient duty of the Crown to secure the defence of the realm.[27] The Service's operations were constrained from 24 September 1952 onwards by an eponymous directive issued by the-then-Home Secretary (and co-author of the ECHR), Sir David Maxwell Fyfe,[28] who (without any Parliamentary oversight) tasked the service to safeguard 'the Defence of the Realm as a whole' from a variety of enemies.[29] The public was unaware of the existence of the directive until it was subsequently revealed by Lord Denning mr in his official report into the Profumo Affair; [30] over the next few decades, it became increasingly untenable to have a major arm of the state exist solely as an unregulated creature of administrative fiat.[31]

The result was the SSA 1989, which sought to *regularise* the operations of the Security Service, rather than to novate the relationship between the agency and Parliament. This is why the statute specifies that the Service shall *continue* to exist. The government thus stresses that the SSA 1989 was not an instrument of reform, but rather a Parliamentary *endorsement* of the notably broad

26 ibid para 1
27 I Leigh & L Lustgarten, 'The Security Service Act 1989' (1989) 52 MLR 801, 802
28 Later Viscount Kilmuir of Creich, even later Earl of Kilmuir and Baron Fyfe of Dornoch..
29 I Leigh, 'The Security Service: the press and the courts' [1987] PL 12, 12-13
30 Lord Denning of Whitchurch, *Lord Denning's Report* (Cmnd 2152, 1963), para 230.. The directive is also quoted in full in the judgment of Scott J in *A-G v Guardian Newspapers & Ors (№2)* [1990] 2 WLR 805 (ChD), 813
31 Leigh & Lustgarten, 'The Security Service Act 1989' (n 28), 802-803

remit given under the Maxwell Fyfe Directive. The result is that the Security Service has the powers to do whatever is necessary to achieve the specific goals in defence of the realm as laid out in the SSA 1989, ss 1(2-4).[32] This argument is supported by the fact that the SSA 1989 is distinguished by the 'the absence of any form of Parliamentary oversight.'[33] Thus, in the government's view, the SSA 1989, far from abolishing the extensive powers under Royal Prerogative, instead gave them a statutory footing. If the Service and its overseers (including the IPC) judge that the use of CHIS criminality is necessary to defend the UK, then Parliament has given the service the ability to do so. The result is that the SSA 1989 is construed as nothing more than Parliament echoing the old maxim *salus populi suprema lex*.

Finally, the government asserts that the context of indirect approval of CHIS criminal activity does not make the state responsible for the actions carried CHIS, nor does it breach the State's positive duty to safeguard people's rights under ECHR, Arts 2 & 3, since any activity carried out by an individual CHIS is unlikely to meet the test of severity laid out in Strasbourg case law. Indeed, the government argues that the use of CHIS criminality is part of the government's duties to protect people's ECHR, Art 2 right against the threat of terrorist action.[34] As the government itself acknowledges, it is not particularly useful to consider these arguments in the absence of specific details of instances of authorisation (and potential breaches of ECHR rights that followed);[35] unfortunately, the redacted, OPEN submissions which are publicly available provide no such detail, with the consequence that any conclusions about the human rights implications of the 'Third Direction' cannot amount to more than speculation.

THE CAMPAIGNERS' VIEW: ILLEGAL, UNJUSTIFIABLE, UNACCOUNTABLE

The coalition of campaigning groups[36] opposing the governments' position on the 'Third Direction' raised several of grounds of purported unlawfulness, disagreeing with the government becaus *inter alia* the 'practical effect' of the policy, regardless of legal formalities, is the granting of *de facto* immunity for criminal conduct.[37]

Their disagreement begins with the construction of the SSA 1989. Citing the judgment of Lord Hoffmann of Chedworth (at 131) in *R v Secretary of State for the Home Department, Ex p Simms*,[38] the campaigners argue that only explicit wording is sufficient to effect a change to fundamental rights.[39] The campaigners point to, a contrast, the Intelligence Services Act (ISA) 1994, s 7, which allows the Secret Intelligence Service (SIS; commonly known as MI6) and

32 *Third Direction Case*, Respondents' [REDACTED] Skeleton Argument (n 13), paras 33-34
33 Leigh & Lustgarten, 'The Security Service Act 1989' (n 28), 802-803
34 *Third Direction Case*, Respondents' [REDACTED] Skeleton Argument (n 13), paras 75-86
35 ibid para 76
36 Privacy International, Reprieve, Committee on the Administration of Justice & the Pat Finucane Centre ('the campaigners')
37 *Third Direction Case* (n 6), Claimant's Skeleton Argument for the hearing: 4-8 November 2019 https://privacyinternational.org/sites/default/files/2019-11/Case%20No%20IPT.17.86%20and%2087CH%20-%20Privacy%20International%20and%20Others%20v%20Security%20Service%20and%20Others%20-%20Claimants%27%20Skeleton%20Argument%20for%20the%20Hearing%20in%20November%202019%5B1%5D.pdf, accessed 29 November 2019, paras 13-16
38 [2000] 2 AC 115
39 *Third Direction Case*, Claimant's Skeleton Argument (n 38), paras 97-99

the Government Communications Headquarters (GCHQ) to commit crimes abroad in explicit language:

7 AUTHORISATION OF ACTS OUTSIDE THE BRITISH ISLANDS

If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section.

The 1994 statute is thus pointed to as the *sine qua non* of legal support for authorisations to engage in criminal activity; anything short of it is unlawful.[40] Yet, the campaigners fail to address adequately the fact that a statutory codification of one area of the law does not invalidate all similar uncodified areas of the law. There is no judicial authority stating that the authorisations which were given to SIS and GCHQ for unlawful overseas activity prior to the ISA 1994 were inherently invalid.

The campaigners further argue that the Maxwell Fyfe Directive did not contain any implication that the Security Service could authorise CHIS criminality.[41] Yet, the Maxwell Fyfe directive gave the Security Service *carte blanche* to do any actions that were necessary to carry out the defence of the realm. Even if the campaigners were correct, it is difficult to read the SSA 1989, ss 1(2-4) (quoted *supra*) as constraining the remit of the Security Service, given that the language of the act contains no explicit limitations. The campaigners then assert that SSA 1989, s 1 cannot 'sensibly be interpreted' as giving *carte blanche* to the Security Service.[42] Dismissing the notion that the Security Service is impliedly authorised to take necessary action to meet its objectives under the aforementioned provision as a 'bad point,' the campaigners argue that 'necessary implication,' as defined by *inter alia* Lord Hobhouse of Woodborough (at para 45) in *R (Morgan Grenfell & Co Ltd) v Special Comr & Anor*,[43] applies only to those interpretations which *must* follow from the statute's express wording.[44] Yet, the campaigners fail to detail why Parliament, having stated the tasks of the Security Service, did not necessarily imply that the agency would have the powers to carry out those tasks. It seems absurd that Parliament would construct a statute as a Robert Browning-esque expression of how the Service's reach ought to exceed its grasp. Of course, it is arguable whether or not authorisations for CHIS criminality are necessary for the defence of the realm, but that is a separate point from the construction argument.

Both the campaigners and government agree that the executive has discretion over whether or not criminal activity should be investigated or prosecuted. The campaigners, however, assert that, because the Security Service can decline to alert either police or prosecutors to its 'Third Direction' authorisations, it has unlawfully 'arrogated to itself the roles of both the independent prosecutor

40 ibid paras 100-102
41 ibid paras 106(a)
42 ibid para 107
43 [2002] UKHL 21; [2003] 1 AC 563
44 Third Direction Case, Claimant's Skeleton Argument (n 38), paras 103-104

and police.'[45] The campaigners raise an interesting point that the duty (or lack thereof) on the general public to disclose information to authorities is not necessarily coterminous with the duty incumbent on public authorities to do the same. Unfortunately, rather than developing this point, they instead dismiss the entire question of duties of disclosure as a 'red herring';[46] the thrust of the campaigners' arguments with regards to immunity is fundamentally constitutional.

This argument is predicated on four points of law:
'The Executive has no power to dispense with the criminal law made by Parliament.'[47]
'The decision as to whether to prosecute lies solely with the prosecutor'[48]
The police are fundamentally distinct from the Executive.[49]
The points in (i–iii) apply *a fortiori* to Scotland & Northern Ireland.[50]
The first point is where the campaigners diverge sharply from the government (who would certainly agree that the police and prosecutors are independent). The campaigners note that, since (at least) the *Case of Proclamations,*[51] the executive has lost any power to suspend or dispense with the laws; this was formalised in the English Bill of Rights 1689, Arts 1–2.[52] The government, of course, does not disagree with this point; the contention arises from the question of what constitutes a dispensation or suspension of the criminal law. The campaigners cite the decision of Scrutton lj in *R v London CC, Ex p Entertainments Protection Association*[53] which ruled that a local council had no power to nullify a restriction against cinemas opening on Sundays by assuring an exhibitor that he would not be prosecuted.[54] They then point to Lord Sumption jsc's *dicta* in *R (Nicklinson)*[55] that the executive cannot have its discretion prevail over the law;[56] this *dicta* was, as noted earlier, also used by the government as evidence that the 'Third Direction' was *infra vires* executive discretion.

Most interestingly, the campaigners point to the recent epochal decision of the Supreme Court in the case of *R (Miller) v Prime Minister* & *Cherry & Ors v Advocate General (Lord Advocate & Ors intervening)* ('*Miller/Cherry*'),[57] arguing that the *per curiam* judgment's focus (especially in para 50) on the *effects* of prorogation on the efficacy of constitutional norms (ie Parliamentary oversight) provided a jurisprudential schema for evaluating the 'Third Direction'.[58] Thus, because the 'Third Direction' undermines the ability of the policing and prosecuting authorities to exercise their discretion, the independence of those authorities from ministerial interference,

45 ibid para 114
46 ibid para 112
47 ibid para 45
48 ibid para 50
49 ibid para 51
50 ibid para 54
51 (1610) 12 Co Rep 74
52 *Third Direction Case*, Claimant's Skeleton Argument (n 38), paras 45-46 53
[1931] 2 KB 215
54 *Third Direction Case*, Claimant's Skeleton Argument (n 38), paras 47-48 55
(n 18)
56 *Third Direction Case*, Claimant's Skeleton Argument (n 38), para 48 57
[2019] UKSC 41; [2019] 3 WLR 589; 2019 SLT 1143
58 *Third Direction Case*, Claimant's Skeleton Argument (n 38), para 49

and the separation of devolved polities' legal systems from Westminster interference, its effects are said to be unlawful when *Miller/Cherry* is applied.[59] In the most recent proceedings in the *Third Direction Case*, the government considered this argument to be so meretricious as to be worthy only of a single desultory statement in their skeleton: 'That principle has no relevance to the present case.'[60]

As with the government, the campaigners make numerous learned arguments regarding the compatibility of the 'Third Direction' with the ECHR. These, again, are completely impossible to evaluate without specific knowledge of the policy. While it is possible to make comparisons between the Third Direction and previous instances of alleged egregious human rights violations by security and intelligence services, including *inter alia* the murder of the solicitor Pat Finucane in Northern Ireland, the lack of any concrete data on authorisations for CHIS criminality means that these comparisons are entirely speculative. The ongoing litigation, and indeed, this article, are focused solely on the 'Third Direction', whose relation to past policies remains frustratingly unclear. There are (to state the extremely obvious) enormous human rights implications if the State is authorising CHIS to commit murder; the human rights implications are less severe if it's authorising minor motoring offences. For similar reasons, the effect of the oversight by the IPC cannot be evaluated in terms of an effective remedy, because the public does not know what rights may have been violated.

THE IPT'S DECISION

The two irreconcilable positions on the 'Third Direction' create an urgent problem for jurists. The policy, according to the respective submissions, is either a wildcat abrogation of fundamental rights by an unaccountable intelligence agency or a necessary and authorised exercise of executive discretion in the interests of the defence of the realm. If the former is true, upholding the policy would be a gross violation of human rights and undermine the rule of law; if the latter is true, striking down the policy would be devastating to the Security Service's ability to protect the UK
. To some degree, the ongoing litigation over the 'Third Direction' is ill-suited to the adversarial system used (in various forms) in the UK's jurisdictions, as each of the two sides are essentially talking past one another.

The learned decision of the IPT (or rather, the publicly available, OPEN decision) failed to resolve this, because the eminent judicial panel proved split on the nature and purpose of authorisations for CHIS criminality. The majority (Singh lj, Lord Boyd of Duncansby, and Sir Richard McLaughlin) held *inter alia* that:
The SSA 1989, especially when considered in its historical context, confers the power to grant authorisations for CHIS criminality. This finding is to be distinguished from any question of the SSA 1989 granting immunity from the law (which is not at issue here; see (ii)).[61]

59 ibid, paras 113-115
60 *Third Direction Case*, Respondents' [REDACTED] Skeleton Argument (n 13), para 53
61 ibid at paras 48–71 *per* Singh lj, Lord Boyd of Duncansby, & Sir Richard McLaughlin

Authorisations for CHIS criminality are *not* grants of immunity. The unique context of the 'Third Direction' distinguishes it from the facts of cases like *Pretty*. CHIS authorisations are not forbidden proleptic grants of immunity as a matter of law. The Security Services cannot be said to have any legal duty to inform prosecuting authorities, and the ignorance of prosecuting authorities of certain crimes hardly undermines their independence, given that prosecutorial discretion necessarily means that crimes will go unprosecuted. The public interest is not co-equal with the prosecution of all offenders.[62]

The policy *per se* does not breach convention rights; this question cannot possibly be answered in the abstract since Strasbourg case law indicates that the question of ECHR breaches can only be determined *post facto*.[63]

However, in a seemingly[64] unprecedented event in the IPT's history, two of the five members of the panel dissented. Professor Graham Zellick qc, an eminent academic, profoundly disagreed with the majority on virtually every issue; in his learned view, the government's case faced 'insurmountable obstacles and must fail.' Yet, Professor Zellick qc also rejected , the campaigners' arguments against the policy, especially with regards to the nature of authorisations for CHIS criminality and the ECHR. In his view, the 'Third Direction' was simply *ultra vires* the SSA 1989.[65] Professor Zellick qc argued that the prerogative powers which the Act codified never allowed the Security Service's to engage in CHIS activity, let alone authorise CHIS criminality. Further, the professor argued that the doctrine of 'necessary implication' could not stretch the ambit of the statute to cover specific activities like agent running, because if Parliament had meant to confer such powers, it would have said so explicitly.[66] Any reading of the SSA 1989 s 1(2) which conferred the power for CHIS criminal authorisations would be so broad as to 'open the door to the lawful exercise of other powers of which we have no notice or notion, creating uncertainty and a potential for abuse.'[67]
Like Professor Zellick qc, Charles Flint qc, a practising barrister and arbitrator, disagreed with the majority on *vires* grounds. In his reading, the principle of legality, as articulated in *Morris v Beardmore*,[68] requires that statutes be interpreted under the assumption that Parliament would never alter common law rights without explicit authorisation. This hermeneutic prevented Mr Flint qc from reading any power to authorise CHIS criminality into the SSA 1989.[69] Thus, even though the 'policy under challenge has been exercised with scrupulous care', it is *ultra vires* the SSA 1989.[70]
The majority decision and the dissenting opinions are thus so fundamentally divided on the very issues at hand that there is very little actual debate between the judgments; rather, the majority

62 ibid at paras 72–85
63 ibid at paras 100–101
64 Any statement regarding the IPT can only be with reference to publicly available, OPEN judgements.
65 *Third Direction Case* (n 6) at para 133 *per* Professor Graham Zellick qc
66 ibid at paras 169–176
67 ibid at para 181
68 [1981] AC 446
69 *Third Direction Case* (n 6) at paras 121–122 *per* Charles Flint qc
70 ibid at paras 130–131

and the dissenters, much like the government and the campaigners, have fundamentally different approaches to the issues under discussion. As both dissenters parted ways from the majority on *vires* grounds, this precluded extensive discussion on the (I respectfully submit) more interesting issue of immunity and discretion.

Until recently, the majority decision of the IPT would have been the last word on this matter. However, as a consequence of the Supreme Court's extension of the *Anisminic*[71] principle in the related case of *R (Privacy International) v IPT*,[72] the decisions of the IPT can be judicially reviewed on the grounds of errors of law. Therefore, it seems certain that the complex and knotty question of the 'Third Direction' will be, in one permutation or another, before the English & Welsh courts for some time to come. This, in turn, means that scholars cannot afford to delay their analysis for years until the courts provide an operational definition of the policy. What, then, *is* the 'Third Direction'? Or, more accurately, what is the best understanding of the 'Third Direction' which can be derived from the limited information available to the public?

WHAT ARE AUTHORISATIONS FOR CHIS CRIMINALITY?

The authorisations granted to CHIS to engage in criminal conduct are, according to the Security Service's internal guidelines (discussed earlier), official endorsements that certain illegal activity carried out by CHIS is in the public interest. I submit that this is, in itself, a natural extension of the courts' longstanding recognition that the law is malleable in the name of common-sense public policy interests, as distinct from a suspension of the law or a separate dispensation of justice.

The very thoughtful *obiter dicta* from Sir John Donaldson mr's partial dissent in the appellate stage of *A-G v Guardian Newspapers & Ors (№2)*[73] identified the conceptual paradox created by the practically appealing idea of executive discretion; the then-Master of the Rolls pointed to the ubiquitous but unspoken discretion which means that ambulance drivers who cross red lights are never prosecuted. These sorts of quotidian *nolle prosequi* policies, often unspoken, create a *de facto* exemption from the law; yet in practice do not intuitively undermine the rule of law. Yet, suspending the law by executive fiat to exempt ambulance drivers from traffic rules would be unconscionable. Sir John Donaldson mr, without a framework for the exercise of discretion, identified the fine line between the exercise of executive discretion, which is 'common sense and discretion', and suspensions of the law, which would lead to 'a sad day for democracy'.[74]

Judicial authority provides a guide for how to distinguish between (to use the language of Lord Bingham of Cornhill in *Pretty*) [75] proleptic immunity and discretion. In *R v MPC, Ex p Blackburn,*[76] Lord Denning mr asserted (at 136) that the discretion of the police about the deployment of their resources was an area beyond the reach of the courts; hence, the historical tendency of the

71 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) 72
[2019] UKSC 22; [2019] 2 WLR 1219
73 [1988] 2 WLR 805 (CA); for the High Court (ChD) judgment in the same case, see n 31
74 ibid at 879H–880G per Sir John Donaldson mr
75 n 12
76 [1968] 2 QB 118

police not to prosecute a person for attempted suicide was beyond judicial oversight. Yet, if the police were to have a policy that petty theft should not be prosecuted, this would be illegal and a usurpation of the law. Although Lord Denning mr does not expound on the philosophical reasons underpinning this difference, these examples fit well with the framework advanced by Lord Hughes of Ombersley jsc's judgment in *Nicklinson*.[77] In that case, His Lordship described (at para 272) the line between discretion and suspension as a 'constitutional Rubicon'; the executive had no discretion to either 'change the law' or give 'advance exemption'.[78] The essence of discretion was that it could only be an individual response to particular facts, rather than a generalised modification of the law. This also accords with the Strasbourg court's decision in *Pretty v United Kingdom*[79] that a generalised exemption from the 'operation of law' violated the rule of law,[80] while individualised 'flexibility' in prosecution was acceptable.[81]

As discussed earlier, the publicly available guidelines for authorisations for CHIS criminality are clear that authorisation is granted only when the specific individual circumstances of a given act of criminality are such that the public interest is served by the criminality. This individual flexibility by the Security Service suggests that the authorisations would fall within the recognised category of discretion, rather than suspension.

The authorisations are issued *before* any criminality, rather than succeeding it. This implies they could fall into the forbidden category of proleptic immunity (and distinguishes them from retrospective prosecutorial decisions). I submit, however, that they are materially distinct because they are *provisional* rather than proleptic. Proleptic immunity would be characterised by, of course, prolepsis—the reification of anticipated events. The guidelines are statements that, prior to the criminality, the Security Service considered this action to be in the public interest. With the benefit of further information, this authorisation may be vitiated and rendered worthless. Even if passed to prosecutors, it does not form a binding policy or provide CHIS criminals with a state promise against prosecution.[82]

This leads, then, to the more difficult class of cases where the Security Service declines to pass such information to prosecutors or police. Even accepting that there is no statutory obligation for the Security Service to report crimes, does the Service effectively transform its authorisations into forbidden grants of immunity by continually concealing crimes from prosecutors? I submit not, because the Security Service is not declining to reveal information to prosecuting authorities based on the promise of a grant, nor can it meaningfully offer a CHIS any enduring decision to refuse. If the Security Service promised a CHIS that they would not disclose this information, this would indeed cross the constitutional Rubicon. However, the decision to decline to pass on information is made on the basis of specific national security considerations weighing *against*

77 n 18
78 ibid para 277 per Lord Hughes of Ombersley jsc
79 (2002) 35 EHRR 1
80 ibid para 77
81 ibid para 76
82 See *R (Mondelly) v MPC* [2006] EWHC 2370 (Admin); [2007] Crim LR 298, paras 47–49

the disclosure, which is separate from the granting of the authorisation.[83] Given the changeable nature of national security considerations in a constantly shifting threat environment, tere is no guarantee that a decision not to disclose operate indefinitely.

THE SOURCE OF THE SECURITY SERVICE'S POWER

Does the Security Service actually have this discretion? I submit that it does, as a result of the SSA 1989. The SSA 1989 is, for all intents and purposes, a reconstituted Maxwell Fyfe directive; it gives enormous discretion to the Security Service by declining to define in detail its objectives or put any effective limits on its powers (in contrast to similar security agencies in other states).[84] The act is, for good or ill, an effective rubber-stamp of the prerogative powers previously exercised by ministerial fiat; the Security Service is left with enormous discretion as to how to carry out its statutory functions. It is true that, in the intervening years, the oversight structure for intelligence agencies has been overhauled, including the introduction of the IPT and IPC. However, there is no indication that this abrogated the enormously broad discretion awarded by Parliament to the service under the SSA 1989. Both the text of the act and the history of its creation suggest that it was designed to give the Security Service more powers, rather than to curtail it.[85]

THE EXERCISE OF THIS POWER

The conclusions I have reached thus far have profoundly unsettling implications. As the campaigners have rightly pointed out, the interpretation which I and the government have taken of the SSA 1989 implies that the Security Service has the power to do, within the letter of the law, whatever it judges to be necessary to advance its statutory aims. This is a disturbing level of *carte blanche*. In theory, the Security Service could authorise its 'agents' to participate in murder, torture, and other egregious human rights violations, if it judged that the information to be gained by such CHIS criminality was of enormous necessity to national security. It is true that I, like Sir John Donaldson mr, 'cannot conceive of physical violence ever coming within this category.'[86] However, that hardly precludes authorisations for serious violence or human rights violations. Such authorisations may take place, either because the Security Service has access to classified information of such severity that serious crimes are ultimately in the public interest, or because the Security Service has made a serious error of judgment. It has been alleged that, albeit under a different regulatory and policy structure to today, that during the Troubles in Northern Ireland, CHIS took part in the most horrifying and shocking abuses of human rights,[87] which are the subject of ongoing criminal proceedings and investigations. There is indeed a process of oversight via the IPC which is designed to prevent abuses. Yet, this secret oversight from an internal government body hardly abrogates concerns over the runaway powers of the Security Service. The IPC's predecessor, as noted earlier, was content to defer to the Security Service's guidance on the 'public interest'. Allowing the Security Service to judge its actions by its guidelines, however well-intentioned, seems instinctively to clash with the common law rule *nemo judex in sua causa*.

83 *Third Direction Case* Witness Statement of MI5 Witness 4 (n 9), para 11
84 Leigh & Lustgarten, 'The Security Service Act 1989' (n 28)
85 ibid
86 *A-G v Guardian Newspapers & Ors (№2)* (n 64) at 880C
87 J Winter, 'Abuses and activism: the role of human rights in the Northern Ireland conflict and peace process' [2013] EHRLR 1,3

It is true that the courts often defer to the executive in matters of national security, foreign policy, or law enforcement, perhaps most famously in *Liversidge v Anderson*.[88] Lord Denning mr wrote that he was content to defer to ministers' judgments of which restrictions on freedom were necessary for the public interest because ministers 'have never interfered with the liberty or the freedom of movement of any individual except where it is absolutely necessary for the safety of the state' (and indeed, such abuses could supposedly never happen in England).[89] Today's judiciary is likely to take a less Panglossian approach.

Baroness Hale of Richmond psc (as she then was), speaking extrajudicially, argued that, under the influence of *inter alia* the jurisprudence of Strasbourg, the nature of judicial deference has fundamentally changed. In her view, courts no longer defer to the executive as a matter of principle, but rather out of pragmatism: ie courts will defer when the executive enjoys practical advantages in its decision making over the courts. Thus, there is no obstacle to a court deciding on questions of policy where it canmake an informed and capable decision.[90] The Supreme Court has already shown it is perfectly willing to exercise jurisdiction over the executive's sensitive intelligence activities, even against the express wish of Parliament, by using purposive interpretation to defeat the ouster clause for the IPT.[91]

On what basis, though, could the courts revise this situation? I submit that *Miller/Cherry* provides the framework by which the courts could supervise the 'Third Direction'. The government, as mentioned earlier, dismissed *Miller/Cherry* as irrelevant because it concerned the constitutional limits on powers whose extent are not defined by statute.[92] Yet, as the Security Service's powers are essentially prerogative powers with a statutory footing, I submit that *Miller/Cherry* is well-suited to this case.

Miller/Cherry concerned the prerogative power to prorogue, which is exercisable by the monarch on the Advice[93] of her government. Unquestionably, the Prime Minister has the power to advise the monarch to prorogue . In the English & Welsh litigation at first instance, the Divisional Court held that this Advice was beyond the realm of the courts and thus non-justiciable.[94] This decision was entirely appropriate for the Divisional Court to make, because that court lacks the power to depart from precedent.

In the 'leapfrog' appeal, the Supreme Court laid out a new test for the exercise of otherwise lawful powers. It was clear that the Prime Minister had in law the power to tender Advice to the

88 [1942] AC 206
89 *R v SSHD, Ex p Hosenball* [1977] 1 WLR 766, 783F–H

90 Baroness Hale of Richmond, 'Principle and Pragmatism in Public Law' (Sir David Williams Lecture 2019, Cambridge, 18 October 2019)
https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/douments/cambridge_sir_david_williams_lecture_2019.pdf accessed 11 December 2019
91 *R (Privacy International) v IPT* (n 75)
92 Miller/Cherry (n 58), para 38 per curiam
93 Capitalised to distinguish binding formal Advice on the exercise of a prerogative power from informal advice to the monarch
94 *R (Miller) v Prime Minister (Baroness Chakrabarti & Ors Intervening)* [2019] EWHC 2381 (QB) (DC)

monarch, and clear that there was no *formal* obstacle in statute law or custom which forbade the exercise of this power as the Prime Minister saw fit. The Supreme Court, however, applied in 2019 the famed brocade of Bracton: *Nihil enim aliud potest rex in terris* [...] *nisi id solum quod de iure potest*.[95] The exercise of this power was fundamentally subject to the dictates of the rule of law, because no power could abrogate the law.

The rule of law is a paradigmatic example of what W B Gallie termed 'essentially contested concepts': ie a social construct whose nature is inherently debated.[96] The question then arises: how can a court delineate the limits set by the rule of law, when the term itself is undefinable? Even if we limit ourselves to 'principles of law' of constitutional import,[97] where is the juridical delineation between the lawful exercise of a prerogative power and the exercise of an unlawful 'power,' which is, per both Bracton and *Miller/Cherry*, a nullity? The Supreme Court's elegant resolution of these knotty problems is worth quoting at length:

'[50] For the purposes of the present case, therefore, the relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course

'[51] That standard is one that can be applied in practice. The extent to which prorogation frustrates or prevents Parliament's ability to perform its legislative functions and its supervision of the executive is a question of fact which presents no greater difficulty than many other questions of fact which are routinely decided by the courts. The court then has to decide whether the Prime Minister's explanation for advising that Parliament should be prorogued is a reasonable justification for a prorogation having those effects. The Prime Minister's wish to end one session of Parliament and to begin another will normally be enough in itself to justify the short period of prorogation which has been normal in modern practice. It could only be in unusual circumstances that any further justification might be necessary. Even in such a case, when considering the justification put forward, the court would have to bear in mind that the decision whether to advise the monarch to prorogue Parliament falls within the area of responsibility of the Prime Minister, and that it may in some circumstances involve a range of considerations, including matters of political judgment. The court would therefore have to consider any justification that might be advanced with sensitivity to the responsibilities and experience of the Prime Minister, and with a corresponding degree of caution. Nevertheless, it is the court's responsibility to determine whether the Prime Minister has remained within the legal limits of the power. If not,

the final question will be whether the consequences are sufficiently serious to call for the court's

95 Henricus de Bractona, *De Legibus Et Consuetudinibus Anglia* (George Woodbine ed, online edn, Harvard Law School Library 2003), Vol 2 p 305 lines [017–8]

96 W B Gallie, 'Essentially Contested Concepts' (1955–6) 56 Proceedings of the Aristotelian Society 167

97 *Miller/Cherry* (n 58), para 39 *per curiam*

intervention.

'[52] Returning, then, to the justiciability of the question of whether the Prime Minister's advice to the Queen was lawful, we are firmly of the opinion that it is justiciable. As we have explained, it is well established, and is accepted by counsel for the Prime Minister, that the courts can rule on the extent of prerogative powers. That is what the court will be doing in this case by applying the legal standard which we have described. That standard is not concerned with the mode of exercise of the prerogative power within its lawful limits. On the contrary, it is a standard which determines the limits of the power, marking the boundary between the prerogative on the one hand and the operation of the constitutional principles of the sovereignty of Parliament and responsible government on the other hand. An issue which can be resolved by the application of that standard is by definition one which concerns the extent of the power to prorogue, and is therefore justiciable.'[98]

Thus, the limit to a power whose extent is not defined by statute (as is the case with the 'Third Direction' *vis-à-vis* the SSA 1989) is determined by a straightforward test:

As a matter of fact (rather than law), the power's exercise in practice frustrate or interfere with the operation of a fundamental constitutional principle?

If (i) is satisfied, is the frustration or interference 'sufficiently serious'[99] to merit judicial intervention?

If (ii) is satisfied, is there a reasonable justification on the part of the executive for the effects of this power?

Thus, there is a clear and rational test the courts not only *can* but *must* apply to ensure that the constitutional principles underlying British democracy are upheld. Even where Parliament has awarded the executive extraordinary power, the court has an inherent jurisdiction to define the limits of this power; any attempt to oust this will be met with the bold application of the *Anisminic* principle seen in *R (Privacy International) v IPT*. Furthermore, the justification of national security can no longer triumph over all other principles. *Salus populi suprema lex*, which saw its heyday in twentieth-century cases such as *Liversidge*[100] and *Hosenball,*[101] is no longer sufficient to inspire trembling deference in the judiciary. Instead, any actions of the executive in pursuit of the welfare of the people and security of the nation must be reasonably justified. The executive is no longer trusted to be the arbiter of what is necessary (as in *Liversidge*), but instead subject to the supervision of the courts. Sir Edward Coke cj in the *Case of Proclamations* ruled that the executive has no power except as given by law;[102] the Supreme Court in *Miller/Cherry* has expounded this to rule that even those powers given by law must be exercised in accordance with fundamental constitutional principles.

How then, would this be applied to the 'Third Direction? It is clear from *Miller/Cherry* the executive cannot judge for itself if its powers are reasonably exercised; this would arrogate the

98 ibid paras 50-52 *per curiam*

99 cf Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany* & R *v SSfT, Ex p Factortame Ltd & Ors* [1996] ECR I-01029, para 4

100 n 80

101 n 81

102 n 52

central role of the courts in protecting the constitution. The internal scrutiny of the IPC does not confer on the executive immunity from judicial scrutiny.[103] Therefore, the current state of affairs, whereby authorisations are conducted in total secrecy, cannot continue, particularly where the authorisation for CHIS criminality would involve giving, even in an indirect way, executive sanction for a serious breach of the law.

This is not to say that information on 'Third Direction' authorisations needs to be made public. It is entirely reasonable that information regarding the activities of covert agents must be hidden; revealing covert surveillance in open court would self-evidently defeat the entire purpose of covert operations. However, there are already many hearings related to sensitive issues of national security which are conducted outside the public eye. The IPT itself has existing procedures to ensure that judicial oversight of sensitive information does not undermine sensitive security operations; this is not least apparent from the extensive redaction in the publicly available documents from the *Third Direction Case*. CLOSED proceedings could be conducted, in which the Security Service places prospective authorisations before the IPT, which evaluates them using some version of the *Miller/Cherry* test for the limitations of executive power. In potentially extreme cases, where CHIS criminality might lead to an individual suffering physical harm (or, in the most extreme, death), it would likely be necessary to appoint some sort of litigation friend, who would advocate for the rights of the individual who might be harmed by CHIS criminality. (The alternative would be to conduct proceedings using an inquisitorial, rather than adversarial, system)

My hypothetical *Miller/Cherry* compliant 'Third Direction' retains many instinctively unsettling aspects, because the Security Service authorising covert criminality in pursuit of national security, without any public knowledge, is inherently unsettling. There will always be a profound tension between safeguarding the welfare of the nation and upholding the ideals which make the nation worth safeguarding. The *Miller/Cherry* principle–*lex suprema lex*, if you will–does not change the truth of Lord Denning MR's observation that 'when the state itself is endangered, our cherished freedoms may have to take second place.'[104] Rather, its crucial innovation is that the determination of how and to what extent 'our cherished freedoms' are to be interfered with is no longer at the whim of the executive (as in *Liversidge*). Instead, under the novel constitutional revolution peacefully heralded by *Millery/Cherry*, it is the courts, in their newly assertive role, who must apply the common law's golden standard of 'reasonableness' in deciding if this interference is within the law.

103 *Miller/Cherry* (n 58), paras 33–34 *per curiam*
104 *Hosenball* (n 81) at 778F *per* Lord Denning mr

LEGAL ANIMAL RIGHTS AND ANIMAL WELFARE LEGISLATION

John Groom

This article was written and submitted before the publication of Saskia Stucki's 'Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights' in the *Oxford Journal of Legal Studies*. As such, that article, which covers some similar ground to this one, has not been referred to below. It is heartily recommended as a detailed exploration of some of the issues discussed.

ABSTRACT

Many critics identify a division within the field of animal law between animal welfare law, which prohibits certain treatment of nonhuman animals by humans, usually with exceptions for perceived human need, and animal rights law, which seeks to recognise the fundamental rights animals have as sentient beings. The legislation currently in place in countries around the world to protect animals is usually characterised as animal welfare law, whereas animal rights law is generally considered to be the realm of academic theory and aspiration. In this article, I seek to demonstrate two reasons why this divide is unhelpful. First, using Hohfeldian and interest-theory analysis, I show that animal welfare legislation such as the UK's Animal Welfare Act 2006 does confer rights on animals. This should play an important role in any attempt to secure further rights for animals. Second, by taking the same analysis further, and with reference to Indian case-law, I suggest a method for deriving these further rights from the legislation.

INTRODUCTION

Western writers concerned about the well-being of nonhuman animals (hereinafter *animals*), in law as in philosophy, are conventionally split into two groups. On the one hand, *welfarists* seek to balance the interests of animals with those of humans, aiming to improve the lives of animals by incremental improvements to their living conditions.[1] This approach has since its inception owed much to utilitarianism, notably to the work of Jeremy Bentham.[2] On the other hand, *abolitionists* believe that animals' interests deserve the same respect as humans' interests, leading them to argue for radical changes to animals' current treatment, including the abolition of animal farming and all forms of captivity. With the exception of Robert Garner's *new welfarism*, which advocates for welfarist reforms as a path towards eventual abolition of animal exploitation, the two camps tend not to share much in the way of either means or ends.[3]

All statutes that humans have passed for the benefit of animals since Martin's Act, the world's first

1 Robert Garner, 'Animal Welfare: A Political Defense' (2006) 1 Journal of Animal Law & Ethics 161.
2 J. H. Burns and H. L. A. Hart (eds), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1970) 300: "The question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?".
3 Gary Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press 2010).

such piece of legislation, in 1822, can be termed *animal welfare legislation*, because they continue to permit all but the most egregious cruelties that humans inflict on animals.[4] Abolitionists regard such statutes as the Animal Welfare Act 2006 (hereinafter AWA) as near-useless laws that do nothing for the millions of animals living in factory farms and serve only to entrench the status quo by soothing the conscience of the nation.[5] Instead of mere animal welfare, abolitionists want *animal rights* that might provide robust and meaningful protection against human exploitation.

The gap between welfarist and abolitionist advocacy for animals must be bridged. This is in order not only to present a united front against the forces that impose lives of suffering on animals, but also to foster a constructive dialectic within the animal advocacy community that might produce the most effective and most true arguments to use. Clare McCausland has begun this work of bridging on the ethical level by showing on the basis of side-constraint and interest-theory analysis that the Five Freedoms, a set of demands for animals typically regarded as welfarist, give rise to moral rights.[6] I propose that the animal welfare legislation that abolitionists malign can in fact be the source of robust *legal* rights for animals. Although, as Cass Sunstein has pointed out, in a vernacular sense this may appear self-evident, in a legal-analytical sense it is far from obvious, for two reasons.[7] First, more technically, the criminal law is not generally considered to grant rights to potential victims; second, more fundamentally, animals are generally considered incapable of having rights. Using Hohfeldian analysis of an offence in section 4 AWA in the context of an interest theory of rights, it can be shown not only that animals have rights deriving from the legislation, but also that these rights can be used to secure more useful protections for animals that the statute appears at first glance to provide.[8] Two Indian cases, Animal Welfare Board of India v A. Nagaraja and others and People for Animals v Md Mohazzim and another, show the latter phenomenon in action.[9][10]

THE RIGHT RIGHTS

Before engaging with any black-letter law we have to decide what kind of rights we are looking for so that we will recognise them when we see them. The analytic system of jural relations designed Wesley Newcomb Hohfeld is the way to do this, with its atoms that appear necessarily in correlative pairs.[11] To take a simple example, a *claim-right* is the correlative of a *duty*. If A has promised B a cup of tea, B has a claim-right to tea from A, and A has a duty to give B tea. The two particles must exist together. So far, so straightforward; however, in order to deal with the

4 Cruel Treatment of Cattle Act 1822.
5 Animal Welfare Act 2006.
6 Clare McCausland, 'The Five Freedoms of Animal Welfare are Rights' (2014) 27 J Agric Environ Ethics 649. The Five Freedoms are: Freedom from hunger and thirst, freedom from discomfort, freedom from pain, injury or disease, freedom to express normal behaviour, and freedom from fear and distress.
7 Cass R. Sunstein, 'The Rights of Animals' (2003) 70 U Chi L Rev 387, 389.
8 Animal Welfare Act 2006, s. 4.
9 Animal Welfare Board of India v A. Nagaraja and others [2014] 7 SCC 547.
10 People for Animals v Md Mohazzim and another [2015] SCC OnLine Del 9508.
11 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) 23 Yale LJ 16. The pairs are: Claim-right/Duty; Liberty/No-claim; Authority/Liability; Immunity/Disability.

cases ahead of us, we need a further rights-framework around Hohfeld's system to explain exactly what the relationship of correlativity is.

The two options before us, the *will theory* and the *interest theory*, are well-known. According to the will theory, because "the function of rights is to protect and foster individual autonomy," a proposed right must be capable of being enforced or waived at the holder's option in order to be a right.[12] Conversely, according to the interest theory, rights exist in order to protect interests, so that anyone or anything with an interest is capable of holding a right.[13] It will be seen at once that both of these frameworks have normative elements. The interest theory clearly involves judgment of what constitutes an interest, and, further, the policy of any legal rule that might potentially impose a right, in order to see whether it protects an interest. The will theory, although sometimes considered to be the more purely positivist model, contains its own hidden moral judgment: the kind of autonomy that can make itself felt in terms of the law deserves a special and superior kind of protection.[14] It ignores the fact that many beings, although apparently not capable of understanding legal rights and duties, make autonomous decisions that are, in Jacques Derrida's terms, *responses* and not *reactions*.[15] In all the senses that matter morally, an elephant is as autonomous as a human being. This normative foundation of the will theory is just as unacceptable to those who believe that animals deserve moral consideration as is its necessary consequence that animals (like young children and adults with certain mental conditions) cannot have rights. The first is, however, the proper reason for rejecting it.

This leads us to the interest theory, which, if we accept that animals have interests, appears to embrace all animals as potential rights-holders. However, some interest theorists argue for a narrower categorisation. Matthew Kramer, believing that it is absurd to say that a lawn can have rights just because it has interests, says that there must be stricter criteria for rights-holding within the category of people or things with interests.[16] He identifies these criteria, which, it should be said, are less important to him that the fact that there should be further criteria, by considering what group appears to him to self-evidently deserve rights: "mentally competent human adults."[17] He proceeds to suggest as the two most morally salient features of that group *animation* and *sentience*, and that they should be the qualifying criteria for beings with interests to be capable of having rights. Given that all vertebrates, if not all animals, are sentient, we can say that with an unrestricted or a restricted interest-theory model of rights, all the animals with which we are concerned, that is those protected by the AWA, can potentially hold rights.

In summary, what this means for our purposes is the following: A provision of criminal law that

12 William A. Edmundson, *An Introduction to Rights* (Cambridge University Press 2012), 98. 13 *ibid*, 97-98.
14 Nigel E. Simmonds, 'Introduction', in David Campbell and Philip Thomas (eds) *Fundamental Legal Conceptions as Applied in Judicial Reasoning by Wesley Newcomb Hohfeld* (Ashgate 2001) ix, xxi.
15 Jacques Derrida, *L'animal que donc je suis* (Galilée 2006), 50.
16 Matthew H. Kramer, 'Getting Rights Right', in Matthew H. Kramer (ed), *Rights, Wrongs, and Responsibilities* (Palgrave 2001) 28, 32.
17 *ibid*, 33.

imposes a duty on certain people not to harm animals in a certain way bestows (or, perhaps, the duty bestows) on those animals a correlative claim-right not to be harmed by those people in that way.

THE ANIMAL WELFARE ACT 2006

The AWA contains numerous specific offences, including mutilation (section 5), tail-docking (section 6) and poisoning (section 7).[18] The two most broadly applicable offences are those found in section 4 and section 9.[19] Section 4 creates two offences of causing unnecessary suffering to an animal and section 9 creates the offence of failing to ensure the welfare of an animal for whom one is responsible. For concision's sake, it is with the first section 4 offence with which we are concerned, and for convenience's sake the provision is reproduced in relevant part.

4 UNNECESSARY SUFFERING

(1) A person commits an offence if—
(a) an act of his, or a failure of his to act, causes an animal to suffer,
(b) he knew, or ought reasonably to have known, that the act, or failure to act, would have that effect or be likely to do so,
(c) the animal is a protected animal, and
(d) the suffering is unnecessary.

(2) [...]

(3) The considerations to which it is relevant to have regard when determining for the purposes of this section whether suffering is unnecessary include—
(a) whether the suffering could reasonably have been avoided or reduced;
(b) whether the conduct which caused the suffering was in compliance with any relevant enactment or any relevant provisions of a licence or code of practice issued under an enactment;
(c) whether the conduct which caused the suffering was for a legitimate purpose, such as—
(i) the purpose of benefiting the animal, or
(ii) the purpose of protecting a person, property or another animal;
(d) whether the suffering was proportionate to the purpose of the conduct concerned;
(e) whether the conduct concerned was in all the circumstances that of a reasonably competent and humane person.

(3A) [...]

(3B) [...]

18 Animal Welfare Act 2006, ss. 5-7.
19 *ibid*, ss. 4 and 9.

(3C) [...]

(4) *Nothing in this section applies to the destruction of an animal in an appropriate and humane manner.*[20]

As can be seen, the protection provided by this offence is far from absolute. The offence excludes people who cause suffering that is deemed to be "necessary" in the broad terms of section 4 (3).[21] Further, it does not apply to the destruction, which means killing, of an animal "in an appropriate and humane manner".[22] This could lead one to believe that animals have no rights as a result of the offence, as a right with such broad qualifications and exceptions piled on top of them is not a right at all. However, our Hohfeldian analysis requires us to find rights as correlatives to the duties imposed on people by legislation. We square this circle by incorporating the qualifications within the right itself. It looks like this:

Section 4 (1) AWA grants protected animals the right not to have unnecessary suffering except for suffering incurred by humanely killing the animal inflicted upon them by the act or omission of a person who knew or should have known that their act or omission would cause or be likely to cause the animal to suffer.

SO WHAT?

It is legitimate to ask what the point of this is. Have we not just tortuously rephrased the section 4 offence into the language of rights? There are two answers to this question.

First, suppose that we accept that the foregoing is not a substantial point. We can show that animals covered by the AWA have rights, but this does not in any way strengthen the statutory protections or add anything further. If this is so, it is still an important point to make that animals under our current legal system are not just capable of having rights but actually *have* rights. It means that, when lawyers take test cases to court to ask for some or other fundamental right of an animal to be recognised, for instance the right to bodily liberty, they are able to say to judges: Animals already have recognised rights. We are only asking you to extend the list. When claims are made at present, and this is notable in the Nonhuman Rights Project's *habeas corpus* applications in the United States of America, the advocate tends to say: We are asking you to recognise the very first right for an animal. Very few judges feel comfortable sticking their necks out in this way. They are generally a cautious, not an adventurous, species. This rhetorical adjustment makes it more likely that further rights will be recognised as belonging to animals in the future, even if they are technically unconnected to the rights deriving from the AWA.

Alternatively, let us scrutinise what we have established in the terms of Hohfeldian analysis: the rights held by animals are claim-rights correlative to the duties owed to them. But calling them

20 Animal Welfare Act 2006, s. 4.
21 *ibid*, s. 4 (3).
22 *ibid*, s. 4 (4).

rights at all seems to dignify something rather insubstantial with that term. Raffael Fasel has answered this by proposing, in what he calls his Exclusive Rights Conception, that Hohfeldian claim-rights are not really rights at all.[23] Rather, what we know as rights are more fundamental things, the sort for which the abolitionists of slavery and the suffragettes fought. Nigel Simmonds agrees that claim-rights under the interest theory are a little thin, but, following Neil MacCormick, offers a different solution, arguing that, under the interest theory, Hohfeldian claim-rights are "merely the instrumental mechanisms whereby deeper rights are protected."[24] Simmonds' more nuanced view is preferable, for two related reasons. First, to assert that claim-rights are not real rights makes no sense. If we are using the terminology and the analytical equipment of Hohfeld's correlatives, then claim-rights, liberties and immunities are all we have. The point of breaking down legal relations into those components is that they are the fundamental particles of *any* legal relation that exists: contractual rights, statutory rights, fundamental common-law rights, human rights under the Convention or the Human Rights Act 1998, and anything else we can think of.[25] It is possible to disagree with Hohfeld's system entirely, but Fasel does not do this, and nor should we, because it is the most coherent account of legal relations that we have. If we accept the Hohfeldian analysis, we have to also accept that all legal relations are reducible to combinations of the fundamental particles of which the claim-right is one. Second, Fasel's appeal to "the importance that the exclusive notion of rights has had in the past and continues to have" conflates the legal and the popular senses of rights.[26] It may be that B's claim-right to tea from A is not the kind of right that liberation movements have in mind when they argue for rights, but that is simply because rights in a social context have a looser meaning than in a strictly legal- analytical context. If this argument has any force, it leads more neatly to the conclusion offered by Simmonds, that claim-rights are properly described as rights, but act as it were as instruments for more invisible, more fundamental rights.

This vision of first-order fundamental rights and second-order claim-rights is another way of seeing the policy basis of the interest theory (or indeed, in applicable circumstances, the will theory). But what exactly is the nature of the first-order rights, if they are not Hohfeldian particles? Are they legal in any sense? The common law has never maintained a strong dividing line between law and policy. If they are the grounds for second-order rights, underlying the correlative relationship between, for instance, claim-rights and duties, then, once established, they should be capable of giving rise to new second-order rights within the limitations of common law's creativity (e.g. not overriding primary legislation in the context of Parliamentary supremacy).

If this sounds speculative, let us have a look at some cases where this has happened.

23 Raffael N. Fasel, 'The Leo and Hercules Trial: An Historic Step for Animal Rights or Business as Usual?' (*Giordano Bruno Foundation Blog*, 26 May 2015) <http://gbs-schweiz.org/blog/legal-personhood-and-rights> accessed 15 December 2019.
24 Simmonds (n. 14), xxii.
25 Human Rights Act 1998.
26 Fasel (n. 23).

ANIMAL WELFARE BOARD OF INDIA V NAGARAJA AND OTHERS

The Animal Welfare Board case in the Indian Supreme Court made waves upon the handing-down of the judgment in 2015.[27] It concerned the compatibility of legislation made by the state of Tamil Nadu permitting the practice of jallikattu, and the same practice in the state of Maharashtra, with the Prevention of Cruelty to Animals Act 1960 (hereinafter PCA), a federal statute that is the Indian equivalent of the UK's AWA.[28] Jallikattu is a traditional form of entertainment in which bulls, it was argued by the claimant statutory body, are severely mistreated both during and in preparation for the spectacle. The judgment is as remarkable for its forensic examination of the harm suffered by the bulls involved in jallikattu as for its wide-ranging discussion of the moral and legal position of animals in India and around the world.[29] This is not the place for a full exegesis of it; some positive contributions have been made, but there remains much to unpack.[30]

What matters for our purposes is that the Supreme Court decided that jallikattu was impermissible, but not exactly because of the PCA. Sections 3 and 11 of that Act were invoked by the claimant, which create offences similar to those in sections 4 and 9 AWA respectively.[31] The court affirmed that the PCA "has conferred duties on the person in-charge or care of the animals and correspondent rights on the animals", as our Hohfeldian analysis above shows.[32] However, it also went further, stating that when the PCA was enacted, it recognised "the intrinsic value and worth of animals".[33] Or, in a memorable passage:

[...] *All living creatures have inherent dignity and a right to live peacefully and right to protect their well-being [...]. Human life, we often say, is not like animal existence, a view having anthropocentric bias, forgetting the fact that animals have also got intrinsic worth and value. Section 3 of the PCA Act has acknowledged those rights and the said section along with Section 11 cast a duty on persons having charge or care of animals to take reasonable measures to ensure well-being of the animals and to prevent infliction of unnecessary pain and suffering.*[34]

Here can see the two-tier rights structure in operation. The claim-rights enjoyed by animals in virtue of sections 3 and 11 PCA are undergirded and justified by the fundamental rights described at the start of the extract. The first-order rights are abstract and vague, and they are crystallised into second-order claim-rights by the legislation. But the Supreme Court goes further, and applies the underlying fundamental right to "prohibit all situations [of animal abuse] even those that

27 Animal Welfare Board (n. 9).
28 Prevention of Cruelty to Animals Act 1960.
29 Animal Welfare Board (n. 9) [13-19].
30 For analyses of the judgment in its cultural context, see Renuka Sarah Abraham, 'Case Comment on Animal Welfare Board of India v. A. Nagaraja & Ors. (the Jallikattu Judgment)' (*Academike*, 16 November 2015) <https://www.lawctopus.com/academike/jallikattu-verdict-supreme-court> accessed 15 December 2019, and Suhrith Parthasarathy, 'The jallikattu challenge' (*The Hindu*, 13 February 2018) <https://www.thehindu.com/opinion/lead/the-jallikattu-challenge/article22734450.ece> accessed 15 December 2019.
31 Prevention of Cruelty to Animals Act 1960 (ss. 3 and 11).
32 Animal Welfare Board (n. 9) [71].
33 *ibid* [46].
34 *ibid* [32].

are not expressly listed in the PCA."[35] It does so by reading the internationally-recognised Five Freedoms into the protections of the PCA, even though they are not mentioned in the statute:

[...] *These five freedoms, as already indicated, are considered to be the fundamental principles of animal welfare and we can say that these freedoms find a place in Sections 3 and 11 of PCA Act and they are for animals like the rights guaranteed to the citizens of this country under Part III of the Constitution of India*.[36]

What the judge is doing, on a mechanical level, is using his common-law powers to crystallise the fundamental rights that are at the root of the sections 3 and 11 rights into concrete claim-rights separate from those specifically enumerated in the PCA. On a policy level, the protections in the PCA are being used as proof of legislative recognition of animals' interests, which constitutes endorsement for the court's protecting those interests in how it sees fit.

Once the Supreme Court endorsed this approach, lower courts have been able to recognise further rights on the same basis. In People for Animals, the Delhi High Court referred to the assertion in Animal Welfare Board of the Five Freedoms' fundamental status before finding that the caged birds in question in the case had "rights to fly in the sky and all human beings have no right to keep them in small cages for the purposes of their business or otherwise".[37] Without any reference to statute, this must be a similar exercise of common-law power in expanding on the fundamental rights underlying statutory protections. While it may be fair to describe these judgments as "heteroclite", as Gilles Tarabout does, they do not merit all the criticism they have provoked.[38] This is not meant to be a full defence of the Animal Welfare Board judgment, but it deserves to be said against the objections raised by Jessamine Therese Mathew and Ira Chadha-Sridhar that the requirement that a rights-holder be a legal person has been explicitly and consistently rejected in Indian jurisprudence, and that the old objection to animal rights that animals cannot bear duties has been thoroughly addressed by Kramer, among others.[39] [40][41] The case is more than sound enough to serve as an example for the kind of rights-logic that we have been exploring.

35 Vishrut Kansal, 'The Curious Case of *Nagaraja* in India: Are Animals Still Regarded as "Property" With No Claim Rights?' (2016) Journal of International Wildlife Law and Policy 19 (3) 256, 262.
36 Animal Welfare Board (n. 9) [54].
37 People for Animals (n. 10) [3, 5].
38 Gilles Tarabout, 'Compassion for Living Creatures in Indian Law Courts' (2019) *Religions* 10 383, 396.
39 Jessamine Therese Mathew and Ira Chadha-Sridhar, 'Granting Animals Rights under the Constitution: A Misplaced Approach: An Analysis in Light of Animal Welfare Board of India v. A. Nagaraja' (2014) 7 NUJS L Rev 349, 354-356.
40 Kansal (n. 34), 264, Tarabout (n. 37), 397. The points made by these authors show, in my opinion, that no discussion of the vexed question of animal personhood is necessary for the purposes of this argument. Cf. Sam Groom, 'Explain the Potential Significance of Granting Legal Personhood to Animals in the UK' (2019) *UK Journal of Animal Law* 3 (1) 12.
41 Kramer (n. 16), 42-44.

CONCLUSION

This has been a fast tour of the terrain, but I hope that the outline of how statutory offences can give rise to useful rights for animals is clear. First we must understand the legal fundamentals of Hohfeld's particles and the interest theory. Then we can isolate the statutory duties owed to animals and their correlative claim-rights, as we did above with section 4 AWA. These can be used to impress upon the court that *animal rights* are nothing to be worried about. But we can go further, and identify the fundamental rights or policy justifications for the claim-rights, and, if necessary, crystallise new claim-rights our of those in order to fit a specific context. For example, it is possible to infer from the AWA rights the policy of respecting the bodily integrity of protected animals, and based on that to ask a court to review an animal's imprisonment through a *habeas corpus* application.

It may be that this argument is too far-fetched to convince you, let alone a judge. I hope that it can, if nothing else, inspire more intellectual cross-pollination between the legal animal welfare and animal rights communities, and persuade legal animal advocates to take seriously the deeper structures and theories of rights as tools that might help them achieve substantial protections for animals.

THE INTERNATIONAL CRIMINAL COURT AND AFRICA: A NEO-COLONIAL TOOL?

Tamanna Arora

The International Criminal Court has been set up to prosecute individuals for the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. But, the ICC could not keep its image neutral and impartial. Furthermore, the ICC is also criticised by the African Union for its approach to be biased and imperialistic towards their States. Thus, the African States are threatening to quit the ICC. This paper will throw the light on the issue of the conduct of the ICC in the African States. The objective of this paper will be to go in depth to understand the role of the ICC and the allegations against it concerning western imperialism and double standards in dispensing the justice. The ICC does not interfere directly into these cases and situations, it is dependent on the cases referred to it by the Security Council and brought by different countries through self-referral. It also exercises its jurisdiction only when the national courts are unwilling to prosecute international criminals. The paper will try to help understand the whole problem regarding the approach of International Criminal Court in handling, investigating, and disposal of these situations of the African continent. A large number of individuals have been indicted by the ICC from Africa, including Ugandan rebel leader Joseph Kony, Far Sudanese President Omar al-Bashir, Iranian President Laurent Gbagbo, Kenyan President Uhuru Kenyatta, Libyan leader Muammar al-Gaddafi. The ICC has therefore faced several criticisms from the African states, including objections about its jurisdiction, accusations of being biased, and it has also posed a question on the fairness of its case selection and trial procedures, further doubting its effectiveness.

For these reasons this paper will discuss the role of ICC in Africa and subsequently go into finding out how it is being used as a tool for neo-colonialism in Africa.

INTRODUCTION

Since the Rome Statute was adopted in 2002 to establish the ICC, the ICC was considered to be a breakthrough in the International Criminal Law system. It is now being criticised for being biased against the African countries and for adopting neo-colonial approaches whilst exerting justice. There are many reasons for the accusations of the ICC being partial. As the ICC was established to complement the national judicial system and other local institutions, it is said to have ignored the local conditions and national environment of African countries. Furthermore, the African states have also criticised the ICC for neglecting its guiding principles of complementarity in which the ICC can only exercise its jurisdiction when national courts are genuinely unwilling to do so.[1]

1 Informal expert paper, 'The principle of complementarity in practice' (icc-cpi.int, 2003) <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> accessed 25 February 2020.

After 18 years in operation the ICC has also proven to be incapable of prosecuting the influential leaders of the African States or working government officials.[2] The ICC has not been responsive to local people who attribute great importance to prosecuting state crimes.[3]

The ICC has sought to provide a particular brand of legal justice. This approach is intolerant towards alternative legal or non-legal responses to control the mass of crimes. The ICC has provided a model of distant justice. It is alleged that it has given more importance and remained dependent on western investigators instead of local or national investigators. The investigations made by the ICC were very limited in Jurisdiction and faced issues as it didn't go deep into the matters or investigate the issues comprehensively. There has been a major shortcoming in the ICC's methods of operation. Therefore, most of the trials done by the ICC have collapsed or have been abandoned due to lack of good evidences in many countries.[4]

It is very interesting that the ICC has not prosecuted any head of state or government officials during its trial for more than ten years. By 2016, the prosecution had dropped charges against all suspects in the cases of violence in elections in Kenya.[5] All the cases concerning Sudan, including that of President Omar Al Bashir have been hibernated.[6] After 18 years of the ICC's work, one of the most important factors is that – without a police or military force of its own, the court is said to be structurally incapable of prosecuting the members of contemporary government. It has been able to tackle only the crimes done by the non-state actors such as the rebel leaders.

The prosecutions of the ICC have been very limited in investigations. Only ten days were given to the investigators to be in the ground and investigate the cases where they had to divide their time between multiple cases across a number of states in Africa.[7] Furthermore, the investigators were from the western countries. Meaning that they were not familiar with the people, local conditions, or working culture of the country where they were investigating the case.[8]

The African Union has also drafted the Malabo Protocol 2014 under which it has proposed to start a regional court i.e. the African Court of International Justice and setting up of International Criminal Law section. However, at present it is unlikely that the African Court of Justice will be established, the reason being that International Criminal Law is not a main priority for African states. Specifically, there has been failure to ratify the protocol, which needs 30 African Union States to ratify the same and till now no states have ratified it and only eleven states have signed it. The office bearers of the African Union clarified that the Malabo protocol should be followed by all the member countries. The main objective was to unite the African states and reconcile

2 Phil Clark, 'Why International Justice Must Go Local: The ICC in Africa - Africa Research Institute' (*Africaresearchinstitute.org*, 2019) <https://www.africaresearchinstitute.org/newsite/publications/why-international-justice-must-go-local-the-icc-in-africa/> accessed 10 January 2020.

3 Ibid

4 Ibid

5 Ibid

6 Ibid

7 Ibid

8 Ibid

their interests.[9]

CRITICAL ANALYSIS

The ICC is an important international institution to provide Criminal Justice. It is the first and the only institution having universal jurisdiction. The relationship of ICC with Africa is under severe criticism because of its partial behaviour towards the African leaders who have been indicted by the ICC.

The ICC has shown many weaknesses while delivering justice to the African nationals. The high-profile leaders in Africa who have been indicted by the ICC, could not be punished for committing the crimes as listed under International Law due to poor evidences and lack of witnesses. Such was in the case of Sudanese President Omar al-Bashir, where the protest of local supporters had started after he was indicted for crimes against humanity and war crimes in the year 2009 and for genocide in 2010. During this time, the ICC was blamed by the African leaders including the Senegalese President Abdoulaye Wade and Jean Ping, Chairperson of the AU's Commission for being partial in favour of the western countries and for applying all laws against Africa despite of heinous crimes in other countries.[10] However, he couldn't be punished due to lack of evidence against him.

REGIONAL CONFLICTS IN AFRICA AND THE ICC

The situation in Darfur, Sudan was referred to the Office of the Prosecutor of the ICC by Security Council when it had adopted the Resolution 1593[11] (2005) acting under Chapter VII of the United Nations Charter. Two arrest warrants were issued against Omar al-Bashir.[12] The warrants issued were for war crimes, crimes against humanity, and genocide allegedly committed by al-Bashir during March 2003-July 2008.[13]

Each member state was notified thereafter to arrest and surrender al-Bashir if he was found within their jurisdiction. It was reported around May 2015 that al-Bashir intended to travel to South Africa to attend the African Union Summit. After knowing which, the ICC notified South Africa requesting it to arrest and surrender al-Bashir to the court.[14]

However, the South African authorities failed to arrest al-Bashir, due to which the Pre-Trial Chamber of the ICC held that the State parties to the Rome Statue such as South Africa were required to arrest and surrender al-Bashir to the ICC when he was found to be in their territory. It further stated that al Bashir's immunity as head of state of Sudan, regardless of Sudan not being party to the Rome Statute, did not bar them from arresting him as per the request of the

9 Eki Yemisi Omorogbe, "The Crisis of International Criminal Law in Africa: A Regional Regime in Response?" (2019) 66 Netherlands Law Review 287

10 Jean-Baptiste Jeangene Vilmer, "The African Union and International Criminal Court: counteracting the crisis" (2016) 92 International affairs 1319

11 UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593

12 Al Bashir Case < https://www.icc-cpi.int/darfur/albashir> accessed 12 February 2020.

13 Max Du Plessis, "Introductory note to prosecutor Prosecutor v. Al-Bashir: Decision Under Article 87 (7) of the Rome Statute on the Non-compliance by South Africa with the request by court for the arrest and surrender of Omar al-Bashir, (2017) 56 I.L.M. 1061Word Count: 280gional Regime in 1egional Regime in Response?col could also be in the ICC to manipulate the situations accordi

14 Ibid

ICC. As authorities' rights and obligations were also applicable to Sudan through the Security Council Resolution 1593, by which the situation had been referred to the Court. The court

regarded this as the violation to the Rome Statute and thus, in this context, the ICC decided under article 87(7)[15] of the Rome statute, non-compliance by South Africa. It is also to be noted that the District and High Courts of South Africa had condemned South Africa for not arresting al-Bashir, even the Supreme Court upheld the same opinion.[16]

It was therefore the duty of South Africa to co-operate with ICC and arrest al-Bashir according to article 27 of the Rome statute. Further, Article 98 of the Rome Statute of ICC also direct all the countries not to follow the head of the state immunity in some cases which was the case argued by the African Union and according to ICC, there is no controversy between these two provisions of the Rome Statute as the head of the state immunity can be lifted when the legal process is to be followed especially in the case of International Law.[17] This can be further understood by reading the Articles 27 and 98 of the Rome Statute as under:

Article 27[18] of the Rome Statute:

"Statute shall apply to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative, or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."

Article 98[19] other the other hand, states that:

"The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity."

Hence, it was argued in the case of al-Bashir that his immunities should have remained intact unless Sudan had waived the immunity under the head of state.[20] Moreover, it was stated that when African states complained about the effects of the proceedings against Al- Bashir on the peace process in Sudan, the (then) Prosecutor "told them that was not really his problem" and that they should approach the Security Council (when the United States had already threatened to veto their request).[21] It was further commented in this regard that this is the reason why ICC chose not to refer South Africa to the Security Council as it would have increased the tensions within the ICC's system.[22]

15 Rome Statute of the International Criminal Court <https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/ rome_statute_english.pdf> accessed 12 February 2020.

16 Max Du Plessis (n9) 1062

17 Francis Ssekandi, Netsanet Tesfay, "Engendered Discontent: The International Criminal Court in Africa" (2017) 18 Georgetown Journal of International Affairs 77, 81

18 Rome Statute of the International Criminal Court (n15)

19 Ibid

20 Francis Ssekandi, Netsanet Tesfay (n13) 81

21 Max Du Plessis (n9) 1061

22 Ibid

The same situation arose when ICC had indicted Muammar al-Gaddafi of Libya (for crimes against humanity) in 2011.[23] Similarly, when the Ivorian President Laurent Gbagbo was arrested and transferred to the ICC for crimes against humanity,[24] the African Union again protested and criticized ICC for not providing the impartial justice to the African leaders.[25] As the African Union's legal position to the same has been that the heads of non-state party states are entitled to immunity from arrest in third states under the customary International Law. It also argues that the immunity still exists irrespective of the nature of crimes committed and that the same rule was established in the Arrest Warrants case by the ICJ in the year 2002.[26] This has also resulted in the African Union adopting the non-cooperation policy in 2009 with the ICC which extended to Gaddafi in 2011. But, he was killed soon in the battle.[27]

The ICC had also prosecuted Uhuru Kenyatta and William Ruto for the violence used in the 2007-08 in Kenyan election. The African Union on its 15th anniversary summit in May 2013, denounced ICC as a court of the north (trying leaders from the south).[28] The hostile relations of the Court and African states could not equate to an intention to mass withdrawal of the African Union.

In December 2014, the ICC finally dropped all the charges against Kenyatta due to lack of evidence against him. The grand victory of Kenyatta in elections and the withdrawal of cases by the ICC was the biggest setback to the image of the ICC.[29]

In the case of Kenyatta ICC became handicapped due to lack of evidence against him and could not prosecute him for creating violence. The ICC prosecutor clarified that Kenyatta could not be punished because he had destroyed the evidences of the violence and political crime committed by him, there is no other way to describe how and why Kenyatta managed to defeat justice at the ICC. It was not true on the part of the African Union to blame ICC for race hunting because in many cases, the African Union had given support to the ICC in Cote d'Ivoire, Mali, Central African Republic, the DRC, and Uganda, which has referred Joseph Kony of the Lord's Resistance Army and his lieutenants to the ICC.[30]

WHAT CRITICS ARGUE…

The ICC has been generally criticised by the African Union for its exclusive focus on the African states, and they have accused it to be a neo-colonial tool. Some scholars have also argued that

23 Jean-Baptiste Jeangene Vilmer (n5) 1321-1322

24 Gbagbo and Blé Goudé Case <https://www.icc-cpi.int/cdi/gbagbo-goude> accessed 12 February 2020. 25 Ibid 20, 1322

26 Eki Yemisi Omorogbe (n6) 288

27 Ibid 311

28 Jean-Baptiste Jeangene Vilmer (n5) 1323

29 Africa research bulletin (Vol. 52, December 2014) 20406 <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-825X.2015.06027.x> accessed 12 February 2020.

30 Makau Matua, "The International Criminal Court: Promise and Politics" (2015) 109 Proceedings of the ASIL Annual Meeting 269, 272

the African countries are poor, backward, and politically unorganised, consequentially to which the ICC has found the Africans as an easy target to use them as a colonial tool for establishing neo-imperialism, meaning, domination on African states economically, politically, and culturally. Even after many decades of independence, these countries could not establish political structure and economic infrastructure which is necessary for the political and economic development of the country. Therefore, the ICC intervenes in many cases of African country even though there are hundreds of incidents which remain untouched by the ICC in other countries.

It is also imperative to note that 10 out of 11 situations currently under investigation are in Africa and so far, only African leaders have been indicted. But, these situations overshadow the fact that half of the situations in Africa were referred to the ICC by the African States themselves such as the situations in the Central African Republic in December 2004 and May 2014, Mali in July 2012.[31] Which further shows that the African states do have support for the ICC. Also, in the recent developments in the case of al-Bashir, it was declared by Sudan officials that al- Bashir may face the charges of war crimes and genocide. In this case it was argued by the critics that the impact of the ICC on the cases in which it intervenes is very low as it has to adopt the domestic political tactics to prosecute the alleged war criminals, which is of no-coincidence that the surrender of al-Bashir as declared by the Sudanese officials was within just hours of the UN chief calling for removal of Sudan from the state sponsors of terrorism list.[32]

The ICC is also criticized for depending on the investigations and information provided by the officials appointed by the UN Security Council. It is argued that in many cases, the investigators were not familiar with the local condition of Africa. In addition, the officials of the ICC also belonged to the western countries. The African leaders were not allowed to protect themselves under the head of state immunity, the decisions were one sided and were not supported by the strong witnesses and true evidences.

One of the important criticisms of the ICC has been the undemocratic representation of the officials in the Office of the Prosecutor that is why many countries do not give weightage to the investigations and collection of the data by the Office of the Prosecutor. It is generally blamed for being biased and partial in collecting the information regarding the case. The majority of officials belong to the western countries and the representation from Asian, African and Latin American countries have been ignored.

The ICC prosecutor is criticised to exceed his authority to investigate some cases *proprio motu* under section 13 (b) and (c)[33] of the Rome Statute, without the consent of African leaders in the ICC and, on the other hand, under the pressure of the security council's permanent members,

31 Eki Yemisi Omorogbe (n7) 295-296What there, the situations in Kenya, etcthis papercognition in the ament menmbers the icc ignored the crimes ..rican leaders in

32 Mark Kersten, 'Sudan's Omar al-Bashir may finally face justice for Darfur but the work is not yet done.' (justice in conflict, 21 February 2020) <https://justiceinconflict.org/2020/02/21/sudans-omar-al-bashir-may-finally-face-justice-for-darfur-but-the-work-is-not-yet-done/> accessed 29 February 2020.

33 Rome Statute of the ICC (n15)

the ICC ignored the investigation of crimes in Syria, Venezuela, and Iraq.[34]
The ICC is also blamed for being a prejudiced institution in relation to the culture, education, social economic background, and political awareness. Hence, the investigations conducted by the ICC always remain away from the true picture of the case because they are based on many prejudices for Asian, African and Latin American countries. The ICC has behaved in many cases like a superficial institution because of this. Therefore, it is necessary to restructure the International Criminal Court and democratise its functioning and to apply a more impartial role, becoming neutral in functioning and acceptable in results.

THE PEACE VS. JUSTICE ARGUMENT

Many International scholars argue that the ICC should consider why and when its intervention can be helpful to establish the peace or to provide justice to the victims. Otherwise, as in certain situations, it has been seen that the interference of ICC has created more conflicts and violence than it extinguishes, such is the situations in Kenya, Uganda, etc. This was particularly evident in the case of Joseph Kony. Even though he committed war crimes and crime against humanity,[35] he was ready to negotiate a peace deal but the deal couldn't be implemented as the ICC had refused to withdraw the case against him. The ICC was hence, criticised for putting its complete focus on Kony without seeing the bigger picture of the conflict and for neglecting the needs of the victims.[36] The ICC, therefore, must be careful while interfering in the matters of political violence in a country.[37]

CONCLUSION

After discussing the above cases related to the conflicts of African states with the International Criminal Court, it can be concluded that there have been conflicts regarding the head of state immunity and the principle of complementarity between the Africa and the ICC due to which, the ICC is unable to keep its image impartial. It can be said that it does have some prejudices towards the African countries.

In many cases, the ICC had ordered warrants for the arrest of leaders for committing crimes against humanity, war crimes or genocide but the ICC didn't initiate the impartial investigations in the cases brought to it by the Security Council or the other agencies. Generally, it depends on the investigations and information provided by the local agencies and sometimes, it depends on the information provided by the Office of the Prosecutor of ICC who belong to the western countries and do not have much familiarity with the local judicial agencies.

34 Francis Ssekandi, Netsanet Tesfay (n12) 82
35 Kony et al. case <https://www.icc-cpi.int/uganda/kony> accessed 12 February 2020
36 Ibid 83
37 Ibid

The ICC has started trial against more than 40 leaders in the last two decades but only four could be found guilty. It can therefore be said that the ICC's presence in Africa is used as a neo-colonial tool. Even though the African states are considering the withdrawal proposal from the ICC due to many conflicts between the ICC and African Union, they haven't been able to perform the procedure, as seen in the case of Kenya. The ICC is also blamed for not respecting the constitutional provisions, political ideology, people's aspirations, and representative political institutions of the involved countries. The African leaders are also compelled by their local conditions and social political environment of the country to oppose the ICC. Hence, there is an urgent need to create cordial relations between the ICC and Africa. Suggestively, a special commission could be created with the collaboration of local prosecutors, national prosecutors, judicial agencies, and the members of ICC to remove the conflicts between the International Criminal Court and the African state governments.

The ICC should create capabilities to equate with the domestic judicial institutions of African countries as the ICC has no permanent structure in different continents to deal with the independent investigations of the cases brought to them by the States themselves or by the Security Council. The ICC ought to have an independent judicial body to investigate the cases and collect the information regarding the criminal activities in order to better represent regions, although The Office of the Prosecutor investigates the cases to some extent, but being dominated by the western officials, many countries have rejected its findings.[38] Ultimately, the ICC should work impartially and neutrally, so it would be able to get stronger recognition in the world. Without adopting some important and concluding steps to create the credibility of the ICC we cannot hope for the positive relationships between the state governments and the ICC. The state governments should also establish an impartial agency to investigate the crimes committed by the political leaders so that the ICC could collaborate with the agencies for positive results. A reconciliation of the Malabo protocol and the ICC may also help to reduce the conflicts between the African countries and the ICC.

38 Max Du Plessis (n12)

PROTEST AS ANTI-SOCIAL BEHAVIOUR? A NEW CASE ON HUMAN RIGHTS AND PUBLIC SPACES PROTECTION ORDERS

Odette Chalaby

In recent years, there have been stark developments in local authorities' powers to prevent 'anti- social behaviour'. These powers now include blanket prohibitions on certain behaviours in public spaces using a Public Spaces Protection Order (PSPO). Operation of these powers can affect everybody in an area and can interfere with rights to free speech and freedom of association. The case of *Dulgheriu v Ealing LBC*[1] was only the second time the English courts have ruled on the legality of a PSPO[2] under the Anti-social Behaviour, Crime and Policing Act 2014 (ABCPA 2014). The Court of Appeal found for the local authority and upheld the PSPO.

FACTS OF THE CASE

In 2018, Ealing LBC, a local authority in West London, made a Public Spaces Protection Order (PSPO) to create a 'safe zone' around the Marie Stopes UK West London Centre. The PSPO was put in place to protect clients and members of staff from the activities of pro-life activists, and it prohibited all abortion-related protests, harassment, and intimidation in the immediate vicinity of the clinic.[3]

Prior to the PSPO, pro-life campaigners had for a number of years been gathering outside the clinic, usually on a daily basis, in an attempt to stop users having abortions. They sought to speak to users, gave out leaflets, held vigils, and displayed posters of foetuses. Pro-choice activists subsequently began protesting against the activities carried out by the pro-life campaigners.[4] The High Court found for the local authority, holding that the PSPO was justified.[5] The trial judge decided that the PSPO met the requirements set out in ABCPA 2014. It was also held that the PSPO was a proportionate interference with the protestors' rights under the European Convention on Human Rights (ECHR).

The appellants, pro-life activists affiliated with a Christian group, sought the quashing of the PSPO in the Court of Appeal.

KEY ISSUES

ABCPA was passed during the Conservative-Liberal Democrat coalition government and was sponsored by the then-Home Secretary Theresa May. It streamlined the web of powers available

1 [2019] EWCA Civ 1490, [2019] 8 WLUK 117.

2 See also *Summers v Richmond upon Thames LBC* [2018] EWHC 782 (Admin) [2018] 1 W.L.R. 4729. The court ruled that a local authority had acted reasonably in imposing a four-dog limit in its public spaces.

3 *Dulgheriu* (n 1) 15. 4

ibid 8-10.

