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Dear Readers,

We are honoured to present you with a new volume of Polish Yearbook of International Law (no. 37/2017). Before discussing the contents of this present volume, we would like to inform you about two important developments that strengthen the position of the Yearbook on the international level. First, PYIL has been recently accepted for indexing in the European Reference Index for the Humanities and the Social Sciences (so-called ERIH PLUS) – a prestigious database maintained by the Norwegian Centre for Research Data. Second, our journal is now available (free of charge) in a new online library established by the Polish Academy of Sciences. The library currently hosts our last seven volumes, and new ones will be added gradually – normally nine months after their publication. The library web page of our journal can be found at: http://journals.pan.pl/dlibra/journal/109865.

The present volume includes our three regular sections: General articles; Polish practice of international law; and Book reviews. In addition, in the current volume we also publish papers that are outcomes of the mini-symposium on the general principles of international law that was held in 2017.

The General articles section opens with a paper by the eminent scholar prof. Christian Tomuschat. His contribution, which was originally presented as a lecture delivered on 18 October 2017 as a part of the series commemorating Krzysztof Skubiszewski, introduces us to the specific questions of identity of individuals and states in contemporary public international law. The next article, written by Alessandra La Vaccara (*Past Conflicts, Present Uncertainty: Legal Answers to the Quest for Information on Missing Persons and Victims of Enforced Disappearance*), discusses why and how the legal frameworks of contemporary international humanitarian law and international human rights law offer tools to address the uncertainty, lack of information, and the consequences thereof in relation to missing persons and victims of enforced disappearances in the context of armed conflicts which predated the adoption the legal frameworks in place today. Subsequently Maryna Rabinovich, in her article entitled *The Rule of Law Promotion through Trade in the "Associated" Eastern Neighbourhood*, deals with the rule of law promotion exercised by the European Union through the Deep and Comprehensive Free Trade Agreements (based on examples of the DCFTAs with Ukraine, Moldova and Georgia). Hanna Kuczyńska, in her article *Changing Evidentiary Rules to the Detriment of the Accused? The Ruto and Sang Decision of the ICC Appeals Chamber*, offers some interesting insights into the issue of international procedural criminal law, while Maciej Szpunar, in his provocatively titled article (*Is the Court of Justice Afraid of International Jurisdictions?*) discusses the relationship between the jurisdiction of the Court of Justice and other international dispute settlement bodies/processes. His analysis also includes the recent, and highly

controversial, decision rendered in the *Achmea* dispute. In the next contribution: *Member State Interests and EU Law: Filtering, Moderating and Transforming?* Marton Varju addresses the problem of the engagement of EU law with the interests represented and pursued by the Member States within the EU framework. In the article that follows (*European "Ghost Airports": EU Law Failure or Policy Failure? The Need for Economic Analysis in State Aid Law*), Jakub Kociubiński deals with the problem of so-called ghost airports from the perspective of EU state aid law. Justyna Maliszewska–Nienartowicz, in her contribution entitled *A New Chapter in the EU Counterterrorism Policy? The Main Changes Introduced by the Directive 2017/541 on Combating Terrorism*, analyses the updated legal framework for the EU's counterterrorism policy, critically assessing various changes introduced by the new directive. The last article in this section, written by Mirosława Myszke-Nowakowska (*Insolvency Forum Shopping: What Can Be Learned from the ECJ and US Supreme Court Case Law on International Company Law and Insolvency Procedures?*), provides an in-depth analysis of the jurisprudence of the ECJ and the US Supreme Court relating to insolvency proceedings, and in this context concentrates on the problem of insolvency forum shopping.

The next section includes four texts presented at the mini-symposium on the general principles of international law, organized at the end of 2017 by the Institute of Law Studies of the Polish Academy of Sciences. The subject matter is introduced by Artur Kozłowski (*Systematicity of General Principles of (International) Law – An Outline*), and followed by the texts of Roman Kwiecień (*General Principles of Law: The Gentle Guardians of Systemic Integration of International Law*), Przemysław Saganek (*General Principles of Law in Public International Law*) and Izabela Skomerska-Muchowska (*Some Remarks on the Role of General Principles in Interpretation and Application of International Customary and Treaty Law*).

The third section looks at recent developments in the Polish practice of international law. It concentrates on the act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against Polish Nation, the amendment of which has recently provoked a lot of (justified) criticism both inside and outside of the country. Although the controversial amendment was adopted only in 2018, we have decided, considering the importance of the topic and the fact that most of the legislative work took place in 2017, to include this analysis in the present volume. In this context, Karolina Wierczyńska analyses those provisions of the act which allow for the prosecution of individuals for international crimes, while Patrycja Grzebyk offers an insightful look into the substantive content of the recent amendment and assesses it against public international law standards.

The last section includes reviews of five books that were published in 2017 and which appeared to us as particularly interesting.

Last but not least, we would like to kindly encourage you to submit your papers for the 2018 volume of the Polish Yearbook of International Law. The call for papers will be traditionally announced in September 2018. Of course, we are also delighted to receive feedback from our Readers concerning the current issue or ideas for the future. Please email us at: pyil@inp.pan.pl.

Karolina Wierczyńska, Łukasz Gruszczyński

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*Christian Tomuschat**

INDIVIDUAL AND COLLECTIVE IDENTITY: FACTUAL GIVENS AND THEIR LEGAL REFLECTION IN INTERNATIONAL LAW. WORDS IN COMMEMORATION OF KRZYSZTOF SKUBISZEWSKI**

Abstract:
States and individuals are the essential building blocks of international law. Normally, their identity seems to be solidly established. However, modern international law is widely permeated by the notion of freedom from natural or societal constraints. This notion, embodied for individuals in the concept of human rights, has enabled human beings to overcome most of the traditional ties of dependency and being subjected to dominant social powers. Beyond that, even the natural specificity of a human as determined by birth and gender is being widely challenged. The law has made far-going concessions to this pressure. The right to leave one's own country, including renouncing one's original nationality, epitomizes the struggle for individual freedom. On the other hand, States generally do not act as oppressive powers but provide comprehensive protection to their nationals. Stateless persons live in a status of precarious insecurity. All efforts should be supported which are aimed at doing away with statelessness or non-recognition as a human person through the refusal to issue identity documents.

Disputes about the collective identity of States also contain two different aspects. On the one hand, disintegrative tendencies manifest themselves through demands for separate statehood by minority groups. Such secession movements, as currently reflected above all in the Spanish province of Catalonia, have no basis in international law except for situations where a group suffers grave structural discrimination (remedial secession). As the common homeland of its citizens, every State also has the right to take care of its sociological identity. Many controversies focus on the distinction between citizens and aliens. This distinction is well rooted in domestic and international law. Changes in that regard cannot be made lightly. At the universal level,

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** This article is based on the lecture which was delivered on 18 October 2017 (Institute of Law Studies of the Polish Academy of Sciences, Warsaw, Poland) as a part of the lecture series commemorating Krzysztof Skubiszewski.

international law has not given birth to a right to be granted asylum. At the regional level, the European Union has put into force an extremely generous system that provides a right of asylum not only to persons persecuted individually, but also affords "subsidiary protection" to persons in danger of being harmed by military hostilities. It is open to doubt whether the EU institutions have the competence to assign quotas of refugees to individual Member States. The relevant judgment of the Court of Justice of the European Union of 6 September 2017 was hasty and avoided the core issue: the compatibility of such decisions with the guarantee of national identity established under Article 4(2) of the EU Treaty.

Keywords: identity, individuals and peoples, determining factors, birth and family, gender, slavery, religious ties, freedom to leave any country, nationality, statelessness, official recognition as a person, self-determination, people and population, minorities and secession, refugees, EU citizenship, admission of refugees, competence of EU authorities to assign quotas of refugees to individual Member States

A. It is a great honour and pleasure for me to address this gathering in commemoration of Krzysztof Skubiszewski (hereinafter: KS), that great lawyer who earned a tremendous reputation not only for himself, but also for his country, Poland. KS died nine years ago, but his name is not forgotten. It is not my task to appraise his political achievements, although they are many and impressive. Poles themselves have to reflect on his legacy and how that legacy can be preserved and made to bear fruit in the best interests of the country. In many cases, looking back may help sharpen the views with respect to the challenges for the future and how to tackle them successfully. I confine myself to saying that a personality that exhibits all the qualities of a well-pondered perseverance, but at the same time a spirit of understanding and tolerance, can ideally serve as a figure of orientation and inspiration guiding political decisions, even in particularly rough waters. Fortunately, KS was able to put into practice these exceptional gifts as the Foreign Minister of his country during the difficult period of transition from 1989 to 1993.

Permit me to say just a few words about the scholarship of KS and his unchallenged recognition as one of the leading international lawyers of his time, of our time if I may say so. Only a few hints are necessary since Jerzy Makarczyk has given an ample account of KS's academic career in the *Festschrift* ("Essays"), which KS received in 1996 on the occasion of his 70th birthday.[1] KS had the enviable opportunity to study and lecture abroad after having completed his studies at Poznan University, a rare privilege during the time of communist rule in Poland. A first stay in Nancy established ties with the French way of understanding and developing international law, which at that time – in

[1] J. Makarczyk, *Krzysztof Skubiszewski: His Professional and Public Activity*, in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, Kluwer Law International, The Hague: 1996, pp. 11-34. For more on the private life of KS, *see* P. Skubiszewski, *About my Brother*, 1 Przegląd Zachodni 321 (2017).

1957 – was still marked by a fairly traditional approach, and a year later he enjoyed the opportunity to become familiar with the intellectual climate of Harvard University in the United States, where he could witness a different spirit, closer to political realities. Thereafter, in 1960, KS completed his *Habilitation* at the University of Poznan. This should have opened up an academic career with full prospects for a successful future. But KS was not appreciated by the regime and could not count on favours from the academic establishment. As an independent spirit, he never bowed to the communist doctrines that also infiltrated the field of international law. The most remarkable sign of KS's proper way of thinking was the article he wrote in 1968 on "Use of Force, Collective Security, Law of War and Neutrality" for the Manual of Public International Law edited by the renowned Danish lawyer Max Sørensen, later judge of the European Court of Human Rights.[2] In that article, not a single word was lost about the specific communist doctrine of the principle of non-use of force, according to which recourse to force was permissible in order to help other brotherly nations in a spirit of friendly assistance to regain the path of genuine socialism. When the article was published that doctrine, later called Brezhnev doctrine, was not yet fully developed; it was formulated explicitly to justify the invasion of Czechoslovakia in August 1968. Nonetheless, signs foreboding that imperial doctrine of the Soviet Union were already in the air. In this context, KS developed his interpretation of the principle of non-use of force in the most traditional way, without creating any special opening for the eastern hegemon, so his opinion was referred to repeatedly in the subsequent decades by lawyers from all quarters as a standard comment on those key principles of the UN Charter.[3] It still reflects the state of the art today, although of course a modern treatment of *jus ad bellum* would have to take into account the doctrine of preemptive strikes that later arose from the US and British invasion of Iraq.

In the relationship between Poland and Germany, KS defended with great vigour the Polish viewpoint that the western border of Poland had already been determined by the 1945 Potsdam Agreement between the three main Allied Powers, the victors of World War II,[4] although that Agreement confined itself to referring to Polish administration of the German territories east of the Oder-Neiße line.[5] But he was absolutely right after the conclusion of the Warsaw Treaty of 7 December 1970 to maintain that a conclusive settlement had been reached through the definition of the western border of Poland in Article 1 of that Treaty,[6] notwithstanding the fact that German political leaders still

[2] Macmillan, London: 1968, pp. 739-843.

[3] *See* M. Kowalski, *The Use of Armed Force: Contemporary Challenges in Light of Professor Skubiszewski's Legacy*, 18 International Community Law Review 109 (2016).

[4] Available at: http://germanhistorydocs.ghi-dc.org/pdf/eng/Allied%20Policies%208_ENG.pdf (accessed 30 June 2018).

[5] *La frontière polono-allemande en droit international*, 61 Revue générale de droit international public 242 (1957).

[6] K. Skubiszewski, *The Western Frontier of Poland and the Treaties with Federal Germany*, III Polish Yearbook of International Law 53 (1970), p. 65.

maintained that specific legal impediments stood in the way of such a settlement – which were eventually resolved formally through the treaties of 1990, the Treaty on the Final Settlement with Respect to Germany (12 September 1990)[7] and the German-Polish Border Treaty (14 November 1990)[8] that was signed by KS himself and by Hans-Dietrich Genscher on the German side. Fortunately, those two treaties put an end to all claims from both sides, including German territorial claims and Polish reparation claims. After that time, KS became a tireless promoter of relations of friendship and good neighbourliness between our countries, engaging himself consistently for the improvement of those relations.

I had the good fortune to meet KS first at a meeting of the Advisory Board of the Kiel Institute of International Law in 1989, when he had accepted forming part of that Board, and later in Strasbourg where he headed a Polish delegation to the Council of Europe. I happened to have some function to discharge with the Strasbourg institutions, and just by chance we met in a restaurant close to the Cathedral, where he kindly invited me to join him. We had an extensive and lively conversation which I still recall most vividly today. Some years later, I succeeded in convincing him to come to Berlin to give a lecture on the Iran – United States Claims Tribunal at Humboldt University.

B. Let me come now to the specific subject matter of today's lecture. It may seem strange to talk about individuals and States at the same time. It is a matter of common knowledge that the traditional actors in the field of international law are States. Up to the middle of the 20th century, international law was conceived of as a set of rules governing exclusively relations among States. Only slowly did international organizations make their way into the cobweb of those rules, a phenomenon that was eventually recognized through the opinion of the International Court of Justice in the *Bernadotte* case of 1949.[9] The individual's personality under international law emerged progressively as a consequence of the creation of the body of rules governing human rights. Originally, States and individuals were viewed as almost natural opponents, thus being fundamentally different as holders of rights and duties under international law.

INTRODUCTION

Generally, no great attention is devoted to the specific identity of an individual or an entity classified as a State in general international law. Individuals are seen as an amorphous mass of people among whom, according to today's standards, the principles of equal rights and non-discrimination shall apply. Accordingly, the individual profile of a person, determined by natural or societal factors, is left out of consideration unless

[7] 29 International Legal Materials (1990), p. 1186.

[8] 31 International Legal Materials (1992), p. 1292.

[9] ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Rep. 1949, p. 174.

the law establishes special categories on legitimate grounds. General agreements exist, in particular, as to the need to afford extraordinary care to children, to handicapped persons, and to elderly people. Yet the interesting question arises whether the "starting conditions" of a person are unalterable and have to be simply accepted by them for their entire lifetime. In what relationship do the facts and the law stand towards one another? Can a person emancipate herself from the original design shaped by nature or the social environment and accede to a new identity? I venture to formulate a working hypothesis in this regard: In our time, one can observe a growing trend by individuals to break out of the cage nature or society has built around them.[10] Bowing to such individualistic pressures, national legislation as well as the relevant rules of international law have acquired some flexibility, although less than what many voices in political philosophy demand.

Similar questions arise with regard to States and peoples. In international law, States are the cornerstones of the entire normative system, the main addressees of international law. Its main rights and duties operate by way of reciprocity within that narrow group of actors. To that end, States should have a firm and unmistakable identity. One should know which entity is a State and which entity, on the other hand, cannot claim the specific privileges of that status. In theory, answers are not difficult to find. Every textbook points out that for a State to emerge and to exist there must be a territory, a population, and governmental structures in place.[11] In practice one rarely encounters any controversies about the element of territory. Disputes may arise with regard to the delimitation of the territory concerned, and the history of mankind is replete with narratives about wars and hostilities over territorial claims. Yet some territorial roots are indispensable. It is an inescapable truth that the exercise of public power can take place only on a specific parcel of land. On the other hand, the concept of a "people" is by no means as clear and requires more careful reflection. Who makes up the population of a country, the people entitled to make determinations on the destiny of the human community assembled within the territory of the State concerned? Does the "people" include everyone who lives within the territory, or does one take into account only those who have formally acquired the relevant citizenship? This is a determinative choice. If the right of political decision-making is granted to everyone present in the territory (the entire population), the original inhabitants might become overwhelmed and estranged in their own country. If, in contrast, political rights remain reserved to those enjoying full citizenship rights, non-naturalized immigrants may become a frustrated group of people endangering the stability of the polity. The choice is between a flexible concept

[10] Yasuaki Onuma, *International Law in a Transcivilizational World*, Cambridge University Press, Cambridge: 2017, p. viii, writes: "[f]rom an overall ethical perspective, this privileged relationship in language [of English native speakers] must be overcome like the inequitable relations in sex, physical condition and other basically innate conditions."

[11] Generally, reference is made in this connection to Article 1 of the Montevideo Convention on the Rights and Duties of States, 26 December 1933, available at: http://bit.ly/2dRwh9G (accessed 30 June 2018).

and a statist notion that prefers stability and continuity to constant change. Obviously, one does not have to go far in order to find concrete examples that lead to realities which governments find difficult to cope with. Globalization and the continually rising flows of refugees exert their impact on every community, including Europe, where statehood got its firm contours during the 19th and the 20th centuries.[12]

1. INDIVIDUAL IDENTITY

When focusing on *individual identity* and its evolution over time, two different aspects may be distinguished. On the one hand, one finds a whole panoply of instances where individuals seek to escape from, or overcome, their original identity by acquiring for themselves new opportunities (*emancipatory* aspects; section 1 below). Yet the opposite is also a significant feature of societal life. Individuals may be in search of a safe haven where they can lead their lives without any outside disturbance (*integration* aspects; section 2 below).

1) a) For everyone, life starts at birth. Nobody can choose the circumstances of their birth. A person may be born into a well-to-do or a poor or struggling family: this founding element of individual identity lies beyond any possibility of human control. It is certainly not incorrect to speak of a lottery that defies any requirements of justice and equity. Everyone has a father and a mother, but the prospects deriving from that origin are as diverse as humankind in its vast variety. Recognition of this state of affairs should prompt the responsible authorities to provide compensatory mechanisms, in particular by offering adequate health care and fair education opportunities.[13] Otherwise, the elementary human condition must be accepted by everyone. Beauty is a particular gift, it undeniably facilitates life – but its lack cannot be compensated for by the polity. Every individual must learn to live with her imperfections. The law cannot change or do away with this basic challenge.

b) Sex or gender is another one of the circumstances which every human being is confronted with outside his or her will. To be a male or a female person is attributable to biological factors which the persons themselves could not control. No one has any influence in respect of occurrences predating their birth. Whereas in former centuries such determinations by the forces of nature seemed to be unalterable, modern medicine has developed methods permitting individuals to change their sex, at least with regard to their external appearance. This quantum leap inevitably led to claims that such changes of gender identity must also be recognized in law. This issue appeared at an early date in the jurisprudence of the European Court of Human Rights. In two early judgments –

[12] *See e.g.* Ch. Ochoa, *The Individual and Customary International Law Formation*, 48 Virginia Journal of International Law 119 (2007-2008), p. 166; A.Y. Seita, *Globalization and the Convergence of Values*, 30 Cornell International Law Journal 429 (1997).

[13] The International Covenant on Economic, Social and Cultural Rights sets out the objectives to be achieved in that regard.

of 1986 and 1990 – the Court denied any violation of Article 8 of the European Convention on Human Rights (ECHR) by a government's refusal to recognize the new status of a person that had undergone surgery for the reassignment of sexual identity, holding that the typical sexual features of a human person remained essentially identical even though external changes in appearance had been brought about by way of a medical operation.[14] This rigid line of thinking was abandoned in 1992 in the decision of *B. v. France*[15] where the Court admitted that the refusal of public authorities officially to acknowledge the changed sexual identity of a person amounted to a breach of the right of privacy under Article 8 ECHR.[16] Since that time, it has become common ground that the right of a person to her or his chosen gender identity must be respected.[17] A whole series of decisions have concretized the specific consequences to be drawn from this principled shift of jurisprudence. Meanwhile, many European countries have enacted legislation that clarifies these consequences. As a documentary brochure issued by the Council of Europe shows, unanimity has not yet been reached as to the suitability of the concept of gender identity.[18] It seems, though, as if the primacy given to the individual's personal wishes is steadily winning ground. At the universal level, the Human Rights Committee has held that States are under an obligation to issue new birth certificates upon application by a transgender person.[19]While the majority of people in Europe continue to live in accordance with the gender assigned to them at birth, nevertheless for those whose physical characteristics as transsexuals are at the borderline between male and female, that jurisprudence has provided enormous relief.

c) Concerning societal rules and customs restricting an individual's freedom, *serfdom and slavery* constitute the most heinous examples. That no one should be held in such abject conditions of dependency on others was one of the primary demands of the revolutionary movements already in the 18th century. In his *Contrat Social* of 1762, Rousseau starts out with the critical words: "L'homme est né libre, et partout il est dans les fers." The French Déclaration des droits de l'homme et du citoyen of 1789 proclaimed in its first article: "Les hommes naissent et demeurent libres et égaux en droits."[20] Today, the prohibition of slavery and slavery-like conditions belongs to the centre-pieces of every codification of human rights. It is anchored in Article 4 of the Universal Declaration of Human Rights (UDHR), Article 8 of the International

[14] ECtHR, *Rees v. The United Kingdom* (App. No. 9532/81), 17 October 1986; ECtHR, *Cossey v. The United Kingdom* (App. No. 10843/84), 27 September 1990.

[15] ECtHR, *B. v. France* (App. No. 13343/87), 25 March 1992, para. 63.

[16] Confirmed extensively in ECtHR, *Christine Goodwin v. The United Kingdom* (App. No. 28597/95), 11 July 2002, paras. 91-93.

[17] *See e.g.* ECtHR, *Y.Y. v. Turkey* (App. No. 14793/08), 10 March 2015, para. 122.

[18] *Protecting Human Rights of Transgender Persons*, November 2015.

[19] Concluding observations on the third periodic report of Ireland, UN doc. CCPR/C/IRL/CO/3, 30 July 2008, pt. 8. In response to that recommendation, Ireland indeed enacted a statute to that effect in 2015: Gender Recognition Act 2015.

[20] The most recent reaffirmation of this basic principle is in the New York Declaration for Refugees and Migrants, UNGA Resolution 71/1, 19 September 2016, para. 13.

Covenant on Civil and Political Rights (ICCPR), Article 4 ECHR, and Article 5 of the Charter of Fundamental Rights of the European Union (Charter).[21] Interestingly enough, neither the Polish Constitution nor Germany's Basic Law have deemed it necessary to set forth an explicit ban on slavery, considering it self-evident that under the auspices of human dignity, freedom and equality of all citizens, slavery or similar status conditions, as a remnant of a distant past, are simply inconceivable in our time. It is well known, on the other hand, that notwithstanding the affirmation in the United States Declaration of Independence of 1776 that "all men are created equal" and that "liberty" constitutes an unalienable right, the Bill of Rights of 1789 refrained from setting forth explicitly a ban on slavery. A civil war was necessary to bring about at least the formal abolition of that status of total discrimination, which had been introduced by civil society and was supported and enforced by public institutions.

d) Other ties restricting the freedom of the individual were for hundreds of years enacted and enforced by religious denominations. In Europe, the Christian faith dominated civil society. Someone who had been dismissed from the community of believers fell into a precarious existence. Even secular leaders had to request the grace of the authorities of the Catholic church in order to stabilize the legitimacy of their power. The most famous example in point is provided by the pilgrimage of the German Emperor Henry IV to Italy ("Walk to Canossa", 1076-1077) to seek the revocation of his excommunication from the Pope. There is no need, nor space here, to refer in detail to the process of secularization that occurred in Europe from the 18th century onward. Many battles were fought in that regard. One of the main points of controversy was whether marriage was an ecclesiastical or a secular institution.[22] In any event, a key issue still ongoing today is whether a person is free to choose the religious denomination of her preference so that, where the burdens of belonging to her inherited religious community seem to become too onerous, she might escape the regime imposed upon her. The usual practice is that children follow the religious orientation of their parents. As is well-known, the Christian churches have introduced procedures ("confirmation") intended to manifest that a child has eventually established its religious membership of its own free will.

One of the main demands of the secularization movement was to recognize the right of the individual to leave their denomination if they so feel and decide. This negative religious freedom is today well-settled in the Western world and recognized by all Christian faiths. The Universal Declaration of Human Rights states in Article 18 that everyone "has the right to freedom of thought, conscience and religion", including the "freedom to change his religion or belief." The text of Article 18 of the International Covenant on Civil and Political Rights is markedly weaker. When defining the scope of freedom of religion, it confines itself to stating that it includes the "freedom to have or

[21] The Slavery Convention of 25 September 1925 (amended in 1953), 212 UNTS 17, currently has only 99 States-parties.

[22] Exemplified in the famous novel *I promessi sposi* by Alessandro Manzoni in 1840.

to adopt a religion or belief of his choice." Although it has rightly been argued that the guarantee of being able to "adopt" a religion must logically imply the right to change one's religion,[23] most tenants of the Muslim faith do not share this construction of Article 18 ICCPR. According to wide sections of the Islamic clergy, the abandonment of the Islamic faith amounts not only to a religious sin (apostasy), but to a genuine criminal offence that may even be punishable by the death penalty.[24] In other words, children are supposed to remain within their family's tradition and are prevented from acting in conformity with their personal convictions. Due to this schism between major world religions attempts to adopt, at the UN General Assembly, a declaration on religious freedom particularizing the wide and general terms of both Articles 18 have failed.[25]

Most Western countries, on the other hand, grant even minors the right to make determinations about their religious belonging from an age when the child is supposed to understand the significance of any decision in that regard. In Germany, the Statute on the religious education of children[26] provides that upon reaching age fourteen a minor is free to make the relevant choice independently of the authority of the parents. Two years earlier, i.e. at the age of twelve, the holders of parental authority are already denied the right to change the religious membership of a child against the child's will. Thus, already at age twelve a child is considered capacitated to assert her own religious identity. The UN Convention on the Rights of the Child addresses the possible conflict between parental authority and the wishes of the child herself only in general terms,[27] apparently as a consequence of the divergent views as to the scope *ratione materiae* of religious freedom. No jurisprudence seems to have arisen within the Committee on the Rights of the Child under this provision.

e) The spirit of freedom has largely prevailed with respect to the demands of the State on the individual. The freedom to leave any country, including one's own, is nowadays firmly established in international law. The UDHR so states (Article 13(2))

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[23] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed.), N.P. Engel, Kehl: 2005, p. 415, comments on Article 18, margin note 15; K.J. Partsch, *Freedom of Conscience and Expression, and Political Freedom*, in: L. Henkin (ed.), *The International Bill of Rights*, Columbia University Press, New York: 1981, p. 211.

[24] *See* the report of the Iranian Human Rights Documentation Center, Apostasy in the Islamic Republic of Iran, 30 July 2014. *See also* the concluding observations of the Human Rights Committee on the second periodic report of Iran, UN doc. CCPR/C/IRN/CO/3, 29 November 2011, pt. 23 (on plans to formally codify the death penalty for apostasy in the Penal Code). For an overview, *see* https://en.wikipedia.org/wiki/Apostasy_in_Islam (accessed 30 June 2018).

[25] GA Resolution 36/55 on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 25 November 1981 does not mention the right to change one's religion. Only a general reservation in Article 8 is intended to safeguard the rights under Article 18 UDHR and Article 18 ICCPR.

[26] Originally of 15 July 1921, amended many times, current version available at: https://www.gesetze-im-internet.de/kerzg/BJNR009390921.html (accessed 30 June 2018).

[27] Article 14(2): "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child."

and the ICCPR has followed suit (Article 12(2)). Obviously, in a strict sense the place of sojourn or residence does not belong to the constituent elements of the identity of a person, but it permeates the human condition profoundly. To be able to flee a country where any dissent is sanctioned by harsh measures of retaliation belongs to the most effective tools of personal liberation and emancipation. Indeed, the stubborn denial of citizens' claims to leave their country was a major factor contributing to the fall of the socialist regimes in Eastern Europe, epitomized by the tearing down of the Berlin wall. In Germany, those fleeing the dictatorship of the GDR had no difficulties in finding a country of reception: they were welcome in the FRG as German citizens, which was an exceptional situation since the right of exit is not automatically combined with a right of entry to another country.

On the other hand, the provisions just referred to do not mention at the same time a right to denounce one's link of citizenship. While mostly national legislation does not place any obstacles in the way of abandonment of one's nationality, nevertheless some countries deviate from this path. Under Iranian legislation, in particular, the renunciation of nationality requires an authorization by the Council of Ministers, which may be denied on discretionary political grounds.[28] The Iranian State thus wishes to maintain its control over the destiny of the person concerned. When an Iranian national has left her country and has lived for decades abroad, without any real contact with her juridical home country, such claim to maintain jurisdiction over her seems to lack any justification. Citizenship is built on an effective relationship embodied in actual facts. In any international proceeding, the applicant could argue with a high degree of persuasiveness that the Iranian State's assertion of jurisdiction lacks any foundation in law. In the jurisprudence of the Iran-U.S. Claims Court issues of dual nationality, where Iranians had lived for many decades in the United States, have played a prominent role, the Tribunal taking as determinative the "dominant and effective nationality."[29]

2) The second aspect in this discussion on individual identity is devoted to the attempts to establish firm links with a specific human group. Membership as a citizen in a national community is generally appreciated as a precious asset, usually acquired by birth. Once again one may allude to the idea of a lottery that creates winners and losers. In fact, it does matter which specific nationality is assigned to an individual. In the American literature, the difference between being born north or south of the Rio Grande is often referred to as a symbolic feature of being rich or poor.[30] An American citizen is a member of the most powerful nation of this globe. Latin Americans, on the other hand, know from their youth that their personal development is constrained by numerous encumbering elements resulting from the political destiny of their countries.

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[28] *See* http://www.mfa.gov.ir/index.aspx?siteid=3&pageid=24718 (accessed 30 June 2018).

[29] Iran-United States Claims Tribunal, Case A/18, 6 April 1984, 23 ILM 489 (1984), p. 501. KS did not participate in that proceeding.

[30] *See e.g.* O. Angeli, *Cosmopolitanism, Self-Determination and Territory: Justice with Borders*, Palgrave Macmillan, New York: 2015, p. 8. *See also* Ch.H. Wellman, P. Cole, *Debating the Ethics of Immigration: Is there a Right to Exclude?*, Oxford University Press, Oxford: 2011, pp. 13, 50.

No single person can fundamentally change this state of affairs. Switching to another nationality can never take place by virtue of an individual act of volition. To date, the distinction between nationals and aliens constitutes a divide closely related to the nature of the international community as a group of nations, each of which has developed its own identity with specific features.[31]

a) Since generally nationality is acquired based on the principle of *jus sanguinis*, children are rarely born as stateless persons, except in case where their parents lack a distinct nationality. Nationality is a status that each State confers according to its own political choices. However, that political discretion is not unlimited. Rules of international law enjoin States to confer their nationality or to abstain from granting their nationality to foreign citizens. Lastly, the rights and duties entailed by the nationality of a specific country are defined by international law insofar as they extend beyond national borders.

Nationality is a status that inserts individuals into the societal life of the people concerned. As citizens, they have to endure the unforeseeable movements which their nation is compelled by history to address. On the one hand, every citizen enjoys the protection of their country even when staying in foreign land beyond national borders. Diplomatic protection is in this regard the oldest and most venerable, but not always effective, mechanism to secure the elementary rights of those placed temporarily under the jurisdiction of a foreign State.[32] On the other hand, the nationals of a given country cannot avoid the burdens which they have to shoulder in solidarity with their nation. In the event of an armed conflict, they may become aliens against whom restrictive measures can be imposed, going as far as temporary internment. Additionally, their assets may be frozen or confiscated as enemy property. A nation is a community of destiny from which no one can easily escape. In the reciprocal relationship between Poland and Germany many illustrative examples can be found, well known to all of us and that need not be highlighted in the present context. It is enough to note that during World War II, more often than not elementary rules of humanitarian law were seriously breached. It is to be hoped that between our two nations recourse to those rules governing armed conflict will never be necessary again.

b) Although nationality thus combines features that constitute a blend of various positive and negative elements, it is clear that a person who is deprived of a nationality is in a precarious status, both legally and emotionally. Every human being needs a home, a place where they can live in safety and dignity, without having to fear for their life on a daily basis. Stateless persons, if they have been granted a right of abode in their country of sojourn, cannot, unless they are granted certain exceptional rights accepted

[31] For voices of criticism *see e.g.* L. Bosniak, *Persons and Citizens in Constitutional Thought*, 8 International Journal of Constitutional Law 9 (2010), p. 17: "[e]xclusive state-centered conceptions of citizenship are unduly narrow or parochial in this age of intensive globalization"; G.M. Ferreira, M.P. Ferreira Snyman, *Migration in the Global Village: Cultural Rights, Citizenship and Self-determination*, 37 South African Yearbook of International Law 130 (2012), p. 133.

[32] *See* the ILC Draft articles on diplomatic protection, Yearbook of the ILC 2006 II/2, p. 24.

also outside that country, cross the borders to any other country. If they succeed in undertaking such a journey, they lack the protective authority of a home State while remaining on foreign territory. The 1954 Convention relating to the Status of Stateless Persons[33] provides for the granting of travel documents by the State of residence (Article 28), travel documents that have to be recognized by other Contracting States. However, the status of ratification of the 1954 Convention is lamentably low. Currently (as of October 2017), the Convention counts only 89 State-parties, less than half of the membership of the United Nations.

Accordingly, statelessness should be remedied to the extent possible. Although the Universal Declaration of Human Rights mentions the right of everyone to a nationality (Article 15), the International Covenant on Civil and Political Rights has abstained from converting this recommendation into a binding obligation. Article 24(3) provides no more than that every child has the right to acquire a nationality, leaving open the question of which State is obliged to grant its nationality to a child who otherwise would be stateless.[34] Unfortunately, the 1961 Convention on the Reduction of Statelessness[35] has refrained from stating unambiguously that any such child shall be granted the nationality of its birthplace – requiring instead that the mother must be a national of that country.[36] In 2014, UNHCR launched a 10-year global campaign to integrate every stateless person into the extant inter-State system through appropriate measures of naturalization, in order to satisfy that deep-seated psychic aspiration of every human being to belong firmly and indissolubly to a polity that provides protection against the major risks of life.[37]

c) At present, it is hard to contend that no State is allowed to deny its citizenship to persons who have spent their entire lifetime in the territory of that State. Yet such a right must be deemed to exist if such denial derives from patterns of systemic discrimination, where the persons concerned had never been granted any opportunity to demand conferral of citizenship. Currently, the case of the Rohingya in Myanmar constitutes the most flagrant case in point. Having lived for many generations as a Muslim minority within the confines of Myanmar, they were deliberately deprived of many amenities a State would normally have to dispense to its citizens. It is true that a people may take measures to preserve its identity.[38] Yet historical occurrences cannot be

[33] Convention relating to the Status of Stateless Persons (entered into force 6 June 1960), 360 UNTS 117.

[34] See in this regard Human Rights Committee, General Comment No. 17 (1989), paras. 7, 8.

[35] Convention on the Reduction of Statelessness (entered into force 13 December 1975) 989 UNTS 175. The circle of State-parties is even more restricted than in the case of the 1954 Convention, comprising only 70 States.

[36] This provision is understandable only on the basis of the traditional concept that nationality is transferred only by the father.

[37] *See* K.A. Belton, *Ending Statelessness Through Belonging: A Transformation Agenda?,* 30 Ethics and International Affairs 419 (2016); *id.*, *Heeding the Clarion Call in the Americas: The Quest to End Statelessness*, 31 Ethics and International Affairs 19 (2017).

[38] This issue will be taken up in greater detail in the following pages.

rolled backward. The presence of the Rohingya in Myanmar for hundreds of years[39] is a fact of life that cannot be talked away and must be accommodated in accordance with today's principles of equality and non-discrimination.

Lastly, a perspective of naturalization should be open to stateless persons in their countries of residence.[40] The 1954 Convention relating to the Status of Stateless Persons calls upon States, in soft terms, to "facilitate" their assimilation and naturalization (Article 32). This proposition should be viewed as a directive being part and parcel of general international law. To exclude a meritorious human being for decades from the full enjoyment of political rights seems to amount to an infringement of human dignity.

d) Similar considerations apply to situations where a State is remiss in officially registering all new-born children at the moment of birth. To be sure, a person whose name is not inscribed into the civil registry is not deprived of her physical existence. In legal terms, for all intents and purposes, however, she is a true nobody. She is prevented from obtaining any identity documents, she is factually and legally denied the right to vote, and she will never be able to travel outside her country. Such degradation of a human being amounts to a clear violation of Article 6 UDHR, Article 16 ICCPR (and Article 7 of the (1989) Convention on the Rights of the Child), according to which "everyone has the right to recognition everywhere as a person before the law."[41]

e) On the reverse side of the coin, States are placed under the commitment not to sever arbitrarily the links of nationality with their citizens. Pursuant to unchallenged human rights standards, everyone has the right to stay in their country.[42] In cases of State succession, the successor State is under an obligation to assign its nationality to all those who had the nationality of the predecessor State and lived permanently in the area concerned.[43] The punishment of exile, widely practiced in ancient Greece, has no legitimate place under the auspices of freedom and equality. It is a debatable issue, though, whether a State may provide in its legislation that a convicted person may choose between imprisonment and exile. Given the natural right of citizens to lead their life within their national territory, practices of arbitrary expulsion can never find any justification. Mass expulsions may entail international responsibility towards those States compelled to admit the victims on their territories.[44] The harshest form of mass

[39] We have currently no other authoritative source than the relevant article on the Rohingya people in Wikipedia, https://en.wikipedia.org/wiki/Rohingya_people (accessed 30 June 2018).

[40] *See* Angeli, *supra* note 30, pp. 92-93.

[41] Article 20 of the American Convention on Human Rights establishes a right to a nationality. For the inferences to draw from that provision for the registration of new-borns, *see* Inter-American Court of Human Rights, *Caso de personas Dominicanas y Haitianas Expulsadas v. República Dominicana*, Judgment C 282, 28 August 2014, paras. 253-271.

[42] Article 13(2) UDHR, Article 12(4) ICCPR.

[43] *See* Article 1 of the 1999 Draft Articles of the ILC on Nationality of Natural Persons in Relation to the Succession of States, text annexed to GA Resolution 55/153, 12 December 2000.

[44] *See* W. Czapliński, *La responsabilité des états pour les flux de réfugiés provoqués par eux*, 40 Annuaire français de droit international 156 (1995); Ch. Tomuschat, *State Responsibility and the Country of Origin*, in: V. Gowland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, Nijhoff, The Hague: 1996, pp. 59-79.

expulsion, ethnic cleansing, has been elevated to the rank of an international crime that is dealt with under the Rome Statute of the ICC (in particular Article 7(d)) and is classified among the core crimes that come within the purview of the Responsibility to Protect (GA Resolution 60/1, 16 September 2005, para. 138). We have all learned from the experiences of World War II and its consequences.

3) Let me give a short summary of my line of reasoning. Generally, human rights have made deep inroads into situations which only decades ago seemed to be firmly and indissolubly established. Even genetic predeterminations have had to cede in law under the pressures of claims for freedom by individuals desirous of taking their fate into their own hands. The right to gender identity has emerged in Western culture but has not yet received world-wide recognition. In a similar fashion, the power of States to decide exclusively on their relationship with their citizens has been significantly eroded. It would necessitate another inquiry to assess to what extent the increasing emphasis on individual human rights has negatively affected the social institutions that are destined to discharge essential functions in the interests of the majority of the population.[45]

2. COLLECTIVE IDENTITY

Let me now come to the second part of my exposition, the impact of occurrences at the international level on the identity of States and their peoples. Here again two opposed aspects must be dealt with. On one hand, the focus will be on disintegrative tendencies originating from the inside. Subsequently, the legitimacy of efforts to preserve national unity and cohesiveness against immigration flows from outside will be analysed.

1) It was already noted that the identity of a State is defined by territory, population and governmental power. The fundamental rules of non-recourse to force and non-intervention protect that identity. Even without such foreign interventions, however, the human foundations of a State may be subject to changes through the constant movement of people across borders.

Is the traditional delimitation of a "people" – that a "people" consists of the sum total of all those who are formally, according to their documents of identity, citizens of the country concerned – still the appropriate yardstick? In a legal sense, no objections can be raised against this configuration. Yet one must be allowed to put forth the question whether, in an epoch in which mobility has arisen to one of the supreme values of our societies and when national boundaries have almost disappeared in law and in practice, a broader definition of "people" should be adopted, including all those who have obtained a right of permanent residence. Should not the right of political

[45] Thus, the assertion of individual rights may destroy schools as social institutions designed to serve the community as a whole. An example of this can be seen in the judgment of the ECtHR in *Lautsi v. Italy* (App. No. 30814/06), 18 March 2011. For more on its general aspects, *see* K.-H. Ladeur, *Bitte weniger Rechte!,* Frankfurter Allgemeine Zeitung, 8.12.2016, p. 8.

self-determination accrue to everyone present on the territory? Such an enlargement of the *ratione personae* scope of the right of self-determination is being discussed in terms of political philosophy. The Spanish (Basque) thinker Daniel Innerarity, among others, contends that in Europe only a common *pouvoir constituant* corresponds to the new realities of our time.[46]

All those who advocate the extension of political decision-making to foreigners on the national soil have to a great extent lost contact with the living architecture of a continent still divided into national communities different in terms of history, habits and languages. The governing constitutional rules, as they are defined both in general international law and in the Treaty of Lisbon, reflect the political wisdom of the international community at both the universal and regional levels and have not brushed aside these traditional boundaries. Europe wishes to live in harmony, but also in its established diversity.

2) It cannot be denied, though, that demands for more political autonomy have sprung up even in Europe. Let me first address the instances where an ethnic or linguistic minority wishes to break away from the State to which it belongs in law. Kosovo and Catalonia are currently the most prominent examples of such demands,[47] and the Kurds living in four different countries in the Middle-East see themselves as victims of a conspiracy that was initiated when the Ottoman Empire collapsed at the end of World War I. The right of self-determination is indeed a right which the relevant instruments of the United Nations recognize as inherent to "all people."[48]

Many authors have undertaken research into what constitutes a "people" as a collective holder of that right. The usual criteria have already been mentioned. A common history, common ethnic features, and a common language are generally identified as constituent characteristics of a people. Authors embracing these criteria,[49] however, tend to forget that the right of self-determination is a creation of the United Nations and has

[46] D. Innerarity, *Transnational Self-Determination. Resetting Self-Government in the Age of Interdependence*, 53 Journal of Common Market Studies 1061 (2015), p. 1069. *See also* E. Hirsch Ballin, *EU Enlargement with Reversed Priorities: Law, Economics and Basic Values in the Process of Turkish Accession to the European Union*, 13 Tilburg Foreign Law Review 31 (2006), pp. 34-35.

[47] Kosovo is clearly ahead of Catalonia. It declared its independence on 17 February 2008 and has hitherto been recognized as an independent State by 115 other States. Catalonia, on the other hand, has made only a few steps on the road to independence which parts of the population of Catalonia wish to attain. By a judgment of 28 June 2010, available at: https://boe.es/diario_boe/txt.php?id=BOE-A-2010-11409 (accessed 30 June 2018), the Spanish Constitutional Court declared unconstitutional large parts of a revised version of Catalonia's Autonomy Statute, the main reason being (pt. 7) that the Catalans were characterized as a nation in the Preamble of that text. As of October 2017, the conflict between the central institutions of the Spanish State and the regional Catalonian institutions has reached new climax points.

[48] UNGA Resolution 1514 (XV), 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples; Resolution 2625 (XXV), 24 October 1970, Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nation, Principle 5.

[49] *See e.g.* F. Mégret, *The Right to Self-Determination*, in: F.R. Tesón (ed.), *The Theory of Self-Determination*, Cambridge University Press, Cambridge: 2016, pp. 54-59.

been provided with a specific meaning in the practice of the world organization. Not every community that might be called a people pursuant to those substantive criteria constitutes a people in the juridical sense under international law, being entitled to establish "a sovereign and independent State."[50] In a selection process that has taken many decades, it has become clear that only specific human communities constitute a people in the legal sense: the populations of territories under colonial occupation, the Palestinian people,[51] and all the nations of a consolidated State: the Poles, the Russians, the Germans, the French etc., without regard to their ethnic composition. No minority group within a State is entitled to a right of self-determination unless that group is structurally excluded from the government of that country.[52] Self-determination thus operates as a remedy of last resort which, in particular, does not apply to the Spanish province of Catalonia. The legal opinion of the International Court of Justice of 2010[53] was severely criticized for not tackling the central issue of the right of self-determination of the Kosovars living in the Yugoslav/Serbian province of Kosovo.[54] Yet the Court was right in answering solely the question put to it, making clear at the same time that while international law does not establish prohibitions against claims for a right of self-determination, the existence in law of such a right is a different matter altogether.

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[50] As authoritatively specified in GA Resolution 2625(XXV), 24 October 1970, *Principle V: The Principle of Equal Rights and Self-determination of Peoples*, pt. 4.

[51] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, p. 184, pt. 122; GA Resolution 71/184, 19 December 2016.

[52] *See e.g.* J. Dugard, *Abdul Koroma, Territorial Integrity and the Kosovo Opinion*, in: Ch. Chernor Jalloh, E. Olufemi (eds.), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma*, Martinus Nijhoff, Leiden, Boston: 2015, p. 60; P. Hilpold, *Secession in International Law: Does the Kosovo Opinion Require a Re-assessment of this Concept?*, in: P. Hilpold (ed.), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010*, Martinus Nijhoff, Leiden, Boston: 2012, pp. 49-65; G.J. Naldi, *Secession: The African experience*, in: Ch. Chernor Jalloh, E. Olufemi (eds.), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma,* Martinus Nijhoff, Leiden, Boston: 2015, pp. 690-692; Ch. Tomuschat, *Secession and self-determination*, in: M.G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, Cambridge: 2006, pp. 23-45. Reserving remedial secession to "extreme circumstances" S. Oeter, *The Kosovo Case – An Unfortunate Precedent*, 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 51 (2015), p. 63.

[53] ICJ, *Accordance with Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Rep. 2010, p. 403.

[54] *See*, in particular, the declaration by judge Simma, ICJ Rep. 2010, p. 479, and the separate opinion by judge Sepúlveda-Amor, *ibid.*, p. 499. *See also* T. Burri, *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links*, 11 German Law Journal 881 (2010); A. Gattini, *You Say You'll Change the Constitution: The ICJ and Non-state Entities in the Kosovo Advisory Opinion*, in: Hilpold, *supra* note 52, pp. 235-239; R. Värk, *The Advisory Opinion on Kosovo's Declaration of Independence: Hopes, Disappointments and its Relevance for Crimea*, XXXIV Polish Yearbook of International Law 115 (2014), p. 121, 131; T.W. Waters, *Misplaced Boldness: The Avoidance of Substance in the International Court of Justice's Kosovo Opinion*, 23 Duke Journal of Comparative and International Law 267 (2013), pp. 303-321. For an opposite view, *see* R. Howse, R. Teitel, *Delphic Dictum: How Has the ICJ Contributed to the Global Rule of Law by its Ruling on Kosovo?*, 11 German Law Journal 841 (2010); Ch. Walter, *The Kosovo Advisory Opinion: What it Says and What It Does Not Say*, in: Ch. Walter et al. (eds.), *Self-Determination and Secession in International Law*, Oxford University Press, Oxford: 2014, pp. 15, 25.

3) The opposite question is whether a State is compelled to open up to foreigners knocking at its doors. Undeniably, the immigration of aliens changes the composition of a population and leads to changes in social structures and mentalities, in both the short- and long-terms. It is for this reason that sovereign States have established mechanisms of immigration control by virtue of regulations that differ widely in their degree of strictness. The right to decide on who may enter the national territory is one of the inherent attributes of every sovereign State.[55] Open borders are a rare exception.

a) Only within the European Union has a more generous system been introduced, based on mutual confidence and reciprocity. Freedom of movement across borders is institutionally guaranteed. Every citizen of each of the 28 EU Member States has the right to take up residence in any other State of the Union, becoming liable to expulsion only if grave criminal offences have been committed by her.[56] Otherwise, according to the principle of national treatment, European citizens enjoy equality of treatment in almost all spheres of life. The European Convention on Human Rights provides additional guarantees to ensure equality and non-discrimination.[57]

The liberal regime of the European Union constitutes a stark exception from the standards applied almost anywhere else in the world. But it has not led to a complete blurring of the distinction between national citizens and those EU citizens of other countries who have followed the incentives for immigration. To date, European citizens settled down in another Member State of the Union remain to a great extent excluded from the political processes in their country of residence. According to Article 20 of the Treaty on the Functioning of the European Union, they are granted: "the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence", but they are not integrated into the political structures at higher levels, so they have no voice in national parliamentary elections. In legal terms, this denial of full political rights cannot be put into question. The International Covenant on Civil and Political Rights, today the yardstick in such matters, grants rights of political participation only to the citizens – not to the inhabitants – of the country concerned (Article 25).

b) The international system established for assistance to refugees has not derogated from this basic ground rule. When the UDHR was drafted, no agreement could be reached on the recognition of an individual right to asylum, meaning a right to be admitted in a host country. Article 14 states in well-pondered weak terms that everyone

[55] *See* the New York Declaration for Refugees and Migrants, GA Resolution 71/1, 19 September 2016, pt. 42: "We recall … that each State has a sovereign right to determine whom to admit to its territory." Institut de droit international, *Resolution on Mass Migration*, 9 September 2017, Preamble, para. 4: "Recognising the legitimate right of States to control their borders and to exercise their sovereignty over entry and residence on their territory."

[56] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004], OJ L 158/77, Article 27.

[57] For more details, *see* Ch. Tomuschat, *Gleichheit in der Europäischen Union*, 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 327 (2008).

has the right to seek and to enjoy in other countries asylum from persecution. Obviously, no one can be denied the right to apply for asylum in another country – but deliberately no right to the fulfilment of such wishes was added to complete the concept of asylum in substantive terms.[58] Nor did the 1951 Geneva Convention relating to the Status of Refugees[59] fill in this lacuna, being essentially designed to lay down rules for the treatment of those who have been recognized as victims suffering from political persecution. In practice, however, the principle of non-refoulement set out in Article 33, according to which no one may be expelled or returned to a country "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" has taken on the function of "asylum light", in that persons being entitled to invoke Article 33 may provisionally remain in the country where they have found refuge, for periods of time that eventually may extend to many years. Later efforts within the United Nations to introduce a general right of territorial asylum have failed. In 1967, agreement could only be reached on the proposition that taking care for refugees was incumbent as a collective responsibility on the entire international community.[60] The United Nations High Commissioner for Refugees is actively engaged in discharging this monumental task at the global level.

Intensive debates among authors in the field of political philosophy are sometimes far removed from living realities. Many authors overvalue the aspirations of individuals seeking to fully exploit their potentialities. One such ill-considered utterance stems from British scholar Kieran Oberman, who sees immigration restrictions as obstacles arbitrarily curtailing individual freedom and preventing people from going where they want to go.[61] The Oxford philosopher David Miller is the major voice cautioning against such boundless optimism, pointing out in his writings that every immigrant puts a demand on the resources of the host country and will contribute to altering the structure of that country.[62] It is amazing that the majority of authors who have taken a stance on this issue avoid appraising the inherent merits and wisdom of the legal rules that have been laid down in positive international law.

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[58] Re-emphasized in the New York Declaration for Refugees and Migrants, *supra* note 55, pt. 67: "We reaffirm respect for the institution of asylum and the right to seek asylum."

[59] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 137.

[60] GA Resolution 2312 (XXII), 14 December 1967: Declaration on Territorial Asylum.

[61] K. Oberman, *Immigration as a Human Right*, in: S. Fine, L. Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership*, Oxford University Press, Oxford: 2016, pp. 32-36; *id.*, *Immigration as a Human Right*, Oxford University Press, Oxford: 2016; Ch. Kukathas, *The Case for Open Immigration*, in: A.I. Cohen, Ch.H. Wellman (eds.), *Contemporary Debates on Applied Ethics*, Blackwell Publishing, Malden, MA, Oxford: 2005, pp. 207-220. Kukathas, however, acknowledges that the modern welfare State constitutes one of the greatest obstacles to open borders.

[62] D. Miller, *Immigration: The Case for Limits*, in: Cohen & Wellman, *supra* note 61, pp. 193-206; *id.*, *Strangers in Our Midst: The Political Philosophy of Immigration*, Harvard University Press, Cambridge, MA: 2016, pp. 49-56; *id.*, *Is there a Human Right to Immigrate?*, in: Fine & Ypi, *supra* note 61, pp. 11-27.

c) The treaties on the European Community/European Union contain, since the Treaty of Amsterdam of 2 October 1997,[63] a title on freedom, security and justice. All affairs related to the free movement of persons: controls on external borders; asylum; immigration; and safeguarding the rights of third-country nationals were at that time "communitised." The regime established on that occasion was later transferred to the 2001 Treaty of Nice[64] and has found its current version in the 2009 Treaty of Lisbon, where the relevant subchapter carries the title "Policies on border checks, asylum, and immigration" (Articles 77 to 80). It is certainly not inappropriate to ask the question whether all the governments involved were fully aware of the consequences entailed by that decision to confer broad and extensive powers on the European institutions. Apparently, it was considered that the concept of freedom of movement within the territory of the entire EU required a uniform border regime that could only be established by common rules under the jurisdiction of the Union. At the same time, it should not go unnoticed that the most decisive determinations on the establishment of a common space of free movement were taken at a time when the former socialist States had not yet acceded to the EU. Their admission was completed only on 1 May 2004. Accordingly, they had no voice at all when the core principles of today's immigration regime were determined. On the occasion of the negotiations on the Treaty of Lisbon, they were unable to bring about a re-orientation of the earlier decisions, which seemed to display all the features of liberal progressiveness.

The final shape of the immigration regime was moulded on the basis of those powers, again in a spirit of great openness. In 2011 a Directive was enacted that transposed into EU law not only the classic concept of asylum – which presupposes a person being individually threatened – as an individual right but extended the traditional scope of asylum by the addition of a right to "subsidiary protection."[65] The peculiar feature of this right is that a person invoking it is relieved of the burden of proving her status as an individualized victim or potential victim. An accurate definition is given in the Qualification Directive (Article 2(f)):

> Person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm …

Thus, the scope *ratione personae* of entitlement to protection was considerably enlarged, much beyond the traditional understanding of asylum. While this enlargement

[63] Entered into force on 1 May 1999.

[64] Of 26 February 2001, entered in force on 1 February 2003.

[65] Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, [2011] OJ L 337/9.

may be called a noble gesture of human solidarity, it stands to reason that it carries with it heavy potential risks and burdens.[66]

When in 2015 the entire system of refugee management collapsed under the influx of hundreds of thousands of persons desirous to leave the theatres of hostility in Syria and Iraq, and when Germany opened its borders, animated by a spirit of human compassion, the question of where and by whom shelter should be provided for the immigrants became automatically an issue for the entire European Union. Germany undertook extraordinary efforts to accommodate the needs of all those who eventually arrived on its soil. But the German Government was not willing to shoulder that burden alone. The issue was taken to the Council of Ministers which, on 14 September 2015, took a first decision by consensus on the basis of Article 78(3) TFEU[67] to relocate 40,000 persons seeking international protection from Italy (24,000) and from Greece (16,000).[68] A few days later, the Council adopted a second decision on provisional measures for relocation with a view to alleviating, once again, the plight of Greece and Italy. It provided that 120,000 persons in need of international protection shall be relocated from those two countries, first of all a contingent of 15,600 persons from Italy, and additionally a contingent of 50,400 persons from Greece.[69] This time the vote was taken by a qualified majority. The Czech Republic, Hungary, Romania and the Slovak Republic, all of which were to shoulder some part of the burden, voted against the proposal, while Finland abstained. Applications requesting that this decision should be annulled were introduced in the European Court of Justice (ECJ) by the Slovak Republic and Hungary; Poland intervened in support of the applicants' submissions.

d) The Preamble to the ECJ's highly controversial judgment of 6 September 2017 contains a lengthy enumeration of the considerations explaining the factual background and discussing the scope of the powers invoked to adopt it. In the proceedings in Luxembourg, Advocate-General Bot meticulously considered all the arguments of the applicants, dismissing them one by one.[70] His line of reasoning was almost entirely endorsed by the Court itself, which also rejected all the allegations that the decision was not in conformity with its legal basis.[71] In particular, the conclusions of a meeting of the European Council of 25/26 June 2015 that a distribution scheme should be set up by consensus were dismissed as irrelevant.[72] Within the European Union, normally

[66] *See* the call for a general review of the border regime of free movement in the EU by political scientist H.-P. Schwarz, *Die neue Völkerwanderung nach Europa. Über den Verlust politischer Kontrolle und moralischer Gewissheiten*, Deutsche Verlags-Anstalt, München: 2017.

[67] "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

[68] Decision (EU) 2015/1523, OJL 239/146.

[69] Decision (EU) 2015/1601, OJL 248/80.

[70] Opinion in cases C-643/15 and C-647/15, 26 July 2017.

[71] Judgment in cases C-643/15 and C-647/15, 6 September 2017.

[72] *Ibidem*, paras. 143-150.

a dispute comes to an end after a judgment from the ECJ in Luxembourg. This time however, things are different. As far as my information goes, the four States that had voted against the adoption of the relocation decision have all declared that they were not inclined to respect the pronouncement by the European judges.[73]

I cannot go into the details of this ongoing dispute, which of course will have many sequels. Obviously, the Commission, which is the guardian of legality, may not remain passive when a State openly disobeys an order of the highest judicial organ of the EU. Yet supervising the execution of the judgment of 6 September 2017 does not belong to daily routine. The case has technical aspects and additionally raises a number of issues of principle. In this regard, an observer may note with some amazement that while Advocate-General Bot and the Court examined every tiny detail in an almost pedantic manner, they shied away from addressing the truly crucial aspect of the scope of their powers. Decisions on who may enter the territory of a country touch upon the very core of national sovereignty. It should be recalled that pursuant to Article 4(2) TEU, the EU shall respect the national identities of Member States, "inherent in their fundamental structures, political and constitutional." Obviously the assignment of migrants to a State considerably affects its societal structure, even under the legal regime of freedom of movement, which is one of the cornerstones of the European Union. It is true that all the Member States of the EU have acquired a multicultural profile through the flows of immigration from their European neighbours. However, the common European space is based on a certain commonality of traditions, customs, and habits among its inhabitants, so that the traditional policy of open doors within the EU was generally accepted not only by governments, but also by the societies of the 28 Member States. By contrast, the massive arrival of migrants constitutes a true challenge to the fundamental requirement of peacefully living together in society.[74]

National identity is not only reflected in the constitutional architecture.[75] Peoples are more than just the sum total of all those who hold the same passport. A people is a community of persons who have a common history and have developed a sense of solidarity, being prepared to share collectively the burdens to which the continuous flow of events exposes them on a daily basis. Such feelings of commonality, of belonging together, of mutual responsibility and trust, expressed in terms such as Heimatliebe, amour de la patrie or patriotism, and manifesting themselves also in the mundane affairs of everyday life,[76] should not be ridiculed or denounced as an expression of

[73] In an interview with the German Newspaper Die Welt, Hungarian Justice Minister László Trócsányi said that in his opinion the ruling of the European Court of Justice had undermined the structure of the European institutions, available at: http://www.politico.eu/article/europe-refugees-hungarian-justice-minister-ecj-decision-very-worrying-for-the-future/ institutions (accessed 30 June 2018).

[74] *See* ECtHR, *S.A.S. v. France* (App. No. 43835/11), 1 July 2014, paras. 141-142, 157.

[75] This is the jurisprudence of the German Federal Constitutional Court; *see* Ch. Tomuschat, *The Defence of National Identity by the German Constitutional Court*, in: A. Saiz Arnaiz, C. Alcoberro Livina (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge: 2013, pp. 205 *et seq*.

[76] *See* B. Schlink, *Alltagskultur als Leitkultur*, Frankfurter Allgemeine Zeitung, 28.09.2017, p. 6.

right-wing extremism or racism.[77] Most human beings need firm foundations in their lives.[78] If through their governments they manifest such desires they deserve respect and their views belong to the concert of voices that in a democratic society can be uttered legitimately, although of course they may be challenged by others who have embraced a more "modern" understanding of the national community. The *pouvoir constituant* is still in the hands of currently 28 "peoples", who may hold diverging views on issues of national existence and identity. EU institutions are well-advised to perceive these boundary lines at the right time. Obviously, however, any distinctions that might be introduced must not degenerate into crass discriminatory patterns.

It is true that the profile of societies is not immutable. They are ineluctably subject to the influences from their societal environment in the international community. Yet it should never be considered illegitimate to defend the existing state of affairs under the slogan: We want to remain what we are. Peoples themselves have the right to decide what way to take toward the future.[79]

The Member States of the EU have unanimously agreed to conduct a policy that takes care of the plight of those compelled to flee their countries of origin. They do not wish to seclude themselves in a "Fortress Europe." Article 18 of the Charter of Fundamental Rights explicitly embraces the Geneva Convention on Refugees; the Lisbon treaty implements that promise appropriately; and the relevant acts of secondary legislation, in an extremely generous spirit, go much beyond what is required under general international law. However, those general acts were invariably adopted by unanimity. And eventually, according to the usual scheme of distribution of powers between the Union and its Member States, decisions on the admission of persons needing international protection are to be taken by the host State concerned, which constitutes an essential ultimate safeguard for maintaining national sovereignty. Given this framework, it is by no means clear that Article 78(3) TFEU provides a power to assign quotas of persons applying for international protection to specific States. Significantly, four of the younger Member States had voiced their disagreement with the draft proposal, expressing their disapproval with a policy of forced immigration susceptible of endangering national self-determination, in any event in the long run.[80]

Both Advocate General Bot and the Court relied decisively on the principle of solidarity, enunciated in Article 80 TFEU. However, solidarity among the Member States

[77] Margin number 305 of the judgment of 6 September 2017, *supra* note 71, does not do justice to this issue.

[78] German Federal President Steinmeier said in his speech of 3 October 2017, commemorating German reunification 27 years ago: "Wer sich nach Heimat sehnt, der ist nicht von gestern. Im Gegenteil: je schneller die Welt sich um uns dreht, desto größer wird die Sehnsucht nach Heimat", available at: http://www.bundespraesident.de/SharedDocs/Reden/DE/Frank-Walter-Steinmeier/Reden/2017/10/171003-TdDE-Rede-Mainz.html (accessed 30 June 2018): "Whoever has a longing for *Heimat* does not belong to yesterday. On the contrary, the faster the world turns around us, the greater becomes the longing for *Heimat*."

[79] For more on the concept of "German Leitkultur" *see* Schlink, *supra* note 76, p. 6.

[80] Poland did not oppose the controversial decision.

can take many different forms and need not be implemented through the allocation of contingents of migrants to the Member States who accepted the Chapter on border checks, asylum and immigration. A better mode of reconciliation between Article 4(2) TEU and Articles 77 to 80 TFEU should have been sought. In fact, the right of self-determination, a principle having the character of *jus cogens* that lies at the foundations of a national community, must be taken into account when construing the provisions of the European treaties. The EU is still comprised of States with different nations, each of which has a specific identity that has not been merged into one single European citizenship. Efforts to advance on the path toward an "ever closer union" require the utmost caution and must be carried out pursuant to the principle of unanimity. Circumventing this principle by recourse to Article 78(3) TFEU, contrary to the agreement reached beforehand to proceed by consensus, was an inconsiderate step to take. A democratic decision of the European Parliament, as embodied in the general regulations on the distribution of migrants, would have required more respect.

Can one say without any hesitation that the judgment of the European Court of 6 September 2017 is wrong?[81] As has been shown, many indicia point in that direction. In any event, however, the Court must be blamed for having circumvented the essential issue of national identity and self-determination. Its strict adherence to the letter of the law, to the detailed provisions of the TFEU, may be called an act of blind obedience to positive law, understood in a narrow sense. Even if the final outcome should be considered correct, the Judgment of 6 September 2017 is not persuasive because in its legal reasoning the Court has eschewed addressing the heart of the matter.[82]

e) One must deplore, in these circumstances, that the judges of the Luxembourg Court are prevented from disclosing their personal views. From the very outset of its activity, the rule applied has been that individual opinions are not admissible.[83] That rule was aimed at protecting the unity of the Court and the independence of its judges. Initially, fears were prevalent that the judges might be supervised by their governments, or that judges might be tempted to please those governments by writing individual opinions in support of national positions. Such fears seem to have been overcome long ago. At the present stage, one must rather regret that the backdrop of a judgment continues to be impenetrable. Judgments of the Luxembourg Court present themselves as pronouncements without any cracks and fissures, stable and unshakeable from bottom to top. One may assume – and hope – that the discussion among the judges was much richer in substance than what the text of the judgment reveals. It is well-known, from the experience of the United States in particular, that individual, and

[81] In this sense M. Nettesheim, *Das Fehlurteil zu Flüchtlingsquoten*, Frankfurter Allgemeine Zeitung, 14.09.2017, p. 8; *id*., *Das EU-Recht in der Krise – ein schwieriges Verhältnis*, Verfassungsblog, 15.09.2017, available at: http://verfassungsblog.de/das-eu-recht-in-der-krise-ein-schwieriges-verhaeltnis/ (accessed 30 June 2018); for the contrary view *see* J. Bast, *ibidem*.

[82] This criticism must also be addressed to A. von Bonin, *Die Rechtsstaatsunion in Gefahr?*, 28 Europäische Zeitschrift für Wirtschaftsrecht 785 (2017).

[83] Currently Article 35 of the Statute of the Court of Justice of the European Union.

not only dissenting, opinions of judges may open up new and constructive avenues for the future.

As the British Brexit has shown, the EU is not as firmly grounded as it may seem at first glance. The democratic forces in the Member States have not been totally amalgamated in a European spirit, and are watching carefully whether the EU institutions follow faithfully the path not only of compliance with the integration treaties, but also of full respect for national sovereignty. The aftermath of the Judgment of 6 September 2017 has already become a test of strength between the four dissenting Member States and the Luxembourg Court (which the Brussels institutions of course must support). It is by no means sure who will eventually come out as the winner of that battle. We must all hope that the Court's decision will not develop into an explosive charge that, after Brexit, threatens once again the cohesion of the EU.

CONCLUSIONS

It would be hazardous to draw too many inferences from the considerations set out above. Indeed, individual and collective identities markedly differ from one another by their very nature. However, one central idea may perhaps have become clear in my presentation. Nations, as associations of human beings, are essentially determined by the ties that relate them to their societal foundations. A polity functioning under the rule of law is a valuable social good that should be immune from challenges arising from whims and fancies of sudden origin. Individuals also find themselves enmeshed in crucial relationships of social dependency, notwithstanding the process of emancipation which they have experienced during the last century. They have achieved a high degree of real freedom by being able to shed numerous burdensome constraints that linked them to traditional environments. Human rights in particular, as well as the processes of international globalization, have contributed to the progressive mitigation and at the same time the erosion of State power. But human rights alone do not provide all the guarantees that everyone needs to live in dignity and peace. The lofty promises of democracy, equality, and rule of law must be secured by effective public institutions. Freedom and authority must go hand in hand. Real enjoyment of human rights is possible only within a well-secured space, which only public authorities can build and maintain.

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PAST CONFLICTS, PRESENT UNCERTAINTY: LEGAL ANSWERS TO THE QUEST FOR INFORMATION ON MISSING PERSONS AND VICTIMS OF ENFORCED DISAPPEARANCE. THREE CASE STUDIES FROM THE EUROPEAN CONTEXT

Abstract:
This article is intended to provide a legally sound explanation of why and how the contemporary International Humanitarian Law and International Human Rights Law legal frameworks offer tools to address the uncertainty, lack of information, and the consequences thereof in relation to missing persons and victims of enforced disappearances in the context of armed conflicts which predated the adoption of such frameworks. To this end, three scenarios will be examined: the contemporary claims of the families of those who were killed in the Katyń massacre in 1940; the claims for information and justice of the families of thousands who were subjected to enforced disappearances during the Spanish Civil War between 1936 and 1939; and the identification efforts concerning those reported missing while involved in military operations in the context of the 1944 Kaprolat/Hasselmann incident which took place during the Second World War. The analysis of these scenarios is conducive to the development of more general reflections that would feed into the debate over the legal relevance of the distant past in light of today's international legal framework.

Keywords: Katyń, Spanish Civil War, Kaprolat/Hasselmann incident, enforced disappearances, missing persons, intertemporal law, continuing violation doctrine, European Court of Human Rights, International Humanitarian Law, armed conflicts

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INTRODUCTION

Past conflicts can still be vivid in the minds of those who survived them as well as those who have been living with the hope of finding answers about their relatives reported missing in the conflicts. Recent examples that have raised the attention of State authorities and international adjudicators revolve around the requests for information of the families of those who were killed in Katyń in 1940; the claims for information and justice by the families of thousands who were subjected to enforced disappearances in the civil war in Spain between 1936 and 1939; and the identification efforts concerning those reported missing while involved in military operations in the context of the 1944 Kaprolat/Hasselmann incident during the Second World War (WWII).

During the Spanish civil war (1936-1939), in addition to the mutual and common practice of desecration of the dead, the nationalists (a falangist group led by General Francisco Franco) refused to issue death certificates for dead republicans.[1] Moreover, the nationalists carried out

> the systematic abduction of children of Republican detainees […], who were allegedly given to families who supported the Franco regime once their identities had been changed in the Civil Register. During the civil war, many Republican parents evacuated their children abroad. When the war was over, the Franco regime decided that all those children should return and, after repatriation, many were sent to *Auxilio Social* centers, whereupon parental rights were automatically transferred to the State, while their biological families were quite unaware of this situation. Many of these children were adopted without the knowledge or consent of their biological families.[2]

The effects of this conduct are still vivid and legally relevant at the time of this writing. It was only in 2007 that Spain, under both national[3] and international[4] pressure,

[1] A. Gillespie, *A History of the Laws of War*, Volume 1: *The Customs and Laws of War with Regards to Combatants and Captives*, Hart Publishing, Oxford and Portland: 2011, p. 208.

[2] UN Working Group on Enforced and Involuntary Disappearance (WGEID), *Report of the WGEID. Addendum – Mission to Spain* (2014), UN Doc A/HRC/27/49/Add.1, para. 7.

[3] A national movement – made of NGOs, victim associations, relatives of the victims of crimes committed both during the civil war and the dictatorship – began to develop at the end of the 1990s. *See* S. Gàlvez, *El proceso de Recuperación de la Memoria Histórica en España: Una aproximación à los Movimientos Sociales por la Memoria*, 19 International Journal Iberian Studies 25 (2006), pp. 32-36. This movement gained strength at the beginning of the twenty-first century through revived support by a new generation of politicians and activists at the national and international level. R. Escudero, *Road to impunity: The absence of transitional justice programs in Spain*, 36 Human Rights Quarterly 123 (2014), p. 141.

[4] In 2002 the UN WGEID listed Spain among those countries with disappearances cases. UN WGEID, *Question of enforced or involuntary disappearances: Report of the WGEID submitted in accordance with Commission Resolution 2002/41* (2003), UN Doc E/CN.4/2003/70, paras. 246-247. In 2006 the Parliamentary Assembly of the Council of Europe (CoE) released an official and public condemnation of Franco's Regime and of the crimes committed during the dictatorship. Parliamentary Assembly of the CoE, *Need for international condemnation of the Franco regime*, Recommendation 1736 (2006), paras. 8.1-8.2. Moreover, the European Parliament held a debate on the condemnation of Franco's Regime in 2006. European Parliament, Debates – 4 July 2006, Strasbourg, available at: https://bit.ly/2pKpp3M (accessed 30 June 2018).

enacted a law – the Historical Memory Act[5] – addressing the calls for the recovery of historical memory. This legislation requests the public authorities to facilitate the location and identification of persons who went missing as a result of both the civil war (1936-1939) and Franco's dictatorship that followed the conflict (1939-1975). Yet, pursuant to the Act the measures aimed at locating and identifying disappeared persons rely on initiatives taken by relatives and not by the State.[6] At the same time, access to information, including to the death registers of the civil war is not always possible due to, for instance, the destruction of these registers and denial of access on various grounds (e.g., the protection of personal information).[7] It is significant that the Committee on Enforced Disappearances (CED) – the treaty body of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) – has considered this part of the Act problematic. Accordingly, the CED has commented that

> the search for persons who have been the victims of enforced disappearance and efforts to clarify their fate are obligations of the State even if no formal complaint has been laid, and that relatives are entitled, inter alia, to know the truth about the fate of their disappeared loved ones.[8]

In the 1944 Kaprolat/Hasselmann incident (in the Karelia region, at the border between the former USSR and Finland) a hundred Norwegian soldiers serving in the German army were killed in the course of a military operation. Their remains were left in the woods.[9] In the aftermath of the conflict, Norway did not undertake any initiative in order to collect and bury the deceased soldiers, who were considered traitors.[10] During the last two decades, the wider public has become aware of the remains of these soldiers: relatives of those who had gone missing in Karelia learned that artefacts belonging to the soldiers were being sold on the Internet and that memorabilia hunters had unearthed human remains at the site of the battle.[11] It was at this point that the families decided to step forward and contact the University of Bergen to recover and identify the remains.[12]

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[5] Articles 11 and 13, Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura, available at: Agencia Estatal Boletín Oficial del Estado, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-22296 (accessed 30 June 2018) (Ley 52/2007 (Spain)). The Historical Memory Act was followed by a Protocol in 2011 (Protocol for exhumation of victims of the civil war and the dictatorship).

[6] UN WGEID, *supra* note 2, para. 21.

[7] *Ibidem*, para. 30.

[8] Committee on Enforced Disappearances (CED), *Concluding Observations on the Report Submitted by Spain under Article 29, Paragraph 1, of the ICPPED* (2013), UN Doc CED/C/ESP/CO/1, paras. 31-32.

[9] I. Morild et al., *Identification of Missing Norwegian World War II Soldiers, in Karelia Russia,* 60 Journal of Forensic Sciences 1104 (2015), p. 1104.

[10] *Ibidem*, p. 1109.

[11] ICMP, *Under a Foreign Flag by Rene Huel*, 2015, available at: http://www.icmp.int/news/under-a-foreign-flag/ (accessed 30 June 2018).

[12] Morild et al., *supra* note 9, p. 1104.

The scenario surrounding the Katyń massacres was different.[13] Between April and May 1940 more than 20,000 Polish Prisoners of War (POWs) and other detainees held in prison camps established by the Soviet People's Commissariat for Internal Affairs (NKVD) were arbitrarily executed and their bodies were buried in mass graves.[14] In 1942 and 1943, with the discovery of the mass grave sites, an international commission consisting of forensic experts carried out the exhumations (April to June 1943). After having identified 2,730 bodies, the commission declared that the Soviets were responsible for the massacre. However, the Soviet authorities denied any involvement, carried out their own investigation, and reached the opposite conclusion, i.e., that the Germans were responsible for the massacre. In 1959 Russian authorities destroyed the records of the persons shot in 1940; other relevant documents[15] were sealed and their content was made public only in 2010.[16] At the same time, Russian authorities recognized that the killing of Polish POWs on USSR territory during WWII had been an arbitrary act by the USSR.[17] Since the 1990s, families have undertaken a number of steps to gain access to the relevant information held by Russian authorities. In 2009 a group of relatives decided to bring their case before the European Court of Human Rights (ECtHR).

These brief accounts shed light on how situations generated in the context of past conflicts impact the possibility of gaining access to information decades later, after the termination of those conflicts. It would be pretentious to proffer that this article

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[13] The account of the facts is based on the following sources: ECtHR, *Janowiec and Others v. Russia* (App. Nos. 55508/08 and 29520/09), 16 April 2012, paras. 10-45; G. Citroni, *Janowiec and Others v. Russia: A Long History of Justice Delayed Turned into a Permanent Case of Justice Denied,* XXXIII Polish Yearbook of International Law 279 (2013), p. 280.

[14] The decision to carry out this mass execution was signed by all members of the Politburo, i.e., the highest body of the former USSR. Prisoners from the Kozelsk camp were killed at a site near Smolensk, known as the Katyń forest.

[15] These documents included the note of Mr. Beria, Head of the People's Commissariat for Internal Affairs (NKVD) of 5 March 1940 (containing the proposal to approve the shooting of Polish prisoners of war on the grounds that they were all "enemies of the Soviet authorities and full of hatred towards the Soviet system"); the Politburo's decision (concerning the approval of the proposal) of the same date; the pages removed from the minutes of the Politburo's meeting and the note of Mr. Shelepin, Chairman of the State Security Committee – KGB (concerning the precise numbers of murdered prisoners) of 3 March 1959. These documents were put into a special file called "package no. 1." As reported in the ECtHR case law, "in Soviet times, only the Secretary General of the USSR Communist Party had the right of access to the file. On 28 April 2010 its contents were officially made public on the website of the Russian State Archives Service (rusarchives.ru)." *See* ECtHR, *Janowiec and Others v. Russia*, paras. 10-21.

[16] In 1991 around 200 bodies were recovered in the Kharkov, Tver and Smolensk regions, and 22 of them were identified. Between 1990 and 2004, Russian authorities opened a criminal investigation into the Katyń massacre, but the Chief Military Prosecutor eventually decided to discontinue the case on the grounds that all alleged suspects were dead. On 22 December 2004, the Russian Interagency Commission for the Protection of State Secrets classified 36 volumes of the case file – out of a total of 183 – as "top secret" and another eight volumes "for internal use only." The decision to discontinue the investigation was also given a "top secret" classification and its existence was only revealed on 11 March 2005 at a press conference given by the Russian Chief Military Prosecutor. *See* Citroni, *supra* note 13, p. 280.

[17] ECtHR, *Janowiec and Others v. Russia*, para. 71.

intends to cast light on all the pending situations – *persons still missing* – resulting from all the conflicts which occurred in the "distant past."[18] Moreover, it would also be misleading to affirm that, under international law, the State is required to address cases of persons reported missing during armed conflicts which occurred so long ago that any effort to account for them would be impossible to carry out and pointless. Thus, this article revolves around the contemporaneity of claims for information lodged by family members who are still alive and suffer from the events where their relatives went missing/were forcibly disappeared.

Although the claims themselves are contemporary, they relate to events which occurred prior to the adoption of the contemporary International Humanitarian Law (IHL) and International Human Rights Law (IHRL) frameworks on persons reported missing, including forcibly disappeared persons. This article places emphasis on two typologies of cases, which differ both semantically and substantively, i.e., persons reported missing in the context of armed conflicts, and persons subjected to enforced disappearance. Under international law, the presence of these distinct terminologies feature in two international treaties, i.e., the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts adopted in 1977 (AP I) and the ICPPED adopted in 2006. Clearly, the termination of the armed conflict scenarios described above predates the adoption of these treaties.

The international legal framework does not provide for a definition of "missing person"; the rationale behind this gap is that in armed conflicts a person can go missing for a variety of reasons, which include – but are not limited to – violations of IHL and IHRL. At the operational level, for instance, the International Committee of the Red Cross (ICRC) defines "missing persons" as follows: a missing person is one

> whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.[19]

This implies that while the IHL rules concerning missing persons also apply in those cases where a person has been forcibly disappeared in the context of an armed conflict, the ICPPED's rules on enforced disappearances apply only to those cases that fit into the definition provided for under Article 2 ICPPED. Pursuant to this provision,

> "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or

[18] This very indefinite terminology is used, *inter alia,* in the human rights case law, particularly that of the ECtHR. *Ibidem*, para. 140

[19] ICRC - Advisory Service on IHL, *Missing Persons and Their Families* (2015), available at: https://bit.ly/2IUhVDU (accessed 30 June 2018).

whereabouts of the disappeared person, which place such a person outside the protection of the law.

Against this backdrop, the present article investigates whether there exists an international obligation to address the claims of families of persons reported missing – including forcibly disappeared persons – in armed conflicts preceding the adoption of the contemporary[20] international legal framework.[21]

In order to respond to this question, the first step will be to provide a survey of the contemporary international legal framework on missing persons and enforced disappearance. This survey will be followed by an examination of whether it is legally tenable to affirm that, under international law, a treaty can impact on situations which occurred prior to its entry into force and whose consequences continued to exist after its entry into force (section 1). As a second step, this article will narrow down the focus to three case-scenarios where such a question has recently arisen in order to seek to define the place of contemporary IHL (section 2) and IHRL in addressing today's consequences arising from a distant past. The approach of the ECtHR vis-à-vis two of these case-scenarios – Spain and Katyń – will cast light upon the relevance of these consequences under the European Convention on Human Rights (ECHR). The perspective adopted by other judicial/quasi-judicial human rights bodies will examine whether similar consequences which arose in other contexts have received different responses (section 3).

1. THE PASSAGE OF TIME AND ITS EFFECTS ON LEGAL ENTITLEMENTS AND OBLIGATIONS CONCERNING THE ISSUES OF MISSING PERSONS AND ENFORCED DISAPPEARANCES

Before embarking on the examination of the effects of the passage of time on the contemporary rules governing the subject matter, it is important to emphasize that no specific rules on missing persons and on enforced disappearances existed at the time of the events described above. Indeed, prior to the Spanish civil war, while the IHRL framework was almost[22] non-existent, the IHL framework was already articulated in a

[20] In this article, the term "contemporary legal framework" with regard to the issue of missing and disappeared persons refers to those treaties that explicitly deal with the issue of missing persons and enforced disappearances. At the international level, these include both IHL and IHRL treaties. For more details, *see* subsection 1.1.

[21] This framework is discussed in subsection 1.1 of the present article.

[22] As noted by Hertig Randall, "[h]uman rights remained an essentially domestic concern until the second half of the 20th century. Several developments in international law had prepared the ground for the birth of international human rights in the aftermath of World War II." Among these was the adoption of the Slavery Convention of 1926. M.H. Randall, *The History of International Human Rights Law*, in: G. Gaggioli & R. Kolb (eds.), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar Publishing, Cheltenham: 2013, pp. 10-14.

set of treaties including, *inter alia*, the 1907 Hague Regulations (Convention IV)[23] and the 1929 Geneva Conventions[24] on the Wounded and Sick and on POWs. The conduct of the parties to the conflict in WWII thus fell under the scope[25] of, *inter alia*, the 1907 Hague Regulations and the 1929 Geneva Conventions.[26]

1.1. An overview of the contemporary international law treaty framework on missing persons and enforced disappearances

Under IHL treaties, only three provisions are specifically dedicated to the issue of missing persons: (i) Article 32 AP I revolves around the general principle that must be followed in the implementation of actions concerning missing persons, i.e., the right of families to know the fate of their relatives; (ii) Article 33 AP I deals with the obligations to be implemented by the parties to the conflict when persons are reported missing (e.g., the obligation to search for the missing, the obligation to transmit information on the missing to the Central Tracing Agency, and the obligation to record information concerning persons deprived of their liberty); and (iii) Article 34 AP I concerns the obligations of the parties to the conflict with regard to the treatment of the remains of the deceased. These provisions are applicable in international armed conflict (IAC) and in situations of belligerent occupation; the IHL treaty provisions concerning non-international armed conflict (NIAC) do not address the issue. Nevertheless, the ICRC study on customary IHL affirms that each party to the conflict has an obligation to account for persons reported missing as a result of armed conflict and to provide their family members with any information it has on their fate; such a rule is applicable to both NIAC and IAC.[27] AP I specifies the time limit within which the parties to

[23] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague (18 October 1907) (1907 Hague Regulations (Convention IV)).

[24] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva (27 July 1929) (1929 Geneva Convention on the wounded and sick); Convention relative to the Treatment of Prisoners of War, Geneva (27 July 1929) (1929 Geneva Convention on POWs).

[25] Both Russia and Norway were parties to The Hague Regulations of 1907 (Convention IV), and both were parties to the 1929 Convention on Wounded and Sick; while Norway was party to the 1929 Convention on POWs, Russia was not. Nevertheless, a set of rules on POWs were already present in the 1907 Hague Regulations (Convention IV), such as the obligation to treat POWs humanely (Article 4), available at: https://ihl-databases.icrc.org (accessed 30 June 2018).

[26] Nonetheless, the rules concerning the treatment of POWs were severely disregarded and violated. Germany treated Soviet, Polish, and other Slavic POWs with brutality. Of the approximately 5,700,000 Red Army soldiers captured by the Germans, only about 2,000,000 survived the war; more than 2,000,000 out of the 3,800,000 Soviet troops captured during the German invasion in 1941 were starved to death. The Soviets replied in kind and consigned hundreds of thousands of German POWs to the labor camps of the Gulag, where most of them died. *See* Encyclopædia Britannica, *Prisoner of War (POW)*, *International Law* (2015), available at: https://www.britannica.com/topic/prisoner-of-war (accessed 30 June 2018). *See also* S.P. MacKenzie, *The Treatment of Prisoners of War in World War II*, 66 The Journal of Modern History 487 (1994), p. 487.

[27] Rule 117, J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Volume 1: *Rules*, Cambridge University Press, Cambridge: 2005, pp. 421 ff.

the conflict must start searching for missing persons (i.e., "as soon as circumstances permit, and at the latest from the end of active hostilities").[28] However, the Protocol does not mention the final moment of such operations.[29] Moreover, the IHL provisions on missing persons form part of those IHL provisions applicable at all times,[30] i.e., their application may continue beyond the conflict's termination.[31] It would be illogical and contrary to the black letter law to affirm that the investigative activities aimed at searching for persons reported missing would abruptly end with the termination of the conflict. IHL is silent with regard to enforced disappearance; nevertheless, the ICRC study on Customary IHL recognizes that the prohibition of enforced disappearance is a customary rule which is applicable in both IAC and NIAC situations.[32]

Under IHRL, the ICPPED sets down the prohibition of enforced disappearance and provides for the right of any – direct and indirect – victim to know "the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."[33] The scope *ratione personae* of the right to know the truth is broader than that of the right to know enshrined in Article 32 AP I.[34] The former is to be understood in the broadest sense, thereby entitling the family, friends, and larger circles or communities[35] to the truth about the enforced disappearance of their beloved ones. Therefore, the notion of "victim" may have a collective dimension, and as a corollary the right to know the truth may be understood as both an individual and a collective right.[36] Nothing in the ICPPED excludes this twofold dimension. Moreover, pursuant to Article 12(2) ICPPED, "[w]here there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities […] shall undertake an investigation, even if there has been no formal complaint."

The question that emerges from this succinct overview of the legal framework concerning missing persons and enforced disappearances is whether such framework is relevant to the above-mentioned case-scenarios. Non-retroactivity, enshrined in the

[28] Article 33(1) AP I.

[29] Pursuant to Article 33 AP I, tracing activities shall be undertaken "as soon as circumstances permit, and at the latest from the end of active hostilities."

[30] *See* Article 3(b) AP I.

[31] Y. Sandoz et al., *Commentary on the Additional Protocols: Of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva: 1987, para. 149, pp. 66-67.

[32] Rule 98, Henckaerts & Doswald-Beck, *supra* note 27, p. 340.

[33] Articles 1 and 24 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), UNGA Res. 61/177, UN Doc A/RES/61/177, 2716 UNTS 3 (20 December 2006).

[34] UN Commission on Human Rights, *Report of the Inter-Sessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearances* (2003), UN Doc. E/CN.4/2003/71, para. 83.

[35] S. McCrory *The International Convention for the Protection of All Persons from Enforced Disappearance,* 7 Human Rights Law Review 545 (2007), p. 557.

[36] On this aspect, *see* UN Office of High Commissioner for Human Rights, *Study on the Right to the Truth* (2006), UN Doc E/CN.4/2006/91, para. 36.

Vienna Convention on the Law of Treaties – is a classical principle of international treaty law.[37] According to this principle, for each contracting party a treaty governs those facts which occur subsequent to the date of its entry into force with regard to the party concerned.[38] However, "continuing situations" have generated practical problems in relation to this principle, notably with regard to the non-retroactive applicability of human rights treaties.[39]

As stated by the Working Group on Enforced or Involuntary Disappearances (WGEID),

> [e]nforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual. […] Thus, when an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction.[40]

Accordingly, should a person be reported missing as a result of an enforced disappearance, the temporal dimension of the obligation to carry out an investigation shall reflect the continuous character of such crime.[41]

General human rights treaties do not address the issues of missing persons and enforced disappearances. However, the views of the Human Rights Committee (HRC), and the case law of the Inter-American Court of Human Rights (IACtHR) and of the European Court of Human Rights (ECtHR) contribute to shedding light upon the impact of uncertainty on the human rights of the family members of those persons reported missing as a result of violations of, *inter alia,* IHRL committed during an armed conflict (see *infra* section 3). For instance, the ECtHR has found that State authorities' reaction and attitudes vis-à-vis the requests of family members for information *might*

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[37] Article 28 of the Vienna Convention on the Law of Treaties (VCLT), adopted on 23 May 1969, 1155 UNTS 331; ECtHR, *Nielsen v. Denmark* (App. No. 343/57) Decision, 1959 (1959-1960) 2 Yearbook 412, p. 454, in R.C.A. White and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (4th ed.), Oxford University Press, Oxford: 2010, p. 87.

[38] O. Corten & P. Klein, *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I, Oxford University Press, Oxford: 2011, p. 724.

[39] D. Shelton, *Regional Protection of Human Rights*, Oxford University Press, New York: 2008, p. 634.

[40] UN WGEID, *General Comment on Enforced Disappearance as a Continuous Crime* (2011), UN Doc A/HRC/16/48, para. 39. *See also* IACtHR, *Velásquez-Rodríguez v. Honduras* (Series C No. 4), Merits, 29 July 1988, para. 181; CAT, *Concluding Observations on Spain* (2009) UN doc. CAT/C/ESP/CO/5, para. 21; G. Citroni *The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death* 12 Journal of International Criminal Justice 787 (2014), p. 793.

[41] UN WGEID, *General Comment on Enforced Disappearance as a Continuous Crime* (2011), UN Doc A/HRC/16/48, para. 39.

constitute a stand-alone violation of the prohibition of inhuman treatment under Article 3 ECHR. However, this finding will depend on the presence of a set of factors, i.e., the proximity of the family tie; the particular circumstances of the relationship; the extent to which the family member witnessed the events in question; the involvement of the family member(s) in the attempts to obtain information about the disappeared person; and the way in which the authorities responded to those enquiries.[42]

The ECtHR is the sole judicial body that has delineated a neat distinction between the procedural obligation to carry out an investigation into alleged violations of fundamental human rights (e.g., Article 2 ECHR, right to life) and the duty to account for missing persons and inform their families under Article 3 ECHR (prohibition of torture and inhuman and degrading treatment). In the view of the Court, these obligations entail investigative activities that are motivated by different purposes.[43] While the implementation of the obligation under Article 2 is aimed at clarifying the circumstances surrounding an alleged violation of the ECHR, the implementation of the obligation under Article 3 responds to the need for information of family members about the fate and whereabouts of their relatives.[44]

1.2. Observing the issue through the lens of the intertemporal law doctrine

Queries on the fate of those reported missing in armed conflicts can arise during the conflict, in the immediate aftermath thereof, or even decades after the termination of the conflict. Delay in undertaking measures to elucidate the fate and whereabouts of missing persons can be the result of a policy of silence[45] adopted by some societies

[42] *See*, *inter alia*, ECtHR, *Çakici v. Turkey* (App. No. 23657/94), Grand Chamber, 8 July 1999, para. 98.

[43] This interpretation is also confirmed by the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, which affirm that "[t]he purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death." UN ECOSOC, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Res. 1989/65 (Annex) (1989) UN ESCOR Supp. (No 1) at 52, UN Doc. E/1989/89, para. 9. At the same time, pursuant to the Principles on the Effective Investigation and Documentation of Torture, an effective investigation has multiple purposes, i.e., clarify the facts and establishment of individual and State responsibility for victims and family; identification of measures to prevent recurrence; and facilitation of prosecution and/or as appropriate disciplinary sanctions for those indicated by the investigation as being responsible. UNGA, *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Res. 55/89 Adopted on 4 December 2000 (1999), UN Doc. A/54/426, para. 1(a-c).

[44] ECtHR, *Janowiec and Others v. Russia*, para. 152. *See also* the opinions of the UNMIK Human Rights Advisory Panel: *Nebojša Petković against UNMIK* (Case No. 125/09), opinion, final, 2013, para. 107; *GR against UNMIK* (Case no. 12/09) opinion, final, 2013, para. 103; *Jočić against UNMIK* (Case No. 34/09), opinion, final, 2013, para. 103.

[45] As explained by Kovras, a decision to "silence" contentious incidents of the past, such as the Spanish Civil War, or "selectively remembering" the past in a way that accentuates a culture of victimhood, as in Cyprus, are frequently considered as the most appropriate bases for consensus in transition democracy. I. Kovras, *Truth Recovery and Transitional Justice: Deferring Human Rights Issues*, Routledge, New York: 2014, p. 67. Kenny points out that after the death of Franco in 1975 Spain faced the monumental task of "restoring peace and democracy." The responsibility of doing so fell to the generation who inherited the

vis-à-vis human rights and IHL violations. However, with the passage of time these same societies have decided to resolve these pending issues, leading to the phenomenon of "post-transitional justice."[46] While this perspective is fascinating and sheds light on the political and societal reasons for disclosing information after the passage of decades, it says nothing about the legal implications of such policies and decisions under international law.

Although an obligation to account for missing persons is not enshrined in past IHL treaties applicable to the events mentioned in the introduction to this article,[47] we reject the assumption that the consequences of these events must uniquely be read in light of the past treaties in effect at the time of the triggering events. The question whether contemporary international treaties apply to events which occurred prior to their entry into force involves the temporal sphere of application of the law, with a specific focus on "the temporal applicability (and not validity) of the norms at stake."[48]

Under public international law, controversies over whether to apply the old or the contemporary norms have emerged mainly in the context of treaty interpretation and territorial claims.[49] With regard to the latter, in the *Island of Palmas* case[50] – a case focused on the question of title to territory – Arbiter Huber posited that inter-temporal law is about "the rules determining which of successive legal systems is to be applied" in a particular case.[51] According to the doctrine, "a juridical fact must be appreciated in

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trauma of the civil war from their parents "and lived their formative years surrounded by the misery, …and repression of the Francoist dictatorship. Hence in order to avoid confrontation of contested memories [...] the choice was made to hold back the tide of history and silence it. […] It was deemed beneficial to avoid discussion of the past, opting instead for a policy of silence and amnesia." This was also known as the "pacto del olvido." N. Kenny. *The Novels of Josefina Aldecoa. Women, Society and Cultural Memory in Contemporary Spain*, Tamesis, Woodbridge: 2012, p. 184. In fact, during a recent meeting on the issue of the missing organized by the International Commission on Missing Persons (ICMP), participants pointed out that "in Spain, after the end of Franco's regime, silence was instituted and the Spanish judiciary stood against the disinterment of dead bodies with the aim of protecting certain political prerogatives and avoiding reopening deep fractures in Spanish society. State-sponsored memorializing has different purposes from memorializing enacted by individual families." ICMP, *Conference Report. The Missing: An Agenda for the Future* (29 October – 1 November 2013), The Hague, p. 33.

[46] *See* Kovras, *supra* note 45, pp. 148 et seq.

[47] For instance, nothing is said about missing persons in the two 1929 Geneva Conventions or in the 1907 Hague Regulations (Convention IV).

