

## REVIEW ARTICLE

# Regulating Shipbreaking as a Global Activity: Issues of Fragmentation and Injustice

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***Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh.* By MD SAIFUL KARIM [Routledge, 2017, ISBN 9781138818200, Hardback, 172 pp, £96]**

### 1. INTRODUCTION

End-of-life ships from different parts of the world often end up in developing countries, primarily in South Asia,<sup>1</sup> and are dismantled on beaches under poor conditions, leading to injuries or deaths of workers and environmental pollution. Shipbreaking, the process of dismantling obsolete ships,<sup>2</sup> currently falls under multiple legal regimes at international and national levels comprising a significantly fragmented regulatory framework. Within this context, Md Saiful Karim's *Shipbreaking in Developing Countries, A Requiem for Environmental Justice from the Perspective of Bangladesh*,<sup>3</sup> makes a significant contribution to the understanding of this framework from the perspective of an academic from and situated in a developing country.

The year 2019 marked one of the most significant years in the regulatory regime of shipbreaking, with India, one of the leading shipbreaking countries, acceding to the International Maritime Organization (IMO) Hong Kong Convention on ship

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1 Most of the world's ships are dismantled in India, Pakistan, Bangladesh, Turkey and China (although China introduced an import ban of ships in 2018). For the latest data, see Nikos Mikelis, *The Recycling of Ships* (2nd edn, 2019) <[http://www.gmsinc.net/gms\\_new/assets/publications/pdf/2020-01-16rJU\\_org.pdf](http://www.gmsinc.net/gms_new/assets/publications/pdf/2020-01-16rJU_org.pdf)> and the annual reports by the NGO Shipbreaking Platform at <<https://www.shipbreakingplatform.org/resources/annual-reports/>> accessed 30 July 2020.

2 This process is also known as ship dismantling or ship recycling. The terms are used interchangeably in this article.

3 Md Saiful Karim, *Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh* (Routledge 2017).

recycling, thereby bringing its entry into force: a small, but significant step forward.<sup>4</sup> This Convention adopts an approach ‘from cradle to grave’ imposing requirements regarding the building, operation and recycling of the ship through obligations on the flag state and the state where dismantling takes place. Around the same time, the Ban Amendment to the UN Environment Programme (UNEP) Basel Convention, which prohibits exports of hazardous waste to countries outside the European Union (EU) and the Organisation for Economic Co-operation and Development (OECD), also entered into force.<sup>5</sup> The Basel Convention on transboundary movements of hazardous waste<sup>6</sup> applies to ship dismantling as a ship may be considered ‘waste’ under the Convention, as further explained in Section 3.1. The Basel regime operates on the basis of prior informed consent by the exporting and importing states as well as any transit states.

In light of these latest developments, Karim’s ‘requiem’, as he calls it, is even more important now, three years following its publication, given its focus on environmental justice and the case of Bangladesh, one of the largest ship recycling countries and one which has not yet joined the Hong Kong Convention, demonstrating the challenges of effectively regulating this global activity. Furthermore, the book’s contribution becomes significant in light of the first certification of compliance with the Hong Kong Convention of a shipbreaking facility in Chittatong, Bangladesh, by private certification companies,<sup>7</sup> despite employing the beaching method and raising concerns about the protection of fundamental rights of workers.<sup>8</sup>

The book under review demonstrates how this fragmented regulatory framework has failed to ensure that shipbreaking takes place in a safe and environmentally sound manner. Karim combines a socio-legal, doctrinal, and empirical approach through an extensive examination of IMO reports, journalistic sources, and existing empirical research. The book seeks to define environmental justice in the context of shipbreaking, thereby engaging in a normative analysis, while offering a doctrinal overview of multiple international legal regimes that may apply to different aspects of ship recycling. The book also examines the shipbreaking regime in Bangladesh and reveals its failings to effectively regulate this hazardous activity. Notably, the analysis is carried out in a structured and systematic manner, explaining complex stages of the ship recycling process in a simple and accessible manner.

4 On India’s accession see <<http://www.imo.org/en/MediaCentre/PressBriefings/Pages/31-India-HKC.aspx>> accessed 29 July 2020. The entry-into-force provision requires ratification by 15 states, which has now been met, as well as a requisite percentage of tonnage of the world’s merchant fleet and of the world’s ship recycling capacity, which remains unfulfilled: Hong Kong International Convention on the Safe and Environmentally Sound Recycling of Ships, 19 May 2009 (not yet in force) SR/CONF/45, Art 17.

5 Basel Ban Amendment 1995 Conference Decision II/12. On its entry into force on 5 December 2019 see, <<http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>> accessed 29 July 2020.

6 Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 57.

7 The facility was authorised by Italian company RINA in 2018 and by Class NK in January 2020. <[https://www.classnk.or.jp/hp/en/press\\_release.aspx](https://www.classnk.or.jp/hp/en/press_release.aspx)> accessed 29 July 2020.

8 This was criticised by environmental NGOs: <<https://www.shipbreakingplatform.org/press-release-ngos-and-trade-unions-denounce-certification-issued-to-php-yard-by-classification-society-rina/>> accessed 29 July 2020.

