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With Special Thanks To:

Jared Kang, Vice Editor-in-Chief of the Cambridge Law Review (*Volume III*) and co-founder of *De Lege Ferenda*, for his support of and contributions to the journal.

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EDITOR'S INTRODUCTION TO THE FIRST VOLUME OF *DE LEGE FERENDA*

It has been a great privilege to work on the inaugural volume of *De Lege Ferenda*. From the outset, the journal was conceived as a forum for law students to discuss and debate contemporary issues in relation to undergraduate topics. As the undergraduate companion to the *Cambridge Law Review*, we hoped *De Lege Ferenda* would provide a springboard for students to make a first foray into legal scholarship, with the benefit of a peer review system and rigorous editing.

We have been fortunate to have received robust pieces exploring current matters such as the householder defence in criminal law, the use of force against ISIL in international law, blockchain regulation, as well as apt commentaries on the International Court of Justice's 2018 compensation judgment in *Costa Rica v Nicaragua*, the 2017 UKSC decision of *Four Seasons Holdings Inc v Brownlie* and the 2017 UKPC decision of *Nazir Ali v Petroleum Company of Trinidad and Tobago*. I am certain readers will gain some insights for the authors' contributions.

Finally, I would like to thank our Honorary Board for their invaluable guidance, as well as the Editorial Board for their tireless work. Special thanks must also be given to the Managing Board of the *Cambridge Law Review* for their generous support, without which *De Lege Ferenda* would not have been possible. I wish the new Board every success with Volume II and look forward to seeing the journal flourish in the future.

Edgar Lee

Managing Editor

Co-Founder, *De Lege Ferenda*

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A TWO-PART ANALYSIS OF THE USE OF FORCE BY THIRD STATES IN SYRIA: EXAMINING THE LEGALITY OF FORCE AGAINST THE SYRIAN GOVERNMENT AND ISLAMIC STATE IN SYRIA

Roystan Ang*

I. INTRODUCTION

SINCE 2011, THE SYRIAN CIVIL WAR has witnessed numerous political and military developments, which have given rise to a diverse range of issues in international law. In this short article, I focus on two specific developments: the increasingly pronounced role taken on by third states (in various capacities) and the rise of Islamic State of Iraq and the Levant (ISIL) in Syria.

This article will be divided into two main sections. Firstly, I examine the legality of the use of force by third states to overthrow the Syrian government. To this end, I identify the orthodox position on the use of force, before analysing the legality of relying on a doctrine of humanitarian intervention, given that protection of Syrian civilians is the main justification relied upon by third states in using force to overthrow the Syrian government.

Secondly, I consider the use of force by third states against ISIL in Syria without the consent of the Syrian government. I will analyse various legal issues that arise out of the key legal justification relied upon for using force in this context, that is, *self-defence*.

* B.A. (Law) (*Cantab*) (Candidate). I am grateful to Professor Christine Gray for her extensive comments as well as the reviewers for their assistance. All errors remain my own.

I argue that there is no legal right for third states to use force to overthrow the Syrian government or protect civilians in Syria, because of the prohibition in Article 2(4) of the UN Charter and the fact that orthodox justifications—self-defence and authorisation by the UN Security Council (UNSC)—do not apply. Furthermore, any justification on the basis of humanitarian intervention has not received sufficient support by States to constitute customary international law (CIL). While the crisis has raised normative questions on whether international law should adapt to better handle such situations, it remains that there is currently no legal justification for such uses of force.

Further, while the position is murkier for the second question, it is likely that third states lack a legal right to use force against ISIL in Syria without the consent of the government. The problems that arise out of a reliance on self-defence—the definition of “armed attack”, anticipatory self-defence, “unwilling or unable”, necessity and proportionality—have not been satisfactorily resolved and cast significant doubt on the legality of such action.

II. PART 1: THE USE OF FORCE TO OVERTHROW THE SYRIAN GOVERNMENT AND PROTECT CIVILIANS

When examining the use of force in international law, the starting point is Article 2(4) of the UN Charter, which is part of CIL.¹ It states that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

A. ORTHODOX POSITION

Prima facie, it appears that Article 2(4) represents an absolute prohibition on the use of force. The effect of Article 2(4) is to ban the use of force without express UNSC authorisation (with the only exception being that of individual and collective self-defence, as provided for by Article 51). Further, in *DRC v Uganda*,² the ICJ distinguished between States lawfully in the DRC at the invitation of the government and those unlawfully assisting opposition forces to overthrow

¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1984] ICJ Rep 392.

² *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Merits) [2005] ICJ Rep 168.

the government. This is reinforced by the *Friendly Relations Declaration*, which states that every State has the duty to refrain from “organising, instigating, assisting or participating in acts of civil strife in another State” and not to “foment, incite or tolerate subversive or armed activities directed towards the violent overthrow of the regime of another State”.³ Finally, *Nicaragua v USA* demonstrates that it is unlawful to forcefully intervene to overthrow the government in another country.⁴ On this analysis, there is no legal basis for the use of force by third states against the Syrian government or to protect civilians, and these acts of violence in support of opposition forces in a civil conflict are clearly banned.

(i) UNSC Authorisation of the Use of Force

Chapter VII of the UN Charter sets out the framework for the UNSC’s enforcement powers; in particular, it empowers it to authorise the use of force. This power was first exercised during the Iraqi invasion of Kuwait, where the phrase “all necessary means”⁵ was used to indicate such authorisation, and has subsequently been used in various contexts, like the protection of civilians⁶ and restoration of democracy.⁷

However, from the outset, it may be established that there has been no UNSC authorisation to use force against the Assad regime or for the protection of civilians in Syria. Nowhere in any UNSC resolution on Syria does such language appear, and the furthest that any resolution goes is to decide “in the event of future non-compliance with resolution 2118 (which set out the framework for the elimination of chemical weapons) to impose measures under Chapter VII of the [UN] Charter”. To date, no such measures have actually been implemented, in large part due to Russia’s use of the veto against intervention efforts by the UNSC, such as the veto against a US-drafted resolution to renew an international inquiry into the use of the chemical weapons in Syria.⁸ Therefore, the UNSC has hitherto not authorised any use of force against the Syrian government for the protection of civilians or to retaliate against the use of chemical weapons.

³ UNGA Res 2625 (1970) GAOR 25th Session Supp 28.

⁴ *Paramilitary Activities* (n 1).

⁵ UNSC Res 678 (20 November 1990) SCOR Resolutions and Decisions 27.

⁶ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

⁷ UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529.

⁸ Michelle Nichols, ‘Russia casts 10th UN veto on Syria action, blocking inquiry renewal’ *Reuters* (London, 16 November 2017) <<https://uk.reuters.com/article/uk-mideast-crisis-syria-chemicalweapons/russia-casts-10th-u-n-veto-on-syria-action-blocking-inquiry-renewal-idUKKBN1DG2WD>> accessed 29 March 2018.

(ii) Self-Defence

Relying on self-defence, pursuant to Article 51 of the UN Charter, is similarly unviable. The central obstacle to a claim of self-defence is simply that Syria has not instigated an “armed attack” against another State. Self-defence may be used as a justification only when a State has been the victim of an armed attack (which covers attacks not just by regular forces but also irregular forces and mercenaries),⁹ but in this case, Syria has neither attacked nor threatened to attack any other State. It is true that Syria’s use of chemical weapons is illegal as a matter of international law, but for the purposes of self-defence, this is legally immaterial because a State may not use force against another State which has violated international law unless the latter has attacked the former. For instance, the US’s claim that the 2017 missile attacks were in response to the Syrian government’s chemical weapons attack is legally irrelevant given that the attack was not directed at the US (or any other State).

Therefore, there is no basis for a claim of self-defence, and under the orthodox position in international law, there is no legal right for a third state to use force against the Syrian government. Both lethal aid¹⁰ and military strikes against the government are accordingly illegal.

B. HUMANITARIAN PURPOSES

While Article 2(4) has generally been interpreted as imposing an absolute ban on the use of force, States have occasionally relied on a narrow interpretation of Article 2(4) to justify their use of force. Under this narrow interpretation, Article 2(4) allows for the use of force for aims which are consistent with the purposes of the UN or where the territorial integrity and political independence of another State is not harmed. For example, in the *Corfu Channel* case, the UK argued that its forcible intervention in Albanian waters did not violate Article 2(4) as it did not threaten Albania’s territorial integrity and political independence.¹¹ Further, Bowett supports such an interpretation on the basis that the words of Article 2(4) should be read according to their “plain meaning”, which would produce the aforementioned conclusion.¹² Under this analysis, it may be possible to justify the use of force on the basis that it intended to protect civilians and remedy gross breaches of international law, which is in line with the purposes of the UN.¹³

⁹ *Paramilitary Activities* (n 1).

¹⁰ See *Armed Activities on the Territory of the Congo* (n 2).

¹¹ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* ICJ Pleadings Vol III.

¹² Derek Bowett, *Self-Defence in International Law* (Praeger 1958) 154–155.

¹³ After all, the use of chemical weapons has already been expressly condemned by the UN.

However, it is unlikely that this argument will succeed. This narrow interpretation is rarely used by States, suggesting that it is not part of CIL (given the paucity of corroborating State practice). In fact, while the ICJ did not specifically consider the UK's argument in the *Corfu Channel* case, its overall condemnation of its actions implicitly suggests a lack of acceptance. Brownlie notes that the *travaux préparatoires* show that Article 2(4) was not intended to have a narrow interpretation;¹⁴ this conclusion is supported by the Friendly Relations Declaration¹⁵ (see specifically, the Section on the Principle on the Use of Force),¹⁶ which does not outline any such qualification on this prohibition and elaborates on the duty of States to refrain from acts of reprisal involving the use of force. Therefore, it is unlikely that this interpretation is part of international law.

More crucially, it may be possible to rely on a doctrine of humanitarian intervention to justify the use of force against the Syrian government, which (by most accounts) has been illegally using chemical weapons against its own civilians, representing a humanitarian crisis.¹⁷ The crux of the issue is whether there is even an independent doctrine of humanitarian intervention. Most notably, the UK has developed a detailed framework for humanitarian intervention, outlining three conditions (emphasis in italics added):

- (i) there is convincing evidence, generally accepted by the international community as a whole, of *extreme humanitarian distress* on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is *no practicable alternative* to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be *necessary and proportionate* to the aim of relief of humanitarian need and must be *strictly limited in time and scope to this aim* (i.e. the minimum necessary to achieve that end and for no other purpose).¹⁸

¹⁴ Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 122–123.

¹⁵ UNGA Res 2625 (n 3).

¹⁶ *ibid* Annex, “The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations”.

¹⁷ UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118; UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139; UNSC Res 2209 (6 March 2015) UN Doc S/RES/2209.

¹⁸ ‘Chemical weapon use by Syrian regime: UK government legal position’ (Prime Minister’s Office, 29 August 2013) <<https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>> accessed 18 December 2017.

Further, it has been argued that all conditions have been met in Syria, due to the “overwhelming humanitarian necessity”, given the large-scale use of chemical weapons by the Syrian government and the failure of efforts to pursue alternative solutions. If such a doctrine does exist in international law in the form defined by the UK, it will then be highly likely for the use of force to be justified in this context. Even if it does not exist in this exact form, it remains likely that the humanitarian situation in Syria is sufficiently grave to warrant such intervention.

NATO’s military intervention in Kosovo in 1999 may provide additional support for this line of argument. While NATO did not clearly state the legal basis for its military action, a few States relied on arguments stemming from humanitarian intervention. Apart from the UK, Belgium (which made one of the most comprehensive arguments among the NATO members) argued that the campaign was an action to “forestall an ongoing humanitarian catastrophe” and that the “armed humanitarian intervention” was compatible with Article 2(4).¹⁹ As Koh notes, “nineteen NATO members (accepted) the legality of some form of humanitarian intervention without [UNSC] approval”.²⁰ Therefore, if the intervention in Kosovo is to be taken as a precedent for humanitarian intervention, this would strengthen the case for the use of such a doctrine as justification for the use of force in Syria.

However, this is ultimately unlikely. Even among NATO states, only a minority of States relied on a doctrine of humanitarian intervention to justify the legality of their actions (in fact, only a few States actually developed a clear argument). For instance, Germany and France emphasised that the operation was unique and should not be treated as a precedent for future humanitarian intervention. Further, State practice in general reveals a lack of acceptance of unilateral or collective humanitarian intervention (that is unauthorised by the UNSC). Russia and China are among the many States which condemned the operation as illegal, and in 2000, the G77 adopted its Declaration of the South Summit, stating that the “so-called “right” of humanitarian intervention [has] no legal basis in the [UN] Charter or in the general principles of international law”. Therefore, the NATO intervention in Kosovo arguably fails to provide a precedent for such action.

More generally, it is highly unlikely that an independent doctrine of humanitarian intervention exists, in spite of the UK’s efforts. There is little State practice that supports the existence of such a doctrine: in the examples commonly cited as precedents of humanitarian

¹⁹ UNSC Verbatim Record (24 March 1999) UN Doc S/PV/4385.

²⁰ Harold Hongju Koh, ‘Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)’ (Just Security, 2 October 2013) <<https://www.justsecurity.org/1506/koh-syria-part2/>> accessed 18 December 2017.

intervention (for example, Tanzania's intervention to overthrow Idi Amin's regime in Uganda), the States involved never actually invoked such a doctrine as justification for their actions. Even during the Gulf War, when the US, UK and France intervened in Iraq and established no-fly zones without the UNSC's authorisation, only the UK relied upon such a justification, and France even withdrew its support for the use of the doctrine later. Many States, including China and Russia, refused to accept the legality of the no-fly zones. As such, it is clear that there is little State practice that justifies the conclusion that there is an independent doctrine of humanitarian intervention in international law; if anything, the Kosovo incident only reinforced the absence of such a doctrine.

Koh has argued that the situation in Syria presents a strong case for intervention and "a law-making moment to crystallise a limited concept of humanitarian intervention".²¹ This is possibly supported by Crawford and Viles's argument that by virtue of the unique nature of international law as a dynamic body of law determined by the practice of the very parties governed by it, we can only discern the content of the law on a given day after that day.²² This suggests that it is possible that on hindsight, humanitarian intervention in the Syrian Civil War would be regarded as actually having been lawful, but ultimately, the example provided by Crawford and Viles (the Truman proclamation) cannot be analogically applied here, given the overwhelming opposition to this doctrine and the status of Article 2(4).

Regardless of the normative arguments in favour of the doctrine, there remains a clear distinction between the "legal regime banning force outside self-defence and Council authorisation"²³ and decisions made by policymakers. Therefore, while an argument may be made that international law should change to accommodate a doctrine of humanitarian intervention, this is materially different from saying that such a doctrine already exists. Given the atrocities committed against Syrian citizens, it is well worth starting a discussion about whether international law should move in the direction encouraged by Koh, but as it stands, there is clearly no such legal doctrine.

²¹ *ibid.*

²² James Crawford and Thomas Viles, 'International Law on a Given Day', in James Crawford (ed), *International Law as an Open System* (Cameron Books 2002).

²³ David Kaye, 'Harold Koh's Case for Humanitarian Intervention' (Just Security, 7 October 2013) <<https://www.justsecurity.org/1730/kaye-kohs-case/>> accessed 19 December 2017.

III. PART 2: THE USE OF FORCE AGAINST ISIL IN SYRIA

The justification most commonly relied upon by States using force against ISIL without the Syrian government's consent is self-defence. The US, which leads the coalition against ISIL (which lacks the Syrian government's consent), has justified its operations in Syria on the basis of individual and collective self-defence. In a letter to the UN Secretary-General,²⁴ then Permanent Representative of the USA to the UN Samantha Power referred to the "inherent right of individual and collective self-defence" (under Article 51) to justify the actions of USA and its allies. For this to succeed, several legal issues must be resolved.

A. "ARMED ATTACK"

Firstly, there must be an "armed attack" against a State. An armed attack may stem from irregular forces, bands and mercenaries, which ISIL certainly qualifies as. The issue is whether these forces have to be operating under the control of a sovereign government (the Syrian government). This is the position adopted in *Nicaragua v USA* and the *Palestinian Wall Advisory Opinion*,²⁵ which states that an "armed attack" must emanate from another State, as opposed to groups of insurgents or terrorists operating from other States but not under the control of the "host" State. On this analysis, it would appear that an "armed attack" has not occurred for the purposes of Article 51, given that the Syrian government is hostile towards ISIL, as evidenced by its willingness to cooperate with other States like Russia to defeat it.

However, this is not necessarily the case. The comment in *Wall* was put forward by the majority without full analysis of the expounded principle, so it is unclear if this rule has a bona fide basis in international law. Further, in *DRC v Uganda*, while the ICJ did not consider whether Uganda could resort to armed force in DRC by way of self-defence, Judges Kooijmans and Simma addressed this issue in their separate opinions, suggesting that the right to self-defence may extend to "armed attacks" by non-state actors where they emanate from territory with an "almost complete absence of governmental authority". This reflects the ambiguity over the definition of "armed attack" in international law, suggesting that there may indeed be a case to be made that self-defence is available.

²⁴ UNSC 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' (23 September 2014) UN Doc S/2014/695.

²⁵ *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* [2004] ICJ Reports 136.

This is reinforced by post-9/11 developments. In the wake of the 9/11 attacks, the US instituted *Operation Enduring Freedom*, on the basis of self-defence, and with the aim of preventing Afghanistan from being used for terrorist activities. Similarly, collective self-defence organisations like NATO and the Organisation of American States (OAS) held that the 9/11 incident constituted an “armed attack” for the purposes of collective self-defence.

This received further support from the likes of the EU, China and Russia (which noticeably opposes action by the coalition against ISIL), with only Iran and Iraq expressly challenging the legality of such a claim. More tellingly, in the preambles of Resolutions 1368²⁶ (which condemned the terrorist attacks) and 1373²⁷ (which implemented counter-terrorism measures), the UNSC recognised the right of self-defence (for the first time in a terrorism context). The corollary of this is that the ambiguity over whether terrorist attacks not conducted under the auspices of any government can be considered an “armed attack” has potentially been resolved (in the context of terrorism) by the overwhelming support (or at least, the lack of express criticism bar two States) of other State parties. If so, ISIL’s activities may constitute an “armed attack”.

It is admittedly uncertain if the recognition of the right of self-defence goes beyond the exceptional circumstances of 9/11, but it could be argued that the actions of ISIL have progressed to a stage where it is possible to analogically extend the right of self-defence to the situation here. The 9/11 attacks were exceptional principally because it was an egregious attack on US soil itself. Similarly, in recent years, ISIL has claimed responsibility for attacks outside Syria and the Middle East, such as the 2015 Paris attacks. These incidents are similar to 9/11 in that they also occurred on the territory of the States (or their allies) which claim the right of self-defence. While these attacks occurred on a much smaller scale, it is nevertheless the case that if 9/11 represents a recognition of this right in these circumstances, such a right should also exist here. However, the legal significance of the support offered in the wake of 9/11 remains unclear, especially in light of the reduced support for a claim of self-defence here (with States like Russia no longer offering such support). Therefore, while a case may be made that the attacks of ISIL constitute an armed attack, considerable uncertainty still exists.

²⁶ UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

²⁷ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

B. ANTICIPATORY OR PRE-EMPTIVE SELF-DEFENCE

Secondly, the right to self-defence claimed is largely anticipatory, by virtue of the nature of terrorist attacks- unlike regular armed conflicts, where an attack is part of a larger series of attacks, terrorist attacks are generally one-off incidents. Once the initial attack has ended, it would be difficult to invoke self-defence, because the State would no longer be defending itself but retaliating. This point was implicitly recognised by the US and UK in their letters to the UNSC after 9/11, where the US's aim was to deter further attacks and the UK's to "avert the continuing threat of attacks from the same source". Similarly, in this context, States like the US²⁸ and UK²⁹ have argued that there is a right of self-defence against an "imminent" attack, with a proposed legal framework being Sir Daniel Bethlehem's set of principles, which includes factors like the nature and immediacy of the threat, probability of the attack and whether the anticipated attack is part of a "concerted pattern of continuing armed activity".³⁰ The US has even gone further and claimed a right of pre-emptive self-defence in the absence of a threat of imminent attack,³¹ but this has received little support elsewhere.

Despite these formulations, it remains unlikely that such a doctrine exists. Although many States accepted the legality of *Operation Enduring Freedom*, it is unclear if this acceptance extended to a general acceptance of the doctrine of anticipatory self-defence. Generally, the right of anticipatory self-defence has not received much support;³² before 9/11, only the US and Israel had claimed such a right. Further, even though several States have notified the UNSC with relation to the exercise of their right of self-defence against ISIL (Annex I, p 15 below),³³ only a few have expressly claimed a right of self-defence against an imminent attack. In *Nicaragua* and *DRC*, the ICJ deliberately left this matter unresolved. Therefore, given the widespread objections (or at least,

²⁸ Brian Egan, 'International Law, Legal Diplomacy and the Counter-ISIL Campaign' (Just Security, 1 April 2016) <<https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf>> accessed 22 December 2017.

²⁹ Jeremy Wright, 'Attorney-General's Speech at International Institute for Strategic Studies' (Attorney General's Office, 11 January 2017) <<https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies>> accessed 22 December 2017. In this speech, the Attorney General discusses the modern law of self-defence.

³⁰ Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors' [2012] AJIL 106.

³¹ The White House (Washington), 'The National Security Strategy of the United States of America' (2002) 41 International Legal Materials 1478.

³² For example, most States interpreted *Oil Platforms Islamic Republic of Iran v United States of America* [1996] ICJ Rep 803 as a total rejection of anticipatory self-defence.

³³ Wright (n 29).

a low level of express support), uncertain legal significance of the approval of Operation Enduring Freedom and the lack of judicial resolution on the matter, State practice has not evolved to a point where it is clear that such a doctrine exists, meaning that it has no basis in international law.

C. “UNWILLING OR UNABLE”

Thirdly, another argument relied upon by States is the “unwilling or unable” doctrine, which states that the “use of force in self-defence against a non-state actor on the territory of a third State, without the consent of that third State, may be lawful under international law if the non-state actor has undertaken an armed attack against the State and the third State is itself unwilling or unable to address the threat posed by the non-state actor”.³⁴ A few States have endorsed this doctrine (Annex II, p 16 below)³⁵ and several States which have claimed a right of self-defence against ISIL have made a reference to it. However, several problems are attendant upon reliance on this.

