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LETTER FROM THE EDITORS

Dear Reader,

The ELSA Law Review has had a turbulent past and has an even more uncertain future. Nevertheless, it has never deviated from its commitment to provide law students and young lawyers a platform to publish their academic work and to create a forum for the analysis and discussion of contemporary legal issues. In a world full of legal journals and opinions, the ELSA Law Review has created a new and accessible platform of additional opportunities for students.

With this in mind, we are grateful for the 50 high quality articles we received, written by graduates and undergraduates across Europe on a large variety of legal topics, from human rights to energy law to arbitration and more. The selection of final articles to include in this edition was a difficult challenge as the submissions were fascinating.

In this edition, the best 7 articles were selected, reviewed and published. The topics differ, however they all contribute to the discussions in the international legal community. Furthermore, we have included an article from the ALSA Law Review to provide the reader with a possibility to read a bit about the topics of discussion of our Asian colleagues. We are exceptionally grateful for this as it aids the reader in achieving a better understanding of our global legal society.

As with every publication, the ELSA Law Review would not be realised without the critical support of certain individuals. First and foremost, we would like to sincerely thank the whole Editorial Board – Despina Ziana, Kaleb Honer, Sam Hussaini, Alice Gould, Pavlo Malyuta, Hoang Anh Nguyen and Desara Dushi – for their dedication and hard work. They were invaluable in carrying out the publication of this edition of the ELSA Law Review.

On behalf of the whole Editorial Board and ELSA, we would like to express our gratitude to our Academic Partner Católica Global School of Law and the Academic Reviewers. By undertaking the peer-review process of the shortlisted articles, their academic contribution helped ensure the high academic quality of the publication.

We hope the ELSA Law Review will assist you in becoming more knowledgeable about law and that you enjoy reading it as much as we enjoyed creating it.

Best wishes,

Jakub Caja, Kerli Kalk, Constantina Markou

Editors-in-Chief of the 2018 ELSA Law Review

IS IT NECESSARY TO UTILISE THE CRIMINAL JUSTICE SYSTEM IN CASES OF VIOLENCE WITHIN SPORT AND TO WHAT EXTENT, IF ANY, SHOULD SPORT BE GOVERNED INTERNALLY?

Sophie Adams

The notion of sports law is a relatively new area of practice for lawyers and is already causing big debates as to whether the utilisation of the law within sport is entirely necessary and if so, to what extent the law should be involved. The biggest question raised by academics such as Edward Grayson and Simon Gardiner, is the use of criminal law within sport and whether sport's National Governing Bodies (NGB's) are well enough equipped to cope with seemingly criminal actions by athletes, to avoid the necessity of using the criminal justice system.

We must firstly consider the definition of sport. There is no precise legal definition of sport in English Law.¹ The dictionary defines sport as "an activity involving physical exertion and skill in which an individual or team competes against another or others for entertainment".² A definition of sport is important for the sake of criminal liability. The athletes need to be fully aware of what they are consenting to in their chosen sport and the risks that may be involved. It would be far more difficult to create rules without a definition. It is important to understand whether athletes merely consent to the rules, or whether they have an acceptance of the culture of the sport, especially where that sport is a contact sport, as we are then able to determine if there has been a breach of the sporting rules, or even the law. As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all.³ This approach was approved much more recently in *Collins v Wilcock*,⁴ wherein consent was held to be a defence to a battery. This is an idea supported by Lord Woolf in *R v Barnes*.⁵ The Defendant in this case had inflicted a serious leg injury upon the victim whilst attempting to make a sliding tackle during an amateur football match. The Defendant accepted that the tackle had been hard, but maintained that it had been fair, and that the injury caused had been purely accidental. He was convicted on one count of unlawfully and maliciously inflicting grievous bodily harm, contrary to Section 20 of the Offences Against the Person Act.⁶

¹ S Gardiner, J O'Leary, R Welch, S Boyes and U Naidoo, *Sports Law* (4th edn, Routledge 2011) 11

² *Oxford Dictionary* (10th edn) 727

³ B Livings, "A different ball game - why the nature of consent in contact sports undermines a unitary approach" (2007) *J. Crim. L.* 2007, 71(6), 3

⁴ *Collins v Wilcock* (1984) 1 WLR 1172

⁵ *R v Barnes* (2004) EWCA Crim 3246

⁶ *Offences Against the Person Act 1861*, s 20

He appealed against the conviction. The appeal was allowed on the basis that firstly, criminal prosecutions should be reserved for situations where the conduct is sufficiently grave to be properly categorised as criminal. Civil remedies are often available and most sports have disciplinary procedures, so prosecutions will usually be unnecessary and undesirable. This is to protect the reputation of the sport and the sport itself. Many contact sports particularly, could suffer from regular prosecutions resulting during the course of play. People would be reluctant to engage in the sport at all and potentially could hold back during play if they believed that any injury caused to another could lead to punishment. Secondly, contact sports, including football, are exceptions on public policy grounds, to the general rule that consent is no defence to bodily harm; implied consent exists where the situation is within what can reasonably be expected. For instance, in this case, a sliding tackle during an amateur game of football, could and should be reasonably expected. These footballers are not professional players. They do not have the skill or training to be held to the same account as those who are professionals. The successful prosecution of an amateur player in any sport, would have a detrimental effect and could lead to fewer people choosing to engage in sport at all, particularly those which involve contact and would be particularly damaging to boxing, rugby, hockey and football and it is not something that I believe should be encouraged in the slightest. Thirdly, all the circumstances must be considered to determine whether the conduct is criminal. Conduct within the rules is unlikely to be criminal. Conduct outside the rules may not be, if it accords with the way the game is conventionally played. Again, a sliding tackle in an amateur match should be reasonably expected and although not strictly part of the rules, it is most definitely in accordance with the way the game is conventionally played. Lastly, the judge's summing up, which asked the jury to consider whether the tackle "could not have been in legitimate sport" was inadequate and the conviction unsafe. Contrary to this notion of consent to injury, is the case of *R v Brown*⁷ where the law establishes that consent to probable injury is not always accepted by the courts and can still be seen as a criminal offence even where the victims are consenting, is it then correct for the law to apply this same approach to sport? If the law is to be applied to all, then surely, as Grayson mentions "The law of the land never stops at the touchline,"⁸ implying that the law should reach those who commit offences on the pitch. Obviously, consenting to probable injury in the case of *Brown* which concerned sadomasochist activity, is entirely different to consenting to probable injury in a game of football, which Grayson does not fully highlight or acknowledge. Particularly when the whole notion of sadomasochist activity is to seek physical harm in order to obtain pleasure. This is wholly different to obtaining an injury through

⁷ *R v Brown* (1994) 1 AC 212

⁸ E Grayson, *Articles University of Warwick, ESLJ Volume 10* (1993) 694

a careless tackle in a game of football. The aim of a game of football is not to cause or receive injury, as it is with sadomasochism. It is my view therefore, that the two are a poor comparison and are used for effect by Grayson, as opposed to being a logical argument used to display his opinions.

Traditionally, sport has been viewed as an area of private activity. It is governed almost entirely by private governing bodies who implement their own regulatory procedures and systems of justice. The state has adopted a non-interventionist approach to the regulation of sport, preferring to leave the industry to self-regulate⁹ because overall, this is something that works very well as a whole, as athletes are punished when necessary by NGB's to a degree that seems to be acceptable, for the main part. It seems however, that sport enjoys privileges which would simply not be permitted in any other industry which gives the impression that sport appears to operate outside the ordinary scope of the law. Gardiner expresses that a self-regulatory approach to sport is necessary to maintain the integrity of sport and to protect its culture. This is supported by Lord Denning "justice can often be done...better by a good layman than by a bad lawyer"¹⁰ implying that a non-legal individual who is familiar with a certain sport is better equipped to deal with an issue within that sport than an outsider who may only see the legal issue and ignore any practicalities which are associated to a particular sport. Those within sport must surely have the best understanding of the rules and be aware of the most appropriate way to discipline those who break those rules. Although arguably, other areas of society don't act in this way and the law is there to govern all within its jurisdiction, so it is arguably better to allow the legal experts to provide suitable discipline, not NGB's. The case of *Australian Football League v Carlton Football Club*¹¹ recognised that there are some situations where the law should not intervene in the decisions of the NGB's, supporting Gardiner's argument and my own opinions, that NGB's are better equipped, financially and by way of understanding, to deal with such situations. The general position is that the courts will almost certainly refuse to hear any claim that a sports disciplinary tribunal simply came to a decision that was wrong on the merits. The courts try to avoid interference with claims that an on-field decision-maker made a wrong decision. The law is not well enough equipped to deal with such decisions and so it is in these situations that NGB's ought to be left to their own devices.¹² The circumstances in which the courts will hear a claim by a disgruntled competitor who has been disciplined by their governing body principally fall into four categories: where the governing body has breached an

⁹ S Gardiner, J O'Leary, R Welch, S Boyes and U Naidoo, *Sports Law* (4th ed, Routledge 2011) 73

¹⁰ *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591

¹¹ *Australian Football League v Carlton Football Club Ltd* [1998] 2

¹² British Broadcasting Corporation, "Let sport deal with discipline" (3 June 2005) <<http://news.bbc.co.uk/1/hi/uk/4607153.stm>> accessed 21 January 2016

express rule; where it has applied an unlawful rule; where it has breached the implied obligation to act fairly; and where it has acted unreasonably or disproportionately. This causes many to question, should the law be involved in sporting matters or not? Who ultimately, should have the final say? Arguably the most significant problem due to its physical impact on others, is violence within sport. Should on-field violence be tolerated differently to that off the sporting field? There is an argument made by Gardiner that there is a certain amount of understanding by athletes, particularly in contact sports such as rugby or hockey, that violence within the game is inevitable and expected, due to the nature and culture of the sports.¹³ The fact that sport, by its very definition, is competitive and physical causes violence within sport to be viewed rather sympathetically and it is arguable that this is the correct approach to take given the context. This idea is supported by Di Nicola and Mendeloff stating “much of sports appeal comes from its unrestrained qualities, the delight of its unpredictability, the exploitation of human error, and the thrill of its sheer physicalness”.¹⁴ If athletes were so caught up in playing by the rules, not making mistakes, not causing harm and were fearful of prosecution if a deviation of the rules occurred, then sport as we know it today would be under threat. The raw, competitive edge would be lost and both sporting spectators and athletes would suffer under such stringent rules. Ben Livings would disagree with such a statement and say that games that are played within the rules, would not suffer due to the law being involved and that only those guilty of playing outside of the rules would be subject to potential prosecution and so the game itself would not suffer¹⁵, supporting Grayson’s argument that the law could be involved within sport effectively. My own personal view, however, supports the notion put forward by Gardiner. Many spectators watch and enjoy sport because of its competitive edge and unpredictability. We, therefore, cannot want to tame it and create such stringent rules within a game that this competitiveness is lost, for the sake of preventing possible minor injuries. Of course, athletes must be protected, this is not in dispute, their safety is paramount. Certainly, we cannot allow criminal activities to take place in the name of sport, neither myself nor Gardiner condones this, but we must not get so caught up in protection that we lose the fundamental positive elements of sport.

NGB’s tend to focus on disciplinary procedures. They tend to include experts in the field of that sport, although most of the larger governing bodies tend to also have legal representation on the panels. This gives the decisions more credibility than those made simply by lay people. It also

¹³ S Gardiner “Sports Participation and Criminal Liability” *Sport and the Law Journal*, Volume 15, Issue 1

¹⁴ R. Di Nicola & S. Mendeloff, ‘Controlling Violence in Professional Sport: Rules Reform and the Federal Professional Sports Violence Commission’ (1983) 21 *Duquesne Law Review* 845

¹⁵ B Livings, ““Legitimate sport” or criminal assault? What are the roles of the rules and the rulemakers in determining criminal liability for violence on the sports field?” (2006) *J. Crim. L.* 2006, 70(6), 2-4

checks that the governing bodies aren't stepping outside the law in their decisions. There are advantages of sport running itself in this way which support Gardiner's argument that sport should be self-regulating. Firstly, this approach is sympathetic to sport; essentially this means that the people making the decisions are doing it in the interest of sport, for the benefit of sport and to protect sport. If judges were to do this, then it may damage sport as they would view it in an entirely legal way and not encompass sporting culture. Secondly, the rules they are applying are less formal and restrictive than that of the courts, as there is no set legislation/precedence they need to follow. This allows the governing body to adapt to the circumstances more effectively. Although contrary to this, is the issue of irregularity between cases. Thirdly, the costs are also lower than they would be in the criminal courts and it also saves time. This seems to maintain the stability of sport and presents positive reasons for keeping sport internal.

There are also disadvantages of running sport this way, which support Grayson's argument that the law does have a place within sport. Firstly, having sport governed internally can allow rules to become entrenched within a sports culture. It can sometimes allow decision making that would be seen as unacceptable in another environment. For example, if someone acted negligently in a workplace outside of sport and because of these actions caused harm to another, it is likely they would receive a worse penalty than a fine. Grayson would argue that a negligent tackle should also fall into this strict category and they should be punished accordingly. Secondly, it prevents disputes going to courts because everything is dealt with internally, this may prevent an athlete from receiving a fair trial which is a breach of their human rights. Unfair trial from within a governing body is illustrated in the already mentioned case of *Jones v Welsh Rugby Union*.¹⁶ As the people on the bench of the hearing act as both judge and jury a fair decision may be intangible as their main focus may be to please the sponsors or the people who invest money in the sport, and not to help the athletes. Governing bodies are often too involved to make a just decision. Thirdly, there is inconsistency in the decision making and it's uncertain because of the lack of precedence and legislation in the area. This can lead to decisions that are both questionable and unjustified, portrayed in *Eastham v Newcastle United*.¹⁷ However, if an athlete is dissatisfied with a decision of a governing body, they may take their concern to the Court of Arbitration for Sport (CAS). Although this would require a certain amount of knowledge and courage from the athlete to understand their rights and situation. The CAS are an independent body that deal with matters such as, ordinary arbitration procedures, mediation service, advisory procedure and the majority of their work is concerned with appeals procedures. The CAS enables sport to carry on working in a

¹⁶ "Jones v Welsh Rugby Union" *The Times* (6 March 1997)

¹⁷ *Eastham v Newcastle United FC Ltd* [1964] Ch 413

self-regulatory approach but helps to give it legitimacy. The CAS is aiming to create precedent within sporting rules to create a fairer justice system within sport to match that of the courts. If this system was in place then I see no reason to ever include the courts within sport, as they would have a fully functioning, legitimate body that was regarded as the ultimate decision maker. The CAS at this moment, requires both parties that the matter concerns to agree in writing for the CAS to consider their case.¹⁸ This is problematic. There needs to be more enforcement from the CAS if they are to create precedents and be respected as an equal to the courts. However, the CAS has nearly 300 arbitrators from 87 countries, chosen for their specialist knowledge of arbitration and sports law. Around 300 cases are registered by the CAS every year. This displays that the CAS is an effective method of governance and can be as effective as the courts if the CAS were to abolish the requirement of written agreement between parties.

Gardiner has expressed that the law does have a role to play within sport and it is not immune to the law entirely. This however should be reserved for the most serious cases of violence within sport. He stated that the involvement has to be absolutely minimal, as the rules set by NGB's seem to be sufficient without involving the courts.¹⁹ An example of how justice can be sufficiently served by NGB's regulations can be seen in the Bowyer case.²⁰ Bowyer was banned for seven matches and fined £30,000 by the Football Association (FA) in addition to the club fine of around £200,000. Both codes of rugby also have their own examples of foul play that again are subject to increasingly effective disciplinary procedures. The law should only intervene in the most exceptional circumstances and sport should largely be self-regulated. Gardiner's opinions appear to be more practical than Grayson's views, as it makes more sense for those who have the most knowledge of the sports and their rules, to deal with any potential issues that occur within them.

The relationship between the formal rules and informal 'playing culture' of the sport can help determine when the law intervenes. The reality is that in contact sports there is a continued risk of injury. The rules of sport are designed to avoid serious injury. They are a crucial guide in determining criminal liability. In the absence of proof of intent or recklessness to injure, participants who cause injury within the reasonable application of the rules of the sport can rely on the victim's consent to potential harm. An injury caused due to an illegal tackle that amounts to a foul within the rules of the sport is also likely to be seen as consensual. It may be contrary to the rules of the game but may well be inside the ... 'working culture' of the sport. Consent is not

¹⁸ Court of Arbitration for Sport <<http://www.tas-cas.org/en/general-information/frequently-asked-questions.html>>, accessed 18 October 2017

¹⁹ S Gardiner, "The law and the sports field" (1994) *Crim. L.R.* 1994, Jul, 513-515

²⁰ The Crown Prosecutor Service, Lee Bowyer pleads guilty to public order offence (5 July 2005) <http://www.cps.gov.uk/news/latest_news/143_06/>, accessed 24 January 2016

limited solely by the formal rules in contact sports. The informality of the playing culture of sport can be exploited illegitimately, especially perhaps in the context of the winner-takes-all mentality of modern sport. The spectre of cheating is raised. But playing cultures are pervasive in all sports.²¹ If we refer back to Grayson's view that sport should not be used as a 'shield' to disguise otherwise criminal activity, then we can see the issue with this level of tolerance of violence within sport. There is no question that some athletes would and do use sport as an excuse to be violent and do behave in ways that they ordinarily would not in ordinary society. Should an illegal tackle, outside the scope of the rules in a game be viewed as consensual as Gardiner mentions? Arguably not. A player consents to the rules of the game and to an extent, the culture of that game. He may well consent to probable injury caused during that game or provide a general consent to the culture of that sport, but it seems a little too much for an outright illegal tackle that amounts to a foul within the rules to be viewed as acceptable. A breach of the rules of the game should not be categorised as part of the 'culture of sport'. This opens up a vast array of issues that could lead to serious injuries to athletes. It condones violence within sport entirely and does not protect sports reputation or its athletes. Although I respect the culture of sport and understand that sports, particularly contact sports, need to operate a little more flexibly because of their nature, a clear breach of sporting rules such as an illegal tackle, should not be condoned or defended. Of course, the level that the sport is being played should be a consideration, an amateur should not be held to the same account as a professional, as this would be unfair.

Primary responsibility for on-field conduct is placed on those involved with the playing and administration of the game. In this way, if the sport is officiated and administered in accordance with its rules, there should be few violent incidents, with the law only intervening in exceptional circumstances,²² supporting the discussion in the previous paragraph. The fact that a defendant is playing sport cannot make legal an action that is illegal.²³ This is stressed by the Lord Advocate's statement that players cannot be regarded as exempt from the criminal law. For example, a rugby player punches another rugby player on the opposing team in the face during a Six Nations match and the attacked rugby player suffers a broken nose. It is likely that the player who threw the punch would be dealt a red card by the referee. He may also receive a match ban of several weeks. It is very unlikely however, that he would be charged with a criminal offence, despite meeting the criteria. He has fulfilled the *actus reus* and *mens rea* when throwing the punch and breaking the other players nose and yet no criminal sanctions are likely to follow. This seems inconsistent with

²¹ See footnote 24

²² M James and S Gardiner, "Touchlines and guidelines: The Lord Advocate's response to sports-field violence" (1997) *Crim. L.R.* 1997, Jan, 41-45

²³ *R v Bradshaw* (1878) 14 *Cox's CC* 83

the rule of law and wholly unfair that player could use sport as a shield to prevent prosecution for actions that would be criminal in any other situation. The courts themselves have stated that sport is not a 'licence for thuggery'²⁴ and yet not enough is done to bridge the gap between street violence and violence on the sports field. These ideas are supported by Grayson who mentions "The law of the land never stops at the touchline"²⁵ implying that the law should reach those who commit offences on the pitch, just as it would those who commit them within everyday society. The notion of this concept that the rule of law extends to all is one that seems much fairer. However, the practicality of such a notion is disputable for the valid reasons previously stated by Gardiner. There needs to be some level of compromise between the views of Grayson and Gardiner. Grayson's opinions are too stringent and do not allow for the rough nature and competitive side of sport. Gardiner's, although more sympathetic to the nature of sport, do not in my view, fully respect or accommodate the rule of law. A method needs to be established to punish legitimately criminal actions implemented on the sports field, in the name of sport, without crushing the culture of sport entirely.

The following paragraph will assess in greater detail the impact of the criminal law on sport and the *laissez faire* approach adopted by the courts in relation to sporting violence. Many seemingly criminal actions within sport, such as assaults, do not go through the criminal justice system but are instead dealt with by NGB's through an internal procedure which mainly consists of disciplinary tribunals.²⁶ Sanctions are then authorised by the NGB as a way to both punish and try to further prevent such actions occurring again. These sanctions could include a fine, match ban or both. It is thought that the NGB's are best placed to analyse the situation and provide fitting punishments because of their knowledge of the rules of the particular game. It is understood that the courts would have little understanding of a sporting environment and the sanctions imposed would be far harsher than they perhaps, needed to be for the situation. Offences such as Actual Bodily Harm (ABH)²⁷ are far easier to discipline internally and remove the need to go through the criminal justice system because of the lack of severity of the injuries incurred. The issue arises where the injuries are more serious and where perhaps, the injuries were caused intentionally. The case of Emile Griffith and Benny Paret²⁸ depicts such a problem and the loophole that is available within sport to commit such major offences. Although this is an American/Cuban case, it is still one that has

²⁴ Lloyd (1989) Crim L.R. 513

²⁵ J D Williams, "Law of the land does not end at the touchline': More sports disputes are ending up in court." *Independent* (23 May 1994)

²⁶ M James, *Sports Law* (Palgrave Macmillan Law Masters) (2010) 111

²⁷ Offences Against the Person Act 1861, s 47

²⁸ D McRae, *A Man's World: The Double Life of Emile Griffith* (2015)

significant impact on the debate of violence in sport and this type of incident could easily happen in the United Kingdom (UK) with British boxers and ought to be considered. It also displays the lack of action taken by the boxing governing body, Amateur International Boxing Association (AIBA) and their inadequacy as a regulating body in this situation. In this case, Griffith, an openly gay man at a time when homosexuality was derided as a disease, condemned as a sin and classified as a crime, was tormented by his opponent about his sexuality at the weigh in. Griffith then went on to kill Paret during the World Championship fight after repeatedly punching him to the head, despite Paret being unconscious and on the ropes. Griffith was given the opportunity to legally attack Paret for the insult caused to him at the weigh in and arguably, used his sport as a shield to “murder” Paret. The referee’s inaction has also been brought into question. It has long been accepted that sport, particularly contact sports, must be treated differently to other situations in which injury is suffered.²⁹ The reason for this is that without some kind of exemption to the general prohibition on being able to consent to ABH or greater being inflicted upon oneself, as in the case of Brown,³ many popular sports would be unable to function in the way that they currently do. There are those that argue because of the dangerous and violent nature of boxing, that its legality should cease entirely. This might seem a little too extreme, as many boxing matches occur without serious injury occurring and it is a sport that is heavily enshrined in British culture particularly and is greatly supported all over the world. It is, however, a viewpoint that ought to be given serious consideration when considering cases outside of sport and their consequences, such as sadomasochism.

Outside of sport, the general law on consent to injury is that nobody can consent to the infliction of ABH or greater on their person. As injury of at least ABH is a common occurrence in many sports, thousands of sports participants would be left at risk of prosecution every week for injuries sustained in the course of play. As many of these injuries would not be in the public interest to be labelled “criminal acts”, the courts have acknowledged that some accommodation for sport needs to be reached. In Bradshaw,³⁰ Bramwell LJ noted that contacts that were within the “rules and practises” of the sport in question were lawful and could be consented to, regardless of the degree of harm caused to the victim. In Billingham,³¹ the court also held that injurious conduct that was “of a kind which could reasonably be expected to happen during a game” could be consented to. The difficulty for the courts and the players is to determine in advance of play when an act is a necessary or expected part of the game and when it is criminal violence. It was not until Lord

²⁹ Attorney-General’s Reference (No 6 of 1980) [1981] QB 715

³⁰ See footnote 28

³¹ R v Billingham [1978] Crim LR 553

Mustill's judgement in *Brown*³² that the criminality of sporting offences was analysed again. Lord Mustill stated contact sports were an exception to the normal rules of consent where there was health and social benefits but that it was not possible to consent to conduct that intentionally causes bodily harm or worse. He believed boxing was an exception due to the public interest in the sport but it has been questioned as to how public policy can be balanced alongside the potential risk to health of participants in a sport where the aim is to deliberately hurt the opponent.³³ This may be viewed as being no different to a football player deliberately intending to injure another opponent as seen in the Roy Keane incident where Keane later confessed in his biography that he had been waiting to injure his opponent following a previous altercation years before.³⁴ It has been argued, however, that the unique nature of boxing in the context of criminal liability should not be used as the standard against which a level of sporting criminality might be set.³⁵ Additionally, Gunn acknowledged that where injuries are suffered in the course of a properly conducted sport the defendant is exempt from criminal liability.³⁶ The decision in *Brown* maintained the awareness of criminal sporting assault focusing on the public interest element as a contributory factor to whether an act is subject to criminal intervention.³⁷

Trying to establish where the line should be drawn in fighting sports is a considerably difficult issue to address as it is ultimately the aim of the sports, to knock out your opponent. The *Emile Griffiths* case highlights such a dilemma. Many would state that the United States legal system should have prosecuted Griffiths for murder, or at the very least, manslaughter and that by allowing him to hide behind the rules of consent to injury does no favours for the notion of allowing sport to self-regulate and discipline when such travesties are allowed to occur with minimal or no consequences. This scenario also highlights the debate as to whether boxing should be legal at all. If you cannot consent to such harm for sadomasochism, should you be able to consent to such injury for sport? The consistencies between the involvement of the law within everyday society and sport are again, called into question. Grayson's opinion on sporting consent is useful to analyse this situation. Grayson believes that a breach of sporting rules determines whether or not an action within sport is criminal. If we consider the Griffith's boxing case as an example, then we can understand Grayson's beliefs in greater depth. Griffith clearly breached the rules of boxing as he was hitting

³² See footnote 7

³³ M Gunn and D Ormerod, "The legality of boxing" (1995) *Legal Studies*, 15: 181–203

³⁴ M James, "The trouble with Roy Keane" (2002) *Ent. Law* 2002, 1(3), 72-92

³⁵ A Ashworth, "Principles of criminal law" (2009)

³⁶ See footnote 55

³⁷ M Rogers, "A critical analysis of the doctrine of implied sporting consent" (2013)

<https://sportslawmatt.wordpress.com/2013/12/01/a-critical-analysis-of-the-doctrine-of-implied-sporting-consent/>, accessed 25 October 2017

his opponent after he was unconscious and therefore, was deserved of criminal sanctions according to Grayson's views of legal intervention. Obviously, the referee in this fight was also to blame as he should have stopped the fight sooner, but ultimately, it was Griffith who committed an illegal act during the course of sport and he should have faced heavy criminal consequences. This was not an accidental act carried out in the course of sport. It was not part of the culture of sport, neither was it to be expected. This was a malicious attack carried out during a legitimate sporting event and that same event was used as a shield for criminal actions. This is precisely the kind of action Grayson had spoken about previously and his expression "the land of the law does not stop at the touchline"³⁸ has never been so prominent. Gardiner's argument that violence and injuries may occur due to the competitive and sometimes dangerous nature of sport suddenly becomes invalid when such a case as Griffith's comes to light. Gardiner could not describe the actions of Griffith's and the consequences that occurred from those actions as part of a "culture of sport", because they quite obviously were not. This is a case that highlights the need for intervention from the law when sport is used in such a way to commit criminal offences in the name of sport.

Following on from the discussion above concerning consent is the issue of on and off the ball offences, which raises the question: when players consent to the culture of the game, do they consent only to a bit of rough and tumble in the course of play i.e. on the ball offences, or do they consent to all sporting violence, including off the ball offences? We must firstly establish the difference between the two. In sports such as football and the two codes of rugby there are contacts during the course of play that can result in injury. Some of the injuries occur as a consequence of contacts that are outside the rules of the sport and are referred to as 'on-the-ball offences'.³⁹ Examples of on-the-ball offences in football, as stated in Fédération Internationale de Football Association's (FIFA) Law 12, include, inter alia, careless tackles, recklessly jumping for a ball and using excessive force when charging an opponent.⁴⁰ Gardiner and Mark James posited the question of whether these types of incident should be immune from prosecution as 'normal' play, or alternatively criminal as they are 'well beyond' what should be expected from 'normal' play? Following the case of *R v Barnes*,⁴¹ James argued that on-the-ball contacts in sport, in breach of the rules of the game, were unlikely to be classed as criminal⁴², supporting Gardiner's opinions and contrasting with Grayson's beliefs. Stefan Fafinski added that only a high degree of departure from

³⁸ See footnote 8

³⁹ A Pendlebury, "The Regulation of on-the-ball Offences: Challenges in Court" E. & S.L.J. 2012, 10(1)

⁴⁰ Fédération Internationale de Football Association, "Laws of the Game" 2010/2011

<http://www.fifa.com/mm/document/affederation/generic/81/42/36/laws_of_the_game_2010_11_e.pdf>, accessed 24 October 2017

⁴¹ See footnote 5

⁴² M James, *Sports Law* (Palgrave Macmillan Law Masters) (2010) 118

the accepted rules of play should cross the policy threshold that ‘justifies the interference of the courts in regulating sporting activities’.⁴³ The rationale for this was in the fact these incidents were not ‘sufficiently grave’ to lead to a finding of criminality; they were better regulated by internal disciplinary mechanisms or the civil law. In the Barnes case, at the Court of Appeal, Woolf L.J. held the term ‘legitimate sport’ to be technically unsafe. He recognised the concept of ‘legitimate sport’ to not be unhelpful but acknowledged the jury was not given any examples of the conduct which could be classed as ‘legitimate sport’ to determine the criminal impact, there was no set precedent for the criminal law to be able to deal with these sorts of sporting cases effectively. Woolf L.J. proceeded to make it clear that a criminal prosecution was not appropriate for sporting assault cases but rather for sporting governing bodies to decide a suitable punishment. On the issue of implied sporting consent, he said that a player’s conduct would have to be “sufficiently grave” to be ‘criminal’ to defeat the defence of consent. Woolf L.J. then outlined an objective test to be satisfied using the criteria established in the Canadian case of Cey.⁴⁴ Such criteria included the type of sport played, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury and the state of mind of the defendant. By introducing an objective test, it is thought Woolf L.J. was trying to provide consistency in this area but this has been criticised by academics, who believe it does not recognise the “playing culture” of a sport and without a subjective test the physicality and pleasure of a sport is severely reduced. The idea of a ‘playing culture’ test to determine criminality of on the ball offences is firmly supported by Gardiner who believes it would be sufficient to decide if a sportsman has impliedly consented to an incident or not. Whilst it has not been expressly approved by the courts it has been indirectly considered in the aforementioned cases and in Barnes, adding more confusion and uncertainty to the approaches taken by the courts that have plagued this area of law with inconsistency.⁴⁵ It has been made clear from case law⁴⁶ that ‘off the ball’ sporting incidents exceed that threshold and the courts are unwilling to grant acts of thuggery.⁴⁷ The most contentious issues arise specifically in on-the-ball sporting incidents. There have been few cases⁴⁸ that have attempted to provide guidance on this issue up until the decision in Barnes which has somewhat clarified the position of criminal

⁴³ S Fafinski, “Consent and the rules of the game: the interplay of civil and criminal liability for sporting injuries” (2005) J. Crim. L. 2005, 69(5), 423

⁴⁴ R v Cey (1989), 48 CCC (3d) 480 (Sask CA)

⁴⁵ See footnote 59

⁴⁶ R v Billinghurst [1978] Crim L.R. 553, R v Gingell [1980] Crim. L.R. 661, R v Birkin [1988] Crim. L.R. 854, R v Kamara, (Unreported), Magistrates Court (Swindon), 14 April 1993, Ferguson v Normand [1995] SCCR 770, R v Bowyer [2001] EWCA Crim 1853

⁴⁷ R v Moss [2000] 1 Cr. App. R. (S.)

