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FOREWORD

Jose Manuel Durão Barroso

It gives me great pleasure to welcome you to the 2nd edition of the revived ELSA Law Review. I should confess at the very outset that this foreword is addressed in particular to all the young student readers across Europe, although I expect that the readership of the review may well be significantly larger in demographic as well as geographic terms.

I am a lawyer by training and my legal background has been a great asset to turn to in my career as a politician, including during the ten years I served as the President of the European Commission. Law and lawyers have a major role to play when it comes to the functioning of their polities. This much is true for individual states but even more so for the European Union, a supranational community which in an important aspect was and a "community of law": not just a community based on the respect for the rule of law, but a community that was created by – and integrated through – law.

With power, of course, comes responsibility. It is easy to pay lip service to the commitment to maintain respect for the principle of the rule of law, but much harder to live up to this commitment in the everyday operation of a political community, be it national or European. This may well be the lawyers' (as well as the politicians') true test – ensuring that the rule of law is maintained and respected even when it is not politically or pragmatically expedient to courageous in their convictions. They should also take their vocation seriously, by which I mean more than simply memorizing the laws and knowing how to browse the case law. It is true that lawyers ought to be good technicians, masters of their craft who are well versed in knowing blackletter law and who can serve their clients to the best of their abilities; but we also need them to be critical thinkers, autonomous intellectuals able to take a step back to look at the bigger picture and engage critically with the existing legal framework. How else are we going to correct its flaws and find new solutions to new legal and societal problems?

It is in this spirit that I am fully supportive of the efforts and the ambition of ELSA in relaunching its law review and, by doing so, not only providing promising young thinkers an international forum to promote and test their ideas but also actively encouraging many students around our continent to start developing and articulating them. We count on these students, as we always do on the younger generations, to be diligent as well as creative, to be critical as well as constructive, to dare show us new possibilities and then, upon graduation if not before, start transforming them into reality.

I also find it particularly reassuring that the review encourages students to share their own research and original ideas. Many in the world have somehow gotten used to the idea that research is something mostly confined to the disciplines of the "hard" natural sciences dedicated to explaining, testing and changing the behaviour of the natural world around us, whereas law is often placed even outside the world of the "soft" social science focusing on understanding societies and individuals within them, and is instead depicted as a largely uninspiring craft of dry technical expertise. That impression is false. There is a need for research and innovation in law just as much as in the natural sciences, and sometimes precisely because of the advancements in natural science and technology, or because of new societal challenges that render existing legal solutions ineffective or impracticable. We need new legal solutions to new or transformed challenges – just by way of example, think about the many uses of new technologies, think about environmental concerns, think about designing new international standards and mechanisms in various disciplines to deal with transnational problems in an ever-more globalised world.

In short, we need students to be prepared for a changing world, and to be able to meet its demand for creative, appropriate and beneficial legal responses to new challenges. It is this ambition that drives the curriculum and the teaching approach of the best international law programmes, and that for instance led me to return to the academia to teach in the LL.M. programmes at the Católica Global School of Law in Lisbon. And it is the same ambition which drives Católica's collaboration with ELSA Law Review in encouraging, evaluating and promoting contributions by law students from across the continent. The papers that were selected to be published in this edition are reproduced in the following pages. I hope they start – or continue – a productive debate on the important open issues that they raise.

In any event, however, these contributions – as well as others from a large pool of inspiring submissions that could not all be included in the volume – will hopefully serve as an inspiration and a reminder to all that the world of legal academia and of legal writing is far from foreclosed. ELSA will soon be making a new call for papers, and we all will again yearn to hear from a new crop of promising legal thinkers to impress and inspire us, and in so doing reassure us that the commitment – and the unending struggle – to maintain and advance the rule of law will be in capable hands in the years to come.

LETTER FROM THE EDITORS

Dear Readers,

The re-establishment of the ELSA Law Review has been made with great zeal. These efforts were warmly welcomed not only by our big ELSA family, but also by dozens of students and spread throughout the network. Moreover, we are positively surprised to have achieved greater success with this one: we received more than 85 high quality articles, written by both graduates and undergraduates – from Europe, Africa and even the United States – on topics falling within a wide range of topics including human rights law, environmental law and corporate law. The competition was fierce.

In this edition, the 11 best articles were selected, reviewed and published. The topics differ, but the major criterion is that they serve the international legal community; even though some of them focus on an individual jurisdiction. Furthermore, we will be publishing an article from the upcoming edition of the ALSA Law Review, which is in turn going to include one of ours. This exchange is in the interest of legal cooperation and bridging that we want to build with our colleagues from Asia. The addition of this project to the already diverse ELSA agenda wholly underlies the need of the association to hold its own academic business card and exemplifies our aspiration to offer something comcrete to the legal community. In a world full of legal journals and opinions, the ELSA Law Review creates a new and accessible platform of additional opportunities for students, since competition is greater nowadays.

As is the case for every single publication, the ELSA Law Review would not be realised without the critical support of certain individuals. First and foremost, we would like to congratulate the whole Editorial Board – namely Jessica Allen, Mariagiulia Cecchini, Desara Dushi, Andreja Friškovec, Pavlo Malyuta and Timos Sourvas – for their dedication to the project. The team managed to effectively, consistently and persistently carry out all the essential tasks required to complete this publication. On behalf of the whole Editorial Board, we would like to further express our huge appreciation to our Academic Partner, Católica Global School of Law; through undertaking the peer-review process of the shortlisted articles, their academic contribution is incredibly valuable for the continued development of this legal publication. In particular, we cannot but sincerely thank Professor J.M. Barroso, Former President of the European Commission and Professor of Católica Global School of Law, who kindly wrote the encouraging foreword of this edition. Last, but certainly not least, we would like to warmly thank Wolf Legal Publishers – especially Mr van der Wolf – for their decision to support and set a professional structure to the project. It might be easy to compile alone a series of articles in a simple

document, but it is challenging to produce a professional legal publication with the potential to impact various different field.

For these reasons, we are truly grateful to each and every one of our contributors, thanks to whom the ELSA Law Review is en route to becoming a leading students' publication. We hope that the cornerstone that built this year will be well maintained by our successors and the whole ELSA network.

Best wishes,

Antonia Markoviti & Marilena Zidianaki
Editors-in-Chief of the ELSA Law Review

GLOBAL LEGAL COOPERATION

Dear Reader,

Before you proceed with the articles of this journal, we would like to highlight that this edition has a special aim to be addressed to as many European and Asian law students as possible among all the potential audience that will be reached. The reasons of this wish are briefly presented in our short article which you can find below as it was published at the 59th edition of the members' magazine of ELSA, Synergy. It should be our responsibility to get closer to each other and bridge our legal education now, in order to face collectively every future challenge.

We hope that you enjoy this edition.

Antonia Markoviti
Vice President in charge of Academic Activities of ELSA

&

Minami Tsuruta
Vice President for Academic Activities of ALSA

BRIDGING LAW STUDENTS IN ASIA & EUROPE: THE IMPORTANCE OF GLOBAL LEGAL COOPERATION

The long distance between Tokyo and Brussels and the time difference could not be perceived as obstacles and, in the end, they have been annihilated, when it came to identify that **ALSA** and **ELSA** have something more in common: two leading legal publications.

Founded in 2007, the **ALSA Law Review** is a student-run journal published annually by Asian Law Students' Association (ALSA) International. Focused on diversity in a shifting legal landscape of Asian countries, the ALSA Law Review has grown significantly over years and seeks to publish timely and important legal articles. The **ELSA Law Review** - founded in early 80s and re-established in 2015 - is a student-edited and peer-reviewed law journal published by the European Law Students' Association (ELSA). The ELSA Law Review strives to create an open forum for legal analysis and discussion and it serves as an international platform through which engaged law students, graduates and young legal professionals can showcase their legal research.

As the premier regional law students' organizations, ALSA and ELSA realize the challenges that arise from the varied legal systems and educational approaches of different countries and regions. It is beyond question that understanding social, economic, and educational factors that have shaped the legal views, principles, and systems of different jurisdictions benefits anyone who studies law. Striving for excellence, our Law Reviews provide a platform for law students with diverse backgrounds to engage in dialogue on current legal issues of global interest, as well as motivate them to enhance their research and writing skills. Additionally, these publications aim to provide an enthusiastic international readership with access to scholarly discussion of contemporary legal issues, exposure to which they may otherwise not have. The core of importance of this project is the free provision of a comprehensible source of legal knowledge tailored to young students' demands.

As the world is becoming smaller by globalization, Asia and Europe foresee greater legal cooperation. The initiation of this goal is clearly based on a big vision: by publishing simultaneously our work and exchanging legal opinions by experts on Asian-European legal relations, we do not only expand the reach of our reading audience, but we set the basis for the establishment of a frequent communication which is aspiring to bring concrete outcomes in the future and unite the populations when it comes to resolution of legal matters - and potentially issues of other fields as well. We believe that our new initiative will be a stepping-stone to bridging law students in the world's two most diverse regions, as the enhancement of legal capabilities of students cannot be achieved without the exchange of knowledge with one another.

ANTI-COMPETITIVE END-USER LICENSE AGREEMENTS AND TERMS OF SERVICE: THE NEED FOR A EUROPEAN REGULATORY FRAMEWORK

Afonso José Ferreira*

Abstract

End-user license agreements (EULAs) and terms of service (ToS) are contracts regulating proprietary software (in the case of EULAs) and website use (in the case of ToS), namely the applicable rights and restrictions. Acceptance of these, either express or tacit, is necessary for the use of software and websites. These agreements are both legally binding and generally enforceable, but, because of their structure (you have to agree to them in order to use the offered service) and legal written complexity, most people are unaware of their contents. In fact, most of them contain abusive clauses from the consumer's viewpoint. This article puts forward the notion that some of these clauses may also restrict competition, in clear violation of European Union (EU) competition rules. The text first provides, in the wake of the Digital Single Market communications, some examples of anti-competitive EULAs and ToS clauses, such as prohibitions to resell software or full prohibitions of reverse engineering. Subsequently, by comparing the rationales for the existence of end-user licensing in the United States (US) and in the EU, and by striving for a regulatory framework that protects both consumer and competition, this article puts forth a double-faced proposal. The proposal consists of not only formal competition regulation (forbidding anti-competitive clauses and a theoretical consideration of end-user licenses as property rights) but also behavioural regulatory mechanisms, such as visual simplification of EULA and ToS terms, derived from Thaler and Sunstein's work in law and behavioural economics, and inspired by previous EU actions.

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1. Introduction and Exposition of Problem

1.1 Introduction: The Perfect Contract

End-user license agreements (EULAs) and terms of service (ToS) are contracts regulating proprietary software (in the case of EULAs) and website use (in the case of ToS), namely the applicable rights and restrictions.[1] Most of us will have agreed upon hundreds of these contracts in our lifetimes, whenever we seek to install a piece of software on our computers or smartphones, or whenever we sign up for a web service such as social network, or even whenever we visit a website. The primary difference between EULAs and ToS is that EULAs require the user to check a box to give consent before installing the piece of software, while ToS agreement is normally given tacitly, with the website notifying the user that website use signifies ToS consent.[2] In all other aspects, the two terms may be used interchangeably and both regulate end-user use of copyright-protected content. In fact, EULAs and ToS are a logical consequence of the idea, present in intellectual property, that when we 'buy' a piece of software, we are, in fact, merely buying a license to use that software in the terms defined by its creator; otherwise, we would all be owners of all software we are using, with the correspondent intellectual property rights being bestowed upon a multitude of people. That would mean, for example, that we could all freely modify proprietary software and profit with those changes. This is the primary reason behind the existence of EULAs and ToS: to prevent the end-user profiting by using the software in ways that its creator did not intend.

EULAs and ToS are, in fact, legally binding agreements, and are generally considered enforceable through courts or arbitration.[3] In this sense, they may be defined as standard form contracts or contracts of adhesion, since their conditions are unilaterally decided by one of the parties (the software creator). This would normally mean that people should read them carefully; however, and even though

1 For more on these definitions, and especially on the comparison between licensing in proprietary and free software, The Linux Information Project (LINFO), "EULA Definition By The Linux Information Project" (2004) <http://www.linfo.org/eula.html> accessed 9 January 2016, archived at <http://perma.cc/J2D6-K6AZ>.

2 Originally, the end-user's consent in EULAs would also be given tacitly (or, at least, not as expressly as in their current iteration), by ripping apart the cellophane wrapper encasing the box where the disk containing the licensed software would be located. This is the reason why EULAs were first known, in the US, as "shrinkwrap" licenses. The end-user would know of the given consent only when first starting the disk and being presented with the license's text, with no way beforehand to know they had accepted a contract. In this sense – use as consent -, EULAs started by resembling ToS.

3 Whether these agreements are enforceable will depend on the end-user's jurisdiction's rules for formation of contract. In the case of ToS, for example, tacit agreement of the proposed clauses may not be enough, in some jurisdictions, for the existence of a contract to be assured. However, in this text, the general enforceability of these agreements will be presumed. In the US, both agreements are generally found to be enforceable by the judiciary, with the landmark case on the matter being *ProCD, Inc. v Zeidenberg* 86 F.3d 1447 (7th Cir 1996). See also Brandon L. Grusd, "Contracting Beyond Copyright: *ProCD, Inc. v Zeidenberg*" (1997) 10 Harvard Journal of Law & Technology 353 <http://jolt.law.harvard.edu/articles/pdf/v10/10HarvJLTech353.pdf>.

there are not formal studies on EULA and ToS awareness, it is widely considered that no attention is paid to them.[4] This is particularly frightening when one considers the consumer abusive clauses sometimes present in these agreements. Electronic Frontier Foundation, a North American non-profit focused on defending digital rights, has found that some EULAs and ToS include clauses that, for example, forbid the end-user from publicly criticizing the company producing the software, or signify automatic consent to unilateral modifications of those agreements without any need for the software maker to notify the end-user of new modifications[5]. Furthermore, clauses that allow the software to install monitoring software on the user's machine or freely collect user data are increasingly common.

These agreements make for the perfect contract. Because of coding properties and proprietary software construction, the end-user is required to accept the contract, either expressly or tacitly, before they can use the software they obtained. These are the perfect contracts of adhesion: impossible to change or refute in any way, legally binding, enforceable, and, most of all, completely unjust for the end-user, in a severe desecration of the principle of protection of the weaker party. This could not happen in a physical context, where the end-user could refute these clauses and bring them before a national court with jurisdiction over the contract; however, the special structure of digital space, normally considered impossible to regulate, is, ironically, what makes for such a binding legal contract[6].

The possible consumer and data protection violations of EULAs and ToS have been considered both by academia[7] and civil society, especially in respect to judicial declarations of enforceability, primarily in the US.[8] However, this article does not deal with such matters. Instead, the reason behind the writing of this article is the belief that some of the clauses normally present in EULAs and ToS may be anti-competitive, consisting in a violation of EU competition rules such as Article 101 TFUE *et seq*. Indeed,

4 For example, for April Fool's Day 2010, GameStation, a British online gaming store, inserted a clause in their website's ToS by which the user, when purchasing a game, consented to voluntary surrender of their soul to the game shop, resulting in 7,500 people selling their souls to the gaming retailer. Whether a soul can be voluntary sold is, of course, a wholly different matter, which would likely need an article on its own. Fox News, "7,500 Online Shoppers Unknowingly Sold Their Souls | Fox News" (2010) <http://www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls.html> accessed 6 January 2016, archived at <http://perma.cc/G67C-HES3>.

5 Annalee Newitz, "Dangerous Terms: A User's Guide To EULAs" (*Electronic Frontier Foundation*, 2005) <https://www.eff.org/wp/dangerous-terms-users-guide-eulas> accessed 6 January 2016, archived at <http://perma.cc/26N6-SX8T>.

6 Lawrence Lessig, Roy L. Furman Professor of Law and Leadership at the Harvard Law School, had previously warned to these matters in his book *Code Version 2.0*, which deals exactly with the regulatory framework of cyberspace and how Internet regulation needs to be evaluated through different lenses than 'physical' regulation due to the special constraints of code. EULAs and ToS are, although for different reasons, prime examples. Lawrence Lessig, *Code Version 2.0* (2nd edn, Basic Books 2006) <http://codev2.cc>.

7 Especially in the US. For example, Michael J. Madison, "Legal-Ware: Contract And Copyright In The Digital Age" (1998) 67 Fordham Law Review <http://ssrn.com/abstract=138256>; Lydia Pallas Loren, "Slaying The Leather-Winged Demons In The Night: Reforming Copyright Owner Contracting With Clickwrap Misuse" (2004) 30 Ohio Northern University Law Review <http://ssrn.com/abstract=582402>.

8 *ProCD* (n 4).

what this article aims to do is to propose a regulatory framework for EULAs and ToS in the EU that takes into account, not only the broadly discussed consumer and data protection concerns of both academia and civil society alike, but also questions about competition protection in Europe. In the light of the Digital Single Market Communications by the European Commission, and with the urgency of preparing Europe as a digital economy stakeholder, these matters seem more pressing than ever. Legal academics in EU law hold that the Digital Single Market will necessarily mean a change in copyright licensing rules in the EU;[9] if so, why not extend the needed regulatory reform to end-user licensing as well – a highly important part of software licensing, dealing directly with consumers?

This article is divided in two parts. In Part I, after this general introduction to EULAs and ToS, Part I.B will provide some examples of possibly anti-competitive clauses in these agreements. Part II then argues for the need of a new regulatory framework for end-user licenses; in Part II.A, the essence of this new regulatory framework will be approached through a comparison with the US mechanisms for EULAs and ToS. This will be done by arguing that the rationale for these agreements is different in the US, where the main concern has been to provide a competitive framework for software making. Conversely, in the EU, the main concerns have been to ensure consumer and data protection. As such, and with the Digital Single Market calling for end-user licenses that not only respect the software owner and protection rules, but also enforce the consumer and data protection rules under the advanced European standards, Part II.B will seek to propose a double-faced regulatory system for these agreements, based on formal regulatory methods, such as forbidding anti-competitive clauses, and behavioural regulatory mechanisms, such as a comprehensive visualisation mechanism that makes EULAs and ToS easier to understand for those who do not speak 'legalese'. These behavioural regulatory mechanisms, applied to competition, are inspired on the European Commission's previous actions when it comes to protecting competition in a digital economy.

1.2 Examples of Anti-Competitive Clauses in EULAs and ToS

This section will explore how some common clauses in both EULAs and ToS may be perceived as anti-competitive; this is in violation of European competition rules, such as Article 102 TFEU on the abuse of dominant market position. The issue at hand is not whether these clauses are abusive from the consumer's standpoint – even though, as previously analysed[10], some may very well be, disregarding consumer and data protection rules alike - but whether they are anti-competitive under the meaning of the Treaties and their interpretation by the Court of Justice of the EU (CJEU). The presented list is not meant to be exhaustive, firstly by reasons of space, and secondly due to the volatility of technology-

9 Pablo Ibáñez Colomo, "Copyright Licensing And The EU Digital Single Market Strategy" [2015] LSE Legal Studies Working Paper 19/2015 <http://ssrn.com/abstract=2697178>.

10 See n 6.

related issues; this to say, of course, that new product-specific clauses may appear in the future which may also be deemed as anti-competitive. As for now, this text will analyse two examples of anti-competitive clauses: clauses that prohibit onerous transfer of license ownership (or clauses that prohibit resell of license) and clauses that fully prohibit reverse engineering.

The first example of an anti-competitive clause is that which prohibits transfer of license ownership from the original end-user – who was originally licensed by the software maker as an end-user – to another end-user by onerous means, or a prohibition to resell a license. The fact is that forbidding the original end-user to resell their license to other end-users makes it impossible for a new market to be created – specifically, a market of second-hand software of a given kind. Of course, reselling a purchased good is not, in itself, a right granted by an end-user license; however, the right to resell is logical when considering a physical good and the right of property existing upon that good.[11] Indeed, if there is no prohibition to resell a physical good (except, in some cases, for health or consumer protection related issues), then to consider that this prohibition could exist in software would be abhorrent.[12] We will further explore this notion in Part II.B, when considering Easterbrook's theories on property in the Internet. This is, once again, a logical constraint of the regulation of code, the consideration of which does not even happen in "physical space", as put forward by Lessig in his book *Code Version 2.0*[13]. If a license forbade one to resell that same license, then it would become impossible for one to start a new market of resold licenses of a given piece of software; indeed, this would amount to an abuse of dominant market position by the software maker, since they are restricting the possibility of formation of new markets. This is, as will become apparent, contrary to Article 102 TFEU.

Though not based on competition-related reasoning, this was the position held by the CJEU in *UsedSoft*[14], wherein the Court found that, under the Computer Programs Directive[15], the first sale of a license by the software maker or with their consent exhausts that maker's exclusive right of distribution in the EU, whether that copy is marketed physically (by CD or DVD) or by download from the Internet.[16] This means that the software maker cannot oppose the resale of the bought license.[17] Some

11 In fact, civil law systems commonly defend that one of the rights descending from right of property is the "right of disposition", or the right to transfer ownership of goods to another person, either by onerous means or not.

12 In this sense, and developing on Lessig's position (n 7), James Grimmelmann, "Regulation by Software" (2005) 114 Yale Law Journal 1719, 1738 <http://www.yalelawjournal.org/note/regulation-by-software>.

13 See n 7.

14 Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* [2012].

15 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16.

16 In the sense of this decision and on the exhaustion doctrine, Case C-128/11 *UsedSoft GmbH v Oracle International Corp.* [2012] Opinion of AG Bot; Bridget Czarnota and Robert J. Hart, *Legal Protection Of Computer Programs In Europe* (Butterworths 1991) 60.

have noted[18] that the software industry may find solutions to this judgement in limited term licenses, separating license agreements from maintenance agreements or contracts for services, or by using technical protective measures to, for instance, make software unusable when resold; however, these measures seem even more anti-competitive and abusive than a clause that merely prohibits software resell.

A note should be made in regards to clauses prohibiting non-onerous transfer of license ownership. Even though these are not technically anti-competitive, since they do not forbid the creation of a new market, they are indeed extremely limiting of the original end-user's rights. However, the probable abuse of these clauses falls under consumer protection and not under competition rules.

The second example of an anti-competitive clause is that which fully prohibits reverse engineering. Reverse engineering may be defined as the process of extracting knowledge or design information from a computer program by disassembling it, analysing its components and workings in detail, and then putting it back together again. Even though there are lawful reasons for the reverse engineering of a program, some are illicit, such as "cracking" software in order to bring down copy protections or to create knock-offs of software. These are normally considered to be just reasons for forbidding reverse engineering, or, at the very least, forbidding reverse engineering when motivated by unlawful reasons.

However, lawful reasons are worthy of consideration, especially when taking into account competition. Reverse engineering for academic research or interoperability – guaranteeing that one product works with another, even in rare scenarios which regular use will rarely produce – is normally considered to fall under fair use.[19] In fact, if end-user licenses forbid reverse engineering due to interoperability, for example, then it would be impossible to market accessories or programs working in tandem with other software. This would constitute an abuse of dominant position by the reverse engineered software maker, contrary to Article 102 TFEU, as interpreted by the CJEU, since it would be impossible to create a new market for these products.

17 In this sense: 'In Tuesday's decision, "the court [is] applying principles that are clear in the bricks and mortar world to the digital environment," Geert Glas, global head of law firm Allen & Overy's IP practice said. "For that same reason it can be applied to other products and services, such as ebooks."' Duncan Robinson, "EU Court Decision Deals Blow To Oracle" *Financial Times* (2012) <http://on.ft.com/LW2wmT> accessed 10 January 2016, archived at <http://perma.cc/WFA2-8ACX>; cf n 19.

18 Kathy Berry, "EU - Usedsoft V Oracle: ECJ Approves Sale Of 'Used' Software" (*Linklaters*, 2012) <http://www.linklaters.com/Insights/Publication1403Newsletter/TMT-News-November-2012/Pages/EU-Used-Soft-Oracle-ECJ-approves-sale-used-software.aspx> accessed 10 January 2016.

19 "Fair use" is a term stemming from fair use doctrine in American copyright law. It first appeared in *Folsom v Marsh* 9. F.Cas. 342 (CCD Mass 1841). As to the differences between fair use in European and American law, Jonathan Band and Masanobu Katoh, *Interfaces on Trial 2.0* (MIT Press 2011) 136 <https://mitpress.mit.edu/sites/default/files/titles/free_download/9780262015004_Interfaces_on_Trial_2.0.pdf>.

In fact, the European legislator holds this view: the Computer Programs Directive created an exemption of interoperability to the general prohibition of reverse engineering.[20] This exemption seems to exist following the CJEU's findings in *Microsoft*[21], where interoperability – or lack thereof – was one of the key issues in finding the existence of a dominant market position by Microsoft. In fact, the preface of the Computer Programs Directive explains that "[circumstances] may exist when such a reproduction of the code and translation of its form are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs."[22] Curiously, in the US, an exemption for interoperability under the Digital Millennium Copyright Act has been found by scholars to be a direct copy of the exemption made by the Computer Programs Directive. Because of this, clauses *fully* prohibiting reverse engineering, or clauses forgoing its lawful uses, are clearly anti-competitive.

By stating that these clauses may breach Article 102 TFEU, as they hinder the creation of new product markets, one must take into consideration the interpretation of this article that the CJEU has provided in the compulsory licensing case law of *Magill*[23] and *IMS Health*[24]. In these cases, the CJEU decided that certain clauses in licensing agreements may violate what is currently Article 102 TFEU where those same licensing agreements make it impossible for a new product market to be created, among other conditions not considered here. As the CJEU has stated in *IMS Health*:

> *It is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.*[25]

It thus seems logical that, as argued by academics,[26] this reasoning should be extended beyond compulsory licensing cases to other situations of intellectual property licensing, such as end-user licensing.

Of course, taking this interpretation of *Magill* and *IMS Health*, one also reaches the conclusion that not all software product markets are capable of hindering the creation of new product markets; to argue so

20 Computer Programs Directive, art 6.
21 Case T-201/04 *Microsoft Corp. v Commission* [2007].
22 Computer Programs Directive, para 15.
23 Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) & Independent Television Publications Ltd. (ITP) v. Commission* [1995].
24 Case C-418/01 *IMS Health GmbH & Co. OHG v. ADC Health GmbH & Co. KG* [2004].
25 Ibid para 38.
26 Christian Ahlborn, David S. Evans and A. Jorge Padilla, "The Logic & Limits of the "Exceptional Circumstances Test" in *Magill* and *IMS Health*" (2004) 28 Fordham International Law Review 1109, 1124 <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1982&context=ilj>.

would be to deprive the aforementioned clauses of their lawful basis. Indeed, the consideration of whether such an impediment is happening must be made in a case by case basis, taking into account the specifics of each primitive product market, as must happen in all situations relating competition law and intellectual property rights. Of particular relevance to this idea will be the counterfactual theory, commonly used in technology transfer agreements and their acceptance under Article 101 TFEU for example, to determine possibly anti-competitive practices.[27] These are merely two possibly anti-competitive clauses under the European competition rules. In fact, the anti-competitive effects of EULAs and ToS are unfortunately present in the multitude of legal texts behind every piece of proprietary software or website. Even more worrisome is the idea that these clauses may be not only anti-competitive but may also violate consumer and data protection, as the reader has surely by now surmised. However, this text will not deal with such matters, which have been extensively discussed, especially by American scholars.[28] This is, nevertheless, a warning that has to be made. Having established that there are anti-competitive clauses in EULAs and ToS, Part II of this article will propose a regulatory framework in EU law which will have to deal both with competition protection and consumer/data protection alike.

2. A Regulatory Framework for EULAs and TOs in Europe

2.1 The Rationale for End-User Licensing: Competition Protection in the US and Consumer/Data Protection in the EU

This section will explore the relationship between consumer/data and competition protection when considering anti-competitive clauses in EULAs and ToS, and specifically the different rationales behind the creation of these types of contracts in both the US and the EU; the conclusion reached is that European rules must adapt themselves to the North American rationale in order to ensure both competition and consumer/data protection.

A historical comparison between software markets in the US and Europe is needed to better explain this perspective. Commercial software industries first appeared in the US with the computing revolution of the 1970s. In fact, the first consideration of software as a market good, distinct from hardware, was made in 1969 when IBM (at the time holding the dominant market-share in the computing industry) decided to unbundle software and services from their hardware, making it possible to buy one or the other separately. Software was normally included in the hardware bought by commercial clients – at the time, and before the personal computing revolution, the biggest customers of computer companies such as IBM – and installed free of charge. By selling their Program Products,

27 Steven D. Anderman and John Kallaugher, *Technology Transfer and the New EU Competition Rules* (Oxford University Press 2006), 167.

28 See n 8.

as software was marketed, IBM successfully created a new market for a product which, as a product *per se*, had not existed before.[29] Cries of anticompetitive practices from IBM's competitors – who would nevertheless go on to follow its conduct – led the US Department of Justice to sue IBM, in a case that dragged on for the next thirteen years, and was eventually dropped when the practice became common in the industry. Even though the suit was dropped, IBM had successfully created the software market.

With the personal computing revolution and the emergence of more and more powerful computers for the common user, the practice of buying software created by other companies than the hardware maker became common. It reached its peak in the 1990s, with the term commercial off-the-shelf software becoming increasingly used and with the appearance of companies entirely dedicated to software, such as Oracle, Google or Sun Microsystems. A software industry, directly linked to the hardware industry, appeared. These were widespread industries with facilitated entry due to the ease of use of personal computers.[30] As such, when the time came to further regulate this industry, the American legislator was preoccupied, not with the consumer or data protection – these worries would appear later, curiously inspired by the European legislator's choices[31] – but with ensuring fair competition within a populated industry. The legislator's reasoning for software regulation – which had, among other effects, as a consequence the creation of end-user licensing as we know it – was to make the software creation playground a fair one; one where issues such as corporate espionage were abolished. As such, later pieces of legislation, like the much vilified DMCA,[32] made it possible for software to include the obligatory installation of digital rights management software on the end-user's computer, which would ensure that the end-user would not circumvent proprietary software in order to use its source code for anti-competitive reasons, nor that they would acquire proprietary software by any unlawful means. The US end-user licensing regulations focused on competition and economy, enabling the country to boost its digital economy to the levels we know today, as crystalized in the digital industries of Silicon Valley.

In the EU, things were quite different. The creation of a computing industry did not take place until much later, inspired by the personal computer revolution that started in the US. The European digital industry, where it existed, appeared with the goal to feed the needs of common users and not companies. As such, a computer hardware market like the one represented by IBM did not exist; in fact, most computers in Europe at the time were either North American or Japanese. This meant that European consumers were using European-made software – although still in small scale when

29 For more on the decision to unbundle software made by IBM, E.W. Pugh, "Origins of software bundling" (2002) 24 Annals of the History of Computing, IEEE 57 <http://ieeexplore.ieee.org/xpl/articleDetails.jsp?arnumber=988580>.

30 One of the most famous software companies of all time, Microsoft, was actually started in a basement, with two college students (Paul Allen and Bill Gates) writing a program for hardware designed by other companies.

31 As defended by Band and Katoh (n 20).

32 Digital Millennium Copyright Act of 1998, Pub L 105-304.

compared to the booming software markets of Silicon Valley – with foreign-made hardware. There was, as previously explained, a preoccupation of the North American legislator with competition, especially since end-user licensing regulations first appeared before the personal computer revolution. However, the European legislator did not have this concern. If there was no large software nor hardware market, why would they concern themselves with that matter? Instead, the EU found something much worthier of concern: the idea that software, whether created in Europe or elsewhere, could violate consumer and data protection.

Consumer protection was initially a logical consequence of the internal market, deriving firstly from the notion of fair consumer treatment with the movement of goods and services from Member State to Member State. It also moved forward by soft law initiatives in the field, and through a progressive harmonisation of consumer law in Member States, leading the Union towards what Weatherill calls an indirect consumer policy,[33] due primarily to the gradual expansion of EU activity beyond defined Treaty limitations.[34] This eventually evolved towards an explicit reference to consumer rights in the Charter.[35] The same may be said for data protection, which is considered to have evolved from consumer protection, and which is predicted not only in the Charter,[36] but also by the highly innovative (and soon to be replaced by the proposed General Data Protection Regulation) Data Protection Directive[37]. The preoccupation of the European legislator with data and consumer protection with regard to software was due to the very fact that software was mostly foreign-made. If there had been an earlier computing industry in Europe, then the Union would have concerned itself sooner with competition law in the software world. However, the reverse of this is also true: in the US, there still is not a data protection act with the strength of the Data Protection Directive, as noticed by North American scholars.[38] Regulation of end-user licensing in the EU stems from legislative concern with consumer and data protection in a Europe that has only just started producing, on a large scale at least, its own software and hardware.

I argue that this approach is not enough. The European Commission has put forward plans to begin the building of the Digital Single Market, the expansion of the European single market idea into digital space. With it have come legislative proposals on copyright reform to end content geo-blocking across

33 Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Elgar European Law 2013) 4.

34 Stephen Weatherill, 'The Constitucional Context of (Ever-wider) Policy Making' in Erik Jones and others (eds), *The Oxford Handbook of the European Union* (OUP 2012).

35 Charter of Fundamental Rights of the European Union OJ C83/389, art 38.

36 Ibid art 8.

37 Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

38 Julia M. Fromholz, "The European Union Data Protection Directive" (2000) 14 Berkeley Technology Law Journal 461 <http://scholarship.law.berkeley.edu/btlj/vol15/iss1/23/>.

the Union,[39] to create a new digital economy for Europe and to shape a new environment for technological networks to flourish, namely through the adoption of the aforementioned General Data Protection Regulation. One of the key changes made by the Union will have to be end-user licensing; if it previously had as its basis a need for consumer and data protection, now it will have to consider competition as well. In fact, the proposal this article puts forward is based on a double rationale for end-user licensing: it needs to protect both consumer and competition alike. The emergence of a new digital economy in Europe will necessarily have to focus itself with competition; and, as I previously showed, EULAs and ToS may be highly anti-competitive. The next section will, and with this mixed rationale in mind, put forward a proposal for end-user licensing reform that focuses not only on consumer and data protection, but also on competition.

2.2 A Double-Faced Approach to End-User Licensing Competition Protection: Formal and Behavioural Regulatory Mechanisms

Taking into account the mixed rationale explored in the previous section, and much needed for the upbringing of a new digital economy for Europe, this section will now put forward a proposal for a new approach to end-user licensing: one that considers not only consumer and data protection, as has happened before in Europe, but also matters of fair competition. My proposal is a double-faced one: it is composed not only of formal regulatory mechanisms, such as the ones commonly found in EU competition rules, but also of what I call behavioural regulatory mechanisms. Behavioural regulatory mechanisms are tools of regulating consumer behaviour in such a way that what is anti-competitive becomes competitive once again; these mechanisms, inspired by behavioural economics, are commonly used in consumer law.

The first aspect of end-user licensing reform which has to be considered is to formal regulatory mechanisms. These mechanisms are formal ways of consolidating and prohibiting anti-competitive clauses. The first way in which this may happen is through the adoption of legislative measures by the Union, such as directives or regulations, specifically forbidding certain types of clauses in EULAs and ToS. We necessarily have to notice the inclusion of these agreements in the category of contracts of adhesion;[40] since these are commonly regulated by consumer law rules, perhaps these legislative measures could take part at the level of directives regulating contracts of adhesion. Nevertheless, the adaptation of the regimens for contracts of adhesion to a digital based economy is being explored at the

39 Glyn Moody, "EU Announces Plans To Banish Geo-Blocking, Modernize Copyright Law" (*Ars Technica*, 2015) <http://arstechnica.com/business/2015/03/eu-announces-plans-to-banish-geo-blocking-modernize-copyright-law/> accessed 25 January 2016, archived at <perma.cc/37US-46P5>.

40 As noticed by Loren (n 8). However, one should notice that the inclusion of terms of service in the definition of contracts of adhesion is more difficult, since these contracts are agreed upon tacitly, which is normally not a characteristic of these types of contracts.

level of the Member States themselves, and the discussion of whether it should happen at the EU level would be another article in itself.

However, the simple explanation of what is or not forbidden as anti-competitive is not enough. The specifics of digital regulation have been explained by Lessig and others, and this kind of practice could not be abolished merely via legislation. If there are currently companies operating outside of the scope of EU regulations and directives, such as Uber (a transport and digital company), since they are impossible to categorise through normal means, then specific measures need to be taken to regulate a digital-based economy.

One of the most interesting proposals on digital regulation has been put forward by Easterbrook.[41] For the end-user, in relation to the internet, Judge Easterbrook seems to argue that copyright needs to be considered in terms of property. As we have previously noticed, specific anti-competitive clauses in EULAs and ToS stem forbid the end-user to do something with their license that they would be able to do if the purchased license was a physical object. The ability to resell a license, for example, makes all sense when considering rights of property; it does not make that much sense when thinking of copyright. I believe that, in order for end-user licensing to be both effective and competitive, it has to consider licensing itself not only as copyright, but as a property right – the end-user has to have all the rights inherent to the purchasing of a physical object. My suggestion is not that we start ignoring intellectual property rights in software; indeed, what I am arguing is that end-user licensing, although a by-product of intellectual property, should grant the end-user the same rights as a right of property grants to physical purchased goods. In this sense, and responding to Easterbrook, Lessig published an article in good part dedicated to the notion I have just described, although focusing more so on State regulation of the Internet.[42] Lessig even goes as far as to suggest that one should have a property right over their personal data, to sell or publish on the Internet as one seems fit.[43] This idea is not at all at odds with what this article has been discussing and seems worthy of debate.

All things considered, one reaches the first side of this double-faced approach to end-user licensing: what I call formal regulatory mechanisms, either through legislative means or through a theoretical conception of the rights, akin to those stemming from property rights, granted upon the end-user licensee. The granting of these rights to the end-user would constitute not only a protection in terms of competition, but would also improve upon consumer and data protection, enabling end-users as fully fledged owners in the eyes of consumer law; although, and once again, there is no intention of

41 Frank H. Easterbrook, "Cyberspace and the Law of the Horse" [1996] The University of Chicago Legal Forum 207, 212 <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2147&context=journal_articles.

42 Lawrence Lessig, "The Law of the Horse: What Cyberlaw Might Teach" (1998) 113 Harvard Law Review 501, 528 <https://cyber.law.harvard.edu/works/lessig/finalhls.pdf>.

43 Ibid 519.

depriving intellectual property holders of their rights, but merely augmenting the scope of those who buy secondary rights from them.

Another face of this approach is based on what I call behavioural regulatory mechanisms. The idea is that competition could be boosted, and competition rules respected, by making small changes to the way how consumers interact with software products in Europe. It has to do with the notion that most consumers do not read end-user licensing agreements, neither when they have to expressly accept them, nor when they are given an optional way to read them.

These would take the form of a visual simplification system of EULAs and ToS, such as the icon-based one used for Creative Commons.[44] For each of their licenses – which are also end-user licenses, although granted in a non-onerous way and commonly related with the free software movement[45] - Creative Commons uses a group of icons identifying rights and obligations bestowed upon the end-user. They call these icons the "Commons Deed",[46] "a user-friendly interface to the Legal Code beneath";[47] although, "the Deed itself is not a license, and its contents are not part of the Legal Code itself".[48] The goal of the Commons Deed is to make available to every user, no matter their legal knowledge, the understanding of what is or not acceptable to do with a piece of media covered by a Creative Commons license. The suggestion of using a visual simplification method for end-user licenses in proprietary software would neither substitute end-user licenses as the complex legal texts that we all know and love, nor would it mean automatic restriction of any clause that is not representable and quickly understandable with an icon or image. Nevertheless, I truly believe that the implementation of such an auxiliary method would greatly help to increase the number of end-users who actively read and seek to understand the often restrictive licenses they are struck with.

Two notes need to be made about this proposal. Firstly, I argue that the use of a visualization mechanism constitutes a behavioural regulatory mechanism in the vein of those suggested by Thaler and Sunstein in their writings on law and behavioural economics, effectively corresponding to their notion of "nudging" consumer behaviour in the right way.[49] That may, in fact, be why the use of Creative Commons licensing is so popular, even in areas where copyright licensing is not traditionally used, such as blogs. Considering license visualisation as a nudge is not at all an uncanny notion; given

44 Creative Commons, "Creative Commons" <http://creativecommons.org/> accessed 26 January 2016.

45 For more on the comparison between end-user licensing in proprietary and free software, n 2.

46 Creative Commons, "About The Licenses - Creative Commons" <https://creativecommons.org/licenses/?lang=en> accessed 26 January 2016, archived at <http://perma.cc/DDP6-BJFW>.

47 Ibid.

48 Ibid.

49 Richard Thaler and Cass Sunstein, *Nudge* (Penguin Books 2009). Thaler and Sunstein describe nudge as "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives."

the EU's traditional worry with consumers' choices, it makes sense to nudge their behaviour towards rational choices, especially when dealing with complex contracts of adhesion such as the ones at hand in this case. It would benefit both industry and consumer alike if the end-user could better understand the contract they are agreeing upon, since it means, as this article has previously explained, a healthy boost in competition in the new European digital economy.

The second note to be made is that, to those worried about paternalism, nudges are already increasingly common in matters of competition and consumer protection in the US[50] and in Europe, in digital-related issues. In one well known case, with a competition focus, the European Commission ordered Microsoft to sell a version of Windows without their browser, Internet Explorer, installed. Instead a webpage, called BrowserChoice, would present a list of web browsers and installation links to the new Windows user. The idea was that pre-installing Internet Explorer in Windows computers restricted users' choices to later install other browsers, since, given they already had one on their computers, they were unlikely to search for another one. As such, the Commission considered Microsoft's bundling of Explorer with Windows anti-competitive.[51] Another example of the use of nudges by the EU, now in consumer protection and through legislation, is a ban on pre-ticked boxes on online purchases by the Consumer Rights Directive[52], considering them unfair nudges which may impose unjust obligations on the buyer.[53] Nudging comes from behavioural economics, and its use in competition law is becoming increasingly common.

3. Conclusion: What New Digital Economy for Europe?

Having explained how end-user licensing may be anti-competitive, and having presented a double-faced approach to end-user licensing based on formal regulatory mechanisms – not only through legislation but also through theoretical consideration of end-user licensing as granting the licensee with rights akin to those stemming from property rights – and behavioural regulatory mechanisms, it is clear that Europe needs copyright reform. Current copyright laws in the EU are outdated, having as reference a Europe of digital consumers and not of digital makers. The European focus on consumer and data protection in copyright has been both unprecedented and far reaching, leading us to conclusions such

50 As an example, with car insurance, see Eric J. Johnson and others, "Framing, probability distortions, and insurance divisions" (1993) 7 Journal of Risk and Uncertainty 35 <http://link.springer.com/article/10.1007/BF01065313>.

51 *Microsoft – Tying* (Case COMP/C-3/39.530) [2009] OJ C36/06.

52 Council Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

53 Pete Lunn, *Regulatory Policy and Behavioural Economics* (OECD Publishing 2014) 15 <http://www.keepeek.com/Digital-Asset-Management/oecd/governance/regulatory-policy-and-behavioural-economics_9789264207851-en>.

as the invalidity of the Safe Harbour US-EU agreements in a decision by the CJEU.[54] This concern with consumer and data protection is a good thing; however, if the EU wants to bolster a fledging digital economy, it is not enough. Rules on software, with end-user licensing being a small example, have to concern themselves also with competition. How can a digital economy be created without competition rules?[55]

The questions raised by this article are also relevant to other topics. EULAs and ToS are examples of abusive contracts of adhesion; and their abusive character is only fortified by their digital structure, with EULAs having to be agreed upon by the end-user in order for them to use the corresponding program. Ponderation needs to be given to the contemporary role of contracts of adhesion in our lives and economies, especially when these contracts are being transformed by code. Once again, Lessig's reminder that code is both impossible to regulate and restricted by specific rules akin to those of physics, when compared to physical space, rings sad. Sadder still is the fact that, 70 years after Kessler first raised concerns with contracts of adhesion,[56] these are still abusive and imperfect, used by economic agents with greater bargaining power to control those without the means to fight back in negotiation.

The proposed use of visualisation mechanisms as a way of simplifying EULAs and ToS for end-users is also a proof that law and behavioural economics is a field still in its infancy. Nudging and other theories put forward by Thaler, Sunstein and others will influence public policy and regulation in fields such as competition or consumer law. EU law is, as this article has tried to show, no exception. The Commission's plans for a Digital Single Market and a new digital economy for Europe are ambitious. However, in order for them to be fulfilled, provisions must be set in place to protect both consumer and competition. This article has been a modest proposal to show that areas commonly taken as a given still need refining in order to bring European law up to speed with the digital economy reforms yet to come.

54 Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* [2015].

55 As an example of the controversies surrounding the Commission's Digital Single Market plan and the adaptation of competition rules to this new dimension, and in this case on online commerce across the Union, Lukas Simas, "EU's Approach To Bans On Online Sales: Consumer Welfarism Or Digital Market Integration? - Berkeley Technology Law Journal" (*Berkeley Technology Law Journal*, 2015) <http://btlj.org/2015/11/eus-approach-to-bans-on-online-sales-consumer-welfarism-or-digital-market-integration/> accessed 26 January 2016, archived at <http://perma.cc/2JYX-RQY3>.

56 Friedrich Kessler, "Contracts of Adhesion – Some Thoughts About Freedom of Contract" (1943) 43 Columbia Law Review 629 <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3728&context=fss_papers>.

IN INTERNATIONAL CHILD ABDUCTION CASES: WHETHER THE AMERICAN APPROACH IN IMPOSING CONDITIONS FOR THE RETURN OF A CHILD (UNDERTAKINGS) IS COMPLIANT WITH THE BEST INTERESTS OF THE CHILD?

Yueying Liu*

Abstract

The introduction of this paper outlines the important elements of the Hague Convention on Child Abduction, its purpose and how it operates in practice. On this basis, chapter II analyzes case law in order to shed light onto a significant concept: the 'undertaking approach'. Overall, this paper focuses on the approaches applied by courts in the United States of America (US) as well as the evolution of the concept of imposing conditions for the safe return of a child, despite the fact that Article 13(b) is proven to be applicable. Furthermore, it illustrates the reasoning behind the approach adopted by US courts, considering that even if a situation under Article 13(b) is present, it is in the best interests of a child to send him or her back. In addition to this, this paper hereby evaluates the benefits and the disadvantages of this approach.

Chapter II presents the arguments surrounding the undertaking approach, thus emphasizing the approach of the US courts on imposing conditions for the safe return of a child. The Convention on the Rights of the Child will be applied. Additionally, its main goal is also highlighted and how the Convention ensures the best interests of the child. Hereinafter, this paper argues that such an approach taken by the US courts is not compliant with the child best interests principle. The main arguments are certainly in line with the Hague Convention, therefore the analysis of the case law and the aforementioned convention is the focal point of this section. Finally, the conclusion underlines the possible solutions to the US courts' approach. In addition, it asserts the reasons why the US courts failed to take into account children's interests while applying the Hague Child Abduction Convention.

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1. Introduction: The Hague Convention on Child Abduction

Due to the increase of international travel, globalization, free movement of people and services, child abduction by parents has become a serious problem since the 1970s that has alarmed numerous countries on the international scene.[1] The Hague Convention on the Civil Aspects of International Child Abduction[2] (the Convention) was adopted on 25 October 1980 in order to combat parent abducting. The United States (US) signed the Convention in 1988 and, in order to integrate parental abduction issues into its national legal regime, it passed the International Child Abduction Remedies Act.[3] The main purpose of the Convention is 'to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for right of access'.[4] However, the Convention does not extend to the subject matter of custody issues itself and thus this paper shall not consider that debate.

The Hague Convention identifies four main stakeholders: the child (only the child who is under 16 will be subject to the Convention),[5] the left-behind parent (petitioner), the abducting parent (respondent) and the Central Authority.[6] The Hague Convention is only applicable in certain circumstances: when there is a wrongful removal of a child by one parent from the child's habitual residence, which is defined in Article 3 of the Convention;[7] when the parent who should have given consent did not offer his or her permission for the removal of child (left-behind parent, petitioner);[8] and when the parent, in the meantime, has the parental responsibility[9].

The Convention also stresses the importance of the notion of 'habitual residence' under Article 4.[10] However, the Convention did not define the phrase, such that it is to be considered as the place where the child lived before the immediate removal or retention.

1 The Article 13(b) 'Grave Risk of Harm' Exception of the Hague Convention on International Child Abduction: Its Application in a World of Terrorist Threats, Infectious Diseases and Civil Unrest http://www.kentlaw.iit.edu/Documents/Academic%20Programs/Honors%20Scholars/2004/Wenfeng-Li-paper.pdf accessed in 16 of June 2015.

2 Hague Convention on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law,(adopted 25 October 1980), Hague XXVIII.

3 International Child Abduction Remedies Act (ICARA) (adopted 29April 1988). H.R. 3971, was assigned Public law 100-300 in 42 U.S.C. 11601.

4 Hague Convention on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law,(adopted 25 October 1980), Hague XXVIII Preamble.

5 Ibid Article 4.

6 Ibid Article 6.

7 Ibid Article 3.

8 Ibid.

9 Ibid.

10 Ibid Article 4.

Moreover, Article 5 illustrates that the removal is a wrongful act if the abductor violates the left-behind parent's right to custody and right to access. The right to custody stipulates that the left-behind parent has the right to determine the habitual residence of the child.[11] Therefore, as long as the left-behind parent shows that the abductor took the child away from the family home without his or her consent, a child abduction claim may be lodged to the Central Authority at hand. The claim would therefore fall within the scope of the Convention. Hence, the judge in the abduct-to country can order the return of the abducted child.

The return order procedure is laid down in Article 7.[12] However, there are five defenses available for the abducting parent, against whom the return order has been issued, listed in Articles 12, 13 and 20 of the Convention.

Yet it is Article 13 (b) that concerns the main subject of this paper, the notion of grave risk of harm, which regulates 'that the judicial or administrative authority of the contracting party is not bound to order the return of the child if there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.[13]

2. Case Law Pertaining to Undertakings

This chapter focuses on the case law concerning the undertaking approach in order to define the concept of imposing extra conditions (undertakings) that has been established before the US courts. The main purpose of the Hague Convention, as aforementioned, is to ensure the expeditious return of the child to its habitual residence providing that the wrongful removal has been proven by the left-behind parent.[14] Article 10 of the Convention stresses a preference for voluntary return of the child. However, the courts can refuse to order the return once one of the five defenses is met. The five defenses are as follows: (1) The return of the child would violate human rights and fundamental freedom[15] (2) The left-behind parent was not actually exercising custody rights at the time of removal[16] (3) The left-behind parent had consented to or subsequently acquiesced in the removal of the child[17] (4) It would expose the child to a grave risk of physical or psychological harm[18] (5) The child has attained the age of maturity and objects to return.[19]

11 Ibid Article 5.
12 Ibid Article 12.
13 Ibid Article 13.
14 Ibid Article 10.
15 Ibid Article 20.
16 Ibid Article 13(a).
17 Ibid Article 13(a).
18 Ibid Article 13(b).
19 Ibid Article 13.

If the abductor parent applied for the child to stay, the burden of proof shifts to him or her, in order to prove one of these five exceptions. The burden of proof is higher as the abductor must present specific or substantial evidence to show that the child is very likely to be exposed to great harm if returned to the habitual residence.[20]

US courts nevertheless take an extremely narrow approach with regards to the Article 13(b) grave risk exception, as the US is considered as the leading authority on the interpretation of the Convention.[21] In an early case *Navarro v Bullock*[22], the caution of the court in applying grave risk defense was evident. The court ordered the return of the child, regardless of testimony of the court-appointed doctor that the daughter might face the risk of permanent psychological damage.[23] According to the judgment, the court believed that it was in the best interest of the child to be returned to Spain. Moreover, the Spanish court (of her habitual residence) not only has the jurisdiction over the custody issues, but also is most suitable to decide any arrangements for the child[24]. The return order was in accordance with the Convention's goals of deterring the abductor on one hand and ensuring the right to custody of the left-behind on the other.

Consequently, the US has established an 'imposing extra conditions' approach or 'further analysis' approach. Not only does Article 13(b) need to be proven by the abductor, but there also must not be a mitigating measure which can be taken in the country of residence to reduce that risk.[25] As aforementioned, this chapter discusses the case law of the US Courts and emphasizes relevant approaches and the evolution of each case.

2.1 The Interpretation of Grave Risk

2.2.1. Friedrich v. Friedrich[26]

In the famous case *Friedrich v. Friedrich* (1996), the US Court of Appeal for the Sixth Circuit interpreted the notion of 'grave risk of harm'. The court explained that the abductor can only use the grave risk defense in two situations.[27] The first one is when the return of child would put the child in imminent danger prior to the resolution of the custody dispute.[28] For instance, returning the child to a war area or

20 Dallmann, Peggy D, 'The Hague Convention on Parental Child Abduction : an analysis of emerging trends in enforcement by U.S. courts' (1995) 5 Ind. Int'l & Comp. L. Rev. 171, 197.

21 Sharon C. Nelson, 'Turning Our Backs On The Children: Implications Of Recent Decisions Regarding The Hague Convention on International Child Abduction' (2001) U. Ill. L. Rev. 669 693.

22 *Navarro v Bullock* [1989] HC/E/USs 208.

23 Ibid.

24 Ibid.

25 Merle H. Weiner, 'Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases' (2008) 58 AM. U. L.REV 335, 349.

26 *Friedrich v. Friedrich* [1996] 78 F.3d 1060, 1069 (6th Cir.).

27 Ibid at 69.

28 Ibid at 69.

an area where the child would be susceptible to famine or disease.[29] The second one is when the left-behind parent has conducted serious child abuse or neglect, or the child has developed extraordinary emotional dependence on the abducting parent, and the court in the country of the habitual residence may be incapable or unwilling to give the child adequate protection.[30]

The US court, when applying the 'grave risk' exception in this case, stated that it would only take into account these two situations. That is to say that arguments such as the lack of economic educational opportunity in the country of habitual residence,[31] or the happiness of the child in the abducted-to country,[32] would not trigger the exception. Significantly, the court imposed an extra condition for applying the grave risk defense which stipulates that the authorities of habitual residence are not able to offer effective protection for the child. In other words, the US courts started to conduct further analysis to examine the efficiency of the child protection law in the abducted-from country. Here, the court artificially imposed an extra condition on the safe returning the child even though Article 13 (b) is satisfied.

2.2 The Concept of imposing extra conditions

2.2.1 Blondin v. Dubois[33]

In the *Blondin v. Dubois* case, the US court explicitly adopted a further analysis as to 'whether suitable arrangements to protect the child can be made in the country of habitual residence, despite a finding of grave risk'.[34] The case pertained to a French mother who took away her children to the US without the consent of their father. She argued for an Article 13 (b) grave risk exception by showing that the father had verbally and physically abused her and the children by beating, choking, and threatening to kill them.[35] She even went to a battered women's shelter twice in 1993[36] and had sought sole custody before French court.[37] However, the court granted both parents custody, with the father receiving physical custody and the mother receiving visitation rights.[38]

These assertions were later confirmed by the court. The District Court found that sending the children back to France would cause physical harm. Nevertheless, the Court of Appeal, though agreeing with those findings, remanded the District Court for further consideration of whether it would be possible

29 Ibid at 69.
30 *Ibid* at 69.
31 *Mendez Lynch v. Mendez Lynch*, [2002] 220 F. Supp. 2d. 1347.
32 *JanakakisKostun v. Janakakis S.* [1999] W.3d 843, 850 (Ky. Ct. App.).
33 *Blondin v. Dubois* [1999]189 F. 3d. 240 248 (2nd Cir.).
34 Ibid.
35 Ibid at 243.
36 Ibid.
37 Ibid.
38 Ibid. at 125-26.

for some temporary arrangements to be made in France in order to ensure effective protection.[39] 'Grave risk' had been proven and thus the District Court ought to have denied the return order based on the Convention. However, the Court of Appeal (Second Circuit) insisted that a further analysis concerning the habitual residence country may be necessary in order to ascertain whether it would be possible to allow for a temporary placement for the child return to France for a custody hearing.[40]

In the judgment, the Court of Appeal held that the return of the children to France in order to resolve the custody issue could be achieved by placing them 'in the temporary care of some other person'.[41] It stated that 'to ask the District Court to consider range of remedies that might allow both the return of the children to their home country and their protection from harm, pending a custody award in due course by a French court with proper jurisdiction'.[42] Later, the Court even suggested that the 'District Court should not limit itself to the single alternative placement', but 'feel free to make any appropriate or necessary inquiries of the government of France—especially regarding the availability of ameliorative placement options in France'.[43] The possible proposed placements were in the care of a third party or 'with subsidized housing and social services'.[44]

The aim of the Court was to return the child promptly, as required by the Hague Convention, as the home country is more suitable for adjudicating custody. Even though the court made inquiries and confirmed the risk of great harm in the habitual residence country, a court must in the meantime take into account the remedies available that will protect the child if repatriated, as required by the US courts.[45]

2.2.2 Walsh v. Walsh[46]

The same theory had been proposed in the *Walsh v. Walsh* case. The First Circuit Court insisted on the theory that 'a potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings'.[47] Furthermore, the court reasoned that 'the undertakings approach allows courts to conduct an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical

39 Ibid at 242.
40 Ibid at 244.
41 Ibid. at 242.
42 Ibid. at 249.
43 Ibid. at 249.
44 Ibid at 249.
45 Robert G. Spector 'A Guide to United States Case Law under The Hague Convention on the Civil Aspects of International Child Abduction' Yearbook of private international law(2010) ISSN 1566-6352 vol. 12, 139 178.
46 *Walsh v. Walsh,* [2000]221 F. 3d 204 - Court of Appeals, (1st Cir).
47 Ibid.

boundaries of their jurisdiction'.[48] In the judgment, the reasoning behind the imposing extra conditions approach to the return of the child is clear, as it relates to the commitment of the Convention and protects the children from being exposed to grave risk if he or she is returned.

2.2.3 Turner v. Frowein[49]

Later, in *Turner v. Frowein*, the Connecticut Supreme Court furthered the imposing extra conditions approach to returning the children by invoking the concept of undertakings. The case was concerned with a Dutch husband and an American wife. The wife was subject to serious domestic violence and sexual abuse that caused her to undergo a hysterectomy.[50] The mother also asserted that he may have been sexually abusing their son.[51] The trial court held that there was sufficient evidence of a grave risk. On appeal, the Connecticut Supreme Court concluded that the findings of grave risk were justified; however, the higher court still remanded the case due to a lack of undertaking analysis.[52]

The Court concluded that 'before a trial court may properly deny a petition under article 13b, it must evaluate the full range of placement options and legal safeguards that might facilitate the child's repatriation under conditions that would ensure his or her safety, thereby preserving the home country's jurisdiction over the underlying custody dispute without endangering the child'. [53] Furthermore, the Connecticut Supreme Court instructed the lower court to take into consideration the 'range of placement options and legal remedies that might allow the child to return'.[54] Following the judgment, it is not difficult to read between the lines that the court preferred the returning the children by imposing various conditions which should be taken into account for a possible safe return, thereby leave the court of home country to decide the custody.

2.2.4 Danaipour v. McLarey[55]

The court in *Danaipour v. McLarey* followed an undertaking approach. The Court rendered its judgment by stating that 'undertakings should be limited in scope and further the Convention's goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that the jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance'.[56]

48 Ibid. at 291.
49 Ibid at 291.
50 *Turner v. Frowein* [2000] 752 A. 2d 95.
51 Ibid.
52 Ibid.
53 Ibid.
54 Ibid at 976.
55 *Danaipour v. McLarey,* [2004]386 F.3d 289 (1st Cir.).
56 Ibid at 22.

