

Cases before International Courts and Tribunals concerning Questions of Public International Law Involving Australia 2020

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I INTRODUCTION

In the year 2020, Australia’s engagement with international law was oriented around several key areas. The first was international criminal law which, as noted in our companion article, was also a key theme in domestic proceedings in 2020. In relation to the International Criminal Court (‘ICC’), Australia submitted amicus curiae observations relating to the Court’s jurisdiction over Palestine. In addition, the ICC Office of the Prosecutor published its decision not to further investigate alleged crimes against humanity committed by Australian officials against asylum seekers and refugees in offshore detention centres.

Australia also closely watched the proceedings in the International Court of Justice (‘ICJ’) regarding Myanmar’s alleged breaches of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (‘*Genocide Convention*’). The case was initiated by The Gambia, and thus far, the Republic of Maldives, Kingdom of the Netherlands, and Canada have expressed their intent to intervene in the case.² Although Australia is not a party or intervener in this matter, the judgment has bearing on Australia’s obligations because it affirmed that a breach of an obligation *erga omnes partes* in the *Genocide Convention* entitles all States parties — including Australia — to seize the Court concerning such a breach.³ We briefly discuss the ICJ’s 2020 judgment in this matter, given the gravity of the allegations and the legal implantations for Australia, as a State party to the *Genocide Convention*.

Australia also had an active year in the sphere of international trade disputes, with several matters in the World Trade Organization (‘WTO’). These include a dispute with Honduras regarding plain packaging on tobacco products, a dispute with India regarding sugar and sugarcane, and a dispute with Indonesia

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² See Priya Pillai, ‘Canada and The Netherlands: New Intervention in The Gambia v Myanmar at the International Court of Justice’, *Opinio Juris* (Media Post, 3 September 2020) <<http://opiniojuris.org/2020/09/03/canada-and-the-netherlands-new-intervention-in-the-gambia-v-myanmar-at-the-international-court-of-justice/>>.

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Provisional Measures)* [2020] ICJ Rep 3, 16–17 [39]–[41] (‘*Gambia v Myanmar*’).

concerning A4 paper products. There is one important case decided in 2020 that we have been unable to summarise — *Tantalum International Ltd and Emerge Gaming Ltd v Arab Republic of Egypt*.⁴ Although a decision on jurisdiction was made on 8 October 2020, apparently in favour of the Australian national claimants, the decision has not been made publicly available.

The final theme that we discuss is international human rights law, with a particular focus on the rights of persons with disabilities. This theme is central to the United States of America’s (‘US’) request for extradition of Julian Assange, an Australian citizen, which was decided by the Westminster Magistrates Court in the United Kingdom (‘UK’) on 4 January 2021. We also discuss some decisions by the UN Committee on the Rights of Persons with a Disability (‘CRPD Committee’ or ‘Committee’). The matters brought using the individual complaints mechanism provided for within optional protocols to various international human rights treaties contribute to jurisprudence on questions of international law. Because of the COVID-19 shut-downs, the number of international cases decided in 2020 was greatly reduced. In these circumstances, we decided to include certain decisions by the CRPD Committee because it includes an Australian panel member. At least one of the cases — *Loma v Spain*⁵ — provides a contrast to *Connor v State of Queensland (Department of Education and Training) (No 3)*,⁶ discussed in our companion article in this same issue of the *Australian Yearbook of International Law*.

⁴ (*Jurisdiction*) (ICSID Arbitral Tribunal, Case No ARB/18/22, 8 October 2020).

⁵ Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 41/2017*, 23rd sess, UN Doc. CRPD/C/23/D/41/2017 (30 September 2020) (‘*Loma v Spain*’). See Part IV(B) of this article.

⁶ *Connor v State of Queensland (Department of Education and Training) (No 3)* [2020] FCA 455.

II GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

A ICC Prosecutor’s Decision Regarding Australia and Offshore Processing Centres

International Criminal Court (ICC)

Office of the Prosecutor

INTERNATIONAL CRIMINAL LAW — INTERNATIONAL CRIMINAL COURT — preliminary examination — crimes against humanity — meaning of ‘attack’ — imprisonment — deportation — Australia’s offshore processing centres — asylum seekers and refugees

1 Background

A ‘preliminary examination’ is an initial enquiry conducted by the ICC Office of the Prosecutor (‘OTP’) in order to determine whether the statutory criteria for opening a full-scale investigation have been satisfied.⁷ In its *Report on Preliminary Examination Activities 2020*, the OTP considered whether to open a ‘preliminary examination’ into Australia’s system of offshore asylum processing.⁸ The *Report* explained that, between 2016 and 2017, the OTP received communications alleging that Australian government authorities had committed crimes against humanity against asylum seekers and refugees who arrived by boat, and were then detained in offshore processing centres in Nauru and Manus Island (Papua New Guinea).

In response to these communications, the OTP considered whether authorities of the Australian, Naurun and Papua New Guinean governments, and/or private actors, had commission of crimes against humanity under Article 7 of the *Rome Statute of the International Criminal Court* (‘*Rome Statute*’)⁹ against migrants or asylum seekers detained in these centres. The specific crimes against humanity examined were: ‘imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law’;¹⁰ ‘deportation’;¹¹ ‘persecution’;¹² ‘torture’;¹³ and ‘other inhumane acts’.¹⁴

2 Decision

The OTP concluded that it appeared that some asylum seekers and refugees had been subjected to ‘imprisonment or other severe deprivations of physical liberty’ under Article 7(1)(e) of the Rome

⁷ Rosemary Grey and Sara Wharton, ‘Lifting the Curtain: Opening a Preliminary Examination at the International Criminal Court’ (2018) 16(3) *Journal of International Criminal Justice* 593.

⁸ The Office of the Prosecutor of the International Criminal Court, *Report on Preliminary Examination Activities 2020* (14 December 2020) 13–16 <<https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>> (‘OTP Preliminary Examination Report’).

⁹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (‘*Rome Statute*’).

¹⁰ *Ibid* art 7(1)(e).

¹¹ *Ibid* art 7(1)(d).

¹² *Ibid* art 7(1)(h).

¹³ *Ibid* art 7(1)(f).

¹⁴ *Ibid* art 7(1)(k).

Statute.¹⁵ This conclusion was based on information indicating that:

[M]igrants and asylum seekers living on Nauru and Manus Island were detained on average for upwards of one year in unhygienic, overcrowded tents or other primitive structures while suffering from heatstroke resulting from a lack of shelter from the sun and stifling heat. These conditions also reportedly caused other health problems — such as digestive, musculoskeletal, and skin conditions among others — which were apparently exacerbated by the limited access to adequate medical care. It appears that these conditions were further aggravated by sporadic acts of physical and sexual violence committed by staff at the facilities and members of the local population. The duration and conditions of detention caused migrants and asylum seekers — including children — severe mental suffering, including by experiencing anxiety and depression that led many to engage in acts of suicide, attempted suicide, and other forms of self-harm, without adequate mental health care provided to assist in alleviating their suffering.¹⁶

However, the OTP found that there was insufficient evidence to demonstrate that the above acts were pursuant to a widespread or systematic attack directed against any civilian population, as required for all crimes against humanity under the *Rome Statute*.¹⁷ Australia's intention to 'deter immigration' was insufficient to support such a finding.¹⁸

The OTP further concluded that there was insufficient information regarding other relevant crimes against humanity. In relation to the crime of 'deportation', the conduct examined was 'Australia's interdiction and transfer of migrants and asylum seekers arriving by boat to third countries'.¹⁹ The critical issue was whether the migrants and asylum seekers would be 'persons... lawfully present' in the area from which they were removed, which is a required element of this crime.²⁰ Having regard to 'domestic legislation, international refugee law, the law of the sea, and human rights and international law principles generally',²¹ the OTP could not identify a basis to establish this element.²² As to 'torture' and 'other inhumane acts', the OTP concluded that there was insufficient information to indicate either crime.²³ Nor did the crime of 'persecution' appear to be committed, because the information did not indicate that the acts were committed with an intent to discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law.²⁴

Therefore, the OTP did not open a preliminary examination because, based on the information available,

¹⁵ OTP Preliminary Examination Report (n 8) 14 [46].

¹⁶ Ibid.

¹⁷ Ibid 15 [53]–[54].

¹⁸ Ibid 15 [54].

¹⁹ Ibid 14 [49].

²⁰ *Rome Statute* (n 9) art 7(2)(d); see also International Criminal Court, Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.B, art 7(2)(d).

²¹ OTP Preliminary Examination Report (n 8) 14 [49].

²² Ibid 14–15 [49]–[50].

²³ Ibid 14 [48].

²⁴ Ibid. See also *Rome Statute* (n 9) art 7(1)(h).

the relevant conduct appeared to fall outside the ICC’s subject-matter jurisdiction.

