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## Editorial

### Je Suis Achbita!; The Trump Jerusalem Declaration and the Rule of Unintended Consequences; 10 Good Reads; *A propos* Book Reviewing; *EJIL* Roll of Honour; In This Issue

#### *Je Suis Achbita!*\*

*Achbita*, decided in March 2017 is not a run of the mill case. It raised what I think are hugely difficult conceptual legal issues. It also comes at a delicate moment in the social and political life of Europe, where the Court of Justice of the European Union is an important actor in shaping the climate and defining the moral identity in and of Europe. I do not believe the Preliminary Ruling of the ECJ comes even close to what one may expect from the supreme judicial voice of justice of our Union in a case of this nature.

The case concerned, as you will know, a Muslim woman whose employer insisted in the name of a neutrality policy of the company that she may not wear the hijab (a head scarf) to work, and thus she lost her job. I think it is a fair reading of the ruling sent back to the referring Belgian Court that other than checking that the company, without overly burdening itself, could not find a place for Achbita in a back office which would not bring her into contact with the public, the Court had no major problems with the company's policy compliance with the specific Directive bringing the case within the jurisdiction of European Law and the overriding human rights controlling norms such as the ECHR and the EU Charter of Fundamental Rights.

I will present the case, for reasons which I will explain below, with a slightly different factual matrix.

Chaya Levi lives in Antwerp. She is part of the large Jewish Hassidic community in that town. She, like other members of that community, follows the strict norms of Orthodox Judaism. Some refer to them as Ultra-Orthodox. She works as a receptionist in a general services company which, *inter alia*, offers reception services to customers in the private and public sectors. As a receptionist she comes into contact with customers. No fault is found with her job performance. Chaya Levi falls in love and marries Moses Cohen of her community. Under Jewish law she now must wear a scarf covering her hair, not unlike the Islamic headscarf. In Antwerp this is an immediate tell-tale sign that she is an observant Jewess.

\* Cite as Weiler, 'Je Suis Achbita', 28 *European Journal of International Law* (2017) 989.

She is told by her supervisors that under company policy this headscarf would not be tolerated because the visible wearing of political, philosophical or religious signs was contrary to the company's policy of neutrality.<sup>1</sup>

Chaya Cohen (née Levi) refused to remove the scarf and was dismissed. She lodged an appeal before the competent Belgian courts and eventually comes by way of Preliminary Reference to the ECJ and is considered primarily under Directive 2000/78.<sup>2</sup> The Directive refers in Recital 1 to fundamental rights protected under the ECHR which provides in Article 9 that everyone has the right to freedom of thought, conscience and religion, a right which includes, in particular, freedom, either alone or in conjunction with others, and in public or private, to manifest her religion or belief in worship, teaching, practice and observance.

The Court points out that these same rights are reflected in Article 10(1) of the Charter. The references to the Charter and the ECHR are important since, whereas the Directive is concerned specifically with non-discrimination, the Charter and the ECHR more capaciously refer to freedom of religion. Both principles come into play in this decision.

## 1 The Framing of the Factual Matrix

As cited, approvingly, by the ECJ, the Belgian Higher Court '... noted ... that it was common ground that [Chaya Cohen] was dismissed not because of her [Jewish] faith but because she persisted in wishing to manifest that faith, visibly, during working hours, by wearing [a Jewish] headscarf'.<sup>3</sup>

The first major problem with the approach of the Court is rooted in this very framing of the case.

I invite you to consider two variations of the factual setting as presented above.

Variation 1. Chaya Cohen, in addition to her scarf, also sports a Star of David pendant.

Variation 2. Moses Cohen also works at the company. He, too, sports a Star of David pendant, but in addition wears a yarmulke (skull cap) and has long dangling sidelocks, which are required under similar strict Jewish law. (You have seen these men around in airports, etc.)

When told of the policy of the company that they may not 'manifest' their faith visibly during working hours, both immediately offer to remove the Stars of David. That indeed is an identity marker which manifests their Jewishness. Moses offers to wear a hat and to try and hide his sidelocks behind his ears. His supervisors are dubious: Who wears a hat indoors if he is not a Jew, they ask? That, too, is a clear tell-tale sign, he is

<sup>1</sup> Case C-157/15, *G4S Secure Solutions ('Achbita')* (ECLI:EU:C:2017:203), para. 15.

<sup>2</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303.

<sup>3</sup> *Ibid.*, para. 18. I say 'approvingly' because when the ECJ analyses the case its entire focus is on the right under the different legal norms, international and European, to 'manifest' one's religion. See e.g. para. 28. Nowhere does it consider other provisions in the same norms to freedom of practice and observance. (Cf. para. 26 with references therein).

told, and thus contrary to company policy. His sidelocks, it turns out, are too long and, alas, are still visible. Reach for the scissors if you wish to keep your job.

Be that as it may, Moses and Chaya try to explain that in wearing the scarf, the yarmulke and the sidelocks they are not 'wishing to *manifest* their faith'. The Star of David can come off at the blink of an eye. But in relation to the scarf and yarmulke they are *practising* their faith. They have no option by law, the observance of which in their eyes overrides, *quelle horreur*, even European law.

Grant me that there is, phenomenologically-speaking, a difference between the wish to manifest one's religious identity and the practising and observing of such. Or, put differently, between forbidding someone from manifesting his or her religious identity and actually coercing them to violate religious norms which they consider sacred.

Here are two examples to underline the difference. It is one thing to tell a vegetarian or vegan that they may not show up at work wearing a lapel button proclaiming their belief in animal rights but quite another to coerce them to eat meat. Or telling a gay man or woman that they may not show up with a rainbow tie and telling them they may not actually practise homosexual love.

It follows, in my view, that the 'common ground' to which the Belgian Court alluded and which seems to underlie the judgment of the ECJ should not be that:

[Chaya Cohen] was dismissed not because of her [Jewish] faith but because she persisted in wishing to manifest that faith, visibly, during working hours, by wearing [a Jewish] headscarf.

But instead quite differently:

Chaya Cohen was dismissed precisely because of her Jewish faith – a faith which manifests itself in a *Nomos* which includes (to the bewilderment of some) a duty and commitment to wear a scarf once married.

Or, put differently:

She was dismissed not because she persisted in wishing to manifest her faith but because she persisted in wishing to practise what she, as an adult woman, or her husband (variation 2), as an adult man, held to be their religious legal duty as an expression of loyalty to, and love of, the Almighty and, born into an eternal Covenant to which they choose to remain loyal.

After all, Moses wears his yarmulke even when alone at home. To whom is he manifesting his religion then? 'To God' would be the only dignified answer. One might raise the philosophical objection – replicating the debate of aims and effects in international trade law – that Chaya was not dismissed because of her Jewish faith but simply in 'neutral' application of company policy. I think this is splitting hairs. If, say, Columbia Law School had in place a similar policy of 'neutrality' it would mean that the illustrious Lou Henkin, one of the 'fathers' of international protection of human rights law, would have lost his job. I assure you he would not have removed his yarmulke. If asked why he lost his job, he most likely would have answered 'because of my faith'; 'because I am an observant Jew'. And if, hypothetically, the ECJ were to adopt a similar rule of neutrality as regards the attire of lawyers appearing before it, the distinguished British barrister, Shaheed Fatima QC would be excluded. I assure you she, too, would not remove her hijab. And just as surely her exclusion would be because of her commitment to the observance



Shaheed Fatima QC

of the precepts of her Muslim faith. ‘I can’t appear there’, she is most likely to say, ‘because I am an observant Muslim’.

*Nota bene:* Does this mean, automatically, that the Court was wrong in allowing the dismissal of Chaya as a receptionist?<sup>4</sup> It certainly does not necessarily mean that.

But this distinction, in my opinion, produces two salient legal consequences. In deciding the case, as part of the inevitable proportionality test, the Court would eventually have to balance the weight to be given to the company’s ‘wish to project an image of neutrality towards customers’, which is but an expression of the ‘... freedom to conduct a business that is recognised in Article 16 of the Charter [which] is, in principle, legitimate’,<sup>5</sup> as against the weight to be given to the freedoms, guaranteed under Directive 2000/78, the Charter and the ECHR, to Chaya.

In weighing the rights of the company as against the rights of Chaya, the first salient legal consequence would or should be that the Chaya side of the scale would be somewhat lighter if it concerned a simple manifestation of her faith than if it concerned her ability to practise and observe her faith or her need to violate her religion. Put differently, the Court (and the society for which it speaks) would have to imbue the right of the company ‘to project an image of neutrality towards customers’ with far more gravitas if it meant that she was forced to choose between losing her job or violating her religion than if it simply required her to tuck her Star of David under her shirt. I do not want to make light of the ‘right to manifest’. In *Eweida* the ECtHR qualifies such as a fundamental right and explains its importance as ‘... the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others.’<sup>6</sup> But I am arguing that compromising or limiting the right of communicating one’s faith to others through the wearing of some sign is not quite as serious as preventing that same person from actually practising and living that faith or forcing them to violate it. (Recall, please, the vegan.)

Failure to make the distinction between preventing a person from ‘manifesting’ their faith and forcing them to violate it will, in my view, very substantially, perhaps even fatally, compromise the eventual proportionality test.

<sup>4</sup> Or transferring her to a back office so that, God forbid, the public will not have to suffer her sight in public. See *infra*.

<sup>5</sup> *Achbita*, *supra* note 1, para. 38.

