

GRAY'S INN STUDENT LAW JOURNAL



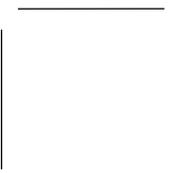
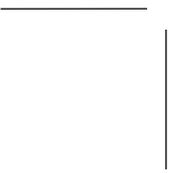
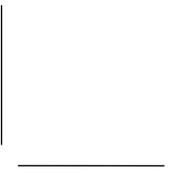
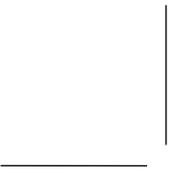
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Robert Avis

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FOREWORD

Robert Avis

It is a great privilege to have compiled this year's volume of the Gray's Inn Student Law journal, now in its fifth year. This edition bears witness to the diverse interests and specialisms of the membership of the Inn, from the law of outer space to the law of village greens. Editing the journal has been an education in itself.

The volume opens with James Goodwin's jurisprudential consideration of the nature of culpability in criminal law, a matter that goes to the heart of the philosophical underpinnings of any legal system. Next, Alexia Solomou provides a comprehensive analysis of space law, true frontier territory of the international legal order. Scott Morrison's piece on town and village greens is doubtless of great topical interest (efforts apparently continue to register the concrete undercroft of the Southbank Centre), as is Thomas van der Merwe's account of some of the effects of the Criminal Justice Act 2003 on the admission of evidence of previous convictions. Jack Duncanson's article interrogates the role of the separate crime of genocide. Finally, this year's edition contains two valuable case-notes on matters of company law and sovereign immunity by Michele Gavin-Rizzuto, and on company law and family law by Tom Wilson.

As with last year's volume, this edition of the journal is available online from the Gray's Inn website and in printed form.

I am most grateful to all the authors for their cooperation and patience throughout the production of the journal. Thanks must also go to the Education Department of Gray's Inn, the AGIS committee, Gareth Lee-Smith and Martin Browne.

A BIPOLAR THEORY OF CULPABILITY

James Goodwin

The question of when, and why, a person is culpable is central to the criminal law. Most would agree that culpability should normally be a necessary condition of criminalisation. So *when* and *why* can we regard an agent as culpable; *when* and *why* can we regard D as open to blame in respect of doing a wrongful act? Most models of culpability expound a unifying theory. This short article will put forward a bipolar theory of culpability, which suggests that culpability can be grounded in defective choices *or* in defective character.¹

I. What is culpability?

First, a word must be said as to *what* it is to be culpable. If we are unclear as to what culpability is, then questions of *when* and *why* D can be regarded as culpable are likely to be confused.

Assume that doing X is wrongful. In Razian terminology, the guiding reasons not to do X defeat any reasons to do X.² X might be ‘causing death’, ‘causing pain’, and so on. This conception of wrongfulness is based simply on a moral assessment of X itself: the act X is wrongful.

Assessing an agent, D, as *culpable*, however, is a different type of moral assessment. We are not simply assessing D as a moral agent. Instead, we assess D *for doing X*. Culpability means that we can *blame* D for doing X. Thus, the central problem for culpability is how to follow the wrongfulness of X into the blameworthiness of D doing X.

¹ I am extremely grateful to Andrew Simester for a number of points within this argument. In the penumbra between plagiarism and inspiration, I hope to fall within the latter.

² J Raz, *Practical Reason and Norms* (2nd edn, 1990)

II. Traditional accounts

The debate over culpability has traditionally been dominated by two accounts. The first, often termed a ‘subjective’ theory, dictates that culpability rests on morally defective *choices*. We blame A for throwing a stone at B because this morally defective choice reflects badly on A. The corollary is that inadvertence cannot be culpable. If A did not intend to harm B, or did not realise the risk in throwing the stone, then she is immune from blame. The alternative account can be termed ‘objective’. On this understanding, we might say A is culpable, since she has a duty to *take care* not to throw stones. Her behaviour has fallen short of a decent standard – that of a reasonable person – and she is therefore open to blame. This transforms into a focus on *character* – D’s character is morally defective. This is, necessarily, a very quick sketch of two polarised positions, and many nuanced positions are held therebetween. But it is important to map out the contours of a terrain before suggesting a route through it.

This article will suggest that neither account is satisfactory. But the purpose of this article is not to knock down two straw men. It will be suggested that both accounts hold very important truths, but in each trying to provide a unified and comprehensive account of culpability, they necessarily fail. Culpability is not unipolar. Culpability can, and often is, grounded in defective choice. But blame can attach to inadvertence. A bipolar theory of culpability therefore provides a satisfying account of when and why we can blame D for doing a wrongful act.

III. The problem with choice

Choice-based conceptions of culpability provide a very clear guide to *when* and *why* D can be regarded as culpable. Moore has provided perhaps the clearest explanation.³ D is culpable when she makes a morally defective choice in doing X. She is culpable because by choosing to do X, which is wrongful, she places herself in opposition to the guiding reasons

³ MS Moore, ‘Choice, Character and Excuse’ (1990) 7 *Social Philosophy & Policy* 29

not to do X. Her choices endorse the very reasons which ground the wrongfulness of X. This clearly opens D, in respect of X, to a blaming judgement. Choice thus provides the link between the wrongfulness of X and the blameworthiness of D. A firm philosophical justification also seems to underpin this focus.⁴

However, the problem with choice-based accounts such as Moore's lies not in what they *do* explain. The problem is what they *not* explain. On Moore's account, D is necessarily excused from culpability whenever she did not advertently choose to do X. In other words, excuse is the other side of the coin to choice. But the difficulty is that Moore's theory is incomplete in two important ways. First, the dichotomy between choice and excuse is misleading. Second, it seems open to doubt whether these two categories – choice and excuse – are mutually exclusive and exhaustive. There appears to be some normative distance between them where culpability can indeed be ascribed to D.

First, take the example of Alex and Edward. Edward is a terrorist, and has placed a bomb in Gray's Inn. He tells Alex that this bomb will explode if Alex does not immediately walk into the Inn and wound James. Now, we might conclude that Alex should be granted an excuse if he were to wound James. This seems a paradigmatic example of duress, or what might be termed a 'true excuse'.⁵ However Alex has manifestly made a *choice* to do X, a wrongful act. But in assessing his explanation, (his explanatory reasons in Razian terms), we understand why Alex has so chosen and see that he has not fallen below a certain standard.⁶ Yet on Moore's account, we must conclude that Alex did not make a *choice*. This seems doubtful; Moore's would appear to be a flawed account of choice.

The second problem with Moore's conception of choice-culpability is even more damaging. It excludes the possibility of culpability for inadvertence. Of course, inadvertence cannot ground blame in the same way that choice does – *ex hypothesi* D has not made a choice. Yet there

⁴ Viz. Kantianism.

⁵ Note here that Moore's theory also fails to distinguish 'irresponsibility' defences, such as automatism, where we would deny Alex's status as a moral agent altogether (meaning that he would simply not be open to moral assessment).

⁶ J Gardner, 'The Gist of Excuses' 2.1 *Buffalo Criminal Law Review* (1997) 575. Compare the Aristotelian view that a concession is made to the fact that human nature is 'overstrained' (*Ethics*, Book III).

appears to be another way we can trace the wrongfulness of X to the blameworthiness of D doing X, outwith choice. The wrongfulness of X, say throwing stones, can reflect badly on D, even if she realised no risk, simply because she failed to act for the right reasons; she failed to *take care* not to throw stones. This is capable of reflecting badly on D *qua* moral agent. She shows a character flaw in not considering the risks inherent in stone throwing. If the stone harms B, then D may be culpable.

IV. The problem with character

If the foregoing is true, then we might be tempted by a theory of culpability focusing on character. Here, we would ground blame in the fact that doing X reflects on some bad character trait of D.⁷ For instance, we can blame A for throwing stones because this reflects bad character traits - being negligent, not thinking of risks. This also explains why we wouldn't blame D for doing X where this was because of D's blindness, or low intelligence: this would not reveal a character flaw.

Nevertheless, the problems of a (unified) character-based conception of culpability are well-known. Indeed, Moore presents two. First, why punish bad character only indirectly, through actions which are expressive thereof? Why not simply punish people for being bad people? Secondly, it is very difficult for character theorists to wriggle out of the 'out of character' wrongdoing example. If Paul, in a moment of unprecedented rage, hits his girlfriend, he may regret the action for the rest of his life, and his action may not reflect a character flaw. Although it must be true, as Duff recognises, that such examples are rare – they will much more commonly exhibit a latent aspect of the agent's character – this will not explain all cases.⁸ Most, I think, would feel deeply uncomfortable with a conclusion that Paul is not culpable for hitting his girlfriend in this case. Yet that would be what a (unified) character theory demanded.

⁷ Compare D Hume, *A Treatise of Human Nature*, ed. LA Selby-Bigge (2nd edn, Clarendon Press 1975).

⁸ RA Duff, 'Choice, Character, and Criminal Liability' 12.4 *Law and Philosophy* (Nov. 1993) 345

V. Is a unified theory impossible?

We have seen that both the choice theory and the character theory seem to provide an explanation of when and why an agent might be deemed culpable, and yet both have flaws as a unified theory. Perhaps a unified theory is, then, impossible. Nevertheless, Gardner attempts to provide a unifying theory, and this must be considered.⁹

Gardner claims: ‘To be blameworthy, one must: (a) have done something wrong and (b) have been responsible for doing it, while lacking (c) justification and (d) excuse for having done it’.¹⁰

So D is blameworthy for throwing stones simply because X, throwing stones, is wrongful. If she cannot fulfil an exculpatory element in (b), (c) or (d), then culpability follows. This would provide a clear structure of *when* D is culpable. It also provides a simple reason *why* D is culpable – the wrongfulness of X can be traced through to D simply *by virtue of D having done it*. However, there is a problem. As Simester has noted, this is a negative test; a gateway through which culpability can be reached.¹¹ Gardner has circumvented the problematic differences between a choice and character based model of culpability, but in so doing has provided a structure that does little explanatory work. *Why* is the wrongfulness of X carried through to D? If it is, as Gardner suggests, this does not seem to follow of its own accord. And think back to Alex in the above example, acting under duress. If we don’t know why Alex would be *prima facie* culpable for doing X (wounding James), it becomes difficult to assess the reasonableness of his choice to do so in light of his duress. A lot of explanatory work is lumped onto the exculpatory defences.¹²

⁹ J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007)

¹⁰ *ibid* 227

¹¹ A Simester, ‘Wrongs and Reasons’, (2009) 72(4) MLR 648

¹² It should be noted here that much the same problems attach to HLA Hart’s capacity theory (see HLA Hart, *Punishment and Responsibility* (OUP 1968)). Although resting on choice, it suffers the same difficulty of providing only a negative test.

VI. A bipolar theory of culpability

The preceding sections have attempted to show that the choice and character theories present a powerful *explanation* for culpability, but they fail in providing a unifying account. Gardner's account, on the other hand, is seemingly unifying but fails to provide an adequate explanation for D's culpability for doing X.

This is not cause for concern, however. There is no need for a theory of culpability to be unipolar. Culpability can be bipolar – a blaming judgement can attach to D vis-à-vis her choices, *or* her character.

A proposed test is as follows:

D is culpable for doing X (where X is wrongful) if:

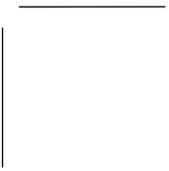
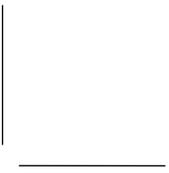
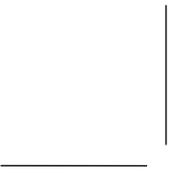
- (a) Doing X displays a morally defective choice; OR
- (b) A reasonable person in D's position would not have done X;
- AND
- (c) D is morally responsible for X;
- (d) D lacks a justification or excuse.

(a) and (b) both, alternatively, ground culpability. (c) seeks to deal with irresponsibility defences, whereas (d) provides true exculpatory elements. By providing an *explanation* for culpability in (a) and (b), less analytical work is required of the exculpatory elements, and their operation would be guided by the reasons underpinning (a) and (b).

So, one major problem with choice theory is solved: inadvertent negligence could be captured. Criminal liability for negligence should nevertheless be circumscribed – there are several rule of law considerations at play here, not least that people should be on notice about crimes they could commit; the criminal law should not 'ambush' citizens. But, if criminal liability for negligence is to be used sparingly, this model could provide a reason why it would be justified. Correlatively, a major flaw with character-based theories may be avoided – the out-of-character wrongdoer can still be liable under (a).

In sum, this short article has assessed when and why a person can be regarded as culpable for doing something wrongful. It has been argued that although the choice and character theories have great explanatory power, they fail to account for culpability in all cases. Gardner's approach suffers from a diametrically opposed problem – a unified approach is achieved but at the expense of explaining *why* culpability is grounded. I

have attempted to sketch a test which accounts for a theory of bipolar culpability. This has sought to combine the explanatory force of the traditional accounts, while recognising the strength in Gardner's unified approach. A bipolar theory of culpability may provide a safe route through a Charybdis and Scylla which have long troubled the waters of the philosophy of criminal law.



THE DEVELOPMENT OF INTERNATIONAL LAW REGARDING THE PEACEFUL USES OF OUTER SPACE

Alexia Solomou

International law has an incredible breadth and depth. It governs a multiplicity of inter-state activities. It spreads its wings over a variety of subject matters: from war to peace, and from the Earth to outer space. International law also has great flexibility; it is sensitive to the development of science and technology. Its reach now extends from the realms of bioethics and cyber-space, to the deep oceans and aerospace. International law has always kept its pace with the best and worst aspects of human activity: from developments in the field of medicine to improve the human condition, to the development of nuclear science, which is capable of eradicating the human race.

International law has also kept up to speed with the development of technology insofar as transport is concerned. At the beginning of the twentieth century the controllable airplane was invented, and by the end of World War I it became a fast means of transporting people and goods. In 1957, the first artificial satellite to orbit the Earth, Sputnik 1 was launched by the Soviet Union. In January 1958, the United States followed with Explorer 1. In 1961, the first human spaceflight, Vostok 1, made one orbit around the Earth with Soviet cosmonaut Yuri Gagarin aboard. In 1968, the United States' NASA Apollo 8 achieved the first manned lunar orbiting mission. In 1969, the first manned lunar landing took place with Apollo 11, and in 2004, SpaceShipOne was used for the first privately-funded human spaceflight.

Space law is a branch of public international law. Fundamental principles of international law are reflected in various norms regulating outer space, from the peaceful uses of outer space and the principle of non-discrimination, to the non-extension of the principle of sovereignty

to space and the characterisation of astronauts as ‘emissaries of mankind’. One of the foremost challenges of public international law is to keep up with the speed and ever-growing physical reach of space technology. It is therefore pertinent to examine how international law has over the past five decades reacted to this phenomenon, contributing to the exploration and various uses of outer space. Human nature, being able of both good and evil, has led to the utilisation of outer space both for peaceful and military uses. Before immersing ourselves in the development of international law regarding the multifarious uses of outer space, it is necessary to examine the definition of ‘outer space’.

Space agreements or other space law instruments have never authoritatively defined the term ‘outer space’. It has proven difficult for the states concerned to agree on a legal definition in the context of rapidly developing technology, and their apprehension that a legally binding legal definition might restrict their sphere of operation.¹ Nevertheless, this legal notion includes the Moon and other celestial bodies other than the Earth,² but does not purport to regulate space activity beyond the solar system.³ It is also pertinent to point to the distinction between airspace and outer space. The airspace above a state’s land area and territorial waters is subject to ‘the complete and exclusive sovereignty’ of the respective state,⁴ whereas outer space ‘is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means’.⁵ Outer space has been thought of beginning at a height of around 110km above sea level, but the issue of limitation has been brought into question.⁶ Opposing views among states

¹ VS Vereschchetin, ‘Outer Space’, *Max Planck Encyclopedia of Public International Law*, <www.mpepil.com> [1]

² Agreement Governing the Activities of State on the Moon and Other Celestial Bodies (adopted 18 December 1979, entered into force 11 July 1984) 1363 UNTS 3, art 1

³ This follows from the title and text of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies (signed 27 January 1967, entered into force 10 October 1967) 610 UNTS 205, ‘Outer Space Treaty’

⁴ Convention on International Civil Aviation (signed 7 December 1944, entered into force 4 April 1947) 15 UNTS 295, art 1

⁵ Outer Space Treaty, art 2

⁶ S Hobe, ‘Definition and Delimitation of Outer Space’, [1997] *ECSL Proceedings* 49, 57

as to the necessity of definition and delimitation of outer space, and the methodology to be adopted continue unabated up to this day.⁷

I. The Development of International Space Law

A. Resolutions in the 1950s and 1960s

With the launching of Sputnik 1 in 1957, the international community commenced discussions regarding the need to regulate this new activity. The crux of the discussion, mainly between the Soviet Union and the United States, was whether by analogy to international air law space activities could come under the regulation of international law.⁸ The superpowers had two overriding considerations: firstly the clarification of the legal status of outer space and celestial bodies; and secondly the potential military uses of outer space. This discussion eventually moved in the late 1950s to the United Nations. In 1957, the United States proposed in a memorandum submitted to the General Assembly that the United Nations should establish a multilateral control system as a first step toward the objective of ‘assuring that future developments in outer space would be devoted exclusively for peaceful and scientific purposes’.⁹

In 1958, the *ad hoc* Committee on the Peaceful Uses of Outer Space was created,¹⁰ which became a permanent body a year later (also known as ‘COPUOS’).¹¹ This committee prepared two key General Assembly Resolutions, adopted in 1961 and 1963 respectively, laying two

⁷ See, for example, UNGA Committee on the Peaceful Uses of Outer Space ‘Report of the Legal Sub-Committee on its Forty-eighth Session, held in Vienna from 4 to 15 April 2005’ (28 April 2005) UN Doc A/AC.105/850 and the unedited verbatim transcripts of meetings of the UNGA Committee on the Peaceful Uses of Outer Space Legal Subcommittee UN Doc COPUOS/Legal/T, 715-720 and 726

⁸ S Hobe, ‘Current and Future Development of International Space Law’ Proceedings of United Nations/Brazil Workshop on Space Law ‘Disseminating and Developing International and National Space Law: The Latin America and Caribbean Perspective’ ST/SPACE/28 (2005), 4

⁹ US Memorandum submitted to the First Committee of the United Nations General Assembly, 12 January 1957, UN Doc. A/C.1/738, printed in Department of State, ‘Documents on Disarmament 1945-1959’ (1960, publication 7008), vol. 2, 733

¹⁰ United Nations General Assembly Resolution 1348 (XIII) of 13 December 1958

¹¹ United Nations General Assembly Resolution 1472 (XIV) of 12 December 1959

foundational principles of international space law.¹² First, states resolved that international law, including the United Nations Charter, applied to outer space and celestial bodies, and that it should be used for ‘peaceful’ purposes. Second, it was established that outer space and celestial bodies cannot be subject to any kind of national appropriation. Finally, the 1963 resolution approved a draft Declaration of the Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space,¹³ which contained a set of principles regulating activities conducted in outer space.