B The ICC’s jurisdiction over Palestine: Australia’s amicus curiae submission

International Criminal Court, Pre-Trial Chamber I

Presiding Judge Perrin de Brichambaut, Judge Kovács and Judge Alapini-Gansou

INTERNATIONAL CRIMINAL LAW — INTERNATIONAL CRIMINAL COURT — territorial jurisdiction — Palestine — East Jerusalem — Gaza — West Bank

1 Background

On 16 March 2020, Australia provided its observations in the matter before the ICC concerning the *Situation in the State of Palestine* as amicus curiae. These observations were provided in response to the request of the ICC Prosecutor, pursuant to Article 19(3) of the *Rome Statute*, for ‘a ruling on the Court’s territorial jurisdiction in Palestine.’ The Pre-Trial Chamber I granted Australia leave to submit its observations regarding the ICC’s territorial jurisdiction in Palestine, specifically whether such ‘territory’ encompasses the West Bank, including East Jerusalem, and Gaza.

In its amicus curiae filing, Australia argued that the ICC lacks jurisdiction over the territory in question on the basis that the jurisdictional preconditions under Article 12 of the *Rome Statute* were not met. Australia noted that it does not consider itself to have a treaty relationship with the ‘State of Palestine’²⁵ as it does not recognise this entity as a State and thus its right to accede to the *Rome Statute*. However, Australia made clear its position that accession to the *Rome Statute* under Article 125(3) is distinct from a finding that the ‘State of Palestine’ constitutes a ‘State’ under Article 12(2)(a). On this basis, the Secretary General’s acceptance the accession to the *Rome Statute* by the ‘State of Palestine’ did not provide the basis for concluding Palestine’s statehood for the jurisdictional preconditions under Article 12.

This argument is centred upon Australia’s view that the accession process constitutes an ‘administrative act’; the nature of such function having been confirmed by the Secretary-General.²⁶ Australia also noted that the UN General Assembly Resolution 67/19 (2012), in granting the ‘State of Palestine’ ‘non-member observer State status in the United Nations’ and ‘expressing aspirations for a “viable State of Palestine”’, did not distinctly decide upon the issue of Palestine’s statehood status.²⁷

Moreover, Australia disputed the ICC Prosecutor’s position that the ICC may exercise its jurisdiction in light of recognition that ‘the question of Palestine’s Statehood under international law does not appear to have been definitively resolved.’²⁸ This was argued on the basis that ‘final status issues’ remain unresolved and the determination of the Court’s territorial jurisdiction would inevitably presuppose

²⁵ The term ‘State of Palestine’ appears in quotation marks in Australia’s amicus curiae filing.

²⁶ *Situation in the State of Palestine (Observations of Australia)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/18, 16 March 2020) 8–9 [20]–[21].

²⁷ *Ibid* 9 [21].

²⁸ *Ibid* 10 [26].

determination of its Statehood status and territorial boundaries.²⁹ It was noted that such a finding is also not in the interest of the parties as this could prejudice a final settlement between Israel and Palestine.

2 Decision

Pre-Trial Chamber I rejected Australia's arguments. On 5 February 2021, it decided, by majority, that the ICC's territorial jurisdiction in the Situation in Palestine, a State party to the ICC *Rome Statute*, extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.³⁰ Addressing Australia's position, the Chamber observed that:

[S]even States Parties submitted observations on the Prosecutor's Request as *amici curiae* thereby arguing that Palestine cannot be considered a State for the purposes of article 12(2)(a) of the *Statute*, namely the Czech Republic, Austria, Australia, Hungary, Germany, Brazil and Uganda. However, it should be noted that these States remained silent during the accession process and that none of them challenged Palestine's accession before the Assembly of State Parties at that time or later.³¹

C Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Provisional Measures) [2020] ICJ Rep 3

International Court of Justice

President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judges *ad hoc* Pillay, Kress; Registrar Gautier.

PUBLIC INTERNATIONAL LAW — GENOCIDE — State responsibility for genocide — provisional measures — Myanmar — Rohingya — Gambia — 'specially affected states' — obligations *erga omnes partes*

In November 2019, the Republic of the Gambia ('The Gambia') filed an application to institute proceedings against the Republic of the Union of Myanmar ('Myanmar') regarding alleged violations of the *Genocide Convention* in connection to Myanmar's treatment of the Rohingya group.³²

In its judgment of 23 January 2020, the Court granted The Gambia's request for provisional measures aimed, *inter alia*, at preventing Myanmar and its military from committing 'all acts that amount to or contribute to the crime of genocide ... against [any] member of the Rohingya group'.³³ A question of standing arose because the alleged acts of genocide were not committed in The Gambia, nor was it a 'specially affected State' (unlike Bangladesh, where many displaced Rohingya relocated).³⁴ The

²⁹ Ibid 10–11 [26], [28].

³⁰ *Situation in the State of Palestine (Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/18, 5 February 2021).

³¹ Ibid 45 [101].

³² *Gambia v Myanmar* (n 3) 4 [1]; *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 4 ('*Genocide Convention*').

³³ *Gambia v Myanmar* (n 3) 5 [5].

³⁴ Ibid 16 [39], 21 [54]; *Situation of human rights in Myanmar*, GA Res 73/264, UN Doc A/RES/73/264 (22 January 2019, adopted 22 December 2018) paras 1–2.

Gambia merely invoked the compromissory clause in the *Genocide Convention*, which provides that disputes relating to its ‘interpretation, application, or fulfillment’ are to be submitted to the International Court of Justice.³⁵

1 *Prima Facie Jurisdiction*

The Court first had to determine whether, *prima facie*, it has jurisdiction as regards to the merits of the case.³⁶ It was held that, because there was a manifest divergence of views as to the events relating to the Rohingya — Myanmar, for example, denying any genocidal intent — such a divergence was sufficient to establish the existence of a dispute.³⁷ It also held that Myanmar’s reservation to Article 8 of the *Genocide Convention* — allowing any State parties to call upon the competent organs of the United Nations — did not prevent Myanmar from seizing the Court under Article 9, which had a distinct area of application specifically concerned with submitting disputes to the International Court of Justice.³⁸ Thus, the Court found it had *prima facie* jurisdiction to deal with the case.

2 *Standing of The Gambia: Erga Omnes Partes Obligations*

A major issue in this decision was whether The Gambia had the capacity to bring this case before the Court without being specially affected by Myanmar’s alleged violations of the *Genocide Convention*.³⁹ Myanmar contended that, although the obligations under the *Convention* were *erga omnes partes*, The Gambia only had an *interest* in Myanmar’s compliance, but as a non-injured State, it had no right to invoke the responsibility of another State.⁴⁰

Citing its previous decisions, the Court affirmed that in treaties such as the *Genocide Convention*, where the obligations are *erga omnes partes*, the contracting States do not have their own individual interests but ‘one and all, a common interest’ in the accomplishment of the *raison d’être* of the *Convention*.⁴¹ The Court reasoned that this ‘common interest’ — in ensuring the compliance of all other States parties to the *Convention* — presumes the ability for any State party to invoke the responsibility of another before the Court.⁴² As such, the conclusion is that ‘any State party to the *Genocide Convention*, and *not only a specially affected State*, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end.’⁴³

3 *Granting of Provisional Measures*

³⁵ Ibid 10 [20]; *Genocide Convention* (n 32) art 9.

³⁶ Ibid 9 [16].

³⁷ Ibid 14 [29]–[31].

³⁸ Ibid 15 [35].

³⁹ Ibid 16 [39].

⁴⁰ Ibid.

⁴¹ Ibid 17 [41], citing *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23.

⁴² Ibid.

⁴³ Ibid (emphasis added).

The Court recalled that, to order provisional measures, the rights asserted by The Gambia must be ‘at least plausible’,⁴⁴ and a link must exist between the rights whose protection is sought and the measures requested.⁴⁵ Further, the situation must be such that there is a risk of irreparable prejudice and urgency if the provisional measures are not granted.⁴⁶

In the case at hand, the Court found that The Gambia's requests for the protection of the Rohingya group from acts of genocide were indeed plausible and adequately linked to the rights asserted on the basis of the *Genocide Convention*.⁴⁷ Although Myanmar asserted that it was engaging in repatriation initiatives for displaced Rohingya, the Court did not find the existence of such initiatives incompatible with the provisional measures, because the steps indicated by Myanmar did not appear to sufficiently remove the possibility of acts causing irreparable prejudice.⁴⁸

4 Conclusion

The Court concluded that the conditions for indicating provisional measures targeting the protection of the Rohingya group were met.⁴⁹ However, it did not, separately, find it necessary to indicate an additional measure relating to the non-aggravation of the dispute between the Parties.⁵⁰

⁴⁴ Ibid 18 [43].

⁴⁵ Ibid 18 [44].

⁴⁶ Ibid 24 [64].

⁴⁷ Ibid 23 [56], 24 [61].

⁴⁸ Ibid 25 [68], 27 [73].

⁴⁹ Ibid 28 [76].

⁵⁰ Ibid 29 [83].