<sup>6</sup> ECtHR, *Eweida and Others v. United Kingdom*, Appl. nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013, para. 94.

Let me, again, make it abundantly clear: the right to religious practice and observance is not sacred in our constitutional orders and there are instances aplenty where we rightly ride roughshod over religious liberties in the name of higher societal values – such as our prohibition, to give but one example, of religiously-driven female circumcision. Nonetheless, when we do allow the denial of so fundamental a right as religious liberty we would expect to find some weighty countervailing values to justify such.

Knowing that the Court failed to make that distinction and, erroneously in my view, considered that Chaya ‘...was dismissed not because of her [Jewish] faith but because she persisted in wishing to manifest that faith’, we should not expect too much ballast to be given by said Court to the countervailing value. But even framing the issue as simply denying her right to ‘manifest’ her religion (which in any event is explicitly protected) would require some serious countervailing argumentation.

The second legal consequence that flows from failure to note the distinction is that the Court will not be aware of the structural discriminatory effect the company policy produces among different religions. Indeed, this possibility is only mentioned in passing as a hypothetical possibility and in a highly problematic way in the 23 brief paragraphs which constitute the operative reasoning of the judgment.<sup>7</sup>

Whence the discrimination?

We tend often to speak of the ‘Judeo-Christian tradition’ as if the two religions are sisters. In fact the sister religions from the perspective under discussion are Islam and Judaism for in both the presence of God for believers is felt primarily by the thick matrix of divinely ordained legal norms – *Nomos* – which accompany the faithful from the moment of waking to resting one’s head to sleep, through dress code, eating code, working code, making love code, etc. Sharia and Halakha are remarkably similar in this respect, in contradistinction with the Pauline revolution undergirding Christianity.

Take Maria, a co-worker who, like Chaya, may wish to manifest her religious fealty by coming to work wearing a pendent with a cross similar to Chaya’s Star of David. And Samira may wish to affix a half-crescent brooch to her shirt. In relation to such, the company policy will impact them equally. To oblige them to remove these visible signs of their faith may compromise some liberty of expression or conscience but not their religious – *strictu sensu* – observance. But with just a very few exceptions, affecting a very few Christians, the company policy will have a huge disparate impact on Jewish and Muslim women (and in other respects men too) – the very stuff of indirect discrimination – compared, say, to Christianity. It is hard to avoid this conclusion as a simple empirical observation. It might even rise to the status of judicial knowledge and not be left to fact-finding.

If this is so, the Directive itself, as well as the general law of discrimination in the field of human rights, mandates that there would have to be weighty reasons (which usually are canvassed in the third stage of proportionality analysis) justifying the acceptance of such discrimination. Failure to address this would constitute another grave flaw in the decision of any judicial instance.

<sup>7</sup> See *Achbita*, *supra* note 1, para. 44 (second paragraph).

## 2 A Brief Theological and Sociological Excursus

Before we move on to see how the CJEU deals (if it does at all) with the above two legal consequences I would like to make two sociological and theological observations.

1. It is not my intention at all to suggest that Christian believers, unlike their Jewish or Muslim brothers or sisters, leave their faith outside the precincts of the workplace. But the way they live their faith in the workplace is through their ethical conduct, their love of their fellow worker and the like, which constitute testimony to the living Christ. For the most part Christianity has abjured the myriad of ritualistic practices which characterize Islamic and Jewish Nomos. It is mostly a religion of the heart. Your Christianity in such circumstances is not manifested by what you wear, what you eat and the like, but how you behave. It is perhaps necessary to dispel the common misunderstanding that Islam and Judaism are all about ritualistic practices: ‘don’t eat pork, but it’s OK to cheat’; ‘avoid alcohol but throw a bomb’ – being classical anti-Semitic and Islamophobic tropes. The moral law and the ethical imperative are a central part of Nomos and indeed render the ritual useless if the ethical is absent, as a brief excursion into Leviticus (where Love thy Neighbour originates) or prophets such as Isaiah and Amos well establish. This would also be the appropriate place to mention that in related cases where, for example, the vindication of one person’s right, say to an abortion, would implicate the violation by another, say a Catholic, of their religion by violating in this example not a ritualistic rule but a firmly held divinely inspired moral rule, any court would have to engage in the same wrenching stage three proportionality analysis involving a clash of two conflicting protected rights. If there is a way of securing the abortion, without forcing someone to violate their religious convictions, it would probably be indicated both under the stage two necessity test as well as stage three balance of values. It is the approach of ‘accommodation’ which is increasingly being used to resolve these divisive cases. (See *infra* in my discussion of Proportionality.)
2. I can understand why the Court – in total good faith (excuse the pun) – was oblivious to the manifest/practise distinction and does not even address it, even if to reject it. This is not surprising since in producing this blindness two massive civilizational forces – which often find themselves in opposition – combine to condition contemporary sensibilities on these issues. The two forces are the Christian Revolution of Jesus/Paul and the *Laique* tradition of the French Revolution.

One (not the only one) central feature of the Christian Revolution was, as mentioned above, the teaching (in the Sermon on the Mount, for example) that the Law was accomplished and that the nature of the Covenant between God and (Wo)man had eternally changed. It was no longer important, to give but one emblematic example, what man put into his mouth but the words that came out of a man’s mouth and with that the intricate matrix of rituals which was and remains one (not the only one) central feature of Nomos was consigned to the

dustbin of Christian religious understanding and practice as a relic of an earlier and more primitive stage in God's world.

A normative judgment was associated with this feature of the Christian Revolution: Ritualistic Nomos was the peel. The core of the religious fruit was the interior of the human subject. You do not circumcise your penis, as do Jews and Muslims, but your heart. This normative judgment was (and is) often accompanied by contempt for the primitiveness of those aspects of Islam and Judaism and, even as contempt dissipated – or at least we have learnt to conceal it – a total incomprehension of the profound spiritual significance of Nomos set in. The underlying blindness to the distinction emanates precisely from that intuitive, almost natural, sensibility conditioned by two millennia of Christianity that 'surely it cannot matter all that much to Chaya if she is asked to remove her scarf. Surely that scarf is but the peel, not the real flesh of the fruit.' And, yes, 'surely it is but a *manifestation* of her faith, *not the faith itself*'.<sup>8</sup>

Add to that, now, the pervasive impact of the French Revolution of which, blessedly, we are all children and beneficiaries in so many ways. Gloriously, to give but one example close to this case, the French Revolution as part of the dismantling of the Confessional State emancipated the Jews, making them '*libres et égaux*' in the famous phrase of that very Revolution. But it was accompanied by *Be a Man Abroad and a Jew in your Tent*, in total accord with the *laïque* vision which regards religion as a private matter. The appropriate locus of religion is the home and Church, not the public space which must remain 'neutral'. Historically, Jews embraced this in part as a worthy price to pay for their emancipation (and many, even most, embraced it as a catalyst for emancipation from the yoke of Nomos ...).

With this sensibility, to tell Chaya that she is welcome to wear her scarf to her heart's content in her private space but not on work premises, would seem the most natural and innocent requirement. Indeed, her insistence on keeping it could be seen – and the tenor of the judgment betrays such a view – as irrational and unjustified obstinacy.

Combine these two forces which are the pillars of Western civilization, add a largely secular society that has lost its knowledge, sensibility and even patience with religion, and the total obliviousness of the Court to this central distinction should not surprise us.

### 3 Proportionality

By contrast, we should be surprised by the puzzling way, to choose a kind expression, in which the Court handles proportionality in this case, proportionality being at the heart of any case of this nature.

Even in a minimalist version of proportionality we would typically expect to find three (often, but not necessarily) sequential steps:

<sup>8</sup> It is, of course, clear that Judaism and Islam just like Christianity are not monolithic and contain various streams and movements not all of which consider the wearing of, say, the hijab or the yarmulke as obligatory. But some clearly do and it is not for us to question the religious commitment of the faithful. And likewise, even if Chaya's religious commitment is of recent origin, who are we to judge when someone is to have their 'Damascus moment'?

1. Does the norm or rule which compromises a certain liberty (in this case religious liberty or liberty of conscience) pursue a legitimate purpose?
2. Is it ‘necessary’ in the sense of ‘least restrictive measure’? Can that legitimate purpose be achieved, at reasonable burden and cost, by a different measure which would be less restrictive to the protected liberty?
3. The third step is thought to be the most crucial from a normative and social perspective. For even if the measure pursues a legitimate purpose and is ‘necessary’ (i.e. no less restrictive measure is available) the Court, any court, would still have to articulate why the values embedded and reflected in the legitimate purpose of the measure necessary to achieve such legitimate purpose outweigh the values embedded and reflected in the protected liberty which is affected and compromised by that measure. It is the ensuing balance that defines the hierarchy of values by which our societies wish to define themselves and, indeed, are often a marker of normative differences among such.

In relation to the first step, the Court in *Achbita* holds that the purpose of ‘projecting an image of neutrality’ is a legitimate purpose.

As regards the second step, it remits back to the national court the second element of proportionality instructing it to examine, on the facts of the case, whether ‘... the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only [the company] workers who interact with customers. [My emphasis]. If, however, that is the case’, the Court holds, ‘the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued’.<sup>9</sup> And ‘... it is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without [the company] being required to take on an additional burden, it would have been possible for [it], faced with such a refusal [by a worker to give up wearing a Jewish headscarf] to offer her a post not involving any visual contact with ... customers’, instead of dismissing her.

