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2020

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Władysław Czapliński

EDITORIAL

One of the former directors of the Institute of Law Studies of the Polish Academy of Sciences, who was also the previous Editor-in-Chief of the Polish Yearbook of International Law, used to say that being in one's 40s is the best age for scientists: one has already learned everything, and yet still has the power and will to share this knowledge with others.

We have the pleasure and honour of introducing Readers to volume XL of the Polish Yearbook of International Law, in the form of a jubilee edition. It is always difficult to prepare a laudation for one's own work. It seems that the Yearbook is entering its best years (interestingly the majority of its editors are also in the corresponding age bracket), but we can be very proud of the work that has been done over the past 50 years.

Poland always had much to say in the domain of public international law. It was quite a natural development that Polish international lawyers began publishing a law journal that on one hand would make it easier for them to publish important texts in English (an international lingua franca), and on the other hand would allow them to disseminate the legacy of Polish international legal writing in the world. The Polish Yearbook of International Law has fulfilled both tasks.

The Yearbook commenced at a difficult time in the late 1960s; a time indeed not favourable for Polish authors. However, we have succeeded in overcoming the political, financial, technological and other obstacles. Step by step the Yearbook has developed, and subsequent editors' ambitions were focused on raising the rank of the journal and making it recognizable and present in the world of science. We have succeeded in introducing the Yearbook not only into leading libraries, but also in most important global databases (including most recently the prestigious Scopus database), and we are doing our best to follow the technological developments. We were particularly happy when the Yearbook was quoted in judgments of the International Court of Justice.

As part of the current jubilee volume, we also pay special tribute to Prof. Janusz Symonides, the former editor-in-chief of our Yearbook (1976-1985), who passed away last year. Prof. Symonides was a well-known Polish jurist and diplomat, specializing in human rights, the Law of the Sea, protection of cultural heritage, and international relations. He was one of the Polish representatives during the work on the Convention on the Law of the Sea, an expert of the OSCE, a conciliator of the Montego Bay Convention, and Director of both the Polish Institute of International Affairs and the Division

of Human Rights, Democracy, Peace and Tolerance at UNESCO. He was also a prolific author, with his textbooks still being taught at Polish universities.

The current volume includes several texts which discuss the ideas that preoccupied Prof. Symonides, refer to his scientific achievements, or deal with other issues relating to his academic and diplomatic work.

We hope that our current Readers will stay with us and new Readers will join us – at least in this 40th anniversary volume of the Yearbook – in taking an active part in these difficult and turbulent yet fascinating times for international lawyers.

Warsaw, Summer 2021

JUBILEE ARTICLE

Pavel Šturma
The Role of Yearbooks of International Law in the Central European Countries

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*Pavel Šturma**

THE ROLE OF YEARBOOKS OF INTERNATIONAL LAW IN THE CENTRAL EUROPEAN COUNTRIES

Abstract: *Yearbooks of international law are publications common to many countries. The present contribution aims at presenting the argument that the yearbooks in the Visegrád countries play an extremely important role for the national academia and its identity and visibility in the globalized world. The argument is justified by an excursion to the common history of the academia in these countries, in particular during the years of communist régime and the transformation in the 1990s. The lack of specialized journals and other publications on international law in English, together with the internal and external stress on publication activities, makes them very precious.*

Keywords: academia, doctrine of international law, publications, Visegrád countries, yearbooks

INTRODUCTION

The present contribution examines the role of national yearbooks of international law from the Visegrád (V4) countries' perspectives. It seems that the theoretical and methodological background of this contribution is anchored in comparative international law. This recent approach in international legal doctrine rightly reflects the fact that international law, despite its quest for universalism (meaning both universal values and universal application), is largely influenced by and depends on national approaches.[1]

If international law is what international lawyers make of it and how they interpret it, then it is necessary to look at the developments of academia in this part of Europe. It also makes sense to focus on the modern history rather than on the older times. In spite of the very interesting personalities and works in the more distant past, the contemporary approaches to international law can be best explained against the background of the past 70 years.

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[1] *See* A. Roberts, *Is International Law International?*, Oxford University Press, Oxford: 2017.

This article posits that the emergence and/or renewal of yearbooks of international law should be seen in a comparative perspective and against the background of the conditions for legal research and publishing in the Central European countries. Such an approach makes it possible to test the hypothesis that the yearbooks in the V4 countries play an indispensable role for the national academia and its identity and visibility in the globalized "invisible college of international lawyers."[2]

One may start with the question: Are there any common traditions in academia of the V4 countries before and after 1990? To answer this question the study has to take into account that the countries under scrutiny have shared the common tradition of legal culture in Central Europe, which emerged mainly from the Austrian (and partly German) culture. While 1918 meant a discontinuity with the old regime (i.e. the Austro-Hungarian monarchy) in politics and diplomacy, it was not such a sharp break when it comes to legal culture and education. Indeed, the newly-acquired statehood of the nations under review (except for Hungary) created an opportunity for the development of education and research in national languages and for opening new universities and law faculties, which eventually made possible the emergence of nation-based doctrines of international law. Nevertheless, with the exception of the Slovakian academia (which only emerged during the first half of the 20th century), they were able to build on older traditions.

By contrast, the post-1945 developments – and in particular the victory of communist regimes in Czechoslovakia, Hungary and Poland – gave rise to elements of discontinuity. During that period, and especially in the 1950s, law in general, including international law, was not considered a matter of priority. This led to a limitation on the number of law students and sometimes even of the faculties of law. For example, in Czechoslovakia, the number of law faculties was reduced to two (in Prague and Bratislava).

At the same time however, the research was not actually discontinued but was largely removed from universities to the Institutes of Law (or Legal Sciences) of the nation-wide Academies of Sciences. Although they could sometimes refer to older traditions, they were reconstructed under the Soviet model. It is fair to admit that this however had some advantages, as in most cases, in particular in the 1960s, these academic Institutes provided for better conditions and sometimes even greater academic freedom for researchers.

1. ACADEMIA AND THE ACADEMIES: THEIR ROLE IN EMERGENCE OF INTERNATIONAL LAW PERIODICALS

There is a kind of parallel development in the V4 countries. The Czechoslovak Academy of Sciences was established in 1952 and its Institute of Law in 1955 (via

[2] To borrow the term from the well-known O. Schachter, *The Invisible College of International Lawyers*, 72 Northwestern University School of Law Review 217 (1977).

a merger of several units focused on legal research). The Slovak Academy of Sciences came into existence in 1953, when the Institute of State and Law was established. Similarly, in Poland the Institute of Law Studies was established in 1956 on the basis of two already-existing departments of the Polish Academy of Sciences. Finally, the Hungarian Academy of Sciences, while it referred to its origins in the Hungarian National Academy from 1831, was transformed by law in 1949 into a Soviet-type Academy. This enabled the emergence of the Institute for Legal Studies during that period (since 1951). Obviously these Institutes, together with similar institutes in other countries of Eastern Europe, had close relations. Academic cooperation among the researchers in the same field has always been quite natural. Moreover, it was strengthened by a certain separation (if not rivalry) between the Academies of Sciences and universities and the limited possibility for cooperation with colleagues in the West.

The situation changed in the 1990s due to the fundamental political changes in the region, including in the countries examined herein. This led to, *inter alia*, an increase in the number and role of universities that became the main centers of both education and research. This shift seems to have been more important in the humanities and social sciences than in the natural sciences. At the same time, Academies of Sciences in all V4 countries underwent a more or less deep reform and continued to exist, maintaining their existence as Institutes of Law or Law Studies, although in a reduced form. From this perspective, the Institute of Law Studies of the Polish Academy of Sciences in Warsaw is the largest institution in comparison with the other institutes in Prague, Bratislava and Budapest. It has benefited from the largest number of researchers and maintained its influence in the Polish academia. The institutes of the Czech Academy of Sciences (the successor of the Czechoslovak Academy since 1993) and of the Slovak Academy of Sciences have survived the transformation period in 1990s on the same premises, but with reduced budgets and a reduced number of research fellows.

The role of the academic Institutes of Law has been mentioned here because it has also played an important role in the establishment and development of yearbooks and other periodical publications on international law. They need to be highlighted in view of their significant place among academic publications in the field of international law. Here again, a comparison of such publications in the four countries shows, perhaps not surprisingly, many common or parallel features but also some differences.

2. A LONG WAY TO THE CONTEMPORARY YEARBOOKS OF INTERNATIONAL LAW

The yearbooks and journals of international law in the V-4 countries have had a complicated history. This is particularly true for the publications in Czechoslovakia and its successor states. The first of them was the Journal for International Law (*Časopis*

pro mezinárodní právo), published in the Czech language by the publishing house of the Czechoslovak Academy of Sciences in Prague from 1957 until 1971. This journal, with its four issues per year, received submissions/contributions on both public and private international law from the leading Czech and Slovak academics and practitioners. Its quality, in particular in the 1960s, was comparable to foreign journals of international law. It was discontinued for political reasons after the suppression of the democratic reform movement (the so-called "Prague Spring") by the Soviet intervention in 1968, because some articles or their authors became unacceptable.[3]

The second periodical that existed in Czechoslovakia in the past was Studies in International Law (*Studie z mezinárodního práva*), published by the same publisher "Academia" in Prague. This was a different kind of publication, more similar to a yearbook than a journal, and also appeared less regularly (mostly one volume per year). The Studies in International Law accepted longer texts on various topics of public and private international law, and even on EC law, which was a little known branch of law in socialist Czechoslovakia before 1990. Although most contributions came from Czech and Slovak authors and were written in their mother tongues, the Studies also accepted, in particular in the 1980s, contributions written in other languages (English, French, and German) and even by foreign authors. This trend became stronger in the late 1980s. However, the story ended with volume 23 of Studies in 1990. This time, the reason for the discontinuation was not political but economic in nature. The first years of the economic transformation and the breakthrough of the market economy in the early 1990s brought about a disruption, or at least major financial problems, for publishers of academic publications.

It is a kind of paradox that the Czech and Slovak international lawyers had more opportunities to publish in their specialized periodicals in Czechoslovakia in the 1960s or 1980s than in the free, democratic and economically-growing Czech Republic. Therefore, some international lawyers who felt strongly that this gap would put the Czech doctrine of international law in a marginal position in comparison to their foreign colleagues decided to come out with the project for the Czech Yearbook of Public and Private International Law (CYIL).[4] It was established by the Czech Society of International Law (CSIL) in 2010. It appears regularly in autumn of each year, having already published 11 volumes by the end of 2020. The latest issue, which appeared in December 2020, includes a thematic section on "The 70th Anniversary of the European Convention on Human Rights."

[3] *See e.g.* A. Čepková, *Pakty – nový standard lidských práv* [Covenants – a new standard of human rights], 12 Časopis pro mezinárodní právo 365 (1968); G. Mencer, *K pojmu a podstatě intervence na pozvaní* [On the concept and substance of the intervention on invitation], 13 Časopis pro mezinárodní právo 2 (1969); G. Mencer, *Ius cogens a zásada nevměšování* [Ius cogens and the principle of non-intervention], 13 Časopis pro mezinárodní právo 162 (1969)

[4] *See* www.cyil.eu. *Cf. also* P. Šturma, *Czech Yearbook of Public and Private International Law on the Occasion of Its 10th Anniversary: Achievements and Perspectives*, 50 Netherlands Yearbook of International Law 111 (2019).

This Yearbook is published by the CSIL in conjunction with the Czech-German publisher RWW. Unlike the previous Czechoslovak publications on international law (i.e. the Journal and Studies), it does not have institutional support from any university or the Czech Academy of Sciences.[5] However, it plays an important role in the small but dynamic Czech community of international lawyers. The Boards of the CSIL and its Czech Yearbook aim at maintaining their inclusive character, involving members from both the academia (mainly the Law Faculty of Charles University but also other academic institutions) and the practice (in particular, the Ministry of Foreign Affairs).

Quite similarly, even the smaller Slovak Society of International Law has also produced its own publication, the Slovak Yearbook of International Law (Slovak Yearbook).[6] It commenced with its first volume already in 2008. In its early years, the Slovak Yearbook accepted articles not only in English but also in Czech or Slovak. Later, it turned into a fully English language publication. As of the time of this writing, its latest issue was volume VIII (2019), and volume IX (2020) is forthcoming. A distinctive feature of the Slovak Society and its Yearbook is the fact that for a considerably long time the driving force behind the activities stayed within the Ministry of Foreign Affairs rather than in the several faculties of law in Slovakia.[7]

Obviously, thanks to the traditional and intense relations between the respective Czech and Slovak academics of international law, there are regular contributions of Slovak authors in the Czech Yearbook and, to a lesser extent, Czech contributions in the Slovak Yearbook. In both countries the respective Yearbooks have filled a gap that had lasted for many years, a gap which was mainly due to the lack of specialized journals of international law.

By contrast, there is a continuity of publishing the Polish Yearbook of International Law. It is a scientific journal established officially in 1966 and published by the Institute of Law Studies of the Polish Academy of Sciences and the Committee on Legal Sciences of the Polish Academy of Sciences, owners of the title.[8] It is noteworthy, however, that the initiative to create that Yearbook came from the Polish Branch of the International Law Association (ILA) rather that from the Academy of Sciences. The first issue appeared in 1968, and this year (2021) the PYIL will mark a milestone with its publication of volume XL. The focus of the Yearbook is on public and private

[5] Except for a modest grant (subsidy) to the Czech Society of International Law for its publication activities from the Council of Scientific Societies of the Academy of Sciences of the Czech Republic.

[6] *See* www.syil.sk.

[7] For instance, the Editor-in-Chief of the SYIL and Vice-president of the Slovak Society is Dr. Metod Špaček, who was the director of the International Law Department of the Slovak Ministry of Foreign Affairs. The other key members of the Board come from the faculties of law of University of Trnava and Pan-European University in Bratislava, respectively (i.e. Assoc. Prof. Dagmar Lantajová and Assoc. Prof. Katarína Šmigová).

[8] *See* https://pyil.inp.pan.pl/; *cf. also* L. Gruszczynski, K. Wierczyńska, *Polish Yearbook of International Law: A History of Constant Change and Adaptation*, 50 Netherlands Yearbook of International Law 266 (2019). The authors are managing co-editor and deputy editor-in-chief of the Polish Yearbook. Both of them are either current or former fellows of the Institute of Law Studies.

international law as well as European law. As in past years, the Polish Yearbook is still published by the Institute through the Warsaw academic publisher Scholar. Indeed, the epistemic community of international lawyers in Poland is larger than in of the other Central European countries. This fact, together with its continuity of existence and institutional support, explains why the Polish Yearbook has an ambition to play the leading role in that region.[9]

The situation in Hungary shows certain similarities, but also some differences in relation to the other countries. In the past, the Hungarian Branch of ILA and the Hungarian Academy of Sciences (HAS) and its Institute for Legal Studies initiated and ensured the publication of Questions of International Law. It was a publication somewhat similar to the then-Czechoslovak Studies in International Law. Between 1962 and 1991, the Akadémiai Kiadó (HAS publishing), in cooperation with the Dutch publisher Sijthoff, produced several volumes of studies in English. The second series finished in 1991 with volume 5, edited by prof. Hanna Bokor-Szegö. All in all, it was a less- than-regular (i.e. annual) publication, but it may be considered, *cum grano salis*, as a predecessor of a yearbook. Like the Czechoslovak Studies, the publication of Questions was discontinued in the early 1990s during the difficult years of economic transformation in all Central and Eastern European countries.

It thus happened that the Hungarian Yearbook of International and European Law[10] was created later than the Czech and Slovak counterparts; only in 2013. However, similarly to those countries, the long period of discontinuity and the increasing number of scholars specialized in international and EU law in the universities (Hungary has eight Faculties of Law now) may be among the reasons why the Hungarian Yearbook did not maintain links to the HAS Institute for Legal Studies. Instead, it was established by a group of younger professors of international law and EU law at the Pázmány Péter Catholic University, Faculty of Law in Budapest.[11] It appears regularly in English and is published by Eleven International Publishing in The Hague. Like the Czech and Polish yearbooks, the Hungarian Yearbook is also published in both print and electronic versions. The latest issue of the Hungarian Yearbook was volume 8 (2020), which includes a thematic chapter on "New Tendencies in the Law of Foreign Investments in European Law and Public International Law."

3. FUNCTIONS AND IMPACT OF THE YEARBOOKS

One may ask why this contribution pays special attention to the phenomenon of Yearbooks in the four Central European countries? It is because they not only play

[9] Gruszczynski and Wierczyńska, *supra* note 8, pp. 274-275.

[10] *See* https://hungarianyearbook.com

[11] *See* M. Szabó, *The Past, Present and Future of the Hungarian Yearbook of International Law and European Law – An Evolving Story*, 50 Netherlands Yearbook of International Law 169 (2019). The author, editor-in-chief, is professor of European law at Pázmány Péter Catholic University.

a very important role for the international law academia inside these countries, but also for the presentation of national doctrines abroad. To assess their role among other similar publications in Europe and in the world, it is not sufficient to compare these four yearbooks with the other yearbooks in international law. There are at least three points that need to be taken into account.

First, all the above-mentioned yearbooks, perhaps with the exception of the Polish one, are younger than the "model" yearbooks in the West. It would be rather ambitious to attempt to compare them with the well-established and renowned examples, such as the British Yearbook of International Law (established in 1921), the German Yearbook of International Law (formerly Jahrbuch, since 1948), or Annuaire français de droit international (since 1955). Even some "smaller" national yearbooks (e.g. the Netherlands Yearbook or the Finnish Yearbook) have a longer history and a more stable institutional background. However, at least from the point of view of volume (i.e. number of articles or pages), some issues of the new yearbooks (in particular the Czech or Hungarian ones) can easily compete with their older Western "brothers."

Second, and more importantly, now all the yearbooks around the world have to face the problem of their identity and impact. On the one hand, they compete with the others, namely law journals and electronic mediums, which are much faster in presenting and sharing new information and ideas among members of the epistemic community of international law. On the other hand, the yearbooks and their authors, both in the West and in the V4 countries, have to face the overwhelming dictate of the formalistic scientometric ranking of periodicals. There is a well-known discrepancy between the traditional position and recognition of a given journal and yearbook in its country (or even internationally), i.e. its factual impact, and the formal ranking used for establishing the so-called "impact factor" of the articles, which plays an important role in the academic evaluation.[12]

Of course, there is a growing resentment among lawyers toward this kind of ranking, which basically comes from the practice in natural sciences. However, since the academics are not able to change the externally-imposed rules and criteria, they have to try and live with them. This was the driving force that pushed the editors of some yearbooks (firstly the Czech one, later the Polish) to seek and obtain admission to the Scopus. Although this does not ensure for their yearbooks the top ranking, which is reserved only to journals indexed in the Web of Science, it has placed them within the second best category of journals. Indeed, in a situation when no single law journal in a country belongs to the top rank, the position of these yearbooks has improved. This may as a consequence lead to an increased number of articles submitted for peer review.

Third, and finally, the role of yearbooks in the V4 countries is highlighted by the fact that they are usually the only periodicals specialized in international law and one

[12] The paradoxes of ranking were aptly described by Jan Klabbers, *On Yearbooks*, 50 Netherlands Yearbook of International Law 46 (2019).

of few law journals in the respective countries published in English. This is the case not only in the Czech Republic[13] and Slovakia,[14] but also in Hungary[15] and even Poland.[16] In a sense, they play the dual role of journals and yearbooks of international law. In combination with the limited number of "top" international law journals in the US and Western Europe, which makes it extremely difficult for authors from the "semi-periphery" countries in Central and Eastern Europe to get their articles published therein, the national yearbooks provide a very precious opportunity for publication.

This means that these yearbooks present mainly a publishing platform for members of a national community of international lawyers wishing to present their theoretical or practice-based contributions to an international public. At the same time, they should not be and are not closed, but rather are open to foreign authors.[17] This is not only a formal requirement for the appropriate ranking, but also an inherent quality of any good journal or yearbook.

In addition to scholarly studies and articles, the yearbooks also present documents and information on the respective state practice of international law, book reviews, and surveys of the bibliography of authors who belong to the national academia. This seems to be an equally valuable source of information, even in the era of Internet, because documents and publications in languages other than English (and possibly some other internationally-used languages, such as French and Spanish) remain unknown to foreign specialists. This is a common fate shared by authors from countries with "languages of limited distribution', who are usually obliged to split their teaching and publication activities between English and their mother tongues. Most of them, with the notable exception of a few expats who are established in the academia or law practice abroad, have not resigned from the use of their native languages. They feel it is important to maintain and develop international legal terminology and to communicate information in a way accessible to both law students and other lawyers in the country.

All in all, the national yearbooks of international law in the V4 countries are far from being considered as historical or outdated kinds of publications. Quite to the contrary, they are future-oriented projects and play a key role in the integration, presentation,

[13] In the Czech Republic, only two other journals, namely The Lawyer Quarterly (TLQ) in Prague and International and Comparative Law Review in Olomouc, accept articles in English on a regular basis. On some occasions, the Charles University Law Review – *Acta Universitatis Carolinae Iuridica* – also publishes contributions in English. *See* AUCI, Vol. 66, No. 4 (2020).

[14] In Slovakia, the Slovak Yearbook was, when established, the only law journal in English. Since 2017, the *Bratislava Law Review* (BLR) has been published in electronic form by the Faculty of Law of Comenius University in Bratislava.

[15] In Hungary, there is only one printed journal, in addition to the Hungarian Yearbook, which regularly accepts articles in English, i.e. the law journal launched by the HAS under the title *Acta Juridica Hungarica* / Hungarian Journal of Legal Sciences. However, there was also an e-journal Miskolc Journal of International Law, run by Professor Péter Kovács (Editor-in-chief) who left the Miskolc University for the ICC. The journal was closed in 2012 with the final issue of Vol. 9, No. 1.

[16] In Poland, there are a few other journals, such as the Polish Review of International and European Law and the Comparative Law Review.

[17] This feature is typical, in particular, for the Czech Yearbook and the Polish Yearbook.

and promotion of small, diversified, but rising communities of international lawyers in each of the countries. At the same time, they offer a chance to publish to foreign colleagues. Indeed, they have to face many challenges, such as financing constraints, costs of print and distribution, new technologies, and the like. Some of the Editorial Boards need to decide whether the Yearbook should be published in the country or moved to one of the international publishing houses. While the maintenance of such publications requires a tireless effort and constant adaptation, the yearbooks in the V4 countries seem to be gaining strong positions.

SPECIAL SECTION

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*Władysław Czapliński**

REMARKS ON *ZASADA EFEKTYWNOŚCI W PRAWIE MIĘDZYNARODOWYM* [PRINCIPLE OF EFFECTIVENESS IN INTERNATIONAL LAW] BY JANUSZ SYMONIDES: ON THE ANNIVERSARY OF THE CONCLUSION OF THE POLISH-GERMAN TREATIES OF 1950, 1970 AND 1990

Abstract: *The present article combines some reflections on the late Prof. Janusz Symonides' most interesting book on the concept and role of effectiveness in international law (Zasada efektywności w prawie międzynarodowym, UMK, Toruń: 1967), with reflection over the anniversaries of the most important Polish-German treaties which not only constituted the basis for bilateral relations between Poland and Germany, but were also of importance for East-West relations. The analysis that follows deals mostly with the significance of effectiveness in the context of boundaries and their recognition, as well as with nationality. The article shows that most of the concepts and ideas of Prof. Symonides still remain actual today.*

Keywords: border treaty, effectiveness, Germany, international law, Poland, Symonides

INTRODUCTORY REMARKS

The year 2020 marked the passage of 70 years since the conclusion of the Zgorzelec/Görlitz Agreement between Poland and the German Democratic Republic (GDR) on the delimitation of the existing state border; 50 years since the conclusion of the Treaty between Poland and the Federal Republic of Germany on the normalization of mutual relations; and 30 years since the conclusion of the Treaty between Poland and the (united) Federal Republic of Germany (FRG) on the confirmation of the border between them. Another Polish-German agreement: the Treaty on good-neighbourly

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relations and friendly cooperation, oriented toward the future relations between the two States, was signed in 1991. Thus, the border dispute that had been in progress since World War II (WWII) came to an end. The dispute formed one of the axes of conflict between the Eastern bloc and the democratic (or free) world.

The legal conflict between Poland and the GDR and FRG played an important role in the development of the Polish international legal thinking. Generations of lawyers presented reflections on the legal status of the territorial dispute and its consequences. In this contribution we focus on the Polish legal writings,[1] as a rule omitting works by German authors. Polish lawyers played a somewhat reactive role in the Polish-German dispute, largely confining themselves to polemics with various theses presented in the (West) German doctrine. On the other hand, a characteristic feature of the German position was the fact that it was based on the judgments of the Federal Constitutional Tribunal of 1973 and 1975, which greatly strengthened the normative foundations of the legal position of Germany, but on the other hand made the German arguments quite homogeneous and repetitive. An important and impressive number of publications on the legal status of Germany after WWII were published in Germany – one could get the impression that once a year every German scholar in law was expected to write a study on general or specific aspects of this issue. The responses of Polish authors were definitely less numerous and were intended to refer to particularly important and/or interesting aspects of the border dispute. Inasmuch as the positions of the Polish and German authors differed in a fundamental way – in fact there were almost no common points between them – it would be difficult to describe the exchange of views as a discussion. The situation changed only after 1989, when it became obvious that the condition of German reunification, that was to achieve the most important political goal of the West, had to be reconciled with the existing territorial order in Central Europe.

[1] A. Klafkowski, *Umowa poczdamska z dnia 2.VIII.1945* [The Potsdam agreement of 2 August 1945], PAX, Warszawa: (1st ed.) 1960, (2nd ed.) 1986; M. Lachs, *The Polish-German Frontier. Law – Life and Logic of History*, PWN, Warszawa: 1964; K. Skubiszewski, *Zachodnia granica Polski w świetle traktatów* [The Polish western border in the light of the treaties], Instytut Zachodni, Poznań: 1975; L. Gelberg, *Normalizacja stosunków PRL-RFN. Problemy polityczno-prawne* [The normalization of PPR-FRG relations. Political and legal problems], Książka i Wiedza, Warszawa: 1978; L. Janicki, *Republika Federalna Niemiec wobec terytorialno-politycznych następstw klęski i upadku Rzeszy* [Federal Republic of Germany and territorial and political consequences of the defeat and fall of the Reich], Wydawnictwo Poznańskie, Poznań: (1st ed.) 1982, (2nd ed.) 1986; W.M. Góralski (ed.), *Przełom i wyzwanie. XX lat polsko-niemieckiego traktatu o dobrym sąsiedztwie i przyjaznej współpracy 1991-2011* [The breakthrough and challange. 20 years of the Polish-German treaty on good-neighbourly relations and friendly cooperation], Dom Wydawniczy Elipsa, Warszawa: 2011 (in particular the chapter by J. Kranz, *Polsko-niemieckie kontrowersje prawne – próba syntezy* [Polish-German legal controversies – an attempt as assessment], p. 477); W. Czapliński, B. Łukańko (eds.), *Problemy prawne w stosunkach polsko-niemieckich u progu XXI wieku* [Legal problems in Polish-German relations at the beginning of the 21st century], Wydawnictwo Naukowe Scholar, Warszawa: 2009; J. Barcz, *Dwadzieścia lat stosunków między Polską a zjednoczonymi Niemcami. Budowanie podstaw prawnych* [Twenty years of relations between Poland and united Germany. Building legal foundations], Dom Wydawniczy Elipsa, Warszawa: 2011.

The monograph of J. Symonides, which is focus issue of the present article,[2] was not linked to the legal dispute between Poland and the FRG *per se*, but was devoted to purely international legal issues. *Prima facie* it corresponded with another monograph on international law published some years later by B. Wiewióra,[3] however the subject of that study was only indirectly linked to the Polish-German conflict. Finally, the essential object of the conflict was to recognize the final character of the Oder and Neisse border. In this context, the question arises as to whether the choice of topic, research issues, and the arguments of J. Symonides had any influence on shaping the Polish legal position in relations with the FRG. Of course, it must be recalled that the book by Symonides was published in 1967, i.e. before the government in the Federal Republic was taken over by the Social Democratic Party, which initiated a new Eastern policy under Chancellor W. Brandt, and that the Polish-German legal dispute reached its apogee in the mid-1970s. It is all the more interesting to look at the possible use of the principle of effectiveness in discussions with the German doctrine.

1. LEGAL POSITIONS OF POLAND AND GERMANY IN THE DISPUTE CONCERNING THE BOUNDARY ON THE ODER AND LAUSITZER NEISSE RIVERS

The present author does not intend to present the legal positions of both countries in detail, so we refer to the most important elements. The Polish legal position referred primarily to the results of the Potsdam Conference, treating the instrument adopted within its framework as an international agreement constituting the basis of the post-war European order. The conference participants had the right to decide about the shape of post-war Germany, including its borders. This stemmed from the unconditional surrender of Germany, which was more than just a military surrender, but included the submission of the entire state to the will of the victors. The legal expression of the seizure of power over Germany by the Allied powers was the Berlin Declaration of 5 June 1945.[4] In it, the powers announced the assumption of supreme power over Germany, with a reservation that they did not intend to annex Germany. Hence the victorious

[2] J. Symonides, *Zasada efektywności w prawie międzynarodowym* [The principle of effectiveness in international law], UMK, Toruń: 1967.

[3] B. Wiewióra, *Uznanie nabytków terytorialnych w prawie międzynarodowym* [Recognition of territorial acquisitions in international law], Instytut Zachodni, Poznań: 1961.

[4] A key text of the Declaration reads as follows: "The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany. The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of

Allied powers had the competence to organize the Potsdam Conference and adopt territorial regulations there, including the administration of the territory of Germany. On the same day, the Allied Control Council of Germany was established to organize life in Germany after the war. The Berlin Declaration posed the question of whether Germany survived as a state following the military capitulation and the collapse of state power, which is, after all, one of the elements of the definition of a state. Two views clashed in the Polish literature. According to the first of them, the German Reich collapsed as a state in 1945; according to the second, the collapse came with the establishment of two German states, East Germany and West Germany in 1949. However, as a new state, Germany could not question the border on the Odra and Neisse rivers established in the Potsdam Agreement. There was scant reference in the Polish legal doctrine to the view of the continuity and identity of the Federal Republic of Germany with the German state established in Versailles in 1871, known as the German Reich.