5 ibid 25.

to local authorities to tackle anti-social behaviour and sought to 'put victims first', ensuring that authorities had effective powers that were quick and easy to use.[6]

In *Dulgheriu v Ealing LBC*, the Court of Appeal was asked to decide on two overarching issues. The first was whether a local authority has the power to make a PSPO when the prohibited activities largely impacted occasional visitors to the locality rather than its residents. The second was whether the PSPO was a justified interference with the protestors' ECHR Article 9, 10, and 11 rights.

MEANING OF 'THOSE IN THE LOCALITY'

PSPOs are designed to deal with behaviours in a particular area that are detrimental to quality of life.[7] They place controls on the use of space as well as everyone within it and can prohibit a range of activities to achieve a specified objective.[8] Breach of a PSPO can carry criminal sanctions including on-the-spot fines of up to £100.[9]

To issue a PSPO, a local authority must be satisfied on reasonable grounds that two conditions are met.[10] The first is that activities carried on in a public place have had or are likely to have a detrimental effect on the quality of life of those in the locality. The second is that the effect of the activities is of a persistent or continuing nature, is such as to make the activities unreasonable, and justifies the restrictions imposed.

In this case, the key issue was whether occasional visitors to the clinic fell under the definition of 'those in the locality', or whether that term was restricted to those who reside or work in the locality or visit it regularly. The appellants argued that the purpose of the statutory power is to protect the local community, and it cannot afford protection for occasional visitors.[11] The appellants also contended that it would be very unlikely that the activity could have a persistent detrimental effect on the quality of life of a person who only visits the area once or twice.[12]

However, the Court of Appeal held that the judge had been entitled to find that the activists had a detrimental effect on 'those in the locality'. Parliament had expressly decided not to limit the expression with a statutory definition, and the word 'community' had been left out of the final statute.[13] The Court held that it is for local authorities to identify behaviours affecting the quality of life in the area and to decide who is 'in the locality' and in need of protection using local knowledge on the ground.[14]

6 Explanatory Notes to the Anti-social Behaviour, Crime, and Policing Act 2014.

7 ABCPA 2014, s 59(2).

8 ibid s 59(4-5).

9 ibid s 67-68.

10 ibid s 59(2-3).

11 *Dulgheriu* (n 1) 30.

12 ibid 34.

13 ibid 40-43.

14 ibid 47.

Furthermore, there is evidence suggesting that there *had* been a persistent detrimental effect on clinic users' quality of life in this case. Some visitors had been left with significant and lasting emotional and psychological damage, and some women had even cancelled their appointments, delaying physical treatment.[15]

INTERFERENCE WITH HUMAN RIGHTS

As PSPOs affect every person within a specified area, their use is subject to certain statutory safeguards under the ABCPA 2014. In particular, an authority making a PSPO must have particular regard to ECHR Article 10, freedom of expression, and Article 11, freedom of association and assembly.[16]

This case involved several human rights issues. Firstly, the courts had to decide whether the clinic visitors' Article 8 rights to respect for private and family life were engaged. Secondly, the courts had to balance any interferences with those Article 8 rights with protestors' Article 9 (freedom of thought, conscience and religion), Article 10, and Article 11 rights.

The appellants argued that the clinic users' Article 8 rights were not engaged as the protest activities were in a public place and there was no publication or record taken of what the clinic users were doing.[17] The appellants also argued that the High Court judge had not conducted the correct balancing exercise and had underestimated the importance of the protestors' Article 9, 10, and 11 rights.[18]

The Court of Appeal affirmed the rights of persons accessing abortion and held that the human rights balance fell in favour of the clinic's clients, who had the right to access services free from unnecessary publicity. The Court had 'no hesitation' in deciding that Article 8 was engaged, as the decision of a woman whether to have an abortion is an intensely personal and sensitive matter that falls within the notion of private life.[19] Article 8 rights were involved both in terms of the right to autonomy in wishing to carry through the abortion and in terms of the reasonable desire and legitimate expectation that visits would not receive publicity beyond that which was inevitable in using a public highway.[20]

On the question of the interference with protestors' rights, the Court of Appeal held that the High Court judge was entitled to conclude that, with the particular facts of the case, the Article 8 rights of service users outweighed those of protesters under Articles 9, 10, and 11.[21] A key deciding factor was that the service users' privacy had been invaded at a time when they were

15 ibid 44.
16 ABCPA 2014, s 72.
17 *Dulgheriu* (n 1) 52. 18
ibid 65, 75, 84.
19 ibid 53.
20 ibid 60.
21 ibid 95.

particularly vulnerable. The protestors' activities did not merely 'shock, offend, or annoy'; they were a cause of lasting harm.[22]

IMPLICATIONS

The implications of this case could be very significant. In a narrow sense, the decision may encourage other local authorities to consider implementing similar 'safe zones' outside their own abortion clinics. Manchester City Council is already consulting on its own 'safe zone' around the Marie Stopes UK Manchester Centre.[23]

In a more general sense, the decision may be seen as a wider judicial endorsement of the use of PSPOs. The Court of Appeal emphasised the wide discretion afforded to local authorities in deciding whether the statutory test for a PSPO is met.[24] Yet PSPO's have been heavily criticized as giving local governments unprecedented new powers with limited transparency or scope for review, in particular by Liberty[25] – who intervened in this case – and by the Manifesto Club.[26]

Liberty and the Manifesto Club criticise PSPOs for several reasons. They argue that local authorities are using PSPOs to target vulnerable groups such as the homeless or Romani Travellers. Councils have banned a wide range of behaviours by using PSPOs, including gatherings in groups, covering the face, and the use of foul language.[27] Multiple local authorities have introduced PSPOs to target rough sleeping and begging and, in its most recent statutory guidance, the Home Office saw a need to explicitly state that PSPOs should not be used to target homeless people.[28]

Secondly, PSPOs are hard to challenge. A challenge can only be made through the High Court and must be brought within six weeks by an 'interested person', defined as someone 'who lives in the restricted area or who regularly works or visits that area'.[29] The cost of such a challenge will be prohibitive for most people, and in *Liberty v Director of Legal Aid Casework*, it was confirmed that the Legal Aid Agency will not provide financial assistance to challenge PSPOs.[30]

Thirdly, it has been argued that the criminalisation of new behaviours brought about by PSPOs

22 ibid 89.
23 Manchester Council, 'Wynnstay Grove Proposed Public Space Protection Order Consultation' (Secure.manchester.gov.uk, 2020) <https://secure.manchester.gov.uk/info/200024/consultations_and_surveys/7836/wynnstay_grove_proposed_public_space_protection_order_consultation> accessed 18 February 2020.
24 *Dulgheriu* (n 1) 15.
25 Liberty, 'Stand Against Criminalising Poverty' (*Liberty Human Rights*, 2020) <https://www.libertyhumanrights.org.uk/campaigning/stand-against-councils-punishing-poverty> accessed 18 February 2020.
26 Manifesto Club, 'PSPOs – The 'Busybodies' Charter in 2018' (*Manifesto Club,* 19 April 2019) <"https://manifestoclub.info/pspos-the-busybodies-charter-in-2018/> accessed 13 December 2019.
27 ibid.
28 Home Office, 'Anti-social Behaviour, Crime and Policing Act 2014: Anti-social behaviour powers Statutory guidance for frontline professionals' (*Home Office*, August 2019).
29 ABCPA 2014, s 66.
30 [2019] EWHC 1532 (Admin), [2019] 1 WLR 5185.

risks fast-tracking people into the criminal justice system.[31] PSPOs are made by local authorities without central government or judicial scrutiny. However, breaching a PSPO can lead to on-the-spot fines of £100, and a failure to pay these fines can result in liability for a conviction of a criminal offence.[32]

CONCLUSIONS

Finally, it is particularly notable that in *Dulgheriu v Ealing LBC* the courts condoned a PSPO prohibiting peaceful protest. It seems unlikely that Parliament intended that PSPOs would be

of when a PSPO might be used are dog control, alcohol use, and noise nuisance.[33] Furthermore, at least one member of the House of Lords has shown express concern about the 'sinister' misuse of PSPOs for restricting protest.[34]

It is arguable that controlling disruptive dogs and drinking is far removed from preventing organized public demonstrations or expressions of political opinion. Should protest really fall under a regime that intends to target 'anti-social behaviour'? The Court of Appeal did not specifically address this broader concern. As a result, local authorities might be encouraged to use PSPOs to stop other protest groups that pose challenges to state control of public space, from animal rights supporters to growing numbers of climate activists.

31 *Liberty Human Rights* (n 25). 32
ABCPA 2014, s 67-68.
33 *Home Office* (n 28).
34 HL Deb 8 September 2016, vol 774, col 153GC.

EXPLORING HOW DOMESTIC LAW MIGHT EVOLVE TO DEAL WITH COPYRIGHT CONCERNING CREATIVE WORKS THAT ARE GENERATED BY AN ARTIFICIAL INTELLIGENCE COMPUTER PROGRAM

Isaac Sachdev Pereira

The term artificial intelligence) AI (was formally coined by John McCarthy in ,1956 who defined it as" the science and engineering of making intelligent machines [1]."It is a branch of computer programming that essentially seeks to emulate human intelligence via algorithmic learning [2].While the prominence of AI in various industries has indicated significant potential for economic and social growth [3],it has also challenged the UK′s current legal landscape ,particularly copyright protection for AI-generated creative works .It is first questionable as to whether or
not such works should be entitled to copyright protection or simply left in the public domain. Secondly ,it is unclear if the Copyright ,Designs and Patents Act) 1988 CDPA (is capable of accommodating AI-generated creative works ,especially due to the standard of originality that is required by literary ,dramatic ,musical and artistic) LDMA (works .Moreover ,there is increasing uncertainty as to the relative contribution of various parties — such as the programmer ,user, and the AI itself — in the creation of AI-generated creative works ,making it difficult to allocate authorship over these works .This essay seeks to address these issues ,proposing that while AI- generated creative works should be protected by copyright ,the current legal system is unable to do so effectively .The legislation must be reformed ,and this essay recommends the definition of 'computer-generated work 'be changed in order to accommodate AI copyright.

1) BACKGROUND OF COPYRIGHT LAW IN THE UK

′Copyright 'is a type of intellectual property right which gives creators the exclusive legal power to regulate the use of their expression .Copyright arises automatically with the creation of the work as long as subsistence requirements are met [4].The first criteria for subsistence of copyright is that the material must be considered a' work 'within one of the categories provided in s 1.CDPA, which is an exhaustive list .Subsequently ,the work must acquire material form and cannot just
be a mere′ idea [5].′Finally ,if the work falls under the literary ,dramatic ,musical and artistic)LDMA (category ,it must meet the standard of originality .Assuming all the above is met ,the work qualifies for copyright protection of a fixed duration and the author — which copyright law

1 John McCarthy, 'Basic Questions, What is Artificial Intelligence?' [2007] Stanford University, Computer Science Department <http://www-formal.stanford.edu/jmc/whatisai/> (Accessed 1 January 2019)
2 David Quest, 'Robo-advice and artificial intelligence: legal risks and issues' [2019] 34(1)(6-8) BJIB & FL
3 Royal Society and British Academy, 'The Impact of Artificial Intelligence on Work' [2018] (An evidence synthesis on implications for individuals, communities, and societies) <https://royalsociety.org/-/media/policy/projects/ai-and-work/evidence-synthesis-the-impact-of- AI-on-work.PDF> accessed 13 March 2019
4 Copyright, Designs and Patents Act 1988, s 1 and s 153.
5 The Trade-Related Aspects of Intellectual Property Agreement (1 January 1995), Article 9.2

clearly defines as" the person who created it — [6]"would be conferred both economic and moral rights .However ,it should be noted computer-generated works do not benefit from moral rights.

2) THE RATIONALE BEHIND GIVING AI-GENERATED CREATIVE WORKS COPYRIGHT PROTECTION

The importance of extending copyright protection to include AI-generated creative works can be established by looking at the rationales that underpin intellectual property rights) IPR .(To start, the Lockean rationale suggests that the general interests of individuals implies that they should have a' natural right to the work of their hands 'and the results of their labour .This idea was put forward by John Locke in his work on' natural rights 'and' labour theory [7].'Using this rationale, it follows that it is only fair and just to all the persons who made the necessary arrangements for the AI to be remunerated according to their contribution [8].The AI would be an emanation of the author's mind and any creative work generated by the AI would also require skill ,labour, and judgment .This suggests that it should be entitled to copyright protection despite it being a non-human creator .However ,the issue of who is considered to be the author in the scenario is a separate issue and will be discussed further below.

The theory most commonly used to support giving AI-generated creative works copyright protection is the economic/utilitarian rationale .This is an incentive-based idea ,suggesting that IPRs encourage people to do things they would not have done otherwise ,which indirectly benefits society as a whole [9].Accordingly ,granting copyright to AI-generated creative works would lead to rising investment and consequently the advancement of the entire technological industry .The advantages of this rationale are hard to deny ,as a thriving digital sector would mean increases in AI innovation and more inward investment into the UK from other countries. In fact ,an independent review from the Department for Business ,Energy & Industrial Strategy
estimated that AI could add" an additional630£ bn to the UK economy by [10],"2035 showing the vast potential for economic growth should the UK capitalise on this opportunity to be at the forefront of AI′s development and utilisation [11].A recent report issued by PwC stresses the macroeconomic benefits of AI [12],further making a strong case for granting of AI copyright due

6 Copyright, Designs and Patents Act 1988, ss 9.
7 Herman Tavani, 'Locke, Intellectual Property Rights, and the Information Commons' [2005] 7(87–97) EITHFJ <http://e-tcs.org/wp-content/uploads/2016/05/Locke-on-Intellectual-Property-1.pdf> Accessed 2 January 2019
8 Shlomit Yanisky-Ravid, 'Generating Rembrandt: AI, Copyright, and Accountability — The human-like authors are already here' [2017] 659 Mich St L Rev <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1199&context=lr> Accessed 2 January 2019
9 Carsten Fink, 'The Economic Justification for the Grant of Intellectuall Property Rights: Patterns of Convergence and Conflict - The Implications of the New Regime for Global Competition Policy' [1996] 72(439) CKLR <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3071&context=cklawreview> Accessed 2 January 2019
10 Jérôme Pesenti, 'Growing the Artificial Intelligence Industry ' [2017] (Department for Business, Energy & Industrial Strategy) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652097/Growing_the_artificial_ intelligence_industry_in_the_UK.pdf> Accessed 2 January 2019
11 House of Lords, 'AI in the UK: ready, willing and able?' [n.d.] Report of Session 2017–19 (Select Committee on Artificial Intelligence) <https://publications.parliament.uk/pa/ld201719/ldselect/ldai/100/100.pdf> accessed 5 January 2019
12 PricewaterhouseCoopers, 'The Macroeconomic Impact of Artificial Intelligence' [2019] <https://www.pwc.co.uk/economic-services/ assets/macroeconomic-impact-of-ai-technical-report-feb-18.pdf> accessed 5 January 2019

to its long-term benefits ,such as stimulating the UK‘s GDP and the creation of employment. Thus ,both the labour and economic rationale give strong reason to grant AI-generated creative works copyright protection.

3) THE DEVELOPMENT OF UK LAW ON THIS AREA: WHAT IS ‘COMPUTER-GENERATED WORK’?

Section (3)9 of the CDPA allows for copyright protection of computer-generated LDMA works for a duration of 50 years [13].According to s ,(3)9.the author of LDMA computer-generated works) CGW (is the one who" made the arrangements necessary for the creation of the work[14],“ implying that the computer itself cannot be regarded as the author of any work .However ,this poses the question as to the identity of the human author who made the necessary arrangements. In this respect ,the UK is an outlier in the EU and internationally) outside the Commonwealth,(where there is generally no similar provision to s .(3)9.Adding on ,s 178.CDPA defines’ CGW‘ to be when a computer generates work’ in circumstances such that there is no human author of the work[15].‘

The use of case-law is especially helpful when considering what might constitute’ CGW .‘In the case of *Express Newspapers v Liverpool Daily* [16],it was established that lottery grid sequences could be protected despite being the product of a computer program and with authorship being vested with the programmer .In his obiter judgment ,Whitford J explained the reasoning behind his decision]" :t[he computer was no more than the tool …produced to the instructions ,via the computer programmes ,of] the programmer [17],“[and further stating that the computer would be

akin to an artist′s pen or a typewriter .Although this case predates the CDPA ,academics have attempted to extrapolate from the’ pen analogy ,‘suggesting that CGW are creations that do not involve the expenditure of significant human skill and effort [18].This can be distinguished from computer-aided work ,where the software is merely a tool to produce the final product.

3.1) CAN S.9(3) CDPA ENCOMPASS COPYRIGHT FOR AI-GENERATED WORKS?

The next question would be if the UK′s legislation allows for’ AI copyright ,‘where the creation of LDMA works is entirely digital and non-human .The provisions in s (3)9.CDPA are somewhat reflecting and in alignment with the digital age ,and there is indeed school of thought that AI-generated creative works would fall within s ,(3)9.despite minimal or non-existent human contribution [19].This argument is commonly made using the spirit-writing case of *Cummins v*

13 Copyright, Designs and Patents Act 1988, s 12(7). 14
ibid, s 9(3).
15 ibid, s 178.
16 *Express Newspapers Plc v Liverpool Daily Post & Echo Plc* 3 [1985] All ER.680
17 *Express Newspapers Plc*) n(16
18 Jani Ihalainen, ‘Computer creativity: artificial intelligence and copyright’ [2018] JIPLP 13(9)
19 Pamela Samuelson, ‘Allocating Ownership Rights in Computer- Generated Works’ [1985] PLR1185

Bond [20],where the court held that the non-human nature of the source of the work should not be a bar to copyright .The judgment from this case is stretched by this school of thought ,who infer that copyright can also be granted to AI-generated creative works ,which is non-human in its nature as well.

While this paper agrees that copyright protection should be given to AI-generated works ,it takes the view that the current legal framework is insufficient to do so for a variety of reasons .Firstly ,it is unlikely that the UK government was thinking ahead to AI when it came up with s .(3)9.The case of *Nova v Mazooma* [21]is the primary case concerning s (3)9.and illustrates this provision in practice .In this case ,the claimant claimed copyright in composite images produced via software and shown to users throughout the course of a game .The court considered these images— which the program generated based on the gamer‘s input — to be CGWs ,even though the graphics were designed by a separate individual .Furthermore ,it was held that author of the CGW in this case would be the game designer ,as he" designed the appearance of the various

elements displayed … ,and wrote the program “and not the user ,who..." contributed no skill or labour of an artistic kind [22].“Yet ,*Nova* focuses on simple computer generation of content .In the case of developed AI ,such as machine learning and neural networks — where a machine learns by itself from experience — it is problematic to view the person who created the AI as the person who made the arrangements necessary for creation of the resulting work.

3.2) THE ISSUE OF ‘ORIGINALITY’ — UK & THE EU

The next problem that AI-generated creative work would face is meeting the standard of originality .As mentioned above ,originality is a key requirement for copyright subsistence in cases concerning LDMA work .However ,s (3)9.makes no mention as to how the requirement of originality might operate in the case of CGW .Thus ,the central argument is how should it be assessed whether a LDMA work created by AI meets the standard of originality .This uncertainty is further exacerbated with the integration of the EU test for originality into UK law .The UK standard of originality is whether the author has exercised the necessary skill ,labour ,and judgment in producing the work [23]and not copied from another work [24].It heavily draws from

the Lockean rationale of IPR ,in the sense that an individual′s use of labour should be awarded. While the UK‘s concept of originality is considerably low ,one must still ask ;what constitutes "skill ,labour ,and judgement ,“when the matter itself is not) directly (produced by a human author ?There has been a number of methods to fathom how the concept of originality can be met in relation to AI-generated creative works.

Guadamuz takes the view that that s (3)9.was worded in a way to exempt it from the originality

20 Cummins v Bond [1927] 1 Ch 167
21 *Nova Productions Ltd v Mazooma Games Ltd & Ors* [2007] EWCA Civ [2007] ,219 Bus LR 1032
22 *Nova Productions Ltd v Mazooma Games Ltd & Ors* [2007] EWCA Civ [2007] ,219 Bus LR 1032
23 *Ladbroke v William Hill* 1 [1964] All ER465
24 *University of London Press v University Tutorial Press* 2 [1916] Ch601

requirements altogether [25].This interpretation seems to be supported by a specific point made by Lord Beaverbrook during the passage of CDPA .In his commentary ,it was stated that the person who made the necessary arrangements for the creation of CGW under s (3)9.would" not
himself have made any personal ,creative effort "despite being considered an' author [26].'Although
Lord Beaverbrook was speaking about CGW in relation to moral rights at the time ,it still provides insight into the state of mind of those who drafted the legislation .Hence ,an argument is made that s (3)9.implicitly exempts CGW from the originality requirements of copyright law[27]. Yet ,there is division within academia as to whether s (3)9.can be interpreted in this manner. Dorotheou adopts the opposing view ,suggesting that the' skill ,labour ,and judgment 'test would be problematic to satisfy in respect of AI-generated creative work [28],leaving no clear answer to this dilemma.

Furthermore ,the uncertainty is only amplified when one considers the EU approach to originality ;the' author's own intellectual creation) 'AOIC (test .Formally ,this EU standard has been harmonised to only apply to computer programs ,databases and photographs through different directives [29].However ,in the landmark case of *Infopaq* ,the CJEU held that this was a generalised standard of originality and extended it to apply to all copyright subject matter.[30] Post *Infopaq* ,English judges have taken various attempts to discern whether the CJEU's decision in *Infopaq* has altered the originality threshold within the UK .In the case of *SAS Institute v World Programming* [31],Lord Justice Lewison conceded that the Information Society Directive has indeed "changed the traditional domestic test ,"implying that the AOIC test has been incorporated in the UK in substitute of the' skill ,labour ,and judgment 'test.

The apparent integration of the AOIC test into the UK spells trouble for AI-generated creative works ,as the EU standard of originality is argued to be of a higher threshold than the UK's. In the Opinion of AG Mengozzi in *Football Dataco* [32],it was opined that labour and skill alone are insufficient to show the' creative aspect 'that is essential for the AOIC standard .The case of
Painer reiterates this higher standard of originality [33],where it was said that an author's creation must reflect his personality to quality for originality .This can be via' free and creative choices' and stamps of his personal touch ,rendering it difficult to reconcile with the concept of AI-

25 Andres Guadamuz, 'Do Androids Dream of Electric Copyright? Comparative Analysis of Originality In Artificial Intelligence Generated Works' [2017] IPQ (2)169-186 <http://sro.sussex.ac.uk/id/eprint/66693/3/Do%20Androids%20Dream%20of%20Electric%20Copyright.pdf> accessed 1 January 2019

26 HL Deb 25 February 1988, vol 493 col 1305

27 Andres Guadamuz, 'Do Androids Dream of Electric Copyright? Comparative Analysis of Originality In Artificial Intelligence Generated Works' [2017] IPQ (2)169-186 <http://sro.sussex.ac.uk/id/eprint/66693/3/Do%20Androids%20Dream%20of%20Electric%20Copyright.pdf> accessed 1 January 2019

28 Emily Dorotheou, 'Reap the Benefits and avoid the Legal Uncertainty: Who owns the creations of Artificial Intelligence?' [2015] CTLR 85

29 Council Directive 2009/24/EC (Computer Programs Directive) [2009] OJ L111/16, Directive 96/9/EC (Database Directive) [1996] OJ L77/20, Directive 2006/116/EC (Term Directive) [2006] OJ L372/12

30 Case C 302/10-*Infopaq International A/S v Danske Dagblades Forening* [2011] ECR I06569-

31 *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ [2014] ,1482 RPC 8

32 Case C 604/10-*Football Dataco v Yahoo* [2011] AWLR)D ,57 (Opinion of AG Mengozzi

33 Case C 145/10-*Eva-Maria Painer v Standard Verlags GmbH & Others* [2010] ECR I12533-

generated creative works ,where a human author sets the creative process in motion but fails to display his own intellectual creation into the final work itself [34].As the technology behind deep learning and neural networks develop ,the role of the programmer will continue to diminish as the machine essentially teaches itself .In fact ,the very concept of deep learning does not require the programmer to write a command to address any flaws ,but instead ,the machine generates its own algorithm" based on example data and a desired output [35]".Moreover ,the Opinion of AG Trstenjak in *Painer* was that" only human creations are …protected [36],"providing the final nail in the coffin for any argument that AI-generated creative works would meet the AOIC standard.

There is an obvious dissonance in the current law on this matter ,with jarring consequences for CGW .Based on the current law ,the inability to meet the' originality 'requirement translates to a failure to guarantee copyright protection .It is clear that reform is necessary ,and the means of this reform must be determined .One could contend that Brexit may present the right opportunity for this reform ,and that the UK could return to the English standard on the basis of" labour ,skill ,and judgment ."Yet ,on its own ,Brexit would not fundamentally solve the issues concerning CGW and the interpretation of originality .The European Union)Withdrawal (Act 2018 explicitly states that any EU-derived domestic legislation) this would include all copyright-related directives (are preserved on and after exit day and thus will continue to apply .In regard to CJEU case-law' ,post-exit 'copyright case law of the CJEU is not binding in the UK .From a practical perspective ,despite not being bound by CJEU case-law after Brexit, the UK Supreme Court" must apply the same test for departing from an earlier CJEU decision as it would in departing from its own case law "and is unlikely to do so lightly [37].Due to the gradual incorporation of the EU's standard of originality into English law and the continuous advancements of AI technology ,it appears that legislative reform the method appropriate to remedy this issue ,and is desperately required to determine the response of UK law-makers in relation to AI copyright.

4) IDENTIFYING THE 'AUTHOR' OF COPYRIGHT OVER AI-GENERATED CREATIVE WORKS

The analysis above regarding' originality 'proved that AI technology stretches the current legal framework too far and updated legislation will become necessary .This point of view is reinforced by the fact that s (3)9.does not specify what the person' who makes necessary arrangements 'must prove .The precedent from *Nova* discusses who might be the author within the ambit of s,(3)9. ultimately giving it to the programmer instead of the user .In the case of AI-generated creative input ,where both the programmer and the user do not directly contribute" skill or labour of an

34 Julia Dickenson, Alex Morgan, and Birgit Clark, 'Creative Machines: Ownership of Copyright in Content Created by Artificial Intelligence Applications' [2017] EIPR 457-460

35 Will Knight' ,Intelligent Machines The Dark Secret at the Heart of AI) '*MIT Technology Review*> (2011 ,https//:www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai </accessed 10 January2019

36 Case C 145/10-*Eva-Maria Painer v Standard Verlags GmbH & Others* [2010] ECR I ,12533-Opinion of AG Trstenjak

37 European Union (Withdrawal) Act 2018, ss 6(5).

artistic kind ,"it is difficult to arrive at the same conclusion [38].The issue of authorship is linked to the core rationale of the IPR system ,as defining the author is a fundamental for copyright as an economic right .It affects investments ,encouraging creativity as a foundation to the existence of a copyright system [39],as only the right holder can assert the protection of copyright in the event of infringement .There are varying academic opinions on who is the author who made' the necessary arrangements 'for AI-generated creative works which are to be discussed below.

4.1) THE PROGRAMMER

The first feasible solution would be to grant authorship in favour of the programmer who created the AI .As mentioned ,the AI machine is a result of the programmer's time ,effort ,and creativity .Therefore ,adopting the' Lockean justification ,'it is only fitting that the programmer be remunerated by awarding him the copyright over any AI-generated creative works .Dorotheou seems to adopt this approach ,employing the use of a doctrine of tort in her analysis ,saying "'but for 'the programmer creating the AI device ,the work would never have been created[40]". Additionally ,the utilitarian approach support this as well ,as granting copyright to programmers would act as an incentive to continue developing AI which would benefit society as a whole .As such ,both reward justification of IPRs and the utilitarian approach support granting authorship to the programmer.

4.2 THE USER

The user can be seen as the person most responsible for arranging the creation in its final form. The user does this by giving the initial instructions ,commencing the AI device to carry out the work .Not only that ,the user could also utilise the AI in creative ways beyond the scope envisioned by the programmer [41].Lastly ,Samuelson posits the idea that even when the user contributes minimally it is still logical to assign' authorship 'to them .This is because in most circumstances ,the user would have generally have already paid the programmer of the AI for the rights to use it ,either by buying ,leasing or licensing it[42].

4.3) THE AI ITSELF

The final option is to bestow the copyright of AI-generated creative works to the AI itself.
Considering ,the likely exclusion of AI to be the author of any AI-generated works under s(3)9. and the fact that AI is neither self-aware nor able to bring legal proceedings upon infringement,

38 Pratap Devarapalli, 'Machine learning to machine owning: redefining the copyright ownership from the perspective of Australian, US, UK and EU law' [2018] EIPR 40(11) 722-728

39 Ryan Abbott, 'Artificial Intelligence, Big Data and Intellectual Property: Protecting Computer-Generated Works in the United Kingdom' [2017] (Research Handbook on Intellectual Property and Digital Technologies) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064213> accessed 5 January 2019

40 Emily Dorotheou, 'Reap the Benefits and avoid the Legal Uncertainty: Who owns the creations of Artificial Intelligence?' [2015] CTLR 85

41 Thomas Margoni and Mark Perry, 'From Music Tracks to Google Maps: Who Owns Computer Generated Works?' [2010] 26(621-629) CLSR <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647584> accessed 5 January 2019

42 Pamela Samuelson, 'Allocating Ownership Rights in Computer- Generated Works' [1985] PLR 1185

it may seem far-fetched .Yet ,it is a view that has gained traction and its merits must at least be examined ,as it may provide a useful model for future legislative reform .In fact ,it is the AI that is directly involved in creating the work and arguably should have a claim over its creation. For instance ,the program Amper Music — a music-making AI platform— merely requires users to select a genre of music and a mood for the AI to produce a song .In situations as such, the AI would be functioning autonomously ,forming its own judgements and creative choices[43].
Following this ,it is the AI which
exerts levels of labour and skill necessary to meet the originality threshold and also be the entity directly involved in undertaking the arrangements necessary for the final work [44].Additionally, certain academics ,such as Pearlman ,even go a step further to advocate the granting of legal personhood to AI [45].This is based on the suggestion that existing legislation already recognises legal personhood in different forms ,such as corporations ,implying that non-natural persons can granted ownership rights .Hence ,Pearlman's argument is that AI should be given similar rights on the basis of" the nexus between a creative AI and the natural person "who is the programmer in most cases.

5) THE REJECTION OF COPYRIGHT FOR AI-GENERATED CREATIVE WORKS ALTOGETHER

Assuming s (3)9.cannot encompass AI copyright and no legislative reforms are adopted ,the only available outcome for AI-generated creative works is to leave them to the public domain. Although this may seem unnecessarily harsh to investors and programmers of AI systems ,there are certain benefits to adopting such a stance [46].The public domain consists of works which have ceased to be protected by copyright .This could be due to the expiration of the term of protection, works with unknown authors or simply works that do not meet the subsistence requirements for copyright protection .One point of view is that the authorship of AI-generated creative works cannot be vested in a single individual as this goes beyond the limits of human mental and physical abilities .Due to this ,it is argued that the current standard of human authorship for CGWs is unable to reconcile with the" anomalous "nature of creative works generated by AI[47]. The outcome of this is that there is no identifiable author for AI work ,and consequently it should go to the public domain .Scholars such as Perry and Margoni have opined that the public domain approach is appropriate for AI works [48].They contend that granting copyright to AI-

43 Kalin Hristov, 'Artificial Intelligence and the Copyright Dilemma' [2017] 57(3) IPLR <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2976428> accessed 5 January 2019

44 Jesus Manuel, 'The role of automated technology in the creation of copyright works: the challenges of artificial intelligence' [2017] IRLCT 31(1), 91

45 Russ Pearlman, 'Recognizing AI as Authors and Inventors Under U.S. Intellectual Property Law' [2018] 2 RJLT 2, 91 <https://jolt.richmond.edu/recognizing-artificial-intelligence-ai-as-authors-and-inventors-under-u-s-intellectual-property-law/> accessed 24 February 2019

46 Pratap Devarapalli, 'Machine learning to machine owning: redefining the copyright ownership from the perspective of Australian, US, UK and EU law' [2018] EIPR 40(11) 722-728

47 Emily Dorotheou, 'Reap the Benefits and avoid the Legal Uncertainty: Who owns the creations of Artificial Intelligence?' [2015] CTLR 85

48 Thomas Margoni and Mark Perry, 'From Music Tracks to Google Maps: Who Owns Computer Generated Works?' [2010] 26(621-629) CLSR <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647584> accessed 5 January 2019

generated creative works would allow authors to exploit AI copyright ,as allocating authorship to the individual in the equation may allow them hold copyrights which are unjustifiably excessive. This would allow these individuals to maintain a monopoly over all future AI-generated creative works.

6) EVALUATION & PROPOSED REFORMS

Upon evaluation ,it is evident that there is no ideal solution to the authorship issue of AI-generated creative works within the constraints of the existing law .Each of the options above —despite their merits — can be rebutted on a number of grounds ,implying the unworkability of current legislation for AI copyright .Returning to the notion of allocating authorship to the programmer ,there seems to be limitations to this approach .The programmer does indeed write the initial algorithm for the operation of the AI but their effort is unlikely to extend to the final output ,which is unpredictable to the programmer [49].Additionally ,a case can be made that granting programmers copyright over AI-generated creative works would over-reward them ,as he would already benefit from the commissioning of his program via selling it or licensing its use .This idea of double-benefit is reiterated in the' Schumpeterian theory of head-start profit,' which essentially means that if a programmer's invention is really ahead of the market ,then the time interval required for competitors to catch up would be enough to allow the programmer to secure profit from his invention [50].Thus ,the theory can be used to clarify that the utilitarian and reward rationales would operate even when the programmers do not have copyright on AI- generated creative works.

Secondly ,arguments for the user to be the author of AI-generated creative works are flawed as well .The user's contribution may be virtually insignificant when compared to the AI's work as a whole ,making it problematic to attribute copyright authorship to the user .The monkey self-portrait case — merely involving the pressing of a button — illustrates this perfectly [51].Surely it is not apt to grant copyright in such cases ,as it falls short of the criteria necessary to establish skill and effort in the final output .Similarly ,the argument of allowing the AI itself to own copyright has its own set of difficulties .The decision to grant AI legal personhood is an immense legal and philosophical question and cannot be done without extreme anthropomorphism .Adding on, this notion does not seem to have any practical benefit as machines do not require any incentive to generate output and thus ,would be inconsistent with the utilitarian rationale .Furthermore, it is incorrect to apply the same reasoning that gives corporations legal personality to AI ,as there are vast differences between the two .Corporations have an indirect link to humans) through their shareholders ,(whereas this relationship is indiscernible with AI devices.

Lastly would be the proposal to leave AI-generated creative works to the public domain .This approach has been subject to criticism [52].Releasing AI-generated creative works under the

49 Jani Ihalainen, 'Computer creativity: artificial intelligence and copyright' [2018] JIPLP 13(9)

50 Joseph Schumpeter ,*Theory of Economic Development*) Routledge3 ,rd edn(

51 *Naruto v .Slater* ,No9) 16-15469 .th Cir(2018 .

52 Russ Pearlman, 'Recognizing AI as Authors and Inventors Under U.S. Intellectual Property Law' [2018] 2 RJLT 2, 91 <https://jolt.

public domain would go against the economic rationale of copyright ,as it would disincentive programmers from the development of AI software and hinder the advancement of society ,going against one of the primary theories of intellectual property rights .Therefore ,this essay argues that leaving AI-generated creative works to the public domain is the least efficient solution in respect of policy considerations concerning AI-generated copyright.

All in all ,the existing law is in desperate need of reform ,especially considering that AI-generated creative work faces two potential hurdles — the threshold of originality and the issue of who is the author of such works .A viable model that the UK could emulate was suggested by

Abott .He proposed changing the definition of CGW as based in s 178.from work" generated by a computer in circumstances such that there is no human author of the work ,"to work "generated by a computer in circumstances such that the computer ,if a natural person ,would meet authorship requirements [53]."In addition to addressing the issue of originality ,his definition would also unambiguously consider the contributions of the machine .Regarding the question of authorship ,the owner of the AI system would be the individual who benefits from the copyright of AI-generated creative works .In most cases ,this would be the programmer .However ,through the use of commercial licensing ,the user could be entitled to own any intellectual property from the AI .Alternatively ,users can purchase a non-commercial licence that costs less but which they are unable to make commercial gains if they are unwilling to pay a higher price to acquire a commercial licence .It is also interesting to note the considerations of the Japanese in dealing with the matter AI-generated creative works .Instead of expanding existing copyright law to accommodate these works ,there seem to be proposals to treat them similarly to trademarks ,where it must acquire a certain degree of popularity) in that it must be distinctive (to be registered[54]. However ,this essay acknowledges that this is a separate issue altogether that is still developing and one that must be considered outside this piece of work.

7) CONCLUSION

Having considered all the above ,there seems to be no simple solution in solving the problems that concern copyright over AI-generated creative works ,specifically the issues of originality and authorship .Nevertheless ,these types of works should indeed be entitled to copyright under UK law ,as evidenced by the rationales of IPR and the benefits explained above .The issue of how UK legislation might do this is far more complex and an enigma in and of itself .This essay submits that changing the definition of' CGWs 'would be a suitable first step forward ,allowing the UK to be at" the forefront of the AI and data revolution[55]".

richmond.edu/recognizing-artificial-intelligence-ai-as-authors-and-inventors-under-u-s-intellectual-property-law/> accessed 24 February 2019

53 Ryan Abbott, 'Artificial Intelligence, Big Data and Intellectual Property: Protecting Computer-Generated Works in the United Kingdom' [2017] (Research Handbook on Intellectual Property and Digital Technologies) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064213> accessed 5 January 2019

54 Natsuko Segawa' ,Japan Eyes Rights Protection for AI Artwork) '*Asian* Review> (2016 ,https//:asia.nikkei.com/Politics-Economy/ Economy/Japan-eyes-rights-protection-for-AI-artwork <accessed 21 March2019

55 Department for Business ,Energy & Industrial Strategy' ,Industrial Strategy :Artificial Intelligence Sector Deal) '*HM Government,* >(2018https//:www.gov.uk/government/publications/artificial-intelligence-sector-deal/ai-sector-deal <accessed 15 March2019

TABLE OF CASES: UK CASES

Cummins v Bond 1 [1927] Ch167
Express Newspapers Plc v Liverpool Daily Post & Echo Plc 3 [1985] All ER680
Ladbroke v William Hill 1 [1964] All ER465
Nova Productions Ltd v Mazooma Games Ltd & Ors [2007] EWCA Civ [2007] ,219 Bus LR 1032
SAS Institute Inc v World Programming Ltd [2013] EWCA Civ [2014] ,1482 RPC 8
University of London Press v University Tutorial Press 2 [1916] Ch601

Table of Cases :EU Cases
Case C 145/10-*Eva-Maria Painer v Standard Verlags GmbH & Others* [2010] ECR I12533-
Case C 604/10-*Football Dataco v Yahoo* [2011] ΛWLR)D57 (
Case C 302/10-*Infopaq International A/S v Danske Dagblades Forening* [2011] ECR I06569-

Table of Legislation :UK
Copyright ,Designs and Patents Act1988
European Union) Withdrawal (Act2018

Table of Legislation :EU
Directive/2009/24 EC) Computer Programs Directive [2009] (OJ L111/16
Directive/96/9 EC) Database Directive [1996] (OJ L77/20
Directive/2006/116 EC) Term Directive [2006] (OJ L372/12

ARBITRATION

Ridhima Sharma

London is one of the most preferred seats of arbitration. Critically analyse the factors that are likely to contribute to London being chosen as the seat. To what extent do you consider the grounds on which an award can be challenged under the Arbitration Act 1996 to be an important factor in the selection of London as the seat?

Arbitration is an adjudicative dispute resolution process. It depends on an understanding between the parties to allude an issue or a question that emerges between the parties to a fair-minded authority or an unprejudiced arbitral court for a judgment[1]. International arbitration extensively covers any reference to arbitration including parties in various states. International arbitration is generally utilized in shipping, construction, and engineering, oil and gas businesses, insurance, banking and money related administrations.[2]

The positive connection between expanding worldwide business and global business is no fortuitous event. It comes subsequently, with the mix of a multilateral universal advancement: the formation of, and the overall membership to, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention')[3]. The principal reasons concerning why parties of various states pick arbitration as an approach to settle their dispute seems to be 'neutrality' and 'enforcement'. Parties to an international dispute originate from various nations so the domestic court of one party will be a remote court to the other party. Therefore, the arbitration will give the parties an opportunity to select a place and tribunal which is neutral to both parties. If the parties decide on one arbitrator, then the arbitrator will be appointed on consent by both parties. If there are three arbitrators, then two arbitrators will be chosen by the parties themselves and the third arbitrator will be chosen on agreement by the two arbitrators. As to enforcement, the award passed will be final and binding. It will be directly enforceable domestically as well as internationally[4].

The 'seat' of arbitration is a standout amongst the most significant highlights of International Arbitration. Selecting an appropriate 'seat' of arbitration is very important because it can have significant, legitimate and useful results, and can really modify the course of Arbitration[5]. The

1 Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach To Alternative Dispute Resolution* (5th edn, Oxford University Press 2018), pp.423
2 Ibid 481
3 Stuart Dutson, Andy Moody and Neil Newing, *International Arbitration, A Practical Guide*(2nd edn, Globe Law and Business Ltd 2019), pp.7
4 Nigel Blackaby and Constantine Partasides QC with Alan Redfern and Martin Hunter: *Redfern & Hunter On International Arbitration, Student Version,* (6th edn, Oxford University Press 2015), pp.28-29
5 Gary B. Born,International Arbitration: Cases and Materials, 2nd Edition, Kluwer Law International 2015, pp. 599-669; http://0-www.kluwerarbitration.com.wam.city.ac.uk/document/kli-ka-born-2015009-n?q=%22selection%20of%20arbitral%20seat%22 accessed dated 15 April

'seat' of arbitration is critical since it will decide the procedure or rules which the arbitration adopts, and the courts which practice purview over the seat will have a supervisory role over the conduct of the arbitration proceedings. By choosing a given state as the seat of arbitration, the parties place the procedure inside the structure of that nation's required national laws relevant to the arbitration[6]. A seat of arbitration supports the legal framework controlling every single lawful part of the arbitral procedure.[7]

As per a 2018 survey,[8] London is the most preferred seat of arbitration followed by Paris, Singapore, Hong Kong, and Geneva. The results of the 2018 survey were not very much different from the 2015 survey[9], London and Paris were considered as the most preferred seats of Arbitration. There are many factors that make London the most preferred seat of arbitration which includes (i) **General reputation and recognition** (ii) **neutrality and impartiality** (iii) **national arbitration law** and (iv) **enforcement.**[10]

GENERAL REPUTATION AND RECOGNITION

Facilitating international arbitration in London is alluring to people and big organizations because of English Law and its common law traditions. A particular element that has the most appeal is the principle of freedom to contract under English law. London as a seat of arbitration has a reputation of having confidentiality advantages. This benefits big businesses or organizations who do not want to litigate in open court due to commercial sensitivity. London being the hub for International Trade for centuries is an added advantage because it has the legal expertise in dealing with international matters. Due to its reputation of being the hub for International Trade, London has international expertise in maritime disputes, engineering, finance, shipping, and intellectual property.[11] London is the headquarters for the world's biggest law firms is also an added advantage.

In England, the arbitration procedures are led according to the arrangements of the Arbitration Act 1996. The act (hereinafter "The Act") was enacted with the intention to support the arbitral proceedings and with minimum interference of the courts. The goal of the Arbitration Act 1996 is to make the arbitration laws increasingly open, easy to understand and to bring the English Law inside the cutting-edge principles of International Arbitration. The key philosophies of the Act are (i) to resolve the disputes fairly (ii) impartially (iii) without unnecessary delay or expense and (iv) with minimum intervention of the courts.[12]

6 https://www.fladgate.com/2009/05/london-as-a-seat-of-arbitration/ accessed dated 14th April 2019

7 Ibrahim Mohamed Nour Shehata (Miami Blockchain Group and Shehata & Partners): Arbitration of Smart Contracts Part 3- Issues to consider when choosing Arbitration to resolve smart contracts disputes http://0-arbitrationblog.kluwerarbitration.com.wam.city.ac.uk/2018/08/30/arbitration-smart-contracts-part-3/ accessed dated 18 April 2019

8 2018 International Arbitration Survey: The Evolution of International Arbitration, (Whites & Case LLP,2018), pp.11

9 2015 International Arbitration Survey, p.12 (Chart 8)

10 Supra n.7, p.12

11 https://www.ashfords.co.uk/news-and-events/general/why-is-london-a-global-capital-for-international-arbitration accessed dated 14th April 2019

12 K&L Gates, Guide to Leading Arbitral Seats and Institutions, pp.8

Upon a general perusing of the Act, which oversees the arbitration procedures in England and Wales, the Act demonstrates that it has a solid harmony between the forces of the arbitral council and forces of the courts. The forces of the courts under the said act are limited however steady the arbitral procedures are. The said act has a pro-arbitration approach which can also be seen in practice, for example in *Ust-Kamenogorsk hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP*[13] wherein the English Court allowed an anti-suit injunction which was acquired in connection to a breach of an arbitration agreement. The order was allowed notwithstanding that the arbitration procedures had not been initiated.

Another factor that contributes to London being the most preferred seat of Arbitration is a general reputation and the quality of its judiciary, legal expertise and education of the judiciary, arbitrators, expert users, students, and legal representatives. The judiciary and legal experts are experienced in international commercial arbitration and international dispute resolution. London offers the best quality of legal education.[14]

London is the most preferred seat for arbitration is also influenced by the fact that there are many sector-specific arbitration with their own set of rules and procedures, example, AIDA Reinsurance and Insurance Arbitration Society (ARIAS), London Maritime Arbitration Association (LMAA), Federation of Oils, Seeds and Fats Association (FOSFA), Grain and Feed Trade Association (GAFTA), and London Metal Exchange (LME).[15]

A standout amongst the most significant factor in London being the most favored seat of arbitration is that London is involved with the New York Convention on Recognition and Enforcement of Foreign Arbitral awards 1958, which gives it a worldwide intrigue[16] by helping to enforce the award in more than 140 states, which are parties to the above-mentioned convention.

Keeping all the above-mentioned factors in mind, it is concluded that English law is pro-arbitration and provides for confidentiality advantages. London has a global appeal and the quality of judiciary and legal expertise available is a class apart with a wide range of sector-specific expertise. All these factors contribute to the general reputation and recognition of London being the most favored seat of arbitration.

NEUTRALITY AND IMPARTIALITY

One of the primary value of the arbitration is *"to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense".*[17] This primary guideline is set down in Section 33, wherein the arbitral court is compelled by a sense of duty to act decently and fairly by giving sensible chance to the parties to put their case before the tribunal.[18]

13 2013 UKSC 35

14 Chartered Institute of Arbitrators launches London principles by Practical law arbitration, published on 8 July 2015, pp.1

15 Supra n.12

16 Supra n.11

17 Section 1(a) Arbitration Act 1996

18 Bruce Harris, Rowan Planterose & Jonathan Tecks: *The Arbitration Act 1996 A Commentary* (5th edn, Wiley Blackwell 2014),

A bare reading of Section 33, which deals with a general duty of the tribunal will go on to show that there are certain factors/boundaries within which the arbitrators must act in order to achieve a fair resolution of justice. The tribunal must also adopt procedures that would avoid unnecessary delay or expenditure to achieve reasonable determination of justice.

The arbitrators have a duty to be impartial. Arbitrators can be impartial by not having a preconceived notion about a party which will result in clouding the arbitrator's judgment. If there is any conflict of interest, the arbitrators are duty-bound to disclose it[19] and recuse themselves from the case. If there is no serious conflict of interest, the arbitrators are still duty-bound to disclose it and it is then left at the discretion of the parties involved whether to proceed with the same arbitrator or appoint a new one.[20] UNCITRAL[21] and even LCIA[22] have put an obligation on the arbitrators to disclose without any delay to the parties any conflict of interest or any situation that would make the parties doubt as to the impartiality of the arbitrator. In *Ghanghola v. Smith & Sherriff Ltd*[23], it has been held that the arbitrator was in breach of his duties as per Section 33 of the act, because the arbitrator acted partially by giving a decision on cost which was based on factors that were not put before the parties, therefore, the parties did not have a chance to argue on those factors. In another case *Vee Networks Ltd v. Econet Wireless International Ltd*[24], the arbitrator was held in breach of his obligations under Section 33, in light of the fact that the judge passed an award which depended on reasons that did not contended before the arbitrator.

The arbitrators also have a duty to follow suitable procedures that would avoid unnecessary delays and costs. It is the duty of the arbitral tribunal to have flexible procedures for the arbitration proceeding which suits both the parties. It is not necessary that the arbitral tribunal follows the court procedure.[25] In *Margulead Ltd v. Exide Technologies*[26], it was held that the arbitrator was within the scope of this section when he ordered that the parties will be allowed only one oral submission.

Section 33 is a mandatory provision[27] and the arbitrator or the tribunal are duty-bound to follow it.[28] If the tribunal is in breach of section 33, then (i) the arbitrator can be removed by court under section 24, (ii) the award can be tested on the ground of genuine abnormality – Section 68, (iii) the award would be incapable of enforcement under Article V of the NYC and (iv) if bad faith is established, the arbitrator could lose his immunity from the suit.

The English law focuses on *'impartiality'* and not on *'independence'* of the arbitrator. This is in

pp.28,177
19 Margaret Moses: Principles And Practice Of International Commercial Arbitration (3rd edn, Cambridge University Press 2017), pp.140-141
20 Ibid pp.141
21 Art 12(1) UNCITRAL Model Law
22 Art 5.5 LCIA Rules
23 [1998] 3 All ER 730
24 [2005] 1 Lloyd's Rep. 192
25 Supra n.18, pp.178
26 [2005] 1 Lloyd's Rep 324
27 Section 4(1) &Sch.1, Arbitration Act 1996
28 Supra n.18, pp.176

contrast with various institutional arbitration rules (Article 12 of the Model Law, Article 11.1 of the ICC Rules and Article 5.2 of the LCIA Rules), which includes impartiality or independence, as grounds for removal of the arbitrator. As per the DAC report,[29] it is conceivable to be fair without being entirely independent, and any individual who is influenced by the absence of independence will exhibit partiality.[30] The universally acknowledged necessity of independence exists more to guarantee that reasonableness is apparently being accomplished, as opposed to really accomplishing it.[31] There is a difference between impartiality and independence. Impartiality arises when there is an actual or apparent bias in favour of one of the parties and doubts of the independence of an arbitrator arises out of a relationship between an arbitrator and one of the parties[32].

Actual bias is nepotism or opposition towards one of the parties to the arbitration. In *Catalina (Owners) v. Norman MV (Owners)*[33], one of the parties was Portuguese and the arbitrator was caught saying that all the Portuguese's people are liars. On this basis, the arbitrator was removed. There are very few cases of alleged actual bias because it is very difficult to prove it.[34] The fundamental principle is that there should not be any doubt of impartiality in the minds of the parties against the arbitrators. This has been accepted throughout the common-law world and this approach is also adopted by the English law in determining cases of impartiality.[35] In *Porter v. Magill*[36], the court laid down a test for impartiality *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"*. Generally, the court, representing, for this reason the honest and educated spectator, thinks about whether, on all the material which is set before it, there is a genuine plausibility of oblivious predisposition with respect to the decision-maker.[37] In *Locabail (UK) Ltd. V. Bayfield Properties Ltd and Others*[38],there were charges against the High Court Judge in light of the fact that earlier his firm of solicitors had represented one of the parties. The court held that any layman would infer that the judge gave a one-sided assessment.

When London is selected as the seat of arbitration, the Arbitration Act 1996 comes into play and specifically all the provisions under schedule 1 of the act apply, because they are all mandatory provisions. Section 33 and Section 24 being mandatory provisions means that whenever the arbitrator or the tribunal is acting partially, or the procedure is not one of a fair resolution of justice, the parties can seek the removal of the arbitrator under the above-mentioned provisions. These provisions make sure that the arbitrators act within the parameters of duties as specified under the act and to also give a fair resolution of justice.

29 DAC Report on Arbitration Bill 1996
30 Supra n.18, pp.134
31 Ibid, pp.140
32 ibid
33 [1938] 61 Lloyd's Rep 360
34 Julian D.M Lew and Harris Bor: Arbitration In England, With Chapters On Scotland And Ireland (Kluwer Law International, 2013), pp.298
35 Ibid pp.323
36 [2002] 2 AC 357
37 Supra n.18, pp.135 38
[2000] QB 451

NATIONAL ARBITRATION LAW

At the point when London is chosen as the seat for arbitration, the arrangements of the Arbitration Act 1996, oversees the arbitral procedures. The core values of the said Act are (i) to get a reasonable resolution of disputes by an unprejudiced tribunal without delay or costs, (ii) parties are allowed to concur on a procedure for the arbitral proceeding subject to shields that are important in public interest, and (iii) the least intervention of courts.[39] When London is chosen as the seat for arbitration the compulsory provisions of the act apply. The mandatory provisions only deal with matters that play a key role in the effective resolution of disputes.[40]
The act is extensively founded on the UNCITRAL Model Law.[41] The hidden arrangement of the Arbitration Act is 'party autonomy' (parties are allowed to concur on an arbitration procedure) and 'judicial non-intervention' or 'minimum intervention of courts', also known as the twin pillars of the arbitration act.

PARTY AUTONOMY

Party autonomy is a standout amongst the most significant highlights of the Arbitration Act. The rule of Party autonomy is set down in Section 1(b). This rule gives the parties to arbitration the opportunity to choose the procedure in settling their dispute.[42] The principle of party autonomy is the fundamental basis of the Model Law[43]. It is also found in other institutional arbitration rules like the International Chamber of Commerce[44] and also in the London Court of International Arbitration Rules[45]. This principle is replicated in part 1 of the Arbitration Act, where the provisions are non-mandatory, thereby giving the parties the opportunity to decide the procedure as per their convenience.

Section 34 says that the procedural and evidential issues are for the arbitral tribunal to choose, subject to the privileges of the parties to concede to any issue. This section gives an undefeated right to the parties to choose their own methods for arbitration.[46]

Under this section, the tribunal is duty-bound to agree with the parties on the procedure they decide. Even if the parties decide on a procedure that is not in compliance with the tribunal's duty under section 33, the tribunal still has to agree. The tribunal hosts to attempt and persuade the parties and in the event that the parties don't concur, the court is available for two alternatives – first, to just plainly agree with the wishes of the parties even if it was not in compliance with the duty of the tribunal under section 33 and under these circumstances, the parties cannot claim

39 Supra n.6
40 Supra n.1
41 Supra n.12, pp.8
42 An Introduction to the English Arbitration Act 1996, (Practical Law Arbitration), Thomas Reuters (2019), pp.1-3
43 Article 19(1) Model Law
44 Article 22 ICC Rules
45 Article 14 LCIA Rules
46 Supra n.18, pp.29

breach of the tribunal's duty under section 33. Secondly, the tribunal can do is to resign but can only do so if the terms of his appointment allow resignation or the parties file an application under section 25 for forced resignation. The court will allow such an application, only if it thinks that the resignation was reasonable.[47]

The above discussion clearly shows that the act was drafted in a way that clearly let the parties decide on their own the arbitration procedure and the arbitrator or the tribunal can either agree with the parties or apply for resignation as discussed above. The arbitration laws in London are pro-arbitration and provides full support to party autonomy. This is one advantage that attracts most arbitrations to choose London as the seat of arbitration.

MINIMUM INTERVENTION OF COURTS

This guideline of the act is to a great extent based on Article 5 of the Model Law. The act pursues the Model law in limiting court intervention.[48] Court interference is allowed when (i) the tribunal cannot make or enforce orders itself, (ii) court orders are necessary to preserve the status quo and (iii) court orders help with the legitimacy and authorization of the arbitration award. The court's role under the act is very limited, it is not a supervisory role but a supportive role. The court will interfere only to support the arbitration process and where the intervention of the court is necessary.[49] The courts should interfere in very rare circumstances to prevent injustice and support arbitration.

There are two ways in which the English courts can uphold the arbitration agreement and support the proceedings: (i) to stay the proceedings where the dispute falls within the arbitration agreement, and (ii) by granting anti-suit injunction against a party to the arbitration agreement, to stop a party from commencing or proceeding in a foreign court, where the dispute is covered by the arbitration agreement.[50]

STAY OF PROCEEDINGS

Section 9 deals with stay of legal proceedings. This is a mandatory provision and it corresponds to Article 8 of the Model Law.[51] Only parties to the arbitration agreement may apply for a stay. Supposed there are 2 parties, Party A and Party B. Both the parties enter into a contract that has an arbitration clause stating that all disputes arising out of the contract will be referred to arbitration in Geneva. Party A breaches the arbitration agreement and commences the proceedings in the High Court of London to resolve the dispute. Party B can then file an application in court under

47 Ibid, pp.179
48 Ibid, pp.30
49 Supra n.46, pp.6
50 Supra N.34, pp.413
51 Supra n.18, pp.63

section 9 of the act and ask for a stay.[52] In *City of London v. Sancheti*[53], the court held that a stay of legal proceedings under section 9 can only be obtained against a party to the arbitration agreement. Establishing a commercial or legal relationship will not suffice.

A party who has submitted itself to a jurisdiction to answer any claim or has taken steps to proceed to answer the claim will not be entitled to a stay of legal proceedings under section 9 of the act. Stay under section 9 will be granted only if the court is satisfied that (i) there is a legitimate arbitration agreement and (ii) that the issue included is an arbitral issue under the said agreement.[54]

The rule under section 9 for the grant of stay of legal proceedings is applicable to both domestic as well as international arbitration. The stay is obligatory except if it is demonstrated that the arbitration agreement is invalid and void or unequipped for being upheld.[55] When a party applies for a stay under section 9 and based on the evidence provided, the court is unable to decide what directions should be issued, the court decides that rather than issuing directions for the matters to be decided by court, in the interest of justice and in accordance with the inherent powers of the court, the court will stay the legal proceedings so that the issues could be decided by an arbitral tribunal.[56] A stay under the inherent jurisdiction might be reasonable where the court can't make certain of those issues but it is of the view that great sense and litigation management makes it attractive for an arbitrator to think about the entire issue first.[57]

ANTI-SUIT INJUNCTION

Anti-suit injunctions are orders of the court that restricts a party to the arbitration agreement not to proceed in a court of a foreign jurisdiction. The reason that anti-suit injunctions are allowed is on the grounds that similar issues between the parties to the arbitration agreement are being arbitrated or disputed by the court issuing the anti-suit injunction.[58]

Anti-suit injunctions are granted under section 44(2)(e) of the act and can also be granted under Section 37 of the Senior Courts Act 1981. The ingredients for granting an anti-suit injunction is urgency and the inability of the arbitral tribunal to act effectively[59]. This remedy is discretionary and should be exercised sparingly. It is exercised when one of the parties satisfies the court that the other party, who has brought in the foreign court proceedings, have done so in breach of a valid arbitration agreement. This provision is a non-mandatory provision and the parties, if they wish to, can exclude this provision, in clear words.[60]

52 Supra N.34, pp.415-416
53 [2009] 1 Lloyd's Rep.117
54 Albon (t/a NA Carriage Co) v. Naza Motor Trading Sdn Bhd, [2007] EWHC 665 (Ch) at para 14
55 Supra n.18, pp.77
56 Ahmad Al-Naimi v. Islamic Press Agency Inc [2000] 1 Llyod's Rep. 522 at 525
57 Supra .18, pp.67
58 Supra N.19, pp.100
59 Supra N.34, pp.224
60 Ibid, pp.426, 428

An Anti-suit injunction is granted against the party and not against the foreign court because the English courts cannot exercise control over the foreign court. Jurisdiction will be exercised when the rights of the claimant are being affected or when the proceedings in the foreign court are malicious in nature.[61]

ENFORCEMENT

A standout amongst the most significant reason that the parties to an international commercial dispute select arbitration, is a direct result of the high enforcement of the awards. These conventions are pro-arbitration and give extremely limited grounds on the refusal of the implementation of the award.[62] London is a party to the New York Convention on Recognition and Enforcement of Arbitral Awards 1958 (NYC). There are 155 other states which are party to the said convention, which makes the enforcement of the arbitral award internationally easy. Article V of NYC lays down the restrictions on which the enforcement of the award can be refused. There are 5 restrictions under Article V(1) and 2 restrictions under Article V(2). Grounds on which the implementation of the award can be limited under Article V(1) are (I) incapacity and invalidity,
(ii) absence of notice or fairness, (iii) the arbitrator acted in abundance of power, (iv) the tribunal or procedure was not acting according to the parties' understanding and (v) the award was not authoritative or had been set aside. Restrictions under Article V(2) are (i) a lack of arbitrability and (ii) a violation of public policy. These restrictions are not based on merits. The award cannot be refused to be enforced if there is a mistake of fact or law by the arbitrator but can be refused when the parties are not treated fairly or when no reasonable opportunity to be heard is given to the parties.[63]

If the award is passed in England and is enforced against assets present in its jurisdiction, then the act and English Courts will govern the enforcement proceedings. It has become common that the act and the English Courts are now enforcing awards that are made in different jurisdictions. This is also because London is the commercial and financial hub where assets worth billions of pounds are held.[64]

The domestic awards are enforced under section 66. The said section lays down 2 methods of enforcement. First, the award can be entered as the judgment of the court (section 66(2)) and second, it can be enforced as if it were a judgment (section 66(1)). The Act also recognizes partial enforcement which means that you do not have to wait until the final award has been obtained. Section 37 of the act recognizes partial awards. The said act recognizes only one mandatory ground on which the enforcement of the award can be refused. It is laid down under Section 66(3) of the act. Award will be refused to be enforced when the party against which the

61 Supra N.34, pp.225
62 Supra N.19, pp. 225
63 Gary Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer Law & Business 2014), 4309 64
Supra n.34, pp.563-564

enforcement is sought, proves that the tribunal lacked 'substantial jurisdiction'[65].

Substantial jurisdiction is characterized under Section 82(1) of the act with reference to issues related to (1) the valid arbitration agreement, (2) matters that are defined in the arbitration agreement and (3) the tribunal is properly constituted. In *Vee Networks Ltd v. Econet Wireless International Ltd*[66], it was stated that the definition of substantial jurisdiction is limited to the above-mentioned matters.

There are other grounds on which the domestic award can be refused enforcement and they are laid down in Article V of NYC (stated above) and Section 103 of the act. In particular, the enforcement is refused when the validity of the arbitral award is being challenged[67] and also on the basis of public policy[68].

The above discussion shows that there are very limited grounds on which the award can be refused enforcement. This approach of the arbitration act is pro-arbitration. The grounds for refusal of enforcement of award must be construed narrowly because they are exceptions to the general rule that foreign awards must be recognized and enforced.[69]

GROUNDS OF CHALLENGE OF AWARD

There is limited ground for the challenge of a final or a partial award under the act. Sections under the act which manages challenge of an award are (1) section 67, where the substantive jurisdiction of the tribunal can be tested, (2) section 68, where the award can be tested on genuine inconsistency, and (3) section 69 on appeal of point of law.

SECTION 67

This is a required provision and can't be rejected by the parties.[70] This section comes into play when an award is made as to the substantial jurisdiction of the tribunal or when an award is made on the merits which address objections to the tribunal's substantive jurisdiction. A party making an application under this section must first use all the available arbitral procedures as specified under section 70(2)(a) and also the application must be made within the time limit of 28 days as specified under section 70(3), subject to the powers of the court to extend the time limit in accordance under section 80(5). If any party fails to comply with these procedures before filing an application under section 67, it will lose the right to approach the court, as was held in the

65 Ibid
66 [2004] EWHC 2909 (Comm) at 22
67 Middlemiss & Gould (a firm) v. Hartlepool Corp, [1972] 1 WLR 1643
68 Soleimany v. Soleimany, [1999] QB 785
69 Julian D.M.Lew, Loukas A. Mistelis, et al.: Comparative International Commercial Arbitration, (Kluwer Law International, 2003), pp.706
70 Supra N.34, pp.325

People's Insurance Company of China, Hebei Branch v. Vysanthi Shipping Co Ltd.[71]

Section 30(1) of the act deals with the doctrine of competence, which implies that the court has the ability to choose its very own jurisdiction, except if otherwise concurred by the parties and the party who raises protests to the jurisdiction of the arbitral tribunal, ought to do so before the issue is challenged on merits. The court in *JSC Zestafoni G. Nikoladze Ferroally Plant v. Ronly Holdings Ltd*[72] held that a party challenging the ground for jurisdiction under section 67 should have raised the ground before the tribunal. A party can challenge the substantive jurisdiction of the arbitral tribunal on issues that are determined under section 30(1) of the act, as was held in *Union Marine Classification Services LLC v. The Government of the Union of Comoros*[73]. It is relevant to point out that it is a complete rehearing of the case and not just a review of how the tribunal determined its substantial jurisdiction.[74]

SECTION 68

This is a compulsory provision and can't be barred by parties. Under this section, an application can be filed by the parties to challenge an award on grounds of serious irregularities as recorded under subsection 2, such as those that have caused or will probably cause significant injustice to one of the parties. The irregularity should relate to the tribunal, proceeding or the award.[75]

A party can file an application under this section on any of the grounds as recorded under section 68(2) of the act. The list of grounds mentioned is exhaustive because the DAC[76] was of the opinion that the courts should not be free to expand the grounds.

It was held in *ASM Shipping Ltd of India v. TTMI Ltd of England*[77] that a party who files an application under this section ought to have raised an objection of irregularity when it first came to know. If a party fails to raise any objection in the first instance, then the party loses its right to object to a serious irregularity. Filing an application under this section is subject to certain restrictions. A party who is planning to file an application under this section, should first exhaust all the available arbitral procedures as mentioned under section 70(2) and also the 28 days' time limit as mentioned under section 70(3), which is subject to the power of the court under section 80(5) to extend the time limit.[78] Also, as it was held in *Groundshire v. VHE Construction*[79] a party alleging ambiguity in an award must first make use of section 57 of the act. Once all the restrictions are exhausted, only then a party can approach the court under this section.

In the DAC report as well as in *Lesotho Highlands Development Authority v. Impregilo SpA*, it was made clear that relief under this section will only be granted in extreme cases and the court will

71 [2003] 2 Lloyd's Rep 617
72 [2004] 2 Lloyd's Rep. 335
73 [2015] EWHC 508
74 [2010] UKSC 46
75 Nathan Searle & Alice Jowitt (Hogan Lovells International LLP) Challenging the award under section 68 of the English Arbitration Act 1996: serious irregularity, pp.1
76 DAC report of February 1996
77 [2005] EWHC 2230 (Comm)
78 Supra N.18, pp.353
79 [2001] 1 Lloyd's Rep. 395 at 80-85

not be quick to interfere.[80] The courts should approach the award in a fair and reasonable way and should not dwell on the minor details.[81]

SECTION 69

This section manages appeals on point of law. It is a non-mandatory section which implies that the parties can consent to reject the right to appeal. This right to appeal is also mentioned under Art 35(6) of the ICC rules 2017 and also under Art 26.8 of the LCIA Rules 2014. It is relevant to point out that under the Model law, there is no such provision.[82]

Appeal only lies when parties agree to do so or by leave of the court and the court may grant such leave only on the grounds as mentioned under subsection 3. The fundamental prerequisite for court fulfillment is that there is an issue of law emerging out of the award and the question must be of English law. The restrictions on filing an application under this section are the same as section 67 & 68 (mentioned above). The court will grant permission to appeal if it is satisfied that the question of law will influence the privileges of one of the parties included, the question ought to have been raised before the tribunal, the tribunal's finding isn't right and the question included ought to be one of public importance.[83]

IMPACT OF BREXIT

London seated arbitration stays exceptionally well known. Picking a London-seated arbitration agreement gives the "comfort" of settling the dispute under the supervisory purview of the English Courts however with the implementation advantage of the New York Convention.
London would hold a large number of the qualities as a seat: the arbitration law, and the role and attitude of the courts, would stay unaffected by withdrawal from the EU. The Act enshrines a sound perceived leverage between the arbitral council and the court. The role of English court under the act takes into account restricted however supportive intervention and there are a huge number of cases which show practically speaking the consolidated qualities of the act and this pro-arbitration frame of mind. English arbitration law and practice have prospered to a great extent free of the UK's participation of the EU and not as a result of it.[84]

CONCLUSION

The above discussion clearly demonstrates that the major factors favouring London to be the most preferred seat for arbitration are the pro-arbitration approach of the English Law providing support to party autonomy, freedom to contract, confidentiality advantages, minimum

80 [2006] 1 AC 221
81 Supra n.18, pp.337
82 Nathan Searle , Tom Mylrea-Lowndes & Alice Jowitt (Hogan Lovells International LLP) Challenging the award under section 69 of the English Arbitration Act 1996: appeal on point of law, pp.2
83 Ibid, pp.2-21
84 Vanessa Naish, Brexit: Implications for London as a seat of arbitration?, Practical Law, 2016, pp. 2- 3

interference of court and many more. There is a good harmony between the arbitration council and courts and the role of courts in England is supportive rather than supervisory. The arbitral tribunal is bound to follow procedures that would avoid unnecessary delay or expense. The arbitrators are under a duty to be impartial and are obligated to disclose any conflict of interest to the parties to the arbitration. The English law focuses on impartiality and has mandatory provisions under the act, not available in many other countries. Further, the law lays emphasis on impartiality and not on the independence of the arbitrator. High enforcement of the arbitral award under the English Law is one of the most significant reasons for selecting London as the seat for arbitration. The grounds for challenging the award are extremely narrow and there is a judicial resistance in setting aside a final award passed by the arbitral tribunal

BALANCING THE PRINCIPLES OF INTERNATIONAL LAW ON ACQUISITION AND MANAGEMENT OF TERRITORY IN THE POLAR REGIONS WITH COMPETING RIGHTS OF SOVEREIGN STATES, INDIGENOUS PEOPLES AND THE NEED FOR ENVIRONMENTAL PROTECTION: WILL COOPERATIVE FOUNDATIONS ENDURE?

Elana Kaymer

INTERNATIONAL LAW, TERRITORY AND SOVEREIGNTY

International law fundamentally hinges on the concept of a state which is in turn defined by 'sovereignty'. Sovereignty is the process by which the state demonstrates supremacy internally via its organisation of governmental institutions, and in an external forum as a legal entity.[1] This is linked to holding territory over which a state exercises its exclusive power; it may be physical land and/or the adjacent waters and airspace. Judge Huber, in the seminal *Island of Palmas* case, noted that 'sovereignty [concerning] a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state.'[2] Territorial sovereignty is essential when evaluating international law's effectiveness as states must be capable (in theory at least) of implementing regulations. Domestic constitutions may limit the hierarchy of international law until ratified according to the entrenched formal rules of the state (as in the USA's requirement of two-thirds of Senators in favour), and whilst this potentially obstructs international law generally, it emphasises the need to respect the territorial integrity of states. Indeed, international law may be broadly characterised as aiming to uphold integrity against other states' imposition, which inherently involves recognising individual states' sovereignty. If the wider international community disagrees with the state's sovereignty over the territory, then delimiting borders is irrelevant. Expansions in the Polar regions must, therefore, consider any international laws and/or accepted methods to avoid conflict and be effective.

International law reflects contemporary political conditions, and the Polar regions are unique in the type and speed of physical changes caused by climate change. This has led to conflicting interests whereby citizens and governments have myriad opinions regarding economic exploitation of natural resources increasingly exposed due to melting ice. These must be balanced with environmental protection and consideration of the earth as a common rather than state heritage. Acquiring territory has a twofold process where ownership assumed by practice leads to a jurisdictional change, automatically affecting inhabitants. This is arguably more prevalent

1 Malcolm Shaw, *International Law* (Cambridge University Press, 2017) 361
2 *Netherlands v* USA [1928] Reports of International Arbitral Awards (2) 838

in the Arctic where permanent Indigenous populations exist, whereas Antarctica is largely uninhabited by humans. Yet consideration of international law involving human rights is linked to acquisition in both areas, as impacting one area of the world is being proven to have far-reaching ramifications for the present and future quality of life relating to climate change.

One difference often cited between domestic and international territorial ownership is that the former has local criteria to fulfil making ownership absolute, whereas the latter considers broader claims in light of the characteristics of the territory and sovereign power before granting titles.[3] The international principles of occupation and prescription evince this, and whilst those methods have historically been applied in recognising the Arctic and Antarctic states, in contemporary extensions of territory, international law may seem an exception to such relativity. This is due to the objectively technical criterion regarding extensions of continental shelves.[4] As will be explored, the reality surrounding recommendations by the Commission on the Limits of the Continental Shelf (CLCS) in the Arctic suggests an increasing international appreciation for shared responsibilities that may restrict the acquisition of territory. However, the existence of an accepted method to acquire Arctic sovereignty presents an ostensible difficulty between any cooperation achieved to match the level envisioned by the legal forum in Antarctica for the sake of peace and science.

2. TERRITORY IN THE POLAR REGIONS

The regions' physical compositions have commonalities apart from the rest of the world, yet differences between the Poles make the rules of territorial acquisition more convoluted. This creates factual and legal barriers to applying international law in identical ways and demonstrates a need for flexibility. Antarctica is usually defined as a permanently uninhabited continent surrounded by an ocean. Contrastingly, the Arctic is an ocean, partly permanently frozen and almost entirely encircled by inhabited landmasses of Canada, Norway, Russia, Denmark (via Greenland), Iceland, Sweden, Finland and the USA. However, as Powell and Dodds acknowledge, stringent definitions can be artificial, and understanding the application of international law requires an appreciation that various lines are drawn and imposed on maps and counter-maps;[5] international law must strive to find workable boundaries. International law recognises two types of territory that are particularly important here, the first being *terra nullis,* which is without a sovereign and can be acquired following established principles. This seemingly applies in the Polar regions, yet the debate is complicated by increasing claims for the oceans – and their resources - in particular, to remain *res communis*. This concept refers to territory incapable of being made sovereign because it is a common heritage thus cannot be 'owned'.

In Antarctica, the territory has widely been termed *res communis*, demonstrated by the halting of sovereignty claims under Article IV of the Antarctic Treaty which entered into force in 1961.

3 Shaw, *International Law* 370
4 United Nations Convention on the Law of the Sea [1982] Part VI
5 Richard Powell, and Klaus Dodds, (eds.) *Polar Geopolitics? Knowledge, Resources and Legal Regimes* (Edward Elgar Publishing, 2014) 17

The treaty, which has 54 states party to it, confirms that previously asserted claims cannot be compromised by subsequent actions of states (including those of the claimant) in Antarctica, but also declares that 'no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica, shall be asserted while the present Treaty is in force.' Thus, the majority of Antarctica should remain *res communis*, and although the force of the treaty is somewhat unstable since it remains only for as long as signatory states uphold it, there does seem global recognition that the land should not be exploited through sovereignty.

Initially, politics seemed intrinsically connected to the increasing self-establishment of States in the region during and after the Second World War, exemplified in 1943 by Argentina claiming territory already disputed by Britain and Chile and climaxing with an exchange of fire by Argentinian ships in Hope Bay above the heads of a British survey team in 1952. Similarly, in 1950 the USSR refused to accept any claimant's sovereignty when making their claims. Ultimately, a diplomatic apology for the Argentinian fire was issued, and the USSR's action was an important spur in the Treaty negotiations, demonstrating an international awareness of the political stakes in recognising more sovereignty in the area. Remarkably, the Treaty satisfied the original eight states in its manifesto to prevent international discord even as the Cold War was developing; there has never been a war in the area and Article I explicitly requires that 'Antarctica shall be used for peaceful purposes only'.

The dual purpose of the Treaty to enable scientific research is tightly interlinked with early sovereignty claims such as the UK's permanent occupation of the area in the South Shetland Islands around 1944 which aimed to simultaneously frustrate enemy activity and collect scientific data.[6] It is thus unsurprising that Article II advocates 'Freedom of scientific investigation in Antarctica and cooperation toward that end', whilst Article III provides for parties to ensure that 'to the greatest extent feasible and practicable:

(a) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations;

(b) scientific personnel shall be exchanged in Antarctica between expeditions and stations;

(c) scientific observations and results from Antarctica shall be exchanged and made freely available.'