Although the 1963 Declaration could not establish binding norms of international law, it was considered during the period of its adoption to be the basis for a future legally-binding treaty. In 1966 the two major space powers submitted their proposals to the General Assembly: the United States submitted a draft Treaty Governing the Exploration of the Moon and Other Celestial Bodies,¹⁴ and the Soviet Union submitted a draft Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, the Moon and other Celestial Bodies.¹⁵ Negotiations for the Outer Space Treaty began in July 1966, initially in Geneva and later in New York. At the end of that year, the General Assembly adopted a resolution recommending the Outer Space Treaty for signature and ratification by states.¹⁶

B. Treaty Framework: The Outer Space Treaty and Four Space Conventions

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies was opened for signature on 27 January 1967, and it entered into force on 10 October of the same year.¹⁷ As of today, 100 states are signatories to the Outer Space Treaty, and 26 states have

¹² United Nations General Assembly Resolution 1721 (XIV) of 20 December 1961; United Nations General Assembly Resolution 1962 (XVII) of 13 December 1963

¹³ UN Doc A/C.1/881, A/AC.105/C.2/L.1

¹⁴ A/AC.105/32

¹⁵ A/6352

¹⁶ United Nations General Assembly Resolution 2222 (XXI) of 19 December 1966

¹⁷ 610 UNTS 205, available at

<<http://www.oosa.unvienna.org/oosa/SpaceLaw/outerspt.html>>

ratified it.¹⁸ The Outer Space Treaty provides the basic framework of international space law. It laid down the main principles for outer space activities, including the non-appropriation principle and the use of the Moon and other celestial bodies exclusively for peaceful purposes. Given that national security concerns of states and their commercial interests related to air navigation did not appear to be of particular relevance in relation to outer space, the principle of sovereignty was not extended to outer space. States were inspired by ‘the great prospects opening up before mankind as a result of man’s entry into outer space’ and ‘the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes’.¹⁹

The Outer Space Treaty is not a comprehensive instrument comprising all existing and foreseeable aspects of space activities. It was therefore followed by the conclusion of four subject-specific instruments. First, in 1968, the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space was adopted.²⁰ It is an instrument dealing with space-related activities on earth and it incorporates the main international legal duty to help astronauts in distress. Second, in 1972, the Convention on International Liability for Damage Caused by Space Objects was adopted.²¹ Elaborating on the responsibility and liability principles of the Outer Space Treaty, article II provides that a launching state shall be absolutely liable to pay compensation for damage caused by its space objects on the surface of the Earth or to aircraft in flight. Third, in 1975, the Convention on Registration of Objects Launched into Outer Space was opened for signature.²² Article II(1) requires a launching state of a space object that is placed into earth orbit or beyond to register such a space object by means of an entry in an appropriate registry which it shall

¹⁸ Outer Space Treaty Signatories available at <http://www.oosa.unvienna.org/oosatdb/showTreatySignatures.do>

¹⁹ Outer Space Treaty, Preamble

²⁰ 672 UNTS 119. It was adopted by the General Assembly on 19 December 1967 with Resolution 2345 (XXII). It opened for signature on 22 April 1968, and entered into force on 3 December 1968.

²¹ 24 UST. 2389, TIAS No. 7762. It was adopted by the General Assembly on 29 November 1971 with Resolution 2777 (XXVI). It was opened for signature on 29 March 1972, and entered into force on 29 March 1972.

²² 1023 UNTS 15. It was opened for signature 14 January 1975, and it entered into force 15 September 1976.

maintain, and to inform the Secretary General of the United Nations of the establishment of such a registry. Fourth, in 1979, the Agreement Governing the Activities of States on the Moon and other Celestial Bodies ('Moon Agreement') was adopted.²³

C. Resolutions: 1980s, 1990s, 2000s

The Moon Agreement proved largely unsuccessful. Only four states have ratified it, and thirteen states have signed it up to this day.²⁴ Following the near-failure of this agreement, the international community opted for soft law making instead of framing new conventions. As a result the General Assembly developed a set of principles of a non-binding nature and of recommendatory value. In 1982, the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting were adopted.²⁵ This is an instrument on direct broadcasting by satellite that balances the differing interests of a trans-border broadcaster, which might be a state or a private entity, and the receiving state. In 1986, the Principles Relating to Remote Sensing of the Earth from Outer Space was adopted, and which in turn balances the interests of sensing states or enterprises and sensed states.²⁶ In 1992, the Principles Relevant to the Use of Nuclear Power Sources in Outer Space was adopted.²⁷ In 1996, the adoption of a Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, taking into Particular Account the Needs of Developing Countries took place.²⁸ The most recent resolutions were adopted in 2004 and 2007 respectively, the former dealing with the application of the concept of the 'launching State',²⁹ and the latter with

²³ It was signed on 5 December 1979, UN Doc A/RES/34/68. It was opened for signature on 18 December 1979, and it entered into force on 11 July 1984. It collected only a limited number of ratifications and signatures.

²⁴ Moon Agreement signatures available at

<<http://www.oosa.unvienna.org/oosatdb/showTreatySignatures.do>>

²⁵ United Nations General Assembly Resolution 37/92 of 10 December 1982

²⁶ United Nations General Assembly Resolution 41/76 of 3 December 1986

²⁷ United Nations General Assembly Resolution 47/68 of 14 December 1992

²⁸ United Nations General Assembly Resolution 51/122 of 13 December 1996

²⁹ United Nations General Assembly Resolution 59/115 of 10 December 2004

recommendations on enhancing the practice of states and international inter-governmental organisations in registering space objects.³⁰

II. The Principle of Peaceful Uses of Outer Space

A. Travaux Préparatoires

The inclusion of the principle of the peaceful use of space in the 1967 Outer Space Treaty was not politically unmotivated. President Eisenhower's immediate reaction to the Soviet Union's success with Sputnik aimed to limit the potential military implications by formulating treaty obligations that would prevent an arms race in space.³¹ Whatever the motivation behind it, the principle of peaceful use had a moderating effect on the arms race in outer space, which could have led human kind to the brink of war and even to the complete destruction of civilisation.³² During the 1950s, the term 'peaceful' definitely meant 'non-military'.³³ This is evident in the first General Assembly resolution on space adopted in 1957.³⁴ It gave priority to the negotiation of a disarmament agreement, which would provide *inter alia* for the joint study of an inspection system designed to ensure that the sending of objects through outer space would be exclusively for peaceful and scientific purposes.³⁵ The United States expressed its support for this proposal, not only by putting it forward to the General Assembly, but also by incorporating the principle of peaceful uses of outer space into its domestic law. The National Aeronautics and Space Act, adopted by the United States Congress on 29 July 1958, stated that 'it is the policy of the United States that activities in space should be

³⁰ United Nations General Assembly Resolution 62/101 of 17 December 2007

³¹ R Handberg, *Seeking New World Vistas: The Militarization of Space* (New York 2000) 44

³² V Kopal, 'Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies' (New York, 19 December 1966) Audiovisual Library of International Law, available at <<http://untreaty.un.org/cod/avl/ha/tos/tos.html>>

³³ See for example Article I of the Antarctic Treaty (1 December 1959) 402 UNTS 71, making clear that 'peaceful' means 'non-military'.

³⁴ United Nations General Assembly Resolution 1148 (XII) of 14 November 1957

³⁵ *ibid* para I(f). See also United Nations General Assembly Resolution 1348 (XIII) of 13 December 1958, Preamble, paras. 1 and 3.

devoted to peaceful purposes for the benefit of all mankind'.³⁶ On the other hand, the Soviet Union proposed a complete ban of all military uses of outer space to the United Nations.³⁷

The proposals by the United States and the Soviet Union regarding a potential international agreement within the framework of the United Nations regulating the uses of outer space were both directed towards preventing an arms race in outer space. In 1959, in its first report, the *ad hoc* Committee on the Peaceful Uses of Outer Space stressed that outer space was the common heritage of all mankind and that its exploration and use had to be for the benefit of all mankind.³⁸ A 1962 General Assembly resolution entitled 'International Cooperation in the Peaceful Uses of Outer Space' tasked COPUOS to elaborate comprehensive legal principles governing the peaceful use of outer space.³⁹ Furthermore, also in 1962, during the discussions before COPUOS, the Indian delegate expressed a position reflecting the attitude of the majority of states at that point, namely that 'outer space should be a kind of warless world, where all military concepts of this earth should be totally inapplicable [...] There should be only one governing concept, that of humanity and sovereignty of mankind'.⁴⁰ The 1963 'Principles Declaration' affirmed that the peaceful use of outer space should be 'for the benefit and in the interests of all mankind'.⁴¹ This Declaration constituted the foundation for the 1967 Outer Space Treaty. Nevertheless, complete demilitarisation of outer space was not palatable to the two superpowers, who were both spending enormous amounts of money on space programmes with military aspects. This was evident in the negotiations of the 1967 Outer Space Treaty, where attempts by some delegations to bring about a complete demilitarisation of outer space were rejected by both superpowers.⁴²

³⁶ Section 102(a), National Aeronautics and Space Act, House Resolution, H.R. 12575, Public Law 86-568, 85th Congress, First Session, 29 July 1958, 5

³⁷ UN Doc. A/3818, Annexes, 17 March 1958, Point 1 of the Draft Treaty of the Soviet Union

³⁸ UN Doc. A/4141, 14 July 1959

³⁹ United Nations General Assembly Resolution 1802 (GV XVII), 14 December 1962

⁴⁰ UN Doc. A/AC.105/PV.3, 20 March 1962, 63

⁴¹ United Nations General Assembly Resolution 1962 (GV XVII), 13 December 1963

⁴² UN Doc. A/AC.105/C.2/SR.65, 22 July 1967, 9-10

B. Textual Interpretation: Ordinary Meaning of Term 'Peaceful'

Article IV confirmed the undertaking of states 'not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner'.⁴³ Article IV prohibited the 'establishment of military bases, installation and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies'. At the same time it allowed 'the use of military personnel for scientific research or for any other peaceful purposes', and 'the use of any equipment or facility necessary for the peaceful exploration of the Moon and other celestial bodies'. To the extent that it is used in the text of the Outer Space Treaty, the word 'peaceful' is used to mean 'non-military', rather than 'non-aggressive'. This is the plain and ordinary meaning of the term 'peaceful', in line with the interpretative rules enshrined in the Vienna Convention of the Law of Treaties 1969.⁴⁴ This meaning is neither ambiguous nor obscure, and it does not lead to a result which is absurd or unreasonable. Rather it is the interpretation of the word 'peaceful' as 'non-aggressive' that is manifestly absurd.

C. Object and Purpose of the Outer Space Treaty

Nevertheless, Article VI of the Outer Space Treaty has to be interpreted in light of its object and purpose. The peaceful use of outer space principle therefore has to be interpreted in light of the 'interest of all mankind' clause found in the Preamble of the 1967 Treaty. Furthermore, article I(1) of the Outer Space Treaty provides that '[t]he exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries [...] and

⁴³ Art IV, Outer Space Treaty, which confirmed the undertaking made in United Nations General Assembly Resolution 1884 (XVIII) of 17 October 1963. For a commentary on Article IV of the Outer Space Treaty see C-J Cheng, 'Military Use of Outer Space: Article IV of the 1967 Space Treaty Revisited' in C-J Cheng and DH Kim (eds), *The Utilization of the World's Air Space and Free Outer Space in the 21st Century* (2000); M Filho, 'Total Militarization of Space and Space Law: The Future of the Article IV of the 1967 Outer Space Treaty', (1998) Proceedings from the 40th Colloquium on the Law of Outer Space, 358

⁴⁴ Art 31(1), Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331

shall be the province of all mankind'. As early as 1952, Oscar Schachter considered space to be a 'common property of all mankind over which no nation would be permitted to exercise domination'. This, he thought, would 'dramatically emphasize the common heritage of humanity and [...] might serve [...] to strengthen the sense of international community which is so vital to the development of a peaceful and secure world order'.⁴⁵ Instead of individual nations exercising sovereignty over outer space, the international community as a whole would exercise sovereignty over outer space. Professor Matte characterises outer space law as representing an enhanced orientation of a new structure of law that shifts the emphasis away from state sovereignty towards the interest of the international community.⁴⁶

The principle of the peaceful use of outer space is generally regarded as a constitutive element of the 'interest of all mankind' principle.⁴⁷ It can generally be held that the enhanced community purpose cannot be furthered successfully without restricting the area to *exclusively* peaceful use. The principle of the peaceful use of outer space and the mankind clause in the Outer Space Treaty were from the outset closely linked with the limitation of the *military* use of outer space.⁴⁸ A non-peaceful use cannot be considered for the benefit of all mankind; quite the contrary. It therefore follows that outer space should not be militarised, or used to achieve any military purposes. Even if the Outer Space Treaty does not explicitly prohibit all military uses at all times, if read in light of the interest of the entirety of the international community, then such uses cannot be allowed. The Outer Space Treaty can therefore be interpreted as mandating complete demilitarisation of outer space.

It is unfortunate that a minimalist interpretation has been given by the major powers to the term 'peaceful' as 'non-aggressive', instead of 'non-

⁴⁵ O Schachter, 'Who Wins the Universe?', reprinted in US Government, 'Space Law – A Symposium' (Washington DC 1959)

⁴⁶ NM Matte, 'Outer Space and International Organizations' in R-J Dupuy (ed), *Manuel sur les organisations internationales* (Leiden 1998) 752

⁴⁷ D Shraga, 'The Common Heritage of Mankind: The Concept and its Application' (1986) 15 *Annales d'Études Internationales* 60; MV White, 'The Common Heritage of Mankind: An Assessment' (1982) 14 *Case Western Journal of International Law* 535

⁴⁸ D Wolter, 'Common Security in Outer Space and International Law' UNIDIR/2005/29, 21

military'.⁴⁹ This position has attracted some doctrinal support.⁵⁰ Nevertheless, if the full implications of this interpretation are explored, and in the words of Professor Vlastic: '[i]f "peaceful" means "non-aggressive," then it follows logically – and absurdly – that all nuclear and chemical weapons are also "peaceful," as long as they are not used for aggressive purposes'.⁵¹ Furthermore, if such an interpretation is accorded to the term 'peaceful', one wonders how to interpret the term 'non-aggressive' when explicitly stipulated in Article IV(2). Given that acts of aggression are explicitly prohibited under international law, and use of force is prohibited under Article 2(4) of the United Nations Charter, then Article IV of the Outer Space Treaty must stipulate that the moon and other celestial bodies shall be used exclusively for non-military purposes.⁵²

D. Subsequent State Practice

i. 'Peaceful' as 'Non-Aggressive'

The interpretation of the term 'peaceful' as 'non-aggressive' and the narrow understanding of Article IV of the Outer Space Treaty by countries like the United States of America allows them to have military space missions which are not 'aggressive'. It also allows for the use of intercontinental ballistic missiles. Other limited uses include so-called 'support activities' for military purposes, such as reconnaissance, surveillance and intelligence collection through the use of satellite imagery and space-based electronic intelligence collection. Moreover, satellite communications have provided an extraordinary new control of

⁴⁹ C-J Cheng, 'Military Use of Outer Space: Article IV of the 1967 Space Treaty Revisited' in C-J Cheng and DH Kim (eds), *The Utilization of the World's Air Space and Free Outer Space in the 21st Century* (2000) 309. See also B Cheng, *Studies in International Space Law* (1997), especially Chapter 19 on 'Definitional Issues in Space Law: The "Peaceful Use" of Outer Space'.

