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Submissions

The Editorial Board of the Cork Online Law Review at University College Cork, Ireland, would like to invite submissions for the 17th edition, due to be launched in March 2018.

All submissions should be on a legal topic, and be between 3,000 and 9,000 words in length. Book reviews and case notes will also be considered.

All interested parties should submit their articles and enquiries to:

The Editor-in-Chief
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Submissions are also invited for the Letters to the Editor section. Submissions should be on a topic of current legal relevance, whether domestic or international, and should be approximately 1000 words in length. Letters are welcome in Irish, English or French.

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TABLE OF CONTENTS

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The Editorial Board of the Cork Online Law Review would like to extend their sincere gratitude to Dr Maria Cahill for her continued support and guidance to the law review over the past year. Her contribution remains invaluable to the law review's continued success. We would also like to thank the academic staff of the School of Law in UCC for the hours they have dedicated once more to help us review submissions.

The Editor-in-Chief, in particular, would like to thank the Hon. Mr Justice Gerard Hogan for doing us the great honour of launching our review and for writing the foreword to this year's edition.

The Editorial Board would like to thank the Dean of the School of Law in UCC, Professor Ursula Kilkelly, for her continued help and support. We would also like to thank the Executive Committee of the UCC Law Society, who have been a constant source of support and advice over the past year.

In addition, the Editorial Board wishes to extend our most sincere gratitude to the law firm Arthur Cox for their continued generous sponsorship of our law review, without which this edition would not be possible. We wish to thank Ms Diana Diamond in particular for all her help and support.

Last but not least, we would like to thank and congratulate the authors without whom this edition would be not possible. This edition is the product of their commendable contribution to academic scholarship. We would also like to acknowledge the thought-provoking contributions, ranging from family law, refugee law and the law of evidence, made throughout the year in our Letters to the Editor platform.

Is mise le meas,

Clara Aisling Hurley
Editor-in-Chief of the 16th Edition
March 2017

FOREWORD TO THE SIXTEENTH EDITION

It is an honour to be asked to launch the 16th edition of the Law Review, a journal that has already contributed so much to legal scholarship in this jurisdiction. It is a particular honour in that in so doing I feel that I may be permitted to have even a slight, vicarious connection with the Law School of University College, Cork, an institution and University whose graduates and academics have made such a contribution to Irish legal life.

At the risk of embarrassment and the charge of selectivity, I propose to mention in this regard just four living individuals associated with the University and the Law School. First, I would naturally wish to pay tribute to my colleague and dear friend, David Gwynn Morgan. Not only is he justly regarded as the father of Irish administrative law, but his prose style and telling insights should serve as a model and inspiration for any up-coming legal writer and researcher of the next generation. Professor Gwynn Morgan's scholarship shows the importance of fine legal writing and communicating directly with one's audience.

Second, I would wish to mark in a special way the telling and profound contribution of Mr Justice McKechnie to contemporary jurisprudence. His judgments are always interesting, erudite and elegantly written. But just as valuable – if not, indeed, more so - is his stubborn independence of thought. There is, I think, a tendency in judicial circles to go along with the path of least resistance and to reject arguments which are innovative or inconvenient or which might seem to some unpopular. That has never been McKechnie J's style and no finer witness to his fearless determination to uphold the Constitution and the law is his judgment in *The People v Doyle* [2017] IESC 1 where, even in a case with deeply repugnant facts and a singularly unattractive defendant, he led the minority of the Supreme Court (or was he alone?) to uphold the constitutional right of an accused to have a solicitor present when facing Garda questioning following arrest. One does not even have to agree with his judgment in this case: the compelling nature of his language and argumentation is in itself sufficient to command respect and admiration.

Third, it is a pleasure to acknowledge the important contribution of another dear friend, Ms Justice Marie Baker. She is perhaps the living embodiment of the legal polymath. With the exception of Ms Justice Laffoy, who else can combine a comprehensive knowledge of contemporary judicial review law with her profound knowledge of all aspects of conveyancing, property and probate law? Who else would take the trouble to produce a sparkling, effervescent judgment on that most vexing of all probate disputes, namely, whether a codicil to a will revives will as she did in *Brennan v O'Donnell* [2015] IEHC 460?

Finally, I must also pay tribute to Dermot Gleeson SC who taught for many years at UCC. There are few more majestic sights in the law than the privilege of hearing him at his captivating best in full flight. His superb oratory can sometimes even overshadow his greatest skill of all, namely, his ability to isolate with an uncanny simplicity and elegance the essential facts and the law. Of course, his presentations are made to look easy but one of the hallmarks of the great advocate is that you are always left to remonstrate with yourself as to why this now blindingly obvious point did not occur to you previously.

The latest edition of the Online Review contains its own living proof that these essential skills are being honed by the up-coming generation of legal writers, both from Ireland and further afield. The diversity and broad vision of the contributors is truly inspiring.

Robert Shaw tackles the intriguing question of the extent to which international arbitrators should be made personally liable in respect of awards which are later annulled. There are shades here of the issues of immunity for judges and quasi-judicial tribunals in respect of costs and other liability. Neil Murphy addresses the question of the interaction between EU competition law and that of third countries, including the case of whether there should be a globalised competition law. Joseph Onele discusses the issue of the recognition of the rights of indigenous peoples, with specific reference to contemporary Canadian practice. Jeremie Maurice Bracka deals with the potential jurisdiction of the International Criminal Court in respect of the Israeli/Palestinian conflict and its possible consequences. John East explores

whether Rawls' political conception should be slightly modified by Rorty's analysis if citizens who hold stark, contradictory views are to adopt justice as fairness. Máireád Leen examines the hidden and hitherto misunderstood problem of concussion from the perspective of sports law. Omatayo Samuel discusses the replacement of the old warranties model contained in the Marine Insurance Act 1906 by the UK Insurance Act 2015 and its implication for both English and Irish insurance law. Finally, continuing in its innovatory spirit of the Review, Alan Cusack's "letter to the editor" contains a proposal for the pre-trial examination of vulnerable witnesses.

The Review thus continues in the spirit of original and fresh research which has been its hallmark since its inception. This I greatly applaud and I can only urge on the editorial team and the contributors that they continue in this Olympian spirit of faster, higher, stronger in their quest for the purity of legal analysis and legal justice within these pages. UCC's golden quartet of great lawyers whose respective achievements I have but lightly championed at the start of this Foreword would wish for no less.

Gerard Hogan,
Court of Appeal Building,
Four Courts,
Dublin 7

6th March 2017

Editorial Board of the Sixteenth Edition of the Cork Online Law Review 2017

Advisory Board of the Sixteenth Edition of the Cork Online Law Review 2017

CONSTRUCTING JUSTICE: FAIRNESS, INCLUSIVENESS, AND UNDERSTANDING

John East*

A INTRODUCTION

In *Political Liberalism,* Rawls presents a theory of justice endeavoring to account for the fact that in a modern democratic society, citizens hold irreconcilable religious and philosophical conceptions of the world. He does not reconcile these competing views within a theory of justice, rather he conceptualises justice as a purely political matter. In essence, Rawls privatises how citizens should connect their underlying personal values to an overarching principle of justice in a reasonable and rational way. His approach is constructivist in nature and attempts to be as inclusive as possible. Principles of justice are built from the ground up and depend on abstractions from specific features of the social world, starting with the basic principle of the social contract.[1] We do not enter democratic society voluntarily, but we are born into it. We find ourselves situated in a political society at a particular moment in time. Given that our presence in this society is not an association, a theory of justice should speak to the extent that democratic citizens are free. Principles of justice should specify fair terms of social co-operation and regulate the division of benefits that arise, along with the encumbrances required to sustain those benefits.[2]

Ultimately, Rawls hopes the most marginalised groups of society will find motivation to adopt justice as fairness. Yet basing principles of justice on abstractions of a uniquely liberal social world raises the question: despite Rawls' constructive efforts, how inclusive and motivating can his justice really be? One way to test the validity of this approach is to take fundamental ideas central to his conception, and theorise about exclusionary effects they may have on groups situated at the far fringes of society. The Anishinabe or Anishinabek are an aboriginal group of

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[1] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) 3-17.

[2] ibid.

peoples fitting this description. More importantly, some Anishinabe communities oppose basic assumptions of the liberal doctrine, particularly when it comes to how they conceive of property or land. They teach that we cannot and should not privately own land.

Working through this thought experiment to its final conclusions reveals that basing justice on liberal assumptions has similar exclusionary effects as theories of justice that purport to illuminate some universal morality or truth. We must slightly reconfigure Rawls' political conception if citizens who hold stark and contradictory views are to adopt justice as fairness. Overall, justice as fairness becomes more stable and inclusive if we couch it in a specific version of the pragmatic theory of truth, championed by the pragmatist Richard Rorty.

This article is divided into three key sections. The first section explains key concepts that are crucial to understanding justice as fairness and include the reasonable comprehensive doctrine, original position, and overlapping consensus. Special focus is given to how some of these principles are dependent on uniquely liberal ideals. The second section begins by highlighting critiques of Rawls' argument concerning citizens' motivation to form an overlapping consensus of justice. The ontological differences between some Anishinabe views of property and underlying liberal assumptions are so stark it results in a motivational deficit. The last section explains that to account for this deficit we should ground Rawls' constructivist approach in a pragmatic theory of truth.

B KEY CONCEPTS

I Reasonable Comprehensive Doctrine

Rawls argues that each citizen will be able to connect their reasonable comprehensive doctrine to an overarching conception of justice in a reasonable and rational way. Understanding his argument requires an explanation of what a reasonable comprehensive doctrine is. We derive the concept of reasonable from the assumption that society is a system of fair co-operation. Persons are fundamentally reasonable when they are ready to propose principles and standards of fair terms of social co-operation.[3] People willingly abide by the standards if they feel assured that others will too. Reasonable people are not motivated by personal desires for good per se; rather,

[3] John Rawls, *Political Liberalism* (Columbia University Press 1993) 50-52.

they are motivated by the intrinsic value of a social world in which they can co-operate with others on terms everyone can accept.

The rational however, is distinct from the reasonable in that it applies to a single, unified agent. This agent is concerned with advancing interests that are particularly his or her own.[4] The rational applies to how the agent adopts or affirms principles, and also how he or she prioritises goals. All things being equal, individual agents apply means-end reasoning and select the most probable outcome. Rational agents are not narrowly 'self-interested' or hedonistic, but may have all kinds of affections or attachments to communities and places, such as the love of nature, and may order their ends in various ways.[5]

Inherent to the notion of reasonableness is a propensity to co-operate, while the rational is understood in terms of self-interest. For example, to say it was 'reasonable' for a person to pick up a piece of litter necessarily implies that part of their motivation is a willingness to co-operate socially. To say it was 'rational', does not necessarily negate the possibility the person wanted to co-operate, but necessarily implies that part of his or her motivation was self-interest. For instance, the person who picks up litter may subjectively dislike seeing litter on the ground.

Justice as fairness assumes reasonable and rational are two very distinct ideas, and we do not derive one concept from the other. It rejects the idea that we derive principles of justice from one's rational preferences or agreements in a specific circumstance. Rather, inherent in the notion of 'fair co-operation' the concepts of reasonable and rational are necessary complementary ideas.[6] They work in tandem and enable individuals and groups to identify fair terms of co-operation by taking into account the type of co-operation in question, along with the nature of the parties and their relationships to each other. In a reasonable society, people have their own rational ends which they hope to advance. The fair way to achieve these personal ends is to propose terms of social co-operation that everyone can accept.

In society we assume that each person has their own reasonable comprehensive doctrine, where the concept of the reasonable limits what persons think can be justified to others, and the rational

[4] ibid 51.
[5] ibid.
[6] ibid 54.

relates to how they pursue their own moral good.[7] Such doctrines have three key features. First, they cover 'major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner.'[8] The way in which these aspects are defined will be distinguished from other doctrines. Second, in determining how to balance values when they conflict, reasonable comprehensive doctrines are 'an exercise of practical reason.'[9] Third, although stable over time, a reasonable comprehensive doctrine evolves slowly based on what it considers good and sufficient reasons.[10] Rawls asserts this conception is deliberately loose; the idea of reasonableness does not require us to believe any specific doctrine, and we do not exclude doctrines without strong grounds based on reasonableness.

Many types of religious, philosophical, and moral doctrines are reasonable, even though one could not seriously entertain them for one's self. However, reasonable comprehensive doctrines must not suppress others' views, nor can political power be a function of one specific doctrine. A public and shared basis for the justification that applies to a specific comprehensive doctrine is necessarily lacking in the public culture of democratic society. If there were such a culture, it would be at the expense of other doctrines, precluding a fair system of social co-operation.

II The Original Position and Primary Goods

Justice as fairness is a political conception that regulates the basic structure of a modern democratic society. What makes it strictly political is that justice is concerned with how political and social institutions fit together as a publicly known form of fair social co-operation. Justice is based on the background social framework, within which the activities of associations and individuals take place.[11] Fair terms of social co-operation are based on equal citizens having basic rights such as the right to property.

If fair terms of social co-operation are based on the basic structure of society, we are still left with the question of how to decide what these fair terms might be. Given the fact of reasonable pluralism, these terms cannot be derivative of God's law or some independent moral order.

[7] ibid 59.
[8] ibid.
[9] ibid.
[10] ibid.
[11] Rawls, *Justice as Fairness* (n 1) 4.

Rawls requires that these principles be set by an agreement of the people engaged in the very discussion. Those engaged in forming an agreement concerning the terms of social co-operation set them.

To form a valid agreement over these terms, it must be made under the right conditions. These conditions must situate people fairly and must not allow those with greater bargaining power over others to dominate the discussion.[12] As noted by Rawls, '[c]ontingent historical advantages and accidental influences from the past should not affect an agreement on the principles that are to regulate the institutions of the basic structure itself into the future.'[13] The original position eliminates bargaining advantages that arise within the background institutions of society due to social, historical and natural tendencies.

It is important to remember that the original position is a device of representation, a thought experiment to explain how persons or 'representatives' would specify fair terms of social co-operation, whatever those terms might be.[14] To mitigate the contingent particular features of an all-encompassing social background, Rawls envisions that the representatives or negotiators should be situated behind a veil of ignorance.[15] For the representatives to be truly impartial, they cannot know the social position of those they represent, or the particular comprehensive doctrine of those they represent. People's race and ethnic groups, sex and gender, and various endowments such as levels of strength and intelligence, all within a normal range, 'hide' behind this veil.[16]

Representatives in the original position are both impartial and rationally autonomous.[17] They pursue whatever principles of justice best achieve an advantage for those they represent. Representatives specify fair terms of social co-operation based on what they think will best achieve an overall moral good. They have the ability to exercise moral powers to a minimum required degree, resulting in loyalty to certain institutions in light of various doctrines. They do not know specifically why they have these affiliations or the doctrine used to interpret them but

[12] ibid 16.
[13] ibid.
[14] Rawls, *Political Liberalism* (n 3) 24.
[15] ibid 26-28.
[16] Rawls, *Justice as Fairness* (n 1) 16-18.
[17] ibid.

they advance a specific conception of the moral good. They work towards this conception by evaluating principles based on how well they secure what Rawls calls 'primary goods'.[18]

We identify primary goods by looking to the background social framework, a uniquely liberal framework. The veil of ignorance does not preclude knowledge of these goods as these are the basic assumptions that make fair social co-operation possible. Rawls lists five primary goods, the first being basic rights and liberties; freedom of thought and liberty of conscious which are essential institutional conditions required for society.[19] The second primary good is freedom of movement and free choice of occupation against a background of diverse opportunities. Third, are powers and prerogatives of offices and positions of authority or responsibility. Fourth, income and wealth that has an exchange value, generally needed to achieve a wide range of ends. Last, the social basis of self-respect, the basic aspect of institutions that give a lively sense of worth to people, and allows them to advance ends with confidence.

The primary good most relevant as an object of analysis for this article is income and wealth that has exchange value. Here, Rawls means 'wealth' roughly in the sense used by economists, in that it is about '(legal) command over exchangeable means for satisfying human needs and interests'.[20] Items that we own such as land are wealth along with benefits that we derive from such ownership. This includes ownership over natural resources and means of production, rights to control them, as well as rights to services.[21] Ownership of property is of considerable political importance.

III Overlapping Consensus

Once representatives in the original position formulate fair terms of social co-operation, Rawls needs to explain how they apply in a stable society. Modern democracy is characterised by reasonable pluralism where conflicting religious, philosophical, and moral doctrines divide society. Reasonable pluralism precludes any one specific reasonable comprehensive doctrine from acting as a social glue. Therefore, justice will be stable when there is an overlapping

[18] Rawls, *Political Liberalism* (n 3) 72-85.
[19] Rawls, *Justice as Fairness* (n 1) 58-59.
[20] John Rawls, 'Fairness to Goodness' (1975) 84(4) The Philosophical Review 536, 540-542.
[21] ibid.

consensus of reasonable comprehensive doctrines that pertains to fair terms of social co-operation.[22]

Since Rawls conception of justice is purely political, the overlapping consensus of justice as fairness must be a consensus over a political conception. The political is thought of as a separate domain from the associational – we do not enter society voluntarily. It is also distinct from the personal and familial, which are more about affection in ways the political is not. This is not to say that political values are unrelated to other values. Rather, it is unreasonable to use public political power to correct members of society who uncompromisingly disagree about non-political matters such as religion. Justice as fairness presents terms of social co-operation that apply specifically to the basic political structure of society. It is up to individual citizens, in connection with the freedom of conscience, to settle how the terms of fair social co-operation relate to underlying values in his or her comprehensive doctrine.[23]

The reasonable comprehensive doctrine, original position, and overlapping consensus are three essential components to Rawls' conception of justice. Since people have competing values relating to a plurality of comprehensive doctrines, it is unreasonable to assert politically one doctrine over another as a basis for modern constitutional democracy. Rawls wants to avoid approaches that take the form of Mill's utilitarianism or Kant's moral imperative. Rawls' distinction and explanation of the 'reasonable' and 'rational' preclude such an approach when one views society as constituting fair social co-operation. Accepting that there is no one right philosophical or moral explanation of justice requires that justice must be separate from those underlying competing and irreconcilable views. Justice must therefore be uniquely a political concern. If justice is solely a political conception that we must agree on, Rawls envisions the original position as a thought experiment to explain the process of negotiation in a manner where underlying contingent, biased, religious and moral views do not dominate the discussion - hence the veil of ignorance. If we are to formulate fair principles of justice, whatever we agree upon, we must negotiate from behind the veil guided by the primary goods. Once we formulate specific terms, Rawls then requires the concept of an overlapping consensus. If the veil of ignorance truly

[22] Rawls, *Political Liberalism* (n 3) 133-140.
[23] ibid.

keeps biases at bay, then once it is lifted citizens should be able to find a meaningful way to make a connection between their underlying philosophical and moral values and the overarching political conception no matter their place in society.

C SEPERATING THE POLITICAL: CRITIQUES OF AN OVERLAPPING CONSENSUS

Rawls' argument concerning the overlapping consensus focuses on how it may come to fruition, rather than justifying why it would be stable. Since Rawls narrowly focuses on how an overlapping consensus to justice as fairness actually forms, some scholars critique its lack of stability once it comes to fruition.[24] Scholars assert that there needs to be a deeper justification as to why citizens should assign political values greater priority. For example, one could adopt a weak realist perspective.[25] What justifies assigning political values greater priority is historical experience itself. Legitimacy of the overlapping consensus would depend on accepting the evils of coercion, pain, oppression, torture, humiliation, along with a desire to avoid such evils. Other approaches suggest that political liberalism should be seen as a 'partially comprehensive' doctrine.[26] Such a theory would not encompass all values, but the moral foundation for justice as fairness would relate to an independent moral order.[27]

Arguing that views such as the weak realist perspective stabilises the overlapping consensus, risks publicly linking political values to deeper moral, religious or philosophical doctrines. With respect to weak realism, one is marginalised if they do not agree with what historical experience might suggest is reasonable. This illustrates an underlying tension where efforts to make the overlapping consensus stable involve Kantian like arguments and link justice as fairness to a moral stance regarding the values the basic structure of society ought to express. If one

[24] Hye Ryoung Kang, 'Can Rawls' Non-ideal Theory Save His Ideal Theory?' (2016) 42(1) Social Theory and Practice 32; Alexander Kaufman, 'Rawls's Practical Conception of Justice: Opinion, Tradition and Objectivity in Political Liberalism' (2006) 3(1) Journal of Moral Philosophy 23; Kok-Chor Tan, *Justice Without Borders* (CUP 2004).
[25] Fabian Freyenhagen, 'Taking Reasonable Pluralism Seriously: An Internal Critique of Political Liberalism' (2011) 10(3) Politics, Philosophy, & Economics 323, 335-337.
[26] Kang (n 24); Kaufman (n 24); Tan (n 24).
[27] Jon Mahoney, 'Public Reason and the Moral Foundation of Liberalism' (2004) 1(3) Journal of Moral Philosophy 311; Thomas Besch, 'Kantian Constructivism, the Issue of Scope, and Perfectionism: O'Neill on Ethical Standing' (2011) 19(1) European Journal of Philosophy 1.

specifically formulates, outright, how the overlapping consensus relates to morality, they affirm that the Rawlsian concept of the reasonable takes priority over the rational. For Rawls, these two concepts work in tandem and do not override each other. These approaches preclude individuals from making their own connection in private as to how their moral dispositions relate to the consensus. It further solidifies the marginalising effect Rawls is trying to avoid. If the problem is a justificatory issue, one is committed to providing a justification as to how liberal ideals are built. These attempts would seem to contradict reasonable pluralism, not embrace it.

It is submitted that a better way to frame the problem is by viewing the apparent instability of the overlapping consensus as a motivational issue. Citizens do not assign political values greater priority because they are not motivated to do so. This lack of motivation is due to certain assumptions inherent in the original position.[28] After all, there is no obvious reason to assume that providing deeper justifications is the only way to address instability. Since Rawls privatises how one may connect their underlying moral dispositions to the overarching conception of justice, citizens must have a reasonable and rational motivation to adopt justice as fairness that coincides with reasonable pluralism.

The original position provides an impartial standpoint for reasoning about what justice requires, however a uniquely liberal structure guides what counts as justice in the first place. As previously mentioned, primary goods such as the notion of private property guides negotiations. Yet commitment to these fixed points is not motivationally strong enough to generate support for prioritising political values when they conflict with non-political values.[29] A conception of justice should be congruent with a 'person's good', but there is no publicly shared account of what a higher-order good is.[30] Rawls does not take this next step given the fact of reasonable pluralism. Nonetheless, this congruence is necessary for a full adoption of justice as fairness. For this reason we should focus on why people may not be strongly committed to the basic liberal structure in the first place.

[28] Mihaela Georgieva, 'Stability and Congruence in Political Liberalism: The Promise of an Ideal of Civic Friendship' (2015) 63 Political Studies 481.
[29] ibid 485-487.
[30] ibid.

Approaching the problem as a motivational issue does not necessarily entail going backwards and rejecting Rawls' basic constructivist approach. The remainder of this article develops how the overlapping consensus becomes more stable if we theorise ways to compensate for how assumptions of the original positions preclude the legitimacy of certain doctrines. This approach may give citizens who feel marginalised motivation to assign Rawls' political values greater priority.

D THE ANISHINABEK THOUGHT EXPERIMENT AND THE MOTIVATIONAL DEFICIT

We can examine how the original position excludes certain doctrines using a specific example. It is important to note that while not all Anishinabek communities view land the same way, some communities hold marginalised views and are unlikely to buy into Rawls' overarching conception. While there may be many practical reasons why such communities lack the desire to adopt justice as fairness, comparing Anishinabe conceptions of property against the liberal doctrine acts as a representational device. It is an extension of the original position thought experiment. Its purpose is to highlight how the instability of the overlapping consensus relates to assumptions of the original position itself. Some Anishinabek communities view land in a way that is not in line with the liberal conception on a normative and ontological level. They have different conceptions about what entities count as 'rights-holders'. Here, ontology refers to what there is, how it is, and forms of being. This foundational difference means that it is extremely difficult to philosophically reconcile these views with liberal notions of property in any meaningful way. Often, adopting the underlying assumptions of one view means rejecting the assumptions of the other.

The Anishinabek nation is situated around the North American Great lakes, and has existed in this territory for thousands of years. 'Anishinabek' means 'good people' and refers to peoples who organise themselves into a loose confederacy of clans across the region.[31] They are Algonquin, and also known as the Odawa, Potawatomi, Ojibway, Chippewa, Mississauga, and

[31] John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press 2010) 241.

Saulteaux.[32] These peoples have a strong connection to the Great Lakes area, primarily because this is where their traditions suggest they originated as a people.[33]

Some Anishinabe clans hold that the land or Earth itself grows, develops, decays, and dies because it is a living being, subject to many of the same forces as all other living creatures.[34] They ontologically characterise the Earth as a living entity that has thoughts and feelings and can exercise agency by making choices; the Earth is related to humans on this most basic level.[35] While these views are related to the religious and the spiritual, the Anishinabe do not worship the Earth as they would the creator. However, the Anishinabe grant the Earth great respect given her ability to provide a good life and reproduce in many forms. Many Anishinabek believe the Earth is at the centre of a vast web of kinship relations, and great power is attached to these relations. The Earth itself has a personality, where this kinship relation between the Anishinabek and the Earth is akin to the way a mother is related to her children. Such a relationship requires various obligations to the Earth and all elements of the natural world, including other living creatures, plant-life, water, etc.[36]

While these views of property relate to the religious or spiritual, many political issues arise given that the Earth itself has a distinct legal personality. Since the Anishinabek strive to live in community with the Earth, there is a political relationship between humans and the land, illustrated by how some Anishinabe characterise rocks.[37] Rocks are an elemental substance of life that one must continually acknowledge for their role in sustaining life for others. The active nature of rocks means they have agency of their own which people must respect.[38] This relationship involves mutual obligations that must be upheld if a community is to reproduce in a healthy fashion. This relationship requires that humans seek the Earth's receptiveness before important decisions are made, which can only be understood by examining the Earth's

[32] ibid.
[33] ibid.
[34] ibid 242-243.
[35] ibid.
[36] ibid.
[37] ibid 245.
[38] ibid.

interactions with wind, water and fire.[39] These sorts of obligations also apply to all other aspects of the natural world.

Under Anishinabek legal traditions, one cannot own land if ownership means exercising control without the Earth's involvement, without acknowledging its agency. After all, human, plant, and animal life ends but the Earth lives on. A useful analogy to understand this view is the concept of the trustee. A trust is a right held by one person (the trustee) for the benefit of another person (the beneficiary). Given the land itself has personhood and agency, the Anishinabe believe land is held by present generations 'in trust' for future generations.[40] Land cannot belong to a person or people on terms of absolute control that neglects the Earth's agency.[41] This type of relationship also extends to animals, plants birds and fish. Potts characterises these relationships as part of a stewardship model.[42] Since the land itself is a living thing that one cannot own or fence off, property is actually a relationship where the land is the boss. Some Anishinabek communities see themselves as stewards of the land where their main purpose is to ensure its self-sufficiency for future generations. Development for example, could not take place solely for a profit margin. Developing natural resources would necessarily involve a process of nurturing the land to ensure unborn future generations have a base from which to grow.[43]

As previously mentioned, the concept of property that grounds Rawlsian justice is that we can privately own and control land, including natural resources. This assumption is inherent to the original position, and guides deliberations when negotiators formulate fair terms of social co-operation. This view of land appropriation and ownership, rejects the notion that people have mutual obligations to the Earth. Nozick's explanation of how individuals come to own and control property is perhaps the best illustration of why the liberal conception of property differs from the Anishinabek view. While Rawls and Nozick fundamentally disagree about the role of the state in re-distributing wealth given the importance Nozick attributes to individual rights, both conceptions of property centre on private ownership.

[39] ibid 243.
[40] ibid 246.
[41] ibid.
[42] Gary Potts, 'The Land Is the Boss: How Stewardship Can Bring Us Together' in Diane Engelstad and John Bird (eds), *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (House of Anansi Press Limited 1992) 35-38.
[43] ibid.

The liberal conception of property rights relates to ideas about individualism. Nozick argues that negative rights preserve the basic liberty each person is due, which leads to certain moral conclusions.[44] For example, it is wrong to sacrifice one person for another, or use a person as a resource for another. One cannot force someone to suffer a loss so another may achieve a gain, as to do this would be to ignore the 'separateness' of the person. Nozick's idea of self-ownership is that only you can decide what is to happen to your life, your liberty, and your body for they belong to no one but yourself.[45]

From the notion of self-ownership, Nozick derives among others, the right of private property. Since we own our powers, we own whatever comes from its exercise.[46] Since we do not create the land or raw materials, our rights extend to such things only by appropriating needed resources legitimately.[47] Nozick's theory of entitlement to property is that a person is free to take anything from nature, so long as that person does not negatively affect another's material well-being. Ownership of one's powers is the basis for owning what one produces and the resources they have legitimately taken. If the private appropriation of land causes no loss for non-appropriators, the self-ownership principle unequivocally implies that the agent has ownership rights.

It is clear that this liberal and Anishinabek conception of land differ at an ontological level. Some Anishinabek communities view the Earth as the centre of a web of kinship relations that involves mutual obligations. The Earth itself has legal agency and rights just as individuals have agency and rights. This has political implications for how communities structure society. Their mutual obligations to land, plants and animals, are understood by studying how the earth interacts with fire, air, and water. The liberal conception of property however, depends on the notion of individual rights and self-ownership. Given a person owns one's self, they own whatever comes from their actions, as long as they do not infringe upon the rights of others.

To understand how these two concepts relate to justice as fairness, it is important to note that this Anishinabek conception of property is indeed a reasonable comprehensive doctrine. Given the

[44] Jonathan Wolff, *Robert Nozick: Property, Justice, and the Minimal State* (Stanford University Press 1991) 7-9.
[45] ibid.
[46] ibid 21-35.
[47] ibid.

fact of reasonable pluralism Rawls' definition is deliberately loose, all a doctrine must do is cover important religious, philosophical, and moral aspects of human life, incorporate a way to determine what values count when they conflict, and evolve slowly over time with respect to what counts as good and sufficient reasons. The specific Anishinabek conception of property explained relates to religious and philosophical assumptions, including the Earth's relation to the Creator and the agency attributed to natural elements. This very agency is used to determine what values count when they conflict with others. Development and extraction of natural resources for example, is never advanced solely for profit. Some Anishinabek see themselves as holding the land in trust for future generations. Last, technological developments and the dependence of natural resources has surely changed what counts as 'good reasons' when developing a specific project, especially compared to how values may have conflicted hundreds of years ago.

While the Anishinabek conception of property is a reasonable comprehensive doctrine, the liberal conception of property inherent to the original positon automatically excludes it. The liberal conception is based on individual rights. Only individuals have agency. Whatever representatives in the original position adopt as fair terms of social co-operation, these terms will always be a function of the idea that we can fence off and privately own land. Rawls' definition of wealth encompasses legal command over natural resources, means of production, and rights to control them in an effort to satisfy and benefit human needs. Even though justice as fairness is a form of egalitarian justice, and Rawls believes that we should redistribute wealth if it leads to equal opportunity, these egalitarian principles do not account for ontologically different conceptions of property. Therefore, if Anishinabek communities chose not to form an overlapping consensus, they do not fail at prioritising political values over moral and religious values. In fact, Anishinabek views are deeply political. Given that the liberal conception of property guides deliberations in the original position, representatives are not even aware that other reasonable, contradictory, ontological views of property exist.

Since reasonable pluralism requires Rawls to privatise how individuals may connect their underlying values to an overlapping consensus of justice, what motivation do the Anishinabek really have? While liberal democracies have found means to hold land in common for the benefit

of the public, such as parks, the idea that the Earth itself has agency does not ground such schemes. The Earth's agency is not the basis or starting point for how land held in common is structured.

Even the fairest terms of social co-operation would not acknowledge the Earth's personality, something various Anishinabe communities would consider before engaging in activities like natural resource development. Their own uniquely political values contradict what Rawls asks them to agree and consent to at a basic ontological level. Grounding the original position in a liberal structure in the manner Rawls suggests, has the same marginalising affects as if he developed a deeper moral justification to the overlapping consensus in the name of stability.

E COMPENSATING FOR THE MARGINALISING EFFECT OF THE ORIGINAL POSITION

As previously mentioned, we need not necessarily blame the instability of the overlapping consensus on a lack of connection to a deeper morality. Instead, this instability is a motivational issue, linked to how assumptions of the original position exclude other reasonable doctrines. If citizens like the Anishinabe are motivated to form an overlapping consensus, negotiators in the original position must be aware of the inherent marginalising effects.

At the same time, these compensatory measures must not infringe upon the overall impartiality of the negotiators. The solution cannot simply be that deliberators in the original position take certain Ansihinabe concerns into account. We cannot make negotiators specifically aware of how governments treated Anishinabe peoples in the past, or how specific Anishinabe views of property differ from their own, as this would require lifting the veil of ignorance. We must determine whether negotiators in the original position can be aware of doctrines that ontologically contradict their own before lifting this veil. Rawls' current explanation of the original position suggests this would be extremely difficult. Representatives are only aware of the primary goods (liberal goods), and they negotiate the fairest terms of social co-operation to distribute those goods. Therefore, the first step to eliminating this motivational deficit is framing the original position in a way that a priori, accounts for contradictory ontological views; views that can be deeply political in nature.

I Constructivism and the Pragmatic Theory of Truth

In order to frame the original position in a way that a priori accounts for the possibility of ontologically different doctrines, we must first understand the deeper philosophical tradition that grounds the original position itself. The original position is a function of the constructivist school of thought. Examining how Rawls relates the original position to constructivism is important to understanding how the original position can be more inclusive of different ontological views. Furthermore, we must also consider whether Rawls' version of constructivism is compatible with a pragmatic theory of truth. After all, the pragmatic theory of truth a priori allows for the awareness of ontologically contradicting positions.

Political constructivism is an approach to conceptualising the structure and content of a political conception. It postulates that the content or principles of political justice represent the outcome of a certain procedure of construction. Rawls models this procedure as the original position. It is a thought experiment which is a rational explanation as to how individuals can construct principles of justice. The significance of constructivism is that it allows for a plurality of contradictory views, as the procedure of construction attempts to build above and around them.