The doctrine remains controversial in international law- even “leading proponents” of the doctrine admit that its “contours are not well-defined and the basic rule itself may not even enjoy [CIL] status”.³⁶ Further, there have been no cases where States have clearly asserted that they follow the test “out of a sense of legal obligation”³⁷ or where the doctrine has been recognised. This indicates that the doctrine’s place in international law is far from certain—in fact, it is arguably more likely that it is not part of international law. Ultimately, only a few States have endorsed it.

Further, even if the doctrine is an established or emerging rule of CIL, it is difficult to see how the test is met. The Assad government is clearly willing to fight ISIL³⁸ and while there may have been areas outside its control (particularly at the height of ISIL’s powers), as noted above ISIL now controls only around 5% of Syria. This shows that its resources and strength have been significantly depleted, and correspondingly it would be difficult to show that the Assad regime is

³⁴ Elena Chachko and Ashley Deeks, ‘Who is on Board with “Unwilling or Unable”?’ (Lawfare, 10 October 2016) <<https://www.lawfareblog.com/who-board-unwilling-or-unable>> accessed 27 December 2017.

³⁵ *ibid.*

³⁶ Ryan Goodman, ‘International Law- and the Unable or Unwilling Test- for US Military Operations in Syria’, (Just Security, 12 September 2014) <<https://www.justsecurity.org/14949/international-law-unwilling-unable-test-military-operations-syria/>> accessed 27 December 2017.

³⁷ Ashley Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defence’ [2012] VJIL 52.

³⁸ UNSC ‘Sixth report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2160 (2014) concerning the Taliban and other associated individuals and entities constituting a threat to the peace, stability and security of Afghanistan’ (26 August 2015) Security Council Report UN Doc S/2015/648.

unable to fight ISIL (particularly with Russia's help, which is regarded by one commentator as a "godsend for Assad, greatly boosting the regime's sagging morale and that of its armed forces").³⁹ Even when ISIL was at its strongest, the Assad regime had largely maintained a willingness to fight it. Therefore, notwithstanding the challenges in showing that the doctrine is even part of international law, the situation in Syria does not seem to meet the requirements of the test.

D. RESOLUTION 2249

Fourthly, it may possibly be argued that Resolution 2249,⁴⁰ adopted in the wake of the Paris attacks, provides an unprecedented legal basis for the use of force against ISIL in Syria. The main operative paragraph is Paragraph 5, which states that the UNSC "*Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law... on the territory under the control of ISIL..." Its significance lies in the fact that it calls upon States to "take all necessary measures", which when used in UNSC resolutions refers to the use of force. Further, although the resolution was not adopted under Chapter VII of the UN Charter, *Namibia Advisory Opinion*⁴¹ indicates that the lack of such reference does not mean that the resolution lacks legal effect. As such, it appears that the UNSC has authorised use of force against ISIL in Syria via Resolution 2249.

However, closer scrutiny reveals that this is not the case. Resolution 2249 does not provide any further *legal* authority for States to use force against ISIL in Syria; at most, it provides *political* support for military action, but qualifies this support by preserving existing legal constraints. There are two key reasons for this.

Crucially, UNSC has not actually authorised "all necessary measures"; instead, it calls upon States to take such measures. This careful choice of language shows that while the UNSC contemplates or considers the viability of the use of force, it has not expressly authorised it yet. For a resolution to be legally binding, the UNSC must actually decide to do something or to authorise something, which it has (carefully and intentionally) omitted to do.

Further, Resolution 2249 calls for these measures to be undertaken in compliance with international law, meaning that any steps would have to be taken in compliance with existing rules

³⁹ Ranjit Gupta, 'Understanding the War in Syria and the Roles of External Players: Way Out of the Quagmire?' [2016] CJI 105.

⁴⁰ UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.

⁴¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1971] ICJ Rep 16.

of international law, like the *jus ad bellum* rules of the Charter. Therefore, given the lack of any direct precedents—the affirmation of the right of individual and collective self-defence was recognised only in the *preambles* of Resolutions 1368 and 1373, for instance—and the careful wording of Resolution 2249, it is clear that the resolution does not support arguments for the use of force against ISIL in Syria.

E. NECESSITY AND PROPORTIONALITY

Finally, the requirements of necessity and proportionality have to be met.⁴² This is particularly thorny when it comes to force used in anticipatory self-defence, given the difficulties in calculating the level of “blameworthiness” where no attack has been committed. For instance, Operation Enduring Freedom lasted for 13 years, raising doubts that the destruction caused over such a long period was either proportionate to the threat posed by Al-Qaeda or necessary to stop it. Therefore, even if the aforementioned obstacles are cleared, it remains difficult to conclude with certainty that any use of force against ISIL without the Syrian government’s consent is lawful.

In summary, it is unlikely that an argument stemming from the right of self-defence can be sustained. The arguments put forth have not received sufficiently widespread State support, and supposed precedents remain ambiguous. This points towards the likelihood that the legal principles espoused by these States have not been incorporated into international law, by custom or otherwise, making it unlawful for force to be used against ISIL without the consent of the Syrian government.

⁴² *Paramilitary Activities* (n 1); *Armed Activities on the Territory of the Congo* (n 2).

IV. CONCLUSION

Throughout the course of the Syrian Civil War, many States have opted to intervene forcefully, proclaiming their use of force to be lawful. However, after cutting through the rhetoric and closely scrutinising their claims, it is clear that the legality of their actions falls short of the confidence with which it has been declared.

That being said, it is well worth considering this: while the rule of law should never give way to political expediency, international law, much like any area of law, does not, and should not stand still. International law is important not because it is the immutable code of yesterday, but because it can adapt and evolve to respond to the dangers of today. The Syrian Civil War has been, and remains, a chastening chapter in our recent history, and has perhaps exposed the inadequacies of international law when it comes to the fundamental protection of the vulnerable.

ANNEX I.**States which have notified the UNSC about the exercise of their right to self-defence against ISIL:**

| S/N | State | Reference Number |
|------------|--------------------------|--|
| 01. | United States of America | S/2014/695 ⁴³ |
| 02. | United Kingdom | S/2014/691, ⁴⁴ S/2015/688, ⁴⁵ S/2015/928 ⁴⁶ |
| 03. | Turkey | S/2015/127, ⁴⁷ S/2015/563 ⁴⁸ |
| 04. | Canada | S/2015/221 ⁴⁹ |
| 05. | France | S/2015/745 ⁵⁰ |
| 06. | Australia | S/2015/693 ⁵¹ |
| 07. | Germany | S/2015/946 ⁵² |
| 08. | Denmark | S/2016/34 ⁵³ |
| 09. | Norway | S/2016/513 ⁵⁴ |
| 10. | Belgium | S/2016/523 ⁵⁵ |

⁴³ UNSC (n 23).

⁴⁴ UNSC 'Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council' (22 September 2014) UN Doc S/2014/691.

⁴⁵ UNSC 'Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (8 September 2015) UN Doc S/2015/688.

⁴⁶ UNSC 'Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council' (3 December 2015) UN Doc S/2015/928.

⁴⁷ UNSC 'Identical letters dated 22 February 2015 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council' (23 February 2015) UN Doc S/2015/127.

⁴⁸ UNSC 'Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council' (24 July 2015) UN Doc S/2015/563.

⁴⁹ UNSC 'Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council' (31 March 2015) UN Doc S/2015/221.

⁵⁰ UNSC 'Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council' (9 September 2015) UN Doc S/2015/745.

⁵¹ UNSC 'Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council' (9 September 2015) UN Doc S/2015/693.

⁵² UNSC 'Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council' (10 December 2015) UN Doc S/2015/946.

⁵³ UNSC 'Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council' (13 January 2016) UN Doc S/2016/34.

⁵⁴ UNSC 'Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council' (3 June 2016) UN Doc S/2016/513.

⁵⁵ UNSC 'Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council' (9 June 2016) UN Doc S/2016/523.

ANNEX II.

Countries which have given explicit endorsement of the ‘unwilling or unable’ doctrine:

| S/N | Country |
|------------|--------------------------|
| 01. | United States of America |
| 02. | United Kingdom |
| 03. | Germany |
| 04. | The Netherlands |
| 05. | Czech Republic |
| 06. | Canada |
| 07. | Australia |
| 08. | Russia |
| 09. | Turkey |
| 10. | Israel |

Countries which have given implicit endorsement of the ‘unwilling or unable’ doctrine:

| S/N | Country |
|------------|----------------|
| 01. | Belgium |
| 02. | Iran |
| 03. | South Africa |

THE INTERNATIONAL COURT OF JUSTICE AND COMPENSATION FOR ENVIRONMENTAL HARM: A MISSED OPPORTUNITY?

Jefferi Hamzah Sendut*

I. INTRODUCTION

THE INTERNATIONAL COURT OF JUSTICE (ICJ) has for the first time considered a compensation claim for environmental harm in its 2018 judgment *Costa Rica v Nicaragua*.¹ The judgment is significant in its application of the law of State responsibility to environmental harms, the Court showing flexibility in regard to the issues of causation and quantification of damages which arise in relation to this particular context. Two criticisms of the Court's judgment are put forward. First, the ICJ's use of an "overall assessment" to quantify compensation leaves much to be desired in terms of clarity—the assessment's application is not explained.

Second, the judgment took an undesirably conservative line in flatly ruling out the imposition of punitive damages for environmental harm, and focusing narrowly on monetary compensation. Both matters were considered by members of the Court in separate opinions. The Court could legitimately have taken a more progressive approach in line with the growing concern of States for a suitable international legal framework to address environmental protection.

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¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation) 2018 <<http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf>> accessed 9 February 2018.

II. BACKGROUND

The case centred around a territorial dispute between Costa Rica and Nicaragua over a three square kilometre area of land around the San Juan river towards the north of the Isla Portillos on the border between both Parties. Costa Rica initiated proceedings on 18 November, 2010, for Nicaragua's alleged unlawful 'incursion into and occupation' of Costa Rican territory, as well as for its construction of a channel (*caño*) and dredging works leading to the degradation of the San Juan river wetland and rainforest environment.² The ICJ issued an order for provisional measures on 8 March, 2011 (hereinafter, "the 2011 Order").³

Further provisional measures were ordered on 22 November, 2013 (hereinafter, "the 2013 Order"). The Court found that Nicaragua had constructed two additional *caños* and established a military presence in the disputed area since the 2011 Order was issued,⁴ acts which Nicaragua acknowledged were in breach of its obligations under the 2011 Order.⁵ The 2013 Order prescribed that Nicaragua should cease excavation activities and remove its personnel from the disputed area.⁶

In its 2015 merits judgment, the ICJ found in favour of Costa Rican sovereignty over the disputed area. Nicaragua was therefore held to be obliged 'to compensate Costa Rica for material damages caused by Nicaragua's unlawful activities on Costa Rican territory', from its initial violation of Costa Rican sovereignty and the breaches of its obligations under the 2011 Order.⁷ The ICJ handed down the 2018 compensation judgment as a result of Costa Rica and Nicaragua's inability to reach agreement on the quantum of compensation in the twelve month period set by the Court at the merits stage.⁸

III. THE COURT'S AWARD

Costa Rica claimed compensation for 'quantifiable environmental damage caused by Nicaragua's excavation of the 2010 *caño* and the 2013 eastern *caño*', and 'costs and expenses incurred as the result of Nicaragua's unlawful activities, including expenses incurred to monitor or remedy the

² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Application Instituting Proceedings) 2010 26 <<https://www.icj-cij.org/files/case-related/150/16279.pdf>> accessed 9 February 2018.

³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Merits) [2015] ICJ Rep 665, 673.

⁴ *Border Area and Construction of a Road* (Merits) (ibid); *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, *Provisional Measures, Order of 22 November 2013* [2013] ICJ Rep 354 [45]-[46].

⁵ *Border Area and Construction of a Road* (Merits) (n 3) [25].

⁶ ibid; *Construction of a Road, Provisional Measures* (n 4) [59].

⁷ *Border Area and Construction of a Road* (Merits) (n 3) [229].

⁸ *Border Area* (Compensation) (n 1) [21].

environmental damage caused.⁹ In respect of the first category of damage, the Court in a 15-1 decision awarded US\$120,000 for the ‘impairment or loss of environmental goods and services’, and US\$2,708.39 for the costs incurred in wetland restoration. Judge *ad hoc* Dugard and Judge Donoghue voted against each of these two awards respectively.¹⁰ In respect of the second category of damage, the ICJ unanimously awarded US\$236,032.16 to Costa Rica for directly consequent costs and expenses, with an additional sum of US\$20,150.04 added as interest.¹¹

III. THE APPROACH OF THE COURT

A. COSTS AND EXPENSES INCURRED BY COSTA RICA

The Court’s approach to the ‘costs and expenses’ category of damage was relatively straightforward, and will be dealt with briefly. The Court engaged in an interrogation of whether Costa Rica was able to satisfy a ‘sufficiently direct and certain causal nexus’ between Nicaragua’s internationally wrongful conduct and the expenses incurred.¹²

It was found that Costa Rica was entitled to partial compensation for ‘fuel and maintenance services for police aircraft’ used to reach and overfly the disputed area,¹³ the Court deducting expenses relating to cargo transportation, press flights, and flights to other destinations.¹⁴ Full compensation was awarded for the cost of obtaining a UN Institute for Training and Research (UNITAR) Operational Satellite Applications Programme report to ‘detect and assess the environmental impact of Nicaragua’s presence’.¹⁵ No compensation was awarded for the salaries of the Costa Rican personnel allegedly involved in monitoring operations. The Court deeming there to be insufficient evidence that any ‘extraordinary expenses’ were incurred.¹⁶ Also, no compensation was awarded for costs incurred from procuring allegedly relevant satellite images from a private company as no evidence was provided on the area covered by these images.¹⁷

⁹ *ibid* [36].

¹⁰ *ibid* 42.

¹¹ *ibid*

¹² *ibid* [89].

¹³ *ibid* [95]

¹⁴ *ibid* [96].

¹⁵ *ibid* [98].

¹⁶ *ibid* [102].

¹⁷ *ibid* [105].

B. QUANTIFIABLE ENVIRONMENTAL DAMAGE

The ICJ's approach to compensation for quantifiable environmental damage is of greater interest. It began by definitively affirming that environmental damage 'and the consequent impairment or loss of the ability of the environment to provide goods and services'¹⁸ is compensable under general international law. This includes payment for 'active restoration measures'¹⁹ which a State may need to take to rectify damage on its territory. The Court's subsequent analysis dealt with the issues of determining the causation and value of the environmental damage caused by Nicaragua's internationally wrongful acts.

(i) *Quantifiable Environmental Damage: Causation*

On causation, the Court was aware of the difficulties in establishing a causal link between environmental damage and internationally wrongful conduct, whether on account of scientific uncertainty or the existence of multiple contributory factors.²⁰ Citing its decision in *Ahmadou Sadio Diallo*,²¹ as well as that of the *Trail Smelter*²² arbitral tribunal, the ICJ avoided taking an unduly rigid approach to the evidential burden.²³ The Court found that Costa Rica had adduced sufficient evidence to establish Nicaraguan causation of damage to 'trees, other raw materials, gas regulation and air quality services, and biodiversity'.²⁴ It is encouraging that the Court was receptive to scientific studies²⁵ which allowed the application of existing principles of law to reach a satisfactory result; the greater uncertainty inherent in quantifying losses to biodiversity as compared to say, trees, did not frustrate an analysis of causation, enabling the award of compensation. The causal assessment undertaken does have sensible limits, demonstrated in the Court's finding of an insufficient nexus between Nicaraguan *caño* construction and soil degradation, because natural processes had minimised the damage to a marginal difference in soil quality.²⁶

¹⁸ *ibid* [42].

¹⁹ *ibid* [43].

²⁰ *ibid* [34].

²¹ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation)* [2012] ICJ Rep 324.

²² *Trail Smelter case (United States v Canada)* (1938 and 1941) 3 RIAA 1920.

²³ *Border Area (Compensation)* (n 1) [35].

²⁴ *ibid* [75].

²⁵ *ibid* [70].

²⁶ *ibid* [74].

(ii) Quantifiable Environmental Damage: Valuation

The Court then went on to consider the alternative methodologies suggested by Costa Rica and Nicaragua to determine the valuation of compensation, eventually deciding that neither was appropriate.²⁷ Both were deemed too simplistic. Costa Rica's suggested method (the "ecosystem services approach")²⁸ was premised on 50 years being the time period required for the environment to recover to its original state naturally. An annual value of damage to 'ecosystem goods and services' was ascertained, and multiplied by the 50 year period, with a deduction made of 4% per year to take into account natural recovery reducing the annual value of damage.²⁹ This was rejected by the Court, which considered that there was inadequate evidence of the disputed area's original environmental state.³⁰ Moreover, the Court thought it to be far too broad-brush to amalgamate the range of distinct forms of environmental damage caused by Nicaragua into a single category with a set rate of recovery.³¹

Continuing its focus on the avoidance of unsuitable generalisations in valuation, the Court went on to reject Nicaragua's suggested methodology (focused on compensating "replacement costs"),³² which calculated a value for each hectare of land affected based on the money paid by Costa Rica to incentivise local landowners to participate in conservation activities—"the prices paid... are designed to offset the opportunity cost of preserving the environment for those individuals and groups" as opposed to representing 'the value of the goods and services provided by the ecosystem'.³³ The ICJ perceptively rejected a "corrected analysis" alternatively put forward by Nicaragua, which employed Costa Rica's suggested methodology with key alterations. The Court placed weight on how the corrected analysis failed to account for the long-lasting impact of environmental damage on fragile wetland ecosystems themselves, as well as upon their capacity to remove carbon dioxide (carbon sequestration) from the surrounding atmosphere.³⁴

The ICJ instead employed its own methodology, engaging in an overall assessment of environmental damage and its impacts on goods and services "from the perspective of the ecosystem as a whole".³⁵ Three reasons were offered for doing so: (1) the removal of trees by

²⁷ *ibid* [76].

²⁸ *ibid* [45].

²⁹ *ibid* [56].

³⁰ *ibid* [76].

³¹ *ibid*.

³² *ibid* [49].

³³ *ibid* [77].

³⁴ *ibid* [85].

³⁵ *ibid* [78].

Nicaragua has knock-on impacts affecting other forms of environmental harm claimed for,³⁶ (2) the goods and services of the wetland ecosystem in question are by their nature “closely interlinked”,³⁷ and (3) an overall valuation enables natural regeneration to be factored into a valuation.³⁸

IV. EVALUATING THE OVERALL ASSESSMENT APPROACH

It is important to evaluate the ICJ’s overall assessment approach to the valuation of quantifiable environmental damage because the approach may inform how the Court adjudicates future environmental compensation claims. Although the Court in this case was clearly influenced by the San Juan River wetland’s great ecological complexity and special protection from the Ramsar Convention, all ecosystems consist of interconnected elements, and natural regeneration likewise will surely always need to be taken into consideration. Furthermore, as the negative effects of climate change and other forms of environmental degradation make themselves increasingly felt, it appears probable that future disputes similar to that in *Costa Rica v Nicaragua* will find their way to the ICJ or other international tribunals.³⁹

The problem evident in the overall assessment approach is that it may well be charged with the same fault the Court implicitly identified in rejecting the methodologies suggested by Costa Rica and Nicaragua: drawing overly simplistic generalisations in valuation. In its judgment, the Court does not detail how the approach is actually applied. The only guidance given as to this matter of application is a statement of the relevant environmental goods and services examined (that is, those established as affected by Nicaragua’s wrongful acts), that the overall assessment will deduct from the compensation awarded a sum to account for the causal uncertainties present, and whatever can be gleaned from the Court’s reasons for adopting the approach. These pieces of information aside, the Court essentially goes straight from declaring that it will undertake an overall assessment to announcing the monetary sum of compensation to be awarded.

³⁶ *ibid* [79].

³⁷ *ibid* [80].

³⁸ *ibid* [81].

³⁹ See Philippe Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’ (2016) 28 *EJIL* 19, 32.

A. WHY THE ICJ NEEDS CLARITY IN ITS METHODOLOGY

This criticism may be challenged as unfounded on the ground that the ICJ did not need to provide guidance on how it applied its overall assessment. After all, the compensation judgment presently considered only arose because Costa Rica and Nicaragua were unable to agree on the quantum of compensation between themselves—so long as the sum awarded was not excessively high or excessively low, the methodology employed by the Court could be argued to be of relatively limited significance to either Party. In light of the absence of international adjudicative bodies of compulsory jurisdiction however, such an argument cannot stand. The role of judicial “style[s]” of judgment in municipal systems as reflections of how courts attempt to “persuade [their relevant] legal audience” of the soundness of their decisions has been thoroughly explored by commentators.⁴⁰

This burden of persuasion must weigh even more heavily on international tribunals, which rely on the consent of States to their jurisdiction in order to fulfil their role in the international system. The ICJ should hence be more forthright in its application of the legal methodology it has apparently formulated under the label of an overall assessment to the facts of future environmental compensation claims. In the context of the ICJ’s apparent use of “assertion” rather than thorough evaluations of State practice to determine customary international law, Talmon has cautioned that “[i]f the Court’s assertions do not convince its clients, States may simply stay away from the Court”.⁴¹ The same may be said in the realm of environmental adjudication of the use of an uncertain overall assessment to determine compensation, which as presently set out conceals more than it clarifies.

B. THE ICJ’S ASSESSMENT LACKS PRINCIPLED, NORMATIVE DIRECTION

A second ground on which this criticism may be challenged is that the ICJ cannot be expected to expound in detail how it reached the sum owed by Nicaragua. Doing so would be contrary to its reasons for employing the overall assessment approach in the first place—environmental damage is not readily amenable to precise quantification. But consider the Separate Opinion of Judge Bhandari, where he highlights the approach of the ICJ to non-material injury to the person in *Diallo*. Precise quantification was also rendered difficult by the nature of the harm

⁴⁰ John Bell, ‘Comparing Precedent’ (1997) 82 Cornell Law Review 1243, 1250.

