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Editorial Board 2017/18

Foreword

The University of Liverpool Law Review has become a prized product of collaboration between the Law School and its students. Over the last three years, the published articles have showcased intellectual prowess and critical mind of our students as well as hard-working dedication of the Review's Editorial Board.

The current issue firmly treads in the footsteps of its predecessors. While echoing the Law School's guiding ethos of examining the law through the lens of social justice, the issue addresses an array of pertinent and timely topics, including the patient's right to be informed of the risks in a medical procedure, the relationship between the defence of humanity and the defence of sovereignty, the principle of distinction in international humanitarian law, and the temporary copy exception in copyright law. The questions that are being explored span the UK, EU and international law, and are of high importance for individuals and states in contemporary context.

I congratulate the Editorial Board for yet another valuable and intellectually-stimulating issue.

Dr Jure Zrilic
Lecturer in Law, University of Liverpool

Preface

I would first like to thank all the contributing authors who have worked tirelessly with us to produce this issue. Without their contributions, this publication would not have been possible. I would also like to extend my gratitude to the authors behind the many quality pieces that we were not able to fit within this issue. Since the inception of the UOLLR, our main goal has been to publish and showcase the best academic works produced by our students. I am proud to say that as the UOLLR has grown in recognition, not only has the pool of submissions grown, we have also received submissions from authors outside our University. I believe that this serves as a strong testament to the continued growth and progress of the UOLLR.

Despite this progress, the UOLLR has not lost sight of its purpose: to present insightful and interesting articles which will not only help create debate among our student body, but will also serve as model essays which our students can learn from. This current issue deals with a diverse selection of thought-provoking legal questions, and we have made a conscious effort to ensure that there is a balance of international and domestic legal topics that are discussed. We believe that this will help students broaden their perspectives and to arouse their interest in legal problems affecting both the UK and the world.

In the order that the articles are presented, this issue features discussions on four topics: (i) the necessity for doctors to disclose potential risks in treatment to patients; (ii) the difficult question of whether intervention for humanitarian goals should prevail over the right of sovereignty of countries in conflict; (iii) the protection of civilian populations in warzones through the principle of distinction; and (iv) the defence for digital users under the temporary copy exception within European Union intellectual property law. I hope that through a critical reading of these articles, you will be able to learn something new and gain a richer perspective on these contentious legal issues.

Finally, I would like to show my appreciation for each member of the UOLLR editorial team – Gemma, Niamh, Callum, Mansour, Victoria, Melvin, Ahmad, Leah, and Katherine. The hard work and dedication shown by each member of the team is what has enabled the successful publication of this issue. I could not have asked for a more supportive and capable team.

We hope that reading this issue would inspire you to send in your own articles in the future.

Titus Teo
Editor-in-Chief

The Supreme Court's Decision in *Montgomery*: How Far Have We Strayed from *Sidaway* and the Professional Practice Test?

Lydia Campbell

Abstract

The area of informed consent has long been an area of great debate. To what extent should a patient be informed of the risks in a procedure? To what extent should doctors be trusted to make decisions regarding risks on behalf of their patients? Can we strike a balance between the two concepts? This paper explores cases central to the great debate, Sidaway v Board of Governors of the Bethlem Royal Hospital[1] and Montgomery v Lanarkshire Health Board.[2] Analysing the tests used in the past, and the test that has more recently been adopted, this paper considers the extent to which risk disclosure is now necessary in the modern day. Further, it focuses on the mind-set of the judiciary behind enforcing such a test, particularly, the judiciary's focus on a patient-centric test, more consistent with automatism and patient choice, than the previously paternalistic "doctor knows best" approach.

I. Montgomery v Lanarkshire Health Board [2015]

The 2015 Supreme Court case of *Montgomery v Lanarkshire Health Board*[3] marked a substantial change from the previously supported case of *Sidaway v Board of Governors of the Bethlem Royal Hospital*.[4]

The Claimant, Mrs Montgomery, suffered from diabetes mellitus, for which she was insulin-dependent. Mrs Montgomery was pregnant, and as a result of her condition, she was classed as being of "high risk". Namely, Mrs Montgomery was exposed to a greater risk of complications in the delivery of her child. For example, the usual 0.7% risk of shoulder dystocia during a natural birth, as attributed in non-diabetic pregnant women, increased to between 9-10% for her, as a

[1] [1985] AC 871
[2] [2015] UKSC 11
[3] *Montgomery* (n 2)
[4] *Sidaway* (n 1)

diabetic woman.

Mrs Montgomery was not advised of the risk, as it was the doctor's opinion that the possibility of it causing a serious problem for the baby was small, in any event. The doctor was also of the opinion that advising of such a risk would encourage the choosing of alternative treatments such as caesarean sections, which were much more demanding on NHS resources.

During Mrs Montgomery's vaginal delivery, the umbilical cord was completely or partially occluded, resulting in a deprivation of oxygen to the baby. Following the baby's birth, he was diagnosed with dyskinetic cerebral palsy. It was the Claimant's case that had she been made aware of the risk of shoulder dystocia, she would have elected to undergo a caesarean section, and therefore avoided the risk of shoulder dystocia altogether.

The court found in favour of the Claimant, highlighting that:

> "the doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."[5]

Ultimately, the judgment highlights that risk is to be considered in terms of materiality in order to determine whether it is to be disclosed to the ordinary patient. In the *Montgomery* circumstances, it was held that the risk was *so* significant that in any event, it warranted disclosure. The court in *Montgomery*[6] was careful so as not to specify particular figures for what constituted a "material risk", and in fact, which specific risks were of greater value than others. This was namely due to the objective/subjective hybrid test that is intended to apply in relation to a "reasonable person" in the particular patient's individual circumstances.[7]

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[5] *Montgomery* (n 2), [87]
[6] ibid
[7] ibid

The court promptly addressed crucial threats created by the passing of the *Montgomery* rules, including the likelihood of additional pressures on doctors to ensure patients understood the information given to them, and an increase in unpredictable litigation as a result of the new rules.[8] However, the court reached the conclusion that in any event the dignity of the patients outweighed the detriment caused by each factor.[9]

II. *Sidaway*: Patient Rights & "Medical" Jurisdiction

Surrounded by a paternalistic past of *Sidaway*,[10] the court in *Montgomery*[11] was tasked with a complex duty to redefine the nature of informed consent rules. The judgment in *Montgomery* acted as a driving force in the change of the area of informed disclosure from a paternalistic past in the *Sidaway* era to a more patient-centred present. It will be shown that whilst *Montgomery's* drastic development of the new area of informed consent in theory points to a wider move away from the *Sidaway* principles, in practice it fails to establish a comprehensive system in which the medical profession can rely on, resulting in post-*Montgomery* cases such as *MC, JC v Birmingham Women's NHS Foundation Trust*[12] in practice, standing a lot closer to the *Sidaway* stance. Through considering the failures of a system of regulating doctors' duties and failure to address problems faced by the medical profession, such as limited resource availability and time constraints, it will be shown that *Montgomery*, in practice, has not departed as drastically from the values that it intended to leave behind in *Sidaway*.

Lord Diplock's approach in *Sidaway* has long been regarded as adopting a "conservative" approach in comparison to the modern day *Montgomery* ruling on informed consent.[13] His failure to depart from the principles previously applied in *Bolam v Friern Hospital Management Committee*[14] were evidenced in his unwillingness to consider informed consent existing as something more than a solely legal principle.[15] Lord Diplock dismissed the view that the matter of risk disclosure amounted to anything more than an "exercise of [a doctor's] professional skill and judgment, [and

[8] *Montgomery* (n 2), [92]
[9] ibid, [93]
[10] *Sidaway* (n 1)
[11] *Montgomery* (n 2)
[12] [2016] EWHC 1334.
[13] Miola, *Medical Ethics and Medical Law a Symbiotic Relationship* (Hart, Oxford, 1st edn, 2007), p57
[14] [1957] 1 WLR 583
[15] *Sidaway* (n 1), 892

was]… in the patient's interest that he should… undergo the treatment [as] recommended by the doctor" [16] arguably considering informed disclosure to be an area falling *within* medical jurisdiction. He based this consideration on an overly paternalistic concept that the "doctor knows best"[17] and that risks were so inherent in all surgical procedures. For example, in the application of anaesthesia carrying the risk of death,[18] that it would be detrimental to the patient's health to be aware of these risks and would deter them from undergoing the operation.[19] Ultimately, he considered the patient's well-being as being of fundamental importance, and the concept of autonomy as hindering (and therefore being inconsistent with) the patient's well-being.

However, through the development of society via social and legal change, [20] *Montgomery* established a significant difference in the way that informed consent was to be governed. In recognising the wide availability of information in the 21st century[21] the court ascertained that it was no longer relevant to consider patients as "uninformed, incapable of understanding medical matters or [being] wholly dependent upon a flow of information from doctors", [22] instead, viewing them as adults who are capable of understanding medical treatment, the risks it entails and accepting responsibility for making their own decisions.[23] Synonymous with these revelations, it was determined that a doctor's duty arose out of a patient's right to autonomy.[24] Patients were no longer considered passive recipients of care, but rather, rights holders.[25] This wider movement to autonomous patients was supported even prior to the *Montgomery* judgment by the General Medical Council who stipulated in their 2013 guidance that patients were to "weigh the information given by the doctor, and decide whether to accept any of the options, and if so, which one".[26]

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[16] *Sidaway* (n 1), 891
[17] ibid, 899
[18] ibid, 891
[19] ibid, 895
[20] *Montgomery* (n 2), [81]
[21] ibid, [76]
[22] ibid, [81]
[23] ibid
[24] Kevin Williams, 'Pre-Operative Consent and Medical Negligence' (1985) 14 Anglo-American Law Review 169, 172
[25] *Montgomery* (n 2), [75]
[26] General Medical Council, *Good Medical Practice*, 2013, *Consent: Patients and Doctors Making Decisions Together*, <www.ntw.nhs.uk/content/uploads/2015/12/NTWC05-App1-ConsPts-DrsMakingDecisions-V04.4-Iss-2-Sep-17.pdf>, p8, accessed 3rd June 2018

The establishment of patients as autonomous beings was further recognised at an international level in the European Court of Human Rights in the cases of *Glass v United Kingdom*[27] and *Tysiac and Poland*.[28] In the former case, the court held that a mother's wishes to take her disabled child home had been unnecessarily interfered with by the hospital who had insisted on the child being present in hospital with a "do not resuscitate" order. In the latter, a Polish woman with short-sightedness was refused an abortion by medical professionals notwithstanding the law depicting that abortions were allowed when the patient had interfering medical issues. Both cases clearly demonstrated a pre-existent establishment of modern day practice supporting patient autonomy.