Rawls political constructivism has four main features:

1) We can represent the content of political justice as the outcome of a procedure of construction. Rational agents, subject to reasonable conditions select principles that regulate society;
2) The procedure of construction is based on practical reason, not on theoretical reason. Practical reason is concerned with the production of objects according to a conception of those objects. For Rawls, as an example, the aim of political endeavor is a just constitutional regime;
3) Constructivism uses a complex conception of person and society to give form and structure to its construction. We view the person as belonging to political society understood as a fair system of social co-operation – their moral powers include the capacity for a sense of justice and for a conception of the good;

4) Political constructivism specifies an idea of the reasonable.[48]

It is also helpful to understand constructivism by comparing it with rational intuitionism. Both philosophies have similar elements concerning how they define objectivity. They agree that well-grounded knowledge or forming reasonable beliefs depends on reasoned discussion. However what is 'reasonable' in the constructivist approach does not illuminate an independent order of moral values.[49] Political constructivism does not criticise religious, philosophical, or metaphysical accounts of the truth or moral judgments and of their validity.[50] Reasonableness is seen as a standard of correctness and given specific political aims, it does not go beyond that. This is because constructivism tries to establish a principle of justice which incorporates a plurality of competing views. For the rational intuitionist however, reasoned discussion is objective depending on how well, through that discussion, a person comes to believe his or her view is true of an independent, pre-ordained, moral order.

The philosophical underpinning of the original position is that it remains silent on whether an independent realm of moral values exists. It neither asserts nor denies that such a realm is out there. The original position does not adopt a comprehensive religious, philosophical or moral view that makes specific assertions about truth and the status of moral values. Rawls thinks that maintaining this silence is how a political conception of justice may account for a plurality of competing moral and religious views. This very silence legitimises working within a liberal framework, as Rawls does not frame it as the 'right' or 'true' framework. However, the Anishinabek thought experiment shows that if representatives simply do not consider, or are silent about deeper ontological frameworks, their conceptions of justice are exclusionary on the deepest level in ways that are impossible to foresee. Maintaining silence about moral truth to account for the fact of reasonable pluralism, still has severe marginalising effects.

The question whether the original position *must* commit to taking an ontologically silent stance on how justice as fairness relates to an independent moral order is important to consider. Rawls' constructivism assumes that justice as fairness should stay silent on the issue because we operate

[48] Rawls (n 3) 90-93.
[49] ibid 94-98.
[50] ibid.

in a paradigm where there are fundamentally two responses to the question. The first is that ontologically, one believes theories of justice can illuminate an independent moral realm. The second response is subjective in nature, and assumes that either truth is relative and does not exist, or given the subjective nature of our perception, truth is impossible to observe. When justice as fairness is silent on the issue it assumes the legitimacy of this paradigm, and the gravity of the issues posed. Rawls fears that adopting a specific response will lead to a level of conflict such that forming an overlapping consensus becomes hopeless. Staying silent on the issue allows us to think about which view is more accurate, in a private sense. However, there is a third answer to the question that Rawls does not consider. This paradigm depends on the ontological assumption there are 'true' or 'right' ways to describe the world in the first place. Why should justice as fairness make this assumption?

Rorty's pragmatist theory of truth does not operate within these ontological constraints. It can ground the original position in a way that maintains the practical aspect of Rawls' constructivist method, but conceptualises truth in a way that awareness of contradictory ontologies at the most basic level occurs a priori. Rorty begins by stating two important reasons as to why we should abandon concerning ourselves with what is 'true' when thinking about justice. The first is that there is no truth independent of the language games we play, and the second is that there is no 'self', independent of the beliefs and desires we have.[51]

Central to Rorty's theory of truth is the concept known as non-reductive physicalism. Non-reductive physicalists reject the correspondence theory of truth, that a sentence 'corresponds' to reality, and argue sentences merely serve certain purposes, while other sentences serve other purposes. For example, the vocabulary of particle physics serves its purpose best in describing a portion of space-time. However, it is important to note these purposes are on par, and the language of physics is not viewed as illuminating the true structure of reality.[52] Describing an event mentally or physically, such as I used an umbrella because I acknowledged it was raining, or because neurons in my brain arranged themselves in a certain way, is a description of the same event. More importantly, we do not reduce one description from the other. The only difference

[51] Richard Rorty, *Objectivity, Relativism, and Truth* (CUP 1991) 111-119.
[52] ibid 114.

between the two explanations is that they are different ways of describing the same aspect of reality, or different tools used to cope with reality.[53] Both descriptions may be useful for doing certain things.

In applying non-reductive physicalism to theories of justice, one can see how even staying silent on whether there is an independent moral order is problematic. Staying silent is a neutral position, but it furthers the legitimacy of assuming truth itself exists. To give legitimacy to the question of whether it is possible a theory may or may not illuminate an independent realm of moral values, contradicts the idea that there is no truth independent of the language games we play. It would be like saying the vocabulary of physics is the only vocabulary that illuminates the true structure of reality. The pragmatic theory of truth does not affirm such a view is false, instead it highlights that there are other ways to describe the world.

To further illustrate this point, Rorty also examines theories of the self, and rejects theories of morality that purport to illuminate some inner true self or will. Similar to the way in which he denies independent truth or a moral truth outside the language games we play, Rorty believes there is no 'true' self, independent of our beliefs and desires.[54] Instead of introspectively trying to distinguish between beliefs we consider impossible to abandon and those we do not, we should ask an observer to watch his or her linguistic behaviour and see if he or she can identify necessary true beliefs, in the same way we recognise that one plus one equals two. The only thing we can observe, is the degree of stubbornness a person has in giving up a belief.[55] Similarly, he thinks all introspection is capable of achieving is estimating the degree of centrality that a belief has in one's own belief system. Through introspection, a person cannot spot an absolute property or the 'unimaginability' of the opposite, but can only recognise the degree of difficulty in imagining how to reconcile an opposing belief within his or her own system.[56]

If we accept Rorty's non-reductive physicalism and his conception of the self, then it is clear we do not have to adopt the paradigm Rawls assumes. There is no truth independent of the language games we play; we understand such terminology as part of a contingent vocabulary itself.

[53] ibid 115.
[54] ibid 123.
[55] ibid.
[56] ibid.

Denying that such a realm exists simply means that we do not think it is a useful way to describe the world. We acknowledge we have different vocabularies that describe our interactions with the world, and that some are more useful than others.

In essence, adopting Rorty's theory of truth commits one to acknowledging a priori, other vocabularies make different ontological assumptions about the world. This results in having continuing doubts about the vocabulary we chose to use.[57] An argument cast in a current vocabulary cannot dissolve such doubts. While people may philosophise about their situations, they do not view a certain vocabulary as closer to reality, or in touch with a power independent of a language game or vocabulary.[58] Different cultures adopt different vocabularies. With respect to a vocabulary that influences public life, such as the language of liberalism, we should be aware of ways in which adopting such vocabularies humiliates others, or causes them to experience cruelty. These notions are always taken into account when theorising about principles that affect public life.

II The Original Position and Rorty's 'Truth'

Recall that the Anishinabek thought experiment also revealed that maintaining silence as to moral truth still had significant marginalising effects. The issue was not simply that representatives in the original position were unable to envision that people in society may not agree with certain principles. The issue was that fair terms of co-operation would never be fair if the original position itself made representatives unaware of instances where one holds a reasonable doctrine, but disagrees with others at the most basic level. Couching the original position in the pragmatic theory provides a solution.

A theory of justice couched in pragmatism can still be built using Rawls constructivist method. Some may object and say that a theory is not constructive unless justice is specifically silent on the deeper issues of morality, philosophy, and religion. In other words, this 'silence' is a necessary condition for the constructivist method to apply. However, if one maintains that constructivism is fundamentally about incorporating a plurality of views and building a theory of justice from the ground up, this objection is moot. Rorty's pragmatism also allows plurality, as it

[57] Richard Rorty, *Contingency, Irony, and Solidarity* (CUP 1989) 52.
[58] ibid.

is nonsensical to assert one vocabulary or language game is more 'true' than another. Given the assumption that there is no truth outside the language games we play does not necessarily break the original positions' silent stance regarding independent moral realms. It just changes the way we frame the issue. It changes the paradigm in which we view the relationship between justice and morality.

The pragmatist theory of truth also does not preclude what Rawls' defines as constructivism's four main features. First, as part of a useful vocabulary we can still maintain that the content of political justice is represented as the outcome of a procedure of construction. Second, the procedure of construction can be a function of practical reason. Third, society can still be understood as a fair system of social co-operation. Last, we can specify an idea of what is reasonable. The only difference is that we give much less importance to the assumptions behind the assertion that our construct must be silent on deeper moral issues. Instead, we view the construction as part of a language game that is a useful way to interact with the world. If we think that justice should be about equal and fair terms of social co-operation, what justice as fairness requires is a good way to describe and structure such a society. That said, we would still have continuing doubts about our current vocabulary given there is no truth independent of the language games we play.

The benefit of this approach is that the original position better incorporates and accounts for the fact of reasonable pluralism. Representatives in the original position are aware of the basic structure and primary goods. However, when situated behind the veil of ignorance they are also aware that other people may have different vocabularies that ontologically contradict their own. In fact, the pragmatic theory of truth requires them to have continuing doubts about their own language game and the effect their version of justice may have on others. This applies to any view, especially if it has public implications.

Since Rorty eliminates an independent standard such as truth, universal moral obligation, and the true self, the critique that was applied to Rawls' overlapping consensus is also applicable to the pragmatic theory of truth as it relates to liberalism. In other words, there is not a strong enough 'social glue,' to facilitate the continuation of free and fair institutions. However, similar to the marginalising effect of the Anishinabek thought experiment, even if a vocabulary is silent on

deeper moral and religious issues, there is something cruel about adopting a specific vocabulary itself.[59] It makes things that people consider most important to them look obsolete and powerless, often leaving them feeling humiliated.[60] Rorty asserts it is the fact one is aware of this power to humiliate that acts as a social glue. A liberal who adopts such a theory of truth would a priori, want our chances of being kind to increase, and experiencing humiliation to decrease.[61] Unlike Kant who appeals to a supposed common power, something like the true self, Rorty argues that adopting the pragmatic theory of truth leads to a common sense of danger, and considers the moral subject to be something susceptible to humiliation or cruelty. The vocabulary we may adopt that is relevant to public life, such as justice as fairness, would force one to consider the possible ways in which its effect on others may result in humiliation.[62]

Rorty's response to the accusation of instability inherent to his theory, may also be applicable to justice as fairness. Perhaps, we should also consider the idea of 'civic humiliation' as a guiding factor that shapes justice. Representatives in the original position would also think about how their terms of social co-operation may humiliate others, where this very consideration would reduce the risk it introduces. While a further explanation as to how this factor would operate is beyond the scope of this article, it is an illustration of how couching the original position in a pragmatic theory of truth leads to ideas of how we may mitigate and compensate severe marginalising effects inherent to the original position.

Rorty's answer as to how we fully understand how a public vocabulary may humiliate is to acquaint oneself with as many vocabularies as possible. This would involve engaging with as much imaginative literature and poetry as possible. One might read the works of literary critics to achieve this wide range of acquaintance. The more literature a person is familiar with, the better he or she would understand the gravity of the situation when people have different opinions and views. Rorty asserts that in the public realm, it does not matter if final vocabularies differ, what matters is that there is enough overlap so '...everybody has some words with which to express

[59] ibid 90.
[60] ibid.
[61] ibid 91.
[62] ibid 92.

the desirability of entering into other people's fantasies as well into one's own.'[63] Criticism would be a matter of looking on this picture and on that, *not* of comparing both pictures to an original.

Rorty's idea as to how an individual adopting his theory of truth accounts for the humiliation his vocabulary might cause raises interesting questions for representatives in the original position. As stated, negotiators must remain impartial and not know the particular social context of the citizens they represent. However, it is not clear if this precludes representatives from acquainting themselves with a wide range of literature and stories. If a priori they are aware of possible marginalising effects of their vocabularies, would representatives remain impartial, if through a wide array of literature, they develop an understanding of humiliation? Understanding such a concept through a multitude of stories for example, would not make them aware of the social context of the citizens they represent, but it may make them better appreciate how their own assumptions exclude others. This could influence what they view as fair terms of social co-operation. It may change their positions on certain issues, such as procedural verses substantive justice.

Future research must explore this next step. It must consider how when we lift the veil of ignorance, we find common language to facilitate a fair agreement by 'comparing this picture to that,' using the mechanism the representatives created. The answer depends on whether negotiators are capable of acquainting themselves with as much literature as possible and still remain impartial. If representatives do appreciate the concept of humiliation from behind the veil, then it follows from the top down, they will give more credence and value to the opposing view once the veil is lifted. When we lift the veil and representatives experience conflict with marginalised groups, the focus would be on how to coexist fairly within a liberal structure, and less on how to rope those who hold such views into the liberal scheme.

When a social conflict depends on ontological differences and the irreconcilability of opposing views, perhaps one methodology representatives could adopt in 'comparing this picture to that' would materialise the following way:

[63] ibid 93.

1) Determine which opposing views are relevant to negotiating the specific fair term under discussion;
2) Assess the relevant opposing views with reference to the environmental and social systems they engage;
3) Discuss the interests underlying the relevant opposing views, so the representative may uncover differences in interests they may exploit to arrive at fair terms in a socially inclusive manner;
4) Discuss behavioral modifications each party could undertake to arrive at fair terms.

Applying this methodology to the Anishinabe thought experiment, the representatives would engage in the following exercise once the veil of ignorance is lifted:

1) The representatives would determine the opposing views of land ownership and sharing the land are relevant to the use and distribution of land or property in society, environmental protection etc.
2) The representatives would discern the opposing views of land use or tenancy versus land ownership, once implemented, have numerous social and environmental impacts. For instance, these views can result in land degradation due to farming, loss of biodiversity and habitat loss due to urbanisation and industrialisation, along with issues with resource use or misuse and distribution, etc.
3) The representatives would discuss the reasons underlying the importance of property ownership versus sharing the land. For example, property ownership is a way for members in society to recognise the goods they are entitled to use and enjoy and those they are not so entitled to. On the other hand, sharing the land is important because it preserves mother Earth by ensuring no one takes more that he or she needs, and people respect their obligations to the Earth; it also preserves the Earth for future generations.
4) Lastly, the representatives would discuss how those who hold those different views could modify their respective behaviors to arrive at fair terms. For example, in spite of the land ownership of some individuals, the representatives would think about agreeing to terms where the owners of those lands would share with their counterparts, allowing them to hunt and gather on their traditional territories. Perhaps the representatives would also

discuss ways to conserve the environment by engaging with, and implementing some of the traditional methods used by other groups. This would apply to many areas of land use and development to ensure social harmony and sustainable practises.

It is important to note that if the representatives adopt such a methodology for attempting to reconcile apparently irreconcilable opposing views, they would not have to accept either the truth of the views at issue nor would they have to accept the existence of an independent realm of truth to engage in this exercise. Assuming the representatives have learned about the propensity to humiliate when adopting vocabularies that structure social relations, they have necessarily gained a sense of compassion. They do not have to accept there is an independent realm of truth in order to recognise inherent value in peoples' beliefs, to explain and try to understand why people hold onto them so sternly. With this recognition the representatives would proceed based on civic friendship, civic humiliation, and respect. By comparing 'this picture to that' the representatives are in a position to look beyond the beliefs themselves, and analyse the underlying interests, goals and values of those who hold views that are different from their own. When we examine these interests and how they relate to the view itself, we can find ways to satisfy peoples' needs without fundamentally changing their beliefs. Instead of attempting to rope people into the liberal structure, or fuse marginalised beliefs with our own, we can address the reasons why people hold certain views and proceed to identify the types of terms the representatives could negotiate to make a fair agreement.

F CONCLUSION

In conclusion, given justice as fairness is a uniquely liberal political conception, it still has marginalising effects as if it purported to illuminate some independent moral order or truth. Representatives in the original position are unable to turn their minds to its exclusionary force, where the Anishinabek thought experiment showed that some groups in society have little motivation to form an overlapping consensus on justice. That said, the pragmatic theory of truth provides an answer. It acts as a lens through which we view the original position; the original position itself is simply a way to interact with the world, and is seen simply as a practical way to specify fair terms of social co-operation. When we view the original position in this light, we

have a better understanding of how to make justice as fairness more inclusive. If we establish this pragmatic foundation, we better account for the original position's exclusionary force. We can better understand that factors like humiliation might be relevant to the discussion. Most importantly, we are more apt to conceptualise justice in a manner that best accounts for a plurality of competing religious, moral, and philosophical views.

IMPACT BENEFIT AGREEMENTS AND THE PROTECTION OF INDIGENOUS PEOPLES RIGHTS: ANY NEW LESSONS FROM CANADA?

Joseph Onele*

A INTRODUCTION

There seems to be a general consensus that developing natural resources in a manner that imposes significant costs and impacts on the indigenous people,[1] while the benefits are enjoyed elsewhere is no longer acceptable.[2] Putting this more succinctly, Fidler and Hitch while stating that meaningful consultation with indigenous peoples is becoming a routine, note that the recent increase in Impact and Benefit Agreements (IBAs) is a clear evidence that resource extraction practices which fail to accommodate the interest of indigenous people are no longer acceptable.[3] It appears, therefore, that the era where the indigenous people are left to battle with the impacts that resource extraction activities have on their environment, economic and social life, with little or no benefit accruing to them, is coming to an end.[4] This perhaps explains, for instance, why the emergence of IBAs in the Canadian mining sector has been welcome as a positive innovation.[5]

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[1] Jason Prno, Ben Bradshaw and Dianne Lapierre, 'Impact and Benefit Agreements: Are they working?' (CIM 2010). <http://www.impactandbenefit.com/UserFiles/Servers/Server_625664/File/IBA%20PDF/CIM%202010%20Paper%20-%20Prno,%20Bradshaw%20and%20Lapierre.pdf> accessed 9 March 2017; see also Ciaran O' Faircheallaigh, 'Extractive and Indigenous peoples: A changing dynamic?' (2013) 30 Journal of Rural Studies 20 <http://dx.doi.org/10.1016/j.jrurstud.2012.11.003> accessed 9 March 2017.

[2] Harvey Sands and Ross Castleton, 'Focus: Business Realities Impact and Benefit Agreement Negotiations (Strategy and Practice)' (2015) (Richter First Nation & Aboriginal Advisory Services, AFOA Canada National Conference Winnipeg, MB) <https://www.afoa.ca/afoadocs/L2/2015Conf/Presentations/V2Richter.pdf> accessed 9 March 2017.

[3] Courtney Fidler and Michael Hitch, 'Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice' (2007) 35(2) Environments Journal 45, 49.

[4] Prno and others (n 1); Irene Sosa and Karyn Keenan, 'Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada' (Report submitted to the Environmental Mining Council of British Columbia and the Canadian Environmental Law Association, October 2001)

Capturing this new trend in the 'mineral resource industry' with a prophetic eye, Sands and Castleton opine that IBAs will soon become a key element of regulatory, community relations, technical and economic considerations that must be addressed if the exploitation of a mineral resource is to progress smoothly.[6] They further assert that even where the negotiation of IBAs is not required by law, resource development proponents can use IBAs 'to address local concerns that, if ignored, could crystallize into organized and effective opposition to natural resource'.[7] Taking the foregoing into account, one would then understand why IBAs are emerging as the principal means of launching a formal relationship between the resource developer[8] and the indigenous people.[9]

Adopting the library-based research method and against the foregoing background, this article examines the nature, basis and framework of IBA in Canada vis-à-vis the right of indigenous people generally. It further considers the use of IBAs, the prospects and potentials of IBAs beyond Canada and concludes with relevant recommendations.

B CONCEPTUAL CLARIFICATION

For a better appreciation of the issues discussed in this article, it is imperative to define what IBA is and what is also meant by rights of indigenous people. Whilst there is no universal or generally acceptable definition of what IBA is, it is useful to make recourse to the definitions provided by some scholars in this regard. According to Fidler and Hitch, IBAs are 'confidential bilateral agreements, negotiated between mining corporations and aboriginal communities to address a multitude of adverse socio-economic and biophysical impacts that can arise from mining development.'[10] A cursory look at this definition will reveal certain basic features of IBA which include: confidentiality, negotiation and being development-focused.

<http://webcache.googleusercontent.com/search?q=cache:IN9eJeVUbdkJ:metisportals.ca/MetisRights/wp/wp-admin/images/Impact%2520Benefit%2520Agreements%2520-%2520Mining.pdf> accessed 9 March 2017.

[5] ibid.

[6] Sands and Castleton (n 2).

[7] ibid.

[8] Public Policy Forum, 'Sharing in the Benefits of Resource Developments: A Study of First Nations-Industry Impact Benefits Agreement,' (2006) Ottawa Ontario Public Policy Forum <https://www.ppforum.ca/sites/default/files/report_impact_benefits-english.pdf> accessed 9 March 2017.

[9] Sands and Castleton (n 2).

[10] Fidler and Hitch (n 3) 50.

Additionally, Le Meur and others define IBA as 'a type of contract through which community representatives provide documented support for a project in exchange for specified benefits, the protection of particular landscapes or resources, and/or a greater role in impact monitoring.'[11] From Le Meur and others's definition, one may be right to opine that some of the attributes of an IBA include: it is contractual in nature; it consists of two main parties, to wit, the community representatives and the developer/mineral resource extracting company; and it is driven by mutual benefits accruing to both the community and the mineral resource extracting company.

Furthermore, Kielland has equally defined IBAs as 'privately negotiated, legally enforceable agreements that establish formal relationships between Aboriginal communities and industry proponents.'[12] The definition provided by Kielland is definitely not problem-free. Kielland's definition suggests that IBAs are generally 'privately negotiated' and 'legally enforceable agreements'. It would seem that Keilland had already ruled out the possibility of government getting involved in the negotiation of IBAs. On another note, one may rightly submit that Kielland's definition fails to capture situations where IBAs may be legally unenforceable; take for instance, a situation where the provisions of an IBA are inconsistent with the established legal framework of a country. As such, the recommendations made in this article become more apposite, as will be demonstrated shortly.

In addition to the foregoing, it may be helpful to note that IBAs have also been referred to as benefit sharing agreements, participation agreements, development agreements, protection and benefit agreements, amongst others.[13] This becomes more important given that some writers have chosen to use these terms interchangeably and this may be somewhat confusing to a reader who is just coming across the IBA concept for the very first time.

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[11] Pierre-Yves Le Meur and others, '"Horizontal'' and ''vertical'' diffusion: The cumulative influence of Impact and Benefit Agreements (IBAs) on mining policy-production in New Caledonia' (2013) 38 Resources Policy 648.

[12] Norah Kielland, 'Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements' (2015) Library of Parliament, Ottawa, Canada, Legal and Social Affairs Division, Parliamentary and Research Service <http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2015-29-e.pdf> accessed 9 March 2017.

[13] Woodward and Company, 'Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Businesses, and Governments' <http://www.woodwardandcompany.com/wp-content/uploads/pdfs/4487_benefit_sharing_final_report_-_updated.pdf> accessed 9 March 2017.

A good example of an IBA is the Impact Management Agreement signed in 1999 between 'two uranium mining companies and seven municipal and First Nation communities in Northern Saskatchewan'[14] in Canada. Other notable examples of IBAs will include: the IBA made between the Athabasca Native Development Corporation and Syncrude Canada Ltd in respect of Syncrude Oil Sands in Alberta, Canada; the IBA signed between Quatsino First Nation and Electra Gold Corporation in 2003 in respect of the Apple Bay Quarry in British Columbia, Canada; the IBA signed in 2004 between Kitikmeot Inuit Association and Sheer Diamonds with respect to the Jericho Diamond Project in Nunavut, Canada; the IBA signed between the Kivalliq Inuit Association and the Agnico-Eagle Mines Ltd in 2011 with respect to the Meadowbank Mine in Nunavut, Canada; the IBA signed in 2006 between Kitikmeot Inuit Association and Newmont Mining Corporation with respect to the Doris North Project in Nunavut, Canada; the IBA signed between the Yellowknives Dene First Nation and BHP Bilton in 1996 in respect of the Ekati Diamond Mine in the Northwest Territories of Canada; and the IBA signed in 2009 between Taku River Tlingit First Nation and Eagle Plains Resources Ltd in relation to the Yellowjacket Gold Project in British Columbia, amongst others.[15]

Having considered the definition of an IBA, this article proceeds to consider the concept of 'Indigenous Peoples Rights'. Whilst there is no gainsaying the fact that the task of defining any concept, including the concept of 'Indigenous Peoples Rights' is a very difficult one, given that there is generally acceptable definition of this concept, one may be right to assert that 'Indigenous Peoples Rights' is better explained as a concept than defined; hence, the approach adopted in this article. Indeed, a discussion on the rights of indigenous peoples generally under International Law would be incomplete without making recourse to some of the following international legal instruments: United Nations Charter 1945, Universal Declaration on Human Rights 1948, the International Labour Organization's Convention 169 on Indigenous and Tribal Peoples in Independent Countries (ILO 169) and more importantly, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Nonetheless, it is apt to allude to

[14] Nola Buhr, 'Indigenous Peoples, Mining, and Impact and Benefit Agreements: Who is Keeping Score?' (Edwards School of Business, University of Saskatchewan, 11th Australian Centre on Social and Environmental Accounting Research Conference, 2-4 December 2012).

[15] IBA Research Network, 'List of Known IBAs' <http://www.impactandbenefit.com/IBA_Database_List/> accessed 9 March 2017.

Article 27 of the International Convention on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR), which affirms the right of all people to 'freely dispose of their natural wealth and resources as an expression of their right to self-determination' and also prohibits the deprivation of a people of their means of subsistence.[16] For the purpose of this article, however, only the UNDRIP will be considered in succinct detail, whilst the other relevant legal instruments will be touched briefly as the UNDRIP largely contains relevant provisions that, if fully implemented by states, are relatively adequate to protect indigenous peoples.

I United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Given recent development under international law and perhaps, in a bid to putting an end to the protracted search for an 'all-encompassing' legal instrument relatively adequate to protect indigenous peoples' rights, the major starting point for a discussion on the right of indigenous peoples would be the UNDRIP. For instance, while Article 17(1) UNDRIP expressly provides that 'indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.' Article 43 UNDRIP specifically states that 'the rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.' Notably, Article 10 of the UNDRIP precludes indigenous peoples from being forcibly removed from their lands or territories. Hence, making recourse to Professor Hohfeld's concept of 'right' and 'duty', it can be rightly argued that where indigenous peoples have a right, then the state or any other authority or person, has a corresponding duty to ensure that the right is not infringed upon.[17]

[16] Article 1(2) of the ICCPR and ICESCR; Heather A Northcott, 'Realisation of the right of indigenous peoples to natural resources under international law through the emerging right to autonomy' (2012) 16(1) The International Journal of Human Rights 73; Nigel Bankes, 'The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments' (2011) 3 Y B Polar L 57.

[17] Nikolai Lazarev, 'Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights' (2005) Murdoch University Electronic Journal of Law 9 <http://www.austlii.edu.au/au/journals/MurUEJL/2005/9.html> accessed 9 March 2017; Isaac Husik, 'Hohfeld's Jurisprudence' University of Pennsylvania Law Review 263; Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16, 28-59; Alan D Cullison, 'A Review of Hohfeld's Fundamental Legal Concepts' (1967) Cleveland State Law Review 559; Arthur Corbin, 'Rights and Duties' (1924) 1(1) Yale Law Journal 501.

The foregoing said, it is also worth noting that Article 10 further stipulates that '[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.' This provision is particularly important not only because it introduces the 'Free, Prior and Informed Consent' (FPIC) concept but also because it allows for compensation of indigenous peoples and guarantees their right to exercise the option of return. A similar provision with the FPIC concept is contained in Article 19 UNDRIP which provides that 'states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'[18]

A cursory look at Article 29(2) UNDRIP will also reveal the duty imposed on states to 'take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.' In the same vein, Article 17(2) UNDRIP imposes a duty on states to consult and cooperate with indigenous peoples as well as take specific measures to 'protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.' Similarly, Article 18 UNDRIP provides for the right of indigenous peoples to 'participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.' Consequently, it may be rightly stated that UNDRIP is indeed a watershed in the history of international legal instruments, in that it has relatively succeeded in giving indigenous peoples rights an adequate place in international human rights law.

Relatedly, Hanna and Vanclay, whilst noting that a major demand of indigenous peoples facing developmental projects likely to impact their livelihoods is to be able to have a say about whether and how the project should proceed vis-à-vis the FPIC concept. They opine that the

[18] See also Article 23 UNDRIP which provides for the right of indigenous peoples to determine and develop priorities and strategies for exercising their right to development and this includes the 'right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions'.

FPIC recognises indigenous peoples' inherent and prior rights to their lands and resources as well as respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. The duo further assert that the FPIC concept is in tandem with the principle of self-determination equally provided for in Article 3 UNDRIP which provides for the indigenous peoples' right to self-determination and the ancillary right to 'freely pursue their economic, social and cultural development.'[19] In a similar fashion, Article 20(1) UNDRIP affirms the right of indigenous peoples 'to maintain and develop their political, economic and social systems or institutions, to be secure in their enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.'[20]

Furthermore, while Article 11(1) UNDRIP protects the right of indigenous peoples to 'maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature,' Article 29(1) UNDRIP also affirms the indigenous peoples' right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources and goes further to impose a duty on states 'to establish and implement assistance programmes for indigenous peoples for such conservation and protection.' Article 29(3) UNDRIP equally imposes a duty on states to take effective measures to ensure that programmes for monitoring, maintaining and restoring the health of indigenous peoples are duly implemented.

Thus, it is a great delight that Canada recently removed its objector status to UNDRIP without any qualification and is now desirous of adopting and implementing UNDRIP in accordance with the Canadian Constitution.[21] This is somewhat removed from the political goodwill of the

[19] Philippe Hanna and Frank Vanclay, 'Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent' (2013) 31(2) *Impact Assessment and Project Appraisal* 146, <http://www.tandfonline.com/doi/full/10.1080/14615517.2013.780373?scroll=top&needAccess=true> accessed 9 March 2017; see also Helen Quane, 'The Rights of Indigenous Peoples and the Development Process' (2005) 27(2) Human Rights Quarterly 652.

[20] Irene Bellier and Martin Preaud, 'Emerging Issues in Indigenous Rights: Transformative Effects of the Recognition of Indigenous Peoples' (2012) 16(3) The International Journal of Human Rights 474.

[21] Tim Fontaine, 'Canada Officially Adopts UN Declaration on the Rights of Indigenous Peoples' (CBC News, 10 May 2016) <http://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272> accessed 9 March 2017; Canada, 'Indigenous and Northern Affairs Canada: United Nations Declaration on the

Prime Minister Justin Trudeau-led-government which earlier gave the impression that, '[n]o relationship is more important to me and to Canada than the one with Indigenous Peoples.'[22] Hence, one may be right to opine that the success, or rather, the opportunity for the development of indigenous people's rights may not be inextricably linked to the goodwill of the political institutions of a country.

Having attempted to define the concept of IBAs generally and explained the notion of indigenous peoples' rights, the article will proceed to examine the nature of IBAs generally.

C NATURE OF IBAS

Typically, IBAs are 'final, legally binding agreements' that stem from an initial memorandum of understanding and are developed through consultation and negotiation between the resource developer, representatives of the indigenous community and their respective solicitors.[23] Whilst some concerns have been raised about how effective IBAs are generally, one may argue, that where an IBA is 'strictly' contractual, notwithstanding the conspicuous absence of any 'external' element of statutory protection, a breach of any clause in the IBA is highly likely to be sanctioned by a court of competent of jurisdiction.

Additionally, notwithstanding the fact that concerns have been raised about the confidentiality provision in IBAs has been a barrier to understanding the evolving nature of IBAs, achieving transparency[24] and assessing their effectiveness,[25] it is irrefutable that IBAs provide a formal

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Rights of Indigenous Peoples' <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958> accessed 9 March 2017.

[22] Mieke Coppes, 'Canada's Acceptance of the United Nations Declaration on the Rights of Indigenous Peoples: Implications for the Inuit' (The Arctic Institute, 9 August 2016) <http://www.thearcticinstitute.org/canadas-acceptance-declaration-rights-indigenous-peoples/> accessed 9 March 2017; Joanna Smith, 'Canada will Implement UN Declaration on Rights of Indigenous Peoples, Carolyn Bennett says' (The Star,) <https://www.thestar.com/news/canada/2015/11/12/canada-will-implement-un-declaration-on-rights-of-indigenous-peoples-carolyn-bennett-says.html> accessed 9 March 2017.

[23] Irene Sosa and Karyn Keenan, 'Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada' (Report for the Canadian Developmental Agency October 2001) <http://webcache.googleusercontent.com/search?q=cache:IN9eJeVUbdkJ:metisportals.ca/MetisRights/wp/wp-admin/images/Impact%2520Benefit%2520Agreements%2520-%2520Mining.pdf> accessed 9 March 2017.

[24] Andre Moura Xavier and Marcello Veiga, 'Supra-Regulatory Agreements in Canada – Private Contracts Between Companies and Indigenous Communities Without Governmental Participation: Are These Effective Practices Towards Sustainability?' (2009) 33 EnANPAD 1 <http://www.anpad.org.br/admin/pdf/APS558.pdf> accessed 9 March 2017.

[25] Kevin O'Reilly and Erin Eacott, 'Aboriginal Peoples and Impact Benefit Agreements: Report of a National Workshop' (1998) Northern Minerals Program Working Paper 7, Canadian Arctic Resources Committee.

structure, which allows indigenous communities to benefit from the extraction of natural resources.[26] It is equally worth mentioning that whilst IBAs may have their inadequacies and their effectiveness varies from one indigenous community to the next, IBAs have generally been found to be meeting their objectives, especially with respect to the delivery of benefits.[27]

It is worth noting that IBA generally outlines any negative effects that may occur as a result of activities geared towards the exploitation of mineral resources and the steps to be taken by both parties to ensure such impacts are moderated. Thus, it would be understandable if an IBA is tagged as 'a good thing.' Following in this line of thinking, one may equally be right to assert that IBAs are some sort of 'damage control' or 'pain killers'.