This has been expanded by particular conventions such as the 1972 Convention for the Conservation of Antarctic Seals which prevents the killing of Ross and Antarctic seals and sets low, sustainable limits for catching other species. Specifically, the Protocol on Environmental Protection to the Antarctic Treaty which entered into force in 1998 consolidated and enhanced the acknowledgment of Antarctica as a unique area with 'aesthetic and scientific value'. Maintaining these values should be the 'fundamental consideration' of any activities there (Article III), and international disputes should be arbitrated (Articles XVIII to XX). Indeed, the economic advantage gained from tourism which arguably makes both regions particularly attractive for sovereignty is mitigated by Article VIII's requirement for environmental assessments related to

6 Anon. 'History of the Territory', (*British Antarctic Territory*) <https://britishantarcticterritory.org.uk/heritage/history-of-the-territory/> accessed 10 February 2020

activities including tourism.

The success of states overcoming political pressures to utilise a legal system for cooperative scientific and environmental research suggests that a similar system could work in the Arctic, especially since there has been little practical conflict over claims. The Arctic Council consisting of the eight sovereign states in the area, whilst not a legal entity, declares itself a 'high-level forum intended to provide a means for promoting cooperation among Arctic states […] in particular issues of sustainable development and environmental protection.'[7] Additionally, the status of the permanent participants of indigenous groups for consultation will be considered as a supporting mechanism to allow those most affected by environmental concerns to advocate for necessary protection. This implies that the states have similar interests which would voluntarily limit the acquisition of territory, yet the USA's insistence on a footnote preventing interference in security matters effectively limits the Council to matters unconnected to border disputes. Therefore, imposing such restrictive management upon any territory already sovereign is harder compared to the relative ease in Antarctica.

3. THE BACKGROUND OF LEGAL OWNERSHIP AND JURISDICTION IN THE ARCTIC

The foundation for existing Arctic cooperation regarding territorial acquisition is the United Nations Convention on the Law of the Sea (UNCLOS) which came into force in 1994 and covers all global waters. Through these existing regulations, Arctic claims may be limited and arguably suffice to prevent claims escalating uncontrollably. Antarctica is noted by Clote[8] as an 'inexact parallel' since it is 90% inaccessible and not covered by detailed international sea law, making a separate treaty more necessary. Moreover, the Arctic contains far more hydrocarbon and mineral resources, increasing its economic value; Article VII of the Protocol on Environmental Protection to the Antarctic Treaty prohibits activities relating to mineral resources other than for scientific research. Added to the varying composition of the interested states and connected political considerations of advancing their industries, – particularly in the USA and Russia – this factor contributes substantially to the opposing priorities. Ultimately some Arctic states are more preoccupied with acquiring territory than with environmental issues.

Acquiring Arctic territory is almost entirely subsumed within the Law of the Sea as recognised by ratified states. States can obtain either full sovereignty over the entire waters and their resources, or a more limited power over an Exclusive Economic Zone where resources are theirs, but the surface is open for international use. Beyond this are the 'high seas', internationally recognised as an entirely common heritage for use and navigation. However, the various categorisations of sea ice make the application more difficult, particularly in relation to criminal law as raised by

7 Anon., Declaration on the Establishment of the Arctic Council (1996), at <http://www.arcticcouncil.org/establ.asp>

8 Parker Clote, 'Implications of Global Warming on State Sovereignty and Arctic Resources under the United Nations Convention on the Law of the Sea: How the Arctic is no Longer Communis Omnium Naturali Jure', (2008) 8 *Richmond Journal of Global Law & Business* 195, 234

Sale.[9] Ice on land has the same status as the land itself, thus the rules of what may be acquired are straightforward. Shelf ice occurs almost exclusively in Antarctica; glaciers reach the sea then flow as a mass across it but are treated generally as land. Comparatively, fast ice occurs where the frozen sea attaches itself to land and has been previously considered an 'attribute' of land; sovereignty extends to having jurisdiction for crimes committed on it as in a case where Canada prosecuted an Inuit murderer.[10] Park ice is found away from the land such as icebergs, and the conviction of Mario Escamilla[11] for murder performed on an ice island demonstrated the complexity in this area. Whilst at the time of the crime the ice was in Canadian territorial waters, the persons involved were Americans. The island originally started its journey in Alaska, so it was declared a 'vessel', allowing the USA to claim sovereignty and legal jurisdiction. However, the matter was not settled conclusively – one could posit political reasons as a factor influencing the Canadians to relax their claim - and obtaining full sovereignty via territorial acquisition may still be compromised by the presence of ice previously attached to another state's territory.

Another connected issue is the rights of Indigenous Arctic peoples who have inhabited and used the ice and surrounding waters for centuries. Most Arctic lands were not 'discovered' by European settlers but expropriated from tribes; in 1867 Russia sold Alaska to the USA even though it was not theirs to cede under international law. This has been addressed in a compensatory treaty in 1968, whilst in Canada, the Nunavut Treaty eventually recognised the appropriate sovereignty. The Inuit received title to 20% of the land together with partnership in all water and wildlife management.[12] Irrespective of this domestic system, Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) rules that Indigenous peoples must grant 'free and informed consent before the approval of any project affecting their lands or territories and other resources', and their role has been enhanced as permanent participants within the Arctic Council. A paper commissioned by Senator Charlie Watt highlights the importance of the Arctic sea for the Inuit as their uses of ice 'are vital components of their definition of home, Inuit culture, identity, and survival as a people.'[13] As such, even where territory is gained, international law imposes potential limits on state exploitation of resources where they affect Inuit interests. This will be analysed further in the context of applying UNCLOS below.

UNCLOS AND THE EXTENDED CONTINENTAL SHELF

Article 77 of UNCLOS states that coastal states have sovereignty over their continental shelf to explore it and exploit its natural resources. However, defining one's continental shelf is subject to evolving technical and complex rules to acquire territory this way, including a time limit of submissions to the CLCS of ten years post-ratification. Before the Second World War, states

9 Richard Sale, *The Scramble for the Arctic: Ownership, Exploitation and Conflict in the Far North* (Frances Lincoln Publishers Ltd., 2009) 139

10 Ibid, 140

11 Kara Kovalchik, 'True Crime: Murder on an Arctic Ice Floe' (*Mental Floss,* 22 July 2009)<http://mentalfloss.com/article/25261/true-crime-murder-arctic-ice-floe> accessed 10 February 2020

12 Tony Penikett, 'An Unfinished Journey: Arctic Indigenous Rights, Lands, and Jurisdiction?' (2015) 37(4) *Seattle University Law Review* 1127, 1134

13 Senator Charlie Watt, *Setting out Canada's Obligations to Inuit in respect of the Extended Continental Shelf in the Arctic Ocean* (Hutchins Legal Inc., 2015) <http://www.hutchinslegal.ca/wp-content/uploads/2019/07/Paper-Inuit.pdf> 9

enjoyed sovereignty over narrow territorial waters of a maximum of four nautical miles. However, in 1945, President Truman declared that 'the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States'[14] were subject to USA jurisdiction and control. This started the trend towards determining the shelf 's outer limit as a method of territorial acquisition. Other states began expanding what they considered their shelf, culminating in the United Nations United Nations General Assembly resolution 1105 (XI) of 21 February 1957 recognising the need for an international convention to codify and take into account 'not only the legal but also technical, biological, economic and political aspects' of sea-based territorial disputes. Article 1 of the 1958 United Nations Continental Shelf Convention defined the shelf as:

'(a) the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.'

This effectively allowed states to extend their claimed territory according to the ability to exploit resources, going beyond the common geophysical definition. As technology expanded, so too could territory to the point where the entire ocean floor could theoretically be owned.[15] Arvid Paro, the contemporary Maltese ambassador, proposed instead that the ocean floor remains under international law as *res communis*; resources could be shared rather than reserved for coastal states' citizens. This counterargument strongly influenced the adoption of the 1982 UNCLOS which explicitly states in Part XI that the 'Area' (sea-bed, ocean floor, and subsoil beyond national jurisdiction) should be the common heritage of mankind such that claims or exercising of sovereignty will not be recognised.[16]

Boundary interpretation has been extremely important in international law and often involves technical issues where old treaties ceding territory between states are disputed due to new geographical data. Article 31 of the 1969 UN Vienna Convention on the Law of Treaties declares that treaties should be interpreted following 'the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose'. This may be contested where treaties predate the Convention, but it ultimately demonstrates the legal aim to find common intention. The 1999 *Botswana v Namibia* case upheld this whereby Judge Higgins noted that in determining the 'main channel' of the River Chobe, the Court should not purely assess it from modern understanding but 'decide what general idea the parties had in mind, and then make reality of that general idea through the use of contemporary knowledge.'[17] The Convention only binds ratified states; its scope is not necessarily limited by those who have not ratified, for example, the USA, as they recognise its power as binding customary law. Yet the principles of its application cannot be directly transplanted where new claims arise without extant treaties.

14 Proclamation 2667 (1945) <https://www.gc.noaa.gov/documents/gcil_proc_2667.pdf> accessed 10 February 2020, 67

15 Timo Koivurova, 'Power politics or Orderly Development? Why are states 'claiming' large areas of the Arctic seabed?', *International law: Contemporary issues and future developments* (Routledge, 2011) 366

16 *UNCLOS*, art 137

17 *Kasikili/Sedudu Island, Botswana v Namibia* [1999] ICJ Rep 1045, 1114

UNCLOS has an ostensibly more rigid system to define what constitutes the shelf 's outer limit. This may be partially due to awareness that international law benefits from clarity; where previous treaties exist law must recognise freedom of states to cede and/or gain territory privately. Considering that oceans cover 71% of Earth's surface,[18] new claims involving them must be tightly regulated to avoid conflict and detrimental effects on other citizens, all of whom rely on water as a central life source quite apart from economic implications.

UNCLOS has objective definitions and an independent body to judge the accuracy of submissions, yet Brekke emphasises the distinction between geoscientific definitions and those adopted by international law.[19] Geo-science views the continental margin as the seafloor between the continent's coast and the deep ocean floor at around 4000-6000 metres below sea level.[20] This leaves the shelf as the shallow area of 100-400 metres adjacent to the coast before the slope occurs. Contrastingly, Article 76(1) defines the entire shelf as the 'natural prolongation of its land territory to the outer edge of the continental margin' or 200 nautical miles from the baselines of the territorial sea; the wider legal meaning may encompass the entire margin. This allows countries the most advantageous application for maximum territorial gain. The somewhat opposing stances on sovereignty expansion within UNCLOS may be explained by an awareness that in reality states would not ratify or obey overly restrictive conventions - hence the common theory as to the USA's disengagement - even as it attempts to protect some common heritage via cooperation. The attempt to compromise is evident in Article 76(5) which restricts the outer limit to less than 350 nautical miles from the territorial sea baseline or 100 nautical miles from the depth of 2500 metres.

POLITICAL, ECOLOGICAL AND HUMANITARIAN IMPLICATIONS OF UNCLOS

UNCLOS undoubtedly clarified acquisition rules but has been criticised for ignoring the complexity of seafloor topography in the Arctic[21] with multiple ridges and elevations. Whereas the former is restricted exclusively to the 350 nautical miles from the baseline limit, submarine elevations that are 'natural components of the continental margin' follow the same rules as Article 76(5). Yet UNCLOS fails to clearly describe the difference between the two, meaning that if the major ones are accepted as elevations, this would place most of the Eurasian and Amerasian Basins under state jurisdiction; recognising just the Lomonosov Ridge would substantially extend the territory of Russia, Greenland, and Canada.

However, the CLCS does not automatically accept extension claims without regard for future overlapping submissions. Russia's 2001 submissions regarding the Bering and Barents Seas were only to be declared following Norway and USA's submissions. This perhaps undermines its own

18 Anon., 'Aqua Facts' (*Hawai'I Pacific University Oceanic Institute*) <https://www.oceanicinstitute.org/aboutoceans/aquafacts.html> accessed 10 February 2020

19 Harold Brekke, 'Defining and recognizing the outer limits of the continental shelf in the polar regions', *Polar Geopolitics? Knowledge, Resources and Legal Regimes* (Edward Elgar Publishing, 2014) 40

20 Ibid, 42

21 Ibid, 47

authority, as although clear time limits exist, those who ratified UNCLOS later seem unaffected, lowering the incentive for adherence. Indeed, upon ratification, the USA will advantageously make submissions with knowledge of neighbouring states' claims and successes. Moreover, the CLCS refused to consider the Sea of Okhotsk in Russia's general submissions given the ongoing dispute with Japan. This suggests respect for other international legal methods of territorial acquisition where states negotiate treaties, recognising that international law binds solely to the extent of acceptance; disputes in the Arctic may require this mixture of processes. The Russo- Norwegian agreement on the Barents Sea border demonstrated this, ending 40 years of disputes by dividing the territory equally. It also considered the specific geological composition by allowing the joint management of hydrocarbon resources. Whilst this could be dismissed as a bilateral agreement separate from the application of international law, it is more usefully seen as exemplifying the complex reciprocal process occurring in Arctic territorial acquisition whereby UNCLOS promotes cooperation. This necessarily involves state-specific legal agreements.[22] This peaceful result is particularly impressive given the 2007 controversy when Russia planted a flag at the North Pole, catalysing rumours that a 'scramble for the Arctic' had begun. In the 15th and 16th centuries, international law had considered discovery sufficient for territorial acquisition, but this was later qualified by the need for proof of effective control, i.e. a symbol of occupation. As the Canadian Foreign Minister pointed out: 'this isn't the 15th Century. You can't go around the world and just plant flags and say "We're claiming this territory"'.[23] Yet Russia never claimed that this was a symbol of occupation; rather they respected the authority of UNCLOS, abiding by its codified rules of acquisition.

Once UNCLOS has been applied to the territory, it is arguable that there would be little respect for the environmental uniqueness of the Arctic without the Arctic Council working in tandem with states. The formation of the Arctic Council in 1996 plays an important role in managing how UNCLOS established territory is used by facilitating international agreements. It was designed as a 'high-level forum intended to provide a means for promoting cooperation among Arctic states […] on common Arctic issues, in particular issues of sustainable development and environmental protection.'[24] Whilst partly traditional in composition with the states as decision-makers (Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, the USA), it is notable that the Council did not exclude the interested parties of indigenous groups. There are currently six indigenous organisations with permanent participant status, intending to provide a voice to those particularly affected by state activities in those areas. This multilateral approach is crucial given the global ramifications of changes in the region, as well as the localised effects on indigenous communities. The status of indigenous peoples in this forum has been emphasised by growing appreciation in international legal fora for their rights to self-determination, as recognised in Articles III and IV of UNDRIP. Indeed, the Inter-American Court of Human Rights recognised in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No.

22 Anon., 'Delimitation agreement: A new era in the Barents Sea and the Arctic?' (*Arctic Forum Foundation*) <http://eu-arctic-forum.org/allgemein/delimitation-agreement-a-new-era-in-the-barents-sea-and-the-arctic/> accessed 10 February 2020

23 Koivurova, 'Power politics or Orderly Development…', 340

24 Declaration on the Establishment of the Arctic Council (1996), <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/arctic-arctique/declaration_ac-declaration_ca.aspx?lang=eng>

79 (Aug. 31, 2001):
'A fundamental theme in the definition of indigenous peoples is how they relate to the land […] One must understand that the land is not a mere instrument of agricultural production, but part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those peoples are linked.'

The indigenous population of the Arctic, comprising the Inupiat, Inuvialuit, Yupik and the Aleut in Alaska, the Inuit in Canada and Greenland, as well as various groups across other states, thus have a right to engage with the Arctic states as an exercise of their self-determination. Intriguingly, even as UNCLOS attempts an objective approach to the acquisition of territory, indigenous peoples acquire their rights through recognition of their 'legally invisible' connection to the land; they do not fit within typical classes of ownership. Rather, their inclusion on the Council recognises the nuance that they 'tend to live lightly on the land, and thus do not produce through their lifestyles the kind of evidence of dominion that European-rooted cultures are willing to recognize as worthy of legal protection.'[25]

The role of permanent participants gives indigenous peoples almost equal rights as state members, except for decision making. However, this may be raised relative to the significance of the decision on their living conditions, and, notably, they were fully engaged with the processes leading to the first two legally binding instruments produced by the Council of the Arctic Search and Rescue (SAR) Agreement adopted in May 2011, and the 2013 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic. The introduction to the latter explicitly recognised the value that indigenous peoples can provide in terms of resources and knowledge for preventing and responding to marine oil pollution. This is mirrored by the Iqaluit Declaration in 2015 in paragraph 5 where the interested parties reaffirmed their 'commitment to consult in good faith with the indigenous peoples concerned […] recognizing interests of all Arctic inhabitants.' The intertwined nature of their lifestyle and the environment means that such recognition is essential for the continued existence of these communities. This is the case particularly with extractive projects, as those groups can be disproportionately impacted because of 'existing social and economic disadvantages they commonly experience as a result of a long history of land dispossessions, marginalisation and discrimination within the states.'[26]

The permanent participant status thus seems to be a more effective legal mechanism to ensure the protection of individuals in the region – and, by extension, the environment itself – than 'free, prior and informed consent' via UNDRIP. Whilst a fundamental procedural requirement, the success of that process ultimately relies on the engagement afforded to the group to raise alternative options and manage the preparation and mitigation processes which are more flexible than the baseline involvement in the Council. As Tomlinson notes, 'the strength of Indigenous

25 Peter Manus, 'Sovereignty, Self-Determination, and Environment-Based Cultures: the Emerging Voice of Indigenous Peoples in International Law' (2003) 23 Wisconsin International Law Journal, 553

26 Kathryn Tomlinson, 'Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC' (2017) 23(5) International Journal of Human Rights < https://0-www-tandfonline-com.wam.city.ac.uk/doi/full/10.1080/13642987.2017.1314648?scroll=top&needAccess=true > accessed 10 February 2020

governance institutions and processes, as well as the capacity support they receive' is fundamental in this and could arguably not be guaranteed outside of the Council mechanism to such a high degree.

5. CONCLUSION

Territorial claims are restricted in Antarctica via an international Treaty respecting the preservation of the environment in the area at the expense of territorial sovereignty and unrestricted exploitation. The Arctic, too, is subject to international law under UNCLOS which effectively prevented conflict over territorial expansion through ostensibly fair and clear mechanisms. Even if current plans for an international treaty to conserve the high seas come into force before the CLCS releases its recommendations, unless the former is legally prioritised and completely halts the acquisition in those areas, the Arctic Ocean will be almost entirely under state sovereignty. Rising voices for restriction of mineral exploitation in the region, along with increased respect for indigenous rights and the need for consent, may infringe on freedom of use even where expansion is accepted. Ultimately the Arctic Council would be required to engage with such issues and develop legally binding management conventions; hopefully, states' mutual considerations will prioritise protection and self-determination.

'COMBATING YOUTH OFFENDING: A SHORT-TERM SEDATION?'

James Gilroy

Dear Editor,

For generations, youth crime has persisted to plague our justice system with over 70,000 occasions of lawbreaking every year, as over 14,500 first time young offenders, annually, plummet into the depths of delinquency.[1] Whilst teen knife crime mounts astronomical figures[2], the anxieties instigated by adolescent crime habitually haunts the British taxpayer for, in excess of, £10 billion a year.[3] In order to achieve the overriding ambition of *"prevent[ing] [young] offending"*, this author opines that a microscopic review of the devices currently adopted to tackle the epidemic of youth violence must be undertaken, whilst, confronting the beating heart and catalysts that force youngsters to transgress, head on.[4]

With £2.5bn recently proposed by the Chancellor to be advanced into HM Prison Service over the next 3 years, the executive upholds a robust bearing on knife and gang crime.[5] Whilst there may be a desire for a retributive style of administration, founded on individual accountability, obliging offenders *"to get what they morally deserve"*[6], this author recognises the statutory duty to protect the *"welfare"*[7] of young offenders. Custodial sentences currently degenerate over 95% of young offenders with at least one affliction of the mind, postulating supplementary damage to delinquents, already vulnerable, mental wellbeing.[8] Therefore, this author believes the antidote to delinquency, in reality, lies in preclusion, rather than further investing into incarceration.

Instigated by the Criminal Justice Act 1988, Youth Offender Institutions were introduced as rehabilitative residences for offenders, aged between 15 and 21.[9] However, the culture of
hard justice within Youth Offender Institutions is one which seemingly inflames delinquents ambition to rebel against the fabric of society, compelling over *70%* of imprisoned young people to reoffend within a mere year of custodial discharge.[10] Thus, it is questioned whether Youth

1 Ministry of Justice, 'Youth Justice Statistics: 2017/18', (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774866/youth_justice_statistics_bulletin_2017_2018.pdf> (Accessed 18th October 2019) p20.
2 Ibid p24.
3 Committee of Public Accounts, 'The youth justice system in England and Wales: Reducing offending by young people' (HC 2010-11, 721-I) p3.
4 s.37(1) Crime and Disorder Act 1998.
5 Ministry of Justice Press Office, '10,000 extra prison places to keep the public safe' (2019) <www.gov.uk/government/news/10-000- extra-prison-places-to-keep-the-public-safe> (Accessed 19th October 2019).
6 J Maki, 'Why Juvenile Justice Advocates Shouldn't Ignore Retribution' (2014) <jjie.org/2014/02/12/why-juvenile-justice-advocates- shouldnt-ignore-retribution/106296> (Accessed 19th October 2019) p6.
7 s.44(1) Children and Young Persons Act 1933.
8 S Campbell and S Abbott, 'Same Old... the experiences of young offenders with mental health needs' (2013) <www.bl.uk/collection-items/same-old---the-experiences-of-young-offenders-with-mental-health-needs> (Accessed 19th October 2019) p4.
9 s.123 Criminal Justice Act 1988.
10 Ministry of Justice, 'Youth Justice Statistics: 2017/18' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774866/youth_justice_statistics_bulletin_2017_2018.pdf> (Accessed 18th October 2019) p65.

Offender Institutions invoke an 'academy of crime', facilitating offenders in honing their craft before being released back into civilisation. This is exhibited by review conducted by Chief Inspectorate of HM Prisons, Peter Clarke, in which a 45% rise in violent incidents over a six-month period was documented, with over 700 instances of in-house violence recorded within one month of assessment.[11]

The Youth Offender Institution Rules 2000 provide the aim of the institution is to *"prepare [offenders] for their return to the outside community"* with an all-encompassing agenda, embracing activities targeted at supporting an offender's liberation.[12] This author questions the efficacy of such a pledge. Reports have concluded that delinquents appetite to be educated has been *"restricted"* due to the lack of time spent unrestrained by four cell walls.[13] Moreover, the atmosphere of such institutions appear to be counter conducive to a programme of self-improvement, inhibiting the exercise of the statutory duty obliging *"proper provision"* to be made for a young person's training and education.[14] However, as Professor Francis Cullen acknowledged, incarceration does shelter the public by providing transient relief from offenders, seemingly muzzling their actions for a brief spell, before release.[15]

In recent months, the executive has broadened the scope for 'stop and search' powers, by advising police officers not to follow the voluntary guidance accompanying *s.60 Police and Criminal Evidence Act 1984*. Reducing the standard of certainty required to the statutory minimum, allowing police officers to demand an examination of anyone within a designated area, if they *"reasonably believe"* serious violence *"may"* transpire.[16] This author doubts the effectiveness of such expansion, as research has indicated that widespread stop and search *"alienat[es]"*[17] young people and creates an atmosphere in which civic members feel *"over-policed and under-protected"*[18]. Furthermore, the utilisation of expansive powers has seen an increase in discriminative searches across the country, with ethnic minorities forty times more likely to be ordered to turn out their pockets.[19] Thus, acting to the contrary of the duty to *"eliminate discrimination"* detailed within the Equality Act 2010.[20] Conversely, it is argued that empowering officers with enriched

11 HM Chief Inspector of Prisons, 'Urgent Notification: HMYOI Feltham A' (2019) <https://www.justiceinspectorates.gov.uk/hmiprisons/wpcontent/uploads/sites/4/2019/07/22july-SofS-Urgent-Notification-FelthamA.pdf?> (Accessed 19th October 2019) p4.
12 s.3(1) Youth Offender Institution Rules 2000.
13 HM Chief Inspector of Prison, 'Report on an unannounced inspection of HMYOI Cookham Wood' (2017) <www.justiceinspectorates.gov.uk/hmiprisons/wpcontent/uploads/sites/4/2019/04/Cookham-Wood-Web-2018.pdf> (Accessed 20th October 2019) p22.
14 s.44(1) Children and Young Persons Act 1933.
15 F Cullen, 'Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science', (2011) 91 The Prison Journal 48 p51.
16 J Brown, 'Police stop and search powers' (Briefing Paper 3878, 2019) p17.
17 Equality & Human Rights Commission, 'Stop and think, A critical review of the use of stop and search powers in England and Wales', (2010) <https://www.equalityhumanrights.com/sites/default/files/ehrc_stop_and_search_report.pdf> (Accessed 19th October 2019) p73.
18 D Tucker, 'Prison increases youth knife-crime reoffending says police report', (2019) <https://www.theguardian.com/uk- news/2019/apr/27/prison-increases-youth-knife-crime-reoffending-says-police-report> (Accessed 19th October 2019) para14.
19 Home Office, 'Equality Impact Assessment: Relaxation of s.60 conditions in the Best Use of Stop and Search Scheme' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839765/Section_60_Equality_Impact_Assessment_July_2019.pdf?> (Accessed 19th October 2019) p5.
20 s.149(1)(a) of the Equality Act 2010.

authority has the power to prevent the undertaking of imminent violent offending, in the short-term. However, the Home Office asserts that alterations to stop and search have, in practice, had negligible effects on tackling crime.[21]

In conclusion, this author implores the reader to consider whether existing measures are effective in eradicating youth crime, entirely, from the streets of Britain. Such measures do not drive far enough in tackling the causative root which plunge young people into transgression. This author opines that the recommendation by Charlie Taylor, substituting Youth Offender Institutions with a scheme of 'secure schools', focussing on both education and reformation, has the power to infuse aspiration into adolescents, both, from turbulent, and economically deprived backgrounds.[22] Additionally, research has proven that referral orders also have the ability to reduce the reoffending rate almost in half, achieving societal reintegration with an emphasis on education.[23] However, HM Inspectorate of Probation recognised that referral orders have not been applied consistently, due to failing to tailor *"personalised and meaningful"* plans to offenders, guaranteeing their reform.[24] Yet this author believes it is conceivable that such disquiet shall diminish with the introduction of updated guidance on issuing these orders. It is thought education, as both a rehabilitative and a preclusive measure, can squash youth law-breaking in totality. Once youth crime is tackled curatively without palliative sedations, this author considers that our streets can conclusively be freed from the shackles of the young offending, forevermore.

Yours faithfully,

James Gilroy
A City, University of London Student

21 Home Office, 'Equality Impact Assessment: Relaxation of s.60 conditions in the Best Use of Stop and Search Scheme' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839765/Section_60_Equality_Impact_Assessment_July_2019.pdf?> (Accessed 19th October 2019) p8.

22 C Taylor, 'Review of the Youth Justice System in England and Wales, Ministry of Justice' (Cm 9298, 2016) p36.

23 HM Inspectorate of Probation, 'Referral orders - do they achieve their potential?' (2016) <https://www.justiceinspectorates.gov.uk/hmiprobation/wpcontent/uploads/sites/5/2016/07/Referral-orders-do-they-achieve-their-potential.pdf> (Accessed 29th January 2020) p15.

24 Ibid p5.

"HUMAN FLYTIPPING": SHAMIMA BEGUM AND THE PROBLEM OF STATELESSNESS

Alice Baxter

ABSTRACT

The case of Shamima Begum came to national attention in early 2019 when Home Secretary Sajid Javid made the decision to revoke her British citizenship, despite Begum having been born in the UK and having only British nationality. The Home Secretary argued that Begum was eligible for Bangladeshi citizenship, and that because of this the decision would not make her stateless. Commentators are divided not only on whether this decision is ethical, but whether it is even legal. Following Shamima Begum's appeal of the Home Secretary's decision, the question remains as to whether she has been made stateless and, if so, whether this is legal. International law such as the 1961 UN Convention on the Reduction of Statelessness prohibits making an individual stateless, but with exceptions; the British Nationality Act 1981 shows that UK law too makes similar, but not identical, provisions. Yet even if making someone stateless is forbidden, the Begum case shows that what 'statelessness' itself means is far from a settled question. Can mere eligibility for a citizenship prevent someone from being stateless? Can someone become de facto stateless even if they have legal citizenship? This article will explore the different definitions of statelessness, whether they apply in Shamima Begum's case, and whether the UK should ever be able to make a British-born citizen stateless under its own and international law.

Laws on statelessness have existed - both in the United Kingdom and internationally - for decades, but the recent case of Shamima Begum has brought the issue to public attention more than ever. Yet despite extensive media coverage of the Begum case, the question of what exactly constitutes statelessness, and whether it is ever legally permissible to make someone stateless, has eluded a simple answer.

This article hopes to shed light on the topic, and will aim to assess UK's laws on the deprivation of citizenship - and their compatibility with the international framework - through the lens of Begum's case. This will not involve a thorough investigation of the individual facts of Shamima Begum's actions in Syria, of Bangladeshi citizenship law, or of the other issues involved in her appeal. Instead, our purpose is to examine whether the Special Immigrations Appeal Commission (SIAC) was correct in finding that Shamima Begum has not been made stateless, what this decision means for UK law more generally, and whether current law on statelessness does enough to protect individuals or whether - in the words of Begum's solicitor - it amounts to "human flytipping".[1]

1 Mattha Busby, 'Shamima Begum would face death penalty in Bangladesh, says minister' (The Guardian, 1 May 2019) <https://www.theguardian.com/uk-news/2019/may/04/shamima-begum-would-face-death-penalty-in-bangladesh-says-minister> accessed 29 February 2020.

THE CASE OF SHAMIMA BEGUM

The main question at hand in Shamima Begum's appeal[2] was whether the Home Secretary's order to revoke her citizenship had the effect of making her stateless. To better understand this question, some factual background is essential. Shamima Begum was born in the UK to parents of Bangladeshi origin.[3] She held British citizenship by birth, by virtue of her father having Indefinite Leave to Remain in the UK at the time of her birth;[4] there is no evidence that she has ever visited Bangladesh or speaks Bengali,[5] although it is true that any child under the age of 21 with a Bangladeshi parent may apply for *jus sanguinis*, citizenship by descent.[6] In February 2015, Begum travelled to Syria with two of her school friends, intending to join ISIL;[7] once in Syria, she married a Dutch-national ISIL fighter and had three children, all of whom died in infancy. She was discovered by journalists from the Times in February 2019, living in al-Hawl refugee camp after the fall of the ISIL caliphate;[8] and after threats on her life she was moved to al-Roj refugee camp in north-eastern Syria.[9]

Following her rediscovery, on 19 February 2015 the then Home Secretary, Sajid Javid, sent notice to Begum's family and subsequently issued an order depriving Begum of her British citizenship.[10] The reasoning given by the Home Secretary was that, "The Security Service considers that an individual assessed to have travelled to Syria and to have aligned with ISIL poses a threat to national security".[11] On 19th February 2019 Begum lodged an appeal against the order depriving her of citizenship,[12] arguing - amongst other things - that the order had made her stateless in a way illegal under British law. On 7th February 2020 SIAC handed down a judgment deciding that the deprivation order did not leave her stateless,[13] on the grounds that she was entitled to apply for citizenship of Bangladesh, and thus that she held citizenship there as of right.[14]

Whether Begum is realistically able to obtain Bangladeshi citizenship is, however, far from certain. Although, currently aged 20, she should legally be able to apply for citizenship by descent in Bangladesh,[15] there would be substantial hurdles for her both while applying for citizenship and once in the country. The Foreign Minister of Bangladesh, Abdul Momen, said of her case that: "We have nothing to do with Shamima Begum. She is not a Bangladeshi citizen. She never applied for Bangladeshi citizenship. She was born in England and her mother is British. If anyone is found to be involved with terrorism, we have a simple rule: there will be capital punishment. And nothing else. She would be put in prison and immediately the rule is she should be hanged."[16]

2 Begum v Secretary of State for the Home Department [2020] UKSIAC SC/163/2019, [2020] All ER (D) 43 (Feb).
3 Begum [2020] UKSIAC SC/163/2019, [2020] All ER (D) 43 (Feb) [12].
4 ibid.
5 ibid.
6 ibid [55].
7 ibid [13].
8 ibid [14].
9 ibid [15].
10 ibid [16].
11 ibid [16].
12 ibid [17].
13 ibid [192].
14 ibid [121].
15 ibid [55].
16 Mattha Busby, 'Shamima Begum would face death penalty in Bangladesh, says minister' (The Guardian, 1 May 2019) <https://www.theguardian.com/uk-news/2019/may/04/shamima-begum-would-face-death-penalty-in-bangladesh-says-minister> accessed 29 February 2020.

Not only does this state equivocally that Begum is currently not a Bangladeshi citizen, but it also demonstrates that, were she to gain citizenship there and attempt to enter the country, she may well be under imminent threat to her life.

This view is supported by an article written by Mr Shah Ali Farhad, a Special Assistant to the Prime Minister of Bangladesh, who argues that the Bangladeshi government cannot be compelled to grant citizenship to anyone, including Shamima Begum, since "citizenship by descent is not an automatic right, it needs to be granted by the government".[17] As a result, he argues, the argument that Begum would be able to obtain Bangladeshi citizenship is "clearly misplaced under the laws of Bangladesh".[18]

What seems clear is that, in practice, it is doubtful whether Begum could claim Bangladeshi citizenship; in any case, the fact that the Bangladeshi government has discretion over whether to award citizenship calls into question the idea that Begum can be said to *have* citizenship merely because she is eligible to *apply* for it. With Begum's connection to Bangladesh so tenuous, and the country's officials themselves displaying such a hostile attitude towards her admittance, protection from Bangladesh does not look likely. It is no wonder that her family's solicitor, Tasnime Akunjee, described the Home Secretary's reliance on her ability to gain Bangladeshi citizenship as equivalent to "human flytipping"[19]: the British government has abrogated the responsibility owed to Begum as a citizen, and has laid that responsibility at the foot of Bangladesh, a country to which she has had no real link in her lifetime. As a result, Begum is left in practice without the assistance of any state.

To assess whether the UK's actions have amounted to 'human flytipping' - a strong and evocative term, to be sure - we must assess whether they have complied with international and national law on statelessness and, furthermore, whether this body of law itself is adequate. To begin with, we shall review the international agreements that form the basis of statelessness protections. Statelessness in international law

International policy on statelessness derives mainly from two United Nations Conventions: the 1954 Convention Relating to the Status of Stateless Persons,[20] and the 1961 Convention of the Reduction of Statelessness.[21] These both set legally binding prohibitions on de jure statelessness[22]

- defined as where "a person…is not considered as a national by any State under the operation of its law".[23]

Yet these Conventions are not binding for all stateless persons. The United Nations recognises de facto stateless persons - those who "no longer enjoy the protection and assistance of their national

17 Begum [2020] UKSIAC SC/163/2019, [2020] All ER (D) 43 (Feb) [71].
18 ibid [72].
19 Mattha Busby, 'Shamima Begum would face death penalty in Bangladesh, says minister' (The Guardian, 1 May 2019) <https://www.theguardian.com/uk-news/2019/may/04/shamima-begum-would-face-death-penalty-in-bangladesh-says-minister> accessed 29 February 2020.
20 Convention Relating to the Status of Refugees (adopted 28 July 1954, entered into force 22 April 1954) 189 UNTS 137 (1954 Convention).
21 Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (1961 Convention).
22 Katja Göcke, 'Stateless Persons', *Max Planck Encyclopedia of Public International Law* (August 2013) paras 11-12 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e878> accessed 31 October 2019.
23 1954 Convention, art 1.

authorities",[24] although they may technically be nationals of a state under the operation of its law - as being one category of stateless persons, but the Conventions do not apply to them in any binding way.[25] The most the Convention does for those who are de facto stateless is to encourage states to extend to them the protections for the de jure stateless.[26]

This traditional dichotomy between de jure and de facto statelessness does not fit easily into the case of Shamima Begum. SIAC has held that Begum is not de jure stateless,[27] but international definitions of de facto statelessness do not readily describe her situation either. SIAC's judgment seems to argue that Begum is de jure a citizen of Bangladesh; following this argument, de facto statelessness would stem from receiving no effective state protection from Bangladesh. Yet early UN reports described the de facto stateless as people who *no longer* receive protection from a state,[28] and Begum has never received protection of any kind from Bangladesh, and has never been treated as its citizen. In a similar vein, the Final Act of the 1954 Convention describes the de facto stateless person as one who "has renounced the protection of the State of which he is a national".[29] Although Begum could be argued to have renounced the protection of the UK by leaving the country in order to join ISIL, this is far from clear; certainly she cannot be said to have expressly renounced the protection of Bangladesh, a country that has never provided her with the protection afforded to a citizen. But in a meaningful sense, Begum does seem to be stateless - certainly, no state will currently accept responsibility for her as a citizen.

The UK is a signatory to both UN Conventions, and thus these form the framework behind British law on statelessness and deprivation of citizenship more generally, to which we will now turn. The UK adopts the UN definition of statelessness[30] as its own;[31] as we shall see, then, all that is protected in British law is de jure statelessness, and this has important ramifications for Shamima Begum.

DEPRIVATION OF CITIZENSHIP IN BRITISH STATUTE

Deprivation of citizenship in the UK is governed primarily by s 40 of the British Nationality Act 1981, which sets out the provision by which Begum was allowed to be deprived of her British citizenship.

Deprivation of citizenship: British Nationality Act 1981 s 40(2)

The Home Secretary's order was made under s 40(2) of the British Nationality Act 1981, which generally allows for an individual to be stripped of their nationality if "the Secretary of State is satisfied that deprivation is conducive to the public good."[32] Whether the deprivation of her citizenship is conducive to the public good was not the main point of contention in Begum's appeal, but it is worth addressing briefly here.

It is likely that the order could fulfil the criterion of being 'conducive to the public good'.

24 UN Ad Hoc Committee on Refugees and Stateless Persons, 'A Study of Statelessness' (1 August 1949) E/1112; E/1112/Add.1.
25 Katja Göcke, 'Stateless Persons', *Max Planck Encyclopedia of Public International Law* (August 2013) paras 11-12 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e878> accessed 31 October 2019.
26 1954 Convention, Final Act; 1961 Convention, Final Act.
27 Begum [2020] UKSIAC SC/163/2019, [2020] All ER (D) 43 (Feb) [192].
28 UN Ad Hoc Committee on Refugees and Stateless Persons, 'A Study of Statelessness' (1 August 1949) E/1112; E/1112/Add.1.
29 1954 Convention, Final Act.
30 ibid, art 1.
31 *R (on the application of MK) v Secretary of State for the Home Department* [2017] EWHC 1365 (Admin), [2017] Imm AR 1425 [14]; *KV (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483, [2018] 4 WLR 166 [28].
32 British Nationality Act 1981, s 40(2).

In giving notice of the deprivation order, the Home Secretary gave as the reason that it was considered that she may pose a threat to national security.[33] Even if her history of ISIL affiliation were not enough to pose a real present danger, British courts have previously held past behaviour alone can be enough to make a deprivation order to be conducive to the public good. In *Pham v. the Secretary of State for the Home Department*,[34] the court held that it can be sufficient that an individual has in the past "so fundamentally repudiated the obligations which he owes as a citizen"[35] that he can be said to have renounced his citizenship. There is certainly an argument to be made that willingly joining ISIL - an organisation that claims statehood for itself and that has made attacks on the UK in the past - is "repudiating the obligations"[36] of loyalty expected of a British citizen.

International law corroborates that states can have the ability to rescind citizenship for citizens that have acted against the interests of the state or that have expressed allegiance to another state. The 1961 Convention establishes that a citizen may even be made stateless for acting in a manner prejudicial to the interests of the State, or repudiating allegiance to the State and acting in affiliation with another.[37]

Thus, this provision aligns with the international framework by which the UK is bound.

The above details the general rule for depriving an individual of citizenship; an important caveat exists, however, in the case of statelessness.

Statelessness: British Nationality Act 1981 s 40(4) and s 40(4A)

s 40(4) of the statute asserts that a deprivation order cannot be made if it would render an individual stateless.[38] As we have established, this applies to de jure, and not de facto, statelessness. Yet even within the realm of statelessness, the British Nationality Act 1981 does retain one set of circumstances under which it is acceptable to deprive an individual of their nationality. Under s 40(4A), the Home Secretary must be satisfied of the following before issuing an order with the effect of making someone stateless:

(a) the citizenship status results from the person's naturalisation,

(b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and

(c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.[39]

This caveat is understandably very limited, only allowing an individual to be made stateless if they were not a British citizen at birth and if they could gain a citizenship outside of the UK, even

33 Begum [2020] UKSIAC SC/163/2019, [2020] All ER (D) 43 (Feb) [16].
34 *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, [2019] 4 All ER 199. 35 ibid [52].
36 ibid.
37 1961 Convention, art 8(3).
38 British Nationality Act 1981 s 40(4).
39 ibid, s 40(4A).

if it were proven that they were acting against the vital interests of the UK. Such a rule, while no doubt setting a double standard between natural-born and naturalised citizens, should not be relevant in the case of Shamima Begum, who was a British citizen by birth. Yet Begum may well meet the other requirements of s 40(4A): the Home Secretary clearly believes the deprivation of her citizenship is conducive to the public good, and there is reason to believe that she is legally able to claim citizenship from Bangladesh.

Moreover, the wording of s 40(4A) seems to run counter to the way in which Begum's SIAC appeal was decided. The section states that an individual can be made stateless if they are eligible to claim citizenship elsewhere: the very fact that this is possible suggests that a person who, like Begum, is merely eligible for citizenship, will be stateless.

Does the judgment in the SIAC appeal, then, provide an example of s 40(4A) being applied to a natural-born citizen in practice? Great mental acrobatics were used in the judgment to explain why Begum's potential eligibility for citizenship meant she already possessed citizenship, despite the law itself leaving discretion to the government and not conferring an automatic right to naturalisation. With such dubious arguments being used to defend a ruling, it is worth asking whether Begum is really being treated as a naturalised citizen, with all the lesser protections that entails.

Contrasting this decision with other recent decisions where statelessness has been at issue may help to address this.

DEPRIVATION OF CITIZENSHIP IN BRITISH CASE LAW

The SIAC judgment concludes that Begum's eligibility for Bangladeshi citizenship means that she has not been left stateless. Put simply, this would mean that the ability to apply for the citizenship of a country would equate to being a citizen of that country. Understandably, this is a contentious point, and is contradicted even within the case law of England and Wales.

Eligibility for citizenship as entailing citizenship

On the one hand, various cases have affirmed that the ability to claim citizenship of a country does not amount to actual citizenship until registration of that citizenship has taken place. In a comparable case to Begum's, the court held that a child whose parent was an Indian citizen, but who was born outside of India and had never visited India themselves, would not be an Indian national unless registration of this had taken place.[40] Similarly, in *The Secretary of State for the Home Department v. Al-Jedda,*[41] the court held that the relevant criterion in establishing statelessness is what citizenship the individual actually holds at the time of the deprivation order, not what citizenship they could conceivably apply for.[42] The Home Office itself acknowledged in its own guidelines, as recently as 2013, that nationality is "neither an historic nor a predictive exercise"[43] - surely, then, Begum's eligibility for Bangladeshi citizenship should not prevent her from being de jure stateless?

And yet other cases have seemed to argue that eligibility for citizenship does preclude individuals from claiming de jure statelessness. In *R (on the application of KV) v. the Secretary of State for*

40 *R (on the application of MK) v Secretary of State for the Home Department* [2017] EWHC 1365 (Admin), [2017] Imm AR 1425 [36].
41 *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62, [2014] AC 253. 42
ibid [32].
43 UK Border Agency, 'Applications for leave to remain as a stateless person - Guidance' (1 May 2013), adapted from UNHCR, *Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons* (20 February 2012), HCR/GS/12/01 [43].

the Home Department,[44] it was held that it may "be relevant to the exercise of discretion"[45] to take into the account the ability to acquire nationality when deciding whether an individual is stateless.

Yet, this case refers to a naturalised citizen, who clearly comes within the ambit of the British Nationality Act s 40(4A), whereas Ms Begum does not.

Perhaps a more serious hurdle is presented by the case of *B2 v. the Secretary of State for the Home Department*,[46] according to which even a statement of the executive that an individual cannot gain citizenship in their country does not prove that individual's statelessness.[47] This chimes with the Begum case, where Foreign Minister Momen issued a statement to the effect of saying that Shamima Begum was not welcome in Bangladesh;[48] if such a statement, combined with a tangible fear of persecution, imprisonment, or execution upon entering the country, does not serve to make her stateless under the law, then there are perhaps bigger problems at play.

SIAC used *B2* as precedent in Begum's case to argue that government discretion was not relevant to the question of citizenship,[49] but perhaps these cases should rather be distinguished on the facts. These particular two cases could in fact be explained by the applicants' citizenship status: the applicant in *KV* was a naturalised citizen, and the applicant in *B2* had previously held Sri Lankan citizenship. As these were naturalised British citizens, and s 40(4A) could theoretically be engaged, all that truly needed to be found in these cases is that eligibility. If so, the alternative line of cases, in which eligibility does not equate to actual citizenship, would seemingly be more pertinent to Begum's case. Let us not forget that - as discussed above - the wording of s 40(4A) itself suggests that eligibility does not equate to citizenship. Such an analysis of the competing cases would resolve their differences by reference to the statute itself, and would yield the conclusion that Begum does not in fact have Bangladeshi citizenship and is, therefore, stateless. *Deprivation of citizenship where there is a risk of torture, persecution, or death*

However, even if we do not accept this argument and maintain that Begum has not been made stateless, there may be a further avenue which could remain open to Begum to retain her citizenship. The case law supports the idea that British citizenship cannot be removed where it would lead to the individual being deported to a country where they would face torture, persecution, or other such treatment. *X2 v Secretary of State for the Home Department*,[50] for example, specifically gives the following example: if an individual detained in a second country would be deported to a third country, and tortured there, were they to be deprived of British citizenship, then they should not be so deprived.[51] *KV*, too, states that an individual cannot be sent to a country where they would face persecution for the sake of gaining citizenship there.[52]

44 *KV (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483, [2018] 4 WLR 166. 45
ibid [28].
46 *B2 v Secretary of State for the Home Department* [2013] EWCA Civ. 616, [2013] 5 WLUK 676. 47 ibid
[92-96].
48 Mattha Busby, 'Shamima Begum would face death penalty in Bangladesh, says minister' (*The Guardian*, 1 May 2019) <https://www.theguardian.com/uk-news/2019/may/04/shamima-begum-would-face-death-penalty-in-bangladesh-says-minister> accessed 29 February 2020.
49 Begum [2020] UKSIAC SC/163/2019, [2020] All ER (D) 43 (Feb) [24].
50 *X2 v Secretary of State for the Home Department* [2017] UKSIAC SC/132/2016 [50] 51
ibid, [135].
52 *KV (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 2483, [2018] 4 WLR 166 [49].

In light of the statements made by Bangladeshi officials such as the Foreign Minister and Mr Farhad, it is clear that there would be a significant risk of poor treatment for Shamima Begum, were she to be deported to Bangladesh. The Foreign Minister has specifically alluded to the fact that she could be executed - a danger at least as severe as torture or persecution. SIAC's response to this argument was to claim that there was no real risk of Begum being returned to Bangladesh,[53] and so this was not an issue - yet in doing so it seemingly acknowledged that Begum is outside the protection of any home state and so, at the very least, stateless in the de facto sense of the word.

CONCLUSIONS

The essential questions are these: has Shamima Begum been made stateless, in either a de jure or a de facto sense of the word? And what does the answer to this first question tell us about the adequacy of the current law on statelessness for protecting vulnerable individuals?

Whether Begum has been made de jure stateless is arguable, and a conclusive answer would depend on a more expert analysis of her status 'under the operation of Bangladeshi law' than this article can provide. Yet it is arguable that a body of British law[54] suggests that eligibility for citizenship in another country should not equate to citizenship of that country itself, and so that Begum should be considered de jure stateless.

This notwithstanding, it seems beyond doubt that Begum has been made de facto stateless. Both the UK and Bangladesh, the only two countries of which she could plausibly claim citizenship, have denied responsibility for her; as a result, she is currently trapped in Al-Roj camp in Syria, the conditions of which are so 'squalid' and 'wretched' that they would violate Article 3 of European Convention of Human Rights.[55] Clearly, then, Begum meets the United Nations' definition of de facto statelessness, as she is unable to "enjoy the protection and assistance of [her] national authorities"[56] to escape such human rights breaches and poor living conditions.

Thus, if we take the judgment by SIAC against Begum's appeal to be correct, what does this tell us about the state of law on statelessness? We have seen that rules precluding de facto statelessness are not binding, either internationally or nationally within the UK. That people can, in practice, be left without the protection of any state may well strike us as a flaw of the system, and it certainly seems to be contrary to the intention of these laws. The Final Acts of both the 1954 and 1961 UN Conventions urge states to afford the protections contained within them to the de facto stateless, and the British Nationality Act 1981 recognises an obligation on the UK government to reduce statelessness.[57] Such statements are important, but in truth they do not do enough to ensure protection for all stateless people. Recent cases have shown an awareness of this, and judges have advocated for the Conventions to be amended to ensure states are compelled to make their protections binding for all de facto stateless people.[58]

It seems clear that this area constitutes a gap in international law, which governments at present

53 *Begum* [2020] UKSIAC SC/163/2019, [2020] All ER (D) 43 (Feb) [133].

54 Cf. *R (on the application of MK) v Secretary of State for the Home Department* [2017] EWHC 1365 (Admin), [2017] Imm AR 1425 [36]; *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62, [2014] AC 253 [32]; 2013 HO guidelines; the implications of the British Nationality Act 1981 s 40(4A).

55 *Begum* [2020] UKSIAC SC/163/2019, [2020] All ER (D) 43 (Feb) [130].

56 UN Ad Hoc Committee on Refugees and Stateless Persons, 'A Study of Statelessness' (1 August 1949) E/1112; E/1112/Add.1.

57 British Nationality Act 1981 s 36; British Nationality Act 1981 Schedule 2.

58 *B2 v Secretary of State for the Home Department* [2013] EWCA Civ. 616, [2013] 5 WLUK 676 [91].

may exploit to rid themselves of citizens they consider troublesome - may 'flytip' by laying the responsibility owed to their nationals at other countries' feet. The UK government has evaded responsibility in the case of Shamima Begum, and recent reports suggest that there have been attempts to leave British citizens de facto stateless even where they do not pose a threat to national security.[59] This is stark evidence that mere statements of intention to protect all stateless persons are not enough. British and international law must be extended to de facto stateless persons if we are to truly protect ourselves from the threat of human flytipping.

59 Jon Stone, 'Home Office finally lets British man sleeping on streets in Europe come home - but charges him £100' (Independent, 13 February 2020) https://www.independent.co.uk/news/uk/home-news/fatush-lala-british-man-europe-uk-home-office-sleeping-streets-a9334781.html> accessed 29 February 2020.

IN LIGHT OF THE RULING IN SHELL UK LTD V TOTAL UK LTD [2010] EWCA CIV 180, CAN A BENEFICIARY, JOINED BY HIS OR HER TRUSTEE, RECOVER FOR FORESEEABLE CONSEQUENTIAL ECONOMIC LOSS

Imogen Todd

ABSTRACT

This is an essay examining the enforceability of rights under a trust. The essay concludes that a beneficiary's right under a trust is a proprietary right to a right. The extent that the right to a right will be enforceable is determined by factors such as: whether a positive or negative obligation is sought; absolute beneficial ownership; and, the proximity between the beneficial and legal owner. The effect of this conclusion on the case discussed (Shell UK Ltd v Total UK Ltd [2010] EWCA Civ 180) is that a beneficiary can legally claim for foreseeable consequential economic loss regardless of their legal or possessory title over the trust assets.

FACTUAL BACKGROUND TO *Shell UK Ltd v Total UK Ltd* [2010] EWCA CIV 180

In December 2005, a series of fires and explosions occurred at the Buncefield Oil Storage Terminal. The event was caused by the negligent overfilling of a fuel storage tank. Shell claimed against Total for the destruction of their property and loss of profits. Total accepted liability for the former but not for the latter on the basis that '...only a legal owner or someone with an immediate right to possession has the right to claim damages for economic loss as the consequence of damage to property'.[1] The issue here is that Shell had neither legal title (which was vested in their trustees) nor an immediate right to possession of the property. In essence, Shell could not recover full damages because the damaged property was the subject matter of a trust to which Shell was not a trustee.

LEGAL BACKGROUND TO *Shell UK Ltd v Total UK Ltd* [2010] EWCA CIV 180

The trustees, United Kingdom Oil Pipelines Ltd (UKOP) and West London Pipeline and Storage Ltd (WLPS), cannot independently claim for the consequential economic loss, because they derived no benefit from holding legal title over Shell's property and so suffered no loss from the explosion.[2] The other beneficiaries need not be joined in this action because Shell's interest is as a co-beneficial owner with an attributable proportion of the trust assets.[3]

1 *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180 [5].
2 James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 LQR 66, 67.
3 see *Hunter v Moss* [1994] 1 WLR 452.

The general rule is that pure economic loss cannot be claimed for.[4] There are many exceptions to this rule. The relevant exception is presented by Lord Brandon in *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (Aliakmon)* [1986] AC 785, 809:

> "*in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have had only contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.*"[5]

To satisfy the *Aliakmon* rule, the relationship between the claimant and the damaged property must be more than merely contractual. Total claimed that Shell had a merely contractual right to have their fuel loaded into, carried and discharged from the pipelines.[6] Waller LJ rejected this as the contractual right was incidental to a greater interest which Shell held in the property, namely their beneficial ownership.[7] In order to ascertain whether Waller was correct in his judgment, one has to consider: what is the nature of the beneficiary's interest in the trust asset? If Shell does have beneficial and legal title, the *Aliakmon* rule will apply. The rationale behind this is that a contractual interest is not enforceable by third parties, whereas a proprietary title has the scope to bind third parties: '...persistence of rights in a thing against third parties is the hallmark of the property idea'.[8] In the present case, Shell did not have a possessory title because a third party, British Pipeline Agency, was the party handling the goods and consequently held the possessory title at the time of the explosion.

In *Aliakmon*, Mr Anthony Clarke QC argued that the beneficiary alone should be able to claim for loss or damage to the trust property negligently caused by a third party. Lord Brandon's reply was that the beneficiary must either have possessory title or join the holder of the legal title in the action.[9] One reason for requiring Shell to join UKOP and WLPS would be to avoid 'double recovery'.[10] But blindly accepting this is too simplistic and risks categorising the trustee-beneficiary relationship as 'sausage-meat'.[11]

AGAINST WHOM/WHAT IS *Shell's* BENEFICIAL INTEREST ENFORCEABLE?

The origin of the debate over whether a beneficiary's interest is proprietary is best described by Ming Wai Lau:

> *"...the debate was reduced to a narrow technical question: is the beneficial interest a right in rem or a right in personam? Maitland argues that the beneficial interest does not bind the bona fide purchaser and cannot possibly be a right in rem, therefore it must be a right in personam. Scott tries*

4 *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27. 5
Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (Aliakmon) [1986] AC 785, 809, 2. 6
Shell (n 1) 11.
7 ibid.
8 Paul Matthews, 'The Comparative Importance of the Rule in Saunders v Vautier' (2006) 122 LQR 266, 4. 9
Leigh (n 5) 812.
10 Shell (n 1) 141.
11 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] UKHL 12 per Lord Browne-Wilkinson.

hard to salvage the situation by arguing that the beneficial interest's in rem attributes are indirect, but this does not hold as the whole point of an in rem right against the asset is that it is directly enforceable against others. Maitland wins the technical argument hands down, but we are still none the wiser about the nature of the beneficial interest".[12]

Two conclusions can be drawn. First, in order to understand whether a beneficial interest is proprietary, it must be ascertained against whom that interest is enforceable. Second, although Maitland wins the '*personam* vs *rem*' debate, his approach inadequately describes the interests held by the beneficiary.[13] It seems to me that the difficulty in defining a beneficiary's interest as 'proprietary' arises from two fundamental characteristics of a trust: the necessarily intermediary role of the trustee and the vulnerability of the beneficiary's interest against a bona fide purchaser. An alternative concept with support from many prominent academics, and myself, is the 'right to a right'. This notion of a 'right to a right' is explained by McFarlane and Stevens as follows:

"B's right is prima facie binding on anyone who acquires a right that derives from A's right... if by property we mean any right that is capable of binding a third party, there is such thing as equitable property". [14]

IS A RIGHT TO A RIGHT PROPRIETARY?

The main distinction McFarlane and Stevens draw between a right to a right and a right *in rem* is that the latter by definition binds third parties, whereas a right to a right is merely capable of doing so. The compromising nature of this definition, instead of resolving the conflict between the laws of property and obligation, has fomented it. Parkinson identifies the crux of the issue: property is fundamental to the trust but the beneficiary's control over the asset is dependant on the trustee fulfilling his or her obligations under the trust.[15] Penner accuses Smith, McFarlane and Stevens of using the concept of a 'right against right' to disprove the existence of beneficial ownership. He explains that their disposition to beneficial ownership '[…] lies in its suggestion that the beneficiary under a trust has a direct right to the trust assets, obscuring the interposition of the trustee'.[16] The ferocity of Penner's article makes it seem as though the two concepts - beneficial ownership and a 'right to a right' - are incompatible; this is deceiving.

Penner explains that the defect in the 'new obligational theory' rests on the assertion that '...the beneficiary's 'right to a right' is the right to the trustee's right to immediate, exclusive possession'.[17] He continues: 'What ownership is about is title... And since beneficiaries have the right that the trustee exercise his powers of title not for his own benefit but only according to the terms of the trust, it not only makes perfect sense to say that the beneficiaries are the beneficial owners of the title to the trust assets, it is essential.[18] Penner highlights an important detail. The definition

12 Ming Wai Lau, 'The Nature of the Beneficial Interest—Historical and Economic Perspectives': <http://ssrn.com/abstract=2213055> 3.

13 For example: '...purely personal obligations are not 'transmissible'...', and yet various successors in title are under an obligation to hold the received assets on trust for the beneficiary; JE Penner, The Law of Trusts (10th edn, OUP, 2016) [2.101].

14 Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1, 1.

15 Patrick Parkinson, 'Reconceptualising the Express Trust' (2006) 61 Cambridge LJ 657.

16 James Penner, 'The (True) Nature of the Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27 Can JL Juris 473.

17 ibid 484.

18 ibid 487.

of property is not fixed. Richard Nolan notes that proprietary terms will be defined differently according to the context in which their definition is sought[19] and emphasises the differences between their sense in equity and their sense at common law.[20] Penner correctly emphasises the beneficiary's enforceable right that the trustee exercise their rights over the trust asset in their favour.[21] The importance of this right is that it makes the beneficiary's interests in the trust property enforceable against third parties; because this right to title derives from the trustee's 'legal title', it is appropriately described as a 'right to a right'. However, a fundamental issue in this case remains unresolved: is it the relationship between the claimant and the trust property which binds third parties or the relationship between the trustee and the trust property?

I take the view that it is the relationship between Shell and the trust assets which bind the third parties for three reasons. First, if a trustee becomes insolvent, their trustee in bankruptcy has no claim over the trust assets.[22] Second, if the trustee acquires new assets from the trust assets, the beneficiary can claim those new assets.[23] Finally, and most persuasively, a "trust shall not fail for want of a trustee"[24]; if the proprietary interest is contingent on the trustee, then a trust should fail for want of a trustee - but it does not.

Richard Nolan recognises the trust as being a combination of the law of property and the law of obligation. He argues that every beneficiary has a multital[25] negative proprietary right to exclude non-beneficiaries from the trust asset and that the different rights which derive from the right to enjoy the trust asset are paucital. He describes these rights as 'paucital' in the sense that they are only enforceable against a small group of people, such as a non bona fide purchaser without notice of the trust. I believe Nolan's theory should be expanded. I concur that a beneficiary's rights to the enjoyment of the trust assets should only be paucitally enforced, but that the enforcement be based on the nature of the equitable interest which the beneficiary seeks to enforce and not limited to the nature of the third party they seek to enforce against. Shell's equitable interest in the assets was a negative obligation. Total owed a duty of care to Shell not to blow up the trust assets. Furthermore, the declaration of trust entitled Shell to absolute beneficial ownership. I believe this approach is necessary to respect the vast variety of trusts. As cautioned by McFarlane and Mitchell: '...there is a great diversity to the law of trusts ...care must be taken in making general statements that purport to apply to all forms of trusts'.[26]

NEGATIVE OBLIGATION

It seems obvious that a negative equitable interest can be proprietary under English law. This is clearly the implication of *Re Nisbet & Potts Contract* [1906] 1 Ch 12 (CA). In this case an adverse

19 Richard Nolan, 'Equitable Property' (2006) 122 LQR 232, 256.

20 Edelman (n 2) 74.

21 see *Re Brogden* (1888) 8 Ch D 436.

22 Ben McFarlane and Charles Mitchell, Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies (14th edn, Sweet & Maxwell, 2015) [17-004].

23 ibid.

24 ibid [17-076].

25 'Multital' is a term Richard Nolan uses to describe a right which relates to multiple people; as opposed to 'paucital' which only relates to two (or a few) parties.

26 McFarlane et al n (23) [17-020].

possessor was bound by a restrictive covenant. It was thought that '...when the old legal estate was destroyed all equitable estates fell with it'.[27] Following this logic, an adverse possessor should take the land free of any equitable interests, but that was not the result in that case. The reasoning for the judgment was that the person who benefits from a negative obligation does not assert his or her right unless it has been interfered with and that he or she is indifferent to who owns the property until it is used in an incompatible way. This notion is echoed by the idea that someone who receives legal title from a trustee - and is not a bona fide purchaser - to the trust assets is not immediately under a duty to carry out the terms of the trust but is under the negative obligation not to hold the assets beneficially for himself or herself. Penner explains that the logic behind this is the *nemo dat quod non habet* rule: because the benefit of the trust asset rests in the beneficiary and not the trustee, the trustee cannot delegate benefit.[28] Clearly, the duty not to blow-up other people's assets is a negative obligation and should be just as readily enforced as the proprietary equitable interest in a restrictive covenant.

ABSOLUTE BENEFICIAL OWNERSHIP

In *DKLR Holding Co (No2) Pty Ltd v Commissioner of Stamp Duties,* the settlor was the beneficiary and the declaration of trust granted the beneficiary the absolute beneficial ownership of the trust assets. The judge found that: 'Where the trustee holds absolutely for the beneficiary, the beneficiary has a right in equity to be put, so far as practicable and generally subject to appropriate indemnities being given, into a position where directly, or indirectly, or for all practical purposes, he enjoys or exercises the rights which the law has vested in the trustee.[29] Both in *DKLR* and this case,[30] the beneficiaries are acting as though no trust exists. The trust in this case was created so that the co-ownership of the assets would comply with s34(2) Law of Property Act 1925 which stipulates that maximum number of possible owners at law is four. The very purpose of the trust was to enable the beneficiaries to act as owners; the mere lack of possessory title should not reduce from this.

At [249] in *Saunders v Vautier*[31] it is noted that '...the fund was intended wholly for the benefit of the legatee...' and accordingly the beneficiary had a right to terminate the trust before reaching the age of 25. There is much interesting academic discussion on how this rule may demonstrate that a beneficiary's interest is proprietary.[32] Nevertheless, such discussion is not relevant here, because, as explained by McFarlane and Mitchell: 'It is, however, possible to recognise a collective power in all the beneficiaries of a trust to acquire the trust property in the future without admitting that each specific beneficiary has a current, individual, proprietary right.' Any application of the *Saunders v Vautier* rule would necessitate the termination of the trust which is irrelevant to the

27 *Re Nisbet & Potts Contract* [1906] 1 Ch 12 (CA).
28 Penner (n 12) 2.101.
29 *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1982] HCA 14.
30 ibid 18.
31 *Saunders v Vautier* (1841) 4 Beav 115.
32 Matthews and Tatiana Cutts, 'The Nature of Equitable Property: a Functional Analysis' (2012) 6 J Equity 44.

facts.[33] Shell cannot retrospectively claim possession of the assets in such a way which would grant them legal ownership or possessory title to the trust property at the time of the loss or damage.

PROXIMITY BETWEEN *Shell and Total*

A final consideration is whether there is a sufficient proximity between Shell and Total.[34] It is a well-established rule that a third party can be introduced to a contract by a trust. The case of *Vandepitte* presents the general rule: '...a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party'.[35] Shell has joined their trustee in this action and is a beneficiary of the performance of the contract. Total cannot claim to have no intention for their contract to cover losses incurred by Shell, because they were aware of the trust from the outset. If a clause in the contract restricted the trustees from granting a contractual benefit via a trust then Shell would hold no interest in that contract being performed.[36] To my knowledge, there was no such clause.

CONCLUSION

A trustee is under a personal obligation to handle trust property for the benefit of the beneficiary; and this obligation must be annexed to the property. As summarised by Jacob's Law of Trusts:

> '*The obligation attaches to the trustees in personam, but it is also annexed to the property so that the equitable interest resembles a right in rem*'.[37]

The result of this case may best be mirrored by the judgment in *R v Von Goetz.*[38] It was held: 'The doctrine in *Walsh v Lonsdale*, which is based on the equitable maxim that "equity looks on that as done which ought to be done" is that a specifically enforceable lease is as good as a lease. '[39] Shell's trust was an accessory to facilitate ownership, not to obstruct it. In this sense, Shell is the 'real' owner. With this in mind, it would be a 'triumph of form over substance' to treat Shell as if they had no proprietary interest in the property. And on the basis that property rights affect third parties, I reject the argument that Shell, joined with UKOP and WLPS, cannot claim for consequential economic loss.

33 *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882 889F. 34
Shell (n 1) 135.
35 *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70 (PC) 79.

36 see *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148.
37 *DKLR* (n 28).
38 *R v (Von Goetz) v Tower Hamlets London Borough Council* [1998] EWCA Civ 1507. 39
ibid 1024.

THE ISSUE OF AN ENHANCED RELIABILITY TEST IN EXPERT EVIDENCE SUBMISSIONS IN CRIMINAL PROCEEDINGS IN ENGLAND AND WALES AND NEW YORK

Mohindhar Doodnauth*

ABSTRACT

The use of expert evidence in criminal proceedings varies significantly between England and Wales and New York. As a result of the absence of an enhanced reliability test in England and Wales when submitting expert evidence in criminal proceedings; its submission has become an arbitrary tool for exploitation, often resulting in the miscarriage of justice. In contrast to this, New York has implemented and adopted an enhanced reliability test for submitting expert evidence in criminal proceedings; both at the state and federal level. The model set forth in New York serves as a template which the Law Commission in England and Wales has recommended to be implemented, to mitigate the challenges which expert evidence submissions presents in criminal proceedings under the current rules.

ESSAY

With the common law legal system being adversarial in nature, it rests upon the premise that evidence submitted before the court is reliable. In spite of this underlying position, the submission of expert evidence in criminal proceedings presents an intriguing challenge. This paper addresses—and contrasts—the current tests for the admission of expert evidence in criminal proceedings in England and Wales with that of New York, examining the disparity in approaches by each jurisdiction and illustrating the increased stability of the New York model in admitting expert evidence.

Generally, common law legal systems advocate the position that parties are required to submit evidence to counter opposing points relating to issues of law and fact.[1] Within this framework, it is recognized that opinion evidence cannot be considered as a cogent and reliable source, to sufficiently propose or oppose an issue, as it is believed that opinion evidence being advanced, could quite simply be bent to suit a subjective position of the defendant or plaintiff, rather than the objective point which the court seeks to draw out at trial.[2] The exception to this position, however, is with regard to expert evidence, where an issue before the court cannot be interpreted by the ordinary and reasonable man, due to its technical or specified nature. This requires the court to refer—and, in some cases, defer—to an expert's opinion.

1 *The author is an LLB graduate from the University of London, who is now pursuing his LLM at Fordham Law School in New York City and has a keen interest in evidence law. The author has written this essay through personal interest and hopes it will be an interesting analysis and comparison of how expert evidence is treated in England and Wales and New York. The author would like to thank Dr. Serene Lim for her constructive discussions in the execution of this paper.

Ray Finkelstein, 'The Adversarial System and The Search for Truth' (2011) Vol 37, No 1 Monash University Law Review <https://www.austlii.edu.au/au/journals/MonashULawRw/2011/8.html> accessed 29 August 2019.

2 Andrew L-T Choo, *Evidence* (Fifth Edition, Oxford University Press, 2018).

While the use of expert evidence would clearly aid the court in sifting through complex and technical issues at trial, by no means does it reduce the possibility of expert evidence being compromised due to its subjective nature, as with standard opinion evidence. As such, in utilizing expert evidence, it becomes imperative for an enhanced reliability test to be employed, to validate the expert evidence being submitted at trial. In addition to safeguarding against subjectivity, the implementation of an enhanced reliability test allows, more importantly, for the court to avoid being caught in a chokepoint; where potentially unreliable expert evidence is submitted at trial, influencing jury deference and leading to a miscarriage of justice.

In England and Wales, *R v. Turner* acknowledged the credibility of such risks, resulting in the common law admissibility test as a general requirement when counsel seeks to adduce expert opinion evidence.[3] The common law admissibility test outlines a four-limb approach:

(1) The matter in question is outside of the court's knowledge; (2) The expert witness must have relevant expertise on the matter; (3) S/he must be able to facilitate impartial evidence on the matter; and (4) The expert's opinion must be reliable and be part of an established body of knowledge or experience.[4]

While prima facie the implementation of this test appears to be a comprehensive means of regulating the admission of expert evidence, its application by the court highlights the challenges English and Welsh prosecutors face in criminal proceedings.

The shortcoming of the common law admissibility test is particularly noted with regard to the fourth limb, and the low threshold set by the courts via a laissez-faire application of the test. This low threshold results in the reliability requirement being easily satisfied, since the focus of the court lies with the skill of the expert, rather than the methodology employed in acquiring the expert evidence or its accuracy; essentially allowing experts to set the parameters of what can be regarded as reliable evidence themselves.[5] Additionally, even the court's approach of precisely defining who is an expert can be viewed as inadequate, since there is little consideration given to the expert's credibility and the quality of the report being submitted before the court.[6] Lord Justice Richards' comments on this was that,

"Whether the claimant is a good expert or not is neither here nor there. The quality of his report is neither here nor there. Whether he has overstepped the mark as regards the material deployed in his report is equally an irrelevant question for present purposes. These matters are not a sufficient basis for having ruled the claimant to be simply not competent to give expert evidence at all." [7]

This culminates to a point whereby as long as a field of study appears to be established on a scientific foundation, no further inspection is usually done or generally required by the courts to allow the evidence to be admissible.[8] As such, any novel field of study would be able to satisfy the admissibility test, as long as it can be shown that empirical studies have been conducted, even though it has not undergone any peer review process by the expert community to verify its

3 *R v Turner* [1975] QB 834 (CA).

4 Ibid.

5 *R v Silverlock* [1894] 2 QB 766 (CCCR).

6 *R (Doughty) v Ely Magistrates' Court* [2008] EWHC 522 (Admin). 7 Ibid [24].

8 *R v Luttrell* [2004] EWCA Crim 1344, [2004] 2 Cr App R 31.

accuracy.

This relaxed approach, in the absence of any statutory provision to establish an enhanced reliability test, has left English and Welsh courts committed to the low standard of ascertaining the reliability of expert evidence being submitted, and this has clearly had detrimental effects in the administration of justice.[9] The case of *R v. Dallagher* is a noted example of the court allowing the use of a novel division of forensic science, i.e., ear print analysis, which was not an established scientific field and had not undergone any peer review to verify its accuracy.[10] It was found that the expert's testimony was instrumental in securing a conviction against the defendant, by swaying the opinion of the jury. However, the use of ear printing analysis in this case was later discredited and found to be inaccurate and unreliable, causing a miscarriage of justice to have occurred, and the previous conviction to be overturned.[11]

The Law Commission, cognizant of this issue, raised concerns in its 2011 Report; citing the *Dallagher* case as a point of reference on just how a miscarriage of justice could occur, resulting from the court's low threshold requirement.[12] The Law Commission recommended that an enhanced statutory reliability test be implemented, to mitigate the risk of unreliable expert evidence and potential miscarriages of justice. The proposed test encompassed a two-limb analysis, whereby expert evidence had to be based on a scientific foundation and it must be supported by scientific underpinnings of other experts within the specific field.[13] As such, the Law Commission's recommendation would employ a holistic analysis of expert evidence including, not only the scientific basis of the evidence, but also practical factors such as the aspects of its procedure, rates of repetition by other experts in the field, and acceptance by the expert community.

Despite the Law Commission's recommendations, the Ministry of Justice rejected the establishing of an enhanced reliability test, citing cost concerns.[14] Alternatively, the Ministry of Justice found it more suitable to delegate to the Criminal Procedure Committee the responsibility of appropriately amending the Criminal Procedure Rules (CPR), as a mitigating response. The Criminal Procedure Rules as per the amendments in 2015, allowed the court to question whether expert opinion evidence being submitted was sufficiently reliable, rather than accept expert evidence solely on the basis that it was by an expert.[15] This amendment can be viewed as tepid, since it did represent an advancement in the scrutiny of expert evidence, but was ultimately undercut and regarded as inadequate, due to the court's inefficiency in enforcing the amended CPR.

A recent example of the laxity of the court post-CPR amendments was noted in the *Tsekiri* case, in which the defendant's DNA was found mixed with others at the crime scene, with the defendant's DNA being the major contributor of the DNA found.[16] While the expert's submissions that the

9 *R v Reed* [2009] EWCA Crim 2698, [2010] 1 Cr App R 23.
10 *R v Dallagher* [2002] EWCA Crim 1903, [2003] 1 Cr App R 12.
11 *R v Dallagher* [2002] EWCA Crim 1903, [2003] 1 Cr App R 12.
12 Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (Law Com CP No 325, 2011).
13 Ibid at para. 3.6.
14 Ministry of Justice, *The Government's Response to the Law Commission Report: Expert Evidence in Criminal Proceedings in England and Wales* (Cm 325, 2013).
15 Criminal Procedure Rules (Amended April 2018 and April 2019) 2015, Part 19.4.
16 *R v Tsekiri* [2017] EWCA Crim 40, [2017] 1 WLR 2879.

evidence demonstrated a high probability that the defendant was at the crime scene, the point of contention raised was that the court never sought to exercise the amended CPR and question the procedure of how mixed DNA was assessed differently from standard DNA analysis, and the accuracy of such results. Instead, the court was able to secure a conviction in light of such questions remaining unanswered, highlighting just how under-utilized the CPR amendments are by the court.

It is cases such as *Dallagher* and *Tsekiri*, which demonstrate the inadequate standard required for expert evidence to be submitted in English and Welsh criminal proceedings. If parties are given free rein to exploit expert evidence as a means of inducing jury deference and undermine the administration of justice, the integrity of the legal system is at risk. Moreover, the meager attempts by the Ministry of Justice of increasing scrutiny with the CPR modifications and the courts reluctance to efficiently utilize what limited measures have been extended, contributes to an overall risk which the legal system faces. In essence, the lack of an enhanced reliability test in England and Wales, poses a significant threat to the administration of justice and the rule of law.