⁴¹ Stefan Talmon, ‘Determining Customary International Law’ (2015) 26 EJIL 417, 442.

there, but the ICJ was clear that “[q]uantification of compensation for non-material injury necessarily rests on equitable considerations”.⁴²

It may be said that recourse to the legal concept of equitable considerations provides no more clarity on quantification in isolation than undertaking an overall assessment; the former concept only has practical meaning to the extent an examination of international treaties or jurisprudence elucidates. Indeed, such an examination was carried out by the ICJ in *Diallo*.⁴³ Notwithstanding, the reliance on equitable considerations undoubtedly engages normative principles, and provides a starting point as to how the Court approaches compensation claims. As the concept’s application in *Diallo* shows, the fundamental importance of redressing the abuses suffered by Mr Diallo as an individual meant that compensation should not be prevented by niceties of causation or quantification—the “benefit of the doubt” should be given. In other words, the principle demanding just compensation for human rights abuses provides at least a tentative indication that the quantum to be awarded will be generous as compared to the position in a claim under a different head of damage equally afflicted by imperfect evidence of a direct causal nexus.

By contrast, the ICJ’s overall assessment approach in *Costa Rica v Nicaragua* does not provide a comparable normative starting point. True, the ICJ does acknowledge the interconnected nature of ecological systems, but when calculating compensation for quantifiable damage, this does no more than amount to an assertion that *all circumstances*, as extremely wide ranging as they are, will be taken into account. Recognising this issue, Judge Bhandari seemingly distanced himself from the label of an overall assessment, preferring instead that the injured State be straightforwardly awarded “a lump sum amount of compensation based on equitable considerations”.⁴⁴ Judge Bhandari’s suggestion has much to commend it, but care should be taken in the environmental context to ensure equitable considerations are not used to mask judicial discretion untethered to any attempt at objective quantification of damage. The concept should serve to frame the Court’s approach, directing it and providing a means to overcome uncertainties arising within the quantification process.

⁴² *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo (Compensation))* [2012] ICJ Rep 324 [24].

⁴³ *ibid.*

⁴⁴ *Border Area (Compensation)* (n 1), Separate Opinion of Judge Bhandari [11] <<https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-03-EN.pdf>> accessed 9 February 2018.

V. THE QUESTION OF PUNITIVE DAMAGES FOR ENVIRONMENTAL HARM

Judge Bhandari's Separate Opinion is also of note for its endorsement of the award of punitive damages for serious environmental harm caused by the wrongful conduct of States,⁴⁵ a prospect which the Court rejected in its judgment.⁴⁶ Judge Bhandari draws upon the ever closer link which has been observed elsewhere between international environmental law and themes of world public order⁴⁷. Matters of no lesser significance than the "survival of mankind"⁴⁸ are said to warrant the imposition of punitive damage by international tribunals so as to deter State behaviour harmful to the environment. Judge Bhandari's reasoning is normatively attractive, and its implementation in practice would move international law closer to a system prioritising the "greater interests of humanity and planetary welfare" over "individual State self-interest", as envisaged by Vice-President Weeramantry in his Separate Opinion to the *Gabčíkovo-Nagymaros Project* judgment.⁴⁹

Additionally, as explained by Shelton in the context of remedies in international human rights law, punitive damages would "also [provide] an incentive for victims who have suffered severe dignitary harm, but little compensatory loss, to pursue wrongdoers who would otherwise go unsanctioned".⁵⁰ This rationale is applicable *mutatis mutandis* to punitive damages for environmental harm. It is certainly conceivable a State economically reliant on a larger neighbouring State may decide against pursuing claims against them, tolerating a certain degree of environmental harm out of a concern to preserve trading relations as they stand. The availability of punitive damages may serve to alter the calculus of the injured State in favour of bringing a claim to the benefit of the wider international community, due to the prospect of a greater quantum of damages than a merely compensatory sum, along with the enhanced moral sanction involved.

Existing State practice indicates that the future development of customary international law to allow the imposition of punitive damages on States which wrongfully cause environmental harm is plausible. States have increasingly demonstrated a willingness to depart from a consensualist model of international law with absolute State sovereignty at its centre, insofar as they have

⁴⁵ *ibid* [18].

⁴⁶ *Border Area (Compensation)* (n 1) [31].

⁴⁷ See Hisashi Owada, 'International Environmental Law and the International Court of Justice' (Inaugural Lecture at the Fellowship Programme on International and Comparative Environmental Law, 2006).

⁴⁸ Separate Opinion of Judge Bhandari (n 44) [17].

⁴⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, Separate Opinion of Vice-President Weeramantry 118.

⁵⁰ Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 402.

accepted legal constraints prohibiting environmentally harmful conduct. The evolution of the law of State responsibility to allow punitive damages in the environmental context would conform to the trend.

Take for example the practice of the 10 States of the Association of South East Asian Nations (ASEAN) in response to transboundary haze pollution. ASEAN has been characterised as the regional grouping “wariest about embracing [international legal] rules and structures”.⁵¹ Its Member States’ “general wariness of delegating sovereignty”⁵² is encapsulated in the “ASEAN Way”, a political approach to intra-regional relations emphasising consensus and mutual non-interference.⁵³ Certain commentators have even gone so far as to argue that ASEAN State practice and *opinio juris* is so consistent as to give the ASEAN Way the status of regional custom.⁵⁴ Even so, the challenges of adequately addressing transboundary haze emanating from Indonesian forest fires have led to changes to the ASEAN Way. These changes have taken the form of the adoption of hard-law instruments such as the ASEAN Agreement on Transboundary Haze Pollution 2002.⁵⁵ The 2002 Agreement enshrined the “no harm principle”, that States are obliged to refrain from conduct within their territories which lead to environmental harm in other States.⁵⁶ A prevalent regional adherence to Westphalian conceptions of sovereignty⁵⁷ was therefore altered “so that it is more compatible with the evolving principles of international environmental law”.⁵⁸ ASEAN States have “[accepted] that a state’s sovereignty is limited by the principles governing transboundary pollution”.⁵⁹ If these changes are possible within ASEAN, it seems reasonable to assert that a wider evolution of customary international law to deter environmental harm with punitive damages is not entirely unforeseeable.

⁵¹ Simon Chesterman, ‘Asia’s Ambivalence about International Law and Institutions: Past, Present and Futures’ (2016) 27 *EJIL* 945.

⁵² *ibid* 946.

⁵³ TI Nischalke, ‘Insights from ASEAN’s Foreign Policy Co-operation: The “ASEAN Way”, a Real Spirit or a Phantom?’ (2000) 1 *Contemporary Southeast Asia* 89, 90.

⁵⁴ Koh Kheng-Lian, Nicholas A. Robinson and Lye Lin-Heng, *ASEAN Environmental Legal Integration: Sustainable Goals?* (CUP 2016) 24.

⁵⁵ Laely Nurhidayah, Shawkat Alam and Zada Lipman, ‘The Influence of International Law upon ASEAN Approaches in Addressing Transboundary Haze Pollution in Southeast Asia’ (2015) 37 *Contemporary Southeast Asia* 183, 191.

⁵⁶ *ibid*.

⁵⁷ See generally, Simon Chesterman (n 51).

⁵⁸ Nurhidayah, Alam and Lipman (n 55) 203.

⁵⁹ *ibid*.

It is nevertheless worth reiterating that punitive damages do not presently form part of customary international law, as Judge Bhandari acknowledges.⁶⁰ As a matter of policy they remain highly controversial,⁶¹ and the Separate Opinions in *Costa Rica v Nicaragua* underscore the disagreement between members of the ICJ on the issue. Warning against their introduction through the overall assessment approach, Judge Gevorgian argues that to do so would risk “the peaceful settlement of environmental disputes [being] jeopardised”.⁶² Judge Gevorgian’s concerns appear to relate to how States may reject international adjudication for environmental dispute settlement if the ICJ or other tribunals impose punitive damages upon them by judicial fiat. No doubt, the basic requirement of “a settled practice”⁶³ of States for customary international law formation would render any arbitrary award of punitive damages illegitimate, regardless of the policy justifications behind them.⁶⁴ Insofar as Judge Bhandari’s call for the “progressive development”⁶⁵ of customary international law envisages precisely such an award, the restraint on the ICJ’s part is prudent. That being said, the issues raised in his Separate Opinion remain pertinent grounds on which to criticise the Court’s refusal to discuss the desirability of punitive damages, and thereby encourage their renewed consideration by States.

VI. *ERGA OMNES* OBLIGATIONS AND INTERNATIONAL ENVIRONMENTAL PROTECTION THROUGH GUARANTEES OF NON-REPETITION

Regrettably, the ICJ’s judgment makes no mention of the relationship between *erga omnes* obligations, “the obligations of a State towards the international community as a whole”,⁶⁶ and compensation for environmental harm caused by internationally wrongful conduct. The issue is however directly addressed in the Dissenting Opinion of Judge *ad hoc* Dugard. He posits that the quantum of compensation awarded to Costa Rica for Nicaragua’s destruction of trees in the

⁶⁰ Separate Opinion of Judge Bhandari (n 44) [16].

⁶¹ Not least due to their association with the concept of “crime of State”; also see Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 416.

⁶² *Border Area* (Compensation) (n 1), Declaration of Judge Gevorgian [9] <<https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-04-EN.pdf>> accessed 9 February 2018.

⁶³ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 44 [77].

⁶⁴ Article 38(1)(b) of the ICJ Statute would also preclude the ICJ applying purportedly customary rules or principles not derived from “general practice accepted as law”.

⁶⁵ Separate Opinion of Judge Bhandari (n 44) [18].

⁶⁶ *Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3, [33].

disputed area was insufficient, because “the obligation not to engage in wrongful deforestation that results in the release of carbon into the atmosphere and the loss of gas sequestration services is certainly an obligation *erga omnes*”.⁶⁷ As such, Costa Rica’s compensation should have been inflated to reflect the breach of an obligation owed both to itself, along with the international community as a whole.⁶⁸

Accepting Judge *ad hoc* Dugard’s categorisation of an obligation against wrongful deforestation as an *erga omnes* obligation, it is difficult to see why simply because Costa Rica is ‘the State most immediately affected’ and “the most likely to assert [the connected rights]”,⁶⁹ it should receive increased compensation to vindicate rights owed to all States across the globe. If part of the sum of compensation awarded to Costa Rica reflects compensation for a breach of an obligation owed to the international community, it follows naturally that Costa Rica would be bound to use that proportion of its award to mitigate the environmental harm caused by the breach to the wider world. That is clearly unsupported by State practice at present. Costa Rica has a complete discretion as to how it should use the monetary compensation it is awarded.⁷⁰ The international community would thus receive nothing in the way of material redress, but one of its members receives a windfall on its behalf.⁷¹

The categorising some of the obligations breached by Nicaragua as *erga omnes* lends itself more readily to measures such as guarantees of non-repetition, adding force to the suggestions within the Separate Opinion of Judge Cançado Trindade. He correctly viewed the ICJ’s judgment as too narrowly restricted to monetary compensation, failing to consider different forms of reparations better suited to environmental harm, including said guarantees.⁷² The interests of the international community in redressing a breach of obligations owed to it would be materially served

⁶⁷ *Border Area (Compensation)* (n 1), Dissenting Opinion of Judge *ad hoc* Dugard [35] <<https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-06-EN.pdf>> accessed 9 February 2018.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ Also see Article 19, International Law Commission Draft Articles on Diplomatic Protection (2006).

⁷¹ A windfall of this type would be distinct from Costa Rica receiving a greater quantum of compensation awarded as punitive damages. While both Judge *ad hoc* Dugard’s *erga omnes* approach and punitive damages would see a State receive a greater quantum of compensation, an award of punitive damages does not suffer from the aforementioned logical difficulty of compensating a State for a breach of an obligation not owed to it, but to the international community. The rationale for an award of punitive damages is based on a policy choice: if States consider the protection of the environment to be sufficiently important to world public order, punitive damages should be seen as a means to enforce this norm and *deter conduct* seriously deleterious to States’ common interest, rather than as compensating the international community in monetary terms.

⁷² *Border Area (Compensation)* (n 1), Separate Opinion of Judge Cançado Trindade [54] <<https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-01-EN.pdf>> accessed 9 February 2018.

by a Costa Rican claim preventing future breaches and the consequent environmental harm. The possible expansion of *erga omnes* obligations associated with international environmental protection should encourage the ICJ to diversify the future reparations it orders in disputes involving environmental harm.

VII. CONCLUSION

Despite the above objections to Judge *ad hoc* Dugard's reasoning on *erga omnes* obligations, his overall sentiment that the ICJ's compensation judgment in *Costa Rica v Nicaragua* represents a missed opportunity is apt.⁷³ In its first adjudication of a claim for compensation for environmental harm, the ICJ has shown that it is capable of determining a practically unobjectionable award despite the hurdles of evidential uncertainty inherent in such claims. The Court's causation and quantification analyses successfully incorporated the flexibility necessary to do so.

However, the judgment's approach is undermined by its failure to provide clarity on how an overall assessment to quantify compensation for environmental harm is carried out, as well as the reluctance of the Court to moot punitive damages and guarantees of non-repetition as appropriate remedies. The Separate and Dissenting Opinions issued by certain members of the Court help illustrate that persuasive arguments do exist for these specific developments. These faults compromise the judgment's capacity to lead the advancement of international law's protection of the environment, a matter which engages issues of existential importance to humankind. These high-stakes circumstances demand a degree of judicial ingenuity on the part of the World Court.

⁷³ See Dissenting Opinion of Judge *ad hoc* Dugard (n 67) [36].

IMPLIED TERMS AND NAZIR ALI: TROUBLE FOR WORK-SPONSORED SCHOLARSHIP?

Matteo Maciel* and Adam Walton*

ABSTRACT

THE RECENT PRIVY COUNCIL judgment *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 has brought forward clear and consistent principles regarding implied terms set out within the Supreme Court Case *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*. It seems to be a foregone conclusion that *Nazir Ali* would be the approach taken by the Supreme Court. Correspondingly the ruling has produced two significant conclusions. Firstly, it draws forward questions relating to the crystallisation of implied terms in the academic-funding context of repayable loans. Second, it shows the approach of necessity made clear in *Marks & Spencer* is to be applied strictly. This case note examines the board's ruling and highlights key elements which may spell trouble for the courts in the future.

I. INTRODUCTION

*Marks & Spencer Plc v BNP Paribas*¹ has provided clear and refined principles for when terms may be implied into legally enforceable agreements, most notably in the commercial context.² In *Nazir Ali v Petroleum Company of Trinidad and Tobago*,³ the Privy Council was asked whether an implied

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¹ *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742.

² *ibid* [21] (Lord Neuberger).

³ *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531.

term existed within a loan-repayment agreement between an employer and employee. It provides one of the first judicial applications of the new re-formulated principles established in *Marks & Spencer* and highlights a narrow interpretation of the necessity test. However, the implications of its judgment are more far-reaching. *Nazir Ali* is significant in its ruling because its timing facilitates further clarification of the breadth of the test. It also speaks directly to implied terms within repayable loans. The *Nazir Ali* decision, made in line with *Marks & Spencer*, might well have produced the correct decision in principle, but one must question whether it produced an equitable or even a just result with respect to repayable loans in a scholarship or academic funding context. The central point of *Nazir Ali* is that the test of ‘necessity’ was interpreted narrowly so that the term was said to be necessary only when the employer prevented the employee from performing his promise.

In *Willers v Joyce & another (No 2)*,⁴ the Supreme Court streamlined an unsettled doctrine of precedent; where it held: (a) that English courts are not bound to follow Privy Council judgments where they are inconsistent with other binding precedent; and (b) that Privy Council judgments are not ‘binding’ but courts are expected to give great weight to them. They hold this weight especially if the panel expressly directs that they represent English law. In *Nazir Ali*, the Privy Council’s direct application of *Marks & Spencer* shows the new implied term regime in practice. In *Marks & Spencer*, the tenant appealed against an implied term concerning repayment of rent in a lease. The Supreme Court, in affirming the judgment of the Court of Appeal, revisited implied terms generally and approved two instances when terms may be implied into a commercial contract: (a) necessity: would the contract lack commercial or practical coherence without the term; and (b) the officious bystander: would both parties have unquestionably agreed to the inclusion of the term if asked at the time of contracting. In commercial matters, detailed agreements should lead courts to be hesitant in implying a term based on fairness or because the parties would have agreed otherwise.

It seems a ‘foregone conclusion’ that the Supreme Court will follow *Nazir Ali* in English Law.⁵ Even if one is unable to attribute binding weight to *Nazir Ali*, it gives an indication of how the Supreme Court would rule in a case within this jurisdiction. Scrutinising the outcome of *Nazir Ali* with regard to scholarships paid by employers to employees for employee development, we suggest, although briefly, that this is contrary to Government goals of promoting workplace

⁴ *Willers v Joyce & another (No 2)* [2016] UKSC 44, [2016] 3 WLR 534.

⁵ *ibid.*

training and it weakens the position of employees. The principles set by the board are uncontroversial in their application of applying the test for implied terms. It has not altered *Marks & Spencer*. However, in the context of repayable loans, *Nazir Ali* is controversial in the board's interpretation of when the implied term engages and further, the consequences of that engagement. The result is that employees may be harmed. On the facts established at trial, the board skirted around a question fundamental to the coherence of repayable loans. At what point do the actions of the lender make it necessary for the lender to relinquishing any right to repayment? *Nazir Ali* has provided an indication of how English courts may rule when approaching repayable loans but it seems to fall short of providing a satisfying resolution to the dilemma which underpins its facts.

II. FACTS, ARGUMENT AND JUDGMENT

In *Nazir Ali*, Mr Ali worked for the Petroleum Company of Trinidad and Tobago's (hereinafter, "Petrotrin") predecessor, the Tobago Petroleum Company (hereinafter, "Trintopec"), beginning in 1978. In 1989 Mr Ali was offered the opportunity to study a degree at Louisiana State University (LSU) in the United States with the course fees paid outright by Trintopec. This was indubitably an opportunity not reasonably achievable without the support of Trintopec. Trintopec also provided a repayable loan of TT\$3500 in a monthly allowance over five years and a TT\$33,000 lump sum for furniture. This loan would be waived if Mr Ali returned to work for Trintopec for a period of five years. In his dissent, Lord Kerr acknowledges that this arrangement was advantageous for Mr Ali and for Trintopec, both receiving long-term benefit. During Mr Ali's time at LSU, Trintopec underwent substantial restructuring and eventually a merged with Trintoc to create Petrotrin. This merger brought Petrotrin the financial hardships which plagued the company's predecessors.

Upon Mr Ali's return in 1994, the company initiated one of many voluntary redundancy schemes, advising a specific class of employees that it was looking to reduce employees within that said class. Mr Ali was within this class, and had previously expressed discontent with his role within the company following his return. He was disappointed with his position and felt let down by the company. At trial, it appears his discontent contributed to the Court's opinion that Mr Ali was aware that his loan would need to be repaid. The judge did not accept that Mr Ali was unaware. Factually this is significant because it meant that the board's decision of when the implied term engaged was of greater importance.

In holding this opinion, the board observed that “[i]nvitations to participate in the scheme would be sent only to those who had a minimum of five years’ service... whose jobs have become redundant as determined by the company”.⁶ The opportunity to participate was a voluntary activity. Mr Ali signed the letter necessary to participate in the scheme in October of 1995. The company subsequently initiated the redundancy scheme and, upon termination, sought to recover the loan owed to Mr Ali by reducing the money owed through redundancy.

The Privy Council appeal asked whether the repayable loan included an implied term restricting Trintopec from terminating Mr Ali’s employment and seeking repayment. Lord Hughes, with whom Lord Neuberger, Lord Clarke and Lord Carnwath agreed, gave the leading judgment, echoing the principle of necessity,⁷ as upheld and re-formulated in *Marks and Spencer*.⁸ Lord Kerr JCS presented a visceral dissent, highlighting inconsistencies and barbed areas of concern within the application of the principles found in *Marks and Spencer* to the facts. It is interesting to note that Lord Kerr was not one of the Lords who sat on the panel in *Marks and Spencer*. The board rejected an implied term that could restrict Trintopec. They acknowledged that had Trintopec terminated Mr Ali’s contract without cause, there would necessarily be an obligation to waive the right to repayment. Lord Kerr questioned the substantive difference between volunteering for (potential) redundancy through a scheme and dismissal without cause. To understand why Lord Kerr’s fine-tuned argument holds particular zest, it is important to understand why the majority dismissed the appeal and found in favour of the respondents. Subsequently, this will highlight why Nazir Ali is of significance beyond the Caribbean commonwealth.

Lord Hughes rejected Mr Ali’s claim that there ought to be a term implied into the contract that the company was required to allow Mr Ali to work for them for at least the five years needed.⁹ However, the board accepted Mr Ali’s second submission that a term is implied which waived the repayment of the loan had the defendants terminated his employment at their own initiative for reasons other than dishonesty or breach of fiduciary duty committed by Mr Ali.¹⁰ Importantly, although the board decided that there was an implied term, they held that it had yet to be triggered. It was the question on when the term had been triggered which divided Lord Hughes and the majority from Lord Kerr. It was the moment at which the implied term was engaged that divided

⁶ *Nazir Ali* (n 3).

⁷ Also see *Stirling v Maitland and Boyd* (1864) 5 B&S 840, 122 ER 1043 (Cockburn CJ); *Southern Foundries Ltd v Shirlaw* [1940] AC 701, 717 (Lord Atkin).

⁸ *Marks & Spencer* (n 1).

⁹ *Nazir Ali* (n 3) [9]–[10] (Lord Hughes JSC).

¹⁰ *ibid* [9], [11].

the Privy Council. The difference can be explained by the differing approaches between Lord Kerr and Lord Hughes in creating the implied term. Lord Kerr, followed an officious bystander test, while Lord Hughes applied the necessity test in accordance with *Marks & Spencer*.

III. IMPLICATIONS AND ANALYSIS

Nazir Ali is significant for two reasons. Firstly, the decision on the facts highlights potential dangers in the application of when the implied term engages. Secondly, it highlights a strict inclination by the courts when interpreting the test of necessity.

The Majority held that the implied term was restricted so that the clause only became triggered when the employer prevented the employee for completing the five years of service without cause. It was further held that such an implied term did not run contrary to the express term which stated Mr Ali must complete five-year's service to waive the payment.¹¹ Lord Hughes went on to expressly reject the formulation offered by Lord Kerr, stating that such that a formulation falls far short from meeting the test for implication. It would mean the respondents would be required to waive the payment as soon as the redundancy circular was sent to Mr Ali, regardless of whether Mr Ali opted to take redundancy or not.¹²

Rather than following the board, Lord Kerr concluded that the result was inequitable. The authors suggest that Lord Kerr's opinion is clearly driven by the narrative of equity. These further frame his interpretation of the application of the officious bystander test and the implied term within Mr Ali's agreement. He relied on the fact that Mr Ali would not have attended LSU if not for the implied term. Redundancy, no matter what form, ought not to be able to trigger debt repayment.¹³ "Mr Ali was told that he might be a member of a targeted group for redundancy and that there was no guarantee if he did not opt for it, he would not have been made redundant nevertheless".¹⁴ One wonders whether there was an additional implied term for the employer to warn the employee that he would be required to repay should redundancy occur.