III TRADE DISPUTES

A Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging

WTO Docs WT/DS435/AB/R; WT/DS441/AB/R [9 June 2020]

Complainant: Honduras

Respondent: Australia

Third Parties (original proceedings): Argentina; Brazil; Canada; Chile; China; Cuba; Dominican Republic; European Union; India; Indonesia; Japan; Korea, Republic of; New Zealand; Nicaragua; Nigeria; Norway; Oman; Panama; Philippines; South Africa; Chinese Taipei; Thailand; Ukraine; United States; Uruguay; Zimbabwe; Guatemala; Singapore; Guatemala; Malawi; Malaysia; Mexico; Singapore; Turkey; Zambia; Peru; Ecuador

WORLD TRADE ORGANIZATION ('WTO') — Whether Australia breached WTO obligations regarding its plain packaging requirements and trademark restrictions on tobacco products — *Agreement on Trade-Related Aspects of Intellectual Property Rights*

1 Background

On 4 April 2012,⁵¹ pursuant to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('*Dispute Settlement Understanding*' or '*DSU*'),⁵² the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('*TRIPs Agreement*'),⁵³ the *Agreement on Technical Barriers to Trade* ('*TBT Agreement*')⁵⁴ and the *General Agreement on Tariffs and Trade 1994* ('*GATT 1994*'),⁵⁵ Honduras requested consultations with Australia regarding its plain packaging requirements and trademark restrictions on tobacco products.

These tobacco plain packaging measures ('*TPP measures*') were implemented in 2011 and required all branding, logos and promotional text be removed from packaging as part of a significant public health scheme to reduce the consumption of tobacco products. Uniform packaging was required across brands, and graphic health warnings ('*GHWs*') were required to be displayed on the front of the packaging.

⁵¹ *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/1, IP/D/31, G/TBT/D/40 and G/L/986 (10 April 2012) (Request for Consultation by Honduras).

⁵² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*') arts 1 and 4 ('*DSU*').

⁵³ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') art 64 ('*TRIPs Agreement*').

⁵⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') art 14 ('*TBT Agreement*').

⁵⁵ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') art XXII ('*GATT 1994*').

Honduras alleged that the Australian legislation implementing the TPP measures, the *Tobacco Plain Packaging Act 2011* (Cth), *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth) and any implementing regulations, were inconsistent with Australia's WTO obligations. Honduras claimed these legislative instruments were inconsistent because the measures unjustifiably encumbered the use of a trademark by special requirements;⁵⁶ 'the measures prevent owners of registered trademarks from enjoying the rights conferred by a trademark';⁵⁷ 'because the nature of the goods to which a trademark is to be applied forms an obstacle to the registration of the trademark';⁵⁸ 'because trademarks registered in a country of origin outside Australia are not protected "as is"' and 'Australia does not provide effective protection against unfair competition to nationals of other countries of the Union';⁵⁹ 'because Australia is diminishing its level of protection for geographical indications below the level that existed prior to 1 January 1995';⁶⁰ 'because Australia does not provide effective protection against acts of unfair competition with respect to geographical indications and creates confusion among consumers related to the origin of the good';⁶¹ 'because Australia accords to nationals of other Members treatment less favourable than it accords to its own nationals with respect to the protection of intellectual property';⁶² 'because the technical regulations at issue create unnecessary obstacles to trade that are more trade-restrictive than necessary to fulfil a legitimate objective';⁶³ and 'because the measures at issue result in treatment less favourable of imported products than of like products of national origin'.⁶⁴

Honduras alleged that the measures could not be justified by Article 8 of the *TRIPs Agreement* as necessary to protect human health, because they are not consistent with the provisions of the *TRIPs Agreement*, or Article 17 of the *TRIPs Agreement* as a 'limited exception' to the rights conferred by a trademark.

At Honduras's request,⁶⁵ the WTO established a panel on 25 September 2013.⁶⁶ On 28 June 2018, the panel report was circulated to Members.⁶⁷ The panel report found that the complainants failed to

⁵⁶ *TRIPs Agreement* (n 53) art 20.

⁵⁷ *Ibid* art 16.1.

⁵⁸ *Ibid* art 15.4.

⁵⁹ *Paris Convention for the protection of industrial property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14 1967*, opened for signature 14 July 1967, 828 UNTS 305 (entered into force 3 June 1984) arts 6quinquies and 10bis ('*Paris Convention*'), as incorporated by *TRIPs Agreement* (n 53) art 2.1.

⁶⁰ *TRIPs Agreement* (n 53) art 24.3.

⁶¹ *Ibid* art 22.2(b).

⁶² *Ibid* art 3.1.

⁶³ *TBT Agreement* (n 54) art 2.2.

⁶⁴ *TBT Agreement* (n 54) art 2.1; *GATT 1994* (n 55) art III(4).

⁶⁵ *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/16 (17 October 2012) (Request for the Establishment of a Panel by Honduras).

⁶⁶ *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/18 (6 May 2014) (Constitution of the Panel Established at the Request of Honduras).

⁶⁷ Panel Report, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain*

demonstrate that Australia's plain packaging measures were inconsistent with Article 2.2 of the *TBT Agreement*, Articles 2.1, 15.4, 16.1, 16.3, 20, 22.2(b) and 24.3 of the *TRIPs Agreement* and Articles 6*quinquies* and 10*bis* of the *Paris Convention* (1967), as incorporated into the *TRIPs Agreement* by Article 2.1. The panel made no findings regarding the complaints of inconsistency with Article 6*bis* of the *Paris Convention* (1967) (incorporated by Article 2.1 of the *TRIPs Agreement*), Article 3.1 of the *TRIPs Agreement*, Article 2.1 of the *TBT Agreement* and Article III(4) of the *GATT 1994* due to the lack of argument put forward by the complainants.

2 Appeal proceedings

On 19 July 2018, Honduras notified the Dispute Settlement Body ('DSB') of its decision to appeal to the Appellate Body.⁶⁸ It disputed the panel's conclusions regarding Article 2.2 of the *TBT Agreement* and Articles 16.1 and 20 of the *TRIPs Agreement*. On 9 June 2020, the Appellate Body Reports were circulated to Members.⁶⁹

(a) Article 2.2 of the *TBT Agreement*

The complainants alleged that the panel was in error in concluding that they had not demonstrated that the TPP measures create unnecessary obstacles to trade that are more trade restrictive than necessary to fulfil a legitimate objective in violation of Article 2.2 of the *TBT Agreement*. Honduras claimed that the panel erred in applying Article 2.2 to the case by failing to make an objective assessment of the facts under Article 11 of the *DSU*.⁷⁰ Since these arguments implicate the panel's use of evidence and facts rather than its application of the legal standard under Article 2.2, the Appellate Body found that Honduras failed to substantiate its claim of a failure to apply the legal standard of the *TBT Agreement*.⁷¹

The Appellate Body did find that the panel erred by disregarding evidence adduced by the Dominican Republic regarding the effectiveness of plain packaging and GHWs⁷² and acted inconsistently with Article 11 of the *DSU* by compromising the complainants' rights to due process by relying on multicollinearity and non-stationarity in its review of all parties' econometric evidence,⁷³ thus vitiating certain factual findings.⁷⁴ However, these errors did not materially vitiate the panel's conclusions regarding the contribution of the TPP measures to Australia's public health objective of 'reducing the

Packaging Requirements Applicable to Tobacco Products and Packaging, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (28 June 2018) ('Plain Packaging Panel Report').

⁶⁸ *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/23 (25 July 2018) (Notification of an Appeal by Honduras under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlements of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review).

⁶⁹ Appellate Body Report, *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/AB/R and WT/DS441/AB/R (9 June 2020) ('Appellate Body Report').

⁷⁰ *Ibid* [6.24].

⁷¹ *Ibid* [6.25].

⁷² *Ibid* [6.79]–[6.95].

⁷³ *Ibid* [6.244]–[6.245].

⁷⁴ *Ibid* [6.262].

use of, and exposure to, tobacco products',⁷⁵ and as such the panel's finding that the appellants failed to demonstrate that the TPP measures are inconsistent with Article 2.2 was upheld.⁷⁶

The appellants failed to demonstrate that the panel erred in its intermediate conclusions assessing the trade restrictiveness of the TPP measures.⁷⁷ Notably, the Appellate Body upheld the panel's finding that the measures' effect of reducing the opportunity for producers to differentiate between different products on the basis of brands did not amount to limiting international trade.⁷⁸ Further, the Appellate Body upheld the panel's conclusion that the complainants failed to demonstrate that the implementation of the TPP measures would shift consumers from premium to non-premium products and thus lead to a decline in value for imported tobacco products.⁷⁹

The Appellate Body found that the panel erred in finding that the complainants had failed to demonstrate that the two alternative measures, increasing the minimum legal purchase age or increasing taxation on tobacco, would be apt to make a contribution equivalent to that of the TPP measures.⁸⁰ However, it also found that the panel did not err in finding that the complainants had failed to demonstrate that these two alternative measures are less trade restrictive than the TPP measures.⁸¹ As such, the panel's ultimate conclusion that the complainants had not demonstrated that the increase in the minimum legal purchase age and the increase in taxation 'would each be a less trade-restrictive alternative to the TPP measures that would make an equivalent contribution to Australia's objective', stands.⁸² Consequently, the Appellate Body upheld the panel's conclusion that the complainants had not demonstrated that 'the TPP measures are more trade-restrictive than necessary to fulfil a legitimate objective, within the meaning of Article 2.2 of the TBT Agreement'.⁸³

(b) Article 16.1 of the TRIPs Agreement

The Appellate Body found that the panel did not err in its interpretation of Article 16.1. The Appellate Body agreed with the panel that Article 16.1 of the *TRIPs Agreement* grants a trademark owner the exclusive right to preclude unauthorized use of the trademark by third parties.⁸⁴ However, Article 16.1 does not confer upon a trademark owner a positive right to use its trademark or a right to protect the distinctiveness of that trademark through use.⁸⁵ The Appellate Body agreed with the panel that, having found no error of interpretation, there was no need to assess Honduras' allegation of fact that the TPP measures' prohibition on the use of certain tobacco related trademarks would in fact reduce the

⁷⁵ Plain Packaging Panel Report (n 67) [7.232].