Hence, some typical clauses that will be seen in IBAs include the impacts of the project, the commitment and responsibilities of both parties,[28] and how the indigenous community will partake in the benefits of the operation through employment and economic development.[29] Whilst one is not unmindful of how important each IBA clause is, this article does not attempt to consider a clause-by-clause analysis of IBA generally as this is outside the scope of the present article. Fidler and Hitch have opined that IBAs operate on a 'project basis' and include provisions to address issues such as recognition of indigenous rights, training and education (including scholarship awards), profit or resource revenue sharing, compensation for land use, environmental compliance and employment. In other words, IBAs address a number of issues that may arise at any point during the natural resource extraction including equity participation,

[26] William Hipwell and others, 'Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change' (2002) The North-South Institute; Irene Sosa and Kathryn Keenan, 'Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada' (2001) Canadian Environmental Law Association, Environmental Mining Council of British Columbia cited in Mining Facts (n 14).

[27] Prno and others (n 1).

[28] Brad Gulmour and Bruce Mellett, 'The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations' (2013) 51(2) Alberta Law Review 385; Jennifer Findlay, 'Striking a Balance: A Case Study on Negotiated Agreements between Aboriginal Communities and The Natural Resource Development Industry' (Integrated Studies Project, Master of Arts Thesis, Athabasca, Alberta 2013); Jason Prno, 'Assessing the Effectiveness of Impact and Benefit Agreements from the Perspective of their Aboriginal Signatories' (Master of Arts Thesis, The University of Guelph, 2007); Prno and others (n 1).

[29] Mining Facts, 'What are Impact and Benefit Agreements (IBAs)?' (2012) <http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/> accessed 9 March 2017.

business contracting opportunities,[30] cultural and environmental protection, consultation and economic development planning, operation and decommissioning.[31]

Having examined the nature of IBAs generally, it becomes pertinent to consider the framework for IBA, particularly in Canada, in order to understand the role, if any, that the law can play in protecting the right of indigenous peoples.

D FRAMEWORK FOR IBAS

Upon a cursory review of Canadian law, one may be tempted to assert that there is no statutory requirement to negotiate an IBA[32] and further submit that the absence of a policy framework makes it difficult to negotiate IBAs that wholly mirror the interests of the indigenous communities.[33] Following this line of reasoning, one may equally be disturbed that there is no well-established regulatory context for enforcement or compliance.[34] This perhaps explains why Fidler and Hitch have opined that IBAs operate 'outside the regulatory environmental regime without government presence.'[35] Consequently, concerns have been raised that the absence of regulatory framework for the negotiations of IBAs including content and timelines increases uncertainty for the mineral industry.[36]

Whilst there is no statutory requirement for the IBAs negotiated thus far in Canada,[37] it may be said that IBAs arose out of the legal duty to consult the indigenous people.[38] Alvin Chartrand restates that the consultation of indigenous communities in Canada stems from the Crown's fiduciary obligation to indigenous people entrenched in section 35 of the Canadian Constitution Act of 1982 (Canadian Constitution) which recognises and affirms the existing and treaty rights

[30] Xavier and Veiga (n 24).
[31] Filder and Hitch (n 3) 60.
[32] Public Policy Forum (n 8) 8.
[33] ibid 11.
[34] Alvin Chartrand, 'Indigenous Leadership Development Institute' (2014) Manitoba Learning Match and the Indigenous Leadership Development's Presentation of Impacts and Benefits Agreements <http://www.edo.ca/downloads/impact-benefit-agreements-2.pdf> accessed 9 March 2017.
[35] Courtney Fidler and Michael Hitch, 'Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice' Environments Journal Volume 35(2) 2007 51.
[36] Public Policy Forum (n 8).
[37] Public Policy Forum (n 8) 11.
[38] Mark Igiehon, 'Revisiting Ownership & Participation of Mineral Resources and Impact & Benefits Agreements' (LS510 Lecture Notes – Oil and Minerals for Good, The University of Aberdeen 2016).

of the aboriginal peoples of Canada.[39] It is pertinent to note that the rights of indigenous people guaranteed under Section 35 of the Canadian Constitution can only be infringed by the government where the test established in *R v Sparrow*[40] is passed, to wit: (a) whether the government is acting pursuant to a valid legislative object; (b) whether the government's actions are consistent with its fiduciary duty to the indigenous people; (c) where there is valid legislative object, whether there has been 'little infringement as possible' in order to achieve the intended result; (d) whether fair compensation has been paid in a case of expropriation and (e) whether the indigenous people concerned were consulted with respect to conservation measures.[41]

E BASIS, USES, PROSPECTS AND POTENTIALS OF IBAS

It is worth noting that why parties engage in IBA negotiations varies according to parties' objectives, circumstances and the apparent development opportunities.[42] For instance, the point has been made that IBAs are negotiated to deliver tangible benefits to local communities, manage impacts associated with a mining project and seek to ensure co-operation of indigenous people.[43] On the mining company side, there is a notion that IBAs greatly assist in reducing uncertainty and potential delays in mineral resource extraction[44] as well as 'exceed the required rate of return on capital' and 'to fulfil or at least be seen to fulfil its corporate social responsibilities.'[45] Indeed, researches have shown that IBAs have substantively assisted in helping to reduce conflicts and protracted litigation[46] between the mining company and the indigenous community. Consequently, other countries where mineral extraction are currently on-going will greatly benefit in drawing lessons from Canada and its approach to the protection of the indigenous peoples' rights both through legislative enactments and judicial pronouncements.

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[39] Chartrand (n 35).
[40] *R v Sparrow* [1990] 1 SCR 1075.
[41] Bob Joseph, 'The Sparrow Case Affirms Constitutionally Protected Aboriginal Rights,' (2014) (Working Effectively with Indigenous People) <http://www.ictinc.ca/blog/sparrow-case-affirms-constitutionally-protected-aboriginal-rights> accessed 9 March 2017.
[42] Public Policy Forum (n 8).
[43] Prno and others (n 1).
[44] Fidler and Hitch (n 3).
[45] Ciaran O'Faircheallaigh, 'Aboriginals, Mining Companies and the State in Contemporary Australia: A New Political Economy or 'Business as Usual?' (2006) 41(1) Australian Journal of Political Science 1, 6.
[46] Public Policy Forum (n 8) 6.

On a related note, Sands and Castleton, in highlighting the benefits of IBAs state that where an IBA is properly negotiated,[47] it can have a very favourable impact on the overall success of the project for both parties and provide employment and training, as well as economic opportunities for the indigenous group, while motivating the indigenous to become actively involved in the success of the venture, by providing essential local resources, rather than just 'compensated bystanders'.[48] The present writer, whilst agreeing with both Sands and Castleton's submission alluded to above, asserts that there is a pressing need, both in the present century and the coming ones, for each state to tailor IBAs to suit each indigenous peoples' specific needs as well as ensuring that IBAs are well adapted to fit into the domestic legal framework. This will definitely go a long way in dousing the tension and/or conflict that often permeates the extraction of mineral resources.[49]

One cannot help but agree with Fidler and Hitch when they assert that IBAs can greatly assist in achieving a more sustainable mining development by ensuring proponents minimally infringe on indigenous rights by engaging in the appropriate level of consultation and providing adequate benefits and compensation.[50] Writing further in this regard and capturing the basis of IBAs, Filder and Hitch suggest: '[f]irst, is to accommodate aboriginal interests by ensuring that benefits and opportunities flow to the community. Second, is to address social risk factors within the community such as adverse socio-economic and biophysical effects of rapid resource development.'[51] Indeed, one needs no soothsayer to come to the realisation that the IBAs have come to stay and have 'successfully' found their way to situate themselves within the legal framework for the rights of indigenous peoples. The apparent success of the IBAs in Canada and some other jurisdictions notwithstanding, one may be right to assert that there is still more that

[47] Ken Caine and Naomi Krogman, 'Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North' (2010) 23(1) Organization & Environment 76; Ciaran O'Faircheallaigh, 'Aboriginal-Mining Company Contractual Agreements in Australia and Canada: Implications for Political Autonomy and Community Development' (2010) 1(2) Canadian Journal of Development Studies 69.
[48] Sands and Castleton (n 2) 6.
[49] Guillaume Peterson St-Laurent and Philippe Le Billon, 'Staking claims and shaking hands: Impact and benefit agreements as a technology of government in the mining sector' (2015) 2 The Extractive Industries and Society 590 <http://dx.doi.org/10.1016/j.exis.2015.06.001> accessed 9 March 2017; Le Meur and others (n 11).
[50] Fidler and Hitch (n 3).
[51] ibid 50.

can be done to ensure that IBAs address the 'resource curse'[52] in countries blessed with mineral resources but also become a tool in empowering the indigenous peoples and protecting their rights affirmed under relevant international legal instruments.

F CONCLUSION

In recent times, there has been agitation for legislative recognition of indigenous land rights across different parts of the globe and mere reliance on the co-operation and goodwill of companies, without more, does not offer an adequate alternative, but with a solid legislative base, indigenous group benefit more from resource extraction.[53] There is great merit in this argument as entrenching the rights of indigenous people and making an IBA a statutory precondition to resource extraction would go a long way in further protecting the indigenous peoples rights[54] as entrenched in the International Labour Organization (ILO) Conventions No. 107,[55] No 169,[56] the United Nations Declaration on the Right of Indigenous People (UNDRIP),[57] the International Covenant on Civil and Political Rights (ICCPR),[58] the Universal Declaration of Human Rights and other international human rights instrument.[59] The above submission finds great support in the provisions of Article 1 of the ICCPR to which all progressive minded countries are

[52] Studies have shown that the discovery and exploitation of some highly prized natural resources, such as oil, gas and minerals do not automatically translate into sustainable economic growth and prosperity. This phenomenon is often referred to as the 'resource curse' or the 'paradox of plenty'. For instance, Sachs and Warner in their article titled 'The Curse of Natural Resources' posit that research has shown evidence of a 'curse of natural resources' in that countries with great natural resource wealth tend nevertheless to grow more slowly than resource-poor countries. Sachs and Warner did, however, accept that just as we lack a universally accepted theory of economic growth in general, we lack a universally accepted theory of the curse of natural resources. It is also worth noting that some have queried whether the curse actually and or truly exist. Nonetheless, Emeka Duruigbo, in one of his scholarly works opines that one of the most puzzling and perplexing discoveries of modern scholarship is the paradoxical phenomenon referred to as 'resource curse'. He notes that the resource curse thesis posits that there exists a negative relationship between endowment with natural resources and social and economic development. The present writer finds some merit in the argument of Duruigbo that the existence of the resource curse is not a law cast in stone as countries can take initiatives to check it while admitting that the extent of its existence presents sufficient cause for pause and bewilderment. See further Emeka Duruigbo, 'The World Bank, Multinational Oil Corporations and the Resource Curse in Africa' (2005) 26(1) University of Pennsylvania Journal 1.

[53] Ciaran O'Faircheallaigh, 'Mineral Development Agreements by Aboriginal Communities in the 1990s' (1995) No 85/1995 (Centre for Aboriginal Economic Policy Research Discussion Papers) <http://caepr.anu.edu.au/sites/default/files/Publications/DP/1995_DP85.pdf> accessed 9 March 2017.

[54] Ian Taggart, 'Indigenous Peoples Rights to Natural Resources: Similarities and difference between the categories of rights' (LS510 Lecture Notes - Oil and Minerals for Good, The University of Aberdeen 2016).

[55] The Indigenous and Tribal Populations Convention, 1957 (No 107).

[56] The Indigenous and Tribal Peoples Convention, 1989 (No 169).

[57] UNDRIP Article 1.

[58] UNDRIP Article 1 and Article 27.

[59] Philip Alston, *People' Rights* (OUP 2005) 238.

encouraged to give precedence.[60] Whilst Article 1(1) of the ICCPR provides for the right of indigenous people to self-determination and the ancillary right to freely determine their political status and freely pursue their economic, social and cultural development, Article 1(2) ICCPR allows all peoples to freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation. The latter is based on the principle of mutual benefit and international law and expressly precludes any situation wherein persons may be deprived of their means of subsistence.

[60] Heather Northcott, 'Realisation of the Right of Indigenous Peoples to Natural Resources Under International Law Through the Emerging Right to Autonomy' (2012) 16(1) The International Journal of Human Rights 73.

SHOULD INTERNATIONAL ARBITRATORS BE LIABLE FOR AWARDS WHICH ARE SUBSEQUENTLY ANNULLED OR HELD UNENFORCEABLE?

Robert Shaw*

A INTRODUCTION

The liability of arbitrators is a concept which 'touches the heart' of arbitration yet is characterised by *conceptual chaos*.[1] It is an issue of particular contemporary significance, given that arbitration is rapidly developing, but this development is 'accompanied by a perceived deterioration of its moral standards'.[2] The situation is only made worse as liability is approached internationally from 'two radically different perspectives'.[3] Because of this there is a glaring absence of uniformity in international arbitration law regarding the liability of arbitrators; a lacuna which needs to be filled.[4]

This article will argue that arbitrators should be liable for awards which are subsequently annulled but not for those that are held unenforceable. It will propose that the imposition of liability rests on a two-step test. Firstly has the arbitral award been annulled? Secondly, if so annulled, is this due to a breach of duty by the arbitrator? This proposition will be justified via critical analysis of the theoretical rationales for arbitral liability which will determine that arbitrators should be afforded immunity but not in absolute terms, with the setting aside of an award the appropriate threshold to apply.

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[1] Dario Alessi, 'Enforcing Arbitrator's Obligations: Rethinking International Commercial Arbitrators' Liability' (2014) 31(6) JIA 735.

[2] Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) [1010].

[3] Susan Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity' (2000) 20(1) New York Law School Journal of International and Comparative Law 1, 16.

[4] Chiara Orlandi, 'Liability of Arbitrators in the Italian Legal System' (2002) 7 IBLJ 795.

B ARBITRATORS DUTIES AND AWARDS

I Duties

It is first important to briefly analyse which duties exist for international arbitrators. Discerning a common set of duties in international commercial arbitration has been described by some as 'something like a treasure hunt'.[5] Sources of arbitrators' duties primarily stem from national legislation whilst others derive from the rules of arbitral institutions, international guidelines, and interpretations of international conventions.[6] The uncertainty here is of critical importance. If the liability of arbitrators - as a remedy for breach of their duties - is to be harmonised internationally, this harmonisation must be reflected by establishing common duties of arbitrators internationally.[7]

Arbitrator's duties can be categorised under three headings; (a) duties imposed by the parties, (b) duties imposed by law and (c) ethical duties.[8] Furthermore, arbitrator's duties must be derived either from the contract with the parties, or else applicable legal or institutional rules.[9]

Legal rules take up the bulk of these duties and there are some discernible commonalities in national laws regarding the duties of arbitrators. A salient duty to begin this discussion is that of impartiality and independence.[10] This derives from the United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules and UNCITRAL Model Law (Model Law).[11] It is adopted by most major arbitral institutions as well as in many national laws, including England and Wales, Switzerland, Sweden, Spain, and the United States (US) amongst

[5] James H Carter, 'Rights and Obligations of the Arbitrator' (1997) 52(1) Dispute Resolution Journal, 56.
[6] Alan Redfern and Martin Hunter, *International Arbitration* (5th edn, OUP 2015) 319-335.
[7] Emmanuela Truli, 'Liability v Quasi-Judicial Immunity of the Arbitrator: The Case against Absolute Immunity' (2006) 17(3) American Review of International Arbitration 383, 408.
[8] ibid 319.
[9] Julian Lew and Loukas Mistelis and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 277.
[10] Alfonso Gomez-Acebo, *Party-Appointed Arbitrators in International Commercial Arbitration* (Kluwer Law International 2016) 70, 71.
[11] Gaillard and Savage (n 2) 560, 561.

others.[12] It is worth noting however, that there have been voiced opponents of this duty, particularly due to its inherent definitional issues.[13]

There is also the generally recognised duty to act in good faith.[14] Again, this is not without its issues, particularly as there is no explicit definition of 'good faith' contained in any legal system.[15] Still, it finds favour in many civil law jurisdictions, as well as in England and Wales, where it is a potential ground for removal of arbitral immunity from civil liability.[16]

Although not semantically identical arbitrator's procedural duties often share a similar place in national and international law. Procedural obligations usually relate to the duty to act without undue delay, which is contained in Article 14 of the Model Law.[17] Examples of this under national law are section 24 of the English Arbitration Act 1996 which allows for removal of the arbitrator if that arbitrator 'has refused or failed to properly conduct the proceedings' and section 813(2) of the Italian Code of Civil Procedure, which gives rise to civil liability of an arbitrator for breach.[18] An interesting recent interpretation of the procedural duties of an arbitrator came from the Austrian Supreme Court, whereby potential civil liability can now be imposed on the arbitrator(s) for their failure to include in the award the 'decisive underlying reasoning' behind it.[19] Failure to include this reasoning in an Austrian arbitral award will now result in a breach of 'procedural public policy', contained in Section 611(2)(5) Austrian Civil Code of Procedure (ACCP).[20]

The last overarching duty to be identified is the duty to render an enforceable award. Some have suggested that it is perhaps the most important obligation of an arbitrator, and that it is the raison

[12] Gomez-Acebo (n 10).
[13] ibid 90.
[14] Duarte G Henriques, 'The role of good faith in arbitration: are arbitrators and arbitral institutions bound to act in good faith?' (2015) 3 ASA Bull 515 <http://www.bch.pt/ASAB%2033-3_.pdf> accessed 2 March 2017.
[15] ibid 516.
[16] ibid; Arbitration Act 1996, s 29.
[17] Andrew Okekeifere, 'The Parties' Rights against a Dilatory or Unskilled Arbitrator – Possible New Approaches' (1998) 15(2) JIA 130, 132-133.
[18] Orlandi (n 4) 797.
[19] Anne-Karin Grill and Sebastian Lukic, 'Arbitrator's Liability: Austrian Supreme Court Reconfirms Strict Standards' (2016) <http://kluwerarbitrationblog.com/2016/09/01/arbitrators-liability-austrian-supreme-court-reconfirms-strict-standards/> accessed 2 March 2017.
[20] ibid.

d'être for arbitration;[21] the arbitrator will have failed their office should they fail to meet the duty.[22] A strict adherence to this duty is perhaps unattainable, given that factors beyond the control of the arbitrator, including national public policy of states where enforcement is sought, can render their awards unenforceable.[23] Such issues will be addressed in more depth when considering the proposition of personal liability at a later stage.

C SETTING ASIDE AND REFUSING ENFORCEMENT OF AWARDS

Unlike the duties of arbitrators, the reasons for setting aside and refusing enforcement of awards are explicitly set out in international and national law: via Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and Articles 34-35 of the Model Law.

Both annulling and refusing to enforce awards mirror each other in terms of the grounds for such actions, with the exception that annulment of an award itself is an additional ground for refusal to enforce that award.[24] The key difference between the annulment of an award and the refusal to enforce an award is the jurisdiction each action takes place in. Annulment of an award is performed in the competent court of the seat of the arbitration, whereas refusal to enforce an award will take place in the state where enforcement is sought: a 'foreign' state.[25] This point is particularly pertinent to the latter stages of this article.

Article V of the New York Convention provides seven grounds for refusal to enforce an award, five of which are available to the parties to arbitration (Article V(1)-(e)), with two being available for the enforcing court to invoke on its own accord (Article V(2)(a)-(b)). Article 34 of the Model Law covers annulment of an award, and subsumes Article V of the New York Convention, subject to omitting Article V(1)(e).

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[21] Fernando Pérez Lozada, 'Duty to Render Enforceable Awards: the Specific Case of Impartiality' (2016) 27 Spain Arbitration Review 71, 72 citing Julian D M Lew, *Applicable Law in International Commercial Arbitration: A Study in International Commercial Awards* (Oceana Publications 1978) 376.
[22] Lozada (n 21) 72.
[23] ibid; Art V(2)(b) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
[24] Art V(1)(e) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; Art 35(1)(v) UNCITRAL Model Law.
[25] Art 34(2) UNCITRAL Model Law; Redfern and Hunter (n 5) ch 9-10.

To analyse the liability of arbitrators with reference to all of the grounds referred to above is beyond the scope of this article. Rather, a connection will be drawn between duties and the grounds for annulment/refusal to enforce, ultimately proposing liability for breaches of duty which subsequently lead to annulment, but not to those which lead to un-enforceability.[26]

The next phase of this response will seek to analyse the foundations of arbitral liability and will then move to applying this analysis to the proposition at the final stage of this article.

D LIABILITY OF ARBITRATORS

The liability of arbitrators is an important determination, given that it delimits the rights and obligations arising from arbitral proceedings.[27] In particular it determines if parties have the ability to bring actions in damages or compensation, against the arbitrator (or institution), should problems occur.[28]

Currently, the liability of arbitrator's is underpinned by two competing rationales. These are the 'status' approach and the 'contractual approach'.[29] Each will be analysed below.

I Contractual Approach

Found in the overwhelming majority of major civil law jurisdictions, the contractual approach is one which will lead to a reduction or complete absence of arbitrator's immunity from civil liability.[30] It is premised on the categorisation of the arbitrator's and parties' relationship as a contract, therefore giving rise to liability for breaches of such a contract.[31]

[26] Art 34(2)(b)(ii) UNCITRAL Model Law; Art V(2)(b) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
[27] Ramon Mullerat and Juliet Blanch, 'The Liability of Arbitrators: A Survey of Current Practice' (2007) 1 Dispute Resolution International 99.
[28] ibid.
[29] Redfern and Hunter (n 6) 321.
[30] Orlandi (n 4) 795.
[31] Franck (n 3) 7.

Within the contractual approach there are generally three sub-schools of thought.[32] The first is one posited by Adam Samuel, which treats the contract to arbitrate as a commission or mandate the arbitrator has to fulfil, based on agency theory.[33]

However, this approach, even by its advocates, has been criticised as incomplete at best and fundamentally incorrect at worst.[34] As noted earlier in this discussion, the duty of impartiality and independence is one of the basic duties of an arbitrator; indeed they must 'sit squarely between the parties, and have no special affiliation to either'.[35] To be an agent, an individual cannot be impartial and independent, they must act on behalf of the party who appointed them.[36] It is therefore apparent that the two concepts are incongruous, thus meaning the approach here is inherently flawed.

The second sub-school of the contractual approach is that the contract is one for the provision of services.[37] Franck is explicit in highlighting this approach, suggesting that arbitrator's 'receive payment from the parties in exchange for professional services'.[38] Again, this view can be criticised, as it gives rise to a noteworthy deficiency. Namely, arbitration does not conform with the traditional notion of a 'service'.[39] Compared to traditional professional services, such as architectural, medical or even legal work (eg a solicitor), arbitration fundamentally differs as the parties have no instructive input during the execution of the service.[40] The point here is that the arbitrator, once appointed, enjoys a status above a mere service provider because their allegiance to the party who appointed them gives way to an allegiance to the process of arbitration itself. It must be viewed at the very least as a 'hybrid' between a service and traditional court litigation.

[32] Mullerat and Blanch (n 27) 102.
[33] ibid.
[34] Anastasia Tsakatoura, 'The Immunity of Arbitrators' (2002) 3 Inter Lawyer < http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm> accessed 2 March 2017.
[35] Hong-Lin Yu, 'Who is an Arbitrator? A Study into the Issue of Immunity' (2009) 12(2) International Arbitration Law Review 3, 10, citing Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths 1989) 223.
[36] Gerard McMeel, 'Philosophical Foundations of the Law of Agency' (2000) 116 LQR 387, 388.
[37] Mullerat and Blanch (n 27) 103.
[38] Franck (n 3) 23.
[39] Gaillard and Savage (n 2) 606.
[40] ibid.

The concept often manifests into qualified immunity as followed by civil law jurisdictions such as Austria, Norway and Germany.[41] Significant merit should be afforded to this view given that it addresses the flaws of both the status and 'traditional' contract theories; that they holistically exclude each other. In reality, I expand on the logic of Lord Mustill by suggesting that both contract and status are important to consider given that an arbitrator derives his existence from contract but his power from law (the state).[42] Thus, the sui generis approach acknowledges the importance of both contract and the state in their capacity as facilitators of the arbitral process which is vital to assimilate the divergence between nations which only acknowledge one or the other; perhaps meaning a compromise can be found.

II Status

The status approach (also known as the 'jurisdictional theory')[43] most often finds favour in common law jurisdictions, particularly in the United Kingdom (UK) and US. The approach dictates that an arbitrator's immunity from liability is an extension of judicial immunity, one which harks back to early 17th century English jurisprudence and has been constantly affirmed through the common law ever since.[44] The basic premise for judicial immunity is that judges should be able to conduct themselves 'in complete independence and free from fear'.[45] Fear, that is, from disgruntled parties seeking retribution for their loss through 'vexatious actions'.[46] Guaranteeing this freedom of thought is seen as a public benefit ensuring finality and integrity of judicial decisions, the independence of the judiciary and confidence in the judicial system.[47]

However the legitimacy of extending judicial immunity to arbitrators has been subject to challenge. A convincing example of this comes from Dario Alessi who says that arbitral immunity is premised on a flawed syllogism.[48] Syllogistic reasoning dictates there are two premises (a major and a minor) and a conclusion. According to Alessi the major premise is that

[41] Tsakatoura (n 34).
[42] Hong-Lin Yu (n 35).
[43] Tsakatoura (n 34).
[44] Dennis R Nolan and Roger I Abrams, 'Arbitral Immunity' (1989) 11(2) Berkeley Journal of Employment and Labour Law 228, 229-230.
[45] *Sirros v Moore* [1975] QB (CA) 118, 136.
[46] *Bradley v Fisher* 80 US 335 (1871) 349.
[47] Nolan and Abrams (n 44) 230.
[48] Alessi (n 1) 744-745.

all judges are immune from liability, the minor premise is that all arbitrators are like judges and the conclusion is therefore that all arbitrators are immune from liability.[49] The flaw, it is argued, is that the minor premise - 'all arbitrators are like judges' - is incorrect thus leading to an invalid conclusion.[50]

This is argued due to the differences between arbitrators and judges such as where each derives their power, how each is remunerated and rights of appeal, which differ between court decisions and arbitral decisions.[51] Differentiating arbitrators and judges in this way is perhaps the most often utilised tact for arguing against arbitral immunity, demonstrated by Tsakatoura, Truli and others.[52]

Indeed there are clear, discernible differences between arbitrators and judges, a rather unexceptional view it must be said. However the methodology is conclusory in nature; ie there are differences so the same immunity cannot be shared. It is submitted that this overlooks the central justification of the status/jurisdictional theory.

It must be remembered that arbitrators are not afforded immunity from liability simply by virtue of their status as an arbitrator which is admittedly confusing given the name attributed to the theory itself.[53] Rather they are afforded immunity on account of the function they perform; the administration of legally binding justice.[54] In other words 'Judicial immunity exists for a broader purpose (than the protection of judges) … It is a means to an end, not an end in itself.'[55]

This is the crux of the issue. Judicial immunity is not just for judges; it is for those who act judicially. Thus, so long as the arbitrator is performing a judicial function they should be immune from liability regardless of whether they have differences to a judge. Put another way when arbitrators flagrantly disregard some of their critical duties and thus fail to perform their function - the legally binding resolution of a case - there is no logic in extending immunity to them.

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[49] ibid.
[50] ibid.
[51] Mullerat and Blanch (n 27) 106.
[52] Franck (n 3); Tsakatoura (n 34); Truli (n 7).
[53] *Butz v Economou* 438 US 478 (1978) 511.
[54] Tsakatoura (n 34).
[55] Nolan and Abrams (n 44) 232.

In light of this it can be argued that there are certain instances which 'trump' the otherwise solid foundation of judicial immunity for arbitrators.[56] Becker is a key advocate of this approach. He suggests that affording judicial immunity to arbitrators is befitting in certain cases including negligence and potentially recklessness but not in others,[57] a view with which this author agrees. This article has rationalised why judicial immunity should be granted to arbitrators but the immunity becomes illogical when the arbitrator disregards the bounds of their function.

In keeping with the theoretical critique given thus far I will now move to propose a standard by which breaches of duty should be assessed. This standard is in effect a threshold requirement; that an award be annulled before any liability can be imposed. However this proposition will stop short of imposing liability on arbitrators for breaches of duty which lead to their awards being refused enforcement for reasons discussed below.

E PROPOSED STANDARD OF LIABILITY

The preceding analysis has demonstrated that 'the common law and the civil law start from opposite directions…both systems, however, have come to realise that the arbitrator in fact acts in a dual capacity: he is both an expert and a judge.[58] Indeed, in the US (a state regarded as affording near full immunity to arbitrators) the common law already tentatively adheres to this view.[59] Due to this, it has been suggested that the sui generis contractual approach is the most appropriate to follow. The approach recognises the judicial character of the arbitrator and the justification for their immunity, whilst acknowledging that there is still a contractual relationship and there must be some degree of liability as a safeguard for the parties.[60]

The logical proposition arising from such analysis is one of qualified immunity, the qualification being a breach of duty has occurred and the breach has either unduly or else purposely caused

[56] Truli (n 7) 21.
[57] Joseph D Becker, 'The United States: The Liability of Arbitrators' (1980) 8(12) International Business Lawyer 341, 343.
[58] Christian Hausmaninger, 'Civil Liability of Arbitrators - Comparative Analysis and Proposals for Reform' (1990) 7(4) Journal of International Arbitration 7, 22.
[59] *Baar v Tigerman* [1983] 140 Cal App 3d 980; *Grane v Grane* [1986] 143 Ill App 3d 979; *Morgan Philips Inc v JAMS Inc/Endispute LLC* [2006] Cal App LEXIS 911 (Cal Ct App 2006).
[60] Gaillard and Savage (n 2).

the award to be set aside.[61] The reason the annulment of an award should give rise to liability is because it avoids arbitrariness, acting as a filter between mistakes or trivial breaches of duty and those which signify a blatant disregard for the process and function of arbitration.[62] Put otherwise, the annulment of the award acts as a threshold for claims only allowing those serious enough to warrant attention to actually receive it. As argued, arbitral immunity seeks to protect arbitrators who make trivial mistakes because they still perform their function of legally binding dispute resolution. If the award is annulled at the fault of the arbitrator, they are no longer performing their function, and thus the logic of extending immunity to them ceases. Therefore, any of the duties discussed at the beginning of this article could give rise to liability as the proposition does not target the specific form of the duty but rather the severity and recklessness of the breach.

However, I refrain from extending this condition of liability to the un-enforceability of an award. In many instances the enforcing country will either be unknown or assets can be moved from the expected enforcing country to a different state.[63] In such cases, arbitrators lack the information necessary for them to carry out their duties with certainty and they should thus be immune from liability.[64]

To illuminate this proposed standard of liability, a recent decision of the Austrian Supreme Court, referred to earlier in this article, provides a practical exemplification of the foregoing discussion.[65] In that case, the court reviewed and upheld an arbitrator's contract which conferred personal liability on the arbitrator subject to two requirements being met: (a) the award must be annulled pursuant to s 611(2)(5) ACCP, and (b) the arbitrator must have acted with gross negligence.[66] The case therefore establishes a relationship between annulment of an award and personal liability of an arbitrator, qualified by a standard of gross negligence.[67] The relationship between annulment and liability is key to the theme of this article as analysis of the theoretical

[61] Hausmaninger (n 58) 31.
[62] ibid.
[63] Lozada (n 21) 73.
[64] ibid.
[65] Grill and Lukic (n 19).
[66] Klaus Oblin, 'Supreme Court Rules on Liability of Arbitrator's to Pay Damages' (2016) International Law Office <http://www.internationallawoffice.com/Newsletters/Litigation/Austria/Oblin-Melichar/Supreme-Court-rules-on-liability-of-arbitrators-to-pay-damages#> accessed 10 March 2017.
[67] ibid.

justifications for arbitral liability has justified that immunity is only valid insofar that the tribunal produces a legally binding resolution to the parties' dispute. By allowing annulment as a standard of liability the court has lent credence to the view posited here, signifying how it as an appropriate mechanism for the imposition of personal liability of arbitrators, particularly given that that Austria is, in a contemporary context, one of the leading arbitral jurisdictions in Europe.[68]

However, it must be admitted that the decision is not entirely surprising as it is in line with general Austrian jurisprudence in the field.[69] But the decision can be seen to add clarity to the area and it is hoped that similar decisions are made in other leading arbitral jurisdictions; moving us towards a harmonised international standard of liability.[70]

In summation, a proposed standard of liability involving two considerations is proffered; has the award been set aside? If so, is the setting aside of the award due to a breach of duty of the arbitrator? This condition of the setting aside of the award strikes the appropriate balance between liability and immunity. The arbitrator can reasonably be expected to have an awareness of the law of the state he/she operates in, and the likely treatment the courts will afford an award. This logic does not extend to enforcement of awards however, given the often unpredictable identity of the enforcing state, the inconsistencies in national laws for assessing the grounds necessary to refuse enforcement (most notably public policy) and the potential for delocalisation.[71] These factors serve to highlight that to predicate the liability of an arbitrator on such an assessment would be unjust and lead to arbitrary results.[72]

[68] Christian W Konrad and Philipp A Peters, 'Austria – The European Arbitration Review 2017' (13 October 2016, Global Arbitration Review) <http://globalarbitrationreview.com/insight/the-european-arbitration-review-2017/1069279/austria> accessed 2 March 2017.
[69] Oblin (n 66).
[70] ibid.
[71] Lozada (n 21) 73; Jan Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters' (1983) 32(1) International and Comparative Law Quarterly 53, 53.
[72] ibid.