This review article highlights and analyses the normative contribution of Karim's book by further demonstrating the complexities of shipbreaking from the perspective of environmental justice and key environmental principles (Section 2). It also analyses its doctrinal and empirical contribution by unfolding the fragmented and failing regulatory regimes of shipbreaking, implemented at different levels of governance (Section 3). Overall, the review article further links Karim's normative assessment of environmental justice with the doctrinal analysis of the relevant regulatory regimes.

## 2. ENVIRONMENTAL JUSTICE AND PRINCIPLES IN THE CONTEXT OF SHIPBREAKING

According to Karim, the exportation of obsolete ships from developed nations to sub-standard facilities in South Asia amounts to an externalisation of environmental responsibilities that places a disproportionate burden on the poor. Karim seeks to develop an understanding of environmental justice in the context of shipbreaking taking place in a developing country that is heavily engaged in shipbreaking as a profitable economic activity, which however causes significant health and environmental damage. Karim links the discussion on environmental justice with multiple environmental principles. However, the analysis of their relevance in the context of ship dismantling is sometimes cursory. This review article further demonstrates the complexities of shipbreaking through the lens of environmental justice and key environmental principles.

Karim defines environmental justice following Amartya Sen's *nyaya* concept of realised justice,<sup>9</sup> without however explaining this concept in any detail. Karim advocates for a combination of *niti*, which is just institutions and rules, resembling the conceptualisation of 'law in books',<sup>10</sup> as well as *nyaya* or realised justice, resembling the conceptualisation of 'law in action'.<sup>11</sup> This combination is necessary to avoid a situation where 'the big fish can eat the small'—where the powerful can prevail over the weak in the absence of a clear ruler. There are multiple dimensions of justice relevant to environmental law, with the most prevalent being Schlosberg's 'trivalent' notion,<sup>12</sup> which requires 'equity in the distribution of environmental risk, recognition of the diversity of the participants and experiences in affected communities, and participation in the political processes which create and manage environmental policy'.<sup>13</sup> These three dimensions are closely and deeply intertwined.<sup>14</sup> Equal distribution of environmental benefits and costs among states and peoples requires, and is dependent on, the recognition of various affected interests, some of which are more acutely

9 Amartya Sen, *The Idea of Justice* (Allen Lane 2009).

10 César Arjona and others, 'Senses of Sen: Reflections on Amartya Sen's Ideas of Justice' (2012) 8 *International Journal of Law in Context* 155.

11 *ibid.*

12 David Schlosberg, 'The Justice of Environmental Justice: Reconciling Equity, Recognition, and Participation in a Political Movement' in Andrew Light and Anver de Shalit (eds), *Moral and Political Reasoning in Environmental Practice* (MIT Press 2003); David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (OUP 2009).

13 Emphasis added by authors; David Schlosberg, 'Reconceiving Environmental Justice: Global Movements and Political Theories' (2004) 13 *Environmental Politics* 517.

14 Schlosberg, *ibid.*; Klaus Bosselmann, 'Ecological Justice and Law' in Benjamin Richardson and Stephan Wood (eds), *Environmental Law and Sustainability* (Hart 2006).

affected by specific activities. At the same time, the extent to which affected interests have real opportunities to participate in, and influence, decision-making processes ultimately determines, and is determined by, distributive choices and by the recognition of various affected interests.

The quest for environmental justice becomes more complex in the context of global activities, such as ship dismantling, whose impacts are felt in different parts of the world unevenly. This complexity is partly related to the divergent understandings of what justice requires in different societies as well as the inadequacy of institutional structures to recognise affected interests beyond jurisdictional borders.

Some consensus has been emerging internationally regarding the content and requirements of international distributive justice, consisting of three principles: more capable states have to accept more duties; more capable states are to assist others and there should be equal and transparent participation.<sup>15</sup> Distributive justice considerations influence the distribution of burdens and benefits of environmental protection action across states. This could translate to obligations on Western states not to outsource their responsibilities by exporting hazardous waste to developing countries.<sup>16</sup>

In light of increased globalisation and the interconnectedness of decisions and impact, the 'who' of justice is increasingly questioned.<sup>17</sup> The procedural opportunities for those affected to participate and influence decision-making processes should not be determined on the basis of state borders,<sup>18</sup> but rather by a focus on whose interests are affected.<sup>19</sup> This is also valid at the international level, requiring representation of different kinds of interests from within states. As further discussed below, international institutions, such as the IMO, do not necessarily provide sufficient opportunities of participation to different kinds of interests, thereby leading to agreements that do not sufficiently reflect all affected interests.

There are various interests affected in the shipbreaking process that reveal the challenges of regulating such global activities in a just manner. Maritime states tend to export their ships to be dismantled in faraway places, in the developing world, where it is cheaper and easier to do so. These practices support a perspective of 'not in my back yard (NIMBY)' on the part of maritime nations,<sup>20</sup> while indicating that developing countries are more immediately affected by unsafe dismantling practices. At the same time, ship recycling countries rely on this activity as a significant source of valuable materials, primarily steel, and for providing job opportunities to vulnerable groups of workers. Circular economy approaches support exports to developing countries, as downstream waste management and production of steel contribute to the economy and development of these countries. A rationale of a circular economy

15 Frank Biermann, 'Justice in the Greenhouse. Perspectives from International Law' in Ferenc L. Toth (ed), *Fair Weather? Equity Concerns in Climate Change* (Earthscan 2009).

16 André Nollkaemper, 'Sovereignty and Environmental Justice in International Law' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009).