III. The Prudent Patient Test

The prioritisation of patient autonomy reflected changes in the professional practice test, adopting a change from "what would the responsible body of medical opinion do" [29] to "what would the reasonable person in the patient's position do?"[30] Further, it was stipulated by the court that the test entailed that "the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it". Primarily, the test became structured around the reasonable person rather than the reasonable doctor. The court recognised the ethical issues raised in the matter of informed consent and the need for the law to govern it given that 'the doctor cannot form an objective, "medical" view of these matters, and is therefore not in a position to take the "right" decision as a matter of clinical judgment".[31] Secondly, the court imposed a duty on doctors whereby they could be liable if they ought to have known about patients' circumstances. In theory, *Montgomery* stepped away from an era whereby ethical decision-making fell into the area of medical opinion, moving to a stage where ethical aspects are considered in a legal context arguably acting as a prevention to medical bias, and higher expectations are placed on a doctor as a means of prioritising the patient.

In an attempt to prioritise patient autonomy, the court, adopting Lord Scarman's dissenting *Sidaway* judgment, further recognised that it was necessary to consider that "a patient may well have in mind circumstances, objectives, and values which… may lead him to a different decision

[27] [2004] EHRR 341
[28] [2007] 45 EHRR 947
[29] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[30] *Montgomery* (n 2), [49]
[31] ibid, [46]

from that suggested by a purely medical opinion'.[32] It therefore became apparent to the court that the consideration of patients as individuals rather than a homogeneous group (and "people" rather than "subjects")[33] was fundamental to the requirements of autonomy. Accordingly, they created the subjective limb of the prudent person test, or, the reasonable person in the patient's circumstances. Dismissing the *Sidaway* train of thought that only substantial risk with grave consequences ought to be disclosed, for example a 10% risk of a stroke, the court in *Montgomery* were eager to express the fact that decisions of whether risks warranted disclosure ought not to be made based on statistics alone. [34] Arguably this warranted significant weight to be placed on the subjective limb. The court was eager to explore the circumstances of the individual patient and allow for them to claim via the subjective limb whereby the objective limb may not warrant being able to claim, for example in *Rogers v Whitaker*[35] where a 1 in 14,000 chance of blindness in an eye when the patient was already blind in the other. The creation of the test earmarked a significant attempt from the court to move away from a period which only considered the opinion of doctors, and failed to regard what the individual patient regarded as important to *them* in making an informed decision.

The court did, however, fail to supply information regarding the weight they would place on the limb. In *Montgomery* for example, the court was quick to emphasise that the claimant was a "highly intelligent individual" with a degree in molecular biology, being employed in the pharmaceutical industry and having a sister and mother who were both qualified general practitioners.[36] The court established that the claimant was more medically informed than that of the average patient.

Is this type of background information now relevant as part of the profile of the "reasonable person in the patient's position"?[37] The court in the post-*Montgomery* case of *MC* similarly noted that the claimant was "undoubtedly an intelligent and articulate woman, and found it inherently

[32] *Sidaway* (n 1), 886
[33] Sizer and Arnold, '*The changing paradigm of the doctor-patient relationship: Montgomery v Lanarkshire Health Board and developments in the 'duty to warn'* (2016) The New Zealand Medical Journal (Online), 129 (1429) 71-76, 75
[34] *Sidaway* (n 1), 900 and *Montgomery* (n 2), [89]
[35] [1992] HCA 58
[36] *Montgomery* (n 2), [6]
[37] Reid, *'Montgomery v Lanarkshire Health Board and the Rights of the Reasonable Patient*' (2015) 19(3) Edinburgh Law Review 360-366

unlikely that she would have failed to ask why an induction was necessary without an explanation being provided".[38] The court used this reasoning to support the submission that she provided informed consent.

This approach can be contested for numerous reasons. The court in *Montgomery* added the subjective limb to the test with the intention of making autonomy more attainable, applying the reasonable standard to the circumstances of the patient in question, and therefore considering the patient's personal attributes and factors which may influence their knowledge and awareness. However, the court's consideration of the patient's limited level of intelligence (compared to that of a medical professional) suggests that there is potential for the court to consider it in a way that hinders access to autonomy (i.e. through considering the patient to be incapable of understanding the medical context of the informed consent decisions).

In this interpretation of the subjective limb it is apparent that contrary to earlier case law, an onus appears to have been attached to the patients to ask about associated risks according to this intelligence rather than expecting doctors to provide the information. [39] The court appears to be stipulating what knowledge a claimant ought to know rather than what they do know. Applying an onus on *some* patients based on levels of intelligence appears to apply a standard similar to that of Lord Diplock in *Sidaway*.[40] That is, that knowledge which the claimant is not already aware from general knowledge as a highly educated individual of experience, ought to be a prompt to enquire of the risks of the procedure.[41]

Degrees of intelligence and standards of education are completely detached concepts from the understanding of medical procedures and risks. "Understanding is such a fluid concept that will naturally vary considerably from patient to patient"[42] and yet, it appears as though an inconsistent standard appears to be applicable to patients based on what they are expected to know. It is somewhat arguable therefore, that the effect of *Montgomery* is de minimis, given that

[38] *MC v Birmingham Women's NHS Foundation Trust* [2016] EWHC 1334 QB
[39] *Wyatt v Curtis* [2003] EWCA Civ 1779, [19]
[40] *Sidaway* (n 1)
[41] ibid, 895
[42] Rob Heywood, *'R.I.P. Sidaway: Patient Oriented Disclsoure – A Standard Worth Waiting For?'* (2015) 23(3) Medical Law Review 455-466, 465

notwithstanding its existence, a court was still able to reach a conclusion more consistent with that of *Sidaway*.

Although the subjective limb of the test itself theoretically paved the way for the consideration of circumstances which *Sidaway* never considered, in practice, the court's interpretation of the test appears to have placed a very similar burden being placed on intellectual patients as previously in *Sidaway*, begging us to question how far *Montgomery* has actually stepped away from *Sidaway*.

IV. A Doctor's Duty (The Doctor/ Patient Relationship)

The fundamental importance of considering informed consent in the eyes of the differing patient was apparent throughout the *Montgomery.* [43] judgment. This, combined with the factors previously mentioned, resulted in a significant change in the duty of the doctor, and therefore, the relationship between doctor and patient. As addressed earlier, the duty of doctors and the doctor-patient relationship during *Sidaway* times differed greatly to that of the *Montgomery* era. As previously discussed, during the *Sidaway* period a doctor's duty extended to deciding on behalf of the patient, failing to disclose risks in fear of clouding a patient's judgment and hindering their decision-making process. It imposed an active duty on patients to ask questions regarding their procedures (rather than being provided with the information as a right) in order to be entitled to make an informed decision. *Montgomery* on the other hand paints a relationship whereby doctors and patients share a dual role. Doctors are to inform and explain the risks, benefits and burdens of treatment options and can recommend an option but must not pressure the patient to agree. In essence, it is submitted that the "patient weighs the information given by the doctor, and decides whether to accept any of the options and, if so, which one".[44] Contrastingly, the patient is now the decision-maker, playing an active role in decision making whilst the doctor is obliged to "work in partnership with patients…Give patients the information they want or need".[45]

Although Lord Diplock recognised a similar dissection of the doctor's duty into the categories of diagnosis, treatment and advice, he believed it was unnecessary to separate them given that it was neither legally meaningful nor medically practical to separate the doctor's duty as a whole.[46]

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[43] *Montgomery* (n 2)
[44] General Medical Council, *Good Medical Practice, (n 26)*
[45] ibid
[46] *Sidaway* (n 1), 893

In defining this, it is likely that Lord Diplock regarded "medically impractical" as expressing a concern in the practical issues faced by the medical profession such as time and resources. *Montgomery* dismissed the query that doctors would have no time to address the new duties that had been defined, instead stating it was "nevertheless necessary to impose [these] legal obligations"[47] simply reminding the court of the need to work around the patient's fundamental right to autonomy. The court failed to define the true dimensions of the doctor's duty, predominantly, what constituted "understanding" and the necessary steps to determine whether the duty had been fulfilled. It was the lack of regulating doctors' duties, I would submit reflects the reality post-*Montgomery* case law.

The case of *MC*[48] demonstrated the dangers of failing to regulate the doctor's duty. In the case, the claimant disputed that she had been provided with the full extent of information that would enable her to provide her informed consent, with regards to inducing her labour. The courts had little information upon which to make their assessment, opting to solely rely on the doctor's medical notes which stipulated that the doctor "discussed in depth induction of labour process. M consents to being induced".[49]

It is important to note that at no stage was it considered that a doctor's duty ought to be regulated. It appears that *Montgomery* has failed to address genuine problems of high magnitude raised by the medical profession. This in turn, has resulted in the court not venturing far from the *Bolam* stance of relying on medical evidence as adopted by *Sidaway.* In an attempt to determine whether the claimant had provided informed consent, aware of the significant amount of time that had passed since the date in question, the court speculatively drew the conclusion that:

> "it [was] not unnatural in [the] circumstances that [the patient] should seek to divorce herself from the consequences of consenting to the process which led up to these appalling results. It is easy to understand how, over time, "I should not have consented" can become "I would not have consented."[50]

[47] *Montgomery* (n 2), [93]
[48] *MC, JC* (n 12)
[49] ibid, [22]
[50] ibid, [31]

The court continued that the defendant doctor's evidence was:

> "a careful and considered witness whose evidence I accept to the effect that she would have explained the implications of the clinical findings to M and would have ensured that in the light of these she was content to proceed*."*[51]

The court's drawing of such a speculative conclusion supports the findings of Miola,[52] that the shift of the pro-patient standard is not as comprehensive as it may previously have been construed given the great weight of medical evidence in post-Montgomery case law. In *Montgomery's* own unwillingness to address the problems that its changes had produced, it created the possibility, and indeed in *MC*, [53] the following of a more "Bolamised" or medical-controlled way of determining informed consent, as followed in *Sidaway*.[54]

V. Conclusion

It has been demonstrated that the arguably revolutionary changes made in *Montgomery* evidenced a wide step away from *Sidaway*, such as the drastic changes in the doctor's duty, the professional practice test and rights of the patient.[55] However, in practice, upon analysis of post-Montgomery case law (such as *MC*[56]*),* I have demonstrated that failure to impose regulation on these changes such as that of the doctor's duty, has resulted in the courts returning to the more familiar memory of *Bolam*,[57] relying on medical evidence to support their findings.

This, coupled with the wide and liberal interpretation of the Supreme Court in *Montgomery,* have resulted in the creation of further potential issues. For example, the greater expectation of knowledge of those with higher academic achievement as well as the court entertaining of the possibility of the patient being obligated to ask the doctor about risk, in certain circumstances. Such an idea poses an issue to a wide cross-section of society and does little more than impose

[51] ibid*,* [21]
[52] Margaret Brazier & Jose Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution?' (2000) 8 Spring Medical Law Review 114
[53] *MC, JC* (n 12)
[54] *Sidaway* (n 1)
[55] Farrell AM, Brazier M. J Med Ethics 2016, 42:85–88, 88
[56] *MC, JC* (n 12)
[57] *Bolam (*n 14)

pre-*Montgomery* opportunities for doctors to have greater prospects of success should an issue reach the litigation stage.