¹¹ *ibid* [12].

¹² *ibid* [13] (Lord Hughes JSC).

¹³ *ibid* [31] (Lord Kerr JSC).

¹⁴ *ibid* [26].

IV. SIGNIFICANCE OF LORD KERR'S DISSENT

Lord Kerr began by questioning the formulation of the 'officious bystander test' which is premised upon a notion of a unanimous agreement as to the inclusion of the term. He observed that the test does not question what is needed to make the contract work (necessity), merely what is an "irresistibly obvious" term which would have been agreed to by both parties.¹⁵

Lord Kerr's questioning of the breadth of the necessity test exposes a certain un-refined danger in its practical application considering the rules of Equity and indeed when thinking of facts to form the test of necessity through an element of retrospect. As noted by Sir Thomas Bingham MR, "Court[s] come to the task of implication with the benefit of hindsight, and it's tempting for the Court then to fashion a term which will reflect the merits of the situation as they appear. Tempting but wrong."¹⁶

Sir Thomas Bingham MR's opinion holds considerable weight considering Lord Kerr's observations of how Lord Hughes and the majority formulated the question posed to the 'officious bystander'. Lord Kerr believed had Mr Ali not opted for voluntary redundancy. For the board to act with hindsight would be introducing an "inadmissible retrospective dimension" (toward the facts necessary to deciding necessity). This would be a mistake. This knowledge of what has been and where the parties have gone, would not accurately represent how the parties would have responded to the so called officious bystander in reality.¹⁷ It was for this reason that Lord Kerr rejected the opinion of the majority in favour of a judgment with a strong flavour of equity. Lord Kerr suggests that the bystander ought to be asked in the context as if:

Mr Ali was told that he might be a member of a targeted group for redundancy and that there was no guarantee that, if he did not opt for it, he would not have been made redundant.¹⁸

This prompts one to question when retrospect ought to be invoked. In *Marks & Spencer* Lord Neuberger P (who was part of the majority with whom Lord Hughes agreed) found that judicial observations, like those of Lord Bingham MR above, as invoked 'retrospect'. This was

¹⁵ *ibid* [26] (Lord Kerr JSC).

¹⁶ *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 (CA) 482 (Sir Thomas Bingham MR).

¹⁷ *Nazir Ali* (n 3) (Lord Kerr JSC) [30].

¹⁸ *ibid*.

expressly and assertively rejected, Lord Neuberger described this as a “clear, consistent and principled approach” which would be “dangerous to reformulate”.¹⁹ Yet in the present case, ‘retrospect’ of the facts which are relied upon to decide necessity, had been central to enabling the courts to draw their conclusions. It calls attention to elements which may lead to substantial inequitable implications.

Lord Kerr suggested Trintopac did not conceive it necessary to include any term which referenced what would happen regarding the repayment of the loan in a situation of redundancy precluding Mr Ali from completing his five-year term of employment. Lord Kerr uses the doctrine of presumed intention established in the *Moorcock*²⁰ to highlight how this omission of such a term must be evidence of the parties’ intention with regard to a situation such as the one in the present case where an answer he suggests must be clearly obvious.²¹ Lord Kerr seems to be invoking an approach, not dissimilar to that taken by Lord Simon when he exposed five terms necessary for terms implied into a contract.²² That is to say, Lord Kerr seems to be pursuing the fact that their Lordship’s retrospective knowledge of where the facts have led, fundamentally changes the question asked of the Board. Lord Kerr’s observations run uneasy with the judgement of Lord Neuberger in *Marks & Spencer*, cutting against the expressly approved observations of Bingham MR,²³ who expressed caution that the Courts must be wary when implying terms where “it may well be doubtful whether the omission [of such a term] was the result of the party’s oversight or of deliberate decision”.²⁴

¹⁹ *Marks & Spencer* (n 1) [21] (Lord Neuberger PSC with whom Lord Sumption and Lord Hodge JJSC agreed); also see *Atkins International HA v Islamic Republic of Iran Shipping Lines* [1987] 2 Lloyd’s Rep 37 (CA) 42 (Bingham LJ).

²⁰ *The Moorcock* (1889) 14 PD 64 (CA) 68 (Bowen LJ).

²¹ *Nazir Ali* (n 3) [27]–[28] (Lord Kerr JSC).

²² *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) 283 (Lord Simon with whom Viscount Dilhorne and Lord Keith agreed).

²³ *Marks & Spencer* (n 1) [19]–[21] (Lord Neuberger PSC with whom Lord Sumption and Lord Hodge JJSC agreed); *Philips Electronique* (n 16) 482 (Bingham MR).

²⁴ *Marks & Spencer* (ibid); *Philips Electronique* (n 16) 481 (Bingham MR).

V. NAZIR ALI AND FUTURE SIGNIFICANCE

Nazir Ali has highlighted an example of a repayable loan which many students in the UK encounter yearly through Training Contracts and Graduate Schemes. It is quite easy, considering the collapse of King Wood & Malleons,²⁵ to imagine a scenario which the Privy Council explicitly skirted around. The court has made clear that:

[I]t does not however, follow, that in every case of dismissal for redundancy the employer can be said to have prevented the employee from continuing to work for him so as to trigger the implied term of cooperation which must be read into the contract in the present case.²⁶

Although the implied term Mr Ali sought could be read-in, less certainty can be said as to what circumstances might trigger the term. Indeed, it is this sentiment which clearly sits as the engine of Lord Kerr's dissent when he writes:

It is to my mind, inconceivable that the employer would have said that the living allowances would have to be repaid if, as a result of its actions, Mr Ali found himself unable to fulfil the conditions.²⁷

It's likely that the Courts will require a second-pass at this question, their conclusion as to whether an employee, who is unable to complete the stipulated work requirements for exempting repayment loans, ought to pay for that funding, is wrong. At the very least, this seems like a place where parliament ought to voice clarity—and provide stability to employees. Education on the whole is a clear good which has been an objective of Government for quite some time, to risk unwinding this policy because some individuals will be unwilling to risk having to pay back their employer, if found in a similar situation to Mr Ali Lord Kerr's argument is particularly cutting when producing scenarios parallel to Mr Ali's case. In questioning the substantive difference between redundancy and termination without cause, Lord Kerr disagrees with the majority who

²⁵ Mark A Cohen, 'The King & Wood Malleons Collapse: Déjà vu All Over Again' *Forbes* (New York, December 17 2016) '<<http://www.forbes.com/sites/markcohen1/2016/12/17/the-king-wood-malleons-collapse-deja-vu-all-over-again/#53f95a8540ba>> accessed 19 February 2017.

²⁶ *Nazir Ali* (n 3) [18]–[19] (Lord Hughes JSC).

²⁷ *ibid* [26] (Lord Kerr JSC).

considered the substantive elements of the two events to be fundamentally different. Lord Kerr reaches his conclusion through construing the officious bystander test to find a way to imply what would be an equitable term.²⁸ His challenge extends from a questioning of whether the decision to take voluntary redundancy is in-fact ever truly ‘voluntary’.²⁹

As previously stated, whilst the judgment in *Nazir Ali* is uncontroversial in its application of *Marks*, there is potential detriment incurred onto the value and. It is hard to say whether the board would side with Lord Kerr had the voluntary redundancy been followed by the winding-up of the company. Would their Lordships have viewed more favourably Mr Ali’s active attempt to take the predictability of his future into his own hands? It is trite that in insolvency, often the best human capital is lost as the certainty of a firm’s future waivers—it is why firms are increasingly looking to pre-packaged sales to preserve intangible value.³⁰ The authors query whether the policy outcome of the judgment in *Nazir Ali* is properly aligned with adequately empowering employees. If an employee is now hesitant to undertake education sponsored by her employer because of the risk of having to pay the fee back, then two major losses have occurred. First, the economy has lost. Real knowledge which may benefit the business and the British economy was prevented because of the unaffordability of education. Second, and most importantly, a scheme designed to increase class mobility by providing education, primarily through on-job training has failed. It has bound the employee to the employer. It devalues the value of her as human capital because she is required to dig-in and hope the employer does not run insolvent. This could be at a wage well below her market value. If that difference is insufficient to cover the cost of paying back her employer for education, then real devaluation has occurred. In a time of growing income inequality, wage suppression, and class immobility, both are aspects which the authors suggest are detrimental, and while not likely to outweigh the benefit of holding precedent, certainly draw forth a policy question for Government to address.

The repayable loan Mr Ali signed is almost ubiquitous in modern solicitor training contracts. Many stipulate a coverage of Legal Practice Course (LPC) fees and maintenance awards repayable should the trainee fail to complete the contract. It is unclear how the Law Lords would approach such a scenario under facts like *Nazir Ali*. The Privy Council does not resolve whether a future employee who has completed the LPC on firm sponsorship, yet to undertake a training contract will be indebted to the firm if that firm offers voluntary redundancy. The firm may well discharge

²⁸ *ibid* [29] (Lord Kerr JSC).

²⁹ *ibid*.

³⁰ Douglas G Baird, ‘Beyond Recidivism’ (2006) 54 *Buffalo Law Review* 343, 360.

the right to pursue collection, but this conclusion is not axiomatic. The activation of the implied term cannot, in principle, rest on good-will. It's conceivable that an administrator might pursue LPC students for unjust enrichment or unpaid debts to discharge obligations the firm owes the LPC supplier. To draw this point to its logical conclusion, we suggest that Lord Hughes' judgment in *Nazir Ali* shows it is not fully settled whether Mr Ali was absolved from the debt had Trintopec mandatorily made Mr Ali redundant, albeit it is seemingly likely that the board would have held this.³¹ Surely an implied term must exist to protect employees who would not have undertaken the course themselves without the company's sponsorship. *Nazir Ali* does little to resolve this despite addressing a nearly identical problem and it will likely require a second-pass by the Court.

VI. CONCLUSION

Nazir Ali reveals the firmness in the Supreme Court judgment of *Marks & Spencer*, while simultaneously showing the obstacles an implied term might encounter when the court is asked to determine the point at which the term has crystallised. The Privy Council has rightly identified an implied term to exist within the contractual scholarship between Mr Ali and Trintopec and most importantly it has shown the court's propensity to narrow necessity. However, the point at which the term engages leaves a sour taste.

It cannot be right that the Court's dividing line exists between voluntary and mandatory redundancy when these two actions have few substantive differences. We suggest that the board was right, on the facts established at trial, to dismiss the appeal. The Privy Council's judgment provides clarity into the implementation of implied terms. With that said, its decision of when to engage the implied term—at least in this academic scenario—seems unjust. The ruling solicits the need to pursue further clarification on whether an implied term is written into academic, work-related scholarships especially in view of the policy objectives which underpin encouraging worker education. With the ubiquity of their commercial use, the Courts or better, Parliament, would do well to settle this question.

³¹ *ibid* [18]–[19] (Lord Hughes JSC).

CONFLICTS IN CAIRO: TORT GATEWAY RECONSIDERED

Jonathan Lee*

I. INTRODUCTION

IN *FOUR SEASONS HOLDINGS INCORPORATED V BROWNLIE* (hereinafter, “*Four Seasons*”),¹ the Supreme Court had the opportunity to consider the requirements for serving a claim out of jurisdiction where the defendant is not domiciled within the EU. But the extraordinary feature is that the ratio of the case does not even turn on the proper interpretation of those requirements, which is perhaps testament to Lord Neuberger’s word of caution in *VTB Capital Plc v Nutritek International Corp*—“[i]t is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost.”²

II. THE BROWNLIE TRAGEDY

In January 2010, the claimant Lady Brownlie and her husband, the distinguished international lawyer Sir Ian Brownlie, were on holiday in Egypt, staying at the Four Seasons Hotel Cairo (hereinafter, “the hotel”) at Nile Plaza. Before leaving England, Lady Brownlie booked with the concierge an excursion to Fayoum in a hired chauffeur-driven car (hereinafter, “the contract”), having read about safari tours advertised in a leaflet published by the hotel. The excursion took

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¹ *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192.

² *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337 [82].

place on 3 January and ended in tragedy—Sir Ian and his daughter Rebecca were killed, while Lady Brownlie and Rebecca’s two children were seriously injured.

Lady Brownlie subsequently brought contractual and tortious claims for damages for personal injury (i) in her own right, (ii) in her capacity as Sir Ian’s executrix, and (iii) for bereavement and loss of dependency under the Fatal Accidents Act 1976 in her capacity as her late husband’s widow. Because the defendant, Four Seasons Holdings (hereinafter, “Four Seasons”), is incorporated in British Columbia, the claimant had to apply for permission to serve the proceedings outside the jurisdiction. Before permission can be given by an English court for service of a claim form outside the jurisdiction, three requirements must be met: (a) the case must fall within at least one of the jurisdictional gateways in paragraph 3.1 of Practice Direction 6B (6BPD) to the Civil Procedure Rules (CPR); (b) the claimant has a reasonable prospect of success; and (c) England and Wales is the proper place in which to bring the claim, *i.e.* the *forum conveniens*.

Lady Brownlie’s contractual claim relies on a contention that “the contract... was made within the jurisdiction” under paragraph 3.1(6)(a) of 6BPD (hereinafter, “the contractual gateway”), whereas her tortious claims rely on a contention that “damage was sustained within the jurisdiction” under paragraph 3.1(9)(a) (hereinafter, “the tortious gateway”).

III. THE JUDGMENT

Having been ruled against in the lower courts and the Court of Appeal, Four Seasons appealed to set aside the claim form and service thereof out of the jurisdiction. The Supreme Court unanimously allowed the appeal on the basis that the hotel had in fact been owned and operated by Four Seasons’ Egyptian subsidiary at all material times. In other words, Four Seasons was *not* a party to the contract, nor could it be held vicariously liable for the driver’s negligence. There is therefore no reasonable prospect of success in respect of either claim.³ The rest was *obiter* but is no less important for that reason as the respective opinions of Lord Sumption and Lady Hale have shed light on two important issues.⁴

³ *Four Seasons* (n 1) [15] (Lord Sumption).

⁴ *ibid* [17] (Lord Sumption), [33] (Lady Hale).

A. GOOD ARGUABLE CASE

The first concerns the evidential standard of the first requirement. The established position is that the claimant must satisfy the court that there is a *good arguable case*, which falls short of the usual civil standard of proof (*i.e.* on a balance of probabilities). This prevents the test from effectively amounting to a trial of the action or a premature expression of opinion on its merits, whilst ensuring that it depends on the legal adequacy of the factual case advanced by the claimant.⁵

But what does ‘a good arguable case’ actually mean? In essence, the claimant must show a much better argument on the material than the defendant.⁶ Lord Sumption regards this as a “serviceable test” and goes on to explain that it means the court must be satisfied that the claimant has, at the very least, a plausible evidential basis for the application of a relevant jurisdictional gateway.⁷ However, he is keen to dispense with the gloss “much”, noting that he does not believe “that anything is gained by the word... which suggests a superior standard of conviction that is both uncertain and unwarranted in this context.”⁸ Lady Hale expressed similar sentiments that glosses should be avoided and that Lord Sumption’s explication does not in fact amount to a gloss.⁹ Both observations should be welcomed—having regard to the preliminary nature of interlocutory proceedings and the associated risk of prejudicing a subsequent finding at trial on that very question, the gloss only adds uncertainty to an otherwise well-known and oft-applied standard of proof.

B. THE TORTIOUS GATEWAY

The second concerns the ambit of the tortious gateway in paragraph 3.1(9)(a). The question is whether, when a tortious act results in personal injury or death, “damage” is limited to the direct damage—that is, the physical injury or death—or whether it extends to the indirect damage, that is, the pecuniary expenditure or loss resulting from the personal injury or death.¹⁰ Whilst stressing the correct interpretation of this gateway and indeed, of the contractual gateway, does not arise¹¹

⁵ *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869, 879 (Lord Simons); *Four Seasons* (n 1) [5] (Lord Sumption).

⁶ *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555 (Waller LJ).

⁷ *Four Seasons* (n 1) [7] (Lord Sumption).

⁸ *ibid.*

⁹ *ibid* [33] (Lady Hale).

¹⁰ *ibid* [20] (Lord Sumption).

¹¹ *ibid* [17] (Lord Sumption).

and that the Rome II Regulations has no bearing on its interpretation,¹² Lord Sumption held that damage is limited to *direct* damage. He gives two reasons for this restrictive interpretation.

(i) *Damage under the Common Law*

His first reason is that there is apparently a “fundamental difference” between the damage done to an interest which the law protects (in this case, bodily integrity) and subsequent expenditure which is merely evidence of the financial value of that damage. Where these interests are deliberately or negligently injured, the tort is complete at the time of the injury, notwithstanding that damage is an essential element of it, since pecuniary interests are not generally protected as such under the law of tort.¹³ As far as the wording of the 6BPD is concerned, Lord Sumption found nothing in the language to suggest “damage” should extend to the financial or physical consequences of the damage,¹⁴ though it is not entirely clear how the latter is different from direct damage. But as Lady Hale recognises, “damage” is not an essential part of every cause of action in tort and indeed there are many torts which are actionable *per se*, without proof of damage (for example, trespass to persons and goods). As a matter of construction, there is no particular reason to think that completion of the cause of action is what the drafters of the CPR had in mind when they used the word “damage”. It is more likely that they were simply contemplating the ordinary and natural meaning of the word—the actionable harm caused by the wrongful act alleged.¹⁵

This of course does not mean that any harm that is remotely linked to the tortious act is actionable. One of Lord Sumption’s concerns is that if “damage” is extended to indirect damage, that would in effect amount to conferring jurisdiction by virtue of the claimant’s place of residence since any pecuniary consequences of the accident or any continuing pain, suffering or loss amenity are more likely to be felt when the claimant has returned to his or her place of residence.¹⁶ But the principles of causation, for one, should be sufficient to remedy the perceived shortcomings of a wider interpretation of damage. And indeed, Lord Wilson refers to the long-standing jurisdiction of the courts of Ontario and New South Wales to entertain tortious claims based only on secondary damage sustained, that is, any loss flowing from the initial injury, which should allay fears that a broader interpretation of the tort gateway would encourage abuse.¹⁷

¹² *ibid* [22] (Lord Sumption).

¹³ *ibid* [23] (Lord Sumption).

¹⁴ *ibid* [27] (Lord Sumption).

¹⁵ *ibid* [52] (Lady Hale), [69] (Lord Clarke).

¹⁶ *ibid* [28] (Lord Sumption).

¹⁷ *ibid* [67] (Lord Wilson).

(ii) Evolution of the Tortious Gateway

Lord Sumption's second reason is that the tortious gateway was deliberately drafted so as to assimilate the tests for asserting jurisdiction over persons domiciled in an EU Member State, which provides that a person domiciled in a Member State could be sued in tort "in the courts for the place where the harmful event occurred",¹⁸ and persons domiciled elsewhere.¹⁹ Having surveyed the history of the tortious gateway and its relationship with the approach under the Brussels Convention²⁰, Brussels I Regulations (BIR),²¹ and the recast Brussels I Regulations,²² Lord Sumption identified three important turning points in its wording:

1. Prior to 1987, service out of the jurisdiction was permitted by Rules of Supreme Court Order 11, rule 1(1)(h), where the action was "founded on a tort committed within the jurisdiction". The focus was on where the wrongful act was done, not the location of damage.
2. On 1 January 1987, however, the Supreme Court Rules (SI 1983/1181) came into effect, which was materially identical to the tortious gateway under the CPR, save that it provides for "the damage... sustained".
3. When the gateways were eventually transferred to a Practice Direction in 2000, the definite article "the" was omitted. The omission thus excludes the suggestion that all of the damage had to be sustained within the jurisdiction.

Recognising that the tortious gateway has generally been construed in the light of the case law of the Court of Justice, Lord Sumption regarded it strange if the effect of expanding the gateway to match the wider special jurisdiction authorised in the BIR cases had been to make it very much wider than even the Convention authorised.²³

¹⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (adopted 12 December 2012, entered into force 09 January 2013) OJ L 351 (20.12.2012) art 7(2).

¹⁹ *Four Seasons* (n 1) [30] (Lord Sumption).

²⁰ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels) (adopted 27 September 1968, entered into force 01 February 1973) 1262 UNTS 15, 8 ILM 229 (1969). The Brussels Convention was replaced by Council Regulation (EC) No 44/2001 (n 21).

²¹ Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) (entered into force 01 March 2002) OJ L 12 (16.1.2001). The BIR was then subsequently replaced in 2012 by the Regulation (EU) No 1215/2012 of the European Parliament (n 18).

²² Regulation (EU) No 1215/2012 of the European Parliament (n 18).

²³ *Four Seasons* (n 1) [30] (Lord Sumption).

But construing the gateways in the light of the European case law does not necessarily mean they should be construed in the same manner. As Lord Wilson points out, it does not follow that the CPR jurisdictional gateways, in a claim unconstrained by EU law, as is the present case, should be narrowed to the size of the gateway set by EU law.²⁴ There has in fact been a consistent line of first instance decisions holding that, in a case which is not governed by the European jurisdictional rules, a claim in tort may be brought in England if damage is suffered here as a result of personal injuries inflicted abroad.²⁵ This is only achieved if the word “damage” is given its ordinary and natural meaning, namely, *any* harm sustained by the claimant, whether physical or economic. Indeed, Professor Briggs makes the point bluntly—it makes no sense to interpret a common law rule of jurisdiction, overlaid with a question about *forum conveniens*, in light of a European jurisdictional rule which operates in an entirely different manner.²⁶

(iii) *The Role of Forum Conveniens*

Under the CPR and its predecessors, the court has always retained a “valuable safety-valve” of discretion to refuse permission to serve proceedings outside the jurisdiction—this is the concept of *forum conveniens*.²⁷ The adjudicatory discretion of English courts is a feature of the common law which arguably stands out the most in comparison with the approach under the BIR, which deliberately eschews any discretion in favour of certainty and clarity in the attribution of jurisdiction.²⁸ Contrast this with the approach taken by the Court of Justice under the Brussels Convention and the BIR—it draws a stark distinction between direct and indirect damage on the basis of the objectives of the BIR and the need to avoid a multiplicity of courts with jurisdiction, which heightens the risk of irreconcilable decisions.²⁹

Lord Sumption argues in response that the jurisdictional gateways and the discretion as to *forum conveniens* serve completely different purposes. The gateways define the maximum extent of the jurisdiction which the English court is permitted to exercise. The discretion then operates to limit the exercise of the court’s jurisdiction depending on the practicalities of the case.³⁰ The

²⁴ *ibid* [61] (Lord Wilson).