According to the Polish position, the Potsdam Agreement settled in a binding fashion the legal situation in the areas transferred by the Allied decision to Poland. Firstly, the Agreement established that the former German eastern territories were transferred to the Polish administration, even if it provided that the final fate of these areas was to be determined by the future peace settlement.[5] Secondly, the competence of the Allied Control Council of Germany did not extend to the territories transferred to Poland and the USSR. Third, the demarcation between Poland and the USSR in the territory of the former East Prussia was to be made on the basis of an agreement between these countries, excluding any competences of Germany in this respect. Fourthly, the agreement provided for the resettlement of German people from Poland (as well as from Czechoslovakia and Hungary) to Germany, i.e. to the four occupation zones and Berlin. The first argument cited is of particular interest. In the Polish doctrine of the 1960s, there was a view that the concept of administration was in fact tantamount to a transfer of sovereignty, which was meant to result from the English understanding of the expression "administration." The subsequent international legal practice (for example in relation to Mostar or Kosovo in the 1990s) does not support such an interpretation. It also seems important that in the Polish legal writings, as well as in the social sense, in the late 1940s there was a widespread view that the Potsdam regulation was not final at all, and German ownership of the property would be returned to former owners after the land was returned to Germany. Relics of such thinking could still be found in the practice of the Third Polish Republic, whereby in regulating ownership matters, the government of Prime Minister L. Miller proposed a differentiated treatment of property in the pre-war territory of the Republic of Poland and the former reclaimed lands, in connection with the transformation of

any area at present being part of German territory," available at: https://en.wikisource.org/wiki/Berlin_Declaration_(1945) (accessed 30 May 2021).

[5] In relation to Germany, the Potsdam Agreement used the term "peace settlement," unlike it wording with respect to the allies of the Reich, in respect of which a peace treaty was envisaged. Thus, the regulation with regard to Poland differed from that applied to the Königsberg area. In this case, the transfer to the USSR was intended to be final, and the Allied powers declared their support in the future peace settlement.

perpetual usufruct into the right of ownership. This is all the stranger as, according to the 1997 Constitution, the territory of the Republic of Poland is indivisible and uniform.

The legal position of Germany was broadly developed and internally coherent. It was based on the thesis that the German state had survived the military surrender,[6] military occupation, and the creation of two German states within some weeks of each other in autumn 1949. The German Reich[7] continued to exist after WWII as a passive subject of international law, unable to act under international law. The FRG was identical with the Reich (albeit only partially identical as to its territory).[8] The Potsdam Agreement (or any other inter-Allied agreement on Germany) was not binding on the German state as *res inter alios acta* – Germany did not participate in the Potsdam Conference. The existence of the German state (including its borders) was guaranteed by the rights and responsibility of the four powers for Germany as a whole, which rested with the Allies. Any decisions on German territory could only be taken by the German sovereign after the reunification of Germany. The 1950 agreement in Zgorzelec between Poland and the GDR was irrelevant as far as the legal status of the former German Eastern territories (FGET) was concerned. Since the sovereignty over the FGET remained with the German state, Poland – which was in charge of these areas – had no right to change their ownership structure. Private property should remain in the hands of the original owners, and any expropriation carried out by the Polish administration was subject to indemnity. The maintenance of the special status of former German Eastern territories led to the introduction by the FRG of a specific structure of the territorial triangle. All territories were divided into foreign areas (*Ausland*), the internal territory of the Federal Republic of Germany (*Inland*), and neither foreign nor FRG areas from the perspective of West German legislation. The latter included the Polish western and northern territories.

The territorial changes after WWII were clearly linked to population changes. The FRG did not accept the legality of the resettlement of the German population from Poland, Czechoslovakia and Hungary to post-war Germany (which included both German states and Berlin). It also claimed that a German minority remained in the former German Eastern Territories. This was a certain manipulation. Indeed, the concept of a "German minority" was based not on an ethnic, but on a political and legal criterion. Art. 116 of the German Basic Law (Constitution) defines the concept of "German," which is linked to German nationality. According to the Federal Law (based on the Law of 1913 on the nationality of the Reich), a German was any person who had German nationality, even if they had no direct link with the German state.

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[6] Effects of the surrender were in that way restricted to purely military issues, separating them from a demission of the government of chancellor K. Doenitz.

[7] Terminology used in German practice and writings in order to describe German statehood (Reich, Germany, German State, FRG) shows a certain confusion.

[8] The concept of partial identity was a significant weakness in the legal position of Germany. From the point of view of international law on the succession of states, the identity of the state means the identity of international rights and obligations, not the territory, population and state authority. If Germany was identical to the Reich, it could, through its international law activities, change the legal situation of the German state.

From the perspective of the FRG, its relations with the GDR were specific. They were not international, but so-called inter-German. According to the FRG, the division of Germany into two states was of a temporary nature. An expression of these special relations was evident in, among other things, the protocol to the Treaty of Rome on inner-German trade, which aimed at the removal of barriers to the movement of goods between the German states.[9] This opened the way for East German products to enter the EEC market – which, of course, communist propaganda was ashamed of. The idea of special relations between the FRG and the GDR was maintained by the Federal Republic both under the so-called *Alleinvertretungsanspruch* (claim to sole representation), known as the Hallstein doctrine,[10] and after 1973, following the entry into force of the normalization agreement between the two German States.

The dispute over the legal nature of the border on the Odra and Nysa was of key importance for the political conflict between the Eastern and Western blocs in Europe. J. Kranz, writing about specific legal solutions, stated that Poland, in the context of its border with Germany, had become a hostage in the game for the reunification of Germany. This was probably not exactly the right analysis and conclusion. I would risk the thesis that Germany was willing to accept the loss of the FGET (as evidenced by the conclusion of the standardization treaty in 1970), but it could not do so because it would thus lose an important legal link between the two German countries. On the other hand, the Chancellor of the FRG, H. Kohl, offered several ambiguous opinions about the recognition of the Polish western border in the period preceding the reunification of Germany, which in turn would confirm the thesis of J. Kranz.

2. J. SYMONIDES' POSSIBLE INPUT TO THE LEGAL POSITION OF POLAND

2.1. Effectiveness and territorial competence of states

After having analyzed the theoretical aspects of the concept of efficiency, in particular assessing it as a principle of international law, Symonides discussed the emergence of a state in the context of the efficiency requirement. His analysis is important from the perspective of the specific, allegedly dualistic nature of the German state. On the one hand, the German Reich existed as a passive entity, deprived of legal capacity to

[9] Treaty establishing the European Economic Community, Protocol on German Internal Trade and connected Problems, 25 March 1957, 11957E/PRO/ALL, available at: https://bit.ly/3x5hC1C (accessed 30 May 2021); *cf.* E. Grabitz, A. von Bogdandy, *Die Europäischen Gemeinschaften und die Einheit Deutschlands – die rechtliche Dimension,* 14(2) Integration 47 (1991); W. Czapliński, *International Legal Aspects of Relations between the GDR and the EEC – A Polish View*, 22 Common Market Law Review 69 (1985).

[10] The political doctrine of the Federal Government in 1954-1969, which consists of the claim by the FRG to represent the German state in its international relations and to deny the GDR's statehood. It assumed, among the other things, that the FRG had not maintained relations with third countries recognizing the GDR.

act, while the ability to modify one's own legal situation is a key element of international personality. On the other hand, a state must be effective, and therefore real. Meanwhile, the passively functioning German Reich did not meet these conditions. A state is effective when its government exercises effective power over the territory and over the population. It does not seem necessary that this effective power should apply to the entire territory of a state. Part of it may (temporarily) be under the sovereignty of another state, e.g. in the form of military occupation or control by insurgents, which does not mean that a state is no longer effective. However, with regard to the German Reich, its Eastern territories were to be separated from the German state. Its power as a state in relation to those territories state did not apply (in the winter of 1945/46 German administration bodies began to appear in the western occupation zones, but they functioned at the local level only). Thus, the German statehood underwent a significant transformation as a result of the lost war, what led to a dispute over the possible collapse of the German state after 1945.

Symonides pointed to the key role of recognition in the process of establishing a state, stressing the importance of efficiency in assessing its existence. He suggested that in granting recognition, states must comply with the objective criterion of the effectiveness of the new legal order. A state can only be recognized if it meets certain factual, not political, criteria. This approach is based on the declarative nature of recognition, meaning that recognition must be based on factual and not legal circumstances, which is not entirely true. Recognition (or its refusal, i.e. the obligation not to recognize unlawful situations) may depend on the decisions of international organizations or bodies, such as the UN Security Council or the European Union and its institutions. Such considerations and views are characteristic of the classical doctrine of international law and, in fact, have not changed even today, which is confirmed by the work of the ILA Committee on Recognition Non-recognition.[11]

Symonides emphasized two consequences of the principle of effectiveness in the case of state recognition. The first is the prohibition of premature recognition; and the second – the need to distinguish recognition of a state from recognition as a belligerent or insurgent party. From our perspective, the former issue is more important.

The ban on premature recognition is discussed generally by authors dealing with the issue of recognition.[12] Recognition is premature when – as Symonides states – it has been granted, despite serious doubts about the stability and durability of the new territorial organization. He deals with this issue in the context of recognition as a belligerent

[11] ILA Committee on Recognition/Non-recognition in International Law, *Report of the Seventy-Eight Conference Sydney 19-24 August 2018: Forth (Final) Report*, available at: https://bit.ly/3qoXRzz (accessed 30 May 2021).

[12] *See* in Polish legal writing *e.g.* E. Dynia, *Uznanie państwa w prawie międzynarodowym* [Recognition of a state in international law], WUR, Rzeszów: 2017, pp. 57 et seq.; S. Zaręba, *Skutki braku uznania państwa w świetle prawa międzynarodowego* [The consequences of the lack of recognition of a state from the point of view of international law], INP PAN, Warszawa: 2020, pp. 106 et seq.; *cf. also* O. Corten, *Déclarations unilatèrales d'indépendence et reconnaissances prématurées: du Kosovo à l'Ossétie du sud et à l'Abkhazie*, 112(4) Revue generale de droit international public 721 (2008).

and/or as insurgents (the author of this text advocates the collective treatment of such entities as groups striving to exercise their right to self-determination).

Symonides pointed to an interesting example of making the recognition of a state conditional on the fulfillment of factual conditions, namely the note of the British Secretary of State Canning to the Spanish government from 1825, setting out the circumstances for the recognition by Great Britain of new states in South America. These included the exercise by the government of effective power in a given territory, and the uniformity and stability of this power. The problem, however, is that the conditions mentioned there are not universally accepted, but were formulated *in casu*, for the needs of a specific group of states, i.e. former Spanish colonies that had declared independence. So Symonides contradicted himself, and it is hard not to conclude that the conditions listed in the note were politically determined.[13]

Oft-cited examples of premature recognition are: the recognition of the USA by France in 1778, i.e. 4 years before the conclusion of the peace treaty between Great Britain and the United States, and the recognition of Croatia (sometimes also Slovenia) by certain European Union member states in 1992. If the US was recognized, such recognition had an unambiguous political goal – to strengthen the new state created as a result of the secession of the former British colonies. Great Britain accused France of interfering in the internal affairs of the United Kingdom by its recognition (to use the language of modern international law). Yet its recognition met the condition of effective territorial control, despite the ongoing war. As for Croatia and Slovenia in 1992, this recognition was not technically premature, since both of them met the criteria of statehood within the meaning of the definition of a "State" in the 1930 Montevideo Convention on the Rights and Duties of States. On the other hand, this recognition was made in breach of the obligations arising from Community law, i.e. the guidelines for the recognition of states in Eastern Europe and in the area of the former USSR.[14] Germany and Austria, which recognized them, thus tended to accelerate a process of recognition by the international community of new states in the area of former Yugoslavia, despite the fact that at the time in question neither new state met the conditions for the protection of minorities as required by the aforementioned Guidelines. Moreover, the available sources do not mention whether any measures were undertaken by the EC against the states that supported the recognition of both states.

The best, and also classic, example of (and controversy over) premature recognition in this context is Kosovo. The number of countries that have recognized the youngest country in Europe is now 117, including its recognition by Israel in February 2021. However, there is still a group of EU Member States (Cyprus, Greece, Romania, Slovakia, Spain) that do not recognize Kosovo as an independent state. The ongoing dispute over

[13] In particular as the last of these conditions made the recognition of the state conditional on the abolition of slavery.

[14] Declaration of Guidelines on the Recognition of New States in Eastern Europe and in the Former Soviet Union, adopted at an Extraordinary EPC Ministerial Meeting at Brussels on 16 December 1991, available in: 4 European Journal of International Law 72 (1993).

the legal status of the Palestinian state is also far from being resolved, and Palestinian actions raise serious concerns in a significant part of the international community.

Recognition also plays an important role in relation to the continuity and identity of a state. Both concepts are related to crisis situations that may affect the international position of a state and its international legal obligations. The continuity of a state means the uninterrupted existence of a state, from its creation until its eventual collapse. On the other hand, the identity of a state means that when comparing the condition of a state before and after the crisis, we can say that we are dealing with the same subject of international law. We have already mentioned the importance of the concepts of continuity, identity, and succession of states for the assessment of the legal situation of Germany in the context of the surrender of the Reich on 8 May 1945. Note that there are no clearly defined criteria for the continuity and identity of a state. The doctrine does however list certain factors that may be helpful in this regard. Some of them will certainly not matter (name of a state, capital city, constitution and other acts of internal law, territorial changes, etc.). On the other hand, it would be difficult to indicate those that will undoubtedly break the continuity – perhaps with the exception of the physical liquidation of a state (e.g. as a result of the flooding of a state as a result of rising ocean levels) or conquest and annexation by another state. However, even in such a situation the assessment may be controversial. For example, the authorities of Tuvalu, which is in danger of being submerged by the ocean in this century, are negotiating the possibility of moving the population (about 11,000 inhabitants) to one of the islands of the Fiji archipelago or buying territory from Australia. An interesting question which arises is whether, in the case of the implementation of these scenarios, the continuity of a state will be maintained? The key role should be played by the presumption of the continuity of a state, which means that a state exists as long as we cannot – with certainty – confirm its permanent and final collapse. The problem is that the assessment of the legal situation of the state may only be possible from a distant time perspective. The legal situation in Germany is a good example in this regard. The identity and continuity of the German state was only confirmed by the unification treaty between the FRG and the GDR, and "2 + 4" treaty on the final settlement with respect to Germany (1990). The reunification of Germany took the form of the accession of the GDR Länder to the existing Federal Republic of Germany, i.e. annexation – and not the unification of states within the meaning of the law on state succession. If there was a union, the united Germany would be a new state, and such a solution would be unacceptable, especially from the perspective of Germany's membership in the NATO and the European Communities.

In conclusion, Symonides' statement that recognition is always political remains valid. The concept of premature recognition, to which we have devoted the above considerations, is not correct because, from the perspective of the recognizing country, it can always say that the conditions for recognition have been met. This assessment is individual and subjective and is not subject to control by other subjects of international law.

2.2. The Polish-German Boundary

Janusz Symonides devoted Chapter VI of his monograph to the mutual relationship between effectiveness and the borders of a state's territory. He pointed out that states strive to delimit their territorial competences in order to avoid conflicts. The problems of border delimitation and demarcation are thus at the center of attention of states. He confirmed that the basis for delimiting the border is usually an agreement (arrangement) between neighboring countries, but it may also be a court or arbitration decision or a decision of a competent international body. An example of adjudication cited by Symonides concerned the decisions of the Conference of Ambassadors, established by the peace treaties of 1919. The author also pointed out that while the concept of a border appears in relations between European countries at the turn of the 13th-14th centuries, the "linear" border first appeared in the treaties concluded by post-revolutionary France in 1797 and 1801, in the Treaty of Paris of 1814, and in the Act of the Congress of Vienna of 1815. Finally, Symonides' statement emphasizing that the key role in resolving territorial disputes is played by the effective exercise of territorial rule, which takes precedence over ineffective possession, is signicant. This stance is confirmed by the arbitration award of 1928 in *Island of Palmas*,[15] as well as the judgment of the International Court of Justice in the *Temple of Preah Vihear* case.[16]

As already mentioned above, the dispute over the course of the Polish-German border was, next to the Berlin Wall, one of the axes of the conflict between the East and the West. The final confirmation of the border's course can be found in the treaty of 14 November 1990. In Art. 1, it reads that the border line delineated by the Zgorzelec/Görlitz treaty of 6 July 1950,[17] and confirmed by the normalization treaty of 7 December 1970, marks the Polish-German border. The 1990 treaty also refers to the sovereignty and territorial integrity of both parties and provides for the mutual renunciation of territorial claims now and in the future. The dominant view in the literature is that the 1990 treaty is of a declarative nature.

However, none of the Polish-German treaties, nor the German judicial practice (including jurisprudence of the German Federal Constitutional Court in its judgments of 7 July 1975 on normalization treaties with Poland and USSR,[18] nor its order of 5 June 1992 on the 1990 Treaty between Poland and the FRG),[19] unequivocally made precise the date of the actual transfer of sovereignty in relation to the former German Eastern Territories. In the Polish doctrine it is assumed that the Potsdam Agreement was of a constitutive nature, and the boundary was determined by that instrument. In German publications, the authors refer to the demarcation of the border by the

[15] *Island of Palmas Case (The Netherlands v. USA)*, Award, 4 April 1928, RIAA II 829, available at: https://legal.un.org/riaa/cases/vol_II/829-871.pdf (accessed 30 May 2021).

[16] ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgement, ICJ Rep 1962, p. 6.

[17] Interestingly, the agreement of 1950 referred to the Polish-German border, instead of the border between Poland and the GDR.

[18] BVerfGE 40, p. 141.

[19] Case 2 BvR 1613/91, NJW 1992, 3222.

Zgorzelec/Görlitz agreement, the normalization treaty of 1970. or the boundary treaty of 1990. Each of these proposals has advantages and disadvantages, and none of them is completely convincing. However, it turns out in practice that setting the date is of the secondary importance, especially in light of the dismissal by the European Court of Human Rights of the complaint by the *Preussische Treuhand* (Prussian Trust) against Poland.[20] That case concerned German private property claims against the Polish state in connection with the confiscation of German property in the post-war territory of Poland. In fact, it contrasted the hypothetical German sovereignty, requiring the maintenance of the property rights of the previous owners, with the real, effective sovereignty of Poland, which had *ipso facto* acquired the competence to regulate property relations in its territory. Poland's competence (i.e. effective territorial rule) has thus been confirmed in a significant aspect by the Strasbourg tribunal.

When considering the issue of the Polish-German border, we can recall one more important theoretical point. The arguments of both sides of the conflict reflect the dispute between the supporters of the primacy of effectiveness and the proponents of the principle of legalism. For if we assume the variant, which is the least favourable from Poland's point of view, that the allied occupying powers – parties to the Potsdam Agreement – had no legal title to dispose of the territory of the Reich and to establish the post-war borders of Germany, we must assume that Poland annexed the former German territories with the consent of the international community and no one else except Germany (before 1970) questioned Poland's sovereignty in the Western and Northern Territories. Moreover, under the 2 + 4 process, the confirmation by united Germany of Poland's western border was a condition for consent to reunification. This explains Poland's admission to the Paris round of unification negotiations.

2.3. Effectiveness and the competence of a state over persons

It has already been mentioned above that one of the key consequences of the German legal position was the conflict between Poland and the FRG regarding nationality.[21] The construction of German citizenship was based on the constitutional concept of "German" within the meaning of Art. 116(1) of the Basic Law,[22] connected with the

[20] ECtHR, *Preussische Treuhand GmbH & CO. Kg A. A. v. Poland* (App. no. 47550/06), 7 October 2008A. *See* A. Jasińska, *Problemy międzynarodowoprawne w sprawie Preussische Treuhand v Poland przed ETPCz* [International law problems in the *Preussische Treuhand v Poland* case before the ECtHR], in: W. Czapliński, B. Łukańko (eds.), *Problemy prawne w stosunkach polsko-niemieckich u progu XXI wieku* [Legal problems in Polish-German relations at the beginning of the 21st century], Wydawnictwo Naukowe Scholar, Warszawa: 2009, p. 230.

[21] W. Czapliński, *Obywatelstwo w procesie normalizacji stosunków RFN-PRL i RFN-NRD* [Citizenship in the process of normalization of relations between FRG-PPR and FRG-GDR], Instytut Zachodni, Poznań: 1990, passim.

[22] Art. 116(1): "Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person."

Statute of 1913 on the citizenship of the Reich.[23] The status of "German" on this basis was enjoyed by people living in the former German eastern territories (in the Polish nomenclature called "Northern and Western Territories"), the so-called "autochtones," i.e. persons who descended from German nationals living in the Eastern territories of Germany.

The notion of "German" cannot be identified with German ethnicity. German citizenship is constitutionally regulated in the Basic Law, while German nationality is defined in the Federal Expellees Act (BVFG). According to § 6 of the 2020 amended version of the BVFG, a German is someone who "has committed himself to the German nationality in his home country, provided this commitment is confirmed by certain characteristics such as descent, language, upbringing, culture." German nationality thus has both a subjective and an objective side: on the one hand, the commitment to German nationality; and on the other hand, objective confirmation features such as descent, language, etc.

Poland consistently argued that the (West) German legal regulation was inconsistent with international law because it was based on a fictitious, artificial relationship between the supposedly still existing German Reich within the borders of 31 December 1937.

J. Symonides devoted Part IV (including, in particular, Chapter VIII) of his monograph to the issue of effectiveness as the basis for the competence of a state over persons. He began his deliberations with the statement that the competence to legally regulate state citizenship is a function of state sovereignty, although this freedom is not absolute, but remains subject to certain limitations imposed by international law. This principle is well established in international law, in particular taking into account the Advisory Opinion of the Permanent Court of International Justice (PCIJ) on nationality decrees in Tunesia and Morocco,[24] and Arts. 1-2 of the Hague Convention of 12 April 1930 on Certain Questions Relating to the Conflict of Nationality Laws.[25] Although the latter Convention did not enter into force due to having too few ratifications, it is nevertheless generally regarded as a codification of customary nationality law. The most important of these restrictions concerned the regulation of nationality in cases of state succession. In the interwar period, the practice of automatic change of nationality in cases of succession became established, leading to the acquisition of the nationality of a new sovereign (successor). This was important for determining the nationality of the inhabitants of the former Eastern territories of the German Reich, which fell to Poland after 1945.

Key to Symonides' considerations is the conflict of laws on nationality, which can lead to multiple citizenship (and on the other hand, to statelessness). This conflict

[23] Nationality Act (Staatsangehörigkeitsgesetz, StAG) of 22 July 1913 (Reichsgesetzblatt I, p. 583 – Bundesgesetzblatt III 102-1), as last amended by Art. 1 of the Second Act Amending the Nationality Act of 13 November 2014 (Bundesgesetzblatt I, p. 1714).

[24] PCIJ, *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921*, Advisory Opinion, 1923 PCIJ (ser. B), p. 24.

[25] LNTS 179, p. 89.

should be resolved in accordance with the principle of effective citizenship, as indicated particularly by the ICJ judgment in the *Nottebohm case*[26] (although Symonides also refers to previous examples of conflict resolution in the laws on citizenship in the jurisprudence of international courts). It is interesting that the author emphasized that the principle of effectiveness is not unequivocally based on positive law, but rather results from a certain trend in the internal legislation and practice of an increasing number of countries. The author also points to various aspects of effective nationality. On the one hand, the principle of effectiveness is intended to guide third states when it is necessary to decide on the basis of which premises they should decide upon the law applicable to citizens with dual nationality. On the other hand, effectiveness should be important in assessing whether the acquisition of the nationality of a given state complies with the requirements of international law. This is because no state should grant its nationality to people who are not effectively connected or do not show a genuine link with that state.

It should be recalled here that in both situations discussed it is about an assessment from the point of view of international law. From the perspective of national law, granting citizenship to a specific group of people will always be effective, even if from the perspective of other countries it was in breach of international law. This statement is very important from the point of view of assessing the conflict between Germany and the People's Republic of Poland over citizenship. The Polish government has consistently argued that the maintenance of German citizenship by persons residing in the territories transferred to Poland is inconsistent with international law, as it allows for treating as "Germans" persons not remaining in an effective relationship with the German state. Since Germany recognized in the standardization system of 1970 that the western border of Poland ran along the line of the Oder and Lausitzer Neisse, it should be the duty of Germany to adjust the legal status of individuals to the treaty, and thus deprive this group of people of German nationality. Germany, in turn, has claimed that under German law it is not possible to deprive anyone of German citizenship without their consent.[27] The Germans living in the Polish western and northern territories under communist rule had no factual or legal opportunity to comment on the issue of their citizenship. Finally, Germany referred – as mentioned above – to the hypothetical structure of the "suspended" (passive) German Reich, pointing to the relationship of people with dual Polish and German citizenship with the Reich.

Symonides also pointed out that in the practice of Nazi Germany, legislation on citizenship was an instrument of state policy, including granting citizenship to the inhabitants of the areas annexed by the Reich: the Sudetenland, Klaipeda (Memel), the Free City of Gdańsk, the Belgian districts of Eupen-Malmedy-Moresnet and the

[26] ICJ, *Nottebohm (Liechtenstein v. Guatemala)*, Second Phase Judgment, ICJ Rep 1955, p. 4.

[27] Art. 16(1): "No German may be deprived of his citizenship. Loss of citizenship may occur only pursuant to a law and, if it occurs against the will of the person affected, only if he does not become stateless as a result."

French regions of Alsace and Lorraine. None of these annexations (with the exception of the Sudetenland) were recognized by the international community.[28] This practice was obviously contrary to international law, which forbids changes to the status of the population in occupied territories. In this context, a reference to the equitable doctrine of clean hands also sometimes appears. It boils down to the question of whether a state may plead that a certain conduct constitutes an internationally wrongful act, when it itself previously acted in a similar incriminating manner in its own practice. The status of this doctrine is unclear under international law; it has not been unequivocally confirmed in the practice of international courts or in the doctrine. Its roots are derived from Roman law, namely from the maxims *ex dolo malo non oritur actio*, *nullus commodum capere potest de injuria sua propria*, *and ex injuria jus non oritur*. However, we are far from saying that every maxim of ancient Roman law should be recognized as a general principle of law within the meaning of Art. 38 of the ICJ Statute.

In connection with this conflict, the granting of Polish nationality should be assigned to people living in the former German Eastern territories (Polish Western and Northern territories). The consequence of assuming sovereignty by Poland in the western and northern territories was the obtainment by the local population of the competence to acquire Polish citizenship. The binding force of Polish legislation in these areas was extended on 27 November 1945, by virtue of the decree on the administration of the regained territories. However, in the doctrine (including foreign) and in judicial decisions, this date was turned back to 2 August 1945, as German legislation was treated as inconsistent with the Polish *ordre public*. It is not clear whether this also applied to the Citizenship Act of 1920. In practice, granting Polish citizenship to local people was preceded by nationality verification. In this way, the group of people excluded from resettlement to Germany was defined. These persons then obtained Polish citizenship, granted in accordance with the Act of 28 April 1946 on the citizenship of the Polish State to persons of Polish nationality residing in the Recovered Territories,[29] together with executive acts. The Polish citizenship of this group of people was confirmed by the Act of 8 January 1951 on Polish citizenship. Doctrine was divided as to the meaning of both laws, especially whether they were declarative or constitutive. Polish legislation has traditionally been based on the principle of exclusivity of Polish citizenship, rejecting dual citizenship. Due to the effective relationship with the Polish state (for example through the place of residence), the Polish citizenship of these people was emphasized, while their German citizenship was rejected.

International law has not changed significantly since the publication of the book by Symonides. The events of the early 1990s confirmed the practice of the consequences of state succession (territorial changes) in relation to nationality. It was also reflected in

[28] Symonides, *supra* note 2, p. 136; more details in Czapliński, *supra* note 21, p. 54.

[29] Journal of Laws of 1946, No. 4, item 30. The notion of "recovered territories" was an effect of efforts of communist propaganda trying to present territorial acquisition after the WW2 as a return of former Polish areas (lost in fact in Middle Ages in favour of Czech Kingdom and the German states).

the work of the UN International Law Commission (ILC), which adopted draft articles on the succession of states with regard to nationality.[30]

After WWII, and especially as a result of the territorial changes of the 1990s (the reunification of Germany and the dissolution of Czechoslovakia, the USSR, and Yugoslavia), the practice shifted towards the successor's right to grant its nationality to people linked to the acquired territory. In this way, the principle that each state is free to make decisions with regard to its people was preserved. This was confirmed by the ILC, pointing to the presumption that citizenship is acquired by the population of the acquired territory, with the proviso that territorial changes may not lead to statelessness. The ILC also emphasized that the successor state should regulate the legal status of the population as soon as possible by passing appropriate legal acts.

One might expect that after the conclusion of the Polish-German treaties in 1990/1991, Germany would change its law on citizenship, adapting it to territorial regulations. Indeed, some modifications were made to the so-called Status-Germans, i.e. persons having the status of Germans within the meaning of Art. 116(1) of the Basic Law, but not having German nationality, i.e. in practice displaced from Germany.[31] Further modifications were introduced by amendments to the Nationality Act of 1913 adopted on 15 July 1999.[32] However, Art. 116(1) was still upheld – although it should be noted that it plays a decidedly marginal role after Poland's accession to the EU and is no longer a subject of disputes.

FACIT

At the time when Symonides was formulating his considerations on effectiveness, the German problem was not yet the subject of dialogue between the Western democracies and the Eastern bloc. This discrepancy was further intensified by the German policy after the change of political course and the initiation by the SPD-FDP government coalition of a new eastern policy in Germany after 1969. Janusz Symonides – unlike other Polish authors of works in the field of international law – did not deal with German issues. Nevertheless, a number of arguments presented by him in favour of the role of the principle of efficiency in law and international relations were not only important for the analysis of the legal position of both sides of the territorial conflict, but also have remained valid to this day.

Symonides' book remains – despite the fact that many years have passed since it was published – substantively up-to-date, which also demonstrates that international law has not undergone any profound changes during this interim. Its development has more concerned entering into new areas rather than modifying the existing legal order.

[30] Draft Articles on Nationality of Natural Persons in relation to the Succession of States (with commentaries), 3 April 1999, Supplement No. 10 (A/54/10).

[31] Amendments added by Kriegsfolgenbereinigungsgesetz, BGBl. 1992, Teil I, p. 2094.

[32] The statute was renamed as politically neutral Staatsangehörigkeitsgesetz.

It is also worth noting that the most important conflict of values raised by the author, i.e. between effectiveness (the actual state) and legalism, has not been resolved either. The methodology proposed by the author and the way of presenting his views remain actual and can be compared with both past and modern studies on effectiveness and the theory of international law. Regrettably, the book remains largely unknown to foreign readers because of the language issue – it should have been translated and published in English, even if by a local publisher. This is one of the telling examples of the advantages of publishing legal studies in English or other international languages.