This, alongside the other reasons highlighted in this paper, I would submit, pose a problem in attaining patient autonomy, and ultimately evidences a significant shift backwards towards the *Sidaway* age.

The Defence of Humanity and the Defence of Sovereignty: Which Should Prevail When They Conflict?

Jessica Brierton

Abstract

"Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas that does not tell us which principle should prevail when they are in conflict." This statement made by Kofi Annan as Secretary General of the United Nations in the aftermath of Kosovo (1999) provides a platform to consider which principle prevails in the international arena: the principle of sovereignty or the doctrine of humanitarian intervention. In so far as the principle of sovereignty remains enshrined by Article 2(4) of the UN Charter and provides the impetus for the law against war, it will continue to prevail. State sovereignty is maintained in practice by the principle of non-intervention. The importance accorded to this, diminishes the possibility for a unilateral right of humanitarian intervention across state borders to come to fruition. This article seeks to extend the widely debated issue of which principle prevails, by considering whether the dominancy of state sovereignty can be reconciled with the concept of global justice. In the light of humanitarian crises such as Kosovo (1999), some attempts were made through the Responsibility to Protect doctrine to re-adjust the balance, with a re-interpretation of state sovereignty. Ultimately, more must be done to ensure the doctrine of humanitarian intervention resonates with modern sentiment towards human rights protection, as opposed to being overshadowed by the more historical factor of state sovereignty.

I. Introduction

The context of Kofi Annan's exposition is important to note, since it has been suggested that "the humanitarian intervention debate was re-ignited in 1999 with NATO's use of force in Kosovo"[1]. Underpinning the law against War or the *Jus Ad Bellum* is the principle of sovereignty. The

[1] Anthea Roberts, 'Legality vs Legitimacy: Can Uses of Force Be Illegal but Justified?' in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008), 181

importance of this is enshrined in suggestions it is "the foundation of not only international law, but the diplomatic system"[2]. With the aftermath of Kosovo came an opportunity for the international arena to re-adjust the balance between the principle of sovereignty and the doctrine of humanitarian intervention. However, the scale was tipped only slightly, with a re-interpretation of sovereignty. Due to the continued importance attached to this principle, it may be contested that it is not clear which principle should prevail when the *Jus Ad Bellum* is engaged. This means even following the events of 1999, we are still left questioning, "how can the humanitarian imperative be reconciled with state sovereignty?"[3]

II. Conflicting Principles

The sovereignty of states is cemented by Article 2(1) of the UN Charter stating that "the Organization is based on the principle of the sovereign equality of all its Members"[4]. Essential to the sovereign status of state is the ability to "have supreme control over their internal affairs"[5]. This is translated by Article 2(7), which prevents interference "in matters which are essentially within the domestic jurisdiction of any state"[6]. It is important to note that the sovereignty of all states is "equal" according to Article 2(1)[7]. This would mean intervention cannot be justified when the treatment of citizens within the domestic jurisdiction of one state conflicts with another states conception of how they should be treated. Juxtaposed against humanitarian intervention which requires, "the threat or use of force across state borders" to prevent widespread violations of human rights, it becomes clear that by mere definition, the two principles conflict[8]. The ability to intervene across state borders, even for humanitarian objectives, must be constrained to maintain state sovereignty as the primary principle of International Law.

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[2] Albrecht Schnabel and Ramesh Thakur, *Kosovo and the Challenge of Humanitarian* Intervention (United Nations University Press 2000), 16
[3] ibid, 17
[4] Charter of The United Nations, Chapter I, Article 2(1)
[5] Jonathan Law (ed), '*Oxford Dictionary of Law*' (Oxford University Press 2015), 584
[6] Charter of The United Nations, Chapter I, Article 2(7)
[7] ibid, Article 2(1)
[8] Jeff Holzgrefe, 'The Humanitarian Intervention Debate' in Jeff Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press 2003), 18

III. The Principle of State Sovereignty

Historically, the foundations of the principle of sovereignty are rooted in the Treaty of Westphalia 1648. Paradoxically, this set the basis for an *International* society based on "independence, autonomy, and the pursuit of individual interests"[9]. International law became fixated around the autonomy of states meaning that sovereignty was cemented as the overarching principle. In turn, international law would rest on a bedrock of the following elements: the notion that all states are sovereign equals, they are not subject to a higher form of law without their consent and will refrain from intervening in the affairs of another sovereign state. On a theoretical level, this is codified under Article 2(1) of the UN Charter recognising the "sovereign equality of all its members"[10]. It is practically enforced through Article 2(7) preventing any intervention "in matters which are essentially within the domestic jurisdiction of any state"[11].

Sovereignty and the cooperative principle of non-intervention thus served as a catalyst for Article 2(4) of the UN Charter. This prohibits the use of force "against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations"[12]. The two exceptions to this prohibition are made explicit under Article 51: the use of force in self-defence or for collective security[13]. In addition, force may be authorised under the gateway provision of Article 39 by members of the Security Council where there is a "threat to the peace, breach of the peace, or an act of aggression"[14], with reference to the measures contained in Article 41 and 42[15].

IV. The Doctrine of Humanitarian Intervention

Pitted against the principle of sovereignty in the "humanitarian intervention debate" is the doctrine of humanitarian intervention[16]. Human rights became internationalised through a trio of

[9] Euan MacDonald and Philip Alston 'Sovereignty, Human Rights, Security: Armed Intervention and the Foundational Problems of International Law' in Philip Alston and Euan MacDonald (eds) *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008), 35

[10] Charter of The United Nations, Chapter I, Article 2(1)

[11] ibid, Article 2(7)

[12] ibid, Article 2(4)

[13] Charter of The United Nations, Chapter VII, Article 51

[14] ibid, Article 39

[15] ibid, Article 41-42

[16] Anthea Roberts (n 1), 17

instruments culminating in The International Bill of Rights[17], setting the backdrop for subsequent tension between the two principles on the international stage.[18] The general prohibition on the use of force is in place to preserve state sovereignty, which requires the borders of states to be almost impermeable. Since humanitarian intervention involves intervention across state borders, questions emerge as to whether this presents a justifiable exception to Article 2(4) and in turn, a diminishment to the importance of state sovereignty.[19]

V. Humanitarian Intervention and the UN Charter

Undertaking a *contrario* interpretation to Article 2(4), its application would be restricted to prohibiting the use of force in the circumstances cited within the wording of the Article itself[20]. This encapsulates any interference with the political independence or territorial integrity of a state, or the purposes of the United Nations[21]. Since humanitarian intervention is not strictly prohibited within the wording of the Article, questions may arise as to whether it falls outside of the parameters of the prohibition. However, this can be rejected on two grounds. Firstly, this interpretation would overlook the primary purpose of the Charter which is, "to take effective collective measures for the prevention and removal of threats to peace" [22]. Unilateral humanitarian intervention would thus conflict with the desire for collective action in circumstances where there is a threat to peace within a nation.

Secondly and on a more conceptual level, Article 31(1) of the Vienna Convention explains "a treaty shall be interpreted…in accordance with the ordinary meaning to be given to the terms…in their context and in the light of its object and purpose" [23]. The inclusion of the terms "territorial integrity" and "political independence" in Article 2(4), as noted by Corten, was at the request of small states, not to reduce the scope of the prohibition[24]. The intention was not to limit the

[17] Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966)
[18] Chris O'Meara, 'Should international law recognize a right of humanitarian intervention?' [2017] ICLQ 448
[19] Charter of The United Nations, Chapter I, Article 2(4)
[20] ibid
[21] Raphaël Van Steenberghe, 'The Law Against War or Jus Contra Bellum: A New Terminology for a Conservative View on the Use of Force?' [2011] Leiden Journal of International Law 747
[22] Charter of The United Nations, Chapter I, Article 1
[23] Vienna Convention on The Law of Treaties, Section 3, Article 31(1)
[24] Raphaël Van Steenberghe **(**n 21), 747

prohibition to just these two terms and make it restricted, but instead to strengthen the prohibition over all. Ultimately, an analysis of the Charter shows that a unilateral right to humanitarian intervention cannot be read as an exception to the Article 2(4) prohibition on the use of force. In turn, legal humanitarian intervention is confined to a collective measure within the boundaries of Article 39. This means that any humanitarian intervention requires the authorisation of the Security Council using their Chapter VII powers [25], and no unilateral intervention outside of the Security Councils' direction can take place.

VI. The Role of the Security Council and the Need for Reform

Fixating humanitarian intervention around the authorisation of the Security Council preserves this United Nations body as the gatekeeper for initiating any intervention to secure humanitarian objectives. This raises concerns, since despite being the only body with the ability to instrument this intervention, there is fundamental inequality within it. The suggestion under Article 2(1) that the organisation is based upon the principle of equality[26], is contradicted by just five permanent members in the Security Council being able to veto humanitarian intervention. Rawls suggests that to achieve equality of opportunity, "society must give more attention to those with fewer native assets and to those born into the less favourable social positions" [27]. The reverse characterises this institution, since power rests with the five most powerful states (China, France, Russia, the United Kingdom, and the United States).

The political undertones of this institution were no more evident than during the Cold War. This was recognised by Kofi Annan in the very same address: "in the 1990s, three times more peace agreements were negotiated and signed during the decade than in the previous three combined"[28]. Its use as a political weapon has continued, reflected more recently by the Security Council's response to the crisis in Syria[29]. The position of humanitarian intervention needs to reflect the modern-day importance attached to human rights, rather than be used as a political strategic tool by the permanent members. Reform must begin with the procedural mechanics of

[25] Charter of The United Nations, Chapter VII, Article 41-42
[26] Charter of The United Nations, Chapter I, Article 2(1)
[27] John Rawls, *A Theory of Justice* (Harvard University Press 1999), 86
[28] Kofi Annan, 'We the Peoples: The Role of the United Nations in the Twenty-First Century' Report of the Secretary-General' (2000) UN Doc A/54/2000
[29] Chris O'Meara (n 18), 466

this institution. Schnabel and Thakur suggest this could be achieved through replacing the veto with qualified majority voting[30]. This is highly preferable, given that it would prevent a state exercising its veto as part of a quest to further its political and foreign policy objectives, as opposed to genuine discontent with humanitarian intervention.