In the state of New York, the use of expert evidence is influenced both at the federal and state levels. At the state level, New York generally adheres to the test of general acceptance outlined in *Frye v United States*, when determining if expert evidence being presented is admissible.[17] The *Frye* test examines whether the expert evidence which a party is attempting to introduce, is outside of the court's knowledge and is generally accepted as reliable by the relevant scientific community.[18] This entails that the court allow expert evidence to be admissible under the *Frye* test; given that it is shown to be beyond the ordinary man's understanding, and the expert evidence is beyond the experimental stages of analysis, and on its way to being sufficiently well established. For example, in *Frye*, when evidence on systolic blood pressure was attempted to be introduced, it was deemed inadmissible for failing to satisfy the general acceptance test. This was due to the fact that, while systolic blood pressure research at the time was scientific and clearly out of the court's understanding, it was not generally accepted by the health expert community in order to satisfy the test. [19]

On the other hand, the federal standard for admitting expert evidence has been more liberal and closely in line with that of the Law Commission's recommendations on how the English legal system ought to treat expert evidence submissions. The use of expert evidence at the federal level is governed by Rule 702, where if the court is not in a position to analyze scientific, technical or specialized knowledge, an expert with sufficient knowledge, experience, skill or training can provide appropriate assistance.[20] The U.S. Supreme Court in *Daubert v Merrell Dow Pharmaceuticals*, emphasized that Rule 702, while incorporating the *Frye* test as part of its analysis, ought to be more flexible than the *Frye* test, by taking into consideration a number of factors beyond merely the acceptance of the evidence by the relevant expert community.[21]

The U.S. Supreme Court explained that central to Rule 702, the trial judge would be the gatekeeper of expert evidence, where he/she would assess the relevance and reliability of the expert evidence sought to be adduced.[22] The trial judge would be under an obligation to consider factors such as the expert's technique in acquiring the evidence, the peer review done of the evidence, the potential rate of error, the standards and controls, and the general acceptance

by the expert community of the evidence being produced. [23] In this process, the court, unlike in England and Wales, would not allow the admission of expert evidence sparsely but would put a primacy on the role of cross examination of experts to ensure a degree of accuracy in the methodology, acceptance and reliability of the results of the evidence being introduced.[24] A good example of the court's approach of employing Rule 702 post-*Daubert* was seen in the case of *Bielskis v Louisville Ladder*, in which the expert evidence being submitted as pertained to defective scaffolding was struck down upon inspection by the trial judge, on grounds that the expert simply acquired his information via a Google search, rather than through an actual analysis and testing of the scaffolding.[25]

Despite the difference in approach between the *Frye* test focusing on the acceptance of the expert evidence by the expert community, and Rule 702 focusing on the methodology and other variables such as error rates, New York remains firm in adhering to the *Frye* test.[26] Justice Dwyer explained in *People v Collins* that in New York,

"…a court assessing the admissibility of evidence under Frye is not charged with deciding the validity of novel scientific procedures. It would hardly be sensible to assign that task to the judiciary, most of which is . . . patently unqualified to perform the task as is this court. Judges should be 'counting scientists' votes,' and not 'verifying the soundness of a scientific conclusion".[27] Essentially, Justice Dwyer finds it to be the case that the *Daubert* standard is inefficient as it requires judges to function as gatekeepers for evidence and to make appropriate assessments, which they are unqualified to do. Thus, he finds it more compelling that New York continues to adopt the *Frye* standard as expert evidence should be assessed by the relevant expert in a given field and not a judge.

In spite of Justice Dwyer's reasoning why New York should continue to utilize the *Frye* standard, it can be regarded as a rigid threshold to meet. As science develops, novel techniques and theories will emerge, which would become a challenge in presenting evidence before a court relying on the *Frye* standard, if the evidence must first have the approval by other experts before it is admissible. Therefore, the material risk of impeding and delaying the administration of justice by following the rigidity of the *Frye* standard outweighs the concerns raised by Justice Dwyer. It is here that Rule 702 has the advantage of flexibility, which the majority of states in the United States have realized and subsequently adopted as their standard of admitting expert evidence. As such, New York courts in the company of a minority of states adhering to the Frye standard would surely benefit from this flexibility should they be more open to employing the Rule 702 test, due to the broader analysis of the evidence being scrutinized.

Nevertheless, in contrasting the two jurisdictions, whether it is the *Frye* or *Daubert* standard, England and Wales clearly falls short when it comes to the standard required for admitting expert evidence. The arbitrary manner in which English courts allow expert evidence to be admitted out of "necessity", either in past cases prior to the CPR amendments and post CPR amendments,

23 Ibid at 593-94.

24 *General Electric v Joiner* 522 US 136, 149 (1997).

25 *Bielskis v Louisville Ladder Inc* 663 F 3d 887, 899 (7th Cir. 2011).

26 Lauren Aguiar and Sara DiLeo, 'An Analysis of the Frye Standard To Determine the Admissibility of Expert Trial Testimony in New York State Courts' (2017) <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=72206> accessed 29 August, 2019.

27 *People v Wesley* 83 NY 2d 417,439 (1994).

illustrates the significant threat to the rule of law if cases such as *Dallagher* and *Tsekiri* occur. In light of this, the interest of the court in utilizing expert evidence should be juxtaposed from that of necessity to reliability, as is demonstrated in New York with the *Frye* test of general acceptance, and the expansion brought about by Rule 702 and the *Daubert* case. A shift from arbitrarily allowing expert evidence out of "necessity", to one of submitting reliable expert evidence on appropriate grounds, would ensure that the objectivity of the court is not compromised and the rule of law is maintained.

Thus, in appreciating the contrasting circumstances in England and Wales and New York toward the submission of expert evidence, it is recommended that the Law Commission's suggestions of outlining and codifying an enhanced reliability test, akin at the very least to the *Frye* test, or ideally to Rule 702, be taken into consideration. This would facilitate a crucial plug in the existing loophole for admitting expert evidence in England and Wales, forcing the courts to forego the current lax approach and prevent *Dallagher*-type miscarriages of justice.

CONCLUSION

In conclusion, while expert evidence is a useful but contentious affair, the model adopted by New York demonstrates greater stability than the one in England and Wales. The use of expert evidence while being an asset to the court, cannot be readily available and abused arbitrarily as this would defeat the very purpose of expert evidence. Thus, a measure of control in the form of a reliability test is required to regulate its use, the likes of which New York has employed by utilizing the *Frye* test at the state level, and Rule 702 at the federal level. Therefore, in going forward it would be in the best interest of the English legal system to consider the Law Commission's proposal as well as emanate the initiative demonstrated by New York in establishing an enhanced reliability test to improve the admission of expert evidence.

LIST OF CASES

United Kingdom Cases

R v Dallagher [2002] EWCA Crim 1903, [2003] 1 Cr App R 12

R (Doughty) v Ely Magistrates' Court [2008] EWHC 522 (Admin) R v Luttrell [2004] EWCA Crim 1344, [2004] 2 Cr App R 31

R v Reed [2009] EWCA Crim 2698, [2010] 1 Cr App R 23

R v Silverlock [1894] 2 QB 766 (CCCR)

R v Tsekiri [2017] EWCA Crim 40, [2017] 1 WLR 2879 R v Turner [1975] QB 834 (CA)

United States Cases

Bielskis v Louisville Ladder Inc 663 F 3d 887 (7th Cir. 2011)

Daubert v Merrell Dow Pharmaceuticals Inc 509 US 579 (1993) Frye v United States 293 F 1013 (DC Cir. 1923)

General Electric v Joiner 522 US 136 (1997)

People v Wesley 83 NY 2d 417 (1994)

LIST OF STATUTES

United Kingdom Legislation

Criminal Procedure Rules (Amended April 2018 and April 2019) 2015

OBLIQUE INTENTION, MORAL ELBOW ROOM AND MENS REA IN MURDER

Robert Palmer

The *mens rea* requirement for murder is intention to kill or cause grievous bodily harm. The 'golden rule' established by *Moloney (1985)*[1] and reaffirmed in *R v Woollin*[2] compels judges to leave it to the 'good sense' of the jury to interpret the meaning of intention. It is generally conceived that the ordinary meaning of intention, and thus that which will be applied by the jury, is 'direct' intention. Death or GBH is taken to be directly intended if it is the purpose or desired end of the defendant's actions. This is to be contrasted with the special case of 'oblique' intention, in terms of which a judge may direct the jury when the harm was not directly intended but was a virtually certain consequence of the accused's actions. It was established by the House of Lords in *Woollin* that the jury is entitled (but not compelled) to find intention when death or serious injury was virtually certain to result from the accused's actions and they realised as much[3]. This has generated a great deal of debate around the legitimacy of such a conception of intention and its implications for the parameters of murder. The following discussion aims to demonstrate that a proper interpretation of oblique intention renders it valid *qua* species of intention, but inapt for the work it was poised to do as a route to *mens rea* for murder. For the sake of simplicity the focus will largely be on intention to kill, though the arguments raised apply *mutatis mutandis* to intention to cause GBH.

Several sub-conclusions are argued for: that oblique intention is a valid type of intention; that the conception of oblique intention which renders it valid must serve as a definition of that type of intention, thus this conception in conjunction with the desire/purpose based direct intention is exhaustive of the notion of intention; that judicial reluctance to treat the *Woollin* direction as a definition of oblique intention is motivated by the intuition that there are considerations apart from intention which properly influence culpability for murder; that these intuitions are valid, can be expressed in their own right and therefore justify a departure from intention as the sole element of *mens rea*; that since oblique intention properly construed and desire/purpose based intention is exhaustive of intention, any considerations currently invoked in the jury discretion whether to find intention under a *Woollin* direction must be distinct from intention, thus such distinct considerations are already operative under the guise of intention in the current law. The broad conclusion drawn is that the understanding of oblique intention presently operative is disposed to act capriciously, but is nonetheless aimed at giving effect to legitimate moral principles. As such, if the law is to retain its present efficacy yet observe desirable standards of transparency and predictability, the *mens rea* requirement for murder should be revised.

PART 1. THE VALIDITY OF OBLIQUE INTENTION

Before turning to the issues surrounding oblique intention it is instructive to examine direct

intention more closely. Plainly, what is meant by a consequence being the desire or purpose of an action is not that it is the 'true' or ultimate desire. A naked desire 'to kill' will seldom if ever be the motive for so doing. Invariably some benefit derived from the fatal act may be identified as the truly desired consequence for which killing is only a means. It is not our concern to pursue these fundamental desires, not least because it invites regress, but also because it diverts the attention of the law from properly culpable behaviours. Killing to enable theft, or even simply because it makes one feel powerful, is rightly described as murder despite the 'desire' to kill supervening on more fundamental desires to which it is (metaphysically speaking) only contingently, not necessarily connected. The point is well put by Glanville Williams: 'If I drive over you because I am in a hurry and you will not get out of the way, I drive over you intentionally, and it would be no use my saying that my sole intention was to make progress. For legal purposes the meaning of intention has to be widened to this extent'[4]. This much is not revelatory, but it is a principle which is relevant to the treatment of oblique intention. The principle is that individuals may not disown the consequences of their actions simply because they are not desired *per se*. That it is an unfortunate quirk of the world that an individual's ultimate desires may only be attained through killing does not absolve them of responsibility for doing so, however much they might wish that it were not necessary. The law must operate strictly within the real world, which does not permit of idealised desires stripped of their inconvenient corollaries. In the real world and in law the desire and intention state of an individual is rightly expanded to include the whole set of circumstances which the individual knowingly brings about for the attainment of their fundamental desires. It is implausible to suggest that I desire to go to Madrid but do not desire to go to Spain, despite knowing that Madrid is in Spain. Since going to Madrid entails going to Spain, insofar as I desire to go to Madrid, I desire to go to Spain, and insofar as I do not desire to go to Spain, I do not desire to go to Madrid. Only one desire-state can prevail, there may be elements of each which I do or do not desire, but ultimately one general desire-state must exclude the other, they are logically inconsistent given the facts of the world. This is the mechanism by which intention is imputed to chosen means as well as ends.

Plausibly, this same mechanism may extend direct intention to paradigm cases of oblique intention. This is dependant on a particular interpretation of the 'virtual certainty' requirement. This may be read either as a moderation of the common sense understanding of certainty to something less than the everyday standard, or merely an acknowledgment that the everyday standard is inherently less stringent than absolute logical certainty. It is submitted that the latter is both the proper interpretation of the intended meaning, and the only interpretation which renders it valid as a description of intention. As to the first point, it is worth noting that this aligns with the attitude of pragmatism towards the meaning of intention indicated in the previous paragraph. Just as a pragmatic, real-world understanding of desire and intention avoids thorny questions of philosophy of mind, so too does an acknowledgment that the degree of certainty in question is a 'virtual' or 'real-world' certainty avoid metaphysical issues which would be unnecessary and destructive to the purpose of the law. This is not an indication that something less than certainty is adequate, but merely that all that is required is whatever level of certainty is obtainable in the

4 G Williams, 'Oblique Intention', [1987] Cambridge Law Journal 46, Issue 3, 420.

real-world, barring far-fetched sceptical hypotheses. This is evidenced in other writings on the issue – In Simester and Sullivan's Criminal Law, 'virtually' is exchanged for 'practically'[5]; and in the 2006 Law Commission report the word 'virtually' is dropped altogether – 'The jury may – but not must – find that the defendant ("D") intended the result if D thought it would be a certain consequence (barring some extraordinary intervention) of his or her actions, whether he or she desired it or not'[6]. Williams also endorses a similar position: 'Certainty in human affairs means certainty as a matter of common sense'[7], though this may permit a less stringent interpretation of certainty than that promoted here. It has already been seen that in reality separating intention for ultimately desired consequences from intention for the means of achieving them is artificial. The same inferential step which transposes intention from fundamental desires to means may do so also from the means to their necessary corollaries. In the same way that insofar as an ultimately desired consequence is intended, so are the necessary means for achieving it, equally, insofar as those means are intended so is anything else which those means cannot be effected without. To meaningfully intend something in reality one must intend everything which it in reality entails
– as with an intention to go to Madrid and thereby Spain.

This only applies to the consequences which are entailed by ones actions; since the desired consequence is contingent on the entailed consequence, so too is an intention to bring about the desired consequence contingent on an intention to bring about the entailed consequence (or else the desire not to bring about the entailed consequence would defeat the intention and desire for the 'desired' consequence). But if a desired consequence does not entail a further consequence, and so is not contingent on it, then intending the desired consequence is not contingent on intending the further consequence. So, the only consequences for which intention is entailed are those which are entailed by the desired consequence, i.e. those which are in realistically certain.

Consequently, 'oblique' intention is untenable if premised on anything less than a high form of certainty. In the instance that an intentionally obtained consequence entails a further consequence, there is no other set of circumstances which exclude the further consequence and which can be identified as the intended outcome (as has been shown, it is implausible to separate an 'ultimately' desired consequence from that which it entails). Whereas, in the instance that the intentionally obtained consequence does not entail the further consequence, there *is* a set of circumstances which exclude the further consequence and which can be identified as the intended outcome. So long as the consequence is less than certain it would be contrary to common usage and misleading to suggest that it were intended as there is a viable alternative set of circumstances which exclude the consequence in question and are the desired outcome, however improbable. If I roll an n-sided dice with the intention of rolling a certain number, it is incorrect to say that I do not have the intention to roll that number to the exclusion of all others, regardless of the magnitude of n and the improbability of achieving my aim. Conversely, if I roll a one-sided dice, it would be absurd to suggest that I intend to roll anything but a 1; whatever my ultimate desire, if my means for achieving it is rolling a one-sided dice and I know that this entails rolling a 1, I cannot but intend to do so. Thus, if the intention described in *Woollin* is to be a valid form of intention, it must be constrained to a stringent degree of certainty. If this is the

case, then, following the above, it is merely an extension of direct intention necessitated by the facts of the world which form the context of the intention.

This is straightforwardly analogous to the imputation of direct intention to means per se; it is realistically certain that, in the given context, bringing about the desired consequence entails bringing about the means, that is simply the nature of means. Intending the circumstances in which the ultimately desired consequence is attained thus entails intending the circumstances in which the given means are achieved. A counterfactual analysis of the same principles shows that they must extend to certain corollaries of those means: if the intended circumstances do not include the certain corollary, then they cannot include the given means either, and thereby cannot include the alleged ultimate desire. If the attainment of the desired outcome realistically entails the success of the means, and the success of the means entails the further consequence, then the attainment of the desired outcome entails the further consequence, they are not meaningfully divisible. It is no more sensible to allow the disownment of certain corollaries of means by wishing that they were not certain, than it is to allow disownment of chosen means by wishing they were not necessary. Lord Hailsham's words in Hyam summarise this position: 'the means as well as the end and the inseparable consequences of the end as well as the means'[8]. The notions of intention and desire now at play are increasingly divorced from the emotional experiences of the individual. It is not desire in an emotional sense that is relevant, but desire in a rational sense which aligns with the definitions of intention common in the literature. That is, intention as 'acting in order to bring something about'[9] or, as suggested by Pedain 'meaningfully choosing something'[10], without reference to any emotion or desire states. From this perspective, any distinction between ultimately desired ends and their certain corollaries is purely semantic and logically and morally hollow.

Williams articulates the initial premise of this position without following it to its natural conclusion. Against the argument that, in light of the ability to intend to endure unpleasant things such as the pain of going to the dentist, intention does not require desire, he says: '[the pain] is accepted not as an end in itself but as part of the package, and the package as a whole is desired—otherwise one would not go to the dentist. The pain taken by itself is not desired, but the proposition was not that the patient intends the pain but that he intends to visit (intentionally visits) the dentist'[11]. Williams shies from the conclusion that the pain is intended, but as is argued here it is no less intended than is the visit to the dentist; insofar as the ultimate intention of improved dental health entails a visit to the dentist, and a visit to the dentist entails pain, intending to improve ones dental health entails intending to endure pain. Whether this extends to 'desire' is a matter of the semantics of that term and inconsequential for the present purposes. If desire is understood in the rational sense indicated above rather than an emotional sense then the same kind of entailment applies – the desire for dental health subsumes all of the necessary conditions for it. But the emotional state of the defendant is generally not a constituent of a crime, and the *mens rea* for murder is concerned with intention. Whether desire is understood in a broadly encompassing rational sense (thus making oblique intention a subtype of direct intention), or in a narrowly emotional sense (making it an indicator of intention as a definitional

element of one of two intention-types, with oblique intention defined by reference to certainty alone), is not material to the validity of oblique intention and its role in *mens rea* for murder.

The foregoing hints at a further clarification which may be required. That is, whether the certainty in question is relative to the achievement of the desired outcome, or relative to the chosen means. In the first case, one is culpable for a killing that was (virtually) certain given the attainment of the ultimately desired outcome. In the second case, one is culpable only for a killing that was (virtually) certain given the course of action taken. The obvious problem with the second interpretation is that if killing was not itself the ultimately desired consequence, then one would avoid culpability for murder simply by using less than certain means to cause death (itself as a means to the ultimate desire), such as the case of the bad shot who is nonetheless striving to hit their victim. The preceding discussion has already indicated that the first interpretation is valid since entailment of a further outcome (successful implementation of means) by an ultimately desired outcome imputes intention to the further outcome; this clearly does not apply to unsuccessful attempts at implementing the chosen means, so the only relevant cases are ones in which the means are successfully implemented and the ultimately desired consequence thereby obtained. As such, the first interpretation is preferred. It is worth noting here that this interpretation generates problem cases of its own, such as the case of the terrorist-warner whose ultimate desire (political sway) is in fact defeated by the collateral consequence of planting the bomb (death) but whom it may be correct to think is culpable for murder. The correct handling of such cases will be discussed later.

The implications of the above for alleged cases of oblique intention murder is mixed and, naturally, dependant on the degree of certainty attached to death. In the case imagined by Simester & Sullivan[12] of a stuck person blocking an escape route, the criteria are clearly met: escaping realistically entails unblocking the exit by destroying their body with dynamite, an intention to escape thus translates into an intention to unblock the exit by destroying the person's body with dynamite, destroying their body with dynamite realistically entails killing them, so killing is thus itself intended. In the case of setting fire to a house for insurance purposes **(**or a grudge per *Hyam*) knowing there are people inside the criteria are not met as it is plausible that the victim might escape or be rescued. If the extra measure were taken to block the windows and doors, or the victim were bed-bound and no help was at hand, then this may ensure a realistic level of certainty and thus intention. If this appears overly demanding and unsatisfactory as the sole determinant of *mens rea* for murder then that is because it likely is. The reasons for this will be discussed later, but first it is worth considering an attempt by Pedain to rescue intention and murder culpability in cases of less-than-certain death.

PART 2. PEDAIN'S CONCEPTION OF INTENTION

To summarise the argument so far: intending an ultimately desired consequence in reality entails intending everything which achieving that desired consequence in reality entails *given* the chosen

12 A P Simester and G R Sullivan, Simester and Sullivan's Criminal Law (7th Revised edition, Hart Publishing 2019) Chapter 5.

means of achieving it (including, of course, those means themselves). Pedain[13] has attempted to extend intention to consequences which are not entailed by the ultimately desired consequence, or which are in fact destructive of the ultimately desired consequence. This is motivated by cases such as the terrorist-warner, in which death is not at all certain as a result of the defendant's actions, but moral intuition nonetheless indicates that a charge for murder is appropriate. In this case a terrorist plants a bomb but alerts the authorities with the aim of gaining notoriety and political sway but in the confidence that the bomb will be defused, which there is a fair likelihood it will. If the defusal fails and someone is killed it may be thought that the terrorist's cause will be damaged by the negative publicity. As such, killing is not intended in any of the senses so far discussed. Pedain derives culpability here from what he calls 'endorsement' of the killing premised on a (direct) intention to create the risk of death; since it is the intention to create risk which underpins this concept, it will be handled in those terms here.

The suggestion is that the terrorist-warner directly intends to create the risk of death as the risk *per se* is the chosen means for gaining their ultimately desired end of political sway. It is through exposing the public to the risk and demonstrating their menacing potential that they achieve their goal, if the risk itself were absent then the desired effect on the minds of the public and the authorities would fail. This is an accurate description of intention towards any outcome which is not directly intended as an end or a means, and is not a certain corollary: it is not the outcome itself which is intended, but the risk of that outcome as it is the risk which is a certain consequence. As Pedain rightly identifies, this looks suspiciously like recklessness in regard to killing, not intention[14].

Pedain seeks to distinguish this from recklessness by contrasting utilising risk as a means *per se* from generating risk as a bi-product of one's actions. This distinction is artificial in the same sense as any distinction between intended means and their certain collateral consequences as discussed above. Furthermore, the arguments put forward in support of it hinge upon a fundamentally flawed treatment of risk. Pedain opens the discussion as follows: 'Does this mean that intention now collapses into recklessness? In my view, it does not. "Having an intention to expose someone to a risk" is different from "realising that someone will or might be exposed to a risk"'. The first thing to note is that the suggestion that someone 'might' be exposed to a risk is nonsensical – the notion of a 'possible' or 'potential' risk is relied upon throughout the argument; it is, however, a hollow one. A potential risk *just is* a risk – if a risk here is 'a potential for harm', then a potential risk is 'a potential potential for harm'. This cannot be anything but simply a potential for harm, probability (or rather risk) is cumulative, not discrete. The imprecise use of language in speaking of a 'potential risk' is merely a rhetorical device indicating the introduction of additional factors affecting the probability of an outcome. This much can be demonstrated by heading to the local bookkeeper and placing a bet on an 'accumulator' – the effect is that the odds increase due to the introduction of additional 'potential' outcomes required for a pay-out, but ultimately it is a bet on a single definite probability. This is not to be confused with a scenario in which someone has the potential to be exposed to a possible cause of harm in that they have certain characteristics which could lead to harm in conceivable circumstances, but those circumstances

are known not to obtain. In that case the first 'potential' outcome is determinate, they are not exposed to the possible cause, so there is no risk of harm. Yet even this is not strictly accurate, if the circumstances are conceivable then it is possible (even in the broadest metaphysical sense) that those circumstances might come about, so the risk they pose is real. Such risks are simply too remote to sensibly be treated as real in ordinary language, but that they are reveals the deep conceptual flaw in the notion of 'potential risk'. The only way to accurately exclude a risk is retrospectively as this is the only context in which it becomes determinate (though this of course does not mean it was determinate at the time). The scenario in question here is one in which it is (for our purposes) indeterminate whether they are or will be exposed to the possible cause of harm; it is possible that they are or will be exposed to it and so there is a risk that they are or will be exposed to it and thereby be harmed. Pedain's propensity to slide between these two different notions of 'potential' and equivocate between them is a means by which the distinction between 'recklessness' and 'intending risk' is conjured by sleight of hand.

Secondly, this description of recklessness does not tell the whole story; it does not account for the reckless act. Recklessness, fully described, is: realising that someone *will* be exposed to a risk *and* choosing to expose them to it. Pedain realises the trouble this poses – if risk either exists or does not exist, with no room for the 'possible' existence of risk, then where it exists it is certain. If, as we have seen, knowingly bringing something about with certainty is sufficient to intend it (or endorse it), then *any* knowing creation of risk is intentional creation of risk. To avoid this conclusion, Pedain falls back on the distinction between ultimately desired consequences and their certain corollaries, which has already been shown to be artificial. Comparing the case of the terrorist-warner with that of someone recklessly overtaking into oncoming traffic, he says: "'I only acted because I thought the risk would not materialise", is what such actors [the over-taker] typically say: "I did not care for there being a risk and wish I could have done what I wanted to do without there being that risk." The intentional risk-makers cannot say the latter'. It is not at all clear why the 'intentional' risk maker (the terrorist-warner) cannot make such a claim. They might perfectly well wish that they could have done what they wanted (gain political sway) without there being that risk and equally may have acted expecting that the risked consequence would not materialise, but as shown this is not adequate to absolve them of responsibility when in reality their means of achieving what they wanted do entail that risk. Equally, in reality the over-taker could not effect an overtake without there being a risk, the overtake entails the risk so intending the overtake entails intending the risk.

Pedain resists this conclusion by essentially suggesting that the means used by the over-taker do not in fact entail a risk, as they could equally be effected without risk, whereas because the terrorist-warner's means *are* the risk, those means can't but entail risk. This is attempted by equivocating the two notions of potential (determinate and indeterminate) and misconstruing the nature of risk as above. The suggestion is that, if overtaking on a blind corner, the reckless driver would be relieved to find that there are no oncoming cars as they overtake; that in this scenario since there are no oncoming cars there is no risk; and since they achieved the desired overtake without 'creating' risk, the means of overtaking do not entail risk, only a potential risk. This reasoning is fundamentally flawed in its equation of the non-materialisation of a risked

consequence with the non-existence of risk. At the time of the overtake there is potentially (indeterminate) an oncoming car and the over-taker cannot effect an overtake on that corner without running the risk of that potential outcome and the further risk to life which it entails. That is the very premise of the risk of overtaking on a blind corner, it is not a potential risk, it is a risk precisely because it is indeterminate. The sleight of hand occurs when the scenario of the determinate 'potential' outcome (that there is no oncoming car) is compared with the indeterminate potential outcomes of the terrorist-warner case where it is supposed that since the terrorist-warner places the bomb and does not know whether it will be defused, they create a risk. For a fair comparison the scenario should be the determinate one in which the bomb is in fact eventually defused, it is not appealing to suggest that this fate means that there was never a risk. It is implausible to suggest in either case that at the time the terrorist-warner or over-taker acted, a time when from their perspective the outcome was indeterminate, those actions did not entail a risk. It is antithetical to the notion of risk to retrospectively construe the circumstances giving rise to it so narrowly as to exclude the possibilities which result in the risked outcome, and thus deem that the risk never existed, simply because those possibilities did not eventually materialise. It is notable that, as stipulated, the terrorist-warner would be equally pleased to find that the risked consequence did not materialise. This is, however, irrelevant to their attitude to the risk itself, in each case the risk is a certain consequence of their actions and cannot but be intended.

As such, intending risk would apply to all cases of recklessness, this in itself is an indication that it is not appropriate as *mens rea* for murder, at least not on its own. But the final inferential step Pedain makes between intending risk and the imputed attitude towards the risked consequence is also problematic. That intention to create a risk does not entail intention to bring about the risked consequence has been discussed above, this extends to 'endorsement' or 'approval' of the consequence. Pedain claims that 'the creation of the risk of such harm is an essential aspect of the success of the terrorist's actions and signals an approval of the possible harmful outcomes'. Firstly, this is a *non-sequitur*, it says nothing of their attitude towards the outcome save that preventing it is prioritised belowqw something which necessitates creating a risk of it. Beyond that, it runs contrary to the explicit details of the terrorist-warner case, which stipulates that they do not want the harmful outcome and seek to avoid it. Finally, this is not borne out by other analogous cases of risk-taking. For example, the thrill-seeking skydiver whose parachute fails would not be considered to have approved of dying, or by extension to have committed suicide. Equally, the prankster who attempts to jolt their friend towards a precipice before pulling them back but accidentally pushes them to their death would not be taken to approve of the death, or by extension to be a murderer. In each case the risk is an essential aspect of achieving the directly intended consequence, but the fatal outcome is not approved, endorsed or intended, only the *risk* of it is. If there is something which makes the terrorist-warner a murderer, but not the pushing prankster or the reckless over-taker, then it must be something other than the relationship between the risk and the ultimately desired outcome.

PART 3. INTENTION AND *Mens Rea*

If the argument so far is correct – that a proper understanding of oblique intention is premised

on a thorough going but real-world compatible standard of certainty; that this is essentially a logical extension of direct intention, relative to means; and that direct intention thus expanded is the only conceptually sound notion of intention. Then it is clear that this *mens rea* requirement is more demanding than many have envisaged and excludes many of the proposed examples of oblique intention, not to mention cases such as the terrorist-warner. It is plausible that 'murder' should be reserved for cases of intention in this restricted sense. It is certainly the most culpable mindset and distinguishing it in law brings a degree of conceptual clarity which would likely translate into consistency. Such an approach was proposed by the Law Commission in provisional proposals preceding the 2006 recommendations where it was indicated that 'first degree' murder should be reserved for cases of direct intention[15]. Though here it is submitted that there is no principled distinction between direct intention and the properly stringent understanding of oblique intention, it is notable that this is plausibly still more culpable than what eventually became the 'second head' of first-degree murder in the final report *i.e.* intent to cause GBH with an awareness of a significant risk of death. If death is definitely going to occur from some actions then that is good reason to think them worse (or at least more worthy if discouragement) than actions from which death only *might* occur.

However, there is much to be said for extending the charge of murder to some cases in which death is not certain to occur given the attainment of the ultimately desired consequence through the chosen means. It has been argued that it is inappropriate and misleading to describe death as intended in such a case as the intended circumstances are those in which the means are achieved and the consequence attained *without* causing death. So, if culpability for murder exists here it is not on grounds of intention.

Some examples will be helpful here. Firstly, the case of the terrorist-warner may be adapted to more neatly evaluate culpability: consider instead an attempt to intimidate or coerce by using a revolver in a 'Russian roulette' style. There is a risk of death, but the intimidator may plausibly intend it not to occur as its occurrence would in fact defeat their purpose. Secondly, the case imagined by Simester & Sullivan[16] of an impatient walker pushing another off a cliff instead of stepping aside to let them past. And finally, the case mentioned previously of the pushing prankster. The facts of each of these cases may be adapted to prompt diverging intuitions about whether a charge of murder is appropriate. A fuller picture of the factors which may influence these intuitions gives an insight into the 'moral elbow room' relied on to supplement a less stringent understanding of oblique intention, demonstrating that intention is inadequate to generate culpability for murder in these cases, and explaining why a full definition of *mens rea* in these cases has not been possible in terms of (oblique) intention alone.

The most obvious factor is the probability of death itself. In none of these cases would a murder charge seem appropriate if only one chamber of a 100-chamber revolver were loaded, or the cliff was such a height that there was only a 1% chance of death. Equally, however, it is plausible

15 Law Commission, A New Homicide Act for England and Wales? CP no 177 1.37.

16 A P Simester and G R Sullivan, Simester and Sullivan's Criminal Law (7th Revised edition, Hart Publishing 2019) Chapter 5.

that certainty (and therefore intention by the understanding promoted here) is not required. If 99 chambers out of 100 were loaded, or the height of the cliff meant death was 99% probable, then a charge of murder seems almost irresistible. It would certainly seem odd to allow the intimidator to fire a 99%-likely-loaded gun point blank at someone's head but escape a murder charge for the resulting death – intuition may well demand a far lower threshold than this and not sensibly described as virtual certainty. Naturally, it may be inferred from the decision to run a particularly high risk of death that death is in fact directly desired/purposed. This may be a legitimate inference in a given case but is beside the point here, the important point is that in the imagined case where death is specifically not desired/purposed, a charge of murder may nonetheless seem appropriate and that this is informed in part by the probability of death.

The death-probability-threshold required for murder will likely be influenced by the legitimacy of the intended outcome (that being the circumstances in which the ultimately desired consequence is achieved by the chosen means without causing death). In the first two cases, intimidating someone by making them think they might be shot, and pushing someone off a cliff without them dying, are not legitimate aims. In the last case, making someone think they're about to fall but successfully stopping them for fun is at least more, if not totally legitimate (and is in any case a fairly common practice). In the case of *R v Allen (2005)*, where the defendant had killed a baby by shaking it, it seems abstruse to place great emphasis on whether harming the baby was a means of expressing frustration per se or was merely a (arguably) virtually certain corollary of the non- malicious means of shaking for the sake of shaking. There is no good reason for shaking a baby in such a way and it may be thought that a risk of death far below virtual certainty may warrant a murder charge regardless of the defendant's actual intentions. Plausibly, the more legitimate the intended outcome, the higher risk of death may be run without incurring a murder charge. This is particularly relevant in the case of benevolent risk-takers such as the doctor administering likely fatal doses of medication to alleviate pain, or the parent throwing their children out of a burning building as imagined by Lord Goff in the House of Lords debate on the Nathan Committee Report17. A common intuition here suggests that some intended outcomes may be legitimate enough to justify the highest degree of probability, even certainty (and therefore intention) of death as per the doctrines of 'double effect'[17] and 'necessity'[18]. In any case it is likely less contentious that the desperate parent can be excused running a higher risk of death than the intimidator.

A further factor which interacts with the previous two is the availability of other means. This affects the legitimacy of the intended outcome as even where the ultimately desired outcome is legitimate, if the chosen means carry a gratuitous risk then the conduct is seemingly more culpable. This is relevant to cases such as the impatient pusher and benevolent risk takers. That the impatient pusher could have simply waited a few moments to allow the other walker to pass on a less narrow stretch, and the seeming triviality of their ultimate desire not to be held up, increases the culpability of their behaviour. Similarly, even if a benevolent risk-taker's motives are less trivial, such as rescuing one's children from a fire, the behaviour is more culpable if there

17 *Airedale N.H.S. Trust v Bland [1993] AC 789.*

18 *Re A (Conjoined Twins: Surgical Separation) [2001] 2 WLR 480.*

is a less risky but adequately effective option available and known, such as an unobstructed fire escape. In such cases it may again be inferred from the choice to use the unnecessarily risky option that the risked consequence is directly desired, but it need not be, culpability is still increased simply by being indifferent to the risked consequence. If the risky option is chosen because of some separate benefit (apart from the benevolent cause in question) then this whole legitimate-risk calculation starts again from the beginning relative to that intended outcome.

What such factors add up to, and therefore what culpability is a product of, is broadly to what extent the risk of death is justified. If these considerations are legitimate determinants of culpability for murder then they illustrate (and occupy) the gap between the proper understanding of intention promoted here, and the work that oblique intention is intended to do and thus why oblique intention as put forward in *Woollin* is subject to nondescript 'moral elbow room' (jury discretion over whether to 'find' intention in cases of ostensive oblique intention). The above is not proposed as an exhaustive list of the relevant factors for culpability in the absence of an intention to kill, and so nor as a complete description of the contents of that 'elbow room'. However, it is an indication that where the death is not intended (in the strict sense described above), the question becomes one of the justification of the risk of death. A fuller picture of the *mens rea* for murder in such cases is thus 'an intention to create a risk of death which is egregiously unjustified'. This is, contrary to Pedain, a high form of reckless manslaughter. Whether this is deemed to warrant a charge of murder or not, glossing over the considerations which determine it or stretching the meaning of intention to account for them is misleading. If these considerations form any part of said moral elbow room then a departure from intention alone as the sole descriptor of the *mens rea* requirement for murder would not increase the complexity of the requirement itself, but simply elaborate on a description which currently belies its complexity.

PART 4. NORRIE AND DESCRIPTIVISM

Many of the issues touched on here appear in Norrie's illuminating article 'After Woollin'[19], his handling of which can be shown to support and explain the broad conclusions drawn here. Firstly, misgivings about the clarity of the *Woollin* judgment and its consequences are a central theme of the article: '*Woollin* is not as clear in its own terms as has been suggested, and there are underlying reasons, connected with the conflict in *mens rea* between moral and factual approaches, why any surface clarity may not endure'. Quoting Smith, Norrie later identifies the issue which has been the primary concern of this article: 'If indirect intention is a species of intention, then to identify foresight of a virtual certainty in the accused's mind *is* to identify that she intended the crime. The use of the word "entitled" however suggests that the jury may so identify intention, but, alternatively may not do so. "Entitled" is permissive rather than obligatory, so that the formulation "involves some ambiguity with the hint of the existence of some ineffable, undefinable, notion of intent, locked in the breasts of the jurors"'. Here it has been argued that, insofar as *Woollin* expresses a valid notion of intention, it is a notion determined solely by the certainty of the *intended* outcome, such that whatever considerations

19 A Norrie, 'After Woollin' [1999] Crim LR 532.

speak against 'finding' intention and so constitute jury elbow room, they are not considerations relevant to intention. Thus, not only are the considerations themselves unarticulated, but what they are meant to establish as a determinant of *mens rea* is unknown. If the above is correct then Norrie's reservations about the conceptual soundness of the Woollin measure of intention are well founded.

Furthermore, these reservations are supported by illustrations similar to those discussed here of the inadequacy of Woollin oblique intention as *mens rea*. Norrie describes circumstances in which 'virtual certainty' may be over-inclusive, in cases where there is a '"moral threshold" such that even though the accused could foresee a result as virtually certain, it is so at odds with his moral conception of what he was doing that it could not be conceived as a result that he intended'. Or under-inclusive in cases where death is less than certain but a degree of 'moral malevolence' or 'wicked recklessness' in the actions warrants a murder charge. These fall under considerations of the 'legitimacy of intended outcomes' discussed in part 3. Norrie suggests handling cases of over-inclusivity by narrowing the understanding of intention to exclude consequences which are 'at odds with [the accused's] moral conception'. Whilst a narrower conception of intention is conceptually sound, it was shown in part 1 that this does not reflect the real-world implications of intention; further, that no principled distinction can be made between intending the chosen means and intending their certain collateral consequences. Even if this were overcome such that intention could sensibly include means *per se* but not their certain corollaries, this approach would still face real practical difficulties. It would necessitate ad-hoc manipulation of the parameters of intention in any given case to either include both the means and their certain corollaries, or to include the means but not their certain corollaries, or to exclude both. Norrie advocates for a principled analysis of central terms such as intention, it is submitted that the most robustly principled analysis of the real-world concept of intention is that offered here, and that the manipulation of that concept in the way proposed by Norrie would invite considerations which are not properly descriptive of it. The kinds of considerations evoked by Norrie are accounted for here, but independently of intention. This provides a higher degree of conceptual clarity and properly reflects the interaction between the distinct moral precepts which determine intuitions about culpability, rather than attempting to force them into a single mould. The mechanism envisaged by Norrie for broadening current law to include cases of under-inclusivity is not explicit, if it were a broadening of the understanding of intention then the same counter- arguments apply; this much is endorsed by Norrie who affirms that a broadening of the notion of intention in *R v Hyam*[20] 'did not catch the essence of her moral wrongdoing'. If it were the incorporation of some other concept then the considerations proposed in part 3 here can account for this, they are equally applicable to generating a murder charge in cases where intention is not found as they are to avoiding a murder charge where intention is found.

Lastly, Norrie provides a compelling account of the forces behind legal lexicon and the inclination to preserve a reductionist account of *mens rea* in terms of intention alone. It is a powerful argument for departing from unsatisfactory descriptors, in light of which it is surprising that he restricted

20 *R v Hyam* [1975] AC 55.

himself to finessing intention (as seen in the previous paragraph) rather than supplementing it. The essence of the account is that legal concepts are expressed in a descriptivist language which is relatively impoverished compared to a full expression of the normative judgments which underpin them, thus providing 'a "simulacrum" of moral judgments, a set of insufficient points of contact with moral issues'. As such, legal discourse is guilty of either naively or disingenuously attempting to express complex normative judgments in reductively factual and descriptive terms: 'It is just such a poverty of language that underlies the law of indirect intention and explains the coexistence of two strands of law in the murder cases and their contradictory evolution. This analysis therefore counsels against the view that *Woollin* constitutes the last word on indirect intention for murder'. It is agreed that there is a disjunction between the normative language of moral values and the descriptive language of the law, but this does not evidence a 'tension' between the two. Rather, the descriptivist language of the law is simply an attempt to translate those moral values into an applicable and effective legal code. This requires deriving practical measures and indicators of those values which can be applied consistently. There are many cracks and faults in our normative evaluations which the law cannot afford to fall into and so must plaster over to some extent; two instances seen earlier are the nuances of 'intention' and 'certainty'/'necessity' (in a high-minded philosophical sense) and their implications for moral responsibility. Expressing *mens rea* for murder in terms of intention alone is another such instance. Where the descriptivist language of the law does not fit the moral terrain underlying it, that is *prima facie* justification for amending the language (tempered of course by considerations pragmatism). It has been suggested here that a proper understanding of intention does not fully express the normative judgments informing intuitions about culpability for murder and alternative considerations which may supplement it have been proposed. Whether the added complexity these would bring warrants their incorporation to the *mens rea* requirement for murder is another question. Though, as has been indicated, these considerations are seemingly already operative, only under entirely vague or misleading terms. Norrie further notes that the descriptivist approach is itself normative, imbuing mental states *simpliciter* with moral significance. Its concordance with normative values may therefore be much closer. Nonetheless, this approach is equally derived from more fundamental moral intuition and reasoning, if the product of such reasoning isn't fully captured by the language used then this warrants amending the language.

THE IMPROVEMENTS OF THE PRESENT APPROACH

There is an obvious difficulty with assessing the practical impact of the less stringent approach to oblique intention which has so far been applied in courts. This being that a large part of the criticism levelled here is that the discretion left to the jury whether to find intention or otherwise under the current construal of a *Woollin* direction operates mysteriously. If the notion of intention is in fact exhausted by direct intention/purpose plus foresight of virtual certainty then it cannot be considerations relevant to intention which inform that jury discretion. Thus, it is not possible to ascertain whether uses of a *Woollin* direction to date have generated injustice without insight into what was in fact considered by the jury in exercising that discretion. However, the central contention is that this is an injustice in itself. That defendants and counsel are not aware of the true nature of the elements of the alleged crimes has clear implications for the right to a

fair trial and the rule of law. Notably, there has been no indication as to what might make the difference between intention and non-intention in the light of foresight of virtual certainty when the absence of any desire towards the outcome is already established (as must be the case for *Woollin* to be effective). It is entirely mysterious what distinguishes the two possibilities in such circumstances and what it is, if direct desire/purposive intention has been ruled out and (as is currently thought) oblique intention is not a separate fully-defined form of intention, that the jury is supposed to be finding for or against.

There are several cases in which this ambiguity and duplicity in the current interpretation of Woollin has led to confusion and misapplication. In *Mathews v Alleyne* (2003)[21] the court of appeal deemed that the *Woollin* direction did not establish a substantive rule of law but merely an evidential rule, this in response to the apparent error of the trial judge in indicating otherwise. However, at several turns in the judgment, the court of appeal seem to treat foresight of virtual certainty as a definition of intention, not simply evidence of it. Firstly, in their discussion of the facts of the case: 'If the jury were sure that the appellants appreciated the virtual certainty of Jonathan's death… it is *impossible* to see how the jury could not have found that the appellants intended Jonathan to die'[22] (emphasis added). And later in their interpretation of the proper workings of a *Woollin* direction: 'The contrast highlighted by the alternatives would then have been between an intent to kill proved by a finding that the appellants had purposed or desired Jonathan's death and an intent to kill proved by a finding that the appellants appreciated the virtual certainty of his death, whether they purposed or desired it or not'[23]. In the instance that the appellants did not purpose or desire the killing, if the foresight of virtual certainty is not definitive of intention and is only evidence to be considered amongst other evidence, there is no sensible answer as to what else may be considered. It cannot be evidence that the appellants did not desire or purpose the death as this is *ex hypothesi* beside the point (intention is being established in the absence of desire/purpose), and it cannot be evidence that they did not foresee it as virtually certain as that is *ex hypothesi* false, so what then? The only way for *Woollin* to serve any function as an alternative to desire/purpose intention is for it to define a form of intention, otherwise its function can only be to assist in determining desire/purpose intention, in which case it is premised on a contradiction. The contradiction lies in supposing that there is no desire/purpose intention yet that intention may be found on the basis of foresight of virtual certainty which nonetheless does not define a different type of intention, making it either wholly mysterious or leading to the conclusion that it must establish intention of the sort already ruled out. It is understandable that courts and juries have opted to tussle with seeming contradiction as opposed to total mystery, it is not clear where one would even begin in the latter case. It is also unsurprising that the court of appeal has heard several appeals on a misapplication of *Woollin*, and that that court's decisions are themselves conflicted when the precedent is to attempt to have the *Woollin* direction act as an 'unsatisfied paradox'[24]. Treating foresight of virtual certainty as definitive of intention ensures that it does serve a distinct and definite role by singularly establishing intention in the absence of other forms of evidence.

Further confusion can be seen in *R v Royle* [2013][25] in which the proper role of foresight of virtual certainty in establishing oblique intention is conflated with the role of foresight of probability as evidence of direct/purposive intention[26]. In *Royle* the defendant had allegedly used violence when robbing an elderly lady who then died of a heart attack. The appeal addresses whether the trial judge erred in not giving a *Woollin* direction in light of the available evidence about the attack. The appellant appears to treat the *availability* of evidence as a determining factor here: 'Since there was no direct evidence of what the robber did to get the bag or of what force he used, the argument is that it could not safely be inferred that he must have been aware that really serious harm would, as opposed to could, be caused. Consequently, the further "virtual certainty" direction was required'[27]. But the question of what the defendant did is logically prior to what they intended (in any sense of the word), an absence of evidence does not support a direction in terms of one type of intention over another. The error here indicates a perception that *Woollin* introduces a more rigorous evidential requirement for intention, since the appellants hope appears to be that if foresight of virtual certainty cannot be established then no intention can be found. *Woollin* is not designed to supplant the ordinary direction but to supplement it, it leaves a finding of desire/purpose intention open to the jury on contemplation of a range of evidence whilst indicating an alternative route to intention through foresight of virtual certainty. The appellants' confusion may plausibly be explained by the precedent that *Woollin* sonly established an evidential rule. If foresight of virtual certainty is only evidence of the basic desire/purpose intention then introducing a *Woollin* direction may give the impression of requiring foresight of virtual certainty before any finding of intention can be made since if it operates on the assumption that desire/purpose intention has not otherwise been found then it would make finding intention conditional on establishing foresight of virtual certainty. It is difficult to see what other function a *Woollin* direction could be perceived to serve if it is only evidential as in that case it appears to introduce a particular and quite stringent evidential requirement, if would not make sense for this to be alternative as opposed to additional[28]. A more fundamental error is made in the case by suggesting that a *Woollin* direction was required due to the ultimate intention being simply to rob the victim. Plainly serious harm is not a virtually certain concomitant of robbery per se, but the point here is that the means of robbery was violence and the purpose of violence is the infliction of harm, thus the infliction of harm was directly intended as means per se. Neither of these issues were addressed by the court of appeal which held that the trial judge's direction had anyway set a higher bar for the prosecution[29] than a *Woollin* direction so was favourable to the appellant and that the appellant's case was complete denial such that any elaboration on the meaning of intention was not necessary which is a perplexing proposition since a correct finding of intention remains an issue regardless of the defendants case.

The legitimacy of considerations apart from 'intention' in determining culpability for murder (as discussed in part 3) is starkly rendered in the case of *Re A (conjoined twins)* (2001)[30]. Here it was held that the separation of conjoined twins, though certain to cause the death of one, did not amount to murder on the part of the doctors. A variety of justifications were invoked for this with

25 *R v Royle* [2013] EWCA Crim 1461.

26 See also *R v Allen* [2005] EWCA Crim 1344.

the result that criminal intent was not deemed to follow despite acknowledgment that oblique intention would undeniably be present: 'an English court would inevitably find that the surgeons intended to kill Mary… because her death would be the virtually certain consequence of their acts'[31]. Application of the doctrine of double effect in this case, as has been argued above, puts an unsustainable strain on the meaning of intention. If it is to have any influence in mitigating a murder charge, then, it must be in determining something other than intention and subsuming whatever that is under the banner of intention is only misleading. The doctrine of necessity, alternatively, establishes a defence to the crime of murder which is otherwise fully constituted[32], so does not strain the notion of intent. However, the case in question only considered necessity derived from competing *legal* obligations[33] (the doctors' obligation to act in the best interests of Jodie), and was cautious not to extend the doctrine any further than was necessary. Nonetheless, Lord Brooke noted: 'the distinction between those who save others out of a legal duty and those who do the same act for reasons which cannot be so characterised is not always very easy to sustain'[34]. At present, anyone in a similar quandary with only moral obligations towards the victim may be vulnerable to the full weight of the law. Given that the doctrine of necessity is essentially premised on a moral calculus this appears unsustainable in principle. The influence on such significant judicial decisions of considerations similar to those identified in part 3 makes their potential implications for broader questions of culpability and *mens* rea in murder hard to ignore.

CONCLUSION

Woollin was correct to restrict intention to exclude probability and affirm virtual certainty alone. However, a proper understanding of intention demands as strict a conception of 'virtual certainty' as the real world can reasonably permit. This excludes all but ultimately desired consequences and that which is (strictly) virtually certain to occur in the course of attaining those consequences by the chosen means. This leaves no further room under the heading of 'intention', thus any further elbow room afforded to the jury cannot be with a view to ascertaining intention and must determine some separately relevant consideration(s).

If oblique intention is to be a valid form of intention then it must serve as a definition of intention. If foresight of virtual certainty only permits 'finding' intention then it is merely serving as evidence of intention of the previously recognised kind, it cannot be a definition of a type of intention yet fail to define instances of it. There are many types of evidence which may assist in inferring intention, but they are not determinative of distinct types; foresight of the probability of an outcome could always have been used as evidence of direct/purposive intention, it would make the *Woollin* direction banal if extremely confusing to suggest that it merely distinguishes one type of evidence only to reintegrate it in the role it was already playing (as evidence of an already recognised form of intention). This paper has attempted to give a full definition of the notion of oblique intention, establish this as the only logical and efficacious understanding of oblique intention, and further reveal its inadequacy for the purpose it was seemingly intended to fulfil in *Woollin*. This further explains the previous reluctance to properly define it in order to allow its intended purpose to be fulfilled under the guise of intention through invoking vague

'elbow room' which is populated with considerations not sensibly determinative of intention and which are excluded by treating foresight of virtual certainty as a definition of intention. Though the inconsistencies, confusion and potential injustice perpetrated by a less rigorous understanding of oblique intention may de discrete, convoluted, or even unapparent, the scope for such difficulties is real and significant. Paired with the apparent possibility of articulating the considerations which counsel against treating oblique intention as an incontestable determinant of *mens rea* for murder in clear terms of their own, this is *prima facie* sound reason to diverge from determining *mens rea* for murder in terms of intention alone.

As is evident from the foregoing, particularly the linguistic analysis by Norrie, there is a degree of superficiality to the debate as conducted here and elsewhere. From one view it is merely a debate about semantics. Notwithstanding concerns about the stigma attached to 'murder', which in any case put the cart before the horse, it is basically immaterial whether the crimes imagined in thought experiments throughout the literature are of the same sort as killing with direct intent and properly described as murder. The fundamental issue is whether the crimes imagined warrant the same legal consequences as murder, it is perfectly sensible to suppose that they do, yet nonetheless distinguish them as separate crimes not premised on intention. It is easy to lose sight of the fact that the association between intention and utmost criminality is ultimately manufactured. That is not to say there are not sound principles motivating it, but if those principles apply in cases not properly described by 'intention' then that is reason to look beyond it. This partly explains Williams' contention that 'recklessness' is not an appropriate descriptor of cases of oblique intention[35], perhaps it is only the culpability attached to it which is inappropriate, not the description itself. The apparent simplicity and conceptual purity of restricting *mens rea* to intention is illusory and thereby self-defeating.

35 G Williams 'Oblique Intention' [1987] Cambridge Law Journal 46, Issue 3. 426.

MODERN SLAVERY ACT 2015: THE SILENCE AROUND LABOUR AND THE FAILURE TO PROTECT

Ann-Marie Debrah*

ABSTRACT

After demands from NGO's for the UK to take a firm step forward in the fight against Modern day slavery, the 2015 Modern Slavery Act was published; this was hailed as a forceful push against the practice of modern slavery in the UK. The Act required companies with a £36 million pound turnover to produce statements that would declare their initiatives to avoid slavery within their operations.[1] The Act also demanded tougher punishments for perpetrators of modern day slavery, extended the role of law enforcement to stop the trafficking of potential victims and an introduction of both a commissioner for tackling anti – slavery as well as an introduction to the defence of slavery and trafficking victims. While this Act provides a step in the right direction; the Act fails to deliver proper protection of victims as well as failing to administer direct accountability to conglomerates. This essay shall address a spectrum of issues. Firstly, the short comings of the Act regarding holding companies to account for practices of modern slavery, the issues pertaining to identification of victims in the Home Office and ways in which improved anti-slavery investigations within the police will stop victims being misidentified.

BRITAIN THE LAND OF MILK AND HONEY

Slavery is no new phenomenon in the legacy of British history. Whilst many believe that post the abolition act of 1833, that slavery became a horror to which the British national consciousness had absolved itself from; this fails to be the case. In 2018 the British Government estimated that there are up to 13000 victims of trafficking in the UK.[2] The cases of Modern-day slavery range from being promised work to kidnapping and forced work in a plethora of industries ranging from forced labour to sex slavery. The tale of promised work seems to be the most highlighted form of modern-day slavery in the UK; it starts with a romanticised envisioned life fashioned by traffickers to often vulnerable and economically unstable groups of people. Britain is often promised to be the land of economic freedom; a place to which they could seek employment and stability. So, they travel, often paying their life savings or saving money within their family groups to pay to be smuggled into the UK.

Upon arrival they are met by the gang of traffickers, who tell them to hand over all forms of identification namely that of their passports for safe keeping, never to be seen again. This is the

*I am a GDL student at City, University of London. I have spent time working with NGO's, recently working with SolidariTee National in efforts to help fund lawyers for refugees as well as trying to unite dispersed families across Europe. I have a key interest in public international law.

1 Modern Slavery Act 2015
2 Department of Justice, 2018 UK Annual Report on Modern Slavery, para 1

typical cycle of entrapment to which many fall victim to. Traffickers maintain control through a plethora of vices such as physical and emotional abuse but namely through the use of threats of deportation, or promises of harm coming to their families at the place of origin and telling them that authorities will not take them seriously as they 'simply do not exist without a passport and will not be believed'.[3] Unfortunately research conducted by Unseenuk; the anti-slavery charity behind the modern slavery helpline has confirmed that one of the threats by these traffickers, seems to be proven true.[4] Anti-slavery organisations have reported that whilst awareness of the practices of modern-day slavery have increased amongst police, there are still trafficked victims who report having been turned away from police stations on the account of not being believed, scrutinised for not having identification and or being criminalised. This misidentification of potential victims has not been addressed by the 2015 Act; whilst the Act has sort to harden sentences for perpetrators, this simply fails to target the first line of encounter with the victims. The 2015 Act introduced two preventive orders Slavery Prevention Orders (STPOs) and Slavery and Trafficking Risk Orders (STROs).[5] These orders aim to enable the police, national crime agency and immigration officers to have the ability to gain court given authority to place restrictions on people who are suspected of partaking in slavery or trafficking offences.

However, these orders do little to address foundation-levels of police training in identifying victims. Additionally, these orders are merely guidance measures and fail to hold the police to account for the misidentification of victims. Moreover, the discretionary and guidance-based nature of these procedures often means that potential victims are having to objectively satisfy authorities on the grounds that they have been groomed by someone. As the first anti-slavery commissioner Kevin Hyland stated, these guidelines fail to be a 'priority in policing plans'.[6] This not only speaks to the wider socio-economic context of underfunding of public services but subsequently addresses the weak nature of the preventive measures given from the Act. The police being the 'first responders' to trafficked victims, play a pivotal role in assessing and gaging all necessary details of the crime perpetrated as well as becoming the first form of safety net for these victims. The discretionary nature of duties given to the police opens a gap of accountability for officers who, on a cyclical basis; fail to identify victims. The Act is therefore rendered half-hearted in its attempt to curb modern slavery. Mandatory police training in the identification of victims of trafficking, spotting signs of abuse, reporting, and investigations into undocumented people has typically been overshadowed by the police's hardline attitude to undocumented victims. London based charity Hestia made a series of super-complaints against the ways in which police dealt with victims of slavery and trafficking. Hestia found that the majority of officers whilst having
mandatory training for staff; had key issues of inconsistency in their continuous professional development.[7]

THE HOME OFFICE VS THE 2015 LEGISLATION

The 2015 Act was believed to be fundamental in creating a safety net for victims of trafficking and slavery, with the Act stating it will 'introduce a defence for victims', as well as placing a duty on the secretary of state to produce statutory guidance on victim identification and services for

7 Harvey Slade, 'Tackling Modern Slavery Needs A Comprehensive Police Response' (n 6)

victims.[8] However, the referral system often categorises victims through their immigration status, this has led to a failure of support being given to victims who typically slip through the cracks during their transitions out of slavery into the justice system. A report by the Independent, stated that the Home Office were often failing to refer victims to subcontracted charities for their entitled services and which resulted in them sending victims back to the addresses to which they were abused in.[9] Frank Field the MP of the chair of the Modern Slavery Act review reported that this was a 'shocking' case of 'carelessness amongst Home Office caseworkers'.[10] A further comment by Labour MP Paul Bloomfield reinforced this as a failure to victims of slavery. [11]

Additionally, the police passing of information of victims to the Home Office creates a culture of fear for victims without leave to remain in the UK. Thus, breaking the chain of first respondent- support-prosecution and convictions. As referred to earlier, the involvement of the Home Office with victims of modern-day slavery has been a key tool for traffickers to coerce victims into staying due to insecurity around of their immigration status. Clarity around the Acts intention and its real practice is reinforced to be at odds with one another. Whilst the 2015 Act intended to strive in creating a safety net for victims, it is clear that police passing information of victims to the Home Office has resulted in mass criminalisation of potential victims and failure of vital services of support being provided. The Salvation Army reported that a recurrence of none communication from the Home Office has created a gap between their work and the victims in need.

The Home Office's fixed lens of questions of immigration status has led to the failure of transferring victims to charities and services. As a result, many are transferred to detention centres. Notably, cases outside of the EU are reported to be four times less likely to be recognised as victims of trafficking and are often brought to detention centres.[12] In 2018 alone over 500 victims of slavery and trafficking were detained.[13] The detention centres of the Home Office has long been a controversial topic in the realm of immigration. Reports coming out Yarl's Wood female detention centre have described an incident where a pregnant woman had to give birth in her cell alone. This is coupled with the numerous hunger strikes by detainees in 2017 and 2018, who continue to protest against the 'hellish' conditions and contest their detention under Article 5 of the Human Rights Convention.[14]

The failings of the Home Office in support of trafficked victims have followed them into court. The 2018 landmark ruling ruled that the Home Offices interactions with victims failed

8 Modern Slavery Act 2015.

9 Diane Taylor, 'More than 500 victims of trafficking detained in 2018, UK study finds', *Independent* (London, 9 July 2019) < https://www.theguardian.com/law/2019/jul/09/more-than-500-victims-of-trafficking-detained-in-2018-uk-study-finds > - accessed 8 November 2019

10 Ibid.

11 Ibid.

12 Anti-Slavery.org <https://www.antislavery.org/slavery-today/slavery-uk/>-, accessed 8 November 2019

13 Diane Taylor, 'More than 500 victims of trafficking detained in 2018, UK study (n 9).

14 Rebecca Hackern 'Here's Why 100 Women Are on Hunger Strike at Yarl's Wood – *RightsInfo*- (London, 5 March 2018) < https://rightsinfo.org/heres-100-women-hunger-strike-yarls-wood/ > - , accessed 8 November 2019.

to mirror that of the European convention obligations.[15] The Court of Appeal ruling forced the government to lower the threshold for allowing trafficked victims leave to remain as the statistics for positive decisions of victims is at a mere 12% success rate. The courts damning judgements of Home Office conduct with victims of slavery was also seen in another controversial ruling of 2018, where a Ghanaian man had his leave to remain rejected by the Home Office despite being sold into slavery as a child and then being trafficked into the UK. The three senior justices; Lord Justice Hickenbottom, Lord Justice Singh and Lord Justice Patten condemned the 'unlawful' UK immigration rules for trafficking victims and went on to state in their judgements that immigration guidance imposed is often 'too high a threshold' when it comes to the personal circumstances of victims. Fundamentally, all justices agreed that the Home Office in complying with their guidance measures failed to meet Britain's responsibilities under the Council of Europe's Convention on human trafficking.[16] The sentiments expressed by the justices not only highlights the systematic failures of the Home Office on account of victims, but also their failures to uphold the legally binding convention by the EU Charter of Fundamental Human Rights which became legally binding under the Lisbon Treaty, Article 6 TEU. The Home Office's failures to safeguard victims of trafficking has reinforced the rendering of the 2015 Act as incompetent in practice.

THE BIG COMPANIES, LAWS AROUND WORKERS RIGHTS AND PROTECTION OF THE VULNERABLE

Corporations ranging from giant companies such as Amazon, Starbucks and Google to that of British based companies such as Sports Direct, all have a fundamental connection in their businesses; within the supply chain of goods, modern-day slavery is present. This comes from a report from the Business & Human Rights Resource Centre which reported that the UK government alone awards £45 billion , the equivalent of 3% of the UK's GDP worth of government contracts to private firms every year this includes some that are involved in high-risk sectors.[17] Despite all companies having manifestos stating that they strive to prevent slavery in their manufacturing supply chains. The question still stands, does the 2015 Act go further to hold these conglomerates to account?

Section 54 (1) and (2) of the Act makes the requirement of businesses 'over a certain size' to disclose annually the actions they are taking to ensure that modern-day slavery in their supply chains and businesses are non-existent.[18] However, this subjective initiative without ramifications attached, allows companies to fall short in adequately addressing modern-day slavery in their organisations, thus affirming the rendering of the policies targeted within the Act as inefficient.

15 Diane Taylor, Modern slavery ruling may lead to more victims getting leave to remain' *Independent* (London, 14 February 2018) < https://www.theguardian.com/law/2018/feb/14/modern-slavery-ruling-may-lead-to-more-victims-getting-leave-to-remain?CMP=twt_gu >-, accessed 8 November 2019.

16 Kirsty O'Connor, 'Trafficking victim wins court fight as immigration guidance ruled unlawful', *Belfast telegraph*, (Belfast, 13 February 2018), < https://www.belfasttelegraph.co.uk/news/uk/trafficking-victim-wins-court-fight-as-immigration-guidance-ruled- unlawful-36599733.html > , accessed 8th November 2019

17 Business & Human Rights Centre, *Modern Slavery in Company Operation and Supply Chains,* (ITUC CSI IGB) paras 3.3 – 3.

18 Modern Slavery Act 2015.

Post the 2015 legislation companies such as Amazon have come under fire for having T-shirts slogans praising slavery for 'making things happen' as well as facing scrutiny for workers having 'slave-like conditions', with employees reporting to have pressures to over-perform as well as being threatened with sacking for taking toilet breaks during 12-hour shifts.[19] Whilst legitimate workers cannot be truly compared in the same light to modern-day slaves; it, however, highlights the citadels of manufacturing in companies such as Amazon, arguably showing why practices of slavery go seemingly undetected in these companies.

SO, WHAT CAN BE DONE ABOUT IT?

The issues addressed in this article are complex, yet the remedies are straightforward. In the case of failures of first responders in the identification of potential victims it is clear that police should take measures to demystify the lies told by traffickers, not only should training be done in an internal sphere; initiatives to dispel these myths conjured by traffickers should have a public educational focus. This should include leaflets, articles and police partnership with local MP's in holding interactive town hall meetings with communities to dispel the rumours of automatic criminalisation when coming to the police without ID. This would also involve a clear collaborative front of police and non-profit organisations such as Unseenuk.
Furthermore, the 2015 legislation outlining guidelines for the police in their identification of victims should have a clear set of rules on how to spot a victim of trafficking whilst investigating cases as well as removing the suggestive nature of these measures. As the previous anti-slavery commissioner stated, these initiatives can truly only work if it is at the forefront of policing. Therefore, these measures should move from a guidance to mandatory setting in policy structure.

Engagement with the Home Office proves a difficult and controversial theme in the assessment of the Modern-Day Slavery Act in the UK. Whilst the Home Office would be rendered void if excluded from the process of assessing trafficked victims. Policy changes likened to that in the police need to be addressed. The controversial and often racialised lens of assessing victims proves to run antagonistically against the aims of support to all victims promised within the Act. A clear improvement the Home Office can make is with the liaison with charities such as Unseenuk, Amnesty International and the Salvation Army. Moreover, judicial scrutiny of the Home Office has opened a caveat in the conversation regarding the ways in which asylum and cases of 'leave to remain' are being assessed within the UK. As previous judges have shown that the actions by the Home Office have often been in contempt of regulations and directives by the EU on human rights and human trafficking. Therefore, legislative pressure; with an aim on prohibiting the Home Office's detention of trafficked victims with an unclear immigration status would force the Home Office to assess the mechanisms of asylum cases.

The case of corporations and modern-day slavery can be aided by reforms to the 2015 Act; as illustrated in the course of this assessment; the legislations has no bite. Legislation can only go so

19 Michael Sainato, 'Exploited Amazon workers need a union. When will they get one?', *The Guardian*, (London, 8 July 2018) < https://www.theguardian.com/commentisfree/2018/jul/08/amazon-jeff-bezos-unionize-working-conditions >- , accessed 8 November 2019.

far without fiscal sanctions against companies who fail to have legitimate steps in identification and stopping of the financially lucrative slave labour. Therefore, governmental economic sanctions should be implemented in regards to companies who not only fail to declare reports of activities to curb modern slavery; but also fail to deliver clear evidence of non- trafficking in their supply chains. Ethical trade manager for Oxfam in the UK, Rachel Wilshaw has commented that there is simply 'no financial benefit for suppliers and producers to provide good practice' as they 'cannot comply because the cheap labour conditions do not allow it'.[20] This therefore establishes the notion that if the UK implemented economic disciplinary penalties against companies who fail to be proactive in tackling modern slavery within their network; companies would be forced to take legitimate action. By removing the option of companies merely releasing discretionary statements, companies will start to heed to the policies within the 2015 Act.

CONCLUSION

In conclusion to this essay, the need for the British government to tighten the 2015 legislation against modern-day slavery is ever-present. Reforms are needed both within the policies of the Act and the practical implementations of it within the Home Office and the Police. The 2015 Act whilst a right step in the direction in combatting trafficking; fails to be sufficient in both preventing slavery and delivering subsequent protection and support for survivors. The many aims I have outlined in remedying the pitfalls within this Act are not uncommon to the conversation around trafficking. As of May 2019, an Independent Review into the Act, suggested increased inspection into the Home Office's reforms of the NRM, as well as changing the terminology of Section 54 (2) of the Act, advocating for stronger language; changing terms such as; 'may' to 'must' in effect to companies initiatives in tackling slavery.[21] It is clear that the British government have a long way to go in combatting the ever-changing lucrative world of modern-day slavery. The 2015 Act should be seen as just the beginning in the fight against modern-day slavery. Whilst some may hail the Act as the first successful pushback against traffickers, as reinforced in the discourse of this essay, legislation can only do so much without legitimate accountability. Accountability is the only currency that will ensure that both first responders and corporations take great lengths in dismantling this network.

20 Kieran Guilbert, 'Lawmakers urge UK to punish big companies that fail to tackle modern slavery' *Reuters;* (London, 22 January 2019) < https://www.reuters.com/article/us-britain-slavery-lawmaking-business/lawmakers-urge-uk-to-punish-big-companies-that-fail- to-tackle-modern-slavery-idUSKCN1PG26P >- , accessed 12 November 2019.

21 Secretary of State for the Home Department, Independent Review of the Modern Slavery Act 2015: Final Report, para 18.

CASE GRAVITY AT THE INTERNATIONAL CRIMINAL COURT

Rhiannon Richards

INTRODUCTION:

The International Criminal Court ('the Court') is an institution of great ambition. In the wake of the many atrocities of the twentieth century, the drafters of the Rome Statute ('the Statute') were determined to "put an end to impunity" for those crimes of most serious concern to the international community – genocide, crimes against humanity, war crimes and aggression.[1] However, relative to national legal systems, the Court has limited resources with which to investigate and prosecute criminality. The complexities of international political pressures, along with volatile conditions often found in the situations in which these crimes are committed, further challenge the Court's capacity to bring the guilty to justice and make its lack of resources ever more striking. The practical capabilities of the Court fall woefully short of those needed to effectively prosecute the crimes within its remit.

In an attempt to curb this disparity between the Court's potential caseload and its limited resources, the drafters of the Statute included a gravity provision for admissibility (dubbed the 'gravity threshold').[2] Gravity works to restrict the cases that can be brought before the Court. However, the drafters of the Statute omitted any definition of what constitutes crimes 'most grave', stating only that a crime is inadmissible if it is "not of sufficient gravity to justify further action by the Court".[3] Interpreting the gravity threshold is left to the Court's discretion.

Selecting which cases to prosecute is a complex and contentious process. All crimes within the Court's jurisdiction are, by their nature, grave. Attempts to compare them involve difficult questions and are subjective in their analysis. Decisions inevitably provoke conflicting responses from onlookers – any decision to prosecute is also a choice not to prosecute other perpetrators of serious crimes. The Court must determine which (few) prosecutions will best progress its struggle against impunity. The institution's legitimacy depends on the choices it makes.

The Court has been developing its interpretation of gravity since entering into force in 2002. There are two stages at which the Court must consider gravity. Situational gravity is considered when the Court decides whether to initiate an investigation into a situation. Case gravity, in turn, is considered at the point of deciding which specific cases within a situation should be brought

1 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 38544, Preamble, article 5(1).

2 Ibid., article 17(1)(d).

3 Ibid., article 17(1)(d).

for prosecution. These two parts to gravity have developed along separate lines and contain different, albeit overlapping, considerations and dilemmas. This paper explores the efficacy and legitimacy of the Court's interpretation of gravity at the case level.

The following proceeds in three parts. Part One explores the Court's approach to gravity to date, concluding that the Court has adopted a flexible interpretation of the threshold. Part Two contains a critique of this flexibility, both in principle and in practice. Part Three then advocates for systematicity as a key measure of gravity, arguing that a prioritisation of systematic crimes stands to strengthen the threshold and the Court's effectiveness as a whole.

PART ONE: THE COURT'S APPROACH TO GRAVITY

(i) The Lubanga/Ntaganda Decision

The Court's first interpretation of gravity came in the Situation in the Democratic Republic of Congo ('DRC'), in relation to the cases of Thomas Lubanga and Bosco Ntaganda. Pre-Trial Chamber I ('PTC I') determined that, for the gravity threshold to be met, three conditions must be satisfied: (i) the relevant conduct must be systematic or large-scale, with "due consideration" given to "social alarm"; (ii) the relevant person must fall within the category of most senior leaders in the situation under investigation; and (iii) the relevant person must fall within the category of being most responsible for the alleged crime.[4] The Chamber also noted that any retributive capacities of the Court must be subordinate to its "higher purpose of prevention", and justified the above criteria on such grounds.[5]

The Chamber found the Lubanga case admissible under the Statute.[6] However, the case against Ntaganda was found inadmissible as a result of failing to satisfy the "most senior" and "most responsible" requirements of the Chamber's gravity test.[7]

PTC I's interpretation of gravity was highly problematic. Firstly, "social alarm" is an inappropriate criterion for a legal test in that it draws on subjective reactions to crimes as opposed to their objective gravity.[8] Secondly, and most strikingly, the Chamber's assertion that a focus on "most senior leaders suspected of being most responsible" for alleged crimes is necessary to protect the Court's deterrent function is somewhat counter-intuitive. Far from maximising deterrence, imposing limitations such as these on the Court's discretionary powers instead risks negating the Court's deterrent function by placing any perpetrator in a position lower than that of leader out of the Court's reach, as exemplified by the Chamber's admissibility finding in the Ntaganda case.[9]

Indeed, in a judgement reversing the decision to find Ntaganda's case inadmissible, the Appeals

4 *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, No. ICC-01/04-01/06, Annex I (24 February 2006), para. 63. 5 Ibid., paras 48, 53-54.
6 Ibid., para. 75.
7 *Prosecutor v. Ntaganda*, Appeals Chamber, No. ICC-01/04-169 (13 July 2006), paras 63–65.
8 See Ibid., para. 72.
9 See, Ibid., paras 73-77.

Chamber ('AC') held that PTC I had "erred in law" and that its errors were enough that they could "impact on the Court as a whole".[10] In addition to the issues outlined above, the AC challenged PTC I's requirement that the crime be widespread or systematic, stating that this criterion "blur[red] the distinction" between crimes against humanity and war crimes as defined in the Statute (which includes an organisational requirement in article 7 but not article 8).[11] This final criticism is questionable. Though there is no organisational requirement for war crimes under the Statute, article 8 clearly states that the Court is to have particular jurisdiction over war crimes that are committed in pursuance of a plan or policy, or are part of a large-scale commission of such crimes.[12] As shall be explored later in this paper, the gravity threshold would be well served by a prioritisation of systematic crimes over others.

Nevertheless, PTC I's interpretation of gravity was clearly insufficient and needed confronting immediately.

(ii) The Abu Garda Decision

In 2007, the Office of the Prosecutor ('OTP') published a Policy Paper recommending four new criteria for determining case gravity: the scale of crimes, their nature, their manner of commission and their impact.[13] In February 2010, the case against Abu Garda provided PTC I with an opportunity to apply the revised approach. In addition to the Prosecutor's four considerations, PTC I added that both quantitative and qualitative factors should be considered when assessing gravity.[14]

Abu Garda was accused of directing attacks against African Union Mission in Sudan ('AMIS') personnel and property involved in a peacekeeping operation in Darfur.[15] In comparison to other cases prosecuted by the Court, the Abu Garda case involved a relatively low number of direct victims, with 12 people killed.[16] However, the Chamber held that the attack had far-reaching impacts, affecting "mandated protective roles with respect to millions of Darfurian civilians" and leaving people without protective measures on which they had previously relied.[17] In light of the new criteria for measuring gravity, PTC I held that these facts rendered the case sufficiently grave and found it admissible under the Statute.[18]

(iii) The Bemba Decision

The admissibility decision in the case against Jean-Pierre Bemba also reflects this revised interpretation of gravity. Bemba was charged with "co-perpetration" through his failure to

10 Ibid., paras 3, 54.
11 Ibid., para. 70.
12 Rome Statute (n 1), article 8(1).
13 ICC-OTP-2007, 'Policy Paper on the Interests of Justice' (September 2007), p. 5.
14 Prosecutor v. Bahar Idriss Abu Garda, Pre-Trial Chamber I, No. ICC-02/05-02/09-243-Red (8 February, 2010), para. 31.
15 Ibid. para. 1.
16 Ibid. para. 21.
17 Ibid.
18 Ibid., para. 34.

"repress or punish" the crimes of his subordinates in the Central African Republic.[19] In February 2010, Bemba's Defence appealed against the admissibility of his case on the grounds that Bemba's alleged mode of responsibility – liability by way of omission as opposed to intentional criminal conduct – did not "meet the requisite level of gravity to justify prosecution by the ICC."[20]

Trial Chamber III rejected this argument, stating that the "scope, scale and nature" of the crimes committed by Bemba's subordinates were sufficiently grave for admissibility.[21]

(iv) The Al Mahdi Decision

The Court's official interpretation of gravity has remained consistent since the Abu Garda decision. In 2016, the OTP issued a Policy Paper on Case Selection which ascribed the same four-pronged interpretation to gravity – considering scale, nature, manner of commission and impact.[22]

Yet the Court has continued to find gravity in novel places. In September 2016, Al Mahdi became the first person convicted for crimes against property (without these being in conjunction with crimes against people) – the destruction of a number of religious and cultural heritage sites in Timbuktu, Mali in 2012, a war crime under article 8(2)(e)(iv) of the Statute. [23] In its judgement, Trial Chamber VIII recognised that crimes against property are "generally of lesser gravity than crimes against persons".[24] However, the Chamber found that, due to the profound religious, cultural, and historical importance of the targeted sites to local people, Malian society, and the international community as a whole, the attacks had far-reaching effects.[25] The discriminatory nature of the crime, directed toward mausoleums that have played a "crucial role in the expansion of Islam in the region", was also identified as a significant factor in the determination of gravity.[26]

(v) Gravity To Date

Though the above does not provide a full account of the Court's application of the gravity threshold, it does contain decisions that are key to understanding how the Court's approach to gravity has developed. Broadly speaking, two phases can be identified: the first emphasised the significance of the role and position of the perpetrator, whereas the second moved away from rigid 'requirements' and instead developed a set of more flexible 'considerations'.[27] This flexibility can be seen as a response to fears that an overly rigid interpretation of gravity could work against the Court's deterrent function.[28] However, since developing this new interpretation of gravity almost thirteen years ago, the Court has not revisited the question of case gravity or reflected

19 *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, No. ICC-01/05-01/08 (25 February 2010), paras 143-144. 20 Ibid., 142.
21 *Prosecutor v. Jean-Pierre Bemba Gombo,* Trial Chamber III, No. ICC-01/05-01/08 (24 June 2010), para. 130.
22 ICC-OTP, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016), paras 37-41.
23 *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Trial Chamber III, No. ICC-01/12-01/15 (27 September 2016), para. 77.
24 Ibid., 78-81.
25 Ibid.
26 Ibid.
27 'Policy Paper on the Interests of Justice' (n 13), p. 5.
28 Prosecutor v. Ntaganda (n 7), paras 73-77.

on the potential flaws in its application. The following section thus unpicks the Court's flexible interpretation of gravity in an effort to reveal its shortcomings and, in turn, to suggest how the threshold could be reworked so as to better serve its function of narrowing the Court's caseload to those cases that will best progress the struggle against impunity.