⁵⁰ ER Finch, 'Outer Space for "Peaceful Purposes"' (1968) 54 *American Bar Association Journal* 365; A Meyer, 'Interpretation of the Term "Peaceful" in the Light of the Space Treaty' (1968) 11 *Space Law Colloquium* 105; M Menter, 'Peaceful uses of Outer Space and National Security' (1983) 17(3) *International Lawyer* 381; L Haeck, 'Le droit de la guerre spatiale' (1991) 16 *Annals of Air and Space Law* 307, 309

⁵¹ In B Jasani (ed), *Peaceful and Non-Peaceful Uses of Space* (1991) 44-45

⁵² C-J Cheng, 'Military Use of Outer Space: Article IV of the 1967 Space Treaty Revisited' in C-J Cheng and DH Kim (eds), *The Utilization of the World's Air Space and Free Outer Space in the 21st Century* (2000) 321

military forces deployed throughout the world. The United States extended the application of the Global Positioning System to further develop the role of military space systems, by integrating them into virtually all aspects of military operations to provide indirect strategic support to military forces and to enable the application of military force in near-real-time tactical operations through precision weapons guidance. Furthermore, radar satellites offer the potential to detect opposition force on the ground in all weather and at all times.

ii. Passive Versus Active Military Uses of Outer Space

Another qualification that exists in the literature insofar as the use of outer space is concerned is the distinction between passive and active military uses of outer space.⁵³ Passive uses are non-destructive, whereas active military uses are destructive. Passive military systems are not weapons themselves; they include reconnaissance, early warning communications, navigation and other satellites in order to effectively use and coordinate aircraft, tanks, missiles, and ships on Earth.⁵⁴ Active military uses of outer space involve destructive acts occurring in outer space itself, rather than on Earth. Another related distinction is the one between militarisation and 'weaponisation' of space. The former category involves non-intrusive military activities conducted in space, and the latter involves potentially intrusive and thus destabilising military space activities.⁵⁵ Recent years have witnessed an increasing tolerance of the passive militarisation of outer space. The distinction between passive and active military space use constitutes a threshold up to which point the international community is willing to accept military uses of outer space.⁵⁶ The non-objection to the passive military uses of outer space does not

⁵³ See for example CQ Christol, 'Outer Space: Battle Ground for the Future?' in M Cohen and ME Gouin (eds), *Lawyers and the Nuclear Debate* (1988); RM Bowman, 'The Militarization of Space? The Real Issue is the Weaponisation of Space', paper submitted to the International Progress Organization (24 September 1984) 2; S Gorove, 'Limiting the Use of Arms in Outer Space: Legal and Policy Issues', *Proceedings from the 25th Colloquium on the Law of Outer Space* (1983) 181

⁵⁴ G Steinberg, 'The Militarization of Space: From Passive support to active weapons systems' (October 1982) *Futures* 379

⁵⁵ D Wolter, 'Common Security in Outer Space and International Law', UNIDIR/2005/29, 27

⁵⁶ *ibid* 52-53

necessarily imply that the international community is prepared to accept active military uses.

iii. Towards Active Military Uses of Outer Space?

Outer space has been used militarily ever since the beginning of the space age. According to the Stockholm International Peace Research Institute more than 70% of all satellites launched in outer space serve full or partial military purposes. In September 1999, the United States Congress adopted the 'National Missile Defence Act', mandating the deployment 'as soon as is technologically possible an effective National Missile Defence System capable of defending the territory of the United States against limited ballistic missile attack (whether accidental, unauthorised or deliberate)'.⁵⁷ The US Space Command also presented a 'Long-Range Plan' consisting of a comprehensive military strategy for outer space until 2020, which provides *inter alia* for the deployment of weapons in space.⁵⁸ In 2000, the Pentagon commissioned the development of a 'space-based laser readiness demonstrator', accompanied by the prediction from the US Air Force that 'new technologies will allow the fielding of space-based weapons of devastating effectiveness to be used to deliver energy and mass as force projection in tactical and strategic conflict'.⁵⁹ The United States has recently been reconsidering the option of equipping interceptor missiles with nuclear warheads.⁶⁰ After the United States renunciation of the Anti-Ballistic Missile Treaty in December 2001, the principle of the peaceful use of outer space remains the only international legal restriction on the introduction of weapons other than weapons of mass-destruction into space.⁶¹

⁵⁷ National Missile Defence Act of 1999, (22 July 1999) *Public Law* 106-38

⁵⁸ US Space Command, 'Long-Range Plan: Implementing USSPACECOM Vision for 2020', available at <www.spacecom.af.mil>

⁵⁹ US Air Force Advisory Board, 'New World Vistas: Air and Space Power for the 21st Century', (1996) *Space Technology*

⁶⁰ Schneider, Press Conference of the Chairman of the US Defence Science Board, 10 April 2002, reported in 'Nuclear-Tipped Interceptors Studies. Rumsfeld Revives Rejected Missile Defence Concept', *The Washington Post* 10 April 2002

⁶¹ D Wolter, 'Common Security in Outer Space and International Law' UNIDIR/2005/29, 3-4

iv. The Case for the Militarisation of Outer Void Space

Professor Bin Cheng argues that insofar as the immense void space in between the innumerable celestial bodies is concerned, apart from the limitation on the stationing of weapons of mass destruction, the 1967 Treaty as a whole leaves states entirely free to use outer void space in any way they wish, including using it for military purposes particularly in self-defence in accordance with the rules of international law and specifically Article 51 of the United Nations Charter.⁶² He therefore concludes that outer void space has not been reserved exclusively for peaceful or non-military purposes. States remain free to deploy in outer void space any type of military satellite, including reconnaissance, communications, early warning and other satellites, construct manned or unmanned military space missions, carry out military exercises and manoeuvres, station or use any non-nuclear or non-mass destruction weapons there, including anti-satellite weapons, and ballistic missile defence systems, and send through or into outer void space any weapon, whether or not nuclear, or of mass destruction, against any target on earth, in outer space or any celestial body.⁶³

This argument, however, rests on a fragmented conception of outer space. It should be conceived as a whole entity, and not as two distinct ones: celestial bodies and the void space in between them. Both celestial bodies and the space in between make up the entirety of outer space. Therefore, Article IV regulates by necessary implication the entirety of outer space, and not only celestial bodies. Furthermore, Bin Cheng argues that what he terms as ‘void outer space’ should be regulated in accordance with international law, pointing to Article 51 of the UN Charter. The most relevant provision so far as the regulation of outer space is concerned is Article 2(4) of the UN Charter, which not only prohibits the use of force, but also the threat of the use of force. Therefore, the mere existence of weapons into outer space, not only on celestial bodies but also in the space in between violates the prohibition of the threat of the use of force.

⁶² C-J Cheng, ‘Military Use of Outer Space: Article IV of the 1967 Space Treaty Revisited’ in C-J Cheng and DH Kim (eds), *The Utilization of the World’s Air Space and Free Outer Space in the 21st Century* (2000) 329-30

⁶³ *ibid* 330-31

III. The Peaceful Uses of Outer Space

Advancements in technology have led to various peaceful uses of outer space. Many satellites have been launched into outer space to provide services to people on Earth. Satellites are now used for a multiplicity of purposes, from managing natural resources to facilitating relief efforts during emergencies. Technology has advanced to such a point that 'space tourism' is now a reality.

A. Communications

Communication satellites form a worldwide network in different orbits, and they are used to transmit information from one point to another. In 1964, the International Telecommunications Consortium (INTELSAT) was established on the basis of agreements signed by governments and operating entities.⁶⁴ In 1965, the world's first commercial communications satellite, Early Bird (Intelsat I) was launched into synchronous orbit, and a few months later, it started providing television and voice services. By 1969, the world's first global satellite communications system was complete. During that year Intelsat transmitted television images of Neil Armstrong's first steps on the moon, with a record of 500 million television viewers. By 2000, INTELSAT made the Olympic Games in Sydney available to a record four billion people worldwide, as broadcasters used more than 40,000 hours of capacity provided by 10 INTELSAT satellites.⁶⁵ In more recent years, mobile satellite communication has become increasingly important. This is performed by privately financed systems, such as IRIDIUM⁶⁶ and Global Star.⁶⁷ Furthermore, communications satellites along with ground-based networks provide access to the World Wide Web. The Internet is a

⁶⁴ For INTELSAT's history, see <<http://www.intelsat.com/about-us/history/>>

⁶⁵ '2000 and Beyond', INTELSAT Official Website, available at <<http://www.intelsat.com/about-us/history/intelsat-2000s.asp>>

⁶⁶ IRIDIUM Satellite Communications, Official Website, available at <<http://www.iridium.com/>>

⁶⁷ Global Star, Official Website, available at <<http://www.globalstar.com/>>

powerful tool of easy and instant transmission of information across the globe.

B. Geostationary Orbit

Geostationary orbit is a circular orbit located at an approximate distance of 36,000 km directly above the Earth's equator. Any object positioned in geostationary orbit seems to be stationary in the sky due to its rotation being equivalent to the rotation of the Earth. It is a privileged position because the antennas that communicate with satellites in geostationary orbit do not have to move to track them, as they can be pointed permanently at their position in the sky. Geostationary orbit is extremely useful for weather observations, remote sensing and telecommunications.⁶⁸ Nevertheless, satellites in geostationary orbit must occupy a single ring above the equator in order to avoid harmful radio-frequency interference. A limited number of satellites can be operated in geostationary orbit because there are a limited number of 'orbital' slots available. This has led to disagreement between countries wishing to have access to the same orbital slots.⁶⁹ That is why the International Telecommunication Union, a specialised agency of the United Nations is tasked with the allocation of such orbital slots.⁷⁰

A competing conception of the geostationary orbit has been adopted by countries traversed by the Earth's equator in the Bogota Declaration of 1976. They consider this orbit not as part of outer space, but rather the segments of this orbit as part of the territory over which equatorial states exercise their national sovereignty. Such states therefore consider this orbit to be a scarce natural resource, whose importance and value increase rapidly together with the development of space technology and with the growing need for communication. As a result, the Equatorial states that met in Bogota in 1976 declared their national sovereignty over

⁶⁸ LD Roberts, 'A Lost Connection: Geostationary Satellite Networks and the International Telecommunication Union' 15 *Berkeley Technology Law Journal* (2000) 1095, 1100

⁶⁹ MK Macauley, 'Allocation of Orbit and Spectrum Resources for Regional Communications: What's at Stake?', available at <<http://www.rff.org/Documents/RFF-DP-98-10.pdf>>

⁷⁰ International Telecommunication Union, Official Website, available at <<http://www.itu.int/en/Pages/default.aspx>>

the geostationary orbit.⁷¹ This claim runs counter to Article II of the 1967 Outer Space Treaty which stipulates that outer space is not subject to national appropriation by claim of sovereignty. Nevertheless, the Bogota Declaration seems to have been based on the lack of international legal agreement regarding where the boundary between the Earth and outer space lies.⁷² The legal status of the geostationary orbit therefore seems to be tied to the controversy over a legal definition of outer space.

C. Remote Sensing

Remote sensing is the sensing of the Earth's surface from space by making use of the properties of electromagnetic waves emitted, reflected or diffracted by the sensed objects, for the purposes of improving natural resources management, land use and protection of the environment.⁷³ Given that most remote sensing satellites cover the entire globe, they are essential tools in studying large-scale phenomena, such as ocean circulation, deforestation and desertification. They can be used in diverse fields of human interaction, from meteorological services in forecasting weather to criminologists' work in recreating scenes of accidents and crimes. Dynamic applications of spatial satellite imaging are invaluable to insurers and risk managers in acquiring data and information on natural or man-made disasters. Furthermore, the combination of satellite imaging with Internet streaming has given rise to systems such as Google Earth, which permit access to a world-wide database of very high resolution images of the Earth's surface.⁷⁴

Remote sensing is a classic case of dual-use technology. Apart from its application for economic development and humanitarian purposes, it has the potential for military uses. The United States, Russia, and more recently China have focused on building space assets for military

⁷¹ Declaration of the First Meeting of Equatorial Countries (also known as the 'Bogota Declaration'), adopted 3 December 1976, available at:

<http://www.jaxa.jp/library/space_law/chapter_2/2-2-1-2_e.html>

⁷² M Williamson, *Space: The Fragile Frontier* (2009) 29

⁷³ Principle I(a), United Nations General Assembly Resolution 41/65, December 1986

⁷⁴ Google Earth, <<http://www.google.com/earth/index.html>>; see also B Jasani, M Pesaresi, S Schneiderbauer and G Zeug, *Remote Sensing From Space: Supporting International Peace and Security* (2009) xlvii

applications.⁷⁵ An estimated two hundred satellites may be operating in exclusively military mode in space, and nearly 90 per cent of these are operated by the United States.⁷⁶ These are capable of high-quality data collection and coverage that provides a near-real-time capability for monitoring events around the world.⁷⁷

Remote sensing is regulated by the Principles Relating to Remote Sensing of the Earth from Outer Space.⁷⁸ These came about in 1986 after a series of resolutions calling for a detailed consideration of the legal implications of remote sensing of the Earth from space.⁷⁹ Principle IV of this resolution stipulates that remote sensing activities shall be conducted according to the principles found in Article I of the Outer Space Treaty, namely that the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Given that not all states have remote sensing capabilities due to lack of resources, Principle XII gives the right to sensed states to have access to primary and processed data concerning the territory under its jurisdiction on a non-discriminatory basis and on reasonable cost terms. Moreover, under Principle XII, sensed states also have the right to access the available analysed information concerning the territory under its jurisdiction in the possession of any state participating in remote sensing activities on the same basis and terms, taking particularly into account the needs and interests of the developing countries. Furthermore, Principle XIII stipulates that states carrying out remote sensing of the Earth from space shall enter into consultations with a state whose territory is sensed in order to make available opportunities for participation and enhance the mutual benefits to be derived therefrom.

⁷⁵ A Mallik, 'Remote Sensing and Earth Observation Satellites' in A Lele and G Singh (eds) *Space Security and Global Cooperation* (2009) 108

⁷⁶ *ibid*

⁷⁷ R Block, 'U.S. to Expand Domestic Use of Spy Satellites', *Wall Street Journal* 15 August 2007

⁷⁸ United Nations General Assembly Resolution 41/65, December 1986. The Committee on the Peaceful Uses of Outer Space has considered whether an update of this resolution is necessary; see Report of the Legal Subcommittee on the work of its forty-second session, held in Vienna from 24 March to 4 April 2003 (A/AC.1.105/805), para 138.

⁷⁹ General Assembly Resolutions 3388 (XXX) of 18 November 1975, 31/8 of 8 November 1976, 32/196 A of 20 December 1977, 33/16 of 10 November 1978, 34/66 of 5 December 1979, 35/14 of 3 November 1980, 36/35 of 18 November 1981, 37/89 of 10 December 1982, 38/80 of 15 December 1983, 39/96 of 14 December 1984 and 40/162 of 16 December 1985

D. Global Navigation Satellite System

The uses of satellites for navigation purposes are growing in significance. The global navigation satellite system ('GNSS') is hailed as the 'greatest scientific revolution of the twenty first century'.⁸⁰ It is a constellation of orbiting satellites that work in tandem with a well-developed network of ground stations to detect and deliver high precision data regarding three dimensional position and time. Such systems include the Global Positioning System ('GPS') of the United States, the Global Navigation Satellite System ('GLONASS') of the Russian Federation, and the European Galileo system, which is scheduled to be fully operational in 2014. The People's Republic of China has indicated that it will expand its regional Beidou navigational system into the global Compass navigation system by 2020. The benefits of GNSS are increasingly felt in aviation, maritime and land transportation, mapping and surveying, precision agriculture, power and telecommunications networks, and disaster warning and emergency response. The market for civilian uses of GPS was to grow at the rate of '22 billion in 2008, according to ABI, a New York-based technology market research firm'.⁸¹ By 2000 civil users outnumbered military users by 100 to 1 and the ratio was increasing, and the Compound Annual Growth Rate of the GPS market was growing by approximately 22 per cent.⁸² Questions of liability incurred by a malfunctioning of satellites for possible accidents are at issue, and a legal framework for long-term liability has recently emerged.⁸³

⁸⁰ R Abeyratne, *Space Security Law* (2011) 21

⁸¹ L David, 'Satellite Navigation: GPS Grows up' in 'Market Booms' available at <http://www.space.com/business/technology/satcom_gps_overview_031105.html>

⁸² NAVSTAR, available at <<http://www.astronautix.com/project/navstar.htm>>

⁸³ Legal Issues regarding Global Navigation Plan for CNS ATM Systems, Chapter 11, Document 9750 AN/963, Second Edition of 2002, 1-11-1; Report of the First, Second and Third Meetings of the Panel of Legal and Technical Experts on the Establishment of a Legal Framework with Regard to GNSS held in the years 1996, 1997, and 1998 respectively; Resolution A 32-19 on Charter on the Rights and Obligations of states Relating to GNSS Services; Resolution 32-30 on Development and elaboration of an appropriate long term legal framework to govern the implementation of GNSS; CNS/ATM Implementation Conference in Rio de Janeiro in May 1998: Legal Matters, Part V, Assembly Resolutions in Force (as of October 2004), Document 9848 at v-4.