⁴⁸ R v Blissett (1992) “Football: Blissett's case causes confusion: The Blissett-Uzzell case has brought a range of reactions within the football world” *Independent*, (5 December 1992)

proceedings arising in sport and was later supported by Chapman.⁴⁹ Mark Chapman was jailed for six months after admitting Grievous Bodily Harm (GBH). Centre forward Chapman, tackled left back Terry Johnson, from behind, breaking his leg in two places and ending his chances of ever playing again. In the past footballers had been punished by the courts for on-field violence, but never jailed for a tackle. This case was held to be unique because of the clear intent to cause harm and due to the seriousness of the injury caused to Johnson. It was clearly not an action part of the “culture of the game” and was not something that could have been reasonably anticipated or consented to by the players involved. It was most definitely in the public interest to prosecute in this case and I would fully support the utilisation of the criminal law in situations such as this, as would Grayson and most likely, Gardiner as well. This is exactly the kind of case where Gardiner would support the intervention of the legal system, as it is not beneficial to sport to allow such events to go unpunished effectively. The intervention of the criminal justice system in cases such as Chapman does not threaten the culture of sport, it merely protects its reputation and its participants.

In contrast to the above case of Chapman, is the Scottish case of Duncan Ferguson. Ferguson was the first British footballer to be convicted and then jailed for an on-field offence after head butting Jock McStay during a game in 1994.⁵⁰ Ferguson served 44 days in prison for this offence. It is arguable, that this imprisonment is not justified. There was no long-term damage done to McStay, unlike that of Johnson in the Chapman case. This was an offence committed during the heat of the moment, when both players were chasing the ball. There was no evidence that it was premeditated before the event occurred, unlike the Chapman case which was clearly malicious. This case for me, was too much interference from the criminal justice system and was frankly, unnecessary. A fine and a match ban from the governing body would have been sufficient punishment for the offence committed. Although I do not condone violence in sport, neither do I welcome an overly paternalist approach from the legal system. If we compare and contrast the Ferguson case to that of Zinidine Zidane, who also head butted another player during a game of football, we can see the different approaches taken. Zidane, a French player, head butted Italian player, Marco Materazzi during the closing minutes of the 2006 World Cup final, knocking him to the ground.⁵¹ Zidane received a red card for this offence, resulting in a three-match ban and a fine of 7,500 Swiss francs (around £5,700). He was also instructed by FIFA, to make himself available

⁴⁹ R v Chapman (2009) “Footballer first to be jailed for on-field tackle” *The Telegraph* (4 March 2010)

⁵⁰ A Pattullo, “Duncan Ferguson: Glasgow kiss that lingered” *The Scotsman*, (13 April 2014)

⁵¹ R Hughes, “Suspensions in World Cup Head-Butting Incident”, *The New York Times* (21 July 2006)

for humanitarian activities with children and adolescents, in essence community service.⁵² This would appear to be a much more satisfactory punishment for the offence at hand and would have been much fairer a punishment in the case of Ferguson. The Zidane case was also a much higher profile case as the game was watched by millions of people, yet he still did not suffer from any legal punishment. It is arguable that Zidane was provoked by comments made by Materazzi, who was also punished by way of a fine by FIFA for defamatory and insulting statements and so this incident is slightly less different to the Ferguson case.⁵³ It is however, a far more satisfactory method of punishment for the offence. Although arguably, FIFA have been a little soft with their sanctions and should have fined Zidane a far greater amount due to his status and income. A fine of £100,000 or more would have been justified given the circumstances. It is clear that since the case of Ferguson, the law has more idea of when it is necessary to intervene i.e. the case of Chapman, and when not to. This leads me to believe that there is more hope of a harmonious relationship between governing bodies and the legal system and that the friction between the two in the past, has been put to one side to achieve consistency, fairness and justice within sport.

One of the main examples that we need to analyse when discussing violence within sport, is the incident between heavy weight boxers, David Haye and Dereck Chisora. A brawl between the two athletes occurred at a press conference in Munich following Chisora's World Boxing Council (WBC) heavyweight title loss to Vitali Klitschko in 2012. The incident started with aggressive verbal exchanges from the two fighters during the press conference, which then escalated into a physical brawl not only between the two boxers, but their support teams as well. Chisora accused Haye of "glassing him" during the incident, before saying at least four times that he would shoot the former WBA heavyweight champion.⁵⁴ Haye's manager, Adam Booth, also suffered cuts to his face in the post-fight melee. Haye picked up and swung a tripod and Booth, who was trying to break things up, was left with a wounded face. After watching the unexpected drama unfold, Wladimir Klitschko told the British Broadcasting Corporation (BBC): "I'm totally disappointed, it went a little too far, the sport of boxing shouldn't be like that".⁵⁵ After the incident, German prosecutors told BBC Sport that both fighters were suspected of committing offences that could carry prison terms.⁵⁶ Haye was suspected of grievous bodily harm - a crime which, if

⁵² Ibid

⁵³ Ibid

⁵⁴ B Dirs, "Dereck Chisora threatens to shoot David Haye after brawl"
<<http://www.bbc.co.uk/sport/boxing/17088021>>, accessed 27 October 2017

⁵⁵ Ibid

⁵⁶ British Broadcasting Corporation, "Dereck Chisora & David Haye release statements after brawl"
<<http://www.bbc.co.uk/sport/boxing/17088619>>, accessed 27 October 2017

proven, carries a prison sentence of six months to 10 years.⁵⁷ Chisora, who admitted his behaviour was “inexcusable”, was under suspicion of malicious injury, which carries a jail sentence of up to five years, and making a “threat”. The latter is a lesser offence punishable by a fine or imprisonment of up to one year.⁵⁸ Chisora and his trainer, Don Charles, were arrested at Munich airport before being released without charge on the Sunday after the event. Neither Haye nor Chisora faced any legal consequences for their behaviour. After more than four hours of deliberation at their headquarters in Cardiff, the British Boxing Board of Control’s (BBBC) stewards bit the bullet when it came to dealing Chisora. Board general secretary Robert Smith spelled out that boxing in this country will no longer tolerate such behaviour, saying: ‘Dereck Chisora let down not only himself and his family but also all of those licence holders who behave in a professional and disciplined manner. The stewards of the board want to make it absolutely clear that such behaviour by any licence holder will not be tolerated.’⁵⁹ Smith added: ‘With regard to David Haye, he is not a licence holder with the Boxing Board of Control. However, if he should apply for a licence with the British Boxing Board of Control, the part he played in the disgraceful scenes that occurred will be considered before any decision is made.’⁶⁰ This is absolutely the correct attitude to be taken by the BBBC. Neither athlete should be welcome in the sport of boxing after such a horrifically violent incident. It is awful that the legal system also didn’t punish the boxers, particularly given the seriousness of the potential charges. This was not an incident that happened in the ring, during the heat of the moment during a legitimate boxing match. This was an angry brawl that dragged other members of the public into the violence and caused quite serious damage to those involved. It was absolutely in the public interest to prosecute both fighters, both as punishment for those involved, and as a deterrent for others involved in sport. David Haye did not even issue an apology for his actions after the event. He could not have his licence revoked as a punishment as Chisora did, as he was retired from boxing at this point in time. Haye received no punishment whatsoever. This is not the message that we want to send out to the public. Actions have consequences, or they should do, no matter if you are a famous sports star or not. These athletes are not above the law. Chisora had his licence reinstated by the BBBC after only a one year ban from the sport.⁶¹ This to me, is unacceptable. He should have been banned for life and been prosecuted for his actions. Both the legal system and the governing body have let boxing

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ J Powell, “Chisora hit by ban as BBBC rule shamed fighter is not fit to hold a boxing licence” *The Daily Mail* (14 March 2012)

⁶⁰ Ibid

⁶¹ R Al-Samarrai, “Bad-boy Chisora finally wins back boxing licence... a year after his infamous Munich brawl with heavyweight rival Haye” *The Daily Mail* (12 March 2013)

down on this occasion.

If we compare the Chisora/Haye incident to the case of Taekwondo Olympian, Angel Matos, then we can fully appreciate the controversy with the BBBC's approach to Chisora's sanctions. The Cuban athlete committed one of the biggest breaches of sportsmanship at the Beijing Olympics in 2008 by kicking a referee in the face in anger after he was disqualified in the semi-finals of the games in the under 80kg category. The World Taekwondo Federation (WTF) said after the match that Matos, along with his coach, Leodis González, would be banned from all its future sanctioned events and his records at the Beijing Games would be erased.⁶² The stadium announcer read a statement from the WTF, saying, "This is a strong violation of the spirit of Taekwondo and the Olympic Games. The sanctions are the following and are effective immediately: Lifetime ban of the coach and athlete in all championships sanctioned by the World Taekwondo Federation and at the same time, all records of this athlete at the Beijing Games will immediately be erased."⁶³ This for me, is what a lifetime ban should be. Enforceable immediately and indefinitely. For the BBBC to allow Chisora to reinstate his licence after serving a one year ban makes a mockery of a lifelong ban altogether. It leads us to believe that governing bodies do not take such violent incidents seriously if an athlete can merely be allowed to reinstate their licence after a period of time. The WTF's stricter approach when providing athletes with sanctions is far more satisfactory in that a lifelong ban, is for life. It works as both a punishment to the specific athlete and a deterrent to other athletes to not breach the rules or in the case of Matos, the law also. Admittedly, the two cases are quite different, but arguably, the Chisora/Haye event is much worse and deserved a more severe punishment. Matos acted in the heat of the moment, during a match. His adrenaline would have been high from the fight he was currently in, the pressure was high to obtain a medal, he would have been angry and disappointed at the disqualification, four years of hard work to achieve nothing. Although I am not condoning or defending his actions, I can sympathise with them. Chisora and Haye on the other hand, were at a press conference. They had no reason to act as violently or as irrationally as they did. There was also the use of weapons during their incidents. Haye was said to have been holding a glass bottle and had struck someone with a tripod. Although this is all hypothetical, as the BBBC were not able to punish Haye as he was retired at this point and had no licence to lose, it is likely that he would have received the same sanctions as Chisora and could have been allowed to regain his licence after one year too. If governing bodies are going to be respected as sufficient authorities to regulate sports, they must come to an agreement between themselves on what terms such as "lifelong ban" actual means. It makes no sense for some lifelong

⁶² L Zinser, "Cuban Athlete is barred for kicking referee in the face" *The New York Times* (23 August 2008)

⁶³ Ibid

bans to be for an indefinite period of time in one sport, and for a limited amount of time in another. It creates a sense of imbalance and unfairness. The consistency between governing bodies on the sanctions of athletes is something which could and should be improved.

To conclude, it is my opinion that Gardiner's argument for internal regulation appears to be the most convincing. Although self-governance can be viewed sceptically and can be a little too lenient towards actions which ought really, be treated as criminal, it is arguable that as a whole, it is more effective than having the courts involved. Having sport governed internally helps to protect sport itself from outside, less understanding forces and it is more sympathetic to sport and its culture. If judges and the legal system were to get involved in every minor case that could classify as ABH, the whole competitive spirit of sport could be ruined. NGB's are far advanced in knowledge and have the resources available to be able to deal with such matters effectively without interference from the legal system. This helps to protect the courts also. It is far more cost effective and relieves the criminal court of this financial burden if NGB's deal with sporting matters and not the courts. It works out better for both if sporting matters and other offences are kept separately. Logically and practically, it just makes more sense to support Gardiner over Grayson in his theory that internal governance within sport is the best option available. Self-governance except in the most exceptional of cases seems to be the only effective way to run sport, without the interference of the law.

THE AGREEMENT BETWEEN THE EUROPEAN UNION AND TURKEY OF 18 MARCH 2016: AN HONEST ATTEMPT TO RESOLVE THE EUROPEAN REFUGEE CRISIS OR A BARGAIN AT EXPENSE OF INTERNATIONAL LAW?

Ekaterina Baliuk*

1. The Unprecedented Refugee Crisis in the European History

The United Nations Refugee Agency (UNHCR), an international body which protects rights of refugees,¹ warns that nowadays the European Union (EU) endures the refugee-provoked humanitarian crisis of an unparalleled character.² For the last two years the refugee flow has assumed an unmanageable number of migrants seeking to protect themselves from the economic, security and human rights instability and violent extremism in Africa, Syria and Libya (Refugee Crisis).³

The numbers of those arriving have overwhelmed the capacity of some EU Member States (MS) and limited their ability to respond to the needs of those seeking or likely needing international protection. Trying to eliminate the after effect of this crisis, the EU embraced all its institutions. In particular, the Union has closely negotiated with Turkey to prevent irregular migration through the Aegean Sea which resulted in the conclusion of the Joint Action Plan dated 29 November 2015. This plan was further implemented and developed by the far-reaching migration control agreement announced by the EU and Turkey through their joint statement of 18 March 2016.⁴ At its core, Turkey agreed to take back all irregular migrants arriving in Europe from the destabilised countries (Agreement).⁵

The aim of this paper is to analyse the most controversial effort of States intended to resolve the Refugee Crisis - the Agreement between the European Union and Turkey dated 18 March 2016.

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¹ Statute of the Office of the United Nations High Commissioner for Refugees General Assembly Resolution 428 (V) (14 December 1950) Annex, ch 1art 1

² Adrian Edwards, "UNHCR warns of imminent humanitarian crisis in Greece amid disarray in Europe over asylum" (UNHCR, 1 March 2016) <<http://www.unhcr.org/news/briefing/2016/3/56d564ed6/unhcr-warns-imminent-humanitarian-crisis-greece-amid-disarray-europe-asylum.html>> accessed 29 November 2016 (Edwards: "UNHCR Warns of Imminent Humanitarian Crisis in Greece Amid Disarray in Europe Over Asylum")

³ Walter Mayr, "Ticket to Europe. Refugee Crisis Focus Shifts to North Africa" *Spiegel International* (Europe, 27 April 2016) <<http://www.spiegel.de/international/europe/refugee-crisis-focus-shifts-to-north-africa-a-1089536.html>> accessed 29 November 2016

⁴ Council of the European Union, "EU-Turkey Statement" Press Release (18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>> accessed 29 November 2016 (Agreement)

⁵ Ibid

Its dubious nature flows from the fact that, on the one hand, the EU and Turkey decided to strengthen the rule of law, but at the same time, their Agreement may undermine the pillars of international order. The nucleus of present study concerns the question whether this Agreement complies with the Union's *non-refoulement* obligation. In the case of negative answer, the author will examine whether the Parties to that Agreement are obliged to implement it. In conclusion, this paper will also clarify whether the Refugee Crisis could have been effectively resolved.

2. The Agreement between the European Union and Turkey from 18 March 2016 – a “Trade in Human Misery” Bypassing International Law?

As Turkish Prime Minister Ahmet Davutoglu emphasized 18 March 2016 was a historic day because Turkey realized that together with the EU they have “the same destiny, the same challenges and the same future”.⁶ On this date the EU and Turkey agreed to end the irregular migration from Turkey that endangers lives of the migrants and decided to offer these persons a safe alternative.⁷ At its relevant to the present essay parts, the Agreement reads that:

*“All new irregular migrants or asylum seekers whose applications have been declared inadmissible crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey; For every Syrian being returned to Turkey from the Greek Islands, another Syrian will be resettled to the EU from Turkey directly; The EU, in close cooperation with Turkey, further speeds up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey (in the field of health, education, infrastructure, food and other living costs) and provides additional funding”.*⁸

This Agreement also produces legal obligations for Greece. In particular, it should register and process any claim for asylum individually for those migrants who had arrived in the Greek Islands.⁹ Moreover, the said country would negotiate with Turkey to “ensure liaison and thereby facilitate the smooth functioning of [any necessary bilateral] arrangements”.¹⁰

This Agreement has opened a vast legal debate. On the one hand, States defend both the legality and effectiveness of the Agreement as it has led to a significant reduction in migrant deaths making

⁶“Migrant crisis: Turkey and EU Reach Deal on Returns” BBC (Europe, 18 March 2016) <<http://www.bbc.com/news/world-europe-35840272>> accessed 29 November 2016 (BBC: Migrant crisis)

⁷ Agreement

⁸ *Ibid*

⁹ *Ibid*

¹⁰ *Ibid*

“the situation today [...] a thousand times better than it was a year ago”.¹¹ They even suggest the Agreement as a “model for similar deals” for the countries fighting against migration.¹² However, major human rights organizations including Amnesty International, Human Rights Watch, *etc.* condemned the Agreement as not only being arbitrary and illegal but also as a “dark day for the humanity”.¹³

2.1 Legal nature of the Agreement

2.1.1 *As the European Union and Turkey Intended to be Bound By the Agreement it Constitutes a Treaty Governed by Customary International Law*

The announcement of the Agreement during the EU-Turkey joint press conference and the secrecy surrounding its conclusion has opened a wide debate on its legal nature. To be certain about the legal character of the Agreement, it is crucial to identify what rules of international law apply to that Agreement and what obligations the EU and Turkey bear. Therefore, as a starting point, the author would analyse whether the EU and Turkey regard themselves obliged to follow the course enshrined in the Agreement.

To conclude agreements between the EU and third countries Article 218 of the Treaty on the Functioning of the European Union (TFEU) foresees a specific procedure¹⁴ and only agreements that comply with that procedure have a binding force.¹⁵ To this end, the European Parliament should approve cooperative agreements between the EU and third countries and should be immediately and fully informed about all stages of the proceedings.¹⁶ However, in the current situation the Parliament did not give its consent to conclude the Agreement.¹⁷ In the meantime, 28 EU MS with the involvement of the European Council accepted the document. Later, it was finalized by the Heads of State and Government of the MS meeting with the Turkish Prime Minister.¹⁸

¹¹ “Merkel Defends Refugee Policy, EU-Turkey Deal Amid Election Setback” *Daily Sabah* (Europe, 7 September 2016) <<http://www.dailysabah.com/europe/2016/09/07/merkel-defends-refugee-policy-eu-turkey-deal-amid-election-setback>> accessed 29 November 2016

¹² *Ibid*

¹³ Lizzie Dearden, “A Dark Day for Europe”: EU Reaches Agreement to Send Refugees Back to Turkey Despite Legal Concerns” *Independent* (Europe, 18 March 2016) <<http://www.independent.co.uk/news/world/europe/eu-turkey-refugee-deal-what-is-it-erdogan-a6939156.html>> accessed 29 November 2016

¹⁴ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 (TFEU), art 218

¹⁵ *Ibid*, art 216(2)

¹⁶ *Ibid*, art 218(6)(a)(iii)

¹⁷ Maarten den Heijer, Thomas Spijkerboer, “Is the EU-Turkey Refugee and Migration Deal a Treaty?” (*EU Law Analysis*, 7 April 2016) <<http://eulawanalysis.blogspot.de/2016/04/is-eu-turkey-refugee-and-migration-deal.html>> accessed 29 November 2016

¹⁸ European Parliament, “Parliamentary Questions” (22 March 2016) <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2016-000053+0+DOC+XML+V0//EN>> accessed 29 November 2016

The fact that the procedure necessary to negotiate the Agreement within Article 218 of the TFEU was not exercised shows that the EU intended to hide its Agreement under the veil of non-binding instrument.¹⁹ Particularly, the EU may want to avoid receiving approval of the European Parliament and without any possible obstacles negotiate the Agreement directly between the governments.²⁰ Should the EU consult with the European Parliament it could have refused to grant its approval to the conclusion of the Agreement and could have instituted proceedings against the EU in the Court of Justice of the European Union (CJEU) claiming violation of the Union's obligations on fair migration policy towards aliens.²¹

This incongruence between the way how the Agreement was actually concluded and how it was supposed to be adopted begs the following question. Does the fact that the Agreement was concluded in contradiction to the rules envisaged by the European Union's legal regime renders it a non-binding instrument?

To interpret the legal nature of the Agreement the author refers to the definition of a treaty embodied in Article 2(1)(a)(i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO).²² Despite the fact that this Convention has not yet entered into force,²³ its definition of a treaty applies to the current Agreement as a matter of international custom.²⁴ Importantly, the VCLTIO uses the same definition of a treaty as the Vienna Convention on the Law of Treaties (VCLT)²⁵ that regulates conclusion of the treaties only between States.²⁶ Comparing with the VCLT, the VCLTIO merely expands its applicability to agreements concluded between international organizations or an international organisation and a state.²⁷ Moreover, even the definition of a treaty embodied in the

¹⁹ Mauro Gatti, "The EU-Turkey Statement: A Treaty that Violates Democracy (Part 1 of 2) (*EJIL: Talk!*, 18 April 2016) <<http://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>> accessed 29 November 2016

²⁰ Ibid

²¹ The European Parliament, "Powers" Factsheets on the European Union <http://www.europarl.europa.eu/atyour-service/en/displayFtu.html?ftuId=FTU_1.3.2.html> accessed 29 November 2016; *See also*: TFEU, art 67(2)

²² Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. II (UN Pub, Sales No E.94.V.5) (VCLTIO), art 2(1)(a)(i)

²³ See generally, Ibid

²⁴ See generally, Malgosa Fitzmaurice, "Treaties" (2010) MPEPIL, 13; *See also*: Statute of the International Court of Justice [1945], art 38(1)(b); *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Merits) [1969] ICJ Rep 3, 74; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Merits) [1985] ICJ Rep 13, 27; *Legality of the Threat or Use of Nuclear Weapons* (Advisory opinion) 1996, 64; *Asylum case (Columbia/Peru)* (Merits) [1950] ICJ Rep 266, 276, 277

²⁵ VCLTIO, art 2(1)(a)(i)/ VCLT, art 2(1)(a)

²⁶ VCLT, art 1

²⁷ VCLTIO, art 2(1)(a)(i)/ VCLT, art 2(1)(a)

VCLT would apply to the current Agreement in so far as it reflects customary international law.²⁸ In this vein, both customary rules determining the definition of an international treaty under Article 2(1)(a)(i) of the VCLTIO and under Article 2(1)(a) of the VCLT²⁹ are applicable to the current Agreement. Therefore, within the meaning of Article 2(1)(a)(i) of the VCLTIO a treaty governed by international law means:

*“an international agreement governed by international law and concluded in written form between one ... State and one ... international organization”.*³⁰

The International Court of Justice (ICJ) in its numerous decisions has further clarified this legal test of how to determine the existence of an international treaty. For example, in *Aegean Sea*, to establish the jurisdiction of the ICJ Greece relied on the joint communique as an international treaty although it was issued during the press conference between Greece and Turkey and contained no signatures, nor were there initials.³¹ Despite Turkey's objections,³² the ICJ held that for a treaty its form is not a determinative factor but rather a nature of the act or transaction to which the communique gives expression. To identify this nature actual terms and circumstances of the conclusion of a treaty should be observed.³³ Another example is provided by *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. In this case, the ICJ held that although the Minutes refer to the consultations between ministers of foreign affairs they are not a simple record of a meeting. Since the Minutes enumerated the commitments to which the Parties had consented to, it had created rights and obligations for them. Therefore, the ICJ recognized that the Minutes amounted to an international agreement.³⁴

Following the practice of the ICJ that interpreted the definition of a treaty under Article 2(a) of the VCLT, the only decisive factor for a simple agreement to constitute an international treaty is the *parties' intent to be bound by their agreement*. In the present situation, the EU and Turkey both agreed on being bound by several obligations and establishment of the collective monitoring mechanism.³⁵ In this vein, Turkey is obliged to accept returned migrants and the EU is bound by the obligation to accept a resettlement of one Syrian for another Syrian returned to Turkey.³⁶ To implement its

²⁸ Anthony Aust, “Vienna Convention on the Law of Treaties (1969)” (2006) MPEPIL, 9

²⁹ See generally, ILC, “Draft Articles on the Law of Treaties with Commentaries” (1966) YILC Vol II, art 2

³⁰ VCLTIO, art 2(1)(a)(i)

³¹ *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Jurisdiction) [1978] ICJ Rep 3 (*Aegean Sea*) 95

³² Observations of the Government of Turkey on the Request by the Government of Greece for Provisional Measures of Protection (*Aegean Sea*), 15

³³ *Aegean Sea*, 96

³⁴ *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112, 24

³⁵ Agreement

³⁶ *Ibid*

part of the deal, the Greek parliament has passed a law allowing migrants arriving in the country to be returned to Turkey.³⁷ Furthermore, shortly after the announcement of the Agreement, the European Commission proposed to amend the Relocation Decisions relating to Greece, in order to transfer some of the relocation commitments concerning asylum seekers arriving in Greece to Syrians in Turkey.³⁸ Moreover, having concluded the Agreement the EU and Turkey reaffirmed their desire to further implement the refugee-protective policy under the Joint Action Plan.³⁹ Therefore, since the EU and Turkey by virtue of their Agreement meant to be legally bound by it, the Agreement constitutes a treaty under customary international law.

2.1.2 Since the Agreement Constitutes an International Treaty, do the EU and Turkey Fulfil Their Obligation to Register and Publish Its Text?

The VCLTIO, which applies to the treaties between the States and international organizations,⁴⁰ in its Article 81(1) underlines that all treaties acquired legal force should be registered and published.⁴¹ However, since this Convention has not entered into force,⁴² the author would refer to the customary rules enshrined in that provision.⁴³ Moreover, the author refers to the customary⁴⁴ Article 80 of the VCLT which in the similar wording as the VCLTIO upheld the requirement of treaty publication.⁴⁵ Article 81(1) of the VCLTIO states that all treaties should:

*“after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording ... and for publication”.*⁴⁶

The very reason of such requirement is to eliminate secrecy in the treaty relations and, therefore, ensure an appropriate level of transparency and security in international law.⁴⁷

In the present situation, since the Agreement constitutes a treaty within the meaning of customary international law, as proved above, the EU and Turkey should have transmitted its text to the United Nations (UN) Secretariat for publication. However, the Parties to the Agreement

³⁷ “Greece passes law allowing migrants’ return to Turkey” BBC (Europe, 1 April 2016) <<http://www.bbc.com/news/world-europe-35948447>> accessed 29 November 2016

³⁸ European Commission, “Proposal for a Council Decision amending Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece” COM(2016) (22 September 2015), 171

³⁹ Agreement

⁴⁰ VCLTIO, art 1(a)

⁴¹ Ibid, art 81(1)

⁴² See generally, VCLTIO

⁴³ See generally, Oliver Corten, Peter Klein, *The Vienna Conventions on the Law of Treaties. A Commentary* (Vol 2 OUP 2011) (Corten, Klein: *VCLT. A Commentary*), 1807

⁴⁴ See generally, *Ibid*

⁴⁵ VCLTIO, art 81(1)/ VCLT, art 80; See also: Corten, Klein: *VCLT. A Commentary*, 1806

⁴⁶ VCLTIO, art 81(1)

⁴⁷ Sir Hersch Lauterpacht, “Report on the Law of Treaties” (1953) A/CN.4/63 YILC Vol II, 161, 1

disregarded this requirement since both the UN and the EU databases neither contain the text of the Agreement nor even mention it.

Even if the EU and Turkey did not fulfil their obligations to transmit the text of their Agreement, the customary law does not contain any sanctions that could have been imposed on them.⁴⁸ However, Article 102 of the UN Charter underlines that if a treaty was not properly registered or the registration was inexcusably delayed, it could not be invoked before any of the UN organs.⁴⁹ In spite of this strong language, in practice, the said provision does not always operate in this strict way. For instance, parties to such unregistered treaties have successfully relied on them before international arbitral tribunals⁵⁰ and the ICJ before.⁵¹ Therefore, despite the obligation to transmit the Agreement, neither the customary law nor even the UN Charter contain any kind of sanctions which would effectively force the EU and Turkey to do so.

Adhering to another side of the obligation to publish the international treaties, this obligation is strongly connected with the rules of transparency.⁵² The secrecy surrounding the conclusion of the current Agreement does not comply with one of the most important human right – the right to have access to information and ideas of all kinds and all forms regardless of frontiers.⁵³ Importantly, this right also embraces access to information held by the public bodies, for example, to their records regardless of the form in which the information is stored, its source and the date of production.⁵⁴ Such governmental information “should be provided [even] without the need to prove the direct interest or personal involvement to obtain it, except in cases in which the legitimate restriction is applied”.⁵⁵

It follows that international law does not allow diplomacy to be secret otherwise it would not satisfy the needs of peoples.⁵⁶ The mere fact that the text of the original EU-Turkey Agreement has never been sent and, therefore, was hidden disturbs the transparent pillars of the international order. On the contrary, State practice, apart from few cases, remains constant and virtually uniform since 1946 when States and international organizations transmitted their treaties and agreements to the UN Secretariat that were subsequently published.⁵⁷ Moreover, as derived from the mentioned

⁴⁸ VCLT, art 80; *See also*: Corten, Klein: *VCLT. A Commentary*, 1801

⁴⁹ Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, *The Charter of the United Nations. A Commentary* (3rd ed. Vol II OUP 2012) (Simma, Khan, Nolte, Paulus: *The Charter of the United Nations. A Commentary*), 1801

⁵⁰ Simma, Khan, Nolte, Paulus: *The Charter of the United Nations. A Commentary*, 2106

⁵¹ *See generally*, *Corfu Channel Case (UK v Albania)* (Preliminary Objections) [1948] ICJ Rep 9, 15

⁵² Andrea Bianchi, Anne Peters, *Transparency in International Law* (CUP 2013), 431

⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 10; *See also*: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 19(1)(2)

⁵⁴ GC No 34, 18

⁵⁵ Inter-American Court of Human Rights, *Claude-Reyes and Others v Chile* (Merits) (2006) Series C no 151

⁵⁶ *See generally*, Simma, Khan, Nolte, Paulus: *The Charter of the United Nations. A Commentary*, 2090

⁵⁷ Corten, Klein: *VCLT. A Commentary*, 1807

human rights instruments, people have a right to become familiar with the text of the EU-Turkey Agreement.