PART TWO: PITFALLS OF FLEXIBILITY

The flexibility of the Court's interpretation of gravity can be criticised in two ways. The first concerns the underlying principles of this flexibility, and whether or not these principles are the appropriate ones to apply, given the gravity threshold's purpose of reducing the Court's caseload. The second critique goes to the core of the gravity issue, questioning the viability of this flexible interpretation in rendering the threshold effective.

(i) Flexibility in Principle

In his article 'The Identity Crisis of International Criminal Law', Darryl Robinson identifies a "distinctively 'liberal', 'broad', 'progressive', and 'dynamic' approach to interpretation" in international criminal law.[29] This approach to interpretation is clear in the Court's reading of gravity. Certainly, given the widely varying circumstances in which crimes in its jurisdiction occur, a degree of flexibility in the Court's interpretation is necessary. The crimes with which the Court deals are inextricable from the complex political, social, and economic conditions in which they operate. In terms of assessing gravity, it is clear that important factors could be lost if cases are subjected to a one-size-fits-all interpretation. In this view, an approach to gravity that is too rigid can be seen as at odds with the realities of "the most serious crimes of concern to the international community as a whole".[30]

However, it must not be forgotten that the purpose of the gravity threshold is to reduce the number of cases admissible before the Court. The threshold was designed to allow the Court to decline cases.[31] This inescapably involves comparing the severity of crimes that should, ideally, be viewed as distinct – grave in their own right. If the gravity threshold is to have its desired effect, the Court must accept that applying it will inevitably involve some awkward choices. It follows that the principle of committing to a broad approach is misplaced when applied to interpreting the gravity threshold: broadly speaking, all crimes under the subject matter jurisdiction of the Statute are grave, by virtue of being those crimes of most serious international concern. The purpose of the gravity threshold, being to narrow the Court's interpretation of what constitutes gravity, is to make a distinction between "the *existence* of jurisdiction and the *exercise* of jurisdiction".[32] In doing so, the threshold is designed to help reconcile the disjuncture between the Court's aims and its limited resources. The underlying principles that invoke a "broad" and "dynamic" approach to interpretation can therefore be seen as contradictory to the purpose of the threshold.

29 Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008), 21(04) *Leiden Journal of International Law 925*, p. 933.
30 Rome Statute (n 1), Preamble.
31 Susana SaCouto and Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2007), 23(05) *American University International Law Review*, p. 809.
32 Ibid., p. 820.

(ii) Flexibility in Practice

This contradiction has practical ramifications. In applying its broad and dynamic approach to interpretation, the Court has developed an understanding of gravity that is so flexible it is difficult to imagine any crime within the Court's jurisdiction that could not be found to contain at least some elements of gravity, and thus could be found inadmissible.[33] Margaret DeGuzman confronts this dilemma in her article 'The International Criminal Court's Gravity Jurisprudence at Ten', arguing that the only cases likely to be found inadmissible are those involving small scale and isolated war crimes.[34] As a result, she concludes, "the threshold seems destined for relative obscurity".[35]

DeGuzman contends that if the Court wishes to limit its potential caseload, it should do so by directly addressing its subject matter jurisdiction, "rather than via the ambiguous notion of gravity".[36] By way of explanation, DeGuzman references Judge Kaul's dissenting judgement in the decision regarding the admissibility of the situation of post-election violence in Kenya. Judge Kaul argued that the relevant crimes did not warrant the Court's adjudication because they did not fulfil the criterion of being part of a State or organisational policy, a requirement of the Statute's definition of crimes against humanity.[37] Fulfilling this criterion is regarded as significant as it increases the likelihood that crimes will result in substantial harm and decreases the likelihood that they will be prosecuted in domestic courts.[38] Judge Kaul's argument, though stemming from a narrower interpretation of the Court's subject matter jurisdiction than those of his peers, relates in essence to gravity.[39] This demonstrates how gravity as a concept can be addressed through an alternative route than that of determining admissibility under article 17(1)(d) of the Statute.

DeGuzman's argument is useful in that it reveals the inefficacy of the gravity threshold as it currently stands. However, her suggestion that the Court should instead address gravity through the lens of subject matter jurisdiction fails to confront the underlying causes of the threshold's apparent futility. Indeed, the "relative obscurity" of the gravity threshold is a symptom of the Court's overly flexible interpretation, which, in turn, is a product of the dilemmas surrounding the qualification of the types of crimes under the Court's jurisdiction and the resultant broad approach to interpretation invoked by the Court. To do away with the threshold would not resolve these dilemmas but would simply transplant them to the process of interpreting subject matter jurisdiction. The Court would face the same conundrum, only under a different name. It seems better, then, to attempt to reinterpret gravity in a way that renders the threshold more effective than the current approach.

33 Margaret DeGuzman, 'The International Criminal Court's Gravity Jurisprudence at Ten' (2013), 12(475) *Global Studies Law Review*, pp. 484-485.
34 Ibid., p. 485.
35 Ibid.
36 Ibid.
37 Ibid., p. 486; Rome Statute (n 1), article 7(2)(a).
38 Margaret DeGuzman (n 33), p. 486
39 Ibid.

In applying its flexible interpretation of gravity, the Court has neglected to employ all those considerations it recognises as significant in its policy papers. Most notably absent from the Court's findings of "sufficient gravity" in the above sample of cases is "the extent to which… crimes [are] systematic or result from a plan or organised policy" (contained within the consideration of 'manner of commission').[40] Abu Garda's case was found admissible as a result of its far-reaching impact;[41] Bemba's due to the "scope, scale and nature" of the crimes committed;[42] and Al Mahdi's owing to its discriminatory nature and widespread effects.[43] None of these admissibility decisions include a discussion of systematicity. This can be seen as an effect of the Court's overly flexible interpretation. Once the Court has established the presence of some aspects of gravity in a case, further consideration is deemed unnecessary. As such elements as brutality, discrimination and far-reaching impacts are substantially more visible than elements such as systematicity, they are established first and thus awarded *de facto* significance over others. This paper contends that the Court's failing to properly consider the systematicity of crimes in evaluating case gravity is the greatest weakness in the Court's application of the gravity threshold, and reveals just how ill- suited the Court's flexible interpretation is to fighting impunity.

PART THREE: SYSTEMATICITY

The significance of systematicity as an element of gravity is clear. Not only is it included in the Court's formal interpretation of gravity set out in its policy papers, but the Statute itself recognises the importance of considering how systematic crimes are: as noted above, article 8(1) provides that the Court is to have particular jurisdiction over war crimes that are "committed as part of a plan or policy or as part of a large-scale commission of such crimes".[44] Scholars too, emphasise the significance of systematicity in assessments of gravity.

Alison Danner identifies two factors that render international crimes particularly serious. Firstly, she argues, "group criminal activity generally poses a greater danger to society than do individuals acting alone".[45] This is because crimes that are perpetrated by groups are more likely to be large in scale and result in greater impacts and conditions of vulnerability for victims. Secondly, Danner asserts that crimes are generally viewed as more serious if they target individuals as a result of their membership to a particular group; even if the crimes target relatively few direct victims, the group as a whole is attacked indirectly.[46]

In his essay 'Situational Gravity Under the Rome Statute', Kevin Heller uses Danner's argument to demonstrate that both these factors contributing to the seriousness of crimes are contained in

40 'Policy Paper on Case Selection and Prioritisation' (n 22), para. 40.
41 *Prosecutor v. Bahar Idriss Abu Garda* (n 14), paras 33-34.
42 *Prosecutor v. Jean-Pierre Bemba Gombo* (n 21), para. 130.
43 *Prosecutor v. Ahmad Al Faqi Al* Mahdi (n 23), paras 78-81.
44 Rome Statute (n 1), article 8(1).
45 Allison Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001), 87(3) *Virginia Law Review*, p. 470.
46 Ibid., pp. 470-471.

the notion of systematicity.[47] Heller holds that, in the contexts of crimes within the subject matter jurisdiction of the Court, with the possible exception of small-scale and isolated war crimes, the collective perpetration of crimes against collective victims is "not simply violence committed by groups of individuals" but, more importantly, is "committed by groups of individuals acting in pursuance of a common criminal design".[48] According to Heller, "groups that coordinate their actions are far more likely to commit crimes, and will cause far greater harm, than groups acting independently".[49] The degree of systematicity in the commission of crimes affects the danger posed to society, and thus constitutes a central aspect of gravity.

To prioritise systematicity in assessments of gravity is not only justified because systematicity contains those aspects that can be regarded as most serious in principle. In practical terms also, the prioritisation of systematicity in interpreting gravity would strengthen the Court's position in its struggle against impunity. This is because the fundamental problem of impunity lies deeper than the simple matter of individual criminals escaping justice. The problem of impunity should not be viewed as isolated within a particular context of a particular crime but, rather, as a process that is continually reinforced and perpetuated by the structures of power that lie behind acts of criminality. The greater the structure of power, the less likely perpetrators will be held to account, and the further impunity penetrates. William Schabas supports this view. Using the example of Northern Uganda, he argues that the greater power structures behind State crimes than behind the crimes of rebel groups like the Lord's Resistance Army mean that pro-government perpetrators are less likely to be brought to justice than their rebel counterparts, "whose leaders can be adequately punished under the national legal system once it can apprehend them".[50] For this reason, Schabas argues, "[t]he problem with impunity in Uganda resides in the fact that pro-government forces are committing atrocities".[51] To effectively confront impunity, the Court must therefore direct its prosecutorial efforts towards those structures of power that most uphold the impunity gap.

The extent to which a crime is systematic can be seen as correlated to the power structures that lie behind it. According to the UNHCHR, "[s]ystem crimes are most often committed by State security forces (army or police) or by insurgent or paramilitary organizations."[52] Heller argues that, in terms of the crimes under the jurisdiction of the Court, "system crimes" are more likely to be committed by States or state-like actors than any other.[53] Using torture as an example, he contends that, although rebel groups often commit acts of torture, the physical resources and pervasive reach of power required to systematically commit this kind of violence are generally only found in the hands of States or state-like entities.[54]

47 Kevin Heller, 'Situational Gravity Under the Rome Statute' (2008), in Carsten Stahn and Larissa van den Herik (eds) *Future Directions in International Criminal Justice* (2009), Cambridge University Press, p. 8.
48 Ibid.
49 Ibid.
50 William Schabas, *An Introduction to the International Criminal Court (Third Ed.)* (2007), Cambridge University Press, p. 191
51 Ibid.
52 UNHCHR, 'Rule of Law Tools for Post-Conflict States: Prosecution Initiatives' (2006), p. 12.
53 Kevin Heller (n 47), p. 15.
54 Ibid.

Heller uses this argument to advocate for State involvement, rather than systematicity, as a requirement of gravity. Indeed, Heller's argument also regards the assessment of gravity at the level of the situation as opposed to the case. However, despite these distinctions, his analysis is illuminating for present purposes, for it demonstrates the implicit relationship between systematicity and structures of power. As we have seen through Schabas' exploration of the impunity gap in Uganda, impunity, too, is inherently linked to these structures of power. It is therefore logical that to require a level of systematicity in interpretations of case gravity would recast the threshold into a mechanism more appropriate for its original purpose of restraining the Court's remit to those cases most effectual in its fight against impunity.

CONCLUSION:

The gravity threshold for case admissibility poses some of the greatest dilemmas facing the Court. For an institution of such great ambition as to "put an end to impunity", the Court's lack of resources is detrimental.[55] The Court exemplifies Robinson's assertion that international criminal law contains within it a "grave disparity between utopian aspirations and dystopian realities"; the gravity threshold stands in the void between.[56] How the Court interprets gravity is therefore critical to the effectiveness of the institution as a whole.

The Court's approach to case gravity has changed over time, moving from a relatively restrictive interpretation to one that is broader and more inclusive. Though, at first blush, this increased flexibility appears logical – not least as a safeguard to the Court's deterrent function – a closer look at the Court's practice reveals the truth behind this flexibility: the Court has no clear strategy for assessing gravity.

The flexibility of the Court's interpretation of gravity can be viewed as deriving from a reluctance to critically compare the seriousness of international crimes. Indeed, it is clear that to do so involves tough choices. Ideally, crimes that fall within the Court's jurisdiction should be regarded grave in their own right and should not be subjected to processes that essentially rank them in terms of seriousness. But the gravity threshold was designed to *narrow* the Court's remit. Adopting an interpretation of gravity that is overly broad or flexible therefore stands at odds with the very purpose of the threshold. The Court has constructed an *inclusive* interpretation of a provision whose function is to attribute *exclusive* significance to some crimes over others.

This has resulted in a situation in which there are virtually no crimes under the Statute that could be found to have insufficient gravity for admissibility.[57] Flexibility, then, has negated gravity to the point of "obscurity".[58] A decisive interpretation of case gravity is needed if the threshold is to be redeemed.

55 Rome Statute (n 1), Preamble.
56 Darryl Robinson (n 29), p. 944.
57 Margaret DeGuzman (n 33), p. 484.
58 Ibid., p. 485.

A focus on the systematicity of crimes provides a compelling solution. The Statute itself recognises the importance of systematicity in assessments of gravity, as is clear from article 8(1). The Court also recognises the significance of systematicity in its official interpretation of gravity.[59] Danner and Heller make clear why systematicity is of such significance. Both demonstrate that crimes which are collective in nature, whether in terms of perpetration or victimisation, pose a greater threat to society than crimes that are not.[60] This threat is particularly poignant when collective criminality occurs in pursuance of a common plan or policy, as it does in the contexts of most crimes under the Court's subject matter jurisdiction.[61] Each of these factors is encapsulated in the notion of systematicity.[62] Systematicity is therefore a logical measure of gravity.

To prioritise systematic crimes would also well serve the Court's purpose of ending impunity. Indeed, impunity is itself systemic. Behind systematic crimes lie the same power structures that create the impunity gap. To direct prosecutorial efforts towards systematic crimes is thus to confront impunity at its heart, as opposed to via the more abstract route of prosecuting independent individuals or groups.

A focus on systematicity in assessments of case gravity thus poses a good strategy for the Court, strengthening the threshold's effect and bringing the Court closer to its goal of ending impunity.

59 'Policy Paper on Case Selection and Prioritisation' (n 22), para. 40.
60 Alison Marston Danner (n 45), p. 470; Kevin Heller (n 47), p. 8.
61 Kevin Heller (n 47), p. 8.
62 Ibid.

AUTONOMOUS MACHINES AND THE LAW

Brian Gannon

ABSTRACT

This paper concerns how existing legal and ethical frameworks can be applied to autonomous machines, which include the emerging technologies of Artificial Intelligence (AI) and machine learning (ML), and the related field of robotics. Although these technologies have been under development for many years, it is only recently that their ability to make decisions independent of humans has become feasible. What was once exclusive to science fiction is now in the public domain, if not quite in everyday use.

While the legal frameworks which govern autonomous machines are not fully developed, there are existing legal concepts and precedents that can form the basis for a comprehensive legal code in this emerging area. Established concepts such as product and vicarious liability, for example, may help underpin laws regulating human-operated autonomous agents. Other laws, for example those relating to animals, might provide some guidance just as historic precedents concerning privacy have been adapted to accommodate the digital world.

But when machines make independent decisions, fundamental questions and principles of law are raised. Where criminal behaviour is concerned, how are the fundamental concepts of intent, culpability and causation to be applied? How and who can be punished? In civil matters, how is legal personality to be addressed? At what stage can it be determined that a machine has rights? Is it possible for a machine to have intent?

This paper is an exploratory study of such issues. It describes the current technological landscape and presents a view of how the existing legal frameworks of product and vicarious liability have been adapted or extended to address emerging technology use. The question of whether and how entirely new legal frameworks will emerge is addressed, but this is necessarily speculative and is not intended to provide definitive or normative answers to challenges posed in law by advanced autonomous technology.

INTRODUCTION

It is difficult today to avoid references to AI, a term used to refer to machines that can mimic human cognitive skills. It is decidedly the technology of the moment, just as the World Wide Web was in 1999, personal computers in 1984, and microprocessors in 1970. It is predicted that it will change our lives in unimaginable ways and that it presents vast benefits to society and at the same time, great dangers. For some, it represents the most challenging and profound technology experienced by humankind to date.[1]

1 MS Chief Envisioning Officer Dave Coplin: AI is the most important technology that anybody on the planet is working on today:

This is not a philosophical and speculative discourse by theoretical futurists. Such technology is present today: its reach already extends into many aspects of society, and is set to revolutionise working practices, including the ways in which justice is dispensed through the courts. It pervades all aspects of modern life. AI systems 'pilot sophisticated aircraft; perform delicate surgery; study the landscape of Mars; and through smart nanotechnology, microscopic machines may soon deliver targeted medicines to areas within the body that are otherwise unreachable. In every one of these examples, machines perform these complex and at times dangerous tasks as well as, if not better than, humans.'[2]

This immediacy is reflected in political and legal discourse. In 2017, the European Parliament, perhaps with an understandable degree of overstatement, issued a resolution with recommendations on Civil Law Rules on robotics in which it recommended "creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons…".[3] While the European Commission did not go so far as to endorse this ambition, in its Communication on Artificial Intelligence in 2018 it acknowledged the need for an appropriate ethical and legal framework, and set out an approach of building on existing regulatory framework, particularly in the areas of Product Liability, Data Protection and Cybersecurity.[4] In the UK, two Supreme Court judges, Lord Sales and Lord Reid, have spoken extra-judicially on the topic in 2019, highlighting the potential risks and benefits of AI for legal systems and practitioners. In the wider legal discourse, the topic is increasingly frequent, featuring in conferences, literature and practice.[5] At the same time, a search of the 2019 Civil Procedure Rules on the term 'artificial intelligence' draws a blank, reflecting the fact that practice inevitably lags discourse.

Given the potential impact and scale of deployment of such powerful technology and the fact that it is already deployed widely, it is reasonable to question the extent to which legal structures in the UK and in other jurisdictions are equipped to deal with its consequences. Lord Sales, in a recent lecture, poses the question as follows:
'[H]ow should legal doctrine adapt to processes governed without human agency, by artificial intelligence - that is by autonomous computers generating their own solutions, free from any direct human control?'[6]
A corollary is how such technology can be introduced 'in ways that build trust and understanding,

https://www.ibtimes.co.uk/microsofts-dave-coplin-ai-will-change-how-humans-relate-each-other-1558940; Elon Musk – AI is the biggest risk we face as a civilization: https://www.telegraph.co.uk/technology/2017/07/17/ai-biggest-risk-face-civilisation-elon-musk-says/

Vladimir Putin - Whoever becomes the leader in this sphere will become the ruler of the world." https://www.theverge.com/2017/9/4/16251226/russia-ai-putin-rule-the-world (All sources accessed 25 Nov 2019)

2 Vladeck, David C., 'Machines without Principals: Liability Rules and Artificial Intelligence', 2014 89 Wash L Rev 117

3 European Parliament resolution, 16 February 2017 (2015/2103(INL)) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017IP0051 (accessed 1 Jan 2020)

4 EU Communication on AI, 25 April 2018: https://ec.europa.eu/digital-single-market/en/news/communication-artificial-intelligence- europe (accessed 1 Jan 2020)

5 'Law and technological change', British Irish Commercial Bar Association Signet Library, Lord Hodge, Edinburgh 4 April 2019

6 'Algorithms, Artificial Intelligence and the Law', The Sir Henry Brooke Lecture for BAILII, Lord Sales, London, 12 November 2019

and respect human and civil rights' and how policies and processes should 'address ethical, privacy, and security implications… to ensure that the benefits of AI technologies will be spread broadly and fairly.'[7]

This paper is the result of research that explores this question. It sets out a brief history of digital technology and AI and identifies how current legal constructs of agency, product liability and vicarious liability address and govern its use. It assesses the applicability of the fundamental legal constructs of intent and legal personality to genuinely novel circumstances, and it concludes that while legal systems in place today appear robust enough to deal with AI for the immediate future, they will need to adapt to deal with the emerging political, social and ethical challenges.

SCOPE OF THIS RESEARCH

The definition of AI used in the context of this research is that set out by Lord Sales:
'I use AI as a shorthand for self-directed and self-adaptive computer activity. It arises when computer systems perform more complex tasks which previously required human intelligence and the application of on-the-spot judgement, such as driving a car.
…
I take AI to involve machines which are capable of analysing situations and learning for themselves and then generating answers which may not even be foreseen or controlled by their programmers.'[8]

The deliberate 'training' of AI systems using repeated 'trial and error' programs to hone their capabilities further enhances their ability to predict and perform tasks, for example, by becoming progressively better at recognising a digital image. This is what is known as machine learning (ML), which is enabled by techniques such as "deep learning," a method which mimics biological thought and learning processes ('adaptive artificial neural networks').[9] AI is further categorised as weak or narrow AI (systems designed to perform a single task such as facial recognition) and strong or general AI, which comprises general-purpose systems designed to perform multiple diverse cognitive tasks, including problem solving.[10] Frequently these systems use complex arrays of sensors and actuators to sense and measure the external environment, allowing them to react to events in the physical world. Such systems are also called intelligent agents or robots. [11] This research does not distinguish sharply between robots, ML and AI agents, whether expressed in software or hardware.[12] The distinguishing factor, emphasised in Lord Sales' definition, is

7 Stanford University, 'One Hundred Year Study on Artificial Intelligence (AI100)', https://ai100.stanford.edu

8 Sales 'Algorithms, Artificial Intelligence and the Law' (n 6)

9 Stanford University, 'One Hundred Year Study on Artificial Intelligence (AI100)' (n 7)

10 https://futureoflife.org/background/benefits-risks-of-artificial-intelligence/?cn-reloaded=1 (accessed, 29 Dec 2019)

11 Barfield W. 'Towards a law of artificial intelligence, Barfield W. and Pagallo U. (eds) Research Handbook on the Law of Artificial Intelligence Edward Elgar Publishing Cheltenham 2018. Barfield offers a more complete definition of an Intelligent Agent as 'an autonomous entity which observes the world through sensors and acts upon an environment using actuators and the agent directs its activity towards achieving specific goals in a rational manner…and which may also learn or use knowledge to achieve their goals.'

12 The researcher acknowledges that there are several significant differences in theory and in practice, but these are not relevant for the

foresight. This is what sets the new technology apart from traditional computing, which to date has been eminently predictable. In fact, the defining aspect of a traditional computer is that it does exactly what it is programmed to do – no more and no less. In the future, AI systems will not.

Excluded from the scope of this research are the issues raised by deployment of AI in the legal sector, a topic which has been covered in some depth by other commentators, most notably Richard Susskind, the IT advisor to the Chief Justice.[13] This is an active area of concern in both research and practice. For example, The Law Society estimates that in a scenario where AI technology is adopted by legal firms, employment among all groups of legal professionals would be significantly reduced.[14] The use of AI in the process of disclosure has already surfaced in the courts: in *Pyrrho Investments v MWB Property*, over three million documents had to be considered for relevance and possible disclosure.[15] Master Matthews estimated that predictive coding (a form of ML) would cost significantly less than doing the job manually.[16]

A BRIEF HISTORY OF DIGITAL TECHNOLOGY AND AI HISTORY OF DIGITAL TECHNOLOGY

Digital technology as it is understood today is relatively new. The first digital computers emerged in the aftermath of the Second World War, and those developed for purely commercial use were deployed in the 1950s. The development of the IBM/360 operating system helped industrialise the use of computers in business, broadly at the same time that the integrated circuit (the 'microchip'), and subsequently the microprocessor, became available.17 The age of consumer computing started with the advent of the personal computer and the DOS operating system, and took off properly with the launch of the Windows 3.0 operating system in 1990. By the time the Internet and the World-Wide Web came into public view in the late 1990s, general purpose consumer computing was widespread and well-positioned to take advantage of connected global networks and associated browser technology.

HISTORY OF AI

The capabilities of the early general-purpose computers were much greater than the electromechanical devices that had preceded them, so that they prompted researchers to explore the limits of digital technology. Thus, the notion of AI emerged at an early stage in the development of digital technology, largely as an extension of the field of robotics. At the

purposes of this research.

13 Susskind, R. 'Online Courts and the Future of Justice', Oxford University Press 2019

14 IES Report, 'Research to inform workforce planning and career development in legal services', December 2019: https://www.lawsociety.org.uk/support-services/research-trends/research-to-inform-workforce-planning-and-career-development-in-legal-services/

15 [2016] EWHC 256 (Ch)

16 Ibid. at [31]

17 Brooks, F. 'The Mythical Man Month', Addison Wesley, Reading, 1975

Dartmouth Summer Research Project on Artificial Intelligence workshop in 1956, researchers set out a goal of investigating 'ways in which machines could be made to simulate aspects of intelligence', and the name 'artificial intelligence' was used to describe this objective.18 The discipline went through various phases. Early research identified many possible applications for AI, but there were few practical solutions, largely because of limitations in hardware (computers could not process instructions quickly enough to provide real-time responses) and because of limitations in the logic required to program simple deductive tasks. Failure to meet expectations led to disillusionment and a reduction in research funding.19 During the 1980s and 1990s interest revived following the advent of 'expert' systems – computer programs that applied specific rules to well-defined fact patterns. These proved most effective in certain contexts: '[F] irst, where the system embodies years of human experience that otherwise might not get collected or analyzed; second, where speed of operation is essential, such as an emergency nuclear reactor shut-down procedure; and third, where it is cheaper to use unskilled labour to implement an expert's recorded knowledge than it is to hire the human expert.'20 Expert systems proved to be good at very specific knowledge-dependant tasks, such as analysing blood samples or playing chess, but failed to be adopted widely because they were expensive and difficult to maintain and update.

Three confluent technology developments have changed this in recent years. First, huge volumes of real-time data are now available through the Internet; second, powerful computing capabilities are available (also through the Internet via 'cloud' computing platforms) at very low cost; and third, there have been significant advances in the development of artificial neural networks - software-based algorithms also known as Deep Learning that 'aim to mimic the brain's cognitive and computation mechanisms'.21 The first element (the data) provides the raw material that can yield insight and intelligence; the second (the hardware) provides the hard computational power to analyse, sift and interpret knowledge in almost real time, ideal for perception and object recognition. When coupled with neural networks the results are powerfully predictive, to the extent that some modern machines and AI agents can appear to make decisions autonomously, for example robots which make decisions to treat plants with pesticide based on visual data.22

THE LAW COVERING TECHNOLOGY TODAY

The law has traditionally addressed the domain of information technology (IT) by treating the computer as a tool. The primary legislation in England and Wales dealing with abuse of such tools is the Computer Misuse Act 1998, which sets out a range of penalties for unauthorised

18 McCarthy, J 'A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence, 1956: http://jmc.stanford.edu/ articles/dartmouth/dartmouth.pdf

19 Lighthill, J 'Artificial Intelligence: A General Survey', Artificial Intelligence: a paper symposium, 1973: http://www.chilton-computing.org.uk/inf/literature/reports/lighthill_report/p001.htm

20 Karnow, C 'Liability for Distributed Artificial Intelligences', Berkeley Technology Law Journal Vol 1 1996

21 Stucke, M and Ezrachi, A 'Antitrust, algorithmic pricing and tacit collusion', Research Handbook on the Law of Artificial Intelligence Edward Elgar Publishing Cheltenham 2018

22 http://www.bluerivertechnology.com/ (accessed 10 Jan 2020)

persons who accessed computer material or those who acted with intent or recklessly to impair the operation of a computer. Legislation regulating the use of the Internet focused on crimes relating to abuse of data privacy (such as the Data Protection Act 1998 and more recently the General Data Protection Regulation 2018), or adopted existing 'real-world' rules such as the Consumer Protection (Distance Selling) Regulations 2000, now replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. Statutory rules in the US, such as the Uniform Electronic Transactions Act (UETA) 1999 also define software as a tool. Vladek notes that "[AI machines] are… tools, albeit remarkably sophisticated tools, used by humans. … They are agents or instruments of other entities that have legal capacity as individuals, corporations, or other legal 'persons' that may be held accountable under the law for their actions.'[23] This approach is hardly surprising: lawyers tend to view technology 'through the lens of existing legal doctrines and present policy concerns' and usually leave it to the engineers and scientists to define the terms.[24] For example, the provision in section 3(2)(b) of the Computer Misuse Act 1998 notes that it is an offence 'to prevent or hinder access to any program or data held in any computer' – a broad policy that does not specify the nature of techniques prohibited.

PRODUCT LIABILITY

Peter Asaro, a philosopher of science and technology, suggests that the fundamental legal issues raised by the use of intelligent robots will be addressed by existing legal precedents, either applied directly or extended and interpreted. This organic evolution is, after all, the way in which the law has developed over centuries and it is likely that the civil laws governing product liability will address most of the common potential harms, and that we will be able to treat new robotic technology just as we treat existing complex artefacts like cars or weapons.[25]

The laws on product liability have developed from the general principles in negligence. Liability for defective or dangerous products is assigned to the manufacturer of the product, and can be differentially apportioned, shared (joint and several liability) or absolute (strict liability). To avoid liability, the manufacturer must take proper care (assessed according to sometimes imprecise industry standards) in assessing the risks a product poses and must warn the consumer of risks associated with use of the product, enforced through the General Product Safety Regulations 2005. The other primary source of law relating to product liability in England is the Consumer Protection Act 1987, under which a claimant who has suffered loss as a result of a defective product can bring an action against the manufacturer. The traditional elements of the tort of negligence apply: existence of a duty of care, the breach of which has caused damage that is not too remote from the breach.[26] A defective product in this context is one which does not meet

the level of safety that persons are generally entitled to expect, taking into account how the

23 Vladeck, 'Machines without Principals' (n 2)

24 Balkin, J., 'The Path of Robotics Law', California Law Review Circuit Vol 6 2015 [45 – 60]

25 Asaro, P, 'A Body to Kick, but Still no soul to Damn', Lin et al (eds), 'Robot Ethics: The Ethical and Social Implications of Robotics' 2014 MIT Press Cambridge

26 This implements the strict liability regime introduced by EU Directive 85/374/EEC on liability for defective products (Product Liability Directive).

product has been marketed, what user instructions and warnings were published and displayed on the product, and the purpose and time at which the product was supplied.[27] The guidance for determining a defective product was clarified in *Wilkes v DePuy,* which held that the defect in the product must be identified first rather than identifying the characteristic that caused injury.[28]

Applying product liability doctrines to intelligent agents raises immediate difficulties. How is the standard of care defined in an emerging industry? How is the level of safety expected to be determined? How can potential 'defects' be identified, if the defect is as a result of a logical, reasoned yet unpredicted action by the product? The issues of foreseeability and reasonable care are problematic because of the 'inherent complexity of anticipating potential future interactions'.[29] It can be argued that this is analogous to the problems faced by manufacturers of programmable general-purpose computers in the 1980s, or by manufacturers of modifiable consumer weapons. This variant of the 'it's the person, not the gun' argument has been successful in apportioning liability almost exclusively to the user, but in the case of the intelligent agent or autonomous robot, there is no 'person' involved.

The fundamental problem concerns foreseeability, a factor which dominates the field of negligence and is illustrated most vividly by the American case of *Palsgraf v Long Island Railroad Co.*.[30, 31] It is unreasonable to expect manufacturers of intelligent agents to anticipate all the things their products might do or be programmed to do. Harm caused by a product can be attributable to a manufacturing defect or design flaw and with computers or other programmable devices, failure may result from faulty code. In such situations, fault is assigned according to the principles of product liability (that is, to the party that developed the product). In AI systems, the fault may not be due to a flaw in design of programming. Rather, it may arise from a deliberate computation by the machine that results in an outcome that was wholly unforeseeable, or in some cases contrary to the rules used to program the machine.[32]

At this point the use of product liability legislation fails and other solutions are needed. Balkin suggests that a solution in such a scenario is to assign liability to the programmer regardless of the outcome, but this is beyond negligence and must answer to established criminal principles regarding proof of intent to harm or recklessness in causing harm. He notes that "If the law hopes to assign responsibility to humans and corporations, injuries by robotic and AI systems may strain traditional concepts of foreseeability… Liability without fault is a traditional solution, but it may stifle innovation in a developing area, and it may not be an appropriate solution in the context of criminal law.'[33] The Consumer Protection Act 1987 imposes a strict liability

27 Consumer Protection Act 1987, Part 1 section 3

28 [2016] EWHC 3096 (QB)

29 Asaro, 'A Body to Kick, but Still no soul to Damn' (n 25)

30 Polelle, M 'The Foreseeability Concept and Strict Products Liability: The Odd Couple of Tort Law' (1976) 8 Rutgers-Cam LJ 101

31 248 N.Y. 339, 162 N.E. 1928) 99)

32 This scenario is vividly portrayed in Stanley Kubrick's sci-fi film '2001: A Space Odyssey', when HAL, the sentient computer in the main character's spaceship, decides to kill the human astronauts).

33 Balkin, 'The Path of Robotics Law' (n 24)

on product manufacturers, meaning that there is no need for a claimant to demonstrate fault or negligence on behalf of the producer. Such liability, while protecting consumers, might cause producers either to limit or delay product innovations because of the risk of unforeseen consequences.

AGENCY

Barfield notes that it is not uncommon for electronic agents to serve in an agency relationship with humans. For example, there are software-driven trading platforms which buy and sell financial instruments without human intervention. He describes an agent in legal terms as a set of contractual, non-contractual and quasi-contractual fiduciary relationships that involve a person called the agent that is authorised to act on behalf of another called the principal to create legal relationships with a third party.[34] A particular challenge in agency relationships in the law is determining whether a person is acting on her own behalf or on behalf of a superior. The answer to this can have significant legal implications and the liability of the principal for the action of the agent arises from the doctrine of 'respondeat superior' – the notion that superiors are responsible for the actions of their subordinates (the origin of this doctrine is discussed at length in the case of *Mohamud v WM Morrison Supermarkets plc).*[35] Courts differentiate between the agent who is acting to achieve the purpose of her principal, and those who embark on 'a frolic of one's own'– that is, pursue a course of action that is for their own purpose.[36]

The concept of agency may be frayed, if not obliterated, by autonomous thinking machines, even those that are not truly sentient. Lord Sales echoes this concern:

'Agency, in the sense of intelligence-directed activity performed for reasons, is fundamental to legal thought. For legal regulation of this sort of machine activity, we need to think not just of control of power, but also of how agency should be conceptualised. Should we move to ascribe legal personality to machines? And perhaps use ideas of vicarious liability? [37]

The questions posed by Lord Sales go to the heart of the matter: given that AI machines are intelligent agents, there must be scope to deploy existing legal frameworks to govern their behaviour. One of the legal tools available for addressing the behaviour of agents is the doctrine of vicarious liability.

VICARIOUS LIABILITY

The legal doctrine of vicarious liability, a particular form of 'respondeat superior' in which the contractual relationship is one between and employer and employee, might be helpful in the context of AI agents. It is based on the premise that the person who puts a risky enterprise into the community may be held responsible if those risks crystallise and cause loss or injury.[38] To

34 Barfield, 'Towards a law of artificial intelligence' (n 11)
35 [2016] UKSC 11 [10] – [43] (Lord Toulson)
36 *Joel v Morison* [1834] EWHC KB J39
37 Sales 'Algorithms, Artificial Intelligence and the Law' (n 6)
38 *Bazley v Curry* [1999] 2 SCR 534 (Canada)

hold an employer vicariously liable for the act of an employee requires proof that actor was the employer's employee; that he did in fact commit a tort; and that the tort was committed 'in the course of employment'. Guidelines that exist to determine the relationship between the employer and the tortfeasor include the extent of control the employer exerts over the 'employee' and the degree to which an agent is 'akin to an employee.'[39, 40]

It is possible to see how this doctrine could be applied to the case of an intelligent agent deployed to perform tasks as part of an employer's workforce. Already now, robots comprise the bulk of the 'workers' in many engineering industries, such as car manufacturing, and are increasingly replacing human workers in roles that are 'dull, dangerous and dirty'.[41] In such a circumstance, it is straightforward to prove that any harmful act was committed in the course of employment. But what of the intelligent agent which defies the instructions of his principal? With AI machines, there is always the chance that in embarking on a frolic of one's own, the agent is not defying the principal's instructions at all, but is in fact interpreting them in an unforeseen way and in consequence is acting unpredictably. How can it be established that the act is a frolic, and not an act derived directly or by inference from its software code, and thus potentially in the course of employment? And how can the intent behind the frolic be determined? These questions are intrinsically complicated.

A way around this complication may be to assign legal personality – and thus liability – directly to the agent; in other words, to sue the robot or agent itself.[42] Conferring legal personality on AI machines would resolve the agency question since as a principal the machine assumes rights and obligations, just as a legal corporation does. This proposal extends well beyond the boundaries of negligence. For example, if a robot or AI agent develops a genuinely new invention, can it own the intellectual property rights in the way a human or a corporation can? Perhaps the most sensitive question to be posed concerns the culpability of a machine that harms or kills a human being: can a machine have the necessary intent? These questions can be answered, in part, if legal personality is assigned to the machine, but this raises profound philosophical issues.

PHILOSOPHICAL CHALLENGES WITH NEW TECH LEGAL PERSONALITY FOR AI AGENTS

The concept of a machine with human personality is a familiar trope in literary fiction – from innocent anthropomorphic creations such as the wooden boy in 'Pinocchio' and the clockwork doll in the ballet 'Coppélia' to more sinister variants such as the violent and murderous robot in

39 *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18
40 *Lister v Hesley Hall* [2001] UKHL 22
41 Connell, J 'Kitanai, Kitsui and Kiken: The Rise of Labour Migration to Japan', Economic & Regional Restructuring Research Unit, University of Sydney, 1993
42 This is contrary to the often-cited case of *United States v Athlone Indus, Inc.*746 F.29 977 (3d Cor. 1984) involving liability for a defective baseball pitching robot, in which it was stated that 'robots cannot be sued'.

the 'Terminator' film series and the powerful replicants in 'Blade Runner'.[43] From a legal point of view, should such artefacts have legal personality?

Christopher Stone, in his insightful 1972 paper proposing to confer legal rights on the natural environment noted that: 'Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable."[44] He identifies rights for (amongst others) '… [W]omen, the insane, Blacks, foetuses, and Indians',[45] along with inanimate entities such as trusts, corporations, and ships as examples. The idea of a machine acquiring rights under the law seems similarly to fall under the category of 'unthinkable'. Stone identifies three criteria which must be satisfied if an entity is to be a holder of legal rights: first, that the thing can institute legal action at its behest; second, that in determining the granting of legal relief, the court must take injury of it into account and third, that the relief must run to the benefit of it (that is, not to someone else on its behalf).[46] Such rights, he argued, must be supported and protected by procedural safeguards, just as human rights are.

The philosopher Dan Lloyd credibly asserted that it is conceivable that a machine could be conscious, even if this is not technically feasible at present:

'Minds, artificial or otherwise, are entitled (prima facie) to continued consciousness, and entitled (prima facie) to the furtherance of whatever they undertake, provided their projects do not conflict with similar rights of others. Artificial minds give rise to a few special claims. Here the crucial fact is that these minds are created, by which fact the creator acquires special responsibilities. Like a parent, the creator is specifically obligated to preserve and enrich the life of his or her creature. That means, among other things, that the created being can claim his, her, or its rights specifically from the creator. Again, the point is not to take a stand on issues of right and obligation. Rather, it is to urge that whatever one's morality entails concerning conscious people, it will similarly entail toward conscious machines. "[47]

Lloyd's conclusion is that the pursuit of conscious machines leads inevitably to ethical violations. This suggests the need to examine some of the fundamental principles of law as they are applied to AI technology.

While the full range of human rights and obligations are unlikely to be appropriate, some may be, and even at this stage an exploration of the notion of legal personality for machines is sensible. Much will depend on the social context in which the AI agent is being used. For example, a robotic policeman ('Robocop') will need to have the right to enforce the law, and this right will need to be carefully defined, articulated and circumscribed.[48] This is true of any situation where

43 The Terminator, Hemdale Pacific Western Productions 1984; dir: James Cameron; Blade Runner, Warner Brothers 1982, dir: Ridley Scott

44 Stone, C. 'Should Trees have Standing? – Towards Legal Rights for Natural Objects' Southern California Law Review 45 (1972) [450 – 501]

45 Ibid, 451

46 Ibid, 458 - 463

47 Lloyd, D. 'Frankenstein's Children: AI and Human Value' Metaphilosophy 1985 Vol 16 No 4 [307-318]

48 Van den Hoven van Genderen, R, 'Legal personhood in the age of AI robots', Research Handbook on the Law of Artificial Intelligence 2018 Edward Elgar Publishing Cheltenham

the intelligent agent has an effect on the real world. Other 'narrow' implementations of AI – for example, fixed robotic arms in a factory – are unlikely to need the same (relatively sophisticated) forms of attributed legal personhood, even though it is possible that they might cause harm to a human.

Today, algorithms and AI agents are legal and widely used in commercial and social situations. They can "threaten, entertain, copy, defame, defraud, warn, console, or seduce… and straddle the lines between the physical, the economic, the social, and the emotional.'[49] In fact, humans treat machines as human, projecting agency on non-living things.[50] Ryan Calo points out humans will take greater risks to preserve the integrity of life-like robots than they would for things designated as tools. [51] He suggests that the problem is that people are willing to substitute machines for humans in certain contexts and speaks of a "a new category of legal subject halfway between person and object", so designated because the machine is treated as a person for some purposes and as an object for others.[52]

Calo's concern about the 'half-way' category seems legitimate. Google's recent demonstration of an AI agent being used to book a hairdressing appointment might be impressive from an engineering perspective, but was decidedly unsettling from the point of view of the receptionist taking the call.[53] Social media posting by bots in the run-up to elections in different countries is a more blatant and highly controversial example of duplicitous human-machine behaviour.

Without context, the question of whether to assign legal personality to AI machines is too vague to have significance. We can already see that there is huge diversity of form and function of intelligent agents, and this will necessitate different legal frameworks. Legal personality – and associated rights and obligations - will be meaningful (or necessary) for a subset of these, possibly determined by the level of autonomy and social function of the agent. Establishing which agents fall into which category will require standards and tests, which will in turn require regulation. The extensive and nuanced regulation which governs the manufacture and use of automotive vehicles of all types is perhaps a model for such regulation. In the future, it is to be assumed that true artificial intelligent agents will understand the need for legal rules and frameworks, and develop their own. This is the route to the hierarchical and controlled environment of the post- apocalyptic 'Terminator' world.

If legal personhood is ascribed to AI machines, it follows that other human 'attributes' might be similarly ascribed. From a legal perspective, one of the most important is the capability of forming intent. Is it possible that a robot or intelligent agent could have intent that is distinct from the intent of its developer or owner?

49 Balkin, 'The Path of Robotics Law' (n 24)

50 This is not just limited to humanoid robots: in the film 'Her', a man falls in love with an operating system. In the film Blade Runner 2049 (Alcon Pictures 2017, dir: Denis Villeneuve) the main character (a replicant) is in love with a holographic companion.

51 Calo, R., 'Robotics and the Lessons of Cyberlaw', 103 Calif. L. Rev. 2015 [513 – 563]

52 Ibid, 549

53 Google Duplex: https://www.youtube.com/watch?v=D5VN56jQMWM) (accessed 10 Jan 2020)

INTENT

Intent is at the heart of criminal liability. For humans to commit a crime they must have intent (mens rea), without it there is no liability. Intent is often difficult to determine – the meaning was discussed at length by Lord Bridge in the case of *R v Moloney*.[54] In criminal trials, specific direction must be given to jury to ensure that they are guided on this subtle, crucial element of guilt. If it is difficult to determine intent with humans, how would it be possible to determine intent in machines? Is it even meaningful to ascribe intent to a machine?

Inevitably, with humans, such questions are informed by fundamental philosophical doctrines concerning the nature of free will and by biological theories about how human minds make decisions (an emerging discipline where little is settled: the working of the human brain is to a great extent unknown). Projecting such fundamental inquiries onto inanimate objects is therefore challenging. Traditionally, moral responsibility has been exclusively human, a view based on the fact that humans alone have the cognitive and emotional abilities necessary for moral decision-making, and awareness of the consequences (reward or sanctions) of their actions.[55] It is impossible at this stage to say whether machines will ever acquire such abilities.
But if they do, what legal and moral frameworks might apply? The European Commission has published Guidelines for Trustworthy AI, a term that carries moral freight.[56] These include such actions as ensuring that AI is human-centric; that it should be developed, deployed and used with an "ethical purpose", grounded in, and reflective of, fundamental rights, societal values and the ethical principles of Beneficence (do good), Non-Maleficence (do no harm), Autonomy of humans, Justice, and Explicability. These are sensible, albeit aspirational rather than practical.

While not necessarily ascribing moral agency to AI, some scholars believe that the technology has the capability of awareness in criminal law, and in particular the mental elements requirements necessary for intent and recklessness. But the question of punishment – an essential part of any criminal legal framework – remains. For Hallevy, punishment for machines is analogous to human punishment regimes: for example, capital punishment equates to 'deletion of the Al software controlling the Al entity' and incarceration to putting 'the Al entity out of use for a determinate period').[57] This seems unsatisfactory, but it can be argued that there are analogues to such punishment today – for example, in putting down a dog which has harmed a human.[58]

Farhany has questioned the implications for the law if techniques to understand intent are

54 [1984] UKHL 4
55 Stahl, B, "Information, Ethics, and Computers: The Problem of Autonomous Moral Agents", Minds and Machines Vol 14 2004 [67–83]
56 European Commission, 'Ethics Guidelines for Trustworthy AI', AI High-Level Expert Group on Artificial Intelligence, 8 April 2019 - https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai
57 Hallevy, G. 'The Criminal Liability of Artificial Intelligence Entities - from Science Fiction to Legal Social Control,' Akron Intellectual Property Journal Vol 4 No 2 2016
58 Asaro (n 25) notes useful parallels between legislation on treatment of animals and putative legislative frameworks for AI machines – both regarded as property but with special rights and protections.

developed at a neuronal level.[59] At present, there is no scientific way of measuring the particular brain patterns that indicate intent in humans, therefore criminal intent is assessed using evidence external to the purported criminal's mental activity. With computers (and hence AI machines) every single instruction is auditable, and the logic of the code is precisely defined, even if a particular outcome following execution of the code is unpredictable. Thus, the behaviour of an AI machine can be monitored in real time to determine the course of its actions. It is conceivable that computer code could be developed that generates an alert or an instruction to override programmed action, if conditions leading to malevolent intent were detected. It is likely that any highly developed intelligent system would have such built-in safeguards, although a genuinely malevolent system of sufficient intelligence could in theory become aware of such safeguards and override them, as HAL did in '2001: A Space Odyssey'.[60] Cinematic licence notwithstanding, this capability would present a way to determine exactly the intent of an AI machine.

IMMEDIATE CONCERNS

AI futurists use the term "singularity" to describe the point in time when machines exceed human intelligence – that is, when they become sentient and when the risks and challenges outlined above will crystallise. Ray Kurzweil, an AI futurist, has famously predicted that the singularity will be achieved in 2045.[61] Other commentators believe that this is fanciful: the Stanford 100 Year Study Panel 'found no cause for concern that AI is an imminent threat to humankind. No machines with self-sustaining long-term goals and intent have been developed, nor are they likely to be developed in the near future.'[62] Ryan Calo agrees: 'Little is gained and much is arguably lost, by pretending contemporary robots exhibit anything like intent.'[63] It seems implausible that 'sapient and sentient' AI technology, as defined by Bostrom and Yudkowsky, is imminent.[64]
In fact, it may be the case that AI machines will never match the capabilities of the human mind. In 1980, the philosopher John Searle published a thought-experiment (the 'Chinese Room Argument'), in which he concluded that programming a digital computer may help simulate understanding but does not produce real understanding.[65] His argument – which opposes the proposition of functionalism, a theory which holds that cognition is separate from the system in which cognition is realised – can be taken to define the limits of computing: their operation is based on manipulation of symbols using pre-defined syntactic rules, whereas the human mind understands meaning (semantics). In other words, computers cannot be made to think in the way that humans think and can at best simulate a biological mind.[66]

59 Farhany, N, 'Incriminating Thoughts', 64 Stanford Law Review 2012 [351 – 408]
60 Metro-Goldwyn-Mayer 1968, dir. Stanley Kubrick
61 Kurzweil, R. 'The Singularity is Near: When Humans Transcend Biology' 2005 Viking (Penguin) New York
62 Stanford University, 'One Hundred Year Study on Artificial Intelligence (AI100)' (n 7)
63 Calo, 'Robotics and the Lessons of Cyberlaw', (n 51)
64 Bostrom N. and Yudkowsky E. 'The Ethics of Artificial Intelligence', Cambridge University Press, 2011. They define sapience as a set of capacities associated with higher intelligence, such as self-awareness and being a reason responsive agent, and coupled with sentience ('the capacity for phenomenal experience … such as the capacity to feel pain and suffer.') Such entities resemble the humanoid robots in the film 'Blade Runner'.
65 Searle. J, 'Minds, brains, and programs', Behavioural and Brain Sciences 1980 Vol 3 [417-457]
66 Ibid 424

Searle's argument has given rise to a great deal of debate and controversy, but in practical terms it is hard to refute. The human brain has evolved over millions of years, and is hugely complex – it is not satisfactorily explained in purely functional terms.[67] AI and robots have existed in digital form for no more than 70 years, and it is unlikely – Moore's law notwithstanding – that such capabilities will rival the complexity of the human mind any time soon.

Daniel Dennett makes this point when talking about the culpability of HAL, the murderous computer in '2001: a Space Odyssey', acknowledging that the programming effort it would take to provide HAL with 'enough world knowledge … to create HAL's dazzlingly humanoid competence' is measured in centuries, and that the 'only practical way of doing it is one version or another of Mother Nature's way - years of embodied learning.'[68] In other words, only a biological entity, evolved through by a process of trial and error (akin to natural selection) over millions of years would have the required embedded knowledge and intelligence to achieve this.

In this context, it is better to prioritise immediate problems. The key question for law is 'how to allocate rights and duties among *human beings* when robots and AI entities create benefits or cause injuries'.[69] This can be done by adapting the existing constructs of product liability, vicarious liability and agency. Vladek believes that 'so long as we can conceive of these (AI) machines as 'agents' of some legal person (individual or virtual), our current system of product liability will be able to address the legal issues surrounding their introduction without significant modification'.[70] Moreover, in the wider field of digital technology, there are other consequences of technical developments for which there are no robust legal frameworks and which present immediate and difficult challenges. Much of the effort in dealing with these have been through regulation.

REGULATION

Lord Hodge, speaking of the speed at which technological change is now happening pointed out that '[T]he speed of technological developments poses a real challenge to the law and to regulation.'[71] Arguments have been made that enhanced scrutiny and better regulation is a necessary starting point. Lord Sales proposes a new agency '… [A]n expert commission staffed by coding technicians, with lawyers and ethicists to assist them', that has some similarities with Karnow's 'Turing registry'. [72] This, he argues, is necessary 'to provide transparency in relation

to the digital processes'. His proposal is in line with the way in which society has dealt in the past with emerging and potential harmful technology. But regulation imposes constraints on potentially positive outcomes, and can stifle innovation, so there is a balance to be struck.

67 This is an argument presented by those who view the human (or animal) mind as an information processing system (the Computational Theory of Mind).
68 Dennett, D. 'When HAL Kills, Who's to Blame?' Computer Ethics 1997 [352 – 365]
69 Balkin, 'The Path of Robotics Law' (n 24) (emphasis added)
70 Vladeck, 'Machines without Principals' (n 2)
71 Lord Hodge, 'Law and technological change' (n 5)
72 Sales 'Algorithms, Artificial Intelligence and the Law' (n 6)

The Internet offers an interesting precedent. At the outset it was deliberately unregulated – in fact, it was promoted as virtual domain free from government and corporate influence; a community for independent-minded and collaborative innovation. The speed at which technology firms have come to dominate and extend beyond the Internet is unprecedented, and it raises the question as to whether it would have been wiser to regulate the Internet at an earlier stage.[73] The challenges with regulation of AI will be more pronounced because AI is fundamentally different, with amorphous boundaries which mean it will interact with the real world in ways that the Internet cannot.[74] The AI techniques used by Cambridge Analytica to influence voting outcomes in the US is a very visible example of the immediate impact of these new technologies, and presents a compelling argument for early regulation. The difficulties in doing this effectively are highlighted by subsequent anti-trust actions to limit the power of global companies such as Facebook and Google, which have largely failed to curb misuse of AI in social media.[75]

This has profound implications for the law and offers much scope for debate. The recent divergence of opinion between the European Parliament and the European Commission is indicative of how difficult it is to reach agreement at the policy level. Another concern is that regulation is usually conducted at a national level, often by regulators which have been established to monitor traditional technologies and markets. For example, drones are regulated in the UK by the U.K.'s Civil Aviation Authority. In other industries, regulation and rules are being worked out by a coalition of manufacturers, public authorities and academics. The Law Commission is playing an active role: for example, it has been commissioned by the Centre for Connected and Autonomous Vehicles (CCAV), a UK government research organisation, to review 'the regulatory framework for the safe deployment of automated vehicles in the UK' and will complete a public consultation period in 16 January 2020.[76]

THE IMPORTANCE OF INFORMATION

Much of the discussion has been around the code/algorithmic aspect of AI – but there is another essential component needed to enable truly intelligent systems: information. ML systems have been described as 'data-dependent' and enabled by the availability of vast datasets in the cloud.[77] This volume of data will continue to grow at exponential rates, driven by the ability of machines to 'informate'[78] and fuelled by the deployment of the 'Internet of Things', which is a metaphor for an increasing tendency to embed data-generating microchips into everyday objects. The

73 Tech firms including Google, Facebook and Microsoft have faced anti-trust actions in Europe and the US. See, for example: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770 (accessed 23 Dec 2019)
74 Weaver, J. 'Regulation of Artificial Intelligence in the United States', Research Handbook on the Law of Artificial Intelligence 2018 Edward Elgar Publishing Cheltenham
75 US Department of Justice reviews the practices of market-leading online platforms: https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms (accessed 11 February 2020)
76 https://www.lawcom.gov.uk/project/automated-vehicles/ (accessed 23 Dec 2019)
77 Stanford University, 'One Hundred Year Study on Artificial Intelligence (AI100)' (n 7)
78 A term coined by the IT scholar Shoshana Zuboff to describe the ability of digital computers to produce information as an *integral part of their operation*, in contrast to earlier technology (such as a steam engine) which simply performed a particular operation more efficiently: Zuboff, S. 'In the Age of the Smart Machine' 1988 Basic Books Inc. New York

sheer volume of data represents a problem that is compounded by its poor quality, veracity and security. If the machines of the future are dependent on data, and that data is questionable, there is an obvious risk. This issue has surfaced in the discussions around algorithmic bias - systematic errors that lead to discriminatory or unfair outcomes - for example in criminal sentencing and in online advertising.[79]

There is a related issue around data privacy that is barely touched by regulation. Modern systems are mostly interconnected, and in the cloud. People are inured to data infringement, and there is general data promiscuity, about to become worse as the Internet of Things introduces chipped humans, devices, pharmaceuticals, wearables and more. Proliferation of data on this scale threatens to overturn the safeguards for individual privacy, that derive from some of the most fundamental common law and constitutional principles. This Orwellian scenario was highlighted by Lord Hodge when he spoke of the risk of totalitarianism, using the example of China's proposed social credit system:

'This scoring system operates by mining people's data in order to construct a full profile of their behaviour, including their friends, their health records, online purchases, legal matters, and tax payments (to name a few), and it combines that data with images gathered from China's 200 million surveillance cameras and facial recognition software. Data that indicates non-compliance with social and economic obligations and contractual commitments are flagged and aggregated on a government-wide level to determine the trustworthiness of companies and individuals.'[80] Balkin agrees, pointing out that surveillance is about to become even more ubiquitous:

'To make matters worse, many robots and AI systems will probably be continually connected to the Internet and will continually take in new information and new programming from multiple sources. ….'[81]

This is a familiar argument, with precedents in English law from *Semayne's Case* in the seventeenth century to *Douglas v Hello!* in the twentieth.[82] It centres on the question of where the line is drawn between public and private matters – in effect, how much intrusion will the citizen tolerate in return for protection. The arrival of smart machines and AI techniques that will greatly enhance the ability of third parties, both public and private, to intrude. Whether enhanced protection will be afforded to the citizen in return is questionable.

CONCLUSION

Calo and other futurists make the point that although we are some way away from sapient, sentient AI machines and robots, they will nonetheless have a widespread and profound impact on society and, like the Internet, will "create deep social, cultural, economic, and of course

79 https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing. https://www.nytimes.com/2015/07/10/ upshot/when-algorithms-discriminate.html (both accessed 29 Dec 2019)
80 Hodge, 'Law and technological change' (n 5)
81 Balkin, 'The Path of Robotics Law' (n 24)
82 (1604) 77 Eng Rep 194; [2005] EWCA Civ 595

legal tensions long before the advent of science fiction.'[83] We already live in a world of lethal autonomous weapons systems, drones that have a capability of complete invasion of privacy and AI agents that trade billions of pounds of securities without any human involvement. We will shortly be in a world of driverless cars, robot carers, life-like humanoid sex partners and, possibly, AI judges.

If we are to deal with this challenge, we will need to adapt our existing legal frameworks. First, there is a need to ensure that existing product liability laws are adequate for sophisticated AI technology. Second, existing legal frameworks that govern agency, such as vicarious liability, will need to be extended and adapted to cover new types of intelligent agents. Third, serious consideration needs to be given (by legal academics, practitioners and policy makers) to the practicality and implication of ascribing legal personality to particular categories of AI. Finally, there is need to be vigilant about the reach and potentially negative impact of interaction of AI techniques with existing repositories of data, both public and private. Such vigilance is not unwarranted, nor is it unprecedented: the law has proven eminently capable of coping with rapid and profound technology change in the past and there is no reason to suppose it cannot adapt to accommodate the emergence of AI and smart machines.

83 Calo, 'Robotics and the Lessons of Cyberlaw' (n 51)

CONTRACT FORMATION IN THE ERA OF E-COMMERCE

Simona Ovcarike*

ABSTRACT

E-commerce is a rapidly growing online outlet that is continuously growing and showing no signs of slowing down. Even though, e-commerce certainly may not be right for each and every one it's important to consider important contractual provisions effecting contracts concluded via the internet. In the era of e-commerce online consumer and retail operators need to become familiar with not only the rules of e-commerce but also with legal formalities. Therefore, this essay will analyse the rights and remedies relating to the B2C contracts concluded via the internet for sale of goods between parties from two different European Union member states. The approach taken is to discuss contract formation in the modern, e-commerce orientated, society, to look into consumer rights, protections and remedies arising from receipt of faulty goods and to look into the purpose of common clauses found in commercial contracts relating to the choice of jurisdiction and governing laws and explain how they are important and relevant in resolving disputes that arise between sellers and buyers. Reference will be made to the UK and EU legislations.

INTRODUCTION TO CONTRACT FORMATION AND E-COMMERCE

In general, contracts require offer by one party of set terms (including price) and acceptance of those terms by the other party, with intention to create a legally binding agreement between the two. However, advertisements for goods and services on the websites are considered to be invitations to treat by the seller. The distinction between invitation to treat and an offer was well illustrated in the well-known case of *Carlill v Carbolic Smoke Ball Company* where the court held that one should always ask whether the terms are clear enough to create an offer or whether any additional negotiations are required, meaning that there are recognised instances when a certain communication is more likely to be regarded as an invitation to treat instead.[1]

E-commerce is a well-known process of buying and selling goods and services via electronic means such as internet and mobile applications (also known as m-commerce). It refers to not only online retail but also electronic transactions such as mobile and online banking for money transfers. The European Union (EU) has a long history of investing in e-commerce throughout

*The author is currently undertaking the LLM International Business Law at City, University of London. The author holds LLB Law and PGCert in Corporate Governance and Business Ethics and will commence LPC studies in March 2020 with an aspiration of becoming a solicitor.

1 *Carlill v The Carbolic Smoke Ball Company* [1983] 1 QB 525 (Court of Appeal).

the years and encouraging its development.[2] More than 20 years later, we now have a well-established, solid and, most importantly, coherent regulatory framework for e-commerce.[3]

When it comes to an offer and acceptance which is made over the Internet, websites that describe goods and services and the prices at which they are available for purchase always constitute an invitation to treat rather than an offer to a potential buyer.[4] Furthermore, when it comes to concluding such contracts over the internet, there are two ways in which acceptance takes place and it is done either via (i) e-mails, when a seller accepts buyer's offer; or (ii) by seller accepting purchase terms and conditions on the website and having received an acknowledgment from the seller confirming contract conclusion.[5]

BREACH OF CONTRACT: FAULTY GOODS

When people shop online, the consumer right laws protect them, but when a UK based customer purchases goods via the internet from a trader who is also from the UK but the goods arrive faulty; the question arises whether the UK or the EU laws should be relied on when enforcing those rights. As established earlier, goods advertised on a website will amount to an invitation to treat, the same way as the goods on the shelves in famous *Boots* case and customer's acceptance of terms and conditions upon purchase constitutes an offer which is then accepted by the seller by issuing customer with an e-mail confirmation.[6] Additionally, many online businesses do not allow buyers to proceed to the stage of placing an order unless business terms and conditions are read and accepted by ticking a box (these type of agreements are also known as 'click-wrap' contracts) and the problems arise when sellers fail to provide relevant information on returns, refunds or any other terms before or at the time the contract is concluded.[7]

For B2C contracts concluded after the 2015, the relevant provisions are found in Consumer Rights Act 2015 (the 'CRA'), which governs agreements made between traders and consumers (B2C) as well as the EU Directive on Consumer Rights (the 'Consumer Rights Directive') which was given the full effect in the UK under UK Consumer Contract (Information, Cancelation, and Additional Charges) Regulations 2013 (the 'CCR').[8]

The CRA not only repealed Sale of Goods Act 1979, Supply of Goods (Implied Terms) Act 1973

2 A. Lodder and A. Murray 'The European Union and E-Commerce' (March 1, 2017)' EU Regulation of E-Commerce. A Commentary Elgar Commentaries series, 2017, 1.

3 *Ibid.*

4 E. MacIntyre, *Business Law* (Pearson 2010, 5th Ed), 92.

5 *Ibid.*

6 *Pharmaceutical Society of General Britain v Boots Cash Chemists (Southern) Ltd* [1953] EWCA Civ 6 is a case where court held that items on display on shelves do not constitute an offer and instead amount to an invitation to treat.

7 L. Mulcahy, Contract Law in Perspective (Routledge 2008, 5th Ed), 65.

8 Consumer Rights Act 2015, s. 2 defines 'consumer' as an individual acting outside individual's trade, business, craft or profession and 'trader' as a person acting for purposes relating to that person's trade, business, craft or profession; also see Consumer Rights Directive 2011/83/EU and Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134).

but also revoked Sale and Supply of Goods to Consumers Regulations 2002 and now covers all B2C contracts. The Consumer Rights Directive (as implemented through the CCR) extended consumer cancellation rights and clarified some points of ambiguity that were being exploited by dishonest traders. Additionally, the Electronic Commence (EC Directive) Regulations 2002 (the 'ECR') remain in full force and apply to most of the contracts concluded via the Internet.[9] Under CCR there is a list of requirements for distance contracts concluded by electronic means. Regulation 14 (2) of the CCR states that the trader must make the consumer aware, clearly and prominently, and directly before the consumer places the order on the website, of the information listed in paragraphs (a), (f), (g), (h), (s) and (t) of Schedule 2.[10] Furthermore, Schedule 2 (a) is explicit that the trader must provide information on the main characteristics of the goods, including any defects it may have.[11] Additionally, Regulation 29 (2) allows a customer to cancel the contract regardless of whether the seller has included such right into its business terms and conditions or not.[12] By relying on the statutory right, a customer would always be entitled to cancel the contract within 14 days from the moment goods come into customer's possession, without any requirement to have a valid reason for such cancellation.[13]
Section 9 (3) of CRA offers additional rights to customers. This section provides that there always is an implied contract term by statue as to the satisfactory quality of goods. Additionally, in the event the seller does not specify that goods are faulty or defected then the seller fails to exclude his liability under section 9 (4).[14] For example, *Combe v Pert's House Furnishers Ltd* was a case about a buyer who has ordered settees from the furniture provider but upon delivery have discovered that there was sagging in the seating areas.[15] Here, the court held that buyer had a right, in principle, to reject settees from a furniture supplier as the buyer was not informed of the defects before making an order.

It is also important to note that section 9 of the CRA is quite similar to section 14 of the Sale of Goods Act 1979 (the 'SGA') and thus all applicable case law relating to section 14 of the SGA can always be applied to section 9 of the CRA.[16] As a result, a customer, by relying on section 22 (3) can always reject received goods within 30 days from the delivery date.[17]
In certain circumstances, customers may also find themselves in situations were sellers explicitly state in their business terms and conditions that no returns are permitted. In such circumstances, customers should rely on section 62 (4) as such terms would always be regarded to be contrary to the requirement to good faith.[18] As a result, customers who received faulty goods can, not only return it within 30 days from the delivery date but also seek a refund under section 20 (15) of CRA.

9 Electronic Commence (EC Directive) Regulations 2002 (SI 2002/2013).
10 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134), Regulation 14 (1).
11 *Ibid*, Schedule 2 (a).
12 *Ibid,* Regulation 29 (2).
13 *Ibid,* 30 (6) (a).
14 *Ibid,* s. 9 (4).
15 *Combe v Pert's House Furnishers Ltd* [2018] 3 WLUK 262.
16 Sale of Goods Act 1979, Part 1 sections 5 – 6.
17 Consumer Rights Act 2015, s. 22 (3).
18 *Ibid*, s. 62 (4).

Furthermore, ECR applies to all distance selling of goods where the buyer is a consumer and ECR place additional obligations on sellers who deal with consumers within the EU.[19] These provisions aim to regulate the provision of services, information, and goods sold to consumers by electronic means i.e. Internet.

According to Regulation 9 of ECR, there is a requirement on the sellers to ensure that prior to the contract being concluded the buyer is provided with certain information, that is clear, unambiguous and accessible. In those circumstances when customers conclude contracts without any prior access or opportunity to review business terms and conditions, the seller would automatically be in breach. Furthermore, any breach of these regulations is considered as a breach of statutory duty entitling customers to statutory remedies such as a claim of damages under Regulation 13 or even a court order requiring the seller to provide the buyer with applicable terms and conditions to comply with Regulation 9 of ECR. [20]

Therefore, customers who concluded B2C contracts via the internet and received faulty goods are entitled to cancel such contracts and bring a claim against the sellers by relying on UK legislation (as EU laws are already implemented in the UK) requesting the seller to accept the return of goods and process a refund. It is also worth noting that under CRA customers are also entitled to request for a replacement (under section 23) and repair (under section 19 (3) (b)) or, instead, keep the goods but ask for a partial refund. In the event sellers are non-compliant then customers can seek a final rejection of goods under section 20 (2), subject to section 24 of CRA.

Furthermore, the UK based customers and traders have additional rights under the EU laws and can seek to resolve their disputes via Online Dispute Resolution platform without needing to take their case to court, however, due to UK decision to depart from the European they will only be able to use Online Dispute Resolution platform until 1 January 2021.[21]

GOVERNING LAWS AND JURISDICTION

European businesses that are concluding contracts via the internet often prefer to have disputes settled in the country where their business is established. It is commonly seen that trader define the governing laws and jurisdiction clause in their contracts, however, it sometimes proves to problematic for a UK based consumers as they could lack knowledge and skill to understand the effect of those laws on their rights. In the event there is a breach of a B2C contract concluded via the internet, it is important for a UK based consumer to understand whether England and Wales laws and courts could still be used when seeking to resolve a dispute over a contract that was concluded via the internet.

19 Electronic Commence (EC Directive) Regulations 2002 (SI 2002/2013), Regulation 2 (1) defines 'consumer' as a natural person who is acting for the purposes other than those of his trade, business or profession.
20 *Ibid,* Regulation 13 and 14.
21 Europa: Online Dispute Resolution, <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN>, accessed 30 March 2019.

Firstly, jurisdiction means the courts which would hear the dispute and, secondly, the choice of governing laws means choosing which law would apply to the contract. It is important to note that EU Regulation 593/2008 (Rome I) (the 'Rome I') deals with a choice of law between EU member states whilst Regulation 1215/2012 (Brussels I) (the 'Brussels I') deals with choice of jurisdiction.

The basic principle under Article 3.1 of Rome I is if the parties have chosen a law which they wish to cover the contract then that choice prevails. *Kingspan Environmental Ltd v Borealis UK* Ltd illustrated how important it is to ensure that the contact is clear on whose law governs the agreement and since both, claimant and the defendant, chose to be bound by Danish laws the claimant was left without any applicable remedy as Danish laws simply had no such doctrine of misrepresentation or negligent misstatement for claimant to rely on.[22] Furthermore, since it was an international sale of goods contract the Unfair Contract Terms Act 1977 did not apply either. Therefore, if looking purely at the explicit choice of laws, customers based in the UK who enter into agreements with a seller based in another EU member state and have accepted to be bound by different laws other than England and Wales and thus, would have no rights to have dispute governed by the laws of England and Wales.

However, the general rule is subject to exceptions where the dispute is over a consumer contract. In *Verein fur Konsumenteninformation v Amazon EU Sarl* the court held that accepting supplier's law as governing law was unfair for the consumer where the consumer was not informed that under Rome I art.6(2) consumer also enjoyed the protection of the mandatory provisions of the law that would be applicable in the absence of that term.[23]
Sometimes customers could also find themselves to be bound by the conflicting terms in the contract. Even though there could be cases where there is a mix of contractual terms from different laws, it does not automatically imply that the choice of governing law will be disregarded. This was established in *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* where the court held that despite English law contractual clause it did not establish that English law governed a contract where the contract contained a Texas law and jurisdiction clause.[24] Article 6 provides that were a choice has been made between the parties then the chosen law prevails but application of a chosen law will be subject to rules or regulations relevant to the protection of the consumer in the consumer's country of habitual residence. [25] The rationale is that customers from the UK would have their case resolved under the laws as chosen in the contract but subject to applicable consumer protection laws under the laws of England and Wales (such as consumer rights under CRA), unless, of course, the court, in its discretion, decides that the case should instead be subject to laws of one country.
In regards to the choice of jurisdiction, customers have the option of bringing an action against

22 *Kingspan Environmental Limited & Others v Borealis A/S and Borealis UK Ltd* [2012] EWHC 1147 (Comm).
23 *Verein fur Konsumenteninformation v Amazon EU Sarl* [2017] 2 W.L.R. 19.
24 *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [2014] 2 C.L.C. 326.
25 EU Regulation 593/2008 (Rome I), Article 6; J. Embley, K. Bamford and N. Hancock, *Commercial and Intellectual Property Law and Practice* (College of Law Publishing, 2018), 171-176.

sellers in the EU member state where the contract should have been performed and if the customer is a resident of the UK then the case can be heard at the courts of England and Wale's.[26] Furthermore, as the contract for the sale of goods concluded via the internet is between two EU member states Articles 17-19 also apply and protect customers, permitting them to have a choice of as to where the action is brought.[27] This means that online businesses can be sued in any jurisdiction in which their website happens to be accessible to potential and current customers.[28]

It is also important to note that customers need to act fast if they want courts of England and Wales to govern the dispute. The application of Article 27 of the Brussels I provides that the court which first seizes the proceedings, even if it is not the chosen court in the contract will have the jurisdiction to hear the claim, but other EU member state court choice (as agreed in the contract) will have to remain involved in the proceedings until England and Wales court determines its validity to jurisdiction. The first case like this was *Gasser v MISAT* where the court ruled that the court chosen under the agreement should stay in the proceedings until the court which first seised the proceedings has declared it did not have the jurisdiction.[29] Furthermore, this decision was later endorsed in *Turner v Grovit* in which the European Court of Justice held that seeking for anti-suit injunctions was incompatible with the Brussels Regulations.[30]

In conclusion, whether the laws of England and Wales will apply will be a matter for judges to decide on. However, customers should be aware that pre-agreed other EU member state laws could end up governing the dispute but still be subject to consumer rights and protections under laws of England and Wales, thus permitting customer to show breach of their consumer rights under CRA and seek for a full refund and any other equitable remedies that would be applicable in such circumstances.

26 Regulation 1215/2012 (Brussels I), Article 7 (1) (a) and (b).
27 *Ibid*, Articles 17 – 19.
28 Lokman Emrek v Vlado Sabranovic [2013] EUECJ c-218/12 (17 October 2013), in this case he court held that consumers may sue professionals before their home courts according to Articles 15 (1) and 16 (1) of Brussels I even if there is no causal link between the means used to direct the commercial or professional activity to the consumers' member state and the conclusion of the contract.
29 *Gasser v Misat* C-116/02, [2003] EUECJ C-116/02.
30 *Turner v Grovit* C-159/02, [2004] EUECJ C-159/02.

HARD-SOFT-HARD": RETHINKING THE ENFORCEMENT OF EQUATOR PRINCIPLES III THROUGH LEGAL MECHANISMS

Sneha Shrestha

*"The environment is not protected by environmental laws only…company and financial laws [can] drive companies, investors and directors towards sustainable, environmentally sound modes of governance and decision-making." -Alice Garton**

INTRODUCTION

Equator Principles (EPs) are voluntary initiatives, therefore, they do not include enforcement mechanisms. This has led to discussions on legal regulations[1] that complement voluntary initiatives, however, that topic requires exploration in its own right which is beyond the ambit of this paper. The main question this paper aims to address is whether EPs can be enforced through legal mechanisms that already exist, albeit not directly under the terms of EPs. '[H] ard-soft-hard'[2] is a concept borrowed from Dr. Bowman's analogy of the business case in terms of corporate social responsibility (CSR): hard signifies revenue, which through the benefit of soft factors (i.e. reputation) enhances profits. Likewise, this paper uses the term to refer to the hard laws permeating soft initiatives in order to produce hard/enforceable results. Part I) of this paper will introduce the EPs and its brief evolution; Part II) will focus on the legal implications heightened by EPs III; Part III) will specify the legal mechanisms that can be utilised to enforce the EPs; Part IV) will discuss some indicative cases that lead to a prediction of an EPs case and finally, Part V) will reflect upon the findings leading to the conclusion.

RATIONALE FOR EPS

The main distinction between hard[3] and soft law[4] is the enforceability factor. While the former will allow strict legal enforceability, the latter lacks this component as soft laws are usually guidelines and codes of conduct as opposed to legislations. However, it is imperative to recognise the importance of soft laws as expressed by Brunnée and Toope through their exploration of constructivism and international law; the important role that 'culture, ideas, institutions, discourse, and social norms play in shaping identity and influencing behaviour.'[5] Rupp and Williams also

1 * Alice Garton, Lawyer (Australian qualified), Company and Financial Project Leader, ClientEarth: <www.clientearth.org/business/#business-topics>
Tim Bartley, 'Transnational governance and the re-centered state: Sustainability or legality?' [2014] Regulation & Governance 93; Lars H Gulbrandsen, 'Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs' [2014] Regulation & Governance 74
2 Megan Bowman, Banking on Climate Change: How Finance Actors and Transnational Regulatory Regimes Are Responding (Kluwer Law International, 2015), 96
3 i.e. Bank of England and Financial Services Act 2016
4 i.e. UN Declaration
5 Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds),

find that looser forms of regulation have brought forth a cultural change, an internalisation of environmental and social values, within the banking industry.[6] Many academics have perceived EPs as characterising '21st century international business…the dawn of a New Enlightenment based on responsible banking'.[7] Against this backdrop, it can be understood that Helm's idea of putting 'natural capital' in the 'balance sheet'[8] is manifested via EPs, albeit as soft law, which sets 'a financial industry benchmark for determining, assessing and managing environmental and social risk'[9] in project finance.