F CONCLUSION

To conclude, this article has argued that arbitrators should be liable for awards which are subsequently annulled so long as this is due to a breach of duty. This is justified with reference to the 'status and 'sui generis' theoretical approaches, acknowledging the proposition that judicial immunity is rightfully extended to arbitrators, but recognising that certain safeguards in the form of liability must prevent this immunity from being unfettered. However the article has not purported to give an all-encompassing solution to the issues of arbitral liability. It has not, as others have,[73] offered a specific provision or formulation for reform. What it has offered is an analysis of the competing rationales for immunity of arbitrators. It has established that upon critical examination of these rationales it is justifiable that arbitrators are to be afforded immunity in all cases, except those which concern such serious breaches of duty that the award itself is set aside.

[73] Hausmaninger (n 58) 47.

WARRANTY TERMS IN THE UK INSURANCE ACT 2015: FIT FOR PURPOSE OR BUSINESS AS USUAL?

Omotayo Akorede Samuel*

A INTRODUCTION

The old law on warranty terms in insurance contracts in the United Kingdom is based on principles developed in the 18th and 19th centuries and codified in the Marine Insurance Act 1906[1] (MIA 1906). However, there have been fundamental changes to this law in the UK with the introduction of the Insurance Act 2015 (IA 2015) which came into force on 12 August 2016.

In the same vein, until now, Irish insurance law has largely mirrored English law, as most insurance law was derived from the Marine Insurance Act 1906 and EU legislation. McClements argues that the reason underpinning this rests in the fact that many Irish risks are written in the London market and are frequently subject to English law; the UK reforms are therefore expected to have a significant impact on the Irish insurance market.[2] However, following the enactment of the UK IA 2015, and the recent support, in principle, by the Irish Government, for the Consumer Insurance Contracts Bill 2015 (CICB) which has just passed the second stage in Dáil, insurance law in the United Kingdom and Ireland is set to be significantly controlled under different regime, with each reforms retaining similar provisions.[3]

The need to consider these reforms cannot be more important. There is the argument that the old law on warranty terms has been tarnished. John Hare, for instance, submitted that the 'toxic' English warranty term be consigned to the obscurity where it belonged.[4] Macgregor, following the UK Law Commission, has echoed similar sentiments stating that the Marine Insurance Act

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[1] Marine Insurance Act 1906, s 33 – 41.

[2] April McClements, 'Irish Insurance Market to be affected by Upcoming UK Reform' (*International Law Office,* 2 February 2016) <http://www.internationallawoffice.com/Newsletters/Insurance/Ireland/Matheson/Irish-insurance-market-to-be-affected-by-upcoming-UK-reform> accessed 9 March 2017.

[3] Irish Legal News, 'Dail to consider reform of consumer insurance contracts law' (*Irish Legal News*, 10 February 2017) <http://www.irishlegal.com/6408/dail-to-consider-reform-of-consumer-insurance-contracts-law/> accessed 9 March 2017.

[4] John Hare, 'The Omnipotent Warranty: England v the World' in Marc Huybrechts and others (eds), *Marine Insurance at the Turn of the Millenium* (Vol 2, Intersentia 2000) 55.

1906 is too 'insurer friendly,' to the detriment of the insured which, more often than not, lead to manifest injustice.[5]

The problem with the old law proceeds from three basic assumptions. First, the indeterminacy of the use of the term 'warranty'. Second, the old law on warranties takes no account of the magnitude of the breach and its relevance to the loss.[6] Thirdly, the 'draconian' effect of an 'automatic discharge' of an insurer from liability in the advent of a breach of warranty is considered unjust.[7] The IA 2015 and the CICB have been formulated to make provisions corrective to the foregoing. The question before this article, however, is whether these new provisions are indeed necessary and fit for purpose, especially against the backdrop of the argument that the rigidity of the 1906 Act has been glossed by case law, which invariably has made it up-to-date with contemporary conditions.

B WARRANTY TERMS IN ENGLISH INSURANCE AND CONTRACT LAW: A PROBLEM OR A BLESSING?

The term 'warranty' has been described as one of the most indeterminate words in English law. The reason for this is not difficult to observe. In general contract law, the terms of a contract have generally been divided into two; 'conditions' and 'warranties.' The resulting effect is that a breach of condition gives the innocent party the right to terminate the contract, per *Poussard v Spiers,*[8] while a breach of warranty only confers a right to sue for damages, per *Bettini v Gye*.[9] Nevertheless, this bifurcation has since been clouded by Lord Diplock's identification of innominate terms in *Hong Kong Fir*[10] whose resulting effect is to create a midway between a condition and warranty and which then gave the court flexibility as regards allocating remedies.[11]

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[5] Laura Macgregor, '"Unwelcome Knowledge": Imputation of the Agent's Knowledge in the Pre-Contractual Phase of Insurance' in Danny Busch, Laura Macgregor and Peter Watts, *Agency Law in Commercial Practice* (OUP, 2015) [11.16].
[6] Baris Soyer, *Reforming Marine and Commercial Insurance Law* (1st edn, Informa, 2008), 128.
[7] ibid 129; Irish Law Commission, *Consumer Insurance Contract* (LRC 113 – 2015) 4.17, 2.18 <http://www.lawreform.ie/_fileupload/Reports/r113.pdf> accessed 9 March 2017.
[8] *Poussard v Spiers* (1876) 1 QBD 410.
[9] *Bettini v Gye* (1876) 1 QB 183.
[10] *Hong Kong Fir Shipping Co Ltd v Kawasaki* [1962] 2 QB 26.
[11] Ray Hodgin, *Insurance Law: Text, Cases and Materials* (Routledge-Cavendish 2002) 329.

Accordingly, although this notion has been challenged by Professor Treitel,[12] it is still trite law that a breach of 'warranty' in contract law does not give rise to revocation of contract. The upshot of this, to McKendrick is that a breach of a warranty only gives rise to a claim for damages, and does not give the innocent party the right to terminate the contract.[13]

Contrarily, a breach of warranty in 'insurance contracts', as developed from MIA 1906,[14] may give the insurer the right to terminate the contract and avoid liability altogether.[15] Ipso facto, warranty terms are to insurance contracts, what 'conditions' are to contract law. An insurance contract, however, is one whereby the insurer undertakes to indemnify the insured/assured, in manner and to the extent thereby agreed, against certain losses in return for a payment known as premium.[16] Ipso facto, since warranties are fundamental to insurance contracts, insurers could terminate the insurance policy, if an insured breaches a warranty clause, per Lord Mansfield in *De Hahn v Hartley.*[17]

However, there seems to be problems with the aforementioned. A mere distinction of its use/effect in contract and insurance law does not satisfy the definitional criterion. Corrective to this is to adopt the statutory definition of warranty contained in section 33 (3) MIA 1906, which provides: 'A warranty … is a condition which must be exactly complied with, whether it is material to the risk or not. If it be not so complied with … the insurer is discharged from liability.' The general applicability of this definition to non-marine insurance contracts is now beyond dispute, so that the MIA can be treated as sui generis in this respect.[18] This notion is typified in Lord Blackburn's obiter in *Thomas v Weems*[19] where he stated, that 'in [his] opinion, as regards a breach of warranty, the same principles applies, whether the insurance be marine or not.'[20]

[12] Guenter Treitel, *Some Landmarks of Twentieth Century Contract Law* (Clarendon Press 2002) 124.
[13] Ewan McKendrick, *Contract Law, Text, Cases and Material* (5th edn, OUP 2012) 773.
[14] MIA 1906 s 33 (3); see also John Birds, *Birds' Modern Insurance Law* (9th edn, Sweet and Maxwell 2013) 167.
[15] *Sugar Hut Group v Great Lakes Reinsurance* [2010] EWHC 2636 42, 49 as per Burton J.
[16] B Soyer, *Warranties in Maritime Insurance* (Cavendish Publishing 2001) 5.
[17] *De Hahn v Hartley* (1786) 1 TR 343.
[18] John Lowry and Philip Rawlings, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011) 219.
[19] *Thomas v Weems* (1884) 9 App Cas 671, 684.
[20] Soyer (n 17).

It is common place to distinguish warranty terms in insurance law into 'express' or 'implied', 'promissory' or 'continuing' warranties. This distinction is important since a breach of any will determine the type of remedy available to the innocent party.[21] Express warranties, for example, appear in the policy or are incorporated by reference depending on the consensus of the assured and insurer.[22] Implied warranties, on the other hand, are incorporated into certain policies by the MIA and, accordingly, their number and scope is determined by the Act.[23]

A consistent problem is the difficulty in identifying which warranty terms are used in the insurance contract. As John Birds puts it, judges, over the years, have not fully grasped the distinction between pre-contractual acts or omissions, representations and terms which amounts to warranty.[24] The principal reason for these confusions, to Birds, is that most insurance policies and documents are often drafted by non-lawyers, without regard to general principles of contract or insurance laws.[25] Hence, the mere fact that the word 'warranty' was mentioned in a policy does not confer or preclude liability from the insurer.

Nevertheless, the comments of Rix LJ in *HIH Casualty* is corrective to the foregoing. To him:

> It is a question of construction, and the presence or absence of the word 'warranty' or 'warranted' is not conclusive. One test is whether it is a term which goes to the root of the transaction; a second, whether it is descriptive or bears materially on the risk of loss; a third, whether damages would be an unsatisfactory or inadequate remedy.[26]

An apparent problem with this line of thought, as anticipated by Howard Bennet while commenting on a similar principle in *Bank of Nova Scotia,*[27] is that it defies the principle of 'freedom of contract.'[28] Freedom of contract, to Bennet, dictates that parties to an insurance

[21] John Birds, 'Warranties in Insurance Proposal Forms' (1977) Journal of Business Law 231ff.
[22] Soyer (n 17) 14.
[23] ibid.
[24] John Birds, 'The Effect of Breach of an Insurance Warranty' (1991) 107 Law Quarterly Review 540.
[25] ibid.
[26] *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161, [2001] EWCA Civ 735, 101.
[27] *Bank of Nova Scotia v Hellenic Mutual WRA Ltd* [1992] 1 AC 233.
[28] Howard Bennet, 'Good Luck with Warranties (Case Comment)' (1991) Journal of Business Law 592, 598.

contract are at liberty to classify any term as a warranty. In other words, an attempt by the court to qualify this terms will be inappropriate.

However, a more profound difficulty with indeterminacy of warranty terms consists in 'basis of the contract clauses'. A common method of creating warranties is by the inclusion of proposals forms, whereby the questions and answers contained in the form, together with the declarations, are stated to be basis of the contract; whereby even a non-material breach discharges the insurer from liability altogether.[29] Thus, an inadvertent mistake in the address given on a proposal form was held by the House of Lords in *Dawsons Ltd,* as entitling the insurer's to avoid liability even though the mistake was immaterial to the risk covered.[30]

It is against this backdrop that other criticisms have flared up. The notion that an Insurer could avoid liability even if the breach of warranty was immaterial to the loss, subject to section 33(3) of the MIA, has been considered unfair.[31] In *Overseas C Ltd v Styles,* the court held that the failure of the insured (who had warranted that each can of pork will be date-stamped) to fulfil this condition due to a large quantity of their goods being swept overboard by a storm, is enough to preclude the insurer from liability.[32] Thus, Lord Griffiths expressed his dissatisfaction, in *Vesta v Butcher* that a breach of warranty in an insurance policy can be relied upon by an insurer, even if there was no causal link between the breach and the loss.[33]

Continually, Soyer has submitted, that the penalty for breach of warranty, is appropriately disproportionate to the assured, as they lose their insurance cover once the warranty is breached even if the breach is remedied before any loss.[34] This notion, often tagged 'draconian', as codified in s 33 (3) and s 34 of the MIA 1906, is well expressed by Lord Goff's comment in *Bank of Nova Scotia* case:

[29] Lowry and Rawlings (n 19).
[30] *Dawsons Ltd v Bonnin* [1922] 2 AC 413 (HL).
[31] Andrew Longmore, 'Good Faith and Breach of Warranty: Are We Moving Forwards of Backwards?' Lloyd's Maritime and Commercial Law Quarterly (2004) 158.
[32] *Overseas Commodities Ltd v Styles* [1959] 1 Llyod's Rep 546.
[33] *F Vesta v Butcher* [1989] AC 852, 893.
[34] Soyer (n 7) 130.

> If a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that fulfilment of the warranty is a condition precedent to the liability of the insurer.[35]

Hence, a breach of warranty automatically discharges the insurer from all liability from the time of the breach, even if the warranty has no bearing on the risk. A fortiori, this perceived injustice informed the reform proposals of the UK and Irish Law Commission reforms.

C REFORMS

The UK Law Commission Report has described the 'draconian' effect of automatic discharge of liability for breach of warranty, even when the warranty is unrelated to the loss, as extremely harsh.[36] Following the provisions of the Law Commission in July 2014, the Insurance Act 2015 was enacted to amend the pitfalls of the present law on warranties in insurance contracts.

I The New Law on Warranty Terms: What does it say?

Section 9 of the UK Insurance Contract Act 2015 abolishes the 'basis of the contract clauses' in non-consumer contracts used to establish warranty terms. It is important to note that this prohibition, in relation to consumer contracts, is provided for in section 6 of the Consumer Insurance (Disclosure and Representation) Act 2012. It follows therefore, that any representation in the proposals will no longer be considered as a warranty unless it was expressly specified by the insurer.

Accordingly, the 'draconian' effect of automatic discharge of insurers from liability, where a warranty is breached, has been abolished by section 10 (1) of the new Act. The IA 2015 introduces 'suspensory liabilities' where liability for a breach of warranty will be suspended rather than repudiated, and restored, if and when the breach is remedied by the insured. The implication of this provision for practitioners, such as Adrian Bingham, is that:

[35] *Bank of Novia Scotia* (n 27) as per Lord Goff.
[36] Law Commission Report, 'Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment [2014] Law Com No 353 [13.39].

> [T]he all-or-nothing nature of the legislation, where an entire policy could, at least in theory, be treated as non-existent for a minor infringement of the insured's duty, regarded by many as 'draconian' and unsatisfactory, is now abolished by the 2015 Act.[37]

Continually, section 11 of the IA 2015 provides that insurers will no longer be able to exclude liability if the warranty breached has no causal link with the loss suffered. As Hjalmarsson submits elsewhere, the section 11 headed 'Terms not relevant to the actual loss' has been introduced to add to the suspensory nature of the new remedy, a requirement that the insured's failure to comply with policy requirements somehow contributed to the risk.[38] It is therefore opined, by Miller, that the new scheme provides more 'proportionate remedies' making it in kilter with modern business practices.[39]

II The Irish Consumer Insurance Contracts Bill 2017

The Law Reform Commission of Ireland also published its draft Consumer Insurance Contracts Bill (CICB) in July 2015 and the Bill has, been passed in the Irish Dáil. Unlike the UK Insurance Act, the Commission's Bill applies only to consumer insurance contracts. While the changes proposed in the bill are not generally as wide-reaching as those to be implemented by the UK Act, there are some similarities in the reform proposals. In particular, the Bill recommends changes to the duty of disclosure, effects of pre-contractual representations, proportionate remedies for non-disclosure and lastly the opportunity for an insured to remedy a breach of warranty and the abolition of basis of contract clauses.[40] The focus of this piece is on the changes on warranty terms[41] which provides;

- The abolition of warranties in consumer insurance contracts (whether that law arose at common law or under an enactment) and their replacement with specific

[37] Adrian Bingham, 'Insurance Act: Flexible and Fit for Purpose' (2015) 42 Ls Gaz 31.
[38] Johanna Hjalmarsson, 'The Insurance Act 2015 – a New Beginning or Business as Usual?' (2015) Shipping and Trade Law 4, 5.
[39] Jan Miller, 'Insurance Bill Now Law' (2015) 265 New Law Journal 7641 5.
[40] See Law Commission Report, 'Report: Consumer Insurance Contract' [July 2015] LRC 113 - 2015, 252 <http://www.lawreform.ie/_fileupload/Reports/r113.pdf> accessed 10 March 2017.
[41] ibid Appendix B, ss 17 (1) – (5) 272.

provisions.

- Any statement made by a consumer in or in connection with a contract of insurance, being a statement made by or attributable to a consumer with respect to the existence of a state of affairs or a statement of opinion, should have effect solely as a representation made by the consumer to the insurer prior to entering into the contract.
- Any provision which purports to convert any such statement into a contractual warranty, including by means of a declared 'basis of contract' clause or by any comparable clause (including one described as a warranty, a future warranty, a promissory or a continuing warranty), should be invalid.
- All terms designed to impose continuing restrictive conditions on a consumer during the course of the insurance contract should be treated in the same manner.
- Any contract term that imposes a continuing restrictive condition on a consumer during the course of the insurance contract should be treated as a suspensive condition in that, upon a breach of such a condition, an insurer's liability for the whole contract is suspended for the duration of the breach. Alas, if the breach has been remedied by the time a loss has occurred, an insurer should be obliged to pay the claim (in the absence of any other defence to the claim.[42]
- Breach of any contract term that is intended to reduce the risk of a particular type of loss, or the risk of loss at a particular time or in a particular location[43] should only suspend liability in respect of that type of loss, or a loss at that time or in that place and an insurer should be unable to rely on the breach of such a term in respective of a loss of a different kind, or loss at a different location or time.[44]

[42] ibid.
[43] ibid.
[44] ibid.

D A COMPARATIVE ANALYSIS

A major difference between the IA 2015 and the CICB 2015, is that the IA 2015 retains the use of warranty terms with regards to warranty of facts and opinions, but does not provide a statutory definition – save the MIA 1906 and common law definitions. In the CICB 2015, the Commission recommends an abolition of warranties in consumer insurance contracts altogether, whether at common law or under an enactment, replacing them with the specific provisions highlighted above.[45] The reasoning of the Irish Commission is that to adopt the existing definition of warranties will defeat the recommendations to abolish the duty of the insured to disclose information and the 'basis of contract clauses' prevalent in cases such as *Keenan v Shield Insurance Co.*[46]

It is interesting to note that while the line of thought and the recommendations in the CICB 2015, defers largely from the provisions in the IA 2015, the substance of the recommendations in the CCIB is in kilter with similar provisions in common law jurisdictions such as Australia and New Zealand.

In New Zealand, section 11 of the Insurance Law Reform Act 1977 groups warranties and those terms that have a similar objective under the umbrella term 'increased risk exclusions' dispelling with the use of warranties altogether. In the same vein, in Australia, *Report No.20 of the Australian Law Reform Commission, Insurance Contract Law in 1982,*[47] advocated a similar approach. Section 54 of the Insurance Contracts Act 1984 (ICA 1984) which implements these recommendations, focuses on whether the 'act or omission' could be regarded as capable of 'causing or contributing to a loss in respect of which insurance cover is provided' although—unlike New Zealand—the legislation excludes both marine insurance and reinsurance.

The UK and Scottish Law Commission had rejected the Australian approach in its 2009 Report, suggesting that the Australian approach could lead to uncertainty in the way in which contract terms were interpreted. They commented that the Australian approach would affect a term such as 'warranted: the car is roadworthy,' but would not affect a term that excluded claims which

[45] ibid [4.21].
[46] *Keenan v Shield Insurance Company* [1987] IR 113.
[47] Report No 20 of the Australian Law Reform Commission, *Insurance Contract Law in 1982* 195.

arose when the car was unroadworthy, nor a definition of the risk stating that the policy only covered roadworthy cars.[48] Here are more far-reaching problems with the IA 2015.

E IS IT FIT FOR PURPOSE?

There is a body of reservations against the new provisions on 'warranty terms.' Jan Miller has reported on the wider implications of the 'proportionate remedies' that the IA 2015 introduces. He submits that this could be seen as confirming 'cover' unless claim handlers make the settlement terms clearer.[49] Contrarily, it could be submitted that this is a problem for the insurers and not the insured. Indeed, one could argue that the mischief which the new Act, and invariably the CICB seeks to remedy is to make it more 'insured friendly' in the first place. Hence, this provision is consistent with the purpose of the parliament and justifiable altogether.

Hjalmarsson offers a subtler criticism. She argues that the old law on insurance warranties have been modified beyond recognition, partly because the new Act constitutes a total departure from the provisions of the 1906 Act. [50] This line of thought is reminiscent of the positions of Hillman and Soyer; that a legal reform will be more efficient if it is not sweeping.[51] According to Soyer, a sweeping reform is likely to unsettle the fine balance in the market.

However, there is a flip side to this argument. There are some who believe that the enactment of IA 2015 is itself superfluous because the MIA 1906 has been modified by case law over the years. Swan and Lacanster in a commentary on reform propositions submit that we already have a good degree of certainty in English insurance law, built up over many years. To date, he courts have found a balance between commercial insured and insurers.[52]

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[48] Law Commission of England and Wales and Scottish Law Commission Report, *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (LRC No 318/Scottish Law Com No 219, 2009) [6.109]-[6.110].
[49] Jan Miller, 'Potential Pitfall of Insurance Act' (2015) 165 NLJ 7666 4.
[50] Hjalmarsson (n 38) 4.
[51] Soyer (n 4) 133; Robert A Hillman, *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (Springer 1997) 271.
[52] George Swan and Priti Lacanster, 'Insurance Contracts Reform' (*Freshfields Bruckhaus Deringer,* June 2014) <http://knowledge.freshfields.com/en/Global/r/359/insurance_contracts_reform> accessed 9 March 2017.

To lend credence to this position, following a spate of cases,[53] the courts have interpreted warranty terms and its effect in favour of the insured and against the insurers (Contra Proferentem rule*)*, to mitigate the harshness of the MIA 1906. The argument, therefore, is that the new provisions on warranties in the IA 2015 is unnecessary, since market participants generally understand where the balance lies and can make decisions accordingly.

However, an apparent pitfall of the aforementioned is that the courts, in its attempt to find in favour of the insured, disregards the freedom of contract and the clear language of the policy. In *Kler*, for example, where the insured had breached a warranty to inspect a sprinkler installation in thirty days. Morland J held the controversial viewpoint that the clause was merely a suspensive condition, and not a warranty.[54] Ipso facto, it may be argued that the enactment of the IA 2015 will not only save the courts the injustice that seems to recur in construing terms but also make the law on warranty terms predictable, clear, and in line with the principle of legality.

A further, and more profound criticism is the causation requirement of section 11 of the IA 2015 Act, even though the UK Law Commission has used the disguised term 'type of loss test' to describe it.[55] Section 11 of the IA 2017 Act provides that an insurer may not be able to avoid liability if an insured can show that the breach could not have increased the risk of the loss which occurred. It may be argued that this new causal requirement will open unnecessary doors to expert evidences in a bid to establish causal links between breach of warranty and the loss suffered; which may have the negative effect of uncertainties and inconsistencies in the application of the IA 2015 Act.

Parallel to this argument, Merkin and Gurses, similar to that of the Irish Law Reform Commission, and adopted in Australia and New Zealand, for the abolition of warranties, by making a distinction based on function rather than form. Merkin and Gurses favour the 'risk clause' approach with the assumption that:

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[53] *Hide v Bruce* (1773*)* 3 Doug KB 213*, Olympic Airways v Husain* 540 US 644 (2004*), A C Ward Sons & Limited v Catlin (Five) Limited & Others* [2009] EWHC 312*, Kler Knitwear Ltd v Lombard General Insurance Co Ltd* [2000] IR 47.
[54] ibid 63.
[55] UK Law Commission Report (n 36) [18.49].

> If the clause is not a risk clause, its enforcement rests upon prejudice. If it is a risk clause, its enforcement rests upon causation. These measures are not identical and their operation is far from straightforward. Nevertheless, they are a great improvement on the formalistic approach (description as warranty and condition precedent) adopted by the common law.[56]

In this regard, they both acknowledge that there is an inherent uncertainty in the pre-IA 2015 law. Courts strived to overcome the worst excesses of conditions precedent and warranties by refusing to regard them as consistent with their titles, or where that was impossible, by artificially narrow construction. However, they purport that the IA 2015 merely replaces one form of uncertainty with another.[57]

On this point, the CICB may run into difficulties as well, even before its enactment. Merkin and Gurses argues that the provisions of terms of a particular type of loss, time and location in sections 11 of the IA 2015 and section 17 (5) (a) in the CICB raises more difficulties than it can solve.[58]

Indeed, the UK Law Commission in its report concedes to this difficulty:

> There is undoubtedly a degree of uncertainty relating to how the courts will interpret a 'type of loss', a 'loss at a particular place' and 'a loss at a particular time'. Often the questions will have common sense answers, but we are aware that sometimes they will not." We would not argue with that.[59]

Hence, whatever the benefits of this approach – viz the assumption that the breach of a term which concerns a particular type of loss, or loss at a particular time or place, should only give the insurer a remedy in respect of that type of loss or loss at that time or place.

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[56] Robert Merkin & Ozlem Gurses, 'Insurance Contracts after the Insurance Act 2015' (2016) 132 (July) Law Quarterly Review 445, 456.
[57] ibid 469.
[58] ibid 464.
[59] Law Commission Report (n 36) [18.49].

It is apparent from this analysis that the old English and Irish law on warranties are 'draconian' and indefinite. As Merkin and Gurses note, warranties have no counterpart in civil law jurisdictions and have been eliminated in New Zealand, and in Australia in non-marine cases.[60] Scarcely any commentator has a good word to say about them[61] and their retention has led to a mass of conflicting case law on what constitutes a warranty, whether the warranty is merely a statement of present fact or precludes future conduct.

In the same vein, the UK Insurance Act 2015 and its progressing Irish equivalence, Consumer Insurance Contracts Bill 2015*,* is not without its uncertainties. However, as Hon. Justice Michael Kirby reiterated in relation to the ICA 1984, during the launch of the Australian Annual Review of Insurance and Reinsurance law:

> The notion of ever going back to the chaos and uncertainty of the previous law is unthinkable. Patching and updating are doubtless necessary, as the [Review] Committee has proposed. But one of the great virtues of having this single federal Act on insurance contract law is that it makes it easier to teach lawyers and claims managers the basic principles of insurance law.[62]

This author argues that the enactment of the IA 2015 and the reform proposals in the CICB*,* does more than make teaching easier. As evidenced in this article, the IA 2015 and the CICB gives more certainty, clarity and confers a proportional remedy to a breach of warranty term in the contract. This is also superior, as it keeps the insurance law up to date with modern business relations and is at par with legislations in other common law jurisdictions, such as Australian Insurance Contracts Act 1984. Albeit, the question remains, whether the new IA 2015 will live up to its billings and whether the CICB will ever 'see the light of the day'.

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[60] ibid.
[61] Reuben A Hasson, 'The Basis of the Contract Clause in Insurance Law' (1971) 34 Modern Law Review 29.
[62] Justice Michael Kirby, 'Insurance and Reinsurance Law' (Lunch of the Annual Review of Insurance and Reinsurance Law 2004 in Sydney, 23 February 2005) <http://www.austlii.edu.au/au/journals/BalJlNTLawSoc/2005/32.pdf> accessed 9 March 2017.

A 'GLOBAL' COMPETITION LAW: THE BEST WAY TO TACKLE CLASHES BETWEEN EU LAW AND THE LAW OF THIRD COUNTRIES ON THE APPLICATION OF THEIR RESPECTIVE COMPETITION LAWS?

Neil Murphy*

A INTRODUCTION

The growing process of globalisation stimulates business activity to expand and further operate at an international level. Therefore, competition authorities in the future will have to further align their enforcement activities so as to fight anticompetitive practices with an international dimension. This will entail a closer form of interaction, more enhanced cooperation and significant modification of the existing systems.[1]

Recently there has been a significant increase in the global recognition of the importance and benefit of competition law to both private and commercial conduct. Over 120 jurisdictions have now adopted a system of competition law with an increasing number of others currently in the process of developing some competition law framework.[2] Based on the premise that competition has the ability to increase a market's allocated productive and dynamic efficiencies, these jurisdictions have an interest in regulating anti-competitive behaviour. There is also the added benefit of offering consumers better prices, services and choices and improving economic welfare. It is safe to say that most competition law regimes share common characteristics and features, including prohibitions on certain types of behaviour such as horizontal agreements between firms, vertical restraints between firms operating at different levels of the market and excessive aggregation of market power.[3] Coupled with these common features and

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[1] International Enforcement Co-operation, *Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation* (OCED 2013) 160 (OCED Report) <http://www.oecd.org/competition/internenforcementcooperation2013.pdf> accessed 10 March 2016.

[2] Maher Dabbah, *International and Comparative Competition Law* (CUP 2010) 3.

[3] Leela Cejnar and Rachel Burgess, 'Challenging the Need for a "Global" Competition Law' (2014) 35(9) ECLR 461.

characteristics there are also considerable economic social cultural and political differences between the jurisdictions that have introduced competition law regimes.

These differences make it difficult to reconcile the benefits of removing hindrances to competition with the need for a set of global competition laws and policies. In addition the uncertainty of how competition law should apply across jurisdictions remains the subject of debate. Since the early nineties the principles of the market economy have been widely embraced. As a result, competition laws spread around the world and subsequently many treaties on competition law have been concluded.[4] The treaties differ hugely in nature, some of them provide for close cooperation, while others do not offer more than a statement of a very general nature and an agreement to have regular talks. In their most advanced form, bilateral treaties aim to facilitate international enforcement of antitrust violations or mergers by creating an active form of mutual cooperation. Even though these agreements are certainly useful, some argue it may well be time for a further step in international cooperation in order to provide for coordinated settlements and leniency programmes.[5] This 'further step' appears to be a global competition law system, enforced by a dedicated competition agency with the resources to tackle anti-competitive conduct across the globe.[6]

This article will first examine the historical context of clashes between the competition law of the EU and third countries. The second part of the article will explore ways in which the EU and third countries can address clashes between the respective competition regimes. A number of possible solutions will be discussed, from the radical option of introducing a global competition law that would see signatories benefit from a uniform set of rules with regard to competition law all over the globe, to the use of bilateral treaties between the EU and third countries. The third and final section of the article will offer concluding comments and observations on the issues and ideas put forward throughout this article.

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[4] The exception seems to be the agreement between the US and the Federal Republic of Germany, which dates from 1976. For an overview of the agreements see: <http://ec.europa.eu/competition/international/bilateral/index.html> and <http://www.justice.gov/atr/public/international/int-arrangements.html> accessed 9 March 2017.

[5] Piet Jan Slot, 'International Competition Law – Bilateral Treaties' (2015) 36(9) ECLR 391.

[6] Jurgita Malinauskaite, 'International Competition Law Harmonisation and the WTO: Past, Present and Future' (Theory and Practices of Harmonisation Workshop, London, 24–26 June 2008) 12 < http://sas-space.sas.ac.uk/3426/1/Malinauskaite%2C_Jurgita-INTERNATONAL_COMPETITION_LAW_HARMONISATION_AND_THE_WTO.pdf> accessed 9 March 2017.

B THE GLOBALISATION OF COMPETITION LAW: THE HISTORICAL BACKGROUND

There have been numerous attempts by various international bodies to establish some form of global competition rules since the end of World War II,[7] particularly in the seventies and eighties, when the extraterritorial application of national antitrust laws was a hot topic.[8] The debate was largely fuelled by the extraterritorial application of US antitrust law. From the moment Judge Learned Hand ruled in the famous *Alcoa* case that US antitrust law could be applied whenever acts had an effect within the US,[9] enforcement of these laws in cases of offences committed outside the US was permissible. This enforcement policy generated considerable strain on the relationship between the US and its main trading partners across the Atlantic. In responding to this situation, many other nations enacted 'blocking statutes' which prohibited subjects under their jurisdiction to comply with US orders to produce documents located in their country.[10] In fact, the United Kingdom enacted a 'claw back' provision,[11] which allowed its nationals to claim damages as a consequence of treble damage actions in the US.[12] The tensions were not quelled until the judgment of the European Court of Justice in *Wood Pulp*.[13] In *Wood Pulp,* the European Court of Justice declared that EU law applied in a case where an agreement concluded outside the EU was implemented in the EU. It is worth noting that in *Wood Pulp* the European Court of Justice was extremely careful not to phrase the test in terms of effect, nevertheless the judgment paved the way for cooperation between the US and the

[7] Examples include the attempt to establish the International Trade Organisation (IT0), UN Economic and Social Council (ECOSOC)'s draft convention, United Nations Conference on Trade and Development (UNCTAD), the OECD and the World Trade Organisation (WTO).
[8] The main literature is cited in Annex I-C 'US Experience with international antitrust enforcement cooperation' <https://www.justice.gov/atr/annex-1-c> accessed 3 March 2017.
[9] *United States v Alcoa* 148 F 2d 416 (2nd circuit 1945). During the presidency of Franklin D Roosevelt, the Justice Department charged Alcoa with illegal monopolisation and demanded that the company be dissolved. Trial began on 1 June 1938. The trial judge dismissed the case four years later. The Government appealed. Two years later in 1944, the Supreme Court announced that it could not assemble a quorum to hear the case so it referred the matter to the US Court of Appeals for the Second Circuit. The Supreme Court was unable to assemble a quorum because several justices held stock in Alcoa. Learned Hand wrote the opinion for the Second Circuit.
[10] Douglas Rosenthal and William Knighton, *National Laws and International Commerce: The Problem of Extraterritoriality* (Chatham House Publishers 1982).
[11] Protection of Trading Interests Act 1980, s 6.
[12] Alan Vaughan Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (Grotius Publications 1983).
[13] Case 89/85 *A Ahlstrom Osakeythio v Commission of the European Communities* [1988] ECR 05193.