I would like to focus now on the third element since it relates most directly to the framing issues explored above and is at the heart of any human rights case, most essentially when the case involves a clash of protected rights among individuals which then have to be balanced.

We would expect the Court when reaching this stage of the analysis to (i) explore and weigh the value of the company policy of neutrality as against at least the presumed liberty of *manifesting* one’s religious beliefs if not *practising* them. And (ii) in addition, if the company policy actually creates a discrimination among religions to further weigh whether the importance of the policy is such as to justify such discrimination.

There are countless examples of this nature. Instructive is the treatment by the ECtHR of the *Burka* case.<sup>10</sup> The burka, unlike Chaya’s veil or Samira’s hijab, covers the entire face of the Muslim woman. Several countries have banned such attire in public places, clearly compromising a religious liberty. The ECtHR when faced with such bans was at

<sup>9</sup> *Achbita*, *supra* note 1, para. 42. And see para. 44.

<sup>10</sup> See ECtHR, *Belcacemi and Oussar v. Belgium*, Appl. no. 37798/13, Judgment of 11 July 2017 and *Dakir v. Belgium*, Appl. no. 4619/12, Judgment of 11 July 2011, and of course the case of *S.A.S. v. France*, Appl. no. 43835/11, Judgment of 1 July 2014.



pains to analyse the set of values behind the ban, such as open society, the nature of human relations which we cherish, dignity of women and weighing them against the individual religious liberty. On balance and with several qualifications it concluded that these values may legitimately justify compromising the religious liberty to wear a burka.

Here is an example of the ECtHR dealing with a set of facts even closer to *Achbita*. In the *Eweida* decision it dealt with a company (British Airways) prohibition on its cabin attendants, employees clearly interacting with the public, from wearing any item manifesting their religion:

Moreover, in weighing the proportionality of the measures taken by a private company in respect of its employee, the national authorities, in particular the courts, operate within a margin of appreciation. Nonetheless, the Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms. Eweida's desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.<sup>11</sup>

One notes in this passage, *inter alia*, the separation of the issue of legitimacy of the purpose (step one) from the balancing of such with the competing right of the individual (step three).

Now let me cite *in extensu* the way the ECJ deals with this essential third step in its proportionality analysis. How do we stack up the protected right of the company to project a policy of neutrality (Article 16 of the Charter) as against the protected right of employees to manifest (or practise) their religion (Article 10 of the Charter)?

No, the empty space is not a computer or printer error. There simply is practically nothing. Third stage proportionality was left out. The Court subsumes the third test into the first test. It holds, quite categorically, that in principle the policy of projecting an image of neutrality towards customers is legitimate, '... notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers'.<sup>12</sup> Having held that, it is understandable why

<sup>11</sup> *Eweida*, *supra* note 5, para. 94.

<sup>12</sup> *Achbita*, *supra* note 1, para. 38.

its only concern is whether the company, without undue burden, could hide the likes of Chaya in the back office and does not address the central conflict of values issue.

The Court seeks support for its statement on the legitimacy of the company's policy from that very ECtHR *Eweida* case. And, of course, given the right to conduct a business mentioned by the ECJ, there could of course be circumstances that justify certain conduct which compromises competing religious freedom rights.

It is of course correct that *Eweida* does stand for the proposition that in principle, as the ECJ says, a company may restrict the manifestation by employees of their religious identity. They even give the central rationale for such: to maintain an image of professionalism in providing a service. Presumably not to offend or distract any potential recipient of such services.

But the comparison between *Eweida* and *Achbita* is nothing less than embarrassing. First, in *Eweida* there is an acknowledgment of the competing rights. There is a brief but pithy articulation of their respective underlying values. And there is, above all, a weighing and balancing which is different from the second-stage necessity stage of proportionality. This is the bread-and-butter of human rights proportionality analysis. This is how you 'do' judicial protection of human rights in cases such as this.

Second, should not the fact that in *Eweida*, in balancing the values in question, the ECtHR reached the conclusion that the company (British Airways) was in violation and, more specifically, that

[t]here was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image ...

give pause?

It is the near total silence which is so puzzling. Compare the statement in *Eweida* with the only statement in *Achbita* which contains some allusion to these sensibilities:

An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers.

The allusion? The slight nod in the words 'in principle', but that is it. The failure manifest in this silence is both professional and moral. It is really hard to explain the failure to confront the issue of right v. right and deal with it adequately. Is it really enough with no more, doctrinally speaking, that a measure pursues a legitimate interest and is the least restrictive measure, to uphold it even if it conflicts with another fundamental human right? And what message is sent by acknowledging the commercial interest but not articulating, robustly or otherwise, the values of pluralism and tolerance which underlie the freedom of religion rights compromised by the vindication of the rights to conduct a business?

In *Bouagnaoui*, decided alongside *Achbita*, the Court commendably stated that 'the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of

[Directive 2000/78]'.<sup>13</sup> This, willy nilly, would be part of a stage three analysis. But, alas, there is no trace of this sentiment in *Achbita* which, because of its more general factual matrix, would seem to be the more important case. Could that principle, should that principle, be limited to some restrictive reading of 'occupational requirement'? Should that not have been part of the dispositive of the case instructing all national courts when applying the Directive to ensure that a professed 'neutrality' is not driven by such customer wishes? But one might enquire further: Is this principle sufficient? What if there is no actual customer-expressed wish, but the employer anticipates such and acts accordingly. Does this kosher the pig? And even further, having made that statement in *Bouagnaoui* and knowing how our world operates, has the Court inadvertently not provided a circumvention roadmap. Henceforth no employer will ever admit to such motive and simply hide behind a generic 'neutrality policy' which the Court seems to legitimate in *Achbita*. Would it not have been better to create a legal presumption that any policy which requires a worker to violate their religious precepts or even 'merely' prevents them from manifesting such, would be presumptively in violation of the Directive and the Charter unless the company could give compelling reasons (of which customer preference not to be served by a person wearing a headscarf would not count as compelling) for such requirements?

We are all aware that despite the professed centrality of the principle of proportionality, there must be hundreds of cases in which the Court never goes beyond stage two. So why all the fuss in this case? There are indeed many cases where it is not necessary for the Court to go beyond stage two. Many such cases do not only fall within the area of the functioning of the Single Market, which is the *par excellence* turf of the Court, but are also cases where the decision of the Court is *de facto* dispositive. Thus in most of those instances the Court is actually able to dispose of the case by addressing only the second LRM stage of proportionality. Additionally, many of those cases are ones where the Court is examining a Member State measure asserting Member State values permitted in, say, one of the exceptions to free movement – i.e., dealing with a value which derives from the national jurisdiction and there indeed, beyond ascertaining that the purpose of the state measure comes within the list of recognized purposes or the rule of reason, its main task is to ensure stage two proportionality (labelling would do the job) and not question the Member State values.

This is not the case here. Under the Directive the issues in this case fall within the province of Union law. The protection afforded the individual (both the company and Chaya) are granted by Union law. And it is thus for the European Court at least to define the parameters and criteria which should control the weighing of one right against another.

The second reason is that here we are dealing with fundamental human rights. As we saw in the examples from the ECtHR, stage three analysis is at the core of human rights analysis especially, unavoidably, as a matter of legal logic, when one is dealing, as in this case, with competing rights of two individuals. How else would one adjudicate between these two competing rights other than through stage three analysis?

Could it be said, then, that although the Court itself does not engage in stage three proportionality analysis, indispensable to a human rights case pitting one protected right against another protected right, it remits such to the national court?

<sup>13</sup> Case C-188/15, *Asma Bouagnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA ('Bouagnaoui')* (ECLI:EU:C:2017:204), para. 41.

Let us examine carefully the 2nd indent in paragraph 44 of the judgment which may indicate such.

[S]uch an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.

The Court mentions the possibility that a measure that in fact produces a disadvantage to a particular religion could constitute indirect discrimination and thus violate the Directive but hastens to add that this would not be so if it were legitimately justified by a legitimate aim. But as noted, earlier in the judgment it had already held, in paragraph 38 that '[a]n employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers'. Having found that, I think the most natural way to read paragraph 44 is that what is left for the national referring court to ascertain is only whether the means to achieve that are proportionate in the manner indicated by the Court, namely that no job could be found, without unduly burdening the company, for Chaya in a position which would not bring her into contact with the public. It does not seem to be instructing the national court that it should also engage in stage three proportionality.

But let us give a 'generous' reading to paragraph 44, namely that the words 'in principle' mean that it would still have to be checked in each case, and that what is for the referring court to ascertain was not simply LRM but actually stage three balancing. Even if we were to give this generous reading to paragraph 44 the Court would still be in dereliction of its duty. Since the protected rights in this case are Union rights under the Directive and the Charter, one cannot outsource their interpretation and articulation, lock, stock and barrel, to national courts. It is for the ECJ to set the parameters of protection under Union law. The Member State courts should apply these to the specifics of the case before them.