From the perspective of the US courts, undertakings are effective methods to ensure the purpose of the Convention and, in the meantime, guarantee the child's safe return. In the cases that have been discussed, the US judges confirmed the grave risk if the child returns on one hand, and yet they issued a return order by imposing some extra conditions on the other; for example, they decided to place the child in temporary third party custody or a child care agency in order to ease the return.

2.3 Defining 'Undertakings'

Undertakings are often offered voluntarily by the left-behind parent in order to supporting the abducting parent and the child return.[57] Imposed conditions are sometimes called undertakings.[58] There are six types of undertakings arising from case law. The first and most common type of undertaking is related to financial matters. In many cases, the left-behind parent covers the expenses of the return of the child and the abductor and provides accommodation.[59] The second type of undertaking is with regard to preventing criminal charges; the left-behind parent will therefore not bring criminal charges against the abducting parent.[60] The third type concerns custody.[61] If the petitioner has already obtained custody because of the wrongful removal, the undertaking is the promise that he or she will not enforce the order unless a full hearing takes place.[62] The fourth type of undertaking is to protect the returning child and parent from violence or other types of abusive behaviors by the left-behind parent.[63] The fifth type of undertaking is the prompt commencement of custody proceedings in the requesting State after the return order of the child is issued.[64] Assurances or other safe return protection measures issued by central authority or a court in the child's habitual residence can be regard as a type of undertaking as well.[65]

Identifying undertakings has been deemed an effective way to secure a safe and quick return of an abducted child.[66] Member States are therefore able to fulfill their obligations towards the Convention. For those considerations, safety precautions are taken to mitigate the grave risk to the abducted child

57 Rhona Schuz *The Hague Child Abduction Convention : a critical analysis*, Studies in private international law; volume 13 Hart Publishing 2013.
58 Ibid.
59 Ibid.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Merle H. Weiner, 'Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases' (2008)58 AM. U. L.REV 335, 349.
66 *Danaipour v. McLarey*, [2004]386 F.3d 289 (1st Cir.).

so that they are able to return to the country of their habitual residence for custody determinations, or to benefit from other arrangements which pursue the best interests of the child.[67]

2.4 Understanding the US approach

The US reasoning for imposing extra conditions will henceforth be discussed.

Firstly, the reason why the Convention operates a prompt return mechanism is that the Convention considers the courts of child's habitual residence as the most suitable place to discuss the issues concerning custody and other effective arraignments. It is in the best interests of the child for him or her to be sent back so that these relevant issues can be addressed; the child's welfare can thus be achieved by returning to the habitual residence country. The US, as a party to the Convention, has an obligation to pursue the Convention's aims and objectives. The US courts will therefore primarily consider the repatriation of the abducted child.

Secondly, in the *Navarro v. Bullock*[68] case, the US court rendered its judgment by stating that 'to retain the children in the United States guarantees that the mother will continue to frustrate the custodial and visitation rights of the father, and to undermine his relationship with his children. To allow this to happen would be to allow the mother to profit by her own wrong and to continue to damage the children psychologically by her unwillingness to allow the father access to his children'.[69] Another goal of the Convention is to deter the abductor and to reduce the negative consequences of the wrongful removal by a parent. By returning the child back to the home country, the US courts can fulfill the obligation under the Convention and ensure that the custody issues will be dealt with in the most proper place on the one hand, whilst also deterring the abductor and protect the custody rights of the left-behind parent whose right to access has been violated on the other. This approach also prevents a change in the custodial rights caused by the unilateral decision of one parent and stops 'forum shopping', which would beneficial to the abducting parent.[70] From this point of view, the approach of the US courts favors the protection of the left-behind parent.

Thirdly, the grave risk of harm will sometimes be mitigated sufficiently by an acceptance of undertakings and adequate guarantees of the performance of those undertakings.[71] When the courts impose different types of undertakings which reduce the harm to the child when he or her is repatriated, they consider that it is the based on the best interest's principle.

67 Ibid.

68 *Navarro v Bullock* [1989] HC/E/USs 208.

69 Ibid.

70 Laura McCue, 'Left Behind : the Failure of the United States to fight for the Return of Victims of International Child Abduction' (2004) Suffolk transnational law review, ISSN 1072-8546 vol.28, issue1,85,112, 89.

71 *Walsh v. Walsh,* [2000] 221 F. 3d 204 - Court of Appeals, (1st).

However, the US courts have held an extremely strict position towards asylum seekers.[72] On some occasions, if the abductor has been a victim of domestic violence, he or she is obligated to prove to the US court that the home country is unwilling or incapable of protecting him or her from the abuse which leads to a negative effect on the child too.[73] He or she will therefore have to apply for asylum status. With respect to migration law, US only grants approximately 20% of the requests and thus domestic violence victims seeking asylum face significant difficulties.[74] Even if an applicant is successful, the US government can always deport him or her back to the original State in light of any substantial circumstance changes.[75]

To this end, the US courts respect the discretion of the judges. It is crucial to keep in mind that the essential purpose of the Convention is to guarantee the quick return of the abducted child, instead of allowing the courts in the abducted-to country to be informed of substantive case-by-case details, or to deal with complex issues such as custody and other beneficial arrangements for the child.[76]

Even if a defense is satisfied under Article 13(b), the judges in US courts still have the discretion to issue a return order as the Convention states that 'the requested State is not bound to order the return of the child', instead of indicating that the party must not give a return order.[77] In practice, courts have interpreted the Convention to suggest that they can order the return of the abducted child to further the objective of the Convention even if the grave risk of harm has been found.[78] Indeed, one US court held that 'even if an exception is established the courts has the discretion to return a children if return would further the aims of the Hague Convention'.[79]

3. The Undertaking Approach and its Inconsistency with the Best Interests of the Child

This chapter presents the arguments concerning the undertakings approach and why it is not consistent with the best-interests-of-child principle, while emphasizing that the Convention on the Rights of the Child (the CRC)[80] has the best interest of the child as its priority.[81]

72 Merle H. Weiner 'Half-Truths, Mistakes and Embarrassments : the United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction'(2008) Volume: 1 Utah Law Review 221, 313 288.

73 Ibid.

74 Ibid.

75 Ibid.

76 Christina Piemonte, 'International Child Abduction and Courts' Evolving Considerations in Evaluating the Hague Convention's Defenses to Return' (2014) 22Tul. J.Int'l & Comp.L. 191.

77 Ibid.

78 The Article 13(b) 'Grave Risk of Harm' Exception of the Hague Convention on International Child Abduction: Its Application in a World of Terrorist Threats, Infectious Diseases and Civil Unrest http://www.kentlaw.iit.edu/Documents/Academic%20Programs/Honors%20Scholars/2004/Wenfeng-Li-paper.pdf accessed 16 of June 2015.

79 Ibid.

80 The Convention on the Rights of the Child (Adopted 20 November 1989, entered into force 2 September 1990) UNTS, 1577 3.

The CRC is one of the most fundamental human protection treaties that protects a vulnerable group of people,[82] with Article 3 stressing that the best interests of a child shall be the primary consideration if any action is taken by public authorities.[83] The main goal of CRC is for government authorities to establish protection standards for children [84] and the treaty covers substantial topics such as: discrimination, freedom of religions, sexual violence, abortion, child labor, capital punishment, child solider, education etc.[85] The CRC has a significant influence around the world with respect to the rights of the child and it has been described as 'the most comprehensive statement of children' rights ever made and the first to give such rights the force of international law'.[86]

Similarly, the preamble of the Hague Convention states that 'the interests of children are of paramount importance in matters relating to their custody'.[87] A conservative reading of the preamble suggests that the Hague Convention is in line with the best interests of the child principle and therefore works hand in hand with the CRC to uphold it. As aforementioned, the Hague Convention established five exceptions which allow judges to refuse the petition [88] which can be considered as evidence that protecting the interests of the abducted child is the essential goal of the Convention.

In the case of *Murray v. Murray*[89], the court confirms this intent and further illustrates that 'the Hague Convention is predicated upon the paramountcy of the rights of the child. It proceeds on the basis that those rights are best protected by having issues as to custody and access determined by the Courts in the country of the child's habitual residence. The fact that the issues relating to the welfare of the child are not relevant to a Hague Convention application is because such an application is concerned with where and in what court issues in relation to the welfare of the child are to be determined'.[90] On the basis of the wording and reasoning delivered by the court, the goal of Hague Convention is consistent with the CRC. The Hague Convention does not merely share similar goals with the CRC but also specifically establishes the return mechanism to ensure a right to proper custody, since it significantly influences the child's living circumstances and is normally resolved in his or her habitual residence.

To this end, it is clear that both conventions strive for the best interest of the child. Firstly, the wording of Article 13(b) specifically states 'notwithstanding the provisions of the preceding Article, the judicial

81 Ibid at Article 3.
82 Laura C. Clemens 'International Parental Child Abduction: Time for the United States to Take a Stand'(2003) 30 Syracuse J.Int'l L. & Com. 151 178.
83 Ibid at Article 3.
84 Ibid.
85 The Convention on the Rights of the Child(Adopted 20 November 1989, entered into force 2 September 1990) UNTS, 1577 3.
86 Ibid.
87 Hague Convention on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law,(adopted 25 October 1980), Hague XXVIII preamble.
88 Ibid Article 12, 13, 20.
89 *Murray v. Director* [1993] FLC 92-416.
90 Ibid at 546.

or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.[91] In other words, the court is not bound to order the return if the child might be imposed to a grave risk. This article is based on the best interest principle.

However, the US courts have developed their interpretation by conducting further analysis of any mitigating circumstances, placement options, legal safeguards, or ameliorative measures in the home country. Such a system contradicts the text of Article 13 (b): if the Convention required this level of analysis, the legislators should have stated this when it was drafted.[92] Conversely, Article 13 (b) sets forth that once the grave risk exception is met, the court in the abducted-to country is not bound to order the child to return. It is inconceivable to deduce an undertaking approach through the plain meaning of the Convention.[93] In fact, imposing extra conditions for the safe return of the child is a restriction on the implementation of the Convention.[94] It provides extra criteria to the successful grave risk exception which the court was not required to consider by the Convention and it thus contradicts the true meaning of Article 13(b).

Furthermore, when imposing conditions in order to return the child, the US courts will conduct further analysis on issues such as the abduct-from country's family law and child protection law in order to ascertain any 'suitable arrangements to protect the child which can be made in the country of habitual residence, despite a grave risk'[95] or 'an evaluation of the placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction'.[96]

In the aforementioned case law, the US courts hereby conduct research to find out whether the home country is capable of protecting the child if he or she is returned. The research or investigation is nevertheless based on the written law in the area of child protection. One practice, for example, is to determine whether there is a childcare agency available or any other family relatives are able to hold temporary custody.

Yet the law on paper and the law in practice vary significantly. As pointed out by Professor Weiner, 'ineffective law enforcement or inadequate implementation can undermine the effectiveness of the laws

91 Hague Convention on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law (adopted 25 October 1980), Hague XXVIII Article 13(b).

92 Sharon C. Nelson, 'Turning Our Backs On The Child: Implications of Recent Decisions Regarding The Hague Convention on International Child Abduction' (2001) U. Ill. L. Rev. 669,693 684.

93 Ibid.

94 Brian S. Kenworhy, 'The Un-Common Law: Emerging Difference Between The United States and United Kingdom On The Children' s Rights aspects of The Hague Convention on International Child Abduction' (2001-2002) 12 Ind. Int'l & Comp. L. Rev. 329, 363 P351.

95 *Blondin v. Dubois* [1999]189 F. 3d. 240 248 (2nd Cir.).

96 *Walsh v. Walsh,* [2000]221 F. 3d 204 - Court of Appeals, 1st Circuit.

on paper'.[97] In other words, even though it appears on paper that the abduct-from country's family law will offer effective and adequate protection, it is possible that it will not provide an effective solution to the issue in practice. This is particularly true in countries where the protection of human rights is rather weak and the rights of children are heavily abused. It is highly doubtful that the effective law as it appears on paper will be enforceable.

In addition, Article 12 of the Hague Convention sets out a principle which states that judicial and administrative authority may refuse the petition if one year has passed since the removal and the child, who is already getting used to his or her new living environment.[98] This article thereby imposes a time limit; if after one year the abducted child has settled in a new environment, the court may not order the return.

Notably, it takes some time to evaluate the family law system of another jurisdiction. Hence there are issues that need to be taken into account, such as the different domestic system, the common law and civil law jurisdiction disparity, different languages and so forth. The US courts will have to consult experts for the purpose of determining the accuracy of the case and the stance of the courts. Such practice certainly requires significant amount of time and effort.

In the case *Blondin v. Dubois*[99], in order to examine the ability of protecting the child from grave risk of harm, the lower court undertook a detailed investigation of the situation and laws in France. The judges sought advice from French attorneys, the French Minister of Justice and experts in international child law.[100] The research was not expeditious; it took months to complete the whole investigation and it was not necessarily in accordance with the quick return mechanism enshrined in the Hague Convention. Furthermore, the child had already become accustomed to his or her lifestyle in the US while waiting for the court decision. Clearly, it was not in accordance with the best interests of the child to send him or her back again.

Furthermore, in the case *Lozano v. Montoya Alvarez*[101], the issue of domestic violence was deliberated. In order to prove that domestic violence caused psychological harm to the child, the court requested an expert witness to testify.[102] Such tests require substantial amount of time as well as the relevant costs[103] which signifies a contradiction to the best interests of the child. While the child is waiting for the court

97 B. Quillen ´The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction´ (2014) TEXAS INTERNATIONAL LAW JOURNAL 49, no. 3,: 621,643, p 631.

98 B. Quillen ´The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction´ (2014) TEXAS INTERNATIONAL LAW JOURNAL 49, no. 3,: 621,643, 631.

99 *Blondin v. Dubois* [2000]78F supp. Ed 283, 288-289.

100 Ibid.

101 *Lozano v. Montoya Alvarez* [2014] 134 S.Ct. 1224No. 12-820.

102 Ibid.

103 Ibid.

decision, there is no certainty of his or her destination and it may cause emotional stress. Furthermore, it undermines the quick return requirement stipulated under the Hague Convention.

Furthermore, in several cases, the US courts have tended to order the placement of the abducted child within a foster care home or under the temporary third party custody. For example, in *Blondin v. Dubois,*[104] the Court of Appeal dictated that the child could be placed in 'temporary custody of some appropriate and suitable third party'.[105] In *Adan v Avans*[106], the US courts planned to place the children into foster care while waiting for the custody decision in the home country. While such a child abduction case is pending, courts can place the children into foster care until they receive the adjudication of the Hague petition.[107] This case concerned domestic violence and sexual abuse of the child. The US courts is evidently of the opinion that placing the child in a foster care or some other relatives for temporary custody will ameliorate the risk of harm and facilitate the child's safe return to the home country for a custody determination.

However, it is questionable whether it does in fact protect the safety of the child. It is uncertain whether the placement of a child into the foster care system or some third party relative would actually provide a safe and harmless environment for the child. There are circumstances where temporary third party custody is a relative: the abuser, for example the father in the context of domestic violence, is still able to access the child.[108] The potential harm can therefore still exist.

As emphasised by Professor Dallmann, 'ordering the child back to another country to be placed in a third party's hands (which could be either a foster home or some types of foster-care institution) would only result in an even more disruption in the short life of a young child, especially where the court has good reason to believe that the child has already experienced an emotionally traumatic family life'.[109] It will cause severe emotional damage on a young child to not have his or her loving parent to take care of them. Besides, the quality of foster care should also be considered. Statistics show that 13% of foster parents have been ranked as 'barely adequate'[110] and 25% of the children in foster care have been known to receive serious physically punishment.[111] There are various reports and documents that can prove a foster care is not the most suitable or most stable environment, even if for a temporary

104 *Blondin v. Dubois* [1999]189 F. 3d. 240 248 (2nd Cir.).
105 Ibid 242.
106 *Adan v Avans*[2007] WL 2212711 (D.N.J.).
107 Merle H. Weiner, 'Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases' (2008) 58 AM. U. L.REV 335, 349.
108 *Blondin v. Dubois* [1999]189 F. 3d. 240 248 (2nd Cir.).
109 Peggy D. Dallmann, 'The Hague Convention on Parental Child Abduction: An Analysis of Emerging Trends in Enforcement by U.S courts ' (1994) 5 IND, INT'L&COMP.REV.171,179 N160.
110 Isable Dando &Brian Minty, 'What Makes Good Forster Parents?' (1987)17 BRIT. J.SOC. WORL 385, 389.
111 David Fanshel ET AL. 'Forster Children In a Life Course Perspective' (1990) 91.

custody.[112] For young children, the caring parent and a stable living environment play the most significant role in his or her growing-up. A custody proceeding can, in any case, be adjudicated in the home country without the presence of the child.[113] Therefore, it is important to first assess where a child is safest and farthest from any grave risk of harm.

Moreover, in some cases, a child may fear his or her return. To support such assertion, in *Danaipour v. Mclarey*[114], the court found that the children would be exposed to psychological harm, 'regardless of any possible conditions or undertakings imposed'.[115] The judges in the case *Blondin v. Dubois*[116]concluded the same: 'the authority, through no fault of their own, may not be able to give the children adequate protection'.[117] Therefore, when a child is in fear of their return, any extra mitigating conditions will not help to reduce the fear due to the psychological harm.

Besides, evaluating another country's family law can also violate the principle of international comity.[118] International comity sets out a fundamental trust and respect for the institution of another country.[119] In other words, 'international comity encompasses the idea that countries should interpret an international convention that applies to both of them so as not to undermine the other country's law and structure'.[120] When imposing extra conditions for the safe return of the abducted child, the US courts will have to analyze the home country child protection system or family law meticulously. The investigation should be accurate and properly conducted as any errors or improper evaluation will certainly contradict the home country's rules and create tensions between the two States. A typical example can be seen in *Blondin v. Dubois*,[121] wherein the District Court conducted a large scale of evaluation of the laws in France.[122] Eventually, the court rendered its judgment and decided not to order the abducted child's return. The court's reasoning stemmed from the fact that even if any alternative living arrangements could be made in France, the child would still suffer a possible psychological damage as his home country could still give him a great deal of fear and could also remind him of the abuse.[123]

112 Sharon C. Nelson, 'Turning Our Backs On The Child: Implications of Recent Decisions Regarding The Hague Convention on International Child Abduction' (2001) U. Ill. L. Rev. 669,693 p691.
113 Ibid.
114 *Danaipour v. McLarey,* [2004]386 F.3d 289 (1st Cir.).
115 Ibid at 303-304.
116 *Blondin v. Dubois* [2001] 238 F.3d 153 (2d Cir.).
117 Ibid.
118 Brian Quillen, 'The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment under the Hague Convention on the Civil Aspects of International Child Abduction'. (2014) Vol49 621 622, 643 p628.
119 Ibid.
120 Sharon C. Nelson, 'Turning Our Backs On The Child: Implications of Recent Decisions Regarding The Hague Convention on International Child Abduction' (2001) U. Ill. L. Rev. 669,693 p691.
121 *Blondin v. Dubois* [2000]78F supp. Ed 283, 288-289.
122 Ibid 283-89.
123 Ibid.

However during the process of this decision, the French authorities were offended at the implication of the US Courts that they were not able to protect the abused child or the domestic violence victim.[124] To make it worse, the French Minister of Justice was threatening to order the extradition of the mother back to France,[125] in order to prosecute her for the abduction, if the US District Court did not order the return of the child.[126]

Every member states of the Hague Convention is required to establish trust and respect to all other signatories,[127] meaning that, they should all respect their national laws and consider that each court is capable of dealing and deciding their custody, family separation or domestic violence issues.[128] The US courts should not intervene by evaluating other countries' family law and child protection system of other countries, nor judge whether it can sufficiently protect the children from grave risk of harm.[129] Whether or not a decision is made to return the child to the home country, the generic confidence that a US court has should not be relied upon[130] and any investigation conducted by a US court thus exceeds its authority. As long as the grave risk exception is met, the court should deny the return as formulated in and accordance with the Convention. The further analysis approach is not consistent the principle of comity.

As aforesaid, the child's well-being shall be considered as the highest priority. Though the decisions of US courts are not related to custody, a decision should be focused on the issue of where the child should be placed during the custody decision.[131] Yet this is not a custody decision.[132]

In some cases, sending a child back to the home country will cause grievous harm, regardless whether of the removal is wrongful.[133] Therefore, the legislator offered some discretion to the judges so as to identify the key issues in specific cases.[134] Judges are invested with the power to exercise their discretion on whether or not to return the abducted child. The discretion should be exercised within the scope of the judge's authority; that is to say, judges shall comply with the primary focus of the Hague Convention that 'the interests of children are of paramount importance in matters relating to their

124 Ibid 299.
125 Ibid.
126 Ibid.
127 Sharon C. Nelson, 'Turning Our Backs On The Child: Implications of Recent Decisions Regarding The Hague Convention on International Child Abduction' (2001) U. Ill. L. Rev. 669,693 p691.
128 Ibid.
129 Ibid.
130 Ibid p691.
131 Ibid p692.
132 Brian S. Kenworhy, 'The Un-Common Law: Emerging Difference Between The United States and United Kingdom On The Children's Rights aspects of The Hague Convention on International Child Abduction' (2001-2002) 12 Ind. Int'l & Comp. L. Rev. 329, 363 P 338.
133 Ibid.
134 Ibid.

custody'.[135] The judges are obliged to examine the text and understand the background of the Convention carefully. The main purpose of the Convention is to act in the children's best interests and to reduce any harmful actions the parents may incur upon them.

The Hague Convention thus sets out rules that are clear and beneficial for the child in question. The US judges shall first of all realize the core purpose of the Convention and focus on the individual child, based on the specific facts of the case. This makes the Hague Convention truly beneficial to each individual child who has faced serious abuse in their home country, instead of generalizing the situation and sending the all abducted children back to the home country without question. When necessary, the judges should therefore exercise their discretion according to the specific facts and gravity of the case.

The US system is not only lengthy but also ineffective. The safety of abducted children cannot be truly guaranteed in the home country. Yet, the well-being of the child shall overrule any other condition. The extensive discretion of the judges has serious consequences and contradicts the key principle of the Hague convention. Taking into account the US case law relating to child abduction, it is apparent that sending the majority of abducted children back is not the aim of the Convention; in fact, it is the contrary. It is of a significant importance that the US courts do not exercise their power or discretion arbitrarily. It is therefore a conspicuous error that most of the cited cases show that the US courts are imposing extra conditions which are contrary to the best interests of the child and main purpose of the Hague Convention.

4. Conclusion

The US courts, in rendering a very strict interpretation of Article 13 (b) and the grave risk exception, create inconsistencies with the Hague Convention. As a party to the Convention, the US is expected to be a leader in the interpretation of the dispositions by reading in line with the text.[136] However, the US courts have failed to understand the core meaning of the Hague Convention. Its goal is generally accomplished by sending the children back to the home country for the custody and other arrangements decisions.[137] Sending the children back to home country for the custody decision is the most effective way of guaranteeing the child's best interests, deterring the abducted parent and ensuring the custodial rights of the left-behind parent as well.

135 Hague Convention on the Civil Aspects of International Child Abduction, Hague Conference on Private International Law,(adopted 25 October 1980), Hague XXVIII Preamble.

136 Sharon C. Nelson, 'Turning Our Backs On The Child: Implications of Recent Decisions Regarding The Hague Convention on International Child Abduction' (2001) U. Ill. L. Rev. 669,693 687.

137 The Article 13(b) 'Grave Risk of Harm' Exception of the Hague Convention on International Child Abduction: Its Application in a World of Terrorist Threats, Infectious Diseases and Civil Unrest http://www.kentlaw.iit.edu/Documents/Academic%20Programs/Honors%20Scholars/2004/Wenfeng-Li-paper.pdf accessed 16 of June 2015.

When the Article 13 the grave risk exception has to be applied, the US courts should look at the individual facts, interpret them in accordance with the actual meaning of the Hague Convention and ensure the safety of the child.[138] Often, the outcome may be to grant him or her residency within its territory if returning will result in the child being exposed to great harm. However, by conducting further analysis and imposing extra conditions, the US courts have undermined the best interests of the child principle and violated international comity. This further analysis approach makes it extremely difficult for the abducted child, who truly needs to stay away from the harm in the home country, to apply this defense. By acting contrary to the convention, the US is not a good example for courts in other contracting States to the Convention to align their judicial interpretation with.[139]

Indeed, the US has also signed the CRC but it is still unratified.[140] It is one of only two countries in the world who have yet to do so.[141] Several reasons why the US has failed to ratify the CRC include: the fact that the US is afraid to hand over its sovereignty to the UN and thereby weaken its power to handle various cases relating to American children;[142] the fact that the burden upon the federal government would violate the principles of federalism governing the relationship between the federal government and the state government;[143] the fact that the treaty would undermine parental authority within US;[144] and the fact that there are conflicting interests between the CRC and American law regarding issues such as capital punishment and corporal punishment.[145] The US central government leaves the margin of appreciation to each federal state to permit or prohibit these issues; the CRC, however, strictly prohibits capital punishment towards children under the age of 18.[146]

The failure of the US to ratify the CRC becomes an impediment to the true meaning of the best interests of the child principle. When the US court applies the grave risk exception, it thus fails to realize the essential purpose of the Hague Convention. In special circumstances, like child abuse, sex violence and domestic violence, the child will be most likely exposed to grave risk of harm if the return order released and the judges shall therefore exercise the discretion according to the gravity of the case. For the most part, though, the US courts should not over-interpret or decide a case beyond the scope of the actual meaning of Article 13(b). Instead, they should comply with the plain text of the

138 Ibid.
139 Ibid.
140 Laura C. Clemens 'International Parental Child Abduction: 'Time for the United States to take a Stand' 30 Syracuse J. Int'L. & Com. 151, 178 P170.
141 Susan Kilbourne, student research, 'The Convention on the Rights of the child: Federalism Issues for the United States, 5 GEO, J. FIGHTING POVERTY' 327, 328. The other country is Somalia, which does not presently have a government in place capable of becoming a party to a treaty such as CRC.
142 Laura C. Clemens 'International Parental Child Abduction: 'Time for the United States to take a Stand' 30 Syracuse J. Int'L. & Com. 151, 178 P170.
143 Ibid.
144 Ibid.
145 Ibid.
146 Ibid.

Convention,[147] which is not to order the return if the grave risk exception is met, and always bear in mind the child's best interest principle.

147 Sharon C. Nelson, 'Turning Our Backs On The Child: Implications of Recent Decisions Regarding The Hague Convention on International Child Abduction' (2001) U. Ill. L. Rev. 669,693 687.

EU LAW IN THE FIELD OF NATIONALITY: THE ROLE OF 'GENUINE LINK' IN GREEK NATIONALITY LAW AND THE POSSIBLE INTRODUCTION OF A GREEK INVESTOR CITIZENSHIP PROGRAMME

Dimitrios Galanakis*

Abstract

Notwithstanding the autonomy of the States in the field of nationality law, the EU has emphasized, in this respect, the observance of, inter alia, the principle of sincere cooperation, which results in the requirement of a genuine link between a Member State and the individual who holds the nationality of that Member State. In particular, this article focuses on the role of genuine link in the context of Greek nationality law, discussing the differentiation between foreign nationals of Greek origin and foreign nationals of non-Greek origin on matters of citizenship acquisition. That differentiation – which is based on the ethnicity and ethnic consciousness of the individual – has led to a privileged status for the former and a disadvantaged position for the latter. Considering the importance that Greek nationality law attaches to the ethnic link, this article examines the possibility of introducing a Greek investor citizenship programme. It argues that such a measure would be acceptable, yet only if the Greek State ameliorates the conditions concerning the granting of Greek citizenship to any person who deserves that citizenship, regardless of ethnicity or wealth. This article concludes that genuine link should correspond to a pragmatic situation of interdependence between the State and the individual, rather than the abstract concept of ethnicity.

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1. Introduction

Nationality law is largely a monopoly of the States.[1] In other words, States are autonomous as far as the regulation of the grounds for acquisition and loss of their nationality is concerned. Nevertheless, that autonomy is not unlimited, since States have to respect international law. More specifically, with regard to the European Union (EU), the obligation of its Member States to respect EU law while regulating their nationality has been stressed particularly in the *Rottmann* judgment[2] and the Commission's reaction to the Maltese citizenship-for-sale affair. One of the issues that have been underlined concerns the principle of sincere cooperation enshrined in Article 4(3) TEU,[3] which results in the requirement of a genuine link between the individual and the Member State concerned.

In particular, this article focuses on Greek nationality law and examines the application of the genuine link requirement within the context of the rules on naturalization and acquisition of Greek citizenship. On the one hand, the existence of a genuine link serves as a ground for simplified procedures for the naturalization of foreign nationals of Greek origin (*ομογενείς*). On the other hand, as far as foreign nationals of another origin (*αλλογενείς*) are concerned, the (alleged) lack of genuine link is used in several circumstances as an argument against naturalization or acquisition of Greek citizenship. The most recent and far-reaching expression of that argument occurred in judgment 460/2013 of the Council of State (CoS) – the supreme administrative court of Greece – which declared certain provisions on the acquisition of Greek citizenship unconstitutional.[4] Furthermore, taking the aforementioned into consideration, this article discusses the question as to whether or not, and under which conditions, Greece could introduce an investor citizenship programme in order to grant Greek citizenship to or facilite the naturalization of foreign investors. Finally, this article concludes with a summary of the main findings, attempting to provide an answer to the question of what the role of genuine link should be in the context of a fair and advanced Greek nationality law.

1 For the purposes of this article, the terms 'nationality' and 'citizenship' are used interchangeably.

2 Case C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-1449.

3 Consolidated Version of the Treaty on European Union [2012] OJ C326/13.

4 Συμβούλιο της Επικρατείας (ολομέλεια), απόφαση 460/2013, δημοσιευθείσα την 4η Φεβρουαρίου 2013 [Council of State (plenum), judgment 460/2013, published on 4 February 2013] <www.constitutionalism.gr/site/ste-460-2013-allodapoi-ithageneia-psifos/> accessed 16 December 2015.

2. State Autonomy in the Field of Nationality Law is not Absolute

2.1 Rule of international law

The autonomy of States concerning the regulation of their nationality law is an old and generally accepted rule of international law.[5] It is enshrined in Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930 Hague Convention), which stipulates that '[i]t is for each State to determine under its own law who are its nationals'.[6] In addition, Article 2 of the 1930 Hague Convention states that '[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State'. Similarly, pursuant to Article 3(1) of the European Convention on Nationality (ECN), '[e]ach State shall determine under its own law who are its nationals'.[7] The aforementioned provisions do not grant, however, absolute autonomy to States. Both Article 1 of the 1930 Hague Convention and Article 3(2) of the ECN stress that the nationality law of a certain State must only be accepted by other States if it is compatible with international conventions, customary international law and the generally recognized principles of law.

In this respect, the judgment of the International Court of Justice (ICJ) in the *Nottebohm* case is decisive.[8] The ICJ confirmed that it is for each State to formulate the rules regarding the acquisition of its own nationality and to confer that nationality by naturalization in accordance with its own legislation.[9] Nonetheless, it also emphasized that, where a situation arises on the international plane, a State is entitled to grant diplomatic protection to one of its nationals only if his or her nationality corresponds with the factual situation; that is, the individual's genuine connection with the State in question.[10] Thus, the Court invoked the rule of 'effective nationality' – the so-called 'genuine link theory'.[11]

5 Gerard-René de Groot, 'The Relationship between the Nationality Legislation of the Member States of the European Union and European citizenship' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International 1998) 123.

6 Convention on Certain Questions Relating to the Conflict of Nationality Laws (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 89.

7 European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS 166.

8 *Nottebohm Case (Liechtenstein v. Guatemala)* (Second phase) [1955] ICJ Rep 4.

9 Ibid 20.

10 Ibid 22-23.

11 Ibid 22.

2.2 Focus on the EU

2.2.1 The effect of Union citizenship on Member State autonomy

In addition to international law, EU law imposes certain limitations on the autonomy of the EU Member States regarding the determination of their nationality legislation. That power of the EU, however, does not emanate from a clear legal basis.

First of all, it should be noted that the EU has not adopted any legislative measures (regulations or directives) in the field of nationality law, considering that there is no explicit competence at the Union level in that area.[12] Article 20(1) TFEU,[13] which provides for the citizenship of the Union, stipulates that '[e]very person holding the nationality of a Member State shall be a citizen of the Union' and that Union citizenship is additional to and does not replace Member State nationality.[14] Based on that provision, no direct limitation of the autonomy of Member States in nationality matters is derived from the creation of Union citizenship.[15]

Despite the fact that Union citizenship and Member State nationality are two distinct concepts, it cannot be denied that they interact. The Court of Justice of the European Union (CJEU) has actively taken steps towards shaping the concept of Union citizenship on several occasions – *inter alia*, in the *Martínez-Sala*,[16] *Grzelczyk*,[17] *Baumbast*,[18] *Zhu and Chen*,[19] *Rottmann*[20] and *Ruiz Zambrano*[21] cases – declaring Union citizenship to be the fundamental status of nationals of the Member States.[22] As stated by Stephen Hall, the introduction of Union citizenship, the status of which depends on the possession of the nationality of a Member State, has brought the latter within the scope of EU law.[23] Indeed, although the CJEU has confirmed the autonomy of Member States in nationality matters through its case law, it

12 Gerard-René de Groot, 'Towards a European Nationality Law. Revised version of the inaugural lecture delivered on 13 November 2003 on the occasion of the author's acceptance of the Pierre Harmel chair of *professeur invité* at the Université de Liège' (2004) 8.3 Electronic Journal of Comparative Law 11-12 <http://digitalarchive.maastrichtuniversity.nl/fedora/get/guid:376eb43c-b500-4db9-8e49-bc52661bb57c/ASSET1> accessed 17 December 2015.

13 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

14 The characteristic of 'additionality' or 'complementarity' of Union citizenship is reiterated in Art 9 TEU.

15 De Groot, 'The Relationship between the Nationality Legislation of the Member States of the European Union and European citizenship' (n 5) 122.

16 Case C-85/96 *María Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.

17 Case C-184/99 *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

18 Case C-413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-7091.

19 Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECR I-9925.

20 Case C-135/08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-1449.

21 Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-1177.

22 Gerard-René de Groot and Anja Seling, 'The consequences of the Rottmann judgment on Member State autonomy – The Court's avant-gardism in nationality matters' in Jo Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (2011) EUI Working Paper RSCAS 2011/62, 27 <http://eudo-citizenship.eu/docs/RSCAS_2011_62.pdf> accessed 15 December 2015.

23 Stephen Hall, 'Loss of Union citizenship in breach of fundamental rights' (1996) 21 European Law Review 129. This has been confirmed –at least as far as the loss of nationality is concerned– by the CJEU in para 42 of the *Rottmann* judgment.

has also limited that autonomy, highlighting that Member States have to respect Union law when regulating their nationality laws. *Micheletti*[24] was the first groundbreaking judgment in this regard.

2.2.2 The Rottmann case and the Maltese citizenship-for-sale affair

Rottmann is one of the most significant judgments in the area of nationality law, since it specifically dealt with the indirect influence of EU law on the Member States' nationality laws and clearly demonstrated the Court's willingness to challenge the autonomy of Member States in that area.[25] In particular, the CJEU, confirming the fundamental status of Union citizenship, underlined that, when Member States take a decision withdrawing nationality and, thus, Union citizenship, they have to observe the principle of proportionality in the light of EU law and national law.[26] In addition, Advocate General (AG) Maduro noted in his opinion that the legislative autonomy of Member States in the field of nationality could be restricted by the provisions of primary Union law as well as the general principles of EU law.[27] In this respect, he referred, *inter alia*, to the principle of sincere cooperation enshrined in Article 4(3) TEU, which could be violated if a Member State granted its nationality to a sizeable part of the population of a non-EU State without consulting the EU.[28]

Moreover, Malta's decision in late 2013 to introduce the 'Individual Investor Programme' (IIP), granting Maltese citizenship (and, thus, citizenship of the Union) in exchange for a pecuniary contribution (initially amounting to € 650,000, subsequently increased to approximately € 1.15 million[29]) and without considering any residence criteria, became a point of contention not only in Malta but also at the Union level.[30] The European Parliament responded to the issue by adopting a resolution, in which it expressed its concern that a national scheme such as the Maltese IIP 'undermines the very concept of European citizenship'.[31] Further, it highlighted that Union citizenship should depend on a person's link with the EU, its Member States or its citizens, in accordance with the principle of sincere cooperation between the Union and the Member States.[32]

24 Case C-369/90 *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria* [1992] ECR I-4239.
25 De Groot and Seling, 'The consequences of the Rottmann judgment on Member State autonomy' (n 22) 27.
26 *Rottmann* (n 20), paras 43 and 55.
27 *Rottmann* (n 20), Opinion of AG Poiares Maduro, para 30.
28 Ibid ; see also de Groot, 'The Relationship between the Nationality Legislation of the Member States of the European Union and European citizenship' (n 5) 123.
29 'Staatsbürgerschaft: Malta erhöht den Preis für seine Staatsbürgerschaft' *Die Zeit* (23 December 2013) <www.zeit.de/gesellschaft/zeitgeschehen/2013-12/malta-staatsbuergerschaft-preis> accessed 15 December 2015.
30 Jelena Džankić, 'Investment-based citizenship and residence programmes in the EU' (2015) EUI Working Paper RSCAS 2015/08, 10 <http://cadmus.eui.eu/bitstream/handle/1814/34484/RSCAS_2015_08.pdf?sequence=1> accessed 17 December 2015; Isabel Pfaff, 'Staatsbürgerschaft gegen Geld: Das Geschäft mit dem Pass' *Süddeutsche Zeitung* (14 November 2013) <www.sueddeutsche.de/politik/staatsbuergerschaft-gegen-geld-das-geschaeft-mit-dem-pass-1.1817530> accessed 15 December 2015.
31 European Parliament, 'Resolution of 16 January 2014 on EU citizenship for sale' 2013/2995(RSP), point 1.
32 Ibid, points 4 and 7.

The European Commission held the opinion that the Maltese IIP entailed a potential violation of the principle of sincere cooperation – considering that, according to a Commission spokesperson, 'Malta might have had to consult other member states before proceeding with the IIP'[33] – and contemplated the initiation of infringement proceedings against Malta.[34] In this respect, the Commission demanded that Malta enrich the IIP with a 'genuine link' between the applicant and the country, which should take the form of the requirement of an effective residence status in the country before the acquisition of Maltese citizenship.[35] As a result, in February 2014, Malta added a one-year residence requirement to its citizenship scheme for investors.[36]

2.2.3 Principle of sincere cooperation and 'genuine link'

The requirement of a genuine link between the applicant and the country concerned is indeed a significant aspect of the principle of sincere cooperation. Nonetheless, as Sergio Carrera contends, the insistence of the EU institutions on strengthening the genuine link could result in the reinforcement of nationalism within the Member States, which might feel encouraged to adopt restrictive policies on the acquisition of their nationality and, thus, exclude certain groups of people from Union citizenship.[37] Such practices would prove problematic in the light of the principle of non-discrimination, the respect for diversity and fundamental rights.[38]

Elspeth Guild has described the manner in which certain Member States have misused the concepts of link, ethnicity and race in order to exclude certain groups of people from their citizenship or the right of residence in their territories.[39] Specific reference is made to the United Kingdom (UK) and the exclusion, under the Commonwealth Immigrants Act 1968, of the East African Asians of British nationality from the right of entry into and residence in the UK. According to the European Commission on Human Rights (ECmHR) of the Council of Europe, the 1968 Act discriminated against that group of people on grounds of their colour or race and, for that reason, their exclusion from the right to enter and reside in the UK constituted inhuman and degrading treatment pursuant to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

33 Miriam Dalli, 'IIP / Brussels contemplating infringement proceedings against Malta' *Malta Today* (18 January 2014) <www.maltatoday.com.mt/news/national/33227/iip-european-commission-contemplating-infringement-proceedings-against-malta-20140118#.Vb_ePXg341w> accessed 15 December 2015.

34 Ibid.

35 Sergio Carrera, 'How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the union?' (2014) CEPS Paper in Liberty and Security in Europe 64/2014, 26 <www.ceps.eu/system/files/LSE%20No%2064%20Price%20of%20EU%20Citizenship%20final2.pdf> accessed 18 December 2015.

36 Džankić (n 30) 11.

37 Carrera (n 35) 27.

38 Ibid.

39 Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004) 68ff.

(ECHR).[40] In contrast, as Guild argues, the CJEU chose a hands-off approach to a similar matter in the *Kaur* case,[41] despite being aware of the said ECmHR opinion.[42] The Court upheld the UK declarations on the definition of British nationals for Community purposes – which excluded British Overseas citizens, thus, *inter alia*, British nationals from East Africa – noting that UK domestic law (ie. the British Nationality Act 1981) only granted the right of residence within the UK to those citizens who had 'the closest connections' with the country.[43] Guild criticizes the reaction of the Court, which, in spite of its repeated proclamations on its duty to protect fundamental rights, including those of the ECHR, failed to intervene in and express its opinion on this politically sensitive case.[44]

3. The Role of Genuine Link in Greek Nationality Law

3.1 The privileged group: foreign nationals of Greek origin

3.1.1 Differential treatment

The classification of foreign nationals into two categories according to their ethnicity or, in other words, their link with the Greek race, is a structural element of Greek nationality law and a powerful expression of the concept of genuine link in the context of the Greek rules concerning naturalization and acquisition of nationality. More precisely, a distinction is made between foreign nationals of Greek origin (*ομογενείς*) and foreign nationals of non-Greek origin (*αλλογενείς*). Foreign nationals of Greek origin, as the term indicates, are not Greek citizens; they are deemed, however, to be connected with the Greek ethnic group via a common language and religion, common traditions and, principally, a common ethnic consciousness.[45]

The distinction between foreign nationals of Greek and non-Greek origin has substantial consequences regarding nationality matters, most importantly in the field of naturalization. Foreign nationals of Greek origin enjoy a considerably simplified and less demanding procedure for acquisition of Greek citizenship. Most importantly, as far as the formal conditions of naturalization are concerned, foreign nationals of Greek origin are exempt from the requirement of residence in Greece, which amounts to seven years for foreign nationals of non-Greek origin.[46] That exemption is even more favourable than the three-year residence requirement which applies to nationals of EU Member States, spouses of Greek citizens with a child, persons who have custody of a Greek citizen, political refugees and

40 *East African Asians v United Kingdom* (1973) 3 EHRR 76 (Commission Decision), paras 201 and 207-209.
41 Case C-192/99 *The Queen v. Secretary of State for the Home Department, ex parte: Manjit Kaur* [2001] ECR I-1237.
42 Guild (n 39) 76.
43 *Kaur* (n 41), paras 21, 25 and 27.
44 Guild (n 39) 76.
45 Ζωή Παπασιώπη-Πασιά, *Δίκαιο ιθαγένειας* (8η έκδ, Εκδόσεις Σάκκουλα 2011) [Zoe Papassiopi-Passia, *Nationality law* (8th edn, Sakkoulas Publications 2011)] 36.
46 Art 5 para 1(d) of the Greek Citizenship Code (Law 3284/2004, as amended by Laws 3838/2010, 4251/2014 and 4332/2015).

stateless persons.[47] It is noteworthy that foreign nationals of Greek origin do not even have to reside in Greece in order to be eligible to apply for naturalization: they can do so while living abroad by submitting the application to the Greek consul of their place of residence.[48]

Furthermore, foreign nationals of Greek origin (as well as nationals of EU Member States, political refugees and stateless persons) are charged a reduced naturalization fee of € 100, whereas the fee that applies to the rest of the foreign nationals amounts to € 700.[49] Prior to the amendment of the Greek Citizenship Code by Law 3838/2010, foreign nationals of Greek origin were exempted from the naturalization fee.[50] Moreover, unlike the rest of the foreign nationals, foreign nationals of Greek origin who possess a residence title for foreign nationals of Greek origin are not called for an interview at the Naturalization Committee unless there are doubts as to whether the substantive conditions of naturalization – that is, adequate knowledge of the Greek language, integration into the economic, political and social life of Greece and respect for its fundamental principles – are met.[51]

Citizenship acquisition is not the only domain presenting such particularities. In the past, the Greek State differentiated between *Greek citizens* of Greek origin and *Greek citizens* of non-Greek origin, hindering the latter from entering certain occupations.[52] For instance, until 2000, naturalized Greek citizens of non-Greek origin could not become notaries;[53] and, until 2013, naturalized Greek citizens of non-Greek origin could only enter the legal profession five years after the date of naturalization, while, paradoxically, foreign nationals of Greek origin could (and still can) become lawyers by a mere permission of the relevant authorities.[54] Due to Law 3304/2005 on the application of the principle of equal treatment regardless of, *inter alia*, racial or ethnic origin, such cases are, quite rightly, rather limited nowadays – although there are still laws that allow foreign nationals of Greek origin to enter several occupations under favourable terms.[55]

3.1.2 Reactions to differential treatment

The differentiation between foreign nationals of Greek and non-Greek origin with regard to citizenship acquisition has been criticized on several occasions. Dimitris Christopoulos emphasizes that the said

47 Ibid.

48 Art 10 of the Greek Citizenship Code.

49 Art 6 para 3(g) of the Greek Citizenship Code.

50 Former Art 6(b) of the Greek Citizenship Code.

51 Art 7 para 8 in conjunction with Art 5A para 1 of the Greek Citizenship Code.

52 Ζωή Παπασιώπη-Πασιά, *Δίκαιο ιθαγένειας* (8η έκδ, Εκδόσεις Σάκκουλα 2011) [Zoe Papassiopi-Passia, *Nationality law* (8th edn, Sakkoulas Publications 2011)] 41.

53 Art 18 of Law 670/1977 'Περί Κώδικος Συμβολαιογράφων' ['On the Notary Code'] (repealed by Law 2830/2000).

54 Art 3 of Legislative Decree 3026/1954 'Περί του Κώδικος των Δικηγόρων' ['On the Lawyer Code'] (repealed by Law 4194/2013).

55 Papassiopi-Passia (n 52) 42-44; see, for instance, Art 6(1) of Law 4194/2013 'Κώδικας Δικηγόρων' ['Lawyer Code'] and Art 19 para 2 of Law 2830/2000 'Κώδικας Συμβολαιογράφων' ['Notary Code'].

differentiation contributes to a 'multispeed naturalisation scheme'.[56] Indeed, due to the considerably simplified naturalization procedure, the total number of foreign nationals of Greek origin naturalized as Greek citizens from 2011 to 2014 amounted to 64,476, according to official statistics, while the corresponding number of foreign nationals of non-Greek origin was 5,964.[57] In other words, naturalization concerns primarily foreign nationals of Greek origin, even after the adoption of Law 3838/2010; in theory, the law has brought about important changes and modernization of Greek nationality law, but has been inadequately implemented in practice.[58] Figure 1 is enlightening.

The problematic character of this policy has been highlighted by the European Commission against Racism and Intolerance (ECRI) of the Council of Europe in its third report on Greece of 5 December 2003. The ECRI stressed that the distinction between foreign nationals of Greek origin and foreign nationals of non-Greek origin, which takes the form of a privileged status for the former, 'might cause discrimination based on ethnic origin'[59] and (justifiably) recommended the Greek authorities to 'reconsider the foundations and the implications of their policy in this respect' in order to ensure that both foreign nationals of Greek origin and foreign nationals of non-Greek origin can enjoy equal advantages and opportunities.[60]

56 Dimitris Christopoulos, 'Naturalisation Procedures for Immigrants: Greece' (2013) EUDO Citizenship Observatory Report RSCAS 2013/9 <http://cadmus.eui.eu/bitstream/handle/1814/29784/NPR_2013_09-Greece.pdf?sequence=1> accessed 16 December 2015.

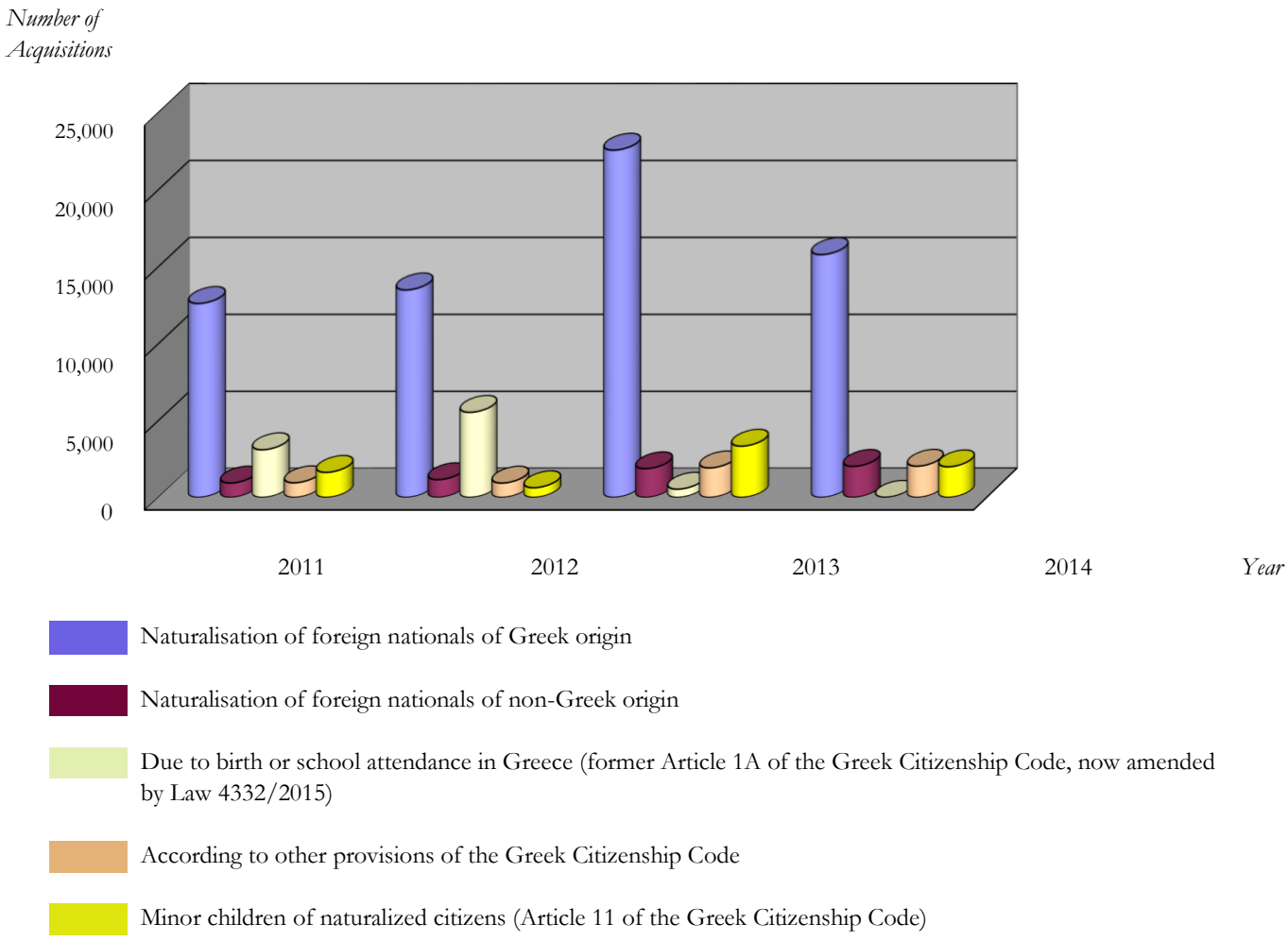
57 Υπουργείο Εσωτερικών: Διεύθυνση Ιθαγένειας, 'Στατιστικά στοιχεία 2011-2014: Κτήσεις Ελληνικής Ιθαγένειας ανά κατηγορία' (20 Μαρτίου 2015) [Ministry of Interior: Department of Citizenship, 'Statistical data 2011-2014: Acquisitions of Greek Citizenship by category' (20 March 2015)] <www.ypes.gr/UserFiles/f0ff9297-f516-40ff-a70e-eca84e2ec9b9/StatsCategory2011-2014-20032015.pdf> accessed 16 December 2015.

58 Christopoulos, 'Naturalisation Procedures for Immigrants: Greece' (n 56).

59 European Commission against Racism and Intolerance, 'Third report on Greece' (adopted on 5 December 2003) CRI(2004)24, 19 <http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/GRC-CbC-III-2004-24-ENG.pdf> accessed 16 December 2015.

60 Ibid.

Figure 1 Acquisitions of Greek citizenship by category (from 2011 to 2014)[61]



With regard to the ECN, which has been signed but not yet ratified by Greece, it is believed that if Greece proceeded with its ratification, the differentiation between foreign nationals of Greek and non-Greek origin would be abolished in the light of Article 5(1) of the Convention, which prohibits discrimination on the grounds of, *inter alia*, ethnic origin.[62] Indeed, such a distinction can be considered as discriminatory, amounting to a nationalistic misuse of the genuine link, as Carrera describes,[63] which is inconsistent with a modern, multicultural society. Ethnic origin or ethnic consciousness should not constitute the only crucial factors in the ascertainment of the existence of a genuine link between the country and the individual. Instead, the policies of the Greek State should use fundamental rights and human values as a starting point and aim at shaping conscientious citizens who respect and are

61 Ministry of Interior: Department of Citizenship (n 57).
62 Papassiopi-Passia (n 52) 45.
63 Sergio Carrera, 'How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the union?' (2014) CEPS Paper in Liberty and Security in Europe 64/2014, 27-28 <www.ceps.eu/system/files/LSE%20No%2064%20Price%20of%20EU%20Citizenship%20final2.pdf> accessed 18 December 2015.

respected by the society in which they live, regardless of race or ethnicity and regardless of whether citizenship has been acquired at birth or at a later stage.

3.2 The other side of the coin: undermining the position of immigrants falling under Article 1A of the Greek Citizenship Code

3.2.1 Judgment 460/2013 of the Council of State

Law 3838/2010 introduced an entirely new and innovative provision into the Greek Citizenship Code: Article 1A. This Article provided children of foreign nationals with three possibilities of acquisition of Greek citizenship by a mere application: the parents' lawful residence in Greece for at least five years, the child's birth in Greece or the attendance of at least six grades at a Greek school in Greece. Each of these possibilities circumvent the demanding procedure for naturalization.

Nevertheless, three years after its entry into force, Article 1A was declared unconstitutional by the plenum of the CoS in its judgment 460/2013.[64] The CoS emphasized the fact that the Greek State was established and continues to exist as a Nation State – as guaranteed by Article 1 paragraph 3 of the Constitution[65] – with a specific historical and cultural background, common traditions and a common language, all of which are passed down from generation to generation via the institutions of family and education.[66] Taking this into consideration, the CoS highlighted that Article 1A of the Greek Citizenship Code introduced a noticeable *ius soli* element into the rules on acquisition of Greek citizenship – which are primarily based on *ius sanguinis* – and provided for acquisition of Greek citizenship merely on the basis of formal and unsound criteria, without involving an individualized examination of the conditions and without guaranteeing the substantive integration of the persons concerned into the Greek society.[67]

The CoS stressed, therefore, that the provisions of Article 1A of the Greek Citizenship Code did not ensure the fulfilment of the genuine link requirement – as developed by the ICJ in the *Nottebohm* judgment – and that they could lead to an arbitrary determination of the composition of the Greek people, thus compromising the national character of the Greek State.[68] Consequently, according to the majority of the plenum of the CoS, Article 1A contravened the constitutional provisions on, *inter alia*,

64 Συμβούλιο της Επικρατείας (ολομέλεια), απόφαση 460/2013, δημοσιευθείσα την 4η Φεβρουαρίου 2013 [Council of State (plenum), judgment 460/2013, published on 4 February 2013] <www.constitutionalism.gr/site/ste-460-2013-allodapoi-ithageneia-psifos/> accessed 16 December 2015.

65 The Constitution of Greece, of 1975, as revised in 1986, 2001 and 2008 <www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf> accessed 16 December 2015. Art 1 para 3 stipulates that 'all powers are derived from the People, exist for the People and the Nation and shall be exercised as specified by the Constitution'.

66 Judgment 460/2013 (n 64), recital 6.

67 Ibid, recitals 6 and 9-10.

68 Ibid, recitals 6 and 10.

popular sovereignty and the protection of the interests of the Greek nation (Article 1 paragraphs 2 and 3 of the Constitution).[69]

In contrast, the judges expressing the dissenting opinion, which this author deems more reasonable than the majority opinion, adopted a liberal approach to the issue. In particular, they contended that, pursuant to the Constitution,[70] the national legislature enjoys considerable discretion concerning the regulation of citizenship acquisition, which is a matter of political significance and can be modified depending on the domestic and international circumstances. In this respect, the courts' judicial review is limited to the question as to whether the legislature's assessment has been objectively, logically and manifestly erroneous.[71]

In other words, considering its discretionary power, the legislature is free to determine that certain objective criteria - such as those required by Article 1A of the Greek Citizenship Code - are capable of establishing an adequate bond between a child of foreign nationals and the Greek society, and can lead, therefore, to the granting of Greek citizenship without prior enquiry into each individual case. According to the dissenting opinion, the legislature has justifiably assessed that the foreign nationals and their children who fulfil the requirements of Article 1A have forged a substantive link with the Greek society. The dissenting opinion concluded by emphasizing that that assessment could not be considered as manifestly erroneous, thus upholding the constitutionality of the provisions of Article 1A.[72]

3.2.2 Remarks on the judgment and aftermath

One can rightly argue that, following judgment 460/2013, the CoS has unjustifiably 'upgraded' the principle of *ius sanguinis* to a rule of constitutional value.[73] It has done so by insisting on the ethnic character of the Greek State as well as the static nature of the concept of Greek people, which needs to

69 Ibid, recitals 5 and 10. On popular sovereignty, Art 1 para 2 of the Constitution stipulates that 'popular sovereignty is the foundation of government'.

70 Art 4 para 3 of the Constitution: 'All persons possessing the qualifications for citizenship as specified by law are Greek citizens. Withdrawal of Greek citizenship shall be permitted only in case of voluntary acquisition of another citizenship or of undertaking service contrary to national interests in a foreign country, under the conditions and procedures more specifically provided by law'.

71 Judgment 460/2013 (n 64), recital 6.

72 Ibid, recital 10.

73 Δημήτρης Χριστόπουλος, 'Με αφορμή την πρόσφατη απόφαση του Δ' Τμήματος του ΣτΕ: Οι μετανάστες μεταξύ «λαού» και «έθνους»' *Ενθέματα* (13 Φεβρουαρίου 2011) [Dimitris Christopoulos, 'In response to the recent judgment of the 4th Chamber of the CoS: The immigrants between "people" and "nation"' *Enthemata* (13 February 2011)] <https://enthemata.wordpress.com/2011/02/13/christopoulos-2/> accessed 18 December 2015: Christopoulos refers to the judgment of the 4th chamber of the CoS on the same matter (Συμβούλιο της Επικρατείας (Δ' τμήμα), απόφαση 350/2011, δημοσιευθείσα την 1η Φεβρουαρίου 2011 [Council of State (4th chamber), judgment 350/2011, published on 1 February 2011] <www.ethemis.gr/ste-3502011-antisintagmatiko-to-dikeoma-psifou-se-allodapous/> accessed 18 December 2015), which gave rise to the judgment of the plenum discussed in this section, and the findings of which are essentially reiterated in the judgment of the plenum.

be protected against arbitrary legislative interventions that could cause its disintegration through the addition of inadequately assimilated persons of various origins.[74] In this respect, the CoS has stressed the importance of a substantive link between the foreign national and the Greek society, which amounts to the existence of a Greek ethnic consciousness. Apparently, the CoS sets very high standards, by noting that five years of residence for the parents or six years of school attendance for the child are not sufficient to guarantee such a link.