VII. Humanitarian Intervention and Customary International Law

A unilateral right to humanitarian intervention, free from the constraints of Security Council authorisation, cannot be read into the Charter. According to the Charter, the only legal means to impose humanitarian intervention is collectively. Unilateral intervention may instead be sought through the realm of customary international law. This has the potential to be an alternative method to enhance its legality, since it is another key legal source of international law in addition to the Charter of the United Nations. For customary international law to exist, there must be widespread state practice, and *opinio juris,* meaning states must be acting because they feel a legal obligation to do so as opposed to merely moral[31]. State practise can be inferred from numerous examples of state intervention involving an underlying humanitarian justification, for instance in both Somalia and Rwanda. The common issue with the numerous interventions which have taken place is that the humanitarian objective is concealed behind the guise of there being a moral impetus and, "moral concerns are deployed into a legal framework"[32]. Rather than boldly declaring the intervention as being unilateral and for a humanitarian objective, states retrospectively fit the intervention into a legal framework which aligns with the Charter. Both resolution 794 for Somalia and resolution 929 for Rwanda relied on the authorisation of the Security Council "acting after Chapter VII…to use all necessary means"[33].

A. Kosovo

The justifications for intervention in Kosovo (1999) seemed to point to a genuine shift towards to necessary *opinio juris* for customary international law to exist. The US representative stated, "The NATO action was justified and necessary to…prevent an even greater humanitarian disaster"[34].

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[30] Albrecht Schnabel and Ramesh Thakur (n 2), 16

[31] Chelsea O'Donnell, 'The Development of The Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention' Duke Journal of Comparative & International Law [2014] 557

[32] Philip Alston and Euan MacDonald (n 9), 93

[33] UNSC Res 794 (3 December 1992) UN Doc S/RES/794, UNSC Res 929 (22 June 1994) UN Doc S/RES/929

[34] UN Press Release SC/6657, Representative of the United States [1999]

Similarly, the UK relied on humanitarian reasons "it was justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe"[35]. However, once again legal justifications were sought elsewhere. For instance, the French representative compared it to the "moral justifications referred to in resolution 688 previously adopted by the Security Council"[36]. The continuity of member states looking to Security Council authorisation, as opposed to relying solely on humanitarian justifications, shows that they do not feel a sense of legal obligation to act on humanitarian grounds alone.

B. The Impact of Responsibility to Protect

In the aftermath of Kosovo, the Responsibility to Protect doctrine was developed. This presented an opportunity for the international arena to re-address the balance between state sovereignty and humanitarian intervention. Three pillars outline the framework of this doctrine: the primary responsibility of states to protect their population, the duty on states to assist each other to fulfil this, and a responsibility falling upon the international community where a state fails to adequately protect their own citizens[37]. In so far as the connotations of state sovereignty are state borders remaining sacrosanct and the principle of non-intervention, humanitarian intervention will continue to conflict with Article 2(4)[38]. Cornerstone to this doctrine was thus the re-interpretation of state sovereignty which it conveyed. There was a shift in understanding from sovereignty being used to control individual state borders and the ability to intervene, to sovereignty as a mechanism for facilitating international responsibility[39]. States would now only be sovereign, not only because their borders are protected against intervention from another state, but to the extent they complied with the responsibility to protect their civilians. The importance of this shift is paramount, since it intertwines understandings of state sovereignty and humanitarian protection, preventing the two principles being entirely antagonistic.

Important inroads have been made in terms of how state sovereignty is interpreted. However, although the doctrine of humanitarian intervention sits more comfortably alongside this

[35] ibid, Representative of the United Kingdom
[36] Philip Alston and Euan MacDonald (n 9), 111
[37] Alex J Bellamy, 'The Responsibility to Protect: A Defence' (Oxford Scholarship Online 2014), accessed 22 December 2017
[38] Charter of The United Nations, Chapter I, Article 2(4)
[39] ibid

definition, it is still overshadowed by the principle. Hence the doctrine of Responsibility to Protect is "not an adversary of sovereignty, but its ally"[40]. This can be attributed to the persistent reluctance of member states to endorse unilateral intervention outside of the confinements of the Charter. In developing the doctrine, the World Summit Outcome Document refused suggestions by the Commission to enable humanitarian intervention by uniting for peace or regional organisations, if intervention was not authorised by the Security Council[41]. Although a change to the interpretation of sovereignty was accepted, the ability to diminish its prevalence in practice, through intervention outside of Security Council authorisation, was clearly opposed from the outset[42].

C. Libya

Libya can be used as a test case to demonstrate the impact of Responsibility to Protect. The responsibility that was now placed on the state was recognised in the Resolution[43]. Alone, this was not enough to provide justification for the intervention. Once again, the Resolution still placed reliance on the authorisation of the Security Council to use "all necessary measures…to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi" which would include the approval of no-fly zones[44].

O'Meara draws the conclusion that "R2P is a political doctrine…and expressly preserves the primacy of the UN Security Council in authorising the use of force"[45]. This is because it was moulded around sovereignty, even in the sense the primary responsibility to protect citizens rests with the state itself[46]. Responsibility to Protect can be used to reaffirm the fact that even when presented with the opportunity to bring about change, sovereignty prevails over humanitarian intervention.

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[40] ibid

[41] World Summit Outcome 2005 <www.un.org/womenwatch/ods/A-RES-60-1-E.pdf> accessed 25 December 2017

[42] Chris O'Meara (n 18), 446

[43] Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press 2006), 250

[44] Security Council Resolution 1973, March 2011 <www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011)> accessed 23 December 2017

[45] Chris O'Meara (n 18), 446

[46] ibid

D. *De Lege Ferenda* (What Should the Law Be)?

Annan's suggestions that both sovereignty and the defence of humanity are principles which "should" be supported resonates with the concept of *de lege ferenda*[47]. This emphasises a focus on what the law *should* be, rather than what the law is. Contemporary atrocities in the on-going Syrian Civil War show how pertinent this question is, with an estimated death toll of 470,000 in 2016[48]. Krisch has referred to the contrast between sovereignty and humanitarian intervention as a "divergence of law and morality" because "considerations of justice and human rights demand the recognition of a right to intervention"[49]. This suggests that for the concept of justice to be satisfied, a unilateral right to humanitarian intervention must exist in international law.

It has been suggested that if this unilateral right did exist, the more powerful states would exploit it, intervening under the guise of human rights protection to fulfil ulterior political incentives[50]. This is not a convincing reason to dispel the right, given an almost identical situation currently exists with the reliance on authorisation by the Security Council and the use of veto alongside political incentives. Moreover, Rawls would not endorse this argument. In *The Law of Peoples,* he suggests international justice can only be assessed in the context of individuals rather than states[51].

IX. Sovereignty, Humanitarian Intervention and Global Justice

Rawls extends his veil of ignorance from the domestic plane to international, placing it over representatives of liberal peoples[52]. Underneath this, they are unaware of the size of their population, its strength, their economic status, or quantity of their resources[53]. The logic behind the veil of ignorance or the original position is that the concepts of justice can only be realised from a position where nothing is guaranteed[54]. This means states could not guarantee for instance

[47] Kofi Annan (n 28)
[48] Ian Black, 'Report on Syria conflict finds 11.5% of population killed or injured' *The Guardian* (February 2016) <www.theguardian.com/world/2016/feb/11/report-on-syria-conflict-finds-115-of-population-killed-or-injured> accessed 23 December 2017
[49] Nico Krisch, 'Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo' [2002] Eur J Int'l L 326
[50] Chris O'Meara (n 18), 466
[51] Pietro Maffettone, 'Benevolent absolutisms, incentives and Rawls's The Law of Peoples' [2016] PPE 381
[52] John Rawls, *The Law of Peoples* (Harvard University Press 2002), 123
[53] ibid
[54] ibid

their power or whether they are a permanent member of the Security Council. From this, Rawls suggests two ideals would emerge: "peoples are to observe a duty of non-intervention" and "peoples are to honour rights"[55].

X. Conclusion

To achieve justice, *The Law of Peoples* places the principles of non-intervention and humanitarian intervention on a parallel. Crucially, non-intervention is not seen as an extension of state sovereignty. Rawls contests the "autonomy" state sovereignty grants to states and suggests it should be limited by the Law of Peoples[56]. Sovereignty, despite its prevailing status in international law, does not adhere to understandings of global justice. Instead as Rawls envisaged, it is perhaps the principle of non-intervention as opposed to state sovereignty which greater weight needs to be accorded to. Whilst non-intervention is pivotal to preventing War amongst international states, exceptions to this should be made where human rights are not honoured to such an extent that mass atrocities occur. This has been witnessed on numerous accounts, for instance in Rwanda, with an estimated death toll of 800,000[57]. So long as state sovereignty is viewed as the main imperative for non-intervention, there will be no opportunity for humanitarian intervention to assume significance. To prevent states exploiting humanitarian intervention as a cover to intervene for other objectives, the Security Council could remain a useful filter. This emphasises the point that reform must begin with this body, to achieve equality, principal to the UN Charter under Article 2(1). A shift from the veto power of the five permanent members to qualified majority voting would stop humanitarian intervention being a mere political tool of the most powerful states. This would provide scope for the doctrine of humanitarian intervention to assume a position within international law, reflective of the modern-day sentiment towards human rights protection.

[55] ibid

[56] ibid

[57] Ved P Nanda, 'Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia - Revisiting the Validity of Humanitarian Intervention under International Law - Part II' [1998] PL 827

The Principle of Distinction in International Humanitarian Law: Is It Really Used By States?

Paige Jones

Abstract

International Humanitarian Law is heralded as a protector of civilians in times of armed conflict. It is in possession of an array of treaties and conventions with the sole aim of protecting the inhabitants of warzones. The framework for targeting is a concept that encompasses these instruments and has, at its heart, the principle of distinction. This article will analyse the purposes of the distinction principle and display the juxtaposition of its intended purpose to its use in reality. Despite the critical approach of this article, it will ultimately determine that international society needs this principle notwithstanding its less than perfect application.

I. Introduction

The principle of distinction is one of the fundamental principles of international humanitarian law, and along with precaution and proportionality, it defines the legal framework for targeting in armed conflicts. Despite its universal acknowledgement, the distinction principle is still subject to controversy, particularly with regards to state failure to implement it, and ambiguity as to its interpretation. In order to assess whether the principle of distinction is used by states in armed conflicts today, this article will firstly evaluate the historical development of the law requiring armed forces to distinguish between combatants and civilians. Furthermore, it will assess in more detail the legal definitions of the principle and compare this with its application to real situations of armed conflict, in order to highlight the disparity between the perceived purposes of the law surrounding the principle, and its application. In order to give the reader a fuller understanding of the significance of the distinction principle, this article will briefly assess the other elements of the framework for targeting: pre-caution and proportionality - in order to show their interrelated relationship and application to armed conflict situations. Ultimately, through an assessment of the way the distinction principle is implemented in armed conflicts, this article will show that it is not being used for its intended purpose, while still acknowledging that the principle nevertheless remains an important one, necessary to protect civilian lives.