17 Nancy Fraser, 'Reframing Justice in a Globalizing World' (2005) 36 *New Left Review* 69.

18 Jonas Ebbesson, 'Piercing the State Veil in the Pursuit of Environmental Justice' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009).

19 Fraser (n 17).

20 Tony George Puthucherril, *From Shipbreaking to Sustainable Ship Recycling: Evolution of a Legal Regime* (Brill | Nijhoff 2010) 178.

in the shipbreaking sector makes environmental justice both difficult to assess and to achieve.<sup>21</sup> At the same time, pollution caused by unsafe ship dismantling practices threatens other economic activities in developing countries, such as farming and fishing, giving rise to toxic waste colonialism.<sup>22</sup>

Regulating shipbreaking also raises questions regarding the allocation of responsibilities and costs, and significant concerns from the perspective of the polluter pays principle, according to which the polluter should bear the cost of pollution.<sup>23</sup> The implementation of this principle is often challenging, because it is difficult to identify who the actual polluter is.<sup>24</sup> Achieving a just allocation of the costs of ship dismantling is not straightforward, both due to the multitude of actors benefiting from the shipbreaking process and the complexities relating to effective enforcement of regulatory requirements. Karim submits that if the dismantled ships are considered waste, the real polluter would be the shipowner who has benefited from their operation and is now making profit by selling them to the shipbreaking yard that makes the best offer.<sup>25</sup> In practice, shipowners often escape their responsibilities by registering or re-registering their ships before disposal, under 'flags of convenience', with lax regulatory control mechanisms.<sup>26</sup> Beyond the shipowner, who benefited financially during the operational life of the ship, and the shipbreaking company, which benefits from its dismantling, additional actors play a role in the transfer of the ship to its destination. While Karim does not identify these additional actors, their role further complicates the allocation of responsibility. Shipowners routinely sell their vessels through cash-buyers, thereby avoiding any contractual relationship with the shipbreaking yards.<sup>27</sup> Cash buyers purchase ships via cash payments and subsequently sell them to the highest paying yards.<sup>28</sup> By using complex mechanisms of re-registration, the beneficial owners of the vessels thereby protect their anonymity, and avoid accountability.<sup>29</sup>

Current practices also raise concerns at the inter-state level, possibly violating the principle of Common but Differentiated Responsibilities (CBDR), which provides that responsibilities for the protection of the global environment are shared among states but are differentiated based on their different capabilities and contributions.<sup>30</sup>

21 See more generally on the difficulties of achieving environmental justice in relation to waste dumping, Gordon Walker, *Environmental Justice, Concepts, Evidence and Politics* (Routledge 2012) 98.

22 In relation to transboundary movements of hazardous waste generally see Laura A Pratt, 'Decreasing Dirty Dumping? A Reevaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste' 21 (2010) *Texas Environmental Law Journal* 148. See also Zada Lipman, 'A Dirty Dilemma: The Hazardous Waste Trade' (2002) 23 *Harvard International Review* 67.

23 Rio Declaration on Environment and Development (12 August 1992) UN Doc A/CONF.151/26 vol 1, Principle 16.

24 Ellen Hey, *Advanced Introduction to International Environmental Law* (Edward Elgar 2016) 77.

25 Karim (n 3) 31; NGO Shipbreaking Platform, 'Cash Buyers' <<https://www.shipbreakingplatform.org/our-work/the-problem/cash-buyers/>> accessed 17 July 2020.

26 NGO Shipbreaking Platform, 'Flags of Convenience' <<https://www.shipbreakingplatform.org/issues-of-interest/focs/>> accessed 17 July 2020.

27 Michael Galley, *Shipbreaking: Hazards and Liabilities* (Springer 2014) 4; Puthucherril (n 20) 20.

28 NGO Shipbreaking Platform (n 25).

29 Nigel P Ready, 'Nationality, Registration, and Ownership of Ships' in David J Attard and others (eds), *The IMLI Manual on International Maritime Law: Volume II: Shipping Law* (OUP 2016) 34.

30 Rio Declaration (n 8) Principle 7.

As a principle that embodies international justice considerations within a legal norm, CBDR primarily provides a basis for distributive and potentially corrective justice.<sup>31</sup> It also draws attention to the importance of recognising that developing countries, and interests within them, are often more acutely affected by environmental decision-making. In turn, it also highlights the need to provide such weaker interests opportunities to raise their concerns and local priorities.

The export of ships from maritime nations to developing countries effectively out-sources their responsibilities of maritime nations to poorer parts of the world, where the dismantling of ships is cheaper and less regulated. This largely arises due to the challenges of regulating ship dismantling on the basis of a ship's flag. While the UN Convention on the Law of the Sea (UNCLOS) requires a 'genuine link' between the ship and the flag under which the ship operates, this requirement is not defined and in practice it has been largely ignored by shipowners.<sup>32</sup> According to a United Nations Conference on Trade and Development (UNCTAD) report, 'more than 70 per cent of the fleet (tonnage) is registered under a foreign flag'; that is, a flag different from the vessel's beneficial ownership.<sup>33</sup> In light of these widespread practices, states with large fleets successfully shift their environmental responsibilities to the developing world, while they continue to accumulate profits from this lucrative waste trade.<sup>34</sup> This is particularly problematic within the environmental justice paradigm presented above.