Project finance involves a borrower for a large infrastructure project, banks and 'nonrecourse'[10] loans, meaning the lender is only repaid by the cash flow of that project. The creation of EPs I was born out of NGOs pressure[11] due to the public outcry against negative environmental and social impacts of projects worldwide,[12] hence the need to manage such concerns through sustainable practices became essential. The raison d'être behind EPs was to benefit the environment and the local communities[13] where projects are carried out[14] which in turn improves the financial security for the banks and smooth working of the project for the borrowers. Therefore, by allowing Equator Principles Financial Institutions (EPFIs) to 'better assess, mitigate, document and monitor the credit and reputation risk'[15] related to project finance, the EPs compliance draws all-encompassing benefits.

It is not the purpose of this paper to analyse the effectiveness and detailed distinctions between EPs, nonetheless, a brief overview of the EPs is useful: EPs I began with ten bank signatories in 2003, which was soon reviewed and updated in 2006 by EPs II and recently revised in 2013 with EPs IIIs (currently 87 signatory banks[16]). In short, EPs I covered the most basic protection whereas EPs II introduced more robust drafting with emphasis on social protection. EPs III is the most progressive document as it recognises, inter alia, the importance of climate change, biodiversity

Interdisciplinary Perspectives on International Law and *International Relations: The State of the Art* (Cambridge University Press, 2012), 4
6 Deborah E Rupp, Cynthia A Williams, 'The Efficacy of Regulations a function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum' [2011] Theoretical Inquiries in Law 581, 598-599; *See Also*: John M Conley and Cynthia A Williams, 'Global Banks as Global Sustainability Regulators?: The Equator Principles' [2011] Law & Policy University of Denver 542, 546
7 Paul Watchman, 'Banks, Business and Human Rights' [2006] Butterworths Journal of International Banking and Financial Law 46, 46; *See Also*: Paul Watchman, Angela Delfino and Juliette Addison, 'EP 2: the revised Equator Principles: why hard-nosed bankers are embracing soft law principles' [2007] Law and Financial Markets Review 85, 86; Michael Torrance, 'Equator Principles III: new sustainability rules requiring legal strategy rethink' [2013] Journal of International Banking & Financial Law 503, 509; Norton Rose Fulbright, Equator Principles III: An introduction and practical guide, <www.nortonrosefulbright.com/files/equator-principles-iii-pdf- 17mb-111048.pdf> p 5
8 Dieter Helm, 'Taking natural capital seriously' [2014] Oxford Review of Economic Policy 109
9 Preamble, Equator Principles III (June 2013) <www.equator-principles.com/index.php/ep3/ep3> p 1
10 Conley and Williams (n 6) 544
11 Bowman (n 2) 43; *See*: David B. Hunter, 'Civil Society Networks and the Development of Environmental Standards at International Financial Institutions' [2008] Chicago Journal of International Law 437; *See Also*: Collevecchio Declaration <www.banktrack.org/download/collevechio_declaration/030401_collevecchio_declaration_with_signatories.pdf>
12 i.e Three Gorges Dam, China; Sardar Sarovar Dam, India; Polonoroeste Highway, Brazil
13 Conley and Williams (n 6) 562-563
14 Preamble, EPs III
15 EPs, About Adoption <www.equator-principles.com/index.php/the-benefits>
16 EPs website <www.equator-principles.com>

and human rights protection.[17] However, the critical question remains: 'is it prudent to put our faith in purely voluntary standard-setting by banks?'[18] Unfortunately not, as non-compliance has been the principal criticism by academics,[19] reporters[20] and NGOs.[21] The UN "Protect, Respect and Remedy" Framework for Business and Human Rights acknowledges that there is significant 'legal and policy incoherence and gaps, which often entail significant consequences for victims, companies and states themselves. The most common gap is the failure to enforce existing laws.'[22] Accordingly, we will grapple with EPs III to address the need to utilise existing laws and legal mechanisms to facilitate enforcement in the case of non-compliance.

EPS III- LEGAL IMPLICATIONS

It is important to outline the changes in general with EPs III which have heightened the legal implications for EPFIs. Firstly, the widened scope of EPs III not only applies to project finance loans and advisory services but extends to project-related-corporate loans and bridge loans. This addresses the issue of project finance loans being disguised as corporate loans to avoid EPs,[23] hence widening scope of dealings certainly raises the amount of risk EPFIs have to mitigate. Furthermore, it also requires EPFIs to provide client public reporting which was not applicable under EPs II, as well as human rights and climate change due diligence and 'Free, Prior and Informed Consent (FPIC)'[24] from indigenous people rather than merely consultations as before.[25] Also, the assessment is now essentially a legal compliance process at first instance,[26] as it obliges abidance by the law of the 'designated' host country, developed countries with robust laws. However, in countries with weak legal systems the International Finance Corporation (IFC) standards must be applied which encompasses an array of considerations.[27] The primary legal significance is demonstrated by the formal contractual obligations (Covenants[28]) incorporated in the EPs, rather than solely voluntary guidelines.[29] These are the major changes in summary, Part
III) of this paper will discuss in fuller detail the relevant principles with the legal implications.

In practice, post-EPs III, many leading law firms have recognised a 'new emphasis on legal

due

17 EPs I, II and III Documents
18 Bowman (n 2)151
19 Nigel Clayton, 'Equator principles and social rights: incomplete protection in a self-regulatory world' [2009] Environmental Law Review 173
20 Nick Mathiason, 'Banks Attacked for Failures to Meet Equator Principles on Environment' *The Guardian* (London, 15 January 2010) <www.theguardian.com/business/2010/jan/14/equator-principles-banks-environment-campaigners>
21 'New Equator Principles to have deeply underwhelming impact on people and planet' (4 June 2013) <www.banktrack.org/show/ news/new_equator_principles_to_have_deeply_underwhelming_impact_on_people_and_planet>
22 September 2010 <www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf> p 2
23 Torrance, (n 7) 504
24 Principle 5, EPs III
25 EPs website (n 9)
26 Principle 3, EPs III; *See Also*: Tina Costas and Michael Torrance, 'Equator Principles III Demand Deeper Due Diligence' (17 July 2013) <www.law360.com/articles/456064/equator-principles-iii-demand-deeper-due-diligence>
27 Principle 3, EPs III.
28 Principle 8, EPs III
29 NRF guide (n 7) 6

diligence'[30] which requires careful litigation risk management for which they have advertised their services.[31] This response by law firms is a clear indication of legal attention and heightened litigation risks. Particularly, Norton Rose Fulbright (NRF) has published a 40-page guide to EPs III where they have cautioned that contract and tort risks could occur hence recommended legal oversight on implementing the EPs; they have even gone as far as developing a software named 'N-Sure'[32] to help EPFIs with compliance. Practitioners suggest that EPs III facilitates the 'ability to streamline and integrate EP[s] due diligence processes into legal due diligence'[33] as this would avoid duplication.[34]

HOW HARD LAW MAY BITE

The ten principles within EPs III have been discussed extensively by academics[35] and practitioners.[36] However, as this paper is concerned with the legal enforcement aspect of EPs, we will simultaneously examine the applicable legal mechanisms with the supporting principles.

THIRD-PARTY-BENEFICIARY RIGHTS

After decades of the English common law courts upholding the doctrine of 'privity'[37] which did not recognise third party rights to a contract, this legal enforcement tool is now governed by the Contracts (Rights of Third Parties) Act 1999 (RTP). This can be triggered when third parties are expressly mentioned in the contract,[38] or if the contract 'purports to confer a benefit' on the third party.[39] More importantly, the third party must either be identified by name or as a member of a particular group in the contract, although they need not exist when the contract is drafted.[40] Likewise, in the US, the Restatement (Second) of Contracts 1981 (RSC) § 302 provides that an intended beneficiary 'acquires a right by virtue of a promise' which indicates that the beneficiary needs to have a right to performance of the promise and not that the parties intended for them to be able to enforce the promise.[41] Similar to the English maxim of equity, '[e]quity looks to the intent rather than the form',[42] the US courts consider the circumstances of the transaction, as

30 Torrance (n 7) 509
31 Clifford Chance, 'Updated Equator Principles released' (16 May 2013) <www.cliffordchance.com/briefings/2013/05/updated_equator_principlesreleased.html>; Dentons, 'Equator Principles III' (9 July 2013) <www.dentons.com/en/insights/articles/2013/july/8/equator-principles-iii-new-guidelines-for-project-finance>; Ashurst, 'Equator Principles III- Implementation Note' (15 May 2013) <www.ashurst.com/en/news-and-insights/legal-updates/equator-principles-iii- release-of-implementation-note/>
32 NRF, 'N-Sure' <www.nortonrosefulbright.com/knowledge/online-services-resources-and-tools/n-sure/>
33 Costas and Torrance (n 26)
34 NRF guide (n 7) 36
35 Conley and Williams (n 6); Watchman, Delfino and Addison (n 7) *See Also*: EPs III (n 9)
36 NRF guide (n 7); Torrance (n 7); Costas and Torrance (n 26)
37 *Twindle v Twindle* (1861) EWHC QB J57 (QBD); *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1951] UKHL 1 (HL); *Beswick v Beswick* [1968] AC 58 (HL)
38 Section 1 (1)(a)
39 Section 1 (1)(b)
40 Section 3
41 Marissa Marco, 'Accountability in International Project Finance: The Equator Principles and the Creation of Third-Party-Beneficiary Status for Project-Affected Communities' [2011] Fordham International Law Journal 451, 477
42 Philip H Pettit, *Equity and the Law of Trusts* (12th edn, Oxford University Press, 2012), 4

opposed to only the language of the contract.[43] The discussion by Marco is particularly guiding for our purposes as she describes the utilisation of a 'third-party-beneficiary' interest as 'a method to police the actions of entities doing business abroad.'[44]

Principles 5 and 6 of EPs III require borrowers to engage with affected communities and resolve their concerns appropriately and promptly which is monitored by the EPFIs under Principle
9. Hence a method of ensuring EPFIs uphold their promises under the EPs is to recognise third-party-beneficiary rights as affected-community have the highest stake in the event of non- compliance.[45] The principles mentioned above along with the preamble clearly show an intent to benefit project-affected communities directly. Furthermore, as EPs place a greater burden on the EPFIs and borrowers (financial and timing setbacks), Marco contends that 'there is little incentive to adopt the Principles other than to provide a benefit to affected communities.'[46] Thus the requirement of intended beneficiaries, project-affected communities, can be established through the EPs. Moreover, Marco suggests that 'the overriding policy to compensate injured parties could serve as an additional basis for finding intended beneficiary status.'[47]

Furthermore, another requirement of the RSC and RTP is that the beneficiaries must be an 'identifiable class of people' which will be satisfied by the explicit mention of indigenous peoples in the EPs[48] and the whole process of assessments, monitoring and 'Action Plan'[49] would directly benefit the affected-community. EPs III now involves assessment and documentation with specific human rights due diligence[50] thus there is a stronger case for the affected-community to claim third-party-beneficiary rights. In particular, with regards to a non-designated country when IFC standards need to be applied, Performance Standard 2 confer rights on 'Labour and Workers Conditions'[51] and Standard 7 confers rights on 'Indigenous Peoples', which also identifies a class of people.

The underlying requirement for a third-party-beneficiary right is that there must be a valid contract which the EPFIs would maintain against, however it has been argued that 'given the magnitude of a typical project finance deal, a valid contract will usually exist.'[52] This appears to be persuasive as transaction of loans do not take place without a valid contract, especially given the nature of project finance that can be complex with syndicate banks involved, which will be discussed later on in this paper, and EPs is negotiated into the loan process thus it forming a part of the contract is a feasible contention. Moreover, the incorporation of covenants between the borrower and EPFIs is a contractual obligation as mentioned above.[53] The element of 'sufficiently

43 § 302 RSC
44 Marco (n 41) 455
45 Marco (n 41) 491
46 Marco (n 41) 492
47 Marco (n 41) 493
48 Principles 5 and 7, EPs III
49 Principle 4, EPs III
50 Principle 2, EPs III
51 Exhibit III IFC Performance Standards, EPs III
52 Marco (n 41) 494
53 NRF guide (n 7) 6

immediate' benefit required by the courts in the leading US case[54] can also be satisfied by the EPs' requirement of borrowers' compliance within an agreed 'grace period'.[55] Hence, although the EPs do not expressly provide for enforcement, the contracting parties' intent to benefit the project-affected communities could be 'gleaned from the contract as a whole.'[56]

EPFIS' POSITION

Though Marco has made a public policy point for not shifting liability from the borrowers to the EPFIs as she expresses this may discourage them to sign up to the EPs at all,[57] this paper begs to differ. Whilst the borrower may be in the best position to ensure compliance, the added responsibility on the EPFI by EPs III and the likelihood that the borrower may not be financially able[58] to remedy the victims indicate EPFIs as best placed for liability. Moreover, EPs have been evolving for over a decade and are increasingly entrenched in the industry practice, which makes it improbable for EPFIs to suddenly opt out; hence predictably proliferating the risks of legal liability.[59]

However, there are two points that EPFIs can use to argue against liability: i) EPs are voluntary guidelines hence do not create rights for third party claims; ii) The inclusion of a disclaimer/ negation clause in the EPs and 'Governance Rules'[60] excludes liability.

Firstly, the 'Governance Rules' released in July 2010 specifies that though EPs are voluntary, once adopted, 'the adopting entity must take all appropriate steps to implement and comply with the Principles.'[61] Moreover, it requires EPFIs to 'contractually commit'[62] to comply with the EPs through the 'Adoption Agreement' which makes each EPFI a 'promisor'.[63] The RSC § 304 defines third-party-beneficiary status by the intent to benefit, not the intent to create a right to sue. Similarly, in *County of Santa Clara v Astra USA Inc*[64] the Ninth Circuit noted that the right to sue 'inheres in one's status as an intended beneficiary.'[65]

Secondly, it is common for contracts to contain a negation clause but the inclusion of the EPs in loan documentation is presumably heavily negotiated and both the EPs and the Governance Rules explicitly state that they will not lend to borrowers that do not comply with the EPs.[66]

54 *Chen v St Beat Sportswear Inc* 226 F Supp 2d 355, 362 (EDNY 2002)
55 Principle 8, EPs III
56 *Chen v St Beat Sportswear Inc*
57 Marco (n 41) 499
58 i.e. *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL)
59 Michael Torrance, 'Making the Sustainability Case: The Convergence of Independent Reviews and Legal Risk Management in Equator Principles Implementation' (18 February 2013) <www.lexsustineo.blogspot.co.uk/2013/02/making-sustainability-case-convergence.html>
60 <www.equator-principles.com/resources/governance_rules.pdf>
61 Governance Rules, EPs (n 60) p 6
62 Marco (n 41) 498
63 Marco (n 41) 498; *See also*: Torrance (n 7) 508
64 588 F3d 1237, (9th Cir 2010)
65 para [1244]
66 Preamble, EPs III (n 9) p 2; Governance Rules, EPs (n 60) p 7

Prouty v Gores Tech. Grp[67] case is analogous to this situation as it was found that a clear intent to benefit a third party could persuade the court to override the negation clause. Marco adds that due to 'the often skewed bargaining positions of…affected communities, a court should find a third-party-beneficiary right.'[68]

Additionally, with regards to the rules of contract, firstly, there is a presumption in favour of negotiated terms[69] and secondly, 'a contract will be interpreted such that none of its terms are superfluous.'[70] The goal of the Governance Rules are to achieve greater transparency and ensure compliance with the EPs[71] therefore, to uphold the disclaimer would defeat the purpose of the EPs to benefit project-affected communities, rendering it superfluous. The express objective and the contractual nature of the Adoption Agreement could supersede the disclaimer.

Therefore even without the express enforcement rights, the intent to benefit project-affected communities is found throughout the EPs III, giving rise to the community's status as an intended beneficiary.[72] The legal mechanism to hold EPFIs liable already exists under the third party's status as an intended beneficiary, hence, to require parties to 'expressly allow the third party to bring an action for breach would be duplicative'.[73] In that vein, a court could focus on the EPs' overwhelming intent to benefit project-affected communities which could 'prevail over a negation clause.'[74] Project-affected communities have the most to lose in case of non-compliance, the recognition of a third-party-beneficiary right would place enforcement power with the appropriate party.[75]

MISREPRESENTATION/FIDUCIARY DUTY

In the absence of third-party-beneficiary right or in order to strengthen the claim, there are other responsibilities and legal mechanisms that could deem EPFIs liable. Many academics and practitioners have acknowledged the EPFIs' role as analogous to a 'regulator' due to their commitment to oversee the implementation of the EPs by the borrowers throughout the life of the project.[76] Thus, failing to adhere to public commitments of EPs related due diligence could give rise to negligent misrepresentation[77] by the breach of a fiduciary duty of care. This part deals with the loan syndication process attracting claims from participating banks or borrowers.

67 121 Cal App 4th 1225, 1225 (2004)
68 Marco (n 41) 497
69 *See*: RSC § 203 (d)
70 Marco (n 41) 489; *See Also*: RSC § 203
71 Governance rule, EPs (n 60); *See also* Rupp and Williams (n 6) 599
72 Marco (n 41) 501
73 Marco (n 41) 500; See Also: Astra USA (n 56) para [1245] 74
Marco (n 41) 501
75 Marco (n 41) 502
76 Torrance (n 7); Rupp and Williams (n 6); Mehrdad Nazari, 'Equator Principles – Creating New Regulators or the Extra Mile?' (13 May 2013) <www.prizmablog.com/2013/05/13/equator-principles-creating-new-regulators-or-the-extra-mile/>; NRF guide (n 7) p 6
77 Torrance (n 7) 507; *See Also*: Alison FitzGerald and Michael Torrance, 'Equator Principles Financings – Mitigating Potential Legal Risks for Canadian Banks' (1 October 2013) <www.lexsustineo.blogspot.co.uk/2013/10/equator-principles-financings.html>

Loan syndication occurs in situations involving large loans where no single bank would have the 'capacity or the desire to lend the entire sum on its own.'[78] This is typically the case in terms of project finance deals. There are two arrangements of syndication, one where the entire deal is performed via the agent bank while the borrower does not necessarily know of the other banks[79] and another where all the banks lend directly to the borrower. We will focus on the former as this is where liability is probable. The difference between an arranging and an agent bank is that the role of an agent begins once the arranger's ceases after the execution of the loan agreement. This paper uses the terms synonymously due to the blurred lines as in most cases both roles will be performed by the same bank, especially with regards to EPs which requires banks to be involved throughout the life of the project.[80] To arrange the syndicate, the agent/lead bank needs to provide participating banks with detailed information relating to the loan, agreement and the borrower in a 'memorandum' as a part of the 'promotion exercise'.[81] Hence, it is the memorandum that gives rise to legal responsibility for inaccuracies and this is where negligent misrepresentation could bite.

Under English law a misrepresentation is an untrue statement that induces the other party to enter a contract.[82] Applying the principle from the leading case, *Hedley Byrne & co Ltd v Heller & Partners*[83], misrepresentation occurs when negligent advice/information is given by the arranging bank to a participating bank giving rise to a 'special relationship' of trust or confidence between them, thus the participating bank(s) suffers loss due to the reliance.[84] As the liability depends on the circumstances of each case, the important factors will be the extent to which the arranging bank was involved in the preparation and distribution of the memorandum and the complexity of the overall transaction as well as the access of information available for the participating banks.[85] Clearly, when there is lack of access and high complexity, syndicate banks would have placed extensive reliance on the skill and expertise of the lead bank,[86] and this will be true in project finance as 'the entire transaction will normally be more complex, with little public information available,'[87] thus the duty of care expected from the arranging bank will be higher.

For instance in *Natwest Australia Bank v Tricontinental Corporation Ltd*[88], the court found a breach of the common law duty of care that the lead bank owed to the rest of the participating banks; the breach of a fiduciary duty to disclose all facts known to Tricontinental and the disclaimer clause in the memorandum did not override the duty of care. Natwest had sued Tricontinental once the borrower defaulted for financial problems as it had proceeded with the loan relying

78 Andrew Haynes, *The Law Relating to International Banking* (Bloomsbury Professional Limited, 2010) 124
79 Haynes (n 78) 124
80 Preamble, EPs III
81 Haynes (n 78) 126; *See Also*: Ross Cranston, *Principles of Banking Law* (2nd edn, Oxford University Press 2002) 55
82 Ewan Mckendrick, *Contract Law* (9th edn, Palgrave Macmillan Publishers Ltd, 2011) 225
83 [1964] AC 465 (HL)
84 Haynes (n 78) 129
85 Haynes (n 78) 130
86 *St Alban's City and District Council v International Computers Ltd* (1994) *The Times* 11-Nov-94, 21 FSR 686 (QBD)
87 Haynes (n 78) 137
88 [1993] ATPR (Digest) 46-109

on Tricontinental who had not disclosed all the known facts of the borrower to Natwest. In Haynes' words '[n]o two cases will ever be the same and therefore, our attention must focus on fundamental principles rather than specific examples.'[89] Accordingly, in relation to the EPs such a situation would arise when a project is halted due to foreseeable labour/local problems which the EPFIs did not assess and monitor/mitigate effectively and may not have disclosed to the participating banks while promoting the loan syndicate. Also, under English law and most common law jurisdictions, a disclaimer to exclude liability in a negligent misrepresentation case will only be upheld if it is deemed reasonable, putting the lead bank in an 'invidious position'[90] as the finding of reasonableness is not foreseeable.

Furthermore, the due diligence factor heightens the uncertain position of exclusion clauses which most certainly will feature in such sophisticated project loans.[91] It is credible for fiduciary obligation to be found on part of the arranging/agent bank when it undertakes to perform some task on behalf of the other banks. Although, it is uncommon to find banks as fiduciaries,[92] case law indicates that courts are willing to extend the traditional principles to novel situations.[93] It is most probable when the arranging bank is in a position of advantage due to the close relationship it has with the borrower, that the other banks do not have, which essentially obliges the participating banks to rely on the arranging bank's expertise.[94] The duty to exercise reasonable care and skill will apply to the agent bank, especially 'where a loan agreement gives the agent a discretion, with regard to the performance of its obligations'.[95] Accordingly, EPs give EPFIs the discretion to 'exercise remedies, as considered appropriate' when the borrower fails to or is not capable of complying with the EPs,[96] which undoubtedly requires due diligence that triggers the likelihood of EPFIs breaching its fiduciary duty of care and skill.

Yet again, it may seem more justified for the borrower to face liability as the information memorandum is their document as is the covenant and representation required by Principle 8, EPs III. However, the practical issue of remedy deters one from suing the borrower, as bluntly put by Cranston: 'what if these remedies are illusory because the borrower is insolvent and the only deep pocket is the lead's?'[97] He goes on to state that the lead bank could avoid liability if it purely acted as a 'conduit pipe' from the borrower to the syndicate banks.[98] Conversely, in most cases

89 Haynes (n 78) 136
90 Haynes (n 78) 136
91 Haynes (n 78) 139
92 *Cornish v Midland Bank plc* [1985] 3 All ER 513 (CA), 522; *Governor & Company of the Bank of Scotland* v *A Ltd* [2001] 1 WLR 751 (CA), [25]; *See Also*: EP Ellinger, Eva Lomnicka, and CVM Hare, *Ellinger's Modern Banking Law* (5th edn, Oxford University Press, 2011) 170
93 *Tamimi v Khodari* [2009] EWCA Civ 1042 (CA), [42]; *Bank of Montreal v Witkin* [2005] OJ No 3221, [59]; *Brian Pty ltd v UDC* [1983] NSWLR 490; *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] NSWLR 157; *Coleman v Myers* [1977] 2 NZLR 255; *See Also*: John Glover, 'Banks and Fiduciary Relationships' [1995] Bond Law Review 49
94 Haynes (n 78) 140; *See*: *UBAF Ltd v European American Banking Corp* [1984] QB 713 (QBD), 728; *See Also*: Cranston (n 81) 59
95 Haynes (n 78) 143
96 Principle 8, EPs III
97 Cranston (n 81) 61
98 i.e. *Royal Bank Trust Co. (Trinidad) Ltd v Pampellonne* [1987] 1 Lloyd's Rep 218 (PC)

lead banks are intimately involved in the preparation of the memorandum[99] and with regards to EPs, it is an unlikely scenario as clearly stated in its Preamble:
"As financiers and advisors, we work in partnership with our clients to identify, assess and manage environmental and social risks and impacts in a structured way, on an ongoing basis."
Against this backdrop it appears implausible to escape negligent misrepresentation as a fiduciary if reliance can be shown by either the participating banks or the borrower due to the lead bank's expertise[100] and responsibilities under EPs III.

IMPLICATIONS FOR EPFIS

The potential legal risks call for watertight practice of due diligence and duty of care and skill as we have seen that the EPFIs can be sued from every angle: the affected-community, participating banks and the borrower, due to the high level of responsibility it commits to under EPs III. It is foreseeable that even exclusion clauses and disclaimers may not suffice to evade liability, hence the risk mitigation recommendations by lawyers may assist better implementation of EPs but will not help avoid liability. With great power and benefits ensue responsibilities which the EPFIs have created themselves; it is unconscionable for them to continue to reap the benefits at the cost of environmental and social deterioration of the project areas and affected-communities.

HARD-SOFT-HARD: RECENT DEVELOPMENTS AND ANTICIPATION OF A LAWSUIT

Despite the possibilities discussed above, unfortunately, no such claim has taken place, thus there is no guiding precedent. However, there have been helpful developments in case-law, especially in Canada and UK. Firstly, a Canadian case, in *Choc v. Hudbay*[101] the plaintiffs claimed that the parent corporation owed a duty of care to the affected-community based, in part, on the corporation's public statements that it had adopted voluntary standards such as the Voluntary Principles on Security and Human Rights. It would be desirable if this case was followed in the context of EPs as this would set an effective precedent that would mean adoption of voluntary standards could create proximity and a duty of care in relation to communities affected by funded projects that EPFIs oversee.[102] This case puts the discussion above of negligence and duty of care claim into practice[103] and explicitly states 'the fact that allegations in an action might be novel is not justification for striking the Statement of Claim.'[104] More importantly, that '[u]nless it is plain and obvious that *Hudbay* cannot owe such a duty, the negligence claim must be allowed

99 Cranston (n 81) 62
100 *Woods v Martins Bank* [1959] 1 QB 55 (QBD), [72]; *Standard Investments Ltd v Canadian Imperial Bank of Commerce* (1985) 22 DLR (4th) 410
101 [2013] ONSC 1414
102 Michael Torrance, 'New Case May Affect Whether Equator Principles Adoption Creates a Global Duty of Care on Canadian Bank' (13 September 2013) <www.lexsustineo.blogspot.co.uk/2013/09/new-case-may-affect-whether-equator.html>
103 *See* para [50] onwards
104 Para [42]

to proceed to trial'.[105] If followed, this case suggests that the burden of proof would rest on the EPFIs to prove no duty exists, which would favour the affected-community claimants.
More recently in UK, in *Dominic Liswaniso Lungowe & others v Vedanta Resources Plc and Konkola Copper Mines Plc*[106] (*Vedanta*), the High Court granted 1,826 Zambian citizens permission to bring a claim against *Konkola* in Zambia, and its parent company *Vedanta* in UK. A salient point that the judge brings to our attention by quoting Dr. Andrew Sanger [107] is useful for this paper:

"Pursuant to recent EU legislation, UK courts have jurisdiction in civil actions alleging tortious activity committed abroad by a corporation domiciled in the UK…English courts have previously found that common law claims can, in principle, proceed against UK parent corporations for torts committed by their subsidiaries abroad…Following *Chandler*, a case could be made that a UK-domiciled parent company owes a duty of care to the employees of a foreign subsidiary."

This decision is extremely significant, as irrespective of the outcome at trial, it demonstrates the 'growing understanding of the English courts that multinational corporations should not be able to hide behind their corporate structures and international borders to avoid proceedings in their home jurisdiction'[108] for the harm caused by their overseas subsidiaries. Thus this case could have bearing on the legal risks of EPFIs brought by third-party-beneficiary rights discussed above as the affected-communities would presumably be able to sue a UK domiciled entity in the English courts. Historically, international credit transactions, such as project finance, have been governed by laws of developed countries with experienced judges,[109] i.e. New York[110] and UK,[111] hence these recent cases reinforce that jurisdictional barrier does not hinder a claim of this nature.

ADVOCATING ON CLIMATE CHANGE: DAKOTA PIPELINE

Before delving into the prospect of this potential claim, it is helpful to draw attention to the controversial London Interbank Offered Rate (LIBOR)[112] investigations and fines which serves as an intriguing analogy for EPs III. LIBOR is also a non-governmental process where banks offer the interest rate based on the international inter-bank market, to lend to one another. However, in 2012 it was found that some of the banks were manipulating LIBOR in order to gain more profit and secure their position in the market. This led to legal action against the banks by regulators, resulting in fines ranging hundreds of millions of dollars. Similarly, non-compliance of the EPs can come under scrutiny followed by legal action against EPFIs for creating reasonable

105 Para [55]
106 [2016] EWHC 975 (TCC)
107 *Vedanta*, para [44]
108 Client Earth, 'Zambian vilagers can sue mining giant in English courts' (1 August 2016) <www.clientearth.org/zambian-villagers-can-sue-mining-giant-english-courts/>
109 Scott L Hoffman, *The Law and Business of International Project Finance* (3rd edn, Cambridge University Press, 2008) 356
110 Charlotte Ku, Christopher J. Borgen, 'American Lawyers and International Competence' [1999] Dickson Journal of International Law 493, 514
111 Cranston (n 81) 424
112 James McBride, 'Understanding the Libor Scandal' (12 October 2016) <www.cfr.org/united-kingdom/understanding-libor-scandal/p28729>; *See Also*: 'Libor Investigations' *Financial Times* <www.ft.com/indepth/libor-investigation>

expectations in the market through the 'regulatory initiative.'[113] Their position as the 'overseer' accentuates the chances of a regulatory offence.[114]Due to the controversy Dakota pipeline project has created in the media,[115] along with NGOs' persistence[116] and public protests,[117] it could be the ideal test case[118] for EPs III enforcement through legal mechanisms. This point is reinforced by Michael Torrance, an active and knowledgeable practitioner in this field, as he warned that '[u]ndoubtedly there will be litigation involving EPFI[s] that will define the parameters of this risk' hence to 'avoid being the "test case"' EPFIs must begin mitigating risks as far as possible.[119]

There is a hard legal case for taking this forward, particularly because of the banks' action after the open letter campaign heralded by BankTrack asking them to halt their support to Dakota.[120] On the same day as the open letter, DNB and Citi released a public statement expressing that they have hired an expert law firm to investigate the matter.[121] Coincidently or not, both banks have hired Foley Hoag LLP and RBS has published a statement clarifying their non-involvement in the project,[122] while Barclays and HSBC have 'declined to comment'.[123] Marco suggested that third-party-beneficiary claim against the EPFIs will be imminent if 'the EPFIs signs a contract with…an outside expert to monitor and report on the social and environmental impacts of a project'.[124] Although at the time of Marco's article this scenario had not unfolded, her prediction appears to have a firm basis in the status quo of Dakota pipeline project. Moreover, Citi bank has been reported as the 'agent' for the loan as well as the 'co-lead arranger'[125] bank thus is susceptible to the liabilities discussed above on negligent misrepresentation as a fiduciary in syndicate loans. Presumably, Citi would need to pay out the lion's share of the compensation if the Dakota claim took place.

Furthermore, on 5th December 2016 a pipeline leak was reported, spilling gallons of oil into North Dakota creek that could contaminate drinking water; this was discovered by a landowner

113 Rupp and Williams (n 6) 598-599
114 Torrance (n 7) 507
115 'Amid 'Crisis and Scandal,' Global Banks Called to Stop Funding Dakota Access' (8 November 2016) <www.commondreams.org/ news/2016/11/08/amid-crisis-and-scandal-global-banks-called-stop-funding-dakota-access>
116 Hiroko Tabuchi, 'Environmentalists Target Bankers Behind Pipeline' (7 November 2016) <www.nytimes.com/2016/11/08/business/energy-environment/environmentalists-blast-bankers-behind-dakota-pipeline.html?_r=0>
117 Aaron Holmes, 'Students protest Citibank for funding of Dakota Access Pipeline' (13 December 2016) <www.columbiaspectator.com/news/2016/12/13/students-protest-citibank-funding-dakota-access-pipeline>
118 i.e. *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 (HL) (Hillsborough Football Stadium disaster)
119 Torrance (n 7) 509
120 BankTrack, 'Global call on banks to halt loan to Dakota Access Pipeline' (30 November 2016) <us6.campaign-archive2.com/?u=ca4ff3016df790ab4c04c0ddd&id=71f5b66e4d&e=54567a8652>
121 DNB (30 November 2016) <www.dnbfeed.no/nyheter/dnbs-kommentar-til-situasjonen-i-nord-dakota/>; Citi (30 November 2016) <www.blog.citigroup.com/2016/11/our-statement-on/>
122 RBS (30 November 2016) <www.rbs.com/news/2016/november/rbs-relationship-with-dakota-access-pipeline-companies-ended- in-.html>
123 Zachary Davies Boren, 'Dakota Access: UK banks back pipeline builder Energy Transfer Partners' (1 December 2016) <www. energydesk.greenpeace.org/2016/12/01/dakota-access-pipeline-energy-transfer-partners-hsbc-rbs-barclays/>
124 Marco (n 41) 498
125 'Amid 'Crisis and Scandal' (n 115)

as opposed to the project's monitoring equipment.[126] Evidently, diligent monitoring and engagement with the locally affected communities as expressly stated in the EPs III appears to have been flagrantly ignored, making it an opportune time to bring this case to court if the situation is not appropriately remedied. It seems that NFR's prediction[127] of a trend in legal involvement and implications has begun to manifest with the banks assigning the reviewing and monitoring to legal experts as mentioned above. Moreover, the developments in case-law of *Vedanta* and *Choc v Hudbay*, along with the possibility of using legal mechanisms for enforcement and importantly the leading law firms' advice of legal risks mitigation, all point to the direction that an EPs III case in the courts is very credible indeed. Whilst, the EPs on their own cannot enforce compliance, the hard laws applied to the soft law could produce hard precedent allowing legal mechanisms to enforce EPs, hence fulfilling the notion of 'hard-soft-hard'.

OVERALL REFLECTIONS

It appears, from the glimmer of hope provided by the above sections, a case can finally be brought to enforce EPs III. Fortunately, the rationale and methods presented is far from the tree-hugging, eco-friendly 'hippie smelling of joss sticks',[128] as the environment is now a 'mainstream business issue'[129] which has drawn the attention of 'hard-nosed'[130] commercial lawyers. Awareness is incrementally rising and EPs have certainly not remained a ceiling for environmental and social protection as feared by Conley and Williams.[131] The seriousness of the banks are demonstrated by the fact that EPs have survived the test of time and the members continue to grow rapidly till date.[132]

Analogous to CSR and banking which presents banks with a 'business case' offering them profits, enhanced reputation and a competitive advantage, enforcing EPs III through the legal mechanisms creates somewhat of a 'legal case' that compliments the commercial lawyers' primary interest in hard laws. It cannot be contested that the end goal and the underlying consideration must be sustainability through environmental and social protection as with the aim of CSR, however one cannot help but notice how such 'soft' tools do not, on their own, bring the change that environmentalist and human rights defenders desire. Thus, initially speaking "'the language of risk" provides a *lingua franca*'[133] that the parties understand in the industry, which is of utmost importance. Dr. Bowman's research reveals that generally bankers have an entrenched perception of their mechanical role in the society; devoid of emotions and unknown to the power to do

126 'Pipeline rupture spews oil into creek 150 miles from Standing Rock' *The Guardian* (12 December 2016) <www.theguardian.com/us-news/2016/dec/12/oil-spill-pipeline-north-dakota-standing-rock-belle-fourche>
127 NRF (n 7) guide; *See also* Torrance (n 7) 509
128 Chris Bray, head of environmental risk policy at Barclays, *Global Finance Magazine* (December 2004) <www.gfmag.com/magazine/december-2004/features-a-matter-of-principles>
129 Bray (n 128)
130 Watchman, Delfino and Addison (n 7) 85
131 (n 6) 569
132 EPs, News and Media <www.equator-principles.com/index.php/all-news-media>
133 [emphasis in the original] Conley and Williams (n 6) 561

good for humanity as opposed to merely the firms they work for.[134] Although this may partly be a gloomy finding for the nature of humanity, 'instead of lamenting that reality, we [should] harness it'[135] and appreciate that the culture has begun to change.[136]

The knowledge of the legal system is a source of 'power' that can be utilised to shape the society, hence lawyers have one of the most important roles in the Western legal tradition,[137] as through their case-work, they can drive sustainable practice. Client Earth is already leading the way; here I refer back to Alice Garton's quote with which I began the paper. We must understand that it is pragmatic to utilise existing laws because it is less time consuming than demanding new laws to be generated. The idea of 'working with what we've got in order to make beneficial change'[138] is prudent advice. In that vein the NGOs, particularly BankTrack with their 2016 EPs campaign,[139] could push their tactic one step further, from naming and shaming and laboriously requesting the banks to incorporate legal enforceability in their code, to effectively helping lawyers construct a good case to enforce the law. BankTrack's criticism of the lack of enforcement has been helpful in identifying banks[140] and highlighting their deficiencies[141] but it is time to start putting it into legal action as there is potential for EPs III enforcement in a different attire via utilisation of legal mechanisms.

CONCLUSION

This paper focused on the strength of EPs III and the potential it has created for hard enforcements; the direction it has taken is a promising one. The enforcement issue could be solved by legal implications rather than through new legislation or by the development of EPs IV with the inclusion of legal enforcement. When project finance becomes public by such dire consequences, as Dakota pipeline project, EPs appear to be nothing more than 'window-dressing',[142] however, the decades of project finance scandals could very well be tested in the court of law through one strong case. Hence, the Dakota pipeline controversy urges banks to start fearing litigation risks more than before. Moreover, convincing banks to insert legal liability seems like a distant dream and frankly quite unnecessary according to Marco, as it would merely duplicate the law that already exists. EPs must transform from a paper tiger which has become a source of reputation and profit gains while harming the environment and local communities.[143] With great power comes responsibilities and with responsibilities arises the duty of care and heightened due diligence which inevitably opens doors to legal mechanisms permeating the scene as discussed above. To end on an optimistic note: in the recent movie Fantastic Beasts and Where to Find

134 Bowman (n 2) 124-125
135 Bowman (n 2) 239
136 Bowman (n 2) 243
137 Fritjof Capra and Ugo Mattei, *The Ecology of Law Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers, 2015) 126
138 Bowman (n 2) 239
139 'Equator Principles Track and Chase Project' (2016) <www.banktrack.org/show/campaign/equator_principles#_>
140 (n 120)
141 (n 21)
142 Conley and Williams (n 6) 11
143 Marco (n 41) 502-503

Them,[144] a tree branch called 'Pickett', is protected considerably by the lead actor 'Newt', and in times of difficulty Pickett is the key to every lock; an intriguing analogy implying that protecting nature vigilantly is the key to sustainability for the common good, which could be achieved by utilising legal mechanisms as proposed by this paper.

BIBLIOGRAPHY

Cases

UK

Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310 (HL)
Beswick v Beswick [1968] AC 58 (HL)
Cornish v Midland Bank plc [1985] 3 All ER 513 (CA)
Dominic Liswaniso Lungowe & others v Vedanta Resources Plc and Konkola Copper Mines Plc [2016] EWHC 975 (TCC)
Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1951] UKHL 1 (HL) *Governor & Company of the Bank of Scotland v A Ltd* [2001] 1 WLR 751 (CA) *Hedley Byrne & co Ltd v Heller & Partners* [1964] AC 465 (HL)
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 (HL)
Royal Bank Trust Co. (Trinidad) Ltd v Pampellonne [1987] 1 Lloyd's Rep 218 (PC)
St Alban's City and District Council v International Computers Ltd [1996] The Times 11-Nov-94, 21 FSR 686 (QBD)
Tamimi v Khodari [2009] EWCA Civ 1042 (CA)
Twindle v Twindle [1861] EWHC QB J57 (QBD)
UBAF Ltd v European American Banking Corp [1984] QB 713 (QBD)
Woods v Martins Bank [1959] 1 QB 55 (QBD)

US

Chen v St Beat Sportswear, Inc 226 F Supp 2d 355 (EDNY 2002) *County of Santa Clara v Astra USA Inc* 588 F3d 1237 (9th Cir 2010) *Prouty v Gores Tech Grp* 121 Cal App 4th 1225 (2004)

Canada

Bank of Montreal v Witkin [2005] OJ No 3221
Choc v Hudbay [2013] ONSC 1414
Standard Investments Ltd v Canadian Imperial Bank of Commerce [1985] 22 DLR (4th) 410

Australia

Brian Pty ltd v UDC [1983] NSWLR 490
Natwest Australia Bank v Tricontinental Corporation Ltd [1993] ATPR (Digest) 46-109
United States Surgical Corporation v Hospital Products International Pty Ltd [1983] NSWLR 157

144 J.K Rowling, *Fantastic Beasts and Where to Find Them* (Director: David Yates 2016)

New Zealand

Coleman v Myers [1977] 2 NZLR 255

Statutes

UK

Bank of England and Financial Services Act 2016
Contracts (Rights of Third Parties) Act 1999

US

Restatement (Second) of Contracts 1981

Books

Bowman M, *Banking on Climate Change: How Finance Actors and Regulatory Regimes are Responding* (Kluwer International Law, 2015)

Brunnée J and Toope JS, 'Constructivism and International Law' in Dunoff LJ and Pollack AM (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012)

Capra F and Mattei U, *The Ecology of Law Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers, 2015)

Cranston R, *Principles of Banking Law* (2nd edn, Oxford University Press, 2002)

Ellinger EP, Lomnicka E and Hare CVM, *Ellinger's Modern Banking Law* (5th edn, Oxford University Press, 2011)

Haynes A, *The Law Relating to International Banking* (Bloomsbury Professional Limited, 2010)

Hoffman LS, *The Law and Business of International Project Finance* (3rd edn, Cambridge University Press, 2008)

Mckendrick E, *Contract Law* (9th edn, Palgrave Macmillan Publishers Ltd, 2011)

Pettit HP, *Equity and the Law of Trusts* (12th edn, Oxford University Press, 2012)

Journal Articles

Bartley T, 'Transnational governance and the re-centered state: Sustainability or legality?' [2014] Regulation & Governance 93
Clayton N, 'Equator principles and social rights: incomplete protection in a self-regulatory world' [2009] Environmental Law Review 173

Conley JM and Williams CA, 'Global Banks as Global Sustainability Regulators?: The Equator

Principles' [2011] Law & Policy University of Denver 542

Glover J, 'Banks and Fiduciary Relationships' [1995] Bond Law Review 49

Gulbrandsen LH, 'Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs' [2014] Regulation & Governance 74
Helm D, 'Taking natural capital seriously', Oxford Review of Economic Policy' [2014] Oxford Review of Economic Policy 109

Hunter DB, 'Civil Society Networks and the Development of Environmental Standards at International Financial Institutions' [2008] Chicago Journal of International Law 437
Ku C, Borgen CJ, 'American Lawyers and International Competence' [1999] Dickson Journal of International Law 493

Marco M, 'Accountability in International Project Finance: The Equator Principles and the Creation of Third-Party-Beneficiary Status for Project-Affected Communities' [2011] Fordham International Law Journal 451
Rupp DE and Williams CA, 'The Efficacy of Regulations a function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum' [2011] Theoretical Inquiries in Law 581
Torrance M, 'Equator Principles III: new sustainability rules requiring legal strategy rethink' [2013] Journal of International Banking & Financial Law 503
Watchman P, 'Banks, Business and Human Rights' [2006] Butterworths Journal of International Banking and Financial Law 46

Watchman P, Delfino A and Addison J, 'EP 2: the revised Equator Principles: why hard-nosed bankers are embracing soft law principles' [2007] Law and Financial Markets Review 85

Websites

'The UN "Protect, Respect and Remedy" Framework for Business and Human Rights' (September 2010) <www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf> accessed 2 January 2017

Equator Principles (EPs)
EPs III (June 2013) <www.equator-principles.com/index.php/ep3/ep3> accessed 2 January 2017
EPs website <www.equator-principles.com> accessed 12 December 2016
EPs, About Adoption <www.equator-principles.com/index.php/the-benefits> accessed 2 January 2017
EPs, Governance Rules (2010) <www.equator-principles.com/resources/governance_rules.pdf> accessed 2 January 2017
EPs, News and Media <www.equator-principles.com/index.php/all-news-media> accessed 2 January 2017

BankTrack
BankTrack, 'Global call on banks to halt loan to Dakota Access Pipeline' (30 November 2016) <us6.campaign-archive2.com/?u=ca4ff3016df790ab4c04c0ddd&id=71f5b66e4d&e=54567a8652> accessed 2 January 2017

'Civil society groups call for stronger climate commitments in EPs and a halt to financing the Dakota Access Pipeline' (7 November 2016) <www.banktrack.org/show/article/an_open_letter_to_the_equator_principles_association> accessed 17 December 2016

Collevecchio Declaration <www.banktrack.org/download/collevechio_declaration/030401_collevecchio_declaration_with_signatories.pdf> accessed 2 January 2017

'Equator Principles Track and Chase Project' (2016) <www.banktrack.org/show/campaign/ equator_principles#_> accessed 30 December 2016

'New Equator Principles to have deeply underwhelming impact on people and planet' (4 June 2013) <www.banktrack.org/show/news/new_equator_principles_to_have_deeply_underwhelming_impact_on_people_and_planet> accessed 2 January 2017

'The Outside Job Turning the Equator Principles towards people and planet' (October 2011) <www.banktrack.org/download/the_outside_job/111021_the_outside_job_final.pdf> accessed 20 December 2016

Client Earth
Client Earth, 'Zambian vilagers can sue mining giant in English courts' (1 August 2016) <www.clientearth.org/zambian-villagers-can-sue-mining-giant-english-courts/> accessed 2 January 2017

Garton A, Lawyer (Australian qualified), Company and Financial Project Leader: <www.clientearth.org/business/#business-topics> accessed 18 December 2016

Law Firms
Ashurst, Equator Principles III- Implementation Note, 15 May 2013 <www.ashurst.com/en/news-and-insights/legal-updates/equator-principles-iii-release-of-implementation-note/> accessed 2 January 2017

Clifford Chance, 'Updated Equator Principles realised' (16 May 2013) <www.cliffordchance.com/briefings/2013/05/updated_equator_principlesreleased.html> accessed 2 January 2017

Dentons, 'Equator Principles III' (9 July 2013) <www.dentons.com/en/insights/articles/2013/ july/8/equator-principles-iii-new-guidelines-for-project-finance> accessed 2 January 2017

Norton Rose Fulbright, Equator Principles III: An introduction and practical guide (January 2014) <www.nortonrosefulbright.com/files/equator-principles-iii-pdf-17mb-111048.pdf> accessed 2 January 2017

NRF, 'N-Sure' <www.nortonrosefulbright.com/knowledge/online-services-resources-and-tools/ n-sure/> accessed 2 January 2017

Banks

Citi Bank, 'Public Statement' (April 2014) <www.citigroup.com/citi/citizen/data/citi_ statement_on_human_rights.pdf> accessed 2 December 2016

'Citi Bank's Statement on the Dakota Access Pipeline Project' (30 November 2016) <www.blog.citigroup.com/2016/11/our-statement-on/> accessed 22 December 2016

DNB Bank- Update on the situation in North Dakota (30 November 2016) <www.dnbfeed.no/nyheter/dnbs-kommentar-til-situasjonen-i-nord-dakota/> accessed 22 December 2016

HSBS, 'Equator Principles' <www.hsbc.com/our-approach/sustainability/finance/equator-principles> accessed 22 December 2016

'RBS Bank Statement on Dekota' (30 November 2016) <www.rbs.com/news/2016/november/ rbs-relationship-with-dakota-access-pipeline-companies-ended-in-.html> accessed 22 December 2016

Blogs

Costas T and Torrance M, 'Equator Principles III Demand Deeper Due Diligence' (17 July 2013) <www.law360.com/articles/456064/equator-principles-iii-demand-deeper-due-diligence> accessed 2 January 2017

FitzGerald A and Torrance A, 'Equator Principles Financings – Mitigating Potential Legal Risks for Canadian Banks' (1 October 2013) <www.lexsustineo.blogspot.co.uk/2013/10/equator-principles-financings.html> accessed 2 January 2017

McBride J, 'Understanding the Libor Scandal' (12 October 2016) <www.cfr.org/united-kingdom/understanding-libor-scandal/p28729> accessed 25 December 2016

Meyerstein A, 'The New Equator Principles III Amplify CSR For Financial Institutions' (12 June 2013) <www.csrwire.com/blog/posts/885-the-new-equator-principles-iii-amplify-csr-for-financial-institutions> accessed 23 December 2016

Nazari M, 'Equator Principles – Creating New Regulators or the Extra Mile?' (13 May 2013) <www.prizmablog.com/2013/05/13/equator-principles-creating-new-regulators-or-the-extra-mile/> accessed 2 January 2017

Torrance M, 'Making the Sustainability Case: The Convergence of Independent Reviews and Legal Risk Management in Equator Principles Implementation' (18 February 2013) <www.lexsustineo.blogspot.co.uk/2013/02/making-sustainability-case-convergence.html> accessed 2 January 2017

Torrance M, 'Managing Lender Liability in Equator Principles Implementation - Third Party Beneficiary Rights in Contract Law' (29 April 2013) <www.lexsustineo.blogspot.co.uk/2013/05/managing-lender-liability-in-equator_5796.html> accessed 23 December 2016

Torrance M, 'New Case May Affect Whether Equator Principles Adoption Creates a Global Duty of Care on Canadian Bank' (13 September 2013) <www.lexsustineo.blogspot.co.uk/2013/09/new-case-may-affect-whether-equator.html> accessed 2 January 2017

Online News

'Amid 'Crisis and Scandal,' Global Banks Called to Stop Funding Dakota Access' (8 November 2016) <www.commondreams.org/news/2016/11/08/amid-crisis-and-scandal-global-banks-called-stop-funding-dakota-access> accessed 2 January 2017

'Barclays — Divest from Dakota Access Pipeline! Protest' (10 Dec 2016) <www.edinburgh.carpediem.cd/events/1989949-barclays-divest-from-dakota-access-pipeline-at-barclays-bank- princes-street/> accessed 15 December 2016

Chris Bray, head of environmental risk policy at Barclays, *Global Finance Magazine* (December 2004) <www.gfmag.com/magazine/december-2004/features-a-matter-of-principles> accessed 2 January 2017

Hiroko Tabuchi, 'Environmentalists Target Bankers Behind Pipeline' (7 November 2016) <www.nytimes.com/2016/11/08/business/energy-environment/environmentalists-blast- bankers-behind-dakota-pipeline.html?_r=0> accessed 2 January 2017

Holmes A, 'Students protest Citibank for funding of Dakota Access Pipeline' (13 December 2016) <www.columbiaspectator.com/news/2016/12/13/students-protest-citibank-funding-dakota-access-pipeline> accessed 2 January 2017

Libor Investigations, *Financial Times* <www.ft.com/indepth/libor-investigation> accessed 2 January 2017

Mathiason N, 'Banks attacked for failures to meet Equator Principles on environment' *The Guardian* (14 January 2010) <www.theguardian.com/business/2010/jan/14/equator-principles-
banks-environment-campaigners> accessed 1 January 2017

'Pipeline rupture spews oil into creek 150 miles from Standing Rock' *The Guardian* (12 December 2016) <www.theguardian.com/us-news/2016/dec/12/oil-spill-pipeline-north-dakota-standing-rock-belle-fourche> accessed 1 January 2017

Watts J, 'Belo Monte dam operations delayed by Brazil court ruling on indigenous people' (15 January 2016) <www.theguardian.com/world/2016/jan/15/brazil-belos-monte-dam-delay-court-indigenous-people> accessed 17 December 2016

Zachary Davies Boren, 'Dakota Access: UK banks back pipeline builder Energy Transfer Partners' (1 December 2016) <www.energydesk.greenpeace.org/2016/12/01/dakota-access-pipeline-energy-transfer-partners-hsbc-rbs-barclays/> accessed 17 December 2016

Videos/ Films

ING Wholesale Banking, 'ING Equator Principles Conference' (Amsterdam, 4 June 2013) <www.vimeo.com/67878906> accessed 2 January 2017

J.K Rowling, *Fantastic Beasts and Where to Find Them* (Director: David Yates 2016)

Norton Rose Fulbright, 'Equator Principles financings: New sustainability standards' (23 Jan 2014) <www.youtube.com/watch?v=X50ySNFbr-w> accessed 20 December 2016

HOW EASY IS IT TO DEPLOY THE BREAK CLAUSE IN A COMMERCIAL EASE? AN EXPLORATION OF THE LEGAL LESSONS FOR BOTH LANDLORD AND TENANT.

Christian Fox

ABSTRACT
THE LEGAL PROBLEM

At its core, the break clause is an option to end a lease before the end of the term. The concept is a simple one. The clause allows for early termination, usually based on either the landlord or the tenant giving notice to the other party. The clause may contain conditions that must be fulfilled for the notice to be valid. The problem is that often the interpretation of those conditions by a layperson does not reflect legal interpretation based on case law up to a century old. As a result, giving of notice under a break clause can be a legal quagmire. Furthermore, the receiving party is not obliged to inform the other of its mistake. They can simply wait until it is too late.

SUMMARY

There are many examples of failure in the deployment of a break clause. This paper examines several in detail. They range from the unwitting landlord accidentally granting a new lease by withdrawing a termination notice, to tenants being unable to recoup rent paid in advance for which part is for a period that extends beyond their leaving.

CONCLUSION

There are ways that this area of law can be modernized. There are processes involving the First Tier Tribunal which apply to other areas of property law that could be adapted to help. Simple legislative amendment could create more certainty. The behaviour of the parties leading up to a dispute could be considered when awarding costs in any proceedings.

CHAPTER 1: INTRODUCTION

"This is a hard case for both sides. The tenant … needs to know if it has successfully broken the lease because its future business depends on using its resources elsewhere. The landlord in these poor economic times seeks to use any argument it properly can to keep its buildings tenanted."[1]

THE BREAK CLAUSE

A break clause allows a party to a lease to terminate the agreement before the end of the term. Break clauses can be tenant only, landlord only or apply to both parties. They usually contain some form of caveat or set of conditions that must be in place before the notice can be validly served. One can envisage conditions that might be quite reasonable. It would not seem unreasonable to insist that if a tenant gives notice to break the lease, their rent payments are up to date. It might not seem unreasonable that the notice is to be given in writing and served on the landlord. Yet even these basic and reasonable requirements can form traps for the unwary and often break clauses contain far more complicated conditions that present a potential minefield for even the seasoned practitioner. As alluded to in the quote at the start of this section, a lot is at stake for both sides.

THE PITFALLS OF THE BREAK CLAUSE

Tenants are often unaware of the legal pitfalls that exist in any attempt they may make to deploy a break clause.[2] If you have a preconception of some fresh-faced band of entrepreneurs with crest- fallen faces at the realisation their break notice has failed and they are contract bound for years to come, think again. Those whose names stand as exemplars of failure against a pedantic landlord include the likes of Marks & Spencer, the NHS, Siemens and Goldman Sachs. Organisations which, one might imagine, employ experienced lawyers to keep them out of trouble.

Organisations such as Siemens or Goldman Sachs are those with the financial resources to pursue an argument through the courts. As a result, we know about their problems. One can only wonder how many smaller firms there are for every Marks & Spencer, who simply swallow the disappointment of a failed break notice and hunker down for several more years *in situ* or become insolvent as a result of being unable to down-size.

CHAPTER 2: LEGAL BACKGROUND

"…in the curious looking-glass world of leases, nothing can be taken for granted."[3]

The author concluded the Bar Professional Training Course and LLM (both part-time) in 2019 at the City Law School. The author works for a firm of Chartered Surveyors and specialises in property law. This essay is an edited version of the author's LLM Dissertation.

1 *Canonical UK Ltd v TST Millbank LLC* [2012] EWHC 3710 (Ch) [3] Voss J.

2 J Mansfield and J Robinson, 'Material compliance and conditional break clauses: some implications for practice' (2007) 25 (2) Structural Survey 117-126.

3 Louise Tee, 'Tantamount to Good Sense' (2000) 59 The Cambridge Law Journal 251-253.

INTRODUCTION

Before immersion in the complex and nuanced, one might also suggest inconsistent, world of the break clause and pursuant notice, a brief scene-setting of some legal concepts, legislature, and landmark cases is appropriate.

THE NATURE OF A LEASE

On the face of it, a lease is a contract between two (or more) parties for the use or occupation of a property. In many ways, it is similar in nature to a contract of any other type where parties agree to something for the benefit of one of those parties in exchange for the other party giving consideration. This consideration may be a payment, or it may be some other thing that represents value. The commercial lease, in this sense, is no different to any other contract.

A lease, however, is more than a simple contract to use or occupy property. It embodies a bundle of rights that are conferred upon the tenant. It reflects (or indeed creates) a legal position and at the same time a position in equity. It is possible to possess equitable property rights that last hundreds of years, without being the legal owner of the property. It is possible to have legal ownership but have no unfettered rights to use or even enter the property you own. It is possible, in English law, for many people to have different rights over the same property at the same time. One of the problems created by the lease is the use of language and conventions that are historic and ingrained.[4] The courts have been careful to recognise that some terms do not lend themselves, as Luba points out, to precise definition.[5] For example, time is of the essence in relation to a break clause.[6] How though, is time to be assessed? To give one of the many examples of how time is assessed in law, let us look at the phrase "notice may be served from…" and in particular the definition of the word "from", courtesy of Humphreys and Seitler:

'The word "from" – the date specified will generally be excluded, so that the notice can be served only from the start of the next day. "A notice can be served from October 7" will only be valid at midnight between October 7 and 8.' [7]

We have not gone very far into the world of the break clause and already we find a potential trap for the unwary landlord or tenant, unaware that the legal convention is that the phrase "A notice can be served from October 7th" actually means October 8th.

THE MECHANICS OF GIVING NOTICE

There are two legal mechanisms for giving notice under a lease: statutory and contractual. Statutory provisions under the Landlord and Tenant Acts of 1925 and 1927 provide for the service of several types of notice. As Mansfield points out, these statutory mechanisms can often be construed less strictly than contractual provisions.[8]

4 J Mansfield 'The Service of Notices by commercial property managers in England and Wales' (2009) 1 (3) International Journal of Law in the Built Environment 244-254.

5 Jan Luba, *Repairs*: *Tenants' Rights* (Legal Action Group 1986).

6 *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] AC 904.

7 Humphreys & Seitler 'Get the facts straight' [2006] Estates Gazette 116-117.

8 Mansfield (n 4).

The provisions in a contract for giving notice are open to the design of the parties and the onus is on them to ensure that the words they write can be easily construed. Any conditions must be strictly carried out for the break notice to succeed. This can be difficult if a condition is either imprecise or should be interpreted in a way that the courts have previously adopted, but which might not seem obvious to the layperson.

Once exercised, a break notice cannot be unilaterally withdrawn.[9] Mutual agreement between the parties is the only way withdrawal can take effect. Even then, mutual agreement to withdraw can lead to traps for the unwary, well established in case law, as we shall see later.

THE EFFECT OF THE LANDLORD AND TENANT ACT 1954

A lease which is "inside the Act", in other words, a lease that has not been contracted out from the LTA 1954 by mutual agreement, can only be terminated in accordance with section 24, LTA 1954. A tenant's break notice is effectively a notice to quit under section 24. As a result, the tenant's break notice will end the lease if properly served. Once served however, the tenant cannot then request a new tenancy under section 26.[10]

If the lease is inside the Act, the landlord's break notice terminates the contractual lease only but a statutory tenancy under Part II of the 1954 Act will be created at the end of the contractual lease. To terminate the statutory tenancy, the landlord also needs to serve notice on the tenant under section 25 of the LTA 1954 which requires the landlord to have reason to do so under one of the grounds listed in section 30 of the Act.

As a result of the protection provided to a tenant by the 1954 Act, it is not common to have a landlord's break clause in a lease that is inside the Act. However, there are ways by which a tenancy that is outside the Act, may be inadvertently brought inside. More of which is set out later in this article.

LANDMARK CASE LAW

There are two landmark cases that require exploration, as they are referred to herein several times in relation to the illustrative cases.

THE MANNAI CASE

In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* the House of Lords overturned the Court of Appeal by holding that a break clause notice was valid even though it set out the wrong date.[11]

9 *Tayleur v Wildin* (1868) L.R. 3 Ex. 303 [305].

10 Landlord and Tenant Act 1954, s 69. See also: *Garston & otrs v Scottish Widows Fund & Life Assurance Society* [1998] EWCA Civ 1091 and *Aberdeen Steak Houses Group plc v Crown Estate Commissioners* [1997] 2 EGLR 73.

11 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 24 EG 122 and 25EG 138.

FACTS

The tenant held business premises on a lease which included the right to terminate the lease by giving no less than six months' notice expiring on the third anniversary of the commencement date, 13 January 1992. In error, the tenant served a break notice to expire on 12 January 1992, one day too soon.

The Court of Appeal held that the error rendered the notice invalid. The House of Lords held that, applying a new "reasonable recipient" test, the notices were valid. Lord Steyn said that a reasonable recipient would have easily understood that the tenant intended to terminate his lease on the termination date and had put it as 12 January not 13 January in error.[12]

Comment

The case has provided discretion, often widely applied by later courts, by allowing that a "reasonable recipient" would not have been misled by the error. Despite the fact that, since Mannai, notices can contain inaccuracies and remain valid, the courts have created tight boundaries around the use of the "reasonable recipient", holding, for example, that even a simple error cannot be an excuse for failure to meet mandatory or statutory requirements.[13]

The case has also met with controversy. Even in the House of Lords judgment, there was dissent: the majority was a marginal 3:2. While Lord Hoffman thought the old precedent produced results that went against common sense, Lords Goff and Jauncey preferred the old, well-settled law which, although harsh, was clear-cut.

THE CASE OF *Ellis v Rowbotham*

A landmark 19th century case that still sets precedent for the principle that rent is not apportionable when paid in advance is that of *Ellis v Rowbotham*.[14]

Facts

The premises in question were let for one year from June 1898. The tenant paid around 50 percent in advance and before taking possession. The remaining sum was to be paid in three equal instalments. The tenant did not pay the second of the three instalments and the landlord sued for the full amount of the due instalment.

The tenant argued that they were only liable for an amount calculated by apportioning the total rent sum on a daily basis and taking credit for the payments already made. The tenant claimed that this is what resulted from applying the Apportionment Act 1870. The Court of Appeal dismissed this, holding that the Apportionment Act only applied to payments made in arrears. In other words, the apportionment of rents payable in advance by instalments does not apply.[15]

Comment

The principle this case sets out is now forever shining in the firmament of property precedent. The case was approved by first *Canas Pty Co Ltd v KL Television Ltd*[16] in 1970 and then *Capital*

12 Ibid 11.

13 *Trafford Metropolitan Borough Council v Total Fitness (UK) Ltd* ([2002] EWCA Civ 1513.

14 *Ellis v Rowbotham* [1900] 1 QB 740.

15 Ibid 14.

16 *Canas Pty Co Ltd v K L Television Ltd* [1970] 2 Q.B. 433.

and City Holdings Ltd v Dean Warburg Ltd[17] in 1989. The latest tilt at the windmill by Marks & Spencer (set out below) resulted in approval for *Ellis* in the Supreme Court.

CHAPTER 3: PROBLEMS ENCOUNTERED BY TENANTS INTRODUCTION

There are numerous problems faced by tenants wishing to correctly deploy the break clause in their lease. This paper will focus on three examples:

1. Imprecise wording of a break notice
2. The overpayment of rent
3. Interpretation of a break clause

Other examples which demonstrate the level to which strict interpretation can apply but for which there is no room herein, include:

1. The case of the wrong address: In *Capital Land Holdings Ltd v Secretary of State for the Environment*, the lease stated that notices to the landlord must be sent to its registered office. The tenant's break notice was sent to the landlord's place of business. It was not in dispute that the landlord had received the notice. The court held that the provisions were mandatory, and service was ineffective.[1816]
2. The case of no interest: In *Avocet Industrial Estates LLP v Merol Ltd and another,* the break clause stated that the tenant had to make all payments due by the break date. The High Court held that the tenant's failure to pay default interest (even though the landlord has not issued any demand for it) meant that the break was invalid. The interest in question was around £130.[1917]
3. The case of premature paint: In *Bairstow Eves (Securities) Ltd v Ripley*, the lease stated that the property was to be painted in the final year. The tenant had it painted just before the beginning of the final year. The practical result at the end of the tenancy was the same as if it had been painted a few weeks later. The court held that the lack of compliance invalidated the break.[2018]
4. The case of chattel or fixture: In *Riverside Park Ltd v NHS Property Services Ltd,* the tenant had installed partitioning during their tenancy. When the tenant vacated the property, they left the partitions *in situ*. The High Court held that the partitions were chattels that interfered with the right of possession. Vacant possession had not been given. Break invalid.[2119]
5. The case of the registration gap: In *Sackville UK Property Select II (GP) No.1 Ltd v Robertson Taylor Insurance Brokers Ltd,* the assignee of the lease attempted to serve a break notice before registering the lease assignment at the Land Registry. The notice was held to be ineffective due to a lack of standing to serve the break notice under the terms of the lease.[2220]

17 *Capital & City Holdings Ltd v Dean Warburg Ltd* [1989] 25 E.G. 97.
18 [16] *Capital Land Holdings Ltd v Secretary of State for the Environment* [1996] SCLR 75. 19 [17] *Avocet Industrial Estates LLP v Merol Ltd and another* [2011] EWHC 3422 (Ch). 20 [18] *Bairstow Eves (Securities) Ltd v Ripley* [1992] 2 EGLR 47.
21 [19] *Riverside Park Ltd v NHS Property Services Ltd* [2016] EWHC 1313 (Ch).
22 [20] *Sackville UK Property Select II (GP) No.1 Ltd v Robertson Taylor Insurance Brokers Ltd* [2018] EWHC 122 (Ch).

6. The case of return to sender: In *Blunden v Frogmore Investments*, the court held that the landlord had validly served notice by sending it via recorded delivery, despite the fact that the notice was later returned to sender in the post.[2321]

It is perhaps self-evident that where there is doubt in a clause, that doubt can be resolved in either party's favour. What is perhaps less self-evident is the extent to which that resolution can confound the ordinary meaning of words as the layperson would understand them.
In each instance below, we look at the facts, unpick any judgments and provide some criticism. In each case, a mini-conclusion is reached which may help provide guidance.

1: A Case of Imprecise Wording - *Siemens Hearing Instruments Ltd v Friends Life Ltd*[24]

THE FACTS

Siemens Hearing Instruments is a case that adequately demonstrates the problem of not following, to the letter, the instructions embedded in the lease break clause. In this case, the break clause stated:
"… notice must be expressed to be given under section 24(2) of the Landlord and Tenant Act 1954."
In September 2012 the tenant's solicitors wrote to the landlord giving notice that their client intended to terminate the lease as per the break clause. The key wording of the notice read thus: "We, Manches LLP, Solicitors and Agents for the Tenant, … HEREBY GIVE YOU NOTICE, for and on behalf of the Tenant, that the Tenant intends to terminate the Lease 23 August 2013 in accordance with clause 19 of the Lease so that the Lease will determine on that date."[25]
On appeal, the court held that the break notice was invalid and therefore did not take effect. The problem with this notice was that it did not expressly state whether it was given under section 24(2) of the Landlord and Tenant Act 1954 (LTA 1954). In fact, it did not mention the Act at all. The reason, (Lewison LJ informs us in his decision) that the clause is so worded, is to exclude the possibility of the tenant requesting a new tenancy under s 26 of the LTA 1954, which might open up the possibility of negotiating a reduced rent.

COMMENT

Lord Justice Lewison's explanation of the wording of this particular clause may seem like a very good reason for insisting that the exact condition is met, however, there can have been no doubt, applying the "reasonable recipient" test set out in *Mannai*, of the tenant's intention. The fact that the landlord did not and was not obliged to bring the error to the tenant's notice and request an amended notice is notable. The behaviour of the parties regarding break clauses has been a little- discussed issue. In several of the cases this paper explores, the landlord sits silently waiting until the tenant's error triggers a failure to break.

23 [21] *Blunden v Frogmore Investments* [2002] EWCA Civ 573.
24 *Siemens Hearing Instruments v Friends Life Ltd* [2014] 2 P&CR 5.
25 Ibid [6].

The courts favour the idea that fairness or reasonableness are not considered in relation to the contract or the behaviour of the parties. Yet, when the parties bring a dispute that has arisen as a result of unfairness or unreasonableness in either a contract or behaviour to court, they are expected to bring both fairness and reasonableness to the courtroom.

Further, the justification that, as an option, the break clause is a unilateral action for which exact terms must be complied with, has allowed the courts to repeatedly fail a break attempt for even a minor variation. That contrasts with the treatment of statutory wording, which is often interpreted to contemplate fairness or reasonableness. One might argue this should be the other way around. Statutes are crafted by teams of professional drafters and laid before two houses of Parliament for scrutiny, revision, and approval. A statute should say exactly what it means. Contracts are an attempt to capture the intentions of the parties who are not necessarily legally trained, by a drafter who may not have ever met the parties and may well use templates to draft the lease. The margin for error is wide.

Conclusion

There is inconsistency in the approach of the courts to statutory and contractual wording. As things stand, tenants should observe the warning that to avoid expensive litigation, the terms must be followed precisely.

Whilst courts need not construe the wording of a break clause with any reference to fairness or reasonableness, it is submitted that the behaviour of the parties to act reasonably and fairly in relation to the agreement should be taken into account and be reflected in costs in any ensuing court case.

2: A CASE OF WASTED RENT – *Marks & Spencer PLC v BNP Paribas Securities Services Trust Co*[26]

THE FACTS

Marks & Spencer concerns four leases between the parties, Marks & Spencer (M&S) being the tenant. Each lease was for a separate floor of an office building in central London and each was on the same terms as the others. Under the terms of these leases, basic rent was payable in advance on English Quarter Days. There were also additional payments made for car parking, insurance, and service charge.

The clause setting out the rent terms used the words "proportionately for any part of any year." The leases also included a break clause which allowed M&S to terminate the lease on one of two dates, 24th January 2012 or 24th January 2016, on giving six months' notice. The clause also stipulated that there should be no arrears of rent and that the tenant should pay a substantial premium by the break date.

M&S exercised its right to operate the break clause on the first of the two dates, giving adequate notice, paying the break premium in good time and ensuring rent and other payments were

26 *Marks & Spencer PLC v BNP Paribas Securities Services Trust Co [2015]* UKSC 72.

up to date. They then demanded repayment of the rent, car parking fee, service charge and insurance paid in advance for the period immediately after the break date (25th January) until the end of that quarter (24th March). The landlord refused to make any repayment so M&S started proceedings to recover the money.

During the first instance hearing, BNP Paribas accepted the contention of M&S that it was entitled to a rebate of service charge payments for services not received, however, they refused to concede that the basic rent was repayable.

The first instance judge, Judge Morgan, held that a reasonable person would consider that a term could be implied that advance rent paid for the broken period would be refunded following the break date largely because the break premium amounted to a year's rent, and as such it should be taken that the parties had agreed that this would be compensation.

The landlords appealed to the Court of Appeal, where LJs Arden, Jackson and Fulford disagreed with Judge Morgan about the rent. They were also happy that the service charge paid in advance which was unused should be returned but not insurance charges. They did not consider it left the lessee at risk of having to make a payment for insurance into the future and, secondly, because the landlord would not be able to get a rebate on the premium as the premium was unlikely to be time apportioned.

The tenant appealed to the Supreme Court who, in short, agreed with the Court of Appeal. Lord Neuberger (at paragraph 21) summed up his view on the idea of an implied term, based on a line of reasoning going back through past precedent cases, thus:

1. Proof of intention of the parties is not critical to the implication of a term
2. The notion of fairness, or that the parties would have agreed a term if suggested to them are not sufficient reasons for implying the term
3. It is questionable whether reasonableness and equitableness will add anything if the term satisfies the other requirements
4. Business necessity and obviousness can be alternatives – only one of them needs to be satisfied
5. When using the premise of the "officious bystander" the question posed to him should be formulated with the utmost care
6. Necessity for business efficacy involves a value judgement which is not absolute.[27]

COMMENT

The argument put forward by counsel for the tenant during the Court of Appeal hearing (Mr Fetherstonhaugh QC, of whom, more later), that if unused service charge should be repaid to the tenant, an implied term should be read into the lease that the same should apply to rent and other payments, sounds like common sense. Even applying the principles according to Lord Neuberger set out above, it is possible to reach the conclusion argued by counsel for the tenant as easily as the opposite. Perhaps, one should add to the above list that common sense is also not a sufficient reason to imply a term.

27 Ibid 20.

The fact that a one-hundred-year-old case (*Ellis and Rowbotham*) held otherwise seems incongruous. One might argue that the Supreme Court was loath to blight a generation of landlords, all relying on the premise that rent is not apportioned in time, by revealing the maxim for what it is. Out of touch.

Further, the argument used by LJ Arden that insurance payments should not be treated in the same way as service charge, because the landlord would not get a rebate is completely inconsistent. Service charge payments are made up of all those elements of common charges that the tenant covenants to reimburse the landlord for. This includes such items as common parts electricity, usually on a contract, and common parts insurance, to which the same contract principles apply as to the insurance rent. Whilst the case papers are silent on what percentage of the service charge payment was considered "unused" the principle reasoning is less than robust.

CONCLUSION

It is time *Ellis and Rowbotham* was apportioned in time; namely, the past. The principle shows no consistency with other forms of property payment, is out of touch with current trends in leasing and flies in the face of modern banking, payment and business methods.

In the interim, tenants should beware. Unless they want to throw money away, they must either ensure that the break clause ties in with the rent payment regime to ensure the quarter's rent and cessation of the lease are in harmony, or that the break clause is explicit in providing for the return of "unused rent".

3: A Case of Unclear Drafting – *Goldman Sachs International v Procession House Trustee Ltd*[28]

THE FACTS

Goldman Sachs International held a lease on an office building paying a passing rent of £4 million *per annum*. The lease contained a break clause which stated that:

"23.1 Subject to the tenant being able to yield up the premises with vacant possession as provided in clause 23.2, this lease shall be terminable by the tenant at the expiry of the twentieth year of the term by the tenant giving to the landlord not less than 12 months' and one day's previous notice in writing."

"23.2 On the expiration of such notice, the term shall cease and determine (and the tenant shall yield up the premises in accordance with clause 11 and with full vacant possession) …"

Clause 11 provided that the tenant would remove any alterations and reinstate to no lesser condition than that set out in a "Works Specification".

Goldman Sachs wished to break the lease, and in advance of doing so brought a Part 8 claim to obtain a declaration from the court so it would know in advance exactly what was expected of them as tenant to correctly deploy the break clause.

The area of contention was around the issue of Clause 11. The landlord contended that the tenant had to give both vacant possession and compliance with Clause 11. The tenant maintained that although they were bound by Clause 11 and the obligations to reinstate the property, it was not a precondition to correctly implementing the break clause.

The court agreed with the tenant's interpretation that the break clause contained a single condition. On the ordinary meaning of the words in clause 23.1, the tenant was to yield up the property with vacant possession as set out in 23.2. The two-condition argument, to yield up the property with vacant possession and also to yield up in accordance with Clause 11 was not correct.

