EXETER LAW REVIEW

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EDITORIAL

I am honoured to have been a Co-Editor in Chief of the Exeter Law Review this year, and to have coordinated our 47th Annual Journal 2021/22. I am proud that for another year, our student-run Journal has showcased talent that the University of Exeter is home to, both that of the brilliant authors who have contributed their insightful works, and that of the skilled editors who have enhanced these works with care and detail.

Having begun my journey with the Exeter Law Review in my first year of university, it has been an integral part of my undergraduate career, as it has been for countless other Exeter students that have edited for, or submitted to, the Review during their law degrees.

Excitingly, this year has seen a rebrand as well as a more tight-knit affiliation with Exeter Law School, which will provide future editors with extra resources and staff support to make their editing process even more seamless. For this, I would like to thank Professor Sue Prince and Professor Lisa Cherkassky, who both invested their time and energy into the Review. As a result of their efforts, we have been able to set up a more concrete framework for the Review to flourish in years to come; a legacy I am proud to leave.

I have to extend a big thank you to our Editorial Board this year, especially to the special few who went above and beyond to make this year's edition of the Journal possible, even when it ran into their summer break (thank you Amelia, Harry and Scarlett!). Being an editor alongside full-time studies is no easy task, which is why I count myself lucky to have worked with such dedicated and accomplished editors this year. Heartwarmingly, I am confident that those remaining on the Board next year will continue this great work and make me and Rida proud.

To Harinee and Ioanna, thank you for all your professional and personal support this year; I am so glad that Law Review brought us together. And to my fellow Editor-in-Chief, Rida, thank you for everything! You are the epitome of determination and confidence, and I feel lucky to have worked with you for the past two years.

I would also like to thank my predecessors, Frances and Shania, for imparting to me their expertise and trusting me with the responsibility of running the Review this year. And, of course, thank you to our incredible authors for contributing your thought-provoking pieces of work and for your patience throughout the editing and publishing processes.

All that is left to say is that, immensely proud of all we have achieved this year and excited for what the future holds, I am over the moon to present you with the 47th Volume of the Exeter Law Review's Annual Journal. It has been a long time in the making, so I hope you enjoy reading these thought-provoking essays as much as we have enjoyed curating them.

Fizaa Bano Ahmed
Editor-in-Chief

EDITORIAL

It has been an honour, and my utmost pleasure, to have undertaken the role of Co-Editor in Chief of the Exeter Law Review for the 21/22 academic year. As we transition into a new normality after facing the most unprecedented times, we are blessed to be able to provide you with incredibly insightful academic pieces. The articles published in our 47th Annual Journal showcase the consistent talent across the University of Exeter. After starting out as a Copy Editor and moving through the ranks over the last three years, it is safe to say that my time at Exeter would have been strikingly different without the Review. It has played an intrinsic part in shaping who I am, as a student and a team player at university.

This is an incredibly exciting time for the Law Review. Over the last academic year, we rebranded and elevated all our social media platforms. Alongside this, and most importantly, we established a more legitimate affiliation with the Law School. I am eternally grateful for the unwavering support of Professor Sue Prince and Professor Lisa Cherkassky during this transition into creating an avenue to provide more streamlined communication between the Review and the student body. With their dedication, the sky is truly the limit, and I am looking forward to seeing the Review move from strength to strength.

None of this would have been made possible without our Editorial Board, whom I appreciate beyond belief. Notable thanks must be given to Amelia, Harry and Scarlett who worked tirelessly to ensure publication of the 47th Annual Journal. Juggling academic work with the Review whilst trying to have some semblance of a life is a task that only very few can handle. This year's Editorial Board has continuously inspired me by doing this with such grace and I will always appreciate their involvement in the Review. Both Fizaa and I trust that we have left the Board in very safe hands. I have no doubts that anyone who is carrying forward with it next year will match, if not exceed, the brilliant work that we have achieved thus far.

And to Fizaa, my Co-Editor in Chief, I do not think I will ever truly find the words to thank you for everything you have done for me. I am in awe of your consistent dedication and hard work. It has been my pleasure working by your side.

Last, but by no means least, I want to thank our phenomenal authors. Personally, the Journal has always been a means of engaging with inspiring pieces that go beyond the scope of my institutional learning. This year is no different and I am continuously astounded by the manner in which our authors' minds operate and their ability to convey information with such eloquence.

Considering much of our time at university was riddled with uncertainty, the Law Review has been a comforting constant. I am overwhelmed by what we have achieved this year and the high calibre of academic material that we are able to provide. The 47th Volume of the Exeter Law Review's Annual Journal is truly a labour of love. I hope that this is reflected to you, dear Reader, and that these pieces spark curiosity and discussion around some incredibly compelling issues.

Rida Amir Ahmed
Editor-in-Chief

The IMF Loan Conditionalities and Neo-Colonialism: Understanding Through the Third World Approach to International Law

*Chloe Cain**

INTRODUCTION

The International Monetary Fund (IMF) has a variety of functions within the global economy. Founded through the Bretton Woods Conference, it has provided financial assistance since 1944. Such financial assistance is achieved in numerous ways and has expanded to be far larger than when it was created. The IMF is now a well-established cornerstone of the global economy, meaning that it has a large influence not only on Member Countries but also the world at large. However since its formation, the IMF has come under criticism because of its lending practices. Their loans and, in particular, their conditionalities, can be seen to be restrictive and exerting western ideals onto states. At an extreme, the IMF can be understood to purport neo-colonialism. This is a common criticism of the IMF and therefore presents a challenge to its operation and reputation. The literature in this area of the IMF and TWAIL is limited to few scholars within TWAIL II as whilst they do discuss Bretton Woods Institutes, they rarely go into depth on the IMF in particular. Therefore, throughout this dissertation, it is important to widen research to primary sources such as IMF reports, as well as a discussion on individual case studies in both political and economic

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contexts. Throughout this process, discussion will be related back to core TWAIL principles to overcome the limited literature in this area.

The aim of this dissertation is to examine the extent to which the IMF can be considered a neo-colonial organisation. In particular, this will be investigated through the conditionality elements which are inseparable from loan agreements, made with the IMF. Through investigating this, it will consider the Third World Approach to International Law (TWAIL) and whether this provides a greater understanding as to how the IMF operates. It will consider the impact of the IMF's background on how it operates today and whether the IMF can be understood to be neo-colonial since its beginning or whether this is a new development. The current practice of the IMF will be understood through analysing case studies from both the first and third worlds and the impact conditionality has had on their economy as well as the general population. Through using western countries alongside eastern, it will provide an answer as to whether conditionality comes in varying degrees or whether it is a blanket approach on all countries. The case studies will operate alongside a TWAIL understanding and whether it lives up to the criteria which they put forward. In this analysis it is important to consider the general population because by focusing only on financial markets would be to remain ignorant of how the population has been impacted by such measures. It will then be considered if reform of the IMF is necessary and if so, how this can be undertaken. When discussing reform, it will be important to consider whether the IMF has become separated from its colonial origins. Such research remains important due to their worldwide position. The majority of countries remain members of the IMF and if it is understood that these conditionalities provide damage due to their neo-colonial nature, reform would be required.

I. THE IMF

The IMF is an organisation which aims to improve the economies of its member countries and it was first founded through the Bretton Woods Conference in 1944. There is no alternative to the IMF which operates on the same scale. It currently operates as the only extensive option for indebted countries in need of aid both in a financial and governmental capacity.

The IMF's primary aims are based upon foundations of a desire for a stronger world economy and assisting member countries both within and outside of times of crisis.[1] These aims are more generally achieved through surveillance of the world economy at regional, national and international levels. However, during times of financial difficulty, these aims are achieved through loans and structural changes. These actions are taken to prevent global implications such as a financial crash. Therefore, the IMF has often come under criticism for prioritising harsh conditionalities on loans for the greater good of worldwide economic health, at the detriment of the population.[2] Through taking this utilitarian stance, the IMF currently operates within 190 member countries. The areas in particular which will be examined are the lending scheme and whether this area of the IMF perpetuates neo-colonialism. With the loans that the IMF creates, these are legitimised through Articles of Agreement. These set out how they operate with its resources.[3] Attached to these loans lie conditionalities, which order what measures need to be implemented.

[1] Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 UNTS 39, as amended through December 15, 2010.
[2] David Goldsbrough, 'Does The IMF Constrain Health Spending In Poor Countries? Evidence For Action' (Center for Global Development 2007).
[3] Articles of Agreement of the International Monetary Fund (n 1).

A. COLONIAL ORIGINS

The IMF formally originates from the Bretton Woods Conference in July 1944. During this time period, the world was still engulfed in World War II, and global peace had not yet been reached. Despite this, the Bretton Woods Conference established three separate areas: an International Bank for Reconstruction and Development; a General Agreement was made on Tariffs and Trade; and the International Monetary Fund. At this time, the IMF was considered a vital part of worldwide recovery. World War II was taking its toll on not only soldiers and civilians but also infrastructure and finances of these countries.

However, war was not the only key signifier for the time the IMF was created. This was a period when colonialism was still a global issue. Very few countries had claimed their independence from colonial rule within the early 1900s, meaning rights to self-determination were still relatively investigated. The British Empire had lost colonies in the years following, allowing for self-determination rights to develop. However, these rights were often not given, especially when looking at the Chagos Islands. This case in particular meant that despite the process of decolonising the Chagos Islands needing to be fulfilled by 1968, it had not been and an Advisory Opinion found that this process had still not been completed 50 years later. This is a clear case where self-determination, even in supposedly post-colonial countries, has not been achieved. As it is stated in the Advisory Opinion; "Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right."[4] This is a reference not only to the importance of self-determination but that it is an expected standard. From this, there is an understanding that self-determination and this process for post-colonial countries is not clear-cut. Despite the Chagos Islands being lawfully granted independence in 1968, only 50 years later was this

[4] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ Rep 95, [180].

actualised. Therefore it becomes evident that whilst ceremoniously self-determination rights had been given, in reality these rights had been withheld. This showcases a performative measure from the UK and no real intention of ridding the 'coloniser' title. As stated in the Advisory Opinion, this is a legal interest of these states and in this case it is obliged to be respected. Therefore, going further in examining this in light of the IMF being created, this demonstrates a shift towards a new interference with self-determination, and similarly to the Chagos Islands, it is not as clear as it should be. It becomes blurry and the lines which demonstrate the legality of self-determination become less rigid, especially in light of the lending scheme and in particular conditionality requirements of loans.

This presents an important backdrop to the IMF and should be noted as an influence in its foundation. It does emerge as an institution with aims which at surface value appear unproblematic, for economic stability both within member countries and the global economy. However when looking deeper into the western norms, having assertive control over countries (eg Crown colonies and Charter colonies) was considered normal. The powers of the IMF, in particular conditionality, have to be viewed in this light. Therefore, an extension of this control into financial matters not only appears logical, but the morally right action. From this, it can be understood that there is an implicit colonial impact on the formation of the IMF. Although the IMF does not outwardly affect self-determination now, its policies do present tight conditions for providing help to these countries, which will be further examined later.

The origins of the IMF can be traced back to one document in particular. 'A Joint Statement by Experts on the Establishment of an International Monetary Fund' was previously published to demonstrate the necessity of the IMF in a

post-war era.[5] This is due to recommendations on a Fund through "concrete evidence that the United Nations can and will cooperate in establishing a peaceful and prosperous world."[6] This statement, made by Henry Morgenthau Jr., demonstrates not only the commitment from the United Nations in this Joint Statement, but also the sentiments of the USA and thus how this is important to their own Secretary of the Treasury, who was later nominated as the President of Bretton Woods Conference. This is especially important when looking at criticism of the IMF; it was used as a tool to expand western capitalism and promote US interests, especially seen through the veto power which the USA holds.[7] The IMF has become a means of the USA exerting control. From the outset of the IMF, it is clear that there is a western dominance within the conference which inadvertently represents western thought. Although this does not immediately demonstrate a colonialism link, this is important to consider when investigating the influences that are held over them in their formative stages.

At Bretton Woods itself, 44 Allied nations came together to build greater cooperation with representation from all continents. Although there is representation from all continents, Bretton Woods was mostly dominated with colonial undertones. Amongst these countries present were observers from the League of Nations and the United Nations.[8] Whilst these organisations themselves can also be questioned for their colonial attributes, the international framework at this time had no criticism. Criticism of these systems of international law did not truly begin until formation of TWAIL in 1997. This

[5] J. Keith Horsefield, Margaret G. de Vries and Joseph Gold, *IMF History Volume 3 (1945-1965): Twenty Years Of International Monetary Cooperation Volume III: Documents* (International Monetary Fund 1996) vol 3.
[6] *Proceedings And Documents Of The United Nations Monetary And Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944* (US Government printing office 1948).
[7] Dries Lesage and others, 'Rising Powers and IMF Governance Reform', *Rising Powers and Multilateral Institutions* (1st edn, Palgrave Macmillan) 153.
[8] Kurt Schuler and Mark Bernkopf, 'Who Was At Bretton Woods?' (Center of Financial Stability 2014).

school of thought examines international law with an aim of preventing recolonisation.[9] The IMF originates from a system of international law which has been heavily criticised in the past thirty years. Most criticisms stem from the conditions of the loans that they offer, which in some cases has worsened the state of the country.[10] As well as this, general neo-liberal criticism has arisen over the extent of structural readjustment measures which they have taken, including privatisation and welfare cuts.[11]

The IMF has developed considerably since the Bretton Woods Conference. Such examples include a newly created Africa Department in 1961 when colonial powers were surrendered, and even an Initiative for Heavily Indebted Poor Countries in 1996. However, the IMF is rooted in its background and thus the original goals of international financial stability. Despite the changes, the USA has remained a powerful influence. One example of this is the USA blocking proposals from the IMF which would have allowed them to facilitate capital alongside the goods and services they currently allow.[12] Simon went as far as saying "we have succeeded in persuading the world to agree on what is essentially a USA view of operation of the exchange system under the IMF articles,"[13] which is a clear domination by the USA on the IMF to perpetuate their understanding and ideologies onto other countries in a trickle-down effect. Panitch and Gindin discuss this as Simon being proud of this influence.[14] This was also seen when a conditionality loan was in the process of being given to the

[9] BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 Int. C. L. Rev 3, 3.
[10] Mark Weisbrot, 'The IMF Is Hurting Countries It Claims To Help' (*The Guardian*, 27 August 2019) <https://www.theguardian.com/commentisfree/2019/aug/27/imf-economics-inequality-trump-ecuador> accessed 8 March 2021.
[11] Kevin Farnsworth and Zoe Irving, 'Austerity Politics, Global Neoliberalism, And The Official Discourse Within The IMF' (*LSE BPP*, 28 January 2019) <https://blogs.lse.ac.uk/politicsandpolicy/imf-discourse/> accessed 16 March 2021.
[12] Leo Panitch and Sam Gindin, *The Making Of Global Capitalism: The Political Economy of America Empire* (Verso 2013) 155.
[13] "Suggested talking points for use with republican study group" June 30 1976, William Simon Papers IIIB 23: 29 p3.
[14] Panitch and Gindin (n 12).

UK. As Burk and Cairncross put it, "what was more unusual was that the pressure in this case was being put on a rich, industrialised country, and the USA made no attempt to dissemble".[15] Through this, it can be argued that one way in which the IMF acts is not as biased as we may see. It provides a critical element to the way in which it uses conditionality. On the contrary, this could also be a means of neo-colonialism which is exerted through USA dominance. This influence is powerful and should be taken into consideration when contemplating this topic prima facie. However, what is more important is the ways in which the IMF have acted through conditionality loans and whether issues that arise are seen more so in post-colonial countries than European.

Whether this original goal has manifested into neo-colonial powers is another issue. The IMF has demonstrated a clear juxtaposition in Western thinking. Although there was a general shift that had been created through anti-colonial sentiments and independence initiatives, there was an effort for there to be economic stability through control. This can be viewed as counterproductive as mentioned previously and the Chagos Island case demonstrates this. The independence given to them by the United Kingdom was performative as it had not provided the rights to self-determination until the International Court of Justice had given its opinion on this issue. Therefore a question can be posed of whether it was ever the UK's goal to allow for self-determination or whether this issue would continue into the future? Whilst this question remains speculative, it calls into consideration how performative and ineffective these initiatives are and how they can be seen as an empty Western promise. Another example of this can be seen through the Declaration on Granting the Independence to Colonial Countries and Peoples.[16] This declares that "Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not

[15] Kathleen Burk and Alec Cairncross, *Goodbye, Great Britain* (Yale University Press 1992).
[16] Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960).

yet attained independence, to transfer all powers to the peoples of those territories."[17] The language which is used in this Declaration stresses an urgency in colonies that there should be rights to self-determine and that these are fundamental to their operation. Despite this urgent global plea, neo-colonialism has developed in a covert way through international institutions such as the IMF, which threaten self-determination rights.

It is difficult to separate the IMF from its background. It has grown in departments and capacity since its conception at Bretton Woods. Whilst it was created 76 years ago, it can at surface level feel counterproductive to base these claims of colonialism upon attitudes which were held when it was created. However, the IMF can be seen to have grown into a neo-colonial institution which operates in a covert manner.

B. TWAIL AND THE IMF

It is important to look at the IMF through the lens of TWAIL. On the surface, TWAIL is advocated by a group of scholars which aim to criticise Eurocentric views of international law. To TWAIL, international law is by no means perfect; they identify and construct arguments on how these institutions can be oppressive in a post-colonial world. Although this school of thought is aligned with how to view international law, it can also be seen to be relevant to the critical examination of the IMF, especially within TWAIL II which focuses on the IMF and other international organisations. The definition of colonisation that will be used is offered in the 1960 UNGA Declaration, which offers different areas which can be dealt with.[18] For example, being subjected to "alien subjugation, domination and exploitation", as well as rights to self-determination through the ability to "freely pursue their economic, social and cultural

[17] ibid 5.
[18] ibid.

development.". Whilst this does not explicitly define what colonialism is, it does provide ways in which self-determination can be impeded, as well as typical ways in which colonialism is purported.

TWAIL defines international law as "a predatory system that legitimises, reproduces and sustains the plunder and subordination of the Third World by the West."[19]. This proposes a question of whether the IMF have legitimised, reproduced and sustained subordination of the Third World. The IMF is its own international legal personality which regularly exerts inadvertent control through their debt relief programmes. This control is inadvertent due to the two conflicting operations of the IMF. To the western world it can be viewed as a necessary means of stabilising the world economy, however when examining this through a TWAIL perspective, it is problematic due to how it interferes with rights to self-determination.

As stated before, the United Nations is a parent organisation of the IMF. The United Nations has been central to criticisms of TWAIL and in particular, how international law within the UN operates. For Mutua, the UN's guise of 'sovereign equality' is undermined through not only the existence, but also the dominance, of the Security Council over the General Assembly.[20] This demonstrates not only hypocrisy within the UN but also a clear issue for TWAIL thinkers. As Mutua and Anghie see it "The primacy of the Security Council over the UN General Assembly, which would be dominated by Third World states, made a mockery of the notion of sovereign equality among states."[21] This demonstrates a conflicting premise of self-determination and how this should operate within the UN. Instead, it bolsters the voice of the dominating onto the dominated. For both Anghie and Mutua, two well-known

[19] Makau Mutua and Antony Anghie, 'Proceedings of the 112th Annual Meeting:What Is TWAIL?' (2000) 94 (ASIL PROC) 31, 31.
[20] ibid 34.
[21] ibid 34.

TWAIL scholars to agree on this understanding adds credibility to this and also the parallels with the functionality of the IMF and how it operates. In its inception it was created through the dominating ideas of the United States of America and other Western powers at Bretton Woods. This continues the dominating vs dominated rhetoric. Therefore, this allows for a better understanding of how the IMF's features through its inception have been influenced from even further back than the Bretton Woods Conference, but through the UN itself.

These influences bode alongside what has previously been discussed of how in the creation of the IMF there was a western dominance and importance that emerged out of a colonial state of mind. Whilst the UN have taken steps to support decolonisation through resolutions, it is still something which should be acknowledged because of how this has impacted their actions and beliefs prior to this.[22]

Mutua and Anghie continue this argument into the IMF, stating that "the international financial institutions refuse to do the right thing and either write off or forgive the debt."[23] In this scathing review of not only the IMF but of other Bretton Woods creations, Mutua and Anghie demonstrate here a frustration with not only the operation of the IMF but its complicit attitude towards the issues facing the world. This demonstrates how western dominance has surfaced and shown itself. It is therefore not just an issue with how the IMF operates, but the reasoning which is built in behind this as a means of setting back these countries.

As Anghie mentions, colonies had been increasingly important to the economics of imperial powers.[24] For this context, it is vital to use thought in contrast with

[22] ibid 35.
[23] ibid 35.
[24] Antony Anghie, *Imperialism, Sovereignty And The Making Of International Law* (CUP 2005) 141.

how the IMF currently operates. A recent IMF statement has stated that their role is limited to economic assistance, emphasising that they do not operate within the realm of political changes.[25] Within this, if viewing the IMF as alike to an imperial power, it changes the dynamic it has over the member countries. Rather than membership to the IMF being an optional sign-up, it is instead a mandatory step for a country's future. There are many factors at play which indicate that IMF membership is not optional within the debt relief programmes and conditionality measures. These factors will be explained in further detail when examining the features of the IMF.

II. LEGITIMISES, REPRODUCES AND SUSTAINS

A. FEATURES OF THE IMF LENDING SCHEME

The IMF has numerous ways of operation for its member countries. These vary through levels of invasiveness, from surveillance to a loan. The loans themselves come alongside a conditionality element that in order to access the vital economic help, there are a set of policies which need to be put in place by the Member Country. These have to be in line with the IMF goals and are achieved through a large structural readjustment. This process is usually formally started through a 'Letter of Intent' and 'Memorandum of Economic Financial Policies'. These provide a clear policy implementation plan, meeting the IMF's requirements of what it expects in return for its resources. These have to be complied with and are usually followed up through reports on how the country has developed.

Implementation of structural adjustment means a variety of measures. However, most notable of these is austerity, privatisation, resource extraction, and allowing

[25] François Gianviti, 'Economic, Social, And Cultural Rights And The International Monetary Fund', *Current Developments in Monetary and Financial Law,* 5 (3rd edn, International Monetary Fund 2021).

for more foreign investments, which developed from the 'Washington Consensus "are considered a "desirable set of economic policy reforms."[26] This approach to economics was born out of the Latin American financial crisis as it was only then that the IMF adopted this policy in order to reform itself, despite the criticism it had received at the time. The IMF had a negative impact on the Ebola crisis within Africa in 2015 due to its conditionality measures on these countries. Robinson and Pfeiffer criticise the IMF's impact on these methods "when countries sacrifice budget allocations to meet macroeconomic policy prescriptions, as per the IMF's decree, it is at the expense of social spending."[27] Robinson and Pfeiffer appear on the Bretton Woods Project, which provides critical voices on the policies and operation of the World Bank and the IMF. These sacrifices within budgets which are made do not take into account the impact it can have in times of crisis, particularly during a pandemic. Not only that, but Robinson and Pfeffier argue that "IMF conditionalities must end, debt cancelled, and health systems built – no strings attached" due to the consequences which can occur and are exacerbated through such a pandemic. However, despite the increasing pressure on the IMF, the G20, and most notably the USA made USD$300 million available to these countries which have been impacted by Ebola.[28] For the US President to agree to such a statement demonstrates not only the severity of this crisis but also the necessity in their recovery. This statement was made on the 15th November 2014 and only took until the 5th February 2015 for the IMF to provide $100 million in grants to

[26] John Williamson, *Latin American Adjustment: How Much Has Happened?* (Peterson Institute for International Economics 1990).
[27] Julia Robinson and James Pfeiffer, 'The IMF's Role In The Ebola Outbreak' (*Brettonwoods Project,* 2 February 2015) <https://www.brettonwoodsproject.org/2015/02/imfs-role-ebola-outbreak/> accessed 3 February 2021.
[28] The White House, 'G20 Leaders' Brisbane Statement On Ebola' (*The White House*, 15 November 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/11/15/g20-leaders-brisbane-statement-ebola> accessed 23 February 2021.

countries hit by Ebola,[29] and then subsequent grants to specific countries.[30] The influence of the G20 countries here should not be underestimated in this context. To go further, a report discusses numerous considerations the IMF must take in order to prevent anymore negative consequences of these actions.[31] This was initially created in 2007, and whilst being 14 years old, the premise still stands, that "it should be the job of governments, not the IMF, to make these choices."[32] The IMF should not continue with such restrictive Washington Consensus policies due to its impact on public health in particular. Whilst this is only one specific example, this establishes one key issue with how the Washington Consensus operates within the IMF.

There are three main ways in which the IMF operates conditionality of loans. These are privatisation, trade liberalisation, and austerity. These are the conditions which are most commonly used by the IMF. The process to conditionality is started through a Letter of Intent, which is created by the member country and used as a tool of identifying the policies they intend to implement in order to receive financial aid from the IMF. These policies which are agreed to usually show commitments through a variety of targets which are to be reached through the loan and its conditionality. The IMF describes it as when "Conditionality encompasses underlying macroeconomic and structural policies, as well as the specific methods used in IMF arrangements to ensure the achievement of program goals."[33] Whilst it does not explicitly state that austerity,

[29] International Monetary Fund, 'IMF Executive Board Approves US$130 Million In Immediate Assistance To Guinea, Liberia, And Sierra Leone In Response To The Ebola Outbreak' (*International Monetary Fund,* 26 September 2014) <https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr14441> accessed 23 February 2021.

[30] International Monetary Fund, 'IMF Executive Board Approves US$114.63 Million In Financing And Debt Relief For Sierra Leone' (*International Monetary Fund,* 2 March 2015) <https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr1586> accessed 23 April 2021.

[31] Goldsbrough (n 2).

[32] ibid 3.

[33] International Monetary Fund, 'IMF Executive Board Discussed " 2018 Review of Program Design and Conditionality"' Press Release No. 19/174 (*International Monetary Fund*, 20 May 2019).

privatisation and trade liberalisation are key elements of this, this is evident from 'structural policies' and when examining how the IMF operates within these countries. From this 2018 Review of Program Design and Conditionality, the Executive Board found that the IMF was often too optimistic in their growth optimism, which means that going forward they will have greater scrutiny to this method, allowing for improvement within this area. Whilst the case studies being examined take place after this review, it is important that we take this into consideration when looking at those which took place around and before this review. By being able to properly analyse how growth optimism, which the IMF inhibits, can be detrimental to the loans which these countries obtain, it means that it can be scrutinised for this and just how much this affects the member countries within the following case studies.

B. CASE STUDIES

The purpose of these case studies is to focus the individual efforts which the IMF made into their Member Countries. For these reasons it is important to look at them both in the context of where they are situated (ie whether they are European or lie elsewhere in the world). It is also important to bear in mind two approaches to colonialism; the 1960 UNGA Declaration and the "legitimises, reproduces and sustains" subordination of the Third World by the West.[34] This criteria will be used throughout analysis of how the IMF have acted within these countries and also in determining whether they are a tool of neo-colonisation. The loans which are given by the IMF occur within their own currency which allows them to optimise the rate at which they lend at.[35] This will be used instead of dollars to mitigate inflation.

[34] Mutua and Anghie (n 19) 31.
[35] International Monetary Fund, 'SDR Valuation' (*International Monetary Fund*, 2021) <https://www.imf.org/external/np/fin/data/rms_sdrv.aspx> accessed 14 March 2021.

1. POLAND 1990

The Republic of Poland has a complicated history, encompassing being a member of the Eastern Bloc, a World War II invasion and in more recent years becoming a Republic. However, its road to becoming the sixth largest economy in the EU has been aided through IMF support.[36] Poland, however, has a long relationship with the IMF, spanning decades and totalling over Special Drawing Rights (SDR) 90 billion being agreed upon.[37] Poland first required IMF aid in early 1990 with the latest loan being given in early 2015. This however only touches the surface of the intricacies of these loans.

The first loan was given to Poland shortly after the fall of communism which allowed for market reforms to take place in 1990. This was made necessary after the overall extent of unemployment increased from 17% to 31.5% between 1989 and 1990.[38] With this, it plunged the country into the unknown, with the only beneficiaries of this being the private sector entrepreneurs.[39] This demonstrated a need for an IMF loan and resources due to this transition period, which almost doubled the poverty within the country. However, private sector entrepreneurs would only continue to feed off this loan. In an IMF Working Paper from 1993, it was stated that "economic reform and transformation programs should be designed to minimise unnecessary adverse effects on poor and vulnerable groups, which requires an appropriately designed mix and sequencing of reform policies."[40] Despite not representing the IMF as a whole, this Working Paper does present some clear goals which are associated with the development of

[36] Central Intelligence Agency, 'Poland - The World Factbook' (*CIA*, 2021) <https://www.cia.gov/the-world-factbook/countries/poland/#economy> accessed 9 March 2021.
[37] International Monetary Fund, 'Poland, Republic Of: History Of Lending Commitments As Of June 30, 2015' (*International Monetary Fund*, 30 June 2021) <https://www.imf.org/external/np/fin/tad/extarr2.aspx?memberKey1=805&date1key=2015-06-30> accessed 13 March 2021.
[38] Branko Milanovic, 'Social Costs Of The Transition To Capitalism: Poland, 1990-91' (1993) Policy Research WPS 1/1165 The World Bank.
[39] Xavier Maret and Gerd Schwartz, 'Poland: The Social Safety Net During The Transition' 4 (2021) International Monetary Fund Working Paper 93/42.
[40] ibid 5.

Poland, demonstrating how lessons needed to be learned in light of its prior involvement.

This loan, totalling SDR 545 million, had particular conditionalities set alongside it. Substantial cutbacks had been made within childcare as well as benefits to the unemployed.[41] Through the effects of the conditionality, one area within Poland that changed was the Employment Law 1989.[42] Prior to the loan, the unemployment policies which were adopted were far more relaxed with what was required to gain these benefits. For example, prior to the reform, those who had not previously been employed could gain access to this which madeit a more general welfare support rather than it being targeted.[43] The reforms, which were contained in the amendments of 1991[44] and 1992,[45] were far more strict in what was required of the recipients. For example, those who had rejected one job offer were not eligible (when this had previously been two); but overall these reforms led to a drop of 124,000 people claiming this benefit between March and April 1992.[46] However, as argued in the Working Paper, this leads to a danger of the inflation rate rocketing, meaning that the benefits lose their value.[47] Austerity shown here is just one example of that which Poland faced. As well as this, they faced challenges to the new pensions calculations (which meant that pensions were lowered) had been taken to the constitutional court.[48] Maret and Schwartz saw that these routes were taken to "prevent severe and imminent financial distress, and have done little to make the system sustainable."[49] Whilst it is the case that these measures were preventative, it has done so at the cost of a

[41] ibid 8.
[42] Employment Act 1989.
[43] Shirley Williams, Robert Beschel and Kerry McNamara, 'Social Safety Nets In East/Central Europe: A Survey Of Current Activity.' [1991] Project Liberty.
[44] Employment Act 1991.
[45] Employment Act 1992.
[46] Maret and Schwartz (n 39).
[47] ibid 12.
[48] *Decision of 1992-02-11*[1992] Constitutional Tribunal, K 14/91 (Constitutional Tribunal).
[49] Maret and Schwartz (n 39).

system which would have provided more support to the workers in this transitionary period.

The later IMF loans were taken out due to outside influences, with the Paris Club being a large factor. The group proposed to Poland that upon signing another agreement with the IMF, they would forgive their debt in two stages, amounting to 50% of it being cut in total.[50] With such an enticing offer to work with them again, realistically they were put in a position by these creditors and had no option but to decide that it was such a necessity to agree to these conditions with the IMF again. Whilst this does not demonstrate the impact of the conditionality, it does represent that there were greater forces at play in order to secure Poland through an agreement again. This was seen through both negative and positive lights, where whilst this had meant that US$3 Billion was cleared from debt, this had 'funding austerity'.[51] Whilst a loan was necessary for Poland to properly transition, the harsh reality of the conditions were extreme. Prior to IMF involvement, as mentioned prior, there were greater austerity programmes and privatisation implemented, which went as far as to set up an anti-monopoly office in order to deal with complaints about monopolistic practices.[52] In essence, this loan forgiveness provided an ultimatum to Poland of what price they see fit for self-determination to be sold.

Many loans later, the IMF's relationship with Poland has been considered a success.[53] However, this should not distract from how Poland's population suffered at the beginning of their relationship. The scale of conditionality here

[50] Steven Greenhouse, 'Poland Is Granted Large Cut In Debt' *New York Times* (New York, 16 March 1991).
[51] ibid.
[52] Timothy Lane, 'Transforming Poland's Economy: Early Experience After the "Big Bang" of 1990' (1992) 29 Finance & Development 11.
[53] Camilla Andersen, 'Poland: European Success Story But Challenges Ahead' (*International Monetary Fund,* 26 March 2010) <https://www.imf.org/en/News/Articles/2015/09/28/04/53/socar032610a> accessed 8 March 2021.

and how this has fed into the austerity measures was brutal. This should be considered in light of the issues the country was already facing and transitioning from a centrally planned economy to one with a free market is not without its challenges. Despite Poland prima facie gaining powers to self-determination through leaving the Eastern Bloc, this has operated in a similar sense to a post-colonial country. In this, neoliberal market ideas have been instilled, which presents a dichotomy. Anghie explores this further to say that there are two conflicting goals: having "political independence" and a practical right to self-determination, and "economic subordination".[54] These two conflicting ideas are evident in the existence of the IMF's membership and then through the conditionality of loans. Whilst countries are free to join and leave the IMF, the economic subordination here is fulfilled through receiving debt relief at the cost of sacrificing political independence.[55]

2. CYPRUS 2013

The country of Cyprus has been independent of colonial control from the UK since 1960, which came after a lengthy 82 years of colony status. In the years leading up to the economic crisis of 2008, Cyprus had a relatively stable economy with low unemployment rates and high growth.[56] However, it was faced with severe economic difficulty in 2010 when the impacts of the global economic crisis truly hit them. The banking industry within Cyprus was on the brink of breaking due to its links with Greece. It had reached a point of bailout or bust.

[54] Anghie (n 24) 267.
[55] Articles of Agreement of the International Monetary Fund(n 1).
[56] International Monetary Fund, *Cyprus: 2011 Article IV Consultation - Staff Report ; Supplement ; Public Information Notice On The Executive Board Discussion; And Statement By The Executive Director For Cyprus* (International Monetary Fund 2011) 4.

By 2013, it became imperative for Cyprus to receive aid due to the impact and lack of growth within the country. At this point the IMF, alongside the European Union (EU) and the European Central Bank had created a loan package. Through an Extended Fund Facility, SDR 891 million was agreed alongside conditionalities to Cyprus. As laid out in the Letter of Intent, there were numerous ways in which the conditionalities would be achieved. The main means of conditionality here was through privatisation.[57] This had the aim of releasing at least €500 million which in reality meant that a large amount of publicly owned assets would be sold. Within the 2015 Letter of Intent, it is specified that both the telecom company and parts of the Limassol port were to be privatised.[58] Whilst this is yet to happen, the extent of the conditionality which is promised here and promoted by the Cyprus government demonstrates the brutality of conditionality. Alongside privatisation, there was a greater structural reform through public spending which was aided through stronger accountability measures and a better tax collection process. This all meant that Cyprus and the IMF were able to part ways sooner than expected on 7 March 2016, not requiring a subsequent loan nor any further resources from the IMF.[59] Despite this early departure from the IMF's programme, Cyprus continued the process of privatisation and is still searching for buyers for particular structures. From this, it can be understood that the IMF's influence on Cyprus remains strong. Whilst there are now further factors which may spur the privatisation, ie the impact of Covid-19 on their growth, it demonstrates how even after the agreement has ended the impact of conditionality remains with Cyprus. In

[57] Charis Georgiades and Panicos Demetriades, 'Letter Of Intent, Memorandum Of Economic And Financial Policies, And Technical Memorandum Of Understanding' (International Monetary Fund 2013) 14.
[58] Harris Georgiades and Chrystalla Georghadji, 'Letter Of Intent, Memorandum Of Economic And Financial Policies, And Technical Memorandum Of Understanding' (International Monetary Fund 2015) 10.
[59] International Monetary Fund, 'Statement By IMF Managing Director Christine Lagarde On Cyprus' (*International Monetary Fund*, 7 March 2016) <https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr1694> accessed 12 March 2021.

particular, this lasting impact has meant that the IMF had succeeded in their aims of economic subordination.[60]

At the time the IMF Chief saw that this deal was a "lasting, durable and fully financed solution".[61] However, this can be viewed as a contradiction when there are discrepancies with the IMF through inconsistencies of how the programme could not be guaranteed in debt sustainability as risks remained large.[62] Therefore, from the outset, before analysing the extent to the effects of the lending agreement, it provides doubts on how the IMF has approached this. In particular, whether it was approached with a solution, rather than creating problems for Cyprus. From looking at Mutua's criteria of "legitimises, reproduces and sustains", whilst it is true that from the outset the IMF believed that this would be a good, reputable solution to the crisis, it is clear that these decisions were made at a great risk, without proper foresight that these would pan out in a less damaging manner.[63] Through this, the IMF can be seen to legitimise a decision which it did not believe in, to allow the negative consequences to reproduce and thus sustain this. However, Cyprus is not a third world country, which then raisesthe question as to why the IMF would wish to continue a first world country's strife that had a previous track record of economic stability. In this, we are presented with a unique situation of a developed country being at the mercy of the IMF. However, using Anghie here, it can be solved through the understanding that in Cyprus' case it is more relevant that it is not one of the large influencer countries on the IMF.[64] Cyprus was within the EU and considered an economically stable country. However it

[60] Anghie (n 24) 267.
[61] BBC News, 'Cyprus Bailout Deal 'Durable' Says IMF Chief' (2013) <https://www.bbc.co.uk/news/av/world-europe-21920731> accessed 12 March 2021.
[62] Pierre Pénet, 'The IMF Failure That Wasn't: Risk Ignorance During The European Debt Crisis' (2018) 69 The British Journal of Sociology 1046
[63] Makau Mutua and Antony Anghie, 'What Is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31.
[64] Anghie (n 24) 265.

was not amongst the most industrialised and rich countries which could influence the IMF, such as the USA. This meant that whilst Cyprus is considered a first world country, to the IMF at least, when possible it will make conditionality a means of exerting dominance.