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PACTUM DE NEGOTIANDO AND *PACTUM DE CONTRAHENDO* AS INTERNATIONAL OBLIGATIONS IN THE PRESENT INTERNATIONAL LAW

Abstract: *The article concerns the obligations to negotiate and conclude agreements in good faith (pactum de negotiando and pactum de contrahendo), which are used in international legal practice to more efficiently settle disputes or negotiate new agreements in various areas of international law. These obligations, however, are sometimes mixed together and misunderstood. They also give rise to various interpretation disputes related to their existence as obligations and their content. The aim of the study is to show that these are not simple obligations, but bundles of obligations. Such perception of them makes it possible to distinguish both pacta and penetrate into their rich content, as well as to unequivocally apply to their performance the principle of performing international obligations in good faith (Art. 2(2) of the UN Charter), especially in the form of pacta sunt servanda (Art. 26 of the Vienna Convention on the Law of Treaties).*

Keywords: good faith, *pactum de contrahendo*, *pactum de negotiando*, obligation to negotiate, *pacta sunt servanda*

INTRODUCTION

One of the basic rules of international law is the freedom of action of its subjects, namely states. International law both protects and regulates this freedom. It is therefore not absolute. The freedom is subject to certain formal and substantive limitations. They arise for various reasons, and their nature and practical value also vary. Nevertheless, they contribute to increasing the predictability and security of legal relations, facilitating international coexistence, strengthening cooperation, and protecting important individual and common values in a decentralized international community.

The concretization of the freedom of action in international relations includes, *inter alia*, the freedom to incur international obligations, including in particular freedom to

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negotiate and conclude international agreements, and the freedom to use all available means for the peaceful settlement of international disputes. These freedoms are also not absolute, but are subject to various limitations. *Pactum de negotiando* and *pactum de contrahendo* are among such limitations. Both *pacta* relate to negotiations and the international agreements resulting therefrom. With respect to *pactum de negotiando*, the International Court of Justice (ICJ) ruled in its judgment in *Obligation to Negotiate Access to the Pacific Ocean Case (Bolivia v. Chile)* that: "While States are free to resort to negotiations or put an end to them, they may agree to be bound by an obligation to negotiate. In that case, States are required under international law to enter into negotiations and to pursue them in good faith."[1]

Pacta are relatively often used in international, mainly state, practice. They also appear in judicial and arbitral practice. Despite their usefulness, *pacta* were not regulated in the Vienna Convention on the Law of Treaties of 1969 (VCLT), nor in the legal regulations in the field of international dispute settlement. Meanwhile, not all their aspects are obvious. The aim of this study is to establish the legal basis and the essence of *pactum de negotiando* and *pactum de contrahendo* as a bundle of international obligations, and to indicate the differences and similarities between them as well as their functions and usefulness in international legal practice.

When considering *pacta* in this study, the context in which they are applied are first analysed, and thereafter the reasons for their use and the general extent of their occurrence are briefly described. Then the legal bases and forms, nature, and characteristics of *pacta* as international obligations and the principles of performing them are examined.

1. CONTEXTUAL ASPECTS OF *PACTA*

Pacta are most often seen as instruments restricting the freedom to choose the means of dispute settlement, requiring bargaining before resorting to other means, and in some cases even excluding other means of dispute resolution. Negotiations are a preferred or exclusive means, especially in the case of sensitive matters (e.g. boundaries). They can serve as a means of determining the existence and subject-matter of the dispute.[2] Negotiations are also considered to be the most effective and flexible method of dispute settlement. Therefore, the parties should at least negotiate with the aim of resolving a dispute, and ideally reach an agreement.[3] The *Manila Declaration on the peaceful settlement of international disputes* of 15 November 1982 speaks in this spirit, stating that:

[1] ICJ, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment (Preliminary Objections), 24 September 2015, ICJ Rep 2018, p. 507, at p. 538, para. 86.

[2] *See* P. Daillier, M. Forteau, A. Pellet, *Droit international public*, L.G.D.J., Paris: 2009, p. 925.

[3] The ICJ has distinguished negotiations from a dispute, stating that "negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counterclaims." *See* ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* Case (*Georgia v. Russian Federation*), Judgment (Preliminary Objections), 1 April 2011, ICJ Rep 2011, p. 70, at 132, para. 157.

> States should, without prejudice to the right of free choice of means, bear in mind that direct negotiations are a flexible and effective means of peaceful settlement of their disputes. When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties.[4]

However, *pacta* often prove no less important in situations where there is is no direct dispute, but states simply wish to negotiate an international agreement. They can then impose a limitation on treaty freedom in the form of an obligation to negotiate a future treaty, or even conclude one. The reasons for invoking *pacta* can be multifold. They can be accepted when a general or specific problem is not yet suitable for regulation (e.g. a peace treaty) or requires the conclusion of an additional agreement (an implementing agreement). *Pacta* may also appear in the context of framework agreements which require further development, clarification, and implementation for their operation, for example in the form of protocols.[5] However, the mere existence of framework agreements does not automatically imply *pacta*.[6] In addition, *pacta* can be envisaged in the context of re-negotiating agreements after gaining some experience (re-negotiation clauses).[7]

The dual role of negotiations (as a means of dispute settlement and a method of law-making) is recognized in the UN General Assembly resolution of 8 December 1998 on "Principles and guidelines for international negotiations" (Principles and guidelines), which states in its preamble that: "[i]nternational negotiations constitute a flexible and effective means for, among other things, the peaceful settlement of disputes among States and for the creation of new international norms of conduct."[8] However, it should be noted that it is sometimes very difficult to distinguish between the two functions. In both situations there is an obligation to negotiate an agreement. At the same time, especially with regard to dispute settlement,[9] the agreement may be legally non-binding.

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[4] A/RES/37/10, pt. 10.

[5] N. Matz-Lück, *Framework Conventions as a Regulatory Tool*, 1(3) Göttingen Journal of International Law 439 (2009).

[6] Y.-K. Kim, *Maritime Boundary and Island Disputes in Northeast Asia*, 25 Korean Journal of International and Comparative Law 1997, pp. 76-77, lists three functions of the *pactum de negotiando*, while noting that they are also performed by the *pactum de contrahendo*: 1) "to ease political tension between states belonging to antagonistic blocks, but willing to relieve tension by entering into some interim contractual relations"(states tend to avoid premature agreements); 2) "to reserve the elaboration of details for the implementation of a given treaty"(negotiations are concerned with more technical and less important issues; the goal is to accelerate the process of conclusion of a treaty); and 3) "to ensure for the concerned parties to resort to a treaty already in existence between them by articulating the legal obligations to proceed expeditiously to an exchange of views to settle the disputes arising between them" (i.e., the parties have the duty "to renew their previously unsuccessful negotiations with the aim of reaching an agreement on seeking a solution by peaceful means").

[7] Z.A.Al. Quarshi, *Renegotiation of International Petroleum Agreements*, 22(4) Journal of International Arbitration 291 (2005).

[8] A/RES/53/101.

[9] S. O'Connor, C.M. Bailliet, *The Good Faith Obligation to Maintain International Peace and Security and the Pacific Settlement of Disputes*, in: C.M. Bailliet, K.M. Larsen (eds.), *Promoting Peace Through International Law*, Oxford University Press, Oxford: 2015, p. 70.

Pacta can exist in all areas of international law. In practice, they most often appear in the international law of peace and security (disarmament, arms control, peace treaties and their implementation); the law of the sea (issues of maritime boundaries, but also maritime cooperation in various areas);[10] natural resources and environmental protection;[11] or international economic law (especially the law of international trade).[12]

2. FREEDOM TO ESTABLISH *PACTA*

Pacta require a decision as to their establishment. There is no general obligation to negotiate/conclude agreements. Paradoxically, they are therefore a reflection of the freedom to incur international obligations. *Pacta* express a limitation on that freedom in relation to the decision to initiate and pursue negotiations or to conclude an agreement. In this context, the freedom to establish *pacta* includes the choice of the type of *pactum*, setting the date, conditions and formulas for starting negotiations, the content of the negotiations, and the possible date of their completion/conclusion of an agreement.

However, the freedom to establish *pacta* may be subject to limitations. Such limitations can be a consequence of the decisions of interested parties, but they can also result from the inclusion of the *pactum* in a broader package of obligations under multilateral agreements (e.g. *pacta* included in the 1982 UN Convention on the Law of the Sea, UNCLOS). *Pacta* may be applicable only to certain parties to a multilateral treaty. The shape of negotiations can be imposed by the third party (e.g. Arts. 98 and 104 of the Versailles Treaty of 28 June 1918[13]). Moreover, the freedom to establish *pacta* can be restricted/abolished by recommendations or decisions taken by an international organisation (e.g. Security Council recommendations under Arts. 36 or 37 of the UN Charter[14]) or by an international court.

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[10] J. Symonides, *Nowe prawo morza* [The new law of the sea], PWN, Warszawa: 1986, pp. 228-230.

[11] *See* C. Hutchinson, *The Duty to Negotiate International Environmental Disputes in Good Faith*, 2(2) McGill International Journal of Sustainable Development and Policy 117 (2006).

[12] 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 and Portland: 2006, pp. 75-84. Critically: B.J. Condon, *Does International Economic Law Impose a Duty to Negotiate*, 17(1) Chinese Journal of International Law 73 (2018).

[13] According to Art. 98, "Germany and Poland undertake, within one year of the coming into force of this Treaty, to enter into conventions of which the terms, in case of difference, shall be settled by the Council of the League of Nations (…)." Art. 104 provided that "The Principal Allied and Associated Powers undertake to negotiate a Treaty between the Polish Government and the Free City of Danzig, which shall come into force at the same time as the establishment of the said Free City."

[14] T. Giegerich, commentary on Art. 36, underlines that Security Council recommendations are neither legally, nor politically binding. Nevertheless, they are "highly authoritative and exercise a considerable political 'compliance pull'." B. Simma et al. (eds.), *The United Nations Charter. A Commentary*, vol. I, Oxford University Press, Oxford: 2012, pp. 1143-1444, 1156-1157, 1160. O'Connor and Bailliet, *supra* note 9, p. 77, consider that the impact of the Security Council recommendations is modest.

Exceptionally, the *pacta* may also be imposed, as in the case where such an obligation results for the weaker parties to an agreement, or even third parties, under the *pactum in odium tertii* formula (Arts. 34-37 VCLT). This is, for instance, the case of Art. 1(2) of the Treaty on the Final Settlement with Respect to Germany (signed on 12 September 1990[15]) which provided that the united Germany and Poland (Poland was not a party to the treaty) shall confirm the existing border between them in a treaty that is binding under international law.

3. LEGAL BASES AND FORM OF *PACTA*

Both *pactum de negotiando* and *pactum de contrahendo* can be formulated as either soft or hard law. In the first case, they can be based on joint political statements or declarations, also included in the final acts of international conferences,[16] or non-binding resolutions of organs of international organizations. Such *pacta* are not legal obligations, but merely political ones. While this does not mean that they are not useful or effective, this type of *pacta* will however remain beyond the scope of our consideration.

The legal bases for *pacta* may differ.[17] They derive primarily from bilateral or multilateral treaties. *Pacta* are most often included in dispute resolution clauses (e.g. the Biodiversity Convention, Art. 27(1)) or are normalized as agreement clauses (e.g. Arts. 74 and 83 UNCLOS). They usually constitute a provision being *pars pro toto* of a broader treaty regulation, such as the Non-Proliferation Treaty, or a treaty negotiated specifically for that purpose, e.g. preliminary peace treaties). A binding resolution of an international organization may also be the basis for a *pactum* in special circumstances (e.g. a UN Security Council resolution imposing an obligation on parties to a conflict to negotiate a ceasefire agreement or even to conclude it or sign a peace treaty). Hypothetically, unilateral declarations can also play such a role. States may, without concluding an agreement, promise each other to negotiate and/or conclude an agreement or a state may promise to join in the future an ongoing conference convened in order to develop a treaty. However, the legal bases of *pacta* cannot be a customary rule[18] or a general principle of law. *Pacta*, as exceptions to the freedom to incur obligations, cannot be presumed.

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[15] 1696 UNTS 29226.

[16] *See* Declaration No. 23 on the future of the Union, incorporated into the Final Act of the 2001 EU Nice Intergovernmental Conference (IGC), which indicated that the conference would take place in 2004 (pt 7).

[17] M.A. Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16(1) Michigan Journal of International Law 141 (1994), pp. 153ff.

[18] Daillier, Forteau, Pellet, *supra* note 2, pp. 924-925, maintain that the obligation to initiate and conduct negotiations is based on customary law, although its existence and content may be confirmed and clarified by a treaty. The obligation exists in particular when the parties have not specified other methods of dispute resolution or do not use those which they have agreed on themselves. For a contrary view *see* Y. Tanaka, *The Peaceful Settlement of International Disputes*, Cambridge University Press, Cambridge: 2018, p. 37.

Recognizing a *pactum* in the form of a formal provision does not always mean that it actually exists. Much depends on the intention of the parties and wording used. The legal existence of *pacta* should be assessed in good faith. Nevertheless, the issue can raise disputes. As regards intention as a precondition of a *pacta* giving rise to legal obligations, the ICJ in the *Obligation to Negotiate Access to the Pacific Ocean Case* of 2018 ruled, in the context of a *pactum de negotiando*, that

> the fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate. In particular, for there to be an obligation to negotiate on the basis of an agreement, the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound. This intention, in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of an objective examination of all the evidence.[19]

The evidence of intention can be taken from different instruments, such as written (notwithstanding the form) and oral (tacit) agreements, declarations and other unilateral acts, but also from other legal bases, namely acquiescence, estoppel, and legitimate expectations. The intention must include the object of the *pacta*, and therefore must not involve anything else, not even conduct of a similar nature. The intention should be the source of the consent of the party to the existence and content of a particular *pactum*.

The significance of the wording of the legal provisions for the existence of *pacta* can be illustrated by the ICSID arbitral award of 7 November 2011 in the *Spyridion Roussalis v. Romania* case.[20] The applicant applied for a finding under Art. 9 of the applicable bilateral investement treaty that Romania had not entered into negotiations with a view to reaching an amicable settlement, which, in its view, led to "an unfair and inequitable treatment." Art. 9(1) stated:

> Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.

However, in interpreting this provision, the tribunal shared the view of the responding state. It held that

> in accordance with the interpretation rules of Article 31 of the Vienna Convention, the Treaty neither imposes a legal duty nor creates a legal right for the Parties to negotiate a settlement. Article 9 does not refer to "negotiations." It only refers to an amicable settlement "if possible."

The arbitration tribunal also added that

> in view of the numerous procedures which had taken place or were still ongoing before the courts of Romania, Respondent may have believed reasonably and in good faith that an amicable settlement was not "possible" and that it should not engage in negotiations.

[19] ICJ Rep 2018, p. 507 (at 539), para. 91ff.

[20] ICSID Case No. ARB/06/1, paras. 333-337.

> The Tribunal therefore decides that Romania's conduct was reasonable and adequate and did not breach the Fair and Equitable Treatment requirement.

This award shows that not every provision of a treaty that *prima facie* expresses the *pactum de negotiando* (in the field of settlement of disputes) may give rise to an obligation to enter into and conduct negotiations. The provision may include not an obligation, but only a possibility ("if possible'). Therefore, if the parties, or one of them, considers that it is not possible to negotiate an amicable agreement, they do not have to engage in negotiations.

Sometimes the *pacta* are not formulated unambiguously and clearly, but constitute a necessary assumption of such a provision ("hidden pacta"). UNCLOS provides various examples of such situations. For example, Art. 15 UNCLOS states that:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. (…)

This solution can be seen as a conditional *pactum de contrahendo*, i.e. if the parties want to depart from the Convention's rule, they must negotiate and conclude an appropriate agreement.[21]

Other examples are Arts. 66(3)(d) and 67(3) UNCLOS, which provide for an obligation to conclude agreements between states in some circumstances in relation to anadromous stocks (enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone) and catadromous species (where catadromous fish migrate through the exclusive economic zone of another State). Similar conclusions can be drawn from Arts. 69(3) and 70(3) insofar as the participation of land-locked states and geographically disadvantaged states in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region are concerned. Additionally, Art. 125 can also be mentioned (freedom of transit).

4. LEGAL NATURE OF *PACTA*

4.1. General remarks

Pacta should not be seen merely as duties. Rather, they are international obligations, a part of the pre-contractual good faith obligations.[22] They constitute correlated rights

[21] *See also* Art. 119(2) of the Rome Statute of the International Criminal Court: "Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties."

[22] Panizzon, *supra* note 12, p. 73.

and obligations defined by international law. The parties have at the same time correlated rights and duties to enter into and pursue negotiations and – in the case of the *pactum de contrahendo* – to conclude an agreement. In the case of violation (non-performance, incomplete or improper performance) of *pacta,* international responsibility can be established.[23] Thus, despite the rather flexible formula (especially in the case of *pactum de negotiando*),[24] it is not about soft law obligations. Their existence and performance should be ascertained in the same way as those arising from any other legal obligation.[25] *Pacta* have to be performed in good faith and are enforceable. They can also be the subject of a legal dispute. This does not mean that the two *pacta* are identical and that they should not be distinguished from other obligations of a similar nature.

4.2. Distinguishing *pactum de negotiando* from *pactum de contrahendo*

4.2.1. Introductory remarks

The considered *pacta* have a lot in common, and this similarity sometimes blurs differences between them.[26] As indicated by, among others, Urlich Bayerlin, "there is neither a legal necessity for nor any practical utility in distinguishing the two *pacta*."[27] After a brief analysis of international practice, he adds: "[T]here is no relevant distinction between the two *pacta* in the legal quality of the obligations resulting from these instruments. There is no case where an absolute "agreement to agree" has been recognized by an international tribunal." He also noted that both obligations will differ slightly according to the circumstances in the particular case: the margin of negotiation on matters of substance left open to the parties for shaping the ultimate agreement will be larger or smaller according to the degree to which the substantive contents

[23] As the arbitral tribunal in *The Government of Kuwait v. Aminoil* of 24 March 1982 noted "the obligation to negotiate is not devoid of content, and when it exists within a well-defined juridical framework it can well involve fairly precise requirements." 21 ILM 1982, p. 976 (at 1014), para. 24.

[24] Due to the flexibility inherent in the nature of such obligations, they are sometimes referred to as soft (legal) obligations. *See* H. Neuhold, *Variations on the Theme of 'Soft International Law'*, in I. Buffard et al. (eds.), *International Law Between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, Martinus Nijhoff Publishers, Leiden-Boston: 2008, pp. 343ff, esp. pp. 349-351.

[25] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment (Merits), 1 October 2018, ICJ Rep 2018, p. 507, at 539, para. 91.

[26] For more on the international practice undermining the relevance and even the existence of a *pactum de contrahendo*, *see* J. Gilas, *Pactum de contrahendo w prawie międzynarodowym publicznym* [Pactum de contrahendo in public international law], 23 Zeszyty Naukowe UMK Prawo 135 (1967).

[27] *See i.a*. U. Bayerlin, *Pactum de contrahendo, pactum de negotiando*, in R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law*, vol. 7, North Holland, Amsterdam-New York-London: 1984, pp. 371ff, esp. pp. 372, 376. The author admits, however, that the doctrine did not agree on the issue of distinguishing between the two categories of the *pacta* (pp. 375-376). Similarly, *see* L. Marion, *La notion de "pactum de contrahendo" dans la jurisprudence internationale*, 78(2) Revue générale de droit international public 351 (1974), esp. pp. 382-397; R.R.Q. Baxter, *International Law in "Her Inifinite Variety"*, 29(4) International and Comparative Law Quarterly 549 (1980), p. 552. For an opposite opinion *see* H. Owada, *Pactum de contrahendo, pactum de negotiando*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. 8, Oxford University Press, Oxford: 2012, pp. 18-19.

of the final agreement can be determined by means of the *pactum* itself. Upon this also depends the success of a party in refuting the assertion of the other side of not having done its best to come to an agreement and in proving that it has negotiated in good faith.[28]

Sometimes it is also argued that while *pactum de negotiando* can be considered, *pactum de contrahendo* is a misleading concept that should be eliminated from the scientific discourse.[29]

The difference between the two types of obligations is indeed difficult to grasp. Problems with determining the content of an obligation are sometimes exacerbated by ambiguous treaty provisions. Given treaty practice and, to a lesser extent, international case law, there is also a tendency to interpret the provisions underpinning obligations to negotiate and conclude international agreements under the guise of *pactum de negotiando*.[30] It seems that the states negotiating treaties for their conclusion are not always interested in strengthening their obligation by defining the need to achieve the outcome of concluding a treaty. However, this does not mean that the possibility of a *pactum de contrahendo*, its practical relevance,[31] or the theoretical need to distinguish it from the *pactum de negotiando* should be rejected.[32] At the same time, distinguishing between the *pacta* requires insight into their legal nature and scope as well as an in-depth analysis of the obligations they give rise to.

4.2.2. Distinguishing *pactum de negotiando* from *pactum de contrahendo*

The *pactum de negotiando* is based on the need to initiate and conduct negotiations in good faith. It is not about having to definitively negotiate an international agreement, let alone to conclude it, or even to ensure that it enters into force. The Permanent Court of International Justice in its Advisory Opinion in *Railway Traffic between Lithuania and Poland* of 15 October 1931 stated, rejecting the Polish argument relating

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[28] Bayerlin, *supra* note 27, p. 376.

[29] A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge: 2000, p. 25, following Lord McNair.

[30] Gilas, *supra* note 26, p. 154.

[31] *See i.a. Case concerning claims arising out of decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (between Greece and the Federal Republic of Germany)* of 26 January 1972, RIAA vol. XIX, p. 27 (at 55-56), para. 62. The tribunal stated: "Article 19 must be considered as a pactum de negotiando. The arrangement arrived at between the parties in the present case is not a pactum de contrahendo as we understand it. This term should be reserved to those cases in which the parties have already undertaken a legal obligation to conclude an agreement (…)." *See also* on the distinction in the arrangement of Israel and the Palestine Liberation Organization (Declaration of Principles on Interim Self-Government Arrangements) of 1993: A. Cassese, *The Israel-PLO Agreement and Self-Determination*, 4(4) European Journal of International Law 564 (1993), pp. 565-568.

[32] Rogoff, *supra* note 17, pp. 148-149, observes: "Although some scholars question the utility of this distinction [between pacta – CM], believing that an obligation to conclude an agreement is no more than an obligation to negotiate in good faith, the distinction is helpful, because it allows for separate consideration of the decision to undertake negotiations."

to the interpretation of the resolution of the Council of the League of Nations, that "an obligation to negotiate does not imply an obligation to reach an agreement."[33] Similarly, the arbitral tribunal in the *Government of Kuwait v. Aminoil* Case of 24 March 1982 made it clear that: "An obligation to negotiate is not an obligation to agree."[34]

As the arbitration tribunal in the *Lake Lannoux* Case of 16 November 1957 explained, the *pactum de negotiando* avoided the rigidity of the *pactum de contrahendo* by not obliging the parties to conclude an agreement. The tribunal confirmed that the *pactum de negotiando* is much more frequent than the *pactum de contrahendo*. This is due to the fact that international practice prefers to resort to less extreme solutions, limiting the obligations of states to seek, in previous negotiations, the terms of an agreement without making the exercise of their competence conditional on its conclusion.[35]

However, contrary to first impressions, the *pactum de negotiando* is not a fully homogenous legal institution. In the *Lake Lannoux* Case the arbitration tribunal found that the *pacta de negotiando* were, often inappropriately, referred to as obligations to negotiate an agreement. In reality, however, obligations of different forms and scope are at stake. In the case of *Air Service Agreement of 27 March 1946 between the United States of America and France* of 9 December 1978, the arbitral tribunal took a similar position, stating that "the duty to negotiate may, in present times, take several forms and thus have a greater or lesser significance."[36] *Pactum de negotiando* can be formulated similarly to *pactum de contrahendo*. This may cause additional distortions in distinguishing this *pactum* from *pactum de contrahendo*.

An important example of such interpretation problems concerns Art. VI of the Non-Proliferation Treaty of 1968. According to it,

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

Regarding this provision, the ICJ, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996,[37] concluded that:

> The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

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[33] PCIJ Series A/B, No. 42, p. 107, at 116. Similarly the ICJ in *Obligation to Negotiate Access to the Pacific Ocean (Merits)*, at 538, para. 87.

[34] 21 ILM 1982, p. 976, at 1014, para. 24.

[35] RIAA vol. XII, p. 281 (at 306-307), para. 11.

[36] RIAA vol. XVIII, p. 417 (at 444), para. 87.

[37] ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Rep 1996, p. 226, at 263-264, para. 99.

In the literature this pronouncement is sometimes interpreted as a recognition of the *pactum de contrahendo.*[38] However, this is not the correct reasoning. It results from the unfortunate appeal to the obligation to achieve a result. The Court does not deny that Art. VI expresses an obligation to enter into and conduct negotiations with a view to agreeing on a nuclear disarmament treaty. However, in order to emphasize its target content, it stated that it was not simply any disarmament that was at stake, but nuclear disarmament in all its aspects.

4.2.3. Distinguishing pacta from similar obligations

Pacta should also be distinguished from obligations of similar nature. Such similar obligations include obligations to exchange views and, as is often the case in international agreements, the obligation to consult.[39] The boundary between them, especially in the context of the drafting of specific treaty provisions, cannot always be drawn from a simple reading of the text and remains to a significant extent a matter of interpretation.[40] It is necessary to refer to the intention and the object and purpose of the provision, or even the treaty.

Both the obligation to exchange views and the obligation to consult, although of varying intensity, come into play with legal obligations, usually those related to the obligation of conduct. However, they consist only in the exchange of information, knowledge, experiences, sharing, learning positions and opinions, discussing specific issues or giving advice. They do not include negotiating and concluding agreements. They do not cover the intention to conclude an agreement.[41] These obligations may either precede or occur after the failure of *pacta*.[42]

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[38] *See e.g.* D. Simon, *Article VI of the Nuclear Non-Proliferation Treaty is a pactum de contrahendo and has Serious Legal Obligation by Implication*, 2 Journal of International Law and Policy 1 (2004-2005), pp. 7-17, text: https://www.law.upenn.edu/journals/jil/jilp/articles/2-1_Simon_David.pdf (accessed 30 May 2021).

[39] Rogoff, *supra* note 17, p. 149; Hutchinson, *supra* note 11, pp. 135-141.

[40] Thus, for example, the arbitration tribunal in the *Air Service Agreement of 27 March 1946 between the United States of America and France Case* of 9 December 1978 derived from the general obligation of permanent (regular) consultations aiming at the compliance with the principles and provisions of the Agreement, "a clear mandate to the Parties to make good faith efforts to negotiate on issues of potential controversy" (RIAA vol. XVIII, p. 417 (at 444), para. 88). *See also* Rogoff, *supra* note 17, pp. 171ff.

[41] *See Case concerning claims arising out of decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece v. Germany)* of 26 January 1972, RIAA vol. XIX, p. 27, at 61-62, para. 78. The tribunal stated: "We have examined the communications that were exchanged between the Governments subsequent to the signature of the Agreement and have concluded that these did not constitute "negotiations" (…). The exchange of views in the main took place in writing. Some oral discussions were held but only during the course of unrelated negotiations. On all these occasions the German side simply rejected the Greek claims ab initio and gave reasons for this rejection. On the other hand, the Greek Government also refused to reconsider its position."

[42] In the *M/V "Norstar" Case (Panama v. Italy)*, Judgement (Preliminary Objections), 4 November 2016, Case No. 25, para. 204ff, the ITLOS considered the importance of the obligation to exchange views regarding its settlement by negotiation under Art. 283(1) UNCLOS. According to the ITLOS, this obligation cannot be equated with an obligation to negotiate the subject-matter of a dispute (para. 208). It does not have to be executed if a party determines that "the possibilities of reaching agreement have been

Pacta should also not be identified with the obligation to cooperate, which often appears in treaties. The obligation to cooperate is broader in scope and relativized to the subject matter of the treaty and linked to its institutional infrastructure, if established. While cooperation requires being open to one another, making contacts and responding to them, and acting in good faith for a common purpose, it does not *per se* involve an obligation to negotiate or conclude a treaty. *Pacta* thus cannot be inferred from a general obligation to cooperate, as due to their restrictive nature they require an indication of a specific legal basis.

5. *PACTA* AS A BUNDLE OF INTERNATIONAL OBLIGATIONS

5.1. General remarks

Pacta are not simple duties. They should not be viewed as single legal obligations. They constitute a bundle of obligations. One can find out about them by analyzing the legal nature and scope of each *pactum*. Considerations in this matter additionally highlight the differences between the two *pacta*. *Pactum de negotiando* includes the obligation to enter into negotiations and to pursue them in good faith,[43] while the *pactum de contrahendo* focuses on the obligation to negotiate and conclude an agreement in good faith. Let us now focus on the content of the *pacta* themselves, leaving good faith to be considered in the next section.

5.2. *Pactum de negotiando* as a bundle of obligations

5.2.1. The obligation to enter into negotiations

Generally speaking, the obligation to enter into negotiations assumes not so much the articulation of a readiness to negotiate as the undertaking of actual activities related to the determination of the date and place of their commencement, scope, conditions, and manner of their conduct. Future negotiators have a great deal of freedom in this regard.

exhausted" (para. 216). *Cf.* diversely: *the case of Chagos Marine Protected Area (Mauritius v. United Kingdom)* in the award of 18 March 2015, RIAA vol. XXXI, p. 359, at 520-521, para. 381. The arbitral tribunal stated that "an overly formalistic application of Article 283 does not accord with how diplomatic negotiations are actually carried out" and added that "substantive negotiations concerning the parties' dispute are not neatly separated from exchanges of views on the preferred means of settling a dispute, and the idealized form exhibited in Southern Bluefin Tuna will rarely occur." As a consequence, "in the jurisprudence on Article 283 it is frequently not clear as to whether the communications that were considered sufficient for the purposes of Article 283 were substantive or procedural in nature" (para. 381). Thus, the tribunal applied criteria similar to those applied to the *pactum de negotiando* with respect to the performance of the obligation to exchange views (para. 385).

[43] R. Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit*, Presses Universitaires de France, Paris: 2000, pp. 587-595. The author derives three principles from *pactum de negotiando*: 1) prohibition of depriving the negotiations of the object and purpose; 2) prohibition of the abuse of rights; 3) protection of trust and confidence.

Nevertheless, the freedom should be perceived as limited insofar as concerns the date of their commencement, the formula, and the substantive scope of the negotiations initiated.