On the other hand, the EU and Turkey could try to excuse themselves arguing that the disclosure of their confidential Agreement would threaten their national interests.⁵⁸ However, the author considers that, in this instance, a balance should be found between necessary disclosure of the information held by the public bodies and protection of national secrets. The information concerning such fundamental agreements as those concerning the destiny of refugees and the Refugee Crisis as a whole should be inevitably disclosed to the public. The EU bodies such as the European Parliament and the Council of the European Union are themselves inclined to subscribe to this view because they underlined in their Directive 2008/115 that the ending of illegal stay of third-country nationals is to be carried out through a fair and transparent procedure.⁵⁹

2.2 Whether the Transfers of the Refugees to Turkey under the Agreement Are Compatible with the Prohibition of *Refoulement*

2.2.1 A General Notion of the Prohibition of Refoulement

The Convention relating to the Status of Refugees (Refugee Convention) which was modified by its 1967 Protocol⁶⁰ constitutes a fundamental human rights instrument protecting rights of the refugees.⁶¹ Its importance chiefly derives from the fact that 142 States, including all EU Member States, have agreed to implement the Convention and its Protocol⁶² let alone that it laid the foundation of the whole European asylum system.⁶³

Within its terms, the Refugee Convention recognizes the notion of *non-refoulement* as a core safeguard for aliens against the most flagrant violations of their human rights.⁶⁴ Under its Article 33, a refugee should not be returned to an unsafe country that is where the refugee would face serious threats to their life or freedom.⁶⁵ Should this be the case, this provision prohibits any kind

⁵⁸ ECHR, art 10(2); *See also*: ICCPR, art 19(3)

⁵⁹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L 348/98, 6

⁶⁰ *See generally*, Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267

⁶¹ *See generally*, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

⁶² UNHCR, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol” <<http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>> accessed 29 November 2016; *See also*: Dieter Kugelmann, “Refugees” (2010) MPEPIL, 2

⁶³ *See generally*, Commission of the European Communities, “Green Paper on the Future Common European Asylum System” COM(2007) 301 final (6 June 2007) <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0301&from=EN>> accessed 29 November 2016

⁶⁴ HRC, “General Comment No 31” (2004) UN Doc CCPR/C/21/Rev.1/Add.13 (GC No 31), 10

⁶⁵ Refugee Convention, art 33; *See also*: Charter of Fundamental Rights of the European Union [2000] OJ C364/01

of transfer⁶⁶ of every person subject to State's jurisdiction, regardless of nationality, statelessness or legal entry to this State.⁶⁷

Beyond the Refugee Convention which provides merely a basis for *non-refoulement*, Articles 6, 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the European Convention on Human Rights (ECHR) and Article 3 of the Convention against Torture entail subsidiary protection.⁶⁸ Having broadened the scope of this prohibition, they require States to protect also non-nationals even not qualified as refugees from being returned if there is a risk to them to be subjected to torture or inhuman and degrading treatments.⁶⁹ In the following sections, the author seeks to shed light as to whether the EU has complied with the prohibition of *refoulement* by concluding the Agreement dated 18 March 2016. The examination will proceed in the threefold manner. *First*, the answer will be given to the question if it is possible to transfer the refugees to Turkey as a safe country. Should this be not correct, the paper will turn to possible exceptions to the *non-refoulement* obligation to justify refugee transfers into unsafe Turkey. *Third*, the section will conclude with the analysis of the diplomatic assurances could have been issued on behalf of Turkey that would be able to dispel any doubts that Turkey is an unsafe country. Also, the author will examine capability of the diplomatic assurances to serve as a plausible excuse of an alleged violation of international law.

2.2.2 Is Turkey a Safe Country of Destination for the Refugees?

The EU MS do not respect their *non-refoulement* obligation under Article 33 of the Refugee Convention that requires sending refugees only to safe countries.⁷⁰ Interpreting this Article by customary norms enshrined in Articles 31-33 of the VCLT,⁷¹ a safe country is defined as a State

(Charter of Fundamental Rights of the EU), art 19(2); UNGA, Declaration on Territorial Asylum A/RES/2312(XXII) (14 December 1967), art 3(1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by UNGA Res 39/46) (10 December 1984) UNTS 1465 (CAT), art 3(1)

⁶⁶ Olof Hasselberg, *Diplomatic Assurances. A Judicial and Political Analysis of the Undermining of the Principle of Non-Refoulement* (Lap Lambert Academic Publishing 2011) (Hasselberg: *Diplomatic Assurances*), 16

⁶⁷ GC No 31, 10; *See also*: HRC "General Comment No 15" (1986) UN Doc HRI/GEN/1/Rev.6 (GC No 15), 1; UNHCR, "Note on *Non-Refoulement*" (23 August 1977) EC/SCP/2 (UNHCR: Note on *Non-Refoulement*), 4; *Abmed v Austria* App no 25964/94 (ECtHR, 17 December 1996), 42, 47; *Mutombo v Switzerland* Com no 13/1993 (Committee against Torture UN Doc A/49/44, 27 April 1994), 2.5, 9.7; *Hamida v Canada* Com no 1544/2007 (HRC UN Doc CCPR/C/98/D/1544/2007 11 May 2010), 8.7, 9

⁶⁸ Bruce Burson, David James Cantor, *Human Rights and the Refugee Definition. Comparative Legal Practice and Theory* (Brill Nijhoff, International Refugee Law Series Vol 5 2016) (Burson, Cantor: *Human Rights and the Refugee Definition. Comparative Legal Practice and Theory*), 3, 4; *See also*: Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2006)

⁶⁹ HRC, "General Comment No 20" (1992) UN Doc HRI/GEN/1/Rev.6, 151 (GC No 20), 9; *See also*: GC No 15, 5, 7; GC No 31, 10; Inter-American Court of Human Rights, *Judicial Conditions and Rights of the Undocumented Migrants* (Advisory Opinion) (2003) OC-18/03 Series A no 18 IHRL 3237

⁷⁰ Refugee Convention, art 33

⁷¹ *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)* (Merits) [1999] ICJ Rep 1045, 18, 20; VCLT, art 31, 32,

where the refugees would not only be free from the risk to their life and freedom but also where “effective protection” will be provided for them.⁷² This protection consists of granting:

*“at least physical and material security, access to humanitarian assistance, access to secondary education and livelihood opportunities, a functioning judicial system, the rule of law, and respect for migrants’ rights (including socio-economic) rights.”*⁷³

As regards the subsidiary protection from torture and inhuman treatment, these actions are distinguished by the level of intensity.⁷⁴ Having been an “aggravated and deliberate form” of inhuman treatment,⁷⁵ a torture exists if it causes “very serious and cruel suffering”.⁷⁶ Taking into account such severity of torture and inhuman treatment a State should ensure that persons within their jurisdiction are not under *risk* to be this ill-treated.⁷⁷

To determine such risk of ill-treatment, the foreseeable consequences of transferring the person to Turkey should be assessed including the general situation in Turkey and personal circumstances of treatment of an expellee.⁷⁸

Within the Agreement, the EU and Turkey agreed that “all new irregular migrants or asylum seekers whose applications have been declared inadmissible ... will be returned to Turkey”.⁷⁹ Having adopted such wording, the EU confirmed that Turkey as a “safe third country” that could effectively protect rights of the transferred persons.⁸⁰ In addition, the Parties to the Agreement strengthened their cooperation and established the Facility for Refugees in Turkey that focuses on humanitarian assistance (providing food, water and shelter), as well as on migration management, education, municipal infrastructure, health and socio-economic support.⁸¹ Despite these positive

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⁷² Guy Goodwyn-Gill, Jane McAdam, *The Refugee in International Law* (3rd ed, OUP 2007) (Goodwyn-Gill, McAdam: *The Refugee in International Law*), 393, 395; *See also*: Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ 326/13, 27

⁷³ Goodwyn-Gill, McAdam: *The Refugee in International Law*, 393, 395

⁷⁴ *Ireland v UK* App no 5310/71 (ECtHR, 18 January 1978) (*Ireland v UK*), 167

⁷⁵ UNGA Res 3452 (XXX), “Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (9 December 1975) UN Doc A/RES/30/3452, art 1

⁷⁶ *Ireland v UK*, 167; *See also*: *Ireland v UK* (Sep Op of Judge Evrigenis)

⁷⁷ *A v UK* App no 100/1997/884/1096 (ECtHR, 23 September 1998), 22

⁷⁸ *See generally*, *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) (*Saadi v Italy*), 130

⁷⁹ Agreement

⁸⁰ European Commission, “EU-Turkey Statement: Questions and Answers” Factsheet (19 March 2016) <http://europa.eu/rapid/press-release_MEMO-16-963_en.htm> accessed 29 November 2016 (EC: EU-Turkey Statement: Questions and Answers); *See also*: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) [2013] OJ L 180/60, 38

⁸¹ European Commission, “Managing the Refugee Crisis. The Facility for Refugees in Turkey” Factsheet (28 September 2016) <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160928/factsheet_frit_factsheet_en.pdf> accessed 29 November 2016; *See also*: Agreement

findings, it was reported that the refugees deported to Turkey were exposed to the ill-treatment.⁸² For instance, most of the refugees live in such disastrous places where even “animals can’t live”.⁸³ Moreover, the refugees constantly are in fear of being killed⁸⁴ and live without access to basic services such as food, water, life-saving health services, *etc.* although the EU has allocated money for these needs.⁸⁵ To improve these inhuman conditions, on 8 September 2016 the EU announced that it would undertake its largest humanitarian aid program intended to finally cover the basic “needs of the most vulnerable refugee families in Turkey”.⁸⁶

However, rights of migrants are still abused by Turkey. For example, unfair system of examining asylum claims of Turkey does not grant the applicant right to obtain legal assistance. Furthermore, the applicant are not only unable to appeal the decisions of the authorities but also are not provided with the reasons of alleged denial of their applications.⁸⁷

Regarding direct compliance with the rule of law, Turkey invoked and subsequently extended the state of emergency. The reason was to defend national security and to hold responsible persons accountable after the failed military *coup d'état*.⁸⁸ Then, Turkey was enveloped in a governmental crisis where State's institutions and its structures were triggered by the investigation.⁸⁹ Consequently, concerns about the existing inhuman treatment and tortures have been raised in given circumstances.⁹⁰ Yet, adhering to the conclusion of the ECtHR in *Fatgan Katani and Others v Germany*, a mere instable situation in a State does not establish the risk of ill-treatment.⁹¹ Therefore, only clear facts could identify Turkey as a State where inhuman treatment and tortures are possible.

⁸² “Turkey Tortures Syrian Refugees Detained at Border” *Caribflame* (14 August 2016) <<http://www.caribflame.com/2016/08/turkey-tortures-syrian-refugees-detained-at-border/>> accessed 29 November 2016

⁸³ Bill Frelick, “Is Turkey Safe for Refugees?” (*Policy Review*, 2016) <<https://www.hrw.org/news/2016/03/22/turkey-safe-refugees>> accessed 29 November 2016

⁸⁴ *Ibid*

⁸⁵ “EU’s reckless refugee returns to Turkey illegal” *Amnesty International* (3 June 2016) <<https://www.amnesty.org/en/latest/news/2016/06/eus-reckless-refugee-returns-to-turkey-illegal/>> accessed 29 November 2016

⁸⁶ European Commission, “EU Announces More Projects Under the Facility for Refugees in Turkey: €348 Million in Humanitarian Aid to Refugees in Turkey” Press release (8 September 2016) <http://europa.eu/rapid/press-release_IP-16-2971_en.htm> accessed 29 November 2016

⁸⁷ Human Rights Watch, “Protecting Refugees” Report <<https://www.hrw.org/reports/2000/turkey2/Turk009-10.htm>> accessed 29 November 2016

⁸⁸ Human Rights Watch, “A Blank Check. Turkey’s Post-Coup Suspension of Safeguards Against Torture” Report, (24 October 2016) <<https://www.hrw.org/report/2016/10/24/blank-check/turkeys-post-coup-suspension-safeguards-against-torture>> accessed 29 November 2016 (HRW Report: Turkey’s Post-Coup Suspension of Safeguards Against Torture)

⁸⁹ *See generally*, Harry Cockburn, “Turkey Coup: Authorities investigate those claiming attempted takeover was a hoax” *Independent* (Europe, 25 July 2016) <<http://www.independent.co.uk/news/world/europe/turkey-coup-attempt-turkish-authorities-hoax-claims-president-erdogan-latest-news-a7154411.html>> accessed 29 November 2016

⁹⁰ “Turkey Coup Attempt: State of Emergency Announced” *BBC* (Europe, 21 July 2016) <<http://www.bbc.com/news/world-europe-36852080>> accessed 29 November 2016; *See also*: Julia Zorthian, “Turkey Extends State of Emergency for Another 90 Days” *Time* (World, Turkey 3 October 2016) <<http://time.com/4516589/turkey-extends-state-of-emergency/>> accessed 29 November 2016

⁹¹ *See generally*, *Fatgan Katani and Others v Germany* App no 67679/01 (ECtHR, 31 May 2001)

In this instance, although Turkey has a sovereign right to declare a state of emergency,⁹² having enacted two emergency decrees the Turkish authorities created a situation where the risk of ill-treatment could exist by removal of fundamental safeguards from such treatment.⁹³ In this vein, Turkey the authorities extended “the maximum length of police detention without judicial review ..., den[ie] detainees access to [a family and] a lawyer [and] restrict[ed] detainees’ right to conduct confidential conversations with their lawyers” which allow authorities to abuse their powers with respect to the detainees.⁹⁴

On the other hand, ensuring respect for the human rights is superior to any privilege to protect the national security.⁹⁵ The ECtHR confirmed this idea in *Soering v UK* having emphasized that the “protection of human rights in the receiving State must meet standards [of the European Convention] in all respects.”⁹⁶ In the case at hand, the Agreement transfers the refugees to a State that derogated from its human rights obligations which amounted to the situation where the refugees may be tortured and inhumanly treated. But the prohibition of torture derived from Article 7 of the ICCPR has an absolute character meaning that a State could not derogate from it.⁹⁷ This prohibition goes far beyond the notion of torture and covers any actions able to cause physical and mental suffering to the individual.⁹⁸

Having invoked state of emergency, Turkey has already extended the application of these measures not only to activists of the *coup d'état* but also to persons who have “links with armed Kurdish and leftist groups”.⁹⁹ In these circumstances, when the refugees would not comply with the demands of the Turkish regime, Turkey could restrict their rights by having arbitrarily detained them where the refugees would not enjoy mentioned safeguards against inhuman treatment. The facts that the detention process is ill-documented and that the detainees could not speak freely and without fear to be further persecuted add fuel to the fire.¹⁰⁰

Aside from this, Turkey ratified the Refugee Convention with a “geographical limitation”.¹⁰¹ It stresses that Turkey will provide all guarantees for refugees flowing only from States that are

⁹² HRC, “General Comment No 29 (2001) UN Doc CCPR/C/21/Rev.1/Add.11, 1; See also: Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception. With Special Reference to the Travaux Préparatoires and Case Law of the International Monitoring Organs* (Martinus Nijhoff 1998), 235

⁹³ HRW Report: *Turkey's Post-Coup Suspension of Safeguards Against Torture*

⁹⁴ Ibid

⁹⁵ Donald M. Snow, *Thinking About National Security. Strategy, Policy, and Issues* (Routledge 2016), 64

⁹⁶ *Soering v UK* App no 14038/88 (ECtHR, 07 July 1989) 88; See also: Burson, Cantor: *Human Rights and the Refugee Definition. Comparative Legal Practice and Theory*, 186

⁹⁷ ICCPR, art 7, 4(2)

⁹⁸ See generally, GC No 20

⁹⁹ HRW Report: *Turkey's Post-Coup Suspension of Safeguards Against Torture*

¹⁰⁰ Ibid

¹⁰¹ Refugee Solidarity Network, “Refugees & Asylum in Turkey” <<http://www.refugeesolidaritynetwork.org/learn-more/turkey-asylum-basics/>> accessed 29 November 2016

members of the Council of Europe.¹⁰² For refugees coming from other States Turkey limits human rights protection.¹⁰³ Hence, persons not qualified to the full protection in Turkey could not be integrated into society and are forced to find a solution outside this State.¹⁰⁴

In acting thus, the absence of democratic values in the refugee protection renders Turkey not a safe haven for the refugees. Obviously, despite the evidence of ill-treatment Turkey would never admit its participation in tortures since it is “something that takes place in the dark”.¹⁰⁵ The fact that Turkey is a State where compliance with the human rights and the international law is only a *façade* transforms the Agreement into an instrument being not in conformity with the *non-refoulement* obligation. As a result, the EU as representative of its MS in a good faith is obliged to cease transfers to Turkey¹⁰⁶ that, unfortunately, not the case here.

2.2.3 The “National Security” and “Danger to the Community” Exceptions to the Non-Refoulement Obligation

Indeed, States have the right to “control the entry, residence and removal of aliens.”¹⁰⁷ Although in some human rights instrument the prohibition of *refoulement* remains absolute,¹⁰⁸ only the Refugee Convention provides the “national security” coupled with the “danger to the community” exceptions¹⁰⁹ to this prohibition.¹¹⁰ However, when a person is risking to be transferred to a country where he would be ill-treated, the exceptions could not be applied.¹¹¹

Although the Refugee Convention establishes an exceptionally high threshold to remove a person under these circumstances,¹¹² the ECtHR underlined in *Chahal v UK* and *Shamayev and Others v Georgia and Russia* that an aim to eliminate terrorist threat lies within a need to protect the national security of a State.¹¹³

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Hasselberg: *Diplomatic Assurances*, 29

¹⁰⁶ Michelle Foster, “Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State” (2008) 28 Michigan J IL, 223, 284

¹⁰⁷ *Abdulaziz, Cabales and Balkandali v UK* App no 9214/80, 9473/81, 9474/81 (ECtHR, 28 May 1985), 67; *See also: Boujlifa v France* App no 25404/94 (ECtHR, 21 October 1997), 42

¹⁰⁸ *For example*, CAT, art 3

¹⁰⁹ Yvanna Maalat, “A Return to the Principle of *Non-Refoulement*: Re-Examining and Reconciling the Principles and Its Exceptions” (2007) 51 Ateneo Law Journal (4), 1137

¹¹⁰ Refugee Convention, art 33(2)

¹¹¹ UNHCR, “Promotion and Protection of Human Rights. Protection of Human Rights and Fundamental Freedoms While Countering Terrorism” Report (2005) E/CN.4/2005/103

¹¹² UNHCR, *Refugee Protection in International Law. UNHCR’s Global Consultations on International Protection* (ed. Erika Feller, Volker Turk, France Nicholson, CUP 2003), 136

¹¹³ *Chahal v UK* App no 22414/93 (ECtHR, 15 November 1996) (*Chahal v UK*) 79; *Shamayev and Others v Georgia and Russia* App no 36378/02 (ECtHR, 12 October 2005), 335; *See also: Saadi v Italy* 137; *See generally, Mortagy v Ashcroft* 5th Circuit 02-60544 [2003]; *Bundesrepublik Deutschland v B and D* C-57/09 and C-101/09 [2010] 81; *See also: UNSC Res 1373* (28 September 2001) UN Doc S/RES/1373, 2(a);

Here, using the chaos created by the refugee flow radical militant bands and terrorists permeate the EU.¹¹⁴ For instance, as reported “coward and abhorrent” sexual assaults and robberies conducted by the migrants during the celebration of the New Year’s Eve in Köln have amounted to organized crime.¹¹⁵ Moreover, the recent Paris attacks clearly show how the terrorists could flood the EU and endanger its national security and lives of its citizens.¹¹⁶ Given this dangerous side of the Refugee Crisis, States could invoke the national security exception. However, this policy could only be undertaken with respect to the particular dangerous groups and not to the flows of migrants as such. Similarly, in 1991 Turkey threatened to close its borders for a huge number of Iraqi Kurds to protect its national security. Although Turkey argued that it did not constitute prohibited *refoulement*, it was criticized by the UNHCR.¹¹⁷ Thus, the EU MS could invoke exceptions only to protect their security from the particular terrorists flowing among the refugees.

2.2.4 Could Turkey Provide the European Union with the Diplomatic Assurances that the Refugees Would Not Be Tortured or Otherwise Ill-Treated?

Having its origin in extradition cases,¹¹⁸ diplomatic assurances could provide a balance between state security and human rights.¹¹⁹ At their core, a receiving State assures the sending State that the expellee would not be tortured within its jurisdiction.¹²⁰

The effectiveness of the diplomatic assurances is disputed. On the one hand, some scholars argue that diplomatic assurances are not legally binding, thus state responsibility could not be enforced.¹²¹ Conversely, the ICJ grants diplomatic assurances a legal force flowing from their nature as unilateral declarations in order for these assurances to be effective in practice. In *Nuclear Tests*, the ICJ clarified that unilateral declarations of a State to follow a course of specific conduct are legally

Oxford Dictionaries (definition of “National Security”) <https://en.oxforddictionaries.com/definition/national_security> accessed 29 November 2016

¹¹⁴ Gilgamesh Nabeel, Jabeen Bhatti, “Refugees in Europe Say They Fear Terrorists Are Among Them” *USA Today* (14 July 2016) <<http://www.usatoday.com/story/news/world/2016/07/14/refugees-europe-say-they-fear-terrorists-among-them/87008334/>> accessed 29 November 2016

¹¹⁵ “Germany on Edge After Mass Sexual Assault in Cologne Blamed on Refugees” *Stuff* (Europe, 6 January 2016) <<http://www.stuff.co.nz/world/europe/75643978/Germany-on-edge-after-mass-sexual-assault-in-Cologne-blamed-on-refugees>> accessed 29 November 2016

¹¹⁶ Frontex, “Risk Analysis for 2016” Report, 7 <http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2016.pdf> accessed 29 November 2016

¹¹⁷ Hasselberg: *Diplomatic Assurances*, 24; *See generally*, UNHCR, “The Scope of International Protection in Mass Influx (1995) EC/1995/SCP/CRP.3 (UNHCR: Mass Influx)

¹¹⁸ Salinas de Frias, Samuel, White: *Counter-Terrorism*, 587

¹¹⁹ Hasselberg: *Diplomatic Assurances*, 28

¹²⁰ *Ibid*

¹²¹ Robert K. Goldman, UN Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (2005) E/CN.4/2005/103 57; *See also*: Manfred Nowak, UN Commission on Human Rights, Report of the Special Rapporteur on the Question of Torture (2005) E/CN.4/2006/6, 31(d)

binding on it if the State clearly expressed its intent to be bound by its statement.¹²² This intent is determined by virtue of the statement's content, of all the factual circumstances in which the statement was made, and of the reactions to which it gave rise.¹²³ For example, in *Nuclear Tests*, France has announced to the world at large that it intends to effectively terminate its nuclear tests. The other States, including the applicant relied on this statement as producing legal consequences; therefore, France's legal obligation was created.¹²⁴

The decisive factor for assurances to be recognized as effective is when the receiving State has capabilities and willingness to provide effective protection for transferred persons from the real risk.¹²⁵ In the situation at bar, as mentioned above the transferred refugees live in Turkey in a fear to be further persecuted and without access to the basic needs. Moreover, having invoked the state of emergency, Turkey partly derogated from its obligations under the ECHR. Therefore, Turkey itself created a situation where the refugees are risking to be subjected to the inhuman treatment and torture and is both incapable and is unwilling to respect the refugees' rights.

Yet, as is persistently advised by the UNHCR,¹²⁶ the diplomatic assurances are sufficient to cover non-compliance with the international law even when there is a high risk of ill-treatment.¹²⁷ As the Human Rights Committee and the Committee against Torture clarified that States should establish clear procedures for obtaining and relying on assurances and also their subsequent effective monitoring and judicial review mechanisms.¹²⁸ Therefore, only when the EU would establish effective review of the Turkish commitments in relation to the refugees the diplomatic assurances would be effective.

For these reasons above, although some facts could have shown that Turkey is not a safe country that the persons are transferred to, Turkey could provide the EU with the diplomatic assurances that these persons would not be ill-treated within its jurisdiction. However, still Turkey should

¹²² *Nuclear Tests Case (New Zealand v France)* (Merits) [1974] ICJ Rep 457 (*Nuclear Tests*), 46; *See also: Case concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (Merits) [1986] ICJ Rep 573, 39; *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*), 261; ILC, "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations with Commentaries Thereto" (2006) A/61/10 (ILC: Principles Applicable to Unilateral Declarations), pr 1;

¹²³ ILC: Principles Applicable to Unilateral Declarations, pr 3

¹²⁴ *Nuclear Tests*, 53

¹²⁵ UNHCR, "Note on Diplomatic Assurances and International Refugee Protection" (2006) http://www.unhcr.ch/fileadmin/unhcr_data/UNHCR_Note_on_Diplomatic_Assurances_and_International_Refugee_Protection.pdf accessed 29 November 2016, 20

¹²⁶ *See generally*, *Ibid*

¹²⁷ *R. (Bagdanavicius) v Secretary for the State of Home Department* 2 W.L.R. 1359 [2005], 7, 8, 9, 10

¹²⁸ HRC, "Concluding Observations: Sweden" (24 April 2003) UN Doc CCPR/CO/74/SWE, 12; *See also*: HRC, "Concluding Observations: France" (31 July 2008) UN Doc CCPR/C/FRA/CO/4, 20; HRC "Concluding Observations: UK" (30 July 2008) UN Doc CCPR/C/GBR/CO/6, 12; Committee Against Torture, "Concluding Observations: USA" (25 July 2006) UN Doc CAT/C/USA/CO/2, 21; Committee Against Torture, "Concluding Observations: Russian Federation" 6 February 2007) UN Doc CAT/C/RUS/CO/4, 16

ensure that the human rights of the transferred persons are respected to the fullest extent with the Turkish obligations under the distinguished human rights instruments. The crucial issue here is that the EU should establish effective monitoring system over Turkey's commitments. In such a case, the diplomatic assurances would benefit the refugees in practice.

3. Conclusion – Does the Agreement constitute a Solution to the Current Refugee Crisis?

The international order is based on the principles of international cooperation and respect for human rights, fundamental freedoms and the rule of law.¹²⁹ Adhering to these underpinnings of international law, the UNHCR constantly emphasizes that a receiving State should not bear alone the burden caused by the flows of migrants. Instead, the burden should be shared among all states even if they are not specifically affected by them.¹³⁰ This guiding idea is pivotal in the midst of the European Refugee Crisis as the endless migratory exodus endangers the whole foundations of the EU. Yet, Europe is still striving to thread its way between its national interests and the needs of those arriving.

In this vein, the EU and Turkey have adopted a number of actions including the most controversial effort – the Agreement dated 18 March 2016.¹³¹ While being an instrument aimed at the respect of human rights on its face,¹³² this Agreement between the EU and Turkey represents rather a bargain kept in the dark. Having suffered from the refugee influx, the EU sought to find a way to protect itself from the unwelcome migration. The only possible candidate to accept that many incoming people was Turkey. But this deal was not a gift. Turkey concluded the Agreement solely in exchange for a visa-free regime with the EU and economic benefits with a blurry perspective of becoming a European Union's MS.¹³³

This paper has shown that this bargain convulsed the main pillars of international law. Although the EU tried to mask its binding character, the Agreement as an international treaty under customary international law produces the legal effects and duties for the EU and Turkey. For instance, they should have transmitted the Agreement to the UN Secretariat for registration and publication. Having failed to do so, the EU and Turkey not only violated their obligations under customary international law but also disrespected the rules of transparency by depriving their

¹²⁹ *Ibid*, preamble, art 1

¹³⁰ UNHCR: Mass Influx, 1, 2

¹³¹ Agreement

¹³² *Ibid*

¹³³ Maria Gladkikh, "Cynism of the EU-Turkey Deal (*EU-Logos*, 10 July 2016)

<<https://eulogos.blogactiv.eu/2016/07/10/the-cynicism-of-the-eu-turkey-deal/>> accessed 29 November 2016

population of the rights to have access to the information held by the public bodies.

Besides, while implementing the Agreement, the EU does not comply with its obligation to respect *non-refoulement* since it transfers the persons to the unsafe country, Turkey. The latter's derogation from its obligations under the ECHR together with its geographical limitation of the Refugee Convention have created a situation where the rights of the refugees are in danger. Therefore, being not in conformity with international law, the Agreement could be challenged in the ECtHR.

There are still some ways to mitigate the harm arising from the Agreement's implementation. The first possible option for the EU to justify its non-compliance with the *non-refoulement* principle would be to argue that the transfers were aimed at the protection of the national security and community of the EU MS. However, these exceptions could only be invoked in relation to the particular dangerous subjects. Second, to eliminate any doubt on the safety of Turkey, the receiving country could additionally assure the EU that the refugees would not be subjected to torture and inhuman treatment. For these assurances to be effective, the EU should monitor the Turkish commitments in the refugee protection. Finally and radically, the Agreement could be terminated to the extent that Turkey is no longer a refugee-accepting country. Instead, the EU should negotiate with the other States that would satisfy the criteria of safe countries both under the European and international law and, consequently, transfer refugees only to those States.

However, the lessons have not been learned by the States. In 2017 the EU endorsed the memorandum of understanding on prevention of illegal migration that had been concluded between Italy and Libya.¹³⁴ Although the States aim to combat illegal flows into the EU by all lawful means, this memorandum of understanding is similar to the disputed Agreement and to the same extent contrary to the international law.

Having adopted the current Agreement, the States "closed" eastern way of illegal migration to the EU, but increased the number of undocumented migrants traveling by the new one, the central Mediterranean route.¹³⁵ The rationale behind of the adoption of the Italy-Lybia agreement is to close this central route. Nevertheless, the result could have been quite the opposite: without careful consideration given to the rule of law and respect to the human rights, the migrants could find another way to flee into the EU and further aggravate the Refugee Crisis.

Yet, the problems remain, and we could not wait until the situation would explode. To regain control over the current chaotic situation, the only possible way is to strengthen collective actions

¹³⁴ Council of the European Union, "Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route" Press Release (3 February 2017) <<http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/#>> accessed by 10 December 2017

¹³⁵ Ibid

on the basis of shared responsibility and solidarity between all States.¹³⁶ These agreements are not tools that could eliminate the irregular migration. The States should rather seek durable legal solutions that prioritize human rights and dignity. In this regard, even unauthorized refugees could not be returned to the countries where they face persecution but should be resettled within the EU. Evidently, the necessary support and assistance would not come merely from the newly adopted legislation. Here, the monitoring role should be given to the civil society to ensure that the refugees are properly integrated.

¹³⁶ See also: Stefano Mallia, Opinion of the European Economic and Social Committee on the “Communication from the Commission to the European Parliament to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration” COM (2015) 240 final (24 February 2016), 2.2

THE RIGHT TO LIFE IN ARMED CONFLICT: THE RATIO OF THE NORMS OF INTERNATIONAL HUMANITARIAN LAW AND THE NORMS OF INTERNATIONAL HUMAN RIGHTS LAW

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Abstract

It is known that the right to life is protected in both peacetime and wartime. But during armed conflicts it is broken due to the nature of the armed conflict. International humanitarian law contains provisions which protect the right to life during armed conflict. However, some questions arise about (connected)the correlation between these norms and the norms of Human Rights Law. This problem is devoted by this article. Rules on the protection of the right to life contained in both International Human Rights law and International Humanitarian Law. In this article, it will be discussed peculiarities of protection of the right to life during armed conflict. It will speak about it from the aspect of these branches of international law. The article also considers such term as “integrated verification of the lawfulness of the deprivation of life in the use of force in armed conflict”. This verification test was developed by the international human rights judicial bodies and actively used by them.

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1. Introduction

The right to life is a fundamental human right. This right is the basis for all other human rights. If there is no life there is no a person so there are not any rights. So the importance of the right to life is really huge.

Article 3 of the universal Declaration of human rights proclaims: “Everyone has the right to life”.¹ The International Covenant on civil and political rights establishes that the right to life is an inalienable right of every human being. This right is protected by law. No one may be arbitrarily deprived of life.² The importance of this right is confirmed by its enshrinement at the national level. For example, article 20 of the Constitution of The Russian Federation enshrines the right to life.³ The right to life is an absolute right. But some scientists disagree with this statement.⁴ It is also important to international control over the observance of this rights.

But what about the right to life in armed conflict? Unfortunately, in any war murder is commonplace. The parties of the armed conflict are killing each other and especially the right to life is thing assault of many international crimes in context of military conflicts the protection of the right to life takes on special meaning. There is a problem of the relation of International Human Rights Law and International Humanitarian Law, more precisely, the law of armed conflict This is one of the most important issues of International Law. Scientists continue arguing and do not cease sharp debates about the relation of these two branches of the rules regarding the protection of a fundamental human right, the right to life. There are various theories of ratio of different rules. First of all it is a competitive theory and according to its rules these branches do not intersect. Secondly, it is complementary theory and according to its rules in some cases these sectors intersect. And finally, it is an integration theory, according to its rules these branches of International Law have a single nature. The diversity of approaches raises controversy, so this topic is so relevant.

2. The Lawfulness of Deprivation of Life in Armed Conflict under International Humanitarian Law

If we compare the regulation of the right to life under the International Humanitarian Law and International Human Rights Law, it can be concluded that many of the rules are the same, for

¹ UNGA res 217 (III), 10 Dec 1948 ‘Universal Declaration of Human Rights’.