In the case of Cyprus, it provides an important analysis to the IMF's approach to first world countries. In particular, how the domination and influence continue outside of the third world countries to a lesser extent. Whilst this may not directly demonstrate a neo-colonial link, it does present the clear flaws that TWAIL highlights with such a system, and how external influences from more powerful countries provide greater issues for all countries, whether considered to be in the first or third world. Alongside this, it demonstrates a greater issue of the lasting impact the IMF has had on Cyprus through conditionalities becoming a part of its post-IMF policy.

3. JAMAICA 2010

Jamaica gained independence from the UK in July 1962 with the Queen remaining the Head of State. Whilst economic growth had started off strong, they had seen numerous setbacks throughout the 1990s and then again with the effects of the 2008 global financial crisis. In 2010 a Standby Arrangement was made for SDR 820 million to be loaned to Jamaica.[65] As laid out in an IMF press release, this programme had three main areas: debt management, fiscal consolidation and reform.[66] However, within the Letter of Intent, it was made clear that a "social safety net" would be strengthened in order to lighten the

[65] International Monetary Fund, 'History Of Lending Commitments: Jamaica' (International Monetary Fund, 31 October 2017) <https://www.imf.org/external/np/fin/Tad/extarr2.aspx?memberKey1=510&date1key=2017-10-31> accessed 9 March 2021.
[66] International Monetary Fund, 'IMF Announces Agreement In Principle With Jamaica On A US$1.25 Billion Loan' (International Monetary Fund, 14 January 2010) <https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr1007> accessed 11 March 2021.

impact which would be made on the poor.[67] From this, it can be understood that they were providing steps towards mitigation to the levels of cuts which they had to make, however small they may have been, due to Jamaica's high levels of unemployment and rising poverty levels.

This IMF programme had set out to cut wages within the public sector,[68] with an overriding principle of 'burden sharing' within society that every sector shares in the austerity measures for a better outcome of society.[69] Alongside this, publicly owned assets had been sold off such as Air Jamaica,[70] and the sale of Sugar Company Jamaica impending at that time.[71] Despite this, the increase in social assistance was to increase by approximately 40 percent, meaning that initiatives such as Programme for Advancement Through Health and Education and the School Feeding Programmes were expected to continue whilst maintaining a public-sector wage freeze.[72] On the surface, it is a problematic approach to Jamaica's debt issues as having austerity measures did not allow for sacrifices to be made to certain social programmes. This 'burden sharing' decision made by the government only allowed for small exceptions to maintain funding, despite the large cuts which were being made across the board and the impact this would have on the wider population. However, Kim and Serra-Garcia made it clear from analysing education and health that GDP fluctuation has 'mixed impacts' in these areas.[73] It was therefore put forward that "responses to economic downturns should be carefully designed and packaged" due to the volatility of these areas. Despite this, it was not as careful as preferred. Even within the

[67] Audley Shaw and Brian Wynter, 'Letter Of Intent, Memorandum Of Economic And Financial Policies, And Technical Memorandum Of Understanding' (International Monetary Fund, 23 December 2010) 4.
[68] International Monetary Fund, 'First Review Of The Stand-By Arrangement—Staff Report; Press Release On The Executive Board Discussion.' (International Monetary Fund 2010) 11.
[69] ibid 31.
[70] ibid 45.
[71] ibid 46.
[72] ibid 48.
[73] Namsuk Kim and Marta Serra-Garcia, 'Economic Crises, Health And Education In Jamaica' (vol. 25, Estudios Económicos 2010) 128.

welfare programmes, strict criteria was maintained of who was eligible to receive aid. With such issues in place and barriers to social programmes, it only aided the austerity measures in place, causing more harm than good.

Despite these efforts, Jamaica's financial situation got worse, remaining below the level GDP it was at in 2007.[74] Alongside this, there was a persistently high level of both unemployment and poverty which could not be solved by the first loan, despite the welfare options that were implemented in order to aid this area.[75] In 2013, Jamaica required another loan (an Extended Fund Facility), totalling SDR 615 million with new conditionalities. As a continuation from the last Letter of Intent in 2013 when requesting this loan, it was stated again that they aimed to "strengthen the social safety net".[76] It was clearly outlining that the public sector cuts would continue with wage freezes and redundancies.[77] Therefore, the austerity measures were being maintained in these conditionalities as they had been in the previous loan in line with the IMF's expectations.

In 2013, the IMF put out a report analysing the issue of 'High Debt and Low Growth' in the Caribbean.[78] In this report, it was stated that "since growth in the current environment is virtually non-existent, significant fiscal consolidation is inevitable, but may not be enough to bring down such high debt levels."[79] This meant that the IMF believed that Jamaica would have to continue making substantial cuts as there is no growth alongside a mounting debt. Therefore, this presents a question of how well austerity is working as a conditionality when

[74] Jake Johnston and Juan Montecino, 'Update On The Jamaican Economy' (Centre for Economic and Policy Research, 2012) 8.
[75] ibid 10.
[76] Peter Phillips and Brian Wynter, 'Letter Of Intent, Memorandum Of Economic And Financial Policies, And Technical Memorandum Of Understanding' (International Monetary Fund, 2013) 4.
[77] ibid 14.
[78] International Monetary Fund, 'Caribbean Small States: Challenges Of High Debt And Low Growth' (International Monetary Fund, 20 February 2013).
[79] ibid 16.

there is not an end in sight. If the only answer to mounting debts is poverty levels, then it proposes a far greater problem than solution. This debt could be written off, helping Jamaica not only to not rely on austerity measures, but also give it a fighting chance in development. However, conversely to Poland, Jamaica has not been offered a deal by any creditors on debt consolidation. Whilst the reasoning behind this is unclear, this could demonstrate a lack of need for Jamaica to be convinced to utilise the IMF again as Poland had required such influence for staying within the IMF's remit.

As Anghie puts it, efforts are made "by integrating their economies into the international economic system in ways which are often disadvantageous to Third World peoples."[80] These disadvantages are apparent in Jamaica's dealings with the IMF and how the country has been put at socioeconomic peril for the sake of IMF 'solutions'. It had not been focused on Jamaica as a population, but rather Jamaica as an economic stake. Chimni critiques this and the conditionalities in general for having "little to do with the welfare of third world peoples and more to do with the concerns of powerful states and the TCC."[81] If the IMF were welfare oriented, they would not have allowed for such severe austerity in place for economic growth. There would be some kind of mitigation, going further than that is laid out in the Letters of Intent, to place Jamaica first and not prioritise the IMF's agenda. This shows the damaging nature that the IMF has fostered over time.

Overall, Jamaica's loans and their conditionalities by 2013 had left the country in a worse position than when it had begun. The first loan in this period had been inadequate, and despite this, the conditionalities in the second loan had not been properly re-examined to negate this. Meanwhile, such austerity measures were

[80] Antony Anghie, *Imperialism, Sovereignty And The Making Of International Law*, 265 (n 24).
[81] B. S. Chimni, 'International Institutions Today: An Imperial Global State In The Making' (2004) 15 European Journal of International Law, 20.

not centred around the welfare of Jamaica. This has proven to be an example of where the subordination of the third world is achieved through the tools of conditionality which the IMF has at hand.

4. REPUBLIC OF KOREA 1997

In 1997, the Republic of Korea saw its greatest financial crisis. With the stock market crashing and its currency losing half its value, South Korea was faced with no option other than to turn to the IMF for support. This had not been the first occasion where the IMF had been required in South Korea. Previously in 1997, the Republic of Korea was met with protests due to IMF projects and their impact on the country.[82] On this occasion however, the crisis led to a Standby Agreement being made of SDR 15 Billion and SDR 9 Billion.[83] For many academics, this marked the beginning of the 'IMF era' defined through "humiliating economic overhaul-revamping its financial structure".[84] This included a new financial plan of privatisation of a large number of Government owned companies and complete restructuring of their economy. Largely, this was also earmarked through austerity measures which is best defined however through how the IMF became a synonym in South Korea for "low cost and value for money".[85] This demonstrates not only a monetary influence left by the IMF, but also the cultural impact. From this, it can be shown that there are hints of neo-colonialism, the impacts of the neoliberal policies implemented, and how this aspect of the IMF was woven into the culture at the time. It had become a

[82] Juha Auvinen, 'IMF Intervention And Political Protest In The Third World: A Conventional Wisdom Refined' (1996) 17 Third World Quarterly, 391.
[83] 'History Of Lending Commitments: Korea' (International Monetary Fund, 31 March 2021).<https://www.imf.org/external/np/fin/tad/extarr2.aspx?memberKey1=550&date1key=2021-03-31> accessed 16 April 2021.
[84] Donald Kirk, 'Korean Crisis: Pride And Identity In The IMF Era' (1999) Vol.13, The Journal of East Asian Affairs, 335.
[85] BBC News, 'Austerity In South Korea' *BBC News* (1998) <http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/61442.stm> accessed 10 March 2021.

culturally defining moment within the Republic of Korea and had occupied the Republic until it had reached a full recovery.

It can be said that the Asian financial crisis led to a new IMF approach. As put by Yoon, the conditionality used in Korea showed a different and more invasive IMF approach to the loan requirements which is demonstrated through the "qualitative targets, set in terms of structural reforms, passing new legislation, and abrogation of laws and regulations".[86] Whilst this can be seen through the Poland case study, here with the Republic of Korea is when we see a more invasive approach become the norm for dealing with financial hardship, especially evident in Jamaica and Cyprus in subsequent years. Prior to this, the IMF's involvement had been less invasive to self-determination rights. The change in pace to infringe upon these rights was a conscious effort to a greater role within these countries. Having such an influence and a bond over sovereign states who require financial help is a means of "legitimising, reproducing and sustaining" the self-determination and thus subordinating these countries, whether they are considered third world or otherwise.

The conditionalities attached to this loan included a significant or total reduction in shares from numerous state-owned enterprises.[87] These measures were taken in order to reduce the bill of debt which the Republic was faced with. Alongside this, and as a means of mitigation, the National Basic Livelihood Security Law was introduced.[88] The aims of this legislation were to have a wider social safety net "to cope with these unprecedented social problems produced by the shock of globalisation".[89] This included access to a minimum income both when

[86] Il-Hyun Yoon, 'The Changing Role Of The IMF: Evidence From Korea's Crisis' (2005) Vol.29, Asian Perspective 186.
[87] ibid 187.
[88] National Basic Livelihood Security Act 1999.
[89] In-Young Jung, 'Explaining The Development And Adoption Of Social Policy In Korea: The Case Of The National Basic Livelihood Security Act' (2009) 29 Korea Institute for Health and Social Affairs, 59.

unemployed (welfare) and employed (minimum wage) only if you were within the typical working age (aged 18-65). One area in particular that was strengthened through this legislation was housing and how this increased both the standard and availability of public housing. In terms of development of the policy, the IMF played a role in a "very limited way".[90] Whilst this is not solely an IMF achievement, having such measures in place meant that the poverty faced in South Korea from unemployment would be reduced. However, if it weren't for the IMF's involvement, it could be argued that these measures would have been introduced anyway leading to a deflated IMF achievement. This achievement of the National Basic Livelihood Security Laws however should not be understood as preventing all poverty. Instead, it operated as a social safety net and did not prevent other suffering under austerity.

The IMF intervention within Korea demonstrated some of the most brutal effects seen from an IMF recovery programme. The number of orphaned children increased,[91] alongside 'IMF suicides' (where the "high economic burden and unemployment rates after the International Monetary Fund may have contributed to an increase in suicide rates").[92] This remains a bleak legacy of IMF involvement in South Korea and a reminder of what the policies mean within the population. These consequences of conditionality measures demonstrate closer to the latter of Mutua and Anghie's definition of the outcome of neo-colonisation, which is "subordination".[93] This was achieved through the lengths to which South Korea had suffered due to the IMF. Whilst National Basic Livelihood Security Laws demonstrated a desire to solve these problems, there was a clear gap where this was missed due to the outcomes mentioned

[90] ibid 75.
[91] Donald Kirk, 'Korean Crisis: Pride And Identity In The IMF Era' (1999) 13 The Journal of East Asian Affairs, 351.
[92] Lee Sang-Uk, Jong-Ik Park and Soojung Lee et al, 'Changing Trends In Suicide Rates In South Korea From 1993 To 2016: A Descriptive Study' (2018) 8 British Medical Journal, 7.
[93] Mutua and Anghie (n 63).

prior. This had not been a policy aim of the IMF as the impact this would have on raising unemployment and poverty levels had been understood. It has been discussed whether South Korea is considered within the Third World remit of TWAIL.[94] The South Korean economy prior to the crisis was considered to be at the same level of its European counterparts. Despite this discourse, it should be seen that the IMF's involvement led to a subordination to western economics and policies in return for aid in their financial crisis.

The IMF's approach to the Republic of Korea demonstrated a new understanding of how such crises would be dealt with. This aggressive new set of conditionalities, whilst they can be argued to be necessary to the survival of the economy, have proven to be at a great cost. Whilst the economy had recovered, the harsh reality of these conditionalities had a lasting effect on the culture of the Republic of Korea. This should be considered a casualty of IMF interference, not a dawn of a different conditionality attitude.

III. REFORM

With all of the challenges that the IMF presents, the question of whether the current issues have solutions is raised. These issues are all linked through how they portray neo-colonialism through the conditionality of the IMF. As is present from the case studies, whilst economically these policies can bring the country's economy to a good level, the cost at which this is done demonstrates that there needs to be a reform of how this operates. Such issues with conditionality should be a clear signifier that change needs to happen. Therefore, this poses the question of whether it is possible for the IMF to not continue neo-colonialism through legitimising, reproducing and sustaining the subordination of the third world, or whether this is inherent to its practice.

[94] Pae Keun Park, 'Korea And TWAIL: Does She Fit Into The Picture?' (2013) Vol.1, Korean Journal of International and Comparative Law 49.

There is a need for reform also when looking at the data of how the IMF involvement has impacted the general population. The harsh reality of the Washington Consensus in particular demonstrates similarly to what Chimni argues; that the "third world countries that the conditionalities have little to do with the welfare of third world peoples and more to do with the concerns of powerful states and the TCC".[95] This criticism of the IMF signifies how important reform is at this point. The IMF is perceived as being disconnected from the general population and impacts these policies have and instead, they should focus on what these policies will mean for the general global economy. By having a hierarchy of consequences here, the IMF demonstrates a neo-colonial attitude. This attitude is fostered through a lack of regard for the general population and the impact they cause. The attitude depicted here is continued through the suggestion by Chossudovsky that the statistics released by the IMF are manipulated.[96] This, alongside "glowing images of global growth and prosperity" within the media, shows a distorted image of the IMF and its merits. From this development, it is posing an issue that the true impact of conditionality measures cannot be properly understood. Through suggesting there has been a cover up, the reality of these statistics is far more work than the IMF presents, showcasing a damaging effect on third world countries and far greater economic subordination.

The case studies discussed in the previous chapter present a sometimes bleak picture of the IMF. It showed that both western and third world countries

[95] Chimni (n 81).
[96] Michel Chossudovsky, 'Global Poverty In The Late 20Th Century' (1998) Vol.52, Journal of International Affairs, 297.

remain at the mercy of conditionality measures. However, this does not mean that there is no neo-colonialism present within the IMF. Neo-colonial features are evident in how conditionality makes these countries operate. By stripping the state back to the bare minimum it demonstrates how the subordination of the third-world is legitimised, reproduced and sustained. The process of removing infrastructure, whilst giving a short term capital gain through its privatisation, only means that the nature of the country shifts. It allows for infrastructure which had not previously been on the table to be bid on out of desperation. This inadvertently removes power from the country and means they have less control over what they initially had. Whilst they can introduce laws to regulate these newly privatised areas as Poland had done through anti-monopolisation initiatives, it is not close to how they had previously held this power. It is important here to state that it is not that there is more power to the country through owning infrastructure, but rather that the IMF puts them in a worse position.

The IMF has also come under criticism for how it can be seen to interfere with self-determination rights. Using Sterio's criteria, the right to self-determination requires "oppression, relatively weak central government, international involvement, and great powers' support".[97] When breaking this down, it can be problematic viewing the IMF under this light, and for member countries to demonstrate that they have been oppressed is an obstacle. The IMF is not mandatory and membership is voluntary and not forced on those that wish not to participate. However, when there is no other option to such countries for economic support, membership becomes mandatory for their survival. Through having such a necessity there, it means that the voluntary element is broken down, infringing on rights to self-determine. Whilst this is not on the same level as a military state, the IMF's necessity within global economics can be viewed as

[97] Milena Sterio, *The Right To Self-Determination Under International Law* (Routledge 2015) 60.

a good regulator, but also as a harmful consequence on self-determination. Another category that Sterio uses is a 'weak central government' in so far that "their central government, although claiming that it wants to govern such groups, is militarily, politically, or structurally unable to assert proper control".[98] When using the more vague description which Sterio implies, a better criterion to fit the IMF is provided. This is because of how the IMF's operation within these countries through the conditionality on loans renders the large structural reform taking place as compulsory. The member countries maintain the right to withdraw their membership within the Articles of Agreement. However, such is not a possibility when the IMF presents the only solution.[99] Whilst it can be said that these reforms would not take place without any prompts from the IMF, reform is necessary to stay afloat. Despite this, the IMF's process of conditionality surrenders self-determination during this time period, leaving the current government weak.

However, the issue with using Sterio's self-determination definition breaks down in the latter stages where a need for international involvement becomes apparent. The IMF operates as an international involvement. This provides a difficult problem where it is not possible for this self-determination surrender to have intervention when the IMF is a part of this international system. Anghie discusses this as a scale of 'good governance', which is promoted by the IMF.[100] This principle to Anghie is only a means of justifying a more intrusive and invasive approach within these countries and continues "to further their neoliberal policies in the guise of 'good governance', rather than enabling real empowerment of Third World citizens." Therefore, in the IMF's case, through these aims of promoting a stronger world economy and providing stability, it does not allow the Third World to develop in any sense that is not within a

[98] ibid 61.
[99] Article XXVI Section 1 Articles of Agreement of the International Monetary Fund (n 1).
[100] Antony Anghie, 'The Evolution Of International Law: Colonial And Postcolonial Realities' (2006) 27 Third World Quarterly, 749.

neoliberal economic ideal such as the Washington Consensus. At this point it can be compared to the Chagos Islands case where the UK had only given independence in a performative sense whilst maintaining control. However, where this differs from that case is how this process in the IMF has been made legal.

The use of scale here is important and therefore Sterio's proposal, whilst giving important ways in which a self-determination infringement can be acknowledged, cannot be properly adapted to a TWAIL perspective. This cannot be synthesised due to the differences between a colony and a sovereign state participating within international law. A colony is under the rule of another state and whilst having a natural right to self-determine, this has been infringed upon. Whereas a third world country participating in international organisations, but in particular within the IMF, there is a deal made where money is exchanged for this self-determination right. Therefore, this definition falls short of being of use to this scenario. More importantly however, it demonstrates a flaw in the system that legitimises such self-determination surrender. Anghie and Mutua take this further, understanding him to mean that Third World states stay dependent on imperial powers.[101] This demonstrates that the self-determination which is surrendered cannot be helped and that the IMF is designed to have a great reliance upon it due to a lack of alternatives and the high stakes. Therefore, whilst in a performative sense states have self-determination rights, the existence of the IMF demonstrates a covert way of maintaining imperial powers. This poses a large issue for the IMF.

There remains a common element of social safety nets within the case studies. These provide a mitigation of the potential outcomes which arise from the Washington Consensus. Social safety nets have ultimately failed the general

[101] Mutua and Anghie (n 19) 35.

populations of these countries as they do not properly mitigate any of the outcomes of these policies, as is evident from the case studies. It prevents an issue with both the quantity and the quality. They normally only extend as far as a reform of social policies, typically making them more restrictive and less accessible only concerning state benefits. The issue with the quantity is that they do not reach society as far as they should. For example, the social safety nets which were introduced in Jamaica, whilst of a good quality for those specific areas of social assistance were increased by 40%, still left the majority of society without any support. Therefore, this poses a question of how this area can be reformed to have a new set of priorities which aid the country as a whole and not only the economy. Anghie sees this through the lack of reform of the global economy itself which is inherently disadvantageous to Third World Countries.[102] From this, it can be gathered that the only means of the IMF justifying conditionality is through the existence of the inherent subordination of the third world. This presents a self-fulfilling fallacy which can only be broken through reform of the system.

Reform is not a new topic for the IMF. There have been notable attempts at reform, however the extent to which they have been effective is debatable. The Bretton Woods Project is a Nongovernmental Organisation alongside a collection of academics who challenge the work of the IMF alongside the World Bank, and promote alternatives to these services. They are not limited to only creating resources as they are in regular contact with the IMF and lobby them. Reform was seen most recently through a reform on conditionality.

However, reform can be seen to be unnecessary through examining the implementation targets. "The worst implementation rates were found for conditions relating to privatisation (45%), the social security system (56%), and

[102] Anghie (n 24).

public enterprise reforms (57%)."[103] This means that despite how conditionality can appear to be a rigid structure, the harshest aspects of these conditions are far more difficult to successfully implement. However this statistic, whilst showing that conditionality is not as rigid as expected, demonstrates that the areas of conditionality which are designed to help the population, such as social security systems, are amongst the lowest implemented. This data was collected from 1993-1997 and therefore may not bear as much relevance as it once had. However, the existence of it demonstrates the imperial nature of the IMF which has existed. The demonstration here of priorities within conditionality shows that the social security measures lack in importance when compared to other aspects of conditionality. Therefore, one important area which should be considered for reform is the existence of preferability of conditionality policies.

From these issues of what needs addressing within the IMF's conditionality measures, there is another issue of the feasibility of these being implemented. The conditionality measures had been reformed in the 2000s. However, despite this, there had not been any reform to the Washington Consensus which had fully removed itself from conditionality.[104] The survival of this through reform shows an unwillingness of the IMF to adapt to a position which would not be considered neo-colonial. There had also been another attempt at reform of conditionality in 2019 through less focus on criteria which needed to be fulfilled in conditionality.[105] Despite this, it did not mean that structural adjustment measures of this would be removed. The IMF, it appears, only wishes to have small scale reforms whilst maintaining the majority of its approach.

The topic of reform within the IMF is not a new subject. However, reform of the IMF to decolonise would mean a complete overhaul of the system. Due to

[103] Axel Dreher, 'IMF And Economic Growth: The Effects Of Programs, Loans, And Compliance With Conditionality' (2006) 34 World Development, 771.
[104] André Broome, 'Back To Basics: The Great Recession And The Narrowing Of IMF Policy Advice' (2014) 28 Governance, 153.
[105] International Monetary Fund (n 33) 22.

the IMF's history of small-scale reform, such a route would not be realistic. Still, this is also due to the fault with the system it lies within. The IMF remains only a small part of the International Law system as a whole, using economic imperialism to maintain subordination of the Third World. It therefore remains that the IMF has become a product of its colonial background. Despite the commonly understood right to self-determine now, the IMF has developed from its colonial beginnings into a system of economic imperialism. In order for reform to be possible, the IMF and its conditionalities will need to be reimagined in a less invasive way. Whilst TWAIL has moved onto its third instalment, the issue of the IMF remains as important as it was during TWAIL II.

CONCLUSION

In summation, the IMF's conditionality measures can be understood to have a neo-colonial nature. It appears that the IMF, despite having developed significantly since its formation, has been unable to develop out of a colonial background. This can be seen to have a large influence on the IMF's structures today. Unless there is reform in this area, it is unlikely that the IMF will be able to start the process of decolonisation. This also begs the question of whether this is possible with such a large and involved organisation.

The case studies have provided a cross-section of where and how the IMF have operated within their member countries through conditionality measures. By looking at those four cases of IMF involvement, the key issues which lie within the IMF have been presented. Through using both Western and Eastern countries, it can be understood that the conditionality approach is abrasive in both settings. However, as the only third-world country used is Jamaica, it limits the findings in reference to TWAIL. This suggests that the TWAIL approach to the IMF needs to widen to include previously ruled out eastern countries as well. Whilst they are not within the third-world inherently, they are still

disproportionately impacted through conditionality measures. This means that the IMF's neo-colonial impact can be seen with any country that does not have a direct influence on the IMF. Those countries that do hold such power, like the G-7, are in a position of financial stability where they do not require the IMF's assistance and therefore do not need to surrender their self-determination rights. Whilst they are member countries, the real control here is demonstrated through conditionality measures which make the debtor share their sovereignty with the IMF in a covert sense. There is no real transfer of power, however, the power imbalance which exists through a lendee and lender within conditionality means that the member country is not able to exercise sovereignty fully. This all provides a means to which the IMF has been able to legitimise, reproduce and sustain the subordination of not only the Third World, but also any country which is not considered among the most powerful.

It appears unlikely that the IMF will reform any of these areas mentioned. Conditionality, in this sense, is used as a tool for subordination of not only third-world countries, but any country which does not have a stake in the IMF. This is because of the influence which is inherent within the IMF as it can become difficult to separate the IMF from these seemingly Imperial powers. These factors, being so intertwined with one another, propose an awkward scenario where the IMF is simply not reformable through conditionality or elsewhere. Unless the IMF is able to distance itself not only from its colonial origin but also of the influence exerted over it, it remains an impossible task. Conditionality measures are therefore used as a means for neo-colonisation and without it, the IMF would not be able to fully subordinate any member countries.

An Appeal for Abolishing the Sudden Shock Requirement

*Leonie Stüssi**

INTRODUCTION

Claims for psychiatric harm, formerly referred to as 'nervous shock', have been significantly impacted by legislation implemented following the Hillsborough disaster. In 1989, at a football match between Liverpool and Nottingham Forest, part of the stands collapsed from the sheer volume of fans police officers had negligently allowed to enter. Close to one-hundred people lost their lives and a further seven-hundred-and-sixty people suffered injuries as a result of the crush, with television stations broadcasting large parts of the disaster. Numerous claims were filed from both victims present in the stadium and their loved ones who watched the incident unfold on television. In response the courts established control mechanisms on litigation, to limit the number of successful claims to a bound which they deemed appropriate. The 'sudden shock' requirement is one mechanism designed to limit these claims. Any secondary victim claiming psychiatric harm must prove that their recognised psychiatric illness came about through the shock of witnessing a horrifying event. This essay makes a comprehensive argument for abolishing the sudden shock requirement; through critical examination of the arguments for and against this specific control mechanism and by utilising domestic legal commentary, case law, and jurisprudence from other common law jurisdictions.

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I. THE ORIGIN OF CONTROL MECHANISMS

Before assessing the need for reform, the current law in a broader sense and the specifics of the sudden shock requirement must be established. *Alcock v Chief Constable of South Yorkshire Police,* the principal case which sets limitations upon liability for psychiatric harm, arose from the aftermath of the Hillsborough disaster.[1] Ten claimants brought an action against the South Yorkshire Police, which had admitted liability in negligence for the deaths resulting from the disaster. Most of the plaintiffs were not present at the stadium and had learned of the events through radio or broadcast. Speaking to those who watched the collapse on television Lord Oliver gave a statement, the sentiment of which has since been extended beyond its original confines.[2] While expressing sympathy for the undisputed suffering of the plaintiffs, he could not find "any pressing reason of policy for taking this further step along a road which must ultimately lead to virtually limitless liability".[3] This rationale shaped the reasonings of the Lords, and they delivered a judgment heavily influenced by policy considerations.

In their judgments, the Law Lords drew a distinction between primary victims, i.e. participants in an event, and secondary victims, who were mere spectators. This division intended to reduce a perceived risk of opening the floodgates on litigation.[4] Further barriers, Harvey Teff has described as "intrinsically unconvincing", have led to unjustifiable judgments and undesirable distinctions.[5] Seeking to limit claims for psychiatric injury, Lord Ackner established four control mechanisms for secondary victims, each needing to be met for a

[1] [1991] UKHL 5, [1992] 1 AC 310 (HL).
[2] See page 6; *Taylorson v Shieldness Produce Ltd* [1994] PIQR P329, 335.
[3] *Alcock* (n 1) 417C (Lord Oliver).
[4] Harvey Teff, 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries' (1998) 57(1) CLJ 91, 111.
[5] Harvey Teff, 'The Requirement of 'Sudden Shock' in Liability for Negligently Inflicted Psychiatric Damage' (1996) 4 Tort L 44, 46.

successful claim.[6] Firstly, most claimants will need to demonstrate a close tie of love and affection with the primary victim, only few relations are automatically deemed by the courts as sufficiently close. Secondly, the plaintiff must be suffering from a recognised psychiatric illness induced by shock from the event that harmed the primary victim. Furthermore, the claimant must have been in the proximity of both time and space of the event's immediate aftermath. Lastly, the claimant must have witnessed this event through their unaided senses.

Prior to the establishment of the *Alcock* control mechanisms, the doctrinal restriction of shock took shape in *King v Phillips* when Lord Denning denied the claim of a mother who watched from seventy yards away as a taxi driver slowly reversed over her child's tricycle.[7] While she could only see the tricycle and not her child, the latter having suffered only minor injuries, her child's scream drew her attention and caused her to witness the 'shocking event'. The Court of Appeal held that no claim could be brought if the nervous shock suffered was the result of a slow and gradual realisation.[8] Thirty years later the need to link a claimant's illness to a sudden shock was "implicitly affirmed" in *McLoughlin v O'Brian*.[9] Mrs McLoughlin joined her family in the hospital after they had been involved in a serious car accident. Upon her arrival she was informed of the death of her youngest daughter and saw the remaining members of her family covered in blood and oil. As a result of the shock she suffered, an undeniable consequence of what she saw and heard that day at the hospital, Mrs McLoughlin developed depression and a change in personality which adversely impacted her ability to meet day-to-day responsibilities. On appeal the House of

[6] *Alcock* (n1) 399-402; Margaret Fordham, 'Psychiatric Injury, Secondary Victims and the "Sudden Shock" Requirement' [2014] Singapore J of LS 41, 41.
[7] [1953] 1 QB 429 (CA); Jordan Owen, 'Tearing Up the Patchwork Quilt: An Examination of How, Why and When Liability for Psychiatric Injury in the Tort of Negligence' (2018) 10 The Plymouth L & Crim Justice Rev 1, 4.
[8] *King* (n 7) 441-442.
[9] [1983] 1 AC 410 (HL); Fordham (n 6) 43.

Lords ruled that she was able to claim for the sudden shock she suffered from witnessing the direct aftermath of the damage-causing event.

With shock now understood to, "in its nature", be capable of affecting a wide range of people, limitations were deemed necessary to limit the extent of possible claims.[10] As a result Lord Wilberforce formulated the three proximities in *McLoughlin*. These proximities require a close familial relation to the victim, spatial and temporal proximity to the event and finally a shock resulting from hearing or seeing the event or its aftermath.[11] *Alcock* later established that no claimant could receive damages if their "psychiatric injury was not induced by shock".[12] Shock is defined as "the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind".[13] However this definition faces controversy as it "has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system".[14] The wording used by Lord Ackner – "yet to include" – indicates an ability to expand what constitutes sudden shock in line with the abolition suggested in this essay.[15] However, this narrow definition results in, most claims where the illness arises from a gradual assault on the senses being denied under the current law.

II. HOW THE CURRENT LAW IS FAILING CLAIMANTS

The Law Commission noted that the shock requirement produces "harsh and seemingly arbitrary decisions", with its sole purpose being to limit litigation.[16] By comparing case law, it is evident that the application of the law as it stands fails

[10] *McLoughlin* (n 9) 422 (Lord Wilberforce).
[11] ibid.
[12] *McLoughlin* (n 9) 400-401.
[13] *McLoughlin* (n 9) 401.
[14] ibid.
[15] ibid.
[16] Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998) at para 2.63; Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998) at para 5.29.

to produce clarity and certainty.[17] This builds a reasoned basis when advocating for legislative reform.

Sion v Hampstead Health Authority and *Taylorson v Shieldness Produce Ltd* both illustrate harsh outcomes for claimants.[18] In *Sion* a father claimed for the abnormal grief reaction that he suffered after watching his injured son deteriorate in health and eventually die due to negligent medical treatment provided to him. The plaintiff's son was seriously injured as the result of a motor-cycle accident and upon his arrival at the hospital, staff failed to recognise a bleed in his kidney. This failure to diagnose and treat the bleed caused the son to suffer a heart attack, resulting in him being placed in a coma three days after the accident. He was transferred to intensive care, where he remained until his death fourteen days after admission. The negligent hospital was able to convince the court to strike out the plaintiff's claim. The medical report concerning the father's mental illness described a gradual process as the cause for psychiatric harm, rather than him having suffered from a sudden shock.[19]

Likewise, in *Taylorson* the plaintiffs were rejected in their claim for damages, subsequent to their son dying three days after he was crushed by a reversing vehicle.[20] They had been by their son's side, whenever allowed, from when he was admitted to the first hospital up until their decision to have his life support turned off at another hospital. However, the court held that their psychiatric illnesses were the result of a sequence of events that extended over multiple days. Again, this was the result of a report made by a consultant psychiatrist, who characterised the condition as attributable to "the whole sequence of events

[17] Suzanne Wollard, 'Liability for Negligently Inflicted Psychiatric Illness: Where Should We Draw the Line' (1998) 27 Anglo-American L Rev 112, 126; Susanna HS Leong and Lan Luh Luh, 'Liability for Pure Psychiatric Injuries – "Thus Far and No Further"? White and Others v Chief Constable of South Yorkshire Police and Others' [1999] Singapore J of LS 265,276.
[18] [1994] 5 Med LR 170; [1994] PIQR P329.
[19] Law Commission (n 15) at para 2.63.
[20] [1994] PIQR P329.

which culminated in the death of [their son], […] rather than to any specific incident".[21] The Court of Appeal felt bound to deny the claim due to the sudden shock requirement. Lord Justice McCowan, delivering ratio on the findings of the High Court judge, expressed this restriction and directly referred to the sentiment above, delivered by Lord Oliver in *Alcock*. Finding liability in the circumstances of *Taylorson* would be, according to Lord Justice McCowan, "[taking] a step further along the road which must ultimately lead to virtually limitless liability".[22]

More recent cases demonstrate that this is a prevalent issue that continues to fail claimants. For instance, the Queen's Bench Division dismissed a sister's claim for psychiatric harm in *Shorther v Surrey and Sussex Healthcare NHS*.[23] The claimant, a senior sister at a neuro-intensive care unit, watched and was kept continuously informed as her sister's condition worsened. She subsequently died following a failure by the hospital to diagnose a haemorrhage a week prior. While the causal link between the hospital's negligence and Mrs Shorter's psychiatric injury was established and accepted, the claim was dismissed on the basis of the sudden shock requirement. Justice Swift argued that he would not describe the scene which Mrs Shorter came upon in the second hospital as a horrifying 'event' nor sufficient to cause a "violent agitation of the mind".[24] Despite the plaintiff's sister being visibly unwell and the plaintiff having been frightened by the diagnosis, the judge found the circumstances to be insufficiently horrifying so as to meet the threshold of 'event'. The plaintiff's claim failed at the *Alcock* definition of what constitutes shock, rather than a lack of the causal link that the requirement is supposed to ensure.

[21] ibid 331.
[22] ibid 335.
[23] [2015] EWHC 614.
[24] ibid, [213].

Contrastingly, the cases of *Tredget and Tredget v Bexley Health Authority* and *Walters v North Glamorgan NHS Trust*, demonstrate that sometimes the sudden shock requirement is found to be satisfied even over an extended time frame.[25] In *Tredget* a set of parents was able to claim damages for the psychiatric harm they suffered as a result of negligent treatment which led to the death of their child two days after a traumatic birth. The presiding judge ruled that despite the long period between the onset of labour and the eventual death of the infant, the forty-eight hours could effectively be treated as one event and subsequently satisfy the shock requirement.

Walters v North Galmorgan, a comparatively recent case, is an example of another instance where a mother was able to claim for a sequence of events that extended over a longer period.[26] On her appeal Lord Justice Ward argued that the happenings which occurred over a period of thirty-six hours and resulted in the death of the plaintiff's baby, were "a seamless tale" which satisfied the sudden shock requirement.[27] The start of this ordeal was the mother coming upon her baby convulsing with blood pouring out of its mouth, an 'event' in its own right horrifying enough to impact the ruling significantly.[28] In his judgment, Lord Justice Ward recognised the need for a sufficient 'event' as part of the sudden shock requirement to be "presently formulated [to] permit a realistic view being taken from case to case of what constituted the necessary".[29] This quote indicate the undesirable uncertainty present within this area of law, and highlights the medically illogical approach taken by the law. Referring to psychiatric professionals it is, to Lord Justice Ward, unsurprising that their

[25] [1994] 5 Med LR 178; [2002] EWCA Civ 1792.
[26] [2002] EWCA Civ 1792 (CA).
[27] *Walters* (n 26) [34].
[28] [2015] EWHC 614 (QB) [213].
[29] *Walters* (n 26) [34].

clinical view would lead them, with good reason, to find that the law "as it has developed" is incomprehensible and illogical to an unacceptable degree.[30]

The decision in *Walters* has been considered in several cases, the aforementioned case of *Shorter* being one such instance. The judgment's conclusion, that the first 'event' – the mother coming upon her convulsing baby – was sufficient to satisfy a 'sudden assault' on her mind, was given close consideration by Justice Swift in the latter case.[31] The events which followed were "successive blows"; further assaults that impacted the mother's suffering but did not diminish the tie of the psychiatric illness to the 'sudden shock' posed by the discovery of the baby.[32] In *Shorther v Surrey and Sussex Healthcare NHS Trust* there was no such 'starting event' – no horrific discovery – the shock of which was prolonged by negligent treatment. While in both cases the psychiatric illness suffered by the plaintiff was the uncontested result of negligence, the sister's claim was rejected along somewhat arbitrary judicial lines which are recognisably disconnected from scientific reasoning. Juxtaposed, the four cases clearly illustrate the arbitrary decision-making highlighted and criticised by the Law Commission.