⁷⁶ Appellate Body Report (n 69) [6.535].

⁷⁷ *Ibid* [6.411].

⁷⁸ *Ibid* [6.410].

⁷⁹ *Ibid* [6.436]–[6.443].

⁸⁰ *Ibid* [6.521].

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ *Ibid* [6.522].

⁸⁴ *Ibid* [6.582].

⁸⁵ *Ibid* [6.586].

distinctiveness of such trademarks, and lead to a situation where a ‘likelihood of confusion’ with respect to these trademarks is less likely to arise in the market.⁸⁶ The Appellate Body thus upheld the panel's conclusion that the complainants have not demonstrated that the TPP measures are inconsistent with Article 16.1 of the *TRIPs Agreement*.⁸⁷

(c) Article 20 of the TRIPs Agreement

The Appellate Body found that the panel did not err in its interpretation and application of Article 20 of the *TRIPs Agreement*. Crucially, the Appellate Body found that the panel did not err in its interpretation of the term ‘unjustifiably’ in Article 20⁸⁸ and in its application of this interpretation to the facts of the case.⁸⁹ As such, the Appellate Body agreed with the panel that the complainants had not demonstrated that the trademark-related requirements of the TPP measures unjustifiably encumbered the use of trademarks in the course of trade within the meaning of Article 20 and consequently upheld the panel's finding that the complainants had not demonstrated that the TPP measures are inconsistent with Article 20 of the *TRIPs Agreement*.⁹⁰

Having upheld the panel's conclusions regarding all grounds of appeal, the Appellate Body made no recommendation to the DSB, pursuant to Article 19.1 of the *DSU*.⁹¹ On 29 June 2020, the DSB adopted the Appellate Body Reports and the panel reports as upheld by the Appellate Body.⁹²

B India — Measures Concerning Sugar and Sugarcane

WTO Docs WT/DS580/1, G/L/1299 G/AG/GEN/152 and G/SCM/D124/1

Complainant: Australia

Respondent: India

Third Parties (original proceedings): Brazil, Canada, China, Colombia, Costa Rica, El Salvador, European Union, Guatemala, Honduras, Indonesia, Japan, Panama, Russian Federation, Thailand, United States

WORLD TRADE ORGANIZATION (‘WTO’) — Whether India breached WTO obligations under the *Agreement on Agriculture* — whether India breached WTO obligations under the *Agreement on Subsidies and Countervailing Measures* — domestic support measures — export subsidies — *de minimis* obligations — Dispute Settlement Action

⁸⁶ Ibid [6.616].

⁸⁷ Ibid [6.619].

⁸⁸ Ibid [6.660].

⁸⁹ Ibid [6.719].

⁹⁰ Ibid.

⁹¹ Ibid [7.15].

⁹² *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/28 and WT/DS441/29 (2 July 2020) (Action by the Dispute Settlement Body).

1 Background

On 27 February 2019, Australia requested consultations with India concerning support measures within the Indian sugar and sugarcane industries.⁹³ Allegedly, the Government of India provides support to Indian producers of sugar and sugarcane via its domestic support measures, and also heavily subsidises exportation costs.⁹⁴ Australia claimed that India's domestic support and export subsidy measures are inconsistent with their obligations as a WTO member. A panel was established by the WTO Dispute Settlement Body ('DSB') on the 15 August 2019 to examine these allegations.⁹⁵

2 Australia's position

Australia presented its opening statement at the First Substantive Meeting on the 8 December 2020.⁹⁶ Australia asserted that Indian domestic support measures vastly exceed the *de minimis* obligation delineated in Article 6.4 of the *Agreement on Agriculture*.⁹⁷ Specifically, given that India's domestic support measures are not scheduled for WTO Member approval, the support the Government of India is entitled to provide is limited to 10% of the total value of sugar and sugarcane production.⁹⁸ Consideration of data from the 2017–18 and 2018–19 sugar and sugarcane seasons showed that India's domestic support measures exceeded 100% of the total value of sugar production.⁹⁹ As such, Australia claimed that India is in breach of Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture* as the domestic support measures surpass the *de minimis* entitlement.¹⁰⁰

Further, Australia argued that as India has not scheduled its export subsidies for WTO Member approval, India is not entitled to maintain export subsidies for sugar and sugarcane.¹⁰¹ As such, Australia claimed that India is in breach of Articles 3.3, 8, 9.1 and 10.1 of the *Agreement on Agriculture*.¹⁰² Additionally, Australia claimed that under the current scheme, Indian sugar and sugarcane producers are required to export the sugar in order to be eligible to receive the subsidisation.¹⁰³ This alleged scheme is in breach of Article 3 of the *Agreement on Subsidies and Countervailing Measures* which prohibits

⁹³ *India — Measures Concerning Sugar and Sugarcane*, WTO Docs WT/DS580/1, G/L/1299, G/AG/GEN/152 and G/SCM/D124/1 (7 March 2019) (Request for Consultations by Australia).

⁹⁴ *Ibid* [2].

⁹⁵ *India — Measures Concerning Sugar and Sugarcane*, WTO Docs WT/DS580/8 (29 October 2019) (Constitution of the Panel Established at the Request of Australia).

⁹⁶ *India — Measures Concerning Sugar and Sugarcane*, WTO Docs WT/DS580 (8 December 2020) (Australia's Opening Statement at the First Substantive Meeting with the Parties and Third Parties) <<https://www.dfat.gov.au/sites/default/files/ds-580-india-sugar-sugarcane-opening-statement-australia-first-substantive-meeting.pdf>> ('Opening Statement').

⁹⁷ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Agriculture*') art 6.4(b) ('*Agreement on Agriculture*').

⁹⁸ Opening Statement (n 96).

⁹⁹ *Ibid*.

¹⁰⁰ *Agreement on Agriculture* (n 97) arts 3.2, 6.3 and 7.2(b).

¹⁰¹ Opening Statement (n 96).

¹⁰² *Agreement on Agriculture* (n 97) arts 3.3, 8, 9.1 and 10.1.

¹⁰³ Opening Statement (n 96).

subsidisation measures that are export contingent.¹⁰⁴

This dispute settlement action is ongoing. It is expected that the panel's final report will be circulated in mid 2021.

C Australia — Anti-dumping Measures on A4 Copy Paper

WTO Doc WT/DS529/R

Complainant: Indonesia

Respondent: Australia

Third Parties (original proceedings): Canada, China, European Union, Egypt, India, Israel, Japan, Republic of Korea, Russian Federation, Singapore, Thailand, Ukraine, United States, Vietnam

WORLD TRADE ORGANIZATION (WTO) — whether Australia breached WTO obligations under the *Anti-Dumping Agreement* — Dispute Settlement Understanding — consideration of what constitutes a 'particular market situation' in applying Article 2.2 of the *Anti-Dumping Agreement* — consideration of what 'permits a proper comparison' in applying Article 2.2 of the *Anti-Dumping Agreement* — consideration of 'properly recorded cost information' as per Article 2.2.1.1 of the *Anti-Dumping Agreement* — Australia given a reasonable period of time to implement recommendations.

1 Background

Pursuant to WTO rules, Australia is entitled to impose 'anti-dumping duties' on products exported to Australia at a lower price than 'normal value', such that the export is likely to cause material injury to an Australian industry.¹⁰⁵ Anti-dumping duties are usually calculated by comparing exporters' domestic sale prices with export prices of the same goods. However, in 'particular market situations' in the exporter's country different rules can apply.¹⁰⁶ Where internal and export sales 'do not permit a proper comparison', the Australian Anti-Dumping Commission ('ADC') may discard the exporter's domestic sale price, and instead construct a 'normal value' as the point of comparison in calculating the duty price.¹⁰⁷

Australia imposed anti-dumping duties on Indonesian A4 copy paper. ADC investigations found that the domestic sale price of A4 copy paper in Indonesia was artificially low due to government subsidies and government interference with the sale of raw materials, such as pulp. The ADC identified this to be a 'particular market situation', and as such, constructed a 'normal value' to calculate the duty price. On

¹⁰⁴ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Subsidies and Countervailing Measures*') art 3.

¹⁰⁵ *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on the Implementation of Article VI of GATT*') art 2.1 ('*Anti-Dumping Agreement*').

¹⁰⁶ *Ibid* art 2.2.

¹⁰⁷ *Ibid*. 'Normal value' may denote a putative or estimated fair equivalent for the exporter's domestic sale prices.