The legitimacy of the CoS's high standards is questionable. Firstly, foreign nationals who have resided permanently and lawfully in Greece for five years may not be considered eligible for the acquisition of Greek citizenship by application, but their child who has been born and resides in Greece can have that right. The first society with which that child comes into contact is the Greek society. Greece becomes that child's home and place of assimilation, considering that both of his or her parents are lawful residents and have made that country the centre of their interests and activities. Secondly, the successful attendance of at least six grades at a Greek school in Greece does, in fact, constitute an objective and adequate factor that demonstrates the child's assimilation into the Greek culture. It could be argued that, by maintaining the contrary, the CoS appears not to trust the Greek education system and the way in which it transmits the Greek fundamental principles and values to the children.[75] In addition, it is not reasonable to hinder or deny the granting of Greek citizenship to individuals who are based in Greece, who depend on that country and who participate in the Greek society and culture, while at the same time – due to the very powerful status of *ius sanguinis* in Greek nationality law – Greek citizenship is transferred automatically and perpetually with regard to persons who live abroad and who may have no bond of attachment with Greece.[76]

Furthermore, judgment 460/2013 could be seen as an attempt of the CoS to restrict the role of the legislature in the field of citizenship acquisition. The majority of the judges of the supreme administrative court of the country appeared so concerned about the preservation of the ethnic character of the Greek State – even if that could lead to unfair and unreasonable effects on immigrants living lawfully and permanently in the country – that they were willing to rule on such an important political issue in a way that gave very limited leeway to the legislature and compelled it to follow a

74 Κωνσταντίνος Τσιτσελίκης, 'Ιθαγένεια: το ελληνικό δίκαιο πρέπει να παραμείνει εναρμονισμένο με τον ευρωπαϊκό Νότο' *Ενθέματα* (10 Φεβρουαρίου 2013) [Konstantinos Tsitselikis, 'Nationality: Greek law must remain harmonized with the European South' *Enthemata* (10 February 2013)] <https://enthemata.wordpress.com/2013/02/10/tsitselikis-2/> accessed 18 December 2015.

75 Στρατής Μπουρνάζος, συνέντευξη με τον Δημήτρη Χριστόπουλο, 'Δίκαιο ιθαγένειας: η ευθυγράμμιση με τον ευρωπαϊκό Νότο έχει ήδη συντελεστεί' *Ενθέματα* (22 Ιουλίου 2012) [Stratis Bournazos, interview with Dimitris Christopoulos, 'Nationality law: the alignment with the European South has already occurred' *Enthemata* (22 July 2012)] <https://enthemata.wordpress.com/2012/07/22/xristopoulos3/> accessed 18 December 2015.

76 Ibid. Indeed, the Greek Citizenship Code stipulates, in Art 1 para 1, that 'a child of a Greek father or a Greek mother acquires Greek Citizenship by birth' and does not impose any restrictions on the acquisition or the retaining of Greek citizenship with regard to persons who are born or live abroad.

specific path, as one can realize by observing the recent amendment to the Greek Citizenship Code.[77] The legislature represents the Greek people and thus the restriction of the legislature's legal powers could amount to restriction of the popular sovereignty, which, in fact, the CoS defended firmly through its judgment. Indeed, as noted by Dimitris Christopoulos, popular sovereignty consists in the power of the Greek people to determine through its representatives, *inter alia*, its identity and composition.[78] The question 'who can be considered as a Greek citizen' is, therefore, a political issue, which should be resolved through political dialogue in a democratic society.[79]

Judgment 460/2013 of the CoS created a serious deficiency in the Greek Citizenship Code, which lingered on for more than two years, since the necessary amendment to the Code only occurred in July 2015 via Law 4332/2015.[80] Although the new provisions resolve to a certain extent the impasse faced by thousands of immigrants, they have also been characterized as problematic due to their demanding formal requirements, which aim at respecting the judgment of the CoS in order to avoid a future judicial challenge. It could be argued, therefore, that the CoS has managed to impose its ethnicity-oriented view on the sensitive political matter of citizenship acquisition. Taking that into consideration, as Dimitris Christopoulos contends, notwithstanding the drawbacks of the new provisions, the legislature has rightly opted for a scheme of citizenship acquisition that will prove durable.[81]

4. On the Possibility of a Greek Investor Citizenship Programme

4.1 Already on offer: investor residence programme

Investor residence programmes or golden visa programmes are not uncommon in the EU. Several Member States provide for simplified immigration systems for wealthy third-country nationals by offering more rapid and less demanding procedures for access to visas and residence permits than those applying to other third-country nationals.[82] The Greek investor residence programme consists of

77 See last paragraph of this subsection.

78 Στρατής Μπουρνάζος, συνέντευξη με τον Δημήτρη Χριστόπουλο, 'Νόμος 3838 για την ιθαγένεια και την ψήφο των μεταναστών: Μείζον πολιτειακό ατόπημα η απόφαση του ΣτΕ' *Ενθέματα* (18 Νοεμβρίου 2012) [Stratis Bournazos, interview with Dimitris Christopoulos, 'Law 3838 on citizenship and the vote of immigrants: The judgment of the CoS as a major political error' *Enthemata* (18 November 2012)] <https://enthemata.wordpress.com/2012/11/18/xristopoulos-4/> accessed 18 December 2015.

79 Ibid.

80 Law 4332/2015 'Τροποποίηση διατάξεων Κώδικα Ελληνικής Ιθαγένειας–Τροποποίηση του Ν. 4251/2014 […] και άλλες διατάξεις' ['Amendments to provisions of the Greek Citizenship Code–Amendments to Law 4251/2014 […] and other provisions'].

81 Δημήτρης Χριστόπουλος, 'Αριστερά και ιθαγένεια: τίποτε δεν είναι αυτονόητο' *Ενθέματα* (29 Μαΐου 2015) [Dimitris Christopoulos, 'The left and citizenship: nothing is self-evident' *Enthemata* (29 May 2015)] <https://enthemata.wordpress.com/2015/05/29/ithageneia-2/> accessed 18 December 2015.

82 Sergio Carrera, 'How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the union?' (2014) CEPS Paper in Liberty and Security in Europe 64/2014, 13

two routes for the acquisition of a residence permit: either by typical investment activity or by purchase of real estate in Greece. It cannot be denied that Greece would constitute an attractive option for investors, especially in the areas of renewable energy and tourism. Nevertheless, there are still serious obstacles that inhibit such investments. Most importantly, the volatile financial situation of the country poses a significant risk, so that an investment in exchange for a mere residence permit in Greece would not appear a particularly appealing offer.[83] But what if Greece introduced an investor programme which would grant Greek and, by extension, EU citizenship to wealthy third-country nationals?

4.2 A step further: Greek citizenship for sale?

4.2.1 Views on the sale of citizenship in general

The issue of the acquisition of citizenship in exchange for a pecuniary contribution has provoked considerable debate. On the one hand, citizenship-by-investment programmes have been criticized for treating citizenship as a tradable commodity in a way that could aggravate inequalities based on social class and break down the wall that separates the fields of wealth and political power, thus leading to the erosion of democratic principles by the rule of money.[84] With regard to the EU area, a number of theorists disapprove of the fact that certain Member States exploit the transnational benefits of EU citizenship in order to enhance the value of national citizenship and increase the opportunities of attracting foreign investors.[85]

On the other hand, as maintained by a group of writers, the sale of citizenship should not always be considered as reprehensible. It is true that certain aspects of citizenship-by-investment programmes are capable of giving cause for concern, but it is equally true that many systems of ordinary transmission and acquisition of citizenship contain injustices.[86] In this respect, selling citizenship is deemed to be a mere part (and not necessarily the most serious one) of a group of citizenship practices that depend on

<www.ceps.eu/system/files/LSE%20No%2064%20Price%20of%20EU%20Citizenship%20final2.pdf> accessed 18 December 2015.

83 Information provided by 'La Vida Golden Visas' <www.goldenvisas.com/greece/> accessed 17 December 2015.

84 Jelena Džankić, 'Investment-based citizenship and residence programmes in the EU' (2015) EUI Working Paper RSCAS 2015/08, 4 <http://cadmus.eui.eu/bitstream/handle/1814/34484/RSCAS_2015_08.pdf?sequence=1> accessed 17 December 2015; Rainer Bauböck, 'What is wrong with selling citizenship? It corrupts democracy!' in Ayelet Shachar and Rainer Bauböck (eds), *Should Citizenship be for Sale?* (2014) EUI Working Paper RSCAS 2014/01, 20-21 <http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf?sequence=1> accessed 17 December 2015.

85 Džankić (n 84) 4; Bauböck (n 84) 19.

86 Chris Armstrong, 'The Price of Selling Citizenship' in Ayelet Shachar and Rainer Bauböck (eds), *Should Citizenship be for Sale?* (2014) EUI Working Paper RSCAS 2014/01, 14 <http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf?sequence=1> accessed 17 December 2015.

and perpetuate inequities.[87] Thus the real issue is not the abolition of citizenship-by-investment programmes, but rather the elimination of cases of unjustified differential treatment in the area of citizenship acquisition. Moreover, it cannot be denied that investments can have a very positive effect on a country's economy. From that perspective, it would not seem unacceptable to contemplate a deal between a country that faces severe financial difficulties and a foreign investor that could provide his or her services for the benefit of the country's economic growth, involving the granting of citizenship to the investor as a reward.[88]

4.2.2 Benefits for Greece and important provisos

Taking the aforementioned into consideration, it can be argued that the Greek State could legitimately contemplate the introduction of an investor citizenship programme. The very recent legislative amendment, which allows foreign investors residing in Greece under the investor residence programme to count their period of residence towards the acquisition of Greek citizenship, could be considered as an indication in that direction. In addition, it is noteworthy that, with regard to the Maltese citizenship-for-sale affair, the Greek Presidency of the Council of the EU took a neutral stance by stating that the Council did not have any position on the matter, was not aware of any case of infringement of the Treaties and had not discussed the issue.[89] That could also be perceived as a non-critical attitude towards citizenship-by-investment programmes.

Indeed, Greece is in need of money and economic growth. Crucial investments can be an efficient means of bringing the country on the right track, ameliorating its economic situation and promoting its sustainable economic growth. Attracting foreign investors can, therefore, be highly beneficial for the Greek State and its citizens. Considering that even the ultra-rich do not easily spend large amounts of money, a foreign investor that is willing to invest in the Greek future takes on a responsibility vis-à-vis the Greek people, becomes dependent, to a certain extent, on the Greek State and can be directly benefited or disadvantaged by its economic status. That would constitute a justification for granting Greek citizenship to him or her – provided, of course, that certain basic criteria, such as due diligence and criminal record check, are met. In this respect, it is noteworthy that the Cypriot programme 'Scheme for naturalisation of investors in Cyprus by exception' has brought in more than € 2 billion in the past two years.[90]

87 Ibid.

88 Ibid 13.

89 European Parliament, 'Debate on EU citizenship for sale: statement of Dimitrios Kourkoulas, President-in-Office of the Council' (15 January 2014) <www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20140115&secondRef=ITEM-017&language=EN&ring=B7-2014-0017> accessed 17 December 2015.

90 'Κύπρος: Δύο δισ. ευρώ έφεραν οι «χρυσές» υπηκοότητες' *Το Βήμα* (26 Μαΐου 2015) ['Cyprus: the "golden" citizenships brought in two billion euros' *To Vima* (26 May 2015)] <www.tovima.gr/politics/article/?aid=707664> accessed 17 December 2015.

After all, as Dimitry Kochenov points out, States provide, in many cases, for simplified naturalization procedures as a means of 'reinforcing the society with talent, money, inspiration and diversity – which translates into inviting the rich, the beautiful and the smart'.[91] From that point of view, offering citizenship to foreign investors parallels the granting of citizenship to persons with extraordinary performance in the sphere of science or sport.[92] Article 13 of the Greek Citizenship Code – entitled 'honorary naturalization' – can be considered as an example of such policies, since it facilitates immensely the naturalization of foreign nationals who have offered special services to Greece, or whose naturalization may serve a special interest of the country.

Certainly, in the event of an investor citizenship programme, Greece would rely on the additional value of EU citizenship, which would play a key role in attracting foreign investors. Yet, as stated by Dimitry Kochenov, that should not be perceived as problematic, since Member States are autonomous in the field of nationality.[93] On the basis of that autonomy, a number of Member States have adopted ethnic citizenship policies creating numerous new EU citizens abroad, without, however, meeting with opposition on the part of the EU or other Member States.[94] Consequently, as Gerard-René de Groot stresses, much depends on the reaction or non-reaction of the European Commission and the other Member States.[95] Nonetheless, a possible Greek investor citizenship programme would have to respect, in any case, the criteria laid down by the EU institutions concerning the observance of the principle of sincere cooperation and mutual trust.

Another aspect of the issue relates to the decisive role of genuine link in the context of Greek nationality law. As described in Chapter C of this article, the existence of a Greek ethnic consciousness and a genuine connection with the Greek ethnic group is, in principle, a fundamental criterion for the acquisition of Greek citizenship, often leading to an arbitrary application and misuse of the requirement of genuine link. Obviously, many of the third-country nationals who would like to invest in Greece would not be able to demonstrate such a substantive bond with the Greek ethnic group. Of course, the Greek State would not impose such a condition in the context of the investor citizenship programme,

91 Dimitry Kochenov, 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price' in Ayelet Shachar and Rainer Bauböck (eds), *Should Citizenship be for Sale?* (2014) EUI Working Paper RSCAS 2014/01, 27-28 <http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf?sequence=1> accessed 17 December 2015.

92 Ibid 28.

93 Ibid.

94 See, for instance, the cases of extension of British and, thus, EU citizenship to (part of) the population of non-EU territories as well as the case of the treaties between Spain and Latin American countries, which entitled persons of dual Spanish-Latin American nationality to apply for a Spanish passport: Gerard-René de Groot, 'Towards a European Nationality Law. Revised version of the inaugural lecture delivered on 13 November 2003 on the occasion of the author's acceptance of the Pierre Harmel chair of *professeur invité* at the Université de Liège' (2004) 8.3 Electronic Journal of Comparative Law 12-13 <http://digitalarchive.maastrichtuniversity.nl/fedora/get/guid:376eb43c-b500-4db9-8e49-bc52661bb57c/ASSET1> accessed 17 December 2015.

95 Ibid 12.

and rightly so. It would be, nevertheless, unacceptable and hypocritical if wealthy third-country nationals could simply acquire citizenship by paying an amount of money and fulfilling certain formal criteria, while, based on the current state of affairs, a very large number of ordinary foreign nationals – especially those of non-Greek origin – are virtually excluded from Greek citizenship due to the (often unrealistically) strict conditions imposed by the legislation and the CoS in conjunction with the inadequate implementation of the relevant provisions.

The solution to that inequity should not consist in prohibiting any form of citizenship-by-investment programme, but rather in laying down rational, acceptable and, most importantly, fair rules concerning the granting of citizenship to ordinary foreign nationals who reside permanently in Greece and have made this country the centre of their interests and activities. In this respect, less importance should be attached to the concepts of ethnicity and race. The genuine link should not correspond to such abstract and arbitrary concepts, but rather to a pragmatic situation of interdependence and interrelationship between the individual and the Greek State and society. From that perspective, the elimination of the differentiation between foreign nationals of Greek origin and foreign nationals of non-Greek origin would be a step in the right direction. On that basis, the system of automatic and perpetual transmission of Greek citizenship between persons who have been born and reside permanently abroad and have no bond of attachment with Greece – apart from a remote 'blood link' with the Greek ethnic group – should also be reviewed.[96]

The persons that the Greek State needs to include in its group of citizens are those who offer their services (of any kind) to the country, rely on it, interact with it and share the responsibility for their accomplishments and failures with the rest of the citizens. Such persons could be, *inter alia*, third-country nationals who invest in Greece and its future, immigrants who reside permanently in the country as well as their children who are brought up within the Greek society, and persons characterized by exemplary civic virtue.[97] It is such a dynamic perception of citizenship, rather than a strict adherence to the concepts of ethnicity and ethnic link, that could help Greece become an open, progressive and receptive State and society, showing respect for human values.

96 Of course, in that case, there are other parameters that need to be taken into account, such as the avoidance of statelessness and the guarantee of the right of free movement of persons within the EU.

97 See, for instance, the request of the Municipality of Chania for the honorary naturalization, as a Greek citizen, of a 19-year-old Syrian woman, Doaa al Zamel, who, after having fled her country, saved a baby while fighting for her life in the Mediterranean Sea: 'Ζητούν την τιμητική πολιτογράφηση της Ντοάα Αλ Ζαμέλ' *Prismanews* (4 Νοεμβρίου 2014) ['Request for the honorary naturalization of Doaa al Zamel' *Prismanews* (4 November 2014)] <www.prismanews.gr/index.php/crete/item/92167-psifisma-politografisi-ntoa-al-zamel> accessed 19 December 2015.

5. Conclusion

In sum, the EU is entitled to set certain limits on the actions of Member States in the field of nationality law and has emphasized, in particular, the observance of the principle of sincere cooperation and the existence of a genuine link between the individual and the Member State concerned. On the other hand, the insistence on the requirement of genuine link may lead to exclusionary and nationalistic citizenship practices on the part of the Member States, as indicates the examination of Greek nationality law, which accords, in principle, a decisive role to the existence of a genuine connection with the Greek ethnic group. This characteristic of Greek nationality law should not inhibit, however, the possible introduction of a Greek investor citizenship programme. In fact, it is essential that the introduction of such a programme be accompanied by an amelioration of the conditions of citizenship acquisition regarding ordinary foreign nationals, especially those of non-Greek origin.

Indeed, Greek nationality law is in need of modern, rational and fair rules on the acquisition of citizenship. Genuine link is certainly an important prerequisite in this regard. But it should reflect a pragmatic situation of interdependence and interaction between the State and the citizen, rather than the abstract ideas of ethnic consciousness, ethnic purity and intergenerational continuity. In other words, genuine link should be perceived as a dynamic concept, which allows the inclusion of persons capable of contributing materially, spiritually or ethically to the Greek society, respecting fundamental rights and human values. It is in this way that Greek nationality law can contribute to the progress, amelioration and modernization of the Greek State – a State which is part of a union of various countries, languages and cultures: the EU. It remains to be seen whether the Greek State will be willing to accept that offer and proceed to the relevant reforms in the field of nationality law.

IRRATIONAL RATIONING RATIONALISED: ACCESS TO HIGHLY EXPENSIVE CANCER TREATMENTS IN ENGLAND

Seán Byrne*

Abstract

This is a condensed version of an LL.M thesis which looks at the impact of rationing access to expensive cancer treatments in England. England has been chosen not only because of its well-established national health service, NHS England, but also due to the introduction of the Cancer Drugs Fund (CDF) in 2010 that is specifically designed to improve access to the most expensive treatments. These factors allow for an analysis, though somewhat shortened here, of the relevant decision making processes as well as their impact on patients whose treatments cost well in excess of £30,000 and grant perhaps a few weeks of extra life; patients who fall victim to an abhorrent disease that is being tackled by an overstretched health service, dealing with an already challenging over-expectant population. The figures in this article are correct as of December 2015.

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1. Introduction

In the past 20 years, medicines and treatments have become more specific in nature, focusing on strains of diseases rather than providing general treatment. Moreover, access to these medicines has become a major global issue since the turn of the century. By creating treatments which focus on specific strains of a disease, the subsequently increased expenditure on research and development has led to prices for treatments growing exponentially; in the US, for example, there were seven treatments priced in excess of $100,000 per patient per year in 2014, versus just four in 2010.1

Cancer treatments shall be discussed in particular here due to the high costs of treatment and the scale of affected persons; in 2011, the disease affected 396.2 citizens per 100,000 of the UK population.2 Not only is cancer one of the most prolific diseases in western society, but it is one which affects people equally. When looking at the use of Quality Adjusted Life Years (QALYs), it is interesting to focus on cancer. Indeed the introduction of the Cancer Drugs Fund (CDF) shows an evident lacking of the current rationing methods and their ability to accommodate expensive treatments.

The following article will discuss the QALY as a method of rationing, explaining how it works, looking at its use in practice, and considering the introduction of the CDF. This article will not reflect on changes to the CDF in 2016.3 A discussion is offered of top-up payments within the NHS: have they created a two tiered system within a healthcare service which on the surface gives free and equal access to all? The culmination of this analysis discusses the exceptional case decisions by way of judicial review challenges. These cases provide an important insight into the issues which face patients, *vis-à-vis* access to expensive treatments, and also highlight the day-to-day problems faced by Clinical Commissioning Groups (CCGs) in administering the rationing decisions relied upon by NHS England. This article does not advocate alternative methods of rationing. Rather it details the current situation in England.

2. What are QALYs, how are they calculated, and why are they criticised?

The QALY is a method of calculating the clinical and cost effectiveness of treatments. It is used by the National Institute for Health and Care Excellence (NICE) as part of the overall technology appraisal process. A QALY analysis 'attempts to evaluate healthcare outcomes according to a generic scale. It

1 EvaluatePharma, 'Budget Busters: The Shift to High Priced Innovator Drugs in the USA', (September 2014), 3.

2 Cancer Research UK, 'Cancer Statistics for the UK' <http://www.cancerresearchuk.org/health-professional/cancer-statistics#heading-Zero> accessed June 2016.

3 NHS England, 'The Cancer Drugs Fund – Transition to New Model 1 July 2016' <https://www.england.nhs.uk/ourwork/cancer/cdf/>

asks (1) how much, and for how long, a treatment will improve the quality of a patient's life and (2) how much the treatment costs'.[4]

QALYs, in providing an estimation of life quality, can aid in the distribution of services. However, they have been subject to much criticism related to their introduction into use. Recently the attitude towards the results of applying QALYs when reaching rationing decisions has come to the fore due to expensive cancer treatments.

The calculation of a QALY is relatively straight forward. On a scale ranging from 0 to 1, 0 being death and 1 being perfect health, the 'quality of life' score of a person is calculated based on their ability to live out a normal life, impacted by factors such as pain and discomfort. The calculated figure is then multiplied by the life expectancy of the person before and after treatment. The difference between these two figures gives the 'quality adjusted' aspect to a QALY.

For example:

Before treatment, a patient's quality life score is 0.5 and their life expectancy is 2 years. The patient's life contains 1 QALY. After treatment, their quality life score is 1 and their life expectancy is 6 years. Treatment would result in 6 QALY. The QALY value of treatment is therefore 5. If treatment costs £50,000, this equates to a cost per QALY of £10,000.[5]

The current threshold cost per QALY is between £20,000 and £30,000[6], meaning that treatments above the upper threshold value are unlikely to be funded unless a strong case is put forward. This can result in many treatments, especially new highly priced pharmaceuticals, remaining unfunded until their price drops dramatically. Some studies have shown that the public would be willing to pay above the current threshold prices, upwards of £30,000 to a maximum of £70,000, which is a doubling of the current NICE thresholds.[7]

Although this is a relatively simple calculation, the scope of a QALY is quite inadequate in the sense that it does not adequately reflect the subjective aspects of a person's life; what they may deem acceptable or not in terms of living. For example, as discussed by Jackson, a person may rather live for ten years with an element of discomfort than for nine perfect years of life.[8]

John Harris, a known critic of the method, offered two possible uses of the QALY in practice: 'QALYs might be used to determine which of rival therapies to give a particular patient or which procedure to

4 Christopher Newdick, *Who Should We Treat? Rights, Rationing and Resources in the NHS,* 2nd edn (OUP, Oxford, 2005), 28.

5 Emily Jackson, *Medical Law: Text, Cases, and Materials*, 3rd edn (OUP, Oxford, 2013), 46.

6 Sir Andrew Dillon 'Carrying NICE Over the Threshold' NICE 19th February 2015 <https://www.nice.org.uk/news/blog/carrying-nice-over-the-threshold>.

7 Adrian Towse 'Should NICE's threshold range for cost per QALY be raised? Yes', 2009 338 BMJ, citing a study by Helen Mason, Michael Jones-Lee and Cam Donaldson, 'Modelling the Monetary Value of the QALY: A New Approach Based on UK Data', (2009) 18 Health Econ. 933–950.

8 Jackson (n 6), 49.

use to treat a particular condition'. Alternatively, 'QALYs might also be used to determine not what treatment to give *these* patients, but which group of patients to treat, or which conditions to give priority in the allocation of health care resources'.[9] It is unfortunate, as Harris notes, that QALYs would be used in the latter situation as a determination of which patients and diseases should be treated.

To offer a 'catch all' answer to the use of the QALY method, it is notable that it has proved to be a useful tool in the continued use of the method since the early 1980s in the rationing of healthcare services due to its fluidity and applicability to different scenarios. The QALY method can be used in conjunction with any other framework of ethical reasoning; it is not a negative or positive method, in favour of any one decision, but a purely objective calculation which can be applied universally. While it is not idealistic, the use of QALYs has not resulted in a blanket refusal to treat anyone over the age of 60, for example, and thus its use is balanced in rationing. While it may be more cost efficient to treat only younger patients, this is not typical practice. Ageism must therefore be counterbalanced by those making the rationing decisions with any number of other negative factors in rationing; if not, decisions can be subject to judicial review for being irrational or unreasonable, as shall be discussed below.

For the sake of argument, is it right to criticise the QALY method at all? It is not in fact discriminatory given it merely provides a calculation. If the rationing process were not bolstered by some detached calculation, it may not be feasible at all.

3. QALYs in Practice, and the Cancer Drugs Fund (CDF)

In practice, it is the threshold cost per QALY which causes problems for access to innovative and expensive treatments, not the process by which the decision is made. This threshold goes as far as to say who would be denied access if there were no monetary limits. As aforementioned, the current threshold stands at approximately £20,000 to £30,000, yet the drugs which challenge the QALY method now far exceed this level.

One such example of a drug which challenges the thresholds in practice is Sovaldi, an antiviral drug used to prevent hepatitis C viral replication in infected cells. Its use in practice was recommended by NICE, subject to certain conditions based on the genotype of the hepatitis C virus suffered by the patient. Sovaldi costs approximately £34,982.94 for a 12 week course and £69,965.88 for a 24-week course; these figures exclude VAT and do not include the cost for other drugs which may be necessary in the course of treatment such as Ribavirin and Peginterferon Alfa.[10] The cost per QALY ranges depending on genotype and whether the person is 'experienced' or 'naive' to treatment. The lowest cost

9 John Harris, 'QALYfying the Value of Life', (1987) 13 Journal of Medical Ethics 117-123, 118.

10 NICE, 'NICE guidance recommends Sofosbuvir (Sovaldi, Gilead Sciences) and Simeprevir (Olysio, Janssen) for treating hepatitis C' February 25th 2015.

per QALY is approximately £10,000 with the highest in the region of £46,000. The higher end costs usually reflect the treatment of naive patients and the related treatments have therefore not been recommended for use in practice.

Trastuzumab (Herceptin) and Imatinib Mesylate (Glivec) offer examples of cancer treatment which have exceeded the cost per QALY threshold, with the latter costing approximately £46,000 per QALY.[11] Trastuzumab has also come to the fore in recent years. Its main use in practice is for treatment of HER2 positive breast cancer. Roughly 41,500 women and 300 men are diagnosed with breast cancer each year in England, with about 1 in 5 cases HER2 positive.[12] In cases where HER2 positive breast cancer metastasises in other parts of the body, Trastuzumab Emtansine (Kadcyla) has been developed as a second line treatment. Its alternatives, however, are much cheaper; for example, Kadcyla costs in excess of £90,000 per treatment or £185,600 per QALY.[13] Unsurprisingly, Kadcyla has been rejected by NICE due to its hefty price tag, but it is nonetheless available via the Cancer Drugs Fund.

In January 2009, NICE introduced supplementary advice to improve NHS access to end of life treatments on foot of the Richards Report.[14] The result of this advice means that treatments for patients with short life expectancy can exceed NICE's cost-effectiveness threshold of £30,000 per QALY, provided that they extend life by at least three months (compared with equivalent NHS treatment) and apply to small patient populations.[15] The use of this end of life criteria only adds to budget pressures, however. In Collins and Latimer's study of the impact of raising the cost effectiveness threshold, they state that 'the £549m that we estimated has been spent on the nine end of life treatments each year is more than the £505m it cost to provide dialysis for the 21,544 patients with kidney failure in England in 2009'.[16]

NICE makes recommendations on what drugs should be made available. Their appraisals are mandatorily applied by CCGs, which are not concerned with the sourcing of these funds and the overall impact it has on patient care. While it makes more drugs available to those at the end of their care, it may have knock-on effects for other patients due to the nature of rationing. It is interesting to note that although the Richards Report was not aimed exclusively at cancer drugs, its preparation by the then National Cancer Director implies a recognition of the special position of cancer drugs.

11 Robert Steinbrook, 'Saying No Isn't NICE — The Travails of Britain's National Institute for Health and Clinical Excellence' (2008) 359 New England Journal of Medicine 1977-1981.

12 NICE, 'Breast cancer drug costing tens of thousands of pounds more than other treatments 'unaffordable' for NHS', 23rd April 2014.

13 Ibid.

14 Mike Richards, *Improving Access to Medicines for NHS Patients: A report for the Secretary of State by Professor Mike Richards*, (2008) Department of Health. Hereinafter referred to as the Richards report.

15 NICE 'Appraising life-extending, end of life treatments', July 2009. See also, Marissa Collins, Nicholas Latimer 'NICE's end of life decision making scheme: impact on population health' (2013) 346 BMJ.

16 Ibid, Collins and Latimer.

Due to the increased cost for treatment of cancer, which takes up approximately £5 billion of the annual NHS budget,[17] the Cancer Drugs Fund was launched to improve patient access in England. After initially making an additional £50 million available to NHS England in the financial year 2010/2011, the Cancer Drugs Fund was launched on 1 April 2011. £600 million was made available to the Fund over three years from 2011 to 2014 to help patients access the cancer drugs recommended by their clinician. In September 2013, it was announced that a further £400 million would be made available to extend the Fund to the end of March 2016. Similarly, in August 2014, it was announced that the size of the Fund would be increased to £280 million for 2014/2015, and £330 million for 2015/2016.[18] A study of the Cancer Drugs Fund found that it had changed clinical practice for the management of certain cancers and had increased the use of cancer drugs. This led to additional costs which were not covered by the fund, thus increasing the overall spending on NHS England cancer treatment.[19] Though the introduction of the Cancer Drugs Fund reflects the continuously increased cost for such treatment, however it is unfortunate that the Fund has not been extended to cover the rest of the UK. Indeed there are reports that people have moved to England in order to make use of it.[20]

The Cancer Drugs Fund seems set to continue operating into the future, with recommendations to be given by NICE as to how a course of treatment is to be funded, it could be routinely funded by the NHS, not funded at all, or funded by the Cancer Drugs Fund for a limited time period.[21] As of March 2015, a number of drugs have been either restricted to certain cancers or completely removed from use by the NHS, with representatives saying that it will no longer fund them. Despite this, four other drugs were recommended for use in practice at the same time. However, the effect of increased pricing is evident in the fact that between 2012 and 2014, in relation to cancer, 14 treatments were approved and 22 blocked. This equates to a rejection rate of 61%, which can be compared to a rejection rate of 32% (48 rejections out of 148 appraisals) since NICE started appraising drugs in 2000; there is clearly a near doubling of rejections in the specified time period.[22]

17 Department of Health, '2010 to 2015 government policy: cancer research and treatment' (May 2015).

18 Ibid, and <http://www.theguardian.com/healthcare-network/2015/feb/27/cancer-drugs-fund-future> accessed July 2015.

19 Sue Kilby, 'A NHS Perspective Of The Impact Of The Cancer Drugs Fund On Oncology Drug Use And Other Health Care Resources Within England', (2012) 15 Value In Health A232.

20 Former NHS Wales chief executive Mary Burrows <http://www.express.co.uk/news/uk/582935/Ex-Welsh-NHS-boss-denied-cancer-patients-drugs-moves-England-own-treament>, and a man from Bangor, Wales who also moved due to non-funding of treatment in Wales; http://www.dailypost.co.uk/news/north-wales-news/irfon-williams-bangor-man-move-8760435, both accessed June 2016.

21 See above, (n 4).

22 Nick Triggle 'Cancer drugs row: A sign of things to come?' <http://www.bbc.com/news/health-28688316> (8th August 2014) accessed June 2016.

4. Top-up Payments

The advent of top-up payments in the UK shows that there had been a lack of resources on the part of the NHS for patients who suffer from the most detrimental diseases in society, frequently for those who suffer from cancer. The medicines are available, having been approved by regulatory bodies such as the Medicines & Healthcare products Regulatory Agency (MHRA), but it is the lack of recommendations from NICE which can lead to treatments being withheld from patients due to the exorbitant prices set by the pharmaceutical companies. Nowadays, access to the internet means that knowledge as to what treatment *is* available and what is being *made* available by the NHS ensures that patients are not only pushing for access, but are pushing the boundaries of what the NHS has previously had to deal with in terms of rationing.[23]

Increasingly, top-up payments are being used to break the ever-growing barrier of access. They have created what some critics describe as a two tier system within the NHS, whereby those that can afford to pay will receive better treatment.[24] From a non-UK perspective, this is not unusual: where private or semi-state healthcare is the norm, the notion that one might have to pay for healthcare or insurance of some sort is inevitable. Yet the NHS England constitution states that 'access to NHS services is based on clinical need, not an individual's ability to pay'.[25]

This ideology is the central focus point for those opposed to the normalisation of top-up payments. It is as if to say that in allowing top-up payments, in a situation where access is based on need, those with the most money *need* better drugs. There is little support for this type of rationalisation within the NHS model in England, and the reality is that there are likely few people that can actually afford a full course of treatment along with the additional costs required for healthcare.

The Richards Report was produced in 2008 and considered aspects ranging from top-up payments to the NICE appraisals process.[26] The report recommended top-up payments in practice, and in order to confine the negative aspects a two tiered approach within the NHS might invoke, those undergoing privately funded treatment should be as segregated as possible from those receiving general NHS treatment. This is an unfeasible practice assuming that patients who are privately funding their treatment are doing so due to their advanced illness, to move such patients would be detrimental to their overall health. Jackson has discussed this issue and aptly highlights that the boundaries between what may be considered as negligence on the part of the staff providing general treatment, and those providing specialist treatment, will be considerably blurred. In the event of a clinical negligence claim,

23 Nick James et al., 'A study of information seeking by cancer patients and their carers' (2007) 19(5) Clinical Oncology 356-362.

24 Karol Sikora, Nick James, 'Top-up Payments in Cancer Care' (2009) 21(1) Clinical Oncology 1-5.

25 The NHS Constitution for England published 26th March 2013, Article 2.

26 See above.

the NHS will remain vicariously liable in some instances even though they may not have been the body which has funded and/ or accepted the given treatment.[27] In clarification of the current NHS position, a patient must pay all of the associated costs with an episode of care. This does not only extend to the administration, assessments and outpatient components of the episode of care, but also to any complications which may arise unless they are emergency in nature.[28]

Sikora and James have suggested that, together with proper division of the actual cost of care, a supplementary charge should be added to ensure improvement in NHS chemotherapy and radiotherapy facilities for all.[29] This is an interesting suggestion; by balancing the effect that top-up payments have on overall rationing within the NHS budget, it seems favourable that those who intend to privately fund their treatment would simultaneously support the ideology of the healthcare system which they are still under the care of. This is of course assuming that it is within a private section of an NHS hospital that the treatment is administered as is preferred by the Richards report and as is most likely to occur given the healthcare structure in England.

Glynn-Jones and Beaumont have suggested that a better solution than top-up payments would be to reassess the arbitrary QALY threshold, and develop a more realistic risk-sharing/ cost-sharing arrangement with the pharmaceutical industry and to prevent further undermining of the principles of the NHS through a top-up system.[30] The introduction of the Pharmaceutical Price Regulation Scheme (PPRS) has attempted the latter, by way of providing the NHS access to branded medicines and upholding a fair price for the manufacturer. The scheme was initiated in 2009, with the current variation in effect from January 2014 and set to run for at least five years or more. The PPRS operates by restricting the growth of costs for pharmaceuticals bought by the NHS; the first two years are capped at 0% growth rising to 1.9% growth at the end of the five year term.[31] Previously, the PPRS offered patient access schemes; for example, Cancer Research UK uses Velcade and Lucentis. For Velcade, the pharmaceutical company agreed that the NHS only had to pay for patients who responded to the treatment; otherwise the pharmaceutical company would foot the bill for the drug. In the case of Lucentis, the company agreed to pay for any injections after the first 14. If patients were not better

27 Emily Jackson, 'Top-Up Payments for Expensive Cancer Drugs: Rationing, Fairness and the NHS' (2010) 73(3) The Modern Law Review 399-427.

28 NHS Commissioning Board, 'Commissioning Policy: Defining the Boundaries between NHS and Private Healthcare' (April 2013), 10 paragraph 13.

29 Sikora and James (n 25), 3.

30 Rob Glynn-Jones, Ian Beaumont, 'Why Co-payment is a Cop-out for Us All' (2009) 21(1) Clinical Oncology 6-7.

31 Department of Health, 'The Pharmaceutical Price Regulation Scheme 2014'. See also Kavita Rainova, 'A new PPRS in the UK: What does it bring?' <http://blog.ihs.com/a-new-pprs-in-the-uk-what-does-it-bring> (27th November 2013) accessed June 2016.

after the initial treatment, the company would pick up the cost of any future treatment.[32] Expensive cancer drugs, such as those discussed within this article, are less likely to benefit from the PPRS as it currently operates; these drugs are less likely to have been recommended to and thus purchased by the NHS, meaning they would not be covered by the scheme.

It has been suggested that top-up payments or co-payments and user charges should be introduced in the NHS, particularly concerning expensive cancer drugs. With increased prices being inevitable, and in light of evidence that people are willing to pay for insurance premiums, a move towards patient contributions to cancer treatment could actually be seen as a reflection of what is already becoming the norm. Aggarwal and Sullivan[33] have discussed this;

In Europe co-payments are also used in a variety of forms. In France there is an escalating scale of proportional co-payments (35%, 70% or 80%) depending on the medical benefit of the drug and seriousness of the condition. In the Netherlands patients pay a deductible copayment for the first 220 Euros of their health care costs, after which all care is covered by the third party payer [meaning an insurance company, the premium of which is paid for by the individual[34]]. In the U.K. we have already adopted copayments for dental and optician services, as well as routine prescriptions, for which a fixed charge (£7.85) is applied. Currently prescription charges generate approximately 1% of the NHS budget in income. Could we therefore reasonably integrate a series of copayments for all health care services?'[35]

The harsh reality of top-up payments, for drugs which in essence will only extend life and are not a cure, is best summarised by Christopher McCabe who states:

top-ups encourage patients to spend a proportion of their assets (maybe by mortgaging a house) on purchasing 'hope value' of a limited extension to life which can be of a marginal quality. Relatives and loved ones cannot be seen other than to support the expenditure and yet, for many, this will be a complete waste of time.[36]

From a British perspective, there is a somewhat sacrosanct view of the NHS, where charging for such a service is abhorrent and will spell the downfall for what is the epitome of the Welfare State of old. The above example demonstrates that such payments are not unheard of in Europe, with similar systems in place in Germany. The US also provides a prominent example of a healthcare system that is almost exclusively funded and operating on private or third party funding.

32 Hilary Tovey, 'The Pharmaceutical Price Regulation Scheme – cutting the cost of cancer drugs' <http://scienceblog.cancerresearchuk.org/2009/01/06/the-pharmaceutical-price-regulation-scheme-cutting-the-cost-of-cancer-drugs/> (6th January 2009) accessed June 2016.

33 Ajay Aggarwal, Richard Sullivan, 'Affordability of cancer care in the United Kingdom – Is it time to introduce user charges?', (2014) 2 Journal of Cancer Policy 31-39.

34 Joe Guadagno, Chris Polman, 'A Dutch window into the development of a two tier healthcare system' (2010) 340 BMJ.

35 Aggarwal and Sullivan (n 34), 35.

36 Memorandum by Professor Chris McCabe, written evidence to the Health Committee Report Ev 73, Jackson (n 28), 426.

With respect to cancer treatment, while it is easy to suggest that top-up payments become the norm, the CDF provides funding for those that are not in a position to pay for treatment themselves. It is important to stress that there other issues with top-up payments exist which are not assessed here or solved in their entirety by the CDF. Whether or not the introduction of compulsory payments towards healthcare should happen is a policy decision which is likely to go unsupported as long as the NHS operates as a public service. Solving the 'fudge'[37] that is separating treatment should also be seen as an important step, although little has been done in this regard since the introduction of the Richards Report.

Pollock is of the view that 'there are really no arguments in favour of [top-up payments]. If the drug is elective and worthwhile then it should be available on the NHS. Introducing co-payments would be privatising healthcare and creating a multi-tier system'.[38] In England, access to drugs and treatment for cancer will continue to be a rationing issue long before they become solely or partly funded by private means under statute. The acceptance of top-up payments can, however, be seen as an acknowledgement of the fact that the NHS no longer provides a universal, free and comprehensive service.[39]

5. Exceptional Cases: Rogers, Gordon, Otley, and Murphy. Judicial Review, and Cancer Drugs

The use of judicial review has led to challenges of NICE and NHS England policy in relation to expensive treatments, especially for those who are considered to be exceptional cases in need of treatment. The cases considered here focus on cancer drugs, offering a practical insight into the reasoning behind current policy in relation to high cost treatments as well as how top-up payments and exceptional cases have come before the courts in the past. Most recent judicial reviews of Clinical Commissioning Groups (CCGs), which are regional decision making bodies, consider the following cases and focus on a range of medical treatments. For example, in *R (Rose),* the court held that a CCG was under a public obligation to have regard to the relevant NICE guideline, though NICE guidelines do not necessarily have to be followed, and to provide clear reasons for any general policy that does not follow them.[40] Technology appraisals differ in that their implementation is mandatory, thus the impact

37 John Appleby, Jo Maybin, 'Topping Up NHS Care' (2008) 337 BMJ.

38 Allyson Pollock, quoted in Carolyn Churchill 'What Price Cancer Victims' Drugs' The Herald <http://www.heraldscotland.com/what-price-cancer-victims-drugs-1.890945> (2nd October 2008), Jackson (n 28), 420.

39 Amy Ford, 'Individual Funding Requests for Cancer Drugs and Other Treatments: A Legal and Ethical Analysis of Exceptionality' (PhD Thesis, University of Manchester, 2013), 54.

40 *R (on the application of Rose) v Thanet Clinical Commissioning Group* [2014] EWHC 1182 (Admin).

of non-recommendations of cancer drugs leads some patients to attempt to privately fund and access treatment.

Firstly, it is important to acknowledge 'the *Wednesbury* principles' which form the basis of the judgments. *Wednesbury*[41] is a famous case within the administrative law field as it provides the test which, although adapted since its inception almost 70 years ago, is still good law (despite many people prematurely predicting the end of its applicability). Of particular importance here is *Wednesbury* unreasonableness which Lord Green described in three different ways. The exercise of a discretionary power must be so unreasonable that 'no sensible person could ever dream that it lay within the powers of the authority; it might almost be described as being done in bad faith; and no reasonable authority could ever have come to it'.[42]

For the purposes of the following cases, the last arm of the test is one which becomes most apparent when discussing access to drugs by way of exceptional case policies utilised by CCGs, or Primary Care Trusts (PCTs) as in the following cases.

R (Rogers)[43] is the seminal case in which the high cost of cancer drugs and the decisions of PCTs were challenged by way of judicial review. Rogers appealed against a decision which had refused her application for a judicial review of the respondent's decision to reject her exceptional case application for funding of a treatment with an unlicensed drug (Trastuzumab). Suffering from breast cancer, which was found to be HER2 positive, Ms Rogers' consultant contacted Swindon PCT to ask if Ms Rogers could pay for Herceptin whilst remaining an NHS patient: the answer was that she could not.[44] Her consultant stated that Ms Rogers had a 25% chance of remaining free of the disease after 10 years and a 57% chance of dying within that period. At the time, trials had revealed that Herceptin would result in a considerable therapeutic benefit in cases of HER2 positive breast cancer. Indeed, Ms Rogers' consultant had even begun to treat her with the drug, waiving his fee, and Ms Rogers herself privately funded the beginning of her treatment. However, she was unable to pay for a full course. Swindon PCT had funds available to provide the drug for all patients within the eligible group, namely those who fulfilled the clinical requirements for Herceptin treatment and whose clinician had prescribed it. At the time, 10 other PCTs were funding access to Herceptin for patients. However, Swindon PCTs policy was to refuse funding for Herceptin treatment save where exceptional personal or clinical circumstances could be shown. Ms Rogers argued that Swindon PCTs policy was irrational.

41 *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, hereinafter referred to as *Wednesbury*.

42 Timothy Endicott, *Administrative Law* (2nd edn, Oxford OUP 2011), 45.

43 *R (on the application of Ann Marie Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, hereinafter referred to as *R (Rogers)*.

44 *R (Rogers)* Paragraph 4.

Being primarily concerned with the rationality of the policy used by the PCT to decide upon exceptional cases, it was generally accepted that such a policy (which differentiated patients who were and were not in exceptional situations) was valid:

Thus we would not hold that the policy was arbitrary because it refers to unidentified exceptional circumstances. The essential question is whether the policy was rational; and, in deciding whether it is rational or not, the court must consider whether there are any relevant exceptional circumstances which could justify the PCT refusing treatment to one woman within the eligible group but granting it to another.[45]

Furthermore, the policy was found to be invalid where it would treat one person with breast cancer who could be treated with Herceptin differently to another patient in the same situation;

> *'while the policy is stated to be one of exceptionality, no persuasive grounds can be identified, at least in clinical terms, for treating one patient who fulfils the clinical requirements for Herceptin treatment differently from others in that cohort'.*[46]

Given that the patient group in question (HER2 positive patients) was more limited in size when compared to the totality of breast cancer sufferers, the court was not satisfied that there would be an opening of the floodgates to treat all patients suffering from cancer. Furthermore,

> *'once the PCT decided (as it did) that it would fund Herceptin for some patients and that cost was irrelevant, the only reasonable approach was to focus on the patient's clinical needs and fund patients within the eligible group who were properly prescribed Herceptin by their physician'.*[47]

The court was not satisfied that any evidence had been offered of a clinical or medical nature to differentiate Ms Rogers from the patient group as someone who was not to be considered an exceptional case.

In relation to rationing, the court stated that 'when an NHS body makes a decision about whether to fund a treatment in an individual patient's case it is entitled to take into account the financial restraints on its budget as well as the patient's circumstances'.[48] This principle draws on early jurisprudence of the court[49] and has been reaffirmed by *R (Rogers)* and subsequent cases.

The *R (Rogers)* case provides an important initial insight into the courts view of exceptional cases policies, mainly that they are appropriate and legal in their nature. The decision making process is subject to judicial review in so far as the policy must be reasonable and rational in line with the

45 *R (Rogers)* Paragraph 63.
46 Ibid.
47 *R (Rogers)* Paragraph 81.
48 *R (Rogers)* paragraph 58, quoted from *R (Murphy)* see below, paragraph 6.
49 *R v Cambridge Health Authority ex p B* [1995] 1 WLR 898

Wednesbury principles: where one patient is treated while another patient in a similar set of circumstances is not, the decision must not be so unreasonable that no reasonable authority could ever have come to it. Rationing may have a valid place in exceptional case decisions, but only where its inclusion is rational. In the case of Ms Rogers, it is clear that a refusal to fund her treatment, where others may be treated, is unreasonable. Ms Rogers was granted treatment by Swindon PCT. However, after the resurgence of her cancer, she died three years after her initial review case.[50]

In *R (Gordon)*[51], Ms Gordon applied for permission to seek judicial review of a refusal by the Bromley PCT to fund her treatment with a new drug, Tarceva, which is a second or third line treatment for lung cancer. The drug was not routinely funded by the NHS at the time and was not covered by Bromley PCTs commissioning arrangements. Moreover, NICE had yet to make an appraisal, although the drug was recommended in 2008 and subsequently reviewed and restricted to select patient groups in 2014.[52] Ms Gordon had been taking the drugs for four weeks using private funding and sought funding from Bromley PCT for the rest of a two-month trial period to discover whether the treatment would be effective. Medical evidence indicated that if it proved to be effective, Ms Gordon's life expectancy of 10 months could be increased by between one and 18 months. The cost of treatment was £1,500 per month. Ms Gordon contended that Bromley PCT had reached its conclusion on the misunderstanding that she was asking it to fund two months treatment, which was incorrect due to her having already funded the first month of treatment.[53]

Ms Gordon was granted leave to appeal due to fact that the PCT failed to properly consider the exceptional case application, which was based on funding for one month of treatment and not two. As 'the application in reality was closer to an application for funding for a trial, and for continuing treatment if there was a good response'[54], Ouseley J made the point that the PCT should clarify its position and make it clear that it was not going to fund the trial because it would not later fund the actual treatment.[55]

It is interesting to note that, in relation to the use of rationing, and utilising an exceptional case policy, Ouseley J stated that 'the PCT could legitimately conclude that it would not fund a continuation of treatment because of the cost, the limited benefit to her in survival, the impact that that would have on

50 <http://www.swindonweb.com/?m=2&s=963&ss=966&c=4976&t=Ann-Marie+Rogers+loses+biggest+battle> (March 2009)

51 *R (on the application of Linda Gordon) v Bedford NHS Primary Care Trust* [2006] EWHC 2462 (Admin), hereinafter referred to as *R (Gordon)*.

52 Lynne Taylor, 'NICE U-turn on Roche's Tarceva' <http://www.pharmatimes.com/article/14-04-04/NICE_U-turn_on_Roche_s_Tarceva.aspx> (4th April 2014) accessed June 2016.

53 Westlaw Case Analysis of *R (Gordon)*.

54 *R (Gordon)* Paragraph 33

55 *R (Gordon)* Paragraph 34

the lives and well-being of others, and the resources available to the PCT'.[56] Ouseley J therefore further confirms that rationing is a valid reason for refusing an exceptional case application.

In *R (Otley)*[57], Ms Otley applied for judicial review of a decision of the Barking and Dagenham NHS trust not to provide funding for a treatment, which included the use of Avastin for metastatic cancer. Secondary tumours had been found in Ms Otley's liver that were too large to be resected and a prescribed course of chemotherapy proved unsuccessful. The oncologist then privately prescribed a combination of three anticancer drugs, including Avastin, which was not available from the NHS. Ms Otley privately funded five cycles of the drugs before making an exceptional case application. The response to treatment was positive and the oncologist applied for a further prescription of Avastin. However, a panel of the trust held that the use of Avastin would not significantly prolong Ms Otley's life or be cost effective. The panel was asked to reconsider its decision and a critical analysis of Avastin was subsequently prepared. The document recommended that Avastin should be authorised in exceptional circumstances and set out the exceptionality criteria:

There needs to be a baseline or comparator for something to be exceptional against. The comparator or baseline should be the cohort of people with the condition. So exceptionality here is exceptional for someone with metastatic colorectal cancer compared to the rest of the cohort of patients with such cancer being treated […]

1. Fitness of the patient in terms of ability to benefit from chemotherapy […]
2. Differences in clinical circumstances to the rest of the cohort of patients such as
    a. Reactions to other treatment, tolerances etc
    b. Specific clinical history and prognosis
    c. Other clinical circumstances exceptional compared to the rest of the population with this cancer.[58]

The panel held that Ms Otley did not fit the exceptionality criteria and refused to fund the treatment. Distinguishing *R (Rogers)* on the basis that the policy which was applied was rational and not open for criticism, Mitting J held that the decision of the trust in the case of Ms Otley was irrational. Citing four clear reasons, Mitting J stated that the questioning as to the ratio of Avastin was irrelevant; there were clearly no other treatments available to Ms Otley; the panel did not take into account the slim but important chance that treatment with Avastin could prolong Ms Otley's life; and on any fair minded view of the exceptionality criteria identified (see above), her case was exceptional.[59] Mitting J went on to

56 *R (Gordon)* Paragraph 40

57 *R (on the application of Victoria June Otley) v Barking and Dagenham NHS Primary Care Trust* [2007] EWHC 1927 (Admin), hereinafter referred to as *R (Otley)*.

58 *R (Otley)* Paragraph 9.

59 *R (Otley)* Paragraph 26.

state that 'although the allocation of resources is a factor, it is not capable of being a decisive factor in the decision which it had to make'.[60] Accordingly, there was no reasonable evidence that the trust was put into a precarious rationing position by the claim of Ms Otley.

R (Otley) gives a clear insight into the factors which may be considered as part of an exceptional review policy, and also builds upon *R (Rogers)* and *R (Gordon)*. Distinguishing *R (Rogers)* is important in clarifying the legal position of exceptional case policies. In relation to rationing, the ratio of *R (Otley)* in contrast with that of *R (Gordon)* shows that rationing may be considered as a factor which plays a part in exceptional case applications but it must be done so within the bounds of reasonableness.

The case of *R (Murphy)*[61] reiterated the principles established in *R (Rogers)* and *R (Otley)* in relation to rationing of resources. *R (Murphy)* focuses mainly on the decision of the PCT, which Ms Murphy claimed was incorrectly applied by the deciding panel. Ms Murphy applied for a judicial review of the refusal by Salford PCT to provide funding for a drug to treat her kidney cancer. Ms Murphy's consultant oncologist had recommended she be treated with Sunitinib due to her severe adverse reaction to the usual course of treatment (Interferon). Treatment with Sunitinib was too expensive to be ordinarily administered and it could not cure her, but it might have extend her life by a few months. The panel, concluding that Ms Murphy's circumstances were not exceptional, refused to make the drug available.

The exceptionality policy was set out as follows: treatment may be funded 'where the failure to provide them would be likely to cause significant damage to his/her psychological health or social circumstances'.[62] Ms Murphy, who at the time of her exceptional case application was also suffering from breast cancer and mental health issues, contended that the PCT failed to take into account all aspects of her circumstances as a whole, instead looking at each individually.[63] In doing so, the panel failed to properly take into account the effect which refusal to fund would actually have on Ms Murphy and her given circumstance. In his closing remarks, Burnett J opined the reality of all judicial review cases that the conclusion of there being a legal error did not mean that there would be a different decision when the case was to be decided again.[64]

In general, NHS policy[65] states that the overriding question which the panel needs to ask is whether it has been demonstrated that this patient's clinical circumstances are exceptional. This policy paper

60 *R (Otley)* Paragraph 27.

61 *R (on the application of Jean Marie Murphy) v Salford Primary Care Trust* [2008] EWHC 1908 (Admin), hereinafter referred to as *R (Murphy)*.

62 *R (Murphy)* Paragraph 11.

63 *R (Murphy)* Paragraph 36.

64 *R (Murphy) P*aragraph 36.

65 NHS Commissioning Board, 'Interim Commissioning Policy: Individual Funding Requests' (April 2013).

draws on the elements which have been established in the discussed cases, in order to take into account all relevant evidence and to disregard non-clinical factors.[66]

With regard to rationing decisions, a further NHS policy paper[67] suggests a scenario based on a fictitious cancer drug. The treatment which is unfunded by the NHS may benefit 3 out of every 100 patients. If these 3 patients could be identified as a specific sub-group who would benefit, the treatment would prove cost-effective and be funded. This is not the case. If patients were to privately fund their treatment, or receive funding from a drug company,[68] and show satisfactory progress, they may make an exceptional case application. The conclusion drawn in the policy paper is that it would be rational (and lawful in light of the reasoning of the aforementioned cases) for the NHS not to fund an exceptional case which has benefitted from prior funding as this would offend the principle of the NHS found in section 1(4) of the NHS Act 2006 (as amended) that all treatment must be freely accessible.

The purpose of discussing these cases has been to outline the litigation of exceptional case applications, but also to show how this litigation has influenced current NHS policy. In an attempt to rationalise the irrational, decisions based on these policies often fail due human error: 'inevitably, mistakes will be made and opportunities will arise to allege procedural impropriety'.[69] Given the complexity of applying an exceptional case policy by boards which usually lack legal awareness, it is unsurprising that challenges arise.[70]

6. Conclusion

Rationing is a necessity for the NHS, which has a limited budget that should provide the best possible care for the population of the UK and sometimes other persons legally present in the state. The challenges that face such a large organisation are obvious: administration and litigation are unwelcome adversaries to budgets, along with patients who inevitably (and rightly so?) expect a higher standard of treatment in-line with technological advances.

In relation to allowing top-up payments, the foundations have been set to legally allow user charges and top-up payments while continuing to receive standard NHS care. The ability to properly charge for this care, that is the division of basic care and topped-up care, must be implemented. Not only does this allow continuation of user charges, but it clarifies the position of same within the structure of the NHS.

66 Ibid, Paragraph 1.27.

67 NHS Commissioning Board 'Commissioning Policy: Defining the Boundaries between NHS and Private Healthcare' (April 2013), 5-7.

68 As was previously possible with the PPRS, see above.

69 Christopher Newdick, 'Judicial Review: Low-Priority Treatment and Exceptional Case Review' (2007) 15(2) Medical Law Review 236-44.

70 Ibid.

While this is unlikely to provoke a less favourable attitude towards top-up payments by diehard Welfare State advocates, it is a necessary step forward for the NHS in the face of expensive cancer treatments. If NICE will not recommend the drugs, patients who can afford a course of treatment, or who are insured by a third party, will gain access to approved medical treatments in the UK. Allowing top-up payments could well provide an income with which the NHS could fund exceptional case applications, as mentioned above and by Sikora and James, for those who do not have access to private funding but deserve care all the same.

The law's influence on patient access takes many forms. Rationing decisions themselves are based on legally accepted policies. Yet it is the postcode lottery which still forms a major barrier to patient access in England and the rest of the UK, with rationing itself falling victim to this lottery too as CCGs budgets are spread across many patient cohorts. Using judicial review as a means to challenge irrational decisions is often a necessary last resort to an increasingly stretched healthcare service. The future of the NHS is not to be questioned, but it is noteworthy that it is a service which is beginning to little resemble what its founding fathers envisaged. This is particularly true when it comes to accessing new, innovative and expensive cancer drugs, the majority of which source funding outside the budgets of CCGs or NHS England.

STATE IMMUNITY: A TRICKY OBSTACLE IN REDRESSAL OF HUMAN RIGHTS VIOLATIONS

Elena-Dimitra Pantopoulou*

Abstract

The present paper has the scope to explore the conflict between the doctrine of state immunity and the jus cogens norm. This conflict has been raised in several human rights litigations due to the numerous reparation claims for World War II crimes. Domestic jurisdictions have produced important decisions on this conflict by considering, and in few cases adopting, the argument of obviated state immunity in case of conflict with jus cogens norms. This has happened particularly in common law countries where Foreign Immunity Acts have been enforced. In international law, the development of the normative hierarchy theory, which is thoroughly analyzed in the third part of this paper, was used in order to justify this new exceptive approach to state immunity in national fora. However, its obvious weaknesses have rendered it unpersuasive. As a result, recognizing state immunity is still the absolute trend for international justice. The decision of the International Court of Justice on the Jurisdictional Immunities of the States confirmed that international fora are not ready yet for the adoption of restrictive immunity. Thus, in the last part of this paper, I address the reluctance of international justice to reconsider the doctrine of state immunity, which remains one of the greatest judicial obstacles for redressal of human rights violations. For this purpose, I invoke the flexibilities of the domestic judicial system of each State.