²⁵ See, eg, *Booth v Phillips* [2004] EWCA 1437 (Comm); *Cooley v Ramsay* [2008] EWHC 129; *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB).

²⁶ Adrian Briggs, ‘The hidden depths of the law of jurisdiction’ [2016] LMCLQ 236, 246.

²⁷ *Four Seasons* (n 1) [51] (Lady Hale).

²⁸ *ibid*.

²⁹ See Case C-364/93 *Marinari v Lloyds Bank Plc* [1996] QB 217; Case C-220/88 *Dumex France SA v Hessische Landesbank* [1990] ECR I-49.

³⁰ *Four Seasons* (n 1) [31] (Lord Sumption).

existence of this “safety-valve” discretion therefore should not be relevant to determining the proper ambit of any jurisdictional gateway. But while the respective individual purposes of the gateways and the discretion may be different, it is important to consider the service out requirements as a whole.

The CPR does not require that permission be given to serve out of the jurisdiction whenever the relevant gateway applied. There was always a discretion not to do so,³¹ exercised in accordance with the principles laid down in *Spiliada Maritime Corpn v Cansulex Ltd*.³² Among those principles, the most fundamental one is to identify the forum in which the case might most suitably be tried in the interests of all the parties and of the ends of justice.³³

By recognising the three requirements of service out as forming one continuous process of judicial enquiry, it follows that the existence of the *forum conveniens* discretion must be relevant to the construction of the gateways. If the gateways were to be arbitrarily restricted, the practical effect is that the court would be barred from exercising its adjudicatory discretion in the interests of justice, thus emptying this discretion of its function. Lord Sumption’s opined that the discretion is to limit the exercise of the court’s jurisdiction, not to displace the criteria in the gateways.³⁴

With respect, this view is based partly on a misunderstanding of *forum conveniens* as a *residual* discretion. The better view is that the discretion is *overriding* and constitutes a fundamental tenet of the common law regime of jurisdiction. It goes *beyond* the practicalities of litigation and mere convenience.³⁵ Even if one were to accept Lord Sumption’s opinion, its converse must be equally valid—the criteria in the gateways exist to define the extent of the court’s jurisdiction, not to displace the discretion. A broad interpretation of the tortious gateway is therefore justified in order to avoid the risk of the gateway being under-inclusive, thus shutting out meritorious claims even when the English courts are the most appropriate forum for the dispute to be heard.³⁶

Lord Wilson referred to *Pike v The Indian Hotels Co*³⁷ as an example that would illumine the injustice to which any narrow interpretation of the word “damage” can give rise.³⁸ The claimant sustained serious injuries rendering him paraplegic during the Mumbai terrorist attacks in 2008 and

³¹ *ibid* [40] (Lady Hale).

³² *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, [1986] 3 WLR 972.

³³ *ibid* 480 (Lord Goff).

³⁴ *Four Seasons* (n 1) [31] (Lord Sumption).

³⁵ *ibid* [66] (Lord Wilson).

³⁶ Bergson, ‘Consequential Damage and the Tort Gateway’ (2016) 132 LQR 42.

³⁷ *Pike v The Indian Hotels Co Ltd* [2013] EWHC 4096 (QB).

³⁸ *Four Seasons* (n 1) [65] (Lord Wilson).

sought to sue the operator of the hotel in England. Despite significant factors connecting the claim to India, Stewart J held that it would be a denial of justice to prevent him from suing the operator in England, since were Mr Pike to sue the operator in the courts of India, the case would not be concluded for another 15 to 20 years, resulting in substantial delay.³⁹

Given that CPR rule 6.21(2A) has effectively enshrined the *forum conveniens* principle by providing that “[t]he court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim”, adopting a broader interpretation of the gateways seems more consistent with the structure and policy of the CPR. The tortious gateway should therefore be given a wide interpretation, encompassing both direct and indirect damage, as the majority (consisting of Lady Hale, Lord Wilson and Lord Clarke) has advocated. But alas, owing to the *obiter* nature of all this, English courts must await further definitive guidance on the matter.

³⁹ *Pike* (n 37) [58], [71] (Stewart J).

LOVE OR MONEY? MORTGAGES AND THE HOME

Shaun Joseph Matos*

I. INTRODUCTION

THE HOME IS A KEY SOCIAL INSTITUTION IN ANY MODERN SOCIETY and is central to all of our lives. However, it also has an important financial aspect in that it represents an investment opportunity for banks and other financial institutions. These two aspects of the home clearly have the potential to clash in cases where there is a dispute between a mortgagee and a beneficial co-owner, and this article will show how in such disputes the law almost always favours the mortgagee.

The article will begin by showing how the law does this in the context of priority disputes and remedies. It will then go on to argue that this position is not justified, and that the social value of the home¹ should be introduced to redress the balance in favour of the co-owner. What is meant by the ‘social value’ of the home will be explored further below, but for present purposes it is enough to say that relevant considerations are security, stability and fostering a family environment. It will conclude by saying that although such an approach would be problematic in the law on priorities, there is ample room in the law on remedies to take account of social considerations.

II. PRIORITY DISPUTES: THE GENERAL LAW

There are a number of mechanisms under the general law which appear to favour the mortgagee over any beneficial co-owners. The first of these can be seen in the courts’ consideration of the

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¹ What is meant by the ‘social value’ of the home will be explored further below, but for present purposes it is enough to say that relevant considerations are security, stability and fostering a family environment.

‘first in time’ rule. In *Abbey National v Cann* the House of Lords rejected the argument that there was a *scintilla temporis* between the completion of the transfer of title and the completion of the charge where a mortgage was used to acquire the property.² Instead, the court held that this was one indivisible transaction. According to Lord Oliver, the court should focus on the “reality... that, in the vast majority of cases, the acquisition of the legal estate and the charge are not only precisely simultaneous but indissolubly bound together”.³ This passage from Lord Oliver’s speech is fairly representative of the preference of the courts to focus on the financial reality of the transaction, rather than choosing to follow a more abstract approach which could have seen Mrs Cann being given priority based on the fact that the primary purpose of the property was arguably social rather than financial.

Cann was later supplemented by the decision of the Supreme Court in *Scott v Southern Pacific Mortgages*.⁴ Here the court was faced with the question of whether, in the context of a sale and leaseback scheme funded by a mortgage from a third party, it was possible for a purchaser to grant proprietary rights before completion of the transfer. Although it was acknowledged that purchasers obtain “rights which are akin to ownership”⁵ it was held that such rights are only property rights in a limited sense; equitable rights carved out of the estate contract were only capable of becoming proprietary when fed by the purchaser’s acquisition of the legal estate. *Cann* was then applied with the result that any such interests would always be subject to the mortgage.

Hence, as in *Cann*, the court preferred to take a strict ‘reality’ based approach rather than considering the situation through a social lens. Perhaps of particular interest in this regard are the *obiter* disagreements between Lords Collins and Sumption on the one hand, and Baroness Hale and Lords Wilson and Reed on the other. According to the latter group, it is not necessarily the case that conveyance and mortgage should always be treated as one indivisible transaction; Baroness Hale puts forward a number of circumstances in which she suggests that *Cann* should not be applied.⁶ As Televantos and Maniscalco point out, this suggests an approach in which the court is able to take into account all of the circumstances in each case rather than simply applying an all or nothing rule.⁷ Such judicial discretion flies in the face of the orthodox interpretation of *Cann* as supported by Lord Collins and Sumption which suggests that the transaction in such

² *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 2 WLR 832.

³ *ibid* AC 92.

⁴ *Southern Pacific Mortgages Ltd v Scott* [2014] UKSC 52, [2015] AC 385.

⁵ *ibid* AC [62] (Lord Collins JSC).

⁶ For example, fraud and where the bank did not carry out the appropriate checks: see *ibid* [116]–[118] and [122].

⁷ Andreas Televantos and Lorenzo Maniscalco [2015] CLJ 27, 29–30.

scenarios will always be indivisible. Further, as both groups acknowledge this goes to the deeper question of how far interests on the register should be protected. The second *obiter* issue on which the two groups disagreed was whether, if it was possible to carve a property right out of an estate contract, *Cann* meant that the contract, mortgage and conveyance were all part of one indivisible transaction. Again, Baroness Hale and Lords Wilson and Reed suggested that a discretionary approach which depended on the facts should be taken⁸ whilst Lords Collins and Sumption opined that an indivisible approach should be taken.⁹ Whilst the difference in opinion is ostensibly based on technical issues such as timing and the relevance of fraud, it will be shown below how Baroness Hale's approach could allow the court to take into account social considerations. Doing so would have profound and undesirable effects on the law in this area.

The second way in which the courts can be seen to favour mortgagees is through findings that the beneficial co-owner had consented to the mortgage. On many occasions such consent will be straightforward, however in situations where the beneficial co-owner is not aware of the mortgage judges have been willing to nevertheless find such consent. Perhaps the least controversial case which deals with this issue is *Cann*. Although *obiter*, Lord Oliver supported the view of the Court of Appeal in arguing that as Mrs Cann knew the net proceeds from the sale of her previous house would be insufficient to cover the purchase of the second property, she would be unable to assert priority over the mortgage even if she was successful on the 'first in time' issue.¹⁰

This point in *Cann* has been followed recently in *Credit and Mercantile v Kaymuu*.¹¹ In *Kaymuu* one individual purchased a property on behalf of another, but, without the latter's permission, executed a mortgage over the property and disappeared with the proceeds. The Court of Appeal held that as the mortgagee had not been made aware of any restrictions on the authority of the person it was dealing with, the mortgage did in fact have priority. However, *Kaymuu* has proved controversial amongst academic commentators. Dixon¹² points out that unlike in *Cann* and other cases on this issue¹³ the beneficial co-owner was not aware, and had no reason to be aware, that a mortgage was intended or needed. Hence, reliance on the 'Brockleby principle' results in treating

⁸ *Southern Pacific* (n 4) [116].

⁹ *ibid* [85].

¹⁰ *Cann* (n 2) 93 (Lord Oliver); see also the Court of Appeal decision of *Cann: Abbey National Building Society v Cann* (1989) 57 P & CR 381 (CA) 392 (Dillon LJ).

¹¹ *Credit and Mercantile v Kaymuu* [2015] EWCA Civ 655, [2015] 2 P & CR 15 (CA).

¹² Martin Dixon, 'The Boland requiem' [2015] Conv 285.

¹³ See *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244.

the trust relationship as one of agency, undermining the beneficiary's property right in the process. It also goes some way to re-introducing the old doctrine of notice under s 29 of the Land Registration Act 1925 (LRA 1925), the latter of which will be explored further later. What all of this goes to show is the extent of the judiciary's willingness to manipulate and arguably distort the modern law to protect the mortgagee over the beneficiary.

Overreaching is a further way in which the mortgagee can gain priority. The doctrine, governed mainly by ss 2 and 27 Law of Property Act 1925 (LPA 1925), is one of the primary ways in which the trust structure intentionally benefits disponees. In *City of London Building Society v Flegg* the House of Lords interpreted the doctrine to mean that the beneficiaries can be overreached even if they are in actual occupation.¹⁴ Such a result makes sense; as Lord Oliver pointed out once the property right is overreached there is nothing to which the actual occupation can be attached.¹⁵ *State Bank of India v Sood* extended the logic of the doctrine to cases where no capital money had been paid if no money was payable under the mortgage agreement.¹⁶ So far this is straightforward, however, two other cases show the same judicial willingness to manipulate the law that has been seen above.

In *Birmingham Midshires Mortgage Service v Sabherwal* the Court of Appeal was faced with a situation in which a mother attempted to claim priority over a mortgage executed by her sons on the basis of a proprietary estoppel claim.¹⁷ At paragraph 31, Walker LJ dismissed the mother's claim, suggesting that in the "family situation, the concepts of trust and equitable estoppel are almost interchangeable, and both are affected in the same way by the statutory mechanism of overreaching." In *Mortgage Express v Lambert* the court held that although the appellant had the right to set aside an unconscionable bargain, which was a proprietary interest, it was also overreached.¹⁸ It may seem natural that 'mere equities', which are arguably weaker interests, should be just as vulnerable to overreaching as the interests of co-owners. However, Televantos, writing on *Lambert* points out that the kind of rights in these two cases are not subject to the terms of the trust as they always had priority.¹⁹ Hence, in the absence of the criteria in s 2(2) LPA 1925 being fulfilled, it is difficult to see how the court in these cases can reach the conclusion that the mortgagee has priority. In *Lambert* the court suggests an alternative route through s 26 of the Land

¹⁴ *City of London Building Society v Flegg* [1988] AC 54, [1987] 2 WLR 1266.

¹⁵ *ibid* AC 91.

¹⁶ *State Bank of India v Sood* [1997] Ch 276, [1997] 2 WLR 421.

¹⁷ *Birmingham Midshires Mortgage Service v Sabherwal* (2000) 80 P & CR 256.

¹⁸ *Mortgage Express v Lambert* [2016] EWCA Civ 555, [2016] 3 WLR 1582.

¹⁹ Andreas Televantos, 'Unconscionable bargains, overreaching and overriding interests' [2016] CLJ 458.

Registration Act 1925 (LRA 2002); allowing A (the beneficiary) to assert her interest as against C (the mortgagee) would mean that, contrary to s 26, the validity of C's title would be questioned.²⁰ This means that whenever there is a voidable transaction, C automatically has priority. Yet as Televantos points out, this approach would go some way to undermining the protocol set out in *RBS v Etridge (No 2)* in cases of undue influence, and, more generally, s 29 and Schedule 3 LRA 2002 (see Part III below).²¹ Televantos goes on to suggest another way in which the court could find for the bank, however for present purposes the important thing to note is the court's willingness to go as far as it does in protecting the mortgagee.

Before moving on to examining the statutory regime, we should briefly take note of subrogation. The doctrine means that even if Mortgagee A does not have priority, it may be able to claim priority by claiming Mortgagee B's mortgage. In order to do this, a number of conditions must be fulfilled, namely: (a) B's mortgage has priority; (b) A has bargained for a mortgage with priority; (c) A does not receive such a mortgage; and (d) the proceeds from the mortgage are used to pay off a mortgage with priority.²² Such priority only extends up to the amount of the original loan paid off by the moneys advanced,²³ however it will still mean that the beneficial co-owner will not be able to resist the mortgagee's priority. The author knows of no cases which have controversially extended the doctrine further in the mortgagee's favour. Nevertheless, if later mortgagees can show that they should be subrogated to the position of the original mortgagee, they will also benefit from the rules discussed above. They will therefore be able to take priority over the beneficiary with relative ease.

III. THE EFFECT OF THE LAND REGISTRATION ACT 2002

The reader may notice a significant absence from the foregoing discussion, namely the Land Registration Act 2002. The act works alongside the common law rules outlined above, however in many cases it renders their application unnecessary as the legislation heavily favours the mortgagee. This can be seen most clearly in s 29 as the disponee takes priority over unregistered interests if: (a) there is a registrable disposition; (b) the estate or charge is registered; and (c) the disposition is made for valuable consideration. Hence, as long as the mortgagee fulfils these relatively straightforward requirements, it will have priority over the beneficial co-owner.

²⁰ *Lambert* (n 18) [27].

²¹ *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773.

²² See, eg, *Ghana Commercial Bank v Chandiram* [1960] AC 732, [1960] 3 WLR 328.

²³ *Cheltenham & Gloucester v Appleyard* [2004] EWCA Civ 291 [43].

A notable exception to this is the category of overriding interests. The protection this category provides is limited, but nevertheless is controversial as it seems to run counter to the rest of the law. Schedule 3 of the LRA 2002 outlines a number of situations in which the registered interests of the disponee can be overridden by unregistered interests. Most significant for present purposes is paragraph 2 which concerns the interests of persons in actual occupation of the property in question. Such protection for occupiers is plainly desirable; the Law Commission point out that many will not be aware of the need to register their interest in the land, and believe that their occupation provides the necessary protection from disponees.²⁴ Hence, failing to protect such occupiers would ignore the reality of modern property ownership and create the real risk of homelessness. There are, however, two caveats to this: if the interest holder failed to disclose her interest when asked, or if occupation would not have been obvious on a reasonably careful inspection of the land at the time of disposition then it is the disponee's interest which takes priority.

There have been two important developments in relation to this provision. In *Williams & Glyn's Bank v Boland* (dealt with under the LRA 1925) the House of Lords held that it was possible for the non-registered interests of a spouse to be protected as overriding interests.²⁵ The decision was welcomed by some commentators who believed that the case could be seen as a victory for women's rights, and the rights of beneficial co-owners more generally. We should, however, be careful to characterise *Boland* in this way. Conaglen points out that the outcome in *Boland* is the consequence of a natural reading of the statute. Indeed, there was little discussion in the House of Lords of the wider social considerations.²⁶ Lord Wilberforce, for example, stated that "[t]he solution must be derived from a consideration in the light of current social conditions of the Land Registration Act 1925 and other property statutes".²⁷ Lord Scarman did go slightly further than this in stating that the courts must interpret the statute in a way consistent with social justice if possible,²⁸ but ultimately said that "the ordinary meaning of the words used by Parliament meets the needs of social justice".²⁹ Therefore, whilst this decision does seem to favour interest holders such as co-owners, it would be wrong to see it as a deliberate judicial attempt to steer the law to

²⁴ Law Commission, *Land Registration for the Twenty-First Century a Conveyancing Revolution* (Law Com No 254, 2001) para 5.61

²⁵ *Williams & Glyn's Bank v Boland* [1981] AC 487, [1980] 3 WLR 138.

²⁶ Matthew Conaglen, 'Mortgagee Powers Rhetoric' (2006) 69 MLR 583.

²⁷ *Boland* (n 25) AC 502.

²⁸ *ibid* 510.

²⁹ *ibid*.

favour such individuals. The second development to note is the evolution in the definition of ‘actual occupation’. Before the 2002 act, cases such as *Cann* and *Boland* confirmed that the question of occupation was a factual and objective one. There has, however, recently been a departure from this approach. *Link Lending v Bustard* concerned the issue of whether a woman who was in a psychiatric hospital and only visited the land in question once a week was in ‘actual occupation’.³⁰ The court held that despite the fact that she was not at the property at the time of the disposition, she was still in ‘actual occupation’ for the purposes of Schedule 3, paragraph 2. Mummery LJ claimed that it would be wrong to simply lay down a single test and the court should instead look at a variety of factors including the ‘occupier’s’ intentions, the reason for her absence and her personal circumstances. The objective question of the person’s presence in the property was reduced to just one of a number of considerations. The full ramifications of such an approach can be seen in *Thomas v Clydesdale Bank* where the judge held that with regard to Schedule 3, paragraph 2(c), it is only the visible aspects of the interest-holder’s actual occupation which need be reasonably obvious.³¹ Consequently where a claim of actual occupation rests on subjective factors, a physical inspection of the land in question may not be enough for the mortgagee to protect itself.

The desirability of this interpretation will be considered further below, however it is safe to say that it has proved controversial. Firstly, it significantly undermines the balance drawn by Parliament with regard to the interests of the occupier and the mortgagee. Secondly, critics such as Bevan point out that the approach runs counter to the general move towards a comprehensive register by undermining s 29 and sitting in tension with the more restrictive approach taken to overriding interests.³² Hence, unlike the *Boland* decision, these cases do suggest a clear judicial rejection of the underlying policy preference in favour of disponees and mortgagees. The consequences of this rejection will be discussed further below.

IV. REMEDIES: THE POWER OF SALE AND THE STATUTORY REGIMES

Whether or not the mortgagee has priority over the co-owner, there are a number of possible remedies open to it with the most powerful being available only to a mortgagee with priority. The most obvious is the power of sale governed by ss 101, 103, and 104 of the LPA 1925. Although there a number of requirements that must be met, no court order is needed and the power may be

³⁰ *Link Lending v Bustard* [2010] EWCA Civ 424, [2010] 2 P & CR DG15.

³¹ *Thomas v Clydesdale Bank* [2010] EWHC 2755 (QB) [38].

³² Chris Bevan, ‘Overriding and over-extended? Actual occupation: a call to orthodoxy’ [2016] Conv 104.

exercised without the mortgagee gaining possession of the property (*Horsham Properties Group v Clark*).³³ In practice, however, the mortgagee will seek possession, not least because it is very difficult to sell a property with people still occupying it. Unlike the power of possession, the right to sell does not require a court order and there are no requirements the mortgagee must fulfil; if the mortgagee wishes to take possession as soon as the mortgage agreement is signed it is entitled to do so.³⁴ There are, however, three limits to the right to possession. The first comes from s 6(1) of the Criminal Law Act 1977 which makes it an offence to use or threaten violence for the purposes of entering a property when there is someone inside who is resisting entry. The mortgagee will consequently often seek a court order to avoid the risk of criminal liability. If a court order is sought, s 36 Administration of Justice Act 1970 gives the court the power to delay possession proceedings if the property is a dwelling house. Yet, this limitation can be easily circumvented by simply taking possession of the property by peaceful re-entry.³⁵ Finally, the court has an inherent jurisdiction to stay possession proceedings, yet in practice this jurisdiction is only exercised where the debt can be fully discharged within a very short period.³⁶

As mentioned above, even if it is the case that the beneficial co-owner has priority, there are still a number of remedies open to the mortgagee. We must distinguish between two scenarios here: where the mortgagor is bankrupt, and where she is not bankrupt. Where the court is faced with the latter scenario, it will apply the Trusts of Land and Appointment of Trustees Act 1996 (TLATA). The mortgagee may make an application for the court to order a sale under s 14 of the act, and in deciding whether to accede to the application the court will consider a range of factors including those outlined in s 15. An order for sale is not inevitable; in *Mortgage Corporation v Shaire*, Neuberger J (as he then was) was clear in stating that the enacting of TLATA had changed the law so that the wishes of the person wanting a sale would not necessarily prevail.³⁷ Instead, he was willing to be flexible, stating that if the occupier is able to pay the bank a proper sum then the sale should be refused. This approach clearly pays considerably more attention to the interests of the occupier than other areas discussed above. However Neuberger J's flexibility cannot always be found in other judgments. In *Bank of Ireland Home Mortgages v Bell* for example, the court placed far

³³ *Horsham Properties Group v Clark* [2008] EWHC 2327 (Ch), [2009] 1 WLR 1255.