1 September 2017, Indonesia requested consultations with Australia.¹⁰⁸ The DSB composed a panel to review the dispute on 12 July 2018.¹⁰⁹

2 Article 2.2 of the Anti-Dumping Agreement

Indonesia contested Australia's finding that Indonesia's A4 copy paper market was a 'particular market situation'. Indonesia claimed that Australia was in breach of the second clause of Article 2.2 of the *Anti-Dumping Agreement*, in that Australia was not entitled to discard domestic sales as the basis of calculating the duty price because no 'particular market situation' had been established.¹¹⁰

The panel rejected Indonesia's submissions and held that Australia had not acted inconsistently with Article 2.2 in its determination that a 'particular market situation' existed.¹¹¹ The panel interpreted the phrase 'particular market situation' broadly, ruling that a situation must be 'distinct, individual, single, specific but that does not necessarily make it unusual or out of the ordinary — ie exceptional.'¹¹² The panel held that the low domestic costs of products can constitute a 'particular market situation', and therefore can justify the use of a constructed 'normal value.'¹¹³ Importantly, however, the panel noted that low domestic costs will not always or necessarily constitute a 'particular market situation'.¹¹⁴

Indonesia contended further that, even if the 'particular market situation' existed, Australia erred in assuming that the low cost of A4 copy paper in the Indonesian market meant that 'a proper comparison' could not be made between the country's domestic sale and the export prices.¹¹⁵ On this point the panel found for Indonesia. It ruled that Australia had acted inconsistently with the first clause of Article 2.2 of the *Anti-Dumping Agreement*.¹¹⁶ Whether a constructed 'normal value' is to be used requires a case by case analysis, in which investigations ought to be made into the effect of domestic prices versus export prices.¹¹⁷ It was held that Australia had failed to undertake a correct analysis. As such, it did not properly determine that paper sales in Indonesia did 'not permit a proper comparison'.¹¹⁸

3 Article 2.2.1.1 of the Anti-Dumping Agreement

Indonesia claimed further that the ADC had wrongfully disregarded the Indonesian pulp producers'

¹⁰⁸ *Australia — Anti-dumping Measures on A4 Copy Paper*, WTO Docs WT/DS529/1, G/L/1184 and G/ADP/D118/1 (5 September 2017) (Request for Consultations by Indonesia).

¹⁰⁹ *Australia — Anti-dumping Measures on A4 Copy Paper*, WTO Doc WT/DS529/7 (13 July 2018) (Constitution of the Panel Established at the Request of Indonesia).

¹¹⁰ *Australia — Anti-dumping Measures on A4 Copy Paper*, WTO Doc WT/DS529/6 (16 March 2018) (Request for Establishment of a Panel by Indonesia).

¹¹¹ Panel Report, *Australia — Anti-Dumping Measures on A4 Copy Paper*, WTO Doc WT/DS529/R (4 December 2019) [7.57].

¹¹² *Ibid* [7.22].

¹¹³ *Ibid* [7.57].

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid* [7.58].

¹¹⁶ *Ibid* [7.91].

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

properly recorded cost information, violating Article 2.2.1.1 of the *Anti-Dumping Agreement*.¹¹⁹ Indonesia argued that an exporter's actual costs (properly recorded) can only be disregarded where one of the two express conditions in Article 2.2.1.1 are not met.¹²⁰ Australia argued *contra* that the word 'normally' in the Article provides another ground on which to disregard an exporter's actual costs. Specifically, Australia argued that because the Indonesian A4 copy paper market is considered a 'particular market situation', the market cannot be considered 'normal and ordinary'. This enabled Australia to disregard Indonesian exportation costs.¹²¹

The panel accepted Australia's argument that exporter costs can be disregarded on the basis that circumstances are not 'normal and ordinary'.¹²² However, this can only occur if the two express conditions in Article 2.2.1.1 are met. The panel found that in this case, both of the express conditions were not met. Accordingly, Australia was not entitled to disregard the properly recorded cost information.¹²³ The panel found that Australia had acted inconsistently with Article 2.2.1.1.

Recommendations

The panel recommended that Australia conform with its obligations under the *Anti-Dumping Agreement*.¹²⁴ Neither Australia nor Indonesia appealed the findings of the panel. Australia was given a reasonable period of time to implement the recommendations. On the 27 January 2020, the DSB adopted the panel report.¹²⁵ On 17 September 2020, Australia reported to the DSB that it had fully implemented the DSB's recommendations, including by correcting the dumping measures it had imposed on Indonesia.¹²⁶

IV HUMAN RIGHTS

A The Government of the United States of America v Julian Paul Assange

Westminster Magistrates' Court
District Judge Vanessa Baraitser

HUMAN RIGHTS — NATIONAL SECURITY — Diplomatic protection — Disability rights — Extradition — Freedom of Speech — Non-refoulement — Whistleblowing — Mental health condition — European Convention on Human Rights

¹¹⁹ Ibid [7.92].

¹²⁰ Ibid [7.93].

¹²¹ Ibid [7.99].

¹²² Ibid [7.118].

¹²³ Ibid [7.126].

¹²⁴ Ibid [8.4].

¹²⁵ *Australia — Anti-dumping Measures on A4 Copy Paper*, WTO Doc WT/DS529/14 (30 January 2020) (Action by the Dispute Settlement Body).

¹²⁶ *Australia — Anti-dumping Measures on A4 Copy Paper*, WTO Doc WT/DS529/17 (18 September 2020) (Status Report Regarding Implementation of the DSB Recommendations and Rulings by Australia).

Background

On 4 January 2021, the Westminster Magistrates' Court in the United Kingdom ('UK') dismissed a request for extradition submitted by the Government of the United States of America ('US') against Australian national, Julian Paul Assange.¹²⁷ The defence submitted numerous arguments regarding the substantive nature of the US' charges and the right to freedom of speech. However, District Judge Baraitser held that extradition was barred on the basis that it would be 'oppressive' for the purposes of s 91 of the *Extradition Act 2003* (UK) by reason of Assange's mental condition and poor state of health.¹²⁸

Assange is the founder and director of WikiLeaks, a not-for-profit organisation that has achieved international notoriety for its large and unprecedented publication of (inter alia) unlawfully obtained US classified security materials. Publications included thousands of documents — including diplomatic cables — that revealed crimes committed by the US military during the wars in Afghanistan and Iraq, as well as grave human rights violations perpetrated upon detainees at the US detention facilities at Guantanamo Bay.¹²⁹ As a result of this conduct, Assange was charged with conspiracy to commit unlawful computer intrusion contrary to Title 18 of the US Code in December 2017.¹³⁰ A federal Grand Jury returned a superseding indictment in May 2019, containing further charges against Assange for the unlawful solicitation, receipt and disclosure of US national security information between 2010 and 2019.¹³¹

In June 2012, Assange sought refuge from arrest and extradition in the Ecuadorian Embassy in London. He remained at the Embassy under diplomatic protection in virtual confinement until 2019.¹³² He took this action to evade arrest by UK authorities, after he breached bail conditions imposed in earlier extradition proceedings involving the Government of Sweden.¹³³ Diplomatic protection was revoked by the Government of Ecuador in April 2019, whereupon Assange was arrested and sentenced to 50 weeks imprisonment in Belmarsh Prison. Proceedings regarding an extradition request against Assange submitted to the UK by the US via diplomatic channels began on 6 June 2019.¹³⁴

1 The UK-US Extradition Treaty

Article 4 of the 2003 extradition treaty between the UK and the US provides that extradition shall not

¹²⁷ *The Government of the United States of America v Julian Paul Assange* (Westminster Magistrates Court, Baraitser DJ, 4 January 2021) ('US v Assange').

¹²⁸ Ibid 118 [363].

¹²⁹ Sapan Maini-Thompson, 'Assange cannot be extradited, but free speech arguments dismissed — an extended look', UK Human Rights Blog (Blog Post, 21 January 2021) <<https://ukhumanrightsblog.com/2021/01/21/assange-cannot-be-extradited-but-free-speech-arguments-dismissed-an-extended-look/>>.

¹³⁰ *US v Assange* (n 127) 3 [4].

¹³¹ Ibid 6-8 [11]. See 'Julian Assange Legal Battles Information Page', Whirlpool (Forum Post)

<https://whirlpool.net.au/wiki/julian_assange> for a compilation of the many documents and decisions in this matter.

¹³² *US v Assange* (n 127) 4-5 [8].

¹³³ Ibid. These proceedings involved allegations of sexual assault, facially unrelated to the WikiLeaks events.

¹³⁴ Ibid 3 [6].

be granted if the offence for which extradition is requested is a political offence.¹³⁵ As Jennifer Robinson notes,¹³⁶ Assange was indicted under the *Espionage Act of 1917* (USA).¹³⁷ The case is the first time a publisher has ever faced espionage charges. Assange's counsel argued that the extradition request should have been rejected as 'arbitrary' because it involved an offence that was prohibited by the same treaty relied on for the extradition process.