Formally, the obligation to negotiate may or may not indicate the date by which negotiations should begin. If a deadline is not set, the parties concerned should enter into negotiations within a reasonable time. In both cases, the obligation to negotiate an agreement is an obligation of result, although it is required at a different point in time. A breach of this obligation would be either an unjustified delay in the opening of negotiations, an open refusal to start negotiations, and/or the ineffective expiry of the date, if any. The obligation to enter into negotiations on a specific date may also depend on a condition.[44]

The parties may decide to negotiate directly or in a more or less institutionalized formula (e.g. in multilateral international conferences or in international organizations, such as the GATT47[45] and now the WTO[46]). They may also define their *modus procedendi* before the start of the negotiations. When they do, however, they must respect and adhere to the mutually agreed framework for conducting negotiations.[47]

The parties are also free to determine the content of the negotiations. Usually, however, their subject matter is laid down at least as to the final result. The result can be described in terms of its overall content or its legal nature (e.g. Arts. 74, 83 UNCLOS: equitable solution). Finally, the freedom to determine the content of the negotiations may be limited by the parties themselves, which may prejudge the issues to be negotiated and possibly included in a future agreement (e.g. preliminary agreements for future peace treaties).[48]

5.2.2. The obligation to pursue negotiations

Pactum de negotiando assumes that once the decision to enter into negotiations is made, such negotiations will be pursued. However, the question arises as to how the parties should behave in order for the obligation to pursue negotiations to be considered as fulfilled. The answer to this question should be sought in international jurisprudence. In particular, the ICJ indicated more generally that the parties are to behave in such a way that the negotiations are meaningful.[49] In its judgments of 20 February 1969 in the *North Sea Continental Shelf Cases* (Germany/Denmark; Germany/Netherlands) it ruled that:

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[44] *See* Art. N(2) EU Treaty (on the IGC 1996), or the 1997 Protocol No 11 on the institutions in view of the enlargement of the European Union (the beginning of the IGC was defined as future and uncertain, and was subject to the condition that it be announced that the number of members of the European Union would soon exceed 20).

[45] *See i.a.* S.L. Klass, *Obligatory Negotiations in International Organizations*, 3 Canadian Yearbook of International Law 36 (1965).

[46] D. Carreau, P. Juillard, *Droit international économique*, Dalloz, Paris: 2010, p. 110ff.

[47] *See* Principles and guidelines, point 2(d).

[48] *See also* 1997 EU Protocol on the institutions with the prospect of enlargement of the European Union.

[49] In the Advisory Opinion in *Railway Traffic between Lithuania and Poland*, PCIJ, Series A/B, No. 42, p. 108 (at 116), it was stated that the obligation to negotiate requires "not only to enter into negotiations, but also to pursue them *as far as possible*, with a view to concluding agreements" [own emphasis].

> [T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[50]

Thus, the concept of meaningfulness determines the behavior of the parties during the negotiations. However, as is clear from international case law, this concept should be related to specific, detailed obligations falling within the scope of the obligation to pursue negotiations. These obligations include: 1) the obligation to make mutual and genuine concessions; 2) the obligation to make serious efforts to ensure that the negotiations are meaningful/successful; 3) the obligation not to jeopardize or hamper the reaching of a final agreement.

The first obligation is analysed in the arbitration award in the case of *Claims arising out of decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece v. Germany)* of 26 January 1972,[51] interpreting Art. 19 of the London Agreement on Public and Private Debt of Germany before and after the First and Second World Wars. The tribunal found that

> both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way. The language of the Agreement cannot be construed to mean that either side intends to adhere to its previous stand and to insist upon the complete capitulation of the other side. Such a concept would be inconsistent with the term "negotiation." (…) An undertaking to negotiate involves an understanding to deal with the other side with a view to coming to terms.

It also added that

> an agreement to negotiate implies much more than mere willingness to accept the other side's complete capitulation. For such a result, negotiations are neither necessary nor desirable. We construe the pertinent provisions of the Agreement to mean that, notwithstanding earlier refusals, rejections or denials, the parties undertook to re-examine their positions and to bargain with one another for the purpose of attempting to reach a settlement.

According to the arbitrators, the obligation to make mutual and genuine concessions is something more than just showing a willingness to make concessions, but also something less than capitulation, submission to the arguments to the other party in negotiations.

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[50] ICJ, *North Sea Continental Shelf*, Judgment, 20 February 1969, ICJ Rep 1969, p. 3, at 47, para. 85. Similarly ICJ, *Pulp Mills on the River Uruguay (Uruguay v. Argentina)*, Judgment, 20 April 2010, ICJ Rep 2010, p. 14, at 48, para. 146; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, ICJ Rep 2011, p. 644, at 685, para. 132.

[51] RIAA vol. XIX, p. 27, at 55, 57-58, 59, paras. 62, 65, 71.

Mutual concessions should be an expression of the negotiating parties' striving for a certain balance, a test of their actual involvement in the meaningful negotiations in order to conclude an agreement. The concession obligation is of particular importance when one of the negotiating parties is clearly weaker than the other.

In the same case, the tribunal also emphasized the parties' obligation to make serious efforts to conclude the treaty, stating that:

> To be meaningful, negotiations have to be entered into with a view to arriving at an agreement. Though (…) an agreement to negotiate does not necessarily imply an obligation to reach an agreement, it does imply that serious efforts towards that end will be made.

In order to demonstrate the fulfillment of the obligation, the participants of the negotiations must therefore demonstrate that they adopted an active attitude during the negotiations, and submitted appropriate proposals that could effectively contribute to the achievement of the negotiation goal, i.e. to the conclusion of an agreement. In the event of an impasse in negotiations, "States should use their best endeavours to continue to work towards a mutually acceptable and just solution" (*Principles and guidelines*, point 2(g)). If there are substantive or procedural rules for the conduct of the negotiations, the parties must also take them into account.

According to international jurisprudence, the obligation to pursue negotiations is also connected with the negative obligation to not jeopardize or hamper the reaching of a final agreement.[52] Sometimes this obligation is explicitly included in the *pactum* (e.g. the case of delimitation of the exclusive economic zone and the continental shelf, Arts. 74(3) and 83(3) UNCLOS). However, it is not necessary that it be so included. Such an obligation may be implied from the obligation to pursue meaningful negotiations. In general, the parties to the negotiations cannot obstruct them by, for example, interrupting communications or causing delays in an unjustified manner, or disregarding the procedures agreed upon.[53] As emphasized by the General Assembly, "States should endeavour to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their progress" (*Principles and guidelines,* point 2(e)).

The need for concessions and making serious efforts in negotiations on the one hand, and the requirement to not jeopardize or hamper the conclusion of an agreement on the other, were explicitly mentioned by the arbitration tribunal in its award on the *Delimitation of the sea border* between French Guyana and Suriname of 17 September 2007.[54] With regard to the obligation to negotiate interim agreements, it stressed that although the term "every effort" leaves some room for interpretation, it is

[52] *Delimitation of the exclusive economic zone and the continental shelf between Barbados-Trinidad and Tobago*, Award of 11 April 2006, RIAA vol. XXVII, p. 147.

[53] *Lake Lanoux Arbitration (Spain v. France)*, RIAA vol. XII, p. 281, at 307, para. 11.

[54] RIAA vol. XXX, p. 1, at 130, 131-133, paras. 461, 465-470. *See also* A. Aizenstadt, *Guyana v Suriname Maritime Boundary Arbitration*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. 8, Oxford University Press, Oxford: 2012, vol. IV, pp. 654-657.

a component of the obligation to negotiate in good faith. Furthermore, by using the words "in a spirit of understanding and cooperation" in the UNCLOS provision, the intention of its authors was to require the parties to adopt a conciliatory approach to the negotiations, whereby they should be prepared to make mutual concessions with a view to reaching a provisional agreement. This is expected particularly in the case of interim agreements, which by definition are temporary and should be negotiated without prejudice to the final delimitation. With regard to the obligation to make every effort not to jeopardize the conclusion of the final agreement, the tribunal pointed out that this did not necessarily prohibit any action, but only any action which would make it more difficult or impossible to conclude the final agreement (in the context of the shelf in particular, such action may be of such a nature as to bring about a permanent physical change in the marine environment, such as the exploitation of gas or oil deposits).

The *pactum de negotiando* does not, in principle, specify the desired date for the conclusion of negotiations (although this is not formally unacceptable). Theoretically therefore, it would be possible to demand that negotiations be conducted indefinitely. However, international law takes the view that negotiations should be concluded within a reasonable period of time and that the obligation to conduct negotiations outside of that period expires when it is demonstrated that they would be counterproductive or meaningless. This was confirmed by the arbitration tribunal in its award in the *Delimitation of the exclusive economic zone and the continental shelf (Barbados v. Republic of Trinidad and Tobago)* case of 11 April 2006.[55] It determined that:

> The existence of a dispute is similarly not precluded by the fact that negotiations could theoretically continue. Where there is an obligation to negotiate it is well established as a matter of general international law that that obligation does not require the Parties to continue with negotiations which in advance show every sign of being unproductive.

The ICJ formulated a similar view in the judgment on preliminary objections in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*) case of 1 April 2011. The Court stated:

> Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced, the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked.[56]

Moreover, following the *Mavrommatis* Case of 1924, it pointed out that "ascertainment of whether negotiations, (…), have taken place, and whether they have failed

[55] RIAA vol. XXVII, s. 147, at 205, para. 199. *See* B. Kwiatkowska, *The 2006 Barbados/Trinidad Tobago Maritime Delimitation (Jurisdiction and Merits) Award*, in: T. Malik Ndiaye, R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah*, Martinus Nijhoff Publishers, Leiden-Boston: 2007, pp. 917ff, esp. 937-939.

[56] ICJ Rep 2011 (I), p. 70, at 133, para. 159.

or become futile or deadlocked, are essentially questions of fact "for consideration in each case."[57]

In its judgment on the *Questions relating to the Obligation to Prosecute or Extradite* of 20 July 2012, the ICJ in turn stressed that:

> The requirement that the dispute "cannot be settled through negotiation" could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, "no reasonable probability exists that further negotiations would lead to a settlement" (…).[58]

Thus, entering into and pursuing negotiations in good faith does not have to be successful. The ICJ in its judgment of 10 October 2002 in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, focusing on Arts. 74 and 83 UNCLOS, noted that these provisions "do not require that delimitation negotiations should be successful; like all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith."[59]

5.3. Pactum de contrahendo as a bundle of obligations

A distinctive feature of the *pactum de contrahendo* is that, in addition to the obligation to enter into and pursue negotiations, it includes the obligation to end them by concluding an agreement. Nevertheless, the content of that *pactum* is not entirely clear. Let's first note that there are two forms of the *pactum*: 1) the obligation to conclude a new agreement; 2) an obligation to accede to an existing agreement.

Insofar as the first version of the *pactum* is concerned, some doubts deal with the final and key phase for the performance of the obligation, i.e. the conclusion of the agreement.[60] At least two interpretations are possible. According to the first of them, the *pactum* will be fulfilled when the negotiating parties adopt/sign an agreement. Pursuant to the second possibility, the agreement's entry into force is to be ensured. In the first case, the mere adoption/signing of an agreement does not necessarily ensure that the agreement will actually enter into force. This means that the *pactum* would in fact be ineffective. The second interpretation thus requires the entry into force of the negotiated agreement. However, the moment of performance may then be postponed, and failure to ensure the entry into force of the agreement may be the result of various factors. Responsibility for breach of the obligation would be developed differently in both cases.

Nevertheless, it seems correct to recognize that the *pactum de contrahendo* means that the parties will bring the agreement into effect and therefore ensure that it enters into force. Indeed, the mere adoption/signing of an agreement, especially if it were not to be applied provisionally, would differ from the *pactum de negotiando* only in appearance, and the obligation to conclude the agreement would be solely formally fulfilled.

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[57] *Ibidem*, para. 160.

[58] ICJ Rep 2012, p. 422, at 446, paras. 114 and 115.

[59] ICJ Rep 2002, p. 303, at 424, para. 244.

[60] On the ambiguity of the concept of concluding an agreement, *see* Gilas, *supra* note 26, pp. 139-141.

The second form of the *pactum de contrahendo* can be considered as simpler. It may consist of an obligation to accede to certain treaties already in force. This situation can be encountered, for example, in the accession practice of the European Union. The Acts of accession contain provisions obliging new member states to accede to international agreements with third parties to which the Union and Member States are parties (so-called "mixed agreements"), as well as agreements concluded by member states in the framework of the integration process, also in a simplified form.[61]

The obligation to conclude an agreement may also be twofold from the point of view of the time of its conclusion. The first refers to a situation when the obligation includes a date when a treaty should not so much be initiated and negotiated as it should be signed (entry into force). Such an obligation is an obligation of result. As a consequence, failure to conclude the agreement on time results in a breach of the obligation. The second form of the *pactum de contrahendo* includes the obligation to conclude an agreement without indicating a deadline. It could be assumed that this is a duty of conduct. This however is not the case. In the absence of a clear time limit, the agreement must be concluded without undue delay, within a reasonable period of time. However, in this case it is more difficult to distinguish between this obligation and the *pactum de negotiando*.

From a substantive point of view, the *pactum de contrahendo* may be either unlimited or limited. In the first case, the subject matter of the future agreement is defined only in general terms. In the second situation, the *pactum* indicates what matters should be included in the future treaty. They are indicated in such a way as to maintain the necessary flexibility. Such matters may also be included in the form of a duty of conduct, which means that failure to include them (completely) in the negotiated treaty will not be tantamount to a breach of the *pactum*.

Pactum de contrahendo is an obligation that goes beyond *pactum de negotiando*. It is connected with the acceptance, or even the final binding nature, of a negotiated treaty. For this reason, the obligation not to defeat the object and purpose of the treaty remains valid in this regard (Art. 18 VCLT) during the period from its adoption to being bound by the treaty. *Ex naturae,* this obligation does not apply to *pactum de negotiando*.

6. PRINCIPLES FOR THE PERFORMANCE OF *PACTA* OBLIGATIONS

6.1. General remarks

Establishing the nature and scope of the specific obligations that make up *pacta* raises another question about the most basic standards for their performance. These standards not only determine the appropriate behaviour of the parties, but also con-

[61] Such obligations have emerged since the first accession to the European Communities (1972). A. Wyrozumska, *Legal Nature of the 2003 Treaty of Accession to the European Union*, XXVI Polish Yearbook of International Law 5 (2002-2003), p. 10.

tribute "to enhancing the predictability of negotiating parties, reducing uncertainty and promoting an atmosphere of trust at negotiations."[62]

Recognizing that *pacta* constitute international obligations, they are subject to the principle of fulfilling obligations in good faith (Art. 2(2) UN Charter).[63] Due to the fact that they appear most often in treaties, the principle of *pacta sunt servanda* applies to them (Arts. 26 and 27 VCLT). As valid international obligations, *pacta* require performance to the full extent and appropriately insofar as persons, time, place, and manner are concerned, consistently with the content of the relevant *pacta*. They cannot be unilaterally and arbitrarily rejected. No reference may be made to the national law of the parties, nor to any internal obstacle or reason to justify the refusal to perform them or to justify their improper performance.

The *pacta* obligations are governed by and must be carried out in accordance with international law (*Principles and guidelines*, point 1). "The purpose and object of all negotiations must be fully compatible with the principles and norms of international law, including the provisions of the Charter" (point 2(c)), especially with *jus cogens* and the primacy of the UN Charter (Art. 103). Moreover, the performance of *pacta* obligations should be consistent with the specific rules of a particular branch of international law (e.g. equitable principles, methods, criteria, and equitable considerations cannot be ignored in negotiations concerning maritime delimitations).[64]

Pacta are essentially bilateral obligations. If they arise within the framework of conferences or international organizations, they may remain bilateral or can be multilateralised. In addition, as the General Assembly underlined in the *Principles and guidelines* resolution (point 2(b)),

> States should take due account of the importance of engaging, in an appropriate manner, in international negotiations the States whose vital interests are directly affected by the matters in question.
>
> Since negotiations take place *inter partes*, they should also pay reasonable regard to the interests and rights or obligations of third parties not participating in them.

6.2. The good faith principle

Good faith is the most basic and, at the same time, a framework standard affecting both the creation of *pacta* and their performance. Good faith is inherently linked to *pacta*. It determines the exercise of each of the specific obligations falling within the scope of both types of *pacta*.[65] As the ICJ explained in *Application of the Interim Accord*

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[62] Principles and guidelines, preamble.

[63] Principles and guidelines, point 2(a).

[64] D.R. Rothwell, T. Stephens, *The International Law of the Sea*, Hart Publishing, Oxford-Portland: 2010, p. 383ff; R. Lagoni, D. Vignes (eds.), *Maritime Delimitation*, Martinus Nijhoff Publishers, Leiden-Boston: 2006.

[65] *See* J.-P. Cot, *La bonne foi et la conclusion des traités*, 4 Revue belge de droit international 140 (1968), pp. 146-149; T. Hassan, *Good Faith in Treaty Formation*, 21(3) Virginia Journal of International Law 470 (1981).

of 13 September 1995,[66] even if the requirement of good faith is not expressly stated in the provision on which it is based, it remains an implicit element. This means that parties which undertake to enter into and to pursue negotiations or to conclude an agreement must do so in good faith. Any conduct of the negotiating parties must therefore be assessed in the light of good faith.[67]

Thus, as the arbitration tribunal in the *Lake Lannoux* Case of 1957 stressed,[68]

> the reality of the obligations thus defined cannot be called into question and can be sanctioned, for example, in the event of unjustified breakdowns in negotiations, abnormal deadlines, contempt for the procedures provided for, systematic refusal to take account of the various proposals or interests and, more generally, in the event of breaches of the rules of good faith.[69]

In the case of *pacta* the assessment of the parties' conduct will not involve examining their merits, but whether the parties have put forward their arguments in good faith with a view to negotiating/concluding an international agreement.[70]

Good faith, however, is difficult to define. There is no consensus as to its understanding.[71] While the analysis of this problem would go beyond the scope of this study, in can nevertheless be assumed that good faith expresses trust and confidence.[72] It assumes the existence of two elements: an ideal one, therefore a subjective but positive attitude to the performance of the obligation (this is a rational ethical attitude resulting from loyalty, honesty, reliability, a serious approach to complex declarations of will, common sense); and also a real one, not related to declarations about a party's behaviour,[73] but aimed at fulfilling the obligation in all respects by practical activities.

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[66] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, p. 684, para. 131.

[67] ICJ, *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Judgment (Merits), 25 July 1974, ICJ Reports 1974, at 33, para. 78.

[68] RIAA vol. XII, p. 281, at 306-307, para. 11.

[69] As regards the proof required for finding the existence of bad faith, "something more must appear than the failure of particular negotiations." It could be provided by circumstantial evidence, but should be supported "not by disputable inferences but by clear and convincing evidence which compels such a conclusion." The arbitration award in the case of *Tacna-Arica (Chile, Peru)*, 4 March 1925, RIAA vol. II, p. 921 (at 930).

[70] In the arbitration award in the case of *Tacna-Arica*, the tribunal stated: "The question now presented is not whether the particular views, proposals, arguments and objections of either Party during the course of the negotiations should be approved, but as to the good faith with which these views, proposals, arguments and objections were advanced. (…) The Parties, by Article 3 of the Treaty of Ancon, having left to a future agreement the conditions of the plebiscite must be deemed to have thereby agreed that each Party should have the right to make proposals, and to object to the other's proposals, so long as they acted in good faith" (p. 933).

[71] *See* Kolb, *supra* note 43; J.F. O'Connor, *Good Faith in International Law*, Dartmouth Publishing Company, Aldershot: 1991; E. Zoller, *La bonne foi en droit international public*, Éditions A. Pédone, Paris: 1977.

[72] ICJ, *Nuclear Tests Cases (Australia v. France/New Zealand v. France)*, Judgments, 20 December 1974, ICJ Rep 1974, respectively p. 253, at 267 and p. 457, at 473.

[73] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Rep 2002, p. 303, at 424, para. 244, with regard

Good faith applies to both the course of action and the result, if assumed by the parties to the obligation. The consequence of good faith is a reasonable expectation that the other party is actually aiming for a positive outcome.[74] Although it is not a precise standard, it is certain that the obligation cannot be performed in bad faith, or in a merely apparent, formal way.

As regards *pacta*, it is understood that the duty to negotiate to conclude an agreement in good faith does not impose a new obligation, but rather reaffirms an existing one.[75] The principle of good faith alone does not generate autonomous obligations.[76] Nevertheless, good faith has a major influence on the performance of *pacta*. To a significant extent it also enables a more precise determination of whether the manner of performing the obligation corresponded to its content.

CONCLUSIONS

Pacta are a useful and frequently-used instrument in the field of dispute resolution and the creation of new international regulations. They are useful in bilateral and multilateral treaty practice in many areas of international law. *Pacta* are legal obligations, although they retain a flexible nature. Their violation results in international responsibility. While they themselves are essentially a product of treaty freedom, they set limits on future negotiations and contracting. Despite their similarities, *pactum de negotiando* and *pactum de contrahendo* should not be equated. They are bundles of partially different obligations. *Pactum de negotiando* includes the obligation to enter into and pursue negotiations. However, the latter is broken down into a number of specific obligations in connection with the requirement of meaningfulness. In turn, the *pactum de contrahendo* requires the conclusion of an agreement, although this obligation is far from attaining clarity. *Pacta* are a mix of obligations of conduct and of result, of action and of omission. Their fulfilment is based on reciprocity and good faith, and should be consistent with international law and respect of the interests of non-negotiating parties.

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to the meaning of the obligation to conduct negotiations in good faith. In *Gabčikovo-Nagymaros Project*, the Court has ruled that: "The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized" (ICJ, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Rep 1997, p. 7. at 78-79, para. 142).

[74] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, 20 January 1984, ICJ Rep 1984, p. 246, at 292, para. 87. In the judgment, the ICJ stated that the obligation to negotiate the agreement requires "a genuine intention to achieve a positive result." *See also* O'Connor and Bailliet, *supra* note 9, p. 72.

[75] R. Barnidge, *The International Law as a Means of Negotiation Settlement*, 36(3) Fordham International Law Journal 545 (2013), p. 557.

[76] Kolb, *supra* note 43, p. 597.

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CHALLENGING CONSTANT AMBIGUITY: MODERN LEGAL APPROACHES TO ASYLUM

Abstract: *Legal understandings of asylum vary and remain to a great extent ambiguous. This is because asylum takes different legal forms in different legal dimensions: general international law, international human rights law, EU law, and constitutional law. All the above-mentioned dimensions are strictly linked and combined. Yet the ways in which asylum has been addressed, especially in the doctrine, often overlook this complexity. This article is aimed at assessing the modern legal approaches to the institution of asylum in international, European, and domestic legal orders, with reference to the positions taken by the late Janusz Symonides and in this way commemorating his recent passing away.*

Keywords: asylum, international refugee law, Janusz Symonides, refugee status

INTRODUCTION

Exactly thirty-five years ago, i.e. in 1986, the Polish Yearbook of International Law published an article by the late Professor Janusz Symonides on territorial asylum.[1] It was an English version of a text published one year earlier in Polish in the renowned Sprawy Międzynarodowe (International Affairs) quarterly.[2] Although Symonides had not published more extensively on asylum earlier, both texts – and especially its original Polish version – became a point of reference in Polish scholarly publications in the field of international law and international relations for many subsequent years. Its influential role increased even more when it was republished – with a slightly modified title – in another referential publication in the Polish legal literature: an extensive collection of texts edited by Roman Wieruszewski and entitled *Human Rights. A Legal Model*.[3] This volume appeared in 1991 – at the beginning of the transformation process of the

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[1] J. Symonides, *Territorial Asylum*, XV Polish Yearbook of International Law 217 (1986).

[2] J. Symonides, *Azyl terytorialny* [Territorial asylum], 9 Sprawy Międzynarodowe 19 (1985).

[3] J. Symonides, *Prawo do azylu* [Right to asylum], in: R. Wieruszewski (ed.), *Prawa człowieka. Model prawny*, Ossolineum, Wrocław: 1991, pp. 615-630.

Polish political system from totalitarian to democratic, and was one of the first and, at the time, definitely the most extensive and systematizing publication in Polish on human rights after the end of the times of censorship in place during the communist era. As such, it became an important point of reference in the debates concerning the introduction of human rights guarantees into the Polish legal system, above all in the constitutional debate of the 1990s that eventually resulted in the adoption in 1997 of a new Constitution for the democratic Poland. Article 56 of the Constitution is a provision on asylum and refugee status which may be characterized as specific and, as such, will be analysed below.

Thirty-five years can constitute an epoch and, obviously, the international legal regulations on asylum have been significantly evolving over that time, especially vis-à-vis the constant development of international human rights guarantees and the emergence of a European Union legal framework on asylum. Yet the legal foundations of asylum remain very much the same and Symonides' analysis retains validity, as it represents the high quality and nuanced precision that always characterized his legal writings. I personally very much benefited from Symonides' publications, as well as from numerous discussions I had with him, which is why I intend the present text to be a way of expressing my gratitude and of commemorating his recent passing away.

This article is aimed at assessing the modern legal approaches to the institution of asylum in the international, European, and domestic legal orders, with reference to the positions taken by Symonides in the above-mentioned texts.[4]

1. THE CONCEPT OF ASYLUM

Legal understandings of asylum vary and still remain to a great extent ambiguous. This is because asylum takes different legal forms in different legal dimensions: general international law, international human rights law, EU law, and constitutional law. As far as the latter is concerned, the modalities in which the right to asylum is construed in the constitutions of particular states vary significantly as well. Obviously, all the above-mentioned dimensions are strictly linked and combined. However, the ways in which asylum has been addressed, especially in the doctrine, often overlook this complexity. What's more, one may get the impression that some of the modern doctrinal approaches to asylum, being aimed at strengthening the legal position of an individual vis-à-vis a state, depart significantly from its current actual legal standing and from the states' practice. I believe this is the case, for example, in two modern approaches which will be addressed more broadly in this text. One claims to perceive asylum as a general principle of international law,[5] whereas the other

[4] The references in this text will be to the English version only, as published in the Polish Yearbook of International Law in 1986.

[5] M.-T. Gil-Bazo, *Asylum as a General Principle of International Law*, 27(1) International Journal of Refugee Law 3 (2015), pp. 3 et seq.

considers a constitutionalized right to asylum as an effective alternative to the protection of refugees.[6]

The basic distinction regarding asylum in international law amounts to defining it as a right of a state on the one hand, and as a right of an individual on the other. This distinction remains valid today. Yet following the (r)evolution of international law since World War II, brought about by the emergence and constant development of the human rights protection framework,[7] it is the latter that has gradually taken precedence in the modern legal discourse. Indeed, the legal protection of an individual plausibly forms one of the main characteristics of modern international law, and states' interests must, in many cases, give way to them. However, the states' interests still matter significantly and they should not be overlooked. This is precisely so in the context of asylum. Asylum understood as a sovereign right of a state retains its validity. What's more, it is claimed here that, as such, it may be beneficial to the protection of an individual as well.

Asylum defined traditionally – as it was formulated in 1950 by the Institute of International Law – amounts to "the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it."[8] Thus it is about a state granting to an alien leave to enter and to remain on its territory, resulting generally in the exclusion of extradition or expulsion to the country of origin.[9] As this understanding is confined to a state's territory, it is referred to as territorial asylum, distinct from diplomatic asylum.[10] Therefore, initially territorial asylum was perceived solely as a consequence of the territorial sovereignty of a state, and therefore as a sovereign right of a state. The element of protection was an intrinsic part of the institution, yet it was completely dependent on a state's assessment and left to its discretion. Importantly, this is still the case in modern international law, as states remain free to grant protection on their territory to anyone they wish. They are also free to regulate this competence in domestic legal orders, including the constitutionalization of asylum. However, states' discretion has become significantly limited, both in a positive

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[6] S. Meili, *The Constitutional Right to Asylum*: *the Wave of the Future in International Refugee Law?*, 41 Fordham International Law Journal 383 (2018), pp. 383 et seq.

[7] "The post-war turn to rights in international law" as it is also referred to, *see e.g.* J. von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 European Journal of International Law 903 (2008).

[8] "Article premier: "Dans les présentes Résolutions, le terme 'asile' désigne la protection qu'un Etat accorde sur son territoire ou dans un autre endroit relevant de certains de ses organes à un individu qui est venu la rechercher," Institut de droit international, *L'asile en droit international public* [*à l'exclusion de l'asile neutre*], Session de Bath – 1950.

[9] *Cf.* K. Hailbronner, J. Gogolin, *Asylum, Territorial*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. I, Oxford University Press, Oxford: 2012, pp. 716 et seq., para. 4. The authors claim that "[territorial asylum] does not necessarily entail or imply a right of residence or a right to remain in the territory for the individual."

[10] Symonides devoted a part of his text to an in-depth analysis of diplomatic asylum and its non-recognition in general international law. Symonides, *supra* note 1, pp. 220-224. *See also* P. Shah, *Asylum, Diplomatic*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. I, Oxford University Press, Oxford: 2012, pp. 713 et seq.

way (the emergence of international legal obligations to grant protection to particular categories of individuals), and in a negative way (the emergence of an international legal obligation to exclude some categories of individuals from protection). As far as the latter is concerned, states' discretion is limited by the exclusion from protection of those engaged in atrocity crimes and/or in activities contrary to the purposes and principles of the United Nations. As for the former, the discretion is limited firstly by introduction of a legal framework for the international protection of refugees (international refugee law), and subsequently by the emergence and evolution of human rights protection standards amounting to the prohibition of an alien's transfer (in whatever legal form) to those territories where his or her fundamental human rights might be endangered. These processes will be referred to in section 3 below.

Importantly, asylum as the right of a state entails a corresponding duty incumbent upon other states: the duty to accept the asylum granted by any other state. Indeed, as is stated in the preamble of the Declaration on Territorial Asylum of 1967, the grant of asylum is "a peaceful and humanitarian act and (…), as such, it cannot be regarded as unfriendly by any other State."[11] Without acceptance of this corresponding duty, the right to grant asylum would be voidable, as is the right to diplomatic asylum in universal international law. Save in some regional treaty arrangements among Latin America states, the right of a state to grant protection to an alien within its diplomatic premises has never been recognized in universal international law. Although occasionally such protection is granted on humanitarian grounds and, to some extent, may appear effective due to the well-established (under customary law and under the 1961 Vienna Convention on Diplomatic Relations[12]) principle of the inviolability of diplomatic mission premises, it does not enjoy the status of a legally accepted entitlement of a state. And from this perspective the right to territorial asylum as the right of a state is – as it has been already stated above – beneficial also to the protection of an individual because it must not be legally denied by other states and because, as such, it forms a means of protection.

As a means of protection, asylum has been, nevertheless, perceived in modern international law – and especially in its doctrine – mainly from the individualistic perspective: i.e. as a right of an individual. Yet no such right has been introduced by any universal international treaty so far, and the fiasco in this respect of the 1977 Conference on Territorial Asylum still remains symbolic. Also, the proposals to introduce the right to be granted asylum to general human rights instruments have not been successful, neither on the universal nor the regional level. In fact, all we have in this regard is the non-binding provision of the 1948 Universal Declaration of Human Rights (UDHR). Its Art. 14(1) states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution." The problem is that Kay Hailbronner and Jana Gogolin are entirely correct when they claim that the provision of Art. 14(1) UDHR – especially while taking into account its drafting history – "does not mean much more than what

[11] Resolution 2312 (XXII) of the UN General Assembly, adopted on 14 December 1967.