² UN doc, ‘The International Covenant on civil and political rights’, 16 Dec 1966.

³ ‘The Constitution of The Russian Federation’, 12 Dec 1993.

⁴ A. Kovalev, *International protection of human rights* (Statut, 2013) 532 – 533.

⁵ G. Luk'yanchev, *International control in the area of human rights : trends and prospects* (Publishing house of RUDN, 2005) 8.

example, the prohibition of arbitrary and deliberate taking of life, the prohibition of extrajudicial executions and etc. Many of the provisions are different, but they compatible and complement each other. For example, rules on the investigation of violations in this area. It is no secret that these two branches of Public International Law are closely linked⁶. But there are some rules that can be regarded as contradictory. And in the first place they are the norms on the protection of the right to life in the application of force against the enemy during the war.

The rules of International Humanitarian Law which regulate the lawfulness of the deprivation of life are allowing, restricting and prohibiting. They provide protection for quite a wide range of individuals⁷. Conventionally, these rules can be divided into 3 blocks⁸. The first block includes the special principles of International Humanitarian Law (the principles of humanity, distinction, proportionality and precaution), the restrictions in the choice of means and methods of warfare⁹, as well as military necessity (which is the most controversial). The second block includes the rules on the classification of participants in armed conflicts and the third block – the rules which are associated with the qualification of the behaviour of civilians as a falling or not falling under the notion of “direct participation in hostilities”.

2.1 The special principles of International Humanitarian Law

Firstly, we refer to the first block. The first and the main principle is **the principle of humanity**, which is enshrined in many international instruments. The essence of this principle is the requirement of humane treatment of civilians and persons *hors de combat*. By this principle include the rules on humane treatment of civilians, the rules that wounded or sick soldiers should be chosen and treated, regardless of their affiliation¹⁰ and etc. According to many scientists, other principles of International Humanitarian Law arising from the principle of humanity¹¹.

The principle of distinction, which consists in the need to distinguish between combatants and the civilian population: the combatants have the right to kill enemy combatants and destroy military targets, but they are forbidden to use force against the civilian population and objects¹². This principle was enshrined quite late – only in 1949. But non-combatants should not apply only to

⁶ G. Ignatenko and O. Tiunov (eds), *International Law* (Norma-Infra-M, 2010) 235.

⁷ M. N. Shaw, *International Law* (Cambridge University Press, 6th edn, 2008) 1170.

⁸ V. Rusinova, *Human rights in armed conflict: problems of correlation of the norms of international humanitarian law and international human rights law* (Statut, 2015) 152.

⁹ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Advisory Opinion.

¹⁰ F. Bugnion, *The International Committee of The Red Cross and the protection of war victims* (ICRC, Macmillan, 2003) 12.

¹¹ E. David, *Principles of law of the armed conflicts* (Bruylant, 2002) 12.

¹² Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2nd edn, 2004) 92.

weapons as long as they use their weapons only in self- defence or defence of property¹³. It should also be noted that part of the principle of distinction is also a rule on the legitimacy of the use of force only in relations between the battling.

The principle of proportionality is applicable to the assessment of the legality of the deprivation of life in the armed conflict. It is enshrined in para. 5(b) of article 51 of the First Additional Protocol: prohibits an attack which may be expected to cause incidental loss of civilian life, injury to civilians and damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated thus gain¹⁴. This principle applies to armed conflicts of an international character, and not international. International tribunals have repeatedly used in his practice this principle to both types of armed conflict¹⁵.

The precautionary principle is the responsibility of the parties to take all possible measures to avoid incidental loss of civilian life, accidental damage to civilian objects, or simply to reduce them to a minimum. This principle was enshrined in article 57 of the First Additional Protocol¹⁶. In fact, this principle is a rule of customary international law, as confirmed in the "Prosecutor v Kupreškić" by International Criminal Tribunal for the former Yugoslavia¹⁷.

There are also a number of principles of International Law, and some scientists refer ban on the use of means and methods of warfare of a nature to cause unnecessary suffering or injury. At the same time the ban on the use of means and methods of warfare of a nature to cause unnecessary suffering, is fixed at the national level - its violation entails criminal liability in many countries¹⁸. International Criminal Tribunal for the former Yugoslavia in the case "The Prosecutor v. Dusko Tadic," pointed out that "elementary considerations of humanity and common sense to make the absurd conclusion that the use by States of weapons prohibited in armed conflicts between them may be allowed when States try to crush the rebellion its own citizens in its own territory¹⁹. In fact, the ban is a customary rule.

We can also mention the principle of the protection of victims of war, according to which the combatants are obliged to protect the interests of victims of war humanely treat them and provide them with the necessary medical care and attention. With regard to them should not be

¹³ V. Kalugin, *International humanitarian law course* (Tesey, 2006) 133.

¹⁴ 'Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)', 8 June 1977.

¹⁵ *Prosecutor v. Milan Martić* [2008] ICTY Trial Judgment IT-95-11-A; *Kupreškić et al* [2000] ICTY Trial Judgment IT-95-16.

¹⁶ 'Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)', 8 June 1977.

¹⁷ *Kupreškić et al* [2000] ICTY Trial Judgment IT-95-16.

¹⁸ V. Rusinova, *Human rights in armed conflict : problems of correlation of the norms of international humanitarian law and international human rights law* (Statut, 2015) 152.

¹⁹ *Prosecutor v. Duško Tadić* [1999] ICTY Trial Judgment IT-94-1-A.

discrimination, as well as those provisions apply to both international conflicts and non-international.²⁰

2.2 Military necessity

Now we turn to military necessity. Scientists do not always distinguish it as a separate principle of International Humanitarian Law, but it was fixed as the stop howling behaviour of the parties in the Guide to the interpretation of the concept of "direct participation in hostilities" in accordance with International Humanitarian Law, published in 2009 under the auspices of the ICRC²¹.

The concept of "military necessity" humanity is clearly opposed to the achievements of the opponent to win. But at the same time, as noted above, military necessity is limiter of behaviour of the parties of the armed conflict: not all actions arising from the needs of war are necessary. In other words, it cannot be considered military necessity concept, which is opposite to humanity. There is an interesting fact which is often in the agreements governing the rules of warfare indicates military necessity, and therefore it is not clear why it is neglected as a principle that regulates the right to life in armed conflict.

The concept of military necessity has arisen for a long time: many of the great thinkers from the past addressed the problem of limitation of military behaviour. For example, Hugo Grotius wrote: "All the battles are not employees or to obtain adequate, nor to stop the war, are intended solely to serve the ambition of power or as the Greeks say, is" testament to the strength, and not fight against the enemies, "contrary to Christian duty and humanity itself". But despite this the principle of military necessity for a long time is not fixed either at national or at international level. It was only in the second half of the XIX century. This principle has become fixed in the international instruments. But even nowadays, not all scientists agree that the principle of military necessity is the principle of International Humanitarian Law.

As for the content of military necessity, it is firstly used to legitimize acts prohibited by International Humanitarian Law, and it is possible only with the direct indication of rules for it. For example, representatives of the ICRC in accordance with the Third Geneva Convention can visit prisoners of war, can visit places of their detention, but those visits could be limited for the purpose of military necessity. Secondly, the military necessity has never been an excuse for any act aimed at the destruction of the enemy, and etc. It is also a constraint. Thirdly, military necessity is a concept evaluation, assessment and therefore is subject to each individual case of use of force. In

²⁰ Y. Kolosov and E. Krivichkova (eds), *International Law* (International relations, Yurayt, 2nd edn, 2007) 461 – 462.

²¹ N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009) 27.

conclusion, we can say that the principle of military necessity has been unfairly forgotten, although it is one of the most important stops howling behaviour of the parties and guarantee the right to life in armed conflict.

2.3 Classification of participants in armed conflicts

Also, separation of combatants and non-combatants is very important for the right to life in armed conflicts. Of course, this division is conditionally²², but it plays a huge role. Combatants, have the right to use weapons against each other, and non-combatants, which include civilians, medical personnel and chaplains, quartermaster composition, military lawyers, reporters and etc.²³, shall be immune from the use of force to them at any circumstances cannot use force and kill non-combatants as well as have a number of specific rights²⁴. During the military operations it is necessary to distinguish combatants from non-combatants²⁵. If warring party violates this rule, it would be a crime. Securing the rights of these persons it has started fix in the first acts of International Humanitarian Law²⁶.

But let us turn to direct participation in hostilities. Nowadays conflicts are increasingly civilians are drawn into hostilities. It is the right point of view, that such persons lose their non-combatant status and become combatants, and therefore carry the same rights and duties as members of the military action. But the concept of military action rather loose, so it is necessary to consider it in detail.

The hostilities include attacks on military targets, goals, actions aimed at causing harm to the enemy, including unlawful attacks on civilian persons and objects. But this is an exception: the attack on the persons who are in the power of the civilians involved or the parties to the conflict as a "military action" is not interpreted²⁷. But it is also possible to note a few cases, when attacks against persons in the power of parties to the conflict, in essence it must be seen as military action. Firstly, if the situation referred to international conflict, and civilians take part in this conflict, they lose their immunity from military attack: in the event that non-combatant would be drawn into the armed struggle, it actually turns into a combatant. Secondly, the bombardment of the camp internees and prisoners of war by mistake must be considered is the military actions. Thirdly, the deliberate targeting of civilians is considered military action, as well as crime. In a situation to hold this

²² V. Kuzhetschov and B. Tuzmukhamedov (eds), *International Law* (Norma-Infra-M, 3rd edn, 2010) 640.

²³ K. Bekyashev, *International Public Law* (Prospect, 2013) 861.

²⁴ M. D. Evans, *International Law* (Oxford University Press, 4th edn, 2014) 841.

²⁵ A. Aust, *Handbook of International Law* (Cambridge University Press, 2005) 259.

²⁶ A. Kapustin (ed), *International Humanitarian Law* (Yurayt, 2009) 501.

²⁷ N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2009) 27.

distinction even more difficult to non-international armed conflict.

In conclusion, we can say that the notion of "direct participation in hostilities" requires further detail, since without it the question of the legality of the deprivation of life, in this case will remain vague. A significant contribution is made to guide the ICRC's interpretation of this concept.

So, we can say that the constraints that guarantee the right to life in armed conflicts are present in International Humanitarian Law. May be not all of them are developed, but it still confirms the value of the right to life under such conditions.

3. The Lawfulness of Deprivation of Life in Armed Conflict Under Human Rights Law

The International Covenant on Civil and Political Rights enshrines the prohibition of arbitrary deprivation of life²⁸. It also prohibits making exceptions to this provision, even in a "state of emergency in the state in which the life of the nation is threatened by"²⁹. This prohibition also clarified in the European Convention on Human Rights: "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law"³⁰. Then there was the adoption of the Protocol number 6 to the ECtHR, allowing the death penalty only in time of war (in force for Russia), and later was adopted by the protocol number 13, abolishing the death penalty (not signed by Russia). But this Convention indicates the legitimacy of cases of deprivation of life is protect the person from unlawful violence, lawful detention, to prevent the escape of a person detained and legitimate insurrection or riot suppression³¹. But even in this case the European Court of Human Rights interprets the term "intentional" rather broadly.

Referring to article 15 of the ECtHR – it states that derogate from it in the event of war or other public emergency threatening the life of the nation, but in the article on the law of life states that the right to life is unacceptable, except in respect of deaths resulting from lawful hostilities³². There is a question on the interpretation of the concept of "legitimate military action", the more the ECHR not yet expressed an opinion on the matter. Many scientists believe that under this concept are hidden all international armed conflicts. With regard to non-international conflicts, the opinion

²⁸ UN doc, 'The International Covenant on civil and political rights', 16 Dec 1966.

²⁹ Ibid

³⁰ CoE doc, 'European Convention on Human Rights', 4 Nov 1950.

³¹ Ibid

³² Ibid

of the majority is inclined to think that they fall under the concept of "other public emergency threatening the life of the nation." But if the government retreats from any of its obligations under the Convention in this case, the lawfulness of the deprivation of life should be assessed under Article 2 of the ECtHR.

But can the boundary be the same between lawful and unlawful deprivation of life in peace and war time? Many of the international judicial bodies in their practice reduce everything to the absolute similarity of concepts – the border is the same in all cases. But this contradicts all the principles of International Humanitarian Law, including deprive combatants of their legitimate right to use weapons against the enemy and renders meaningless the position of the UN Charter the right of States to individual and collective defence³³. I think, this point of view is wrong, because still retained the factors that may lead to military action, which would still entail sacrifice. The priority in the context of armed conflict still has a notion of arbitrariness enshrined in the International Humanitarian Law, so the bar set in the International Law of Human Rights in the context of international conflicts should be reduced.

But still there is a tendency in the practice of international courts which prohibit the International Humanitarian Law to protect non-combatants is generally regarded as the minimum guarantees for the protection of human rights, including the right to life. And the explanation is that the rules of the absolute prohibition of the taking of life in human rights law are the general rules in relation to the rules of International Humanitarian Law. IHL can be called *lex specialis* in relation to the absolute prohibition of the taking of life. This is the most common argument³⁴. There is another explanation too. So the rules of International Humanitarian Law are included in the customary rules, and then they become norms *jus cogens*.

Now let us return to the combatants. There were some interesting cases on this subject in the practice of the UN Human Rights Committee and the ECHR. With regard to the UN Human Rights Committee, its practice on the legality of the deprivation of life of combatants rather scarce it could be noted the cases "Suárez de Guerrero v. Colombia" dated March 31, 1982 and concluding observations on Israel's reports 2003 and 2010. Taking the first case we can say that it is interesting because of its factual circumstances have occurred during the armed conflict, but the Committee did not apply the rules of International Humanitarian Law and applied only the rules of Human Rights Law. But the second case of Israel is more interesting. The Committee was concerned about the use of force by Israel against the people suspected of terrorism. Israel, in turn,

³³ UN doc, 'UN Charter', 26 June 1945.

³⁴ V. Rusinova, 'International legal regulation of the right to life in armed conflict' (2013) 1 Moscow' Journal of International Law 4 – 9, 5.

justified the legitimacy of their actions, referring to the rules of International Humanitarian Law, but the Committee noted that it is necessary to exhaust such methods of struggle as the arrest and etc.

The practice of the ECHR on this subject is vast. Although in these cases have not raised the question of the legality of the deprivation of life of fighting, but the Court repeatedly made the caveat that the use by the state forces against the armed opposition groups must be proportionate in the light of article 2 of the ECHR. This approach can be seen in a number of "Turkish" and "Chechen" solutions. For example, in the case "Isayeva v. Russia" the Court is not limited by the fact that "the situation in Chechnya called for exceptional measures by the Russian Federation needed to regain control of the Chechen Republic and to suppress the illegal armed insurgency". The Court also pointed out that "taking into account the circumstances Chechen conflict, such measures could include the use of military force, equipped with military weapons, including artillery and military aircraft, as well as the presence of a fairly large group of armed militants in Katyr-Yurt and their active resistance to law enforcement authorities, which was not disputed by the parties, could justify the infliction of death³⁵. It should also mention the case of "Esmukhambetov and others against Russia." Despite the fact that the ECHR recognized the existence of an armed conflict not of an international character in Chechnya, but due to the fact that the evidence which force was used against the federal forces were absent, the Court decided that the right to life has been violated³⁶.

Of course, anti-Russian rhetoric can be clearly traced in these decisions the ECHR, and there are some contradictions, but they are important to us. They have the Court of proportionality applicable to the forces fighting parties.

In general, we can say that the ECHR's way is characteristic as way of Human Rights Law, which is different from the approach of International Humanitarian Law. You can highlight the following features of this approach. So the first feature is that each situation is evaluated individually, and not the overall context in which military force is used. The second – the application of the proportionality test in the deprivation of life.

Now we turn to the legality of accidental deaths of civilians in an attack on military targets. This issue affects only the ECHR. Pay attention to the following: the concept and limits of acceptability "collateral damage" (random victim) and the content of the precautionary measures to be taken by parties to the conflict in order to avoid such accidental loss.

³⁵ *Isayeva v. Russia* App no 57950/00 (ECHR, 24 Feb 2005); *Isayeva, Yusupova and Bazayeva v. Russia*, App no. 57947 – 57949/00 (ECHR, 24 Feb 2005).

³⁶ *Esmukhambetov and others v. Russia* App no. 23445/03 (ECHR, 29 March 2011).

These cases also apply the proportionality test and the Court in its practice takes the position that allows recognizing the validity of such acts. Of course, there is a difference between the criteria of proportionality in the ECHR and in the International Humanitarian Law – IHL clearly indicates the need for a comparison with the military advantage of random victims, not taking direct part in hostilities, and the ECHR logic implies that should be checked and the use of force against the "rebels", including persons who are directly involved in the hostilities.

Regarding civilians, the ECHR is guided by the same logic as in International Humanitarian Law: an attack on military targets should not lead to disproportionate civilian casualties, and fight should take precautions both in the preparation and planning, as well as during operation.

With regard to precautionary measures, they are not expressly provided for in the ECHR. The ECHR removes them from the obligation to ensure respect for the right to life. Also, decision of ECHR "McCann v. The United Kingdom" is significant. In this case the European Court said: "to determine whether the use of force in line with article 2, the court must check carefully ... not only whether the force used by soldiers in exact proportion to the protection of individual targets from unlawful violence but also whether the anti-terrorist operation planned and whether it is controlled by the authorities to minimize as much as possible".³⁷

In general, the analysis of the practice of the ECHR, it can be concluded that the Court in such matters is based on the norms of International Humanitarian Law, without mentioning them directly. There are 3 groups of such obligations: first group – commitments made by the ECHR similarly IHL norms (for example, rules on the prohibition of certain methods and means of armed conflict); the second group – the commitments of the output by interpreting the rules of IHL (such as precautions to prevent accidental civilian deaths); third group – the obligation, which the Court deduced yourself and which not derived from the norms of international humanitarian law³⁸.

So, it can be concluded that in the International Human Rights Law in the assessment of the legality of the deprivation of life in the armed conflict has its own method of assessment different from the techniques of International Humanitarian Law, but in some cases, this technique still relies on the technique of IHL.

4. Integrated Verification the Lawfulness of Deprivation of Life in the Use of Force in Armed Conflict

We have examined the legality of the deprivation of life assessment in the conditions of military

³⁷ *McCann v. United Kingdom*, App no. 18984/91 (ECHR, 13 May 2008).

³⁸ V. Rusinova, *Human rights in armed conflict : problems of correlation of the norms of international humanitarian law and international human rights law* (Statut, 2015) 240 – 244.

conflict in the aspect of the two branches of international law. Now we turn to the joint management of the International Human Rights Law and International Humanitarian Law deprivation of life as a result of the use of force in armed conflict, which is quite problematic. According to the norms of IHL deprivation combatant life, organized armed group members and persons taking direct part in hostilities at the time of these actions is lawful, if he is not *hors de combat* and if the use of force will not lead or do not lead to civilian casualties and causing damage to civilian objects that would be excessive in relation to the military advantage obtainable, and if another party do not using prohibited methods and means of warfare. According to the norms of human rights law, as it was found to have changed the interpretation of international instruments on human rights, recognizing the right to life: the criteria of absolute necessity and proportionality, as well as in time of peace, are applicable to the case of military conflict, thereby tightening requirements for the legality of the deprivation of life. As a result, international judicial bodies used "integrated " verification test of the legality of the deprivation of life, which consist of IHL practices and human rights law practices – there are taken into account rules of IHL, and the criteria of absolute necessity and proportionality are applied.

This test, in fact, was born from the practice of international bodies to protect human rights, in particular from the practice of the ECHR, which can be seen in his practice. Of course, this test has been criticized for failing to IHL, but it should be noted that this assertion is incorrect – international humanitarian cannot be used in isolation, its provisions are part of the international public law, and therefore should be applied taking into account the provisions of other branches of international law. It should also be noted that there are situations where international human rights law does not apply, therefore, in these situations it should be applied only the rules of international humanitarian law. Moreover, the criteria, which ECHR applies, have never been more challenged by the respondent states. The practice of these bodies, the opinion of the doctrine, despite the criticism of the test, still has determined that this test international law.

But it should be noted that this test is that only applies to non-international conflicts. Is it possible to use it to armed conflicts of an international character? According to scientists on the matter clearly – if it may be used "integrated" test for non-international conflicts, then to conflicts of an international character it may be applied only rules of international humanitarian law. It is argued that the international nature of the armed conflict is governed by slightly different rules than non-international conflicts. In the absence of practice on this issue, you must turn to the international instruments on human rights – only the European Convention makes a hard division between the international conflict and non-international conflict, so it is concluded that an integrated approach is only applicable to non-international conflicts, but it can be denied.

Firstly, the distinction between these types of conflicts is based on the presumption that during the armed conflict of an international character state will do no derogation from the right to life, but in practice this is what happens and does not happen.

Secondly, even if the retreat was, this derogation must comply with the criteria of proportionality and necessity, because, according to the ECtHR, it could do retreat "only to the extent required by the exigencies of circumstances"³⁹.

Thirdly, the Convention there is no reference to the need to apply the *renvoi* to IHL, therefore, what is considered lawful acts of war is determined on the basis of other instruments of international law.

On this basis, it can be concluded that the dualistic approach to evaluating the legality of the deprivation of life during armed conflict is quite controversial. "Integrated" test requires States to take account of all the commitments given situation. Therefore, no ads situation "military" or "fighting" or the use of military forces to carry it out, or view applicable government forces weapons are neither together nor separately decisive factors to determine the legality of the deprivation of life, because of the situation does not depend on the type of operation, and on the qualifications of all the circumstances. This approach avoids the abuse when the cases that arise in the context of armed conflict, are treated by the state as "combat", which is considered a "total indulgence" for the use of force. This means that, even in respect of members of armed groups must respect the principles of proportionality and necessity, therefore, not in all cases be lawful deprivation of life. In fact, international human rights law has tightened the requirements: not all that is recognized as lawful under international humanitarian law will be valid in the aspect of human rights law. But there is also a positive aspect – this approach should help strengthen the protection of victims of armed conflicts. It should be remembered that human rights law and international humanitarian law have different scope. International humanitarian law applies only in case of armed conflict, and provides a number of safeguards that reflect the specific characteristics of such conflicts. A significant number of human rights are unparalleled in international humanitarian law.

5. Conclusion

To sum up, examining the theme of the relation of International Human Rights Law and IHL, it can be concluded that, firstly, IHL has a whole set of legal rules that restrict the application of

³⁹ CoE doc, 'European Convention on Human Rights', 4 Nov 1950.

violence or are the legal minimum, which guarantees relative immunity rights a life. Despite the fact that International Humanitarian Law regulates the military action in which the murder is the usual case, still have rules that guarantee the inviolability of human life, and whose violation is considered serious international crime.

Secondly, International Human Rights Law also has standards in the protection of right to life in armed conflict, but they set more stringent requirements for the legality of the deprivation of life. Maybe in some situations, in terms of the priority of human rights such stringent requirements and justified, but in general, these requirements are deprived of power such as the right of IHL combatants use weapons against enemy combatant sides- under such stringent requirements, these rules simply do not apply.

Thirdly, there is "integrated" verification test of the legality of the deprivation of life in the conditions of armed conflict, combining the approaches of both International Human Rights Law and IHL. This test is most applicable, because the competition theory, according to which international humanitarian law excludes the applicability of international human rights law, is contrary to international treaties and their practical application. But, on the one hand, this test ensures the rights of those who enjoy immunity during the armed conflict, but on the other hand, this test is only applicable to non-international armed conflicts, and sometimes do not take into account some unimportant rules of IHL.

Based on all this research, it can be concluded that the universally recognized human rights priority in armed conflicts to such an overriding law, the right to life, apply the rules of IHL - its rules in this case have priority. The norms of human rights law in these situations are secondary and should be applied in the second place after the application of IHL. I believe that once the rules of IHL governing relations during armed conflicts, and attitudes related to human rights, in this period should also be governed by the same rules.

CERTAINTY OR FAIRNESS? THE CONSTRUCTIVE TRUST IN CASES OF NON-MARITAL COHABITATION

Saxon Norgard*

1. Introduction

Non-marital cohabitation is the fastest growing domestic arrangement in England and Wales,¹ with the Government Actuary's Department predicting that 16% of adults will find themselves in a cohabiting relationship by 2031.² This, combined with the continued absence of a legislative regime for cohabitation, despite the fact that cohabitants are nearly five times more likely than spouses to separate,³ has posed an ever-growing challenge for the judiciary. Ideally, couples will make an express declaration of trust as to their interests in the cohabited family home, thus leaving their post-separation positions relatively clear. But with many demonstrating indifference to their legal interests at the time of acquisition⁴ and an erroneous belief in 'common law marriage',⁵ it is often the case that this does not occur – leaving the matter, after Baroness Hale's landmark decision in *Stack v Dowden*,⁶ to be settled by the common intention constructive trust. In this Article, the success of the contemporary constructive trust in providing relief for separating cohabitants is assessed against the indicia of fairness, certainty and procedural hardship. While it is possible that the approach established in *Stack* (and later clarified in *Jones v Kernott*) has increased the likelihood of parties achieving a 'fair' outcome, it is posited that the law has been left in a complex, uncertain and altogether unsatisfactory state as a result. However, it is suggested that this reflects a more fundamental problem – that being an inherent deficiency in the capacity of the constructive trust to suitably manage familial breakdowns – which has left the judiciary to navigate an inevitable trade-off between certainty and fairness.

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¹ Office for National Statistics, 'Families and Households, 2014' (Statistical Bulletin, 28 January 2015) <http://www.ons.gov.uk/ons/dcp171778_393133.pdf> accessed 27 February 2016.

² Government Actuary's Department, 'Marital Status Projections for England and Wales (2005)' <www.gad.gov.uk/marital_status_projections/background.htm> accessed 25 February 2016.

³ René Boheim and John Ermisch, *Breaking Up – Financial Surprises and Partnership Dissolution* (University of Essex, ISER, 1999) 7.

⁴ David Cowan, Lorna F. O'Mahony and Neil Cobb, *Great Debates in Property Law* (Palgrave Macmillan, 2012) 224.

⁵ Anne Barlow, Carole Burgoyne, Elizabeth Cleary and Janet Smithson, 'Cohabitation and the Law: Myths, Money and the Media' in Alison Park, John Curtis, Katarina Thompson, Miranda Phillips, Mark Johnson and Elizabeth Cleary (eds), *British Social Attitudes: The 24th Report* (Sage, 2008) 40.

⁶ [2007] UKHL 17.

⁷ [2011] UKSC 53.

2. A Shift Towards Fairness?

When cohabitants share joint legal ownership of the family home, it is now presumed – following Baroness Hale’s decision in *Stack v Dowden* – that they hold the beneficial interest in equal shares under a constructive trust.⁸ This presumption may be rebutted in “very unusual”⁹ cases, whereupon the court will quantify the appropriate equitable shares by reference to a wide range of factors.¹⁰ There is no doubt that this holistic approach has vastly improved the law’s propensity to operate fairly in joint ownership cases, giving judges wide discretion to incorporate non-financial contributions into the quantification of equitable shares, and addressing the inequities produced by strict applications of the resulting trust. This is well illustrated by *Fowler v Barron*,¹¹ where the Court of Appeal awarded Ms Fowler a 50% beneficial interest in the co-owned family home despite the fact that she had not contributed to the purchase price.

However, there is uncertainty as to the correct approach in cases where legal title is held solely by one cohabitant. Here, the non-owner cohabitant must first establish that he or she has acquired *some* share of the beneficial interest (the ‘acquisition stage’) before that interest can be quantified (the ‘quantification stage’). While it is clear that Baroness Hale’s holistic approach will apply at the quantification stage of sole ownership cases, some commentators have argued that the courts have not extended it to the acquisition stage.¹² If this is correct, it means that parties without a legal interest must still meet the strict criteria in *Lloyds Bank plc v Rosset*¹³ and demonstrate a common intention to share the beneficial interest arising from an express agreement or financial contributions directly attributable to the purchase price.¹⁴ This has the potential to engender vast unfairness. First, it is difficult to see why services that have an economic value should be given less significance than financial contributions, particularly when they offer additional social value to the family unit.¹⁵ Privileging monetary contributions also has a discriminatory effect against the party (often female¹⁶) who gives up full-time employment in order to care for a child.¹⁷ Women are further disadvantaged because of disparities in the labour market, which on aggregate leave

⁸ *Stack* (n 6) [58] (Baroness Hale).

⁹ *Ibid* [68].

¹⁰ *Ibid* [69].

¹¹ *Fowler v Barron* [2008] EWCA Civ 377.

¹² Joanna Miles, ‘Cohabitation: Lessons for the South from North of the Border’ (2012) 71(3) *Cambridge Law Journal* 492, 492.

¹³ [1991] 1 AC 104 (HL).

¹⁴ *Ibid* 132-3 (Lord Bridge).

¹⁵ Joanna Miles, ‘Property law v family law: resolving the problems of family property’ (2003) 23(4) *Legal Studies* 624, 641.

¹⁶ Katherine Rake (ed), *Women’s Incomes over the Lifetime* (The Stationary Office, 2000).

¹⁷ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com CP No 179, 2006) para 4.15.

them less able to make substantial financial contributions.¹⁸

The contrary body of opinion points to Baroness Hale's *obiter* comment that *Rosset* had "set the hurdle rather too high"¹⁹ and the concluding remarks of her joint judgment in *Jones*²⁰ to suggest that the same holistic approach is to be taken with acquisition.²¹ There is also an argument that judges have proved their willingness to be creative with the concepts of 'express agreement' and 'financial contribution' in order to achieve fair results, irrespective of the strict criteria expressed in *Rosset*.²² Examples of this include Lord Denning's judgment in *Eves v Eves*²³ and the recent High Court decision in *Bank of Scotland v Brogan*,²⁴ where reliance was placed on substantial non-financial contributions to find that the non-owner cohabitant had acquired a beneficial interest.²⁵ Nevertheless, it is doubtful whether forcing parties to rely on 'judicial creativity' for a fair result is satisfactory.

At present, the true state of the law on this matter is unclear. There have been sharp divides at the academic level²⁶ and a slew of contradictory decisions from the judiciary – some taking a holistic approach to acquisition²⁷ while others have applied the strict rules in *Rosset*.²⁸ So while there is no doubt that courts are better placed to deliver just results when quantifying interests in the family home, it remains to be seen whether this is offset by persisting unfairness at the acquisition stage.

3. The Current State of the Law

The one conclusion with near-universal acceptance is that the constructive trust in its current form is overly complex, subjective and uncertain. This is well illustrated by constant iterations, from both academics²⁹ and judges,³⁰ as to the importance of having cohabiting couples make express declarations of trust in order to avoid a process that "can become fraught with uncertainty".³¹

¹⁸ Anne Bottomley, 'Self and Subjectivities: Languages of Claim in Property Law' (1993) 20 *Journal of Law and Society* 56, 60.

¹⁹ *Stack* (n 6) [63].

²⁰ *Jones* (n 7) [51], [52].

²¹ Simon Gardner and Katharine Davidson, 'The Supreme Court on family homes' (2012) 128 *Law Quarterly Review* 178, 178.

²² Simon Gardner, 'Problems in family property' (2013) 72(2) *Cambridge Law Journal* 301, 306.

²³ [1975] 1 WLR 1338.

²⁴ [2012] NICH 21.

²⁵ Heather Conway, 'Constructive trusts and the family home (yet again) – Bank of Scotland Plc v Brogan' (2013) 6 *Conv.* 538, 543.

²⁶ Gardner (n 22) 305–6 cf Miles (n 12) 492.

²⁷ *Brogan* (n 24), *Crown Prosecution Service v Piper* [2011] EWHC 3570.