Nugee J gives us the rationale in his judgment at paragraph 27: "…just because a draftsman has spelt out the consequences of the break clause being exercised in cl.23.2, it does not mean that that necessarily was intended by the draftsman to add anything to the position..."[29]

COMMENT

There are two interesting aspects to this case. Firstly, the description by Judge Nugee of the way the court seeks to construe lease clauses. He refers to the speech of Lord Neuberger in *Arnold v Britton* who sets out (at paragraph 15) how the court is seeking to identify the intention of the parties by reference to (Lord Neuberger's words) "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean". Lord Neuberger further says, "And it does so by focussing on the meaning of the relevant words..."[30]

Judge Nugee then goes on to describe how, in *Wood v Capita Insurance Services Ltd*, Lord Hodge (between paragraphs eight and 15) restates the above principles. "…It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context ..."

In concluding the point, Nugee J states that, "…the task of the court is to ascertain the meaning of the language that has been used, not other language that has not been used."[31] These brief paragraphs give us great insight into the challenge the court has, the way it tries to apply principles and the difficulty the court faces in being objective. We are also left with a better understanding of why there can be inconsistencies on a cursory comparison between ostensibly similar cases.

The second interesting aspect of this case is the tenant's use of a Part 8 claim. Civil Procedure Rules (CPR) are set out in the "White Book". The usual method for starting a claim is set out in Part 7. The alternative procedure for claims under Part 8 is followed when a claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact.[32]

By using the Part 8 process, the tenant gained what is in effect a ruling in advance. This ruling set out how the clauses are to be interpreted and thus what the tenant must do to ensure a successful deployment of the break clause.

28 *Goldman Sachs International v Procession House Trustee Ltd* [2018] EWHC 1523 (Ch), [2018] L. & T.R. 28.

29 Ibid 22.

30 *Arnold v Britton* [2015] UKSC 36.

31 *Wood v Capita Insurance Services Limited [2017] UKSC 24.*

32 Civil Procedure Vol 1 Sweet and Maxwell [2018] 8.1- (2).

The tenant clearly saw this process, although undoubtedly expensive, as representing good value for money when compared with the risk of a failed attempt to break. The remaining term represented several years at a rent of £4 million per annum. Given that Goldman Sachs had already vacated the premises at the time of the hearing, it would not have meant a resigned shrug and a shuffle back to the office if the break failed.

CONCLUSION

The use of the Part 8 process would seem a sensible path to ensuring successful use of a break clause by obtaining a court declaration and is to be recommended for high-value cases where break clauses are conditional or equivocal.

CHAPTER 4: PROBLEMS ENCOUNTERED BY LANDLORDS INTRODUCTION

The range of issues faced by the landlord is also wide. Here, we will focus on arguably the two most profound examples:

1. Common law doctrine
2. Interpretation of drafting

The reservoir of cases that challenge the landlord may seem fewer than those relating to tenants, but this is understandable. The range of conditions that apply to the landlord who engages his right to break are typically fewer and simpler than those bestowed upon a tenant in the same position.

1: A CASE OF NO TURNING BACK – *Tayleur v Wildin*[33]

"…whether the notice to quit is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both. If that is so, then the consent of the parties makes a new agreement, and if there is a new agreement there is a new tenancy created to take effect at the expiration of the old tenancy."

THE FACTS

Tayleur v Wildin **(1868) LR 3 EXCH 303.**

In 1863, Mr Morgan held an annual tenancy on a farm. The tenancy was guaranteed by Mr Wildin. Mr Morgan fell into arrears in 1865 and Mr Tayleur, the landlord, gave Mr Morgan notice to quit. Mr Morgan paid the arrears and in February 1866, the notice to quit was

33 *Tayleur v Wildin* (1868) L.R. 3 Ex. 303 [305] Kelly CB.

withdrawn by Mr Tayleur and Mr Morgan remained in occupation. Mr Morgan fell into arrears again in late 1866. Mr Tayleur served another notice to quit, the rent was paid, but this time the landlord notified Mr Wildin that, as guarantor, he would be liable for future rent. In March 1867, Mr Morgan left the premises without paying rent. Mr Tayleur sued Mr Wildin for the rent as guarantor.

The landlord argued that Mr Morgan's tenancy, once the notice to quit was withdrawn, continued and that under that annual tenancy the guarantor was responsible for unpaid rent. Mr Wildin argued that the tenancy had been terminated when the original notice to quit issued by Mr Tayleur had been withdrawn and that a new tenancy was created by the waiver or withdrawal of the notice to quit, under the terms of which Mr Wildin had no liability. The court agreed with Mr Wildin.

Freeman v Evans **[1922] 1 CH 36.**

Mr Evans held a tenancy on business premises for a term of one year (then annually thereafter). The terms of the tenancy included a condition that the tenant would not underlet without consent of the landlord. The tenant did underlet part of the premises to Fletcher and Co. The landlord did not object. Later, the original landlord was succeeded by Freeman, who let the whole to Evans under a new lease for five years at a higher rent. Evans again gave a covenant not to underlet. In 1920, Evans wrote to his sub-tenant Fletcher, explaining that the new lease he had undertaken was at a higher rent and, as a result, he would have to charge them more. When Fletcher refused an increase, Evans served a notice to terminate the underlease. When Fletcher later agreed to the revised rent, the notice to terminate was withdrawn by Evans. The landlord instigated forfeiture proceedings asserting that the notice to terminate, followed by withdrawal of that notice had created a new tenancy which was a breach of the covenant against underletting. The Court of Appeal agreed.[34]

Lower v Sorrell **[1963] 1 QB 959.**

In this case, the Court of Appeal was asked to give consideration to the effects of a series of notices to quit. The case involved an agricultural holding let for 5 years, continuing thereafter from year to year unless determined by 12 months' notice in writing. The landlord served a notice on the tenant giving over 12 months' notice. There then followed a period where the parties contemplated terms for a potential new tenancy. When those discussions failed, the landlord gave a second notice, giving a new termination date 12 months hence. The landlord then sought possession.

The tenant claimed that the first notice, by being withdrawn had created a new tenancy. The second notice was invalid as it was served in respect of a tenancy that did not yet exist. The (possibly reluctant) conclusion of the court was that it was constrained by both *Tayleur* and

34 *Freeman v Evans* [1922] 1 Ch 36.

Freeman and agreed with the tenant.[35]

Fareham BC v Miller **[2013] EWCA CIV 159**

In 2013 the Court of Appeal confirmed *Tayleur*, holding that, "as a matter of law it was impossible for the Council to revoke the notice to quit… Even if the Council had made an irrevocable decision not to rely on the notice the tenancy would still have come to an end." [36]

COMMENT

No doubt the rule set out above is either ignored or goes unnoticed in practice. Where no legal advice is sought, if a break notice is withdrawn the parties carry on in ignorance. Nevertheless, if an issue subsequently arises and the matter comes to light, expensive complications could ensue. If a tenant withdraws a break notice, the landlord's acceptance of it has the effect of granting a new lease, which might have implications for any mortgage. If an undertenant withdraws a break notice, a new underlease is granted. Failure to obtain consent from a superior landlord could lead to proceedings and even forfeiture.

A further complication is that any new lease will be inside the security of tenure provisions of the Landlord and Tenant Act 1954. Where the original lease was outside the 54 Act, this creates a fundamental change in the tenancy. Similar complications are created by the loss of a guarantor.

CONCLUSION

Lest we think that the potential traps for the unwary are weighted against the tenant, this potential bombshell proves otherwise. There may be more case-based evidence of issues faced by the unwary tenant, but the issue described above has implications that are as great, if not greater, than any faced by a tenant. The only consolation to a landlord is that in this case, ignorance, if shared by your tenant, is bliss.

2: A Case of Actions Speak Louder – *Legal & General Assurance Society Ltd v Expeditors International*[37]

THE FACTS

The tenant, Expeditors International ended two commercial leases by exercising a break clause. The landlord appealed the first instance decision[38] that the break had been correctly exercised. The break clause stated that the ability to break was conditional upon the tenant paying rent and observing covenants up to the end of the lease. After the service of notices by the tenant, agreement was reached as to the quantum of dilapidations to be paid to the landlord by the

35 *Lower v Sorrell* [1963] 1 QB 959.
36 *Fareham BC v Miller* [2013] EWCA Civ 159 [30] Patten LJ.
37 *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2007] EWCA Civ 7.
38 *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch), [2007] 1 P.

tenant. Conditional on that payment was that the landlord would release the tenant from its liabilities, covenants, and obligations in relation to the condition of the property.

There was no issue between the parties that Expeditors International had failed to completely yield up the property and provide vacant possession at the agreed date. At the court of first instance Lewison J found that, although the tenant had failed to comply completely with the terms of the break clause, the conditions had been modified by the dilapidations agreement which meant that the landlord could no longer rely on them. As a result, the break notices still had effect and terminated the leases. The landlord appealed.

At the Court of Appeal, before Sir Anthony Clarke MR, Lord Justice Lloyd and Lord Justice Sedley, the landlord contended that the dilapidations agreement was to the point, had been drafted by a professional and did not mention the provisions of the break clauses. Furthermore, although there had been an assumption that the tenant was going to give vacant possession, nothing in the agreement suggested that the landlord would have wanted to convert that into a contract term, meaning the leases were to terminate regardless of the tenant giving vacant possession.

The tenant argued that the settlement figure assumed all the leases would terminate because it allowed for liabilities that only came into being on expiration.

The appeal was dismissed (Lloyd L.J. dissenting). Sir Anthony Clarke implied a term into the settlement agreement that the leases would end on the expiration of the break notices. He did so to give business efficacy to the dilapidations agreement.

Sedley LJ did not feel the need to insert an implied term. Instead, he reached the same conclusion on the basis that the construction of the dilapidations agreement and its effect was such that the break notices were effective despite the provisions of the break clause itself.

We will examine Lord Justice Lloyd's dissenting comments below.

Effectively the Court of Appeal held that a dilapidations agreement between the landlord and the tenant created a situation where time was no longer of the essence in relation to the break clause and the giving of vacant possession.[39]

COMMENT

Peta Dollar gives us an insight into the possible motivation for the attitude of the court, suggesting that, both at first instance and on appeal, the court, "may have been swayed by the fact that the landlord had received a substantial sum of money in respect of the disrepair of the premises, and felt that it would be unfair for the landlord to retain that sum of money and for the leases to continue."[40] She also contends that it is tempting to agree with the dissenting judge Lloyd LJ. The wording of the agreement is clear that the release from covenants and obligations was in relation to the condition of the property.

Lloyd LJ, as Dollar tells us, asked, "was the tenant really free to breach any or all of the other covenants …? If so, why did the settlement agreement expressly deal only with the repairing covenants in the lease? Why did it not expressly state that the leases would end on the expiry of

39 Ibid 31.
40 P Dollar 'Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd' (2007) 11(3) L. & T. Review 83-85.

the break notices, regardless of the tenant's behaviour in the meantime?"[41]
Here we have an example where interpretation by the courts is not always straightforward or predictable. What appears unequivocal in words has become otherwise by the action, in this case, paying a large sum of money.

CONCLUSION

Under the sections for problems faced by tenants and problems faced by landlords, a lease or agreement construction issue has appeared in both, suggesting that the issue is of concern to landlords and tenants. The only way to avoid problems like this is to ensure that wording explicitly states what will happen to other clauses in the lease and sets out clearly what payments are for and what will happen to them if the other conditions are not met.

CHAPTER 5: COMPARISONS

Introduction
As the break clause in a lease is essentially a property-related notice, it is worth a glance at the other types of property related notices and how they compare to the break clause.
John Mansfield gives us a useful list of reasons for giving notice in the context of commercial tenancies that may be issued (or reacted to) by both landlords and tenants. The list includes:

- Rent reviews
- Interim rent
- Rent arrears
- Termination of tenancy
- Application to court for continuation of the tenancy
- Contracting out of the 1954 Act protection
- Break clauses
- Consent to assign or sublet part or whole
- Interim and terminal dilapidations.[42][35]

Comparison with elements in other forms of notice
We can extract from the list above several elements which contrast quite starkly with similar elements when part of a break clause.
Time
The case of *United Scientific Holdings Ltd v. Burnley Borough Council*[43] established that time is not of the essence concerning the service of either notices or counter-notices under the rent review provisions in a lease, subject to there being terms to that effect or unless the parties have made it clear their intentions that time should be of the essence. That said, as Mansfield points out, "… the boundaries of this decision continue to be tested in the courts."[44] Not something to explore further here, but even this established matter is not without testing boundaries. The exception to the rule is when a break clause creates a link between a break date and a rent review date. In such

41 ibid.
42 [35] Mansfield (n 4).
43 *United Scientific Holdings Ltd v. Burnley Borough Council* [1978] AC 904.
44 Mansfield (n 4).

a case time does then become of the essence for the rent review date.
In contrast to the rent review notice and counter-notice, break clauses are subject to time being of the essence as established by the same case, *United Scientific Holdings*. A break clause may expressly set this out but if the lease is silent on the matter, it is implied.
Discussion
One can understand from a practical perspective that serving a notice under a rent review provision is not particularly time-sensitive. It makes little difference to either party when the review is carried out (within reason) as the new rent will be effective from the review date regardless of the timing of the review itself. Conversely, breaking a tenancy requires a notice period to be given in advance of quitting on a set date. Certainty is required, particularly when it comes to the landlord taking back possession.
Sub-tenancies
When a break notice is served and a periodic tenancy comes to an end, any sub-tenancy will also end. The break involves, as Louise Tee evocatively suggests, "the 'root and branch' destruction of any derivative interest."[45] When a lease is surrendered however, any sublease continues. This major difference in what appears to be two processes that result in the same thing, i.e. termination, is based on a simple premise set out by Lord Millet in *Barrett and others v Morgan*.[46] A break notice is a unilateral action (albeit pre-agreed) by a tenant. It requires no consent at the time it is enacted. By contrast, a surrender requires the consent of both parties, the tenant in offering (or requesting) to surrender and the landlord in accepting it.
Discussion
By maintaining the distinction, a sub-tenant is protected from collusion between landlord and tenant to oust them, thereby preventing a landlord from evading the protection provided to tenants by the Landlord and Tenant Act 1954.

Conclusion
Whilst only concentrating on two simple elements: the effect of time on a notice and the effect of a notice on sub-tenancies; the differences are quite stark and serve as a reminder that the elements that make up landlord and tenant law have evolved to their specific use or specific place in the area of practice, such that they no longer resemble their close relatives.

CHAPTER 6: RESOLVING THE PROBLEMS

Introduction
Pilgrim suggests that, "Given that the courts continue to strictly construe break clauses, tenants need to continue to press for shorter leases, negotiate unconditional breaks wherever possible and watch the drafting carefully."[47] Good, sensible advice, but what can be done to reduce the burden on the courts' time, the burden on the parties' purses and the potential for business ruin already mentioned? This final section explores ideas for change.

45 Tee (n 3).
46 *Barrett and others v Morgan* [2000] 2 AC 264.
47 T Pilgrim 'Breaking Bad, Tenants Disappointed Again' (2014) 18 (4) L. & T. Review 127-128.

Change an Act of Parliament

Guy Fetherstonhaugh QC, writing in the Estates Gazette, asks if there is any solution to the problem of defective notices.[48]

Mr. Fetherstonhaugh has had significant influence in this area, having been counsel in several of the cases cited by this paper. As a result, he should be well placed to propose changes to the benefit of all. He notes that the list of reported cases held on the Estates Gazette database concerning the failure to observe statutory requirements of a notice or other contractual interpretation matters, numbers 380.

Fetherstonhaugh's solution to the problem is an amendment to the Interpretation Act 1978, an act that provides for the interpretation of Acts of Parliament, deeds and other documents. His suggested amendment is by the provision of a new section stating:

"Where in any primary or subordinate legislation or deeds and other instruments and documents, a notice is to be served, then, notwithstanding any stipulation to the contrary, whether in the legislation or instrument or elsewhere, (a) that notice shall be sufficiently served if it comes to the attention of the person whom that legislation or instrument specifies shall be served; and (b) that notice shall be a valid notice if the effect intended by the legislation or instrument would be clear to a reasonable recipient."[49]

The flaw in this otherwise excellent plan is that it requires the services of a willing MP to initiate a private members' bill within the House of Commons. At the time of writing (January 2020), the House seems a little preoccupied with an issue that, though theoretically resolved, will surely see a backlog of legislation clogging the parliamentary system for another several years.

Set out a protocol in the Civil Procedure Rules

There are a number of pre-action protocols set out in the Civil Procedure Rules. They are designed to help meet the overriding objective of allowing the court to deal with cases justly and at proportionate cost. They also serve to "carve out" cases that need not get as far as a court room by promoting alternative dispute resolution, exchange of information to allow cases to be understood by both parties and agreement or narrowing of issues in dispute.

Were it possible to set out a new pre-action protocol for cases involving break clauses, the parties might only be able to bring a case if they can show that they have behaved as contracting parties in a way that is in line with the expectation of the parties involved in proceedings. In other words, that they have communicated, pointed out errors and attempted to agree a termination plan, including agreement of wording for a notice, in advance of a notice being submitted. Only then, once an agreed plan has failed and the parties have demonstrably acted in good faith in its inception, can proceedings be brought.

What is unclear, is whether creating a pre-action protocol would be any easier than changing an act of Parliament.

Promotion of the use of a Part 8 procedure

The Part 8 procedure, as utilised in *Goldman Sachs,* should be more widely recommended for

48 G Fetherstonhaugh 'Time to Take Notice' (2014) The Estates Gazette 89.
49 ibid 41.

high-value cases as already suggested. It might even be possible for a "cut-price" Part 8 to be created to be run through the First-Tier Tribunal (FTT). It would involve both parties agreeing to be bound by the ruling of the FTT as the result would be futile if the landlord could simply appeal, removing the certainty of the ruling and adding time to the process that may be of the essence.

The 2007 Lease Code

In 2007, a number of organisations, including the British Property Federation and the Royal Institute of Chartered Surveyors, put forward a paper entitled The Code for Leasing Business Premises in England and Wales (2007 Lease Code). The code made a number of recommendations on all aspects of leasing. In relation to break clauses, they suggested that the only pre-conditions should be that tenants are up to date with the main rent, give up occupation and leave behind no continuing subleases. Disputes about the state of the premises, or what has been left behind or removed, should be settled later (as with any normal lease expiry). Were this code to see wide uptake in new lease drafting it would have positive effects by the removal of onerous or complex requirements.

The problem is, as an informal survey of practitioners in property management carried out by the author suggests, the 2007 code has not been taken up by the industry. Further, as Peta Dollar points out[50], the code would not have helped the tenant in *Legal and General* if the court had failed to imply terms into their settlement agreement. It is also hard to see how the code would have helped Marks & Spencer; *Ellis and Rowbotham* would still stand.

Conclusion

There are ways in which the state can intervene to bring order to the problems created by leaving agreements to the market. But should they do so? It is arguable that they should, given that the cost of resolving the issues places at least some burden on the legal system.

CHAPTER 7: CONCLUSION

The famous quote by Lord Hoffmann in *Mannai* (at 776) is a good place to start a conclusion:

"If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease."[51]

This seems to be the general position of the court when it comes to the wording of a break clause or break notice. Sir Stanley Burnton in *Newbold and Ors v The Coal Authority* (a case we need not elaborate on here) said at paragraph 70, in direct response to the above statement by Lord Hoffmann:

"…Against that, on its true construction a statutory requirement may be satisfied by what is referred to as adequate compliance. Finally, it may be that even non-compliance with a

50 Dollar (n 33).
51 Mannai (n 11) [776] Hoffman LJ.

requirement is not fatal…"[52]

This position is arguably inconsistent. Statute is, as already discussed, created in an environment where the words are scrutinised by two Houses of Parliament. The views expressed above arguably

place a higher standard of drafting and meaning on contracts between the owner of a building and an occupier, than on contracts between the state and its entire citizenry.

A lease is a contract which both parties have a hand in setting out and in doing so have in mind the way in which the parties will conduct themselves. A contract need not be fair; there is rarely a balance of power between a landlord and a tenant, the market granting a superior hand to one party or the other. The contents of the lease, as a result, need not be reasonable. It is arguable, however, that the parties' conduct should be both fair and reasonable but, at the very least, reasonable.

Returning briefly to *Mannai*, Lord Goff (at 753) tells us that:

"The fact that the landlord realises that the tenant intended to take advantage of his rights… but has only failed through some mistake to give the required notice, is irrelevant."[53]

It is hard to equate this attitude towards the behaviour of the parties within a contract, with the attitude of the courts towards the behaviour expected of the parties if they bring a dispute arising from that contract to court.

Civil Procedure Rule (CPR) 1.3 requires the parties to help the court further the overriding objective, which is to enable the court to deal with cases justly and at proportionate cost.[54] This duty is further elaborated at CPR 1.3.2, where it states that (quoting Salter J in *McGann v Bisping*):

"…a particularly high level of realism and co-operation is expected of parties in their approach to pre-trial case management."[55]

This level of co-operation should surely be expected before a dispute arises.

Finally, there are legislative or state-sponsored changes that might reduce uncertainty, save businesses from the risk of failure and reduce the burden on courts. Perhaps of those discussed in this paper, the easiest to implement would be a binding "part 8" type procedure at the FTT. This would effectively furnish the tenant with a prescription to ensure a successful attempt to break the lease.

I conclude with the introductory quote:

"This is a hard case for both sides…"[56]

Perhaps harder than it need be.

52 *Newbold and Ors v The Coal Authority* [2013] EWCA Civ 584 [70].
53 *Mannai* (n 11) [753] Goff LJ.
54 *Civil Procedure Rules* (2018) vol 1 para 1.1.
55 [48] *McGann v Bisping* [2017] EWCH 2951 (Comm).
56 *Canonical* (n 1).

PREDICTIVE POLICING AND INTERNATIONAL HUMAN RIGHTS LAW

Seun Adekoya

INTRODUCTIO N

Imagine it is 1999 and an unidentified, suspicious bag has been left by the New York Stock Exchange. The NYPD are in disarray. The police have been notified by a pedestrian and officers visit the scene. Unsure of the bag's contents, a bomb disposal unit is likely to be called out, resulting in traffic disruption, the shutting down of the New York Stock Exchange and financial loss to the New York economy. In 2019, the NYPD have better tools at their disposal. The Domain Awareness System ("DAS"), a partnership between the NYPD and Microsoft, collects and analyses information from sensors across New York City, including 9,000 surveillance cameras, 500 license readers, 600 mobile radiation and chemical sensors and millions of 911 calls.[1] A digital alert system tracks for suspicious behaviour and, once alerted, recorded video can be played back to track the movement of suspects.[2] As soon as the unidentified, suspicious bag has been dropped, the DAS triggers an alert and officers can trace the disposer of the bag, identify him, review his criminal record, follow him back to his vehicle and track his movements across the city. All in real time. All done from the comfort of a patrol car anywhere in the city, because NYPD officers have access to the system though their smartphones.[3]

Policing has been transformed by the rise of big data and predictive analytics. 'Predictive policing' has changed whom, how, and where we police.[4] Many cities have created 'heat lists' of individuals considered to be at 'risk' of committing future crime or a victim of such crime. Algorithms now designate which areas should be policed more closely, updating its advice daily, even hourly. Police forces can predict what type of crime may be committed through aggregation of social media data, school records and meteorological forecasts. However, the unfortunate reality is that in the midst of the absorption of these practices into policing too little attention has been paid to the individuals who may feel the brunt of the increased police activity: minority communities. There is a long and difficult history of communities of colour feeling the sharp edge of the law through discriminatory measures and if attention is not paid to this issue, policing in the new age will reflect the prejudices of the last.

The rise of predictive policing has implications for international human rights law. This paper will explore the law on racial discrimination and discern whether big data policing may fall foul of international law. It will focus on how big data and predictive analytics have changed the nature of policing and suggest policy options which could pave the way for a fairer future in the artificial intelligence age.

This paper begins by providing an overview of big data and predictive analytics and its use in policing, focusing on the USA and UK. It goes on to examine the international law on discrimination. The main sources of international law in this area are the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on the Elimination of All

Forms of Racial Discrimination ("CERD"), and the treaty bodies that interpret them. Judgments of the European Court of Human Rights ("ECtHR") are also helpful in understanding the nature of the law on discrimination as the European Convention on Human Rights' ("ECHR") prohibition on discrimination is substantively similar to that in the ICCPR. The paper then describes the dangers of predictive policing, focusing on racial bias and error, and assesses whether the current systems are in breach of international law. Finally, it offers recommendations on how to ensure that the police's use of predictive analytics complies with the international human rights law on discrimination and how the police may be able to correct past injustices rather than perpetrate them.

BIG DATA AND PREDICTIVE ANALYTICS: PREDICTIVE POLICING

An Introduction to Big Data and Predictive Analytics

Big data refers to datasets of a size beyond the capacity of traditional software tools to store or analyse.[5] Big data is commonly characterised by three 'V's: volume (the mass of the data accumulated), velocity (data is constantly changing and can be analysed in real time) and variety (different sources and forms of data).[6] In the realm of law enforcement the data collected relies on a multitude of sources from social media and law enforcement datasets to newer surveillance and tracking technologies.[7]

Predictive analytics uses this data to make decisions based on statistical models implemented through algorithms. [8] Big data and predictive analytics introduce fundamental changes to prediction and decision processes.[9] No area of decision making will be immune. In the future, it seems likely that crime analysts will increasingly be replaced by algorithms.

The Rise of Predictive Policing

Predictive policing involves the algorithmic processing of large amounts of data to predict patterns of future offending and re-offending.[10] In 2011, TIME listed the city of Santa Cruz's predictive policing program as one of the 50 best innovations of the year.[11] Reminiscent of what was science fiction in the film Minority Report, such programmes are promised to 'stop crime

5 'Big Data The New Frontier For Innovation, Competition And Productivity' https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Big%20data%20The%20next%20frontier%20for%20innovation/MGI_big_data_exec_summary.ashx.

6 Aleš Završnik, *Big Data, Crime And Social Control* 6 (2018). Jules J Berman, *Principles Of Big Data: Preparing, Sharing, And Analyzing Complex Information* (2013).

7 Andrew Guthrie Ferguson, 'Big Data And Predictive Reasonable Suspicion' [2014] University of Pennsylvania Law School.

8 Jacob LaRiviere, 'Where Predictive Analytics Is Having The Biggest Impact' *Harvard Business Review* https://hbr.org/05/2016/where-predictive-analytics-is-having-the-biggest-impact.

9 ibid.

10 Završnik (no 6) 108.

11 'Predictive Policing | City Of Santa Cruz' http://www.cityofsantacruz.com/government/city-departments/city-manager/community- relations/city-annual-report/march-2012-newsletter/predictive-policing.

before it occurs'[12], while helping police forces do 'more with less'[13] in times of austerity.

Many police forces across the USA and the UK have purchased or created their own predicting policing programs. At least 14 police forces in the UK are currently using predictive programs or are engaged in research or trials.[14] A number of police forces in all of the USA's 50 states are using different types of predictive algorithms.[15] PredPol predicts that 1 in 33 American citizens are in a jurisdiction covered by one of its algorithms.[16]

The following subsections of this paper will follow the approach of Ferguson in The Rise of Big Data Policing and detail how predictive policing has changed a) whom, b) where and c) how we police.[17]

Whom we police

For the last four years, every arrestee in Chicago has been rated with a threat score from 1 to 500. The Strategic Subjects List, dubbed the 'heat list', has attributed a numerical value to nearly 400,000 individuals. This list ranks individuals according to the probability that they will be involved in a shooting or murder, either as the perpetrator or as a victim. [18] After a protracted legal dispute between the Chicago Sun-Times and the Chicago Police Department, the police revealed the variables assessed, but declined to release the algorithm used to create the score. The majority of the variables concern the nature of the individual's current and previous arrests, but the analysis of Medium and the New York Times found that the most important variable was the age of the arrestee.[19] For every decade of age, the risk score declined by around 40 points, reflecting mainstream criminology research.[20]

The police have attempted to use this new information constructively. The Chicago Police Department visited select members of the 'heat list' with social workers and community leaders to inform them of their risk, the consequences they face if they engage in violence and explain the opportunities in the community for help and support.[21] Though over four years only 1,400 personal visits have been made, few of these visits were followed up regularly.[22]

The non-profit RAND Corporation determined that the first iteration of the 'heat list' did not

12 'How Can We Prevent Crime' (PredPol) https://www.predpol.com/crime-prevention-with-predpol/

13 Završnik (no 6) 132.

14 'Policing By Machine' (Liberty) https://www.libertyhumanrights.org.uk/sites/default/files/LIB%2011%20Predictive%20Policing%20Report%20WEB.pdf.

15 Završnik (no 6) 167.

16 'Overview' (PredPol) https://www.predpol.com/about/.

17 Andrew G Ferguson, *Rise Of Big Data Policing* (New York University 2017).

18 Brianna Posadas, *How strategic is Chicago's "Strategic Subjects List"? Upturn investigates.*, Medium (June 22, 2017), https://medium.com/equal-future/how-strategic-is-chicagos-strategic-subjects-list-upturn-investigates-9e5b4b235a7c.

19 *Id.*

20 Jeff Asher and Rob Arthur, 'Inside the Algorithm That Tries to Predict Gun Violence in Chicago', New York Times (2017).

21 'Custom Notifications In Chicago' (*Chicago Police Department*) http://directives.chicagopolice.org/directives/data/a7a57bf0-1456faf9-bfa14-570a-a2deebf33c56ae59.html.

22 Brianna Posadas, 'How strategic is Chicago's "Strategic Subjects List"? Upturn investigates.', Medium (2017), https://medium.com/equal-future/how-strategic-is-chicagos-strategic-subjects-list-upturn-investigates-9e5b4b235a7c.

prove to be accurate and was 'not successful in reducing gun violence'.[23] Despite the greater attention paid to these individuals, RAND found that police officers were not given guidance on how to treat these targeted individuals.[24] The list became a shorthand for the 'most wanted' list in Chicago.[25] All the while, homicide rates have continued to rise in Chicago and, when they escalated in 2016, close to 200 people on the heat list were arrested.[26] Recently, Medium's research has found that a third of the individuals on the 'heat list' had never been arrested, and the Chicago Sun-Times found that of the individuals with the maximum 500 score, only 22% were repeat offenders'.[27]

The 'Smart Policing Initiative' of Kansas City shows that the use of predictive analytics in 'focused deterrence' may assist in reducing crime. The police in Kansas City developed a list of suspects after analysing police records focusing on those who were arrested and their co-arrestees. The algorithm includes more data than in Chicago's system, including information about friendships, social media activity and drug use.[28] During 2014, the police department identified 884 violent offenders and held call in sessions, which have been described as 'part threat, part intervention, part "scared-straight" lecture'.[29] Nearly 600 of the violent offenders attended the call in sessions and they were followed by individual meetings with social service providers.[30] Central to the scheme of focused deterrence was communicating 'often and directly' with offenders, and letting them know they were 'under close scrutiny' and how they could avoid severe sanctions.[31] The 'Smart Policing Initiative' achieved a significant decrease in homicide and gun-related aggravated assaults of nearly 40% and 20% respectively after one month of the program. The decline in crime was largest immediately after the program and decreased over time.[32]

Predictive policing may be a threat to traditional prosecuting. The Manhattan District Attorney's Office has created the Crime Strategies Unit ("CSU") to target individuals for incapacitation and removal from the city's problem areas.[33] The CSU asks for a list of each precinct's worst offenders whose 'incapacitation by the criminal-justice system would have a positive impact on

23 Jessica Saunders, Priscilla Hunt, John S. Hollywood, 'Predictions put into practice: a quasi-experimental evaluation of Chicago's predictive policing pilot', RAND Corporation, https://link.springer.com/epdf/10.1007/s11292-016-9272-0?shared_access_token=eQ6T0_Tp8Ujhw1FvFjrSAfe4RwlQNchNByi7wbcMAY7ld1taU-_UkmhNtqplQkKD100KqQJkKYhMHKJwrWGUE0TAupbsk_D72dJ8OWNl7fUD76qaDaV1uBsRlH0HCrm-hAVZhXhO6c-a8GfFzIlha8YYeRgrOCSrJB_sSkTAZRY=.

24 ibid.

25 Ferguson (no 2) 39.

26 ibid.

27 ibid.

28 John Eligon and Timothy Williams, 'Police Program Aims To Pinpoint Those Most Likely To Commit Crimes' New York Times (2015).

29 Ferguson (no 2) 36.

30 Kenneth J. Novak, Andrew M. Fox, Christine M. Carr, Joseph McHale, and Michael D. White, Kansas City, Missouri Smart Policing Initiative From Foot Patrol to Focused Deterrence, December 2015 http://www.strategiesforpolicinginnovation.com/sites/default/files/spotlights/Kansas%20City%20SPI%20Spotlight%20FINAL%202015.pdf

31 ibid 8.

32 Ibid 12

33 Ferguson (no 2) 42.

the community's safety' and creates a list of 'priority targets.[34] The CSU practises 'intelligence-driven prosecution' and have established the 'Arrest Alert System' so when a priority target enters the system, even on a minor charge, a prosecutor can be informed by email.[35] Ten years ago such a criminal on a minor charge would enter the system in one part of the city and prosecutors would have no idea of the general threat level this individual possessed, but now the CSU will be notified immediately and use all its means to incapacitate the individual.

Where we police

Place-based predictive policing allows law enforcement agencies to analyse years' worth of historical crime data and identify hot spot locations where future crime is likely to be committed. The algorithms can include other factors that influence crime: the weather on a given day, where the Friday night football game is being held, or that Friday is payday, all of which can correlate with an elevated risk of crime.[36]

PredPol has become the industry leader in place based predictive technology. The Washington Post studied the use of PredPol's tools by following police officers in Los Angeles. A crime forecast is produced by PredPol at the start of each shift. Red boxes spread across the map covering 500 by 500 square foot areas where property crimes are likely to occur. The police officers are expected to proactively interact with people in the red box areas to deter crime.[37] PredPol uses past crime data and real-time crime data, but limits the inputs to crime type, location and time of offence.[38] With PredPol's small number of inputs it undertakes a rather minimalist approach. Other competitors have developed much more complex algorithms. For example, a competitor, Azavea, has developed algorithms that analyse not only past crime, but other data points such as, population density, census data, the location of bars, schools and transportation hubs and schedules for sports games.[39]

Police departments are experimenting with Risk Terrain Modelling ("RTM"), which isolates the environmental risk factors that attract crime. Essentially, they ask why certain areas attract more crime than others. After risk diagnosis, police forces can deploy their resources to tackle these specific risks.[40] An RTM model studied environmental risk factors for burglary in Chicago. Apartment complexes, foreclosures, gas stations, grocery stores, laundromats and schools were among variables considered. The RTM found that the most important predictor of burglary occurrence is proximity to foreclosed properties.[41] The algorithms produced by Azavea also

34 Chip Brown, 'Cyrus Vance Jr.'s 'Moneyball' Approach to Crime', New York Times (2015).

35 *Id.*

36 Ferguson (no 2) 63.

37 Justin Jouvenal, 'Police Are Using Software To Predict Crime. Is It A 'Holy Grail' Or Biased Against Minorities', The Washington Post (2016).

38 Ferguson (no 2) 67.

39 Maurice Chammah, 'Policing The Future', The Verge, https://www.theverge.com/2016/2/3/10895804/st-louis-police-hunchlab-predictive-policing-marshall-project

40 'Risk Terrain Modelling' http://www.riskterrainmodeling.com/.

41 Caplan, J., Kennedy, L., Barnum, J. and Piza, E., Risk Terrain Modeling for Spatial Risk Assessment (2015) 17(1): 7-16 Cityscape: A Journal of Policy Development and Research.

uncovered correlations that ranged from the expected (less crime occurs on cold days) to the unexpected (cars were often stolen in Philadelphia near schools).[42]

The jury is still out as to the effectiveness or accuracy of place-based predictive policing. While police departments have rushed to PredPol and similar systems, others have dropped the technology after trial periods.[43] The founders of PredPol have published a peer reviewed study of their technology. The study compares PredPol's technology with the predictions of human crime analysts in Los Angeles Police Department (USA) and Kent Police Department (UK). The paper found that the PredPol model predicted crime 1.4 to 2.2 times more accurately than the control analysts, which contributed to an average 7.4% reduction in crime volume.[44] Whereas, another study of a predictive software called Precobs in Germany found that the impact of the tool on crime was 'unclear'.[45] Kent Police have since ended their contract with PredPol but seek to develop more complex predictive models 'with the information to actually prevent crime, such as detailed information about past offences in that area'.[46]

Despite the uncertainty in the science community, police officers are committed to their new tools and departing from traditional policing practice. Ferguson noted that PredPol's first users in California had to be reminded to leave the red box areas.[47] The San Francisco Police Department's Legal Department commented that in LA 'many officers were only patrolling the red boxes, not other areas…'. A RAND study also noted that police officers engaged in intelligence gathering in red box areas, interacting with people more (stopped, questioned and ran the records of more people), in an attempt to understand the drivers of crime in the community.[48]

How we police

The police now have access to vast amounts of data and metadata. Beyond the usual tracking of telephonic information (location and duration of the call), the police have turned their eyes to the new preeminent medium of communication: social media. Companies like Geofeedia sell 'location-based intelligence', whereby they analyse public social media posts (Twitter, Facebook, Instagram etc) within a geographic location in real time.[49] When the 'Freddie Gray' Riots occurred in Baltimore in 2015, Geofeedia advertised that its facial recognition technology allowed police officers to locate protestors or rioters with outstanding warrants and arrest them directly from the crowd.[50] Facebook and Instagram have since revoked Geofeedia's access to their user data after an

42 Chammah (no 39)
43 Emily Thomas, 'Why Oakland Police Turned Down Predictive Policing', Motherboard Vice (2016).
44 G. O. Mohler and others, 'Randomized Controlled Field Trials Of Predictive Policing' (2015) 110 Journal of the American Statistical Association.
45 Dominik Gerstner, 'Predictive Policing In The Context Of Residential Burglary: An Empirical Illustration On The Basis Of A Pilot Project In Baden-Württemberg, Germany' (2018) 3 European Journal for Security Research.
46 Hasan Chowdhury, 'Kent Police stop using crime predicting software', The Telegraph, (27 Nov,2018).
47 Ferguson (no 2) 79.
48 Priscilla Hunt, Jessica Saunders, John S. Hollywood, Rand Corporation, Evaluation of the Shreveport Predictive Policing Experiment 26 (2014).
49 Ashley Wong, 'What is Geofeedia? The tool police say could have warned them to Capital Gazette shooter', USA TODAY (June 30, 2018).
50 George Joseph, 'How Police Are Watching You on Social Media', City Lab, (2016).

American Civil Liberties Union ("ACLU") report published Geofeedia's agreements with various social media companies.[51]

Social media data now forms an integral part of intelligence gathering operations. It is not unusual for police to follow suspects on public channels. The police in New York and Chicago watch YouTube videos to determine the organisation of gangs and their activities.[52] But the huge growth of social media has made such information much more available and valuable.

Data mining is the process of analysing large datasets to gain new information.[53] The definition of non-sensitive data has now changed. Mundane location data, when analysed in large data sets, can reveal one's health problems, sexual preferences and racial background.[54] Data mining has become an integral part of the law enforcement toolkit for fighting financial crime. The US Securities and Exchange Commission's algorithms track continuously for suspicious or unusual transactions.[55] The search through unstructured data sets can bring to light more unusual information. Richmond's Police Department used its database to study rape and found 'a prior property crime [to be] a better predictor of a stranger rape than a prior sex offense'.[56] This information would never have been accessed before the information age.

DISCRIMINATION IN INTERNATIONAL HUMAN RIGHTS LAW

With an understanding of how traditional policing has been transformed in the information age, international law must be examined. International law prohibits discrimination on the basis of race, colour, or national or ethnic origin in the guarantee/protection of all rights.[57] The aim of ridding the world of discrimination has been constant since the earliest development of human rights law, as is represented by the Universal Declaration of Human Rights which ordained that the universal rights inscribed therein shall apply without 'distinction of any kind'.[58]

All UN human rights treaties contain a prohibition on discrimination. This paper will focus on two most important treaties on the prohibition of discrimination in the civil liberties context: the Intentional Convention on the Elimination of All Forms of Racial Discrimination ("CERD") and the International Covenant on Civil and Political Rights ("ICCPR"). Both Treaties obligate states to end discrimination on the basis of race, colour and gender and end difference in treatment of their nationals on the basis of one of these grounds.

The paper will next examine the international law that applies to police forces engaging with predictive policing.

51 Matt Cagle, Facebook, Instagram, and Twitter Provided Data Access for a Surveillance Product Marketed to Target Activists of Color, ACLU (2016), https://www.aclu.org/blog/privacy-technology/internet-privacy/facebook-instagram-and-twitter-provided-data-access?redirect=blog/free-future/facebook-instagram-and-twitter-provided-data-access-surveillance-product-marketed
52 Ferguson (no 2) 115.
53 Alexander Furnas, 'Everything You Wanted to Know About Data Mining but Were Afraid to Ask', The Atlantic, (Apr 3, 2012).
54 Margot Kaminski, 'Toward defining privacy expectations in an age of oversharing', The Economist (2018).
55 'SEC launches 'RoboCop' to fight against accounting fraud', The Telegraph (2013).
56 Ferguson (no 2) 117.
57 U.N. Charter, art 1, para 3.
58 Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), art 2.

Grounds of Discrimination

International law prohibits both direct and indirect discrimination and places positive and negative obligations on states to uphold these rights. The CERD prohibits discrimination on the basis race, colour, descent, or national or ethnic origin.[59] States are obliged to legislate against racial discrimination and ensure public authorities comply with the obligations set out in legislation.[60] Discrimination on the same grounds is prohibited by the ICCPR. The ICCPR further clarifies that the right to be discriminated against "on the ground of race, colour, sex, language, religion or social origin" is non-derogable, even in times of officially proclaimed public emergencies where the State may permissibly limit other ICCPR rights.[61] The pertinent issue for this paper is whether international law prohibits practices of national law enforcement that use race or a proxy for race as a determinative factor.

International law prohibits both direct and indirect discrimination.[62] Direct discrimination occurs when the act on its face aims to disadvantage a particular group[63] or impairs a particular group's exercise of their rights or freedoms.[64] Indirect discrimination, which is of principal concern in predictive policing, involves actions that are apparently neutral but have greater impact on minority groups.[65] To prove that policies involve indirect discrimination requires showing that the neutral policy has a disproportionate impact on the particular group's enjoyment of rights or freedoms.[66] The Committee states that 'indirect discrimination can only be demonstrated circumstantially'.[67]

However, not all forms of disparate treatment will form a human rights violation. In certain circumstances discrimination may be permissible. A difference in treatment will not constitute discrimination if the criteria for such differentiation is 'legitimate', which allows special measures for the sole purpose of advancing the rights minority groups (i.e. affirmative action).[68]

An example of indirect racial discrimination by law enforcement officers is the practice of racial profiling. The ACLU defined racial profiling as unlawful detentions and searches without evidence of criminal activity that are based on perceived race, ethnicity, national origin or religion.[69] Morris

59 Intentional Convention on the Elimination of All Forms of Racial Discrimination, art 1(a), 660 U.N.T.S 195 (1966).
60 CERD (no 55) art 2(a), art 2(c).
61 International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, art 4(1).
62 Irreversible Consequences: Racial Profiling And Lethal Force In The "War On Terror", The Center for Human Rights and Global Justice New York University School of Law, May 2006
63 Interights, Non-Discrimination In International Law – A Handbook For Practitioners 72 (2005)
64 Human Rights Committee, General Comment No. 18, Non-discrimination para. 1 (1989)
65 ibid.
66 ibid.
67 *L.R. v. Slovakia*, Communication No. 31/2003, Committee on the Elimination of Racial Discrimination, para 10.4 (1996).
68 General Recommendation No. 14, General Recommendation XIV On Article 1', Paragraph 1, Of The Convention' (Committee on the Elimination of Racial Discrimination 1993); Broeks v. The Netherlands, Communication No. 172/1984, Human Rights Committee, U.N. Doc. CCPR/C/OP/2 para. 13 (1990), 'The right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.1'.
69 ACLU, 'Racial Profiling', https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling.

shows that the violation of international law is revealed in the evidence of the disparate impact on African American of pretextual traffic stops.[70] The disparate practice of the police forces sampled had a cost to the individual, affecting their rights to human dignity, to equality before the law and to society as a whole. The criminal justice system comes to be viewed as less legitimate in the eyes of those who disproportionately feel its invasive powers.[71] Racial profiling with the aim of the more efficient fighting of crime should not mean that rights guaranteed to individuals by the ICCPR and the CERD are undermined.[72]

A textual analysis of the CERD shows that the Treaty has broader application than just explicitly discriminatory laws. The preamble of the Treaty states that its object and purpose is to 'combat racist doctrines and practices'.[73] Article 2 of the Treaty obliges a state to 'engage in no act or practice of racial discrimination'[74] and to review local, national or governmental policies which may have the effect of perpetuating discrimination. If such an effect is found these policies must be amended or nullified.[75] Considering the object and purpose of the Treaty and its text, the Treaty will apply to the policies and practices of law enforcement agencies.

The Committee on the Elimination of Racial Discrimination, the body tasked with interpreting the CERD and monitoring state compliance, released a Recommendation on how the prohibition applies in the context of the administration of justice.[76] The Committee says that a state must take the necessary steps to prevent 'questioning, arrests and searches' which are based solely on 'that person's colour or features or membership of a racial or ethnic group', or any profiling which exposes him or her to greater suspicion.[77]

CERD has recognised that the police are the entry point into the criminal justice system and an important element of the state's exercise of coercive measures. Therefore, given the potential for police abuse, General Recommendation 13 details the importance of law enforcement officials being 'properly informed about the obligations their state has entered into under the Convention' and mandates 'intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin'.[78]

Predictive Policing and Discrimination Law

Bias and errors in predictive policing are the two key issues to be studied when determining whether predictive policing is compliant with international discrimination law.

70 Maria V. Morris, 'Racial Profiling And International Human Rights Law: Illegal Discrimination In The United States' [2001] Emory International Law Review.
71 ibid.
72 ibid.
73 CERD (no 55) preamble.
74 ibid art 2(1)(a).
75 ibid art 2(1)(c).
76 'General Recommendation No. 31, General Recommendation XXXI On The Prevention Of Racial Discrimination In The Administration And Functioning Of The Criminal Justice System' (Committee on the Elimination of Racial Discrimination 2005).
77 ibid 20.
78 'General Recommendation No. 13, General Recommendation XIII On The Training Of Law Enforcement Officials In The Protection Of Human Rights' (Committee on the Elimination of Racial Discrimination 1993).

Bias

A number of studies have shown that the use of predictive policing in sentencing can serve to entrench bias against certain groups in society. Using historical crime records such as training data to create predictive crime mapping programs can be problematic, especially because historical crime data is not an accurate representation of past crime in an area. Much crime is not reported to the police, especially by minority communities. Liberty, a UK-focused human rights advocacy group, states that 'predictive policing programs are better at predicting likely police involvement in a certain community – not potential crime'.[79] Therefore, the predictive mapping programmes based on historic data will create a feedback loop where police officers are sent to minority neighbourhoods and find crime, which is fed back into the software ensuring more crime will be found in that area in the future.

Both the The Lammy Review[80] and The Color of Justice[81] recognise implicit bias as playing a causal role in the magnitude of the disparity in the treatment of ethnic minorities in the criminal justice system. The Color of Justice argued that one of the principal drivers of the disparity is policing practices and policies, a clear example of which being disparate drug law enforcement: 'blacks are nearly four times as likely as whites to be arrested for drug offenses and 2.5 times as likely to be arrested for drug possession', despite 'the evidence that whites and blacks use drugs at roughly the same rate'.[82] The Lammy Review on the UK's criminal justice system found similar disproportionate outcomes. The necessary discretion in policing allows for prejudicial subjective assumptions. Studies find ethnic minorities are given harsher sanctions because they are perceived as posing a greater threat to public safety so are deserving of greater punishment.[83] Consequently, the use of historical crime data in predictive policing may simply serve to amplify existing discriminatory practices.[84] Pasquale observed that it is 'quite difficult to find a less objective set of statistics than crime figures'.[85]

Studying the use of algorithms in sentencing provides a cogent illustration of the dangers of bias. ProPublica's analysed the COMPAS risk assessment software, which is designed to measure the likelihood of a defendant's recidivism. ProPublica found that that 'blacks are almost twice as likely as whites to be labelled a higher risk but not actually re-offend'.[86] The basis for this error was found to be the training data. Though race is not used as a factor by the algorithm, there are many factors used which correlate with race, such as poverty, homelessness and social

79 'Policing By Machine' (Liberty) https://www.libertyhumanrights.org.uk/sites/default/files/LIB%2011%20Predictive%20Policing%20Report%20WEB.pdf.
80 'The Lammy Review: An Independent Review Into The Treatment Of, And Outcomes For, Black, Asian And Minority Ethnic Individuals In The Criminal Justice System' (2017).
81 Ashley Nellis, 'The Color Of Justice: Racial And Ethnic Disparity In State Prisons' (The Sentencing Project 2016).
82 ibid.
83 ibid.
84 ibid.
85 Završnik (no 6) 120.
86 Surya Mattu Julia Angwin, 'Machine Bias — Propublica' (*ProPublica*, 2016) https://www.propublica.org/article/machine- bias-risk-assessments-in-criminal-sentencing.

marginalisation.[87] Further studies have shown that it is not the algorithm which is biased, but the data inputted which replicates 'existing societal racial inequities, creating a disparate outcome'.[88]

The ACLU argues that predictive policing will only 'increase community harm' through 'over-enforcement of low-level offenses'.[89] The ACLU highlights the self-fulfilling prophecy and vicious cycle of the over policing of ethnic minority areas. However, predictive policing advocates retort that predictive systems input reported crimes rather than arrests and race is not a variable.[90] Focusing on reported crimes helps remove the subjective bias that afflicts police in the use of their arrest discretion, but as Liberty has made clear, many crimes are not reported to the police 'for a wide range of reasons including a lack of confidence, mistrust and fear'. Furthermore, even though race is not a variable, other variables such as poverty correlate with race and neighbourhoods in the US have been segregated by 'law, practice and custom'.[91]

Error

Data error is an important issue to address. Famously an IBM researcher advised that 'garbage in' means 'garbage out' in artificial intelligence. Law enforcement data can contain numerous errors that police do not even know about. Citizens cannot verify the data because a lack of transparency means they do not know what data is collected about them. The increasing volume of data means it is now even harder to track and change inaccuracies.

Data can also go stale.[92] Many algorithms work on the basis of social network theory, which dictates that if a burglar has been active in a particular area it is likely that he will return, because he believes that familiar areas are easier to burgle. But if this burglar is caught and the algorithm maintains that the area is a 'hot spot' for crime, police activity may increase superfluously.

The brunt of data error and data staleness may be felt disproportionately by people and communities of colour. ProPublica's research revealed large amounts of errors in Chicago's gang database.[93] The database of 128,000 Chicagoans labelled over a hundred septuagenarians and octogenarians as gang members and included 13 people who are supposedly 118 years old.[94] On the basis of this data whole minority neighbourhoods could be characterised as dangerous.

Indirect discrimination or a permissible disparate treatment?

The USA and the UK are not employing the use of predictive policing to directly discriminate against racial minorities. However, the effects of the bias and errors, as discussed, that can be endemic in predictive policing methods means that these tools can have a 'greater impact' on

87 ibid.
88 Ferguson (no 2) 51.
89 'Predictive Policing Software Is More Accurate At Predicting Policing Than Predicting Crime' (*American Civil Liberties Union*, 2016) https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/predictive-policing-software-more-accurate.
90 Ferguson (no 2) 74.
91 ibid 75.
92 Andrew Guthrie Ferguson, 'Big Data And Predictive Reasonable Suspicion' [2015] University of Pennsylvania Law Review.
93 Mick Dumke, 'Chicago's Gang Database Is Full of Errors — And Records We Have Prove It', ProPublica (2018)
94 ibid.

racial minority groups, such as black Britons or black Americans, than other ethnic groups. This will be a form of indirect discrimination. However, the disparate treatment will not constitute unlawful discrimination if the 'criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.[95]

The international treaty bodies have provided little case law on what is considered 'legitimate', but the European Court of Human Rights ("ECtHR") applying the European Convention on Human Rights ("ECHR") has developed a jurisprudence dealing with permissible differentiation.[96] Though the USA, unlike the UK, is not a party to the ECHR, the non-discrimination provision in the ECHR, Article 14, is substantively similar to that in the ICCPR and CERD,[97] therefore the guidance provided by the European Court should be persuasive and structure employed by the Court is helpful when considering the issues under international law.

The ECtHR has defined discrimination as '… treating differently, without an objective and reasonable justification, persons in relevantly similar situations'.[98] The well-established test dictates that a difference in treatment is discriminatory within the meaning of Article 14 ECHR if it has no objective and reasonable justification; that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[99] The ECtHR applies a two-step test 'focusing first on the aim pursued, second on the relationship between the impugned difference in treatment and the realisation of that aim'.[100]

The first step of the test asks whether the policing practises pursue a legitimate aim. The question can be dealt with swiftly. The aim of efficient and effective law enforcement will be recognised as a legitimate government objective.

The second, more difficult, step is whether the practice of biased or error-prone predictive policing is proportionate to the legitimate aim. Under ECHR case law, race falls into a category of 'suspect' grounds, therefore 'very weighty reasons' are required to justify why the difference in treatment appears both suited for realising the legitimate aim pursued, and why it is necessary.[101] The perceived law enforcement efficiency gains must be balanced against the impingement on discrimination rights and the plethora of other rights that are affected.

95 'General Recommendation No. 14, General Recommendation XIV On Article 1', Paragraph 1, Of The Convention' (Committee on the Elimination of Racial Discrimination 1993).

96 Morris (no 72) 15.

97 European Convention for the Protection of Human rights and Fundamental Freedoms, Sept. 3, 1953, arts 14, 213 U.N.T.S 221. Article 14 states, 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

98 D.H. and Others v. the Czech Republic, App. No. 57325/00, para. 44 (Eur. Ct. H.R. Feb. 7, 2006).

99 Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24.

100 European Commission, 'The Prohibition of Discrimination under European Human Rights Law: Relevance for EU Racial and Employment Equality Directives' 14 (2005) (hereinafter "European Commission, The Prohibition of Discrimination under European Human Rights Law"), http://europa.eu.int/comm/employment_social/publications/2005/ke6605103_en.pdf.

101 ibid.

Discriminatory predictive policing negatively affects the right to freedom of expression and association and the rights to equality, and private life. Many of the predictive systems base their level of dangerousness not just of the arrestees' record, but those of their co-arrestees and even their known friendships. The focus on relationships may have the effect of restricting association rights in targeted neighbourhoods. The wholesale hoovering of data from public and private sources more negatively affects the freedom of expression and the right to privacy of those on whom the police more closely focus their attention. When an officer is sent to an area in which he is told to expect a high risk of violent crime he may see what were traditionally routine encounters as more threatening.[102] In these circumstances, officers are more likely to use force in a way that infringes the right to security and even the right to life.

As mentioned above, Article 2 of the CERD is clear that states must nullify laws and regulations which have the effect of perpetuating racial discrimination.[103] Furthermore, General Recommendation 31 of the CERD Committee which obliges states to 'implement national strategies or plans of action aimed at the elimination of structural racial discrimination'.[104] Without regulation, the rise of predictive analytics in policing will only perpetuate existing societal divisions and erode confidence in the criminal justice system.

Taking into account the positive obligations on states under international law, the array of rights affected by the indirect discrimination and the wider societal implications, it is unlikely that the use of bias or error-prone predictive algorithms could be proportionate to a legitimate aim. Therefore, such practices should be impermissible indirect discrimination under the ECHR and under international law in general. But the interplay between predictive analytics and international human rights law can change if the deficiencies of the new tools are recognised and efforts are taken to remedy them. The next part of this paper provides recommendations on what the next steps should be.

RECOMMENDATIONS FOR THE FUTURE OF PREDICTIVE POLICING

The use of predictive analytics in the criminal justice system, where life and liberty are at stake, must be constantly regulated and monitored. Four ways algorithms can become a constructive influence on decision makers will now be explained.

Fair Algorithms

There is a promising body of research exploring how to create machine learning tools devoid of bias. DeepMind, a world leader in Artificial Intelligence, created an Ethics and Society unit to address AI's impact on society. Researchers from DeepMind recently published a paper entitled 'Path-Specific Counterfactual Fairness' suggesting a way to build non-discriminatory algorithms.

102 'How data-driven policing threatens human freedom', The Economist (2018).

103 CERD (no 55) art 2(1)(c).

104 'General Recommendation No. 31, General Recommendation XXXI On The Prevention Of Racial Discrimination In The Administration And Functioning Of The Criminal Justice System' (Committee on the Elimination of Racial Discrimination 2005).

Instead of removing the 'sensitive attribute', such as race or gender, DeepMind would consider an algorithm fair towards an individual if the decision made would have been made in a counterfactual world in which the sensitive attribute were different.[105] In this algorithm the sensitive variables do not have to be removed, strengthening the algorithm's predictive ability. This paper is but one example of research in a growing area of study, which is essential as the speed of innovation increases and machine learning tools make ever more decisions that have an affect on our lives.

Algorithm Transparency and Accountability

It is unlikely that society will ever reach the point at which we trust algorithms independently. Regulations must be laid down to ensure their transparency and accountability, especially when these tools are used by public authorities.

Most algorithms used by public authorities have been developed commercially, so are the proprietary 'trade secrets' of the private party. Because of such opacity it is difficult for users to know what variables are considered against them and how the variables are weighed. If an algorithm used by a police force is commercially developed there must be a minimum amount of information released to the public that could enable researchers to test the algorithms and communities to hold their users to account.[106] Ideally, public authorities should build their own predictive systems with academic researchers, and these algorithms should be made publicly available for widespread scrutiny.

The algorithms themselves should be subject to mandated audits and validity studies by third parties. An algorithmic audit allows researchers to study the fairness of an algorithm by submitting fictitious information while changing sensitive attributes.[107] ProPublica's study of COMPAS's algorithm in Florida is an example of a validity study, which tests the algorithms predictions against real-world data.

Governments should create bodies which oversee algorithmic transparency and accountability. This body should maintain a roster of third-party units available to conduct the necessary research and the results should be made public and published in peer-reviewed journals to further the research in this area. Predpol is the only company that has tested its algorithm in a peer-reviewed journal. Several other companies have escaped any scrutiny, and this is unsatisfactory. Public interest organisations should conduct human rights assessments concerning the rights observed above so the human rights impact can be specifically assessed.

105 Silvia Chiappa, Thomas P.S. Gillam, 'Path-Specific Counterfactual Fairness' (2018), https://arxiv.org/pdf/1802.08139.pdf.
106 Danielle Kehl, Priscilla Guo and Samuel Kessler, 'Algorithms In The Criminal Justice System: Assessing The Use Of Risk Assessments In Sentencing, Responsive Communities Initiative, Berkman Klein Center For Internet & Society' (Harvard Law School 2017).
107 'Data And Discrimination: Collected Essays, An Algorithmic Audit' (2014) https://www.ftc.gov/system/files/documents/public_ comments/2014/10/00078-92938.pdf.

Community Engagement

Algorithmic decision making should not be introduced into a community without their consultation. The community can question the police as to the efficacy of predictive systems, raise their concerns and receive assurances as to its use. Well informed public debate is the bedrock of decisions which change a society for the better. Algorithms introduced in the dark will seem too much like a mechanism of manipulative social control.

Through well-informed interaction with the community the public health model of policing should be developed. Data insights gained in New Orleans led to a community wide transformation addressing violence as a public health issue. Social services programmes were funded, the fire department engaged with local schools, public works repaired streetlights and the health department targeted schools at risk. In total, New Orleans established 29 programmes focusing on schooling, family, job training, and community and economic development. The homicide rate fell by more than 20% and gang related murders dropped by 55%.[108] New Orleans is an example of a city that utilised big data and predictive analytics to its advantage, but only because a community focused holistic approach was endorsed.

Police Training

Police officers must become sophisticated data interpreters. In an example detailed above, police officers in LA had to be reminded to leave the high-risk areas PredPol had designated. This represents a real danger of police officers working by algorithm instead of with the algorithms. Police officers must understand the inner workings of the tools they are using and their deficiencies. Situations of particular importance are where algorithms designate individuals or areas as high risk. In high risk scenarios, all available options should always be considered and years of police officer experience should not be discounted. Moreover, the torch should be turned inwards – data should be mined on police activity to analyse and address police misconduct.

CONCLUSION

Policing in the twenty first century must be more enlightened than that of the twentieth. The incursion of predictive analytics into the criminal justice system will continue unimpeded as developers 'move fast and break things', which is why we must pay close attention and hold these new systems to account. The norms set by international human rights law must remain a standard for the duties owed by law enforcement officials to their fellow citizens.

The four recommendations provided in this Paper: building fair algorithms, regulating for algorithmic transparency and accountability, community engagement and police training ensure that technological progress does not undermine these rights. However, the first question should always be whether predictive analytics serves the aims of the criminal justice system. Under some

108 Ferguson (no 2) 42.

circumstances, the prevalence of such algorithms may push the system towards prioritising crime control, whereas in others algorithms can be used to identify and act on the sources of crime and lead to constructive engagement with the community. There is a battle underway for the purpose of the criminal justice system and it must be fought in plain sight.

SHAMIMA BEGUM, STATELESSNESS AND THE CASE FOR PROPORTIONALITY AS A GROUND FOR JUDICIAL REVIEW

Mahnoor Javed

ABSTRACT

This essay will consider the recent exercise of section 40 British Nationality Act 1981 by the Home Secretary in the case of Shamima Begum, who left the UK for ISIS territory at age 15. It will examine the exercise of section 40 powers within the context of 1) her potential status as a stateless person due to the revocation of her citizenship, 2) the judicial review grounds currently available to people like Begum in challenging executive decisions, 3) how these grounds fall short of what is necessary for checking actions by the executive and 4) how a potential solution may be the introduction of proportionality as a ground for judicial review. The essay begins with a review of Begum's situation, as well as the judicial context and grounds on which the decision to strip her of citizenship was taken, including a short discussion on how statelessness is to be understood in light of relevant domestic and international law. Following this, the case is made for introducing proportionality as a ground for judicial review and the test of proportionality is applied to Begum's case.

On 19 February 2019, Home Secretary Sajid Javid revoked the British citizenship of 20-year-old Shamima Begum. The Home Secretary's exercise of his s.40(2) British Nationality Act 1981 ('BNA 1981') powers has aroused concerns about leaving Begum stateless as she was born in the UK and has never held foreign citizenship. Questions have arisen regarding the UK's commitment to the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, both of which aim to prevent statelessness. Per s.40(2), a person may be deprived of British citizenship where such deprivation would be "conducive to the public good", but the legitimacy of the order has been questioned, as s.40(4) prohibits the removal of citizenship where it would render a person stateless. Begum appealed the Home Secretary's decision to the Special Immigrations Appeals Commission (SIAC). Her appeal was rejected; the Commission found that Begum had not been left stateless by the Home Secretary's decision.

In what follows, I will consider the legal principles that underpin this finding, focusing on *Pham v Secretary of State for the Home Department*[1] as it provides us with the main authority on statelessness in the context of revoking British citizenship. I will then go on to consider a point raised in *Pham* regarding the relevance of proportionality in citizenship cases, considering the case for proportionality as an stand-alone ground for judicial review, before going on to consider how it might be applied in Shamima Begum's case.

1 [2015] UKSC 19.

THE EXERCISE OF S.40 POWERS

The exercise of s.40 powers has become increasingly common since 2010,[2] but the revocation of Begum's citizenship was a departure from the legal norm in that the decision was based solely on a potentiality for foreign citizenship. This was found by the Commission to be a valid exercise of the Home Secretary's s.40 powers, despite the Bangladeshi government's refusal to allow Begum entry into Bangladesh, with Bangladeshi authorities making it explicit that Begum would face hanging if she tried to enter secretly. The SIAC decision was handed down after these proclamations by the Bangladeshi government but the court found her to have been a Bangladeshi citizen at the time the Home Secretary made his decision as she was under 21 years of age and her parents were both born in Bangladesh, meaning she met the textual requirements for Bangladeshi citizenship at that time. This has the effect that s.40 (4A)(c) BNA 1981 – an exception to the s.40(4) prohibition on statelessness where the Secretary of State has reasonable grounds for believing someone is able to become a national of another state – applied when citizenship was revoked; the executive action was therefore lawful at the time it was taken.[3]

One may draw a parallel with the case of Mr Pham, who in December 2011 was served a similar order as Begum, which he appealed.[4] In the *Pham* case, the absence of *de jure* statelessness was the Home Secretary's second ground of response to the appeal; because Mr Pham was not, strictly legally speaking, disqualified from gaining citizenship in Vietnam, he was not rendered stateless when his British citizenship was revoked.

Despite the fact that Pham was refused recognition of a national by the state purported by the British authorities to afford him citizenship, in his case Vietnam, he was not disqualified at the time his British citizenship was revoked. As noted above, Bangladesh's refusal to grant citizenship to Begum came *after* the order to strip Begum of British citizenship had been served, meaning that she was not *de jure* stateless until the time of the response from Bangladesh.

RATIONALISING STATELESSNESS?

In 2015, the question before the Supreme Court was one of whether there had been a contravention of the 1954 Convention. Article 1(1) of that Convention defines a stateless person as one who is "not considered as a national by any state under the operation of its law". That this provision was not contravened by the order, as Pham was not *de jure* stateless, was the Home Secretary's first ground of response against the appeal. This ground was successful in the Supreme Court, as it was found that Mr Pham was not *de jure* stateless since his status remained unaffected by both his acquisition of British citizenship and by the

2 Colin Yeo, 'How is the government using its increased powers to strip British people of their citizenship?' (*Freemovement*, 9 August 2018) <https://www.freemovement.org.uk/british-nationals-citizenship-deprivation/> accessed 10 February 2020.

3 *Begum v Secretary of Home Department* SC/163/2019 [121].

4 *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

Vietnamese government's refusal to make a formal decision regarding his status. The court, therefore, found that the UK had not acted in contravention of the 1954 Convention.

This is difficult to reconcile with the Convention itself, as Article 1(1) states that it is *'concerned primarily with whether individuals have or do not have national protection'*. This suggests the technical distinction between *de facto* and *de jure* statelessness, on which the *Pham* decision rested, does not align with the object and purpose of the Convention. Indeed, in addressing the issue of statelessness, Lord Carnwath cited a 2014 handbook from the UNHCR, quoting it as saying that:

"Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status. This is a mixed question of fact and law".[5]

It is the case that everyone who has thus far been stripped of their British citizenship has had either a dual or multiple nationalities. The power to revoke the citizenship of those who acquired it by birth has its source in the Nationality Immigration and Asylum Act 2002's amendments of the BNA 1981. A vital distinction between Pham and Begum is that Pham had previously held Vietnamese citizenship, which he had not renounced upon gaining British citizenship, with the court finding that the loss of Vietnamese citizenship was not automatic despite the fact that dual nationality is not possible in Vietnam. However, it should be noted that, although a person who has a dual or multiple nationalities may not be rendered stateless by the revocation of one of their citizenships, the power to revoke citizenship where a person has dual or multiple nationalities is perhaps in itself problematic due to its disproportionate effect on a minority demographic.

In Begum's case, she was only ever technically eligible for Bangladeshi citizenship. This technicality will not translate to actual citizenship considering the response from Bangladesh, and it essentially means that she will find herself confined to a war zone without national protection as a result of being stripped of British citizenship.

PUBLIC LAW CHALLENGES AND PROPORTIONALITY

Because the action to remove Begum of her citizenship was a public law decision, appeals against it are to be brought as public law challenges, i.e. as challenges in judicial review. Currently, potential grounds for judicial review include illegality, irrationality, and procedural impropriety.

It is the case, however, that an executive decision can be excessive, despite falling within the

5 Ibid. [24].

executive's powers, despite being rational, and despite compliance with the relevant procedural requirements. The judicial review grounds currently available, therefore, leave something to be desired where a decision is excessive but otherwise lawful. For this reason, just as the court is able to consider the proportionality of a decision in human rights cases, it should be able to do the same in domestic judicial review challenges. The test for proportionality, essentially being one of necessity, would fill the gap left by the grounds of review currently available. A fuller test will be considered below, but the question to be posed is essentially one of whether an action taken was necessary and reasonable in light of the actor's aims.

In practice, this means striking a balance between the rights of the individual and the interests of the wider community and, where a decision is disproportionate despite not being illegal, unreasonable or procedurally improper, a balancing act should still be carried out to determine whether it is justified. Considering Michael Fordham's convincing analysis that *'proportionality is inherently about protecting fundamental rights'* due to the balancing exercise it mandates,[6] the courts should be able to carry out this balancing exercise if they are to effectively check the executive.

Not only this, but such a balancing exercise is more straightforward than the application of proportionality's most closely related ground, that of *Wednesbury* unreasonableness – as Lord Steyn acknowledges, the criteria for proportionality is *"more precise and more sophisticated than the traditional grounds of review"*.[7] In contrast to the precision of the proportionality test, a decision may be challenged on the ground of irrationality if it is 'so unreasonable that no reasonable authority could ever have come to it'.[8] Although proportionality is considered by some to be a subset of reasonableness,[9] the criteria for unreasonableness is both less precise and more difficult to apply than that of proportionality.

In his explication of the existing grounds of judicial review, Lord Diplock in the GCHQ case predicted that proportionality would "someday" be a ground of judicial review in its own right, and such a change has since been endorsed by various authorities.[10] Yet, there has been continuous resistance to establishing proportionality as an independent ground of review, which can be seen as limiting the efficacy of domestic judicial review. As Mark Elliot explains it, proportionality not being a separate ground for review has the effect that a total lack of proportionality may render a decision unreasonable. It follows that, if a decision must be grossly disproportionate to meet the *Wednesbury* threshold, proportionality in and of itself *'is capable of supplying a shaper and potentially more intrusive form of judicial intervention'*.[11]

6 Michael Fordam, 'Common Law Proportionality' [2002] 7(2) Judicial Review 110-123, 113.
7 *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26.
8 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223 [681].
9 See, for example, Schiemann J in *R v Secretary of State for Transport, ex p. Pegasus Holdings (London) Ltd* [1988] 1 WLR 990 [1001].
10 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 [410].
11 Mark Elliot, 'The HRA 1998 and the Standard of Substantive Review' [2002] 7(2) Judicial Review 97-109, 97.

Counsel for the Appellant attempted to plead proportionality in Mr Pham's case. It was submitted on his behalf that, because proportionality is mandated by EU law and European citizenship is contingent on British citizenship, decisions to revoke the latter had to be proportionate in line with European law. Although *dicta* from *Pham* stress the significance of proportionality in cases concerning the deprivation of citizenship, the issue was not definitively decided due to the success of the government's argument that Mr Pham was not *de facto* stateless.

On proportionality more generally, Lord Mance's judgment from a 2014 case was cited, where he stated that the common law *'no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called* Wednesbury *principle*.'[12] Although perhaps no longer a rigidly applied test, the threshold can still be cumbersome in practice. This is because the definition of unreasonableness differs enough in substance from proportionality that the effect is similar to having to meet a rigid test in regard to the degree of unreasonableness being alleged, with a sufficient degree of unreasonableness having to be established in order to bring a domestic challenge.

In fact, Lord Mance's stress on flexibility can be contrasted with Lord Reid's analysis of how:

> *"The approach to proportionality in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted"*.[13]

It was suggested by Lord Reed in *Pham* that proportionality can be assumed as a Parliamentary intention when considering statutory powers afforded to government bodies.[14] In practice, however, the assumption of proportionality is relevant at the stage of initial statutory interpretation, and may not form the basis of a challenge in judicial review. It is only explicitly arguable where an established ground of judicial review may be invoked as a primary ground of challenge and there is a potential European dimension to the case in question.

What precedes this is not to say that the Home Secretary's decision to revoke Begum's citizenship should or would automatically be quashed as disproportionate, were proportionality available to her as a ground for review. Rather, her appeal is an appropriate case study as it represents an

12 *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [60], citing Lord Mance in *Kennedy v Charity Commission* [2014] UKSC 20 [51].
13 *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 [72].
14 *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [119].

interference with a vital right that is not protected by the European Convention on Human Rights. The possibility of challenging a decision on the basis of disproportionality would be a welcome change for those who consider judicial review an integral tool for vindicating the rule of law in this country, but it is unlikely to be introduced through a lower-stakes appeal than Begum's.

APPLYING THE TEST – IMPORTANCE, RATIONALITY, NECESSITY

The most logical form for the test of proportionality can be articulated in three stages, as endorsed by Lord Clyde. The relevant questions are whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measures designed to meet the legislative objective are rationally connected to it, and

(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[15]

The legislative objective is, in this case, curbing the threat posed by Begum and others like her. The importance of such an objective is difficult to overstate, especially when the nature and degree of the threat posed by terrorists and their affiliates are so extreme.

As regards the existence of a rational link between this objective and the executive action in question, it can be said that there is a link between banning someone from a place in order to keep its people safe. However, the rationality of the link in this specific instance has been questioned, with suggestions being made that the move was made more for populist reasons than reasons of public policy. As well as this, it has been pointed out that the Home Secretary's responsibility for keeping people safe includes people like Begum herself, calling into question the rationality of making this decision on the grounds of public safety when it may result in someone being abandoned in a warzone.[16]The rationality of the public safety argument is not to be considered without referring to Begum's own gendered experience of life in a refugee camp as a former ISIS bride. Dr Cordula Droega, the Chief Legal Officer of the International Committee of the Red Cross, recently drew attention to the dire conditions in which women like Begum

15 *de Freitas v Minister of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 [80].

16 Jamie Doward, 'Shamima Begum: Sajid Javid labelled 'moral coward' over baby death' (*The Guardian*, 9 March 2019) <https://www.theguardian.com/uk-news/2019/mar/09/sajid-javid-moral-coward-death-begum-baby> accessed 6 November 2019.

now find themselves, commenting that:

> *"The specific risks they face include retributive violence for their perceived role as IS "brides"; statelessness of their children arising from nationality laws or policies that limit women's ability to confer citizenship; and prosecutions that fail to take account of the broad range of roles of women in the context".*[17]

The third element of the test goes to the very heart of proportionality, however, it has been suggested that policy considerations mean that the *'obligation on public authorities to use the least-restrictive means of accomplishing their objectives has not yet played a significant role under the HRA*'.[18] Nevertheless, the enforcement of this obligation is particularly important when the potential effect of a decision is as undesirable as it is in Begum's case.

As regards the necessity of the action in order to achieve its stated aim, it is relevant that we may see an influx of cases like Begum's, with degrees of culpability likely to vary in a way that requires alternative action to the revocation of citizenship. If the aim of revoking citizenship in cases like Begum's is to address the security threat they pose, this is possible through building an effective criminal case against her, which is made more difficult by her absence from the UK. Recently, the Metropolitan Police failed in a legal bid to acquire unpublished materials from journalists who interviewed Begum. This was, in part, because there was found to be no "pressing need" for access to the materials while she is not in the country.[19]

As well as necessity and a balance between competing interests, proportionality is to be considered in light of alternative, less intrusive actions available to the executive. In Begum's case, measures other than an exercise of s.40(2) powers could perhaps have been taken in response to her wish to return to the UK, preferably, ones that do not create a risk of anyone being rendered stateless.

As things stand, the order served to Begum was appealed on the following grounds: that the decision has left Begum stateless, that the removal of citizenship has led to a risk of death, inhuman or degrading treatment, and that she has been unable to initiate a "fair and effective" legal challenge to the order.[20] The question of Begum's alleged statelessness was the central issue

17 Open Briefing of the UN Counter-Terrorism Committee, *Gender-sensitive Reintegration in Context: Remarks by Dr. Cordula Droege, ICRC Chief Legal Officer.* (Statement, 2019).

18 Richard Clayton QC, 'Proportionality and the HRA 1998: Implications for Substantive Review' (2002) Judicial Review 7(2) 124-136, 129.

19 Lizzie Dearden, 'Shamima Begum: Police lose legal bid to seize journalists' interview notes with Isis bride' (*The Independent*, 4 September 2019) <https://www.independent.co.uk/news/uk/crime/shamima-begum-isis-bride-interview-police-journalist-notes-syria-a9091226.html> accessed 6 November 2019.