³⁴ *Four-Maids Ltd v Dudley Marshall (Properties)* [1957] Ch 317, 320. The mortgagee will, however become liable to the mortgagor for any rents and profits received, as well as wilful default. See *White v City of London Brewery Co* (189) 42 ChD 237, 246

³⁵ *Ropaigealach v Barclays Bank* [2000] QB 263, [1999] 3 WLR 17.

³⁶ See, eg, *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883, 912.

³⁷ *Mortgage Corporation v Shaire* [2001] Ch 743, [2001] 3 WLR 639.

more weight on the injustice that could be inflicted on the mortgagee if a sale was refused than on the consequences for the occupier.³⁸ Further, the s 15 factors were interpreted strictly, with the result that the fact that the original purpose of the acquisition was to provide a family home was no longer relevant when the husband had left it.³⁹ Despite Neuberger J's judgment in *Shaire*, the trend under TLATA is still to order sale.

If the mortgagor is insolvent, it is s 335A of the Insolvency Act 1986 which will apply. Subsection (2) directs the court to have regard to the interests of the bankrupt's spouse or civil partner (who will often, but not always, be a beneficial co-owner), however in (3) the act goes on to state that after one year the interests of the creditor are presumed to outweigh all other considerations unless the circumstances are exceptional. Hence, the mortgagee's preferred outcome will almost always be granted. It is worth noting that even if the court does order a sale under TLATA or the Insolvency Act, the beneficial co-owner still has priority over the proceeds. However seeing as, in most cases, the co-owner will not want a sale, the court is nevertheless favouring the interests and priorities of the mortgagee.

V. REFORM? FAVOURING THE CO-OWNER

We can see that, in the majority of cases, the mortgagee will get its preferred outcome one way or another. This section will argue that this approach fails to take account of the co-owner's interests, and that the law could be reformed to result in a more balanced approach. As many of the cases mentioned came after *Boland*, some commentators have argued that these cases amount to a deliberate retreat from *Boland* and a policy decision from the judiciary to favour the mortgagee over the beneficial co-owner. First appearances may give this impression, however, we should be cautious in finding such an active and policy driven judiciary. Conaglen points out that the so-called retreat from *Boland* was, like *Boland* itself, nothing more than an application of ordinary land law rules and principles.⁴⁰ Indeed, the possibility of these rules being applied was expressly recognised at various stages in *Boland*. It is true that in some of the cases that have been explored certain doctrines have been extended beyond their initial rationale as a result of the focus on the financial aspect of property. The result has been the mortgagee's interests being protected in the majority of cases. Nevertheless, we can label these cases as problematic or even incorrect without

³⁸ *Bank of Ireland Home Mortgages v Bell* [2001] 2 All ER (Comm) 920.

³⁹ *ibid* [27].

⁴⁰ *Boland* (n 25).

questioning the importance or validity of the initial principle which such doctrines sought to protect; the security of transactions remains vitally important in this area, even if the doctrines that have sought to protect it have sometimes been applied inappropriately.

Yet we are still faced with the question of whether the courts should interpret or alter the rules in a way which pays more attention to the social importance of property. A number of commentators⁴¹ have called for the law to recognise that whilst lending institutions view property in purely financial terms, many individuals view property in mostly, if not entirely, social terms. When buying a house, for example, most will think of it as a place of security and perhaps somewhere to start a family rather than as a financial asset. We can already see this approach being taken in relation to the question of actual occupation, as a person's subjective intentions and continuing emotional connection to the property are regarded as just as important as the objective fact of physical occupation. Reform to the law could take place in the area of priority disputes or remedies, or both. I shall examine each option in turn.

Reforming the priorities rules would probably be the most dramatic change in favour of co-owners. A simple way to do this would be to follow the approach in the case law on overriding interests. For example, the doctrine of overreaching could be reformed so that an interest is only overreachable where the interest holder is not in occupation of the property, or where the property has no social significance. Likewise, the *Cann* rule could be reformed so that it does not apply where the property has a primarily social purpose. It is plainly possible to reform most if not all of the priority rules in this way, however whether it is desirable to do so is a separate issue. It is argued that such reform would cause great confusion and uncertainty in the mortgage market, as well as having repercussions on wider trusts law. It is consequently argued that it should not be carried out.

This potential for uncertainty can be seen by examining two areas where the courts have chosen to take into account the social value of property. The first is the case law on Schedule 3, paragraph 2 as mentioned at Part III above. As a consequence of those cases, potential mortgagees may have to carry out an extremely in depth examination of both the property and the mortgagor's family and social circumstances. There is therefore a real possibility that the cost of carrying out such an examination may impact on a mortgagee's willingness to lend money. Moreover, if the beneficial co-owner is absent from the property for an extended period of time, it may actually be impossible for the mortgagee to fully protect itself. The current consequences of this approach is

⁴¹ See, eg, Martin Dixon, 'Mortgage Default and Mortgagees' Remedies' [2008] Conv 474.

currently limited by the relatively small number of cases in which actual occupation is an issue, however if extended to cover all of the priority rules, there could be a considerable impact on lending practices.

Potential issues can also be seen when reflecting on *Stack v Dowden*.⁴² The view taken here and developed in subsequent cases that domestic property should be treated differently from commercial property seems normatively desirable; however, it is inherently difficult to apply. As Hopkins points out, this is because there is no clear division between the commercial and the domestic.⁴³ A number of cases after *Stack* have had to grapple with this issue, with judges having to draw distinctions so fine that they verge on arbitrary.⁴⁴ The reason for this is very simple: people's lives are complicated and they use their land in a variety of ways that defy neat categorisation. Indeed, the Law Commission had to abandon its attempt to define the domestic context. Considering this, it may prove practically impossible to reform the law, at least in relation to priorities, along financial or social lines in a way which will be fair to all parties. Whilst the cases discussed above show that there sometimes is a clear distinction between the two, the existence of such borderline cases risks the law falling into a state of confusion and arbitrariness. Further, no matter how much the parties attempt to discover their true position, it is entirely possible that they might enter into a priority dispute without knowing whether the court will apply to 'financial' or 'social' rules. The presence of any judicial discretion would only aggravate this further. This kind of uncertainty as to the type of interest each party has would have serious implications for the mortgage market.

It may instead be more appropriate to consider how we could reform the rights and remedies of each party as the presence of judicial discretion here is not as objectionable. We saw above how the social aspect of property is sometimes taken into account in the remedial legislation, and it is argued that there is scope for further reform. When the mortgagee has priority, the main protection for the beneficial owner when the property is a dwelling house is found in AJA 1970 s 36, yet there are a number of problems with it. Firstly, as outlined above, the protection offered by s 36 can easily be circumvented by taking peaceful possession and so obviating the need for a court order;⁴⁵ moreover, it is possible for the mortgagee to simply sell the property under s 101 LPA 1925

⁴² *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

⁴³ Nicholas Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' [2011] *Legal Studies* 175.

⁴⁴ See, eg, *Wodzicki v Wodzicki* [2017] EWCA Civ 95, [2017] 2 P & CR DG1 and *Geary v Rankine* [2012] EWCA Civ 555.

⁴⁵ See *Ropaigealach* (n 35).

without seeking possession.⁴⁶ To deal with this issue, Dixon puts forward a number of potential solutions.⁴⁷ To deal with the possession issue, Dixon suggests making possession a remedy rather than a right, and so effectively reversing *Ropaigealach*. Connected to this is the entitlement of the borrower to resist a possession claim if she can show a genuine intention to sell the property herself supported by prescribed steps. This would give the borrower control over disposal of the property and so prevent other occupants and co-owners being removed in a manner inconvenient for them. Dixon's suggestions have much to commend them, however some argue that they do not go far enough. Whilst ensuring the effectiveness of AJA s 36 indirectly benefits the beneficial co-owner, commentators such as Fox⁴⁸ and Whitehouse⁴⁹ point out that the focus remains on financial rather than 'home oriented' factors. If we are to take the concept of the family home seriously, the court should be willing to consider the social impact when exercising its discretion. That is not to say that social factors should allow occupants to remain in the property indefinitely, but it seems perverse to suggest that they are wholly irrelevant in deciding whether to delay a possession order. In relation to the right to sell under s 101 of the LPA, Dixon suggests keeping this right but placing the purchaser under the same obligations as the mortgagee would have been under in relation to possession.

S 335a of the Insolvency Act appears to make some progress in this direction, by explicitly referring to the needs of the bankrupt's spouse or civil partner, and any children. Nevertheless, there is still considerable scope for reform. Fox points out that the discretion is centred on the concept of the 'family' home, ignoring the variety of different ways in which people cohabit in modern Britain.⁵⁰ The provision also opens up the possibility that where the spouse and beneficial co-owner are different people, only the interests and needs of the former will be considered despite the fact that it is only the latter whose property is being affected. It therefore seems clear that the law focuses on the relationship between individuals occupying the property rather than between the individual and the property itself. Indeed, Fox points out that whilst family may be an important social connection to the home, it may not always be so, and it is not the only non-financial connection people have with their homes. Whether living alone, with friends or with family, a home provides a sense of stability and security, and there is no reason to privilege the

⁴⁶ See *Horsham Properties Group* (n 30).

⁴⁷ Dixon (n 41).

⁴⁸ Lorna Fox, 'Creditors and the Concept of "Family Home": A Functional Analysis' (2005) 25(2) *Legal Studies* 201.

⁴⁹ Lisa Whitehouse, 'The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost' (2009) 72(5) *MLR* 793.

⁵⁰ See Fox (n 48).

family situation to the exclusion of all others. In both s 335a of the Insolvency Act and AJA s 36 cases it would be preferable for the courts to undertake a detailed examination of the significance the property plays in the life of the co-owner rather than relying on outdated and lazy categorisations.

The enactment of TLATA went some way towards introducing this individualistic approach into the law. S 15 expressly considers the social significance of the property, whilst the replacement of the trust of sale with a trust of land is surely a recognition that the home is different to other types of property. However despite this, the trend in the case law has been to grant sale. Dixon suggests that this may in part be due to the failure to recognise that the equitable co-owner's priority is being forcibly converted from a possessory interest to a monetary interest.⁵¹ Given the increasingly recognised social aspect of the home, it cannot seriously be contended the two interests are the same. It would consequently make sense to take this difference in the character of the interest into account when deciding whether to order a sale.

Opponents of this reform may oppose it on the basis that, like reform to the priorities rules, it would cause uncertainty and instability in the mortgage market. However it is argued that such criticisms have no force in the remedies context. In relation to AJA s 36 and the Insolvency Act s 335a there is no question that the mortgagee will be able to realise its security, but the process suggested would be more sensitive to the social impact that leaving a property can have. The mortgagee can therefore be sure of its rights. It is true that in TLATA cases the mortgagee may not be able to realise its security, especially if the co-owners social interest in the property is taken into account. Yet this is not necessarily problematic. Dixon suggests that the courts should examine exactly why the mortgagee doesn't have priority and needs to use TLATA; if it is because of the mortgagee's own carelessness then it is difficult to see why the law should intervene to save it. Far from causing uncertainty, this method would encourage more careful lending practices and incentivise information gathering. Lenders would therefore be more rather than less confident of their rights.

⁵¹ Martin Dixon, 'To Sell or Not to Sell: That is the Question—The Irony of the Trusts of Land and Appointment of Trustees Act 1996' [2011] CLJ 579.

VI. CONCLUSION

This article has shown that in the majority of cases involving a dispute between a mortgagee and a beneficial co-owner, it will be the mortgagee who wins. This is largely because of a failure of the law on priorities and the law on remedies to fully appreciate the social significance that property may have. It has been argued that whilst such considerations can and should be made a part of the rules on remedies, it would be a mistake to reform the current priority rules due to the uncertainty and instability such reform could cause.

BLOCKING THE CHAIN: REGULATING THE INITIAL COIN OFFERING

Alexander Fong*

I. INTRODUCTION

TODAY, the issuance of equity and debt securities are governed by regulatory regimes which aim to promote freedom of information and are designed to sift out fraudulent activity, for the purposes of ensuring financial stability, market efficiency and investor protection.¹ Regulatory systems which fail to inhibit fraudulent behaviour have done so to their detriment.²

A. A HISTORY OF FINANCE

In A.D. 424, a man named Ochus was summoned by his half-brother, King Sogdianus, to the Persian capital of Susa. The new king wished to consolidate his power, so the purpose of the summons was manifest: fratricide. Ochus lived comfortably in Babylon, enjoying the company and support of wealthy landowners. Ochus' backers knew that standing with a future king might favour their fortunes, yet their investment in Ochus required that they stomach a substantial amount of risk. Asset-rich but cash-poor, they collectively mortgaged substantial portions of land to a clan of financiers—the Murašū family—and hired a private army. With their help, Ochus marched to Susa, killed his brother, and took the throne as King Darius II. Bereft of aid and forgotten by the

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¹ See, generally: Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, OUP 2014). For specific comment on the objectives of financial markets regulation, 48ff.

² Bernard Black, 'The Legal and Institutional Preconditions for Strong Securities Markets (2001) 48 UCLA LR 781.

usurper, many of Ochus' backers defaulted on their mortgage payments and went into foreclosure. Darius II had left them behind.³

The arrangement between Ochus' backers and the Murašu clan must seem familiar to the modern eye.⁴ In this case, Ochus was a mere beneficiary. His backers were issuers of the asset, and the Murašu clan their investors. Then, such acts of financing were unregulated, or at least not in the sense we understand it today. No structure existed to regulate the disclosure of risks of complex debt obligations,⁵ and so whether the Murašu clan were aware of precisely the enterprise which Ochus undertook remain a mystery.⁶

B. STRUCTURE OF ANALYSIS

The rapid development and application of blockchain technology has created a realm of both unparalleled innovation and incalculable risk,⁷ not least in the form of Initial Coin Offerings (ICOs) as a form of financing. Regulation has taken some shape, among others in the form of anti-money-laundering controls,⁸ and different jurisdictions have adopted different approaches in the service of ensuring financial stability and investor protection. We will consider regulation chiefly in the context of the UK, but compare where necessary the effect of regulation in other jurisdictions.

In this paper, I first set out the main objectives of financial regulation as it exists in the UK,⁹ and the key regulatory requirements relating to corporate governance and disclosure.¹⁰ I then consider the procedural problems arising out of superimposition of pre-existing securities regulation onto ICOs (the "recycle approach").¹¹ I argue that this may (a) produce over regulation; (b) produce legal uncertainty by allowing regulatory authorities the discretion to under- or over-regulate; or (c) lead to over-complication in the regulatory framework and practical uncertainty.¹² Finally, I consider the substantive problems in equating ICOs with other investment products,

³ William N. Goetzmann, *Money Changes Everything: How Finance Made Civilisation Possible* (Princeton 2016) 64.

⁴ Michael Simkovic, 'Competition and Crisis in Mortgage Securitization' (2013) *Indiana LJ* 88, 213.

⁵ Black (n 2).

⁶ For the effect that imperial policy had on encouraging risk, see: Tenney Frank, 'The Financial Crisis of 33 AD' (1935) 56(4) *American Journal of Philology* 336.

⁷ Clare Dickinson, 'US exchange giant launches cryptocurrency data feed' *Financial News* (London, 18 January 2018).

⁸ Council Directive (EU) 2018/843 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2018] OJ L 156/43.

⁹ See below, II.B.

¹⁰ See below, II.C.

¹¹ See below, III.

¹² See, below, III.A–III.C.

especially securities.¹³ I argue that there is merit in producing bespoke ICO regulations which acknowledge ICOs as a unique class of products (the “bespoke approach”).¹⁴ This approach does not envision the creation of regulatory mechanisms alien to the law as it stands. It merely proposes a consolidation of certain key mechanisms which ICO promoters should comply with, namely the implementation of a) rules relating to corporate governance through a scheme of registration, and b) mandatory prospectus requirements. These measures would better contribute to the fulfilment of the Financial Conduct Authority’s (FCA) objectives, reduce the legal uncertainty attaching to the superimposition of securities regulation, and allow blockchain technology to thrive.

II. FINANCIAL REGULATION IN THE UK

A. BACKGROUND

It suffices to note briefly that the regulatory regime in the UK has, understandably, undergone quite significant a metamorphosis from the enactment of the Financial Services Act 1986 (FS Act 1986) to the post-2008 reforms which have led to the regulatory regime today.¹⁵ The general trend of regulation has been, after 2008, toward increasing interventionism.¹⁶

The UK has two primary regulatory bodies. The Prudential Regulatory Authority (PRA) deals primarily—though not exclusively—with prudential regulation and the maintenance of capital and liquidity requirements. The functions of supervision of conduct and enforcement of specific rules relating to financial activity and assets are divested into another body. In this respect, the Financial Services Authority (FSA) was known for its adoption of a “principle-based regulation” approach to supervising such conduct.¹⁷ This approach rewarded firms which exhibited a “high degree of cooperation... with the FSA supervisors”,¹⁸ by providing them with

¹³ See below, IV.

¹⁴ See below, IV.C.

¹⁵ For a comprehensive overview of the evolution of the regulatory regime in the UK, see Julia Black, ‘Regulatory Styles & Supervisory Strategies’ in Niamh Moloney, Ellis Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015).

¹⁶ *ibid* 238f.

¹⁷ *ibid* 230f.

¹⁸ Financial Services Authority, *The Failure of the Royal Bank of Scotland* (Board Report 2011) 242.

regulatory “holidays” in the form of, *inter alia*, fewer risk assessments.¹⁹ However, the UK’s current approach as the Financial Conduct Authority²⁰ has been one of more intense scrutiny.²¹

B. OBJECTIVES OF REGULATION

In light of this background, the objectives of financial regulation, as set out by the FCA in a 2017 Discussion Paper, are: (a) the protection of investors; (b) the protection of financial markets; and (c) the promotion of competition.²² All three are mirrored in Section 1 of the Financial Services and Markets Act 2000 (FSMA) as the *consumer protection objective*, the *integrity objective*, and the *competition objective* respectively.²³

(i) *The Consumer Protection Objective*

According to Section 1C(1) of the FSMA,²⁴ the consumer protection objective is defined as ‘securing an appropriate degree of protection for consumers.’²⁵ Section 1C(2) then considers the factors the FCA must have regard to in considering what is “appropriate”: *inter alia*, the degrees of risk in investing,²⁶ the differing expertise²⁷ and expectations of investors,²⁸ general principles of investor responsibility on one hand,²⁹ and issuer responsibility on the other.³⁰

The manner in which the consumer protection objective is drafted underscores the inimitable role financial regulation plays in correcting asymmetries of information between investors in, and issuers of, investment products.³¹ This particular objective is salient in relation to ICOs, primarily because most investors in speculative ICOs are members of the public-at-large.³²

¹⁹ For a comprehensive self-assessment undertaken by the FSA in 2009, after the 2008 crisis, see generally: Financial Services Authority, ‘The Turner Review: A regulatory response to the global banking crisis’ (Review 2009).

²⁰ The FSA was abolished by the Financial Services Act 2012 and replaced by the FCA and the Prudential Regulation Authority of the Bank of England.

²¹ Black (n 15) 239.

²² Financial Conduct Authority, Distributed Ledger Technology: Discussion Paper on distributed ledger technology (Discussion Paper, DP17/03 2017).

²³ Financial Services Act 2012, Pt 1A, Ch. 1B–1E.

²⁴ As amended by the Financial Services Act 2012.

²⁵ Financial Services and Markets Act 2000, as amended by the Financial Services Act 2012, s 1C(1).

²⁶ *ibid* s 1C(2)(a).

²⁷ *ibid* s 1C(2)(b).

²⁸ *ibid* s 1C(2)(f).

²⁹ *ibid* s 1C(2)(d).

³⁰ *ibid* s 1C(2)(e).

³¹ *ibid* s 1C(2)(c).

³² Thus benefitting from Council Directive 2004/39/EC on markets in financial instruments [2004] OJ L 145/1.

(ii) The Integrity Objective

Section 1D(1) of the FSMA defines the integrity objective as “protecting and enhancing the integrity of the UK financial system”.³³ The word “integrity” is defined by s 1D(2) which reads: (2) The “integrity” of the UK financial system includes—(a) its soundness, stability and resilience, (b) its not being used for a purpose connected with financial crime, (c) its not being affected by behaviour which amounts to market abuse, (d) the orderly operation of the financial markets, and the transparency of the price formation process in those markets.

The market for ICOs has proven a hotbed for frustrated investors.³⁴ In November 2017, a “smart contract” technology firm called Confido carried out an ICO to raise funds in the service of its blockchain. It managed to raise nearly USD \$375,000, before the firm, and all traces of it, disappeared.³⁵ The ICO tokens were traded on certain online venues, most notably TokenLot, which could do naught but notify the authorities in the aftermath. The case of Confido shows how regulations which are not targeted towards the prevention of financial crime or market abuse, *per* the integrity objective as set out in the FSMA, might fail to preserve the integrity of a financial market.

(iii) The Competition Objective

This objective raises issues of competition law which lie outside the scope of this article. The precise achievement of this objective, therefore, will not be analysed in relation to the regulatory mechanisms purporting to govern ICOs.

³³ Financial Services and Markets Act 2000, s 1D(1), as amended by the Financial Services Act 2012.

³⁴ Saheli Roy Choudhury, ‘Many ICOs are fraudulent, say men behind two top bitcoin rivals’ *CNBC* (New Jersey, 17 November 2017), <<https://www.cnbc.com/2017/11/17/many-icos-are-fraud-according-to-ethereum-co-founder-and-ripple-ceo.html>> accessed 22 January 2018; see also: Nikhilesh De, ‘New Class-Action Suit Filed Against Tezos Founders’ (Coindesk, 18 December 2017), <<https://www.coindesk.com/new-class-action-suit-filed-tezos-founders/>> accessed 22 January 2018.