II. Historical Development of the Principle

There has been a diachronic development of the law regarding the distinction principle. Pre-nineteenth century laws regarding the conduct of hostilities were based on bilateral treaties agreed between states party to a specific armed conflict, which led to a multitude of variations of applicable laws of conduct. The nineteenth century produced a desire for a more generally accepted international rule, with emerging treaties expressing an obligation to alleviate "as much as possible the calamities of war."[1] Further developments are evidenced in the *Oxford Manual 1880* which necessitated a distinction between the "armed force of a state and its other ressortissants". [2] These developments therefore display the first steps toward the level of protection that the international humanitarian law of today aims to provide.

A significant juncture in the development of the distinction principle is the work of Henry Dunant and the creation of the Geneva Conventions. Through his book *"A Memory of Solferino",* Dunant described the death and suffering he saw during his time in Northern Italy.[3] This resonated with many, including government leaders all over Europe.[4] It was, therefore, through the ideas of Dunant and like-minded men that the *International Committee of the Red Cross* was formed. However, despite the committee's somewhat isolated initial intention to create a neutral relief society, the first Geneva Convention was signed in 1864 and has since been revised, increasing its scope to the protection of civilians. Even of its time, the Convention was believed to have "diminished [war's] hold over man and… deprived it of innumerable victims."[5] This accordingly formulates the basis of the principle of distinction apparent in modern day international humanitarian law.

[1] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, (11 December 1868) (St Petersburg Declaration).
[2] Gustave Moynier, 'The Laws of War on Land' (Institute of International Law, 1880) (Oxford Manual), art 1
[3] François Bugnion, 'Birth of an idea: The founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent movement: from Solferino to the original Geneva Convention 1859-1864' (2012) 888 IRRC 1299, 1305
[4] ibid, 1299;1307
[5] Bugnion (n 3), 1321

Another developmental point in the evolution of the distinction principle is the Nuremberg trials, which are considered to be a "milestone for the development of" international humanitarian law.[6] The trials from 1945-1949 established "crimes against humanity" as a result of the atrocities suffered by civilians during WWII which "shocked, horrified and… motivated the international community."[7] This created a need for individual criminal responsibility for acts committed against civilians. Unlike the Geneva Conventions, which predetermine the need to safeguard civilians, the Nuremberg trials forged the development of criminal liability for breaches of distinction - the likes of which are still evident today in the ad-hoc tribunals. For instance, the International Criminal Tribunal for the Former Yugoslavia (ICTY) reaffirmed in the *Martić* case that it is impermissible to "blur the principle of distinction between civilians and combatants".[8] Today, the distinction principle is considered the "undisputed cornerstone of"[9] international humanitarian law and is a matter of customary law that belligerents must distinguish between their adversaries and civilians.[10] It is arguable that distinction is now so widely accepted that it is a principle from which no derogations are permitted, and therefore could be considered as a peremptory norm of international law.[11] Consequentially, there has been considerable development over time, in which distinction evolved from an intention to a universally enforceable rule.

III. The Legal Definitions of the Distinction Principle

The prime legal provision defining the principle of distinction is the Additional Protocol I of the Geneva Conventions. Article 48 provides that "Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives."[12] This definition is furthered by Article 51, maintaining that the principle includes a

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[6] Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg legacy* (Routledge 2008), 31

[7] ibid, 32

[8] Martić case ICTY (Judgement) IT-95-11 (8 October 2008)

[9] Nils Melzer, 'International Humanitarian Law: A Comprehensive Introduction' <www.icrc.org/en/publication/4231-international-humanitarian-law-comprehensive-introduction> accessed 18 January 2017

[10] ICRC, 'Customary IHL' (report of the International Committee of the Red Cross, December 1995) < https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul> accessed 22 January 2017 (CIHL) rule 1

[11] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53

[12] Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I), art 48

prohibition of "indiscriminate attacks."[13] These attacks are defined as those which "are not directed at a specific military objective",[14] including those which are incapable of being directed only at a military objective.[15] In addition to the preceding codified law, the distinction principle is also defined in customary humanitarian law. To illustrate, "Rule 1" of customary humanitarian law sets out the obligation of parties to a conflict to distinguish between civilians and combatants.[16] Just as, "Rule 7" reaffirms the obligation of states to distinguish between civilian objects and military objectives.[17] This is inclusive of the prohibition of indiscriminate attacks.[18] Therefore, the definition of the principle encompasses, both a positive obligation to distinguish, and a negative obligation to refrain from attacking.

To fully understand this principle, it is essential to define what is meant by civilians and armed forces within IHL. Armed forces are defined as "forces, groups and units which are under a command" of a party responsible for its conduct.[19] Contrarily, civilians are negatively defined as anyone not a member of the armed forces.[20] They neither, belong to the definition within Article 43 of Protocol I, nor do they qualify for prisoner of war status under Article 4(A) of the Third Geneva Convention.[21] Similarly, with the dichotomy of civilian objects and military objectives, a military objective is something which provides a "definite military advantage"[22] to the attacking party, anything falling short of this definition is therefore a civilian object.[23] Analysis of these definitions provides clarity that at the core of the distinction principle is the need to protect "inoffensive populations"[24] during an armed conflict.

IV. The Legal Application of the Distinction Principle

Alongside the laws that define the principle of distinction are those legal provisions which illustrate the application of the principle. The general consensus of the laws prescribing the

[13] ibid, art 51(4)
[14] Additional Protocol I (n 11), art 51(4)(a)
[15] ibid, art 51(4)(b)
[16] CIHL (n 10), rule 1
[17] ibid, rule 7
[18] ibid, rule 12
[19] Additional Protocol I (n 12), art 43; CIHL (n 10), rule 4
[20] CIHL (n 10), rule 5
[21] Additional Protocol I (n 12), art 50
[22] ibid, art 52; CIHL (n 10), rule 8
[23] ibid; ibid, rule 9
[24] Oxford Manual (n 2), art 7

conduct of parties is that states should only endeavour "to weaken the military forces of the enemy."[25] Therefore the provisions attempt to limit the harm caused during a conflict by providing that attacks may "only be directed at military objectives."[26] These obligations take the form of prohibitions and are orientated around protecting civilian life, both during the attack, and through the secondary consequences of it. An example of this is the prohibition of parties to the conflict to attack or destroy "objects indispensable to the survival of the civilian population."[27] Hence, this rule not only prevents the parties from launching an attack at civilian objects, which causes damage and potential loss of life, but it also ensures that civilians are not being affected in the long term. To destroy important works such as water installations or agricultural areas would lead to an inability of the population to provide for themselves during the time of conflict and ultimately to their deaths. This rule is an extension of the prohibition of starvation of civilians,[28] which is seen as unacceptable as, not only does it not distinguish between combatants and civilians, but it directly harms them providing no definite military advantage and having severe moral implications. Certain kinds of attacks are specifically prohibited such as "area bombardment."[29] The indiscriminate nature of area bombardment causes harm to the civilian population who are situated in the area simply because there are potential military objectives located around them. This prohibition reinforces the rule that attacks must be directed at "specific" military objectives in order to properly adhere to the distinction principle. Area bombardment does not do so and is therefore a violation of customary law.

A comprehensive understanding of the legality of the conduct of parties to a conflict, necessitates an analysis of the concept of civilian "direct participation in hostilities". Both customary law and convention provide that when a civilian directly takes part in hostilities, they lose their protection from direct attack[30] as they are no longer acting as a civilian. As a consequence, civilians may legally be subject to attack and this would neither, amount to a breach of the distinction principle nor a breach of international humanitarian law. However, considerable weight is placed on Article 51(3) of Additional Protocol I, stating that civilians may only be attacked "unless and for such time

[25] St Petersburg Declaration (n 1)
[26] Additional Protocol I (n 12), art 48
[27] ibid, art 54(2); CIHL (n 10), rule 54
[28] ibid, art 54(1); ibid, rule 53
[29] CIHL (n 10), rule 13
[30] Additional Protocol I (n 12), art 51(3); CIHL (n 10), rule 6

as they take a direct part in hostilities."[31] Such a rule clearly gained prominence as the need to adhere to it was included in the 1991 Memorandum of Understanding between Croatia and the Socialist Federal Republic of Yugoslavia,[32] and the 1992 agreement between the parties to the conflict in Bosnia and Herzegovina.[33] Despite this acceptance, the problem remains in this area of international humanitarian law that there is no set definition of what "direct participation in hostilities" actually is. This therefore leads to difficulty with the issue of determining the legality of acts of parties to a conflict and whether or not the principle of distinction has been implemented.

Any acts committed that are contrary to the principle of distinction are known as "grave breaches" [34] of the Geneva Conventions and are therefore war crimes. The statute of the International Criminal Court enforces the proposition that "intentionally directing attacks against the civilian population"[35] or "against civilian objects"[36] amounts to a war crime and is prohibited under international humanitarian law. It is arguable that this statute, by holding state parties liable to their obligation to respect and enforce international humanitarian law, [37] is an essential component of the many provisions regulating the application of the distinction principle. Perhaps, without this legal basis for the punishment of war crimes, any attempts by the legislators to limit "all wanton violence committed against persons"[38] would not be so widely accepted.

V. The Framework for Targeting

The entire legal framework for targeting, aims to limit the suffering of civilians in times of armed conflict. The framework encompasses three principles which are simultaneously independent and

[31] Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (ICRC 2009), 26

[32] Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the Socialist Federal Republic of Yugoslavia (November 1991), para 6

[33] Agreement between Representatives of Mr Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina), Representatives of Mr Radovan Karadzic (President of the Serbian Democratic Party), and Representative of Mr Miljenko Brkic (President of the Croatian Democratic Community) (May 1992), para 2.5

[34] 'Rome Statute of the International Criminal Court' (17 July 1998) U.N Doc. A/CONF. 183/9 (Rome Statute), art 8(2)(a)

[35] ibid, art 8(2)(b)(i)

[36] ibid, art 8(2)(b)(ii)

[37] CIHL (n 10), rule 140

[38] Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field' (24 April 1863), art 44

interlinked. Pre-caution is the first principle which parties to a conflict must adhere to. Before any attack is launched, the principle imposes an obligation on belligerents to verify that their proposed target is, in fact, a military objective.[39] The intention of the pre-caution principle under IHL is to "avoid, and in any event to minimize, incidental loss of civilian life"[40] and prevent damage to civilian objects. The notion of pre-caution is one of prevention, as it is concerned with actions and obligations occurring before a specific attack. For instance, states must take pre-caution in choosing means and methods of attack[41] in order to ensure their choices will avoid or minimise the loss and damage caused to civilians. Therefore, as the distinction principle "entails a duty to prevent erroneous targeting,"[42] there is a clear relationship between distinction and pre-caution as it is through pre-cautionary measures that armed forces have the ability to distinguish between civilians and military objectives.