While Karim's conceptualisation of environmental justice following Amartya Sen's concept of realised justice and the discussion of environmental principles is a useful exercise in demonstrating the multiple dimensions of shipbreaking, it is not clear how this normative conception of justice is used in the book to doctrinally assess the applicable legal frameworks.

### 3. A FRAGMENTED AND UNSATISFACTORY REGULATORY REGIME

Shipbreaking is currently regulated by multiple overlapping regimes in ways that demonstrate significant fragmentation of the regulatory framework and shortcomings from the perspective of global environmental justice. Regulatory requirements are also selectively and variably implemented at the national level. Karim's discussion of the Bangladeshi regulatory regime practically demonstrates the challenges of achieving a just outcome that sufficiently recognises vulnerable affected communities, largely due to systemic failings of an under-resourced and corrupted national system.

31 Dinah Shelton, 'Describing the Elephant: International Justice and Environmental Law' in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009).

32 UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 art 91.

33 UNCTAD, *Review of Maritime Transport* (2019) <[https://unctad.org/en/PublicationsLibrary/rmt2019\\_en.pdf](https://unctad.org/en/PublicationsLibrary/rmt2019_en.pdf)> accessed 30 July 2020.

34 Karim (n 3) 28; Federico Demaria, 'Shipbreaking at Alang-Sosiya (India): An Ecological Distribution Conflict' (2010) 70 *Ecological Economics* 250.

### 3.1 International Level: General and Specialised Conventions

At the international level, shipbreaking is potentially covered by various environmental conventions. Karim reviews multiple international agreements that may be relevant at different stages of the shipbreaking process, some more directly applicable than others. This overarching conclusion of his discussion is that most general international conventions do not sufficiently address shipbreaking. A notable exception that merits discussion is the Basel Convention.

As mentioned above, the Basel Convention can cover shipbreaking with the ship becoming 'waste' once the intention to scrap becomes known.<sup>35</sup> Obsolete ships can be classified as waste under the Basel Convention, while at the same time still be defined as ships under other international rules.<sup>36</sup> Ships heading for dismantling may carry hazardous materials as cargo. Even if they do not, they often contain large amounts of toxic materials within their structure, which may be considered hazardous, under the Basel Convention.<sup>37</sup> Therefore, when the decision to be disposed of is made, a vessel may fall under the definition of 'hazardous waste' that is subject to transboundary movement.<sup>38</sup> The main structure of the Basel regime revolves around the system of prior informed consent requiring the consent of the exporting and importing country (and any transit states), including a requirement to ensure that hazardous waste is treated in an environmentally sound manner.<sup>39</sup> Karim highlights the complexities and failings of the distribution of responsibilities between flag states and port states in the Basel regime. As the intention to scrap is often not disclosed before embarking on the last trip to the shipyard, this regime has often been circumvented.<sup>40</sup> This is also because importing developing states also do not consider that the ship was classified as 'waste' under the Basel regime at the moment in time when it departed the exporting state so as to agree to send it back to the exporting state in accordance with the prior informed consent system established under the Convention. At the same time, Karim warns against adopting an outright ban of movements of hazardous waste from OECD to non-OECD countries, as now required by signatories to the Basel Amendment Ban, given the negative economic impacts for developing countries as well as the circumvention possibilities of such a restriction.

Subsequently, Karim provides a detailed examination of the specialised regime on shipbreaking developed under the IMO, which seeks to address the weaknesses of the Basel regime. Written almost ten years after the adoption of the IMO's Hong Kong Convention on ship recycling, the book offers useful insights, moving beyond a textual analysis, by discussing its negotiating history, and the compromises made to

35 Wastes are defined as 'substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law', Basel Convention (n 6) art 2(1).

36 This was confirmed by the Basel COP in Decision VII/26, 'Environmentally Sound waste management of ship dismantling'. See further Karim (n 3) 56–58.

37 Under art 1 and Annexes I and II of the Basel Convention. See Gabriela Argüello, *Marine Pollution, Shipping Waste and International Law* (Routledge 2019) 40–62.

38 Basel Convention (n 6) art 1; Disposal operations are specified in Annex IV and they include operations with no possibility of resource recovery, recycling reclamation, direct re-use or alternative uses but also operations which may lead to resource recovery.

39 Basel Convention (n 6) arts 2.8, 4.2, 4.8, 6.

40 Karim (n 3) 62; NGO Shipbreaking Platform, 'The Controversial Case of the Harrier' <<https://www.shipbreakingplatform.org/spotlight-harrier-case/>> accessed 20 July 2020.

achieve consensus, as well as touching upon subsequent guidelines. It thus complements early book analyses of the Convention.<sup>41</sup>

While Karim identifies key failings of the IMO Convention,<sup>42</sup> he does not elaborate on the inter-connection and interplay between the overlapping Basel and Hong Kong regimes. The Basel Convention does not require a formal authorisation for parties to enter into other international agreements but provides that such arrangements should not be less environmentally sound, effectively requiring an equivalent level of control.<sup>43</sup> The equivalence of the two regimes has, however, not been conclusively settled at the international level.<sup>44</sup> This is particularly evident in relation to the non-prohibition of the 'beaching' method of dismantling and the non-regulation of the downstream management of hazardous materials in the Hong Kong Convention.<sup>45</sup> Karim identifies these two issues as weaknesses of the Convention but he fails to analyse them in the context of the simultaneous application of the Basel Convention.