[12] Signed 18 April 1961, entered into force 24 April 1964, 500 UNTS 95.

is already regulated in Art. 13 [UDHR],"[13] i.e. that "[e]veryone has the right to leave any country, including his own, and to return to his country." And, indeed, the right to seek and to enjoy asylum is conceptually different from the right to be granted asylum.

Thus, as Symonides put it already in the mid-1980s, "the institution of asylum is both the right of the state to grant asylum and the right of the individual to request it. But we should note a clear trend towards limiting the freedom of decision of the state in cases when the claims of the individual are justified. Also the right to seek asylum is still not tantamount to the right to it, since no legally binding international obligation to grant asylum in justifiable circumstances is operative as yet."[14] This statement remains valid today, notwithstanding the evolutions of international refugee law and international human rights law that have introduced crucial legal safeguards for an individual seeking international protection. Yet, these safeguards do not amount – at least not explicitly – to a right to be granted asylum.

In the absence of any explicit treaty provisions on asylum it is generally accepted that asylum as the right of a state forms an established customary legal norm. Indeed, as Symonides put it: "There is no doubt that the granting of asylum within the scope of international law lies entirely within the competence of the State. As it is the State that determines the basis for granting to an alien asylum on its territory, and decides on granting or refusing asylum, the grant of asylum is a right of the State."[15] This is a sovereign right of any state, recognized by other states. Both *usus* and *opinio juris* remain unambiguous in this respect.

The legal nature of asylum as an individual right is far less clear. As was stated above, there are no treaty provisions imposing on a state a duty to grant asylum to an individual. Neither respective states' practice nor *opinio juris* exist in this respect. Indeed, there are concrete limitations incumbent on states under the non-refoulement principle (both as a treaty and customary norm under international refugee law and international human rights law), but they are conceptually different from the concept of a right to be granted asylum. Note that the non-refoulement principle permits the transfer of an alien seeking international protection to other states (territories) where an individual's fundamental rights would not be endangered. The non-refoulement principle is not about granting asylum. It is about the protection from persecution and from other fundamental human rights' violations. Thus, statements such as "although there is no established right to asylum, under special circumstances, an individual might effectively be granted a right to asylum"[16] does not necessarily contribute to legal clarity.

Notwithstanding the above, the doctrinal desire to strengthen the legal position of an individual seeking international protection vis-à-vis a state seems to be overwhelming. One of the most intriguing efforts in this regard was proposed in 2015 by María-Teresa

[13] Hailbronner, Gogolin, *supra* note 9, para. 12. Indeed, it should be noted that the preamble of the 1967 Declaration on Territorial Asylum explicitly links the provisions of Art. 14 and Art. 13.2 UDHR.

[14] Symonides, *supra* note 1, p. 226 (footnotes omitted).

[15] *Ibidem*, p. 224 (footnotes omitted).

[16] Heilbronner, Gogolin, *supra* note 9, para. 33.

Gil-Bazo, who submitted that "asylum constitutes a general principle of international law that is legally binding when it comes to the interpretation of the nature and scope of states' obligations towards individuals seeking protection."[17]

Gil-Bazo claimed that "the long historical tradition of asylum as an expression of sovereignty has now been coupled with a right of individuals to be granted asylum of constitutional rank, which in turn is recognised by international human rights instruments of regional scope" and, in consequence, "asylum constitutes a general principle of international law and, as such, it is legally binding when it comes to the interpretation of the nature and scope of states' obligations towards individuals seeking protection."[18]

The main problem with references to general principles of law is that they remain – as Roman Kwiecień put it – "the most enigmatic sources of international law"[19] or – as even more cautiously formulated by Przemysław Saganek – "the most mysterious element discussed in the context of sources of international law."[20] Indeed, although the position of general principles of law in international law seems to be consistently rising in the international legal discourse, their legal status is far from clear. What's more, the very terminology is confusing, as references are made by various authors to either "general principles," "general principles of law" or to "general principles of international law." Saganek was perfectly right in remarking that the very terminological choices may predetermine their legal status.[21] Gil-Bazo's text is not free from such ambiguity.

For practical reasons it is impossible to refer in the present text more broadly to the theoretical background of general principles of (international) law. However, the assertion is widely made that general principles of law form an autonomous source of international law, alongside treaties and customs.[22] Yet it is submitted here that in terms of methodological precision general principles of law as a formal source of international law should be clearly distinguished from general principles of international

[17] Gil-Bazo, *supra* note 5.

[18] *Ibidem*, p. 28.

[19] R. Kwiecień, *General Principles of Law: The Gentle Guardians of Systemic Integration of International Law*, XXXVII Polish Yearbook of International Law 235 (2017), p. 235.

[20] P. Saganek, *General Principles of Law in Public International Law*, XXXVII Polish Yearbook of International Law 243 (2017). The texts by Kwiecień and Saganek are parts of a Mini Symposium on general principles of law published in the Polish Yearbook of International Law. *See also* A. Kozłowski, *Systematicity of General Principles of (International) Law – an Outline*, XXXVII Polish Yearbook of International Law 225 (2017), and I. Skomerska-Muchowska, *Some Remarks on the Role of General Principles in the Interpretation and Application of International Customary and Treaty Law*, XXXVII Polish Yearbook of International Law 255 (2017).

[21] Saganek, *supra* note 20, p. 243.

[22] Rüdiger Wolfrum noted that the contrary view, arguing "against the incorporation of general principles amongst the sources of international law has become obsolete"; R. Wolfrum, *General International Law (Principles, Rules and Standards)*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. IV, Oxford University Press, Oxford: 2012, pp. 344 et seq., para. 22. And the assertion that general principles of law form an autonomous source of international law is not only exclusively derived from the formulation of Art. 38(1)(c) of the ICJ Statute.

law. The latter form principles in a prescriptive meaning of the term: they belong to the international legal order (thus they are of a treaty or customary character, or – yes, indeed – may take the status of general principles of law) and form general rules playing a principal role in that order (also because they emanate the very extra-legal values creating the axiological basis of international law, such as safeguarding and maintaining international peace and security, as well as international justice). Most commonly, general principles of international law are referred to as those listed in Art. 2 of the UN Charter and in the 1970 UNGA Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[23] Thus, general principles of international law amount to its normative core, but do not form a separate formal source of international law.[24] One can also speak of general principles of particular branches of international law – and this is exactly the case of the non-refoulement principle in international refugee law.

Gil-Bazo – although referring to general principles of international law and referring in this context to Sir Gerald Fitzmaurice's well-known Hague lecture[25] – perceived the legal nature of asylum as a right of individuals (the right to be granted asylum) as independent from treaty or custom and constituting a general principle of law, and as such binding upon states irrespective of their express recognition. The author elaborated on the religious and historical foundations of asylum, and first and foremost on the position of asylum in the national constitutions of numerous states, and claimed that "asylum aims to protect higher values in which the state itself is founded: national liberation, justice, democracy, and human rights" and that "this conception of asylum does not exist exclusively within any given domestic legal order. On the contrary, it is intimately linked with international law."[26]

Indeed, general principles of law as a separate source of international law are, to a great extent (though not exclusively[27]), derived from municipal legal orders, i.e. principles accepted by all legal orders. As such – and taking into account the subsidiary character of general principles of law in international law in the sense that their crucial function is to address a situation of *non liquet* – they mainly (but, again, not exclusively) are of a procedural character, and as well encompass the main rules of legal relations in general and

[23] Resolution 26/25 (XXV) of the UN General Assembly, adopted on 24 October 1970.

[24] This approach is also well illustrated in the ICC Statute, whicht explicitly distinguishes between principles (and rules) of international law (Art. 21(1)(b) and general principles of law (Art. 21(1)(c)).

[25] G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Recueil des cours de l'Académie de droit international de La Haye (1957-II). One has to note, however, that Fitzmaurice's approach was not to address general principles of law as a source of international law. And indeed, general principles of law are principles of international law in the sense that they should be viewed as part of international law. *Cf.* G. Gaja, *General Principles of Law*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. IV, Oxford University Press, Oxford: 2012, pp. 370 et seq., paras. 4-6.

[26] Gil-Bazo, *supra* note 5, p. 26.

[27] *Cf. e.g.* the extensive classification of general principles as proposed by Wolfrum (Wolfrum, *supra* note 22, paras. 28-53).

legal logic. As such they are accepted by all states "irrespective of their express recognition," but not irrespective of states' implied consent, although – as Wolfrum put it – "such consent is expressed for the various types of principles constituting a source of international law in different forms."[28] In no way should general principles of law be adduced in order to impose obligations upon states irrespective of, or contrary to, their will.

Indisputably, asylum has vast religious and historical traditions and foundations and in various forms is known to many modern municipal legal orders. What's more, in a significant number of them asylum was introduced into national constitutions. But does this all make asylum a general principle of law? The answer must be negative because, firstly, the acceptance of asylum in national constitutions is not so widespread as it may seem *prima facie*;[29] and secondly, the approaches in which asylum is constitutionally regulated are not at all unanimous and it is the content that is decisive here, and – as Giorgio Gaja put it, although in a slightly different context – "in any event, [the principles'] character would depend on their content, not whether or not they find a parallel in municipal systems."[30]

Domestic regulations on asylum, in their varieties and different modalities, reflect its very essence as a sovereign right of a state. And obviously, as was mentioned above, this understanding of asylum encompasses an element of protection of an individual. It forms an intrinsic part of the institution, but it is dependent on a state's assessment and up to its discretion. This is also valid in domestic regulations with respect to asylum. States may limit themselves in this regard, introducing specific domestic regulations, including the constitutionalization of asylum. Yet, among those states that have introduced asylum into their constitutions, numerous include either references to statutory legislations, dubbed by Stephen Meili as "escape clauses"[31], or references to binding international agreements and, in consequence, (in the absence of any universal agreements on asylum as such) practically equate asylum with refugee status. Indeed, it seems hardly possible to derive from constitutional regulations a general principle of law amounting to an individual right to be granted asylum. And Gil-Bazo admitted herself that "the nuances of what specific protection asylum provides, who is entitled to benefit from it, as well as its derogations or exceptions are far from settled."[32] This is what asylum as an individual right is about. And it is the content of a principle that matters. Thus one can conclude that municipal regulations on asylum do nothing more than confirm domestically an individual's right to seek asylum and a state's competence to offer protection as

[28] *Ibidem*, para. 54.

[29] And interestingly enough, there are actually not so many of them. Meili notes that only thirty-five percent of world's constitutions include asylum provisions. Meili, *supra* note 6, p. 386 and sources referred to therein, including: L. Kowalczyk, M. Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 Cornell Law Review 1219 (2017).

[30] Gaja, *supra* note 25, para. 21.

[31] By "escape clauses" Meili refers to constitutional provisions "allowing the right to be interpreted according to [statutory] national law," Meili, *supra* note 6, p. 390. Meili refers in this context to the example of the Polish Constitution, which is more broadly analysed below in section 4 of the present text.

[32] Gil-Bazo, *supra* note 5, p. 28.

recognised in international law.[33] No limitations exist in this respect in international law, save for those deriving from both treaty and customary norms of international refugee law and international human rights law. And they are momentous, indeed.

2. ASYLUM, REFUGEE PROTECTION AND HUMAN RIGHTS[34]

Not surprisingly, asylum was incorporated into the UDHR in large part because this document was motivated by – and here we can refer to its preamble – "barbarous acts which have outraged the conscience of mankind" resulting from World War II. Another result of the World War II was the enormous increase in numbers of displaced persons seeking protection internationally. But the formulation of Art. 14(1) UDHR leads to an interpretative ambiguity. Obviously, as has been set forth above, the right to seek and to enjoy asylum is conceptually and essentially different from the right to be granted asylum.[35] Notwithstanding the foregoing, its content remains unclear. And it may be claimed that this ambiguity was welcomed by states, as at that time they were not ready to undertake any clearly settled – not to mention legally binding – commitments vis-à-vis individuals in this respect. And not that much has changed since then. States' reluctance to legally bind themselves – in the context of granting protection to aliens – still remains one of the factors, and a very important one, shaping modern international refugee law.

The key issue for a proper understanding of the mechanisms for granting international protection to individuals is the relationship between two principal institutions: asylum and refugee status. The former has been already analysed above, but it is worth emphasising here that indeed the development of a human rights protection framework starting after World War II led to perceiving asylum from the individualistic perspective, i.e. as a right of an individual. Art. 14 UDHR played a pivotal role in this process, as it anchored asylum in international refugee law and international human rights law, both with individualistic foundations. But it should be recalled that in the interwar period the early international refugee law instruments were not individualistic at all, but were aimed at the protection of particular (mainly ethnic) groups. This approach

[33] Thus, Goodwin-Gil's and McAdam's assertion of 2007 still remains fully legitimate: "In regard to asylum (…) the argument for obligation fails, both on account of the vagueness of the institution and of the continuing reluctance of States formally to accept such obligation and to accord a right of asylum enforceable at the insistence of the individual" (G.S. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, Oxford University Press, Oxford: 2007, p. 358).

[34] This section is based on parts of my previous publication in Polish, shortened and modified accordingly: M. Kowalski, *Znaczenie art. 14 Powszechnej Deklaracji Praw Człowieka dla międzynarodowego prawa uchodźczego* [The meaning of Art. 14 of the Universal Declaration of Human Rights for international refugee law], in: M. Florczak-Wątor, M. Kowalski (eds.), *70 lat Powszechnej Deklaracji Praw Człowieka*, Księgarnia Akademicka, Kraków: 2019, pp. 79-90.

[35] It should not be overlooked that the first draft of Art. 14(1) included the "right to seek and be granted asylum," but it was rejected by states and altered. Goodwin-Gill, McAdam, *supra* note 33, p. 358.

was changed and resulted in the adoption of the 1951 Geneva Convention on Refugee Status, and subsequently the 1967 New York Protocol introducing an individualistic definition of a refugee as an individual at risk of persecution and entitled to a set of rights (as well as duties) in the form of refugee status.

Granting refugee status under the 1951 Geneva Convention amounts to the recognition that an alien meeting the criteria set out in the definition of a refugee is entitled to be granted protection by excluding his or her removal to those territories where he or she could be at risk of persecution (the non-refoulement principle), as well as by guaranteeing to him or her some rights in a host country. Granting refugee status to an individual at risk of persecution becomes a form of granting international protection. Granting asylum to an individual at risk of persecution or of other human rights violations is also a form of international protection. And, if granted to an alien meeting the refugee definition criteria, asylum becomes a legal means of refugee protection. This is how the process of merging the asylum and refugee status began, and in the domestic regulations of numerous states the concept of asylum has been understood as the right of an individual to seek protection while endangered by persecution. Notions such "applying for asylum" and "applying for refugee status" or "granting asylum" and "granting refugee status" began to be synonymous in many domestic legislations. And the term "asylum-seeker" is commonly used to designate a person applying for refugee status. The same process of blurring the differences between asylum and refugee status took place in the EU law.[36] Symptomatically, Art. 18 of the Charter of Fundamental Rights of the EU (the EU Charter),[37] entitled "Right to asylum," states that "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union." Moreover Art. 78(1) of the Treaty on the Functioning of the European Union (TFEU)[38] provides that "[t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the [Geneva Convention] and the [New York Protocol], and other relevant treaties." Thus, the legal measures adopted under Art. 78(2) TFEU and forming the "Common European Asylum System" actually constitute the EU system of refugee protection based on the foundations of international refugee law (the 1951 Geneva Convention and the 1967 New York Protocol), supplemented by subsidiary forms of protection.

[36] Gil-Bazo rightly noted an emerging trend developing among European states (especially among the EU Member States) of blurring the distinction between asylum and refugee status "by restricting the use of the term asylum to refugees within the meaning of [the 1951 Refugee Convention], while developing alternative institutions for protection (such as temporary protection and subsidiary / complementary protection)," Gil-Bazo, *supra* note 5, p. 4.

[37] OJ C 326, 26 October 2012, pp. 391-407.

[38] *Ibidem*, pp. 47-390.

Yet, under international law the concept of asylum remains broader. This is the case also in those municipal legal orders in which the concepts of asylum, including asylum as a constitutional right, and refugee status remain differentiated. This was confirmed by the EU Court of Justice, which famously stated in the German law context that "[EU] Member States may grant a right of asylum under their national law to a person who is excluded from refugee status."[39] Nevertheless, it was exactly the formulation of Art. 14(1) UDHR that linked the right of an individual to seek and enjoy asylum with the risk of persecution and initiated the individualistic approach to asylum in the context of human rights protection.

Notwithstanding all of the above, the legal consequences of the right to seek and enjoy asylum still remain ambiguous. Especially, it is unclear whether this right has acquired the status of a customary legal norm. While generally states do not question the right of an individual to seek and enjoy asylum, what remains problematic however is the exact content of this right and what exactly an individual is entitled to. Definitely an individual has the corresponding right to leave any country, including his or her own, and to return to the country of origin as provided for in Art. 13(2) UDHR. It is also widely accepted that the individual right to seek asylum corresponds a state's duty not to jeopardize those seeking asylum. In practice however it may be challenged, as states widely apply various immigration control measures such as visa regimes, carrier sanctions, etc.

It is submitted here that the ambiguity in the legal status of the right to seek and enjoy asylum is irrelevant in the sense that it is the non-refoulement principle which is of key importance for the protection of an individual at risk of persecution. The non-refoulement principle "in the absence of a human right to be granted asylum (…), remains the cornerstone of international protection of refugees because it guarantees that refugees remain outside the reach of the country of persecution even if they are not granted asylum or are otherwise refused by the country of refuge."[40] The development of this principle under international refugee law and – even more importantly – under international human rights law is crucial in this respect.[41]

It is always worth bearing in mind that the foundations of international refugee protection lie between states' discretion and states' obligations.[42] Indeed, neither the 1951 Geneva Convention nor the 1967 New York Protocol contain any provision explicitly imposing on state-parties an obligation to grant refugee status. Nor do they contain any provision on procedural obligations aimed at determining a request for refugee

[39] Joined Cases C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D.* [2010], ECLI:EU:C:2010:661, para. 121.

[40] W. Kälin, M. Caroni, L. Heim, *Art. 33, para 1*, in: A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary*, Oxford University Press, Oxford: 2011, p. 1395.

[41] For more on the non-refoulement principle generally, *see e.g. ibidem,* pp. 1327 et seq.; Goodwin-Gill, McAdam, *supra* note 33, pp. 201 et seq.

[42] M. Kowalski, *International Refugee Law and Judicial Dialogue from the Polish Perspective*, in: A. Wyrozumska (ed.), *Transnational Judicial Dialogue on International Law in Central and Eastern Europe*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź: 2017, p. 367.

status. Thus, State-parties enjoy a great deal of discretion in this respect and persistently tend to secure it. Yet this discretion is limited by the non-refoulement principle as introduced in Art. 33(1) of the 1951 Geneva Convention, providing for the prohibition of expulsion or return of a refugee "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." This prohibition – in the absence of an individual right to be granted asylum and, in consequence, in the absence of the corresponding positive obligation on the part of a state – results in a state's negative obligation to not take any measures that might endanger an individual by forcing his or her return to territories where he or she could be at risk of persecution. In other words, the prohibition guarantees "that refugees remain beyond the reach of a persecuting state as long as their fear of persecution remains well-founded."[43] At the same time, alongside the above-mentioned negative obligation of a state, an implied positive obligation of a state occurs as well. Under Art. 33(1) of the 1951 Geneva Convention, the prohibition of refoulement applies to refugees as defined in Art. 1(A). It undoubtedly applies also to those requesting refugee status, i.e. before the formal recognition of their status as refugees. This is especially evident in context of the generally-accepted declaratory nature of refugee status. In order not to violate the prohibition of refoulement, a host state is positively obliged to determine whether the individual concerned (an asylum-seeker) is or is not a refugee. Alternatively, a host state may – if applicable on practical grounds – transfer the individual concerned to a third-country where he or she would not be at risk of persecution nor at risk of further refoulement.

Thus, the prohibition of refoulement is absolutely crucial for the protection of an individual seeking international protection and, as such, may acquire the status of a principle of international refugee law. Indeed, the non-refoulement principle offers actual protection for those seeking international protection and, therefore, it may be plausibly claimed that it is a legal consequence of the individual right to seek and enjoy asylum as provided for in Art. 14(1) UDHR. Correspondingly, states retain some discretion, allowing them to free themselves from granting protection if an individual concerned may be transferred to a third-state. This legal construction makes it possible to introduce such mechanisms as those determining which EU Member State is responsible for examining an application for international protection lodged in one of the Member States (known commonly as the Dublin rules and based on the "one application – one Member State responsible" approach[44]), or other mechanisms such as the safe third-country or the country of first asylum notions. This is possible because under binding international law States generally do not accept the right of an individual to choose the state in which they wish to apply for (and be granted) protection. However, a host state, while com-

[43] Kälin, Caroni, Heim, *supra* note 40, p. 1335.

[44] Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29 June 2013, pp. 31-59.

plying with its obligation resulting from the non-refoulement principle, must take into account the rights of an individual guaranteed under international human rights law (such as the right to respect for private and family life; special status of the vulnerable etc.), which may result in acceptance of an individual's preferences in this regard.

The above remarks referred to the non-refoulement principle as it was regulated in Art. 33 of the 1951 Geneva Convention. Yet, it is obvious that although the principle initially had only a treaty norm status, it has acquired the status of a norm of universal customary international law.[45] What's more, it may plausibly be claimed that the non-refoulement principle in its customary form is of much wider scope than the treaty norm under Art. 33 of the 1951 Geneva Convention. Its customary scope has been evolving and developing by states' practice not only under (but importantly also independently from) the 1951 Geneva Convention, but also – actually first and foremost – under other treaty and customary obligations imposing an absolute prohibition of torture, inhuman or degrading treatment or punishment, including the prohibition to transfer an individual to territories where he or she would be at risk of such a treatment. In this respect the prohibition is of an absolute nature and the exclusion clause of Art. 33(2) of the 1951 Geneva Convention does not apply. Also, it applies not only on territories but on state's frontiers as well. Moreover, and importantly, it applies not only to those meeting the criteria of the refugee definition under Art. 1(A) of the Convention, but also to every individual that in case of removal would be at risk of torture or inhuman or degrading treatment or punishment. In this context we face interpenetrating legal guarantees for an individual under both international human rights law and international refugee law, in which the former "embodies a principle of non-refoulement with a considerably wider scope of application."[46] This interpenetration is also illustrated in the EU law, as Art. 19(2) of the EU Charter guarantees that "No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment," and only this provision forms the completion of the right to asylum under Art. 18 of the EU Charter.

3. ASYLUM AS A CONSTITUTIONAL RIGHT AND THE POLISH PERSPECTIVE

While referring to the constitutional regulations on asylum, one should start with the general remark that under international law for a state to exercise its prerogative in the form of granting asylum to an alien it is not necessary to introduce asylum into its municipal legal order as a domestic institution. From the perspective of international law, asylum is about granting protection in the form of leave to enter, to remain, and not to be returned, that may be granted under domestic law in any sort of legal

[45] Kälin, Caroni, Heim, *supra* note 40, pp. 1343-1346.

[46] *Ibidem*, p. 1350.

form. Yet many states tend to regulate asylum as such in their municipal legal orders. Numerous national constitutions include provisions providing the right to asylum, and their number has been increasing. In this context Lucas Kowalczyk and Mila Versteeg wrote recently about "the global spread of constitutional asylum provisions" because – as they show – the percentage of the world's constitutions including asylum provisions increased to thirty-five percent in 2017, up from eleven percent in the wake of World War II.[47] Still, most constitutions do not introduce asylum as a constitutional right. What's more, as has been already mentioned above those that do vary significantly in their modalities, which are not at all unanimous. This aspect is indeed consequential as it makes any generalisations very difficult and demands a careful and detailed analysis of constitutional asylum provisions, with due attention to their historical and legal culture aspects. Also, constitutional provisions on asylum have been influenced by all the processes mentioned above: the development of international refugee law, international human rights law and in Europe EU law.

The doctrinal approaches to asylum as a constitutional right vary as well. Hélène Lambert, Francesco Messineo, and Paul Tiedemann, after a careful analysis of the constitutional provisions of France, Italy and Germany, convincingly claimed that international law and EU law obligations made constitutional asylum in these states "a redundant, almost obsolete, concept."[48] But this view is not shared by other authors, including Gil-Bazo, who remarks in the historical context:

> as a matter of law, [the] conception of asylum as a duty found its first formulation in modern times in article 120 of the 1793 French Constitution, born after the French Revolution: "[Le Peuple français] donne asile aux étrangers bannis de leur patrie pour la cause de la liberté. Il le refuse aux tyrans." Far from being obsolete, despite the establishment of the refugee protection regime as a matter of international law, this provision constitutes a reference upon which constitutions around the world still formulate asylum in their bill of rights as an essential element of liberal-democratic states.[49]

Other authors, such as Stephen Meili, go even further and perceive a constitutionalized right to asylum as an effective alternative to refugee protection.[50] Much obviously depends on the particular constitutional model, and in some cases the constitutionalization of asylum may indeed strengthen the position of an individual and come to his or her rescue where refugee protection fails. This however is definitely not the case in those states in which constitutional asylum remains of a discretional nature. What's more, one should not ignore the fact that in non-democratic states some constitutional references to asylum are of an ornamental character only, and/or that they are brutally subjected to the ruling totalitarian ideologies. This was exactly the case of the ex-Soviet

[47] Kowalczyk, Versteeg, *supra* note 29, p. 1260.

[48] H. Lambert, F. Messineo, P. Tiedemann, *Comparative Perspectives of Constitutional Asylum in France, Italy and Germany: Requiescat in Pace?*, 27(3) Refugee Survey Quarterly 16 (2008).

[49] Gil-Bazo, *supra* note 5, p. 23.

[50] Meili, *supra* note 6, pp. 383 et seq.

bloc states, including Poland, in which – prior to the change of their political systems from totalitarian into democratic at the turn of the 1980s and 1990s – the 1951 Geneva Convention and 1967 New York Protocol were perceived as no more than instruments of "Western imperialism."[51] Taking into account the principal role of international refugee law and international human rights law mechanisms, as well as the mutual relationship between domestic and international legal orders, constitutional regulations on asylum should not be perceived as an alternative to refugee protection. Rather they should be as compatible as possible with international law obligations aimed at the protection of an individual. And indeed, asylum as a broader notion should not – contrary to the modern tendencies – be entirely equated with refugee status. Yet it may form a useful, albeit only complementary, form of protection.

The above-mentioned tendencies are well illustrated in the Polish context, as asylum is provided for in the Polish Constitution and this regulation is frequently evoked in international literature, but its specificity in most cases is not noticed, or even misinterpreted.[52] Thus, it is worth briefly presenting it here.

After the change of the political system in 1989 and the transitional constitutional changes, the new constitution of the democratic Poland was adopted in 1997. Art. 56 of the Constitution states that:

1. Aliens may enjoy the right of asylum in the Republic of Poland in accordance with principles specified in a statute.
2. An alien who is seeking protection from persecution in the Republic of Poland may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party.[53]

Thus, the constitutional regulation refers to both asylum and refugee status and explicitly regulates them as two separate legal institutions. As far as refugee status is concerned, domestic statutory regulations entirely reflect the obligations under the 1951 Geneva Convention, 1967 New York Protocol and – following the 2004 accession to the EU – the EU legal framework. The international protection under EU law (consisting of refugee status and subsidiary protection) remain the principal form of aliens' protection in Poland. In addition, Polish law provides for some other complementary forms of protection, such as a humanitarian stay and tolerated stay that under statutory regulations are aimed at meeting the human rights standards excluding the return of an alien.

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[51] The 1951 Geneva Convention and the 1967 New York Protocol were jointly acceded to by e.g. Hungary on 14 March 1989; Poland on 27 September 1991; then Czechoslovakia on 26 November 1991 (after the dissolution of Czechoslovakia the Czech Republic and Slovakia became state-parties to the Convention and the Protocol on 11 May 1993 and 4 February 1993, respectively). The Baltic States acceded only in 1997 (Estonia on 10 April 1997, Lithuania on 28 April 1997 and Latvia on 31 July 1997). Kowalski, *supra* note 42, p. 369.

[52] *See e.g.* Meili, *supra* note 6, p. 401.

[53] Translation by the author. Note that some available English translations of Art. 56 lack precision. *See e.g.* the English translation of the 1997 Constitution available on the website of the Sejm (the lower house of the Parliament) https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (accessed 30 May 2021).

Asylum as regulated in Art. 56(1) of the Constitution is a domestic legal institution of a different character. Although framed as a constitutional human right listed in the catalogue of "Personal Freedoms and Rights" of Chapter II of the Constitution, granting asylum remains of a discretional character. It is characteristic that under Art. 79(2) of the Constitution rights regulated in Art. 56 are explicitly excluded from the scope of constitutional complaint to the Constitutional Court. The discretional character of asylum is even more evident under the statutory regulation: asylum may be granted to an alien if he or she is in need of protection and cumulatively granting asylum is in the best interests of Poland. No character of the protection needed is specified. The discretional character of asylum is also confirmed in the case law of the administrative courts.

The institution of asylum in Polish law originates from legal traditions prior to Poland's accession to the 1951 Geneva Convention and the 1967 New York Protocol, and in the communist era it was highly ideologized. The formulation of Art. 56(1) of the 1997 Constitution has been elaborated alongside with the gradual introduction to the Polish legal order of other forms of legal protection of aliens under international refugee law and international human rights law. Although freed from its previous ideological ballast, asylum has proven to be of marginal practical importance. It has been applied in practice very rarely. Thus, Polish law is another example of a municipal legal order in which a constitutional right to asylum has become superfluous. One can claim that it is only the profound political reluctance towards constitutional amendments in Poland that allows for the preservation of the constitutional status of asylum.

CONCLUSIONS

Understandings of the concept of asylum remain complex and must be viewed in various, albeit interrelated, legal dimensions. Yet its international law status still remains of predominant importance. Undoubtedly, the human rights approach to asylum, perceiving the concept as the right of an individual to protection status, has been consistently gaining importance. It should be noted, however, that the individualistic approach to asylum should not be legally framed in opposition to the traditional approach, which defines asylum as a right of a state. Rather, both approaches should be perceived and interpreted as complementary.