EU.[14] This then led to the formation of bilateral treaties and agreements between the US and the EU, followed by treaties between other jurisdictions that pursued an active competition policy.[15]

In terms of more contemporary attempts to establish some form of competition rules, the 4th United Nations (UN) Conference adopted a resolution in 2000 which dealt with the issue of cooperation between antitrust authorities.[16] The Resolution recognises the importance of bilateral agreements and multilateral initiatives and also asked the United Nations Conference on Trade and Development (UNCTAD) to examine the possibility of developing a model cooperation agreement on competition (antitrust) law and policy, based on UNCTAD's Set of Multilaterally Agreed Principles.[17] Accordingly, UNCTAD's work includes the development of a Model Law on Competition, which states that the main objectives of national competition law and policy are:

> …to control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.[18]

UNCTAD continually looks for ways in which to improve worldwide cooperation on competition policy and how to spread a competition-based culture.[19] The measures adopted by UNCTAD include training activities that are developed in collaboration with competition authorities in different countries. The purpose of these training activities is to reinforce the need to formulate and enforce competition law in developing countries, so as to foster a culture of efficiency.[20] Indeed, the Organisation for Economic Co-operation and Development (OECD) has

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[14] ibid, [13]-[18].
[15] Piet Jan Slot, 'International Competition Law – Bilateral Treaties' (2015) 36(9) ECLR 391.
[16] UNCTAD secretariat, 'Review of Technical Assistance, Advisory and Training Programmes on Competition Law And Policy' (United Nations Conference on Trade and Development – Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 2-4 July 2001) <http://unctad.org/en/Docs/c2clp20.en.pdf> accessed 9 March 2017.
[17] Cejnar and Burgess (n 3).
[18] UNCTAD Secretariat, 'Objectives of Competition Law and Policy: Towards a Coherent Strategy for Promoting Competition and Development' (United Nations Conference on Trade and Development - Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 10 May 2011) <http://www.unctad.org> accessed 9 March 2017.
[19] Dabbah (n 2) 143.
[20] Qianian Wu, 'EU-China Competition Dialogue: A New Step in the In the Internationalisation of EU Competition Law?' (2012) 18(3) European Law Journal 461.

also played, and continues to play, an important role in assisting countries both with and without competition laws. In particular, the OECD has issued several non-binding recommendations, including in 1986 and 1995 on international cooperation amongst domestic competition law authorities and in 1998 condemning hard-core cartels.[21] The OECD has demonstrated its commitment to the development of global competition policy by establishing the Competition Law and Policy Committee (CLPC) and the Joint Group on Trade and Competition (JGTC). The aim of the CLPC is primarily to promote common understanding and cooperation among competition authorities, while the JGTC focuses on fostering the understanding of member countries on issues relevant to the interface between competition and trade policy.[22] Furthermore, in the pursuit of effective competition law enforcement through domestic competition regimes, the International Competition Network (ICN) was launched in 2001. The ICN is a multilateral initiative, which has as its main focus the enforcement and development of domestic competition regimes around the world. It has three main areas of priority: multi-jurisdictional merger control; competition advocacy; and cartels.

Although each of the organisations noted above have made a worthwhile and considerable contribution to the field of competition law and policy, many feel that more progress is necessary to ensure that there is greater international coordination and consistency in the development, application and enforcement of competition law and policies.[23] Previous efforts to develop multilateral competition procedures have not been completely successful.[24] In the modern day, it is difficult to find a type of business that does not operate in globally integrated markets, particularly with the increasing aid of technology. Following on from this it would appear at least in some quarters that there is an urgent need to develop a form of global competition law to ensure that the ever-expanding world of business is regulated and overseen by robust competition laws. It is clear that there are some common goals across the various competition

[21] Dabbah (n 2). See also the OECD Reports on international cooperation and hard-core cartels; <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=190&InstrumentPID=186&Lang=en&Book=> and <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/38835329.pdf> accessed 9 March 2017.

[22] Cornelis Canenbely and Michael Rosenthal, 'Co-operation between antitrust authorities in – and outside the EU: what does it mean for multinational corporations?: Part 2' (2005) 26(3) ECLR 178.

[23] See Cejnar and Burgess (n 3); Dabbah (n 2); Malinauskaite (n 6).

[24] Numerous attempts in the past have not been successful in establishing a multilateral treaty on competition. Examples of previous attempts include The Draft Havana Charter, The ECOSOC Draft Convention, General Agreement on Tariffs and Trade (GATT) and the Munich Group Code.

law systems, even if the approach to trying to reach these goals that is adopted in each is different. These goals include protecting citizens from any misuse of market power and ensuring a level playing field across markets. The problem for the EU and other jurisdictions, is that in spite of there being a smorgasbord of competition laws and policies across jurisdictions, and varying approaches used by different competition authorities to enforce competition laws, certain types of agreements and conduct are universally recognised as raising competition law concerns. Hard-core cartels, misuse of market power, certain types of exclusionary conduct and international mergers are some of the concerns that all competition authorities must grapple with.[25] Is it in these areas that the law may benefit from a global approach? Possible solutions to addressing the problem of the clashing of EU law wand the law of third countries with regard to competition law will be examined.

C ADDRESSING JURISDICTIONAL CLASHES OF COMPETITION LAW: POSSIBLE SOLUTIONS

The history of global competition law illustrates the lack of meaningful progress made in agreeing a common set of competition rules. One of the main reasons for the lack of common rules and procedures is that there seems to have been a huge loss of appetite for creating such rules. The positions of countries that have an established system of competition law will undoubtedly hamper any chances of creating a common set of rules. There are considerable gulfs in the approach and application of competition laws between respective jurisdictions.[26] The example of the EU is preferable here as it explains both the positive and the negative side to the application of a common competition law across a number of jurisdictions. EU Member States have a consistent and coordinated economic policy that makes the application of a common competition policy a lot more feasible and realistic as compared to a global economic policy. It should be noted that the various Member States of the EU each have their own domestic competition laws, yet they are required to interpret those laws in a manner that is consistent with

[25] Alec Burnside and Helen Crossley, 'Cooperation in competition: a new era?' (2005) 30(2) ELRev 234.
[26] For example, in the United States, the rules that apply to agreements dealing with resale price maintenance used to be fairly consistent with those that applied in Australia, that is, that agreements that control a resale price are strictly prohibited. Yet the United States has recently changed its view on this, deciding that resale price maintenance agreements should be assessed using a 'rule of reason' approach. See Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (2nd edn, Hart Publishing 2011) 1242-1247.

the primacy of EU law.[27] With respect, it is hard to envisage a similar system being adopted globally.

I Global Competition Law: An Evidence Based Review

With the spread of competition law and policy in recent years, the various legal systems implementing competition policy are evolving at much different rates. In 2007, India introduced its own Competition Act.[28] The Competition Commission of India (CCI) has been reasonably aggressive in its application of the new legislation, having already recorded fines of US $1.13 billion on a number of cement manufacturers and the Cement Manufacturers Association for engaging in cartel activity.[29] Although the judgment was overturned by the Competition Appellate Tribunal (COMPAT) and sent back to the CCI for retrial, the level of the fine imposed by the Indian court demonstrates the appetite some legal systems have in tackling infringements of competition law.[30]

On the contrary, the People's Republic of China introduced its Anti-Monopoly Law in 2008,[31] and its numerous regulators have had a slower start with enforcement as compared to India, with its initial investigations being limited to domestic companies with only comparatively small fines being imposed.[32] It is fair to say that the enforcement procedure used by the Chinese in anti-monopoly cases is both lengthy and complex, certainly when compared to the system in India. The enforcement procedure is spread across three separate administrative bodies: one reviewing mergers;[33] one responsible for anti-competitive agreements; and abuses of dominance;[34] and the final body which is responsible for reviewing price related anti-competitive behaviour.[35]

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[27] See for example, Competition Act 1998 (UK), s.60.
[28] The Competition (Amendment) Act 2007 (India).
[29] *Builders Association of India v Cement Manufacturers' Association and Ors* Case No 29 of 2010 (CCI).
[30] The case was overturned by COMPAT in December 2015 and returned to the CCI on procedural grounds. COMPAT returned the case to the CCI without going into the merits of the conduct of the cement manufacturers.
[31] Anti-Monopoly Law 2008 (China).
[32] See Alison Jones and Brenda Sufrin, '*EU Competition Law: Text, Cases and Materials'* (6th edn, OUP 2014) 1254-1255.
[33] Ministry of Commerce (MOFCOM).
[34] State Administration for Industry and Commerce (SAIC).
[35] National Development and Reform Commission (NDRC).

When one compares the various competition laws from around the world, it becomes obvious how difficult forming a global competition law really is. As demonstrated by the comparison between the EU, India and China, there are clearly considerable differences in how competition law is applied and enforced across jurisdictions. In fact in the EU there are numerous competition laws each applied differently when compared to the other. Another appropriate example of the differences between jurisdictions' laws can be seen in the context of the countries of the Association of South-East Asian Nations (ASEAN). Countries from the ASEAN in 2010 agreed to non-binding Regional Guidelines on Competition Policy.[36] Today Indonesia, Vietnam, Singapore, Malaysia and Thailand have competition laws in place which deal with anti-competitive conduct and misuse of market power.[37] Similar to the EU, the ASEAN countries apply the law differently and there are also significant differences between the laws despite the common policy. For example, Singapore expressly excludes all vertical agreements from its Act (so resale price maintenance agreements are permitted) whilst Indonesia expressly prohibits resale price agreements,[38] and has done so since 2000.[39]

Due to the development of the law varying so significantly from jurisdiction to jurisdiction, the possibility of a global competition law becomes a very unrealistic hope. While it is contended that the development of a global competition law would be most beneficial to businesses, consumers and those applying the law, it is clear from the analysis above that there are a number of barriers to forming a global set of binding rules for competition. The differing levels of development in each jurisdiction are down to a number of factors. Differences in economic and political policies and also the lack of resources in many countries to combat anti-competitive agreements and conduct are major reasons for the lack of uniform development of competition policy across the world. A law that fits in the legal system of the USA and Europe may not be of assistance to countries such as Vietnam or Brazil. Indeed, it may be entirely impossible for the governments of Vietnam or Brazil to implement laws that are suited to the European and American legal systems. Issues that are important in the established regimes may not even be

[36] ASEAN, Regional Guidelines on Competition Policy <http://www.asean.org/storage/images/archive/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf> accessed 9 March 2017.
[37] See Jones and Sufrin (n 32).
[38] Law Concerning Prohibition of Monopolistic Practices and Unfair Business Practices 1999 (Indonesia).
[39] Cejnar and Burgess (n 3).

recognised as an issue for some of the newer regimes. The criminalisation of cartel conduct offers the most appropriate example here. With a lot of the newer regimes only becoming established, they are not tackling this challenge whereas established systems have years of experience in pursuing cartels and their anti-competitive activity.[40] It is worth noting here that much of the opposition to the global competition rules developed by the WTO were from 'small developing countries that feared intrusive competition law enforcement designed by developed countries'.[41] The working paper concluded:

> …parachuting competition laws from developed countries on developing countries would mean that they will not be able to develop competition rules to suit their own legal, economic and political conditions.[42]

With this complex background it becomes increasingly difficult to understand how it would be possible to have a truly global competition law. Obviously it is possible to have a global competition policy that prohibits hard-core cartels as the activities related to hard-core cartels are outlawed by all competition regimes around the world. The issue that arises is when we discuss the process by which those alleged to have formed part of a hard-core cartel would be charged and prosecuted. Would accused parties be arraigned under a global per se offence?[43] If not, what legal tests would be applied? What standards of proof would be applied? At the moment the EU doesn't even have a common standard of proof and the EU is a supposed success story of cooperation in the enforcement of competition law.[44] There is also the issue of legal certainty. Without an independent body applying the law, would there be uniform application across the globe if there were to be a global competition law?

Arguably the area that would benefit most from global competition law is merger control. There are many issues to be considered here. First, there is the question of whether global competition law would cover merger control? Merger control does not exist in every jurisdiction that has

[40] Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2012) 511.
[41] Malinauskaite (n 6).
[42] ibid.
[43] Competition Act offences can be categorized broadly as either per se offences or 'rule of reason' offences. A per se offence is one in which merely engaging in the conduct intentionally is the offence. If a supplier is found to have engaged in the practice, then it has committed the offence. The effect of the conduct is irrelevant.
[44] The law in the UK and Ireland is a lot more severe as compared to the EU law on the enforcement of competition law.

enacted a competition or set of competition acts, which presents a problem when we wish to consider what test should be applied to merger cases. In Europe the test, contained in the EU Merger Regulation, is whether a merger significantly impedes effective competition.[45] A similar test is used in both the US and Australia,[46] however the test used in Turkey and Brazil is two-pronged, assessing whether competition will be substantially lessened and also whether a dominant position will be created after the merger has taken place.[47] Global business would benefit from a global set of rules on merger control. Most large mergers nowadays involve multinational corporations, therefore requiring approval from multiple competition authorities worldwide.[48] A set of rules that spanned the globe would ensure that transaction costs and the burden for undertakings of multiple jurisdictional reviews are both reduced. In short, it would be more efficient for businesses to be able to comply with one set of rules rather than two or three sets of rules which is what they are generally forced to do when completing a cross-jurisdictional merger. A possible solution would be to globally implement the same procedure that the EU uses which is to apply global rules to multi-jurisdictional mergers whilst domestic mergers could be governed by domestic rules.[49]

With regard to the EU and its goal of having competition law, we can see that the discourse and discussion within EU circles is to increase trade with other global actors and make that trade both efficient for business and good for consumers not only in the EU but also all over the globe.[50] The role competition law is attributed in the Treaty on the Functioning of the European Union is important in the discussion on how there can be a global competition law. Introduced by the Treaty of Amsterdam as Article 127(2) EC the Treaty states:

> In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the

[45] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).
[46] The Sherman Antitrust Act (Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1–7) (USA); Competition and Consumer Act 2010 (Australia).
[47] Law No 4054 on the Protection of Competition (Turkey); Brazilian Competition Act - Law 12.529/2011 (Brazil).
[48] Cejnar and Burgess (n 3).
[49] Valerie Demedts, 'International Competition Law Enforcement: Different Means, One Goal?' (2012) 8(3) The Competition Law Review 223.
[50] Burnside and Crossley (n 25); Marek Martyniszyn, 'Inter-Agency Evidence Sharing in Competition Law Enforcement' (2015) 19(1) International Journal of Evidence and Proof 11.

> guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.[51]

These 'policies and activities' also include competition policy. This article should be read in conjunction with Article 3(3) TEU and Protocol 27. Upon the introduction of the Lisbon Treaty the 'shift' of competition policy to Protocol 27 has been an issue of intense debate as competition law/free competition is no longer mentioned in the Treaty articles as an instrument to develop the internal market.[52] One of the other goals of competition law from the point of view of the EU will now be considered in order to ascertain what other ends the EU is interested in pursuing through competition policy and how this may benefit the development of competition law. For the purposes of this article, I will consider one of the objectives that DG Competition pursues as it falls perfectly within the scope of the discussion. Of the so-called 'specific objectives' of DG Competition the 'policy coordination, European Competition Network (ECN) and international cooperation' is an objective that throws up many interesting issues.[53] What DG Competition pursues under the last part of this objective is to promote the international convergence of competition policy and to contribute actively towards this objective by cooperating effectively with the EU's main trading partners and the competition authorities of third countries in a bilateral and multilateral context and by including competition and state aid clauses in Free Trade Agreements (FTAs) to create a level playing field for European and foreign companies.[54]

Therefore the competition policy of the EU does not represent a goal in itself but it serves a wide range of goals in order to strengthen and optimise the internal market structure. The question then arises as to why competition law would constitute a goal as such in the EU's external relations. The answer confirms what was discussed earlier in this section. The purpose of competition law constituting a goal in the external relations of the EU is simply to create a global competition culture, improve international law enforcement and to ensure there is a global level playing field. The benefits to there being a competition element to the EU's external relations

[51] Article 127(2) EC.
[52] Demedts (n 49).
[53] European Commission, *DG Competition Management Plan 2012* <http://ec.europa.eu/competition/publications/annual_management_plan/amp_2012_en.pdf> accessed 9 March 2017.
[54] ibid 35.

considerations are almost identical to the benefits of having a global competition law which were discussed earlier. Although the EU has not said that it is in favour of a global competition law at any stage it could be inferred that the EU is willing to slowly and steadily build towards a greater form of cooperation in competition law. At present the EU in its dealings with third countries seems intent on entering into agreements that can 'provide for better structured and therefore more effective dialogue.'[55] The EU sees a dedicated agreement as being 'a framework within which cooperation can be conducted.'[56] There are numerous legal commentators who strive for these objectives to take priority.[57] It is argued that states need to accept that ensuring their respective competition policies focus not only on the public interests of one state but also on the global market. States should aim particularly in the global market place to ensure that the international community as a whole benefits from the application of respective competition laws. Therefore the application of national laws should not be based solely on the effect those laws will have on the anti-competitive conduct in one domestic market.

One certainty from this discussion on the possibility of there being a global competition law to address the inevitable clashes between the law of the EU and the law of third countries is that there is a number of fundamental questions which need to be resolved before the prospect of a global competition law can gain any real momentum.

II Multilateral Versus Bilateral Cooperation

There has been a varied discussion on multilateral versus bilateral cooperation between the EU and third countries and cooperation between more countries in general. The disagreement is based on how many countries/jurisdictions should be involved in cooperative agreements. Some of the recurring arguments for and against both schools of thought will be considered below. The argument in favour of one generally leads to the disadvantages of the other. Therefore, this author will now consider the bilateral versus multilateral argument.

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[55] European Commission, 'Competition: Vice President Almunia Signs Cooperation Agreement with Russian Competition Authority' 2011 IP/11/278*:* <http://europa.eu/rapid/press-release_IP-11-278_en.htm?locale=en> accessed 9 March 2017.
[56] ibid.
[57] Jörg Philipp Terhechte, *International Competition Enforcement Law between Cooperation and Convergence* (Springer 2011); Martyniszyn (n 50).

1 For Bilateral/Against Multilateral

The obvious benefit of a bilateral agreement is that there are only two parties involved in the negotiations making it easier to come to a conclusion as compared to when there are more than two interested parties negotiating. A discussion involving two parties means it is easier to build up trust and rapport which should ensure any agreement serves both parties interests and ensures there is a mutually beneficial cooperative action between the two. Similarly one can assume that cooperation and interaction will generally be a whole lot more difficult when there are more than two parties involved. This is due to there being a more diverse group of partners involved in the discussion when compared to the bilateral option. It is fair to say that in bilateral negotiations there will be an increased chance that the two parties will share a number of similar viewpoints which can be the basis for an agreement whereas when there are numerous parties negotiating the common viewpoints may be very few therefore making it near impossible to agree on a policy that will benefit all parties in some way.

In a multilateral framework developed and developing countries in regard to their experiences of competition law will have different preferences and goals to pursue. Accordingly they may not be able to come to an agreement as their goals for competition law may be completely separate on certain issues. Taking into account the sensitive nature of competition policy to nation-states, it being closely linked to other policy areas such as industrial policy and trade, and the differing levels of experience with it is foreseeable that in a diverse multilateral framework the chance to reach agreement on certain issues is much smaller than in a bilateral context.[58] There is much disagreement on some fundamental issues such as the goals of competition law and its substantial functions which need to be addressed before there can be any form of a multi-jurisdictional approach to competition law. In terms of a multilateral agreement in the global economy of today anything agreed upon would simply represent the lowest common

[58] Demedts (n 49).

denominator which could have a negative impact on the development of competition policy across the world.[59]

2 For Multilateral/Against Bilateral

When one factors in the diversity of the parties involved in multilateral discussions it becomes clear how there can be a number of advantages to having more parties around the negotiating table. Having more than two parties discussing the possibility of coming to an agreement ensures there is a broader range of opinions and experiences at the table whilst also allowing less developed countries who may not be selected as partners for bilateral cooperation agreements or may have decreased negotiation powers to be involved and express their own point of view and how they want to proceed. Rather than being subject to the rule of many of the 'bigger' players on the world stage smaller and developing competition regimes can have their voice heard. It also presents developing countries the opportunity to organise and coordinate their actions with other developing countries ensuring that the competition programmes in each developing jurisdiction progress at the same pace.[60] Also a move towards a true competition culture can only take place when all parties are involved. This means involving as many countries as possible in discussions as often as possible. If a certain amount of convergence took place, even if it were to be a superficial convergence, the geographical scope would be a lot broader and inclusive than in a bilateral context.[61] In theory, as the global economy becomes increasingly integrated bilateral agreements do encounter their limitations. A proliferation of bilateral agreements in the long term may prove to be counter-effective.[62]

3 Concluding Comments on the Bilateral Versus Multilateral Debate

To conclude the discussion on bilateral versus multilateral agreements bilateral agreements are undertaken with only a limited number of selected partners however multilateral forums also

[59] Eva J Lohse, 'The Meaning of Harmonisation in the Context of European Union Law – a Process in Need of Definition' in Mads Andenæs & Camilla Baasch Anderson (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2012) 291.
[60] This may also constitute a reason for developed countries not to enter into multilateral negotiations. It was one of the causes of the failure to include competition issues into the Doha-round.
[61] Claudio Cocuzza and Massimiliano Montini, 'International Antitrust Cooperation in a Global Economy' (1998) 19(3) European Competition Law Review 156, 159.
[62] A partial solution to this problem could be the creation of networks of bilateral cooperation.

have their drawbacks. A number of regional groupings have limited membership while others have a small geographical scope. Others have substantive limitations for instance WTO and UNCTAD cooperation will only involve competition issues with a direct trade dimension.[63] The negotiation of a single multilateral agreement laying down an agreed set of competition rules presents obvious difficulties illustrated by the failure to achieve one to date. The only multilateral agreement currently in place in relation to competition law is the UNCTAD Set of Principle*s* referred to in Section 2 which is only voluntary.[64] There are over 120 countries that have competition laws in place at present and as was the case when the possibility of a global competition law was discussed there seems to be far too many needs to be accommodated for multilateral treaties to be successful in any meaningful way. Reaching agreement on a global competition law seems to be off the table as does more than two jurisdictions reaching agreement in a multilateral form. As mentioned above, there is a considerable risk that any agreement reached between more than two parties will not serve as much more than the lowest common denominator as countries will be unwilling to surrender responsibility over the more important issues.

There are a number of bilateral agreements in place around the world at present some dealing directly with competition law others indirectly. The EU has cooperation agreements dedicated to competition law with ten countries around the world;[65] the United States has cooperation agreements with twelve countries[66] and Australia has agreements with ten countries.[67] China has entered into cooperation agreements with five countries[68] and India has formal cooperation with the EU, the United States and Australia. Some of the better-known cooperation agreements in the

[63] Cejnar and Burgess (n 3).
[64] Martyn D Taylor, *International Competition Law: A New Dimension for the WTO?* (CUP 2006) 64.
[65] Bosnia and Herzegovina, Brazil, Canada, China, India, Japan, Republic of Korea, Russia, Switzerland and the United States. <http://ec.europa.eu/competition/international/bilateral/index.html> accessed 9 March 2017.
[66] Australia, Brazil, Canada, Chile, China, European Union, Germany, India, Israel, Japan, Mexico, Russia. <http://www.justice.gov/atr/public/international/int-arrangements.html> accessed 9 March 2017.
[67] Canada, China, Fiji, India, New Zealand, Papua New Guinea, Republic of Korea, Taipei, United Kingdom and United States. There are further co-operation agreements in place with other countries on consumer policy issues only eg European Commission. <http://www.accc.gov.au/about-us/international-relations/treaties-agreements> accessed 9 March 2017.
[68] Australia, Brazil, European Commission, Republic of Korea, United Kingdom.

field of competition law are those in place between the EU and the US.[69] Although these agreements were put under heavy pressure and intense criticism they have been a relative success story. The now famous disagreement between the EU and the US highlighted in the mergers of *Boeing/McDonnell Douglas* and *GE/Honeywell* offer reason to be sceptical about the agreement between the US and the EU.[70] The two merger cases are prime examples of why international competition law is necessary, at least in the area of mergers between multinationals.[71]

The flip side of this argument is that there have been numerous cases since the enactment of these agreements between the EU and US where there was no friction between the two parties.[72] Even though bilateral agreements are slightly easier in theory to achieve, from a policy perspective it is not likely that a series of bilateral agreements would be effective in reducing clashes of EU law with the law of third countries. There is an argument that if all countries or the majority of countries that have competition laws negotiate bilateral treaties with one another eventually there will be scope to introduce a global law or a series of sweeping multilateral treaties that incorporate a number of bilateral treaties. This argument falls down when one looks at the complexity of each individual bilateral agreement. They tend to be jurisdiction specific and vary greatly from country to country each depending on various factors such as the economy, political culture and the goals of competition policy. Negotiations between the EU and third countries will inevitably lead to some sort of agreement being reached whether these agreements will reduce clashes between EU law and the law of third countries remains to be seen.

[69] 1991 EU/US Competition Cooperation Agreement; 1998 EU/US Positive Comity Agreement; 2011 EU/US Best Practices on Cooperation in Merger Investigations. <http://ec.europa.eu/competition/international/bilateral/usa.html> accessed 9 March 2017.

[70] Commission Decision of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement Case No IV/M.877 - *Boeing/McDonnell Douglas* Council Regulation (EEC) No 4064/89; Commission Decision of 03/07/2001 declaring a concentration to be incompatible with the common market and the EEA Agreement Case No COMP/M.2220 *General Electric/Honeywell.*

[71] Council Regulation (EEC) No 4064/89; Commission Decision of 03/07/2001 declaring a concentration to be incompatible with the common market and the EEA Agreement Case No COMP/M.2220 *General Electric/Honeywell.*

[72] Whish and Bailey (n 40) 511.

III The Findings of the OECD/ICN Questionnaire: The Case for Enhanced International Cooperation?

The various debates as to how to address the clashes between EU law and the law of third countries have produced many possible solutions. This article has discussed the possibility of having a global competition law and also the prospect of encouraging the use of bilateral and multilateral agreements. Each of these solutions have their merits however they do not get to the crux of the issue which is that some competition law systems are a lot less developed than others. This presents the obvious challenge to advocates of a global competition law and advocates of bilateral/multilateral agreements to detail how they would circumvent the issue of developed versus developing countries and how the differences between the two systems could be reconciled with one set of uniform laws or an agreement of some sort. In short, a set of global rules is far too complex to be achieved anytime soon and the challenges associated with negotiating agreements (even non-binding ones) between governments whether bilateral or multilateral, may make clashes between Union law and the law of third countries more frequent.[73]

Considerable progress has been made in the area of informal cooperation between countries that have competition laws and policies. Much of this progress has been made through the International Competition Network (ICN). The ICN Statement of Achievements 2011-2013 discusses the achievements of the ICN since its foundation in 2001.[74] Similarly, the Organisation for Economic Co-operation and Development (OECD) has released a number of information documents which urge international cooperation. These documents include the OECD Recommendation on international cooperation (1995) and Best Practices on the exchange of information in cartel investigations (2005). The ICN's commitment to international standards of competition law can be seen from its approval of the international enforcement cooperation project in 2012. At the same time, the Competition Committee of the OECD agreed to focus part

[73] Lowe (n 12).
[74] International Competition Network, 'ICN Statement of Achievements 20010 - 2013' (12th Annual Conference of the ICN, Warsaw, 24-26 April 2013) <http://internationalcompetitionnetwork.org/uploads/library/doc905.pdf> accessed 9 March 2017 (ICN Statement).

of its future work on international cooperation in competition enforcement.[75] This commitment to international cooperation between competition law systems was gauged when the ICN Steering Group and the Competition Committee of the OECD joined forces to undertake a comprehensive survey to assess the state of current international cooperation and where there could be improvements going forward. In 2013, the ICN and the OECD released their joint report on International Enforcement Cooperation.[76]

The report highlighted three objectives that should be pursued in striving for international cooperation these were: capacity building, facilitating investigations and avoiding conflicting outcomes.[77] The parties surveyed for the purposes of the report noted that they wished to see future work related to cooperation on cartels and mergers. The report was keen to stress that informal cooperation, through bilateral agreements and confidentiality waivers had worked reasonably well and had been valuable to date on the goal of achieving a less diverse set of competition laws across the globe. The report did also cite a number of issues that are holding back the development of competition law and causing clashes between the laws of separate jurisdictions. For example the lack of willingness of enforcers to cooperate with one another and the lack of effective cooperative relationships in matters of enforcement were highlighted as restricting jurisdictions to cooperate fully in matters of competition law. The restrictions on sharing confidential information were found to be the greatest impediments to cooperation. Even though there are cases where a confidentiality waiver is in place it is not the most ideal way to achieve cooperation if you constantly need to seek the other parties' consent to access confidential documents. Therefore there is a need for closer cooperation on the issue of the exchange of sensitive information between countries. The other key point in the report is the legal limitations based on different legal systems. Dual criminality is highlighted as the obvious example of this problem because criminality requirements affect cooperation between agencies

[75] Terhechte (n 57) 5; Martyniszyn (n 50).
[76] International Competition Network, 'ICN Report on OECD/ICN Questionnaire on International Enforcement Cooperation' <http://www.internationalcompetitionnetwork.org/uploads/library/doc908.pdf> accessed 9 March 2017.
[77] OECD Report (n 1)

operating under different legal regimes for cartel prosecution/investigation.[78] When asked about cooperation and its future development:

> [R]espondents emphasized that (i) they expect to see more international enforcement cooperation in the future, particularly at regional level; (ii) they hoped to see better provisions for international cooperation and for information sharing in particular; and (iii) globalisation is a strong motivation for more cooperation.[79]

The report is clear as to how valuable the transfer of information is for the newer competition agencies around the world particularly when the transfer of information is from an experienced agency. This transfer is facilitated by the ICN and it is of benefit to newer competition agencies as it has helped them develop and learn investigative techniques or 'enhanced thinking' relevant to specific issues and cases. The ICN best practices and guidelines have ensured new competition agencies are avoiding re-inventing the wheel when confronting problems. The vast majority of respondents also noted the importance of the ICN in providing a platform for interaction such as engaging in ICN workshops and working groups.[80] This means that competition authorities are considered to be likely to make more effort in international cooperation if they better understand its benefits. Increasing the level of transparency as to which cases an agency is working on would be of considerable benefit along with the more extensive sharing of experiences as has been discussed previously in this article. Diversification in terms of scope, content, legal value and flexibility can help attain different goals. As discussed above, the lack of ability to exchange confidential information has often been recognised as 'the single most important reason why more and better cooperation doesn't yet occur between national authorities'.[81]

[78] Cejnar and Burges (n 3).
[79] OECD Report (n 1) 22.
[80] ibid.
[81] Diane Wood, Luncheon Speech, 'Is Cooperation Possible?' (1999-2000) 34(1) New England Law Review 103.

D CONCLUSION

The advent of the global economy has presented numerous legal challenges for businesses operating on the international stage. The internet has made the marketplace a much smaller, easily accessible place for consumers all over the world. In fact, the 2013 report of the ICN and the OECD on International Enforcement Cooperation noted that the issues discussed throughout this article could only be the tip of the iceberg.[82] With regard to competition law and particularly the competition law of the EU, there has recently been an increased focus on international mergers and cross-border cartel activity. The number of countries with domestic competition laws has also increased leading to conflicts between EU law and the law of these third countries. These clashes and conflicts as discussed throughout this article present problems for both the EU and third countries in terms of the application of their respective laws. Those who advocate for a global competition law regime will point to the fact that all clashes of EU law and the law of third countries would be reduced if there were to be a global set of binding rules. A common set of rules in theory at least would provide legal certainty and a uniform standard that all undertakings could comply with. The issue with this proposal is that there would be significant difficulty in establishing a common set of rules. Then there is the issue of ensuring that these rules are being applied uniformly and universally in the same way in each jurisdiction. The creation of an international body to oversee those rules is unlikely to proceed as countries are concerned about losing their sovereignty over these issues. The huge increase in international trade and the concomitant lowering of barriers coupled with competition laws around the world developing alongside each other means there may not be not a need for an international competition law. The need for an international competition law is negated by each jurisdiction seeking to tackle the same type of policy objective. Undoubtedly difficulties will continue occurring with the implementation of competition laws particularly when a cartel operates in numerous jurisdictions.

As discussed in this article, the best way to tackle this issue should be through enhanced and improved cooperation in order to achieve a more consistent outcome. This solution also resolves the sovereignty issue; with increased cooperation between jurisdictions there is no need for

[82] OECD Report (n 1) 163; ICN Statement (n 74).

countries to give up control over their own laws. From reading the report from the ICN and the OECD on International Enforcement Cooperation, it is clear that the ICN and OECD have a very important role to play in facilitating the growing scope and scale of competition law across the world. The EU should support the ICN and the OECD in their efforts to introduce a more structured framework for cooperation. Such a framework for international cooperation in matters of competition law and cooperation in the enforcement of competition law globally would ensure clashes between EU law and the law of third countries would be greatly reduced. It is by means of continued international cooperation in matters of competition law that the EU will ensure there are as few clashes as possible between EU law and the law of third countries. It is advisable that the EU proceeds in addressing the problem of the clashing of EU law and the law of third countries by increasing international cooperation with the aid of the ICN and the OECD.

THE REPERCUSSIONS OF CONCUSSION: A CALL FOR REFORM

Máiréad Leen*

A INTRODUCTION

As McCrory and others have posited '[c]oncussion is a brain injury and is defined as a complex pathophysiological process affecting the brain, induced by biomechanical forces.'[1] There are a plethora of definitions for concussion available, from the aforementioned one to vaguer and perhaps misconstrued definitions. For example, the Gaelic Athletic Association (GAA) defines a concussion as:

> [A] brain injury and can be caused by a direct or indirect hit to the player's head or body. Concussion typically results in an immediate onset of short lived signs and symptoms. However, occasionally, the signs and symptoms of concussion may evolve over a number of minutes or hours.[2]

This is a less technical interpretation, intended to educate players, coaches, referees and parents. Unfortunately, there is a misconception that concussions are not serious or that to suffer a concussion, a player must be 'knocked out'; this is mainly due to a lack of education.[3] In fact, only 10% of concussions result in unconsciousness.[4]

This article shall deal with the issue of insufficient regulations of concussion in sports law, with a particular focus on the National Football League (NFL) procedures in comparison to rugby in this jurisdiction. In Ireland, rugby is a fast growing phenomenon, with 153,080 registered players.[5] The long term effects of repeated concussions shall also be analysed, with a focus on minors and the efforts that the various arbitrary sports bodies have made to ensure that major

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[1] Paul McCrory and others, 'Consensus statement on concussion in sport: the 4th International Conference on Concussion in Sport held in Zurich' (BJSM 2012) 1.

[2] GAA, GAA Concussion Awareness Workshop Powerpoint (Ulster GAA, Abbey Street, 20 May 2014) 9, <http://www.carrickemmets.com/images/GAAConcussionAwarenessWorkshop.pptx.pdf> accessed 9 March 2017.