[48] *See* M. Kotzur, *Inter-temporal Law*, in: Max Planck Encyclopedia of Public International Law 2008, available at: https://bit.ly/2GbQiJ1 (accessed 30 June 2018); Judge Weeramantry (ICJ), *Separate Opinion - Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, Merits, Judgment, 1997, ICJ Rep. 7, p. 112.

[49] Kotzur, *supra* note 48; A. D'Amato, *International Law: Intertemporal Problems*, in: R. Bernhardt (ed.), *Encyclopedia of International Public Law*, vol. 2, North-Holland, Amsterdam: 1995, p. 1234; T.O. Elias, *The Doctrine of Intertemporal Law*, 74 American Journal of International Law 285 (1980), p. 285.

[50] For a summary of the case, *see* L. Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 European Journal of International Law 543 (2010), pp. 579–580.

[51] Permanent Court of Arbitration, *Island of Palmas Case (United States of America v. The Netherlands)*, Award of the Tribunal, 1928, p. 15.

the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[52] In other words, one has "to look at the law of the era and not at the law as it may have later developed, or as it stood at the time any dispute arose or fell to be resolved."[53] Therefore, the doctrine of inter-temporal law applied in these types of cases implies that the rules of law "contemporaneous with the acts in the distant past,"[54] and not the present rules, control the legal significance of those acts.

As the Institut de Droit International points out, an inter-temporal problem arises, *inter alia*, "whenever a rule refers to a concept the scope or significance of which has changed in the course of time."[55] In the context of the interpretation of treaties,[56] as explained by the International Law Commission (ILC), the doctrine of inter-temporal law has two aspects, i.e. "one affirming 'contemporaneity', the other allowing the changes in the law to be taken into account."[57] According to former, the treaty has to be interpreted "in the light of the law in force at the time when the treaty was drawn up"; the latter aspect requires, however, that 'the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied' (footnotes omitted).[58]

These two rationales, therefore, point "to the past as a guide for finding party intent" as well as "to the present for the exactly same reason."[59] The ILC makes it clear that it

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[52] *Ibidem*, p. 14. The International Law Commission (ILC) assessed the possibility of including part of the *dictum* of Arbiter Huber in the VCLT (e.g., with regard to the interpretation of the treaties). Eventually, due to disagreement among the members, this possibility was dropped. H. Waldock, *Third Report on the Law of Treaties*, Yearbook of the International Law Commission (1964), ii, 5, pp. 8 ff. (draft Article 56) in Grover, *supra* note 50, p. 580; Elias, *supra* note 49, pp. 302-304. The principle of non-retroactivity, by contrast, is embedded in the VCLT, which proves that this principle cannot be considered as a synonym for inter-temporal law.

[53] R. Higgins, *Themes and Theories: Selected Essays, Speeches and Writings in International Law*, Oxford University Press, Oxford: 2009, pp. 867-868. *See also* R. Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 International and Comparative Law Quarterly 501 (1997), p. 516.

[54] D'Amato, *supra* note 49, p. 1234.

[55] Institut de Droit International (IDI), *Resolution on the Inter-Temporal Problem in Public International Law* (1975), Session of Wiesbaden Fourth Recital (Preamble).

[56] The United Nations International Law Commission (ILC), in its report on the fragmentation of international law, has examined the question of "what should be the right moment in time (critical date) for the assessment of the rules that should be "taken into account" under article 31 (3) (c)?." ILC, *Report of the International Law Commission, Fifty-Seventh Session, Chapter XI "Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law"* (2005), UN Doc A/60/10, para. 475.

[57] *Ibidem.*

[58] *Ibidem.* According to D'Amato, in the context of treaty interpretation, the doctrine of inter-temporal law includes two aspects: first, the language of a treaty must be interpreted in light of "the definitions of words that were prevalent at the time the treaty was made"; and second, a treaty should be construed in light of "the rules of international law in force at the time the treaty was made." D'Amato, *supra* note 49, p. 1234.

[59] ILC, *supra* note 56, para. 477.

is "pointless to try to set any general and abstract preference between the past and the present."[60] Therefore,

> when deciding whether to apply article 31(3)(c) (VCLT) so as to 'take account' of those 'other obligations' as they existed when the treaty was concluded or as they exist when it is being applied, (…) the starting-point must be (…) the fact that deciding this issue is a matter of interpreting the treaty itself.[61]

As suggested by Higgins, IHRL treaties – due to their nature – fall into a special category insofar as inter-temporal law[62] is concerned.[63] In the interpretative approach adopted by both the ECtHR and the IACtHR, these bodies look at the present and not at the past, thereby considering possible "changes in the law" which occurred subsequent to its adoption. In the *Tyrer* case, the ECtHR crafted a formula which became a recurrent one in its ensuing case law:

> the Convention is *a living instrument* which […] must be interpreted in the light of present-day conditions. […] [T]he Court cannot but be influenced by the developments and *commonly accepted standards in general policy of the member States of the Council of Europe* in this field [emphasis added].[64]

The special character of the Convention has also been emphasized, together with the importance of considering the Convention within the international legal system.[65] In this respect, the Court has highlighted that

> the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction […].[66]

Along the same lines, the IACtHR has held that

> […] it is necessary to point out that to determine the legal status of the American Declaration it is appropriate to look *to the Inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration*, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.[67]

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[60] *Ibidem*, para. 478.

[61] *Ibidem.*

[62] In his considerations on human rights law treaties, Fitzmaurice refers to the principle of contemporaneity and the doctrine of inter-temporal law as interchangeable terms. M. Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties*, 21 Hague Yearbook of International Law 101 (2008), p. 104, in: Grover, *supra* note 50, p. 579.

[63] Higgins (*Themes and Theories*), *supra* note 53, p. 868.

[64] ECtHR, *Tyrer v. The UK* (App. No. 5856/72), 15 March 1978, para. 31.

[65] ECtHR, *Loizidou v. Turkey* (App. No. 15318/89), 28 November 1996, para. 43.

[66] *Ibidem*.

[67] IACtHR, *Advisory Opinion - Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the ACHR Requested by the Government of the Republic of Colombia* (Doc no. OC-10/89), 1989, para. 37 (emphasis added).

From the foregoing, it can be inferred that the States upon whom the obligations fall are not required to reopen legal acts or pay compensation for "incorrect applications" of the obligations in the past,[68] unless the consequences of this conduct are still continuing in present times. In the latter instance, such consequences should be read in light of the contemporary framework.

2. THE PLACE OF IHL IN ADDRESSING TODAY'S CONSEQUENCES RESULTING FROM PAST CONFLICTS

Very few scholars have tackled the doctrine of inter-temporal law in conjunction with IHL.[69] Nevertheless, the issue of whether to apply contemporary rules to a conduct held in a situation which occurred prior to the entry into force of the relevant treaty for the State concerned, or whether to apply an old rule read in light of contemporary developments under IHL has arisen in a few cases related to past conflicts (e.g., WWII). Thus, subsection 2.1 of this section will depict the three case-scenarios briefly introduced above with a focus on the legal framework applicable at the time of their occurrence and its interrelation with the contemporary legal framework outlined in subsection 1.1. Next, subsection 2.2, will examine these two issues in light of the theoretical remarks put forward in subsection 1.2 of the present article.

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[68] Higgins (*Themes and Theories*), *supra* note 53, pp. 869–870. Along the same lines, in dealing with the inter-temporal aspect of interpretation, the ICJ seems to have relied on the nature of the instrument at issue: in the case of instruments relating to human rights or environmental issues, the ICJ seems "to be inclined towards applying and interpreting them within the framework of contemporary international law." *See* ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Merits, Judgment, 25 September 1997, ICJ Rep. 7, paras. 112, 140-141, in G. Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles*, Intersentia, Cambridge/Mortsel: 2008, p. 30. In this regard, in his separate opinion in the *Gabčikovo-Nagymaros* case, Judge Weeramantry stressed that "[t]he ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standards of yesterday. […] In the application of an environmental treaty, it is vitally important that the standards in force *at the time of application* would be the governing standards." Judge Weeramantry (ICJ), Separate Opinion, *supra* note 48, pp. 111-112. *See* Y. Tanaka, *Reflections on Time Elements in the International Law of the Environment,* 73 ZaöRV (Heidelberg Journal of International Law) 139 (2013).

[69] *E.g.* A. Petrig, *The War Dead and Their Gravesites*, 874 International Review of the Red Cross 341 (2009); S. Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford: 2014, p. 175. With regard to the applicability of ancient norms to contemporary problems, *see generally* M. Bedjaoui, *The Gulf War of 1980-1988 and the Islamic Conception of International Law*, in: I.F. Dekker & H. H.G. Post (eds.), *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective*, Martinus Nijhoff Publishers, Leiden/Boston: 1992. *Contra* (interpretative): K. Macak, *Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law*, 48 Israel Law Review 55 (2015), pp. 69-71.

2.1. Specific cases of lingering uncertainty on missing persons/victims of enforced disappearances which have emerged from past conflicts

2.1.1. The Spanish civil war

Uncertainty about those reported missing during the Spanish civil war and the legal obstacles preventing families from knowing the fate and whereabouts of their relatives are still present and continuing to date. The first aspect to be addressed vis-à-vis this pending situation is the definition of the rules that applied to the Spanish Civil War (NIAC[70]) and clarification of whether the content of these rules has changed over the course of time.

At first glance, it might be submitted that no IHL rule in force at the time of the Spanish civil war was applicable to a NIAC. Although the nationalists requested recognition of belligerency, their request was rejected.[71] In 1936, on the initiative of the ICRC,[72] the parties to the conflict – the Republican Government and the Nationalists[73] – agreed to apply the 1929 Geneva Convention on the Wounded and Sick through the intermediary of formal declarations to the ICRC;[74] they also agreed to cooperate in the establishment of a POW Information Agency.[75]

The agreement between the parties under the auspices of the ICRC replicated some of the rules provided for in the 1929 Geneva Conventions. Cassese explains that this was possible because "some of the rules on civil war evolved on the pattern of those governing inter-State conflicts."[76] From a practical point of view, the exchange of messages and the collection of information concerning those in enemy hands were possible only in very limited circumstances.[77] While records concerning those detained

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[70] F. Bugnion, *Jus ad bellum, jus in bello and non-international armed conflicts*, 6 Yearbook of International Humanitarian Law 198 (2003), p. 218.

[71] A. Cassese, *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, Oxford University Press, Oxford: 2008, p. 131.

[72] The ICRC played a major role in searching for missing persons and providing answers to their families. *See* F. Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan Education, Geneva: 2003, pp. 271-278.

[73] The opposition forces to the Republicans were the Nationalists; these had their first National Defense Council's meeting in Burgos. In the literature, these are often referred to as "the Burgos authorities." Cassese, *supra* note 71, p. 131.

[74] However, in a circular letter sent, in 1937, to all national Societies of the Red Cross, the ICRC pointed out that "the application by analogy" of the 1929 Geneva Convention on Wounded and Sick was in a general way admitted in fact by both contending parties. *L'Action de la Croix-Rouge en Espagne, 335me Circulaire du Comité international de la Croix-Rouge* (Geneva 31 March 1937), p. 4 in *ibidem*, p. 132. For a thorough analysis of the activities carried out by the ICRC during the Spanish civil war concerning persons deprived of their liberty and the civlian population, *see* Bugnion, *supra* note 72, pp. 266-283.

[75] Cassese, *supra* note 71, pp. 132-133.

[76] *Ibidem*, p. 146.

[77] Political prisoners were never recorded and the Parties to the conflict did not transmit details concerning their fate and whereabouts, as this information would have been tantamount to admitting the existence of an unimaginable number of detainees: G. Đurović, *L'Agence centrale de recherches du Comité international de la Croix-rouge. Activité du CICR en vue du soulagement des souffrances morales des victimes de guerre*, University of Geneva – Institut Henry Dunant, Geneva: 1981, pp. 97-99.

by the two parties to the conflict existed, these were not handed over to the ICRC,[78] which had to count on unofficial lists.[79]

It became clear right from the outbreak of the conflict that the commitment to respect the 1929 Geneva Conventions was not as strong as expected with respect to both sides.[80] The illegal detentions, accompanied by the concealment of the whereabouts of those detained, resulted in the disappearances of many persons during the Civil War[81] and the dictatorship that followed.[82] This attitude rendered the embryonic system concerning the handling of information set out by the 1929 Geneva Conventions meaningless, as this was blatantly disregarded. It is submitted that the 1949 Geneva Conventions I and III – the revised version[83] of the 1929 Geneva Conventions – developed the embryonic version of the preceding obligations and/or made them explicit.[84] However, this consideration does not allow a retroactive application of the 1949 Geneva Conventions to the events which occurred during the civil war.

Some informal exhumations started after the death of Franco – at the end of the 1970s.[85] However, it was only at the beginning of the twenty-first century that

[78] *Ibidem*, p. 99.

[79] These lists were the result of an informal sharing of records by the directors of detention centers, members of the civilian/military administration, the commanders of the camps where detainees were held, and the prisoners themselves (*ibidem*, p. 114).

[80] The forces led by Franco as well as the republicans violated the laws of war during the Civil War. H. Graham, *The Spanish Civil War: A Very Short Introduction*, Oxford University Press, Oxford/New York: 2005, pp. 133-134. From a historical perspective, the republican violence has received far less attention than that committed by the nationalists. One scholar who has examined this part of the historic account of the civil war is José Luis Ledesma. *See generally* J.L. Ledesma, *Los días de llamas de la revolución: Violencia y política en la retaguardia republicana de Zaragoza durante la guerra civil*, Institución Fernando el Católico, Zaragoza: 2003. Due to word limit constraints, the focus will remain on the practice of enforced disappearance committed by the nationalists, which continued to be perpetrated during the dictatorship – i.e., after the termination of the civil war.

[81] As for disappearances committed during the war, the Spanish decree no. 67, enacted in 1936 by the Coup Government (i.e., the nationalists), declared in its preamble that any disappearance was the natural consequence of the war; for this reason, any absence, disappearance or death of persons had to be recorded as resulting from the national fight against Marxism. Decreto núm. 67 - Dictando reglas a las que habrá de sujetarse la inscripción del fallecimiento o desaparición de personas, ocurridos con motivo de la actual lucha nacional contra el marxismo, B.O.E. núm. 27, de 11/11/1936 in P. Galella, *Contra El Miedo a Prevaricar. El Punto de Vista Del Derecho Internacional Sobre La Investigación Y Reparación de Las Desapariciones Forzadas Ocurridas Durante El Franquismo* (Tesis Doctoral, Universidad Complutense de Madrid, 2015), p. 172.

[82] UN WGEID, *Mission to Spain*, *supra* note 2; CED, *supra* note 8, paras. 31-32.

[83] *E.g.* ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd ed.) (2016), *Introduction to the commentary on Geneva Convention (I) of 1949*, paras. 62, 71, 73, available at: https://bit.ly/2GboYdN (accessed 30 June 2018); ECtHR, *Varnava and Others v. Turkey* (App. No. 16064/90 and others), Grand Chamber, 18 September 2009, para. 130.

[84] *See* J.S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, vol. I, ICRC, Geneva: 1952, pp. 134, 137.

[85] This was the case of the informal exhumations carried out in the late 1970s in Navarre, Extremadura, and La Rioja. *See* P. Galella, *Privatising the search and identification of human remains: the case of Spain*, 1(1) Human Remains and Violence: An Interdisciplinary Journal 57 (2015), p. 60.

a systematic documentation of the mass graves began.[86] Among the reasons that delayed the process of elucidation of the fate and whereabouts of many of those reported missing during the conflict was the thirty-six year dictatorship that ensued after the end of the civil war. During that period, only those victims who were loyal to the dictatorship obtained reparations and saw the crimes committed by Franco's opponents documented in the *Causa Géneral*, which led to the exhumation of mass graves where their loved ones were buried.[87] Moreover, the dictatorship featured a continuation of the practice of enforced disappearances against those who expressed their dissent.[88] Another reason lies in the subsequent enactment of an Amnesty Law (1977)[89] – still in force to date – that posed obstacles for the carrying out of investigations into the violations committed in the past (including enforced disappearances).[90]

Only recently has the struggle for the recovery of historical memory gained a new centrality in Spanish politics, along with a "wave of remembering" in other fields, including the rise of NGOs working on recovery of historical memory (e.g., associations of the lost children of the war and of refugees of the civil war).[91] Pursuant to the Historical Memory Act,[92] State authorities have "an obligation to cooperate with individuals and to facilitate investigation, search and identification"[93] of disappeared persons, thereby shifting the burden from the State to the families. The authorities have to "facilitate" the location and identification of persons who went missing as a result of, *inter alia,* the civil war (1936-1939), as well as the recovery and reburial of human remains by the families. Since the measures provided for in the Act do not create a State obligation to

[86] F. Ferrandiz, *Exhumaciones y relatos de la derrota en la Espana actual*, 84 Revista de Historia Jeronimo Zurita 135 (2009), p. 138.

[87] Causa General informativa de los hechos delictivos y otros aspectos de la vida en la zona roja desde el 18 de julio de 1936 hasta la liberación, Decreto del Ministerio de Justicia, 26 April 1940, available at: http://www.causageneral.org/(accessed 30 June 2018).

[88] The Francoist regime launched systematic purges – also known as *limpieza* (cleansing) – to eliminate threats to the new order. A. Suhrke, *Post-War States: Differentiating Patterns of Peace*, in: C. Stahn, J.S. Easterday, J. Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations*, Oxford University Press, Oxford: 2014, p. 275.

[89] For more details on the scope of application *ratione materiae* of the Amnesty, *see*: Article 2, Ley 46/1977 (Spain), de 15 de octubre, de Amnistía in Noticias Juridicas, available at: http://noticias.juridicas.com/base_datos/Penal/l46-1977.html (accessed 30 June 2018).

[90] *See* CED, *supra* note 8, paras. 11-12.

[91] Kovras, *supra* note 45, pp. 82-83.

[92] Articles 11 and 13, Ley 52/2007 (Spain). The Historical Memory Act has fostered the intervention of local authorities in removing monuments related to the Francoism; the *Act* has also constituted the basis for regional laws and public policies of remembrance. Nevertheless, actions/initiatives concerning the handling of the past were implemented well before the enactment of the Historical Memory Act. For instance, the Catalan Government established the General Agency of Democratic Remembrance in 2003. A. Aragoneses, *Legal Silences and the Memory of Francoism in Spain,* in: U. Belavusau & A. Gliszczynska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, Cambridge: 2017, pp. 185-191.

[93] UN WGEID, *Mission to Spain*, *supra* note 2, para. 21.

act *ex officio*, they generate a number of difficulties[94] for the families trying to exercise the rights contained in the Act itself, including the right to have access to (historical) information on the civil war.[95]

The current conduct of the government against the families and their actual situation generated by the disappearance of their relatives is covered by those rules that prohibit the concealment of the fate and whereabouts of persons deprived of their liberty. Since "any rule which relates to an actual situation shall apply to situations existing while the rule is in force, even if these situations have been created previously",[96] the government is obliged not only to cooperate with the families, but also to act in accordance with the international rules outlawing enforced disappearances. Indeed, pursuant to the ICPPED (ratified by Spain in 2009), relatives remain entitled to know the truth about the fate of their disappeared loved ones.[97] Moreover, the CED has urged Spain

> to ensure that all disappearances are investigated thoroughly and impartially, regardless of the time that has elapsed since they took place and even if there has been no formal complaint; the necessary legislative or judicial measures are adopted to remove any legal impediments to such investigations in domestic law[…]; suspected perpetrators are prosecuted and, if found guilty, punished in accordance with the seriousness of their actions; and victims receive adequate reparation that includes the means for their rehabilitation and takes account of gender issue.[98]

2.1.2. Two cases from the Second World War

The Kaprolat/Hasselman incident and the Katyń massacre have very little in common, apart from the fact that both occurred during WWII and that in both cases the families of the victims were left without news. The main distinctive aspect is the nature of the *fait générateur* of the situations at issue: while the former corresponds to a typical scenario generated in the course of a conflict - soldiers caught in an ambush and killed by enemy soldiers;[99] the latter – the mass killing of POWs by Soviet soldiers – constitutes a war crime.

2.1.2.1. The Kaprolat/Hasselman incident

The recent debate in Norway on the treatment of human remains from WWII is best reflected in what the then-Prime Minister stated in 2005: no international legal obligation binds Norway vis-à-vis the fallen soldiers in Kaprolat, particularly with

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[94] *E.g.* access to information, including to the death registers containing information on the victims of the civil war, is still difficult and in certain instances almost impossible to obtain due to, *inter alia*, the denial of access on various grounds. UN WGEID, *Mission to Spain*, *supra* note 2, paras. 30, 40.

[95] *Exposición de motivos*, Ley 52/2007 (Spain).

[96] IDI, *supra* note 55, para. 2(c).

[97] In its concluding observations concerning Spain, the Committee on Enforced Disappearances (CED) "recalls that the search for persons who have been the victims of enforced disappearance and efforts to clarify their fate are obligations of the State even if no formal complaint has been laid, and that relatives are entitled, *inter alia*, to know the truth about the fate of their disappeared loved ones." CED, *supra* note 8, para. 32.

[98] *Ibidem*, para. 12.

[99] A combatant is a legitimate military target in light of Article 48 AP I.

regard to financial support for the identification of human remains and their subsequent repatriation.[100] In his view, it was Germany's responsibility to identify and repatriate their remains.[101] The same attitude has been displayed by Norway vis-à-vis the exhumation of the fallen soldiers in its own territory; in this respect the Norwegian National Red Cross has pointed out that this conduct violates IHL.[102] Can it be argued that Norway must recover these soldiers' human remains pursuant to contemporary IHL? Petrig suggests that this question could be answered in the affirmative from both a normative and practical perspective. From the normative point of view, Petrig notes that the acts at stake

> cannot be qualified as completed or isolated acts lying in the past. Rather, they are of a continuing or even present nature. [...] The continuing nature of these facts is also reflected by the wording of various gravesite provisions. […] Obligations ensuring that the dead are accounted for […] do not cease at a given moment but persist over time. Other obligations can be dormant and may only materialize long after death, such as those pertaining to exhumation, identification or return of mortal remains.[103]

From a practical perspective, Petrig states that

> Application of the law as in force at the time of death or burial would … [lead] to a fragmented legal regime, since a fact pattern often comprises elements attributable to different points of time in the past. Applying the IHL rules as in force today enables the situation to be taken into account as it has evolved with the passage of time [...]. The situation is thereby governed by one and the same set of rules.[104]

Another approach that might be undertaken to answer the question posed above is to consider the right of families to know the fate of their relatives – which is provided for under Article 32 AP I – as part of customary international law.[105] It can be argued that the AP I's provision makes explicit what was implicitly inherent in Article 46 of the 1907 Hague Regulations (Convention IV). The latter, whose customary character was acknowledged by the International Military Tribunal (IMT) in Nuremberg,[106] obliges

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[100] V. Trellevik, *Ligger Fortsatt På Slagmarken* (Documentary Is Still on the Battlefield), NRK 24.02.2009, available at: https://www.nrk.no/dokumentar/dodsmarkene-1.6488248 (accessed 30 June 2018). *See also* Ch. Jennings, *Bosnia's Million Bones: Solving the World's Greatest Forensic Puzzle*, Macmillan, New York: 2013, p. 162.

[101] Trellevik, *supra* note 100.

[102] E. Veum, *Giske Opptrer Arrogant* (Giske Acting Arrogant), NRK 15.06.2008, available at: https://www.nrk.no/norge/-giske-opptrer-arrogant-1.6010263 (accessed 30 June 2018).

[103] Petrig, *supra* note 69, p. 367.

[104] *Ibidem*, p. 368.

[105] Đurović observes that the right enshrined in Article 32 represents the confirmation of a principle of customary international law. Đurović, *supra* note 77, p. 272; cf. Rule 117 "Accounting for Missing Persons", in: Henckaerts & Doswald-Beck, *supra* note 27, pp. 421 ff.

[106] *Trial of the Major War Criminals before the IMT*, Nuremberg, 14 November 1945 – 1 October 1946, Official Documents and Proceedings, Nuremberg, 1947, pp. 301-304 and 317-320. *See also* Eritrea-Ethiopia Claims Commission, Central Front-Eritrea's claims 2, 4, 6, 7, 8, and 22 between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Partial Award, 2004, para. 22.

the parties to the conflict to respect family rights and honour. The IMT held that the disappearance of many persons resulting from the Night and Fog program set up by the Nazi regime amounted to a war crime, and that such a conduct was contrary to, *inter alia*, the above-mentioned Article 46 of the 1907 Hague Regulations (Convention IV) and to Article 6(b) of the Charter of the Nuremberg Tribunal.[107] In reaching this conclusion, the Tribunal took into account the consequences of the implementation of the Night and Fog program: no word of the prisoners captured in the context of Night and Fog program was allowed to reach their country of origin, nor their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person.[108]

Since the early codification of IHL, its rationale consisted in diminishing "the evils of war, as far as military requirements permit" (Preamble, 1907 Hague Regulations (Convention IV)) and in mitigating its "inevitable rigours," (Preamble, 1929 Geneva Convention on POWs) which include alleviating the suffering of those who remain without news of their loved ones because of the war. In light of these considerations, it can be submitted that the *general principle* of the right of families to know the fate of their relatives (Article 32 AP I) makes explicit what was implicitly embedded in the 1907 Hague Regulations (Convention IV). This is not a question which arises out of "an amendment of a law and which should be decided on the basis of the principle […] of non-retroactivity."[109] Indeed, "the recognition of the generation of a new customary international law" concerning the right of families to know the fate of their relatives

> is nothing other than a simple clarification of what was not so clear [decades] ago. What ought to have been clear [at that time] has been revealed by the creation of a new customary law which plays the role of authentic interpretation, the effect of which is retroactive.[110]

Despite Norway's public statement vis-à-vis its international obligations, the State has offered support to the families in order to facilitate the repatriation of human remains on the basis of humanitarian reasons, and not as a consequence of any international

[107] Pursuant to Article 6(b) of the Charter of the International Military Tribunal, "war crimes – namely, violations of the laws or customs of war" – are crimes falling within the jurisdiction of the Tribunal. *Cf.* Article 6(b), Charter of the International Military Tribunal, London, 8 August 1945. Indeed, the IMT confirmed the indictment by adding that the acts listed in Article 6(b) of the Charter were "already" recognized as war crimes under international law, for these were covered by, *inter alia*, Article 46 of the 1907 Hague Regulations.

[108] IMT, *Trial of the Major War Criminals – Proceedings of the IMT* (1948) Vol. 22 (14 November 1945 – 1 October 1946), p. 476.

[109] This point was raised by Judge Tanaka in his Dissenting Opinion in the *South West Africa cases* (1966), in which South Africa argued that its mandate over South West Africa was to be interpreted by reference to the law as it stood in 1920 and without reference to the subsequently-developed right to self-determination. In contrast, Tanaka pointed out that contemporary law, and not the law as it stood when the mandate was set up, should apply. Judge Tanaka (ICJ), *Dissenting Opinion – South West Africa (Liberia v. South Africa)*, Second Phase, Merits, Judgment, 1966, ICJ Rep. 6, pp. 293–294.

[110] *See ibidem*.

law obligation.[111] However, the distinction between these two courses of action (i.e., humanitarian reasons v. international law obligations) does not appear clear, since the treatment of human remains, their identification, and their return to the families are measures required by the law. This standpoint does not advocate for a retroactive application of the law but is rather focused on the aspect of contemporaneity between the law and the situation at stake, which is evident in the present case.

2.1.2.2. The Katyń massacre

The other situation mentioned at the outset of this subsection – the Katyń massacre – was carried out by the Soviet secret police against Polish POWs and amounted, at the time of its occurrence, to a war crime.[112] Viewed in this perspective, the question asked at the beginning of this article is no longer based on an inter-temporal issue; rather, it focuses on the temporal scope of the duty to investigate international crimes and on the interrelated right of the families to know the fate of their relatives.[113] It is submitted that under international law there is an *erga omnes* obligation[114] to prosecute war crimes.[115] The pre-WWII customary international law prohibition of war crimes,

[111] The families' pressure on the Government resulted in financial support aimed at finding, identifying, and repatriating the remains. Jennings, *supra* note 100, p. 162.

[112] Pursuant to the 1907 Hague Regulations (Convention IV), POWs must be treated humanely (Article 4); it is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army as well as to kill or wound an enemy who, having laid down his arms, or no longer having a means of defense, has surrendered at discretion (Article 23(b) and (c)). The 1929 Geneva Convention on POW adds that measures of reprisal against POWs are forbidden (Article 2); and that no POW shall be sentenced without being given the opportunity to defend himself (Article 61). Moreover, pursuant to Article 6 of the Charter of the IMT (London, 8 August 1945), the murder or ill-treatment of a POW constitutes a war crime. *E.g.* P. Grzebyk, *Katyn: Riposte*, 4 The Polish Quarterly of International Affairs 72 (2011), p. 73; M. Tuszynski & D.F. Denda, *Soviet war crimes against Poland during the Second World War and its aftermath: a review of the factual record and outstanding questions*, 44(2) The Polish Review 183 (1999), p. 185; M. Kobielska *Endless aftershock. The Katyń Massacre in Contemporary Polish Culture*, in: P. Lees & J. Crouthamel (eds.), *Traumatic Memories of the Second World War and After*, Palgrave Macmillan, Cham: 2016, p. 202. Some scholars have explored whether the Katyń Massacre could amount to the crime of genocide: *see e.g.* M. Sterio, *Katyn Forest Massacre: Of Genocide, State Lies, and Secrecy*, 44 Case Western Reserve Journal of International Law 615 (2012); K. Karski, *The Katyn Massacre as a Crime of Genocide in International Law*, 4 The Polish Quarterly of International Affairs 5 (2011).

[113] UN Commission on Human Rights, *Promotion and Protection of Human Rights: Impunity. Add. 1 "Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Orentlicher Principles)"* (2005), UN Doc E/CN.4/2005/102/Add.1, Principle 2.

[114] ICJ, *Barcelona Traction Light and Power Co, Ltd (Belgium v. Spain)*, Merits, Judgment, 5 February 1970, ICJ Rep. 3, paras. 33-34.

[115] This stance is based on the fact that under the 1949 Geneva Conventions I-IV, which are universally ratified treaties, each High Contracting Party is obliged to search for the alleged perpetrators of violations qualified as grave breaches and to bring them before its own courts; on this last point, the High Contracting Party "may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case" (in other words, this can be boiled down to the principle *aut dedere aut judicare*). Common Article 49 /50/129/146, Convention (I) for the Amelioration of the Condition of

with no statutory limitation[116] on prosecution, implied a continuing obligation to investigate, prosecute, and punish those crimes.[117] In addition to that, under IHRL, despite the passage of time "the authorities are under an obligation to take further investigative measures"[118] whenever there is a "plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrators" of unlawful killings (see *infra* section 3).[119]

2.2. Cutting the Gordian knot: The limited relevance of contemporary IHL against the lingering consequences of past conflicts

The application of contemporary IHL to the contemporary consequences of an armed conflict that occurred too long ago generates practical effects. In the case of persons reported missing in combat scenarios (e.g., in the Kaprolat/Hasselman incident), contemporary rules can be guiding standards vis-à-vis specific actions; in the case of persons who went missing as a result of international crimes, these rules can reinforce the applicable standards and provide for avenues of action. Although a retroactive application of contemporary IHL is not legally tenable, the 1987 Commentary to AP I emphasized that

> [i]n principle the Parties to the Protocol are only required to apply it *inter se* in order to resolve problems relating to the consequences of conflicts breaking out between them or relating to the aftermath of such conflicts. Obviously we would not wish to defend the idea of retroactive application of the Protocol, but even so it is to be hoped that Parties bound by it will refer to it to resolve problems still unresolved at the end of a conflict, which had ended before they had become bound by the Protocol. Questions relating to missing persons, and to an even greater extent, those concerning the remains of the deceased, actually pose problems well after the end of an armed conflict.[120]

The subsections above cast light upon the contemporary relevance of IHL rules vis-à-vis the lingering consequences generated in the context of armed conflicts that occurred prior to the entry into force of contemporary IHL. The question of whether this relevance remains purely theoretical has to be answered in the negative. Domestic courts have used contemporary IHL treaties to assess situations related to or being

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the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (1949 Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 (1949 Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (1949 Geneva Convention III); Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (1949 Geneva Convention IV).

[116] Article I(a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, UN Doc. A/7218, 754 UNTS 73.

[117] Amnesty International, *Written Observations. Case of Janowiec and Others v. Russia - App Nos 55508/07 and 29520/09*, (2012) 8.

[118] ECtHR, *Janowiec and Others v. Russia*, para. 133.

[119] *Ibidem.*

[120] Sandoz et al., *supra* note 31, para. 1193, p. 341 (emphasis added).

direct consequences of events that occurred before the entry into force of the relevant treaties for the State concerned.[121] States have been guided by contemporary IHL vis-à-vis families' requests for measures concerning exhumations and identification of persons who went missing in WWII. In this respect, the Kaprolat case shows that, despite the official declaration of acting for humanitarian reasons and not under any international obligation, the recent measures implemented by Norway have aligned themselves with contemporary IHL standards[122] regarding the treatment of the deceased and the right of families to know the fate of their relatives.

3. ADDRESSING TODAY'S CONSEQUENCES OF A DISTANT PAST: THE APPROACH OF HUMAN RIGHTS JUDICIAL AND QUASI-JUDICIAL BODIES

Pauwelyn has stressed that

> in [IHRL], where the individual is the victim of the crime, s/he should *a priori* be able to invoke the most favorable law. This argument could then be used to plead in favor of retroactive effect for rules of *jus cogens*, involving individuals as victims, more favorable to the individual.[123]

The "most favourable law" argument is appealing but, as noted by Ago in his Fifth Report on State Responsibility and also by Pauwelyn himself, "allowing such exceptions would have an effect of such magnitude hardly acceptable to the legal conscience of members of the international community."[124]

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[121] The application of contemporary IHL treaties to events preceding their adoption has not been rare in domestic courts: e.g., *Aboitiz and Company, Incorporated v. Price*, Trial judgment, (1951), 99 F. Supp. 602, ILDC 931 (District Court for the District of Utah), paras. 118-119; *United States v. Batchelor* (1955), 19 CMR 452 (Army Court of Criminal Appeals), pp. 503–504; *Dolenc and Petan*, Constitutional complaint (2006) U-I-266/04, OG RS No 118/2006, ILDC 570 (SI 2006) (Constitutional Court (Slovenia)).

[122] Pursuant to Article 34 AP I, the "next of kin" can request the return of the remains of the deceased and of personal effects, but the "home country" can exercise a right of veto ("unless that country objects"). However, the driver of the conduct of States is the right of families to know the fate of their relatives. Indeed, Article 34 is encompassed under Section III Part II of the API. Pursuant to Article 32 AP I, "[i]n the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives." Moreover, IHL sets out detailed obligations concerning the treatment of human remains and the transmission of information concerning the dead, including the obligation to mark and respect the graves (Article 17 – Prescriptions regarding the Dead – 1949 Geneva Convention I; Article 130 – Burial and cremation - 1949 Geneva Convention IV; Article 34 – Remains of deceased - AP I); and the obligation to record and forward information on the dead (Article 16 – Recording and forwarding of information – 1949 Geneva Convention I; Article 130 – Burial and cremation – 1949 Geneva Convention IV; Article 33 – Missing Persons – AP I).

[123] J. Pauwelyn, *The Concept of a "Continuing Violation" of an International Obligation: Selected Problems,* 66 British Yearbook of International Law 415 (1996), p. 442.

[124] 5th Report of Ago 20 in *ibidem*, p. 441.

Human rights bodies have conceived the notion of a "continuing situation" and have acknowledged the continuous nature of certain violations. In this respect, the triggering event might not fall under their competence insofar as it predated the State's acceptance of such competence and the adoption of the human rights treaty concerned; nevertheless, the continuous character of the effects of the disappearance triggers the responsibility of States for action/inaction contrary to human rights treaties.

In the human rights case law, considerations on the temporal scope of the human rights treaties intertwine with issues concerning both the duration of the violation/obligation of the States and the jurisdiction *ratione temporis* of the human rights judicial bodies. This phenomenon will be expounded upon in light of the ECtHR's case law (subsection 3.1), as both the Spanish civil war and WWII scenarios have been at the centre of the Court's judicial assessment. In light of the ECtHR's approach and that of other judicial bodies (subsection 3.2), this section will elucidate whether State authorities in the case-scenarios above can consider themselves discharged from the obligation to investigate cases of persons who went missing in the context of human rights violations, on the grounds that they went missing too long ago.

3.1. The effects of the passage of time on the States' obligation to carry out an investigation under IHRL: the ECtHR's approach

In given instances the circumstances surrounding the disappearance of persons in an armed conflict substantiate the likelihood that the persons concerned were subjected to severe violations of their rights. As it emerges from the ECtHR's case law, it is possible that, after several years of uncertainty, the body of a missing person is recovered and shows evident signs of abusive acts and violations; the fact that the body is no longer missing does not waive the obligation to investigate.[125] More generally, in the human rights case law, the continuous nature of enforced disappearances[126] has affected the judicial assessment at multiple levels, including at the admissibility level.[127]

States bear positive obligations to protect the right to life; these include the obligation to carry out an investigation in order to elucidate the circumstances of death – even when this took place in the distant past – and to establish responsibility for

[125] ECtHR, *Aslakhanova and Others v. Russia* (App. No. 2944/06 and others), 18 December 2012, para. 145; ECtHR, *Varnava and Others v. Turkey* (GC), para. 145.

[126] *See supra* subsection 1.1. *See also* UN WGEID, *General Comment on Article 17 of the Declaration in Report of the WGEID* (2000), UN Doc E/CN.4/2001/68, paras 27-32.

[127] *See* HRC, *Edouardo Bleier v. Uruguay* (Comm No. 30/1978), UN Doc. Supp. No. 40 (A/37/40) 1982, para. 15; HRC, *Norma Yurich v. Chile* (Comm No. 1078/2002), UN Doc CCPR/C/85/D/1078/2002, 2005, paras. 6.3-6.5; HRC, *S E v. Argentina* (Comm No. 2751/1988, UN Doc CCPR/C/38/D/275/1988, 1990, paras. 5.2-5.3; IACtHR, *Radilla Pacheco v. Mexico* (Series C No. 209), Preliminary Objections, Merits, Reparations and Costs, 2009, para. 166; IACtHR, *Ibsen Cárdenas and Ibsen Peña v. Bolivia* (Series C No. 217) Merits, Reparation, and Costs, 2010, paras. 126, 130; IACtHR, *La Cantuta v. Peru* (Series C No. 162), Merits, Reparations and Costs, 2006, para. 125; ECtHR, *Varnava and Others v. Turkey* (GC), paras. 161 ff.; AfCommHPR, *JE Zitha and PJL Zitha v. Mozambique (represented by Prof. Dr. Liesbeth Zegveld) v. Mozambique* (Comm No. 361/08), 2011, para. 84.

it.[128] Where the contours of an enforced disappearance are absent, the continuous nature argument is not easily tenable. A bridge between the present and the past must judicially be drawn up in order to assess an event that might have occurred before the ratification of a certain IHRL treaty or before the acceptance of the competence of a certain international adjudicator in assessing individual petitions.

The States parties to the ECHR – including Spain and Russia – have an obligation to carry out an effective investigation[129] into the circumstances of death (including suspicious deaths).[130] The effectiveness of the investigation depends on whether it will be capable of leading to the identification of those responsible.[131] As part of the positive obligations[132] of the State, the procedural obligation under Article 2 ECHR "has evolved into a separate and autonomous duty capable of binding the State even when the death took place before the critical date [i.e., the entry into force of the ECHR for the State concerned]."[133]

Furthermore, the Court has acknowledged that the suffering and psychological distress of the families of the missing does not fade away with the passage of time.[134] The fact of not knowing and of not being able to access the relevant information has an extreme impact on the life of all family members, including those who were unborn at the time of the disappearance.[135] The "continuous and callous" disregard of the obligation to

[128] The prime characteristic of positive obligations is that they require national authorities to take the necessary measures to safeguard a right or, more precisely, to adopt reasonable and suitable measures to protect the rights of the individual. ECtHR, *Hokkanen v. Finland* (App. No. 19823/92), 23 September 1994, paras. 55-59; ECtHR, *López-Ostra v. Spain* (App. No. 16798/90), 9 December 1994, para. 51. As part of the positive obligations of the State, the procedural obligation under Article 2 ECHR "has evolved into a separate and autonomous duty capable of binding the State even when the death took place before the critical date [i.e., the entry into force of the ECHR for the State concerned]." ECtHR, *Šilih v. Slovenia* (App. No. 71463/01), Grand Chamber, 9 April 2009, paras. 159-160. *Mutatis mutandis see also* ECtHR, *Calvelli and Ciglio v. Italy* (App. No. 32967/96), Grand Chamber, 17 January 2002, paras. 41-57; ECtHR, *Byrzykowski v. Poland* (App. No. 11562/05), 27 June 2006, paras. 86, 94-118; ECtHR, *Brecknell v. the UK* (App. No. 32457/04), 12 December 2007, para. 53; ECtHR, *Janowiec and Others v. Russia*, para. 131.

[129] ECtHR, *McCann and Others v. the UK* (App. No. 19009/04), 13 May 2008, para. 161.

[130] *See* ECtHR, *Janowiec and Others v. Russia*, para. 130; ECtHR, *Nachova and Others v. Bulgaria* (App. No. 43577/98 and 43579/98), Grand Chamber, 6 July 2005, paras. 110-113.

[131] *E.g.* ECtHR, *Orhan v. Turkey* (App. No. 25656/94), 18 June 2002, para. 335; ECtHR, *Öğur v. Turkey* (App. No. 21954/93), Grand Chamber, 20 May 1999, para. 88.

[132] *E.g.* ECtHR, *Hokkanen v. Finland*, paras. 55-59.

[133] ECtHR, *Šilih v. Slovenia* (GC), paras. 159-160. *Mutatis mutandis*, ECtHR, *Brecknell v. The UK*, para. 53. *See also* W.A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford: 2015, p. 2004.

[134] ECtHR, *Šilih v. Slovenia* (GC), para. 157.

[135] P. Boss, *Ambiguous Loss in Families of the Missing*, 360 Medicine and Conflict – The Lancet Supplement 39 (2002); S.M. Drawdy, C. Katzmarzy, *When X Doesn't Mark the Spot: Historical Investigation and Identifying Remains from the Korean War*, in: D. Congram (ed.), *Missing Persons: Multidisciplinary Perspectives on the Disappeared*, Canadian Scholars' Press, Toronto: 2016, p. 150; L. Holmes, *Missing Someone: Exploring the Experiences of Family Members*, in: S. Morewitz & C. Sturdy Colls (eds.), *Handbook of Missing Persons*, Springer, Cham: 2016, pp. 108-110; P. Boss, *Ambiguous Loss: Working with Families of the Missing*, 17 Family Process 14 (2002); J. Edkins, *Missing: Persons and Politics*, Cornell University Press, Ithaca: 2011, pp. 4-5.

account for the whereabouts and the fate of a missing person amounts to a violation of the prohibition of inhuman and degrading treatment against the relatives of the missing persons.[136] For instance, the ECtHR has recognized that "the essence of the violation is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention."[137] It is "[t]he silence of the authorities of the respondent State in face of the real concerns of the relatives" that amounts to inhuman treatment.[138]

In the Cyprus/Turkey-related cases, the Court recognized that the queries of the families and their quest for any piece of information could not remain unanswered using the excuse that the disappearance occurred too long ago. Specifically, in *Cyprus v. Turkey* and *Varnava v. Turkey* the ECtHR, in ruling on preliminary objections, stressed that

> a disappearance is […] characterized by an ongoing situation of uncertainty and unaccountability in which there is a lack of information. […] This situation is very often drawn out over time, prolonging the torment of the victim's relatives.[139]

A State's infringement of the human rights of the relatives takes place when the State's response to the relatives' quest for information, or the obstacles placed in their way, cause them "to bear the brunt of the efforts to uncover any facts."[140] The length of time without information is not considered the sole factor that determines whether the States infringed the rights of the relatives of the victim;[141] however, the "length of time over which the ordeal of the relatives has been dragged out" contributes to creating a situation "attaining the requisite level of severity"[142] which is in violation of the prohibition of inhuman and degrading treatment vis-à-vis the relatives of the missing person.[143] The Court went on to remark that since "the subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for."[144] Thus, "the ongoing failure to provide the requisite investigation will be regarded as a continuing violation."[145]

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[136] ECtHR, *Varnava and Others v. Turkey* (GC), para. 200.

[137] *Ibidem*. *Contra:* IACtHR, *Blake v. Guatemala* (Series C No. 36), Merits, 1998, paras. 110, 112–116.

[138] ECtHR, *Cyprus v. Turkey* (App. No. 25781/94), Grand Chamber, 10 May 2001, para. 157; ECtHR, *Varnava and Others v. Turkey* (GC), para. 201.

[139] ECtHR, *Cyprus v. Turkey* (GC), para. 136; ECtHR, *Varnava and Others v. Turkey* (GC), para. 148.

[140] *E.g.* ECtHR, *Varnava and Others v. Turkey* (GC), para. 200; ECtHR, *Janowiec and Others v. Russia*, para. 164.

[141] L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford: 2011, p. 239.

[142] ECtHR, *Varnava and Others v. Turkey* (GC), para. 202; ECtHR, *Skendžić and Krznarić v. Croatia* (App. No. 16212/08), 20 January 2011, para. 93.

[143] ECtHR, *Varnava and Others v. Turkey* (GC), paras. 166–167, 170.

[144] *Ibidem*; ECtHR, *Cyprus v. Turkey*, para. 136.

[145] *See* ECtHR, *Šilih v. Slovenia* (GC), paras. 161–162; ECtHR, *Varnava and Others v. Turkey* (GC), para. 150; B. Rainey, E. Wicks and C. Ovey, *The European Convention on Human Rights* (6th ed.), Oxford University Press, Oxford: 2014, p. 89.

The ECtHR's approach to the temporal dimension of the obligation to carry out an investigation has intertwined with its analysis for determining its *ratione temporis* jurisdiction, as well as with its assessment of the temporal scope of the Convention. In those instances when this has occurred, the results reached have been bizarre and at odds with the rest of the Court's case law. The case of *Janowiec and Others v. Russia* (Grand Chamber, GC), addressing the Katyń massacre, sheds lights on the Court's approach to the determination of its competence *ratione temporis* and on the application of this approach to historical cases.

The Court's reasoning was articulated as follows: (i) the obligation to investigate the death of individuals is of a detachable character in relation to the substantive aspect;[146] (ii) where the triggering event occurred before the critical date, the Court's jurisdiction applies only to procedural acts/omissions[147] in the period subsequent to the critical date; (iii) the procedural obligation will come into effect only if there was a "genuine connection" between the death as the triggering event and the entry into force of the Convention; (iv) the verification of the 'genuine connection test' is based on two criteria, i.e., a) the temporal proximity between the triggering event and the critical date (which period should not exceed ten years)[148] and b) the moment in which most of the omissions/procedural acts took place/ought to have taken place should be situated after the entry into force of the ECHR;[149] (v) "the discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the 'genuine connection' test or the 'Convention values' test (…) (see *pt.* (vi)) has been met";[150] (vi) the Court's jurisdiction might be established in any case where it is necessary for ensuring that "the guarantees and the underlying values" of the ECHR are protected in "a real and effective way."[151] The "Convention values test" – also called "humanitarian clause"[152] – is met[153] when the triggering event is "of a larger dimension than an ordinary criminal offence" (e.g., an international crime), constitutes a negation of the very foundations of the Convention, and occurred after the date of the adoption of the ECHR (i.e., 4 November 1950).[154]

[146] ECtHR, *Janowiec and Others v. Russia* (App No. 55508/08 and others), Grand Chamber, 21 October 2013, para. 114.

[147] The procedural acts to be assessed include those acts undertaken in the context of "criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible" (*ibidem*, para. 143).

[148] The Court admitted that there are no "apparent legal criteria by which the absolute limit in the duration of that period may be defined" (*ibidem*, paras. 146-147).

[149] ECtHR, *Janowiec and Others v. Russia*, para. 140.

[150] Since neither of the tests had been met the Court did not examine whether any new developments after the critical date might justify a "fresh obligation" to carry out an investigation. ECtHR, *Janowiec and others v. Russia* (GC), paras. 136 (recalling the criteria laid out in *Šilih v. Slovenia*, (GC)), 141, 143-148.

[151] *Ibidem*, para. 149.

[152] Concurring Opinion of Judge Gyulumyan and Jointly Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque, and Keller - *Janowiec and Others v. Russia* (GC).

[153] ECtHR, *Janowiec and Others v. Russia*, GC, para. 146.

[154] The Court eventually recognized that the Katyń massacre was a war crime but stressed that the "Convention values" clause cannot be applied since the loss of life occurred ten years prior to the adoption

Although the *Janowiec and Others* case was not qualified as a disappearance case, the claims of the family members and the Court's approach to historical cases involving international crimes make this a landmark case, with likely effects on other cases with a similar temporal structure. The approach outlined above shows that the passage of time is a relevant factor in the Court's assessment. Based on the evaluation of the above criteria, it may be concluded that the Court has demonstrated a conservative approach and attachment to the non-retroactivity principle. The specification of the time limit (1950) – non-existent in previous ECtHR case law – with regard to the "Convention values test" seems to be driven by strategic considerations of internal judicial policy. The "unwarranted arithmetic considerations"[155] related to the "genuine connection test" culminate in a distorted time-bound interpretation of the Convention values. Indeed, the temporal limit of 1950 automatically avoids the possibility of opening the "Pandora's box" (e.g., submission of complaints relating to international crimes preceding the ECHR's adoption).[156] The final result is that the scope of the "humanitarian clause" has been restrained in the most "non-humanitarian way."[157]

A month before the Chamber's judgment in the *Janowiec and Others* case, the Court addressed the obligation to carry out an investigation in relation to another historical case, which concerned the disappearance of Mr. Dorado Luque in the context of the Spanish Civil War.[158] The Court pointed out that

> there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.[159]

Despite this consideration, the Court anticipated the *Janowiec* case's approach to the obligation to investigate under Article 2 ECHR (the "Convention values test" was incidentally mentioned)[160] and found that there was no temporal proximity between the triggering event (which occurred in 1936) and the critical date (Spain ratified the ECHR in 1979).[161] The substantive difference between the *Janowiec* case and the *Dorado*

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of the Convention (i.e., 4 November 1950) and too long ago with respect to the critical date (*see ibidem*, para. 150).

[155] Citroni, *supra* note 13, p. 285.

[156] For a critique of the Court's approach to the Convention values' test, *see* W.A. Schabas, *Do the "Underlying Values" of the European Convention on Human Rights Begin in 1950?*, XXXIII Polish Yearbook of International Law 247 (2013).

[157] Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque, and Keller - *Janowiec and Others v. Russia* (GC), para. 35.

[158] ECtHR, *Antonio Gutiérrez Dorado and Carmen Dorado Ortiz v. Spain* (App. No. 30141/09), Decision, 27 March 2012. For a critical assessment of the case, *see* J.J. García Blesa and V.L. Gutiérrez Castillo, *The Rights of the Victims of Past Atrocities in Spain: Reparation without Truth and Justice?*, 29 Connecticut Journal of International Law 227 (2014), pp. 250-254.

[159] ECtHR, *Dorado and Dorado Ortiz v. Spain*, para. 34.

[160] *Ibidem*, para. 35.

[161] *Ibidem*, para. 36.

case lies in the fact that the latter was a disappearance case. However, the Court did not assess the merits of the application, since another procedural factor played a major role, i.e., the six-month rule (*cf.* Article 35(1) ECHR). The rule's rationale is to protect legal certainty; therefore, it provides that after the exhaustion of domestic remedies applicants have a six-month period, running from the final decision in the process of the exhaustion of domestic remedies, in which to lodge an application before the Court. Such a rule is not applicable if a continuing situation (e.g., a disappearance[162]) is at stake, as no remedy might be available at all in the course of such a situation. Nonetheless, should the applicants' case be a disappearance case, the applicants cannot wait an indefinite time before lodging an application with the Court.[163] Indeed, they "must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay."[164]

In the *Dorado* case, since the application was lodged in 2009, "the applicants did not display the diligence required to comply with the requisites derived from the Convention and the case law of the Court concerning disappearances."[165] Among other elements,[166] in assessing the admissibility of the case the Court disregarded the fact that the Supreme Court's Investigating Judge no. 5 ordered several institutions to provide information on the disappearance of Mr. Dorado and of others and issued a ruling accepting jurisdiction. However, the Public Prosecutor in Spain appealed against the Investigating Judge's decision on the acceptance of jurisdiction, requesting the closure of the proceedings. In the relinquishment's decision, the Investigating Judge pointed out that "the lack of official *ex officio* investigation for many years coupled with the numerous obstacles introduced by the Public Prosecutor to the opening of an investigation was in conflict with the ECHR […]."[167]

3.2. The approach of other judicial bodies

At the international level, the HRC has adopted a different approach from that of the ECtHR when dealing with alleged violations of the prohibition of torture and of inhuman and degrading treatment (Article 7 of the International Covenant on Civil and Political Rights – ICCPR) due to the suffering of the families generated by the uncertainty on the fate of their beloved ones.[168] In cases where the death of the relative

[162] ECtHR, *Varnava and Others v. Turkey* (GC), paras. 161 et seq.

[163] *Ibidem*, para. 161.

[164] ECtHR, *Dorado and Dorado Ortiz v. Spain*, para. 37.

[165] *Ibidem.*

[166] For instance, the applicants kept having this contact with the authorities and, together with victims' associations, filed a complaint before the Spanish Supreme Court (*Audiencia Nacional*).

[167] ECtHR, *Dorado and Dorado Ortiz v. Spain*, para. 17.

[168] HRC, *Mariam Sankara and Others v. Burkina Faso* (Comm No. 1159/2003), UN Doc. CCPR/C/86/D/1159/2003, 2006, para. 12.2 (a case where the circumstances of the death remained unclear and the whereabouts of the human remains unknown); HRC, *Sarma v. Sri Lanka* (Comm No. 950/2000), UN Doc CCPRC78D9502000, 2003, para. 9.5 (a case where a person was removed by members of the military and not seen alive afterward).

occurred before the acceptance by the State concerned of the HRC's competence under the ICCPR Optional Protocol,[169] the Committee has stressed that the State has a duty "to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son […]" under Article 2(3) ICCPR (right to effective remedy).[170] In this context, the State has an obligation to investigate matters which occurred before the entry into force of the Optional Protocol. This, however, has not been a constant finding in cases where the events predated either the entry into force of the ICCPR or the date from which the HRC acquired competence to assess the conduct of the State under the Covenant[171] (or both[172]). The Committee has been reluctant to give priority to the continuous nature of the disappearance to overcome a *ratione temporis* objection. However, some of the HRC's members, in expressing their criticism of the HRC's approach to disappearances, have emphasized that

> a disappearance […] inherently has continuing effects on a number of Covenant rights. It has a continuing character because of the continuing violative impact, which it inevitably has on Covenant rights. The continuity of this negative impact is irrespective of at what point in time the acts constituting the disappearance itself occurred. Inevitably the State party's obligations continue in relation to those rights.[173]

At the regional level, the approach of the IACtHR and of the African Commission on Human and Peoples' Rights (AfCommHPR) slightly differ from that of the ECtHR. According to the IACtHR, the obligation to carry out an investigation is more broadly couched. The IACtHR has held that, under the obligation to respect and guarantee the rights provided for by the American Convention on Human Rights (ACHR)

> the duty to investigate facts of this type [i.e., enforced disappearance] continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.[174]

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[169] Article 1, Optional Protocol to the ICCPR, December 16, 1966, 999 UNTS 171.

[170] HRC, *Sarma v. Sri Lanka*, para. 11

[171] HRC, *Cifuentes Elgueta v. Chile* (Comm No. 1536/2006), UN Doc CCPR/C/96/D/1536/2006, 2009, paras. 8.3-8.5. Contradictorily, the Committee considered "enforced disappearance as a continuing offence", *see ibidem* para. 8.5. However, in earlier case law, the Committee assessed the detachable nature of the obligation to investigate a disappearance even if the material fact occurred before the ratification of the Optional Protocol by the State concerned. *See* in this respect HRC, *Edouardo Bleier v. Uruguay*, para. 15.

[172] HRC, *Norma Yurich v. Chile*, paras. 6.3-6.5; HRC, *S E v. Argentina*, paras. 5.2-5.3.

[173] Individual opinion of Committee members Christine Chanet, Rajsoomer Lallah and Zonke Majodina (dissenting) in *Cifuentes Elgueta v. Chile*, Appendix; Individual opinion of Committee members Christine Chanet, Rajsoomer Lallah, Michael O'Flaherty, Elisabeth Palm, Hipólito Solari-Yrigoyen (dissenting) in *Norma Yurich v. Chile*, Appendix.

[174] IACtHR, *Velásquez-Rodríguez v. Honduras*, Merits, para. 181.

Where the disappearances pre-dated (e.g., in 1978) the ratification by the State of the ACHR (e.g., 1992) as well as the acceptance of the Court's contentious jurisdiction (e.g., 1998), the IACtHR has noted that "acts of a continuous or permanent nature extend throughout time wherein the event continues, maintaining a lack of conformity with international obligations."[175] As Judge Cançado Trindade underscored, obligations under the Convention bind the State from the moment of the ratification of/accession to the ACHR, and regardless of whether the State has accepted the contentious jurisdiction of the Court; as a matter of fact, this acceptance "conditions only the judicial means of settlement" of a case under the ACHR.[176] The emphasis should be placed "not on the sword of Damocles" (i.e. the date on which the State accepted the jurisdiction of the Court), "but rather on the nature of the alleged multiple and interrelated violations of protected human rights, prolonged in time, with which the […] case of disappearance is concerned."[177]

However, some States have made reservations stating that only those events which occurred after the submission of the instruments of acceptance could be addressed by the Court.[178] For instance, in the *Serrano Cruz Sisters* case, the State reservation served the purpose of avoiding the jurisdiction of the Court with regard to events which occurred during the NIAC in El Salvador.[179] However, such reservation did not waive the responsibility of the State vis-à-vis the victims.[180] Indeed, the passage of time does

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[175] IACtHR, *Gomes-Lund and Others (Guerrilha do Araguaia) v. Brazil* (Series C No. 219), Preliminary Objections, Merits, Reparations, and Costs, 2010, para. 17.

[176] Separate Opinion of Judge Cançado Trindade – *Blake v. Guatemala* (Series C No. 36), Merits, IACtHR 1998, para. 33.

[177] Separate Opinion of Judge Cançado Trindade – *Blake v. Guatemala* (Series C No. 27), Preliminary Objections, IACtHR 1996, para. 12.

[178] In the leading case of *Blake v. Guatemala*, the State raised the preliminary objections with respect to the competence *ratione temporis* of the Court, as the alleged violations pre-dated the acceptance of the compulsory jurisdiction; moreover, the acceptance *per se* had been accompanied with a reservation that only those events which occurred after the State had submitted the instruments of acceptance could be taken into account. IACtHR, *Blake v. Guatemala*, Preliminary Objections; IACtHR, *Serrano-Cruz Sisters v. El Salvador* (Series C no 118), Preliminary Objections, 2004.

[179] L. Burgorgue-Larsen, A.U. de Torres, & R. Greenstein, *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford University Press, Oxford: 2011, p. 311.

[180] Pursuant to Article 28 VCLT (the non-retroactivity principle), the Court stressed that it would not override the will of the States "when the alleged facts or the conduct of the defendant State, which might involve international responsibility, precede recognition of the Court's jurisdiction." *See* IACtHR, *Serrano-Cruz Sisters v. El Salvador*, Preliminary Objections, para. 66. Despite such a traditional interpretative approach to the scope of the *ratione temporis* competence in contentious matters, the IACtHR has held that if the events began before the State recognized such competence and if they continued after the date of submission of the instrument of acceptance, then the Court would have jurisdiction to decide upon the events which occurred after that date. IACtHR, *Blake v. Guatemala*, Preliminary Objections, paras. 39-40. *See also* IACtHR, *Serrano-Cruz Sisters v. El Salvador* (Series C No. 120), Merits, reparations and costs, 2005, para. 67. This principle has been restated in several enforced disappearance-related cases, where the Court primarily considered the continuing nature of the enforced disappearance and detached it from the instantaneous character of the circumstances of the death of the victim. IACtHR, *Heliodoro Portugal v. Panama*

not modify the obligation to conduct an investigation, as it is the full implementation of this obligation that sheds light upon the non-viability of any prosecution against the alleged perpetrators, and not the other way around.

The stance taken by the IACtHR is in contrast with the reluctance of the ECtHR and the HRC vis-à-vis the dismissal of *ratione temporis* preliminary objections in light of the occurrence of the triggering event prior to the entry into force of the corresponding human rights treaties. In cases where the disappearance occurred before the entry into force of the ACHR for the State concerned, the Court has stated that acts of a continuous or permanent nature

> extend through the entire time period during which the fact continues and the lack of conformity with the international obligation is maintained. Due to its characteristics, once the treaty goes into force, those continuous or permanent acts that persist after that date, may generate international obligations for the State Party, without this implying a violation to the principle of non-retroactivity of treaties. The forced disappearance of persons […] falls within this category of acts.[181] [Footnotes omitted]

Thus, in referring to the continuous character of the disappearance in its dismissal of the preliminary objection *ratione temporis*, the Court has found the State responsible for having continuously deprived the next of kin of the "truth regarding the fate of a disappeared person", which "constitutes a form of cruel and inhuman treatment for the close relatives."[182] In this respect, the Court has acknowledged that "the State […] has the obligation to guarantee the right to humane treatment of the next of kin through effective investigations."[183]

In *Zitha & Zitha v. Mozambique*, the AfCommHPR has recognized that

> [i]t is a well-established rule of international law that a State can be held responsible for its acts or omissions only if these acts and omissions are not in conformity with the obligations imposed on that State at the time that they were committed.[184]

It has also acknowledged that "in some cases, an act or an omission committed before the ratification of a human rights treaty may keep affecting the right(s) of a person protected under the treaty."[185] As a matter of fact,

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(Series C No.186), Preliminary objections, merits, reparations, and costs, 2008, paras. 32, 36-37. Such an approach has also allowed the Court to find violations of the rights of the victims' relatives. The "constant uncertainty in which the next of kin [had to] live as a result of not knowing the victim's whereabouts" has been one of the issues to be considered when assessing the violations of the rights of the relatives. IACtHR, *Blake v. Guatemala*, Merits, para. 114; IACtHR, *Cantoral Huamaní and García Santa Cruz*, Preliminary Objections, Merits, reparations and costs, para. 117; IACtHR, *Albán Cornejo and Others v. Ecuador* (Series C No. 171), Merits, reparations and costs, 2007, para. 50.

[181] IACtHR, *Radilla Pacheco v. Mexico*, paras. 22-23; IACtHR, *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, paras. 21, 60.

[182] *E.g.* IACtHR, *Radilla Pacheco v. Mexico*, para. 166; IACtHR, *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, paras. 126, 130; IACtHR, *La Cantuta v. Peru*, para. 125.

[183] IACtHR, *Radilla Pacheco v. Mexico*, para. 167.

[184] AfCommHPR, *E Zitha and PJL Zitha v. Mozambique*, para. 84.

[185] *Ibidem*.

> a similar situation may be observed when an application is lodged with an international organ whose competence was recognized by the relevant State after the complained act or omission had been committed. The effects of an event which occurred before the recognition might be continuing. Problems arising from these situations are generally resolved with reference to the doctrine of continuing violation under international law.[186]

The impact on the family members was not assessed in the same case, as the Commission considered the Communication inadmissible.[187] However, in light of previous pronouncements by the Commission in *Amnesty International and Others v. Sudan*, where the withholding of information on the detainee's fate and whereabouts amounted to inhuman treatment against the family members, the reasoning above may play a role in subsequent case law where the family members' rights are at stake.

The judicial narrative highlights that although a disappearance pre-dated the entry into force of human rights treaties, the State is not freed from the obligation to carry out an investigation[188] into the circumstances surrounding the suspicious death and/or the disappearance.[189]

CONCLUSIONS – AN UNCEASING DUTY TO INVESTIGATE THE LINGERING CONSEQUENCES OF PAST HUMAN RIGHTS VIOLATIONS?

The assertion that contemporary IHL and IHRL treaties apply to events preceding their adoption and entry into force appears at first glance to be legally unsound. In order to explore this hypothesis, three case-scenarios have been examined. The Spanish civil war, the Kaprolat/Hasselman incident, and the Katyń massacre provide an illustration of how difficult it can be for families to obtain access to information on missing persons decades after the termination of the armed conflicts at issue.

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[186] Based on this reasoning and on the corresponding improper conduct of the State, the Commission considered the disappearance of the victim concerned to be a continuing violation of his human rights, thereby affirming its competence *ratione temporis* to examine the matter (*ibidem*).

[187] *Ibidem*, para. 94. The Commission did not decide on the merits of the case, as the requirement of the exhaustion of the local remedies – *cf.* Article 56 of the African Charter on Human and Peoples Rights – had not been fulfilled by the applicant, thus causing, the Commission to find the communication inadmissible (*ibidem*, paras. 95-115).

[188] The *Janowiec* case has raised widespread criticism among scholars and practitioners with regard to several points, including the one outlined above on the procedural limb of Article 2 ECHR, raised by the Court both in its Chamber and in its Grand Chamber judgment. *E.g.* I. Kamiński, *Comments on Janowiec and Others v. Russia: The Katyń Massacre before the European Court of Human Rights: A Personal Account*, XXXIII Polish Yearbook of International Law 205 (2013); C. Heri, *Enforced Disappearance and the European Court of Human Rights' Ratione Temporis Jurisdiction. A Discussion of Temporal Elements in Janowiec and Others v. Russia*, 12 Journal of International Criminal Justice 751 (2014); Schabas, *supra* note 156; Y. Kozheurov, *The Case of Janowiec and Others v. Russia: Relinquishment of Jurisdiction in Favour of the Court of History* XXXIII Polish Yearbook of International Law 227 (2013).

[189] *See* ECtHR, *Cyprus v. Turkey* (GC), para. 132.

Contemporary IHL treaty law sets down obligations that were under-developed under the early IHL treaties. However, this is not tantamount to saying that contemporary IHL, in its entirety, applies to the pending consequences of past armed conflicts. In the case of persons who went missing in the context of traditional military operations (e.g., in the Kaprolat/Hasselman incident), contemporary rules can constitute guiding standards vis-à-vis specific actions (e.g., exhumations and recovery of the bodies); in the case of persons who went missing in the context of international crimes they can reinforce the applicable international law rules.

With regard to the cases dating back to WWII, the fact that the core of the right of families to know the fate of their relatives is grounded in Article 46 of the 1907 Hague Regulations (Convention IV) – considered customary since 1939[190] – suggests that the right to know is *per se* an explicit statement of a new international norm whose customary character derives from a direct link with the 1907 Hague Regulations (Convention IV). Thus, it represents

> nothing other than a simple clarification of what was not so clear [a long time ago]. What ought to have been clear [a long time ago] has been revealed by the creation of a new customary law which plays the role of authentic interpretation [of previous provisions], the effect of which is retroactive.[191]

Hence, this confirms that contemporary law is of relevance to the assessment of the contemporary consequences of a situation/action/fact which occurred after 1939.

In the cases of both the Spanish civil war as well as the Katyń massacre, no intertemporal problem arises, as the situations at stake entail considerations related to the continuity of the consequences generated by international crimes, which create a bridge between the distant past and the present. Thus, the present article has explored the temporal dimension of the obligation to carry out an investigation and to address the queries of families under IHRL in light of the ECtHR's case law.

The duration of the violation of the rights generated by the disappearance of a person determines the duration of the obligation to carry out investigative operations aimed at accounting for the person reported missing. In this way, although the disappearance occurred before the entry into force of the ECHR, the continuing nature of the disappearance bridges the past with the present. However, a bridge between the past and the present is not always possible, as the ECtHR's case law shows. A contracting party of the ECHR will not be held responsible under the Convention for not investigating even the most serious crimes under international law if these pre-dated the adoption of the Convention.[192]

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[190] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Official Documents and Proceedings, Nuremberg, 1947, pp. 301-304 and 317-320.

[191] Judge Tanaka (ICJ), Dissenting Opinion, *supra* note 109. *See also* Sandoz et al., *supra* note 31, para. 1193, p. 341.

[192] Although the Court recognized that "even today some countries have successfully tried those responsible for war crimes committed during [WWII]", it emphasized "the fundamental difference between

The analysis of the temporal dimension of the obligation to carry out an investigation also highlights that judicial reflections on the temporal scope of the human rights treaties intertwine with issues concerning both the duration of the violation/obligations of the States and the jurisdiction *ratione temporis* of the judicial bodies. In spite of the fact that the triggering event causing distress - the disappearance – may have occurred before the ratification of/accession to the relevant treaty by the concerned State or before the acceptance of the right to individual petition, the international judicial bodies have used various techniques (e.g., the continuing violation doctrine) in order to ensure legal certainty. The cases of disappearance addressed by international judicial bodies show that the queries of the families and their quest for information about their missing relatives cannot remain unanswered using the excuse that the disappearance occurred too long ago. In this respect, this article follows the approach of the ECtHR in *Janowiec and Others v. Russia* (2012): the obligation to carry out an investigation subsumed under Article 3 ECHR (prohibition of torture and inhuman and degrading treatment) is of "a more general humanitarian nature, for it enjoins the authorities to react to the plight of the relatives of the dead or disappeared individual in a humane and compassionate way."[193]

International law, while duly safeguarding the legitimate interests of States, still "must gradually turn to the protection of human beings."[194] Can a State be asked to do the impossible to solve cases of persons reported missing in the context of events that occurred in the distant past? The answer is no. However, State authorities should be required to do what is within their power in order to guarantee the rights of family members of missing persons and forcibly disappeared persons.

having the possibility to prosecute an individual for a serious crime under international law where circumstances allow it and being obliged to do so by the Convention" (ECtHR, *Janowiec and Others v. Russia* (GC), para. 151).

[193] ECtHR, *Janowiec and Others v. Russia*, para. 152.

[194] ICTY, *Prosecutor v. Duško Tadič aka 'Dule'* (Case no. IT-94-1-A), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 97.

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THE RULE OF LAW PROMOTION THROUGH TRADE IN THE "ASSOCIATED" EASTERN NEIGHBOURHOOD

Abstract:
This article aims to investigate the phenomenon of the rule of law promotion exercised by the EU through the Deep and Comprehensive Free Trade Agreements (DCFTAs). First, the article emphasizes the unique combination of normative and market power the EU uses to diffuse its norms through trade liberalization. Next, it provides an insight into the particularities of the European Neighbourhood Policy as a policy context for the conclusion and implementation of the Association Agreements, including the DCFTAs with Ukraine, Moldova and Georgia, as well as the conceptual problematic and scope of the rule of law as a value the EU seeks to externalize. Using the DCFTAs with Ukraine, Moldova, and Georgia) as a single group case study of the transparency dimension of the rule of law, the central part of the article analyzes the DCFTAs substantive requirements, directed toward promoting transparency in the partner states (while categorizing the requirements into the most general ones; cooperation-related; and discipline-specific) and the legal mechanisms that make these clauses operational (e.g., the institutional framework of the AAs, gradual approximation and monitoring clauses, and the Dispute Settlement Mechanism). In concluding, the article summarizes the state-of-the-art of the rule of law promotion through the DCFTAs, distinguishes the major challenges the respective phenomenon faces, and emphasizes the prospects for and difficulties of using the DCFTAs as an instrument of rule of law promotion.

Keywords: Association Agreement, approximation, Deep and Comprehensive Free Trade Agreement, Rule of Law, value promotion

INTRODUCTION

The background behind the present article is shaped by four major trends. First of all, the present dynamics of conflict and cooperation in the multipolar world fuels the

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debate regarding the European Union's (EU) power in international relationships and, subsequently, the legal manifestations thereof.[1] Moreover, the global rise of nationalism, state-centrism and protectionism[2] creates the need to reassess the normative role the EU seeks to exercise in its external relations. In turn, the core of the Union's normative power is represented by the external promotion of the values the Union is founded upon.[3] Pursuant to Article 2 of the Treaty on European Union (TEU), these values include "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Article 21(1) TEU stipulates that the above values are the "guiding principles" of the EU's action in the international arena, and Article 21(2)(a)(b) TEU mentions the "safeguarding" of the Union's values and their "consolidation" as the objectives of such EU actions. In focusing on the EU's rule of law promotion, it is worthwhile mentioning that, despite the fact that the Union promotes the rule of law through various external policies and legal instruments, there is no uniform approach to defining the rule of law for the purposes of the EU's external action.[4] Subsequently, there is no uniform approach to assessing the impact of the Union's rule of law promotion on domestic legal systems, neither in general nor by recourse to particular legal instruments applied by the EU.[5] Thus, a present understanding of the normative role the EU plays abroad clearlymust be complemented with an insight into the conceptual foundations of the EU's promotion of the rule of law and the legal pathways of the respective norms' diffusion.

The second trend constituting the background of this article is represented by the ambitious "deep" bi- and plurilateral trade liberalization agenda[6] pursued by the EU following the deadlock of the WTO Doha Round.[7] Importantly, the free trade agreements negotiated and concluded by the EU in the recent decade go far beyond trade in goods and encompass various disciplines, such as trade in services, technical barriers to trade, mutual access to contract procurement procedures, sustainable development, as

[1] *E.g.* P. Holden, *In Search of Structural Power: EU Aid Policy as a Global Political Instrument*, Routledge, London: 2016; T. Lenz, *EU Normative Power and Regionalization: Ideational Diffusion and its Limits*, 48(2) Cooperation and Conflict 211 (2013).

[2] *See* A. Smith, *Nations and Nationalism in a Global Era*, John Wiley and Sons, Cambridge: 2013; M. Telo (ed.), *European Union and New Regionalism. Competing Regionalism and Global Governance in a Post-Hegemonic Era*, Ashgate Publishing, Aldershot: 2014.

[3] I. Manners, *The EU's Normative Power in Changing World Politics*, in: A. Gerrits (ed.), *Normative Power Europe in a Changing World: A Discussion*, Netherlands Institute of International Relations, The Hague: 2009, p. 3.

[4] *See* D. Kochenov, *The ENP Conditionality: Pre-Accession Mistakes Repeated*, in: L. Delcour, E. Tulmets (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood*, Nomos, Baden-Baden: 2008, pp. 105-110.

[5] *Ibidem*.

[6] *See* Communication from the European Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "Global Europe: Competing in the World", [2006] COM (2006) 567 final.

[7] *See generally* A. Narlikar (ed.), *Deadlocks in Multilateral Negotiations: Causes and Solutions*, Cambridge University Press, Cambridge: 2010.

well as competition and state aid.[8] Since the creation of "cooperative regional orders", as provided in the EU's Global Strategy, is directed, *inter alia*, to "reaping economic gains",[9] deep trade liberalization represents a crucial means of the Union's order-building and, subsequently, the European Neighbourhood Policy (ENP). Moreover, the "deep" nature of the trade liberalization with the EU inevitably impacts domestic legislation, thus this aspect can be considered as representing part of the Union's rule of law promotion agenda. Ultimately, the ever-deepening trade liberalization ambitions of the EU, the tightening of the trade-development nexus.[10] And the importance of trade for the Union's regional order-building activities together create the need to make full use of the rule of law promotion potential of the EU Free Trade Agreements (FTA) and streamline their application.

Third, the ENP presently faces an array of difficulties, requiring concentration on uncontroversial common priorities, such as economic growth and mutually beneficial free trade. Facilitating transformation in the "Associated Neighbourhood" (Ukraine, Moldova and Georgia) becomes ever more difficult due to the lack of incentives, domestic political situations, and strategic concerns.[11] As it stems from these observations, sector cooperation tends to promote the fundamental value-related standards, such as transparency, accountability and inclusiveness. Given the present circumstances of the impossible advancement of political relations between the EU and the "associated" Neighbours, the focus on trade, sector cooperation, and the promotion of fundamental values through the above pathways can be viewed as at least a temporary solution for sustaining the EU's leverage in the region.[12]

Fourth, pursuant to Article 21(3) TEU, the EU seeks to ensure consistency in the different areas of its external action. Directly linked to the effectiveness of the EU foreign policies, their coherence ranges from the avoidance of overlaps between actions taken within different policy fields to creating synergies aimed at achieving common aims.[13] The emphasis on synergies is contained in the 2006 European Consensus on Development that underlines the Union's need to consider developmental objectives in its external policies, such as trade, environment, and climate change.[14] Consequently,

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[8] *See* B.A. Araujo, *The EU Deep Trade Agenda: Law and Policy*, Oxford University Press, Oxford: 2016.

[9] EU External Action Service, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy*, available at: http://www.eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf (accessed 30 June 2018).

[10] *See generally* M. Carbone, J. Orbie (eds.), *The Trade-Development Nexus in the European Union: Differentiation, Coherence and Norms*, Taylor and Francis Group, London: 2014.

[11] *See* A. Wilson, *Partners for life: 'Europe's unanswered Eastern question'*, European Council on Foreign Relations Policy Brief, October 2017.

[12] *Ibidem.*

[13] C. Gebhard, *The Problem of Coherence in the European Union's International Relations*, in: C. Hill, M. Smith, S. Vanhoonacker (eds.), *International Relations and the European Union*, Oxford University Press, Oxford: 2017, p. 125.

[14] Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled "The European Consensus", [2006] C 46.

analysis of the FTAs' role in the advancement of the rule of law is essential for strengthening the existing synergies between the Union's external economic policy and the promotion of its fundamental values.

In view of the above trends, this article aims to investigate the phenomenon of rule of law promotion through trade liberalization in the "associated Neighbourhood" of the EU (Ukraine, Moldova and Georgia). The aim of the article requires that the arguments be addressed as follows: First, the article discusses the EU's norms' transfer to third countries from the standpoint of the "civilian power Europe" debate and introduces the policy and legal framework of the European Neighbourhood Policy, with a focus on the EU's bilateral economic relationships with Ukraine, Moldova and Georgia. This discussion is followed by an analysis of the conceptual problematics of the rule of law. The central part of the article focuses on distinguishing and categorizing the major mechanisms of the rule of law promotion contained in the EU's DCFTAs with the "associated Neighbours", using the example of transparency as a key component of this umbrella concept. In conclusion, the article elaborates on the major prospects and problems of the Union's policy of promoting the rule of law through trade liberalization. Ultimately, the study points out the potential of the modern FTAs for achieving non-trade-related aims (namely, values-promotion) and thus, to create new bridges between the EU's external economic law and its external value-promotion activities.

1. THE FOUNDATIONS OF EU'S VALUE-PROMOTION: THE "CIVILIAN POWER EUROPE" CONCEPTUAL DEBATE

The concept of power is central for understanding the processes shaping the international system.[15] Most commonly, political scientists link power to an actor's ability to influence other actors' decisions and actions.[16] Since the 1970s, the uniqueness of the European Community (later the EU) as an international actor has given rise to intense scholarly debate on the EU's self-conceptualization as a power, as well as the actual nature and mechanisms of the Union's power.[17] Despite its vagueness, repeatedly emphasized in the scholarship,[18] the early "civilian power Europe" (CPE) concept has long dominated the debate and opened up pathways for a multitude of the EU-specific concepts of power.[19] F. Duchene, author of the CPE concept, defined the European

[15] *See* M. Barnett, R. Duvall, *Power in International Politics*, 59(1) International Organization 39 (2005), pp. 40-42.

[16] *Ibidem*, p. 44.

[17] *See generally* A. Boening, J.F. Kremer, A. Van Loon (eds.), *Global Power Europe*, Vol. 1: *Theoretical and Institutional Approaches to the EU's External Relations*, Springer, Berlin: 2013.

[18] *See* C.W. Burckhardt, *Why is there a public debate about the idea of a 'civilian power Europe'?*, LSE European Institute Working Paper 2004/02.

[19] S. Ozoguz-Bolgi, *Is the EU Becoming a Global Power after the Treaty of Lisbon?*, in: A. Boening, J. Kremer, A. van Loon (eds.), *Global Power Europe*, Vol. 1: *Theoretical and Institutional Approaches to the EU's External Relations*, Springer, Berlin: 2013, pp. 6-7.

Community as a "civilian group of countries long on economic power and relatively short on armed force."[20] The continuous development of the EU's military capabilities since the era of the Yugoslav Wars has turned out to be, however, a key element that has led to questioning the CPE framework and the development of new pathways to conceptualizing the EU's power within the international system.[21]

To understand the politics of the EU's value-promotion through trade liberalization, this article suggests applying four "civilian power Europe" concepts that can be substantively divided into two groups. While the normative and structural power approaches explain the EU's leverage by referring to its identity, values and norms, market, and trade power, other "civilian power Europe" theories tend to emphasize the economic aspects of the EU's power.[22] The foundational concept, frequently applied by scholars in the studies of the EU's value-promotion, is that of "normative power Europe" (NPE), a term coined by I. Manners.[23] In his view, the orientation on fundamental values, lying at the heart of the Union's identity, particularly "predisposes the Union to act in a normative way in world politics."[24] Thus, the unique nature of the EU as a polity, its value-based identity and its striving to act as a "global common good"[25] differentiate the Union from other international actors, which behave in a realist manner, and allow it to diffuse its rules beyond its borders. Consequently, I. Manners distinguished six major mechanisms of the EU's norms' diffusion, i.e. contagion (unintentional diffusion of norms); informational; procedural (through the institutionalization of relationships with non-Member States and international organizations); transference (through trade, aid and technical assistance, including conditionality); overt diffusion (the EU's presence in third states); and cultural filter.[26]

While the NPE focuses on substantiating the phenomenon of the EU's norms' transfer, the operational "structural power Europe" concept is directed toward the impact of EU actions in different domains, using the idea of structures.[27]According to S. Keukeleire, structural foreign policy is "the policy, which, conducted over the long-term, aims at sustainably influencing or shaping political, legal, economic, social, security or other structures in a given space."[28] In turn, the term "structures" refers to "the relatively

[20] F. Duchene, *The EC and the Uncertainties of Independence*, in: M. Kohnstamm, W. Hager (eds.), *A Nation Writ Large? Foreign Policy Problems before the European Community*, Palgrave MacMillan, London: 1973, p. 19.

[21] A. E. Juncos, *The EU's post-Conflict Intervention in Bosnia and Herzegovina: (Re)integrating the Balkans and/or (re)Inventing the EU*, VI(2) Southeast European Politics 88 (2005), p. 89.

[22] *See* I. Manners, *Normative Power Europe: a Contradiction in Terms?*, 40(2) Journal of Common Market Studies 235 (2002); S. Keukeleire, T. Delreux, *The Foreign Policy of the European Union*, Palgrave Macmillan, London: 2014, pp. 28-31; Ch. Damro, *Market Power Europe*, 19 Journal of European Public Policy 682 (2012); S. Meunier, K. Nicolaidis, *The European Union as a Conflicted Trade Power*, 13 Journal of European Public Policy 906 (2006).

[23] *See* Manners, *supra* note 22.

[24] *Ibidem*, p. 252.

[25] L. Aggestam, *Introduction: Ethical Power Europe?*, 84(1) International Affairs 1 (2008), p. 8.

[26] Manners, *supra* note 22, p. 245.

[27] Keukeleire & Delreux, *supra* note 22, p. 28.

[28] *Ibidem*.

permanent organizing principles, institutions and norms" that shape particular sectors of a given society (e.g., economic, political, social etc.) at various levels (individual, societal, state, inter-societal etc.).[29] At the societal level, the most common examples of structures are democracy, the rule of law, and the liberal market economy.[30] The sustainability of the promoted structures is conditioned on material and non-material factors. In case of the EU's structural foreign policy, material factors refer to the Union's financial instruments and technical expertise, while the non-material factors encompass the legitimacy of the promoted structures and their proximity and accessibility to the cultures and beliefs in a target state. The non-material factors in particular pose a major challenge to the internalization of the structures promoted by the EU, as for instance in both the Southern and Eastern Neighbourhoods.[31]

Despite the fact that both NPE and 'structural power Europe' touch upon the use of the EU's material capabilities in the external diffusion of the Union's norms,[32] neither of these conceptions emphasizes the economic dimension of the EU's leverage. However, as stated by H. Haukkala in her NPE-based study dedicated to the EU enlargement process, "it is only through the unique and rich combination of stick and carrots that are present in the accession process that the EU can exert the strongest normative influence on its partners."[33] This statement can be also substantiated by referral to the studies of the EU's economic conditionality in its ENP and EU development policy,[34] Thus, the understanding of the EU's power underlying value-promotion through trade would not be complete without referring to the EU's nature as a single market and its powerful position in world trade. Pursuant to both the market power Europe (MPE) and trade power Europe (TPE) concepts, the key driver behind the EU's power is that it represents the largest economy in the world.[35] As argued by D. Drezner, market size

[29] *Ibidem*.

[30] R. Metais, Ch. Thepaut, *What Is Structural Foreign Policy?*, in: R. Metais, Ch. Thepaut, S. Keukeleire (eds.), *The European Union's Rule of Law Promotion in its Neighbourhood: A Structural Foreign Policy Analysis*, College of Europe, Bruges: 2013, p. 6.

[31] Keukeleire & Delreux, *supra* note 22, p. 31. *See also* P. Manoli, *A Structural Foreign Policy Perspective on the European Neighbourhood Policy*, in: S. Gstoehl and S. Schunz (eds.), *Theoretizing the European Neighbourhood Policy*, Routledge, London: 2016, pp. 124-143.

[32] On the transference and overt diffusion pathways of norms' diffusion, *see* Manners, *supra* note 22, p. 245. On the material factors in structural foreign policy, *see* Keukeleire & Delreux, *supra* note 22, pp. 30-31. For the critique regarding the lacking attention to material factors in civilian and normative power concepts, *see* K.E. Smith, *Beyond the Civilian Power Europe Debate*, 3(17) Politique Européenne 63 (2005), pp. 64-66.

[33] H. Haukkala, *The European Union as Regional Normative Hegemon: The Case of European Neighbourhood Policy*, in: R. Whitman (ed.), *Normative Power Europe: Empirical and Theoretical Perspectives*, Springer, Berlin: 2011, p. 47.

[34] *See generally* J. Kelley, *New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy*, 44(1) Journal of Common Market Studies 29 (2006); O. Stokke (ed.), *Aid and Political Conditionality*, Frank Cass, London: 2006.

[35] Damro, *supra* note 22, p. 682. *See also* European Commission, *Priority: Internal Market*, available at: https://ec.europa.eu/commission/priorities/internal-market_en (accessed 30 June 2018).

supports the externalization of the EU's internal rules in two major ways; namely by creating material incentives for governments to coordinate their regulatory standards with those of the large market, and second by influencing their perceptions regarding the outcomes of adopting the respective standards.[36] Furthermore, integration into the EU market is particularly attractive given its broad scope, which includes, *inter alia*, public procurement, standardization, and the Digital Single Market. Third, the EU trade-development nexus makes it attractive for developing partner countries to comply with the EU's conditions, contained in the FTAs, since this allows them to obtain not only market access, but also unilateral trade preferences and aid.[37]

To sum up, from the standpoint of the power Europe debate, the EU applies both normative/structural and market/trade power to promote its values and other norms through the FTAs. Thus, the unique combination of material (market access, trade preferences, financial and technical assistance) and ideational factors (EU's normative identity, foreign policy goals, the perceptions of the Union in a partner country) creates the foundations for the promotion of the EU's values and norms through trade liberalization.

2. THE EUROPEAN NEIGHBOURHOOD POLICY: BACKGROUND, LEGAL BASIS AND INSTRUMENTS

The ENP represents a geographically comprehensive umbrella initiative that brings together the regional and bilateral dimensions of the EU's foreign policies in the Eastern and Southern Neighbourhoods.[38] Due to its clear distinguishment from enlargement, scholars tend to label the ENP as "a substitute for EU membership", "an integration without membership" and/or "a model of extending integration beyond the EU borders."[39] The Lisbon Treaty constitutionalized the EU's special relations with the Neighbourhood by supplementing the TEU with Article 8. According to Article 8(1) TEU, "the Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based

[36] D. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes*, Princeton University Press, Princeton: 2007, p. 32.

[37] *See* M. Carbone, J. Orbie (eds.), *The Trade- Development Nexus in the European Union: Differentiation, Coherence and Norms*, Taylor and Francis Group, London: 2014.

[38] B. Van Vooren, R.A. Wessel, *EU External Relations Law. Text, Cases, Materials*, Cambridge University Press, Cambridge: 2014, pp. 540-541.

[39] *E.g.* R. Petrov, *The New EU-Ukraine Enhanced Agreement versus the EU-Ukraine Partnership and Cooperation Agreement*, in: F. Maiani, R. Petrov, E. Mouliroya (eds.), *European Integration without EU Membership: Models, Experiences, Perspectives*, EUI Working Paper 2009/10, pp. 39-47; K. Raik, T. Tamminen, *Inclusive and Exclusive Differentiation: Enlargement and the European Neighbourhood Policy*, in: J. Jokela (ed.), *Multi-speed Europe. Differentiated Integration in the External Relations of the European Union*, FIIA Report 38 (2014), pp. 45-64.

on cooperation." Building upon Article 8(1) TEU, the 2014 Regulation establishing the European Neighbourhood Instrument also refers to the ENP as a framework for a "privileged relationship, building upon a mutual commitment to, and promotion of, the values of democracy and human rights, the rule of law, good governance and the principles of a market economy and sustainable and inclusive development."[40] It's worth noting that the threat of terrorism and radicalization, and the ongoing conflicts in the Neighbourhood, determined the securitization of the ENP following its 2015 Review, as well as strengthening the links between economic development and the advancement of fundamental values on the one hand, and security and stability on the other.[41] Thus, the ENP is characterized by "the final objective of security, stability and prosperity through conditionally offering a stake in the internal market, disconnected from potential EU enlargement."[42]

The "umbrella" nature of the ENP determines the high degree of the policy's differentiation. The idea of differentiation is substantiated by the need to have recourse to the individual needs, multifaceted particularities, and geopolitical preferences of each partner state. Linking the differentiation to conditionality, the ENP proclaims that the "pace of development of the EU's relationship with each partner country will depend on its degree of commitment to common values, as well as its will and capacity to implement agreed priorities."[43] Differentiated relationships in the Neighbourhood condition the variation in the types of agreements between the EU and its Neighbours. The legal basis for the conclusion of such agreements is contained in Article 8(2) TEU, which tends to repeat the language of the Article 217 TFEU on association. Presently, the Eastern Neighbourhood represents a two-speed partnership. While the EU has concluded innovative Association Agreements that encompass "deep and comprehensive free trade" with Ukraine, Moldova and Georgia, the second, outer "circle" of integration is represented by Belarus, Armenia and Azerbaijan, which are not interested in deep integration with the EU.[44] The relations between the EU and Armenia are governed by the newly concluded Comprehensive and Enhanced Partnership Agreement (CEPA).[45] Partnership and Cooperation Agreements (PCAs) concluded in the mid-

[40] Regulation (EU) No 232/2014 of the European Parliament and of the Council establishing a European Neighbourhood Instrument, OJ 77, 15 March 2014, pp. 27-43.

[41] Joint Communication from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Review of the European Neighbourhood Policy", [2015], JOIN (2015) 50 final.

[42] Van Vooren & Wessel, *supra* note 38, p. 541.

[43] Commission of the European Communities, European Neighbourhood Policy Strategy Paper [2004], COM 373 final, p. 8.

[44] Raik & Tamminen, *supra* note 39, pp. 45-46.

[45] Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, [2017], JOIN/2017/037.

1990s continue to serve as the foundation for the EU-Belarus and the EU-Azerbaijan relations.[46]

Before proceeding to the problematics of the rule of law in the EU's external economic relations, it is important to note that the DCFTAs between the EU and the 'associated' Eastern Neighbours are marked by their uniquely broad scope. Thus, the DCFTAs encompass a variety of disciplines, ranging from the conventional liberalization of trade in goods to elaborate provisions on mutual access to contract procurement procedures, levelling technical barriers to trade (TBT), as well as the establishment of trade in services and electronic commerce.[47] In turn, both the broad scope and the comprehensive nature of the DCFTAs condition the extensive norms' transfer from the EU to the "associated Neighbourhood", which is illustrated by, *inter alia,* the requirements that partner states' approximate their domestic legislation with the respective *acquis communautaire* and comply with the WTO rules.[48] Furthermore, combined with the EU's strong market power in the region and its importance as a normative actor on one hand, and the "associated Neighbours" European aspirations on the other, the comprehensiveness of the DCFTAs provides room for the Union to pursue non-trade-related goals through these agreements.[49] The legal avenues available for promoting the rule of law as a non-trade-related goal through the DCFTAs will be further analysed in the central part of this article.

3. THE CONCEPTUAL PROBLEMATICS AND SCOPE OF THE RULE OF LAW IN EU LAW

3.1. The rule of law as a fundamental value of the EU

The history of the rule of law as a fundamental value of the European Communities dates back to the concept of the European supranational legal Community (*Rechtsgemeinschaft*), coined by the first EEC Commission President W. Hallstein, which gave rise to the theory of European integration through law.[50] Importantly, Hallstein conceptualized the Community as Rechtsgemeinschaft in three senses: as a creation of law (*Rechtsschöpfung*); a source of law (*Rechtsquelle*); and the legal order (*Rechtsordnung*) and legal policy (*Rechtspolitik*).[51] Since the concepts of the Rechtsgemeinschaft, Rechts-

[46] Proposal for a Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Belarus, of the other part [1995], COM 95/44/FINAL; ECSC, Euratom Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, [1999], OJ L 246, pp. 1-2.

[47] *See* Araujo, *supra* note 8, pp. 137-145; pp. 179-199; pp. 203-223.

[48] *Ibidem*, p. 196, pp. 21-25.

[49] *See generally ibidem*, pp. 228-233.

[50] W. Hallstein, *Die Europäische Gemeinschaft (The European Community)*, ECON, München: 1979, p. 51.

[51] *Ibidem*, p. 53.

staat[52] and the rule of law significantly differ in their substance, the Court of Justice of the European Union's (CJEU) referral to the EC as a "Community based on the rule of law" in its landmark *Les Verts* judgment determined the significant conceptual disarray.[53] Nevertheless, analysis of this judgment makes it possible to acquire insights into the CJEU's early understanding of the rule of law. First, the CJEU implicitly pointed to the rule of law as a "positive good in itself" or, in other words, a value. Second, since the judgment refers to the Treaty as the "basic Constitutional Charter", hence the rule of law can be understood as a constitutional principle of the Community. Finally, while not discussing the scope of the rule of law, the Court approached it from the formal standpoint and associated it with both the Union's institutions and those of the Member States, which were subjected to the Treaty.[54]

For the first time, the rule of law acquired the imprimatur of primary law with the adoption of the Maastricht Treaty, which however neither mentioned it as a fundamental principle or value of the Community nor referred to its substance.[55] Pursuant to the Treaty of Amsterdam, the rule of law began to be viewed in three dimensions: as a founding principle of the EU (Article 6(1) TEU), whose breach can lead to the application of sanctions (Article 7(1) TEU); a criterion for the EU membership (Article 49 TEU); and an objective of the CFSP (Article 11 TEU).[56] Pursuant to the Treaty of Lisbon, the internal dimension of the rule of law lies in its nature as a common fundamental value of the EU (Article 2 TEU) and the objective of the EU's institutions' actions (Article 3(1) TEU in conjunction with Article 13(1) TEU).[57] Externally, the rule of law applies as a criterion for membership in the Union (Article 49(1) TEU) and as an objective of the EU's external action (Article 21(1) TEU).[58] Notwithstanding the constitutive nature of the rule of law for the Community and its relatively long history in the EU legal system, its substance has not yet been clarified in either primary or secondary law of the Union.[59] Viewed in this light, some insight into the respective conceptual problematics and the components of the rule of law is required in order to investigate the promotion of this value through trade liberalization.