Although the individualistic approach to asylum as a means of protection is crucial, it still remains to a large extent unclear. Firstly, one should recall that the right to seek and enjoy asylum is conceptually different from the right to be granted asylum. Notwithstanding the human rights limitations incumbent on states under the non-refoulement principle, the right to be granted asylum lacks a solid legal basis in binding international law. What's more, the legal status of the right to seek and enjoy asylum remains ambiguous and – as has been mentioned above – it seems problematic whether it has acquired the status of a customary legal norm. It has been argued however that the ambiguity in the legal status of the right to seek and enjoy asylum is in a way

compensated for by the firm legal status of the non-refoulement principle under both international refugee law and, even more importantly, under international human rights law. Although conceptually different from the concept of asylum, the non-refoulement principle offers individuals effective legal protection from persecution and other grave violations of human rights.

One should also note the importance of asylum as a constitutional right. While it seems disputable whether it is on the rise or in decline, any generalisations in this respect remain highly risky because of the different constitutional modalities in domestic legal orders, and a thorough analysis of the domestic legal contexts is always required. Importantly, it has been submitted above that the constitutional regulations on asylum should not be perceived as an alternative to refugee protection. On the contrary, they should be intrinsically linked with states' international law obligations aimed at the protection of individuals from persecution and other human rights violations.

Taking into account all that has been stated above, one can claim that modern legal approaches to the concept of asylum must constantly challenge the existing and noticeable legal ambiguity. And indeed, Janusz Symonides' remarks on the legal foundations of asylum referred to above still offer, due to their incisive character, a valuable point of reference for contemporary analyses.

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THE UN SECURITY COUNCIL AND INTERNATIONAL TERRORISM

Abstract: *The present contribution pays tribute to the late Professor Janusz Symonides by examining the position of United Nations Security Council towards international terrorism. The analysis concentrates on how the phenomenon is perceived by the main political organ of the United Nations, and offers some cursory remarks on its reactions (both actual and potential).*

Keywords: terrorism, Security Council, Symonides, United Nations

INTRODUCTION

Without doubt, international terrorism has attracted the attention of international law scholars for many decades. One cannot but subscribe to the view expressed by Dame Rosalyn Higgins that it is "a pernicious contemporary phenomenon which both presents complicated legal problems and affords an interesting opportunity to see the efforts made within the United Nations to respond to these problems."[1] The hitherto attempts to define and combat terrorism have quite a long history, but nevertheless have been of rather limited effectiveness. Over the last decades however the UN has been very active in dealing with different issues related to terrorism. It has adopted different positions and initiatives, including those of the United Nations (UN) Global Counter-Terrorism Strategy,[2] or more recently the UN Office for Counter Terrorism,[3] as well as the UN Global Counterterrorism Coordination Compact and the UN Counter-Terrorism Centre.

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[1] R. Higgins, *The general international law of terrorism*, in: R. Higgins, M. Flory (eds.), *Terrorism and international law*, Routledge, London: 1997, p. 14.

[2] UN Doc. A/RES/60/288 is a unique global instrument to enhance national, regional and international efforts to counter terrorism. Through its adoption by consensus in 2006, all UN Member States agreed for the first time to a common strategic and operational approach to fighting terrorism.

[3] Established on 15 June 2017 through the adoption of UN General Assembly Resolution 71/291.

The purpose of this article is to pay tribute to the late Professor Janusz Symonides by examining the position of the UN Security Council towards international terrorism and addressing the respective implications thereof. It may be argued that its changing attitude triggers additional problems. Our analysis concentrates on how the phenomenon is perceived by the main political organ of the UN (the Security Council) and offers some cursory remarks on its reactions (both actual and potential). Of course, an overall assessment of the practice of the UN as a whole, or even only of the Security Council, would definitely exceed the space allotted for this contribution, as it would have to result in a very extensive analysis comparable in volume to the monumental seminal work on the practice of the United Nations edited by Professor Symonides.[4] Hence it is worth remarking here that this impressive collection of analyses under his chairmanship is only one of the many lasting achievements by Professor Symonides with respect to the doctrine of international law and international relations. In several contributions the learned Scholar considered the structural changes of the international legal order, which may seem to have been one of his favourite topics.[5] Naturally enough, he also recognized the UN's involvement in addressing the threat of terrorism and alluded to the obvious and pressing need for international cooperation in combating it, and in particular to its normative dimension.[6]

Given this clearly discernible thread of thought it may seem natural to examine the respective developments in the practice of the Security Council and to offer the following remarks as a tribute to the memory of an outstanding Scholar of international law. Since the end of the Cold War it has been possible to observe a general growth in the activity of the Security Council with respect to the application of Chapter VII of the UN Charter,[7]

[4] One and half decades ago he offered, together with a numerous group of influential researchers, a panoramic view of almost all aspects and problems related to the operation of the UN: J. Symonides (ed.), *Organizacja Narodów Zjednoczonych. Bilans i perspektywy* [The United Nations. Balance and prospects], Wydawnictwo Naukowe Scholar, Warszawa: 2006.

[5] *See e.g.* J. Symonides, *Konieczność dostowania porządku międzynarodowego do wyzwań i zagrożeń XXI wieku* [The necessity to adjust the international order to the challenges and threats of the 21st century], in: J. Symonides (ed.), *Świat wobec współczesnych wyzwań i zagrożeń*, Wydawnictwo Naukowe Scholar, Warszawa: 2010, pp. 637ff. When referring to the attacks on World Trade Center and the Pentagon and their perception as a turning point, or the beginning of a new era in international relations, Symonides remained skeptical, if only by alluding to the obstacles to obtaining the consent of numerous states to the proposal for a new order, dominated by the fight with international terrorism: J. Symonides, *Normatywne teorie* ładu *międzynarodowego po zimnej wojnie* [Normative theories of the international order after the Cold War], in: R. Kuźniar (ed.), *Porządek międzynarodowy u progu XXI wieku*, Wydawnictwo Uniwersytetu Wrocławskiego, Warszawa: 2005, p. 100.

[6] Symonides (*Normatywne teorie*), *supra* note 5, p. 99. *See also* J. Symonides, *Prawnomiędzynarodowe aspekty walki z międzynarodowym terroryzmem* [International law aspects of the fight against international terrorism], 4 Sprawy Międzynarodowe 23 (2001).

[7] Attention is drawn to this by, *inter alia,* W. Czapliński, *Ewolucja kompetencji Rady Bezpieczeństwa ONZ* [Evolution of powers by the UN Security Council], in: K. Lankosz (ed.), *Aktualne problemy prawa międzynarodowego we współczesnym świecie. Księga pamiątkowa poświęcona pamięci Profesora Mariana Iwanejko*, Akademia Ekonomiczna, Kraków: 1995, p. 28. For a detailed analysis, including from a statistical perspective, *see* P. Wallensteen, P. Johansson, *Security Council Decisions in Perspective*, in: D.M. Malone

in particular with regard to terrorism.[8] Before, if the Security Council decided to employ specific measures, they were a concrete response to a given threat in a defined situation. This practice was broken for the first time with the changing attitude towards terrorism. The goal of this analysis is thus to trace and to assess the attitude of the main political organ of the UN towards the latter problem, as well as to point to the consequences (including some problematic ones) of the broadened approach.

1. TERRORISM DETERMINATION

Although it may seem obvious, it needs to be borne in mind that the Security Council, exercising rather executive functions, bears primary responsibility for international peace and security.[9] Art. 39 of the UN Charter does not define the threats, breaches, or acts of aggression, having regard to the need for the Security Council to react in a flexible way to any of those phenomena. The organ thus was deliberately granted broad discretion when it comes to determination of a threat to international peace and security[10], as well as to taking decisions on what measures to apply.

The evolution and/or constant expansion of the organ's powers is most clearly visible with respect to how the Security Council considers and reacts to terrorism. Traditionally, the notion "threat to peace" was interpreted narrowly, coupling it tightly with the threat of force, which is prohibited under Art. 2(4) of the UN Charter.[11] However, with the passage of time a gradual broadening of the meaning of that notion took place.[12] While the practice by the Council is not always consistent in this regard, which of course may

(ed.), *The UN Security Council: from the Cold War to the 21st Century*, Lynne Rienner, Boulder: 2004, pp. 18f.

[8] *See e.g.* I. Rysińska, *Ewolucja stanowiska Rady Bezpieczeństwa Narodów Zjednoczonych wobec terroryzmu międzynarodowego* [The evolving position of the UN Security Council towards international terrorism], in: E. Haliżak et al. (eds.), *Terroryzm w świecie współczesnym*, Fundacja Studiów Międzynarodowych, Warszawa-Pieniężno: 2004, pp. 145ff. M. Marcinko, *ONZ wobec terroryzmu międzynarodowego* [The United Nations and international terrorism], Fundacja Instytut Studiów Strategicznych, Kraków: 2008; M. Kowalski, *Prawo do samoobrony jako środek zwalczania terroryzmu międzynarodowego* [The right to self-defence as a means of counter-terrorism], Wydawnictwo Difin, Warszawa: 2013. *Cf.* P. Grzebyk, *Authorizing Attacks in Response to Terrorist Attacks: A Dark Side of the Law of Armed Conflicts*, in: G. Ulrich, I. Ziemele (eds.), *How International Law Works in Times of Crisis*, Oxford University Press, Oxford: 2019.

[9] Art. 24 of the UN Charter.

[10] *See* M. Krökel, *Die Bindungswirkung von Resolutionen des Sicherheitsrates der Vereinten Nationen gegenüber Mitgliedstaaten*, Duncker und Humblot, Berlin: 1977, p. 73.

[11] *See* J. Arntz, *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen*, Duncker und Humblot, Berlin: 1975, pp. 64, 110-111.

[12] For example, it has been expanded to include a serious violation of human rights and international humanitarian law (*see* UN Doc. S/RES/1264 (1999)), or violations of the right of nations to self-determination (e.g. Resolution 217 (1965)). Another example may be given in the form of Resolution 2177 (2014), in: which the eruption of an epidemic of the Ebola virus was treated as a threat to international peace and security (UN Doc. S/RES/2177(2014), para. 5 of the Preamble).

affect its credibility,[13] nevertheless, it needs to be recalled that a threat to peace in the sense of Art. 39 of the Charter refers to a situation in which the Security Council, with its competence to impose sanctions, declares there to be an actual threat to the peace.[14] It should be borne in mind that when exercising this power the Security Council enjoys complete discretion.[15]

The opinion that international terrorism constitutes a threat to the peace is no longer controversial,[16] although during the initial years of its operation the UN Security Council turned a blind eye to the issue.[17] While the assassination of Count Folke Bernadotte was considered "as the result of a cowardly act which appears to have been committed by a criminal group of terrorists in Jerusalem while the United Nations representative was fulfilling his peace-seeking mission in the Holy Land,"[18] even in the subsequent decades terrorism did not attract much of the Security Council's attention, as it practiced rather a "piecemeal approach."[19]

Significant changes in the attitude of the Security Council towards terrorism became visible in 1980s. In the wake of the Achillo Laure affair, a statement by the President of the Security Council was issued condemning "terrorism in all its forms, wherever and by whomever committed."[20] The first resolution in which the Council used the term "in-

[13] *Cf.* I. Österdahl, *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*, Justus Forlag, Uppsala: 1998, p. 138.

[14] J. Combacau, *Le pouvoir de sanction de l'ONU: Etude théorique de la coercition non militaire*, Pedone, Paris: 1974, p. 100. *Cf.* T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter*, 26 Netherlands Yearbook of International Law 72 (1995), p. 109; P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised edition, Routledge, London-New York: 1997, p. 426 ("a threat to the peace seems to be whatever the Security Council says is a threat to the peace, which is a political evaluation and, as a matter of principle, not easily subject to legal evaluation").

[15] P.H. Kooijmans, *The Enlargement of the Concept "Threat to the Peace"*, in: R.-J. Dupuy (ed.), *Le Développment du rôle du Conseil de sécurité – Peace-keeping and Peace-building: The Development of the Role of the Security Council, Colloque, La Haye, 21-23 Juillet 1992*, Nijhoff, Dordrecht: 1993, p. 111.

[16] Österdahl, *supra* note 13, p. 75.

[17] *See* P. Romaniuk, *Responding to terrorism*, in: S. von Einsiedel, D.M. Malone, B. Stagno Ugarte (eds.), *The UN Security Council in the 21st Century*, Lynne Rienner, Boulder: 2015, pp. 278-279.

[18] J. Boulden, *The Security Council and Terrorism*, in: V. Lowe et al. (eds.), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, Oxford: 2010, p. 609.

[19] Romaniuk, *supra* note 17, p. 279. It was only in the 1970s that the Security Council, in: its Resolution 286, reacted to the series of aircraft hijackings, and then in 1973 when Resolution 377 condemned the mistaken interception of MEP plane. However, no analogous resolution was taken after the Israeli raid on Entebbe, Uganda, where more than 100 Jewish hostages and the crew of a hijacked AIR France aircraft were rescued. In contrast, the attack by the United Red Army of Japan at Lod airport in Israel was met with a mere announcement by the President of the Security Council of the decision on hijacking (UN Doc. S/10705, 20 June 1972) An even greater divide among the members was visible in the lack of reaction to killings of the Israeli athletes at the Munich Olympics in September 1972. *Cf.* E.C. Luck, *Tackling Terrorism*, in: D. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century*, Lynne Rienner, Boulder, CO: 2004, pp. 87-89; Marcinko, *supra* note 8, pp. 110ff.

[20] UN Doc. S/17554, 9 October 1985.

ternational terrorism" was passed in 1985.[21] In addressing suicide attempts perpetrated in the airports of Rome and Vienna, the Council condemned "all acts of hostage-taking and abduction" regarded as "manifestations of international terrorism" and considered to be "offences of grave concern to the international community, having severe adverse consequences for the rights of the victims and for the promotion of friendly relations and co-operation among States." Three and half years later, in Resolution 635 of 14 June 1989 on the special marking of explosives, the Security Council, "conscious of the implications of acts of terrorism for international security," and "determined to encourage the promotion of effective measures to prevent acts of terrorism," called upon "all States to co-operate in devising and implementing measures to prevent all acts of terrorism, including those involving explosives." When adopting Resolution 638 (1989) of 31 July 1989 on hostage-taking, it urged "the further development of international co-operation among States in devising and adopting effective measures which arc in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of terrorism." Neither of these resolutions referred to any concrete conflict, nor contained any concrete determination on the existence of a threat to peace.

More conflict-related was Resolution 687 of 3 April 1991, which required Iraq "to inform the Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism."[22]

Interestingly enough, in the subsequently-adopted resolutions, most notably in those relating to the Lockerbie incident,[23] instead of reaching directly to terrorism, the determinations of threats to peace concerned the non-extradition of the suspected terrorists or the non-compliance with the obligations imposed by previous decisions by the Security Council.[24] A similar approach was taken when Sudan refused the extradition of those suspected of the terrorist assassination attempt on the life of the President

[21] UN Doc S/RES /579 (1985).

[22] UN Doc S/RES/687 (1991), Part H, para. 32.

[23] As a reaction to the Lockerbie incident resulting in the destruction of Pan Am flight 103 and Union de transports aériens flight 772 and the loss of hundreds of lives in January 1992, the Security Council adopted Resolution 731 of 21 January 1992, where after "affirming the right of all States, in accordance with the Charter of the United Nations and relevant principles of international law, to protect their nationals from acts of international terrorism that constitute threats to international peace and security," it urged "the Libyan Government to immediately provide a full and effective response to (…) requests [cooperate fully in establishing responsibility for the terrorist acts referred to] so as to contribute to the elimination of international terrorism."

[24] In Resolution 748 of 31 March 1992, the Security Council was "convinced that the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security" and determined that "the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 constitute a threat to international peace and security."

of the Arab Republic of Egypt, in Addis Ababa, Ethiopia, on 26 June 1995.[25] Even more importantly, however, the initial Resolution 1044 stressed "the imperative need to strengthen international cooperation between States in order to make and adopt practical and effective measures to prevent, combat and eliminate all forms of terrorism that affect the international community as a whole," and expressed its conviction that "the suppression of acts of international terrorism, including those in which States are involved, is an essential element for the maintenance of international peace and security."[26]

In a similar vein, the relevance of the suppression of acts of international terrorism for the maintenance of international peace and security was stressed in Resolution 1189 of 13 August 1998, when the Council condemned the terrorist bomb attacks in Nairobi, Kenya, and Dar-es-Salaam, Tanzania on 7 August 1998 and called upon "all States to adopt, in accordance with international law and as a matter of priority, effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators."[27]

One can thus ascertain a clear trend in the Council's practice of addressing terrorism in general terms, without any connection to specific acts. Such was the perception when the Council adopted Resolution 1269 of 1999.[28] This discernible tendency gained even greater momentum after the attacks in the USA on 11 September 2001.[29] In particular, Resolution 1373, adopted on 28 September 2001, considered any act of international

[25] UN Doc. S/RES/1044 (1996), 31 January 1996. After Sudan refused to cooperate, the Council adopted another Resolution (UN Doc. S/RES/1054 (1996), 26 April 1996) in which it reaffirmed "that the suppression of acts of international terrorism, including those in which States are involved is essential for the maintenance of international peace and security" and further determined "that the non-compliance by the Government of Sudan with the requests set out in paragraph 4 of resolution 1044 (1996) constitutes a threat to international peace and security." In addition, the Council expressed its determination to eliminate international terrorism and to ensure the effective implementation of resolution 1044 (1996), and to that end acted under Chapter VII of the Charter of the United Nations.

[26] UN Doc. S/RES/1044 (1996), 31 January 1996.

[27] Resolution 1214 of 8 December 1998 demanded the Taliban to "stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice," but it took the Council several further months to determine, first in Resolution 1267 of 15 October 1999, and then again in Resolution 1333 of 19 December 2000 that "the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) constitutes a threat to international peace and security" – UN Doc. S/RES/1267 (1999), 15 October 1999; further reaffirmed in UN Doc. S/RES/1333 (2000), 19 December 2000.

[28] After expressing its deep concern "by the increase in acts of international terrorism which endangers the lives and well-being of individuals worldwide as well as the peace and security of all States," the Security Council "unequivocally condemn[ed] all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security – UN Doc. S/RES/1269 (1999), 19 October 1999, para. 1.

[29] Then the Council immediately condemned in the strongest terms such terrorist acts, regarding them as a threat to international peace and security and called on the international community to redouble their efforts to prevent and suppress such acts. UN Doc. S/RES/1368 (2001), 12 September 2001.

terrorism as constituting a threat to international peace and security, while at the same time imposing extensive mandatory measures for the suppression of international terrorism.[30] The Council decided that all states should, *inter alia*, prevent and suppress the financing of terrorist acts as well as criminalize the willful provision or collection of funds in order to carry out such acts.[31] The plural form of the term was used, thereby suggesting it was not limited only to the attacks on New York, Washington and Pennsylvania in 2001. In a similar vein, the Council decided further that all States should "refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts (…), and to monitor the resolution wherein the Council established the Committee consisting of all the members of the Council."[32] Resolution 1373 can be thus regarded as the beginning of a new stage in the exercise of the Security Council's powers, being the first to purport to create general and temporally undefined obligations that bind the members of the UN.

In the Declaration on the Global Effort to Combat Terrorism, which was attached to Resolution 1377 of 12 November 2001, the Security Council also declared that "acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century" and that "acts of international terrorism constitute a challenge to all States and to all of humanity."[33] It is also important to note that it underlined that "acts of terrorism endanger innocent lives and the dignity and security of human beings everywhere, threaten the social and economic development of all States and undermine global stability and prosperity," which in itself resembles the statement read at the conclusion of the meeting of the Security Council held at the level of Heads of State and Government on 31 January 1992.[34]

Against the background of addressing the phenomenon of terrorism in general terms, particular attention should be paid to Resolution 1456,[35] which deserves additional consideration as it alluded to "a serious and growing danger of terrorist access to and use of nuclear, chemical, biological and other potentially deadly materials, and therefore a need to strengthen controls on these materials,"[36] thereby paving the way for the

[30] UN Doc. S/RES/1373 (2001), 28 September 2001.

[31] *Ibidem*, operative para. 1(a) and (b).

[32] *Ibidem*, operative paras. 2 and 4, respectively.

[33] UN Doc. S/RES/1377 (2001), Annex. The Council further stressed that "acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations."

[34] *See* UN Doc. S/23500: "The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."

[35] UN Doc. S/RES/1456 (2003), including reaffirmations that "terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security; and that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians."

[36] UN Doc. S/RES/1456 (2003).

unanimously-adopted Resolution 1540 of 28 April 2004, which aimed at organizing and reinforcing the fight against terrorism and the proliferation of weapons of mass destruction.[37]

In Resolution 1566 (2004), as well as during the Security Council Summit 2005, a condemnation in the strongest terms was expressed of "all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security."[38] A similar formula may be found in yet another important Resolution, i.e. no. 2178 of 24 September 2014,[39] which further noted "with concern that the terrorism threat has become more diffuse, with an increase, in various regions of the world, of terrorist acts including those motivated by intolerance or extremism, and expressing its determination to combat this threat." However, the said resolution was remarkable for yet another reason, as it extends the concepts of terrorism to situations of armed conflict by dealing with (and defining[40]) foreign terrorist fighters. This may pose problems because of the apparent presumption that engagement in acts of violence during an armed conflict abroad amounts to a terrorist offence, at least when fighting with certain groups.[41]

All in all, a gradual expansion of Council's sensitivity is manifested also by its inclusion of terrorism within the remit of a threat to peace. This may be considered as a move from tackling specific manifestations of terrorism into a more general approach to the phenomenon.[42] In parallel to those changes, the Council developed from introduction of a link in an indirect manner, by determining that the failure to extradite alleged terrorists as well as non-compliance with the resolutions so requesting constitutes a threat to peace, arriving at the conclusion that terrorism threatens international peace and

[37] The main assumption of this resolution was the danger that non-State actors, to which the Resolution 1373 applied, might make use of such weapons. As a consequence, the Council affirmed that the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security, and then decided that all States shall refrain from providing any form of support to non-State actors dealing in any way with them – UN Doc. S/RES/1540 (2004), 28 April 2004, preambular para. 8 and operative para 1.

[38] UN Doc. S/RES/1624 (2005), 14 September 2005. The formulation was again used in the Statement by the President of the Security Council of 2 October 2013 (S/PRST/2013/15), and in Resolution 2139 (2014) of 22 February 2014.

[39] "Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and remaining determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level."

[40] *See* UN Doc. S/RES/2178, preambular para. 8: "[i]ndividuals 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."

[41] S Krähenmann, *The Obligations under International Law of the Foreign Fighter's State of Nationality or Habitual Residence, State of Transit and State of Destination*, in: A. de Guttry, F. Capone, C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Springer, Berlin: 2016, p. 241.

[42] Boulden, *supra* note 18, p. 633.

security.[43] It has thus been the case that the Security Council only gradually considered a more direct connection between terroristic acts and the threat to peace.

2. DEFINING TERRORISM

With regard to the definition of international terrorism, the main political organ of the UN did not follow its predecessor, the Council of the League of Nations. The latter established the Committee for the International Repression of Terrorism, that was successful in the adoption of two conventions (on terrorism[44] and on the International Criminal Court (ICC), respectively).

It goes without saying that the term "terrorism" may be used in many ways and also for many purposes. The challenge to defining terrorism has attracted the attention of many eminent international lawyers.[45] Some would even question the legal significance of the term.[46] The lack of a comprehensive normative definition blurs the whole analysis. For a long time there has been a tradition of avoiding a general definition and addressing specific issues instead.[47] One may of course rely on sectoral definitions as provided in various treaties concluded over several decades.[48] It is beyond the scope of this paper to investigate the content of the very definition or the appropriateness of a generic approach,

[43] *Cf.* V. Santori, *The UN Security Council's (Broad) Interpretation of the Notion of the Threat to Peace in Counter-terrorism*, in: G. Nesi (ed.), *International Cooperation in Counter-terrorism. The United Nations and Regional Organizations in the Fight Against Terrorism,* Ashgate, London: 2006, p. 98.

[44] League of Nations, Convention for the Prevention and Punishment of Terrorism, Doc. C.546. M3831937.V (1937).

[45] Suffice it here to mention a careful study by K. Skubiszewski, *Definition of Terrorism*, 19 Israel Yearbook on Human Rights 39 (1989), p. 42. *See also* B. Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford: 2006. For an overview of the struggle over a definition, *see* M. Di Filippo, *The Definition(s) of Terrorism in International Law*, in: B. Saul (ed.), *Research Handbook on International Law and Terrorism,* 2nd edition, Edward Elgar, Cheltenham: 2020, pp. 2ff, and C.M. Díaz-Barrado, *The Definition of Terrorism and International Law*, in: P.A. Fernández-Sánchez (ed.), *International Legal Dimension of Terrorism*, Brill, Leiden: 2009, pp. 27ff.

[46] Higgins, *supra* note 1, p. 28: "'Terrorism' is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both. International law generally, and the mechanisms of the United Nations specifically, have sought painstakingly over the years to specify exactly what is prohibited, and to provide wide possibilities for jurisdiction over such events and persons. None of that activity has in fact required an umbrella concept of 'terrorism', over and above the specific topics of hostages, aircraft, protected persons etc. The term is at once a shorthand to allude to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned."

[47] *See* Ch. Walter, *Defining Terrorism in National and International Law*, in: Ch. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer, Berlin: 2004, p. 33.

[48] *See* Symonides, *supra* note 6, p. 40, and A. Gioia, *The UN Conventions on the Prevention and Suppression of International Terrorism*, in: G. Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, London: 2006,

or for example the problems over how to distinguish between terrorism and a legitimate struggle for self-determination. Rather, in line with the general goal of this analysis, the task in this work is to examine the relevant practice of the UN Security Council.

Against this particular background of defining terrorism it may be of course worthwhile to look at certain definitional aspects of terrorism in the Security Council's determinations as presented above. One crucial aspect that can be derived is the irrelevance of the international character of terrorism, which is manifested in resolutions adopted by the Council after the hostage-taking in the Moscow theatre,[49] or the bomb attack in Istanbul.[50] The mentioned practice shows that even terrorist attacks of a more national scope or character are not disqualified from being considered as threats to international peace and security.

In more concrete definitional terms however, it seems noteworthy to pay attention to the much wasted potential of the definition elaborated by the Security Council itself. In Resolution 1566 it formulated the following definition of terrorist acts:

> [C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

Against this particular background striking similarities with the International Convention for the Suppression of the Financing of Terrorism should be noted.[51] However, the potential of this formulation has not been further employed. One may only regret that this avenue has not been taken, especially given the largely diverging regional and national definitions.

3. MEASURES ADOPTED

A determination under Art. 39 opens the floor for the Security Council to adopt measures under Chapter VII. However, with regard to determinations on terrorism the complicating factor is the lack of a precise definition.

The reactions have been taken not only by the Council itself, but also by its numerous subsidiary bodies, which additionally blurs the overall picture of the attitude of the

[49] UN Doc. S/Res/1440 (2002).

[50] UN Doc. S/Res/1516 (2003).

[51] This Convention was adopted by the General Assembly by Resolution 54/109 of 25 February 2000 and also relied on reference to various sectoral conventions on different aspects of terrorism, in addition to defining the latter as "any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act" – Art. 2(1)(b).

Security Council towards this phenomenon, and requires cooperation (and coordination) among the committees established pursuant to Resolutions 1373 (2001), 1267 (1999), 1989 (2011), 2253 (2015), and 1540 (2004) and their respective groups of experts.[52] The regime of sanctions has been constantly updated. According to an accurate assessment, the Security Council adapted to the spread of transnational terrorism by demanding more from states, intervening deeper into their domestic realm, and at the same time offering more support.[53] Indeed, it may be rightly claimed that the UN counter-terrorism regime is probably most innovative in terms of its development of sanctions, from traditionally conceived diplomatic efforts to enforcement tools.[54] It is striking that sanctions no longer targeted exclusively the leaders (political and/or military) of a given State but reached at a worldwide terrorist organization/network. The anti-terrorism measures, as well their purpose, have continually evolved with the aim of constraining the military, financial and operational resources of different terrorist groups.[55] One can observe a metamorphosis in the functions of the Security Council, from a body addressing security threats to a body developing a criminal and security policy with both quasi-judicial and legislative functions.[56]

The Security Council's legislation may be a powerful instrument in the maintenance of international peace and security. This pragmatism has the advantages of speed and its general scope of validity, as decisions of that organ bind all states. Such legislation also raises some serious problems however. If the Security Council is to legislate it should provide unanimity in voting, thus reflecting also general support for the measures adopted. It is crucial that such measures are followed by further steps from the States that endorse the Council's legislation. Otherwise, the credibility of the Council, as well as that of the whole United Nations, may be put at stake.

It is important to distinguish between different degrees of legislation. Whereas Resolution 1267 imposed specific obligations as a reaction to a specific yet global threat, i.e. Al-Qaeda, Resolution 1373 provided for more intrusive obligations, but its implementation was to be fostered by the then-created Counter-Terrorism Committee (CTC), assisted by the Counter-Terrorism Executive Directorate. In contradistinction to the Sanction Committee imposing financial and travel sanctions and embargoes, the CTC has operated in a more cooperative manner, preferring a managerial attitude towards

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[52] *See e.g.* UN Doc. S/PRST/2021/1, 12 January 2021.

[53] M. Heupel, *Adapting to Transnational Terrorism: The UN Security Council's Evolving Approach to Terrorism*, 38(4) Security Dialogue 477 (2007), p. 494.

[54] L. Ginsborg, *UN sanctions and counter-terrorism strategies: moving towards thematic sanctions against individuals?*, in: L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar, Cheltenham: 2017, p. 73.

[55] After the terrorist attacks which took place in New York, Washington and Pennsylvania on 11 September 2001, the 1267 regime was extended by the ground-breaking sanctions resolution 1390, without any link to a specific territory or State. to include the threat posed by Al-Qaeda and to convert it into a global sanctions regime, which was then reformulated by Resolution 1989 of 2011 and once again in 2014 to include the ISIL (Da'esh) in Resolution 2253.

[56] Ginsborg, *supra* note 54, p. 73.

securing compliance.[57] In turn, Resolution 1540, despite also imposing several obligations of a generic character (as in Resolution 1373) but is even more far-reaching as it has created completely novel legal obligations of a general character, relying on the nexus between terrorism and the proliferation of weapons of mass destruction. It cannot be forgotten that the interpretative possibilities of the Security Council are not boundless, and it may not interpret that notion in a manner that would amount to amending the UN Charter.[58]

There can be several problems identified with targeted sanctions freezing the financial assets of individuals and entities. Among others, the listing and delisting process lacks procedural protections,[59] with additional problems concerning the confidentiality of the information on which they are based and corresponding problems with its verification.[60]

The open-ended asset freezes, with no termination of the underlying ongoing conflict in sight, have provoked the temptation to assess the Security Council's sanctions regime as evolving into the realm of a permanent exception, given the fact that temporary measures taken as an exception have become de facto permanent confiscations.[61]

With Resolution 2396 (2017) the Security Council broadened the obligations of States in relation to criminal justice, border security, and cooperation and called for the creation of "watch lists or databases" of suspect persons and information sharing between States. This process was further developed in Resolution 2462 (2019), underscoring the need for "dissuasive criminal sanctions."