[3] See EIHA concussion <http://eiha.co.uk/eiha-education-program/medical/> accessed 9 March 2017.

[4] Jordan Grafman and Andres M Salazar, *Handbook of Clinical Neurology Traumatic Brain Injury Part 1* (Elsiever 2015).

[5] See IRFU's Relationship with ERC/ Six Nations 3.1 <http://www.irishrugby.ie/save/the_facts.php> accessed 9 March 2017.

reform is implemented. Following a number of deaths which resulted from a total lack of protection of athlete this article will reiterate that the law should play a greater role in certain cases, indicating a failing on behalf of the various sports bodies. This analysis undertakes to disprove the theory that concussions have been adequately regulated for in Ireland.

In the NFL scandal in America, where players suffered from Chronic Traumatic Encephalopathy (CTE), and in the cases of Ben Robinson, Lucas Nevin and Kenny Nuzum in Ireland, the law did not play an important enough role. Rugby will be the focus of this article because there is a higher risk of players suffering from injuries in rugby than other sports.[6]

B THE NFL FAILINGS AND MEDICAL DISCOVERIES

First, the NFL scandal is a major turning point in the law that needs to be examined. The various ailments that players suffer as a result of repeated brain trauma shall also be discussed as this occurred due to lack of regulations to protect the athletes. A brief summary of the relationship between sports and the law is also needed: when and where the law should intervene with sports has always been a subject of public discourse.[7]

Donnellan notes that '[d]ue to the private structure of sporting bodies, the public law has, in the past, been loath to interfere with the determinations of these organisations'.[8] Perhaps this is what accounted for a failure to report sports related injuries in recent times. Another tool which has aided the family of players in relation to litigation is the discovery of CTE by Dr Bennet Omalu; CTE is a 'slowly progressive neurodegenerative disease with pathological tau accumulation at the depths of the sulci in superficial layers of the cortex.'[9] It can only be distinguished by autopsy.[10]

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[6] Kim Bielenberg, 'Crunch game: The Increasing Toughness of Rugby' *The Irish Independent* (Dublin, 8 February 2015) <http://www.independent.ie/sport/rugby/other-rugby/crunch-game-the-increasing-toughness-of-rugby-30968075.html> accessed on 9 March 2017.

[7] Laura Donnellan*, Sport and the Law – A Concise Guide* (Blackhall Publishing 2010).

[8] ibid 7.

[9] Maria Carmela Tartaglia and others, 'Chronic Traumatic Encephalopathy and Other Neurodegenerative Proteinopathies' (2014) 8 Frontiers in Human Neuroscience <http://journal.frontiersin.org/article/10.3389/fnhum.2014.00030/full> accessed on 9 March 2017.

[10] It results from tau protein accumulation in the brain and it causes mood swings, memory loss and psychiatric issues. Repeated blows to the head are undoubtedly linked to CTE.

Over thirty NFL players have been diagnosed with CTE at their premature deaths. Dr Julian Bailes supported Dr Omalu in his discovery, though the NFL attempted to discredit both of them.[11] This scandal opened the floodgates. Before the case of Mike Webster, the NFL, one of the world's most powerful organisations that makes a turnover of $10 billion per annum, claimed that they had never lost a disability case before.[12]

CTE was discovered in Mike Webster's brain during his autopsy. Terry Long, Andre Waters and a litany of other players also had CTE.[13] This resulted in the 88 Plan,[14] with Sylvia Mackey stating that her husband's existence had become: 'a deteriorating, ugly, caregiver-killing, degenerative brain-destroying tragic horror'.[15] The NFL made serious efforts to improve regulations for athletes to decrease concussions. The IRFU have also attempted to reform their rules but they have not done so stringently enough.[16]

Dementia pugilistica or 'punch-drunk' syndrome' is another worrying consequence of repeated head injuries which only too many athletes learned about once it was too late. This condition is a branch of CTE, first discussed by Dr Harrison Martland.[17] Boxers who tended to show aggressive behaviour and suffer from psychiatric symptoms as a result of repeated blows to the head were the focus of the examination.[18] It is submitted that the law should have played a more important role for these athletes as they were unprotected from the consequences of the game.

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[11] As seen in 'The League of Denial' documentary. The NFL ended up compensating over five thousand players up to $765 million in total, which evidently shows that they did not provide an adequate duty of care to their players; Michael Beattie, 'US documentary 'League of Denial' exposes NFL's response to chronic brain trauma' *The Telegraph* (Dublin, 13 October 2013) <http://www.telegraph.co.uk/sport/othersports/americanfootball/10375831/US-documentary-League-of-Denial-exposes-NFLs-response-to-chronic-brain-trauma.html> accessed 9 March 2017.

[12] Jeanne Marie Laskas, 'Concussions in the NFL: Game Brain' (GQ Magazine 14 September 2009) <http://www.gq.com/story/update-game-brain> accessed on 28 February 2017.

[13] ibid.

[14] The 88 Plan gave financial compensation to players who were disabled as a result of repeated concussions.

[15] Linda Carroll and David Rosner, *The Concussion Crisis: Anatomy of a Silent Epidemic* (Simon and Schuster 2011) 236.

[16] Nor have they created a plan (like the aforementioned 88 Plan in the NFL) to support any players who now potentially suffer the long term effects from repeated concussions.

[17] Harrison S Martland, 'Punch Drunk' (1928) 91(15) JAMA 1103.

[18] ibid. This paper discussed the fact that dementia pugilistic was as a result of multiple concussions.

Fifty-three-year-old former NFL player, Jim McMahon asserted he would not have engaged in this sport if he knew the interrelation between concussions and dementia.[19]A 2005 University of North Carolina study by Dr Bailes showed that NFL players are 37% more likely to get Alzheimer's disease than a normal person. Kevin Guskiewicz, an expert in sports medicine, stated in the earlier 2003 report that players who suffered multiple concussions were three times more likely to suffer clinical depression than others.[20] These statistics show how vulnerable athletes are to concussion and how little has been done to educate these players sufficiently.

The first case of CTE in Ireland was diagnosed in Kenny Nuzum, who suffered from psychiatric issues.[21] There seems to be an unspoken culture of undeniable 'machoism' in sports like rugby, setting a bad example for children, and representing poor public policy.[22] Perhaps this is why psychiatric symptoms are taken less seriously in contrast to physical ailments, as reports have shown that players fail to report somatic symptoms, though physical symptoms have a higher rate of being reported.[23] Underreporting is perhaps due to a fear of repercussions. Calvin Johnson famously told the press he suffered a concussion and retracted this statement a month later via a joint statement with the NFL.[24]

[19] Mr McMahon also brought up the fact that he played due to financial pressure, another socio-economic factor that must be considered.

[20] Kevin Guskiewicz and others, 'Association Between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players' (2005) 57(4) Neurosurgery Online 719, <https://www.researchgate.net/publication/7526466_Association_between_Recurrent_Concussion_and_Late-Life_Cognitive_Impairment_in_Retired_Professional_Football_Players> accessed 9 March 2017.

[21] Kenny Nuzum died at only fifty seven.

[22] John Fogarty, Ireland under 20 and Leinster Scrum Coach, speaking on 'Hidden Impact: Rugby and Concussion' (Monday 5 October 2015) spoke of how 'one bang' is often perceived as irrelevant.

[23] Timothy B Meier and others, 'The Underreporting of Self-Reported Symptoms Following Sports-Related Concussion' (2014) 18(5) Journal of Science and Medicine in Sport 507. 'Critically, unlike the cognitive symptom domain, the psychiatric and portions of the somatic domains remain uniquely vulnerable to underreporting.'

[24] Whiff of Cordite, 'Are Concussion Injuries Rugby's Ticking Timebomb?' (*The Irish Post*, 19 April 2013) <http://irishpost.co.uk/are-concussion-injuries-rugbys-ticking-timebomb/> accessed 9 March 2017.

C COMPARISON BETWEEN IRISH AND AMERICAN REGULATIONS

After the death of Kenny Nuzum in 2012, his brain was examined by Professor Michael Farrell, consultant neuropathologist in Beaumont, who requested the expertise of world renowned surgeon Dr Willie Stewart from Glasgow. Speaking on RTÉ's documentary 'Hidden Impact: Rugby and Concussion', he confirmed that Mr Nuzum had died from asphyxia pneumonia caused by CTE, as a result of repetitive head injuries and affirmed it was one of the worst cases that he had ever seen, particularly for the relatively young age of the man.[25] It seems that deaths are the main catalyst for change, as proved by the death of schoolboy Ben Johnson in 2011, a year earlier.

The death of the young teenager publicised the issue of a lack of knowledge in relation to concussions amongst players, referees, coaches and parents. Indeed, at the time, very little was known about Second Impact Syndrome (SIS), a short term effect of concussion.[26] In America, Max Conradt was impacted by SIS after two concussions within eight days of each other.[27] He is now permanently disabled, suffering from memory loss and prone to violent outbursts.[28] The Governor of Oregon, Ted Kulongoski signed Max's Law in 2009 once it was passed in the House and Senate.[29] This resulted in many states in the USA passing Max's law, requiring coaches to be trained annually on how to recognise the symptoms of concussion. It also bans players from returning to play on the same day as they have suffered a suspected concussion.[30]

[25] Brendan Fanning, 'Nuzum's Death Confirms Rugby Has a Crisis on its Hands' *Irish Independent* (Dublin, 1 June 2014) <http://www.independent.ie/sport/rugby/nuzums-death-confirms-rugby-has-a-crisis-on-its-hands-30319582.html> accessed 9 March 2017.
[26] Jonathan C Edwards and Jeffrey D Bodle, 'Causes and Consequences of Sport Concussion' (2014) 42(2) Journal of Law, Medicine and Ethics 128.
[27] He was diagnosed with acute subdural hematoma in 2001 and underwent three brain surgeries.
[28] Laurent Bonczjik, 'NHS Testing Student Athletes for Concussion' (The Newberg Graphic) <http://www.newberg.k12.or.us/nhs/nhs-testing-student-athletes-concussions> accessed 9 March 2017.
[29] David Kracke, 'Max's Law: One Tragedy That Needn't be Repeated' (Oregon Live, 10 June 2009) <http://www.oregonlive.com/opinion/index.ssf/2009/06/maxs_law_one_tragedy_that_need.html> accessed 9 March 2017.
[30] ibid.

Currently, there is no such requirement in Ireland for coaches to receive annual concussion training.[31]

Further, as recognised by Bompadre and others, '[u]ntil 2009, no legislation addressed concussion reporting, documentation, and management'.[32] Lystedt Law also came into force in 2009 as a result of Zackery Lystedt, then aged thirteen, returning to play after an initial concussion in the same match which led to permanent brain damage. Lystedt Law, or some form of it, has been signed into force in more than fifty states.[33] The three main parts of this measure include the education of parents or guardians and athletes about concussion, removal of youth athletes from play if a concussion or head injury is suspected and return to play only with 'written permission to participate from a licensed healthcare provider trained in the management of concussions.'[34] This is a positive progression towards safer sport. Before the measure was passed the amount of reported cases of concussion increased from 419 (9.6%) in 2008-2009, to 579 (11.8%) in 2009-2010.[35]

In comparison, Kenny Nuzem, Ben Johnson and Lucas Neville have been the leading cases in this jurisdiction. Kenny Nuzem died as a result of CTE. Ben Johnson died from Second Impact Syndrome (SIS). Lucas Neville, like Ben Robinson, had been cleared to play after a first suspected concussion, due to inept understanding of concussion by the coaches. For Lucas, however, the two major blows did not occur in the same match. He suffered SIS but unlike Ben, he survived, with devastating consequences due to lack of knowledge by all present on concussions.[36]

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[31] Only short online training appears to apply, for example see <http://www.irishrugby.ie/playingthegame/coaching/mini_rugby_course_stage_one_ltpd.php> accessed 9 March 2017.

[32] Viviana Bompadre and others, 'Washington State's Lystedt Law in Concussion Documentation in Seattle Public High Schools' (2014) 49(4) Journal of Athletic Training 486.

[33] Amanda Cook and others, 'Where Do We Go from Here? An Inside Look into the Development of Georgia's Youth Concussion Law' (2014) 42(3) JLME 284.

[34] Concussion Information <http://assets.ngin.com/attachments/document/0079/2110/CONCUSSION_INFORMATION_15.pdf> accessed 9 March 2017.

[35] Bompadre (n 32) 488.

[36] He successfully sued his school for €2.75 million. A duty of care was owed to this underage player and both St Vincent's Hospital and St Michael's College acted negligently.

D SECOND IMPACT SYNDROME IN CHILDREN

It is affirmed that SIS 'occurs when the brain swells rapidly, and catastrophically, after a person suffers a second concussion before symptoms from an earlier one have subsided.'[37] It is more prevalent in teenagers than in adults, meaning that more regulations are needed to ensure the safety of young players. Dr Willie Stewart has reiterated this point, explaining that 'adolescent brains can swell uncontrollably after a single bang on the head'.[38] What is critical is that the brain may then be susceptible to additional injury. If the referee at Ben's match had a Standardised Concussion Assessment Tool (SCAT) then he would have known immediately that he was suffering from a concussion; unfortunately, he did not have one and knew nothing of its existence, as he later admitted at the trial.[39] This is not the fault of the referee but rather of the system.

As a result of the coroner's findings, Minister for Education in Northern Ireland John O' Dowd wrote to schools informing them of the consequences of concussion and how important the player's welfare is. This also included classroom activities such as quizzes to see if pupils know the signs of concussion.[40] However, as recently as 2013, two years after Ben Robinson's death, SCAT cards were outdated on the International Rugby Board (IRB) website and were not handed out to referees meaning that some referees still do not understand the common symptoms of concussions.[41] 140,000 children play rugby in Ireland; it is a relatively new phenomenon. In the US, there is hard law such as Max's Law and the Lystedt Law; however, in this jurisdiction, there are soft regulations that are not legally binding. This proves that regulations are insufficient to protect athletes from concussions.

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[37] Second Impact Syndrome <http://hitstothehead.org/recognition/second-impact-syndrome/> accessed 9 March 2017.

[38] Andy Bull, 'Death of a Schoolboy: Why Concussion is Rugby Union's Dirty Secret' *The Guardian* (London, 13 December 2013) <http://www.theguardian.com/sport/2013/dec/13/death-of-a-schoolboy-ben-robinson-concussion-rugby-union> accessed 9 March 2017.

[39] ibid. SCAT was created at the Zurich International Consensus Conference for Concussion in Sport as was the definition of concussion.

[40] Lesley-Anne McKeown, 'Schoolchildren Taught How to Recognise Signs of Concussion' *Irish Independent* (Dublin, 30 September 2015) <http://www.independent.ie/life/health-wellbeing/schoolchildren-taught-how-to-recognise-signs-of-concussion-31570970.html> accessed 9 March 2017.

[41] Bull (n 38).

E BETTER GUIDELINES: ATTEMPT AT REFORM

Concussion guidance for the general public was brought out online which follows a 'Return to Play' protocol by World Rugby Concussion Management which developed the motto of 'if in doubt, sit them out'.[42] It provides guidance on how to recognise concussion and a graduated return to play programme, composing of six steps.[43] The Third International Congress on Concussion in Sport created a 'Return to Play' protocol that is also widely used.[44] FIFA have a pocket concussion recognition tool. However, FIFA has not been a leading example of promoting player welfare either; the infamous incident of Christoph Kramer being allowed to continue playing after a suspected concussion caused outrage amongst critics.[45]

Similarly, in the US, the Center for Disease Control (CDC) launched their 'heads up' campaign after statistics proved that '3.8 million sports-related traumatic brain injuries occur in the United States each year'.[46] Their website tells many stories, including section 504 plans that are put in place for students suffering from a temporary or permanent disability that affects their schoolwork as a result of concussion.[47] This is in huge contrast to Lucas Nevin; his school told his mother that it would be better if he did not stay.[48] It is submitted that Ireland should follow the US system. It is only a matter of time before there is an avalanche of litigation by Irish players against the IRFU, similar to the NFL catastrophe, because athletes are not sufficiently protected from concussion due to inadequate regulation.

[42] It was previously known as the International Rugby Board.
[43] World Rugby Concussion Guidance for the General Public.
[44] Edwards and Bodle (n 26) 131.
[45] Gavin Bluett, 'An Update on Concussion in Sport' (Leman Solicitors, 23 October 2014) <http://leman.ie/an-update-on-concussion-in-sport/> accessed 9 March 2017.
[46] Jean A Langlois and others, 'The Epidemiology and Impact of Traumatic Brain Injury: A Brief Overview' (2006) 21(5) Journal of Head Trauma Rehabilitation 375.
[47] Services and accommodations for students may include speech-language therapy, environmental adaptations, curriculum modifications, and behavioural strategies.
[48] 'Student Who Suffered Brain Injury Playing School Rugby had to be Home Schooled' <http://www.independent.ie/irish-news/courts/student-who-suffered-brain-injury-playing-school-rugby-had-to-be-home-schooled-30066949.html> *Irish Independent* (Dublin, 5 March 2014) accessed 9 March 2017.

F THE SIDE-LINE ASSESSMENT

There is also a different approach to the sideline assessment, as Mr McMahon stated that simply 'finger-tracking' was inefficient.[49] The Pitch Side Concussion Assessment is a welcome change, necessitating a medical professional to assess players suspected of suffering from a concussion.[50] Yet it can be argued that it is not sufficiently in force, as seen by George North returning to play last year after suffering a concussion. It is obviously a flawed concussion assessment. It has been seen far too often on live television how global rugby stars continue to play whilst suffering from a concussion; Johnny Sexton being removed from the pitch on a stretcher and Ronan O'Gara admitting that he did not remember most of a match are just a few examples.[51] Brian O'Driscoll, stating that he and other rugby players were merely **'**guinea pigs', at a time when he was considered to be the world's top rugby player.[52] Dr Barry O'Driscoll, a former World Rugby medical advisor said that, in Ireland, the five-minute side-line assessment in 2012 was inappropriate as it is has 'no medical, no scientific, no clinical or rugby basis and no-one else in the world did it'. He claimed it was 'putting damaged brains' on the field.[53]

One report states that 46.6% of concussions go unreported.[54] Of the seventy players who admitted to suffering from concussions in this particular report, none told their coaches.[55] It can be argued that there is an onus on players to protect both themselves and other players from concussions. For example, concussion rates are highest for backs in their tackling position and not all players are aware of this.[56] The case of Brian O'Driscoll being 'spear-tackled' led to

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[49] Jim McMahon Discusses Early Dementia from Concussions <https://www.youtube.com/watch?v=V0L_uQMxQvA> accessed 9 March 2017.

[50] Gordon Fuller and Simon D Kemp 'The International Rugby Board (IRB) Pitch Side Concussion Assessment Trial: a Pilot Test Accuracy Study' (2015) 49(8) British Journal of Sports Medicine 43. It consists of a four part assessment tandem balance test, a symptom assessment and a brief assessment evaluation of mental status.

[51] Ruaidhri O'Connor, 'Rob Kearney: Concussion is the one injury guys take far more seriously' *The Independent* (Dublin, 17 February 2016) <http://www.independent.ie/sport/rugby/rob-kearney-concussion-is-the-one-injury-guys-take-far-more-seriously-34460183.html> accessed 9 March 2017; 'Ronan O'Gara: Rugby dealing with "serious" issue of concussion' (RTÉ News, 15 September 2014) <http://www.rte.ie/sport/rugby/2014/0914/643703-ogara-concussion-a-serious-issue-in-rugby/> accessed 9 March 2017.

[52] Sean Farrell, 'O'Driscoll: Pro rugby players are guinea pigs for concussion study' (The 42, 3 September 2013) <http://www.the42.ie/odriscoll-concussion-1066572-Sep2013/> accessed 9 March 2017.

[53] Hidden Impact (n 22).

[54] Michael R Fraas and others, 'Concussion History and Reporting Rates in Elite Irish Rugby Union Players' (2014) 15(3) Physical Therapy in Sport 136.

[55] ibid 138.

[56] ibid.

criticism that the offending players were not sufficiently punished.[57] This is an example of insufficient sanctions for players and it can result in other players suffering from concussions or other injuries. It is evident that the law and justice were insufficient in this case. The idea of helmets may also help regulate the sport in favour of player welfare, but can also lead to a sense of invincibility and players may suffer even more injuries.[58]

G CONCLUSION

Dr Willie Stewart stated:

> … we're battling concussion on a sport-by-sport basis, region by region, rather than just accepting that the good work in America carried out over the past decade has told us what we need to know: *repeatedly injuring your brain over and over again is not good for some people.* And it's not just a boxer problem, it's not just an American football problem … it's a rugby problem, it's a football problem, it's a global problem.[59]

This article examined the NFL scandal and its shoddy attempt at reform; it also compared and contrasted the IRFU and the NFL. In addition, the impact of CTE and SIS was analysed and it was illustrated how the law has played a trivial part in the adequate protection of players. The differences between the American and the Irish systems were compared. The fact that the Irish Sports Law Conference 2015 dealt with the impacts of concussion is a positive step.[60] However, it is evident that more legislation on concussion is needed in the IRFU and that political measures need to begin so that there are laws surrounding concussion in Ireland instead of rules, particularly in relation to youth rugby. Currently, in women's professional rugby in Ireland, a player can only have three official concussions. Otherwise, they cannot play. This has created a culture of secrecy amongst players,[61] who have suffered concussions but remain quiet, as they do

[57] 'League Would Punish O'Driscoll "Spearing" Accused' *Irish Examiner* (Cork, 27th June 2005) <http://www.irishexaminer.com/breakingnews/sport/league-would-punish-odriscoll-spearing-accused-208929.html> accessed 9 March 2017.
[58] McCrory (n 1) 6.
[59] Fanning (n 25).
[60] Federation of Irish Sport (Irish Sports Law Conference 2015, Dublin 27 August 2015) <http://www.irishsport.ie/irish-sports-law-conference-2015/> accessed 9 March 2017.
[61] Patrick McCarry, 'Almost 50% of Irish Rugby Players Have Hidden a Concussion' (The 42, 28 December 2013) <http://www.the42.ie/rugby-concussion-player-survey-1241570-Dec2013/> accessed 9 March 2017.

not want it to count as a strike against them. This means that injured brains are playing on our fields. The lack of robust law in this area leads this writer to conclude that a landmark death, as seen with Ben Robinson, is inevitable. Yet it will then be too late.

Concussion is still not taken seriously in Irish society.[62] Every weekend, we watch them unfold on our television screens. People automatically think that concussion is synonymous with a lack of consciousness, or a player who cannot continue playing, yet this is not always the case. It is frightening to watch doctors rush onto the pitch, who just as quickly rush off. The accuracy of such a short examination must be scrutinised. This is a game that will result in the death of a player unless legislation is brought in, instead of soft guidelines that are clearly not being followed.

[62] 'There's a culture in rugby where concussion isn't taken as seriously as it should be by the players – in training when someone is left reeling, other players often joke and laugh about it.' Patrick McCarry 'Concussion No Longer a Badge of Honour for Rugby Players' (The 42, 14 December 2013) <http://www.the42.ie/concussion-debate-brian-odriscoll-1219754-Dec2013/?utm_source=thescore> accessed 9 March 2017.

‘AN EAR FOR AN EAR, NOT AN EYE FOR AN EYE’: CRITIQUING THE ICC FOR THE ISRAELI-PALESTINIAN CONFLICT

Jeremie Maurice Bracka*

A INTRODUCTION

The Palestinian Authority’s (PA) recent decision in April 2015, to join the International Criminal Court (ICC) has instigated a fiery debate, exposing tensions between international criminal justice (ICJ) and the Middle East peace process. This article critiques the potential role of the ICC in the Israeli-Palestinian conflict, whether its intervention is politically and legally plausible, and whether it is desirable for the Court to intervene. It will identify some of the obstacles to jurisdiction over Israel’s alleged crimes in Gaza, and the Israeli settlements, concluding that they are not unsubstantial. In short, opening an investigation into the complex situation of Palestine is far from assured. Moreover, it will be contended, that beyond polarised rhetoric or technical legal debate, any meaningful resolution of the conflict will need to include questions of historical responsibility, and account for the existential aspects of both nations’ pasts. Accordingly, it will be submitted that an unofficial bi-national truth commission, based on a model of ‘restorative justice’, may be far better suited to Israelis and Palestinians, than the blunter tool of international ‘retributive justice’.

B APPLICABILITY OF ICJ TO THE ISRAELI-PALESTINIAN CONFLICT

I International Criminal Liability

The relevance of ICJ to the region is best explored through the debate over the wisdom and implications of an ICC intervention. This is because Israelis and Palestinians appear unlikely to agree to an ad-hoc or hybrid tribunal. It is also because the very raison d’être of the ICC was to become a permanent home to adjudicate serious international crimes. No doubt, an international prosecutor could build a solid case against either Israelis or Palestinians, regarding any number of potential breaches of international criminal and humanitarian law. There is no shortage of scholarship and human rights reports discussing alleged breaches of international criminal law (ICL) and international humanitarian law (IHL) on both sides.

On the Israeli front, civilian settlements into the Palestinian territories are commonly cited as war crimes.[1] These charges, in turn, led to attempts by other states to exercise universal jurisdiction over Israeli political and military leaders.[2] Some have even claimed Israel is liable for genocide against the Palestinian people.[3] It is equally not difficult to find reports that Palestinians, (namely Hamas) have also committed serious crimes against Israelis such as using human shields.[4] For example, deliberate rocket fire on Israeli civilians could equally warrant prosecutions.[5] Some commentators have noted that Hamas attacks on civilians might in fact be easier to establish than alleged Israeli war crimes.[6] In sum, there are credible accounts of deliberate and/or indiscriminate attacks on civilians by both Israelis and Palestinians. Such practices, and other alleged breaches could expose officials and militants on both sides to prosecutions for gross human rights violations.

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* LLB (Hons) (Monash), LLM (NYU), PhD (Monash). The author wishes to dedicate the piece to his inspiring Mamma Fela who taught him to think with his heart.

[1] Israeli settlements in the West Bank are widely considered to contravene Art 49(6) of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV). Under Art 8 (2) (b) (viii) of the ICC Statute, such acts would constitute war crimes. See David Forsythe, *The Humanitarians: the International Committee of the Red Cross* (CUP 2005) 73.

[2] For example see: UN General Assembly Meeting Coverage, Experts Suggest Invoking Universal Jurisdiction among Legal Options to Address Israeli Settlements, as International Meeting on Palestine Question Continues, GA/PAL/1346 (8 September 2015).

[3] For example, the late human rights lawyer and Center for Constitutional Rights Board President Michael Ratner charged Israel with committing 'incremental genocide' against the Palestinian people**:** Michael Ratner, 'UN's Investigation of Israel Should Go Beyond War Crimes to Genocide' (The Real News, 27 July 2013) <http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=7 4&jumival=12155> accessed 10 March 2017.

[4] See for example Human Rights Watch Report, 'Rockets from Gaza: Harm to Civilians from Palestinian Armed Groups' <www.hrw.org/report/2009/08/06/rockets-gaza/harm-civilians-palestinian-armed-groups-rocket-attacks> accessed 10 March 2017. The Report stated that, 'Palestinian armed groups unnecessarily placed Palestinian civilians at risk from retaliatory attacks by firing rockets from densely populated areas. Additionally, reports by news media and a nongovernmental organization indicate that in some cases, Palestinian armed groups intentionally hid behind civilians to unlawfully use them as shields to deter Israeli counter-attacks.'

[5]According to several sources deliberate and systematic targeting of Israeli civilians and civilian objects by Palestinian armed groups' rocket attacks violates IHL and amounts to a war crime. The Israeli Intelligence and Terrorism Information Center (ITIC) notes that such attacks contravene the Principle of Distinction, as encapsulated by Art 48 of Additional Protocol I to the Geneva Conventions of 1949. See also Irwin Cotler, 'The UN-Hamas and Alice in Wonderland' *Jerusalem Post* (Jerusalem, 26 July 2014) <http://www.jpost.com/Opinion/Op-Ed-Contributors/The-UN-Hamas-and-Alice-in-Wonderland-368970> and Daniel Benoliel and Ronen Perry, 'Israel, Palestine and the ICC' (2010) 32(1) Michigan Journal of International Law 73, 119-120.

[6] See Linda M Keller, 'The International Criminal Court and Palestine: Part II' (JURIST-Forum, 5 February, 2013) <http://www.jurist.org/forum/2013/02/linda-keller-icc-palestine-part2.php> accessed 10 March 2017.

II Previous ICJ Efforts

Nevertheless, until recently, the prospect of a criminal intervention in the Israeli-Palestinian conflict seemed legally and politically inconceivable. Firstly, neither Israel nor Palestine were state parties to the Rome Statute, and so crimes committed on their territory or by their nationals remained beyond the court's jurisdiction.[7] Further, any attempt by the UN Security Council to refer the conflict to the ICC would have likely been vetoed by the US. Secondly, there were failed attempts to prosecute prominent Israeli political and military officials for alleged war crimes under European criminal law based on universal jurisdiction.[8] As a result of intense geopolitical pressure, these European states have now rolled back their domestic universal jurisdiction legislation.[9] Thus, for a while, it appeared there was no forum capable of addressing the criminality of Israeli and Palestinian conduct.

This is no longer the case. Over the past decade, both the International Court of Justice – with its 2004 Advisory Opinion on the Wall,[10] as well as the ICC, have been confronted with aspects of the conflict. In September 2009, the UN Fact Finding Mission on Gaza (Goldstone Report)[11] was mandated with investigating international legal violations during Operation Cast Lead.[12] The Goldstone Report issued a comprehensive report, accusing both the IDF, and Palestinian militants of war crimes and potential crimes against humanity.[13] Of particular relevance, the

[7] Israel signed the Rome Statute on 31 December 2000, adding a political declaration which clarified that the signature is to be understood as a moral identification with the objectives of the Court, but conveys no intention of becoming a party to its statute. See Alan Baker, 'International Criminal Court Press Briefing (3 January 2001) <http://mfa.gov.il/MFA/MFA-Archive/2001/Pages/International%20Criminal%20Court%20-%20Press%20Briefing%20by%20I.aspx> accessed 10 March 2017.

[8] Universal Jurisdiction led governments to authorise their judicial systems to apprehend and prosecute war criminals, even if they commit acts outside of the state's geographic boundaries. This development reached the public consciousness in relation to the UK's dramatic 1998 detention of Augusto Pinochet, former ruler of Chile. See generally Kenneth C Randall, 'Universal Jurisdiction under International Law' (1988) 66 Texas Law Review 785.

[9] See Richard Bernstein, 'Belgium Rethinks Its Prosecutorial Zeal' *The New York Times* (New York, 1 April 2003); Ben Quinn, 'Former Israeli Minister Tzipi Livni to Visit UK After Change in Arrest Law' *The Guardian* (London, 3 October 2011).

[10] Advisory Opinion of the International Court of Justice, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (9 July 2004) <http://www.icj-cij.org/docket/files/131/1671.pdf> accessed 9 March 2017 (Advisory Opinion on the Wall).

[11] UN Human Rights Council, 'Report of the United Nations Fact Finding Mission on the Gaza Conflict' (25 September 2009) A/HRC/12/48 (Goldstone Report).

[12] Israel's military operation in the Gaza Strip during December 2008-January 2009.

[13] The Goldstone Report engaged in a sweeping review of the violence, as well as the historical underpinnings of the conflict and human rights in the West Bank. See Goldstone Report (n 11).

Report made detailed recommendations about the need for accountability measures, including recourse to the ICC.[14] However, as a result of political pressure, the legal impact of the Report was diminished, and its recommendations were un-instituted. Notably, Israel refused to cooperate, and along with many legal observers sharply rejected the investigation as prejudiced and full of errors.[15] In an event, it remains significant that the UN established such a high profile mission to investigate war crimes in the region. As Richard Falk put it: 'the Goldstone Report broke the sound barrier.'[16]

In a civil society context, the Russell Tribunal on Palestine (a non-governmental 'people's tribunal) convened between November 2010 and September 2014 to investigate Israeli human rights violations.[17] Composed of prominent human rights experts and advocates, the Tribunal collected testimony and deliberated on whether Israel committed war crimes and genocide against the Palestinians. On September 24 2014, a special session was held in Brussels to critically scrutinise Israel's conduct in Gaza during Operation Protective Edge.[18] The jury concluded that some Israeli citizens and leaders may be liable to several instances of incitement to genocide.[19] Unsurprisingly, the legitimacy of this Tribunal is controverted, and has been

[14] The Goldstone Report called on Israel to conduct independent investigations into alleged serious violations of IHL and human rights law during the Gaza conflict. The Report also called on Hamas to initiate genuine and effective proceedings into the many allegations of such violations as well. At the same time, the UN established a Committee of Experts to evaluate Israeli and Palestinian internal investigations. See Goldstone Report (n 11).

[15] For extensive critiques of the Goldstone Report and its application of international law, see Laurie R Blank, 'The Application of IHL in the Goldstone Report: A Critical Commentary' (2009) 12 Yearbook of International Humanitarian Law 347; Chris Jenks and Geoffrey S Corn, 'Siren Song: The Implications of the Goldstone Report on International Criminal Law' (2011) 7 Berkeley Journal of International Law 1.

[16] Richard Falk, 'The Goldstone Report and the Goldstone Retreat' in Chantal Meloni and Gianni Tognoni (eds) *Is there a Court for Gaza? A Test Bench for International Justice* (TMC Asser Press 2012)

[17] The Russell Tribunal on Palestine, an independent human rights organisation founded in 2009, has convened in Barcelona in 2010, London in 2010 and Cape Town in 2011 to present different aspects of the Israeli-Palestinian conflict. In October 2012, the New York City session focused on the possible complicity of the US and the UN with Israeli violations of international law. See Russell Tribunal on Palestine, 'About' <http://www.russelltribunalonpalestine.com/en/about-rtop> accessed 10 March 2017.

[18] The jury heard evidence from eyewitnesses to Israeli attacks during the Gaza war 2014 including journalists Mohammed Omer, Max Blumenthal, David Sheen, Martin Lejeune, Eran Efrati and Paul Mason, as well as surgeons Mads Gilbert, Mohammed Abou Arab, Genocide Expert Paul Behrens, Col Desmond Travers and Ivan Karakashian, Head of Advocacy and Defence for Children International.