The beaching method has been one of the most controversial aspects of regulating ship recycling. Some argue that this method is known for its 'fatal shortcomings' for the marine environment and that its prohibition is essential for the realisation of ship dismantling in a safe and environmentally sound manner.<sup>46</sup> Others highlight that the improvement of practices will not happen overnight through a total ban on beaching and instead requires a gradual process.<sup>47</sup> Karim submits that the beaching method is largely responsible for the serious pollution and dangerous working conditions in shipbreaking yards.<sup>48</sup> However, it is predicted that a global prohibition of beaching, as endorsed unilaterally by the European Union,<sup>49</sup> would effectively exclude facilities located in South Asia, which realistically need considerable time and investment before adjusting to strict standards.<sup>50</sup> A global regime that outright prohibits beaching would not necessarily lead to better practices as the regulatory requirements would likely be circumvented, as demonstrated with the operation of the Basel regime to date.

Another critical flaw of the Hong Kong Convention is that it fails to cover the recycling activities taking place outside the ship recycling facilities,<sup>51</sup> and therefore

41 Urs Daniel Engels, *European Ship Recycling Regulation: Entry-Into-Force Implications of the Hong Kong Convention* (Springer 2013); Galley (n 27); Puthucherril (n 20).

42 Karim (n 3) 83–92.

43 Basel Convention (n 6) art 11.

44 'Compilation of the completed tables and submissions received pursuant to decision OEWG-VII/12' Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal Tenth meeting (Cartagena, Colombia, 17–21 October 2011) (11 August 2011) UNEP/CHW.10/INF/18.

45 *ibid.*

46 *ibid.* 174.

47 Mikelis (n 1).

48 Karim (n 3) 83–84.

49 Parliament and Council Regulation (EU) 1257/2013 of 20 November 2013 on Ship Recycling [2013] OJ L330/1; Commission, 'Requirements and procedure for inclusion of facilities located in third countries in the European List of ship recycling facilities—Technical guidance note under Regulation (EU) No 1257/2013 on ship recycling' (Communication) [2016] OJ C 128/1.

50 Commission, 'Impact Assessment of Proposal for Council Regulation on ship recycling' (Staff Working Document) SEC (2012) 47 final, 28, 118.

51 Galley (n 27) 179, 180.

does not provide safeguards against the mismanagement of waste transferred from the recycling yard.<sup>52</sup> While subsequent guidelines have provided certain clarifications, they grant considerable discretion and render the application of their standards dependent on national initiative and responsibility.<sup>53</sup> On the contrary, the Basel Convention regulates the environmentally sound management of hazardous wastes from their generation to their subsequent transport, until their downstream treatment and final disposal.<sup>54</sup>

Karim generally argues that the Hong Kong Convention and the relevant IMO Guidelines distribute obligations among the various actors in ways that disregard the polluter pays principle and the principle of CBDR, by imposing the highest financial burdens on developing countries.<sup>55</sup> The responsibilities of shipowners are mainly procedural and therefore less burdensome, and consist of preparing and periodically updating an Inventory of Hazardous Materials on board their ships, carrying out a number of surveys, and obtaining a Ready for Recycling certificate which is issued by the flag state.<sup>56</sup> At the same time, ship recycling facilities have to invest large amounts of money to upgrade their infrastructure and improve their working practices, as well as for the training, equipment and safety of their personnel.<sup>57</sup> This structure fails to sufficiently recognise affected interests in shipbreaking countries, as well as their particular vulnerabilities. While the Hong Kong Convention provides for co-operation on technical assistance and technology transfer,<sup>58</sup> it does not provide for the generation or supply of funds by maritime nations for adjusting ship recycling facilities in developing countries to the requirements of the Convention.<sup>59</sup> Such requirements would have contributed to the equitable distribution of costs and benefits. They are also important from a corrective justice perspective, particularly in light of the need for an even-handed enforcement of legal requirements as well as sufficient compensation of those harmed.<sup>60</sup> Interestingly, Karim notes that efforts made by the IMO via the establishment of a fund aiming to improve policies and training in shipbreaking countries<sup>61</sup> have not been particularly helpful for Bangladesh, since the main weaknesses relating to technological and financial resources for the improvement of recycling infrastructure are not addressed.<sup>62</sup> The actual allocation of responsibility once the Hong Kong Convention is operational will ultimately depend on its compliance. The danger of avoiding the Convention through reflagging will not necessarily disappear, especially if not all ship recycling countries ratify it.

52 UNEP/CHW.10/INF/18 (n 49) 174.

53 Karim (n 3) 88.

54 UNEP/CHW.10/INF/18 (n 49) 8; Basel (n 6) arts 2. 2, 2.5, 2.8, 4.2(a), (b), (c), 4.8.

55 Karim (n 3) 88.

56 Emmanuel Yujuico, 'Demandeur Pays: The EU and Funding Improvements in South Asian Ship Recycling Practices' (2014) 67 *Transportation Research* 340, 344.

57 Nikos Mikelis, 'Ship Recycling' in Harilaos N Psaraftis (ed), *Sustainable Shipping: A Cross-Disciplinary View* (Springer 2019) 242.