E. Space Tourism

Space tourism is a term broadly applied to the concept of travel beyond Earth's atmosphere by paying customers. This term includes suborbital flights such as short excursions to the edge of Earth's atmosphere; travel to low earth orbit or orbital flights, including longer stays in orbital facilities; and parabolic flights in especially equipped aircraft to experience short periods of weightlessness.⁸⁴ In 2001, Dennis Tito paid 20 million US dollars to fly into space on board a Russian Soyuz spacecraft, which docked at the International Space Station. In 2004 the privately funded SpaceShipOne made two suborbital journeys to an altitude of more than 100 kilometres within two weeks while carrying the equivalent weight of two passengers with the same reusable manned spacecraft.⁸⁵ Virgin Galactic has been making it possible for individuals to pay a deposit of 20,000 US dollars to reserve a place on SpaceShipTwo since 2005. The starting price for space travel is 200,000 US dollars, and the deposit makes it possible to have an inside view of the process of building a fleet of five sub-orbital vehicles to carry paying passengers, six per vehicle.⁸⁶

In light of the increasing interest of private companies in exploring possibilities to provide services for space flight and space tourism to the general public, the question arises as to what the legal regime applicable to space tourists would be. Several issues are raised insofar as space tourism is concerned, including questions of international institutions, the safety and legal status of crew, passengers and vehicles, the registration of vehicles, and third party and passenger liability. The commercialisation of space tourism constitutes a major challenge for space law. The Outer Space Treaty clearly did not envisage the possibility of space tourism; terms such as 'object' and 'personnel' do not adequately cover persons who are passengers in a spacecraft.⁸⁷ A regime of private international

⁸⁴ J Cloppenburg, 'Legal Aspects of Space Tourism' in M Benkő and K Schrogl (eds) *Space Law: Current Problems and Perspectives for Future Regulations* (2005) 191

⁸⁵ For a list of the SpaceShipOne tests, see:

<http://www.scaled.com/projects/tierone/combined_white_knight_spaceshipone_flight_tests>. See also the 'SpaceShipOne' entry in Encyclopaedia Astronautica, available at <<http://www.astronautix.com/craft/spaipone.htm>>

⁸⁶ Virgin Galactic, Official Website, available at <<http://www.virgingalactic.com/>>

⁸⁷ B Cheng, *Studies in International Space Law* (Clarendon Press 1997) 458

space law governing the relationship between space tourists and operators of space vehicles is currently lacking.⁸⁸ Furthermore, it is unclear whether air or space law applies because of the unresolved issue of the delimitation of air space and outer space. Future space flights could give rise to considerations of a future aerospace convention in which notions of liability and registration should be considered from an air law, as well as a space law angle, with a view of reconciling both legal regimes.⁸⁹

F. The International Space Station

The International Space Station ('ISS') is a common undertaking by the United States, Russia, Japan, Canada, and the European Space Agency ('ESA') member states, particularly France, Germany and Italy.⁹⁰ It was launched in October 2000 and first occupied on 2 November of the same year.⁹¹ Since then it has been visited by 196 individuals from eight different countries.⁹² The ISS is a research platform in space aiming to advance scientific knowledge through experiments conducted in space, to develop and test new technologies and to derive Earth applications from the experiments' results.⁹³ The creation of the ISS is the result of several agreements, mainly the International Government Agreement of 1998, and the bilateral Memoranda of Understanding concluded between NASA and other space agencies of the cooperating agencies.⁹⁴ It remains

⁸⁸ S Hobe and J Cloppenburg, 'Towards A New Aerospace Convention? – Selected Legal Issues of "Space Tourism"' 47 *Colloquium on the Law of Outer Space* 2004, IAC-04-IISL.4.14, 4

⁸⁹ *ibid* 1

⁹⁰ 'International Space Station, International Cooperation' available at <http://www.nasa.gov/mission_pages/station/cooperation/index.html>

⁹¹ 'International Space Station, Facts and Figures' available at <http://www.nasa.gov/mission_pages/station/main/onthestation/facts_and_figures.html>

⁹² *ibid*

⁹³ 'International Space Station, Research and Technology' available at <http://www.nasa.gov/mission_pages/station/research/index.html>

⁹⁴ Agreement among the Government of Canada, the Governments of ESA Member States, the Governments of Japan, the Russian Federation, and the USA Concerning Cooperation on the Civil International Space Station, done 29 January 1998, and entered into force on 28 March 2001; Memorandum of Understanding between the National Aeronautics and Space Administration of the United States of America and the European Space Agency Concerning Cooperation on the Civil International Space Station, done on 29 January 1998

to be seen whether the ISS has the potential of commercialisation in the future.

G. Space Debris

Space debris constitutes ‘all man-made objects, including elements and fragments thereof, in Earth orbit or re-entering the atmosphere’.⁹⁵ It is also known as space junk or space waste. Examples of orbital debris include derelict spacecraft and upper stages of launch vehicles, carriers for multiple payloads, debris created as a result of spacecraft or upper stage explosions or collisions, solid rocket motor effluents, and tiny flecks of paint released by thermal stress or small particle impacts.⁹⁶ 19,000 pieces larger than 10 centimetres have been identified in Earth orbit, 90 per cent of which is space debris.⁹⁷ The principal source of orbital debris is satellite explosions and collisions. Space debris has a higher probability of remaining longer in Earth orbit. Orbital decay does not occur after a century or more if located more than 1000 kilometres above the Earth’s surface.

Since the orbits of these objects often overlap the trajectories of spacecraft, space debris is a potential collision risk. The risk of collision is higher in geostationary orbit because satellites tend to cluster at this altitude because of its great utility. Space debris can physically damage functional satellites, especially where objects travel at very high speeds. The worst such incident occurred in February 2009 when an operational US Iridium satellite and a derelict Russian Cosmos satellite collided.⁹⁸ Furthermore, orbital debris can disrupt precisely positioned satellites by knocking them off balance. Space debris can also interfere with the observation function of some satellites by scattering light into the telescope of the satellite.

⁹⁵ Inter-Agency Space Debris Committee (IADC), UN Doc. A/AC.105/C.1/L.260 (29 November 2002) 3.1

⁹⁶ NASA, ‘Orbital Debris, Frequently Asked Questions’ available at: <<http://orbitaldebris.jsc.nasa.gov/faqs.html>>

⁹⁷ ‘Space Security Fact Sheet’ available at <<http://www.spacesecurity.org/SpaceSecurityFactSheet.pdf>>

⁹⁸ NASA, ‘Orbital Debris, Frequently Asked Questions’ available at <<http://orbitaldebris.jsc.nasa.gov/faqs.html>>

Various instruments address space debris at different levels of government, but no international treaty has emerged regulating this issue. The leading space agencies of the world have formed the Inter-Agency Space Debris Coordination Committee ('IADC') to address orbital debris issues and to encourage operations in Earth orbit which limit the growth of orbital debris.⁹⁹ Since 1994, orbital debris has been a topic of assessment and discussion in the Scientific and Technical Subcommittee of COPUOS. In 1995, NASA was the first space agency in the world to issue a comprehensive set of orbital debris mitigation guidelines.¹⁰⁰ In 1997, based on the NASA guidelines, the US government developed a set of Orbital Debris Mitigation Standard Practices.¹⁰¹ In 2002, the IADC adopted a set of guidelines designed to mitigate the growth of the orbital debris population.¹⁰² Five years later, the Scientific and Technical Subcommittee of COPUOS adopted a set of space debris mitigation guidelines very similar to the IADC guidelines.¹⁰³ These were endorsed by the United Nations General Assembly in January 2008.¹⁰⁴

Orbital debris poses a risk to the continued reliable use of space-based services and operations and to the safety of persons and property in space and on Earth. The creation of orbital debris should be minimised in order to preserve the space environment for future generations. Various authors argue that an international treaty regime should make spacecraft operators liable for damage to property caused by debris, and that it should require reasonable debris-mitigation measures to be taken for every mission.¹⁰⁵ More specifically, Professor Bin Cheng argues that a way to address the space debris problem is for states to

⁹⁹ Inter-Agency Space Debris Coordination Committee, Official Website, available at <<http://www.iadc-online.org/index.cgi>>

¹⁰⁰ NASA, 'Orbital Debris Mitigation' available at <<http://orbitaldebris.jsc.nasa.gov/mitigate/mitigation.html>>

¹⁰¹ NASA, 'U.S. Orbital Debris Mitigation Standard Practices' available at <http://www.orbitaldebris.jsc.nasa.gov/library/USG_OD_Standard_Practices.pdf>

¹⁰² IADC Space Debris Mitigation Guidelines, IADC Action Item 22.4, IADC-02-01, Revision 1, September 2007, issued by Steering Group and Working Group 4, September 2007, available at: <http://www.iadc-online.org/index.cgi?item=docs_pub>

¹⁰³ Adopted at the forty-fourth session of the Subcommittee of COPUOS, A/AC.105/890, at para 99, 2007

¹⁰⁴ United Nations General Assembly Resolution 62/217 of 22 December 2007

¹⁰⁵ See for example N Pusey, 'The Case for Preserving Nothing: The Need for a Global Response to the Space Debris Problem' 21 *Colorado Journal of International Environmental Law and Policy* (2010) 425, 447-49

divest jurisdiction over their inactive space objects so that any state would be free to remove the disowned objects without incurring liability.¹⁰⁶ He further argues that the Outer Space Treaty could be amended to hold states strictly liable for damage caused by debris that they do not 'disown'.¹⁰⁷ Space mitigation practices should be implemented in order to secure the preservation of a sustainable orbital environment.

IV. Space Law as Public International Law

Space law is one of the numerous branches of public international law. As such, many of its provisions reflect fundamental principles of international law, such as the prohibition on the use of force. Furthermore, given the unique nature of outer space and the rapidity of the technological developments in this area, some departures have been noted from established principles of international law, such as the non-extension of the principle of sovereignty in outer space, and the potential creation of 'instant' international customary law.

A. Peaceful Uses of Outer Space and the Prohibition of the Threat of Use of Force

The spirit of the Outer Space Treaty 1967, as reflected in its Preamble, encapsulates the interest of all mankind in the exploration, exploitation and use of outer space for peaceful purposes and the promotion of international co-operation. The Outer Space Treaty, in conjunction with the United Nations Charter and other obligations in international law, must be implemented in light of the peaceful uses of outer space principle. The prohibition of the threat of use of force enshrined in Article 2(4) of the United Nations Charter, and the obligation to use outer space exclusively for peaceful purposes enshrined in Article IV of the Outer Space Treaty 1967 must be applied by all states in the interest of all mankind, irrespective of states' economic and scientific

¹⁰⁶ B Cheng, *Studies in International Space Law* (1997) 506. According to Article VIII of the Outer Space Treaty, space debris might be considered objects that remain within the jurisdiction of the launching state.

¹⁰⁷ B Cheng, *Studies in International Space Law* (1997) 506

development. The term 'peaceful' has been accorded three different meanings: 'non-military', 'non-aggressive' and 'non-weaponised'. Whatever the meaning accorded to this term, it is clear that any activity that poses the threat of the use of force is prohibited.

B. Non-Extension of the Principle of Sovereignty to Outer Space

Outer space is a common area beyond national jurisdiction. It is not subject to national appropriation by claims of sovereignty, by means of use or occupation, or any other means.¹⁰⁸ The Declaration of Bogota of 1976 by equatorial states over the geostationary orbit runs counter to this provision, and it has therefore not acquired widespread acceptance. Nevertheless, recent years have witnessed a shift away from the recognition of outer space as a common area free of state sovereignty under international law. This has been particularly evident in the United States' efforts to 'address goals of space sovereignty' and to 'establish international space sovereignty policy' in a 'Space Faring Nations Treaty', which is intended to guarantee the 'protection of national (commercial) space assets'.¹⁰⁹ Nevertheless, the abolition of the non-extension of the principle of state sovereignty to outer space would only be possible with the consent of the parties to the Outer Space Treaty. The plans of the United States for 'space superiority' run counter the mankind clause of the Outer Space Treaty, and its obligation to use outer space in the interest of all states.

C. Instant International Customary Law

Professor Bin Cheng argued as early as 1965 that international customary law may be created instantly.¹¹⁰ He argues that state practice, instead of being a constitutive element of customary international law, is merely evidence of the existence and contents of the underlying rule and of the requisite *opinio juris*. From this point of view, there is no reason why an *opinio juris* may not grow in a very short period of time among the

¹⁰⁸ Outer Space Treaty, art II

¹⁰⁹ See the United States 'Long-Range Plan' available at <<http://www.fas.org/spp/military/docops/usspac/lrp/toc.htm>>

¹¹⁰ B Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23-48

members of the United Nations with the result that a new rule of international customary law comes into being. This argument is raised in the context of General Assembly resolutions 1721 and 1962, where agreements between the two space powers made their unanimous adoption possible. Professor Bin Cheng therefore argues that the two space powers may well be held to be bound by these *pacta de contrabendo* to observe the principles contained in these resolutions in their *inter se* relations.

This argument seems to run contrary to the requirement of state practice, which suggests that a certain amount of time must elapse before the emergence of an international customary rule.¹¹¹ In the *North Sea Continental Shelf* cases, the International Court of Justice held that state practice is ‘an indispensable requirement’ in that ‘within the period in question, short though it may be, State practice [...] should have been both extensive and virtually uniform’.¹¹² Professor Van Hoof argues that ‘customary law and instantaneousness are irreconcilable concepts’.¹¹³ Professor Weil argues that instant custom is ‘no mere acceleration of the custom-formation process, but a veritable revolution in the theory of custom’.¹¹⁴ This is so because the acceptance of instant custom would necessarily involve the discarding of the requirement of state practice, which by definition requires at least some time for the change of the practice of states to bring it in line with the new customary rule that has emerged.

V. Conclusion

Throughout its evolution, the international law of outer space has remained true to its original mission, namely that outer space should be used for peaceful purposes, and for the benefit of mankind. Space law has had to adapt from initially purely research-oriented space flights to

¹¹¹ *North Sea Continental Shelf Cases (Germany v Denmark and Germany v Netherlands)*, 1969 ICJ Reports [74]

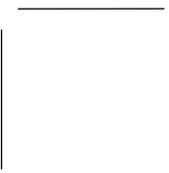
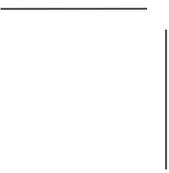
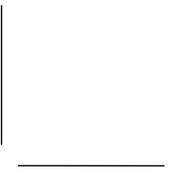
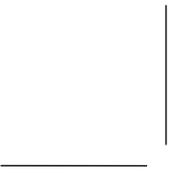
¹¹² *ibid*

¹¹³ GJH Van Hoof, *Rethinking the Sources of International Law* (1983) 86

¹¹⁴ P Weil, ‘Towards Relative Normativity in International Law?’ 77 *American Journal of International Law* (1983) 413, 435

commercial applications conducted by a growing number of private entities. International law is now called upon to demonstrate flexibility to enable private actors to engage in activities in outer space. In facing this challenge, international law has to be respectful of the interests of all mankind, instead of serving state interests, and should not succumb to military objectives. The international legal order to be elaborated has to safeguard the principle of the peaceful and beneficial use of outer space for the international community. Outer space is the province of all mankind, and in the end 'the root of man's security does not lie in his weaponry, but lies in his mind'.¹¹⁵

¹¹⁵ R McNamara, United States Secretary of Defence, Speech on national defence policy, 18 December 1967, quoted in D. Goedhuis, 'An Evaluation of the Leading Principles of the Outer Space Treaty of 27th January 1967' (1968) 15 NTIR 40



RESTORING THE FADING HUE OF TOWN AND VILLAGE GREENS

Scott Morrison

It is a paradox that keeping alive a custom or a tradition requires its periodic re-invention. Some traditions, of course, are better left to die a natural death, and the end of others ought even to be hastened. However there are those other elderly practices that society seeks to sustain – whether stirred by nostalgic fondness or a dispassionate appraisal of value – that are endangered because law has failed to re-invent and to reform.

Former manorial wastelands,¹ town and village greens ('greens') may encompass glebes, dells, reed-beds, moors, woodlands, sports-grounds, band-stands, beaches and even lakes. They emanate from immemorial local custom² pre-dating Richard I's accession in 1189 – surely numbering amongst the most ancient survivors of ancestral English heritage. And amongst the most esteemed, whose wisdom and appeal becomes ever more evident to an increasing number: those who seek to be and to live, as it were, green.

A green is a unique species of common wherein Victorian penal law protects both the land and the activities (paradigmatically: cricket, blackberry-picking, kite-flying) staged upon it. Town and village greens are distinct from national parks (encompassing national or local nature reserves and country parks) in the retrospective reference they make to the history of the land and the historical human relationship with and use of the land. Parks and nature reserves by contrast may be solely prospective; invented *de novo*, they rarely host a human community or protect an historic and specific relationship between people and geography as town and village greens do.

¹ *Corpus Christi College, Oxford v Gloucestershire CC* [1983] 1 QB 360, [1982] 3 All ER 995 [1005] (Oliver LJ)

² *Abbot v Weekly* [1666] 1 Lev 176

I. The Statutory Framework

With the inaugural legislative reference to the term ‘village green’ in the Inclosure Act 1845, Parliament acted to alleviate a socio-cultural crisis born of economic rupture. Since the twelfth century statutes had gradually allowed for the conversion of public commons and fields unencumbered by fences or other boundaries into demarcated areas of private property. The pace of such conversions accelerated between the mid-eighteenth and mid-nineteenth centuries. This process of inclosure reduced the customary right to access to common lands, and the accompanying rights to cultivate, forage upon, or graze livestock upon them. The inclosures ushered in a regime of exclusive use and territorial rights to use the land. The social consequences of the inclosures were manifold, and combined with industrialisation to create elevated population density in cities and the expansion of urban areas and development.

Town and village greens represent the revivification of a vestigial customary right, pressed into service of social and political needs that had in turn arisen as a result of the loss of the original customary rights. Proximity and, in some towns and cities overcrowding, and the life patterns of industrial labour channelled a flow of people – and new life – into what remained of the pre-inclosure rights to recreation in common public spaces.³

The penal force of the law on greens originates in s. 12 of the Inclosure Act 1857, which makes any ‘act or injury’ upon a green a criminal offence, should such action interfere with the ‘use or enjoyment as a place for exercise or recreation’. Section 29 of the Commons Act 1867 renders enclosure of a green a public nuisance.⁴ A green is neither owned by the public nor the state; it may be privately owned or have no registered owner; it is neither reducible to a right of way, nor an easement.⁵ Incorporating proposals from the Royal Commission on Common Land 1955-1958,⁶ the Commons Registration Act 1965 (‘the

³ *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 (*Trap Grounds*) [7] (Lord Hoffman)

⁴ *Halsbury’s Laws* (5th edn, 2010) vol 78, para 544

⁵ *Mounsey v Ismay* [1865] 3 H and C 486

⁶ Cmnd 462

1965 Act') sought to systematise greens law and the types of greens recognised by it.

This article addresses the most consequential aspect of the statutory framework constructed by the 1965 Act: the application for registering land as a green (s. 1(2)(a)). The protections afforded existing and future greens is not an issue in dispute, and there is no groundswell (literally or figuratively) of opposition to these aspects of the status quo. However, whether new greens should be recognised (and, if so, how rapidly that process should proceed, and to what extent) is a contentious and a vigorously contested issue; it is also, not coincidentally, the issue that has the greatest effects on local communities and commercial parties seeking to develop land that could become registered as a green. Supporters of greens maintain that greens preserve communities and defend the public interest whilst detractors suggest that greens registration is abused – particularly by better resourced members of society – to bar necessary development in a variation on the 'not in my backyard' theme.