[19] 'The cumulative effect of the long-standing regime of collective punishment in Gaza appears to inflict conditions of life calculated to bring about the incremental destruction of the Palestinians as a group in Gaza. The Tribunal emphasises the potential for a regime of persecution to become genocidal in effect.' See the Bertrand Russell Peace Foundation website <http://www.russfound.org/RToP/RToP.htm> accessed 9 March 2017.

challenged by respected members of the international community.[20] Without doubt such efforts to empower and promote civil society, human rights advocacy, Palestinian rights and symbolic justice are noteworthy.[21] Nevertheless, the one-sidedness of this inquiry, and lack of enforcement capacity, means it does not command sufficient legal authority to play a leading role in conflict resolution.[22] Ultimately, the Tribunal's practical impact on the parties is questionable, and its normative value has been eclipsed by progress at the ICC.

III ICC Route

Indeed, recent moves on Palestinian statehood and the PA's engagement with international law, have now paved the way for an ICC intervention. During the Israel-Gaza armed conflict (2008-2009) ('Operation Cast Lead'), the PA lodged a declaration with the ICC Registrar, seeking to recognise the jurisdiction of the Court based on Article 12(3) of the Rome Statute.[23] Whilst on April 3 2012, the Office of the Prosecutor (OTP) declined to continue its preliminary examination because Palestine was not a state; the decision deferred the statehood issue to the 'relevant bodies' at the UN or the ICC Assembly of States.[24] On December 4 2012, the UN

[20] Judge Richard Goldstone, writing in The New York Times in October 2011 dismissed its credibility as an objective tribunal: 'The 'evidence' is going to be one-sided and the members of the 'jury' are critics whose harsh views of Israel are well know'. See Richard Goldstone, 'Israel and the Apartheid Slander' *The New York Times*, (New York, 31 October 2011). According to Richard Falk: 'As with the Nuremberg judgment … the Russell Tribunal process was flawed and can be criticized as one-sided'. Richard Falk, 'Is Israel Guilty of Genocide in Its Assault on Gaza?' (The Nation, 6 October 2014) <www.thenation.com/article/israel-guilty-genocide-its-assault-gaza> accessed 10 March 2017.

[21] 'The Tribunal is also interested in empowering civil society and reinforcing the work of already existing campaigns by providing additional legal arguments and ideas that will assist in future litigation and legal lobbying…the legality of the Russell Tribunal comes from both its absolute powerlessness and its universality'. See Frank Barat and Daniel Machover, 'Chapter 16: The Russell Tribunal on Palestine' in Chantal Meloni and Gianni Tognoni (eds) *Is there a Court for Gaza? A Test Bench for International Justice* (TMC Asser Press 2012) 531.

[22] After all, the Tribunal is in essence a symbolic People's Court which does not have any immediate consequences on the policies or practices of Israel. The Russell Tribunal has been derided by critics as a 'kangaroo court' because its legal conclusions are virtually predetermined, that its authority is self-proclaimed, that it has no control over those accused, that its proceedings are one-sided, and that its capabilities fall far short of enforcement. See Richard Falk, 'War, war crimes, power, and justice: toward a jurisprudence of conscience' (2013) 21(3) Transnational Law & Contemporary Problems 667.

[23] Under Art 12(3) of the Rome Statute, 'a state which is not a Party to this Statute' may lodge a declaration that accepts the jurisdiction of the ICC 'with respect to the crime in question.' The government of Palestine lodged such a declaration on January 22 2009, accepting jurisdiction for 'acts committed on the territory of Palestine since 1 July 2002.' <https://www.icc-cpi.int/nr/rdonlyres/74eee201-0fed-4481-95d4-c8071087102c/279777/20090122palestiniandeclaration2.pdf > accessed 9 March 2017.

[24] The basis for the decision is that: *'*it did not have the authority to determine whether Palestine was a 'state' for the purposes of the Rome Statute, but that it was for the 'relevant bodies' at the United Nations or the ICC Assembly of States Parties to make the legal determination*.'* See Valentina Azarov, 'ICC Jurisdiction in Palestine: Blurring Law

General Assembly passed a resolution, conferring non-member observer-state status on Palestine[25] which arguably amounts to a de facto, or implicit, recognition of statehood.[26]

Having gained this recognition, Palestine joined a number of international treaties[27] and bodies including the Rome Statute. On 1 January 2015, the PA lodged a declaration under Article 12(3) accepting the jurisdiction of the ICC over alleged crimes committed 'in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.'[28] This timeframe indicates the PA's desire for the ICC to investigate alleged crimes committed during the 2014 war in Gaza (Operation Protective Edge). Thus, on 1 April 2015 Palestine became the 123rd state party to the Rome Statute.[29]

On 16 January 2015, the ICC Prosecutor opened a preliminary examination into the situation in Palestine.[30] Specifically, under Article 53(1) of the Rome Statute, the Prosecutor must consider issues of jurisdiction, admissibility and the interests of justice in making her determination to open a formal investigation. Presently, the ICC Prosecutor is conducting a preliminary investigation into both alleged crimes committed during Operation Protective Edge, and other

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and Politics' (JURIST-Forum, 9 April 2012) <http://www.jurist.org/forum/2012/04/valentina-azarov-icc-palestine.php> accessed 9 March 2017.

[25] UNGA Res 67/19 (4 December 2012) UN Doc A/RES/67/19. Notably, some states voting for the resolution 'underscored that statehood could only be achieved through dialogue between the parties implying that Palestine had not yet achieved statehood.' See Linda M Keller, 'The International Criminal Court and Palestine: Part I' (*JURIST*, 29 January 2013) <http://www.jurist.org/forum/2013/01/linda-keller-icc-palestine-part1.php> accessed 9 March 2017.

[26] To some legal scholars, this upgrade is capable of clearing the path for the OTP. The UNGA decided 138- votes in favor to 9 against- to accord to Palestine a 'State' status in the UN. See George Bisharat, 'Why Palestine Should Take Israel to Court in The Hague' *The New York Times* (New York, 29 January 29 2013). Notably, other legal scholars like John Quigley assert that Palestine had already qualified as a state for the purposes of Art 12(3) of the Rome Statute. See John Quigley, 'The Palestine Declaration to the International Criminal Court' (2009) 35 Rutgers Law Record 1.

[27] On 3 and 7 April 2014, the state of Palestine acceded to fourteen international treaties including the Convention on the Rights of the Child (with Optional Protocol), the ICCPR, the ICESCR, the Genocide Convention, the Vienna Convention on the law of treaties, and CAT.

[28] On 2 January 2015, the Government of Palestine acceded to the Rome Statute, which entered into force on 1 April 2015. See ICC Press Release, 'The State of Palestine Accedes to the Rome Statute' (7 January 2015), <https://www.icc-cpi.int/palestine> accessed 10 March 2017.

[29] See ICC Press Release, 'ICC Welcomes Palestine as a new State Party' (1 April 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1103> accessed 10 March 2017.

[30] Upon receipt of a referral or a valid declaration made pursuant to Art 12(3) of the Rome Statute, the Prosecutor, in accordance with Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor, (OTP) and as a matter of policy and practice, opens a preliminary examination of the situation at hand. See ICC Press Release, 'The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine' (16 January 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083> accessed 10 March 2017.

alleged crimes, primarily the settlements. The preliminary examination is designed, as per Article 15 of the Rome Statute to 'assess whether a situation warrants investigation'. In sum, the Pre-Trial Chamber must determine whether there is a reasonable basis to proceed, and whether the case falls within the Court's jurisdiction before authorising a formal investigation.[31]

C LEGAL AND THEORETICAL HURDLES TO THE ICC

I Complementarity

Accordingly, certain procedural preconditions exist for exercising ICC jurisdiction.[32] On this front, the Court faces steep legal and evidentiary hurdles. Firstly, even if the Prosecutor opened a formal investigation, the ICC must establish that Israeli/ Palestinian national courts are unwilling or genuinely unable to address alleged war crimes.[33] As a Court of last resort, the principle of complementarity is firmly embedded into the Rome Statute under Article 17.

Arguably, Israel has a track record of conducting investigations of alleged war crimes, and might undertake more if an ICC intervention were imminent. In the aftermath of Operation Cast Lead, the Israeli military ordered five cumulative legal inquiries into Israeli warfare in Gaza (2009).[34] In 2010, the government adopted the Turkel Commission's recommendations to enhance military investigations of credible war crimes charges.[35] Ultimately, Israel's sophisticated justice system would make it difficult to impeach national investigations. Israel is widely regarded as a state governed by the rule of law with effective and independent investigative mechanisms.[36]

[31] See Rome Statute, Arts 15(4) and 53 (1).

[32] Should the Prosecutor decide to open an investigation proprio motu, then under Art 15(3) of the Rome Statute, the issue of jurisdiction will be determined by a pre-trial chamber. Under Art 17 of the Rome Statute, the issue of admissibility is determined by two criteria: gravity and complementarity.

[33] The Preamble to the Rome Statute explicitly provides that the ICC is 'complementary to national criminal jurisdictions' and 'is not intended to supersede their jurisdiction'. As such, the Court's jurisdiction will only be called into effect exceptionally, where national authorities are unwilling or unable to hold genuine proceedings.

[34] Operation Cast Lead was subject to an independent Israeli Commission of Inquiry headed by a former Supreme Court justice (The Turkel Commission) and by a Panel of Inquiry established by the UN Secretary General (The Palmer Panel). See Philip Willams, 'Israeli Military Orders Inquiry into the Recent Gaza Conflict' (The World Today, 12 March 2009) <http://www.abc.net.au/worldtoday/> accessed 9 March 2017.

[35] In 2010, The Turkel Commission was established by the Israeli Government to investigate the legality of the Gaza flotilla raid, and the Blockade of Gaza. See <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> accessed 9 March 2017.

[36] The ICC gives precedence to domestic courts operating in good faith and genuine effort. Based on Art 17(2), the OTP would face an uphill battle to try to prove bad faith ('unwillingness' in the language of the Statute) on the part of Israel. According to Dershowitz: '[i]f it were to be ruled that the Israeli legal system does not provide the required

Nevertheless, Israelis might still be exposed to prosecution for future settlement activity in the Palestinian territories. [37] Given state policy, it seems inconceivable that Israel would investigate or prosecute its own leadership for settlement involvement. In this regard, complementarity offers limited protection.[38] Either way, the Rome Statute framework provides Israel ample opportunities to present information about alleged crimes committed after June 2014, and the existence of genuine investigations.[39]

On the Palestinian side, considerations of complementarity also apply. Thus, the Palestinian Independent National Committee was established in July 2015 to investigate war crimes during the 2014 Gaza Conflict. The PA might similarly mount a case that it is willing and able to investigate and prosecute crimes by Palestinians, though this would be harder to prove. Even assuming Palestinians had the legal mechanisms to do so, such a move '…could lead to immense political friction if the PA investigates the Hamas leadership for rocket attacks against Israel.' [40] In sum, complementarity ultimately offers Israelis and Palestinians a measure of insularity from the ICC.

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complementarity to deny the ICC institution jurisdiction as "a court of last resort," then no nation would pass that test**'.** Alan M Dershowitz, 'Response to My Friend Luis Moreno Ocampo on the ICC and the Palestinian Situation' (Just Security, 20 January 2015) <https://www.justsecurity.org/19248/response-friend-luis-moreno-ocampo-international-criminal-court-palestinian-situation/> accessed 9 March 2017.

[37] Under Art 8(2)(b)(viii) of the Rome Statute, '[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies' is a war crime. In 2004, the International Court of Justice's Advisory Opinion on the Wall concluded that by establishing settlements, Israel had breached its international obligations and could not rely on self-defense or necessity. See Advisory Opinion on the Wall (n 10) [119]-[120].

[38] Israeli Courts have heard cases involving settlement growth and construction, often imposing limits derived from IHL. Nevertheless, they are yet to rule on the legality of the settlements per se or on the legal status of the Palestinian territories. See David Luban, Some Legal Questions (Just Security, 2 January 2015) <https://www.justsecurity.org/18817/palestine-icc-legal-questions> accessed 9 March 2017.

[39] See Luis Moreno Ocampo, 'Palestine's Two Cards: A Commitment to Legality and an Invitation to Stop Crimes' (Just Security, 12 January 2015) <https://www.justsecurity.org/19046/palestines-cards-commitment-legality-invitation-stop-crimes/> accessed 9 March 2017.

[40] According to Luban, under such circumstances, 'if Hamas stonewalls the investigation, the ICC might find that Palestine is unable to fulfill its responsibilities, in much the same way that it found Libya unable to prosecute Saif Gaddafi'; Luban (n 38).

II 'Gravity'

ICC practice also entails an evaluation of the criterion of 'gravity'. Article 5 limits the Court's jurisdiction to 'the most serious crimes of concern to the international community as a whole.' [41] Arguably, Israelis and Palestinians have both committed serious violations of IHL that could amount to war crimes. For example, indiscriminate targeting of civilians might very well satisfy the gravity definition.[42] This appears to be supported by the findings of the UNHCR Commission's Report on Operation Protective Edge in Gaza (2014). [43]

Nevertheless, the scale of atrocities must be quite extensive before the ICC Prosecutor agrees to proceed.[44] According to the OTP, the basic inquiry is a product of the number of victims and the degree of brutality.[45] Given that typical ICC cases involve thousands of killed and injured, it is unclear whether alleged rocket attacks on Israel, and/or aerial bombardment of Palestinians, would be regarded as sufficiently grave.[46] Indeed, in 2006, the Prosecutor dismissed a case involving twelve unlawful killings by British soldiers in Iraq.[47] The Prosecutor also declined an investigation into the Gaza Flotilla (Mavi Marmara Incident) (2010) because it lacked the requisite 'gravity'. [48] Moreover, the gravity criterion is rather elusive, and recent practice

[41] Any crime within ICC jurisdiction is serious, but the Statute requires an additional consideration of gravity. Art 17(1)(d) clarifies that the ICC shall rule a case inadmissible if it is not 'of sufficient gravity to justify further action by the Court'.

[42] Kontorovich Eugene, 'When Gravity Fails: Israeli Settlements and the Admissibility at the ICC' (2014) 47(3) Israel Law Review 379, 381.

[43] 'In relation to this latest round of violence, which resulted in an unprecedented number of casualties, the commission was able to gather substantial information pointing to serious violations of IHL and international human rights law by Israel and by Palestinian armed groups. In some cases, these violations may amount to war crimes'. See UNHRC, 'Report of the Independent Commission of Inquiry' (25 June 2015) [668].

[44] See Gideon Boas and others, *International Criminal Procedure* (CUP 2011) 85.

[45] ICC Office of the Prosecutor, 'Policy Paper on Preliminary Examinations' (November 2013) [61] <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 9 March 2017.

[46] 'Gravity assessment, as it seems, begs a proper comparative assessment of events during any conflict, and the Israel-Gaza conflict in particular, both internationally and among the parties involved in the particular cycle of violence'; Benoliel and Perry (n 5) 120.

[47] In his reply, regarding suspected war crimes in the Iraq war, Chief Prosecutor Moreno-Ocampo concluded: 'the available information did not provide a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed with regard to the targeting of civilians or clearly excessive attacks'. See ICC, Office of the Prosecutor, 'Letter dated 9 February 2006' (9 February 2006).

[48] On 6 November 2014, the Prosecutor Fatou Bensouda closed the Preliminary Examination into the Gaza Flotilla (Mavi Marmara) incident and referred it to the ICC by the Union of the Comoros in May 2013. She said war crimes may have been committed on the Mavi Marmara, but ruled the case was not serious enough to merit an ICC probe. The Incident resulted in 15 deaths and seemed to differ from the typical case that involves thousands of killed or injured.

demonstrates only partial consistency in application.[49] Thus, as Schabas concludes, there are no assurances that indiscriminate use of weapons in the Israeli-Palestinian context will meet the gravity threshold for prosecution.[50]

Regarding settlements**,** it is even less likely that the transfer of Israeli civilians would qualify. Firstly, settlements are not a 'grave breach' under the Rome Statute.[51]As Kontorovich observes: '[t]he OTP has never investigated a situation … defined primarily by non-grave breaches of Geneva norms, or that do not involve the killing, wounding or physical coercion of masses of people.'[52] Indeed, the 'transfer' crime does not involve murder or direct physical violence.[53] Secondly, the ICC would at best have jurisdiction over settlement activity from 2014, (the date of Palestine's acceptance of jurisdiction). Thus, it would be a tall order to demonstrate that expansion of settlements during this time frame is sufficiently grave to warrant prosecution.[54] Ultimately, it is unclear whether a political campaign of simply facilitating civilian migration (albeit in breach of IHL) meets the jurisdictional threshold.

[49] According to Kontorovitch: 'Discussing the gravity requirement is an even more speculative endeavour than most ICC analysis. The ICC Statute and its drafting history offer no definition of 'gravity'. The Court has never defined it, and in almost all the situations before the Court the gravity of the crimes has been manifest, involving situations of mass atrocity as contemplated by the Preamble'; Kontorovich (n 42).

[50] Professor William Schabas quoted from a discussion at the American Society of International Law (ASIL), Andrew Blandford, 'International Law and the Future of the Israeli-Palestinian Conflict' (ASIL, 10 April 2015) <https://www.asil.org/blogs/international-law-and-future-israeli-palestinian-conflict> accessed 9 March 2017.

[51] As discussed, Israeli settlements appear to violate Art 8(2)(b)(viii) of the Rome Statute, which prohibits '[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies'. The language is lifted almost verbatim from Art 49(6) of the Geneva Convention (IV). The provision proved to be controversial at the Rome Conference, as Arab states wanted language that would clearly apply to Israeli settlements, which, after some negotiation, led to the phrase 'directly or indirectly' being added to the Geneva-based language.

[52] 'No modern international criminal tribunal has ever prosecuted crimes that do not involve systematic violence and physical coercion'; Kontorovitch (n 49) 379

[53] Given that the ICC's gravity measure involves the number of persons killed, for settlements it would be zero; ibid 389. See Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010).

[54] According to the OTP's guidelines, the 'scale' component of gravity has a temporal component. '[L]ow intensity' crimes over a long period apparently are less grave than brief, intense eruptions.' See ICC Office of the Prosecutor (n 45) [62]. In recent years, somewhere between three and five thousand Israeli Jews have migrated into the West Bank annually, the vast majority of population growth is from births, which are much harder to fit into the 'deport or transfer' category of crime.

III 'Interests of Justice'

A third criterion lies within the 'interests of justice'. Article 53 of the Rome Statute allows the Prosecutor to decline a case when it would not be in 'the interests of justice' to proceed. Arguably, an ICC investigation or prosecution might be justified to overcome the impasse between Israelis and Palestinians, to reject violence and to offer human rights protection.[55] Nevertheless, it could also be contended that international prosecutions would simply exacerbate tensions between the parties, interfere with non-legal political considerations, and ultimately undermine the 'interests of justice'.[56] Again, ICC practice reveals wide discretionary usage of criteria, specifically regarding the role and interest in peace negotiations.[57]

IV Palestinian Statehood and Territory

There are other potential obstacles to ICC jurisdiction. Firstly, the question of whether Palestine qualifies as a 'State',[58] a precondition to joining the ICC, remains contested.[59] Although the OTP would likely treat the GA vote as conclusive, the ICC has never formally ruled on this issue.[60] Indeed, academics,[61] and two non-State Parties to the Rome Statute (Israel and the US), and one

[55] As noted by the spokesperson of the UN High Commissioner for Human Rights: 'This accession […] is a significant step towards enhancing the promotion and protection of human rights in Palestine.' See Chantal Meloni, 'On Palestinian, International law and the ICC', Justice in Conflict, 31 March 2015 <https://justiceinconflict.org/2015/03/31/on-palestine-international-law-and-the-international-criminal-court/> accessed 9 March 2017.

[56] 'In the event that the Oslo peace process is hampered due to single-sidedness vis-a-vis Israel … one could argue that this is not only contrary to peace but also contrary to justice.' See Benoliel and Perry (n 5) 122. According to Israel's MFA, the Palestinian decision to initiate proceedings at the ICC, is 'a political, hypocritical and cynical manoeuver. [It] contradicts the core purposes for which the Court was founded and will bring about the destructive politicization of the Court as well as undermine its standing.' See <http://mfa.gov.il/MFA/PressRoom/2015/Pages/Palestinian-Authority-joins-the-ICC-Israel-response-1-Apr-2015.aspx> accessed 9 March 2017.

[57] The ICC drafters' contemplation of the peace-justice tension refers to a 'delicate balance between the search for international justice … and the need for the maintenance of international peace and security,' within the UN Charter context. See Roy S Lee, 'The Rome Conference and Its Contributions to International Law' in Roy S Lee (ed), *The ICC: The Making of the Rome Statute* (Springer 1999) 35. See also Benoliel and Perry (n 5) 120.

[58] The Palestinian claim to statehood is grounded in constitutive and declarative theories of public international law. The debate over Palestinian statehood is one of the more complex in international law, and is beyond the scope of this article.

[59] Eugene Kontorovich, 'Israel/Palestine – The ICC's Uncharted "Territory"' (2013)11 Journal of International Criminal Justice 979, 982.

[60] Luban (n 38). The official position of the ICC on Palestinian statehood remains unknown.

[61] For example, Luban notes that 'the Palestinian effort to bootstrap itself into statehood by joining international organisations backhandedly concedes that its statehood claim needs buttressing. The UN Security Council refused a 2012 Palestinian request to become a member of the UN'; ibid. According to Dershowitz, 'the recent symbolic

State Party (Canada) continue to query whether Palestine's status under international law sufficiently satisfies the statehood required for accession.[62] Presumably, the Court's Pre-Trial Chamber would address this issue if it were raised as a challenge to its jurisdiction.

Moreover, even if Palestine were a State, it may still be contended that the alleged criminal activity does not take place 'on the territory' of Palestine.[63] For example, the absence of Palestine's agreed borders might preclude the ICC from exercising jurisdiction over the Israeli settlements.[64] Israel could also argue that the Oslo agreements exclude Israelis from Palestinian jurisdiction, and as a consequence from the ICC's authority.[65] Whether these somewhat formalistic arguments are mere technicalities the Court will dismiss remains to be seen.

Ultimately, the obstacles to jurisdiction over Israel's alleged crimes in Gaza, and the settlements are formidable. So too are the cooperation and other non-substantive barriers an ICC intervention would face. Suffice it to say, opening an investigation into the complex situation of Palestine is far from assured. Moreover, beyond scholastic debates, the prospect of the ICC pushing ahead with prosecutions of Israelis and/or Palestinian seems unlikely. According to Heller, the OTP is institutionally over-stretched, and politically '…has shown very little desire to wade into situations where major superpowers are watching their behavior'.[66] In sum, it might be worth

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actions of several parliaments and the UN General Assembly do not change the legal status of what was correctly deemed a non-state as recently as 2012'; See Dershowitz (n 36).

[62] See Blandford (n 50).

[63] Extensive, and in some areas exclusive Israeli authority over the West Bank means that Palestine does not exercise all the functions of a State in the territories. One objection to the ICC exercising jurisdiction by reference to Palestine as the State on whose territory the alleged crime had been committed is that by doing so it would essentially become a 'border-determination body'. It is argued that such a role would exceed the Court's mandate as envisaged by the drafters, namely to determine the guilt of individuals. See Kontorovich (n 59) 982. But for a contrary view see Yaël Ronen, 'Israel, Palestine and the ICC – Territory Uncharted but not Unknown' (2014) 12 Journal of International Criminal Justice 7

[64] 'Israel could allege that settlements are not in Palestine but rather in disputed territories, and additionally that the alleged crimes were eventually committed in the past by those who decided the settlements'; Ocampo (n 39).

[65] The ICC operates on criminal jurisdiction borrowed from its members; but Palestine might lack jurisdiction over Israelis in the Palestinian territories to delegate to the ICC. Under Oslo II (1995), 'Israel has sole criminal jurisdiction over … offenses committed in the Territories by Israelis'; (Annex IV, art. 1(2)). Palestine *does* have criminal jurisdiction over Palestinians and non-Israelis in Areas A and B. (Israel has full criminal jurisdiction over Area C.) However, crimes committed by Israelis in Palestinian territory are, under Oslo, solely Israel's to investigate and try. See Luban (n 38)

[66] In Heller's words: 'In Afghanistan, where the US is potentially subject to the Court's jurisdiction, the preliminary examination is now in its 8th year. In Georgia, where Russia is obviously sitting on the sidelines, the preliminary examination is now in its 6th year. So the OTP knows full well how to slow-walk a preliminary examination into

conceding that for now, ICJ has a limited role to play in addressing the Israeli-Palestinian conflict.

V Normative and Philosophical Objections to ICJ

Nevertheless, many welcome the potential contribution of international prosecutions to the Israeli-Palestinian conflict. According to Bisharat, invoking ICC jurisdiction would end '…Israeli impunity … promote peace in the Middle East, and help uphold the integrity of international law'.[67] Similarly, King-Irani favours a legal route for war crimes in Israel/Palestine.[68] Another legal commentator claims that an ICC referral '…would allow for an expert determination of the merits of the culaims of atrocities… unpunished crimes stoke the fires of conflict and make a lasting peace in the Middle East less likely'.[69] Indeed, the orthodoxy of 'moral transformation' and 'norm projection'[70] are firmly embedded into the criminal justice paradigm. Many scholars extol the didactic virtues of international prosecutions to dispense justice and '…enable the community ritually to affirm its guiding principles'.[71]

It is worth noting however, that ICJ faces several normative and theoretical objections to its involvement with the conflict. Firstly, even if the OTP overcame the legal barriers discussed above, and commenced a criminal investigation, the ICC could only ever (at best) exercise jurisdiction over crimes occurring since 2014. Thus, any foray by the ICC into the dispute would

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oblivion, and that seems to be precisely want it wants to do when superpowers are involved. And very few superpowers are neutral with regard to the situation in Palestine.' Kevin Jon Heller, 'The ICC in Palestine: Be Careful What You Wish For' (Justice in Conflict, 2 April 2015) <https://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for/> accessed 10 March 2017.

[67] Bisharat (n 26).

[68] Lauri King-Irani, 'To Reconcile, or to be Reconciled? Agency, Accountability, and Law in Middle-Eastern Conflicts' (2004-5) 28 Hastings International and Comparative Law Review 369, 386.

[69] Julian Ensbey, 'Israel, Palestine and the ICC' (The Comment Factory, 19 January 2009).

[70] According to Luban 'International criminal law uses trials, punishments and forms of law to project a radically different set of norms, one that reclassifies political violence from the domain of the sacred to the domain of ordinary thuggery'; David Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11 Journal of International Criminal Justice 510.

[71] Martii Koskenniemi, 'Between Impunity and Show Trials' (2002) 1 *Max Planck Yearbook of United Nations Law* 10; Mark Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre' (1995-6) 144 University of Pennsylvania Law Review 463; Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (Yale University Press 2001) 6.

neglect the vast majority of alleged criminal violations committed over the course of the conflict, and this 'would be a paltry response to the decades-long conflict and its consequences'.[72]

Secondly, judicial proceedings are often blunt truth-telling instruments, which risk distorting the complexity, and sensitive historical dimension of conflict. Indeed, trials tend to mask contested versions of history, and are ultimately entrapped in radically selective and symbolic justice.[73] Which crimes in the six-decade of the Israeli-Palestinian history should be prosecuted? Arguably the historical dimensions of almost every aspect of the conflict, are far too important and axiomatic to collective identity, to be reduced to mere evidentiary inquiry or technical legalistic definitions.[74]

Who might be prosecuted free from the taint of foreign politicisation or the sense of scapegoating? Indeed, whether an Israeli or a Palestinian is indicted, it would be difficult to imagine garnering the requisite public support of either side to establish the moral legitimacy of international proceedings. Both Israelis and Palestinians are equally cynical about the potential misuse of international law for political ends, a strategy known as 'law-fare.'[75] It's worth noting that previous international criminal investigations of the conflict have been dismissed as biased and lacking credibility.[76] Indeed, why ought we to assume that a verdict from the lofty chambers in The Hague will do anything for either side's accounting of the past or collective memory? In truth, there may be a profound disjuncture between the experience of international and domestic 'truths' especially when the parties themselves are not directly involved in the transitional

[72] Ariel Meyerstein, 'Transitional Justice and Post-conflict Israel/Palestine: Assessing the Applicability of the Truth Commission Paradigm' (2006-2007) 38 Case Western Reserve Journal of International Law 281, 310.

[73] According to Osiel, war trials are conceived not simply as individual prosecutions, but as radically symbolic 'history lessons' or 'morality plays', in which one version of the past is always favored over another. Osiel (n 71) 505. See also Lawrence McNamara, 'History, Memory and Judgment: Holocaust denial, The History Wars and Law's Problem with the Past' (2004) 26 Sydney Law Review 353. According to McNamara: 'judicialisation of the past' renders collective memory liable to the distortion of both law and history.

[74] Scholars note the limitations of legal paradigms, and the disjuncture between law and history when it comes to reckoning with large-scale political events through trials. See Brian Havel, 'In Search of a Theory of Public Memory: The State, the Individual, and Marcel Proust' (2005) 80 Indiana Law Journal 605; Osiel (n 71) 661.

[75] For example, Linda Keller writes: 'Palestinian officials may reopen the OTP's preliminary examination of international crimes in Palestine, if only to strengthen their hand against continued Israeli settlement activity (a strategy known as 'lawfare'').' Keller (n 25).

[76] As discussed, Israel refused to cooperate with the Goldstone Report, and also sharply rejected it as prejudiced and full of errors. The militant Islamic group Hamas also initially dismissed some of the Report's findings.

process.[77] Despite the normative value of criminal justice, it is therefore arguable that issuing ICC indictments against senior Israeli or Palestinian officials would only antagonise the parties, or even serve to undermine what are already strained peace negotiations.[78]

Moreover, the multi-dimensional aspect of responsibility for every event in the conflict, from Palestinian displacement, terrorism to military occupation defies any singular allocation of culpability or individuation of guilt. [79] To be clear, an ICC warrant is issued in the name of a particular person. It imposes individual, rather than collective liability. Commonly, those who end up on trial are ironically not the most responsible but the most 'available'.[80] Thus, international criminal justice is radically selective, and may risk granting 'de facto amnesty' to those who dodge the prosecutorial bullet.[81] In this light, it is arguable that truth commissions may be more effective than trials, by focusing on institutions and patterns of behavior rather than on a handful of 'big fish'.[82] Ultimately, it might be conceded that individual criminal justice is simply ill equipped to deal with the complex 'grey-zone of complicity' in the Israel-Palestinian context, which is spread so diffusively throughout both societies.[83] There is also the question of

[77] For example, the ICTY's Milosevic trial demonstrated the inherent problem with a tribunal's account of history, and how it might produce the contrary effect on the local population. Far from vindicating the prosecution's version of the past, the Serbian broadcasting of the Milosevic trial provoked a nationalist backlash. Following the trial, general elections saw a boost in Serbian support for Milosevic's political party. Maya Steinitz, 'The Milosevic Trial Live! – An Iconical Analysis of International Law's Claim of Legitimate Authority' (2005) 3(1) Journal of International Criminal Justice 103, 103.

[78] The ICC has been accused of indirectly undermining peace negotiations. 'Where a leading figure in a conflict – such as Joseph Kony in Uganda or Omar Al-Bashir in Sudan is indicted – peace may become a less attractive option to that individual and his or her supporters.' Ensbey n (69). Notably, pursuant to Art 16 of the Rome Statute, the UN Security Council could ask the ICC to suspend investigation or prosecution if it is considered a threat to international peace and security.

[79] The rather intricate nature of the administration of the Palestinian Territories is reflected in the complexity of the applicable laws that would defy reduction to criminal legal proceedings. See Kathleen Cavanaugh, 'Selective Justice: The Case of Israel and the Occupied Territories' (2002-3) 26 Fordham International Law Journal 934, 942.

[80]Alex Boraine, 'Truth and Reconciliation in South Africa: The Third Way' in Robert Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press 2000).

[81] Notably, using political 'big-wigs' as the main candidates for justice, comes with a historical price tag. It often means turning a blind-eye to the vast number of agents and low-level collaborators implicated in past crimes. Thus, what is lauded as individual justice may in fact be a de facto way of exculpating many with blood on their hands. . Donald Shriver, 'Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?'(2001) 16 Journal of Law and Religion 1, 7; Gary Jonathan, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000) 300.

[82] Martha Minow, 'The Hope for Healing: What can Truth Commissions do?' in Robert Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press 2000).

[83] Meyerstein (n 72) 313-314.

feasibility[84] in placing current Israeli military and political officials on trial, or prosecuting the military wing of Hamas for past war crimes when they are dead every few years.[85]

Above all else, by focusing on retributive justice, international tribunals risk favoring the moral culpability of the accused, over the dignity of victims.[86] Indeed, criminal judicial proceedings, with their punitive focus and narrow evidentiary paradigm, are notorious for excluding victims from telling the 'whole story'.[87] 'Just the facts ma'am' is a telling legal adage. Complicated by large-scale political events, witnesses to trauma inevitably disagree, memories fade and an intimidating cross-examination discredits even the most reliable witness.[88] In a conflict, like Israel-Palestine, with mutual legacies of human rights abuse and victimhood, no transitional measure could withstand the threat of double-victimisation for either population.

Notwithstanding the value of moral condemnation, criminal trials founded on retributive desire, might ultimately install negative past-orientated history into collective memory that excludes victims. Even once a perpetrator is brought to justice, trials are not geared to promote reconciliatory 'truths' or generate closure among victims that their stories were 'heard'. Conversely, under a 'restorative justice' model, 'the sharp 'truth' it means to uncover comes wrapped in a surgeon's intention to heal, not in a judge's threat to punish.'[89] From this standpoint, it is submitted that civil society projects, with broader transitional justice goals and modes of inquiry, might be more hospitable to validating the legitimacy of narratives, and addressing collective notions of responsibility so central to the Israeli/Palestinian struggle.