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1. Introduction

Before examining the conflict of state immunity with *jus cogens* norms, it is important to start by determining the context of foreign sovereign immunity in cases of human rights violations by a State against nationals of another State. When the court of one State assumes jurisdiction over another State or its representatives, the authority of the forum State is to adjudicate the dispute conflicts with the principle of state equality, as expressed by the maxim *par in parem non habet imperium*[1]. Over time, a number of customary rules have emerged in international law which bar domestic courts from adjudicating disputes involving another State. These rules are necessary in order to avoid an interference with the exercise of sovereign prerogatives by a foreign State and to allow its representatives to perform their official duties without practical obstacles. According to the International Law Commission (ILC), customary international law on state immunity has grown principally and essentially out of the judicial practice of States on the matter. Although, in practice, other branches of the government (namely the executive and the legislative body) have had their share of input in the progressive evolution of these rules of international law.[2]

One of the most difficult tasks in recognizing foreign sovereign immunities is to identify the international rules governing state immunity. This is because sources of international law on this subject appear to be more widely scattered than normally expected in the search for rules on a topic of international law.[3] Additionally, the practice of States on the matter is not uniform. In fact, there are two different periods of consideration of state immunity at the domestic level. The first period, covering the eighteenth and nineteenth centuries, has been called the period of absolute immunity. In this first period, foreign States are said to have enjoyed complete immunity from domestic legal proceedings.[4] The second period emerged during the early twentieth century, when Western nations adopted a restrictive approach to immunity in response to the increased participation of State governments in international trade. This period was marked by the development of the theoretical distinction between *acta jure imperii* and *acta jure gestionis*.

The first kind of state activities was considered to be the State conduct of a public or governmental nature for which immunity should be granted, whereas the second kind was considered to be the state conduct of a commercial or private nature for which immunity should not be granted.[5] According to the theoretical approaches of the era, the exercise of jurisdiction over *acta jure gestionis* did not affront a

1 See Hazel Fox, *The Law of State Immunity*, 2nd edition, Oxford International Law Library, 2008.

2 See *Preliminary Report on Jurisdictional Immunities of States and Their Property*, par. 23,UN Doc. A/CN.4/323. *reprinted in* 2 Y.B. INT' L L. COMM'N 231(1979)

3 Ibid, par.22

4 See *The Parlement Belge*, (1880) 5 P.D.197, 217. See also *Spanish Government vs Lambege et Pujol*, Cass. D. 1849, I, 5,9.

5 See James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 1983 BRIT. Y. B. INT'L L. 75.

State's sovereignty or dignity. However, the application of this public/private nature distinction proved difficult for many courts. Thus, in some States, particularly the common law countries, a functional variation on the restrictive approach has been developed in order to replace this practical distinction with national immunity legislation.[6]

As for today, the exact scope of this so-called 'restrictive' doctrine of state immunity remains unclear. Despite the fact that most countries have similarly extended their courts' jurisdiction over foreign States' activities over time, international consensus on the matter 'exists only at a rather high level of abstraction, and the details of the international law of state immunity are not always certain'.[7] The difficulty of uniformity of State practice exists also due to the sensitivity of the question before the court: legal decisions regarding State immunity yield to considerations of foreign relations and policy, most of the time, so as to maintain friendly relations with the foreign sovereign.

For years now the codification of customary rules on State immunity has remained limited at the regional level. The European Convention on State Immunity, signed in Basel in 1972, remains the only Convention in force which codifies rules on State immunity. Its low-ranked ratification by only eight European countries shows that the doctrine of State immunity is still evolving and no consensus exists between States on the application of this doctrine within every domestic legal framework. In 2004, though, the United Nations Convention on Jurisdictional Immunities of States and Their Property (JISP Convention) appeared as a major step towards enhanced legal certainty in this area of law. This Convention was designed to achieve the codification and development of international law, and the harmonization of the practice of domestic courts, by embracing the restrictive approach to State immunity[8]. The important development established by this Convention is that, even if it is not yet in force, it has already been ratified by 28 to 30 States; these States include Russia and China, where national courts traditionally favored an absolute immunity approach.

In light of this legal uncertainty, I will attempt to examine the possibility of granting state immunity in cases of human rights violation by adopting a new, more successful approach to the concept. This should not remove any obstacles for human rights victims seeking legal redressal for *jus cogens* violations.

Within the topic of State immunity, it is also relevant to discuss the extraterritorial application of human right treaties and the recognition of extraterritorial jurisdiction of States as construed by international and national courts. The universality of application, which is an underlying purpose of human rights conventions, has led to an ever-widening scope of the obligations undertaken by State

6 See U.S. Foreign Sovereign Immunities Act of 1976 and UK State Immunity Act, 1978

7 See Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 1992, 5 N.Y. INT' L L. REV. 51, 61

8 See the *Preamble of the United Nations Convention on Jurisdictional Immunities of States and Their Property, opened for signature* Jan. 17, 2005, reprinted in 44 ILM 803 (2005).

Parties.[9] As a result, State Parties undertake to ensure the protection of the convention rights of all individuals, not only within its territory but also within its jurisdiction. Thus a wider responsibility for States to respect human rights is established, and every State is to be considered responsible for human rights violations even when these activities are taking place outside its territory but within its jurisdiction.

State immunity, in practice, is raised as a tool of judicial flexibility in cases of human rights violations which have taken place outside the territory of a State. Yet, at the same time, it refers to activities that fall under its jurisdiction. The extraterritorial application of human rights conventions should definitely be considered as a substantial criterion for the granting or not of State immunity, and accordingly should be considered in discussions on the issue. However, this paper principally examines whether or not State immunity constitutes an international law custom and how it should be treated in national and international courts when immunity is to be granted to a particular State. For this reason, I have decided to exclude the discussion on the extraterritorial application of human rights conventions so as to extend the analysis of these two questions.

2. The Conflict Between *Jus Cogens* Norms and State Immunity: Revisited Immunity?

As aforementioned, the involvement of States in activities of a private law nature has been the reason for the development of the restrictive approach of the jurisdictional immunity of States. The gradual awakening of the international community's conscience, with regard to the need to protect certain fundamental values and principles, has led to a reconsideration of the limits of State sovereignty and its constitutive elements, both at a theoretical and judicial level. However, the question to consider is at what point these relatively new concerns have affected the doctrine of state immunity.

Since the end of World War II, impressive initiatives on this issue have been introduced in the field of international criminal law through the emergence of rules on war crimes, crimes against humanity and genocide. These initiatives are echoed in the texts of international criminal courts such as the Nyremberg Charter, the founding texts of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as in the content of several human rights conventions (such as the Geneva Conventions or the Convention Against Torture).[10] However, international instruments which provide both substantive and procedural laws and mechanisms are not always able to cope with the reparation of violations committed by a State of the community's fundamental values. Domestic courts, through civil procedures, have tried to assist the

9 See M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law Principle and Policy*, OUP, 2011, p.55

10 See D. Robinson, *The impact of the human rights accountability movement on the international law of immunities*, The Canadian Yearbook of International Law 2002, 151 et seq., 154-155

development of immunity in cases where reparations for violations of *jus cogens* have been claimed. Nevertheless, there is a critical distinction between the way in which international courts interpret and apply the restrictive immunity and the way in which domestic courts do this. In its 1989 Report on Jurisdictional Immunities of States and their Property, a working group of the ILC found that the plea of sovereign immunity could succeed. However, national courts had shown sympathy for the argument that States were not entitled to plead immunity in cases where there had been a violation of *jus cogens* norm.[11] At this point, it is important to examine how international and domestic jurisdiction have dealt with the conflict between jus cogens norms and state immunity.

2.1 The national adjudication system and the conflict

A major blow to the developing trend of the restrictive approach, which inspired domestic legal systems to enlarge the context of restrictive immunity in human rights proceedings, was the judgment by the International Court of Justice (ICJ) in the case of *Arrest Warrant (Democratic Republic of the Congo v. Belgium)* in 2002. The case referred to an arrest warrant issued by the Belgian courts against an incumbent minister of the Democratic Republic of Congo for having committed serious war crimes and crimes against humanity. Before the international court, Belgium contested that an exception to the immunity rule was permitted for serious crimes under international law by referring to the recognition of such an exception by the House of Lords of the United Kingdom in the *Pinochet* judgment and the French Court of Cassation in the *Quaddafi* judgment. Yet the Court rejected the Belgian claim on the basis that the written rules, provided by various international instruments, did not support the argument that any such exception exists in customary international law[12].

This case has provoked a number of subsequent adjudications by ICJ in similar instances. In at least three important national court cases, there are judicial decisions which take under serious consideration the non-granting of immunity for a State which violates *jus cogens* rules. The first and most successful of the cases is the judicial decision of *Prefectures of Voiotia*. The case refers to the civil claims for violations committed by German forces in Distomo in Greece during the country's occupation in the Second World War. Years later, the multi-member Livadia court denied immunity to Germany by referring to the crimes as violating *jus cogens* rules.[13] The ruling had been upheld by the Court of Cassation *(Areios*

11 The working group cited the following cases in this connection: (United Kingdom) *Al-Adsani v. State of Kuwait, ILR* 100, 465, 471; (New Zealand) *Controller and Auditor General v. Sir Ronald Davidson, New Zealand Law Reports* 1996, 278, particularly at 290 ; Dissenting Opinion of Justice Wald in (United States) *Prinz v. Federal Republic of Germany* 26F3d 1166 (DC Cir. 1994) at 1176-1185; *Siderman de Blake v. Republic* of Argentina 965 F2d 699 (9th Cir. 1992); Argentine Republic v. Amerada Hess Shipping Corporation 488 US 428 (1989); Saudi Arabia v. Nelson, ILR 100, 544.

12 See *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, 24-25

13 See Judgment 137/1997 of 30 October 1997, Nomiko Vima - NoV 1998, 246 *et seq.*

Pagos), but it was ultimately overturned by the Supreme Court which held that Germany enjoyed immunity in this respect.[14]

When the case went to the German courts, it was also dismissed. The final finding by the *Bundesgerichtshof* ruled that 'the judgment of the [Greek] *Areios Pagos* could not be enforced in Germany, and that the massacres complained of were the exercise of sovereign power, and thus fell within the scope of state immunity'.[15]

The second case, wherein the argument was invoked and taken under consideration by the Court, was the case of *Houshang Bouzari* against Iran. The plaintiff claimed damages before the Ontario Supreme Court of Justice in Canada for torture allegedly suffered by him. The case was examined on the basis of the Canadian State Immunity Act and the Court decided that Iran was immune before national courts for breaches of the *jus cogens* rule prohibiting torture, taking into account the ruling of both the *Arrest Warrant* and *Al-Adsani* judgments.[16]

The third case is the decision by the Italian Supreme Court in the case of *Luigi Ferrini,* a person who was deported to Germany during the Second World War and forcibly employed in the war industry. The Supreme Court invoked the most successful application of an immunity waiver for violations of *jus cogens*. The Italian Courts of First Instance declined jurisdiction, on the basis of immunity, but the Supreme Court overturned them and held that Germany was not immune from jurisdiction because the crimes in question violated *jus cogens* rules. Accordingly, these rules had an overriding effect on all other conflicting rules of international law.[17]

As is obvious, national courts diverge from the absolute immunity trend by taking under serious consideration, and sometimes accepting, the argument of restrictive immunity of States in relation to the violation of *jus cogens* norms. The international courts, on the contrary, do not seem ready to accept such a concept and retain conservative views on the issue.

2.2 The international adjudication system and the conflict

With the exception of the Arrest Warrant case, which referred to the waiving of functional immunity of a Head of a State for *jus cogens* violations, there have only been a few cases dealing with the conflict between *jus cogens* and State immunity before international fora. Before the European Court of Human Rights (ECtHR), the only two cases to arise were the cases of *Al Adsani v. UK*[18] and *McElhinney v.*

14 See Judgment 6/2002 of 17 September 2002, Epetirida Institoutou Diethnon Spoudon, 2002-03, 688 *et seq.*

15 Ibid

16 See Ontario Superior Court of Justice, *Bouzari v. Islamic Republic of Iran,* 1 May 2002.

17 See Corte di Cassazione, *Ferrini v. Repubblica Federale di Germania*, no. 7791, 15/4/2005, Italian Yearbook of InternationalL aw 2005, 317 et seq.

18 See *Al-Adsani v. the United Kingdom* [GC] (App. no. 35763/97), ECHR Reports of Judgments and Decisions 2001 -XI

Ireland[19]. In both instances, the plaintiffs were claiming that the defendant States had violated their right to a fair trial under article 6 of the European Convention of Human Rights by granting State immunity to States that had caused suffering for or tortured the applicants. Substantially, both decisions recognized that there is no exception from immunity in cases of *jus cogens* violations as is stated in international customary law. Thus granting immunity to States for conduct in the public sphere is absolute and correct. This was the reason why the Court had dismissed the claims.

The same argument for absolute State immunity has been used by the ICJ in the recent decision on *Judicial Immunities of the States (Federal Republic of Germany v Italy, intervening Greece)* of 2012. The Court found that the Italian legislation violated the fundamental right of Germany to benefit from State immunity by recognizing the immunity waiver in the case of *jus cogens* violations. According to the ruling of the Court, there was no exception in any international treaty or customary law which recognized the existence of such an exception.

From what has been mentioned above, it is clear that there is much more space for consideration of restrictive immunity in human rights litigations before domestic courts than before international fora. For this reason, in section 4, I propose an argument based on the focus shift of the conflict to the domestic legal order. Nevertheless, prior to my analysis, I believe it is important to examine the theory of the hierarchy of norms that created the immunity waiver in instances of *jus cogens* violation in order to discover why it has not yet succeeded to convince courts in international human rights proceedings.

3. The Prefectures of Voiotia Case: The Rise and Fall of the Normative Hierarchy Theory

The normative hierarchy theory was invoked as a basic argument before both national and international fora in order to support the idea that State immunity should not be granted in cases when a State conduct has violated *jus cogens* norms against nationals of the forum State. The reason for a special reference to the theory is the fact that it was close to being successfully accepted in domestic legal orders, in cases where civil claims for war crimes had been raised, whereas it was rejected as an argument in the international fora which insisted on absolute immunity. By criticizing this counterargument, I will firstly evaluate the reasons why the argument was not convincing in the international fora, before trying to rebuild the state immunity approach so as to propose a brand new convincing argument on how to deal with State immunity in human rights violations.

Beginning with the main aspects, this theory turns on the assumption that State immunity is a product of State sovereignty, resting on the foundation that sovereign States are equal and independent and as

19 See *McElhinney v. Ireland* [GC] (App. no. 31253/96), ECHR Reports of Judgments and Decisions 2001-XI

such cannot be bound by foreign laws without their consent.[20] Since State immunity is not a peremptory norm, whenever is invoked in defense of *jus cogens* violations, it must yield to the 'general will' of the international community of States.[21] Accordingly, *jus cogens* is by definition a set of rules from which States may not derogate. Consequently, any State act in violation of such a rule will not be recognized as a sovereign act by the community of States. Therefore the violating State may not claim sovereign immunity for its actions.[22] In the case of harm to an individual in violation of *jus cogens*, a State may no longer raise an immunity defense since the State may be regarded as having implicitly waived any entitlement to immunity.

The theory was initially used as a legal argument for supporting the application of section 1605 (a) (1) of the American Foreign State Immunity Act in order to empower the exercise of District Court jurisdiction in cases in which a State has waived its immunity, either explicitly or by implication.[23] The application of the waiver to immunity under section 1605 (a)(1) of the FSIA has been successfully used in cases such as the famous case of *Siderman de Blake v. Republic of Argentina,*[24] which referred to the torture and the expropriation of property of an Argentine citizen by Argentine military officials. The theory was also used as the sole argument in *Princz v. Federal Republic of Germany* which considered claims of personal injury and forced labor rising from the plaintiff's imprisonment in Nazi concentration camps. Despite receiving substantial consideration, the argument was ultimately rejected and was not successfully raised as a legal argument in national or international court proceedings for years. Several legal scholars started to produce significant discourse about it nonetheless.[25]

In 2001, a civil law court in Greece, feeling free from the constraints of national immunity legislation and treaty obligations,[26] inclined from the trend of absolute immunity and accepted the waiver of immunity for the Federal Republic of Germany. In this case, several arguments based on the normative hierarchy of norms theory were considered. In the case *Prefectures of Voiotia v. Federal Republic of Germany*, the facts of the case arose out of the Nazi occupation of southern Greece during World War II. In 1944, Nazi military troops committed war atrocities against the local inhabitants of the Prefectures of

20 See Adam C. Belsky, Mark Merva, & Naomi Roht-Arriaza, Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989), at 390.

21 Ibid

22 Ibid at 377

23 See 28 U.S.C. §1605(a)(1)

24 See 965 F.2d 699 (9th Cir. 1992)

25 See William Pepper, *Iraq's Crimes of State Against Individuals, and Sovereign Immunity*, 18 BROOK. J. INT'L L. 313, 1992 ; Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403, 1995; Joseph G. Bergen, Note, Princz v. The Federal Republic of Germany: *Why the Courts Should Find That Violating* Jus Cogens *Norms Constitutes an Implied Waiver of Sovereign Immunity*, 14 CONN. J. INT'L L. 169, 1999; Thora A. Johnson, Note, *A Violation of* Jus Cogens *Norms as an Implicit Waiver of Immunity under the Federal Sovereign Immunities Act*, 19 MD. J. INT'L L. & TRADE 259, 1995.

26 Greece had not signed and ratified the European Convention on State Immunity of 1972. There were no national legislation regulating the immunity of States, as well.

Voiotia, principally in the village of Distomo. These atrocities included willful murders and the destruction of personal property. Over 50 years later, the plaintiffs, who were predominantly descendants of the victims, sued the Federal Republic of Germany in the Greek Court of First Instance of Livadia, claiming compensation for the material damage and mental suffering endured at the hands of the Nazis.[27]

The Court of First Instance invoked the normative hierarchy theory to rule that Germany was not immune. The Court stated that: 'according to the prevailing contemporary theory and practice of international law opinion . . . the state cannot invoke immunity when the act attributed to has been perpetrated in breach of a jus cogens rule.'[28] The rule of *jus cogens* that the Court identified was contained in Articles 43 and 46 of the regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land.[29] Article 43 obligates an occupying power to respect the laws in force in the occupied territory and ensure public order and safety. Article 46 obliges occupying powers to protect certain rights of the occupied population, especially the rights to family honor, life, private property and religious convictions.[30]The Court concluded that the demonstrated breach of this rule deprives a State of the immunity defense in domestic proceedings. The Hellenic Supreme Court (*Areios Pagos*) affirmed the holding of the lower court and seemingly supported its reasoning based on the normative hierarchy theory.[31] The Supreme Court determined that the Nazis' atrocities were an abuse of sovereign power, on which Germany could not base an immunity defence. Unfortunately, the potential disruption to political relations between Germany and Greece which could have resulted from the execution of the decision meant that the victims were not actually compensated by the German Government.

After this judicial triumph in the Greek court proceedings, the normative hierarchy theory has not been raised successfully in any other national or international court since. At the international level, the argument was raised before the ECtHR in the recent *Al Adsani* case. Yet the Court decided in favour of absolute State immunity and consequently rejected the claim, despite the strong dissenting opinions of Judge Christos Rozakis and Judge Nicola Bratza, who expressed the opposite views following an argumentation based on the normative hierarchy theory. Similarly, as aforementioned, the ICJ decision on *State Immunities* has denied any restriction to State immunity for any State conduct that violates

27 See *Prefecture of Voiotia v. Federal Republic of Germany*, No. 137/1997 (Ct. 1st Inst. Leivadia, Oct. 30, 1997), *translated in* Maria Gavouneli, *War Reparation Claims and State Immunity*, 50 Revue Hellénique De Droit International 595 (1997) [hereinafter Greek Judgment I].

28 See Greek Judgment I, supra note 210, at 599.

29 Ibid

30 See *Regulations Respecting the Laws and Customs of War on Land*, Art. 43, annexed to Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631

31 See Maria Gavouneli & Ilias Bantekas, *Case Report: Prefecture of Voiotia v. Federal Republic of Germany*, 95 AJIL 198 (2001).

human rights and *jus cogens*. According to the Court, no existing rule or custom could justify the acceptance of this restriction on States.

It is obvious that, even for a short period, the normative hierarchy theory was a very promising basis for overcoming the obstacles in the path of human rights victims seeking legal redressal. However, any use of it as a legal argument has proved to be incapable of securing success in domestic or international law fora, except in the *Prefectures of Voiotia* case. The reasonable question, at this point, is why the application of normative hierarchy theory is so unconvincing for the fora.

The theory has several weak aspects. First of all, there is the issue of the context and the application of *jus cogens*; the theory places *jus cogens* norms at the centre of its establishment. However, supporters of this theory underestimate the fact that while the exact scope and content of *jus cogens* norms in international law is an increasingly accepted proposition, its exact scope and content remain open.[32] Supporters of the normative hierarchy theory have failed to indicate a precise list of human right norms with a peremptory character. In the international arena, consensus is emerging as to the status of certain norms, such as the prohibition against piracy, genocide, slavery, aggression and torture. But still these norms represent only a small fraction of the norms that potentially may belong to the body of *jus cogens*. In the *Prefectures of Voiotia* case, though, the Greek courts identified the rights of family honor, life, private property and religious convictions enshrined in Article 46 of the Hague Regulations as operative *jus cogens*.[33] Nevertheless, the undefined character of *jus cogens* may present problems for the courts. Attempting the application of the theory beyond cases of genocide, slavery and torture would place courts in an awkward position as it would force courts to determine whether a particular norm of international law has attained the status of *jus cogens* or not, a task that international legal scholars have grappled with for decades with only limited success.

Furthermore, it is worth-pointing out that the normative hierarchy theory assumes that the concept of *jus cogens* is confined solely to the realm of human rights. This is a total misconception. Great commentators have suggested that crucial fundamental international norms of universal acceptance may constitute *jus cogens* as well.[34]International norms of this kind include the norm of *pacta sunt servanda* as well as notions that are related to the protection of State sovereignty and State equality. If we accept this alternative conception of *jus cogens*, many human rights that could constitute *jus cogens* norms are in the same position as State immunity, which could equally constitute *jus cogens* as a norm that protects the principle of state equality. In this case, is it reasonable to have a secondary hierarchy of norms in the *jus cogens* context?

32 See Ian Brownlie, *Principles Of Public International Law*, 8th Ed., OUP, 2012, *supra* note 6, at 516–17

33 See Greek Judgment I, *supra* note 210, at 599

34 See William J. Aceves, *The Vienna Convention on Consular Relations*, 31 VAND. J. TRANSNAT'L L. 257, 293, 1998

Additionally, it is vital to consider a very important distinction which makes the application of primacy in the normative hierarchy theory difficult. In international law, there is a distinction between prescriptive jurisdiction, enforcement jurisdiction and adjudicative jurisdiction. The prescriptive jurisdiction is defined as the State's legislature right to create, amend or repeal legislation. This jurisdiction is unlimited, meaning that every State can create, amend or repeal legislation concerning any subject or any person, irrespective of their nationality or location. This is a primary rule of international law, and since *jus cogens* rules have primacy over primary rules of international law, prescriptive jurisdiction should always be bound by the supremacy of *jus cogens* norms[35].

At the same time, the rules of enforcement and adjudicative jurisdiction are secondary rules of international law, covering the procedural safeguards that should be followed when a State exercises its jurisdiction over a person. The enforcement jurisdiction refers to the State's right to enforce its legislation through the police and public prosecutors, while adjudicative jurisdiction is the ability of national courts exercising judicial functions to hear and decide on matters. Both enforcement and adjudicative jurisdiction are not allowed to be enforced outside the territory or over a national of another State without an international agreement or a rule of international customary rule to permit it.[36] If we accept that State immunity is a rule of international customary law that permits the enforcement and adjudicative jurisdiction of a State, State immunity is a secondary rule of international law. Accepting the application of normative hierarchy theory in *jus cogens* violations in this context would mean that the hierarchy would apply between a primary law rule (*jus cogens*) and a secondary law rule (State immunity). This is an unusual legal paradox for international law.

Moreover, the explanation of how a State loses its immunity is a critical element of the normative hierarchy theory. Two different and interrelated explanations are offered in literature. In one instance, a State is said to waive or forfeit its entitlement to immunity by implication when it commits a *jus cogens* violation.[37] Yet this is totally unconvincing since, as already stated, the concept of *jus cogens* is quite uncertain and its interpretation is always up to the court when a conflict between State immunity and a human rights violation arises. It is not logical to say that a State loses the expression of its own sovereignty for a violation that does not constitute *a priori* a universal *jus cogens* norm. This is the reason why no provisions for the waiver of immunity for *jus cogens* violations have been included in national or international legislation, except in the United States. According to the second explanation, state conduct that violates a *jus cogens* norm is said to fall outside the category of protected State conduct known as *acta jure imperii.* As discussed earlier, immunity is traditionally granted for *acta jure imperii* when

35 See Malcolm Shaw, *International Law*, 7th edition, Cambridge University Press, October 2014,p. 576

36 See Brownlie pp.298-305

37 See Working Group of the American Bar Association, *Report, Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 546,2002

conduct is devoid of legitimacy because it contravenes the will of the community of nations.[38] This reasoning is equally unpersuasive since it implies a third exception to the limitation of State immunity without explaining how this exception would be safely applied. If State conduct that violates *jus cogens* is neither *jure imperii* nor *jure gestionis* (private or commercial), then what is it? The theory leaves us without an answer.

According to my abovementioned legal considerations, there are a lot of weaknesses to the promising normative hierarchy theory. Therefore, it has not succeeded its purpose to remove the obstacle of State immunity from the path of human right victims in civil proceedings. However, I believe that re-approaching the context of state immunity and reconsidering the conflict in human rights violations, will lead us to an argument that could be used successfully from victims before their national courts. This is exactly what I am going to present in the next part.

4. State Immunity in Human Rights Litigation: A Domestic Judiciary Privilege Instead of a Customary International Rule

A basic element of the theory of normative hierarchy is the assumption that State immunity in cases of human rights violations is an entitlement of States that derives from international law. The centerpiece of the theory is a proposed hierarchy of international legal norms, which resolves the conflict between *jus cogens* and State immunity in favor of the former. This means that State immunity is either the product of a fundamental principle of international law or a rule of customary international law.[39] But is this assumption correct in the context of State immunity?

The doctrine of foreign State immunity was born out of the tension between two important international law norms: sovereign equality and exclusive territorial jurisdiction. The principles of territorial jurisdiction and sovereign equality work individually to promote order and fairness in the international legal system. The former serves to delineate each State's authority to govern a distinct geographical area of the world,[40] while the latter guarantees all States have equal capacity for rights under international law, regardless of size, power or wealth. The conflict of judicial State immunity arises whenever the authority of the forum State to adjudicate the dispute is at loggerheads with the principle of sovereign equality.[41] As was stated in *Lotus* case, in instances of human rights abuse by a foreign State, adjudicatory jurisdiction may rest on other principles of jurisdiction in public international law besides territoriality, such as nationality, passive personality, the protective principle

38 See Greek Judgment I, at note 214.

39 *See* Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, BRIT. Y.B. INT'L L. 220, 1951.

40 See Andrew L. Strauss*, Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J.373, 1995.

41 See, D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, BRIT. Y.B. INT'L L. 1, 4, 1982.

and universality. The doctrine of foreign State immunity emerged from the theoretical conflict described above, asserting that State immunity is a fundamental State right by virtue of the principle of sovereign equality.

However, it is arguable that we could also consider State immunity as an exception to the principle of adjudicatory jurisdiction, a privilege derived from the principle of sovereign equality. Sovereign equality does not mean that all States are equal in any given circumstance but that every State enjoys an equality of capacity for rights.[42] Capacity for rights is the freedom and ability of a State to engage in official conduct typically associated with statehood, such as the formulation and promotion of domestic and foreign policies, the execution of treaties and membership in international organizations. The principle of sovereign equality thus means that every State enjoys an equal capacity of rights in relation to every other State, but it does not alter the fact that a State may exercise the rights of statehood only with respect to its own territory and population. The previous observations made in this paper do not suggest that foreign States should be refused immunity in all circumstances, but that an entitlement to immunity is not intrinsic to statehood.[43] Thus foreign State immunity is a privilege, not a right, based on the principle of sovereign equality. However, this judiciary privilege should only be granted by the forum State and after evaluating the particular circumstances of the case.[44]

But why is it so important for human rights litigation to conceive state immunity as a judiciary privilege instead of a fundamental right of a State? The answer is quite simple. If State immunity is deemed a fundamental right of statehood, human rights litigants face impossible obstacles. The State defendant would be entitled to presumptive immunity and, as previously noted, even considerations such as the normative hierarchy theory would not be effective. It is not clear if *jus cogens* norms trump a fundamental State right to immunity; on the contrary, State immunity as a judicial privilege is regulated within the authoritative domain of the forum State rather than the foreign State defendant.

It is a very important consideration for human rights litigation if State immunity is granted to a State for violating human rights. The true conflict is thereafter between human rights protection and the protection of *jus cogens* norms within the forum State as well as the right of the forum State to regulate the authority of its judicial organs. This conflict in the domestic arena has a double effect in human rights litigations. First, human rights protection at the domestic level may be higher than at the international level, where universal acceptance is limited and there is only an absolute protection against violations such as piracy, torture and slavery. This can lead to domestic court decisions which grant

42 *See* Edwin Dewitt Dickinson, *The Equality Of States In International Law*, Harvard University Press,1920, *supra* note 41.

43 *See Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 829, 838, Perm. Ct. Arb. 1928.

44 See Christian Dominicé, *The Relationship Between State Immunity and the Jurisdiction of Courts, in International Law Association, Documentation for the Members of the Committee on State Immunity* (prepared for the ILA Cairo Conference, 1992)

State immunity being rather limited in cases of human rights law violations. Second, it is not necessary to establish an international consensus on the applicability of State immunity. One of the main arguments, arising from international adjudication in particular, is the fact that State immunity remains an absolute right of a State. This is true even in cases where State conduct violates *jus cogens* norms, since there is no exception of this kind established in an international treaty or customary law. The domestic courts, on the other hand, is not obliged to grant immunity in the absence of relevant provisions waiving immunity for massive human rights violations. Rather they apply human rights legislation more deliberately in such a situation so they are entirely free to differentiate their decisions from what it has been decided in a similar case by another State's court.

5. Conclusion

As is obvious from the context of this paper, State immunity is indeed a huge obstacle for human rights litigation, even in cases where human rights violations constitute a violation of a *jus cogens* norm. The uncertain status of State immunity in international legislation and customary law has also made the development of this doctrine slow and ambiguous. The acceptance of the concept of restrictive immunity historically applies in cases where State conduct has a commercial character, while absolute immunity is applied in all other cases. However, several changes in human rights litigation have been made lately, particularly in cases of war crimes or war atrocities. Domestic courts, having been influenced by the developments of the field of personal immunities, have seriously considered and sometimes accepted the concept of an immunity waiver by a State for State conducts that violate *jus cogens*. However, the international fora still remain loyal to the trend of absolute immunity.

The normative hierarchy theory has been a basis for justifying the immunity waiver if there is a *jus cogens* violation by putting the universal acceptance of *jus cogens* at the centre. According to this theory, *jus cogens* norms are the only legal norms accepted by all States; in case of a conflict with a customary law, the former should prevail. However, the plain character of *jus cogens* in the international legal order is a weak element that makes the theory difficult to apply. For this reason, a more practical argument for justifying the immunity waiver of states in human rights litigations should be adopted. The basis of the argument proposed by the current paper to resolve the problem is that State immunity can be considered as a judicial privilege of the forum State instead of fundamental right based on customary international rules. Thus domestic judicial institutions are to decide *ad hoc* on the granting or not of State immunity when fundamental human rights have been substantially violated.

PHARMACEUTICAL COMPANIES VS. HUMAN RIGHTS: THE CASE OF PAY-FOR-DELAY AGREEMENTS AND THE RIGHT OF ACCESS TO MEDICINES

Theano Karanikioti*

Abstract

Pay-for-delay agreements between originator and generic pharmaceutical companies are a unique but common practice in the pharmaceutical world. Such settlements, which result in a 'win-win' situation for the parties, raise concerns regarding their compatibility with human rights, and particularly the right of access to medicines. By delaying generic entry, pay-for-delay agreements prolong the monopolistic position of the brand company and thus extend the period during which consumers have to face high prices of medicines. The increased cost of treatment such agreements entail can be detrimental both to the State and the patients, which may result in medicines being unaffordable. However, it has also been argued that these agreements benefit consumers, since in practice they may lead to earlier generic entry. Which opinion is correct? Do pay-for-delay agreements infringe on the patients' right of access to medicines? It is the author's opinion that a generalization as to the effect of such settlements on access to medicines would not be accurate. An individual assessment of the agreement at hand is required in order to reach a conclusion regarding its effect on human rights.

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1. Introduction

In a world 'thirsty' for innovation, originator pharmaceutical companies have shouldered the task of producing new medicines that provide better treatment prospects and improve the lives of thousands of patients. The discovery of new drugs is a complex, costly and lengthy process.[1] A number of steps, ranging from discovery and development to preclinical and clinical research, need to be taken before the drug can be placed on the market.[2]

Without incentives and the possibility to profit from their discoveries, pharmaceutical companies would not embark on research for the creation of new medicines. The protection afforded to brand companies under intellectual property (IP) law, at least in principle, guarantees that their investments will be fruitful.[3] Patents promoting and protecting innovation grant exclusive rights to the brand companies for the production and sale of the medicine they have developed.[4] The monopolistic position that they hold for the duration of the patent allows them to freely determine the price of the medicines, with no restrictions being imposed on them and no competition preventing them from charging high prices.[5]

However, patents do have an expiry date, after which generic drugs can enter the market. Market competition created through generic entry contributes enormously to the reduction of the price of medicines.[6] A prominent example concerns the cost of antiretroviral treatment. The cost of the patent-protected HIV treatment exceeded 10.000 US dollars per year. When the generic version of the drug was introduced in the market, the competition reduced the price of the treatment to 350 US dollars per year.[7]

From a human rights perspective, it seems that generic entry is the *deus ex machina*, enhancing access to medicines and thus promoting the right to health; competition by generic products results in

1 Yves J Ribeill, 'Discovery of new medicines' in John P Griffin, John Posner and Geoffrey R Barker (eds), *The Textbook of Pharmaceutical Medicine* (7th edn, John Wiley & Sons Ltd 2013), 3; S S Mulaje and others, 'Procedure For Drug Approval in Different Countries: A Review' (2013) 3(2) Journal of Drug Delivery & Therapeutics, 233.

2 Ibid.

3 OECD Competition Committee, 'Annex to the Summary Record of the 121st Meeting of the Competition Committee Held on 18-19 June 2014; Executive Summary of the Discussion on Competition and Generic Pharmaceuticals' DAF/COMP/M(2014)2/ANN6/FINAL, 2.

4 Anand Grover and others, 'Pharmaceutical Companies and Global Lack of Access to Medicines: Strengthening Accountability under the Right to Health' (2012) 40 Journal of Law, Medicine and Ethics 234, 236.

5 Ibid.

6 Raymond A Huml and John Posner, 'Biosimilars' in John P Griffin, John Posner and Geoffrey R Barker (eds), *The Textbook of Pharmaceutical Medicine* (7th edn, John Wiley & Sons Ltd 2013), 744; OECD Competition Committee, 'Generic Pharmaceuticals; Note by the United States' DAF/COMP/WD(2014)51, 2.

7 'Intellectual property protection: impact on public health' (2005) 19(3) WHO Drug Information 236, 237.

substantially lower prices for consumers and the social systems of states.[8] In reality, though, the expiration of a patent does not always lead to generic entry. Originator companies try to prolong the commercial life of their products without generic competition for as long as possible. In order to achieve this aim, they often enter into agreements with the generic companies in order to delay generic entry in the market.[9] Apart from the anticompetitive effects such settlements might have, pay-for-delay agreements have also been criticized for interfering with the right of access to medicines, since they delay the provision of cheaper medicines to the detriment of the patients.[10]

This effect of pay-for-delay agreements on access to medicines will be the focus of the paper. After the delimitation of the paper's scope section 1 will provide a background to the topic by briefly looking into the protective function of IP law before focusing on pay-for-delay agreements. Section 2 will deal with the right of access to medicines, whereas section 3 will touch upon the different views as to the effect of pay-for-delay agreements on access to medicines.

2. Delimitation of The Paper's Scope

The interplay between pay-for-delay agreements and the right of access to medicines is very broad and a number of reference points, as regards jurisdiction, legislation and case law, can potentially be used. Thus, it is imperative that certain criteria are applied in order to limit the scope of the paper, allowing a more in-depth analysis.

First, the right of access to medicines will be examined as a right generally accepted under international human rights law, and thus the paper will not be concerned with establishing a potential violation of a particular provision. Inevitably emphasis will be given on the right as included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), since this instrument contains the most comprehensive provision on the right.[11]

Furthermore, this study will not be concerned with the regulation of pay-for-delay agreements in a particular jurisdiction, and thus no reference will be made to specific laws and regulations. Since the most prominent actors in the pharmaceutical world are multinational companies,[12] it is interesting to conduct a study at a level where this is reflected. Consequently, examples will be mentioned and

8 Paul Csiszar, 'Delay in generic entry should remain a concern to competition authorities' (2012) 9(3) Journal of Generic Medicines 123, 123.

9 Ibid.

10 Ibid, 125.

11 UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14; The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2000/4, 1.

12 Leading global pharmaceutical companies include Novartis, Pfizer, Roche, Sanofi, AstraZeneca, GlaxoSmithKline, Bayer etc. All of them have presence in numerous countries around the globe.

scholarly documents will be used from both the European Union (EU) and the United States of America (US).

Finally, the paper will focus on the situation in the developed countries and will not address access to medicines in the developing world. When it comes to this topic a wide range of factors influence access to medicines, something that goes beyond the scope of the following analysis.[13]

3. Background to the Topic

3.1 Intellectual property law and patents

Intellectual property law allows people to gain recognition or financial benefits from their inventions or creations.[14] It comprises four separate legal fields: trademarks, copyrights, patents and trade secrets.[15] Patents are of particular importance for this paper, as they afford protection to originator pharmaceutical companies when developing and producing a new drug.[16]

A patent is an exclusive right granted for an invention – a product or process that provides a new way of doing something or that offers a new technical solution to a problem.[17] Protection to the patent owner is granted for a limited period of time, generally 20 years.[18] Due to this protection, the invention cannot be commercially made, used, distributed or sold by a third party without the patent holder's consent, for as long as the patent is in force.[19] Thus, a patent provides its holder with exclusive rights over their invention, allowing them to control the way in which it is exploited.[20] This 'special position' of the inventor is terminated once the patent has expired.[21]

13 Anand Grover and others, 'Pharmaceutical Companies and Global Lack of Access to Medicines: Strengthening Accountability under the Right to Health' (2012) 40 Journal of Law, Medicine and Ethics 234, 235.

14 WIPO, 'What is Intellectual Property?' <http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf> accessed 7 January 2016, 3.

15 Deborah E Bouchoux, *Intellectual Property: The Law of Trademarks, Copyrights, Patents and Trade Secrets* (4th edn, Delmar Cengage Learning 2012), 2.

16 Anand Grover and others, 'Pharmaceutical Companies and Global Lack of Access to Medicines: Strengthening Accountability under the Right to Health' (2012) 40 Journal of Law, Medicine and Ethics 234, 236.

17 WIPO, 'What is Intellectual Property?' <http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf> accessed 7 January 2016, 5.

18 Ibid.

19 Ibid.

20 Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014), 375.

21 Of course there are certain particularities under the different jurisdictions regarding the term of patents. However, these surpass the scope of the present paper, and thus will not be analyzed further.

3.2 Pay-for-delay agreements

More than 142 generic versions of drugs have been delayed in the US between 2005 and 2013 as a result of pay-for-delay agreements between generic and brand companies.[22] On average, generic entry has been delayed for five years, during which patients are facing higher costs of drugs.[23] Even though most of these settlements are not known to the general public, pharmaceutical scandals are increasingly making headlines due to the effect they have and the burden they impose on patients and social systems of states.[24]

3.2.1 Introduction to pay-for-delay agreements

Pay-for-delay agreements, which are a unique but common practice in the pharmaceutical sector, are a means of solving patent-related disputes and avoiding patent litigation. Thus, they come into play when generic companies have entered or threaten to enter the market, while the patent of the brand drug has not yet expired.[25]

Pay-for-delay agreements can be the result of two types of litigation; first, when the generic company brings proceedings to invalidate the patent of the brand company or, second, when the originator company acts as a plaintiff and commences litigation against the generic company having entered or threatening to enter the market.[26] What may happen in such cases is that, instead of allowing the court to rule on the dispute, the parties decide to solve their dispute by themselves.[27]

Such agreements result in a 'win-win' situation for both sides. On the one hand, the originator company will be able to retain its monopoly for a longer period of time and, thus, enjoy higher profits due to the absence of competition. On the other hand, generic companies will benefit from the higher

22 U.S. PIRG and Community Catalyst, 'Top Twenty Pay-for-Delay Drugs: How Drug Industry Payoffs Delay Generics, Inflate Prices and Hurt Consumers' (2013) <http://www.uspirg.org/sites/pirg/files/reports/Top_Twenty_Pay_For_Delay_Drugs_USPIRG.pdf> accessed 8 December 2015.

23 Ibid.

24 Examples of such agreements include: the agreement between AstraZeneca and generic manufacturers with regards to the brand drug Nolvadex; the agreement between Bayer and generic companies regarding the patented drug Cipro; the agreement entered into by Cephalon/Teva for its brand drug Provigil; the agreement concluded between Lundbeck and generic manufacturers concerning the drug Citalopram etc.

25 OECD Competition Committee, 'Annex to the Summary Record of the 121st Meeting of the Competition Committee Held on 18-19 June 2014; Executive Summary of the Discussion on Competition and Generic Pharmaceuticals' DAF/COMP/M(2014)2/ANN6/FINAL, 6.

26 Paul Csiszar, 'Delay in generic entry should remain a concern to competition authorities' (2012) 9(3) Journal of Generic Medicines 123, 125.

27 Xiang Yu and Anjan Chatterji, 'Why Brand Pharmaceutical Companies Choose to Pay Generics in Settling Patent Disputes: A Systematic Evaluation of the Asymmetric Risks in Litigation' (2011) 10(2) Northwestern Journal of Technology and Intellectual Property 19, 19; OECD Competition Committee, 'Generic Pharmaceuticals; Note by the United States' DAF/COMP/WD(2014)51, 5.

income of the originator company, as they can share the profits.[28] This value-sharing can take various forms, including cash payments and advantageous licensing or distribution agreements.[29]
Economically, such agreements can be perceived as an effective and efficient way of dealing with patent disputes. They promote amicable solutions between the parties, allowing them to reach a compromise that benefits them both. They allow the parties to avoid high litigation costs and lengthy judicial proceedings.[30]

3.2.2 Pay-for-delay agreements and competition law

Settlements between pharmaceutical companies intending to put an end to patent litigation are, just like any agreement entered into by undertakings, under the scrutiny of competition law.[31] However, there is no 'official' definition under EU or US law of what constitutes an anticompetitive pay-for-delay agreement; thus there is no pre-determined form of the agreement or a certain length of delay that will lead to such a characterization.[32]

The potential anticompetitive effect is to be judged on a case-by-case basis by the competent court.[33] This was established by the US Supreme Court in the landmark case *Federal Trade Commission (FTC) v. Actavis*, a ruling that put an end to the unclear situation regarding the legality of pay-for-delay agreements.[34] The case concerned an agreement between Solvay Pharmaceuticals – the originator company – and several generic companies. The former paid the generic manufacturers millions of dollars to keep the generic version of its patented drug AndroGel®, used to treat low testosterone in men, out of the market until 2015. On the question of whether this type of agreement violates federal antitrust law by 'unreasonably diminishing competition', the US Supreme Court declined to label such arrangements as either legal or illegal *per se*. On the contrary, it held that this is to be decided by the

28 Paul Csiszar, 'Delay in generic entry should remain a concern to competition authorities' (2012) 9(3) Journal of Generic Medicines 123, 125.
29 Ibid.
30 Ibid.
31 *Lundbeck* (Case AT. 39226) Commission Decision C(2013) 3803, 199.
32 Yunzhe Zhang, 'Paying for Delay or Something Else? The Potential Anticompetitive Effect of Reverse Payment Patent Settlements in the Pharmaceutical Industry under Article 101 TFEU' (Master Thesis, Lund University 2014), 14.
33 Yunzhe Zhang, 'Paying for Delay or Something Else? The Potential Anticompetitive Effect of Reverse Payment Patent Settlements in the Pharmaceutical Industry under Article 101 TFEU' (Master Thesis, Lund University 2014), 15.
34 *Federal Trade Commission v. Actavis,, Inc., et al.* 570 U.S. ____(2013), Docket No. 12-416.

court after examining each agreement on the basis of the 'rule of reason'. However, no detailed instructions were given on the structure of this test.[35]

In the EU, since 2008 the European Commission has increasingly been focusing on settlements between pharmaceutical companies addressing patent disputes.[36] As is also the case in the US, the European Commission examines each agreement individually in order to establish whether it violates the EU competition rules. The prominent case in this regard is the *Lundbeck* case.[37] It concerned agreements concluded between the Danish originator company Lundbeck on the one hand, and each of four generic manufacturers on the other.[38] The generic undertakings agreed to not market generic versions of the brand drug Citalopram® in return for a value transfer from Lundbeck, which took into consideration the turnover or the profit the generic undertaking expected if it had successfully entered the market.[39]

The Commission followed a threefold test in order to examine whether te agreement violated Article 101 of the Treaty on the Functioning of the European Union (TFEU).[40] First, it examined whether the generic and the brand undertaking were, at least potential, competitors. Second, it looked into whether the agreement limited the generic company's ability to market their product. Third, it considered whether there was some kind of value transfer from the brand to the generic company.[41]

Since the Commission found that those three conditions were fulfilled in the case at hand, Lundbeck and the generic undertakings were held to be in breach of Article 101 TFEU and were fined for their anticompetitive settlement.[42]

4. The Right of Access to Medicines

4.1 General framework: the right to health

Health is a fundamental human right, indispensable for the exercise of other human rights.[43] In the post-World War II world, the right to health emerged as a component of the right to an adequate

35 Yunzhe Zhang, 'Paying for Delay or Something Else? The Potential Anticompetitive Effect of Reverse Payment Patent Settlements in the Pharmaceutical Industry under Article 101 TFEU' (Master Thesis, Lund University 2014), 25.

36 The European Commission has issued a number of formal 'Statements of Objection' against pharmaceutical companies, the most prominent of which include Les Laboratoires Servier and Lundbeck. Moreover, there is an ongoing antitrust investigation against Johnson and Johnson and Novartis, regarding an agreement between them and the generic company Sandoz.

37 *Lundbeck* (Case AT. 39226) Commission Decision C(2013) 3803.

38 Ibid.

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid.

standard of living in Article 25(1) of the 1948 Universal Declaration of Human Rights, where it was set out that 'everyone has the right to a standard of living adequate for the health of himself and of his family, including […] medical care […]'. After this initial formulation, the right to health was included in a number of UN and regional treaties, with the most comprehensive provision included in the ICESCR.[44]

Article 12 ICESCR provides that states-parties to the Covenant shall 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. The 'highest attainable standard of physical and mental health' does not only refer to the right to timely and appropriate healthcare; on the contrary, the right to health is very broad in scope, encompassing socio-economic factors promoting conditions in which people can live a healthy life, as well as underlying determinants of health, such as food, housing, healthy environment and safe and healthy working conditions.[45] This right comprises four essential elements: availability, accessibility, acceptability and quality.[46]

The right to health is also included in other UN treaties, such as Article 24 of the Convention on the Rights of the Child, Article 25 of the Convention on the Rights of Persons with Disabilities and Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women. Moreover, regional human rights instruments, such as the European Social Charter, contain provisions providing for the right to health, and case law developed under those instruments also elaborates on this right.[47]

Despite the differences in the formulation of the right in the various instruments, there is consensus that the interpretation put forward by the Committee on Economic, Social and Cultural Rights (CESCR) in General Comment No. 14 on the ICESCR encapsulates the essential elements of the right to health.[48]

43 UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14; The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2000/4, 1.

44 Stephen P Marks, 'The emergence and scope of the human right to health' in José M Zuniga, Stephen P Marks and Lawrence O Gostin (eds), *Advancing the Human Right to Health* (Oxford University Press 2013), 8.

45 UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14; The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2000/4, 2.

46 Ibid 4.

47 Stephen P Marks, 'The emergence and scope of the human right to health' in José M Zuniga, Stephen P Marks and Lawrence O Gostin (eds), *Advancing the Human Right to Health* (Oxford University Press 2013), 10.

48 Ibid.

4.2 The right of access to medicines as part of the right to health

Under international human rights law, the right to medical products is derivative from the right to health.[49] After all, since the use of medicines is an essential part of the treatment of diseases, access to medicines is indispensable to the right to health.[50]

In the ICESCR, one of the most significant sources of the rights to health and medicines under international law, access to medicines is safeguarded under Article 12. This provision binds states to promote, facilitate and provide access to medicines.[51] When it comes to the provision of 'essential drugs', providing access to medicines is considered to be a core, non-derogable obligation for States.[52] However, there is no explicit definition provided under the ICESCR or by the CESCR as to what constitutes 'essential medicines'. According to the World Health Organization (WHO), essential medicines are those which satisfy the priority healthcare needs of the population.[53] Consequently, the classification of medicines as 'essential' takes due account of the health needs of the population, as well as the medicines' cost-effectiveness.[54] In their efforts to prepare national essential medicines lists, states are guided by the WHO Model List of Essential Medicines.[55] The existence of such national lists is paramount since they guide the procurement and supply of medicines in the public sector, schemes that reimburse medicine costs, medicine donations, and local medicine production.[56]

However, the right of access to medicines, enshrined under Article 12 ICESCR, is not limited to essential medicines; the progressive 'right to the highest attainable standard of health', requires that states move as expeditiously and effectively as possible towards the full realization of the right to

49 Stephen P Marks and Adriana L Benedict, 'Access to medical products, vaccines, and medical technologies' in José M Zuniga, Stephen P Marks and Lawrence O Gostin (eds), *Advancing the Human Right to Health* (Oxford University Press 2013), 306.

50 Jennifer A Sellin, 'Does One Size Fit All? Patents, the Right to Health and Access to Medicines' (2015) 62 Netherlands International Law Review 445, 450.

51 Laura Niada-Avshalom, 'Some scepticism on the right to health: the case of the provision of medicines' (2015) 19(4) The International Journal of Human Rights 527, 530.

52 UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14; The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2000/4, 14; UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' E/1991/23, para 10.

53 WHO Essential medicines and health products <http://www.who.int/medicines/services/essmedicines_def/en/> accessed 8 December 2015.

54 Laura Niada-Avshalom, 'Some scepticism on the right to health: the case of the provision of medicines' (2015) 19(4) The International Journal of Human Rights 527, 533; WHO Essential medicines and health products <http://www.who.int/medicines/services/essmedicines_def/en/> accessed 8 December 2015.

55 The most recent one is the 19th Model List of Essential Medicines, prepared by the WHO Expert Committee in April 2015. WHO Essential medicines and health products <http://www.who.int/medicines/services/essmedicines_def/en/> accessed 8 December 2015.

56 Ibid.

health.[57] Within this context, states must also aim at providing individuals with medicines that are not characterized as essential.[58]

Finally, it must be noted that, in light of the obligation of States to provide timely access to healthcare in order to fulfil their obligations under Article 12 ICESCR, States are also under the obligation to provide patients with timely access to the medical products they need.[59] In other words, the four elements of the right to health – availability, accessibility, acceptability and quality – also apply to the derivative right of access to medicines.[60]

4.3 Factors influencing access to medicines

One of the main factors influencing access to medicines is the way in which health services are organized, financed and delivered.[61] While well-performing health systems offer high levels of access, poorly-performing ones result in large numbers of people being prevented from accessing medicines.[62] Moreover, access to medicines depends on four factors; (1) rational selection and use of medicines, (2) affordable prices, (3) sustainable financing, and (4) reliable health and supply systems.[63]

The first factor prescribes that the selection process for medicines should be based on the national or local essential drugs lists and treatment guidelines. The notion of affordable prices concerns the affordability by governments, healthcare providers and consumers. Sustainable financing requires the existence of adequate funding levels and equitable prepayment mechanisms, such as government revenues or social health insurance, in order to ensure that poor people do not face proportionally higher costs than wealthier ones. The final requirement refers to the necessity for an efficient and locally-appropriate combination of private and public healthcare providers.[64]

57 Stephen P Marks and Adriana L Benedict, 'Access to medical products, vaccines, and medical technologies' in José M Zuniga, Stephen P Marks and Lawrence O Gostin (eds), *Advancing the Human Right to Health* (Oxford University Press 2013), 307; UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' E/1991/23.

58 Stephen P Marks and Adriana L Benedict, 'Access to medical products, vaccines, and medical technologies' in José M Zuniga, Stephen P Marks and Lawrence O Gostin (eds), *Advancing the Human Right to Health* (Oxford University Press 2013), 307.

59 UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14; The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2000/4, 6.

60 Jennifer A Sellin, 'Does One Size Fit All? Patents, the Right to Health and Access to Medicines' (2015) 62 Netherlands International Law Review 445, 451.

61 World Health Organization, 'The World Medicines Situation' (2004), WHO/EDM/PAR/2004.5, 63.

62 Ibid 64.

63 Ibid.

64 Ibid.

4.4 Access to medicines in the developed countries

The unavailability and unaffordability of medicines in the developing world dominates the discussions on this topic. However, problems regarding access to medicines also exist in developed countries, even though the number of individuals they affect is less compared to the ones in the developing world.[65]
In most developed countries, the vast majority of residents enjoy some kind of basic health coverage.[66] Most EU countries have universal or near universal health coverage.[67] However, not all medicines are fully covered by insurance schemes, and thus direct out-of-pocket expenditure by patients might be required.[68] This can influence patients' access to medicines in cases they cannot afford to pay for the treatment they need.[69]
Moreover, since medicines weigh on the public budget, governments may decide to place restrictions on funded drugs, due to the burden they impose on the social security system of the state.[70]
Finally, despite the near universal health coverage in EU countries, the phenomenon of uninsured patients is not unknown in the developed world. In the US, for example, 32.967.500 people are not covered by any insurance scheme, something that impacts their access to medicines.[71]

5. The Effects of Pay-For-Delay Agreements and Access to Medicines

5.1 Negative effects

In order to establish the effects that pay-for-delay agreements have on access to medicines, it is helpful to look into how the situation would be without these agreements in place. Were this the case, generic products would be able to enter the market, which would in turn lead to lower prices of medicines

65 Ibid, ch 7.
66 The way in which health coverage is organized differs from country to country and can take various forms including: automatic health coverage to the entire population and financed from taxes, social health insurance financed through income-related social contributions, social security etc. Valérie Paris, Marion Devaux and Lihan Wei, 'Health Systems Institutional Characteristics: A Survey of 29 OECD Countries' (2010) 50 OECD Health Working Papers, <http://www.oecd-ilibrary.org/social-issues-migration-health/health-systems-institutional-characteristics_5kmfxfq9qbnr-en> accessed 1 January 2016, 2.
67 OECD, *Health at a Glance: Europe 2014* (OECD Publishing 2014), 108.
68 Ibid.
69 International Federation of Pharmaceutical Manufacturers & Associations, *The Changing Landscape on Access to Medicines* (IFPMA 2012) <http://www.ifpma.org/fileadmin/content/Publication/2012/ChangingLandscapes-Web.pdf> accessed 30 December 2015, 44.
70 OECD Competition Committee, 'Annex to the Summary Record of the 121st Meeting of the Competition Committee Held on 18-19 June 2014; Executive Summary of the Discussion on Competition and Generic Pharmaceuticals' DAF/COMP/M(2014)2/ANN6/FINAL, 2.
71 'Health Insurance Coverage of the Total Population' (The Henry J. Kaiser Family Foundation) <http://kff.org/other/state-indicator/total-population/> accessed 1 January 2016.

through the creation of market competition. This would provide a solution to the problem of the high prices and the unaffordability of medicines.[72]

In the previous section, three main areas were identified where the cost of drugs might influence patients' enjoyment of their right of access to medicines. First, certain drugs are not (fully) covered by insurance schemes, and thus patients' financial contribution is required. Second, due to the overspending of health budget, governments may restrict the number of drugs funded by public resources. Third, there exist patients in the developed countries who are uninsured, and consequently might face obstacles in accessing medical products.[73]

Each of these areas can be tackled by generic entry. First, with the prices of generic drugs being dramatically lower than the ones of the patented version, generics would enable more people to afford the medicines they need, even if they are not funded by insurance schemes.[74] Second, the lower prices of generic drugs would reduce public spending on medicines and allow the development of sustainable healthcare systems. With generic drugs generating savings for health systems, governments would be able to fund a larger number of drugs, increasing the number of patients benefiting from the public funding of medicines.[75]

All the above outline the financial implications agreements delaying the entry of generic drugs have on the right of access to medicines. However, the effects should not only be seen in economic terms. It can also be argued that the delay in generic entry caused by pay-for-delay agreements between pharmaceutical companies interferes with the right of timely access to medicines. The high prices of brand drugs may prevent patients from starting treatment on time, if such medicines are not covered by insurance. Since pay-for-delay agreements prevent the marketing of cheaper generic drugs, patients who are not able to afford the more expensive brand versions are prevented from accessing the medicines they need at the time they need them.[76]

In conclusion, the main effect of pay-for-delay agreements on access to medicines is therefore financial; the prolonged monopolistic position of brand pharmaceutical companies extends the period of time the prices of drugs remain high. This leads to the second implication, namely that there can be

72 OECD Competition Committee, 'Annex to the Summary Record of the 121st Meeting of the Competition Committee Held on 18-19 June 2014; Executive Summary of the Discussion on Competition and Generic Pharmaceuticals' DAF/COMP/M(2014)2/ANN6/FINAL, 2.

73 OECD, *Health at a Glance: Europe 2014* (OECD Publishing 2014), 108; OECD Competition Committee, 'Annex to the Summary Record of the 121st Meeting of the Competition Committee Held on 18-19 June 2014; Executive Summary of the Discussion on Competition and Generic Pharmaceuticals' DAF/COMP/M(2014)2/ANN6/FINAL, 2.

74 Ibid.

75 Frank Bongers and Hugo Carradinha, 'How to Increase Patient Access to Generic Medicines in European Healthcare Systems; A Report by the EGA Health Economics Committee' (European Generic Medicines Association, June 2009), 11.

76 Ibid.

restrictions on the timely access to medicines, if the consumers cannot start treatment on time due to the unaffordability of brand drugs.

5.2 Positive effects

While strong arguments have been advanced outlining the negative implications of pay-for-delay agreements on access to medicines, there are some voices praising such agreements and highlighting that they have positive effects instead.