Under this questionable hypothesis (that the ECJ is actually inviting the national court to engage in stage three analysis) should not, at a minimum, the ECJ in remitting the case back to the national court have instructed it specifically on the parameters of the balancing to be done? Taking a leaf out of the *Eweida* case to which it itself referred, should it not have explained the values enshrined in the protected rights? Guided the national court that, given the importance of the compromised rights, the company would have to 'make the case' empirically and normatively that the exercise of its right, in the circumstances of its type of business, the situation of the social environment and so forth overrode the deleterious effect such a policy would have on a right protected by the Directive, the Charter and the ECHR? Alongside its reference to the right of the company to conduct its business could they have not, at a minimum, made some reference to, for example, the need of

a healthy democratic society ... to tolerate and sustain pluralism and diversity[?]

and to instruct the national judge that there is more to the case than simply exploring whether Chaya could be hidden in the back? That it should explore whether the concern of the company to maintain 'neutrality' in contact with clients is not just driven by a concern for professionalism (such as a legitimate insistence on dressing neatly) but a way of accommodating the prejudices of clients, prejudices which are inimical to a healthy democracy that tolerates pluralism and diversity, and to take a stand on such? That there is empirical evidence that the wearing of hijabs and turbans is accepted and that this should be encouraged throughout by prohibiting, except in compelling cases (operating rooms?), restrictions of such? It does not surprise me that several commentators in the blogosphere excoriated the Court of seeming to care more about the economic rights of the company than the human rights of the individual.

Judges in private conversations will tell you: 'We simply could not do that; it would upend practices which are rife throughout many Member States, even in public administrations'. And yet, when it comes to some famous economic rights the ECJ has over the years been bold enough to upend many a Member State rooted practice. Why the timidity here? But even so, it need not have upended these practices directly but could have established robust criteria for evaluating them, since, indeed, different contexts might call for different determinations, and allow the national courts to make the specific determinations.

This is decidedly not a call for the Court to embroil itself in political debates. But serenely, judiciously, to do its legal duty and, at a minimum, to lay down, first, that the national court must in addition to LRM also examine the balance between the competing rights (granted under Union law) and the considerations and factors which a national court *must* take into account in doing so. That is the role of the Court, and never more important than in this case. The ECJ must also understand that a 'not getting involved' approach is in fact getting involved by omission. In this kind of case there is no such thing as neutrality. Not doing is a form of doing.

It is hard not to reach the conclusion that the proportionality analysis in this case leaves a lot to be desired and that if you take this case and others – notably the *Taricco* saga – the professional credibility of the Court as an adjudicator of human rights has taken a blow. Still, *errare humanum est* – and a poor decision may be followed by an excellent one.

I have not in this comment so far made allusion to the two Opinions of Advocate General Sharpston in *Bouagnaoui* and Advocate General Kokott in *Achbita*. As is the custom to date, the opinions are much richer and fuller than the judgments of the Court. And there is much to learn from them. Advocate General Sharpston, among other virtues of her Opinion, demonstrates a far greater understanding of, and empathy with, the position of the religious persona. Her impact is noted for example in the statement in *Bouagnaoui* regarding toadying to customer prejudices. *Achbita* would have been a different and better decision had this sensibility been adopted by the ECJ. I find myself in disagreement with some of the reasoning and conclusions of Advocate General Kokott in her Opinion, which was largely followed by the Court. One point in particular is worth mentioning. AG Kokott draws a distinction between, say, race and gender discrimination, characteristics over which the victims have no

choice, and religion which is a matter of choice. It is, indeed, as many of Chaya's ancestors learnt over the centuries when offered the choice of a different Saviour and often burnt on the stake for refusing such. Chaya can choose to abandon the 5000 year-old Covenant. She can choose, too, to violate the precepts of that Covenant. She has chosen not to. But what of it? To remove the scarf is not exactly like choosing whether to wear black or brown shoes to work. And her sense of exclusion, loss of dignity and humiliation if forced to take a job because of her religion that will make her invisible to clients would, I am sure, be no less acute than, say, a female or black employee who was subjected to such on account of gender or colour of skin. And our outrage, in the circumstances of this case, should be the same, choice notwithstanding. Be that as it may, the Court could have learnt a thing or two from AG Kokott on how one employs proportionality in human right cases; particularly valuable is her analysis how differing national contexts may call for different considerations in balancing the competing values.

The problems of this judgment are not confined to what I am arguing are serious legal shortcomings. It is just but one more example of a case of enormous importance and consequence where the reasoning is reduced effectively to 23 laconic and largely apodictic paragraphs. Koen Lenaerts in his remarkable essay 'The Court's Outer and Inner Selves' (to be found in *Judging Europe's Judges*, edited by Adams *et al.*) offers one possible explanation for this:

[T]he ECJ operates under the principle of collegiality. In light of the latter principle, reaching an outcome based on consensus is of paramount importance for the daily inner-workings of the ECJ. Accordingly, for the sake of consensus, in hard cases the discourse of the ECJ cannot be as profuse as it would be if dissenting opinions were allowed. As consensus-building requires to bring on board as many opinions as possible, the argumentative discourse of the ECJ is limited to the very essential. In order to preserve consensus, the ECJ does not take 'long jumps' when expounding the rationale underpinning the solution given to novel questions of constitutional importance.

If I may jump on one of my hobby horses, this is yet another case which underscores the argument for limiting the tenure of CJEU judges to one fixed term (following Best Practice in Europe), thus opening the door, sparingly perhaps, for dissenting opinions and allowing the Court in critical cases, even where there is no consensus, to articulate its decisions more fully and not be reduced to the lowest common denominator of consensual collegiality. And given that ECJ decisions on occasion, like similar decisions of Member State highest courts, have a meaning and significance and impact beyond the restricted ambience of European law practitioners, and beyond the national court that requested the ruling, it is sometimes essential to go beyond the 'very essential'. Sometimes, how a court explains, frames and articulates is no less important than the actual decision itself. It is important for the polity and it is important for the legitimacy of the Court itself. Mauro Cappelletti used to teach that the single most important element in legitimating judicial decisions is the quality of the reasoning. A landmark case such as *Achbita* reverberates. One does not expect the Court to decide issues not before it. But one expects it to decide issues before it with the quality of reasoning that a landmark decision such as *Achbita* merits as is the practice of most European constitutional courts in similar circumstances.

## 4 Neutrality

The Court, as we have seen, states that ‘neutrality’ is a legitimate purpose and roots this in the freedom to conduct business as articulated in Article 16 of the Charter. The judgment is premised on the assumption that what the company achieves is in fact a neutral workplace. I would not go as far as to argue that this is wrong; but I would argue that in the constitutional traditions of the Member States there are at least two competing notions of neutrality and I would have thought that in a well-reasoned judgment, this would be acknowledged and some explanation would be forthcoming as to why Europe should follow one rather than the other. For heuristic reasons let us first focus on religious symbols alone.

According to the classic French tradition, which the Court seems to be following, the public space is neutral when there is no state-sponsored direct or indirect endorsement of any religion and concomitantly when in the workplace no religious symbols can be displayed.

Now let us engage in the following mental exercise. Imagine three universities. In one, and I am familiar with such institutions, everyone, students and teachers, has to wear a yarmulke and a scarf. In another, no one is allowed to display any symbol manifesting their religious allegiance. In the third, everyone is free to follow their conscience. Some wear crosses, hijabs and turbans, others do not, but may sport buttons or shirts displaying vegan or Marxist or other signs manifesting their secular commitments, or they may wear no signs at all. If Major Tom were to find these institutions on Mars and send a report back to Ground Control, would he not report that the first two universities were not neutral, one had odiously enforced religiosity, the other (odiously?) enforced *laïcité*, and that only the third was neutral? At least food for thought.

This is the logic whereby, in the name of this version of neutrality, the Netherlands and the UK fund both public religious schools of different denominations as well as secular schools so as to ensure that the state is neutral.

Please refrain for a moment from taking sides and entrenching yourself in one position or another. Though I believe that the third university is more neutral than the other two, I will acknowledge that the *laïque* position is not without its logic. But I want to complicate the matter even further. The company does not only exclude religious identity markers but treats all political and philosophical markers as well. Does this make the place more neutral? In some respects yes. Because had they allowed the manifestation of markers of other types of *convictions* (the term used in the French version of the Directive), religious people would be more justified in feeling discriminated: Why can somebody sport a Che Guevara button and I cannot display a cross?

But let’s probe deeper. Neutrality has no essential meaning without reference to the ‘criteria’ or metrics by reference to which we decide what is neutral and what is not.

For example, the company does not employ an aesthetic metric to what it conceives as a neutral workplace. Betty can come to the office in a screaming red dress and Jane can come in a quiet, reserved grey. The company does not insist that its employees wear uniforms, so the workplace may be a cacophony of colours and styles (which, incidentally are also an expression of certain philosophical convictions). Does this not, at a minimum, further illustrate the conceptual conundrum of defining ‘neutrality’?

It is not simply the question as to which is the more ‘neutral’ environment: the workspace where everyone is to wear a uniform – i.e. no signs of expression of individual aesthetic convictions – or the cacophony of colour and style, whereby the company is agnostic (neutral) as to the expression of aesthetic convictions by its employees. But these examples are here to highlight that the very determination of what is to define the metrics of neutrality are in the hands of the company, which makes choices. Is it free to adopt any metric?

Now would be the time to return to the legal framework. Maybe we should simply abandon the attempt to frame the issue as one of neutrality which carries with it a high normative appeal (neutral is good!) but which has this Janus-like quality. This, I insist, is not a trivial legal issue. By characterizing the policy of the company as pursuing neutrality, the Court imbues such policy with a gravitas which, perhaps, it does not deserve and makes it easier for it to reach the conclusion it does – that in principle the policy of neutrality (as interpreted by the company and acquiesced in by the Court) *tout court* (provided it is the least restrictive way of achieving it) overrides Chaya’s liberty to manifest (thin version) or to practise (thick version) her religion, as well as overriding the inter-religious disparate impact and hence discrimination it produces.