³⁵ Arjun Kharpal, ‘Cryptocurrency start-up Confido disappears with \$375,000 from an ICO, and nobody can find the founders’ *CNBC* (New Jersey, 21 November 2017), <<https://www.cnbc.com/2017/11/21/confido-ico-exit-scam-founders-run-away-with-375k.html>> accessed 23 January 2018.

C. MECHANISMS OF REGULATION

Issuers and investors in the UK are, at least in theory, subject to the regime created primarily by the FSMA and its corresponding amendments,³⁶ the 2005 Prospectus Regulations (PR 2005),³⁷ and the FCA's Handbook.³⁸ The final mechanism contains an assortment of rules which relate to disclosure guidance and transparency requirements, as well as rules relating to venues for the trading of assets.

We will chiefly consider how (a) listing requirements; and (b) mandatory disclosure requirements, aid in the fulfilment of the consumer protection objective and integrity objective.

(i) *Listing Requirements*

The regime of rules relating to securities' and investments extend past the regulation of the assets themselves,³⁹ to the regulation of the venues at which such assets are traded.⁴⁰

To ensure the efficacy of these rules and regulations, ICO promoters must be identifiable and accountable to investors.⁴¹ This is because the regime of corporate governance regulation works to the benefit of the consumer if issuers and promoters are responsible per s 1C(2)(e) FSMA.⁴² It works to the benefit of the market if financial crime is not only *attributable to an individual* but *prosecutable* according to s 1D(2) FSMA.⁴³

Yet it appears from the outset that the most onerous of listing requirements relating to offerings of securities will not apply to the majority of ICOs. First, ICOs rarely, if ever, are admitted for trading on regulated markets such as the London Stock Exchange (LSE). Such an admission might distinguish the ICO as a high-quality investment product, but it would not be in

³⁶ See, generally: Financial Services Act 2012.

³⁷ Financial Services and Markets: The Prospectus Regulations 2004, SI 2005/1433, enacted pursuant to Council Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJ L 345/64.

³⁸ The regulatory environment in the UK must also be appreciated amidst the EU's wider regulatory regime. See Council Directive 2004/109/EC on the harmonisation of transparency requirements [2004] OJ L 390/38 (the "Transparency Directive"), Council Directive 2011/61/EU on Alternative Investment Fund Managers [2011] OJ L 174/1; and Council Directive (EU) 2015/849 on money laundering or terrorist financing [2015] OJ L 141/73, the Council Regulation (EU) 596/2014 on market abuse (market abuse regulation) [2014] OJ L 173/1.

³⁹ See the definition of a 'specified investment', Article 76 of the Regulated Activities Order 2000.

⁴⁰ For an overview of the framework, see, generally: Barber & Allen, *The ICSA Corporate Governance Handbook* (4th ed) (ICSA Publishing Ltd 2007).

⁴¹ For discussion on issues relating to the novel issues of accountability presented by ICOs, see Chohan, 'Initial Coin Offerings (ICOs): Risks, Regulation, and Accountability' in *Discussion Paper Series: Notes on the 21st Century* (UNSW 2017)

⁴² As amended by the Financial Services Act 2012.

⁴³ As amended by the Financial Services Act 2012.

the ICO promoter's interest to do so voluntarily; compliance with these conditions are time-consuming and expensive.⁴⁴ ICOs trade, by and large, through online exchanges such as TokenLot, which describes itself as an ICO "superstore".⁴⁵ Although it is common for such exchanges to conduct "Know-Your-Customer" disclosures,⁴⁶ such measures fall short of ensuring that ICO promoters are held fully accountable, as they would be if admitted to the LSE, for the process and product of their ICOs. Reference to the Confido scam suffices to make this point.⁴⁷

(ii) Disclosure Requirements

The imposition of disclosure requirements is generally conceded to benefit both investors and issuers.⁴⁸ A key component of the disclosure regime relates to the publishing of a prospectus relating to the financial instrument—or security, as the case may be—being offered to the public, and this mechanism is governed by FSMA, s 85(1). If ICO promoters are subject to a disclosure regime, the consumer protection objective is achieved when investors are able to, by consulting the document issued by the ICO promoter, according to s 87A of the FSMA, "make an informed assessment of (a) the assets and liabilities, financial position, profits and losses, and prospects of the [promoter]... and (b) the rights attaching to the transferable [assets]".⁴⁹ In the vein of accountability and in the service of the integrity objective, the details of the promoter must also be disclosed, together with a detailed assessment of the tokens to be offered.⁵⁰

The provision of a disclosure document in the form of a prospectus also offers consumers *evidential* protection through the law. A prospectus, reduced to its core, is a series of representations made by the company regarding the product it offers, upon which investors rely in making a decision. Although, strictly speaking, there is a distinction between misrepresentation and prospectus liability, what in effect occurs remains a misrepresentation which the law is actively seized against through s 90 FSMA,⁵¹ which allows investors to make a claim in respect of an error

⁴⁴ For more on 'signalling' and the hypothesis on 'lemons', see, generally: George Akerlof, 'Market for lemons: Quantitative Uncertainty and the Market Mechanism' (1970) 222 *Quarterly Journal of Economics* 488.

⁴⁵ TokenLot <<https://www.tokenlot.com>> accessed 5 February 2018.

⁴⁶ *ibid*, see also 'Singapore MAS-licensed P2P lender Crowd Genie launches ICO' *Digital News Asia* (Malaysia, 4 February 2018) <<https://www.digitalnewsasia.com/business/singapore-mas-licensed-p2p-lender-crowd-genie-launches-ico>> accessed 5 February 2018.

⁴⁷ See above, II.B.(ii)

⁴⁸ For a discussion which concludes the contrary see Omri Ben-Shahar and Carl Schneider, 'The Failure of Mandated Disclosure' (2011) 159 *University of Pennsylvania Law Review* 647.

⁴⁹ In relation to issuers and securities, see Financial Services and Markets Act 2000 s 87A(2).

⁵⁰ See below, IV.B, 'A unique class of product'.

⁵¹ A stance which has been held for centuries; see *Derry v Peek* (1889) 14 App Cas 337.

on the prospectus which distorts the market price. The importance of this section is that, although some reliance must be shown, reliance on the prospectus itself need not be proven. In effect, the statute enables actions to be brought to preserve the “soundness, stability and resilience” of the market; in other words, its *integrity*.⁵²

A prospectus may also play a part in ‘signalling’ that the security is being offered by a reputable promoter.⁵³ The process of compiling a prospectus often requires consultation of analysts, auditors and other financial intermediaries known as “gatekeepers”.⁵⁴ The function of these intermediaries is meted out: as an impartial third party, an auditor has little incentive to misinform potential investors in the product which they find themselves auditing.⁵⁵

Currently, it is customary for ICO promoters to issue a “white-paper” which sets out the complexities of its product and its operation and application of blockchain technology.⁵⁶ But such a paper would not be in compliance with traditional prospectus requirements, which prioritise ease of reading and accessibility to investors.⁵⁷

III. PROCEDURAL PROBLEMS OF THE ‘RECYCLE APPROACH’

Having briefly disposed of the objectives which underpin financial regulation in the UK, and the various regulatory mechanisms which exist, the efficacy of these mechanisms in achieving these objectives in relation to ICOs falls to be considered. The “recycle approach” entails the application of pre-existing securities regulation to ICOs. But the procedural mechanism—namely, the use of the definition of ‘security’—which determines whether or not ICOs fall within these regimes, I argue, is deficient. I compare the approaches of the US and Singapore to that of the UK, and argue that not all ICOs are so capable of such conclusive definitions.

⁵² Financial Services and Markets Act 2000 s 1D(2)(a), as amended by the Financial Services Act 2012.

⁵³ Akerlof (n 44).

⁵⁴ Jennifer Payne, ‘The Role of Gatekeepers’ in Moloney, Ferran and Payne (n 15).

⁵⁵ Zohar Goshen and Gideon Parchomovsky, ‘The Essential Role of Securities Regulation’ (2006) 55 Duke LJ 711, 711.

⁵⁶ See, below, the discussion of the Decentralised Autonomous Organization in III.A: Danger of over-regulation—the United States.

⁵⁷ Prospectus Directive art 5(1), as implemented by Financial Services and Markets Act 2000 s 87A(3).

A. DANGER OF OVER-REGULATION – THE UNITED STATES

In 2016, Christoph and Simon Jentzsch wrote a code for an enterprise called the Decentralised Autonomous Organization (DAO).⁵⁸ The code was scripted to allocate investor capital to experimental digital technology. Investors obtained rights to vote on the technology they wanted by buying DAO tokens in an ICO, in other words, “investing” in the DAO.⁵⁹

The fund raised approximately USD\$150 million worth of the cryptocurrency Ethereum, after which the code was attacked by an unknown entity.⁶⁰ Approximately USD\$50 million was directed to a subsidiary account.⁶¹ The episode prompted a regulatory scramble by the Securities and Exchange Commission (SEC), its findings culminating in the release of an investigative report.⁶² The SEC Report stated that certain ICOs would be subject to securities regulation on a case-by-case basis “depending on the particular facts and circumstances, without regard to the form of the organization or technology used to effectuate a particular offer or sale”.⁶³ The finding was based on a factual application of securities laws to DAO tokens. It was made on the grounds that investors in the DAO “[invested] money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others”.⁶⁴

The SEC’s approach proves ineffective because of the overtly broad nature of its securities regulations. The *Howey* test—or US securities regulation in general⁶⁵—provides a ‘catch-all’ form of regulation which cuts into the innovation so important to the block-chain space. There is much to be said for protecting investors from a legal perspective⁶⁶ and an economic one,⁶⁷ but there is also a balance to be struck with the need to preserve the vibrancy of the market.

⁵⁸ Richard Waters, ‘Automated company raises equivalent of \$120m in digital currency’ *CNBC* (New Jersey, 17 May 2016) <<https://www.cnbc.com/2016/05/17/automated-company-raises-equivalent-of-120-million-in-digital-currency.html>> accessed 5 February 2018.

⁵⁹ Although these voting rights were limited, see the United States (US) Securities Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (Release No. 81207, 25 July 2017) (the SEC report).

⁶⁰ See, generally: *ibid.*

⁶¹ Investors were made whole by the ‘forking’ of the Ethereum blockchain, which had tremendous ramifications on holders of the cryptocurrency Ethereum as a whole: see Rachel O’Leary, ‘Upgrade Complete? Ethereum’s New Software Isn’t Quite Stable Yet’ (Coindesk, 18 October 2017), <<https://www.coindesk.com/update-complete-no-ethereums-new-software-isnt-stable-just-yet/>> accessed 22 January 2018.

⁶² The SEC Report (n 59).

⁶³ *ibid.* 10.

⁶⁴ *ibid.* 11ff, per the US Securities Act s 2(a)(1) and the US Exchange Act s 3(a)(10). Also see the ‘Howey’ test for what concerns a security: *Securities and Exchange Commission v W J Howey Co* (1946) 328 US 293.

⁶⁵ Per the US Securities Act s 2(a)(1) and the US Exchange Act s 3(a)(10).

⁶⁶ William Douglas, ‘Protecting the Investor’ (1934) 23 *Yale LJ* 521.

⁶⁷ Roberta Romano, ‘Empowering Investors: A Market Approach to Securities Regulation’ (1998) 107 *Yale LJ* 2359.

B. TOO MUCH DISCRETION – SINGAPORE

In November 2017, the Monetary Authority of Singapore (MAS) published a guide stating that “if a digital token constitutes a product regulated under the securities laws administered by MAS, the offer or issue of digital tokens must comply with the applicable securities laws”.⁶⁸

But although such a statement might *prima facie* appear quite similar to the approach taken by the SEC, no ‘witch-hunt’ of the sort undertaken in the USA has been carried out in Singapore. This is despite the regulation of “collective investment schemes”, a definitional category ostensibly capable of being encompass all ICOs.⁶⁹

What does this suggest? I propose that it exposes another problem with relying on definition as the controlling mechanism for regulating ICOs: unfettered discretion and legal uncertainty.

It is true that case studies offered by the MAS Guide contemplate cases in which ICOs will not fall under the regulatory regime under the SFA. But the odds of these cases proving problematic in real-life scenarios are slim. The following is one such case: Company A plans to set up a platform to enable sharing and rental of computing power amongst the users of the platform. Company A intends to offer digital tokens (hereinafter, “Token A”) in Singapore to raise funds to develop the platform. Token A will give token holders access rights to use Company A’s platform. The token can be used to pay for renting computing power provided by other platform users. Token A will not have any other rights or functions attached to it.⁷⁰

In such an example, it is hard to see what the value is in embodying access rights in a digital token. Access rights are customarily restricted on online webpages by registration fees. Further, the use of the token in payment for ‘renting computer power’ appears to resemble more a credit for use on an online site—the type of which is already existent.⁷¹ It is difficult to countenance that such a case study would apply to a more than negligible number of ICO companies.

It may be said that the MAS may ultimately hesitate to apply the regulatory regime too wantonly and oppressively as a matter of public policy.⁷² But although it may serve an adequate *ex post* measure to allow innovation, this kind of ‘discretionary’ regulation does little to alleviate worries of legal uncertainty, especially in a market already so dynamic and volatile.

⁶⁸ Monetary Authority of Singapore, A Guide to Digital Token Offerings (2017) (the MAS Guide) 2ff.

⁶⁹ Securities and Futures Act 2001 (SFA) s 2(1).

⁷⁰ MAS Guide (n 69) 8.

⁷¹ For example, ‘Amazon Reward Points’ obtained for utilising an Amazon credit card, see: Amazon Platinum Mastercard, <amazon.co.uk/gp/cobrandcard/marketing.html> accessed 22 January 2018.

⁷² Jamie Lee, ‘Singapore embraces FinTech to stay ahead’ *Business Times* (Singapore, 13 November 2017).

C. UNDER-REGULATION, OVER-COMPLICATION—UNITED KINGDOM

In April 2017, the FCA released a discussion paper⁷³ which focused on the innovation and corresponding risks of adopting “distributed ledger technology” (DLT). In September 2017, the FCA released a consumer alert on ICOs and emphasised the highly speculative nature of the investment, and the lack of regulatory coverage for investors.⁷⁴ It specifically stated that most ICOs would not fall *within* the regulatory framework which governed securities, but those which did would be regulated as such.⁷⁵ It followed that those falling *without*, would unfortunately leave their investors bereft of a claim s 90 of the FSMA.

The FCA’s Feedback Statement⁷⁶ was a novel opportunity to go further, and to propose bespoke regulations with regard to ICOs, but it proposed a recycle approach which injected even more uncertainty in relation to the classification of ICO tokens. The FCA considered a class of ICO tokens which might *not* amount to ‘specified investment[s]’⁷⁷ subject to requirements under the FCA Handbook’s Conduct of Business Sourcebook (COBS) and the FCA’s Principles for Business.⁷⁸ These requirements take the form of lighter regulations concerning corporate governance and other governance strategies.⁷⁹ It then reiterated its position regarding the classification of certain ICOs as ‘transferable securities’ within the meaning of the Markets in Financial Instruments Directive (MiFID) II⁸⁰ and the prospectus requirements which follow. The stratification of these different regulatory classifications—ICO tokens as securities, “regulated activities”, and “specified investments”—introduces scope for even more definitional difficulties for ICO promoters, not least for the FCA itself.

This is not to say that such a regime would be incapable of regulating ICOs—under or over-regulation are still forms of regulation. But it does mean that the FCA, like the MAS, has much discretion, sometimes very arbitrary discretion, in relation to which ICOs it regulates.

⁷³ FCA Discussion Paper (n 22).

⁷⁴ Financial Conduct Authority, ‘Consumer warning about the risks of Initial Coin Offerings (ICOs)’ (Financial Conduct Authority, 12 September 2017) <<https://www.fca.org.uk/news/statements/initial-coin-offerings>> accessed 22 January 2018.

⁷⁵ *ibid.*

⁷⁶ Financial Conduct Authority, Distributed Ledger Technology: Feedback Statement on Discussion Paper 17/03 (Feedback Statement, FS17/04 2018), 28f.

⁷⁷ *ibid.* 2.

⁷⁸ *ibid.* 3.

⁷⁹ See, above, II.C.(i).

⁸⁰ Council Directive 2014/65/EU on markets in financial instruments [2014] OJ L 173/349, effective 2018.

IV. SUBSTANTIVE PROBLEMS AND THE ‘BESPOKE APPROACH’

A. FACT-DEPENDENCE AND SUBJECTIVITY

The problems found in Part III, with regard to the *manner* in which ICOs have been regulated, stem almost completely from the difference in *substance* between ICOs and securities. What precisely constitutes an ICO token is a matter of immense subjectivity. ICO tokens are digital assets which confer on investors certain rights which may be enforced. Depending on the ICO and the objectives of each issuer, these rights may differ. They may confer voting rights in respect of a distributed ledger network,⁸¹ or they may confer rights to acquire the issuer’s cryptocurrency at a later date. But because ICO tokens as a class of products vary so greatly in the manner in which they are constituted—and the purpose for which they are envisioned to be used—they cannot be properly equated with securities in all instances.

B. A UNIQUE CLASS OF PRODUCT

There must be some merit in calling a spade a spade. First, the definition of a security, which determines which products fall within the regulatory regime in the first place, does not survive an application to ICOs, which may differ greatly in how they are constituted. But although the current law may find that a BAT token does indeed constitute a security, or at least a ‘specified investment’ under the RAO 2001, it also offers tremendous latitude for a finding to the contrary. I submit that there is no reason this should be the case. There is nothing intrinsically different about the BAT ICO insofar as its proceeds provided the resources with which to finance the running of the platform.⁸² The recycle approach provides a false sense of assurance that regulation exists, while failing to offer a principled basis upon which regulation is based. It is true that the FCA has not stated categorically that utility tokens would not be subject to at least some form of regulation.⁸³ But as we have seen, without the requirement of a prospectus, or with piecemeal regulation relating to the corporate governance of the ICO promoter, no concrete assessment of the token, whether

⁸¹ SEC Report (n 59) 13f.

⁸² The BAT ICO raised USD \$ 35 million in 30 seconds: Ameer Rosic, “ICO Pros & Cons: Cutting through the Noise” *Huffington Post* (New York, 2 June 2017).

⁸³ Specifically, Art. 4.1.44 MiFID II: ‘transferable securities’ are classes of securities which are negotiable on the capital market, such as: “(a) shares in companies and other securities equivalent to shares... (b) bonds or other forms of securitised debt... (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities [inter alia].”

it be utility or asset-backed, exists for the investor to make an informed decision regarding her investment.⁸⁴

C. THE BESPOKE APPROACH

I argue that the preferred mechanism for reform would be through the implementation of ICO-specific rules in the FCA Handbook. In particular, the following regulations should be considered.

(i) *A Scheme of Registration*

I argue first that all ICO promoters should be registered with the FCA, and all registered promoters should be subject to the listing requirements found in the Listing Rules (LR) of the FCA's Handbook.⁸⁵ ICO promoters should be incorporated,⁸⁶ and should furnish details of the details of their company and directors. Such a requirement would give body to the FCA's language of 'authorisation' in their Feedback Statement⁸⁷ and would be tremendously effective in ensuring accountability and the fulfilment of the consumer protection objective and integrity objective.

(ii) *Incorporating a Definitional Test*

Of course, requiring ICO promoters to register with the FCA merely shifts the definitional question forward; which promoters will be required to register, and how will they know that they must do so? It is the author's view that the answer should focus on the subjective intentions of the promoters, and the manner in which the digital token is meant to be used in the promoters' entrepreneurial activities.

Accordingly, I argue that the following test be adopted: a digital token should be regulated if, in selling the relevant digital token: (a) the promoter intends to confer rights in favour of investors; (b) the promoter intends to induce investors' reliance; and (c) the promoter purports to affect the value of the digital token by way of his managerial efforts.

It will be immediately apparent that the above test incorporates elements of the *Howey* test, but does away with the legal fiction that such assets are necessarily securities. Instead, it focuses

⁸⁴ For the relationship between legal regulation and economics, see, generally: Anthony I. Ogus, *Regulation: Legal Forms and Economic Theory* (Hart Publishing 2004).

⁸⁵ Specifically, Listing Rules 1–3.

⁸⁶ Listing Rules R 2.2.1.

⁸⁷ FCA Feedback Statement (n 76) Annex 1, para 2.

on the subjective intention of the promoter, which, if made out, establishes a justifiable ground for sanction.

(iii) Mandatory Disclosure Requirements

Perhaps more controversially, I argue that all ICOs be subject to mandatory disclosure requirements in the form of the release of a prospectus. It suffices briefly to reiterate the main benefits of imposing disclosure requirements onto ICO promoters. The first relates to the benefit derived by investors. In accordance with the consumer protection objective and integrity objective as articulated by the FCA,⁸⁸ the imposition of disclosure requirements would be instrumental in ensuring that investors receive the information they require to make informed decisions regarding their investments.⁸⁹ Second, it allows them a concrete document on which they can rely, and on which they might advance a private claim arising out of the negligent⁹⁰ or fraudulent misrepresentation resulting therefrom.⁹¹ Third, the benefit to the ICO promoter is that a disclosure document signals the quality of the product, if compiled with reputable gatekeepers, and creates an incentive for the ICO promoter to disclose accurate information.⁹²

It is important, however, to be aware that too onerous a set of disclosure requirements might prove to be counter-productive and might stifle innovation in blockchain technology.⁹³ But I contend that in the realm of such nascent technology, it pays to be cautious. The imposition of disclosure requirements may result in a marked decrease in the amount of ICOs from the time of its implementation, but such a decrease may perhaps be attributable to a decrease in the number of *fraudulent* ICOs, as opposed to indicating stifled innovation.

⁸⁸ See above, II.B.

⁸⁹ Ogus (n 84).

⁹⁰ The law on negligent misstatements is found in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

⁹¹ Governed by the MAR, the Criminal Justice Act 1993, and the Insolvency Act 1986. For the law on misrepresentation consult *Derry v Peek*, n 52; and for excellent and exhaustive treatment of the subject in the law of contract: Neil Andrews, *Contract Law* (CUP, 2nd edn, 2015), 218ff.

⁹² Akerlof (n 44).

⁹³ Ben-Shahar and Schneider (n 48).