According to the Generic Pharmaceutical Association, such settlements can facilitate and accelerate generic entry into the market.[77] First, patent litigation is a costly and lengthy procedure; an agreement between the parties can thus end the dispute and set a date for generic entry earlier than the one in which the court would have delivered its judgment.[78] Furthermore, RBC Capital Markets research has indicated that the success rate for generic companies is only 48% in patent-related disputes:[79] a loss by the generic manufacturer in patent litigation would mean that generic entry would only be allowed after the expiration of the patent held by the brand company.[80] On the contrary, according to the same study, when a settlement was involved, generic manufacturers were successful in bringing the generic product to market before patent expiration in 76% of cases.[81] As a result, agreements between the parties can lead to an earlier and guaranteed placement of the generic drug into the market and thus benefit patients by decreasing the cost.[82]

6. Conclusion

Different views are expressed when it comes to the effect of pay-for-delay agreements on patients' access to medicines. On the one hand, it has been argued that such agreements delay generic entry into the market and thus prolong the monopolistic position brand companies hold. This results in higher costs for medicines, which might prove detrimental for the States, insurance systems and consequently the patients.[83] On the other hand, it has been put forward that such settlements actually result in earlier and guaranteed generic entry, which benefits patients due to the decrease in the price of medicines.

77 Roxanne Nelson, 'Pay-for-Delay Drug Deals: Do They Hurt or Help Patients?' (Medscape Medical News, 15 April 2015) <http://www.medscape.com/viewarticle/843231#vp_3> accessed 1 January 2016.

78 Ibid.

79 Adam Greene and Dewey D Steadman, 'Pharmaceuticals; Analyzing Litigation Success Rates' (RBC Capital Markets, 15 January 2010) <http://amlawdaily.typepad.com/pharmareport.pdf> accessed 1 January 2016.

80 Roxanne Nelson, 'Pay-for-Delay Drug Deals: Do They Hurt or Help Patients?' (Medscape Medical News, 15 April 2015) <http://www.medscape.com/viewarticle/843231#vp_3> accessed 1 January 2016.

81 Adam Greene and Dewey D Steadman, 'Pharmaceuticals; Analyzing Litigation Success Rates' (RBC Capital Markets, 15 January 2010) <http://amlawdaily.typepad.com/pharmareport.pdf> accessed 1 January 2016.

82 Roxanne Nelson, 'Pay-for-Delay Drug Deals: Do They Hurt or Help Patients?' (Medscape Medical News, 15 April 2015) <http://www.medscape.com/viewarticle/843231#vp_3> accessed 1 January 2016.

83 See Section 5(I).

This is reinforced by the finding that, in the absence of such a settlement, generic companies have less than a 50% chance of winning the case through litigation, which in turn means that the placement of the generic product into the market would have to be delayed until the expiry of the patent.[84]

So, which side is correct? Do pay-for-delay agreements between brand and generic pharmaceutical companies infringe on the fundamental human right of access to medicines?

It is the author's opinion that agreements between pharmaceutical companies should not *in abstracto* be considered to violate the right of access to medicines. A generalized answer that would cover all settlements between originator and generic companies would not be accurate. Each agreement should be examined individually, in order to establish whether, in light of the circumstances surrounding the settlement, this infringes upon the right of access to medicines. What is certain, however, is that a balance should be struck between the rights of individuals and the ones of pharmaceutical companies; a balance that would safeguard the fundamental right to health and ensure that the derivative right of access to medicines would not be sacrificed in the temple of the financial interests of pharmaceutical companies.

84 See Section 5(II).

DOES 'YES' MEAN 'NO' IN CON(SENSUAL) SEX & HIV TRANSMISSION? A STRANGE BEDFELLOW TO THE DEFENCE OF CONSENT

Marcus Sim*

Abstract

The defence of consent in relation to a charge under s.18 and s.20 of the Offences Against the Persons Act (OAPA) is generally not applicable to grievous bodily harm (GBH). Yet the law recognises that consent in relation to running the risk of contracting HIV is allowed. It is thus submitted that consent in this area of the law is a strange bedfellow to the general law of consent. It is perhaps relevant to consider alternative approaches, such as that applied in Canada, where the courts consider other defences such as condom usage or low or undetectable viral load. This approach encourages safer sexual practices and is in line with the ultimate goal of reduction of HIV transmissions.

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1. Introduction

On 11 December 2015, 17 years after the first successful prosecution of reckless transmission of the Human Immunodeficiency Virus ('HIV'), Simon James[1] was but only the third successful conviction.[2] This essay examines the criminalisation of HIV transmissions, focusing especially on the issue of consent. Firstly, it will present the current approach taken by England.[3] Secondly, the essay will highlight the problems in relation to consent as a result of the approach. Thirdly, it will consider the alternative approaches taken in Canada and other Commonwealth states. It is submitted that criminalisation of HIV transmission through an extension of the common law's interpretation of the Offences Against the Persons Act 1861 (OAPA) causes difficulties in the law, specifically in relation to consent. A review of the defence, taking a scientific and updated attitude of the problem, is due.

2. The Charge: England's Current Approach

Prosecutions of HIV transmissions have been exclusively charged under s.20 OAPA. In addition to the prosecution of Simon James, the other two successful prosecutions in England[4] were in the cases of *R v Dica*[5] and *R v Konzani (Feston)*.[6] These latter two cases currently represent the approach that is taken by the criminal law. Section 20 of the OAPA provides:

> *'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .' (emphasis added)*

In both *Dica* and *Konzani*, the defendants knew that they were HIV positive. Both had unprotected consensual sexual intercourse, in varying degrees of relationships, with a number of women. All the victims were subsequently diagnosed as HIV positive. Both defendants were charged with inflicting grievous bodily harm (GBH) contrary to OAPA s.20. Although not explicitly mentioned, there can be no doubt from *Dica* and *Konzani* that HIV constitutes GBH. The main issues that these two cases considered were issues of infliction, recklessness and consent.

1 At the time of writing, the court's judgement for Simon James' case was not yet reported.
2 Agency, 'Personal trainer jailed for five years for knowingly infecting two professional women with HIV' (*The Telegraph,* 11 Dec 2015) <http://www.telegraph.co.uk/news/uknews/12046900/Personal-trainer-jailed-for-five-years-for-knowingly-infecting-two-professional-women-with-HIV.html> accessed 14 Jan 2016.
3 This essay refers to the law of England and is intended to include Wales. However it excludes Scotland and Northern Ireland as OAPA s.20 are not identical in those jurisdictions.
4 There was one other successful case in Scotland prior to *Dica,* but *Dica* represented the first of its kind in England & Wales.
5 [2004] EWCA Crim 1103.
6 [2005] EWCA Crim 706.

The court in *Dica* confirmed three key points. First, their lordships established, overruling *R v Clarence*,[7] that the statutory meaning of 'inflict' does not require a 'direct or indirect violence, or an assault.'[8] This was a departure from the approach of the court in *Clarence,* which held that if a man has sex with his wife and transmits a sexually transmitted disease, there can be no infliction because there is a presumption of consent to sex between married couples.[9] However, it is submitted that this extension of the reasoning from *Chan-Fook*[10] and *Ireland*,[11] which recognise that infliction of violence may not require an assault, effectively nullifies the meaning of 'inflict.' This position was confirmed in *Konzani* and remains good law.

Second, the courts further stated that 'consent *to sexual intercourse* is not to be equated with consent *to the risk of contracting HIV through sex*.'[12] *Dica* confirms that where consent is given to the sexual act, notwithstanding that the victim is subsequently infected, there can be no rape[13]. This essay submits that the distinction drawn was a welcomed development of the law. Indeed, it is plainly logical that the procured consent to sex does not equate to consent to being physically harmed. The former would square within the offence of rape, but not the latter. Further, as Rogers argues, 'consent to sexual intercourse requires only a *general understanding* of sex',[14] whereas consent to 'the risk of bodily harm requires a more nuanced understanding of the nature of the risk involved'.[15]

Third, and perhaps most contentiously, *Dica* confirms that it is possible to consent to the risk of being infected with HIV. Judge LJ made it clear that 'if however, the victim consents to the risk, this continues to provide a defence',[16] and that unless the victim was 'prepared to take whatever risk of sexually transmitted infection there may be, [the court will presume that] it was unlikely that [the victim] would consent to a risk of major consequent illness if [he/she] were ignorant of it'.[17] This approach raises numerous questions; for example, how much information should the victim have known in order to consent?[18] Or from whose perspective should this examination be done? These issues are exacerbated by the concept of implied consent that the court recognised in *Konzani*.[19] It is also difficult to reconcile the judgment with the general approach taken with regard to the defence of consent. These issues shall be discussed in turn.

7 (1888) 22 QBD 23.
8 *Dica* (n 5)[30].
9 *Clarence* (n 7).
10 [1994] 1 WLR 689.
11 [1998] AC 147.
12 Jonathan Rogers, 'Criminal Liability for the Transmission of HIV' (2005) CLJUK 20, 21.
13 *Dica* (n 5) [39].
14 Rogers (n 12).
15 Ibid.
16 *Dica* (n 5) [59].
17 Ibid.
18 Stephen Leake & DC Ormerod, 'Grievous Bodily Harm' (2004) Crim LR 945, 947.
19 *Konzani* (n 5) [44].

3. The Defence: Con(sensual)ity

It is necessary to set out the position of the law regarding the defence of consent. The general approach laid down in *R v Donovan*[20] provides that '[…] it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial.'[21] This position has been confirmed in *Attorney-General's Reference (No. 6 of 1980),*[22] wherein Lord Lane refined the general rule. He accepted that an assault ordinarily only occurs in the absence of the victim's consent. However, he recognised that public interest sometimes allows the courts to make an exception when it so requires.[23] This particular case was accepted as falling within an exceptional category of cases, where matters of public interest 'require the court to hold otherwise'.[24] Examples of such exceptional categories include 'games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions'.[25]

Whilst it is beneficial for the law to retain flexibility by leaving open the possibility of other exceptional categories, it is a regrettable development of the law that the meaning of 'public interest' has never been explained. Lord Lane in the Court of Appeal of *R v Brown*[26] suggested that the test pertains to whether there is a 'good reason' for the act, but his lordship does not provide further explanation. Indeed, the House of Lord's decision of *Brown*[27] is particularly relevant to this point; on a charge contrary to s.47 and s.20 OAPA, the majority held that it would not be in the public's interest to allow sadomasochistic activities (S/M) for reasons ranging from health to the glorification of violence. Nevertheless, none of their lordships provided clarification to the test of public interest.

4. A Kink in the Defence Principle

The logic from the development of the law beginning with *Dica and Konzani* is difficult to reconcile with the principle in *Brown*. If the law prohibits the participation of such behaviour that inflicts violence, why should it allow individuals to engage in potentially injurious sexual behaviour through the transmission of disease?[28]

Cowan suggests that the law is more willing to acknowledge the known risks of normal sexual intercourse and its effects, compared to the potential harms that arise from S/M activity. Cowan argues

20 [1934] 2 KB 498.
21 Ibid 507.
22 [1981] Q.B. 715.
23 Ibid 718E–F.
24 Ibid 719.
25 Ibid.
26 [1992] QB 491.
27 [1994] 1 AC 212.
28 Leake (n 18) 948.

that this is an undesirable moral paradigm in which non-consensual, morally-dubious sexual violence (as in *Dica*) is permissible, but consensual, expressly communicative violent sex (as in *Brown*) is not.[29] This inconsistency in the law makes it difficult to fully understand the impact of *Dica* & *Konzani.*

Further, Rogers highlights that it is unclear whether *Dica* should be interpreted to mean '(a) that the need to find a 'good reason' […] only applies to cases where the bodily harm is *intended* by the defendant [...] or (b) that there *still* needs to be a 'good reason' for the activity even where the doer does not wish to cause bodily harm but is aware of the risk that he might do so'.[30]

It is submitted that the former interpretation of *Dica* is logically untenable because it leads to a highly arbitrary outcome whereby individuals may consent to a high risk of being subjected to bodily harm, even if the risk is so high that it could be said to be almost certain. But if it were certain, then, applying *Brown,* any consent is negated because there is no 'good reason'. Indeed, Mawhinney has sought to justify the departure from the rule in *Brown*. She argues that 'the risk of transmission ... is an incidental consequence of sexual intercourse'[31] and therefore infection is not guaranteed. It is, however, submitted that this is simply a question of semantics; surely 'consent to a risk naturally includes consent to the harm if the risk comes to fruition'.[32]

The latter interpretation similarly causes difficulties. Even if *Dica* was applied in conjunction with *Brown,* meaning that there has to be 'good reason' even in cases where the victim consents to the risk of the activity, *Dica* could stand as authority that 'the pursuit of sexual gratification might normally qualify'[33] for said 'good reason'. Yet this similarly causes problems because *Brown* itself is authority that the pursuit of sexual gratification, albeit premised on the infliction of physical pain, was not a 'good reason'. What should the law make of individuals, then, who derive sexual gratification *from* the risk of being infected with HIV;[34] individuals who consider the sexual activity with a HIV positive person to be 'intensely erotic'?[35] It is submitted that the egregious notion that being infected could be inherent to the sexual gratification was beyond the scope of the courts' consideration in *Dica & Konzani.* Applying the present law, it is unclear whether the principle from *Brown* would preclude the validity of consent to gaining sexual gratification *from* the risk of infection.

29 Cowan, 'The Pain of Pleasure: Consent and the criminalization of sado-masochistic "assaults"' (2013) *University of Edinburgh School of Law Research Paper Series*, 04.

30 Rogers (n 12) 21.

31 George R. Mawhinney, 'To be ill or to kill: the criminality of contagion' (2013) Journal of Criminal Law 202, 206.

32 Ibid.

33 Rogers (n 12) 21.

34 Tewksbury, 'An analysis of internet-based bug chasers and bug givers' (2006) *Deviant Behavior* 27(4) 379–39.

35 Gregory A. Freeman, "Bug Chasers: *The men who long to be HIV+*" (*Rolling Stone*, 23 January 2003) <http://web.archive.org/web/20061116220955/http://www.rollingstone.com/news/story/5939950/bug_chas/print> accessed 20 Jan 2016.

Due to the lack of concerted prosecution in this area, the limits of the law established in *Dica & Konzani* have not been tested; however, it presently sits uncomfortably with general principles of consent. It therefore remains to be seen whether the court will be able to iron out the logical inconsistency.

5. Dangerous Games: Implied Consent to the Risk of Infection

In addition to the possibility of consenting to the risk of infection, the rationale of *Dica & Konzani* emphasises the notion of informed consent. Judge LJ confirmed that consent cannot have been given in 'ignorance of the facts of the defendant's condition'[36]; if consent could be given without knowledge, 'the concept of consent in relation to section 20 is devoid of real meaning'.[37] The requirement for informed consent is reiterated in *Konzani* with greater emphasis placed on the fact that the defendant deliberately concealed his status from his partners and, therefore, no informed consent could be given.

However, whilst the decision is largely in line with the development from *Dica,* Judge LJ discussed a number of highly contentious circumstances whereby 'it would be open to a jury to infer that, notwithstanding that the defendant was reckless and concealed his condition from the complainant, [that] informed consent to the risk of contracting the HIV virus [was given]'.[38] The two identified circumstances were: if the victim met the defendant in a hospital whilst the defendant was receiving treatment (presumably for HIV) and if the defendant 'honestly believe(d) that his new sexual partner was told of his condition by someone known to them both'.[39] This development is problematic as it blurs the concepts of consent, actual or imputed knowledge and honest belief. Although Judge LJ categorically stated that the ultimate question is not knowledge but consent, he nevertheless goes on to also state that it is unlikely that one would consent if one were ignorant of the risk.[40] Indeed Cherkassky points out that if social interactions can produce informed consent, then this effectively shifts the burden on the victim to look into the sexual history of his or her partner before consenting.[41] This issue is further exacerbated by Judge LJ's view that the victim's implied consent may be obvious under cross-examination,[42] exposing the victim's state of mind and conduct to greater scrutiny.

Further, as Cherkassky rightly identifies, 'as a result of both *Dica* and *Konzani,* it seems as though a person can consent to the transmission of HIV under s. 20 if those risks have been directly or indirectly

36 *Dica* (n 5) [37].
37 Ibid.
38 *Konzani* (n 6) [44].
39 Ibid.
40 *Dica* (n 5) [59].
41 Lisa Cherkassky, 'Being informed: the complexities of knowledge, deception and consent when transmitting HIV' (2010) J Crim LJ 242, 254.
42 *Konzani* (n 6) [44].

disclosed to him or her by any source'.[43] What is clear however, is that there must be disclosure. This means that even if 'a person understands that a non-disclosing sexual partner may be HIV positive (eg because of his prior history of intravenous drug use), such understanding will not provide the defendant with a defence'.[44] In other words, the body of case law establishes that, no matter how well aware the victim was of the risk of exposure, there can be no consent without disclosure (direct or indirect).

6. Improvements to the Defence: Lessons from Canada

The decision of *R v Cuerrier*[45] from the Supreme Court of Canada was 'influential in the English Court of Appeal decision in *Dica*'[46]. *Cuerrier* established that not disclosing one's HIV positive status could constitute fraud contrary to s.265(3)(c) of the Canadian Criminal Code; the result being that it may vitiate consent to unprotected sex if there exists 'significant risk of serious bodily harm'. However, the court was quick to note that 'the careful use of condoms might reduce the risk of harm to one that was not significant so that there might be neither deprivation nor risk of deprivation, and so no fraud and hence no offence'.[47] Recent cases from Canada focus on the issue of 'significant risk'. *R v Mabior*[48] focused on the defendant's low viral-load or condom use as negating the risks. As has been highlighted, '*Cuerrier* was decided before the emergence of highly active antiretroviral therapy which can dramatically reduce viral load, HIV transmissibility and risk of death from HIV/AIDS'.[49]

The Canadian approach is one of two Commonwealth jurisdictions, the other being South Australia, that penalise non-disclosure with a serious assault offence.[50] Compared to England's approach, these approaches effectively place a duty on the defendant to disclose. However, the English courts have yet to take on a scientific approach to the assessment of transmission risk. *Mabior* considered that trace or undetectable HIV viral load may 'theoretically be relevant to the unlawfulness of the infliction under s.20 in the sense that failure to disclose a low viral load may not preclude the defence of consent from rendering the infliction "lawful" and therefore no crime'[51]. This is the critical difference between the law in England and Canada: it is clear from *Mabior* that condom use or an undetectable or low viral load are alternative defences in Canada, but this logic has not been adopted in England.

43 Cherkassky (n 41) 255.
44 Matthew Weait, 'Knowledge, Autonomy and Consent: R v Konzani' (2005) Criminal Law Review 763, 767.
45 [1998] 2 SCR 371.
46 Janet Loveless, 'Criminalising failure to disclose HIV to sexual partners: a short note on recent lessons from the Canadian Supreme Court' (2013) Crim LR 214, 220.
47 Ibid 214.
48 [2012] SCC 47.
49 Loveless (n 46) 216.
50 Ibid 220.
51 Ibid.

This essay therefore submits that, with the development of Pre-Exposure Prophylaxis and Post-Exposure Prophylaxis,[52] and improvements to the treatment of HIV and better risk awareness, English law ought to begin considering similar factors as possible defences. Much of the reasoning in *Dica & Konzani* unfortunately centred on the issue of disclosure and informed consent. It is submitted that *Mabior* is to be preferred as it shares the responsibility of risks and 'promote(s) safe(r) sexual practices and be in line with public health policies initiatives, the ultimate goal being to reduce transmission of the virus'.[53]

7. Alternative Approach

It is also possible for Parliament to pass HIV-specific criminal statutes. This is the approach taken in at least 12 jurisdictions, notably Singapore, Cape Verde and Tanzania.[54] The benefit of such specific criminal statutes is that they offer clarity to the law. For example, s.23 Infectious Diseases Act in Singapore explicitly and precisely detail the behaviour that is required from an infected person in order to avoid criminal sanctions. However, as has been pointed out, specific laws may lack flexibility and 'omit important advancements'.[55] If any such statutes were passed, there 'would need to be an inbuilt mechanism that would allow the law to adapt to change'.[56] In any event, perhaps most importantly, legislation in this area of law has not been forthcoming. Rogers points out that 'British governments in taking prompt action in clearing up controversial points of criminal law is so dire […] that waiting for Parliament is no solution at all'.[57] The burden of developing the law in a cogent manner therefore has to be left to the courts.

8. Concluding Points

This essay has examined the operation of the defence of consent in relation to a charge under s.20 OAPA for the reckless transmission of HIV. There are numerous issues that plague the current state of the law and it is thus submitted that consent in this area of the law is a strange bedfellow to the general law of consent. However, short of statutorily overhauling the law, it seems that the cases of *Brown* and *Dica* will continue to pose a degree of tension. Coupled with the lack of alternative recognised defences, the tension is exacerbated since defendants are left with little choice other than disclosure or

52 The former is course of medication taken before exposure to HIV and the latter is taken after exposure.
53 David Hughes, 'Condom use, viral load and the type of sexual activity as defences to the sexual transmission of HIV' (2013) J Crim LJ 136, 150.
54 UNAIDS, *Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Background and Current Landscape* (Expert Meeting on the Science and Law of Criminalisation of HIV Non-Disclosure, Exposure and Transmission) para. 13.
55 Hughes (n 53) 149.
56 Ibid.
57 Rogers (n 12) 23.

abstinence. Therefore, a look to Canada's approach is therefore welcomed, including the adoption of alternative defences such as condom usage or low or undetectable viral load, which should provide a shared responsibility of risks. This would encourage safer sexual practices and is in line with the ultimate goal of reduction of HIV transmissions.

THE MODERN GOVERNANCE AND REGULATION OF CREDIT RATING AGENCIES: A LEGAL COMPARATIVE STUDY TO REDUCE DEPENDENCY ON AND RELEVANCE OF EXTERNAL RATINGS IN US AND EUROPEAN BANKING SUPERVISION

Tobias Bauerfeind *

Abstract

Credit rating agencies (CRAs) play an important role in the financial world. For a long period of time, they were capable of operating in the shadow of the financial system, relatively unnoticed by the public eye. The most recent developments regarding the United States of America (USA) mortgage market and the Euro debt crisis, however, have shown that certain aspects of the current regulatory framework had to be re-examined. Financial institutions, insurance companies and institutional investors rely far too much on external ratings, without having sufficient internal credit risk ratings themselves. This cannot only lead to market volatility and instability of the financial system, but also to substantial economic losses. Following extensive and long running discussions at national and international level, in recent years both the European Union (EU) and the USA have implemented regulations to prohibit an exclusive or instant use of ratings from CRAs for supervisory purposes. These rules are intended to toughen and complete the regulatory framework for CRAs, while simultaneously reducing the excessive use of external ratings in the financial system over all. For this purpose, an appropriate alternative pursued by the supervisory authorities could be to revise, adjust and extend the intrabank approaches in order to internally calculate the (credit) risk assessment and prudential capital requirements. The following article will therefore focus on analysing comparative law to highlight discrepancies in the regulations of the EU and the USA concerning their supervisory legislations. This will be an important step in order to find possibilities for avoiding mechanistic reliance on external ratings, as reducing mechanistic regulatory reliance is a critical step for the financial sector.

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1. Introduction

From the agency-specific calculation method, through the governmental use for supervisory purposes, right up to the big influence and the significant market power of the three major CRAs,[1] followed by the emergence of the subprime mortgage-backed securities[2] and Euro debt crisis[3] and the subsequent crisis on the international financial markets, which led to massive loan defaults and corresponding losses such as write-downs with banks and financial institutions, the external rating has been subject to various intensive discussions among the public debate.[4] In connection with the implementation of Basel II,[5] the external rating witnessed an increasing demand by market forces as well as banking supervisors; under Basel II, external ratings were used for banking regulation.[6] Meaning, in addition to the existing significant market power, based on the prevailing market conditions, an additional, artificial dependency of the financial market and its participants on external ratings was created by the supervisors themselves.[7] Accordingly, external ratings became institutionalised as a tool and indicator for prudential capital requirements and the bank internal risk assessment in the global supervisory process.[8] Thus, numerous supervisory authorities in banking practice used external ratings as a supportive instrument for the performance of their prudential duties.[9]

Yet the financial companies' uncritical and often schematic use of external ratings for classifying the creditworthiness of borrowers, securities and other counterparty credit risks for supervisory purposes often led to inadequate assessment of default risk. This has contributed significantly to the emergence

1 Standard and Poor's Corporation (S&P), Moody's Investors Service, Fitch Ratings.

2 Christian A Conrad, *Moral und Wirtschaftskrisen – Enron, Subprime & Co* (1st edn, disserta 2010) 10.

3 'Finanzkrise und Rezession drücken Europas Aktien tief ins Minus' *Börsen-Zeitung* (Frankfurt, 31 December 2008) 2.

4 Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743.

5 Basel II is the second of the Basel Accords, which are recommendations on banking laws and regulations issued by the Basel Committee on Banking Supervision (BCBS). Basel II, initially published in June 2004, was intended to amend international standards that controlled how much capital banks need to hold to guard against the financial and operational risks banks face.

6 According to Basel II banks were allowed to rely on external ratings (credit assessments) to determine the risk weight of their exposures pursuant to the standardised approach, provided the External Credit Assessment Institution (ECAI) in the EU or rather the Nationally Recognised Statistical Rating Organisation (NRSRO) in the USA that produce those ratings has been recognised as eligible for that purpose by the responsible supervisory authority, cf. Sebastian Herfurth, *Die Regulierung von Ratingagenturen unter Basel II* (1st edn Josef Eul 2010) 53 et seq.; Peter Reichling et al., *Praxishandbuch Risikomanagement und Rating* (2nd edn Gabler 2007) 44; Thomas Rauschenbach, 'Offenheit statt Lethargie: Basel II im Kontext mit Ratings' [2002] RIW 1.

7 Cf. Herfurth (n 6) 53 et seq.

8 Gunther Meeh-Bunse et al., 'Externes Rating – (k)ein Auslaufmodell für Kreditinstitute?' [2014] Die Bank 18; q.v. Sandra Zehetner, *Regulation of Credit Rating Agencies* (1st edn AV Akademikerverlag 2014) 21 et seq.

9 Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743.

of the aforementioned financial crises and its ramifications.[10] The strong market position of the CRAs and their global importance result exclusively from regulation, enforced through Basel II provisions and the corresponding regulations of the Securities and Exchange Commission (SEC).[11] To sum up, then, the opposite of well-meant is badly done.[12] The use of external ratings by banking supervisors led to issuers and also investors seeking the rating itself, regardless of the quality of its content; in other words, they were not so much interested in a rating high in quality then in the result of the rating and what that brought with it: a product that was rated sufficiently high to meet the regulatory threshold.[13]

However, to meet the statutory objective of reducing the dependency on and the relevance of external ratings in banking supervision, the efficient risk assessment within the risk assessment models recognised for supervisory purposes of financial service institutions must be supported. Moreover, the references to external ratings for supervisory purposes in the supervisory regime of the EU must also be regressed,[14] just as they have been in the USA.[15] Nonetheless, a complete, all-embracing abandonment of external ratings in financial supervision appears relatively impractical at the present time.[16] In revising the use of external ratings, it is of utmost importance that the specific needs of the various financial sectors as well as the nature, scope and complexity of the respective activities and investments are taken into account.[17]

The approach of the EU[18] and the USA,[19] to diminish dependency on and regulatory relevance of external ratings, provides the basis to give fresh impetus and consideration to the issue of the regulation

10 'Im Bann der Finanzkrise: Brüssel stellt Ratingagenturen auf den Prüfstand' *Börsen-Zeitung* (Frankfurt 29 December 2007) 27.

11 Zehetner (n 8) 22.

12 For instance, Moody's has been a vocal opponent of the use of ratings in regulation for a long period of time, at least going back to the mid-1990s. For an example of a statement of Moody's views, see Moody's letter to SEC in response to its 'Concept Release on Rating Agencies and the Use of Credit Ratings under the Federal Securities Laws' (28 July 2003).

13 Moody's, Special Comment, 'Sovereign Ratings and Regulation: The Problem of Intervention' (15 April 2013) 2.

14 Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536; q.v. Rainer Baule and Christian Tallau, 'Konsultationspapier zum Kreditrisiko-Standardansatz: Abkehr von externen Ratings' [2015] ZfgK 132.

15 Cf. SEC, 'Report on Review of Reliance on Credit Ratings' (July 2011) 2; Moody's, Special Comment, 'Sovereign Ratings and Regulation: The Problem of Intervention' (15 April 2013) 3.

16 Moody's, Special Comment, 'Sovereign Ratings and Regulation: The Problem of Intervention' (15 April 2013) 3.

17 Q.v. Gesamtverband der Deutschen Versicherungswirtschaft e.V., 'Stellungnahme zu dem Bericht des Ausschusses Wirtschaft und Währung des Europäischen Parlaments zu dem Vorschlag der EU-Kommission für eine Verordnung des Europäischen Parlaments und des Rates zur Änderung der Verordnung (EG) Nr. 1060/2009 über Ratingagenturen' (30 August 2012) 3 et seq.

18 Cf. Article 5a, Article 5b and Article 5c of the Regulation (EU) No. 462/2013 of the European Parliament and of the Council of 21.5.2013 amending Regulation (EC) No. 1060/2009 on credit rating agencies (CRA III) [2013] OJ L 146/1.

19 Cf. Section 939A of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 21.7.2010 (Dodd-Frank Act), Pub.L. 111–203.

of CRAs, thus allowing further examination. In order to achieve this objective, the supervisory regime of the EU and USA must change and adapt fundamentally, other kinds of tools and alternatives must be provided to the financial market by the banking supervisors (in order to finally abandon external ratings) and their use and acceptance by the market must be observed. The idea is that a fair and well-balanced system of rating agency supervision will help to prevent economic crises such as the one the world is currently facing. In that respect, it is fundamental for the supervisory regime on CRAs to distinguish between instruments of the regulation of CRAs on the one hand, and the reduction of dependency on and reducing relevance of external ratings in banking supervision on the other.[20] Concerning the latter, the key question is whether and to what extent banking supervision is generally reliant on the use of external ratings in the regulatory capital framework to achieve its objectives of ensuring stable banking systems and adequate capital markets that serve as a basis for functioning national economies. A further question is whether and to what extent the results of external ratings can be used effectively by national, international and supranational financial market supervisory authorities for banking supervisory purposes without further governmental considerations or analyses.[21]

In summary, external ratings have been strongly cross-linked in financial contracts, supervisory regimes and investment provisions over the last decades. Therefore, regulatory frameworks nowadays seem determined to reducing their strong systematic consequences and are supposed to go even further to reduce the systematic reliance on external ratings.[22]

2. The Supervisory Regimes on Cra's

2.1 The concept of the 'external rating'

The term 'rating' firstly describes the procedure with which the creditworthiness of a company (i.e. its probable solvency), or rather the probability of default (PD) of a financial instrument, is described under analysis of all strategically important corporate and market data. Secondly, the term refers to the result of such analysis. Although, there is a distinction made between the subject of the analysis, the principal and the timescale of the rating.[23] The basis of a rating system is formed by heuristic, statistical

20 Gudula Deipenbrock, 'Die notwendige Schärfung des Profils – das reformierte europäische Regulierungs- und Aufsichtsregime für Ratingagenturen' [2011] WM 1829; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743.

21 'Stuft Ratingagenturen herab; Börsen-Zeitung' *Börsen-Zeitung* (Frankfurt, 3 July 2008) 8; 'Ratingagenturen schieben Banken Schuld an der Krise in die Schuhe' *Börsen-Zeitung* (Frankfurt, 4 June 2010) 1; 'Im Bann der Finanzkrise: Brüssel stellt Ratingagenturen auf den Prüfstand' *Börsen-Zeitung* (Frankfurt, 29 December 2007) 27; cf. Herfurth (n 6) 24; Gudula Deipenbrock, 'Die notwendige Schärfung des Profils – das reformierte europäische Regulierungs- und Aufsichtsregime für Ratingagenturen' [2011] WM 1829, 1835.

22 Zehetner (n 8) 22.

23 Reichling (n 6) 45.

or causal-analytical methods and models.[24] By means of using heuristic methods, fundamental insights shall be derived directly from subjective experiences and observations or rather expected economic relationships.[25] Statistical models re-use historical data in order to find characteristics or key figures that provide information about the probable solvency.[26] Causal-analytical models are based on complex economic theories and directly extract the contexts related to the probable solvency.[27] CRAs establish ratings, inter alia, for short and long-term debt securities, bonds, debentures, commercial papers, certificates of deposit, bank deposits, receivables from insurance policies, money market and bond funds, issuer ratings as well as country ratings.[28] In doing so, the three major CRAs (and many of the smaller CRAs) use a rating scale that is originally taken from the US school grade system. For the financial sector, and the rating triggers, the distinction between investment and speculative grade is decisive.

Withal external ratings should serve as one of many tools that help the private sector to be more informed and efficient. Those tools include the consideration of the views from a wide range of sources. For example, market participants in the private sector can take into account: issuers' public statements and financial filings, market-based measures of risk such as changes in bond prices or credit default swap premia, financial press opinions, bank research reports, competitors' views, general market sentiment, and last, but not least, credit ratings.[29] Nevertheless, regulatory reliance on ratings could increase the perception that agents of the private sector, such as credit institutions and investors, may use ratings to the exclusion of its own credit analysis.[30] As a consequence, regulatory use of external ratings bears the danger of threatening the independence of CRAs' 'opinions', discouraging credit institutions and investors from undertaking their own (credit) risk assessments and reducing credit institutions' and investors' independent assessments of CRA quality.[31]

Common rating scale of the three major CRAs[32]			
Moody's	**S&P**	**Fitch**	Risk category
Aaa	AAA	AAA	Investment grade

24 Ibid, 46.
25 Ibid, 46 et seq.
26 Ibid, 52 et seq.
27 Ibid, 53.
28 Cf. Heinz-Dieter Assmann in Heinz-Dieter Assmann and Uwe H Schneider (eds), *Commentary on the German Securities Trading Act* (WpHG) (6th edn Dr. Otto Schmidt 2012) § 17 recital 1; see also Article 3 para. 1 (a) (b) of the Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16.9.2009 on credit rating agencies (CRA I) [2009] OJ L 302.
29 Moody's, Special Comment, 'Opinion versus fact: The difference between Private Sector and Public Sector Expectations of Credit Ratings' (9 May 2014) 2.
30 Q.v. Moody's, Special Comment, 'Sovereign Ratings and Regulation: The Problem of Intervention' (15 April 2013) 2.
31 Q.v. Moody's, Special Comment, 'Sovereign Ratings and Regulation: The Problem of Intervention' (15 April 2013) 2.
32 Modified taken from: Herfurth (n 6) 57.

Aa1 Aa2 Aa3	AA+ AA AA-	AA+ AA AA-	
A1 A2 A3	A+ A A-	A+ A A-	
Baa1 Baa2 Baa3	BBB+ BBB BBB-	BBB+ BBB BBB-	
Ba1 Ba2 Ba3	BB+ BB BB-	BB+ BB BB-	Speculative grade
B1 B2 B3	B+ B B-	B+ B B-	
Caa Ca -	CCC CC C	CCC CC D	Extremely speculative
C	D	DDD DD D	In default

While the Financial Stability Board (FSB) has strongly recommended to reduce mechanistic regulatory reliance,[33] and the USA have done a very good job of removing the use of external ratings in regulation fairly widely, the Basel Committee on Banking Supervision (BCBS) still seems to be undecided, even though there has been some progress.[34] At least, reducing mechanistic reliance on external ratings is a stated objective of the latest EU regulation of CRAs (CRA III).

2.2 The European supervisory regime

The financial crisis has, in Europe as well as in the USA, led to a re-shaping and re-thinking of the regulatory system.[35] With regard to this factual context, the European Parliament and Council of the EU adopted the Regulation (EC) No. 1060/2009 of 16.9.2009 on CRAs (CRA I). This Regulation was amended by Regulation (EU) No. 513/2011 (CRA II),[36] thus giving the European Securities and Markets Authority (ESMA)[37] the necessary supervisory powers for the registration and oversight of

33 Cf. FSB, 'Principles for Reducing Reliance on CRA Ratings' (Basel, 27 October 2010); cf. FSB, 'Roadmap and workshop for reducing reliance on CRA ratings' (Basel, 5 November 2012); cf. FSB, 'Thematic Review on FSB Principles for Reducing Reliance on Credit Rating Agency Ratings', Interim Report (Basel, 29 August 2013); cf. FSB, 'Thematic Review on FSB Principles for Reducing Reliance on CRA Ratings', Peer Review Report (Basel, 12 May 2014).

34 See below chapter III. 1.2.

35 Zehetner (n 8) 25; Up to here, the previous supervisory regime of the EU has only been fragmentary, consisting of the IOSCO Code of Conduct ('self-regulation'), Directive 2003/6/EC (MAD), Directive 2003/125/EC ('no recommendation to invest'), Directive 2004/39/EC (MiFID) and Directive 2006/49/EC (CRD (Basel II)).

36 Regulation (EU) No. 513/2011 of the European Parliament and of the Council of 11.5.2011 amending Regulation (EC) No. 1060/2009 on credit rating agencies (CRA II) [2011] OJ L 145/30.

37 The European Securities and Markets Authority is a European Union financial regulatory institution and European Supervisory Authority. ESMA replaced the Committee of European Securities Regulators (CESR)

CRAs within the EU. On this issue, Commission Regulation (EU) No. 462/2013 (CRA III) once again amended Regulation (EC) No. 1060/2009.

2.2.1 CRA I

The CRA I, ratified in April 2009, was seen as a major step of the EU as it should have significant influence on the rating business, thereby setting higher standards. The four basic objectives of the CRA I – to ensure that CRAs avoid conflict of interest, to improve the quality of the methodologies used by CRAs, to increase transparency by setting disclosure obligations for CRAs and to ensure an efficient registration and surveillance framework – were all targeted at improving the process of the rating issuance. They were aimed to restore market confidence, protect the stability of financial markets and improve protection of investors, thus representing a common regulatory framework for the member states. Moreover, continuous supervision through CESR and national supervisory authorities was meant to guarantee the regulation's enforcement.[38]

2.2.2 CRA II

The CRA II, ratified in May 2011, amending the CRA I, entrusted ESMA with exclusive supervisory power over CRAs that are registered within the EU. As a consequence, registration and supervision at European level was centralised and simplified through ESMA.[39] Although, it is more than legally questionable whether the delegated powers of ESMA in the area of CRA supervision according to the CRA II can be subsumed under the authority to standardise legislation (*Rechtsangleichungskompetenz*) of Article 114 of the Treaty on the functioning of the European Union (TFEU).[40] Nonetheless, in so doing, a central agency has been established in order to simplify and pool CRA supervision within the EU making processes more efficient.

2.2.3 CRA III

The CRA III, ratified in May 2013, tries to indicate proper instruments for the regulation of CRAs as well as to reduce the dependency on and the relevance of external ratings in banking supervision and private sector.

2.2.3.1 Instruments of the regulation of CRAs

As already stated, the CRA III is first and foremost dedicated to reduce references to external ratings – particularly in supervisory legislations – as far as possible. However, the CRA III additionally strengthens and expands the regulation of CRAs. CRA III introduces a requirement to appoint at least

on 1.1.2011. It is one of the three new European Supervisory Authorities set up within the European System of Financial Supervisors.

38 Zehetner (n 8) 35.

39 Zehetner (n 8) 37 et seq.

40 Q.v. Tim O Koslowski, *Die Europäische Bankenaufsichtsbehörde und ihre Befugnisse: Eine Untersuchung zu sekundärrechtlich begründeten Kompetenzen von EU-Agenturen* (1st edn Peter Lang 2014) 88 et seq..

two CRAs in respect of rated structured finance instruments, a requirement to consider appointing at least one small CRA, as well as a joint obligation for issuers, originators and sponsors of structured finance instruments to publish certain information in relation to the underlying assets and the transaction and rotation requirements[41] for CRAs in relation to re-securitisations. Furthermore, CRA III amends the regulatory framework established under the CRA I in order to address the potential conflicts of interest,[42] including those arising from the 'issuer-pays-model', the lack of transparency and the limited liability of CRAs in relation to the ratings they have issued. Besides, and very importantly, special provisions are set out concerning sovereign debt ratings (government bonds of EU member states).[43] Unsolicited sovereign debt ratings are restricted to three ratings per year.

In exceptional circumstances and with good reasoning, however, CRAs can bypass this provision. Nevertheless, those ratings are exclusively published on Fridays after the close of trading and at least one hour before the opening of marketplaces within the EU.[44] Finally, CRAs are required to submit ratings, rating outlooks and other relevant information to ESMA, which is required to publish this information on a website referred to as the European rating platform.[45] This is intended to allow the private sector to compare all external ratings and to allow smaller and new CRAs to gain more visibility in order to contribute to even greater diversity within the rating industry.[46]

2.2.3.2. Reducing dependency on and relevance of external ratings

The nucleus of the reform, however, is the group of provisions requiring credit institutions, investment firms, insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision, management companies, investment companies, alternative investment fund managers and central counterparties to make their own (credit) risk assessment and not to rely solely or mechanistically on external ratings for assessing the creditworthiness of an entity or financial instrument.[47] The legislative purpose is that credit and financial institutions should put internal procedures into place[48] in order to make their own (credit) risk assessment and encourage investors to carry out own due diligences. The recitals to CRA III also state that financial institutions should avoid using external ratings in contracts as the only parameter to assess the creditworthiness of investments

41 Cf. recital 19 of the CRA III; Verena Weick-Ludewig in Thomas Heidel (ed), *Commentary on the German Stock Corporation Act* (AktG) (4th edn Nomos 2014), § 17 WpHG recital 5h.
42 Cf. recital 23 of the CRA III; Ibid.
43 Cf. recital 40 of the CRA III; Ibid.
44 Cf. recital 42 of the CRA III; Ibid.
45 Bernd Goller, 'Ratingagenturen unter ESMA-Aufsicht' [2013] BaFinJournal 1, 2.
46 Cf. recital 31 of the CRA III.
47 Weick-Ludewig (n 41) § 17 WpHG recital 5g et seq.
48 Cf. e.g. the internal rating approaches of the Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26.6.2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 (CRR) [2013] OJ L 176/1: (Standardised approach and) IRB approach, cf. Article 107 para. 1, Article 111 and Article 142 of the CRR.

or to decide whether to invest or divest.[49] National supervisory authorities are required to monitor the adequacy of the (credit) risk assessment processes of the institutions, assess the use of contractual references to external ratings and encourage financial institutions to mitigate the impact of such references, with a view to reduce sole and mechanistic reliance on external ratings.

According to Article 5a of the CRA III, financial institutions shall make their own (credit) risk assessment and shall not solely or mechanistically rely on external ratings for assessing the creditworthiness of an entity or financial instrument.

According to Article 5b of the CRA III the European Banking Authority (EBA) established by Regulation (EU) No. 1093/2010 of the European Parliament and of the Council,[50] the European Insurance and Occupational Pensions Authority (EIOPA), established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council,[51] and ESMA shall not refer to external ratings in their guidelines, recommendations and draft technical standards where such references have the potential to trigger sole or mechanistic reliance on external ratings by the responsible supervisory authorities, the sectoral responsible supervisory authorities, the financial institutions referred to in the regulation[52] or other financial market participants. Accordingly, EBA, EIOPA and ESMA shall review and remove, where appropriate, all such references to external ratings in existing guidelines and recommendations in order to avoid potential pro-cyclical effects.[53] From an economic point of view this is extremely important, as the wrong reaction of the risk management processes of the financial sector to the symptoms and consequences of the financial crisis has revealed the pro-cyclicality of the (fair-value) valuation methods linked to external ratings[54] which has been exacerbated by regulatory provisions.[55] If financial institutions, insurance companies and institutional investors rely solely or mechanistically on ratings, without having sufficient internal credit risk ratings themselves, this will lead to herd behavior, such as parallel sales of debt securities, once those instruments are rated less than investment grade. Such behavior can affect the stability of capital markets, especially if the three major CRAs judge wrongly as in the past.

49 Cf. recital 9 of the CRA III.

50 [2010] OJ L 331/12.

51 [2010] OJ L 331/48.

52 Cf. the first subparagraph of Article 4 para. 1 of the CRA III.

53 Gunther Meeh-Bunse et al., 'Externes Rating – (k)ein Auslaufmodell für Kreditinstitute?' [2014] Die Bank 18; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536; Katja Langenbucher (ed), *Internes und externes Rating – Aktuelle Entwicklungen im Recht der Kreditsicherheiten – national und international* (Schriftenreihe der Bankrechtlichen Vereinigung, Vol 24 De Gruyter 2004) 63, 67; see also Hermann Schulte-Mattler, 'Antizyklische und systemische Eigenmittelpuffer als Hoffnungsträger der Bankenaufsicht' [2014] Die Bank 8.

54 Cf. in this respect Peter Schaub and Michael Schaub, 'Ratingurteile als Entscheidungsgrundlage für Vorstand und Abschlussprüfer?' [2013] ZIP 656; Langenbucher (n 53) 67.

55 Cf. Stefan Müller and Kai Brackschulze, 'Prozyklische Effekte von Risikomanagementsystemen nach KonTraG in Finanz- und Vertrauenskrisen' [2011] DB 2389.

Finally, according to Article 5c of the CRA III the Commission shall continue to review whether references to external ratings in EU law trigger or have the potential to trigger sole or mechanistic reliance on external ratings by the responsible supervisory authorities, the sectoral responsible supervisory authorities, the financial institutions referred to in the regulation[56] or other financial market participants, with a view to deleting all references to external ratings in EU law for regulatory purposes by 1.1.2020, provided that appropriate alternatives to (credit) risk assessment have been identified and implemented.[57] In addition, similar requirements are imposed under the Directive 2013/14/EU[58] in order to reduce sole and mechanistic reliance on external ratings by institutions for occupational retirement provision (IORPs), undertakings for collective investment in transferable securities (UCITS) and alternative investment fund managers (AIFMs).

2.2.3 Final remarks

Finally, it will become apparent whether the new legal framework of the EU is able to provide modern governance and regulation of CRAs, i.e. how it is capable of regulating CRAs in a reasonable balance between the regulation of the market behavior and the legal regime of CRAs on the one hand, and the reduction of the dependency on and the relevance of external ratings in banking supervision on the other, without further making them institutionalised gatekeepers. Obviously, it is therefore compulsory to put internal procedures into place in order to internally calculate the (credit) risk assessment. The importance of those internal rating approaches cannot be emphasised enough. They will be key determinants of reducing the dependency on and the relevance of external ratings in banking supervision and the private sector for the purpose of making external ratings what they are: the expression of an opinion of a third party ('opinions' – as the CRAs themselves never get tired of emphasising).[59] External ratings should only be one of many parameters which are used for (credit) risk assessment and prudential capital requirements.

56 Cf. the first subparagraph of Article 4 para. 1 of the CRA III.

57 Gunther Meeh-Bunse et al., 'Externes Rating – (k)ein Auslaufmodell für Kreditinstitute?' [2014] Die Bank 18; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536; cf. FSB, 'Thematic Review on FSB Principles for Reducing Reliance on CRA Ratings', Peer Review Report (Basel, 12 May 2014) 5.

58 Directive 2013/14/EU of the European Parliament and of the Council of 21.5.2013 amending Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of overreliance on credit ratings [2013] OJ L 145/1.

59 *County of Orange v The McGraw-Hill Companies* [1999] d/b/a Standard & Poor's Ratings Services, United States District Court, Central District of California, Case No. SACV 96-0765, 18.3.1997. This is different from the situation in Australia. The Australian Federal Court has delivered a landmark judgment which holds a CRA liable for the first time (among other things) for the negligent AAA rating of a structured financial product. In *Bathurst Regional Council v Local Government Financial Services & Ors* (No. 5) [2012] FCA 1200, the court held that 13 local councils were entitled to be compensated for their estimated $30 million losses arising out of their investment in Rembrandt notes, comprising constant proportion debt obligations (CPDOs) arranged by

2.3 The US supervisory regime

Despite the rising importance of CRAs in the past century, they were largely neglected by regulators, allowing them to gain (oligopolistic) market power continuously. In the USA, the main detailed regulatory intervention and supervision occurred with regard to the 'dot.com bubble' and some famous corporate scandals that upset financial markets and the public in general. Enron[60] was probably the best-known example that highlighted CRAs' inability to predict defaults.[61] From then on, CRA reform has been on the minds of US Congress and the SEC for years. But it was not until the near collapse of the financial markets in 2008, and US Congress' singling out of the CRAs as one of the culprits for their role in the subprime mortgage-backed securities crisis, that the call for reform was intensified.[62]

2.3.1 The Securities Exchange Act

In the USA, the prudential institutionalisation of external ratings within a regulatory framework had already started with the legislation of the Securities Exchange Act back in 1934.[63] The Securities Exchange Act was created to provide governance of securities transactions on the secondary market[64] and to regulate the exchanges and broker-dealers in order to protect the investing public.[65] In addition, the SEC was created by Section 4 of the Securities Exchange Act. In the wake of this new regulation, credit institutions were not allowed to hold bonds that were rated below investment grade. While the idea of these new rules was basically just designed to encourage credit and other financial institutions to hold safe bonds in their portfolios, this led to an anchoring of CRAs' 'opinions' into a regulatory framework. As a consequence, automatic sale of bonds was triggered if a bond was downgraded below investment grade level. Such barriers are able to systemically induce a downward spiral (e.g. pro-cyclical and cliff effects).[66]

ABN Amro Bank N.V., rated AAA by S&P, and marketed and sold to them by the financial advisory business, Local Government Financial Services.

60 Cf. Tobias Pukropski, *Regulierung von Ratingagenturen als Reaktion auf die Finanzkrise: die europäische Ratingverordnung 1060/2009 vor dem Hintergrund von Fehlentwicklungen auf dem Ratingmarkt* (1st edn LIT Verlag 2013) 19; Conrad (n 2) 1 et seq.

61 Enron was rated investment grade by S&P and Moody's until four days before it declared bankruptcy, cf. Zehetner (n 8) 49; q.v. Gudula Deipenbrock, 'Der US-amerikanische Rechtsrahmen für das Ratingwesen – ein Modell für die europäische Regulierungsdebatte?' [2007] WM 2217, 2218 et seq.

62 Danielle Carbone, 'The Impact of the Dodd-Frank Act's Credit Rating Agency Reform on Public Companies' [2010] 24 Insights: The Corporate and Securities Law Advisor 1.

63 Pub.L. 73–291.

64 The secondary market is the financial market in which previously issued financial instruments such as stock, bonds, options, and futures are bought and sold. Another frequent usage of secondary market is to refer to loans which are sold by a mortgage bank to investors.

65 Zehetner (n 8) 49.

66 Gunther Meeh-Bunse et al., 'Externes Rating – (k)ein Auslaufmodell für Kreditinstitute?' [2014] Die Bank 18; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536; Langenbucher (n 53) 67; Hermann Schulte-Mattler, 'Antizyklische und systemische Eigenmittelpuffer als Hoffnungsträger der Bankenaufsicht' [2014] Die Bank 8; Peter Schaub and Michael Schaub, 'Ratingurteile als

2.3.2 Nationally Recognised Statistical Rating Organisations

In 1975, shortly after the change from the 'investor-pay' to the 'issuer-pay-model' took place, a new legislation regulating CRAs came into force and the 'Nationally Recognised Statistical Rating Organisations' (NRSROs) were born. A NRSRO is a CRA that issues ratings that the SEC permits other financial firms to use for certain regulatory purposes. Originally, seven CRAs were recognised as NRSROs, a number that dwindled as a result of mergers to six by the mid-1990s[67] and then to three by 2003.[68] As of September 2015, ten organisations were designated as NRSROs.[69] External ratings by NRSROs are used for a variety of regulatory purposes in the USA. In addition to prudential capital requirements, the SEC permits certain bond issuers to use a shorter prospectus form when issuing bonds if the issuer is older, has issued bonds before, and has a rating above a certain level. SEC regulations also require that money market funds comprise only securities with a very high rating from a NRSRO.[70] The recognition of a CRA as a NRSRO (or an external credit assessment institution (ECAI) as the European equivalent) bears the danger of increasing the foreclosure of a market already dominated by three major undertakings.[71] S&P, Moody's, Fitch, DBRS[72] and Japan Credit Rating Agency (JCR)[73] are registered as both NRSRO and ECAI.

2.3.3 The Sarbanes-Oxley Act

The Sarbanes-Oxley Act[74] 2002 set new or rather expanded requirements for all US public company boards, management and public accounting firms. There were also a number of provisions of the Act that equally applied to privately held companies, such as the willful destruction of evidence to impede a federal investigation. The Bill, which contained eleven sections, was enacted as a reaction to a number of major corporate and accounting scandals, including Enron. Title VII consisted of five sections and

Entscheidungsgrundlage für Vorstand und Abschlussprüfer?' [2013] ZIP 656; Stefan Müller and Kai Brackschulze, 'Prozyklische Effekte von Risikomanagementsystemen nach KonTraG in Finanz- und Vertrauenskrisen' [2011] DB 2389; Zehetner (n 8) 50.

67 SEC, Release Nos. 33-7085; 34-34616; IC-20508; International Series Release No. 706, File No. S7-23-94.

68 SEC, 'Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets' (January 2003).

69 SEC, Office of Credit Ratings, http://www.sec.gov/ocr, last visited on 25 June 2016.

70 Cf. Gudula Deipenbrock, 'Der US-amerikanische Rechtsrahmen für das Ratingwesen – ein Modell für die europäische Regulierungsdebatte?' [2007] WM 2217, 2218 et seq.; Zehetner (n 8) 52.

71 The three major CRAs were immediately grandfathered into the NRSRO category, cf. Zehetner (n 8) 52; q.v. recital 98 of the CRR.

72 DBRS is a CRA founded in 1976 (originally known as Dominion Bond Rating Service) in Toronto by Walter Schroeder, who sold the company to a consortium led by The Carlyle Group and Warburg Pincus in December 2014. DBRS is the largest CRA in Canada with other offices in New York, Chicago, and London.

73 The JCR, established in 1985, is a Japanese financial services company which publishes ratings to Japanese companies, local governments, and other interested parties. The company is one of the Japanese CRAs which the Japanese financial service agency has approved as eligible for Japanese local banks to utilise under the Basel II framework.

74 Pub.L. 107–204.

requires the SEC to perform various studies and to report their findings. Those studies and reports, among other issues,[75] include the role of CRAs in the operation of securities markets.

The use of ratings in regulation has been criticised for many years. The prevailing opinion argues that the regulatory use of external ratings in regulation reveals their dual rule; ratings have contractual and valuation uses. Whereas their basic function was to reduce asymmetric information on the capital and financial markets, the use of external ratings for supervisory purposes leads to the creation of a regulatory license, and CRAs become institutionalised gatekeepers of the markets.[76] However, the regime of NRSROs (as well as of ECAIs), in turn, led to a system of incumbent protection and creation of entry barriers for new CRAs.[77] As a consequence, the market power of the three major CRAs, registered as NRSRO and ECAI, was manifested and simultaneously the dependency of the capital and financial markets continued to rise – a vicious circle.

2.3.4 The Credit Rating Agency Reform Act

The Credit Rating Agency Reform Act (CRA Reform Act)[78] tried to improve rating quality for the protection of investors, which was also in the public interest, by fostering accountability, transparency, and competition in the CRA industry.[79] Enacted on 29 September 2006, it amended the Securities Exchange Act 1934 to require NRSROs to register with the SEC. Critics had complained that the dominance of the major CRAs were preponderantly responsible for the subprime mortgage-backed securities crisis of 2007.[80] The CRA Reform Act abolished the SEC's authority to recognise 'nationally recognised rating agencies', and allowed smaller CRAs with three years of experience to register as 'statistical ratings organisations'. The intent of the US Congress was to increase the choice for consumers by opening the market to a greater number of CRAs, and also to incent accurate and reliable ratings.[81] Since the CRA Reform Act 2006 took effect, the SEC has registered six new firms. Though, three of the newly registered companies were small US CRAs that had operated for years already. Two of them were newly emerged US players, Kroll Bond Rating Agency (KBRA)[82] and Morningstar Inc.

75 The effects of consolidation of public accounting firms, securities violations, enforcement actions, and whether investment banks assisted Enron, Global Crossing, and others to manipulate earnings and obfuscate true financial conditions.

76 Zehetner (n 8) 53.

77 Zehetner (n 8) 54.

78 Pub.L. 109-291.

79 Richard Shelby, *Credit Rating Agency Reform Act of 2006* (Washington, D.C., 29 September 2006) 3850 (109th).

80 Greg Gordon, 'Industry wrote provision that undercuts credit-rating overhaul' [2013] McClatchy Washington Bureau.

81 Daniel Scheeringa, 'Dodd-Frank Credit Rating Agency Reform in the Crosshairs' [2011] Illinois Business Law Journal 1.

82 KBRA is a CRA. KBRA publishes research and analyses that are available to the public domain free of charge. Its head office is located in New York City.

(Morningstar Credit Ratings),[83] but only because they bought two of the three newly licensed US CRAs.[84]

However, the core problem of the reduced (credit) risk assessments of financial institutions, and of due diligences of investors and their overreliance on external ratings that had an undeniable catalyst effect on the outbreak of the financial crisis, has not been resolved by the CRA Reform Act. Actually, the CRA Reform Act had an adverse effect: due to the extension of NRSROs, financial institutions and investors relied even more on ratings of those CRAs, while not caring about the informational value they contained. This regulatory reliance may have even artificially pushed the demand for ratings, in particular for NRSROs.[85]

2.3.5 The Dodd–Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[86] as a response to the great recession, brought the most significant changes to financial regulation in the USA since the regulatory reform that followed the great depression. It made changes in the US financial regulatory environment that affected all federal financial supervisory authorities and almost every part of the nation's financial sector.[87] Recognising that ratings issued by CRAs (but also and above all including NRSROs) are matters of national public interest, and that CRAs are institutionalised gatekeepers in the market substantial to capital formation, investor confidence and the efficient performance of the US economy, US Congress finally expanded regulation of CRAs.[88]

Besides implementing a liability regime for CRAs, as they have largely been immune to civil and criminal liability prior to the enactment of the Dodd-Frank Act, the law primarily addresses the removal of references to NRSRO ratings. The Dodd-Frank Act[89] intended the removal of statutory references leading to a reduction of mechanistic overreliance on external ratings, simultaneously causing financial institutions and investors to rely more on other financial information[90] and to apply

83 Morningstar Inc. is an investment research and investment management firm headquartered in Chicago. Morningstar created the Morningstar Rating and Morningstar Analyst Rating.

84 Greg Gordon, 'Industry wrote provision that undercuts credit-rating overhaul' [2013] McClatchy Washington Bureau.

85 Zehetner (n 8) 57.

86 Pub.L. 111–203.

87 William Sweet, 'Dodd-Frank Act Becomes Law' [2010] The Harvard Law School Forum on Corporate Governance and Financial Regulation; Daniel Scheeringa, 'Dodd-Frank Credit Rating Agency Reform in the Crosshairs' [2011] Illinois Business Law Journal 1.

88 Title IX – Investor Protections and Improvements to the Regulation of Securities, Subtitle C – Improvements to the Regulation of Credit Rating Agencies; H.R. 4173, Section 939 of the Dodd-Frank Act.