The Countryside and Rights of Way Act 2000 ('the 2000 Act' (s. 98)), and the Commons Act 2006 ('the 2006 Act') amended the 1965 Act, without changing the means or method by which new land might be registered as a green. That test, as adumbrated in the 2006 Act (part 15 s. 1) reads as follows:

[A] significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years.

'Significant number' means sufficient to indicate that the land is in general use (*R v Staffordshire County Council, ex p McAlpine Homes Ltd*).⁷ 'Locality' or 'neighbourhood' means that there is a recognisable geographic area where most of the users of the land live or work (*Leeds Group plc v Leeds City Council*).⁸ 'As of right' means *nec vi* (without force), *nec clam* (without secrecy), and *nec precario* (without permission): *R v Oxfordshire County Council, ex p Sunningwell Parish Council*.⁹

⁷ [2002] EWHC Admin 76 (QB)

⁸ [2010] EWCA Civ 1438 (CA)

⁹ [2000] 1 AC [2010] UKSC 11 (*Sunningwell*)

The common law has construed ‘lawful sports and pastimes’ ever more broadly.¹⁰ The use over twenty years must not be trivial or sporadic although it may be seasonal (*Trap Grounds*).

II. Why Reform is Needed

The law relies upon oblique measures of land use that were once pragmatic and elegant, but are now irrational and obsolete. It demands elaborate fact-finding by means of evidence that is difficult to collect and analyse. It foments undue conflict. Resolving resulting disputes imposes excessive costs in the time, personnel, and financial resources of the parties concerned, and the authorities of adjudication. In support of the proposition that reform is required even after the comparatively recent parliamentary interventions in the 2000 Act and the 2006 Act, this article sets out to accomplish two things. Firstly, to demonstrate the inadequacy of the law of greens. Secondly, to propose a straightforward legislative addition that will ameliorate that inadequacy.

Whilst the fact of rapid technological and material change is common to the epoch of the Inclosures and to that of present-day England and Wales, the respective causes and consequences of these respective changes could scarcely be more different. The advanced and largely post-industrial economy of contemporary England and Wales do not suffer the same pressures as the late Victorian era; at the same time, urban development, population growth, and patterns of labour and life, as well as ecological and environmental consciousness, create new desiderata for towns, villages and cities and the protection of greens. On the view that a (minimal) twenty year test of human activities, and the scope of activities envisaged by the legal framework are inadequate to recognise or balance contemporary patterns of life and economic necessities, as section IV will elaborate, this article accordingly proposes a new legal test: a land-character test. In order for new land to be registered as a green, that land must satisfy certain objective criteria, set out in section V below.

The submitted reform serves a dual purpose: perpetuating the advantages of greens and the legal regime governing them, whilst

¹⁰ *ibid*

obviating the irrationality – and minimising the practical difficulties and conflicts – to which that legal regime is susceptible.

III. The Case for Greens

Since greens may let flourish trees, plants and grasses otherwise vulnerable to removal, they can provide ecological and environmental benefits. Such vegetation absorbs carbon dioxide and releases oxygen; improves air quality; supplies fauna with a habitat; captures and productively employs waste-water; facilitates drainage; and prevents and reduces flooding.

The economic benefits are manifold. Greens can elevate and insulate property values; stabilise expectations, thereby facilitating planning and investment; and enhance the potential for tourism and tourist revenue. Greens may encourage bio-regionalism and local commerce and enterprise by lending a site to farmer's markets or country fairs.

The intangible benefits to humans are substantial. Insofar as maypoles, lawn and garden games or sports subsist, some greens offer ideal settings. The common law has expanded the roster of 'lawful sports and pastimes' the existence of which qualifies land as a green.¹¹ Local inhabitants may feel a special attachment and duty as stewards and managers of their town or village green – as the Rio Declaration suggests of indigenous peoples globally.¹²

Greens can help avert the 'tragedy of the commons'. That tragedy transpires when the pursuit of individually rational incentives – such as the motive to profit (by converting open land into rent-producing buildings) – yields an outcome that is worse for everyone. Greens place in the hand of state and citizen alike a key excavated from pre-capitalist times; that key can solve precisely such collective action problems, without doing violence to the institution of private property.

¹¹ *Halsbury's Laws* (5th edn, 2010) vol 78, para 532

¹² Rio Declaration on Environment and Development (13 June 1992) UN Doc A/CONF.151/26, principle 22

IV. Criticism

A. Existing legal test not fit for purpose

The legal test referenced in section I is overly inclusive and/or absurd in result. Recently registered greens include a golf course (*R (ex p Lewis) v Redcar and Cleveland Borough Council*),¹³ and two lakes: Llanfaelog on Anglesey and Sherwood Lake in Tunbridge Wells.¹⁴ Such sites do not conform to the traditional image of a green – as adumbrated, for example, by Carnwath LJ in *Trap Grounds*.¹⁵ Registration of such sites disregards the notion that the value of greens inheres in the link they forge between past and present, by means of their resemblance to historical greens – both real and imagined.

Greens in England number approximately 4,547.¹⁶ Overuse of registration devalues it and erodes the distinction between greens and national parks or nature reserves which lack the notional connection with a local human community.

The legal test abnegates an essential aim of commons legislation. Greens are nothing if not an idea rooted in English history. The 1965 and 2006 Acts mobilise statute to sustain and re-invent an historical artefact. They bespeak a Parliamentary intent to preserve a feature of town and village life: they are a legislative antidote to collective amnesia. If the law undermines historical memory and its embodiment in the landscape by being insufficiently discriminating, that intent is defeated.

The evidence admitted into the legal framework, and the weighing of that evidence is subjective and/or arbitrary. The legal test demands evidence that is difficult and costly to collect. Tracing activities and users over twenty years necessitates the accumulation of plentiful testimony – often susceptible of conflicting interpretation. In addition, cases usually turn on their precise facts, producing disagreements hinging on: is a neighbourhood or locality involved; who counts as an inhabitant; how

¹³ [2010] UKSC 11

¹⁴ (2011) <<http://www.bbc.co.uk/news/uk-wales-north-west-wales-140435447>>

¹⁵ *Trap Grounds* [1]

¹⁶ Department of Environment, Food and Rural Affairs, 'Consultation on the registration of new town or village greens', (2011) available at <<http://www.defra.gov.uk/consult/2011/07/25/town-village-greens/>> (DEFRA) 4.1.5

many inhabitants are sufficient; does the presence of outsiders dilute the claim? The controversy over Whitstable Beach in Kent provides an example of each of these issues, with the locals' application putatively threatened by 'down from Londoners'.¹⁷

Furthermore, cases and the law itself are not widely known. The obscurity and the esoteric quality of this specialist area help explain why a small subset of practitioners retain a monopoly on greens law. As a result of the small number of qualified legal practitioners, and the depth of the knowledge that these practitioners must acquire in this recondite area of law, the difficulty of locating or identifying appropriate counsel, and the cost of instructing such specialist counsel (where such counsel is available at all) is much greater for concerned parties than it would be were a wider range of legal generalists able to advise and offer representation in disputes involving greens law.

Although the cost consequences of opposing applications for registration of new land as a green may be a less serious obstacle to commercial parties and developers, the expense incurred by individuals and communities – whose ability to afford specialist barristers may be limited – may well quash the prospects of vigorously pursuing or prevailing in an application to register land as a green.

Because of the intensive, costly nature of evidence gathering, it is a further problem that prospective applicants are unable independently to determine whether they have any real prospect of success. The uncertainty of success doubtless discourages those without considerable institutional, organisational and financial backing, thereby undermining equality before the law. In addition, the prospect of a public inquiry can intimidate and deter witnesses; typically proceedings reveal a power imbalance between applicant and opposition.¹⁸

These factors combine to make the result unequal and unjust. This result is further compounded by the role of local authorities in determinations (*R (Christopher John Whitmey) v Common Commissioners*).¹⁹ It

¹⁷ R Coward, 'Get off my Sand' (2002) available at <<http://www.guardian.co.uk/g2/story/0,3604,806547,00.html>>

¹⁸ ADAS, *Town and Village Greens Report: Market Research Report Stages 1 and 2* (ADAS UK Ltd 2006) iv

¹⁹ [2004] EWCA Civ 951 (CA) (*Whitmey*)

is difficult if not impossible to assure uniform application of the law. The legal test increases costs and decreases efficiency of determination.

The number of applications is quickly escalating. From 2003-2005 the number of applications rose from 50-70 per annum to 100-200 in 2006-2009. From January 2009 to September 2009 there were 139 applications. In the entirety of 2009, 17 applications were accepted and 79 rejected. Firstly, these figures convey the onerous burden upon public authorities and their consequent inability to dispose of applications in timely fashion. Secondly, these figures reveal the high number of applications ultimately deemed to lack merit. Furthermore from these statistics alone it is impossible to ascertain whether unsuccessful applications failed on their merits or because the applicants lacked the resources or knowledge necessary to advance effectively their claim. Thirdly, whatever the outcome, costs for the parties can be high. In one egregious example, successfully opposing an application at Oulton St. Michael in Suffolk cost one of the land-owners, the Norwich Diocesan Board of Finance, over £52,000.²⁰

Delays of determination may tempt those with greater resources to mount applications that – knowingly or not – have no real prospect of success, in order to forestall and discourage development, without considering or heeding the benefits that such development might bring the community. Greens law in this manner invites frivolous and/or counterproductive misuse; the case of the beach at Carlyon Bay near St Austell on the south coast of Cornwall is one example.²¹ Furthermore, a community's needs constantly evolve; the statutory protection granted greens – and the difficulty of variation, rectification, or extinguishment of registration – impairs the ability of public and private agents alike to balance one public interest against others, such as the need for proximate schools, hospitals, or housing. The common law has already begun to move in a countervailing direction, recognising a quasi-right to development – albeit only with respect to greens owned by public authorities, in *Barratt Homes v Spooner*.²²

²⁰ *ibid* [4.6.4]

²¹ S Morris, 'A village green? Yes, if locals have their way' [2004]

<<http://www.guardian.co.uk/society/2004/aug/02/urbandesign.ruralaffairs>>

²² [2011] EWHC 290 (QB)

B. Defeats intended localism

The register of greens encompasses all of England and Wales, but it is local authorities that have the power to add land to that register, following *Whitney*; county or district councils in England, London borough councils, and county/borough councils in Wales.²³ Judicial appeals, however, remove the application from the locality, defeating the evident Parliamentary intention that decisions be made as close as possible to the site. Local planning commissions possess greater in-house surveying, cartographic, ecological, and policy expertise than the courts, and the appeal process in effect conflates law and policy turning what is or arguably should be primarily a policy matter into a legal one requiring adjudication. The disparity between judicial and planning/policy methodologies combines to bring the court into conflict with local authorities in a context where that relationship should be complimentary rather than contradictory.²⁴

The vague criteria for registration renders a policy issue an excessively contentious political one. Once underway, planning processes involve consultation and consideration of public opinion, which should reduce the need for recourse to the courts. An admitted difference between local land-planning, in contradistinction to the greens application procedure, is that only in the latter has a private citizen the power of initiative. However, subject to the difficulties a prospective applicant will face, this freedom is more illusory than real. Rather than offering a procedure for resolving disputes, the 2006 Act is a formula for generating more disputes and excessive litigation.²⁵ Greens law foments disproportionate political conflict.

²³ part 1 s 4, 2006 Act

²⁴ D McGillivray and J Holder, 'Locality, environment and law: the case of town and village greens' *IJLC* 3, 1 [2007] 3

²⁵ R Honey, 'Commons Act 2006: Developing Common Land and Protecting Village Greens' [2007] *ELR* 9, 5

V. Reform

Being the accretion of centuries, the law of greens is not to be tampered with lightly. Indeed the prestige of town and village greens is a product of that long and revered genealogy. The aim of the proposed reform is the fortification of existing provisions with an additional test. The purpose of this test is to ameliorate the deficiencies and practical problems (as elaborated in section IV) attendant to the legal framework. Since a plethora of authorities are rightfully empowered to apply the law, piecemeal measures will not suffice. Parliamentary action is the only remedy.

A. The proposal

This article supplements the land user-based test in part 1 s. 15 of the 2006 Act with a land character-based test. Failure to satisfy this test would result in an application's summary rejection. The suggested legislation runs along these lines:

The land is unenclosed; uncultivated; open; and centrally located in a town or village.

B. Interpretation

Taking counsel from Lord Scott's dictum in the *Trap Grounds* case²⁶ and selectively drawing upon reforms tabled by DEFRA,²⁷ the character test identifies four physical characteristics all of which the land must exhibit at the time of application in order for the application to progress to the second (and now current legal) test:

- (1) Unenclosed: free of fences or other man-made obstructions tending to exclude the general public;
- (2) Uncultivated: the soil must not be tilled and/or planted indicating agricultural use inconsistent with general public user;
- (3) Open: the surface of the land must not be covered by natural

²⁶ *Trap Grounds* [77]-[81]

²⁷ DEFRA [5.5]

- obstacles (boulders, vegetation, tidal waters) inconsistent with public access;
- (4) Central location in a town or village: excluding rural sites and those in larger urban areas.

C. Counterarguments

It may be argued that the character test is:

- (1) at least as vague and subjective as the current test;

Each criterion is a matter of degree, so the proposed test might appear as uncertain as the current test. However, it is susceptible to more definitive determination because it is physical rather than behavioural, and it is contemporaneous rather than diachronic. Therefore it reduces the burden of evidence collection and the subjectivity of its interpretation. Furthermore, it shifts the discretion of local authorities towards present and future environmental imperatives, in a way that the metric of past human activity does not.

- (2) excessively restrictive;

The aim of the reform is indeed to reduce the number of applications and to increase the meritorious proportion amongst them. Land owned by the state or by the public and the statutory protections and policies governing parks and other natural areas remains available. The stringency of the supplemental test recognises greens are a special category receiving a high level of protection which dynamic, changing localities must allocate with prudence.

- (3) anti-democratic.

Firstly, the reform purposely strengthens local authorities' ability to summarily reject greens applications. It does not thereby impose any *a priori* restriction on applications. Secondly, the proposed legislation *does* afford local authorities grounds to reject applications without considering testimony, rendering the process less penetrable to citizen intervention.

However, the current law admits historical fact evidenced by denizens' testimony – not their wishes or opinions; the current regime neither requires nor empowers authorities to act at the behest of popular will. Indeed, in overturning *R v Suffolk County Council, ex p Steed*,²⁸ *Sunningwell* declared subjective beliefs of inhabitants irrelevant to whether a user is as of right. Thirdly, electoral review and the safeguards and consultation procedures built into planning and policy deliberations counter-balance the intended constraint on greens applications.

VI. Conclusion

Town and village greens may be a legal chimera in their anomalous admixture of public and private property law. However, greens themselves are anything but chimerical. The environmental, economic and human benefits of greens are real. The most appealing examples of greens are living, pulsating presences at the heart of local communities. Without statutory support to sustain it, this ancient tradition may well perish. The existing legal test has served well, but sits increasingly uncomfortably with contemporary modes of social life and governance.

Today, in a time of rapid change comparable in magnitude but distinct in character from that which occasioned Victorian recognition of greens, further Parliamentary action is needed. The intention of the proposed legislative reform is to strike a better – and a more sustainable – balance between worthy tradition and the modern condition.

²⁸ [1997] 1 EGLR 131 (CA)

**MODUS OPERANDI: PROPENSITY AND THE ADMISSIBILITY OF THE
CIRCUMSTANCES OF DEFENDANTS' PREVIOUS CONVICTIONS
UNDER S. 101(1)(D) OF THE CRIMINAL JUSTICE ACT 2003**

Thomas van der Merwe

The Criminal Justice Act 2003 ('the Act') changed the position regarding the admissibility of a defendant's previous convictions. The Act opened up a line of reasoning that was forbidden at common law; namely that if a defendant had been previously convicted of a particular offence, then that made it more likely he had committed the same offence with which he was now charged. In 1934, in the case of *Maxwell v DPP*, Lord Sankey described the rule that a defendant could not have his previous convictions admitted against him in this manner as 'one of the most deeply rooted and jealously guarded principles of our criminal law'.¹ This is no longer the case. The Act created a host of gateways through which bad-character evidence could be admitted, tempered by judicial discretion and s. 78 of the Police and Criminal Evidence Act 1984. The operation of s. 101(1)(d) of the Act is particularly relevant. Bad-character evidence relating to a defendant is admissible by the prosecution if 'it is relevant to an important matter in issue between the defendant and the prosecution'.² Such an 'important matter' is defined by s. 112(1) of the Act as being one of 'substantial importance in the context of the case as a whole' – encompassing, *inter alia*, the identity of the defendant, the *actus reus* and *mens rea* of the offence, and any defences raised.

The operation of s. 103(1)(a) and s. 103(2) further expands the scope of s. 101(1)(d). Matters in issue between the defendant and prosecution also include the question as to whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the

¹ [1934] AC 309, 317.