3.2. The conceptual problematics of the rule of law

In the relevant literature, the rule of law is referred to as an "expansive" and "essentially contested" concept, and simultaneously as the "panacea for the world's problems." The

[52] *Ibidem*.

[53] Case 294/83 *Parti ecologiste Les Verts v. the European Parliament* [1986] ECR 1339.

[54] *Ibidem*, para. 23.

[55] Treaty on European Union (Maastricht Treaty).

[56] Treaty on European Union (Amsterdam Treaty), Article 7, Article 11, Article 49.

[57] Treaty on European Union (Lisbon Treaty), Article 2, Article 3, Article 13.

[58] Treaty on European Union (Lisbon Treaty), Article 49, Article 21.

[59] *See generally* Kochenov, *supra* note 4, pp. 105-110; L. Pech, *Rule of law as a guiding principle of the European Union's external action*, CLEER Working Paper 2012/13.

analysis of the conceptual problematics of the rule of law in the EU context and beyond makes it possible to distinguish six major issues.

First, as argued by C. Schmidt, "the rule of law is conceptually empty if it does not receive its actual sense through a certain opposition."[60] Thus, an analysis of the "opposing concepts" is required to investigate the rationale behind the rule of law principle and the major functions it performs in a state. By juxtaposing the rule of law and "the rule of status", R. Fallon distinguished several functions and three major purposes the rule of law is to pursue as a solution to the inequality and arbitrariness stemming from the rule of men. First, the rule of law "should protect against anarchy and the Hobbesian war of law against all."[61] Second, the rule of law should provide individuals with an opportunity to plan their affairs and predict the legal consequences of particular deeds. Third, the political ideal of the rule of law needs to serve as a guarantee against at least some types of state arbitrariness.[62] The above insights serve as the basis for the understanding of the conceptual origins of the rule of law.

Second, the scholarship distinguishes between the formal and substantive understandings ofdefining the rule of law. The core of the formal approach to the rule of law stems directly from the above dichotomy between the rule of law and the rule of men. According to Raz, the formal precepts of the rule of law include its prospective nature, openness, and the clarity of laws; the relative stability of laws; open, stable and clear rules of law-making; guaranteed independence of the judiciary; observance of the principles of "natural justice" (open and fair hearings, absence of bias etc.); review powers of the courts, as well as accessibility to courts and limited discretion on the part of the crime-prevention agencies.[63] Since the formal approach recognizes the inability of morally objectionable regimes to comply with the rule of law requirement, post-war Europe witnessed the rise of the substantive conception of the rule of law, i.e. emphasis on the substance of laws rather than their formal characteristics.[64] Thus, the German concept of material rule of law (*materieller Rechtstaat*) concentrates on material justice (*materielle Gerechtigkeit*), human rights and an order directed toward the public good (*am Gemeinwohl orientierte Ordnung*).[65] The English concept, however, is strongly rights-oriented, rather than focusing on justice and social security dimensions.[66] An analysis of the different approaches to the rule of law, presently manifested by the leading international organizations (e.g., the UN, the OSCE, the Council of Europe)

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[60] C. Schmidt *Constitutional Theory*, Duke University Press, Durham: 2008, p. 181.

[61] R. Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, 97(1) Columbia Law Review 1 (1997), p. 8.

[62] *Ibidem*, pp. 9-10.

[63] J. Raz, *The Authority of Law. Essays on Law and Morality* (2nd ed.), Oxford University Press, Oxford: 2009, pp. 211-212.

[64] P. Craig, *Formal and Substantive Approaches to the Rule of Law: An Analytical Framework*, 1 Public Law 467 (1997), p. 468.

[65] *See* B. Enzmann, *Der Demokratische Verfassungsstaat: Entstehung, Elemente, Herausforderungen*, Springer, Berlin: 2012, pp. 51-57.

[66] T. Bingham, *The Rule of Law*, Penguin, London: 2013, p. 13.

shows that all of them tend to emphasize both the substantive components of the rule of law along with the formal ones.[67]

Third, the above differences between the classical English substantive rule of law concept and the German material rule of law approach perfectly illustrates the key difficulty in defining the rule of law for the purposes of the EU legal system; namely, the different understandings of the rule of law in the constitutional traditions of the Member States.[68] Consequently, the question arises whether a consensual EU-wide definition of the rule of law can be applied. The first attempt to do so can be traced in the 2014 EU Rule of Law Framework.[69] introducing as a "pre-Article 7 procedure" for addressing systemic threats to the rule of law, such as the present rule of law crises in Poland and Hungary.[70] The Framework applies the consensual approach to the rule of law developed by the Venice Commission. However, the "soft law" nature of both the Framework and the Rule of Law Checklist, the limited experience with the Framework's application, and its non-applicability to the external dimension of the rule of law make it problematic to establish whether any consensus on the rule of law has been reached so far. Nevertheless, as the crises in Poland and Hungary show, a common understanding of values is essential for sustaining the integrity of the Union, as well as consolidating its international role.

Fourth, if viewed as a crucial means to prevent conflicts and mitigate the complexities of the post-conflict period,[71] the rule of law represents a frequent target of international projects. Despite the fact that international organizations tend to praise a comprehensive substantive approach to the rule of law, their excessively technocratic institutions-only focus is widely criticised in the scholarship as the key deficiency in their rule of law promotion activities.[72] Thus, according to the arguments by K. Erbeznik and J. Cao, the crucial fallacy of rule of law reforms lies in the donors' non-consideration of the

[67] *See* T. Fitschen, *Inventing the Rule of Law for the United Nations*, in: A.V. Bogdandy and R. Wolfrum (eds.), 12 Max Planck Yearbook of United Nations Law, Brill, Amsterdam: 2008, pp. 347-380; F. Evers, *OSCE efforts to promote the rule of law. History, structures*, *surveys*, Working Paper No. 20 of the Centre for OSCE Research, 03/2010; European Commission for Democracy through Law, *Rule of Law Checklist*, Study No. 711/13, CDL/AD(2016)007.

[68] *See* L. Pech, *The rule of law as a constitutional principle of the European Union*, Jean Monnet Working Paper 04/09, pp. 22-41.

[69] Communication from the Commission to the European Parliament and the Council "A new EU Framework to Strengthen the Rule of Law, [2014], COM (2014) 158 final/2.

[70] For an overview of the present threats to the rule of law threats posed by Poland and Hungary, *see* B. Bugaric, *Protecting democracy and the rule of law in the European Union: The Hungarian challenge.* LEQS Paper No. 79/2014; A. Gostynska-Jakubowska, *Poland: Europe's new enfant terrible*, Bulletin of the Centre for European Reform 01/2016.

[71] *See generally* J. Ray, *Democracy and International Conflict. An Evaluation of the Democratic Peace Proposition*, Islington, Reaktion Books: 1998; A. Hurwitz, R. Huang, *Civil War and the Rule of Law: Security, Development and Human Rights*, Boulder: Lynne Rienner: 2014; J.J.C. Voorhoeve, *From War to the Rule of Law: Peace-Building after Violent Conflicts*, Amsterdam University Press, Amsterdam: 2007.

[72] *E.g.* K. Erbeznik, *Money Can't Buy You Law: The Effects of Foreign Aid on the Rule of Law in Developing Countries*, 18(2) Indiana Journal of Global Legal Studies 873 (2011); M.J. Trebilcock, M. Prado, *Advanced Introduction to Law and Development*, Edward Elgar, Cheltenham: 2014.

political and cultural particularities of target societies.[73] Moreover, crucial obstacles to efficient rule of law actions concern the opposing economic interests in the respective societies and the rent-seeking effects of foreign aid dependency.

Fifth, the value-promotion of the EU is particularly marked by a fuzzy boundary between the rule of law and democracy.[74] As argued by O'Donnell, the EU seeks to promote "the democratic rule of law with fundamental rights"[75] and, consequently, the clear delimitation between these values is not obligatory anymore. Such a concept, however, contradicts the traditional understanding of substantive rule of law as serving not only as the foundation for transparent, accountable and inclusive institutions, but also as a means to limit the discretion of the ruling majority.[76] Moreover, drawing a borderline between democracy and the rule of law is essential to counter the impression that the Union's prioritizes stability over democracy, something it is frequently accused of.[77] Thus, some demarcation between the values is essential for creating a coherent and legitimate external action.

Sixth, the aims of the present article make it topical to trace the linkage between the rule of law and economic development. Analysis of the major developments in economic theories and movements since the early post-war era to the present day makes it possible to distinguish two major approaches to the law in general and to the rule of law in particular. The early post-war theoreticians and the adherents of the dependencies and the world systems theory tended to view law from a pragmatic standpoint, as an instrument for converting economic theories into policies.[78] The independent emphasis on law was first made under the auspices of the Law and Development Movement (LDM), which sought to promote political, social and economic development in Southeast Asia and Latin America by transplanting Western norms and structures.[79] Following

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[73] Erbeznik, *supra* note 72, pp. 878-879; L. Cao, *Culture in Law and Development: Nurturing Positive Change*, Oxford University Press, Oxford: 2016, pp. 187-198.

[74] K. Nikolaidis, R. Kleinfeld, *Rethinking Europe's "rule of law" and enlargement agenda: The fundamental dilemma*, SIGMA Paper No. 49/2012, pp. 10-12.

[75] G. O'Donnell, *The Quality of Democracy: Why the Rule of Law Matters*, 15(4) Journal of Democracy 32 (2004).

[76] *See* H. Lauth, *Rechtstaat, Rechtssysteme und Demokratie*, in: M. Becker, H.J. Lauth, G. Pickel (eds.), *Rechtstaat und Demokratie. Theoretische und empirische Studien zum Recht in der Demokratie*, Springer, Berlin: 2001, pp. 21-22.

[77] *E.g.* V. Van Hüllen, *EU Democracy Promotion and the Arab Spring: International Cooperation and Authoritarianism*, Springer, Berlin: 2015, pp. 22-23; J. Bridoux, M. Kurki, *Cosmetic Agreements and the Cracks Beneath: Ideological Convergences and Divergences in U.S. and EU Democracy Promotion in Civil Society*, 28(1) Cambridge Review of International Affairs 55 (2015).

[78] *See* J.E. Stiglitz, D. Kennedy, *Law and Economics with Chinese Characteristics. Institutions for Promoting Development in the Twenty-first Century*, Oxford University Press, Oxford: 2013, pp. 23-24; J.C. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies in the Northeast Asian Experience*, 28(2) University of Pennsylvania Journal of International Law 219 (2007), p. 240.

[79] *See* K. Kroncke, *Law and Development as Anti-Comparative Law*, 45 Vanderbilt Journal of Transnational Law 477 (2012), pp. 479-482. For a critique of the LDM, *see* D. Trubeck, M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the USA*, Wisconsin Law Review 1062 (1974).

the collapse of the LDM, the focus on norms and institutions regained momentum with the introduction of the new institutionalism and governance theories, which were reflected in the "Washington consensus" by the World Bank.[80] According to D. Rodrik, the basis for the modern law-development nexus is constituted by the so-called "augmented Washington consensus", elements of which are, in turn, emphasized in the EU's cooperation with its Eastern Neighbours.[81] They include, *inter alia*, financial liberalization, financial codes and standards, trade liberalization, openness to FDI, corporate law and governance, compliance with the WTO agreements, etc.[82] Rodrik's insight supports the previous statements with regard to the considerable potential of the DCFTAs to diffuse the EU's norms and values, based on an analysis of the disciplines they contain. It is, however, worth mentioning that the conceptual documents underlying the ENP barely refer to the law-development nexus, emphasizing rather the role of law and economic development in stabilization.[83]

Ultimately, the above review shows that a systemic and coherent rule of law action through trade liberalization requires an in-depth understanding of the specific features of the rule of law concept and its application, as well as its linkages to democracy and economic development.

3.3. The components of the rule of law

Analysis of the value-promoting aspect of the EU DCFTAs with Ukraine, Moldova and Georgia requires not only an understanding of the conceptual problematics of the rule of law, but also distinguishing and defining the key elements of this umbrella concept. The major sources to be considered include the case law of the CJEU; the CoE Rule of Law Checklist (whose applicability is confirmed by the 2014 EU Rule of Law Framework); and the theoretical contributions featuring the constitutional traditions of the EU Member States.[84] Analysis of the respective sources allows for distinguishing six major dimensions of the rule of law, namely: legality; legal certainty; independence and impartiality of public authorities (especially, the judiciary); equality and non-discrimination; the relationship between international and domestic law; and public accountability and the transparency of the authorities. Due to the space limitations of the present article, it will further focus on the single issue of the promotion of transparency through the DCFTAs in the Eastern Neighbourhood,

[80] *See* T. Krever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model*, 52(1) Harvard International Law Journal 287 (2011), pp. 302-304.

[81] D. Rodrik, *Goodbye, Washington Consensus, Hello Washington Confusion? A Review of the World Bank's Economic Growth in the 1990s: Learning from the Decade of Reform,* XLIV Journal of Economic Literature 973 (2006), pp. 977-978.

[82] *Ibidem*.

[83] *E.g.* Joint Communication, *supra* note 41, pp. 4-7.

[84] *See* European Commission for Democracy through Law, *Rule of Law Checklist*, Study No. 711/13, CDL/AD(2016)007; Communication from the Commission to the European Parliament and the Council "A new EU Framework to Strengthen the Rule of Law", [2014], COM (2014) 158 final/2. *E.g.* Pech, *supra* note 59; Craig, *supra* note 64, p. 468.

while carefully tracing the links to the various dimensions of the rule of law mentioned above.

The principle of legality (also commonly referred to as "lawfulness") encompasses a range of components, particular to the formal understanding of the rule of law, such as the supremacy of laws, their general nature, and the consistency of a legal system.[85] Moreover, the principle entails an institutional dimension, concentrating on the clear horizontal and vertical delineation of powers between different authorities as a foundation for their observance of the law in general and positive human rights obligations in particular.[86] Ensuring institutions' compliance with laws also requires clear procedures for introducing exceptions to laws and the delegation of state competences to private bodies.[87] In procedural terms, the principle of legality is primarily associated with transparent and accountable law-making procedures.[88] Pursuant to the CoE Rule of Law Checklist, the legal certainty requirement encompasses, *inter alia*, the accessibility of laws, regulations and court decisions; the foreseeability of laws; stability of laws; their prospective nature, as well as the "nullum crimen sine lege", "nulla poena sine lege" and res judicata principles.[89]

Next, the authorities' independence from each other is ensured through multiple checks and balances, such as the proper delineation of authority between institutions, guaranteed financial autonomy, as well as fair and sufficient salaries.[90] In particular, "an independent, transparent and impartial judicial system, free from political influence, which guarantees equal access to justice, protection of human rights, gender equality and non-discrimination, and full application of the law" represents a crucial goal the EU pursues in its relations with its Neighbours.[91] Tightly linked to the principles of independence, equality and non-discrimination is the principle of impartiality, which is investigated based on the public perceptions thereof, the public perceptions of corruption, and the application of anti-corruption measures to public bodies.[92]

The principles of equality and non-discrimination play a crucial role in the EU's legal order, located at the crossroads of the triangular relationship between the rule of

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[85] *See* European Commission, *supra* note 84, pp. 11-14. *See also* A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed.), Springer, Berlin: 1979, p. 202; S. Unger, *Das Verfassungsprinzip der Demokratie. Normstruktur und Norminhalt des grundgesetzlichen Demokratieprinzips*, Mohr Siebeck, Tübingen: 2008, p. 17.

[86] European Commission *supra* note 84, p. 11.

[87] *Ibidem*, p. 14.

[88] *Ibidem*.

[89] *Ibidem*, pp. 15-17. *See also* M. Fernwick, M. Simes, S. Wrbka, *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law*, Bloomsbury Publishing, London: 2017.

[90] European Commission, *supra* note 84, pp. 20-22.

[91] Joint Communication, *supra* note 41, p. 5.

[92] European Commission, *supra* note 84, pp. 20-22; *See also* Joined Cases C-341/06 P and C-342/06 P *Chronopost SA and La Poste v. Union française de l'express* (*UFEX) and Others* [2008], ECR I4777; Case C-367/95 *Commission of the European Communities v. Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL* [1998], ECR I-01719.

law, democracy and human rights.[93] According to the CoE Rule of Law Checklist, a state's adherence to the rule of law requires a constitutional stipulation of the principle of equality, a state's immediate commitment to this principle, and an effective system for ensuring individuals' right be free from discrimination.[94] In addition, adherence to the non-discrimination principle is associated not only with the constitutional prohibition of discrimination, but providing clear definitions of direct and indirect discrimination in laws, and justifications for any deviations from this principle.[95] Moreover, the essential prerequisites for adherence to the principle of non-discrimination include the possibility of judicial review of laws alleged to violate the requirements of equality and non-discrimination, and the availability of effective remedies against possible breaches.[96]

According to the Article 3(5) TEU, the EU aims to "contribute to the strict observance and the development of international law, including respect for the principles of the United Nations Charter." The crucial challenges to this aim are reflected in the CoE's limited approach to the relationship between international and domestic law (contradicting Article 3(5) TEU),[97] and the uncertainties of the interplay between international law and the law of the EU as an autonomous legal order.[98] However, since the EU explicitly supports the multilateral treaty process, the observance of key international law standards (usually specified on a case-by-case basis) represents a vital component of the EU's rule of law promotion agenda, including, *inter alia*, within the context of the present generation of FTAs.

Ensuring institutions' compliance with laws and preventing their misuse or abuse of powers requires public accountability and transparency in their functioning.[99] According to M. Busuioc, public accountability can be understood as a three-component relationship between an actor (a public authority) and a forum (society).[100] The respective components (or stages) include an actor providing a forum with information regarding

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[93] *See* Treaty on the European Union, Article 2, Article 3(3), Article 9, and Article 21. *See also* S. Carrera, E. Guild, N. Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism*, European Parliament, Brussels: 2013, pp. 21-22; pp. 31-35.

[94] European Commission, *supra* note 84, pp. 18-19.

[95] *Ibidem*.

[96] *Ibidem*.

[97] *Ibidem*, p. 12 (levelling the above requirement purely to the international human rights obligations); Treaty on the European Union, Article 3.

[98] For an in-detail review of the relationship between the EU and international law, *see* Van Vooren & Wessel, *supra* note 38, pp. 208-243. *See also* K. Lenaerts, *The Kadi Saga and the Rule of Law within the EU*, 67 SMU Law Review: 707 (2014).

[99] *E.g.* M. Bovens, *Public Accountability*, in: E. Ferlie, L.E. Lynn, C. Pollitt (eds.), *The Oxford Handbook of Public Management*, Oxford University Press, Oxford: 2007, p. 182. *See also* D. Curtin, M. Hillebrandt, *Transparency in the EU: Constitutional Overtones, Institutional Dynamics and the Escape Catch of Secrecy*, in: A. Lazowski, S. Blockmans (eds.), *Research Handbook on EU Institutional Law*, Edward Elgar Publishing, Cheltenham: 2016, pp. 190-191.

[100] E.M. Busuioc, *European Agencies: Law and Practices of Accountability*, Oxford University Press, Oxford: 2013, p. 32.

its activities; the debate between the actor and the forum as regards the former's activities; and, finally, the "redistributive justice" element, allowing the forum to sanction the actor.[101] Based on the above, the key indicators of accountability include the legal basis for an accountability relationship; an obligation placed on an institution to provide an accountability forum with information regarding its activities; an obligation to engage in the debating phase; and finally the sanctioning power of an accountability forum.

Last, but not least, the transparency requirement constitutes a necessary component of the broader standards of legality (in part related to the transparency of the law-making procedures) and legal certainty (in part related to the accessibility of legislation and court decisions and the legal clarity requirement).[102] Since the EU views accountability to citizens and transparency as a means to counter the "democratic deficit", the transparency standard is also intertwined with inclusiveness, legitimacy, and democracy.[103] In EU law terms, the principle of transparency applies not only to the law-making procedures at the European Parliament, but also to the decision-making procedures exercised in multiple institutions, bodies, and agencies of the Union.[104] Moreover, the crucial component of the evolving EU-wide principle of transparency is the right to access the documents of EU institutions, stipulated in Regulation 1049/2001/EC.[105] Next, the legal clarity requirement also extends to the national legal orders of the Member States, *inter alia* through the requirement of "precision, clarity and transparency" in the process of transposing directives into the national laws of the Member States.[106] Finally, an important component of transparency in the EU law context is the "duty to give reasons" for legislative and administrative acts, stipulated in Article 296 TFEU and Article 41 CFR.[107]

4. PROMOTION OF THE RULE OF LAW THROUGH DCFTAS

4.1. "Essential element clauses"

Bi- and pluri-lateral association and trade agreements between the EU and third countries usually include standard conditionality clauses. The so-called "common values" conditionality structure contains an "essential element clause" (specifying the core values on which "the relationships between the parties are premised"[108]) and a

[101] *Ibidem*.

[102] European Commission, *supra* note 84, pp. 13-17.

[103] *See* G. Majone, *Europe's Democratic Deficit: The Question of Standards*, 4(1) European Law Journal 5 (1998).

[104] Curtin & Hillebrandt, *supra* note 99, pp. 190-191.

[105] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and the Commission documents, [2001] OJ L 145/43.

[106] Case C-417/99 *Commission v. Spain* [2001], ECR 1-6015, para. 40.

[107] Charter of Fundamental Rights of the European Union, [2000], OJ C/364.

[108] N. Hachez, *Essential elements clauses in EU trade agreements making trade work in a way that helps human rights?*, Working Paper No. 158 of the Leuven Centre for Global Governance Studies, p. 8.

"suspension clause" (defining the procedure for suspending the agreement in case of violation of the essential elements). The history of the respective conditionality clauses dates back to Article 5 of the 1989 Lome IV Convention, which referred to human rights but was not yet operative.[109] At the present time, the model "common values" conditionality structure is constituted by the Articles 9 and 96 of the Cotonou Agreement between the EU and the ACP countries.[110]

As compared to Article 9 of the Cotonou Agreement and the "essential element" clauses, contained in the EU's SAAs with Western Balkans, the 'common values' conditionality structures of the EU's Association Agreements (AAs) with Ukraine, Moldova and Georgia are more elaborate. First, together with the hard "common values" conditionality, the EU's AAs with the above states contain the parties' commitments to a broad range of principles that are, however, not addressed as 'essential elements', but rather as "underpinning" the relationships between the parties and "are central to" enhancing them.[111] Among them, one can mention the principles of a free market economy, sustainable development, effective multilateralism, good governance, as well as the fight against corruption and organized crime.[112] The above provisions also contain references to the parties' commitments under the UN, the Council of Europe, and the OSCE treaties.[113] Second, apart from the standard "essential elements" clause (Article 2 of the EU-Ukraine AA), Article 6 of the EU-Ukraine AA, dedicated to "dialogue and cooperation on domestic reform", refers to the stability and effectiveness of democratic institutions, the rule of law, and respect for human rights and fundamental freedoms as the principles to be ensured in the internal policies of the parties.[114] By comparison, Article 4 of the EU AAs with both Moldova and Georgia, entitled "Domestic reform" specifies an array of cooperation targets, such as reform of the judiciary, of law enforcement agencies, of public administration and civil service, as well as countering corruption.[115] Cooperation on the rule of law and fundamental freedoms is also underlined in the AAs with regard to Freedom, Security and Justice.[116] Third, as already noted by G. Van

[109] Fourth ACP-EEC Lome Convention [1989], Article 5.

[110] Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, [2000], OJ L 317, Article 9, Article 96. *See also* L. Bartels, *A model human rights clause for the EU's international trade agreements*, German Institute for Human Rights and the MISEREOR, 2014, pp. 10-11.

[111] Association Agreement between the European Union and the European Atomic Energy Community and its Member States, of the one part, and Ukraine, of the other part, [2014], OJ L 161, Article 3; Association Agreement between the European Union and the European Atomic Energy Community, and their Member States, of the one part, and Georgia, of the other part, [2014], OJ L 261/14, Article 2(2)(3)(4); Association Agreement between the European Union and the European Atomic Energy Community, and their Member States, of the one part, and the Republic of Moldova, of the other part, [2014], OJ L 260, Article 2(2)(3)(4).

[112] *Ibidem*.

[113] *Ibidem*.

[114] EU-Ukraine AA, Article 2, Article 6.

[115] EU-Moldova AA, Article 4.

[116] EU-Ukraine AA, Article 14; EU-Moldova AA, Article 12; EU-Georgia AA, Article 13.

der Loo with respect to the EU-Ukraine AA, the "essential elements" clauses of the AAs with the Eastern Neighbours include a strong emphasis on security.[117] All three clauses mention "countering the proliferation of weapons of mass destruction, related materials and their means of delivery" as an "essential element."[118] Furthermore, under Article 2 of the EU-Ukraine AA, the "promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and integrity"[119] are also referred to as "essential elements", which is highly topical in view of Russia's 2014 annexation of Crimea and its ongoing armed presence in Eastern Ukraine. Last, but not least, the "suspension clause", included into the EU-Ukraine AA, represents the single and most remarkable example of the explicit conditionality between the "common values" and market access provisions, allowing for the suspension of the specific DCFTA-based trade benefits in the event of a violation by Ukraine of any of the common values defined as "essential elements."[120]

While the above analysis unveils the promising agenda for the EU's invocation of "essential elements" clauses in partner countries, the experience of the ACP countries shows that the Union tends not to activate the respective clauses often enough, and even when doing so manifests a selective approach.[121] Moreover, the activation of the respective clauses usually leads to consultations and the suspension of aid rather than the actual lifting of trade preferences. Consequently, it can be argued that presently the "essential element" clauses represent a political tool, allowing the Union to launch dialogue with partner states in the event of alarming developments, rather than a road to economic sanctions. Nevertheless, the "essential elements" clauses included in the framework AAs served as the foundation for including specific values-related commitments into the DCFTAs and further cooperation on the respective matters.

4.2. Transparency: general, cooperation-related, and discipline-specific provisions

Tightly linked to the standards of legality, legal certainty and public accountability, the principle of transparency represents a crucial component of the rule of law. The analysis of the transparency-related provisions contained in the EU's DCFTAs with the Eastern Neighbours allows for dividing them into three groups. They include 1) the norms contained in the transparency-specific chapters of each DCFTA; 2) the norms governing administrative and technical cooperation; and 3) sector-specific transparency provisions (e.g., public procurement, competition, and state aid).

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[117] *See* G. Van der Loo, *The EU-Ukraine Association Agreement and Deep Comprehensive Free Trade Area: A New Legal Instrument for EU without Membership*, Brill, Leiden: 2016.

[118] *See* EU-Ukraine AA, Article 2, EU-Moldova AA, Article 2, EU-Georgia AA, Article 2

[119] EU-Ukraine AA, Article 2.

[120] *See* EU-Ukraine AA, Article 478(3)(b). *See also* Van der Loo, *supra* note 117, p. 209.

[121] Hachez, *supra* note 108, p. 18.

4.2.1. Transparency-specific chapters of the DCFTAs

In view of the impact the regulatory environment exerts on trade and investment, as well as the importance of adherence to the principles of legal certainty and proportionality with respect to economic operators, the DCFTAs with Eastern Neighbours contain elaborate publication requirements as regards laws, regulations, judicial decisions, and other "measures of general application."[122] Both the respective publication requirements (which will "enable any person to become acquainted with the above measures") and the requirements regarding the establishment of contact points to address enquiries encompassing all the disciplines are enshrined in the AAs under the title "Trade and Trade-related Matters."[123] Since the respective titles of the AAs address a broad range of issues (e.g., standards, competition and state aid, public procurement, financial markets) which are also relevant for national economic operators, the requirements related to publication and contact points clearly contribute to the domestic dimension of transparency, and thus to the rule of law.[124]

Of special relevance for the domestic dimension of the rule of law are the DCFTAs' requirements concerning the review and appeal mechanisms. Pursuant to the Article 224(1) of the EU-Georgia AA and Article 360(1) of the EU-Moldova AA "each party shall establish or maintain judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of administrative action relating to matters, covered by the Titles V and IV ("Trade and Trade-related matters") respectively."[125] Using similar wording, Article 286(1) of the EU-Ukraine AA additionally points to the independence "of the office or authority entrusted with administrative enforcement [which] shall not have any substantial interest in the outcome of the matter."[126] Furthermore, the chapters under study specify some particulars of the proceedings, namely the parties' right to support or defend their positions and the need for evidence to be used to substantiate the decision.[127] Moreover, the subsequent provisions refer to the two further pillars of administrative procedure, such as the decisions being subject to an appeal or judicial review and the binding nature of previous decisions on the practice of the respective administrative authority with respect to subsequent administrative actions.[128] Since an independent judiciary lies at the heart of the rule of law concept, and also intersects with the standards of legality, legal certainty and human rights, the above provisions manifestly bind the partner states to advance the state of the rule of law through ensuring a functional

[122] EU-Ukraine AA, Title IV, Chapter 12; EU-Moldova AA, Title V, Chapter 12; EU-Georgia AA, Title IV, Chapter 12.

[123] *See* EU-Ukraine AA, Articles 283-284; EU-Moldova AA, Articles 357-358; EU-Georgia Association Agreement, Articles 221-222.

[124] *See* EU-Ukraine AA, Title IV; EU-Moldova AA, Title V; EU-Georgia AA, Title IV,

[125] *See* EU-Moldova AA, Article 224(1); EU-Georgia Association Agreement, Article 360(1).

[126] EU-Ukraine AA, Article 286(1).

[127] *See* EU-Ukraine AA, Article 286(2); EU-Moldova AA, Article 360(2); EU-Georgia AA, Article 224(2).

[128] *Ibidem*.

judiciary.[129] The above requirements intersect with the multiple provisions on judicial reform contained in all three DCFTAs. However, their implementation constitutes a challenge to the partner states.[130]

Last, but not least, parties to the AAs under study "recognize the importance of the principle of good administrative behaviour and agree to cooperate in promoting such principle, including through exchange of information and best practices."[131] The scope of this principle is highlighted in the 20 June 2007 CoE Recommendation to member states on good administration. It is worth noting that pursuant to the above Recommendation, the principles of good administration closely resemble the key components of the rule of law, namely lawfulness (legality), equality, impartiality, proportionality, legal certainty, participation, and transparency, as well as respect for privacy.[132] Thus it can be seen that despite the explicit dedication to transparency in the considered chapters of the EU's DCFTAs with the Eastern Neighbours, the provisions address a broad array of standards encompassed by the umbrella principle of the rule of law, both through binding provisions and by recourse to soft law.

4.2.2. Transparency standards in administrative and technical cooperation

As stated above, in all three DCFTAs under study administrative cooperation "is essential for the implementation and control of the preferential treatment" with regard to the trade in goods.[133] While the AAs' sections on administrative cooperation do not explicitly refer to the transparency standard, the analysis of cases addressed by the Agreements as "a failure to provide customs administrative cooperation in investigating customs irregularities or fraud"[134] illustrates that the administrative cooperation is to great extent based on transparency. Similarly, the parties' cooperation with the Association Committee in trade configuration as regards the management of administrative errors and consultations on the FTAs and customs unions with third countries requires adherence to the transparency standard.

It is worth mentioning that the administrative cooperation provisions view transparency in two dimensions: as the domestic authorities' transparent application of the rules on preferential treatment (e.g., the application of the rules of origin) and transparency in the information exchange with another party to the Agreement.[135] Importantly, the former dimension of transparency is tightly intertwined with the legality component

[129] *See* Van der Loo, *supra* note 117, p. 288.

[130] *E.g.* EU-Ukraine AA, Article 14, Article 252(c); EU-Moldova AA, Article 4, Article 12, Article 332; EU-Georgia AA, Article 4; Article 13, Article 202. *See also* R. Petrov, P. Kalinichenko, *The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine*, 60(2) International and Comparative Law Quarterly 325 (2011).

[131] EU-Ukraine AA, Article 287; EU-Moldova AA, Article 361; EU-Georgia AA, Article 225.

[132] Recommendation of the CoE Committee of Ministers to member states on good administration, CM/Rec [2007]7.

[133] EU-Ukraine AA, Article 37(1); EU-Moldova AA, Article 155(1); EU-Georgia AA, Article 34(1).

[134] EU-Ukraine AA, Article 37(3); EU-Moldova AA, Article 155(3); EU-Georgia AA, Article 34(3).

[135] *Ibidem*.

of the rule of law, since it requires abiding by the legal requirements governing the provision of preferential treatment. Notwithstanding the importance of transparency in the administrative cooperation, the above regulations lack the far-reaching nature and transformative potential of those contained in the transparency-specific chapters of the DCFTAs under study, analysed above. The standards relating to publication of the measures of general application, access to documents and judicial protection contained in the above-discussed chapters relate to a broad array of issues, even going beyond the scope of the DCFTAs, whereas the cooperation-related standards predominantly affect the functioning of customs authorities. On the other hand, while the DCFTAs' chapters on transparency lack specific sanctions, non-compliance with the transparency requirements in the administrative cooperation domain may lead to the temporary suspension of trade preferences.[136]

In view of the importance of international technical regulations and standards in the establishment of barrier-free trade, all three DCFTAs under study specifically address technical barriers to trade, metrology, accreditation, and conformity assessment. Pursuant to the analysis of the respective provisions of the DCFTAs, it can be stated that the levelling of technical barriers to trade in the EU's relations with the "advanced" Neighbours takes three forms: the parties' affirmation of the rights and obligations under the WTO TBT Agreement; technical cooperation (regulatory cooperation, cooperation between the respective organizations and bodies, and infrastructure development); and finally, the approximation of domestic legislation to the EU standards.[137] All of the above activities are inextricably linked to the transparency principle. For example, adherence to the TBT Agreement requires fulfilling multiple transparency requirements relating to notifications, publications, the functioning of enquiry points and the procedures regarding information exchange.[138] By analogy, with respect to the administrative cooperation requirements it can be also stated that the regulatory cooperation requires transparency in the exchange of information and "best practices." Finally, the approximation of the respective EU *acquis* and the transposition of the EU's standards into the "associated Neighbours" domestic legislation requires achieving and maintaining "the level of administrative and institutional effectiveness necessary to provide an effective and transparent system."[139] Nonetheless, as opposed to the approximation/ transposition requirements contained in other DCFTAs' disciplines (e.g., services and establishment, public procurement), the approximation of technical standards and regulations is not linked to market access conditionality.[140]

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[136] EU-Ukraine AA, Title IV, Chapter 12; EU-Moldova AA, Title V, Chapter 12; EU-Georgia AA, Title IV, Chapter 12.

[137] *See* EU-Ukraine AA, Title IV, Chapter 3; EU-Moldova AA, Title V, Chapter 3; EU-Georgia AA, Title IV, Chapter 3.

[138] Agreement on Technical Barriers to Trade, 1186 UNTS 276 (entered into force 1 January 1980). *E.g.* Article 2(9)(10), Article 5(6)(7)(8)(9), Article 8(1), Article 10(1)(2)(3).

[139] EU-Ukraine AA, Article 56(2)(ii); EU-Moldova AA, Article 173(2)(b); EU-Georgia AA, Article 47(2)(b).

[140] *See* Van der Loo, *supra* note 117, pp. 308-309.

Ultimately, efficient administrative and technical cooperation, being directed toward creating a predictable trading environment, inevitably requires the parties' adherence to the transparency principle. The example of cooperation on the levelling of technical barriers to trade illustrates that the DCFTAs employ a number of legal mechanisms, such as recourse to international trade agreements as well as the approximation and transposition clauses. However, these provisions, which govern the administrative and technical cooperation between the EU and the associated Neighbours, impact the state of the rule of law in the latter only in particular domains, such as the development and introduction of technical regulations and standards and the functioning of customs.

4.2.3. Transparency standards and the public procurement domain

As mentioned above, the "deep" nature of the DCFTAs and the prospects of the Neighbours' integration into the EU's Single Market enhance the significance of the Agreements in terms of their "norms transfer" potential.[141] In view of the "contribution of transparent, non-discriminatory, competitive and open tendering to sustainable economic development", the DCFTA's chapters on public procurement tend to contain multiple transparency provisions. First and foremost, similar to case of technical cooperation the EU uses approximation requirements as a tool to promote incorporation of the above principles into the efficient public procurement system.[142] Importantly, the public procurement domain is particularly characterized by strict 'market access' conditionality. In other words, the associated Neighbours "will only be granted (additional) access to a specific section of the EU Internal market, if the EU determines, after a strict monitoring procedure that Ukraine [as well as, Moldova and Georgia] implemented their legislative approximation commitments."[143] Second, the DCFTAs promote the transparency of domestic public procurement systems in Ukraine, Moldova and Georgia by introducing the parties' obligations as regards the establishment and maintenance of "an appropriate institutional framework and mechanisms, necessary for the proper functioning of the public procurement system and the implementation of the relevant principles."[144] Importantly, along with requiring the 'associated Neighbours' to establish and maintain a central executive in the public procurement domain, the Agreement also binds them to ensure the review of decisions by the contracting authority by an impartial and independent body, together with the opportunity for judicial review.[145]

Third, along with the approximation- and institutions-related requirements, the Agreements also contain provisions establishing the basic standards regulating the award of contracts. The transparency component of the rule of law is manifested in the vast majority of the above requirements, including, *inter alia*, the publication of the intended

[141] *Ibidem*, p. 304.
[142] EU-Ukraine AA, Article 148; EU-Moldova AA, Article 268(1); EU-Georgia AA, Article 141.
[143] Van der Loo, *supra* note 117, p. 207.
[144] EU-Ukraine AA, Article 150; EU-Moldova AA, Article 270; EU-Georgia AA, Article 143.
[145] *Ibidem*.

procurements, the specific items required in the description of the subject-matter of the contract, the establishment of sufficient time limits for an expression of interest, the use of a qualification system, and the right to judicial review.[146] Hence, similar to the case of the transparency-specific chapters of the DCFTAs, the public procurement domain is characterized by the interplay of the multiple components of the rule of law, such as transparency, legality (e.g., the adherence to the particular pieces of the EU legislation and the observance of the respective basic standards), legal certainty (foreseeability of procedures, access to documents), equality and non-discrimination, as well as the independence and impartiality of the review bodies, including courts. Thus, the strength of the rule of law component in the public procurement domain, coupled with the market access conditionality, shows that the DCFTAs are directed toward establishing comprehensive public procurement reforms in the associated Neighbourhood.

4.3. The operational nature of the rule of law in the AAs/DCFTAs

The comprehensiveness of the AAs, providing for, *inter alia,* the gradual integration of the associated Neighbours' economies into the EU's Single Market, determines the operational nature of the Agreements. Thus, analysis of the provisions aimed at ensuring the operational nature of the Parties' obligations under the auspices of trade-related chapters of the AAs is essential to developing an understanding of the implementation of the respective norms.

4.3.1. Institutional framework of the AAs

To a great extent, the fulfilment of the obligations contained in the AAs is reinforced by their multilevel institutional structure. The annual summit meetings at the highest political level will provide "overall guidance" as regards the implementation of the Agreements, as well as "an opportunity to discuss any bilateral or international issues of mutual interest."[147] The AAs confer the specific function of supervising and monitoring the application and implementation of the Agreements to the Association Council.[148] Established at the ministerial level and comprised of the members of the Council of the EU and the European Commission, the Association Council is authorized to take legally-binding decisions within the scope of the respective agreements.[149] Importantly, in particular it is the Association Council that decides on further market openings for the "associated Neighbours" following its monitoring of the implementation of the respective legislative approximation commitments.[150] The Association Council is assisted by the Association Committee, which appoints, *inter alia*, a specific body (the Trade Committee) to address the issues related to the DCFTAs.[151] In turn, the

[146] EU-Ukraine AA, Article 151; EU-Moldova AA, Article 271; EU-Georgia AA, Article 144.
[147] EU-Ukraine AA, Article 460(1); EU-Moldova AA, Article 433; EU-Georgia AA, Article 403.
[148] EU-Ukraine AA, Article 461; EU-Moldova AA, Article 434; EU-Georgia AA, Article 404.
[149] *Ibidem*.
[150] EU-Ukraine AA, Article 463; EU-Moldova AA, Article 436; EU-Georgia AA, Article 406.
[151] EU-Ukraine AA, Article 464; EU-Moldova AA, Article 437; EU-Georgia AA, Article 407.

Association Committee shall be assisted by further sub-committees, established under the auspices of the respective AAs.[152] Last but not least, the AAs provide for forums for interparliamentary and civil society cooperation.[153] Thus, the institutional framework of the AAs plays a crucial role in making the Agreements operational, by ensuring a continuous dialogue between the Parties and by monitoring the fulfilment of respective commitments and the public accountability of the implementation process.

4.3.2. Approximation and monitoring

As has already been mentioned above, the EU's DCFTAs with the associated Neighbours contain binding legislative approximation clauses, directed at tackling the non-tariff barriers to trade and creating a legal environment conducive to the partial integration of the partner countries into the EU's Single Market. As underlined by R. Petrov, a proper understanding of partner countries' obligations under the respective AAs requires distinguishing between the concepts of "gradual approximation", "standard approximation" and "soft approximation."[154] In case of the EU-Ukraine AA, the "gradual approximation clause" reaffirms the country's obligation to "carry out gradual approximation of its legislation to EU law as referred to in Annexes I to XLIV to this Agreement."[155] As underlined by the clause, despite the common logics the gradual approximation "shall be without prejudice to any specific principles and obligations on regulatory approximation under Title IV ("Trade and Trade-related Matters of the Agreement")."[156] It is worth noting that Article 474 of the EU-Ukraine AA does not point out any market integration "carrots" that fulfilment of the respective obligations may bring to Ukraine.

As opposed to the "gradual approximation" clauses, characterized by their general nature, the "standard approximation clauses" attached to each chapter of the EU's economic cooperation with the associated Neighbours are far "deeper." First, as can be exemplified by the referral to the approximation-related obligations of the chapters on "Technical barriers to trade", standard approximation clauses go beyond the incorporation of the relevant EU *acquis,* and include specific requirements with respect to carrying out specific administrative and institutional reforms.[157] Undoubtedly, the above broadly-formulated requirements, backed by the market access conditionality and strict monitoring procedures, create a sound framework for the Union's promotion of the rule of law standards through trade in the "associated Neighbourhood." Secondly, the in-depth nature of the market integration within particular fields, such as for instance

[152] EU-Ukraine AA, Article 466; EU-Moldova AA, Article 439; EU-Georgia AA, Article 409.

[153] EU-Ukraine AA, Articles 467-470; EU-Moldova AA, Articles 440-443; EU-Georgia AA, Articles 410-413.

[154] R. Petrov, *Approximation of laws in the EU-Ukraine Association Agreement*, available at: http://bit.ly/2GXq34F (accessed 30 June 2018).

[155] EU-Ukraine AA, Article 474.

[156] *Ibidem*.

[157] EU-Ukraine AA, Article 56; EU-Moldova AA, Article 173; EU-Georgia AA, Article 46.

public procurement, also implies taking "due account of … any modifications of the EU acquis occurring in the meantime."[158] This dynamic obligation of approximation is aimed at ensuring the continuing nature of the legal uniformity[159] and, what is also important, the continuing close cooperation between the EU and the partner countries through the functioning of the respective association bodies. As reflected in the procurement procedures described above, the dynamic nature of the approximation obligations, coupled with the elaborate conditionality and monitoring procedures, enhances the EU's ability to utilize approximation for the sake of rule of law promotion. This statement can be substantiated by evidence from the EU-STRAT research project, underlining the importance of the dynamic framework of the legislative approximation process for sustaining the EU's leverage in the "associated" Neighbourhood.[160]

Third, the standard approximation clauses require taking "due account of the corresponding case law of the European Court of Justice."[161] Along with the above mentioned requirements, this one explicitly testifies to the deep nature of the legislative approximation to be conducted pursuant to the AAs. The significance of the CJEU's role in the legislative approximation is also confirmed by the AAs' provisions on the interpretation of the provisions of the EU law for the purposes of the regulatory approximation-specific dispute settlement procedure.[162] For instance, Article 322(2) of the EU-Ukraine AA stipulates that "where a dispute raises a question of interpretation of a provision of EU law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question, which ruling shall be binding on the arbitration panel."[163] The extension of the Court's jurisdiction over the Arbitration Tribunal illustrates the EU's desire to maintain full control over the interpretation of the Union's law and, consequently, maintain the integrity of the EU's legal order vis-à-vis external influences. Despite the fact that the "soft approximation clauses" tend to avoid the binding phrases contained in the standard approximation clauses, they still encourage partner countries to conduct the respective approximation and refer to the specific *acquis* acts and timetables contained in the AAs.[164] Along with "hard" conditionality, the "soft" approach can also be effective, especially with regard to influencing not only domestic laws, but also institutional and administrative practices.

Moreover, the "General and final provisions" of the AAs contain strict monitoring procedures, inspired by the pre-accession logic that provides, *inter alia*, for a focus on

[158] EU-Ukraine AA, Article 153; EU-Moldova AA, Article 273; EU-Georgia AA, Article 146.

[159] A. Lazowski, *Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union*, 45 Common Market Law Review 1433 (2008).

[160] K. Wolczuk, L. Delcour, R. Dragneva, K. Maniokas, D. Zeruolis, *The Association Agreement as a Dynamic Framework: Between Modernization and Integration*, EU-STRAT Working Paper Series 06/2017.

[161] EU-Ukraine AA, Article 153(2); EU-Moldova AA, Article 273(2); EU-Georgia AA, Article 146(2).

[162] *See e.g.* Article 322(2) EU-Ukraine AA.

[163] EU-Ukraine AA, Article 322(2).

[164] *See supra* note 154.

the continuity of the legislative approximation and the aspects of their implementation and enforcement.[165] An important novelty is represented by the provision for on-the-spot missions in the assessment of approximation, which missions' aim is to ensure that approximation goes beyond the formal adaptation of the respective *acquis*.[166] It is worth mentioning that a market opening would not automatically follow from a positive assessment, as it explicitly requires an approval by the Association Council.[167] The recommendations or decisions of the joint bodies (as well as their failure to come up with such recommendations or decisions) cannot be addressed in the dispute settlement procedure.[168] Overall, the strictness of the approximation and monitoring clauses reflects the ambitious nature of the market integration envisioned under the AAs and, consequently, their norms' transfer potential. The above insights also reveal that the design of the approximation and monitoring clauses makes it possible for the Union to exert a dynamic and systemic influence on the rule of law standards in the partner states, using the prospect of a market opening as a "carrot."

4.3.3. Financial cooperation and anti-fraud provisions

The complex nature of the legislative and practice-related changes which are required to implement the AA/DCFTAs obligations gives rise to the need for the EU's technical and financial assistance. The AAs' financial assistance clauses specify the parties' obligation to inform the Association Council about the "progress and implementation of financial assistance and its impact upon pursuing the objectives of the Agreement."[169] To ensure sound financial management, the AAs contain multiple provisions which oblige the associated Neighbours' governments to conduct financial checks over the operations financed with EU funds, take measures to prevent and remedy corruption practices, as well as to investigate and prosecute cases of fraud, corruption, or other irregularities, including conflicts of interest.[170] Importantly, the associated Neighbours' governments are obliged to communicate the application of all the above measures (ranging from the preventive ones to those stipulating prosecution) to the European Commission.[171] Moreover, the AAs serve as the legal basis for the checks, inspections,

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[165] *See* EU-Ukraine AA, Article 475; EU-Moldova AA, Articles 450-451; EU-Georgia AA, Article 419.

[166] *Ibidem. See also* G. Van der Loo, P. Van Elsuwege, R. Petrov, *The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument*, EUI Working Paper 2014/09, p. 13.

[167] EU-Ukraine AA, Article 475(5); EU-Moldova AA, Article 452(2); EU-Georgia AA, Article 419(5).

[168] EU-Ukraine AA, Article 475(6); EU-Moldova AA, Article 452(3); EU-Georgia AA, Article 419(6).

[169] EU-Ukraine AA, Article 458; EU-Moldova AA, Article 418; EU-Georgia AA, Article 388.

[170] EU-Ukraine AA, Title VI "Financial cooperation with anti-fraud provisions"; *see* Annex XLIII; EU-Moldova AA, Title VI "Financial assistance, and anti-fraud and control provisions"; EU-Georgia AA, VII "Financial assistance, and anti-fraud and control provisions."

[171] EU-Ukraine AA, Annex XLIII, Articles 1-5; EU-Moldova AA, Articles 423-426; EU-Georgia AA, Articles 393-396.

controls and other anti-fraud measures conducted by the European Commission, the European Court of Auditors, and the OLAF.[172] Last but not least, the AAs provide for the European Commission's application of administrative measures to protect the Union's financial interests, and provide the basic principles concerning the recovery of EU funds.[173] In view of the importance of bilateral cooperation projects and unilateral financial and technical assistance for the implementation of the DCFTAs' goals, the associated neighbours' governmental obligations under the AAs' financial cooperation and anti-fraud provisions serve as a guarantee of the targeted use of the EU's funds and, subsequently, successful cooperation projects.

4.3.4. Dispute-settlement mechanism

The EU's AAs with its Eastern Neighbours contain two parallel dispute settlement mechanisms. The disputes concerning the non-DCFTA parts of the AAs are settled by a binding decision taken by the Association Council following a period of consultations.[174] The complaining party is allowed to take "appropriate measures" if agreement is not reached within the Association Council after three months.[175] In turn, the disputes arising from the DCFTAs are resolved through a sophisticated Dispute Settlement Mechanism (DSM), which resembles the quasi-judicial WTO Dispute Settlement Understanding (DSU).[176] Under the DSM, the Parties are first expected to endeavour to resolve a dispute regarding the interpretation and application of the DCFTA through consultations.[177] In the event the Parties fail to resolve the dispute through consultations, the complaining party can request the establishment of an arbitration panel. As emphasized by G. Van der Loo, the important novelty of the DSM is that "either party has the right to establish the panel and that another party cannot block the initiation of the arbitration proceedings by refusing to appoint its arbitrator."[178] The DSM chapters also provide for a specific procedure to conciliate urgent energy disputes.[179] The arbitration panel shall interpret the DCFTA's provisions based on the 1969 Vienna Convention on the Law of the Treaties, and with recourse to the "relevant interpretations established in reports of panels and the Appellate Body adopted by the WTO DSB."[180]

The ruling of the arbitration panel is binding upon the parties, and they "shall take any measure necessary to comply in good faith" with it.[181] Based on the above require-

[172] EU-Ukraine AA, Annex XLIII, Articles 5-6; EU-Moldova AA, Articles 427-428; EU-Georgia AA, Articles 397-398.

[173] EU-Ukraine AA, Annex XLIII, Articles 7-8; EU-Moldova AA, Articles 429-430; EU-Georgia AA, Articles 399-400.

[174] EU-Ukraine AA, Article 477; EU-Moldova AA, Article 454; EU-Georgia AA, Article 421.

[175] EU-Ukraine AA, Article 478; EU-Moldova AA, Article 455; EU-Georgia AA, Article 422.

[176] Van der Loo, *supra* note 117, p. 293.

[177] EU-Ukraine AA, Article 305; EU-Moldova AA, Article 382; EU-Georgia AA, Article 246.

[178] Van der Loo, *supra* note 117, p. 294.

[179] EU-Ukraine AA, Article 309; EU-Moldova AA, Article 388; EU-Georgia AA, Article 252.

[180] EU-Ukraine AA, Article 320; EU-Moldova AA, Article 401; EU-Georgia AA, Article 265.

[181] EU-Ukraine AA, Article 311; EU-Moldova AA, Article 390; EU-Georgia AA, Article 254.

ment, the "Compliance" sections of the DCFTAs provide for a reasonable period of time for compliance and remedies in the event of non-compliance.[182] It should also be mentioned that the EU-Ukraine AA stipulates a procedure under the mediation mechanism applicable to measures falling within the scope of the National Treatment and Market Access for Goods chapters of the DCFTA.[183] The DSM, modelled after the DSU and a range of post-2006 EU FTAs, plays a crucial role in resolving the disputes arising from the DCFTAs and in ensuring the Parties' compliance with their obligations under the DCFTAs, including those related to legislative approximation.

CONCLUDING REMARKS

The unique combination of normative and market power, as well as the striving for the sustainability of promoted structures, creates the foundation for the Union to use its economic agreements as an instrument to achieve non-trade-related goals, such as the externalization of the Union's values. The above analysis of the promotion of the transparency standard as a component of the umbrella concept of the rule of law showcases that the DCFTAs with the Eastern neighbours contain a range of regulatory mechanisms capable of advancing the state of the rule of law in the associated Neighbourhood. Along with the standard "common values" conditionality, they include the introduction of basic standards, recourse to the WTO law, as well as the gradual and dynamic legislative approximation requirements, coupled with the market access conditionality. The realization of the above mechanisms is supported by the functioning of the multilevel institutional framework of the AAs, enhanced monitoring of the gradual approximation, the EU's unilateral technical and financial assistance (governed by the respective AA's financial cooperation-related and anti-fraud provisions) and the elaborate DSM. As compared to the substantive transparency requirements associated with the administrative and technical cooperation, the more promising rule of law promotion mechanisms are contained in the DCFTAs' transparency-specific chapters and the disciplines, wherein it is expected to fulfil a most ambitious market integration agenda (e.g., services and establishment, public procurement). The above analysis also helps to understand that the DCFTAs' provisions tend to create bridges between the different dimensions of the rule of law, such as transparency, legal certainty (especially with regard to the access to the judiciary) and the relationship between the domestic and international law.

Despite the particularities of the EU's power, the comprehensiveness of the considered DCFTAs and their disciplines' relatedness to the different dimensions of the rule of law, the application of the DCFTAs as a value-promotion tool faces a number of challenges. In the most general terms, these challenges can be classified into three

[182] *See* EU-Ukraine AA, Articles 311-316; EU-Moldova AA, Articles 390-395; EU-Georgia AA, Articles 254-260.

[183] EU-Ukraine AA, Article 333.

groups: those stemming from the "essentially contested" nature of the rule of law as a value the EU promotes worldwide; those stemming from the EU's present approach to the Neighbourhood; and, finally, those related to the legal mechanisms embedded into the DCFTAs. First, since the rule of law represents an "essentially contested" concept and the attempts to find a European-wide consensus on it are quite recent, the EU and its institutions lack analytical tools to assess and measure the Union's policies' impact on the state of the rule of law in an associated country. In this regard, additional complexities may arise from the conceptual issues within the particular dimensions of the rule of law, such as the relationship between the international and the EU legal order. Second, a crucial source of challenges deals with the lack of the Union's and Eastern Neighbours' consensus as regards the final outcome of the ENP. The existing capabilities-expectations gap coupled with the lack of radically novel incentives results in the lack of the conducive environment to the genuine transformation of the "associated Neighbourhood" and the formal legislative approximation. Moreover, the lack of a comprehensive strategy of the EU's value-promotion in the Neighbourhood will inevitably result in challenges to the way of strategizing the Union's rule of law promotion in the Neighbourhood. In turn, a coherent strategy of the rule of law promotion through the FTAs requires coordinating the regulatory measures on the one hand, and the EU's financial and technical assistance on the other. Third, since the DCFTAs were concluded recently and are innovative with regard to their scope and the legal instruments applied, it is not yet clear how all the considered instruments will be applied by the EU in practice. For instance, the interplay of the "common values" and "market access" conditionality introduced in the EU-Ukraine AA has given rise to considerable concern.

Notwithstanding the above, the tight links between the law and economic development, as well as the ambitious scope of the EU's trade liberalization with the "associated Neighbourhood" countries condition the yet insufficiently explored potential of using FTAs to pursue non-trade-related goals, such as the promotion of fundamental values, protection of the environment, or improving labour and social standards. Thus, research into the legal avenues for pursuing the above goals through trade, and the challenges that subsequently arise, represents a promising area in the studies on the EU law of external relations.

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CHANGING EVIDENTIARY RULES TO THE DETRIMENT OF THE ACCUSED? THE RUTO AND SANG DECISION OF THE ICC APPEALS CHAMBER

Abstract:
The main topic of this article is retroactive application of procedural criminal law. In this text the question will be posed – and answered – whether the application of a new procedural provision that entered into force in the course of an ongoing proceeding should in that proceeding be considered as retroactive and in what scope or/and under what conditions can such retroactivity be allowed for. As will be shown the solutions in national jurisdictions differ according to the common law – continental law states divide. This problem will be discussed in the light of a decision in the ICC Ruto and Sang case. In this case the ICC Appeals Chamber had to answer several questions pertaining to the temporal application of new procedural provisions. Firstly, the Chamber had to decide whether a general ban on the retroactive application of substantive law should also apply to procedural criminal law. Secondly, the ICC Appeals Chamber had to analyze the criteria according to which it would evaluate whether the change of rules of criminal procedure in the course of an ongoing trial was to be considered as having a retroactive effect, and whether the change in the rules of admission of evidence could be considered detrimental to the accused. Thirdly, it will be shown that the ICC Appeals Chamber has chosen the common law concept of "due process rights" rather than the idea of "intertemporal rules" known from the continental doctrine, and why it chose to do so.

Keywords: ICC, ICC Rules of Procedure and Evidence, International Criminal Court, intertemporal rules, *lex retro non agit*, retroactive application of criminal law, retroactive application of procedural criminal law, Rome Statute, Ruto and Sang case

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INTRODUCTION

This article discusses the retroactive application of procedural criminal law. Usually, in substantive criminal law the rule is that a criminal act should be punished on the basis of the law in force at the time the act was committed (*lex retro non agit*) – unless the new law is more favourable to the accused.[1] Substantive criminal law thus operates to the favour of the accused. But there is no similar general rule in procedural criminal law. Rules concerning the temporal application of substantive and procedural criminal law are usually set out separately.

In the first part of this article general problems of the retroactive application of procedural criminal law are presented, and in this context, it is important to define intertemporal rules. There is neither an official definition of intertemporal rules nor is there an obligation to denote the rules as such. Whether a rule may be affiliated with the scope of intertemporal rules depends rather on how and in which field it is applied. The easiest way to understand this concept is to describe "intertemporal rules" as a group of directives that rule conflicts of law in time. The retroactivity analysis is seen as a choice between an old and a new legal rule.[2] According to a more complicated, but also more accurate, definition intertemporal rules are directives established by the legislator in the course of lawmaking and applied with the aim of solving intertemporal problems.[3] Whether a certain rule of criminal procedure can be included into the group of "intertemporal rules" depends on its content – whether it expresses a rule that commands the application of a specific procedure only to legal situations arising or ongoing after the rule's entry into force.[4]

This article further discusses how new rules of criminal procedure are to be applied to ongoing trials. The crucial test – in the light of the above-mentioned definition of intertemporal rules – is whether the application of a new procedural provision that entered into force in the course of an ongoing proceeding should be considered to be retroactive in that proceeding. As will be shown, the solutions adopted in national jurisdictions differ according to the common law/continental law divide. These different

[1] *E.g.* Article 4 of the Polish Criminal Code, Section 2(3) of the German Criminal Code, U.S. Constitution, Article I § 9 cl. 1. The first state that introduced the constitutional prohibition on the retroactive use of criminal law was Maryland in 1776. *See* W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym* [Normative change and intertemporal principles in criminal law], Zakamycze, Kraków: 2003, p. 361.

[2] P. Czarnecki, A. Matukin, *Intertemporalne aspekty obowiązywania ustawy karnej procesowej – zarys problematyki* [Intertemporal aspects of operation of criminal procedural law – an outline of the problematique], 1 Czasopismo Prawa Karnego i Nauk Penalnych 183 (2010), p. 188.

[3] H. Paluszkiewicz, *Kilka uwag o gwarancyjnym charakterze przepisów przejściowych w ustawie z dnia 27 września 2013 r. o zmianie ustawy - kodeks postępowania karnego i niektórych innych ustaw* [A few comments on the transitional nature of the transitional provisions in the Act of 27 September 2013 amending the Act - the Code of Criminal Procedure and some other acts], in: B. Bieńkowska, H. Gajewska-Kraczkowska, M. Rogacka-Rzewnicka (eds.), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa profesora Piotra Kruszyńskiego*, Warszawa: 2015, p. 342; H. Paluszkiewicz, *Studia z zakresu problematyki intertemporalnej w prawie karnym procesowym* [Studies in the field of intertemporal issues in criminal procedural law], CH Beck, Warszawa: 2016, pp. 88-90.

[4] *See* Paluszkiewicz (*Kilka uwag*), *supra* note 3, p. 342.

methods of solving the problem will be presented before the background to the general dilemma of whether the application of a new procedural provision that entered into force in the course of an ongoing proceeding should be considered retroactive in that proceeding. The article will give some basic information on the above-mentioned legal orders, with Germany and Poland will be chosen as examples of the continental tradition and the United States of America as an example of the common law approach.

This article will also analyse the approach of the ICC to this problem in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (the "Ruto and Sang case").[5] In this case the ICC Appeals Chamber had to decide whether the general ban on retroactive application of substantive law should apply also to procedural criminal law. Secondly, the ICC Appeals Chamber had to define the criteria according to which it would analyze whether a change in the rules of criminal procedure during the course of an ongoing trial were to be considered retroactive, and whether a change in the rules of admission of evidence could be considered detrimental to the accused. The Chamber decided that the basis for assessing whether the application of a rule concerning the introduction of evidence at trial was "retroactive" was the procedural regime in force at the start of the trial.

Finally, in the last part of the article the dogmatic, political and practical consequences of this approach are discussed – as well as the actual consequences of the ICC Appeals Chamber's decision on the outcome of the specific case.

1. GENERAL RULES OF TEMPORAL APPLICATION OF PROCEDURAL CRIMINAL LAW

The fundamental rule of substantive criminal law is that the retroactive application of law is forbidden – a criminal act should be punished on the basis of the law in force at the time the act was committed. Most jurisdictions also recognise an exception to this general rule when the new law is more favourable (lenient) to the accused. On the other hand, where the rules on the application of procedural rules are in question, these rules usually differ in the practice of continental states and that of the common law states.[6]

1.1. The common law concept of "vested rights" (due process theory)

In common law states the term "retroactive" describes an effect which occurs when a new law is imposed.[7] The U.S. Supreme Court defined what it considered to be *ex*

[5] Judgment on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11 OA 10, decision of 12 February 2016.

[6] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu* [Criminal process. An outline of the system], Wolters Kluwer, Warszawa: 2013, p. 144; W. Daszkiewicz, *Proces karny. Część ogólna* [Criminal procedure. General part], Uniwersytet Mikołaja Kopernika, Toruń: 1972, p. 25; J. T. Woodhouse, *The Principle of Retroactivity in International Law*, 41 Problems of Public and Private International Law 69 (1955), p. 70, who even names those states that place this ban in their constitutions.

[7] W.D. Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 California Law Review 216 (1960), p. 217.

post facto laws, prohibited by the US Constitutional prohibition, as follows: "[e]very law that makes an action done before the passing of the law and which was innocent when done, criminal and punishes such action" and also "[e]very law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."[8] The evaluation of whether the retroactive application of procedural law is forbidden is based on an assessment of the position of the accused and on whether the change affects his/her "vested rights."[9] A law is retroactive if it changes the legal consequences of past events, i.e. when it provides that something which was not the law at the date anterior to its passage shall be treated as having been the law on that date.[10] This doctrine is based on the assumption that the judicial evaluation of a situation should be based on the law that was in force when an individual made a choice to act. If the new law is applied retroactively, it may not only affect previously established rights or legal relationships or alter pre-existing legal arrangements; it can also change the future consequences of a choice taken by an individual before the law's entry into force.[11]

The arguments for such a rule have been set out in the jurisprudence of the U.S. Supreme Court.[12] In *Teague v. Lane*[13] the Court stated that a new rule related to a change in criminal procedure should not be given retroactive effect, unless it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." In short, procedural statutes may be applied retroactively as long as there is no injustice done.[14] As the accused made his or her choice(s) as to the most desirable line of defence at the beginning of a trial, it is this point in time that should determine whether the change was detrimental to the accused and has thus a prohibited retroactive effect. In consequence, the notion of "vested rights" is central to the definition of the ideas of fairness, justice, the public good and moral rights and tailors them to a given case.[15]

1.2. Procedural intertemporal rules as rules of conflict of laws in continental systems

Whereas the common law doctrine and jurisprudence are based on the concept of vested rights and on a general assessment of the notion of due process rights, continental

[8] *Calder v. Bull*, 3 U.S. 3 Dall. 386 386 (1798).

[9] *E.g.* Slawson, *supra* note 7, p. 217; Woodhouse, *supra* note 6, p. 77-79 who compares retroactive application of law with a game of chess where the rules change during the game; had the change been made before the commencement of the game the players would have made different moves.

[10] Woodhouse, *supra* note 6, p. 78.

[11] J.G. Laitos, *Legislative Retroactivity*, 52 Washington University Journal of Urban and Contemporary Law 81 (1997), p. 81.

[12] *Linkletter v. Walker*, 381 U.S. 618 (1965), judgment of 7 June 1965, para. 629.

[13] *Teague v. Lane*, 489 U.S. 288 (1989), judgment of 22 February 1989.

[14] M.R. Doherty, *The Reluctance Towards Retroactivity: The Retroactive Application of Laws in Death Penalty Collateral Review Cases*, 39 Valparaiso University Law Review 445 (2004), p. 465; J. Popple, *The Right to Protection from Retroactive Criminal Law*, 13(4) Criminal Law Journal 251 (1989), p. 253.

[15] Woodhouse, *supra* note 6 at 80.

states have clear and structured procedural intertemporal rules. There, intertemporal rules are regulated in statutes. If the law changes in the course of a trial, the statute offers provisions on how to apply the new law in the course of an ongoing case. Usually three different possibilities can be adopted:

1) conducting the trial to the end according to the old law (the old law rule);
2) repeating the trial from the beginning according to the new provisions (the new law rule);
3) the conducted procedural activities remain valid, whereas the new activities in the trial are conducted according to the new provisions (the mixed rule).[16]

Continental statutes (in Poland and Germany) usually operate according to the mixed rule – the conducted activities remain valid, whereas the new activities in the trial are conducted according to the new provisions. In most cases, however, the intertemporal statutes offer no provisions with regard to intertemporal rules, thus the new procedural rules apply as soon as the new rule enters into force and also can be applied retroactively. Therefore, there is no general prohibition of applying evidentiary laws retroactively: if taking evidence that was formerly illegal becomes legal under a new rule, the courts are prone to also use evidence taken before the rule change.

The three options may be chosen in accordance with practical demands. The two first solutions can also be adopted depending on the stage of the trial. In some cases, the new law applies from the start of a certain stage of the proceedings, e.g. from the beginning of the appellate proceedings or when charges are brought.[17] In Poland this rule is also known as the rule of "catching up in the course of a trial" (*chwytania w locie*), which means applying the new provisions to an ongoing case.[18] This approach generally allows procedural law to be applied retroactively. This rule however, has exceptions. In certain situations, where it is practicable a legislator may decide to apply the old law – which in Polish procedure is called "petrification" or "stability of the competence" of a certain court or a court of certain instance to adjudicate an ongoing case (*perpetuatio fori*),[19] if it would be unreasonable to change the forum in the course of a trial and start the trial anew. In this situation however, one of the most important exceptions is also that the validity of procedural activities already concluded is determined according to the old governing regulations.[20]

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[16] *See* M. Cieślak, *Polska procedura karna* [Polish criminal procedure], PWN, Warszawa: 1984, p. 182; Waltoś & Hofmański, *supra* note 6, p. 145. In German doctrine these issues were discussed by G. Dannecker, *Das intertemporale Strafrecht*, Mohr Siebeck, Tübingen: 1993, p. 317.

[17] Act of 27 September 2013 about amending the act - Code of Criminal Procedure and some others acts (Dz. U. 2013, item 1247), Article 36; Act of 11 March 2016 about amending the act – Code of Criminal Procedure and some other acts Dz. U. 2016, item 437), Article 26.

[18] Act of 27 September 2013, Article 27: "[t]he provisions of the acts mentioned in art. 1-26 of this Act, in the wording of this Act, applies to cases initiated before its entry into force, unless the provisions below provide otherwise." In German law the same solution applies, *see* Dannecker, *supra* note 16, p. 317.

[19] Act of 27 September 2013, Article 30.

[20] *Ibidem*, Article 28: "[p]rocedural actions made before the date of entry into force of this Act shall be effective if they have been made in compliance with the provisions in force so far" (Act of 11 March 2016, Article 20).

This general rule and the exceptions to it are accompanied by an additional rule, according to which the new law applies if there are any doubts as to which law reigns (*in dubio lex nova*).[21]

The purpose of introducing a new law – as it is explained by a legislator – is usually to eliminate an inaccurate or ineffective legal solution and to introduce a new law better adapted to practice as construed by a rational legislator.[22] Therefore, as the legislator maintains, the new law should usually be applied straightaway. But if the new rule is more detrimental to the accused, this model – as applied in Poland – has some serious disadvantages. The most serious disadvantage is the fact that neither the legislator nor the court will take the factor of detriment of the accused into consideration, nor the fact that the accused may have certain "vested rights." Most continental legal orders only allow for exceptions to this rule where formalities are concerned. There are no exceptions based on certain vested rights of the accused or the fairness of the proceedings. The legislator's point of interest usually focuses on the protection of judicial efficiency and structure, not on the protection of individual rights.

2. PROCEDURAL INTERTEMPORAL RULES IN THE ROME STATUTE

2.1. The facts of the "Prior Recorded Testimony Decision" in the ICC's Ruto and Sang case

In *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, a case tried as part of the situation in the Republic of Kenya, the International Criminal Court had to interpret the possibility of retroactive application of a procedural law which had changed during the course of the proceedings.

On 12 of February 2016, the Appeals Chamber of the ICC issued a judgment on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony."[23] In that judgment the Appeals Chamber discussed the timeframe for the application of the recently amended Rules of Procedure and Evidence (RPE[24]), as these amendments came into effect in the course

[21] Act of 27 September 2013, Article 29; Act of 11 March 2016, Article 21. *See also* Paluszkiewicz (*Kilka uwag*), *supra* note 3, pp. 341-342.

[22] In German doctrine this opinion has been widely presented: *See*, *inter alia*, C. Roxin, *Strafrecht. Allgemeiner Teil*, Band I: *Grundlagen. Der Aufbau der Verbrechenslehre*, C.H. Beck, München 2006, p. 166; E. Dreher, H. Tröndle, *Strafgesetzbuch und Nebengesetze*, C.H. Beck, München: 1982, p. 20. For Polish doctrine, *see* Czarnecki & Matukin, *supra* note 2, pp. 190-191.

[23] Judgment on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11 OA 10, decision of 12 February 2016 (the Appeals Chamber decision).

[24] Rules of Procedure and Evidence, published by the International Criminal Court, ISBN No. 92-9227-278-0 ICC-PIDS-LT-02-002/13_Eng, 2013, as amended by the Assembly of States Parties to the

of the trial proceeding in the Ruto and Sang case. Two aspects are key in this judgment: Firstly, there is the question of whether the application of a new procedural provision that entered into force in the course of an ongoing proceedings to that proceedings is retroactive; and secondly whether the new rule that allowed for the admission into evidence of a wider scope of prior recorded statements changed the accuseds' situation to their detriment. Finally, there is the question whether the general ban on retroactive application of substantive law should apply at all – and if so what should be the scope of its application – to procedural criminal law.

The questions of how to apply intertemporal rules of procedural law correctly to the circumstances of a concrete case came up when the ICC Prosecutor requested the Trial Chamber to admit prior recorded testimony of certain "Concerned Witnesses" (names redacted) for the truth of their content. The Prosecution wanted to rely thereon in order to establish the guilt of the accused. According to the Prosecution Rule 68, as amended, should be considered to be applicable. The "prior recorded testimony" that Rule 68 addresses should encompass the prior written statements of witnesses made in anticipation of their testimony at trial. The Prosecutor argued that the admission of such evidence should be possible either under Rule 68 RPE, or alternatively under Article 69(2) and (4) of the Statute.[25] The Prosecution contended that even if Rule 68 as amended was to be considered retroactive in application, it would not apply to the detriment of the accused because the amended procedure for the admission of prior recorded testimony would be equally available to both the Prosecution and the Defence.[26]

Both of the accused opposed this motion. On 12 June 2015, Mr. William Samoei Ruto and Mr. Joshua Arap Sang filed their responses to the Prosecutor's Request to Admit Prior Recorded Testimony into Evidence.[27]

On 19 August 2015, the Trial Chamber rendered its "Decision on Prosecution Request for Admission of Prior Recorded Testimony."[28] In this decision it granted (in part) the Prosecutor's Request to Admit Prior Recorded Testimony into Evidence, by admitting into evidence prior recorded testimony under Rule 68(2)(c) and (d) of the amended Rules. According to the Trial Chamber applying Rule 68 as amended to the present case did not have retroactive effect, neither was it detrimental to the accused.

Rome Statute of the International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, Resolution ICC-ASP/12/Res.7.

[25] Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses, registered on 21 May 2015, ICC-01/09-01/11-1866-Red, paras. 1, 239.

[26] Prosecution's request, paras. 15 and 24-31.

[27] For Mr. Ruto: Public redacted version of Corrigendum of Ruto Defence response to the "Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses", ICC-01/09-01/11-1908-Corr-Red, registered 23 June 2015. For Mr. Sang: Public Redacted Version of Corrigendum to Sang Defence Response to "Prosecution's Request for the Admission of Prior Recorded Testimony of [Redacted] Witnesses", ICC-01/09- 01/11-1911-Corr-Red, registered 2 July 2015.

[28] Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2 (Trial Chamber decision), TC, 19 August 2015, paras. 54-55.

It therefore did not fall within the scope of Article 51(4) of the Rome Statute (the Statute), which stipulates that "Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted." The Chamber agreed with the arguments presented by the Prosecutor that admitting prior recorded testimony that was not admissible earlier is not retroactive as it "is not seeking to alter anything which the Defence has previously been granted or been entitled to as a matter of right." According to the Chamber, "The Prosecution is seeking to apply the provision prospectively to introduce items into evidence."[29] The Chamber thus presented its definition of the notion of "retroactivity": a case of retroactive application of a procedural norm exists if, for example, the Prosecution attempted to apply an amended admissibility provision to exclude evidence previously admitted into the record. In consequence, every new procedural provision is applied "prospectively" if its application concerns decisions taken after its entry into force. The Trial Chamber thus found in *Ruto and Sang* that the new procedural rules usually apply in an ongoing trial.

The Chamber also expressed the view that the principle of non-retroactivity, as set out in Article 24(2) of the Statute, pertains only to substantive law, such as the crimes set out in Articles 5 to 8bis of the Statute. It does not apply to procedural law. Article 24(2) and Article 51(4) of the Statute should thus be interpreted and applied differently. Article 24(2) appears in the part of the Statute that governs "General Principles of Criminal Law." The norm forms part of the provisions that together set out the principle of legality before the Court. In the view of the Trial Chamber, if Article 24(2) of the Statute governed all amendments to the Rules, "Article 51(4) would be rendered almost entirely redundant." The Chamber was however careful not to say that this principle "does not generally apply to the Rules." It simply restricted the scope of the norm and stated that it "does not consider that the amended Rule 68 falls under Article 24(2) of the Statute." Therefore, the Chamber considered that the amended Rule 68 can only be considered subject to Article 51(4) of the Statute. And since Article 51(4) only bars the application of the amended Rule 68 if it applies "retroactively to the detriment of the person who is being (…) prosecuted", it raises no obstacles to the application of the new evidentiary rules in this case.

Neither did the Trial Chamber agree with the accused that the application of the new Rule 68 RPE is applied "to the detriment of the person who is being (...) prosecuted" within the meaning of Article 51(4) of the Statute. The determination of whether the application of Rule 68 can be considered detrimental to the accused could not be simply based on the fact that the new rule allows the Prosecution to request the admission of incriminatory evidence against the accused. The amended Rule 68 is a rule of neutral application – it is an admissibility rule that can be invoked equally by all parties to the proceedings before the Court. The accused can also make use of the new rule to defend him/herself to the "detriment" of the Prosecution:

[29] Trial Chamber decision, para. 23.

> The Chamber looks at the application of the amended rule in the abstract, and not at any concrete application of it. To do otherwise would create uncertainty and double standards across procedural amendments, potentially requiring oscillation between amended and unamended rules each time an application was filed.[30]

Both Mr. Ruto and Mr. Sang requested leave to appeal this decision, which was granted. They indicated that in one of the previous judgments, in another case, the Trial Chamber had already held that the retroactive application of amended Rule 68 of the Rules should not occur in pending cases.[31] They therefore wanted the Appeals Chamber to rule that a modification in the law that occurs "during the course of pending proceedings will only apply to those proceedings provided it does not offend the presumption against the retroactive application of legislation."

2.2. The decision of the Appeals Chamber

The Appeals Chamber thus had to decide whether the present case falls within the scope of Article 24(2) or of Article 51(4) of the Statue, and if Article 51(4) applies, whether the application of Rule 68 was both "retroactive" and "detrimental to the accused." To do so, the Appeals Chamber did not have to explain the scope of the new Rule 68 allowing for the admission of prior recorded statements, nor to decide – as the Trial Chamber had done – whether the evidence that the Prosecutor sought to introduce fell within the scope of Rule 68 at all. Nor did it have to decide what the standard of proof was for evaluating the conditions of Rule 68 on admissibility. It only had to decide whether a procedural norm introduced during the course of a trial could be applied in these proceedings from its date of entry into force, and, if so, whether there were any conditions for its application.

The Appeals Chamber found that admitting prior recorded statements of a witness into evidence that had not been admissible before an amendment of rules during the course of the proceedings was both retroactive and detrimental to the accused. Therefore, it fell within the scope of Article 51(4) of the Statute that expressly forbids such retrospective application of the Rules of Procedure and Evidence. The Appeals Chamber thus held that the Trial Chamber had applied the amended Rule 68 of the Rules retroactively to the detriment of the accused and reversed the "Decision on Prosecution Request for Admission of Prior Recorded Testimony" to the extent that the prior recorded testimony had been admitted under amended Rule 68 of the Rules to establish the truth of its contents. According to the Appeals Chamber, any application of the RPE was retroactive if this effected changes in the procedural regime which had been in place at the start of the trial. It held that when deviating from the principle of orality, a Chamber must ensure that doing so is not prejudicial to or inconsistent with

[30] *Ibidem*, para. 24.

[31] Referring to *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the admission into evidence of items deferred in the Chamber's previous decisions, items related to the testimony of Witness CHM-01 and written statements of witnesses who provided testimony before the Chamber of 17 March 2014, ICC-01/05-01/08-3019-Red, 26 August 2014, ft 88 and 111.

the rights of the accused or the fairness of the trial. In the view of the Appeals Chamber, this requires a cautious assessment. The Trial Chamber may, for example, take into account a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether the evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.

Three issues were deemed crucial within this decision. The first was to clarify whether and how the *lex retro non agit* rule established in substantive criminal law applies to changes in procedural criminal law. The second issue was to determine whether the elements of Article 51(4) were satisfied, in particular whether the application of the new Rule 68(2)(d) RPE was to the detriment of the accused. The third question concerned the application of a new Rule of Procedure and Evidence in an ongoing trial. The Appeals Chamber decided that the application of the new procedural rules fell within the scope of Article 51(4) of the Statute and within the scope of the notion of "retroactive" operation of the law.

2.3. Intertemporal procedural rules v. intertemporal substantive rules

The interesting part of the Ruto and Sang decision is the distinction drawn between Article 51(4) and Article 24 of the Rome Statute. The latter provides that no person shall be held criminally responsible under the Statute for conduct which took place prior to the entry into force of the Statute. It also stipulates that if the substantive law applicable to a given case changes prior to a final judgment, the law which is more favourable to the person being investigated, prosecuted, or convicted shall apply.

On the other hand, Article 51(4) of the Statute regulates the circumstances under which amendments to the Rules of Procedure and Evidence shall not be applied to an ongoing case: "[a]mendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted."

Since both intertemporal rules are incorporated into one body of law (the Rome Statute), one may ask whether Article 24(2) includes a general norm and whether Article 51(4) of the Rome Statute is a *lex specialis* to the general rule. Another difference, as compared to national legal systems, is that the intertemporal rules for procedural law were adopted in the Rome Statute and are also applicable to the Rules of Procedure and Evidence.[32] With regards to procedural intertemporal rules the question should be asked whether the prohibition of retroactive application should be understood in the same way and banned to the same extent as in the case of substantive law.

What then, in effect, are the intertemporal rules for the law of the International Criminal Court? In the Rome Statute there is no direct reference to "procedural inter-

[32] There is, however, no provision related to intertemporal rules in the case of a change in the Statute. As the Statute is an international convention there was an assumption that any procedural changes were to be introduced by the Assembly of the State Parties in the Rules of Procedure and Evidence, and not by the laborious procedure of ratification of an amendment of the Statute by all the State Parties.

temporal rules" – Article 51 is simply entitled "Rules of Procedure and Evidence." However, whether a certain rule of criminal procedure can be included within the group of "intertemporal rules" depends on its content, and whether it expresses a rule that commands that a specific procedure is only applicable in legal situations arising or ongoing after a change in the law has entered into force.[33] Applying this meaning, there can be no doubt that Article 51(4) of the Statute embraces intertemporal procedural rules.

The Appeals Chamber established that Article 51(4) of the Statute was applicable to the circumstances of the present case, whereas Article 24(2) should not be applied. Thus, the Appeals Chamber agreed with the Trial Chamber that the principle of non-retroactivity of procedural law before the ICC is governed solely by the specific provisions of Article 51(4) of the Statute. It found that, in principle, Article 24(2) of the Statute concerns substantive law. In order to understand the proper context of Article 24 of the Statute, the Article must be read as a whole. If paragraph 2 is read together with paragraph 1 it is clear that Article 24 of the Statute concerns only conduct giving rise to criminal responsibility. When invoking the rules of contextual interpretation, it should furthermore be noted that Article 24(2) is contained in Part 3 of the Statute, which pertains to general principles of criminal law. The Appeals Chamber thus concluded that the "law" referred to in Article 24(2) of the Statute is only the substantive law which relates to criminal conduct. It does not apply to amendments to the Rules of Procedure and Evidence. Before this judgment hat been rendered, the scope of application of Article 24(2) had been unclear. For example, B. Broomhall presumed that the "law applicable" in Article 24(2) "can only mean the 'applicable law' and that the Rules should be included within the term" – because if Article 24(2) is read by the Court as including the Rules within the term "law", then Article 24 will apply directly to have this effect.[34]

After clarifying the relationship between Article 24(2) and Article 51(2) of the Statute, the Appeals Chamber next considered whether the present situation falls within the scope of Article 51(4) – the only applicable norm in this context.

2.4. Admission of previously recorded testimonies – the consequences of the amendment of Rule 68

The second level of analysis of the Appeals Chamber's decision concerns the nature and scope of the procedural rules that were changed on the basis of the amendment. On 27 November 2013 the Assembly of States Parties amended Rule 68 RPE.[35] The amended Rule 68 expands the existing provisions regarding the admission of prior recoded testimony by including several additional situations in which the admission of

[33] *See* Paluszkiewicz (*Kilka uwag*), *supra* note 3, p. 342.

[34] *See* B. Broomhall, *Article 51*, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, Beck/Hart, München: 2016, p. 1344.

[35] Rules of Procedure and Evidence, as amended by resolution by the Assembly of States Parties, 12 November 2013, ICC-ASP/12/Res.7, available at: https://bit.ly/2wykERj (accessed 30 June 2018).

such testimony is allowed.[36] The Ruto and Sang case was the first instance of use of the amended Rule 68 in practice.[37]

The former Rule 68 provided for the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, under the condition that the witness who had given the previously recorded testimony:

- is not present before the Trial Chamber, and both the Prosecutor and the Defence had had the opportunity to examine the witness during the recording; or
- is present before the Trial Chamber, and he or she does not object to the submission of the previously recorded testimony, and the Prosecutor, the Defence and the Chamber have the opportunity to examine the witness during the proceedings.

Presently, Rule 68(2)(c) allows the Chamber to introduce previously recorded testimony also when the prior recorded testimony comes from a person who has subsequently died, or must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case the prior recorded testimony may be introduced if the Chamber is satisfied that the person is unavailable for the reasons mentioned above and that the prior recorded testimony has sufficient indicia of reliability. The crucial change was introduced in Rule 68(2)(d), which allows for the admission of the prior recorded testimony which comes from a person who has been materially influenced by an improper interference, including threats, intimidation, or coercion, which may relate, *inter alia*, to the physical, psychological, economic or other interests of the person. The fact that the prior recorded testimony goes to the proof of acts and the conduct of an accused may be a factor against its introduction, in whole or in part. In such a case this prior recorded testimony may only be introduced if the Chamber is satisfied that:

- the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony;
- the failure of the person to attend or to give evidence has been materially influenced by an improper interference, including threats, intimidation, or coercion;
- reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness;
- the interests of justice are best served by the prior recorded testimony being introduced; and
- the prior recorded testimony has sufficient indicia of reliability.

This norm complements Article 69(2) of the Statue, which introduces the principle of orality of proceedings. It also gives the exceptions to the general principle that "[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence."

[36] The Appeals Chamber decision of 12 February 2016.

[37] F. Gaynor, K.I. Kappos, P. Hayden, *Current Developments at the International Criminal Court*, 14(3) Journal of International Criminal Justice 623 (2016), p. 696.

Therefore, Rule 68 is a so-called "complementing legal norm", which gives a meaning and sets the scope of the statutory provision.

The Rule was adopted in order to ensure the expeditiousness and efficiency of proceedings by stream lining the presentation of evidence by increasing the instances in which prior recorded testimony could be introduced instead of examining the witness in person.[38] It is worth noting – as mentioned above – that the admission of prior recorded testimony also allows for admission of testimonies of witnesses who have been subjected to improper interferences. This possibility was adopted in order to facilitate the admission of initially recorded evidence of witnesses who were subsequently bribed, intimidated or who disappeared – specifically in the situation in Kenya. The new rule thus became a tool for using recorded testimonies of intimidated witnesses who – out of fear – refused to testify before the Court.[39]

How these rules were interpreted by the Court reflects a struggle of power between the Kenyan government and the Court. The rules even became part of political negotiations, as during the works on the amendments of the RPE Kenya argued that the Assembly of State Parties (ASP) had earlier agreed during the previous sessions that the changes to Rule 68 would not apply retroactively.[40] According to the opinion of the Kenyan government, the amendment was inconsistent with the Rome Statute's protection of defence rights. The ASP had agreed that the new rules would not adversely affect the cases already on trial before the Court. This was supposed to specifically relate to the cases concerning Kenya, including the Ruto and Sang case.[41]

Contrary to the opinion of the Kenyan government, it is clear that any reference in any of the formal resolutions to the formal interpretation of the amended Rule 68 which was adopted at the end of the Assembly would amount to a political interference in a matter being litigated in an ongoing ICC trial.[42] Thus giving such an assurance would infringe on the ICC's judicial independence. The Rome Statute does not allow

[38] According to the opinion expressed by the Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, Official Records, Volume I, ICC-ASP/12/20, at 71, available at: https://asaticc-cpi.int/iccdocs/asp_docs/ASP12/OR/ICC-ASP-12-20-ENG-OR-vol-I.pdf (accessed 30 June 2018).

[39] As the Trial Chamber noted in this case: "[t]he element of systematicity of the interferences of several witnesses in this case which gives rise to the impression of an attempt to methodically target witnesses of this case in order to hamper the proceedings." *See* the Trial Chamber decision, para. 60. *See also* Gaynor, Kappos & Hayden, *supra* note 37, pp. 696-697.

[40] The true purpose, as it is indicated in the doctrine, was to handle the obstruction of the Kenyan Government – this rule allowed for admission of prior recorded testimony which comes from a person who has been subjected to interference – as it was the case in the situation of Kenya. *See* H. Woolaver, E. Palmer, *Challenges to the Independence of the International Criminal Court from the Assembly of States Parties*, 15(4) Journal of International Criminal Justice 641 (2017), p. 649.

[41] According to the documents cited by Woolaver & Palmer, *supra* note 41, p. 651, Kenya sought to have this interpretation affirmed by the ASP (p. 649).

[42] Civil society organizations had called on governments to reject the Kenyan request- specifically the Coalition for the ICC. *See* International Criminal Court independence under threat at annual assembly, available at: https://bit.ly/1Q8eZ5a (accessed 30 June 2018).

the ASP to adopt formal interpretations of the RPE – or to circumscribe the Chambers' interpretation of these Rules.[43] However, after rounds of negotiations, the ASP decided to include a special remark in the Official records of the fourteenth ASP – that Rule 68 would not be applied retroactively, as follows:

> the Assembly recalled its resolution ICC-ASP/12/Res.7, dated 27 November 2013, which amended rule 68 of the Rules of Procedure and Evidence, which entered into force on the above date, and consistent with the Rome Statute reaffirmed its understanding that the amended rule 68 shall not be applied retroactively.[44]

However, the same wording was not used in the resolution. On this basis the Appeals Chamber found in this case that these records, as opposed to resolutions, were irrelevant for the determination of the appeal.[45]

This discussion of the possible interpretations of the Rules shows how the Rules may be turned into a tool whereby the State Parties try to use the ASP to influence ongoing judicial proceedings. What's more, it also shows that the ASP potentially has the power to prescribe the judicial interpretation of the Rules: Firstly, it can pass a formal resolution interpreting a previously amended Rule (as the Appeals Chamber accepted, such a resolution would have an impact on its judicial interpretation). Secondly, the ASP can change the Rules by enacting Rule amendments. In this case, the ASP decided not to exert an exact influence on the Rule's judicial interpretation. However, in the struggle for power it is not clear that such self-restraint will be always the case, and the potential impact of political forces cannot be ignored.

The problem that arose before the ICC Appeals Chamber concerned the question whether the prior recorded evidence, which was deemed admissible under the new rule by the Trial Chamber but was not under the previous law, could be admitted in the ongoing trial (the trial started after 23 January 2012, when the Pre-Trial Chamber issued its *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*), while it would clearly not be admissible if it was considered to have retroactive effect.

2.5. The scope of the notion of "retroactive" (Article 51(4) of the Statute)

A criminal trial is a phenomenon stretched out over time. Thus, changes in the rules pose the question of what limits, if any, should be placed on a new rule's application to trials that started before the adoption of the new rule?[46]

In analysing Article 51(4) of the Rome Statute the notions of "retroactivity" and "detriment" should be examined separately. The first step is to explain what the

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[43] As was observed by Woolaver & Palmer, *supra* note 40, p. 651.

[44] Assembly of State Parties, Official Records – 14th Session, para. 61, available at: https://bit.ly/2HHWJ7p (accessed 30 June 2018).

[45] The Appeals Chamber decision, para. 19.

[46] A paraphrase of the question asked by J.E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harvard Law Review 1055 (1997), p. 1055.

"retroactive application" of the law is, and whether such a retroactive application occurred in the Ruto and Sang case.

In order to make this assessment it was necessary to determine the point in time at which the procedural regime governing the proceedings became applicable to the parties, and in particular to the accused. According to the Appeals Chamber, the basis for assessing whether the application of a rule concerning the introduction of evidence at trial is "retroactive" should be the procedural regime at the commencement of the trial. Usually before the start of a trial the Prosecutor provides the accused with the names of witnesses the Prosecutor intends to call to testify and with the copies of any prior statements made by those witnesses, in accordance with Rule 76(1) of the Rules. The rules applicable to the introduction of the testimony of these witnesses are then part of the above-mentioned procedural regime. That regime, as it was in force at the commencement of the trial, governed the introduction of prior recorded testimony at the start of the trial, then changed during the course of the trial due to the amendment of Rule 68 RPE. Thus in the present case prior recorded testimony, consisting of incriminatory evidence which was admitted into evidence under the amended Rule 68, would not have been admissible under the former Rule 68 RPE. Under the previous regime, the evidence could only have been admitted by way of oral testimony. In consequence, the Appeals Chamber found that the amended Rule 68 was applied retroactively to the on-going trial proceedings within the meaning of Article 51(4) of the Statute.

The test it used was to assess whether "the overall position of the accused in the proceedings can be negatively affected by the disadvantage", i.e. whether his/her position was worse at the time of the amendment of the rules than it was when the trial started. Therefore all the amendments of procedural law that took place after the commencement of a trial were considered to be "retroactive." The Appeals Chamber invoked the doctrine of "vested rights" known from the Anglo-Saxon doctrine rather than the complex set of intertemporal rules that exist in states of continental law. The doctrine of vested rights was, however, tailored to its own purposes. The Court did not wish to rely strictly on that doctrine alone, choosing instead to base its decision on a more flexible assessment of the overall position of the accused. The ICC – as on numerous other occasions – elaborated a *sui generis* interpretation of intertemporal rules. Furthermore, although the text of Article 51(4) was based on a similar regulation which had been adopted before the *ad hoc* tribunals, the Appeals Chamber differentiated the interpretation of similar provisions in the Ruto and Sang case from the regulations and solutions applied before the UN *ad hoc* tribunals.

2.6. The scope of the notion of "detriment" (Article 51(4) Rome Statute)

The next factor that had to be considered was whether the application of the amended rule and admission of prior recorded statements that had not been admissible prior to the amendment was detrimental to the accused. The Trial Chamber adjudicating the case had based its interpretation of the notion "detriment" on whether the changes

resulted in prejudice to "the rights of the accused", but the Appeals Chamber disagreed. It stated that the there was nothing in Article 51(4) of the Statute that indicated that "detriment" must or may be limited only to such rights. The term "detriment" should be interpreted broadly and not be limited to prejudicing the rights of the person who is being prosecuted. It interpreted the notion of "detriment" in its ordinary, that is dictionary, meaning, which involves "disadvantage, loss, damage, or harm."[47] The Appeals Chamber applied – equally – a contextual, a teleological and a dictionary interpretation. In consequence, the Chamber decided that this broad literal meaning of the notion spoke against using only a limited understanding of the term. As Article 51(4) of the Statute concerns amendments to the Rules which relate to proceedings before the Court, including the admission of evidence, the notion of "detriment", within the meaning of Article 51(4) of the Statute, should be understood as "disadvantage, loss, damage or harm to the accused, including but not limited to, the rights of that person." Moreover, "it is not any disadvantage caused by the amendment of a rule that is sufficient for a finding of detriment under article 51(4) of the Statute. Detriment in the sense of article 51(4) of the Statute needs to meet a certain threshold, which is that the overall position of the accused in the proceedings be negatively affected by the disadvantage."[48] In consequence, the Appeals Chamber concluded that

> the application of the amended rule resulted in (i) additional exceptions to the principle of orality and restrictions on the right to cross-examine witnesses, and (ii) as a consequence, in the admission of evidence, not previously admissible in that form under former rule 68 of the Rules or article 69 (2) and (4) of the Statute which could be used against the accused in an article 74 decision.[49]

It results from the above considerations that "the application of this rule negatively affected the overall position of Mr. Sang and Mr. Ruto in the proceedings at hand."[50] Moreover, the Appeals Chamber invoked the interpretation and aim of Article 69 of the Statute, which allows for introducing prior recorded testimony on the basis of Rule 68 only if "these measures shall not be prejudicial to or inconsistent with the rights of the accused." It stressed that the interpretation of this provision should take into account the importance of the principle of orality as established in this provision. The Appeals Chamber did not elaborate on the procedural meaning of "detriment" or how it relates to any retrospective application of law. It did not discuss how it relates to the rights of the accused (as the Trial Chamber did), nor how it relates to due process rights. Nevertheless, this linkage between the notion of "detriment to the accused" as incorporated in Article 51(2) and the wider scope of procedural rights of the accused cannot be ignored.