Going beyond the domestic criminal domain, one may also consider the avenue of the Security Council establishing an *ad hoc* tribunal pursuant to a resolution adopted under Chapter VII of the UN Charter. Needless to say, the Council has gathered considerable experience in this regard, as evidenced (but not only) by the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.[62] It is worth underlining that the operation of the Special Tribunal for Lebanon (STL), the first international tribunal with jurisdiction over (or confined to) the crime of terrorism resulting from the assassination of the Lebanese Prime Minister Rafiq Hariri[63], was only

[57] It may thus be considered as a transformation of the SC's role from that of a policeman to that of a regulator – *see* N. Krisch, *The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council*, in: Ch. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer, Berlin: 2004, p. 890f.

[58] N. Angelet, *Protest against Security Council decisions*, in: K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy*, Kluwer Law International, The Hague: 1998, p. 281.

[59] The Kadi saga is probably the most evident reflection of those problems, which continued also after the establishment of the Ombudsperson by Resolution 1904 (2009)

[60] B. van Ginkel, *Combating Terrorism: Proposals for Improving the International Legal Framework*, in: A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford: 2012, p. 468.

[61] S. Eckert, *The Evolution and Effectiveness of UN Targeted Sanctions*, in: L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar, Cheltenham: 2017, p. 68.

[62] UN Doc S/RES/827 (1993) and UN Doc S/RES/955(1994).

[63] The STL's Appeals Chamber in the Interlocutory Decision of 16 February 2011 provided a much discussed definition of terrorism in times of peace as emerging – in the opinion of judges – in customary

possible given the resolution by the Security Council that bypassed the lack of ratification of the UN-Lebanese Agreement by the latter party.[64] For a broader application, trying terrorism cases before the ICC would constitute yet another option.[65] So far the subject matter jurisdiction of the ICC has not been expanded to include terrorism as a distinct crime in its own right. However, certain manifestations of terrorism may fall within the remit of Art. 7 or 8 of the Rome Statute (to be qualified as crimes against humanity or war crimes, respectively). No plausible alternative is offered by a new treaty establishing an international tribunal for terrorism[66], which in itself may be of limited application.

In addition to responding to the actual occurrences of terrorism, it is important to prevent it by addressing "conditions conducive to the spread of terrorism." The Security Council has indeed been employing broad and comprehensive strategies aimed also at prevention, in addition to combating terrorism, as can be discerned for example from the Security Council Resolution 2482 (2019) on preventing and combating terrorism, including terrorism benefitting from transnational organized crime. While recognizing that terrorists can benefit from organized crime, the Council has also acknowledged "that prisons can serve as potential incubators for radicalization to terrorism and terrorist recruitment." Therefore, proper assessment and monitoring of persons convicted of terrorist offences is critical to mitigating opportunities for terrorists to attract new recruits. Attention is also paid to the roles which prisons can serve in terms of rehabilitating and reintegrating prisoners, as well as the need for continuous engagement by states with offenders after their release from prison in order to avoid recidivism.

From the Council's perspective it is also necessary to address the conditions and factors leading to the rise of radicalization and to violence and violent extremism among youth, in itself yet another factor which can be conducive to terrorism.[67] On several occasions the Council has also stressed the important role of the media, civil and religious society, the business community, and educational institutions in the efforts to enhance dialogue and broaden understanding, in promoting tolerance and coexistence, and in fostering an environment which is not conducive to the incitement of terrorism,

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international law; Special Tribunal for Lebanon, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism conspiracy, homicide, perpetration, cumulative charging, Case no. STL-11–01/I, 16 February 2011, paras. 83-123. *See also* K. Ambos, *Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?*, 24(3) Leiden Journal of International Law 655 (2011); M. Ventura, *Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?*, 9(5) Journal of International Criminal Justice 1021 (2011).

[64] UN Doc. S/RES/1757 (2007). It is important to note that its Appeals Chamber, in the Interlocutory Decision of 16 February 2011, provided a much-discussed definition of terrorism in times of peace as emerging, in the opinion of judges, in customary international law (Case no. STL-11–01/I, paras 83–123) - *see* Ambos, *supra* note 63; Ventura, *supra* note 63.

[65] Although, the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Resolution E recognized that "terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community." It recommended that the topic be taken up at the Review Conference.

[66] Van Ginkel, *supra* note 60, p. 476.

[67] UN Doc. S/RES/2250 (2015), S/RES/2419 (2018) and S/RES/2535 (2020).

as well as in countering terrorist narratives.[68] It has been frequently remarked that "terrorism and violent extremism conducive to terrorism cannot and should not be associated with any religion, nationality, or civilization."[69]

In general, the panorama of the measures to which the Security Council can refer when addressing and preventing terrorism is indeed broad. However, this wealth of different strategies calls for better coordination, thus leading to their more effective implementation. Cooperation between the actors involved seems indispensable for the struggle against terrorism to be efficient.

CONCLUDING REMARKS

The practice of the Security Council as analysed above allows for some general conclusions. Terrorism has been gradually included as a threat to international peace and security. The Council has in principle developed ever more direct references to terrorism. Instead of merely reacting to concrete emanations of terrorism, it has approached the problem in a more general, yet more complex manner. The variety of measures adopted by the Council itself and its subsidiary bodies is both impressive and problematic, and not only because of the lack of procedural guarantees or mechanisms of review. They consist of different obligations for restraining the military, financial and operational resources of different terrorist groups, as well as with respect to prosecuting their activities. The growing legislation by the Security Council has been focused mostly on impacting the domestic reactions, but the Council could also play an important role in the international prosecution of terrorism. In the end, a rather comprehensive approach has been offered with respect to its prevention.

Without doubt, due to its growing involvement the Security Council established itself as a key – and the most active – player in the fight against terrorism, which in itself confirms the relatively optimistic conclusions arrived at by the late Professor Symonides, who stated that "the growing awareness of the limited effectiveness of unilateral actions and military strength may have positive consequences for cooperation with the United Nations, participation in its reform and return to the path of full respect for international law."[70] Yet, as also noted by the learned Scholar, the entire process is by definition time-consuming.

[68] UN Doc. S/RES/2178 (2014) and S/RES/2354 (2017).

[69] *See e.g.* S/RES/2083 (2012), S/RES/2199 (2015) S/PRST/2021/1.

[70] Symonides, *Normatywne teorie*, *supra* note 5, p. 102.

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SPECIAL CHARACTER OF HUMAN RIGHTS OBLIGATIONS AND THE JURISDICTION OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION IN THE *PALESTINE V. ISRAEL* CASE[1]

Abstract: *Among UN human rights treaty bodies that have the competence to examine inter-state communications, only the Committee on the Elimination of Racial Discrimination (CERD) has had the possibility to develop its case law in this regard (as of 2020). One of these cases – submitted by the State of Palestine against Israel – resulted in a controversy arising from the respondent state's declaration excluding any treaty relations between Palestine and Israel, the latter considering the former "a non-recognized entity." The present paper analyses the CERD's decision of 12 December 2019 in which the Committee found that it had jurisdiction to hear the inter-state communication. The author argues that while invocation of the "special character" of human rights obligations constitutes a powerful argument in judicial discourse, this should not lead to (re)opening debates on self-contained regimes and alienating human rights treaties from the norms and principles of general international law. At the same time, there are also valid reasons to perceive the obligations enshrined in the ICERD as being of a specific and erga omnes character.*

Keywords: Committee on the Elimination of Racial Discrimination, human rights, International Convention on the Elimination of All Forms of Racial Discrimination, inter-state complaints jurisdiction, obligations *erga omnes*

INTRODUCTION

It was not until 2018 that the Committee on the Elimination of Racial Discrimination (the Committee or the CERD) – the treaty body established under the Interna-

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[1] This article is a tribute to Prof. Janusz Symonides (1938-2020), whose expertise and scholarly excellence in public international law, including the international protection of human rights, was truly inspirational.

tional Convention on the Elimination of All Forms of Racial Discrimination (ICERD or the Convention)[2] – was seized with its first inter-state communications under Art. 11 ICERD. Two of them were lodged by Qatar (against Saudi Arabia and the United Arab Emirates), and one by Palestine against Israel.[3] These communications ended a long period of reluctance on the part of states to engage in the inter-state conciliatory procedures provided in UN human rights treaties. It is noteworthy that although the competence to receive and examine inter-state communications was entrusted to seven out of ten UN treaty bodies (committees),[4] it is only in case of CERD that this competence is automatic, i.e. it does not require a prior declaration of a state-party recognizing such a competence of a given committee.

Whereas in all three of the above-mentioned inter-state cases the CERD decided that it had jurisdiction, the communication submitted by the State of Palestine against Israel raised a problematic issue, notably: Did the Israeli declaration of 2014 refusing to enter into any treaty relations with Palestine (which acceded to ICERD that year) effectively exclude the possibility of invoking Art. 11 of the Convention between both parties? Thus an interesting question of treaty law emerged and was addressed by the CERD in its decision concerning jurisdiction, adopted on 12 Dec. 2019, with 10 votes in favour, 3 votes against, and 2 abstentions. The CERD's decision referred, *inter alia*, to the nature of human rights obligations enshrined in the Convention, as well as to the object and purpose of the inter-state procedures provided in Arts. 11-13 ICERD. The Committee's decision – as well as the dissenting opinion attached to it – contribute to the discussion concerning the special features of human rights treaties in general, and of ICERD in particular.

1. WHY ARE HUMAN RIGHTS TREATIES REGARDED AS "SPECIAL"?

For many years the issue of the peculiarity of human rights obligations was a subject of doctrinal interest, with some scholars focusing on the special features of human

[2] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195.

[3] *See* the Report of the CERD of its 99th and 100th sessions, Consideration of communications received under art. 11 of the Convention, pp. 15-16, available at: https://bit.ly/3akPDSG (accessed 30 May 2021).

[4] *See* Art. 41 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Art. 10 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), A/RES/63/117; Art. 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 112; Art. 12 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014), A/RES/66/138; Art. 76 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (signed 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3; and Art. 32 of the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010), 2716 UNTS 3.

rights obligations themselves,[5] while others expounded on the special character of human rights treaties in international law.[6] There is an obvious connection between the specificity of human rights obligations and the international treaties that enshrine them. While the former might also be derived from non-treaty sources of international law, such as international custom or general principles of law, it is however indisputable that treaties remain the principal normative source of international human rights law. In any event, it would be hard to deny that it is the character of human rights obligations that influenced the debate on the character of human rights treaties. The authors dealing with the subject have reflected on the possible justifications for the view that human rights treaties are "special" as compared with other treaties, in particular those on the protection of the human person in a larger sense.[7] The general question also concerned the nature of the relationship between conventional human rights law and general principles of treaty law;[8] in other words: How are human rights treaties "different" or "atypical" when juxtaposed with classical international law treaties, and what are the potential consequences of these differences?

There have been several factors nourishing the debate on the character of human rights treaties: the pronouncements of regional human rights courts on the objective character of human rights obligations, which have been considered as created "over and above a network of mutual, bilateral undertakings"[9]; the concept of obligations *erga omnes* developed in the case law of the International Court of Justice (ICJ);[10] and finally the discussion on whether the regime of reservations to international treaties (as elaborated by the International Law Commission) is adequate in the case of human rights conventions.[11] The above list is not exhaustive; nevertheless one of the key problems was rightly identified as that concerning reciprocity in the context of human rights treaties.[12]

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[5] *See e.g.* C. Mik, *On the Specific Character of State Obligations in the Field of Human Rights*, XX Polish Yearbook of International Law 113 (1993).

[6] *See* E.W. Vierdag, *Some remarks about special features of human rights treaties*, 25 Netherlands Yearbook of International Law 119 (1994) and M. Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11(3) European Journal of Human Rights 489 (2000). *See also* J. Klabbers, *On Human Rights Treaties, Contractual Conceptions and Reservations*, in: I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, Springer, Dordrecht: 2014, pp. 149-182.

[7] Vierdag, *supra* note 6, p. 122.

[8] Craven, *supra* note 6, pp. 489 *et seq*.

[9] *See* the judgment of the European Court of Human Rights (ECtHR), *Case of Ireland v. United Kingdom* (App. No. 5310/71), 18 January 1978, para. 239. This concept was followed by the Inter-American Court of Human Rights (IACtHR) in *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, IACHR Series A no 2, IHRL 3398 (IACHR 1982).

[10] *See* ICJ, *Barcelona Traction, Light and Power Case (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Rep 1970, paras. 33-34. *See also* C. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge: 2009; Mik, *supra* note 5, pp. 129-132; and W. Czapliński, *Concepts of Jus Cogens and Obligations Erga Omnes in International Law in the Light of Recent Developments*, XXIII Polish Yearbook of International Law 87 (1997).

[11] *See* Vierdag, *supra* note 6, pp. 130-134, Craven, *supra* note 6, pp. 495-496.

[12] Craven, *supra* note 6, pp. 504-513.

While summarizing this debate in a concise fashion would be problematic, suffice it to say that international legal scholarship generally admits that some features of human rights obligations justify their specific nature, which is also reflected in the character of human rights conventions. This assumption is correct, even though there is no "standard definition" of a human rights treaty nor are all human rights obligations of exactly the same character, irrespective of their contents. M. Craven identified three possible approaches to the problem of what constitutes the specific "identity" of a human rights treaty: a formalist one (treaties are still founded upon a series of bilateral relationships between the parties, and the claim of non-reciprocity of obligations stemming from human rights treaties is largely misconceived in the legal sense); a purposeful (teleological) one (human rights treaties are different in that they defend the legal interests of individuals or groups rather than states – a vision which departs from the contractual paradigm and sometimes considers human rights treaties as a series of unilateral commitments of states); and a cognitivist one (human rights as carriers of collective values – this approach assumes that states undertake obligations not in relation to each other but to all other participating states as a collective).[13] The author admits however that the international practice seems to meld the above concepts together, and none of them is fully explanatory.[14]

If we try to look at these problems from today's perspective, the discussion on the special character of human rights treaties seems far from concluded, as proven in the position of the state parties to the dispute commented on below. There are however two preliminary remarks on that subject which the present author wishes to make prior to discussing the decision of the CERD in the Palestinian-Israeli case. The first remark is that, objectively speaking, human rights treaties may be considered as distinguishable or "special" in the sense that the international obligations enshrined therein are supposed to protect and promote individual rights and freedoms recognized as superior values of mankind and the international community as such. This is so even if we take into consideration that only a small fraction of human rights obligations could be considered as being of an *erga omnes* character.

The second remark is of a more systemic nature. While the peculiarity of human rights treaties justifies certain nuanced approaches to the application of general rules of treaty law (with the rules on reservations constituting a major example), one should however avoid creating an impression that the treaties under consideration are each a separate kind "of its own" or – even worse – that they could be considered as forming self-contained regimes.[15] It is submitted that the effectiveness of the international protection of human rights depends to a large extent on whether human rights treaties continue to be considered as part and parcel of general international law. Such an ap-

[13] *Ibidem*, pp. 513-517.

[14] *Ibidem*, p. 516.

[15] Here I refer to the concept elaborated on by B. Simma and discussed ever since in international legal scholarship with regard to some regimes of state responsibility. *See* B. Simma, *Self-contained regimes*, 16 Netherlands Yearbook of International Law 111 (1985); B. Simma, D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17(3) European Journal of International Law 483 (2006).

proach not only does not preclude, but in fact *assumes* a duty to interpret human rights treaties in the light of their object and purpose,[16] as was the task of the CERD in the inter-state proceedings discussed below.

2. THE *MODUS OPERANDI* AND NATURE OF INTER-STATE PROCEDURE(S) IN ARTS. 11-13 ICERD

Let us first recall that the inter-state procedure under ICERD consists of several steps. The first one is to bring a communication to the attention of the Committee if the applicant state considers that the respondent state is not giving effect to a provision of the Convention. Pursuant to Art. 11(1) ICERD, such a communication needs to be transmitted to the state party concerned, with the view of obtaining (within three months) written explanations or statements clarifying the matter and possible remedies that may have been taken by the respondent state. At this stage the CERD fulfils the role of an intermediary and/or facilitator in the dialogue between both states.

The next phase may be initiated when "the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication."[17] In such circumstances each of the parties has the right to "refer the matter again to the Committee," which in fact turns the role of the CERD from that of a facilitator of dialogue to that of a body in charge of establishing a Conciliatory Commission.

The inter-state procedure implies that the CERD itself determines whether it has jurisdiction to proceed with the case and ascertains whether "all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law."[18] But the role of the CERD *in pleno* is actually restricted to pronouncing on issues of jurisdiction and admissibility, as well as "obtaining and collating all the information it deems necessary," since further steps in the procedure are vested with the Chairperson of the Committee. The Chair is supposed to appoint an *ad hoc* Conciliation Commission, with the unanimous consent of the parties to the dispute, comprising five persons who may or may not be members of the Committee. The task of the Commission is to make available its good offices with "a view to an amicable solution of the matter on the basis of respect for the Convention."

The only situation when the CERD *in pleno* needs to intervene at this stage is when state parties to the dispute fail to reach agreement on all or part of the composition of an *ad hoc* Conciliation Commission appointed by the Chairperson. In such circum-

[16] *See* Art. 31(1) of the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[17] *See* Art. 11(2) ICERD.

[18] *Ibidem*, Art. 11(3).

stances the CERD elects the members of the Commission who were not agreed upon by the State parties from among its own members, by a two-thirds majority vote. The Commission elects its own Chairperson and adopts its own rules of procedure. The final report embodying its findings, including recommendations for amicable solutions of the matter, is submitted to the Chairperson of the CERD. State parties to the dispute are expected to inform the Chairperson whether or not they accept the recommendations contained in the report of the Conciliatory Commission. In the final step – which is purely technical in nature – the report of the Conciliation Commission and the declarations of the state parties concerned are communicated to other state parties of ICERD, pursuant to its Art. 13(3).

It follows that the inter-state procedure may have at least two phases: the one involving the exchange of communications and possible negotiations; and the other consisting of an attempt to resolve an inter-state dispute through conciliation by an *ad hoc* commission composed under the authority of the Chairperson of the CERD, with the agreement of both parties. Two such commissions were established so far on the basis of Art. 12(1)(a) ICERD, in the cases *Qatar v. Saudi Arabia* and *Qatar v. United Arab Emirates*.[19] Prior to the set-up of the commissions, in both cases the CERD decided that it had jurisdiction to examine them and rejected the exceptions raised by the respondent state as regards the admissibility of the communications.[20]

It should also be mentioned that Art. 22 ICERD includes a compromissory clause which allows a referral of any dispute between two or more States Parties to the International Court of Justice if the dispute is "not settled by negotiation or by the procedures expressly provided for in the Convention" and "unless the disputants agree to another mode of settlement." The ICJ had an opportunity to interpret Art. 22 ICERD in the *Georgia v. Russian Federation* case.[21] Let us note that the compromissory clause does

[19] Both were established during the 99th session of the CERD in 2019 and the members of the commissions were appointed by the Chair of the CERD in February 2020. The commission in the case *Qatar v. Saudi Arabia* is composed of: Marc Bossuyt (Belgium), Chinsung Chung (Republic of Korea), Makane Moïse Mbengue (Senegal), Monica Pinto (Argentina) and Verene Alberta Shepherd (Jamaica). The members of the other commission – in *Qatar v. United Arab Emirates* – are: Sarah Cleveland (United States), Chiara Giorgetti (Italy), Bernardo Sepúlveda-Amor (Mexico), Maya Sahli-Fadel (Algeria) and Yeung Kam John Yeung Sik Yuen (Mauritius). Both commissions are of a mixed character, i.e. they include both sitting members of CERD and non-members. On 15 March 2021 both commissions decided to suspend the proceedings concerning the inter-state communications submitted by Qatar at the latter's request, and invited any of the state parties concerned to inform the commissions whether they wish to resume the consideration of the matter. Given the improvement of bilateral relations between Qatar and the two respondent states (United Arab Emirates and Saudi Arabia) at the beginning of 2021, a possible course of action is a withdrawal of the communications, which would result in a discontinuation of the proceedings.

[20] *See* decisions of the CERD on the jurisdiction and admissibility of the inter-state communications: *Qatar v. United Arab Emirates*, CERD/C/99/3 and CERD/C/99/4 and *Qatar v. Saudi Arabia*, CERD/C/99/5 and CERD/C/96. All these decisions were adopted on 27 August 2019.

[21] *See* ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment (Preliminary Objections), 1 April 2011, ICJ Rep 2011, p. 70.

not require that the inter-state procedures of Arts. 11-13 ICERD are exhausted prior to submitting the case to the ICJ; however, the Court expressed the view that there must have been at least a "genuine attempt" on the part of at least one of the disputing parties to engage in discussions with view to resolving a dispute.[22] Interestingly, the pending procedure under Art. 11 ICERD initiated by the communication of *Qatar v. United Arab Emirates* (submitted to the CERD on 8 March 2018) was not considered as an impediment by the ICJ to examine the case between the same state parties under Art. 22 ICERD (on 11 June 2018), at least as to the preliminary objections. In its judgment the ICJ decided however that it did not have jurisdiction *ratione materiae* to entertain the application filed by Qatar.[23]

The nature of the inter-state procedures provided in Arts. 11-13 ICERD requires an additional comment. It could appear that due to its conciliatory character, the procedure is supposed to end up in recommendations for the amicable solution of the matter, rather than explicitly pronouncing on the state responsibility of the respondent state for the alleged violations of ICERD. However, we must keep in mind that the whole procedure is triggered by "a consideration" of one state party that another state party "is not giving effect to the provisions of the Convention." This elegant expression is actually tantamount to saying or submitting that "a state party has violated or is violating the provisions of the treaty." Once such an allegation was made, it could reasonably be expected that the Conciliation Commission set up under Art. 12 ICERD would address it, especially given that under Art. 13 it is tasked with preparing the report after having *fully* considered the matter. In other words, "submitting recommendations (…) proper for the amicable solution of the dispute" implies prior examination of the allegations and pronouncing on whether a violation of ICERD indeed occurred. If it did, it could be assumed that the Commission's recommendations would be guided by the rules of international state responsibility, as embodied in the ILC Articles on State Responsibility for Internationally Wrongful Acts.[24] But even if the Commission does not

[22] *Ibidem*, para. 157.

[23] *See* ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Judgment (Preliminary Objections), 4 February 2021. The ICJ found that the term "national origin" in Art. 1 ICERD (definition of "racial discrimination") does not encompass current nationality, hence the dispute falls outside the scope of ICERD. This conclusion may have far-reaching consequences for the interpretation of the term "racial discrimination" for the purposes of ICERD, especially that the CERD Committee expressed a different view in its general recommendation no. 30 on discrimination against non-citizens (para. 4) and in the decision on the admissibility of the inter-state communication submitted by Qatar (CERD/C/99/4). The ICJ noted that it "has carefully considered the position taken by the CERD Committee (…) on the issue of discrimination based on nationality. By applying, as it is required to do (…) the relevant customary rules on treaty interpretation, it came to the conclusions indicated in paragraph 88 above (…)" (para. 101). The position of the ICJ may – or may not – influence the interpretation of Art. 1 ICERD by the CERD Committee. It will be also interesting to see if and how it affects the recommendations of the conciliation commissions set up under Art. 12 ICERD.

[24] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

find any breach of ICERD, it would still be empowered to offer such recommendations "as it may think proper" in accordance with Art. 13(1) ICERD.

The differences between the inter-state procedures under Arts. 11-13 ICERD and the individual communications procedure under its Art. 14 are substantial, since not only do both types of procedures involve different kinds of applicants, but also the latter requires that the competence of the Committee to receive and consider communications from individuals or a group of individuals be recognized by the respondent states. The difference also consists in the CERD's role, since in case of communications submitted under Art. 14 the competence to examine them lies with the plenary Committee, whereas in inter-state cases the plenary CERD pronounces on issues of jurisdiction and admissibility, but then the dispute is handed over to a conciliation commission appointed by the CERD Chairperson. Thus the plenary CERD is actually not empowered to express itself on the merits of inter-state communications.

3. THE *PALESTINE V. ISRAEL* CASE AND THE CERD'S DECISION OF 12 DECEMBER 2019

Palestine submitted its communication under Art. 11 ICERD on 28 April 2018, thereby initiating the first phase of the inter-state procedure (exchange of positions). While the full text of Palestine's communication was not made available by the CERD on its website until April 2021,[25] nevertheless the summary of the complaint, the position of the respondent state, and the Committee's decisions, including the one on the jurisdiction, were published in the course of the proceedings as three separate documents.[26] In a nutshell, the applicant claimed that Israel violated several provisions of ICERD with regard to Palestinians living in the Occupied Palestinian Territory, including East Jerusalem.

The submission of the communication by Palestine in 2018 came very shortly after the first ever inter-state complaints to a UN treaty body were lodged by Qatar.[27] Roughly at the same time the situation in Palestine was brought by its government to the attention of the Prosecutor of the International Criminal Court.[28] The year 2018 must

[25] *See* https://bit.ly/3ydXfjf (accessed 30 May 2021).

[26] *See* CERD, *Inter-state communication submitted by the State of Palestine against Israel*, doc. CERD/C/100/3, CERD/C/100/4 and CERD/C/100/5, all dated 12 December 2019.

[27] *See* fn 7 above.

[28] On 1 January 2015 the State of Palestine made a valid declaration under Art. 12(3) of the Rome Statute accepting the jurisdiction of the International Criminal Court and acceded to the Rome Statute on 2 January 2015. The referral (invoking Articles 13(a) and 14 of the Statute) was dated 15 May 2018 and registered on 22 May 2018 (available at: https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf, accessed 30 May 2021). It was followed by a preliminary examination by the Prosecutor, who requested Pre-Trial Chamber I for a jurisdictional ruling. The Pre-Trial Chamber I delivered its decision on 5 February 2021 and found, by a majority, that the ICC's jurisdiction extends to the territories occupied by Israel since 1967 (Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's

have been quite busy for Palestinian foreign and legal services, since on 28 September 2018 another legal action was undertaken: the Palestinian government filed with the International Court of Justice an application instituting proceedings against the United States, invoking violations of the Vienna Convention on Diplomatic Relations by the decision to relocate the US embassy to Jerusalem earlier that year.[29] Although these actions obviously are procedurally unrelated, nevertheless they demonstrate the determination of the State of Palestine to pursue avenues available to it under international law.

Since the role of the CERD in the first stage of inter-state proceedings is rather passive, the Committee's initial decisions were of purely procedural nature: it transmitted Palestine's communication to Israel on 4 May 2018, and invited both states to provide written explanations or statements within three months. Israel did so several times, stressing the view that the CERD lacks jurisdiction to examine the communication. Palestine referred the matter again to the Committee on 7 November 2018, thus triggering Art. 11(2) ICERD and opening a second phase of the inter-state procedure. By virtue of the decision of the CERD adopted on 14 December 2018, both parties were invited to supply "any relevant information on issues of jurisdiction of the Committee or admissibility of the communication, including the exhaustion of available domestic remedies," as well as to appoint one representative to take part in the proceedings in the Committee.[30] After another round of submissions from both parties, the CERD examined preliminary questions and conducted hearings during its 98th session from 23 April to 10 May 2019. However, adoption of the decision as to the jurisdiction was postponed for the 99th session of the Committee, and finally for the subsequent one held in December 2019.

The postponement might have been caused – at least partially – by the need to allow the applicant state to comment on a memorandum (dated 23 July 2019) submitted by the UN Office of Legal Affairs at the request of the Committee.[31] Neither seeking nor obtaining such advice would be particularly problematic if the reply was made available to both parties of the dispute at the same time. However, as it transpires from the documentation of the case, during its 99th session in August 2019 the CERD learned that the respondent had knowledge of the Office of Legal Affairs memorandum, as the latter was referred to in Israel's note verbal of 20 August 2019. This must have caused some consternation; anyhow the only fair response to the situation was to give Palestine an opportunity to submit additional comments on the basis of the memorandum,

territorial jurisdiction in Palestine of 5 February 2021, No. ICC-01/18, available at: https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF, accessed 30 May 2021). On 3 March 2021 the Prosecutor of the ICC officially opened an investigation in to the "Situation in Palestine" case.

[29] *See Relocation of the United Nations Embassy to Jerusalem (Palestine v. United States)*, application filed with the Registry of the Court on 28 September 2018, available at: https://www.icj-cij.org/public/files/case-related/176/176-20180928-APP-01-00-EN.pdf (accessed 30 May 2021).

[30] *See* document CERD/C/100/3, para. 8.

[31] *See* the text of the memorandum: https://bit.ly/2Ugjvdj (accessed 30 May 2021).

especially bearing in mind that it was supportive of the Israeli position in the case under consideration.[32]

The crucial point of dispute between the parties – as regards the Committee's jurisdiction – was the question whether Israel's objection to Palestine's accession to the ICERD (dated 22 May 2014) resulted in the "lack of treaty obligations" between both states and precluded the CERD from examining Palestine's communication against Israel submitted on 23 April 2018. The text of the afore-mentioned objection of Israel as to Palestine's accession to ICERD was hardly available in the public domain, but it remains clear that it was deposited with the Secretary-General, circulated among state parties, and included a statement that Israel did not consider the State of Palestine to be a party to ICERD, as well as that the accession was "without effect on Israel's treaty relations under the Convention."[33]

Building on the objection it raised in 2014, Israel invoked the provisions of the VCLT, which envisage a situation when a treaty has not entered into force between certain parties to a multilateral treaty.[34] The respondent also relied on the legal principle that a state is only bound by a treaty to the extent it has agreed to be bound, as demonstrated in international case law[35] and the negotiating history of the VCLT. Israel's contentions were opposed by the State of Palestine, which indicated that there is no customary rule allowing a state party to unilaterally exclude bilateral treaty relations in multilateral treaty systems.[36] Furthermore, while Palestine agreed that a state party may declare that an accession of a non-recognized entity to a multilateral treaty does not serve as an argument proving the recognition of that entity by the refusing state, nevertheless such a declaration should not – in view of the State of Palestine – affect treaty relations between the parties to a multilateral treaty.[37]

The applicant state also insisted that bilateral treaty relations between state parties to ICERD cannot be excluded due to the *erga omnes* character of the prohibition of racial discrimination,[38] and moreover that Israel's objection of 2014 should be considered in the light of Art. 20(2) of ICERD, which prohibits reservations incompatible with the object and purpose of the treaty or those which would "inhibit the operation of any bodies established by the Convention." Actually the same provision of ICERD requires

[32] *See* document CERD/C/100/5, paras 2.1-2.5.

[33] *Ibidem*, para. 4.3. *See also* the Palestine's reply "regretting" the position of Israel, deposited with the Secretary-General, available at: https://treaties.un.org/doc/Publication/CN/2014/CN.354.2014-Eng.pdf (accessed 30 May 2021).