This argument was rejected by the judge on the basis that the *Extradition Treaty* did not confer on Assange rights which are enforceable by the court. This was because the *Extradition Act 2003* (UK) had not incorporated the article 4 prohibition.¹³⁸

2 Freedom of speech

District Judge Baraitser described the defence submissions against Assange's extradition as 'numerous, complex, and in some instances, novel'.¹³⁹ The submissions included several arguments based on the fundamental right to 'freedom of speech', given the nature of the alleged offences and Assange's reputation as an 'avowed whistle-blower'.¹⁴⁰ It was submitted that Assange is accused of doing 'no more than engaging in the ordinary and lawful conduct of the investigative journalist, conducted protected by article 10 of the [European Convention of Human Rights]'.¹⁴¹

In contrast, the US maintained that the prosecution case is brought on the basis that Assange consistently violated responsible journalistic standard, publishing the unredacted names of confidential sources whose lives had been put at significant risk.¹⁴² Baraister DJ concluded that 'Mr. Assange's alleged activities went beyond the mere encouragement of a whistle-blower' in his solicitation and unlawful receipt of classified information,¹⁴³ and ultimately dismissed the defence's argument on the basis that it 'vests in Mr. Assange the right to make the decision to sacrifice the safety of these few individuals, knowing nothing of their circumstances or the dangers they faced, in the name of free speech'.¹⁴⁴ Significantly, DJ Baraister also found that the defence were unable to establish the existence of the public's 'right to truth' as a 'free-standing legal right' recognised by international law, in order to justify Assange's on the basis of the grave human rights violations exposed.¹⁴⁵

3 Oppression due to Health

¹³⁵ Ibid 16–17 [34].

¹³⁶ Jennifer Robinson, 'International Law and the Case of Julian Assange' (Speech, Sydney Centre for International Law Year in Review Conference, 26 February 2021).

¹³⁷ *US v Assange* (n 127) 18 [37]; see *Espionage Act of 1917* 18 USC 792.

¹³⁸ Ibid 19 [41].

¹³⁹ Ibid 15 [32].

¹⁴⁰ Sapan Maini-Thompson, 'Assange cannot be extradited, but free speech arguments dismissed – an extended look', *UK Human Rights Blog* (Blog Post, 21 January 2021) [1] <<https://ukhumanrightsblog.com/2021/01/21/assange-cannot-be-extradited-but-free-speech-arguments-dismissed-an-extended-look/>>.

¹⁴¹ *US v Assange* (n 127) 30 [77].

¹⁴² Ibid 31 [81].

¹⁴³ Ibid 35 [96].

¹⁴⁴ Ibid 47 [131].

¹⁴⁵ Ibid 49 [138].

Section 91 of the *Extradition Act 2003* (UK) prohibits extradition where the Court is satisfied that ‘the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him’.¹⁴⁶ This requires the Court to consider whether there is a ‘substantial risk that [the appellant] will commit suicide’ upon an order for extradition being made. Such that a finding of oppression is justified in light of ‘the risk of the appellant succeeding in committing suicide, whatever steps are taken’.¹⁴⁷ On this matter, the Court heard extensive expert medical evidence regarding the deleterious state of Assange’s mental health. Baraitser DJ ultimately accepted the opinion of defence expert, Professor Kopelman, who gave evidence that Assange suffers from ‘recurrent depressive disorder, which was severe in December 2019, and sometimes accompanied by psychotic features (hallucinations) and often with ruminative suicidal ideas’.¹⁴⁸

District Judge Baraitser’s characterisation of Assange’s suicide risk as ‘substantial’ if extradited to the US also drew on evidence given by Dr. Deeley to the effect that Assange had been diagnosed with ‘Autism spectrum disorder...albeit a high functioning case’ and ‘Asperger’s syndrome disorder’.¹⁴⁹ While the US attempted to challenge Dr. Deeley’s opinion on the basis that ‘this condition had not prevented Assange running WikiLeaks, presenting a television chat show...or...establishing intimate relationships’.¹⁵⁰ Baraitser DJ ultimately accepted Dr. Deeley’s conclusions as ‘the only expert to give evidence with a specialism in autistic spectrum conditions’.¹⁵¹ Accordingly, Baraitster DJ held that there was ‘no doubt’ that Assange has the ‘determination, planning and intelligence’ to commit suicide despite the imposition of preventative measures, which would be ‘executed with the single-minded determination of his autism spectrum disorder’.¹⁵² Furthermore, Her Honour considered that the combination of diagnoses would remove Assange’s capacity to resist suicidal impulses, in the likely event that his psychiatric condition should worsen upon extradition.¹⁵³

To determine whether Assange’s risk of suicide could be appropriately managed by the US government, the Court heard evidence regarding the relevant detention conditions he would most likely face in custody. Given that Assange’s alleged conduct related to ‘one of the largest compromises of classified information in the history of the US’,¹⁵⁴ Baraitser DJ found there to be a ‘real risk’ that Assange would be subject to restrictive special administrative measures during his pre-trial and potential post-trial detention.¹⁵⁵ This would result in Assange being subjected to extreme ‘conditions of significant isolation’, which the experts unanimously agreed would be detrimental to his mental condition.¹⁵⁶

¹⁴⁶ *Extradition Act 2003* (UK) s 91.

¹⁴⁷ *US v Assange* (n 127) 90 [279], quoting *Turner v Government of the USA* [2012] EWHC 2426 [28] (Aikens LJ).

¹⁴⁸ *Ibid* 108 [332].

¹⁴⁹ *Ibid* 108 [333].

¹⁵⁰ *Ibid* 103 [320].

¹⁵¹ *Ibid* 108 [333].

¹⁵² *Ibid* 117 [359]–[356], 118 [362].

¹⁵³ *Ibid* 112 [348].

¹⁵⁴ *Ibid* 93 [291].

¹⁵⁵ *Ibid* 94 [291], 96 [305].

¹⁵⁶ *Ibid* 110 [340].

Evidence of the mental health care resources available to Assange under these conditions included ‘sporadic access to a psychiatrist for medication’,¹⁵⁷ ‘self-help packets and videos’, and ‘group therapy...from individual cages and with prisoners shackled’.¹⁵⁸

Whilst Assange is yet to have committed a serious suicide attempt within the custody of the United Kingdom, Dr. Deeley noted the benefit of ‘protective factors’ available at to Assange at Belmarsh Prison, such as ‘regular visits from his partner and children’, ‘a trusting therapeutic relationship with the prison In-Reach psychologist; and contact with ‘other prisoners in the general population since leaving the relative isolation of the healthcare unit’.¹⁵⁹ As such protective factors would undoubtedly be removed upon extradition, Baraister DJ concluded that protocols in the US would ‘not prevent Mr. Assange from finding a way to commit suicide’.¹⁶⁰

For these reasons, Baraister DJ was satisfied on the evidence that the mental condition of Assange rendered it ‘oppressive’ to fulfil the extradition request.¹⁶¹ Therefore, she ordered the discharge of Assange in accordance with section 91(3) of the *Extradition Act 2003*.¹⁶²

In spite of this finding and order, Assange remained in custody at Belmarsh Prison at the conclusion of the case because his subsequent application for bail was denied.¹⁶³ While the US Department of Justice has signalled its intention to appeal the extradition decision,¹⁶⁴ the United Nations Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment has stated that Assange should be released immediately. The Special Rapporteur has called for the ‘collective persecution’ of Assange to come to an end, stating that he has ‘never seen a group of democratic States ganging up to deliberately isolate, demonise and abuse a single individual for such a long time and with so little regard for human dignity and the rule of law’.¹⁶⁵

B Rubén Calleja Loma and Alejandro Calleja Lucas v Spain

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 41/2017

United Nations Committee on the Rights of Persons with Disabilities

HUMAN RIGHTS — DISCRIMINATION — Right to inclusive education for a child with Down syndrome — Right to inclusive education — discrimination and cruel, inhuman or degrading treatment or

¹⁵⁷ Ibid 115 [353],

¹⁵⁸ Ibid 117 [358].

¹⁵⁹ Ibid 111 [342].

¹⁶⁰ Ibid 118 [361].

¹⁶¹ Ibid 118 [363].

¹⁶² Ibid 131 [410].

¹⁶³ ‘Julian Assange denied bail by UK judge after extradition ruling’, *ABC News* (online, 6 January 2021) <<https://www.abc.net.au/news/2021-01-06/julian-assange-extradition-hearing-denied-bail/13036792>>.

¹⁶⁴ Ibid.

¹⁶⁵ ‘UN expert says “collective persecution” of Julian Assange must end now’, *United Nations Human Rights Office of the High Commissioner* (Blog, 31 May 2019)

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24665>>.

punishment on the basis of disability — respect for home and the family

PROCEDURE — Admissibility — non-substantiation of claims

1 *Background*

The authors of the communication are Rubén Calleja Loma and Alejandro Calleja Lucas, nationals of Spain who were born on 25 August 1999 and 25 October 1962, respectively. At the time of the submission of the present communication, Rubén was a minor and was challenging the State party's administrative decision to enrol him in a special education centre on account of his Down syndrome. The authors claim that they are the victims of violations by the State party of their rights under Articles 7, 13, 15, 17, 23 and 24, read in conjunction with Article 4, of the Convention *on the Rights of Persons with Disabilities* ('CPRD' or 'Convention').¹⁶⁶ Rubén is represented by his father, Calleja Lucas.¹⁶⁷ *The Optional Protocol to the Convention on the Rights of Persons with Disabilities*¹⁶⁸ entered into force for Spain on 3 May 2008.¹⁶⁹

The Committee on the Rights of Persons with Disabilities ('CPRD Committee' or 'Committee') published its views on the complaint in accordance with the Optional Protocol process,¹⁷⁰ which involves consideration of written submissions on relevant matters in closed session and seeking a response from the relevant State.