Not only does case law demonstrate a lack of certainty in the application of the law, it also exposes a concerning trend that shows mental and emotional wellbeing to be of a lower value than physical health.[33] The case of *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* exemplifies how deeply at odds the control mechanisms are with "psychological reality".[34] Mr Ronayne watched as his wife suffered serious and prolonged consequences from a hospital's negligent treatment during a routine hysterectomy. For the duration of a week

[30] ibid, [39].
[31] *Shorter* (n 28) [213].
[32] *Walters* (n 26) [40].
[33] Harvey Teff, 'Liability for Psychiatric Illness: Advancing Cautiously' (1998) 61(6) MLR 849, 849.
[34] [2015] EWCA Civ 588; Teff, 'Justification and Boundaries' (n 4) 95.

after her operation, Julie Ronayne was suffering from a high temperature and growing post-operative discomfort at home. The side-effects culminated in shallow breathing and a continued high temperature, which eventually lead to an admission at the local emergency department. Once admitted her condition continued to deteriorate, resulting in her undergoing a further operation, which stabilised her condition and unveiled the negligent treatment she initially received, but her husband was informed that there was a continued risk of death.[35] While Mrs Ronayne survived as a result of extensive medical care, her husband suffered an adjustment disorder – a recognised psychiatric illness – as a result of the ordeal. However, due to the nature of an adjustment disorder his claim was rejected. Lord Justice Tomlinson noted that the "diagnostic criteria" for the condition suffered by Mr Ronayne ruled out an illness which was the consequence of sudden shock, though he did make commentary about possibly isolating "one or two events from a larger continuum" as to attract liability in the case of an adjustment disorder.[36] Furthermore, while recognising the "profound distress" suffered by Mr Ronayne, Lord Justice Tomlinson believed that the circumstances with which he suffered "fall far short of those which have been recognised by the law".[37] The ruling in *Ronayne* demonstrates a hierarchy within psychiatric illnesses with some diseases being treated as more readily compensable, despite a lack of a clinical suggestion that suffering is greater when the illness is shock induced.[38]

For this very reason, it is hard to medically justify the shock requirement. It has "little connection to the factors causing psychiatric illness once one moves away from [post-traumatic stress disorder]" and has been criticised by the Royal

[35] *Ronayne* (n 34) [27].
[36] ibid, [9]; ibid, [47].
[37] ibid, [33].
[38] Law Commission (n 15) 67.

College of Psychiatrists for causing serious problems.[39] Moreover, the Law Commission noted in their report that there was and is no clinical merit to the requirement, it is at odds with advances made in psychiatry.[40] In the case of *McLoughlin* the plaintiff explicitly invited the House of Lords not to make new law, but rather to ensure that the law keeps up with these advances and appreciates the changes in the knowledge of ordinary citizens.[41] The current law governing psychiatric harm fails to respect the fundamental principle that the law "should be informed by its context". [42] For this reason the control mechanisms need to be reformed, so that the law adopts the scientific consensus and the common understanding set by the society which it intends to serve.

III. THE ARGUMENT WHICH SHAPED THIS SYSTEM AND A RESPONSE

This essay contends that the sudden shock requirement has no ties to clinical reality and has failed claimants repeatedly as a result of its absolutist restriction of liability. The existing system, which stands at odds with many sides, stems from "the accumulated weight of policy driven authority".[43] The scope of the following section is to address the focal argument against expanding liability – the fear of opening the floodgates – as well as to provide an example of functioning reform, which invalidates the floodgates argument.

[39] Andrew Burrows and John Burrows, 'A Shocking Requirement in the Law on Negligence Liability for Psychiatric Illness: Liverpool Women's Hospital NHS Foundation Trust v Ronayne [2015] EWCA Civ 588' (2016) 24(2) Medical L Rev 278, 282; Keith Rix and Charlie Cory-Wright, 'How shocking: compensating secondary victims for psychiatric injury' (2018) 24 BJPsych Advances 110, 114.
[40] Law Commission (n 15) 68.
[41] *McLoughlin* (n 9) 410.
[42] Desmond Butler, 'An assessment of competing policy considerations in cases of psychiatric injury resulting from negligence' (2002) 10 Torts L J 13, 13.
[43] Harvey Teff, 'Liability for Psychiatric Illness after Hillsborough' (1992) 12(3) OJLS 440, 441.

A. THE FEAR OF OPENING THE FLOODGATES

At its core the judiciary fears that in the absence of functional control mechanisms, claims could be virtually limitless and as a result the courts would be overwhelmed by a dramatic increase in litigation.[44] Supporters worry that defendants would be undefinably liable and subsequently uninsurable, increasing insurance premiums across the board.[45] This fear is a result of the indeterminate nature of psychiatric illness, claiming for psychiatric harm – if left unrestrained – would not be limited by a "physical chain of causation".[46] Highly publicized events and the Hillsborough disaster further reinforced the traditional judicial concerns that too liberal an approach would lead to an increase in claims.[47]

However, at large the floodgates argument has been exaggerated, with both Lord Wilberforce in *McLoughlin* and Nolan LJ in *Alcock* acknowledging this.[48] If a rise of fraudulent claims came about as a result of broadening liability this could be dealt with within the courts.[49] Lord Wilberforce made his argument by explicitly referring to "the scarcity of cases which have occurred in the past and the modest sums recovered" and how this evidences an exaggeration of the risk of an increase in litigation.[50] Defendants would not become infinitely liable and uninsurable. Nevertheless, any small increase in litigation that could be observed would not be inherently bad, but rather mean that the amended rules were now finally meeting "a genuine social need" for compensation.[51]

[44] Rix and Cory-Wright (n 37) 111.
[45] Donal Nolan, 'Psychiatric injury at the crossroads' (2004) 1 Journal of Personal Injury Law 1, 12.
[46] ibid.
[47] Teff, 'Liability after Hillsborough' (n 41) 458; Fordham (n 6) 54.
[48] *Alcock* (n 1) 336; *McLoughlin* (n 9) 421; Teff, 'Liability after Hillsborough' (n 41) 442.
[49] *McLoughlin* (n 9) 421.
[50] ibid.
[51] ibid.

Nolan argues beyond this, that the exaggerated fear of opening the floodgates on litigation "conceals two more valid concerns".[52] Firstly, that issues can arise in cases where there is a lack of directness and proximity between defendant and the claimant, and secondly a wider distrust in the psychiatric profession. The former argument will be addressed at length in a later section, nevertheless – in sum – any such issues can be alleviated through an effective requirement for the plaintiff to be suffering from a recognised psychiatric illness. The latter is a result of a perceived difficulty with drawing the line between psychiatric illnesses and heightened ordinary emotions, especially those which are not a direct result of sudden shock unlike post-traumatic stress disorder.[53] However, this is a matter which can again be addressed through the requirement of a recognised psychiatric illness, where a medical professional ensures that the plaintiff is suffering as a consequence of the defendant's negligent acts.

B. AN AUSTRALIAN RESPONSE

The Australian model for dealing with the sudden shock requirement, and case law concerning psychiatric harm at large, has had wide-spread influence on the reasoning of judges within England and Wales. Particular consideration has been given to the case of *Jaensch v Coeffy*, three Lords commented on it as part of their judgments in *Alcock* and the appellant in *Taylorson* relied on its ratio.[54] The case concerned a non-fatal car accident, with the claimant's husband being seriously injured by the vehicle of a negligently driving Mr Jaensch. Mrs Coeffy came upon her husband in the hospital, where she saw him in extensive pain, with his condition deteriorating further throughout the following days, to such an extent that the staff requested she return to the hospital as soon as possible. Mrs Coeffy was awarded damages for the acute anxiety depressant state caused by the

[52] Nolan, 'Crossroads' (n 43) 12.
[53] ibid.
[54] (1984) 54 ALR 417; [1994] PIQR P329 (CA) 333-335.

aftermath of the accident. As a result of her affliction, she was entered into a psychiatric facility and suffered extensive physical symptoms leading to two operations. While the facts of the case are not dissimilar to those of *McLoughlin,* the reasonings provided by Justice Brennan and Justice Deane, "appear much more instructive and helpful" than the ratio delivered by the House of Lords.[55] Of particular interest to this essay are the comments made by Justice Brennan regarding the interplay of psychiatric illness "induced by mere knowledge" and an abandonment of the 'sudden shock' requirement.[56] In *Alcock* it was expressly affirmed that this part of the ratio in *Jaensch* demonstrates that removing the requirement would not open the gates for claims where the afflicted fell ill as a result of being informed of, reading about or hearing of the shocking event.[57]

Furthermore, the absurdity of the floodgate argument as a whole can be amply demonstrated by the modern Australian model for dealing with psychiatric harm claims, where the sudden shock requirement has since been abolished. In the case of *Tame v New South Wales* and *Annetts v Australian Stations Pty Limited* the two matters were jointly heard by the High Court: the majority rejected the requirement that only psychiatric injury caused by shock can be claimed for.[58] *Annetts* concerned the death of the 16-year-old son of the plaintiffs, who at the time was acting as a farm hand in a remote part of Australia. After becoming unhappy with the work, he and a friend abandoned their jobs at the farm and became lost in the desert. His parents were informed of the disappearance a few days later – the farm manager had waited to inform the police of the young men's absence – and a thorough search began. Throughout this search the parents would travel numerous times to the location of their son's disappearance and a month into the search police found his bloodied hat out in the wilderness.

[55] Francis Trindade, 'Negligently Caused Nervous Shock – An Antipodean Perspective' (1985) 5(2) OJLS Studies 305, 305.
[56] (1984) 54 ALR 417, (1984) 155 CLR 549 567.
[57] *Alcock* (n 1) 400.
[58] [2002] 211 CLR 317.

Eventually the search ended in the discovery of the boy's car bogged in the desert, within which the skeletons of the two men were found. Mr Annetts was able to identify his son's remains through a photo shown to him. Both mother and father were diagnosed with a recognised 'grief reaction' as a result of their son's death and sought to claim damages for the psychiatric injuries they suffered. Difficulty arose as a result of the parents' degree of removal from the disappearance and eventual death of their child. Nevertheless, despite the difficulties in arguing the case under the current law at the time, the High Court sided with the parents.

The judgment held that various control mechanisms were 'unsound', thereby rejecting those of sudden shock and direct perception subsequently being rejected.[59] The two requirements were deemed to have been "operated in an arbitrary and capricious manner", which brought about "unprincipled distinctions and artificial mechanisms […] [bringing] the law into disrepute".[60] As a result of the removal, claimants are able to bring action for psychiatric injuries which are the result of a gradual build-up, for example, the strain one might suffer from caring for an injured loved one.[61] The facts in *Annetts* demonstrated the ability for psychiatric injury to arise as a result of prolonged stress and anxiety, leading the court to question the sudden shock requirement:[62]

> "Cases of protracted suffering, as opposed to 'sudden shock', [could] raise difficult issues of causation and remoteness of damage. Difficulties of that kind are more appropriately analysed with reference to the

[59] ibid, [188]; Fordham (n 6) 49.
[60] *Annetts* (n 56) [190].
[61] Donal Nolan, 'Reforming Liability for Psychiatric Injury in Scotland: A Recipe for Uncertainty?' (2005) 68(6) MLR 983, 992.
[62] Yega Muthu, Ellen Geraghty & Barbara Hocking, 'If I Only Had a Heart – The Australian Case of Annets and the Internationally Confounding Question of Compensation in Nervous Shock Law' (2005) 7 UTS L Rev 157, 174.

> principles of causation and remoteness, not through an absolute denial of liability."[63]

The applicability of causation and remoteness as principles extends beyond Australia, their application is also able to limit cases within England and Wales. Thus, the medically unjustifiable restriction posed by the sudden shock requirement – as an outright denial of liability – is superfluous. Since the abandonment of the requirement no exponential increase in successful claims has been observed within the jurisdiction.[64] It can be assumed that such an outcome can be expected in England and Wales should the restrictions change.

IV. ABANDONING THE SUDDEN SHOCK REQUIREMENT

The courts have disproportionately elevated the importance of policy considerations in their ratio, sacrificing the rationality of their arguments in the process.[65] They apply an absolutist approach based on control mechanisms, despite clinical evidence demonstrating this to be absurd.[66] The sudden shock requirement has as a consequence "long been the legal bane" of a secondary victim making a claim.[67] Judges, such as Lord Steyn in *Frost and Others v Chief Constable of South Yorkshire Police,* have made note of the unsatisfactory state of the law governing psychiatric harm:

> "[T]he law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. […]. In my

[63] *Tame* (n 56) [211].
[64] Fordham (n 6) 57.
[65] Jyoti Ahuja, 'Liability for Psychological and Psychiatric Harm: The Road to Recovery' (2014) 23(1) Medical L Rev 27, 51.
[66] Val Corbett, 'Perceptions of Nervous Shock: The Law on Psychiatric Harm' (2012) 4 Q Rev of Tort L 11, 18.
[67] Rachael Mulheron, 'Rewriting the Requirement for a "Recognized Psychiatric Injury" in Negligence Claims' (2012) 32(1) OJLS 77, 110.

> view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions […] as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform".[68]

Thus, the question is posed as to how Parliament should amend the control mechanisms. In a very liberal and broad reaching approach academics have argued that abandoning "all the special limitations", bar the recognised psychiatric illness threshold, should be possible.[69] While this essay appreciates the multitude of structures within the law governing psychiatric harm claims which require amendment, it focuses on the control mechanism of sudden shock and as such endorses the Australian model. The common law jurisdiction has demonstrated that the policy concerns behind the requirement are unfounded and has acted as inspiration for reform.[70] As a result of the amendment judges are no longer solely relied upon to make the difficult decisions regarding the causal link between a tortfeasor's negligence and the psychiatric harm in question. Rather the system can benefit from a greater involvement of medical experts in determining what acts as satisfactory causation, especially in cases where a claimant's illness occurs months or years after the defendant's negligent act or omission.[71]

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[68] [1999] 2 AC 455, 500.
[69] Teff, 'Justification and Boundaries' (n 4) 121.
[70] Nolan, 'Liability in Scotland' (n 59) 983.
[71] Jonathan Patterson, 'Negligently Caused Psychiatric Harm: Recovering Principle and Fairness after the Alcock-Up at Hillsborough' (2016) 6 Southampton Student L Rev 23, 33; Law Commission (n 15) at para 5.32.

IV. THE ROLE OF PARLIAMENT AND JUDGES

Precedent shows that bringing about change, regardless of how necessary it may be, is met with continuous resistance as the judiciary and legislature call upon the other to establish reform. In 1998 the Law Commission published a report, 'Liability for Psychiatric Illness', which argued for extensive legislative reform, including the removal of the sudden shock mechanism.[72] Yet, none of the Commission's suggested reforms for the shock requirement were ever implemented.[73] The proposals were rejected by Parliament due to "policy concerns", a consequence of the demonstrably false fear of opening the floodgates.[74] In contrast, the government rejected the Commission's recommendations because they believed psychiatric illness to be too controversial an area of law.[75] They argued that rather than Parliament amending the existing law, it should be left to the common law so that judges can adjust as they deem fit.[76]

In juxtaposition numerous judges have made commentaries which place the burden of reform solely on Parliament. In *Frost*, the House of Lords embraced a position of "thus far and no further", with Lord Hoffman noting that the search for principles in psychiatric harm claims was "called off" in *Alcock*.[77] Despite the existing law's shortcomings, the presiding Lords regarded the matter as settled and viewed any significant expansion to the rules as a matter for Parliament.[78] This conclusion was further endorsed in the judgment delivered by Lord Dyson

[72] Law Commission (n 15) at para 5.33.
[73] Fordham (n 6) 45.
[74] Ahuja (n 63) 49.
[75] Law Commission, *Forty-Fourth Annual Report* (2010), Law Com No. 323 at para 3.11.
[76] ibid.
[77] *White* (n 68) 500; *White* (n 68) 511.
[78] Fordham (n 6) 46.

in the case of *Taylor v A Novo (UK) Ltd.*[79] Making direct reference to *Frost* he stated:

> "The effect of the judge's approach is potentially to extend the scope of liability to secondary victims considerably further than has been done hitherto. The courts have been astute for the policy reasons articulated by Lord Steyn to confine the right of action of secondary victims by means of strict control mechanisms. In my view, these same policy reasons militate against any further substantial extension. That should only be done by Parliament".[80]

While the above reasoning was based on a belief contrary to that of this essay, that the courts were 'astute' in limiting the ability to claim for policy reasons, it acts as the foundation of his opposition for reform to be undertaken by judges.[81] In light of the unwillingness of judges 'to go further' and amend the existing law, it is now certainly time for Parliament to bring about the substantial reform which will ensure that the presiding laws are no longer at odds with clinical reality.

CONCLUSION

As the law currently stands the claims of secondary victims are restrained by the four *Alcock* control mechanisms, one of which is the sudden shock requirement. This requirement in particular has been the bane of many claims, especially when the claimant suffered a more gradual assault to the senses which caused their psychiatric illness. This has led to demonstrably arbitrary rulings and undesirable outcomes, as the law fails to keep up with the clinical advancements made in the

[79] [2013] EWCA Civ 194.
[80] ibid, [31].
[81] ibid.

field of psychiatric illness. This failed system came about through the overvaluing of policy arguments, in particular the heavily criticised and disproven fear of opening the floodgates on litigation. The Australian model has amply demonstrated that systems where non-shock-induced psychiatric illnesses can be claimed for do not result in an explosion of cases brought before the courts. Furthermore, other methods – namely the principles of causation and proximity – can ensure an adequate causal link between the defendant's negligent act or omission and the claimant's recognised illness.

It is now the responsibility of Parliament to heed the Law Commission's reform proposals regarding the laws governing psychiatric harm. By abolishing the superfluous sudden shock requirement claimants will benefit from more just decisions, as well as an expansion of the recognised illnesses which can be claimed for.

The Success and Legitimacy of UN Treaty Bodies and UN Special Procedures in Clarifying the Content of Human Rights

*Sam Myer**

INTRODUCTION

Since the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948,[1] the international community has continued to strive for compliance by all nations across the world. Over the years, the international community has mandated several mechanisms to monitor human rights across the globe. These include United Nations (UN) Treaty Body supervision, UN Special Procedures, regional systems, and Universal Periodic Review (UPR). These mechanisms operate with different methods and aims, although one shared objective is to clarify the content of human rights. This is achieved with varying degrees of significance, success and legitimacy.

This essay will demonstrate how Special Procedures and UN Treaty Bodies have helped to clarify the content of human rights. Special Procedures have a significant role in clarifying the content of human rights. They achieve this through the

[1] United Nations General Assembly Resolution (10 December 1948) UN Doc A/RES/217A.

* *LLB Exon (Hons)*.

mechanisms of country visits and report writing. Individually, these mechanisms may not play a particularly extensive role in clarifying the content of human rights, however, together the impact of their role is heightened. UN Treaty Bodies also play a substantial role in the clarification of human rights. They achieve this through the mechanisms of individual communications, state reporting and the subsequent concluding observations, and general comments. These mechanisms both individually and collectively play an important role in the clarification of the normative content of human rights. However, their legitimacy, and by extension, their success is somewhat undermined by the perception of illegitimacy, the nature of the non-binding legal status of Treaty Body recommendations and non-implementation of those recommendations.

UN SPECIAL PROCEDURES

Special Procedures are a process whereby independent experts, known as Special Rapporteurs, are appointed for fixed terms to examine either human rights generally within a specific country or one thematic right across the world. They are almost exclusively commissioned by the Human Rights Council,[2] and examine human rights situations in all parts of the world (irrespective of the adherence of a State to a treaty). Initially, they developed as *ad hoc* mechanisms but over the years have developed into a system now known as 'Special Procedures'.[3] GA Resolution 60/251 mandated the Human Rights Council to review and, where necessary,

[2] The seldom used method is the creation of a special representative of the Secretary-General.
[3] Vienna Declaration and Programme of Action (12 July 1993) UN Doc. A/CONF.157/23, 95.

rationalise and improve all mandates and mechanisms of the former Commission 'to maintain a system of special procedures.'[4]

Each Special Procedure functions based on the specific mandate authorising it, creating differences in the way they operate, but there are common features to all mandates namely: monitoring, investigating and reporting.[5] The legal basis for each Special Procedure lies in the Human Rights Council Resolution establishing the mandate.[6]

The contribution of Special Procedures to the legal interpretation or even the progressive development of international human rights law is not insignificant,[7] and is achieved through various methods with the most prominent being country visits and writing reports. These mechanisms will be considered individually.

COUNTRY VISITS

Country visits are an important facet of the UN human rights monitoring system. Visits allow Special Procedures to access information on human rights violations directly and influence the improvement of the situation on the ground.[8] No State is

[4] UN General Assembly Resolution 60/251 (15 March 2006) UN Doc A/HRC/4/40/Add.1.
[5] Manual of Operations of the Special Procedures of the Human Rights Council (August 2008), 8–10.
[6] The Human Rights Council itself is mandated by UN General Assembly Resolution 60/251 (15 March 2006) UN Doc A/HRC/4/40/Add.1, and the overall basis for the human rights actions of the UN organs is the UN Charter (in particular Article 1(3)).
[7] Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (1st edn, Intersentia 2006), 64; Christopher Golay, Claire Mahon and Ioana Cismas, 'The Impact of the UN Special Procedures on the Development and Implementation of Economic, Social and Cultural Rights' (2011) 15(2) The International Journal of Human Rights 299, 299-318.
[8] Human Rights Council (n 5), 52.

obliged to provide access to Special Rapporteurs to conduct on-site investigations. Country visits are only possible following a standing invitation or an *ad hoc* invitation issued by the requesting nation. They facilitate an 'intensive' dialogue with state authorities (executive, legislative, and judicial branches) as well as contacts with victims, witnesses, national human rights institutions, international governmental and non-governmental organisations (NGOs), other civil society organisations, and academia. They represent an opportunity to raise awareness of specific problems under consideration.[9]

Besides facilitating the investigative work of Special Procedures, country visits have given rise to an additional dimension of great significance: pressure. Any visit is typically an event much talked about in the media of the visited nation and the public perception tends to be that a UN human rights body would not visit but for a serious human rights violation. This tension trickles through to the country's political institutions, which tend to be keen to appease public sentiment and improve the nation's image abroad. Therefore, country visits can effectively apply pressure from the international community to improve adherence with human rights obligations. Resultantly, this pressure from both domestic and international sources acts as a catalyst for compliance.[10] Piccone has found that States have made 'modest but important'[11] progress toward implementation of the recommendations and

[9] ibid, 54.
[10] Ted Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Brookings Institution Press 2012), 21.
[11] Ted Piccone, 'The Contribution of the UN's Special Procedures to National Level Implementation of Human Rights Norms' (2011) 15 The International Journal of Human Rights 206, 214.

clarifications of the content of the relevant rights made by a Special Procedure after a country visit.[12]

This is because the visit serves as an important tool for elevating human rights issues to senior levels within government and generating action to remedy the issue. For example, the Special Rapporteur on the Human Rights of Migrants was able to use information he received regarding a secret agreement between the governments of Indonesia and Malaysia to prompt reforms.[13] Special Rapporteurs tend to be held in high regards by State Parties, and such position can result in significant influence exerted on those who are positioned to modify the domestic law to closer align with the human rights standards set out by that treaty. This demonstrates the crucial impact that country visits can have on human rights standards.

Country visits play an incredibly important role in promoting and protecting human rights standards; however, this role is far less significant when it comes to clarifying the normative content of human rights. This is because Special Procedures are mandated to monitor the adherence to human rights standards, and then to report their findings to the Human Rights Council, which is considered below. Country visits can and have brought major benefits in terms of promotion and implementation of human rights. This is achieved through the internal and international pressure exerted by their very presence in the country; Special Rapporteurs have huge influence, which they can use against domestic lawmakers directly, and they can gather support internationally to pressure domestic legislators

[12] ibid 214.

[13] Jorge Bustamante, 'Report of the Special Rapporteur on the Human Rights of Migrants, Mission to Indonesia' (2 March 2007) UN Doc A/HRC/4/24/Add.3.

into enacting change. However, in terms of clarifying the normative content of human rights, country visits do not play a significant role.

SUCCESS AND LEGITIMACY

Country visits are generally considered the most effective tools the mandate-holders have at their disposal. This is because human rights monitoring generally operates in Geneva or New York, far removed from the places where violations tend to occur, and from the victims themselves.[14] Country visits in contrast allow for direct interaction with all parties concerned – including government officials and parliamentarians as well as civil society and local communities, national human rights institutions, and the UN agencies working in the country concerned. This allows the Special Rapporteur not only to obtain first-hand information, and to grasp the issues much better than would be possible by reading reports, but also to play a mediating role between the parties and facilitate processes through which dialogue between public authorities, victims and their representatives, and the UN country team shall be allowed to progress.

Despite the success that country visits can have on human rights standards, the impact can vary from substantial to quasi-null,[15] and it is contingent on two contemporaneous factors.

[14] The main exception being the Subcommittee on the Prevention of Torture under the Optional Protocol to the Convention against Torture 2006.
[15] Golay et al. (n 7), 311.

Firstly, the success of whether a country visit is successful in its aims to promote human rights depends on the relationship with on-the-ground stakeholders. These include UN country teams, national human rights institutions, civil society organisations, and the media.[16] For example, during the mission of the Special Rapporteur on the right to adequate housing to Peru in 2004,[17] the government and Peruvian civil society undertook a dialogue on housing rights issues which was prominent in helping to improve the situation. Before, during, and after the country visit of the Special Rapporteur on the right to food in Guatemala in 2005,[18] the government, the Food and Agriculture Organisation of the UN and NGOs were able to coordinate their actions. This led to the shaping of national legislation, which reflects international standards on the right to food as set out by the Special Rapporteur during the country visit;[19] the government acted upon the recommendations of the Special Rapporteur, and civil society monitored the implementation of these recommendations.[20]

Secondly, the success of country visits depends on the enforcement and effectiveness of follow-up procedures and mechanisms. This is key to the success and legitimacy of special procedures because it acts as an additional safeguard that

[16] UNCHR Reports of Jean Ziegler (20 March 2006) UN Doc E/CN.4/2006/44/Add.2; Report of the Special Rapporteur on the right to food, Jean Ziegler - Addendum - Mission to Cuba (30 January 2008) UN Doc A/HRC/7/5/Add.2.

[17] Miloon Kothari, 'Report of the special rapporteur on adequate housing as a component of the right to an adequate standard of living', (11 February 2004) UN Doc E/CN.4/2004/48/Add.1.

[18] See Jean Ziegler, 'Report of the special rapporteur on the right to food' (18 January 2006) UN Doc E/CN.4/2006/ 44/Add.1.

[19] Olivier de Schutter, 'Report of the Special Rapporteur on the Right to Food' (19 February 2010) UN Doc A/HRC/13/33/Ad.6; Olivier de Schutter, 'Report of the Special Rapporteur on the Right to Food' (26 January 2010) UN Doc A/HRC/13/33/Add.4.

[20] See Ricardo Zepeda Gaitan and Martin Wolpold-Bosien, Avances en la Promoción del Derecho a la Alimentación en Guatemala, CIIDH/ FIAN, 2007.

can ensure that clarifications made by the Special Rapporteur are being adhered to.[21] These procedures include monitoring by national institutions and civil society organisations. Moreover, the more recent mechanism of Universal Periodic Review (UPR) is helping to raise awareness regarding the need for states to implement recommendations from country missions' reports, especially through the inclusion of such information as one of the foundational inputs to the UPR.

Ultimately, the protection of human rights standards is most effective when country visits identify and use their influence to push for closer alignment to human rights standards when enforced through thorough follow-up mechanisms such as UPR, State reports and the subsequent concluding observations. These follow-up mechanisms are far more successful at clarifying the content of human rights than country visits.

REPORT WRITING

One of the most visible contributions of Special Procedures at international level are the reports they submit, on at least an annual basis, to the Human Rights Council, and – for some Special Procedures – to the Third Committee of the General Assembly. The annual reports contain an overview of the activities conducted by mandate-holders in the fulfilment of their mandate, and a set of recommendations addressed to governments or, occasionally, to other actors, including to UN agencies. In their thematic reports, Special Rapporteurs and independent experts seek to fill normative gaps by developing analytical frameworks or clarifying aspects of a certain human right, including the specific application to

[21] Golay et al. (n 7), 311.

particular groups such as women, children, indigenous people, and people with disabilities.

The reports are written by Special Rapporteurs, especially when discussing emerging issues and violations of a thematic or geographical right, explain the origin of the violation and in doing so clarify to the relevant States what they must do to comply with their human rights obligations. For example, Katarina Tomasevski, the first Special Rapporteur on the right to education, developed in her early reports to the Commission on Human Rights the '4As' scheme,[22] according to which "governments are obliged to make education available, accessible, acceptable and adaptable".[23] In Tomasevski's model, availability represents two obligations: the negative obligation of the state to permit the creation of schools, and the positive obligation to ensure free and compulsory education is available to all school-age children.[24] This entails access for children to primary education free of charge, while secondary and higher education may incur tuition fees; however, States are obliged to progressively enable access to post-compulsory education where circumstances permit. Acceptability involves, *inter alia*, a guaranteed quality of education to be achieved, for example through establishing, monitoring and enforcing a set of criteria for teachers, ensuring minimum standards of health and safety, and

[22] Katarina Tomasevski, 'Annual Report of the Special Rapporteur on the Right to Education' (13 January 1999) UN Doc E/CN.4/1999/49, paras 51–74; Katarina Tomasevski, 'Annual Report of the Special Rapporteur on the Right to Education' (1 February 2000) UN Doc E/CN.4/2000/6, paras 32–65; Katarina Tomasevski, 'Annual Report of the Special Rapporteur on the Right to Education' (11 January 2001)UN Doc E/CN.4/2001/52, paras 64–77; Katarina Tomasevski, 'Annual Report of the Special Rapporteur on the Right to Education' (7 January 2002) UN Doc E/CN.4/2002/60, paras 22–45.

[23] Katarina Tomasevski, Education Denied: Costs and Remedies (1st edn, Bloomsbury Publishing 2003), 51.

[24] ibid.

providing special attention to the needs of minorities and indigenous people.[25] Adaptability in the realm of education means that schools and the school system must recognise and accommodate the needs and rights of the children, as sanctioned, amongst others, by the Convention on the Rights of the Child.[26]

Attributable to its cogency, comprehensiveness and coherence, the '4As' scheme revolutionised the understanding of the content of economic, social and cultural rights and their practical implementation. The recommendations have since been adopted, adapted and expanded upon by the Committee on Economic, Social and Cultural Rights (CESCR) in defining the right to education and other rights,[27] and by several other Special Rapporteurs in the context of various economic, social and cultural (ESC) rights.[28] The '4As' framework cannot, and was not intended to, be applied *ad litteram* to every ESC right;[29] however it offers a model of how the content of an ESC right can be clarified with clear implications for the monitoring and adjudication of the State's obligations. These examples demonstrate the important role that Special Procedures have played in clarifying the content of these rights and the overall human rights legal framework.

[25] Golay et al. (n 7), 301.
[26] ibid 51 –2; Convention on the Rights of the Child 1989.
[27] See Committee on Economic, Social and Cultural Rights, 'General Comment No. 13: The Right to Education (Art.13)' (8 December 1999) UN Doc E/C.12/1999/10, para 6. See also Committee on Economic, Social and Cultural Rights, 'General Comment No. 12: Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5, paras 6–13; Committee on Economic, Social and Cultural Rights, 'General Comment No. 15: The Right to Water' (20 January 2003) UN Doc E/C.12/2002/11, para 12. See also Catarina de Albuquerque (1 July 2009) UN Doc A/HRC/12/24, paras 13–59.
[28] ibid, paras 69–80.
[29] Golay et al. (n 7), 301.

SUCCESS AND LEGITIMACY

As demonstrated above, the success of Special Procedures' reports has been wide and far-reaching. To achieve this, especially given the non-binding nature of these reports, Special Procedures must retain, and be perceived to have, a high level of legitimacy. This legitimacy is a crucial factor in how the international system delivers change without a coercive force.[30] The legitimacy of Special Procedures stems from the independence of the Special Rapporteurs, who are selected only if their independence from states and governments is assured.[31] This ensures Special Procedures are independent from States, UN organisations, civil society and any other stakeholders. The Code of Conduct for Special Procedures explicitly states that mandate holders shall '[n]either seek nor accept instructions from any Government, individual, governmental or NGOs or pressure group whatsoever'.[32] This ensures that the manner in which they carry out their duties is fully independent. In principle, all their choices are based on their own priorities. They set their own agenda.

Such demonstrable independence garners respect and promotes confidence in the absence of bias and should facilitate access to all material and sources, thus engendering respect from both the States as well as the UN and other human rights

[30] José Alvarez, 'Book Review Essay: The Quest for Legitimacy: An Examination of *The Power of Legitimacy Among Nations* by Thomas M Franck' (1991) 24(1) New York University Journal of International Law and Politics 199, 206.
[31] UN Human Rights Council Resolution 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, 46.
[32] United Nations Human Rights Council Resolution 5/2 (Code of Conduct) (18 June 2007) UN Doc. A/HRC/RES/5/2, Article 3(a)(e); Miko Lempinen, Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights (Abo Akademi University 2001), 40.

organisations.[33] An independent Rapporteur should therefore have more freedom to access a variety of sources and understand their relative value in an attempt at achieving a balanced viewpoint of the actual situation, and of the best means of developing human rights.

While independence is not necessarily determinative of competency,[34] it does however provide legitimacy, and legitimacy strongly relates to the subjective perception and belief systems of actors,[35] meaning States are far more likely to enter into a constructive dialogue. This, therefore, increases the propensity for a positive outcome because if the mechanism is considered independent, the assurance of confidentiality will be maintained and trusted, and accordingly more comprehensive and accurate information will become available to the Rapporteur. This creates a positive feedback loop in which increasingly more human rights issues can be clarified and protected.

Special Procedure reports are both critical and revealing and, owing to their legitimacy, are heavily employed in practice as authoritative secondary sources of law and fact by scholars and UN institutions, as well as by international courts and tribunals.[36] In addition, the UPR system relies heavily on these reports, using them

[33] Rhona K.M. Smith, 'The Possibilities of an Independent Special Rapporteur Scheme' (2011) 15(2) The International Journal of Human Rights 172, 173.
[34] ibid 183.
[35] Thomas Franck, *The Power of Legitimacy and Institutions* (Oxford University Press 1990), 19; Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107(2) Yale Law Journal 273, 284; Ian Hurd, 'Legitimacy and Authority in International Politics' (1999) 53(3) International Organization 379, 381.
[36] Ted Piccone, 'Human Rights Special Procedures: Determinants of Influence', Proceedings of the Annual Meeting (American Society of International Law) Vol. 108, The Effectiveness of International Law (2014), pp. 288-9.

to collate information to assess the national report,[37] and judge a country's human rights standards by considering their cooperation with Special Procedures.[38] This demonstrates that the success of these reports can extend far beyond the primary purpose of clarifying and promoting human rights.

UN TREATY BODIES

The basic function of Treaty Bodies is to monitor the implementation of human rights instruments. As observed by the UN High Commissioner on Human Rights, the Treaty Bodies 'are custodians of legal norms established by the human rights treaties'.[39] The idea of setting up bodies composed of independent experts to monitor state conduct in the domestic sphere in the mid 20th century constituted a departure from the prevailing notion of State sovereignty. The current model reflects the compromise that was made by the formative suggestions, such as an International Court of Human Rights,[40] and special monitoring bodies,[41] and has resulted in the dynamics and challenges evident today.

A total of ten treaty bodies have been adopted under the auspices of the Commission on Human Rights and Humans Rights Council. UN Treaty Bodies

[37] UN Human Rights Council (n 29), Annex, para 15(b).
[38] For example, Report of the Working Group on the German UPR (25 November 2008) UN Doc. A/HRC/WG.6/4/DEU/2, 3-4.
[39] OHCHR, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights*, (June 2012), p. 8.
[40] Annemarie Devereux, 'Australia and the International Scrutiny of Civil and Political Rights: An Analysis of Australia's Negotiating Policies, 1946-1966' (2003) 22 Australian Yearbook of International Law 47, 54-60.
[41] Yogesh Tyagi, *The UN Human Rights Committee: Practice and Procedure* (Cambridge University Press 2011), 58-60.

engage with human rights through state reporting and the following concluding observations, individual communications, and general comments. The role that these mechanisms have contributed to the clarification of the content of human rights, as well as their success and legitimacy will be considered individually.

STATE REPORTING AND CONCLUDING OBSERVATIONS

The second activity that Treaty Bodies use to monitor the implementation of human rights is State Reporting. Article 40 of the International Covenant on Civil and Political Rights (ICCPR) creates the obligation on State Parties to each core UN human rights treaty to undertake regular reporting indicating the factors and difficulties affecting the implementation of that particular treaty,[42] with the overall objective being to 'give effect to the rights recognised'.[43] While reporting normally forms part of the constructive dialogue between a treaty monitoring body and the State, it is the primary mechanism for monitoring the implementation of human rights. In general, States are to submit a 'Treaty Specific Document' setting out the legal, administrative, and judicial measures taken to give effect to the treaty provisions and any difficulties encountered in implementing the rights. The report once submitted is publicly considered, and Treaty Bodies adopt concluding observations, which identify progress in implementation since the last report and remaining concerns.