There can be no doubt that a new provision which allows the prosecution to introduce a piece of evidence that was not admissible earlier changes the legal situation of the

[47] Appeals Chamber decision of 12 February 2016, paras. 76 and 78.
[48] *Ibidem*, para. 78.
[49] *Ibidem*, para. 95.
[50] *Ibidem*.

accused. The new rule in the Ruto and Sang case was introduced when the proceedings were in full course and the accused already knew the charges and the scope of the accusation, as well as the evidence that the prosecution intended to present in support of the charges. If the amendment of Rule 68 RPE had changed nothing with regard to the scope of admissible evidence, there would have been no detriment. In consequence, the Appeals Chamber adopted a casuistic approach instead of the approach taken by the Trial Chamber, which looked at the application of the amended rule in the abstract.

The Appeals Chamber had recourse to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) but decided that it would not follow the ICTY's interpretation of intertemporal rules. The Trial Chamber's ruling in this case had been consistent with the jurisprudence of the ICTY. In addition, the scope of admissibility of prior recorded statements before the ICTY had also been broadened when Rules 92 *quater* and *quinquies* of the ICTY Rules were introduced. Analogously to Rule 68(2)(c) and (d) of the ICC RPE, they allowed for the introduction of the prior recorded testimony of witnesses who subsequently died, became untraceable or too ill to testify or whose failure to attend had been influenced by an improper interference. However, the Rules of Procedure and Evidence before the *ad hoc* tribunals specifically referred to the rights of the accused: Rule 6(C) of the ICTY RPE states that: "[a]n amendment (of the Rules) shall enter into force immediately but shall not operate to prejudice the rights of the accused in any pending case."[51]

In case of *The Prosecutor v. Seselj*, the ICTY Trial Chamber decided that the application of those Rules of Procedure and Evidence that allowed for the admission of new evidence which had previously been inadmissible before did not prejudice the rights of the accused – since he/she could invoke the same rights as the prosecution and could as well request that the new rules of admissibility of evidence apply in order to get written statements and transcripts of testimony admitted. However, in this case the amendments had been introduced into the Rules more than a year before the trial began.[52] As a result, the accused had been informed more than a year in advance of the possibility that the prosecution might make use of these new procedures. However, in *The Prosecutor v. Milan Milutinovic et al.*,[53] the amendments were introduced during the course of the trial (Rule 92*bis* was modified on 12 September 2006) and allowed for the admission of statements or transcripts of a deceased relating to acts and conduct of an accused which had not admissible earlier. Although the defence argued that any probative value of this evidence should be substantially outweighed by the need to ensure a fair trial and that the admission of this evidence would be unduly prejudicial to

[51] Rule 6 (D) and (C) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, 29 June 1995, as amended: IT/32/Rev. 44 of 10 December 2009, last amended on 13 May 2015.

[52] ICTY, *The Prosecutor v. Vojislav Seselj*, Trial Chamber, Decision on the prosecutions consolidated motion pursuant to rules 89 (F), 92 bis, 92 ter and 92 quater of the rules of procedure and evidence filed confidentially on 7 January 2008, IT-03-67-T, 21 February 2008, paras. 33-37.

[53] ICTY, *The Prosecutor v. Milan Milutinovic et al.*, Trial Chamber, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 Quater, IT-05-87-T, 5 March 2007, para. 8.

the accused, the ICTY Trial Chamber nevertheless decided that considering the entirety of the evidence, as requested by the prosecution, would help set the most significant parts of the events in question into the right context. The Chamber stated that it was "unable to identify any way in which admitting the evidence [would] unduly prejudice the rights of the Accused." Also in *The Prosecutor v. Ramush Haradinaj et al.* the ICTY Appeals Chamber noted that on re-trial the latest version of the Rules was to be applied by the Trial Chamber to the ongoing proceedings.[54]

The ICC Appeals Chamber chose a different path, as the text of Article 51(4) of the Statute differs from that applicable to the *ad hoc* tribunals, notably because the text does not contain the term "rights." There is no mention of "prejudice to the rights" – just "detriment." The assumption that only "rights" are embodied in Article 67 of the Statute would narrow down the application of Article 51(4).

The interpretation adopted by the Appeals Chamber is consistent with the one used in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, where the Trial Chamber stated that although Rule 68 had been amended by Resolution ICC-ASP/12/Res.7, the amended rule could not be applied retroactively to the detriment of the person who is being investigated or prosecuted. In this case the Chamber decided to apply the initial Rule 68 concerning prior recorded testimony. Thus, in the present decision the Appeals Chamber remained faithful to the ICC's earlier interpretation of the rule – even though in the previous decision no further reasons were given for this conclusion. To sum up: The problem of the retroactive application of procedural rules has become one further example of situations in which the ICC jurisprudence does not adopt ICTY solutions (a similar situation takes place where witness proofing is concerned). The ICC distinguished the interpretation of Article 51(4) of the Rome Statute from the one used for Rule 6(C) of the ICTY Rules of Procedure and Evidence based on textual differences in the two rules.

2.7. Consequences of applying the due process doctrine to procedural intertemporal law

The ICC's decision to forbid the retroactive application of amendments to the Court's Rules when doing so would be to the detriment of the accused defines the scope of application of the *lex retro non agit* principle to procedural criminal law. The Appeals Chamber has adopted the common law doctrine and has chosen the concept of "due process rights" over the idea of "intertemporal rules" known from the continental doctrine. The "right" of the accused not to have the new law applied, if it works to his/her detriment need not be included in the restrictively interpreted scope of rights under Article 67 of the Statute, as it refers to strictly procedural "rights of the accused." The right not to have new procedural rules applied to the detriment of a party to the proceedings should be perceived in the more general scope of "due process rights" (as

[54] ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Appeals Chamber, IT-04-84-A, 19 July 2010, para. 50, ft 159.

it is a defence right and the prosecution should not enjoy it). Therefore, intertemporal rules in the jurisprudence of the ICC have become another element of the broadly understood concept of "defence rights" and an element of a fair trial. For the ICC, intertemporal rules are not just a set of rules designed to resolve conflicts of law.

This decision is interesting as seen from the Polish perspective, as it comes during a time of extensive and frequent changes in Polish criminal procedure. Even though it is not seen by the legislator, in the Polish doctrine, intertemporal rules are described as "principles" of intertemporal law.[55] However, they cannot be included in the group of legal principles of criminal procedure, as they are rather directions as to the method of proceeding. Nevertheless, they have the character of a guarantee (for the suspect/accused), that has to be taken into consideration. They should not be understood as mere "technical rules" of operation of different states of law or "mechanisms",[56] and should not be limited to solely a mechanism of application of a procedural provision.[57] As participants of proceedings are not prepared for any changes in the law, intertemporal rules should serve to eliminate inequities resulting from such changes. From the jurisprudence it results that the rules of intertemporal law protect certain values. Changes to procedural laws require the legislator to take preventive measures in order to provide adequate guarantees for the accused. The prohibition of retroactive application of laws to the detriment of the accused should apply in both procedural as well as substantive criminal law. Retroactive laws are not accessible to the accused at the time when he takes crucial decisions as to his/her line of defence.[58] Retroactive laws are often characterized by a lack of notice, and/or by inadequate legislatorial consideration of past conditions.[59] This can be described as a violation of the vested rights of the accused – and a violation of vested rights occurs when due process rights are involved.[60] A situation whereby evidence that was not previously admissible becomes admissible later is not, however, a straightforward example of "vested rights" as it does not always prejudice the rights of the accused.

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[55] T. Pietrzykowski, *Podstawy prawa intertemporalnego. Zmiany przepisów a problemy stosowania prawa* [Basic issues of intertemporal law. Law changes and problems of applying the law], LexisNexis, Warszawa: 2011, pp. 60-61. *See also* H. Paluszkiewicz, *Zagadnienia intertemporalne w polskim prawie karnym procesowym* [Intertemporal issues in Polish criminal procedural law], in: J. Mikołajewicz (ed.), *Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza, funkcje, aksjologia*, C.H. Beck, Warszawa: 2015, p. 321. In criminal substantive law *see* Wróbel, *supra* note 1, p. 154.

[56] *See* Paluszkiewicz (*Studia*), *supra* note 3, p. 11.

[57] The notion of an "intertemporal mechanism" was used by A. Matukin-Szumlińska, *Obowiązywanie prawa karnego procesowego w miejscu i czasie. Prawo intertemporalne* [Application of procedural criminal law in place and time. Intertemporal law], in: P. Hofmański (ed.), *System prawa karnego procesowego. Zagadnienia ogólne*, Wolters Kluwer, Warszawa: 2013, p. 499.

[58] J. Popple, *The Right to Protection from Retroactive Law*, 13(4) Criminal Law Journal 251 (1989), p. 254.

[59] Editors, *Today's Law and Yesterday's Crime*, p. 120, citing E. E. Smead, *The Rule Against Retroactive Legislation; A Basic Principle of Jurisprudence,* 20 Minnesota Law Review 775 (1936), p. 775 and B. Smith, *Retroactive Laws and Vested Rights*, 5 Texas Law Review 231 (1927), p. 231.

[60] N. Duxbury, *Ex Post Facto Law*, 58(2) American Journal of Jurisprudence 135 (2013), pp. 135-161 and the case law mentioned there.

With regard to the ICC decision in Ruto and Sang, some concerns must be raised concerning the practical application of the Appeal Chamber's interpretation of Article 51(4) in relation to the amended Rule 68 RPE. In any case in which the amended Rule 68 may apply, a Trial Chamber must decide whether introducing prior recorded testimony is detrimental to the accused. If so, the evidence is inadmissible. This places another burden on the ICC judges. It adds a new element to the admissibility assessment with regard to prior recorded evidence, in addition to those elements specified in Article 69(4) of the Statute. It also adds one further condition to the admissibility rule under Article 69(2) – and this condition does not relate to the reliability of such evidence. A Chamber must also assess the overall situation of the accused using the test established by the Appeals Chamber in the *Ruto and Sang* case. It must take into account a number of factors, including the weight of the evidence and their connection to the core issues of the case, and it must assess whether the evidence is corroborative of other evidence.

When taking into consideration the procedural consequences of this decision – which certainly is favourable to the accused – it could be asked what the temporal limit of application of this provision is. If it is accepted that new evidence cannot be admitted to the detriment of the accused because of procedural rule changes during the course of the proceedings, what if the rule changes (hypothetically) after a sentence has been issued by the Trial Chamber and before an appeal is lodged? Could the new rule apply before the Appeals Chamber? It seems clear that the new rule should also not be applied to the detriment of the accused in the proceedings before the Appeals Chamber. It could also happen that a prior recorded statement was admitted into a proceeding in violation of the Rules, but later – when a case was transmitted to the Appeals Chamber – the RPE rule changed and the admission of such evidence would be legal and proper. In such a case two solutions can be used: one is to repeal the defective judgment and adjudicate the case anew, and the second is to recognize the previously illegal evidence. The first solution leads to the necessity to repeat the first-instance proceedings. But this is then repeated according to the new rules – and the piece of evidence can be admitted anyway. The second solution would save time and costs but appears to have consequences to the detriment of the accused. In addition, as the law did not allow for the admission of a certain piece of evidence, an appellate court cannot affirm the proceedings of the lower court that admitted such evidence.[61] Such a conclusion seems to be dictated from application of the rule of legal certainty and the fact that a person cannot bear the negative consequences that result from a violation of the law by a court. However, it would seem that the need for functionality in applying procedural rules speaks for the second solution. Adopting the first solution would lead to a situation where a judgment has to be revoked while the new trial would be handled in exactly the same way as was done previously – even though this trial had been deemed to be defective.[62]

[61] *See* D. Lerman, *Glosa do postanowienia SN z dnia 9 lipca 2015 r., III KK 375/14* [Commentary on the Supreme Court decision of 9 July 2015], 9 Prokuratura i Prawo 180 (2016), p. 182.

[62] Polish Supreme Court, decision of 9 July 2015, case no. III KK 375/14, 7 Orzecznictwo Sądów Polskich (2016), p. 980.

A rational application of the law should therefore lead to the conclusion that once a new rule enters into force, the previous violations lose their character as a violation of the law and consequently a change of a procedural provision can heal a defective judgment.[63]

CONCLUSIONS

In the times of increased repression and a search for new methods of combating crime, it often happens that the established rights of the accused are considered to be of lower value than the efficiency of the criminal trial. There can be no doubt that the legislator can introduce provisions limiting the rights of the accused – as long as they are in compliance with the constitution and international law – but at the same time it must also be borne in mind that the accused cannot prepare him/herself for these legislative "surprises." His/her due process guarantees can disappear during the course of an ongoing proceeding, and thus his/her legal situation change for the worse from one day to another. His/her whole line of defence can be based on the fact that some type of evidence is not admissible; and after the amendment of the provisions the defence strategy lies in ruins and it may seems to have been a better idea to have pled guilty – which is still possible but carries different (less favourable) consequences at this stage of the trial and is less beneficial. Such a case should not happen in a democratic state. The new rules disturb the rights of the "players" established under the former rules, and any alteration in the law is bound to disturb past rights.[64] The change upsets the expectation of the participants in a criminal trial which commenced based on the previous rules. In a democratic state there should be a legal obligation not to "surprise" an individual with a new solution which unfavourably changes his/her legal situation.[65] Similarly, as in the case of shaping the rules of procedure, also in the course of shaping the intertemporal rules the legislator should search for a "relative balance between the procedural rights of the accused and the victim and to secure effectiveness of the proceedings at the same time."[66] A tendency may be seen – also in continental procedural models (at least in the doctrine) – to assess changes to the procedural law from the perspective of constitutional criteria, in particular the principle of legal certainty, as well as the standards of a fair trial.[67]

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[63] *See* S. Waltoś, *Konwalidacja w procesie karnym* [Convalidation in criminal procedure], 4 Nowe Prawo 494 (1960), p. 494. *Differently* R. Kmiecik, *Commentary on decision of the Polish Supreme Court, decision of 9 July 2015, case no. III KK 375/14*, 7 Orzecznictwo Sądów Polskich 980 (2016), p. 980.

[64] *See* Woodhouse, *supra* note 6, p. 79.

[65] Polish Constitutional Tribunal, judgment of 24 October 2000, case no. SK 7/00, OTK 2000/7/256, Dz. U. (Journal of Laws) 2000, No. 92, item 1024*;* judgment of 3 December 1996, case no. K. 25/95, OTK ZU Nr 6/1996, at 501-502.

[66] *Ibidem*.

[67] Wróbel, *supra* note 1, p. 514. This tendency is also seen in the French literature: G. Mathieu, *L'application de la loi pénale dans le temps*, 1 Revue de science criminelle (1995), p. 263.

It should be noted that the intertemporal rules in Poland should be amended so as to contain a notion of due process rights when a decision has to be taken on whether to apply a new law in the course of an ongoing trial – or at least Polish courts should decide to follow this principle as a consequence of the fair trial principle. When an important public interest and an important personal interest collide, a court should take into consideration the necessity to respect lawfully acquired rights. However, there is no statutory grounds for this.

Finally, in the ICC case of Ruto and Sang it turned out that the Appeal Chamber's particular interpretation of the intertemporal rules embodied in the Statute had serious practical consequences. The epilogue of this decision is as follows: on 5 April 2016, Trial Chamber V(A) decided, by majority, that the case against William Samoei Ruto and Joshua Arap Sang be terminated. The parties have not appealed this decision. Since the Appeals Chamber decided that the evidence contained in the prior recorded testimony of witnesses must be completely disregarded, the Trial Chamber, after assessing the evidence in accordance with the statutory standard, according to which the guilt of the accused should be established beyond reasonable doubt, came to the conclusion that, after the Prosecution had finished presenting its evidence, it could not support a conviction beyond reasonable doubt. The prior recorded statements were statements by the five key Prosecution witnesses. Without them the Prosecution ended up with no convincing evidentiary material. The Prosecution argued that even without the admission of the prior recorded testimony pursuant to Rule 68 of the Rules, it would have presented sufficient evidence and that there was no scope for a decision of "no case to answer." The Prosecution was of the view that the removal of the prior recorded testimony of the "Concerned Witnesses" from the evidentiary record would not be fatal to its case. However, the Trial Chamber later, in its "Decision on Defence Applications for Judgments of Acquittal" decided that the proceedings should be declared a mistrial due to a troubling incidence of witness interference and an intolerable political intrusion that was reasonably likely to intimidate witnesses.[68] The ICC used the specific legal construction of a "mistrial", concluding that to continue the proceedings under such circumstances would be contrary to the rights of the accused, whose trial should not continue beyond the moment when it has become evident that no finding of guilt beyond all reasonable doubt can follow.[69] The consequences of this decision are specific: it is not an acquittal, and it is important to note that there is a difference between terminating a case and entering a judgment of acquittal, "and it is legally significant."[70] The charges were vacated and the accused were

[68] Decision on Defence Applications for Judgments of Acquittal, Trial Chamber, ICC-01/09-01/11, 5 April 2016.

[69] In this regard, the Chamber was "in full agreement with Judge Pocar of the International Criminal Tribunal for the former Yugoslavia, who has expressed this view on several occasions", e.g. *Partial Dissenting Opinion of Judge Pocar to the Prosecutor v. Goran Jelisić*, IT-95-10-A, Appeals Judgment, 5 July 2001, pp. 70-72. *See* Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11, 5 April 2016, para. 19.

[70] *See* https://www.icc-cpi.int/iccdocs/PIDS/publications/EN-QandA-Ruto.pdf (accessed 30 June 2018).

discharged from the process, without prejudice to their presumption of innocence or the Prosecutor's right to re-prosecute the case at a later time. The accused were found neither "guilty" nor "not guilty" of the crimes charged. An acquittal before the ICC, as in many other jurisdictions, would prevent the future re-prosecution of the accused for the same crimes. But, the case against Mr. Ruto and Mr. Sang has been "terminated" and it was thus made clear that they could be prosecuted again in future.

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IS THE COURT OF JUSTICE AFRAID OF INTERNATIONAL JURISDICTIONS?

Abstract:
This article analyses the relationship between the Court of Justice and other international jurisdictions. In particular, it addresses the following question: To what extent is the Court of Justice ready to accept that some aspects of EU law are subject to the jurisdiction of an international body? The answer to this question requires analysis of the precise scope of the principle of autonomy of EU law as this principle could potentially constitute grounds on the basis of which the Court of Justice excludes the transfer of judicial competences to external bodies. For this reason, the article refers to the most important decisions in the field: Opinions 1/91 and 1/92, Opinion 1/09, Opinion 2/13, judgment in C-146/13 Spain v. Parliament and Council and judgment in C-284/14 Achmea. It also discusses the consequences of the application of Article 344 TFEU.

Keywords: Achmea, Article 344 TFEU, autonomy of EU law, dispute settlement, EU law and international law, opinion 1/09, opinion 2/13

INTRODUCTION

When the Court of Justice of the European Union (Court of Justice or Court) ruled on 18 December 2014, in its Opinion 2/13[1] that the Draft Agreement on accession of the European Union (EU) to the European Convention on Human Rights (ECHR) was not compatible with Article 6(2) of the Treaty on European Union (TEU) or with Protocol (No. 8) relating to Article 6(2) TEU, a number of critics were quick to claim that the Court of Justice was afraid of the European Court of Human Rights (ECtHR).[2] As I am well aware that entire monographs have dealt with the Court

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[1] Opinion 2/13 (Accession of the EU to the ECHR), EU:C:2014:2454.

[2] Among others: E. Spaventa, *A very fearful Court?*, 22 Maastricht Journal of European and Comparative Law 35 (2015); W. Michl, *Thou shalt have no other courts before me*, VerfBlog, 23.12.2014, available at: http://verfassungsblog.de/thou-shalt-no-courts/ (accessed 30 June 2018).

of Justice and international courts,[3] this article does not exhaustively deal with the relationship between the Court of Justice and (other) international jurisdictions. It is rather confined to addressing the admittedly provocative question of whether the Court is afraid of other international jurisdictions. In doing so, I should first like to recall a number of features in the relationship between EU law and international law, and then turn to a number of decisions of the Court on the concept of autonomy in the EU legal order, before examining the above referenced Opinion. Perhaps not surprisingly, I shall conclude that the relationship between the Court and other international jurisdictions, as reflected in the Court's case-law, is a consequence of the normative institutional framework of the Treaties and that the question posed in the title of this article is, accordingly, to be answered in the negative.

This article deals with international jurisdictions which have been set up pursuant to an international treaty or convention to which the EU is a party,[4] and which have a mandate to adjudicate conflicts arising from the implementation of such treaty or convention. It does not, however, deal with the specific dispute-settlement mechanisms of arbitration in the context of investment treaties the EU has entered into.[5] In this context one should also mention the recent Opinion 2/15 concerning the Free Trade Agreement with Singapore, in which the Court ruled that the dispute resolution mechanism contained in this Agreement falls within the competence shared between the Union and the Member States.[6] Moreover, very recently the Court replied to questions asked by the German Bundesgerichtshof in the *Achmea* judgment.[7] The procedure concerned the compatibility of the recourse to arbitration in a dispute resolution clause contained in a bilateral investment treaty concluded between two EU Member States. This decision of the Court of Justice, even though it does not concern an international agreement to which the EU is a party, is nevertheless important for the purposes of this article, to the extent that it deals with the autonomy of EU law.

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[3] *See e.g.* T. Lock, *The European Court of Justice and International Courts*, Oxford University Press, Oxford: 2015; and specifically dealing with the relationship of the Court of Justice and the ECtHR, P. Gragl, *The EU's Accession to the ECHR*, Hart Publishing, Oxford: 2013; and more recently F. Fabbrini, J. Larik, *The Past, the Present and the Future Relation between the European Court of Justice and the European Court of Human Rights*, 35 Yearbook of European Law 145 (2016).

[4] Whether it has been already been a party initially (*see e.g.* Opinion 1/91 (EEA Agreement – I), EU:C:1991:490, and Opinion 1/92 (EEA II) EU:C:1992:189, below) or has become a party to such an international treaty or convention (*see e.g.* Opinion 2/13 (Accession of the EU to the ECHR)) concerning the Council of Europe and the ECHR).

[5] On this question, *see* M. Szpunar, *Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU*, in: F. Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration*, Jurisnet, New York: 2017, pp. 85-123; and A. Rosas, *The EU and international dispute settlement*, 1(1) Europe and the World 1 (2017), pp. 18-26.

[6] Opinion 2/15 (EU-Singapore Free Trade Agreement), EU:C:2017:376, paras. 285-304.

[7] Case C-284/16 *Slowakische Republik (Slovak Republic) v. Achmea BV*, EU:C:2018:158.

1. INTERNATIONAL LAW BEFORE THE COURT OF JUSTICE

It is well known that the EU is founded on international treaties, adopted by the Member States and ratified according to the constitutional requirements of these states. These treaties constitute the very foundation of the EU legal order. In addition to the Treaties, international agreements concluded by the Union with other subjects of international law (states or international organisations) constitute an integral part of EU law,[8] as does, of course, secondary law adopted by the Union itself according to the procedures provided for in the Treaties.

Questions relating to the interpretation of the Treaties and the interpretation and validity of secondary law constitute the "bread and butter" of the Court's activity. In the vast majority of cases, the Court deals with a wide variety of issues of substantive primary or secondary law – starting with the four freedoms, cooperation in criminal and civil matters, through to asylum law, taxation, consumer protection and many other areas in which the EU legislator has exercised its competence. By contrast, the interpretation of international agreements and of international law constitutes, in quantitative terms, only a marginal area of the Court's activity.

One can therefore observe in the case-law of the Court that while the very existence of EU law stems from international law, international law does not normally constitute a subject matter of disputes arising from the application of EU law. One could compare this situation to domestic legal practice. Even though a domestic legal order is based on a national constitution (written or unwritten), one could hardly say that the majority of practicing lawyers are constitutional lawyers.[9]

When addressing the somewhat complex relationship of EU law and international law, I think that the mere fact that EU law has its origins in international law is not necessarily crucial. I would submit that the most interesting questions concerning the relationship between EU law and international law result from the fact that the EU itself acts as an international player. After the entry into force of the Treaty of Lisbon, there is no doubt that the EU is vested with legal personality in international law and can therefore take upon itself this role vis-à-vis the international community.[10]

2. INTERNATIONAL AGREEMENTS

The EU exercises its external competence by concluding international agreements, as provided for in Article 216 of the Treaty on the functioning of the European Union

[8] This has been settled case-law since case 181/73 *R. & V. Haegeman v. Belgian State*, EU:C:1974:41, para. 5.

[9] The Court of Justice has expressly referred to the Treaties as the "constitutional charter" of the EU, despite them being concluded in the form of an international agreement, *see* Case C-294/83 *Parti écologiste Les Verts v. European Parliament*, EU:C:1986:166, para. 23; and reiterated this point in Opinion 1/91 (EEA I), para. 21, in relation to the international order.

[10] Even prior to the Treaty of Lisbon, there was never any doubt that the European Community had legal personality; *see* ex-Article 281 EC and now Article 47 TEU.

(TFEU). Since this provision is a specific expression of the principle of conferral enshrined in Article 4(1) TEU,[11] the rules on the exercise of EU competences apply as follows: if the competence in question is exclusive, the EU must act alone; if this competence is shared with the Member States, and not yet exercised, the EU has the choice whether it acts alone or together with the Member States, in the form of a mixed agreement.

As the judicial institution of an organisation which is marked by the principle of institutional balance,[12] it is the task of the Court to ensure, in the words of Article 19 TEU, that in the interpretation and application of the Treaties the law is observed. Together with the specialised provisions in the TFEU, this provision ensures that the Court has the last word when it comes to determining the validity of international agreements and secondary EU law, as well as interpreting any provision of EU law, including primary law. Article 19 TEU and its predecessors (Article 164 EEC and Article 220 EC) have been used by the Court on numerous occasions in support of this argument.[13]

One of the reasons for the considerable powers of the Court in the field of external relations of the EU is the Opinion procedure, enshrined in Article 218(11) TFEU. By virtue of this provision, a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. In this procedure, which has been resorted to less than 20 times since 1957,[14] the Court acts in a quasi-legislative capacity. This "exceptional procedure of a prior reference to the Court of Justice"[15] exists in order "to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the [Union]."[16]

If the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended, or the Treaties are revised. In other words, the Court's role is confined to interpreting. The consequences of such interpretation are determined by the Treaty in Article 218(11) TFEU. If an agreement cannot enter into force, it is not the fault of the Court. It is the "fault", if you like, of the Treaties.

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[11] S. Lorenzmeier, in: E. Grabitz, M. Hilf, M. Nettesheim (eds.), *Das Recht der Europäischen Union*, C.H. Beck, Munich: 2016, Article 218(6) TFEU.

[12] Which is the corollary to the institutional aspects pertaining to the rule of law in a regular state.

[13] *See e.g.* Case 294/83 *Parti écologiste Les Verts v. European Parliament*, para. 25.

[14] The first time being in 1975, Opinion 1/75 (OECD Understanding on a Local Cost Standard) EU: C:1975:145.

[15] *Ibidem*, para. 11.

[16] *See ibidem*, para. 10. For instance, the Union might be held liable on the international plane if it had to pull out of an agreement it adhered to because subsequently the Court found this agreement to be incompatible with the Treaties. For this reason, the procedure is referred to as "preventive judicial review." *See* Lorenzmeier, *supra* note 11, Article 218 TFEU, pt. 69.

3. EU COMPETENCE TO ENTRUST JUDICIAL COMPETENCES TO AN INTERNATIONAL BODY

The Court has on numerous occasions affirmed that the Union has the competence to conclude agreements which grant jurisdiction to external judicial bodies. Thus, in Opinion 1/91 (EEA Agreement – I), the Court held that "the Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions."[17] This view was repeated in Opinion 1/09[18] and Opinion 2/13.[19] These cases are discussed in more detail below.

At the same time, EU law imposes certain limits on the creation of external judicial bodies by Member States and by the Union acting internationally. Such limits can result from the Treaties themselves or from the principles developed by the Court of Justice in its case-law, such as the principle of autonomy of EU law, understood as the preservation of the "essential character" of the Court's judicial function.[20]

4. ARTICLE 344 TFEU: A LIMIT TO ENTRUSTING JURISDICTION

Article 344 TFEU, according to which "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein", confers an exclusive jurisdiction on the Court of Justice in matters of EU law. As a consequence of this provision, Member States cannot "escape" into the sphere of public international dispute resolution when it comes to an area which is governed by EU law. Article 344 TFEU is a key provision of the whole EU constitutional order and a specific expression of the principle of loyal cooperation under Article 4(3) TEU.[21] Nevertheless, this provision has not been invoked by the Court as often as Article 19 TEU. Indeed, it took considerably longer for Article 344 TFEU to surface in the Court's jurisprudence.[22]

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[17] Para. 40.

[18] Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123, para. 74. For a critical reception of this principle in the legal doctrine, *see e.g.* C. Eckes, *EU Accession to the ECHR: Between Autonomy and Adaption*, 76(2) Modern Law Review 254 (2013); T. Lock, *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order*, 48(4) Common Market Law Review 1025 (2011).

[19] Opinion 2/13 (Accession of the EU to the ECHR), para. 182.

[20] *See* in detail *infra*.

[21] Case C-459/03 *Commission v. Ireland*, EU:C:2006:345, para. 169, and Opinion 2/13 (Accession of the EU to the ECHR), para. 202.

[22] Although Article 344 TFUE has been mentioned in different cases such as Opinion 1/91 (EEA I), para. 85, and Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123, para. 63, it was not given a prominent role until the ruling in Opinion 2/13 (Accession of the EU to the ECHR). *See also* S. Johansen, *The Reinterpretation of TFEU Article 344 in Opinion 2/13 and its Potential Consequences*, 16(1) German Law Journal 169 (2015), p. 171.

For the first time the provision of Article 344 TFEU was interpreted by the Court in the MOX Plant case,[23] in which Ireland brought actions against the United Kingdom before an arbitral tribunal and before the International Tribunal of the Law of the Sea in Hamburg - on the basis of the United Nations Convention on the Law of the Sea (UNCLOS) - with respect to resolving the dispute concerning the MOX plant located at Sellafield, on the British coast of the Irish Sea.

The Commission took the position that Ireland and the UK were in dispute in an area governed by substantive EU law and that they were therefore subject to the exclusive jurisdiction of the Court of Justice.[24] As UNCLOS is a mixed agreement, the Commission argued that the provisions of the Convention on which Ireland relied before the Arbitral Tribunal came within the scope of the Community's external competence in matters relating to environmental protection, as provided for under Article 192 TFEU,[25] and thus the interpretation and application of those provisions in the context of a dispute between Member States are matters falling within the exclusive jurisdiction of the Court by virtue of Article 344 TFEU.[26]

The Court sided with the Commission. It held[27] that by instituting dispute-settlement proceedings against the United Kingdom of Great Britain and Northern Ireland under the United Nations Convention on the Law of the Sea concerning the MOX plant, Ireland had failed to fulfil its obligations under Articles 4(3) TFEU[28] and 344 TFEU.[29]

We can see, therefore, that Article 344 TFEU substantially limits the capacity of Member States to bring disputes in the domain of public international law to entities outside the EU edifice.[30] Thus, Article 344 TFEU shields the EU legal order from external influences and, in consequence, guarantees its autonomy.[31]

5. THE PRINCIPLE OF AUTONOMY OF EU LAW AS A LIMIT TO ENTRUSTING JURISDICTION

The principle of autonomy has both an internal and an external dimension.[32] While the internal dimension of autonomy of the EU legal order vis-à-vis the Member States

[23] Case C-459/03.

[24] For the arguments on which the Commission relied in the proceedings, *see ibidem*, paras. 60 et seq.

[25] Formerly Article 175 EC.

[26] Formerly Article 292 EC.

[27] Case C-459/03 *Commission v. Ireland*, para. 182.

[28] Principle of loyal cooperation, formerly Article 10 EC.

[29] Formerly Article 292 EC.

[30] For the impact of Article 344 TFEU also in the light of Opinion 2/13 (Accession of the EU to the ECHR), *see* Johansen, *supra* note 22, p. 169.

[31] Opinion 1/91 (EEA I), para. 25; Lock, *supra* note 3, p. 81; S. Douglas-Scott, *Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession the EU to the ECHR*, Europarättslig Tidskrift 29 (2016), p. 33.

32 For these terms *see* Lock, *supra* note 18, p. 1028; *see also* P. Gragl, *Strasbourg's External Review after the EU's Accession to the ECHR: A Subordination to the Luxembourg Court?*, 17 Tilburg Law Review 32 (2012), p. 36.

has been a prominent subject in the Court's case-law since the landmark judgments in cases 26/62 *Van Gend en Loos* and 6/64 *Costa/ENEL*,[33] the Court has only had the chance to rule on the external dimension vis-à-vis the international legal order, and especially its capacity to limit external jurisdiction, in a rather small number of cases, which are presented below.

5.1. Opinions 1/91 and 1/92

Opinions 1/91 and 1/92 dealt with the system of judicial oversight established by the draft EEA agreement.

The first draft agreement provided for a system with an "EEA Court" composed of eight judges, including five from the Court of Justice, and an "EEA Court of First Instance" composed of five judges including three from the (then) Court of First Instance.

The Court held, in Opinion 1/91 (EEA I), that the Union acting in the international sphere may "submit itself to the decisions of a court which is created or designated by [the international] agreement as regards the interpretation and application of its provisions."[34] However, where the agreement restates or refers to the fundamental provisions of the EU legal order, the judicial mechanism must respect the exclusive jurisdiction of the Court.[35]

The Court found that *in casu* the dispute resolution mechanism provided for in the draft agreement was incompatible with EU law,[36] as it risked undermining the autonomy of the EU legal order, inasmuch as the EEA Court, in interpreting the term "contracting party", would have to rule on the respective competences of the Union and the Member States as regards the matters governed by the provisions of the EEA agreement.[37] Furthermore, as the EEA agreement replicated a good deal of primary and secondary internal market law, coupled with an obligation of homogeneous interpretation, the EEA court, in interpreting the EEA agreement, would have to determine the meaning of corresponding provisions of EU law.[38] Moreover, the Court took issue with the organic links between the Court of Justice and the EEA Court. It would almost be impossible for the judges sitting on both the Court of Justice and the EEA court, when sitting in the Court of Justice, to tackle questions with completely open minds where they had already taken part in determining those questions as members of the EEA Court.[39] Finally, the Court found the proposed system of non-binding preliminary rulings unacceptable, under which the Court of Justice was to give to the courts and tribunals of the EFTA

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[33] Respectively: EU:C:1963:1 and EU:C:1964:66.

[34] Opinion 1/91 (EEA I), para. 40; M. Bronckers, *The Relationship of the EC Courts with Other International Tribunals: Non-Committal, Respectful or Submissive?* 44 Common Market Law Review 601 (2007), p. 614, doubts the validity of this statement in the light of the case-law to date.

[35] Opinion 1/91 (EEA I), paras. 41-46.

[36] *Ibidem*, para. 36.

[37] *Ibidem*, para. 34.

[38] *Ibidem*, para. 45.

[39] *Ibidem*, para. 52. This is what I would refer to as "normative schizophrenia."

states purely advisory opinions.[40] This, in the opinion of the Court, would have changed the nature of the function of the Court as conceived by the Treaties.[41]

Following Opinion 1/91, the contracting parties to the EEA agreement did their homework and created a system under which a new EFTA Court was completely separated from the Court of Justice and under which that court could not determine the interpretation of EU provisions. Accordingly, in Opinion 1/92, the Court, after reiterating that an international agreement may confer new powers on the EU judiciary provided that this "does not change the essential character of the function of the Court as conceived in the treaties",[42] found the envisaged system to be compatible with the Treaties.

5.2. Opinion 1/00

Roughly ten years later, in Opinion 1/00,[43] the Court found that the preservation of the autonomy of the EU legal order required that the essential character of the powers of the EU and its institutions as conceived in the Treaty remain unaltered.[44] However in the case before it, given that judicial oversight of the agreement on the establishment on a European Common Aviation Area was to be ensured by the Court of Justice, the question of the relationship between that Court and other jurisdictions did not arise.

5.3. Opinion 1/09

Another landmark decision of the Court concerning the competence to interpret EU law by an external judicial organ is Opinion 1/09.[45] The EU Member States and third-states parties to the European Patent Convention[46] were considering the creation of a court with jurisdiction to hear actions related to European and Community patents. The envisaged agreement was to establish a European and Community Patent Court composed of a court of first instance, comprising a central division and local and regional divisions, and a court of appeal, having jurisdiction to hear appeals brought against decisions delivered by the court of first instance.

According to Article 48 of the draft agreement, the Patent Court was empowered (and the Appeal Court was obliged) to refer the questions of interpretation and validity of EU law to the Court of Justice. Preliminary rulings handed down by the Court of Justice would be binding on the Patent Court.

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[40] This envisaged procedures had been characterised by the fact that it would have the EFTA states free to authorise (or not) their courts to refer questions to the Court of Justice, that it would not have made such a reference obligatory in the case of courts of last instance in those states and that there would have been no guarantee that the answers given by the Court of Justice in such proceedings would have been binding on the courts making the reference.

[41] *Ibidem*, para. 61.

[42] Opinion 1/92 (EEA II), EU:C:1992:189, para. 32.

[43] Opinion 1/00 (European Common Aviation Area), EU:C:2002:231.

[44] *Ibidem*, para. 12.

[45] Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123.

[46] Signed in Munich on 5 October 1973.

In Opinion 1/09, the Court recalled that the creation of such a court was precluded neither by Article 262 TFEU nor by Article 344 TFEU. The former provision provides for the option of extending the jurisdiction of the European Union courts to disputes relating to the application of acts of the European Union which create European intellectual property rights. The latter provision – as has been already recalled above – prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.[47]

Nevertheless, the Court observed that such a court would be placed outside the institutional and judicial framework of the EU. It would not be a part of the judicial system provided for in Article 19(1) TEU.[48] The Court continued that an international agreement providing for the creation of a court responsible for the interpretation of its provisions was not, in principle, incompatible with EU law.[49] EU competence in the field of international relations and its capacity to conclude international agreements necessarily entailed the power of the Union to submit itself to decisions of a court created or designated by such agreements regarding the interpretation and application of their provisions.[50]

The Court noted, however, that the agreement under consideration intended to create a court whose jurisdiction would not be limited to the interpretation of that agreement but would principally cover the application of other EU law instruments.[51] Thus the Court found the draft agreement to be incompatible with EU law.

The essential argument was not that the draft agreement would affect the competencies of the Court of Justice itself, but rather that it would deprive national courts of the Member States of the application of some EU law instruments.[52] The Court concluded that

> conferring on an international court which is outside the institutional and judicial framework of the EU an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply EU Law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of EU Law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the EU and on the Member States and which are indispensable to the preservation of the very nature of EU Law.[53]

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[47] In this respect, Article 344 TFEU is seen as a provision addressed to Member States to deal with cases of doubt about which court to refer to in a case of parallel jurisdiction; *see* Johansen, *supra* note 22, p. 174.

[48] *See* Opinion 1/09 (Agreement creating a unified patent litigation system), para. 71.

49 *See e.g.* Opinions 1/91 (EEA I), and 1/92 (EEA II), as well as Opinion 1/00 (European Common Aviation Area).

[50] *See* Opinion 1/09 (Agreement creating a unified patent litigation system), paras. 40 and 70.

[51] *Ibidem,* paras. 77-78. These would concern essentially the EU Regulations creating the system of a Community Patent (now a Unitary Patent).

[52] *Ibidem,* para. 80.

[53] *Ibidem*, para. 89. The Court, differently than in its Opinion 1/91 on the establishment of an EEA Court, does not base its reasoning on the ability of the Patent Court to rule on provisions of EU law, but rather on the fact that the involvement of an external court would change the system of judicial cooperation between the Court and the Member States, *see* Eckes, *supra* note 18, p. 259.

It is true that the draft agreement provided for a preliminary ruling mechanism. Nevertheless, this factor was not relevant for the Court, since the proposed Patent Court would have been an external judicial body. In that sense, the Patent Court cannot be treated in the same way as, for example, the Benelux Court which is "a court common to a number of Member States, situated, consequently, within the EU judicial system."[54] For this reason, the Patent Court's decisions would not be subject to "mechanisms capable of ensuring the full effectiveness of EU Law", such as Member States' liability and infringement actions for breach of EU law.[55]

The obstacles to the creation of a Patent Court resulting from the Opinion 1/09 had to be overcome by the Member States by drafting another instrument that would take into account the Opinion of the Court. The Agreement on a Unified Patent Court (UPC) was finally adopted in 2013. It is open to accession by the Member States only.

This implies that, from the point of view of the Court, the Patent Court must be considered as a court or tribunal of a Member State within the meaning of Article 267 TFEU.[56] This status of the Patent Court is confirmed by several provisions of the Agreement. The possibility of referring preliminary questions to the Court of Justice is expressly provided for in Article 21 of the agreement. Article 22 reaffirms that the Member States are "jointly and severally liable for damage resulting from an infringement of Union law by the Court of Appeal, in accordance with Union law concerning non-contractual liability of Member States for damage caused by their national courts breaching Union law." In accordance with Article 23, the actions of the Unified Patent Court are "directly attributable to each contracting Member State individually, including for the purposes of Articles 258, 259 and 260 TFEU, and to all contracting Member States collectively."

5.4. Case C-146/13 *Spain v. Parliament and Council*

The issues discussed by the Court in Opinion 1/09, which concerned the competence to interpret EU law by an external body, constituted one of the aspects of the litigation in case C-146/13 *Spain v. Parliament and Council*.[57] It is important to recall that the so-called "patent package" consists not only of the Agreement on the UPC, but also of two EU Regulations: one creating a European patent with unitary effect ("unitary patent"); and the second establishing a language regime applicable to the unitary patent. These regulations implement enhanced cooperation in the creation of unitary patent protection. All EU countries will participate in this enhanced cooperation except for Spain, Italy and Croatia.

[54] *Ibidem,* para. 80.

[55] *Ibidem*, paras. 86-88.

[56] This is questioned by legal doctrine with regard to the criteria established by the Court of Justice in case C-196/09 *Paul Miles and Others v. Écoles européennes*, EU:C:2011:388. *See e.g.* M. Amort, *Zur Vorlageberechtigung des Europäischen Patentgerichts: Rechtsschutzlücken und ihre Schließung*, Europarecht (2017), p. 56; J. Gruber, *Das Einheitliche Patentgericht: vorlagebefugt kraft eines völkerrechtlichen Vertrags?*, Gewerblicher Rechtsschutz und Urheberrecht International (2015), p. 323.

[57] EU:C:2015:298.

Following the adoption of the two Regulations in December 2012, the majority of Member States, except for Poland but with the addition of Italy,[58] proceeded to sign the Agreement on a Unified Patent Court. As has been already stated, the Patent Court will deal with disputes relating to European and unitary patents, at to which it will have exclusive jurisdiction.

The Agreement on a Unified Patent Court entrusts to the Court of Justice the competence to interpret both of the EU law instruments that form part of the "patent package", i.e. Regulation (EU) No 1257/2012 of 17 December 2012[59] implementing enhanced cooperation in the area of the creation of unitary patent protection and Regulation (EU) No 1260/2012 of 17 December 2012[60] establishing a language regime applicable to the unitary patent.

Regulation No 1257/2012 has been intentionally stripped of all its substantive content. The proposal for a Unitary Patent Regulation specified, in Articles 6 to 8, the content of the exclusive right granted to patent holders. However, part of the patent community and the UK government vigorously lobbied for the deletion of those articles, on the grounds that they paved the way for preliminary rulings of the Court of Justice. This would arguably unduly prolong infringement proceedings and expose highly technical matters of patent law to examination and assessment by a non-specialised court. Consequently, those articles were deleted from the proposal for a Unitary Patent Regulation and transferred to the Agreement on a Unified Patent Court (see Articles 25-27 thereof).

This is exactly one of the essential problems that Spain sought to target in case C-146/13 *Spain v. Parliament and Council*, in which Spain challenged the validity of Regulation No 1257/2012. One of the pleas questioned in particular whether Article 118 TFEU could constitute the legal basis of the Regulation. According to Spain, that Regulation did not create the "uniform protection" mentioned in Article 118 TFEU insofar as it did not define and harmonize the content of such a uniform protection. The Court dismissed that plea as well as all others, thereby confirming the validity of Regulation No 1257/2012.

In the absence of any substantive provision in Regulation No. 1257/2012, one may legitimately wonder to what extent the Court of Justice will influence European patent law. One could take the view that Article 5 of Regulation No. 1257/2012 may be viewed as incorporating Articles 25 to 27 of the Agreement on a Unified Patent Court into the EU legal order by way of reference. Thus Article 5(3) of that regulation refers to national laws. Those national laws would have been superseded by Articles 25 to 27 of the Agreement on a Unified Patent Court. This would mean that Article 5(3) of Regulation No. 1257/2012 also contains an indirect reference to Articles 25 to 27 of

[58] Even though Italy and Spain do not participate in this enhanced cooperation due to an unresolved conflict about the language regime; *see* Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, [2011] OJ L 76.

[59] [2012] OJ L 361.

[60] [2012] OJ L 361.

the agreement on a Unified Patent Court, which in turn would mean that the Court of Justice is competent to rule on those articles.

5.5. Opinion 2/13

By way of the Opinion procedure,[61] the Court was asked to reply to the question of the Commission whether the draft agreement between the Member States of the Council of Europe and the European Union providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms was compatible with the Treaties.

As is well known, the Court found that it was not. The Court's Opinion is clear and leaves no room for doubt: the draft accession agreement is not compatible with the Treaties. More specifically, the Court identified seven specific points in which the draft agreement lacked necessary provisions or requires modification.

First, the agreement does not contain a provision clarifying the relationship between Article 53 ECHR and Article 53 of the Charter.[62]

Secondly, the draft agreement does not contain a provision securing the observance of the principle of mutual trust between the Member States of the EU, which risks undermining the autonomy of EU law.[63] Such principle excludes an approach, based on the ECHR, whereupon one Member State would have to check in each specific case whether the other Member State has observed the human rights of the ECHR.[64]

Thirdly, the draft agreement does not contain a provision clarifying the relationship between Protocol No. 16 ECHR[65] and the preliminary reference procedure under Article 267 TFEU.[66]

Fourthly, the Court declared that the accession agreement should contain a provision *expressly* excluding the ECtHR's jurisdiction within the scope of EU law, so as to make it compatible with Article 344 TFEU.[67]

Fifthly, the co-respondent mechanism envisaged by the draft agreement does not ensure that the specific characteristics of the EU and EU law are preserved.[68] The Court

[61] Opinion 2/13 (Accession of the EU to the ECHR).

[62] *Ibidem*, paras. 188-190. For an in-depth analysis of this argument, *see* E. Alkema, R. van der Hulle, *Safeguard Rules in the European Legal Order: The Relationship between Article 53 ECHR and Article 53 of the CFR*, 35 (1-8) Human Rights Law Journal 8 (2015), pp. 17-19.

[63] Opinion 2/13 (Accession of the EU to the ECHR), paras. 194-195.

[64] The emphasis on the principle of mutual trust has been widely criticised. In this context it is important to recognise that mutual trust must not be confused with blind trust, which might encourage turning a blind eye to violations of fundamental rights between Member States. For a detailed analysis of this problem, *see* K. Lenaerts, *La vie après l'avis: Exploring the Principle of Mutual (Yet not Blind) Trust*, 54 Common Market Law Review 805 (2017).

[65] Protocol No. 16 ECHR, signed on 2 October 2013, i.e. after the finalization of the draft agreement on EU accession, provides for advisory opinions by the ECtHR on the interpretation of the ECHR rights at the request of courts from the contracting parties that have acceded to the Protocol.

[66] Opinion 2/13 (Accession of the EU to the ECHR), paras. 198-199.

[67] *Ibidem*, para. 213.

[68] *Ibidem*, para. 235.

finds fault in the fact that it would be the ECtHR which would take a binding decision on the EU rules concerning the division of competences and on the criteria for the attribution of acts in the context of the co-respondent mechanism.[69]

Sixthly, the prior involvement procedure envisaged by the draft agreement runs afoul of EU law in that the question whether prior involvement is triggered cannot be left to the ECtHR, but must be conferred on an EU institution.[70] Moreover, the prior involvement procedure should be extended to the interpretation of secondary law, instead of just with respect to its validity.[71]

Finally, in its seventh point the Court holds that it would prove incompatible with the "specific characteristics" of EU law to confer jurisdiction in matters of Common Foreign and Security Policy (CFSP) exclusively on an international court like the ECtHR, while at the same time they fall outside the ambit of judicial review by the Court of Justice.[72]

From the mere description of these seven points, it is clear that it is not accession to the ECHR as such that poses a problem with respect to the EU, but that it is the role of the European Court of Human Rights and, in particular, its relationship with the Court of Justice of the European Union that has not been adequately addressed in the draft accession agreement. Many critics were quick to pass a very negative judgment on the Opinion,[73] while others were more balanced and could see some sense in what the Court of Justice was doing.[74]

5.6. Case C-284/16 *Achmea*

The decision of the Court in *Achmea* did not concern the interpretation of a dispute resolution clause contained in an agreement to which the EU is a party. It dealt with a bilateral investment treaty (BIT) concluded between two Member States, namely the Netherlands and the Slovak Republic (which succeeded to the rights and obligations of the Czech and Slovak Federative Republic). Article 8 of this BIT, as it is the case in a

[69] *Ibidem*, paras. 224-225.

[70] *Ibidem*, para. 238.

[71] *Ibidem*, paras. 244-247.

[72] *Ibidem*, paras. 249-257. As for points 4 and 7, the Court only invokes Article 344 TFEU insofar as areas of EU competence are concerned. It does not reject the jurisdiction of the ECtHR in the area of CFSP on the grounds of Article 344 TFEU. Therefore, the criticism that the Court could not reject the ECtHR's competence in CFSR matters as a result of Article 344 TFEU is somewhat beside the point, *see* S. Peers, *The EU's accession to the ECHR: The dream becomes a nightmare*, 16 German Law Journal 213 (2015), p. 221. Even if one would like to invoke Article 344 TFEU in this context, it should be stressed that – as already mentioned above – Article 344 TFEU not only attributes exclusive jurisdiction, but more generally enshrines the autonomy of the EU legal order.

[73] *See e.g.* Peers, *supra* note 72, p. 213; F. Picod, *La Cour de justice a dit non à l'adhésion de l'Union européenne à la Convention EDH. Le mieux est l'ennemi du bien, selon les sages du plateau du Kirchberg*, 6 La Semaine Juridique – Edition générale (2015), p. 145.

[74] *See e.g.* D. Halberstam, *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward*, 16(1) German Law Journal 105 (2015); A. Łazowski, R. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 German Law Journal 179 (2015).

vast majority of BITs, provided for investment arbitration in order to resolve disputes between one contracting party and an investor of the other contracting party.

It has to be recalled that problems of the potential incompatibility of BITs with EU law have been discussed in the legal writings for many years.[75] BITs – by definition – privilege investors from one country in relation to domestic investors or investors coming from countries which have not concluded a BIT with the host country. Such a conclusion is not necessarily altered by the existence of a most favourable nation clause in almost all BITs. The fundamental freedoms of the internal market are based on the principle of non-discrimination.[76] The internal market should constitute an equal and level playing field for all undertakings. The existence of privileged investors being able to rely on the possibility of invoking protection that goes further than the protection guaranteed by EU law inevitably results in discrimination. In this context it has to be emphasized that many of the typical BIT provisions[77] coincide with or overlap with the rules of EU law, especially of the internal market.[78] Another problem pertaining to the compatibility of BITs with EU law is the possibility for an investor to resort to international arbitration. This may potentially result in the exclusion of these types of disputes from EU judicial review and – as a consequence – in disregarding the primacy and autonomy of EU law.

It is precisely this latter problem which constituted the core issue of the Court's decision in *Achmea*. The Court first recalled the principle of the autonomy of EU law, which is "justified by essential characteristics of the EU and its law, relating in particular to the constitutional structure of EU and the very nature of that law."[79] The Court further continued that, in accordance with Article 19 TFEU, it is for the national courts and tribunals and the Court of Justice to ensure the judicial protection of the rights of individuals under EU law.[80] In this context the Court invoked the preliminary ruling procedure as the keystone of the judicial system of the Union.[81] For the Court of Justice, arbitration based on a BIT cannot be considered as a court or tribunal of a Member State under Article 267 TFEU, and therefore such arbitration cannot refer questions to the Court of Justice.[82] At the same time, such arbitration "may be called on to interpret or indeed to apply EU law, particularly the provisions concerning fundamental freedoms, including freedom of establishment and free movement of capital."[83]

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[75] *See e.g.* T. Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46(2) Common Market Law Review 383 (2009), pp. 407-426.

[76] In fact, the fundamental freedoms go beyond non-discrimination and also cover mere obstacles to intra-Union trade, i.e. measures which, although they are indistinctly applicable, in law and in fact, to home and foreign economic operators, lead to a diminution of cross-border economic activity.

[77] *E.g.* Fair and equitable treatment, full security, and protection or prohibition of illegal expropriation.

[78] *See* a detailed analysis of this problem in AG Wathelet's Opinion in case C-284/16 *Slowakische Republik (Slovak Republic) v. Achmea BV*, EU:C:2017:699, paras. 179-228.

[79] C-284/16 *Slowakische Republik (Slovak Republic) v. Achmea BV*, para. 33.

[80] *Ibidem*, para. 36.

[81] *Ibidem*, para 37.

[82] *Ibidem*, paras. 43-49.

[83] *Ibidem*, para. 42.

For the above reasons, the Court concluded that under EU law, in particular Article 267 and Article 344 TFEU, a dispute resolution clause providing for investment arbitration, contained in a BIT between two Member States, calls "into question not only the principle of mutual trust between the Member States, but also the preservation of the particular nature of the law established by the Treaties."[84]

CONCLUSIONS

To allege from the above-mentioned case-law that the Court of Justice is afraid of another international jurisdiction does not quite get to the heart of the matter. It should not be forgotten that it took the Court of Justice decades to assert the scope of its jurisdiction in relation to national courts, especially national courts of last instance or national constitutional courts.[85] This is why, in my opinion, the Court is very wary when it comes to ceding jurisdiction to another international court or tribunal.

It should not be forgotten that "ceding" jurisdiction has another, less obvious effect. It fosters what I call an "escape into public international law." If two states, both of them members of the European Union, can turn to an international jurisdiction to solve a dispute in the domain of EU law, the Court of Justice would no longer be able to fulfil its role, which is to ensure that in the interpretation and application of the Treaties the law is observed. Apart from that, such an "escape" would in itself be contrary to Article 344 TFEU.[86] This provision is a key provision of the whole constitutional order of the EU. It has been in the (EEC) Treaty since the EEC's inception in the 1950s.

In my view, the Court was quite right to recall this provision in Opinion 2/13, just as it was correct in finding that Ireland infringed EU law when it took the United Kingdom before the International Tribunal of the Law of the Sea instead of the Court of Justice in a matter concerning environmental law, which falls within the scope of EU law.

Opinion 2/13 should also be seen in the broader context of the role of the Union, and by extension the role of its Court of Justice, in the protection of fundamental rights. In joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* case,[87] in setting aside a case of the General Court on appeal, the Court held, among many other things, that measures adopted by the Union institutions to give effect to United Nations Security Council (UNSC)

[84] *Ibidem*, para. 58.

[85] The German Constitutional Court, for example, referred a question to the Court of Justice for preliminary ruling for the first time ever in 2014; *see* case C-62/14 *Peter Gauweiler and Others v. Deutscher Bundestag*, EU:C:2015:400.

[86] *Cf.* Opinion 2/13 (Accession of the EU to the ECHR), para. 258. Moreover, as Johansen, *supra* note 22, p. 174-175, argues, Art 344 TFEU is not only directed at the Member States by instructing them what to do when faced with another Court competent to decide a matter concerning Union law, but also when they are faced with any agreement "liable to affect" Article 344 TFEU.

[87] EU:C:2008:461.

resolutions are subject to review on grounds of their respect of the fundamental rights as protected by EU law.[88] In doing so, it reserved for itself the right to control whether an EU regulation implementing a UNSC resolution is compatible with EU fundamental rights. The Court adopted a somewhat dualist approach,[89] by holding that whilst it does not have power to review the lawfulness of a UNSC resolution, it does have jurisdiction to review the compatibility of measures adopted by the Union institutions with the Treaty – whatever the real origin of such measures.[90]

Through *Kadi* and Opinion 2/13, the Court thus completes the image of the EU legal order as autonomous, not only in relation to its own Member States (through the principles of primacy, direct effect and uniformity), but also vis-à-vis the international world.[91] Although one may certainly criticise such an approach, I would submit that it is legitimate for the Court to preserve the legal order of the Union, the establishment of which has been a very long and arduous process.[92]

One could therefore conclude that as regards the attitude of the Court towards international jurisdictions, the Court is essentially concerned about assuring the autonomy as well as the uniform application of EU law.[93] The law of the EU is a very unique legal order that cannot exist without the legal orders of the Member States. The very existence of this fragile legal order depends on establishing an adequate balance - on the one hand between EU law and national law; and on the other between EU law and international law. This is the task of the Court of Justice (alone).[94]

In Opinions 1/91, 1/92, 1/09 and 2/13, the Court was extremely strict with respect to its competence and the external competence of the Union. However, in *Spain v. Parliament and Council*, the Court did not find a problem that substantive provisions defining the scope of protection of a unitary patent were transferred from the Regulation to the international agreement (to which the EU is not a party).

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[88] *Ibidem*, para. 290.

[89] *See* P. Gragl, *The Silence of the Treaties: General International Law and the European Union*, 57 German Yearbook of International Law 375 (2014), p. 382.

[90] C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, para. 326.

[91] Some authors read the *Kadi* judgment as the recognition of the EU as a "constitutional entity" and thus completing the concept of autonomy of the EU legal order. *See* Halberstam, *supra* note 74, p. 115; *see also* G. de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 51 Harvard International Law Journal 1 (2010), p. 23.

[92] The Court expressively addresses the aim of maintaining the functioning of the well-balanced system of judicial cooperation between the national courts and the Court of Justice in Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123, para. 31. *See also* Eckes, *supra* note 18, p. 259.

[93] For this reading of the Court of Justice's case-law in relation to international law in general *see* de Búrca, *supra* note 91, pp. 23 and 31-34. In this context, the Court has been accused of putting autonomy before fundamental rights, *see* Douglas-Scott, *supra* note 31, p. 37; Halberstam, *supra* note 74, p. 113.

[94] Before the Court's ruling in Opinion 2/13 (Accession of the EU to the ECHR), it had therefore been suggested to exclude EU primary law from judicial review by the ECtHR, *see* for discussion Gragl, *supra* note 32, pp. 55-56; however, this clearly incompatible approach only highlights the fact that the authority to interpret EU law should stay with the Court of Justice alone.

In this context, one should bear the following thought in mind: the areas relating to the internal market (EEA, *Achmea*) and to fundamental rights (ECHR) are "horizontal" ones, which means that they are cross-cutting through virtually all (other) areas of competence and policy. By ceding the authority to interpret a wide range of these provisions to another court, the task of the Court as enshrined in Article 19 TEU, i.e. to guarantee the lawful and uniform application of EU law, risks being undermined and jeopardised.[95] Moreover, the interpretation of the internal market provisions, which since the outset have been central to the EU integration project, has an effect on a whole range of other policy fields, such as the environment, health, consumer protection and cultural policy, to name a few. The Court has fuelled the motor of integration in this area, and ceding jurisdiction would be tantamount to handing over the petrol can. Fundamental rights have the same effect, as they have to be protected in all areas of EU law and thus, by their very nature, are not limited to certain fields. The consequences of their application are very far-reaching, since even national provisions and practices have to comply with EU fundamental rights when Member States implement EU law, i.e., when the relevant national provisions fall within the scope of application of EU law.[96]

In my view, it is therefore understandable that the Court of Justice is very careful about autonomy when it comes to such large and important areas of law as the internal market or fundamental rights. Where, however, an area is highly specialized and more or less severable from the rest of EU law – as for example patents – it is a lot easier for the Court of Justice to take a more lenient view on autonomy.

This is the main reason why the Court of Justice is wary of entrusting jurisdictions to outside bodies. It concerns the breadth of the area at stake, and is not a subjective feeling of fear.

[95] Eckes, *supra* note 18, p. 259.

[96] *See*, in this respect, case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105.

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MEMBER STATES' INTERESTS AND EU LAW: FILTERING, MODERATING AND TRANSFORMING?

Abstract:
This article investigates the engagement of EU law with the interests represented and pursued by the Member States within the framework of the European Union. In principle, because the interests which the Member States feed into the EU governance machinery are formulated in political processes at the national level, and thus possess paramount political legitimacy, EU law may only interact with those interests when a clear and sufficient mandate has been provided for doing so. Such mandates follow from Treaty provisions or EU legislation. They embody common political agreements among the Member States by which they commit themselves to realising the specific interests they share, as well as achieving related common policy objectives. In practice, however, the boundaries of EU law's mandate are difficult to determine with precision, and this may weaken the legitimacy of EU law's interventions. The weaker legitimacy of the law raises particular problems in the law of the Single Market, where the interests pursued by national governments are subjected to filtering, moderation, and even transformation by the Court of Justice.

Keywords: EU obligations, legitimacy, Member State interests, proportionality

INTRODUCTION

This article examines the ways in which Member State interests and EU law interact with each other. The former is understood here as the political basis of cooperation within the EU, while the latter was put in place – in part – to control the conduct of Member States. The article analyses in particular the legitimacy of EU law's engagement with the interests pursued by the Member States in the Union. The interests of the Member States are the products of national political processes and relate to locally-defined needs, and therefore they enjoy a robust political legitimacy. As a result, when

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EU law interferes with them it needs to rely, as a matter of principle, on a clear legally expressed mandate. Such mandates are provided by the Treaties and EU legislation; they express a previous political agreement among the Member States concerning their shared commitment to the implementation of common (policy) objectives. However, practice demonstrates – in particular in the domain of the Single Market, where the law interacts with local interests perhaps the most markedly – that defining that mandate and determining its boundaries may be difficult to achieve, which then raises questions about the legitimacy of the law, as applied by the Court of Justice, in filtering and moderating Member States' interests, and even transforming them.

Our analysis is structured as follows. The article begins by introducing Member State interests, on the basis of the legal and non-legal literature as well as the most relevant Treaty provisions, as a central politico-legal concept and component of inter-State cooperation in the EU. This provides the basis for the ensuing discussion concerning the mandate available to EU law when it engages with the local interests brought within the EU's framework. In its second part, the article examines legal developments in the domain of the law of the Single Market, in particular relevant cases before the Court of Justice, where the legal scrutiny applied to the interests pursued by the Member States raises issues as regards EU law's above-mentioned mandate and its boundaries. It analyses, in particular, how EU law separates legitimate Member State interests from illegitimate ones, and how it moderates and, potentially, transforms local interests under the requirements arising from the principle of proportionality. This article is not aimed at challenging the basic premises of the EU legal order as developed in the jurisprudence and accepted in legal scholarship. Rather, it suggests their re-examination from the analytical perspective offered by the political concept of Member State interests.

1. MEMBER STATE INTERESTS AND EU LAW

The core objective of EU law, as defined by the Court of Justice,[1] is to confine, under the framework of common policies, unilateral Member State actions pursuing territorially defined economic and social interests. In this framework, EU law may appear as superimposed, with nearly absolute force, over considerations of local interest. Its application and enforcement seems unaffected by questions of legitimacy raised with respect to the policing of the conduct of sovereign States. The formalism of EU law's doctrinal construction had, however, the consequence of disconnecting the interaction between EU legal obligations and the interests of the Member States from the historical and political circumstances of European integration. This, in our view, was a problematic development because, as has been forcefully argued, EU integration, as well as the creation and implementation of common policies and the legal obligations formulated thereunder, cannot be separated from the interests of the Member States

[1] *See* Case 6/64 *Flaminio Costa v. E.N.E.L.*, EU:C:1964:66 and Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA.,* EU:C:1978:49.

nor be examined without accepting their influence on those processes.[2] The direct linkage between Member State interests and the objectives of the Union,[3] and their overlaps as well as their potential mutuality, have been characterised as an essential condition of European integration,[4] whereby locally-defined interests dictate political and policy developments.[5] It has also been argued that the EU political process is driven by interests that emerge from the preferences, constraints, and opportunities presented in the national political arena,[6] and that its aim is, ultimately, to develop inter-State (supranational) responses to needs defined in the territories of the Member States.[7][8]

[2] *See* A. Milward, V. Sorensen, *Interdependence or Integration? A National Choice*, in: Alan Milward et al. (eds.), *The Frontier of National Sovereignty: History and Theory, 1945-1991*, Routledge, London: 1994, pp. 20-21; A. Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 Journal of Common Market Studies 473 (1993), pp. 480-483, 485-486 and 507-517; P. Craig, *Competence and Member State Autonomy: Casualty, Consequence and Legitimacy*, in: H. Micklitz, B. de Witte (eds.), *The ECJ and the Autonomy of the Member States*, Intersentia, Antwerp: 2012, pp. 11-12 and 26-34; Y. Mény, *National Squares European Circles: the Challenge of Adjustment*, in: A. Menon et al. (eds.), *From the Nation State to Europe*, Oxford University Press, Oxford: 2001, pp. 31-32. *See also* Bartolini's overview of "rationalist" and "constructivist" approaches – divided along these lines – on EU-Member State relations, S. Bartolini, *Restructuring Europe*, Oxford University Press, Oxford: 2005, pp. 188 and 197-200. *See further*, in the context of the EU enlargement process, A. Moravcsik, M. Vachudova, *National Interests, State Power and EU Enlargement*, 17 East European Politics and Societies 42 (2003), and, in the context of a Member State left in a minority in EU decision-making to challenge an EU measure concerned on account of its incompatibility with national values, P. Craig, *Subsidiarity: A Political and Legal Analysis*, 50 Journal of Common Market Studies 72 (2012), p. 83.

[3] For more on the Union interest as a legal concept, *see* M. Cremona, *Defending the Community Interest: The Duties of Cooperation and Compliance*, in: M. Cremona, B. de Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamental*, Hart Publishing, Oxford: 2008, p. 125. *See also* the manifestation of Member State interests in the distinguishable "European profile" developed by the Member States overtaking the task of the Council Presidency, which could combine domestic and EU priorities and bear the stamp of a political identity constructed for this particular purpose in O. Elgström (ed.), *European Union Council Presidencies: A Comparative Perspective*, Routledge, Abingdon: 2003.

[4] *See* Craig, *supra* note 2, pp. 11-12 and Mény, *supra* note 2, pp. 31-32.

[5] The inseparability of the interests of the Member States and the Union is analysed eloquently and somewhat controversially by Bartolini, who put forward the argument that "the national-European political elites are victims of the constraints they have imposed on themselves, on their countries, and on their citizens" so as "to force exogenous discipline on respective national communities", which followed from their original political intention to use European integration to "bypass the constraints of national political production" to the benefit of political and policy efficiency (Bartolini, *supra* note 2, p. 405).

[6] *See* the theories of state-formation which describe the multitude of factors, including private and public goods, which may bear political and social relevance within the boundaries of nation states, in Bartolini, *supra* note 2, pp. 12-31.

[7] *See* the similar assessment made in connection with international politics and its interplay with national politics by: J.N. Rosenau, *National Interest*, in: D.L. Sills (ed.), *International Encyclopaedia of the Social Sciences*, Macmillan, London: 1968, pp. 34 and 37-38; C.A. Beard, *The Idea of the National Interest*, Quadrangle, Chicago: 1934; D.W. Clinton, *The Two Faces of National Interest*, Louisiana State University Press, Baton Rouge: 1994; J. Frankel, *National Interest*, Pall Mall, London: 1970, pp. 31-38; J.S. Nye, *Redefining the National Interest*, 78 Foreign Affairs 22 (1999); S. Burchill, *The National Interest in International Relations Theory*, Palgrave, Houndmills: 2005, especially pp. 206-211.

[8] For realist definitions of the national interest, *see*, *inter alia*, H. Morgenthau, *In Defense of the National Interest: A Critical Examination of American Foreign Policy*, Knopf, New York: 1951 and *Politics among*

If this entanglement of local interests and common policy frameworks in the EU is accepted as valid, then EU law's engagement with Member State interests necessitates a constant examination and validation as a matter of its legitimacy. More specifically, the robust political legitimacy of Member State interests, within and outside the EU political and legal framework, requires that an equally robust mandate is available for EU law and its application and enforcement. The interests of the Member States are products of national political processes and are represented under local political mandates and political responsibility towards the local electorate.[9] There is plenty of evidence that local interests, as well as their diversity, directly and fundamentally influence the EU decision-making process and the resulting common policy frameworks, as well as the legal obligations adopted for their implementation.[10] Viewed in this light, the authorisation for EU law – as applied by both the Court of Justice and by national authorities and courts – to interfere with Member State interests needs to come from a political process in which the Member States reach common agreements, and must be expressed clearly, preferably in specific legal provisions.

The EU legal order contains a wide variety of rules which express both general and more specific politically agreed undertakings by the Member States to realise shared objectives and develop and operate corresponding common policy frameworks. These legal rules, which are included in both the Treaties and in legislation adopted under the Treaties should, in principle, secure a sufficient mandate for EU law to interact with locally-rooted interests. The legitimacy they may lend to EU action is further enhanced by the circumstance that they originate from the local interests which were brought by the Member States themselves to the EU framework and were negotiated among them with a view toward reaching a common agreement on the objectives of EU policy actions and their implementation.[11] From this perspective, EU law's engagement with the particular interests of the Member States entails, in effect, the settling of conflicts

Nations: Struggle for Power and Peace, Knopf: New York, 1978; K.W. Thompson, *Traditions and Values in Politics and Diplomacy: Theory and Practice*, Louisiana State University Press, Baton Rouge: 1992. For constructivist attempts, *see*, *inter alia*, P.J. Katzenstein, *The Culture of National Security*, Columbia University Press, New York: 1996, and M. Finnemore, *National Interests in International Society*, Cornell University Press, Ithaca: 1996. For a strong subjective definition of the national interest, *see* B. Brodie, *War and Politics*, Cassel, London: 1974, especially pp. 342-345.

[9] *See* from the political economy literature, B. Clift, C. Woll, *Economic Patriotism: Reinventing Control over Open Markets*, 19(3) Journal of European Public Policy 307 (2012), pp. 301-302.

[10] For more on the impact of different national economic interests on the content of EU harmonisation measures, *see*, *inter alia*, M. Höpner, A. Schäfer, *A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe*, 33 West European Politics 344 (2010) and B. Clift, *The Second Time as Farce? The EU Takeover Directive, the Clash of Capitalisms and the Hamstrung Harmonization of European (and French) Corporate Governance*, 47(1) Journal of Common Market Studies 55 (2009).

[11] The earlier mentioned mutuality of and overlap between national interests and EU obligations mean that the Member States are simultaneously interested in the EU being able to deliver the common policy objectives, if necessary by the enforcement of legal obligations imposed on the Member States themselves, and in safeguarding particular local interests from the restrictions arising from the implementation of those common objectives.

between prior agreed-upon common commitments based on local interests and the particular interests raised subsequently by individual Member States. This means that the interactions between EU law and Member State interests are not governed by according an automatic preference for European politics and decision-making over the national, and vice versa, but rather in a process where the competing political mandates should be continuously examined and validated.[12]

In the Treaties, the most general recognition of the role played by Member State interests in European integration, as well as in the construction and operation of the EU's policies, is found in Article 1(1) of the Treaty on European Union (TEU). It expresses primarily that the locally-defined interests of the Member States provide the basis of common actions and policies under the EU framework. It also indicates that the Member States have agreed, in general terms, to act (i.e. to pursue certain of their interests) under a common framework. This latter component of Article 1(1) may well be interpreted as offering EU law with the most general of mandates to engage with local interests. Article 1(1) TEU holds that the Member States created "among themselves" the European Union, on which they conferred competences "to attain objectives they have in common." This can be interpreted as referring to a prior act by the Member States which elevates their shared interests to the European level[13] and agreeing on common actions introduced under very real powers to realise those interests. As an important characteristic of that common agreement, Article 1(1) stresses that it was voluntary and that the obligation on the part of the Member States to cooperate under a common framework was self-imposed.[14]

The Treaties also contain so-called "constitutionalising elements",[15] which can be regarded as providing general bases, beyond Article 1(1) TEU, for the EU law's mandate to interact with the interests of individual Member States. This term was introduced by Dashwood to distinguish these provisions from the so-called "conservatory elements" of the Treaties, the latter of which were placed in the Treaties with the purpose of preserving the position of the Member States within the Union.[16] "Constitutionalising elements"

[12] This may be particularly true when the mutual dependence of Member States and EU governance resulting from a manifest policy interdependencies is considered; *see* A. Dashwood, *States in the European Union*, 23 European Law Review 201 (1998), p. 202.

[13] A similar uploading of local considerations is evidenced in Article 2 TEU, which holds that the Member States also share common values, which values are also those of the Union, and operate local societies according to these values.

[14] The constraints on Member State interests and on Member States' conduct implementing those interests must be understood as self-imposed, *see* Weiler's analysis in J. H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, in: J. Dickson, P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law*, Oxford University Press, Oxford: 2012, pp. 139-140. This decision by national governments and the domestic electorate finds support in the promised benefits of common policy actions, which are expected to materialise locally (e.g. reduction of transaction costs for home undertakings).

[15] Dashwood, *supra* note 12, p. 203.

[16] The Treaty framework manifestly regulates the desire to maintain local particularities. It appears that the choices made in this regard reflect fundamental preferences concerning the right level of governance in Europe and the adequate spatial distribution of functions within the EU (as it follows from the principle

were defined as covering provisions that are available to promote and consolidate the interests of the Union and protect them – in law – against the disintegrative effects of the Member States acting unilaterally in the pursuit of their own interests.[17] These Treaty components,[18] including the principle of loyalty under Article 4(3) TEU – which are interpreted and applied together with individual legal provisions that formulate specific Member State obligations in concrete policy areas – enable the policing of conduct of the Member States in the Union and authorise the scrutiny by the EU of those local interests which are formulated, often in contradiction with EU obligations, in the national political arena.

More specific manifestations of a common political will among the Member States to pursue together their shared interests can be found in other Treaty provisions, such as Article 18 of the Treaty on the functioning of the European Union (TFEU) or those containing the fundamental freedoms.[19] In essence, they exclude the unilateral promotion of the territorially-bound interests of individual Member States at the

of subsidiarity). *See* C. Barnard, *Flexibility and Social Policy*, in: G. de Búrca, J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility?*, Hart Publishing, Oxford: 2000, p. 199, who argues that these fundamental preferences, together with flexibility, could justify solutions which confirm *and* which reduce Member State diversity and autonomy, *see* pp. 204-213 and 217. *See also* Scott on procedural forms of flexibility (procedurally constrained flexibility), J. Scott, *Flexibility, "Proceduralization", and Environmental Governance in the EU*, in: de Búrca & Scott (*ibidem*) pp. 259-260. Locally formulated interests are not subjected to an overwhelming requirement of uniformisation under the EU framework, and the Member States are allowed to pursue their own interests not only in the EU political domain but also in the law of core EU policies, *see* G. de Búrca, J. Scott, *Introduction*, in: de Búrca & Scott (*ibidem*), p. 2. In this context, even the core principle of compliance has been softened to one whereby the Member States are required to maintain a minimum level of conformity and to commit to maintaining the EU as a polity, G. de Búrca, *Differentiation within the Core: The Case of the Common Market*, in: de Búrca & Scott (*ibidem*), pp. 137-138.

[17] Dashwood, *supra* note 12, p. 203 ("conservatory elements" ensure that "Members survival as States in a full sense is a basic assumption of the constitutional order"). The constitutionalising elements could also be referred to as principles of "system maintenance" for the EU, as used by Klamert for the principle of loyalty (M. Klamert, *The Principle of Loyalty in EU Law*, Oxford University Press, Oxford: 2014). Their function is to indicate an equality and unity of interests among the Member States and ensure that there be an "equilibrium between advantages and obligations" flowing from EU membership for each Member State, *ibidem*, p. 37; raised in the context of the principle of solidarity among the Member States.

[18] Which find further support in the references in the Treaties to common roots and aspirations and common values and objectives in the EU and in the explicit programme of continuing "the process of creating an ever closer union among the peoples of Europe" and of taking further steps to "in order to advance European integration."

[19] They were declared by the Court to contain clear and unconditional legal commitments by the Member States. *See*, *inter alia*, Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, EU:C:1963:1; and after the expiry of the transitional period provided in the Treaties, Case 81/87 *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.*, EU:C:1988:456, para. 15; and with regard to the prohibition of discrimination on the basis of nationality, Case 2/74 *Jean Reyners v. Belgian State*, EU:C:1974:68, paras. 26-32. They were also recognised as specific manifestations of the general non-discrimination principle in, *inter alia*, Case 2/74 *Reyners*, paras. 15-16.

expense of either the shared interests embodied in EU policy frameworks, or to the disadvantage of the interests of the nationals of other Member States.[20]

An even more robust mandate may follow from EU legislation. EU secondary law is based on a clear political agreement among the Member States in a specific area, and on that basis formulates concrete commitments.[21] EU legislative measures may lend detail to the political will expressed at Treaty-level, or secure the necessary implementation foreseen in the Treaty provisions. Generally speaking, their provisions can secure a more enhanced legitimacy to EU law's intervention than legal mandates which require further clarification by means of judicial interpretation. The Court of Justice has recognised that when the Treaties regulate a detailed implementation strategy for a particular provision, as in case of freedom of establishment under Article 49 TFEU, the results to be achieved by EU law must primarily follow from the measures negotiated and agreed upon by the Member States.[22]

The earlier-mentioned "conservatory elements" of the Treaties, which focus on the position maintained by the Member States within the Union, in effect give further expression to the fundamental circumstance recognised in Article 1(1) TEU, i.e. that the shared interests pursued in the EU have been formulated in the national political process and are represented under territorially-defined political mandates.[23] The first of these – Article 4(2) TEU – anchors the relevance of the local by providing that the national identities (and essential state functions) formulated within the territorial confines of the Member States must be protected. The national political arena is given further recognition under the rules governing the EU's system of competences, including the principle of conferral in Article 5(1) TEU and the principle of subsidiarity in Article 5(3) TEU. These provisions were introduced in order to ensure that certain decisions concerning interests, policy priorities, or governance design continue to be taken at the national level. A similar conservatory role is played by the rules which allow the Member States to derogate from their EU obligations, or apply for an opt-out.[24] Local decision-making is favoured by other provisions as well, such as that permitting the

[20] In the infringement case concerning the Luxembourgian single-practice rule for medical professionals, the Court of Justice made it clear that the "observance of the principle of equality of treatment cannot depend on the unilateral will of national authorities", Case C-351/90 *Commission v. Luxembourg*, EU:C:1992:266, para. 17.

[21] The adoption of EU legislation was recognised by the Treaty in numerous policy areas, such as the free movement of capital, freedom of establishment, or transport services, as the politically and legally prioritised method of implementation of common policies. *See*, *inter alia*, Case 2/74 *Reyners*, paras. 18-23; Joined Cases C-163, C-165 and C-250/94 *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu*, EU:C:1995:451, paras. 41-47; Case 4/88 *Lambregts Transportbedrijf PVBA v. Belgian State*, EU:C:1989:320, paras. 8-9; Case C-49/89 *Corsica Ferries France v. Direction générale des douanes françaises*, EU:C:1989:649, paras. 7-10.

[22] *See* Article 50 TFEU and Case C-313/01 *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*, EU:C:2003:612, para. 55 (in connection with the applicability of the *Vlassopoulou*-principle).

[23] *See* the overview of the various principles and instruments available to safeguard the status of the Member States within the EU in Dashwood, *supra* note 12, pp. 206-213.

[24] *See* the analysis in the next section.

"switching off" of core Treaty rules in order to protect Member State public services (Article 106(2) TFEU), or those allowing for differentiation (flexibility) among the Member States in matters concerning their obligations.[25] The law explicitly recognises the discretion and the autonomy of Member States to make policy choices and regulate matters themselves in fields where the EU's competences are limited.[26]

Having established the above-described analytical framework, it becomes possible to depart from idealistic legal accounts of the interplay between local interests and EU legal obligations. Clearly, more fundamental considerations are in play than those captured by the interpretation that Member State interests and EU obligations are engaged in an incessant process of balancing, in which the Court of Justice's task is to create a fair and reasonable balance between them.[27] The dilemmas addressed in this article, in particular those arising from the constant necessity of validation for EU law's interference in every instance, which could concern the choice between legitimate and illegitimate Member State interests or the decision to moderate local interests and the relevant national decision-making processes,[28] are similar to those raised by Azoulai as regards the respecting of "sensitive national interests" by the Court.[29] Our analysis will demonstrate that the Court's task is not simply the "desensitization" of sensitive national interests addressed under the EU law framework. Its engagement using EU legal provisions goes beyond that of simply compelling national political actors and policies to unquestioningly integrate "European legal parameters" into national laws and policies and adhere to EU objectives.[30]

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[25] *See* C.-D. Ehlermann, *How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"*, 82 Michigan Law Review 1274 (1984), and de Búrca, *supra* note 16, p. 133. The most relevant reason for flexibility is the diversity of economic and social development in the Member States, which could lead to non-negotiable conflicts and paralysed cooperation within the EU, E. Philippart, M. Sie Dhian Ho, *Flexibility and Models of Governance for the EU*, in de Búrca & Scott, *supra* note 16, p. 301.

[26] *See* Micklitz & de Witte, *supra* note 2.

[27] J. Schwarze, *Die Abwägung von Zielen der europäischen Integration und mitgliedstaatliche Interessen in der Rechtsprechung des EUGH*, Europarecht 253 (2013), p. 273, suggests that the convenient solution would be that all conflicts between the EU and the Member States should be resolved by the EU Court to the benefit of European integration, which in its general jurisdiction should create a "fair and reasonable" relationship (balance) between the requirements of EU membership and the interests of the Member States. *See also* the overview of the corresponding literature in Bartolini, *supra* note 2, pp. 406-407, which strongly criticises these balanced academic positions, arguing that EU legal obligations "have largely reduced the adaptation elasticity offered to Member States", p. 407. He also states that constraint (leverage) and compliance are central to the functional offerings of the EU for the Member States, which, however, can also resort to EU law when seeking opportunities for utilising EU policy tools so as to address national policy concerns (*ibidem*, pp. 305-306).

[28] *See* the carefully constructed legal reasoning in Case C-177/94 *Criminal proceedings against Gianfranco Perfili*, EU:C:1996:24, paras. 10-15.

[29] *See* L. Azoulai, *The European Court of Justice and the Duty to Respect Sensitive National Interests*, in: B. de Witte et al. (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar: Cheltenham: 2013, pp. 168-171.

[30] *Ibidem*.

2. ENGAGING WITH MEMBER STATE INTERESTS: EXAMPLES FROM THE SINGLE MARKET

The questions concerning the legitimacy of EU law's interferences with Member States' interests are perhaps most acutely raised in the law of the Single Market. In the policy and regulatory conflicts generated by the fundamental freedoms and their implementing legislation, the legal obligations of the Member States and their particular interests, often formulated in contravention of those obligations, interact particularly intensively. While the scrutiny of Member State interests can, in most cases, rely on clear and unconditional Treaty provisions and numerous detailed legislative rules which express concrete commitments by the Member States, EU legal provisions are nevertheless very often confronted with interests that are deeply embedded in the local socio-economic environment and/or are implemented under national competences or in the discretion of national authorities. These interests, and their implementation in national law, enjoy a high degree of legitimacy, which means that EU law's engagement with them necessitates the availability of a clear and sufficient mandate.

EU law interacts with the Member State interests primarily in the context of assessing national restrictions on the fundamental freedoms. Their justification in law involves examining the proportionality of the national measure and/or the national policy action being challenged, in the course of which the Court of Justice, which usually decides such cases, has the competence to filter and/or moderate those interests, and potentially to transform them. The Court's performance in this regard has been subject to intensive criticism, mainly for failing to observe the boundaries of its mandate.[31] It has been claimed that there has been a "hemming in" of the derogation possibilities – which are available in EU law to protect legitimate local interests – via imposing ever more wide-ranging requirements and principles, which has had the consequence of putting EU law firmly in charge of deciding which Member State interests may be raised and how they may be protected.[32] Others have argued that the strict scrutiny of national measures under the fundamental freedoms is propelled by a "prior assumption" that market integration as a core EU "value" must be given a strong weight "in the balance", which means that market integration is regularly prioritised over "state sovereignty."[33]

[31] *See* Azoulai's criticisms of instances when EU law was responsive to locally formulated interests, and also when it trivialised Member State efforts to defend sensitive national interests (Azoulai, *supra* note 29, pp. 168-187). Significant differences in the treatment of Member State interests have also been pointed out in the different strands of the jurisprudence as developed by the Court (*ibidem*). *See further* G. Davies, *Free Movement, the Quality of Life and the Myth that the Court Balances Interests*, in: P. Koutrakos, N. Nic Shuibhne, P. Syrpis (eds.), *Exceptions from EU Free Movement Law*, Hart Publishing, Oxford: 2016, pp. 218-219.

[32] C. Barnard, *Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?*, in: C. Barnard, O. Odudu (eds.), *The Outer Limits of European Union Law*, Hart Publishing, Oxford: 2009, pp. 273 and 289. The close scrutiny exercised by the Court of Justice allowed for the conclusion that "state interest is not, in fact, being protected by the justification jurisprudence" (*ibidem*).

[33] G.A. Bermann, *Proportionality and Subsidiarity*, in: C. Barnard, J. Scott (eds.), *The Law of the Single European Market*, Hart Publishing: Oxford: 2002, pp. 76-77. *See also* J. Scott, *Mandatory or Imperative Requirements in the EU and the WTO*, in: Barnard & Scott (*ibidem*), p. 270.

It has also been highlighted, from the perspective of the failing social dimension of the Single Market, that not all local interests are internalised adequately or in a politically desirable way by EU law.[34]

2.1. Filtering Member State interests

In the law of the Single Market, the first interaction with Member State interests occurs when the interests which can be pursued legitimately under the EU framework are separated from those which cannot.[35] This filtering of Member State interests already raises controversies from the perspective of the legitimacy of the EU's intervention.[36] First of all, according to standard case law the Member States are not allowed to justify their actions on the basis that the "national interest" *in general* requires protection. The Court of Justice will reject such claims on the grounds that they aim to secure a blanket justification for Member State policies which violate EU requirements, and that they are too general and unsubstantiated in their content to qualify as transparent, clear and certain, and non-discriminatory representations of legitimate local interests.[37] Member States' claims for the protection of their "national interest" frequently relate to national policies which are poorly explained and equally poorly designed, which pursue objectives that are either invalid or lack objectivity, or which are implemented using inadequately targeted, excessive, or unsuitable means.[38] However, the Court of Justice must make its distinctions carefully, as particular circumstances may require that

[34] C. Kaupa, *Maybe Not Activist Enough? On the Court's Alleged Neoliberal Bias in its Recent Labor Cases*, in: de Witte et al., *supra* note 29, pp. 57-58, where he argued that the most relevant reason for this is the lack of an "operational framework" before the Court to assess and deal with the socio-economic conflicts at stake. *See further* C. Kaupa, *The Pluralist Character of the European Economic Constitution*, Hart Publishing, Oxford: 2016.

[35] The literature on differentiation within the EU distinguishes, as grounds for differentiation, between the categories of legitimate socio-economic differences between the Member States and illegitimate subjective political preferences represented by national governments (e.g. domestic partisanship, political obstructionism, national profiteering), de Búrca, *supra* note 16, pp. 135-136.

[36] It has been remarked, in this context, that EU law's choices can be compromised by the usage of uncertain and "slippery" terms, which enable the moving of boundaries, or by the dressing up Member State preferences, local policy priorities and national commercial advantages as objective interests, *see* W. Wallace, H. Wallace, *Flying Together in a Larger and More Diverse EU*, Netherlands Scientific Council for Government Working Documents No. W 87 1995.

[37] *See* Case C-112/05 *Commission v. Germany*, EU:C:2007:625, paras. 79-80 and Joined Cases C-282/04 and 283/04 *Commission v. the Netherlands*, EU:C:2005:712, paras. 33-35. *See also* the Greek crisis management judgment, Case C-244/11 *Commission v. Greece*, EU:C:2012:694, paras. 76-77, and the Italian helicopter procurement judgment, Case C-337/05 *Commission v. Italy*, EU:C:2008:203, paras. 42-54. *See* further Commission Communication on certain legal aspects concerning intra-EU investment, [1997] OJ C220/15, pt 8.

[38] *See e.g.* the judgment in Joined Cases C-105/12 to C-107/12 *Staat der Nederlanden v. Essent NV and Others*, EU:C:2013:677, where EU legislation on electricity markets provided a rather convenient background for a decision approving national policy, and the judgment in Case C-271/09 *Commission v. Poland*, EU:C:2011:855, where a much lesser restriction on capital movements serving a public interest aim was found incompatible with the Treaties.

national governments act in the national interest in a manner which does not comply with the benchmarks that seem to be applicable to normal governance situations. It must also be borne in mind that they alone bear political responsibility for these actions. It is also uncertain whether legal scrutiny, as implemented by the Court of Justice, will be able to make defendable distinctions between legitimate and illegitimate manifestations of the local interest, especially in situations wherein they are rather crudely expressed political desires covered with a light veneer of native unilateralism.[39]

The case law also excludes the unilateral advancement of "purely economic" interests[40] by the Member States, which raises similar concerns about the boundaries of EU law's intervention. The Court has consistently denied that aims such as reinforcing the structure and operation of competitive markets at the national level, the modernisation of national markets, or increasing the effectiveness of national markets could be legitimately protected in opposition to the fundamental freedoms.[41] The Member States will also be prevented from relying – when interfering with the operation of competitive markets – on considerations of expediency that arise from the general state of a given sector of the national economy.[42] The rationale for barring such claims is that they concern the interests of a single national economy within the Single Market, and have a clear potential for disadvantaging the economies of other Member States as well as undermining the Union's own economic policy. Allowing national governments to defend "purely economic" interests would not only pose a threat to the competitive equality of the Member States but would also directly jeopardise the multilateral economic arrangement that is the Single Market.[43]

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[39] Judicially constructed formulas, such as the "sufficient link" clause (*see*, *inter alia*, Case C-103/08 *Arthur Gottwald v. Bezirkshauptmannschaft Bregenz*, EU:C:2009:597; Case C-213/05 *Wendy Geven v. Land Nordrhein-Westfalen*, EU:C:2007:438; Case C-158/07 *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep*, EU:C:2008:630) may allow, in particular circumstances, for the recognition of Member State practices as legitimate which otherwise would qualify as illegitimate on account of the territorially-linked, possibly protectionist aims pursued by them.

[40] *E.g.* interests which relate to the financial interests of the Member State concerned or to the development of the national economy. *See* Case C-367/98 *Commission v. Portugal*, EU:C:2002:326, para. 52; Case C-35/98 *Staatssecretaris van Financiën v. B.G.M. Verkooijen*, EU:C:2000:294, para. 47; and in the context of the free movement of goods, Case C-265/95 *Commission v. France*, EU:C:1997:595, para. 62; and as to the free movement of services, Case C-398/95 *Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v. Ypourgos Ergasias*, EU:C:1997:282, para. 23 and Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, EU:C:2011:124, para. 52. Purely (national) economic interests may also fail the requirements imposed during moderation by EU law under the proportionality test, as they may be extremely broad as a matter of substance, reduce the transparency and accessibility of policy-making, or offer uncontrollably broad discretion at the national level.

[41] Case C-367/98 *Commission v. Portugal*, para 52; Case C-174/04 *Commission v. Italy*, EU:C:2005:350, para. 37; Case C-274/06 *Commission v. Spain*, EU:C:2008:06, para. 44, in which the strengthening of the structure of competition meant reinforcing the ability of the market to resist anti-competitive practices.

[42] Case C-162/06 *International Mail Spain SL v. Administración del Estado and Correos*, EU:C:2007:681, paras. 41-42.

[43] Its implementation depends on the Member States mutually excluding territorially-linked economic advantages available to nationals, as well as territorially-linked restrictions concerning non-nationals. *See* Barnard, *supra* note 32, p. 274.

The Court needs to carefully decide when making these choices and pay close attention to what makes a local interest "purely" economic. Many of the economic interests raised by the Member States may only have indirect links with a Member State's competitive position, and when examined closely it may turn out that their non-economic policy dimension (e.g. public health, public security, media pluralism etc.) may, in the national context, be more prevalent.[44] A narrow assessment by the Court may fail to acknowledge the recognisable social and industrial policy implications of the economic interest raised (e.g. the protection of small traders).[45] In the case of non-economic interests, a similar judicial scrutiny may overlook their significant commercial implications (e.g. the protection of national cinematographic culture, the protection of the national film industry, or the protection of small printed media).[46] Also, there is a particularly fine line – especially in terms of the legal assessment – between the Member States being unwilling to sacrifice domestic resources for the implementation of EU policies on the grounds of purely economic interests, and the claim that a departure from EU obligations is justified by the interests of economy and efficiency in administration and governance at the national level.[47]

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[44] *See*, *inter alia*, Case C-294/00 *Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner*, EU:C:2002:442, para. 43; Case 96/85 *Commission v. France*, EU:C:1986:189, para. 10; Case C-351/90 *Commission v. Luxembourg*, para. 13; Case C-108/96 *Criminal proceedings against Dennis Mac Quen, Derek Pouton, Carla Godts, Youssef Antoun and Grandvision Belgium SA*, EU:C:2001:67, para. 30; Case C-117/97 *Commission v. Spain*, EU:C:1998:519, paras. 36-38 and 45-46; Case C-148/91 *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, EU:C:1993:45, para. 9. When the economically relevant Member State interest in question coincides with the relevant EU policy objectives (e.g. protecting public service values, promoting regional development, or strengthening innovation), this can further decrease EU law's mandate for intervention. *See* Case C-209/98 *Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune*, EU:C:2000:279, paras. 78-80; Case 36/73 *Nederlandse Spoorwegen v. Minister van Verkeer en Waterstaat*, EU:C:1973:130, paras. 20-22; Joined Cases C-105/12 to C-107/12 *Essent*, paras 49-52.

[45] *See* the order in Case C-343/12 *Euronics Belgium CVBA v. Kamera Express BV and Kamera Express Belgium BVBA*, EU:C:2013:54, in which the protection of consumers triumphed over the protection of the interests of small traders via banning commercial practices which would have enabled small traders to compete with retail giants.