58 Hong Kong Convention (n 4) art 13.

59 Galley (n 27) 181.

60 Robert R Kuehn, 'A Taxonomy of Environmental Justice' (2000) 30 *Environmental Law Reporter News & Analysis* 10681.

61 Karim (n 3) 93.

62 *ibid* 94–95.

A very interesting contribution of the book, found at the end of Chapter 4, seeks to explain why the IMO Convention has not allocated greater responsibility to ship-owners and shipping nations. The IMO is controlled by the countries with the largest fleets.<sup>63</sup> However, ship recycling is a land-based activity that largely influences ship recycling nations. Karim demonstrates that in the IMO decision-making process, the interests and capabilities of those ship recycling countries are largely ignored, since they lack the necessary power and representation.<sup>64</sup> Shipowner and shipbreaker actors are routinely involved in state delegations to the IMO's Marine Environmental Protection Committee (MEPC).<sup>65</sup> However, while delegations of developed countries sometimes include researchers, academics and representatives from environmental and other NGOs, the same does not occur in the delegations of the most important ship recycling states.<sup>66</sup> As Karim explains, in the delegations of Bangladesh and India, industry representatives may not only act as advisers, but also as representatives of the respective states, sometimes without the participation of the relevant government agencies.<sup>67</sup> Labour rights and environmental protection issues from those countries are only represented through activist groups with limited participation status and no voting rights, thereby restricting their influential power.<sup>68</sup> These practices raise concerns from the perspective of justice as recognition and participation (discussed above), given the unequal consideration given to the communities most affected, which do not have sufficient opportunities to raise their concerns and provide input in the decision-making process.

This discussion in the book provides the seeds to a novel understanding of the multiple applicable international regulatory regimes, revealing unexplored research directions that deserve further investigation, particularly through empirical research. The nature of the two regimes is noticeably different. On the one hand, the IMO selectively deals with environmental issues and only by exception regulates ship recycling, given that it is largely a land-based activity. On the other hand, the Basel regime under UNEP is primarily an environmental regime that deals with waste management more generally. Comparing the two from an institutional perspective would provide useful insights, both for explaining the different regulatory requirements and for evaluating the best way forward. The shortcomings of the current regulatory regime to effectively regulate safe ship-dismantling become even more obvious when examining its operation at the national level within a ship recycling state.

### 3.2 The National Level: The Case of Bangladesh

Karim's detailed and systematic analysis of the legal and institutional regime of Bangladesh demonstrates how its economic vulnerability and the need to safeguard sources of income and employment have placed environmental and human rights

63 Md Saiful Karim, *Prevention of Pollution of the Marine Environment from Vessels: the Potential and Limits of the International Maritime Organisation* (Springer 2015) 139.

64 *ibid.* See also Karim (n 3) 92.

65 This observation is based on a selective examination of the MEPC's meeting documents by the authors. <<https://docs.imo.org/Category.aspx?cid=47>> accessed 17 July 2020.

66 *ibid.*

67 Karim (n 3) 92.

68 *ibid.*

concerns at the bottom of the government's agenda. This analysis exhibits not only the complex regime of Bangladesh but more broadly the intricate interaction between the different branches of government, and particularly the importance of public-interest litigation and judicial activism.

The discussion in the book focuses on three themes. First, the existence of general regulatory regimes, which although not created with ship recycling in mind, could function to improve the overall situation. Environmental protection in Bangladesh is safeguarded under the Environment Conservation Act 1995 and shipbreaking operations can be brought within its ambit.<sup>69</sup> Other general national regimes relate to labour and criminal laws which could function to hold shipyard owners to account, in relation to the deaths and injuries caused to their workers.<sup>70</sup>

Karim highlights that the problem has not been so much the absence of a specialised regime, but the reluctance of the enforcement authorities to properly implement existing laws and prosecute violations.<sup>71</sup> This lack of compliance enables the shipbreaking industry to act with impunity, while operating under extremely dangerous conditions and unsafe working practices.<sup>72</sup> Recently, due to this weak domestic enforcement system, attempts have been made by injured labourers or their families to seek legal remedies in other jurisdictions connected to the shipowner, thereby demonstrating how global environmental justice may sometimes be effectuated across jurisdictional borders.<sup>73</sup> There has been a notable effort to hold shipowners accountable for knowingly sending their ships to Bangladesh to be dismantled under dangerous conditions, thereby exposing the workers to a foreseeable risk of harm.

Secondly, Karim highlights the significant role of legal activism in Bangladesh, and particularly public-interest litigation, in bringing about change and objecting to the imports of hazardous ships. He discusses the multiple cases brought by the Bangladesh Environmental Lawyers Association (BELA) and the directions issued by the Supreme Court of Bangladesh to relevant government departments to properly regulate shipbreaking operations, in accordance with international obligations under the Basel Convention,<sup>74</sup> and by complying with existing national laws regulating the industry.<sup>75</sup>

Specifically, in *MT Enterprise*, the Supreme Court of Bangladesh heavily criticised the Ministry of Environment and the Ministry of Shipping for failing to prohibit the entrance and ultimate scrapping of the vessel 'MT Enterprise' without first ascertaining whether its dismantling could be done under safe conditions in an environmentally sound manner, in contravention of obligations both under the Basel

69 Environment Conservation Act 1995 (Act No. 1 of 1995); Karim (n 3) 99–101.

70 Karim (n 3) 102–06.

71 *ibid* 107.