Why not simply say that the company has the liberty to conduct its business (in accordance with Article 16 of the Charter), a liberty which, quite normally, has limits imposed by the general law (such as labour law) and is limited even more when it clashes with equal or more worthy liberties of individuals. Remove the baggage or normative noise of neutrality and the intuition of many would be that an individual liberty of religion and conscience should override the business interests of the company – though many others would take perhaps the opposite view. But all would agree that the company would have to show some compelling reasons why its policy should prevail. Unencumbered by the positive normative weight of the ambiguous word ‘neutrality’ the stakes become clearer and the value choice the Court so cavalierly (in my view) took, becomes more transparent.

Surely grant me that put like this the justification for compromising as the company does the religious liberty (manifestation or practice, take your pick) deserves a better and weightier justification than the simple word ‘neutrality’ which, I hope I have persuaded at least some, is highly problematic in this context.

Let us probe even deeper (we will soon reach the other side of the earth). The Court insists, again and again, that the trump card of the company is its right to provide its customers with a ‘neutral’ environment. Why should so much weight be given to customer preference? And in some ways does this not contradict at least the spirit of the statement in *Bougnouli*? The *telos* of our laws against discrimination, as we saw in the infinitely better reasoned decision of the ECtHR, is to combat prejudice and bigotry which feed our discriminatory instincts and practices. Could we not, should we not, read the Directive, and the various higher norms which the Court is at pains to show that the Directive is but an expression thereof, as allowing a company to define as it wishes its notion of neutrality, provided it does not have an adverse effect on the categories protected by the express language of the Directive – unless a truly weighty reason is given? After all, the motives of the consumers which inform the company’s



definition of ‘neutrality’ might be the very base prejudice and bigotry which the Directive was intended to combat? Some of our customers don’t want to be served by a Jewess; some don’t want to be served by a Muslim. Let’s call it neutrality and either fire those employees or hide them in the back office. Not a particularly appealing way for our society, in whose name the Directive was enacted, to combat the prejudice which feeds – and in this case even results – in discrimination as well as exclusion.

## 5 Direct or Indirect Discrimination

Finally, I would like to call into question the characterization of the company measure as potentially creating indirect discrimination but not direct discrimination. This in fact was the formal and only question asked of the Court in the Preliminary Reference and to which it gave a clear answer: one is dealing with potential indirect discrimination in this case. It does make a difference since the justificatory burden will differ as between direct and indirect discrimination.

Here is a classic example of indirect discrimination. Consider the old English requirement that police men and women be six feet tall. It produces a disparate impact on women’s ability to serve in the police force. Unless justification can be offered it would be considered indirect discrimination. By contrast, had you targeted women directly by, say, having a quota on women police, this would be direct discrimination.

What is important is that the metric for the measure that produces the disparate impact has nothing to do with the protected class which is affected by it. The metric is in fact metres and centimetres, or feet and inches. The purpose of the measure is to ensure a more effective police force based on the (misguided) notion that big persons would be more effective Bobbies (in fact it is no longer followed).

In our case the purpose is to ensure ‘neutrality’ for the presumed purpose of offering a more ‘professional’ contact between company employees or some such objective, but the metrics used are precisely the protected classes – religion; ‘convictions’. If you use as your metric the protected class itself, this seems to me to take it squarely out of ‘indirect’ discrimination and into direct discrimination. By contrast, indirect would be the discrimination as between different religions. All religions were targeted; it affects some more than others – that is classical indirect discrimination.

In *Chez/Nikolova* the ECJ was not willing to accept the explanation given for the supposedly neutral practice (situating electricity meters high in certain districts where tampering was suspected) but instructed the national court to examine all the circumstances of the case to see whether the measure was introduced for reasons related to race. Here is the relevant language from that Decision:<sup>14</sup>

Directive 2000/43 must be interpreted as meaning that a measure such as the practice at issue constitutes direct discrimination within the meaning of that provision *if that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned, a matter which is for the referring court to determine by taking account of all the relevant circumstances of the case ...*

<sup>14</sup> Case C-83/14 *CHEZ Razpredelenie Bulgaria* (*‘Chez/Nikolova’*) (ECLI:EU:C:2015:480), para. 91 (emphasis added).

Substitute ‘religion’ for ‘ethnic origin’ and the logic seems to apply with equal force. In the case of *Achbita* one would not even need to investigate too much since the reference to ‘religion’ and ‘conviction’ (the protected categories) is explicit in the formulation of the Company’s policy.

Does it make a difference that ‘all’ religions and beliefs are targeted? I am not sure. The ECtHR referred to ‘an individual who has made religion [or some conviction] a central tenet of his or her life’. There are many who might not fall into this category and hence would not be affected in the same way by the policy. In my view, then, the very targeting of two protected categories in the definition of neutrality makes the policy in this respect direct discrimination. The disparate impact it produces among religions remains indirect discrimination.

There might be reasons which would justify direct discrimination. Here is an example. If a synagogue is hiring a Rabbi, or a church a priest, they would obviously insist that he or she be Jewish in the first case or Christian in the second. And perhaps this could be justified. But we would not call such use of the metric of religion ‘indirect discrimination’. We would say it is direct discrimination but perhaps justified.

Even if the church or synagogue characterized their recruitment policy as ‘suitability’, and then defined the metric as not being any religion other than Jewish or Christian, we would not re-characterize the recruiting criteria as ‘indirect discrimination’. But is that not what is happening in the *Achbita* case? They want to exclude manifestation of religion and other ‘convictions’. So they specifically use religion and ‘conviction’ as the metric for exclusion and simply call it ‘neutrality’. Does this make the discriminatory effect less direct – whether justified or not?

Imagine the following hypothetical conversation between lawyer and client.

Client: I really don’t like all those religious guys with their crosses and yarmulkes and hijabs serving my clients. Can I just prohibit that?

Lawyer: No, that would be direct discrimination specifically prohibited by the EU law.

Client: So?

Lawyer: I’ll tell you what. Let’s add philosophical conviction too, which incidentally is also prohibited and call it a ‘policy of neutrality’. At worst it will be defined as ‘indirect discrimination’, for which the tests are weaker; at best, since neutrality is legitimate purpose, all you might need is to prove you have no back office jobs available. And thus you can get rid of them altogether.

Since there seems to be such widespread consensus that what is happening in the case is indirect discrimination, I offer the above analysis with lesser ‘conviction’.

## 6 From Chaya to Samira

I do not think, as indicated above, that the mores of any religion, not least Islam, should be shielded from criticism (and there can be plenty), nor that practices which are odious to our fundamental values need be accepted simply because they are rooted in religious faith. And we may legitimately expect from those who come to join us, in the phraseology of the defunct Constitution, ‘... along the path of civilisation, progress

and prosperity, for the good of all ..., including the weakest and most deprived; [and] to remain a continent open to culture, learning and social progress...’, that they embrace our dreams and values. But an essential component of those very values is our firm belief in pluralism, and our commitment to tolerance and religious liberty. Our liberal states should not behave like the confessional state of yore, and joining us should not require abandoning one’s faith and religion or, without grave reasons, forcing one to violate such. Just as our commitment to freedom of expression is put to the test when the speech in question offends us, so our commitment to tolerance, pluralism and religious liberty is put to the test when challenged. Whatever you may think of, say, Islam, particularly odious is to paint an individual with a brush dripping with group hatred.

I hope no one is so uncharitable as to think that I switched from Samira the Muslim to Chaya the Jewess because of a concern of mine for my fellow Jews. For reasons which are well known, the Jewish population in Europe is, historically speaking, very small, and among them the number of Orthodox observant Jews such as Chaya is miniscule.<sup>15</sup> (If your impression is that they are numerous you may wish to check the prejudice scales in your bathroom.)

For the same well-known reasons I do not think that one would ever see in any respectable public space a poster such as this.



By contrast, representations such as the following photograph and much worse were and are to be found prominently in many European countries during recent times, put forward not by fringe groups but by what have become mainstream parties with representation in our parliaments.

<sup>15</sup> This is not to say that I am not concerned with the distinct and very worrying rise of anti-Semitism in Europe. It takes two forms: the abhorrent social kind which, for example, was the subject of a fierce debate within the British Labour Party (and for an understanding of which Anthony Julius’ *Trials of the Diaspora* is most illuminating) and the murderous type, also on a deadly increase, which, yes, in recent years has been perpetrated almost exclusively by radical Islamists. But we know better than to fall into the syllogistic trap of, for example, during the IRA campaign in the British Isles, All Terrorists are Irish, All Irish are Terrorists. Or, Some Jews Killed Jesus, All Jews are Christ Killers.



I see little difference between the two.

The policy of the company in our case feeds this. These posters, the intolerance and even generalized hatred they represent, follow the syllogistic slide which defines religious and racial prejudice and bigotry. Law apart, we have here a betrayal of common decency and humanity. The threshold for justification of such policies should be high. Sadly, in *Achbita* there seemed to be hardly any threshold at all.

I find it hard to understand how the hands of whoever drafted and signed the judgment in *Achbita* did not tremble when writing these words:

An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is ..., in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers. Or that the Company, should endeavor '...to offer her a post not involving any visual contact with ... customers' (emphasis added).