[42] UN General Assembly, 'International Covenant on Civil and Political Rights' (16 December 1966), article 40(1) and (2); United Nations General Assembly Resolution 68/268 (April 2014)UN Doc A/RES/68/268.
[43] UN General Assembly (n 42) , article 2(2).

This combination of reporting and following concluding observations allows Treaty Bodies to clarify the content of human rights. When States report on the measures they have taken, it allows the Treaty Bodies to give direct feedback on their efforts through concluding observations. In these observations, Treaty Bodies identify where States are failing with their obligations and what is required by that specific treaty. Through this process of identifying obligations, Treaty Bodies clarify the content of human rights and play a key role in this service. This is exhibited in New Zealand repealing the Foreshore and Seabed Act 2004. The 2004 Act was originally intended to address fears that public access to beaches would be limited following a court's judgement allowing Maori claims to the coastline.[44] The treatment of Maori led to the establishment of the Maori Party, which lobbied the Committee on the Elimination of Racial Discrimination (CERD) to consider the 2004 Act. The committee concluded the Act contained 'discriminatory aspects' against Maori and also suggested legislative amendment 'where necessary'.[45] This led to repeal of the 2004 Act in 2011. CERD, in the 2007 concluding observations, was able to clarify the obligations that the New Zealand government had under the International Convention on the Elimination of All Forms of Racial Discrimination and ensure that domestic legislation met these obligations.

SUCCESS AND LEGITIMACY

The success of State Reporting at clarifying the content of human rights has been mixed. Two main issues hamper its success: a lack of enforcement mechanisms and an inability to mobilise domestic actors.

[44] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643; Claire Charters and Andrew Erueti, 'Report from the Inside: the CERD Committee's Review of the Foreshore and Seabed Act 2004' (2005) 36(2) Victoria University of Wellington Law Review, 257.

[45] UN General Assembly, 'International Convention on the Elimination of All Forms of Racial Discrimination' (21 December 1965), para 19.

A lack of enforcement mechanisms has led to non-compliance with recommendations as well as a failure to even submit reports at all or only years after they were due.[46] For example, in January 2016 no more than 25 of the 197 States Parties (or 13%) fully complied with their reporting obligations.[47] The Treaty Bodies have limited enforcement powers and there is no apparent political cost for late submissions, unlike with UPR, for example.[48] This is despite efforts by the Treaty Bodies and the OHCHR to support States in building their capacity to prepare and submit reports.[49] This lack of enforcement mechanisms leads to States simply disregarding concluding observations or not even submitting their reports in the first place despite the obligation to do so.[50] This absence of enforcement mechanisms also means that there are no penalties for non-compliance either at the national and international level. If fewer reports are submitted, then Treaty Bodies cannot analyse compliance with obligations and so the extent to which they can successfully clarify the content of human rights is reduced. This is because Treaty Bodies cannot write concluding observations of reports that were not submitted. Furthermore, it tends to be the States with the more egregious breaches of their human rights obligations that submit reports the least, further limiting the potential impact Treaty Bodies are able to have.

[46] Navi Pillay, 'Strengthening the United Nations Human Rights Treaty Body System, A Report by the United Nations High Commissioner for Human Rights' (United Nations, June 2012), 23.
[47] *Report of the Secretary-General on Status of the Human Rights Treaty Body System* (A/71/118), Supplementary Information, Annex II (18 July 2016).
[48] UN Human Rights Council (n 29), para 1.
[49] See United Nations, International Human Rights Instruments, UN Doc HRI/MC/2006/3, paras 31-59.
[50] UN General Assembly (n 42), Article 40(1).

Secondly, the Treaty Body system cannot mobilise domestic actors, allowing many States to not comply with the concluding observations. McQuigg found that the Committee against Torture's (CAT) concluding observations had a substantial impact in Norway, the Netherlands, Portugal and a significant effect in Sweden, however, only a limited impact in Denmark and the Czech Republic, and little to no effect in Iceland and Luxembourg.[51] The issues raised by the Committee were the repeated failure of these nations to incorporate torture as a specific crime into national criminal legislation,[52] and the continued use of solitary confinement for prisoners.[53] All these nations are relatively wealthy so the absence of implementation cannot be as a result of lack of resources to finance it, but rather is due to a lack of domestic impetus to implement recommendations. It is domestic actors, such as NGOs and political parties who lobby governments about their non-compliance through campaigns that can often subsequently force policy and legislative changes. If domestic actors are not engaged with this process, then it is highly unlikely that the recommendations, established in the Treaty Bodies' Concluding Observations, will lead to a change in policy by States.

Despite the superficiality and the deficiencies of the process of State Reporting and the UN human rights Treaty Body system, some Concluding Observations have contributed to or accelerated policy and legislative measures and have been useful

[51] Ronagh McQuigg, 'How Effective is the United Nations Committee Against Torture?' (2011) 22(3) European Journal of International Law 813, 827.
[52] Report of the Committee against Torture, United Nations, UN Doc A/64/50, New York, 2008, at section 41(5); Report of the Committee against Torture, United Nations, UN Doc A/62/76, New York, 2007., at section 39(10).
[53] Report of the Committee against Torture, United Nations, UN Doc A/66/44, New York, 2002, 72-74; Report of the Committee against Torture, United Nations, UN Doc A/64/50, New York, 2008, at section 41(9).

devices in giving extra conviction to the arguments and demands of domestic actors when advocating for policy or legislative change.[54] However, the inherent weakness from the lack of enforcement mechanisms and an inability to mobilise domestic actors have seriously undermined the extent that Treaty Bodies can successfully clarify the content of human rights through the mechanism of State Reporting.

INDIVIDUAL COMMUNICATIONS

Potentially the most important type of activity of Treaty Bodies involves considering individual communications, which is dependent upon the consent of a State Party. The possibility of receiving individual communications is obviously a key, if not the most effective, ingredient in human rights protection because when assessing an individual case, it can enable the relevant competent bodies to determine the existence of a violation of a right by a particular state.

Each Treaty Body may, under certain conditions, consider complaints or communications directly from individuals. When an individual brings a complaint against a country, and the Treaty Body accepts and hears the case, a significant amount of jurisprudence is developed. This helps clarify the content of human rights, which in turn enables not just the State being complained about, but also other States Parties to compare their compliance with the right in question.

We can see this through the specific actions taken by the Treaty Body Committee of the Rights of Persons with Disabilities (CRPD). Of the 177 States party to the

[54] Jasper Krommendijk, 'The (In)effectiveness of UN Human Rights Treaty Body Recommendations' (2017) 33(2) Netherlands Quarterly of Human Rights 194, 221.

Convention on the Rights of Persons with Disabilities (ICRPD), 92 recognise the competence of the Committee to hear complaints brought by or on behalf of victims or groups of victims claiming to be victims.[55] By September 2018, the CPRD had decided 26 cases brought against nations such as Argentina, Denmark, Lithuania and Saudi Arabia, finding violations in 16 cases.[56] These cases highlight the serious shortcomings in the practices of States Parties that fail to take the rights of persons with disabilities adequately into consideration. Article 2 of the ICRPD and the denial of reasonable accommodation was at issue in several cases. In its early jurisprudence, the CRPD also had the opportunity to elaborate on key concepts; holding that the 'difference between illness and disability the difference of degree and not the difference of kind',[57] and that States enjoy a margin of appreciation 'when assessing reasonableness and proportionality of accommodation measures'.[58]

In the case of *Nyusti and Takás v Hungary*, indivudals alleged discrimination by the State because they were unable to use cash machines without assistance. This is because the keyboards were not marked with Braille, and nor did they provide audible instructions and voice assistance for banking operations, meaning that the visually impared individuals could not use them. The CPRD acknowledged the efforts Hungary had made to enhance accessibility, but ultimately held in favour of the individuals.[59] The case effectively forced the State to make sure that private entities do not directly or indirectly discriminate against persons with disabilities.

[55] Report of the Committee on the Rights of Persons with Disabilities (twentieth session 27 August – 21 September 2018) (12 December 2018) UN Doc. CPRD/C/202/2, para. 1.
[56] ibid, paras 8-9.
[57] *S. C. v Brazil* (CtRPD) (2014) [6.3].
[58] *Jungelin v Sweden* (CtRPD) (2014) [10.5].
[59] *Nyusti and Takás v Hungary* (CtRPD) (2014) [6.3].

The case demonstrates the CRPD's unwillingness to accept half-hearted measures of implementation and, instead, its insistence that the State Party shows concretely how it complies with its obligations. These judgements, which preside over the issue presented by the individual communications, help to clarify the content of human rights to the States Parties because by deciding the outcome of a particular violation they stipulate what that right requires from the State, thus clarifying any ambiguity or misinterpretation that may have occurred. As a result, the State in question is then clearer as to its obligations under human rights treaties and can accordingly adjust its compliance to align closer with these obligations. Furthermore, other States Parties to the treaties are made aware of the standards set by the Treaty Body from the judgements and can then compare to their own compliance, and if it is incompatible can adjust their legislation to reflect the standards set by human rights treaties.

SUCCESS AND LEGITIMACY

The Achilles heel of the success of individual communications is non-implementation. While there is a certain level of compliance, and many judgements have been implemented,[60] non-implementation remains an inherent obstacle to fulfilling the potential success of this mechanism. Many States do adjust following a judgement concerning a violation of a human right, as set out above, but worryingly many States also fail to do this. It is difficult to pinpoint why some States Parties' are less likely to implement the judgements than others but there are several reasons that could contribute to this.

[60] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (IACtHR) (2001); ibid.

The democratic argument is based on the concern that such a review is undertaken by democratically unaccountable judges, at the expense of democratically elected legislators. Extending this power to international tribunals could be seen as more concerning as the State cannot control either the election of these judges nor amend the treaty obligations.[61] However, international tribunals are not without democratic legitimacy: their establishment is based on the ratification of a treaty by each State according to their national ratification process. Furthermore, the bodies do not issue legally binding judgements – their findings are to be attributed "great weight" and non-compliance may just lead to "naming and shaming".[62] States are legally free to conclude that they do not respect the findings of the body and can simply ignore them and continue with their previous course of action.[63] Treaty Bodies monitoring the implementation of the human rights treaties lack instruments to enforce compliance with their recommendations.[64] Therefore, to remain effective so that

[61] Geir Ulfstein, 'Individual Complaints' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (Cambridge University Press 2012), 46.

[62] For example, in relation to Gambia, the HRCtee considered the situation in absence of a report in 2002 and 'declared the state party to be in breach of its obligations to cooperate with the Committee in the performance of its function under Part IV of the Covenant', and in 2009, referred the matter 'to the High Commissioner for Human Rights, Report of the Special Rapporteur for follow-up on concluding observations', UN Human Rights Committee (HRC), Report of the Special Rapporteur for Follow-up on Concluding Observations (Ninety-fifth session, March 2009), 26 December 2011, UN Doc CCPR/C/95/2/rev.1 (26 May 2009), 2-3.

[63] For example, The 2014 Annual Report of the HRCtee, UN Doc A/69/40 (vol. 1) paras. 258-65; Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press, 2013), 51.

[64] Henry J. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000), 52; Michael O'Flaherty and Pei-Lun Tsai, 'Periodic Reporting: The Backbone of the UN Treaty Body Review Procedures' in M. Cherif Bassiouni and William A. Schabas (eds) *New Challenges for the UN Human Rights Machinery* (Intersentia 2011), 37.

governments feel bound to act upon these judgements, UN Treaty Bodies must be seen and perceived to be legitimate by States.[65]

Thus, Treaty Bodies must rely on the persuasiveness of their reasoning. As Risse and Sikkink comment, countries most sensitive to pressure are not those that are economically weakest, but rather those that care about their international image.[66] If a state consistently refuses to act in accordance with international human rights standards then there is very little that can be done,[67] with the ultimate enforcement measure available being sanctions, or exclusion, from the political body in question, but these steps require a considerable degree of political support which is not easily achieved.[68]

The legitimacy of the communications procedure may be contingent on the extent to which Treaty Bodies are seen as inefficient and ineffective, and whether any review of national decisions by international Treaty Bodies violates democratic ideals.[69] This could stem from their function as expert bodies that examine complaints on a part-time basis without having public hearings or undertaking

[65] James Gibson and Gregory Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice' (1995) 39(2) American Journal of Political Science 459, 460, 470; Franck (n 33), 24, 26.

[66] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights – International Norms and Domestic Change*(1999), 27–38.

[67] Andreea Vesa, 'International and Regional Standards for Protecting Victims of Domestic Violence' (2004) 12 American University Journal of Gender, Social Policy and the Law 309, 360.

[68] See Protocol no. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Explanatory Reports (CTES no. 194) Agreement of Madrid (15/5/2009), para 100.

[69] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346; Richard Bellamy, *Political Constitutionalism* (Cambridge University Press 2007).

fact-finding, and issue decisions that often do not attract great visibility, although they attract greater visibility than Special Procedures do because of the increased knowledge of UN Treaty Bodies in the world. If they are repeatedly not complied with, this is also likely to limit their success if States take non-compliance by others as a justifiable precedent.

This can culminate in growing non-implementation, and also a lack of recognition of the competence of Treaty Bodies to hear individual communications. As of 2018, only 58 of the 179 States party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) had made the declaration under Article 14;[70] 68 of the 165 States Parties had made the declaration under Article 22 United Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);[71] and, 109 of the 189 States Parties had recognised the competence of Committee on the Elimination of Discrimination Against Women (CEDAW).[72] Although this arguably shields the Committees from the opposite problem of a significantly large increase in caseload that would adversely affect the effectiveness of complaints procedures,[73] the fact that these communications are underutilised prevents a large number of nations from being bound to the standards that are clarified by the Committees. Consequently, the ability to clarify the content and protect human rights standards is constrained and therefore the success and legitimacy of these Treaty Bodies is constrained.

[70] Report of the Committee on the Elimination of Racial Discrimination, UN Doc. A/73/18 (2018), 2.
[71] Report of the Committee Against Torture, UN Doc. A/73/44 (2018), 56.
[72] Report of the Committee on the Elimination of Discrimination against Women, UN Doc. A/73/38 (2018) 41, 1-2.
[73] Ilias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press 2020), 233.

GENERAL COMMENTS

General Comments are a Treaty Body's written instruments to set out its views on the rights and obligations under the treaty concerned. They are an interpretation of the provisions of its respective human rights treaty provisions and thematic issues. As such, the purpose of a General Comment is to interpret and clarify substantive provisions, not only regarding the reporting duties of State Parties, but also when it comes to providing guidance and suggesting approaches to the implementation of the treaty provisions or thematic issues in question. However, they remain not legally binding. Instead, General Comments are 'secondary soft law instruments',[74] meaning they are sources of non-binding norms that interpret and add detail to the rights and obligations contained in the respective human rights treaties.

Their highly authoritative character is based on the provisions of the Convention and is recognised in international law in Article 31 of the 1965 Vienna Convention on Law of Treaties,[75] stipulating that treaties need continuous contextual interpretation. Through the ratification of the Convention, States accept Treaty Bodies play a crucial role in the interpretation of enshrined rights and therefore also in the monitoring of the proper implementation in the respective countries. Furthermore, as norm-generating instruments, they increase the density of international practice on the interpretation of the Covenant, and over time could contribute to the emergence of customary international legal norms.[76] General

[74] Dinah Shelton, 'Commentary and Conclusions' in Dinah Shelton (ed), *Commitment and Compliance* (Oxford University Press 2000), 449–64, 451.
[75] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, article 31.
[76] Eckart Klein, "Allgemeine Bemerkungen" der UN-Menschenrechtsausschüsse', *Handbuch der Grundrechte in Deutschland und Europa* (Heidelberg: C.F. Müller Verlag, 2009), 416.

Comments have served to clarify the fundamental norms of a treaty, such as the application of non-discrimination to violence against women,[77] and the relationship between torture and other forms of cruel, inhumane or degrading treatment or punishment.[78]

Further examples of how General Comments have developed and clarified the content of human rights are found in the work of the Committee on Economic, Social and Cultural Rights (CESCR). The CESCR has used its General Comments to develop a sophisticated understanding of States Parties' obligations necessitated by the controversies surrounding the nature of economic, social and cultural rights, and corresponding obligations.

This process was initiated by General Comment 3 on the nature of States Parties' obligations. The General Comment explained esoteric legal terms to clarify the nature of obligations set out by the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Comment seeks to clarify the content of Article 2(1) ICESCR, which states that State parties must undertake steps to implement the rights with 'a view to achieving progressively the full realization of the rights recognized'.[79] The General Comment states that this 'flexibility device, reflect[s] the

[77] Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 12, Violence Against Women, UN Doc A/41/45 (1989); General Recommendation General Recommendation No. 19 on Violence Against Women, U.N. Doc A/47/38 (1992); General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN Doc CEDAW/C/GC/35 (2017).

[78] For example, the use of solitary confinement in prisons. See Committee Against Torture, General Comment 2: Implementation of Article 2 by State Parties, UN Doc CAT/C/GC/2 (24 January 2008).

[79] International Covenant on Economic, Social and Cultural Rights, article 2(1) .

realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights'.[80] The phrase must be read accounting for the 'overall objective of the Covenant which [aims to] establish clear obligations for States Parties in respect of the full realization of the rights in question'.[81] 'It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal'.[82] The comments made by the CESCR clarify the requirements by stating that progressive realisation is not a polite bureaucratic request that can be disregarded, but rather they act as a soft directive, delineating human rights obligations and stipulating what States must do to comply, for example, with policy implementation, but within the fiscal restraints that a country may be subject to.

This has in turn been referred to in national jurisprudence, as exhibited in the *Grootboom* case.[83] The Constitutional Court lays the foundation for the justiciability of the obligation to progressively realise economic, social, and cultural rights, which will be reviewed on a 'reasonableness test', and exercise appropriate deference at the stage of remedy.[84] The ruling places the adjudication of economic, social, and cultural rights within a familiar framework to courts in all jurisdictions and modifies the rationality review standard adopted in the earlier *Soobramoney* case.[85] This

[80] General Comment No. 3, The Nature of States Parties' Obligations (1990) UN Doc E/1991/23, para. 9.
[81] ibid.
[82] ibid.
[83] *Government of the Republic of South Africa and Others v Grootboom and Others* (South Africa (2000). See also *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* ICJ (2010) para 66 (General Comment 15); [77] (General Comment 8).
[84] *Government of the Republic of South Africa and Others v Grootboom and Others* (South Africa (2000) [29]-[31].
[85] *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal* (CCT32/97) [1997] ZACC 17.

demonstrates the essential role played by General Comments to clarify the content of human rights,[86] which in turn ensures that States Parties are fulfilling their obligations as set out by the relevant treaty.

General Comments appear to have a robust legal analytical function and do not merely contribute to the normative content of the human right in question. They have developed several ways to clarify the scope and content of Covenant rights. General Comments include descriptions of domestic laws that must respect a Covenant right,[87] as well as classes of persons who bear a right and those who have certain corresponding duties.[88] General Comments also detail where rights and duties apply (for example all places of detention, not just prisons),[89] when they apply,[90] what is protected by a right (for example, certain legal activities,[91] ordinary activities,[92] and objects),[93] and modes of liability for a Covenant violation.[94]

[86] Thomas Buergenthal, 'The UN Human Rights Committee' (2001) 5 Max Planck Yearbook of United Nations Law 341, 387.
[87] General Comment No. 4 (1981) UN Doc 30/07/81.
[88] See General Comment Nos. 7 (1982) UN Doc 30/05/82; 13 UN Doc 13/04/84 (1984); 15, UN Doc 11/04/86 (1986); 16, UN Doc 08/04/88 (1988); 17, UN Doc 07/04/89 (1989); 20, UN Doc 10/03/92 (1992); 23, UN Doc 08/04/94 (1994); and 32, 23 August 2007, UN Doc CCPR/C/GC/32 (2007).
[89] See General Comment Nos. 8, UN Doc 30/06/82 (1982); 9, UN Doc 30/07/82 (1982); 13, UN Doc 13/04/84 (1984); 31, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) and 32, 23 August 2007, UN Doc CCPR/C/GC/32 (2007).
[90] General Comment Nos. 8, UN Doc 30/06/82 (1982); 13, UN Doc 13/04/84 (1984); 31 (2004); 32, 23 August 2007, UN Doc CCPR/C/GC/32 (2007) and 33, 23 August 2007, UN Doc CCPR/C/GC/32 (2008).
[91] General Comment Nos. 13 UN Doc 13/04/84 (1984); 18, UN Doc 10/11/89 (1989) and 32, 23 August 2007, UN Doc CCPR/C/GC/32 (2007).
[92] General Comment No. 25, UN Doc CCPR/C/21/Rev.1/Add.7 (1996).
[93] General Comment No. 16, UN Doc 08/04/88 (1988).
[94] General Comment No. 20, UN Doc 10/03/92 (1992), para. 13.

Additionally, the Committee has set out legal tests applicable to determining the existence of a Covenant violation. For example, the first such test can be found in General Comment 18 on non-discrimination and indicates that, for differential treatment not to constitute discrimination under the Covenant, it must aim to achieve a purpose that is legitimate under the Covenant and must be reasonable and objective. The 'reasonable and objective' test has become a mainstay of the Committee's General Comments.[95] The same goes for the principle of proportionality, which was introduced in 1996.[96] On occasion, the Committee has gone one step further and listed acts that violate or might violate certain Covenant rights.[97] While the Committee has used many impressive techniques to ensure the determinacy of Covenant rights, these techniques are not consistently invoked in General Comments.[98] Thus, determinacy varies. Regardless, it is clear to see how General Comments have clarified and expanded upon the normative content of human rights.

SUCCESS AND LEGITIMACY

General Comments have been seen as legitimate by States Parties and thus have been largely successful in their role of clarifying human rights. One key aspect for

[95] See General Comment Nos. 25, UN Doc CCPR/C/21/Rev.1/Add.7 (1996) and 32 23 August 2007, UN Doc CCPR/C/GC/32 (2007), paras. 9, 13 and 14.
[96] See General Comment Nos. 25, UN Doc CCPR/C/21/Rev.1/Add.7 (1996); 27, 2 November 1999, UN Doc CCPR/C/21/Rev.1/Add.9 (1999), paras. 11–18; 29, 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para. 4 and 32, 23 August 2007, UN Doc CCPR/C/GC/32 (2007), para. 37.
[97] See General Comment Nos. 18, UN Doc 10/11/89 (1989); 20 (1992) UN Doc 10/03/92 and 32, 23 August 2007, UN Doc CCPR/C/GC/32 (2007), para. 15.
[98] Helen Keller and Leena Grover, 'General Comments of The Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies Law and Legitimacy* (Cambridge University Press 2012), 116-198.

the success of General Comments is their presumption of correctness. This presumption derives from the fact that the Committee is the only international body established to interpret the Covenant.[99] This mandate also enhances the persuasiveness of General Comments, as does the fact that their legal analysis is usually based not simply on mere interpretation or theory, but on concrete experience gathered in the examination of State Reports and cases under the Optional Protocol. This is what has led some to see General Comments as comparable to advisory opinions.[100]

The legitimacy, and by extension, the success of General Comments has been attributed to a number of factors, which were identified in a series of interviews with committee members as determinacy, symbolic validation, coherence, adherence and democratic decision-making.[101] For example, determinacy is the textual 'clarity of the message transmitted by a rule to those at whom it is directed as a command'.[102] The idea is that a rule with content that is easy to ascertain has a better chance of regulating the conduct of its audience members, so long as it does not produce absurd results,[103] than one which is ambiguous.[104] General Comments are a means of enhancing the determinacy of the Covenant and they can do this through the use of mandatory language to bolster the authoritativeness of a statement and highlight legal obligations stemming from the Covenant, or permissive language to gently

[99] ibid.
[100] Buergenthal (n 86), 386; *Ahmadou Sadio Diallo*, (n 86), 66.
[101] Keller and Grover (n 98).
[102] Thomas Franck, 'Legitimacy in the International System' (1988) 82 American Journal of International Law 705, 721.
[103] Franck (n 35), Ch. 5.
[104] ibid, 52.

persuade states to comply with very real Covenant obligations.[105] In addition, if a primary rule does not adhere to a system of validating secondary rules, the primary rules are merely *ad hoc* arrangements of reciprocity.[106] Thus, the legitimacy of a primary legal rule in a General Comment may be demonstrated by partly showing that it arises from adherence to secondary rules on 1) the sources of international law; 2) the interpretation of international law; and 3) the process for drafting General Comments.[107] Once General Comments are perceived as illegitimate then compliance and therefore the success that they have dwindles, highlighting the importance of perceived legitimacy.

Several academics believe that the success of General Comments' ability to clarify the content of human rights hinges on the levels of consistency and persuasiveness. [108] Copelon goes further, remarking that the international human rights system still operates more in 'rhetoric than in reality'.[109] A notable example was the Human Rights Committee's (HRCtee) General Comment 24, which elicited considerable controversy. Several states, namely the UK, USA and France, took exception to the HRCtee's position that it, rather than the States Parties themselves, has the competence to decide on the validity of reservations, as has been the traditional

[105] Keller and Grover (n 98), 146.
[106] Franck (n 35), 184.
[107] ibid 183, 193.
[108] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007), 154–7. See also Andrew Byrnes, 'Enforcement Through International Law and Procedures', in R. J. Cook (ed), *Human Rights of Women – Nationaland International Perspectives* (1994), 191-192.
[109] Rhonda Copelon, 'International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking' (2003) 11 American University Journal of Gender, Social Policy and the Law 865, 875.

understanding in international law.[110] Such reactions generate tension that can damage the relationship between States and Treaty Bodies, and undermine the latter's authority and legitimacy. This can have serious implications on the success of the Treaty Bodies because if they are not seen as legitimate then the fragile balance between State and Body will precipitously fall away, and as a result States will no longer look to the Treaty Body for guidance on the clarification of the content of human rights.

Nonetheless, they retain a base level of legitimacy and persuasive authority owing to the expertise of the members of the Treaty Bodies and to their experience in examining State Party reports over many decades. Consequently, States tend to apply the criteria developed therein voluntarily,[111] and therefore by extension General Comments' success at clarifying the content of human rights is delicately balanced but maintained.

[110] See observations by the USA, UK and France on General Comment 24, in Report of HRCtee, UN Doc A/50/40 (3 October 1995), Annex IV (USA and UK), and United Nations, Report of the Human Rights Committee, UN Doc A/51/40 (13 April 1997), Annex VI (France).

[111] Takhmina Karimova, Gilles Giacca and Stuart Casey-Maslen, 'United Nations Human Rights Mechanisms and The Right to Education in Insecurity and Armed Conflict' (2013) Geneva Academy of International Humanitarian Law and Human Rights <https://www.geneva-academy.ch/joomlatools-files/docman-files/Protection%20of%20Education%20in%20Armed%20Conflict.pdf> accessed 10 January 2021, 8; Philip Alston, 'The Historical Origins of "General Comments" in Human Rights Law', in Lawrence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum*, Georges Abi-Saab, Martinus Nijhoff, The Hague, 2001), 257–75.

CONCLUDING THOUGHTS

Overall, UN Special Procedures and UN Treaty Bodies have both played significant roles in clarifying the normative content of human rights and have had marked success in doing so.

Special Procedures have been able to clarify the content of human rights through country visits and report writing. Individually, the mechanism of country visits does not play a hugely significant role in clarifying human rights content, as it is more effective at on-the-ground information gathering and using its status to promote compliance. However, their use in the overall role that Special Procedures play hugely facilitates the clarification of the content of human rights. For example, country visits excel at promotion and pushing for implementation, but the reports they then write play a significant role in clarification. Other UN mechanisms, such as UPR, will then rely on these reports which can further clarify the normative content of rights. Overall, Special Procedures, when split into their individual components, are not as successful at clarifying the content of human rights, but when used in conjunction, their effectiveness at clarifying human rights noticeably increases and helps Special Procedures provide a crucial role in the clarification of rights content.

Reports written by UN Special Procedures have also played an essential role in clarifying the content of human rights. These reports delineate human rights violations when they are submitted to the Human Rights Council, clarify to the

relevant States the reasons why they have violated a certain right and establish to these States what must be done for them to comply with human rights.

UN Treaty Bodies have also played a substantial role in the clarification of human rights with high levels of success. They have been able to achieve this through the mechanisms of individual communications, State Reporting and General Comments.

Individual communications play a crucial role in the human rights legal framework, allowing individuals or groups of individuals to complain directly to the UN about human rights violations they believe they have been subjected to. Such communications present the opportunity for Treaty Bodies to deliver judgements concerning these violations and can consequently define obligations more clearly. This not only informs the State being complained about but also allows other States to see what is expected of them in order to fulfil their obligations. Despite the crucial role that individual communications can play in clarifying the content of human rights, their success is limited because of non-implementation, which stems from a perception of illegitimacy and undemocratic procedures. As a result, States Parties' are entitled to simply disregard their findings and therefore render any clarifications made in the judgement ineffective, forcing UN Treaty Bodies to rely on their persuasiveness to boost implementation.

The mechanism of State Reporting and interaction of the subsequent Concluding Observations has played a vital role in the clarification of human rights. After States have submitted their reports, the Treaty Body is able, in its Concluding Observations, to identify where States are failing in their obligations and clarify what

is required by that specific treaty to comply. This has led to a successful implementation of policies following the clarification of human rights obligations. However, despite the strong legal framework, the success of State Reporting and Concluding Observations has been varied due to a lack of enforcement mechanisms and an inability to mobilise domestic actors. A lack of enforcement power minimises the disadvantages to States from not submitting reports, and thus, lowers the impetus to comply with reporting obligations. Furthermore, there can be an inability to mobilise domestic actors, such as NGOs and political parties, who use the reports to compel governments to comply. These factors lead to it being far more difficult to ensure that States comply with Concluding Observations than it should be.

Lastly, the mechanism of General Comments has played a central role in the clarification of human rights. Treaty Bodies achieve this because General Comments can interpret and clarify substantive human rights provisions, not only regarding the reporting duties of State Parties, but also when it comes to providing guidance and suggesting approaches concerning the implementation of the treaty provisions or thematic issues in question. This is crucial in helping to clarify the normative content of human rights. The mechanism of General Comments has been largely successful, which is mostly down to their perceived legitimacy based on the exhibited factors of determinacy, symbolic validation, coherence, adherence, and democratic decision making. This aids the mechanism to be consistent and persuasive in its undertaking, which promotes successful outcomes.

Legal Analysis on the Accession of the European Union to the European Convention on Human Rights: Towards a Marriage or a Divorce?

*Giselle Vega**

"The *raison d'être* of the EU judiciary is not to ensure
a minimum protection of fundamental rights in Europe
but uniformity of EU law based on the principle of equality
of Member States […] Opinion 2/13 demonstrate[s] that
[the] protection of fundamental rights is pursued
to the extent and only to the extent
that it does not undermine
the unity and effectiveness of EU law".[1]

- Dean Spielmann,
Judge at the General Court of the European Union
and former President of the European Court of Human Rights

INTRODUCTION

Under Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), individual applications against actions and omissions committed by the European Union (EU) are inadmissible before the European Court of Human Rights (ECtHR).[2] While all EU Member States are contracting parties to the Convention and are subject to

[1] Dean Spielmann, 'The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights or How to Remain Good Neighbours after the Opinion 2/13' (Speech at the FRAME, Brussels 27 March 2017) <www.fp7-frame.eu/wpcontent/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final.pdf> accessed 14 November 2020.

[2] Tobias Lock, 'Accession of the EU to the ECHR: Who would be responsible in Strasbourg?' (2010) Maynooth University Department of Law <https://ssrn.com/abstract=1685785 114> accessed 20 February 2021.

* ***LLB Exon (Hons)***.

the control mechanisms of Strasbourg by virtue of Article 1 ECHR, the EU enjoys immunity *vis-à-vis* the ECtHR's external scrutiny.[3] The present exemption has given way to academic criticisms and extensive literature on the feasibility of concluding the accession process in the years to come.[4]

Although EU accession to the ECHR has not been achieved, significant progress was made in the last decade when a promising agreement for accession was finalised. In 2010, after three years of arduous negotiations between EU Member States and non-EU high contracting parties (HCPs) to the ECHR, accession was regarded as a settled matter. The human rights gap would finally be closed since the EU would become accountable to the ECtHR like all EU Member States.[5] Successively, in May 2013, the Steering Committee for Human Rights submitted the Draft Accession Agreement (DAA) to the Court of Justice of the European Union (CJEU) to assess its compatibility with the Union's law.[6]

Almost two years later, on 18 December 2014, the CJEU declared the DAA incompatible with EU law in its ruling, Opinion 2/13.[7] In contrast to the optimistic spirit shared by the European Commission, the Council of the European Union, the European Parliament, and the majority of EU Member States, in Opinion 2/13, the CJEU raised ten objections against the approval of the Agreement.[8] The contentious points concerned, *inter alia*, issues relating to the exclusive jurisdiction of the CJEU to interpret EU law, the principle of

[3] ibid; Johan Callawaert, 'Do We Still Need Article 6(2) TEU? Consideration on the absence of EU Accession to the ECHR and Its Consequences' (2018) 55(6) Common Market Law Review 1689.
[4] Given the numerous academic works incorporated, reference to legal scholarship can be found in the last section of this paper.
[5] Lock (n 2) 114.
[6] ibid.
[7] *Opinion 2/13* ECLI:EU:C:2014:2454; Clara Rauchegger and Sarah Lambrecht, 'European Union: The EU's Attitude to the ECHR' in Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-dynamics at the National and EU Level* (Intersentia 2016) 42.
[8] ibid.

mutual trust, the co-respondent model, and the Common Foreign and Security Policy. While Advocate General Kokott favoured a 'yes, if' approach to clear accession, the CJEU held a 'no, unless' position. The CJEU made clear it would not declare the Agreement compatible and allow accession unless the needed amendments were adequately addressed first. Consequently, Opinion 2/13 was heavily criticised by academic commentators and EU institutions, given the political momentum that surrounded the accession of the EU at the time. Following the ruling, unsurprisingly, the commitment of the CJEU to the protection of human rights was put into question among EU Member States and non-EU HCPs to the ECHR.

As a result, the objections laid down in Opinion 2/13 and the requirement to deliver a revised agreement compatible with EU law in its entirety brought accession to a halt. Notably, the CJEU's objections call for substantive change in the Agreement and a rebalance of judicial powers between the CJEU and the ECtHR. Currently, numerous unprivileged applicants cannot access the CJEU due to the stringent standing test established in the Lisbon Treaty.[9] Even with the introduction of an EU catalogue of human rights, the Charter of Fundamental Rights of the European Union (EU Charter or CFR), effective access to justice and human rights enforcement still remain a challenge for alleged victims. While the matter has been left aside for several years, there is an urgent need for political action and reform in both justice systems. It is worth noticing that the ECHR has not only influenced the EU's human rights jurisprudence but has also provided an alternative route for court actions brought by individuals who do not meet the CJEU's judicial standing criteria.

[9] Noreen O'Meara, 'A More Secure Europe of Rights?' The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' (2011) 12(10) German Law Journal 1823; see also Callawaert (n 3) 1689.

Markedly, the pressure to achieve formal accession in the years to come stems from the explicit obligation incorporated in the Treaty of the European Union (TEU). Article 6(2) TEU acts as the legal basis of the commitment of the EU to seek accession. Nonetheless, the accession process is a qualified one since the EU shall accede to the ECHR without affecting the competences of the Union as established in the Treaties. Equally important, Article 6(3) TEU declares that fundamental rights as recognised in the Convention "shall constitute general principles of the Union's law". Thereby, the special status conferred to Convention rights in the EU Treaties is central to the interpretation and enforcement of EU law by the CJEU.

Along the same lines, according to Article 52(3) of the EU Charter, the rights laid down in the Charter shall guarantee the enforcement of corresponding rights by the CJEU to the same scope and meaning acknowledged in Strasbourg. Because of this, an effective dialogue must be maintained between the courts to afford an equal degree of protection of human rights. To this end, it is worth noticing that the long-standing relationship between the CJEU and the ECtHR has been weakened by the introduction in 2008 of the EU Charter, a legally binding framework on EU institutions and EU Member States. As a result, the incorporation of the EU Charter to the legal edifice of the EU has given way to significant uncertainty in the evolution of human rights jurisprudence in Europe.

In 2020, the EU resumed negotiations to discuss possible amendments to the DAA. Nonetheless, prospects of success remain small, given the prevailing struggle between the constitutional principles of the EU and the enforcement of Convention rights in the CJEU, as well as the difficult negotiations between EU Member States and non-EU HCPs to the ECHR. Besides, even though accession was of immediate importance for EU institutions and EU Member States in 2010, the political conjuncture that Europe is experiencing in 2021 due

to the Covid-19 pandemic may further preclude the process of accession. Thus, it is uncertain if EU accession will ever be achieved.

Against this background, this dissertation will address the research question 'Legal Analysis on the Accession of the European Union to the European Convention on Human Rights: Towards a Marriage or a Divorce?' and will argue that the EU's decision to accede to the ECHR has the potential of undermining human rights protection in Europe because of the development of divergent jurisprudences in each legal order. This author contends that in order to protect the autonomy of both legal regimes, the ECHR should not be incorporated into the EU's legal structure. Nevertheless, in light of Article 6(2) TEU and Article 52(3) CFR, judicial dialogue can be reinforced by requiring CJEU judges to consult and make explicit references to the jurisprudence of the ECtHR in their judgments.