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[84] Mathew Weiner notes that in Israel/Palestine: 'Criminal trials are impractical because, much like in the Chilean or El Salvadorian contexts, those most likely to be accused of crimes were the people most likely to hold power'; Mathew Weiner, 'Defeating Hatred With Truth: An Argument in Support of a Truth Commission as part of the solution to Israel/Palestine' (2005-2006) 38 Connecticut Law Review 123, 153

[85] For example, it is likely that most of the Hamas leaders responsible for rocket attacks against Israel during the 2009 Operation Cast Lead are probably dead (ie Ahmed Jabari).

[86] Generally speaking, international tribunals establish 'truth' by honing in on the moral condemnation of the accused. Indeed, the Nuremberg prosecutions, focused not on witnesses but on Nazi documents to produce an enduring historical record. In so doing, it is arguable that international criminal trials constrain the truth-seeking exercise by pitching victims against perpetrators, as mere adversaries. See Stephan Landsman 'Those Who Remember the Past May Not Be Condemned to Repeat it' (2002) 100 Michigan Law Review 1564, 1571.

[87] Shriver (n 81) 8.

[88] For example, many witnesses during the Eichmann trial were so emotionally traumatised '…as to prove incapable of testifying competently. One fainted on the witness stand and could not continue.' Landsman (n 86) 1575; Koskenniemi (n 71) 33.

[89] Shriver (n 81) 27.

D DESIRABILITY OF CIVIL SOCIETY TRANSITIONAL JUSTICE EFFORTS

In this light, other tools of transitional justice may better foster truth-telling, justice and reconciliation efforts around the Israeli-Palestinian conflict. Broadly speaking, transitional justice may be defined as a 'process' that 'seeks recognition for victims and to promote possibilities for peace, reconciliation, and democracy'.[90] While some adhere to a narrower legalistic concept of transitional justice,[91] others argue for a thicker understanding, in which 'dealing with the past' extends beyond fixed transitional periods or juridical mechanisms.[92] Thus, in the Israeli/Palestinian scenario, one could proposes 'an incremental process…through a long process of transition, rather than one high-profile and all-encompassing mechanism in the post-conflict stage'.[93] Given the ongoing violence and official resistance to transitional justice efforts and the ICC, this seems to be a sensible approach.

Beyond the ICC, it is thus worth considering a more holistic and inclusive view of transitional justice,[94] whereby creative peace and reconciliation efforts may be initiated by civil society regardless of the conflict's degree of activity. For example, engaging the historical record could help challenge the competing meta-narratives of victimhood to which both sides are wedded. Indeed, projects like memorials, textbook reform and truth committees, could be presently contemplated as transitional justice measures**,** to sow the seeds of reconciling the historical elements of the conflict before a political accord is formally concluded.[95] Arguably, such

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[90] International Centre for Transitional Justice, 'What is Transitional Justice Fact Sheet' (2009) <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> accessed 10 March 2017.

[91] 'At the very least, there needs to be an awareness that legalism, a focus on law's normativity, and the imperative to frame questions in legal terms may privilege elite understandings, and render invisible key issues affecting disenfranchised groups.' Colm Campbell, Fionnula Ni Aolain & Harvey Colin, 'The Frontiers Legal Analysis: reframing the transition in Northern Ireland' (2003) 66 Modern Law Review 317; Christine Bell, 'Transitional Justice, Interdisciplinary and the State of the "Field" or "NonField"' (2009) 3(1) International Journal of Transitional Justice 5.

[92] Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34(4) Journal of Law and Society 411, 440; Ron Dudai, 'A Model for Dealing with the Past in the Israeli-Palestinian Context' (2007) 1 International Journal of Transitional Justice 249.

[93] ibid, 250

[94] ibid.

[95] Rafi Nets-Zehngut, 'Transitional Justice and Addressing the History of Active Conflicts: The Case of the Israeli Palestinian Conflict' (2012) The Leonard Davis Institute for International Relations, The Hebrew University of Jerusalem (Under Review) 2.

measures have the potential to herald earlier support, healing and trust between the parties, and to promote a more meaningful termination of the conflict by extending the boundaries of discussion.[96]

In this regard, it's worth noting the cross-border work of several grass-roots organisations, from the Peres Center for Peace,[97] to the coalition of 85 organizations in the Alliance for Middle East Peace[98] who promote Israeli-Palestinian and Arab-Jewish co-existence. There are also several Israeli groups from Breaking the Silence[99] to Zochrot,[100] that engage in truth-telling activities to promote the recognition of wrongdoing, reconciliation and recasting debate on the treatment of Palestinians. Many scholars have lauded the capacity of such projects to reconfigure the social and psychological dynamics of the conflict. [101] It is notable, that this approach draws on conflict resolution theory and particularly the contact hypothesis[102] which regards intergroup communication as crucial to transforming protracted violent conflict.[103] This rational[104] has spawned various peace-building collaborations between Israelis and Palestinians, despite the conflict's persistence or perhaps precisely because of it.

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[96] ibid 20.
[97] See the organisation's website at <http://www.peres-center.org/> accessed 9 March 2017.
[98] See the organisation's website at <http://www.allmep.org/> accessed 9 March 2017.
[99] Breaking the Silence is an Israeli organization of veteran combatants who served in the Israeli military since the Second Intifada, and seek to expose the Israeli public to life in the Palestinian Territories <http://www.breakingthesilence.org.il/> accessed 9 March 2017.
[100] *Zochrot* (remembering in Hebrew) is an Israeli group, which seeks to stimulate debate and promote awareness within Israeli-Jewish society about the Palestinian villages that were destroyed by Israel in 1948 <http://zochrot.org/en> accessed 9 March 2017.
[101] Maoz favorably examines the contribution of peace-building workshops between Palestinian and Israelis high school students to breaking down psychological barriers: '[o]ur results show that transformative practices can still be effective, and possibly even more relevant, in the harsh context of a violent conflictual sociopolitical reality'; Ifat Maoz**,** 'An Experiment in Peace: Reconciliation-Aimed Workshops of Jewish-Israeli and Palestinian Youth' (2000) 37(6) Journal of Peace Research 722, 733. Ruesch also concludes that virtual spaces like Facebook have the potential to increase inter-group communications between Israelis and Palestinians. Michelle Ruesch, 'A Peaceful Net? Intergroup Contact and Communicative Conflict Resolution of the Israel-Palestine Conflict on Facebook' (First Global Conference on Communication and Conflict, Prague, 2011).
[102] 'These ideas of dialogue as changing constructions of self and other, and as enabling, through mainly experiential, affective processes to include the other within the self, resonate with recent reformulations of the contact hypothesis' ibid.
[103] Ruesch, (n 101).
[104] Ellis and Maoz maintain that even emotional argument and deaf dialogue (ie articulations of mutual rejection) may increase tolerance by broadening horizons and exposing inconsistencies in conventional reasoning. Donald Ellis and Ifat Maoz, 'Online Argument between Israeli Jews and Palestinians' (2007) 33 Human Communication Research 291, 307.

I Bridging Narrative: From Mutual Denial to Joint Acknowledgement

Beyond unilateral initiatives directed at the Israeli-Jewish public, it is also important to contemplate collaborative mechanisms that address both sides' demands to have their historical rights and injustices acknowledged. For example, Israelis continue to officially deny any responsibility for the creation of the Palestinian refugees,[105] and Palestinians still refuse, by and large, to recognise their part in the conflict, and the consequences of their long-term rejection of Israel's right to exist as a Jewish state.[106] Accordingly, recognition of the past remains crucial to both nations' selfhood, something an ICC intervention could not seek to accomplish. In the words of Khalidi, the issue of accountability for 1948 'is so central to the national narrative and the self-view of the Palestinian people...'[107] He adds '[i]t has always been a grievance of the Palestinians that the wrongs done to them have never been recognized'.[108] Similarly, the mass trauma wrought by Jewish persecution,[109] Arab warfare and rejectionism, cannot be easily

[105] Generally, Israeli political leaders (including Ehud Barak at Camp David) are unwilling to accept any moral or legal responsibility for the refugee problem or the Palestinian concept of the right to return. Rashid Khalidi highlights the 'unremitting pressure from the Israeli side for more than 50 years to ignore, diminish and ideally to bury the whole question of the Palestinians made refugees in 1948'. Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (Columbia University Press 1997). Uri Ram analyses how the Palestinian displacement in 1948 was obliterated from Jewish-Israeli collective memory, and the continuous denial of Israeli historical and moral responsibility for the Nakba; Uri Ram, *Israeli Nationalism: Social Conflicts and the Politics of Knowledge* (Routledge 2010) 108-110; Dov Waxman, *The Pursuit of Peace and the Crisis of Israeli Identity* (Palgrave Macmillan 2006) 166-167.

[106] Many Palestinians distinguish between at least two levels of legitimacy: the legitimacy of Israel to exist and the legitimacy of Israel to exist as a Jewish state. According to Rouhana '[i]f Palestinians were to recognize Israel as a Jewish state, they would be accepting the principle that Jews are superior to Arabs. They would also be acknowledging the right to establish a Jewish state in Palestine, which is tantamount to recognizing the legitimacy of the Zionist project.' Nadim Rouhana 'Zionism's Encounter with the Palestinians: The Dynamics of Force, Fear, and Extremism' in Robert Rotberg (ed), *Israeli-Palestinian Narratives of Conflict: History's Double Helix* (Indiana University Press 2006) 138.

[107] Rashid Khalidi 'Observations on the Right of Return' (1992) 82 Journal of Palestine Studies 29, 30.

[108] Rashid Khalidi, 'Attainable Justice: Elements of a Solution to the Palestinian Refugee Issue' (1998) 33(2) International Journal 233, 236. According to Khalidi 'any official Israeli response to the refugee question must acknowledge the existential hurt that was done to the majority of the Palestinian people…by those who caused that hurt, or their successors in power.' Rashid Khalidi, 'The Palestinian Refugee Problem: A Possible Solution' 2(4) (1995) Palestine-Israel Journal 74.

[109] 'It is obvious that there was no responsibility, whatsoever, direct or indirect by the Palestinians for the holocaust. But this innocence did not exempt them from the effects of the holocaust that culminated in the establishment of the State of Israel…Palestinians have to be able to work on their reaction to holocaust in the direction of being able to recognize and acknowledge the other's agony and suffering on a human basis…' Walid Salem and Benjamin Pogrund Paul Scham (ed) *Shared Histories: A Palestinian-Israeli Dialogue* (Routledge 2005) 152.

dismissed for Israelis. Until today, Israel demands that Palestinians recognise their legitimacy as a Jewish state.[110]

Beyond polarised rhetoric or technical legal debate at the ICC, any meaningful conversation on the conflict would need to include questions of responsibility, and account for the existential aspects of both nations' pasts. Notably, even former ICC Prosecutor Ocampo has conceded that 'Israel could achieve an even bigger impact while avoiding the intervention of the Court by inviting Palestine to create a "bilateral fact-finding committee" with experts representing all the parties to investigate alleged crimes committed by any party'.[111]

In this light, a mechanism might be conceived that transcends the narrow legal and political framing of the conflict, and which can '…encompass the requirements of narrative, history, reparations, and repair'.[112] As many academics have concluded, it is unlikely that international law alone could comprehensively resolve all the claims of the Palestinian refugees, even if the right to return were to be recognised theoretically.[113] Thus, creative and innovative approaches should be trialed that produce a common narrative on the origins of the refugee problem, and offer a critical history of the major historical events of the conflict endorsed by both parties. According to Bar-Tal, the ability to develop a new and shared view of the past is a key element to reconciliation processes.[114] On transitional Iraq, Davis concludes 'scholars, and other

[110] In May 2014, Prime Minister Benjamin Netanyahu ruled out any deal with the Palestinians unless they recognise Israel as the Jewish state and give up their refugees' right of return. Although Palestinians now recognise Israel they deny the essence of Zionism – the Jewish people's right to establish a Jewish state in Palestine. Nadim Rouhana, 'Identity and Power in Israeli-Palestinian Reconciliation' (2000/2001) 3(2) Israeli Sociology 277, 287-295.

[111] Ocampo continues '[t]his committee, which could also include international experts, could provide the evidence collected to Palestinian or Israeli Courts with jurisdiction over the case. I am not sure if the current state of the relations between the parties makes it feasible to develop such a common mechanism, but I am presenting it because I see its enormous advantages it would create a buffer between both parties and the ICC and it would foster a strong complementarity system for all the parties'; Ocampo (n 39).

[112] Zinaida Miller, 'Settling with History: A Hybrid Commission of Inquiry for Israel/Palestine' (2007) 20 Harvard Human Rights Journal 293, 306.

[113] In short, there is a difference between acknowledging that an expansive right to return exists in international human rights law, and recognising that in certain instances it may not be implemented due to the unresolved political situation. See generally Jeremie Bracka, 'Past the Point of No Return? The Palestinian Right of Return in International Human Rights Law' (2005) 6(2) Melbourne Journal of International Law 272; Meyerstein (n 72) and Weiner, (n 84).

[114] Daniel Bar-Tal D and Gemma Bennink, 'The Nature of Reconciliation as an Outcome and as a Process' in Yaacov Bar-Siman-Tov (ed), *From Conflict Resolution to Reconciliation* (OUP 2004).

observers of politics have not paid sufficient attention to the idea that historical memory can assist democratic transitions'.[115]

In the Israeli-Palestinian context, it can be similarly argued that Israeli and Palestinian civil society should address historical memory now in order to transcend a conflict culture deeply rooted in polarised narrative. A challenge for transitional justice is to calibrate and re-shape each nation's ideological discourse in order to extract practical concessions. For Palestinians, this means trading utopian conceptions of return[116] and absolute justice[117] with compensation, resettlement and attainable justice for the refugees. Despite inroads made by the 'New Historians', Israelis still need to forgo righteous victim mythologising of 1948 in order to assume ownership over their role in the Palestinian displacement.[118]

II Designing an Israeli-Palestinian Truth Commission (IPTC)

Civil society might begin designing an IPTC, well before political resolution of the conflict. In this light, one could envisage a collaborative project between Israeli and Palestinian academics and NGO's, in which an IPTC model is jointly formulated and discussed to inform political negotiations and provoke wider public debate. Just as critical scholarship of 1948 sensitised

[115] Eric Davis, 'The New Iraq: The Uses of Historical Memory' (2005) 16(3) Journal of Democracy 54, 55. Davis persuasively argues how Iraqi scholars, the internet, and the media '…can play a crucial role in refuting fallacious claims that Iraq lacks democratic traditions, that its main ethnic groups are unable to work together, and that civil society and democracy are intrinsically alien concepts…'.

[116] '…Palestinian discourse on return remains utopian, abstract and nostalgic…justified as it may be, however nostalgia cannot substitute a plan of action or forever postpone it'; Dan Rabinowitz, 'Israel and the Palestinian Refugees: Post Pragmatic Reflections on Historical Narratives, Closure' Transitional Justice, and Palestinian Refugees' Right to Refuse in Barbara Rose Johnston and Susan Slyomovics (ed) *Waging War, Making Peace: Reparations and Human Rights* (Left Coast Press 2009) 225-239, 230. 'The problematic historical sequence is manifested in the Palestinian tendency to ignore the present and exchange it with the past, and a fixation with history…'; Esther Webman 'The Evolution of a Founding Myth: The *Nakba* and Its Fluctuating Meaning' in Meir Litvak (ed) *Palestinian Collective Memory and National Identity* (Palgrave Macmillan 2009) 41.

[117] 'When Palestinians talk about return, they also yearn to go back to a social order in which Israel and Israeli sovereignty are nonexistent.' Rabinowitz (n 116) 230.

[118] 'The refugee issue, however still receives scant attention in Israel. It remains highly sensitive and potential solutions are rarely discussed within the general public domain. Israeli academia and media have been largely silent on this question, and the little coverage there has been has uncritically repeated the dominant Israeli discourse…' Joel Peters 'Israel and the Palestinian Refugee Issue' in Elizabeth Mathews, *'The Israel-Palestine Conflict' Parallel Discourses* (Routledge 2011) 23.

Israeli public opinion,[119] an academic initiative of this kind could break taboos, propose counter-narratives and envisage a post-conflict reality before a political accord is concluded.

Thus, a model IPTC spearheaded by civil society could provide creative strategies for diplomatic resolution of the conflict. According to Nets-Zehngut[120] and Hirsch,[121] revised historical narratives of 1948 opened up the official Israeli/Palestinian peace discussions. In particular, critical scholarship enabled negotiators to revisit the issue of Palestinian refugees by '…allowing the consideration of new negotiable tradeoffs, namely the tradeoff between the symbolic act of an Israeli acknowledgement (or even apology) and a Palestinian concession on their actual right of return'. [122] Thus, as well as influencing the political elites,[123] an IPTC blueprint might help resolve intractable items on the negotiation agenda by looking at them through a transitional justice prism.[124] Indeed, the joint Israeli-Palestinian Geneva Initiative (December 2003) affirmed the value of symbolic acts diplomatically, and proposed 'creating forums for exchanging historical narratives and enhancing mutual understanding about the past'.[125] Thus, Israeli and Palestinian negotiators might draw on an IPTC model devised by civil society to overcome diplomatic obstacles. [126]

[119] A 2008 public opinion reflected a major shift in Israeli-Jewish popular memory of the conflict, which used to be more Zionist-orientated, especially in the first decade after 1948. See Nets-Zehngut (n 95) 15.
[120] 'In contrast, the 2000 Camp David and the 2001 Taba Israeli-Palestinian peace summits witnessed a significant change. At that time, the Critical narrative regarding the exodus was so prevalent in Israel that it was hard for Israeli negotiators to ignore it'; ibid 14.
[121] 'In the last round of the Israeli-Palestinian peace talks at the Taba Conference (January 2001), Israeli negotiators went where no Israeli officials went before: they considered the right of return, and a quasi statement that acknowledges the Palestinian tragedy and Israel's share of the responsibility'; Michal Ben-Josef Hirsch, 'From Taboo to the Negotiable: The Israeli New Historians and the Changing Representation of the Palestinian Refugee Problem' (2007) 5(2) Perspectives on Politics 241.
[122] ibid.
[123] ibid 251.
[124] Dudai (n 92) 256.
[125] The Geneva Accord, Art 7 – Refugees <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5> accessed 9 March 2016.
[126] For example, an Israeli public apology, compensation to refugees based on clear and transparent criteria, and an official report whose findings or recommendations would address past abuses, may all be contemplated as political concessions. As was the case in Sierra Leone and El Salvador, negotiators can agree upon a truth and reconciliation mechanism 'in principle' to be implemented once an agreement is achieved. See Dudai (n 92) 264.

Notably, practitioners in the field tend to envisage an IPTC, which solely examines 1948 and Israeli accountability for the Palestinian refugees.[127] Indeed, in October 2014 Zochrot established an unofficial public truth commission to address Israeli responsibility for the displacement of Negev Bedouins during 1948-1960.[128] No doubt, such endeavours are brave attempts to trial transitional justice in the region. Nevertheless, they are also too easily dismissed as one-sided and lacking in a suitably nuanced view of historical responsibility.[129] An IPTC that only examines Israeli abuses diminishes its ability to affect alestinian society,[130] and transcend reductionist history.[131] Given Zochrot's hostility to Zionism,[132] it would also alienate large segments of the Israeli public.

Rather than deepening the divide, it is submitted that a model IPTC be broader than 1948,[133] and akin to the South African model be devised to address human rights abuses of both parties. To be afforded contemporary relevance, credibility and real cathartic potential, a model IPTC should contend with essential elements of the current conflict narrative (from Israeli occupation abuses to Palestinian terrorist attacks). A wider IPTC would increase its reconciliatory and truth-telling

[127] For Miller, the Commission's focus is squarely on the Palestinian refugees. See Miller (n 112) 203. Similarly, Peled and Rouhana contemplate transitional justice in Israel/Palestine as limited to 1948, and the Palestinian right of return. Yoav Peled and Nadim Rouhana, 'Transitional Justice and the Right of Return of the Palestinian Refugees' (2004) 5 Theoretical Inquiry Law 317.

[128] Zochrot, *'The Truth Commission for Exposing Israeli Society's Responsibility for the period of 1948-1960 in the South'* (2015) examines testimonies by Palestinian refugees, as well as Jews who lived in the south and Jewish fighters involved in displacement and expulsion operations in the area.

[129] This Commission seems to place responsibility for the Palestinian refugees today entirely on Israel: '[t]he Commission's report will be designed to encourage the Jewish society in Israel to accept responsibility for past injustices in the south, with reference to the *ongoing* Nakba, and for redressing them'; ibid.

[130] Nets-Zehngut persuasively demonstrates how since the late 1990's, Israeli and Palestinian collaborative projects on the history of the conflict have positively impacted Palestinian society. '…through the collaborative mechanism, Palestinians took control over their own destiny and thereby influenced it'; Nets-Zehngut (n 95)16.

[131] Rashid Khalidi exposes the tendency in Palestinian historiography to focus on causes external to Palestinian society and even produce a narrative that denies any agency or responsibility for its own fate. Rashid Khalidi, 'The Palestinians and 1948: The Underlying Causes of Failure' in Eugene Rogan and Avi Shlaim, (eds) *The War for Palestine, Rewriting The History of 1948* (CUP 2001); Eugene Rogan and Avi Shlaim, 'Introduction' in Eugene Rogan and Avi Shlaim, (eds) *The War for Palestine, Rewriting The History of 1948* (CUP 2001).

[132] Ideally, groups sympathetic to the legitimate national aspirations of both sides and to a two state-solution would pioneer an IPTC. On its website, one of the overarching goals of Zochrot is for Israeli Jewish society 'to renounce the colonial conception of its existence in the region and the colonial practices it entails.' and 'Zochrot believes that peace will come only after the country has been decolonized'; Zochrot (n 128).

[133] Ideally the IPTC should ideally address two historical periods, one of 1945-50 to resolve the historic taboo of Palestinian displacement and the claimed moral right of return for the 1948 refugees. The second period will examine the conflict's recent escalation following the second Intifada (2000-present) to treat two themes, one of Israeli military occupation and the other, of Palestinian suicide bombing and terrorist attacks on Israeli civilians.

capacity by garnering more support in Israel and the international community. Despite the asymmetry of power between Israelis and Palestinians, it is argued that, psychologically both nations are traumatised by '…a victim ideology affecting their deepest levels of existence'.[134]

E CONCLUSION

Choosing the means to address the past is one of transitional justice's threshold dilemmas. In recent decades, the cardinal value of criminal trials, and the creation of the ICC have profoundly shaped transitional justice.[135] Despite extensive criticism of WWII and ad hoc tribunals,[136] solid support remains for the role of ICJ and its primacy.[137] The Israeli-Palestinian conflict is no exception. While legal practitioners often debate the feasibility of international trials, many share the view that prosecution is the means of choice to counter impunity.[138] This has fueled the assumption that alternative approaches, such as truth commissions are somewhat inferior.[139] Even those championing non-prosecution options often concede the normative preference for retributive justice and trials.[140] This article challenges that foundational premise in the Israeli-Palestinian context.

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[134] 'While a suicide bomber may kill only a handful of civilians and perhaps injure dozens more, the real violence done is psychological'; Meyerstein (n 72) 301 and 313

[135] Mahmoud Cherif Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights' in Mahmoud Cherif Bassiouni, *Post-Conflict Justice* (Transnational Publishers 2002) 745-760.

[136] Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford University Press 2006); Mark Drumbl, *Atrocity, Punishment and International Law* (CUP 2007); Mark Findlay and Ralph Henham, *Beyond Justice: Achieving International Criminal Justice* (Palgrave McMillan, Basingstoke, 2010); Hans Kochler, *Global Justice of Global Revenge? International Criminal Justice at the Crossroads* (Springer 2003); Danilo Zolo, (M.W. Weir, Translator) *Victors' Justice: From Nuremberg to Baghdad* (Verso 2009).

[137] Jose Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 Yale J Intl L 365, 365-366.

[138] Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation' (2001-2) 12(1 & 2) International Legal Perspectives 73, 100.

[139] For example, according to Dixon and Tenove, 'Truth commissions…and other non-ICJ approaches to transitional justice are not created to advance the collective will of multiple state governments. They often lack the legal authority … they also lack the forms of moral and expert authority that are globally recognised in the ICJ movement….' Chris Tenove and Peter Dixon, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims' (2013) 7 International Journal of Transitional Justice 393, 407.

[140] Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' (1996) 59 Laq & Contemp Problems 81, 83 (arguing that the best response is usually the 'vigorous prosecution of perpetrators'); Martha Mnow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston Beacon Press 1998) 58. She notes that most commentators believe prosecution is the best option and truth commissions should be used only when prosecution is impossible.

Indeed, given the political and jurisdictional constraints of the ICC, it might be worth conceding that for now, ICJ has a limited role to play for Israelis and Palestinians at present. Moreover, given the centrality of history to Israelis and Palestinians, the legacy of human rights abuses over six decades, and the value of truth, justice and reconciliation to conflict resolution, this article supports a broader framework of local and collaborative transitional justice mechanisms. Ultimately, devising a bi-national IPTC involving civil society could help both nations reframe the conflict narrative, and more meaningfully address notions of justice to which both sides are wedded.

THE GOLD MEDAL FOR BEST LETTER 2017: PRE-TRIAL CROSS-EXAMINATION FOR VULNERABLE WITNESSES: AN IDEA WHOSE TIME HAS COME

Alan Cusack*

Dear Editor,

Last month, in one of her first public acts as Lord Chancellor and Secretary of State for Justice, Elizabeth Truss launched a joint paper which sets out the Ministry of Justice's vision for the future of the English justice system.[1] The vision, according to the paper, is 'to modernise and upgrade our justice system so that it works even better for everyone, from judges and legal professionals, to witnesses, litigants and the vulnerable victims of crime'.[2]

One of principal reforms which is to be introduced as part of this ameliorative exercise is the admission of pre-trial cross-examination.[3] Under the scheme, vulnerable victims and witnesses will be spared the ordeal of having to appear in court. The scheme envisages that, rather than being required to undergo the orthodox practice of live cross-examination before a jury, such witnesses will instead undergo private cross-examination at an earlier stage in proceedings. A video recording of these exchanges will then be played for the jury at the eventual trial thereby sparing vulnerable persons the stress of reliving traumatic events in open court. The move to introduce this measure comes following the successful implementation of pre-trial cross-examination on a pilot basis in three Crown Courts in England.[4] According to the joint paper, the

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[1] Ministry of Justice, *Transforming Our Justice System: By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals* (Joint Statement, Ministry of Justice September 2016).

[2] ibid 3.

[3] It should be noted that the use of pre-trial cross-examination has been statutorily prescribed in England and Wales since 1999 under section 28 of the Youth Justice and Criminal Evidence Act 1999. However, at the time of writing, this provision has yet to be legally implemented.

[4] The chosen Crown Courts for the pilot scheme were Liverpool, Leeds and Kingston-Upon-Thames. For a greater exploration of the formalities associated with the pilot, see Judiciary of England and Wales, *Judicial Protocol on the*

results of this pilot indicate that pre-trial cross-examination 'results in a better experience for witnesses, with the cross-examination taking place in around half the time compared to other cases, and also showed an increase in early guilty pleas by defendants'.[5]

When the scheme is rolled out nationally in England and Wales next year, it will mark a major shift in how criminal courts operate across the Irish Sea. For centuries, victims and witnesses have been expected to physically attend and, deliver their evidence live, in court in front of both members of the jury and the criminal accused. In enabling jurors to make judgments about the reliability of a witness's account based on his or her demeanour in court, the live delivery of testimony has long been seen as an important evidentiary safeguard within the adversarial model of trial justice. In other words, it was seen as an essential ingredient in securing a fair trial for the criminal accused. Moreover, there was a significant practical argument against conducting this process pre-trial. Essentially, it was felt that by staging cross-examination earlier in proceedings both police and prosecutors would encounter significant difficulties in meeting their disclosure obligations. Given that the legal representatives of an accused can only effectively cross-examine a witness once they have received full disclosure of all prosecution evidence, expedited examination posed the obvious risk that some evidence may not have been disclosed to the defence by the scheduled interview date.[6]

It is almost certainly for these reasons that Irish policymakers have traditionally been reluctant to meaningfully entertain the prospect of reforming this area of trial practice. Thus, while we have seen some significant developments in Irish criminal process in recent years with a view to improving the experience of vulnerable witnesses - such as the admission of live tv link testimony, the introduction of intermediaries and the recognition of recorded examination-in-chief- the position nevertheless remains that vulnerable witnesses must be available to attend court on the day of trial for live cross-examination. Even for the most assiduous and indefatigable of witnesses this process can be intimidating, but for vulnerable witnesses- such as

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Implementation of Section 28 of the Youth Justice and Criminal Evidence Act 1999: Pre-recording of Cross-examination and Re-examination (Protocol, September 2014).

[5] Ministry of Justice, *Transforming Our Justice System* (n 1) 8.

[6] For greater discussion of this disclosure concern see JR Spencer, 'Introduction', in JR Spencer and Michael Lamb (eds.), *Children and Cross-Examination: Time to Change the Rules?* (Hart 2012) 13.

those who, for instance, are children or have an intellectual disability- the ordeal is arguably heightened.

Owing to their limited cognitive development, such witnesses can encounter significant difficulties in understanding, recalling and communicating the details of a criminal event.[7] These difficulties, research has shown, are in turn compounded by the intimidating setting and formality of the courtroom.[8] On a moralistic level then, it is difficult to justify Ireland's enduring subscription to this process. Nor, it would seem, can this procedural imperative be justified on instrumental grounds. In insisting that cross-examination be delayed until the formal trial date, traditional adversarial practice not only poses the serious risk of narrative distortion (given the likelihood of a vulnerable witness's memory degrading over time), but it also poses a significant risk of attrition (given the likelihood of a witness dis-engaging with the criminal process over time due to mounting anxiety at the prospect of going to court).

Moreover, the evidentiary concerns routinely cited to justify our continued subscription to live cross-examination appear to be over-stated. Consistent research by Graham Davies in England, for instance, suggests that the medium of presentation of evidence has no material impact of the overall decision-making process of the jury.[9] With regard to the traditional disclosure argument, the experience of the police and Crown Prosecution Service in England, who participated in the pilot scheme, suggest that this fear is unfounded. Indeed, in the Ministry of Justice's formal process evaluation of the pilot (which too was launched last week), it was found that '[d]espite

[7] Marguerite Ternes and John Yuille, 'Eyewitness Memory and Eyewitness Identification Performance in Adults with Intellectual Disabilities' (2008) 21 Journal of Applied Research in Intellectual Disabilities 519; Mark Kebbell and others, 'People with Learning Disabilities as Witnesses in Court: What Questions Should Lawyers Ask?' (2001) 29 British Journal of Learning Disabilities 98. See also Andrew Sanders and others, *Victims with Learning Disabilities: Negotiating the Criminal Justice System* (Oxford 1997).

[8] Claire Edwards, Gillian Harold and Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (UCC 2012). See also Rosie McLeod and others, *Court Experience of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 3: At Court* (Ministry of Justice Research Series 10/10, 2010).

[9] Graham Davies, 'The Impact of Television on the Presentation and Reception of Children's Testimony' (1999) 22 International Journal of Law and Psychiatry 241; Graham Davies and others, *Videotaping Children's Evidence: An Evaluation* (Home Office 1995) and Graham Davies and Elizabeth Noon, *An Evaluation of the Live Link for Child Witnesses* (Home Office 1991).

the concerns held by the police, third party disclosure did not appear to be a substantial problem for CPS prosecutors, defence advocates of judges'.[10]

Ireland, it is submitted, should follow the lead of our Commonwealth neighbours on this issue. With our approaching (and long overdue) transposition of the Victims' Directive, we have a unique opportunity to re-examine the formalities of the Irish criminal trial with a view to yielding a more inclusionary paradigm.[11] Article 23(2)(a) of the Directive compels Member States to put in place, for vulnerable victims, 'measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of communication technology'. The first step in meeting our obligation under this instrument is to establish pre-trial cross-examination on a statutory basis in this jurisdiction. In heeding the overwhelmingly positive reports emerging from the Ministry of Justice's pilot scheme, the Irish framework should, at a minimum, replicate the scheme poised for introduction in England and Wales in 2017. However, Irish policymakers should also be emboldened to take this reformative exercise one step further by providing the measure to both vulnerable witnesses and vulnerable defendants alike. To restrict the benefit of pre-trial cross-examination solely to witnesses and victims- as is the case, for instance, in England and Wales[12]- would not only be to deprive Irish courts of a vulnerable defendant's best evidence but it would also, arguably, be to infringe the sacrosanct due process principle of equality of arms.

Pre-trial recording of the cross-examination of vulnerable witnesses is not a new idea. Back in 1989, the Pigot Committee advocated the implementation of such a scheme in England and Wales.[13] While more recently in Ireland, the Irish Council for Civil Liberties recommended in a 2013 report that 'provision…should be made to permit video recorded cross-examination or re-

[10] John Baverstock, *Process Evaluation of Pre-recorded Cross-examination Pilot (Section 28)* (Ministry of Justice Analytical Series, Ministry of Justice 2016) 30.
[11] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57 (Victims' Directive). The Victims' Directive was adopted in October 2012 and entered into force on 15 November 2012, giving Ireland three years to implement the provisions.
[12] Section 16 of the Youth Justice and Criminal Evidence Act 1999 expressly directs that accused persons are ineligible for applying for a special measures direction. For a convincing criticism of the uneven provision of special measures on a statutory basis in England and Wales, see Laura Hoyano, 'Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants' [2015] Criminal Law Review 107.
[13] Home Office, *Report of the Advisory Group on Video Evidence* (Home Office 1989).

examination of vulnerable witnesses'.[14] It is high time that these calls for reform were acknowledged and responded to by Irish policymakers. After all there is a strong public interest in empowering vulnerable witnesses to give their best evidence in court, not only in the moral sense of ensuring that the legitimate expectations of all court users are equally met within our criminal justice process, but also in the instrumental sense of making sure that those who prey on some of the most vulnerable members of our society are brought to justice.

Is mise le meas,

Alan Cusack

[14] Shane Kilcommins, Claire Edwards and Tina O'Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (Irish Council for Civil Liberties 2013) 227.