Yes, in theory it is about everyone. In practice it is about the Achbitas of our European world. You are, we tell them, ok, provided you keep out of sight, conceal your identity and your religion and do not come into contact with us.

In my view, this decision, apart from serious legal errors and impoverished reasoning, does not reflect what Europe stands for.

Samira Achbita, you are my sister.

(For A.I.)

## The Trump Jerusalem Declaration and the Rule of Unintended Consequences

I need not add any comment on the political dimension of the Trump Declaration. But legally speaking it may perhaps be cited as a striking example of the rule of unintended consequences.

Two principal issues underlie the question of Jerusalem in international law: its status as the capital of Israel and the status of the 50-year-old Israeli annexation of East Jerusalem.

We are all aware that in the structurally still 'primitive' or crude nature of central aspects of international legal process, the passage of time plays an important role whether it concerns norm-setting or determination of legal status. Situations of illegality slowly, sometimes imperceptibly, are cured as the years go by. This may be through shifts in *opinio juris* in the formation and crystallization but also in the reformation of customary law. And the same is true where recognition is the critical factor in the determination of legal status. The pattern of recognition, politically less embarrassing, is often manifested not through positive declarations but through tacit acceptance and failure to protest.

Indeed, in reaction to acts (or lack thereof) rather than in the act itself, we often seek to find the key to our legal determinations. Examples abound. To give but one, consider the change as regards the legality of declaring an exclusive economic zone in littoral sea space. Indeed, the acceptance, now firmly and indisputably established, of the Armistice boundary between Israel and Jordan including West Jerusalem, as the internationally recognized border of Israel was the result of the processes I am describing.

Jerusalem, in practice, was the capital of Israel since its foundation and entry into the UN. And various declarations notwithstanding, in the practice of many states it was treated as such including the establishment or placement of numerous embassies in West Jerusalem. The flight of embassies to Tel Aviv was a result of, and explicitly in protest to, the post 1967 annexation of East Jerusalem. But even after that, diplomatic practice, *de facto*, accepted the capital status of Jerusalem in usages such as state visits, accepting the credentials of Ambassadors by the President of Israel and endless other signs. Underscoring the distinction between the issue of the status of Jerusalem as capital and the status of the annexation of East Jerusalem, was, in the same diplomatic practice, the rather rigorous abstention of many states from participating in events or, to the best of their ability, acknowledging in other practices, the sovereignty claim of Israel over East Jerusalem. Famously, in the Hyatt Hotel (now under different ownership) which was built on the dividing line between East and West, functions and booking of rooms in the west wing was 'Kosher' for many foreign diplomats but not in the east wing. The emerging legal result was, as a result of this differentiated practice of 'recognition' and 'non-recognition', a colourable claim that the status of (West) Jerusalem as capital was being consolidated over time, in contradistinction to the status of the annexation.

All this has been upended by the Trump Tweetrine. (Yes, I know that on this occasion there was, actually, a formal Declaration, though I find it hard to dignify almost anything he does or says with the gravitas associated with the word 'doctrine'). The reaction of states, almost wall to wall, has been such as to reduce almost to tatters, any probative legal effect that one might have given to the aforementioned diplomatic practice, as distinct from the formal official position on the status of Jerusalem as capital that until recently was in most cases collecting dust and seemed to be destined to quiet oblivion.

As to the second issue, even some of the few states which hurried to align themselves with Trump (like the Czech Republic) were careful to emphasize that it was *West* Jerusalem to which their embassy would be moving. On this issue, too, the legal result of the Declaration has been the opposite of what might have been intended or hoped for by some.

## 10 Good Reads

It is the time of the year once more when I publish my pick from some of the books that came my way since my last 'Good Reads' listing. These are not book reviews in the classical and rigorous sense of the word, for which you should turn to our Book Review section. I do not attempt to analyse or critique, but rather to explain why the books appealed to me and why I think you, too, may find them well worth reading. They are listed in no particular order, except for the first one which is definitely my choice for the year.

### **Robert Caro, *The Years of Lyndon Johnson, 4 Volumes* (Alfred A. Knopf, 1982–2012)**

I have a certain passion for political biography and like to think of myself as something of a connoisseur. Why it has taken me so long to finally sit down and read this much acclaimed treatment of Johnson might be because of its daunting length. A fifth and final volume covering his post-elections years in the Vietnam White House is eagerly awaited and apparently imminent. I am not going to prevaricate with the 'one of the most' formula. This is undoubtedly the finest of this genre that I have ever read. For those who might wonder why they should spend precious reading time on Johnson I would like to say that the "years" in the title are not just his years but a political and social history of the USA over half a century. Not many would be willing to set aside time to plough through all four volumes, though they amply repay the effort. But I most strongly recommend, as a second best, to read just Volume 4 (*The Passage of Power*). It essentially covers the period from Kennedy's assassination to Johnson's first year in office. It becomes a microcosm of the Johnson phenomenon. On the one hand, he was undoubtedly, and this is meticulously documented, entirely ruthless and politically (and in some measure financially) corrupt from his early days as a student through his days in Congress until his accidental ascent to the presidency. From those early days one gets the impression of a person interested in power (and winning, winning, winning) for almost its own sake. He understood the power of procedural command from his early elections in college politics until his commanding mastery as Majority Leader in the Senate. And the lessons we as readers learn about congressional politics remain illuminating, even essential, 60 years later, in understanding the tortured relations of, say, Obama and Trump with Congress. I would say an indispensable lesson. You don't know what you don't know until you have read such. And, of course, in our minds there is always the Johnson of 'Hey hey LBJ, how many kids did you kill today'.

Now comes the 'On the other hand' which makes both the personality of Johnson so intriguingly complex and our judgment of him so difficult. He grew up in abject poverty – no exaggeration. He pined for the ham sandwich at school but could only afford the cheese one. He and his family literally scratched a living out of the barren soil on which they lived. Like Clinton decades later, he grew up with and alongside a black and Hispanic population in the most natural way. The result was, his greed for power and avarice notwithstanding, a person with a huge and genuine commitment to social justice and, miracle of miracles for a son of Texas, bereft of that visceral racism, not mere disdain for but real disgust towards blacks, which was so present in the South (and not only the South) of that era and indeed has not been fully eradicated today. In his deep feeling for the poor, he made no distinction between black and white.

The result was that in his first months in office as the Accidental President, combining his commitment to social justice and a lifelong honing of his political prowess, he

managed to achieve infinitely more than Kennedy, fluent and charming, had managed to achieve in three years as President. Infinite is the right word since Kennedy achieved close to nothing. And he did so whilst risking his chances in the elections to come in November of 1964. The passing of the Civil Rights Act of 1964 – and he deserves the lion's share of the credit – was epochal. And though he dropped what at the time seemed the centrepiece of civil rights, namely voting rights, true to his word to Martin Luther King, he passed that in his first year as elected President. His overarching Great Society legislation, the war on poverty and all that, though imperfect and still work in progress, changed America forever. In his domestic agenda he stands, in my view, equal to Roosevelt and, a matter of personal taste, more likable. It will be hugely interesting to see what Caro makes of Johnson's Vietnam years in the pending final volume, though the impression given from his actions in his first year was that he was 'out of it', having neither an interest nor the experience to handle foreign affairs, and just ate out of the hands of those bright young mandarins he inherited from Kennedy, not least Robert McNamara. His sense of inferiority and mixture of disdain, fear and admiration for Bobby Kennedy are among the most riveting pages in the biography.

Caro manages what is rare in biography generally and political biography in particular, to demonstrate all along great empathy for his subject without confusing that with sympathy. He is sympathetic and antipathetic, praising and censorious in just the right measure.

I bought the four volumes in hard cover for a pittance on, quelle horreur, Amazon. This is not a good read – it is a compelling read.

### **Ludovic Hennebel, Hélène Tigroudja, *Traité de droit international Droits de l'homme* (Editions Pedone, 2016)**

No, I have not read all 1461 pages of this impressive work. It is, in mitigation, not the kind of book you read from cover to cover but one that you consult. And consult it I did, extensively, with great reward. It covers, take a deep breath: universal protection, regional protection, theories, foundations, interpretation, application, responsibility and remedies. It is a combination of both a Law Book and a book about the Law. Impressively researched, exhaustively referenced both to primary and secondary sources, surprisingly fluid to read, it gives in each of its sections the what, the why and the how of its topic. Here, too: not exactly a 'good read', but good to read.

### **Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press, 2015)**

There are IL books that one reads (or should read) not because they advance our own research agenda – to be processed into learned footnotes – but simply as a means of enhancing our general scholarly literacy, the way I know you all read EJIL or I.CON from cover to cover. Approach Mälksoo with this spirit and you will not be disappointed.

This is purely and simply a good read. It weighs in at just under 200 pages, and you can read it for pleasure in two or three sittings. You will learn an awful lot as well as become wiser – a good test for fine scholarship. The approach of Mälksoo is to explain the current Russian approach by an exploration of the preceding history or histories. I came to the book with a scant knowledge – what I had learnt from Nino Cassese's illuminating *International Law in a Divided World* – which, for all its worth, did not

purport to be Russia specific in its exposition of the Second World. Where one may have expected a story of ruptures and revolution one discovers some surprising continuities. Particularly insightful are the sections dealing with the relationship of international law to the domestic legal order, and I do not mean just in the technical sense of the issue.