The first chapter of this work will focus on the relationship between the CJEU and ECtHR, the development of the EU's human rights framework in light of the ECHR and the reluctance of the CJEU to include express citations and cross-references of ECtHR case law in its judgments. Next, certain objections presented in Opinion 2/13 and how they are in conflict with key constitutional principles of EU law will be discussed. Finally, the challenges lying ahead to achieve accession, as well as the political difficulties in the negotiation table, will be further analysed.

I. RELATIONSHIP BETWEEN THE CJEU AND THE ECtHR: BEFORE AND AFTER THE EU CHARTER AND OPINION 2/13

Before Opinion 2/13, the relationship between the CJEU and the ECtHR was described as harmonious and cooperative.[10] Mutual cross-citations rooted for the advancement of an active judicial dialogue and legitimacy of the human rights jurisprudence developed in both Courts.[11] By the same token, through speeches, meetings and academic engagement, such dialogue was continuously reinforced in an extra-judicial context.[12] Nonetheless, in light of the incorporation of the EU Charter, the predominant role it has gained within the EU legal order and the infamous Opinion 2/13, the positive relationship between the Strasbourg and Luxembourg Courts must be questioned.[13] The relationship between the Courts, some of the difficulties behind the uniform interpretation of corresponding rights and the CJEU's obligation to ensure the uniformity and effectiveness of EU law will be studied next.

A change in the pattern of behaviour of the CJEU is one of the major concerns in the academic community. Since the EU Charter came into force, it has been generally agreed that there have been fewer *Strasbourg friendly* judgments. It is argued that after Opinion 2/13 was delivered, references to ECtHR judgments have been made with less frequency and consistency.[14] Interestingly, the special consideration that the CJEU has given to the EU Charter has been popularly

[10] O'Meara (n 9) 1815; Christopher McCrudden, 'Using Comparative Reasoning in Human Rights Adjudication: the Court of Justice of the European Union and the European Court of Human Rights Compared' (2013) 15 Cambridge Yearbook of European Legal Studies 390.
[11] O'Meara (n 9) 1815.
[12] ibid 1816.
[13] Bruno De Witte, 'The European Union in the International System of Human Rights Protection: Solo Singer or Voice in the Choir?' in Emmanuelle Bribosia and Isabelle Rorive (eds), *Human rights tectonics: global perspectives on integration and fragmentation* (Intersentia 2018) 226.
[14] Sarah Atkins, 'Between the CJEU and the ECtHR: human rights of asylum seekers and their reception conditions in Europe since Opinion 2/13' (2020) 34(2) Journal of Immigration, Asylum and Nationality 169.

referred to as *Charter centrism*.[15] According to Atkins, the CJEU has progressively given human rights cases a distinct treatment than the one it used to give before Opinion 2/13, asylum cases being one of the areas where the deviation is more noticeable.[16] Nevertheless, Atkins bases her analysis mainly on the decrease in the number of explicit references made by the CJEU in its judgments. Conversely, Krommendjik believes that it is too soon to assert with certainty that Opinion 2/13 has actually affected the judicial dialogue between the Courts.[17] In contrast to Atkins, he recognises an important limitation of Atkins' proposition, namely the short period of time that has passed since Opinion 2/13 was delivered. More years are needed to confirm whether the decline of judicial cross-fertilisation is a solid practice in Luxembourg. For the time being, only tentative observations and trends can be formulated.[18] Thereupon, while the number of references has declined and it can be inferred that this is because of Opinion 2/13, it cannot be concluded that the CJEU will intentionally overlook the ECHR or new developments incorporated into ECtHR case law in the future.

The legal obligation that arises from Article 52(3) CFR states that the ECHR must be used as an interpretative source by the CJEU in its rulings.[19] Academic discourse has described Article 52(3) CFR as an "interpretive bridge" between the EU's fundamental rights regime and the ECHR.[20] Before the introduction of the EU Charter, the CJEU used the ECHR as a yardstick to conduct a legality review of human rights protection.[21] For this reason, Roes and Petkova claim

[15] Jasper Krommendijk, 'Opinion 2/13 as a Game Changer in the Dialogue between the European Courts?' in Emmanuelle Bribosia and Isabelle Rorive (eds), *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation*(Intersentia 2018) 249; Opinion 2/13 (n 7) [169].
[16] ibid 160.
[17] Krommendijk (n 15) 245.
[18] ibid 245, 246.
[19] Atkins (n 14) 168; Lock (n 2) 109.
[20] Timothy Roes and Bilyana Petkova, 'Fundamental Rights in Europe after Opinion 2/13: the Hidden Promise of Mutual Trust' in C Landfried (ed), *Judicial Power: How Courts Affect Political Transformations* (Cambridge University Press 2018) 205.
[21] ibid.

that the Convention has been fully integrated into the EU's legal order, as well as in the laws of its Member States.[22] Nonetheless, in *Akerberg Fransson*[23] and *Kamberaj,*[24] the CJEU made clear that the ECHR is a legal instrument that has not been formally incorporated into the EU and has reiterated this postulation after Opinion 2/13.[25] Even though the EU's human rights jurisprudence has been largely influenced by Strasbourg, this legality review cannot be equated with a formal incorporation of the Convention to the EU's legal order.

With this in mind, it can be argued that the *incorporated* status of the EU Charter and the *unincorporated* status of the Convention carry strong significance in Luxembourg; otherwise, the Charter would lose relevance within its own legal order *vis-à-vis* other international human rights frameworks. As a result, the introduction of the EU Charter has encouraged CJEU judges to give greater relevance to the EU's catalogue of fundamental rights over other regimes and has referred to the Convention with more modesty. After Opinion 2/13, the CJEU has abstained from describing ECtHR case law as "a source of inspiration" or "of special significance".[26] Similarly, fewer references to ECtHR case law in EU judgments have rested importance to the ECHR as a source of inspiration.[27] In the last decades, in spite of an absent human rights framework, the CJEU ensured the observance of fundamental rights by drawing inspiration from other human rights frameworks.[28] Still, in light of an EU catalogue of human rights, there is keen interest in CJEU judges to develop an independent

[22] ibid; see also Spielmann (n 1) 5, 6.
[23] C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105.
[24] C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* ECLI:EU:C:2012:233.
[25] Krommendijk (n 15) 247.
[26] ibid 267.
[27] Martin Kuijer, 'The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession' (2020) 24(7) International Journal of Human Rights 1002.
[28] ibid 1000.

framework of human rights and revendicate the power of the Court to exercise an autonomous interpretation of the EU Charter before accession.

To this end, it is worth remembering that although the Strasbourg and Luxembourg Courts have a story in common, they pursue different objectives. While the ECtHR is concerned with fundamental rights, the CJEU aims to guarantee a balance between uniformity, primacy and effectiveness of EU law.[29] In *Melloni*, the role of the CJEU was clearly distinguished from that of the ECtHR.[30] According to the judgment, the CJEU is not a second supranational court but a federal constitutional and supreme court.[31] From the Convention side, *Melloni* has been regarded as a judgment which is difficult to understand. It has been argued that by applying a legal doctrine, the CJEU has sacrificed a higher protection of human rights.[32] Therefore, even though a jurisdictional overlap exists between both legal orders, the character and objective of the CJEU must be fully appreciated. Both jurisprudence cannot be developed in a homogenous way, and naturally, the distinct character of the CJEU will be reflected in its judgments. As CJEU judges often highlight in academic lectures, the CJEU is not a human rights court but the Supreme Court of the EU.[33] In fact, in some cases, such as *Willems* and *X and X,* the strong consciousness of CJEU judges about the different objectives of the Courts has resulted in resistance to issue rulings from a fundamental human rights perspective.[34] It follows that a more nuanced understanding of human rights adjudication in the EU, as opposed to other human rights regimes, must be developed by commentators by giving special attention to the specific objectives and nature of the Luxembourg Court.

[29] Krommendijk (n 15) 244.
[30] C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.
[31] Roes and Petkova (n 20) 207.
[32] Kuijer (n 27) 1004.
[33] Krommendijk (n 15) 263.
[34] ibid.

Moreover, the role of the CJEU and the ECtHR cannot be equated. Throughout time, each court has developed legal traditions that reflect their specific character and objectives. More often than not, in an attempt to match one court with the other to construct a critique of Opinion 2/13, the characteristics of each court are analysed at a superficial level, resulting in scenarios that do not contemplate the reality and practical implications of their long-term relationship. The historical background of the CJEU and the way in which its role has evolved within the legal order of the EU largely differs from Strasbourg's. In its origins, the CJEU was responsible for ensuring that the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community observed the law of the treaties. Considerations as to the infringement of human rights and other international frameworks on human rights were not among the primary functions of the Court until recent years. On the contrary, the ECtHR has shown a strong willingness to take into consideration other human rights instruments since it was founded. In *Saadi v United Kingdom*,[35] the ECtHR had regard to the EU Charter even before it became legally binding in the EU.[36] It follows that parallel interpretation and cross-fertilisation are solid practices in the ECtHR, yet this is not necessarily the case in the CJEU. Expecting the CJEU to mirror such an approach is futile and a way in which the CJEU's autonomy can ultimately be undermined.

It is worth pointing out that as part of a legal tradition, the CJEU does not often cite international legal texts.[37] Nonetheless, in the context of Convention rights, this tradition has become problematic. While scholarly discourse recognises the reasons behind the practice, mainly because of pragmatic considerations such as keeping judgments short and focusing on solving the dispute, it also warns about

[35] C-13229/03 *Saadi v. the United Kingdom [GC]*.
[36] Atkins (n 14) 163.
[37] Rauchegger and Lambrecht (n 7) 53.

not having written evidence that reflects the CJEU's commitment to Article 52(3) CFR.[38] It is worth mentioning that among the multiple instruments of law, the ECtHR's jurisprudence has been the body of foreign case law most cited by the CJEU.[39] This observation should not be disregarded since it confers unique importance to the ECHR over other international legal texts. Thereupon, even though it is a general practice of the CJEU to avoid citing foreign law, arguments that insist on the systematic incorporation of explicit citations and cross-referencing of ECtHR case law have a strong foundation and are well justified.

Additionally, in light of Article 52(3) CFR, it is expected that the CJEU will systematically conduct a double-check of the rights recognised in the EU Charter and the ECHR when delivering a judgment.[40] Nevertheless, as De Witte underscores, the CJEU does not conduct such checks systematically, and even if it did so, there is no clear evidence that a check on ECtHR case law has been done since there are no express references or citations.[41] From a direct observer point of view, there is no ample evidence that the CJEU considered or at least had regard for ECtHR jurisprudence in its judicial reasoning to comply with Article 52(3) CFR. It follows that the CJEU's justification to not cite ECtHR case law is not sufficiently strong when the relationship between both Courts is examined, and the obligation of the CJEU to consider the meaning and scope of corresponding rights is discussed. Against this background, as a matter of necessary convenience, the CJEU must develop an exception for ECtHR case law and systematically incorporate explicit references in its judgments given the

[38] ibid; De Witte (n 13) 231; Krommendijk (n 15) 250.
[39] Lize R Glas and Jasper Krommendijk, 'From Opinion 2/13 to *Avotins*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts' (2017) 17(3) Human Rights Law Review 569.
[40] De Witte (n 13) 228.
[41] ibid.

underlying relationship between the Courts and the legal uniformity that shall exist in the EU's human rights jurisprudence.

Further, the CJEU's intention to avoid cherry-picking has resulted in a paradoxical state of the Court's jurisprudence, and more generally, of EU law. With the purpose of reflecting an impartial attitude, the CJEU has developed a legal tradition where it does not explicitly rely on international or comparative law in its rulings.[42] It has been argued that the CJEU maintains this practice since it does not want to give the impression of privileging an EU Member State over the others.[43] Nonetheless, this attitude is counterproductive since the few ECtHR case laws cited by the CJEU give the impression of cherry-picking.[44] In this manner, the CJEU's desire to communicate an image of neutrality and not favouring a particular EU Member State works against it as it weakens the internal relationship between the CJEU and EU Member States. Rauchegger and Lambrecht assert that the CJEU's limited number of explicit references to ECtHR case law should not be interpreted as a criticism against the Strasbourg Court.[45] Still, valid arguments have been formulated to address the motives behind the CJEU's low number of explicit citations of ECtHR case law, namely Charter centrism and the intention of the CJEU to develop a fortified jurisprudence of Convention rights before the EU becomes a HCP to the ECHR.[46] It follows that the CJEU has failed to consider the downside of its practice. Worse, it has procured an environment where speculations can easily blossom as to its neutrality and lack of commitment to comply with its legal obligation to give due regard to ECtHR case law and afford adequate protection to human rights across EU Member States.

[42] Rauchegger and Lambrecht (n 7) 53.
[43] ibid.
[44] De Witte (n 13) 229.
[45] Rauchegger and Lambrecht (n 7) 53.
[46] Adam Łazowski and Ramses A Wessel, 'When Caveats Turn into Locks: *Opinion 2/13* on Accession of the European Union to the ECHR' (2015) 16 German Law Journal 180.

After Opinion 2/13, as already mentioned, the CJEU has demonstrated an intention to develop an autonomous interpretation of human rights provisions by putting aside the ECHR and ECtHR case law in its judgments.[47] But, can the CJEU develop an autonomous interpretation of human rights provisions in light of Article 6(2) TEU and 52(3) CFR? Roes and Petkova believe that a cooperative judicial dialogue between the Courts amounts to more than just voluntary comity.[48] There is a legal duty enshrined in Article 52(3) CFR where the CJEU is bound to consider to the same scope and meaning the rights recognised in the EU Charter with reference to the Convention. It follows that the CJEU must afford a similar level of protection by having due regard to the minimum standard of rights as established in ECtHR case law; otherwise, a risk of divergence can arise.[49] According to Atkins, the noticeable attitudinal shift of the Luxembourg Court towards Strasbourg has resulted in the possibility of having divergent interpretations of human rights in the years to come.[50] If the CJEU offers lower protection than the ECtHR's *de minimus*, incompatibility and inconsistency will give way to tensions between the Courts and weaker human rights protection across Europe.[51] For this reason, the comparable human rights provisions demand urgent parallel interpretation of the EU Charter and the ECHR,[52] even if the ECHR has not been formally incorporated into the EU's legal structure yet.

In a research project conducted at Oxford Brookes University, CJEU judges were interviewed to determine the position in Luxembourg towards ECtHR jurisprudence.[53] It was reported that an attitude of consensus instead of rivalry

[47] Krommendijk (n 15) 245.
[48] Roes and Petkova (n 20) 204.
[49] Atkins (n 14) 160.
[50] ibid 162.
[51] ibid 159.
[52] ibid 158.
[53] Rauchegger and Lambrecht (n 7) 53.

existed between the judges of both Courts.[54] According to the interviewed judges, "coherence, legal certainty and the best protection" were ensured since the CJEU gave due consideration to ECtHR case law.[55] Furthermore, a joint communication from Judges Costa (former President of the ECtHR) and Skouris (former President of the CJEU) highlighted the need of the CJEU to achieve the "greatest coherence" between the corresponding rights of the Convention and the EU Charter.[56] Nonetheless, the variety of usages given to ECtHR case law within the EU legal order has put into question the CJEU judges' assertion on legal certainty and coherence as reported in the research project.[57] The manner in which ECtHR case law has been applied by Luxembourg ranges from being absent to being an integral part of the EU legal order.[58] While in *McB v E*[59] the CJEU maintained that it must give the same meaning and scope to EU Charter rights as interpreted in the ECtHR's case law.[60] In Opinion 2/13, the CJEU declared that Article 52(3) CFR establishes a "mere obligation" to take into consideration ECtHR jurisprudence.[61] Conclusively, having such a wide spectrum evinces the inconsistent application of ECtHR jurisprudence in the EU, and to some extent, contradicts the notion of legal certainty asserted by CJEU judges.

By the same token, the diverse legal weight given to Strasbourg manifests the potential risk of legal digression and justifies some of the concerns relating to the effective protection of human rights in Europe. Against this background, the

[54] ibid.
[55] ibid.
[56] O'Meara (n 9) 1819.
[57] De Witte (n 13) 231.
[58] ibid.
[59] C-400/10 PPU *J. McB. v L. E.* ECLI:EU:C:2010:582.
[60] Rauchegger and Lambrecht (n 7) 52; McCrudden (n 10) 390; see also C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida* ECLI:EU:C:2014:2453.
[61] Krommendijk (n 15) 248; De Witte (n 13) 229; see also C- 131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ECLI:EU:C:2014:317.

need to include explicit references in CJEU judgments of ECtHR case law, once again, becomes evident. Regardless of the accession process, finding common ground between the legal obligations of the CJEU to consider ECtHR case law and maintaining the effectiveness of the Union's law is of utmost importance given the present state of affairs. This alternative has the potential of strengthening the judicial dialogue of both Courts and ensuring consistency in the interpretation of human rights provisions. The fact that there has not been a direct challenge against CJEU rulings by the ECtHR may give the impression of sufficient consistency in judicial interpretation and application. Nevertheless, the guarantee of a Convention check and legal certainty for observers outside Kirchberg's doors would be reinforced if express references are incorporated into CJEU rulings.[62]

In *Bosphorus*, the ECtHR decided that a HCP to the ECHR will be presumed not to be in breach of the Convention if its actions or omissions complied with the obligations established by an international organisation that afforded adequate human rights protection without falling under the standard of manifest deficiency.[63] The introduction of the *Bosphorus* doctrine by the ECtHR was and continues to be a sign of judicial cooperation and respect towards EU law and the CJEU's jurisprudence.[64] As Glas and Krommendijk indicate, the doctrine reflects the type of relationship the ECtHR wishes to foster with the CJEU, one that is suggestive of comity and not of conflict.[65] Nonetheless, it can be argued that the doctrine may have softened the legal obligation of the CJEU and the due consideration it must give to ECtHR case law. Because of this, the utility and practical implications of the doctrine must be examined *vis-à-vis* the obligation to comply with Article 52(3) CFR and not only the establishment of a friendly relationship between the Courts.

[62] Krommendijk (n 15) 260.
[63] C-45036/98 *Bosphorus Airways v. Ireland [GC]*; Kuijer (n 27) 1002.
[64] Glas and Krommendijk (n 39) 571.
[65] ibid.

Markedly, when the *Bosphorus* doctrine was created, the ECtHR gave considerable weight to the numerous explicit references made by the CJEU to the ECHR and ECtHR jurisprudence.[66] Nonetheless, the introduction of the EU Charter and Opinion 2/13 resulted in a different legal landscape than the one that existed when the doctrine was developed in 2005. Consequently, with the purpose of strengthening human rights protection across Europe and examining the extent to which the doctrine hinders the usefulness of Article 52(3) CFR, a careful revision on the *Bosphorus* doctrine must be executed by the academic community, and hopefully, by the ECtHR in the years to come.

Additionally, while the CJEU's human rights jurisprudence has gained legitimacy across the years, the application of international frameworks can give way to a loss of legitimacy for the CJEU among EU institutions and Member States. In *Laval* and *Viking Lines*, the CJEU relied on several international treaties to develop its reasoning on the right to take collective action even though not all EU Member States were contracting parties to such treaties.[67] Subsequently, the Court developed a general principle of EU law and established new legal obligations to some EU Member States since it was acting within the scope of the Union's law.[68] Against this background, some EU Member States demonstrated an attitude of distrust towards the Court's decision. Notably, the incorporation of principles of international law coming from outside the EU's legal order have the potential to expand the Court's jurisdiction at the expense of the conformity of EU Member States. It is worth noticing that the ramifications of this loss of legitimacy have resulted in intense opposition to EU accession by political parties in the European Parliament.[69]

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[66] ibid.
[67] C-341/05 *Laval un Partneri* [2007] ECR I-11767*;* C-348/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007] ECR I-10779; De Witte (n 13) 232.
[68] ibid 233.
[69] Further discussion on this particular point will be provided in Chapter III.

Finally, despite general disbelief and the expectation of judicial deference from the CJEU towards the ECtHR, it has been argued that the revendication of autonomy by the CJEU after Opinion 2/13 has a positive side.[70] The deviation of legal precedent undertaken in Luxembourg "in well-founded instances" procures a judicial dialogue which results in the review and refinement of the principles and reasonings developed in the case law of both legal orders.[71] Prior to the entry into force of the EU Charter, in 1996, the CJEU not only referred for the first time in its judgments to ECtHR case law but also decided to follow it.[72] Consequently, the CJEU legitimised its judicial reasoning and decision-making as it drew upon international legal texts on human rights.

Significantly, in *WebMindLicenses*, the CJEU decided that under Article 8 ECHR, the interception of telecommunications and seizure of emails were an interference against the right to respect an individual's private and family life.[73] The Court's ruling relied on more than seven ECtHR judgments. Nevertheless, the CJEU could have used its own case law on data protection to develop such reasoning.[74] In a similar way, the ECtHR has relied on CJEU jurisprudence when advancing or adapting its interpretation of Convention rights.[75] Accordingly, judicial reciprocity has resulted in the parallel enhancement and development of both human rights frameworks.[76] Still, the external review mechanism proposed in the DAA will inevitably reshape the relationship and judicial dialogue between the Courts, and quite possibly, foster a hostile sentiment in the CJEU against Strasbourg, hindering the prospects of reciprocal enrichment.

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[70] De Witte (n 13) 231.
[71] ibid.
[72] Glas and Krommendijk (n 39) 569.
[73] C-419/14 *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* ECLI:EU:C:2015:832.
[74] Krommendijk (n 15) 252.
[75] Glas and Krommendijk (n 39) 569.
[76] See generally McCrudden (n 10) 392-400.

II. OPINION 2/13 AND ARTICLE 6(2) TEU: EU ACCESSION AS A QUALIFIED OBLIGATION

After the introduction of Article 52(3) CFR, the accession of the EU to the ECHR was regarded as the next logical step to follow.[77] It signalled the readiness of the EU to have its fundamental human rights regime externally reviewed by the ECtHR.[78] Nonetheless, it is of key importance to notice that Article 6(2) TEU does not specify the modalities for accession, only that it should not affect the *specific characteristics* of the EU.[79] In May 2010, in light of the start of negotiations to achieve accession, the CJEU warned about the qualified character of the accession process by emphasising that Article 6(2) TEU depended on the specific conditions which had been stated in Protocol No.8 TFEU.[80] Significantly, Opinion 2/13 laid out important clarifications of the EU's legal obligation to accede to the ECHR. Accordingly, accession is not an absolute but rather a conditional obligation that must respect the general principles of the Union's law. Further, in view of Article 19 TFEU, the CJEU, as the highest interpretative authority of the EU, is obliged to carefully observe the interpretation and correct application of EU law. Consequently, its exclusive jurisdiction does not allow it to be legally bound to a specific interpretation of Union law by other bodies, namely the ECtHR.

Prior to the negotiation process of the DAA, the Stockholm programme of the Council of the EU regarded the rapid accession to the ECHR to be of vital importance.[81] On 1 June 2010, Protocol No.14 of the ECHR came into force,

[77] Lock (n 2) 110.
[78] ibid.
[79] ibid.
[80] 'Editorial Comments: The EU's Accession to the ECHR - a 'NO' from the ECJ!' (2015) 52(1) Common Market Law Review 4.
[81] Lock (n 2) 111.

allowing international organisations to become HCPs to the Convention.[82] One month later, the negotiation rounds for EU accession began. In June 2012, the first unified Strategic Framework on Human Rights and Democracy was adopted by the European Council,[83] prompting a political momentum that encouraged a quick accession. Nonetheless, the enthusiasm for human rights protection faded away by the difficult accession negotiations, and ultimately, the DAA's incompatibility with Union law. In a similar way, Opinion 2/13 gave the impression of setting aside or at least lessening importance to the protection of fundamental human rights in the EU.[84] Notably, while mutual trust, autonomy and human rights are considered key constitutional principles of the EU legal order, it has been suggested that in Opinion 2/13 there was a hierarchisation of these principles, where mutual trust and autonomy were placed above human rights protection.[85] Nevertheless, as it will be discussed, CJEU objections in Opinion 2/13, as a matter of fact, are based on substantive grounds that must be further analysed to assess the prospects to achieve accession – if it will ever happen.

While Opinion 2/13 took some commentators by surprise, others thought it was an expected development. In spite of the predictable outcome, the judgment has been described as an "unmitigated disaster", a "legal bombshell" and to be "fundamentally flawed".[86] The CJEU has been characterised as a strong defensor of EU autonomy *vis-à-vis* the national laws of EU Member States and international law.[87] Kuijer goes on to say that the CJEU in Opinion 2/13

[82] ibid.
[83] Elena Butti, 'The Roles and Relationships between the Two European Courts in Post-Lisbon EU Human Rights Protection' (*Jurist*, 21 September 2013) <https://www.jurist.org/commentary/2013/09/elena-butti-lisbon-treaty/> accessed 23 February 2021.
[84] Forlati Serena, 'Between Mutual Trust and Respect for Fundamental Rights - Judicial Cooperation in Civil Matters and the European Convention on Human Rights After Opinion 2/13' in Pietro Franzina (ed), *The External Dimension of EU Private International Law after Opinion 1/13* (Intersentia 2016) 24.
[85] ibid.
[86] Kuijer (n 27) 1005.
[87] Łazowski and Wessel (n 46) 179.

demonstrated a complete disregard of the *imperative obligation* to accede to the ECHR as stated in Article 6 TEU.[88] Nonetheless, it is increasingly important to note that such obligation is not unqualified,[89] and thus, it cannot be imperative. Sentence 2 of Article 6(2) TEU specifies that EU's accession to the Convention must not affect "the Union's competences as defined in the Treaties".[90] By the same token, Article 1 of Protocol No.8 relating to Article 6(2) TEU states that EU's accession "shall make provision for preserving the specific characteristics of the Union and Union law". Accordingly, it can be concluded that accession may be precluded if the formal incorporation of the ECHR would affect the specific characteristics of the EU. Thereupon, even though there is an obligation to accede, this obligation is not imperative; otherwise, the EU would have to first modify its specific characteristics to not contravene the above provisions.

Markedly, in the negotiation stage, although unanimous consensus had not been reached in all issues in the EU side, the Steering Committee for Human Rights took the DAA to the CJEU to be evaluated against EU law, and thus, receive further guidance on its drafting under Article 218 TFEU.[91] To this end, it is worth noticing that prior to the declaration of incompatibility in Opinion 2/13, conflicting positions existed in the negotiation table which were ultimately manifested in the Court's judgment. O'Meara has made reference to the contrasting attitudes of the EU and the Council of Europe during accession negotiations. While the negotiating position of the EU was largely kept in secrecy, the non-EU HCPs to the ECHR strived for the greatest transparency.[92] It follows that the opposing approaches resulted in further political tensions

[88] Kuijer (n 27) 1005.
[89] Stian Øby Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences' (2015) 16 German Law Journal 170.
[90] Catherine Barnard, 'Opinion 2/13 on EU accession to the ECHR: looking for the silver lining' (*EU Law Analysis*, 16 February 2015) <http://eulawanalysis.blogspot.com/2015/02/opinion-213-on-eu-accession-to-echr.html> accessed 22 February 2021.
[91] O'Meara (n 9) 1831.
[92] ibid 1818.

between both sides.[93] Significantly, the objections stated in Opinion 2/13 mainly concerned the fact that the DAA did not give sufficient consideration to the autonomy of EU law, certain characteristics of the EU legal order and the role of the CJEU as the highest judicial authority in the EU.[94] Particularly, the negotiation of Article 3(6) DAA which focuses on the review powers of the ECtHR proved difficult since negotiators had to find a workable solution where the autonomy of both legal orders would not be undermined.[95] According to Kuijer, the CJEU had the only purpose of killing accession altogether.[96] Yet this is an exaggeration since it ignores the nature of the negotiations, the underlying secrecy among the parties and the internal EU difficulties as he attributes the incompatibility entirely to the Court's decision. Ultimately, the objections could possibly have been the reflection of unsettled points during the negotiation stage.

As previously mentioned, one of the main duties of the CJEU is to protect the autonomy and effectiveness of the EU legal order.[97] Article 19(1) TEU lays down the obligation of the CJEU to "ensure that in the interpretation and application of the Treaties the law is observed". Articles 260(1), 263 and 267 TFEU have effectively placed the CJEU as the "ultimate umpire" in the EU legal system.[98] According to Krenn, Opinion 2/13 brought to light important fragile features of the EU's constitutional arrangement.[99] While Opinion 2/13 has been described as "critical" and "uncompromising",[100] it reveals major challenges lying ahead for

[93] ibid 1818; Aidan O'Neill, 'Opinion 2/13 on EU Accession to the ECHR: the CJEU as Humpty Dumpty' (*Eutopialaw*, 18 December 2014) <https://eutopialaw.wordpress.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/> accessed 20 February 2021.
[94] Kuijer (n 27) 1004.
[95] O'Meara (n 9) 1822.
[96] Kuijer (n 27) 1004.
[97] Øby Johansen (n 89) 171.
[98] Marja-Liisa Öberg, 'Autonomy of the EU Legal Order,' *The Boundaries of the EU Internal Market: Participation without Membership* (Cambridge University Press 2020) 185.
[99] Cristoph Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13' (2015) 16 German Law Journal 148.
[100] Øby Johansen (n 89) 169.

the protection of human rights in Europe.[101] All ECHR HCPs are vigilant on the protection of the autonomy and effectiveness of their legal systems, these being common constitutional concerns.[102] Reservations and provisions on the exhaustion of remedies are some of the terms on which HCPs have incorporated the Convention into their national legal systems.[103] Markedly, the legal force of CJEU pronouncements under Article 3(6) DAA was unclear.[104] Specifications as to the scope were omitted and it could not be known with certainty if the CJEU's findings had the capacity to strike down legal acts within the EU legal order or conclude the ECtHR's external review proceedings.[105] Consequently, even though Opinion 2/13 has been extensively criticised, arguably the CJEU, as any other HCP, naturally objected to those provisions of the Agreement that contravened or had the potential to put its constitutional principles at risk, specifically the authoritative interpretative role of the CJEU.

Similarly, within the DAA, there is not a guarantee that the CJEU will have exclusive jurisdiction when a legal question involving primary or secondary EU law is brought before the ECtHR. Commentators have warned about a scenario where the Strasbourg Court could try to preempt the involvement of the CJEU due to expediency reasons.[106] The ECtHR may skip the internal review process with the argument that the CJEU has already ruled on the compatibility between EU law and the ECHR.[107] Although this is a mere speculation, the possibility can turn into risky ground for the CJEU's exclusive jurisdiction in its interpretation of EU law. Still, in the attempt to protect EU autonomy, the CJEU might undermine the protection of human rights if its internal review process is not carried out as efficiently as possible. As established in the DAA, when

[101] Krenn (n 99) 167.
[102] ibid.
[103] ibid 148.
[104] O'Meara (n 9) 1824.
[105] ibid.
[106] Krenn (n 99) 154.
[107] ibid.

conducting an internal review, the CJEU shall give particular attention to subjects of urgent preliminary ruling procedures so the efforts made in Strasbourg to minimise delays are not being frustrated.[108] Nonetheless, while the process of internal review was designed in light of the maxim "justice delayed is justice denied," in cases where individuals are being deprived of their liberty, facing extradition or are in grave situations, in a post-accession era, the ECtHR may be inclined to use the compatibility of EU law and the ECHR as a backdrop.[109] Moreover, the fact that the findings of the CJEU are not binding on the ECtHR puts into question the finality of the CJEU's process of internal review. Against this background, expediency concerns which already are a persisting problem in Strasbourg may effectively sideline the CJEU's involvement and pronouncements on the internal review process, and more generally, the exercise of its functions as the highest interpretative authority of the Union.

As Łazowski and Wessel admit, Opinion 2/13 is neither complete nor robust.[110] The CJEU has shared numerous concerns that leave EU-internal stakeholders with insufficient guidance as regards the process of EU accession. Particularly, the new interpretation of Article 344 TFEU as developed in the case of *MOX Plant* resulted in a departure of the precedent without a clear legal basis.[111] In *MOX Plant*, Ireland brought an action against the UK under the United Nations Convention on the Law of the Sea and the Protection of the Marine Environment of the North-East Atlantic.[112] In light of Article 344 TFEU, the EU Commission initiated proceedings against Ireland since there was an

[108] O'Meara (n 9) 1825, 1826.
[109] Łazowski and Wessel (n 46) 1826; see also Daniel Thym, 'A Trojan Horse? Challenges to the Primacy of EU Law in the Draft Agreement on Accession to the ECHR' (*Eutopialaw*, 12 September 2013) <https://eutopialaw.wordpress.com/2013/09/12/a-trojan-horse-challenges-to-the-primacy-of-eu-law-in-the-draft-agreement-on-accession-to-the-echr/> accessed 8 February 2021.
[110] Łazowski and Wessel (n 46) 185; O'Neill (n 93).
[111] C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-04635 (*MOX Plant c*ase); Øby Johansen (n 80) 172.
[112] ibid.

EU-intra dispute and Ireland had sidestepped the CJEU's exclusive jurisdiction.[113] According to Øby Johansen, in Opinion 2/13, the CJEU established a higher and stricter interpretation of Article 344 TFEU when it required the explicit exclusion in the DAA of the ECtHR's jurisdiction as provided in Article 33 ECHR in cases concerning intra-EU disputes.[114] Conversely, Roes and Petkova claim that Article 344 is not necessarily incompatible with the DAA.[115] In spite of the diverse critiques, the underlying digression is more problematic than what can be seen at the surface level. The matter at hand is not only about incompatibility but also ensuring consistency within the EU's legal order. Although concern exists between EU Member States to not allow the increase of powers of the EU as a result of accession,[116] the reinterpretation of Article 344 TFEU has already enlarged the power of the EU in its external action by giving absolute jurisdiction to the CJEU in intra-EU dispute resolution.

Equally important, the line of case law preceding *MOX Plant* can be considered to be particularly progressive. In *MOX Plant*, by setting a more stringent interpretation than the one applied in *Hèrmes, Dior* and *Merck Genericos* (prior to *MOX Plant*) the CJEU made an emphasis on the underlying relationship between the principle of unity and its exclusive jurisdiction in the interpretation of EU law.[117] However, in *MOX Plant*, the CJEU took one step further when it established that the possibility of interpretation would be a threat not only to the unity of EU law, but more importantly, to EU autonomy.[118] Since then, and as it was reaffirmed in Opinion 2/13, the Court affords and advocates for the highest

[113] ibid.
[114] ibid; Tobias Lock, 'Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR' (*Verfassungsblog*, 18 December 2014) <https://verfassungsblog.de/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu-2/> accessed 9 February 2021.
[115] Roes and Petkova (n 20) 207.
[116] Łazowski and Wessel (n 46) 186.
[117] Öberg (n 98) 192.
[118] ibid.

protection to EU autonomy. Nonetheless, this progressive protection has not come without its difficulties. The reinterpretation of Article 344 TFEU has given way to a vitiating defect, as voiced by AG Kokott in her advisory opinion, which has left into question the validity of numerous mixed agreements between the EU, EU Member States and third parties such as the Aarhus Convention and the United Nations Convention Against Transnational Organized Crime.[119] In effect, the autonomy fortress built in Luxembourg in light of EU accession to the ECHR may have already started to weaken the relationship of the EU with third countries and damage the reputation of the EU as a reliable contracting party *vis-à-vis* EU Member States.

Finally, it has been claimed that Opinion 2/13 mainly focused on the protection of EU autonomy while the appropriate protection of human rights was left aside.[120] In the words of De Witte, human rights protection "is voiced nowhere".[121] Nonetheless, the CJEU examined the mechanisms underlying the protection of human rights and assessed how they could encroach upon the constitutional principles of unity and effectiveness of the Union's law. The CJEU underscored the principle of mutual trust and called for uniformity by giving special attention to the diverging interpretation of Article 3 ECHR and Article 4 CFR.[122] In *M.S.S v Belgium and Greec*e, the ECtHR stated that systematic deficiencies in asylum procedures could rebut the *Bosphorus* presumption.[123] Nevertheless, in *Tarakhel v Switzerland*, the ECtHR departed from *M.S.S*. when it considered that although the Italian asylum system was not deficient, Switzerland ought to have regard to the particular situation of applicants and prevent their transfer if there was not a special guarantee of protection from the Italian

[119] Øby Johansen (n 89) 176.
[120] Benedikt H Pipker and Stefan Reitemeyer, 'Between Discursive and Exclusive Autonomy - Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU law' (2015) 17 Cambridge Yearbook of European Legal Studies 176.
[121] De Witte (n 13) 227.
[122] Krenn (n 99) 160.
[123] C-30696/09 *M.S.S v. Belgium and Greece [GC]*.

government.[124] It follows that the ECtHR's judgment resulted in the rebalancing of two competing issues, on one side, the systematic deficiencies of asylum systems and on the other, the individual situation of asylum applicants. With this in mind, it is inappropriate to assert that human rights are not voiced in Opinion 2/13. The discussion on Article 3 ECHR and Article 4 CFR purely concerns human rights protection. With no less than nine paragraphs specifically talking about human rights protection in the Opinion,[125] the CJEU did not disregard human rights but voiced the need to uphold uniformity in the interpretation of corresponding rights.