2 *Facts submitted by the authors*

Rubén's complaint centred on a decision that he be forced to attend a special education school instead of being allowed to continue, with support, at a mainstream public school.¹⁷¹ Until entering Year 5 of compulsory primary school, he had received support from a special education assistant and had 'been going well' at the mainstream school.¹⁷² Rubén's troubles began in fourth grade, when his teacher subjected him to discrimination, neglect and abuse. This teacher ('X') advised Rubén's parents that he should be transferred to a special education centre. He physically assaulted Rubén, including grabbing him by the neck, threatening to throw him out of a window and hitting him with a chair.¹⁷³ Rubén was also physically assaulted by a teacher ('Y') who slapped him on multiple occasions.¹⁷⁴ Although Rubén's parents reported these incidents to the Provincial Director of Education, no investigation was

¹⁶⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('CPRD').

¹⁶⁷ Rubén provided a power of attorney that he had signed, authorizing his father to represent him.

¹⁶⁸ *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2008, 2518 UNTS 283 (entered into force 3 May 2008) ('Optional Protocol').

¹⁶⁹ Spain signed the *CRPD* and the *Optional Protocol* on 3 December 2007.

¹⁷⁰ *Optional Protocol* (n 168) art 5.

¹⁷¹ Rubén Calleja Loma and Alejandro Calleja Lucas *Convention on the Rights of Persons with Disabilities* (28 August 2020) C/23/D/41/2017, at [2.1]–[2.3].

¹⁷² *Ibid* [2.1].

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

undertaken.¹⁷⁵

The following year Rubén progressed to fifth grade. For nearly two months, Rubén did not receive any support from a special education assistant, because his teacher ‘Z’ ‘did not consider it necessary’.¹⁷⁶ After an assistant was appointed, Z continued to discriminate against Rubén. The assistant reported that Z ‘completely ignored and gave up teaching’ Rubén. Again, his parents were asked to transfer him to a special education centre.¹⁷⁷ Despite continued complaints by his parents, the school’s management did not take any action to address the situation.¹⁷⁸

A social worker, in a report dated 13 December 2010, attributed Rubén’s difficulties at school to the ‘poor relationship with his teacher(s)’ and recommended that the boy be transferred to another mainstream school with ‘similar characteristics and resources’.¹⁷⁹ The report obtained by the school was done without Rubén’s parents’ involvement and did not address the discrimination and abuse that Rubén suffered.¹⁸⁰

Rubén’s parents exhausted all domestic legal remedies available to them prior to making their complaint to the CRPD Committee.¹⁸¹ This included an attempt to have the León juvenile prosecution service action the abuse and discrimination Rubén suffered. The matter was ‘shelved’ on the ground that ‘the actions of the teaching staff are not considered to constitute the criminal offence of assault, coercion or abuse of [Rubén]’.¹⁸² The parents appealed unsuccessfully to the Administration Court No. of León, challenging the decision of the Provincial Directorate of Education to enrol Rubén in a special education centre on 20 June 2011. They argued that the order violated Rubén’s constitutional right to equality and to be educated in a mainstream public school.¹⁸³ The Administration Court noted that the principle of equality requires that ‘equal treatment’ be given ‘to those in equal legal situations’. It held that Rubén’s rights had not been violated because his situation was legally different to other children without disabilities.¹⁸⁴ This decision was affirmed by the High Court of Justice of Castile and León on 22 March 2013.¹⁸⁵

Moreover, Rubén’s parents’ demands for the protection of his right to inclusive education and their decision not to take him to the special education centre led to them being prosecuted for the criminal offence of neglect on 12 May 2014.¹⁸⁶ They were acquitted of these charges on 20 April 2015.¹⁸⁷

¹⁷⁵ Ibid.

¹⁷⁶ Ibid [2.3].

¹⁷⁷ Ibid [2.3], [8.2].

¹⁷⁸ Ibid [2.3].

¹⁷⁹ Ibid [2.4].

¹⁸⁰ Ibid [2.5]–[2.6].

¹⁸¹ Ibid [7.3].

¹⁸² Ibid [2.7].

¹⁸³ Ibid [2.8]–[2.9].

¹⁸⁴ Ibid [2.10].

¹⁸⁵ Ibid [2.13].

¹⁸⁶ Ibid [2.16].

¹⁸⁷ Ibid.

During 2017-8, Rubén enrolled in a publicly funded subsidised private education centre, ‘Down León Amidown Amigos del Síndrome de Down’.¹⁸⁸ Rubén had to enrol at this centre as there were no adequate mainstream educational centres that offered effective inclusive education in the surrounding area.¹⁸⁹ However, his parents assert that this is not a mainstream educational establishment and therefore his right to inclusive education under Article 24 of the *Convention* had still not been realised.¹⁹⁰

3 Views and recommendations

The communication was found to be admissible under the *Optional Protocol*. Claims related to violation of Articles 24, 23, 7, 15 and 17 of the *CRPD*, read alone and in conjunction with Article 4, as Spain had not adopted legislation or policies to ensure Rubén’s rights under these articles at the time of the case.¹⁹¹

The Committee held that the administrative decision to enrol Rubén in a special education centre constituted a violation of his right to inclusive education in accordance with Article 24.¹⁹² It found that the government made its decision without considering the opinion of Rubén’s parents. It also neglected considering the reports of the clinical psychologist and special education assistant, as well as the allegations of discrimination and abuse Rubén suffered. There was also a failure to effectively investigate ‘reasonable accommodations’ that could have been made to support Rubén to remain in the mainstream education system.¹⁹³ The Committee noted that an inclusive education system ‘requires the abolition of the separate education system for students with disabilities’.¹⁹⁴

Furthermore, the accusation of neglect against Rubén’s parents by the State parties’ prosecution department was found to constitute a violation of its obligations under Article 23.¹⁹⁵

The failure of the State party to investigate allegations between 2009 and 2011 by Rubén’s parents, in respect of the discrimination and physical abuse he suffered at the mainstream public school, were held by the Committee to violate Rubén’s rights under Articles 15 and 17.¹⁹⁶

The Committee recommended that the State party compensate Rubén and his parents for the psychological and emotional harm suffered, and recommended that the family be reimbursed for their legal costs.¹⁹⁷ It found that the State was obliged to: support Rubén’s admission to a ‘truly inclusive vocational training programme’; effectively investigate the allegations of discrimination and abuse; publicly recognise the violation of Rubén’s rights; and make available the Views of the Committee.¹⁹⁸

¹⁸⁸ Ibid [5.1].

¹⁸⁹ Ibid [5.3].

¹⁹⁰ Ibid [5.1].

¹⁹¹ Ibid [7.6].

¹⁹² Ibid [8.8].

¹⁹³ Ibid.

¹⁹⁴ Ibid [8.5].

¹⁹⁵ Ibid [8.10].

¹⁹⁶ Ibid [8.11]–[8.13].

¹⁹⁷ Ibid [9](a)(i).

¹⁹⁸ Ibid [9](a)(ii)–(v).

The Committee also found that the State party was obliged to ‘prevent similar violations in the future’.¹⁹⁹ It recommended that the State party take measures including measures such as: expediting legislative reform in accordance with the *Convention*; adopting ‘inclusive education’ as a right owed to all students; formulating a ‘comprehensive, inclusive education policy’; and eliminating ‘educational segregation of students with disabilities’. It also recommended that parents of children with disabilities should be protected from prosecution for neglect if they demand, as Rubén’s parents did, that their child’s right to inclusive education be realised.²⁰⁰

The State party was required to respond in writing to the Committee within six months, including in respect of measures taken in consideration of its Views and recommendations.²⁰¹

C Richard Sahlin (represented by the Swedish Association of the Deaf, the Swedish Youth Association of the Deaf and the non-governmental organization Med Lagen som Verktyg) v Sweden

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 45/2018

United Nations Committee on the Rights of Persons with Disabilities

HUMAN RIGHTS — DISCRIMINATION — Recruitment process and appropriate modification and adjustments to the workplace — Equality and non-discrimination — equal recognition before the law — work and employment — facts and evidence

PROCEDURE — Exhaustion of domestic remedies — substantiation of claims

1 Background

The author of the communication is Richard Sahlin, a national of Sweden, born on 23 June 1967. The author is deaf. He claims to be a victim of violations of his rights under Articles 3, 4 (2), 5 (2) and (3), and 27 (1) (b), (g) and (i) of the *Convention*.²⁰² The author is represented by the Swedish Association of the Deaf, the Swedish Youth Association of the Deaf and the non-governmental organization Med Lagen som Verktyg (‘With the law as a tool’).

Sahlin’s complaint centred on a decision to cancel his appointment to the permanent position of lecturer at Södertöm University, a public institution, on the basis that it would be ‘too expensive’ to provide the sign language interpretation services required to accommodate his employment.²⁰³ This decision was made despite the fact that Sahlin had been considered by recruiters as the ‘most qualified candidate for

¹⁹⁹ Ibid [9](b).