89 Cf. Sections 939 et seq. of the Dodd-Frank Act.

90 Such as business and management reports, financial statements, balance sheets, issue prospecti, credit spreads, capital markets.

internal (credit) risk assessments, internal calculation of prudential capital requirements and own due diligences.[91]

Section 939 of the Dodd-Frank Act requires the removal of statutory references to external ratings from the Federal Deposit Insurance Act, the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, the Investment Company Act of 1940, the Revised Statues of the United States, the Securities and Exchange Act of 1934, and the World Bank Discussion.[92]

According to Section 939A of the Dodd-Frank Act (review of reliance on ratings), each federal agency shall remove reference to or requirement of reliance on external ratings and make appropriate substitutions using alternative measures of credit-worthiness.[93]

2.3.6 Final remarks

As well as the CRA III in Europe, the Dodd-Frank Act attempted to implement a modern governance and regulation of CRAs within the USA. However, to come to this conclusion in the USA, as well as in the EU, it took many crises and unsuccessful attempts at resolving so far. Meanwhile the US and EU law primarily focus on the reduction of dependency on and the relevance of external ratings in banking supervision. The realisation that the primary supervisory focus should not be on the CRAs, telling them how to do their jobs in adapting and conforming their rating methodologies was an important step to a modern supervisory regime.[94] Objective criteria by which to compare ratings quality are widely recognised as being hard, if not at all possible, to establish. Also, legislation should address legislators themselves, as they were the ones that integrated external ratings into regulatory frameworks.[95] Although legislators have taken the first step with passing the Dodd-Frank Act in 2010[96] and the CRA III in 2013, there is obviously still a great deal of work left for the SEC, the BCBS and the European supervisory authorities as it is difficult to replace a system that has been permanent for decades with new alternatives.[97]

2.4 Comparison of EU and US supervisory regimes at the micro level

The functional legal comparative analysis at the micro level takes the reasons for the structure of the law and its functions into account. Subject of the comparison at the micro level are specific individual problems and their solutions, the individual legal institutions and provisions such as the constitution of

91 Zehetner (n 8) 62; cf. SEC, 'Report on Review of Reliance on Credit Ratings' (July 2011).
92 Effective dates vary across acts and statutes; most changes completed as of 21.7.2012.
93 Effective dates vary by federal agency; SEC rules effective as of 2.9.2011.
94 Moody's, Special Comment, 'Sovereign Ratings and Regulation: The Problem of Intervention' (15 April 2013) 2.
95 Zehetner (n 8) 66.
96 Cf. Daniel Scheeringa, 'Dodd-Frank Credit Rating Agency Reform in the Crosshairs' [2011] Illinois Business Law Journal 1.
97 Zehetner (n 8) 66; cf. SEC, 'Report on Review of Reliance on Credit Ratings' (July 2011).

the supervisory regimes on CRAs in the EU and the USA and the problem of dependency on and relevance of external ratings in European and US banking supervision in the present case.

Although there have been some clear differences in the past, when comparing the present European and US supervisory regimes, it can be stated that both move into the same direction. Hitherto, the European regime preponderantly focused on quality and transparency of external ratings, as the US' statutory objectives were to disclose registration requirements. However, both the European and the US supervisory regimes included plentiful external ratings into their regulatory frameworks, making CRAs institutionalised gatekeepers and creating an artificial dependency of the financial market and its participants.

One of the reasons why the EU focused so strongly on quality and transparency of external ratings is that these two factors have been massively questioned during the European sovereign debt crisis since the end of 2009.[98] As the US still has an outstanding rating from the three major CRAs, the situation with regard to regulation has not been as strongly politically motivated as it is in the EU, since the Euro-zone really felt attacked by the CRAs in the course of the sovereign debt crisis.[99] Due to the strong market power of the three major CRAs which are all headquartered in the USA, with the exception of Fitch which is dual-headquartered in the USA and France, lobbying as an interference to regulation cannot therefore be underestimated.[100] According to this, the USA was never found to be driven to excessive regulation of CRAs. In turn, supervisory instruments of the EU have anyway been limited due to the above mentioned geographical circumstances.

Nevertheless, supervisory regimes such as CRA III and the Dodd-Frank Act have finally realised that the core problem of regulation is the dependency on and relevance of external ratings in banking supervision and private sector. This means that the purpose is therefore to reduce the excessive use and overreliance of external ratings in the financial system over all by installing appropriate alternatives pursued by the supervisory authorities in order to internally calculate the (credit) risk assessment and prudential capital requirement. According to Sections 939 et seq. of the Dodd-Frank Act, and Articles 5a et seq. of the CRA III, it is the particular responsibility of the leading supervisory authorities – such as the SEC in the USA and the EBA, ESMA and EIOPA in Europe – to implement the aforementioned statutory specifications and to simultaneously find proper alternatives for avoiding mechanistic reliance on external ratings. Examples include improving the comparability and

98 Zehetner (n 8) 68; 'EU plant Einschränkungen für Ratingagenturen' *Frankfurter Allgemeine Zeitung* (Frankfurt, 28 November 2012).

99 Zehetner (n 8) 68; Jean Quatremer,'Ratingagenturen jagen den Euro' VoxEurop.eu (Paris, 13 June 2011); 'Schuldenkrise: Rating-Konzern Moody's straft EU-Länder ab' Spiegel Online (Hamburg, 14 February 2012); European Commission, Press release 'Stricter rules for credit rating agencies to enter into force' (Brussels, 18 June 2013).

100 Greg Gordon, 'Industry wrote provision that undercuts credit-rating overhaul' [2013] McClatchy Washington Bureau.

transparency of the internal ratings-based approach (IRB approach),[101] removing the standardised approach's dependency on external ratings of ECAIs (and NRSROs) and installing central (credit) risk rating platforms to share knowledge and conception of rating methodologies and in particular the necessary underlying credit information at individual borrower level.[102]

A further important step in improving the regulation of CRAs is to implement a consistent liability regime for CRAs, as they have largely been immune to any kind of liability so far. Both, the European and the US supervisory regime move in that very direction. In addition, several times in the past jurisdiction globally has questioned the CRAs' view in solely releasing non-binding 'opinions', subsumed under the constitutionally guaranteed freedom of opinion.[103] Here, it is important to provide jurisdiction with the statutory tools they need to pass judgement, as CRA III and Dodd-Frank Act attempt to. Overall, it can be said that a modern governance and regulation of CRAs is possible with the present supervisory regimes in the EU and the USA.

3. Internal Rating Approaches as a Regulatory Target

Proper alternatives and the solution for avoiding overreliance on external ratings within the EU and the USA could probably be internal rating approaches. Basel II introduced two alternative approaches for the calculation of prudential capital requirements and the bank internal (credit) risk assessment:[104] the standardised approach, occasionally supported by external credit assessments,[105] and the intrabank IRB approach.[106] While the US' regulators have required the IRB approach for the largest banks, the standardised approach is available for their smaller institutions.[107] Within the EU, the (internal) rating approaches are governed by the CRR, according to which, in principle, all credit and financial institutions are encouraged to use the IRB approach. Nevertheless, the standardised approach is still used by a wide range of companies.[108] In the process and within this framework, the use of ECAIs or

101 BCBS, Basel II, III. Credit Risk 'The Internal Ratings-Based Approach' 60 et seq.; EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015).

102 BCBS, Basel II, II. Credit Risk 'The Standardised Approach' 27 et seq.; BCBS, Consultative Document, 'Revisions to the Standardised Approach for credit risk (Basel IV)' (Basel, 22 December 2014).

103 BGH NJW 2013, 386 = ZIP 2013, 239 = MDR 2013, 296; *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65.

104 BCBS, Basel II, II. Credit Risk 'The Standardised Approach' 27 et seq.; BCBS, Basel II, III. Credit Risk 'The Internal Ratings-Based Approach' 60 et seq.; q.v. Article 107 para. 1, Article 111 (standardised approach) and Article 142 (IRB approach) of the CRR.

105 Cf. Herfurth (n 6) 25.

106 Cf. Herfurth (n 6) 28.

107 Federal Reserve Board, Press Release '2008 Banking and Consumer Regulatory Policy' (Washington, D.C., 26 June 2008).

108 Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 539; Circa 30% of

NRSROs may lead to differences in prudential capital requirements for two reasons: external ratings are the subjective assessment of a counterparty's PD and as such differ across ECAIs/NRSROs because of differences in opinion, methodology and rating scale. Differences in external ratings are likely to create differences in prudential risk weights. Hence, in prudential capital requirements, ECAIs as well as NRSROs do not have the same coverage across rating markets and across countries.[109] However, there are presently attempts of the European supervisory authority EBA and the BCBS to reduce dependency on external ratings within the standardised approach while increasing risk sensitivity, to strengthen the coherence of standardised approach and IRB approach and to improve the comparability of the prudential capital requirements between credit institutions.[110]

3.1 Standardised approach

3.1.1 Functionality

Under this approach, credit institutions are occasionally required to use ratings from ECAIs or rather NRSROs[111] to quantify required capital for credit risk.[112] Depending on the external credit assessment, specific risk weights are allocated to credit risk exposures according to the asset class. For non-rated credit exposures, general risk weights which only consider the type of credit risk exposure are used for the internal calculation.[113] Below is a calculation example of the minimum capital requirement of a corporate bond with an external rating of S&P subject to the standardised approach according to Articles 111, 122 and 136 of the CRR:

Mapping of exposures to corporates according to Article 122 para. 1 of the CRR:						
Credit Quality Step	1	2	3	4	5	6
External Rating (S&P)	AAA to AA-	A+ to A-	BBB+ to BBB-	BB+ to BB-	B+ to B-	CCC and below
Risk Weight	20%	50%	100%	100%	150%	150%

Example 1[114]	Corporate Bond	100€
	External Rating	A+

European banks, mostly active in the retail, securities and cooperative sector, cf. Patrick van Roy, 'Credit Ratings and the Standardised Approach to Credit Risk in Basel II' [2005] 517 ECB Working Paper Series 5.

109 Patrick van Roy, 'Credit Ratings and the Standardised Approach to Credit Risk in Basel II' [2005] 517 ECB Working Paper Series 5.

110 Cf. BCBS, Consultative Document, 'Revisions to the Standardised Approach for credit risk' (Basel 22 December 2014); cf. Frank Pierschel, 'Kreditrisiko-Standardansatz' [2015] BaFinJournal 28 et seq.; cf. EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015).

111 Paul Kupiec, 'NRSROs: An overview of the policy debate' [2006] Federal Deposit Insurance Corporation 1; Federal Deposit Insurance Corporation, Federal Reserve System, US Department of the Treasury, Regulatory Capital Rules: Standardised Approach for Risk-weighted Assets; Market Discipline and Disclosure Requirements.

112 BCBS, Basel II, II. Credit Risk 'The Standardised Approach' 27 et seq.; cf. Article 111 et seq. of the CRR.

113 Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 537.

114 Cf. Articles 111, 112 (g), 122 para. 1 and 136 of the CRR.

	Risk Weight	50%
	Minimum Capital Requirement	100 * 50% * 0,08[115] = 4€

However, the "new" proposals of BCBS with regard to the standardised approach are prepared to change this system fundamentally, especially with respect to reference to external ratings.[116]

3.1.2 Basel IV

According to the proposals of the BCBS, revising the standardised approach should lead to a calibration of the prudential capital requirements in accordance with the corresponding inherent risk in order to represent a proper alternative or complement to the IRB approach. The new proposals signify a substantive revision of the internal risk measurement procedures for determining the prudential capital requirements.[117] These innovations, timidly referred to as Basel IV due to the calibration of the risk-weighted capital requirements in Pillar I, will be associated with great expenses for all credit and financial institutions, including institutions that use the IRB approach.[118] Therefore institutions using the IRB approach are likewise affected by the proposal since the calculation of the minimum level of the general capital requirements is based on parameters of the new standardised approach.

Previously, the significant weakness of the standardised approach was sometimes the reliance on external ratings. In particular, the negative effects on the stability of the financial sector associated with external ratings, that arise from an abrupt increase of the risk weights (cliff effects) for example, should be avoided in the future. The risk weights under the standardised approach for bank and corporate receivables should therefore be subject to certain standardised risk drivers that are prescribed by law. For bank receivables, those risk drivers are the core capital ratio (Capital Adequacy Ratio, CET1) and the net non-performing assets ratio (relation of defaulted assets to total exposure), assessing the quality of the assets.[119] In accordance with the quotas, determined risk weights will be in the range of 30% to

115 The systemically relevant banks must hold at least 8% (0,08) of equity capital for prudential capital requirements, cf. Hermann Schulte-Mattler and Uwe Traber, *Marktrisiko und Eigenkapital: Adressenausfall- und Preisrisiken* (2nd edn Gabler 1997) 60

116 Cf. BCBS, Consultative Document, 'Revisions to the Standardised Approach for credit risk' (Basel, 22 December 2014).

117 Cf. BCBS, Consultative Document, 'Revisions to the Standardised Approach for credit risk' (Basel, 22 December 2014); cf. Frank Pierschel, 'Kreditrisiko-Standardansatz' [2015] BaFinJournal 28 et seq.; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1746.

118 Cf. BCBS, Consultative Document, 'Capital floors: the design of a framework based on standardised approaches' (Basel, 22 December 2014); Rainer Baule and Christian Tallau, 'Konsultationspapier zum Kreditrisiko-Standardansatz: Abkehr von externen Ratings' [2015] ZfgK 132; Frank Pierschel, 'Kreditrisiko-Standardansatz' [2015] BaFinJournal 28, 29; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1746.

119 BCBS, Consultative Document, 'Revisions to the Standardised Approach for credit risk' (Basel, 22 December 2014) 6; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 537; Rainer Baule and Christian Tallau, 'Konsultationspapier zum Kreditrisiko-Standardansatz: Abkehr von externen Ratings' [2015]

300%.[120] Thus, this proposal will result in substantially higher capital requirements for bank receivables compared to today's common risk weight of 20% for banks in Germany, or rather in the EU. For corporate receivables, crucial risk drivers are revenue and leverage. This in turn will bring about risk weights from 60% to 300%, compared to the currently most widely used risk weight of 100% for this type of receivables.[121]

3.2 IRB approach

3.2.1 Functionality

Since the Basel II accord, credit institutions are allowed to use their own estimated risk parameters for the purpose of calculating prudential capital requirements.[122] To calculate these capital requirements for all banking exposures, there are elements such as risk parameters including PD, exposure at default (EAD), loss given default (LGD) and the maturity (M), as well as risk-weight functions[123] and minimum requirements.[124] Subsequently, the accord provides two broad approaches, the foundation approach and advanced approach.[125] In the foundation approach, credit institutions calculate their own PD parameter, while the other risk parameters are provided by the institutions' national supervisory authority. In the advanced approach, the institutions calculate their own risk parameters subject to meeting some minimum guidelines.[126]

Below is an (extremely complicated) calculation example of the minimum capital requirement of a corporate loan subject to the IRB approach. It has to be stated that the mathematical description below shall simply provide background information and thus disclose the significant differences with regard to complexity, risk sensitivity and the results of the regulatory minimum capital requirements in the two

ZfgK 132; Frank Pierschel, 'Kreditrisiko-Standardansatz' [2015] BaFinJournal 28, 30; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1746.

120 BCBS, Consultative Document, 'Revisions to the Standardised Approach for credit risk' (Basel, 22 December 2014) 8; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 537; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1746; Rainer Baule and Christian Tallau, 'Konsultationspapier zum Kreditrisiko-Standardansatz: Abkehr von externen Ratings' [2015] ZfgK 132, 133.

121 BCBS, Consultative Document, 'Revisions to the Standardised Approach for credit risk' (Basel, 22 December 2014) 10; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 538; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1746; Rainer Baule and Christian Tallau, 'Konsultationspapier zum Kreditrisiko-Standardansatz: Abkehr von externen Ratings' [2015] ZfgK 132, 133.

122 BCBS, Basel II, III. Credit Risk 'The Internal Ratings-Based Approach' 60 et seq.

123 Functions provided as part of the Basel II regulatory framework, which maps the risk parameters above to risk-weighted assets.

124 Core minimum standards that a bank must satisfy to use the IRB approach.

125 Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 537; Reichling (n 6) 83.

126 Langenbucher (n 53) 64.

approaches (standardised versus IRB approach), calculating credit risk/capital requirements according to CRR/Basel III.[127]

Example 2	Exposure Class	Corporates
	Credit Volume	100€
	PD	3% (by internal rating system)
	LGD	45% (not subordinated)
	Risk Weight	136,14%
	Minimum Capital Requirement	10,89€

Mathematical Description[128]	
1. step:	Calculation of the Correlation Coefficient (R)[129]
$R = \frac{0{,}03 * (1 - e^{(-35 * 0{,}03)})}{(1 - e^{(-35)})} + 0{,}16 * \left(\frac{1 - (1 - e^{(-35 * 0{,}03)})}{(1 - e^{(-35)})}\right)$	
2. step:	Calculation of the Risk Weight (RW)
$RW = \left(0{,}45 * N\left(\frac{1}{\sqrt{1-R}} * G(0{,}02) + \sqrt{\frac{R}{1-R}} * G(0{,}999)\right) - 0{,}02 * 0{,}45\right) * 12{,}5 * 1{,}06 - 0{,}68295 = 136{,}14\%$	
3. step:	Calculation of the Minimum Capital Requirement
$= (100€ * RW) * 0{,}08 * (minimum\ capital\ coefficient) = 10{,}89€$	

3.2.2 Prudential efforts

3.2.2.1 Current status and issues

According to EBA the IRB approach has proven its validity as a risk sensitive way of measuring capital requirements from an overall perspective, which also encourages institutions to implement sound and sophisticated internal risk management processes. However, despite the positive aspects of the IRB models, the very high degree of flexibility in the IRB framework has compromised comparability in capital requirements across. Some observers have therefore questioned the reliability of IRB models, which has triggered a lack of trust in the use of IRB models.[130]

127 Cf. Example 1.

128 For additional information please see Article 153 para. 1 of the CRR.

129 The correlation coefficient is widely used as a measure of the degree of linear dependence between two variables.

130 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 5; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 538; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747.

The latter mandates were identified in the set of reports on the comparability and pro-cyclicality of capital requirements under the IRB approach, published by EBA in December 2013.[131] This report showed substantial divergences in the approach taken by institutions as a consequence of a degree too high in flexibility in the IRB framework. The report also identified significant differences with respect to the supervisory approaches taken in such areas as definition of default, PD and LGD calibration, treatment of defaulted assets and scope of use of the IRB approach.[132]

The planned regulatory developments are expected to result in substantial burden for both institutions and their responsible supervisory authorities regarding the effort that is linked to the implementation and approval of the required changes. Hence, it is necessary to group and prioritise the technical standards and guidelines in a manner that will allow the implementation in an operationally efficient manner.[133] According to the proposal, the changes related to the definition of default, the calibration of risk parameters and the treatment of defaulted assets would have to be implemented by the institutions by the end of 2018 after an implementation period of two to two and a half years.[134]

These regulatory developments in general are focused very much on the comparability of risk estimates and capital requirements. However, it is important to recognise that there is a potential trade-off between these objectives and risk sensitivity. Therefore, the aim is to align those approaches that are not based on the underlying risk of exposures of transaction, but leave enough flexibility for the institutions to measure their risk in an accurate manner. Similarly, the simplicity and conservatism of the capital requirements is naturally much more desirable from the supervisory perspective. However, the trade-off in that regard should be defined by the risk sensitivity of the IRB approach. The oversimplification and excessive conservatism should be avoided where it might lead to the loss of risk sensitivity, because this in turn creates incorrect incentives for the institutions and encourages them to embrace more risky exposures.

With that in mind, it has to be accepted that there will always be differences between the outcomes of internal models of particular institutions, although they should be well explained and justified by the

131 EBA, 'Report on the pro-cyclicality of capital requirements under the Internal Ratings Based Approach' (London, 17 December 2013).

132 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4.3.2015) 5; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 538; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747; cf. 'Eigenmittelanforderungen' [2015] BaFinJournal 10.

133 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 5 et seq.; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 538; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747; cf. 'Eigenmittelanforderungen' [2015] BaFinJournal 10.

134 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 6; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747.

differences in the underlying risk or the internal strategies and risk management processes at the institutions. As a general objective, it is therefore important to seek for the right balance between the simplicity, conservatism, comparability and risk sensitivity of the capital requirements.[135]

3.2.2.2 The impact of prudential developments

The overall impact of the changes that will be implemented via Regulatory Technical Standards (RTS)[136] its and guidelines is difficult to estimate. For some institutions, where the current practices do not yet reflect the proposed harmonised rules, implementation of the required changes might be associated with material costs. Depending on the individual situations of particular institutions, those costs might be related to the re-development of the rating models or recalibration of the risk parameters, adjusting the historical data, changes in the IT systems, internal strategies and procedures or even organisational structure. It is impossible at this stage to estimate the global impact of the changes that may be proposed on the prudential capital requirements and capital adequacy ratios of the institutions.[137]

Large parts of those changes may require material changes to the rating systems, or to the scope of application to the rating systems, that will require prior approval of the responsible supervisory authorities. Therefore, the new set of RTS will also impact the responsible supervisory authorities through the expected increase in the number of applications for the approval of material changes.[138] The impact on responsible supervisory authorities will also be more direct considering that the adoption of the RTS on the assessment methodology of the IRB approach might in some cases result in more thorough assessment processes.[139]

The planned changes in the regulatory environment will impact various aspects of the IRB approach that are largely interdependent. In order to reduce the operational burden on the institutions and the

135 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 36; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 538; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747.

136 RTS are benchmarks promulgated by a European supervisory authority, created to enforce the provisions of a legislation.

137 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 37; cf. 'Eigenmittel-anforderungen' [2015] BaFinJournal 10; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 538; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747.

138 Q.v. Deutsche Bundesbank, 'Merkblatt zu Änderungen von IRBA-Systemen und anderen kreditnehmer-bezogenen internen Risikomessverfahren' (Frankfurt, 19 December 2008).

139 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 37; cf. 'Eigenmittelanforderungen' [2015] BaFinJournal 10; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 538; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747.

national supervisory authorities, the prudential supervision considers that it may be desirable for most of the regulatory changes in a specific area to come into force simultaneously.[140]

3.2.2.3 Proposed solutions

Convergence in supervisory methodologies and practices for assessing internal models is key for ensuring comparability of models' outcomes and restoring public confidence in the use of such models for regulatory purposes in order to reduce sole and mechanistic reliance on external ratings. The existence of consistent evaluation criteria, frequency and scope of analysis as well as supervisory measures will also ensure an even playing field. A significant step in this direction will come from the implementation of the RTS on the assessment methodology of the IRB approach addressed to the responsible supervisory authorities which establishes specific criteria for the evaluation of critical aspects of risk parameters' estimation, internal governance, internal use of risk parameters and other important aspects of the IRB approach.[141]

Yet, transparency is also an integral part of the adjustment of IRB models as it provides stakeholders with insights about the functioning of the models and the soundness of their outcomes. Increased transparency towards markets will be achieved among others via improved, more comparable disclosures by the institutions or about institutions and the models they use. Increased transparency could take the form of enhanced Pillar 3 disclosures,[142] or *ad hoc* disclosure exercises, including those related to benchmarking. Enhancements and *ad hoc* information will especially strive to achieve more consistency in disclosures in order to ease the comparison of institutions and their regulatory required capital by market participants.[143]

140 Q.v. Deutsche Bundesbank, 'Merkblatt zu Änderungen von IRBA-Systemen und anderen kreditnehmerbezogenen internen Risikomessverfahren' (Frankfurt, 19 December 2008); EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 37; cf. 'Eigenmittelanforderungen' [2015] BaFinJournal 10; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 538; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747.

141 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 47; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 539; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747 et seq.

142 Cf. Title III of Part Eight of the CRR.

143 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 47; Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 539; Tobias Bauerfeind, 'Die aufsichtliche Abkehr von externen Ratings in der europäischen Bankenaufsicht' [2015] WM 1743, 1747 et seq.

3.2.2.4 Implementation of changes

According to the RTS on assessment methodology, the responsible supervisory authorities (and the European Central Bank (ECB) itself)[144] will assess in detail the models used by institutions for the purpose of the IRB approach.[145] For some institutions, it is possible for the amendments of the provisions, with regard to the calculation of the IRB shortfall, to cause a cliff effect on own funds. Since in some cases fewer own funds will be deducted to cover the expected loss, the institutions should ensure that the unexpected loss related with defaulted exposures is adequately covered by the prudential capital requirements.[146]

As the area of internal governance and risk management is treated as an integral part of the IRB approach, all changes will therefore have to be either approved or notified to the responsible supervisory authority.[147] The changes that require prior notification to the responsible authority, in particular, include changes in the credit risk control unit due to its position and its responsibilities within the organisation; changes in the validation unit's position and its responsibilities within the organisation; changes in the internal organisational or control environment or key processes that have an important influence on a rating system; and changes in the use of models, if an institution starts using risk parameter estimates for internal business purposes that are not those used for regulatory purpose and where this was previously not the case.[148]

4. Conclusion and Outlook

The regulatory turning away from external ratings and thus limiting of the dependency on CRAs and their ratings are fundamental objectives of European and US legislation. The excessive and mechanistic overreliance on external ratings must be reduced and all rating triggered automatisms have to be removed gradually. The CRA III and the Dodd-Frank Act have been landmarks on the way there. Subsequently, it is essential to focus on the internal rating models. In this sphere, EBA and BCBS are doing sound work that is growing in importance. Their main mission now must be to improve the comparability and transparency of the IRB approach, to adjust its parameters via RTS, to remove the standardised approach's dependency on external ratings and to install central (credit) risk rating platforms to share knowledge and conception of rating methodologies. By using these three methods as

144 In the course of its direct supervision of Systemically Important Financial Institutions (SIFIs) within the Single Supervisory Mechanism (Council Regulation (EU) No 1024/2013 of 15.10.2013, SSM) and associated therewith, the audit investigation, the ECB will prospectively examine more closely whether the SIFIs determine their credit risks properly, cf. Pascal di Prima and Tobias Bauerfeind, 'Externe und interne Ratings für die aufsichtliche Eigenkapitalhinterlegung und die bankinterne Risikobeurteilung' [2015] ZfgK 536, 539.

145 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 26.

146 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 29.

147 Q.v. Deutsche Bundesbank, 'Merkblatt zu Änderungen von IRBA-Systemen und anderen kreditnehmerbezogenen internen Risikomessverfahren' (Frankfurt, 19 December 2008).

148 EBA/DP/2015/01, 'Future of the IRB Approach' (London, 4 March 2015) 33.

a kind of a hybrid model, it should be possible to build a modern governance system, reducing dependency on and relevance of external ratings in banking supervision and private sector that is not pro-cyclical. However, the process of implementation of legislative measures is perspectively very slow, both in the EU and the USA.

JUSTICE FOR VICTIMS OF FLIGHT MH17: ALTERNATIVES TO AN INTERNATIONAL TRIBUNAL AFTER RUSSIA'S VETO

Thomas Mulder*

Abstract

After Russia vetoed an ad hoc international criminal tribunal for the crash of flight MH17, the States involved in the incident have several alternatives left to bring the perpetrators to justice. Although it is unlikely that the States can bypass Russia's veto in the United Nations (UN) General Assembly, the States could consider the creation of a special court, established by a multilateral treaty. Another feasible alternative is to try the suspect in a domestic court. From a legal point of view, the best candidate to start trials in domestic courts would be Ukraine, as that State definitely has jurisdiction. However, questions as to the fairness of the trials and the independence of the courts might disqualify Ukraine. In sum, each alternative has its weaknesses, both in a legal and a political sense. From a practical point of view, enforcement seems to be an insurmountable problem that could undermine all alternatives. It remains uncertain and doubtful whether the perpetrators ever will be held accountable and whether, one day, justice will be served.

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1. Introduction

On 17 July 2014, Malaysian Airlines flight MH17 from Amsterdam to Kuala Lumpur crashed in the fields near to the village of Hrabove in the east of Ukraine, fifty kilometres from the Ukrainian-Russian border. None of the 298 passengers and crew members survived the crash. Soon after the incident it became clear that the crash was not an accident, but that the aircraft was shot down. Yet it never became clear who was responsible for the crash.

One year later, a group of States that had nationals on board of the aircraft,[1] brought a draft resolution to the UN Security Council calling for the establishment of a special international criminal tribunal for the crash of flight MH17. These States had gathered support of many others,[2] but faced strong opposition from Russia. Russia believed that an international criminal tribunal was premature, as the investigation was still ongoing, and therefore warned the UN Security Council members that it would use its veto power to block the creation of an international criminal tribunal. So, with a single vote, Russia blocked an international criminal tribunal for flight MH17 and crushed the hopes of the States, which lost citizens in the crash, to bring the perpetrators to justice on an international level. But it must be asked whether there is a reason to be pessimistic about the aspirations of those States. Could they choose to walk a different road? Is there any reasonable alternative to serve justice after Russia's veto?

This article will discuss the alternatives to an international criminal tribunal after Russia's veto in the UN Security Council on 29 July 2015. I will first discuss the rejected plans for an international tribunal. I will examine what the intentions of the drafters were and what the limits are under international law in establishing international courts. Finally, I will contemplate the alternatives, their advantages and disadvantages, and the legal feasibility of other options.

2. International Criminal Tribunals

From the start, five States, working together in a Joint Investigations Team (JIT), supported an international effort to punish the perpetrators.[3] Their argumentation is simple: the incident has a large international component, as so many States are involved, and therefore justice could only be served on an international level. The JIT States believed that the United Nations was the right platform to find a satisfying solution and decided to propose an international criminal tribunal established under the UN, which would have the heavy task of prosecuting and convicting the perpetrators of the MH17 crash.

1 Netherlands (193), Malaysia (43), Australia (27), Indonesia (12), United Kingdom (10), Belgium (4), Germany (4), Philippines (3), Canada (1) and New Zealand (1).

2 Australia, Belgium, Canada, France, Germany, Ireland, Israel, Italy, Lithuania, Malaysia, Netherlands, New Zealand, Philippines, Romania, Spain, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America.

3 The JIT consists of representatives from: Australia, Belgium, Malaysia, the Netherlands and Ukraine.

Proposing the creation of a MH17 international criminal tribunal was, politically speaking, a courageous move by the JIT States, since tribunals are rare and the international community has only allowed such courts under exceptional circumstances. To understand the intentions of the JIT States, the legal problems of international criminal tribunals and the hesitance of the international community to embrace the JIT States' proposal, it is essential to first look into the phenomenon of international criminal tribunals.

2.1 Historical background

International crimes or transnational crimes have always existed, but an international justice system to prosecute and (possibly) convict these criminals has never developed. Instead, for a long time, States have preferred to try the criminals in their own domestic courts under domestic laws.

A change occurred after the Second World War. The allied forces believed that the perpetrators of the most heinous crimes had to be prosecuted in order to restore peace in Europe. Trials would help the people of Europe to deal with their past and it would provide groundwork for rebuilding the continent. Problematic was the question of who should prosecute the criminals. After all, the institutions in Germany were destroyed.

The allied forces could have prosecuted the war criminals in their domestic court under domestic laws. However, this could have caused legitimacy problems and would undermine one of the key objectives of the trials, to give Europe an opportunity to deal with its past. Instead, the allied forces created the International Military Tribunal.[4] The Tribunal, known as the Nuremberg Tribunal, was a court composed of four judges from the United Kingdom (UK), France, the United States of America (US) and the Soviet Union.[5] The Nuremberg Tribunal had jurisdiction over three international crimes: crimes against peace, war crimes and crimes against humanity.[6] For the first time in history, an international court tried individuals for international crimes. Shortly after, another international criminal tribunal was created by the allied forces for the crimes committed in Asia during the Second World War. The International Military Tribunal for the Far East, known as the Tokyo Tribunal, had a similar structure as the Nuremberg Tribunal.[7]

While these international tribunals are considered to be successful, the following Cold War made it impossible for the international community to create other international criminal tribunals.[8] The ideal of an international justice system faded. But after the fall of the Berlin wall and the ending of the Cold

4 WA Schabas, The UN International Criminal Tribunals (Cambridge University Press 2006) 3.
5 Charter of the International Military Tribunal, article 2.
6 Ibid., article 6.
7 Charter of the International Military Tribunal for the Far East.
8 Y Beigbeder, International Justice against Impunity (Martinus Nijhoff Publishers 2005) 4.

War, it regained momentum.[9] Even the idea of a permanent international criminal court received support in the early 1990s.[10] While a permanent international criminal court was politically unachievable at that time, the UN did establish *ad hoc* tribunals for specific conflicts.

In May 1993, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY).[11] This tribunal was assigned to prosecute the crimes committed in the Yugoslav Wars in 1990s. Presently, the tribunal is still in function. The trials of key leaders of the former Yugoslavia, such as Ratko Mladić, are still heard by the tribunal. The ICTY is the first international criminal tribunal established under the UN.

In the aftermath of the genocide in Rwanda, the international community found it appropriate to create another *ad hoc* international tribunal to prosecute the perpetrators of one of the most heinous crimes in recent history. In 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR).[12]

Both the ICTY and the ICTR are composed of international judges appointed by the UN.[13] Furthermore, the jurisdiction of both courts lie in international law, namely the UN Security Council resolutions. For both courts, this jurisdiction covers only international crimes.[14]

The international character of the crimes committed in both Yugoslavia and Rwanda were the primary justifications of the creation. The international community felt an urgency to act and to launch an international effort to serve justice. While there have been many calls for other international criminal tribunals, the international community has not found consensus on the creation of new *ad hoc* courts. There has, however, been a surge in momentum for the creation of a permanent international criminal court, resulting in the creation of the International Criminal Court (ICC) in 2002. The ICC, however, is not recognised by all States.[15]

2.1 The legal nature of an international criminal tribunal

The legal origin is an interesting starting point to define the legal position of international criminal tribunals. One can make a distinction between two different birth proceedings: there are those tribunals that are established by a treaty and there are tribunals that are based on a resolution of the UN Security

9 Schabas (n 5) 11-13.
10 Ibid.
11 UN Security Council resolution S/RES/827 (1993).
12 UN Security Council resolution S/RES/955 (1994).
13 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, articles 12 and 13; Statute of the International Tribunal for Rwanda, article 12.
14 According to the Statute of the International Criminal Tribunal for the Former Yugoslavia, the tribunal has jurisdiction over crimes against humanity (art. 5), war crimes (art. 2 and 3) and genocide (art. 4). The International Tribunal for Rwanda has jurisdiction over crimes against humanity (art. 3), certain (but not all) war crimes (art. 4) and genocide (art. 2).
15 Presently 123 States are parties to the International Criminal Court. The United States of America is potentially the most prominent absentee.

Council.[16] The Nuremberg Tribunal was based on a treaty concluded by the allied forces.[17] The ICC was also established by a treaty.[18] The *ad hoc* ICTY and ICTR are both founded by the UN Security Council.[19] The creation of the Tokyo Tribunal does not fall under either category and has a remarkable history. US General MacArthur issued, with approval of the allied forces, a special declaration that established the Tokyo Tribunal[20] while the allied forces occupied Japan.

This distinction is important for several reasons. For instance, the UN Security Council resolutions were adopted under chapter VII of the UN Charter, meaning that these are binding on all States. That is different for tribunals based on treaties. By a general rule of international law, treaties are only binding on the parties. In other words, all States are obliged to cooperate with the ICTY and the ICTR, but only for parties to the founding treaty is cooperation with the ICC mandatory.

The powers of an international criminal tribunal depend on the agreement that underlies the tribunal. There are no default rules of international law on composition or powers of international tribunals. In other words, the legal position of an international tribunal depends on the political willingness of its creators. Those States decide what the tribunal will look like and what it can and cannot do.

Following that line of reason, there is no international obligation for States to recognise, host or cooperate with international tribunals, with the exception of tribunals that are created by the UN Security Council. However, that exception needs to be nuanced. It is correct to say that States are only obliged to cooperate with an international tribunal if the UN Security Council explicitly say so. In practice, all States are obliged to cooperate with the ICTY[21] and the ICTR[22] as regards investigation and prosecution; they are obliged to 'cooperate fully with the International Tribunal and its organs in accordance with the [UN Security Council] resolution and the Statute of the International Tribunal'.[23] Conversely, only parties to the Rome Statute must cooperate with the ICC.[24]

2.3 Disadvantages of an international criminal tribunal

The creation of an international criminal tribunal seems, from a moral viewpoint, to be a reasonable reaction to growing international crime in an ever globalising world. But why do only two international

16 GJA Knoops, An Introduction to the Law of International Criminal Tribunals (An Introduction to the Law of International Criminal Tribunals 2003) 7.
17 Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis.
18 Rome Statute of the International Criminal Court.
19 UN Security Council resolution S/RES/827 (1993) and UN Security Council resolution S/RES/955 (1994) respectively.
20 Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo of January 19, 1946.
21 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, articles 29.
22 Statute of the International Tribunal for Rwanda, article 28.
23 UN Security Council resolution S/RES/827 (1993) and UN Security Council resolution S/RES/955 (1994) respectively.
24 Rome Statute of the International Criminal Court, part IX, articles 86-102.

criminal tribunals exist? What are the disadvantages of tribunals and why are States reluctant to create them?

Most of the answers can be found when considering the political context. One of the leading interests of many States in political negations is the protection of sovereignty. If States agree to the creation of an international tribunal, they usually are no longer entitled to prosecute the criminals in domestic courts and thus they cannot control the prosecution proceedings.[25] Many States are not willing to compromise on this, especially when they expect that their nationals may become the subject of investigations.

Another problem of international criminal tribunals is the issue of legitimacy.[26] Many have doubted that the international community should take on the prosecution of international and transnational criminals. Moreover, international criminal tribunals face jurisdictional difficulties. It is well an established and fundamental rule of international law that a State has territorial sovereignty and that it requires prior permission for international officials to enter the country.[27] An international tribunal does not have enforcement jurisdiction and needs prior consent to investigate on a State's territory. Furthermore, a tribunal depends on the cooperation of other States. A tribunal does not have its own police force and needs States to arrest or surrender suspects. Even though States might be under a legal obligation to assist the tribunal, this obligation is near impossible to enforce in practice.

3. The International Criminal Tribunal for Malaysia Airlines Flight Mh17

The JIT States, together with a group of friendly States,[28] proposed an international criminal tribunal for flight MH17. According to this group of predominantly Western States, the creation of an international criminal tribunal would serve justice and would guarantee the cooperation of all States.[29] The JIT States sought support in the UN Security Council and hoped for a resolution similar to the ones creating the ICTY and ICTR. They wanted to secure that all States would be under legal obligation to cooperate with the tribunal. As mentioned before, a UN Security Council resolution would help to reach that objective.

25 Member States to the ICC stay entitled to prosecute suspects for the crimes under the Rome Statute. The ICC can only start prosecution if on the request of the State or if the State is unwilling to start domestic prosecution.

26 Knoops (n 17) 17-19.

27 MN Shaw, International Law (7th edn, Cambridge University Press 2014) 473.

28 The group of States included: Australia, Belgium, Canada, France, Germany, Ireland, Israel, Italy, Lithuania, Malaysia, Netherlands, New Zealand, Philippines, Romania, Spain, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America.

29 Independent, 'MH17: Vladimir Putin rejects calls for UN tribunal as 'premature and counterproductive' (The Independent, 16 July 2015) <http://www.independent.co.uk/news/world/europe/mh17-vladimir-putin-rejects-calls-for-un-tribunal-as-premature-and-counterproductive-10393446.html > accessed 31 January 2016.

On 29 July 2015, Malaysia introduced draft resolution S/2015/562 in the UN Security Council on behalf of the JIT States. The resolution would 'establish an international tribunal for the sole purpose of prosecuting persons responsible for crimes connected with the downing of Malaysia Airlines flight MH17'.[30] This tribunal would carry the poetic name 'International Criminal Tribunal for Malaysia Airlines Flight MH17' (ICTMH17).[31] Furthermore, the draft resolution proposed the acceptance of the statute of the ICTMH17, which strongly resembles to the statutes of the ICTY and ICTR.

As Russia had already announced its opposition against the draft resolution, it was no surprise that the resolution did not pass. Eleven members voted in favour,[32] three abstained[33] and one member, Russia, used its veto and blocked the adoption of the resolution, despite the majority it carried.

The failure of the UN Security Council to accept the draft resolution and to create an international criminal tribunal is exemplifies the difficult international relations between the JIT States and Russia. After the vote, the JIT States announced their intent to seek alternatives in order to bring the perpetrators of the MH17 crash to justice. Despite the fact that it was defeated in the UN Security Council, the draft resolution is nonetheless important in their search because it shows the intentions and objectives of the JIT States in the prosecution of potential suspects. It is therefore necessary to study the content of resolution S/2015/562.

3.1 Objectives of the ICTMH17

The draft resolution mentioned a number of justifications for an international criminal tribunal, such as deterrence of future attacks, the guarantee of an 'independent and impartial accountability process',[34] and the protection of international peace and security. Successful trials at the ICTMH17 would send a strong message to potential perpetrators of international and transnational crimes. The fact that someone might end up in front of an international court is believed to be a strong repellent for criminals. A spirit of 'never again' underlies this justification and is, apparently, an important motivator for the JIT States.

An international tribunal under supervision of the UN would also guarantee independent and impartial trails. A situation in which suspects will be prosecuted by biased domestic courts can be avoided.

Ultimately, one of the objectives of the ICTMH17 is to protect international peace and security and international relations. The involved States want justice and retaliation for the wrongs that were done to their nationals. An open and widely supported international tribunal can stimulate that process and may

30 UN Security Council draft resolution S/2015/562, operative clause 6.
31 Ibid.
32 Chad, Chile, France, Jordan, Lithuania, Malaysia, New Zealand, Nigeria, Spain, United Kingdom of Great Britain and Northern Ireland and United States of America.
33 Angola, China and Venezuela.
34 UN Security Council draft resolution S/2015/562.

ease tensions between States. This objective makes the rejection of the draft resolution even more painful.

3.2 Statute of the ICTMH17

By accepting the draft resolution, the UN Security Council would have adopted the statute of the ICTMH17 that was annexed to the resolution. A look at that statute reveals that the JIT States aimed for a tribunal similar to the ICTY and ICTR.

The statute would give jurisdiction to the ICTMH17 over three crimes.[35] First, the ICTMH17 could exercise jurisdiction over certain war crimes.[36] These war crimes find their basis in international law, more precisely in the Geneva Conventions 1949.[37] It is not uncommon that war crimes fall under the jurisdiction of international criminal tribunals. War criminals can also be tried before both the ICTY and the ICTR.[38] The second and third crimes do not have their basis in international law, but in national law. The second category is 'crimes against the safety of civil aviation'.[39] The Statute refers to the Aviation Offences Act 1984 of Malaysia for the definition of these crimes. The final category of crimes that would have fallen under the jurisdiction of the Tribunal are 'crimes under the Criminal Code of Ukraine'.[40] These crimes include murder, negligent homicide and wilful destruction of property. The Statute refers to Ukrainian domestic law for more precise definitions of these crimes.

The inclusion of the second and third crimes are special for an international criminal tribunal. The ICTY and ICTR do not refer to national laws. However, it is not impossible: international law does not prescribe any rules for the structure and jurisdictional range of an international tribunal.

3.3 International cooperation within ICTMH17

That States are obliged to cooperate with the ICTMH17 was a very important objective of the JIT States. It was one of the primary reasons to introduce a resolution in the UN Security Council in the first place. This is also reflected in the text of the draft. Out of fear that Russia would hinder the investigation and be unwilling to surrender suspects, one of the operative clauses of the draft resolution reads:

> *7. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal, and that*

35 Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 (ICTMH17), article 1
36 Ibid., article 2.
37 Geneva Conventions of 12 August 1949.
38 See article 2 and 3 Statute of the International Criminal Tribunal for the Former Yugoslavia and article 4 of the Statute of the International Tribunal for Rwanda.
39 Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 (ICTMH17), article 3.
40 Ibid., article 4.

> *consequently, all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued in accordance with the Statute of the International Tribunal, and requests States to keep the Secretary-General informed of such measures.*

The words 'decides' and 'shall' indicate that, if the resolution had been accepted, all States would be under a legal obligation to work with the ICTMH17, including Russia. No exceptions allowed.

4. The Alternatives

After Russia's veto, the JIT States announced that they would not give up their efforts to persecute the perpetrators of the downing of flight MH17.[41] However, there was no plan B. Instead, the JIT States decided to work on a new plan in silence. Behind the closed doors of the ministries of foreign affairs of the respective States, international and criminal lawyers worked together on composing a list of feasible alternatives for prosecuting those who are responsible for the crash. Meanwhile, the technical and criminal investigations continued. As of today, the JIT States have not released their plans for prosecutions and it is likely that the governments will first wait for the results of the ongoing investigations before making any decision.

This position provides an opportunity to discuss the possible and more or less obvious alternatives. In this section, probable alternatives will be examined. Not only will the legal grounds be discussed, but also the advantages and, more importantly, the disadvantages. The defeated UN Security Council resolution will guide the search for other options, as this resolution (and the annexed statute) indicate the objectives and wishes of the JIT States.

5. Bypassing Russia's Veto

The first alternative to be discussed is the possibility of bypassing Russia's veto. Is it possible to undo the veto vote and pass a draft resolution and establish the ICTMH17 as it was once envisaged? To answer that question, one must start with the UN Charter that specifies the powers of the UN Security Council and other UN organs. The article on the voting procedure does not prescribe a process of overruling of veto vote. In other words, there is no possibility to override a veto vote in the UN Security Council by a special procedure.

41 R Gladstone, 'International tribunal may be formed for MH17' (TODAYonline, 24 September 2015) <http://www.todayonline.com/world/asia/international-tribunal-may-be-formed-mh17-despite-russias-objections> accessed 31 January 2016.

However, in practice, the veto powers have had a crippling effect on the UN Security Council. During the Cold War, the permanent members have vetoed many resolutions and in recent years the frequency of the use of a veto has increased. Especially in the field of peace and security, the primary area of concern of the UN Security Council,[42] the crippling effect has led to frustrations and tensions in international relations. In a dire need of breaking the status quo of the UN Security Council, some States have searched for other ways to address urgent matters. They have found their solution in the form of that other primary body of the UN, the General Assembly.

5.1 The 'Uniting for Peace' resolution

In the early days of the Korean War, when the Soviet Union had returned to the UN Security Council after a short intermezzo, the UN Security Council was paralysed. Time and time again, the Soviet Union used its veto power to block all 'Western' resolutions concerning the hostile situation in Korea. This caused a huge amount of frustration for the Americans and their allies. Under leadership of the US, a group of States tried to change the status quo through the UN General Assembly.

The US introduced a revolutionary Resolution named 'Uniting for Peace'.[43] This Resolution recognised that primarily the UN Security Council is responsible for 'the maintenance of peace and security'.[44] However, that does not imply that other States have no additional responsibilities to achieve that same goal. The Resolution then proceeded to actually bypass the UN Security Council for the sake of protecting peace and security. The Resolution stated:

> *Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.*[45]

The Resolution emphasised that the UN General Assembly would not take over the primary position of the UN Security Council. Instead it would serve as an alternate in advocating international stability if the latter became paralysed.[46]

The Uniting for Peace Resolution was highly controversial, as indicated by the length of the debate in the UN General Assembly. The representatives of all UN Member States only ended the debate after

42 Article 24 (1) UN Charter.
43 UN General Assembly resolution A/RES/377 A.
44 Ibid. See also the exact same wording in article 24 (1) of the UN Charter.
45 Ibid.
46 Ibid.

14 days, which is a very exceptional situation. Finally, the Resolution passed and carried a large two-third majority.[47] This 'new' power of the UN General Assembly to intervene in security matters was confirmed during the Suez Crisis in 1956. As Egypt was invaded by Israel, and later France and the UK, the UN Security Council was bitterly divided. Resolutions that would call for a peaceful settlement of the conflict were vetoed by the two permanent members involved in the crisis, namely France and the UK. Again, the UN General Assembly tried to break the status quo and adopted, with a two-third majority, a resolution that called for an immediate ceasefire and approved a special emergency force under supervision of the UN to deescalate the crisis.[48] These actions are normally reserved exclusively for the UN Security Council.

The Uniting for Peace Resolution set an important precedent for the intervention of the UN General Assembly in issues of peace and security, while the UN Security Council is in a political gridlock. That precedent entails that the UN General Assembly can only adopt 'Uniting for Peace' resolutions when the UN Security Council is unable to agree on a resolution. Furthermore, a 'Uniting for Peace' resolution must be adopted by a two-third majority in the UN General Assembly; depending on the circumstances, at least 125 States would have to vote in favour of a the resolution nowadays.

5.2 Uniting for Peace resolution for ICTMH17?

Is it possible for the JIT States to bypass the UN Security Council through a 'Uniting for Peace' resolution in the UN General Assembly? Would that be an alternative to establish the ICTMH17 even after Russia's veto?

It seems very unlikely that the JIT States would be successful. There are several reasons which cast considerable doubt on the effectiveness of a 'Uniting for Peace' resolution. First of all, there are some legal implications for this alternative. Moreover, it will be hard to find a two-third majority in the UN General Assembly to support such a resolution. Finally, a 'Uniting for Peace' resolution would be faced with fierce opposition from Russia, which would in turn hinder investigations and the functioning of the ICTMH17 as well as intensifying tensions between Russia and the JIT States. These considerations will be discussed below.

To start, it is legally uncertain whether an international criminal tribunal can be established through a 'Uniting for Peace' resolution. As was described above, there are no rules on how to create an international tribunal or on the organisation and powers of that tribunal in principle. However, a 'Uniting for Peace' resolution does not seem to be an appropriate instrument to use under these circumstances. Firstly, a 'Uniting for Peace' resolution can be accepted in a case of emergency and in

47 Fifty-two States voted in favour of the resolution, five voted against (Czechoslovakia, Poland, Ukraine, the Soviet Union and Belarus) and two members abstained (India and Argentina).

48 UN General Assembly resolution A/RES/1001.

urgent peace and security matters. It is doubtful whether the situation around the prosecution of the perpetrators of the downing of flight MH17 has such urgency to a justifiable extent and whether peace and security is at stake. It is fair to say that prosecution of those who are responsible will contribute to peace and security in the world. Furthermore, as other international criminals tribunals have proven in the past, a tribunal may be a form of retribution. However, is this enough justification for a 'Uniting for Peace' resolution? The present author argues that it is not.

A 'Uniting for Peace' resolution is only appropriate in an emergency situation that jeopardises peace and security. There must be an imminent threat to the stability of the international community. As much as an international criminal tribunal for flight MH17 may help to bring justice for the victims of the horrible incident, there is no emergency situation that justifies intervention by the UN General Assembly at present. Instead, the matter should be left to the UN Security Council. It is easy to implicate that the UN Security Council would stay in gridlock on this issue. However, the functioning of the UN Security Council and the legitimacy of the veto power is a different debate.

Furthermore, there is no legal precedent for the UN General Assembly to establish an international tribunal. The only body in the UN that has created international tribunals is the UN Security Council. Therefore, it remains unclear to what extent the UN General Assembly has the legal authority to do so and whether a 'Uniting for Peace' resolution for flight MH17 would be lawful.

Besides, from a practical point of view, it would be a tough challenge for the JIT States to find a two-third majority in the UN General Assembly. As was mentioned, that would mean that at least 125 States have to vote in favour of the resolution. It is doubtful whether there is enough political will amongst the UN members to adopt the resolution, and it is only left to wonder how many political sacrifices the JIT States are willing to make to reach the two-third threshold. It would almost inevitably mean that the JIT States would have to make concessions on the ICTMH17.

Finally, the creation of an international criminal tribunal through the UN General Assembly would have negative effects for the current investigations and the effectiveness of the created tribunal. An adopted 'Uniting for Peace' resolution would certainly face fierce opposition from Russia as a State which does not want its veto powers to be diminished or overruled. It is likely that Russia would not recognise the legitimacy of the ICTMH17. Cooperation in the gathering of evidence and the surrender of suspects is probably out of reach of the ICTMH17, which would ruin the effectiveness of the court and the ultimate objective of the JIT States: justice for the victims. On the other hand, that Russia would not cooperate is pure speculation. It is possible that, under pressure of the international community, Russia would be willing to work with the ICTMH17.

In conclusion, it remains unclear whether the UN General Assembly has the legal authority to create the ICTMH17. Either way, a 'Uniting for Peace' resolution, which bypasses the UN Security Council,

would be inappropriate and unrecommendable. It, therefore, seems that it would not be a feasible alternative for the JIT States.

6. Domestic Court

It seems that the options available to the JIT States at the UN have thus run out. An alternative may be to adopt an 'old-fashioned' approach and start trials on a national level in domestic courts. However, this alternative almost seems too obvious. Why have the JIT States not chosen this method, instead of researching other possibilities for months? What are the hidden pitfalls and drawbacks of domestic court trials?

6.1 Jurisdiction

There is a preliminary question that always needs to be answered before a court can move on to the merits of a case: does the court have jurisdiction?

Before answering this question, the term 'jurisdiction' should be clarified. In international law, one could think of three different forms of jurisdiction: legislative, executive (or enforcement) and judicial jurisdiction.[49] Legislative jurisdiction means that a State has jurisdiction to generate legislation on a specific issue. As will be discussed later, international law limits legislative jurisdiction. Executive jurisdiction refers to powers of the State to enforce laws. Judicial jurisdiction entails the question of which court in particular has the power to hear the case. This paragraph will only focus on legislative jurisdiction as this would be the basis of any potential case. After all, the criminalisation of the acts committed by the perpetrators must be based on jurisdiction of the legislating State. Otherwise, the criminalisation itself would be unlawful and any case would fail. Enforcement jurisdiction will be discussed in a different paragraph.

The legislative powers of States are not unlimited. Regarding legislative jurisdiction in criminal matters, international law has developed five principles that provide States legislative jurisdiction.[50] The first is the territorial principle, which dictates that States have legislative jurisdiction over acts that take place on their territory.[51] The second is the nationality principle, which grants States jurisdiction over acts committed by their nationals, regardless of the location of the crime.[52] The third is the principle of passive personality, which gives States legislative jurisdiction if their nationals are victims of the act.[53] This principle is controversial in international law and it remains unclear to what extent States can base

49 Shaw (n 28) 472-473.
50 Ibid., 474.
51 Ibid., 474-478.
52 Ibid., 479-482.
53 Ibid., 482-484.

jurisdiction on this ground.[54] The fourth principle is less controversial but still disputed: the protective principle allows State to criminalise acts 'on the basis of protection of a State's vital interests'.[55] In other words, a State would have jurisdiction in order to protect itself. It is unclear what the limits of this principle are.[56] The final principle is the most controversial one for international lawyers: the universality principle.[57] It is acknowledged that this principle allows all States to criminalise core international crimes, such as genocide, crimes against humanity and war crimes.[58] There is no substantial support yet that indicates that the universality principle would also apply to terrorist acts or downing of civilian airplanes.

The urgent question is whether the downing of the MH17 would fall under one of the principles. If the answer is affirmative, then the domestic courts would have jurisdiction. In other words, which States could legally claim legislative jurisdiction? There is only one State that can claim jurisdiction under the territorial principle: Ukraine. The crash took place in Ukrainian airspace, which is covered by the principle. It could, however, be argued that the crash took place above territory of the separatists and that Ukraine would not have jurisdiction. Yet there is no evidence that indicates that a State loses legislative jurisdiction over disputed areas.

There is little to say about which State(s) have legislative jurisdiction under the nationality principle, as the identity and nationality of the suspects have not yet been established. The principle dictates that the State of which the suspect is a national will have jurisdiction.

Rather, it could be argued that the JIT States can claim jurisdiction based on the protective principle. One could give the argument that the security interests in civil aviation are concerned in the case of flight MH17. This would provide them a legal ground to prosecute the perpetrators. However, this argument is not solid. It is questionable to what extent there really is a security concern here. A conservative interpretation of the principle would indicate that there is no security issue as airlines can still fly different routes to avoid risks of being taken down. Besides, if the argument were accepted, all States could claim jurisdiction. That is not a desirable outcome.

Another potential base for jurisdiction for the States that had nationals on board of flight MH17 is the passive personality principle. These States are the Netherlands, Malaysia, Australia, Indonesia, Germany, Belgium, the Philippines, Canada and New Zealand.[59] Even though that principle is highly controversial and opposed by many States, it has gained more acceptance when applied in cases of

54 Ibid., 483.
55 Ibid., 484.
56 Ibid., 484-485.
57 Ibid., 485-497.
58 Ibid.
59 Dutch Safety Board, 'Preliminary Report: Crash involving Malaysia Airlines Boeing 777-200 flight MH17' of 17 July 2014, 12.

terrorism.[60] It is possible that courts will accept jurisdiction in this case as it potentially concerns terrorism. However, this is only speculative as investigations are ongoing to deduce what happened and what crimes, if any, have been committed.

The discussion whether States can claim jurisdiction under the universality principle is extensive and interesting, but will not be discussed in this article. After all, the discussion revolves around the question whether the acts were war crimes, over which all States have jurisdiction. At this stage, it is impossible to discuss this question since the investigation has not yet been concluded. A discussion would be useless and be purely speculative.

There remains one other point regarding the jurisdiction question. In this respect, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation must be mentioned.[61] This Convention, signed by almost every State, demands the criminalisation of the destruction of a civilian airplane that is in flight.[62] More interestingly and importantly for the JIT States is that the convention obliges party States to establish jurisdiction over the offences in the following cases:

(a) when the offence is committed in the territory of that State;
(b) when the offence is committed against or on board an aircraft registered in that State;
(c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board
(d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.[63]

This is a useful provision for some of the JIT States, but not all of them. Clearly, Ukraine has the right (and obligation) to establish jurisdiction over the acts. The Convention also assigns Malaysia as a State that has jurisdiction as the State of registration (ground (b)).[64] The third and fourth ground are not applicable, as the airplane never landed nor was it leased without crew.

In conclusion, international law provokes several difficulties to the establishment of jurisdiction for States over the committed acts which makes it difficult to prosecute suspects in domestic courts. While

60 See *Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Reports 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para 47; C Staker, 'Jurisdiction', in MD Evans, International Law (4th edn, Oxford University Press 2014), 327; C Ryngaert, Jurisdiction in International Law (2nd edn, Oxford University Press 2015), 111-113; R Higgins, Problems & Process. International Law and How We Use it (Clarendon Press 1994), 66-69.

61 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation concluded at Montreal on 23 September 1971.

62 Ibid., article 1 (1) (b).

63 Ibid., article 5 (1).

64 Malaysia is the State of registration. See: Dutch Safety Board, 'Preliminary Report: Crash involving Malaysia Airlines Boeing 777-200 flight MH17' of 17 July 2014, 7.

the investigations may clarify which States could claim jurisdiction, at this stage it is apparent that Ukraine (where the crash took place) and Malaysia (where the airplane was registered) are the only States which can successfully establish jurisdiction over the crash. For other States, in particular the JIT States, it will be a challenge to come up with a solid and convincing argument that they indeed have jurisdiction.

6.2 Applicable law

A second obstacle for prosecution in domestic courts is the definition of the applicable laws. Obviously, a domestic court can only apply domestic law. Consequently, the trial will be subject to criminal law of the State that initiates prosecution. Problematic is that there are different regimes in different States; notably, one could think about different rules on due process, admissibility of evidence and the penalty.

6.3 Organisational issues

The problem of applicable law relates closely to organisational issues and a problem of political compromise. Imagine that multiple States are able to claim jurisdiction. Which State will then actually start a trial? Will it be Ukraine, because the crash took place in their airspace? Or will it be Malaysia, the land of destination and the State where the aircraft was registered? Perhaps the Netherlands will claim jurisdiction and initiate prosecutions as the leader of the investigations and the State that has lost the most nationals in the incident? These are only a few possibilities. However, the principle of *ne bis in idem,* or double jeopardy, requires that the suspects can be tried only once for the same act. States would have find a compromise.

6.4 Enforcement

Another disadvantage of trials in domestic courts is the lack of enforceability. Gathering of evidence and arresting suspects on another State's territory can only proceed with prior approval of that State.[65] There are no exceptions.[66] This may stand in the way of truly achieving justice for the victims of MH17.