Despite the complex relationship between the EU legal order and other international legal frameworks, the CJEU has given effect to international law within the EU through what has been described as "substantive borrowing,"[126] the ECHR being a clear example.[127] This approach demonstrates the openness of the EU to considering and applying principles developed in other legal orders.[128] Still, it is important to notice that this practice is done in an unstructured manner since the legal weight bestowed to foreign law is accommodated according to the specific characteristics of the EU.[129] Wouters has referred to this process as the Europeanisation of international agreements.[130] Markedly, the relevance attributed to other legal orders in Luxembourg can range from being a source of inspiration, persuasive authority to be adopted as a general principle of EU law.[131] Despite disbelief, the CJEU does consider other legal frameworks in its

[124] C-29217/12 *Tarakhel v. Switzerland [GC]*; Krenn (n 99) 159, 160.
[125] Łazowski and Wessel (n 46) 187.
[126] Katja Ziegler 'The Relationship Between EU Law and International Law' in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley Blackwell 2016) 5, 6.
[127] ibid 13.
[128] ibid 5, 6.
[129] ibid.
[130] Jan Wouters, 'The Tormented Relationship between International Law and EU Law' in Pieter HF Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*(Cambridge University Press 2010) 206.
[131] Ziegler (n 126) 5-6.

judicial reasoning, yet, the fact that it assimilates foreign principles to different extents tends to give the opposite impression. Still, the irregular manner in which the CJEU integrates foreign law does not come without its problems. While the proper functioning of the EU as a legal order cannot be attained without unity in EU law,[132] the exercise of autonomy by the CJEU when considering foreign principles has also raised eyebrows within the EU, especially when it concerns the EU's external action.[133]

It is widely acknowledged that the preservation of uniformity in the Union's law amounts to the preservation of the EU. For this reason, in the last decade, the focus of the CJEU has moved from the ECHR to the EU Charter.[134] It is generally agreed that the legally binding character conferred to the EU Charter in the Lisbon Treaty has been the primary accelerator of such a shift.[135] Equally important, aside from the incorporation of the EU Charter, CJEU judges have indicated that judges in Strasbourg do not give sufficient consideration in their rulings to the particularities of Union law.[136] Thus, out of necessity, the CJEU has reinforced its autonomous character and resistance to external review procedures by extensively relying on its jurisprudence and the EU Charter.[137] Moreover, it is worth keeping in mind that the CJEU has not developed an EU version of the *Bosphorus* doctrine yet, and in light of an adverse accession process, it is unlikely it will ever show the same *professional courtesy*. In spite of pressure against Luxembourg to afford greater flexibility in the process of accession, the CJEU maintains a strong defence of EU autonomy and uniformity to protect the effectiveness of the Union's law. Under these circumstances, the negotiation of a revised accession agreement must prevent the possibility of transferring powers

[132] Öberg (n 98) 186.
[133] ibid 184.
[134] Kuijer (n 27) 1005.
[135] ibid.
[136] Krommendijk (n 15) 244.
[137] Kuijer (n 27) 1005.

to the ECtHR which will ultimately infringe upon the specific characteristics of the EU.

By and large, the environment under which it is expected that the EU will accede to the ECHR is one where the specific features of Union law must be preserved but also a reinforced dialogue among the Courts. Still, how this will be achieved is a critical question. As discussed before, the CJEU has shown reluctance towards the explicit incorporation of ECtHR case law in its rulings. The entry into force of the EU Charter and Opinion 2/13 have encouraged the development of an autonomous and fortified interpretation of human rights before EU accession.[138] Nonetheless, it is important to observe that Declaration No.2 of Article 6(2) TEU conflicts with the CJEU's intention to fortify its human rights jurisprudence since the Declaration calls for a reinforced dialogue between the Courts throughout the accession process. In light of desired Charter centrism, how will a reinforced dialogue be achieved? The CJEU has manifested its interest to keep the possibility of developing its own divergent interpretation of human rights after accession.[139] Nevertheless, EU autonomy demands an authoritative interpretation of EU law that is aligned to the arrangement and objectives of the EU.[140] Similarly, it has been argued that accession can turn more problematic since the EU and EU Member States would regard each other as 'normal' ECHR contracting parties, and thus, the importance of their underlying EU relationship would be minimised.[141] As a result, more hostility may arise within the EU's institutional structure, particularly between the EU Commission and EU Member States. Finally, the required observance of human rights among the HCPs to the ECHR is likely to undermine the principle of mutual trust among EU Member States, and ultimately, the effectiveness of Union law.

[138] Łazowski and Wessel (n 46) 180.
[139] Glas and Krommendijk (n 39) 573.
[140] Opinion 2/13 (n 7) [170].
[141] Glas and Krommendijk (n 39) 573.

In the same vein, an inter-institutional conflict can emerge between the EU Commission and the CJEU as a result of the differing positions with respect to the DAA. Opinion 2/13 did not present direct criticisms against the ECHR or ECtHR case law but to EU negotiators, specifically the EU Commission who acted as negotiator and who was bound by negotiating directives.[142] It has been suggested that in light of the amount of effort and time invested in the negotiation process, it would be naïve not to expect, post-accession, the careful scrutiny of the EU Commission over the CJEU and the legal weight the Court gives to the ECHR and ECtHR case law.[143] Upon accession, it is expected that CJEU judges will give greater relevance to the judgments delivered in Strasbourg. That being so, while the CJEU might have gained strength *vis-à-vis* the ECtHR, it could have lost strength within the EU's institutional arrangement by fostering a sentiment of distrust, inside and outside the Union's order. In January 2015, at the Opening of the Judicial Year, Dean Spielmann, former President of the ECtHR, reaffirmed the commitment of the ECtHR to address the legal vacuum in human rights protection by imputing violations brought before it to a State, but more important to this work, to supranational institutions.[144] It follows that with an unapproved agreement for accession and the CJEU's spirit of revendication against Strasbourg's external scrutiny, it is uncertain if the ECtHR will uphold its professional courtesy towards Luxembourg in the future.[145]

Despite the numerous objections in Opinion 2/13, the DAA has been described as an "imperfect but constructive attempt" for the improvement of human rights

[142] O'Meara (n 9) 1817; Catherine Barnard, 'Opinion 2/13 on EU accession to the ECHR: looking for the silver lining' (*EU Law Analysis*, 16 February 2015) <http://eulawanalysis.blogspot.com/2015/02/opinion-213-on-eu-accession-to-echr.html> accessed 22 February 2021.
[143] O'Meara (n 9) 1830, 1831.
[144] Kuijer (n 27) 1006.
[145] ibid.

protection.[146] With a 48th HCP to the Convention on the doorstep, EU accession is regarded as the beginning of a new era of fundamental rights protection in Europe.[147] Nonetheless, as has been noted, difficult negotiations lie ahead for a — if not impossible — highly complex framework to achieve accession in the years to come. Thus, the success of future negotiations and the possibility of a revised accession agreement remains to be seen and further discussed by commentators. However, regardless of accession, in light of the existing obligation of the CJEU to afford adequate protection as established in Article 6(2) TEU and Article 52(3) CFR, there is a clear need to find common ground where the autonomy and effectiveness of both legal orders are preserved. For this reason, the adoption of a more cordial attitude by the CJEU towards Strasbourg and the incorporation of explicit references of ECtHR case law in the CJEU's judgments is, and will continue to be, of vital importance.

III. CHALLENGES AHEAD: REACHING THE IMPASSE AND OPTING FOR A RENEWED JUDICIAL DIALOGUE

The CJEU's objections in Opinion 2/13 and the incompatibility of the DAA revolve around a single concern: autonomy. In the eyes of the Court, the Union is autonomous, and thus, its autonomous character must be protected.[148] Markedly, as a legal order, specific characteristics of the EU such as primacy of EU law have derived from the concept of autonomy.[149] As stated in the landmark case of *Costa v ENEL,*[150] "the law stemming from the treaty is an independent source of law".[151] In Opinion 1/91, the Court referred to the concept of autonomy for the first time when resolving legal questions concerning EU law

[146] O'Meara (n 9) 1832.
[147] ibid 1813.
[148] Lock (n 2) 117.
[149] ibid.
[150] C-6/64 *Costa v ENEL* [1964] ECR 585.
[151] ibid.

and its relationship with international law.[152] By the same token, in *Kadi I*,[153] the CJEU declared that international agreements cannot prejudice the constitutional principles of EU Treaties.[154] Thereupon, the CJEU's line of case law evinces the crucial role autonomy plays in the EU and the due regard that the Court has given to it. While having an external scrutiny on Convention rights and allowing EU institutions to have a say in the numerous cases involving EU law brought before ECtHR could contribute to the overall protection of human rights in Europe,[155] the preservation of the specific characteristics of the Union determines the limits in which an accession agreement can be reached between EU Member States and non-EU HCPs.

In an attempt to illustrate the reasoning behind Opinion 2/13, Pipker and Reitemeyer distinguish between two types of understandings of autonomy: discursive and exclusive.[156] According to the authors, the CJEU opted for the latter as it mainly focused on the protection of EU autonomy when it could have considered "acceptable losses of autonomy" to render the DAA compatible with EU law.[157] Nonetheless, the CJEU cannot give away part of the EU's autonomy to align EU law with international law, more specifically, the accession agreement. If the CJEU allowed a loss of autonomy, this would be a direct contravention to Article 19(1) TEU since the Court would not be observing the law of the Treaties, particularly Article 6(2) TEU.[158] Still, more useful to this work is to question if EU accession will ever justify such loss of autonomy. Regardless of academic or political discourses, for the most part, any acceptable loss of autonomy should be decided by EU institutions other than the Court, namely

[152] Opinion 1/91 [1991] ECR I-06079.
[153] Joined Cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351 (Kadi case).
[154] Lock (n 2) 119.
[155] De Witte (n 13) 227.
[156] Pipker and Reitemeyer (n 120) 186.
[157] ibid.
[158] *Costa v ENEL* [1964] ECR 585.

the Council of the European Union and the European Parliament. Any intended loss of autonomy would require the amendment of treaty provisions and a qualification of the autonomous character of EU law, which is unlikely. The wording of Article 6(2) TEU is clear. While EU accession to the ECHR must be sought, the process should not affect the specific characteristics of Union law. Henceforth, accession must not affect EU autonomy, or as proposed by Pipker and Reitemeyer, make provision for "acceptable losses of autonomy".[159]

Dean Spielmann, Judge at the General Court of the EU and former President of the ECtHR, has emphasised the conditional character of Article 6(2) TEU by stating that EU accession should take place "to the extent and only to the extent" it does not affect Union law.[160] Despite general disapproval with the CJEU's decision to render the DAA incompatible with EU law, Opinion 2/13 has been a reminder of the limitations when seeking EU accession to the Convention as established in the EU Treaties. The matter at hand is not whether the CJEU gives sufficient importance to human rights protection in its rulings but rather observing the law. Thereupon, an alleged hierarchisation of constitutional principles and academic arguments that describe Opinion 2/13 as "fundamentally flawed",[161] fail to comprehend the legal landscape in which the Court's decision was made. If the CJEU's judgments follow an exclusive autonomy approach, that does not mean its judicial reasoning is flawed. Opinion 2/13 goes beyond the political discourse of human rights protection and gives due consideration to the legal effects that EU accession would bring to the authoritative character of the CJEU, but more importantly, the underlying consistency in the Union's law. In contrast to Pipker and Reitemeyer's criticism against Opinion 2/13, the exclusive autonomy of the CJEU is not the result of a lack of confidence from the Court *vis-à-vis* external influences but rather a

[159] Pipker and Reitemeyer (n 120) 186.
[160] Spielmann (n 1) 2.
[161] Kuijer (n 27) 1005.

constitutional obligation to respect the specificities of the EU's legal order, especially in the context of EU accession. For these reasons, according to the theoretical dichotomy of the commentators, the CJEU has naturally and duly fallen under the category of exclusive autonomy.

If the EU becomes a HCP to the ECHR, both Courts would have to accept the fact that they will not always concur with each other and would have to address any forthcoming clashing interpretations between Convention and EU Charter rights.[162] It follows that the legal obligation of Luxembourg to observe the interpretation and application of Union law may undermine the effectiveness of the ECHR.[163] Convention rights enforced at the CJEU and EU Member States are not immune to the legal effect of the EU's specific character. In *Van Gend en Loos*, the CJEU declared the Community to constitute a new legal order of international law with the doctrines of primacy and direct effect as its main characteristics.[164] According to Wouters, in the early days of the EU, the CJEU's strong defence of autonomy was of existential importance.[165] The attitude of the Court conferred legitimacy to the newly established legal order inside and outside the EU. Nonetheless, contrary to Wouters' assertion, this author believes that the effective protection of EU autonomy is still of existential importance. Unity of law is paramount for the functioning of the EU and it is ultimately ensured through the authoritative interpretation of the Union's law by a single court, the CJEU.

The application of multiple international instruments on human rights in the EU legal order, in itself, is not a threat to the effectiveness of the ECHR.[166] Instead, the concern of the relationship between Luxembourg and Strasbourg focuses on

[162] O'Meara (n 9) 1832.
[163] Öberg (n 98) 194.
[164] C-26/62 *Van Gend & Loos* [1963] ECR 1; Łazowski and Wessel (n 46) 186, 187.
[165] Wouters (n 130) 200.
[166] Kuijer (n 27) 999.

the diverging interpretations followed in each legal order of the same or interrelated human rights norms.[167] Because of this, references to the ECtHR case law in CJEU judgements have become necessary. As discussed in previous chapters, executing a parallel interpretation which is expressly incorporated in the CJEU's jurisprudence ensures consistency between Convention rights and EU law, more specifically, the EU Charter. It provides evidence that a Convention check has been duly performed by the CJEU. While EU accession has a strong symbolic value since it reinforces the centrality of human rights protection in both European legal orders,[168] the Court's objections have put into perspective the cost of accession for the CJEU and EU Member States. Which court is ultimately entitled to decide on the meaning and scope of the protection of human rights in Europe? Admittedly, there is not an easy answer to this question. In Opinion 2/13, the CJEU said that having to apply a binding interpretation of Convention rights was not possible because of the exclusive jurisdiction of the Court to interpret Union law. Even though the CJEU and the ECtHR have overlapping jurisdictions in the enforcement of Convention rights, under Article 19(1) TEU, the CJEU, ultimately, has exclusive jurisdiction on the interpretation of Union law, and thus, corresponding rights. Thus, unless the DAA addresses the objections laid down in Opinion 2/13, the CJEU cannot clear accession.

Moreover, the amendments to the DAA as underscored in Opinion 2/13 may impair the ECtHR to fulfil its role as the highest human rights court in Europe. In the words of Dean Spielmann, "the Luxembourg Court is not and has never been a human rights court."[169] Because of this, the protection of human rights is likely to be undermined since the ECtHR's jurisdiction may be curtailed by the EU's requirements. According to Callewaert, the authoritative interpretation of

[167] ibid.
[168] O'Meara (n 9) 1832.
[169] Spielmann (n 1) 2.

the ECHR should not fall to any third party; otherwise, the Convention architecture would be subjected to significant distortion.[170] Within the CJEU's jurisdiction, the ECHR is particularly susceptible to be reshaped because of Luxembourg's primary obligation to ensure the unity and effectiveness of the EU as an independent legal order through the observance and interpretation of Union law. Following that, if the protection of human rights is sought, the amendments of the DAA will register the factual shortcomings for the ECtHR as established in Opinion 2/13.[171]

In light of the incompatibility of the DAA with EU law, last year's renewed negotiations have used the DAA along with Opinion 2/13 as the starting point to discuss possible amendments.[172] Nonetheless, Buyse warns about the limitations that will be placed on Strasbourg as a result of the amendment process in the accession agreement.[173] For this reason, it has been argued that Luxembourg's objections will be detrimental for the protection of human rights in Europe.[174] According to Peers, the effectiveness of the ECHR will eventually be undermined if the EU accedes to the Convention as provided in Opinion 2/13.[175] Even though the incorporation of the ECHR to the EU would represent a major step towards the protection of human rights in Europe, on the whole, EU accession may be counterproductive for both legal orders. While the incorporation of explicit references of ECtHR case law in CJEU judgments

[170] Johan Callawaert, 'Do We Still Need Article 6(2) TEU? Consideration on the absence of EU Accession to the ECHR and Its Consequences' (2018) 55(6) Common Market Law Review 1696.
[171] Antoine Buyse, 'CJEU Rules: Draft Agreement on EU Accession to ECHR Incompatible with EU Law' (*ECHR Blog*, 20 December 2014) <https://www.echrblog.com/2014/12/cjeu-rules-draft-agreement-on-eu.html> accessed 7 February 2021.
[172] Anita Kovacs, 'The on and off negotiations on the EU's accession to the ECHR – it's complicated (*EU Law Analysis*, 30 January 2021) <http://eulawanalysis.blogspot.com/2021/01/negotiations-for-eu-accession-to-echr.html> accessed 9 February 2021.
[173] Buyse (n 171).
[174] ibid.
[175] Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' (*EU Law Analysis*, 18 December 2014) <http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html> accessed 20 February 2021.

cannot be equated with formal accession, it is a workable approach that complies with Article 52(3) CFR since it affords the same degree of human rights protection.

Still, complex renewed negotiations might result in irreconcilable positions between the multiple stakeholders in the accession process. Numerous academics are sceptical about the success of such negotiations and achieving accession.[176] While the current preparatory negotiations have given a sense of hope, it has been claimed that the opposing positions between the 'EU side' and the 'non-EU HCPs' side will become more apparent when concrete proposals start to be laid down on the table.[177] In view of a renewed attempt to achieve EU accession, non-EU HCPs may lose their patience and become uncooperative with the EU.[178] It is worth remembering that the 2010-2013 negotiations have been described as arduous mainly because of the EU's internal difficulties, which were ultimately manifested in Opinion 2/13.[179] Against this background, future negotiations to address the CJEU's objections and submit a revised agreement are not promising. In the words of Łazowski and Wessel, "it does not require a sophisticated legal analysis to realise that meeting such demands is almost impossible".[180] Accordingly, it is unlikely that the 47 members of the Council of Europe will ever agree with the far-reaching requirements established by the CJEU to render the DAA compatible with EU law.[181]

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[176] Pipker and Reitemeyer (n 120) 187; Łazowski and Wessel (n 46) 189.
[177] Stian Øby Johanson, 'EU accession to the ECHR: Details of the relaunched negotiations' (*EU Law Analysis*, 30 January 2021) <http://eulawanalysis.blogspot.com/2021/01/negotiations-for-eu-accession-to-echr.html> accessed 9 February 2021.
[178] Buyse (n 171).
[179] ibid.
[180] Łazowski and Wessel (n 46) 189; see also John Morijn, 'After Opinion 2/13: how to move on in Strasbourg and Brussels?' (*Eutopialaw*, 5 January 2015) <https://eutopialaw.wordpress.com/2015/01/05/after-opinion-213-how-to-move-on-in-strasbourg-and-brussels/> accessed 20 February 2021.
[181] Fisnik Korenica, 'Guest Post: Negotiations on EU Accession to the ECHR Restart after Five Years: Between Unlikely and Doable' (*ECHR Blog*, 14 October 2020) <https://www.echrblog.com/2020/10/guest-post-negotiations-on-eu-accession.html> accessed 20 February 2021.

In a similar vein, even with the political consensus of all HCPs, problems may arise across EU Member States. During the ratification process of a revised accession agreement, national legislatures may show an uncooperative and distrustful attitude towards the terms in which the EU will accede to the Convention and the possibility of the ECtHR to encroach upon the Union's law.[182] Although negotiators have recognised that serious work remains to be done and that the objections laid down in Opinion 2/13 are not insurmountable,[183] the delivery of a revised accession agreement will be difficult given the fundamental character of the CJEU's objections.[184] For the most part, AG Kokott's 'yes, if' approach has been regarded as a last beam of light to achieve accession. Nonetheless, arguably, academic approaches that favour EU accession do not fully appreciate the character of the CJEU's objections. The required amendments are more than mere modifications to the DAA; they go to the roots of the Agreement.[185] For the most part, Opinion 2/13 demonstrated the fundamental character of the CJEU's objections and how central they are in the accession process for EU Member States. The amendments have called for the renegotiation of the accession agreement, and to some extent, questioned whether it is worth continuing to seek accession in the future.

Markedly, in light of Article 6(2) TEU, if the ECtHR or any non-EU Member State refuses to keep renegotiating and eventually a revised DAA cannot come into fruition, EU institutions and EU Member States cannot be held liable.[186] While it would be hasty to suggest that no accession agreement will ever be reached, the arduous rounds of negotiation that the parties went through to deliver the first DAA are likely to be replicated. As already discussed, accession is

[182] ibid.
[183] Kovacs (n 172).
[184] Buyse (n 171).
[185] ibid; Lock (n 114).
[186] Peers (n 175).

not an imperative obligation. It is limited by the specific characteristics of the Union and must have the approval of all non-EU HCPs and EU Member States.[187] More emphatically, the words "shall accede" in Article 6(2) TEU have been described as *lex imperfecta*, an "unfinished law".[188] So, although a legal obligation to accede to the ECHR can be said to exist on paper, the obligation is not typically enforced or cannot be enforced. This is an important distinction. Article 6(2) TEU may give the impression that accession must be achieved at some point, yet a closer look at the Article results in a completely different outcome. It follows that the EU has the only obligation to seek accession (*i.e.* to show willingness to renegotiate with non-EU HCPs) as long as the accession agreement will not have the potential of undermining the effectiveness and objectives of EU law.[189]

In a scenario where EU accession cannot be achieved, it is of utmost importance that Luxembourg strives for a fortified relationship with Strasbourg. In 2007, Declaration No. 2 of Article 6(2) TEU was incorporated into the Lisbon Treaty along with the EU Charter. The declaration recognised the cooperative judicial context that existed between the CJEU and ECtHR at the time: "the Conference notes the existence of a regular dialogue between the [CJEU] and the [ECtHR]; such dialogue could be reinforced when the Union accedes to that Convention".[190] Upon accession, it was expected that the CJEU would reinforce its judicial dialogue with the ECtHR. Nonetheless, it has been argued that the dialogue between the Courts should be reinforced before and after EU accession.[191] Even more decisive is that regardless of accession, the CJEU must reinforce its dialogue with Strasbourg not to promote accession but instead to

[187] Barnard (n 90).
[188] Łazowski and Wessel (n 46) 183.
[189] Spielmann (n 1) 2.
[190] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Declaration No. 2 on Article 6(2) TEU.
[191] Łazowski and Wessel (n 46) 185.

return to the legal landscape that existed before the formal introduction of the EU Charter to the Lisbon Treaty. Even though the CJEU wishes to develop an autonomous interpretation of corresponding rights, on the whole, this approach overlooks the practical relevance of Article 52(3) CFR and illustrates why Charter centrism is particularly problematic. How can the dialogue between the Courts be reinforced if the CJEU strives to develop an autonomous interpretation of corresponding rights? The intention of the CJEU to fortify its jurisprudence on human rights prior to accession leaves little scope to the incorporation of express references of ECtHR case law in its judgments. Against this background, the CJEU should be formally required to explicitly refer to Strasbourg's jurisprudence in a consistent manner, and thus, reinforce its judicial dialogue with the ECtHR.

Furthermore, aside from the legal hurdles underlying EU accession, there are salient political objections against the ECHR that accentuate the difficulties surrounding the accession process. In the European Parliament, although most political groups support accession, strong opinions have been shared against the ECtHR and the Convention system.[192] Markedly, before Brexit, the United Kingdom Independence Party (UKIP) maintained a critical stance against the accession process. Anti-ECHR rhetoric described the consequences of the ECHR as far-reaching.[193] In the view of UKIP's MEP Helmer, the Convention has resulted in an "inability to deport foreign criminals, terrorists, murderers and rapists" because of "the so-called right to family life".[194] In addition, the combined effect arisen by the Covid-19 pandemic and EU accession could potentially further manifest the biggest weakness of the ECHR, the doctrine of margin of appreciation.[195] To this end, it is worth making mention of the political criticisms in the European Parliament that have called for prompt reform of the

[192] Rauchegger and Lambrecht (n 7) 45.
[193] ibid.
[194] ibid 45, 48.
[195] ibid 46.

Convention system because of the complex mechanisms underlying both legal orders.[196]

Markedly, it has never been the case that an EU Member State is not a party to the ECHR. Although this is not a legal rule, since it is not part of EU law, the implicit requirement stems from the general principles of the Union. Nonetheless, in the context of Brexit, it was questioned if the UK would have a say on the accession process even though it intended to leave the EU.[197] In the aftermath of the 2016 UK EU membership referendum, the possibility of the UK rejecting EU accession represented a threat for the EU Commission's negotiation position. The UK's long-standing political discontent with the Convention could eventually frustrate any attempt of the EU to accede the Convention.[198] Such a possibility was put aside in January 2020 with the UK's withdrawal from the Union. Still, despite the UK's attempts to withdraw from the ECHR, the European Parliament passed two resolutions on Brexit negotiations stipulating that the UK would have to remain a HCP to the ECHR. Permanence was insisted since it reflected the values of the EU and ensured security cooperation across EU Member States and non-EU HCPs.[199] By staying, the UK reaffirmed its political commitment to the protection of human rights in Europe and across the world.[200] Nonetheless, the symbolic value and political momentum for human rights protection was ultimately weakened when the UK decided to withdraw from the EU Charter. To this end, it is worth noticing the influence that the Convention had within the EU's arrangement during the

[196] Rauchegger and Lambrecht (n 7) 48; O'Meara (n 9) 1829.
[197] Steve Peers, 'Would the UK's withdrawal from the ECHR lead to withdrawal from the EU?' (*EU Law Analysis,* 24 July 2014) <http://eulawanalysis.blogspot.com/2014/07/would-uks-withdrawal-from-echr-lead-to.html> accessed 8 February 2021.
[198] ibid.
[199] Frederick Cowell, 'The Brexit deal locks the UK into continued Strasbourg Human Rights court membership' (*LSE Blog*, 17 January 2021) <https://blogs.lse.ac.uk/brexit/2021/01/17/the-brexit-deal-locks-the-uk-into-continued-strasbourg-human-rights-court-membership> accessed 20 February 2021.
[200] Peers (n 197).

withdrawal process. Despite difficult Brexit negotiations between the UK and the EU, the ECHR worked as a backdrop for the protection of human rights in non-EU Member States, leaving the British with a human rights framework coming from Europe. In the future, a renewed cooperative spirit from the Luxembourg Court with Strasbourg could be a means to influence the human rights jurisprudence of non-EU Member States, and more specifically, the UK's Human Rights Act 1998.

From the perspective of human rights lawyers, Opinion 2/13 has come across as deeply unfortunate. The gap in human rights protection across Europe resulting from the inadmissibility of individual applications to the ECtHR under Article 34 ECHR that could have been closed with the DAA will remain open. Nonetheless, as it has been mentioned before, it is worth keeping in mind that in the context of accession, the CJEU is not a second supranational human rights court. Consequently, the legal concerns of the CJEU as laid down in Opinion 2/13 are justifiable.[201] Even though Opinion 2/13 might give the impression of the CJEU placing itself as the apex court in Europe,[202] the objections of the Court are well-founded. In Opinion 2/13, the CJEU examined the accession of the EU to the ECHR in light of the specific characteristics and general principles of the EU's legal order.[203] So, despite the wide political support to achieve accession among EU institutions, EU Member States and the academic community, the constitutional principles of unity, primacy and mutual trust have effectively conditioned the accession process. Likewise , the future developments in the political world may further condition any prospects of success of accession and the delivery of a newly revised agreement.

[201] See generally Johanson (n 177); Łazowski and Wessel (n 46); Krenn (n 99).
[202] Johansen (n 177) 176; O'Neill (n 93); see generally Pipker and Reitemeyer (n 120).
[203] Łazowski and Wessel (n 46) 188.

CONCLUSION

A renewed judicial dialogue among the CJEU and the ECtHR is the most useful tool to ensure the protection of fundamental rights across Europe.[204] The different judicial attitudes towards human rights of the Courts, limited by the arrangements and law of their respective legal order, can protect or undermine the protection of Convention rights. As discussed, human rights protection in EU law has always been achieved in light of the objectives established in the EU Treaties.[205] This realisation has demonstrated the underlying tensions among both legal orders to achieve EU accession. Still, regardless of EU accession, legal digressions are likely to arise between the Strasbourg and Luxembourg Courts. It is in the hands of the Courts to address such problems and afford the same degree of protection under the ECHR and the EU Charter. Notably, while EU accession will remodel the judicial relationship between the ECtHR and the CJEU, an overarching impact on EU institutions, national courts, and litigants/applicants will become tangible in a post-accession era – if it ever occurs.[206]

While in the last years the EU has fledged out its human rights framework, the re-orientation towards the EU Charter by the CJEU has been achieved at the expense of the legal bearing of the Convention and ECtHR case law within the EU legal order.[207] An autonomous interpretation of Convention rights may be beneficial for EU's human rights protection, however, this landscape is not conducive to the harmonious development of both legal systems.[208] Greater judicial reciprocity amongst the CJEU and ECtHR is needed. It follows that for the time being, the CJEU should incorporate explicit references of Strasbourg's

[204] Kuijer (n 27) 1008.
[205] Spielmann (n 1) 3.
[206] Morijn (n 180); O'Meara (n 9) 1826.
[207] Kuijer (n 27) 1002.
[208] ibid 1002.

jurisprudence to comply with its obligation under Article 52(3) CFR and give due weight to the role of the ECHR in the EU legal order.

Although the CJEU is not a supranational human rights court, it appreciates the vital role of human rights protection. Arguably, the inclination of the CJEU towards the EU Charter as opposed to Convention rights has resulted in a stronger commitment and friendlier human rights approach from the Luxembourg Court.[209] The CJEU has gained legitimacy as an international adjudicator in disputes involving human rights issues.[210] Markedly, the introduction of the EU Charter proved the commitment of the EU to recognise and afford human rights protection across EU Member States. At the time it was enacted, significant scepticism existed. It was questioned whether the EU had moved from a market-focused entity to one that observed the protection of human rights across EU Member States.[211] Nowadays, CJEU jurisprudence has demonstrated the positive response to human rights protection that the EU wishes to establish in its legal order.

As discussed, beyond the prospect of EU accession, the existing complexity of both legal orders calls for urgent reform.[212] Political discourses and academic commentators have voiced the need to ensure an integrated approach in the interpretation of corresponding rights between the EU Charter and the ECHR. The introduction of the EU Charter has resulted in the marginalisation of ECtHR jurisprudence and the risk of potential digressions as to the scope and meaning of corresponding rights. The objections raised in Opinion 2/13 have

[209] Daniel Thym, 'A Trojan Horse? Challenges to the Primacy of EU Law in the Draft Agreement on Accession to the ECHR' (*Eutopialaw*, 12 September 2013) <https://eutopialaw.wordpress.com/2013/09/12/a-trojan-horse-challenges-to-the-primacy-of-eu-law-in-the-draft-agreement-on-accession-to-the-echr/> accessed 8 February 2021.
[210] ibid.
[211] ibid.
[212] O'Meara (n 9) 1829.

further examined the convoluted relationship between the Courts if accession is achieved.

While external scrutiny has been regarded as an important benefit for the protection of human rights, the binding nature of the ECtHR's judgments and the interpretation of corresponding rights as formulated in the DAA is highly problematic. The specific characteristics of the Union, namely unity of law and mutual trust, shape the terms on which the EU is capable of acceding to the Convention. So, while Article 6(2) TEU establishes an obligation to seek accession, such obligation is not imperative. The specific characteristics of the Union must be taken into consideration as they establish the framework in which EU accession can be achieved. Significantly, since accession has been conditioned to the constitutional principles of the EU, if a revised accession agreement continues to threaten the unity and autonomy of the Union, the EU may decide not to accede to the ECHR in the future.

Furthermore, EU and non-EU HCPs to the ECHR will have to go through difficult negotiations. The far-reaching objections of the CJEU to the DAA have posed a key challenge in the relationship of both Courts in a post-accession era. The CJEU will not deem compatible a revised DAA with the potential of legally binding EU institutions to an 'ECtHR interpretation' of EU law.[213] As discussed, the CJEU has pointed out that the diverging interpretation of Article 3 ECHR and Article 4 CFR must be remedied before accession. Notably, aside from the manifested legal complexities, Brexit and the Covid-19 pandemic have resulted in a new political landscape within the EU, especially in the European Parliament. The political momentum for EU accession that surrounded the negotiations of the DAA back in 2010 may be gone forever, and the EU Commission should engage in negotiations with that in mind. In the years to come, the political

[213] Opinion 2/13 (n 7) [184], [185]; Łazowski and Wessel (n 46) 189.

agenda of the EU will be largely inclined to resolve on the exigencies of economic slowdown and the UK's withdrawal from the EU.

As a last point, Opinion 2/13 and a new judicial landscape which has brought into question the professional courtesy attained by the ECtHR, demonstrate the need to address the issue. The DAA was a constructive attempt to achieve EU accession and Opinion 2/13 provided an enriching analysis as to the current state and coexistence of both legal orders. However, their overlapping jurisdictions and the protection of autonomy pose a challenge for their relationship beyond accession. Therefore, calling for a reassessment of the utility of the *Bosphorus* doctrine by the ECtHR is worth being the subject of a wider study.

Filtering Through the Chaff: A Critical Discussion Surrounding Article 17 of the EU Copyright Directive and the Commercial Suitability of its Implementation

*Ho-Man Tang**

INTRODUCTION, BACKGROUND AND DEFINITIONS

This essay explores the legal impact of Article 17 of the EU Copyright Directive as well as the commercial viability of implementing the technologies required to make such a directive work.[1] Drawing reference from academic sources, business analysis of the digital market and the pre-existing status quo, it ultimately determines whether Article 17 truly furthers copyright protection within Europe, or whether an alternative compensation system would be preferable. The idea of an alternative compensation system has long been touted as an alternative to copyright but has never successfully been implemented into a large-scale legal system.[2]

[1] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130, article 17.

[2] Lisette Kalshoven and Katarzyna Rybicka, 'Alternative Compensation Systems only work if adopted by all sides' (Communa, 16 July 2015) <https://www.communia-association.org/2015/07/16/alternative-compensation-systems-only-work-if-adopted-by-all-sides/> accessed 15 March 2020.

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The current approach of Article 17, especially with the proposed legislation, strongly suggests that EU governments are preparing to use upload filters:[3] technology which uses fingerprinting systems to pre-emptively check and stop the uploading of any digital materials which may violate the parameters of the filter. This technology, due to its pre-emptive nature, has prompted discussion on whether upload filters infringe on human rights, user rights, or damage the digital market, which would all run contrary to either the rule of law, the status quo or the purpose of the directive.[4] In short, the directive and its objectives has been introduced to tackle what are seen as inadequacies in tackling copyright piracy or inequality, but this essay will take the view that an alternative system for upload filters would prove to be less problematic.

While upload filters are not explicitly stated as the enforcer of Article 17, the reality is, as Solmecke and Herr report, that because no other technologies are developed enough or exist to fulfil the requirements of the law, it is essentially a quasi-requirement.[5] While they put forward that alternatives are possible in theory, they would require creating a more advanced private copying levy, and any attempts to do this have been scuppered. Germany had previously attempted

[3] French National Assembly, 'Projet de loi relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique' [2020] <http://www.assemblee-nationale.fr/dyn/15/textes/l15b2488_projet-loi> accessed 9 March 2020.

[4] European Commission, 'Questions and Answers: The Juncker Commission' (European commission, Brussels, 10 September 2014) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_523> (accessed 23 April 2020). Juncker's position was to create a harmonised approach to EU copyright to allow for a stronger digital market which led to the directive's implementation. This desire for harmonisation was a concern throughout the proceedings.

[5] Anne-Christine Herr and Christian Solmecke, 'Rechtliche Analyse der Pro-und Contra Argumente zu Artikel 13 der geplanten EU Urheberrechtsnovelle' [2019] <https://www.wbs-law.de/wp-content/uploads/2019/03/Analyse-Artikel-13-Version-1.2-WILDE-BEUGER-SOLMECKE-Rechtsanw%C3%A4lte.pdf> accessed 17 April 2020.

to achieve this via negotiations, but the introduction of French legislation has set upload filters up as the primary vehicle to enforce Article 17.[6]

Copyrighted material itself is incredibly vague, but within the context of this essay, it is to be understood as any digital media which has a licence or licences held by individuals or companies, and which has the ability to be distributed. This essay concerns itself with the rights of both the creative authors and the internet denizens who may interact with online material. This definition will prove to be a broad sweep as the nuances of copyright make it a large and varied area. Online service providers (OSPs) will also be discussed within this essay, however, interestingly, this cannot be accurately defined for the sole reason that there is still confusion within the context of Article 17 as to what defines a platform which can function as an OSP.

This essay ultimately considers whether the digital market and physical market has transformed and whether Article 17 creates a greater danger of monopolies and competition. Partnered with the concepts of generational differences, the looking glass of the legislators as they determined the directive, varies greatly with the reality proposed by those opposing it, with the disparity between the two giving a strong insight into why Article 17 has suffered from so many difficulties in its consideration to implementation.

[6] Nils Rauer, 'Copyright law reform: Germany considers upload filters', (Pinsent Masons, 2 July 2020) <https://www.pinsentmasons.com/out-law/news/justizministerium-will-upload filtern-das-aussortieren-erleichtern> accessed 15 July 2020.

The structure of this essay is designed to unpick through several issues before putting forward any solutions.

Firstly, we will have to appreciate the societal backdrop surrounding the law as this will give us a clearer understanding of the issues surrounding Article 17. While there are numerous grievances from different parties concerning Article 17, this essay focuses primarily on the feasibility of implementing Article 17 and its upload filter. While acknowledging that human rights and specific user rights are a considerable concern, especially with regard to freedom of speech and the copyright status quo, this issue in itself could form the subject of another essay entirely. Additionally, the Polish case to the CJEU aiming to strike down Article 17 had recently received a judgement after 3 years in April 2022.[7] The argument that Article 17 of the DSM Directive conflicted with Article 11 (freedom of expression and information) of the EU Charter of Fundamental Rights was rejected[8]. While the court believes that they are compatible, it remains to be seen if this is the case.