[46] Case 60/84 *Cinéthèque SA and Others v. Fédération nationale des cinémas français*, EU:C:1985:329; Case C-17/92 *Federación de Distribuidores Cinematográficos v. Spanish State*, EU:C:1993:172, para. 17; Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, EU:C:1997:325. *See also* the judgment in Case C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung*, EU:C:2003:493, where it was unclear whether both the economic and the non-economic aspects of maintaining a distribution of land ownership, "which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters are social objectives" were adequately taken into account. *See*, in contrast, Case C-202/11 *Anton Las v. PSA Antwerp NV*, EU:C:2013:239 concerning the diffuse national interest of protecting national languages in the domain of employment contracts and Joined Cases C-197/11 & C-203/11 *Libert and Others*, EU:C:2013:288, where a housing policy addressing local housing shortages was considered in the context of the free movement of capital.

[47] *See e.g.* Joined Cases C-501/12 to C-506/12, C-540/12 & C-541/12 *Thomas Specht and Others v. Land Berlin and Bundesrepublik Deutschland*, EU:C:2014:2005. *See also* the case law confirming as le-

In the event there is a strong and clear legal mandate, the Court of Justice can act more confidently when filtering Member State interests. For example, Article 18 TFEU provides a solid basis for separating discriminatory Member State measures and policies from those which refrain from discriminating on the basis of nationality or establishment. The same Treaty article also makes it possible to limit the grounds available to justify such measures and subject them to a particularly exacting scrutiny under the proportionality principle.[48] In contrast, when the EU lacks the competences to act in a particular policy domain, the filtering of Member State interests will be more confined. This is expressed first and foremost in the general formula which states that – having regard to the state of EU law at the time and in the absence of necessary EU legislative measures – the Member States are entitled (i.e. "remain competent"; "have the power") to regulate national policy matters affected by EU obligations, for example access to social security entitlements, the criterion for taxation, criminal law, access to the professions, or the taking up of certain economic activities.[49]

2.2. Moderating and transforming Member State interests

The fundamental freedoms impose direct and legally enforceable restrictions on Member States in their pursuit of their respective interests. The law, as applied, subjects Member State interests to rather intensive moderation, which may even lead to the eventual transformation of those interests in the national political arena. Under the principle of proportionality, the central legal principle for deciding whether Member States can legitimately depart from the fundamental freedoms in pursuit of locally defined interests Member States are required to demonstrate that their national policy intervention is based on a genuine need, is suitable for attaining the relevant local interest(s), and does not go beyond what is necessary to achieve them. In general terms, the proportionality principle gives effect to the assumption that national governments, when acting under their political mandates in areas covered by the rules on free movement, will use the least restrictive means possible.[50] While, on average, it serves

gitimate the protection of the financial equilibrium of national public services in, *inter alia*, Joined Cases C-11/06 & C-12/06 *Rhiannon Morgan v. Bezirksregierung Köln*, EU:C:2007:626; Case C-8/*02 Ludwig Leichtle v. Bundesanstalt für Arbeit*, EU:C:2004:161; and Case C-303/02 *Peter Haackert v. Pensionsversiche rungsanstalt der Angestellten*, EU:C:2004:128.

[48] *See*, *inter alia*, Case 182/83 *Robert Fearon & Company Limited v. Irish Land Commission*, EU:C: 1984:335, para. 10; Case C-351/90 *Commission v. Luxembourg*, para. 14; Case 96/85 *Commission v. France*, EU:C:1986:189, para. 12.

[49] *See*, *inter alia*, Case C-15/90 *David Maxwell Middleburgh v. Chief Adjudication Officer*, EU:C:1991: 377, paras. 14-15; Case C-307/97 *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanz- amt Aachen-Innenstadt*, EU:C:1999:438, para. 56; Case C-230/97 *Criminal proceedings against Ibiyinka Awoyemi*, EU:C:1998:521, para. 25; Case 352/85 *Bond van Adverteerders and Others v. The Netherlands State*, EU:C:1988:196, para. 38; Case C-71/76 *Jean Thieffry v. Conseil de l'ordre des avocats à la cour de Paris*, EU:C:1977:65, para. 15. This general formula, beyond confirming the limited nature of the EU's competence system, implies that obligations for the Member States which were not agreed upon and set out previously require subsequent political agreement among the Member States in the EU legislative process.

[50] T. Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford: 2007, p. 152.

as an effective instrument in judicial decision-making, in controversial instances, for example when a choice between competing values or policy objectives of the same importance needs to be made, the legitimacy of the judicial assessment and the decision-making it enables becomes more dubious.[51]

Considering its directness and intensity, in order to ensure the legitimacy of any interference with locally-defined interests it is of paramount importance to examine the proportionality of the related Member State (policy) action. The choices made with respect to the application of the proportionality test must be principled and stay within the boundaries of the mandate provided under EU law. The legitimacy of controls over national policies naturally raises less controversy when such controls are carried out under an EU legal provision which sets out Member State obligations clearly, based on a manifest agreement among the Member States as to the interests and objectives to be achieved. Such legal provisions include the EU non-discrimination principle, both on its own or as implemented through the fundamental freedoms,[52] or a clearly expressed rule in a piece of EU legislation agreed to by the Member State. In instances when the application of EU requirements in the specific circumstances is less certain, or interference with national policies and policy action(s) lacks a detailed legal basis, the engagement of EU law with Member State interests must demonstrate self-restraint.

Under the principle of proportionality, EU law imposes requirements such as that Member State actions pursuing local interests must relate to a particular purpose and objective (i.e. they must be targeted at achieving a particular objective); must pursue genuine policy objectives that are determined clearly and transparently in advance; must be limited to what is necessary to achieve the policy objectives identified; and must avoid the use of excessive administrative discretion.[53] It may further be demanded

[51] *See* T. Harbo, *The Function of Proportionality Analysis in European Law*, Brill-Nijhoff, Leiden: 2015 and *The Function of the Proportionality Principle in EU Law*, 16 European Law Journal 158 (2010).

[52] It, nevertheless, needs to be applied with restraint as it is capable of excluding a broad range of Member State actions which would normally form part of the toolkit of national governments, and it can impose far-reaching obligations contradicting local political intentions. *See*, *inter alia*, Case C-412/04 *Commission v. Italy*, EU:C:2008:102, para. 106; Case 90/76 *S.r.l. Ufficio Henry van Ameyde v. S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI)*, EU:C:1997:101. The principle contains openness and transparency requirements of its own; *see* Case C-410/04 *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari and AMTAB Servizio SpA*, EU:C:2006:237, paras. 22-23 and Case C-458/03 *Parking Brixen GmbH v. Gemeinde Brixen and Stadtwerke Brixen AG*, EU:C:2005:605, paras. 50-51.

[53] *See*, *inter alia*, Case C-265/08 *Federutility and Others v. Autorità per l'energia elettrica e il gas*, EU:C:2010:205, para. 44; Case C-242/10 *Enel Produzione SpA v. Autorità per l'energia elettrica e il gas*, EU:C:2011:861, para. 48; Case C-503/99 *Commission v. Belgium*, EU:C:2002:328, paras. 48-52. The Member States could be required to produce a regulation that is able to differentiate between the various groups of persons affected, provides specific guarantees in order to avoid jeopardising the operation of the persons affected, offers mechanisms to compensate or reduce the potential negative impact of national intervention, applies measures which are limited in time and which are subject to revision in regular time intervals, and which was introduced as part of a complex policy package aiming to introduce positive mid- and long-term changes in the sector, Case C-242/10 *ENEL Produzione,* paras. 66-80 and Case C-265/08

that the realisation of local interests be carried out with due regard for the fundamental requirements of accessible and transparent regulation and comply with formal rule of law requirements. The latter include, in particular, the requirements that the legal position of the individuals affected is determined with precision and clarity, that adequate information on the rights and obligations of the persons affected is provided, that effective judicial protection and remedies are available, and that the effects of the applicable measures and policies are delimited in law adequately (objectively).[54] This set of principles places serious limitations as to which local interest and under what circumstances, as pursued by the Member States, may be accepted under EU law. As a result, Member States seeking approval for their policies under EU law may have to transform national processes and frameworks which were put in place for the formulation and the realisation of local interests.[55]

The legitimacy of EU law's intervention under these requirements depends foremost on the intensity of the legal scrutiny and how it is calibrated in the circumstances of a given case. The controls imposed under the proportionality principle depend on numerous factors, such as the nature of the EU competence affected, the scope of the Member State competence involved, and/or the availability, as well as the nature, of EU regulatory and harmonisation efforts in the given domain.[56] Arguably, when focusing on these elements of the law, the Court of Justice (and national courts) in effect explore whether intervention with the Member State interest in question has been legitimised by the availability of a prior political agreement at the EU level expressed in some form of law. When the EU's competences are limited and EU legislative efforts have been restricted, or where the relevant policy objectives (or values) are expected to be secured

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Federutility, paras. 17-21 and 35-46. For rather similar conditions in connection with the compensation of public service obligations, *see* Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, EU:C:2003:415, paras. 89-93.

[54] *E.g.* Case C-320/91 *Criminal proceedings against Paul Corbeau*, EU:C:1993:198, paras. 16-19; Case C-475/99 *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz*, EU:C:2001:577, paras. 57-65. The Member States could be required to introduce compensatory mechanisms or regulatory systems to control the operation of a Member State policy or remedy its unlawful (economic) impacts, Case C-340/99 *TNT Traco SpA v. Poste Italiane SpA and Others*, EU:C:2001:281, paras. 56-62.

[55] In general terms, EU law requires that the Member States avoid (bad) routines and practices in national governance and ensure that their conduct is able withstand legal and policy scrutiny. Narrow-minded, badly designed, erroneously prepared, potentially unfair and unsustainable expressions of local interests and considerations will be deemed as unacceptable. *See* Case C-162/06 *International Mail Spain*, para. 35; Case C-320/91 *Corbeau*, paras. 14-16. *See also* the requirement of consistent and systematic regulatory intervention at the national level as a condition for finding national measures suitable to achieve their aim, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, EU:C:2009:519, paras. 59-61, and the cases cited therein.

[56] Also, there may be a temporal dimension to these legal possibilities, such as that experienced in case of Services of General Economic Interest, where the protection of public service values was first an interest formulated at the national level, which later found its way as a Union objective into the Treaties, *see* Protocol No. 26 on Services of General Interest, [2012] OJ C326/1.

within Member State competences, Member State interests and the corresponding local policies will be accorded a rather broad leeway.[57]

The Court of Justice's case law offers a number of examples of such restrained scrutiny of the national interests pursued and the relevant national policy frameworks. In the early electricity market liberalisation judgments, the Court recognised – as a matter of principle – that a broad discretion was available to the Member States when they interfere in a market which is essentially a public service market, in pursuit of both national public service objectives as well as the related local economic, fiscal, social etc. policy objectives.[58] In those instances where a Member State's action in the national public service market effectively complemented the EU's policy efforts in the social domain, especially when the operation of fundamental public services and the meeting of fundamental social needs were under threat,[59] the Court again opted for a light-touch review of the Member State's interests and demanded only that the relevant national policies comply with some basic good governance requirements.[60]

In other circumstances, the legitimacy of EU law's engagement with locally-rooted interests may be much more uncertain. The case law dealing with the fundamental political choice that certain activities in what is perceived as a market must be provided on a not-for-profit basis introduced requirements towards Member State actions which may be difficult to link with a clear mandate under EU law expressing an unquestionable political agreement among the Member States. The requirements imposed by the Court in *Sodemare* included, in particular, that choices made in the local interest must follow from a logical and sound policy decision, which was made without discrimination at the national level, and that the policy objectives formulated by the national government must be genuine and must "necessarily" imply that the expectation of a not-for-profit

[57] A fitting, and maybe the only, example is the EU created concept of Services of General Economic Interest, the content and application of which will be determined primarily at the national level. The "switch rule" of Article 106(2) TFEU concerning the application of EU economic law as regards such services is closely linked to the principle of subsidiarity, the constitutional ability of the Member States to exercise local competences, and to the individual responsibility of the Member States for most components of local public service policy; *see* Protocol No. 26, *supra* note 56. *See also* the assessment of Member State action under public morality considerations, Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614 or, to a somewhat lesser extent, in pursuit of public policy objectives; Case C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v. The Prime Minister*, EU:C:2000:124.

[58] Case C-157/94 *Commission v. the Netherlands*, EU:C:1997:499, paras. 37-40; Case C-159/94 *Commission v. France*, EU:C:1997:501, paras. 52-55. It readily confirmed that the Member States may implement the objective of ensuring the undisturbed and sufficient, reliable and effective, efficient and socially responsible provision of public services. *See* Case C-157/94 *Commission v. the Netherlands*, paras. 41-42; Case C-159/94 *Commission v. France*, paras. 57-58.

[59] Case C-159/94 *Commission v. France*, paras. 57-58; Case C-503/99 *Commission v. Belgium*, paras. 45-47; Case C-207/07 *Commission v. Spain*, EU:C:2008:428, paras. 50-54.

[60] Case C-117/97 *Commission v. Spain*, para. 82; Case C-207/07 *Commission v. Spain*, para. 56; Case C-244/11 *Commission v. Greece*, paras. 69-75.

operation can be enforced in the particular local circumstances.[61] As a further demand, national policy-makers must ensure that the not-for-profit nature of the activity forms part of a national policy framework which promotes and protects genuine non-economic objectives and which is operated under genuine non-economic principles and in circumstances which exclude for-profit operations.[62]

While some of the *Sodemare* requirements, such as non-discrimination, may find a solid basis in clear and specific EU legal provisions, others have the potential to unjustifiably narrow down national policy choices and excessively interfere with their actual implementation. For example, the strict demand for policy coherence at the national level, which was presumably introduced by the Court of Justice to ensure that the Member States do not abuse the not-for-profit label to secure illegitimate advantages in the Single Market, is difficult to connect to an actual provision or principle of EU law, and may be impossible to satisfy, when interpreted strictly, in an actual policy setting and in an actual market where considerable uncertainties prevail. However, the judgment in *Sodemare* is also capable of being read in a more forgiving manner. It seems that the Court, quite consistent with its light-touch jurisprudence, will readily defer to the national policy process and the interests represented therein provided that the local interest of a not-for-profit (non-commercial) operation is sufficiently embedded in domestic non-economic policies and is adequately linked to local non-economic value considerations, which may be expressed in terms of fundamental rights.[63]

The legitimacy of EU law's engagement with local interests is perhaps the weakest when the proportionality principle is applied with a view to demanding from the Member States that they adopt less restrictive alternative measures which are nonetheless sufficiently effective to ensure the realisation of the policy objectives pursued.[64] The root of the problem here is that the requirement of less restrictive national policy alternatives aims explicitly at delimiting Member State choices. It also interferes rather directly with the domestic policy-process whereby the instruments for policy-implementation are selected. As a more specific issue concerning the power of the Court of Justice and its scope, the assessment of potential alternative measures, no matter how abstract it may be, seems to be a matter for the domestic policy-maker and the national legislature.[65]

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[61] Case C-70/95 *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia*, EU:C:1997:301, paras. 31-33.

[62] *Ibidem*, paras. 28-30.

[63] Case C-23/93 *TV10 SA v. Commissariaat voor de Media*, EU:C:1994:362, paras. 23-25. In contrast, *see* Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v. Commissariaat voor de Media*, EU:C:1991:323, paras. 27-28; Case C-353/89 *Commission v. the Netherlands*, EU:C:1991:325, paras. 30-45.

[64] *See*, *inter alia*, Case C-157/94 *Commission v. the Netherlands*, paras. 56-58; Case C-158/94 *Commission v. Italy*, EU:C:1997:500, paras. 53-54; Case C-159/94 *Commission v. France*, paras. 100-101.

[65] Opinions differ over whether the application of the requirement of a less restrictive alternative means is desirable in connection with Article 106(2) TFEU. *See* T. Prosser, *The Limits of Competition Law*, Oxford University Press, Oxford: 2005, pp. 137-138; J. Baquero Cruz, *Beyond Competition: Services of General Interest and EC Law*, in: G. de Búrca (ed.), *EU Law and the Welfare State*, Oxford University Press, Oxford:

In practice, however, the application of this limb of the proportionality test by the Court of Justice is circumscribed by the limitations of the judicial mandate available under EU law. The scrutiny is carried out, and its intensity set, with regard to the circumstances of the given case, which involves an assessment of the relevant factors from the perspective of the legitimacy of EU law's interference with local interests. Such factors include, in particular, the scope of the EU competences available as well as the nature and scope of the relevant national policy action.[66] As a clear example of a constrained scrutiny, in the earlier-mentioned electricity market rulings – where the national government was held entitled to make the most fundamental policy choices – the Court ruled that the assessment of potential, less restrictive alternative measures must not be purely speculative and must take place having regard to the specificities of the domestic public service market.[67]

Under the proportionality principle, EU law may demand from the Member States – as alternative instruments that are less restrictive than the enforcement of strict legal prohibitions or the imposition of additional administrative burdens – the introduction and operation of alternative user-friendly administrative solutions[68] or administrative supervision arrangements.[69] These solutions can rely on a particularly strong source of legitimacy when the Member States have made common, legally-binding commitments to the same effect. Arguably, the Treaty provisions on the fundamental freedoms may themselves provide a sufficient mandate, as their underlying objective is to liberate cross-border economic activities from excessive regulatory and administrative constraints.[70] The availability of EU legislation, which regulates cross-border cooperation avenues among the Member States so that economic operators can avoid restrictive national administrative and regulatory frameworks, only reinforces the force of these Treaty rules.[71] In contrast, when the alternative trader-friendly instrument entails the

2005, pp. 191-192; H. Schweitzer, *Services of General Economic Interest: European Law's Impact on the Role of Markets and of Member States*, in: M. Cremona (ed.), *Market Integration and Public Services in the European Union*, Oxford University Press, Oxford: 2012, p. 42.

[66] *See* Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap*, EU:C:2002:98, para. 105, where the Court made considerable efforts to establish that there was absolutely no other way in the domestic regulatory environment to achieve the desired result.

[67] Case C-157/94 *Commission v. the Netherlands*, paras. 56-58; Case C-159/94 *Commission v. France*, paras. 100-101.

[68] *See e.g.* Case C-39/11 *VBV — Vorsorgekasse AG v. Finanzmarktaufsichtsbehörde (FMA)*, EU:C:2012:327, para. 33; Case C-311/08 *Société de gestion industrielle (SGI) v. Belgian State*, EU:C:2010:26, para. 71; Case C-326/12 *Rita van Caster and Patrick van Caster v. Finanzamt Essen-Süd*, EU:C:2014:2269, paras. 49-54; Case C-262/09 *Wienand Meilicke and Others v. Finanzamt Bonn-Innenstadt*, EU:C:2011:438, paras. 45-52.

[69] *See e.g.* Case C-299/02 *Commission v. the Netherlands*, EU:C:2004:620, paras. 25-36; Case C-101/94 *Commission v. Italy*, EU:C:1996:221, paras. 21-24.

[70] *E.g.* Case C-212/97 *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, EU:C:1999:126, para. 38; Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others*, EU:C:2003:597, para. 73.

[71] *Ibidem*.

introduction of market-based solutions, such as resorting to private law arrangements or solutions which do not restrict the choices of the individuals (market operators) affected,[72] the legitimacy of EU law's interference, which assumes the existence of a common agreement among the Member States, is less obvious. The same holds true for imposing the requirement under the proportionality principle that Member States, instead of imposing direct legal prohibitions on individuals, should regulate the risks associated with the conduct in question,[73] resort to risk mitigation solutions,[74] or switch to a risk-based approach in economic regulation.[75]

Overall, the jurisprudence of the Court of Justice concerning the proportionality of policy actions adopted by the Member States in the pursuit of locally-formulated interests includes obvious, as well as controversial, instances of judicial interference. Even the minimum requirements enforced, such as the clarity of legal rules or the genuineness and coherence of the domestic policy framework, have the potential for moderating the processes of national policy-making and the realisation of local interests. The law has made clear what domestic practices are preferred and what may qualify as unacceptable. The scrutiny under EU law may also involve the transformation of how Member State interests are formulated and realised in the national domain. This may manifest itself through the requirement of a less restrictive alternative solution, the application of which may lead to changing the policy direction pursued by the Member State concerned. In every case, the legitimacy of EU law's engagement with Member State interests depends first and foremost on whether it can point to a common agreement among the Member States as expressed in a provision of law, lacking which the political opportunity, as well as the responsibility for realising their interests, must remain with national governments.

CONCLUSIONS

The political legitimacy enjoyed by Member State interests, fed into the EU integration framework as its fundamental building blocks and also as the political limitations of the common policies developed and operated therein, requires that their treatment under EU law relies on a clear source of legitimacy. The legitimacy for EU law's interferences flows first foremost from the prior agreements among the Member States, which are expressed in general and specific provisions of law, to achieve particular common (policy) objectives as they emerge from the interests they share. However,

[72] *See* Case C-171/02 *Commission v. Portugal*, EU:C:2004:270, paras. 43 and 55; Case C-442/02 *CaixaBank France v. Ministère de l'Économie, des Finances et de l'Industrie*, EU:C:2004:586, para. 22.

[73] *E.g.* Case C-9/02 *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, EU:C:2004:138, para. 54; Case C-436/00 *X and Y v. Riksskatteverket*, EU:C:2002:704, para. 59.

[74] *E.g.* Case C-493/09 *Commission v. Portugal*, EU:C:2011:635, para. 50; Joined Cases C-197/11 and C-203/11 *Eric Libert and Others v. Gouvernement flamand*, EU:C:2013:288, para. 56.

[75] *E.g.* Case 3/88 *Commission v. Italy*, EU:C:1989:606, para. 11.

the mandate thus provided for EU law, as well as its boundaries, requires constant examination and validation when applied in individual cases by the Court of Justice or by national courts. This is particularly true for the law of the Single Market, where local interests are filtered and moderated, and may even be transformed, under the proportionality principle. The choices taken with regard to the local interests represented must be defended in judicial reasoning. The judicial decisions must demonstrate that they understand the legitimacy dilemmas caused by the fundamental circumstance that the interests raised by the Member States are the products of national political processes and respond to specific local needs.

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EUROPEAN "GHOST AIRPORTS": EU LAW FAILURE OR POLICY FAILURE? THE NEED FOR ECONOMIC ANALYSIS IN STATE AID LAW

Abstract:
Wasteful spending of public funds, leading to the creation of "ghost airports", is often described as a regulatory failure and a major deficiency in European State aid control. It is pointed out that decisions to build or upgrade an airport are often ill-conceived, poorly implemented, and without economic justification. This raises the question whether European law, namely its State aid control system, contains inherent flaws or whether the European Commission's decision-making process can be improved by increasing reliance on objective economic reasoning under the existing legal framework. This article provides an analysis of the decision-making problems leading to failed aid efforts; of the role of the economic approach in State aids; and of the standard of economic assessment required in State aid cases. The article concludes with de lege ferenda *postulates.*

Keywords: air transport, airports, economic analysis, EU law, investment aid, state aid

INTRODUCTION – A PROBLEM OF DEFINITION AND LIMITATIONS

State aid has always been a major part of the European aviation industry.[1] The States' role in creating "ghost airports" – high-cost, underused facilities – is often examined using the almost proverbial *Ciudad Real* case as the prime example of reckless spending and failed investments.[2] The construction and upgrade of airport infrastructure, as well

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[1] M. Stainland, *A Europe of the Air? The Airline Industry and European Integration*, Rowman & Littlefield, Lanham, Boulder, New York, Toronto, Plymouth: 2008, pp. 23-24.

[2] European Court of Auditors (ECA), *EU Funded airport infrastructures: Poor value for money* (Special Report no. 21), available at: http://www.eca.europa.eu/Lists/ECADocuments/SR14_21/QJAB14021ENC.pdf (accessed 30 June 2018).

as the investment process itself, is shaped by two main interrelated factors. The first relates to States' decisions authorising the process to begin. These are often motivated by purely domestic political considerations rather than legal ones, and hence are subject to only indirect control under EU State aid law, and then only to the extent it may affect the compatibility criteria of aid measures. The second factor relates to the EU State aid rules themselves. One of the main goals of the State Aid Modernisation initiative (SAM) – a major overhaul of the European Union's (EU) State aid control system launched in 2012 – is to place a greater emphasis on the appropriateness of aid measures and to avoid wasteful expenditure of public funds.[3] As a result, a number of legislative changes have been introduced by the *Guidelines on State aid to airports and airlines*, issued under Article 107(3)c of the Treaty on the functioning of the European Union (TFEU) and aimed at ensuring the economic viability of airport projects receiving investment aid.[4]

Nevertheless, while a more rigid approach has become noticeable in recent years, both in the regulatory landscape as well as in the European Commission's (EC) decisions, the problem with regard to State aids for the construction and modernisation of airports seems to persist. Consequently, the following research question can be asked: If domestic economic policies fall in principle outside the purview of EU law (and consequently outside the scope of this article) and the State aid rules concerning investment aid to airports already explicitly require proof of economic viability, then where does the problem lie? Alternatively, the question can be reformulated around the issue of the effectiveness of various safeguards designed to prevent wasteful or inefficient spending. Given this perspective, the material law rules of EU State aid law do not themselves warrant a detailed analysis, although they are outlined briefly in paragraph 1. Instead, this article adopts a rebuttable presumption that there are adequately formulated provisions in the existing material law, and thus the analysis focuses on how these provisions are interpreted and above all substantiated, which leads to the formulation of possible *de lege ferenda* postulates.[5]

As already emerges from the foregoing remarks, it is both my opinion and the article's hypothesis that the root cause of the problems of investment failures, and at the same time the answer to the question posed above, lies in the insufficient interface between the rules and operationalization of substantiating economic data. Despite the EC's

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU State Aid Modernisation (SAM), COM(2012)0209 final (2012 Communication).

[4] Communication from the Commission — Guidelines on State aid to airports and airlines, OJ [2014] C 99/3 (2014 Guidelines).

[5] The term "adequate" refers to the requirement of a contribution to a well-defined objective of common interest; of limiting aid to the minimum necessary; of the absence of less restrictive means, along with the "controlling" principle of proportionality common to all investment aids authorised under Article 107(3)c TFEU. Although these criteria are fairly generic, given the complex nature of many investment projects the governing rules must remain sufficiently general to provide a solution in the event of a lacuna. These criteria should prevent wasteful spending when correctly applied. Therefore, as mentioned, the problem at issue boils down to the question of how to establish whether these criteria are fulfilled.

claims of its reliance on various economic analyses in its case assessments, it seems that the current approach lacks transparency and methodological rigidity, to the detriment of legal certainty. While it stands to reason that regulators and lawmakers cannot reasonably expect that complex economic relations can be narrowed down to a simple input-reaction equation, and thus a certain randomness is unavoidable, nevertheless unpredictable outcomes could be minimized and legal certainty improved.[6] Therefore, in this article I aim to formulate a hypothesis based on the above-mentioned research question: that when properly structured, the legal sciences, and thus regulatory decision-making, can greatly benefit from the extensive *acquis* of economic/management sciences, and hence I put forward the argument that the Commission's current approach towards State aids for the construction and modernisation of airports can be refined and improved.

This article is organized as follows: Section 1 explores types of decision-making failures in State aids for the construction or upgrade of airports, illustrating the problem outlined in the research question and serving as a springboard to further analysis. Section 2 provides a brief discussion of the role of economic analyses in European lawmaking and market regulation processes in the field of State aid. Section 3 considers the standards for assessing the competitive impact of aid measures. This is followed by an examination of the procedural aspects of State aid cases – the prior notification requirement and burden of proof – in Sections 4 and 5 respectively. The analysis concludes with *de lege ferenda* proposals.

1. DECISION-MAKING FAILURES IN STATE AID TO AIRPORTS – THE NATURE OF THE BEAST

In EU law, State aid is defined as a measure attributable to a State, granting a selective advantage, unobtainable under normal market conditions, to certain undertakings.[7] There is some controversy about whether a distortion of competition and trade between

[6] The concept of legal certainty is recognised as one of the fundamental principles of European Union law. Throughout this analysis, the concept will be interpreted in a European context, which is inextricably linked with the doctrine of legitimate expectations and the principle of good faith. In a nutshell, it will be understood as a requirement that sufficient information must be made public to enable parties to know what the law is and why has it been applied in a particular way. *See* T. Tridmas, *The General Principles of EU Law* (3rd ed.), Oxford University Press, Oxford: 2013, p. 242.

[7] The notion of State aid is traditionally based on the extensive case-law, and rather loosely on the actual wording of Article 107(1) TFEU. In 2015 the Commission adopted the Communication on the notion of State aid (Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C262/1 (2016 Notice)) which did not introduce any new approaches but rather codified the pre-existing case-law. Interpretation of the notion of State aid by the EU Courts will thus constitute primary point of reference for this analysis. *See further* K. Bacon, *European Union Law of State Aid*, Oxford University Press, Oxford: 2017, pp. 17-89; H.C.H. Hofmann, C. Micheau (eds.), *State Aid Law of the European Union*, Oxford University Press, Oxford: 2016, pp. 65-220; K. Quigley, *European State Aid Law and Policy* (3rd ed.), Bloomsbury, Hart Publishing, Oxford, Portland: 2015.

Member States is an element of the definition itself, or just the compatibility criterion.[8] Yet, such distinction remains a semantic one for this analysis, as the issue of whether or not a measure constitutes State aid, or that the measure is compatible with the Internal Market, must be preceded by a market analysis.[9] Additionally, while the distortion of competition and effect on trade criteria remain distinct, they are usually analysed together.[10]

A comprehensive overhaul of the rules governing State aids to airports is one of the most prominent components of the State Aid Modernisation initiative.[11] The Commission asserted in the policy paper that nearly half of the European airports are not profitable, and further elaborated that there have been cases of "ghost airports" which should not have been constructed in the first place.[12] In the EC's view, the issue has become serious enough to warrant legislative action. Some may argue that spectacular failures are rare, but they tend to be the cases that the media publicizes, so it is more of a publicity problem than any intrinsic failing in the system itself, although it remains debatable what precise percentage of failed investments constitutes a failure of the entire system. Nevertheless, in my opinion the mere fact that such avoidable problems occur requires policy adjustments.

There are two distinct, but linked, sets of problems associated with decision-making on State aids for the construction and modernisation of airports that lead to the failure of aid measures. The first relates to the EC's decisions made on the basis of erroneous forecasts. It goes without saying that every prediction has a margin of error, but in some cases forecasts are *prima facie* methodologically flawed.[13] This problem exists in both State aids and in other cases involving EU funds.[14] The second issue concerns cases where the original predictions are sound, but due to either mismanagement or

[8] Quigley *supra* note 7, pp. 79-80. The EU Courts have held that where aid is granted to an undertaking that operates beyond one Member State, such aid will be regarded as affecting trade on the Internal Market (*See*, *inter alia*, Case C-66/02 *Italy v. Commission* [2005], ECLI:EU:C:2005:768). This interpretation seems applicable if there are international flights at the airport.

[9] The aid may be either declared compatible with the Internal Market, or a particular measure can be considered not to constitute State aid.

[10] *See*, *inter alia*, Cases T-288/97 *Regione Friuli Venezia Giulia v. Commission of the European Communities* [2001], ECLI:EU:T:2001:115, para. 41; T-50/06 *RENV II: Ireland and Aughinish Alumina Ltd v. European Commission* [2016], ECLI:EU:T:2016:227, para. 113.

[11] *Competition policy brief: New State aid rules for a competitive aviation industry*, Issue 2, February 2014 (2014 Policy Brief), available at: http://ec.europa.eu/competition/publications/cpb/2014/002_en.pdf (accessed 30 June 2018).

[12] *Ibidem*, p. 2. This issue has been the subject of Parliamentary Questions (E-001393/2015, P-011981-15), and in its answers the Commission has stated that it has no plans to establish a list of "inefficient airports" but intends to remain in close contact with Member States to make sure that the new rules on State aid for airports are applied.

[13] *See* especially the cases described in Section 5.

[14] In principle State aid must be attributable to the State, which is not the case with the EU funds. However, most EU programmes involve co-financing from States' budgets and thus fall within the ambit of State aid rules (Hofmann & Micheau, *supra* note 7, pp. 204-209). Airports can be financed from the European Regional Development Fund, The Cohesion Fund, or under the Trans-European Transport Networks (TEN-T) programme.

to unforeseen and unavoidable circumstances, the predictions initially made become invalid over time, and thus the original objective of the State's intervention becomes unattainable without further subsequent aid.

Referring to the first scenario, case of *Kassel* (formerly *Kassel-Calden*) serves as a prime example of a project gone wrong.[15] The airport, converted from an airfield, was originally intended to relieve congestion at the Frankfurt Airport. Kassel was supposed to take over parts of low-cost, charter, and cargo operations as well as the general aviation already present on the site. The airport operator benefited from four separate aid measures.[16] All aids were authorised by the Commission, which concluded that the project offered a reasonable prospect for profit. In hindsight, we now know that the airport attracted negligible commercial air traffic and did not even come close to the break-even point. Currently, (i.e. as of November 2017), the owners are considering shutting it down.[17]

If one were to look solely at the formal interpretation of the existing rules, it is difficult to find anything to criticise in the Kassel case. What's more, every single case involving State aid to the Kassel airport outwardly appears to be an example of correct application of the State aid rules. Investment aid may be considered to be compatible with the Internal Market under Article 107(3)c TFEU only if the aid measure is aimed at a "well-defined objective of common interest."[18] At first glance, it would seem this criterion was fulfilled, as the airport was considered to provide a local economic stimulus. There is an extensive body of research that shows a positive relationship between infrastructure development and economic growth, and while the actual extent may be subject to some debate, there is a general consensus regarding the existence of such impacts – direct, indirect, and induced.[19] Consequently, it can be concluded that the aid granted was well-targeted and proportional.[20] Controversy arises over the

[15] In January 2015, Kassel-Calden Airport was renamed Kassel Airport. The previous name is used in older decisions.

[16] Cases: NN14/2007 *Kassel-Calden Airport* [nyr] – Decision not to raise objections; N 112/08 *Flughafen Kassel-Calden* [2009] OJ C97/4 - Decision not to raise objections; N335/2010 *Finanzierung des Ausbaus des Verkehrslandeplatzes Kassel-Calden* [2011] OJ C23/1 – Decision not to raise objections; SA.34089 *Erneute Finanzierung des Ausbaus des Verkehrslandeplatzes Kassel-Calden* [2012] OJ C341/2 – Decision not to raise objections.

[17] The airport operator, Flughafen GmbH Kassel, is owned by the Land Hessen (68%), the city of Kassel (13%), the Landkreis Kassel (13%) and the municipality of Calden (6%). Given this ownership structure, a closure decision may be delayed for political reasons.

[18] 2014 Guidelines, *supra* note 4, para. 79(a). This requirement is common to all aids authorised under Article 107(3) TFEU, not only aids for airports.

[19] *See generally* J. Hakfoort, T. Poot, P. Rietveld, *The Regional Economic Impact of an Airport: The Case of Amsterdam Schiphol Airport*, 35(7) Regional Studies 595 (2001); M.N. Postorino (ed.), *Regional Airports*, WIT Press, Southampton, Boston: 2011; A. Smyth, G. Christodoulou, N. Dennis, M. Al-Azzawi, J. Campbell, *Is air transport a necessity for social inclusion and economic development?* 22(7) Journal of Air Transport Management 53 (2012); Z. Elburz, P. Nijkamp, E. Pels, *Public infrastructure and regional growth: Lessons from meta-analysis*, 58(1) Journal of Transport Geography 1 (2017). This list may not be exhaustive, but it does provide an overview.

[20] Aid is deemed proportionate if the objective cannot be delivered through the use of market means alone, or using an aid scheme that would have a less distortive effect on competition (Bacon, *supra* note 7,

requirement that infrastructure must demonstrate that it has a reasonable prospect of achieving profitability over the mid-term horizon.[21] The Commission pointed to the observable drop in the number of charter operations and to the fact that three regional airports – Paderborn-Lippstadt, Hannover and Erfurt – have similar catchment areas, and therefore concluded that the chances were rather slim that the new airport would satisfy a significant portion of the local demand, estimated at 3.3 million passengers per annum.[22] All of these factors quite clearly indicate that the investment showed dubious prospects for profitability, yet the EC cleared the aid, apparently disregarding its own analysis.

At this point it is worthwhile mentioning that there are no exact annual passenger flow figures to conclusively determine that an airport will be profitable.[23] There is a significant body of research on the subject, highlighting various factors affecting airports' profitability.[24] The Commission concluded that airports serving in excess of 3 million

pp. 100-101; Quigley, *supra* note 7, pp. 377-383). In the case of the Kassel airport, no private investor was interested in the project.

[21] 2014 Guidelines, *supra* note 4, paras. 86, 99 *in fine*. According to submitted (and accepted) business plan, in 2014, the number of passengers was expected to increase to 410,000. The business plan expected a constant yearly growth in passenger numbers (4% per annum). The actual figures were as follows: 2014 – 45,587 passengers; 2015 – 64,926 passengers; 2016 – 54,822; 2017 (January-August) – 34,232 (Kassel Airport – Zahlen, Daten und Fakten, available at: https://www.kassel-airport.aero/de/inhalte-metanavigation-seitenfuss/die-flughafen-gmbh/zahlen-daten-und-fakten (accessed 30 June 2018)).

[22] Additionally, the aid coincided with the financial crisis. The overall downturn resulted in a 4.6% decrease in passenger air transport in Germany in 2009. However, since June 2010 the monthly growth rates in passenger air traffic in Germany have been increasing and were 7% above the monthly growth rates of the previous year, and since 2009 Germany has enjoyed a GDP growth of around 3% per annum. The Commission concluded that figures in the business plan still hold true (Aktualisierte Stellungnahme zur Nachfrageprognose für den Flughafen Kassel-Calden, Intraplan Consult GmbH, 12 März 2012, S. 8 – the business plan is not publicly available in its entirety, only excerpts in the EC's decisions). In decision SA/34089 (para. 63) the Commission asserted: "(…) in the 'most probable' scenario examined, it is not expected that Kassel-Calden airport will be able to fully exhaust its regional market potential of 3.1 million passengers. Overall, a market share of 16.3% is expected." Such threshold is well below the EC's own estimates on airports' profitability (2014 Guidelines, *supra* note 4, para 118).

[23] Additionally, the data suggest that low cost carriers usually bring less revenue for airports than legacy carriers (especially non-aeronautical – i.e. from passengers). Therefore, if an airport mostly depends on low cost carriers, the required number of passengers per annum may be higher than indicated below (*see*, *inter alia*, D. Gillen, P. Forsyth, J. Müller, H-M. Nimeier (eds.), *Airport Competition: The European Experience*, Ashgate, Farnham: 2010, pp. 68-70; J. Wiltshire, *Airport competition: Reality or myth?*, 67 Journal of Air Transport Management 241 (2018); M. Yokomi, P. Wheat, J. Mizutani, *The Impact of Low Cost Carriers on Non-Aeronautical Revenues in Airport: An Empirical Study of UK Airports*, 64 Journal of Air Transport Management 77 (2017)). These figures also do not take into account the existence of other indirect aid measures, such as marketing contracts.

[24] *See generally*, *inter alia*, Gillen et al., *supra* note 23; Postorino, *supra* note 19; C. Oliviera Cruz, J. Miranda Sarmento, *Airport privatization with public finances under stress: An analysis of government and investor's motivations*, 62(7) Journal of Air Transport Management 197 (2017); J. Zuidberg, *Exploring the determinants for airport profitability: Traffic characteristics, low-cost carriers, seasonality and cost efficiency*, 101 Transportation Research Part A: Policy and Practice 61 (2017). The list is by no means exhaustive.

passengers per annum should be able to cover their operating costs.[25] The European Commission broadly based its assessment on the research conducted at Cranfield University in 2002.[26] The Cranfield analysis is generally considered to be thorough and reliable, but it remains an open question whether these figures have become outdated.

The above highlights a more general problem, relevant for all regulatory measures. The central dilemma here focuses on whether fixed parameters – imposed *ex ante* – can be the basis for an appraisal of all cases involving interventions in the market. i.e. State aids, competition, merger control, and so on. There exists an unrealizable dream among many market regulators that economic processes can be reduced to invariable formulas, "stimulus and reaction."[27] Since this is impossible in practice, all economic regulations must allow for a margin of appreciation, meaning a certain degree of flexibility.[28] This flexibility is sometimes incorrectly equated with arbitrariness, especially in State aid cases where the Commission enjoys a high degree of discretionary power.[29] At the same time however, it is also true that without transparency flexibility can easily transform into arbitrariness, or at least be perceived as such, to the obvious detriment of legal certainty.

The importance of this factor becomes apparent when considering interpretation of the compatibility criteria in the *Kassel* case. From a purely formal standpoint, the existing rules were correctly applied. The interpretation was sound, logical, coherent, and consistent with the *ratio legis* of the State aid system.[30] Yet the investment has proven to be a failure. If one searches for the root cause of this manifest divergence,

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[25] 2014 Guidelines, *supra* note 4, para. 118. It is worth mentioning that in a prior version of Aviation Guidelines (Communication from the Commission, *Community guidelines on financing of airports and start-up aid to airlines departing from regional airports* [2005] OJ C312/1) the Commission stated that airports need between 500,000 and 1.5 million passengers to make a profit, although it rightly observed that there are no absolute figures with regard to the break-even point, a fact directly referred to in the 2002 Cranfield Study. In the current guidelines (2014 Guidelines), the EC has revised these figures: according to the Commission airports with annual passenger traffic above 3 million are usually profitable, while smaller airports may not be able to cover at least part of their operating costs (*cf.* para. 72 of the 2005 Guidelines with para. 118 of the 2014 Guidelines). The current guidelines also quote from the 2002 Cranfield Study, but these figures remain unsourced.

[26] Study on competition between airports and the application of State aid rules – Cranfield University, June 2002 (2002 Cranfield Study), available at: http://bit.ly/2ERSyQC (accessed 30 June 2018).

[27] Karl Popper correctly pointed that every rulemaking can be boiled down to the method of "trial and error" (K. Popper, *Objective Knowledge: An Evolutionary Approach*, Oxford University Press, Oxford: 1973, p. 9). Additionally, one can point out the emblematic "butterfly effect" describing situation when a small change in one state of a deterministic nonlinear system can result in large differences in a later state (E.E. Peters, *Applying Chaos Theory to Investment & Economics*, Wiley & Sons, New York, NY: 1994). It can be argued that in the complex economic relationship high number of variables make accurate prediction impossible.

[28] In legal doctrine, the term margin of appreciation is often used in a specific context of human rights. The term will continue to be used in this analysis in the literal sense with no relation to that context.

[29] P. Nicolaides, M. Kekelekis, P. Buyskes, *State Aid Policy in the European Community: A Guide for Practitioner*s, Kluwer Law International, Alphen aan den Rijn: 2004, p. 164.

[30] *See* criteria in 2014 Guidelines, *supra* note 4, paras. 83-111.

a purely legal analysis of the compatibility criteria does not reveal any apparent flaws. On the contrary, these rules seem to be impartial and aimed at achieving economic efficiency, while avoiding wasteful or inefficient expenditures. However, as mentioned in the Introduction, the problem lies at the interface between the above-mentioned rules and the data used to substantiate a particular interpretation. If erroneous data is fed to the regulator or competition authority, the application of these rules will fail to produce the desired result.[31]

The case of the Kassel airport is by no means an isolated one. A similar problem can be seen not only in State aids wherein a project is financed entirely from the public purse, but also in cases involving EU funds and those co-financed by the State.[32] The following most glaring examples can also be found: Córdoba (unnecessary airside expansion); Fuerteventura (oversized terminal); La Palma (too large airside expansion); Thessaloniki (unused cargo terminal); Kastoria (extension to the runway that has never been used by the type of aircraft it was designed for); Vigo (extensive overlaps in catchment areas of at least two non-congested airports); Murcia – San Javier (extensive overlaps in catchment areas of other airports); and Corvera (simultaneous construction of another airport).[33]

The second mentioned category relates to the situation when initial projections rightly prove that the investment is viable (viability must be assumed at this point), but the project has been derailed at a later stage.[34] There is no better example than the Berlin-Brandenburg airport. This case has become a source of national embarrassment as the project has been plagued by cost overruns and construction delays.[35] In this case, the apparent failure of aid measures cannot be attributed to using unrealistic profitability forecasts.[36] Examples from around the world convincingly show that hub airports, especially those that serve major cities, are generally profitable.[37] For this reason, it could be assumed that the airport serving Berlin would have been profitable as well. However, in the case of the Berlin-Brandenburg airport management errors were to blame.[38] It can thus be argued that sound management practices should have prevented the occurrence of such negative events. But this is a separate issue and should not be confused with the existence of over-optimistic, biased forecasts. However, because these

[31] I. Sanderson, *Evaluation, policy learning and evidence-based policy making*, 80 Public Administration 1 (2002).

[32] *See* N. Robins, *State aid assessments in the aviation and ports sectors: The role of economic and financial analysis*, 18 ERA Forum 121 (2017).

[33] Special Report no. 21, *supr*a note 2, pp. 18 et seq.

[34] It is widely believed that there is a general trend for infrastructure projects carried out and paid for by central or local governments to involve overly optimistic assumptions regarding costs and predicted profitability (*see* B. Flyvbjerg, *Five Misunderstandings about Case-study Research*, 12 Qualitative Inquiry 219 (2006)). The two failures described above are not mutually exclusive.

[35] J. Fiedler, A. Wendler, *Berlin Brandenburg Airport*, in: G. Kostka, J. Fiedler, (eds.), *Large Infrastructure Projects in Germany: Between Ambition and Realities*, Palgrave Macmillan, London: 2016, pp. 87 et seq.

[36] *Ibidem*, pp. 88-91.

[37] Gillen et al., *supra* note 23, pp. 63-73.

[38] Fiedler, Wendler, *supra* note 35, p. 93 et seq.

events are not mutually exclusive, such confusion can easily occur. Nevertheless, the fact remains that fixing these problems requires different solutions.

This example serves to illustrate that securing a sound and reliable analysis cannot be regarded as the universal *panaceum* for unsuccessful State interventions. Therefore, it must be noted that the analysis which follows and the proposed improvements are only applicable to situations where economic demand does not in itself justify construction of the airport.

2. APPLYING A MORE ECONOMIC APPROACH – A FORGOTTEN IDEA?

Placing a greater emphasis on economic efficiency is nothing new in competition law. In the late 1980s and early 1990s the European system was criticised (and rightly so) for being "too legalistic and lacking in economic analysis."[39] Many critics pointed out the unfavourable comparison between EU competition law and that of its equivalent – US Antitrust law – which since the 1970s has been applied through the lens of objective economic analysis.[40] These arguments have been largely substantiated in some high-profile "transatlantic" cases – *Boeing/McDonnel Douglas* (1997), *GE/Honeywell* (2001) and *Microsoft* (2004) – when a conflict between the US and the (then) European Community competition authorities exposed problems with the (then) contemporary European approach.[41]

As a result, in 1999 the European Commission (under Mario Monti, then the Competition Commissioner) undertook an ambitious, but "soft" reform under the label *More Economic Approach*.[42] During this process, the Commission enacted a series of acts, mostly soft law, within the antitrust (Articles 101 and 102 TFEU) as well as Merger Control spheres, outlining an approach "based on the effects on the market."[43] While the broad goal of grounding law in microeconomics is not hard to decode, the concept of the *More Economic Approach* seems superfluous, as official policy papers have failed to clearly explain its agenda.[44]

Such vagueness is unavoidable to a certain extent, because as Robert Bork famously said about the US antitrust system, "only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."[45] The same holds true in case of the EU competition law, and there is an ongoing and unresolved debate over the

[39] B.E. Hawk, *System Failure: Vertical Restraints and EC Competition Law*, 32 Common Market Law Review 973 (1995).

[40] R. van den Bergh, *Modern Industrial Organisation versus old-Fashioned European Competition Law*, 17 European Competition Law Review 75 (1996); A.C., Witt, *The More Economic Approach to EU Antitrust Law*, Hart Publishing, Oxford, Portland: 2016, pp. 10-11.

[41] Witt, *supra* note 40, pp. 11-24.

[42] Commission of the European Communities, White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1 (1999 White Paper).

[43] A list of these acts is available in Witt, *supra* note 40, pp. 57-60.

[44] Witt, *supra* note 40, pp. 57-59.

[45] R. Bork, *The Antitrust Paradox*, Free Press, New York: 1993, p. 59.

goals, priorities, and values of the European economic model.[46] Nevertheless, despite these uncertainties the practical ramification of this new approach is, broadly speaking, the use of an economic analysis as a justification for a given EC decision.[47] A lack thereof may constitute a violation of the applicable procedural standards, resulting in a declaration of *ex tunc* nullity.[48] Yet, this development cannot give rise to a legitimate expectation regarding the quality of these analyses, but merely their existence.[49]

While the approach presented above can be criticised as half-hearted, surprisingly even as such it did not initially find its way into State aid law. Only in 2005 did the European Commission publish a vague document entitled *State Aid Action Plan* outlining (in rather broad strokes) a conceptual framework for the appraisal of State aids.[50] The balancing test laid out therein has subsequently been introduced into a number of sectoral guidelines and further refined as part of the SAM reform.[51] While these declarations remain mostly vague and aspirational, nevertheless they cannot be completely ignored and as a result practicing lawyers can expect some economic justification for State aids. However, as with its antitrust counterpart, such an expectation does not extend to a specific methodological standard. Even though there has been observable progress over recent years, State Aid Modernization seems oblivious to those voices advocating the need to improve analyses of distortions of competition and effects on trade.[52] This becomes apparent given that the EC did not introduce into State aids a market analysis comparable to that carried out under Articles 101 and 102 TFEU and in Merger Control.[53] In a similar vein, the CJEU has remained reticent in its case-law

[46] There is an extensive debate among legal scholars over the goals of both the EU Competition law as well as the whole European economic model. While it is broadly accepted that these goals encompass the effective allocation of resources, consumer welfare, and integration of the Internal Market, there is no consensus on meaning of these notions as well as on the relationship between them.

[47] G. Monti, *EC Competition Law*, Cambridge University Press, Cambridge: 2007, pp. 15-17.

[48] It can be considered as "infringement of an essential procedural requirement" within the meaning of Article 263 TFEU. *See* Cases T-34/02 *EURL Le Levant 001 and Others v. Commission of the European Communities* [2006], ECLI:EU:T:2006:59; T-1/08 *Buczek Automotive sp. z o.o. v. Commission of the European Communities* [2008], ECLI:EU:T:2008:79.

[49] Bacon, *supra* note 7, p. 84.

[50] Commission of the European Communities, *State Aid Action Plan. Less and better targeted state aid: a roadmap for state aid reform 2005–2009*, COM(2005) 107 final (2005 SAAP).

[51] Bacon, *supra* note 7, pp. 15-16; Hofmann & Micheau, *supra* note 7, pp. 33-35.

[52] *See* X. Boutin, N. Gaál, *Modernising State Aid through Better Evaluations – Insights from Recent Discussions with Stakeholders*, 13(1) European State Aid Law Quarterly 67 (2014); F. Gröteke, K. Mause, *The Economic Approach to European State Aid Control: A Politico-Economic Analysis*, 17(2) Journal of Industry, Competition and Trade 185 (2016). The State aid control system was put in a difficult position following the financial crisis, when many extraordinary measures were authorised. The too-great leniency towards ailing operations was one of the main causes of the SAM reform. Despite this initiative however, the post-crisis fallout has not yet been fully cleaned up. *See* A. Sanchez-Graells, *Digging itself out of the hole? A critical assessment of the European Commission's attempt to revitalise State aid enforcement after the crisis*, 4(1) Journal of Antitrust Enforcement 157 (2015).

[53] J.T. Lang, *EU State Aid Rules – The Need for Substantive Reform*, 3 European State Aid Law Quarterly 440 (2014).

and rejected suggestions that it should revise its methods to analyse the impact of aid measures.[54]

Although relatively recently (November 2016) the Commission published a call for a tender to evaluate the impact of state measures on the market and assess how market analyses can be applied to State aid cases, so far it has not resulted in any legislative initiative.[55] This apparent deficiency is inextricably linked with the construction of the State aid control system, which determines the required standard of impact assessment. Each of these areas will be discussed in turn below.

3. DISTORTION OF COMPETITION AND EFFECT ON TRADE – ACTUAL V. PREDICTED DATA

The existing lack of methodological rigidity can be explained, but not entirely justified, by the low standard of the effect on competition and trade test. For our purposes here, the crucial determinant is that, in principle, aid in the aviation sector, especially investment aid, requires prior notification.[56] Member States may not initiate an aid measure before the Commission has given its approval. However, non-notified aid is not automatically deemed incompatible with the Internal Market.[57] For this reason, the analysis of the effects of the aid measure must be made on the basis of the *ex ante* (or *a priori*) characteristics of the given measure.[58]

In the model scenario, a compatibility assessment is done before data showing its actual effect becomes available. It follows from this that basing the substantive assessment on a predicted impact seems to be the only practically feasible solution. Therefore, the analysis of distortions of competition and effects on trade does not require a definition of the relevant geographic and product markets. Similarly, there is no need to identify all existing conditions relevant to the case; *inter alia* the level and dynamics of trade, extent of existing competition, supply-demand structure etc.[59] It is sufficient to present a theoretically valid mechanism showing the potential effect on

[54] *See* especially Case C-518/13 *Eventech Ltd v. The Parking Adjudicator* [2015], ECLI:EU:C:2015:9, paras. 64-71.

[55] Available at: http://ec.europa.eu/competition/calls/exante_en.html (accessed 30 June 2018), under no. COMP/2016/005.

[56] With the exception of regional aid under GBER and *de minimis* aid.

[57] Bacon, *supra* note 7, pp. 94-95; Hofmann & Micheau, *supra* note 7, pp. 348-350.

[58] Although the Commission may strengthen its evidence by reference to new data, where these confirm the EC's assessment. *See* Case C-142/97 *Belgium v. Commission (Tubemeuse)* [1990], ECLI:EU:C:1990:125, para. 39.

[59] Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and Others v. Commission of the European Communities* [2000], ECLI:EU:T:2000:151, para. 95; T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v. Commission of the European Communities* [2000], ECLI:EU:T:2000:223, para. 102; T-58/13 *Club Hotel Loutraki AE and Others v. European Commission* [2015], ECLI:EU:T:2015:1, paras. 88-89.

competition and trade, without real supporting data establishing the likelihood of its actual occurrence.

As a result, the actual threshold for proof is rather low.[60] Although, while in *Hotel Cipriani* the Court held that a distortive effect could not automatically be assumed from the case's circumstances, it was sufficient to show the existence of factors leading to the conclusion that the measure is liable to distort competition and affect inter-State trade.[61] In other words, the Commission needs only to present a theoretically valid but practically unverifiable mechanism. While the decision is likely to be overturned if there is no link between this mechanism and the facts of the case, nevertheless the analysis remains purely theoretical.[62]

One more point merits mentioning here: according to the Court's established case law, the generic test for a distortion of competition is whether the aid strengthens the position of the beneficiary vis-à-vis its competitors.[63] However, this line of reasoning is problematic due to parallel case-law where the Court has asserted that neither an assessment of the relative strength of the undertakings nor the establishment of the existence of actual competitors is required.[64] It is sufficient merely to prove the elimination of costs which are usually incurred by a typical undertaking.[65] This interpretation appears to be a leap in logic by linking the advantage criterion with the criteria of distortion of competition and effect on trade. The argument runs that if a measure confers an economic advantage, it will distort intra-community competition and trade (or be liable to have such effect).[66]

The reason why this factor is especially relevant here is that there is an ongoing debate among economists about whether airports have market power, i.e. whether they can compete with other airports.[67] This issue remains controversial and there are radically conflicting opinions concerning this question. Regardless, even if in a particular case the existence of market power can in principle be established, it cannot be done without

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[60] Bacon, *supra* note 7, p. 84; Hofmann & Micheau, *supra* note 7, pp. 150-152.

[61] Case T-254/00, T-270/00 and T-277/00 *Hotel Cipriani SpA and Others v. Commission of the European Communities* [2008], ECLI:EU:T:2008:537, paras. 227-228.

[62] *See* Cases T-34/02 *Le Levant*; T-1/08 *Buczek*.

[63] Established for the first time in Case 730/79 *Philip Morris Holland BV v. Commission of the European Communities* [1990], ECLI:EU:C:1980:209.

[64] *See* model example of this reasoning in AG Darmon opinion in Case C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1993], ECLI:EU:C:1993:97, para. 61.

[65] *See*, *inter alia*, Cases C-494/06 P *Commission of the European Communities v. Italian Republic and Wam SpA* [2009], ECLI:EU:C:2009:272, para. 54; C-71/09 P, C-73/09 P and C-76/09 P *Comitato «Venezia vuole vivere», Hotel Cipriani Srl and Società Italiana per il gas SpA (Italgas) v. European Commission* [2011], ECLI:EU:C:2011:368, para. 136.

[66] Mause & Gröteke, *supra* note 52,

[67] *See generally* Gillen et al., *supra* note 23; S. Maertens, *Estimating the Market Power of Airports in Their Catchment Areas: A Europe-Wide Approach*, 22 Journal of Transport Geography 10 (2012); A. Polk, V. Bilotkach, *The Assessment of Market Power of Hub Airports*, 29 Transport Policy 29 (2013); Wiltshire, *supra* note 23. This list is not exhaustive. It is merely a representation of the positions in a debate.

a detailed analysis of catchment areas, route networks, demand structures, and so on. This leads to the conclusion that an assumption that an advantage (the existence of which is very easy to establish) automatically distorts competition is oversimplifying a more complicated issue for the sake of maintaining a *quasi*-legal assumption of the incompatibility of the State aid measures. This is particularly important for the State aid control system, because it places the burden of proof on the Member State, as discussed below in Section 5.

4. IMPORTANCE OF PRIOR NOTIFICATION – SAFEGUARDING THE ENFORCEMENT SYSTEM

It would seem that another, and arguably more important, reason why such a rudimentary test of the effect on trade and competition is accepted is to avoid incentivising violations of the notification requirement.[68] It goes without saying that only an *ex post* impact evaluation can be based on actual data and thus is most likely to be more detailed and accurate than even the best predictions. Preservation of the integrity of the State aid control system is certainly a valid goal. First, there is a matter of principle: infringement should never be rewarded. This reflects the old legal adage that rights cannot be based on, or derived from, injustices or the violation of other rights.[69] Additionally, avoiding notification is not only detrimental to the effectiveness and predictability of State aid control, but also in the long term such an erosion is dangerous to the control system itself.[70] It is often pointed out that the disregard or disobedience of legal rules creates an environment conducive to various abuses, which pose a serious threat to the rule of law.[71] From an individual case perspective, it could lead to wasteful spending and misuse of State aids, even if a recovery decision were issued *ex post*, as at this point the funds are usually spent and have become irrevocably lost.

The case of Gdynia-Kosakowo airport in Poland is especially instructive in this respect, as it shows the practical consequences of disregarding the notification requirement and highlights the relevance and importance of a prior notification requirement.[72] It was glaringly obvious that building a new regional airport within approximately 20 km from the operating, non-congested airport in Gdańsk constituted a blatant infringement of

[68] Bacon, *supra* note 7, p. 83.

[69] *Ex iniuria ius non oritur* principle is recognized and endorsed by the EU Courts. *See* especially Case C-208/90 *Theresa Emmott v. Minister for Social Welfare and Attorney General* [1991], ECLI:EU:C:1991:333.

[70] Hofmann & Micheau, *supra* note 7, pp. 25-30.

[71] A. Marmor (ed.), *The Routledge Companion to Philosophy of Law*, Routledge, Abingdon: 2012, p. 560.

[72] Commission decision SA.35388 Setting up the Gdynia-Kosakowo Airport [2015], OJ L250/165. This is the only case so far in regard to aid to airports wherein the EC has issued negative decision with respect to recovery. This interpretation was upheld by the Court (Case T-215/14 *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v. Commission* [2014], ECLI:EU:T:2014:733) although the ruling lowered the amount of the sum sought to be recovered due to an initial cost allocation error.

State aid rules.[73] Yet, the investment went ahead unnotified, owing to mismanagement bordering on criminal.[74] When the Commission finally launched an investigation, the construction was essentially completed and all the funds already spent.[75] Since most funds were allocated to the construction of the terminal building (located on a military terrain – the airstrip has dual purpose military and civilian usage), there was no possibility of recovering the aid, especially given that airport is not operating.[76] There is no doubt that it is far more difficult to recover money after it is spent than to prevent it from being spent in the first place. Yet, it cannot be said that the State has somehow benefited from its failure to notify the aid.[77] This was clearly a lose-lose situation which has spiralled out of control due to wilful disregard of the State aid rules. The point of this example is to show that prior notification has a value in itself; and requires legal protection. (As a side note: in November 2017 the Court annulled the Commission decisions on the grounds of procedural error.[78] However, the Court did not rule on the substantive issue – the compatibility of the aid itself – and the Commission will be able to start a new case and essentially re-issue its previous decision).

We see here a clash between maintaining a prior authorisation system and improving the quality of assessments in State aid cases. The line of reasoning behind disallowing actual data when it is available hinges on the assumption that recourse to an analysis of existing data will make it possible to prove that an effect on trade and competition that is non-existent or negligible. However, the opposite may actually be the case. First, it might turn out that the actual impact of aid will exceed its baseline forecast.[79] Secondly,

[73] The Case was assessed under 2005 Guidelines. The Commission asserted that the duplication of unprofitable airports or the creation of additional unused capacity does not contribute to an objective of common interest. This would be the case if the new airport was in the catchment area of an existing airport where the existing airport is not operating at or near full capacity and the medium-term prospects for use of this new infrastructure are not demonstrated by a sound business plan (The 2014 Guidelines repeat these criteria). The Gdańsk airport, located within 20 km of the then-prospective airport, was operating at approx. 60% capacity and Gdynia failed to provide any data substantiating its claims. In fact, they wasted an opportunity to do so by disregarding notification. A clearer example of infringement of aid criteria could not be found.

[74] Mismanagement and waste of public funds can be considered a crime, even if no official directly profited from it, and even if it is involuntary (although it is hard to imagine that such a blatant infringement was involuntary). The wilful disregard of the notification procedure is the decisive factor, and there exists no objective reason why this aid was not notified *ex ante*. Additionally, the Commission usually advocates the approach that aid should be notified in cases of doubt (*See* reasoning in Case C 284/12 *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH* [2013], ECLI:EU:C:2013:755).

[75] J. Kociubiński, *Regional airport policy – financing construction and operations: European state aids perspective. Role for national parliaments?*, in: W. Szydło, M. Szydło (eds.), *Parlament jako instytucjonalny uczestnik sektorów sieciowych*, Oficyna Prawnicza, Wrocław: 2014.

[76] No further aid can be issued so long as the previous illegal aid is not paid in full.

[77] The airport operator went into insolvency liquidation.

[78] Case T-263/15 *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo v. Commission* [2017], ECLI:EU:T:2017:820.

[79] It is worth recounting Court's position that the EC's analysis may be augmented by further data if the data supports the initial assessment (Case C-142/97 *Tubemeuse*). Based on a strict reading of the word-

when *ex post* assessment is performed relatively early after a measure has been put into effect, the evidence needed to demonstrate its full impact may not yet be available. It therefore seems an oversimplification to draw categorical dichotomous distinctions between accurate "real" data and inaccurate predictions. The variables are too complex and the circumstances too case-specific.

It must therefore be stated that violating the notification requirement, based on an assumption that the actual data can be used *ex post*, may not bring about the desired results for either the beneficiary or the Member State. Nonetheless, the mere unquantifiable possibility of creating an incentive to breach the notification requirements should be reason enough to impose uniformity on assessment standards.[80] Additionally, any such incentivisation can be perceived as discriminatory against those States who have adhered to the notification requirements.[81] To conclude this part of the discussion, it seems it must be tentatively accepted (after due consideration) as a matter of principle that no actual data should be used in a test for establishing an effect on trade and competition. In the light of the foregoing, I would argue that the real problem lies not in the factual differences between actual and predicted data, but in the fact that no methodological requirements or standards exist for either of them.

5. BURDEN OF PROOF – PROCEDURAL PROBLEMS OF DATA VERIFICATION

Bearing in mind the discussion in the above Section 4, the question arises as to the significance of the procedural aspects of the application of State aid law and the burden of proof. From a formal standpoint, only the Commission and the Member State concerned participate in a proceeding; but in reality it bears a strong resemblance to *inter partes* procedures.[82] Therefore, it seems more accurate to say that it is *de facto* dialogue-based, as during the administrative procedure the Commission may request Member States (and thereby indirectly undertakings) to provide any further information necessary to complete its analysis. The procedure also offers ample opportunity for updating data if

ing it is not entirely clear whether actual data supporting opposite conclusion may be accepted *ex officio*, or only upon a request from a Member State.

[80] As was held by the Court in Case C-351/98 *Kingdom of Spain v. Commission of the European Communities (Spanish Trucks)* [2002], ECLI:EU:C:2002:530, paras. 66-67.

[81] In EU law, not every unequal treatment is considered discriminatory. Discrimination is interpreted as unequal treatment in a comparable situation (*See, inter alia*, cases 17-76 and 16-77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen; Diamalt AG v. Hauptzollamt Itzehoe* [1977], ECLI:EU:C:1977:160, para. 7; C-127/07 *Société Arcelor Atlantique et Lorraine and Others v. Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie* [2008], ECLI:EU:C:2008:728, para. 23). In the latter case all parties were equally bound by the notification requirements, which have made them comparable.

[82] L. Ortiz Blanco (ed.), *EU Competition Procedure* (3rd ed.), Oxford University Press, Oxford: 2013, pp. 884-885.

deemed deficient, so it aims at consensual solutions.[83] Yet the Commission is entirely free to decide whether to accept or reject data submitted by a State. In practice, only in cases of a *prima facie* incompatibility with the Internal Market, i.e. when a measure has no redeeming qualities, is all data rejected outright.

The overall idea behind the dialogue-based procedure is certainly laudable, as it allows for addressing any data deficiencies. But at the same time, it lacks transparency. Here we see another case of contradictory policy objectives. It stands to reason that sensitive business information, which the beneficiary will not want disclosed, is routinely presented in State aid cases.[84] This adds another layer of complexity. Since most data used by the Commission is confidential (in the business sense), it is hard to determine whether an EC decision to accept or reject data was reasonable. Errors of judgment may only become apparent in hindsight, following a project's failure, but such *post factum* validation serves little useful purpose.[85] For these reasons the procedure itself, when involving confidential information, must be protected as well, and thus is not open to public observation and scrutiny (and rightly so).[86] Therefore, there is no practical and effective method of monitoring cases on a continuous basis. The above observations seem to reinforce the view that the imposition of certain methodological standards from the outset would appear to be the most feasible way to objectify the decision-making process in State aid cases, or at least to reduce the failure rate.

On top of this there are additional practical problems relating to the burden of proof. As a general rule, the onus is on the Member State to prove that the aid meets all the criteria set out in Article 107 TFEU and in sector-specific rules.[87] In other words, State measures initially are given a rebuttable presumption of incompatibility with the Internal Market (there are a few exemptions).[88] The Commission is therefore forced to rely on the data supplied by the Member States. These may be better or worse, but as mentioned before the EC is free to decide whether to accept or reject the data.

The infrastructure improvements – financed by the EU funds – of Polish regional airports, especially in Zielona Góra and Łódź, provide instructive case studies. In the applications for EU funds (mostly from the Regional Development Fund) airport

[83] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9 (2015 Procedural Regulation).

[84] Data confidentiality is guaranteed in the 2015 Procedural Regulation.

[85] Some commentators suggest that penalties should be imposed on the Member States that unlawfully grants the aid (Lang, *supra* note 53, p. 453; J. Lever, *EU State Aid Law – Not a Pretty Sight*, 12 European State Aid Law Quarterly 5 (2014)). It may have a certain deterrent effect, and it reinforces the author's postulates. Additionally, individuals may be responsible under domestic law.

[86] Ortiz Blanco, *supra* note 82, pp. 418-419.

[87] Bacon, *supra* note 7, p. 465; Hofmann & Micheau, *supra* note 7, pp. 224-225.

[88] Such an interpretation stems directly from the literal wording of Article 107(1) TFEU and has been repeated numerous times in the case-law. *See*, *inter alia*, Case T-348/04, *Société internationale de diffusion et d'édition SA (SIDE) v. Commission of the European Communities* [2008], ECLI:EU:T:2008:109, para. 58. Exceptions include Regional aid and *de minimis* aid.

operators presented data showing unprecedented rates of air traffic growth, not even remotely close to the values recorded earlier.[89] This data was accepted as valid estimates and used as a basis for financing. Some experts questioned the plausibility of these figures from the outset. These concerns proved entirely justified, as it turned out that the submitted predictions were wrong by staggering percentages in some cases.[90] It was speculated that the analyses were deliberately biased to make them appear more favourable than warranted, and/or that the forecasters were just too eager to please.[91] At some stage a lawsuit or some form of dispute settlement action against the authors of these analyses have been taken into consideration, as such erroneous predictions can result in withdrawal of the funding.[92] In a nutshell, these were typical examples of the "ghost airports" mentioned earlier. The dilemma presented in these cases is how to filter out erroneous data.[93] It seems logical that such data should not be accepted at face value, since the applicants are in a conflict of interest situation, naturally being interested in presenting data supporting their claims.[94]

One alternative possibility which can be considered would be to invert the burden of proof in favour of the Member State. Such an approach would mean that the requirement to present theoretically valid mechanisms of effect on trade and competition would effectively be replaced by a presumption that the aid is non-distortive unless proven otherwise. However, given the need for and nature of *ex-ante* appraisals, this alternative is unlikely to lead to any radical improvement. Of course, there is always the option of issuing a negative decision on the grounds that the conclusions were not justified by the data, but as mentioned earlier, the distinction between "good" and "bad" data can be problematic and is particularly hard to discern with respect to *ex ante* data

[89] This conclusion is supported by the statements for the European Commission and by the European Court of Auditors, although, however the actual analyses (except for Master plan for the Zielona Góra airport) were either withdrawn or never published.

[90] In Poland there exists a quite heated debate concerning "ghost airports." A brief overview in English is available in: *Reuters Special Report: EU funds help Poland build 'ghost' airports*, available at: http://www.reuters.com/article/us-poland-airports-specialreport/special-report-eu-funds-help-poland-build-ghost-airports-idUSKBN0JS06K20141214 (accessed 30 June 2018).

[91] The master plan for the Zielona Góra airport, containing the predicted growth of air traffic, is available (in Polish only) at: http://airport.lubuskie.pl/wp-content/uploads/selected-elements-of-the-master-plan-epzg-2014-2034.pdf (accessed 30 June 2018). At the same time, the PricewaterhouseCoopers acknowledges that the city of Zielona Góra had commissioned the report on the prospects for their local airport. The conclusions did not support the idea of airport expansions nor the overly optimistic data presented in master plan, so it therefore remained unpublished.

[92] Proving deliberate research misconduct would however be extremely difficult.

[93] Robins, *supra* note 32, pp. 132-133.

[94] It is worth mentioning that in merger control cases the Commission expressed the view that there must be the possibility to submit data prepared by the undertakings to independent verification. The argument runs that merging parties are interested in providing data supporting their claims, and they such data should not be accepted at face value (I. Kokkoris. H. Shelanski, *EU Merger Control. A Legal and Economic Analysis*, Oxford University Press, Oxford: 2014, pp. 270 et seq.). A similar motivation would seem to exist in State aids, yet an analogous interpretation has not been fully endorsed.

(except in cases where research misconduct can be proven). Therefore, all the problems mentioned earlier with respect to prediction-based appraisals will remain. Furthermore, a requirement that the Commission should always conduct its own research would place an unsustainable strain on its resources and manpower. It should also be pointed out that such a solution seems contrary to the principle that a person (or entity) wishing to derive a right must prove that they are entitled to it.

Additionally, multiple aid schemes may exist simultaneously, provided to the same beneficiary, either directly or indirectly.[95] It goes without saying that for an airport, the ability to attract carriers and air cargo traffic is crucial to the establishment of a positive financial performance. At the same time, an airline may be reluctant to enter a small or untested market due to the risks associated with such an entry.[96] Therefore, air traffic may require a stimulus either through a PSO for the thinnest "public service" routes or through start-up aid for routes that will ultimately prove profitable.[97] Hence a domino effect occurs, as airport profitability predictions hinge on the assumption that another State intervention will prove successful.[98] It is true of course that no one can reasonably assume State aid failure in their baseline scenario, but nevertheless other aids should be assessed separately, as possible failures can directly affect other aid measures.[99] Such a risk factor is largely because the above-described data accuracy problem exists for each separate aid share.

CONCLUSIONS – EXORCISING "GHOST AIRPORTS"

In this article I have repeatedly referred to "forecasts", "predictions" and "economic analysis", without elaborating on the specifics of a given research. This was done because practicing competition lawyers have neither a legal nor a professional obligation to be fully versed in conducting sophisticated market research. Although competition law is by its very nature "immersed" in economics and lawyers draw heavily upon its *acquis*, no one can reasonably expect legal professionals to have the ability to self-verify economic data.

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[95] Only rescue and restructuring aid *ex lege* cannot be combined with any other type of aid.

[96] *See generally* Gillen et al., *supra* note 23; Postorino, *supra* note 19; Zuidberg, *supra* note 24.

[97] Start-up aid is regulated by the 2014 Guidelines and requires prior notification under generic State aid rules. Compensation for discharging a Public Service Obligation is not considered to constitute a State aid within the meaning of Article 107(1) and is therefore entirely exempted from the notification requirement. Member States have essentially carte blanche discretion to impose PSOs.

[98] An aid measure will be addressed to a different beneficiary – the airline. Thus, the airport will benefit indirectly.

[99] Research conducted on the Spanish market reveals that airlines usually abandon routes as soon as funding dries up. Importantly in this connection, start-up aid has a finite period and is not renewable (*see* D. Ramos-Pérez, *State Aid to Airlines in Spain: An assessment of regional and local government support from 1996 to 2014*, 49 Transport Policy 137 (2016)). Since this research covers only one state and predominately one carrier, so due to the insufficient data we can only speculate whether this is an EU-wide trend.

What can be expected is that all analyses submitted will meet a specific set of methodological criteria. However, it must be clearly said that the problem of research misconduct cannot be eliminated through purely legal means – e.g. requirements, incentives, penalties. The procedural aspects presented earlier – avoiding any encouragement of the infringement of notification requirements, maintaining cohesion of the control system, and the burden of proof – produce a limitation in the possible range of legal and regulatory solutions. Therefore, a realistic goal is to minimize rather than completely eliminate the obvious biases existing in research. In order to achieve improvement from the perspective of the initial hypotheses, the following variants can be considered:

Variant one – Hard law regulation. This variant encompasses an amendment to the 2015 Procedural Regulation. It would introduce prescribed requirements and a procedure for methodologically evaluating the findings submitted to the Commission in State aid cases. Not meeting this standard would result in the State aid being declared incompatible with the Internal Market. Since the post-notification procedure is dialogue-based, the Commission could always request the State to bring a submitted analysis up to the required standard, instead of rejecting the application outright. The same holds true for non-notified aid.[100]

Although this solution has the merit of clarity, its bluntness, bordering on arbitrariness, poses a problem that becomes immediately apparent: the desired methodological standard would have to be established through the legislative procedure, which would make a sector-specific approach impossible without separately dedicated procedural rules; which in turn could lead to an unnecessary multiplication of laws, thus further complicating the system and creating secondary problems, including, *inter alia,* choice-of-law conflicts. Additionally, any possible deficiencies in a proposed act could affect the entire spectrum of State aid cases. Finally, this solution that lacks flexibility, as any changes would require complex and time-consuming legislative procedures.

Variant two – Soft law regulation. A large – and constantly growing – number of soft law instruments have been adopted by the Commission. According to well-established case-law, soft law, while directly enforceable, contributes to greater legal certainty as undertakings are able to know beforehand in what way the EC will interpret and apply competition rules (including State aids) to a certain sector.[101] The argument runs that these acts create binding results as long as they do not lead to a *contra legem* interpretation of the Treaties.[102] Soft law has been successfully used in other sectors; for example the Commission has adopted so-called 'analytical grids' to assist it in the assessment of whether a measure involves State aid, and if so, whether the compatibility criteria are met.[103] Additionally, it is

[100] Ortiz Blanco, *supra* note 82, pp. 938-939.

[101] L. Senden, *Soft Law in European Community Law*. Hart, Oxford, Portland: 2004, pp. 132-133.

[102] *Ibidem*, pp. 282-287.

[103] Following analytical grids has been adopted in: Water infrastructures; Roads, bridges, tunnels and inland waterways; Railway, metro and local transport; Port infrastructure; and Culture, heritage and nature conservation. Available at: http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html (accessed 30 June 2018).

worth mentioning that a set of "Best Practices" exists for the submission of economic evidence and data collection in cases concerning the application of antitrust and merger rules.[104] There are no objective reasons why they could not be implemented in the air transport sector.

However, this approach shares risks in common with variant one. A deficiency in an analytical grid could negatively affect all subsequent State aid decisions. However, the Commission is acting alone when adopting soft law instruments, so these are relatively easy to replace or update. Moreover, unlike hard law regulations, the European Commission can always deviate from its self-imposed guidelines, although potential problems could arise from this latter issue; past experience suggests that soft law is not always strictly adhered to. The Commission is rather inclined to take a more lenient stance, on a case-to-case basis, than make *ex ante* criteria (*vide* SGEI Altmark criteria).[105] While a certain degree of interpretive flexibility is a must, nevertheless this practice could potentially erode legal certainty, leading to a regulation which misses its main purpose.

Variant three – Hybrid regulation (**hard law + soft law**). The third variant amalgamates certain features of the two previous options by entailing the parallel application of both soft and hard law instruments. Amendments to a procedural regulation could introduce a "hard law" requirement for substantiation, while at the same time granting a legislative delegation to the Commission to enact soft law detailing the required methodological standard – for example the analytical grid. In theory, this method offers the benefits of both above-discussed methods while avoiding their drawbacks. The approach allows for the flexibility of soft law regulation together with the increased legal certainty of hard law regulation, although without the heavy-handed manner of the latter approach. However, it can be argued that this method is to a certain extent redundant, because *de facto* the binding nature of soft law can as well be inferred from its mere existence. Nevertheless, having direct recourse to a soft law instrument can be interpreted as a strong dedication to the "more economic approach." It may also indicate that cases where the submitted documentation does not meet the requirements specified in the relevant soft law will not be cleared, except on an exceptional basis.

Variant four – No change. This last variant serves merely as a reference point. The current situation cannot be considered as radically negative, although as has been shown the most apparent disadvantage lies in its arbitrariness and thus sometimes in insufficient legal certainty. As a result, the general standard is too lax in areas where

[104] The following best practices have been published: Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in Merger cases; Best Practices on the Submission of Economic Evidence and Data Collection; available at: http://ec.europa.eu/dgs/competition/economist/best_practices_en.html (accessed 30 June 2018).

[105] *See* Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003], ECLI:EU:C:2003:415 with CaseT-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v. Commission of the European Communities* [2008], ECLI:EU:T:2008:29.

a more stringent approach is needed. It must also be said that those situations when State aid is obviously misapplied, although spectacular and drawing widespread media attention, are relatively rare, statistically speaking. Furthermore, it must also be noted that recently the Commission has taken a stricter approach, which to a certain extent can remedy existing problems, although legal certainty will remain problematic.

To sum up, my attempt to answer to the title-question has revealed the limitations of law on one hand, and the deficiencies of policy on the other. While each proposed variant has its advantages and disadvantages, in my opinion the hybrid solution offers the most advantageous combination of features for an objectivized decision-making process. Yet it must again be emphasized that certain limitations are insurmountable, and that the overall success of any reform hinges upon two interwoven factors: the quality of the required methodology; and the consistency of the Commission's decision-taking practice.

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A NEW CHAPTER IN THE EU COUNTERTERRORISM POLICY? THE MAIN CHANGES INTRODUCED BY THE DIRECTIVE 2017/541 ON COMBATING TERRORISM

Abstract:
Taking into account that terrorism has grown in recent years, the EU institutions decided to update the legal framework which provides for fighting this phenomenon. Consequently, the Council Framework Decision 2002/475/JHA was replaced by the EU Directive 2017/541 of the European Parliament and of the Council on combating terrorism, which should be implemented by the Member States by 8 September 2018.

This new act contains a long list of terrorist offences, offences related to a terrorist group, and offences related to terrorist activities. It also stipulates penal sanctions for terrorist offences and provides measures of protection, support and assistance for terrorism victims. This article is a commentary on these groups of provisions and compares them to the previously binding ones. Thus, it indicates the legal changes introduced by the Directive which have to be taken into account by the Member States while implementing it. The comparison of these new provisions with the previously binding ones is also helpful in answering the question posed in the title: Can the Directive 2017/541 be treated as a new chapter in combating terrorism by the European Union?

Keywords: combating terrorism in the EU, Decision 2002/475/JHA, Directive 2017/541, foreign terrorist fighters, protection of terrorism victims, terrorist offences, the Council Framework

INTRODUCTION

Although terrorism has always been a threat to both internal and external security, since 11 September 2001 combating this phenomenon has become an important task and at the same time a major challenge for the European Union. It has had a great impact

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on the European Union (EU)'s policies. Indeed, it is fair to say that counterterrorism is one of the fastest developing policy regimes within the EU.[1] In reaction to the World Trade Centre attacks in the US, on 21 September 2001 the European Council reiterated its strong support for the EU's counterterrorism activities by passing the first "plan of action" on "the European Policy to combat terrorism."[2] Due to its general nature, the Action Plan did little more than give a green light to various initiatives that had already been put on the agenda in the immediate response to the events of 9/11, but at the same time it represented the first step in reducing the ambiguity that surrounded the overall shape of the EU's renewed counterterrorism effort.[3] Following the dramatic events of the Madrid train bombing in March 2004 and the London bombings in July 2005, the EU decided to strengthen the general framework for its activities in this area. Consequently, the European Council adopted the Counterterrorism Strategy,[4] based on four strategic objectives (called "pillars") covering prevention, protection, pursuit, and response. In this way the EU wanted to show that it was going to cover all the stages important for fighting with terrorism, i.e. both before as well as after an attack, and at the level of structure as well as agency.[5] At the same time, the Counterterrorism Strategy underlined that the Member States had the primary responsibility for combating terrorism and that the EU could only add value to their actions by strengthening national capabilities, facilitating European cooperation, developing a collective capability, and promoting international partnership.[6] It should also be noted that according to the Counterterrorism Strategy document, terrorism is a criminal phenomenon that poses a serious threat to the EU's security. Thus, it was deemed a crime which demands a law enforcement response, but not a war-like aggression.[7]

As a result, the EU has adopted a criminal justice approach, according to which terrorism should be tackled through criminal law.[8] Such model appears more attractive to the Member States, which are not generally ready to allow the EU to interfere with the politically sensitive matters of internal and external security. Moreover, the criminal

[1] Ch. Eckes, *The Legal Framework of the European Union's Counter-Terrorist Policies: Full of Good Intentions?*, in: C. Eckes, T. Konstadinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, Cambridge University Press, Cambridge: 2011, p. 127.

[2] European Council, Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01, available at: https://www.consilium.europa.eu/media/20972/140en.pdf (accessed 30 June 2018).

[3] R. Bossong, *The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance*, 46(1) Journal of Common Market Studies 27 (2008), p. 35.

[4] The European Union Counterterrorism Strategy, 144469/4/05 REV 4, Brussels, 30 November 2005, available at: https://bit.ly/2Hrz221 (accessed 30 June 2018).

[5] R. Bossong, *The EU's Mature Counterterrorism Policy – A Critical Historical and Functional Assessment*, LSE Challenge Working Paper, June 2008, p. 10.

[6] The European Union Counterterrorism Strategy, *supra* note 4, p. 4.

[7] *See* J. Monar, *The EU as an International Counterterrorism Actor: Progress and Constraints*, 30(2-3) Intelligence and National Security 333 (2015), p. 337.

[8] R. Coolsaet, *EU Counterterrorism Strategy: Value Added or Chimera?*, 86(4) International Affairs 857 (2010).

justice approach reflects the convictions of a number of Member States that have always taken a more integrated view on terrorism and is also in line with the approach the international community has moved toward more recently.[9] Consequently, the legal framework for combating terrorism by the EU is created by means of criminal law, adopted mainly within the Area of Freedom, Security and Justice (AFSJ) under the Lisbon Treaty. This article concentrates on the fight against terrorism based on these provisions, while leaving aside the international dimension realised through Common Foreign and Security Policy. The criminal law measures concerning the fight against terrorism are very numerous. However, the new EU Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism[10] (that replaced the Council Framework Decision 2002/475/JHA on combating terrorism[11]) is at the centre of all the acts which deal with this phenomenon. Not only does it define terrorist offences, but it also sets the minimum level of penal sanctions for terrorist offences and provides for measures of protection, support and assistance for terrorism victims.

The main aim of the article is to comment on these groups of provisions and to compare them to the previously binding ones. Such a comparison is necessary in order to indicate the legal changes foreseen by the Directive 2017/541 on combating terrorism (which have to be introduced by the Member States into their legislation in the process of its implementation). Taking into account its provisions, the following preliminary hypothesis can be formulated: The content of the Directive 2017/541generally represents a continuation of existing legislation, but this act can contribute to combating the phenomenon of 'foreign terrorist fighters' within the EU, as it introduces new rules in this field based on international standards and it also extends the scope of protection for terrorist victims. Moreover, as this is a new form of the EU legislation (a Directive instead of a Council Framework Decision) it has a greater potential, in particular with regard to its direct effect. As a result, the first part of the article concentrates on the provisions of the Treaties on terrorism, including the legal basis for the new act, as it is important to explain why the previous Framework Decision has been replaced by the new Directive and what are the consequences of this change. The next section deals with the definition of terrorist offences, offences related to a terrorist group, and offences related to terrorist activities, with particular attention given to the provisions on counterterrorism financing and travel by "foreign terrorist fighters." The third part presents the penal sanctions for these offences as well as the jurisdictional rules. Finally, new measures of protection, support and assistance for terrorism victims are described.

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[9] Eckes, *supra* note 1, pp. 150-151.

[10] Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism, [2017] OJ L 88.

[11] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, [2002] OJ L 164. *See also* Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, [2008] OJ L 330.

1. THE TREATY PROVISIONS ON TERRORISM (INCLUDING THE AREA OF FREEDOM, SECURITY AND JUSTICE – TITLE V OF TFEU). THE LEGAL BASIS FOR THE DIRECTIVE

Under the Maastricht Treaty, preventing and combating terrorism was mentioned in Article K.1 among other "matters of common interest." In other words, the EU counterterrorism policy could have been developed as part of the Member States cooperation in the field of Justice and Home Affairs ('the third pillar' of the EU). After the entry into force of the Amsterdam Treaty the old Article 29 of the Treaty of the European Union (TEU) continued to list the fight against terrorism as one of the primary objectives of Police and Judicial Co-operation in Criminal Matters (Title VI TEU).[12] Consequently, both the policy and legal acts adopted in this field were still under the regime of 'the third pillar', with all the constraints inherent in it (in particular, the exclusion of such acts as Regulations and Directives).

The primary instruments in the intergovernmental domain of Title VI TEU were decisions and framework decisions. The latter were comparable in their legal effects to EC Directives (as they bound the Member States only to the result to be achieved but left the choice of form and methods to the national authorities). However, by virtue of the Treaty they did not have direct effect (Article 34(2)(b) TEU). Therefore, the first anti-terrorism acts took the form of framework decisions without the direct effect. Moreover, they fell under the unanimity requirement in the Council, which not only delayed the adoption of acts but also had an impact on their content. It is also important to note that the European Parliament played a very limited role in the adoption of the framework decisions and other EU anti-terrorism measures, as it had mainly consultative powers in this field, while adequate parliamentary control should be regarded as very important when one takes into account that some of the EU measures have given rise to serious concerns about negative effects on civil liberties in the EU.[13] Finally, the Court of Justice did not enjoy full jurisdiction over the framework decisions combating terrorism and other acts adopted in this field. First of all, it had jurisdiction to make preliminary rulings on the interpretation or validity of framework decisions only when a Member State made a declaration under the (pre-Lisbon) Treaty on European Union indicating the circumstances in which the Court could exercise such a jurisdiction. Moreover, the European Commission could not bring enforcement proceedings against the Member States for failing to implement a framework decision or for implementing it incorrectly. However, the Court did have jurisdiction in relation to review of the legality of framework decisions in actions brought by a Member State or the Commission, and it could resolve disagreements between the Member States concerning their interpretation or application. Hence, it has been underlined that "the

[12] *Ibidem*, p. 8.

[13] J. Monar, *The European Union's Response to 11 September 2001: Bases for action, performance and limits*, available at: https://www.albany.edu/~rk289758/BCHS/col/JHA-TERRORISM-NEWARK.doc (accessed 30 June 2018), p. 19.

pre-Lisbon anti-terrorism cooperation was founded on a mixed third and second pillar basis, which suffered not only from a mostly intergovernmental integration but also from gaps regarding the jurisdiction of the ECJ."[14]

The Lisbon Treaty abolished "the pillar structure" of the EU and the Area of Freedom, Security and Justice became one of its internal policies. As a result, it is generally governed by the "community method", which has had important consequences for the EU anti-terrorism measures. First of all, it allows for adoption in this field of such legal acts as Regulations and Directives with the direct effect (on the conditions given by the Court of Justice in its case-law). Secondly, the European Commission enjoys a monopoly on proposals.[15] The Commission can also bring proceedings for failure to fulfil an obligation against those Member States which do not comply with provisions concerning the AFSJ, for example by not implementing Directives or implementing them incorrectly. Thirdly, the unanimity in the Council is replaced by the qualified majority vote in this body, so the decision-making process is more flexible. Fourthly, the European Parliament has a greater oversight role on these matters, as well as full co-decisional powers,[16] and national parliaments – in addition to their role in the EU law-making (the examination of legislative proposals in the light of the subsidiarity principle) - take part in the evaluation mechanisms for the implementation of the Union policies within the Area of Freedom, Security and Justice in accordance with Article 70 TFEU. Finally, the jurisdiction of the Court of Justice covers all freedom, security and justice issues – it can give preliminary rulings without any restriction and rulings in proceedings for failure to fulfil an obligation (these new competences effectively began on 30 November 2014, following a five-year transition period). Therefore, it is worth underlining that the Court of Justice can have a significant impact on counterterrorism policy; among other things, it will be able to press reluctant Member States to implement measures adopted by the EU.[17]

It should also be noted that under the Lisbon Treaty terrorism is integrated within a great range of policies. Article 43 TEU, which regulates missions undertaken by the EU in the frames of Common Security and Defence Policy, provides that such missions "may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories." Article 222 TFEU on the solidarity clause refers to the legal obligation of both the Union and its Member States to act "jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster." This provision is seen as both rather ambitious

[14] G. Gargantini, *European Cooperation in Counter-Terrorism and the Case of Individual Sanctions*, 3(3) Perspectives on Federalism 155 (2011), pp. 168-169.

[15] However, according to Article 76 TFEU "[t]he acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted: (a) on a proposal from the Commission, or (b) on the initiative of a quarter of the Member States." These chapters cover judicial cooperation in criminal matters and police cooperation.

[16] T. Renard, *EU Counterterrorism Policies and Institutions After the Lisbon Treaty*, Centre on Global Counterterrorism Cooperation, Policy Brief, September 2012, p. 1.

[17] *Ibidem*, p. 2.

and somewhat vague, but at the same time it has been observed that it "could bring a significant contribution to the global response of the EU alongside the efforts made at national level."[18] It is interesting to note, however, that following the terrorist attacks in Paris on 13 November 2015, France did not invoke the solidarity clause but the mutual assistance clause of Article 42(7) TEU, which refers to "armed aggression" on the territory of a Member State. This can be explained by the fact that under this provision other Member States have to provide "aid and assistance by all the means in their power", which is a stronger obligation than merely to act "jointly in a spirit of solidarity" as provided in Article 222 TFEU.

Other Treaty references to terrorism can be found in the provisions on the Area of Freedom, Security and Justice (Title V of TFEU). Article 75 TFEU provides for "a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains", which should be defined by the European Parliament and the Council in order to prevent and combat terrorism and related activities. Article 88 TFEU refers to Europol's mission, which includes supporting the Member States cooperation in preventing and combating terrorism. Finally, Article 83 TFEU provides for the adoption by the European Parliament and the Council of Directives establishing "minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension", and expressly mentions terrorism as one example of such serious crimes. Directive 2017/541 on combating terrorism is based on this Treaty provision, which has certain procedural consequences and at the same time affects its scope and content.

First of all, it was adopted on the basis of the proposal from the European Commission and after taking into account the opinion of the European Economic and Social Committee. Moreover, the draft legislative act was transmitted to the national parliaments. Finally, the Directive was adopted in the ordinary procedure by both the European Parliament and the Council. Thus, it seems that Directive 2017/541 on combating terrorism was subject to a thorough parliamentary control, as not only did the European Parliament introduce certain amendments to the original version of the act, but also national parliaments examined its proposal in light of the subsidiarity principle. As far as its scope is concerned, it should be noted that measures based on the Title V TFEU are generally not binding for the United Kingdom, Ireland, and Denmark, although they can decide to take part in certain initiatives. However, this is not the case with regard to Directive 2017/541 on combating terrorism[19] and consequently it is

[18] J. Keller-Noellet, *The Solidarity Clause of the Lisbon Treaty* in: E. Fabry (ed.), *Think Global – Act European: The Contribution of 16 European Think Tanks to the Polish, Danish and Cypriot Trio Presidency of the European Union*, Notre Europe, Paris: 2011, pp. 329 and 333.

[19] Recitals 41 and 42 of the preamble provide that "[i]n accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application"; and "[i]n accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark

binding only for the remaining 25 Member States. It should be noted though that two of the above-mentioned states (Ireland and Denmark) will continue to be bound by the Council Framework Decision.

As it was mentioned above, measures adopted on the basis of Article 83 TFEU contain only minimum rules concerning the definition of criminal offences and sanctions. This can explain why the main provisions of the Directive concentrate on the definitions of terrorist offences, offences related to a terrorist group, and offences related to terrorist activities (Articles 5-12 of the Directive 2017/541), as well as sanctions (Articles 13-18 of the Directive 2017/541). Further issues include jurisdiction and prosecution, investigative tools and confiscation, measures against content constituting public provocation online, amendments to Decision 2005/671/JHA, and last but not least the special provision on fundamental rights and freedoms that should not be affected by the Directive. It also contains a separate title on measures of protection, support and assistance for terrorism victims (Articles 24-26 of the Directive 2017/541), and final provisions on transposition, reporting, and entry into force (Articles 27-31 of the Directive 2017/541). The Directive should be implemented by 8 September 2018, and since it is based on the minimum harmonisation principle, the Member States can set more stringent requirements.