With distinction as the second principle, the third and final one in the framework for targeting is proportionality and like pre-caution, proportionality requires forethought. It establishes that any attack that causes loss of civilian life or damage to civilian objects "which would be excessive in relation to the concrete and direct military advantage anticipate" [43] is prohibited under international humanitarian law. Accordingly, even in adherence to the distinction principle, when "incidental harm on civilians or civilian objects cannot be avoided",[44] proportionality must be assessed. One of the problems facing the implementation of all three principles is "dual use objects." These are civilian objects which also have a military function and are considered military objectives "for the duration of such use"[45] by the armed forces. Dual use objects necessitate an accurate proportionality assessment to ensure the legality of an attack. It requires consideration of what amount of civilian damage is justifiable, given that the mere presence of soldiers in an area does not deprive it of its civilian status.[46] Otherwise, a disproportionate attack on civilians will also amount to a breach of the distinction principle. The effective functioning of international humanitarian law requires an operating relationship between all three principles, this is best

[39] Additional Protocol I (n 12), art 57(2)(a)(i); CIHL (n 10), rule 16
[40] CIHL (n 10), rule 15
[41] Additional Protocol I (n 12), art 57(2)(a)(ii); CIHL (n 10), rule 17
[42] Melzer (n 9), 99
[43] Additional Protocol I (n 12), art 51(5)(b); CIHL (n 10), rule 14
[44] Melzer (n 9), 18
[45] ibid, 92
[46] *Prosecutor v Tihomir Blaskic* (Judgement)ICTY IT-95-14 (29 July 2004)

evidenced through matters such as the choice of weapons. The general principle is that, it is prohibited to use weapons, known as means of warfare, which cause "superfluous injury or unnecessary suffering."[47] A particularly controversial topic is the use of incendiary weapons. For instance, the prohibition of directing incendiary weapons at the civilian population [48] is a manifestation of the distinction principle. However, the use of incendiaries, in itself is not prohibited. Their use may be lawful if "all feasible precautions are taken"[49] in order to avoid or limit the harm to the civilian population. This is an example of both, the pre-caution and proportionality principles.

Further evidence of the interlinked relationship of the principles is provided within the *Rome Statute*. To carry out an operation "in the knowledge that such an attack will cause incidental loss of life" or excessive injury to the civilian population is a war crime .[50] The requirement of "knowledge" implies a breach of pre-caution and distinction. Similarly, the condemnation of "excessive" injury in relation to military advantage implies a breach of proportionality. Therefore, it is believed that as military actions "are usually expected to jeopardize people, they have to be justifiable,"[51] and it is this justification that the culmination of the three principles aims to provide. It could be argued then, that a breach of one principle is a breach of them all, as they operate in relation to each other.

VI. Uncertainties of Implementation

One of the main issues with the distinction principle is that, theoretically it appears to be an effective principle that protects civilians, but in practice there is a lack of implementation, especially in non-international armed conflicts (NIACS). Customary law dictates that every party to a conflict has an obligation to distinguish between civilians and combatants[52] and that this obligation is applicable to NIACS. It is also accepted through case law, such as *Prosecutor v Tadic*, that international humanitarian law "applies from the initiation of such armed conflicts…until a

[47] CIHL (n 10), rule 70

[48] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended (Protocol III) (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137, art 2(1)

[49] ibid, art 2(3)

[50] Rome Statute (n 34), art 8(b)(iv)

[51] Asa Kasher, 'The Principle of Distinction' (2007) 6 Journal of Military Ethics 152, 155

[52] CIHL (n 10) rule 1

general conclusion of peace is reached."[53] This reaffirms that until a conflict has truly ceased, the civilian population is protected by the distinction principle. Some scholars have argued that enforcement organisations, such as the U.N., have moved away from the leniency of humanitarian law and are now imposing the "more exacting standard of care"[54] required under international human rights law. If such an inclination towards human rights law is to be believed, it would suggest that the international community wishes to impose stricter standards on combating states and is less forgiving of violations of the principle as well as the harm caused to civilians. However, recent evidence shows that contrary to imposing strict liability on the armed forces in violation of the distinction principle, the international community "appears to be caught between denial and helplessness"[55] by failing to provide support to endangered civilians. For instance, despite the International Court of Justice (ICJ) declaring the principle, and indeed the entire framework for targeting, to be the "cardinal principles" of international humanitarian law,[56] the conflict in Sudan's Southern Kordofan state exemplifies how civilians are still being subject to indiscriminate attack without action from the international community penalising the Government of Sudan for their actions. The saddening suggestion here is that the "lack of enforcement could not be more stark,"[57] whereby the standards set by the international community differ from reality. Yet, a prominent opinion in the international dialogue is that "a world in which the principle governs military activity… is better than a world in which it does not."[58] This is an important proposal, because although there is an issue with lack of adherence to the distinction principle, this does not render it wholly ineffective and is therefore still an important element of international humanitarian law.

A further issue with the distinction principle is the lack of clarity regarding its application, particularly in relation to the legality of attacks on civilians. The problem arises when, although it

[53] *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*)* ICTY IT-94-1 (2 October 1995)

[54] Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011)

[55] Lucy Hovil and others, '"We just want a rest from war." Civilian perspectives on the conflict in Sudan's Southern Kordofan State' (2015) International Refugee Rights Initiative Paper <http://www.refugee-rights.org/Publications/Papers/2015/Papers2015.html> accessed 20 January 2017

[56] Legality of the Threat or Use of Nuclear Weapons (advisory opinion) 1996 ICJ rep 226, para 78

[57] Hovil (n 55)

[58] Kasher (n 51), 154

appears that civilians must be distinguished from combatants, there are certain kinds of civilians who are not entitled to protection from attack. An example of this are those civilians who spontaneously attack an invading force. Such civilians may be attacked and even granted the status of prisoners of war[59], yet they are not regarded as armed forces. This is tantamount to the notion of civilian "direct participation in hostilities". However, in *Prosecutor v Théoneste Bagosora* the court disagreed with the concept that "the use of rudimentary defensive weapons changes the status of the victims."[60] Thereby suggesting that defensive retaliation by civilians does not preclude their right to be distinguished from actual combatants, and as a consequence this makes it harder for parties to a conflict to be clear on who they are allowed to attack in compliance with the distinction principle. This apparent subset of civilian classification not only hinders the application of the distinction principle, but it also vindicates the theory that "as a result, civilians are more likely to fall victim to erroneous or arbitrary targeting."[61]

VII. Conclusion

In conclusion, it is clear that although subject to inherent imperfections - the principle of distinction is one of fundamental importance. As the principle has developed over time, so too has the acceptance of it by the international community. It has been identified above that defining the principle does not boil down to one simple explanation, but rather, the principle encompasses varying meanings and obligations. International dialogue, both, historical and modern make reference to the idea of the distinction principle being an extension of the principles of humanity and a reflection of the evolution of civilisation. It is also clear that the principle is reliant on the principles of pre-caution and proportionality in order to serve as a fully functioning framework that can be used to protect innocent lives in times of combat. Yet, despite the clear desirability of the principle and support for its implementation as evidenced in the case law identified above, the use of the principle in armed conflict sadly still falls short of its imagined purposes. This reality is all too poignant in the case of South of Sudan. However, all is not lost. The ever-mounting support for and the international development of the distinction principle demonstrates a real commitment by the international community to pursue laws of armed conflict that truly serve to protect innocent civilians. What should be taken from the above analysis is that current

[59] Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 4 (a)(6)

[60] *Prosecutor v Théoneste Bagosora* (Judgement and Sentence) ICTR 98-41-T (18 December 2008)

[61] Melzer (n 31), 11-12

implementation is not adequate and thus more must be done in order to see the distinction principle matching in practice what is preached by the law makers. It is undoubtedly more beneficial for global society to have the distinction principle and its precaution and proportionality counterparts, inclusive of its flaws, when the alternative is to have no rules regulating the actions of States during war at all. What one must remember is that the work here is not done until innocent civilians are diligently protected by the distinction principle.

Protecting Digital Users Through the Temporary Copy Exception: A Defence Available to Both Digital Users Who Stream and Browse Legally and Illegally?

Samuel Poh Kai Yan

Abstract

This article seeks to explore the Temporary Copy exception in copyright law. It will be argued that the conditions of Article 5(1) of the Information Society Directive (ISD) would be difficult for digital users to prove whether a temporary copy is legitimate, especially for acts of caching and streaming, with the exception of browsing. This essay will examine the interpretation of the key cases of the CJEU which explains the three key conditions: (a) transient or incidental (b) integral and essential part of the technological process (c) independent economic significance. It will however be argued that the temporary copy exception has not, and should not be phased out as the interpretation of the three-step test in Article 5(5) of the ISD ultimately maintains the balance of rights between copyright holders and digital users.

I. Introduction

There are multiple temporary copies made every day that may be impliedly licensed or constitute a technical infringement which are not pursued by the copyright owner, and many of which, the copyright owner would wish to charge a license fee for.[1] The exceptions and limitations in copyright help secure a fair balance between the protection of and access to copyrighted works.[2] As such, these exceptions and limitations are important for digital users who infringe the reproduction right.

The temporary copy exception is provided in Article 5(1) of the Information Society Directive (ISD), which provides an exception for certain temporary acts of reproduction without any independent

[1] Toby Headdon, 'Ghosts in the Machine: Copyright and Temporary Copies' (2011) 22 C&LM SCL 4, 18
[2] Case C-201/13 *Deckmyn v Vandersteen* [2014] Bus LR 1368

economic significance.[3] It serves as the only mandatory exception to the Reproduction right under Article 2 of the ISD.[4] The UK implemented Article 5(1) through section 28A of the Copyright, Designs and Patents Act 1988.

This article will first analyse the leading cases of the Court of Justice of the European Union (CJEU) pertaining to the interpretation of Article 5(1) in granting the exception, focusing particularly on whether the acts of digital users are being protected. It is argued that fulfilling the conditions of Article 5(1) would be difficult for digital users to prove whether a temporary copy is legitimate, especially for acts of caching and streaming, albeit with the exception of browsing.

Finally, it will be argued that the temporary copy exception has not been phased out in the digital environment. The interpretation of the three-step test in Article 5(5) of the ISD interpreted together with the leading CJEU decisions has maintained the balance of rights between the right holder and the digital user.

II. Article 5(1): The Temporary Copy Exception

Under Article 5(1) of the ISD, temporary reproductions are exempted from the protections provided by the reproduction right when they are: transient or incidental, and are an integral and essential part of the technological process, whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary; or (b) a lawful use of a work or subject matter to be made, and which has no independent economic significance. The conditions under Article 5(1) are cumulative.[5]

Recital 33 of the ISD states that the provisions should enable acts of browsing and caching, including those which enable transmission systems to function efficiently, provided the intermediary does not modify the information. A use should be considered lawful when it is authorized by the right holder or when it is not restricted by law.