20 Owen Bowcott and Dan Sabbagh, 'Shamima Begum begins appeal against loss of UK citizenship'. (*The Guardian*, 22 October 2019) <https://www.theguardian.com/uk-news/2019/oct/22/shamima-begum-begins-appeal-against-loss-of-uk-citizenship> accessed 6 November 2019.

to be determined. Applying the test of proportionality allows for other pressing considerations to become directly relevant, shifting the focus of the case onto whether the executive action was appropriate in light of the Home Secretary's aims. Certainly, using the test of proportionality

allows for a precise and effective way of checking the executive action being challenged where the substantive issues are not directly addressed by the grounds currently available in judicial review.

TRIAL BY ONE'S SUPERIORS – RATIONALES FOR RANK RESTRICTIONS ON UK COURT MARTIAL BOARDS

Nicholas Fryer

ABSTRACT

Trial by one's peers, that is trial by jury, is regarded as an essential pillar of the criminal justice system in England and Wales. Yet in the Service Justice System, the equivalent tribunal of fact in a Court Martial is usually not a Service person's peers, but instead a small group of Officers and Warrant Officers, known as a Court Martial board. Although the limitations regarding which ranks can serve on a Court Martial board have been criticised and may appear out of date in a modern, liberal democratic society, this article argues that they can be justified. This conclusion is based both on the limited role of trial by jury in the civilian justice systems in England and Wales and in other jurisdictions and the rationales given for this role, and on the principles which underpin the UK Service Justice System and comparable arrangements within other military justice systems.

The author is a BPTC student at City, University of London. Interested in criminal, employment and international law, he is a serving officer in the Armed Forces who is training to become a Service lawyer. This article was written out of personal interest in the operation of the Service Justice System and the views expressed are entirely the author's own and do not reflect official policy.

"The trial by jury…is also that trial by the peers, of every Englishman…the grand bulwark of his liberties…"[1]

Blackstone's words reflect the sacrosanct position ascribed to trial by jury, that is by one's peers, in the criminal justice system in England and Wales, not to mention many other jurisdictions. Yet within the UK military justice system, trial by jury does not exist in Courts Martial, which are often considered to be equivalent to a Crown Court as serious criminal and Service offences by Service personnel are tried in them. [2] Instead, the fact-finding panel which determines the verdict is the Court Martial board, which is comprised of three to seven Officers, depending on the nature of the case,[3] and which may include up to two Warrant Officers if the accused is the rank of Warrant Officer or below.[4] In every case, the President of a Court Martial board is at least the rank of Lieutenant Commander, Major or Squadron Leader, and must be superior in rank to the Service person(s) on trial and the other board members.[5] These rank restrictions are set by Statutory Instrument rather than by Statute and are supplemented by policy in the form of the Court Martial Board Specification, which requires that the Board President is at least two ranks senior to the defendant and that no board member may be junior to the defendant. Thus, for Service personnel tried at Court Martial, trial is not by one's peers but instead by one's superiors, that is a board entirely made up of Service personnel of a superior rank or rate.

Such regulations may appear outdated in our society and in a liberal democracy in the

21st Century. Liberty, in their 2019 report *Military Justice: Second-Rate Justice*, recommended that boards are permitted to include "Other Ranks".[6] The report notes Liberty's concern about the arrangement that ranks below Warrant Officer are excluded from boards and stated that:

> "There appears to be no official rationale as to why such restrictions should apply to board membership in the Court Martial and certainly there has been no recent attempt to publicly justify why such qualifications render those members better equipped to judge on the guilt or innocence of a defendant than junior service personnel or civilians".[7]

While this article is definitively not an articulation of official rationales and only reflects the author's own views, it does consider possible rationales for such regulations. It suggests that the principles determining which ranks or rates can be members of a Court Martial board may be justified when considered in relation to use of trial by jury in civilian jurisdictions, in particular in England and Wales, as well as in relation to other Service Justice systems and the principles which underlie the UK Service Justice system. Each of these subjects will be considered in turn.

1. The rarity of trial by one's peers in civilian justice

In reality, the principle of trial by one's peers is neither the predominant nor the only way in which criminal and other trials and tribunals may be conducted in civilian justice systems. This is the case both internationally, which will be considered first, and in England and Wales, which will be examined second.

1.(a) Trial by one's peers in civilian justice – the international perspective

Internationally, juries are by no means the predominant means of assessing guilt in criminal trials. Lieb has estimated that in approximately half the major democracies, jury systems in criminal trials have been entirely rejected.[8] There are many jurisdictions with "pure" jury systems, such as England and Wales, Scotland, Ireland, Australia, Canada, the United States, Belgium, Spain and Brazil.[9] However, many other nations, including the Netherlands, South Africa, Chile, the Czech Republic, Hungary, Israel and Mexico, dispense with juries in criminal trials.[10]

An intermediate position between jury trial and trial by judge alone is the practice of having a combination of lay and professional adjudication, mitigating to some extent the principle of judgment by one's peers. This is the case in criminal cases in Austria, Germany, Poland, Greece and Portugal.[11] Age restrictions relating to lay jury membership can also reduce the extent to which a jury is really composed of one's peers. For example, these are present in Italy, where jurors must be between 30 and 65 years old.[12] This is not to suggest that the justice systems in these countries compare favourably to that in England and Wales, but instead that

12 Patrizia Catellani and Patrizia Milesi, 'Juries in Italy: Legal and Extra-Legal Norms in Sentencing' in ibid, 127.

the principle of trial by one's peers in the form of a jury, deliberating alone, is by no means a universal. Where lay jurors are used, the extent to which they are representative of wider society can be affected by eligibility requirements such as age, while in many cases the principle of trial by one's peers is mitigated by the verdict being considered by lay jurors in combination with professional judges.

1.(b) Trial by one's peers in civilian justice – the domestic perspective

Within England and Wales, trial by jury is not the predominant means of determining trial verdicts in criminal or civil cases either. One of the underlying reasons for this is that there is no enshrined constitutional right to trial by jury in either England and Wales or Scotland.[13] In Auld LJ's 2001 *Review of the Criminal Courts of England and Wales* he went further, stating that there is no legal basis for regarding trial by jury as a right at all.[14] Notably, the right to a Fair Trial under Article 6 of the European Convention on Human Rights is silent on the matter of trial by one's peers. This was reflected in *R v T and others* [2009] 3 All ER 1002 [18] where Lord Judge CJ stated that with regard to the Convention, "it is irrelevant whether the tribunal is judge and jury or judge alone".

The practical meaning of this is that trial by jury is employed in comparatively few cases. Civil trials are almost exclusively tried without juries, with the exception of cases of malicious prosecution, deceit, false imprisonment and of any defamation trials where the court orders that a jury sit.[15] While it was only with the Defamation Act 2013 that the use of juries in defamation cases was restricted, in general, civil trials have been tried without juries since 1934.[16] As for criminal cases, trial by jury is relatively rare. While around 1.37 million people were charged with offences in the 12 months to March 2019, only 59,728 defendants were sent for trial in the Crown Court, just 4.34% of the total.[17] Around 2/3rds of Crown Court defendants plead guilty, with only a few hundred doing this in the course of a trial,[18] indicating that only around 1-1.5% of all prosecutions in England and Wales are tried before a jury. The vast majority of contested criminal cases are in fact heard before magistrates, who decide on innocence or guilt. While magistrates are drawn from the community, summary trial is not generally considered to be trial by one's peers as the makeup of the magistracy is not representative of the wider population. For example, compared to the general population magistrates are less likely to be disabled, are predominantly middle class and are older,[19] with over 52% of magistrates aged over 60 and only 5% under the age of 40.[20] In practice, the norm in criminal trials is *not* trial by one's peers.

Even in the Crown Court, trials for serious offences have in the past been and procedurally can still be heard in front of a judge only, without a jury. Historically, while Northern Ireland is a separate jurisdiction to England and Wales, from 1973 until 2007 in cases there involving charges for serious terrorist offences it was possible for the trial to be by judge alone. These so-called Diplock courts were put in place by the s 2(1) of the Northern Ireland (Emergency Provisions) Act 1973 and were created due to the threat to would-be jurors of intimidation and harm. The performance of these courts has been positively commented upon despite the absence

of the jury. [21]

Procedurally, trial by judge alone without a jury is also possible following the Criminal Justice Act 2003, which enables the prosecution to apply under s 44 for a trial to be conducted in front of a judge alone, without a jury, where there is evidence of a real and present danger of jury tampering and the court is satisfied that "notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury".

Another way in which trials on indictment take place with diluted jury involvement in England and Wales is where the trial by jury is of sample counts only, under s 17 of the Domestic Violence, Crime and Victims Act 2004. This may occur where the prosecution applies to the judge to have some of the counts on the indictment tried without a jury and the judge is satisfied that three conditions are fulfilled: namely that the number of counts in the indictment means trial by jury would be impracticable, that it is in the interests of justice to order that a trial by jury is of sample counts and where each count tried before a jury is regarded as a sample of the counts which will be tried by the judge alone. Where a jury then finds a defendant guilty of a sample count, the other counts related to that sample may then be tried by the judge alone. In short, in certain circumstances trial of serious offences has occurred and can and still does occur in the absence of a jury.

The principle of trial by jury as a manifestation of trial by one's peers has not remained static historically within England and Wales either. While Liberty question why junior Service personnel are not tried by civilians, civilians may well not be the peers of Service personnel. This is discussed in more detail below, but there are historical examples in England and Wales of trial by one's peers being trial not by the general population but instead by a specific group within it who may be better described as one's peers or who better understand a particular area of life. Special juries, involving jurors with specialist knowledge of a particular non-legal area, were used to act as informed judges of fact from medieval times until their general abolition in 1949, with the juries being composed of cooks and fishmongers in trials of people accused of selling bad food, or of merchants acquainted with the trade in question.[22] While these arrangements no longer exist, it is suggested that limited knowledge of the Service context among the general population might hinder the Court Martial process if trial by civilian jury was introduced.

A more pertinent example of where "trial" is not by one's peers is in disciplinary hearings for professional bodies. In these, the tribunal or panel conducting the hearing and deciding on the verdict are often senior figures in the relevant profession, something which may not be the case for the person subject to the hearing. The position of those adjudicating in such tribunals was mentioned in the Canadian case of *MacKay v R* (1980) 114 DLR (3d) 393, an appeal concerning fairness in the Court Martial. In his judgment, McIntyre J commented that the

21 Louis Blom-Cooper, *op cit,* 54-57.
22 WR Cornish, *The Jury* (Penguin 1971) 33-34.

senior position of the adjudicators does not necessarily call into question the validity or fairness of the tribunal:

> It has been recognized that wide powers of discipline may be safely accorded in professional associations to senior members of such professions. The controlling bodies of most professions such as those of law, medicine, accountancy, engineering, among others, are given this power. I am unable to say that the close identification of such disciplinary bodies with the profession concerned, taken with the seniority enjoyed by such officers within their professional group, has ever been recognised as a disqualifying factor on grounds of bias or otherwise.

This passage was cited with approval by Lord Rodger in *R v Spear and another; R v Boyd; R v Saunby and other appeals* [2002] UKHL 31 [2002] 3 All ER 1074 at [52], a series of conjoined appeals concerning UK Courts Martial. Although disciplinary tribunals are not criminal tribunals, in some ways these hearings are comparable to a military hearing, especially given the specialist subject matter which may be involved where offences are tried which are Service and not civilian offences. Similar to a criminal trial, disciplinary tribunals can also have serious and long-lasting consequences for a professional and their career. In this vein, trial by jury in the Crown Court is sometimes justified on the basis that an individual should be tried by their peers, given the serious consequences a criminal conviction can have for them. However, this underplays how significantly someone can be affected by a judgment against them in a disciplinary tribunal or a civil case, even though the latter is decided upon by a judge only, in a system which is generally considered fit for purpose.[23] Further, Lord Denning drew on the example of disciplinary tribunals to recommend that jury trial could be replaced by the adjudicative system of a judge and assessors.[24] It is perhaps in these civilian tribunals that the civilian equivalent of the Court Martial may be found, including the principle that in some circumstances trial by one's superiors may be appropriate.

In considering trial by jury in civilian justice as a yardstick for assessing the fairness of Court Martial boards and the ineligibility of other ranks to sit on them, it is clear that the principle of trial by one's peers is neither universal internationally nor within the UK. It is a minority approach to the trying of criminal cases and can be displaced in serious cases. Further, serious civil cases and regulatory cases are tried in the absence of a jury. Considered in this way, the case for encouraging "trial by one's peers" in the Service Justice System is not clear cut.

2. Trial by one's superiors in the Service Justice System

A comparison of the UK Court Martial system to Service Justice Systems around the world and the principles which underpin the system in the UK further calls into question the recommendation that trial should be by one's peers in a military context.

2. (a) The UK in step with Service Justice Systems internationally

23 Louis Blom-Cooper, *op cit*, 105.
24 Lord Alfred Denning, *What next in Law* (Butterworths 1982) 73, 77.

International comparison suggests that UK rank restrictions on Court Martial board membership are not anomalous when compared to other common law countries. Similar to the UK system is that of Australia, where s 116 of the Defence Force Discipline Act 1982 mandates that only commissioned Officers who hold a rank not lower than the accused may be Court Martial board members. Warrant Officers cannot sit as members, unlike in the UK, so by comparison the UK Court Martial regulations do allow for a greater degree of "trial by one's peers" in the possibility of Warrant Officers sitting on boards.

The system in New Zealand is also similar to the UK, as under s 22 of the Court Martial of New Zealand Act 2007, the fact-finding panel may be composed of 3 or 5 military members, depending on the seriousness of the offence, all of whom must be Officers or Warrant Officers. Where the members are not all Officers, the majority of members must be Officers and all must be at least the rank of the accused, a system very similar to the UK in the extent to which it incorporates trial by one's superiors.[25] These examples suggest that the UK system is in fact in step with those of other common law countries.

On the other hand, the Canadian Court Martial regulations go further than the UK ones in ensuring trial by one's peers. Under s 167 of Part III of the National Defence Act 1985 there are specific rules for the rank composition of the five panel members in a General Court Martial. For the trial of an accused below the rank of Colonel, the panel must be of or above the rank of the accused while for a non-Officer the panel must comprise two Officers and three non-commissioned officers of or above the rank of the accused and the rank of sergeant (7), which is two ranks lower than is permitted in the UK. This approach is closer to "trial by one's peers" for the most junior ranks than that which exists in the UK. Nevertheless, it is still the case that for the most junior personnel, trial will be by one's superiors in the General Court Martial (unless they choose to be tried by a judge alone in a Standing Court Martial under s 165 of the 1985 Act).

In marked contrast, in the United States under the Manual for Courts-Martial Rule 502, in a Court-Martial (as the tribunals are called in the American system), the members who decide the verdict are "those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament". Court Under Art 25(c)(1) of the Uniform Code of Military Justice any enlisted person may serve on the Court-Martial of any other enlisted member, (under (e) (1) where it can be avoided, no member of the Armed Forces may be tried by a Court-Martial member junior to them in rank or grade). This is a significant departure from the norm in Commonwealth countries where enlisted personnel of the most junior ranks do not sit. Further, Art 25(c)(2) allows an enlisted member to request either that the membership of the Court-Martial be entirely composed of Officers, or that enlisted members comprise at least one-third of the membership of the Court-Martial. The rules in the United States therefore offer an example, in one of the UK's closest allies and a pre-eminent military power with a large Armed Forces, of a system whereby more junior enlisted personnel may sit on a Court-Marital board and an accused

25 Ann Lyon, Geoffrey Farmloe, 'The new British system of courts martial' in Alison Duxbury, Matthew Groves (eds), *op cit*: 177.

can insist on a certain number of them being among board members.

The United States military justice system offers perhaps the closest vision to trial by one's peers for the most junior ranks in a common law country and yet, even then the rights of the accused to insist upon trial by their peers, that is by other enlisted personnel, are mitigated to the extent they can only request that one third of the Court-Martial board are enlisted men and women. Further, all those who sit on Court-Martial boards in the United States are selected by the convening authority, rather than randomly selected as in UK Courts Martial and in the civilian jury system in England and Wales.[26] Thus, even though in some ways the United States system better embodies the principle of trial by one's peers than the UK system, other elements of the system differ from the way the principle operates in the jury system in England and Wales.

Of course, there are examples of other military justice systems which do not conform to the prevailing approach in the UK and other examples above of trial by one's superiors. In Argentina following reforms in 2008, military personnel are tried by a civilian jury, as long as the process does not interfere with ongoing military operations and there are no insurmountable difficulties.[27] However, it is suggested that while such an approach may work for Armed Forces focused on homeland defence, it would be woefully inadequate for Armed Forces of states which aim to maintain a global presence and global power projection capabilities, such as the United States or the UK.

The rank restrictions on board membership in UK Courts Martial are thus not out of step with the approach in the Armed Forces of states with similar historical and cultural backgrounds and similar aspirations in terms of global operations.

2. (b) The UK in line with the principles underlying Service Justice Systems

The strongest arguments justifying the rules governing Court Martial board membership in the UK are that they reflect the underlying principles of the Service Justice System and that there are a number of practical respects in which they are justified.

In terms of the underlying principles, the Service Justice System is separate from the civilian justice system, of which trial by jury is a product. Recognition of the importance of having specific rules governing the conduct of those who bear arms, separate to the law for civilians, goes back in Europe at least as far as the Romans and in the British Isles, for senior nobles at least, to the period after the Norman Conquest[28]. In the current era, the reasons for having a separate Service Justice System are perhaps most clearly articulated by HHJ Blackett, the Judge Advocate General in his written evidence to the Armed Forces Bill Select Committee, as including the need to:

1. "support operational effectiveness and morale

26 Bradley J Huestis, 'Anatomy of a Random Court-Martial Panel' (2006) Army Law 22, 26.

27 Ivette Castaneda Garcia, 'Military justice in Latin America: a comparative analysis' in Alison Duxbury, Matthew Groves (eds), *op cit*, 201.

28 HHJ Jeff Blackett, *Rant on the Court Martial and Service Law* (3rd edn, OUP 2009) 1-6.

2. maintain discipline which is an essential element of command
3. reflect the special and unique nature of the Armed Forces, [who] are required to use lethal force to support Government policy, to risk their personal safety, and to be prepared to lay down their lives for their country, and
4. extend the law of England and Wales to personnel serving overseas and outside the jurisdiction of the civilian courts."[29]

The bearing of these reasons on the rules governing Court Martial board membership is that Service personnel who serve globally must be able to be tried or be able to testify anywhere in the world in a Court Martial when they are accused of or victims of serious offences. This is to avoid them having to leave their post to return to the UK, with the expense, inconvenience and impact on operational effectiveness which that involves for them and their unit. Historically, Courts Martial have taken place overseas and continue from time to time to do so in Northern Ireland, Germany and Cyprus.[30] While the Liberty report suggests no official justification has been made for why civilians should not sit in judgment of Service personnel in Courts Martial,[31] it is clear that it would either be inappropriate or impractically expensive to suggest that in these locations, Northern Ireland excepted, British or local civilians should be used.

Aside from the geographical element, the unique situation of the Armed Forces, subject as they are to the Armed Forces Act 2006 and the specific nature of their role, suggests that civilian juries would not be suited to the task of sitting in judgement in Courts Martial. As HHJ Blackett stated in his evidence to the Armed Forces Bill Select Committee, Service personnel should be "tried expeditiously and fairly by a tribunal with unique knowledge of Service life and discipline".[32] Few civilian jurors would have a similar understanding to that of a member of the Armed Forces of the demands and stresses of operations, of the burden of bearing arms and operating in a team where each member's life may depend on the actions and sacrifice of others. More prosaically, in modern society civilian jurors would neither be likely to share an understanding of the requirements of communal Service living, in close proximity for prolonged periods, nor of the range of offences which are unique to the Armed Forces under the Armed Forces Act. In particular, it is suggested that civilian juries might not appreciate the central importance in the Armed Forces of following the orders of those superior in rank. Such concerns were expressed by the Air Chief Marshal Sir Anthony Bagnall, vice-chief of the defence staff, in his witness statement in *R v Spear and others* [51] which Lord Rodger described as authoritative and up-to-date [52]. The importance of rank structure to the Armed Forces has almost no parallel in civilian life,[33] with the possible exception of the uniformed or emergency services. Due to their experience, Service personnel sitting on Court Martial boards, by contrast, are able

29 House of Commons Select Committee on the Armed Forces Bill: Special Report of Session 2005-06, Vol 1 (25 April 2006) para 14, https://publications.parliament.uk/pa/cm200506/cmselect/cmarmed/828/828i.pdf accessed on 10 November 2019.
30 Courts and Tribunals Judiciary webpage on 'Military' jurisdiction, https://www.judiciary.uk/about-the-judiciary/the-justice-system/jurisdictions/military-jurisdiction/ accessed 10 November 2019.
31 Liberty, o*p cit*, 71-72.
32 House of Commons Select Committee on the Armed Forces Bill: Special Report of Session 2005-06, Vol 1, para 17.
33 Dwight H Sullivan, 'Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty' (1999) 158 MIL L REV 1, 28.

to place alleged offences into context.[34] Conversely, trial of Service personnel by civilians, would in fact be further from trial by one's peers than trial by other Service personnel.

In light of the conclusion that the Court Martial board should comprise Service personnel, the question is which ranks are the most appropriate to sit on it. A number of practical points suggest that Officers and Warrant Officers are the appropriate level to do so. While the image of (primarily) Officers sitting in judgment over enlisted personnel may seem far from the principle of judgment by one's peers, 30% of Officers across the Armed Forces have been promoted from the ranks, as has every Warrant Officer. Thus, to some extent, judgment in the Court Martial is by one's peers.[35] Further, professional training can arguably suppress bias and prejudice,[36] and in this vein, Lord Rodger in *R v Spear and others* quotes with approval the words of McIntyre J in *MacKay v R*, where he notes that Armed Forces Officers are trained to look after the welfare of their personnel and are no more prone to bias or prejudice than anyone in judicial office.

A further practical point is that a Court Martial board fulfils a different role to a Crown Court jury. In a Court Martial, unlike a Crown Court, it is the board and Judge who decide the sentence.[37] This means the Board member's role is similar to that of a Magistrate, who decides the sentence of those convicted in the Magistrates Court and also when they sit alongside a judge in the Crown Court on an appeal from the Magistrates court. Indeed, the similarity of the two roles is apparent in the judgment of the Grand Chamber of the European Court of Human Rights in *Cooper v UK* [2003] ECHR 48843/99 [123] which compared members of a Court Martial board to "lay judges". In conceptualising the Court Martial board as similar to a "lay judge" or magistrate, the principle of trial by one's peers in the Court Martial appears less pertinent than it at first seems.

A final practical point is that the sentencing role of the Court Martial Board is a significant power which would it would not be appropriate to delegate to the lowest ranks. One reason for this is that they have not held a position of responsibility within the rank structure and not even had the power to award minor administrative sanctions to others (as Junior non- commissioned officers can). Another reason is that the purpose of the involvement of the lay members in sentencing is to assist the judge in bringing their Service experience to bear.[38] It is in this respect that it is suggested that having Officers and Warrant Officers is appropriate as given their more senior role within the Armed Forces and role managing, developing and appraising personnel below them, they will have an understanding and overview of a Service person's career and thus of the impact a particular sentence may have.

Yet in some of the Services such as the Royal Navy there are Senior Non-commissioned

34 HHJ Jeff Blackett, *op cit*, 26.
35 '30% of officers progress from the ranks' (16 March 2017) https://www.gov.uk/government/news/30-of-officers-progress-from-the- ranks accessed 10 November 2019.
36 Louis Blom Cooper, *op cit*, 92.
37 Armed Forces Act 2006, s 160.
38 HHJ Jeff Blackett, *op cit*, 16.

Officers at the rank below Warrant Officer who have significant personnel reporting and management roles. By this logic there is an argument for reducing the rank of personnel able to sit on a Court Martial board, though not to the level of allowing junior Service personnel to sit. Indeed, the inclusion of personnel of the rank below Warrant Officer was recommended in the most recent Service Justice System Review, partly to reflect the empowerment of those ranks to award minor administrative sanctions to those junior in rank to them and partly to ease the practical burden on Officers and Warrant Officers of being the sole group from which Board members may be drawn.[39] Such recommendations have been supported by the Army and RAF, although the Navy has underlined that the level of responsibility being a Board member is consistent with the responsibility of a Warrant Officer or above and is concerned that many of its Chief Petty Officers (the level which would be included) are relatively junior in experience due to accelerated promotion.[40] The Review suggests that if implemented, the proposals could be controlled through the Court Martial Rules or the Court Martial Board Specification, ensuring that all Board members must be senior to defendants and that a certain period of service could be required to respond to this. [41] While it remains to be seen what practical effect the recommendations will have, it remains the case that even if implemented, the principle will almost certainly remain that Service personnel are not tried by their peers but instead by their superiors.

Conclusion

By taking a broad perspective on the question of rank restrictions on board membership in Courts Martial, reasons can be found to justify them. That the fact-finding panel in a Court Martial is not entirely by one's peers is not out of step with many civilian and Service justice systems internationally, nor with civilian courts system domestically. The principles which underpin the maintenance of a separate Service justice system argue strongly for judgment of Service personnel by Service personnel, rather than by civilians and underline the difference between a civilian jury and a Court Martial board. The Court Martial board's similarities with the magistracy and the panel in professional and regulatory tribunals suggest there are rationales for rank restrictions for sitting on boards, especially given their sentencing role.

While the Court Martial system has changed considerably since the time of Field Marshal Slim, and will continue to change into the future, his words emphasise that initial impressions of the Court Martial may be misleading:

> "The popular conception of a court-martial is half a dozen blood-thirsty old Colonel Blimps, who take it for granted that anyone brought before them is guilty – damme, sir, would he be here if he hadn't done something? – and who at intervals chant in unison, "Maximum penalty – death!" In reality courts-martial are almost invariably composed of nervous officers, feverishly consulting their manuals…anxious to avoid a miscarriage of justice." [42]

39 Shaun Lyons, *Service Justice System Review (Part 1)* (29 March 2018): 49, https://www.gov.uk/government/publications/service-justice-system-review accessed 28 February 2020.

40 HH Shaun Lyons CBE and Professor Sir Jon Murphy, *Service Justice System Review (Part 2)* (29 March 2019): 57, https://www.gov.uk/government/publications/service-justice-system-review accessed 28 February 2020.

41 Ibid: 57.

42 *Unofficial History* (1959), quoted in Peter Tsouras (ed), *The Daily Telegraph Dictionary of Military Quotations* (Greenhill Books 2005) 106.

EFFECTS OF OVERLAPPING MARITIME ZONE CLAIMS OVER THE OFFSHORE OIL AND GAS LAW: THE JOINT DEVELOPMENT AGREEMENTS

Ça□atay Do□an

ABSTRACT

Following the recent projections and discoveries of untapped oil and gas fields, the race to extract these resources has begun in resource-rich regions. This race has dramatically increased the importance of maritime zones, especially the exclusive economic areas where states have sovereign rights over natural resources. An oil and gas field within an exclusive economic zone or continental shelf of more than one state, authorizes multiple jurisdictions to exercise their rights over the straddling reservoir. In this scenario, a boundary delimitation process has to be sought between two or more states to designate a border between the contentious maritime zones where each state claims an exclusive right to explore or exploit natural resources. These efforts to form a dividing line between maritime zones may force states to seek alternative paths since it is likely to delay the exploitation of resources, reduce the amount of projected profit and damage interstate relationships. Judicial delimitation efforts to clarify which state is entitled to exercise their sovereign rights in a certain area can be inconsistent, unpredictable and deadlocked in most cases. To escape from any unexpected results that might be encountered in a judicial maritime delimitation phase, states are entertaining the possibility of developing a joint development regime in disputed areas. This article will explore the effects of maritime zone conflicts and maritime boundary delimitation efforts over the management of resources in disputed waters, as well as discuss the essentials of arranging joint development agreements within areas where more than one state is entitled to have sovereign rights over the same resources under customary international law.

A CALL FOR OTHER APPROACHES TO MARITIME DISPUTES

The relevant international agreement dealing with the rights and obligations of states concerning their use of international seas is the United Nations Convention on the Law of Sea 1982 (UNCLOS).[1] UNCLOS sets out a legal framework for coastal states to resolve their maritime boundary conflicts. The Convention has included a new concept called Exclusive Economic Zone with a specific legal regime of its own between high seas and territorial seas where states have sovereign rights to manage resources within the water, seafloor or under the seafloors subsoil.[2] With the inclusion of a new intermediate area called EEZ and the addition of Article 74 and 83

about the delimitation of EEZ and continental shelf between states with opposite or adjacent coasts, new rules to international delimitation law was presented alongside the need of a detailed interpretation and clarification of such concepts.

1 UN Convention on the Law of Sea, 1833 U.N.T.S. 397 (adopted 10 December 1982, entered into force 16 November 1994)

2 David Harris and Sandesh Sivakumaran, *Cases and Material on International Law* (8th edn, Sweet&Maxwell 2015) 395

The main problems arise when two or more states have overlapping claims over the same maritime zone and both are entitled to have sovereign rights over the natural resources of the disputed water. These disputes can either derive from territorial sovereignty disputes or maritime delimitation disputes. Overlapping maritime claims can be settled according to a negotiation which leads to an interstate treaty. Conciliation, arbitration or resorting to an international court or tribunal are other options. Another trending approach is to construct a joint development regime which is the cooperation of two states concerning the exploration and exploitation of oil and gas in the area of overlapping claims. In this regard, the trends and developments in the delimitation law revealed the necessity of other solutions, which aim to make use of these resources and simplify the exploitation process in disputed areas. Joint Development Agreements are the reflection of that approach in oil and gas law; therefore, they must be examined in light of developments occurring in delimitation law.

APPLICABLE LAW IN MARITIME ZONE DISPUTES

Before any convention, this area of law was mostly governed by customs.[3] The proclamation of U.S President Truman in 1945 stating that natural resources within the continental shelf of the United States belongs to the United States was an innovational approach to these former customs.[4] This proclamation was rapidly adopted by other states and reached a customary international law status in the absence of a comprehensive convention.

The first comprehensive development on the law of maritime delimitation occurred with the codification of the 1958 Geneva Conventions. These conventions introduced the territorial sea, contiguous zone and continental shelf as new maritime zones. Article 6[5] of the Convention on the Continental Shelf also included a method to delimit continental shelf boundaries.

The last development on the law of maritime delimitation was the conclusion of 1982 UNCLOS which also added a fourth maritime area called the exclusive economic zone. This convention allows coastal states to declare 200-mile exclusive economic zones, but it does not lay out any methods for delimiting it. Article 15 of UNCLOS gives a detailed methodology of delimiting territorial seas between states with opposite or adjacent coasts; opposed to Article 15, Article 74 and 83 which deal with the delimitation of EEZs and continental shelves remain silent as to any method for delimiting these zones and only referring to an equitable solution requirement, leaving the settlement to international judiciary or interstate agreements.[6] Given this silence, the limitation of jurisprudence in international law suggests that an international court and tribunal shall decide on disputes by applying international law not by creating any law through

3 Micheal Scharf, *The Truman Proclamation on the Continental Shelf. In Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press 2013)107-122

4 Proclamations 2667 and 2668, issued by U.S. President Harry S. Truman on 28 September 1945 (10 Fed. Reg.12,305)

5 United Nations Convention on the Continental Shelf (29 April 1958) 499 UNTS 311

6 Davor Vidas, 'The Delimitation of the Territorial Sea, the Continental Shelf, and the EEZ: A Comparative Perspective' in Tore Henriksen and others (eds), *Maritime Boundary Delimitation: The Case Law* (Cambridge University Press 2018) 34

codification or progressive development.[7] It has yet to be clarified whether the creation of a methodology by international courts for articles 74 and 83 falls in the scope of an international court's duties. In this regard, creating a methodology should solely be an attempt to clarify legal international principles rather than forming a new set of rules that may cause the progressive development of the law in a new form.[8]

Controversies over the applicable law mostly originate from the methodological uncertainty caused by the 1958 and 1982 Conventions. Rather than setting a precise definition of what the applicable law is, courts and tribunals have fallen back on indications focusing on how to go about delimitation. The failure to put a distinction between delimitation law and delimitation methods resulted in the merging of law and method. The applicable law today involves a requirement to build a particular methodology to delimit a boundary. The starting point for this applicable law is Article 74/83 so it is necessary to identify what it specifically mandates. One might analyse that, the purpose of UNCLOS Article 74/83 was to reconcile equitable principles with the requirements of Article 6 of the Convention on the Continental Shelf. To what extent the current methodology addresses that purpose is a question that will be further evaluated.

DEVELOPMENT OF THE CASE LAW IN MARITIME BOUNDARY DELIMITATION

Maritime delimitation cases have witnessed many different methods when attempting to reach an equitable solution throughout the years. The first judicial examination of Article 6 and customary international law relating to this area was carried out in initial cases such as the *North Sea Continental Shelf* and the *Anglo-French Continental Shelf*. In the *North Sea Continental Shelf*, court argued that the non-party status of Germany to the Geneva Convention blocked the application of Article 6 since it was not binding on Germany either treaty wise or by the virtue of customary international law.[9] Therefore, the court turned back to the Truman Proclamation as a customary international law that provided an 'equitable principle' solution in case of a delimitation problem between the U.S and its neighbours.[10] On the other hand, the *Anglo-French Continental Shelf* dealt with both customary international law and Article 6. Article 6 states that "[...] unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured ", this was perceived as a combined equidistance/ special circumstances rule and the article did not contain two separate rules in itself. At last, the court stated that the method of delimitation had to depend on the geographical circumstances of each case. So it was the first continental shelf boundary dispute that has been settled between parties to the 1958 Geneva Convention on the Continental Shelf.

7 Charter of United Nations Chapter IV - The General Assembly 13(1) (a) and Statute of the International Law Commission 1947 A(16)
8 Vidas (n 6) 40
9 *North Sea Continental Shelf Cases* [1969] ICJ Rep 3
10 Donald McRae, 'The Applicable Law: The Geneva Convention on the Continental Shelf, the LOSC and Customary International Law' in Tore Henriksen and others (eds), *Maritime Boundary Delimitation: The Case Law* (Cambridge University Press 2018)

With the emergence of UNCLOS rules, Article 74 and 83 were presented to the delimitation law. These provisions did not state any specific methods to delimit maritime zones, therefore, the focus moved from determining the applicable law to forming methods that will apply in delimitation. In maritime delimitation cases such as the *Black Sea* (Romania v Ukraine)[11], ICJ set the foundation of a new three-stage approach. The courts first attempt to construct a geometrically objective equidistance line that is at equal distance from the nearest points on the coasts of parties. At the next stage, the courts consider reasons that call for an adjustment on the equidistance line drawn. The characteristics of these factors that might cause an adjustment is not clear due to the lack of unity between cases and the failure to demonstrate appropriate explanations on the court's part. In the third stage, a disproportionality test was applied for the first time in a delimitation case. This test was to ensure a reasonable degree of proportionality between the ratio of the respective coastal lengths and the ratio of the relevant maritime areas created by the delimitation line.[12] The third stage was an improvement on the former two-stage approach applied by the ICJ in cases such as *Qatar v Bahrain*.[13] The two-stage approach included an equitable principles/relevant circumstances method which involves two steps. Firstly, an equidistance line is drawn, then relevant circumstances that might cause the shifting of the line are examined. However, some older cases also demonstrated that these separate stages have been disregarded and a simultaneous approach was encouraged by the judges. This simultaneity approach was practiced in the *Tunisia v Libya*[14] delimitation case where the court did not entertain the idea of constructing an equidistance line and all relevant circumstances were thrown together and analysed at once, to find the equitable solution by eliminating successive stages.

REASONS THAT PROMPT THE FORMATION OF JOINT DEVELOPMENT REGIMES

The inconsistent and unpredictable jurisprudence of ICJ alongside legal and political problems generated by UNCLOS, causes states to shift away from presenting their case before international courts or tribunals. This shift results in states entertaining other joint development opportunities.

The nature of a maritime delimitation decision will almost always have an impact on the rights or obligations of a third state. Even if we acknowledge that the jurisdiction of international dispute settlement mechanisms is based on the consent of both parties, the effects of such jurisdiction can prejudice the rights of third parties. These courts or tribunals when deciding on delimitation matters concerning a certain area can implicitly decide that disputed areas do not appertain to a third state which is not represented in the case. For instance, in *Libya v Malta*[15] the court expressed a distinction between the areas that appertain to the parties and areas that might be proved to appertain to a third state. Such decisions that are not intervened by all parties that possess entitlements on a disputed maritime zone, will create difficulties when parties are

11 [2009] ICJ Rep 61
12 *Romania v Ukraine* [2009] ICJ Rep 61 13
[1994] ICJ Rep 112
14 [1981] ICJ Rep 3
15 [1985] ICJ Rep 13

attempting to exercise their sovereign rights based upon the Court's decision. Delimitation tribunals are attempting similar efforts that have been adopted in the merits stage of the *Libya v Malta*[16] case to anticipate the third state entitlements and support the finality of their judgment.[17] The inconsistent approach to determine the scope of third state entitlements without allowing third state interventions, cast away all the delimitation efforts. A third state which is not bound by the decision can prevent the parties of the case from exercising their sovereign rights referring to or depending on the decision given by a tribunal based on these merits.

Also, in terms of politics, the emergence of newly independent states resulted in the need for rearranging maritime borders that were ought to be drawn.[18] Plus, some states vote against the adoption of the relevant Conventions, considering that the Conventions do not take special geographical situations into account. To set an example, areas with a multitude of islands complicate the drawing of maritime boundaries, especially in cases where small islands are too proximate to the coast of another state. This situation raises questions about whether islands should be given full weight in the delimitation process. There has been an approach to give partial or no effects to islands lying on the wrong side of the delimitation line. But still, there is no guidance in maritime delimitation about the weight given to particular factors which arguably have a chance to effect a final equitable solution.[19] As a similar example, adding a separate part in the Convention about enclosed or semi-enclosed seas without suggesting any maritime boundary delimitation methods that accommodate the special characteristics of such areas, underlined the necessity of a consistent and predictable case law that would support the clarity and application of the Convention as well as provide an adequate protection on coastal state rights. It is therefore arguable that unstable jurisprudence in such delimitation matters has done little to add to the certainty and consistency of maritime delimitation methods. In light of these concerns, some states reacted to these shortcomings by voting against the adoption of UNCLOS.

Joint Development Agreements are an attempt to conclude these legal problems by setting aside the disputed area as a joint development zone. The political and economic context in which a delimitation agreement is negotiated in can eventually deadlock the delimitation attempts. These aforementioned legal problems generate the grounds for preparing a joint development regime. By way of JDAs, the deadlocked delimitation process will be postponed, and earlier exploitation of oil and gas will be possible.

CHARACTERISTICS OF JOINT DEVELOPMENT AGREEMENTS

Joint Development is closely linked to Article 74(3) and 83(3) of UNCLOS in which a legal obligation to 'make every effort to enter into provisional arrangements of a practical nature' is promoted throughout the transitional period pending any delimitation agreement. The meaning of provisional arrangements is mostly left to the interpretation of states. Based upon this

16 [1985] ICJ Rep 13

17 Naomi Burke O'Sullivan, 'Case Law's Handling of Issues Concerning Third States' in Tore Henriksen and others (eds), *Maritime Boundary Delimitation: The Case Law* (Cambridge University Press 2018) 290

18 George Burn and others, 'Legal Issues in Cross Border Resource Development' [2015] J World Energy Law Bus 8(2) 154, 160

19 McRae (n 10) 115

obligation to cooperate, some lawyers suggest that joint development is mandated as a matter of customary international law in areas of overlapping maritime claims without an agreed boundary.

Z. Gao also interprets these articles as a mandatory obligation to cooperate whose breach would construct a breach of international law.[20] Nonetheless, it is hard to agree that this legal obligation specifically mandates developing provisional development zones as an effort to cooperate. For joint development to reach a mandatory status it must first reach a customary international law status. This can only happen if there is a subjective conviction that joint development agreements are a required practice and only if JDAs resemble a general constant practice adopted by a large number of states.[21] Despite the constant use of joint development agreements for the exploration and exploitation of offshore oil and gas; all arrangement models defer from each other, denying any uniformity in this area of law. This disparity is mainly caused by the need for corresponding to the economic and political conditions between states. The preferable view in current practice is to treat the establishment of a joint development area as a voluntary process which is not concluded out of a perception of customary law status but only for the pure desire of sharing the oil and gas jointly in agreed proportions. [22]

As stated above, joint development has a temporary effect of bypassing delimitation disagreements in a disputed area to concentrate on resource development. Therefore, joint development agreements perfectly fit the expression of a 'transitional period' since it only deals with developing the resources in an area of overlapping claims without providing any permanent solution to delimit these areas. However, joint development agreements can be the only feasible and implementable way to achieve a permanent solution because of the geographical or political context it occurs in. The current view acknowledges that states who establish a joint development regime as an interim measure may transform this agreement into a permanent one even after a final delimitation line is drawn. In some cases, states may have to implement joint development as a permanent solution due to the inability of finalizing delimitation. This inability is generated by the absence of any binding dispute settlement mechanisms in force between disputed states. [23]

JOINT DEVELOPMENT OF OFFSHORE OIL AND GAS MODELS

Even the most successful delimitation of a boundary can still require arrangements or precise cooperation that will assist adjacent states to rationally exploit the offshore oil and gas. A joint development regime can either be a step towards new delimitation efforts or an attempt to postpone delimitation and focus only on making use of the natural resources that the area presents. Therefore, a precise agreement with a strong outline covering potential issues has to be constituted. The existing joint development models all have their unique characteristics compatible with the economic and political aspects of their respective regions. These models

20 Zhigou Gao, 'The Legal Concept and Aspects of Joint Development in International Law' [1998] 13 Ocean Year Book 107,108

21 Michael Wood, 'Second Report on Identification of Customary International Law' (International Law Commission Report, 22 May 2014) 7

22 Hazel Fox and others, *Joint Development of Offshore Oil and Gas, vol I* (British Institute of International and Comparative Law 1989) 44-45

23 Rainer Lagoni 'Interim Measures Pending Maritime Delimitation Agreements' [1984] 78 AJIL 345, 358

all address the possible challenges that can be encountered while determining a management authority and a legal regime in the joint development zone. With that being said, three basic models can be presented according to the joint development agreements that have been arranged until this time.[24]

The first model is to split the joint development zone into subzones. Oil and gas in these subzones will be explored and exploited under a joint operating agreement. Each state will authorize its concessionary in the zone who will work collaboratively with the concessionary appointed by the other state. This can be expressed as a system of joint ventures where each state's government grants a company to operate in a defined zone The Japan/South Korea[25] agreement on a disputed continental shelf is a well-rounded example of this model.
The second model is the supranational authority model, which is also considered, arguably, the ideal agreement for a joint development regime by many experts.[26] However, the model also comes with many issues of its own. This model suggests an entirely new management structure that consists of a legal committee with large rights and responsibilities. The difference in management is to establish a joint authority that will act on behalf of the states in financial, technical and legal issues. This management model gives the Joint authority a judicial personality that can exercise regulatory powers and manage oil exploration and exploitation activities in the area. The main example of this model is the Timor Gap Treaty[27] between Australia and Indonesia. This treaty also presents unique features that have set new precedents on the model, making it more attractive as a model agreement. The model suggests a mechanism where states are less involved in matters relating to oil and gas law, and administrative issues as they leave it to the judicial personality of the Joint Authority. [28]

In the last model, a managing state is appointed who is responsible for the development of the oil and gas in the joint zone on behalf of the other state. In the Timor Gap Treaty, there are two other zones created in this sense where a managing state exercises full jurisdiction with administrative powers, however, each state still must notify the other state in its sole administrative actions. The true example of such an agreement is the Qatar/Abu Dhabi [29] settlement where the area to be developed jointly is described with attention to determining offshore boundaries and ownership of islands. However, it had been concluded as one of the earliest examples of a joint development agreement. It fails to specify broad objectives and principles which will govern the regime of the development. Besides including such details it only gives an idea about the manner of the development and establishes a common zone of cooperation where equal rights of ownership

24 Fox and others (n 22)115
25 Japan/South Korea Joint Development Agreement < https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1974-Japan-South- Korea-Agreement-on-the-Continental-Shelf-Joint-Development.pdf> (accessed 12 December 2019)
26 Chidinma Bernadine Okafor, 'Model Agreements for Joint Development: A Case Study' [2007] 25 J Energy Nat Resources L 58
27 1989 Treaty Between Australia and The Republic of Indonesia on the zone of cooperation between the Indonesian province of East Timor and Northern Australia <https://cil.nus.edu.sg/wp-content/uploads/formidable/14/1989-Australia-Indonesia-Timor-Gap-Treaty.pdf> (accessed 10 December 2019)
28 Okafor (n 26) 69,70
29 See Agreement between Qatar and Abu Dhabi on the settlement of maritime boundaires and ownership of islands<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/QAT-ARE1969MB.PDF> (accessed 10 December 2019)

and shared revenues are provided.[30] The managing state applies its legal regime and regulatory procedures in the area, but the revenue is still shared, and the other state has the right to monitor the activities of the managing state.

Other Development Options Under a Joint Development Agreement

A variety of models and structures are applied in existing JDAs. But all of them have to address some major issues in order to carry out a successful exploration and exploitation. The objectives of each state will shape the form of the development contract.

The most likely petroleum licensing form experienced in joint development agreements are concessions. In concessions, the host country has no claims as to the ownership of the oil produced. Under a typical concession agreement, the contractor will bear all the risks and rewards while the government gets benefits based on the product price, royalties and in rare cases bonus payments such as windfall profit taxes. Many concessions contain a provision for the equity participation of states.[31] This means that each state will grant exclusive rights to explore and exploit petroleum resources to a private party that it chooses in a specific area.
Production sharing agreements are another form of the development contract. In this scenario, the oil company will be engaged in joint development as a contractor to perform defined services for reward. [32] This contractor will be appointed by the host state. The holder of the rights to exploit the oil and gas is the State or its national agency. Therefore, the oil company will only have a contractual right to the production rather than an exclusive right that it enjoys under a concession agreement.

Joint venture agreements are also a typical method that is employed throughout the world. This might be in the form of a contractual joint venture or an equity joint venture. A host state can opt to participate in a contractual joint venture to conduct business for mutual gains. Each participant will have a predetermined share of costs, risks and production of oil in a contractual joint venture. The CJV(contractual joint venture) does not have a separate legal entity in this case. The equity joint venture will have a separate legal entity and profits will be distributed according to the ratio of capital investments conducted by each party. In both systems, the exploration expenses will be covered by the foreign company. These expenses can be amortised if a discovery is made in the area. After such discovery, the foreign company will compensate for the costs from the revenue gathered through the production. After the oil is explored; the development of the field in terms of site selection, drilling and production of wells, will require high levels of technological and industrial expertise. States may be reluctant to shoulder such responsibilities due to their lacking technical expertise. Each joint venture has to be formed according to the unique circumstances and the legal regime that they operate in. [33] Therefore, state participation in these ventures are another important aspect to be examined since the policy

30 Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation* (Cambridge University Press 2015) 257
31 Kato Gogo Kingston, *Oil and Gas Laws: A Guide for International Practitioners* (Lambert Academic Publishing 2017) 157
32 Fox and others (n19) 223
33 Kingston (n 28)

of participation adopted by the states in petroleum ventures will differ case by case according to the development framework and priorities of each state. Historically, governments were seeking to hold a significant amount of equity in these ventures so that they could affect operation policies and access to specific information. If the goal is to exert some type of influence on strategic decisions then participation is likely, however, to reach financial goals state participation is not indispensable and most probably it will create an extra amount of financial burden and risks on the state's part.[34]

CONCLUSION

Overall, efforts to produce a transparent delimitation law is yet to bring consistent results in delimitation law. Risks generated by these inconsistencies has invited states to participate in cooperation schemes to explore and exploit the offshore oil and gas. The efforts of the courts and tribunals to set a precise delimitation case law according to the relevant provisions of Article 74 and 83 were mainly insufficient. The nuances in language and the failure to describe the applicable law undermine their efforts to create clear and consistent case law. The lack of explicit expressions accepting or rejecting particular circumstances and the absence of clear guidelines that define the weight to be given to particular circumstances that call for an adjustment on the delimitation line does a disservice to the transparency that the courts are seeking to achieve. Other than these legal problems, the political and economic difficulties attached to a specific region may also necessitate cooperation between states to make use of natural resources in disputed waters. This type of cooperation mainly shows up in the form of a joint development agreement. JDAs are a common state practice that is sometimes applied even before attempting to solve boundary conflicts. Whether if it is a provisional arrangement or a permanent solution depends on the context in which it is negotiated. With that being said, to avoid a further deadlock in the management of natural resources a joint development agreement has to be prepared precisely with astute attention to detail. The aforementioned development options have to be compatible with the economic circumstances and political complexion occurring in the area, to reach a fully functional joint development regime that simplifies the exploration and exploitation of oil and gas.

34 Fox and others (n 19) 224,225

PERDUELLIO AND LEGAL AUTHORITY IN THE TRIAL OF C. RABIRIUS

Jenn Lawrence

INTRODUCTION

This study was spurred by a seemingly straightforward question: under Roman law, was C. Rabirius guilty of *perduellio* in 63 BCE?[1] Even at first glance, any Romanist will comprehend that this question is far from simple. Indeed, it immediately raises a host of correlated questions in Roman legal science that need be answered first: what, exactly, is the nature of *perduellio*? Moreover, how should we understand the archaic charge of *perduellio* in the context of Rabirius' trial in 63 BCE? Can the statute law definition of *perduellio* be divorced from its ancient association with the *duumviral* procedure? And what are we to make of the talk of consular *imperium* and the *senatus consultus ultimum* that Cicero cites to argue that Rabirius didn't, in fact, legally commit '*perduellio*'? It soon becomes apparent that the inherent complexion in the above question derives from the lack of a clear singular source of legal authority by which to measure Rabirius' guilt. Thus, the answer ultimately boils down to the issue of determining what sources of legal authority figured in Rabirius' trial, and which of these prevailed.

Indeed, much of scholarship on Roman criminal law – distinctly, the German tradition – is built on the supposition that in the Roman Republic there existed a criminal law 'system'. However, I argue that a closer look at the trial of Rabirius reveals that there were, in fact, multiple (and distinct) competing systems of asserting legality in 63 BCE. Though Roman law is often envisaged as a static set of rules, it is perhaps more effectively understood as a multi-faceted mechanism for enabling individuals to be brought to justice, deeply influenced by political and social forces.[2] Thus, while there is often still an 'answer' in the law, as in the obsolete *lex* concerning *perduellio* which had not been abolished by 63 BCE, it is often not part of the legal discourse of the day. Further, while a legal framework might provide the basis of actions, in practice, it might carry little significance. This raises important questions about currency, obsolescence, and how the Romans understood legal authority within their multi-faceted system(s) of criminal law. The purpose of this paper, then, is to offer a fresh consideration of the problems involved in interpreting sources of 'legal authority' in Rabirius' trial, through the lens of Cicero's *pro Rabirio*. My aim is to discuss and weigh the various sources Cicero cites as possessing legal authority (or argues *against* possessing legal authority) from a legal science perspective. However, before I begin my main discussion, it will first be necessary to briefly recount the history of '*perduellio*' and its related legal procedures.

'PERDUELLIO' AND RELATED LEGAL PROCEDURES

In Roman criminal law, *perduellio* was a comprehensive and malleable term referring to any type of hostile action against the Roman state, embracing acts such as joining the enemy, rousing an enemy, delivering a Roman citizen to an enemy, desertion on the battlefield, and political

murder.[3] It was a capital charge under the early Republic, and first appears in the Roman tradition in the famous story in Livy 1.26 of Horatius, though it is generally conceded that *perduellio* was not always a part of this tale.[4]

In the later Republic, the charge of *perduellio* was gradually absorbed into the more comprehensive *crimen maiestas*.[5] The first statutory recognition of the *crimen maiestas* was probably the *lex maiestatis*, introduced in the first or second tribunate of L. Apuleius Saturninus, in 103 or 100 BCE.[6] The relationship between *perduellio* and the *crimen maiestas* is so convoluted that scholarship has yet to come to an agreement on what distinctions, if any, existed between the two.[7] Since both are regularly translated as 'treason', why was it necessary to introduce a *quaestio maiestatis* when it would appear that the primary jurisdictional function of the early Republican assembly courts was to handle cases of *perduellio*?[8] Cloud argues that the establishment of the first *quaestio perpetua* had nothing to do with the nature of the crime, but rather with the nature of the court – a *quaestio perpetua* had a jury composed solely of *equites*, and Saturninus intended the statute to protect leaders of the *populares* such as himself.[9] From around 100 BCE onwards, *maiestas* was the typical charge associated with 'treason'.

Under the educated assumption that *perduellio* and *maiestas* were largely parallel charges, it would appear that the only reason for the revival of the *perduellio* charge in 63 BCE was for the associated procedure it entailed. The revival of the *duumviri*, as specified in an ancient *lex horrendi carminis*, permitted the execution of a citizen without a defense or opportunity to escape, and in this, it resembled the powers assumed under the *senatus consultum ultimum* (hereafter SCU).[10] In the *pro Rabirio*, Cicero attacks the method of punishment for *perduello* more emphatically than the actual treason charge. Indeed, it would appear that Labienus and Caesar's revival of the trial by *duumviri* was ultimately an attempt to strike a political blow at the Senate by challenging its authority. This must be understood within the narrative of Roman political groups fighting for control over the courts and over who would have the last word on sources of legal authority at the time.[11]

3 Dig. 48.4.11: *hostile animo adversus rem publicam*. The bibliography on *perduellio* is extensive. Authoritative sources include C.W. Chilton, 'The Roman Law of Treason under the Early Principate' (1955) JRS 45, 73-81; Christoph Brecht, Perduellio: eine Studie zu ihrer begrifflichen Abgrenzung im römischen Strafrecht bis zum Ausgang der Republik (Ludwig-Maximilians-Universität München 1938); Richard Bauman, The Crimen Maiestas in the Roman Republic and Augustan Principate (Witwatersrand University Press 1967) and Richard Bauman, The Duumviri in the Roman Criminal Law and in the Horatius Legend (Wiesbaden 1969).

4 Bauman (n 3) 1969, 2ff.

5 Schisas, Offenses against the state in R. Law (London 1926); Brecht (n 3). 6

Bauman 1967 (n 3) 16.

7 See the discussion in Bauman 1967 (n 3) 17, 20-25.

8 D. Cloud, 'The Constitution and Public Criminal Law' in J.W. Crook and others (eds), CAH IX2 (2nd edn, Cambridge 1994) 9, 491-530, esp. 518.

9 Cloud (n 8) 519; Bauman 1967 (n 3) 45-8.

10 Tyrrell (n 1) 36. Both the *lex horrendi carminis* and the SCU will be discussed below.

11 R.L. Enos 'Rhetoric and Law in Ancient Rome' in M.J. MacDonald (ed), The Oxford Handbook of Rhetorical Studies (Oxford University Press 2014) gives a brief history of political parties fighting for control over the courts in the mid-late Republic.

SOURCES OF LEGAL AUTHORITY IN THE TRIAL OF C. RABIRIUS

A closer look at the *Pro Rabirio* reveals many different systems of asserting legality – some of which are harnessed to facilitate Cicero's goal of acquitting Rabirius, and others of which are substantiated more tacitly. Those systems are: 1) the obsolete procedural law specifying the duumviral trial, 2) statute law (*lex*), 3) the SCU, 4) the tradition of consular *imperium*, and 5) certain rhetorical tropes that seem to hold legal sway.

OBSOLETE LEGAL PROCEDURE OF THE DUUMVIRI

We might begin with Labienus' revival of the obsolete legal procedure for *perduellio*. In 63 BCE, the tribune seems to have secured the passing into law of a resolution which instituted an inquiry into the death of Saturninus, appointing a board of two *duumviri*, according to an ancient procedure, to try any criminal case which might result from its findings. Regarding how the proceedings were initiated, scholarly opinion is based on Livy, Dio and Cicero, though the full debate need not concern us for the present purpose.[12] Tyrrell's recent argument is that the *duumviri* were 1) initially religious magistrates commissioned to execute a *homo sacer* and rid him from the community, and 2) appointed when there was no need to establish guilt because the guilt was self-evident, and therefore solely for the task of 'condemning'.[13] Since the *pro Rabirio* was delivered with the goal of undermining the legality of the duumviral procedure, Cicero is notably biased against asserting its legal authority.[14] However, it could be argued that the very existence of the *pro Rabirio* – as well as the fact that Cicero argues so strongly against the method of execution in the old *lex perduellionis*, but makes only one brief attempt to question legitimacy of the duumviral trial (before immediately reverting back to attacking its form of execution)[15] – are testament to its legal sway. Ultimately, the very fact that the Senate could initially do nothing to prevent the revived trial from proceeding demonstrates that, on some level, it was recognized with the force of law.[16]

What is interesting is that the archaic procedure for *perduellio* could so easily be revived, which invites certain questions about Roman legal science: could obsolete legal procedures simply be 'rooted out' and applied to contemporary trials to achieve desired legal results? Cicero claims that Labienus used the *commentarii* and *annales* from the regal period as a precedent: the punishment and language was hunted out "ex annalium monumentis atque ex regum commentariis" (5.15). Regarding the former, it is not clear what these commentaries contained or whether they were genuine. Mommsen thought that they were pontifical rules and instructions from the regal period for sacral and magisterial acts.[17] Von Premerstein, on the

12 Liv. 1.26.5; 6.20.12; Dio 37.27.2; Cic. *Rab.* 12.

13 Tyrell (n 1) 19, 22.

14 Indeed, he reports that the archaic procedure was 'resisted by a consul' (referring to himself). *Rab.* 3.10.

15 *Rab.* 4.12-13.

16 Gross Hodge (n 12) *Intro* 5.

17 Liv. 1.31.8 *commentarii Numae*; 1.60.4 *commentarii Ser. Tulli*. Cf. *Straf.* 2[3].12 n. 3; 42 n. 3.

other hand, considered them to be collections of statutes and formulae, which because of their antiquity had been attributed to one or another of the kings by historians and antiquarians of the first century.[18] As for the *annales*, the *annales* of C. Licinius Macer have been suggested,[19] as have those of Valerius Antias[20]. Both treated the early history of Rome – including the trial of Horatius, a clear precedent – and would appear to have been available in 63 BCE. Labienus (or Caesar) may also possibly have drawn his information about the *duumviri* from writings on public law.

We know that at certain commentaries had legal force. When Cicero considered in March of 49 BCE the elections which Caesar planned to hold, he refers to the authority of the books ('nos autem in libris habemus') in his assertion that while consuls could preside over the elections of consuls or praetors, praetors could not preside over the election of either consuls or praetors. These books are generally identified with augural commentaries – collections of previous augural decisions. There also existed commentaries on constitutional practice compiled in the later 2nd century BCE by one C. Sempronius Tuditanus.[21] Hence, we seem to have evidence in the late Republic for traditions with legal force which eventually were written down, but did not derive their ultimate authority from the writing in which they were recorded.[22]

It is often assumed that the audience did not understand the particularities of the duumviral proceedings.[23] However, as Tyrrell points out, they must have known something of its nature for Labienus to have been understood. Further, their knowledge is indicated by the fact that Cicero was free to speak ironically of the proceedings.[24] Yet Cicero's usage of the term 'conquisierit' also provides insight into one source of legal authority of the time – namely, certain commentaries and annalistic traditions, not necessarily available to the Roman public, that could be 'sought out' / 'investigated', and subsequently referenced as a source of legality. This is especially interesting in light of the fact that Caesar likely determined to revive the obsolete procedure of Horatius for the sake of creating a deeper impression on the public mind – a political statement, at a crucial time in his career. This raises important questions about the malleability of the Roman legal system in the face of certain political agendas.

STATUTE LAW: THE LEX HORRENDI CARMINIS

A second source for legal authority in Cicero's *Pro Rabirio* is that of an ancient *lex* related to *perduellio*. *Lex* – formal statute law, with obvious legal authority – had been regularly published on bronze in public places by the 2nd century BCE, with copies kept on tablets or papyri in the treasury or its associated record-office. The authority behind *lex* was that of the *populus*

18 S.v. "commentarii" *RE* 4.1 (1900) cols.728-29.
19 Brecht (n 3) 174 n. 1.
20 Tyrrell (n 1) 96-7.
21 Andrew Lintott, The Constitution of the Roman Republic. (Oxford University Press 1999), 4.
22 Ibid.
23 Brecht (n 3) 181-89, especially 182, n. 1.
24 Tyrrell (n 1) 79.

Romanus voting in an assembly.[25] There was, in fact, a *lex* of *perduellio* in the Twelve Tables (Tab. IX, Lex VII). However, in 63 BCE, Labienus must have promulgated a bill, providing for the appointment of *duumviri perduellionis*, prescribing the form of sentence to be pronounced, and specifying the gruesome punishment in rigid accordance with the *lex horrendi carminis* handed down from the barbarous legend of kingly days. Cicero's allusions to Labienus' actions seem to leave no room for doubt on this point (cf. *Rab.* 11).

This *lex* would likely have been that from Livy's narrative of Horatius, from which the rest of the narrative's duumviral procedure was likely constructed.[26] The text is given in Livy (1.26.6). This *lex* is widely held to be authentic for the early Republic, a point which Tyrrell's analysis of the grammar goes a long way in demonstrating.[27] The *lex* harbours a combination of the subjunctive form, used in decrees, and the future imperatives of statute. Though the grammatical forms are classical, they could represent a modernization of an ancient law. Furthermore, the manner of expression is ancient: the impersonal imperatives used are the same type as those found in the Twelve Tables, and the omission of the subject in the clause *si… provocaverit* is also reminiscent of this source. These affinities with the Twelve Tables have led to the suggestion that they were the original source of the law.[28] As the phrase *vel intra pomerium vel extra pomeria* would suggest a period during which the *imperium domi* was somehow limited, Tyrrell proposes a *terminus ante quem* of the trial of Manilius in 384 BCE.[29]

However, in the *pro Rabirio,* Cicero seems to consciously take care not to reference any explicit *lex* at stake, referring to *perduellio* as a 'iudicium' or an 'actio' instead.[30] These words both draw attention to the procedure rather than the law. His decision to never reference an explicit '*lex*' related to *perduellio* was likely a rhetorical technique that amplified his sarcastic contrast between the *lex Porcia* of C. Gracchus and Labienus' *duumviri*.[31] And when Cicero moves on from discussing the procedure of *perduellio* to discussing whether Rabirius was guilty of the *crime* of treason, he begins to promote the legal authority of a different source: that of the SCU.

THE SCU AND CONSULAR IMPERIUM

Indeed, on the day on which Saturninus was killed, the Senate had declared both Saturninus and Glaucia public enemies, and called upon Marius to 'defend the state' by issuing the SCU. In the late Republic, the senate developed the tradition of this degree when faced with what it regarded as a violent internal threat to the security of the *res publica*, whereby it urged the consuls and other magistrates to take any measure necessary to guarantee the safety of the state. The *res publica* was entrusted to these magistrates, and they were called upon to defend it.[32] As the decree was exceedingly vague in its language, it was not clear whether it was recommending a limited

25 Lintott (n 22) 3.
26 Tyrrell (n 1) 16. Brecht (n 3) 146-47 presents this view convincingly, arguing that the *lex* is genuine.
27 Ibid 16ff.
28 Ibid.
29 Ibid. For the character of the *lex* see Brecht (n 3) 157-58.
30 E.g. *Rab.* 3.10 (iudicium); 5.14 (actio).
31 *Rab.* 4.12. Cf. Tyrrell (n 1) 82.
32 Cic. *Phil.* 5.34; 8.14; *Rab.* 20; Sall. *Hist.* 1.77.22. Cf. Lintott (n 22) 89.

use of force against fellow-citizens to restore legal stability, or the extermination of those who comprised the threat.[33]

Probably the critical step in the concretization of this decree as an institution was the acquittal of L. Opimius, the consul of 121 BCE, on the charge of throwing men into prison without trial and killing Gracchus against statute law. The context of this decree being issued was the suppression of C. Gracchus, M. Fulvius Flaccus, and their supporters, and it was the first time any such decree had been formally put to vote by the presiding magistrate[34]. From Cicero's mentioning of the SCU in relation to Opimius' actions, it can be assumed that his defence rested on the fact that he had killed Gracchus in accordance with the SCU, in order to 'guarantee the safety of the state'. However, the legality of the decree was debated, and Opimius' acquittal was still a matter of contention as far as Decius was concerned; in Cicero's own words: at id ipsum negat contra leges licuisse Decius.[35]

In the *pro Rabirio*, Cicero again vouches for the legal force of the SCU, associating it with those anyone who desired the 'safety of the Republic' (cf. *Rab.* 20). The trial, he claims, was an attempt "to abolish from the constitution that chief support of our imperial dignity handed down to us by our forefathers (*quod nobis a maioribus est traditum*), to make the authority of the Senate…impotent."[36] Cicero here couches the SCU within rhetoric of the *mos maiorum* in order to assert its validity, but the SCU did not have the antiquity to which Cicero lays claim. Indeed, an attempt to employ the measure for the first time in 133 BCE was stymied when the consul P. Mucius Scaevola refused to honour it,[37] and it had only been employed successfully once before, forty-eight years previously.[38] However, the fact that the legal authority of the SCU was hotly debated demonstrates that, at the very least, the issue was not black and white.[39] The authority behind a *senatus consultum* was different from *lex*, and less absolute. Most scholars agree that the SCU contained no inherent power of a '*lex*', and was ultimately no more than a recommendation, encouraging magistrates to act in accordance with senatorial opinion.[40] The clearest proof that the SCU could not stop the 'normal' Roman legal process from functioning comes from Cicero's experience after making use of the decree in 63 BCE, when he was prosecuted and ultimately exiled.

However, despite the SCU having a different type of 'force' than a *lex*, it doesn't make sense to claim that the decree had no legal force whatsoever, especially in the context of Opimius' acquittal in 121 BCE and Cicero's blatant citations of the SCU in the *pro Rabirio* – a legal court case – to argue the legality of his defendant's actions. Indeed, the *senatusconsulta* were often

33 Lintott (n 22) 89. Normally, the person of a Roman citizen was protected from physical harm at the hands of magistrates by the right of *provocatio* and the capacity of the tribunes to offer physical protection. The effect of the SCU was to deter the tribunes from intervention. Cf. Cic. *Rab.* 20.
34 Livy, *Per.* 61; Cic. *De Or.* 2.106 and 132ff.; *Part. Or.* 104; *Sest.* 140; *VRR* 167-8.
35 *De Or.* 2.132.
36 Cic. *Rab.* 2. Cf. Cic. *Rab.* 34.
37 Val. Max. 3.2.17; Plut, *TG* 19; cf. Cic. *Dom.* 91; *Planc.* 88. Cf. Tyrrell (n 1) 57.
38 Caesar in protesting the use of the decree in 49 BCE drew attention to its brief history: *BC* 1.7.5-6.
39 Cf. Lintott's full discussion of the legal power of the SCU in (n 22) 89-93.
40 Lintott (n 22) 90; Tyrrell (n 1) 35.

published in bronze in public spaces in Rome, which surely proclaimed a certain authority – whether technically 'legal' or otherwise.[41] It is also possible that the SCU labelled Saturninus a *hostis publicus*, a *homo sacer* whom everybody might kill without punishment.

Yet most important, in my opinion, is the fact that the SCU was a recommendation to magistrates, which encouraged them to use their own constitutional powers – namely, *imperium* – to effect a decision. To this end, Cicero takes care to remark that the arms were taken "at the direction of a consul", which turns the entire source of the action upon consular imperium (*Rab.* 21). The constitutional power of the *consul* is well known, and another one of those 'sources of legal authority' which Cicero thus makes reference to in order to argue in court. Many of the fundamental rules of the so-called Roman 'constitution' were not based on written *leges*; for example, the elections of two consuls each year, the convening of different assemblies, the existence and functions of the senate. However, these elements, though not based on specific legislation, were certainly 'unwritten constitutional rules' – even though their exact nature could be debated.[42]

Indeed, many scholars share the belief that the power is inherent in the *imperium* of a consul to take extra-ordinary measures if the safety of the *res publica* is at stake, and the SCU is simply marginal to this responsibility. Temporary neglect of established legal process in a crisis was necessary.[43] Both Plaumann shares a similar opinion in believing that the decree was superfluous – in Plaumann's opinion, the SCU developed as an institution to render the supra-legal measures taken by consuls in times of crisis less arbitrary.[44] Ultimately, the SCU appears to have been a public declaration by the senate of a state of emergency, which had maybe no sense of legal authority on its own; however, when considered alongside the *imperium* of the consuls whom the SCU called upon, consular *imperium* seems to have worked in tandem with senatorial authority to give the SCU *some* decree of legal authority, if not of inherent legality. A few more remarks need be made. The SCU is interesting as a 'source of legal authority' because it is an example of an institution that not only owed nothing to *lex*, but had the precise effect of rendering temporarily void certain *leges* (at least in 121 BCE). Further, we are faced with the enduring question of how far law and order can be saved by suspending said law and order and referring to some sort of 'extra-legal authority.'

RHETORIC

The last source of legal authority asserted in the *pro Rabirio* is perhaps the most debatable – rhetoric. Ancient advocates like Cicero were masters of rhetoric; it was then regarded as the

41 E.g. the decree about the Bacchanals of 186 BCE, and the imperial decree found at Larinum forbidding senators and *equites* to become gladiators. *CIL* i².581 = *FIRA* i.30.
42 Lintott (n 22) 7.
43 Lintott (n 22) 90.
44 Von Gerhard Plaumann, "Das sogenannte Senatus consultum ultimum, die Quasidiktatur der späteren römischen Republik" (1913) Klio 13, 321–386.

theoretical foundation of forerensic legal practice.[45] In the Roman Republic, rhetorical argument was a part of almost every higher-level activity – the law being one such activity. The influence of rhetoric on Roman law is a topic that has been continuously debated over the last sixty years.[46] It is part of a wider debate, that on the influence of Greek legal concepts and institutions on those of Rome, in which scholars remain divided.[47] However, more practically, it has to do with the inter-relation between rhetorical theory and training and philosophies of legality.[48]

Throughout the *pro Rabirio*, Cicero uses certain rhetorical tropes to frame past events within a certain light with respect to the law. Most notably, he refers to two rhetorical tropes: those of the *mos maiorum* and the discourse of 'tyranny'. The *mos maiorum* – the 'ways of the ancestors' – is a well-known tradition in Roman history. Under the Republic, it was the unwritten code of ancestral customs from which the Romans derived their political and social norms; the core concept of Roman traditionalism. It came to ultimately be regarded as a conservative tradition, idealized as a counterpoise to new proposals which changed the fabric of Roman civic life.[49] Watson argues that while *mos* was not one of the major factors in legal development in the later Republic, it can properly be regarded as making law during this time.[50] And indeed, Cicero refers uses the trope many times to make certain legal arguments. As mentioned above, Cicero discusses the SCU as a component of the *mos maiorum* (despite its short life) to assert its legal authority. Furthermore, his rejection of the procedure of the *duumviri* proposed by Labienus hinges on the fact that it is against the *mos maiorum* (as well as the *leges* and the *auctoritas senatus*).[51] Cicero argues that the duumviral procedure, with its compulsory condemnation (cf. the phrase 'indicta causa condemnari coegit'[52]) was a scandalous violation of what at least by the *mos maiorum*, if not by statute law, had become the customary method of dealing with *perduellio*, namely the tribunician prosecution. And he had a point: a recognized legal procedure had developed to try cases of *perduellio*, in which no *duumviri* were required, and a capital sentence, rarely conferred, was made more decent through the formula of *aquae et igni interdictio*. Despite the fact that the *lex horrendi carminis* existed, and had seemingly not been legally declared obsolete, Cicero argues, on the basis of *mos*, that the duumviral trial was not lawful.

Moreover, Cicero emphasizes the duumviral procedure's association with tyranny to undermine its legal authority. Any reference to kingship or *regnum* in the invective of the later Roman Republic indicated a power which, though arguably legal, was 'incompatible with the spirit of the Republican constitution.'[53] Cicero's claim that Labienus 'hunted out' (*conquisierit*) the procedure 'ex annalium monumentis atque ex regum commentariis' makes the point that the

45 John Anthony Crook, Legal Advocacy in the Roman World (Duckworth 1995), 3.
46 See ibid 3, 9 for a historical account of views on the relationship between rhetoric and legal truth.
47 Ibid, *introduction*.
48 On rhetoric and its importance in Roman law, see M.L. Clarke, Rhetoric at Rome: A Historical Survey (Cohen & West, 1953); Edward Corbett, Classical Rhetoric for the Modern Student (3rd edn, Oxford University Press 1990) and Enos (n 11).
49 Lintott (n 22) 4.
50 Alan Watson, Law Making in the Later Roman Republic (Clarendon Press 1974), 169.
51 Cic. *Rab.* 17.
52 *Rab.* 12.
53 C.H. Wirszubski, Libertas as a Political Idea at Rome during the Late Republic and Early Principate (Cambridge University Press 1950), 64.

origin of the *duumviri* was rooted in Rome's tyrannical past, which he takes care to elaborate on further in *Rab.* 13. Cicero's point is that in invoking the obsolete institution of the *duumviri*, Labienus was attempting to revive procedures and punishments which were essentially *inusitata* as well as cruel, and which were 'vestigium crudelitatis regiae' – unknown in the free Republic since the last expulsion of the kings.[54] His reference to Tarquin was particularly poignant – the annalistic account of Rome's last king was embellished with the stereotype of a Greek tyrant, so by 63 BCE his name had become synonymous with the evils of monarchical rule.[55] Superbia and crudelitas – both referenced – were the traditional vices of the tyrant, with *superbia* deriving from *hybris*, and *crudelitas* including any brutal and capricious act, but particularly murder.[56] At another point in the oration, Cicero claims that while people have accused him of opposing a legal procedure, he is proud to be opposing the ancient trial for *perduellio* on account of its punishment, which is equated with a charge of the kings.[57] Ultimately, Cicero's association of the duumviral trial for *perduellio* with kingship (as well as his presentation of it as contra the *mos maiorum*) are rhetorical tools that serve to undermine the legal authority of the procedure at hand. As devices employed at a court trial in order to temper the legality of another procedure, they must be understood as possessing, at least in some abstract respect, a type of legal authority.

CONCLUSION

Under Roman law, was Rabirius guilty of *perduellio*? I have attempted to demonstrate above that the answer to this question is far from simple. The oration Cicero delivered in 63 BCE reveals at least five different sources of legal authority, and the answer pertaining to Rabirius' guilt varies. It would appear that the true determinants of this answer might well be political context, tradition, and precedent: the procedure for *perduellio* went against Roman tradition and recent precedent; the SCU had been cast in a light of legal legitimacy by the events of 121 BCE; the trial had a clear political context. At the same time, however, we are told that the people were about to declare Rabirius guilty before the flag was pulled down on the Janiculum – an indication that something had changed from 121 BCE, and the outcome may have been different. Ultimately, and as a result, it will suffice to offer two concluding observations about Roman law in the late Republic: first, that there were many different sources of legal authority that might be cited, and second, that the law was more multi-faceted than singular.

54 Cic. *Rab.* 13.
55 Tyrrell (n 1) 91.
56 Superbia: H. Haffter, 'Superbia Innenpolitisch' (1956) SIFC 27, 135-41. Crudelitas: Cic. *Cat.* 3.24; *Dom.* 43. See Roger Dunkle, 'The Greek Tyrant and Roman Political Invective of the Late Republic' (1967) TAPA 98, 151-71.
57 Cic. *Rab.* 10. Cf. 17.

AFTERWORD

It is our sincere hope that you have enjoyed reading the second edition of the City Law Review. As City's sole publication of legal scholarship, we aim to provide our readers with the legal research of the highest quality and with original analysis of changes, threats and improvements within the legal sector.

We truly believe this year's writers have achieved these aims in their work through their dedication to excellence and skill. They have been a pleasure to work with through all stages of publication. We look forward to seeing their works in various other publications throughout their careers and wish them all the best in their future endeavours.

We would like to offer our sincere thanks to the City Law School, especially the Dean, for their continued support of the Law Review. Their faith, time and effort have been invaluable to the Law Review since the very beginning. We are so very grateful to them for making another edition of the Law Review possible.

Lastly, we would like to thank everyone for their patience throughout these difficult times and to all those who attended our online launch event with Supreme Court Justice Lord Briggs. We hope to have to opportunity to meet you all at our next launch event in safer times.

Yours faithfully,

The Editorial Board of the City Law Review