² s. 101(1)(d) Criminal Justice Act 2003 (CJA 2003)

offence.³ Section 103(2) states that a defendant's propensity to commit such offences may be established (without prejudice to any other way of doing so) by evidence that he has been convicted of an offence of the same description or category as the one with which he is charged.⁴

Lord Sankey's dictum has been overturned by statute. However, in *R v Hanson*, the Court of Appeal issued guidance on how to approach the admissibility of evidence of propensity to commit a particular offence. The court stated that where the prosecution seeks to rely on a previous conviction, it should state at the time of its application whether it seeks to rely on the fact of the conviction itself, or also on the circumstances of that conviction. Furthermore, *Hanson* establishes that:

It will often be necessary, before determining admissibility, and even when considering offences of the same description or category, to examine each individual conviction rather than to merely look at the nature of the offence or the defendant's record as a whole.⁵

There are two issues to be considered. Firstly, when can the detail of previous convictions be admitted to show propensity? Secondly, how important is the accuracy of the information supplied in regard of previous offences and what happens where that detail is disputed?

I. Propensity and the admissibility of similar *modus operandi*

R v Smith (James William) is authority for the admissibility of previous convictions in terms of both fact of conviction and the details of the offence.⁶ The defendant had been convicted of burglary, specifically a distraction burglary of the residence of a vulnerable elderly woman. At first instance the prosecution successfully applied to admit both the fact and circumstances of the defendant's previous convictions under s. 101(1)(d) of the Act, on the basis that there was:

³ s. 103(1)(a) CJA 2003

⁴ s. 103(2) CJA 2003

⁵ [2005] 2 Cr App R 21 [12]

⁶ [2006] EWCA Crim 1355

[S]uch a similarity between the circumstances of the previous offences, with those with which the appellant was charged, that those previous offences should be admitted in evidence. Those previous offences involved the appellant having entered houses of vulnerable elderly people by a trick [...] and taking their money. This offence involved someone having entered the house of an elderly lady by a trick and stealing money.⁷

The trial judge held that the convictions were admissible:

If the *modus operandi* [of the previous conviction] has significant features shared by the offence charged, it may show propensity.⁸

The defence appealed on the basis that it was wrong ‘to permit the explicit and prejudicial facts of those convictions to be adduced’. The defence also relied on *R v McLeod* which states that lengthy cross-examination in relation to previous offences should be avoided as (1) a distraction to the jury; and (2) that prosecuting counsel should not seek to probe or emphasize similarities between previous offences and the instant ones.⁹

The appeal was dismissed. The Court of Appeal held that it was ‘the circumstances of the particular type of burglary which provides its probative force’.¹⁰ In regard of *R v McLeod*, the court held that cross-examination on previous offences had (1) not been a distraction to the jury; and that (2) the Criminal Justice Act 2003 had reversed the position since that case. The very purpose of putting in evidence previous convictions and their circumstances was to establish propensity and to put in material that was probative of the particular offence.

Where the circumstances of previous convicted offences exhibit a similar method to the instant offence, they go to show propensity and are caught by s 101(1)(d) of the Act. However, it should be noted that in *R v Cushing*, the Court of Appeal approved the decision of the trial judge to admit evidence of the defendant’s previous burglaries of commercial property, where the instant offence was a robbery of an elderly man in his home. The court stated that ‘[i]t is plainly a matter of fact and degree

⁷ *ibid* [10]

⁸ [2006] EWCA Crim 1355 [11]

⁹ [1995] 1 Cr App R 591, 604

¹⁰ [2006] EWCA Crim 1355 [15]

in every case and it is a matter for the judge's discretion and individual judgment'.¹¹

II. Accuracy in admitting the fact of past convictions

'Meticulous' accuracy and precision is of the utmost importance in admitting both the fact and circumstances of previous offences. In the last eighteen months, two convictions have been quashed and retrials ordered where errors in this regard have been made.

Regarding problems with the fact of previous convictions, in *R v M* the appellant (D) successfully appealed against his conviction for robbery.¹² At trial the Crown had sought to adduce D's previous convictions for robbery (and their circumstances) as evidence of his propensity to carry out the kind of street robbery he was charged with. Neither the Crown nor the judge had received any counter-notice to this application under Part 35 of the Criminal Procedure Rules that the list of convictions to be adduced was inaccurate. The judge ruled that six of D's prior robbery convictions were admissible, three of which dated from 2007. After the judge had made her ruling, D disputed (from the dock) the accuracy of the record of the 2007 convictions. D's former solicitor was contacted. He stated that his recollection was that D had been convicted of one offence and the other two had been taken into consideration. In the instant offence D was alleged to have committed a street robbery by snatching a watch from the wrist of an off-duty police officer. With regard to the three robberies committed in 2007, the judge described them in basic detail. They involved demanding property from victims on the street, snatching the property and assaulting the victim if they resisted. The Court of Appeal stated that the judge gave an entirely appropriate direction in regard to this evidence.¹³ However, in regard to the appellant's account of his previous convictions, the trial judge said to the jury in summing up:

¹¹ [2006] EWCA Crim 1221 [22]

¹² [2012] EWCA Crim 1588; [2012] 2 Cr. App. R. 25

¹³ [2012] EWCA Crim 1588 [12]

He told you that while he knows the antecedent records, the record of his convictions shows the three robberies in 2007, his recollection was that he thought he had pleaded guilty to just one of those and the other two did not proceed against him and he told you he had not committed those offences.¹⁴

As a consequence, there was an issue for the jury to resolve in regard to those convictions. The Court of Appeal held that, while the three ‘convictions’ were properly admitted to show propensity, they enhanced the probability of an adverse impact on the defendant. In these circumstances:

[I]t is imperative that the judge is supplied with meticulously accurate information about a defendant’s previous convictions and that, whatever other considerations may apply, the jury should not be misinformed in any way which might suggest that the defendant’s previous convictions are worse, and more serious, than in truth they are. That is what happened here.¹⁵

Furthermore, ‘the way in which this issue was left to the jury may [...] have meant that the jury disbelieved the appellant’s account of his previous convictions. They may have thought, reasonably, that the prosecution account of his previous convictions was correct and that if he was denying [...] two offences which the prosecution said were former previous convictions, then his evidence was not creditworthy’.¹⁶

The Court allowed the appeal, quashed the conviction and ordered a retrial.

III. Dispute over the circumstances of previous convictions, and the need for accuracy

In *R v Hanson*, it was held that under most normal circumstances it would be possible to agree the relevant circumstances of a previous conviction and (subject to a ruling on admissibility) put it before a jury. Even where a genuine dispute arose over the detail of previous convictions, it would

¹⁴ *ibid* [13]

¹⁵ *ibid* [15]

¹⁶ *ibid* [16]

normally be possible for minimum indisputable facts to be admitted. It would be very rare for a judge to hear evidence before ruling on admissibility.¹⁷ Nevertheless, following *R v Humphris*, where the details of a previous crime are in dispute, the Crown should be in a position to prove the facts of the conviction by having evidence available. This will normally mean the complainant being available to attend court – except in sexual cases where a statement from the victim is preferable. A printout from the Police National Computer is not sufficient evidence.¹⁸

Where there is a dispute over the circumstances of a convicted offence which cannot be resolved and there is not a minimum level of indisputable detail, then, should that detail be admitted, it is imperative that a clear direction be given to the jury. They must be sure of the circumstances of the convicted offence before deciding whether it shows propensity for the instant one. In *R v Vickers (Louis Calvert)*, the Court of Appeal allowed an appeal against conviction, partly on the grounds that such a direction was not given.¹⁹ In this case, which involved domestic violence, the appellant had been convicted of making threats to kill to his ex-partner. It was alleged that the appellant had gone to his ex-partner's home with a knife and threatened to kill her. In regard to bad character evidence, there had been a late application for it to be adduced by the Crown. This application was allowed in part: two convictions for possession of bladed articles in 2002, a conviction for possession of an offensive weapon in 2009 and a robbery conviction in the same year. However, as a consequence of the late application, it was not possible to agree the details of the offences. The defence argued that in those circumstances only the fact of the former convictions should go in; the robbery conviction should not be adduced at all. The judge admitted all the convictions, along with disputed detail over whether the appellant had threatened to use a knife in the robbery offence. The officer in the case, who had access to the complainant's original statement, gave this in his evidence. The officer's other evidence appeared to be based on information of the type found on the Police National Computer. The

¹⁷ [2005] EWCA Crim 824 [17]

¹⁸ [2005] EWCA Crim 2030 [15]

¹⁹ [2012] EWCA Crim 2689

appellant had to contradict this solely with his own oral evidence.²⁰ The Court of Appeal held that:

Although the judge gave directions to the jury that they had to be sure that the previous convictions demonstrated a propensity of the sort relied on, he gave them no direction that they had to be sure about the facts underlying one of those convictions before they acted upon it. This seems to us to have been a particularly important requirement in relation to the robbery conviction, which was a relatively recent matter and whose admission would be wholly meaningless unless the element of threat with a knife was introduced.²¹

The Court went on to refer to the aforementioned case of *R v M*, and the need for ‘meticulously accurate information’.²² Where the Crown had served a late application and created a situation where a dispute could not be resolved, it could not ‘properly seek to adduce material truly appropriate to prove the contested matters’ on which it sought to rely in regard to bad character.²³

If the judge was in those circumstances nonetheless prepared to admit the material, and we think he should have been very hesitant to do so, it required a very clear direction to the jury that it should be sure in relation to the disputed element before it could begin to act on it and consider whether it demonstrated any propensity. We consider that in the circumstances of this case merely leaving the matter to the jury as the judge did was wholly unsatisfactory.²⁴

In conclusion, where a previous conviction shows propensity for the instant offence, it will be admissible. The *modus operandi* of the previous conviction will also be admissible to show propensity if it shares significant features with the instant offence. However, this is a matter of fact and degree, and is up to the discretion and individual judgment of the trial judge. Where such details are to be admitted, it is imperative that the judge is provided with ‘meticulously accurate information’. Where

²⁰ *ibid* [36]

²¹ *ibid* [37]

²² [2012] EWCA Crim 1588 [15]

²³ [2012] EWCA Crim 2689

²⁴ *ibid* [38]

such details are disputed, the Crown should be in a position to prove the details sought to be adduced and in any regard should have sought to agree minimum indisputable facts with the defence. The jury must be sure of the accuracy of the details of the previous convictions before using them in regard to propensity. Adducing inaccurate or disputed details without suitable proof can lead to a subsequent conviction being quashed.

WHAT IS GENOCIDE?

Jack Duncanson

Born from the bloodiest century in human history¹ was the ultimate crime:² the crime of genocide. The first widely accepted genocide of the twentieth century was that of the Armenian population of the Ottoman Empire in 1915.³ The status of genocide as the crime of crimes, or the ultimate crime, stems from its direct association with the Holocaust. At this point in history genocide was ‘a crime without a name’.⁴ The term genocide coined by the Polish lawyer Raphaël Lemkin⁵ from the Greek word *genos*, meaning race or tribe and *caedere*, the Latin word for killing.⁶ It was not until 1948 with the adoption of the Genocide Convention⁷ that the act of genocide became in itself a crime.

I. Elements of the Crime

There are three crucial components to the crime of genocide. Firstly, there must be an underlying offence committed with the necessary *mens rea*. Secondly, the offence must be directed against a national, ethnic, racial or religious group. Thirdly, any one of the underlying offences

¹ BA Valentino, *Final Solutions; Mass Killing and Genocide in the Twentieth Century* (Cornell University Press 2004) 1

² P Akhavan, ‘Enforcement of the Genocide Convention: A Challenge to Civilisation’ [1995] *Harvard Human Rights Journal* 229

³ I Bantekas, *International Criminal Law* (Hart Publishing 2010) 203

⁴ A Cassese et al, *International Criminal Law: Cases and Commentary* (OUP 2011) 200

⁵ R Lemkin, ‘Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress’ (1944) Washington: Carnegie Endowment for World Peace 90

⁶ Cassese, *International Criminal Law* 200

⁷ 78 UNTS 277, adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948

targeted towards any of the aforementioned groups must be committed with genocidal intent; in other words, the intent to extinguish the group.⁸

II. *Actus Reus* of the Crime of Genocide

The five underlying offences as seen in article 2 of the Genocide Convention are focused upon offences which directly or indirectly result in the physical or biological destruction of the group.⁹ In the *Akayesu* case,¹⁰ the International Criminal Tribunal for Rwanda (‘ICTR’) analysed the elements which form the *actus reus* of the crime. Regarding the first offence, intentionally killing members of the group,¹¹ the ICTR found a discrepancy between the French and the English versions. The English version uses ‘killing’ whilst the French version uses ‘meutre’. The term killing was found to be too broad; it could incorporate both intentional and unintentional homicide, whereas the French ‘meutre’ was more precise, since it connotes intentional killing or ‘murder’.¹²

Causing serious bodily or mental harm to members of a group can also constitute genocide¹³ as was seen in the *Eichmann* case.¹⁴ The District Court of Jerusalem held that serious bodily or mental harm can be caused by the ‘enslavement, starvation, deportation and persecution, confinement to ghettos, to transit camps and to concentration camps [...] to suppress and torment them by inhuman suffering and torture’.¹⁵ *Akayesu* followed the case of *Eichmann* holding that acts, such as but not limited to acts of torture, physiological or psychological; inhumane and degrading treatment; and persecution can constitute serious bodily or

⁸ Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art 2

⁹ Cassese, *International Criminal Law* 201

¹⁰ International Criminal Tribunal for Rwanda, *Prosecutor v Akayesu*, Trial Chamber, Judgment of 2 September 1998, Case No. ICTR-96-4-T

¹¹ ICTR Statute art 2(2)(a)

¹² *Akayesu* [500]

¹³ ICTR Statute Art.2(2)(b)

¹⁴ *A.-G. Israel v. Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem)

¹⁵ *ibid* [199]

mental harm.¹⁶ There is no requirement, despite the arguments of the USA, that the harm be ‘permanent or irremediable’.¹⁷

Acts which deliberately inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part can also constitute genocide.¹⁸ This can include ‘subjecting a group of people to a subsistence diet [...] and the reduction of essential medical services’.¹⁹ This has been criticised on the grounds that subjecting a group to a subsistence diet, although unethical, does not *prima facie* amount to conditions of life calculated to bring about its physical destruction.²⁰ Starvation would result in physical destruction and is a much more precise term than simply a subsistence diet, which although unhealthy, is not a threat to life in the same degree.

Imposing measures intended to prevent births within the group²¹ can further constitute the crime of genocide. This includes acts of sexual mutilation, forced birth control, separation of the sexes, the prohibition of marriage, and the practice of sterilisation.²² Such measures could also include threats calculated to have the effect of preventing procreation. Rape could be a measure to prevent births if the result meant that the individuals were too traumatised to procreate.²³

The final underlying act is that of forcibly transferring children from one group to another.²⁴ Article 2 of the Convention has been incorporated verbatim into the statutes of the *ad hoc* tribunals of both the ICTR and the International Criminal Tribunal for the former Yugoslavia (‘ICTY’).²⁵ It has also been implemented into the Rome Statute of the International Criminal Court in much the same way.²⁶ The *ad hoc* tribunals and the ICC have generally followed the ICTR’s discussions in relation to the five categories of conduct aforementioned that amount to genocide.²⁷

¹⁶ *Akayesu* [504]

¹⁷ Bantekas, *International Criminal Law* 216

¹⁸ Genocide Convention art 2

¹⁹ *Akayesu* [506]

²⁰ Cassese, *International Criminal Law* 203

²¹ Genocide Convention art 2(d)

²² *Akayesu* [507]

²³ *ibid* [508]

²⁴ Genocide Convention art 2

²⁵ Cassese, *International Criminal Law* 201

²⁶ Rome Statute of the International Criminal Court, art 6

²⁷ Cassese, *International Criminal Law* 203

III. What Constitutes a Protected Group?

The Genocide Convention only applies to the destruction of four specific groups: national, ethnic, racial and religious groups.²⁸ An ethnic group is one whose members share a common language or culture. Membership of a racial group is based upon hereditary physical traits often identified in relation to a specific geographical location. A religious group is defined as members sharing the same religion and mode of worship. Finally a national group is a collection of people who are perceived as sharing a legal bond as a result of citizenship.²⁹

The drafters of the Convention excluded *inter alia* political and economic groups, with the intention instead to focus on groups with more 'stable' characteristics.³⁰ It has been argued that omitting these groups helped to ensure greater acceptance and increased ratification. Therefore states which were involved in political purges such as the Soviet Union would find it less intimidating.³¹

In domestic implementations, some states have broadened the scope of genocide. For example, genocide under Spanish law³² is broader than the Convention and incorporates political groups.³³ In the *Jorgić* case,³⁴ a German court held that German law³⁵ does not require the physical extermination and destruction of the group since destruction of the group in a social sense can suffice.³⁶ This is consistent with the Convention whose primary concern was to protect the group as a whole, not the individuals themselves.³⁷ Although recent developments in the law do seem to be broadening the categories of protected groups, the

²⁸ Genocide Convention art 2

²⁹ ICTR, *Prosecutor v Kayishema and Ruzindana* (1999) Case No ICTR-95-1-T [512], [513], [514], [515].

³⁰ Cassese, *International Criminal Law* 204

³¹ *ibid*

³² Spanish Criminal Code, art 137

³³ Bantekas, *International Criminal Law* 214; *Re Scilingo*, Judgment No 16/2005 (19 April 2005)

³⁴ Germany, *Jorgić* case, Federal Court of Justice (Bundesgerichtshof), Judgment of 30 April, Case No 3StR 215/98F, published in NStZ Vol 8 1999, 396

³⁵ Under art 220a of the German Penal Code

³⁶ Cassese, *International Criminal Law* 228

³⁷ Bantekas, *International Criminal Law* 214

Genocide Convention and the ICC are still limited in jurisdiction to the four groups.