[3] Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (ISD)
[4] Bernd Justin Jutte, *Reconstructing European Coypright Law for the Digital Single Market: Between Old Paradigms and Digital Challenges* (1st edn, Hart 2017), 242
[5] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569, [25]

It is suggested that under Recital 33, the "acts" that enable browsing and caching apply only to intermediaries and not to "end-users",[6] while "lawful use" is concerned solely with the digital users.[7] Notably, the distinction is that Article 5(1)(a) lies with intermediaries such as internet service providers, while Article 5(1)(b) applies to end users.[8] Thus, it is clear that Article 5(1) does not expressly provide for the everyday acts of digital users where acts of browsing and caching are involved.

A. CJEU's Interpretation of Article 5(1)

i. Flexible and broad interpretation

Generally, the purpose of the exception is to ensure a high level of protection for right holders, reflecting the aim of the EU copyright and related rights law as established under Recital 9 of the ISD. Furthermore, there is an overall purpose to ensure that EU copyright law accounts for a fair balance of the competing rights and interests provided in Recital 31 of the ISD. However, it is suggested that digital users will be at a bigger disadvantage as Recital 44 of the ISD requires a potentially narrower application of the limitations and exceptions to certain new uses of copyright works and other subject matter.[9] The scope of Article 5(1) is therefore limited and should be applied strictly.[10]

The CJEU has chosen to adopt this strict interpretation. In *Infopaq I*[11] and *Infopaq II*[12] which concerned reproductions made at various stages of a media monitoring service,[13] the CJEU held that Article 5(1) must be interpreted strictly as it is a derogation from the reproduction right in light of the three-step test developed in Article 5(5).[14] The acts of printing could not be viewed as "transient".[15] Furthermore, in *Infopaq II*, the other reproduction acts such as e-mails could not

[6] Headdon (n 1), 194
[7] ibid
[8] Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Berlin: Springer, 2008), p62–63.
[9] Jutte (n 4), 247
[10] Headdon (n 1), 15
[11] *Infopaq I* (n 5)
[12] Case C–302/10 *Infopaq International A/S v Danske Dagblades Forening* EU:C:2012:16
[13] *Infopaq I* (n 5)
[14] ibid, [56]-[58]
[15] ibid

benefit from Article 5(1).[16] Thus, a strict interpretation is observed as the reproductions failed to fulfil the transient requirement provided in Article 5(1).

However, Jutte argues against this strict interpretation.[17] As noted in *FAPL,* which concerned temporary copies made through satellite decoders receiving television broadcasts,[18] the CJEU held that that although Article 5(1) must be interpreted strictly, there ought to be a fair balance between the rights and interests of right holders and users of protected works wishing to avail themselves to new technologies. The purpose of Article 5(1) was the development and operation of new technologies.[19] Furthermore, it was also held that Article 5(1) applies to acts of reproduction.[20] Thus, a broad interpretation was observed as the copies could benefit from Article 5(1).

In the PRCA cases which dealt with temporary copies made in the computer's cached and on-screen made by consumers accessing a media monitoring service,[21] the UK High Court and the Court of Appeal[22] held that the copying was not transient or incidental, and permission was required by subscribers to access results on the service providers website.[23] However, the Supreme Court overturned both rulings, stating that on-screen copies and cached copies satisfied Article 5(1),[24] thereby adopting a flexible and balanced interpretation of Article 5(1).[25] The CJEU in response to a referral subsequently agreed with the Supreme Court.[26] Thus, a broad interpretation of Article 5(1) was observed as the copies in question could benefit from Article 5(1).

[16] *Infopaq II* (n 12), [42]
[17] Jutte (n 4), 249
[18] Case C-403/08 *Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Ltd*, [2012] Bus LR 1321
[19] ibid [179] [162-3], [164]
[20] ibid
[21] Case 360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* [2014] AC 1438 [23-4]
[22] *Newspaper Licensing Agency v. Meltwater Holdings* [2010] EWHC 3099 (Ch); on appeal [2011] EWCA Civ 890
[23] ibid
[24] *Public Relations Consultants Ltd v Newspaper Licensing Agency Ltd* [2013] UKSC 18
[25] Jutte (n 4), 249
[26] PRCA (CJEU) (n 21)

Finally, in *Filmspeler,* which looked at temporary copies on a multimedia player obtained by allowing users to stream from third-party websites without consent,[27] the CJEU firmly rejected the application of Article 5(1) to the reproductions in question, holding that it did not enable a lawful use. This was made in light of *Infopaq*, *FAPL*, and *PRCA.*[28] This was because the users were able to access unauthorized protected works "deliberately and in in full knowledge of the circumstances".[29] Contrary to FAPL and *PRCA*, a strict interpretation was observed as the copies in question could not benefit from Article 5(1).

As such, Article 5(1) has shifted from a strict interpretation to a flexible and balanced interpretation.[30] This approach affords protection to digital users, maintaining the balance between right holders and users, and to react to changes in technology and society.[31]

B. Conditions of Article 5(1)

Despite the CJEU's adoption of a flexible and balanced interpretation of Article 5(1), the conditions of Article 5(1) have made it difficult to predict when temporary acts of reproduction would be legitimate.[32] It is argued that this difficulty in satisfying the conditions would not protect temporary copies made in caching and streaming by digital users, although the act of internet browsing is covered.

i. Transient or Incidental

According to the CJEU in *Infopaq II*, an act can be held to be "transient" only if its duration is limited to what is necessary for the proper completion of the technological process, and the copy must subsequently be deleted automatically without human intervention.[33] Thus, the transient element will be assessed with regard to the proper completion of the technological process.[34] The CJEU ruled that reproduction acts such as printing were not transient since it involved the creation of a record which could only be destroyed with human intervention, thus making it permanent rather

[27] Case-527/15 *Stichting Brein* [2017] 3 CMLR 30
[28] ibid, [62], [64] – [70]
[29] ibid
[30] Jutte (n 4), 250
[31] ibid
[32] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP 2014), p231
[33] *Infopaq II* (n 12), [61]-[64]
[34] Justine Pila and Paul Torremans*, European Intellectual Property Law* (1st edn OUP 2017), p46

than transient.[35] However, Headdon argues that the CJEU failed to clarify how long the copy could last to be qualified as transient.[36] Importantly, there was the risk that cached copies would remain in existence for a longer period based on the user's needs.[37] Thus, uncertainty exists as to when a temporary act would be deemed as "transient".

The Supreme Court in *PRCA* held that "temporary" had the same meaning as "transient".[38] However, Headdon argues that this conclusion does not sit comfortably as the terms are separate conditions under Article 5(1), and have separate definitions.[39] Furthermore, the Supreme Court concluded that a temporary copy is determined by duration of the technological process.[40] Accordingly, this would suggest that once the copy forms a part of the technological process, it will falls within the Article 5(1) exception regardless of how long the process lasts.[41] Thus, there is difficulty that the concept of "transient" would be largely dependent on the type of technological process.[42]

Furthermore, the CJEU in *PRCA* held that because the reproduction acts of caching are automatically replaced after a "certain time", they could also be deemed as temporary.[43] However, the CJEU did not quantify when a 'certain time' would last until it no longer becomes temporary.[44] This creates the uncertainty as to whether acts of caching may be qualified as "transient".[45] The cached copies could remain in hard drives for years and still be temporary.[46]

[35] *Infopaq II* (n 12), [61]- [64]
[36] Toby Headdon, 'Browsing Through the Looking Glass: From Copyright to Wonderland?' (2015) JIPLP Vol 10(3) 194
[37] ibid
[38] PRCA (SC) (n 24), [30]
[39] Headdon (n 36), 194
[40] PRCA (SC) (n 24), [31]-[32]
[41] Headdon (n 36), 194
[42] ibid.
[43] PRCA (CJEU) (n 21), [26]
[44] Headdon (n 36), 194
[45] Maurizio Borghi, 'Chasing Copyright Infringement in the Streaming Landscape' (2011) 42(3) IIC 316, 15
[46] ibid

Google and Copiepresse arguably addresses this uncertainty.[47] The Court of Appeal of Brussels held that the reproduction acts of caching did not qualify as "transient".[48] They were stored for a prolonged period on Google's servers and the online article was available on the websites, possibly for "days, weeks, months or years".[49] As such, the Court found that the duration of the reproduction was not limited to what was necessary for the technological process.[50] It is therefore submitted that *Google and Copiepresse* would be helpful for the CJEU in determining whether temporary acts of reproduction would qualify as "transient".

As such, it is still unclear whether temporary copies created in caching will qualify as transient. Accordingly, digital users who utilize caching in the course of browsing would have difficulty in satisfying this condition and might not be able to rely on the Article 5(1) exception.

ii. Integral and Essential Part of the Technological Process

The CJEU in *PRCA* examined this condition in light of *Infopaq* and *Infopaq II*, and ruled that the on-screen and cached copies were an integral and essential part of the technological process.[51] It was irrelevant that the internet browsing process is activated by the internet user and terminated by a temporary act of reproduction such as an on-screen copy.[52] Furthermore, the CJEU did not consider that the technological process was activated by the internet user, nor that it was terminated by a temporary act of reproduction such as the on-screen copy.[53] However, it is arguably difficult to see how the CJEU reached this decision since *Infopaq II* made no mention of manual completion of the technological process[54]

Nonetheless, the CJEU construed Article 5(1) in a relatively expansive manner.[55] The CJEU stated that Article 5(1) does not specify the exact stage the technological process is deemed to be carried

[47] *Copiepresse SCRL & alii v. Google Inc (*Brussels 5 May 2011) <http://www.copiepresse.be/pdf/Copiepresse%20-%20ruling%20appeal%20Google_5May2011.pdf> accessed 4th January 2018
[48] ibid, [26]
[49] ibid
[50] ibid
[51] PRCA (CJEU) (n 21), [29]
[52] ibid, [30]
[53] Headdon (n 36), 195
[54] ibid
[55] Alan Baker, 'EU Copyright Directive: Does Internet Browsing Require Copyright Licences? PRCA v NLA (C-360/13) (the Meltwater case)' (2014) EntLR.25(7) 257-261, 271

out, thus it cannot be excluded that such acts can initiate or terminate that process.[56] Furthermore, Article 5(1) does not preclude the technological process from involving human intervention, and specifically from being activated or completed manually.[57] As such, this condition does not appear to be difficult to fulfil for digital users who browse the internet, as long as the technological process is clearly identified.[58]

iii. Sole Purpose is Aimed at Enabling Lawful Use of the Work

Recital 33 of the ISD defines lawful use as a use authorized by the right holder, or not restricted by law. It is difficult to define acts not restricted by law that would qualify as temporary reproduction.[59] Nevertheless, it is important to clearly define the lawful use when relying on Article 5(1).[60] It is submitted that the lawful use requirement would be difficult to prove for temporary copies created in streaming but acts of browsing would meet the lawful use requirement.