Instead, this essay focuses on analysing how proposed legislation aims to implement Article 17 with which we will use France as a base line. With that knowledge, we will move on to the technological limitations of implementing upload filters for Article 17. This section will highlight the fact that this technology has been sorely underestimated by legislators and the issues that implementing upload filters may pose. Following this, we will observe the commercial issues created by using upload filters which will be exacerbated by

[7] Case C-401/19 Republic of Poland v European Parliament and Council of the European Union [2022].
[8] Charter of Fundamental Rights and Freedoms of the European Union [2012] OJ C 326/02, article 11.

the fact that this is still a developing technology. Finally, on the balance of the evidence, it will be argued that attempting to force an introduction of upload filters will not be able to address the reasons for Article 17 being introduced in the first place, and that instead an alternative compensation system would be a more suitable alternative.

It should be noted that this essay will be reviewing the law up to April 2020, back when the German legislation was being debated.[9] While it is obvious that delays in 2021 and 2022 have been wrought by the Covid-19 pandemic, a dragging of the feet with few viable or obvious directions is clear, meaning there is little movement on the theoretical arguments within this essay. For instance, the deadline for the 7th May 2021 for the laws, regulations and administrative provisions necessary to comply with this Directive only three hit this deadline.

LITERATURE REVIEW

Due to the relatively new nature of Article 17 - and as will be explored later, the lack of development of upload filters - much of the essay sources will be secondary sources, discussed and written by industry and academic experts both in law and technology. Paul Keller and Felix Reda, who have both helped bring Article 17 to the forefront in public discussion will feature heavily either explicitly, or having influenced the work of others, but it should be noted that Felix Reda is especially political and as such, much of her discussion is often tempered by societal impacts. They are both able to provide a strong and critical

[9] (n 1).

overview of the law but also take into account its social interaction hence my usage and engagement of their positions.

The idea of upload filters has much to be developed, and as such there is little accessible academic literature. Moreno is able to shed more light on this area, separating the key issues around fingerprinting technology[10] and explaining how different methodology such as watermarks may be used, as well as considering their shortcomings.

Additionally, some of my sources will be blog posts or newspaper articles, owing to the fact that the nature of the topic is of concern to multiple groups of people and agendas, as has been established. Some of these are academic blogs, and those which are not I have taken care to fact check.

The concept of Alternative Compensation Systems has seen prior discussion, especially following developments in file sharing technology such as Napster. [11] That said, this compensation system has come about from developments in technology and as such, whatever is suggested needs to have the consideration of these developments making older articles but a guide. The distinction needed will only grow as technology develops so it is proposed within this essay that this must be subject to a review as per the work of Ginsburg.[12] While the work of

[10] Felipe Romero Moreno, 'Upload filters' and human rights: implementing Article 17 of the Directive on Copyright in the Digital Single Market' (2020) 34 International Review of Law, Computers & Technology 153.
[11] Daniel Gervais, "The Price of Social Norms: Towards a Liability Regime for File Sharing" (2004) 12 Journal of Intellectual Property Law 39.
[12] Jane C Ginsburg, 'Fair Use for Free, or Permitted-but-Paid?' (2014) Columbia Law School Working Paper No. 481 1.

Quintais and Angelopoulos helped shaped my solution,[13] I have ultimately tried to create a more coherent test that better suits our current technological standpoint.

THE LEGAL PHILOSOPHY

When Article 17 of the Directive on Copyright in the Digital Single Market (DSM) was originally announced,[14] back when it was Article 13, it garnered much controversy, quickly becoming known colloquially as the "Meme Ban".[15] Originally introduced as part of a compromise to address the "value-gap" found within industries such as the music industry - albeit never officially introduced as that solution - it has opened up a fervent discussion on the current state of copyright law and cyberspace.[16] As Article 13, it was generally agreed upon that while the concerns of copyright inadequacies were legitimate, it was the controversial wordings of the Article itself which aimed to fix issues surrounding the "usage…of protected content [hosted] by online content-sharing providers" which were ultimately problematic.[17]

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[13] Christina Angelopoulos, João Pedro Quintais, 'Fixing Copyright Reform: A Better Solution to Online Infringement'(2019) Journal of Intellectual Property, Information Technology and E-Commerce Law 147.

[14] (n 1).

[15] Andrew Griffin, 'Article 13: What just happened to the EU 'meme ban' and why are people so angry?' (The Independent, 26 March 2019)<https://www.independent.co.uk/life-style/gadgets-and-tech/news/article-13-vote-eu-meme-ban-copyright-law-rule-explained-a8841016.html> accessed 13 December 2019.

[16] Kathy Berr, 'EU Copyright Directive – Mind the Value Gap', (CBR Online, 2019) <https://www.cbronline.com/opinion/the-copyright-directive> (accessed on 18th February 2020).

[17] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD), article 13.

When understanding its controversy, it is important to appreciate the general situation surrounding this directive. Beyond just the words of the legislation, you must also recognise the societal backdrop of how and where this directive is being implemented, namely digital cyberspace.

Primarily an issue due its vague nature with a lack of specific details on the directive and its aims, this broad target left the door open to the usage of upload filters to police this "protection".[18] It is interesting to note how wide-spread support quickly spread online under the "#saveyourinternet" banner. While "#saveyourinternet" has existed for several years, being founded in 2006 to protect net neutrality,[19] the adoption of twitter hashtags and being aimed at younger people, as evidenced by the website, demonstrates how this is in some ways viewed as a generational issue.[20]

It could be argued that this generational issue is one which is aptly displayed by John Perry Barlow's ground-breaking Declaration of Cyberspace: "[The governments] have not engaged in our great and gathering conversation … You do not know our culture, our ethics, or the unwritten codes that already provide our society more order than could be obtained by any of your impositions".[21] This was a statement made at the dawn of the internet – a warning to prevent governments overstepping their bounds and infringing on what was designed to be an extension of one's mind. This is a generation which is often cited as having

[18] ibid.
[19] Internet Archive, 'Save the Internet' (Savetheinternet.com, 2007) <https://web.archive.org/web/20071012025915/http://www.savetheinternet.com/=coalition> accessed 18 February 2020.
[20] 'Save your Internet' (#SaveYourInternet, 2018) <https://saveyourinternet.eu/> accessed 18 February 2020.
[21] John P Barlow, 'A Declaration of the Independence of Cyberspace' (1996).

the peaceful time in history, and while the data for this has different interpretations,[22] it has created a greater emphasis within society of protecting the rights obtained as a result of this 'peace' and 'freedom'.Barlow would likely have said that the legislators for Article 17 had put it upon themselves to govern where they hold "no sovereignty",[23] especially now that cyberspace has emerged as a safe haven for personal expression. It is this from which a large inspiration of this essay came, questioning whether this directive is the wrong law for the wrong time. Rawl's theory of justice brings about an idea of an 'original position', a position of universal equal rights and liberties,[24] something that with the idea of legal autopoiesis would suggest that our laws and societies are growing symbiotically to allow for such rights and liberties.[25] The very fact that this can be seen as a generational issue gives credence to this suggestion, with Felix Reda viewing memes as parodies, hence her concerns over their protection.[26] The legislator's creation of Article 17 appears to show that they do not truly appreciate the technology they have at their disposal nor how quickly society has shifted. The law is slow and burgeoning where, for instance, what we understand to be parodies have drastically shifted, such as videos or pictures with minor alterations. This is a far cry from the pastiches made via cabaret shows in Nazi Germany. Such ideas have evolved as their mediums have shifted with

[22] Will Koehrsen, 'Has Global Violence Declined? A Look at the Data' (Towards Data Science, 2019) <https://towardsdatascience.com/has-global-violence-declined-a-look-at-the-data-5af708f47fba?gi=650e33aa3ed4> accessed 16 March 2020.
[23] Barlow (n 21).
[24] John Rawls, *A Theory of Justice*(Belknap Press 1971).
[25] ibid; Francisco Varela and Humberto Maturana, 'Autopoiesis and Cognition: The Realization of the Living' (D Reidel Publishing Company 1973), 89.
[26] Felix Reda (Twitter, 28 February 2019) <https://twitter.com/senficon/status/1101074852109275137?lang=bg> (accessed 25 February 2020).

technology, as demonstrated by the ease of access to pictures with captions in what can be described as "meme-culture".[27]

The ability to access content with greater ease via technology is something which has proved to be a double-edged sword. Developing technologies have made media more accessible to the public, as shown with CD sales far outstripping vinyl sales.[28] However, online piracy has proved to be a new issue.[29] While piracy was not the sole issue which launched Article 17, it is indicative of the issues which surround the idea of the "value gap".[30]

The value gap is essentially the idea that, with the changes in digital economies and the providing of content online, there is a supposed inequality from previous revenues returned to the rightsholders and the value that the online hosting platforms were generating.[31] For instance, for every twenty dollars Spotify returned to the music community, YouTube was estimated to return less than one dollar.[32]

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[27] Michelle, 'Meme Culture: What Is It?' (The Student View, 20 March 2019) <https://www.thestudentview.org/meme-culture-what-is-it/> accessed 17 March 2020.

[28] Elias Leight, 'Vinyl Is Poised to Outsell CDs For the First Time Since 1986' (Rolling Stone, 6 September 2019) <https://www.rollingstone.com/pro/news/vinyl-cds-revenue-growth-riaa-880959/> accessed 17 March 2019.

[29] International Federation of the Phonographic Industry (IFPI), 'Music Consumer Insight Report' 2018' 15. <https://www.ifpi.org/wp-content/uploads/2020/07/091018_Music-Consumer-Insight-Report-2018.pdf> accessed 15 March 2020, 15.

[30] Neil Luzhoft, 'The EU Copyright Directive: Platform liability, the value gap, and unanswered questions' (Media Writes, 2019) <https://www.lexology.com/library/detail.aspx?g=cf2d9558-f5d5-4e8a-a6fd-bd8c90fc1b5e> (accessed on 17th March 2020).

[31] ibid.

[32] 'Soundcharts, What Music Streaming Services Pay Per Stream' (2019) <https://soundcharts.com/blog/music-streaming-rates-payouts> accessed 17 March 2020.

While Article 17's primary aim is to address the value-gap, the issue extends beyond this. Despite what Article 17 states, it introduces a regime of pre-emptive strike downs and direct liability and one which, as explained later, forces the usage of upload filters. Upload filters create a culture of shoot first (or take down first), ask questions (on the legality) later.

CAN ARTICLE 17 BE JUSTIFIED IN FIGHTING THE VALUE GAP?

Having established a snapshot of the landscape, it now falls to the question on whether Article 17 can achieve its aims. The brief aforementioned stats regarding Spotify and its compensation along with the fact that the music industry has been unable to sustain the revenue it previously had as a result from declining sales from physical formats such as CD, cassettes and vinyls explain why some people believe Article 17 to be necessary.[33]

With physical sales declining, it would come to mind that it is a result of them being superseded by digital sales but this is not the case. Digital sales have also decreased with online privacy and music subscription models such as Spotify.[34] YouTube's model in particular holds several issues: holding a premium service where YouTube removes ads for a large profit or a free subscription service which is supported by ads, which does not generate the revenue levels previously seen by music companies. While Google claims to have returned 1.8 billion dollars via ads in 2018, considering the size of the media industries, the internet traffic of YouTube and the Spotify stats, it is understandable that the music

[33] Leight (n 28).
[34] IFPI, 'Music Listening Report 2019', <https://www.ifpi.org/wp-content/uploads/2020/07/Music-Listening-2019-1.pdf> accessed 19 March 2020.

industry wants greater parity in repatriation, especially from larger companies such as YouTube or Amazon Prime, which explains the increased rise in services such as Tidal.[35]

This view on big tech companies and lack of parity comes not just from the music industry, but also subconsciously as the public perception of media outlets such as Twitter and Facebook begin to suffer. Examples would include the failure to combat hate speech, 'fake news' such as in the UK regarding 5G towers and the usage of data.[36] Cambridge Analytica proved to be an eye-opener and the increased scrutiny over Zuckerberg's Facebook in the US Congress only highlights growing public distrust.[37] This is partially led by a failure to understand the full capabilities of the technology, but is coupled with and exacerbated by a lack of transparency. As such, there is now greater scrutiny, in fact more than ever, on technology, and this is reflected by the legislator. The relevance of this point is that the upload filter technology is understood by few, made understandable to even fewer, and as will be explored later, resultantly has shortcomings not foreseen by legislators.

In first addressing whether Article 17 is effective in its purpose, we must build a more nuanced view of the value gap.

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[35] Google, 'How Google Fights Piracy', (Google, 2018) <https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf> accessed 13 February 2020.

[36] Matteo Cinelli, Stefano Cresci, Alessandro Galeazzi , Walter Quattrociocchi and Maurizio Tesconi , 'The Limited Reach of Fake News on Twitter During 2019 European Elections' (2020) 15(6) PLoS ONE 13.

[37] Peter Schroeoder, 'Facebook's Zuckerberg Grilled In U.S. Congress On Digital Currency, Privacy, Elections' (*UK Reuters*, 2019) <https://uk.reuters.com/article/uk-facebook-congress/facebooks-zuckerberg-grilled-in-u-s-congress-on-digital-currency-privacy-elections-idUKKBN1X216B> accessed 14 March 2020.

Firstly, there is no set definition for the phrase: "value gap", indeed, it does not exist within the EU legislation itself, often being bandied around as a buzzword. It appears to be a phrase denoting an existence of the difference between expected income if there were no piracy or subscription services, i.e. solely sales, and the real income. As such, this is a rather loose term relating to negative income. Frosio believes that the idea of a value-gap is actually a falsehood, created for lobbying purposes.[38]

This brings about an interesting question, which is whether the implementation of Article 17 would achieve its underlying goal, especially if this goal does not exist. Husovec considered the concept, "fabricated by the music and entertainment industry"[39] and to exist merely as a term with little "empirical data" to back this up. Frosio goes further, noting that when observing Article 13, the economic impacts would be assessed "qualitatively" with "the limited availability of data in this area"[40] preventing a quantitative analysis.[41] Instead, the idea of a value gap was not borne of evidence but a slogan in lobbying, as noted by Bridy.[42] Ironically, lobbyists opposing Article 13/17 were quick to jump on this fact with the European Copyright Society, pointing to the lack of economic

[38] Giancarlo Frosio, 'To Filter Or Not To Filter? That Is The Question In EU Copyright Reform' [2018] 36(2) Cardozo Arts & Entertainment Law Journal 331, Center for International Intellectual Property Studies (CEIPI) Research Paper No. 2017-16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116825> accessed 17 March 2020.

[39] Martin Husovec, 'EC Proposes Stay-down & Expanded Obligation to Licence UGC Services' (Hut'ko's Technology Law Blog, 2016) <http://www.husovec.eu/2016/09/ecproposes-stay-down-expanded.html> accessed 18 March 2020.

[40] Frosio (n 38).

[41] European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD (2016) 301 final, PART 1/3, 136.

[42] Annemarie Bridy, 'The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform' (2020) 22(2) Vanderbilt Journal of Entertainment and Technology Law 323.

evidence supporting the concept. Frosio is able to show how these multiple compiled reports have all come to the same conclusion: there is little empirical evidence that can be used to draw conclusions.[43] Indeed, correlation does not equal causation and the rise of cyber space does not necessarily mean the value gap exists. Frosio also mentions that the usage of filtering technologies has no guarantees of keeping in check the supposed effects of the value-gap, and thus this shoot-first tactic has no basis to be used.

It may be that the value-gap does exist, but rather being a value-gap, it is merely a side effect of the evolution of digital mediums. Firstly, in the same way, digital sales overtook physical sales, online subscriptions are the new medium and should not be dismissed just because they appear to be less profitable. Secondly, the idea of a value-gap, if it is true, may have been exaggerated in lobbying, supported by the lack of empirical data indicating a large gap.

This brings us to Article 17. If we are to assume the value gap does indeed exist, we must now establish whether Article 17 is appropriate in addressing it.

Article 17 appears to run contrary to Safe Harbour regimes.[44] While these were controversial in their implementation and remain an issue with regards to confusing the legal landscape, they are the current status quo. Frosio and Mendis are of the belief that Article 17 acts as a stepping stone to prevent the growing "internet threat".[45] With a shift in the view of ISPs from being mere conduits to

[43] ibid.
[44] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000.
[45] Frosio (n 38).

now being gatekeepers, this follows the growing trend against safe harbour legislation.

Specifically, it focused on "fair remunerations"[46] and the "difference in bargaining power" relating to rights.[47] The Commission clearly believed that online intermediaries had duties in creating a safe online environment, which not only targeted illegal content in terms of copyright breaches but also in removing illegal content from the above points such as fake news. This created a new burden whereby, it is not only reactionary i.e. removing content which has notices, but almost a pre-emptive approach in adopting proactive technology to detect and remove illegal content. So, by becoming a reactionary gatekeeper, it removes the idea of a safe harbour by forcing the removal of items which would otherwise have been safe. As a stepping stone, it draws the new generation of legislation away from this doctrine.

Thereby, Article 17 seems to be a natural extension of such logic, targeting the threats in cyberspace along with the rest of the DSM. Further, with the switch to acting as an 'active gatekeeper', the filter acts as the drawbridge to the territories of cyberspace. With the justification of Article 17 thus being ingrained in the idea of a value-gap, it means that it appears to be opposing ad-based models such as YouTube rather than subscription-based models such as Spotify. This targeting does appear to result from the idea that subscription services will have paid more for the licences, and thus repatriate rightsholders more, and this is made clear by Article 17(4).[48] Here, in an effort to close the value-gap, there

[46] (n 1).
[47] ibid.
[48] ibid.

enters a best effort requirement which means that CSSPs must attempt to apply their best efforts in agreeing licences with the rightsholders.

This action allows for two consequences, the first being a shifting from the bargaining positions. rightsholders will now hold a better negotiation position in agreeing licensing rights between them and CSSPs. It also reduces the power of the safe harbour, which as mentioned earlier, was a key issue. The second is that it also ensures a shift in dynamics where safe-harbour mechanics had previously worked on the basis of being a passive bystander. By requiring the pursuit of licences, they have now been forced into the active role, thus creating a new power balance.

Article 17 can be seen to be of good intentions, redistributing wealth from the creation of the rightsholders proportionally. In theory, this would feed creativity with artists secure in the knowledge that their content would be compensated suitably in the cyber landscape. However, this does not prevent it being misguided, especially if there exists no value-gap. What this would mean is that the implementation of Article 17 would not guarantee a positive effect, if any effect at all. Indeed, it could create numerous issues. One such focus is that of over blocking and efficiency.

CURRENT LEGISLATION PROPOSAL AND POTENTIAL ISSUES

What the French position gives us is a snapshot of how Article 17 may be implemented, for better or for worse. By April 2020, there were 5 draft legislations available to view, the French and Netherland's versions which have

entered the parliamentary stage,[49] and also Croatia, Belgium and Hungary's own drafts.[50] However, it was the French legislation which was first published, and thus, it is easier to view how with the lack of guidance given by the EU, Article 17's implementation may vary.

As explained, the French legislation has been implemented in two separate articles concerning copyright and related rights,[51] however these articles fail to mention the obligations on platforms and rightsholders not to impact any legitimate usage. It can therefore be assumed that the French legislators believe that this area of Article 17(7)[52] must be covered by their existing legislator. Additionally, any disputes over blocking would be governed by a governmental body called ARCOR.

The Dutch released their version, not too long after, which created three new articles in their Copyright Act and 2 new articles in the related rights act.[53] Again,

[49] French National Assembly (n 3); Wetsvoorstel houdende wijziging van de Auteurswet, de Wet op de naburige rechten en de Databankenwet in verband met de implementatie van Richtlijn (EU) 2019/PM van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG (Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt).

[50] Nacrt prijedloga zakona o autorskom pravu i srodnim pravima (Croatian Draft Bill on Copyright and Related Rights) (2019); Avis du Conseil de la Propriété intellectuelle du 19 juin 2020 concernant la transposition en droit belge de la directive 2019/790/UE du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE (Document de travail contenant l'exposé des motifs relatif à la transposition des articles 1 à 17 de la directive 2019/790); Törvény az egyes szerői jogi törvények jogharmonizációs célú módosításáról, 7 May 2020, (Hungarian Implementation Draft) <https://www.sztnh.gov.hu/sites/default/files/szjt_dsm.satcab_indoklassal_2020.05.07.pdf> (accessed 13 May 2020).

[51] French National Assembly (n 3).

[52] (n 1).

[53] French National Assembly (n 3) article 29 (a)-(c), article 19 (a)-(b).

this fails to create obligations on platforms and rightsholders that measures cannot impact legitimate uses. While they do suggest the creation of a second stage dispute resolution body, they did not assign one as France did with ARCOR. However, there is arguably more flexibility implanted into the Dutch legislation as its opening clause allows for further rules to be set by administrative degree. This can be seen as beneficial in that it gives it the flexibility to deal with any initial shortcomings. This advantage is notably missing from France's approach, indicating a less flexible nature, in line with its usual IP stance.

Belgium has included their ideas in a new section (Article XI.228) in book XI on copyright and related rights. They contain obligations on platform and rightsholders on measures not impacting legitimate uses. It also assumes that Article 17(7) is covered by already existing exceptions.[54] Similarly, it does not stipulate the use of a second stage dispute resolution which is incredibly problematic. However, within their opening clause, it too allows for some further flexibility with the addition of rules available via royal decree.

Croatia included four new articles relating to this area[55] which use specific language from Recital 62 which was directed against pirate sites and also uses extra language on the exploitation of the repeated use of start-up privileges. It also stipulated that contracts between service providers and authors must be fair, i.e. with a reasonable balance with fair compensation. This can be seen to be directly addressing the value-gap and supposed uneven bargaining positions which formed part of the argument for the implementation of Article 17. It also

[54] (n 1).
[55] Croatian Draft Bill on Copyright and Related Rights (n 50) articles 43-46.

makes clear that there is a "higher standard"[56] - a reference to the Article 17(4) measures - to "undertake everything in their power".[57] This may prove to be problematic as little guidance is again provided. However, this may be addressed in that they have a "Council of Experts for fees in the field of copyright and related rights"[58] to adjudicate on 2nd level disputes. This is an existing council, which means that it has previous experience and will provide some continuity for the copyright law. However, the fact that the Articles in Croatia refer to existing exceptions, but fail to include pastiche, could still cause certain issues with regards to interpretation by the Council.

Finally, there is Hungary's suggestion of an addition of a new article to their pre-existing copyright act.[59] This has some positive inclusions such as containing an obligation that any measures cannot impact legitimate uses. In order to do so, they present two options for a new general exception within their proposal. The first definition is to allow "anyone to use any work for…parody by evoking the original work and by expression, humour or mockery". This is problematic as what can be considered humorous is entirely subjective. It is not something an upload filter would be able to differentiate in its current state. The second definition - merely "allowing anyone to use any works for the purpose of creating a parody, caricature or pastiche" [60]covers a large range of the exceptions generally afforded to user rights. However, unlike Croatia, there are no 2nd stage dispute resolution mechanisms.

[56] Croatian Draft Bill on Copyright and Related Rights (n 50).
[57] (n 1).
[58] (n 50).
[59] Hungarian Implementation Draft (n 50) article 57.
[60] ibid.

Some brief observations can be made from these points. Firstly, the lack of harmonisation or united front. For instance, not all of the legislation mentions parody, caricature or pastiche, meaning that it is possible that only some will be protected in certain countries, which is certainly not an approach which can be considered beneficial to clarity. Even if it can be decided by court in the future, this would require a large financial backing in order to do so which could potentially deprive smaller OSPs of their rights. Secondly, the fact that not all mention a 2nd stage dispute resolution which would act as an appeal mechanism. A lack of a clear mechanism prior to implementation, especially with the future issues which could occur, as will be discussed later, results in much confusion over jurisdiction, appeal process and how methodology would occur.

There is also another issue with the legislation, namely the lack of consultation of key groups prior to their creation. When Article 13 was replaced byArticle 17, it was done with the promise of having stakeholder dialogue meetings to ensure that any future legislation would address the issues raised by them. With the lack of guidance in Article 17, these dialogues would have helped shape the direction of the law. The reality is that only six meetings have occurred between October 2019 and February 2020, the contents of which have mostly been positional statements rather than evidence-backed points. The definition of best efforts for licensing which was supposed to be resolved in these meetings remains unclear even now, and with the legislation dependent on those definitions, it seems illogical to have such an approach.

Reda previously pointed out that such an approach could lead to issues, with an example being the definition of platforms.[61] It is never explained by what is meant by "large amounts"[62] within Article 17, and as such the French were able to assume that this would be defined by their decree. As each member state may decree it differently, there begins an inability to maintain a harmonised standard across the EU which runs contrary to the purpose of the EU copyright directives to create a harmonised system. [63] Additionally, Reda points out that the French legislators have merely "cherry picked"[64] directives which widen legal definitions rather than narrowing them.

Germany had previously desired to avoid upload filters by the implementation of a mandatory licensing system.[65] This would be rendered moot by the French draft law which gives the rightsholders the ability to decide whether or not they grant licensing. By giving autonomy of right conferences to the rightsholders, an upload filter would have to be used as the basis of Article 17. The French rejection of this system has forced a harmonised approach on using upload filters, but not on implementing Article 17.

Furthermore, the French legislation contains several more issues, such as that platforms have no obligations to disclose anything in relation to trade secrets. This would create an opaque barrier for private companies in relation to inspection of upload filters which would require machine learning to develop.

[61] Felix Reda, 'France proposes upload filter law, "forgets" user rights' (2019), <https://juliareda.eu/2019/12/french_uploadfilter_law/> accessed 15 March 2020.
[62] ibid.
[63] ibid.
[64] ibid.
[65] Rauer (n 6).

Metaphorical black boxes with regards to machine learning is potentially disruptive as it would prevent the public from inspecting these filters to see if there are any algorithmic biases or human right infringements.[66]

Finally, Reda brings up the point about user rights.[67] The European Commision believed user rights to be irrelevant as they would fall under parody, caricature, pastiche and quotation - the exceptions outlined in Article 17. Combined with the fact that platforms would not have monitoring obligations, and that legal uploads could not be removed, this was the argument detailed on its fairness.

However, this is said by Reda to be ignored in the French proposal, being "forgot[ten]".[68] In short, there is a failure to ensure that these exceptions are made clear, with user benefits and protection of legal content missing. This indicates that despite the supposed non-necessity for upload filters, due to the platforms not needing to monitor uploads, the French Law's failure to disclose this and other items contained within the draft document[69] means that copyrighted content is blocked by default. This then requires any legal content to be unblocked by the uploader, which is a shift in obligation for copyright blocking. This idea of shooting first (or blocking first) and asking questions later is enshrined in the French proposal, requiring platforms to have mechanisms for user complaints. Furthermore, rightsholders when submitting a request to block content, do not require justification, only requiring it when the user challenges this initial block. This can become a potential issue as French Law also leaves

[66] Frank Pasquale, 'The Black Box Society: The Secret Algorithms That Control Money and Information' (Harvard University Press, 2015).
[67] Reda (n 61).
[68] ibid.
[69] French National Assembly (n 3).

out the requirement that a block is subject to human review, instead requiring it only after complaints, and thus, where it has already been blocked.

TECHNOLOGICAL LIMITATIONS OF UPLOAD FILTERING TECHNOLOGIES

The necessity of upload filters as protection has been reinforced by the current legislation discussion for implementing Article 17. Any possibility of finding an alternative solution, as was desired by the Germans, were dismissed by the French in forcing forward their ideas. As such, with the requirements and reliance on this technology, this means that the future importance for CSSPs under Article 17's implementation will subsequently shine the spotlight on its shortcomings. That said, much of our worries rest on over-blocking when this technology is not even widely developed. Indeed, one could argue that this is an overreaction as a result of a lack of understanding of the technology. In the same way the legislation severely overestimates the development of filtering technologies, so have we in our opposition.

The first issue is the efficiency of these filters. Youtube have determined the success of their Content ID on the basis of it having 99% efficiency.[70] In their lobbying, Audible Logic said that their technology showed similar figures with a 99% catchment rate. Even if we ignore the fact that we do not know how these figures are calculated due to the proprietary nature of their technology, the additional idea that when displaying with a negative burden - i.e. where we

[70] Evan Engstrom and Nick Feamster, 'The Limits of Filtering' (2017) <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/58d058712994ca536bbfa47a/1490049138881/FilteringPaperWebsite.pdf>accessed 17 February 2020.

cannot check if in reality it is 99% accurate as the point of what it does not catch would be unknown - creates difficulty. While 99% accuracy rates prima facie sound commendable and make an appropriate soundbite in lobbying, this is with technology developed for several years.

The issues here are three-fold: that of false negatives in system checks, false accepts and false positives. While the focus will primarily be on false positives, all three have the potential to severely skew data.

False positives would be a situation where content was flagged as infringing on pre-existing copyright. This would be the easiest to check as it would in theory be the smallest data sample, however the numbers would suggest otherwise. In 2013, SoundCloud was uploading 12 hours of content every minute, or a 72000% real time increase in content generation.[71] This was one platform, one media format and 9 years ago. False positives would only be known to be false if checked, which creates two problems. The first is that the amount to manually check would be incredibly large as was demonstrated just by outdated statistics, even after filtering. It would be unsustainable to manually check even the filtered positive matches but at the same time, the possibility of false positives then make it all the more important to check for false positives rather than just relying on relatively undeveloped technology. The second is that false positives actively change the validity of accuracy rates. Until proven to be false, they are considered positive matches. The amount of content online means that even a

[71] Sound Cloud, 'Sound Cloud is 5!' (*Sound Cloud Blog,* 13 November 2013) <https://blog.soundcloud.com/2013/11/13/soundcloud-is-5/> accessed 2020.

small percentage of false positives can be a large amount of real world content that is being unjustly removed.

False negatives would be when content is not identified by the system as infringing on copyright, even when it is. Because of this, we would be reliant on humans directly identifying false negatives. There may be many as indicated by the existence of Youtube's DMCA takedown process but its major issue is that it is wildly inefficient to check to the point of infeasibility.

False accepts should in theory not occur in the traditional sense, provided that upload filters are as stringent as predicted. A false accept occurs when what would normally be rejected is allowed due to a deliberate decrease in accuracy by reducing the criteria which would cause it to be flagged as positive normally. An example of how it might occur would be a popular music phenomenon known as the four chord progression. Many pieces of popular music now use the same four chord progression,[72] and it would be problematic for upload filters to flag any song with those four chords. However, by allowing anything with those four chords to be passed, they now run the risk of not fulfilling "best efforts".[73] False accepts only become an issue with underenforcement while this dissertation is mostly concerned with overenforcement as the former would essentially mean an ineffective directive which would in turn have little to no impact then what we already have.

[72] Journey, "Don't Stop Believin'" accessed; James Blunt, "You're Beautiful" accessed; Train, "Hey Soul Sister" accessed; Lady Gaga, "Poker Face" accessed 17 December 2018.
[73] (n 1).

These three 'false statuses' may seem insignificant but real world examples demonstrate how even in a small setting, their numbers are troublesome. Engstrom and Feamster explain this by analysing echoprint: a open source fingerprinting service whose patrons include Spotify. While their error rates involving false positives, false negatives and false accepts were between 1-2%, it would not be beyond feasibility for the cited 1% error rate.[74] However, on a practical basis, they highlight several issues – online mail service providers reject filters with an error rate of more than 0.1%.[75] This error rate relates to identifying spam messages, with the argument being the potential limitations on the freedom of speech, something that remains with over-blocking, making this an apt comparison. When taking into consideration the sheer number of items potentially going through upload filters, a 1% error rate could potentially cost in the tens of thousands per day.[76]

Additionally, there appear-further issues when considering the current limitations of the technology in question. Without advanced machine learning to expand on knowledge, it means that all of the tools for filtering, such as fingerprinting or hash-based filtering, have severe limitations in identifying infringements.[77] Specifically, fingerprinting for instance to identify the "contents of a file, not making the often-complex determinations as to whether the use of a particular file constitutes an infringement".[78] This is particularly apt when considering

[74] Daniel Ellis, Brian Whitman, and Alastair Porter, 'Echoprint: An open music identification service' (2011) Columbia Academic Commons <https://academiccommons.columbia.edu/doi/10.7916/D8W09G8W> accessed 7 March 2020.

[75] Shuang Hao, et al., 'Detecting Spammers with SNARE: Spatio-temporal Network-level Automatic Reputation Engine' (2009) 9 USENIX Security Symposium.

[76] Taking into account YouTube's 1.2 billion ad revenue distribution, dividing that by 36,500 (365 days in a year and 1% of that ad revenue) would give you around 32,00 dollars per day.

[77] Engstrom and Feamster (n 70).

[78] The UK for instance uses the 'by ear and by eye test' for music copyright infringement cases.

something such as a parody or review. Certain audio files for instance will match up, however they may be edited enough to be considered original. This would only be clear to a viewer requiring this system to have some sort of human oversight. If we bear in mind the 1% error rate with overblocking and an inability to discriminate between mere infringement and the idea of 'fair use', we begin to realise that fears on the infringement of freedom of speech are not entirely unfounded.

FALSE POSITIVES

Merely matching content is useful but is a rather small part in what upload filters are required for under Article 17, which regulates all media types including the protection of media such as parodies. This sort of intervention would require a human touch. Indeed when viewing something like music copyright, often a judge who is guided by expert opinions will decide if there is infringement. In the same way, we would be forced to employ judges to sift through files which have been identified as positive to determine if they are indeed positive or a false positive. Now, more specifically within the EU, there is a list of 21 copyright exceptions.[79] The most famous of which is parody, pastiche and criticisms. However there is a necessity for a full harmonisation of copyrights in general in order to ensure filtering systems are more effective. As not only is a case-by-case basis required normally, but it now requires determining if there is an infringement within the geographic point of origin of the online content. This is needlessly complicated, requiring even more resources to develop, as it does not

[79] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (2001).

currently exist for most fingerprinting technologies. What this can be summarised as is that while content can be matched, both practically and in theory for other media, the issue persists on determining whether the nuances of them infringing or falling under the EU exceptions remain out of reach for the current technologies. This would require significant investment with technology which is currently underdeveloped, such as machine learning. Instead, as a bridging gap, it would necessitate human interactions to decide on a case-by-case basis, who would also require determination on the geographical location in which the infringement took place. This is not cost-effective and would further force effective regulation out of the reach of smaller companies.

There is a further issue with false positives which can be seen by Content ID's inability to determine copyrighted work and public domain works. Prior controversy relating to Content ID can show how this has occurred. For instance, Professor Ulrich Kaiser decided to test Content ID in the context of the then proposed Article 13 and the implications of potentially broad upload filters.[80] He used media in the public domain with compositions by Wagner amongst other composers, which were still blocked. Another instance that received public attention was the infamous white noise generator takedown which was hit five times with copyright strikes.[81]There are potentially hundreds of thousands more of these instances that we do not hear about, such is the nature of our news cycle. This is not merely limited to YouTube, with Facebook's usage of audible magic giving a false positive in some Bach compositions.

[80] 'Can Beethoven Send Takedown Requests?' (2018) <https://wikimediafoundation.org/news/2018/08/27/can-beethoven-send-takedown-requests-a-first-hand-account-of-one-german-professors-experience-with-overly-broad-upload-filters/> accessed 17 March 2020.

[81] 'White Noise Video on YouTube Hit by Five Copyright Claims' (2018) <https://www.bbc.co.uk/news/technology-42580523> accessed 17 March 2020.

The current iteration of Content ID technology is not flawless and this is further evidenced by the fact that they remain in a development stage with several teething problems to solve before they can accurately be used. If they were to be run now, there would be, in the context of the mass of content that would be processed through them, too many false positives potentially impacting the freedom of speech creating over blocking.

THE COMMERCIAL VIABILITY OF UPLOAD FILTERS

As established, the current push by legislators for upload filters has ensured that this will likely be the method implemented. Unaided by the best effort requirements, it would mean that for most service providers they would have to implement technology to err on the side of caution. However, by requiring a shift in this direction there are potential issues to be found in the commercial market.

To explain, such technologies are in the formative stages on a constantly evolving platform. YouTube, who have the financial backing to explore this technology have invested over one hundred million dollars into what they have dubbed "Content ID".[82] This technology uses filtering technology known as finger printing.Without going into the details, it essentially identifies characteristics from audio files called metadata against a database of copyrighted materials. However, despite the guidelines for Content ID preventing the usage of unlicensed materials where there are not enough rights, there has been criticism levelled at YouTube for both inefficiency and where notices were given

[82] Google (n 35).

for content which should not have been infringing on rights. This can be demonstrated by the number of potential copyrighted materials on the site as well as the many allegations of false positives.

How fair these criticisms are is hard to tell; this is a burgeoning technology which has continually improved. By Google's own estimation, Content ID was able to identify 98% of copyright infringement as opposed to the 2% they claimed would be done manually.[83] Furthermore, this may be more to do with the nature of music copyright in the courts and uncertainty regarding infringements. That said, 99.5% of music copyright went through Content ID. That is not to say Content ID is flawless, it does have several issues that can be established, despite Google's lack of transparency due to its proprietary nature.

Firstly, is Youtube's own admission that it is not perfect. The question falls as to whether the figures set out by YouTube, if they are indeed accurate, represent an unfair burden. By this, we are asking whether it is fair to use Youtube's accuracy as a benchmark for other service providers, particularly new start ups. Other issues to consider are false positives and the abuse of copyright claims.

Critics of Content ID have noted that technologies such as upload filters have had issues concerning false positives and their inability to be able to distinguish between fair dealing and parody ultimately leads to what can be considered limitations on copyright filtering. It is for this reason that it has been regarded as a 'meme ban' and 'meme law', where it has a high potential to flag items

[83] ibid.

designed to be small edits on a general template.[84] Furthermore, YouTube has consistently found that "copyright trolls"[85] or scammers have gamed YouTube's usage of the U.S. Online Copyright Infringement Liability Limitation Act (OCILLA)[86] which is an offshoot of the Digital Millennium Copyright Act (DCMA).[87] An example of this exploitation is when a false copyright claim is placed on a user's content unless they take down the content or pay up.[88] In tandem with the cases of Facebook's false positives where Sony for instance have tried to copyright licencing on Bach, it is not inconceivable that this exploitation may be knowingly or unknowingly exploited by larger companies. This is problematic because both the upload filter's automated process and the 2% of manual copyright claims for Content ID both have possible issues.