²⁰⁰ Ibid [9](b)(i)–(v).

²⁰¹ Ibid [10].

²⁰² CPRD (n 166). Sweden signed the *CRPD* and the *Optional Protocol* on 30 March 2007.

²⁰³ Committee on the Rights of Persons with Disabilities, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 45/2018*, 23rd sess, UN Doc CPRD/C/23/D/45/2018 (15 October 2020) [2.2] (‘*Sahlin case*’).

the position’, having previously taught at several universities following the receipt of a doctorate in public law, including Södertöm University, on a short-term contractual basis.²⁰⁴

Fully aware of his need for sign language interpretation, the authorities at Södertöm University offered Sahlin the opportunity to present a ‘trial lecture’ as part of the recruitment process.²⁰⁵ However, the employment process was later terminated on 17 May 2017, without any further inquiry or consultation as to alternative work modifications that could be made to guarantee Sahlin’s right to employment on an equal-opportunity basis.²⁰⁶ Furthermore, the University failed to inform Sahlin that State-funded measures would be insufficient to cover the required expenses prior to the decision to terminate, effectively denying him of the opportunity to ‘discuss alternative measures that required less interpretation costs’.²⁰⁷

As a result of these circumstance, the Discrimination Ombudsman brought a civil suit for monetary compensation on Sahlin’s behalf before the Swedish Labour Court.²⁰⁸ However, on 11 October 2017, the Court ruled that the University had not violated the relevant discrimination provisions, as it was ‘not reasonable to demand the university to finance interpreting expenses amounting to 520,000 Swedish krona per year’.²⁰⁹ This decision was made despite the fact that the University’s staff budget amounts to over half a billion Swedish Krona per year, with a budget surplus of 187 million Swedish Krona for the fiscal year of 2016.²¹⁰ The Court is the final instance in cases tried under the *Labour Disputes (Judicial Procedure) Act*.²¹¹

Alternatively, Sahlin also appealed the University’s decision to terminate the employment process to the Higher Education Appeal’s Board, claiming that it had ‘violated the prohibition of discrimination in the form of inadequate inaccessibility’.²¹² On 1 July 2016, the Board dismissed the appeal and submitted it to the Administrative Court in Stockholm.²¹³ As the matter concerned a decision relating to employment, the Administrative Court also dismissed the action on 7 April 2017, stating it was outside the purview of its jurisdiction.²¹⁴ Whilst Sahlin had the opportunity to appeal the Administrative Court’s decision to the Supreme Administrative Court, he was strongly advised not to by the Equality Ombudsman, as ‘such an appeal would probably not have been effective’²¹⁵. Nevertheless, Sahlin submits that only one of ‘several parallel remedies’ had to be exhausted prior to making a complaint to

²⁰⁴ Ibid [2.1]–[2.2].

²⁰⁵ Ibid [2.2].

²⁰⁶ Ibid [2.2].

²⁰⁷ Ibid [5.4].

²⁰⁸ Ibid [2.3].

²⁰⁹ Ibid [2.4].

²¹⁰ Ibid [2.2].

²¹¹ Ibid [2.4].

²¹² Ibid [4.10].

²¹³ Ibid [4.11].

²¹⁴ Ibid [4.11].

²¹⁵ Ibid [5.8].

the CRPD Committee, in accordance with the jurisprudence of the European Court of Human Rights.²¹⁶

Sahlin asserts that the State Party failed to protect his rights to equal work and reasonable accommodation in employment, by placing the financial burden of providing reasonable accommodation solely on the employer.²¹⁷ Sahlin contends that the State Party ‘should have provided specific funding from its budget, or should have ensured State Universities and public authorities had the financial preconditions and clear obligation provide reasonable accommodation for the employment of persons with disabilities’.²¹⁸ As a public institution, Södertöm University additionally failed to assess whether other measures of reasonable accommodation could have been adopted to significantly reduce the estimated expenses, such as online learning and adapted work tasks.²¹⁹ Significantly however, the State party also failed to consider, let alone appreciate, the benefit of employing a deaf academic as a senior lecturer.²²⁰ In Sahlin’s view, such an appointment could have ‘provided a valuable contribution Södertöm University, showing that it is open and inclusive for all kinds of underrepresented groups’, in accordance with the State Party’s obligation to ‘raise awareness of people with disabilities’ under article 8 of the Convention.²²¹

2 Views and Recommendations of the Committee

The Communication was found to be admissible under the *Optional Protocol*, despite the State party’s challenge on the basis of articles 2(d) and (e).²²² The Committee held that Sahlin had exhausted all available domestic remedies; specifically, an appeal to the Supreme Administrative Court could not be considered as a civil claim and was ‘therefore unlikely to bring effective relief’.²²³ Furthermore, the Committee rejected the State Party’s submission that Sahlin’s claim lacked substantiation, as evidenced by result of the domestic proceedings, given the Labour Court failed to properly assess the reasonableness of alternative forms of accommodation measures suggested by Sahlin to the University.²²⁴

The Committee held that the various State authorities involved in the domestic proceedings ‘failed to take all measures available to promote the realisation of the right to work of persons with disabilities’.²²⁵ Article 5 of the *Convention* requires the ‘duty-bearer’ to ‘enter into dialogue with the individual with a disability’,²²⁶ for the purpose of including the individual in the process of finding solutions for better

²¹⁶ Ibid [5.6], citing *Karakó v Hungary* (European Court of Human Rights, Second Session), Application No 39311/05, 28 April 2009; *Marinkovic v Sweden* (European Court of Human Rights), Application No 43570/10, 10 December 2013.

²¹⁷ Ibid [3.1].

²¹⁸ Ibid [3.1].

²¹⁹ Ibid [3.4].

²²⁰ Ibid [3.5].

²²¹ Ibid [3.5].

²²² Ibid [7.2], [7.3].

²²³ Ibid [7.3].

²²⁴ Ibid [7.5].

²²⁵ Ibid [8.9]

²²⁶ Committee on the Rights of Persons with Disabilities, *General Comment No. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) [26 (a)] (‘*General Comment No. 6*’).

realising their rights and building their capacities'.²²⁷ In failing to inform Sahlin prior to the termination decision that State-funding was inadequate to finance the proposed sign-language interpretation services, Södertöm University 'prevented any process of consultation' with Sahlin regarding alternative measures of adjustment that could be implemented to enable his employment as a person with disability.²²⁸ Furthermore, the Committee found more generally that held 'this absence of dialogue impacted the judicial proceedings', with reasoning focused purely on the 'cost of sign language interpretation' and the reasonableness of such an expense.²²⁹

In addition, the Committee considered that the failure of the Equality Ombudsman as a 'specialised public authority' to raise the potential availability of alternative funding sources, such as an annual wage subsidy, prevented a full consideration of all measures that could have reasonably supported Sahlin's employment.²³⁰ Whilst this did not necessarily prevent the Labour Court from taking into account alternative funding measures into account, the Committee ultimately concluded that the Labour Court's decision resulted in 'the denial of reasonable accommodation' and the 'de facto discriminatory exclusion' of Sahlin from employment, in violation of his rights under Articles 5 and 27 of the *Convention*.²³¹

The Committee also noted that State Authorities 'did not take into account' the impact of the decision to cancel Sahlin's appointment on the realisation of rights under the *Convention* for all persons with disability.²³² Whilst the employment of a deaf lecturer could have undeniably served to 'promote diversity and reflect the composition of society', the indirect impact of the Court's assessment may be such as to 'discourage potential employers' from considering the recruitment of similar individuals with hearing impairments for academic and teaching roles.²³³ For the aforementioned reasons, the Committee therefore held that the 'decisions and interventions of the authorities of the State party limited the possibility for persons with disabilities being selected for positions requiring the adaption of the working environment to their needs'.²³⁴

The Committee recommended that the State party provide Sahlin with an effective remedy and compensation for the violation of Sahlin's rights, including the reimbursement of any legal costs incurred by him, and publicly make available the Views of the Committee.²³⁵ It further found that the State party was obliged to 'prevent similar violations in the future', recommending that 'concrete measures' be taken to ensure: the employment of persons with disability is promoted in practice, including by ensuring that the criteria applied to assess the reasonableness and proportionality of the

²²⁷ *Salin Case* (n 203) [8.5], citing *General Comment No. 6* (n 2010) [67 (h)].

²²⁸ *Ibid* [8.7].

²²⁹ *Ibid* [8.8].

²³⁰ *Ibid* [8.9].

²³¹ *Ibid* [8.11].

²³² *Ibid* [8.10].

²³³ *Ibid* [8,10].

²³⁴ *Ibid* [8.11].

²³⁵ *Ibid* [9].

accommodation measures is assessed in alignment with the principles enshrined in the *Convention*; that dialogue with the person with disability is systematically carried out to enable the realisation of his or her rights on an equal basis with others; and that appropriate and regular training is provided to State agents involved in recruitment processes and to legal servants, especially those of the Labour Court, on the promotion of employment of persons with disabilities in compliance with *Convention* and its *Optional Protocol*.²³⁶

²³⁶ Ibid.