²⁸ *Geary v Rankine* [2012] EWCA Civ 555, *James v Thomas* [2007] EWCA Civ 1212, *Morris v Morris* [2008] EWCA Civ 257.

²⁹ Miranda Allardice, 'Cohabitants and constructive trusts in 2015' (2015) 3 *PCB* 105, 105.

³⁰ *Carlton v Goodman* [2002] EWCA Civ 545 [44] (Ward LJ).

³¹ Frances Ratcliffe, 'State of play: Legal Update Family' (2015) 165 *New Law Journal* 7659, 7660.

Practitioners have also been candid as to the problems they face because of the law's complexity and the virtual impossibility of predicting how cases will be resolved at trial.³² Ultimately this has translated into hardship for separating cohabitants, making it more difficult to reach out-of-court settlements and forcing many to pursue a destructive trial process or abandon their claim. Complexity also places a premium on specialised legal representation, not only increasing legal costs across the system but advantaging those with greater financial means. Moreover, the multitude of factors relevant to establishing a common intention mean that considerable resources must be spent compiling large bodies of evidence to establish something that, often, never existed.³³ This forces reliance on notoriously subjective oral testimony, making it even harder to predict the outcome of a trial and subjecting parties to the rigours of giving evidence in open court. With all these contingent factors in play, litigants can at best expect a drawn-out process of appeals and prolonged subjugation to an uncertain future.³⁴ Along with the confusion regarding sole ownership cases, it is suggested that two sources of uncertainty produced by *Stack* and *Jones* have contributed to the unsatisfactory state of law; the court's reliance on 'imputed' intentions, and Baroness Hale's category of 'unusual' cases.

3.1 Imputed Intentions

Where the court is unable to infer a common intention as to the quantum of shares, it is now settled that one may be 'imputed' by reference to a yardstick of fairness.³⁵ This involves a legal fiction whereby judges use their discretion to construct an intention that the parties likely never held,³⁶ creating uncertainty by opening the door to a multitude of equally justifiable outcomes.³⁷ It also allows the law to disconnect from reality, as occurred in *Aspden v Elvy*³⁸ where the judge was forced to impute an intention on the basis that the parties were 'just and reasonable', despite evidence suggesting the complete opposite – creating a risk of arbitrary results.³⁹ Unfortunately, these inherent difficulties have been compounded by a lack of clarification from the Supreme Court. There was no explicit guidance in *Jones* as to the types of circumstances that make it 'impossible' to infer an intention, and little can be gleaned from the facts because the court split over whether it was necessary to impute an intention.⁴⁰ *Jones* also shed little light on how an intention should be

³² Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 *Modern Law Review* 24, 42.

³³ Law Commission (n 17) para 4.50.

³⁴ *Ibid* paras 4.52-4.55.

³⁵ *Jones* (n 7) [31].

³⁶ *Stack* (n 6) [126] (Lord Neuberger).

³⁷ Gardner (n 22) 304.

³⁸ [2012] EWHC 1387 (Ch).

³⁹ James Lee, "'And the waters began to subside": imputing intention under *Jones v Kernott* – *Aspden v Elvy*' (2012) 5 *Conv.* 421, 424.

⁴⁰ *Jones* (n 7) [48] (Lord Walker and Lady Hale) cf [77] (Lord Kerr), [89] (Lord Wilson).

imputed, the majority viewing it as practically the same as an inference,⁴¹ versus the minority who supported a distinct approach.⁴² As Lord Collins put it, “one person’s inference will be another person’s imputation”,⁴³ offering very little in the way of concrete direction for the courts or practitioners. A worrying ramification of this is that some judges appear to have reverted to a narrow focus on financial contributions in order to avoid the process of imputation altogether, once again opening the door to unfairness.⁴⁴

3.2 ‘Unusual’ Cases

Baroness Hale in *Stack* purported to impose a “heavy burden”⁴⁵ on parties seeking to rebut the posited starting presumption, requiring that the circumstances be “very unusual”. Theoretically, this should mean that the large majority of joint ownership cases can be predicted with relative certainty. However, with the presumption being rebutted in both leading cases and there being no substantive guidance as to what makes a case sufficiently ‘unusual’, this has not materialised. Thus, with the wide variety of relevant factors it will always be possible for a skilled lawyer to make the argument that their client’s case is unusual, encouraging litigation.⁴⁶ This stipulation is made even less clear by the fact that what is ‘unusual’ in law does not appear to correspond with what is ‘unusual’ in reality. In *Stack* for example, the starting presumption was rebutted in part because the parties kept their finances separate, yet empirical studies show this to be a common arrangement among cohabitants.⁴⁷ Once again, this need to engage in fiction is troubling and indicative of a more fundamental deficiency with the constructive trust.⁴⁸

4. The Constructive Trust

While it is attractive to blame these shortcomings on the Supreme Court’s failure to appropriately clarify the *Stack* principles in *Jones*,⁴⁹ it is suggested that to do so ignores a more fundamental deficiency in the constructive trust. This lies in its proprietary character, which has forced the judiciary to sacrifice certainty for the possibility of securing a fair outcome. The starting point for this analysis is the proposition that while separating cohabitants have a wide range of interests

⁴¹ Ibid [34] (Lord Walker and Lady Hale).

⁴² Ibid [73] (Lord Kerr), [87] (Lord Wilson).

⁴³ Ibid [65] (Lord Collins).

⁴⁴ Sarah Greer and Mark Pawlowski, ‘Imputation, fairness and the family home: *Graham-York v York*’ (2015) 6 *Comv.* 512, 515-21.

⁴⁵ *Stack* (n 6) [33].

⁴⁶ Andrew Dyson, ‘All’s fair in love and law: an analysis of the common intention constructive trust’ (2008) 4(2) *Cambridge Student Law Review* 149, 163.

⁴⁷ Douglas, Pearce and Woodward (n 32) 37.

⁴⁸ Cowan, O’Mahony and Cobb (n 4) 223.

⁴⁹ Adam Doyle and James Brown, ‘*Jones v Kernott*: which road to Rome?’ (2012) 26(2) *Trust Law International* 96, 105.

ranging from compensation for a variety of contributions to residential security, their central concern is ensuring a secure future for themselves and any dependents they might have.⁵⁰ The problem with the constructive trust is that like all proprietary devices, it is wholly concerned with looking backwards to make a mechanical determination of what parties have done to acquire legal rights. At the most basic level therefore, it is incongruous with the objectives that the law should be pursuing. From a practical perspective, this materialises in the fact that the constructive trust can only be used to grant parties a proprietary interest, meaning that it lacks the “remedial flexibility”⁵¹ necessary to properly address the parties’ needs.

This becomes clear upon closer examination of the core requirement that parties demonstrate a ‘common intention’ as to how the property is held. With domestic cohabitation now fulfilling the same social function as marriage,⁵² there is a strong public policy argument that the recognition given to non-financial contributions when spouses divorce⁵³ should also exist when cohabitees separate. Indeed it is argued that a key source of unfairness is the law’s failure to recognise the unjust enrichment, through non-monetary sacrifices, of one party at the expense of the other.⁵⁴ Yet it is simply not possible, without engaging in fiction, to rationalise the conclusion that parties somehow make these contributions with the genuine intention that they should translate into a proprietary interest.⁵⁵ In fact as has been noted, it is not uncommon for cohabitees to hold no real intention as to ownership at all. Thus, the judiciary has had to resort to legal fictions and judicial discretion to manufacture just results from an inherently flawed proprietary device.

5. Conclusion

In his dissenting opinion in *Stack*, Lord Neuberger expressed concern that Baroness Hale’s holistic approach was a “recipe for uncertainty, subjectivity, and a long and expensive examination of the facts.”⁵⁶ Unfortunately, it appears that these fears have materialised. But so long as the law is confined to the constructive trust as a vehicle for resolving breakdowns in cohabiting relationships, it seems that the only way to ensure some measure of fairness is to accept an equal portion of uncertainty and complexity. This reality, in combination with the plainly inadequate remedies

⁵⁰ Miles (n 15) 639 citing Anne Barlow and Craig Lind, ‘A matter of trust: the allocation of rights in the family home’ (1999) 19(4) *Legal Studies* 468.

⁵¹ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No. 307, 2007) para 2.68.

⁵² Anne Barlow and Grace James, ‘Regulating Marriage and Cohabitation in 21st Century Britain’ (2004) 67 *MLR* 143, 173.

⁵³ Matrimonial Causes Act 1973, s 25(2)(f).

⁵⁴ Douglas, Pearce and Woodward (n 32) 31.

⁵⁵ Dyson (n 46) 164.

⁵⁶ *Stack* (n 6) [146] (Lord Neuberger).

offered by the constructive trust, presents a strong case for a legislative regime that regulates domestic cohabitation within a similar framework to marriage.

EVOLUTION OF THE DISCIPLINE OF DELAY IN THE EU MARKET ABUSE LEGISLATION

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Abstract

The aim of this paper is to depict the Market Abuse Regulation (596/2014) with a focus on the discipline of the delay of disclosure obligation. Since the subject is completely included in MAR, the new Market Abuse Directive (2014/57/UE) will be only considered in the general part of the presentation.

First and foremost, in order to provide a better insight of the discipline of delay, it is necessary to pass through the former MAD (2003/6/EC) and the experience of its implementation, where delay was included in article 6(2). Moreover, the definition of inside information is a key element of this paper, because it represents the object of the disclosure obligation and more in general of the overall regulation about market abuse.

Since it has been written short after the entry into force of MAR, this paper can just rely on the literal analysis of the regulation, ESMA guidelines, questions and answers and some scholars' opinions. It will take some time to have a sufficient number of case law and practical insights from issuers in order to express a comprehensive evaluation of the discipline.

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1. Former discipline on market abuse (MAD 2003/6): a general overview

In the general framework of financial regulation in EU, transparency and disclosure of information that can influence prices of publicly traded instruments are considered of fundamental importance for the optimal functioning of capital markets.

The Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation,¹ called Market Abuse Directive (MAD) was adopted at the end of 2002. The Directive was designed to be a step toward the creation of a single market for financial services. The idea of a single financial market in EU was a main concern both for the Commission and for the Committee chaired by Alexandre Lamfaloussy,² but at that time the project was far less ambitious than the Capital Market Union, that will be outlined in the conclusion of this paper.

The goal of a more organized discipline led the legislator to replace the former regulation through the Market Abuse Directive, thus Directive 89/592/EEC (the Insider Dealing Directive, IDD) was repealed. Since IDD dealt only with insider dealing and the use of insider information (transposed in MAD at articles 2, 3 and 4), the MAD contained a comprehensive regulation which included market manipulation (art. 5) and provisions about the continuous mandatory disclosure of monopolistic information (art. 6). Also articles 68(1) and 81(1) of Directive 2001/34/EC were repealed, this last piece of legislation was a consolidated directive about admission of securities to official stock exchange listing and information to be published on those securities.

The architecture of MAD is consistent with the Lamfaloussy procedure: the directive by Parliament and Council represented the “Level 1” of the regulation, whereas article 6(10) allowed “Level 2” rules in the form of supplementary rules that Commission adopted with its Directives 2003/124 and 2003/125 in collaboration with the European Security Committee.³ The European Securities and Markets Authority (ESMA) would have been created only in 2011, boosting the need of a new approach in market abuse regulation.

MAD tried to establish a level playing field to the extent that offered a homogeneous and sufficiently detailed framework for issuers all around Europe. Before MAD, Member States had different regulations and some of them even lacked a proper piece of legislation about capital markets. At the time of introduction of MAD, in some European Member State there were not any form of specific legislation for the prosecution of price manipulation and the dissemination of

¹ Directive of the European Parliament and of the Council 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse) (2003) OJ L 96/16

² The Committee of Wise Men, ‘Final Report on the Regulation of European Securities Markets’ (2001) final

³ Guido A Ferrarini, ‘The european market abuse directive.’ (2004) 41.3 Common Market Law Review, 711-741

misleading information, especially in those States that had less developed financial markets. In this perspective, differences among Members were, and in some cases still are, enormously deep. The overall situation was characterized by inadequacy and scarce coordination: that condition represented a main concern not only for regulators and for authorities, but also for issuers, investors and traders, who could not rely on an adequate legal framework, finding difficulties in the risk assessment activities and suffering higher transaction costs.

The Directive aimed at strengthen market integrity and efficiency by smoothing the functioning of securities markets, in this perspectives it introduced measures for the prevention and the sanction of market abuses, as well as interventions enhancing market transparency. In order to achieve economic growth and job creation, the public confidence in market was considered crucial, especially in the financial sector, where securities and derivatives are traded.

The directive was part of the answer that legislators gave to financial scandals like Enron in the US, which stressed the weakness of an unregulated security market, where investment banks and financial operators could undertake fraudulent and manipulative practices. At the same time, in a broad sense, MAD has been a part of the effort undertaken by the international community in the fight against the illegal activities that could be exploited for financing terroristic organizations.

As a first step, the Directive provided a clear and unambiguous definition of “Market abuse” establishing that the term was referred to both insider dealing and market manipulation practices. Since the entry into force of MAD, those two offences shared the same legal framework for allocation of responsibilities, enforcement and cooperation.

1.1 Definition of inside information

The definition MAD gave of inside information is fundamental to understand the objectives and the magnitude of the regulation. Article 1, first paragraph, was almost the same both in MAD and in Directive 89/592/EEC; it described the inside information outlining four main characteristics.⁴ First, the inside information is a precise one, meaning that the content or the event expressed by the information is true or could reasonably be expected to become true in the future. Indeed, it must be quite specific in order to foresee its impact on prices. The text of the article defined it as an *‘information of a precise nature’* referring both to the accuracy of the event or the content and to the effect on prices.

Secondly, it is a non-public information. This requirement could be considered obvious and

⁴ For an analytic comment of the whole discipline, see Marco Ventoruzzo and Sebastian Mock, ‘Market Abuse Regulation. Commentary and Annotated Guide’ (2017) Oxford University Press

probably it is, but in this perspective it is important to distinguish between information that become public for their nature or because are out of the control of the issuer, and information to be disclosed by the issuer. In the latter case, there is a specific procedure to make an inside information public.

The third point dealt with the issue whether the inside one is an information *'relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments'*. The information related to the issuer is a corporate information, while the one about financial instruments in generally called market information. As the expression point out, it is not exclusively a direct information, coming straight from the issuer, but it could be an indirect information arising from operators like rating agencies which offer reports and insight about listed financial instruments, or in a broader sense a general information about the market in which the issuer operates, where decisions are undertaken by institutions and policy makers, even news about a particular event could be significant.

Finally, the article focused on effects on financial instruments and established that after its disclosure the information *'would be likely to have a significant effect on the prices'*. How it is possible to determine the impact of the information on prices? And in which moment it should be done? According to the Advice issued by the Committee of European Securities Regulators (CESR) on Level 2 Implementing Measures for the proposed Market Abuse Directive,⁵ the price sensitivity of the instrument had to be assessed *ex-ante*, foreseeing possible price movement upon publication of an inside information. In this effort, all market variables should be considered.

Article 1 also had two additional paragraphs: the second completely devoted to derivatives on commodities, and the third addressed to persons in charge of the execution of orders concerning financial instruments, who can receive inside information by their clients during their activities.

The definition of inside information provided by MAD aimed at reaching the general purpose of the regulation and it is specifically intended to be suitable for its dual use: the ban on insider dealing contained in articles from 2 to 4 and the establishing of the obligation to disclose, imposed by art. 6.

1.2 The disclosure of inside information: two theories

Article 6 of MAD established onto Member States the duty to ensure that issuers of financial instruments kept the public informed as soon as possible about the inside information that would

⁵ The Committee of European Securities Regulators, 'CESR's Advice on Level 2 Implementing Measures for the proposed Market Abuse Directive' (2002), CESR/02-089d

have arisen during their activity. Furthermore, Member States had to set up a proper regulation in order to make issuers do a complete and effective disclosure of inside information, both in case of intentional and non-intentional disclosure. At the same time, paragraph 2 envisaged an exception to the general rule of an immediate disclosure, it is the case of the delayed disclosure that will be examined shortly.

Nevertheless, as it is known, a directive is a piece of European legislation that needs to be implemented by single Member States and each of them, in the exercise of its sovereignty, can do it in a different way. This is the case of MAD, with particular regard to the discipline of delay in disclosure obligation, which legislators introduced having in mind their particular national framework and legal tradition.

Every Member state had already set out its proper approach on disclosure obligation since the implementation of the consolidated directive 2001/34, and the subsequent article 6 of MAD underlined already existing differences.

The situation was depicted in 2007 by the European Securities Markets Expert Group (ESME) in its report *Market abuse EU legal framework and its implementation by Member states; a first evaluation*.⁶ Two main patterns were identifiable: the tie-in approach and the two-step approach.

Germany and some other member states followed the tie-in approach. According with this interpretation, when a piece of information arises and it could be considered as inside information under art 1 MAD, the provisions related to the ban on insider dealing (Articles 2 – 4 MAD) are triggered and at the same time also disclosure obligation (Art. 6 MAD) took effect. Therefore, upon the moment an information becomes inside information, an issuer should simultaneously refrain from an unlawful use of that information and disclose it.

This approach produced the so called problem of “short blanket”: if it is considered to be inside information a piece of information still in an early state and not completely definite, then the ban on insider dealing would have the maximum effect in preventing abuses, but the disclosure obligation would harm the issuer, providing the public with strategic details. On the other hand, if it is defined as inside information the one which appears to be certain or near-certain, then the discipline of disclosure obligation would provide the best result, although the ban on insider dealing would arise too late to be effective.

Italy and Denmark, together with a group of other Member States, adopted the two-step approach. This kind of interpretation led to split the triggering of the insider dealing ban and the mechanism of disclosure obligation. When a particular piece of information starts to be considered as a potential

⁶ ESME Report ‘Market abuse EU legal framework and its implementation by Member States: a first evaluation’ (2007)

inside information, the ban on insider dealing arises and it lasts until the time of the disclosure. Every action contrary to the ban that is undertaken in this period would be sanctioned by the national authority. After a while, when the information is certainly an inside one, also the disclosure obligation arises. Member states that applied this mechanism relied on the Commission Directive 2003/124 that referred to MAD clarifying the definition of inside information without reference to uncertain and future information.

As it is easy to understand, the issue laid on the definition of inside information, its borders and the interpretation provided by different subjects.⁷

1.3 The former discipline of delay

Having in mind the different approach among Member State in defining the time of the coming into light of inside information, it is now possible to look at the general discipline of delay set out by MAD and understand how that single rule was consistent with several national regulation.

Art 6 (2) of MAD established the right for an issuer to delay the public disclosure of inside information. As pointed out before, the aim of the directive was to provide a regulation for the capital market and enhance the confidence of investors; in this perspective, the first condition to trigger the instrument of the delay is that the information should not mislead the public.

Another remarkable aspect was set out at the very beginning of the paragraph where was specified that the issuer acts '*under his own responsibility*'. This duty was carried out through the commitment to keep the information confidential, that meant to avoid possible leaks by insiders. Nevertheless, for the issuer such a provision is a source of costs of compliance and if it fails to assure the cooperation of all those who have access to the inside information, it can no more delay the information.

The discipline of the delay in the disclosure was obligation deeply influenced by the two approaches toward inside information depicted above. Moreover, the directive gave to national authorities the power to provide a supplementary regulation and to be informed in advance in case of a delayed disclosure of inside information.

The result was a very confused and fragmented framework, where national borders were still an important aspect to value before an investment in a particular member state.

A source of unification was represented by the already mentioned CESR technical advice, which outlined some example of justified delay. In particular, the case of ongoing negotiation was

⁷ Jesper Lau Hansen and David Moalem 'The MAD disclosure regime and the twofold notion of inside information: the available solution' (2009) Capital Markets Law Journal

considered a good reason to delay inside information, especially when such disclosure could threaten the continuation of negotiation and the deal behind them. In a similar case, when a very important deal is discussed and it can determine the financial stability of the issuer, the shareholder interest in the strength and survival of the listed company was protected from an early disclosure that could undermine the condition of the company. Under the corporate governance perspective, CESR took into account the case of a two-tier system corporation when the approval of supervisory board is required for an important transaction. The same issue was considered for one-tier system corporation when the vote of the full board is required. In both cases, the conclusion underlined a risk in the form of a negative influence on the unfinished deal by the public reaction to the news.

2. New discipline on market abuse, MAD II and MAR: a general overview

The experience in the implementation of MAD, has led the European legislator to develop a new piece of legislation in order to provide a more harmonized and comprehensive discipline to fight market abuse. The former MAD left too much independence to Member States legislators and authorities, and lot of heterogeneous provisions have arisen.

The new discipline is composed of two piece of legislation: a new Market Abuse Directive (2014/57/UE, called MAD II)⁸ mainly focused on standards for criminal sanctions, and a self-implementing Market Abuse Regulation (596/2014),⁹ which repeal the existing set of rules and provides a single source for the entire subject of market abuse, applicable all over Europe in a uniform way.

Both MAD II and MAR include provision concerning insider dealing, unlawful disclosure of inside information and market manipulation, but they do it under different perspectives.

Following the recommendations of the High Level Group in Financial Supervision in the EU chaired by Jacques de Larosière,¹⁰ the new MAR establishes a stronger framework and avoids potential regulatory arbitrage. This structure is in favour of more legal certainty and less confusion in regulation, therefore market participants can benefit from a clearer discipline to comply with.

The scope of MAR is quite the same of the former MAD, but the use of a directly applicable and detailed instrument will certainly make the difference in the implementation. The MAR constitutes a uniform law all over Europe, every Member State is subject to the same rules in terms of financial

⁸ Directive of the European Parliament and the Council 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (2014) OJ L 173/179

⁹ **Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation)** (2014) OJ L 173

¹⁰ High Level Group in Financial Supervision in the EU 'Report' (2009)

regulation and different interpretation of the same rule are no more admissible. In this perspective it is valuable the specific goal to boost cross border operations and to facilitate financial operation for small and medium-sized enterprises (SMEs). Financial markets are by their nature indifferent to borders, and any form of protectionism and limitation could possibly led to abuses.

As a final remark, the fragmented supervision has been converted in a unified control by ESMA through an integrated network, where national authorities work in synergy and under the same approach. Since 2011, through the institution of the common framework for financial supervision, called European System of Financial Supervision (ESFS), the former CESR, who had been part of the Lamfaloussy system launched in 2001, was repealed and substituted by ESMA.

2.1 Definition of inside information: new article and jurisprudence

Whereas article 7(1) of MAR on the definition of inside information is substantially the same of article 1(1) of MAD I, the following paragraphs of the article 7 introduce in the new piece of legislation the experience of ten years of implementation of MAD I.

Paragraph 2 sets out the extent of the concept of information of '*precise nature*' in the case of an event which is not certain but it can be predicted with a reasonable expectation to occur and – consequently – with the opportunity to make predictions on market performances. In this case, the information can be deemed as an inside one, and the same goes for protracted process that can result in a future event or circumstance. Indeed, according to paragraph 3, also an intermediate step in protracted process can be source of inside information, if it fulfils the same condition provided for general inside information.

Paragraph 4 is about the ex-ante perspective of evaluating effects of possible inside information. Under this paragraph inside information is the one that, if it were announced to public, a reasonable investor would be likely to use it as an element of his investment decision.

Finally, paragraph 5 gives to ESMA a mandate to draft guidelines with a non-exhaustive list of the kind of information that are likely to be disclosed in any case under the national and European legal framework.

It is interesting to remark a contribution from the jurisprudence: in the judgment of case C 628/13 *Lafonta v. Autorité des marchés financiers*, the European Court of Justice settled that: '*In order for information to be regarded as being of a precise nature for the purpose of that provisions, it need not be possible to infer from that information, with a sufficient degree of probation, that once it is made public, its potential effect on the prices of the financial instruments concerned will be in a particular direction*'.¹¹ Therefore, an information

¹¹ Case C-628/13 *Jean-Bernard Lafonta v Autorité des marchés financiers* [2015]

which permits to know whether the prices in the market are going to vary – also if the person who receives the piece of information cannot say if they will increase or decrease – can be deemed as an inside information. This guidance represents an important issue in derivatives markets.

2.2 The new discipline of delay

Since MAR adopts a tie-in approach, the general rule about disclosure is in article 17(1) MAR and the time set out for the issuer to inform the public is ‘as soon as possible’. It is self-evident that ‘as soon as possible’ is not the same than ‘immediately’: this distinction is essential to understand the general rule for the timely disclosure of information, and therefore the magnitude of the choice of delaying the disclosure.¹²

The European legislator is aware that the issuer is constantly exposed to a great number of pieces of information, most of which are incomplete, unprocessed, thus unintelligible, and even dangerous for the public that may be misled by such information. On the contrary, the Market Abuse discipline pursues the goal to provide the public with relevant and reliable information, those that could help the smooth functioning of the market by supporting long-term investment decisions. In this perspective, the disclosure should intervene when the information has been processed and its features of price sensitivity verified, only after that stage the disclosure can be considered complete, correct and timely.

According with the process of information’s assessment depicted above, it could be said that there is a time, not considered as delay, during which the issuer inevitably withholds the ‘rough’ information, and a time, considered delay and granted under specific condition, when the ‘complete’ inside information might be withheld.

How delay of disclosure actually works? The issuer has to value whether the three conditions hereunder are met and then it can decide what to do. If it chooses to delay, immediately after the information is disclosed to the public, the competent authority has to be informed of the choice through a written document to explain how and when requirements for delay were met. This procedure can be amended by Member States that decides that explanation is mandatory only upon the request of the competent authority.¹³ For example in the United Kingdom the Financial Conduct Authority (FCA) has created a website where issuers can fill an online form in order to submit a ‘Notification of Delayed Disclosure of Inside Information’.¹⁴

¹² Jasper Lau Hansen, ‘Issuers’ duty to disclose inside information’ (2017) ERA Forum No. 18: 21

¹³ Linda Hellstén, ‘Disclosure and delayed disclosure of inside information in the light of the EU Market Abuse Regulation’ (February 2015 Master’s thesis University of Helsinki, Faculty of Law)

¹⁴ Financial Conduct Authority’s website,

https://marketoversight.fca.org.uk/electronicsubmissionssystem/MaPo_DDII_Introduction (accessed 9th

Credit and financial institutions have a separated, but similar, discipline of the delay that has been introduced for the purpose to protect institution with temporary liquidity problem the need of any help from central bank or more generally lender of last resort.

The provision concerning the delay of disclosure obligation on inside information is expressed in article 17(4) and it concerns the withholding of the inside information.¹⁵ As already mentioned the new set of rules only allows delayed disclosure in three specific cases, when all the circumstances listed in the article are jointly met.

These conditions are:

'a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant'

The definition of what exactly is a 'legitimate interest' is the most relevant part of ESMA guidelines required by article 17(11) of MAR in order to establish a non-exhaustive and indicative list of them.¹⁶

First of all, the Authority points out that the delay represents the exception to the general rule to the immediate disclosure and the evaluation should be assessed on a case by case basis then, following the example of the second set of Guidance of CESR (CESR/06-562b).¹⁷ The Authority included in its list the case of ongoing negotiation; the risk of a serious and imminent danger to the financial viability of the issuer. With reference to corporate governance issues, it includes decisions taken or contracts entered into by the management body of an issuer that need the approval of another body of the issuer in order to become effective. Also the development of a product or an invention are considered as cases when a legitimate interest can prevail on immediate disclosure, protecting intellectual property. In the merger and acquisition field it can be significant the case of an issuer planning to buy or sell a major holding in another entity; in a similar way it is mentioned the case of a deal or transaction previously announced by the issuer and subject to a public authority's approval.

'b) delay of disclosure is not likely to mislead the public'

Also the specification of this condition is part of the mandate of article 17(11). In this context ESMA provides three specific examples for an inside information considered misleading in case

December 2017)

¹⁵ Jesper Lau Hansen, 'Say when: When must an issuer disclose inside information?' (2016) Nordic & European Company Law LSN Research Paper Series No. 16-03

¹⁶ ESMA 'Guidelines on the Market Abuse Regulation - market soundings and delay of disclosure of inside information' (2016), ESMA/2016/1130; the document has been updated by ESMA 'MAR Guidelines (2016) Delay in the disclosure of inside information' ESMA/2016/1478

¹⁷ The Committee of European Securities Regulators 'Market Abuse Directive Level 3 – second set of CESR guidance and information on the common operation of the Directive to the market' (2007) CESR/06-562b

the disclosure is delayed: when an information is inconsistent with former announcements already made to the public by the issuer on a particular matter; whether the information the issuer wants to delay is about the failure to meet financial objectives already disclosed to the public; the information the issuer intends to delay is opposite to market expectation which rely on any kind of previous communication managed by the issuer or on its behalf.

These two first parameters were further specified in a successive publication of MAR guidelines by ESMA.

'c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information'

This duty was already present in the MAD and is just reaffirmed in the MAR, without any addition by ESMA. Anyway it is now considered one of the three fundamental conditions for delay to be allowed.

Following a request for clarification coming from issuers, recently ESMA specified that in case of a delayed information that lose its feature of price sensitivity the issuer is no more obliged to publicly disclose that information nor to inform the competent authority about the delay of such information.¹⁸

Since MAR is applicable to issuers from United States that are admitted to trade on European market and on multilateral trading facilities in particular, it is interesting to notice how US financial actors focused on certain corporate aspects of delay. In particular a document about the application of MAR published by NASDAQ pointed out that the decision on the disclosure of an inside information is part of the day-to-day administration entrusted to authorized individuals. The board of directors has not any specific role on such matters, therefore the supposed necessity for the issuer to hold a board meeting in order to decide about the disclosure of an inside information is not a legitimate reason for delaying the disclosure.¹⁹

3. Conclusion and future perspectives: The Capital Markets Union

After the publication of MAD II and MAR, but before their entry into force, the European Commission – on 30 September 2015 – adopted an action plan unveiling its intention of promoting a Capital Markets Union.²⁰ This ambitious project aims at the creation of a fully integrated capital

¹⁸ ESMA 'Questions and Answers On the Market Abuse Regulation (MAR)' (21st November 2017)

¹⁹ See National Association of Securities Dealers Automated Quotation (NASDAQ), 'The Market Abuse Regulation and the Duty to Disclose Inside Information. Questions and Answers on the Application of the Market Abuse Regulation ('MAR') 596/2014' (13th December 2016), available at http://business.nasdaq.com/media/MAR_QA_161213%20-%20Final%20version_tcm5044-35878.pdf (accessed 9th December 2017)

²⁰ European Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan on Building a Capital

market in European Union by 2019. This plan is composed of 33 actions and measures whose goal is to provide the maximum mobility for capitals across Europe.

The shock of Brexit has slowed down the optimistic prediction of a bright future for the UE and its financial markets. The United Kingdom has been the most relevant financial centre in Europe and part of the Single Market. Despite providing a high volume of financial services for issuers all over Europe, UK implemented MAR, but opted out from MAD. At the moment it is impossible to foresee what will happen to UK's financial sector and under which condition it will continue to be aligned with the European legislation, since negotiation for leaving UE are pending.

Focusing on the Market Abuse discipline in the 27 Member States, it is still too early to examine its impact on the financial markets, and the only possible analysis is in the comparison between previous and current discipline as done above. It is clear that the regulation is now harmonized and more detailed, but nobody can predict if it will really encourage the economic growth through integrity and reliability of capital markets, especially after Brexit. Nevertheless, it will be interesting to observe how issuers from Member States that adopted a two-step approach will face the new regulation shaped on the tie-in approach. This shift could be considered as a restriction of their space for manoeuvre particularly when they are willing to delay an inside information and it will be useful to collect data from such issuers and their experience in the implementation of MAR.