6.5 Reasonable alternative?

In conclusion, trials in domestic courts seem to be a fairly good alternative to the vetoed international criminal tribunal. The option was also chosen in *the Lockerbie-case.*[67] In that case, a civilian aircraft

65 Shaw (n 28) 473.
66 Ibid.
67 The Lockerbie case can be found at https://www.scotcourts.gov.uk/docs/default-source/sc---lockerbie/lockerbieappealjudgement.pdf?sfvrsn=2

crashed after explosions of bombs on board. The plane crashed in Scotland, killing 270 people from 20 different countries. Two individuals were tried in a Scottish court for their roles in the bombing. Scotland successfully claimed jurisdiction as the crash took place on its territory.

The same tactics could be applied by the JIT States. However, this is, once again, problematic. As Scotland had jurisdiction in *the Lockerbie-case*, Ukraine could claim jurisdiction for the MH17 crash. The issue here is that Ukraine, unlike Scotland, is in a civil war and has an unstable regime. It is questionable to what extent the suspects will have a fair trial in the Ukraine. It might be more desirable to have a trial in another State's domestic court.

7. Special Court of Affected States

Instead of trials in one State's domestic courts, the JIT States could join forces and create one court for the affected States. This special court could be created by a multilateral treaty between the affected States.

7.1 Treaty based tribunal

As was described above, there are basically two ways to create an international criminal tribunal: either through the UN Security Council or by treaty. Assuming that the former is no longer an option, a multilateral treaty might be the Holy Grail for the JIT States. The JIT States could negotiate a treaty that would create a special court. In principle, the States are free to design that court and transfer as many powers to the court as they wish.

There are precedents for the creation of international criminal tribunals through treaties. The Nuremberg Tribunal, for example, was based on a treaty,[68] and so is the International Criminal Court.[69] Thus, it would be lawful for the JIT States to create their own international tribunal to prosecute the perpetrators by treaty.

Nonetheless, there are various disadvantages of a treaty-based court. First, the treaty would not create obligations for non-parties and the cooperation for the court would not be enforceable for States that choose not to recognise the court. Second, there will be jurisdictional problems. Third, the content and the organisation of the court might be problematic. These issues will be discussed in more detail.

68 Charter of the International Military Tribunal.
69 Rome Statute.

7.2 Optional participation

Under international law a treaty can only bind parties to that treaty. The agreement would never have legal effects on third States. The Vienna Convention on the Law of Treaties is clear: 'A treaty does not create either obligations or rights for a third State without its consent'.[70]

This general rule is a significant problem for a treaty-based court for flight MH17 because its success depends upon the willingness of States to participate. Like the Rome Statute that created the ICC, a treaty for a MH17 tribunal needs to be signed and ratified by states. There is no obligation for States to become party to any treaty, so participation is completely voluntary.

It is therefore possible that some key States will refuse to participate in the treaty-based court and refuse to sign the treaty. In that case, the treaty will not be binding for that State and the court cannot oblige that State to cooperate. There simply would not be any legal ties between the State and the court. This is problematic in the case of the MH17. Russia has already expressed its opposition against an international criminal tribunal for flight MH17 at this point. It is therefore highly unlikely that Russia will sign a treaty drafted by the JIT States in order to establish the very court they opposed. Admittedly, this is speculative and Russia's position might change in the future. Nonetheless, as long as Russia refuses to become party to a treaty-based court, that court will be less effective. It has not been proven that Russia was involved in the downing of flight MH17, but it is undeniable that Russia plays a central role in the case. The absence of Russia in the court will have negative consequences for the investigations and will certainly make the surrender of suspects by Russia, if necessary, more difficult. However, it cannot be overstated that these problems are speculative.

7.3 Jurisdictional problems

A second issue for a treaty-based court is connected to questions of jurisdiction. It is somewhat unclear what the basis is for the jurisdiction of that special court. It could be argued that the involved States would transfer their bases of jurisdiction to the special court. If a Member State has jurisdiction over the committed crimes, the special court has jurisdiction too.

Unfortunately, there are no examples of similar special courts in recent history and it is not clear whether this transfer of jurisdiction is legal under international law. However, the reasoning is convincing. After all, States have 'transferred' jurisdiction to the ICC as well. Besides, it would make sense that one State 'shares' its jurisdiction with other States as it is free to decide what to do with its powers under the umbrella of State sovereignty.

70 Article 34 of the Vienna Convention on the Law of Treaties.

7.4 Applicable law

The drafters of the treaty must consider which laws will be applicable in the special court. This does not seem to be a problem for the special court, as the statute of the ICTMH17 deals with that question: it declares international law, Malaysian law and Ukrainian law applicable.[71] It is likely that a special court will follow the same approach.

7.5 Organisational issues

There would be various organisational problems that should be tackled by the founding States. For example, it must be decided where the court would be based; who would assign the judges; who would be responsible for the criminal investigation and who should be responsible for the prosecution; who would supervise the work of the court and who would execute the court's orders; and how would the court be funded. These questions seem less important from a legal point of view, but cannot be underestimated. These practical issues would, to a large extent, influence the success of the court.

7.6 Enforcement

What will happen with the court's orders? Who will arrest suspects and who will execute punishments? These are critical questions for the JIT States in their search for justice. As mentioned above, one State cannot enforce the law against another State without the latter's consent. In general, that should not be a problem with regard to parties to the treaty that establishes the special court. However, it will be an almost insurmountable problem with regard to non-parties.

7.7 Reasonable alternative?

Compared to the alternative of domestic courts, a special court created by the affected States is an equally reasonable alternative. It might even be preferable over prosecutions in domestic courts as other affected States would be involved as well.

8. International Criminal Court

However, is it even necessary to create a new court? The next two alternatives will analyse whether the JIT States could find justice in existing international courts: namely the permanent International Criminal Court, which was designed to avoid proliferation of *ad hoc* international criminal tribunals.
The first problem of this alternative is that the Rome Statute, which is the basis of the ICC, has not been ratified by every State. More crucially, several States that are involved in het MH17 crash have not

71 See articles 2-4 of the Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17.

ratified the Rome Statute and are thus not party to the ICC. Of the JIT States, only the Netherlands, Australia and Belgium are members of the ICC.[72] Ukraine has signed the treaty, but has not ratified it,[73] and Malaysia did not sign the Rome Statute at all. Russia has also signed the treaty, but not ratified it, and is therefore not a party to the ICC.[74]

This is very problematic as the ICC may only exercise its jurisdiction if either the State of which the suspect has the nationality or the State on whose territory the crime was committed is party to the Rome Statute.[75] There are, however, two exceptions to that rule. First, the ICC can act if the case is referred to it by the UN Security Council.[76] It is very unlikely that this will happen, though, as Russia has a veto power in the UN Security Council. The second exception is that States which are not a party to the ICC can accept its jurisdiction for a specific timeframe.[77] Ukraine has lodged a declaration with the ICC that provides that the State 'accepts the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in territory of Ukraine since 20 February 2014'.[78] This declaration enables the ICC to investigate the crash of MH17.

The next question is whether the crimes fall under the jurisdiction of the ICC. The Rome Statute provides jurisdiction for the ICC over four core crimes: genocide, crimes against humanity, war crimes and the crime of aggression.[79] It is questionable whether the downing of flight MH17 falls under one of these crimes. In any case, the question will remain open as long as the investigation is still ongoing. If the downing of the MH17 indeed falls under the jurisdiction of the ICC, the prosecution by the court based in The Hague seems a fair alternative. Justice could be served on an international level, just as the JIT States have always wanted. Nonetheless, the ICC does not have a long or strong track record of convictions. Besides, it will be hard to find the suspects, arrest them and bring them to The Hague.

9. Conclusion

Eighteen months after the confident and strong words of the Dutch prime-minister that those responsible for the deaths of the 298 passengers of flight MH17 will be brought to justice, the journey

72 International Criminal Court, 'The States Parties to the Rome Statute ' (ICC-PCI, -) <https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 31 January 2016.

73 UN Treaty Collections, '10. Rome Statute of the International Criminal Court' (UN) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> accessed 31 January 2016.

74 Ibid.

75 Article 12 (2) of the Rome Statute.

76 Ibid., article 13 (b).

77 Ibid., article 12 (3).

78 International Criminal Court, 'Declaration by Ukraine lodged under Article 12(3) of the Rome Statute of 8 September 2015' (ICC-PCI) <https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf> accessed 31 January 2016.

79 Article 5 of the Rome Statute.

forward is still long. As the investigations conducted by the JIT States are coming to an end, the affected States are still searching for an effective and satisfying way to prosecute potential suspects at the next stage. Russia's veto in the UN Security Council against an international criminal tribunal for flight MH17 proves that that goal is still far out of reach.

As the prospects of creating an *ad hoc* international tribunal for flight MH17 are diminished, the JIT States are left with few alternatives. Of these, the best options are the creation of a special court by the States involved or trials in a domestic court. However, both options are not free of controversy. The alternatives will test the dedication of the States to reach their final objective and their perseverance. There will be many legal and political obstacles for pursuing prosecution of the perpetrators and the political costs will be high. The question is whether the States are willing to pay that price. Moreover, for every alternative the enforcement problem is a returning problem that seems insurmountable. How can Russia, undeniably a key player in the MH17 crash, be forced to cooperate with the JIT States? And if Russia refuses to work with these States in prosecuting the perpetrators, is it sensible to move forward at all?

There is much at stake. Politicians have to keep their promises and the international community is under pressure as long as the perpetrators walk of free. For now, States seem to be more preoccupied with political games than fulfilling their duties to maintain international justice. Unfortunately, it is doubtful whether, one day, justice will actually be served.

COMPARING THE ROLE OF THE COURTS IN ENGLISH AND GERMAN ARBITRATION LAW: SHOULD PARTY AUTONOMY OR CERTAINTY BE PREFERRED?

Satya Talwar Mouland*

Abstract

'At the heart of these different approaches … lies a contradiction. Arbitration law must constantly grapple with the disharmonious relationship between party autonomy and legal certainty. It is within the discretion of the legislator to decide where to draw the line.' [Section C III, final paragraph].

This essay seeks to draw on the often complementary, but contrasting principles of party autonomy and legal certainty to distinguish the English and German legislators' approach to the drafting of their respective national arbitration laws. Emphasis is placed on how they have differently defined the boundaries of the relationship between the courts and arbitral tribunals.

Despite attempts by a 1985 the United Nations Commission on International Trade Law (UNCITRAL) to harmonise the widely differing arbitration laws in Europe through the UNCITRAL Model Law, national systems maintain certain features of their own arbitration rules in order to attract international parties to arbitrate in their countries. This author concludes that whilst English arbitration law provides more legal certainty for parties concluding arbitration agreements, an almost verbatim adoption of the UNCITRAL Model Law in Germany gives parties freedom to fill gaps in the substantive law by their own agreement.

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1 United Nations Commission on International Trade Law, see website: https://www.uncitral.org.

1. Introduction

Arbitration is an alternative form of dispute resolution,[2] which is often preferred by parties for its private and (potentially) less costly nature when compared with the public forum of the courts. In light of the UNCITRAL Model Law (Model Law), it is particularly interesting to compare the English and German arbitration rules. The Model Law, written by UNCTRAL in 1985, aimed to harmonise the widely differing arbitration rules in Europe.[3]

1.1 Model Law: Harmonisation or divergence

If the Model Law aimed to harmonise differing national rules, why do differences still exist? Another aim of the Model Law was to create rules which satisfy the needs of international arbitration.[4] Even though the German rules in principle apply when Germany is chosen as the forum for arbitration (§1025 of the German Code of Civil Procedure[5]), and the English rules when England is chosen (s. 2 of the English Arbitration Act[6]), the aim of both systems was to promote its arbitration rules to attract international parties[7] to arbitrate in those countries. These are the default procedural rules that apply when parties select either England or Germany as the place of their *ad hoc* arbitration if they have not explicitly agreed otherwise. The possibility of choice is designed to protect the parties' interests.[8]
The national systems have therefore preserved some peculiarities of their own to set them apart as unique sites for international arbitration. The longer history and acceptance of arbitration might explain why English arbitration law is so comprehensive when compared to its German equivalent. Whilst arbitration was already recognised in the 14th century in England, it took many centuries for it to be accepted as an alternative form of dispute resolution in Germany.[9] Numerous commercial disputes had already been decided by arbitration in England by the 17th century, whereas Germany only reformed its

2 Diana Bechte, 'Einführung in das Schiedsverfahrensrecht' (2001), ZJS 4-5/2001, 307 ff.
3 UNCITRAL Secretariat*, United Nations Commission on International Trade Law* (Explanatory Note, 2006), 25.
4 Siegfried Georg Häberle, Handbuch für Kaufrecht, Rechtsdurchsetzung und Zahlungssicherung im Außenhandel (De Gruyter, 2002), 344.
5 Hereinafter, all articles named '§' are paragraphs of the German Code Civil Procedure.
6 Hereinafter, all articles named 's.' are sections of the English Arbitration Act 1996.
7 Arthur L Marriott*,* 'The Categorical Imperatives of Pateley Bridge', Arbitration 1999, 278 ff,97 (98); Ben Steinbrück*, Die Unterstützung ausländischer Schiedsverfahren durch das staatliche Gericht* (Mohr Siebeck, 2009), 503.
8 Stefan Frommel*,* Barry Rider, *Conflicting Legal Cultures in Commercial Arbitration* (Kluwer Law International, 4th ed., 1999), 18.
9 Manuela Schäfer*,* 'Die Verträge zur Durchführung des Schiedsverfahrens' (2010), *Saarbrücker Studien zum Privat- und Wirtschaftsrecht* (Volume 64, 2010), 44.

rules in 1990 after the unpopularity of Germany as a forum for arbitration was mooted.[10] A virtually verbatim adoption of the Model Law was proposed and accepted in Germany.

1.2 Role of the courts

The relationship between arbitration and the courts has created tension. Some authors speak of a forced cohabitation, whilst others describe it as a real partnership.[11] It is therefore necessary that this relationship is governed and defined, to a certain extent, by the law.

According to Art. 5 of the Model Law, no court shall intervene except where so provided in this Law. Similar rules can be found in §1026 of the German Civil Code and s. 1c of the English Arbitration Act. They do not completely exclude the role of the courts from arbitration, but rather allude to the policy of the Model Law; namely that the role of the courts must be limited because arbitration is a private form of dispute resolution, independent (to an extent) from the courts. If courts were always able to interfere with arbitral proceedings, then the purpose of arbitration as an alternative form of dispute resolution would be compromised.

The role of the courts in English and German arbitration will be examined and compared following the three phases of arbitration: before, during and after the arbitral proceeding. Whether party autonomy or legal certainty is preferred will be highlighted at each stage for each jurisdiction.

2. Before the Arbitration: Examining the Jurisdiction of the Arbitral Tribunal

Prima facie, the arbitral tribunal decides on its own jurisdiction. Nevertheless, it is the duty of the courts in both English and German arbitration to recognise an arbitration clause provided it is not 'null and void, inoperable or incapable of being performed'. According to Steinbrück, it makes sense in certain situations for the courts 'to decide on the admissibility or inadmissibility of an arbitration agreement before the arbitral tribunal is constituted in order to achieve certainty at an early stage for the parties' [translation by this author].[12]

10 Jan Schäfer, 'New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared' (1998), Band 2.2 Electronic Journal of Comparative Law, <http://www.ejcl.org/22/art22-2.html> accessed 12 January 2014, Rn. 4.2.1.

11 N Blackaby, C Partasides, A Redfern, M Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed., 2009), Rn. 7-01.

12 Ben Steinbrück, *Die Unterstützung ausländischer Schiedsverfahren durch das staatliche Gericht* (Mohr Siebeck, 2009), 346.

2.1 §1032 and §1040 of Code of Civil Procedure (Germany)

In German arbitration law, the court has three routes to establish or reject the jurisdiction of the arbitral tribunal. The three options for parties are: to object to the court hearing a claim which should be the subject matter of an arbitration (§1032(1)); to file a petition to the court to determine the admissibility of an arbitration clause before the tribunal is formed (§1032(2)); or to object to the competence of the arbitral tribunal after the request for arbitration is made (§1040).[13]

2.1.1 Parallel proceedings

§1040(2) provides that 'the objection as to a lack of competence of the arbitral tribunal is to be submitted no later than the time at which the reply to the request for arbitration is made'.[14] Moreover, §1040(3) states:

> *Where the arbitral tribunal believes it has competence, it shall rule on an objection raised pursuant to subsection (2)..in such event, each of the parties may apply for a court decision to be taken, doing so within (1) month…for the period during which such a petition is pending, the arbitral tribunal may continue the arbitration proceedings and may deliver an arbitration award [emphasis added].*[15]

This wording is problematic because an objection to the competence of the arbitral tribunal in the court, whilst the arbitral proceeding is taking place, could lead to parallel proceedings. There is no rule as to which should prevail in the matter of conflict – the court judgment or the arbitral award.

The wording also does not exclude the possibility that the court could deliver a decision as to admissibility of the arbitral proceedings after the arbitral award is rendered, although the Bundesgerichtshof (Federal Court of Justice of Germany, hereinafter 'BGH') excluded this possibility in its decision of 30 April 2014.[16] However, arbitral decisions are not binding on other tribunals. This demonstrates that the broad wording of the German statute does not resolve all issues which can arise in practice.

2.2 Sections 32 and 9 English Arbitration Act (England)

In English arbitration law, the court can decide on the admissibility of the arbitration either by determining a preliminary point of jurisdiction according to s. 32 or through a stay of legal proceedings pursuant to s. 9.

13 OLG München, 22.06.2011 – Az 34 SchH 3/11, Rn. 38.
14 English translation of ZPO: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html
15 Ibid.
16 BGH 30.04.2014 - Az. III ZB 37/12.

2.2.1 More conditions

Section 32(1) differs from the equivalent provision in the German procedural rules (§1032 (2)) since a request for determination is possible not only before the arbitral tribunal is formed, but also at any point during the proceedings until the award is rendered: 'the court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal'.

On the one hand, this could lead to the same problem as in the German rules and provoke parallel proceedings. On the other hand, many conditions are attached to this possibility in s. 32(2):

> *An application under this section shall not be considered unless—*
>
> *(a) it is made with the agreement in writing of all the other parties to the proceedings, or*
>
> *(b) it is made with the permission of the tribunal and the court is satisfied—*
>
> *(i) that the determination of the question is likely to produce substantial savings in costs,*
>
> *(ii) that the application was made without delay, and*
>
> *(iii) that there is good reason why the matter should be decided by the court.*

This demonstrates a tendency of the English arbitration rules, as will later be developed, to firstly give the parties more freedom to decide on whether the court should be able to decide the issue of jurisdiction, and then limit this using specific conditions in the codified arbitration law so that the arbitral proceeding is not abused. It is a welcome balancing act between party autonomy and legal certainty.

2.2.2 A 'stay' of legal proceedings

Section 9 provides that court proceedings can be 'stayed'[17] when they are brought against a party to an arbitration agreement unless the court is satisfied that the arbitration agreement is 'null or void, inoperative or incapable of being performed'.[18] A 'stay' pursuant to s. 9 differs from the German equivalent; court proceedings contrary to the arbitration agreement are not deemed inadmissible but are rather temporarily halted. The effect of a 'stay' in comparison to a petition for an order for lack of admissibility per §1032(2) is of importance. According to Steinbrück, filing a petition to the court to determine the admissibility of arbitral proceedings 'does not remove the competence of the courts to rule on the merits' [translation by author].[19] Since the courts are stayed, they remain competent on the basis of inherent jurisdiction. This means they can support the arbitral tribunal later on in the proceeding (for example, by ordering interim measures) or can step in automatically should the

17 Defined as 'the act of temporarily stopping a judicial proceeding through the order of a court' <http://legal-dictionary.thefreedictionary.com/stay>

18 s. 9(4).

19 Steinbrück (n 13) 113.

proceeding fail. The effect of a stay might be to improve the expediency of proceedings, but could also paradoxically grant the courts more authority should the arbitration later collapse.

2.3 Comparison

Whilst the rules on jurisdiction in both English and German arbitration law open up the possibility of parallel proceedings in the courts and arbitral tribunals, England offers more clear-cut rules about when the competence of the court should be exercised. For example, in determining a preliminary point of jurisdiction, there must be 'good reason why the matter should be decided by the court' (s. 32(2)(iii)). This may be a result of the history of arbitration in England where the 'interventionist-friendly approach' of the courts was heavily criticised.[20] The possibility for the courts to intervene was already limited by the 1979 Arbitration Act in England. Nevertheless, the courts had a role of oversight in arbitration proceedings until the 19th century.[21] It was important for the English legislator to maintain this well-functioning system, ensuring that the courts had a limited role of overseeing the arbitration. The Mustill Committee, which rejected a verbatim adoption of the Model Law in England[22], favoured an approach which changed the wording of the Model Law[23] to achieve more clarity in the context of the English legal system.

A 'stay' means that English courts remain competent on an 'inherent jurisdiction'.[24] Paradoxically, this could lead to a stronger role of the courts in arbitration than envisioned. In the event that the arbitration fails, a court action which has been stayed resumes automatically automatically[25] without having to re-establish jurisdiction. In German law, a court that hears a matter which should be the subject of arbitration, the court proceeding is deemed inadmissible. The German court must then establish its jurisdiction from different legal sources.

3. During the Procedure: Interim Measures

Schlosser considers that in almost all legal systems, state interim measures are permissible 'despite the existence of an arbitration agreement'.[26] Interim measures preserve the subjective rights of parties before the main arbitration has commenced and can be ordered by both the arbitral tribunal and the

20 Julian Lew, Loukas Mistellis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), 149 ff.

21 Professor David AR Williams QC, *Defining The Role of The Court in Modern International Commercial Arbitration* (Herbert Smith Freehills – SMU Asian Arbitration Lecture, Singapore, 2012).

22 Robert Merkin, Louis Flannery, *Arbitration Act 1996* (Informa, 5th ed., 2014), Rn. 1.13.

23 Ibid, Rn. 1.14.

24 Steinbrück (n 13) 113 *translation by the author.*

25 Michael Mustill, Steward Boyd, *International Commercial Arbitration* (Butterworth 2nd ed 2001), 14.

26 B Schlosser, *Kommentar zur Zivilprozessordnung* (Stein/Jonas, 22nd Ed. 2013), §1033 Rn.1.

court. In English arbitration law, a unique subsidiarity principle provides that the arbitral tribunal has priority to order interim measures over the courts. In comparison, the German legislator decided against implementing such a rule in order to protect the free choice of the parties.

3.1 §1041 in conjunction with §1033 Civil Procedure Rules (Germany)

German arbitration law, with regards to interim measures, favours party autonomy. The state court has the same power as the arbitral tribunal to order interim measures. According to §1033, the state court may order an interim measure at the request of one of the parties 'an arbitration agreement does not rule out that a court may order…that a provisional measure..be taken with regard to the subject matter of the dispute being dealt with in the arbitration proceedings'.[27]
The arbitral tribunal has the same power to order interim measures according to §1041(1).

3.1.1 Supporting free choice: no restriction on court-ordered interim measures

In principle, there is no restriction on court-ordered interim measures. Parties do not require the permission of the arbitral tribunal to seek them. This rule could be viewed in two different ways. On the one hand, it follows from the German arbitration rules that parties could only order interim measures in the state courts rather than the arbitral tribunal.[28] On the other hand, the rule corresponds to the Model Law, which supports the free choice of parties.[29]

3.1.2 Preservation of historical power of courts

The wording of the German statute sheds light on the decision of German legislators to preserve the historical power of the courts. The state court has an obligation to provide the possibility of interim measures when certain conditions are fulfilled[30], whereas the arbitral tribunal has a choice, according to the wording of §1041(1):

> *Unless the parties to the dispute have agreed otherwise...the arbitral tribunal may order interim measures by the order of one of the parties' [emphasis added].*

This difference can lead to tactical decisions being taken by parties[31], whereby they choose to apply for interim measures in state courts because judges have less 'elbow room' to grant these than arbitrators.

27 English translation of ZPO: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html
28 T. Rauscher, W Krüger, *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*, (Beck, 3rd sup. 4th ed. 2013). §1033 Rn. 3.
29 J. Schäfer (n 11), Rn. 4.2.2.1.
30 K. Böckstiegel, S. Kröll, P Nacimento, *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2nd ed., 2007), §1033.
31 Herbert Kronke, 'Internationale Schiedsverfahren nach der Reform' (1998), RIW, 44(4), 257 -265, 264.

According to Schaefer[32], this demonstrates that free choice of the parties is actually being supported. Nonetheless, it could be problematic that §1033 does not provide which court, and under which circumstances, is authorised to order interim measures. The German legislator saw such a rule as superfluous and arbitrary because the arbitral tribunal is not limited in its competencies to order interim measures.[33]

3.1.3 Adoption of Model Law provision

The rule in §1033 is similar to that of Art. 9 of the Model Law, which also protects party autonomy. According to Voigt[34], the use of this principle in this context is appropriate. Parties, pursuant to their private autonomy, should be able to request what they desire from an arbitral proceeding (within the limits defined by law) because it is the parties who decided to go to arbitration in the first place.

German arbitration law is heavily influenced by the Model Law. This is because reform of arbitration law in Germany first took place in 1991, after the Model Law had been concluded. A commission of arbitration experts recommended modernising the Model Law in 1994 with a few caveats.[35] The only difference is that the German rule limits the interim relief recoverable to that directly related to the subject matter in dispute.

3.2 Section 44 of the English Arbitration Act (England)

With regards to interim measures, English arbitration law is based on a unique subsidiarity principle. It is unique because, in contrast with other arbitration rules, parties should treat the state courts as the subsidiary organ to the arbitral tribunal when considering a request for interim measures. In comparison, many international treaties, such as the European Convention on International Commercial Arbitration 1961 as well as the Model Law, only provide that an arbitration agreement does not *exclude* the state courts from ordering interim measures. The comprehensive nature of the English arbitration law is a result of the long history of development of arbitration in the common law. It achieves clarity and supports the principle of a non-interfering court.

3.2.1 Preservation of the historical relevance of restricting court intervention

The principle of subsidiarity is defined in English legal jurisprudence. In comparison to Germany, there had been three Acts of Parliament and extensive case law that influenced the drafting of the English Arbitration Act. In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd[36], it was important that the court first examined the implications of taking away the power of ordering interim measures

32 J. Schäfer (n 11), Rn. 4.2.2.2.
33 Steinbrück (n 13) 427.
34 Oliver Voigt, *Einstweiliger Rechtsschutz im Schiedsverfahren gemäß §1041*, (GRIN 1st ed. 2009), 4.
35 J Schäfer (n 11), 4.2.1.
36 Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334

from the arbitral tribunal in light of the parties' agreement to arbitrate. The case led to the adoption of s. 2(3) of English Arbitration Act.[37]

3.2.2 Independence of arbitral tribunal

Furthermore, English arbitration law governs the issue of when, and under which conditions, the state court has competence to order interim measures. The rule aims to not overcomplicate the arbitral proceeding through unnecessary court intervention.[38] This is beneficial because it supports the independence of the arbitral tribunal. Section 44(1) states that the court exercises its powers in support of arbitral proceedings 'unless otherwise agreed by parties'.

Pursuant to s. 44(3), the court can only make orders it deems 'necessary' for the purpose of preserving evidence or assets 'if the case is one of urgency'. Absent a case of urgency, the court can only act upon an application upon notice to the other parties and the tribunal, made with the permission of the tribunal or the agreement in writing of the other parties (s. 44(4)).[39] In both cases, the state court only exercises its power when the arbitral tribunal is not able to.[40]

The subsidiarity principle in English arbitration law is welcome. Section 44 supports not only the private autonomy philosophy behind arbitration, but also provides conditions according to which the state court can intervene and limits these accordingly.

3.3 Comparison

According to Redfern and Hunter[41], the position in English law is clearer as to the conditions to invoke state court interim measures over those available in the arbitral tribunal. Section 44(5) of the English Arbitration Act provides that the arbitral tribunal has priority over the state courts to order interim measures should the parties not have agreed otherwise. This sensible handling of the problem of conflict between the state court and the arbitral tribunal derives from the history of the development of the English Arbitration Act.

One aim of the Act was to ensure the articles contained therein were sensibly ordered[42], thereby reducing the problems of the Model Law highlighted in the 1989 Mustill Report.[43] According to

37 Blackaby, Partasides, Redfern, Hunter (n 12) Rn. 7.51.

38 Kelda Groves, 'Virtual Reality: Effective Injunctive Relief in Relation to International Arbitrations' (1998), Int, A.L.R. 188, 188 ff, 190; DAC Report of February 1996, Rn. 215.

39 Steinbrück (n 13) 106.

40 Three Shipping Ltd v Harebell Shipping Ltd [2004] EWHC 2001 (QBD).

41 Blackaby, Partasides, Redfern, Hunter (n 12) Rn. 7.28.

42 Robert Merkin, Louis Flannery, *Arbitration Act 1996* (Informa, 5th ed., 2014), 171.

43 Stewart Shackleton, 'The Internationalization of English Arbitration Law, ICC International Court of Arbitration' (2000) International Court of Arbitration Bulletin Vol. 11/No. 1, 17.

Shackleton[44], England had a reputation of freeing itself from 'international problems' using local solutions. That explains why the Model Law was seen merely as a *travail prépatoire* in England. Since arbitration has its roots in freedom of contract, the English legislator decided to protect this in respect of interim measures by providing for the subsidiarity of courts.

The general formulation of the German rule offers flexibility. In §1033, it is provided that the arbitration agreement does not exclude the possibility of state-ordered interim measures, but not that the parties could agree to such. The idea is taken from the Model Law, where it is simply provided that the state court and the arbitral tribunal have the same competence to order interim measures. Therefore the German rule, just like the English rule, does not solve the issue of conflict between court-ordered and arbitral interim measures. The German legislator wanted there to be no limits to the courts' competence to order interim measures pursuant to §1041.[45] The relationship between the state court and the arbitral tribunal is not defined precisely, leaving the choice up to the parties.

At the heart of these different approaches to interim measures lies a contradiction. Arbitration must constantly grapple with the disharmonious relationship between party autonomy and legal certainty. It is within the discretion of the legislator to decide where to draw the line. Whilst the German legislator in this instance decided in favour of party autonomy, the English legislator preferred legal certainty. The English subsidiarity principle resolves the problem of conflict between the state court and the arbitral tribunal best, thus promoting the use of arbitration as a private form of dispute resolution. Nevertheless, the German rule might be preferred by the parties since it does not restrict their choice of where to request interim measures.

4. AFTER THE PROCEEDINGS: APPEAL

In principle, the arbitral award is final and binding on both parties. Nevertheless, parties can go to the state courts in certain circumstances to appeal or review the award according to §1059 and s. 69. However, the scope of these circumstances are quite distinct in English and German arbitration law.

4.1 §1059 of the Civil Procedure Rules (Germany)

Appeal and review rules in German arbitration law are similar to those found in the Model Law. §1059 lists the grounds upon which parties can appeal or review the award in the state courts. These grounds are exhaustively listed[46] and exclusively procedural[47], which means that the arbitration award can only

44 Ibid.
45 Steinbrück (n 13) 429.
46 Vorwerk, Wolf, *Beck'scher Online Kommentar zur Zivilprozessordnung* (Beck, 14th ed. 2014).
47 Thomas Henkel, 'Konstituierungsbezogene Rechtsbehelfe in schiedsrichterlichen Verfahren nach der ZPO' (2007)

be appealed on the procedural grounds listed in §1059 paragraphs (2) and (3). This exclusivity is clear from the wording of §1059(1):

> *Only a petition for reversal of the arbitration award by a court pursuant to subsections (2) and (3) may be filed against an arbitration award [emphasis added].*

4.1.1 Promoting finality of award

At first blush, these limitations on the scope of review seem to go hand in hand with the principle of finality of the award. The state court can only appeal the award on one of the few exhaustively listed grounds in the article.[48] A *révision au fond* (review on the merits) is excluded.[49] Nonetheless, it will be asserted that the principle of finality is not necessarily supported in practice. The limitations in §1059 have driven parties to think up creative solutions to limit the effect of the restriction.[50]

4.1.2 No substantive review on 'public policy' grounds

An arbitral award can be appealed if the court finds that its recognition or enforcement would be contrary to public policy of the state in which enforcement is sought. It has been the subject of debate whether, for the court to be able to determine this, it must intervene to some extent in the substance of the dispute.[51] According to the BGH decision of 28 January 2014,[52] public policy in Germany only includes fundamental principles of the legal order and flagrant violations. A violation of one of these principles would therefore be so obvious in most cases that it would be unnecessary to examine the substantive elements of the arbitral award.

4.1.3 BGH Case: 1 March 2007

Despite the apparent exclusion of a *révision au fond*, the BGH case of 1 March 2007[53] has questionably limited this. The parties agreed to the following clause: 'should one of the Parties be dissatisfied with the arbitral award, it can take this matter to the state courts within one month following the rendering of the award' [translation by author].[54] The parties thus were able to attach certain conditions to the finality of the award.

<http://edoc.hu-berlin.de/dissertationen/henkel-thomas-2007-05-08/HTML> accessed 24 June 2014.

48 Rauscher, Krüger (n 26) §1059, Rn. 7.

49 BGH SchiedsVZ 2008, 40 (42).

50 BGH Fall vom 1.3.2007– III ZB 7/06.

51 Rymanlova, 'Le contrôle de la sentence arbitrale au regard du droit communautaire de la concurrence: application de l'arrêt Eco Swiss de la CJCE en France et en Allemagne', Arbitrage et ADR <http://m2bde.u-paris10.fr/content/le-contr%C3%B4le-de-la-sentence-arbitrale-au-regard-du-droit-communautaire-de-la-concurrence-appl> accessed 2 February 2014.

52 BGH vom 1.1.2014 - III ZB 40/13 - OLG Celle.

53 BGH Fall vom 1.3.2007– III ZB 7/06.

54 Ibid., Rn. 1.

On the one hand, this decision runs contrary to §1055, according to which the arbitral award has the same effect as a court judgement. The parties can then always attach certain conditions to the finality of the arbitral award, which diminishes the significance of the arbitral proceeding. According to Wolff[55], the arbitral proceeding loses some of its importance if the parties can 'say no' to finality. Such an agreement seems more like mediation where the parties do not bind themselves to any certain rules.

On the other hand, the arbitration agreement derives from the parties' autonomy. The BGH decided on this basis that the more fundamental reason for the final and binding nature of the arbitral award derives from the parties' own choice to make it so.[56] This analysis brings the decision in line with the nature of arbitration as a creature of contract. Since the binding nature of the arbitral award (§1055) derives from the consensus of the parties, the parties should be abble to attach conditions to this finality.

This case demonstrates that restrictive grounds for review do not always have a positive knock-on-effect for the final and binding nature of arbitration awards. Rather the parties begin to choose their own rules by concluding creative arbitration agreements.

4.2 Section 69 of the English Arbitration Act 1996 (England)

In contrast with German arbitration law, the state court may review a question of law (but not a question of fact).[57] Section 69 codified the general wording of s.1 of the English Arbitration Act with regard to the developing case law, in particular The *Nema*[58] and The *Antaois*[59], providing in s. 69(1):

> *Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.*

In both cases mentioned above, the House of Lords found that review on a question of law should only be possible if the arbitrators made an obviously wrong decision, which hinders the rights of one or both of the parties substantially. Upon a first reading, the statement seems to run contrary to the principle of excluding the courts from interfering with arbitration. Conversely, it limits the parties' ability to agree to a contrary (and perhaps more expansive) form of judicial review.

55 Reinmar Wolff, Party autonomy to Agree to Non-Final Arbitration?' (2003) 26 ASA Bulletin 3/2008, No. 3, S. 626–64, Rn. 3.

56 1.3. 2007 (n 64), Rn. 18.

57 J.F. Poudret, S Besson, *Comparative Law of International Arbitration*, (Sweet & Maxwell, 2nd ed. 2007) 40.

58 Pioneer Shipping Ltd. v. BTP Tioxide Ltd. (The Nema) [1982] AC 724.

59 Antaios Compania Naviera SA v. Salen Rederierna AB (The Antaios) [1985] AC 191.

4.2.1 The elusive review on a 'question of law' – against finality?

It might be argued that a substantive examination of the award hinders the finality of it. According to Wolff[60], the principles of private autonomy and finality come in to conflict when it comes to appeal and review. If the court can review questions of law, it has the capability of changing the material decision of the arbitrator. Arbitration is thereby reduced to a mere 'first step' before the parties finally go to court.[61] The arbitral proceeding, as well as the arbitration agreement itself, lose their meaning and effect. Nevertheless, it remains open to the parties to exclude an appeal on a point of law by agreement. Section 69 is thus not a binding rule if the parties do not want it to be.

4.2.2 Limited by conditions

In any case, s. 69 is seldom utilised by parties since certain conditions must be fulfilled for it to apply. Statistically, the reviews of a question of law pursuant to s. 69 only occurred 151 times between 2004 and 2006. Only 14 of these attempts actually led to an appeal of the award.[62]

The first condition is that the applicant must receive the consent of all parties of the arbitration agreement as well as the court to be able to review a question of law. The court can only agree in the explicitly listed cases in s. 69(2), including:

> *(a) that the determination of the question will substantially affect the rights of one or more of the parties,*
>
> *(c) that, on the basis of the findings of fact in the award*
>
> *(i) the decision of the tribunal on the question is obviously wrong, or*
>
> *(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
>
> *(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.*

An expansive list of grounds for review, limited by conditions, could therefore be seen as positive for arbitration. Even though they appear, at first glance, to give the state courts too much power to review arbitral awards, the grounds are sensibly limited in the arbitration law.

60 Wolff (n 56) Rn. 3.

61 Kate Davies, In Defence of Section 69 of the English Arbitration Act, (Kluwer Arbitration Blog, 2010) < http://kluwerarbitrationblog.com/2010/11/01/in-defence-of-section-69-of-the-english-arbitration-act/> accessed 1 May 2014

62 Ibid.

4.3 Comparison

When compared with German arbitration law, the possibility of an appeal on a question of law is a unique and welcome feature of English arbitration law. Section 69 sets precise conditions upon which a material review by the state courts can be granted, whereas German arbitration law permits review only on express procedural grounds.

The English legislator opened up these grounds and then attached conditions to such a review.[63] The BGH case of 1 March 2007[64] demonstrates that the uncertainty created in German law by the absence of such provisions can lead to contradictory results, whereby the parties can determine the scope and possibility of review by the courts themselves. The possibility of expanded review by state courts paradoxically promotes finality more than the uncertain German rules. Before the earlier version of the English Arbitration Act of 1979, there was significant mistrust towards the state courts. The review mechanism which existed at that time was considered to be a back door to give the state courts more power in arbitral proceedings.[65]

Following the conclusion of the Model Law in 1985, an English Committee presented a report called the DAC Report[66] which can be used as an instrument of interpretation for today's law. The English legislator felt that the parties are entitled to expect that the selected legal mechanism (i.e. courts or arbitral tribuneals) is correctly applied as they have placed their trust in the English legal system. A further justification given was that a court is more likely to correctly apply the law since arbitrators are not always necessarily lawyers. The DAC Report therefore favoured a possible review on a question of law but made sure that certain conditions were attached so that it could not be abused.

5. Conclusion

As a result of this analysis, which compares the role of the courts in English and German arbitration, it has been established that English arbitration law treats the uneasy relationship between the arbitral tribunal and the court in a more sensible and definite way then German arbitration law. This is partly due to the longer history of arbitration in resolving international commercial disputes in England, and the English legislator's preference for the principle of legal certainty over party autonomy when defining the outer limits of court assistance and intervention. Whilst party autonomy could be seen as beneficial to parties, too much freedom runs contrary to the principle of legal certainty, thereby hindering the meaning of arbitration for the international community.

63 Taner Dedezade, 'Are you in? Are you out? An analysis of Section 69 of the English Arbitration Act 1996: Appeals on Questions of Law' (2006) Int.A.L.R, 56 ff., 56.
64 1.3. 2007 (n 64).
65 Dedezade (n 64) 57.
66 In: (1997) 13 Arbitration International 3.

A 'real partnership' between the court and the arbitral tribunal - deemed by some commentators as necessary for a well-functioning arbitration[67] - is not easy to achieve. It demands recognition by the state court that the arbitral tribunal is in principle independent, whilst having the capacity to support the arbitral tribunal in any of the ways prescribed (where necessary for a well-functioning arbitral proceeding). Therefore, it is important that the state court finds the right balance between these two duties.

It has been explained that the German rules, which permit arbitral tribunals and courts to concurrently order interim measures, may promote party autonomy at the expense of legal certainty. Similarly, the limited form of review offered in German arbitration law may lead to parties agreeing to expanded forms of review in their arbitration agreements, which have not been found to run contrary to the aims of arbitration. This suggests that the expanded form of review on a question of law, permitted in English arbitration law, may in fact strike the correct balance between promoting party autonomy and legal certainty since a certain higher level of review is permitted but limited by the statute itself.

Arbitration laws are thus a question of give and take. Whilst parties cannot be deprived of the exercise of their own autonomy, this cannot be permitted to the extent that it hinders the meaning of arbitration itself as a private form of dispute resolution. Perhaps the answer lies in not viewing party autonomy and legal certainty as mutually exclusive, but complementary and mutually beneficial. However, this article has shown that a balance must be struck between the two in order to preserve arbitration as a freestanding form of dispute resolution, independent (at least, to an extent) from the public sphere of the courts.

67 Blackaby, Partasides, Redfern, Hunter (n 12) 7.01.

AN ANALYSIS OF THE THEORETICAL AND PRACTICAL HURDLES IN PROSECUTING A SITTING HEAD OF STATE

Sabreen Hassen*

Abstract

The International Criminal Court (ICC) was established in 1998 to assist States in putting an end to the era of impunity. Some years later and many African countries are falling short of complying with their obligations under the Rome Statute of the International Criminal Court. African States are furthermore blatantly ignoring orders of cooperation with the ICC, keeping the notion of impunity very much alive on the continent. Tensions between the ICC and the African continent reached a breaking point when the court issued an arrest warrant for the Sudanese President, Omar Al Bashir. President Bashir is wanted by the court for crimes against humanity, war crimes and genocide. Despite the arrest warrants, President Bashir has managed to travel comfortably in the African continent without being arrested.

South Africa is one of the few countries which have transposed their obligations under the Rome Statute into domestic legislation: Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act). In terms of this piece of legislation, South Africa had a duty to not only cooperate with the ICC but also to arrest President Bashir if he entered the country. In blatant disregard of these obligations South Africa invited President Bashir to attend the 2015 African Union (AU) Summit held in Johannesburg and additionally assured that his immunity would be respected.

As a Head of State, President Bashir would normally have enjoyed criminal immunity. However, as a result of the international crimes he has committed, President Bashir's immunity is invalid before an international court such as the ICC. Furthermore, all Member States of the Rome Statute are obliged to cooperate with the ICC, irrespective of their membership to the AU. As a result of South Africa's ICC Act, South Africa cannot in any way escape its obligations to arrest and surrender President Bashir. Yet it did just that.

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1. Introduction

There are 123 States which are parties to the Rome Statute of the International Criminal Court (Rome Statute),[1] of which 34 are African States.[2] These States have all voluntarily accepted the jurisdiction of the International Criminal Court (ICC). The ICC has a limited scope of jurisdiction including crimes against humanity, war crimes, genocide and, as of 1 January 2017, the crime of aggression as well. The ICC's aim is to end impunity.[3]

South Africa's commitment towards ending impunity was recently called into question by allowing President Omar Al Bashir to leave the country, despite not one but two arrest warrants issued against him by the ICC. South Africa has been a member State to the Rome Statute since 17 July 1988 and as a result has many obligations towards the court. One such obligation is to arrest and surrender an accused person who is wanted by the court if he or she is within the State's territory.[4]

Omar Al Bashir rose to power when he led a military coup against Prime Minister Sadiq al Mahdi, who was democratically elected.[5] Bashir subsequently became the President of Sudan in 1993.[6] President Bashir is wanted by the ICC for charges of crimes against humanity, genocide and war crimes. He has even been referred to as 'the African Adolf Hitler'[7] as he wanted to establish a pure race in Sudan.[8] In the process, three million people were displaced and an average of 500 000 people were killed, most of whom belonged to black African tribes in Darfur.[9]

As a result of being the Sudanese President, he would normally have enjoyed certain civil and criminal immunities under customary international law. The validity of his criminal immunity has been a topic of much debate; the debate was sparked when the ICC issued two arrest warrants for President Bashir.

This article will examine both the theoretical and practical aspects of prosecuting a Head of State. Section A will examine the theoretical hurdles relating to the prosecution of a Head of State; namely immunity and admissibility in terms of the complementarity principle. Acknowledging that this topic cannot be explored without addressing immunity, section A will include a brief examination on the validity of Head of State immunity before national and international courts with respect to international crimes. Section A will further address the principle of complementarity as set out in article 17 of the

1 Rome Statute of the International Criminal Court 1988.
2 https://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african% 20states.aspx (03-07-2015).
3 Preamble Rome Statute.
4 A 89(1) Rome Statute.
5 http://www.sudantribune.com/spip.php?mot126 (06-08-2015).
6 http://www.sudantribune.com/spip.php?mot126 (06-08-2015).
7 Tladi 'When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' 2014 *African Journal of Legal Studies* 381.
8 Tladi (n 7) 381.
9 https://www.washingtonpost.com/opinions/the-abandonment-of-darfur/2015/05/15/ca744c46-f8f4-11e4-9030-b4732caefe81_story.html (06-08-2015).

Rome Statute.[10] Complementarity relates to the admissibility of a case before the ICC. This part of the section will conclude that because there are no States investigating or prosecuting President Bashir, the case is indeed admissible before the ICC.

Section B will in turn examine the practicalities of prosecuting a sitting Head of State. It will begin by addressing the obligations to cooperate with the ICC, with reference to Member States of the ICC, Sudan and other AU members. Furthermore section B will also discuss the ICC Act[11] of South Africa regarding their obligations towards the ICC.

Finally section C will explain the South African High Court ruling which ordered that President Bashir be arrested,[12] as well as their decision to allow the Respondents to appeal the matter.

2. Brief Background

President Bashir was invited to attend the 2015 AU Summit that was held in Johannesburg. Upon extending the invitation to President Bashir, the South African government granted him a guarantee of immunity.[13] President Bashir arrived in South Africa on Saturday 13 June 2015 and left the country few days later on Monday 15 June 2015.

On 13 June, the day that President Bashir arrived in South Africa, the ICC Pre Trial Chamber II issued an order that South Africa immediately arrest him.[14] On 14 July 2015, an interim order was issued by the High Court ordering President Bashir to remain in South Africa until the court determined whether he should be arrested and surrendered to The Hague.[15]

One day later, the South African High Court ruled that President Bashir must be arrested.[16] On that very same day, President Bashir left the Waterkloof Air Force base on a private jet.[17] On 14 June, the night before his departure, President Bashir's private jet was flown from O.R. Tambo International Airport to the Waterkloof Air Force base, which is controlled by the South African National Defence Force.[18] The South African president, Jacob Zuma, is Commander in Chief of all armed forces and therefore the Commander in Chief of the base as well.[19]

10 Rome Statute.
11 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
12 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* case no 27740/2015 (ZAGPPHC) (unreported).
13 GG 38860 (05-06-2015).
14 *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir* ICC-02/05-01/09-242 par 1.
15 *Southern Africa Litigation Centre* case (n 12).
16 *Southern Africa Litigation Centre* case (n 12).
17 http://www.theguardian.com/world/2015/jun/16/omar-al-bashir-escape-south-africa-african-union (01-07-2015).
18 http://mg.co.za/article/2015-06-18-how-zuma-and-ministers-plotted-omar-al-bashirs-escape (01-07-2015).
19 http://mg.co.za/article/2015-06-18-how-zuma-and-ministers-plotted-omar-al-bashirs-escape (01-07-2015).

The above may indicate that the South African government colluded with President Bashir to ensure his escape from South Africa before he could be arrested and surrendered to The Hague to stand trial.

3. Section A: Theoretical Hurdles in Prosecuting a Head of State

3.1 Immunity

Absolute immunity enjoyed by a Head of State in a forum other than their own national jurisdiction was once a firmly established rule of customary international law.[20] Since the end of World War II, however, this rule has been continuously called into question.[21]

Under customary international law, Heads of States are granted immunity from jurisdiction being exercised over them by a State other than their own.[22] This rule is founded on the basis that one State does not adjudicate on the conduct of another State, which stems from international comity and the equality of sovereign States.[23]

The distinction between functional and personal immunity must first be explained. Functional immunity, or immunity *ratione materiae,* covers any official act of the Head of State and is a substantive defence.[24] This immunity is not discharged when the official steps down from his position.[25] The widespread opinion is that immunity *ratione materiae* cannot safeguard anyone from prosecution of international crimes such as genocide, war crimes, torture and crimes against humanity. The abolition of functional immunity previously enjoyed by Heads of States or government can be attributed to the statutory provisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), ICC and hybrid tribunals, along with some of their decisions and certain international treaties and resolutions mentioned above.[26] Although divided on the reasoning, legal scholars have argued against recognising immunity with regards to international crimes. Some believe that the nature of these crimes prevent them from being categorized as official acts.[27] Others however believe that it is the prohibition of these crimes as *jus cogens* which is capable of

20 Jovanovic 'Immunity of Heads of State for International Crimes: Deflating Dictators' Lifebelt?' 2009 *Belgrade Law Review* 202.

21 Cassese *International Criminal Law* (2001) 305.

22 Watts 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers' 1994 *Recued des Cours de la Academie de Droit International de la Haye* 35 as cited by Jovanovic (n 20) 202.

23 Jovanovic (n 20) 203.

24 Cassese (n 21) 305.

25 Cassese (n 21) 305.

26 *Prosecutor v Karadzic* ICTY IT-95-5/18, *Prosecutor v Mil*osevic ICTY IT-02-54, *Prosecutor v Furundzija* ICTY IT-95-17/1, *Prosecutor v Blaskic* ICTY IT-95-14, *Prosecutor v Kambanda* ICTR-97-23, *Prosecutor v Taylor* SCSL-03-01-A-1389, A 7(2) Statute of the International Criminal Tribunal for the former Yugoslavia, A 6(2) Statute of the International Criminal Tribunal for Rwanda and A 27(1) Rome Statute.

27 Bianchi 'State Immunity to Violations of Human Rights' 2015 *Austrian Journal of Public International Law* 229.

overriding immunity because it lacks the status of *jus cogens*.[28] In *Ex Parte Pinochet Ugarte*, official acts were defined as 'acts through the duty of a Head of State to protect his subjects, not grossly violate their rights'.[29] Other authors however, believe that the exclusion of immunity in the statutes of international tribunals and courts is based on the principle of universal jurisdiction which excludes functional immunity.[30]

Functional immunity and international crimes are naturally irreconcilable.[31] If we allow the actions which constitute international crimes to be categorized as official acts, we are defeating the purpose of international treaties like the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Torture Convention and even the Geneva Conventions which have established an unconditional prohibition of these acts as well as international peremptory norms.[32] All these treaties allow States to establish universal jurisdiction if necessary in order to enable them to prosecute those responsible for international crimes with no exceptions.[33]

We can therefore say that the customary international law rule establishing functional immunity can be subjected to the exception of international crimes in international and foreign national courts.[34] However, in the latter, there has not been consistent State practice to justify the absolute denial of functional immunity before a foreign national court.[35] This coupled with the ICJ decision in *the Arrest Warrant case* leads us to the fact that a customary international law rule has not yet crystallised which would oblige States to deny a Head of State their functional immunity.[36] Yet it can also be said that there is no obligation to respect a Head of State's functional immunity either.[37] Upholding the distinction between prosecution in national and international courts has been intensely criticized.[38] Judge Van den Wyngaert articulated her disapproval of the distinction in *the Arrest Warrant case* by stating that 'immunity should never apply to crimes under international law, neither before international

28 Bianchi "Immunity Versus Human Rights: The Pinochet case" 1999 European Journal of International Law 237- 265.

29 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 3) 1999.

30 Akande 'International Law Immunities and the International Criminal Court' 2004 *American Journal of International Law* 407 415.

31 Jovanovic (n 20) 221.

32 Jovanovic (n 20) 221.

33 A 6 Genocide Convention 1948, A 49 Geneva Convention I 1949, A 50 Geneva Convention II, A 129 Geneva Convention III, A 146 Geneva Convention IV, A 5 Torture Convention 1984. IV, Article 146, A 5 Torture Convention.

34 Gaeta 'Official Capacity and Immunities' in Cassese (ed) *The Rome Statute of the International Criminal Court – A Commentary* (2002) 982.

35 Jovanovic (n 20) 221.

36 Jovanovic (n 20) 221.

37 Jovanovic (n 20) 221.

38 Van der Vyver 'Prosecuting President Omar Al Bashir in the International Criminal Court' available at http://ebookbrowse.com/johan-van-der-vyver-pdf-d142822965 (19-02-215) 7.

courts nor national courts'.[39] Ideally, States should not acknowledge functional immunity when it comes to prosecuting international crimes, nor should this denial be considered a violation of international law.[40]

Personal immunity on the other hand is still able to shield a Head of State from prosecution.[41] Though personal immunity of an official ceases to exist once the official steps down from his or her position,[42] Personal immunity covers all private and officials acts of the individual and is applicable to certain officials such as Heads of State, Heads of Government, Foreign Ministers and Diplomatic Agents. The exceptions to personal immunity are limited to international courts and tribunals within their mandates and jurisdiction.[43] State practice in this regard has actually led to the preservation of personal immunity in foreign national courts as demonstrated in *the Arrest Warrant case*.[44] The sanctity of personal immunity has been acknowledged in the Princeton Principles on Universal Jurisdiction,[45] the 2001 Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law [46] and in the International Law Commission 2008 Memorandum. [47] Currently customary international law does not allow for the exception that a Head of State be prosecuted for international crimes in a foreign national court.[48] States find personal immunity binding as it is necessary for the conduct of international relations.[49] To completely disregard immunities as a whole and allow national courts to prosecute sitting Heads of State would open the door for malicious prosecution of foreign officials.[50] Personal immunity does not deny justice to the victims of international crimes but merely delays it until the Head of State steps down.[51]

39 Case Concering the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belguim*) 2002 I.C.J. 3 Dissenting Opinion of Judge Van den Wyngaert par 36, Boister 'The ICJ in The Belgian Arrest Warrant Case*:* Arresting The Development Of International Criminal Law' 2002 J*ournal of Conflict and Security Law*, Bassiouni 'Universal Jurisdiction Un-revisited: The International Court Of Justice Decision In *Case Concerning The Arrest Warrant Of 11 April 2000 (Democratic Republic Of The Congo V Belgium)* 2002 *The Palestine Yearbook of International Law*, Chok 'Let the Responsible be Responsible: Judicial Oversight and Over-optimism in The *Arrest Warrant* Case and the Fall Of the Head of State Immunity Doctrine in International And Domestic Courts' 2015 *American University International Law Review*.

40 Jovanovic (n 20) 221.

41 Jovanovic (n 20) 221.

42 Cassese (n 21) 305.

43 Jovanovic (n 20) 222, A 6 and 7 Charter of International Military Tribunal 1945, German Control Council Law No 10 1945, A 6 International Military Tribunal for the Far East 1948, A 7(2) Statute of the International Criminal Tribunal for the former Yugoslavia1993, A 6(2) Statute of the International Criminal Tribunal for Rwanda 1994 and A 27(1) Rome Statute.

44 Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) 2002 I.C.J. 3.

45 Principle 5 of Robinson and Princeton University *The Princeton Principles on Universal Jurisdiction* (2001) 30.

46 A 13(2).

47 International Law Commission 148.

48 Gaeta (n 34) 987.

49 Jovanovic (n 20) 222.

50 Jovanovic (n 20) 222.

51 Jovanovic (n 20) 222.

The only forum, therefore, in which a sitting Head of State may be prosecuted would be either an international court or tribunal.[52] Prosecution before a national court will only be possible if the State which the Head of State is representing chooses to waive the immunity.[53] Prosecution of a sitting Head of State is possible because it does not interfere with the principle of equality between sovereign States: one State does not judge the conduct of another.[54] Determining whether to acknowledge or deny immunity will almost always be influenced by politics.[55]

This type of immunity has remained unchallenged for decades, but the relative perspectives and rules have now been altered by several watershed developments.[56] The first breakthrough in this regard came with the establishment of the Nuremberg and Tokyo Military Tribunals. The Charter of International Military Tribunal stated that 'the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'.[57] This provision was repeated in the German Control Law No 10.[58] Without explicitly mentioning Heads of State or government officials, the Tokyo Tribunal adopted the same position on immunity by implying that official capacity would not be acceptable as a valid defence.[59] Not long after these charters, the principles established in them were unanimously endorsed by the General Assembly in 1946,[60] and in 1970 the International Law Commission confirmed that Heads of States are not immune from criminal responsibility.[61]

Twenty years later, with the emergence of the ICTY[62] and the ICTR,[63] the question of immunity for Heads of State reappeared.[64] Both the ICTY and ICTR Statutes contain the same provision: 'the official position of any accused person, whether as Head of State or Government … shall not relieve such a person from criminal responsibility of mitigate punishment'.[65] The ICTY reaffirmed that immunity would not act as a safeguard from prosecution by the tribunal when they rejected Milosevic's challenge to the tribunal's jurisdiction.[66] Milosevic was the very first Head of State to be not only indicted but also

52 Jovanovic (n 20) 222.
53 Jovanovic (n 20) 222.
54 Jovanovic (n 20) 223.
55 Jovanovic (n 20) 224.
56 Jovanovic (n 20) 203.
57 A 7.
58 German Control Council Law No 10 1945.
59 A 6 International Military Tribunal for the Far East 1948.
60 United Nations General Assembly Resolution 95 (I) 1946.
61 UN General Assembly, Report of the International Law Commission 1950 Principle 3.
62 United Nations Security Council Resolution 827 (1993).
63 United Nations Security Council Resolution 955 (1994).
64 Jovanovic (n 20) 205.
65 A 7(2) Statute of the International Criminal Tribunal for the former Yugoslavia and A 6(2) Statute of the International Criminal Tribunal for Rwanda.
66 *Prosecutor v Slobodan Milosevic* IT-99-37-PT par 28-34.

prosecuted by a court other than his one from his own State;[67] no foreign Heads of State appeared before the Military Tribunals of Nuremberg and Tokyo.[68] Unfortunately, as a result of Milosevic's death, the trial could not be concluded. In 2007, the Special Court for Sierra Leone indicted Charles Taylor and also rejected his immunity based on the ICJ's opinion that an exception to immunity exists before international courts.[69]

The history behind the drafting of both the ICTY and ICTR Statutes indicate that they were meant to echo the principle of criminal responsibility, irrespective of any official position as set out after World War II.[70] The ICTY also stated the inapplicability of Head of State immunity in its statute is 'indisputably declaratory of customary international law' in *Prosecutor v Furundzija.*[71] Neither of the Military Tribunal Charters, nor the ICTY and ICTR Statutes, makes a distinction between personal and functional immunity.[72] The failure to make such a distinction could indicate that the Security Council does not support the concept of immunity in the case of international crimes. However, the fact that the ICTY opted to issue an indictment against Milosevic while he was in office shows that the ICTY interprets its statute as denying both personal and functional immunity.[73]

Provisions denying immunity to Heads of State can also be found in other treaties. The very first treaty mentioning the accountability of Heads of State is the Treaty of Versailles,[74] which enabled German Emperor William II to be prosecuted after World War I. The Genocide Convention[75] states that those who commit genocide 'shall be punishable whether they are constitutionally responsible rulers, public officials or private individuals'.[76] The Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, as well as the International Convention on the Suppression and Punishment of the Crime of Apartheid, support the notion that Heads of State may be held criminally responsible.[77]

The Rome Statute was the first multilateral treaty to explicitly State that, with respect to genocide, war crimes and crimes against humanity, personal or functional immunity will not prevent a Head of State from being held criminally responsible.[78] Nor will it prevent the court from exercising jurisdiction over

67 *Milosevic case* (n 66*)* par 4.
68 Jovanovic (n 20) 204.
69 *Prosecutor v Taylor* SCSL-2003-01-I par 37-52.
70 UN Secretary General 25704 (1993).
71 *Prosecutor v Furundzija* ICTY-95-17/1 par 140.
72 Jovanovic (n 20) 206.
73 Jovanovic (n 20) 206.
74 A 227 Treaty of the Peace between the Allied and Associated Powers and Germany 1919.
75 Convention on the Prevention and Punishment of the Crime of Genocide 1948.
76 A 4.
77 A 2 Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and A 3 International Convention on the Suppression and Punishment of the Crime of Apartheid.
78 A 27(1).

them.[79] Article 27[80] cannot be read in isolation and must be read in conjunction with article 98 which states:

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 cooperation of that third State for the waiver of the immunity.[81]

At first glance, article 98[82] might seem to be in direct conflict with article 27.[83] However, close attention must be paid to the choice of words used in this provision. First, the provision does not prevent the court from exercising jurisdiction over persons with immunity. Second, the provision only prohibits the court from requesting assistance from the government of a State which is not party to Rome Statute regarding the surrender of the Head of State.[84] This means that the court may still have jurisdiction over such a person but will have to refrain from requesting a Member State from arresting and surrendering an official of a non-member State who has immunity.[85] A non-member State, Head of State or government will nonetheless fall under the jurisdiction of the ICC if the case is referred to it by a Security Council resolution.[86]

The issuing of the arrest warrants for President Bashir demonstrates the above interpretation of articles 27 and 98.[87] Indeed, Al Bashir is a Head of State that enjoys immunity as an official of Sudan in a country which is not a Member State to the Rome Statute. Yet the court was able to dismiss his immunity because of the Security Council's powers in chapter 7[88] as the case was referred to the court by a Security Council resolution.[89] This in turn suggests that other State Parties to the Rome Statute, such as South Africa, have to disregard Al Bashir's immunity as well and co-operate with the court enabling it to effectively exercise jurisdiction.[90] Non-member States, however, are still obligated to respect his immunity.[91]

79 A 27(2).
80 Rome Statute.
81 A 98(1) Rome Statute.
82 Rome Statute.
83 Rome Statute.
84 Akande 'International Law Immunities and the International Criminal Court' 2004 *American Journal of International Law* 407 421.
85 Akande (n 84) 421.
86 A 13(b).
87 *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan* ICC-02/05-01/09-1.
88 Charter of the United Nations 1945.
89 United Nations Security Council Resolution 1593 (2005).
90 Akande 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' 2009 *Journal of International Criminal Justice* 333 342.
91 Jovanovic (n 20) 209.