**Aldo Schiavone, *Ponzio Pilato: Un enigma tra storia e memoria* (Einaudi, 2016); *Pontius Pilate: Deciphering a Memory* (transl. Jeremy Carden, Liveright, 2017)**

I have always been dismissive of the huge literature on the Trial of Jesus before Pontius Pilate. We have scant external sources on the Trial so that our main reference are the Gospel accounts according to which Pilate was but the executive arm of the Sanhedrin before whom the principal, perhaps only, trial took place. Why so much writing then on the Trial before Pilate? It is, I reasoned, a classical so-called Streetlight Effect: the proverbial looking under the streetlight rather than where the key actually dropped out of your pocket. Since most scholars were familiar with Roman Law rather than Jewish Law they wrote about that which they knew.

I have never read anything by Schiavone that was not both original and profound. This book does not disappoint. He does not fall into the Streetlight error. The appearance of Jesus before Pilate is central but not forced into a legal straitjacket. What's more, the book – elegant and brief – explores the personality and the circumstances of his governorship as well as reconstructing the Passion and the events leading to the crucifixion. There is a tension between the Pilate we know from history and his figure in the Gospel narrative. Schiavone navigates that perfectly. If it's a long time since you addressed your mind to those events which reshaped history and what we call today The West, and not long ago, Christendom, you could do better than read this book. More of an Easter read than a Christmas one, but a good read at any time.

**Eduardo García de Enterría, *Fervor de Borges* (Editorial Trotta, 1999)**

García de Enterría was, until his death in 2013 at the age of 90, a figure larger than life in Spanish public law and in law generally. He served as the Spanish judge for several years on the European Court of Human Rights and his list of accolades extends from here till further notice. It is in this capacity that I knew him and even had the privilege to work alongside him on the Committee of Jurists of the European Parliament for several years.

Imagine my surprise when I discovered, just recently, a little book he wrote on Borges the poet. The title of the book is a play on Borges' own book of poems *Fervor de Buenos Aires*. Despite having read more than once all of Borges' short stories translated into English – and it seems that all have been translated – I was simply unaware of Borges as a poet, though his volume of poetry, I have now discovered, exceeds considerably his fictions. There are, obviously, some translations, but as an excuse for my ignorance, far less known. When you finally approach Borges the poet you will discover another reason for the relative anonymity of his poetry outside the Spanish speaking world compared to his short stories. The poetry is difficult – uneven,



something it is hard to say about his stories – and not immediately accessible outside the cultural context in which they are situated. In my view this must be true for some of his poems even for those within that culture. And this is the great virtue of García de Enterría's little book: it helps enormously in learning to understand, appreciate and be moved by the poetry. García de Enterría is categorical in his tastes and judgments – but these are fine and sensitive. He works his way (and yours) through a handful of poems and, like a good curator of a museum or art critic, pours light so that you can see the light.

**Guy Fiti Sinclair, *To Reform the World – International Organizations and the Making of Modern States* (Oxford University Press, 2017)**

Full disclosure – I already read an earlier version of this book when presented as a doctoral dissertation, though I was not a member of the examining board, and, as you will all know, Guy Sinclair is the Associate Editor of EJIL. Since these are not book reviews, but my personal recommendations, and since I found this a particular rewarding read, I did not think I should refrain from offering this recommendation.

This is another example of a Law Book that is also a book about the Law, which in recent years has happily become the Gold Standard of doctoral dissertations. You will get chapter and verse on the manner in which International Organizations manage their competences and manage to expand such at times with creative hermeneutics. But the book goes well beyond that. Sinclair advances a veritable thesis: that in some ways IOs have been captured by a Eurocentric liberal (and to some extent capitalist) world view (this is my rendition of the thesis) and nobly (or perhaps otherwise) are not simply in the business of world peace, international cooperation, motherhood and apple pie, but also in the business of exerting influence, even shaping the ethos and telos, structure and function of modern states, the cooperation among which is their more traditionally perceived function, or in more recent times, their 'governance' function.

There is a very fine-grained and rich analysis of the way legal structure and political process of IOs combine to produce the effect claimed. And the book is elegant and readable, you can actually enjoy the reading.

**Matthew Saul, Andreas Follesdal, Geir Ulfstein, (Eds.) *The International Human Rights Judiciary and National Parliaments* (Cambridge University Press, 2017)**

I am usually rather sceptical about edited books for reasons I explained in a previous Editorial. The topic of this volume intrigued me since there is rather a dearth of research and writing on the role of parliaments in the human rights universe, a discipline dominated by court-gazing and hermeneutics. When there are interactive studies they tend to be about judicial interaction, international and national, or, in recent times the rich (oh, so rich one gets indigestion) on judicial borrowings and the like. I was put off by the Introduction by the three editors, which was the usual fare for an edited book: some slight prefatory words on the project and a roadmap of the various chapters, which, I have often suspected, is there for lazy book reviewers. I am glad I read on since the

actual chapters, including, even especially, those by the three editors are excellent, and what I found lacking in the Introduction was to be found in the concluding chapter by Matthew Saul – an analytical framework, a critical vision and a normativity in just the right proportions. The book is still, as it proclaims, court-centric, but focuses on the interaction of courts, notably European but also the Inter-American, with parliaments as institutions rather than parliaments as authors of violative or otherwise legislation which come before them. This is an edited volume which has managed to follow a rather tight scheme covering the various aspects of parliamentary involvement in human rights. Indeed, perhaps the biggest gain for me was that not having ever thought about this systematically, I learnt not only about the interaction but about how to think about the role of parliaments in ways that were new. Appropriately, all chapters fully internalized the need to situate the law in political theory of democracy and human rights. Social scientists might complain about a certain lack of quantitative empirical analysis – but let them, then, pull their sleeves up and fill the gap. An important, useful and, otherwise it would not be here, a good read too.

**Bernard E. Harcourt, *Exposed – Desire and Disobedience in the Digital Age* (Harvard University Press, 2015)**

The topic is not new; indeed, we are inundated by cries of woe about the power of the digital corporate dinosaurs, the invasion of our privacy, and the use made by them of the data mined by our internet-dominated lives. The value of this book, which Benedict Kingsbury and I used in our Seminar on International Law and Google as one of the key texts, is the trenchant, if passionate (not altogether unjustified, though at a certain point perhaps somewhat excessive and even grating) manner in which Harcourt walks us through this labyrinth and explains and demonstrates its profound implications for polity, our sociality and the human condition itself.

What I found most appealing in the book was the way the author eschews an easy narrative of villainous (American) corporations and government agencies which are either asleep or captured with us, you and I, being the victims of such. He puts a mirror before us and shows how we are at times willing accomplices in the culture of exhibitionism and self-exposure which is a hallmark of the age. Yes, at times our options are foreclosed, but this is oftentimes but a fig leaf, a weak alibi for our own exhibitionist and voyeuristic appetites.

I am not sure if Harcourt's strategies of 'disobedience' can amount to more than gestures. But even if trapped, he will not let us off the hook as being ultimately, in the democracies in which we live, responsible also for the very structures in which we are trapped.

A bracing read – but still very good.

**María Elvira Roca Barea, *Imperiofobia y Leyenda Negra – Roma, Rusia, Estados Unidos y el Imperio español* (Siruela, 2016)**

I am not sure if a 'good read' is appropriate in this case. And I am confident that once translated into English it will provoke a storm. The book cover lists the author as having worked for the Spanish Consejo Superior de Investigaciones Científicas and as having taught at Harvard. It is revisionist history of the Spanish Empire framed within

a more general theory and phenomenology about the way empires, according to the author, provoke *Leyendas Negras* which could be rendered as ‘dark, malicious legends’. It has been a runaway best seller in Spain, subject to praise and harsh criticism (see for example in the XX Siglos blog the critique by Estaban Mira Caballos, 13 Sept. 2017). Roca Barea does not hold her punches. The Protestant European ‘North’ is one villain of the piece, Noam Chomsky another in her (in my view often insightful and in some respects original) discussion of Anti-americanism and there is more. With some shades of the Jamestown affair in our sister *Journal of the History of International Law*, Roca Barea invites us to reconsider downwards (not to whitewash) the scope and scale of Spanish atrocities in their conquest and rule over much of Central and South America and similarly of, say, the Inquisition in Spain – the conventional history characterized by her as Hispanophobia driven by, inter alia, Lutheran nationalism. She is at her best, I believe, not so much in the history and historiography of the Spanish Empire itself – about which one can cavil – as in her parsing of the texts and attitudes over the centuries, attacking such which, as she demonstrates persuasively, are marred, in an almost macabre twist of a twist, by distinct racist elements (the Spaniards as a degenerate race) whose moral fibre was corrupted – in a twist on a twist on a twist – by, surprise, surprise, Jewish influence. To my knowledge she is the first to subject such to critical analysis and in my view these parts of the book cannot be dismissed. It is the kind of book the intrinsic value of which will only be clear once it is subjected to the slow process of serious historical and historiographical analysis. This will not be easy, given the inevitable contemporary political mills for which the book has already become grist. I suppose that for many beauty or ugliness will be in the eye of the beholder rather than in the book itself. It is not exactly a ‘good read’ but, despite a certain polemical style, it is one that cannot tout court be dismissed as diatribe. Caveat Lector!