2. THE DEFINITIONS OF TERRORIST OFFENCES, OFFENCES RELATED TO A TERRORIST GROUP, AND OFFENCES RELATED TO TERRORIST ACTIVITIES

The provisions of Directive 2017/541 on combating terrorism take into account both the evolution of terrorist threats and the legal obligations of the Union and the Member States under international law. Accordingly, the definitions of terrorist offences, of offences related to a terrorist group, and of offences related to terrorist activities are extended in order to more comprehensively cover conduct related to foreign terrorist fighters and terrorist financing. "These forms of conduct should also be punishable if committed through the internet, including social media" (recital 6 of the Directive preamble). Terrorist offences are defined with reference to the same elements as previously provided in the Council Framework Decision 2002/475/JHA: two objective elements (intentional acts defined as offences under national law which may "seriously damage a country or an international organisation"[20]), and a subjective one (offences committed

annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application."

[20] On the basis of the Council Framework Decision it was usually assumed in the literature that the phrase "which, given their nature or context, may seriously damage a country or an international organisation" should be regarded as an objective requirement for qualifying punishable behaviour as a terrorist offence. However, other interpretations of this phrase are also possible – *see* M.J. Borgers, *Framework Decision on Combating Terrorism: Two Questions on the Definition of Terrorist Offences*, 3(1) New Journal of European Criminal Law 68 (2012), p. 69-71.

with the aim of: seriously intimidating a population, or unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation). It should also be noted that the Directive sets out a three-part definition of terrorism, consisting of: (i) the context of the action; (ii) the aim of the action; (iii) the specific acts being committed.[21]

The list of the acts which the Member States are required to incriminate under their national law is provided in Article 3(1).[22] Thus, ten categories of behaviour are taken into account that, if committed intentionally, can be considered terrorist offences. It should be noted that two changes have been introduced into this list. The first concerns point f, where radiological weapon is taken into account. The second is connected with the inclusion of a new provision (point i) on illegal system and illegal data interferences, referred to in the Directive 2013/40 of the European Parliament and of the Council on attacks against information systems.[23] Both changes take into account technological progress. The provision on illegal system interference can also be considered as an attempt to regulate cyberterrorism, although in a very general way. Thus, Directive 2017/541 on combating terrorism does not contain striking changes in relation to the list of the acts which the Member States are required to incriminate under their national law. This is also connected with the fact that this list covers all terrorist acts prohibited by international conventions on terrorism.[24]

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[21] With reference to the provisions of the Council Framework Decision, *see* M.E. Salerno, *Terrorism in the EU: An Overview of the Current Situation as Reported by Europol*, available at: https://bit.ly/2H24qEV (accessed 30 June 2018), p. 2; and S. Peers, *EU Response to Terrorism*, 52(1) The International & Comparative Law Quarterly 227 (2003), p. 229.

[22] "Member States shall take the necessary measures to ensure that the following intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, are defined as terrorist offences where committed with one of the aims listed in paragraph 2: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage-taking; (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons; (g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) illegal system interference, as referred to in Article 4 of Directive 2013/40/EU of the European Parliament and of the Council in cases where Article 9(3) or point (b) or (c) of Article 9(4) of that Directive applies, and illegal data interference, as referred to in Article 5 of that Directive in cases where point (c) of Article 9(4) of that Directive applies; j) threatening to commit any of the acts listed in points (a) to (i)."

[23] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, [2013] OJ L 218.

[24] E. Dumitriu, *The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism*, 5(5) German Law Journal 585 (2004), p. 595.

The second objective element in the definition of terrorist offences refers to their effective or potential consequences, i.e. serious damage to a country or an international organisation. This ensures a differentiation of terrorist offences from less serious offences constituted by the same material element[25] and therefore should be treated as an important part of the definition contained in the new Directive. However, in some cases it can be difficult to ascertain the degree of endangerment connected with specific behaviour. Moreover, the phrase "may seriously damage a country or an international organisation" is rather vague and can be interpreted in different ways – more strictly or more flexibly depending on the circumstances. These problems have already been pointed out with relation to the Council Framework Decision 2002/475/JHA, but no changes have been introduced to this element of the definition of terrorist offences.

Directive 2017/541 also requires a specific terrorist intent,[26] which can be treated as a criterion making it possible to distinguish the terrorist offences listed in Article 3(1) from other offences. It should be noted though that political or ideological motives do not form part of the definition of terrorist offences.[27] "A key aspect is that it can be established *that* the offender intends to seriously intimidate a population and so on, but not *why* he is pursuing that objective."[28] This element of the definition has not been changed by the Directive, so it allows a court to regard an act as a terrorist offence without establishing its underlying motive. Generally, the provisions on terrorist offences appear to be sufficient to cover all the activities dangerous for a country or an international organisation. By stressing the intent, while leaving aside the motive, they seem to provide a correct solution (as the former one is easier to be proved in a court). The negative aspect is that the Directive (similarly to the Council Framework Decisions) uses unclear wording in the definition of terrorist offences. This concerns not only the objective element concentrating on the consequences of an offence, but also the specific terrorist aims and the list of the acts which the Member States are required to incriminate under their national law. Consequently, it is difficult to foresee how certain general terms will be interpreted in practice, e.g. phrases like "seriously destabilising or destroying", "extensive destruction" or "major economic loss."

Article 4 of the Directive concentrates on offences relating to a terrorist group, which is defined as "a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences."[29] Directing such a group as well as participating in its activities, including supplying information or material resources or

[25] *Ibidem*.

[26] Article 3(2) lists these aims: (a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

[27] Borgers, *supra* note 20, p. 76.

[28] *Ibidem*, p. 77.

[29] Article 2(3) of the Directive. This provision further explains that "'structured group' means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership, or a developed structure."

funding its activities in any way, are punishable as criminal offences. However, in order to avoid sanctioning all individuals associated with the group, Article 4(b) of the Directive (similarly to the Council Framework Decision) requires that the person accused of an offence relating to a terrorist group has acted with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group. Thus a subjective element, difficult to prove in practice, is included in the offence's definition.[30] On the other hand, the offence of participating in the activities of a terrorist group is not limited to contributions that have an actual effect on the commission of a principal criminal offence.

Offences related to terrorist activities include: public provocation to commit a terrorist offence (whether online or offline – Article 5); recruitment for terrorism (Article 6); providing training for terrorism (Article 7); receiving training for terrorism (Article 8); travelling for the purpose of terrorism (Article 9); organising or otherwise facilitating travelling for the purpose of terrorism (Article 10); terrorist financing (Article 11); other offences related to terrorist activities (Article 12[31]). Hence, in comparison to the Council Framework Decision 2002/475/JHA on combating terrorism, as amended in 2008,[32] the list of the offences related to terrorist activities has been extended to cover further activities of a preparatory nature, such as receiving training for terrorism, and travelling, organising, or otherwise facilitating travelling for the purpose of terrorism. Moreover, terrorist financing has been included in this long list.

These new provisions of the Directive are largely based on international standards in the field of counterterrorism finance and of travel by "foreign terrorist fighters." It should be noted that in its Resolution 2178(2014) the Security Council of the United Nations has obliged all States to prevent the recruiting, transporting or equipping, and the financing of foreign terrorist fighters' activities. They are defined as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict."[33] The Resolution also provides that offences related to foreign terrorist fighters, such as travelling to another State for terrorism purposes, financing or organising funds for such travels, and providing or receiving terrorist training should be criminalised in national legislation.

Consequently, Articles 9 and 10 of the EU Directive require the Member States to create the offences of travelling abroad for terrorism and of organising or facilitating such travel – Member States must take the necessary measures to punish all such actions

[30] Dumitriu, *supra* note 24, p. 598.

[31] They include: aggravated theft with a view to committing one of the offences listed in Article 3; extortion with a view to committing one of the offences listed in Article 3; drawing up or using false administrative documents with a view to commiting one of the offences listed in points (a) to (i) of Article 3(1), point (b) of Article 4, and Article 9.

[32] Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, [2008] OJ L 330.

[33] UN Security Council, Security Council resolution 2178 (2014) on threats to international peace and security caused by foreign terrorist fighters, 24 September 2014, S/RES/2178 (2014), available at: http://www.refworld.org/docid/542a8ed74.html (accessed 30 June 2018).

as criminal offences when committed intentionally. However, the act of travelling to another country should be criminalised only if it can be demonstrated that the intended purpose of that travel was to commit, contribute to or participate in terrorist offences, or to provide or receive training for terrorism. Article 8 also provides for a new offence – to receive training for terrorism – that aims to capture those individuals that may "self-radicalise" and train themselves using materials available on the internet or elsewhere.[34] Such activities should be carried out with regard to a terrorism purpose and with an intention to commit a terrorist offence. In relation to terrorist financing it is observed that "criminalisation should cover not only the financing of terrorist acts, but also the financing of a terrorist group, as well as other offences related to terrorist activities, such as the recruitment and training, or travel for the purpose of terrorism (...)."[35] Thus, the Member States should adopt measures which will extend the scope of the criminalisation of this offence. This is a very important provision, as both the prevention and criminalisation of the financing of all activities connected with terrorism are essential to effectively combat this phenomenon.

Apart from the changes in relation to these subsidiary offences, the Directive is aimed at widening the scope of 'aiding or abetting, inciting and attempting' to include a broader range of offences.[36] It extends the criminalisation of incitement to all offences (Article 14(2) of the Directive). Similarly, aiding and abetting is punishable in relation to almost all offences (only travelling and organising or otherwise facilitating travelling for the purpose of terrorism are excluded from the scope of Article 14(1) of the Directive). Finally, the criminalisation of an attempt is extended to all offences, including travelling abroad for terrorist purposes and terrorist financing, with the exception of receiving training and organising or otherwise facilitating travel abroad.[37] These provisions refer to

[34] C.C. Murphy, *The Draft EU Directive on Combating Terrorism: Much Ado about What?*, available at: http://eulawanalysis.blogspot.com/2016/01/the-draft-eu-directive-on-combating.html (accessed 30 June 2018). Recital 11 of the Directive preamble explains that: "Criminalisation of receiving training for terrorism complements the existing offence of providing training and specifically addresses the threats resulting from those actively preparing for the commission of terrorist offences, including those ultimately acting alone. Receiving training for terrorism includes obtaining knowledge, documentation or practical skills. Self-study, including through the internet or consulting other teaching material, should also be considered to be receiving training for terrorism when resulting from active conduct and done with the intent to commit or contribute to the commission of a terrorist offence. In the context of all of the specific circumstances of the case, this intention can for instance be inferred from the type of materials and the frequency of reference. Thus, downloading a manual to make explosives for the purpose of committing a terrorist offence could be considered to be receiving training for terrorism. By contrast, merely visiting websites or collecting materials for legitimate purposes, such as academic or research purposes, is not considered to be receiving training for terrorism under this Directive."

[35] Recital 14 of the Directive preamble.

[36] S. Wittendorp, W*hat's in a definition? Is the proposed EU Directive on Combating Terrorism still about terrorism?*, available at: https://bit.ly/2qyAVR4 (accessed 30 June 2018).

[37] *See* Article 14(3) of the Directive, which provides for the criminalisation of the attempt in relation to "an offence referred to in Articles 3, 6, 7, Article 9(1), point (a) of Article 9(2), and Articles 11 and 12, with the exception of possession as provided for in point (f) of Article 3(1) and the offence referred to in point (j) of Article 3(1)."

preparatory and subsidiary activities, but they should be treated (with a few exceptions) in the same way as the terrorist offences. In this way the Directive introduces a set of rules which is supposed to counteract all actions connected with terrorism, even if they are of an ancillary nature.

On the whole, it can be seen that with regard to the definition of terrorism most of the changes introduced by the Directive concern offences related to terrorist activities (mainly via the extension of their scope). Similarly, the scope of aiding or abetting, inciting and attempting has been extended and they should be punishable in relation to a broader range of offences. This shows an increasing interest in anticipatory action – by introducing ancillary and facilitative offences, authorities can intervene early on in order to prevent violent attacks before they materialise.[38] However, such an approach is not unproblematic, as preparatory and subsidiary activities may or may not lead to the commitment of a terrorist offence. "Acting in anticipation, which ancillary and facilitative offences make possible, thus raises the question of exactly what standard of evidence applies in convicting suspects and the effect this has on fundamental rights."[39] Therefore, after much discussion on this question a special clause on fundamental rights and freedoms has been included. It also refers to freedom of the press and other media (Article 23). Moreover, the Directive underlines the importance of freedom of expression and opinions - it clearly indicates that "the expression of radical, polemic or controversial views in the public debates" is outside its scope (recital 40 of the preamble). It is also stressed that "the notion of intention must apply to all the elements constituting [criminal] offences" (Recital 17 of the preamble). These provisions are seen as the positive side of the Directive from the perspective of the protection of fundamental rights, and it has been observed that "if it was duly transposed and implemented in this regard, some mistakes made in the past would not be made in the future."[40]

3. PENAL SANCTIONS FOR TERRORIST OFFENCES AND JURISDICTIONAL RULES

The Directive provides penal sanctions for both natural and legal persons. The first group of these provisions remains practically unchanged, with the general requirement that all the offences prohibited by this act (including facilitative offences such as aiding or abetting, inciting, and attempting) should be punished by "effective, proportionate and dissuasive criminal penalties, which may entail surrender or extradition" (Article 15(1) of the Directive).[41] However, there is one additional provision in the framework

[38] Wittendorp, *supra* note 36.

[39] *Ibidem*.

[40] A. Ollo, *Can we ensure EU terrorism policies respect human rights?*, available at: https://edri.org/can-we-ensure-eu-terrorism-policies-respect-human-rights/ (accessed 30 June 2018).

[41] Article 15 predicts further that: "2. Member States shall take the necessary measures to ensure that the terrorist offences referred to in Article 3 and offences referred to in Article 14, insofar as they relate to

of penalties for natural persons which aims at protecting children's interests. The Member States should take the necessary measures to ensure that when the recruitment for terrorism or providing training for terrorism is directed towards a child, this may, in accordance with national law, be taken into account when sentencing (Article 15(4) of the Directive), although there is no obligation on judges to increase the sentence. It remains within the discretion of the judge to assess that element together with the other facts of the particular case.[42] Moreover, the circumstances that can be taken into account by the Member States in order to reduce the penalties are regulated in the same way as in the Council Framework Decision. Finally, provisions on the liability of legal persons and sanctions for their activities are unchanged.[43] It should therefore be noted that, although the Directive has extended the scope of offences related to terrorist activities (receiving training for terrorism, travelling and organising or otherwise facilitating travelling for the purpose of terrorism, terrorist financing), it does not provide for sanctions which should be introduced in relation to them by the Member States. They are taken into account only in the framework of the general requirement that all the offences prohibited by this act should be punished by "effective, proportionate and dissuasive criminal penalties." It would seem that leaving to the Member States the general choice of sanctions for offences related to terrorist activities is not the right solution. It can lead to the adoption of different penalties and consequently, weaken the effective fight with such offences within the European Union.

The provisions on jurisdiction and prosecution also remain unchanged,[44] with one notable exception. The Directive includes a new rule on jurisdiction to ensure that an individual providing training for terrorist purposes can be prosecuted in the

terrorist offences, are punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent required pursuant to Article 3, except where the sentences imposable are already the maximum possible sentences under national law. 3. Member States shall take the necessary measures to ensure that offences listed in Article 4 are punishable by custodial sentences, with a maximum sentence of not less than 15 years for the offence referred to in point (a) of Article 4, and for the offences listed in point (b) of Article 4 a maximum sentence of not less than 8 years. Where the terrorist offence referred to in point (j) of Article 3(1) is committed by a person directing a terrorist group as referred to in point (a) of Article 4, the maximum sentence shall not be less than 8 years."

[42] Recital 19 of the Directive preamble.

[43] They should be effective, proportionate and dissuasive and include criminal or non-criminal fines. They can also include: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order; and (e) temporary or permanent closure of establishments which have been used for committing the offence.

[44] According to Article 19(1): "Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 to 12 and 14 where: (a) the offence is committed in whole or in part in its territory; (b) the offence is committed on board a vessel flying its flag or an aircraft registered there; (c) the offender is one of its nationals or residents; (d) the offence is committed for the benefit of a legal person established in its territory; (e) the offence is committed against the institutions or people of the Member State in question or against an institution, body, office or agency of the Union based in that Member State. Each Member State may extend its jurisdiction if the offence is committed in the territory of another Member State."

Member State where the training is received. However, "when an offence falls within the jurisdiction of more than one Member State and when any of the Member States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State" (Article 19(3) of the Directive). It also provides that in such a situation the Member States can turn to Eurojust, which will facilitate the cooperation between their judicial authorities and the coordination of their actions.

The Directive contains separate provisions on investigative tools and confiscation (Article 20). The former should be similar to those used in organised crime or other serious crime cases, and they should be proportionate and well targeted;[45] while the latter relates to "the proceeds derived from and instrumentalities used or intended to be used in the commission or contribution to the commission of any of the offences referred to in this Directive." It should also be mentioned that the Member States are to take the necessary measures to ensure the prompt removal of online content constituting a public provocation to commit a terrorist offence that is hosted in their territory, or to block access to it, while ensuring transparency and adequate safeguards as well as the possibility of judicial redress (Article 21). Thus, the Directive places an obligation on the Member States and their authorities to respond immediately to any online provocation to commit terrorist offences, which may play an important role in their prevention.

4. MEASURES OF PROTECTION, ASSISTANCE, AND SUPPORT FOR TERRORISM VICTIMS

The provisions on terrorism victims have been extended to cover not only their protection but also support services and their rights in cross-border situations. Generally, they are intended to supplement those contained in the Directive 2012/29/EU on victims of crime.[46] As a result the definition of victims of terrorism is based on this act and it covers:

> a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, insofar as that was directly caused by a terrorist offence, or a family member of a person whose death was directly caused by a terrorist offence and who has

[45] Such tools include, for example, the search of any personal property, the interception of communications, covert surveillance including electronic surveillance, the taking and the keeping of audio recordings, in private or public vehicles and places, and of visual images of persons in public vehicles and places, and financial investigations. Their use should take into account the principle of proportionality and the nature and seriousness of the offences under investigation and should respect the right to the protection of personal data – recital 21 of the Directive preamble.

[46] Directive of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, [2012] OJ L 315.

> suffered harm as a result of that person's death. Family members of surviving victims of terrorism (...) have access to victim support services and protection measures.[47]

In other words, the status of the family members of victims of terrorism is clarified: family members of victims whose death was the result of terrorist offences are assimilated with victims and can benefit from the same rights,[48] while family members of surviving victims just have access to the same rights.

Apart from the previously provided general obligation of the Member States to ensure that prosecution of offences covered by the Directive is not dependent on a report made by a victim of terrorism or other person subjected to the offence, the Directive includes extensive provisions on assistance and support services for terrorism victims. Their aim is to take into account the specific needs of terrorism victims, and they should be confidential, free of charge, easily accessible, available both immediately after a terrorist attack and later, for as long as necessary. They should include in particular: emotional and psychological support, such as trauma support and counselling; provision of advice and information on any relevant legal, practical or financial matters and assistance with claims regarding compensation for victims of terrorism available under the national law of the Member State concerned (Article 24(3) of the Directive). Moreover, the Member States should ensure adequate medical treatment for victims of terrorism as well as the access to the legal aid in accordance with Article 13 of Directive 2012/29/EU. Undoubtedly, these provisions require quite a significant commitment of resources on the part of the Member States' health services, the funding of which may prove a challenge in practice.[49] However, this medical support is a very important element in the process of terrorism victims' recovery. Similarly, the legal aid which should be provided by the Member States requires additional costs, but it also seems indispensable in the framework of the support services for terrorism victims.

Protection measures cover both victims of terrorism and their family members and are subject to the provisions of Directive 2012/29/EU. It is underlined that "when determining whether and to what extent they should benefit from protection measures in the course of criminal proceedings, particular attention shall be paid to the risk of intimidation and retaliation and to the need to protect the dignity and physical integrity of victims of terrorism, including during questioning and when testifying." Thus, the Directive on combating terrorism takes into account dangers to which the victims and their family members are exposed, in particular their potential intimidation and retaliation. In some cases, special protection by the police or other security services could be necessary, especially where the terrorism victims are important witnesses in criminal proceedings concerning an act of terrorism. The Directive also underlines the need to protect the dignity and physical integrity of such persons and this requirement

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[47] Recital 27 of the preamble of the Directive on combating terrorism.

[48] S. Voronova, *Combating terrorism*, Briefing EU Legislation in Progress, September 2017, available at: https://bit.ly/2ykSY2V (accessed 30 June 2018), p. 7.

[49] *See* Murphy, *supra* note 34.

should be provided for by the Member States, notably in relation to the national authorities that question terrorism victims, such as the police, prosecutor's offices, or courts. Finally, the Directive acknowledges the cross-border dimension of terrorist attacks and the need to ensure both access to information and the available support services in the Member State where the terrorist offence was committed as well as assistance and support services in the victim's home Member State. Hence, terrorism victims' rights in cross-border situations are also taken into account.

CONCLUSIONS

By means of Directive 2017/541 the European Union has introduced several important changes to its previously existing provisions on combating terrorism. Accordingly, the following terrorist activities are made punishable: illegal system interference and illegal data interference (cyber-attacks), when they are committed against a critical infrastructure information system; receiving training for terrorism; travelling and organising or otherwise facilitating travelling for the purpose of terrorism and terrorist financing. In relation to public provocations to commit terrorism, the Member States are required to remove such online content or to block access to it. Thus, most of these changes concern offences related to terrorist activities and are influenced by international standards, such as Resolution 2178(2014) of the Security Council of the United Nations and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism. The Directive also extends the criminalisation of aid, abetment, incitement and attempt to a broader range of offences. Moreover, it introduces new provisions on the protection of victims of terrorism, including the requirement for a comprehensive response to their specific needs (assistance and support services, not only in the country where the attack was committed but also in that of the victims' residence). Other changes include: a specific clause on fundamental rights and freedoms; a special provision on the recruitment and training for terrorism directed towards a child, to be taken into account in sentencing; effective investigative tools, which should be targeted and proportional; and freezing and confiscation of the proceeds of terrorist offences.[50]

The analysis of all of these provisions confirms that, as regards its content, the Directive 2017/541 cannot be treated as a completely new chapter in combating terrorism by the EU. It is rather a continuation based on the provisions previously adopted in this field. The majority of the Directive's provisions can already be found in the Council Framework Decision (as amended in 2008). However, it takes into account international standards in the field of counterterrorism financing and travel by "foreign terrorist fighters", which can be treated as a further step in combating this phenomenon. It should be underlined that its implementation by the EU Member States at the same time meets the requirements provided for by the Resolution 2178

[50] *See* Voronova, *supra* note 48, p. 11.

(2014) of the Security Council of the United Nations. Moreover, the Directive may contribute to better protection of terrorism victims, as it extends its scope. In this field, the Directive applies an approach based on the protection of human rights. Not only does it require that support and assistance services should take into account the specific needs of terrorism victims, but it also refers to the necessity to protect their dignity and physical integrity. Finally, there is no doubt that as a new form of the EU legislation in the framework of counterterrorism policy (i.e. a Directive instead of a Council Framework Decision), it can play a larger role in practice, at least with respect to two aspects: its provisions will have direct effect under the conditions provided in the case-law of the Court of Justice, and the process of its implementation will be supervised by both the European Commission and the Court.

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INSOLVENCY FORUM SHOPPING – WHAT CAN BE LEARNED FROM THE ECJ AND US SUPREME COURT CASE LAW ON INTERNATIONAL COMPANY LAW AND INSOLVENCY PROCEDURES?

Abstract:
The recast of the European Insolvency Regulation, which has been applicable from 26 June 2017, implements a philosophy of Euro universalism, according to which insolvency proceedings opened in a Member State where the debtor has its centre of main interests (COMI) should have a universal scope and encompass all the debtor's assets situated throughout the EU.

The wording of the Recast Regulation is intended to comply with the ECJ case law concerning COMI, such as Interedil, Eurofood, Bank Handlowy or Mediasucre judgments. Nevertheless, it is now questioned whether the Recast Regulation strengthens or rather weakens the COMI/registered office rebuttable presumption and opens the gate for insolvency forum shopping.

As far as international company law is concerned, the issue of transfer of seat as well as forum shopping has been widely discussed. So far the ECJ has issued a series of judgments in which it has explained the European freedom of establishment and the cross-border activities of companies in the internal market.

Similarly, the US Supreme Court has issued several significant decisions, such as CTP Corp. v. Dynamics Corp. of America, Edgar v. MITE Corp., and International Shoe Co. v. State of Washington, in which the limits of acceptable forum shopping are better delineated.

Based on the aforementioned, it may be concluded that European harmonization measures facilitating cross-border mobility should additionally assist in achieving predictability and efficiency, as well as the economic viability and security of the operations under consideration. This contribution analyses and expounds on the lessons that can be learned from both the ECJ case law as well as US Supreme Court's decisions on international company law, including an examination of their effect on insolvency forum shopping. There is no doubt that, if successful, harmonized legislation on these matters would be a great asset for the internal market.

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INTRODUCTION

The capital market and the economic operations of international companies seem to be constantly a step ahead of the latest legal regulations, as well as political storms. What is taking place in politics exercises a great impact on the various world economies, but there is also no doubt that multinational, global companies themselves are perfectly prepared to withstand these trends and pursue their established goals. Their business assumptions may encompass a wide array of goals, such as a specific percentage of global revenue increase or strengthening of the brand. However, it may also include a transfer of the company's central place of administration, in order to find the best forum for either doing business or for insolvency.

Based on a comparative analysis of the results from the period 2007-2016, we can see that the financial crisis has created new obstacles for businesses all over the world.[1] It has highlighted the existing weaknesses and changed the priorities of companies in various regions and at all stages of development. One of the most serious problems for business, as a consequence of the global financial crisis, is their access to insolvency and restructuring procedures.

The European Union (EU) market has proven to be a predictable and desirable place for doing business. Functioning as a single market with – still so far – 28 Member States, the EU remains an important world trading power. In order to maintain that position and to overcome the recent severe recession, the European Commission has identified insolvency and restructuring proceedings as an important factor and one of its top priorities for creating a strong capital market.[2]

As the European Commission noted with respect to its Action Plan on building a Capital Markets Union, "despite progress in recent decades to develop a single market for capital, there are still many obstacles that stand in the way of cross-border investment."[3] These include obstacles that have origins in national law, such as substantive insolvency law. Therefore, the European Commission held consultations on the key insolvency barriers and put forward a legislative initiative on business insolvency, addressing the

[1] The Global Competitiveness Index 2016-2017 (The World Economic Forum), available at: https://www.weforum.org/reports/the-global-competitiveness-report-2016-2017-1/; Doing Business Index (The World Bank), available at: http://www.doingbusiness.org/rankings (both accessed 30 June 2018).

[2] *Action Plan on Building a Capital Markets Union*, COM (2015) 468 Final, 30 September 2015.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan on Building a Capital Markets Union; COM/2015/0468 final.

most important barriers to the free flow of capital and building on those national regimes that work well.[4]

More integrated EU capital markets and removal of some of the deep-rooted barriers which discourage investors from diversifying their worldwide investments would produce significant benefits to the EU economy as a whole and increase the attractiveness of the EU Member States as investment destinations for third country investors. The convergence of insolvency and restructuring proceedings would promote legal certainty for cross-border investors and encourage the appropriate restructuring of companies in temporary financial distress.

The Recast of the European Regulation on Insolvency, which entered into force on 26 July 2017, is a great tool of a procedural nature and one of the major advantages of the EU internal market. While it does not harmonize substantive national insolvency laws, it co-ordinates the different procedures of insolvency.[5] The centre stage is given to the State where the debtors' centre of main interests (COMI) is located, which gives that State exclusive authority to open main insolvency proceedings. This automatically requires its full recognition throughout the EU.[6]

In more general terms, based on the freedom of establishment companies properly established in one Member State can freely choose to incorporate in any other Member State to conduct business activities there. Therefore, freedom of establishment also covers situations where a company transfers its COMI abroad and, in consequence, changes the applicable law with respect to insolvency procedures.[7] The ECJ has appeared to emphasize this in the preliminary questions referred to it on the right of establishment and insolvency law, aimed at clarifying its position on the Member States' choice-of-law policies.[8] In *Centros*, *Cartesio*, *Vale, Cadbury*, *Bank Handlowy*, and *Interedil*, a line of case law has been developed upon which a correlation can be built between forum shopping in international company law and forum shopping in insolvency law within the EU.[9]

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[4] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Capital Markets Union – Accelerating Reform, COM (2016) 601 Final, Brussels 14 September 2016.

[5] *E.g.*, based on the Regulation all creditors have to submit to the same procedure that concerns a common debtor. Since this principle is concerned with substantive insolvency law, it requires the additional application of relevant national rules.

[6] G. McCormack, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, 10(1) Journal of Private International Law 41 (2014).

[7] D. Latella, *The "COMI" Concept in the Revision of the European Insolvency Regulation*, 11(4) European Company and Financial Law Review 484 (2014).

[8] J. Meeusen, M. Myszke-Nowakowska, *International Company Law in the European Internal Market: Three Decades of Judicial Activity*, XI Anuário brasileiro de direito internacional 92 (2016).

[9] ECJ, C-212/97 *Centros Ltd v. Erhvervs-og Selskabsstyrelsen* [1999], ECR I-1459; C-210/06 *Cartesio Oktatóés Szolgáltatóbt* [2008], ECR I-9614; C-378/10 *VALE Építésikft* [2012], ECR-00000; C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue* [2006], ECR I-07995; C-116/11 *Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v. Christianapol sp. z o.o.* [2012], ECLI:EU:C:2012:739; C-396/09 *Interedil Srl, in liquidation v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011], ECR I-09915.

Similarly, the US Supreme Court has already issued several significant decisions in this regard: *CTP Corp. v. Dynamics Corp. of America*,[10] *Edgar v. MITE Corp.*,[11] *International Shoe Co. v. State of Washington*,[12] *Yukos Oil*,[13] and *Avianca*,[14] based on which the limits of acceptable changes of applicable insolvency laws are better delineated.

The important question which will be examined below is whether this case law differentiates between international company law forum shopping and insolvency forum shopping; and consequently whether the applicable choice of law rules indeed discourage opportunistic cross-border reorganizations and protect creditors. Additionally, in the context of conflict of law rules for insolvency law, the present contribution is meant to introduce the reader to the problematic questions surrounding the definition of the "centre of main interest" (COMI). It will be argued that the Insolvency Regulation provides only facilities for the effective administration of cross-border insolvencies rather than attempting to harmonize the insolvency procedures of the Member States.[15]

1. CHOICE OF LAW RULES IN INTERNATIONAL COMPANY LAW AND INSOLVENCY LAW

The EU system of corporate law and that of the US differ significantly insofar as the scope of the applicable law is concerned. Within international company law in the EU, up till now both the "incorporation" and the "real seat" theories are predominant in the Member States' systems of private international law.[16] According to the former theory, a company is governed by the law of the State where it was incorporated; while according to the latter a company is governed by the law of the state where its head office (real seat) is located. In practice, a number of Member States adhere to a mixed system, containing elements of both approaches.[17]

The US does not follow either the place of incorporation or real seat theories, but rather applies an "internal affairs" doctrine. Therefore, the scope of applicable rules differs significantly. The American internal affairs doctrine focuses first of all on the regulation of board's fiduciary duties and its liability towards shareholders, whereas creditors' protection (important from the insolvency law point of view) is either federalized or left

[10] *CTP Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

[11] *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

[12] *International Shoe Co. v. State of Washington*, 326 U. S. 310 (1945).

[13] *Yukos Oil Co.* (2005) 321 BR 396.

[14] *Aerovias Nacionales de Colombia SA Avianca* (2004) 303 BR 1.

[15] G. McCormack, *Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies*, 63 International & Comparative Law Quarterly 817 (2014).

[16] Commission's staff working document, *Impact assessment on the Directive on the cross-border transfer of registered office*, SEC (2007), 1707, p. 9.

[17] P. Paschalis, *Freedom of Establishment and Private International Law for Corporations*, Oxford University Press, Oxford: 2012, pp. 4-14.

out of the doctrine.[18] Obviously this doesn't mean that there is no form of protection for creditors. Rather, the creditors' protection in the U.S. relies on important mechanisms that fall outside the scope of the internal affairs doctrine but are contained within the American insolvency law (i.e. Federal bankruptcy law), such as the restrictions on distributing dividends,[19] prohibition of fraudulent transfers, equitable subordination, or "piercing the corporate veil." Consequently, it is no wonder that a cross-border transfer of companies is relatively straight-forward insofar as company law is concerned, but rather limited in the domain of insolvency law. The internal affairs doctrine governs the horizontal competences between the states, since companies transferring their centre of main interests also change the relevant applicable law.

This issue was addressed by the U.S. Supreme Court in *CTS Corp. v. Dynamics Corp. of America*,[20] where the Court confirmed that States cannot discriminate against interstate commerce by treating in-State and out-of-State corporations differently. It determined that the Indiana law in question, intended to prevent hostile takeovers of Indiana corporations, did not differentiate between in-state and out-of-state corporations. Therefore, the Court concluded that Indiana law might result in fewer bids to take over Indiana companies. However, since companies are creations of State law, that law did not stop them from making a takeover bid, but only provided procedures for better protection of the shareholders.[21] This approach was confirmed also in *Amanda Acquisition Corp. v. Universal Foods Corp*.[22] *and Tyson Food Inc. v. Mc Reynolds*.[23] In contrast, in *Edgar v. MITE Corp*., the US Supreme Court held that the Illinois Business Take-Over Act imposed impermissible burdens on interstate commerce by requiring a tender offeror to notify the Secretary of State and the target company of its plan to make a tender offer and its terms 20 days before the offer becomes effective. During that time the target company, but not the offeror, was free to disseminate information about the offer to the target company's shareholders. The Court stated that the burden was excessive and would give the power to the State whether to proceed with a tender offer or not, even if it concerned a company established and having its main centre of interest outside of Illinois. Therefore, Illinois's interest in protecting resident security holders was deemed insufficient to outweigh the burdens imposed on interstate commerce.

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[18] L. Ribstein, E.A. O'Hara, *Corporations and the market for law*, University of Illinois Law Review 661 (2008), p. 694.

[19] In many states dividends are allowed to be distributed only provided that it would not result in insolvency and may not be paid out of states' capital. The Revised Model Business Corporation Act, Section 6.40, provides that: "directors can pay a dividend if there is a surplus of assets over liabilities, but only if, after the distribution, the corporation would be still able to pay its debts when they fall due."

[20] *CTS Corp. v. Dynamics Corp. of America* 481 U.S. 69 (1987)

[21] *Ibidem*, p. 89: "[s]o long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."

[22] *Amanda Acquisition Corp. v. Universal Foods Corp.* 877 F. 2d 496 (7th Cir. 1989).

[23] *Tyson Food Inc. v. Mc Reynolds* 865 F.2d 99 (6th Circ. 1989).

It is clear that the internal affairs doctrine displays a number of similarities to the "incorporation" principle applied in some Member States of the EU. The most recognizable is that companies do not have to keep their main centre of administration or management in the state of their incorporation in order to be validly incorporated. According to the Model Business Corporation Act and the law of most states of the US, reincorporation should be implemented by way of a cross-border merger.[24] Therefore, US companies are free to choose the applicable company law regardless of the location of their main centre of business.

It should be noted that freedom of reincorporation allows companies initially incorporated in one State to transfer their headquarters to any other State. However, in contrast to the EU, the scope of competence of the state of incorporation is limited to the relations between shareholders and managers, exclusive of the weaker parties' protections, such as creditors or minority shareholders (the internal affairs doctrine). The latter issues belong to federal law (including federal bankruptcy law) rather than state law. As a result, the state of incorporation is competent to regulate the cross-border companies' reincorporation and the other states must recognize validly formed companies.[25] In such case, there is no need for the company to liquidate.

It is often postulated that the incorporation theory, which is said to promote private autonomy and commercial freedom, best satisfies the requirements of the internal market and enhances business mobility.[26] In contrast, the real seat theory is generally considered to be more autonomy restrictive by being principally centred on the State instead of private and commercial interests.[27]

The main argument is based on the fact that the incorporation theory, in contrast to the real seat theory, enhances mutual recognition of companies by accepting the localization of the registered office of a company and its real seat in two different States. Therefore, a cross-border transfer of the company's head office is possible without the dissolution of the company and the establishment of a new company in the state of destination.

So far, the ECJ has been able to develop a consistent interpretation of freedom of establishment when adjudicating on Member States' rules of international company law.[28] In spite of the many pleas to the ECJ to condemn the real seat theory as

[24] Model Business Corporation Act, 1984, para. 11.02.

[25] Restatement of the Law, Conflict of Law (2nd ed.), para. 296: "[i]n order to incorporate validly, a business corporation must comply with the requirements of the state in which incorporation occurs regardless of where its activities are to take place or where its directors, officers or shareholders are domiciled"; para. 297: "[i]ncorporation by one state will be recognized by other states."

[26] K. Kreuzer, *Zu Stand und Perspektiven des europäischen Internationalen Privatrechts, Wie europäisch soll das Europäische Internationale Privatrecht sein*?, 70 Rabels Zeitschrift 1 (2006).

[27] Ch. Teichmann, *The Downside of Being a Letterbox Company*, 9(3) European Company Law 180 (2012); W.-G. Ringe, *Corporate Mobility in the European Union: A flash in the pan? An empirical study on the success of lawmaking and regulatory competition*, 2 European Company and Financial Law Review 231 (2013).

[28] G. Mathisen, *Consistency and coherence as conditions for justification of Member States measures restricting free movement*, 47 Common Market Law Review 1021 (2010); K. Hopt, *Europäisches Gesellschaftsrecht*

incompatible with the requirements of the internal market, it is still a legally binding choice-of-law approach for EU-Member States. However, the continued application of the real seat theory has been made subject to a number of strict requirements.[29]

Since the EU does not share a common internal affairs doctrine, but rather permits Member States follow either the incorporation theory or the real seat theory, the scope of the applicable set of rules in international company law by the incorporation state remains much larger than in the US and also includes creditors' protection. There is, however, a visible trend according to which, similarly to the U.S., creditors in the EU are increasingly protected via *ex post* mechanisms or by contracts, as well as instruments embodied in insolvency law or in tort law (such as piercing the corporate veil).[30]

COMI seems to be an expression of the real seat theory in insolvency law, therefore the debate concerning international companies' abusive forum shopping might be very useful in defining the limits of the opportunistic reincorporations in insolvency law as well. COMI is a legal term that is open for interpretation in each particular case. Nevertheless, when searching for a definition, it should be interpreted in a uniform manner, independently of national doctrine and law.[31] The Regulation provides for a rebuttable presumption that the COMI corresponds to the place of incorporation.

As a result, since based on the Insolvency Regulation any reincorporation abroad affects the location of a company's COMI, it also transfers the applicable insolvency to the new state of incorporation.[32] Consequently, even if instruments for creditors' protection are included in insolvency law, due to the lack of European substantive insolvency law rules the reincorporation will result in the amendment of the applicable law to protect creditors. This mechanism is one of the reasons why the transfer of the registered office of a company still carries a significant risk to creditors, taking into account that the transfer will affect the applicable law not only concerning shareholders' value and the value of the firm, but also concerning creditors' protection.

Taken altogether, the aforementioned position of companies characterises an approach which can greatly impact conflict of laws rules and lead to a very specific

im Lichte des Aktionsplans der Europäischen Kommission vom Dezember 2012, 2 Zeitschrift für Unternehmens- und Gesellschaftsrecht 165 (2013), p. 177.

[29] J. Meeusen, *Freedom of Establishment, Conflict of Laws and the Transfer of a Company's Registered Office: Towards Full Cross-Border Corporate Mobility in the Internal Market?*, 13(2) Journal of Private International Law 294 (2017).

[30] E.-M. Kieninger, *The Law Applicable to Corporations in the EC*, 73 Rabels Zeitschrift 607 (2009), p. 614; The decision of the German Bundesgerichtshof, 16 July 2007, NJW 2689 (2007); Rome II Regulation 864/2007 on the law applicable to non-contractual obligations, OJ L 199, 31.7.2007, Article 4.

[31] D. Latella, *The "COMI" Concept in the Revision of the European Insolvency Regulation*, 11(4) European Company and Financial Law Review 479 (2014), p. 481.

[32] The Insolvency Regulation determines, using COMI, both the law to be applied and the *forum concursus*. Migrating companies may be trapped if they apply for insolvency proceedings while transferring their seat abroad. They may be considered to have their COMI in the State of their origin, except where the company indeed was genuinely involved in business dealings in its foreign extensions. *See* S. Rammeloo, *The 14th EC Company Law Directive on the Cross-Border Transfer of the Registered Office of Limited Liability Companies*, 5 Maastricht Journal of European & Comparative Law 359 (2008).

understanding of private international law, its role, and its content. As the Brussels conference on convergence of insolvency frameworks within the European Union proved, there is a room for increasing harmonization of not only company law, but also of insolvency law.[33]

2. FORUM SHOPPING

It should not come as a surprise that forum shopping is in practice used on a daily basis, concerning both international company law as well as insolvency law. However, despite the fact that both these fields of law apply a very similar conflict of law connecting factor, they are aimed at protecting opposite underlying interests. International company law intends to enhance business mobility but also protect the weaker third parties, whereas insolvency law in theory plays typically just the opposite role; it aims at protecting creditors and only secondarily the company undergoing insolvency proceedings. This remains valid only under the assumption that in the EU the main goal of insolvency is to protect creditors whose interests are at risk as a result of the insolvency proceeding. Indeed, the Recast of the Insolvency Regulations fails to consider the difference between a company in a bankrupt state and one simply in financial distress. In fact, it is possible to imagine an alternative approach that would focus on quick insolvency or an effective prompt restructuring that would put a company in financial distress on the right track again. Still, it is a troublesome question: how to prove that a particular action or transaction done in one country triggers the avoidance laws of another? A "one-size-fits-all" solution is doomed to failure: different legal traditions, jurisdictions and economies on different levels clearly have different priorities, as well as a different understanding of the goals of insolvency proceedings.[34]

As far as international company law is concerned, parties to a contract enjoy great autonomy to decide whether a particular transaction is worthy of being carried out, and if so, on what conditions. A business has numerous reasons to consider the aims of a cross-border company's reincorporation. Hence a company transferring its seat may seek a more flexible market or more convenient company law regulations, but also be seeking to circumvent company creditors demanding compensation. It should not come as a surprise that the latter involves not only cross-border company law, but also insolvency proceedings at the same time. Therefore, the applicable law may not be entirely neutral and, depending on the preferred policy, a proper balance needs to be struck between the involved interests.[35]

[33] "Convergence of insolvency frameworks within the European Union – the way forward?", Brussels Conference held on 12 July 2016, available at: https://europa.eu/newsroom/events/convergence-insolvency-frameworks-within-european-union-way-forward_en (accessed 30 June 2018).

[34] Ch.G. Paulus, *Global Insolvency Law and the Role of Multinational Institutions*, 32 Brooklyn Journal of International Law 755 (2007), p. 765.

[35] Ch.G. Paulus, *A Statutory Proceeding for Restructuring Debts of Sovereign States*, 49 Recht der internationalen Wirtschaft 401 (2003).

The issue of forum shopping has also been widely discussed in the US literature.[36] This is due to the fact that the US Bankruptcy Code allows the proceedings to be initiated in the place of debtor's incorporation, or where its principal place of business is located, or where its affiliate has already filed for bankruptcy.[37] The relevant provisions on dissolution and liquidation are in Chapter 7 of the US Bankruptcy Code, however, most important provisions for foreign companies are in Chapter 11, the goal of which is prepare and confirm a reorganization plan. However, insofar as the jurisdictional threshold is concerned, there is no distinction between the liquidation proceedings in Chapter 7 and reorganization proceedings in Chapter 11. Namely, section 109(a) of the Bankruptcy Code provides for a wide-ranging jurisdictional basis, according to which "any person who resides or has a domicile, a place of business or property in the United States may be a debtor under the Code." This has been further expanded by the acceptance of US bankruptcy jurisdiction on the sole basis that the debtor had a place of business in a hotel room, or possessed a bank account in the US.[38] Even a shareholding in a US-incorporated subsidiary or retainer paid in advance of the bankruptcy filing to a US counsel constituted property in the US sufficient to file for bankruptcy under the US Bankruptcy Code.[39]

Chapter 11 is based on the idea that a failing business can be reorganized into a successful operation.[40] As the US Supreme Court noted:

> [i]n proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future…By attempting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners… Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if sold for scrap.[41]

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[36] J.A.E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 Brooklyn Journal of International Law 785 (2007); R.K. Rasmussen, *Where Are All the Transnational Bankruptcies? The Puzzling Case for Universalism*, 32 Brooklyn Journal of International Law 983 (2007); M.B. Jakoby, *Fast, Cheap and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 Buffalo Law Review 401 (2006); K. Ayotte, D. Skeel, *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 University of Chicago Law Review 425 (2006); S. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 Connecticut Law Review 28 (2003).

[37] L.M. LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts*, University of Michigan Press, Ann Arbor: 2005.

[38] *In Re Primo Camera* (1933) 6 F Supp. 267, *In Re McTaque* (1996) 198 BR 428, *In Re Globo Communicacoes E Participacoes SA* (2004) 317 BR 235 at 249.

[39] *In Re Marco Polo Seatrade BV*, No. 11-13634; *see also* J. Canfield, *How Low Can You Go? Minimum Jurisdictional Threshold for US Bankruptcy Courts in Cross-Border Insolvency Cases*, ABI Committee News, March 2012.

[40] I. Darke, *Use of US Chapter 11 Filings by Non-US Corporations; Realistic Option of Non-Starter*, International Corporate Rescue 206(2011); E. Warren, J.L. Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 Michigan Law Review 603 (2009).

[41] *US v. Whiting Pools Inc.* (1983) 462 US 198 at 203. HR Rep. No 595, 95th Congress, 1st Sess 220 (1977).

The main attractiveness of Chapter 11 for foreign companies, including companies that engage in forum shopping, lies mainly in the worldwide stay – brought about automatically by a bankruptcy filing – of any and all enforcement proceedings against the debtor or its property.[42]

Section 541 of the Bankruptcy Code provides that the property of the debtor that comprises the bankruptcy estate includes property "wherever located and by whomever held."[43] Therefore, the bankruptcy estate consists of debtors' property located wherever in the world. Apart from that, it is also helpful for a foreign company not to be under an obligation to automatically replace the company management with an outside administrator or trustee. Chapter 11 proceedings are initiated by a debtor's voluntary petition and the existing corporate management structure remains untouched. Therefore, even if the reorganization process has formally been commenced, the companies corporate governance does not change, unless – which happens exceptionally rarely – under strong creditors' pressure. This is also related to the consolidation of insolvency proceedings, which co-ordinates group rescue reorganization for multinational companies active across a number of jurisdictions.

Chapter 15 of the Bankruptcy Code has implemented the UNICTRAL Model Law on Cross-Border insolvency.[44] The Model Law does not directly allocate jurisdiction to open insolvency proceedings, because it does not define mandatory uniform conflict of law rules. It rather provides for recognition – albeit not automatic – of insolvency proceedings, depending on the application to the court and in part on the law of the recognizing state. Namely, foreign main insolvency proceedings will be recognized if they were opened in the jurisdiction where the debtor has its centre of main interest. However, under section 1528 of the US Bankruptcy Code, a case may be commenced based on Chapters 7 and 11 only in the event that the debtor has assets in the US, since the effects of such a case will normally be restricted to assets that the foreign debtor has in the US. In contrast, in the EU the recognition of the proceedings is automatic and has the same effect throughout all the Member States.

The criticism of the application of Chapter 15 together with Chapters 7 and 11 lies in the asymmetry in the threshold concerning the opening of the bankruptcy proceedings. On one hand, US courts will recognize foreign main insolvency proceedings only provided that they were initiated in a jurisdiction where the debtor has its centre of main interest, whereas on the other hand the threshold for opening main insolvency proceedings in the US for a foreign debtor is much lower and is satisfied with minimal assets in the US.

Forum shopping appears as an immanent component of EU insolvency law. Due to the significant differences between the Member States with respect to the priorities granted to creditors, e.g. whether to continue existing contracts or avoid

[42] *Re Nortel Networks Inc.* (2011) 669 F 3d 128.

[43] *Hong Kong and Shanghai Banking Corp v. Simon* (1998) 153 F 3d 991 at 996.

[44] The UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013).

them, debtors may endeavour to change the applicable insolvency law.[45] Obviously, a decision to change the applicable law may have interests in common with business decisions on the transfer of a company's seat, or may have a completely dissimilar logic. Despite the actual justification, forum shopping results in different pay outs to creditors.

U.S. corporate law, in principle, does not provide creditors with protection from re-distributive cross-border reincorporations.[46] Such transactions normally aim at increasing the shareholders' value, therefore remain irrelevant and neutral for the creditors. Here, the mechanism for creditors' protection is shifted from company law to insolvency law or tort law. In the EU, in contrast, there are still doubts about the feasibility of transferring the registered office abroad, due to the necessity to protect creditors from opportunistic cross-border reincorporations that may increase the shareholders' value but be detrimental to creditors. This is so because, indeed, creditors that have once relied upon particular company law may be damaged by the reincorporation and the accompanying change of applicable law. In the current state of the law, the most workable method is a merger or acquisition, wherein creditors are entitled to oppose the merger in order to receive an advance payment or security.[47] In this respect, the Member States are free to shape more or less stringent mechanisms offering different levels or protection to creditors, depending on each national policy. Otherwise, if national company law does not provide for a protective mechanism, the creditors' protection may be at the disposal of the board and shareholders who decide upon and pursue the cross-border reincorporation, who clearly may have different interests in mind.[48] Insolvency law at the national level may not offer sufficient shielding from such operations. Whenever the creditors' protection relies on company law rules rather than on insolvency law, such mechanisms usually prevent a significant number of cross-border reincorporations, in part by increasing their costs and time.

The ECJ has already banned unreasonable burdens to inbound transfers of a company's seat. The issue of system shopping and international company law lies at the heart of the *Centros* judgment, where the ECJ stated that as long as there remain differences in the choice of law rules, there exists a motive for seeking out and for utilizing the "most favorable climate."[49] In the EU there is an emerging market of rules in which States compete with each other in offering to entrepreneurs different models of both company law as well as insolvency law. This raises the question to what extent

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[45] E. Warren, *Bankruptcy Policy*, 54 University of Chicago Law Review 775 (1987); R. Goode, *Principles of Corporate Insolvency Law*, Sweet & Maxwell, London: 2011, pp. 72-79.

[46] RMBCA, para. 13.02(b)(1).

[47] Cross-border merger Directive, Article 4. S. Lombardo, *Regulatory Competition in Company Law in the European Union after Cartesio*, 10 European Business Organization Law Review 627 (2009), p. 647.

[48] M.-P. Weller, *The German Autonomous International Company Law*, 2 IPRax 167 (2017).

[49] J. Carruthers, C Villiers, *Company Law in Europe – Condoning the Continental Drift?*, 11 European Business Law Review 91 (2000), p. 95.

Member States' interests might be associated with free movement within the internal market.[50]

In general, the ECJ seems to show considerable tolerance toward companies seeking out the most favourable company law. In this vein, the Member States' margin for action is rather limited. They are not allowed to adopt measures which create obstacles to fundamental freedoms nor undermine the full effect and uniform application of EU law. Nevertheless, there are cases in which the subjective motives to rely on EU law are deliberately aimed at achieving an advantage from evading Member States' laws.[51] The subjective element is decisive in particular in those cases which are on the borderline between the use and abuse of EU law.[52] The ECJ has made it clear that the intention to search for the most suitable rules governing the formation of a company cannot be abusive and should be viewed as a legitimate manifestation of the right of establishment. According to the Court, the aim to form a company in accordance with the least restrictive legal system entails the avoidance of more stringent national provisions. However, even the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abusive or fraudulent conduct which would entitle the latter Member State to deny the company the benefit arising from the right of establishment.[53] The possibility of forum shopping is a logical consequence of the rights guaranteed under the Treaty, and is also consistent with the objective to achieve the internal market.[54]

On the other hand, a Member State may have a legitimate interest in preventing its nationals from attempting to evade the application of its national legislation. Attempts to circumvent the national set of rules can be remedied within the confines of the four-factor test.[55] Therefore, according to case law of the Court, a Member State is entitled to take restrictive measures designed to prevent its nationals from attempting, under cover of the rights created by the Treaty, to circumvent national legislation or to prevent individuals from improperly or fraudulently taking advantage of the provisions of EU law.[56]

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[50] J. Meeusen, *System Shopping in European Private International Law in Family Matters*, in: J. Meeusen, M. Pertegás, G. Straetmans & F. Swennen (eds.), *International Family Law for the European Union*, Intersentia, Antwerp: 2007, pp. 239-278.

[51] P. Cabral, P. Cunha, '*Presumed Innocent': Companies and the Exercise of the Right of Establishment under Community Law*, 25 European Law Review 157 (2000), p. 161.

[52] Meeusen, *supra* note 50, p. 258.

[53] ECJ, C-212/97 *Centros*, paras. 26-29.

[54] ECJ, C-79/85 *Segers v. Bedrijfsvereniging voor Bank- en Verzekeringswezen. Groothandel en Vrije Beroepen* [1986], ECR 2375, para. 16.

[55] National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.

[56] M. Evers, A de Graaf, *Limiting Benefit Shopping: Use and Abuse of EC Law*, 6 EC Tax Review 279 (2009), p. 285.

An example of such a restrictive measure can be found in the *National Grid Indus* judgment, where the ECJ declared that the transfer of the place of effective management cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer.[57] From the ECJ's point of view, such a measure was intended to prevent situations capable of jeopardising the right of the home Member State to exercise its powers of taxation in relation to activities carried on in its territory, and may therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States.[58]

In contrast, one of the goals of the Recast of the Insolvency Regulation is to limit forum shopping.[59] Recital 29 expresses this very clearly: "This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping." However, the practice of active companies looks quite different, as forum shopping is becoming more and more common in the EU. The reason for this can paradoxically be found in the mechanisms of the Insolvency Regulation itself. Namely, the main insolvency proceeding with universal effect (i.e. on all debtors' assets regardless of their location) is governed by the law of State where a debtor's centre of main interests is located.[60]And the companies' COMI is presumed to coincide with their registered office, unless the contrary is proven.

This can clearly encourage insolvency forum shopping.[61] A debtor might seek to change its COMI because a transaction that might come under the scrutiny of a liquidator benefits a person connected with the debtor, such as the relative of a director of a corporate debtor. But also directors of the company involved in the insolvency proceedings may find it beneficial to change in advance the company's COMI in order to benefit from more lenient insolvency rules.

Without doubt, the wording of the Recast Insolvency Regulation intends to comply with the ECJ case law concerning COMI, such as the *Interedil*, *Eurofood*, *Bank Handlowy* or *Mediasucre* judgments. The problem, however, arises if we take into account that

[57] ECJ, C-371/10 *National Grid Indus BV v. Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [2011] ECR I-12273 para. 46. The Court held that, in accordance with the principle of fiscal territoriality linked to a temporal component, namely the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise, a Member State is entitled to charge tax on those gains at the time when the taxpayer leaves the country. *See also* to that effect ECJ, C-374/04 *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue* [2006], ECR I-11673, para. 59.

[58] ECJ, C-371/10 *National Grid Indus*, para. 46; Case C-311/08 *Société de Gestion Industrielle (SGI) v. Belgian State* [2010], ECR I-487, para. 60.

[59] F.M. Mucciarelli, *The unavoidable persistence of forum shopping in European insolvency law* (November 2013), available at: https://ssrn.com/abstract=2375654 (accessed 30 June 2018).

[60] Article 3(1) of the Insolvency Regulation. Nevertheless, based on Article 3(2) of the Insolvency Regulation, courts of states where a debtor has an "establishment" can open ancillary proceedings with mere territorial effects and aimed at liquidation.

[61] G. Moss, *Group Insolvency – Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 Brooklyn Journal of International Law 1005 (2007), J. L. Westbrook, *Locating the Eye of the Financial Storm*, 32 Brooklyn Journal of International Law 1019 (2007).

thanks to the ECJ case law, as well as relevant EU legislation, companies can transfer not only their COMI but also their registered office abroad. Since the reference date to assess the insolvency competence is a three-month period, if a company relocates its registered office abroad before that period, the creditors will have to prove that the COMI is still in the former Member State and that the new jurisdiction should not take the competence to govern the insolvency from the original State.[62]

Additionally, creditors' protection against abusive insolvency forum shopping depends on the "ascertainability" criterion, which means that the presumption that the COMI coincides with the registered office cannot be rebutted if a company relocates its COMI alongside with its registered office in a way that is "ascertainable" by third parties.

According to Recital 28:

> When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a transfer of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

These criteria of ascertainability are designed to guarantee creditors that a company will not move its COMI or registered office in order to search for a more convenient insolvency law.[63]

Can we accept that within the European internal market creditors might be faced with the risk of a fluctuating value of their investment? Can we presume that they should be aware enough to protect themselves *ex ante*, for instance, by way of contractual obligations and conditions or in the price of credit?[64] While creditor risk is an obvious component of insolvency law, one may ask whether the very possibility of forum shopping indeed prevents potential creditors from calculating their risks?[65]

In my opinion, the rebuttable presumption of the COMI in fact decreases the legal predictability. Although, one of the goals of the Insolvency Regulation is "to avoid

[62] Recital 31 of the Insolvency Regulation: "With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's principal place of business or at the individual's habitual residence should not apply where, respectively, in the case of a company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings."

[63] G. McCormack, *Jurisdictional Competition and Forum Shopping in Insolvency Proceedings*, 68(1) Cambridge Law Journal 169 (2009), p. 191; M. Szydło, *Prevention of Forum Shopping in European Insolvency Law*, 11 European Business Organization Law Review 253 (2010), pp. 258-259.

[64] B. Adler, *A theory of corporate insolvency*, 72 New York University Law Review 342 (1997); S.A. Davidenko, J. R. Franks, *Do bankruptcy codes matter? A study of defaults in France, Germany and the U.K.*, 63 Journal of Finance 565 (2008).

[65] M.-P. Weller, *Forum shopping im internationalen Insolvenzrecht?*, IPRax 412 (2004).

incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping),"[66] creditors could be better protected *ex ante* rather than having to risk their investments being put at risk by changing insolvency rules and proceedings in the event of a debtor's default.

3. TRANSFER OF REGISTERED OFFICE

Globalization, as well as the growing integration of the markets, leads companies to increasingly do business across national borders, both within the Union and beyond.[67] Their mobility may take various forms, such as mergers or acquisitions and transfer of seats, including the transfer of registered office. One of the options provided for the European Company (SE) is that a company is granted the right to transfer its registered office from one Member State to another with the attendant change of the applicable law.[68] Additionally, a directive on cross-border merger grants EU companies the right to merge across-borders, i.e. to relocate their registered office.[69]

Based on the ECJ case-law concerning international company law, such as, e.g., *National Grid Indus*, cross-border transfer of the registered office falls within the scope of the freedom of establishment. Nevertheless, the home State is still free to decide whether to permit the company to retain its status as a company incorporated under national law. Therefore, according to the Court, the transfer of seat is covered by the freedom of establishment at least when the company retains its legal personality based on the law of the country from which it migrated.[70]

The extent of regulatory power of Member States has been further clarified in the most recent case – *Polbud* – where the ECJ noted that the regulatory power ends when a company converts itself into a company governed by the law of another Member State.[71] Accordingly, it is for the latter State to determine the legal and economic conditions that have to be satisfied in order to bring the conversion into effect.[72]As a rule, based

[66] Rt. 13 of the Insolvency Regulation.

[67] C. Pamboukis, *La renaissance-métamorphose de la méthode de reconnaissance*, 97 Revue Critique de Droit International Privé 513 (2008), p. 519; K. J. Hopt, *Droit compare des société: Quelques réflexions sur l'actualité et les evolutions comparés du droit allemand et du droit français des sociétés*, Revue des sociétés 309 (2009); P. Jund, *Vers une convergence des droits allemand et français des societiés?*, 4 Revue internationale de droit comparé 861 (2008).

[68] Regulation of the Council 2157/2001/CE, 8 October 2001 on the statute of the European Company (the SE Regulation), OJ L 294, pp. 1-21.

[69] 21 Directive 2005/56/CE of the Parliament and the Council of26 October 2005, on cross-border mergers of limited liability companies, OJ L 294, 10.11.2001, pp. 22–32.

[70] M. Benabdallah, R. de Wit, H. Reinoud, *ECJ Disallows Immediate Collection of Tax Upon Migration*, Baker & McKenzie –Nederlands, Client/Legal Alert, 5 December 2011.

[71] ECJ C-106/16 *Polbud — Wykonawstwo sp. z o.o., in liquidation* [2017], ECLI:EU:C:2017:804.

[72] *Ibidem*, para. 33.

on Articles 49 and 54 TFEU, the home Member State is entitled to provide legislation for the protection of public interests but cannot impose mandatory liquidation. In *Polbud*, the ECJ extended the scope of application of the principle of equivalence to the Member State of origin.[73]

Therefore, inasmuch as this kind of reincorporation is accessible to companies, they obviously make use of it. Consequently, companies take advantage of the presumption that their COMI coincides with their registered office, unless creditors are able to rebut the presumption by proving that it is still in the State of origin.

Without any doubt, a decision to transfer the COMI when insolvency proceedings are on the horizon significantly impacts creditors' risks.[74] The three-month reference date/freezing period might be seen as a simple solution to forum shopping at the creditor's expense. As a consequence, the applicable law will be that of the jurisdiction of the Member State in which the principal place of business or the registered office was located within the three-month period prior to the request for opening insolvency proceedings.

The considerations with respect to this freezing period were further analysed by the ECJ in the *Staubitz-Schreiber* case, in which a German sole trader resident in Germany pursued business activities until 2001, when she filed for the opening of insolvency proceedings. In 2002, she moved to Spain in order to live and work there, i.e. she moved her residence from Germany to Spain after filing for insolvency with a German court.[75] The ECJ maintained that a transfer of jurisdiction from the court originally seized to a court of another Member State would be contrary to the objectives pursued by the Regulation, which intends to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another in order to obtain a more favourable legal position.

> That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law.[76]

Furthermore, it would be contrary to efficient and effective cross-border proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever it chose to establish itself more or less permanently, and would often mean in practice that the proceedings would be prolonged, whereas "retaining the jurisdiction of the first court ensures greater judicial certainty for creditors who have assessed the risks to be assumed

[73] *Ibidem*, para. 43. Please note that the principle of equivalence requires the same remedies and procedural rules to be available to claims based on European Union law as are extended to analogous claims of a purely domestic nature.

[74] P.L. Davies, S. Worthington, *Gower and Davies' Principles of Modern company Law*, Sweet & Maxwell, London: 2012, pp. 235-237.

[75] ECJ C-1/04 *Susanne Staubitz-Schreiber* [2006], ECR-I 00701, para. 15.

[76] *Ibidem*, paras. 24-25.

in the event of the debtor's insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him."[77] Indeed, if the transfer of a company's centre of main interest after the filing resulted in a change of the international competence, the debtor would have the unrestricted power to select the preferred location and the applicable law.[78]

We may then conclude that the *Staubitz-Schreiber* case was underpinned by the need to avoid forum shopping. It seems, however, that one of the next ECJ cases, i.e. *Interedil,* actually paves the way for that practice.

The problematic issue in *Interedil* related to the question whether the reasoning from *Staubitz-Schreiber* could be applied when a COMI was transferred before the filing for insolvency. Interedil was established under Italian law and had its registered office in Italy. In 2001, its registered office was transferred to the United Kingdom as a result of acquisition proceedings and removed from the Italian register of companies. However, it still held some assets and a bank account in Italy. In 2003 an Italian creditor filed a petition with the Italian court for the opening of bankruptcy proceedings against Interedil. Interedil challenged the jurisdiction of that court on the grounds that, as a result of the transfer of its registered office to the United Kingdom, only the courts of that Member State had jurisdiction to open insolvency proceedings.[79]

The ECJ stated that when the registered office is transferred before a request to open insolvency proceedings is lodged, the centre of the debtor's main interests is therefore presumed, in accordance with the second sentence of Article 3(1) of the Regulation, to be located at the place of the new registered office and, accordingly, the courts of the Member State within the territory in which the new registered office is located have jurisdiction. The same rules must apply where, at the date on which the request to open insolvency proceedings is lodged, the debtor company has been removed from the register of companies, and where it has ceased all activity.[80] As a consequence, cross-border reorganizations before the filing would also shift the applicable law and jurisdiction for insolvency proceedings.

Therefore, we may conclude that a company's COMI is to be determined having regard exclusively to factual elements existing within the three-month period prior to the request for opening insolvency proceedings, irrespective of the previous location of a company's registered office and real seat. If a company transfers its registered office to another Member State three months before filing for insolvency, the presumption is that the COMI is also transferred to the Member State of the new registered office, unless proven to be the contrary. Obviously, the burden of proof of that is shifted to the objecting creditors. Proving such an assertion is not an easy task, since they have to

[77] *Ibidem*, paras. 26-27.

[78] M.-P. Weller, *Die Verlegung des Centre of Main Interest von Deutschland nach England*, 37(6) Zeitschrift für das gesamte Handels- und Gesellschaftsrecht 835 (2008), p. 850; H. Eidenmüller, *Abuse of Law in European Insolvency Law*, 1 European Company Financial Law Review 1 (2009), p. 13.

[79] ECJ, C-396/09 *Interedil*, paras. 10-13.

[80] *Ibidem*, paras. 56-57.

prove that the last location of the company's headquarters is still the only one that third parties can "ascertain" as the company's centre of administration.[81]

This reasoning, however, remains in line with the ECJ case-law in international company law granting companies the right to free movement within the European Union. The home State's priority position is maintained, though combined with a reference to the host State's law in so far as the latter accepts the new *lex societatis* of the company.[82]

As a consequence, we may conclude that corporate mobility has significantly impacted EU insolvency law by enabling forum shopping through the transfer of registered offices, despite the fact that the Insolvency Regulation itself intends to limit forum shopping. Companies can manage to change the applicable law for their insolvency by transferring their registered offices and – after three months – filing for insolvency in that Member State.

If the insolvent company transfers its headquarters together with its registered office and third parties can clearly ascertain that the company is managed from the new Member State, no evidence can be given to overcome the presumption that a company's COMI coincides with its registered office. The *Interedil* decision applied the principles of *Eurofood* by specifying what proof is required to rebut the presumption of concurrence between the COMI and the registered office.[83] The ECJ held that "where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation."[84] Additionally, it was stated that if a company's headquarters coincides with its registered office in a way ascertainable by third parties, the presumption cannot be rebutted.[85] Therefore, the ascertainability mechanism is able to prevent forum shopping, but in fact at the creditors' expense.[86]

It would be possible to reduce uncertainty by replacing the COMI test for main insolvency proceedings within the EU with an incorporation or registration seat test, or by allowing the presumption that COMI equals the place of registered rebuttable

[81] The ascertainability requirement was initially mentioned by the ECJ in its *Eurofood* case, where it stated, *inter alia*, that "in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect" (ECJ, C-341/04, *Eurofood IFSC Ltd.* [2006], ECR I-1078).

[82] D. Daniel, *Outbound Establishment Revisited in Cartesio*, 6 EC Tax Review 250 (2008), p. 251; M.-P. Weller, *Die Rechtsquellen des Gesellschaftskollisionsrechts*, 3 IPRax 202 (2009).

[83] ECJ, *Interedil*, para. 53.

[84] ECJ, *Eurofood*, sentence pt. 1.

[85] ECJ, *Interedil*, para. 59.

[86] Whereas there are better instruments that the ascertainbility criterion: for instance, the cross-border merger directive requires Member States to protect creditors of the merging companies which have to provide a security or to pay in advance credits that have not yet fallen due; creditors are often required to file a petition or to oppose judicially against the merger.

only in wholly exceptional circumstances. While companies are free to choose their business location within the EU, Member States are still entitled to implement various procedures and laws that would combat fraud and wholly artificial arrangements. Such an approach would be advisable as far as the EU and all its safeguards and mutual recognition principle are concerned. In contrast, the current shape of the conflict of laws rules in insolvency law, i.e. the COMI principle with the rebuttable presumption with respect to the registered office, might be maintained as far as companies originating from third countries beyond the European Union would be concerned.

The US already applies, with respect to its recognition of main insolvency proceedings, an asymmetric logic between a national and a foreign company. As explained, the criterion of centre of main interest will be of primary importance if the main insolvency proceedings are commenced by a national company in a foreign jurisdiction, whereas more trust is granted and a lower threshold required for opening main insolvency proceedings in the US for a foreign debtor.

There is no similar policy within the EU, but it seems to suit perfectly the above postulated approach, according to which the centre of main interest could apply only to the recognition of the foreign main insolvency proceedings, whereas more trust would be provided for similar proceedings originating within the EU.

CONCLUSIONS

The European Commission has identified insolvency and restructuring proceedings for debtor companies as an important factor and one of its top priorities for creating a strong capital market. As the Brussels conference on convergence of insolvency frameworks within the European Union proved, there is a room for an increasing harmonization of insolvency law.

The Recast Regulation implements a theory of universalism within the EU and automatically recognizes main insolvency proceedings opened in any Member State where the debtor has its COMI, with such proceedings encompassing all the debtor's assets situated anywhere in the EU. It is, however, legitimately being questioned whether this actually strengthens, or rather weakens, the COMI/registered office rebuttable presumption and in fact encourages insolvency forum shopping. A debtor might seek to change its COMI because a transaction that might come under the scrutiny of a liquidator benefits a person connected with the debtor, such as the relative of a director of a corporate debtor. But directors of a debtor company may also find it beneficial to change in advance the company's COMI in order to benefit from more lenient insolvency rules.

The issue of transfer of the company seat, as well as forum shopping, has been widely discussed by the ECJ in its case-law on international company law. Due to the lack of a uniform European choice-of-law rule for companies, this case-law sheds light on the impact of the EU law on the right of establishment on the cross-border activities of companies in the internal market. In the same vein, the US Supreme Court has issued

several significant decisions based on which the limits of acceptable forum shopping are at least a little bit more clearly marked.

Based on the aforementioned, European harmonization measures facilitating cross-border mobility should necessarily offer predictability and efficiency, but as well as the security of such operations. It is essential that the parties should be able to calculate the risk of an investment, including the foreseeability of the applicable law that will handle any future disputes.[87] "A free demand for corporate law requires freedom of incorporation as well as freedom of reincorporation,"[88] but it should be balanced with fundamental insolvency law policies.

Recital 22 of the preamble to the Recast Regulation acknowledges that "as a result of widely differing substantive laws it was not practical to introduce insolvency proceedings with universal scope throughout the entire EU. The application without exception of the law of the State of the opening of proceedings would (…) frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different."

There are different opinions as to the extent to which a company during the insolvency process should be entitled to abrogate existing contractual commitments. Furthermore, there is no agreement as to the priority afforded secured credit, or whether secured creditors are subject to a restructuring or bankruptcy moratorium, or if they can be forced to agree on a restructuring plan against their will. In the same vein, some countries place a strong emphasis on liquidation, whereas others emphasise company restructuring.

Taking into account the flexible insolvency market in the US, as well as high business mobility within the US, the European Commission noted in its Communication on a new European approach to business failure and insolvency that: "As Europe is facing a severe economic and social crisis, the European Union is taking action to promote economic recovery, boost investment and safeguard employment. It is a high political priority to take measures to create sustainable growth and prosperity." The Commission highlights the importance of insolvency rules in supporting economic activity.

However, since the solution applied by the Recast Regulation to determine a court's international competence and the applicable law remains open to challenge, it reduces legal certainty and encourages an increase in litigation with respect to proper jurisdiction. Both national courts as well as businesses would appreciate more precise guidance to determine the applicable law for insolvency. Therefore, the traditional national approach underlying the current system of insolvency law might possibly make room for a unilateral approach which would grant a central place to intra-Union mobility and recognition of rights granted by other Member States, whereas COMI would still remain the applicable threshold for companies originating from third States.

[87] H. Eidenmüller, *Der Markt für internationale Konzerninsolvenzen: Zuständigkeitskonflikte unter der EuInsVO*, 57 Neue juristische Wochenschrift 3456 (2004).

[88] F.M. Mucciarelli, *Freedom of Reincorporation and the Scope of Corporate Law in the US and the EU*, New York University Law and Economics Working Papers 2011, p. 4.

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SYSTEMATICITY OF GENERAL PRINCIPLES OF (INTERNATIONAL) LAW – AN OUTLINE

Abstract:
International law reflects systemic conditions compatible with its essence, which means that a space must exist inside the borders of that order for the presence of the phenomenon of general principles. The assumption that international law is a legal system ipso facto *means that general principles must exist within its borders. A general principle of law is a necessary element of every legal order. It is a form and a tool in which the efforts of the individual seeking to comprehend a given phenomenon are materialized through imposing order on it rather than by breaking it down into unconnected and independent elements. Since law is an expression of order, law therefore applies general principles. The systematicity of law, and therefore of international law as well, creates the primary source of the binding force of any norm. Considerations of natural law or positive law justifications for the presence of general principles in international law are of little consequence, as the source of general principles is the systemic nature of the law. Order and hierarchy are part of the rationalized system in which norms of law present themselves. This dependency applies also to norms of international law. The role of the judge is to fill in the appropriate normative content (general principles) in fields constituting at one and the same time both a necessary element and a consequence of the systemic character of the international legal order. Within this context the principle of good faith constitutes one of the bases for considerations concerning the extent of the international legal order. The extent of international law reaches as far as the extent to which evidence of good faith are present among the subjects of international law. The impossibility of describing relations between two states by the use of the determinants of good faith, translated in turn into a normative general principle, determinates the limits of international law.*

Keywords: general principle of international law, general principle of law, limits of international law, systematicity of international legal order

The justification for consideration of the topic of general principles of law in the context of international law should arise out of the perceivable dependencies that weave

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the notions together. The evocation of an understanding of law leads automatically to evocation of the notion of a system. No analysis of law is possible in the absence of a systemic context, whether on the theoretical or practical plane. This dependency is of a fundamental nature and is associated with the essence of the understanding of law *per se*.[1] Thus, if international law is a collection of legal norms, it can only materialize its potential through association with the notion of a system. In this sense, the system is at once both a particular source of international law and its objective, the materialization of which facilitates optimization of the formula of international law.[2] The invocation of the notion of a system in reference to law implies a condition in which a given thing is arranged and ordered. If international law is a legal system, it displays the characteristic of being arranged. It should, however, be specified that this arrangement occurs in accordance with the nature of a given order. Thus, considerations of the coherence, completeness, or unity of international law must take this point of reference into account. International law will continue to display systemic characteristics in accordance with its essence, despite the fact that its systemic nature can, when contrasted with the municipal legal order, give rise to doubts.[3] These can lead to the perception of an asystematicity of the international legal order when viewed from this perspective, which in turn presupposes its systemic imperfection. However, this is an inherent feature of the very specificities of international law, which in fact build the systematicity of that order in accordance with its nature (essence).

When discussing the imposition of order on a certain state of things, it becomes necessary to incorporate into our considerations the topic of the rules or directives which introduce such an order and constitute a guarantee of its existence. International law, as a certain type of legal order, reflects systemic conditions compatible with its essence, which means that a space must exist inside the borders of that order for the presence of the phenomenon of general principles. For if we adopt the assumption that international law is a legal system, this ipso facto means that general principles must exist within its borders – in that part where a common denominator exists for creation

[1] *See* J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd ed.), Clarendon Press, Oxford: 1980; A. Marmor, *The Pure Theory of Law*, Stanford Encyclopedia of Philosophy [2016] ("Be this as it may, even if Kelsen erred about the details of the unity of legal systems, his main insight remains true, and quite important. It is true that law is essentially systematic, and it is also true that the idea of legal validity and law's systematic nature are very closely linked. Norms are legally valid within a given system, they have to form part of a system of norms that is in force in a given place and time", available at: https://plato.stanford.edu/entries/lawphil-theory, accessed 30 June 2018); A.A. Cançado Trindade, *International Law for Humankind. Towards a New Jus Gentium* (2nd ed.), Martinus Nijhoff Publishers, Leiden, Boston: 2013, p. 55 ("It is indeed the principles of International Law which, permeating the *corpus juris* of the discipline, render it a truly normative system").

[2] *Cf.* O. Schachter, *Towards a Theory of International Obligation*, in: S.M. Schwebel (ed.), *The Effectiveness of International Decisions*, Oceana Publications, Leyden: 1971, pp. 9-10 (suggested grounds for obligations in international law).

[3] *E.g.* with respect to the scope of application of the notion of a constitution in the context of international law (J. Zajadło, *Konstytucjonalizacja prawa międzynarodowego* [Constitutionalization of international law], 3 Państwo i Prawo 6 (2011)).

of the normativity of law in general, including international law. Thus general principles of international law must exist as well within the scope of the particular nature of the international legal order. The scope of these general principles can partially intersect with other preconditions (e.g. conceptualization of the principle *pacta servanda sunt* as a characteristic condition for the comprehension of law as such, but also as a primary determinant of the essence of international law). A general principle of law is a necessary element of every legal order. It is a form and a tool in which the efforts of the individual seeking to comprehend a given phenomenon is materialized through imposing order on it rather than by breaking it down into unconnected and independent elements.[4] This is the prevailing rationalization, with its source in the nature of human beings and their means of communicating with their surroundings. It would seem that this rationalizing approach to the reality encompassing us can even translate into a rule of validation of law itself,[5] in a form that could be expressed as follows: Since law is an expression of order, law therefore applies. In this sense, the systematicity of law, and therefore of international law as well, would be the primary source of the binding force of any norm. If a norm belongs to a system, is its necessary element, and is systemically appropriate and adapted, then it is in force. James Brierly expressed the issue of rationalization and its impact on the binding force of law by stating that "[t]he ultimate explanation of the binding force of all law is that individuals, whether as single human beings, or associated with others in a state, are constrained, in so far as they are reasonable beings, to believe that order and not chaos is the governing principle of the world in which they have to live."[6]

It would thus result from the foregoing that understanding (*reasoning*) is the source of order. Order, in turn, is achieved via principles. General principles are therefore a necessary element of every legal order. And if they are a necessary element, they are binding, and they have normative value within the reasoning of a given legal order. If we define the role of general principles in this manner, the statement that they are the most important but least spectacular sources of international law is quite

[4] Apart from a situation in which the absence of a connection or dependency is a description of a particular state of order.

[5] A. Clapham, *Brierly's Law of Nations: The Introduction to the Role of International Law in International Relations* (7th ed.), Oxford University Press, Oxford: 2012, p. 68 ("Those who administer law must meet new situations not precisely covered by a formulated rule, by resorting to the principle which medieval writers would have called natural law, and which we generally call reason. Reason in this context does not mean the unassisted reasoning powers of any intelligent person, but rather a 'judicial' reason. This means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid, for example, the consideration of precedents, the finding of analogies, and resorting to the fundamental principles behind established legal rules.")

[6] *Ibidem*, p. 53. To this view an additional comment has been added by M. Koskenniemi: "[a] descending and ascending argument are made to coincide: order is binding because no social life can exist without it. This is presented as an objective truth, independent of human will or perception. But it is also binding because human beings believe it is. It is now subjective conviction which is primary" (M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with new Epilogue*, Cambridge University Press, Cambridge: 2005, p. 169).

accurate.[7] In light of the preceding determinations, it would seem that considerations of natural law or positive law justifications for the presence of general principles in international law are of little consequence, as their source is the systemic nature of the law. Order and hierarchy are the rationalized state in which norms of law present themselves. This dependency applies also to norms of international law.

Considering the character of the international legal order, one of the important objective tests of the binding force of norms, including those contained in general principles, is the occurrence of a dispute which is then resolved judicially.[8] The role of the judge is to fill in the appropriate normative content in those fields constituting at one and the same time both a necessary element and a consequence of the systemic character of the international legal order, including in the form of general principles. This process does not contradict the consensual nature of international law. Indeed, in no case does a general principle of law, when treated as a source of normativity, displace the consent of states as the primary and fundamental source of normativity in international law.[9] If, in a given factual situation, there are at least two normative utterances authored by states as subjects of international law, they will always attempt to achieve a particular order vis à vis one another, by the same token creating space for an affirmation – at a higher level of development of international law – of particular general principles. If this abstraction is performed by way of judicial reasoning, states can always append to the judgement a relevant commentary addressing the normative meaning of a given general principle, ultimately going so far as to deprive such a generalization of normative significance. The fate of a general principle of law is in every case dependent on precisely the same factor, *id est* whether the distinction of a general principle in harmony with the essence of the international legal order properly "orders" that system, or whether it does not. In the longer term, it is of no importance whether this is contributed to by a real judicial precedent in the substantive sense, or a corrective act of interested states (even in the form of a joint rejection of the verdict by the parties to judicial proceedings).[10] It would seem that an understanding rationalizing the entire international legal order should prevail in the long run.

Thus, the systematicity of international law creates, consistent with its essence, a space for existence of the phenomenon of general principles of (international) law.[11] A

[7] *See* R. Kwiecień in this volume.

[8] L. Ehrlich, *Prawo międzynarodowe* [International law] (4th ed.), Wydawnictwo Prawnicze, Warszawa: 1958, pp. 9-10 ("Thus, a norm of international law is a norm applied by tribunals appointed to apply international law, primarily international courts (e.g. International Court of Justice)").

[9] *See* Kwiecień, *supra* note 7.

[10] An extreme, borderline situation, imaginable considering the voluntary nature of international judicial venues. Its systemic acceptance, however, is dependent on the fulfilment of additional conditions, such as non-violation of the legal interests of a third-party state, not breaching the fundamental principles of the UN Charter, and respect for peremptory norms.

[11] *Cf.* M. Kohen, B. Schramm, *General Principles of Law*, Oxford Bibliographies, available at: https://bit.ly/2BwybtD (accessed 30 June 2018) ("They are logic inferences that can be found in any legal system: the principle of reparation for caused damage, the principles of interpretation of rules, or those used for

general principle of law as a necessary element of the international legal order cannot, insofar as its content is concerned, be an empty set, as it would then not perform any function. First and foremost, all the constituent elements of a given legal order should be functionally programmed and aim at achieving a specified objective.

It remains to be determined how general principles of law acquire their content. It seems that two potential paths can be traced. In the first version, a general principle of law constituting a fixed element in the description of international law, and thus a general principle of international law, is a generalization of all of the primary parts, or of a distinct group of norms (such as within the framework of a *self-contained regime*), i.e. a particular reduction of them to a common denominator.[12] Both a general principle of international law, as well as a general principle of a particular field or subsystem of international law would, in accordance with this meaning, be neutral in systemic terms, and would share the fate of all conditions of the international legal order. Viewed in this light, sets of consensually-agreed norms constitute the material from which general principles are derived. A change in particular primary norms automatically leads to changes in the understanding of general principles, which are in all cases adapted to the system in which they function, without creating contradictions in the course of their application. General principles of international law understood in this manner constitute a kind of genetic code of the sum of all the constituent elements from which they are derived. Applying this model, we can state that, for example, that equity is a general principle of international law, but pursuant to the understanding of it within the international legal order. A similar reservation should be formulated with respect to good faith or *pacta sunt servanda* as examples of other systemically relativized general principles.

In the second path, the space created for general principles is filled by borrowing from beyond the borders of international law. This is done in two ways. Sometimes directly

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the resolution of conflicts of rules – many of them known through Latin maxims – are good examples. […] However, they are also logic inferences that are related to particular areas of international law, giving room for the emergence of general principles specifically applicable in the realm of international law, for example the principle of humanity in international humanitarian law"). That is why both general principles of law and general principles of international law share from the perspective of international legal order the same systemic value, i.e. their normativity. And this applies despite the controversies concerning particular sources of general principles of law and general principles of international law. *Cf.* M.W. Janis, *International Law* (7th ed.), Wolters Kluwer, New York: 2016, p. 59 ("Although some liberally suggest that the availability of general principles of law as a source of international law permits international lawyers to apply natural law, while others restrictively contend that general principles of law may be international law only when draw from customary international practice, the most usual approach to general principles of law as a source of international law relies upon techniques of comparative law. The basic notion is that a general principle of law is some preposition of law so fundamental that it will be found in virtually every legal system"). In this sense each and every general principle of law and general principle of international law constitutes a logical systemic necessity.

[12] *Cf.* A. Ross, *A Textbook of International Law: General Part*, The Lawbook Exchange, Ltd., Clark: 2006, p. 92 ("A special form of interpretation is the deduction of 'principles of International Law' from the material immediately given in treaties and especially in customs. These principles must then be distinguished from the 'general principles of law' previously mentioned, which are derived from national legal material").

and expressly, using a legal provision that invokes an external source. A classic example is Article 38(1) of the ICJ Statute, and other similarly formulated provisions containing a referring clause. When it becomes necessary to resolve a particular dispute, a general principle of law (recognized by civilized nations) becomes one of the potential grounds for doing so. The comparativist effort of the judge, juxtaposing municipal legal orders so as to distinguish a common element among them (a general principle), becomes its substantive source. Taking into account the context of the judicial resolution of a given conflict, this type of analysis can be reduced to the level of the two legal orders of states-parties to proceedings before the ICJ. It should be held that the normativity of a general principle of law thus defined is a source of the rights and duties of the parties to the extent of their being formally bound by the judgment. However, there is no barrier to preventing a general principle thus derived from expanding the scope of its effectiveness via the verdict's influence on the international legal order based on the principle of case precedents, i.e. filling in a foreseen space in that order with an adequate and systemically acceptable general principle. Sticking to the example of the principle of equity, it should however be observed that when juxtaposed with an extra-normative model of equity, the general principle that constitutes its embodiment in international law can turn out to be far more modest than equity *per se*. This is the source of the second suggested path, proposing that the space within the system be filled in by general principles of law treated as forms of reception of values within the borders of international law, in an autonomous form and non-relativized by the conditions of the legal order within the borders of which those values are supposed to be ultimately situated.[13] As an example we may consider an attempt to implement a reasoning leading to such an effect, i.e. the desire to turn a breach of a peremptory norm (*ius cogens*) into automatic grounds for the jurisdiction of an international court that would be appointed to settle a dispute involving a purported breach of that norm.[14] A similar assessment can be offered of the drive to demonstrate that a breach of a peremptory norm terminates the jurisdictional

[13] *Cf.* Trindade, *supra* note 1, p. 291 ("The new jus gentium of our days, the International Law for humankind, already counts on some conceptual achievements. The fact that the concepts both of the jus cogens and of the obligations (and rights) *erga omnes* integrate the conceptual universe of International Law discloses the reassuring and necessary opening of this latter, in the last decades, to certain superior and fundamental values").

[14] ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, ICJ Rep. 2006, p. 32, para. 64. ("The Court observes, however, as it has already had occasion to emphasize, that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' (East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (jus cogens) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.")

immunity of a third-party state in proceedings before a municipal court.[15] The external source of the content of a general principle of law with effect in international law means that the ideological image thereof becomes clearer and more unequivocal within the perception of what is equitable and just. From this perspective, the internal systemic decoding of general principles can be a less spectacular operation, even evoking discomfort in conjunction with the perception of international law norms as imperfect or defective because the concentration of values contained therein is unsatisfactory. It would, however, seem that the path of internal systemic quests remains tightly coupled with the essence of international law. It does not atomize the legal order, it gives birth fewer paradoxes, and ensures greater cohesion (again, within the meaning proper to international law). Going beyond the borders of the international legal order in search of the content of general principles naturally evokes an adaptive reflex, signifying the necessity of adapting a general principle to internal systemic rules. Of course this dependency is also applicable in relation to Article 38(1)(c) of the ICJ Statute. In order to perform their primary task of settling disputes based on the law, in their reasoning judges should only take into account a result associated with the search for a general principle of law which in its essence is in harmony with the nature of the international legal order. Allowing – in the course of passing judgement – for the notion of a general principle that cannot be harmonized with the systemic conditions of international law is ultimately ineffective and counterproductive. It is a harbinger of manifold problems concerning the cohesion of the system. On the other hand, internal systemic decoding of general principles by definition implies their adequacy vis-à-vis the conditions prevalent within the confines of the international legal order. Each of the presented paths for developing general principles from the environment external to international law makes the effectiveness of a given general principle dependent on its systemic adaptation. If we are speaking of a general principle (recognized by civilized nations), the adaptation is expressed in the act of invoking the general principle by a judge after conducting a comparative analysis, including fitting the principle into its appropriate field within the confines of international law. The case is similar at the moment with respect to the reception of autonomous values using the form of a general principle, although the risk of systemic disruption here is greater. Internal systemic decoding of general principles generates fewer problems but, as has already been emphasized, the ideological undertones of a general principle derived in this manner may be more modest, as "justice", as understood by international law, need not necessarily equate to "justice" *per se*.[16]

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[15] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Rep. 2012, p. 142, para. 97 ("Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of jus cogens rules, the applicability of the customary international law on State immunity was not affected").

[16] For more on the potential modes and contexts of understanding justice, *see* H. Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science*, University of California Press, Berkeley, Los Angeles, London: 1957.

The preceding considerations also allow us to address terminological issues. General principles of law (recognized by civilized nations) are principles of law derived from municipal legal orders recognized as appropriate grounds for ruling in proceedings before an international court under the relevant provisions of law (e.g. Article 38 of the ICJ Statute), or in extreme cases, principles reflecting the sphere of values in force within those internal orders, or values in general *per se*, and incorporated into general international legal circulation via a true judicial precedent. This scope would include principles of both a procedural and a substantive nature.[17] In turn, *Brownlie's Principles* characterizes general principles of international law as a notion that can alternatively encompass the rules of customary international law, general principles of law referenced in Article 38 of the ICJ Statute and "certain logical propositions underlying judicial reasoning on the basis of existing international law."[18] This category of general principles of international law includes the following principles: consent, reciprocity, equality of states, finality of judgements, validity of treaties, good faith, national jurisdiction, and freedom of the high seas. In conjunction with the abstract and primary character of these principles, the argument has been raised that they do not require further support in the practice of states for their binding force to be retained.[19] Their character means they are effective irrespective of that practice.

In analysing the objective scopes of general principles of law and general principles of international law, we may indicate both groupings (consent, good faith) and individualities (freedom of the high seas). In turn, in assessing the role or function of general principles within international law, it would seem that the elements linking general principles and general principles of law are systematic necessity and normativity. The relevant fields of order of international law must be filled with an appropriate content in order to speak of a legal system. This is a task achieved by both general principles of law and general principles of international law. Determination of the scope of coverage of these fields takes place in accordance with the discussed modes during the judicial settlement of legal disputes.

Because general principles constitute both a systemic necessity and an integral part of the order of international law, each of them displays a normativity appropriate to that order. General principles express legal norms. This is true of all general principles, whether they have already been elaborated or are awaiting elaboration. This rule is not hampered by the meta character assigned to a portion of those general principles.[20]

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[17] J. Crawford, *Brownlie's Principles of Public International Law* (8th ed.), Oxford University Press, Oxford: 2012, p. 35 ("Tribunals have not adopted a mechanical system of borrowing from domestic law. Rather they have employed or adapted modes of general legal reasoning as well as comparative law analogies in order to make a coherent body of rules for application by international judicial process. It is difficult for state practice to generate the evolution of the rules of procedure and evidence as well as the substantive law that a court must employ").

[18] *Ibidem*, p. 37.

[19] *Ibidem*. However, the question remains of how to assess effectiveness, validity, or the binding force derived in the case of a general principle of international law in clear contradiction to a later general practice that departs from the established model.

[20] Upper directives regulating the process of evaluation and application of legal norms. *Cf.* R. Guastini, *Lex superior*, 21 Revus [Online] (2013), available at: http://journals.openedition.org/revus/2664 (accessed

In particular, attention should be paid to the normative character of the principle of good faith. It is present as both a general principle of law and a general principle of international law. It conditions the existence and the entire effectiveness of the legal order, penetrating all of its constituent elements.[21] Since each general principle should be treated in terms of a legal norm, it can clearly serve as grounds for judgement in the settlement of a legal dispute between subjects of international law. In this sense, the principle of good faith constitutes a norm that can underpin the rights and obligations of subjects of international law. The question remains, however, as to the real effectiveness of the principle of good faith and of other general principles of (international) law in the role of norms constituting direct grounds for a ruling. International courts do not frequently issue such verdicts. Such reticence may be incorrectly interpreted as a means of depriving general principles of their normative value. The absence of spectacular decisions invoking the principle of good faith or other general principles is a simple consequence of their character. Good faith is an element of the genetic code forming the nature of international law. It is therefore an element of every norm that constitutes international law. In the case of a specific legal dispute, all norms of a *posteriori* and *specialis* character are given priority in application, without the necessity of invoking the principle of good faith as a separate basis for the ruling, as the good faith vital for arriving at a decision (recall that the dispute is between subjects of international law) is already invoked via more detailed norms which eliminate the need of invoking the principle of good faith. Theoretically, however, we may imagine a situation in which, absent such norms and assuming the mutual insistence of the subjects engaged in an international legal dispute, owing to its normative value the principle of good faith becomes the direct grounds for passing judgement in a dispute, thereby satisfying the conditions for being a borderline case to address the essence of the legal order itself. The dependence invoked provides a good picture of the effectiveness of estoppel in international law, applied in the category of general principles of international law and constituting an elaboration of the principle of good faith. One may ask why cases of a clear invocation of estoppel and treating it as the direct grounds for ruling on a case are so rare? Because the judge identifies the direct justification for a proper ruling in a group of detailed norms, which are backed by the consent of the interested subjects. It is only the necessity of determining the repercussions of the relation, which cannot be linked with the expression of consent and which are backed by good faith, that lead to the direct application of estoppel in the character of a general principle (*a consent-like formula*).[22] If the dispute is associated with a norm

30 June 2018): "*Prima facie,* une métanorme est une norme qui porte, au niveau de méta-langage, sur une autre norme. […] Les normes réglant la production du droit ne portent pas sur d'autres normes: elles portent sur des actes normatifs."

[21] Ehrlich, *supra* note 8, p. 8 ("The principle under which a state is bound in its relations with other states only by virtue of its will, but that it is bound by that will in full, can be called the principle of good faith. It is the fundamental principle of international law").

[22] N.S. Marques Antunes, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement*, 8(2) Boundary & Territory Briefings 1 (2000), p. 25 ("it may only look like consent"); J. Pan,

justified by consensus, the conclusion is associated with the interpretation and application of the norm in question. In turn, in a situation not encompassed by the consent of the subjects, and in the case of harm to the subject acting in good faith, the presumption of the international law character of mutual relations and the necessity of determining responsibility in conjunction with a breach of good faith all lead to the invocation of estoppel as a general principle of international law – and as a result of the absence of other norms confirmed by the consent of the parties to a dispute, in the event of a dispute it becomes independent grounds for a legal assessment of the entire situation.

The principle of good faith, in conjunction with its functionality characterized above as a meta-general-principle, not only facilitates such decisions in particular cases, but can also constitute a basis for considerations concerning the extent of the international legal order. To put it succinctly, the extent of international law reaches as far as evidence of good faith are present among the subjects of international law. Considering the normative character of the principle of good faith, violating it in mutual relations leads to responsibility under international law, including the rules which can be derived from the principle of good faith and elaborations thereof (e.g. estoppel). Thus, in the event evidence of good faith between subjects is present, an international tribunal may not ascertain a *non liquet* situation by invoking the absence of a clear legal norm and component of the system, as it is under an obligation to resolve the dispute on the grounds of good faith considered as a general principle of international law.[23]

The absence of a systemic justification for a given constituent element means that we are reaching the borders of a given legal order. Thus, the impossibility of describing the relations between two states by the use of the determinants of good faith, translated in turn into a normative general principle, entails the determination of limits of international law. This observation is significant in both theoretical and practical terms. The situation is similar with respect to the issue of the systematicity of general principles of (international) law. On one hand, their consideration on this plane says much about the essence of the international legal order; while on the other it delivers a useful tool for resolving concrete international disputes in a manner strengthening that system, such as by eliminating paradoxes or reinforcing the perception of legal certainty.

Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes, Martinus Nijhoff Publishers, Leiden, Boston: 2009, p. 29 ("Acquiescence and recognition are the expressions of consent while estoppel is not in itself a manifestation of consent").

[23] Ruling on grounds of the principle of good faith is not related here to the notion of gaps in the law, but rather remaining within the borders of the law. The exclusion of *non liquet* does not, however, mean that we also exclude the notion of a border to the scope of considerations of the essence of a given legal system. Reaching the limit of a given legal order should not automatically be equated with the notion of a gap in the law. *Cf.* H. Lauterpacht, *The Function of Law in the International Community*, Oxford University Press, Oxford: 2011, p. 72 ("It is impossible, as a matter of a priori assumption, to conceive that it is the will of the law that its rule should break down as a result of the refusal to pronounce upon claims. There may be gaps in a statute or in a statutory law as a whole; there may be gaps in the various manifestations of customary law. There are no gaps in the legal system taken as a whole").

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GENERAL PRINCIPLES OF LAW: THE GENTLE GUARDIANS OF SYSTEMIC INTEGRATION OF INTERNATIONAL LAW

Abstract:
There are different meanings and functions of what is called a "general principle of law." This article seeks to address their importance as the basis for the systemic integration of the international legal order. When international law is considered as a legal system, its normative unity and completeness seems essential. This article argues that general principles of law are a necessary, although less visible, element of international legal practice and reasoning, which secure the systemic integration and long-lasting underpinnings of international law. In this sense they may be seen as the gentle guardians of international law as a legal system.

Keywords: coherence of the legal order, completeness of the legal order, general principles of law, international legal reasoning, sources of international law, systemic integration of international law

I. General principles of law (GPsL) are believed to be the most enigmatic sources of international law. That opinion is enhanced by the striking lack of a visible presence of GPsL in international practice, and consequently an absence of rights directly stemming from them.

GPsL are creatures similar to Dworkin's *standards*, i.e. *principles* and *policies*, although the drafters of the Statute of the Permanent Court of International Justice (PCIJ) did not themselves consider them in this way. The principles concern rights, while the policies describe common aims. Both sets of standards – Dworkin argues – point to particular decisions about legal obligations in particular circumstances, but they differ in the character of the direction they give. Principles particularly differ from rules, as rules apply in "an all-or nothing fashion", whereas principles have "the dimensions of weight and importance" and must be taken into account by decision makers as suggesting a given direction without necessitating a particular decision.[1] Principles as such differ

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[1] R. Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge MA: 1978, pp. 24, 28.

from the legal rules that may be equally valid in given circumstances. It is interesting that the distinction between principles and rules had been known in international law scholarship prior to Dworkin's *Taking Rights Seriously*. As early as in the 1950s, Gerald Fitzmaurice stated that "a rule answers the question '*what*', a principle in effect answers the question '*why*'."[2] Indeed, principles address primary problems in legal reality and shape the ways in which rules act. Regrettably, this has not been sufficiently taken into account by international courts and tribunals.

Legal reality is not passively experienced and researched by lawyers, including academia. They co-create this reality by their vocabulary, because language fulfils a creative function. Philip Allott claims it to be inherent in the nature of legal systems that writing and talking about the law may itself constitute law.[3] Which is why the vocabulary matters. Indeed, "[…] the limits of the language (*the* language which I understand) mean the limits of my world."[4] Perception, cognition, and understanding of reality is conditioned by the ideas and concepts in our language. Thus, the creative function of vocabulary seems to be beyond questioning. As far as international law is concerned, the recent broad debate about the constitutionalisation of international law has clearly proved this.[5] During this debate the following issue has been prominently discussed: Is constitutionalisation a desirable and effective agenda for international law to be improved? I share the opinion that is supported by, among others, Bruno Simma[6]: If international law scholars want international law to be improved, they should underline its universalism and its systemic character based on such features as coherence, completeness and normative unity. The very nature of those features can cope with what is often considered to be a major threat to international law; namely the fragmentation of legal regulations and proliferation of judicial bodies. The first sentence that opens the *Conclusions of the Study Group of ILC on Fragmentation of International Law* is worth repeating in this context: "International law is a legal system." The next goes on to state that "[i]ts rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them."[7]

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[2] G.G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Recueil des cours 1 (1957-II), p. 7.

[3] P. Allott, *Language, Method and the Nature of International Law*, 45 British Yearbook of International Law 79 (1971), p. 118.

[4] L. Wittgenstein, *Tractatus Logico-Philosophicus*, Kegan Paul: 1922, p. 87, para. 5.62.

[5] *See* R. Kwiecień, *International Constitutionalism, Language in Legal Discourse, and the Functions of International Law Scholarship*, in: A. Jakubowski, K. Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry*, Routledge, Abingdon/Oxon, New York: 2016, pp. 53 ff.

[6] B. Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 European Journal of International Law 268 (2009), p. 297.

[7] International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, UN Doc. A/Res/61/34, para. 1(1).

These excerpts from the International Law Commission's statement literally and substantively differentiate rules from principles, as did, e.g., Dworkin and Fitzmaurice. This article argues that it is GPsL that protect the systemic features of international law, and, consequently, its transparency and efficiency. Thus, GPsL are the guardians of the systematic character of international law. As such they provide international law with predictability.

II. The value judgments of scholars normally carry political implications even though, unlike States and intergovernmental organisations, scholars are not direct law-makers. Thus, scholars may be seen as political actors, especially when their language is characterised by the phenomenon of reification, that is to say, turning conceptual entities into real things. This is visible when scholars' aspirations are strongly motivated by political and moral aims.[8] When the international legal language borrows from the moral and political discourse, the legal terminology absorbs some moral and political normativity. This is why the normative significance of the conceptual terms used in legal discourse turns not on the normativity of law as such, but rather on the normativity associated with the moral or political concepts drawn upon. It follows that the use of concepts as intermediate links in legal inferences may work to provoke reactions that international law itself and its main makers – States – cannot provoke. This is what is called "the normative functionality of conceptual terms in international law."[9]

As stated above, there has been a striking lack of visible presence of GPsL in international judicial practice. On one hand, the general principles of private law have been treated by the PCIJ as well as the International Court of Justice (ICJ) as sources of national, not international, law; and on the other hand the general principles of international law have been rooted by the World Court in international customs and treaties.[10] The World Court and other courts and tribunals have not used, as yet, the potential of GPsL as meaningful instruments for judicial creativity and innovation, because they have, so far, used them "sparingly."[11] The Hague Court in particular has not yet based any of its judgments on GPsL themselves, because it has denied their status as autonomous sources of legal obligations. The position of the good faith principle in its case-law is quite symptomatic of this point. In *Border and Transborder Armed*

[8] J. Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 Harvard International Law Journal 327 (1985), pp. 349-351.

[9] U. Linderfalk, *The Functionality of Conceptual Terms in International Law and International Legal Discourse*, 6 European Journal of Legal Studies 27 (2013/2014), p. 37.

[10] This approach has not been entirely shared by the International Law Commission. In Chapter VIII of its *Report on the work of the sixty-ninth session (2017)* (A/72/10), the ILC states: "General principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law" (draft conclusion 5(3)). Nonetheless, the leading importance of customary international law is also underlined by the ILC, as follows: "Customary international law is the most common basis for the formation of *jus cogens* norms of international law" (draft conclusion 5(2)).

[11] V. Lowe, *International Law*, Oxford University Press, Oxford: 2007, p. 88.

Actions it stated, following its *Nuclear Test* judgments: "The principle of good faith is, as the Court has observed, 'one of the basic principles governing the creation and performance of legal obligations' […]; it is not in itself a source of obligation where none would otherwise exist."[12]

One can ask what the above means. Could anything that "is not in itself a source of obligation" be a source of law? Secondly, is the function of GPsL governing the creation and performance of legal obligations only a subsidiary one or, in any case, less important than being a direct source of legal obligations? And a third question arises, namely whether the systemic integration function performed by GPsL is more important than the primary rules' function? The answers to these questions are provided below. At this point it is just worth noting that Herbert Hart's *secondary rules* (rules of change, of adjudication, and of recognition) cannot exist without *primary rules*.[13] At the same time, without secondary rules there is just chaos, not a legal system. It is GPsL that protect the systemic underpinnings of international law. They govern the creation and performance of the legal obligations flowing from primary rules, because they fulfil the systemic integration function. The latter is crucial for the legal reasoning that shapes legal practice.

III. Since the *travaux préparatoires* of Article 38 of the PCIJ Statute, there has been a dispute over the justification of the substantive nature of GPsL. The positivist position, defended then by Elihu Root in the Advisory Committee of Jurists, suggested that judges could only decide in accordance with the "recognised rules" and that, in their absence, they should pronounce a *non-liquet*. Besides, for Root the principles of justice mentioned in the drafted Article 38 as "recognised by civilized nations" varied from country to country.[14] Edward Descamps, the President of the Committee, opposed Root's position and replied that this might be "partly true as to certain rules of secondary importance", but "it is no longer true when it concerns the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilised nations."[15] Descamps and most jurists in the Committee also opposed the possibility of *non-liquet*, asserting that if neither conventional nor customary law existed, the judge ought then to apply general principles. Descamps strongly emphasised that "objective justice is the natural principle to be applied by the judge."[16] Eventually, a clearly compromise

[12] ICJ, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgement, 20 December 1988, ICJ Rep. 1988, p. 69, p. 105, para. 94. *See also* ICJ, *Nuclear Test (Australia v. France)*, Jurisdiction and Admissibility, Judgement, 20 December 1974, ICJ Rep. 1974, p. 253 p. 268, para. 46; *Nuclear Test (New Zealand v. France)*, ICJ Rep. 1974, p. 457, p. 473, para. 49.

[13] *See* H. Hart, *The Concept of Law* (3rd ed.), Clarendon Press, Oxford: 2012, pp. 91-97.

[14] PCIJ/Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes*, The Hague 1920, Ann. no. 3, point no. 3, p. 310.

[15] *Ibidem*, pp. 310-311.

[16] *Ibidem*, p. 323. For commentary, *see* B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons, London: 1953, pp. 6-22; A. Pellet, *Article 38*, in: A. Zimmermann

solution was reached by the Advisory Committee of Jurists between the supporters of Descamps's position and Root's positivist outlook. This compromise was expressed in Article 38(3) of the PCIJ Statute and is now visible in Article 38(1)(c) of the ICJ Statute.

Nonetheless, a dispute continues concerning the normative autonomy of GPsL. Legal positivists are mostly inclined to treat GPsL as incomplete international customs.[17] On the other hand, both in scholarship and in the judiciary there is a starkly different approach to GPsL. Judge Cançado Trindade's views are representative of the autonomous position of GPsL. His reasoning, given in a separate opinion in the *Pulp Mill* case, is worth quoting here:

> The *mens legis* of the expression 'general principles of law', as it appears in Article 38(1)(c) of the ICJ Statute, clearly indicates that those principles constitute a (formal) 'source' of international law, on their own, not necessarily to be subsumed under custom or treaties (…) [A] general principle of law is quite distinct from a rule of customary international law or a norm of conventional international law. A principle is not the same as a norm or a rule; these latter are inspired in the former and abide by them. A principle is not the same as a custom or conventional law.[18]

When the status of GPsL is taken into account, Judge Trindade's point of view is worth deliberating. I share his opinion that rules of customary and conventional international law are inspired by GPsL and abide by them. It follows that GPsL make up the constitutional background for the international legal order. However this raises the following question: Is there a difference between GPsL and what is known as general principles of international law? According to the ICJ, these latter are founded in customs and treaties,[19] but despite that they remain "principles", not rules. And yet another question: What is the ascertainment of the sources of GPsL within the international legal order? Is it based on substantive-law ascertainment criteria connected with the natural-law approach? Or perhaps, a State consent, which constitutes a formal source of law, remains inevitable in this respect? Hersch Lauterpacht's legacy reflects the complexity of the issue. On the one hand, Lauterpacht did not entirely reject the positivistic justification of law, including the significance of State consent in international law,

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et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, Oxford: 2006, pp. 684 ff.; O. Spiermann, *International Legal Argument in the Permanent Court of International Justice. The Rise of the International Judiciary*, Cambridge University Press, Cambridge: 2005, pp. 57-62; R. Yotova, *Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations": The Approach of the International Court*, The University of Cambridge, Faculty of Law Legal Studies Research Paper Series, Paper No. 38/2017, pp. 16-21.

[17] *E.g.* G. Gaja (*General Principles of Law*, in: *Max Planck Encyclopaedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law – Oxford University Press, 2016 (on-line edition), para. 16) regards them as *inchoate customs* that do not require support in a State's practice.

[18] ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Separate Opinion of Judge Cançado Trindade, 20 April 2010, ICJ Rep. 2010, p. 135, 142, para. 17.

[19] *See supra* note 12.

but on the other hand he strongly argued that sources of international law, particularly GPsL themselves, follow the precepts of natural law.[20]

Within the problem of ascertainment of the sources of legal rules, GPsL seem to be the most ambiguous source. As already mentioned, Baron Descampes originally designated them as a measure against *non-liquet* that includes resort to natural law principles, before being subsequently re-constructed as an emanation of national traditions. Those traditions cannot be – according to him – ascertained in international law entirely on formal positivistic grounds, especially on State consent; a position which was later more broadly developed by Hersch Lauterpacht.[21] In this sense, the ascertainment of GPsL is "devoided of any formal character", as claimed by a contemporary commentator.[22]

Indeed, the validity and legitimacy of GPsL are not grounded in State consent. In this sense, they need no formal ascertainment. It is rather the reverse that appears to be true; namely, the legal validity and the ascertainment of State consent and its normative effects come from some GPsL. This is why the latter are an essential factor in legal reasoning. GPsL, as similar to Hart's *secondary rules*, perform the ordering function among norms and confirm their validity. Thus, they support the coherence and completeness of international law independently of State consent.[23] As Gerald Fitzmaurice noted, it is not State consent but GPsL that are essential when a legal order is to perform its basic functions.[24]

The validation and legitimisation of legal rules are accomplished during their interpretation and application, where logical reasoning and its quality is crucial. In particular legal language and its vocabulary, as underlined above, may have a causative influence on legal practice. So, the presence of GPsL in legal vocabulary and their meanings shape the legal reality, since the world of law – actually the human world – is governed by logical and mental regularities. In consequence, it is not GPsL that need State consent to be introduced and legitimate in international law, but rather the latter that needs GPsL to obtain normative validity and practical efficiency. Obviously this is the point of Kant's critical philosophy's origin, as well as of Kelsen's *Grundnorm*'s.

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[20] *See* especially H. Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration*), Longmans, London: 1927; *idem*, *The Function of Law in the International Community*, Clarendon Press, Oxford: 1933.

[21] *See* Lauterpacht (*The Function*), *supra* note 20, pp. 60-84, where Lauterpacht stresses the crucial importance of the completeness of the legal system as a general principle of law.

[22] J. d'Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules*, Oxford University Press, Oxford: 2011, p. 171.

[23] *See* J.I. Charney, *Universal International Law*, 87 American Journal of International Law 529 (1993), pp. 535-536. *See also* the World Court's judgments which support the independence of GPsL from State consent: PCIJ, *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ Series 1926 A, No. 7, p. 42; PCIJ, *Factory at Chorzów* (Jurisdiction), PCIJ Series 1927 A, No. 9, p. 21; PCIJ, *Factory at Chorzów (Claim for Indemnity)* (Merits), PCIJ Series 1928A, No. 17, p. 29; ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep. 1951, pp. 15, 23.

[24] Fitzmaurice, *supra* note 2, pp. 39-40.

IV. The heterogeneous substantive and formal character of GPsL must be taken into account to indicate their functions in international law. They are marked by diverse features, which is responsible for their various normative and logical functions. Some of them may undoubtedly perform the role of Dworkin's *rules*. That role can be attributed to the principles covered by Article 38(1)(c) of the ICJ Statute, or the "general principles of law recognised by civilised nations." They can be directly applied by the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it." As is known, a long-standing controversy concerns their nature. Are they *private law analogies* or emanations of natural law? The former meaning is nowadays supported by Article 21(1)(c) of the Statute of the International Criminal Court (ICC). It entitles the ICC to apply

> general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

Needless to say, under Article 21(1)(c) of the ICC Statute GPsL, firstly, do not follow from customs and treaties, and secondly their role comes down to filling in gaps. But the issue still remains open whether GPsL are just simplistic borrowings from national legal orders. In other words, are they a generalisation based on a comparison of norms from "civilised national legal orders"? If so, one should share the opinion that the principle of good faith makes up a crucial criterion for belonging to "civilised legal orders."[25] For this reason the principle of good faith should be seen as a fundamental constitutional principle of the law. At the same time, the application of national legal principles in the international legal order is effective when it is appropriate for international relations or when it works within the systemic specificity of international law.[26]

V. But it is not this kind of GPsL that is the most meaningful for the systemic integration function of international law. That key function in international legal reasoning is performed by the principles which built the "constructivist thinking" in legal argumentation.[27] They are "intrinsic to the idea of law"[28] or "principles of legal

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[25] *See* M. Kałduński, *Zasada dobrej wiary w prawie międzynarodowym* [The principle of good faith in international law], C.H. Beck, Warszawa: 2017, pp. 68-88; R. Kolb, *Principles as Sources of International Law (with Special Reference to Good Faith)*, 53 Netherlands International Law Review 1 (2006), p. 9; A. Kozłowski, *Estoppel jako ogólna zasada prawa międzynarodowego* [Estoppel as a general principle of international law], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław: 2009, p. 40; U. Linderfalk, *What Are the Functions of the General Principles? Good Faith and International Legal Pragmatics*, available at: https://ssrn.com/abstract=2955648 (accessed 30 June 2018).

[26] O. Schachter, *International Law in Theory and Practise: General Course in Public International Law*, Martinus Nijhoff, Dordrecht/Boston/London: 1991, p. 50.

[27] M. Koskenniemi, *General Principles: Reflections on Constructivist Thinking in International Law*, in: M. Koskenniemi (ed.), *Sources of International Law*, Ashgate Publishing, New York: 2000, p. 361.

[28] Schachter, *supra* note 26, pp. 53-54.

logic", that is measures of legal reasoning leading to legal effects.[29] Thus, they are essential elements of legal argumentation. Without them, what is labelled as *legal logic* is simply not possible.

The function performed by such principles consists in the justification of coherence, stability, and the efficiency of both substantive and procedural sources of international law, as well as the rights and obligations flowing from them. It is a purely rhetorical question whether the efficiency and stability of treaty and customary rights and obligations could exist without such principles, or actually meta-principles, as *bona fides*, *pacta sunt servanda* and *estoppel*. This is exactly the meaning represented in the ICJ's reasoning when it spoke of the principle of good faith as "one of the basic principles governing the creation and performance of legal obligation."[30] These principles are neither rules nor vague ideas. They are rather norm-sources, which aim to develop the rules of constitutional importance.[31] It is due to them that international law may be seen as a legal order. They are "*generic principles*" which are to "systemise the interacting subsystems of society."[32] Therefore, GPsL, gently but meaningfully, serve as the guardians of the systematicity of norms within international law. They determine the relationships between norms as guidelines when international law is interpreted and applied, which supports both the codification process and the progressive development of international law. Their systemic integration function cannot be underestimated.

VI. If international law is to be seen as a legal system, then its coherence, completeness and normative unity seem decisive. These features of international law should be protected in the legal reasoning whereby the systemic integration of international law is achieved. The constructivist thinking of lawyers may make them invisible law-makers. But this constructivist thinking is not possible without GPsL. Thus, GPsL, as the indispensable measures of action for the invisible law-makers, are *nolens volens* the guardians of the systemic integration of international law.

[29] J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, Cambridge: 2003, pp. 129-131.

[30] *See* ICJ, *Nuclear Tests (Australia v. France)*, p. 268, para. 46.

[31] *See* Kolb, *supra* note 25, p. 9.

[32] P. Allott, *Eunomia: New Order for a New World*, Oxford University Press, Oxford: 2001, pp. 167-168.

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GENERAL PRINCIPLES OF LAW IN PUBLIC INTERNATIONAL LAW**

Abstract:
This article discusses the classical question whether general principles of law form a separate source of international law. To this end it adopts the method of a posteriori analysis, examining the normative nature of various principles of law one by one. This analysis leads to the conclusion that only some principles have a normative nature, while others lack it.

Keywords: general principle of law, general principle of international law, ICJ Statute

INTRODUCTORY REMARKS

General principles of law remain the most mysterious element discussed in the context of sources of international law. Even their very name may give rise to some doubts. One can wonder whether to call them "general principles" as such, "general principles of law", "general principles of municipal law applied to interstate matters", or maybe "general principles of international law." One can have the feeling that this terminological choice predetermines the results to a high (possibly too high) extent.

There is no doubt that general principles of law have, or at least can have, an important role in international jurisprudence. There is also no doubt that they may be very useful for advocates of the parties, allowing them to construct arguments which may sometimes be very rational and sometimes very bold. This practical importance should be noted with some suspicion, however. Objectively, it can mean the readiness of at least some courts or arbitrators to pronounce on obligations of states which find support neither in their treaty obligations nor in established norms of customary law. It brings to the fore the question of state sovereignty and its influence on the catalogue of sources of international law. While the need to respect the former was the main

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** The present text refers to the conclusions and ideas presented by the author in two texts: *The theoretical problem of sources of international law* (to be published in the Memorial Book for Prof. K. Wolfke) and *Ogólne zasady prawa w prawie międzynarodowym* (to be published in Festschrift for Judge T. Szymanek).

stimulating factor for the present text, it is within the context of the latter that the main arguments are going to be discussed. The major underlying question is whether general principles of law form a separate source of international law.

The answer will be sought on two planes. The first is supplied by the doctrine dealing with sources of international law in general, or with general principles of law in particular. It could be called an *a priori* analysis. It will be confronted by the second approach, which can be called an *a posteriori* analysis. The latter consists of examining a series of principles, one by one, in order to analyse their possible presence, or absence, in the framework of public international law. An additional tool, called the "zero-extra" test, is also explained and discussed in the article.

1. THE POSITION OF GENERAL PRINCIPLES OF LAW IN THE SCHOLARSHIP ON SOURCES OF PUBLIC INTERNATIONAL LAW

It is natural for international lawyers trying to grasp the topic of general principles to take Article 38(1)(c) of the Statute of the International Court of Justice (ICJ Statute) as a point of departure. This provision provides that: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (...) c. the general principles of law recognized by civilized nations."

While it is difficult to overestimate the importance of this provision for the functioning of the World Court,[1] its influence on the theory of international law is much more difficult to assess. One can have problems even with comparing the views of several authors writing about general principles of law. The reason for this is that for some authors this term is limited just to the elements referred to in Article 38(1)(c) of the ICJ Statute, while for the others it could be a notion autonomous from this provision, or even read in opposition to it.

There is no doubt that the most important aspect of the topic is the question whether general principles of law form a separate source of international law. One should agree with A. Verdross, who writes that the problem of the general principles of law cannot be solved without solution of the problem of the sources of international law.[2]

Let us treat as a point of departure the stance on the topic presented by the doctrine of legal positivism. It limited the number of sources of international law to two elements, namely treaty and custom.[3] These elements reflected two modes of expression of states'

[1] Actually, it is based on Article 38(1)(c) of the Statute of the Permanent Court of International Justice (PCIJ Statute). This explains the reference to "civilized nations", which would nowadays might encounter problems both from the perspective of political correctness and the principle of the sovereign equality of states.

[2] A. Verdross, *Règles générales du droit international de la paix*, Collected Courses of the Hague Academy of International Law, vol. 30, Brill Nijhoff, Leiden, Boston: 1929, p. 195.

[3] *See e.g.* F. Despagnet, *Cours de droit international public*, Librairie de la Societé du Recueil Sirey, Paris: 1910, p. 69.

consent for international norms – either express (by treaties) or tacit (by custom). Sometimes this led to treating custom as a tacit treaty.[4] Such an attitude left no space for general principles of law. The latter could be seen rather as elements of the law of nature – a notion openly negated by legal positivism.

On the other hand, the very emergence of Article 38(1)(c) of the PCIJ Statute could be seen as a denial of legal positivism. For example, L. Oppenheim took the position that Article 38(3) meant an express recognition by States of "the existence of a third source of International Law independent of, although merely supplementary to, custom and treaty."[5] He associated these principles with the practice of international arbitration before the establishment of the Court. In his opinion, "the formal incorporation of that practice in the Statute of the Court marks the explicit abandonment of the positivist view (…). It equally signifies the rejection of the naturalist attitude, according to which the law of nature is the primary source of the law of nations."[6]

This explains why he chose the term "supplementary source" for general principles of law. This term was also used (though unfortunately not explained) by P. Cahier.[7] Interestingly enough, contemporary editors of the work of Oppenheim have not retained the very term "supplementary source."[8] This is due to the wording adopted by Article 38(1)(c) of the ICJ Statute. A. Cassese lists "general principles of law recognized by the community of nations" among primary sources.[9]

What is often analysed however is Article 38 in and of itself, and not necessarily the nature of the elements mentioned in it. In this sense general principles are believed to be a source of law because they are listed in Article 38(1). For example, K. Zemanek seems to attach a decisive and positive role to the words "whose function it is to decide in accordance with international law." In his opinion, this puts an end to the dispute whether Article 38 refers to sources of law.[10] It is manifest that the longer is the catalogue of sources adopted, the greater is chance that general principles will be included within it.[11]

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[4] P. Heilborn, *Les sources du droit international*, Collected Courses of the Hague Academy of International Law, vol. 11, Brill Nijhoff, Leiden, Boston: 1926, p. 19.

[5] L. Oppenheim, *International Law: A Treatise. Vol. I – Peace* (8th ed.), H. Lauterpacht (ed.), Longmans, Green and Co., London, New York, Toronto: 1955, p. 30.

[6] *Ibidem*, p. 30.

[7] P. Cahier, *Changements et continuité du droit international. Cours général de droit international public*, Collected Courses of the Hague Academy of International Law, vol. 195, Brill Nijhoff, Leiden, Boston: 1985, p. 222.

[8] R. Jennings, A. Watts, *Oppenheim's International Law*. Vol. 1: *Peace* (9th ed.), Oxford University Press, Oxford, New York: 1996, p. 40.

[9] A. Cassese, *International Law*, Oxford University Press, Oxford: 2005, p. 183. Along with custom, treaties and unilateral acts of states. On the other hand, secondary sources include decisions of international organizations and court decisions made *ex aequo et bono*.

[10] K. Zemanek, *The Legal Foundations of the International System: General Course on Public International Law*, Collected Courses of the Hague Academy of International Law, vol. 266, Brill Nijhoff, Leiden, Boston: 1997, p. 131.

[11] *See e.g.* the list adopted by A. Verdross, B. Simma, *Universelles Völkerrecht. Theorie und Praxis*, Duncker & Humblot, Berlin: 1984, p. 323.

W. Czapliński and A. Wyrozumska go as far as to write that "the doctrine of international law seems to be unanimous that art. 38 of the Statute of the ICJ is a reference to formal sources of international law."[12] It goes without saying that general principles may be a hostage or even a victim, of this way of presentation.

At the same time, there is no unanimity in this respect. For example, W. Góralczyk underscores that

> from the formal point of view art. 38 lists the basis or sources of decision-making by the ICJ. They may coincide with the sources of international law. All the same it must be kept in mind that art. 38 does not have to be treated as an exhaustive list of sources of international law, as well as that not all elements from art. 38 must be true sources of international law.[13]

R. Bierzanek and J. Symonides also stress that the bases of judgments of the ICJ should not be identified with sources of international law.[14] P.-M. Dupuy rightly points out the contractual character of Article 38 and criticizes attempts to give it a quasi-constitutional nature.[15]

Keeping this in mind, we should not be astonished when encountering much shorter lists of sources of international law. What particularly interests us here are lists in which general principles are missing. They can be found in the works of many authors.[16]

The decision not to include general principles in the list of sources of international law is seldom explicitly justified. This is why it is so worthwhile to trace those few justifications actually made. To some extent they may relate to the very wording of Article 38(1)(c) of the ICJ Statute. For example, S. Rosenne, when referring to Article 38(1)(c) writes "[t]hat is not an allusion to the general principles of *international* law (really part of customary law). It is broader and embraces the general principles of law recognized by the community of States as a whole."[17] P.-M. Dupuy also strictly separates two elements – the general principles of law of civilized nations mentioned in Article 38(1)(c), and general principles of international law.[18] It should be noted that such a position does not have to predetermine the stance of a given author as to the list of types of sources of international law.

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[12] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [Public international law. Systemic issues], C.H. Beck, Warszawa: 1999, p. 15.

[13] W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie* [An outline of public international law], PWN, Warszawa: 1989, p. 63.

[14] R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne* [Public international law], LexisNexis, Warszawa: 1994, p. 78.

[15] P.-M. Dupuy, *Droit international public*, Dalloz, Paris: 2008, p. 280.

[16] Bierzanek & Symonides, *supra* note 14, p. 78; Góralczyk, *supra* note 13, pp. 65-66; Ch. Rousseau, *Droit international public*, Sirey, Paris: 1970, vol. I, pp. 59-60; N. Quoc Dinh, P. Daillier, A. Pellet, *Droit international public*, LGDJ, Paris: 1994, p. 114; F. Berber, *Lehrbuch des Völkerrechts. Erster Band. Allgemeines Friedensrecht*, C.H. Beck, München und Berlin: p. 69.

[17] S. Rosenne, *The Perplexities of Modern International Law: General Course on Public International Law*, vol. 291, Brill Nijhoff, Leiden, Boston: 2001, pp. 47-48.

[18] Dupuy, *supra* note 15, pp. 356-358.

In the Polish legal literature, it was W. Góralczyk who undertook a more comprehensive explanation of the unwillingness of some scholars to treat general principles of law as a separate source of law.[19] He also examines, as a point of departure, the differentiation between general principles of international law and the general principles of law recognized by the community of States. In his opinion "general principles of international law can be situated within custom and treaties so art. 38(1)(c) would add nothing new to 38(1)(a) and (b)."[20]

It is difficult to refrain here from making a few remarks. Firstly, one can be very sympathetic to the scepticism about treating Article 38 of the ICJ Statute as an authority decisive for the number and identity of sources of international law. It is a kind of paradox, however, that such scepticism is often combined with attaching decisive importance to this Article as regards the question whether general principles are a separate source of law. There is no doubt that the establishment of the World Court was a great achievement in history. It is difficult however to treat its statute as a constitution of the World or of international law as a whole.

What is even more important is the question of how to interpret the assertion that general principles of international law can be situated within custom and treaties. This is especially doubtful with respect to treaties. There is no problem with labelling some treaty provisions as principles or rules (as provisions of fundamental importance, as provisions referring to more general patterns or clauses, or as rules as opposed to exceptions). This element is however of no importance for the question of sources of international law. All such rules and principles are just treaty provisions, binding only on the states parties and possibly those third states which expressed their consent to rights or obligations stemming from a given treaty.

On the other hand, that part of the statement which situates general principles of international law within custom (be it true or false) actually addresses the essence of the problem of unwritten international law.

2. THE ESSENCE OF THE PROBLEM

The question whether general principles of law are or are not sources of international law is of substantial theoretical and practical importance. If we are to confirm the status of general principles of law as an autonomous source of international law, we arrive at *two* sources of general and unwritten international law, namely: general principles and custom. We are, however, aware that a great number of lawyers accept only one such source, i.e. custom. What may be striking is that despite this fundamental difference, the pictures of international law as such, as presented by representatives of the two ways of thinking, are not so different.

[19] Góralczyk, *supra* note 13, p. 63.
[20] *Ibidem*.

In my opinion, it is advisable to examine custom and general principles of law together. In other words, treating them as a connected system may be a promising way to solve at least some problems surrounding general principles of law.

It goes without saying that the main object of concern is not the theoretical question of having a longer or shorter catalogue of sources of international law. It is much more precise and has to do with the influence of states on the scope of their international law obligations. This is the essence of state sovereignty.

The requirement of express consent provides a good safeguard for that sovereignty with respect to treaties, resolutions of international organizations, and unilateral acts of states. As regards custom, while this safeguard is not fool proof, all the same it is present. Its essence is the two-element nature of custom, i.e. comprising practice and *opinio iuris*. As K. Wolfke summed it up:

> Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law, the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear.[21]

It is visible that the requirements of practice and *opinio iuris* protect states (at least *prima facie*) against the presentation of mere assertions and bold propositions as customary legal norms. It is much more difficult to find such safeguards with respect to general principles. In this respect, they constitute a *prima facie* danger to state sovereignty.

Thus it is worthwhile to examine this apparent danger from different perspectives. One of them has not been tested so far, though it may turn out to be promising. One can call it the "zero-extra" model. It would refer to an idealized model of a state which is willing to respect all its obligations imposed by international law, but unwilling to go over this level, even to a minimum extent. It is especially interesting to see how this model would work with respect to general principles of law. A most intriguing question in this respect is, namely, whether a state has an objective obligation to follow general principles of law or whether they just emerge when a case is brought to the court. If the second answer is the proper one, it would mean than general principles should rather be denied the qualification of a separate and autonomous source of international law. On the other hand, the decision to bring a case to an international court or arbitrator would not be neutral with respect to the scope of legal obligations of states.

As opposed to the hitherto applied theoretical and *a priori* method, I suggest adopting an *a posteriori* analysis, taking as a point of departure several principles of law presented as general principles in the legal literature.

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[21] K. Wolfke, *Custom in Present International Law*, Brill, Dordrecht: 1993, pp. 40-41.

3. *A POSTERIORI* ANALYSIS

The space limitations of the present text make it impossible for me to devote an entire subchapter to the different typologies of general principles of law presented in the legal literature. What is possible, however, is to refer to some principles or groups of principles present in the writings of eminent specialists.

One of the groups of general principles of law which is very frequently referred to consists of the so-called 'procedural principles'. They are identified by such authors as A. Ross,[22] F. Berber,[23] N. Quoc Dinh,[24] P.-M. Dupuy,[25] W. Czapliński and A. Wyrozumska.[26] Elements invoked in this group (by all or at least some of those authors) include the principles of: *res iudicata, lis pendens, estoppel, nemo iudex in causa sua propria*, equality of the parties of the proceedings, and *compétence de la compétence*. They also relate to distinguishing between jurisdiction and admissibility, *onus probandi* (or more precisely, the rule according to which facts are to be proved by those asserting them), presumptions, and indirect evidence.[27]

A few remarks can be made. It is beyond doubt that several principles emerge only within given proceedings. That is why the very application of the "zero-extra" model seems completely unthinkable. This can be, paradoxically enough, a calming down factor, if we look at the topic from the perspective of dangers for sovereignty. A state which gave its consent for jurisdiction of a court/arbitrator usually enters one or even a few treaty relationships. What's more, one can assume that this state is interested in the case being decided and not blocked because of the inability of a court to decide who should prove a given fact or whether to accept indirect evidence.

Not all procedural principles are the same in this respect. Some are of objective importance, both within and outside proceedings. This relates first of all to the principle of *res iudicata* or *lis pendens*. What they have in common with the other procedural principles is that they presuppose finished (*res iudicata*) or unfinished proceedings (*lis pendens*).

In fact, every principle has its own properties. Let us consider the principle *nemo iudex*… One can wonder whether it really deserves to be called a legal norm. A lot depends upon the understanding both of the former (a principle) and the latter (a norm). If we try to apply the "zero-extra" model and understand *nemo iudex…* as an objective prohibition against a state assessing its own legal position, we arrive at a conclusion which is so absurd that it is even difficult to consider it seriously as a legal norm. A very tempting explanation would be to say that we have to do with a nice legal proverb, with

[22] A. Ross, *A Textbook of International Law: General Part*, Longmans, Green and Co., London, New York, Toronto: 1947, p. 90.

[23] Berber, *supra* note 16, p. 71.

[24] Quoc Dinh et al., *supra* note 16, pp. 344-345.

[25] Dupuy, *supra* note 15, p. 357.

[26] Czapliński & Wyrozumska, *supra* note 12, p. 81.

[27] Dupuy, *supra* note 15, p. 357.

no precise legal content. All the same, a competing justification would suggest that if we understand *nemo iudex…* as an indication that an international court is not bound by the legal auto-assessment of a given state-party in given proceedings, it is possible to attribute some legal importance to this formula.

Another element deserving to be mentioned is the principle of *compétence de la compétence*. One can actually wonder whether to qualify as a legal principle meaning *compétence de la competence* as such, or possibly a lack of *compétence de la compétence.* It is the latter that is attributed to international organizations. What is meant by it is that no organization can grant itself new powers without a basis in the statute of this organization. In fact, however, what is usually meant by *compétence de la compétence* is the power of an international court to assess, rather than create, its competence (in practice its jurisdiction and the possible admissibility of a given case).

The above-mentioned readiness to lower the level of protection of states (or rather not to care about states' sovereignty) is present not only in the context of court/arbitral proceedings. It can also be present in the context of international organizations in which a given state is a member. To be precise, the doctrine of public international law has not revealed any readiness to speak, in the context of general principles of law, about such elements as the principle of conferred powers or the principle of proportionality. Inasmuch as these elements protect the rights of states, there would be no problem with defending the existence of such principles. It would be equally easy to infer them from other customary norms, accepted general principles (not limited to international organizations), or even the statute of a given organization. At the same time, there is some space for principles which do not necessarily work in favour of states. In my opinion we can consider the existence of a principle of implied powers. This would allow for implying competences of an organization which are necessary for its internal functioning. It would cover at least matters such as buying a building, basic equipment, taking security measures around the seat of an organization, and so on. It should be stressed however that it is difficult to compare these two sets of principles with ones aimed at, or believed to regulate, matters outside the context of court proceedings or the functioning within a given organization.

The number of such principles defended in the legal literature is very high. Most authors known to me refer to such principles of law as: *nemo plus iuris*, *nemo potest commodum capere de iniuria sua propria, lex specialis derogat generali*, *inadimplenti non est adimplendum,* etc.[28]

There should be no problem with confirming the legal (normative) nature of all those elements. Proving their customary nature, however, could be either easier or more difficult. In my opinion it is the easiest to do this with respect to the principle *inadimplenti non est adimplendum*. State-victims of violations of international law have withheld, withhold, and will continue to withhold their respective services to violating states. What the doctrine of law can do in this respect is to choose an appropriate label

[28] Góralczyk, *supra* note 13, p. 64.

for these types of situations. It could call them sanctions, countermeasures, reprisals, treaty law measures, and so on. There is also no problem with finding *opinio iuris* on this principle. This comfort is not, however, the same with respect to all such principles. That is why Article 38(1)(c) of the ICJ Statute matters so much. States bringing cases to the ICJ can make no claims against the possible application by the Court of such principles.

However, it would be rather unrealistic to believe that even in the absence in Article 38(1) (c) of the PCIJ/ICJ Statute of the principles of law, such principles as *lex specialis*…, *lex posterior*…, *nemo plus iuris*, *nemo commodum*… would have not found their way into the case-law. They have also found their way into legal writings – undoubtedly including that of both theoreticians as well as governmental advisers. One can say that they form canons of legal thinking all over the world.

It is interesting to examine the possibility of denying their status as principles of law on the basis of a two-element nature of custom. It would perhaps look like this – "we are able to accept a customary norm *nemo plus iuris* only if you are able to prove practice and *opinio iuris* on it." While there would be no problem with the latter, the former may be more problematic. What however should be done if we wish to assert: "We protect states from elements pretending to be custom, so if you cannot prove practice of *nemo plus iuris* we deny the existence of such a legal norm." What would this mean however? Does it mean that if we have problems with showing a practice in support of this apparent norm we should accept the presence of a contrary norm? In this sense it would mean a norm according to which a state can transfer more rights that it has. For example, the Soviet Union or Russia would have been able to waive Polish claims to war compensation without any Polish consent. Of course, it goes without saying that such an apparent norm would also need proof of practice and *opinio iuris*, and that (fortunately) it would have no chance of success.

The same can be said about the principle of state responsibility. This principle is invoked by almost all above-cited authors trying to present a system of general principles of law.[29] This should not be surprising if we take into consideration a fragment of the famous PCIJ judgment given in the Chorzów Factory case. According to it:

> [t]he essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[30]

In this respect we can speak about the existence of a fundamental principle that a state is responsible for breaches of law. As R. Ago put it:

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[29] Czapliński & Wyrozumska, *supra* note 12, p. 81; Quoc Dinh et al., *supra* note 16, pp. 344-345; Rousseau, *supra* note 16, p. 385.

[30] PCIJ, *Factory at Chorzow (Germany v. Poland)*, Judgement, 13 September 1928, PCIJ Publ. Serie A, No. 17, p. 47.

> [a] justification for the existence of this fundamental rule has usually been found in the actual existence of an international legal order and in the *legal* nature of the obligations it imposes on its subjects. For it is obvious that if one attempts, as certain advocates of State absolutism have done in the past, to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order.[31]

If we treat the principle on state responsibility and the principles governing that responsibility as elements without which there is no international law, we can ask a similar question to another set of principles identified by the doctrine, namely, the principles governing the validity (or rather invalidity) of treaties.[32] It is visible that they are inspired by domestic laws (or to be precise by Roman law). If we are ready to confess to their being part of international law, the question is where to stop. Why not to treat all solutions common to different laws as a part of international law?

One can see such a temptation on the part of the doctrine. This is why one can have some doubts insofar as this regards such principles as extinctive prescription, *negotiorum gestio*, or acquisitive prescription.[33] If they are to be treated as a part of international law, what is the sense of pressing on the necessity of sticking to the two-element nature of customary norms? It may be said that if a practice is not consistent with an apparent principle, and this practice cannot itself be called an inhuman activity, there is very little chance for this principle to be viewed as a part of international law. In contrast, if there is no practice and an apparent principle seems to be the only rational choice in a new situation, our readiness to treat such a principle as a part of law is much greater.

CONCLUSIONS

The doctrine is not unanimous with respect to the presence of general principles of law on the list of sources of international law. An *a posteriori* analysis using the "zero-extra" model leads to some conclusions which may be interesting, but are far from providing clear "yes-no" answers. To a certain extent they may calm down states. If the main aim of this present work is to safeguard the legal security of states and respect for their sovereignty, the results are to a very high extent optimistic. There are some principles which work only within the context of court or arbitral proceedings. By definition, the "zero-extra" model does not apply to them. There are also principles which do not create obligations for states. And there are principles which impose obligations but are so obvious or so useful that states would not be able to do business

[31] Second report on State responsibility by Roberto Ago, Special Rapporteur, *The Origin of International Responsibility*, Document A/CN.4/233, Yearbook of the International Law Commission, 1970, Vol. II, pp. 179-180, para. 13.

[32] Dupuy, *supra* note 15, pp. 357-358.

[33] Czapliński & Wyrozumska, *supra* note 12, p. 81.

if they questioned them. It is easy to defend the thesis that these principles are a part of public international law and should be respected by states as such.

In fact, this tells us more about international community and custom than about general principles as such.

The situation at present makes it possible to see several principles as a part of international law. The question whether they all are customary norms seems to be largely unresolvable. This is why in my opinion the answer which is closest to the truth is that there are some principles which are not norms of international law, despite having been invoked in one or more judgments. There are also some principles which are a part of international law. And there are some which may not be norms but have a great chance of becoming a part of international law after several judgments and an emerging *opinio iuris* on their binding force.

At the same time, states need to exercise a lot of care. The concept of principles of law is a general notion, and it contains a potential which may be dangerous for states. They should be attentive to different trends in the international discourse and react quickly and decisively to counteract future dangers. This is especially true with respect to "paper" or "spoken" law, i.e. political or ideological claims and statements which some powerful states or groups of interests attempt to impose on other states under the guise of "general principles of law."

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SOME REMARKS ON THE ROLE OF GENERAL PRINCIPLES IN THE INTERPRETATION AND APPLICATION OF INTERNATIONAL CUSTOMARY AND TREATY LAW

Abstract:
This article is devoted to current practices concerning the application of general principles of law in the light of their function in the international legal system. As a means of the application and interpretation of both treaty and customary law, general principles of law perform a crucial function in the system of international law, which is understood as set of interrelated rules and principles – norms. The role played by general principles of law in the international legal order has been discussed by academia for years now. Initially they were used to ensure the completeness of the system of international law. However, at the current stage of development of international law, when many of them have been codified, they are usually invoked by international courts for the interpretation of treaties and customary law and/or the determination of their scope. This means that despite their ongoing codification they do not lose their character as general principles and are still applied by international courts in the process of judicial argumentation and the interpretation of other norms to which they are pertinent. References by international courts to general principles of law perform the all-important function of maintaining the coherence of the international legal order, which is faced with the twin challenges of fragmentation and the proliferation of international courts.

Keywords: general international law, general principles of law, interpretation of international law, sources of international law

INTRODUCTION

In the discussion about the function of general principles of law in international legal order, its systemic nature seems to be of crucial importance. As indicated by the International Law Commission:

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> International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.[1]

In addition to treaties and customary law, general legal principles form part of the international law system and enter into various relations with other norms of the system.[2] Owing to their nature general principles of law perform a specific function.[3] They are rarely applied by international courts and tribunals as a source of legal rights and obligations, but are invoked for the interpretation of treaty and customary law or determination of their scope and, sometimes (which remains outside the scope of this paper), for review of the validity[4] of other norms. Although at the

[1] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of The International Law Commission, A/Cn.4/L.702, 18 July 2006, p. 3.

[2] *See generally* B. Cheng, *General Principles as Applied by International Courts and Tribunals*, Cambridge University Press, Cambridge 2006; M.C. Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 Michigan Journal of International Law 768 (1990); H. Mosler, *General Principles of Law*, in: *Encyclopedia of Public International Law*, vol. II, North-Holland, Amsterdam: 1995, pp. 511-512; G. Gaja, *General Principles of Law*, in: R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (MPEPIL), Oxford University Press, Oxford: 2008; M. Koskenniemi, *General Principles: Reflections on Constructivist Thinking in International Law*, in: M. Koskenniemi (ed.), *Sources of International Law*, Ashgate, Dartmouth: 2000, pp. 359-402; G. Herczegh, *General Principles of International Law and the International Legal Order*, Akadémiai Kiadó, Budapest 1969; G. Tunkin, *"General Principles of Law" in International Law*, in: R. Marcic (ed.), *Internationale Festschrift für Alfred Verdross*, Fink Verlag, München-Salzburg: 1971, pp. 523-532; W. Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57(2) American Journal of International Law 279 (1963), pp. 279–299; F.O. Raimondo, *General Principles of Law in the Decisions of International Courts and Tribunals*, Martinus Nijhoff, Leiden, Boston: 2008; Ch. Voigt, *The Role of General Principles in International Law and Their Relationship to Treaty Law*, 31 Retfaerd Årgang 3 (2008); H. Akehurst, *Equity and General Principles of Law*, 25 International and Comparative Law Review 801 (1976); E. Carpanelli, *General Principles of International Law: Struggling with a Slippery Concept*, in: L. Pineschi (ed.), *General Principles of Law - The Role of the Judiciary*, Springer, Heidelberg, New York, Dordrecht, London: 2015.

[3] As pointed out by members of the International Committee of Jurists (Permanent Court of International Justice Advisory Committee of Jurists, *Procès-verbaux of the proceedings of the Committee*, June 16th – July 24th, 1920, available at: https://bit.ly/2Ie6fzj, accessed 30 June 2018), if international law is something more than the law of consent and the role of the Court is not to become in many cases a "registry for the high-handed acts of the strong against the weak", recognition of general principles of law as part of the applicable law was necessary (*see* especially statements of Baron Descamps on the Rules of Law to be applied (*ibidem*, pp. 323-324) and Statement of M. Fernandes (*ibidem*, pp. 345-346)).

[4] Sometimes the concept of *jus cogens norms* of international law is connected with "fundamental general principles of international law." Such connection was indicated by G.G. Fitzmaurice in the Third Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, A/CN. 4/115 and Corr. 1. Also, A. Verdross referred to general principles when he indicated the evolution in State practice of non-derogability based on core values of the international community. He indicated that "[n]o juridical order can ... admit treaties between juridical subjects, which are obviously in contradiction to the ethics

current stage of development of international law many general principles have been codified in multilateral agreements or customary law, they do not lose their character as general principles and are still applied by international courts in the process of judicial argumentation and interpretation of these norms or alongside. This is important in particular in the context of their *erga omnes* effect, which, as a rule, is devoid of treaty norms, and which does not have to be a feature of customary norms. References by international courts to general principles of law perform an important function in maintaining the coherence of the international legal order, which is faced with the challenges posed by fragmentation and the proliferation of international courts.

1. GENERAL PRINCIPLES OF LAW AND THEIR POSITION IN THE INTERNATIONAL LEGAL ORDER

The current academic discussion about the general principles of law is based on the assumption that international law constitutes a legal system of a universal nature.[5] As indicated by B. Simma, one of the possible understandings of universality "responds to the question whether international law can be perceived as constituting an organized whole, a coherent legal system, or whether it remains no more than (…) a random collection of norms, or webs of norms, with little interconnection."[6] Although the requirement of unity or coherence of the international legal system is currently challenged by the process of the fragmentation of international law, there is no doubt that the notion that general principles of law are part of general international law may be seen as the main tool for preservation of the systemic nature of the legal order.[7] Special attention is paid to systemic coherence as a precondition of legal certainty and the predictability of law. As will be demonstrated, this function seems to be very predominant in the practice of international courts.

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of a certain community" (A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 American Journal of International Law 55 (1966), pp. 55-64). However, today's practice and discussion show that the concept itself, as well as relationship between *jus cogens* and other norms of international law, remains unclear (beyond the VCLT). *See* Second report on *jus cogens* by Dire Tladi, Special Rapporteur, A/CN.4/706, 16 March 2017.

[5] Although various authors understand the universality of international law differently, general principles are always included into the system. *See*, *inter alia*, R. Kwiecień, *Państwa jako suwerenni „międzynarodowi prawodawcy" a systemowe cechy prawa międzynarodowego* [States as sovereign international law-makers and systemic features of international law], in: R. Kwiecień (ed.), *Państwo a prawo międzynarodowe jako system prawa*, Wydawnictwo UMCS, Lublin: 2015, pp. 76-80, 83, 89.

[6] B. Simma, *Universality of International Law from the Perspective of a Practitioner*, 20(2) European Journal of International Law 265 (2009), p. 267.

[7] *See e.g.* H. Lauterpacht, *Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order*, in: H. Lauterpacht (ed.), *International Law: The Collected Papers of Hersch Lauterpacht*, Cambridge University Press, Cambridge: 1975, pp. 213-237.

The distinction and relationship between general principles and other norms of the system (rules) may be explained in at least two ways.[8] The first is a hierarchical differentiation, which is used to refer the differentiation between fundamental norms and the relative importance of their subject matter. From this point of view, we can talk about fundamental principles of the international legal order, i.e. legal principles immanent to legal logic or certain "natural law" principles. The basis of the distinction between such norms and other norms is the function that principles perform or the social interests for which they stand. If they are fundamental or of particular importance, they should be considered as legal norms. From this point of view, one can talk about fundamental principles of the international legal order like good faith, *pacta sunt servanda,* the rule of law, sovereign equality of States, the non-use of force, etc. The higher hierarchical rank of such principles may be either systemic in nature (general principles as constitutional rules), logical (general principles as those which are logically presupposed by the concept of law itself), or substantive (other norms must bow to certain higher principles).[9] The hierarchical differentiation between rules and principles is strictly connected with the universality and systemic nature of international law, which is further discussed below. Despite the lack of a hierarchy of *sources* of international law, a more specific treaty norm will not always override a "general" principle based on the collision clause *lex specialis derogat legi generali*. In a particular case, a general rule of law may in fact determine the manner in which the treaty norm is to be applied. It may affect the application of treaty norms as a limiting factor. In this context, it thus seems appropriate to state that a particular principle may prevail over a treaty norm (i.e. the treaty norm is inapplicable in a particular case and/or the interpretation of a customary or treaty norm in conformity with a general principle takes precedence over a literal interpretation).[10]

According to the logical distinction, general principles are characterized by a high degree of generality and abstractness and, therefore, they leave discretion to international courts in the final determination of the scope, content and legal consequences as well as the mutual obligations of the parties arising from a treaty and/or customary law in the context of a given case. As G. Fitzmaurice pointed out in 1975, general principles, in contrast to rules, even general rules of law, do not define what the rule is (in the sense

[8] For more about theory of principles of law, *see* R. Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge: 1978; R. Dworkin, *Law's Empire*, Harvard University Press, Cambridge: 1988; H. Avila, *Theory of Legal Principles*, Springer, Dordrecht: 2007; M. Atienza, J.R. Manero, *A Theory of Legal Sentences*, Kluwer Academic Publishers, Dordrecht, Boston, London: 1997; S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa: zagadnienia podstawowe* [Principles of law: basic issues], Wydawnictwo Prawnicze, Warszawa: 1974; G. Maroń, *Zasady prawa – pojmowanie i typologie a rola w wykładni prawa i orzecznictwie Trybunalu Konstytucyjnego* [Principles of law – conceptualization and typologies, and the role of the interpretation in the case law of the Contstitutional Court], Wydawnictwo UAM, Poznań: 2011.

[9] O. Elias, Ch. Lin, *"General Principles of Law", "Soft Law" and the Identification of International Law*, 23 Netherlands Yearbook of International Law 4 (1997), p. 6.

[10] Gaja, *supra* note 2, para. 22.

of a warrant or prohibition), but emphasise the scope and meaning of the rule and explain it or provide justification for it. The rule answers the question – what? – while the principle addresses the question – why? In the event of a dispute as to which rule is to apply, the solution will often depend on which principle will be considered as the basis of the norm and which will "prevail" in a particular case.[11]

Thus principles equip a judge with a certain degree of discretion, because they do not determine a specific solution but provide arguments for the adoption of a particular solution. While a conflict between rules can in principle be resolved by introducing an exception clause or recognizing one of the conflicting rules as inapplicable, in the case of principles the adoption of an "all or nothing" approach can lead to a bad result. Under certain circumstances, one principle may give way to another, even though the former is still valid. It should be emphasized that we are not dealing here with a classic case of weighing on a scale, because as Habermas points out in his remarks concerning Dworkin's concept, it would lead to the loss of their deontological importance. Principles are therefore an important element of judges' argumentation, taking a different (i.e. different than rules) place in the logic of the argumentation. While rules always have a component of an "if" that specifies the conditions of application typical for a given situation, principles either apply with a non-specific claim to validity[12] or are limited in their field only by very general conditions, in any case requiring interpretation against the specific background of a case. This means that while in the case of rules the determination of the scope of their norms will in principle belong only to the legislator (in the case of international law, first and foremost States), in case of principles it is the role of the court.

The use of general principles by international courts makes international law more flexible and allows international courts to make decisions that are not only consistent with the existing legal order, but also meet the requirement of rational acceptability in the sense that they enable the development of international law in a manner adequate to the needs of the international community. Thus, general principles of law in many cases are a source of legitimacy for judicial decisions developing international law.

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[11] G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, Collected Courses of the Hague Academy of International Law, vol. 92, Brill-Nijhoff, Leiden, Boston: 1975, p. 8. Similar distinction between rules and principles is also adopted by other authors. *See also* D. W. Greig, *The Underlying Principles of International Humanitarian Law*, 9 Australian Yearbook of International Law 46 (1985), p. 64; V. Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in: M. Byers (ed,), *The Role of Law in International Politics*, Oxford University Press, Oxford: 2000, pp. 207, 213-19; R. Kolb, *Principles as Sources of International Law*, 53(1) Netherlands International Law Review 1 (2006), p. 26.

[12] In contrast to rules which are, according to Dworkin, indefensible, principles as defensible norms have dimension of weight/importance which appears in specific cases.

2. COHERENCE OF THE SYSTEM OF INTERNATIONAL LAW AND GENERAL PRINCIPLES OF LAW

For many years, general principles of law were mainly discussed in terms of gap-filling and avoidance of *non liquet*.[13] However, developments of the end of the 20th century, namely the proliferation of international courts and fragmentation of international law, make the second function – preservation of the coherence of the system – currently appear even more important. International law is a legal system, and there are contextual links between its norms. Despite its specific features, such as its lack of a centralised law-making process, the lack of hierarchy of sources of international law and the lack of a court of universal jurisdiction, the uniform application and coherence of international law is preserved by its structure.

In the context of relationship between general principles and other sources of international law, the principle of good faith, which is the meta-norm of the international law system, deserves special attention. As the International Court of Justice (ICJ) pointed out in the *Nuclear Tests* case, good faith is the principle "governing the creation and implementation of international obligations, regardless of their source."[14] The principle of good faith has been invoked in the recent practice of the ICJ in the context of the obligation to interpret treaties in good faith (Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT));[15] the obligation to execute treaties in good faith (*pacta sunt servanda*),[16] and the obligation of States to negotiate in the event of a dispute.[17] It also plays an important role in the practice of the World Trade Organization (WTO) dispute settlement body,[18] both in the context

[13] Avoidance of *non-liquet* and the distinction between application and creation of law by the World Court was a crucial point of the discussion in the International Commission of Jurists during preparation of draft of the Statute of the Permanent Court of International Justice. *See also* the discussion between Lauterpacht and Stone: Lauterpacht, *supra* note 7, p. 205, and J. Stone, *Non Liquet and the Function of Law in the International Community*, 35 British Yearbook of International Law 124 (1959), pp. 145 et seq.

[14] ICJ, *Nuclear Tests (New Zealand v. France)*, Judgment, 20 December 1974, ICJ Rep. 1974, para. 46.

[15] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, ICJ Rep. 2004, para. 94; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Rep. 2010, para. 146.

[16] ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement, 25 September 1997, ICJ Rep. 1997, para. 140.

[17] ICJ, *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction of the Court, Judgement, 21 June 2000, ICJ Rep. 2000, para. 53; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, para. 94.

[18] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 12 October 1998, para. 158; Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R, adopted 24 July 2001, para. 101; Appellate Body Report, *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 8 October 2001, para. 81.

of the interpretation of WTO agreements as well as in its specific aspects, such as the prohibition of abuse of rights[19] or the protection of legitimate expectations.[20] Also, the Permanent Court of Arbitration confirmed the role that the principle of good faith plays in the system of international law. In the case of *The Netherlands v. France*, the Court emphasized that it

> fully recognises the fundamental role of good faith and how it dominates the interpretation and application of the entire body of international law, not only the interpretation of treaties. The fundamental rule of *pacta sunt servanda* rests on the principle of good faith.[21]

The general principles of law cement the system of international law, since they often explain the logic and function of legal institutions provided for in customary law. Thus, even if a general principle is reflected in customary or treaty norms, it does not cease to be a general legal principle, binding on all subjects of international law. The current practice surrounding the application of general international law on State responsibility may serve as an example of the use of general principles as an interpretative tool preserving the coherence of general international law. State responsibility was recognized as a general principle of law by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case,[22] and subsequently confirmed by the ICJ.[23] Customary law developed in this area has been specified in the Report of ILC.[24] The European Court of Human Rights (ECtHR), in its judgment on redress of 12 May 2014 (*Cyprus v. Turkey*),[25] interpreted Article 41 of the Convention for the Protection

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[19] In *US – Shrimp*, the Appellate Body held that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith (…). One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges' on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably" (para. 158). *See also* Appellate Body Report, *Brazil Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R, adopted 3 December 2007, para. 224.

[20] *See also* M. Panizzon, *Good faith in the jurisprudence of the WTO: the protection of legitimate expectations, good faith interpretation and fair dispute settlement*, Hart Publishing, Oxford: 2006.

[21] Arbitral Award of 12 March 2004, *The Auditing of Accounts between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1976 (The Netherlands v. France)*, para. 65.

[22] "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form" (para. 54 of the PCJI *Factory at Chorzów (Germany v. Poland), Claim for Indemnity, Jurisdiction, Judgment*, 26 July 1927, 1927 PCIJ (ser. A) No. 9).

[23] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Rep. 1949, p. 174; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania),* Merits, Judgment, 9 April 1949, ICJ Rep. 1949, p. 23; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, ICJ Rep. 1986, para. 283; *Gabčíkovo-Nagymaros Project*, para. 47.

[24] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) GAOR 56th Session Supp 10, 43.

[25] ECtHR, *Cyprus v. Turkey* (App. No. 25781/94), Grand Chamber, 12 May 2014.

of Human Rights and Fundamental Freedoms (ECHR) in the light of the principle of State responsibility as a general principle of law. The case concerned violations of the rights of Greek Cypriots granted under the ECHR, in the northern part of Cyprus after the Turkish military invasion in 1974. The Grand Chamber of the ECtHR settled the dispute many years earlier, on 10 May 2001, finding Turkey in violation of several provisions of the ECHR.[26] In the subsequent proceeding relating to redress, the Court had first of all to decide whether Article 41 of the ECHR[27] is also applicable to disputes between States. The Court, referring to the judgment of the PCIJ in the *Chorzów factory case*, declared that a breach of obligations is connected with the obligation of compensation in a proper form. According to the ECtHR, despite the specific nature of the Convention, the general logic of Article 41 is not fundamentally different from the design of liability for damages under international law (expressed in the judgment of the ICJ in the *Gabčikovo-Nagymaros* case), according to which "it is a universally recognized rule of international law that an aggrieved State is entitled to compensation from the State that committed the act contrary to international law for damage caused by that State." In these circumstances and bearing in mind that Article 41 is itself a *lex specialis* in relation to the general rules and principles of international law, the Court held that it cannot interpret this provision so restrictively, under the Convention itself, so as to exclude disputes between States from the scope of its application. On the contrary, the ECtHR considered that Article 41 provides for just satisfaction of the "aggrieved party" (*à la partie lésée*), which should be understood as referring to the actual parties to the proceedings before the Court.

A similar approach to the general principle of State responsibility has been adopted by international arbitral tribunals. In the famous award in *Rainbow Warrior*[28] the arbitral tribunal held that the general principles of international law concerning State responsibility are equally applicable in the case of breach of a treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The arbitral tribunal admitted that the particular treaty itself might limit or extend the general law of State responsibility, however the existence of circumstances excluding wrongfulness, as well as the questions of appropriate remedies, should be answered in the context and in the light of the customary law on State responsibility.[29]In the *Duzgit*

[26] ECtHR, *Cyprus v. Turkey* (App. No. 25781/94), 10 May 2001.

[27] Article 41 of the ECHR provides that "[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

[28] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 30 April 1990, Reports of International Arbitral Awards, vol. XX para 75.

[29] *Ibidem*, para. 75.

Integrity[30] case, the Permanent Court of Arbitration emphasized that for the correct interpretation and application of the Convention it is necessary for the Court to refer to foundational or secondary norms of general international law, such as the law of treaties or rules on State responsibility. In case of some broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the Convention in order to interpret and apply particular provisions of the Convention.

The above examples manifest the importance of general international law, including its general principles, for preservation of the coherence of the system. The references made to the general principle of State responsibility confirm the existence of a uniform regime of State responsibility under international law, which can be modified by special regimes on the basis of *lex specialis*, but only subject to their compliance with the general regime. The above judgments are not only examples of the application of the principle of harmonization, but also indicate a structural hierarchy in which the general principle of State responsibility prevails. They also indicate the importance of judicial dialogue in the identification of general principles of law. In some cases preservation of the coherence of the international legal system may require reference to the general principles in above-mentioned hierarchical sense, i.e. as norms of special importance for the international community. A classic example of distinguishing legal norms as principles of special importance concerns the rules of humanitarian law applicable to armed conflicts. The ICJ, in its Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[31] referred to them as general principles of law of a fundamental nature, which must be observed by all States regardless of whether they ratified the Geneva Conventions of 1907, because they constitute intransgressible principles of international customary law. Despite the fact that these norms have not been recognized by the Tribunal as peremptory norms of international law (*jus cogens*), the Court pointed to the special significance of the norms of humanitarian law, as general principles reflected in customary law, for the system of international law and determination of the scope of other norms of this system, without however granting them a superior position as in the case of *jus cogens*.[32] Consequently, the Court recognized that in light of the applicable international law, it cannot be definitively stated that the threat of the use of force would be legal or illegal under extreme circumstances in which the

[30] Award of the Permanent Court of Arbitration, *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe),* 5 September 2016, paras. 208-209.

[31] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, para. 79.

[32] The Court simply avoided the question of *jus cogens* by limiting interpretation of the questions posed by the General Assembly. The Court found that "[t]he question whether a norm is part of the jus cogens relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter."

very preservation of the existence of a State would be jeopardized. This means that the Tribunal did not exclude a situation in which the right to self-defence would outweigh the principles of humanitarian law. A different position, recognizing the principles of humanitarian law as peremptory norms, was presented by Judge Weeramantry in his dissenting opinion.[33] The reluctance of the ICJ to recognise the *jus cogens* nature of humanitarian law seems, however, to be justified. The reasoning of the Court shows that even fundamental principles, because of their general nature, may come into conflict in specific circumstances, and that the best way to resolve a conflict between them is to attempt balancing.

3. GENERAL PRINCIPLES AS A MEANS OF INTERPRETATION OF TREATY PROVISIONS AND CUSTOMARY LAW

Every application of law requires an act of interpretation, understood as the obvious necessity for a certain form of understanding.[34] The principal task of the judge is therefore to identify the legal meaning of the applicable norm and the scope of its application. There is also no doubt that international law should be interpreted and applied in the light of the basic principles of the system.[35]

The interpretation of other norms in the light of existing international law, including general principles of law, was obvious for international arbitrators from the very beginning.[36] In addition the ICJ indicated, in the case of *The Right of Passage over Indian Territory*, that "it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it."[37] The general rule of interpretation has been included in Article 31 of the VCLT, which not only enables, but indicates an obligation to indirectly apply general principles within the process of interpretation of both treaties and customary law. It requires to take into account in the interpretation of the treaties "all other rules of international law applicable between the parties." Today there is no doubt that Article 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the

[33] According to Judge Weeramantry, "[t]he rules of the humanitarian law of war have clearly acquired the status of *jus cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect." Dissenting opinion in *Legality of the Threat or Use of Nuclear Weapons*, p. 274.

[34] M. Klatt, *Making the Law Explicit: The Normativity of Legal Argumentation*, Oxford University Press, Oxford: 2008, p. 4.

[35] Bassiouni, *supra* note 2, p. 770.

[36] *See* the examples discussed by W. Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 American Journal of International Law 279 (1963), pp. 287-290.

[37] ICJ, *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary objections, Judgment, 26 November 1957, ICJ Rep. 1957, p. 142.

international legal system.[38] This principle was indicated by the ICJ in the *Oil Platform* case[39] and then emphasized and explained by the ILC in the Report on Fragmentation of International Law. In considering the possible relationships between international norms, the ILC specified two possible situations: relationships of interpretation and relationships of conflict. The former occurs when one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm in, for example, an application, clarification, updating, or modification of the second norm. In such a situation, both norms are applied in conjunction.[40] Systemic integration, as defined by the Commission, governs all treaty interpretation, the other relevant aspects of which are set out in the other paragraphs of Articles 31-32 of the VCLT, which "describe a process of legal reasoning, in which particular elements will have greater or less relevance depending upon the nature of the treaty provisions in the context of interpretation."[41] At the same time "Article 31(3)(c) deals with cases where material sources external to the treaty are relevant to its interpretation. These may include other treaties, customary rules or general principles of law."[42]In some cases, implementation of the postulate of the coherence of international law requires the interpretation of both treaty and customary norms in the light of general principles indirectly, i.e. not as direct sources of international obligations but as ordering rules, indicating the way of application of other norms of the system.

The practice of WTO dispute settlement bodies can serve as an example of the interpretation of treaty provisions in the light of general principles.[43] Interestingly, the Appellate Body in the *US – Gasoline* case referred to the general rule of interpretation as the common standard of customary law, and acknowledged its own commitment to take into account general international law, including general principles of

[38] For more, *see* C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International & Comparative Law Quarterly 279 (2005), pp. 279-319.

[39] "[U]nder the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty." (ICJ, *Oil Platforms (Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Rep. 2003, para. 41).

[40] *Fragmentation of International Law*, *supra* note 1, pp. 7-8.

[41] *Ibidem*, p. 14.

[42] *Ibidem*, p. 13.

[43] For more on the interpretation of the WTO Convention *see* G. White, *Treaty Interpretation: The Vienna Convention "Code" as Applied by the World Trade Organization Judiciary*, Australian Yearbook of International Law 319 (1999); J. Cameron, K.R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 International & Comparative Law Quarterly 248 (2001); J. Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 American Journal of International Law 535 (2001).

law.[44] Also the European Court of Human Rights, on the grounds of Article 31(3)(c) of the VCLT, applies general international law as an interpretative means of the provisions of the ECHR as a "living instrument." The Court has repeatedly pointed out that in the application of the Convention it is necessary to take into account the development of international law, and that the Convention cannot be interpreted in a vacuum but should be interpreted in accordance with the general international law of which it is a part.[45] General rules of interpretation are also invoked by the Permanent Court of Arbitration[46] as well as by the Court of Justice of the European Union with respect to international treaties to which the EU is a party.[47]

4. GENERAL PRINCIPLES AND EXTENSIVE INTERPRETATIONS OF OTHER SOURCES OF INTERNATIONAL LAW

The concept of general principles of law is also used by international courts for extension of the application of treaty and customary norms of international law. This is

[44] "The 'general rule of interpretation' set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the *General Agreement* and the other 'covered agreements' of the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law." Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO WT/DS2/AB/R, adopted 9 April 1996, p. 17.

[45] *See* ECtHR, *Al-Adsani v. United Kingdom* (App. No. 5763/97), Grand Chamber, 21 November 2001, para. 55 ("the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account (*see*, *mutatis mutandis*, *Loizidou v. Turkey* (merits), judgment of 18 December 1996, Reports 1996-VI, p. 2231, § 43). The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity"). *See also* ECtHR *Saadi v. UK* (App. No. 13229/03), Grand Chamber, 29 January 2008, para. 62; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* (App. No. 45036/98), Grand Chamber, 30 June 2005, para. 150; *Banković v. Belgium and Other*s (App. No. 52207/99), Grand Chamber, Decision as to the admissibility, 12 December 2001, para. 57.

[46] Award of the Permanent Court of Arbitration of *Iron Rhine (Belgium v. The Netherlands),* 24 May 2005 paras. 58-61, in which the PCA referred to general principles of environmental law for interpretation of applicable convention.

[47] Case C-162/96 *A. Racke GmbH & Co v. Hauptzollamt Mainz* [1998], ECR I-03655, para. 49; Case C-61/94 *Commission v. Germany* [1996], ECR I-03989, para.30; Case C-386/08 *Brita GmbH v. Hauptzollamt Hamburg-Hafen* [2010], ECR I-01289, paras. 39-42; Case C-416/96 *Nour Eddline El-Yassmi v. Secretary of State for the Home Department* [1999], ECR I-1209, para. 47; Case C-268/99 *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* [2001], ECR I-08615, para. 35.

especially the case with respect to the general principles of international law commonly recognised by all States in their mutual relations[48] – principles that are generally applicable in all matters of the same type appearing in international law.[49] As pointed out by some authors, in many cases it is not easy to distinguish between the general principles as formal sources of international law and customary law.[50] However, such a clear distinction is not made by international courts. On the contrary, in many cases they refer to "general principles of customary international law." It follows that in judicial practice general principles are distinguished not as a formal source (i.e. the legal basis of a judicial decision), but rather as a material source of international law, explaining the content and scope of application of customary or treaty law. However, in some cases the concept of a general principle may be a gate for the creation of customary law.

In its 1949 judgment in the *Corfu Chanel* case, the ICJ considered the issue of Albania's responsibility for damage caused by mine eruptions in its territorial waters. According to the Court, although Albania was not a party to the VIII Hague Convention of 1907, it was obliged during times of peace to inform other States about mines on its territory. This obligation resulted not from the Hague Convention, which applies during war, but from "general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[51] The Court acknowledged the United Kingdom's argument and held that the VIII Hague Convention of 1907 was in essence a confirmation of the general principles of international law applicable to the mutual relations between States.[52]

The nature of the principles of humanitarian law as general principles of law was subsequently confirmed in the ICJ's judgment in the case of *The Military and Paramilitary Activities in and against Nicaragua*,[53] while in its advisory opinion of 1996 in *Legality*

[48] H. Mosler, *The International Society as a Legal Community*, Sijthoff and Noordhoff, Alphen: 1980, pp. 134 et seq.; O. Schachter, *International Law in Theory and International Practice*, Springer, Dordrecht-Boston-London: 1991, p. 51; O. Elias & Ch. Lin, *supra* note 9, p. 28.

[49] Mosler, *supra* note 2, p. 512.

[50] *See* Cheng, *supra* note 3; K. Wolfke, *Some Present Controversies Regarding Customary International Law*, XXVI Netherlands Yearbook of International Law 1 (1993), p. 12.

[51] ICJ, *Corfu Chanel*, p. 22.

[52] The United Kingdom argued as follows: "Since the adoption of the Convention in 1907, States have in their practice treated its provisions as having been received into general international law. Even Germany, who in the wars of 1914-1918 and 1939-1945 was guilty of serious breaches of the Convention, publicly professed to be complying with its provisions. The Allied Powers in both wars held themselves bound by the Convention and throughout observed the provisions relating to notification" (ICJ Pleadings, vol. 1, p. 39).

[53] The Court held that "there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression" (ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Rep. 1986, para. 220).

of the Threat or Use of Nuclear Weapons case, the Court, referring to *Corfu Chanel* case, held that most of the norms of humanitarian law applicable in armed conflicts are of fundamental value for respect for the dignity of a person and "elementary considerations of humanity", and that "the Hague and Geneva Conventions have enjoyed a broad accession. Further, these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[54]

The above-mentioned case-law of the ICJ is also important because it illustrates how the Court identifies the existence and content of general principles of law. It confirms that in contrast to customary law, the requirement of State practice does not apply to general principles of law. It is obvious that directly after the end of World War II, when the decisions in *Corfu Chanel* and *Reservations to the Genocide Convention* were issued by the Court, it was hardly possible to prove a consistent practice. However, at the same time the *opinio juris* and general recognition of the general principles as envisaged in multilateral conventions did not raise any doubts.[55] The creation of customary international law has been confirmed by the Court in subsequent judgments. In *Legality of the Threat or Use of Nuclear Weapons*, the ICJ indicated practice, including not only the earlier jurisprudence of the Court itself but also the case law of the Nuremberg International Military Tribunal and the unanimous approval of the UN Secretary General Secretary's Report introducing the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).[56] On this basis, the Court held that

> the extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community

[54] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, para. 79.

[55] T. Meron refers to the moral value of humanitarian law principles; *see* T. Meron, *International Law in the Age of Human Rights: General Course on Public International Law*, Collected Courses of the Hague Academy of International Law, vol. 301 Brill Nijhoff, Leiden, Boston: 2003, p. 26. Simma and Alston indicate that "[g]eneral principles seem to conform more closely than the concept of custom to the situation where a norm invested with strong inherent authority is widely accepted even though widely violated" (B. Simma and P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 Australian Yearbook of International Law, 82 (1991), p. 102). T.M. Franck went even further, suggesting that the legally binding force of principles is based on "but of course" recognition, which means that a general principle "should be recognized as a legitimate norm when the common sense of the interpretive community (governments, judges, scholars) coalesces around the principle and regards it as applicable" (*see* T.M. Franck, *Non-Treaty Law-Making: When, Where, and How?*, in: R. Wolfrum, V. Röben (eds.), *Developments of International Law in Treaty Making*, Springer, Berlin, Heidelberg: 2005, p. 423). Other authors suggest an "implicit state consensus" behind general principles of law; *see* N. Petersen, *Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23(2) American University International Law Review 275 (2007), pp. 284-286.

[56] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, paras. 80-81.

with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles.

It follows that despite the transformation, as a result of practice, of the general principles of humanitarian law into customary norms, they do not lose their character as general principles of law. Obviously in a situation wherein a treaty, a customary rule, and a general principle of the same content are in force, in the process of applying the law the court will base its judgment on the more detailed norm, usually a treaty or custom. That's why the ICJ in its advisory opinion on the construction of a wall on the territory of Palestine did not use the concept of general principles to prove the applicability of general humanitarian law, but examined whether customary law was applicable to the parties to the procedure.[57] The international criminal courts refer to general humanitarian law as both customary rules and general principles of law.[58] In its *Tadić* judgment on jurisdiction, the ICTY referred to customary international humanitarian law as a reflection of general principles as an argument for interpretation of Article 3 of its Statute as covering violations of humanitarian customary law in both internal and international conflict.[59]

Similarly, in the judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*[60] the ICJ referred to the advisory opinion on *the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, according to which "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[61]

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[57] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 89.

[58] *See e.g.* ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, paras. 183, 148; *Prosecutor v. Zejnil Delalic et al.*, IT-96-21-T, para. 200.

[59] In *Prosecutor v. Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction para. 93-94, the ICTY, referring to the judgment in *Nicaragua*, confirmed that the Geneva Conventions and the "Hague law" "has become a general principle of humanitarian law to which the Convention merely give specific expression." *Tadić* gave rise to the extensive application of humanitarian law by the court. However, in the *Celebici Camp* case, the Trial Chamber of the ICTY, although fully confirming above findings, tried to find practice and prove the existence of customary law. In *Furundžija*, the ICTY Trial Chamber was concerned with the definition of the crime of rape and, in particular, whether forced oral penetration is covered by its constructive elements of the offence. The Chamber found that conventional and customary law did not contain a specific definition of rape and referred to human dignity as derived from general principles of international humanitarian and human rights law and permeated in the corpus of international law as a whole. According to the Chamber, forcible oral penetration was a severe and degrading attack on human dignity, and as violation of a general principle must be classified as rape.

[60] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary objections, Judgment, 11 July 1996, ICJ Rep. 1996.

[61] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep. 1951, para. 23.

5. GENERAL PRINCIPLES AS AN INTERPRETATIVE TOOL IN THE APPLICATION OF OTHER SOURCES OF INTERNATIONAL LAW

It is manifest that courts invoke general principles of law in their argumentation, especially in problematic (hard) cases in which customary or treaty norms raise doubts as to the content of the obligations set out in them. Reference to general principles of law is used not only as a persuasive argument to support the adopted solution, but also to "model" the content and scope of other norms. An example of such a practice can be the case-law of international courts in cases concerning State immunity. The potential conflict between the immunity of a State, as an expression of the general principle of the sovereign equality of states, and the rights of individuals, including the right to an effective remedy in the event of a violation of a *jus cogens* norm, has become one of the most problematic issues in international law in recent years. It is no wonder then that in cases concerning the scope of State immunity, international courts have been extremely careful in building up the legal argumentation of their decisions.

The European Court of Human Rights, in its landmark cases concerning State immunity, has used general principles to justify a restrictive interpretation of the ECHR.[62] Referring to the VCLT, the Court recognized its own obligation under Article 31(3)(c) of the VCLT to interpret Article 6 of the ECHR in harmony with other norms of international law, including customary law on State immunity. What is significant is that the Court made a reservation that measures taken by state-parties to the ECHR which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to courts as embodied in Article 6. The ECtHR then considered customary law in the field of State immunity, and emphasized the important place of the institution of State immunity in the international law system to hold that

> sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

By indicating the close link between immunity and a basic principle of the international legal order, the protection of which is the legitimate aim of restriction of fundamental rights, the ECtHR justified a narrow interpretation of customary norms establishing exceptions to State immunity.[63]

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[62] ECtHR, *Al-Adsani*. *See also* ECtHR, *Fogarty v. the United Kingdom* (App. No. 37112/97), Grand Chamber, 21 November 2001.

[63] *See* ECtHR, *Al-Adsani*, paras. 53-55.

The same approach has been adopted by the ICJ in the case *Jurisdictional Immunities of the State*.[64] The ICJ found that since State immunity is rooted in the principle of sovereign equality of States and the principle of territorial sovereignty, any exception to the immunity of a State represents a departure from the above mentioned principles.[65] The Court's reference to the principles of sovereign equality of States and territorial jurisdiction (as a consequence of the principle of territorial sovereignty) as basic principles of the international legal order played primarily a persuasive role in the Court's argumentation, because the final decision was based on the procedural nature of immunity and the inability of its repeal by a material *jus cogens* norm. This, however, clearly indicates the Court's restraint with respect to the recognition of customary norms that could undermine the nature of international law by interfering with its basic principles. In fact, as commentators have rightly pointed out, this ruling has blocked the progressive development of international law (at least for some time) and preserved the traditional understanding of not only immunity, but also of the basic principles of international law.[66]

CONCLUSIONS

There is no doubt that general principles of law as a means of application and interpretation of treaty and customary law perform a crucial function in the system of international law. In recent decades the role of general principles of law in maintaining the coherence of the system has significantly increased. They complement other sources of international law in various ways. First of all, general principles guide the interpretation of treaties and customary law. Due to their abstract formulation, they open the way for a progressive interpretation and development of international law. They may be the starting point for the evolution of a new rule of customary international law, and they have frequently had an influence on the interpretation of the latter, as in the case of principles of international humanitarian law. However, in some instances general principles may also limit the development of new rules of international law, if such rules might call into question the core of international law, as in the case of exceptions to state immunity.

The fragmentation of international law and proliferation of international courts requires that due attention be played to the preservation of coherence and the unified application of general international law. The inclusion of general principles of law in the

[64] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Judgment, 3 February 2013, ICJ Rep. 2013.

[65] *Ibidem*, para. 57.

[66] A. Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14(3) European Journal of International Law 529 (2003), p. 529; M. Krajewski, Ch. Singer, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, 16 Max Planck Yearbook of United Nations Law 1 (2012), p. 28.

body of (indirectly or directly) applicable international law and the principle of systemic integration are important tools for international courts to maintain a concordance between the treaty regimes within which they adjudicate and the general system of international law. The discussed example of the principle of state responsibility shows that international courts recognise general principles as part of general international law, applicable within treaty regimes which fall within the jurisdiction of these courts. It is also important to note that international courts duly consider the practice of other courts concerning the application of general principles when they determine the content and scope of general principles. This may give rise to the conclusion that general principles contribute to the creation of a body of international constitutional law, understood as set of basic rules and principles of a systemic nature.

General principles may become, and indeed have become, not only the motor of the progressive development of international law, but as applied by international courts they also preserve the systemic nature of international law.

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ACT OF 18 DECEMBER 1998 ON THE INSTITUTE OF NATIONAL REMEMBRANCE – COMMISSION FOR THE PROSECUTION OF CRIMES AGAINST THE POLISH NATION AS A GROUND FOR PROSECUTION OF CRIMES AGAINST HUMANITY, WAR CRIMES AND CRIMES AGAINST PEACE

Abstract:
This article discusses definitions of crimes included into the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, and their usefulness in prosecuting individuals who committed international crimes. It is argued that the provisions of the Act cannot constitute a ground for criminal responsibility of individuals, as they violate the principle of nullum crimen sine lege certa.

Keywords: crimes against humanity, crimes against peace, genocide, ICC, ICTR, Institute of National Remembrance, war crimes

INTRODUCTION

The current discussion on the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (the Act) should have been started many years before adoption of the controversial amendment which has unleashed an international furore, with Poland at the centre.[1]

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[1] The amendment, which was accepted on 26 January 2018 and entered into force on 1 March 2018 (*see* Dz. U. (Journal of Laws): http://www.dziennikustaw.gov.pl/du/2018/369), was intended to prevent using the misnomer "Polish death camps", but has led to precisely the opposite result. The amendment made said phrase more popular and brought more attention to it, making this phrase a headline in newspapers (*see* https://wapo.st/2H7Ogcl). It flooded the internet (*see* https://bit.ly/2HEROUu and https://cnn.it/2r7fyX3), being the most searched phrase there and on TV news (as is visible if, for example, we compare

The reason is that from the very beginning the Act has been ambiguous, as it consists of regulations which do not have their point of departure in international law, while at the same time the Act refers to and partially relies on already accepted definitions of international crimes. After a closer look however, an addressee looking for a reliable definition of international crimes will rather be disappointed and be left with a number of doubts and unanswered questions. Additionally, the case law of Polish courts referring to the Act does not provide answers, especially to those who are familiar with international regulations concerning international crimes and the practice of international criminal tribunals (ICTs).

It should be stressed at the beginning that the present analysis is focused on the Act itself, and not on its recent controversial amendments. The objectives of this article are twofold. Firstly, it aims at examining the relevant normative content of the Act and the definitions of international crimes used in acts of international law, as for example in the Statute of the International Criminal Court[2] (Rome Statute), which is the main point of reference (especially in the practice of Polish courts, as it is the code of the only international permanent criminal court of which Poland is a member state). In this context, this article focuses on those definitions contained in the Act which are inconsistent with definitions used in international law, in particular the notion of "crimes against humanity." Secondly, the contribution analyses the practice of Polish courts which have used and applied definitions from the Act to charge and convict individuals for crimes against humanity and argues that this practice is inconsistent with the *nullum crimen sine lege certa* principle. The inconsistencies in the Polish regulations are highlighted to conclude that the Polish system based on the Act does not follow any universal standard concerning the definitions and the content of international crimes.

1. CRITICAL OVERVIEW OF THE ACT IN THE CONTEXT OF THE CRIMES IT DEEMS TO PROSECUTE

The Act came into force on 19 January 1999, aimed at "the remembrance of the enormity of the number of victims and the losses and damages suffered by the Polish people during World War II and after it ended." It also recalls "the obligation to prosecute crimes against peace and humanity and war crimes", as clearly stated in its Preamble.

Further Article 1(2) states that it regulates the procedure for the prosecution of the following crimes (specified in Article 1(1)(a)):

- Nazi crimes;
- communist crimes;

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the phrases "German death camps" and "Polish death camps" in the application of google trends) (all accessed 30 June 2018). The amendments to the Act are addressed by Patrycja Grzebyk in the subsequent article. The amendments were partly withdrawn in June 2018.

[2] Rome Statute of the International Criminal Court, signed 17 July 1998, 2187 UNTS 3.

- crimes of the Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich;[3]
- other offences constituting crimes against peace, crimes against humanity or war crimes.

The notion of Nazi crimes is not defined in the Act, nor are its elements or prerequisites mentioned. This general category is supposed to cover all crimes committed by the Nazis. Some light into its hypothetical content could be found in Article 55a (which was introduced by the 2018 amendment in January), which referred to the responsibility of individuals who publicly, and contrary to the facts, declare the responsibility of the Polish nation for Nazi crimes regulated in Article 6 of the Charter of the International Military Tribunal (the Nuremberg Charter). Thus, while Article 55a at least gave the reader a slight idea of what the point of reference of the drafters of the Act was (i.e. the Nuremberg Charter[4]), it must be underscored that this new provision, which did not exist before January 2018 was withdrawn in June.

According to Article 2 of the Act, communist crimes are defined as

> the actions performed by the officers of the communist state between 8.11.1917 and 31.07.1990 which consisted in applying reprisals or other forms of violating human rights in relation to individuals or groups of people, which as such constituted crimes according to the Polish penal act in force at the time of their perpetration.[5]

According to Article 2a of the Act crimes committed by the Ukrainian nationalists and members of Ukrainian formations collaborating with the Third Reich consist of:

> acts committed by Ukrainian nationalists between the years 1925-1950 consisting of the use of violence, terror, or other violations of human rights against individuals or groups of the population. The crimes committed by Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich also include participation in the extermination of the Jewish population or genocide of the citizens of the 2nd Republic of Poland on the territory of Volhynia and Eastern Lesser Poland.

The Act provides only fragmented definitions of international crimes, as it neither offers definitions of all the mentioned crimes nor describes the elements or content of those mentioned above. Among the crimes defined in international law, the Act includes solely the definition of 'crimes against humanity', which however can hardly be recognized as a definition that currently exists under public international law. Article 3 of the Act states as follows:

> Crimes against humanity are especially considered as the crimes of genocide as understood by the Convention on the Prevention and Punishment of the Crime of Genocide,

[3] Note that the passage mentioning these crimes was added by the amendment in January, Dz. U. 2018, item 369, part of January amendments was however withdrawn in June 2018, Dz. U. 2018, item 1277 including Article 55a. The text of the Act before amendment can be found in Dz. U. 2016, item 1575.

[4] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, containing the Charter of the International Military Tribunal, signed 8 August 1945, 82 UNTS 280.

[5] Translation taken from the official website of the Institute of National Remembrance (available at: https://bit.ly/2E5YyIl); amendments available at: https://bit.ly/2F5pWry (both accessed 30 June 2018).

adopted on 9 December 1948 (Journal of Laws of 1952 No. 2, item 9 as amended), as well as other serious persecutions based on the ethnicity of the people persecuted and their political, social, racial or religious affiliations, if they were either performed by public functionaries or inspired or tolerated by them.

At the same time, the Act does not offer any definition of war crimes or crimes against peace, although it refers to them directly in Articles 1, 3, 4 and withdrawn in June article 55a. It also refers to the crime of genocide, which must be understood in its conventional meaning, because the Convention on the Prevention and Punishment of the Crime of Genocide (Convention on Genocide) are, together with the Nuremberg Charter, the only regulations which are referred to in the Act and which refer to the international crimes as defined and understood in international law.

2. GENERAL DISCUSSION ON THE DEFINITION OF CRIMES INCLUDED IN THE ACT

Insofar as concerns the eventual prosecution of the crimes specified above, as provided for in Article 1(2), the situation becomes very complex and problematic. The problems are connected with the definition of crimes against humanity given in the Act, which is not a definition accepted in international law, and the lack of definitions of "war crimes" and "crimes against peace."

It could probably be argued that the drafters wanted the Act to reproduce the definition of crimes against peace and war crimes by taking into account the Nuremberg Charter. Some arguments could be presented to support such a thesis, as for example the reference to the Nuremberg Charter in Article 55a (which was however included in the text only in the amendment and was later withdrawn) and the fact that Poland is a State-party of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and subsequently the Nuremberg Charter of the International Military Tribunal,[6] which is annexed to the said agreement. One could also take into account the fact that the notion of 'international crime' is used, while the Polish Penal Code does not use the notion "crime" (*zbrodnia*) but "offence" (*przestępstwo*).[7] The Nuremberg Charter is also the only treaty instrument binding Poland where the definition of "crimes against peace" appears.[8] None of the other documents which are aimed at prosecuting individuals regulate this issue. However, in international law the notion of a crime against peace was replaced by the crime of aggression, as visible in Article 8 *bis* of the Rome Statute. Although Poland is bound by several treaties

[6] *Supra* note 4.

[7] *See* chapter XVI of the Polish Penal Code, available at: https://bit.ly/2KlcmiI (accessed 30 June 2018).

[8] Article 6a of the Nuremberg Charter states: "[c]rimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

concerning war crimes – such notion was used solely in the Nuremberg Charter (and later in the Rome Statute, and Additional protocol I to the Geneva Conventions of 1949), while in the other documents a different nomenclature was applied, such as "grave breaches of humanitarian law", or "violation of the laws or customs of war" (as in the Hague Conventions of 1907 or Geneva Conventions of 1949[9]). This all leads to the conclusion that the Nuremberg Charter was probably the model for the provisions included in the Act.

The lack of a legal definition of a war crime and a crime against peace in the Act, which simultaneously provides for regulation of the procedure for the prosecution of those crimes, means that the document violates the *nullum crimen sine lege certa* principle, as penal law requires a crime to be precisely defined so that the foreseeability of the punishment and accessibility to the concrete penal norms can be established for individuals.[10]

In contrast to war crimes and crimes against peace, the notion of "crimes against humanity" is defined in the Act. However the definition, which includes genocide within its scope ("the crimes against humanity are especially considered the crimes of genocide (…), as well as other serious persecutions based on…") is not compatible with the definitions of crimes against humanity known in international law. The definition used in Article 6c of the Nuremberg Charter enumerated: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." This definition is completely different from the definition used in the Act, although since World War II this crime has been widely recognized in international regulations. The definition of crimes against humanity has been subjected to many modifications, as the drafters of the various definitions have taken different approaches as to whether crimes against humanity can be committed only during an armed conflict, or include actions outside a war, or whether they need to be committed on discriminatory grounds, etc. Interestingly, according to the definition included into the Statute of International Criminal Tribunal for Rwanda, the court had a competence to prosecute "crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"[11], while the Rome Statute states that a "'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any

[9] Geneva Conventions of 1949, 75 UNTS 31, 75 UNTS 85, 75 UNTS 135, 75 UNTS 287; 1907 Hague Convention (iv) available at: https://bit.ly/2gZ093I (accessed 30 June 2018); Additional protocol I to Geneva Conventions of 1949, 1125 UNTS 3.

[10] P. Karlik, T. Sroka, P. Wiliński, *Artykuł 42* [Article 42], in: M. Safjan, L. Bosek (eds.), *Konstytucja RP.* Vol. I: *Komentarz do art. 1-86*, CH Beck, Warszawa: 2016, pp. 1033-1040, para. 118.

[11] The Statute of the ICTR is available at: http://legal.un.org/avl/pdf/ha/ictr_EF.pdf (accessed 30 June 2018).

civilian population, with knowledge of the attack." Although different in many respects – these definitions have one common denominator, i.e. a civilian population.[12] But this element was eventually omitted in the definition included in the Act. To the contrary, the definition in the Act was construed using the notion of genocide. This definition does not have any connection with any existing definition of "crimes against humanity" in the statutes of the ICTs, but it shows certain similarities to the provisions used in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[13], which states in Article 1 that:

> No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:
> a) (…)
> b) crimes against humanity, whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal (…), eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, *and the crime of genocide* as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed (emphasis added).

In the above wording it is not clear whether genocide is a part of a definition, making genocide a crime against humanity, or whether it is a distinct crime. Note that the name of the Convention refers solely to war crimes and crimes against humanity, which would support the thesis that in 1968, when the Convention was adopted, genocide was treated as a crime against humanity. It is not clear however whether this definition was the source for the Polish legislator, especially that the Convention is not a penal act which allows for the prosecution of international crimes. It was only designed to avoid the impunity of the criminals and ensure the effective punishment of war crimes and crimes against humanity by confirming the "principle that there is no period of limitation for war crimes and crimes against humanity."[14] But it might be argued that the Convention was a model for Polish legislators, as the formulations of the relevant provisions are similar to those applied in the Act. Additionally, Article 4 of the Act refers to the limitation period by stating: "[t]he crimes mentioned in Article 1(1)(a), which according to international law constitute crimes against peace, humanity or war crimes, shall not be subject to a limitation period." This provision, however, differs from the provisions of the Convention on the Non-Applicability of Statutory Limitations, as it also mentions crimes against peace, while the Convention does not. Thus the Act provides for a better protection of the prosecution of international crimes, but it does not provide the legal definitions of such crimes.

[12] The definition included in the Polish Penal Code in Article 118a also mentions the population as one of its elements.

[13] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, signed 26 November 1968, 754 UNTS 73.