In *PRCA*, the Supreme Court held that a use should be considered lawful when it is authorized by the right holder or not restricted by the applicable legislation, and in doing so, *FAPL* was considered.[61] However, the Supreme Court decided that the 'applicable legislation' was confined solely to the Article 2 reproduction right.[62] This suggests that the determination of lawful use required checking of both Article 2 and Article 5(1). Crucially, Article 5(1) does not provide a clear definition of lawful use.[63]

Nevertheless, there has been a broad interpretation of what would constitute lawful use. In PRCA, the Supreme Court concluded that 'lawful' use is not determined by whether the right holder had authorized the use, but whether the use is restricted by legislation.[64] The decisions of *FAPL* and *Infopaq* were both considered.[65] Furthermore, the Supreme Court accepted that the purpose of

[56] PRCA (CJEU) (n 21), [31]
[57] ibid
[58] Pila (n 34), 307
[59] Mazziotti (n 8), 64
[60] Pila (n 34), 308
[61] PRCA (SC) (n 24), [17]
[62] ibid
[63] Headdon (n 36), 196
[64] PRCA (SC) (n 24), [25]
[65] ibid

Article 5(1) was to authorize the making of copies for user to view material on the internet and the conditions of Article 5(1) should be construed consistently with that purpose.[66] Importantly, it is submitted that lawful use would cover digital acts of browsing.

A lawful use would also depend on whether the acts of reproduction amounted to a communication to the public. *ITV* concerned an online live streaming service, and whether the temporary copy exception in section 28A could apply.[67] The UK High Court held that the 'lawful use' would depend on whether the activities amounted to a communication to the public.[68] The Court held that there was a communication to the public, and thus there was no lawful use of the work. The copies therefore could not benefit from the temporary copy exception.[69]

Similarly, in *Filmspeler* the court held that lawful use depended on the communication to the public right.[70] The CJEU considered whether the act of streaming was restricted by any applicable legislation.[71] In turn, this required an assessment of the three-step test in Article 5(5).[72] The CJEU concluded that since the content was streamed to a third-party who had no right to communicate the works to the public, the act of the end-user making temporary copies was not for a lawful use.[73] Similar to *ITV*, the lawful use was dependent on the communication to the public right.

As such, the CJEU in *PRCA* clarified that lawful uses included acts of browsing, and this would ultimately be beneficial for digital users. However, the lawful use of streaming would depend on whether the communication to the public right was infringed. Accordingly, digital users who access streaming sites will have difficulty in satisfying this condition and might not be able to rely on the Article 5(1) exception.

iv. Independent Economic Significance

Recital 33 of the ISD provides that copies in Article 5(1) must have no separate economic value of their own, indicating that the copies cannot be exploited economically in their own right. It is

[66] ibid, [26]
[67] *ITV Studios Ltd v. TV CatchUp Ltd* [2011] EWHC 1874 (Pat)
[68] ibid, [129]
[69] ibid
[70] Stichting Brein (n 27)
[71] ibid, [66]
[72] ibid
[73] ibid, [70]

submitted that this condition appears to be difficult for temporary copies created in the course of television broadcasts by digital users.

In *FAPL*, both the decoder copies and television screen were assessed together in assessment of independent economic significance. The CJEU in *FAPL* stated that both the copies in the decoder and the television were an inseparable and non-autonomous part of process of reception of the broadcasts containing the protected works, being performed without influence or even awareness by the viewers.[74] Thus, the acts in question were not capable of creating additional economic advantage beyond the advantage derived from the mere reception of the broadcasts.[75] However, it was argued that the CJEU did not consider that the television screen copies were clearly for consumption and would therefore have independent economic significance.

A different approach was taken by the UK High Court in *ITV*, which considered CJEU's ruling in *FAPL*, holding that while the server copies did not have independent economic significance, the user's on-screen copies had such significance.[76] Floyd LJ noted that although *ITV* received revenue from the transmissions, the temporary copes made were not linked to the advertising revenue and therefore did not have independent economic significance.[77]

This essay agrees with the CJEU in FAPL's approach in considering that both the decoder and television copies did not have independent economic significance. It is submitted that in separating the server copies from the decoder copies, it could be difficult in satisfying the requirement of independent economic significance. Thus, the approach by the CJEU in *FAPL* would be advantageous in protecting digital users who use satellite decoders during television broadcasts, as they would be able to rely on Article 5(1).

As such, the CJEU's interpretation of the conditions of Article 5(1) has made it difficult for digital users who access streaming and television broadcasts to rely on the temporary copy exception in Article 5(1). Nonetheless, the act of internet browsing would be legitimate for digital users.

[74] *FAPL* (n 18), [172]
[75] Headdon (n 22), 176
[76] *ITV* (n 67), [127] – [128]
[77] ibid

III. Article 5(1) is not Phased Out in the Digital Environment

It is submitted that Article 5(1) has not been phased out in the digital environment. Firstly, the interpretation of the three-step test in Article 5(5) as a standalone requirement maintains the balance of rights between the right holders and digital users, in line with the purpose of the exceptions. Secondly, the practical implications of the CJEU decisions have also maintained this balance.

A. CJEU's interpretation of the three-step test

Article 5(5) incorporates the 'three-step test' found in Article 9(2) of the Berne Convention. Article 5(1) is subject to Article 5(5), which provides that all the exceptions and limitations are to be applied only: (1) in certain special cases which; (2) do not conflict with the normal exploitation; and (3) does not unreasonably prejudice the legitimate interests of the right holder.

There is conflicting CJEU jurisprudence on whether Article 5(5) is a standalone test, or a test that is to be taken into account when applying an exception.[78] The CJEU in *PRCA* assumed that Article 5(5) was a standalone test, in holding that that in order to rely on Article 5(1), the copies in question must also satisfy Article 5(5).[79] In stark contrast, the CJEU in *Infopaq II* and *FAPL* held that Article 5(1) was satisfied if the conditions in Article 5(5) are also satisfied.[80] Nevertheless, *Filmspeler* provides clarification to this conflict. The CJEU held that Article 5(5) is a standalone test, and Article 5(1) must be interpreted in light of Article 5(5).[81]

Despite this clarification by the CJEU in *Filmspeler*, Hart argues that the standalone approach of Article 5(5) would result in greater uncertainty as not only would digital users be unable to rely on the express language of the exception, but they would also have to consider the clear language of Article 5(5).[82] Furthermore, if the Court interprets the three-step test literally in the sequence of the steps as provided in the ISD, its scope will be limited to the detriment of digital users.[83]

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[78] Michael Hart, 'The Legality of Internet Browsing in the Digital Age' (2014) EIPR 36(10), 630-639, 632
[79] PRCA (CJEU) (n 21) [53]
[80] *Infopaq II* (n 12)[58]; *FAPL* (n 18), [181]
[81] Stichting Brein (n 27), [63]
[82] Hart (n 78), 638, 639
[83] Geiger, 'From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-step test' (2007) EIPR, 491

Nevertheless, this article agrees that Article 5(5) should be a standalone test. The standalone approach of Article 5(5) provides more weight to the interests of right holders in the balancing act as stated in *FAPL,* because the limitations only applied where it did not prejudice the legitimate interests of the right holder.[84] Further, Recital 44 of the ISD states that the conditions of Article 5(5) must be examined in each individual case. Consequently, the use Article 5(1) is not, and should not be phased out in the digital environment as the use of Article 5(5) ensures that the legitimate interests of the right holder would be protected.[85] This helps balance the rights and interests of both parties.[86]

B. Practical Implications of the CJEU Decisions

Following *Infopaq I & II*, media monitoring services may convert news content into a searchable and digital format which will be lawful under Article 5(1), as long as it remains in the digital format (but not in physical format) and is automatically deleted.[87] This would be in favour of digital users who utilise search and analytics functions while browsing.

In *FAPL,* acts of reproduction that merely enable the reception of transmission can be exempted by Article 5(1).[88] The digital user will be exempted from compensation for additional reproduction provided that the basic service was licensed. At the same time, licenses were not required for service providers.[89] In considering both right holders and digital users' interest, a balance is maintained.

In *PRCA*, Article 5(1) allows digital users to browse the internet without the need for authorisation if a permanent copying is avoided.[90] However, the permitted use is limited, as it is unlawful for digital users to download, print, or forward contents,[91] or enact a paywall which requires payment to access.[92] Further, the breach of contractual terms help to restrict certain uses of commercial

[84] Victoria Ball*, '*Striking the Balance While Browsing Online: Recent ECJ Decisions*'* (2016) BSL Rev, 1(1), 34-46
[85] ibid, 40
[86] ibid
[87] W Wesley Hill, 'Media Monitoring, Copyright and Technology: Implications of Recent Cases' (2013) 8 JIPL&P 10, 765
[88] Jutte (n 4), 253
[89] ibid
[90] Hill (n 87)
[91] Hart (n 78), 639
[92] ibid

content that would be considered unlawful.[93] Thus, while the outcome appears to favour digital users, the rights of the right holder are also protected through the practical implications of the decision, and a strict application of Article 5(5).

Finally, in *Filmspeler*, digital users who stream illegally from copyrighted material might be liable for copyright infringement.[94] Yet, the balance between the rights and interest are maintained as this only applies to end users who "deliberately and in full knowledge of the circumstances access free and unauthorized works".[95]

As such, the interpretation of Article 5(1) in line with the three-step test in Article 5(5) by the CJEU and the practical implications of the decisions have ultimately maintained a balance between the right holders and the interests of digital users. Thus, it is argued that the exception still remains relevant for both digital users and right holders, and it has not been phased out in the digital environment.

IV. Conclusion

Based on the interpretation of the CJEU decisions, this article has argued that the conditions of Article 5(1) are difficult to establish a legitimate use, specifically the temporary copies made in streaming and TV broadcasts. Nevertheless, the everyday acts of browsing and streaming remain protected for digital users, and an overall balance between the right holder and user is observed. As such, it is argued that interpreting Article 5(1) in light of Article 5(5) would provide an overall increase in protection for digital users.[96] The CJEU directs the three-step test at national courts, where the courts will have a corrective instrument when interpreting the temporary copy exception in light of Article 5(5).[97] Importantly, the national courts can employ the test for the benefit of the users if the three-step test is interpreted to introduce flexibility for Article 5(1),[98] as observed in the interpretation by the national courts in *ITV* and *Google Copiepresse* which has broadened of the scope of Article 5(1).

[93] ibid
[94] Sunniva Hansson, 'End of Play: the CJEU's judgment in the Filmspeler case' (2017) 28(6) ELR 210-212, 212.
[95] ibid, 210
[96] Jutte (n 4), 292
[97] ibid
[98] ibid

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