72 *ibid* 102–06.

73 Leigh Day, 'Legal action against London-based shipping company following life-changing injuries' <<https://www.leighday.co.uk/News/News-2017/December-2017/Legal-action-against-London-based-shipping-company>> accessed 10 October 2020; For a recent example see *Begum v Maran* [2020] EWHC 1846.

74 Bangladesh has acceded to the Basel Convention since 1993 but has not ratified the Basel Ban Amendment.

75 Karim (n 3) 107–11.

Convention and under national laws.<sup>76</sup> Notably, the Supreme Court directed the Ministry of Shipping to ensure that obsolete vessels will not be imported into Bangladesh before their prior decontamination at source or outside the territory of the country.<sup>77</sup> It also ordered the Ministry of the Environment to close down all illegal shipbreaking yards until they apply for, and are provided with, a clearance certificate, to be issued only under strict conditions.<sup>78</sup> The Court also directed the Ministry of the Environment to develop a specialised regulatory framework, taking into consideration the Basel Convention and the relevant national legislation.<sup>79</sup> These judicial directions eventually led to the adoption of the Hazardous Wastes and Shipbreaking Wastes Management Rules 2011<sup>80</sup> and the Ship Breaking and Recycling Rules 2011.<sup>81</sup>

Despite the adoption of these legal instruments, Karim also demonstrates how judicial directions to the executive and legislature can only go so far, as the implementation and enforcement of applicable rules is dependent on political will, which has been largely absent, due to the tendency of the executive to be influenced by corporate interests and corruption.<sup>82</sup> He notes that the implementation of the judicial directions given in *MT Enterprise* was largely problematic and even led to the initiation of contempt proceedings. A notable example is the reluctance shown by the yards to comply with the safety requirements and conditions attached to the clearance certificates issued, undermining in practice the safety guarantees that the Supreme Court was aiming to provide with its directions.

The incorrect interpretation and implementation of the legislation adopted following the Court's directions in *MT Enterprise* is particularly evident in *MT Producer*, a more recent decision by the Supreme Court of Bangladesh, issued in November 2019, after Karim's writing.<sup>83</sup> The Supreme Court stated that both sets of rules adopted following its judgment in *MT Enterprise* are partly based on Basel principles and play a predominant role in the shipbreaking industry regulation.<sup>84</sup> However, in this instance, the Supreme Court found a number of infringements and illegalities in the permissions given by the government for the import and dismantling of the vessel 'MT Producer', concluding that these actions constituted illegal traffic of a toxic ship.<sup>85</sup> The Supreme

76 *Bangladesh Environmental Lawyers Association v. Ministry of Shipping*, Writ Petition No 7260 of 2008 (Unreported judgment, 17 March 2009) ('*MT Enterprise*'); Karim (n 3) 109–10.

77 *ibid* 15, 22.

78 *ibid* 18–19, 21.

79 *ibid* 15, 22.

80 Hazardous Wastes and Shipbreaking Wastes Management Rules, 2011 (SRO No. 369-Law/2011) (21 December 2011).

81 Ship Breaking and Recycling Rules, 2011 (Ministry of Industries Gazette Notification dated 12 December 2011, an amended gazette notification published on 11 January 2012).

82 Karim (n 3) 99, 111, 120–23; NGO Shipbreaking Platform, 'Press Release–Bangladesh High Court Issues Contempt Rule against 14 Government Officials: Ministries and Shipbreakers Asked to Account for Non-Compliance with 2009 Judgement' <[www.shipbreakingplatform.org/press-release-bangladesh-high-court-issues-contempt-rule-against-14-government-officials-ministries-and-shipbreakers-asked-to-account-for-non-compliance-with-2009-judgement/](http://www.shipbreakingplatform.org/press-release-bangladesh-high-court-issues-contempt-rule-against-14-government-officials-ministries-and-shipbreakers-asked-to-account-for-non-compliance-with-2009-judgement/)> accessed 17 July 2020.

83 *Bangladesh Environmental Lawyers Association v. Bangladesh and others*, Writ Petition No 8466 of 2017 (14 November 2019) ('*The MT Producer*').

84 *ibid* 10, 39.

85 *ibid* 47, 50.

Court further opined that the legal regime in Bangladesh 'suffers from an overall lack of accountability, inconsistency and disdain, in practice, of strict compliance with international law standards'<sup>86</sup> and reiterated that this behaviour cannot remain unpunished.<sup>87</sup> To that end, the Supreme Court stipulated, once again, a number of directions towards the government. Specifically, it directed the authorities to strictly regulate the operations of cash buyers and subject them to stricter scrutiny and more severe sanctions.<sup>88</sup> It also directed them to secure compliance with the Basel requirements and previous directions of the Supreme Court when importing obsolete vessels.<sup>89</sup> Furthermore, it emphasised that import of vessels should be prohibited unless the yards comply fully with the conditions of their Environmental Clearance Certification and provided that pre-cleaning certificates and verifications are available.<sup>90</sup> Finally, the Court emphasised that a breaking permission should be awarded only when the hazardous waste on the vessel is properly assessed.<sup>91</sup>

The analysis of such cases demonstrates how, in developing countries, public-interest litigation is wide-spread, and the courts are often progressive on environmental issues, issuing authoritative and demanding directions to the executive and legislature. The extent to which they then follow such judicial directions very much depends on political will and economic interests.