The high number of States which are party to the Rome Statute suggests their willingness to adhere to the limitations it imposes on immunity and furthermore proves the argument that immunity is no longer applicable in cases of international crimes.[92] Acknowledgment of the notion of holding Heads of State criminally responsible for any international crimes committed has been increasing; it is being followed slowly but surely with correlating rules.[93] Crimes against humanity, genocide, torture and war crimes have all been undoubtedly recognized as crimes in which immunity is rendered irrelevant.[94] These exceptions are based on the gravity of the crimes: they are not only international wrongs, but they offend the public order of the international community.[95]

The fact remains, however, that Sudan is not a party to the Rome Statute and therefore cannot have consented to the waiver of immunity. When the arrest warrant was issued for President Bashir, the Trial Chamber of ICC stated:

> *Without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that position of Omar Al Bashir as Head of State which is not party to the Statute has no effect on the Courts jurisdiction over the present case.*[96]

In coming to the above conclusion, the Trial Chamber relied on article 27[97] and Resolution 1593,[98] which it interpreted to mean that the Security Council has accepted that an investigation and prosecution will take place in terms of the Rome Statute.[99] The effect of the Trial Chamber's decision is that Sudan is treated as a party to the Rome Statute because of the powers of the Security Council in chapter 7 of the UN Charter which are compulsory in nature.[100] As will be discussed in detail further in this dissertation, article 25 of the UN Charter[101] places a duty on African States to comply with the Rome Statute.

Furthermore, when the ICC's Pre Trial Chamber ruled on Chad's decision not to cooperate with the court, it restated its reasoning in *the Malawi case.* First, immunity cannot be invoked by sitting Heads of States for prosecutions before international courts.[102] Second, the immunity of Heads of State before

92 Jovanovic (n 20) 218.
93 Jovanovic (n 20) 219.
94 Cassese (n 21) 305.
95 Watts (n 22) 84.
96 *Prosecutor v Al Bashir Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-3 par 41.
97 Rome Statute.
98 Resolution 1593 (n 89).
99 Cross and Williams 'Recent Developments at the ICC' 2009 *Human Rights Law Review* 267 279.
100 Cross and Williams (n 99) 279.
101 Charter of the United Nations.
102 *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-139 par 36.

international courts has been repeatedly rejected since World War I.[103] Third, all 120 States which are party to the Rome Statute have waived immunity by ratifying the statute,[104] in particular article 27(2).[105] Fourth, there is an international commitment to reject immunity[106] Finally, customary international law creates an exception to immunity when a Head of State is arrested for international crimes.[107]

The ICC Act adopts the strict position on immunity. Section 4(2)(a) states that 'despite any other law contrary…the fact that a person is/was a Head of State/government ... is neither a defence to a crime nor a ground for any reduction of sentence once a person has been convicted for a crime'.[108] This provision gives South African courts the same power to override immunity as section 27 of the Rome Statute gives the ICC.[109] Both Dugard and Abraham correctly point out that this provision represents the legislator's choice not to follow the decision of *the Arrest Warrant case*.[110] We can safely argue that immunity is not supported by South Africa; this is not only because of section 4(2)(a) but also because section 232 of the Constitution States 'customary international law is law in the Republic, unless it is inconsistent with the Constitution or an act of parliament'.[111] Moreover, South Africa is not the only African country to explicitly deny immunity to Heads of State who have committed international crimes: the constitution of Kenya states 'immunity of the President under this article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity'.[112]

Consequently, President Bashir cannot claim immunity at the ICC because the ICC has obtained jurisdiction over him through the Security Council referral. The ICC will not be acting in conflict with article 98 by asking South Africa for assistance and surrender of Al Bashir because South African legislation allows for this possibility.[113] Functional immunity in particular will be ineffective, irrespective of the forum. Personal immunity is only an effective defence in an international forum and not in a foreign national court. However, Al Bashir was present in South Africa and was therefore bound by all South African legislation while in the country; he would not have been able to invoke personal immunity before a South African national court because of section 4(2) of the ICC Act which does not acknowledge immunity at all. This provision cannot be overridden by the customary international law rule which allows Heads of State to invoke immunity before foreign national courts because section

103 *Al Bashir case* (n 103*)* par 38.
104 *Al Bashir* case (n 103) par 40.
105 Rome Statute.
106 *Al Bashir* case (n 103) par 42.
107 *Al Bashir* case (n 103) par 43.
108 s 4(2)(a) ICC Act.
109 Du Plessis 'South Africa's International Criminal Court Act' 2008 available at https://www.issafrica.org/uploads/Paper172.pdf (07-07-2015) 12.
110 Du Plessis (n 109) 12.
111 Constitution of the Republic of South Africa, 1996.
112 A 143(4) The Constitution of Kenya.
113 s 14-32 ICC Act.

232 of the Constitution outlaws this customary international law rule, as it is in conflict with section 4(2) of the ICC Act.

3.2 Complementarity

Both the ICTY and ICTR had primary jurisdiction with respect to international crimes.[114] In terms of their primary jurisdiction, the tribunals were given the first right to investigate and prosecute war crimes.[115] The ICC, however, has complementary jurisdiction.[116] Complementary jurisdiction means that when there are conflicting claims for jurisdiction over international crimes, the principle of complementarity gives the national jurisdiction the primary right to investigate and prosecute the international crimes.[117] This principle is founded on the respect of national jurisdiction and the need to ensure efficiency and effectiveness because States will have the best access to evidence and witnesses.[118] As Frederic Megret writes:

> *Although crime is obviously something that societies are keen to eliminate, it is also curiously something about which they feel a strong sense of ownership, especially when competing claims for jurisdiction arise.*[119]

Given this 'sense of ownership', States needed a convincing reason to ratify the Rome Statute and the principle of complementarity allowed for the preservation of their sovereignty.[120] Complementarity was not included in the statutes of the ad hoc tribunals because States were legally obliged to accept their jurisdiction as a result of the Security Council resolutions which established them.[121]

The prosecutor's objective is not to compete with States and their national jurisdiction, but rather to ensure that international crimes are punished and impunity is ended.[122] States have a responsibility to investigate and prosecute international crimes.[123] The principle of complementarity is an instrument which encourages States to fulfil that responsibility.[124] In *S v Basson*, the Constitutional Court stated that

114 A 9(2) Statute of the International Criminal Tribunal for the former Yugoslavia, A 8(2) Statute of the International Criminal Tribunal for Rwanda

115 Nouwen *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2014) 9.

116 Preamble Rome Statute.

117 Nouwen (n 115) 9.

118 Nouwen (n 115) 16.

119 Nouwen (n 115) 16.

120 Nouwen (n 115) 16.

121 Nouwen (n 115) 16.

122 Office of the Prosecutor Informal Expert Paper: The Principle of Complementarity in Practice available at https://www.icc-cpi.int/iccdocs/doc/doc654724.PDF (12-10-2015) 3.

123 Dugard *International Law: A South African Perspective* (4th ed) 192, A 5 Genocide Convention, A 49 Geneva Convention I, A 50 Geneva Convention II, A 129 Geneva Convention III, A 146 Geneva Convention IV, A 5 Convention Against Torture and preamble of the Rome Statute.

124 Dugard (n 123) 192.

the responsibility to prosecute international crimes by national courts will not be deprived by the establishment of the ICC.[125]

There are two guiding principles which underscore complementarity. The first principle is partnership. In terms of this principle, a positive and constructive relationship between an investigating and/or prosecuting State and the ICC must be maintained.[126] The second principle is vigilance, which entails that the ICC must also ensure that it carries out its designated responsibilities.[127] This means that the prosecutor must ensure that national proceedings are genuine by being able to gather information verifying this.[128] The principle of complementarity can increase the effectiveness of the court far beyond what it can achieve on its own.[129] This is because it establishes a network spanning across all 123 countries which can carry out careful and consistent proceedings.[130]

Article 17 of the Rome Statute determines the admissibility of a case before the ICC with reference to complementarity. Admissibility is not a matter that should be litigated; rather it is something that the prosecutor must take into account when deciding to investigate or prosecute.[131] This article provides for three different scenarios. The first is when no State has initiated any investigation into the international crimes and this case become admissible immediately.[132] There is no need to determine unwillingness or inability because none of the situations listed in article 17(1)(c) are present.[133] The second scenario is when a State has initiated an investigation into the international crimes but chooses not to initiate a prosecution.[134] In this scenario, the case will be inadmissible before the ICC unless an exception can be established.[135] The third scenario is when a State has initiated proceedings, but it can be proven that the proceedings are not genuine because the State is unable or unwilling to carry out a genuine proceeding.[136] This is the only scenario in which the issue of unwillingness and genuineness comes into play.[137]

125 *S v Basson* 2005 (12) BCLR 1192 (CC) par 172.
126 Jurdi 'Lessons for Complementarity for the International Criminal Court' 2009 *South African Yearbook of International Law* 28 33.
127 Jurdi (n 126) 33.
128 Jurdi (n 126) 33.
129 Office of the Prosecutor (n 122) 4.
130 Office of the Prosecutor (n 122) 4.
131 Office of the Prosecutor (n 122) 9.
132 Benzing 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity' 2003 *Max Planck Yearbook of United Nations Law* 591 601.
133 Office of the Prosecutor (n 122) 7.
134 Benzing (n 132) 618.
135 Office of the Prosecutor (n 122) 7.
136 Office of the Prosecutor (n 122) 7.
137 Office of the Prosecutor (n 122) 7.

There has been some uncertainty regarding the adverb 'genuinely'.[138] There has been confusion around whether 'genuinely' is meant as a qualifier for 'unable', 'to carry out' or 'to prosecute'.[139] The correct approach would be that it is a qualifier for the phrase 'to prosecute'.[140] Without such a qualifier, any national proceedings would prevent the ICC from obtaining jurisdiction even if these proceedings were sham trials.[141] The term 'genuinely' not only acts as a restrictive measure, but also sets an objective standard;[142] it is very much possible that a conflict torn country may be may be willing to conduct proceedings but unable to do so at the same time.[143] Proceedings are not found to be dubious simply because a State does not have the same resources available to them as the ICC,[144] such as funding and investigative teams. In essence, the determination is whether the proceedings are so inadequate that they cannot be found to be 'genuine'.[145]

Determining whether a State is unwilling to investigate or prosecute is challenging as it involves drawing inferences and considering circumstantial evidence.[146] Furthermore, it is a politically sensitive matter as it is an accusation against the State's prosecution authorities.[147] The Rome Statute provides certain factors that the ICC must consider when trying to determine whether a State is unwilling to investigate or prosecute.[148] There may be varying degrees of willingness within the State itself.[149] It may be possible that the police are willing to investigate but that the military prevents them from doing so, or that the judiciary is willing to prosecute but the executive is not.[150] The unwillingness of one branch of government may, and in most circumstances will, lead to the inability of the other branches to investigate or prosecute.[151] The unwillingness test is based on the procedure and not the substantive outcome.[152] If it was based on the outcome, it would be inconsistent with the Rome Statute.[153] Unwillingness may be inferred from political interference, obstructions and delays, institutional deficiencies and procedural irregularities:[154] for example, independence and impartiality.[155]

138 Office of the Prosecutor (n 122) 8.
139 Office of the Prosecutor (n 122) 8.
140 Office of the Prosecutor (n 122) 8.
141 Benzing (n 132) 605.
142 Benzing (n 132) 605.
143 Office of the Prosecutor (n 122) 8.
144 Office of the Prosecutor (n 122) 8.
145 Office of the Prosecutor (n 122) 8.
146 Office of the Prosecutor (n 122) 14.
147 Jurdi (n 126) 44.
148 A 17(2).
149 Office of the Prosecutor (n 122) 14.
150 Office of the Prosecutor (n 122) 14.
151 Office of the Prosecutor (n 122) 14.
152 Office of the Prosecutor (n 122) 14.
153 Office of the Prosecutor (n 122) 14.
154 Office of the Prosecutor (n 122) 14.
155 Office of the Prosecutor (n 122) 30.

Under the principle of complementarity, a third State which is investigating an international crime will prevent the ICC from exercising jurisdiction provided that the investigating State can obtain the accused with all the necessary evidence.[156] A third State may be investigating the international crimes based on active or passive nationality or even under universal jurisdiction.[157] A good example of a third State exercising jurisdiction is the investigation by South Africa into crimes against humanity, particularly torture, perpetrated in Zimbabwe.[158] Third States which exercise jurisdiction in this manner strengthen the complementarity regime as they encourage other capable States to do the same.[159] Third States are encouraged to provide the ICC or the State exercising jurisdiction with any assistance required to further the investigation or prosecution, of persons accused of committing international crimes.[160]

In view of the fact that no State has initiated an investigation into the international crimes committed by President Bashir, his case is admissible before the ICC. In terms of the ICC Act, South Africa would have been able to exercise universal jurisdiction while President Bashir was still in the country. [161] The ICC Act further provides that no immunity is recognized with respect to international crimes: [162] inability in this sense would therefore not have arisen. Had South Africa initiated proceedings, it would have precluded the ICC from exercising their jurisdiction. However, the varying degree of willingness within the government itself is best illustrated through the South African example. Here it was the judiciary that was willing to prosecute President Bashir while the executive was not, thereby leading to the inability to initiate proceedings. Even if South Africa had initiated proceedings, their inability to prosecute the Sudanese president would have reactivated the ICC's ability to exercise jurisdiction as the case is admissible under article 17.

4. Section B: Practical Hurdles in Prosecuting a Head of State

4.1 Cooperation with the ICC

'A giant without arms and legs, it needs artificial limbs to walk and work' was how the first ICTY President, Cassese, described the court; he criticsed the lack of enforcement mechanisms in

156 Office of the Prosecutor (n 122) 24.
157 Office of the Prosecutor (n 122) 24.
158 *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 1 SA 315.
159 Office of the Prosecutor (n 122) 24.
160 Office of the Prosecutor (n 122) 24.
161 s 4(3)(c).
162 s 4(2)(c).

particular.[163] The tribunal had to rely on the cooperation of States in order to investigate, arrest and prosecute persons accused of committing international crimes.[164] The same is true for the ICC. The ICC requires the cooperation of States to investigate arrest and prosecute the accused. Unless the Security Council issues a resolution in which it binds all members to co-operate, the obligation to cooperate will be a treaty obligation and not an obligation in terms of chapter 7 of the UN Charter.[165] An obligation to cooperate under a Security Council resolution is binding upon all members of the UN, as a treaty obligation is only binding on Member States.[166] Considering the fact that both the ICTY and ICTR were established in terms of a Security Council resolution under the respective chapter 7 powers, cooperation with these tribunals were mandatory. This is different to cooperation with the ICC, which in essence means that the ICC has even less enforcement mechanisms than the tribunals.[167]

Cooperation with the ICC is dealt with in part 9 of the Rome Statute. Article 86 provides that 'States parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'.[168] This is a general treaty obligation. The statute also requires that all Member States ensure their national laws provide for the necessary procedures of the cooperation that may be required.[169] Furthermore State parties are required to comply with arrest warrants when the accused is in their territory.[170]

As seen above, the establishment of the ad hoc tribunals under chapter 7 gave them stronger powers to order compliance than the ICC has as a result of its treaty obligation.[171] Irrespective of the theoretical difference in powers, it is impossible to obtain people and evidence without the State being willing to cooperate in the first place.[172] Cooperation is likely to be obtained when the *locus delicti* feels that it is in its best interests to comply and cooperate.[173] When the accused is a Head of State, the *locus delicti* is in all probability going to decide that it is not in its best interests to cooperate with the ICC.[174] Once cooperation from the *locus delicti* has been denied, the cooperation from Third States becomes harder to

163 Goldstone 'The Role of the United Nations in the Prosecution of International War Criminals' 2001 *Journal of Law & Policy* 119 124.

164 Southern Africa Litigation Centre (SALC) 'Positive Reinforcement: Advocating for International Criminal Justice in Africa' (2013) available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Positive-Reinforcement-Advocating-for-International-Criminal-Justice-in-Africa.pdf (15-09-2015) 54.

165 Charter of the United Nations.

166 SALC (n 164) 54.

167 SALC (n 164) 54.

168 Rome Statute.

169 A 88 Rome Statute.

170 A 89(1) Rome Statute.

171 Cryer 'Prosecuting Leaders: Promises, Politics and Practicalities' 2009 Gottingen Journal of International Law 45 62.

172 Cryer (n 171) 62.

173 Rastan 'Testing Co-Operation: The International Criminal Court and National Authorities' 2008 *Leiden Journal of International Law* 431 454.

174 Rastan (n 169) 431-456.

obtain. Cooperation from Third States relies on not only the presence of the accused or evidence in their territory, but also on their willingness to cooperate, which is dependent on the coincidence of who the accused is and what the evidence is.[175] In *the Pinochet case,* cooperation was denied because of this very reason.[176] However, this was not the case in the prosecution of Charles Taylor.[177] There is no denying that politics and political will play an important part in the cooperation of States.[178] The ICC must be able to uphold the delicate balance of ensuring that States are favourable towards it and comply with their cooperation obligations as well as ensuring that it is independent and that crimes by all parties are investigated and prosecuted.[179]

The issues which stem from State cooperation are in some ways comparable to extradition and mutual legal assistance.[180] The difference, however, is that extradition is the mere arrest and surrender of the accused to another State.[181] Mutual legal assistance goes beyond arrest and surrender and includes a host of activities that relate to the investigation and prosecution of crimes.[182] Both extradition and mutual legal assistance may be denied when there is a high probability of a human rights violation in the requesting State.[183] These issues are irrelevant when it comes to cooperation with the ICC as it adheres to international human rights standards at the highest possible level.[184]

The record of African States cooperating with the court has varied.[185] In terms of States which have cooperated with the ICC, Germaine Katanga and Mathieu Ngudjolo Chui were arrested and surrendered to the ICC by the Democratic Republic of Congo.[186] The Ivory Coast arrested and surrendered Laurent Gbagbo to the ICC.[187] If State parties do not comply with a request to cooperate by the ICC, they may be referred to the Assembly of State Parties or to the Security Council when the matter was referred to the ICC by the Security Council.[188] The ICC has referred Chad,[189] Djibouti,[190]

175 Cryer (n 171) 63.
176 Cryer (n 171) 63.
177 Cryer (n 171) 63.
178 Roper & Barria 'State Co-operation and the International Criminal Court: Bargaining Influence in the Arrest and Surrender of Suspects' 2008 *Leiden Journal of International Law* 457.
179 Roper and Barria (n 178) 457.
180 Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) 976.
181 Schabas (n 180) 976.
182 Schabas (n 180) 976.
183 Schabas (n 180) 976.
184 Schabas (n 180) 976.
185 SALC (n 164) 55.
186 SALC (n 164) 55.
187 SALC (n 164) 55.
188 A 86(7) Rome Statute.
189 *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-140.
190 *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti* ICC-02/05-01/09-129.

DRC[191] and Malawi[192] to the Security Council for non-cooperation relating to Al Bashir. Once a referral has been made, the Assembly of State Parties or the Security Council may take 'any measure they deem fit'.[193]

If the Security Council was to make a decision that there was a failure on behalf of the States to cooperate, they would be able to impose sanctions such as the interruption of economic and diplomatic relations.[194] However, regarding the aforementioned referrals, the Security Council has not imposed any sanctions to date. The Assembly of State Parties has adopted certain procedures in the case of non-cooperation by States that have an obligation to cooperate.[195] The procedure to be followed when there has been a referral of non-cooperation is an informal and urgent response prior to a formal response.[196] This informal response can consist of an urgent Bureau meeting or a letter from the Assembly of State Parties president.[197] It is evident that these procedures are neither punitive nor confrontational and are thus ineffective.

When the Security Council referred the situation in Darfur to the ICC, it stated that 'the Government of Sudan and all parties to the conflict in Darfur shall cooperate fully'.[198] This imposed a chapter 7 obligation only on Sudan to cooperate with the court. In the very same resolution, the Security Council further stated that it acknowledges that 'States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully'.[199] By choosing the word 'urges', the Security Council imposed no compliance obligations on non-member States; the only obligation that exists in terms of compliance is the treaty obligation upon Member States. The treaty obligation that exists among States is compulsory as the provision states that 'State parties shall … fully cooperate'; 'shall' is defined as a mandatory expression.[200] Furthermore, State parties such as Chad, Djibouti, DRC Malawi and South Africa all had the mandatory obligation to arrest President Bashir while he was in their territory.

The majority of African countries have opposed the proceedings against President Bashir.[201] South Africa has an obligation to cooperate with the ICC not only because they are a Member State to the Rome Statute but also because of its own national legislation. Despite these obligations, South Africa

191 *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* ICC-02/05-01/09-195.
192 *Al Bashir* case (n 103).
193 SALC (n 164) 56.
194 A 41 Charter of the United Nations.
195 United Nations, Assembly of State Parties (ASP) Resolution ICC-ASP/10/Res5 (2011).
196 ASP Resolution (n 195) 39.
197 ASP Resolution (n 195) 39.
198 Security Council Resolution (n 89).
199 Security Council Resolution (n 89).
200 http://www.merriam-webster.com/dictionary/shall (12-10-2015).
201 SALC (n 164) 57.

voted in favour of the 2009 AU Resolution.[202] This Resolution calls on all members of the AU to disregard the arrest warrant issued by the ICC against Al Bashir and thus places AU Member States which are parties to the Rome Statute in a difficult situation.[203] These States have competing obligations: they are obliged to cooperate with the ICC in terms of the Rome Statute but they are also obliged to cooperate with any AU decisions or policies.[204] The AU Constitutive Act[205] provides that a Member State which does not cooperate with the AU may be subjected to political and economic sanctions as well as being denied communication and transport to other Member States.[206]

The ICC's incapacity to enforce compliance, more particularly compliance with arrest warrants, is its pitfall. This makes ensuring cooperation at a national level vital.[207] Both South Africa and Kenya have enacted national legislation to enforce their compliance obligations with the ICC. Part 2 of the ICC Act is titled 'Judicial Assistance to Court' and contains several sections. Sections 14-32 contain many circumstances in which the 'relevant and competent authorities in the Republic' must 'cooperate with and render assistance to, the Court in relation to investigations and prosecutions'.[208] Section 14[209] in particular contains a list of instances in which the relevant authorities in South Africa must assist the ICC including: questioning of suspects,[210] identification and whereabouts of people and items,[211] taking evidence,[212] performing inspections *in loco*,[213] executing searches and seizures[214] as well as any other assistance which is not prohibited by law.[215] Kenya's International Crime Act provides that immunity will not constitute a ground for refusing to execute a request by the ICC for the surrender of an accused.[216]

As a result of its enactment of the ICC Act, which does make provision for cooperation with the ICC, South Africa was bound to arrest President Bashir. Similarly Kenya will be bound to surrender Al Bashir if he is in their territory because of the enactment of the International Crimes Act. Cooperation from other AU members which are not party to the Rome Statute is highly unlikely to be obtained for three reasons. First, they have an obligation to comply with the AU Decision to disregard the arrest

202 Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court Doc. Assembly/AU/13(XIII).
203 SALC (n 164) 57.
204 SALC (n 164) 57.
205 Constitutive Act of the African Union 2000.
206 A 23(2) Constitutive Act of the African Union.
207 SALC (n 164) 56.
208 ICC Act.
209 ICC Act.
210 s 14(c).
211 s 14(a).
212 s 14(b).
213 s 14(g).
214 s 14(h).
215 s 14(l).
216 A 27(1)(a) International Crimes Act 2008.

warrant. Second, the *locus delicti* is unwilling to cooperate and the person accused is a sitting Head of State, making cooperation by Third States uncertain. Third, non-member States do not have a chapter 7 obligation to cooperate as the Security Council simply urged them to cooperate. All other member States to the Rome statute are obliged to cooperate by part 9 of the Rome Statute.[217]

Additionally, African States which are party to the Rome Statute will have an obligation to cooperate fully. The UN Charter states that, 'members of the United Nations agree to accept and carry out the decisions of the Security Council',[218] thereby giving the Security Council the power to make decisions which are binding on all members of the UN and therefore binding on any AU members. The UN Charter further states:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.[219]

As a result of article 25 of the UN Charter,[220] all AU members which are party to the Rome Statute have an obligation under the Charter to fully cooperate with the ICC. This obligation overrides any obligation that they have towards the AU by virtue of article 103.[221] They will, however, have to consider their obligations to comply with the AU Resolution; this is where the political considerations will come into play.

As a result of this political factor and the hostility of African States towards the ICC, it is up to civil society organisations to assist the ICC as much as possible. These organisations have had to come up with creative ways to pressure their governments into complying with their Rome Statute obligations.[222] If States are the limbs of the court as Cassese described, then civil society organisations have become the nervous system prompting them to move.[223]

4.2 Effects of the ICC Act on South Africa

It has been 13 years since South Africa enacted the ICC Act which mentioned war crimes and crimes against humanity for the first time in domestic legislation.[224] Despite Africa's initial support of the ICC, only three African countries have domesticated their obligations towards the court. South Africa was

217 Rome Statute.
218 A 25.
219 A 103.
220 Charter of the United Nations.
221 Charter of the United Nations.
222 SALC (n 164) 55.
223 SALC (n 164) 55.
224 Du Plessis (n 109) 1.

the first to incorporate the Rome Statute and it obligations into its domestic law, with Senegal and Kenya following suite.[225]

The ICC Act makes prosecution of international crimes before South African national courts possible. The preamble of the ICC Act states that South Africa is 'committed to bringing persons who commit such atrocities to justice…in a court of law in the Republic in terms of its domestic law where possible'.[226] Section 3(d) further states that one of the objectives of the Act is to enable the national prosecuting authority to prosecute and the higher courts to adjudicate over any cases in which a person is accused of committing a crime outside of its jurisdiction in certain circumstances.[227] By analysing the South African government's reaction to Al Bashir's visit, one can conclude that South Africa is no longer taking their international obligations seriously.

4.2.1. Jurisdiction

Section 4 defines the jurisdiction of South African courts in respect of the crimes before them.[228] Section 4(3) particularly deals with extra-territorial jurisdiction.[229] In terms of this section, a South African court will have jurisdiction over any person who commits an international crime outside of South Africa's borders if the person is a South African citizen,[230] ordinarily resident in South Africa,[231] if the crime was committed against a South African citizen or someone who is ordinarily resident in South Africa,[232] or if after the commission of the crime the accused is present in the territory of South Africa.[233] If the requirements under section 4(3) are met, a South African higher court will have jurisdiction because the crime is deemed to have been committed in South Africa.[234]

The jurisdictional trigger found in section 4(3)(c) is based on the concept of universal jurisdiction. Universal jurisdiction can be described as jurisdiction which exists for all States for international crimes.[235] This is because the accused is 'an enemy of mankind in whose punishment all States have an equal interest', therefore allowing the national court to act as an agent of the international community.[236] Universal jurisdiction can therefore be seen as the ability to act irrespective of where the crime was actually committed or the accused's nationality.[237] Yet international law merely allows States

225 Du Plessis (n 109) 1.
226 ICC Act.
227 s 3(d) ICC Act.
228 s 4 ICC Act.
229 s 4(3) ICC Act.
230 s 4(3)(a) ICC Act.
231 s 4(3)(b) ICC Act.
232 s 4(3)(d) ICC Act.
233 s 4(3)(c) ICC Act.
234 s 4(3) ICC Act.
235 Du Plessis (n 109) 4.
236 Dugard (n 123) 154.
237 Du Plessis (n 109) 4.

to exercise universal jurisdiction over international crimes: it does not compel them to do so.[238] Most States will not prosecute an accused for international crimes unless the crime has been criminalised under domestic laws, with South Africa being one of them.[239] Cassese is of the opinion that universal jurisdiction is not an absolute right under which all States are permitted to investigate and prosecute an international crime.[240] He believes that States are 'potentially' enabled to act, but that currently universal jurisdiction may only be established if the accused is in the prosecuting States territory.[241] Section 4(3)(c) therefore limits absolute universal jurisdiction. The act therefore adopts Cassese's view and demonstrates a 'conditional' universal jurisdiction dependent on the accused's presence in South Africa.[242]

In the case of President Al Bashir, jurisdiction was validly founded under section 4(3)(c) because he was physically present in South Africa for the AU summit in Johannesburg. The National Prosecuting Authority would therefore have been able to not only investigate, but also to successfully initiate prosecutions in a South African High Court against Bashir for the genocide, war crimes and crimes against humanity he committed in Darfur.

4.2.2. Investigation and Prosecution

Under the current body of international law, when exercising universal jurisdiction, States may investigate international crimes without the accused being present in their territory.[243] Principle 1(2) of the Princeton Principles of Universal Jurisdiction States that universal jurisdiction may be exercised by a competent judicial authority of any State to try a person accused of international crimes provided the person is present before the judicial body.[244] The wording of the principle does not prevent a State from investigating the commission of international crimes in the absence of the accused.[245]

Adopting 'anticipated presence' as a precondition for opening an investigation will allow South Africa to comply with their complementarity obligations under the Rome Statute and will ensure the ICC Act is used in the manner that parliament intended.[246] In addition to enacting the ICC Act, South Africa established a Priority Crimes Litigation Unit within the National Prosecuting Authority (NPA) to fulfil

238 Dugard (n 123) 55.
239 Dugard (n 123) 55.
240 Cassese 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' 2003 *Journal of International Criminal Justice* 589 592.
241 Cassese (n 240) 592.
242 Du Plessis (n 109) 4.
243 Du Plessis (n 109) 5.
244 Robinson and Princeton University (n 45) 28.
245 Robinson and Princeton University (n 45) 44.
246 Du Plessis (n 109) 6.

their obligations to the Rome Statute in 2003.[247] This unit is tasked with the management and direction of investigations relating to international crimes.[248]

There are three factors which must be taken into account when the Priority Crimes Litigation Unit and the National Director of Public Prosecutions (NDPP) are determining whether an investigation or prosecution under the ICC Act should be conducted.[249] First, the decision to investigate or prosecute must take the aims of the ICC Act into account.[250] The primary aim of the ICC Act is to ensure the prosecution of individuals who have committed international crimes.[251] Second, in the event that the NDPP chooses not prosecute a person accused of international crimes, the NDPP must inform the central authority of his decision and the reasons on which it is based. The central authority must then forward both the decision and reasons to the registrar of the ICC.[252] Third, the decision must comply with the policy of the NPA.[253]

In terms of the policy, when deciding whether to prosecute, the prosecutor shall consider all relevant factors: the seriousness of the crime, the way in which the crime was committed and its effect on the victim, the nature of the crime, its pervasiveness and repetition, and the economic impact of the crime on the effected community.[254]

International crimes such as genocide, war crimes and crimes against humanity are *jus cogens* crimes.[255] They are by their very nature the most serious crimes and it is logical that an investigation and prosecution of one such should be conducted under the ICC Act. In the event that there is no investigation and/or prosecution of these crimes under the ICC Act, sufficient and compelling reasons of public interest must exist.[256] In determining what is in the public interest, cognisance must be taken of the gravity of the crime, international condemnation and the universal commitment to suppress these crimes.[257] The Constitutional Court confirmed these factors in the *S v Basson*.[258] The court held that:

> *Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative*

247 GG 24876 (23-05-2003)
248 GG (n 247).
249 Du Plessis (n 109) 7.
250 Du Plessis (n 109) 7.
251 Du Plessis (n 109) 7.
252 s 5(5) ICC Act.
253 Du Plessis (n 109) 7.
254 National Prosecuting Authority (NPA) Prosecution Policy (2013) 7.
255 Dugard (n 123) 38.
256 NPA (n 249) 7.
257 NPA (n 249) 7.
258 *Basson* case (n 125).

> *desirability of prosecuting war criminals, only the most compelling reasons would have justified the Supreme Court of Appeal in exercising its discretion to refuse to rule on the charges.*[259]

President Bashir was invited to the AU Summit by the South Africa, therefore 'anticipated presence' was existent and an investigation should have been opened under the ICC Act. The Priority Crimes and Litigation Unit should have considered that the aim of the ICC Act is to prosecute individuals such as Al Bashir who have committed war crimes and crimes against humanity. There was no decision to investigate, let alone prosecute, and the central authority should have notified the Registrar of the ICC but it did not. Furthermore, a decision not to prosecute should be based on the NPA's policy, which it was not: the seriousness, nature and economic effects of the crimes were ignored.

4.2.3. Arrest and Surrender

The ICC Act is based on the understanding that the ICC will have to rely on national jurisdictions to gain custody of the accused.[260] The ICC Act mentions two types of arrests, the first of which is where the ICC issues an arrest warrant for the accused.[261] Once the arrest warrant has been received by South Africa, it must be forwarded to the Director General of Justice and Constitutional Development to convince the local courts that there are reasonable and sufficient grounds for the accused's arrest.[262] The Director General must then forward the request to a magistrate to have the warrant endorsed.[263] The second type is when the arrest warrant is not issued by the ICC but by the NDPP.[264] The Director General receives a request by the ICC for the provisional arrest of an accused and forwards this request to the NDPP.[265] The NDPP must then apply for a warrant before a magistrate.[266]

Once the accused has been arrested by South Africa, he must be surrendered to The Hague.[267] Before the accused is surrendered, a magistrate must make a committal order.[268] A committal order will be made if the magistrate is satisfied that the accused is in fact the person named in the arrest warrant,[269] the accused has been arrested in accordance with national procedures[270] and the accused's rights as granted in the Bill of Rights have not been violated.[271] Surrendering the accused to The Hague is very

259 *Basson* case (n 125) par 184.
260 Du Plessis (n 109) 9.
261 s 8.
262 s 8 (1) ICC Act.
263 s 8 (2) ICC.
264 s 9 ICC Act.
265 s 9(1) ICC Act.
266 s 9(2) ICC Act.
267 Du Plessis (n 109) 9.
268 s 10(5) ICC Act.
269 s 10(1)(a) ICC Act.
270 s 10(1)(b) ICC Act.
271 s 10(1)(c) ICC Act.

different from extraditing him to another country. First, the 'double criminality' rule is the backbone of any extradition proceeding, whereas this is not a requirement for surrender.[272] Second, in the case of an extradition, there must be a *prima facie* case against the accused;[273] regarding a surrender, the magistrate must merely be satisfied that the requirements in section 10(1) are met in order to make an order of committal.[274]

Despite the ICC having issued not one but two arrest warrants for President Al Bashir, South Africa welcomed him with open arms. President Al Bashir was not arrested in South Africa and consequently could not have been surrendered to The Hague. Had he been arrested, an order of committal would most definitely have been made and South Africa would have played a significant part in ending impunity.

3. Section C: Outcome of Litigation in South Africa

The day that President Bashir arrived in South Africa, the ICC Pre-Trial Chamber II issued an order that South Africa immediately arrest him.[275] As a result of the guarantee provided by the South African government not to arrest President Bashir,[276] South African Litigation Centre (SALC), a civil society organisation, instituted proceedings in the High Court of South Africa for an order against the Minister of Justice and Constitutional Development, along with several other officials, compelling them to ensure that President Bashir does not leave the country until the High Court makes a ruling determining whether he should be arrested and surrendered to the ICC for trial. On 14 June 2015, an interim order was issued by the High Court ordering President Bashir to remain in South Africa until the court has determined whether he should be arrested and surrendered.[277]

On 15 July 2015, the High Court of South Africa unanimously ruled:

> *That the Respondents are forthwith compelled to take all reasonable steps to prepare to arrest President Bashir without a warrant…and detain him, pending a formal request for his surrender from the International Criminal Court.*[278]

The High Court of South Africa elaborated on the reasons for its judgment. First, South African law must be interpreted in a manner that complies with international law:[279] the Rome Statute 'expressly

272 Dugard (n 123) 219-220.
273 Du Plessis (n 109) 10.
274 s 10 (1) ICC Act.
275 *The Prosecutor v Omar Hassan Ahmad Al Bashir Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir* ICC-02/05-01/09-242 par 1.
276 GG (n 13).
277 *Southern Africa Litigation Centre* case (n 12).
278 *Southern Africa Litigation Centre* case (n 12).

provides that Heads of State do not enjoy immunity under its terms' and a similar provision is found in the ICC Act, which means that immunity which President Bashir would have normally enjoyed is waived with respect to international crimes.[280] Second, South Africa's obligations towards the ICC cannot be overridden by any decisions taken by the AU.[281] Finally, the court stated that 'the rule of law must prevail'.[282]

Following President Bashir's escape from South Africa, Ian Khama, the President of Botswana, urged all ICC member States to cooperate with the court and stated 'we therefore find it disappointing that President Al Bashir avoided his arrest when he cut short his visit and fled, in fear of arrest, to his country'.[283] On 16 June 2015, the respondents applied to the High Court of South Africa for leave to appeal.[284] The High Court denied their application to appeal the matter as it was now 'moot'.[285] The respondents have since lodged a petition with the Supreme Court of Appeal in order to appeal the High Courts' decision.[286]

4. Conclusion

In conclusion, we can state that it is theoretically possible to prosecute President Bashir, who is a sitting Head of State. The first theoretical issue which was examined was immunity. President Bashir will not be able claim functional or personal immunity before the ICC as no immunity exists for international crimes. Furthermore, the defence of functional or personal immunity before a foreign national court, such as the High Court of South Africa, will not be available as a result of the section 4(2)(a) of the ICC Act. The second theoretical issue was admissibility before the ICC. The case against President Bashir is admissible before the ICC because there has been no investigation or prosecution by any State, including South Africa.

Furthermore, it is also practically possible to prosecute President Bashir. The first practical issue with prosecuting a sitting Head of State, such as President Bashir, is obtaining the cooperation of other States. All States which are members to the Rome Statute, including those that are also members of the AU, have an obligation to cooperate with the court. Sudan which is not a party to the Rome Statute is bound to cooperate because of the Security Council Resolution. Obtaining the cooperation of States

279 s 233 Constitution of the Republic of South Africa, 1996.
280 *Southern Africa Litigation Centre* case (n 12) par 28.8.
281 *Southern Africa Litigation Centre* case (n 12) par 28.13.
282 *Southern Africa Litigation Centre* case (n 12) par 33.
283 http://www.iol.co.za/news/africa/botswana-critical-of-sa-over-bashir-1.1872656 (18-07-2015).
284 http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ (01-10-2015).
285 http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ (01-10-2015).
286 http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ (01-10-2015).

which are not party to the Rome Statute, but are members of the AU, is more challenging. This is because they are bound by the AU Resolution calling for the non-cooperation with the ICC in the matter of President Bashir. As a result of the ICC Act,[287] South Africa would have been able to exercise universal jurisdiction and institute proceedings against President Bashir. By electing not to institute proceedings against him, South Africa was bound to then have him arrested and surrendered to The Hague to stand trial.

If South Africa does elect to withdraw from the Rome Statute, their obligations will not cease to exist. First, as a result of article 127(1), the effect of a withdrawal will only take place after one year. In that year, South Africa will still have to respect and adhere to all their obligations they incurred under the Rome Statute. Furthermore, unless Parliament repeals the ICC Act and chooses to withdraw from all international treaties, the obligations under these will still remain intact.

[287] ICC Act.

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THE EFFECT OF INTERNATIONAL HUMAN RIGHTS LAW IN PROTECTING THE FREEDOM OF SPEECH: A CASE STUDY OF DEFAMATION BETWEEN TWO CITIES OF COMMON LAW TRADITION

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This article is one of the selected ones for the ALSA Law Review. In the framework of our cooperation with the Asian Law Students' Association (ALSA), we exchange and publish both one of our articles in order to raise awareness of hot topics in both continents.

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1. Introduction

Albeit inheriting from the same common law tradition, Hong Kong and Singapore diverted significantly in tort of defamation, especially when the affected persons are public figures. While both constitutions guarantee free speech, the courts of jurisdictions balanced free speech with defamation on different weights. Why such departure?

This paper argues that international human rights law plays a pivotal role in shaping freedom of speech in local jurisprudence. The higher the human rights law diffuses into the legal system, the higher the jurisprudence leans towards narrow interpretation of defamation. Hong Kong, with multiple international human rights law provisions in force, allows for wider margin in protecting free speech, while Singapore, in an almost vacuum of such provisions, hold reputation of persons, especially public figures, to a much higher weight.

This paper starts with discussion of the effect of international and transnational legal regime on local jurisprudence. Then it will examine the guarantee of free speech in international human rights law, together with their incorporation and adoption in Hong Kong and Singapore.

After laying the basis, this paper will move on to discuss landmark cases to demonstrate the effect of international human rights law on defamation. The background of each cases will be briefly discussed, followed by analysis of judgments on different issues. For the purpose of this paper, only these elements of the judgment will be discussed: court's approach to defamation in general, the interpretation of defamatory words, defence of fair comment, and the court's approach towards public officials affected by allegedly defamatory words.

2. Effect of International and Transnational Legal Regime on Local Jurisprudence

Comparative law has always been concerned with comparison amongst jurisdictions, but in recent times, its ignorance of the effect of international and transnational legal regime on local jurisprudence has raised doubts.[1] While this paper does not attempt to propose a new method in examining comparative law issues, it will attempt to use a vertical integration method in examining the effect of international human rights legal regime on local jurisprudence.

The progress of comparative law has been largely ignoring the development of transnational and international legal regime. Since the Paris Conference in 1900, the mainstream of comparative law has always been the study of national legislations.[2] While transnational legal regime has been studied in

1 M Reimann 'Beyond National Systems: A Comparative Law for the International Age' 75 Tulane Law Review 1103 (Reimann).

2 Ibid 1108.

comparative law, it is more sporadic than regular, and scholarly interest on the effect of such regime on local jurisprudence is lacking.[3]

To remedy the situation, it has been suggested that instead of horisontally compare among jurisdictions, it would be more desirable if these transnational or international legal regime can be incorporated into the studies of comparative law.[4] For example, comparative law scholars must examine the interplay between national and international legal regimes.[5]

3. Freedom of Speech in International Human Rights Law

Freedom of speech has been enshrined in international human rights law. Although a recent term invented in Universal Declaration of Human Rights, freedom of speech has been pervading among all important international human rights law instruments.

The first of the international human rights law regime, Universal Declaration of Human Rights of 1948, has coined the term of 'freedom of expression'. Mentioned in the Preamble as 'freedom of speech' and later in Art 19 as 'freedom of expression', the article entails 'a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion.'. Although not a legally binding document, the Declaration nevertheless serves as precursor to the later international human rights covenants.[6]

The International Covenant on Civil and Political Rights of 1966, a landmark in international human rights law, also protects freedom of speech. With its widespread number of parties to the Covenant and its extensive coverage of rights, it is by far the most important international human rights documents there is.[7] Almost identical to the relevant provision in the Declaration, Art 19 of the Covenant specifically provides for freedom of speech, which entails the right to hold opinions without interference, the right of access to information, and the right to impart information and ideas of all kinds.[8] In regards to defamation, the Human Rights Committee, the UN body which issues General Comments to explain the meaning of ICCPR, stated in one of its General Comments that 'Defamation

3 Ibid 1110.
4 Ibid 1116.
5 Ibid 1117.
6 S Joseph and others *The International Covenant on Civil and Political Rights: Case, Materials and Commentary* (2nd edn, OUP 2004) 7 [1.10] (Joseph).
7 Ibid 8 [1.12].
8 UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue' A/HRC/14/23 (20 April 2010) [24].

law should be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression'.[9]

There are other regional human rights instruments that covers the same freedom of speech. The European Convention of Human Rights of 1950 is one of the first regional human rights instrument, and its protection of freedom of speech is extensive, as effected by domestic legislation of the signatories, and the jurisprudence of European Court of Human Rights. Art 10 of that Convention provides for freedom of expression without interference and regardless of frontiers.[10]

4. Applicability of International Human Rights Law in Hong Kong and Singapore

Hong Kong and Singapore have adopted different international human rights standard in their respective jurisdiction. Hong Kong is more inclined to accept universal standards of human rights, while Singapore is skeptical about such standards.

Hong Kong is under rigorous international human rights legal regime, conforming to universal standards as observed worldwide. The constitution of Hong Kong, Basic Law, contains various provisions of fundamental rights, including freedom of speech.[11] Moreover, Art 39 of Basic Law also guarantees the applicability of ICCPR in Hong Kong, reflected in the Bill of Rights Ordinance.[12] These instruments, such as the Ordinance, which promulgated in 1991, has trickled down the human rights tradition into the jurisprudence of Hong Kong. Since 1997, the Court of Final Appeal, together with the whole judiciary, has frequently invoked human rights principles enshrined in ICCPR[13] or Basic Law[14] to protect the fundamental freedoms of Hong Kong citizens or those within the jurisdiction.

On the other hand, Singapore is stranger to the international human rights standard. Being a member of the United Nations since 1958, it has been adopting the Universal Declaration of Human Rights.[15] However, given the limited legal power of the Declaration, it is hard to say if it affects any of the local legislation, or the Singapore Constitution, meaningfully.[16] Apart from that, Singapore has never adopted any of the international human rights instruments concerning civil and political rights, let alone

9 CCPR 'General Comment 34: Article 19: Freedoms of opinion and expression' CCPR/C/GC/34 (12 September 2011) [47].
10 European Convention on Human Rights (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 Art 10.
11 Basic Law Art 27.
12 Cap 383.
13 *R v Sin Yau Ming* (1991) 1 HKPLR 88.
14 *Ng Ka Ling and another v The Director of Immigration* (1999) 2 HKCFAR 4.
15 K Tan 'Fifty Years of the UDHR: A Singapore Perspective' (1999) 20 Singapore Law Review 239, 241.
16 Ibid, 275.

conforming to the standards they set.[17] Singapore has also been a fierce advocate against the 'West-dominant' human rights standards, and instead calling for a more state-centered and pragmatic approach to human rights.[18]

In short, while Hong Kongers enjoy human rights as guaranteed by their constitution, which is confined by international human rights legal regime, Singaporeans enjoy no rights where international human rights law would have granted them should Singapore entered into the regime, and their human rights are largely modified around state interest.

5. Cases in Examination

To demonstrate the effect of international human rights legal regime on local jurisprudence, several defamation cases are chosen to assist the exercise. They are leading cases in their respective jurisdictions, and are touching upon the intersection of defamation and freedom of speech in their respective jurisdictions.

Two Hong Kong cases are chosen for the purpose of this paper. They both are originated from comments and wordings made during TV shows on current affairs. The first case in question, *Eastern Express Publisher Ltd & Another v Mo Man Ching & Another*,[19] concerns remarks made in a TV programme on plaintiff's legal actions towards other news agencies.[20] The second case, *Cheng & Another v Tse Wai Chun*,[21] concerns a dialogue in a radio programme that affected the plaintiff's reputation in a travel industry dispute.[22]

One Singapore case is chosen for comparison with the Hong Kong cases. *Review Publishing Ltd and others v Lee Hsien Loong and others appeal*[23] is a case where all the classic elements of defamation in Singapore are present: Public Figures (Lee Kuan Yew and Lee Hsien Loong), Media (Far East Economic Times), and a defamatory speech printed on Far East Economic Times. The case is about the allegation of the leaders of Singaporean Government being corrupt and unfit for office, as drawn from the inference of the National Kidney Fund scandal around the time when the article was authored.[24]

Looking at these cases in totality, there are some striking similarities. For example, these cases all concerns statements made via media to the general public. Moreover, the courts are faced with whether

17 Article 19 'Singapore: no real commitment for change despite pledge' (Article 19, 26 September 2011) < https://www.article19.org/resources.php/resource/2747/en/singapore:-no-real-commitment-for-change-despite-pledge> (accessed 25 April 2016).
18 Tan (n 15) 242-243.
19 (1999) 2 HKCFAR 264 (*Eastern Express*).
20 Ibid 267-268.
21 [2003] 3 HKLRD 418 (*Cheng*).
22 Ibid 426-427.
23 [2009] 1 SLR 52 (*Review Publishing*).
24 Ibid [4]-[15].

the maker of statements are commenting on public interest matters. A number of defence, including defence concerning human rights are raised. These will be examined below one by one.

6. Courts' Approach to Defamation Cases

Courts in both jurisdictions have framed the elements of defamation slightly differently, but with different approaches. While Hong Kong emphasizes the effect of human rights on defamation cases, Singapore has taken defamation strictly on protection of reputation, and rejected any argument based on human rights claim.

Hong Kong courts have consciously included human rights in their defamation judgments, and generally offer a greater protection of freedom of speech. In both of the cases examined, human rights are listed as the official catchwords.[25] Both judgments include a considerable length of text dedicated to discuss the protection of freedom of speech in defamation.[26] Moreover, specifically in *Cheng v Tse Wai Chun*, the then-Chief Justice emphasized the court must grant a generous interpretation of the freedom of speech,[27] thus narrowing the scope of defamation. The frequent mention of human rights is a direct evidence of how the courts in Hong Kong treat cases of defamation in general.

Singapore courts have been treating defamation cases as if any other tort cases, with little regards paid in its possible effect on limiting freedom of speech. The catchword for the case mentioned nothing about constitution, or human rights protection.[28] This has always been the case in Singapore, since another landmark case decided by the Court of Appeal in 1992,[29] where it has been commented as:

> *'It is perhaps not overly fastidious to observe that, notwithstanding the* ***significant pronouncements concerning constitutional law*** *in general and freedom of speech in particular,* ***this decision is only indexed under "Tort" and "Defamation".*** *One would have thought that the case should also be indexed under "Constitutional Law".'*[30] *(Emphasis added)*

Perhaps this best sums up the court's attitude on defamation in Singapore.

7. FORMATION AND ELEMENTS OF DEFAMATION

The constitution of defamation, although stem from the same legal principles, is interpreted narrowly in Hong Kong, yet broadly in Singapore.

25 *Cheng* (n 21) 418D.
26 Ibid 422F-H; *Eastern Express* (n 19) 278C-E.
27 Ibid.
28 *Review Publishing* (n 23) 52.
29 *JB Jeyaretnam v Lee Kuan Yew* [1992] 2 SLR 310 (CA) (Singapore) (JB).
30 M Hor 'The Freedom of Speech and Defamation' [1992] Singapore Journal of Legal Studies 542, 542.

In Hong Kong, given the generous interpretation of the freedom of speech, defamation has been limited to certain well-defined rules. It is said that the source of defamation law stems from Defamation Ordinance, English judicial decisions, Hong Kong decisions and other common law jurisdictions decisions. In essence, the elements of defamation[31] are (1) defamatory statements, either direct or 'in some metaphorical or secondary innocent sense',[32] (2) which refers to plaintiff, and (3) published so that the public is aware of the statement. It should also be noted that the court in Hong Kong takes a very lenient attitude towards statements made in common life, stating that 'ordinary people in everyday speech do not craft their language as if they were lawyers…people often use words loosely.'[33] Thus giving leeway for anyone, including journalists, to speak freely without trampling onto the regime of defamation.

Singaporean jurisdiction has employed a strict, and even rather expanded, definition of defamation, which is a serious threat to freedom of speech and of the press. While the elements for defamation is largely the same,[34] It is specifically stated that the courts declined to introduce new refinements that would otherwise be available in other common law jurisdictions with international or regional human rights regime protection.[35]

8. Defence in Defamation: Right to Fair Comment vs Rejection of Human Rights as Defence

The defence of fair comment in defamation protects makers of statements from defamation if they are basing their comments or opinions on facts reasonably. To constitute a successful defence at common law, the defendant must establish that the comments, which are accused to be defamatory by the plaintiff, is a fair comment on the issue itself, founded by genuine belief of the maker of the statement. The different approaches adopted in Courts in Hong Kong and Singapore marks a striking difference in valuing human rights on freedom of speech across two cities.

While Hong Kong recognizes the right to fair comment a constitutional defence, Singapore has fiercely rejected such formation, and taking a much restricted approach. Free from any international human

31 DK Srivastava & AD Tennekone *The Law of Tort in Hong Kong* (2nd edn, LexisNexis 2005) 594-616.
32 Ibid 598.
33 *Eastern Express* (n 19) 269A-C.
34 GYK Chan and PW Lee *The Law of Torts in Singapore* (Academy Pub 2011) 451 [12.009].
35 KR Evans *The Law of Defamation in Singapore and Malaysia* (2nd edn, Butterworths 1993) 98-99.

rights obligation, the Singaporean courts have repeatedly rejected any defence that invokes international human rights, or any human rights at all.

Hong Kong has classified the defence of fair comment as a right, and has given a generous interpretation on it. As put by the then-Chief Justice, the defence of fair comment, being a right, 'is a most important element in the freedom of speech',[36] by citing relevant provisions in Basic Law.[37] Although courts in both cases went on to discuss the specific elements without explicitly referring to any human rights principle, it should be read that the court has put human rights, particularly freedom of speech, paramount to the issues themselves.

Singapore has followed strictly to the common law tradition of protecting reputation over freedom of speech, and rejected any human rights-related consideration in applying fair comment.[38] In the body of the judgment discussing defence related to privilege, the court in Singapore explicitly rejected English common law on providing journalists privilege because they are 'based on Art 10 of the European Convention and the Human Righs Act, which collectively elevated freedom of speech from being merely a common law right to being "a right based on a constitutional or higher legal order foundation".[39] By specifically distinguishing these privileges from Singaporean common law tradition, it is a sign that the court has posted to the general public of their repugnance on international human rights legal regime.

The court has also placed heavy burden on the media to prove fair comment by imposing immense liabilities that are arguably arbitrary interference with freedom of speech. In the judgment, the court has asked the publisher, being 'no strangers to court actions for defamation',[40] to 'have lawyers to advise them on the law of defamation in the various jurisdictions in which they publish'.[41] The court went on to say that 'it is incumbent upon the media to make it clear in its editorials or opinion pieces which statements are comments and which statements are simply factual statements or imputations of fact.' (Emphasis added [42] Moreover, the court added that 'the media has a responsibility to its readers…potential plaintiff whose reputation may be seriously damaged by careless words which the ordinary reasonable person may view as statements of fact rather than comments.'[43]

By including these criteria in the court's assessment for a fair comment defence, the court in Singapore is imposing immense liabilities for the media to fulfil, thus severely limiting their freedom of speech.

36 *Cheng* (n 21) 422F-H.
37 Basic Law Art 27.
38 Evans (n 34) 98-99.
39 *Review Publishing* (n 23) [244].
40 *Review Publishing* (n 23) [145].
41 Ibid.
42 Ibid.
43 Ibid [147].

9. Public Official: Standard of Tolerance

Although Hong Kong courts have rarely commented on public official's status as affected persons to the statements, other jurisdictions have given a wider appreciation to freedom of speech. It is held by the European Court of Human Rights that when politician is affected by allegedly defamatory speech, 'the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual…the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance'.[44] There has also been theory suggesting that with regards to public interest matters, there should be a marketplace of ideas because of 'the aggregate benefits to society and not because an individual speaker receives a particular benefit'[45]. Therefore, places which conforms more to international human rights standard prefers, in the situation involving public officials, a wider margin to allow for speech to be made against them.

Meanwhile, Singaporean courts are concerned with public official's reputation and integrity of political system far more than freedom of speech. First, unlike some other jurisdictions, it made distinction between public officials and ordinary citizen when they are affected by the defamatory speech, but leaning towards politicians. Second, the court also says that Singapore does not abide by the concept of marketplace of ideas, and there is 'no law recognizing journalistic material as being of special importance in the context of publishing matters of public interest.'[46] It went on to state that there is 'no place in our political culture for making false defamatory statements which damage the reputation of a person for the purpose of scoring political points'.[47] These strong statements protecting politicians strike a clear difference between Singapore and the rest of the world, and, by fiercely fending off international human rights standards, developing its own version of 'protection of reputation' over freedom of speech.

10. Conclusion

The effect of international human rights law on protecting freedom of speech is unexpectedly huge, as reflected in cases of defamation. While numerous international human rights instruments stressed the importance of freedom of speech, it is not without limits. Defamation has always been an exercise balancing the freedom of speech and protecting reputation of citizens.

44 *Lingens v Austria* 8 EHRR 407 (1986) (European Court of Human Rights).
45 S Ingber 'The Marketplace of Ideas: A Legitmizing Myth' (1984) 33 Duke Law Journal 1, 4-5.
46 *Review Publishing* (n 23) [272(c)].
47 Ibid [285].

However, the balance can sometimes be disproportionate towards protection of reputation, which may be easily exploited by governments to suppress freedom of speech beyond permissible limits. Looking at Hong Kong and Singapore, both inheriting the common law from England, it is easy to spot the difference: the more liberal regime in Hong Kong, and the more pro-government, pro-reputation regime in Singapore. With the balance tipping away from freedom of speech, one cannot stop but to propose that the origin of such difference lies within the applicability and the diffusion of international human rights law and ideas into their respective jurisdictions. Obviously, with stronger protection in fundamental rights as guaranteed by the ICCPR and the Basic Law, Hong Kong takes the lead in this issue.

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