[14] *Ibidem* (Preamble).

3. CRIMES AGAINST HUMANITY AND GENOCIDE TODAY

A few decades ago genocide was perceived as "constituting a crime against humanity",[15] or as an aggravated form of a crime against humanity or, as noted by Stefan Glaser, as a qualified form of a crime against humanity ("génocide n'est par sa nature qu'un crime contre l'humanité, voire un crime qualifié contre l'humanité").[16] Today however, after the recognized definitions of both crimes have evolved,[17] they are perceived as separate crimes, the elements of which can be easily distinguished from one another.

The current definition of genocide, as accepted in the Convention on Genocide and then subsequently reproduced without modifications in the statutes of ICTs (including the ICC), states that: "genocide means any of the following acts (the acts are here omitted – KW) committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Thus intent, i.e. the mental element (*mens rea*), is the most important factor distinguishing genocide from all other crimes. Additionally, it must be committed against certain protected groups, as the intent of the criminal must be aimed at destroying a protected group, in whole or in part. Such a definition markedly differs from definition of a crime against humanity accepted in the Rome Statute, which underscores the fact that act be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack", where the attack against a civilian population and its systematic or widespread nature are the main features of the definition. In the light of the cited definitions, the thesis that genocide constitutes a crime against humanity can no longer be sustained, which is why the definition included in the Act stating that "crimes against humanity are especially considered the crimes of genocide (…) as well as other serious persecutions based on …" must be regarded as erroneous, as it actually is not a definition which could be recognized as having anything in common with the international definitions of crimes. Additionally, it cannot be the ground for individual responsibility as it is not clear enough to be a basis for prosecution, inasmuch as it does not regulate the scope of criminalization and the elements of the crime. An addressee may not discern from the wording of the definition of the criminal conduct which acts or omissions are prohibited.[18] Furthermore, the definition refers only to the conventional definition of

[15] Fourth report on the draft code of offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/398 and Corr. 1-3, Yearbook of the International Law Commission: 1986, vol. II(1), p. 58, para. 29.

[16] S. Glaser, *Droit international pénal conventionell*, vol. 1, Bruylant, Bruxelles: 1970, p. 109.

[17] In the context of genocide, we refer to the definition in the Convention on Genocide. With respect to crimes against humanity, the situation is more complex as there is no any separate convention regulating only this crime. It must be however noted that its definition in the Rome Statute is recognized universally as there are 123 member-parties of that statute, and this universal recognition of the definition impacted the work on the convention on crimes against humanity, where such a definition was reproduced, *see* Crimes against humanity, Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau, 5 June 2015, ILC, 67th session, pp. 5-6.

[18] Karlik et al., *supra* note 10.

genocide, although the provisions of the Convention on Genocide cannot be directly applied.

Finally, the definition included in the Act, which is inconsistent with any existing definition in current international law, is also inconsistent with the Polish Penal Code, which in its Article 118 regulates the responsibility for genocide, and separately in Article 118a regulates responsibility for crimes against humanity. To sum up – the acts defined as crimes against humanity in the Act, despite having the same label must be regarded as separate forms, different from the notion of crimes against humanity contained in the Penal Code. And insofar as concerns its application in practice, it must be noted that such a definition is not only inconsistent with any known definition of a crime against humanity, but also violates the fundamental principle of law – legal certainty (*nullum crimen sine lege certa*)[19] – if it is applied for the prosecution of individuals. The legislator does not have to regulate normative provisions precisely, but the regulations in the Act must fulfil the principle of sufficient specificity of a prohibited act, and its provisions under criminal law should satisfy the test of foreseeability and predictability, specifically the predictability of the legal effects of the addressee's actions.[20] Thus the provisions concerning the definitions of crimes in the Act cannot be applied to prosecute anyone for either war crimes or crimes against humanity, because they are not precise enough to be the grounds for a criminal prosecution. They cannot be applied according to legal theory... but the practice in Polish courts has been different.

4. COURTS APPLYING THE ACT

The practice of the courts applying the Act requires a critical reassessment.[21] In recent decades, the Act was applied in order to prosecute members of the Citizens' Militia (the communist police force) for their internment of members of the political opposition. The alleged illegal internment, which refers to the events surrounding the introduction of martial law on 12 December 1981, lasted only a few days or a week at most, as after 19 December – when the act went into effect – the "illegal internment" became legal, and usually lasted several weeks or months.[22] Several regional courts (for

[19] C. Kress, *Nulla poena nullum crimen sine lege*, Max Planck Encyclopedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, Oxford: 2010.

[20] *See* Karlik et al., *supra* note 10.

[21] The Polish Yearbook of International Law already presented a discussion on the issue. *See* A. Kleczkowska, *Decision of the Supreme Court-Criminal Chamber, dated October 14, 2015 (ref. no. I KZP 7/15)*, XXXV Polish Yearbook of International Law 327 (2015) where the author, in analyzing whether internment could be qualified as a crime against humanity, noted that international courts demand longer periods for a crime to be qualified as a deprivation of liberty (*see* particularly pp. 334-335).

[22] In this instance, "illegal internment" covers those situations when such internment was not yet grounded on legal provisions deriving from the Decree of 12 December 1981, which was the normative

example in Skierniewice and Gorzów Wielkopolski) found that such illegal application of the practice of internment was an unlawful deprivation of liberty and a serious political repression of the political opposition, and consequently constituted a crime against humanity, being simultaneously a communist crime according to Articles 2 and 3 of the Act.[23] A few of the accused were sentenced to two years of imprisonment, although these sentences were in each case suspended and replaced by probation for a period between 2-5 years. The courts did not apply any international definition of crimes against humanity (only the one included in Article 3 of the Act), and one Court (the Skierniewice court) addressed the definition of crimes against humanity by taking into account (following the decision of the Supreme Court[24]) the criteria mentioned in Article 7 of the Rome Statute (which came into force in 2002!), and applied them to the situation of the accused, pointing out that the decision on the internment of 36 persons was a massive persecution of a social group because of its political views. Every deprivation of liberty which is the result of such persecution of certain groups by state organs, applied on mass scale and connected with a clear violation of citizens' rights and causes physical and mental suffering might be, in the opinion of the court, qualified as a crime against humanity.

A few circuit courts also confirmed this line of reasoning by addressing, once again following the decision of the Supreme Court, the provisions of the Rome Statute to analyse and interpret the provisions of the Act, specifically the definition of crimes against humanity.[25]

The above-mentioned decision of the Supreme Court focused its considerations specifically on the status of crimes against humanity with respect to domestic acts in the context of internment. It confirmed that even a short-term deprivation of liberty (for less than 7 days) could be exceptionally considered as a crime against humanity, but only when other elements of crimes against humanity recognized in international documents are fulfilled. The Supreme Court stated that an intentional deprivation of liberty might be considered as a crime against humanity even if the prerequisites of this crime as contained in the Polish Penal Code (Article 118a para. 2) are not met.[26] The Court also underlined that the notion of "crimes against humanity" is not identical

ground for the application of internment. After the Decree was officially promulgated, the internments which continued were not illegal. *See* Judgement of the Supreme Court No. V KK 402/14, 2 February 2016, p. 7 and G. Wierczyński, *Urzędowe ogłoszenie aktu normatywnego* [Official promulgation of a normative act], Wolters Kluwer, Warszawa: 2008, pp. 121-122.

[23] *See e.g.* the judgement of the Regional Court in Skierniewice No. II K 504/15, 1 February 2017. *See also* the judgement of the Regional Court in Gorzów Wielkopolski no. II K 62/11, 15 October 2012, both available at: https://www.legal-tools.org/en/browse/record/a98935// (accessed 30 June 2018); *see also* Kleczkowska, *supra* note 21, pp. 327-328.

[24] Decision of the Supreme Court, Criminal Chamber, No. I KZP 7/15, 14 October 2015, available at: www.sn.pl (accessed 30 June 2018).

[25] *See e.g.* the judgement of the circuit court in Białystok, No. VIII Ka 414/16, dated 18 October 2016, available at: https://orzeczenia.ms.gov.pl/ (accessed 30 June 2018).

[26] Decision of the Supreme Court, p. 23.

with the notion of crime as provided in Article 7 of Polish Penal Code,[27] thus the Court decided that lesser offence (*występek*) could be also recognized as crime against humanity.[28]

Taking this decision into account, the Supreme Court issued a judgement in the case of J.W. who was accused of both a communist crime and a crime against humanity for illegally interning certain individuals. The Supreme Court criticized the direct application of Article 3 of the Act, pointing out that the provisions of Article 3 do not have a penal character – they cannot constitute grounds for criminal responsibility of an individual, and that such definition of crimes against humanity is specifically established only for the Act on the Institute of National Remembrance. Contrary to the actions of the other courts, the Supreme Court decided to take into account the different notions of crimes against humanity appearing in international documents, suggesting at the same time that courts in the case of J.W. should have taken into account the definition of the crime existing at the moment when it was possible to proceed in the case of the accused on normal terms, bearing in mind the prescription periods set out in the penal code.[29] The Supreme Court decided that in the case of J.W it was necessary for the circuit court to precisely reconstruct and determine the notion of crimes against humanity which refer to the situation of the accused (especially in that there are other definitions of crimes beside those included in the Nuremberg Charter and the Rome Statute) and decide whether the acts of accused fulfilled the elements of such definition of crimes against humanity and whether they still do. In the judgement however, the Court did not refer to the question whether lesser offences could be qualified as crimes against humanity, and this question is touched upon below.

CONCLUSIONS

The judgement of Supreme Court revealed flaws of the regional and circuit courts not only in the context of the case of J.W., to which it referred directly, but also in a few other cases where the qualification of the crime for which internment was applied was based on Article 3 of the Act, i.e. qualified as a crime against humanity. The Supreme Court was clear that this definition cannot be the grounds for finding criminal responsibility on the part of an individual, as it does not have a penal character. The Supreme Court did not however refer to the *nullum crimen sine lege certa* principle, or the legality principle in general, which could have strengthened its arguments.

[27] Article 7 of Polish Penal Code makes a difference between types of offences: crimes and vices. The former, being a more grave form of an offence, is punishable by a penalty not less than 3 years of imprisonment.

[28] Decision of the Supreme Court, p. 17.

[29] Judgement of the Supreme Court No. V KK 402/14, 2 February 2016, p. 12.

Furthermore, it is worth noting that the Court obliged the Circuit Court to consider which definition of crimes against humanity should be applied with respect to J.W., and whether, under whatever definition is applied, the court considers that his acts fulfilled the elements of the definition which existed at that time.

The Supreme Court did not directly declare that the Rome Statute came into force only in 2002 and thus cannot be directly applied to acts which had taken place before that date (*lex retro non agit*), although it seems that it can be inferred as a natural consequence of the obligation imposed on the circuit court demanding the establishment of the proper definition of the crime (if any) to be applied.

It is however disappointing that the Supreme Court did not take re-examine the question whether a lesser offence could actually be qualified as a crime against humanity, a question which was answered in the affirmative in an earlier Supreme Court decision (which in the opinion of this author was an erroneous interpretation). It must be noted that all the definitions of crimes against humanity existing in international law concern only grave crimes, the "most serious crimes of concern to the international community", or grave crimes that "threaten the peace, security and well-being of the world" (from the preamble of the Rome Statute). A short-term internment would probably never fulfil such a notion of a grave crime, and the practice of the International Criminal Court seems to confirm it could never be recognized as a crime before that court, as it would be assessed as not being sufficiently grave. It seems that the Supreme Court's decision was wrong in allowing for qualifying a lesser offence as a crime against humanity. It was never the idea of the international community to include lesser offences within the notion of crimes against humanity. Quite the contrary, Article 5 of the Rome Statute states that the ICC "has jurisdiction over the most serious crimes of concern to the international community as a whole." The ICC understands this in the following way: "[A]ll crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases."[30] This means that a short-term internment would probably never be qualified as crime against humanity, as it is not deemed to be a sufficiently grave crime to justify further actions by the Court. As expressed by Judge Kovács: "[t]he concept of gravity in the Statute (…) should function in such a manner as to achieve the ultimate goal for its inclusion, namely to focus on those situations/cases which are indisputably grave and deserve the attention of the international community."[31] This does not mean that the domestic courts cannot prosecute lesser offences. States have primary responsibility for prosecuting crimes, but it cannot be derived from this that they are allowed to freely qualify a few days' internment as a crime against humanity.

[30] ICC, Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, ICC -01/09-19-Corr, p. 25, para. 56.

[31] Partly Dissenting Opinion of Judge Péter Kovács, ICC-01/13-34-Anx 16-07-2015 1/21 EC PT, para. 18.

Interestingly, the Polish regional and circuit courts have, in a few cases, used the concept of crimes against humanity to justify the very proceedings against perpetrators of communist crimes, qualifying them as crimes against humanity so that the limitation periods do not apply to such crimes (which is probably why the prosecutors and courts insisted on such a qualification), as presumably in 2020 they would be subject to the statute of limitations as communist crimes. Apart from that, the rationale underlying the policy of qualifying lesser offences as a crime against humanity is not the proper way to fulfil the aims of criminal justice.

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AMENDMENTS OF JANUARY 2018 TO THE ACT ON THE INSTITUTE OF NATIONAL REMEMBRANCE – COMMISSION FOR THE PROSECUTION OF CRIMES AGAINST THE POLISH NATION IN LIGHT OF INTERNATIONAL LAW

Abstract:
This article analyses the amendments of January 2018 to the Act on the Institute of National Remembrance (INR) of 1998, which has raised doubts in light of international law and provoked diplomatic tensions between Poland on one side and Germany, Ukraine, United States of America and Israel on the other. The INR is a national institution whose role is, among others, to prosecute perpetrators of international crimes committed between 1917-1990. The article proves that the wording of the amendments is inconsistent with international law, as it ignores the principles of international responsibility, definitions of international crimes, and disproportionately limits freedom of expression. In consequence, it cannot be expected that third states will cooperate with Poland in the execution of responsibility for violation of the newly adopted norms.

Keywords: denial crime, double criminality, freedom of expression, freedom of speech, Institute of National Remembrance, memory law, rule of law

INTRODUCTION

The Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (INR) was adopted in 1998.[1] The aim of the newly established institution is, according to the current version of the law, to:

> properly record, collect, store, process, secure, make available and publish documents of the state security authorities, produced and accumulated from 22 July 1944 until 31

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[1] Journal of Laws 1998, No. 155, item 1016. English version available at: https://ipn.gov.pl/en/about-the-ipn/documents/327,The-Act-on-the-Institute-of-National-Remembrance.html (all accessed 30 June 2018). The article presents state of Polish law as at 24 May 2018.

July 1990, as well as the documents of the security authorities of the Third Reich and the Soviet Union relating to Nazi and communist crimes, as well as other international crimes like crimes against peace, humanity, or war crimes; establish a procedure for the prosecution of the crimes; protect personal data of the people referred to in the documents collected in the archive of the Institute of National Remembrance; perform activities in the field of public education; look for resting places of persons killed in the fight for independence and unity of the Polish State, in particular those killed in the fight against the imposed totalitarian system or as a consequence of totalitarian repressions or ethnic cleansing in the period between 08 November 1917 and 31 July 1990; conduct activities related to commemorating historic events, places, and persons in the history of the struggle and martyrdom of the Polish nation, both in the country and abroad, as well as the places of struggle and martyrdom of other nations within the territory of the Republic of Poland, in the period between 08 November 1917 and 31 July 1990.[2]

In consequence, the INR combines prosecutorial tasks with educational or scientific ones. Therefore the wording of the Act can be perceived as a compromise between lawyers and historians, and as each group attaches different meanings to notions such as, e.g., genocide, it is understood that not all the provisions would satisfy international lawyers' expectations. However the Act, when used for purely legal purposes – especially in the case of criminal prosecutions – should meet the highest standard of legislation (especially if we take into account that violation of newly introduced norms is penalized by up to three years of deprivation of liberty) and must be carefully, i.e. narrowly, worded in order to not threaten, among other rights, freedom of expression protected by Human Rights Law. Moreover, as the Act refers to international crimes it should also properly refer to notions and principles of international law. Unfortunately, it does not.

The first part of this article examines the newly adopted Chapter 6c – "Protection of the reputation of the Republic of Poland and the Polish Nation"– with a focus on criminal provisions. It indicates those terms which are used in a way that could raise doubts in light of international law. In its second part, the article assesses newly the adopted law in light of Human Rights Law. The third part refers to issue concerning criminal jurisdiction which are essential for effective implementation of the Act.

1. THE AMENDMENTS IN LIGHT OF INTERNATIONAL LAW ON RESPONSIBILITY

Chapter 6c – "Protection of the reputation of the Republic of Poland and the Polish Nation" – was supposed to be an effective tool in combating the use of such notions as "Polish death camps", "Polish extermination camps", and "Polish concentration camps" which as allegedly historically false have a tremendous impact, inasmuch as they threaten the good name of the Polish state and nation abroad by creating the impression that the Polish state and nation is responsible for the Third Reich's crimes.[3] Polish authorities are frustrated with the consistent German historical policy which employs widely accepted descriptions

[2] *Ibidem*, Article 1.

[3] *See* the official justification of the draft amendments: https://bit.ly/2Inj9uR (accessed 30 June 2018).

of the Third Reich's crimes not as German crimes, but as Nazi crimes (without therefore an indication of the state responsible for them). Moreover, the focus in contemporary public discussion is not on German responsibility for the World War II atrocities, but on the extent of collaboration of other states/nations (including Poland) with, e.g., the Holocaust. Poland, which suffered enormous losses (almost 6 million people, a figure which is ten times more than, for example, France lost during the whole war), would prefer to describe the heroic actions of its people rather than explain tragic but marginal incidents in which local Polish communities committed crimes against, e.g., Jews. Those crimes in which Polish citizens were involved are sometimes referred to as definitive proof of a Polish state policy, which clearly was not the case. Thus, based on the conviction that the historic narration is unfavourable to Poland, Polish authorities decided to use legal tools to change it.

After entry into force of the amendments, the public use of notions similar to those mentioned above (e.g. "Polish concentration camps") should entail not only criminal but also civil responsibility. Surprisingly, none of these controversial notions were enumerated in the amendments. The Polish legislator decided to introduce a general prohibition against the denial of, e.g., Nazi crimes in order to include all expressions which could be perceived as insulting to the Polish state or nation.

The original version of the Article 55 of the Act states that "[a]nyone who publicly and contrary to the facts denies crimes referred to in Article 1(1) shall be subject to a fine or the penalty of imprisonment of up to 3 years. The sentence shall be made public." The mentioned Article 1 enumerates:

> Nazi and communist crimes; other crimes against peace, humanity or war crimes, perpetrated on persons of Polish nationality or Polish citizens of other nationalities between 8 November 1917 until 31 July 1990; and other politically motivated reprisals, instigated by the officers of the Polish law enforcement agencies or the judiciary or persons acting on their order which were disclosed in the contents of the rulings made on the strength of the Act, dated 23 February 1991, on considering as invalid the rulings made in the cases of persons oppressed for their activities for the cause of an independent Polish State; the actions of the state security authorities described in Article 5.

The Act defines communist crimes[4] and crimes against humanity[5] but it does not

[4] *See* Article 2, which states: "As conceived of by the Act, communist crimes are actions performed by the officers of the communist state between 08 November 1917 and 31 July 1990 which consisted in applying reprisals or other forms of violating human rights in relation to individuals or groups of people or which as such constituted crimes according to the Polish penal act in force at the time of their perpetration. As communist crimes are also regarded the actions of those officers in the period in question in the preceding sentence which bear the hallmarks of the unlawful acts defined in articles 187, 193 or 194 of the ordinance of the President of the Republic of Poland, dated 11 July 1932 – the Penal Code or article 265(1), article 266(1, 2, or 4), or article 267 of the Act dated 19 April 1969 – the Penal Code, performed in relation to the documents within the understanding of article 3(1 and 3) of the Act dated 18 October 2006 on the disclosure of information relating to the documents of the state security authorities from the period between 1944 and 1990 and the contents of those documents (…) to the detriment of the persons referred to in the documents."

[5] *See* Article 3, which states: "As crimes against humanity are especially considered the crimes of genocide as understood by the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948 (…), as well as other serious persecutions based on the ethnicity of the

provide a definition of Nazi crimes, crimes against peace, or war crimes. Taking into account the period which is specified as being within the remit of the institution i.e. 1917-1990, this omission is justified by the argument that the definition of those crimes and principles of responsibility for them changed throughout this period, which would mean that a prosecutor should apply norms (of national or international law) which were binding at the time of commission of the crimes.

The amendments to the Act adopted in January 2018 added new crimes to the above-mentioned list, i.e. "crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich." These crimes were defined as:

> acts committed by Ukrainian nationalists between the years 1925-1950 consisting in the use of violence, terror or other violations of human rights against individuals or groups of population. A crime of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich is also the participation in the extermination of the Jewish population or genocide of the citizens of the 2nd Republic of Poland on the territory of Volhynia and Eastern Lesser Poland.

As a result of the amendments, Ukrainians are the only national group directly mentioned in the Act as perpetrators of crimes, and the Act does not refer even to Germans or Russians but instead prefers to speak about crimes of the "Third Reich" or of the "communists." Not surprisingly, Ukrainians have felt offended by this "distinction." Moreover, the Act qualifies the extermination of Polish citizens on the territory of Volhynia and Eastern Lesser Poland as genocide and at the same time it does not apply the same classification to the case of extermination of the Jewish population.

It can be understood why the genocide label was omitted in the case of the Holocaust. Even the International Military Tribunal in Nuremberg, despite Rafał Lemkin's efforts, did not have jurisdiction over genocide and in consequence did not use this notion in its final judgment. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted only on 9 December 1948,[6] i.e. after the Holocaust took place, and even the Israeli court when deciding on the responsibility of Adolf Eichmann referred to classification of the Holocaust as genocide but not as a distinct international crime but as a specific genre of crime against humanity.[7] Notwithstanding, Polish courts such as, e.g., the Polish National Supreme Court did not hesitate to designate Nazi crimes committed in Poland during World War II as genocide,[8] therefore it is hard to understand why this qualification is avoided now. A possible argument on the

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people and their political, social, racial or religious affiliations, if they were performed by public functionaries or either inspired or tolerated by them."

[6] 78 UNTS 277.

[7] District Court of Jerusalem, Israel, *Attorney General v. Adolf Eichmann*, Criminal Case No. 40/61, 11 December 1961, para. 26.

[8] *See e.g.* Supreme National Tribunal (SNT), *Artur Greiser Judgment*, p. 16 (Judgment published in: T. Cyprian, J. Sawicki, *Siedem wyroków Najwyższego Trybunału Narodowego* [Seven judgments of the Supreme National Tribunal], Instytut Zachodni, Poznań: 1962, pp. 1 ff). Summary published also in Law Reports of Trials of War Criminals, Vol. XIII, United War Crimes Commission, London: 1949, pp. 70 *et seq*.

non-retroactive application of the Genocide Convention would be inconsistent with classification of the massacre in Volhynia (which took place 1943-45, i.e. in a similar time period as the Holocaust) as genocide in the same sentence of the Amendment. In addition, the use of such undefined notions as "Ukrainian nationalist" should raise doubts, as it is not clear if all Ukrainians are perceived by the Polish legislator as nationalists or whether courts should make an additional assessment of Ukrainians as nationalists, based on unspecified criteria.

The amendments also refer to human rights violations during the period 1925-1950, while for most of this time there was war in the territory of Poland (an international one and a civil one). Therefore, references should be made not to the human rights law regime (developed only after World War II), but to the law of war, the regime of which legitimizes, e.g., violence against military objectives. The Polish Act seems to ignore this, which can result in prosecution of Ukrainians for mere participation in hostilities against the Polish army. This is not unlawful *per se*, as even the contemporary Additional Protocol II to the Geneva Convention of 1949 indirectly allows for prosecution of non-state party members for participation in hostilities (Article 6(5)).[9] However, such a solution is controversial inasmuch as it equals attacking military objectives with the extermination of a civilian population (which definitely took place in Volhynia and Eastern Lesser Poland) – a result which should not be satisfactory to either the Polish or Ukrainian side.

The amendments of January 2018 introduced Article 55a, according to which:

> 1. Whoever publicly and contrary to the facts attributes to the Polish Nation or to the Polish State responsibility or co-responsibility for the Nazi crimes committed by the German Third Reich, as specified in article 6 of the Charter of the International Military Tribunal (…), or for any other offences constituting crimes against peace, humanity or war crimes, or otherwise grossly diminishes the responsibility of the actual perpetrators of these crimes, shall be liable to a fine or deprivation of liberty for up to 3 years. The judgment shall be communicated to the public.
> 2. If the perpetrator of the act specified in section 1 above acts unintentionally, they shall be liable to a fine or restriction of liberty.
> 3. An offence is not committed if the perpetrator of a prohibited act set out in sections 1 and 2 above acted within the framework of artistic or scientific activity.

Article 55b emphasizes that irrespective of the law applicable at the place of commission of the prohibited act, this Act shall be applicable to a Polish citizen as well as a foreigner in the event of commission of the offences set out in Article 55 and Article 55a.

Article 55a refers to both the alleged responsibility of Polish state and the responsibility of Polish nation. World War II confirmed that occupation cannot be treated as a legitimate way of acquiring territory and it does not result in ending the existence of a state. In consequence, throughout the entire World War II period the Polish state existed. Its representatives in exile took part in negotiations, and Poland was one of the original members of the United Nations (despite its non-participation

[9] 1125 UNTS 609.

in the United Nations Conference on International Organization at San Francisco).[10] However, as Polish authorities (both those in exile as well as the Polish underground) did not control Polish territory, obviously the crimes committed by Nazi Germany cannot be attributed to the Polish state on any known basis.[11] The Polish state could not have prevented them, did not approve them, and did not collaborate with the Third Reich (as did, e.g., the Vichy government), therefore there was no complicity in Nazi crimes to any extent on behalf of the Polish state. However, Article 55a raises doubts insofar as it mentions not only responsibility of the Polish state, but also of the Polish nation.

A nation (people) is not classified as distinct from a state in terms of being a subject of international law. The only exception is attribution of the right to self-determination to all peoples[12] and the limited subjectivity of insurrectional movements whose violations of international law can be attributed to the state of which the movement becomes the new government.[13] As the Polish state existed throughout the entire whole World War II, it is impossible to talk on one hand about Polish state responsibility and separately about the responsibility of the Polish nation at the same time. It also cannot be ignored that the question of responsibility for crimes against peace, crimes against humanity, or war crimes is discussed in international law only in the context of state responsibility or individual responsibility.[14] Even though the International Military Tribunal declared that some legal entities, like Gestapo, SD or SS, were responsible for the above-mentioned international crimes, the responsibility for Nazi crimes was not attached to the German nation.

Even if we decide to distinguish the nation from the state as separate subjects of international law in the context of responsibility for international crimes, we should still apply some general rules concerning the responsibility of subjects of international law (if we agree that some common standards exist).[15] Thus it must be decided which norms of international law were binding for a nation (definitely customary ones, but not clear with respect to treaty norms, as the contemporary discussion concerning international obligations of non-state actors proves[16]), and what conduct can be attributed to the

[10] *See* Article 3 of the United Nations Charter of 26 June 1945, 1 UNTS XVI.

[11] *Cf.* Articles 4-11 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission 2001, vol. II, Part Two.

[12] Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant of Economic, Social and Cultural Rights of 16 December 1966, 999 UNTS 171 and 993 UNTS 3. *See also* M.N. Shaw, *International Law* (6th ed.), Cambridge University Press, Cambridge: 2008, pp. 251 et seq., and W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [Public international law. Systemic issues] (2nd ed.), C.H. Beck, Warszawa: 2004, p. 473.

[13] Article 10 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts.

[14] *See e.g.* Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission, 1996, vol. II, Part II.

[15] *See* A. Czaplińska, *Odpowiedzialność organizacji międzynarodowych jako element uniwersalnego systemu odpowiedzialności międzynarodowoprawnej* [Responsibility of international organizations as an element of universal system of international responsibility], Uniwersytet Łódzki, Łódź: 2014, pp. 298 et seq.

[16] *See e.g.* J. Kleffner, *The Applicability of International Humanitarian Law to Organized Armed Groups*, 93(883) International Review of the Red Cross 443 (2011).

nation. These issues are not resolved in contemporary international law, therefore they should raise doubts all the more in the context of World War II.

In the official justification of the amendments to the Act, it is explained that the concept of "nation" which is used in Article 55a should be understood in the same way as in the preamble of the Polish Constitution of 2 April 1997, i.e. as all citizens of the Res Publica.[17] It is not clear however whether the Polish legislator is of the opinion that the conduct of every Polish citizen can be attributed to Polish nation, in which case every Polish citizen would be an organ/agent of the Polish nation. This understanding would be absurd as it would broaden responsibility of this kind of "subject" of international law to the extreme. That is why the more logical interpretation is that the Polish legislator did not mean the attribution of Nazi crimes to the Polish nation as a separate subject of international law, but the attribution of responsibility to individual Polish citizens. However, this would result in the possibility of prosecution of all those who would raise the issue of individual participation of Polish citizens in Nazi crimes e.g. as inspired by Germans in pogroms similar to the one in Jedwabne in 1941.

The amendments stress that responsibility is attributed only when public statements are made contrary to the facts, but at the same time that the responsibility is linked also with the gross diminishment of the responsibility of the actual perpetrators. In the case of complicity it is impossible to precisely state to what extent each participant was responsible, therefore the interpretation of the words "grossly diminishes the responsibility" could in fact limit the discussion on the involvement of Polish (and other states') citizens in the crimes committed by the Third Reich crimes. Any mistake concerning the number of victims – and in the case of many WWII atrocities it is still impossible to obtain exact numbers of victims; for example the estimation of the number of victims of the Wola massacre oscillates between 40 and 60 thousand – could be treated as diminishment of responsibility of the perpetrators as well as improper classification of the conduct.

We should also recall how many controversies have been provoked by the qualification or non-qualification of a particular atrocity as genocide. Genocide is perceived not only as legal term but also as a moral, sociological, or historical one.[18] There is a dispute over whether genocide should be considered as the "crime of crimes", i.e. the crime which is the gravest among all international crimes.[19] Therefore it cannot be excluded that merely undermining the classification of a particular atrocity as genocide could be perceived as "gross diminishment of the responsibility" of the actual perpetrators.

Article 55a refers to Nazi crimes enumerated in Article 6 of the International Military Tribunal Charter (which mentions crimes against peace, crimes against humanity, and war crimes) and to other offences constituting crimes against peace, crimes against

[17] Journal of Laws, No. 78, item 483. English version available at: https://bit.ly/2s5vPeN (accessed 30 June 2018).

[18] *See* L. Nijakowski, *Rozkosz zemsty. Socjologia historyczna mobilizacji ludobójczej* [Pleasure of revange. Historical sociology of genocidal mobilization], Wydawnictwo Naukowe Scholar, Warszawa: 2013, p. 33.

[19] *See* P. Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime*, Cambridge University Press, Cambridge: 2012, passim.

humanity, and war crimes. Therefore, Article 55a enumerates the same crimes twice. If we reject the idea that part of section 1 of Article 55a is superfluous, the mentioned repetition can be explained as an attempt to avoid problems related with the narrow scope of Article 6 of the IMT Charter of 1945, which was supposed to be applied only to the "major war criminals of the European Axis countries" (thus excluding the crimes of citizens of the USSR from the scope of the IMT), and the fact that the definition of crimes against humanity was changed even in reference to crimes committed during WW II, which Article II of the Control Council Law no. 10 of 20 December 1945 proved. Therefore even in the case of crimes against humanity committed during World War II it is possible to operate under different definitions of this crime.

Having in mind the doubts concerning interpretation of the amendments in light of international law, the establishment by Polish authorities of responsibility also for unintentional public statements (where there was no intent to engage in unlawful conduct and knowledge about circumstances and possible consequences of the conduct) in which the responsibility for Nazi crimes is attached to the Polish state and Polish nation should provoke astonishment.[20] The prosecution of offences committed without an intent (in the case of either a lack of knowledge about the existence of the prohibition or lack of intent to violate the prohibition) is extremely rare and is applied to the most serious cases, like killing a person as a result of gross negligence vis-à-vis the basic rules of safety.[21] The choice of the Polish legislator to include the attribution of Nazi crimes to the Polish state or Polish nation contrary to the facts in the category of the gravest crimes (i.e. prosecuted even in case of unintentional commission) must be perceived as controversial to say the least, and will impact cooperation with other states concerning the extradition of perpetrators of such crimes. It is interesting that the Polish legislator did not qualify the denial of the Holocaust as such as a crime of the same gravity. Therefore, according to the new law it is possible to avoid responsibility in the case of denial of Holocaust by reference to the lack of knowledge/intent, but this possibility is excluded in case of attribution of responsibility for the Holocaust to the Polish nation.

2. THE AMENDMENTS IN LIGHT OF HUMAN RIGHTS LAW

The Polish authorities explained that the inclusion of a separate crime concerning attribution of responsibility for Nazi crimes to the Polish state or Polish nation contrary to the facts should be perceived in similar way like other memory laws which were adopted in numerous states and which penalize denial of the Holocaust or other international crimes. In addition, the amendments were supposed to implement the European Union's

[20] According to the official justification the purpose of the criminalization of unintentional public statements described above was necessary in order to guarantee the jurisdiction of Polish courts in civil proceedings concerning protection of reputation of Polish state and nation based on Article 7.3 of the Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351.

[21] *See* Article 8 of the Polish Criminal Code of 1997, Journal of Laws 1997, No. 88, item 553.

Framework Decision 2008/913/JHA, which aimed to harmonize criminal measures against racism and xenophobia.[22] In consequence, the Polish authorities, by referring to the concept of memory laws and European Union law wanted to cut short any discussion concerning the violation of the right to hold opinions without interference, and the issue of freedom of expression.[23]

The mentioned Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law entitles states to punish conduct such as:

> publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group (Article 1(c))

and:

> publicly condoning, denying or grossly trivialising the crimes defined in article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group (Article 1(d)).

Therefore, it does not limit memory laws only to crimes committed during World War II, but it obliges states to punish, e.g., the trivialisation of crimes against humanity or war crimes in a specific context i.e. when this such trivialisation is made to spread racism or xenophobia or to incite violence and hatred.

Article 1(2) of the Framework Decision emphasizes that states can "punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting."[24] Therefore, the Framework Decision refers to Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which emphasizes that the freedom of expression may be restricted, but only if it is prescribed by law (the adoption of the Act fulfils this condition) and is necessary "in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others (…)."[25]

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[22] [2008] OJ L 328.

[23] *See e.g.* Article 19 of the ICCPR; Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 2889.

[24] *Cf.* ECtHR, *Perincek v. Switzerland* (App. no. 27510/08), Grand Chamber, 15 October 2015, para. 280.

[25] It should be noted that the European Court of Human Rights at first discussed cases concerning denial of the Holocaust in light of the Article 17 (abuse of right), but recently changed this approach in order to assess whether all the conditions mentioned in Article 10(2) of the Convention concerning restriction of freedom of expression are fulfilled. The so-called "automatic guillotine effect" of Article 17 is

It cannot be excluded that the attribution of Nazi crimes to the Polish state or nation could be done in order to promote hatred or to incite to violence against Polish citizens, but definitely not all mistaken (unintentional) statements (e.g. statements on "Polish camps" made by a person who meant that the Nazi camps were situated in Poland, not that they were organized by Polish state) disturb order or have as their aim insulting someone. Even if we agree that the purpose of the amendments is consistent with the requirements of the European Convention of Human Rights and of the above-mentioned Framework Decision, and thus that its aim is not only to guarantee the proper interpretation of the facts but also to protect public order, there still can be doubts about whether the amendments are necessary to protect public order and, taking into account the severe penalties prescribed by the new law, the amendments might be considered as a disproportional interference in the freedom of expression.

It should also be noted that the Framework Decision on memory laws refers to the punishment of denial or minimisation of international crimes or the clear negation of their existence.[26] The Framework Decision cannot be used to justify punishment for a broadly understood diminishment of responsibility of the actual perpetrators, which – as was mentioned above – could halt any discussion concerning the scope of involvement of Polish and other citizens in Nazi crimes.

The Polish legislator was however persuaded that the inclusion of the exception of "artistic or scientific activity" sufficiently guarantees the protection of freedom of expression. However, the amendments do not explain what is meant by "artistic or scientific activity." Thus, inasmuch as an article in a newspaper or voice in a discussion in mass media is not normally treated as scientific activity but as the popularization of science (at least when a scientist's work is assessed by his/her peers), statements for or through the media might not be covered by the exception introduced in the Article 55a (3) of the amended Act. It might be also possible to prosecute a scientist for making public statements in the media which were undermined by other scholars. If the method used by scientist was alleged to be wrong or wrongly applied, it could be argued that the particular work cannot be treated as scientific one and therefore there is a ground for

limited in cases involving the assessment of historic facts, which was applauded by the doctrine, *see e.g.* P. Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, 26 European Journal of International Law 1 (2015).

[26] S. Gorton, *The Uncertain Future of Genocide Denial Laws in the European Union*, 47 George Washington International Law Review 421 (2015), pp. 426 et seq. *See also* ECtHR, *Garaudy v. France* (App. No. 65831/01), 7 July 2003; as well as Article 6 of the *Additional Protocol* to the *Convention* of 28 January 2003 on *Cybercrime*, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Reference, ETS No. 189 ("Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.")

prosecution. The lack of bad intentions would not prevent the criminal proceeding, as the current Polish law criminalizes even unintentional statements made contrary to the facts and which might be considered as insulting for the Polish state or nation.

In addition, it should be stressed that freedom of speech could be violated not only by the application of the criminal provisions, but also by the application of those provisions which establish civil responsibility (Articles 53 o-q), which raise enormous doubts also in light of Polish national law.[27] According to the amendments, the legal regime for the protection of personal interests should be applied to the protection of the reputation of the Republic of Poland and of the Polish nation. The amendments attach personal interests to the Polish State as such and to the Polish nation, therefore they establish new subjects of civil law (or in other words they qualify them as new legal entities) and attribute them with personal interests. Moreover, the amendments allow non-governmental organizations acting within the scope of their statutory goals to bring a case on behalf of the Polish state or Polish nation, which is a kind of *actio popularis* – an institution not used in the case of protection of personal interests as they are usually defined as non-material, individual values within the sphere of the feelings and psychological life of a particular person.[28]

The civil protection of private interests of the Polish state and nation is not linked with wrong attributions of responsibility to the Polish state and nation for Nazi crimes. Most disturbing is the fact that the amendments did not establish any exception from civil responsibility in the case of artistic or scientific activity. In consequence, even if a scientist could avoid criminal prosecution, the INR (or any other non-governmental organization!) may bring a case to protect the reputation of the Republic of Poland and claim immense compensation. A scientist who would like to investigate crimes committed by Polish citizens or the scale of Polish collaboration risks the loss of his time, money and reputation in lengthy proceedings against her/him commenced by someone who feels insulted. Such severe consequences must impact the scope of freedom of speech and freedom of scientific activity, as promotion of its results could in some instances be qualified as non-scientific activities.

3. CRIMINAL JURISDICTION

The preamble of the Act stresses "the obligation to prosecute crimes against peace and humanity and war crimes." However, based on the subsequent provisions of the Act the crimes against peace, crimes against humanity or war crimes are encompassed

[27] *See* J. Wyrembak, *Opinia prawna w sprawie projektu ustawy o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach, ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary oraz ustawy o zakazie propagowania komunizmu lub innego ustroju totalitarnego przez nazwy budowli, obiektów i urządzeń użyteczności publicznej (druk sejmowy nr 806)*, 7 November 2016 (available at: orka.sejm.gov.pl/RexDomk8.nsf/0/.../$file/i2195-16.docx, accessed 30 June 2018).

[28] S. Grzybowski, *Ochrona dóbr osobistych według przepisów ogólnych prawa cywilnego* [Protection of personal rights under general provisions of the civil law], Wydawnictwo Prawnicze, Warszawa: 1957, p. 78.

by the Act only if they were "perpetrated on persons of Polish nationality or Polish citizens of other nationalities between 08 November 1917 until 31 July 1990" (Article 1(a)). However, in Article 4.2 it is stressed that the mentioned crimes (as well as "Nazi crimes or communist crimes") "committed against other persons than Polish citizens are within the cognizance of the organs established by the Act, provided they were committed on the territory of the Polish State." Therefore the Act ignores the obligation to introduce and execute universal jurisdiction which is based on the nature of the crime and not on the citizenship of victims or perpetrators or on the place of commission. All states parties to the Geneva Conventions of 1949 were obliged to introduce this type of jurisdiction in their legislation in reference to grave breaches.[29] The obligation to introduce universal jurisdiction in reference to crimes against peace, humanity or genocide is linked with the status of the prohibition of commission of those crimes as *ius cogens*.[30]

Poland, as a party to the Geneva Conventions for the Protection of War Victims of 12 August 1949[31] since 26 November 1954 (it signed them in 1949), introduced universal jurisdiction in Article 115 (2) of the Polish Criminal Code of 1969,[32] and then in Articles 110(2) and 113 of the Polish Criminal Code of 1997, which derogated the previous one. Therefore, it is surprising that in the Act on the INR the legislator decided to limit jurisdiction only to crimes committed against Polish citizens or nationals or to crimes committed on Polish territory. As a result, crimes committed during the Second World War, e.g. against German Jews in Nazi concentration camps situated not in Poland but in Germany, are excluded from the jurisdiction of Polish courts.

The above-described amendments of January 2018 do not refer to the core crimes of international law, but they introduce a new national denial type crime, therefore the criminal prosecution of persons who publicly use such notions as "Polish death camps" could cause difficulties. The introduction of Article 55b as well as the official justification of the amendments stress that the focus would be on the prosecution of foreigners, which raises questions concerning possible criminal cooperation, including extradition procedures.

According to one of customary rules governing extradition an offence must be criminalized in both states engaged in an extradition proceeding (double/dual criminality).[33] In consequence, as no other state has similar provisions like those contained in the Act, the lack of double criminality of an offence might be used as an obstacle to extradition, including the European Arrest Warrant procedure (as an optional ground).

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[29] *See e.g.* Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31.

[30] M.Ch. Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Virginia Journal of International Law 81 (2001), p. 104.

[31] 75 UNTS 31.

[32] Journal of Laws 1969, No. 13, item 94.

[33] M.Ch. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, Martinus Nijhoff, Leiden, Boston: 2013, p. 501.

It cannot be expected that the criminalization of public attributions of Nazi crimes to the Polish state will be "a fast and effective step in order to correct information which has no basis in historic truth", as presented in the official justification. The only result of the adopted law for an accused person would be the threat of arrest of the defendant, which effectively would exclude him/her from public discussion in Poland. In consequence, the accused would not have an opportunity to confront his/her accusers or defend her/his opinions.

CONCLUSIONS

The Amendments to the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation revealed many of the weaknesses of this regulation and added new ones. The poor wording of the amendments has caused diplomatic tensions between Poland and its allies – mainly Germany, Ukraine, United States of America and Israel – as it has provoked legal doubts in light of international law. The principles of international responsibility were largely ignored, as well as the definitions of international crimes adopted in international law. Moreover, the newly introduced crime, with its imprecise wording and severe punishment, limits freedom of speech, which is one of the basic values protected in democratic states. Fortunately, work on changes of the amended Act has been undertaken and the Polish President decided to ask the Constitutional Tribunal to verify the consistency of the amendments with, among others, Article 2 of the Constitution of the Republic of Poland of 1997, which states: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice." It would be recommended to verify the content of the amendments also in light of Article 9 of the Polish Constitution, which states: "The Republic of Poland shall respect international law binding upon it."

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After submission of the article to the Polish Yearbook of International Law by the author, Articles 55a and 55b of the Act were repealed by the law of 27 June 2018 (Journal of Laws 2018, item 1277), adopted in a special (urgent) procedure.

On the same day a joint declaration of the Prime Ministers of the State of Israel and the Republic of Poland was adopted, which stated: "[w]e believe that there is a common responsibility to conduct free research, to promote understanding and to preserve the memory of the history of the Holocaust. We have always agreed that the term 'Polish concentration/death camps' is blatantly erroneous and diminishes the responsibility of Germans for establishing those camps." It also added: "[w]e reject the actions aimed at blaming Poland or the Polish nation as a whole for the atrocities committed by the Nazis and their collaborators of different nations. (…) We support free and open historical expression and research on all aspects of the Holocaust so that it can be conducted

without any fear of legal obstacles, including but not limited to students, teachers, researchers, journalists and – with all certainty the survivors and their families – who will not be subject to any legal charges for using the right to free speech and academic freedom with reference to the Holocaust. No law can and will change that."[34]

The passage of the amendments to the Institute of National Remembrance Law was warmly welcomed by the US Department of State, which issued a statement that: "[t]his action underscores Poland's commitment to open debate, freedom of speech and academic inquiry. The Holocaust and the crimes of the Nazis are an unspeakable tragedy in the history of Poland and mankind. We agree that phrases attributing responsibility to the Polish state for crimes committed by the Nazis on occupied Polish territory, such as 'Polish death camps', are inaccurate and hurtful. Such misrepresentations are best confronted through free and open dialogue."[35]

The linkage of adoption of the amendments to the law and the Polish-Israeli joint declaration proves that political arguments prevailed over legal ones as regards the shape of the memory law in Poland. However, the international discussion focused only on the criminal provisions, without focusing on the dangers related with other norms introduced in January 2018. The amendments of June 2018 repealed the most controversial articles of the January 2018 Amendments to the Act, which provided for criminal responsibility for a public, and factually inaccurate, attribution of responsibility to the Polish Nation or to the Polish State for the Nazi crimes committed by the German Third Reich. The June amendments were justified by the Polish government by the general aim of the law, which is the effective protection of the good reputation of the Polish State and Nation. According to Polish authorities, this aim may be achieved in civil procedures.

However, as was shown in this article, those provisions which establish civil responsibility for violation of personal interests of the Polish state and nation could also be considered as inconsistent with human rights standards, as they limit freedom of speech and scientific activity in a disproportional way and entitle NGOs to bring a lawsuit on behalf of the Polish state or nation. Moreover, the June 2018 amendments did not eliminate doubts concerning the wording of crimes covered by the Act on the Institute of National Remembrance, including "crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich."

Not surprisingly, Ukrainian authorities are not satisfied with the recent changes. (It should be noted that the amendments of January 2018 were condemned by the Ukrainian parliament for equalizing crimes committed by the Ukrainian Insurgent Army – OUN-UPA – with Nazi and communist crimes). In consequence, the Act on the Institute of National Remembrance still needs to be adjusted in order to be consistent with international law.

[34] Declaration available at: https://bit.ly/2NkbPik (accessed 3 July 2018).

[35] Statement by Department Spokesperson Heather Nauert – Legislation in Poland Regarding Crimes Committed During the Holocaust available at: https://bit.ly/2IRQWI8 (accessed 3 July 2018).

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Alexandra Xanthaki, Sanna Valkonen, Leena Heinämäki and Piia Nuorgam (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill-Nijhoff, Leiden-Boston: 2017, pp. viii, 351

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The rise of indigenous rights is undoubtedly one of the most significant developments in international law in recent decades. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), being the fruit of difficult negotiations between governments and indigenous peoples' representatives which lasted for over twenty years, was adopted in 2006 during the inaugural session of the Human Rights Council, and subsequently on 13 September 2007 by the UN General Assembly.[1] It consolidated a novel conceptualisation of the right to self-determination and established a universal framework of minimum standards for the survival, dignity, well-being, and rights of indigenous peoples, one that is assessed as having already contributed to the formation of principles of customary international law.[2] Unsurprisingly, culture and cultural heritage lie in the heart of the indigenous rights system. Indeed, the significance of cultural heritage for indigenous peoples refers to "a number of key factors, including its holistic nature; the central significance of land and resources; collective and intergenerational custodianship; and the importance of customary law."[3] Cultural heritage is fundamental for the collective identity and cultural distinctiveness of indigenous peoples, and for these reasons it has long been subjected to various forms of deliberate subversion, destruction, and misappropriation, primarily in the colonial context, profoundly affecting the social, economic and cultural development of these communities. The recognition of indigenous peoples' cultural rights, including the enhancement of their rights attached to cultural heritage and comprising the establishment of effective domestic mechanisms for redressing past injustices and wrongs, is gradually becoming seen as a matter of general international law.[4] In this respect, it has been underlined that "States are bound

[1] UN Doc. A/RES/61/295 (2007).

[2] *See e.g.* S.G. Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, 6(2) International Human Rights Law Review 242 (2017), pp. 244-254.

[3] A.F. Vrdoljak, *Reparations for Cultural Loss*, in: F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Oxford University Press, Oxford: 2008, p. 199.

[4] F. Lenzerini, *The Safeguarding of Collective Cultural Rights through the Evolutionary Interpretation of Human Rights Treaties and Their Translation into Principles of Customary International Law*, in: A. Jakubowski (ed.), *Cultural Rights as Collective Rights: An International Law Perspective*, Brill-Nijhoff, Boston-Leiden: 2016, pp. 151-152.

to recognise, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) and to cooperate with them in good faith – through all possible means – in order to ensure its preservation and transmission to future generations."[5] Importantly, such a cooperation requires full implementation of the processes of Free, Prior, and Informed Consent (FPIC), establishing bottom-up participation and prior consultation with indigenous communities, pursued through their own representative institutions. The FPIC of an indigenous community needs to be obtained prior to "adopting and implementing legislative or administrative measures that may affect" this community in all matters concerning their culture and cultural heritage.[6] In fact, both international and domestic law practice have recently evidenced important developments in this regard, albeit many challenges are still to be faced and legal questions yet unexplored.

The volume co-edited by Alexandra Xanthaki, Sanna Valkonen, Leena Heinämäki and Piia Nuorgam offers a selection of critical responses to major issues related to the effective governance of indigenous peoples' cultural heritage, given in a wide, multi-faceted, and comparative perspective, yet with special focus on Sámi cultural heritage. The major strength of this scholarly endeavour it its comparative approach and practice-oriented, aspirational focus on how existing legal frameworks can be used to accommodate and address indigenous peoples' cultural heritage interests. The volume stems from a conference organized in February 2015 by the University of Lapland in cooperation with the Office of High Commissioner for Human Rights and supported by the Unit for Human Rights Policy of the Ministry of Foreign Affairs of Finland. The conference contributed to a study on indigenous peoples' heritage,[7] embarked upon by the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), a subsidiary body of the UN Human Rights Council which provides it with expertise and advice on the operationalization of UNDRIP. In turn, the University of Lapland is one of the most important European research centres in the field of indigenous rights, with particular focus on indigenous communities living in the Arctic.

The book consists of fifteen analytical chapters, grounded on sound research into primary sources and approaching the topic of indigenous cultural heritage from distinct legal and policy angles. However, the entire collection of studies could benefit from a more developed introductory chapter. Ideally, this would explain and substantiate the choice of particular topics analysed in the book and its overall structure and the theoretical approach taken. In fact, the indigenous notion and the conceptualisation of cultural heritage is explicitly offered only in the introduction to the last chapter, "Reparations for Wrongs against Indigenous Peoples' Cultural Heritage", by Federico Lenzerini (p. 326). He quotes the statement by Mililani Trask, Leader of the Indigenous

[5] ILA, Resolution 5/2012, "Rights of Indigenous Peoples", 30 August 2012, para 6; available at <http://www.ila-hq.org/download.cfm/docid/6784224B-04C6-490A-A0724CC6BAF63838> (accessed 30 June 2018).

[6] Article 19 UNIDRIP; *see also* UN Doc A/HRC/30/53 (2015).

[7] UN Doc. A/HRC/30/52 (2015).

World Association,[8] who explains that the heritage of indigenous peoples needs to be seen in a holistic way ("regarded as a single integrated, interdependent whole") embracing "everything that defines our distinct identities as peoples." Importantly, it also includes their "socio-political, cultural and economic systems and institutions", as well as their beliefs, moral values, customary laws and norms, ways of life, use of land as well as traditional knowledge. Moreover, "[h]eritage includes human genetic material and ancestral human remains." It also includes that which indigenous peoples "inherited from nature such as the natural features in our territories and landscapes, biodiversity which consists of plants and animals, cultigens, micro-organisms and the various ecosystems which we have nurtured and sustained." Such a broad notion of cultural heritage, being the essence of indigenous peoples' understanding of culture, may clearly constitute a major difficulty for the legal operationalisation of indigenous heritage on both the international and domestic law levels. In this regard, some clarifications regarding the relationship between various "rights, debates, [and] challenges" (as worded in the volume's subtitle) can be found in the first chapter, entitled "International Instruments on Cultural Heritage: Tales of Fragmentation" (p. 19), by Alexandra Xanthaki. She rightly argues that "the current recognition of indigenous cultural heritage must penetrate all areas of international law", but it is undermined by its profound fragmentation into different, methodologically compartmentalised, areas of regulation. Xanthaki also advocates that "[t]he methodologies of the humanities on the concept, history and politics of cultural heritage are invaluable in adding context and depth when balancing conflicting rights and interests, but all discussions need to support and follow the indigenous viewpoints and voices on the issues." One can hardly agree more. This sentence appears to constitute the underlying idea of the entire volume.

Three contributions deal with more general issues relating to the international law framework for the enhancement and enforcement of indigenous peoples' rights in relation to their cultural heritage. Alongside the two chapters already referred to, a more general debate is also provided by Jérémie Gilbert, who convincingly promotes and analyses the emergence of an inherently collective right to cultural integrity. By referring to the jurisprudence and statements of various international human rights monitoring bodies, the treaty law of the International Labour Organisation (ILO),[9] and UNDRIP he argues that "[a]ll these markers are indicating the slow maturing of a right to cultural integrity, which would support a much more cohesive and holistic approach to cultural heritage" (p. 38). The full realisation of this right, as Lenzerini underlines in his article, requires proper mechanisms for redressing past wrongs and injustices through adequate reparation for the cultural harm suffered (pp. 344-346). Here the reversal of assimilation and genocidal practices via collective reparations involving the

[8] *See also* UN Doc. PFII/2005/WS.TK/5 (2015).

[9] *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (No. 169) (adopted on 27 June 1989, in force 5 September 1991) 1650 UNTS 383.

restitution of cultural property taken from indigenous communities should play a key role in recognising the cultural rights of indigenous peoples.

Next the analysis offered in the volume turns to more specific topics related to the indigenous concepts of collective property, confronted with prevailing legal institutions of property law. In this regard, Shea Elizabeth Esterling explains that indigenous peoples' remedial claims for grave violations of human rights and cultural claims constitute "respectively the cultural and remedial aspects of self-determination" (p. 324), challenging usual non-retroactivity nature of international law mechanisms for the return of cultural material. Three other chapters – by Daphne Zografos Johnsson and Hai-Yuean Tualima; Mattias Åhrén; and Elina Helander-Renvall and Inkeri Markkula – discuss the legal, conceptual, and methodological difficulties and shortcoming of current international and domestic legislation, and the legal scholarship with respect to protecting indigenous traditional knowledge and creativity. In their meticulous investigation of the most recent judicial, regulatory, and doctrinal developments, this group of contributions brings critically needed updates to the existing scholarship on indigenous heritage, property rights, and the use of territorial and natural resources.[10]

In turn, the two chapters by Stefan Disco, and by Leena Heinämäki, Thora Herrmann and Carina Green deal with the highly important issue of community participation of indigenous peoples in relation to the designation, management, and protection of World Heritage sites (with particular focus on the rights of the Sámi indigenous community). These contributions indicate the shortcomings of the existing international law system for the protection of cultural heritage of outstanding universal value on the one hand, and the realisation of the right of self-determination of indigenous communities concerning those sites and properties on the other. Both chapters stress the importance of procedural justice, which entails participatory forms of realisation of the rights of self-determination, thus contributing to a broader global debate on inclusive, participatory governance in cultural heritage. The discussion in this regard is complemented by the contribution by Anne-Maria Magga, who deals with another aspect of indigenous cultural heritage: traditional customary legal orders and governance systems, "with special focus on indigenous lands and livelihoods as an integral part of their cultural heritage" (273). Magga, by referring to a number of developments in regional human rights law, emphasises the role of community-based forms of governance in matters constituting the essence of collective, indigenous identity.

Finally, a group of five chapters provides a series of studies on the implementation of indigenous peoples' rights to cultural heritage on the domestic level: Sámi cultural heritage (chapters by Sanna Valkonen, Jarno Valkonen and Veli-Pekka Lehtola; Øyvind Ravna; and by Piia Nuorgam), as well as Inuit self-governance in Canada (Violet Ford), and Khoisan cultural heritage in South Africa' (Willa Boezak). These contributions

[10] In particular, *see* M. Åhrén, *Indigenous Peoples' Status in the International Legal System*, Oxford University Press, Oxford: 2016; J.Ch. Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?*, Springer, Cham-Heidelberg: 2013; K. Kuprecht, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond*, Springer, Cham-Heidelberg: 2013.

bring together various regional, historical, and political perspectives, with special focus on the implementation of ILO treaty law, the endorsement of UNDRIP, and the practices of domestic authorities in relation to tangible and intangible cultural heritage, self-governance, and land use.

Written with passion by a group of experts in the field of indigenous rights, this volume is a must-read for anyone interested in the current developments concerning the realisation and enforcement of these rights. The focus on indigenous Sámi communities renders the reading of this book particularly engaging for a European audience. while the wider international and domestic contexts are undoubtedly interesting for all readers working in the spectrum of disciplines associated with indigenous rights, including international human rights law, cultural heritage law, land rights, environmental law, and procedural justice.

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Bimal N. Patel, Aruna K. Malik and William Nunes (eds.), *Indian Ocean and Maritime Security: Competition, Cooperation and Threat*, Routledge, London and New York: 2017, pp. 164

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The ability of international actors to receive and maximize benefits from the oceans largely depends on maintaining maritime security. The UN Secretary General 2016 Report "Oceans and the Law of the Sea" identifies several threats to maritime security. These include: piracy and armed robbery at sea; transnational organized crime and terrorism; trafficking in persons and the smuggling of migrants; illegal, unreported and unregulated fishing; and other maritime activities that threaten global stability, security and prosperity.[1] The book under review identifies two basic threats in the Indian Ocean Region: (1) instability in some of the littoral and hinterland States around the Indian Ocean (mainly giving rise to terrorism and piracy); and (2) the rise of new naval powers in the Indian Ocean (China, India). Of course, there are many others in the region, but the authors seem to feel they are mainly of secondary characters.

The Indian Ocean is of great importance to the international economy and transportation. There are nearly 40 States around its littoral belt. The Ocean contains important minerals, which include tin, manganese, nickel, cobalt, gold, cadmium and natural rubber, and a wealth of resources that can be exploited. Thus, the coastal States have vigorously disputed their rights and entitlements to maritime areas (mainly exclusive economic zones as well as the inner and outer continental shelf) before international courts and tribunals.[2] The Indian Ocean also witnesses great transformations and changes. The straits of Hormuz, Malacca and the Bab-el-Mandeb constitute strategically-situated points on international shipping lanes, the safe passage of which is of paramount importance to international trade.

This book is written strictly from the Indian perspective. It is a compilation of articles devoted to various aspects of Indian maritime security. While the discussion on the significance of maritime security is a not recent occurrence, security on the Indian Ocean and the Indian perspective might seem in certain academic quarters to be a new challenge. The peninsular character of the State of India's territory and its long coastline naturally creates for India a large dependence on the Indian Ocean. Therefore, India's rising political and military position in the region and its corollary need to

[1] *Oceans and the law of the sea*, Report of the Secretary General, 6 September 2016, UN Doc. A/71/74/Add.1, at para. 36. *See* also *Oceans and the law of the sea*, UN General Assembly Res. 70/235, UN Doc. A/RES/70/235, chapter VIII.

[2] *See* ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 March 2012, case no. 16, [2012] ITLOS Rep.; PCA, *Maritime Boundary Arbitration between Bangladesh and India*, Permanent Court of Arbitration (PCA), Award of 7 July 2014; ICJ, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (pending).

safeguard Indian interests demands control of the seas. Achieving these aims – the book claims – should lie in the heart of Indian diplomacy and international policy. At the same time, the authors recognize the crucial role of international cooperation at the global and regional levels in combating threats to maritime security through bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats.

The great powers and their allies are steadily increasing their naval presence and their military capabilities in the region, and coastal States are also developing their military potential in the Indian Ocean. Throughout this book the authors underline the economic and political importance of the Indian Ocean, which they claim is gaining strategic significance throughout the whole of Asia. The competing rises of China and India, the potential confrontation between India and Pakistan, the United States' intervention in Afghanistan and Iraq, Islamist terrorism, piracy around the Horn of Africa, and the diminishing fishing resources constitute the main developments that make the Indian Ocean a significant part of the world seas. This book supports those who believe that the balance of world power is gradually shifting from Europe to Asia.

The book is divided into three parts. Part I focuses on the past, present, and future of the Indian Ocean. In the second chapter, K. Robinson describes China's involvement in the Indian Ocean Region and portrays China as the main rival in the forthcoming battle for dominance over the region, which until now has been regarded as an Indian stronghold. This chapter offers attention-grabbing insights into the maritime relations between India and China, as well as possible tensions which may arise over the use and exploitation of Indian Ocean Region's resources. It claims that China's main political objective is to prevent the emergence of rival powers, like India, within the region. Robinson argues that India should counter the actions of China by building its own position in the region and extending its economic and political influence over other littoral States, thus defying the Chinese "String of Pearls" strategy – a project aimed at encircling India in the Indian Ocean and drastically limiting its sphere of influence. Combating this strategy is clearly in the best interests of Indian security, including energy security. To the authors, India seems to be a natural leader in the region. Thus, the fight for control over strategic sea lines such as the Malacca Strait, control of which could allow for cutting off nearly all of China's energy supplies, is crucial in the event of conflict. More than 82 per cent of Chinese oil import travels to the Chinese mainland through the Indian Ocean and the Malacca Strait, into the South China Sea.[3] The two other articles in Part I generally share the same views.

Part II is devoted to those States with which India has special relations, while Part III discusses India's responsibility to the members of the Indian Ocean Rim Association with respect to countering China's growing influence. While it includes some observations

[3] Office of the Secretary of Defence, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2015*, https://www.defense.gov/Portals/1/Documents/pubs/2015_China_Military _Power_Report.pdf (accessed 30 June 2018).

on the US interests in the Indian Ocean region, unfortunately little space is devoted to the US presence in the region and US-India relations. All of the authors focus mainly on various aspects of maritime security, hence their remarks overlap to a certain extent. The last Part starts with a piece concerning piracy off the coast of Somalia, which provides the reader with basic information regarding piracy in the Horn of Africa, presenting it as an imminent and serious threat to maritime security. The author of this piece is correct in saying that the Somalian piracy is a land-based problem and can only be curbed from there.

A special chapter in the context of the China element is aptly devoted to the Indo-Japanese strategic relationship. Japan has a geostrategic interest in having secure and uninterrupted routes in the Indian Ocean. Japan, as an archipelago State, heavily depends on maritime trade for the importation of raw materials and food for its industry and society. Free, safe, and easily accessible maritime lanes also ensure energy security. To this end, Japan built a naval base in Djibouti in 2011. Moreover, the chapter also discusses – contrary to its title – India's relations with Russia and the threat to Indian interests posed by the cooperation between China, Iran, Pakistan and Russia. To counter the growing Chinese power and its relations with the above-mentioned States, both India and Japan have tightened their bilateral cooperation, including economic and military relations. This chapter is both interesting and thought-provoking. Some may think that the Indo-Japanese strategic cooperation is indispensable in light of the growing power of China, while others may claim that the need for strategic Indo-Japanese relations is optional, as there are other ways to counter Chinese strength in the region.

The last chapter concerns India's relations with ASEAN. One of the major concerns is terrorism, and thus both sides have established anti-terrorism cooperation, and India and ASEAN signed an agreement to share information and to co-ordinate their actions. Moreover, India is also pressing for maritime defense cooperation with ASEAN navies. Military security is connected with cooperation in terms of energy and food security. This chapter underscores that mutual cooperation between the two sides in the above fields can only be a win-win situation. It seems that India and the ASEAN states are natural partners who may effectively fight off possible Chinese domination.

The book seems to be a collection of pieces of advice for the Indian Government concerning to how to address the manifold security dilemmas in the Indian Ocean Region, as well as identifies the main challenges for India now and in the future. The authors urge India to use its diplomacy and economic capabilities to secure good trade relations and enlarge its sphere of influence. China's behavior in the South and East China Seas illustrates its aggressive attitude vis-à-vis the defence of Chinese interests. India needs to respond appropriately by creating its own "Chain of Diamonds" and establish firm links with various partners in the Indian Ocean Region. To this end, India should ramp up its naval military capabilities. It needs to invest in modernization of its navy and coastal defense. It should cooperate with other naval powers, especially with the United States, so that eventually China will recognize India's leading role in the Indian Ocean Region. Clearly the authors' hope is that India can become the

predominant power in the region. Owing to its structure, to some extent various chapters of the book duplicate pieces of advice given and comments concerning the present and future international policy of India.

It seems that there are certain elements in the complex concept of maritime security that are missing in the book. For example, an independent chapter regarding the Indian attitude towards the North Korean crisis would be welcome. Also, it is difficult to ascertain whether and how India should cooperate with the United States in the Indian Ocean Rim, even though it is common knowledge that the United States is not an ally of China. In addition, little space is devoted to the questions concerning the prevention of illicit activities on the sea, including organized crime, drug and arms smuggling, human trafficking and maritime terrorism, as well as the future of regional cooperation in the Indian Ocean. Perhaps this reflects the need for the Indian Ocean Rim states to find mechanisms for addressing the issues of maritime security by establishing a peaceful zone of commerce and energy security. The enhanced sharing of information among those States should cover, *inter alia*: the detection, prevention, and suppression of such threats; the creation of effective and uniform national legislations to prosecute offenders; the need for sustained capacity-building to support such objectives; and respect for international law.

To summarize, this book has a number of strengths. The authors must be applauded for taking up an interesting and complex subject. The practical examination of the various aspects of maritime safety in the Indian Ocean presents an in-depth analysis and compels the reader to rethink the whole concept of security in the Indian Ocean Region. The breadth of issues discussed demonstrate that the authors fully committed themselves to the subject matter, and this book delivers a compelling anatomy of Indian interests in the Indian Ocean Rim. In addition, the book is both a satisfactory stand-alone resource as well as a point of departure for a more detailed discussion of various aspects of maritime safety, including the relations between the growing powers in the Asia region.

Naturally it is not possible in a short review of such a book to comment in detail on every aspect of maritime security. But hopefully it follows from this brief description that the book under review is a well-researched work. The authors do not avoid thorny issues and confidently present and defend their views. I would venture to conclude that anyone with a genuine interest in the maritime safety and security in the Indian Ocean would identify with this book and regard it as a good work. Thus I expect that this book will find its way onto many shelves of those dealing with maritime security at sea.

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Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, pp. 1488

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Since the dawn of history, aggression has constituted the most serious crime a State could commit against another State. However, only after the First World War did the international community recognize that the crime of aggression should be penalized as a crime that affects not only the sovereignty of a State but also constitutes a criminal act against the population of that State, which suffers from the scourge of war. The regulation of the crime of aggression was also present in the discussions during the Rome Conference on the International Criminal Court (ICC) Statute. Even though States could not reach agreement upon the regulation of aggression during the Conference, immediately afterwards a Preparatory Commission was established which commenced drafting the appropriate amendments to the Statute.[1] The culmination of these efforts was Resolution RC/Res.6 of 11 June 2010, adopted by consensus during the Kampala Review Conference, which introduced Article 8 *bis*, as well as Articles 15 *bis* and *ter* to the Rome Statute, granting the Court jurisdiction over the crime of aggression.[2]

Even though there is a rich scholarship surrounding these provisions, the book under review – *The Crime of Aggression: A Commentary*, edited by Claus Kreß and Stefan Barriga - claims to be the only commentary to the regulations introduced to the Rome Statute by the Kampala Conference. At the same time, it is much more than that. It offers not only insightful and detailed perspectives on the crime of aggression, both from the theoretical and the practical standpoints, but also presents the history of the regulation of aggression under general international law and criminal law, discusses examples from selected national legislations, as well as indicates the links between international criminal law and extra-legal factors like politics and morality. It is not the monumental volume of the book, but first and foremost its content - examining every aspect of the crime of aggression - which makes it, as promised in the Foreword by Christian Wenaweser and Zeid Ra'ad Zeid Al-Hussein, the authoritative guide for anyone interested in developments in international criminal law. However, as always in the case of any book containing contributions by many authors and covering a wide variety of topics, there are some minor inaccuracies or ambiguities, which however do not deprive the book of its value.

The book has fifty-three chapters in total, in addition to the concluding personal memoire by Benjamin B. Ferencz. This impressive number of topics concerning the

[1] *See* S.A. Férnandez de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 2 Fordham International Law Journal 25 (2010).

[2] Available at: https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf (accessed 30 June 2018).

crime of aggression is grouped into five Parts, devoted to the history of the penalization of aggression; theoretical issues; the crime of aggression under current international law; regulation of the crime of aggression under the national law of different States; as well as the future world order with regulation of the crime of aggression.

Part I of the book starts with the input by Kirsten Sellars concerning the first attempt to launch a criminal proceeding against a State's leader, Wilhelm II, for committing the crime of aggression. Next the crime against peace is discussed, which Carrie McDougall, the author of this chapter, claims is essential to understand the current provisions of the Rome Statute, as well as the heritage of the Nuremberg International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE). The chapter contributes not only to the understanding of the crime of aggression, but also to the undefined notion of "war" as used before 1945, the history of the term "aggression", as well as the model of responsibility applied to defendants before the above-mentioned tribunals. Thus, what may be confusing is the title of the chapter – the 'crime against peace' is in fact mentioned only a few times in the chapter, and while it could serve as a good reason to discuss important issues connected with the crime of aggression, the chapter is rather focused on the legacy of the IMT and IMTFE. Since the very next chapter, also by Kirsten Sellars, is devoted to the dissenting opinions to the IMTFE judgment, these two chapters together form a coherent narration. The next chapter of this Part, authored by Thomas Bruha, examines the work upon the definition of aggression by the UN GA. The ensuing one, by Nicolaos Strapatsas, concerns the practice of the UN Security Council (UN SC) regarding the concept of aggression and offers an interesting and detailed examination of the UN SC resolutions which refer, or could potentially refer, to the crime of aggression. Next Dapo Akande and Antonios Tzanakopoulos make an interesting observation on the practice of the International Court of Justice (ICJ) concerning the crime of aggression and argue that, despite the fact that the ICJ never qualified the unlawful use of force as an act of aggression, its jurisprudence, especially including its discussion of the prohibition of the use of force and armed attack, is important for understanding of the notion of aggression. James Crawford, the former Chairman of the Working Group on a Draft Statute for the International Criminal Court, discusses the International Law Commission's work on aggression. In the final chapter of Part I, Roger S. Clark gives an account of the negotiations on the Rome Statute.

The second part of the book, focused on theoretical aspects, starts with an interesting comment from Larry May on the links between the 'just war' theory and the crime of aggression. The chapter by Florian Jeßberger on the modern doctrinal debate over the crime of aggression includes an engaging account of the origins of this discussion. Next Astrid Reisinger Coracini and Pål Wrange explore the most important traits of the crime of aggression. Part II closes with a thought-provoking chapter by William A. Schabas on aggression and human rights, wherein he discusses, *inter alia*, the right to peace, and also touches upon the indifference of human rights non-governmental organizations (NGOs) towards the works on regulation of the crime of aggression.

The third, and the core part of the book, concerns the crime of aggression under current international law. The opening article of this part by Leena Grover offers guidance for judges on the interpretation of the regulation of the crime of aggression as included in the Rome Statute. The most elaborate chapter of this part, authored by the book's editor Claus Kreß, is an insightful, detailed, and engaging analysis of the State conduct element. The author meticulously discusses all elements of the crime of aggression as defined in the Rome Statute, also offering an analysis of many related side issues, like the use of force, consent for the use of force, term "international relations", the collective security system, the right to self-defence, and many others. In the next chapter, Roger S. Clark points out aspects connected with individual conduct that contributes to the crime of aggression and general principles of international criminal law. Then Stefan Barriga and Niels Blokker discuss the transitional provisions and the entry into force of Article 15 *bis* and 15 *ter*. The next two chapters focus on the conditions for the exercise of jurisdiction based on the UN SC referrals, State referrals, and *proprio motu* investigations. They are followed by a chapter on immunities, authored by Helmut Kreicker, which provides a brief overview of the topic of immunities. What is missing in this chapter is perhaps a more profound analysis of particular cases when domestic courts have faced difficult questions on immunities. H. Kreicker does refer to the ICJ judgment in *Jurisdictional Immunities of the State*[3] and observes that, according to the ICJ, State practice does not allow for bringing civil law actions against States before the courts of foreign states, denying the existence of a customary international law exception to State immunity in cases of crimes. At the same time however, he claims that "it would be wrong to deny a criminal law exception to state immunity simply by referring to this decision of the ICJ." Unfortunately the author does not refer to some important domestic court judgements to support his findings, such as Judgment no. 238 of the Italian Constitutional Court of 2014, which clearly rejected the option that Italian judges may be obliged to comply with the ICJ *Jurisdictional Immunities* judgment, finding that such an approach "requires that Italian courts deny their jurisdiction in case of acts of a foreign State constituting war crimes and crimes against humanity, in breach of inviolable human rights."[4] Thus, a reference to this domestic case law would be beneficial not only for the coherence of the article, but also could help build up the author's arguments. In the next chapter, Pål Wrange discusses in detail domestic prosecutions and the principle of complementarity, providing insightful remarks not only on these issues from the perspective of the crime of aggression, but also more generally on complementarity, the *par in parem non habet imperium* principle, the notion of jurisdiction, and many others. Next Eleni Chaitidou, Franziska Eckelmans and Barbara Roche provide an account of the judicial function of the pre-trial division of the ICC. Finally, in the last chapter of this part Erin Pobjie explores, in an engaging way, the problem whether individuals as well as States may be victims of the crime of aggression under the Rome Statute.

[3] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Rep. 2012, p. 99.

[4] Available at: https://bit.ly/2qnKfWN (accessed 30 June 2018).

Part IV of the book is devoted to regulation of the crime of aggression under domestic law, discussing in detail examples of legislation from such States as Croatia, Germany, Estonia, Russia, the United Kingdom, and then, much more generally, the Arab States' attitude towards the crime of aggression. This is followed by a chapter which briefly examines also the domestic law of some of the Asian States (e.g. Tajikistan, Kazakhstan, Uzbekistan, Mongolia, Vietnam, India, Pakistan, Bangladesh, Sri Lanka). Unfortunately, the choice of States' domestic regulations to be examined in the book is not accompanied by any explanation why the Authors of the book decided to explore precisely these domestic legislations. One may ask, for example, why the Polish national legislation was not explored in the book, as among the examples of civil law national regulations presented in the book, the Polish instance would be the only one which does not refer explicitly to the "crime of aggression", as Article 117 of the Polish Criminal Code's chapter, titled "Offences against peace, humanity, and war crimes", penalizes the crime called "wojna napastnicza" (literally translated as "a war started by assault").[5] Moreover, Poland has a rich case law in this respect, dating from the 1940s.[6] Thus the Polish example could be very interesting, given that a State on which initiative the League of Nations adopted the Declaration concerning wars of aggression[7] and is one of the few States which has procedural experience in this regard, yet currently does not have a regulation concerning the crime of aggression.[8] The final Chapter of this part, authored by Astrid Reisinger Coracini, offers an extended synopsis of the crime of aggression under domestic criminal law which, as the title of the chapter suggests, extends the analysis far beyond the examples discussed in previous chapters. Once again however, this part of the book seems to lack precise organization, as this final chapter not only expands upon but also highlights considerably different issues than those discussed in the previous chapters. Here one may mention the section entitled "The Arab Model Law for Crimes within the Court's Jurisdiction", which not entirely overlaps with the chapter on the legislation of the crime of aggression in the Arab World.

The final part of the book, titled "Crime of aggression and the future world order" is divided into two subsections: "Actor's views" and "Scholarly reflections." The first of these subsections provides an account of the Kampala Conference and of the regulation of the crime of aggression in the ICC Statute from the high governmental officials from

[5] "Wojna napastnicza" is sometimes translated as "aggressive war." However, "aggressive war" in Polish would be "wojna agresywna", while the Polish Criminal Code stipulates the crime of "wojna napastnicza" ("wojna" – war, "napastnicza" – caused by an assault). "Aggression" is thus a broader term than the "assault", given the Article 3 definition of aggression contained in UN GA Resolution 3314 (XXIX) (Annex).

[6] *See* P. Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, Abingdon: 2013, pp. 182-188.

[7] Declaration concerning wars of aggression, Resolution adopted by the Assembly on September 24th, 1927, A. 119.1927.IX.

[8] It should be noted that the Polish legislation is mentioned in Chapter 31, in the section 31.3.1.1, p. 1055, although this section erroneously enumerates Poland as among "twenty states [which] implemented aggression as a crime under customary international law", while in fact, as stated above, the Polish Criminal Code does not mention aggression.

different States, each presenting their viewpoint on the topic.[9] Thus, the reader may learn the stance of such States as Brazil, China, France, Germany, India, Iran, Israel, Japan, the Republic of Korea, Norway, Russia, South Africa, the United Kingdom, the United States and Egypt. Despite the fact that these chapters certainly constitute a very interesting input and provide material that every academic would find valuable, once again one may question the lack of the Central European perspective. The final chapter of this subsection focuses on the views of civil society, presenting the attitudes of different NGOs. Finally, subsection B, which presents the reflections of scholars, includes articles by Martti Koskenniemi, Jeff McMahan, Frédéric Mégret, Jens David Ohlin and David Scheffer. Here one can enjoy the discussion of the overlapping areas of the law of the use of force and international criminal law (e.g. the articles of Jeff McMahan and Martti Koskenniemi); on the inseparable links between international law and politics (Martti Koskenniemi's contribution); on killing from the perspective of law and morality (Jens David Ohlin's article); as well as on the proposition of amending the regulation of the crime of aggression under the ICC Statute (David Scheffer's article).

The Epilogue of the book presents the personal memoire by Benjamin B. Ferencz, titled "The Long Journey to Kampala", which contains a fascinating account of Professor Ferencz's experiences as the Chief Prosecutor in the *Einsatzgruppen* case during the Nuremberg trials, and the comparison of those experiences with the drafting of the regulation on the crime of aggression in the Rome Statute. The memoire is a must-read for every lawyer who seeks to understand the essence of international criminal law.

To summarize, the book edited by Claus Kreß and Stefan Barriga offers an engaging narrative which explores every aspect of the crime of aggression, as it discusses not only theory and history, but also as many practical aspects as possible. It will certainly find a well-deserved place on the shelfs of many practitioners and academics. What may constitute a drawback is that some chapters overlap, stressing different elements, which may leave the reader confused about what deserves emphasis. Moreover, the choice of national legislations discussed in the book seems to be too selective and in particular, as pointed out, ignores the Central European standpoint. However, given the ambitious nature of this work these are minor drawbacks, and the book should be wholeheartedly recommended.

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[9] However, the majority of these chapters include a note that the views expressed therein "do not necessarily represent those of the government" of the respective State.

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Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars*, Edward Elgar Publishing, Cheltenham: 2017, pp. 260

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While the number of international armed conflicts (IACs) has significantly decreased after the Second World War, it is a truism to say that the vast majority of modern armed conflicts consist of non-international armed conflicts (NIACs), or in other words: civil wars. In the aftermath of the second round of the U.S.–led allied missile strikes in Syria, it has also become a new truism that the vast majority of modern NIACs are accompanied by the intervention of foreign states in support of one or more parties.

Even though for lay persons the depiction of the actual situations in countries like Libya, Mali, Syria or Yemen as wars seems obvious and accurate, in legal terms their proper classification is far from clear and certain. Especially when the intervention of a foreign state in support of one or more of the parties may result in parallel armed conflicts taking place in the same territory, the internationalization of a NIAC between a territorial state and a non-state group or reclassification of hostilities between a territorial state and a foreign state from an IAC to a NIAC. This is all the more important given that the adequate classification of a conflict under the regime of international humanitarian law (IHL) constitutes a key matter for proper application of the norms protecting the victims suffering from the hostilities, determining the acceptability of means of warfare and establishing the regime of belligerents' responsibility.

Noam Zamir provides a comprehensive and concise analysis of the issues concerning conflict classification, with particular focus on the impact of foreign state interventions in the internal affairs of states engaged in a NIAC. The presentation of the normative framework of conflict classification, supported by a well-argued contribution to the scholarly discourse of IHL, is the incontestable added value of his work. It is worth noting that his theoretical undertaking is pertinent not only to the development of the IHL doctrine but also to the practice of states.

Zamir's work is based on two hypotheses. First, the classification of conflicts must be supported by a factual analysis of the identity of the belligerent parties to the conflict and the existence of hostilities. Second, it should reflect the eagerness of the majority of states to broaden humanitarian protection to all kinds of armed conflicts, without impeding their sovereign right to put an end to rebellions or other internal disorders and to prosecute non-state group members through their own system of justice.

Moreover, his analysis is solidly intertwined with state practice, a feature that is too often overlooked in some doctrinal works. This research is highly commendable given the difficulties of making a proper analysis of state practice, resulting from the ambiguous language used by states (such as "operations" or "an armed conflict short of war") and the lack of consistent and published classifications of specific conflicts,

which is exacerbated by political motives and the hardships surrounding practical assessments.

The author's reasoning is well structured and praiseworthy. The book is divided into eight chapters, each of which deal with a specific angle of the subject of research, at the same time forming a coherent whole. The very construction of individual parts of the book and chapters testifies to the author's well thought-out argumentation and mastery of materials. Each of the chapters follows the same structural logic: introduction, presentation of the problem, doctrinal findings, case law, state practice, the author's *de lege ferenda* propositions, and conclusions. The author's careful construction is especially visible when it comes to the footnotes, which refer the reader to the individual chapters discussing a particular issue and thus help avoid unnecessary repetitions and contributes to the logic of the reasoning. As a result, the reader is able to follow the theoretical argument and at the same time enjoy the pleasure of reading.

Another noteworthy practice is the author's inclusion in the introductory chapter of a compact glossary of the terms that are used throughout the book, which simultaneously consist of notions that are not without controversy in the IHL doctrine, such as "civil wars" and "internationalisation." Given the complex and highly theoretical division of belligerents under IHL, Zamir organizes them and divides them into three categories: territorial states, foreign states, and non-state groups. One would be tempted to say that at the end of the glossary there is only one thing missing: corresponding diagrams showing the configurations of the analysed conflicts, taking into account the characteristics of belligerents' activities and the subsequent classification of the conflicts.

Chapter 1 presents the historical development of the international ramifications of the distinction between conflicts since the origins of IHL, and enables the author to formulate his first hypothesis: that of states' willingness to broaden the humanitarian protection to include internal wars with simultaneous respect for right of sovereigns to deal with internal disorders and exercise justice towards rebels under their domestic law. Chapter 2 examines the normative framework of the distinction between IACs and NIACs by inferring three aspects that distinguish between these two kinds of armed conflict: 1) different actors; 2) a different threshold of applicability; and 3) different applicable norms.

The next chapters (3, 4, 5 and 6) discuss different configurations of actors involved in an armed conflict and the resulting classification of the conflict. Chapter 3 deals with cases where states intervene directly, using their own forces in support of one of the sides to a civil war. Chapter 4 analyses the case of indirect foreign intervention, such as the supply of training and funds to one of the sides in a civil war. Chapter 5 examines the representation of states and the reclassification of ongoing armed foreign interventions vis-à-vis governmental change(s). Chapter 6 explores those foreign states' armed interventions which are conducted under the auspices of international organisations.

One of the most interesting parts is Chapter 4, in which the author analyses when indirect interventions constitute a use of armed force that can trigger an armed conflict between the foreign state and the territorial state or the non-state group, and what kind

of links are required between a foreign state and the non-state group to internationalise an armed conflict between the territorial state and the non-state group. This issue is of great importance to IHL doctrine, which is not clear when it comes to the determination of what constitutes a use of force, and what's more, what kinds of indirect interventions constitute a use of force. Despite the rather common agreement among scholars that acts like providing funds, logistical support in the form of the intelligence or military supplies, and training to one party in a conflict can constitute cases in which the foreign country is deemed to be waging war, there is virtually no state practice to back this argument (with the isolated example of the conflict in Georgia in 2008). Zamir rightly points out that this issue is illustrative in highlighting the well-discussed gap between the theory and practical application of IHL, while at the same time showing the great power of international tribunals' jurisprudence and scholarly writings in substantiating the IHL despite the lack of state practice. The reluctance of states to acknowledge internationalisation can be understandable in the terms of their internal policy and security, nevertheless the author rightly emphasises that at this stage of IHL development, arguing against the concept of internationalisation is like "tilting at windmills" (p. 149).

Chapter 7 presents a case study of the armed conflict(s) in Yemen since 2015, clarifying and exemplifying arguments examined in the book. If some criticism is due it would concern the discussed examples of civil war. The author analyses the most recent civil wars (in Yemen, Syria, Libya and Mali), which is laudable given that since the 1970s the character and legal ramifications of NIACs, notably due to the development of the case law of the international tribunals, has evolved and some of the previous views in the doctrine no longer correspond to reality. Nevertheless, there is one conflict missing, i.e. the one currently taking place in Ukraine. The wide scope of the author's contribution would be even more complete if he had examined the case of the annexation of Crimea by the Russian Federation in 2014. It seems that his thoughts on the matter would be of great interest, especially to readers from neighbouring countries of the Russian Federation. Nonetheless, the book gathers arguments that are usually raised on the occasion of a singular analysis of a specific conflict, and his comparative method makes his book a valuable and distinctive work.

Finally, as was noted above Zamir's book constitutes not only an important contribution to the doctrine of IHL, but it also deals with issues that are crucial for practitioners. It swiftly and succinctly presents the interests of those territorial states that are probably most concerned with the consequences of foreign state intervention in their internal affairs, and develops the one virtually unstoppable issue of modern IHL – the internationalisation of NIACs due to foreign state interventions.

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Cheryl Lawther, Luke Moffett and Dov Jacobs (eds.), *Research Handbook on Transitional Justice*, Edward Elgar Publishing, Cheltenham: 2017, pp. 576

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During the last few decades one can observe a dynamic growth of the processes of transitional justice. The beginnings were rather modest, but with growing emphasis on accountability for committed crimes and no impunity for the perpetrators of grave crimes, the practice of transitional justice has become more sophisticated. Today there are a considerable number of debates concerning the question of what transitional justice is, what it should look like, and the role of transitional justice towards the community, while at the same time numerous mechanisms of transitional justice have been/are applied in practice. International criminal tribunals, truth commissions, or "justice for victims" are perceived as elements of the current legal landscape. Transitional justice is widely accepted both as a field of expertise and a field of practice.

After the fall of "Iron curtain" and the wars in former Yugoslavia and Rwanda, the question of how to manage with reconciliation, protection of victims, protection of human rights, and at the same time the responsibility of the state and criminal investigations and punishments levied against perpetrators of crimes began to arise anew. Transitional justice mechanisms tend to operate on many different levels and with a diversity of approaches and fulfil their goals from many different angles, which include, *inter alia*, reconciliation, criminal responsibility, historical justice, reparations, and truth seeking, all of which in the broader perspective tend to consolidate the new democratic order of a given state.

The book edited by Cheryl Lawther, Luke Moffett, and Dov Jacobs entitled *Research Handbook on Transitional Justice* addresses the problem of transitional justice in different legal, political, and historical contexts. It presents the underlying concepts of transitional justice (Part I), the actors in transitional justice (Part II), the mechanisms of transitional justice (Part III), and the practice of transitional justice (Part IV), devoting 25 chapters to focusing on the problem of transitional justice in this broad (more than 500 pages), insightful study of the issue.

The first part is of an introductory and sketchy character and it takes into account the issues of the historical development and geographical roots of transitional justice, addresses its main problems or "growing pains", and also refers to the criticism directed towards transitional justice and its local dimensions (J.R. Quinn, *The Development of Transitional Justice,* pp.11-34; C. Turner, *Transitional Justice and Critique*, pp. 52-74, D.N. Sharp, *Transitional Justice and 'Local' Justice*, pp. 142-158). Also in this part, T.O. Hansen discusses the developments of transitional justice and points out those contexts which cannot be assessed in a static and uniform manner, but rather demand dynamic recognition of their mechanisms and their usefulness in certain contexts of time and

space (*The Time and Space of Transitional Justice*, pp. 34-50). As noted, this part takes a general approach, which is especially visible in the contribution of F. Mégret and R. Vagliano, who take into account human rights law in the context of transitional justice. The authors underline that human rights must be perceived on one hand as facilitating and empowering the transitional processes, while at the same time limiting the measures that could be undertaken in the name of transitional justice on the other hand, and subsequently discuss mechanisms shaped by the human rights law such as amnesties, reparations, restitutions and so on. Being so general in scope, this contribution leaves certain contexts only touched upon, without an in-depth analysis. While this is perhaps justified, as this part is obviously of an introductory character, it does leave the reader unsatisfied. For example, the context of amnesties as described by Mégret and Vagliano is treated very superficially. The authors do not distinguish between different types of amnesties, they do not proffer which amnesties are legitimate, nor do they note that amnesties may be applied both before a prosecution and after, and that for example blanket amnesties applied a few years after a prosecution pose completely different issues than a blanket amnesty applied before any justice was done, or even in place of such justice. The authors fail to point out that there is a difference between amnesties for political offences and amnesties relating to international crimes, and that these latter are the real problems for the ICC in its practice (happily the question of amnesties is developed broadly in the third part of the book by T. Hadden, *Transitional Justice and Amnesties*, p. 359).

The second part of the book is dedicated to different actors in the transitional justice process, although no one contribution is specifically dedicated to states. (The fourth part of the book refers to the practice of states but takes into account only a few examples). Other subjects recognized as actors (not necessarily legal ones) include international institutions, social society, and the media. In the second part A. Davidian and E. Kenney refer specifically to the United Nations and its contribution to different areas of transitional justice (*The United Nations and Transitional Justice*, pp. 185-201). The authors explore the normative standards for its work, focusing on the UN's added values to the field. What is actually missing in the chapter is the other side of the same coin, specifically the inability, or unwillingness, of the UN to act in support of various processes of transitional justice. One might expect from the authors of the contribution a more critical assessment of cases in which the UN did nothing, or where its actions even worsened the situation. I am also personally critical of referring generally to the policies of "the UN" as a whole, as whether we wish it or not different policies govern, for example, the actions of the Human Rights Council and those of the Security Council.

Other mentioned actors include the International Centre for Transitional Justice as representative of the non-governmental organisations (S. Dezalay, *The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Centre for Transitional Justice*, pp. 202-220); civil society (H. van der Merwe, M. Schkolne, *The Role of Local Civil Society in Transitional Justice*, pp. 221-244); the media (R. Hodzic, D. Tolbert, *Media and Transitional Justice: A Dream of Symbiosis in a Troubled Relation-*

ship, pp. 286-301); and victims (L.E. Fletcher, H. Weinstein, *Transitional Justice and the 'Plight' of Victimhood*, pp. 244-266). With reference to victims, the most striking part of the contribution is the one referring to the responses of transitional justice to victims. The authors describe in a very comprehensive way institutional responses to victims, such as international criminal tribunals, truth commissions, reparations, lustration measures, and also examine the geographical determinants of transitional justice responses. Moreover, the authors provide an intellectual contribution to the concept of victimhood and in a very engaging way discuss the narratives of the transitional justice responses, referring to the concepts of victimhood and victim-centeredness and underscoring that place of the victim "as the central moral force if transitional justice."

The third part is focused on the mechanisms of transitional justice and refers, *inter alia,* to the International Criminal Court, hybrid tribunals, various commissions, amnesties, lustration and vetting, and reparations. J. Gallen (*The International criminal Court: In the interests of transitional justice?*, pp. 305-327) addresses the role of the ICC and notes that although it could definitely be recognized as a transitional justice institution, its ability to support its processes will always be limited due to its limited financial and institutional resources and the absence of international pressure. In this context Gallan critically assesses the position of Security Council, which threatens not only the legitimacy and effectiveness of the Court, but also its ability to support victims. No matter how great are our expectations as to the role of the ICC, it will never constitute a sufficient response to the legacy of great violations of human rights, and it must be supported by the other mechanisms. In the chapter *Transitional justice and the end of impunity: hybrid tribunals* (A. Fichtelberg, pp. 328-341), the author refers to other tribunals which can be perceived as other institutions and alternative programs of transitional justice, examining whether they provide significant benefits for transitional justice. Hybrid courts are in a unique position, as by including certain domestic components they represent the locality, which makes them more acceptable for the local community. Subsequently, by being a part of transitional tools they help to establish other legal institutions in states with a poor infrastructure, and they also help to build trust in the works of such institutions. The author notes that while on one hand such tribunals can be deemed failures because they have prosecuted so few perpetrators, on the other hand they can be helpful in establishing reconciliation, protecting human rights, or even strengthening the rule of law. Ch. Lawther, in her contribution entitled *Transitional justice and truth commissions* (pp. 342-357), refers to the role of truth commissions in the context of victims, perpetrators and structural actors, the latter of which concern the actions and omissions of groups who in some fashion contributed to or engaged in the violations, such as a church, the media, the educational sector, etc.

In her chapter, C. Harwood (*Contributions of International Commissions of Inquiry to Transitional Justice*, pp. 401-423), briefly addresses the question of commissions of inquiry as fact-finding mechanisms and their practices and achievements by, for example, identifying those individuals responsible for committing crimes, or armed groups, suspected perpetrators, etc.

The last part takes into account the practice of transitional justice in Guatemala, Cambodia, Palestine, and Central and Eastern Europe. While States were not mentioned in the second part of the monograph as actors of transitional justice, this presentation of the practice of selected states without doubt takes a closer look at the policies of some selected states. At the same time however, this part is also very rudimentary, as it concerns only the practice of a few states. The last section refers to the experience of half of Europe in just 20 pages (L. Stahn, *Transitional justice in Central and Eastern Europe*, pp. 508-529), which definitely calls for a broader and more thorough examination, especially that in many instances these processes are still ongoing. Certain states appear in this contribution almost solely as statistical data. This is probably not the flaw of the author however, but most likely reflects a problem of the accepted convention for this collection of essays.

This monograph is definitely worth examining for several different reasons. Its added value must be seen primarily in its utility, because of the collection's practical orientation. Moreover, it is worth reading because of the diversity of the authors (they are not all lawyers and the book is not solely a legal treatise) and because it provides a unique perspective from each and every author of the book.

The core idea of the book is to use a transitional justice as an umbrella concept under which different institutions, mechanisms, and actors are presented. By showing the process of transitional justice as a tool, the book serves different scientific contexts, bringing the theoretical and practical debates to a more accessible level, and contributes to the understanding of legal, political, and sociological discourses and the interaction between different areas and actors on the interdisciplinary level.

Aside from some minor mistakes (for example footnote 42, page 18), the book can be treated as a guide to exploring the question of transitional justice, and it is quite visible that the editors had a holistic concept in mind when thinking about the conventions of their collection, and it includes a really remarkable number of ideas providing a reader with a timely and practical introduction to the issue of transitional justice.

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