INTERNATIONAL CIVIL LITIGATION AND ACCESS TO EVIDENCE: CHALLENGES OF UNITED STATES PRE-TRIAL DISCOVERY

Federica Simonelli*

Abstract

“No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the application of U.S. discovery rules to the taking of evidentiary material located in foreign countries for investigation and litigation in the United States” (Restatement (Third) of the Foreign Relations Law of the United States § 442 (Am. Law Inst. 1987), Reporters Note 1).

The present contribution first focuses on the typical features of U.S.-style discovery and the differences that exist in relation to the methods of fact-finding and evidence gathering in most (if not all) other countries. These differences are key to understand the tensions that surround foreign discovery requests in the course of cross-border disputes before U.S. courts. The analysis then moves to the Hague Evidence Convention which was designed to improve mutual judicial cooperation in civil and commercial matters in the context of the ambitious objective of providing methods that reconcile the different legal philosophies of the Civil Law, the Common Law and other systems, and investigates how the Convention has been received and interpreted by American courts. Background and reasoning of the landmark (but not undisputed) decision of the U.S. Supreme Court *Aérospatiale* are exposed at some length. In the concluding remarks two recent developments are briefly mentioned: first, the tendency of civil law systems to reconsider their policies of strict pleading requirements and limited evidentiary obligations. Second, the trend, on a worldwide scale, whereby persons and entities involved or interested in transnational litigation in their home country with increasing frequency resort to U.S. discovery through the provision of Title 28 §1782 U.S.C. in order to get access to facts and information necessary to successfully plead their case and vindicate substantive rights.

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1. Introduction

Information gathering for the purpose of evidence collection in civil litigation presents a variety of peculiarities among the different legal systems worldwide. But when it comes to U.S.-style discovery and the various methods of access to information and evidence used in American civil litigation, we are confronted with techniques of fact-finding and fact-gathering that differ profoundly from those in use in other legal orders around the world. In this area the United States are “against the Rest of the World” with all the serious implications on the taking of evidence in cross-border disputes that will be briefly considered.¹

The European Union, for example, has adopted *ad hoc* instruments in order to foster judicial assistance among relatively homogeneous legal systems with regard to the taking of evidence in civil and commercial matters.² On the contrary, the phenomenon which is frequently presented as ‘American exceptionalism’,³ to describe the distinctive and unique aspects of the American system of civil litigation, has led to much friction in trans-border disputes, as pointed out by the Third Restatement of the Foreign Relations Law:

*“No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the application of U.S. discovery rules to the taking of evidentiary material located in foreign countries for investigation and litigation in the United States”.*⁴

At the basis of the divergent approaches there are substantial differences with regard not only to the technical aspects of the procedural systems, but also to the underlying concepts of procedural justice and these differences are a primary source of conflict. Also a parochial view of sovereignty contributes to the clash of jurisdictional authorities in the pertinent field.⁵

In order to understand the mentioned conflicts, it has to be first considered the different pleading system in place: fact-pleading as opposed to notice-pleading. In procedural systems of continental tradition the process of fact-finding is strictly limited at a relatively early stage of the dispute.⁶ Under

¹ For in-depth analysis of the various aspects D. J. GERBER, “Extraterritorial Discovery and the Conflicts of Procedural Systems: Germany and the United States” (1986) 34 *American Journal of Comparative Law* 745. N. TROCKER, “Transnational Litigation, Access to Evidence and U.S. Discovery: Learning from American Exceptionalism?”, in Rolf Stürner and Masanori Kawano (eds), *Current Topics of International Litigation* (Mohr Siebeck 2009). See also Judge Posner's statements in *Heraeus Kulzer GmbH v Biomet Inc*, 633 F.3d 591 [7th Cir. 2011].

² Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in Civil or Commercial matters [2001] OJ L174/1.

³ OSCAR CHASE, 'American “Exceptionalism” and Comparative Procedure' (2002) Spring, 50 *American Journal Comparative Law* 227.

⁴ Restatement (Third) of the Foreign Relations Law of the United States § 442 (Am. Law Inst. 1987).

⁵ H. BUXBAUM, 'Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from *Aérospatiale*' (2003) 38 *Tex Intl L J* 87.

⁶ On claim initiation and issue identification in the countries of continental legal tradition see O.G. CHASE – H. HERSHKOFF (eds.), *Civil Litigation in Comparative Context* (2nd edn, West Academic Publishing 2017) 226, 258.

the codes of civil procedure of civil law countries, a party is generally required to present a detailed assertion of facts and specified means of evidence at the time he files suit.⁷ Also in England, a country of common law tradition, under the modern Civil Procedure Rules, a party has to assert sufficiently detailed facts in the statement of a case, capable of disclosing reasonable grounds for bringing a suit.⁸

In contrast, American civil procedure, at the federal level, does not require the assertion of detailed facts and of individualized means of evidence during the pleading phase. As Professor J. H. Friedenthal explained, notice-pleading means that ‘a plaintiff need only make a short plain statement of claim rather than the statement of facts setting forth a cause of action’.⁹ The US Supreme Court decisions *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009) have suggested that (in certain types of cases) federal courts should engage in more vigorous scrutiny of complaints before allowing the plaintiff to proceed to discovery. These discrete changes directing the courts to determine whether the factual allegations of a complaint make the claim “plausible” do not reflect a deeper and broader change to American pleading. And “even if they did, the potential change to American pleading would still leave it significantly different from foreign models”.¹⁰

1.1 Discovery American style

When a fact-pleading system applies, once the case is started, there is little need or room for the parties to go around searching (or “fishing”) for facts and information; there is need for *evidence*. Evidence is probative material that supports, contradicts or weakens a fact at issue in the proceedings and the standard of admission is therefore relevancy: a concept that refers to the statements of facts that are alleged in the pleadings as a basis for claims or defenses.¹¹

In contrast, according to the United States Federal Rules of Civil Procedure, *discovery* is a technique by which, in civil litigation, each side seeks to obtain from the other side, prior to trial, information (and not only evidence in the strict sense) useful in establishing its position or controverting the position of its adversary¹².

⁷ Significant examples are the German ZPO (130; 253), the Italian Code of Civil Procedure (Art. 163), that require all or some of the followings: definitive statements of the factual subject matter, the law sustaining the case, an indication of the relief sought and the identification of evidence and produced documents.

⁸ NEIL ANDREWS, *English Civil Procedure: Fundamentals of the New Civil Justice System* (OUP 2003).

⁹ JACK FRIEDENTHAL and others, *Civil Procedure* (5th edn, West Academic Publishing 2015) 237.

¹⁰S. DODSON, “Comparative Convergences in Pleading Standards” 158 *Uni Penn L Rev* (2010) 441, 463.

¹¹M. TARUFFO, “Rethinking the Standards of Proof” 51 *Am J Comp L* (2003) 675.

¹²This investigative process is aptly named “discovery” because it often turns up facts and documents that were previously unknown to at least one party to the lawsuit. S.SUBRIN, “Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules” (1998) 39 *Boston Coll L Rev* 691,745.

At their disposal, litigants have four main devices before initiating trial. First of all, any party may request any other party to appear for an oral deposition:¹³ this is known as the examination before trial, where the person being deposed is placed under oath. Secondly, any party is entitled to request any other to produce documents and to permit inspections¹⁴ of any tangible thing(s) (e.g. properties/lands) in possession or control of the party to which the request is addressed. Thirdly, any party may serve to any other party written questions and interrogatories.¹⁵ Lastly, any party can ask for admission of certain facts¹⁶ that have then to be proven at trial. Any information gathered using those instruments can be introduced as evidence by the opposing party and it is subject to the Federal Rules of Evidence.

What is seen by foreign litigants and their lawyers with distrust in the American discovery process, is the breath of U.S.-style discovery run by lawyers and its exploratory nature with a minimum intervention on behalf of the court, which usually intervenes, with its sanctioning powers, only when a party refuses, for some reason, to comply with the discovery request of the opposing party. This frequently becomes a point of tensions because in other countries and legal orders such behaviour is perceived as relevant with regard to sovereign powers, typically inherent to judicial bodies. On the other hand, American lawyers tend to consider foreign resistance to broad requests for disclosure of information and evidence as a sort of "conspiracy of concealment" and are distrustful of the efficiency of the methods of taking evidence adopted in foreign countries.¹⁷

There have been changes and adjustments of the pertinent American provisions in the course of time. Under the provision of Rule 26 (b)(1)¹⁸ of the Federal Rules of Civil Procedure in its previous form, parties could obtain discovery regarding 'any matter, not privileged, which is relevant to the subject matter involved in the pending action',¹⁹ with disregard of the information sought to be admissible at trial. Furthermore, the information could (and still can) be requested even if a party making the request (e.g. for the production of documents) does not know if the information exists or cannot specifically describe it. As Professor Charles Alan Wright explained, this was (and is) intended to make trial 'less a game of blind man's bluff and more fair contest with the basic issues

¹³ Ibid, Rule 30.

¹⁴ Ibid, Rule 34.

¹⁵ Ibid, Rule 33.

¹⁶ Ibid, Rule 36.

¹⁷ A.F.LOWENFELD, *International Litigation and Arbitration* (2nd edn, West Academic Publishing 2002) 738.

¹⁸ Original text: Parties may obtain discovery regarding any non privileged matter that is relevant to any party's claim or defence— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

¹⁹ FRCP, 26 (b)(1). For example documents sought under Rule 34 may be requested by category (eg "all *memoranda* and communications...") without identifying specific documents.

and facts disclosed'.²⁰ In order to curb "discovery abuses" that the mentioned provisions allowed, in 1980, preliminary interventions were made to adjust the institution of discovery by strengthening its judicial supervision. In 1993, an amendment to introduce a mandatory initial disclosure was adopted, with the purpose of accelerating the exchange of basic information, but with substantial debate on it.²¹ At the beginning of the new millennium, a scope-narrowing provision had been embodied in Rule 26 (b)(1) by the 2000 Amendments of the Federal Rules of Civil Procedure, that moved to a new version that allowed discovery of any non-privileged matter 'that is relevant to the claim or defence of any party'. But it was soon clear that 'the dividing line between information "relevant to the claims and defences" and that relevant only to "the subject matter of the action" could not be defined with precision and so the new rule did not serve as a significant barrier to the receipt of discovery'.²²

1.2 The 2015 Amendments to the Federal Rules of Civil Procedure

The new rules, also known as the 'Duke Rules Package', developed on the basis of the 2010 Federal Rules Advisory Committee meeting held at Duke University, came into effect on December 1, 2015. Among other things, these new rules aimed at narrowing the scope of discovery permitted under the FRCP. Prior to this, discovery was admissible for any discoverable information 'relevant to any party's claim or defence' and federal courts had the discretionary power to allow further discovery into 'any matter relevant to the subject matter involved in the action' (provided that this 'appear[ed] reasonably calculated') that led to the disclosure of admissible evidence.²³

The new Federal Rule 26 (b)(1) now states that:

(1) [T]he scope of discovery is as follows: Parties may obtain discovery regarding any non privileged matter that is relevant to any party's claim or defence and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

²⁰ *United States v Proctor & Gamble*, 356 U.S. 677 [1958].

²¹ For a description of the discovery amendments through 1998 and their background, see R.L. MARCUS, "Discovery Containment Redux", 39 Boston College L Rev (1998) 747.

²² CHRISTOPHER FROST, "The Sound and the Fury or the Sound of Silence? Evaluating the Pre-amendment Predictions and Post-amendment Effects of the Scope-Narrowing Language in the 2000 Amendments to the Federal Rule of Civil Procedure 26 (b)(1)" (2003) 37 Ga L Rev 1038.

²³ See A.D. STEINMAN, "The End of an Era: Federal Civil Procedure After the 2015 Amendments" (2016) 66 Emory L J 1-53 (arguing that the amendments do not mandate a more restrictive approach to pleading or discovery).

The new provision replaces the broader standard imposing that discovery shall be based on matters specifically relevant to the claims and defences asserted in the case, with the additional requirement that discovery should be ‘proportional to the needs of the case’.²⁴ Here, proportionality becomes the key factor of the amendments and provides five illustrative factors for courts to consider.

Another notable change to Rule 26(b)(1) is the elimination of the phrase ‘reasonably calculated to lead to the discovery of admissible evidence’.²⁵ Generations of lawyers have been under the wrong impression that the scope of federal discovery is so broad that ‘*anything* reasonably calculated’²⁶ is fair game²⁷ and this is no longer admissible. Proportionate discovery, even though already practised by courts when conducting their analysis, has now become an explicit discovery requirement, limited to the unique circumstances of each case.

Criticism by lawyers and law practitioners followed the amendments: there has always been a rule that the discovery cannot be overly burdensome, which requires a case-by-case analysis that looks at the burden/benefit and the size of the case. In fact, the Committee Notes recognize that this has been part of the FRCP since 1983.²⁸ The Notes also mention that the primary concern of the new rule is e-discovery.²⁹

The amended Rule 26 now explicitly requires parties to consider proportionality when propounding discovery. While proportionality is an important principle to be applied to all of discovery, the Advisory Committee Note explains that this change neither places the burden of addressing all proportionality considerations on the party seeking discovery, nor permits the opposing party to refuse discovery by making boilerplate objections based on proportionality.³⁰

In sum: the 2015 amendments tend to change to some extent the way civil litigation is conducted in federal courts, yet liberal discovery remains a prominent feature of American procedure.

²⁴J. MILES, “Proportionality Under Amended Rule 26 (b)(1): A New Mindset” (ABA Section of litigation, May 2016).

²⁵Ibid

²⁶Ibid (emphasis added)

²⁷Louisville Bar Association, 'Upcoming Changes to Federal Rules of Civil Procedure: Modernizing Scope of Discovery and Clarifying Consequences of Failure to Preserve' (*Stites & Harbison PLLC*, September 2014) <<http://www.stites.com>> accessed 30 June 2017.

²⁸Jeff Bennion, 'Everything You Need to Know About The New FRCP Amendments' (*Above the Law*, 1 December 2015) <<http://abovethelaw.com/>> accessed 30 June 2017.

²⁹A result of the “information explosion” in recent decades is that electronically stored information (ESI) often constitutes the majority, if not all, of the entire universe of information held by parties to litigation. Moreover, the digitally nature of modern businesses leads to large volumes of ESI being created, duplicated and stored in a variety of formats and locations. Therefore, new challenges are posed during the process of discovery.

³⁰Karen Henry, Diana Palacios, 'The 2015 Amendments to the Federal Rules of Civil Procedure: Changing the Way Civil Litigants Operate in Federal Court' (*Davis Wright Tremaine LLP*, November 2015) <<http://www.dwt.com/>> accessed 30 June 2016.

1.3 Foreign perspectives of American discovery: differences of information gathering in other countries

Litigation was once defined by Sir John Donaldson to be conducted in England ‘cards face up on the table’,³¹ which is a metaphor expressing that discovery is expected to do "real justice" with all relevant information available to the court. However, English practice differs sharply from the American one, when it comes to third-party discovery, which is generally not available. Thus, “disclosure” (the new name for discovery) is primarily between both parties and focused on documents. Under the current Civil Procedure Rules, each party is required to disclose the documents on which it relies, the documents that may affect its own or another party's case. Despite the partial dissatisfaction, disclosure is still significantly more restrictive compared to the American practice. Recent reforms have limited documents requests even further, by introducing the parties' duty to regulate their behaviour to conform to the ‘overriding objective’ of the CPR Rules directed at the achievements of efficiency, speediness and proportionality.³²

Despite shared legal origins, England has looked at American civil procedure not without critical tones. In a famous House of Lords' decision,³³ Lord Diplock noted that:

[O]ne of the characteristics of the rules of civil procedure, which seems to any English lawyer strange and, indeed, oppressive on defendants, is that a complaint, the document by which an action is begun, while it alleges that the complainant has a cause of action against the defendants, does not disclose, or discloses in a most exiguous form, the facts which the plaintiff will eventually rely on at the trial as giving rise to that cause of action. Instead, the complaint is accompanied, or immediately followed, by a request to the defendants for pre-trial discovery which bears little resemblance to the kind of discovery that is available in English civil actions. Its breadth, the variety of methods, oral and written, that it makes available for a wide-roving search for any information that might be helpful to the case of the party seeking discovery, the enormous expense, irrecoverable in any award of costs to a successful defendant, in which it may involve parties from whom discovery is sought, and its potentiality for oppressive use by plaintiff, received sufficient mention in the various speeches in this House.

In civil law systems there is no duty of a party to an action to spontaneously supply his opponent with a list of relevant documents in his possession or control. In other words, there is no English-style “disclosure of documents”. The adversary nature of civil proceedings before a neutral

³¹ *Davies v Eli Lilly & Co* [1987] 1 All ER 801.

³² In the majority of cases, disclosure is limited to standard disclosure which effectively includes only documents of direct relevance to the issues. J.SORABJI, “Fact-Finding in Tort Litigation: Discovery, Disclosure, Proof-Taking” (2013) 3 Int'l J Proc L 295.

³³ *British Airways Board v Laker Airways Ltd.* [1985] AC 58, [1984] 3 WLR 419.

decision-maker is a basic landmark. Still, the emphasis is on documentary proof of facts rather than on oral evidence: there is a general distrust of oral testimony, which is used at judge's discretion to clarify written declarations. Typically, factual assertions made in pleadings are to be accompanied by documents attached or to be provided. Also, cross-examination of witnesses is relatively uncommon and certainly not the rule in civil law systems.

Generally, it is the judge who is in charge of evidence gathering: neither the parties, nor the lawyers have the discretion to do it. Judicial control of litigation is the principal instrument for accommodating law enforcement with the objective of justice on the merits.³⁴ Most importantly for this purpose, cases proceed on the basis of documents' presented by the parties and the documents not included in the pleading files cannot be relied upon. The judge does have the power to order the production of documents, if they are relevant to the decision, but applications to the judge to order production of documents must be specific, or already supported by evidence. In fact, continental codes of civil procedure of the 19th century strictly adhered to the principle *nemo tenetur edere contra se*, i.e. no party has to help the opponent in his/her inquiry into the facts. The litigation process maintained the primitive nature of legalized fight where each litigant strove to defeat the opponent, leaving no room for cooperation between the parties and this attitude continues to have a significant impact on the parties' access to documentary evidence.³⁵

1.4 Judicial cooperation within the Hague Evidence Convention (1970)

The principle that each State has full and exclusive authority over its own territory without interference from outside sources or bodies is a widely accepted principle of international law. Therefore, international judicial cooperation evolved over time as a necessity in the regulation of legal relationships between sovereign entities. The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (of 1970) provides for litigants of Contracting States to obtain evidence located on foreign soil through the 'letter of request' mechanism and certain alternative means³⁶: evidence intended for use in proceedings commenced or merely contemplated³⁷. Properly completed letters of request have to be processed "expeditiously" and execution may

³⁴On the purposes and roles of civil justice in Germany, see P. MURRAY - R. STÜRNER, *German Civil Justice* (Carolina Academic Press 2004) 575.

³⁵As Professor STUERNER emphasizes "German procedure includes no general rule that a party has to help the opponent who does not have a sufficient case. The basic principle is that each party has to make its own case". O.G. CHASE – H. HERSHKOFF (eds.), *Civil Litigation in Comparative Context* (n 7) at 296-297.

³⁶Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Evidence Convention), art. 2. Detailed explanations on the operation of the Convention as well as comments on the major issues raised by its practical application are offered by the "Practical Handbook on the Operation of the Hague Evidence Convention", 3rd ed., 2016.

³⁷*Ibid*, art. 1.

be refused only on limited grounds.³⁸

The United States played a crucial role in promoting the Hague Evidence Convention and consistently signed it in 1972, after an active participation by the U.S. Delegation to The Hague.³⁹ The Convention was welcomed as a step forward in international judicial assistance in its attempt to accommodate the ‘American Style’ discovery to a certain extent⁴⁰ as well as preserve civil law judicial sovereignty in evidence gathering. Nevertheless, conflicts in international litigation have arisen in respect to Article 23 of the Convention which states that “a Contracting State may not execute Letters of Requests issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries’. As a result, U.S. litigants not infrequently encounter foreign resistance to their letters of request. What is remarkable in the United States’ participation in the preparatory works of the Convention, is that, quite surprisingly, the U.S. Delegation did not express its concerns with regard to the conduct of discovery abroad. It was the British Delegation that insisted on the provision of Article 23 to be included in the Convention. The reason for this is that the United Kingdom were the only country at that time, which had some experience with American style discovery.⁴¹ In England, the House of Lords, in the famous decision *In re Asbestos Insurance Coverage* reminded US litigants that the Evidence Act 1975 imposes strict limits on the English courts when applying the Hague Convention and emphasized that ‘mere fishing expeditions’ would not be allowed.⁴²

2. The Hague Evidence Convention Before the U.S. Supreme Court: *Société Aérospatiale V U.S. District Court Of Iowa* (1987)

The extent to which U.S. litigants are required to use the Convention procedures rather than resorting to the customary rules of U.S. discovery in order to obtain evidence located abroad has been the subject of conflicting views among lower courts dealing with cross-border disputes. In order to avoid uncertainty on the issue of exclusivity of the Hague Evidence Convention, the U.S. Supreme Court granted *certiorari* in *Société Aérospatiale* and its ruling has become the leading

³⁸Ibid, art. 9. For performance, the Convention relies on the “Central Authority” that each of the contracting States must designate.

³⁹Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law (1969) 8 Intl Legal Materials 785.

⁴⁰Hague Evidence Convention, art. 15, 21. An ambitious objective of the drafters of the Convention was to provide “methods to reconcile the different legal philosophies of the Civil Law, the Common Law and other systems”.

⁴¹LAWRENCE COLLINS, ‘Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States’ (1979) 13 Int'l Lawyer 27.

⁴²*In re Asbestos Insurance Coverage* [1985] 1 WLR 331; [1985] 1 All ER 716. Relying on these standards courts have evaluated US discovery request also in recent cases. See *Genira Trade & Finance Inc. and others v. Refco Capital Markets Ltd* [2001] EWCA Civ., 1733.

precedent on the matter⁴³. Therefore, it deserves to be closely analysed.

2.1 The case and the lower courts' response

The case originated in August 1980, in Iowa, where a plane, owned and manufactured by the French company, *Société Nationale Industrielle Aéronautique*, crashed and injured several passengers. The injured passengers (US citizens) brought a product liability suit in the U.S. District Court for the Southern District of Iowa, claiming that petitioners had manufactured and sold a defective plane and were therefore liable of negligence and breach of warranty. Both sides initially conducted pre-trial discovery pursuant the Federal Rules of Civil Procedure without objections⁴⁴. But when plaintiffs served on the defendants further requests for the production of other documents, a set of interrogatories and requests of admissions (under Rules 33,34,36), petitioners filed a motion for a protective order. The motion alleged that because defendants were French corporations and the discovery (in particular, the documents) requested was located in a foreign state, namely France, the Hague Evidence Convention dictated the terms under which discovery could occur. In addition, petitioners highlighted that under French criminal law, they could not respond to discovery requests that did not comply with the Convention.⁴⁵

The District Court did not embrace this interpretation and denied the motion. Petitioners then sought a writ of *mandamus* from the Court of Appeals for the Eighth Circuit, which confirmed the previous decision, affirming that:

*[W]hen the district court has jurisdiction over a foreign litigant, the Hague Convention does not apply to the production of evidence in that litigant's possession even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention.*⁴⁶

The Court of Appeals rejected the 'extreme position' of considering the Hague Convention the exclusive and mandatory procedure for obtaining evidence abroad⁴⁷.

⁴³ For an excellent discussion of its background, reasoning and impact see G. BORN, "The Hague Evidence Convention Revisited: Reflections on its Role in U.S. Civil Procedure" 57 *Law & Contemporary Problems* (1994) 77.

⁴⁴ Plaintiffs made certain requests pursuant Rule 34(b) and Rule 36. Apparently the petitioners responded to those requests without objections, as far as the material was located in the United States. In turn, plaintiffs had complied with all the requests made by the petitioners.

⁴⁵ Article 1A of the French "blocking statute", French Penal Code Law 80-538.

⁴⁶ *Société Nationale Industrielle Aéronautique v United States District Court*, 482 U.S. 528 [1987].

⁴⁷ *Ibid* (emphasis added)

2.2 The “question” and the Supreme Court's analysis of the Convention: negotiating history, language, reservations and costs

The U.S. Supreme Court granted certiorari to rule on the question:

[...] “concerning the extent to which a federal district court must employ the procedures set forth in the Convention when litigants seek answers to interrogatories, the production of documents, and admissions from a French adversary over whom the court has personal jurisdiction.”⁴⁸

The Court first moved to analyse the interaction between the two bodies of federal law:⁴⁹ the U.S. Federal Rules of Civil Procedure, on one side, and the Hague Evidence Convention on the other. As to the latter it affirmed that it is fundamental to read and interpret the treaty in a sense consistent ‘with the language and its negotiating history’.⁵⁰ The preamble of the Convention ‘specifies its purpose to facilitate the transmission and execution of Letters of Request and to improve mutual judicial co-operation in civil or commercial matters’.⁵¹ However, the Court noted, to achieve this objective:

[T]he Convention use[s] permissive rather than mandatory language. Thus, Article 1 provides that a judicial authority in a contracting state may forward a letter of request,⁵² and the preamble does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices. Therefore, the Convention is not mandatory in its terms and does not exclude other existing evidence-gathering practices.⁵³

The Court further pointed to Article 23 which ‘expressly authorizes a contracting state to declare that it will not execute any letter of request in aid of pre-trial discovery of documents in a common law country’.⁵⁴ and noted that many countries had made reservations to this article of the Convention, like France, which was one of the thirteen of the (at the time) total seventeen signatory states with declarations made under this provision in order to restrict pre-trial discovery, if necessary, with specific instruments, such as “blocking statutes”.

Surely, - the Court argued - if the Convention had been intended to replace completely the U.S. broad discovery powers that the common law courts in the United States previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common

⁴⁸ Ibid, 524

⁴⁹ Ibid, 532

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid, 536 (emphasis added)

⁵³ Ibid, 532 (emphasis added)

⁵⁴ Ibid, 536

law contracting parties to agree to Article 23, which enables contracting party to revoke its consent to the treaty's procedures for pretrial discovery.⁵⁵

Moreover, the Court added, Article 27 plainly states that the Convention does not prevent a contracting state from using more liberal methods of rendering evidence than those authorized by the Convention. Thus, the text of the Evidence Convention, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures that would facilitate the taking of evidence abroad.⁵⁶

With regard the assumption of its non-exclusivity:

[P]etitioners contend that even if the Hague Convention's procedures are not mandatory, this Court should adopt a rule requiring that American litigants first resort to those procedures before initiating any discovery pursuant to the normal methods of the Federal Rules of Civil Procedure.⁵⁷

But the Court, invoking the cost and time argument declined to accept petitioners' invitation to announce a new rule of law that would require first resort to the Convention procedures whenever discovery is sought from a foreign litigant. In many situations – the Justices observed – the Letters of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules. A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the just, speedy, and inexpensive determination of litigation in our courts.⁵⁸

As to the sovereignty of the States in which evidence is located, the Supreme Court held that the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners' proposed general rule would generate. “We therefore decline to hold as a blanket matter that comity requires resort to the Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective”.⁵⁹

The Court admits that:

[S]ome discovery procedures are much more intrusive than others. In the present dispute this was the case of the plaintiffs' request “to produce all of the design specifications, line drawings and engineering plans and all engineering change orders and plans and all drawings concerning the leading edge slats

⁵⁵ Ibid, 537

⁵⁶ Ibid, 540

⁵⁷ Ibid, 540

⁵⁸ Ibid, 544 (emphasis added)

⁵⁹ Ibid, 544

for the Rallye type aircraft manufactured by the defendants”⁶⁰: thus, opening the floor for higher standards of the requests’ specificity and other relevant factors to be taken into account when dealing with pre-trial discovery requests.⁶¹

The exact line between reasonableness and unreasonableness of the requests in each case, according to the Supreme Court, is to be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they may invoke.

2.3 The Court's rulings: taking evidence from parties subject to jurisdiction; taking evidence from third parties

Prior to the Supreme Court's ruling, some district courts tended to consider the Convention only applicable to non-parties, or parties not otherwise subject to a U.S. court's jurisdiction. *In re Anschütz & Co.*, the District court held that ‘the Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules’.⁶² The Supreme Court quoting *In re Anschütz*, said that:

[W]hile it is conceivable that the United States could enter into a treaty giving others signatories control over litigation instituted and pursued in American Courts, a treaty intended to bring about such a curtailment of the rights given to all litigants by the federal rules would surely state its intention clearly and precisely identify crucial terms.

The Hague Convention contains no such plain statement of a pre-emptive intent and, accordingly, ‘it did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party, over whom it has jurisdiction, to produce evidence physically located within a signatory nation’.⁶³ Embracing the argument made by the plaintiffs the Court also observed that:

[W]hen a litigant is subject to the jurisdiction of the district court, arguably the evidence he/she is required to produce is not abroad within the meaning of the Convention, even though it is in fact located in a foreign country at the time of the discovery request and even though it will have to be gathered or otherwise prepared abroad.⁶⁴

⁶⁰ Ibid, 544 (emphasis added)

⁶¹ Restatement of Foreign Relations Law of the United States (n 28) as taken into consideration also by the ABA - American Bar Association Annual Meeting, that took place in Boston, Massachusetts, on August 8, 2014, on ‘An examination of factors considered by U.S. courts in ruling on requests to conduct discovery on information located in foreign countries’.

⁶² *In re Anschütz & Co.*, 754 F.2d 602 (CA5 1985).

⁶³ *Aérospatiale* (n 47) 540.

⁶⁴ Ibid (emphasis added).

The fiction is used by that court with the specific purpose of subjecting foreign evidence to U.S. jurisdiction, whenever a US court has jurisdiction in personam over foreign litigants.

As to the distinction between evidence to be obtained from third parties and that to be obtained from litigants, the Supreme Court held that the District Court of Iowa was wrong when it ‘concluded that the Convention simply applies to discovery sought from a foreign litigant that is subject to the jurisdiction of an American court’.⁶⁵

*The text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves, nor does it purport to draw any sharp line between evidence that is ‘abroad’ and evidence that is within the control of a party subject to the jurisdiction of the requesting court. Thus “it appears clear to us that the optional Convention procedures are available whenever they facilitate the gathering of evidence by the means authorized in the Convention⁶⁶ and that although these procedures are not mandatory, the Hague Convention does apply to the production of evidence in a litigant's possession in the sense that it is one method of seeking evidence that a court may elect to employ”.*⁶⁷

The Court dedicates no specific attention to distinction between party and non-party witnesses.⁶⁸

2.4 The Court's “guidelines” for international discovery

In order to moderate “global” discovery when evidence is to be produced by a party over whom the trial court has personal jurisdiction, the Supreme Court in the final part of its decision urges:

*American courts, in supervising pre-trial proceedings, to exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and prevent improper uses of discovery requests.*⁶⁹

By doing so, the Court proved to show consideration for foreign litigants that are used to more restrictive systems of discovery. And in an attempt to give content to the principle of “reasonableness” in the formulation of requests for foreign discovery added that: ‘When it is necessary to seek evidence abroad, the district court must supervise pretrial proceedings particularly

⁶⁵Ibid

⁶⁶*Aérospatiale* (n 47) 540.

⁶⁷Ibid, 540 (emphasis added)

⁶⁸H. BUXBAUM, 'Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from *Aérospatiale*' (2003) 38 *Tex Intl L J* 99.