IV. CONCLUSION

I have argued that ICO tokens represent a unique class of products which is incapable of being defined with the language in respect of securities. Concomitantly, I have proposed that a discrete set of regulations be enacted to deal directly with ICOs, which in my assessment will add uniformity, clarity and certainty to this developing area of law. Such regulation necessarily comes at the cost of inhibiting some degree of innovation—but I hold still that it serves more to constrain fraudulent activity, primarily because of the high incidence of fraud which exists in the current ICO market.

But whether one decides to recycle the cloth of regulation or tailor it bespoke is perhaps a question which suits the lawyer alone. For the rest of the world it remains apparent that the end of the initial coin offering lies far over the wine-dark sea.⁹⁴

⁹⁴ Homeric epithet. A.T. Murray (trs), *Homer, The Odyssey* (Heinemann 1919) book 1, line 180: “And now have I put in here, as thou seest, with ship and crew, while sailing over the wine-dark sea to men of strange speech, on my way to Temese for copper. And I bear with me shining iron.”

ACTING REASONABLY WHILE USING DISPROPORTIONATE FORCE: AN OXYMORON

Cliston Chiok*

I. INTRODUCTION

IN THE RECENT DECISION OF *STEVEN*,¹ the defendant (D) sought to reverse *Collins*,² arguing that Parliament enacted s 76(5A) of the Criminal Justice and Immigration Act 2008 (CJIA) with the intention that if D is found not to have used grossly disproportionate force, s 76(5A) applies to deem him as using a degree of force which is reasonable, satisfying the defence of self-defence. The Court of Appeal (CA) rejected this interpretation, affirming and citing the interpretation of s 76 (5A) by Sir Brian Leveson in *Collins*. This article seeks to provide further justification for these decisions by: (a) outlining the background behind s 76(5A); (b) assessing the interpretation of s 76(5A) in *Collins*; and (c) addressing any possible justifications for an alternative interpretation of s 76(5A).

II. BACKGROUND AND MISCONCEPTIONS BEHIND S 76(5A) CJIA

A. FIRST MISCONCEPTION: THE OLD LAW³

Firstly, there was a misconceived belief that the old law (i.e. the common law before it introduced a reasonableness test for self-defence) had always sanctioned intruders such as burglars to be slain on sight. Indeed, Blackstone⁴ did suggest that householders had a *carte blanche* to kill burglars if they

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¹ *R v Ray (Steven)* [2017] EWCA Crim 1391, [2018] 2 WLR 1148.

² *R (Collins) v Secretary of State* [2016] EWHC 33 (Admin), [2016] QB 862, [2016] 2 WLR 1303.

³ John Spencer, 'Using force on burglars' [2016] 2 Arch Rev 6.

⁴ Blackstone's Commentaries on the Laws of England Volume IV (Bl Comm Vol IV) 180.

wanted. However, this was not an absolute rule; the authority that Blackstone relied upon had an implicit requirement that the householder's force must be directed against an intruder who was himself using force.⁵

B. SECOND MISCONCEPTION: COMMON LAW REASONABLENESS TEST

The Criminal Law Act 1967 introduced a test of reasonableness to the common law of self-defence.⁶ The reasonableness of D's act was judged objectively by a jury, based on D's subjective view of the facts.⁷ This test was applied in *Martin*,⁸ where D shot an intruder but failed to satisfy the claim of self-defence. This directly led to the second misconception that the law had changed; using any degree of force against intruders was misunderstood as now being always illegal. In fact, even under the old law, such self-defence would have been precluded since the intruders were not using force against D. However, the media misreported the case and portrayed D as a hero who was victimised by the criminal justice system.⁹

C. THE ENACTMENT OF S.76 CJIA

Several bills¹⁰ were proposed in response to the public outcry regarding the decision in *Martin*,¹¹ but there was no concrete change until after the case of *Hussain*.¹² In that case, the defendants who were convicted did not claim self-defence but instead unsuccessfully argued that they did not carry out any assault on the household intruder. However, the media sensationalised the case and propagated the second misconception.¹³ As a response to the public outrage, Justice Minister Jack Straw pledged to overhaul the existing law, which led to the enactment of s 76 CJIA.¹⁴

⁵ Hale, *The History of the Pleas of the Crown* (Hale PC) 488.

⁶ Criminal Law Act 1967 s 3.

⁷ *R v Williams (Gladstone)* (1984) 78 Cr App R 276, [1987] All ER 411; *Beckford v R* [1988] AC 130, [1987] 3 WLR 611.

⁸ *R v Martin* [2001] EWCA Crim 2245, [2003] QB 1, [2002] 2 WLR 1.

⁹ Spencer (n 3).

¹⁰ Criminal Justice (Justifiable Conduct) Bill 2004; Criminal Law (Amendment) (Householder Protection) Bill 2004.

¹¹ *Martin* (n 8).

¹² *R v Hussain (Tokeer)* [2010] EWCA Crim 94, [2010] 2 Cr App R (S) 60.

¹³ 'Chris Grayling: A Tory government would seek to protect the rights of the victim' *The Telegraph* (London, 19 December 2009) <www.telegraph.co.uk/news/uknews/law-and-order/6844244/Chris-Grayling-A-Tory-government-would-seek-to-protect-the-rights-of-the-victim.html> accessed on 27 March 2016.

¹⁴ Spencer (n 3).

In effect, s 76 merely codified the existing reasonableness test,¹⁵ and was criticised as “wholly unnecessary” and only “deployed as a weapon in a PR war” to assuage the public’s outrage.¹⁶

D. REVIVAL OF THE FIRST MISCONCEPTION: S 76(5A)

In 2012, Conservative backbenchers called for further reform of s 76 for two main reasons.¹⁷ Firstly, they wanted to honour the pledge made in their 2010 election manifesto; that further reforms to s 76 would be carried out.¹⁸ Secondly, it was to ensure “victims of crime do not find themselves facing prosecution for defending their own homes”.¹⁹ The amendment was effected through s 43(3) of the Crime and Courts Act 2013, which inserted s 76(5A) into the CJIA. S 76(5A) states that “in a householder case, the degree of force used by [D] is not to be regarded as having been reasonable in the circumstances as [D] believed them to be if it was grossly disproportionate in those circumstances”. Certain commentators²⁰ and even the Crown Prosecution Service (CPS)²¹ interpreted s 76(5A) to indicate that any force used in the householder context, as long as not grossly disproportionate, would be reasonable. This led to the third misconception (in truth, a revival similar to the first misconception) that householders could use any degree of force on home intruders, as long as it was not grossly disproportionate. However, *Collins*²² expressly dispels this misconception.

II. THE DECISION IN *COLLINS*

The court in *Collins*²³ interpreted s 76(5A) such that the question of whether force is grossly disproportionate and whether it is reasonable was to be considered disjunctively by the jury.²⁴ Ostensibly, this decision is unconvincing as it allows the absurd possibility of an act done by a

¹⁵ Sally Lipscombe, ‘Householders and the Criminal Law of Self-Defence’ (Standard Note SN/HA/2959, *House of Commons Library*, 2013) 3.

¹⁶ Paul Mendelle, ‘Self-defence law shows how politicians use legislation as PR’ *The Guardian* (London, 31 October 2011) <www.guardian.co.uk/law/2011/oct/31/self-defence-law-legislation-pr> accessed 27 March 2016.

¹⁷ Patrick Hennessy, ‘Conservative MPs demand greater rights for householders against burglars’ *Sunday Telegraph* (London, 9 September 2012) <www.telegraph.co.uk/news/politics/9530564/Conservative-MPs-demand-greater-rights-for-householders-against-burglars.html> accessed 27 March 2016.

¹⁸ ‘Invitation to Join the Government of Britain: the Conservative Manifesto 2010’ (Conservative Party, 2010) 56.

¹⁹ Hennessy (n 17).

²⁰ James Richardson, *Archbold 2016: Criminal Pleading, Evidence and Practice* (64th edn, Sweet & Maxwell 2015) para 19–48a.

²¹ *Collins* (n 2).

²² *ibid.*

²³ *ibid.*

²⁴ *ibid.* [22].

householder to be concurrently disproportionate and reasonable. Logically speaking, a reasonable act would impliedly exclude any act that involves disproportionate force. Judges themselves have used the terms “reasonable” and “proportionate” interchangeably²⁵ and the court in *Collins*²⁶ conceded that in most cases, D would be found by the jury to have acted reasonably where he was using proportionate force.²⁷ However, this illogical possibility seems to be justifiable as the court interprets s 76(5A) as only “limitative, not permissive”;²⁸ this means that s 76(5A) only operates to prevent the possibility of a grossly disproportionate degree of force being held as reasonable.²⁹ In other words, s 76(5A) operates as a filter before the reasonableness test in s 76(3) is applied. Firstly, this interpretation is logically drawn from the fact that s 76(5A) was drafted in the negative, “allowing but not requiring the fact finder to conclude that force which is disproportionate still has to be reasonable”.³⁰ Secondly, this construction of s 76(5A) is consistent with the Ministry of Justice’s view that s 76(5A) “does not give householders free rein to use disproportionate force in every case... [The] level of force used must still be reasonable in the circumstances as the householder believed them to be”.³¹ Finally, this is in line with the explanatory notes relating to s 43(3) of the Crime and Courts Bill (which implements s 76(5A) CJIA) that “it could be reasonable for householders to use disproportionate force to defend themselves from burglars in their homes”.³²

Accepting the interpretation that s 76(5A) co-exists with s 76(3), it is clear that the third misconception has been expressly dispelled and that reasonableness and proportionality cannot be used interchangeably given that they apply in different contexts. As a result of statutory drafting, when both ss 76(5A) and (3) operate, it is conceivable that a disproportionate act may be reasonable.

III. ARGUMENTS FOR AN ALTERNATIVE INTERPRETATION OF S 76(5A)

While an alternative interpretation of s 76(5A) is that any degree of force will be reasonable unless it is grossly disproportionate, the justifications for such an interpretation are untenable when subject to greater scrutiny. Four such justifications will now be considered.

²⁵ *R v Keane (Daniel)* [2010] EWCA Crim 2514 [5] (Hughes LJ).

²⁶ *Collins* (n 2).

²⁷ *ibid* [25].

²⁸ Spencer (n 3).

²⁹ *Collins* (n 2) [61].

³⁰ *ibid* [25].

³¹ ‘Use of force in self-defence at place of residence’ (Circular No 2013/02, Ministry of Justice 26 April 2013) [10].

³² Crime and Courts Bill Deb (Explanatory notes) 19 December 2012 col 431.

A. UNCERTAINTY WITH THE ‘REASONABLE FORCE’ TEST

The main criticism of the reasonable force test (s 76(3)) is that it is placed in the jury’s “black box” discretion;³³ what amounts to reasonable force cannot be adequately defined as each case turns on its own facts. As such, it has been said to be “unacceptably vague and gives insufficient guidance”³⁴ as to what a householder can legally do when dealing with an intruder. Is the alternative interpretation more helpful than the interpretation in *Collins*?³⁵

Given the lack of any statutory guidance as to what constitutes grossly disproportionate, distinguishing between a disproportionate and grossly disproportionate act has been criticised to be “as decipherable as assessment of how many angels can dance on the head of a pin”.³⁶ A circular issued by the Ministry of Justice acknowledges that “there are no hard and fast rules about what is disproportionate or grossly disproportionate”³⁷ and instead tries to give some guidance by way of an illustration. It was stated that an instinctive punch from a householder, which leaves the fleeing intruder unconscious is deemed as a disproportionate act, while a grossly disproportionate act would be if the householder continues stomping or stabs the intruder after he is knocked unconscious. This illustration is troubling as it suggests the threshold is set “when it is abundantly clear that no further force is required”.³⁸ It is submitted that even if the courts were to consider adopting the alternative interpretation of s 76(5A), what amounts to a grossly disproportionate act would not be confined to circumstances that are analogous to the illustration given by the Ministry of Justice. Instead, it would just be another reasonableness test in substance and left to the jury’s discretion. Given that it is unclear what constitutes grossly disproportionate, the alternative interpretation cannot be justified on the grounds that it provides more certainty over present law.

While a stronger argument could be made if the statute were to provide definitions or clearer guidance on what grossly disproportionate means, it is submitted that this will still not be advantageous over the current test. Listing all circumstances where an act would be grossly disproportionate would be an impossible task, as there are too many different factual circumstances. Not all situations can be anticipated and this will lead to the pursuit of an elusive

³³ Joshua Getzler, ‘Use of Force in Protecting Property’ (2006) 7 *Theoretical Inquiries in Law* 131, 151.

³⁴ Ian Dennis, ‘What Should Be Done about the Law of Self-Defence?’ [2000] *Crim LR* 417.

³⁵ *Collins* (n 2).

³⁶ Nicola Wake, ‘Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives’ (2013) 77(6) *Journal of Criminal Law* 512.

³⁷ Circular No. 2013/02 (n 31) [12].

³⁸ Wake (n 36).

“will-o’-the-wisp”³⁹ of “an appropriate one-size-fits-all” statutory definition.⁴⁰ Lord Woolf opined that this would lead to “amendment after amendment to the law, making it more and more complex and difficult to apply”.⁴¹ Smith & Hogan observe that the current reasonableness test works perfectly well in practice, as its “virtue is that it is malleable and can be applied appropriately in different contexts”.⁴² As such, it is submitted that flexibility over certainty would be more appropriate in practice. Moreover, s 76(7) already gives a wide margin of appreciation in D’s favour when determining reasonableness; the jury must take into account that D “may not be able to weigh to a nicety the exact measure of any necessary action”.⁴³ Thus, the advantages of statutory certainty are far outweighed by the potential problems it would bring.

B. RECOGNISING THE SPECIAL STATUS OF THE HOME

Miller⁴⁴ suggests that the law should treat home intrusion cases in a special manner, so as to recognise that “there is a special emotional affinity between a person and his home”⁴⁵ and that it is the “ultimate place of safety”.⁴⁶ The special status of the home has been stated as early as in the 17th century, with Sir Edward Coke expressing that “a man’s home is his castle, *et domus sua cuique est tutissimum* [and each man’s home is his safest refuge]”.⁴⁷ As Miller⁴⁸ points out, English law has historically taken into account the special status of home. In *R v Hussey*,⁴⁹ the Court of Appeal affirmed the right of the tenant who was facing wrongful eviction to shoot his landlady. Would allowing any degree of force that is not grossly disproportionate in a householder case suitably reflect the significant status of home?

³⁹ Michael Reynolds, ‘The rise and fall of the Atkin doctrine: searching for a will-o’-the-wisp’ (2004) 20(3) Construction Law Journal 111.

⁴⁰ Jill Dickinson, ‘Open season for burglar battering: is it time to check in with the civil courts?’ (2013) 2 Journal of Personal Injury Law 63.

⁴¹ HL Deb 10 December 2012, vol 741, col 885.

⁴² David Omerod and Karl Laird, *Smith and Hogan’s Criminal law* (14th edn, OUP 2015) 436.

⁴³ Criminal Justice and Immigration Act 2008, s 76(7)(a).

⁴⁴ Sophie Miller, “‘Grossly disproportionate’: home owners’ legal licence to kill’ (2013) 77(4) Journal of Criminal Law 299.

⁴⁵ Boaz Sangero, *Self-defence in Criminal Law* (Hart Publishing: Oxford 2006) 267.

⁴⁶ Denise Drake, ‘The Castle Doctrine: An Expanding Right to Stand Your Ground’ (2008) 37 St Mary’s Law Journal 573 at 596.

⁴⁷ Co Inst.

⁴⁸ Miller (n 50).

⁴⁹ *R v Hussey* (1924) 18 Cr App R 160.

It is submitted that this justification is untenable. Firstly, *Hussey*⁵⁰ is not followed in the modern line of cases.⁵¹ Secondly, allowing this alternative interpretation would breach an even more fundamental concept: the sanctity and right to life.⁵² While home intruders are frequently portrayed as violent criminals, Leverick notes that most “just want to escape without contact with the home owner at all—they only want to steal property”.⁵³ As Miller states, do we want a legal system “where people are allowed to shoot dead someone who is only trying to steal their TV”?⁵⁴ Furthermore, this justification is only tenable if the householder does not mistake someone as an intruder. However, s 76(3) CJIA allows the defence to apply even under a mistaken belief, as it is decided by reference to the defendant’s subjective beliefs of the circumstances. Therefore, if the householder should always be allowed to kill in defence of his home, “the aggressive armed burglar can be safely dispatched, but so also can the ten-year-old boy stealing apples from the kitchen”.⁵⁵

Fundamentally, Jones⁵⁶ provides an argument that the underlying thrust of this justification does not reflect reality; the home does not have a special status for everyone. He notes that people in “weaker positions in the domestic power relationships”, such as youths, may not regard their home as a “safe haven”. For others, their home is where threats occur from the occupants themselves and not trespassers; the Office for National Statistics estimates that 8.2% of women and 4.0% of men reported experiencing domestic abuse in 2015, equivalent to 1.3 million women and 600,000 men.⁵⁷ Furthermore, s 76(5A)’s scope is limited to where D uses force while he is “in or partly in a building”.⁵⁸ How can the proposed test be justifiable if its applicability depends whether the householder engages the intruder in his room instead of his garden?⁵⁹ As such, clearly even the special status of home cannot justify the alternative interpretation.

⁵⁰ *Hussey* (n 55).

⁵¹ *R v Faraj (Shwan)* [2007] EWCA Crim 1033 [22] (Tuckey LJ).

⁵² Art 2 ECHR.

⁵³ Fiona Leverick, *Killing in Self-Defence* (OUP 2008) 139.

⁵⁴ Miller (n 50).

⁵⁵ Dennis (n 34).

⁵⁶ Gill Jones, ‘Experimenting with Households and Inventing “Home”’ (2000) 52 *International Social Science Journal* 183,184.

⁵⁷ ‘Chapter 4: Intimate personal violence and partner abuse’ (Office for National Statistics, 11 February 2016).

⁵⁸ Criminal Justice and Immigration Act 2008, s 76(8A)(b).

⁵⁹ Claire de Than and Jesse Elvin, ‘Mistaken private defence: the case for reform’ in Alan Reed and Michael Bohlander (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Routledge 2014).

C. CONSISTENCY WITH THE CIVIL LAW

The Occupiers' Liability Act 1984 governs the civil law liability that is imposed on occupiers towards trespassers. Notwithstanding the act imposing a reasonableness test to determine whether a duty is owed, Jill Dickinson⁶⁰ observes that courts are growing more likely to find that the entrant, rather than the occupier, is responsible for the injuries suffered. This is evidenced from Lord Hoffmann's statement in the tort case of *Tomlinson*⁶¹ that it is "extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities that they freely choose to undertake... if people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair".⁶² Since the civil law seems more likely to favour the occupier, could developing the criminal law in line with its civil counterpart be good justification for the alternative interpretation of s 76(5A)?

Despite *Hinks*⁶³ primarily deciding on the criminal law of theft, it can be distilled from the judgment that disharmony between the civil and criminal law does not of itself justify a departure from the present state of criminal law. Lord Steyn in *Hinks*⁶⁴ states, "in a practical world there will sometimes be some disharmony between the two systems. In any event, it would be wrong to assume on *a priori* grounds that the criminal law rather than the civil law is defective".⁶⁵ Therefore, unless there is some other justifiable reason for accepting the alternative interpretation of s 76(5A), the divergence between the civil and criminal law is tolerable.

D. ADDRESSING THE PUBLIC'S CONCERN

During a debate regarding the implementation of s 76(5A), Member of Parliament Mr Shailesh Vara made reference to an ICM poll for *The Sunday Telegraph*; 79% of the respondents indicated that householders should have more discretion in the degree of force used against home intruders. He expressed that "if we are here to do good for the public and listen to them, this measure [s 76(5A)] would put into place what the public want".⁶⁶ Can societal demands justify an alternative interpretation?

⁶⁰ Dickinson (n 40).

⁶¹ *Tomlinson v Congleton BC* [2003] UKHL 47, [2004] 1 AC 46.

⁶² *ibid* [84]–[85].

⁶³ *R v Hinks* [2001] 2 AC 241.

⁶⁴ *ibid*.

⁶⁵ *ibid* 252.

⁶⁶ Crime and Courts Bill Deb 5 February 2013, col 285.

As Spencer expresses, “legislating about criminal justice in the hope of pleasing public opinion as reflected in the popular press is a dangerous and foolish game to play, because on criminal justice matters, public opinion—as misled by the popular press—is seriously misinformed”.⁶⁷ To illustrate how the popular press misleads public opinion, the Daily Mail’s headlines on the decision in *Collins*⁶⁸ wrongly states, “A person is permitted to use disproportionate force to challenge an intruder in their home... only grossly disproportionate force is illegal”.⁶⁹ It is natural for the public to support the alternative interpretation of s 76(5A), given that they bear the two long-standing misconceptions (as discussed at Sections II.A and II.B above) at the back of their minds. Spencer⁷⁰ rightly expresses that the politicians should not be playing the demagogue and legislating to address misunderstandings, instead they should be using their position to correct the public perception of the criminal law.

IV. CONCLUSION

The decision in *Collins*⁷¹ (and by extension, the endorsement by the CA in *Steven*)⁷² is convincing as it is based on proper reasoning; the court’s interpretation of s 76(5A) is consistent with the relevant explanatory notes and other legal guidance. While the interpretation may be criticised for allowing the absurd possibility of a disproportionate force to be held as reasonable, it is justifiable on the basis that the interpretation is an inevitable result of how s 76(5A) is drafted. Furthermore, *Collins* is convincing because it takes the law in the right direction. As considered earlier, there are no justifiable reasons that support the alternative interpretation of s 76(5A). Therefore, the public is clearly misconceived in believing that s 76(5A) effectively sanctions disproportionate force; *Collins* is correct in finding that s 76(5A) was never intended to change substantial law.

⁶⁷ John Spencer, ‘The Drafting of Criminal Legislation – Need it be so impenetrable?’ [2008] Cambridge Law Journal 585, 599.

⁶⁸ *Collins* (n 2).

⁶⁹ Ian Drury, ‘Judge says homeowners CAN beat up burglars because new “householder defence” does not break human rights laws’ *Daily Mail* (London, 15 January 2016) <www.dailymail.co.uk/news/article-3401442/Judge-says-homeowners-beat-burglars-new-householder-defence-does-not-break-human-rights-laws.html> accessed on 27 March 2016.

⁷⁰ Spencer (n 67) 599.

⁷¹ *Collins* (n 2).

⁷² *Steven* (n 1).