The early jurisprudence of the International Court of Justice ('ICJ') and the case law of the Permanent Court of International Justice suggested that the existence of a specific group was a question of fact and therefore objective in nature.³⁸ However, in recent times it has become apparent that the four protected groups are subjective concepts. In *Akayesu*³⁹ focus was not placed on whether there were significant objective differences between the two 'groups' but whether the groups perceived themselves as distinct.⁴⁰ This approach may be seen as desirable since groups may have very subtle differences which may not be apparent to an outsider. However, the *Stakić*⁴¹ case held that 'a subjective definition alone is not enough to determine victim groups'.⁴² Having objective elements will help prevent a 'floodgates' scenario where anyone could argue genocide victimhood on the basis of an unfounded perceived group membership.⁴³

The definition of genocide involves the victimisation of a particular group resulting from certain positive characteristics. The negative approach was rejected in the case of *Stakić* because 'negatively defined groups lack specific characteristics, [therefore] defining groups by reference to a negative would run counter to the intent of the Genocide Convention's drafters'.⁴⁴

In the case of *Krstić*,⁴⁵ General Krstić was ordered to and carried out the mass slaughter of Bosnian Muslim men and boys in Srebrenica. In this case the defence argued that the Bosnian Muslim men of Srebrenica did not constitute a specific national, ethnical, racial or religious group.⁴⁶ The defence contended that 'one cannot create an artificial "group" by limiting its scope to a geographical area'.⁴⁷ It was also unlikely that the Bosnian Muslim men of Srebrenica would consider themselves a distinct

³⁸ *ibid* 212

³⁹ *Akayesu*

⁴⁰ Bantekas, *International Criminal Law* 213

⁴¹ *ICTY Prosecutor v Stakić*, Appeals Chamber Judgment (22 March 2006)

⁴² *ibid* [25]

⁴³ Bantekas, *International Criminal Law* 215

⁴⁴ *Stakić* [22]

⁴⁵ *ICTY, Prosecutor v Krstić*, Trial Chamber, IT-98-33-T (2001)

⁴⁶ *ibid* [558]

⁴⁷ *ibid*

group among Bosnian Muslims.⁴⁸ When assessing whether a targeted group falls within the definition of a protected group, what is important is whether subjectively they were perceived as belonging to a specific identifiable group. It was held that the Bosnian Muslims were as a whole a protected group to which the Bosnian Muslims of Srebrenica constituted part,⁴⁹ and were thus protected by article 4 of the ICTY Statute.

IV. *Dolus Specialis*

The defendant must have the relevant *mens rea* for the underlying offences, but must also have genocidal intent, i.e. the intent to destroy the group. It is important to note that there is no requirement of premeditation,⁵⁰ yet the very nature of the offences necessitates a certain degree of planning.⁵¹ It is often difficult to establish the specific intent to destroy one of the aforementioned groups, as in the case of *Jelisić*.⁵² Here the defendant held during the Bosnian war a position of authority at Luka prison camp. He was charged with the crime of genocide. His actions were sufficient to satisfy the conduct element of genocide, but the question remained as to whether he possessed the requisite genocidal intent. The evidence provided from witnesses showed he took pleasure from his position⁵³ when he committed the violent crimes and mass murders for which he was indicted. Since this was held to show that Jelisić had a disturbed personality⁵⁴ and was not sufficient to prove genocidal intent, he was accordingly acquitted of the genocide charge. The prosecution appealed the acquittal on the ground that the trial chamber had applied an overly narrow interpretation of genocidal intent. The trial chamber had held that his almost sadistic nature was different to the intent to destroy the group.⁵⁵ The Appeals Chamber however

⁴⁸ *ibid* [559]

⁴⁹ *ibid* [560]

⁵⁰ *ICTY, Prosecutor v Jelisić*, Trial Chamber, IT-95-10 (1999), [100]

⁵¹ Bantekas, *International Criminal Law* 209

⁵² *Jelisić* (n 50)

⁵³ *ibid* 104

⁵⁴ *ibid* 105

⁵⁵ *ICTY, Prosecutor v Jelisić*, Appeal Chamber, IT-95-10-A (2001) [70]

disagreed, pointing out that a disturbed personality in itself does not prevent the individual from having the intent to destroy a particular group; and in fact it is often the mentally unbalanced who are drawn to extreme racial and ethnic hatred.⁵⁶ This case shows the difficulty in proving genocidal intent, particularly where an individual has acted outside of a joint enterprise.⁵⁷

When violence is used with the intent to displace but not destroy a population, does this amount to genocide? Displacing a population has commonly become known as ‘ethnic cleansing’. In the case of *Krstić*, the ICTY considered whether the defendant had the relevant genocidal intent (*dolus specialis*). The case concerned the forcible transfer of Muslim women and children and the detention and execution of men. The International Law Commission considered that having the ‘intent to destroy’ meant destruction ‘only in its material sense, its physical or biological sense’.⁵⁸ However there have been declarations otherwise. The United Nations General Assembly in 1992 labelled ethnic cleansing as a form of genocide,⁵⁹ and the Federal Constitutional Court of Germany in 2000 applied a very broad definition of ‘destroy’, beyond merely the physical and biological.⁶⁰ These seem to encompass non-physical forms of the destruction of a group. Regardless, the Trial Chamber held that the ‘definition of genocide is limited to those acts seeking the physical or biological destruction of all or part of a group’.⁶¹ This decision was made in regard of the principle of *nullum crimen sine lege*.⁶² Displacing a population does not *per se* cause the destruction of the group in a physical sense. Without the intention to destroy in a physical sense there is no genocidal intent. It is a very fine line between ethnic cleansing and genocide, since if the campaign of ethnic cleansing ‘implicates any of the objective elements of the offence and is [...] committed with the requisite *dolus specialis* it will no doubt amount to genocide’.⁶³

⁵⁶ *ibid*

⁵⁷ *Jelisić* Trial Chamber [101]

⁵⁸ *Krstić* [576]

⁵⁹ *ibid* [578]

⁶⁰ *ibid* [579]

⁶¹ *ibid* [580]

⁶² Rome Statute of the International Criminal Court 1998, art 22

⁶³ Bantekas, *International Criminal Law* 215

What constitutes intent to destroy ‘part’ as opposed to ‘all’ is the subject of much debate. In the *Krstić* case the defence argued that the term ‘in part’ refers to the scale of the crimes.⁶⁴ The Trial Chamber held that under a plain reading of the Convention, ‘in part’ refers to intention.⁶⁵ Any ‘act committed with the intent to destroy a part of a group [...] constitutes an act of genocide’.⁶⁶ Partial destruction of a group constitutes genocide either when it concerns a large proportion of the group or a significant section,⁶⁷ such as its military personnel, as this would leave them vulnerable. This has been reaffirmed by the Final Report of the Commission of Experts.⁶⁸ The *Jelisić* case highlighted that genocidal intent can manifest itself either as the killing of a large proportion of a group or by the killing of a smaller number which is calculated to have a significant impact on the survival of the rest of the group.⁶⁹ The Muslim men in the *Krstić* case were considered a significant section of the group, as they amounted to three generations and in such a society this would ‘inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica’.⁷⁰ The intent to kill all the Muslim military aged men was held to constitute intent to destroy ‘in part’ the Bosnian Muslim group, thus constituting genocide.⁷¹ On appeal it was reaffirmed that genocide was committed, although it was held that the Trial Chamber had erred in law and that Krstić did not have genocidal intent. Nonetheless because he was aware of the genocidal intent of others when he allowed his men to join the killing operations, this made him an accomplice to genocide.⁷²

The difficulties in distinguishing between the intent to destroy a group and the intent to displace it have been seen in relation to the attacks against civilians in Darfur.⁷³ The Commission considered whether the

⁶⁴ *Krstić* [583]

⁶⁵ *ibid* [584]

⁶⁶ *ibid*

⁶⁷ *Krstić* [587]

⁶⁸ Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992)

⁶⁹ *Jelisić*, Trial Chamber [82]

⁷⁰ *Krstić* [595]

⁷¹ *ibid* [598]

⁷² Cassese, *International Criminal Law* 223

⁷³ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 2005 (UN Doc. S/2005/60)

attacks were committed with genocidal intent. The Commission drew inferences from factors such as the scale of the crimes and the systematic manner in which they were committed.⁷⁴ The attackers did not exterminate the whole group; instead the militias selectively killed groups of young men. The Commission held that the intention was not to destroy the group in whole or in part but instead to kill those whom the attackers considered rebels and displace the remaining population to prevent the rebels from gaining support.⁷⁵ The Commission's conclusion therefore was that the Government of Sudan had not implemented a policy of genocide.

The Rome Statute of the ICC reproduces the definition of genocide from the Convention. However the ICC Elements of Crime, an aid to interpretation and application, adds as an element of genocide that 'the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'.⁷⁶ This approach was reaffirmed in the *Al-Bashir Warrant* decision.⁷⁷ This case established that not only is a pattern of conduct necessary but the 'conduct must present a concrete threat to the existence of the targeted group, or a part thereof'.⁷⁸ Therefore an offence of genocide is only triggered when the threat of destruction of the group becomes concrete and real⁷⁹ which would cause a delay in preventative action. This element may give greater clarity and help distinguish between crimes against humanity and genocide.⁸⁰ The need of a 'manifest pattern' is perhaps an attempt at simplifying establishing genocidal intent as multiple acts may make it easier to infer.

⁷⁴ *ibid* [513]

⁷⁵ *ibid* [514]

⁷⁶ ICC, Elements of a Crime, art 6

⁷⁷ ICC, *Prosecutor v Al-Bashir, Decision on the Prosecution's Application for a warrant of Arrest* (4 March 2009)

⁷⁸ *ibid* [121], [123]

⁷⁹ Bantekas, *International Criminal Law* 210

⁸⁰ Cassese, *International Criminal Law* 227

V. Duties and Obligations

The purpose of the Convention is not just to punish but also to actively prevent genocide, and prevention has been described as the Convention's 'greatest failure'.⁸¹ UN member states are often hesitant to 'get involved' by singling out states which have breached international criminal law in relation to genocide. The Convention provides that enforcement of the Convention is up to the courts in the state in which genocide was committed, or before an international penal tribunal.⁸² In practice this is unreasonable as it is often state officials who are implicated and will actively oppose prosecution.⁸³ The punishment of genocide ought, of course, to act as a major deterrent to prevent atrocities taking place. *Bosnia v Serbia*⁸⁴ reaffirmed that states have a duty to 'employ all means reasonably available to them [...] to prevent genocide so far as possible'.⁸⁵ The outcome is irrelevant; the pertinent question from the state's point of view is whether the state took all reasonable steps to prevent genocide.⁸⁶ This duty arises once the state becomes aware of or should have become aware of the risk of genocide.⁸⁷ It is important to distinguish between a state violating its obligations under article 1 of the Convention whereby the state omits to take reasonable steps to prevent the commission of genocide and those held responsible for complicity in genocide under article 3 which involves some form of positive action to aid the perpetrators of genocide.⁸⁸ The ICJ held that 'unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica'.⁸⁹ This coupled with the failure to take reasonable preventative measures resulted in the finding that Serbia violated its state obligations under the Convention.⁹⁰

⁸¹ *ibid* 230

⁸² Genocide Convention, art 6

⁸³ Cassese, *International Criminal Law* 230

⁸⁴ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment of 26 February 2007

⁸⁵ *ibid* [430]

⁸⁶ *ibid*

⁸⁷ *ibid* [431]

⁸⁸ *ibid* [432]

⁸⁹ *ibid* [438]

⁹⁰ *ibid*

VI. Crimes of Genocide versus Crimes against Humanity

The crime of genocide and crimes against humanity were ‘forged in the same crucible and were used at Nuremberg almost as if they were synonyms’.⁹¹ The Nuremberg tribunals took place before the creation of the Convention, and the charges laid were of ‘crimes against humanity’ as there was no self-standing crime of genocide. The Nuremberg tribunals:

[O]nly considered [the] mass murder of racial or ethnic groups to the extent that they showed a *nexus* with war crimes [...] For this reason, the International Military Tribunal at Nuremberg felt it could not make a general declaration that the acts before 1939 were crimes against humanity.⁹²

This meant that racially motivated atrocities committed by the Nazi regime within Germany *before* the outbreak of the war were not initially punishable under international law.⁹³ From this India, Panama and Cuba proposed that the issue of genocide be placed on the agenda for the first meeting of the United Nations General Assembly.⁹⁴ Accordingly the Genocide Convention was born, drafted in part from frustration with the Nuremberg judgments. The Genocide Convention established a separate international crime that could be committed either during a time of war or peace.⁹⁵ In comparison it was not until 1995 that the ICTY in the *Tadić*⁹⁶ case held that crimes against humanity did not have to be linked with war.⁹⁷ The early distinction between genocide and crimes against humanity was the nexus that crimes against humanity had with war, and had Nuremberg not imposed this upon crimes against humanity then ‘there would likely have been no need to define genocide as a distinct international crime’.⁹⁸ It seems that in modern times the crime of genocide and crimes against humanity are closer now than they have

⁹¹ WA Schabas, ‘Origins of the Genocide Convention: From Nuremberg to Paris’ 40 *Case Western Reserve Journal of International Law* (2008) 35, 53

⁹² WA Schabas, ‘National courts finally begin to prosecute genocide, the “crime of crimes”’ (2003) JICJ 3

⁹³ *ibid*

⁹⁴ *ibid*

⁹⁵ Genocide Convention art 1

⁹⁶ ICTY, *Prosecutor v Tadić*, Appeals Jurisdiction Decision (2 Oct 1995)

⁹⁷ *ibid* [140], [141]

⁹⁸ Schabas, ‘Origins of the Genocide Convention’ 53

perhaps ever been. The acts covered in the Convention could be encompassed under crimes against humanity, as a form of extermination or persecution.⁹⁹ Now that they have almost identical jurisdiction under the ICC statute it seems strange that genocide should remain distinct and separate from crimes against humanity as a whole. The only legal advantage to a crime being labelled genocide is that it provides relatively easy access to the ICJ under article 9 of the Genocide Convention.¹⁰⁰ Furthermore, there are important symbolic differences to condemning an action as an act of genocide instead of a crime against humanity. The term genocide contains a particular stigma because of its association with the Holocaust. Being prosecuted for genocide expresses a form of revulsion and a sense of condemnation by society which perhaps exceeds that felt towards crimes against humanity.

VII. Final Commentary

The crime of crimes has been the subject of much legal criticism. As previously mentioned, proving *dolus specialis* is practically very difficult. The definition of genocide is also very narrow. The fact that the crime of genocide excludes political and social groups is particularly contentious. Despite the limited groups which can be protected, at the Rome Conference in 1998, the only state to argue that the Convention definition of genocide should be expanded to include political and social groups was Cuba.¹⁰¹ The definition of genocide is also limited to acts against people and does not include acts against the environment which sustains them; neither does it protect their cultural identities.

Although the definition of genocide is very narrow, currently this is not necessarily an issue due to the development of the closely related concept of crimes against humanity.¹⁰² The voids created by the narrow application of the crime of genocide have been filled. As a result the

⁹⁹ Bantekas, *International Criminal Law* 204

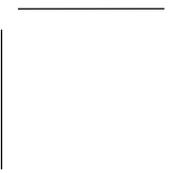
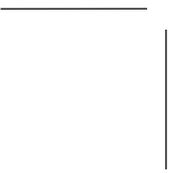
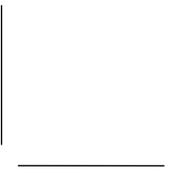
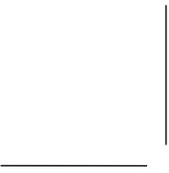
¹⁰⁰ Schabas, 'Origins of the Genocide Convention' 54

¹⁰¹ Schabas, 'Origins of the Genocide Convention' 46

¹⁰² WA Schabas, 'Convention for the Prevention and Punishment of the Crime of Genocide', page 3, available at <http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf>, accessed 18/10/11

'crime of genocide has been left alone, where it occupies a special place as the crime of crimes'.¹⁰³

¹⁰³ *ibid*, 4



NOTES

La Générale des Carrières et des Mines (Appellant) v FG Hemisphere Associates LLC (Respondent) [2012] UKPC 27

FG Hemisphere Associates LLC ('Hemisphere') acquired the assignment of two highly valuable arbitration awards granted by the International Chamber of Commerce against the Democratic Republic of the Congo ('DRC'). Hemisphere then sought enforcement of those awards against assets of a DRC state-owned corporation, La Générale des Carrières et des Mines ('Gécamines'). The assets consisted of Gécamines' shareholding in a Jersey-based company, together with the income due from that company to Gécamines.

The Royal Court of Jersey ('Royal Court') held that the arbitration awards could be enforced against Gécamines' assets on the basis that Gécamines, as an organ of the DRC, was to be equated with the state. The test for determining whether Gécamines was an organ of the DRC required the existence of government control and the exercise of governmental functions. This was derived from the English Court of Appeal case of *Trendtex*¹, which was a decision on state immunity. In applying this test, the Royal Court examined Gécamines' constitutional position (by reference to both national laws and Gécamines' articles of incorporation) and the control actually exercised by the state over Gécamines and Gécamines' functions.

In concluding that the *Trendtex* test was satisfied, the Royal Court relied upon two bases: (1) Gécamines' constitutional position, in relation to which it noted that 'the exceptional degree of power accorded to the state over the affairs of Gécamines, at all levels, was such that the company was no more, in truth, than an arm of the state with

¹ *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529, in particular from the judgment of Lord Denning MR.

responsibility for operations in a sector of vital importance to the national economy;² and (2) instances where the DRC had appropriated Gécamines' assets without providing consideration in return.