Thirdly, Karim extensively analyses the regulatory instruments adopted to specifically regulate ship recycling activities in Bangladesh, partly on the basis of the Supreme Court's directions discussed above. He explains that in the process of designing ship dismantling regulation, several provisions aiming to safeguard environmental protection were either changed at the request of the shipbreaking industry or are simply ignored and remain without implementation.<sup>92</sup> Beyond the 2011 Rules mentioned above, he discusses the 2018 Bangladesh Ship Recycling Act, which was in draft form at the time of his writing.<sup>93</sup> The Act establishes the 'Bangladesh Ship Recycling Board' to supervise the activities of the ship recycling industry and to safeguard the application and implementation of relevant conventions and national law. In his critique on the draft Act, Karim expresses serious concerns regarding the impartiality of the Board, because of the strong representation of the shipbreaking industry in its membership.<sup>94</sup> Karim characterises the institutional framework in Bangladesh as 'fragmented',<sup>95</sup> highlighting that multiple government agencies are working in an uncoordinated manner, with significant influence by the shipyard owners and a reluctance by enforcement authorities to restrict their operations.<sup>96</sup> Despite

86 *ibid* 56.

87 *ibid* 48.

88 *ibid* 50.

89 *ibid*.

90 *ibid* 51.

91 *ibid*.

92 Karim (n 3) 111–17.

93 The Bangladesh Ship Recycling Act 2018 (Act No 08 of 2018).

94 Karim (n 3) 117–19.

95 *ibid* 119.

96 *ibid* 104, 120. See further on the legal framework in Bangladesh, Md Ashabur Rahman and others, 'A National and International Regulatory Framework for Establishing Sustainable Shipbreaking Industry in Bangladesh' (2019) 3 *Bangladesh Maritime Journal* 87.

the repeated directions of the Supreme Court to ensure strict compliance with existing and new regulatory developments, in reality these rules are applied only in a way that serves the interests of the industry.<sup>97</sup> Karim also underlines the fact that the implementation of international standards requires significant investment for facilities and equipment, the lack of which makes compliance even more difficult.<sup>98</sup>

Overall, Karim's analysis reveals serious failings of the national system to protect vulnerable affected interests. It also demonstrates how the burden is effectively placed on developing countries with weaker governance systems, scarce resources and technological know-how, as well as corrupt law enforcement systems, to deal with the impacts of waste generated by rich shipping companies and countries, which have immensely benefited during the operational life of the ships. More broadly, this section of the review article has demonstrated that affected communities may be better recognised and given an opportunity to participate not in the decision-making processes of adopting laws but in the court room, with opportunities to challenge the implementation applicable law in specific cases. However, any judicial decision's potential to influence distributive choices is necessarily affected by broader issues of economic and social justice in any given system, as evidently demonstrated by the practices prevalent in the Bangladesh shipbreaking framework.

#### 4. CONCLUSION

Karim concludes that both the international and national regulatory regimes have failed to ensure the safe and environmentally sound breaking of ships, allowing the small fish to be eaten by the big. The small fish, that is the local illiterate workers and the local environment, have no voice in the matter and this book seeks to bring their voice to the front. His analysis demonstrates that the current regulatory landscape for shipbreaking fails to meet the demands of justice both from a *niti* and a *nyaya* perspective, but this is not explicitly and systematically analysed in the book. From a *niti* perspective of rules and institutions, the international regime is highly fragmented, and the IMO gives priority to shipping interests, particularly given that the provisions of the Hong Kong Convention are often not as demanding as needed. From a *nyaya* perspective, the current regime is highly susceptible to circumvention. In terms of realised justice, the regime is failing to sufficiently protect the workers of shipbreaking facilities, as evidenced by the numbers of injuries and deaths of poor vulnerable workers in dire need of work even under unsafe conditions.<sup>99</sup> Additionally, the avoidance of responsibility and liability of both states and ship-owners that benefited from the operational use of the ship and the insufficient enforcement of national rules exhibit the extent to which the regulatory regime is failing from a perspective of realised justice.

The book exposes how Bangladesh, one of the major ship recycling countries, handles and regulates its shipbreaking industry. The analysis highlights the lack of compliance with international and national legislation, demonstrating the 'culture of

97 *ibid* 120.

98 *ibid* 123.

99 Karim provides an overview of the number and cases of deaths in the shipbreaking industry for the period 2006–2016, Karim (n 3) 6.

impunity' that is prevalent in the country.<sup>100</sup> Karim's book reveals significant concerns and failings, which are often concealed by the government when relevant decisions are taken at the international level. It becomes evident that Bangladesh often prioritises the profits gained by this industry over the protection of the marine environment and the rights of vulnerable shipyard workers. When these realities are exposed in an academic publication written in an accessible and well-researched manner, the failings of the currently fragmented regime on shipbreaking from the perspective of global justice can no longer be ignored. The way forward, however, remains an open question, to which Karim does not offer any answer. It is not clear whether better implementation of existing international regimes or ratification of the Hong Kong Convention would bring about the necessary changes for achieving a just outcome, both for workers that depend on shipbreaking and for the environment.

#### ACKNOWLEDGEMENTS

The authors are grateful to Steven Vaughan and the anonymous reviewer for useful comments on earlier drafts. Any omissions or mistakes remain our own.