**Claudio Rodríguez, *Alianza y Condena* (Ediciones de la Revista de Occidente, 1965); *Alliance and Condemnation* (transl. Philip W. Silver, Swan Isle Press, 2014)**

Should Roca Barea leave a mixed taste in your mouth, Rodríguez would be the perfect dessert to wash it away. Although he won the Prince of Asturias Prize for Letters in 1993 (six years before his untimely death from cancer at age 65) Claudio Rodríguez is relatively unknown outside literary circles, even in his home country of Spain. I discovered him just this last year and am still under the spell. His poetry is personal and exquisite – in form, tonality and delicacy of emotion, though extremely powerful, even shocking at times.

*Alianza y Condena* (Alliance and Condemnation) is a good place to start since it exists, too, in a particularly felicitous bilingual edition translated by Philip W. Silver, Emeritus Professor of Spanish Literature at Columbia. Here are a couple of excerpts to whet your appetite:

*Adiós  
Cualquier cosa valdría por mi vida  
esta tarde. Cualquier cosa pequeña  
si alguna hay. Martirio me es el ruido  
sereno, sin excrípulos, sin vuelta,*

*de tu zapato bajo. ¿Qué victoria  
busca el que ama?*

....

*Goodbye  
I'D take anything for my life  
This afternoon. Any small token  
If there is one. It's martyrdom,  
the calm, determined, unforgiving sound of your steps.  
What victory do lovers seek?*

....

*Mala Puesta  
LA luz entusiasmada de conquista  
Pierde confianza ahora,  
Trémula de impotencia y no se sabe  
Si es de tierra o de cielo. Se Despoja  
De su íntima ternura  
Y se retira lenta.*

....

*Faded Sunset  
THE light, excited by conquest,  
Loses confidence now,  
Trembling with impotence. And we wonder  
If it belongs to the earth or sky. It shrugs  
Off its intimate tenderness  
And slowly withdraws.*

....

Enjoy and be edified!

## ***A propos* Book Reviewing**

I am sure that many of our readers have their own views on their preferred international legal journal. But it is hard for me to believe that there will be many who do not assign pride of place to *EJIL*'s Book Review section under the editorship and curatorship of Isabel Feichtner. In the selection of books for review, in the rigour imposed on reviewers, in the exploration of different forms for featuring books she has made *EJIL* second to none. Isabel Feichtner is stepping down as Book Review Editor, though happily she will remain a member of the Board of Editors. She deserves our deep gratitude. Christian Tams has generously agreed to take over from her. We wish him every success.

## ***EJIL* Roll of Honour**

*EJIL* relies on the good will of colleagues in the international law community who generously devote their time and energy to act as peer reviewers for the large number of submissions we receive. Without their efforts our Journal would not be able to maintain the excellent standards to which we strive. A lion's share of the burden is borne by members of our Boards, but we also turn to many colleagues in the broader

community. We thank the following colleagues for their contribution to *EJIL*'s peer review process in 2017:

Ademola Abass, Maartje Abbenhuis, Tawhida Ahmed, Amanda Alexander, Karen Alter, Milagros Alvarez-Verdugo, Dia Anagnostou, Antony Anghie, Kenneth Armstrong, Helmut Aust, Ilias Bantekas, Michael Barnett, Arnulf Becker Lorca, Richard Bellamy, Eyal Benvenisti, Stephen Bouwhuis, Eric Brabandere, Damian Chalmers, David Chandler, Simon Chesterman, Sungjoon Cho, Ben Coates, Matthew Craven, Michael Crawford, Luigi Crema, Kristina Daugirdas, Gráinne de Búrca, Phillip Dehne, Rosalind Dixon, Christian Djeflal, Alison Duxbury, Franco Ferrari, Francesco Francioni, Micaela Frulli, Paola Gaeta, Mónica García-Salmones Rovira, Leena Grover, Jonathan Gumz, Monica Hakimi, Gerd Hankel, Gina Heathcote, Laurence Helfer, Kevin Heller, Caroline Henckels, Gleider Hernández, Loveday Hodson, Bernard Hoekman, Douglas Howland, Isabel Hull, Stephen Humphreys, Ian Hurd, Fleur Johns, Leslie Johns, Ian Johnstone, Heather Jones, Daniel Joyce, Daniel Joyner, Helen Keller, Alexandra Kemmerer, William Keylor, Thomas Kleinlein, Martti Koskenniemi, Sari Kouvo, James Kraska, Samuel Kruizinga, Shashank Kumar, Malcolm Langford, Randall Lesaffer, Mark Lewis, David Luban, Mikael Madsen, Debora Malito, Lauri Mälksoo, Nora Markard, Tanja Masson-Zwaan, Petros Mavroidis, Lorna McGregor, David McGrogan, Campbell McLachlan, Frédéric Mégret, Liam Murphy, Stephen Neff, Vasuki Nesiah, Luigi Nuzzo, Therese O'Donnell, Henrik Olsen, Alexander Orakhelashvili, Sundhya Pahuja, Martins Paparinskis, Andreas Paulus, Joost Pauwelyn, Clint Peinhardt, Victor Peskin, Niels Petersen, Yannick Radi, Surabhi Ranganathan, Morten Rasmussen, Cecily Rose, Cedric Ryngaert, William Schabas, Sibylle Scheipers, Stephen Schill, Thomas Schultz, Christine Schwöbel, Joanne Scott, Gerry Simpson, Sandesh Sivakumaran, Peter Stirk, Oisín Suttle, Katie Sykes, Anastasia Telesetsky, Christopher Vajda, Isabel Van Damme, Antoine Vauchez, Milos Vec, Ingo Venzke, Ana Filipa Vrdoljak, Robert Wai, Andrew Webster, Ramses Wessel, Jason Yackee, Margaret Young, Aldo Zammit Borda

## In This Issue

This issue presents a cornucopia of insights and perspectives on international law. It opens with a pair of articles that reflect *EJIL*'s long commitment to explore diverse theoretical and methodological approaches. First, *Catherine O'Rourke* combines theoretical engagement with an empirical, sociological methodology to offer a unique perspective on the engagement of feminist activists with international law. We invite readers to take a look at our *EJIL*: Live! interview with the author. Second, *Anthony Reeves* proposes an alternative approach to substantiating the right to punish, focusing on the capacity to respond to the reasons for punishment and analysing universal jurisdiction to show the improvements the alternative model makes.

The next set of articles focus on questions of responsibility. *Luke Glanville* examines the duty to protect human rights beyond sovereign borders, exploring the thinking of a series of Western natural law theorists both to expose the source of this duty in international law and to retrieve forgotten ideas that might be reconsidered. *Sandesh Sivakumaran* traces the 'piecemeal' emergence of an international law of disaster relief and analyses the general techniques by which this body of law is developing. Lastly, *Jan Klabbers* investigates whether international organizations can be held responsible

under international law for a failure to act, introducing a conception of ‘role responsibility’ to address this thorny issue. We think it is a particularly valuable contribution on a trendy topic the literature on which is often characterized by a lot of hot air.

A selection of articles from the Fifth Annual Junior Faculty Forum for International Law exposes the innovative thinking of a new generation of scholars. *Neha Jain* considers the role of ‘radical’ dissents in shaping the discourse of international criminal law in the context of mass atrocities. *Lawrence Hill-Cawthorne* explores the nature of state and individual rights under international humanitarian law, and their relationship to a more general identity crisis in that body of law. *Cheah W.L.* examines the rule of law dynamics in war crimes trials pertaining to the desertion of British Indian Army soldiers conducted by British colonial authorities in postwar Singapore.

This issue’s *Roaming Charges* takes us to Bogotá where the solemnity of Ash Wednesday provides a moment of dignity.

We are pleased to present in this issue an Afterword to the Foreword written by Laurence Boisson de Chazournes, which featured in the first issue of this volume. *Yuval Shany* mostly agrees with Boisson de Chazournes’s account of an evolving ‘managerial approach’; however, he is less convinced that international courts are truly committed to such an approach or that such an approach is likely to succeed in future without more far-reaching reforms. *Thomas Streinz* suggests that greater attention could be given to who wins and who loses as a result of coordination among international courts and tribunals, as a way into exploring what motivates those efforts and how various actors contribute to them. *Veronika Bilkova* focuses on the normative dimension of the phenomenon Boisson de Chazournes describes, giving greater emphasis to the threats that managerialism can pose. *Sergio Puig* likewise strikes a note of caution that the evolution of procedures adopted by international courts and tribunals might result in suboptimal outcomes. *Laurence Boisson de Chazournes* offers a rejoinder to her critics.

Following the Afterword, we feature another Debate centring on an article by *Yahli Shereshevsky* and *Tom Noah*, who adopt an innovative experimental approach to assess the possible effects that exposure to preparatory work has on the interpretation of treaties. This is only the second time we publish an article in EJIL utilizing the methodology of ‘experimental law’ and appropriately it comes from the hands of two young emerging scholars. We encourage you to take a peek at the EJIL: Live! interview with one of its authors, Yahli Shereshevsky. Given the interest that is bound to be generated by this article, we have decided to present a long Reply by *Jeffrey L. Dunoff* and *Mark A. Pollack*, who reflect at length on the ‘experimental turn’ in the study of international law more broadly.

The issue closes with a Critical Review of International Governance by *Rebecca Schmidt*, who examines regulatory cooperation between public and private actors at the global level, grounding her analysis in the cooperation between the Olympic Movement and the United Nations Environmental Programme.

For the *Last Page*, the dust, heat, and sweat are almost palpable in *Gregory Shaffer’s* extraordinarily vivid poem of life and politics in Kathmandu.

JHHW