The Court of Appeal of Jersey ('Court of Appeal') affirmed the Royal Court's judgment (Nigel Plemming QC dissenting) and accepted the dual *Trendtex* test of government control and governmental functions.

Regarding the exercise of governmental functions, submissions were made in the Court of Appeal for the first time as to the significance of the distinction between sovereign functions and private or commercial activity. The majority required the entity's principal functions and activities to be governmental, although (i) it is unnecessary to find actual sovereign acts, as opposed to acts which could be performed by any individual; (ii) government is a broad concept; (iii) what may otherwise appear to be activities performed in the ordinary course of business qualify where they are in fact secondary to a primary function, which is governmental in nature; and (iv) the extent to which the entity performs governmental functions must be such that it is essentially an arm of the government.

Gécamines appealed to the Privy Council with leave from the Court of Appeal.

At the Privy Council, the question of whether the test in *Trendtex* remained appropriate was raised for the first time. The question was twofold. First, was the *Trendtex* test appropriate generally? Second, did the applicability of the *Trendtex* test extend beyond matters of state immunity to issues of liability and enforcement?

Hemisphere submitted that the *Trendtex* case set out the appropriate test for a state organ, and that the lower courts had been correct to find that Gécamines satisfied the test.

Gécamines made the following submissions:

(1) If *Trendtex* is the appropriate test, it is not satisfied. There was nothing extraordinary about the extent to which the state exercised control over Gécamines as a state-owned corporation, and furthermore its functions and activities were neither governmental nor sovereign.

² *F.G. Hemisphere Associates LLC v The Democratic Republic of Congo and La Générale des Carrières et des Mines* [2010] JRC 195 [69]

(2) The *Trendtex* test is in any event inappropriate when considering questions of liability and enforcement. Gécamines' status as a separate juridical entity should be respected, unless it is a sham or circumstances exist which require the courts to lift the corporate veil.

The appeal was allowed on the following grounds:

(1) The starting point for determining whether an entity is a state organ is to decide whether the entity has a separate juridical status, although this in itself is not conclusive. Control and functions, as identified in the *Trendtex* test, also remain relevant.

(2) Constitutional and factual control by the government, together with the exercise of sovereign functions are insufficient, on their own, to convert a separate entity into an organ of the state. There is a strong presumption that an entity, which has its own management and budget and which operates for apparently commercial purposes, will have its separate corporate status respected, notwithstanding that it has in fact been created by the state. Extreme circumstances are required to displace this presumption, such as where the entity has no effective separate existence or where the affairs of the state and the entity are so closely intertwined that the two ought properly to be regarded as one and the same.

(3) On the facts, Gécamines was not a sham. It was an independent and fully-functional corporate entity, whose functions were not such that it could be regarded as inseparable from the executive organs of the state. This finding was supported by the existence of Gécamines' own budget, accounts and liabilities. Gécamines also had a large number of assets and a sizeable business portfolio, which included being a party to numerous joint ventures with other companies. Moreover, in the past Gécamines had found itself at odds with government departments, so much so that on occasions the tax authorities had seized Gécamines' assets in order to satisfy outstanding tax liabilities.

(4) The lower courts focussed their analysis on a few areas of Gécamines' activities, which may have indicated that Gécamines was an organ of the state. They failed, however, to consider these activities against the broader context of Gécamines' overall operations. Moreover, the lower courts misconstrued the governmental functions test, applying it far too widely. Even when Gécamines was using its rights or assets for

the benefit of the state, it could not sensibly be described as having exercised sovereign authority. It was entirely possible for Gécamines at times to exercise certain governmental functions without losing its separate legal identity.

(5) The fact that Gécamines' assets have been used for the benefit of the state is no basis for imposing liability for the entirety of the state's debts on Gécamines. To attempt to lift Gécamines' corporate veil in order to achieve this is to misunderstand the purpose of the law in this area.

Comment

The Privy Council affirmed that the international and domestic approach to state immunity was indeed relevant to the question of whether an entity was an organ of the state for the purposes of liability and enforcement. The central case in this area was the *Trendtex* case. The Royal Court of Jersey and the Court of Appeal of Jersey had correctly identified this case, but they had misapplied it. In particular, they construed the governmental functions element of the test too broadly. Their approach lowered the threshold for the assimilation of a separate juridical entity with the state and led them to find that Gécamines was an organ of the DRC. The exception created in the *Trendtex* case was too readily satisfied when using this lower threshold. Contrary to the conclusions of the lower courts, the Privy Council found that the narrow exception, when properly applied, was not made out in the instant case.

In reaching its decision, it is clear that the Privy Council was mindful of the negative effects on Gécamines' creditors of a finding which resulted in Gécamines being held liable for the state's debts. Against this backdrop, it is unsurprising that the court narrowly construed the *Trendtex* exception.

Michele Gavin-Rizzuto

Prest v Petrodel: An Open Road and Fast Car?

In October 2012 the Court of Appeal delivered a judgment in *Prest v Petrodel*¹ that, in the words of Craig Rose, ‘consigned long-standing family case law to the judicial equivalent of the naughty step’.² Thorpe LJ, dissenting, warned that the effect of this decision would be to ‘present an open road and a fast car to the money-maker who disapproves of the principles developed by the [courts]’ in financial remedy cases.³ In June 2013, the Supreme Court allowed the appeal in this case in a decision that was widely acclaimed as being both novel and fair.⁴ As a result, many felt that Thorpe LJ’s warning had been heeded. This note argues the contrary, and suggests that the true effect of the decision was in fact to provide wealthy spouses with the tools needed to avoid the enforcement of financial orders following divorce.

The Facts

Prest is a case concerning the distribution of property after the breakdown of a marriage. Mr Prest is a wealthy businessman who was ordered to pay Mrs Prest £17.5m. He owns a group of foreign companies known as the Petrodel Group who, in turn, own a number of valuable properties in and around London. Throughout the first instance proceedings Mr Prest was uncooperative regarding his assets and, to ensure his judgment was enforced, Moylan J ordered that he ‘transfer or cause to be transferred’ these properties to his wife.

The judge found that he had such a power under s. 24(1)(a) Matrimonial Causes Act 1973, which states that the court may make:

[A]n order that a party to the marriage shall transfer to the other party [...] such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion.

¹ *Petrodel Resources Ltd v Prest* [2012] EWCA Civ 1395

² C Rose, ‘Family: Hidden Assets?’ (2012) 162 NLJ 1487, 1488

³ *Prest* (n 1), [65]

⁴ *Prest v Petrodel Resources Ltd.* [2013] UKSC 34

The ownership structure of the Petrodel Group is complex, but it suffices to say that Moylan J made findings of fact to the effect that the husband was the sole shareholder and shadow director of the companies, that he was therefore the ‘effective owner’ of the companies,⁵ and that ‘the corporate structure is being used as a repository for the family wealth’.⁶ Consequently, the Judge held that he was ‘entitled’ to the properties, and that they were therefore capable of being subject to a s. 24(1)(a) order. It was this finding that formed the subject of the appeals.

The Decision of the Supreme Court

The Court of Appeal allowed Mr Prest’s appeal, holding that the judge’s reasoning, based on the family authority of *Nicholas v Nicholas*,⁷ was not only ‘heretical’⁸ but also ‘internally inconsistent, contrary to principle and wrong’.⁹ On Mrs Prest’s appeal, the Supreme Court found that there were three potential avenues through which the court could order the Husband to transfer the properties to the wife.¹⁰

The first of these involves ‘piercing the corporate veil’. Lord Sumption engaged in a masterful analysis of the case law on this topic and ultimately found that this avenue was unavailable to Mrs Prest. He began by setting out the principle in *Salomon v A. Salomon & Co. Ltd*,¹¹ best stated by Lord Wrenbury in a later case:

[T]he corporator even if he holds all the shares is not the corporation, and [...] neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation.¹²

Lord Sumption then examined the exceptions to this rule, concluding that:

⁵ *Prest v Prest* [2011] EWHC 2956, [208]

⁶ *ibid* [225]

⁷ (1984) FLR 285

⁸ *ibid* [104]

⁹ *Prest* (n 1) [97]

¹⁰ *Prest* (n 4) [9]

¹¹ [1897] AC 22

¹² *Macaura v Northern Assurance Co.* [1925] AC 610, 628

[T]he principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities.¹³

However, in his view, the difficulty lies in identifying what is a 'relevant wrongdoing'.¹⁴ He held that there were two principles to consider:

They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'facade,' but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.¹⁵

Ultimately, Lord Sumption concluded that there had only ever been two instances of relief, namely 'piercing the corporate veil', being granted due to the evasion principle. In every other case, relief had been granted on the concealment principle.¹⁶ In the present case, despite Mr Prest's persistent non-disclosure, there was no evidence that he was seeking to avoid an existing legal obligation and, as such, the concealment principle alone was engaged.¹⁷ As a result, the veil could not be pierced and this avenue was unavailable.

The second potential avenue for enforcement was under s. 24(1)(a) MCA. It was this route that Moylan J utilised at first instance, finding that Mr Prest's effective control of the companies rendered him 'entitled' to the properties. Lord Sumption agreed with the Court of Appeal, holding

¹³ *Prest* (n 4), [27]

¹⁴ *ibid* [28]

¹⁵ *ibid*

¹⁶ *ibid* [35]

¹⁷ *ibid* [35]

that:

An 'entitlement' is a legal right in respect of the property in question. The words 'in possession or reversion' show that the right in question is a proprietary right, legal or equitable.¹⁸

He then held that:

If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere.

As a result, property could only be transferred under this provision if Mr Prest had a proprietary right to it. Moylan J did not find such a right, and as such he was wrong to have ordered the transfer on the basis of control, and this avenue was unavailable.

However, it followed that the final potential avenue was a finding that Mr Prest was in fact entitled, in the proprietorial sense of the word, to the properties. This would depend on a finding that, despite the companies being the legal owners of the properties, Mr Prest retained a beneficial interest. Before examining whether this was the case, Lord Sumption made some powerful comments regarding the drawing of adverse inferences in such proceedings:

The concept of the burden of proof [...] cannot be applied in the same way to proceedings of this kind. [...] These considerations are not a licence to engage in pure speculation. But judges exercising a family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities[.]¹⁹

Against the background of this powerful statement, the court held that Mr Prest was beneficially entitled to the properties. Three had originally been purchased by Mr Prest and transferred to the companies for nominal consideration. As a result, the presumption of a resulting trust arose and the court found that Mr Prest's material non-disclosure meant there was insufficient evidence to rebut it. A further two properties were transferred for substantial consideration, but at a time when the companies had not begun trading. As a result, it was inferred that the

¹⁸ *ibid* [37]

¹⁹ *ibid* [45]

purchase monies came from Mr Prest and the same presumption, not rebuttable on the evidence, arose.

Finally, one property was purchased for substantial consideration after the company had begun trading. Lord Sumption first noted that the business of the oil-trading company was unrelated to residential property investment. He then noted the 'consistent pattern'²⁰ of Mr Prest's behaviour. As a result, he found that, 'in the absence of any explanation of these transactions by the husband or his companies',²¹ Mr Prest was also beneficially entitled to this property.

A Licence to Engage in Speculation?

As quoted above, Lord Sumption stated that the decision in *Prest* was not a licence for the Family Division to engage in speculation. Arguably, the boundary between a legitimate adverse inference and speculation is unclear, and will only be delineated through further litigation. It is not difficult to imagine creative litigants relying on this passage to support arguments that an adverse inference should be drawn. Nor is it difficult to imagine, given the fact-specific nature of the exercise, that judges of the Family Division will differ in their application of this principle.

A difficulty arises when one considers the underlying paradox behind such litigation. On the one hand, the courts must ensure that property is not only divided fairly, but that such a division is easily enforceable. Without this, economically weak spouses may not only be left destitute, but also cheated by their wealthier and more financially adept counterpart. On the other hand, the black-letter nature of company and trusts law allows those with access to high quality (and of course expensive) legal advice to effectively mask their assets. It was the need for the former to prevail that led to the practice of piercing the corporate veil in the Family Division. Presumably it was this same need that led to Lord Sumption's powerful comments regarding the burden of proof. It is argued that this very same need will continue to prevail, and that family judges will be left to blur the line between legitimate inference and pure speculation.

²⁰ *ibid* [51]

²¹ *ibid*

Not only does this undermine those voices claiming that *Prest* has clarified the law, it also means that further appellate litigation in this area is inevitable. This, of course, leaves those in Mrs Prest's position the unenviable task of gambling their limited finances on the hope that such litigation will be resolved in their favour. Whilst she was of course entitled to £17.5m, such litigation is concerned with ensuring she is actually able to receive such sums, and thus even the wealthiest of divorcing spouses may be compelled to take this gamble.

An Open Road and a Fast Car?

Thorpe LJ, in his dissenting opinion in the Court of Appeal, warned the Supreme Court that an unfavourable decision would 'present an open road and a fast car' to wealthy spouses seeking to obfuscate their assets. It is argued that the decision of the Supreme Court has provided such tools for those future litigants in Mr Prest's position. By clarifying and confining the law regarding the corporate veil, the Supreme Court has effectively provided a 'road map for dishonest litigants going forward'.²² John Wilson QC argues that such litigants 'are likely to ensure that the pitfalls that brought down Mr Prest are avoided in their cases'.

A simple example demonstrates this point. A husband transfers properties into the name of a company that had been specifically incorporated for this purpose. He owns 85% of the shares and provides modest disclosure. He provides evidence that the property was transferred for substantial consideration obtained by a loan from a second company, in which he owns 65% of the shares. In this situation, whilst it may appear that he caused the purchase monies to be loaned, it is clear that such monies have not come directly from him. As a result, it is arguable that an adverse inference could not be drawn, that the presumption of a resulting trust would not arise and that the wife would fail to follow in the footsteps of Mrs Prest.

²²J Wilson QC, 'Stripping Away the Veil of Deceit: *Prest v Petrodel*' (Family Law Week) available at <<http://www.familylawweek.co.uk/site.aspx?i=ed114454>> accessed 10 August 2013

Can *Prest* Be Seen in Isolation?

Finally, it is argued that this decision must be seen in context. In 2010, the Court of Appeal delivered the infamous *Imerman*²³ decision. This categorically declared that the law of confidence extends to the marital relationship, and that it was unlawful for divorcing spouses to ascertain 'confidential' information from their counterpart regarding financial issues. Previously, it had been common practice to do so, and had been thought lawful under the so-called *Hildebrand* rules, derived from the eponymous decision of the Court of Appeal.²⁴ This was widely seen as an important method of protecting an economically weak spouse from those divorcees who choose to hide, dissipate or obfuscate their wealth.

This, however, is no longer possible and people in Mrs *Prest*'s position are left to rely on the hope that their spouse complies with the disclosure obligations contained in the FPR. *Prest* is a stark illustration that wealthy divorcees are happy to flout such obligations, and that significant difficulties can arise as a result. Whilst Lord Sumption made it clear that there will be consequences to such non-disclosure, few spouses will be able to afford the forensic accounting necessary to give rise to adverse inferences. Even those that can afford such luxuries will be compelled to increase their costs to do so.

Moreover, the recent case of *UL v BK*²⁵ in the High Court illustrates the additional difficulties facing a spouse who is aware of the extent of their counterpart's finances, but who fears their concealment or dissipation. Mostyn J discharged a freezing injunction on the basis that there were material breaches of the usual safeguards in place for such orders. The order did not state on its face the geographical extent of the injunction, contained an exception allowing reasonable sums to be spent on living expenses and legal fees and contained no undertakings on the part of the wife. However, more crucially, despite the wife's affidavit disclosing no evidence that he held any assets other than a single property in Spain, it froze all assets up to £20m in the husband's name.

Mostyn J expressed 'great concern'²⁶ at the excessive level of *ex parte*

²³ *Tchengui v Imerman; Imerman v Imerman* [2010] EWCA Civ 908

²⁴ *Hildebrand v Hildebrand* [1992] 1 FLR 244

²⁵ [2013] EWHC 1735 (Fam)

²⁶ *ibid* [52]

applications for freezing injunctions. He emphasised the large number of safeguards necessary in such orders and reaffirmed the high threshold that must be crossed for such an injunction to be granted, namely that there is clear evidence of ‘an unjustified dealing with assets’ leading to a ‘solid risk of dissipation’.²⁷

It is obvious that such safeguards are both necessary and fair; such an order is undoubtedly draconian. It is not argued that *UL v BK* was wrongly decided. However, it is argued that this case highlights the difficulties inherent in this area of litigation. Wealthy spouses have both the motive and means to obfuscate their assets, and the only party to suffer as a result of such actions is the economically weaker spouse. Unless clear evidence of unjust dealing is available, which arguably it rarely will be, such a spouse has few options available to protect their position.

Prest must be seen against the background of these cases, a background that paints a bleak picture. It is difficult for individuals in Mrs Prest’s position to ascertain the full extent of their spouse’s assets. It is difficult for them to ensure such assets are not hidden or dissipated. Moreover, after *Prest*, it is even more difficult for them to prevent a clever spouse from hiding assets their behind a corporate structure.

Conclusion

Thankfully, due to constraints of both time and words, the author is not in a position to suggest an alternative, fairer solution. Instead, it is hoped that this note will provide a simple warning. Whilst the Supreme Court decision is undoubtedly a victory for Mrs Prest, it is far from clear that it will produce similar results for others in her position. Moreover, it must be seen against the background of other cases in this area. Not only will this decision lead to further litigation, it will also provide guidance for those wealthy spouses who wish to evade their obligations upon divorce. When seen alongside similar cases in this area, *Prest* is further illustration of the difficulties facing those who divorce wealthy, well-advised spouses.

²⁷ *ibid* [51]

It is hoped that, in interpreting this decision, judges of the Family Division do not ignore the warning provided by Thorpe LJ.

Tom Wilson