⁶⁹*Aérospatiale* (n 47) 547.

closely to prevent discovery abuses'.⁷⁰ It surely did not question the jurisdictional powers of U.S. courts, but to a certain extent reestablished the international obligations assumed by the United States in signing the Hague Evidence Convention. 'Objections to 'abusive' discovery that foreign litigants advance should receive the most careful consideration'.⁷¹

2.5 The concurring opinion and the dissent: a "first resort" to the Convention procedures

The Court in *Aérospatiale* rendered a split 5-4 decision on how district courts are to determine when use of the Evidence Convention is appropriate. Justice Blackmun, with whom Justice Brennan, Marshall and O'Connor agreed, wrote a concurring and in part dissenting opinion.⁷²

For the dissenters it appeared quite clear that the majority ignored the importance of the Convention as an effort in accommodating divergent interests that are represented in the Treaty. A case-by-case comity analysis, they objected, will endorse an inadequate and infrequent application of the Convention.

Justice Blackmun supported the rejection of the positions at both extremities of the Convention's use: complete non implementation, as well as exclusiveness of application were correctly rejected. On the other hand, he dissented to the case-by-case inquiry for determining whether to use the Hague procedures, because this would leave lower courts with no meaningful guidance for carrying out that inquiry.

*Lower courts are not equipped - Blackmun wrote- for a role of balancing the interests of foreign nations and it should be no surprise if they will turn to the more familiar procedures established by their local rules.*⁷³

He therefore suggested to apply a general presumption that courts should resort *first* to the Convention procedures and leave only to particular circumstances an individualized analysis, when it appears futile to employ the Convention.

The dissenting judges further pointed to some clarifying remarks with regard to the reservations made by certain states on Article 23 of the Hague Convention, stating that:

It is true that these may pose problems that would require comity analysis, but the majority's interpretation that a contracting party could unilaterally abrogate the Convention's procedures is simply excessive.

⁷⁰Ibid

⁷¹Ibid

⁷²GARY BORN, *International Civil Litigation in the United States Courts*, Commentary and Materials (3rd edn, Kluwer Law International 1997) 909-12.

⁷³*Aérospatiale* (n 47).

First, because reservations affect only letters of requests for the production of documents, not requests for depositions or interrogatories nor the alternative procedures through commissioners. Secondly, because many declarations made on that Article are there to limit its reach: indeed, an emerging view among Contracting States is that they apply only to 'requests that lack sufficient specificity or that have not been reviewed for relevancy by the requesting court'.

These reasons lead to the conclusion that an Article 23 reservation is not that significant obstacle to discovery, as the wording of Article 23 would suggest.

3. The Hague Evidence Convention After *Aérospatiale*: selected case law

The two cases analysed below present efforts by lower courts to apply the *Aérospatiale* comity analysis. While bearing in mind the guiding principles set forth by the Supreme Court's decision, lower courts have shown a certain resistance in applying the Hague Evidence Convention in the early stages following *Aérospatiale*, as well as in more recent years.

It is also to be mentioned, that lower courts have responded with various approaches to the five-factor test set forth in the Restatement of Foreign Relations Law of the U.S (revised as of 1986) and have conducted their comity analysis taking into consideration one or more of the following factors: (a) the importance to the litigation of the documents or other information requested; (b) the degree of specificity of the request; (c) whether the information originated in the U.S.; (d) the availability of alternative means of securing the information; (e) the extent to which non-compliance to request would undermine important U.S. or the foreign states' interests. Second Circuit courts have further relied upon other two principles: the compliance hardship on the party from whom discovery is sought and the good faith of the resisting party.⁷⁴

Critics have noted that U.S. Courts are strongly inclined to resort to the Federal Rules invoking reasons of efficiency and show little sensitivity in their evaluation of foreign interests to international system values. But the trend to authorize foreign discovery under the domestic rules, backed by an American court's sanctioning powers under Rule 37, in cases where the stakes are high, reflects also the concern not to deprive litigants in U.S. courts, and transnational litigation in the U.S. generally, of the advantages of ample pre-trial discovery.

While both of the following two cases confirm the strong preference of U.S. courts to apply the domestic rules of pre-trial discovery in cross-border disputes, one of them also shows that when

⁷⁴GEORGE WASHINGTON JR, 'An examination of factors considered by U.S. courts in ruling on requests to conduct discovery on information located in foreign countries' (Boston 2004) American Bar Association Annual Meeting.

not requiring compliance with the Convention, some courts have shown a willingness to entertain certain requests that sweeping demands for production of evidence be narrowed.

3.1 *Benton Graphics v Uddeholm Corp.* (D.N.J. 1987)

The parties in this case are plaintiff Benton Graphics, a New Jersey corporation in the business of manufacturing and distributing doctor blades and, and defendant Uddeholm Corp., a Swedish corporation which manufactures and distributes steel products used in the production of doctors blades. The two entered into a contractual relationship for supplies of blades. Benton brought an action against the defendant for alleged breach of contracts for misrepresentation of the quality of the products.

Although the *Aérospatiale* decision does not directly investigate on the burden of proof on the parties, the case first deals with the application of either the Federal Rules of Civil Procedure, as the court should do according to Benton Graphics, or the Hague Evidence Convention, as claimed by Uddeholm Corp. The issue was resolved ‘by granting the burden of proof to the foreign defendants, because they were the ones voluntarily marketing their products in the United States’.⁷⁵ Not having the defendants been able to demonstrate ‘particular facts that could have justified the resort to the Convention’,⁷⁶ the court found that the applicable law to the controversy should be the *lex fori*, i.e. the Federal Rules of Civil Procedure.⁷⁷

Turning to the objection of the foreign discovery requests being over-broad and too burdensome, the court held that a general refusal was not admissible. But at the same time, after reviewing the discovery requests, the court recognized that a number of the requests were not “simple and may require streamlining”. In particular, the court noted: “a number of questions seek information held by any employee of Uddeholm Corp; this appears too encompassing”. “I believe these questions can be limited to a defined group of individuals from Uddeholm”. “Furthermore the questions, as phrased, include even clerical employees. Identification of such persons while being of little or no moment, would however involve substantial investigation by the foreign litigants. This type of expansive discovery without concomitant relevance is not what the Court envisioned when it ended down the *Aérospatiale* decision’.⁷⁸ For these reasons the court granted a time framework in order for the parties to make an effort to limit the scope of discovery requests within reasonableness and a short period of time for the defendants to address any specific objections to interrogatories and

⁷⁵*Benton Graphics v Uddeholm Corp.*, 118 FRD 386-389 [DNJ 1987].

⁷⁶*Ibid*

⁷⁷G. BORN- P. RUTLEDGE, *International Civil Litigation in United States Courts*, (4th edn, Wolters Kluwer 2011) 1035.

⁷⁸*Benton Graphics* (n 77).

documents requests.

With regard to the ‘critical sovereign interests of Sweden’,⁷⁹ invoked by the defendants to persuade the court to resort to the Convention, rather than to the domestic law, the court argued that there were merely “general reasons” why Sweden prefers civil law discovery procedures to the more liberal discovery under the Federal rules. It further noted with regard to the effectiveness of the procedures, that in the light of the lengthy history of this case and the potential for additional delays the Convention procedures would not prove effective.

3.2 Hagenbuch v. 3B6 Sistemi Elettronici Industriali (N.D. ILL. 2006)

The case originated in 2005, between the plaintiff Leroy Hagenbuch and the defendants Sistemi Elettronici Industriali S.r.l., an Italian company and others. The lawsuit concerned patents' infringements, allegedly conducted by the Italian company and others with damages caused to the plaintiff. The requests of access to documents by Hagenbuch were severely opposed by defendants, who claimed the applicability of the Hague Evidence Convention and consequently refused to provide the plaintiff with any documents within their possession, custody or control, since both Italy and the United States are signatories of the Convention.

Relying on *Aérospatiale* the district court denied resort to the Hague Convention and opted for a case-by-case approach giving preference to the FCPR.⁸⁰

With regard to the three-standards-rule set by the Supreme Court in 1987, and particularly to the first, the intrusiveness of discovery requests, the Italian main company declared itself indirectly liable only if the U.S. subsidiary was to be proven responsible, and therefore refused the production of full documentation of designs, manufacturing and drawings, as irrelevant and unrelated to infringement.

Moreover, the Italian company affirmed that it never sold nor imported into the United States components of the patent machine, which was the only possibility to find the company liable, and that it had already produced all the relevant documents. Nevertheless, the court allowed the plaintiff to explore his theory, complying with Rule 26 of the Federal Rules of Civil Procedure.

Next, defendants claimed that the discovery requests were too vague and broad, and referring to *Aérospatiale*'s “guidelines” reminded the court of its duty to protect foreign litigants from abusive and unduly burdensome discovery requests. They also remarked that Articles 118 and 210 of the Italian code of civil procedure permit the court to order the parties or third persons who are in

⁷⁹Ibid

⁸⁰*Hagenbuch v 3B6 Sistemi Elettronici Industriali*, 4 C 3109 ND Ill [2006].

Italy, to produce evidence and allow evidence to be inspected. But the documents or other objects must be in physical possession of the person to whom the order is directed.⁸¹ The argument was intended to show that the power of an Italian court to order a person in Italy to produce tangible evidence, that is abroad, for use in civil proceedings, is severely limited, compared to that of the U.S. courts considered extremely intrusive by Italian defendants.

The court found the defendants' allegations not sufficiently supported by evidence and undermined by the fact that the Italian company had already supplied some documentation to the subsidiary with no great efforts. Further, the Italian company had replied to discovery requests accordingly with respect to the FRCP, therefore proving, in the court's view, its irrevocable preference for the U.S. domestic law.

With regard to the sovereign interests and likelihood of effective resort to the Convention, the court commented that Italy expressed its legitimate national interest in preventing pre-trial discovery, according to its reservation to Article 23 of the Convention, but the United States' interest in a just, speedy and inexpensive determination of litigation prevailed and the Convention would have been, once again, 'not so efficient for the purpose'.⁸² For the above reasons, the court allowed plaintiff to proceed to pre-trial discovery under the Federal Rules of Civil Procedures.

4. Concluding remarks

The purpose of the present contribution was to offer a first glimpse both at the outstanding aspects the U.S. pre-trial discovery and the difficulties and tensions that arise when foreign litigants are confronted with US discovery requests in cross-border disputes.

The United States' attitude towards full disclosure of facts and evidence, as allowed by the Federal Rules of Civil Procedure, appears to be pervasive to the extent that American courts, in handling problems of evidence gathering in transnational civil disputes tend to resort predominantly to their domestic law. Their policy approach to civil litigation makes judicial cooperation with other legal systems, in line with international comity standards, quite problematic, as courts persistently see the Hague Evidence Convention as not binding and a potential obstacle especially with regard to those Contracting States that made reservations under article 23 of the treaty. Criticism has been directed to U.S. courts by American scholars noting that resort to the Federal Rules is often based on unsupported reasons of efficiency and that little sensitivity is shown in the evaluation of foreign interests of international system values.⁸³

⁸¹HANS SMIT, 'International Co-Operation in Litigation: Europe' (1965) 66 Michigan Law Review 1079.

⁸²*Hagenbuch* (n 81).

⁸³H. BUXBAUM, "Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from *Aérospatiale*"

Suggesting a case by case analysis the Supreme Court in *Aérospatiale* allowed lower courts individual and autonomous interpretations of the Convention, and thereby underestimated the difficulties that lower courts would face, left with little guidance.

As the minority opinion anticipated in *Aérospatiale*: lower courts are not equipped for a role of balancing the interests of foreign nations and it is no surprise that they will turn to the more familiar procedures established by their local rules. It would have been a better choice to opt for a “first resort” rule which could also guarantee greater certainty. So did in fact the district courts of New Jersey and Oregon when they applied the first-resort rule advocated by Justice Blackmun's dissent. On the other hand, *Aérospatiale* can hardly be criticized for rejecting the view that American courts are not permitted to order the production of documents located outside the American soil, because this would infringe the sovereignty of the state where evidentiary material is located. As Professor Schlosser said, strict territorialisation’ would frustrate the administration of justice in many cases:

International judicial cooperation in this field means: not to interfere with foreign proceedings by artificially erecting ‘Chinese walls’ against the normal conduct of civil proceedings just because the information needed is located beyond the jurisdiction's territory.⁸⁴

It is well settled practice in many countries outside the U.S. that the provision of specific information may be ordered from a foreign litigant subject to jurisdiction in the same way as from a domestic litigant. Any litigant must comply with the “rules of the game”.

As to the “guidelines” offered in *Aérospatiale* to moderate foreign discovery by strengthening judicial supervision and scrutiny of reasonableness and so to increase also consideration of the Hague Convention, Professor Nafziger, a well known American scholar, remarked some time ago that:

[N]early one hundred reported cases after Aérospatiale have considered the applicability of the Evidence Convention and there is a substantial commitment to a form of particularized analysis that balances competing claims and interests, as set forth in the Third Restatement and more or less prescribed by Aérospatiale, in the interest of comity.⁸⁵

With regard to Article 23, it is certainly true that reservations by Contracting States have not

(2003) 38 Tex Intl L J 96; P.J. BORCHERS, “The Incredible Shrinking Hague Evidence Convention” (2003) 38 Tex Intl L J 73, 79; M. GARDNER, “Parochial Procedure” (2017) 69 Stan L Rev 971, 973.

⁸⁴P. SCHLOSSER, “Jurisdiction and International Judicial and Administrative Cooperation” (2000) 284 Recueil des Cours de l'Académie de Droit International.

⁸⁵JAMES NAFZIGER, “Another Look at the Hague Evidence Convention after Aérospatiale” (2003) 38 Tex Intl L J 114-15.

encouraged U.S. courts to apply the Convention, but, as already mentioned, a reservation to Article 23 is not that significant obstacle to discovery under the Convention that the broad wording might suggest. Reasonable requests for the production of documents will generally be executed by the foreign state. Furthermore, should the production of documents be rejected, and discovery not allowed, similar results can be obtained by requesting oral depositions to the counterpart to be taken at the pre-trial stage. The German experience in the *Siemens* decision⁸⁶ is particularly significant, since depositions were taken with respect to the material listed in the request for the production of documents, with great satisfaction of the American lawyers, even if the request had just been denied by the German court.

In order to evaluate the U.S. courts case law in its context, we have to consider the way in which procedural law is conceived and the role civil litigation plays in the political and societal structure of the United States. Compared to the continental tradition, starting litigation in the U.S. moves from radically different preconditions and pre-trial discovery pursues different objectives than fact-finding and evidence gathering in other procedural systems. And it is the attitude to litigation that offers keys to understand the ongoing challenges that US pre-trial discovery still forces us to deal with. This cannot be ignored when evaluating U.S. courts' decisions.

At the same time, we should not forget that civil law countries are moving some steps forward in reconsidering their traditional policies of strict fact-pleading requirements and limited evidentiary obligations. Just to mention the reform of the German *Zivilprozessnovelle* (2002), which introduced a new procedural right for documentary disclosure, set out in §142 ZPO, and vested the judge with additional power to order parties or third parties to disclose documents (including reasonably specified groups of documents) in their possession on the basis that they might be helpful to the ascertainment of the facts of the cases⁸⁷. And then there is the trend we have been witnessing, on a worldwide scale, whereby persons and entities involved in transnational litigation (actual or merely contemplated) in their home country are taking advantage of United States liberalism in providing discovery-assistance to foreign courts and foreign litigants, under the long time neglected provision of Title 28 §1782 U.S.C..⁸⁸

As to the potential changes in attitude of the U.S. courts on the matters of domestic and foreign discovery, the case law that courts are developing under the 2015 Amendments to the Federal

⁸⁶ *United States v Siemens Corp*, 490 F Supp 1130 SDNY [1980].

⁸⁷ For the broader picture O. CHASE – H. HERSHKOFF, *Civil Litigation in Comparative Context* (n 7) 298, 304. On the developments at the European level (in the areas of Intellectual property and Antitrust law) N. TROCKER, “From ALI/UNIDROIT Principles to common European rules on access to information and evidence. A preliminary outlook and some suggestions.” 19 *Uniform L Rev* (2014) 239-291.

⁸⁸ On background and developments N. TROCKER, “U.S.-Style Discovery for Non-U.S. Proceedings: Judicial Assistance or Judicial Interference?” 1 *Int'l J Proc L* (2011) 299-326.

Rules of Civil Procedure, as well as the applications of the new Rule 26 (b)(1) with its renewed standard of proportionality, will have to be carefully considered.

HOW BAD LAW MAKES HARD CASES: A NOTE ON *TAYLOR VA NOVO*

Andreas Wildner*

1. Introduction

The facts of *Taylor v A. Novo (UK) Ltd*¹ are as follows: On 27 February 2008, Cindy Taylor (primary victim) was injured in a work accident caused by the negligence of her employer “Novo” (defendant). As a result of this accident, Cindy Taylor sustained injuries to her head and left foot. She appeared to make a good recovery. However, on 19 March 2008, due to deep vein thrombosis and consequent pulmonary emboli, which themselves were consequences of the injury sustained in the work accident, she suddenly collapsed and died at home. Cindy Taylor’s daughter, Crystal Taylor (secondary victim), who had not witnessed the work accident, witnessed her mother’s collapse and death and suffered post-traumatic stress disorder.

Crystal Taylor had brought a claim against Novo for damages for the psychiatric harm she sustained as a secondary victim of Novo’s negligence. The trial judge allowed the claim, holding that all the relevant criteria² were satisfied since the operative “event” was the collapse, not the original accident, and the fact that Novo’s negligence caused both the accident and collapse was irrelevant to the collapse being the operative “event”³.

The Court of Appeal allowed the appeal, thus overturning the trial judge’s decision⁴. The sole judgment, given by Lord Dyson MR, was based on the following reasoning:

Based on dicta by Lord Steyn in *Frost*⁵, this area of law should not be developed any further by the courts⁶.

With regards to the criteria for this claim, the relevant “event” is the accident, not the collapse⁷, and the relevant criteria within the current law cannot be stretched so far as to include this event⁸. This case note will focus on the first premise of this argument. It will argue that (1) on the facts of this particular case, it is doubtful whether Lord Steyn’s dicta really prevent the finding of a duty of care on part of Novo; and (2) more generally, that Lord Steyn’s dicta should be rejected or, at least,

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¹ *Taylor v A Novo (UK) Ltd*, [2013] 3 WLR 989 (EWCA Civ 2013).

² *Ibid* at [2]

³ *Ibid* at [19]

⁴ *Ibid* at [36] (Lord Dyson MR), [37] (Moore-Bick LJ); and [38] (Kitchin LJ).

⁵ *White v Chief Constable of South Yorkshire*, [1999] 2 AC 455 (UKHL 1998).

⁶ *Taylor v A Novo (UK) Ltd*, [2013] 3 WLR 989 (EWCA Civ 2013) at [31], [24].

⁷ *Ibid* at [32]

⁸ *Ibid* at [30]

revisited.

2. The limits created by Lord Steyn's dicta

This section will argue (1) that Lord Steyn's dicta restrict the development of new *legal categories*, rather than the accommodation of new *factual scenarios* within existing legal categories; and (2) that the trial judge's decision in *Taylor v A Novo* represents an instance of the latter which means that it is permissible and, thus, that Lord Dyson MR's reasoning is flawed.

Lord Dyson MR relied on a dictum by Lord Steyn in *Frost* to the effect that the law in the area of liability for psychiatric harm sustained by secondary victims should not be further developed by analogy and incrementalism ("thus far and no further")⁹. In Lord Steyn's words:

*'[t]he only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as the Alcock case [1992] 1 AC 310 and Page v Smith [1996] AC 155 as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform.'*¹⁰

However, while Lord Steyn appeared to regard the legal categories, or "tests", within this area of law as settled, he seemed to allow for development of the law through accommodation of new factual scenarios, e.g. if developments in scientific knowledge command it. He stated that "*courts of law must act on the best medical insight of the day*"¹¹ and, in a different case, he said that it is "*an uncontroversial point*" that courts "*cannot ignore advances*" in this respect.¹²

An even broader understanding of Lord Steyn's dicta is supported by the later strike-out case of *W v Essex County Council*¹³ where the House of Lords were confronted with a potentially new factual scenario: parents suffered psychiatric illness when they learned that a foster child, wrongly placed with them due to the council's social worker's negligence, had abused their children. The issue was

⁹ Ibid at [31] and [24]

¹⁰ *White and Others v. Chief Constable of South Yorkshire and Others*, [1999] 2 AC 455 (UKHL 1998) per Lord Steyn at p. 500C-D, cited in *Taylor v A Novo (UK) Ltd*, [2013] 3 WLR 989 (EWCA Civ 2013) at [8].

¹¹ *White v Chief Constable of South Yorkshire*, [1999] 2 AC 455 (UKHL 1998) at p. 492,

¹² *King v Bristow Helicopters Ltd. (Scotland)*; *In Re M*, [2002] 2 AC 628 (UKHL 2002) at [25].

¹³ *W v Essex County Council*, [2001] 2 AC 592 (UKHL 2000); Lord Dyson MR's discussion of this decision (*Taylor v A Novo (UK) Ltd*, [2013] 3 WLR 989 (EWCA Civ 2013) at [14] and [34]) focused on the "concept of the 'immediate aftermath' of an incident". This relates to the second limb of Lord Dyson MR's reasoning. Lord Dyson MR dismissing the case as irrelevant to the present case. Yet *W v Essex County Council* is of considerable significance for the, logically prior, step of understanding the scope of Lord Steyn's dictum in *White v Chief Constable of South Yorkshire*, [1999] 2 AC 455 (UKHL 1998), i.e. the first limb of the reasoning.

whether, since the parents learned about the abuse only some time after it had occurred, there could be said to have been spatial and temporal proximity between the abuse (the relevant event) and the learning of it. According to Lord Slynn, the case would turn on whether, in the particular factual situation, the parents could be said to have learned about the abuse (and sustained the shock) in the “immediate aftermath” of the incident and, thus, to satisfy the requirement of temporal and spatial proximity¹⁴. His Lordship held that this would at least be arguable¹⁵ and, therefore, the claim should proceed to trial. The concept of immediate aftermath appears to be irrelevant to *Taylor v A Novo*¹⁶ but it is important to note how Lord Slynn, in light of Lord Steyn’s earlier judgment in *Frost*, emphasized the need for flexibility in dealing with new factual scenarios¹⁷:

[...] it is right to recall that in McLoughlin v O'Brian Lord Scarman, at p 430C-E, recognised the need for flexibility in dealing with new situations not clearly covered by existing decisions; that in Page v Smith [1996] AC 155, 197G Lord Lloyd of Berwick said that once it was accepted that the defendant could foresee that his conduct would expose the claimant to personal injury "there is no justification for regarding physical and psychiatric injury as different 'kinds of damage'"; that in this still developing area the courts must proceed incrementally: Caparo Industries plc v Dickman [1990] 2 AC 605.

It is of some significance that Lord Steyn himself, in this very case, agreed with Lord Slynn’s speech¹⁸.

The trial judge in *Taylor v A Novo* had concluded that the “*point at issue had not been previously decided*”¹⁹, a conclusion that Lord Dyson MR tacitly appeared to accept. The issue of what the law should regard as operative “event” should, of course, be classified as legal. However, it is not an expansion of the legal *categories* but rather the accommodation of a “*new situation not clearly covered by existing decisions*” (Lord Slynn, see above) within existing legal categories (as permitted by the judgments of Lord Scarman in *McLoughlin v O'Brian* and Lord Slynn in *W v Essex CC*). Therefore, Lord Dyson MR’s reasoning²⁰ that the trial judge had extended the scope of liability to secondary victims in a way prohibited by Lord Steyn’s dicta in *Frost* seems to be flawed.

From this it follows that, since Lord Dyson MR’s first premise appears to be wrong, the second step in his argument does not work and the whole argument, as well as the outcome of the case, needs to be revisited.

¹⁴ *W v Essex County Council*, [2001] 2 AC 592 (UKHL 2000) at p. 601F-G.

¹⁵ *Ibid* at p. 601G-602A

¹⁶ *Taylor v A Novo (UK) Ltd*, [2013] 3 WLR 989 (EWCA Civ 2013) at [34].

¹⁷ *W v Essex County Council*, [2001] 2 AC 592 (UKHL 2000) at p. 600B-C.

¹⁸ *Ibid* at p. 602A

¹⁹ *Taylor v A Novo (UK) Ltd*, [2013] 3 WLR 989 (EWCA Civ 2013) at [19].

²⁰ *Ibid* at [31]

2.1 The reasons given by Lord Steyn

This section will argue that the reasons given by Lord Steyn to support the conclusion that the law should not be extended any further are problematic and should be rejected.

Lord Steyn stated that there are “at least” four reasons for treating psychiatric harm differently from other personal injury.²¹

- 1) *there is the complexity of drawing the line between acute grief and psychiatric harm. [...] there is greater diagnostic uncertainty [...]. [...] expert evidence is required [...].*
- 2) *the unconscious effect of the prospect of compensation on potential claimants. [...] where there is [...] a prospect of recovery of compensation, psychiatric harm is repeatedly encountered and often endures until the process of claiming compensation comes to an end [...]. The litigation is sometimes an unconscious disincentive to rehabilitation. [...]*
- 3) *The abolition or a relaxation of the special rules governing the recovery of damages for psychiatric harm would greatly increase the class of persons who can recover damages [...] in cases of pure psychiatric harm there is potentially a wide class of plaintiffs involved. [...]*
- 4) *the imposition of liability for pure psychiatric harm in a wide range of situations may result in a burden of liability on defendants which may be disproportionate to tortious, conduct.*

Those rationales, which underlie Lord Steyn’s dictum in *Frost* and, therefore, the basis of Lord Dyson MR’s judgment, are unconvincing.

The **first reason** he doubted himself, admitting that ‘*on its own this factor may not be entitled to great weight and may not outweigh the considerations of justice supporting genuine claims in respect of pure psychiatric injury.*’²² Lord Steyn’s skepticism in respect of scientific expertise and diagnostic certainty seems increasingly outdated, especially in light of Lord Steyn’s abovementioned dicta that courts must take into account scientific advances in this field.

In his **second reason**, based on the notion of “compensation neurosis”, Lord Steyn relies on the case *James v Woodall Duckham Construction Co. Ltd*²³. In this case, Salmon LJ gave the leading judgment, relying heavily on expert evidence which said: ‘*I do not think that these [symptoms] can now be expected to clear until his action has been settled, following which I do not think there will be left any persisting serious disability*’²⁴. He further mentioned a statement that the plaintiff was told through his agent (apparently his solicitors), who had received a different expert’s report to the same effect: ‘[...] as

²¹ *White v Chief Constable of South Yorkshire*, [1999] 2 AC 455 (UKHL 1998) at p. 493-4.

²² *Ibid* at p. 493

²³ *James v Woodall Duckham Construction Co. Ltd*, [1969] 1 WLR 903 (EWCA Civ 1969).

²⁴ *Ibid* at p. 907

soon as [your claim] is disposed of you will be able to pursue your usual avocation'.²⁵

In 1995, three years before the decision in *Frost*, the *Journal of Psychosomatic Research* published an article by George Mendelson on the phenomenon of compensation neurosis. According to his findings, '*the frequently expressed expectation that the patient will be 'cured by a verdict' is thus very often incorrect*.'²⁶ He stated that '*the concept of compensation neurosis, [...] is simplistic and false*'²⁷ and that the continued usage of labels as 'compensation neurosis' '*reflects more on the attitudes and biases of those who utilize them than on the subjects thus characterized*'²⁸. Regardless of whether Lord Steyn actually knew about this article (he presumably did not), it is obvious that the scientific state of knowledge in *James*, which was to some extent reflecting the 19th century hostility towards psychiatric injury claims²⁹, was outdated by the time when *Frost* was decided. It was even more so by the time of *Taylor v A Novo* and, accordingly, should not have formed part of the basis of Lord Dyson's decision.

The third and fourth reasons are the core of Lord Steyn's reasons: the restriction of the class of potential claimants and, therefore, the burden of liability on defendants on grounds of policy reasons. This is the so-called floodgates argument. This argument is not only problematic in general³⁰, but it should also be rejected specifically with respect to the current law of liability for psychiatric injury of secondary victims of negligence.

Most developments of the law are preceded by the fear that these very developments would effect an unmanageable increase in claims. An example of this is the law of liability for psychiatric injury of *primary* victims. The two cases *Victorian Railways* and *Dulieu v White* concerned essentially identical facts: a woman, apprehending to be killed by the impact of an approaching train/van, sustains a severe shock which, in turn, causes physical illness and a miscarriage³¹. In the *Victorian Railways* case, Sir Richard Couch, delivering the judgment of the Privy Council, argued that allowing a claim for psychiatric injury caused by the fright of seeing a train approaching and apprehending to be killed would unduly '*extend the liability*'. It might lead to claims '*not only in such a case [...] but in every*

²⁵ Ibid at p. 907

²⁶ George Mendelson, "Compensation Neurosis' Revisited Outcome Studies of the Effects of Litigation," *Journal of Psychosomatic Research* 39, no. 6 (1995): 695–706; at p. 703.

²⁷ Ibid at p. 704

²⁸ Ibid at p. 705

²⁹ See, e.g., *Victorian Railways Commissioners v Coultas*, (1888) 13 App. Cas. 222 (UKPC 1888), a famous case representing the 'old' approach towards psychiatric injury claims, the departure from which began with the famous case of *Dulieu v White*, [1901] 2 KB 669 (EWHC KB 1901).

³⁰ For a powerful rejection of the floodgate argument see Lord Scarman's speech in *McLoughlin v O'Brian*, [1983] 1 AC 410 (UKHL 1982) at p. 430-1.

³¹ *Victorian Railways Commissioners v Coultas*, (1888) 13 App. Cas. 222 (UKPC 1888) at p. 223 – 224; *Dulieu v White*, [1901] 2 KB 669 (EWHC KB 1901) at p. 672; the miscarriage in *Victorian Railways* is not mentioned in the report itself but it is referred to in the judgment of Kennedy J in *Dulieu v White* at p.676. However, the plaintiff in *Victorian Railways* clearly suffered some physical illness as consequence of the nervous shock.

case where an accident caused by negligence had given a person a serious nervous shock' and a 'wide field [would be] opened for imaginary claims'³². Only thirteen years later, in *Dulieu v White* the opposite decision was reached (with Kennedy J explicitly refusing to follow the decision in *Victorian Railways* and disapproving the very passage quoted above as well as referring to other cases criticising *Victorian Railways*³³). Later, *Page v Smith*³⁴ completely removed the requirement that some physical harm must have resulted from the negligent act. However, despite this extension of liability, it does not seem that the "floodgates" have been opened.

The argument that the fears of opening the floodgates rarely come true is also made by Teff³⁵ (citing Fleming³⁶):

"[...] the experience in the statutory Australian jurisdictions has not borne out fears of becoming swamped by unmeritorious claims in the wake of relaxing the requirements of actionability; nor has the experience with such claims in the most liberal American jurisdictions figured in the complaints and conservative reform efforts of the defence interests. Perhaps the fears are after all largely imaginary, certainly exaggerated."

The Law Commission in 1997 published a report on liability for psychiatric illness³⁷. Being fully aware, and in favour, of the floodgates argument³⁸, the Commission nevertheless regarded the current law as 'unduly restrictive'³⁹. They suggested dispensing with the criteria of closeness in time and space to the accident or its aftermath and of sudden appreciation through unaided senses⁴⁰, considering that

*"[...] the most acceptable method of [limiting the potential number of claimants] is [...] by reference to their connection with the immediate victim. Provided that the requirement for a close tie of love and affection between the plaintiff and the immediate victim is retained, the main floodgates objection [...] is limited."*⁴¹

The Law Commission, in this respect, follows the Australian approach. In *Jaensch v Coffey*, Gibbs

³² *Victorian Railways Commissioners v Coultas*, (1888) 13 App. Cas. 222 (UKPC 1888) at p. 225-6.

³³ *Dulieu v White*, [1901] 2 KB 669 (EWHC KB 1901) at p. 677-678.