It can be posited that there is another issue that has resulted from this – the burden of efficiency and the emphasis on protecting the hosts means that there comes the issue of what YouTube has come to represent. In the words of YouTube's CEO, Susan Wojcikci, it has become a platform to "share your voice with the world".[89] It has become an extension of ourselves, where we can share

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[84] Katie Collins, 'Article 13: Europe's hotly debated revamp of copyright law, explained' (*CNET*, 25 March 2019) <https://www.cnet.com/news/article-13-europes-hotly-debated-eu-copyright-law-explained/> accessed 12 February 2020.

[85] Katherine Trendacosta, 'YouTube's New Lawsuit Shows Just How Far Copyright Trolls Have to Go Before They're Stopped' (*Electronic Frontier Foundation,* 21 August 2019) <https://www.eff.org/deeplinks/2019/08/youtubes-new-lawsuit-shows-just-how-far-copyright-trolls-have-go-theyre-stopped> accessed 14 February 2020.

[86] Online Copyright Infringement Liability Limitation Act 1998.

[87] Digital Millennium Copyright Act 1998.

[88] Shoshana Wodinsky, 'YouTube's copyright strikes have become a tool for extortion' (2019) <https://www.theverge.com/2019/2/11/18220032/youtube-copystrike-blackmail-three-strikes-copyright-violation> accessed 17 February 2020.

[89] Emine Samer, YouTube's Susan Wojcicki: 'Where's the line of free speech – are you removing voices that should be heard?' (*The Guardian*, 10 August 2019) <https://www.theguardian.com/technology/2019/aug/10/youtube-susan-wojcicki-ceo-where-line-removing-voices-heard> accessed 12 February 2020.

ideas. If upload filters are used, this technology will be a product of the law, a law which has been playing catch up. If there are inadequacies present, such as those discussed above, it highlights an inadequacy in the law in tackling the situation. It follows that upload filters are not the solution, not only because they are unable to deal with the value-gap, but also because these inadequacies impact our freedom of speech.

While Content ID is likely the most well-established upload filter, being a developing project since 2007, it is a private proprietary technology and it is thus restricted to Google affiliated products. As such, other platforms such as Daily Motion, Tumblr, Vimeo and Facebook have been turning to Audible Magic. This is a US Private company, and one of the only established third-party upload filter providers. It too uses digital fingerprinting, however the full details of how they differ are confidential. We would do well to note, however, that the companies using Audible Magic are high profit companies.[90]

If we are to assume that Content ID will remain exclusive to protect Google's proprietary interest it would mean other service providers would have to follow suit, and either seek the usage of Audible Magic or to create their own. Audible Magic's client base is not coincidental. For instance, for what was labelled as medium-sized companies, a survey of OSPs established that an average of 10,000 to 25,000 dollars a month was spent on licensing fees for Audible Magic. Licensing fees are only a small part of the costs, and there has been another survey which states the average may even be 30,000 to 60,000 dollars per month. Additional costs come too in the integration of filtering services with

[90] Engstrom and Feamster (n 70).

pre-existing systems and new platforms, meaning substantial alterations to allow it to work. However, the idea of 'best effort' from Article 17(4) of the DSM[91] appears to be the requirement to ensure litigation protection. In short, the EU Commission's prior costing estimates have failed to take this into account adequately. Ansip had claimed to EU member states that using Audible Magic would cost "400, 500 bucks"[92] to identify ten thousand songs.[93] The real price is likely double that and the averages of 30,000 to 60,000 above appear to indicate that it is not as simple as using an external company. This would leave the final option: creating their own. For companies such as Soundcloud who would easily surpass 10,000 songs due to their modus operandi of music streaming, outsourcing is not financially feasible. As such, SoundCloud spent over five million euros to build its own upload filter, which also required seven full-time employees. At the time this was implemented (2012), Soundcloud was dealing with around 172,000 files a month.[94]

There is another key limitation to upload filters presented by Article 17 DSM – visual works, an example being memes. The majority of upload filters currently focus on audio/audio-visual works, indeed, that is how Content ID works. Article 17 DSM applies to "copyright-protected works or other protected subject matter"[95] now, not merely audio. While this is not an issue for some hosts such as SoundCloud, which focus solely on audio works, this is not the case for many

[91] (n 1).
[92] Maud Sacquet, 'The Real Cost of Filtering Technology' (2017) <https://www.project-disco.org/european-union/070517-the-real-cost-of-filtering-technology/> accessed 18th February 2020.
[93] ibid.
[94] Engstrom and Feamster (n 70); EU Survey <https://ec.europa.eu/eusurvey/pdf/answer/6acf2b21-865a-402c-876a-e2b67c0ceef9> accessed 22 March 2020.
[95] (n 1).

others, such as those currently subscribed to Audible Magic (i.e. Facebook and Tumblr), or even those who are uploading content such as meme compilations. The 98 percent processed relates to audio means only and with a deluge of new content formats to work through thus showing the limitation of current upload filters.[96] We do not have a single filter which can accurately go through the different media formats, i.e. pictures, audio, literary, video to name a few, and then check them across a centralised database. While it is true that meta-data such as text data is easy to process, this does not mean that the current fingerprinting technologies are adapted for it. For example, audio fingerprinting tools are designed currently only for audio files. This presents an issue in that readily available tools currently exist for audio for the aforementioned types, but not for other content, requiring an even larger investment to fulfil the 'best effort requirement'. Additionally, these are extraordinarily narrow subsets, as it is likely that this means we would have to have audio, video, text or images, and that's with today's technology. This is a time and money consuming project to undertake, and prices out many smaller companies.

With only those options available, due to the financial costs to medium profit companies, it leaves smaller online service providers with several issues. These smaller online service providers can be drawn into two categories: low profits and start-ups. Both have a unique set of challenges. Low profit OSPs will be more established with a user base meaning that when the legislation is finalised, they will be forced to find a way of adopting upload filters in order to not fall foul of the "best efforts" requirement.[97] This will impose a large financial obligation which may be beyond their means and could cause the loss of smaller

[96] (n 35) 14.
[97] (n 1).

OSPs. With regards to start-ups, the cost of these systems will make it much harder for them to attract any investors. Engstrom noted that in a survey of investors, the majority of investors would be ''uncomfortable''[98] with investing in any business which would be required to run an upload filter.[99] This would likely also cause a stagnation in job market growth too which could severely impact the economy.[100]

As explained above, the costs are incredibly large, either to develop or subscribe to such a service. With there also appearing to be an apprehension towards investing in the EU in the new online climate, we explained how it would decrease startup projects and thus stagnate growth. This can be expanded further: the sliding scales of cost means that the investment towards such a large technology will pay off once the groundworks are set, meaning that much of the initial cost would in theory be in the development stage. Large companies such as Google with Content ID or Audible Magic are thus set for a key advantage as they can afford to take the initial financial costs while smaller companies would be left with few options. Either subscribe to services such as Audible Magic which leads to a reliance on the service and inability to adapt without the aid of said company, be forced to invest their own money into creating their own independent service such as Content ID with Google which is an incredibly large

[98] Evan Engstrom et al., 'The Impact of Internet Regulation on Early Stage Investment', (2014) Fifth Era <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/EngineFifthEraCopyrightReport.pdf> accessed 15 February 2020.

[99] ibid.

[100] Tim Kane, 'The Importance of Startups in Job Creation and Job Destruction' (2010) KAUFFMAN FOUNDATION <http://www.kauffman.org/~/media/kauffman_org/research%20reports%20and%20covers/2010/07/firm_formation_importance_of_startups.pdf > accessed 24 February 2020).

financial investment unavailable to them, or to be forced out. Note too that the creation of an independent service is more than just straight finances but also manpower. For instance, SoundCloud still employs seven full-time specialists to help with their system.[101] Simply put, it is not cost effective for them to build their own services, thus meaning that only those with sufficient financial backing or already established in the market will be able to survive. When bearing in mind that YouTube has spent 100 million dollars for their filter which would not necessarily work for other companies, and has the advantage of over 10 years of development, it seems that it is a huge risk to financially invest into developing a filter for one's self, especially if it is unable to comply to Article 17 (4)[102] ,which requires CSSPs to make best efforts in accordance with the high industry standards of professional diligence and to take all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works, taking into account best industry practices and the effectiveness of the steps taken.

This appears to be a contradiction, albeit indirect, with the aims of Article 17 – making a single digital market with fair competition and to reduce a value-gap. But this is a false dichotomy, creating instead a new value-gap. This is a view echoed by Ulrich Kelber calling the situation an "oligopoly" with only a few filter technology providers controlling much of the internet traffic.[103] There are several concerns here, such as Big Data companies gaining unprecedented amounts of information which would raise issues with data protection but also the forcing out of smaller providers. With the power of the essential filtering

[101] Engstrom and Feamster (n 70).
[102] (n 1).
[103] Ulrich Kelber, 'Official Statement on Article 13' (2017) <http://www.fosspatents.com/2019/02/germanys-federal-data-protection.html#translation> accessed 21 April 2020.

technologies, it means that CSSPs now have a distinct market advantage by being able to withdraw support for smaller companies. For this very reason, the worries of reduced investments to start ups becomes even more true. There is little to reconcile this imbalance of power within Article 17 itself, and Ulrich Kelher again highlights that the generic statements released by the EU is not enough to ensure market stability.[104] Reduced competition is not healthy and would likely reduce or stagnate future growth. In particular, the ability to control the market and digital landscape to a handful of technology companies could allow significant concerns over how they could manipulate what is a key cultural base and also what has become a marketplace.

One could argue that the removal of smaller service providers also creates a new issue – namely that the potential loss of online platforms might curb freedom of expression and information. Not in the traditional sense, but rather by blocking new technologies or platforms being developed, it could prevent hypothetical future scenarios. If we could imagine TikTok, a common app for teenagers were to be launched five years from now, the obstacles seem insurmountable due to a lack of investment resulting from the inability to obtain the required filtering technologies it would need as a result of its usage of audio-visual licencing. Now, all the potential possibilities which we know can happen, as the technology is there is removed and thus, there is a removal of one's ability to express themselves online. A secondary consideration is that as well as driving societal and cultural changes, it has also become a commercial space where influencers, businesses or brands advertise goods, services or labels. The loss of something

[104] ibid.

like TikTok is just one example of how Article 17 could have societal and commercial impacts.

Ultimately, there are too many variables and potential scenarios to hypothesise in this situation, however it remains unlikely that smaller companies would actually be able to have the financial clout to develop content filters which would reach the threshold of Article 17(4) by themselves.[105] Any that could achieve this would remain a minority and others would instead rely on licensing their filters from a third party, such as Audible Magic. It would then require Audible Magic's filters to then meet the Article 17(4) threshold. However, it is necessary to consider that it does not yet meet the criteria of these filters due to its music specialisation. Once these criterias are met, any upload filters or companies owning the proprietary technology would now hold a market advantage and due to the financial costs of development, these licences would likely be incredibly expensive and most likely outside the range of many smaller companies. In addition to this, upload filters would also restrict new start-ups from entering the digital market if it required filters, unless they were to have significant financial backing. While the reality may be different, this series of events is a logical chain to follow and therefore worry about. It would be reckless abandonment to simply allow Article 17 to proceed without further safeguards in place. In short, the realities of what the EU has created may very well differ from how they imagined it would play out, and they are playing a dangerous game in gambling market stability and human rights on the ability of affordable filtering technology.

[105] (n 1) article 17.

FRAMEWORK FOR ALTERNATIVE COMPENSATION

Having discussed the issues surrounding Article 17 and its commercial impact, as well as analysing the current legal proposals, it is important to consider how the solution must not only be legally coherent but how it will fit in with our current societal norms. The previous sections highlight how Article 17 is unable to reconcile a harmonised front which advances copyright due to its dilution from lobbyists.[106] But any law inherently has a relationship with society and drawing on the idea of autopoiesis,[107] it is clear that any copyright directive must consider carefully how it fits in with current society and the impact it may have. The filtering and monitoring obligations in their current form do not, for instance, have a place in our society where we have shifted from paternalism to one where we hold a greater value to our freedom and rights.[108] While it is necessary to have some forms of monitoring for safety, as indicated by its overriding nature in human rights law,[109] the EU Copyright Directives do not fall into this restricted category. Further, the fact that our speech now transcends borders due to the rise of cyberspace and the rising concerns of global equality means that any solutions must bear these two ideals in mind.

Prior to writing this, I had considered alternative proposals such as watermarks which were considered by Germany due to their opposition to upload filters

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[106] Susan Wojcicki, "My final letter in 2019: Updates for this year" (Youtube, 2019) <https://blog.youtube/inside-youtube/my-final-letter-in-2019/> accessed 13 December 2019.

[107] Gunther Teubner, *Law as an Autopoietic System* (Blackwell Publishers 1993); Dimitris Michailakis, 'Law as an Autopoietic System' (1995) 38 Acta Sociologica 323.

[108] Matthew Thomas and Luke Buckmaster, 'Paternalism in Social Policy, When is it Justifiable?' (2010), Australian Parliamentary Library, Research Paper no. 8 (2010–11).

[109] European Court of Human Rights, 'National Security and Case Law', <https://www.echr.coe.int/Documents/Research_report_national_security_ENG.pdf> accessed 17 March 2020.

before their "broken promise.[110] Whilst watermarking would have, in theory, kept the burden of proof with the licence holder, requiring them to embed metadata, this proposal held several issues. Firstly, it would be unable to retroactively protect previously disseminated materials which did not have watermarks and its inability to deal with recreations such as cover art.[111] Retroactive protection would create an "origin proof" issue whereby you would have to prove you had created the work which in turn creates a legal quagmire.

The two remaining solutions would either be to find a way to make upload filters work, which considering the inadequacies of fingerprinting technology and the conflict within Article 17 currently,[112] or to instead tackle the value gap – the oft-touted reason for the creation of Article 17.[113]

The justification for tackling the value gap directly rather than other means of enforcement demonstrates the issues that may be bypassed in this process. For instance, current technology is unable to discern with enough accuracy whether or not it infringes on licensing. Overenforcement is a genuine concern which

[110] Communia Association, 'Article 17 implementation: German proposal strengthens the right of user and creators' (2020) <https://www.communia-association.org/2020/06/24/article-17-implementation-german-proposal-strengthens-right-user-creators/> accessed 24 June 2020.

[111] Olivier Japiot, 'Copyright Protection on Digital Platforms: Existing Tools, Good Practice and Limitations' (2017) <http://www.culture.gouv.fr/content/download/185905/2020626/version/2/file/CSPLA%20report-%20Copyright%20protection%20on%20digital%20platforms%20.pdf> accessed 9 February 2020.

[112] Alexander Gann and David Abecassis, 'The Impact of a Content Filtering Mandate on Online Service Providers' (Analysys Mason, 2018) <https://www.analysysmason.com/contentassets/a5fe19f42b1e4ca69666fa7f45960012/impact-of-a-content-filtering-mandate---2018-06-08---full-report.pdf> accessed 23 February 2020.

[113] Neil Luzhoft, 'The EU Copyright Directive: Platform liability, the value gap, and unanswered questions' (Media Writes, 22 May 2019) <https://www.lexology.com/library/detail.aspx?g=cf2d9558-f5d5-4e8a-a6fd-bd8c90fc1b5e> accessed 17 March 2020.

may also stymie creativity due to a reduced protection of user rights.By tackling the value gap directly, this would allow for art to remain an expression of speech without fear of unintended censorship from upload filters.[114]

As mentioned previously, I had considered using watermarks, combining them with CMO governed databases which would have created a database for the new age.[115] This was not a unique idea, with the US having records of copyright registration and previous attempts in the UK failing.[116] The idea centred around registering watermarks embedded into uploaded online materials and centralising it. These would then be routinely scanned for, and then if a positive was found, humans would assess it to see if it was a false positive. However, it proved impossible to do so without trying to maintain current copyright law alongside its transition as it was impractical to shift everything across due to a prior lack of registration. Upon registration there was also an "origin issue". This involved upon registration of watermarks, difficulties in establishing whether this was truly the original, or someone who had sought to take advantage of someone who might have been too slow to protect their product. It is increasingly hard to determine what has appeared first in relation to copyright and it would be inadequate to simply remove all existing copyright as that would fly in the face of the commercial values copyright stands for, i.e. rewarding creativity. But with that in mind, given the current average life span and copyright protection of time of death and 70 years respectively, it could potentially be many years before a CMO

[114] Edward Eberle, 'Art as Speech' (2007) 11 University of Pennsylvania Journal of Law and Social Change <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1069&context=jlasc> accessed 18 April 2020.

[115] Intellectual Property Office, 'Licensing bodies and collective management organisations' <https://www.gov.uk/guidance/licensing-bodies-and-collective-management-organisations> accessed 18 November 2019.

[116] U.S. Copyright Office Circular 1a, United States Copyright Office: A Brief Introduction and History.

governed watermark database would cover all of copyright.[117] This may be seen as swapping the issues of upload filters for another and whilst upload filters are currently not advanced enough, it is extremely likely that a CMO database would need to change constantly and advance with the times. While implementing a database that could be secured with appropriate legislation, protecting a database system within statute runs the risk of being outdated.

The second solution is to instead focus on the value gap by mainly creating an alternative compensation system.[118] An alternative compensation system is a form of copyright which requires governmental aid to allow widespread dissemination of copyrighted materials which then compensates the creative authors. While it may exist in theory without the aid of any governments, the complex nature of copyright and the issue of the value gap means that a harmonised approach is desirable.[119] To implement this method would also require several things to be achieved, namely for national courts to be comparatively more flexible in copyright matters, harmonisation of liability and also redistribution. While complex, reversing this part of the DSM would not be ill-advised compared to the issues discussed above regarding Article 17. Reversing the DSM would ensure the protection of fundamental rights and allow for the way we currently consume media to be untouched, allowing for a continuation of society.

[117] Copyright, Designs and Patents Act (1988).
[118] Stan J Liebowitz, 'Alternative Copyright Systems: The Problems with a Compulsory License' (2003) University of Texas at Dallas <https://www.researchgate.net/publication/238748514_Alternative_Copyright_Systems_The_Problems_with_a_Compulsory_License> accessed 4 January 2020.
[119] Kalshoven and Rybicka (n 2).

Firstly though, we must focus on the compensation system before working on these issues. ACSs are not a novel idea, having been considered since the days of peer-to-peer file sharing.[120] In short, this is a general model which simply shifts the burden of licencing. Rather than having companies directly authorising licences, it would instead repatriate and remunerate the rightsholders for usage of licencing in certain cases. While this appears to be a small shift, it has several issues to consider. Firstly is from the idea of "Permitted but Paid" from Ginsburg.[121] While she has delivered this model as a response to the US Fair Use, which does not exist in the EU as it does in the US, it can still prove useful.[122] In this idea she proposes that redistributed usages can be given in two categories or classes: "Subsidy (socially worthy redistributions); and Market Failure (transactions costs are too high to warrant a licensing solution".[123] These are useful terms because it allows us to reevaluate where necessary the cost effectiveness of the upcoming system. Indeed, Ginsburg had stated that she would require a five-year review from the Copyright Office in relation to phasing out a usage's categorisation. If we were to have similar provisions within our framework, it would allow us to adjust accordingly any value gaps which appear.

This in turn would allow for a statutory framework for licensing negotiations which has the benefits of changing the way one can lawfully use works while maintaining remuneration. This is not a change of how rights would be enforced, as the enhancements for enforcements such as Article 17's upload filters have displayed several issues as shown in the previous sections.

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[120] João Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law*, (Kluwer Law International 2017).
[121] Ginsburg (n 12).
[122] Copyright Law of the United States (Title 17 of the United States Code) (May 2021) <https://www.copyright.gov/title17/> accessed 3 September 2022.
[123] Ginsburg (n 12).

One of the key aims of this compensation system model would be to maintain a "fair balance", as has been so strongly emphasised by the EU previously. This would maintain the general frame of mind that Article 17 appears to have discarded so effortlessly.

This model would be summarised as a statutory licence which would also give exceptions to non-commercial usage on online services with a user content platform, i.e. a platform where users either upload or share content on online platforms. This would be similar to the US and it should be noted that while there were concerns about piracy, any pirated content will be explored later.[124][125] These works can be dubbed as 'UGC' (user-generated content). This model would be introduced across the EU as a compulsory service with the reasoning that the large-scale repercussions on legal certainty would bring consistencies to the market both nationally and cross-border. This model would also maintain a forward momentum in the evolution in the Law without losing sight of the important rights.

Much like Article 17, there will also be exceptions given to UGC which fall as parodies, incidental inclusion or pastiche for instance.[126] This would also ensure that online content now has greater protection in relation to those user rights, such asdigital adaptations. As demonstrated in cases such as Deckmyn, the EU

[124] Audio Home Recording Act of 1992 (AHRA).
[125] Tia Hall, 'Music Piracy and the Audio Home Recording Act' (2002) Duke Law & Technology Review 1. (2002).
[126] J-P Trialle and others, 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive") (Directorate-General for the Internal Market and Services' European Commission (2013).

Courts have taken these user rights as imperative, narrowing the scope for which remedies can be sought by broadening the interpretation of parodies and quotations as required in this both dynamic and subjective area.[127] This would ensure the protection of privileged users while also protecting other fundamental rights such as freedom of expression or information. To also maintain some consistency, we would also force forward the question on computer generated works, such as A.I., by ensuring that user rights can only be applied to a "natural person", much in the same way the right to be forgotten is ensured.[128] The legal personality of A.I. in itself is a whole other topic, but this would help move away from the question of computer-generated works being given rights until such a point where A.I. is sufficiently developed enough to be discussed. This would assist in demonstrating the inadequacies of current online infringements by addressing the lack of compensation. In such a way, ideas such as parodies will be given greater protection than the over-enforcement policies that Article 17 proposes. However, by also ensuring that it is natural persons invoking these rights, this would ensure that only individual users of content-sharing platforms, and not legal entities, would be afforded this protection.

This is in contract to Article 17 of the Copyright Directive. In Article 17(2) which caused the platforms to break licensing agreements when there were both non-commercial users and "their activities did not generate significant revenue" and Article 17(4) which caused liability unless "best efforts" had been made.[129]

[127] Johan Deckmyn and Vrijheidsfonds VZW vs Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH and WPG Uitgevers België, Case number C-201/13 ECLI:EU:C:2014:2132 [2014].
[128] General Data Protection Regulation (GDPR), article 17.
[129] (n 1) articles 17(2), 17(4).

By focusing on user rights rather than licensing issues, we would prevent the loss of the 'safe harbour' which is so important to copyright law today.[130]

That would of course be reliant on the hosting platforms themselves avoiding infringement in accordance with accessory liability laws within the EU for copyright. While that would lead to a fragmentation of the legal landscape, it can be argued that the area of authorization in Copyright law has long been due for an overhaul. As Paul Davies and Richard Arnold argue, a "uniform doctrine" is required, such as following Australia's example.[131] This would ensure that content-sharing platforms where measures are taken to avoid accessory will now be free of liability whilst also ensuring legal certainty by making clear where certain acts are liable. This would further prevent user rights to be wielded by platforms. Additionally, this would mean that with Article 8(3) of the InfoSoc Directive,[132] if the contents fall under the exception such as parodies, would not be subject to injunctions. This would do away with needing filtering in line with fundamental rights and the ECD.

With regards to content, this would apply to all works uploaded or used by EU citizens, with some exceptions in regard to the three-step test. Namely, this would be in regard to the interpretation of subject matter of the InfoSoc Directive, thereby maintaining consistency and flexibility. This would also encourage the growth of several areas of collective rights due to the extended

[130] ibid.
[131] Paul S Davies and Richard Arnold, 'Accessory liability for intellectual property infringement: the case of authorisation'(2017) UCL Law Review 1.
[132] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[2001] OJ L 167.

flexibility, giving protection in inventive ways, such as defining video games as artwork, benefitting creative authors. In keeping with this, the subject matter would therefore be reliant on any material that relies on Article 2 and 3 of the InfoSoc Directive – the rights to reproduction and communication to the public. By using reproduction, as per the point of Senfleben,[133] this would protect remixes and mashups. These items are in a curious area of copyright law where their place under the exceptions are uncertain. Instead, this would make it more clear that these are parodies created by reproduction which would in turn protect the culture we have created with 'meme culture', as long as it falls under non-commercial usage. This does create some difficulty, for instance with ad revenue for YouTube videos. However, this is not a hard-set rule. When used in EU copyright law it has never been defined, such as with the InfoSoc Directive, Orphan Work Directive and even the DSM.[134][135][136] With that in mind, this creates malleability within this area to shape it as an effective tool. This is convenient as it can be used as a statutory compensation model to define non-commercial works and commercial works, allowing for greater clarity on what may be subject to compensation.

[133] Martin Senftleben, Christina Angelopoulos, Giancarlo Frosio, Valentina Moscon, Miquel Peguera and Ole-Andreas Rognstad, 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform' (2018) 40(3) European Intellectual Property Review 149.

[134] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167.

[135] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance [2012] OJ L 299.

[136] The Directive on Copyright in the Digital Single Market (Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L 130).

While it is difficult to define this standard due to the character of usage and the purpose the user had intended, non-commercial works could take some inspiration from Article 17(2), which defines non-commercial works as works which do not generate significant revenues while also considering usage.[137] The benefits of defining these tests is that it would allow for a clearer view as to whether creative authors can claim compensation from pirated works.

When considering usage, which is step two of a three-step test, this contains references to possible exceptions. This may be of value as these exceptions are by and largely accepted and this would maintain the current status quo. However, these exceptions would have to be implemented within any statute narrowly to ensure that these exceptions are not abused. [138]

With an understanding of what we need to consider, we can now synthesise a test for commercial works.

I. CRITERIA OF THE TEST

To establish whether a work is commercial, we need to establish two criteria of the work – its revenue and its usage. Revenue in itself is self-explanatory and straightforward. Usage is more complicated for which I have generated a two-step objective-subjective test to find.

[137] (n 1) article 17(2).

[138] Sam Rickeston, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (2003) <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805> accessed 28 February 2020.

The first step would be what is the purpose of the user's content, which would be subjective. This would view whether for instance this was a channel designed to create revenue on YouTube. For instance, if the channel has a Patreon or is used as a revenue stream, then its purpose can be seen as commercial. This would require a background check of the channel but this would be relatively straight forward.

The next step is an objective branch which would define the character of the channel's usage. For instance, if its purpose were to generate revenue, was it actually generating revenue? This could be observed with ad revenues but also Patreon revenue amongst other things. Depending on character, a sliding scale of compensation would then be implemented.

Some confusion might occur in instances where YouTube automatically implements ads which may muddy the water. However, this can be solved by seeing if any revenue is either of a commercial scale or whether the ads were placed by the uploader for a commercial objective. This part may become subjective as determining whether it was a commercial scale might involve several factors including whether or not the user had uploaded multiple videos in an effort to generate a cumulative income. On the other hand, it would also ensure that any users who had unintentionally generated revenue would then trigger the compensation scheme. As this is work which was not designed to steal revenue away from the authors, any compensation would be a bonus.

This test would help to close down the value gap without punishing those who had unintentionally generated revenue with copyright strikes. Meanwhile, those

who had sought to generate revenue would be paying a higher scale of compensation. As this is revenue that would otherwise have not reached the authors, this is an additional income source. It also means that by not copyright striking materials, it would allow for a continued revenue income. This may also prove useful with HBO finding that the uploading of Game of Thrones clips actually benefited the show to a certain extent due to the interest generated.[139] If there is revenue being gained from what is essentially free advertising, then artists could potentially benefit further and this may merely be a new form of advertisement.[140]

That said, it must be stressed that natural persons must be the only people who can take advantage of this law. This would ensure that for-profit companies, such as YouTube, are able to maintain their business model as otherwise it is open to being abused.

Having established the criteria and thus the scope of what works can be seen as commercial, remuneration is the next logical step. This would be fair compensation, which is an established doctrine under EU copyright via the InfoSoc Directive with Recital 35, detailing how that might occur, and Recital 36, detailing when else it should may be considered.[141]

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[139] Sydney Herald Times, 'Downloads don't matter' (Sydney Herald Times, 16 February 2013) <https://www.smh.com.au/entertainment/tv-and-radio/downloads-dont-matter-20130226-2f36r.html> accessed 28 February 2020.

[140] Paul Goldstein, *Copyright's Highway: From the Printing Press to the Cloud* (Stanford University Press 2019).

[141] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001]OJ L167, Recital 35, Recital 36.

> "Account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise".[142]

> "Member States may provide for fair compensation for rightsholders also when applying the optional provisions on exceptions or limitations which do not require such compensation".[143]

This has been considered by the CJEU, as demonstrated in the case of Reprobel. [144] Whilst fair compensation is open to Member states according to Padawan,[145] this system would require any compensation method to be harmonised. The

[142] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001]OJ L167, Recital 35.
[143] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001]OJ L167, Recital 36.
[144] Case C-572/13 Hewlett-Packard Belgium SPRL v. Reprobel SCRL [2015].
[145] Case C-467/08 PADAWAN SL v Sociedad General de Autores y Editores (SGAE) CJEU [2010].

nature of cyberspace is that it transcends borders and by having inconsistencies it brings potential issues with cross border works.

Reprobel also brought forward interesting issues, with the European Copyright Society in light of this case making it a key point that creative authors by principle should be remunerated first and foremost.[146] This is the general line handed by Reprobel with some leeway given to member states. This principle exists to reward creativity, but it does cause some issue in the monetary chain. Fisher had published the confusion in copyright surrounded by the revenue stream and the confusing nature surrounding licensing.[147] rightsholders, especially for licences, are no longer the creative authors for many situations. This means that the remuneration changes its connotation. Rather than being around rewarding creativity, it falls on revenue generation via creativity. As such, when seeking remuneration, these unwaivable rights should be transferred to the rightsholders with repayments along this chain to ensure that the creative authors would see some share of this. The question would be on how it would be calculated.

When calculating this compensation, a large issue falls in determining the effect it would have had on previous revenues and calculating the loss. Attempting to decide remunerations would prove to be difficult and might change from court to court. Instead an independent inquiry which would apply to all countries, relying on the harmonised system we are proposing, should be sought to determine the market value of the content. For example, how many copies the

[146] European Copyright Society, 'Opinion on Reprobel' (*European Copyright Society,* 5 September 2015) <https://europeancopyrightsociety.org/opinion-on-reprobel/> accessed 17 April 2020.
[147] William Fisher, 'CopyrightX: Lecture 1.1, The Foundations of Copyright Law: Introduction' (2016), <https://www.youtube.com/watch?v=CqkonSY__ic> accessed 27 April 2020.

product or infringed item ought to have sold or was predicted to sell. Upon a significant shortfall, the difference would then be used to calculate compensation. In the event of an insignificant shortfall, the de minimis principle would apply, therefore removing the obligation to compensate on the basis of lack of financial viability. This would require companies to share details such as revenue. For example, YouTube would be required to give the inquirer's details of the revenue stream of a video, and from this would then determine if it was significant or not. If Youtube refused to do so, they would no longer be acting as neutral but as a gatekeeper, thus allowing repayment via accessory liability, hence the necessity for harmonisation to ensure clarity between borders in the EU. This is incredibly important due to the amalgamation of culture that is occurring from cyberspace, transcending the idea of physical or sovereign borders. In the event of a stronger than expected revenue stream, compensation would be ignored on the basis that it has not caused economic harm. In short, provided that the content did not fall into any exceptions, fair compensation would be given if possible.

There will of course be a financial cost in the enforcement of this, and it would be decidedly costly both in time and resources to use the courts for this. Instead, payment would have to be enforced by another means. Using statutory licences would provide a neutral enforcer. To pay for this, an EU wide tax levied at online service providers in the EU who earn above a certain threshold could be brought into force.[148] This cost can be viewed as a small price to pay for the potential costs that upload filters would have required. These licences would be enforced via a collective management organisation, which is defined within

[148] Neil Netanel, *Copyright: What everyone needs to know* (Oxford University Press 2018).

Article 3 of the DRM.[149] They are "any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightsholders, for the collective benefit of those rightsholders, as its sole or main purpose". These must also be owned or controlled by their members and be not-for-profit.

Article 12 of the DSM requires licensing to be managed by a CMO to "safeguard" the interests of the rightsholders.[150] This article also includes several safeguard mechanisms to ensure parity between parties, such as the ability to opt-out and obligations. In return, collective licences can be extended to right-holders regardless of whether they are represented directly. Similar to Article 17, this has been criticised for its lack of legal clarity.[151] However, the manner in which it works could be used to obtain authorisation for online services, but there are several issues which present themselves. Firstly, CMOs, much like upload filter technologies, simply do not exist in most fields for most member states. As such, it would require an arduous task to not only ensure CMOs are harmonised, but to create them for multiple areas such as online videos. Without harmonisation, it would simply lead to an uneven legal landscape which would cause confusion in this area of law. Secondly, it should be considered whether much like Article 17, it would actually be possible to roll

[149] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance [2014] OJ L 84, article 3.

[150] The Directive on Copyright in the Digital Single Market (n 136), article 12.

[151] Sanasto, 'Article 12 in the proposal for the DSM Directive threatens authors' and translators' copyright remunerations' (2017) <https://www.sanasto.fi/en/article-12-proposal-dsm-directive-threatens-authors-translators-copyright-remunerations/> accessed 18 January 2020.

something like CMOs out in two years or less. However, with the creation of statutory licences, this would provide a strong opportunity for a collective which is harmonised and unlike Article 17, the issue lies not on a lack of available technology, but rather cost of structuring which is actually possible if enough member states agreed to it, much like how Article 17 was brought in.

When collecting these payments, the CMO would then distribute them accordingly. We can follow the European Copyright Society's understanding that copyright law is linked to allowing creative freedom, and that any compensation "should remunerate the creative authors in first instance".[152] Assuming the idea of fair numeration being unwaivable, i.e. cannot be signed away, then it would mean that compensation should always be available for creative authors, regardless of what they may have licensed away.[153] This would then require the CMO to now consider how this would be determined. However, a set portion would be given to the creative authors before the other distributive rightsholders via calculation, which could be done in the inquiry section of calculating harm. This would need to be determined at a later stage with stakeholder consideration. Currently licensing agreements and what rights are available to give may vary from state to state. A benefit to this harmonised approach would be bypassing any difficulties that may occur with different jurisdictions.

In summary, this proposal may appear to be a drastic shift from Article 17. However, it is also one which remains closer to the status quo while considering and addressing the concerns of the value gap. This would create a driving force in line with developing technologies with which EU Law is currently out of date,

[152] European Copyright Society (n 146).
[153] ibid.

without losing sight of the aims of EU Law. This would be done via statutory licences enforced by a collective management organisation. This licence would cover online content besides where there is an exception, which would focus on non-commercial reproduction and communication. In the event where, regardless of intent or not, significant revenue harm can be found, then repatriation can be sought via the CMO. This would allow for quite a few benefits, namely the flourishing of creativity by compensating creative authors, allowing for a continuation of 'meme culture' whereby our society has a growing appreciation and usage of parodies and pastiche. This would also allow for legal continuation by keeping the e-commerce directive compatible with the Berne Convention given the test is given some flexibility and avoiding filtering. The removal of filtering obligations would in turn cause a removal of monitoring obligation, the protection of fundamental rights and the maintenance of user rights. This would require considerable cost to set up, but so would the rushed development of filtering technologies. This, however, is able to ensure protection without sacrificing our culture, our rights, or our creativity, all of these are core facets to who we are as a society. With more creativity and greater freedom online, our culture can only grow and expand, bringing an advancement to us as a species. The uproar against the 'Meme Law' online, highlights how we view digital and artistic rights and the increasingly widespread usage of these memes appear to confirm that the Berne Convention's viewpoint is more in line with the concerns of ordinary citizens.

CONCLUSIONS

This essay has explored the considerations which should have been made by the legislative bodies during lobbying, specifically the obstacles presented by using upload filters. By attempting to remove the issue by not specifying upload filters, several issues have been created. Namely that there is a lot less certainty surrounding guidance on Article 17 and that upload filters are implicitly required. Ambiguity to allow Article 17 to proceed does not remove any of the issues which should have been discussed around this and ultimately, without factoring the legal issues surrounding it such as user rights or human rights, it has been proven that the technology in question is neither developed enough nor accessible enough. The question of commercial viability is answered with the knowledge that it will likely throttle smaller OSPs especially when paired with the fact that further development would be needed to enable it to work for all types of media. It runs the risk of creating oligopolies, stopping startups and new ventures.The conclusion drawn here was that Article 17's enforcement caused too many potential future issues which could not easily be avoided.

It is for this reason that an alternative would have to be sought, to ensure that Article 17's concerns of the 'value-gap' were addressed, whilst ensuring that any solution would not harm our digital landscape and thus society.

While other digital fingerprinting technologies, even if less disruptive such as watermarking, are theoretically viable, they still encounter the same issue of development. With that, it has become a quest to find what method would not require state members to hold an idea of digital sovereignty while allowing progressive movement in digital media. While an alternative compensation

system is highly theoretical and would require much more work to implement, it is something which may be necessary to allow digital media to develop. Perhaps in the future, upload filters could be used, but for now the filtering of digital media is too risky to the development of our society.

The legislation and idea of Article 17 ultimately differs too far from how we as a society currently function. The very fact that it had wide-spread online support demonstrates this. If human rights were discussed, we would see that it is a fine line between copyright protection and infringing on the freedom of speech. The usage of upload filters was one step too far over this very fine line and this is why Article 17 cannot be allowed to be implemented as haphazardly as it currently is.

EXETER
LAW REVIEW