³⁴ *Page v Smith*, [1996] 1 AC 155 (UKHL 1995).

³⁵ Harvey Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries," *Cambridge Law Journal* 57, no. 1 (March 1988): 91-122, at p. 121

³⁶ J.G. Fleming, *Tort Law Review*, 1994, 202; at p. 204.

³⁷ Law Commission, "Liability for Psychiatric Illness. Item 2 of the Sixth Programme of Law Reform: Damages," Law Commission Report No. 249 (London: Law Commission, 1997).

³⁸ *Ibid* at [6.8]

³⁹ *Ibid* at [6.10]

⁴⁰ *Ibid* at [6.16]

⁴¹ *Ibid* at [6.10]

CJ said⁴²:

“Where the relationship between the person killed or physically injured and the person who suffers nervous shock is close and intimate, not only is there the requisite proximity in that respect, but it is readily defensible on grounds of policy to allow recovery.”

This approach was endorsed in the later Australian case of *Gifford v Strang Patrick*⁴³ where the Australian High Court allowed children to recover for psychiatric injury sustained when they learned that their father had died in a work accident. The children had not witnessed the accident and, in fact, did not see their father’s body or the scene of the accident at all. They were merely informed of it, later on the same day. However, Gleeson CJ held that this made no difference⁴⁴:

“[...] children form an obvious category of people who might be expected to be at risk of the kind of injury in question. Where there is a class of person, such as children, who are recognised, by the law, and by society, as being ordinarily in a relationship of natural love and affection with another class, their parents, then it is not unreasonable to require that an employer of a person in the second class, whose acts or omissions place an employee at risk of physical injury, should also have in contemplation the risk of consequent psychiatric injury to a member of the first class.”

In a more general context, not specifically of Australian law, Mullany⁴⁵ provides further reasons for rejecting the floodgates argument. He argues that the “normal” control mechanism relating to physical injury and other common law claims are perfectly adequate for psychiatric injury claims as well⁴⁶ and that psychiatric injury claims are automatically limited because *“the incontrovertible medical fact of the matter is that the psychiatric equilibrium of the vast majority of community members is not disturbed by even the most severe traumatic stimuli”*.⁴⁷

While the floodgates argument is, by its nature, a matter of speculation rather than a definite and decisive line of argument, it cannot be ignored that a considerable body of medical and legal experts considers it (in the way Lord Steyn stated it) as plainly wrong. This, in turn, leads to the conclusion that all of Lord Steyn’s four reasons are highly problematic. Yet, the reasoning of Lord Dyson MR in *Taylor v A Novo* shows that these dicta still form a cornerstone of this area of law. It follows that

⁴² Jaensch v Coffey, (1984) 155 CLR 549 (High Court of Australia 1984) at p. at 555.

⁴³ Gifford v Strang Patrick Stevedoring, (2003) 214 CLR 269 (High Court of Australia 2003).

⁴⁴ Ibid at [12]

⁴⁵ Nicholas Mullany, “Psychiatric Damage in the House of Lords--Fourth Time Unlucky. Page v. Smith,” *Journal of Law and Medicine* 3 (1995): 112.

⁴⁶ Ibid at p. 119: “There is nothing to suggest that the normal interlocutory mechanism designed to excise baseless physical injury and other types of common law claims are somehow inadequate in psychiatric injury proceedings. Psychiatric injury is not a nebulous ailment: it is a broad recognisable medial category, of which there are numerous identified subcategories.”

⁴⁷ Ibid at p. 118-9

there is urgent need to reconsider Lord Steyn's dicta.

3. Conclusion

Lord Scarman said in *McLoughlin*:⁴⁸ “*The real risk to the common law is not its movement to cover new situations and new knowledge but lest it should stand still, halted by a conservative judicial approach.*” Sadly, this risk appears to have materialised in *Taylor v A Novo*. Given that the law on negligence should develop “*incrementally and by analogy with established categories*”⁴⁹ it seems questionable whether such a judicial bar (especially with respect to new factual scenarios: see above) can, or should, be imposed at all. More importantly, however, the specific reasons given by Lord Steyn do not stand up to closer scrutiny and, accordingly, should be rejected. It is to be hoped that this area of law will be revisited in the near future and that the courts will use such an opportunity to remedy the flaws in the current law.

⁴⁸ *McLoughlin v O'Brian*, [1983] 1 AC 410 (UKHL 1982) at p.430D.

⁴⁹ Brennan J in *Sutherland Shire Council v Heyman*, (1985) 60 ALR 1 (High Court of Australia 1985) cited by Lord Bridge in *Caparo Industries v Dickman*, [1990] 2 AC 605 (UKHL 1990) at 618D.

DEFEATING INVERTED PENTAGRAMS: CRIMINAL LIABILITIES OF THE CHIEF OF STATE AND HIS MINIONS IN ERRANT WAR ON DRUGS

Chad Patrick Osorio*

Abstract

In light of the Philippines President Rodrigo Duterte's War on Drugs, this article discusses several key issues which relate to its implementation. It discusses Operation Tokhang and notes that the extrajudicial killings (EJK) accompanying it show the failure of the Executives to uphold Republic Act No. 9165, or the Comprehensive Dangerous Drugs Act of 2002. It analyzes legislations and cases which could give rise to criminal liabilities of the Commander-in-Chief and errant law enforcers under domestic and international criminal law, despite the cloak of Presidential Immunity and the ability of the Chief Executive to grant absolute pardon. It also discusses various legal remedies for citizens directly and indirectly affected by Duterte's administration of the War on Drugs, and posits that the Courts retain the power to prevent these abuses from further happening, as well as penalize those who have exceeded the scope of their authorities and exercised abuse of power.

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1. Introduction

The Inverted Pentagram is associated with black magic lore as a circle of protection. Once inside it, the user seems invincible against the maleficent effects of the dark magic he practices. The same can be said to hold true for an errant Chief-of-State; by virtue of the concept of Presidential Immunity from Suit, he may cast far-reaching damages from the safety of his demonic circle.

But as it is in popular lore, the hands of justice grant legal mechanisms to hinder this grave and deadly abuse of power.

The prevailing law on the matter of drug abuse in the Philippines is Republic Act No. 9165, or the Dangerous Drugs Act of 2002. It is *mala prohibita* in nature; certain acts relating to the use, possession, transport and trade of illegal substances, controlled precursors and essential chemicals are punishable by the law, regardless of motive or intent. Fines range from PHP10,000 to PHP15,000,000; the minimum term of imprisonment is six (6) months; and the death penalty is the maximum imposable punishment. As the death penalty is suspended, this sentence is normally commuted to life imprisonment; but with recent developments, in the Philippines legislature, pushing for the re-imposition of the death penalty, this can spell death by lethal injection, hanging or firing squad.¹

Under the strict letter of the law, possession of as little as 10 grams of an illegal drug can be punishable by death. However, this harsh penalty is tempered by the law itself; under its implementing rules and regulations, the meticulous manner by which a person can be convicted of the crime, particularly of possession, is provided.² In fact, it even provides the sanction of death for people who are found to have planted evidence on unsuspecting persons. Furthermore, in *People v. Gutierrez*,³ the Court stated that the corpus delicti to be presented as evidence must follow the chain of custody rule, as defined by Section 1(b) of the Dangerous Drugs Regulation No. 1, Series of 2002:

Chain of Custody means the duly recorded authorized movements and custody of seized drugs or controlled chemicals or plants source of dangerous drugs or laboratory equipment at each stage, from the time of seizure/confiscation to receipt in the forensic laboratory to safekeeping to presentation in court and destruction. Such record of movements and custody of the seized item shall include the identity and signature of the person who held temporary custody of the seized item, the dates and times when

¹ Viray, Patricia, 'Execution by hanging, firing squad included in proposed Death Penalty Law' (Philippine Star, 2016) <www.philstar.com/headlines/2016/12/01/1649307/execution-hanging-firing-squad-included-proposed-death-penalty-law> accessed 20 February 2017

² Rep. Act No. 9165 (2002) §21.

³ *People v. Gutierrez*, G.R. No. 179213 (2009)

such transfers of custody were made in the course of safekeeping and use in court as evidence, and the final disposition.

This process, which involves the transfer and documentation of the evidence from the arresting officer to the investigating officer, and then to the forensic chemist, and finally the court trying the case, is required to be strictly followed. Non-compliance therewith will result in a denial of due process for the accused, constituting grounds for the dismissal of the criminal case.

Unfortunately, in the implementation of Republic Act 9165, police officers are taking shortcuts. By killing those who are guilty of possession in alleged buy-bust operations, they do not have to comply with these lengthy reportorial requirements. All they have to allege in the police reports would be that there was an altercation and the suspect fought back, popularly known in the Philippines as ‘nanlaban’, and cases like these are closed without further investigation.⁴ Other cases of extrajudicial killings involve masked men, also reportedly police officers,⁵ killing those who are suspected drug addicts and small-time pushers, some of whom have previously surrendered to the police and are alleged to be on their way to reform, off the streets.

Alarmingly, these practices are now very widespread. As of December 2016, a mere six (6) months after President Duterte has assumed the Presidency, nearly 6,000 cases have been reported by the Philippine National Police (PNP).⁶ While, of course, these are not all attributable to errant police officers, the culture of impunity can be reasonably attributable to the Chief Executive, who has repeatedly promised the police his support and protection,⁷ despite official and verified reports of

⁴ There are many various instances where the ‘nanlaban’ excuse has been used, including incredulous ones such as when the accused had his hands cuffed behind his back, when the accused is under the custody of the government with no reasonable access to guns, or even when ballistics report reveal that the victim was lying down and most likely asleep. These news reports are but a few. Bea Cupin "Nanlaban sila": Duterte's war on drugs" (*Rappler*, September 1 2016) <www.rappler.com/newsbreak/in-depth/143905-war-on-drugs-pnp-duterte> accessed 20 February 2017; ABS-CBN News. Nanlaban umano: Hinihilang tulad ng droga, patay sa Maynila' (*ABS-CBN News*, January 5 2017) <<http://news.abs-cbn.com/video/news/01/05/17/nanlaban-umano-hinihinalang-tulak-ng-droga-patay-sa-maynila>> accessed 20 February 2017; Lottie Salarda "Nanlaban"? | With video: Albuera Mayor Espinosa killed in Leyte jail" (*Interaksyon News*, November 5 2016) <<http://interaksyon.com/article/133992/nanlaban--albuera-mayor-espinosa-killed-in-leyte-jail-cell>> accessed 20 February 2017; Christina Mendez "Suspect unarmed? Give him a gun" (*The Philippine Star*, December 20, 2016) <<http://www.philstar.com/headlines/2016/12/20/1655205/suspect-unarmed-give-him-gun>> accessed 20 February 2017

⁵ Kate Lamb 'Philippines secret death squads: officer claims police teams behind wave of killings' (*The Guardian*, October 4 2016) <<https://www.theguardian.com/world/2016/oct/04/philippines-secret-death-squads-police-officer-teams-behind-killings>> accessed 20 February 2017; Christopher Woody 'The Philippines' president has declared a war on drugs, and it's turned normal people into hired killers' (*Business Insider*, September 5, 2016) <<http://www.businessinsider.com/philippines-vigilante-drug-killings-2016-9>> accessed 20 February 2017

⁶ Kimberly Tan 'More than 5,800 killed amid drug war on drugs: PNP' (*ABS-CBN News*, December 6 2016) <<http://news.abs-cbn.com/news/12/06/16/more-than-5800-killed-amid-war-on-drugs-pnp>> accessed 20 February 2017; Jaime Laude 'PNP: 4,605 dead in drug war' (*The Philippine Star*, November 26 2016) <<http://www.philstar.com/headlines/2016/11/26/1647555/pnp-4605-dead-drug-war>> accessed 20 February 2017

⁷ Christina Mendez 'Duterte to PNP: Kill 1,000, I'll protect you' *The Philippine Star*, July 2, 2016 <<http://www.philstar.com/headlines/2016/07/02/1598740/duterte-pnp-kill-1000-ill-protect-you>> accessed 20 February

police abuse of power.⁸

The drug problem does exist. It is undeniable that with the increase in the ease of use of technology and transportation, the illegal drug trade problem has grown in the past decade,⁹ and this problem concerns the smallest of Filipino communities¹⁰ to international entities such as the Association of Southeast Asian Nations (ASEAN).¹¹ However, Philippines President Duterte's War on Drugs is ill-informed at best.

In his rants during live media coverage, he has promised to kill more than 3 million Filipinos who are involved in the drug trade, making no differentiation between multinational drug cartels, small-time dealers, or victims of substance use disorder.¹² The targets of his campaign of blood and gore remain the poor and the helpless, as no crackdown has yet been made on international organizations; and from the looks of it, none will be. This War on Drugs, nicknamed 'Oplan Tokhang',¹³ has turned into a War against the Poor.

This is alarming because not only does it have short-term repercussions, translating into a mass murder of those suffering from substance use disorder, it has long-term and wide-ranging repercussions as well, from personal to cultural and even economic and political. Not only are the families of the victims affected, it also affords a culture of impunity for both errant police officers and criminals seeking to commit felonies under the guise of vigilante killings. These, in turn, create political and economic tensions, particularly in the international community, whose members' aid and support in the Philippines are slowly being withdrawn in light of Duterte's unreasonable stance on the War on Drugs.¹⁴ The damages that these may cause extend beyond his six-year term.

2017; CNN Philippines Staff 'PNP Chief: President only showing support for police' (CNN Philippines, December 8 2016) <<http://cnnphilippines.com/news/2016/12/08/Duterte-CIDG-Marvin-Marcos-Mayor-Espinosa.html>> accessed 20 February 2017

⁸ Patricia Viray 'NBI: Espinosa slay was a rubout, not shootout' (*The Philippine Star*, December 6 2016) <<http://www.philstar.com/headlines/2016/12/06/1650872/nbi-espinosa-slay-was-rubout-not-shootout>> accessed 20 February 2017; Dharel Placido 'Police in Espinosa 'rubout' won't go to prison: Duterte' (*ABS-CBN News*, December 7 2016) <<http://news.abs-cbn.com/news/12/07/16/police-in-espinosa-rubout-wont-go-to-prison-duterte>> accessed 20 February 2017

⁹ Keegan Hamilton 'The golden age of drug trafficking: How meth, cocaine, and heroin move around the world' (*Vice*, April 26 2016) <<https://news.vice.com/article/drug-trafficking-meth-cocaine-heroin-global-drug-smuggling>> accessed 20 February 2017

¹⁰ Araneta, Sandy, and Ramos-Araneta, Macon. 'PDEA: Drug trade bigger' (*The Standard*, February 4 2016) <<http://www.thestandard.com.ph/news/-main-stories/top-stories/198455/pdea-drug-trade-bigger.html>> accessed 20 February 2017

¹¹ Laignee Barron 'ASEAN integration fuelling trafficking, crime' (*Myanmar Times*, February 26, 2016) <<http://www.mmtimes.com/index.php/national-news/19195-asean-integration-fuelling-trafficking-crime.html>> accessed 20 February 2017

¹² Felipe Villamor 'Duterte, citing Hitler, says he wants to kill 3 million addicts in Philippines' (*The New York Times*, September 30 2016) <<http://www.nytimes.com/2016/10/01/world/asia/philippines-rodolfo-duterte-hitler-drugs.html>> accessed 20 February 2017

¹³ Jessica Soho 'Brigada: Ano ang Oplan Tokhang?' (*GMA News Online*, July 12 2016) <<http://www.gmanetwork.com/news/video/376781/brigada/brigada-ano-ang-oplan-tokhang->> accessed 20 February 2017

¹⁴ Phelim Kine 'Duterte's abusive 'war on drugs' risks foreign aid' (*Asia Times*, December 19 2016) <<https://>

This review posits that the method by which Duterte addresses this growing problem is not only grossly unconstitutional, it also goes against international human rights law, and can make the President liable under the Rome Statute and the International Criminal Court, regardless of whether he chooses to withdraw from it or not.

2. ISSUES

There are three key issues to be discussed this article:

1. What are the remedies against the continued implementation of *Oplan Tokhang*?
2. Can the members of the Philippine National Police, as law enforcers, be liable when it comes to the community implementation of a flawed order from the Chief Executive?
3. Can the President be liable as Commander-in-Chief for his misguided and malinformed War on Drugs?

3. Regulations

For the first question, we turn to the legal basis of *Oplan Tokhang*, which is Republic Act No. 9165, otherwise known as the Comprehensive Dangerous Drugs Act of 2002. Further guidance is provided in its Implementing Rules and Regulations, promulgated by the Executive. We will analyze the actions under *Oplan Tokhang* and see whether they follow the guidelines set by both RA 9165 and the 1987 Constitution. If the answer is negative, we will seek remedies in the Supreme Court under the Revised Rules of Court to halt these actions.

The second question calls into fore the criminal provisions of the Revised Penal Code which, despite being promulgated in 1930, remains good law. Together, we will tackle their applications with the administrative penalties proposed under Republic Act No. 6713, which contains the Code of Conduct and ethical standards for government officials and employees, including the Dangerous Drugs Board, the Philippine Drug Enforcement Agency, and the Philippine National Police, the main implementation arm of the Executive when it comes to preventing and suppressing illegal drug trade. The author posits that they can also be held liable for damages under the Civil Code of 1950, but this is beyond the ambit of this paper.

The third question relates to the liability of the President. While the Chief Executive enjoys immunity from suit during his term, a principle upheld both in domestic jurisprudence¹⁵ and under international law,¹⁶ the conclusion of his Presidential tenure opens the gates for him to answer to

www.hrw.org/news/2016/12/19/dutertes-abusive-war-drugs-risks-foreign-aid-0> accessed 20 February 2017

¹⁵ *Soliven v. Judge Makasiar*, G.R. No. 82585 (1988); *David v Macapagal-Arroyo*, G.R. No. 171396 (2006)

¹⁶ Akande, Dapo and Shah, Sangeeta 'Immunities of State Officials, International Crimes, and Foreign Domestic

the call of justice, not only as a driving force for murders under national laws, but also under Article VII of the Rome Statute. This can be hastened by a potential call for impeachment under the 1987 Constitution.

4. Analysis

4.1 EJKs as Failure to Uphold RA 9165

Republic Act No. 9165 provides guidance on how the anti-drug campaigns of the government should be implemented. *Oplan Tokhang* is the Philippine National Police's massive national campaign against drugs, under the initiative of President Duterte. The name '*tokhang*' is derived from the Visayan term '*toktok hangyo*' meaning to knock and to plead.¹⁷ This program was originally spearheaded in Davao City back when President Duterte was still Mayor. In its nationwide implementation, officials of the barangay, the smallest local government unit in the country, are asked to produce a list of suspected drug personalities in the community. Police officers were to knock in the homes of suspected drug addicts and pushers, and plead with them to discontinue their illegal ways, hence '*tokhang*'. These persons are then asked to go to the police station to 'surrender', or otherwise face dire consequences.

This practice goes beyond the ambit of RA 9165. Under Article VII, the participation of local government units mandate that they allot a percentage of their respective annual budgets to assist in the enforcement of the law, either for educational or rehabilitation purposes, or abate drug-related public nuisances. Local government officials are not qualified by law to identify drug abusers and pushers; the most they can base their lists on are rumors and pure village hearsay. Based on this alone, they cannot even be called to court to testify.

There is indeed a provision for voluntary submission, of a drug dependent, to confinement, under Article VIII of RA 9165. However, such submission is not through forceful compulsion, nor for fear for one's life. It does not involve any list which discriminates and seeks to sow fear in the community.

The implementation of *Oplan Tokhang* is clearly unconstitutional, going against the very essence of the Bill of Rights as enshrined in the 1987 Constitution. It removes the presumption of innocence from the accused, by virtue of only hearsay evidence. It further subjects the right against self-

Courts' Eur J Int Law (2015) 21 (4) 815-852, < <http://ejil.oxfordjournals.org/content/21/4/815.fun> > accessed 20 February 2017

¹⁷ Germelina Lacorte 'Davao City's anti-illegal drugs campaign to go national' (*Philippine Daily Inquirer*, May 31 2016) <<http://newsinfo.inquirer.net/788429/davao-citys-anti-illegal-drugs-campaign-to-go-national>> accessed 20 February 2017

incrimination invalid, as the suspects who are invited to the police station are made to sign documents that they promise to refrain from continuing their illegal drug-related activities,¹⁸ documents which, even to the eyes of the legally untrained, automatically makes them admit guilt of previous illicit actions. Due process is forgotten.

Vaguer, but similarly unconstitutional, are the extrajudicial killings related to *Oplan Tokhang*. The term 'extrajudicial killings' refers to executions conducted by the police organ of the state without giving its victims their necessary day in court. In contrast, a judicial execution may refer to the imposition of the death penalty. Accidental deaths in cases of legitimate police operations may also be included under the second category. Extrajudicial killings remove the right to life of the accused without regard for due process and celebrate the culture of impunity. These killings can take varied forms, from vigilante killings by alleged police officers and their agents to legitimate buy-bust operations alleging that the suspects tried to fight their way out of the situation. Massive evidence, however, points to the police abuse of this aspect of *Oplan Tokhang*, where officers liberally take the lives of suspects even when there exists no danger to justify such actions.

The conclusion remains that *Oplan Tokhang* and its evil twin, EJK, are against the law which created it; additionally, it is grossly unconstitutional and immensely immoral. It is a grotesque failure in the implementation of the law, and tramples the most basic human rights.

Fortunately, the separation of power provides the concept of judicial review. When there exists grave abuse of discretion, or the lack or excess of jurisdiction in the exercise of powers granted by the State, the Judiciary can put its foot down and order such acts to cease.

Such power has been granted by the 1987 Constitution¹⁹ and made operational under Rule 65 of the Rules of Court. In the case of Operation *Tokhang*, a petition for certiorari, prohibition and mandamus can be made against it, to enjoin the Executive Arm from further implementing this bloody War on Drugs. Grounds for such action can be based on both the Constitution and international human rights laws, particularly those related to the protection of life and liberty without due process of law.

Presently, *Oplan Tokhang* is geared towards stronger implementation,²⁰ and it is up to lawyers to mount this powerful remedy from the courts to prevent more deaths of the citizens.

¹⁸ Cardinoza, Gabriel and Agoncillo, Jodee. 'Pushers give up en masse' (*Philippine Daily Inquirer*, June 29 2016) <<http://newsinfo.inquirer.net/792984/pushers-give-up-en-masse>> accessed 20 February 2017

¹⁹ PHIL CONST, art VIII, § 1.

²⁰ Cheryl Cosim 'Oplan Tokhang, mas paigtingin sa 2017' (*News 5*, January 2, 2017) <<http://news5.com.ph/videos/6724698269BC495/0/oplan-tokhang-mas-paigtingin-sa-2017>> accessed 20 February 2017

4.1.1 Liability of Police Officers

Another equally noteworthy aspect of this War on Drugs is the promise of President Duterte to pardon police officers who have killed in the line of duty, even commending them in doing so. Clearly, he does not intend to exercise the innate disciplinary powers that he has as the Chief Executive over the members of the PNP, despite recorded cases of grave errors on the part of the latter.²¹ Because of this, we turn again to the courts to implement the law.

Section 28 of RA 9165 governs the criminal liabilities of government officials and employees. It provides for the imposition of the maximum allowable penalty, including absolute perpetual disqualification from office. A common suspected crime committed by these police officers, that of planting of evidence, falls under Section 29, which is punishable by death.

Furthermore, under the Revised Penal Code and (support from) jurisprudence, a police officer going beyond the allowed mandate of duty and killing an accused, where such action is hardly necessary, is considered murder.²²

Families of victims of EJKs, can file a suit against the erring police, it may be an administrative or a criminal case. Republic Act No. 6975, as amended by Republic Act No. 8551, provides for a section on Citizen's Complaints, where an administrative complaint by any person, whether natural or juristic, against any member of the PNP, can be brought to Chiefs of Police, the Mayors of cities and municipalities and the People's Law Enforcement Board, depending on the period of suspension to be imposed.²³ However, in instances where criminal cases are filed, for planting of evidence, committing perjury and murder, etc., regular courts maintain exclusive jurisdiction.

Despite the promise of the sitting President to pardon the wrongdoings of policemen, it is also noteworthy that he may not even have the chance to do so. Before executive clemency can be granted, the Constitution requires that the accused first be convicted by final judgment.²⁴ Under the Revised Penal Code, crimes which are punishable by death, *reclusion perpetua* or *reclusion temporal* have a prescription period of 20 years.²⁵ Families of victims may then choose to file the appropriate criminal case once Duterte's term is over; his term is limited to only six years.

This, however, is a lot easier said than done. While these are all valid and strategic legal remedies, they prove to be impractical for a good number of people who have been victimized by the police

²¹ Agoncillo, Jodee and De Jesus, Julliane Love 'Ateneo HS teacher and anti-drug advocate shot dead in Marikina' (*Philippine Daily Inquirer*, July 19 2016) <<http://newsinfo.inquirer.net/797022/ateneo-hs-teacher-shot-dead-in-marikina>> accessed 20 February 2017; Foundation scholar a victim of Duterte's war on drugs?' (*ABS-CBN News*, July 20 2016) <<http://news.abs-cbn.com/focus/07/20/16/foundation-scholar-a-victim-of-dutertes-war-on-drugs>> accessed 20 February 2017

²² *People v. Buensuceso*, G.R. No. L-32103 (1984)

²³ Rep. Act No. 8551 (1998) §41(a)

²⁴ PHIL CONST, art IX-C, § 5.

²⁵ Act No. 3815 (1930), art 90.

abuse of power. These victims are characterized as poor, and in many cases, uneducated.²⁶ They do not have ready access to the criminal justice mechanism, and even if they do, it may prove to be too resource-draining in the long run, especially in a country where justice is very rarely served on time. Their voices are heard only when they cry out for justice in the media, but are still completely forgotten by the annals of the legal system. This is also precisely why these systematic abuses have to be stopped before more people are killed by the War on Drugs.

4.1.2 *Liability of the President*

It is admittedly difficult to pinpoint individual members of the police who engage in vigilante killings, or who make *Oplan Tokhang* a poor excuse to kill without reservations, much more to hold them accountable. After all, even if the justice system convicts these erring officials as criminals and dismisses them from service, the President can exercise his power of pardon and restore them to their positions *tabula rasa*, ready to abuse again. In this case, we posit that the President himself can be liable.

Even without taking into account his numerous inflammatory statements, including his positive regard for the Holocaust and his promise to kill 3 million of his own people, Duterte stands as a leader whose words and actions enable his police forces to act with impunity in dealing with civilians, particularly when it comes to the War on Drugs and EJKs.

Under ordinary circumstances, Duterte would be liable under the Revised Penal Code, not only for Crimes against Persons, embodying murder and physical injuries suffered by the people caught in the meshes of his War on Drugs, but also for Crimes against the Fundamental Laws of the State, which are committed upon his orders, including arbitrary detention and violation of domicile. However, due to the all-powerful concept of Presidential Immunity, President Duterte cannot be impeached in the courts today. It is interesting to note that the 1973 Constitution has a provision to this effect, while the 1987 Constitution does not.²⁷ This doctrine is also preserved in Philippine jurisprudence, particularly in *Soliven v. Judge Makasiar*, where it was held that '[t]he rationale for the grant to the President of the privilege of immunity from suit is to assure the exercise of Presidential duties and functions free from any hindrance or distraction, considering that being the Chief Executive of the Government is a job that, aside from requiring all of the office-holder's time, also demands undivided attention.'²⁸ This immunity, however, does not subsist beyond the term of

²⁶ Joseph Franco 'The Philippines' War on Drugs is really a war on the poor' (*The Global Observatory*, August 10 2016) <<https://theglobalobservatory.org/2016/08/philippines-duterte-drugs-extrajudicial-killing-tokhang/>> accessed 20 February 2017

²⁷ Joaquin Bernas 'Executive immunity' (*The Philippine Daily Inquirer*, July 14 2014) <<http://opinion.inquirer.net/76532/executive-immunity>> accessed 20 February 2017

²⁸ G.R. No. 82585 (1988)

office. In *Estrada v. Desierto*, the Court ruled that ‘unlawful acts of public officials are not acts of the State and the officer who acts illegally is not acting as such but stands in the same footing as any other trespasser.’²⁹ This means that the moment that Duterte steps out, resigns, is impeached or is otherwise ousted from office, he can be liable for criminal acts that he has engendered. This concept can be likened to command responsibility, wherein given the knowledge that such crimes are being committed, he had grossly failed to prevent and punish such illegal acts of his subordinates.³⁰

But apart from national law, where arguably everything is a function of politics, Duterte is also liable under international criminal law. In fact, a number of legal commentators from the Philippines and the UN has noted that Duterte can be held liable under Article 5(b) of the Rome Statute, as defined under Article 7.³¹ Crimes against humanity refer to ‘the widespread or systematic attack directed against any civilian population, with knowledge of the attack,’ and include murder, extermination, persecution and other inhumane acts of similar character, intentionally causing great suffering or serious injury to body or to mental or physical health.³² To commence investigations, a State Party may refer a situation to the Court, or the Prosecutor may motu proprio conduct it on the basis of available information.³³ In this particular case, presidential immunity does not apply, as official capacity is rendered irrelevant by the Rome Statute.³⁴ In fact, heads of states of Sudan and Kenya have been charged before the ICC even during their incumbency.³⁵ Applicable penalties may include imprisonment of up to 30 years, or in extreme cases, a life sentence, in addition to fines and forfeitures of proceeds, property and assets derived from the commission. More importantly, reparation can be ordered to be made to the victims, which may be in the form of restitution, compensation or rehabilitation, to name a few.³⁶

²⁹ G.R. Nos. 146710-15 (2001)

³⁰ Guenaël Mettraux 'The Doctrine of Superior/Command Responsibility, Peace and Justice Initiative' (2016) <<http://www.peaceandjusticeinitiative.org/implementation-resources/command-responsibility>> accessed 20 February 2017

³¹ *UN warns Duterte: Watch your mouth or be liable for crimes against humanity* (*Politics.com*, January 10 2017) <<http://politics.com.ph/un-warns-duterte-watch-mouth-liable-crimes-humanity/>> accessed 20 February 2017; Balagtas, Camille Balagtas, 'CHR: Duterte can be held liable under ICC' (*Sunstar Manila*, August 23, 2016) <<http://www.sunstar.com.ph/manila/local-news/2016/08/24/chr-duterte-can-be-held-liable-under-icc-493199>> accessed 20 February 2017

³² Rome Statute (2002) art 7 (a) (b) (h) (k)

³³ Rome Statute (2002) arts 14, 15

³⁴ *Ibid* art 27

³⁵ Joel Butuyan, 'Extrajudicial killings as crime against humanity' (*Philippine Daily Inquirer*, August 15 2016) <<http://opinion.inquirer.net/96518/extrajudicial-killings-crime-humanity>> accessed 20 February 2017

³⁶ Rome Statute (n 32) arts 75, 79

5. Conclusion

From this brief review we've established several important ideas:

Firstly, that Operation *Tokhang* is illegal, and intrudes upon the key rights of citizens envisioned not only by the Constitution but also by international human rights law.

Secondly, police officers can be held personally liable, both administratively and criminally, for such acts beyond the scope of their powers.

Thirdly, the President is also liable. Under national laws, he faces charges once he is stripped of the inverted pentagram masquerading as presidential immunity, but international law does not make any particular distinction.

Lastly, the answer could lie in the courts, whether it be the Philippine Courts or the International Criminal Court. Although once considered the little brother of Executive and the Legislative, the Judiciary now enjoys more freedom in the exercise of its supreme powers.

While it is not, and cannot be, totally free from ravaging politics, it may hold the key to this dire situation that Filipinos currently face.

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