[34] *See* document CERD/C/100/3, para. 4.4. Israel referred to Arts. 20(4)9b) and 76(2) VCLT.

[35] In the *S.S. Lotus case (France v. Turkey)*, the Permanent Court of International Justice noted that: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law (…)" (PCIJ Series A No 10, PCIJ judgment, 7 October 1927, p. 18).

[36] *See* document CERD/C/100/3, paras. 5.5 et seq.

[37] *Ibidem*, para. 5.9.

[38] *Ibidem*, paras. 5.10 et seq.

that a reservation shall be considered incompatible or inhibitive if at least two-thirds of the state parties of the Convention object to it, which was not the case.

Addressing the question of its own jurisdiction provided the CERD with an opportunity to pronounce on some crucial issues, such as the special character of human rights treaties or the features of the control and supervision mechanisms enshrined in the ICERD itself. The Committee's decision not only strengthened a tendency to consider human rights treaties as a "special genre" – as already argued by regional human rights courts for some time – but also promoted the viewpoint that the "superior common values" of such treaties justify certain departures from the general framework of treaty law. However before commenting on that matter, one should take a closer look at the CERD's arguments and the way of reasoning which led the Committee to the finding that it has jurisdiction to hear the inter-state communication brought by the State of Palestine. The summary of its reasons for this conclusion were as follows:

(a) some provisions of general international law do not apply to human rights treaties due to the non-synallagmatic character of their obligations, which are implemented collectively;
(b) the "erga omnes" nature of the core provisions of the Convention;
(c) the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights that brings a "breath of fresh air" to the "laissez faire" attitude of certain State parties, as well as the position taken by the Human Rights Committee in its General Comment no. 24, confirm that any State party to a human rights treaty may trigger the collective enforcement machinery created by it, independently from the existence of correlative obligations between the concerned parties;
(d) the Convention is a human rights treaty which contains non-synallagmatic obligations of collective guarantee, and is based on superior common values;
(e) within the category of human rights treaties, the Convention is of a particular character, taking into account that racial discrimination has been universally recognized as a scourge which must be combated by all available and pragmatic means, and as a matter of the highest priority for the international community as a whole, without consideration of bilateral issues between States parties;
(f) the unique conciliatory nature of the automatic mechanism under Arts. 11 to 13 of the Convention signals that it should be implemented in a manner that is practical, constructive and effective.[39]

Points (b) and (d) above do not raise much controversy. The concept of obligations *erga omnes*, i.e. obligations owed to the international community as a whole, was developed half-a-century ago by the International Court of Justice in the *Barcelona Traction* case[40] and since then it has earned its place and title in the theory of international legal obligations. The CERD recalled that at least four obligations of such character

[39] *See* document CERD/C/100/5, para. 3.50.

[40] *See* ICJ, *Barcelona Traction, Light and Power Case (Belgium v. Spain)*, Second Phase Judgment, 5 February 1970, ICJ Rep 1970, paras. 33-34.

were identified in the ICJ's case law (the prohibition of aggression, torture, genocide, and racial discrimination).[41] It is generally accepted that obligations of this kind can be inferred from norms which have a *jus cogens* character, even though the catalogue of these norms is not a matter of universal consensus. Nevertheless, the International Law Commission recognized that apart from the above-mentioned norms, the *jus cogens* character could be ascribed to the prohibition of slavery, crimes against humanity, and to the right to self-determination.[42] In any event, the legal character of the prohibition of racial discrimination – the pillar of the ICERD – is duly identified as a peremptory norm of international law.

Likewise, the assertion that ICERD is a human rights treaty which "goes beyond" a network of mutual, bilateral obligations is not particularly controversial. In this regard the Committee referred extensively to the practice of regional human rights bodies, and notably the European Commission and the European Court of Human Rights,[43] as well as the Inter-American Court of Human Rights.[44] The CERD relied also on the point of view of the Human Rights Committee (HRC) expressed in its General Comment no. 24 on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights.[45] In that General Comment the HRC insisted that human rights treaties "are not a web of inter-State exchanges of mutual obligations" and that "the principle of inter-State reciprocity has no place" between the state parties, save in the limited context of reservations to declarations on the HRC's competence under Art. 41 ICCPR (the facultative clause allowing the HRC to examine inter-state communications).[46]

The non-synallagmatic character of the obligations enshrined in human rights treaties, the principle of collective implementation of these treaties, as well as their own

[41] *See* document CERD/C/100/5, para. 3.23.

[42] *Ibidem.*

[43] *See* in particular the *dictum* of the ECtHR in the *Case of Ireland v. United Kingdom*: "(…) Unlike international treaties of the classic kind, the [European] Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'" (para. 239).

[44] *See* the advisory opinion OC-2/82 of the IACtHR, where it noted, *inter alia*, that: "Modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of States. (…) In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction" (para. 29).

[45] *See* General Comment No. 24 of the Human Rights Committee on *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant,* document CCPR/C/21/Rev.1/Add.6, 11 November 1994. *See* also U. Linderfalk, *Reservations to Treaties and Norms of Jus Cogens – A Comment on Human Rights Committee General Comment No. 24*, in: I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, Springer, Dordrecht: 2014, pp. 213-234.

[46] *See* document CERD/C/100/5, para. 3.31.

mechanisms of supervision – in conjunction with the fact that they are "inspired by superior common values shared by the international community as a whole" – led the CERD to the conclusion that these treaties constitute a special category to which certain rules of treaty law are not applicable.[47] This statement had a direct effect on the issue of the Committee's jurisdiction to examine the Palestinian communication against Israel. The CERD did not deny the principle of general international treaty law which allows a state party to a multilateral treaty to exclude treaty relations with an entity it does not recognize. Instead, this principle was departed from – or rather bypassed – and considered as not affecting Israel's scope of obligations under the Convention, in either the material or procedural sense.

While it is not unexpected to learn from a human rights treaty body or a court that the character of human rights obligations justifies a specific approach or interpretation, it is however less common for human rights bodies to expressly deviate from a rule of general international law. More often than not human rights courts and treaty bodies tend to recall that public international law is the normative platform of the international human rights systems. Actually, the CERD's way of reasoning was based on arguments strictly related to international law, since it drew conclusions from the *erga omnes* status of the obligations prohibiting racial discrimination, and relied heavily on the well-established line of reasoning of regional human rights courts, insofar as they highlighted the atypical character of obligations enshrined in human rights treaties. Therefore it would be incorrect to claim that the Committee disregarded public international law as such. On the contrary, the CERD went to great effort to elaborate on how to tackle the dispute as to its jurisdiction, taking into account general treaty law. In effect the Committee decided that mutual treaty relations between two state parties are not a *sine qua non* condition to apply the inter-state procedure referred to in Arts. 11-13 ICERD, as long as both states are considered parties to the Convention.

Leaving aside for the moment the question of the nature of an inter-state procedure(s) (as interpreted by the CERD), there is another interesting paragraph in the Committee's decision which ascribes to the Convention a "particular character within the category of human rights treaties."[48] The Committee observed that:

> Bearing in mind its broadly recognized insidious and pervasive character, racial discrimination was the first violation of human rights to be taken care of by the international community, just after the international crime of genocide. The Convention was a first of a series of treaties codifying and expanding the scope of human rights law. The Committee also notes that in more recent times racial discrimination has been universally recognized as a scourge which must be combated by all available and appropriate means and as a matter of the highest priority for the international community. Thus, the Committee considers that it is undisputable that all State parties to the Convention act together against racial discrimination. In this regard, the Committee notes that the

[47] *Ibidem*, para. 3.34.

[48] *See* document CERD/C/100/5, para. 3.31.

> claims brought forward in the present inter-state communication pertain to the interests of all States parties to the Convention.[49]

The above passage rightly reflects the origins of ICERD and the high place of combating racial discrimination in the international agenda. However, it can be presumed that the Committee referred to the "particular character" of ICERD within the catalogue of human rights treaties in a symbolic rather than legal sense. There is no doubt that the Convention paved the way for the subsequent core human rights treaties and that its obligations are subject to collective enforcement. But bearing all that in mind, there would be no rational justification to introduce a hierarchy of human rights treaties. Obviously, one could introduce some classifications or typologies, but legally speaking it would be incorrect to consider one of the ten core UN human rights treaties as a *primus inter pares*.

Another important pronouncement of the CERD in the decision as to its jurisdiction in the Palestinian-Israeli case concerned the uniqueness of the mechanism established under Arts. 11-13 of the Convention. Indeed, the inter-state complaint mechanism provided in ICERD is automatic and does not require any additional declaration on the part of state parties, in contrast to all the other inter-state mechanisms in the UN treaties.[50] According to the Committee this indicates that the drafters of ICERD were strongly committed "to set up protective measures to ensure that the provisions of the Convention are adequately observed and complied with by all State parties."[51] This was most likely the case, though it would be unfair to argue that the drafters of subsequent UN human rights treaties were less committed to achieve the aims of the treaties just because they introduced a facultative – rather than compulsory – inter-state complaint mechanism.

What is also of interest in the CERD's elaboration on the uniqueness of the inter-state mechanism is the reference to the exact wording of Art. 11 of the Convention, which entrusts the right to bring a matter to the Committee to "a State Party," without any preconditions as to the mutual relations between the state parties. Given that both Israel and the State of Palestine undisputedly had the status of parties to ICERD, the Committee "was not persuaded that general international law rules should be interpreted so as to add conditions which are not present in the Convention."[52] This argument sounds quite convincing, since it is undeniable that it is the status as a state party to ICERD which is decisive for the right to "bring the matter to the Committee," whereas the issue of the "existence" of bilateral relations between the parties, or the recognition of one state party *vis-à-vis* the other is a matter completely absent from the scope of Arts. 11- 13 ICERD.

The Committee promoted the idea that Arts. 11-13 ICERD should be implemented "in a manner that is practical, constructive and effective."[53] This echoes the principle

[49] *Ibidem.*

[50] *See* footnote 4 above.

[51] *See* document CERD/C/100/5, para. 3.38.

[52] *Ibidem*, para. 3.40.

[53] *See* document CERD/C/100/5, para. 3.50(f).

of effectiveness present in the case law of the ECtHR, which has consistently held that the European Convention on Human Rights was intended to guarantee rights that are "practical and effective and not theoretical or illusory."[54] One could argue that the principle of effectiveness, understood in the above sense, should apply to both the material and the procedural obligations set forth in human rights treaties.

It should not go unnoticed that the Committee's decision of 12 December 2019 was not unanimous, and five CERD members decided to submit a joint individual opinion.[55] The dissenting members stressed the significance of consent in treaty relations; they also referred to the memorandum prepared by the UN Office of Legal Affairs, which expressed doubts as to the Committee's jurisdiction if the treaty relations between Israel and Palestine were "prevented" by the former's declaration submitted to the depositary of ICERD. The joint individual opinion expresses a view that "the Vienna Convention on the Law of Treaties applies to human rights treaties equally as to any other treaty. No provision of that Convention allows for any exception in case of human rights treaties."[56] While the first sentence is arguably correct, the second is debatable given the wording of Art. 60(5) VCLT, which excludes the possibility to terminate or suspend the operation of a treaty as a consequence of its breach if the latter concerned "provisions relating to the protection of the human person contained in treaties of a humanitarian character."[57]

CONCLUSIONS

Palestine's communication under Art. 11 ICERD gave rise to understandable attention and comments[58]. Notwithstanding the merits of the case, the dispute over the jurisdiction of the Committee provided it with an opportunity to recall the nature of obligations enshrined in the Convention as well as to reflect on the specific features and purpose of the inter-state complaint mechanism. One should generally appreciate the

[54] This well-known principle was developed in the judgment of ECtHR in the *Airey v. Ireland* (App. No. 6289/73), 9 October 1979, para. 24. The influence of a doctrine elaborated in the ECtHR on the case law of CERD was also identified with respect to considering ICERD as a "living instrument." *See* D. Keane, *Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument*, 20 Human Rights Law Review 236 (2020).

[55] *See* an annex to the decision of CERD of 12 December of 2019, Individual opinion of the following Committee members: Marc Bossuyt, Rita Izák-Ndiaye, Keiko Ko, Yanduan Li and Maria Teresa Verdugo Moreno (dissenting).

[56] *Ibidem*, para. 10.

[57] *See* Art. 60(6) VCLT: "Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

[58] *See* D. Keane, *ICERD and Palestine's Inter-State Complaint*, 30 April 2018, available at: https://www.ejiltalk.org/icerd-and-palestines-inter-state-complaint, as well as J. Eiken, *Breaking new ground? The CERD Committee's decision on the jurisdiction in the inter-State communications procedure between Palestine and Israel*, 29 January 2020, available at: https://bit.ly/3Adq1lK (both accessed 30 May 2021).

CERD's decision of 12 December 2019, while noting that it should not be construed as "detaching" the Convention from the general international treaty regime as such.

The requirement of consent remains – and should remain – a principal element in the concept of an international treaty (including those established for the purpose of protecting human rights). Also, the Vienna Convention on the Law of Treaties remains the primary codification of the rules of treaty law applicable to the ICERD. Nevertheless, in interpreting ICERD obligations, both material and procedural ones, the majority of the Committee members found it appropriate to "reach deeper," in the sense of drawing conclusions from the specific nature of the prohibition of racial discrimination as an obligation *erga omnes*, as well as from the purpose of the collective enforcement machinery established in Arts. 11-13 ICERD.

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THE DEVELOPMENT OF THE INTERNATIONAL LAW CONCERNING THE PROTECTION OF UNDERWATER CULTURAL HERITAGE: REMARKS ON THE OCCASION OF THE ACCESSION OF POLAND TO THE 2001 UNESCO CONVENTION

Abstract: *This article discusses the development of international law concerning the underwater cultural heritage (UCH), with particular emphasis on the 2001 UNESCO Convention on the subject. It attempts to set out the main legal solutions adopted in the 2001 Convention. However, in order to achieve this aim, it traces the genesis of the Convention and identifies the problems which prompted UNESCO to initiate the negotiations that ultimately led to the adoption of the 2001 Convention. Hence, before analysis of the UNESCO treaty it firstly describes the initial phase of the development of law regarding UCH, which was mostly based on the national laws of particular coastal States, as well as in some instances on the laws of salvage. Subsequently, the article turns to the discussion concerning the (in)famous two provisions of the UN Convention on the Law of the Sea (UNCLOS) dealing with archaeological objects, as well as the efforts that were undertaken within the framework of the Council of Europe to adopt a convention on UCH.*

Keywords: 2001 UNESCO Convention, law of the sea, UNCLOS, underwater archaeology, underwater cultural heritage,

INTRODUCTION

While 2021 marks the 20th anniversary of the adoption of the UNESCO Convention on the Protection of the Underwater Cultural Heritage[1] (2001 UNESCO Convention),

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[1] Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3.

it is certainly not the only reason substantiating the need for reflection with respect to its provisions and their implementation. Firstly, there has been academic debate as to the relationship of the Convention with the United Nations Convention on the Law of the Sea[2] (UNCLOS) and the added value of the former in connection to the latter. In this context, it is also worth recalling that some states have also questioned the particular legal solutions that were finally adopted in the 2001 UNESCO Convention. This debate still merits academic enquiry. Secondly, as the title of this paper suggests, the Republic of Poland became the 69th state-party to the 2001 UNESCO Convention. Poland deposited its instrument of ratification on 18 May 2021 and, accordingly, in line with its Art. 27 the Convention entered into force for it on 18 August 2021. This step contributes to the wider application of the underwater cultural heritage (UCH) Convention's rules on the international plane as well as signifies the need for Poland to introduce necessary changes in its domestic legal system. Thus it seems warranted, if only for this reason, to discuss this development here. Thirdly, the present volume of the Polish Yearbook of International Law is dedicated to the scientific legacy of Prof. Janusz Symonides. This article should be also regarded as a modest attempt to pay tribute to the life and work of this great scholar and practitioner. The 2001 UNESCO Convention as such was within Professor Symonides' academic interests,[3] as part of his activities in the field of the international law of the sea.[4] It is also a part of the UNESCO system, where he served as the Director (1989-2000) of the then Division of Human Rights, Democracy, Peace and Tolerance.

This article first sets out general considerations with respect to the UCH. Subsequently (Part 2), it discusses the development of international laws and standards with respect to UCH, paying particular attention to the relevant rules in the UNCLOS and efforts within the Council of Europe. Thirdly, the article turns its attention to the development of the 2001 UNESCO Convention itself, addressing its genesis within UNESCO, its main controversial aspects, as well as its principal provisions. The final part presents some brief conclusions.

1. UNDERWATER CULTURAL HERITAGE: AN OVERVIEW OF ITS IMPORTANCE AND THE THREATS THERETO

It was reported that the best record of human (principally terrestrial) civilization may well rest on the seabed, given that according to some estimates some 5% of ships are

[2] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[3] J. Symonides, *Międzynarodowa ochrona podwodnego dziedzictwa kulturowego* [International protection of the underwater cultural heritage], 27(1-2) Stosunki Międzynarodowe 52 (2003); J. Symonides, *Unresolved Issues and Emerging Challenges in the Law of the Sea*, 34 Prawo Morskie 17 (2018), pp. 34 *et seq*.

[4] *See* particularly J. Symonides, *Nowe prawo morza* [New law of the sea], PWN, *Warszawa*: 1986; J. Symonides, *Geographically Disadvantaged States under the 1982 Convention on the Law of the Sea*, RCADI, Vol. 208 (1988-I).

lost every year.[5] However, it is not only the ships and their cargo, but also the remains of old or even ancient towns or settlements, as well other artefacts, that constitute UCH,[6] as all this material carries traces of human existence of a cultural, historical, or archaeological character.[7] Moreover, due to the underwater conditions such material is often well preserved, constituting "time capsules"[8] which enable the present generations to look back into and better understand our past.

Access to such artefacts had been largely restricted, roughly up until the 1940s, by the limited human capacity to engage in underwater activities. This was primarily about lung capacity, which later was enhanced by early aqualungs and then submersibles (as well as such equipment as sonars or, later, underwater cameras and the like). These instruments, combined with better knowledge about depressurization processes, significantly enlarged access to UCH. Consequently, what had been previously thought to have been "lost forever," became gradually within human reach, dependent "only" on the capacity of a given person or entity to secure necessary financial resources and technology (as well as time and perseverance) to engage in the search for underwater treasures.[9] For example, the wreck of the *Titanic* was found in 1985 at a depth of 3,798 meters, and the wreck of the bulk carrier *Derbyshire* in 1994 at a depth of more than 4.000 meters (and in less than four days).[10] It should be remarked that the recovery of some 1800 artefacts from the site of the *Titanic*, with the aid of a submersible, is sometimes considered as a turning point in the development of international legal protection for the UCH and a symbol that the former "physical" protection of the oceanic depth was not longer a bar to accessing UCH.[11]

While on the one hand such better access has brought with itself undeniable advantages, i.e. as it translated into better knowledge about and understanding of our past, it also meant that the UCH has become more vulnerable to other non-scientific activities, in particular due to increased commercial interest and related private explorations. Suffice it to say that, as has been most famously reported, the *Geldermalsen* (which sunk in the South China Seas in 1752) was salvaged in 1985; and the "Nankin treasure"

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[5] T. Scovazzi, *Protection of Underwater Cultural Heritage*, in: D. Attard, M. Fitzmaurice, N.A. Martinez Gutiérrez (eds.), *The IMLI Manual on International Maritime Law*, vol. I: *The Law of the Sea*, Oxford University Press, Oxford: 2014, p. 443.

[6] P.J. O'Keefe, *Underwater Cultural Heritage*, in: F. Francioni, A.F. Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford: 2020, p. 295. *See also* S. Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge University Press, Cambridge: 2013, p. 41.

[7] *See* Art. 1(1)(a) of the 2001 UNESCO Convention.

[8] O'Keefe, *supra* note 6, p. 295.

[9] *Ibidem*, pp. 295-296; W. Kowalski, *Konwencja UNESCO o ochronie podwodnego dziedzictwa kulturowego* [UNESCO Convention on the Protection of Underwater Cultural Heritage], in: K. Zalasińska (ed.), *Konwencje UNESCO w dziedzinie kultury. Komentarz* [UNESCO Conventions in the field of culture. A Commentary], Wolters Kluwer, Warszawa: 2014, pp. 312-314.

[10] G. Hutchinson, *Threats to Underwater Cultural Heritage: The Problems of Unprotected Archaeological and Historic Sites, Wrecks and Objects Found at Sea*, 20(4) Marine Policy 287 (1996), pp. 287-288.

[11] Dromgoole, *supra* note 6, p. 32.

was recovered and sold at Christie's auction for £10 million.[12] However, what is often overlooked in commercially-oriented underwater efforts is the cultural importance (and integrity) of the UCH, not necessarily present only in such materials as bullion, gold bars or porcelain. More recently, in 2015 a similar debate occurred in relation to the "holy grail" of shipwrecks – the *San José,* a Spanish treasure ship that sank to the bottom of the Caribbean Sea in 1708.[13]

2. THE DEVELOPMENT OF INTERNATIONAL LAW CONCERNING UNDERWATER CULTURAL HERITAGE

2.1. Early beginnings: the application of national laws and the role of salvage law

Against the backdrop of above-described technological advances enlarging the scope of access to the UCH, before 2001 the relevant international legal framework had been relatively modest. By way of illustration, one may observe at this point that UNCLOS, sometimes referred to as a "Constitution of the Oceans," contains just two provisions on the subject. Moreover, it is not only *international* law that matters when it comes to the UCH. In fact, it was observed by one scholar that "the law of marine archaeology is primarily the law of a particular state regarding the conduct of marine archaeology and the resultant property interests in anything that may be found."[14] By virtue of its sovereignty, a state could relatively freely, subject to its international obligations, regulate access to the UCH present on its (maritime) territory. It would normally be for international *private* law, as applied by national courts, to decide on any claims to title to UCH objects that would be made on the basis of the laws of another state.

This notwithstanding, the question still arises as to the legal status of UCH *beyond national jurisdiction*, as well as, more generally, of the legal rules concerning activities aimed at the UCH therein. Traditionally, it has been accepted – even if those rules were not really designed to deal with UCH – that the rules of admiralty (maritime) law apply, in particular salvage law.[15] However, even these rules have been given

[12] *Ibidem*, pp. 288-299.

[13] J. Daley, *"Holy Grail" of Spanish Treasure Galleons Found Off Colombia*, Smithsonian Magazine, 25 May 2018, available at: https://bit.ly/3jfYYAk (accessed 30 May 2021).

[14] B.H. Oxman, *Marine Archaeology and the International Law of the Sea*, 12(3) Columbia-VLA Journal of Law & the Arts 353 (1987), p. 353.

[15] Salvage law would apply to situations whereby a person (a salvor) voluntarily saves the maritime property from danger and, thus, is entitled to a reward. Clearly, the concept of "saving a maritime property in danger" (as well as the idea of a "reward") is not easily applied to underwater cultural heritage, especially if it has rested on a seabed for a century or more. *See generally* S. Baughen, *Shipping Law* (4th ed.), Routledge, London and New York: 2009, pp. 292-324 (*cf.* in particular pp. 322-323); International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165. With reference to UCH, *see* Dromgoole, *supra* note 6, p. 32; Oxman, *supra* note 14, p. 354; and L. Caflisch, *Submarine Antiquities and the International Law of the Sea*, 13 Netherlands Yearbook of International Law 3 (1982),

various interpretations under common and civil law systems, and one could identify differences especially with regard to the issue whether the finder/salvor of a wreck would be entitled to claims to ownership or rather compensation only (whereby it would be a state that would acquire ownership over the wreck, often after a lapse of certain period of time).[16] In any case, the applicability of the law of salvage has become a contentious issue, not only due to the fact that it was arguably not designed for this purpose but also because it prioritized private (financial) interests over the cultural value and integrity of the UCH.

2.2. International and regional efforts preceding the 2001 UNESCO Convention

As may be inferred from the above, the law (or rather, "laws") that would apply to UCH constituted a patchwork of different national regulations, as well as admiralty/salvage law, only some of which would be relevant in waters within national jurisdiction. Still, the legal puzzle in these waters, complicated as it was, offered better opportunities for the protection of UCH in comparison with the largely unregulated situation in areas beyond national jurisdictions. This deficiency was quickly noted with the advancement (as described above) of technology and *know-how* that made access to underwater archaeological objects significantly easier – including at ever greater depths. It also translated, at least partially, into the possibility to access UCH further from land, which in turn would often mean access in either maritime zones where States enjoy (only) sovereign rights and jurisdiction (as opposed to "full" sovereignty) – the Exclusive Economic Zone (EEZ) and Continental Shelf (CS) – or even zones beyond national jurisdiction, i.e. the High Seas or the Area.[17]

Overall, the problem of preservation and regulation of the UCH has been gradually identified at both the international and regional levels. While a full account of these developments would exceed the constraints of this article, attention will nevertheless be paid to the most significant developments. They include the discussion of relevant rules enshrined in the UNCLOS on the one hand, and developments within the Council of Europe (CoE) and, obviously, the UNESCO on the other. One should underline that many of the relevant processes took place in parallel, mutually influencing each other, especially in the 1980s and 1990s. It is also interesting to observe the juxtaposition between the general law of the sea (i.e. UNCLOS), which addresses UCH in a very general manner, and the regional and specialized instruments which deal with cultural heritage generally, which however for various reasons refer to *underwater* cultural heritage in a limited way.

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p. 5. For a critique, *see e.g.* T. Scovazzi, *Underwater Cultural Heritage*, Max Planck Encyclopedia of Public International Law (online), paras. 4, 15-18.

[16] P.J. O'Keefe, J. Nafziger, *The Draft Convention on the Protection of the Underwater Cultural Heritage*, 25 Ocean Development & International Law 391 (1994), pp. 392-396.

[17] This part of argumentation omits the discussion on the temporal development of the law of the sea and the establishment of respective maritime zones, as well as the powers of states therein. It should be noted, though, that the terminology used here relies on the UNCLOS.

2.2.1. UNCLOS

Underwater cultural heritage was certainly not among the main issues that were subject to negotiations at the Third UN Conference for the Law the Sea (1973-1982). Consequently, out of 320 articles, only two deal with UCH, and they arguably do so in an incomplete and unsatisfactory manner. One of these provisions (Art. 149) was inserted in the earlier work of the Conference and was present already in the 1975 Informal Single Negotiating Text.[18] However, it deals only with objects in the Area (i.e. the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction). The other one (Art. 303) found its way into the Convention much later (1980), when attempts were made to include a provision that would address more pressing needs; that is, the protection of the UCH closer to shore, in the waters of or adjacent to the territorial sea, such as in the case of Mediterranean Sea. This issue proved more controversial, not so much because of the advanced stage of negotiations but due to fears of, most notably, the maritime powers that such a new regulation would amount to yet another instance of what had come to be known as "creeping jurisdiction." Namely, this meant a concern that the delicate compromise concerning the balance of coastal states' rights in their continental shelves and EEZs on the one hand, and the freedoms third states enjoy therein on the other, would be affected if the former group of states would be entitled to expand their sovereign rights and jurisdiction to archaeological objects.[19] Thus, the final shape of Art. 303 of UNCLOS – the result of many compromises – consists of four paragraphs, with each one basically devoted to a different issue, and all of them resorting to "constructive ambiguity" and/or legal fiction. Both of these articles have been subject to considerable analysis and critique.[20] Therefore, for the purposes of this article, they will be only briefly addressed.

Firstly, it shall be observed that articles make reference to the rather odd, especially if interpreted verbatim, phrase "objects of an archaeological *and* historical nature." It is far from clear what the difference would be, if any, between these objects. Secondly, they cover explicitly only the Area (Art. 149), as well as the contiguous zone (Art. 303(2), which creates a presumption that the conditions specified in Art. 33 UNCLOS – identifying functional rights of coastal States in that zone – are to be considered fulfilled). It

[18] Doc. A/CONF.62/WP.8 of 7 May 1975.

[19] B. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 American Journal of International Law 211 (1981), pp. 239-242; T. Scovazzi, *The Law of the Sea Convention and Underwater Cultural Heritage*, 27 International Journal of Marine and Coastal Law 753 (2012), p. 754.

[20] Oxman, *supra* note 14, pp. 359-365; Caflisch, *supra* note 15, pp. 16-31; O'Keefe, *supra* note 6, pp. 298-300; A. Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 International and Comparative Law Quarterly 859 (1991), pp. 871-892; T. Scovazzi, *The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention*, in: D. Freestone, R. Barnes, D. Ong (eds.), *The Law of the Sea: Progress and Prospects*, Oxford University Press, Oxford: 2006, pp. 121-128. Particularly the latter author presents a very sharp critique of the UNCLOS regime with respect to UCH, e.g. assessing it as 'incomplete', 'counterproductive' and as one that could in fact be interpreted in a way "which undermines the very objective of protecting the underwater cultural heritage" (*infra*, p. 121).

is implied, by way of sovereignty, that a coastal State may regulate the UCH within its territorial sea. The result is that there are no rules that would apply specifically to the remainder of the EEZ and Continental Shelf (i.e. from the outer limit of the contiguous zone – which, if established at all,[21] could extend 24 nautical miles – up to the 200 nautical miles from the baselines, or even more in the case of the continental shelf).

This conclusion needs to be qualified by stating, thirdly, that Art. 303(1) UNCLOS sets a general duty for States, not restricted to any maritime zone, to protect these objects, as well as "a duty to co-operate for that purpose." Important as it is, this obligation is not supported by any procedural or institutional means that would be able to verify its implementation.

The remaining two provisions of Art. 303 are basically non-prejudice clauses, according to which neither the rights of owners, the law of salvage "or other rules of admiralty," nor other agreements and rules of international law dealing with "objects of an archaeological and historical nature" are affected (Art. 303(3)).

Finally, going back to Art. 149 UNCLOS and putting aside the fact it has limited spatial application, one needs to observe that this provision seems, on the one hand, to prioritize community interests in protecting UCH ("for the benefit of mankind as a whole"), while, on the other, it underlines the need for preferential treatment of "State or country" (*sic!*) of origin, or of cultural, or historical and archaeological origin – without specifying what these concepts mean or how to take into account the concepts they embody (which in some situations are certainly conflicting).

Overall, while the UNCLOS does contain some provisions that deal with UCH, they are certainly general, ambiguous, and incomplete. Without a doubt they are rather a result of compromises that were struck at the side lines of the main thrust of negotiations during the III Conference on the Law of the Sea in order to include *any* provisions concerning UCH in the Convention. This unsatisfactory situation was one of the main reasons that prompted UNESCO, some two decades later, to take action.[22]

2.2.2. Council of Europe

Partially in parallel to the III UN Conference on the Law of the Sea, the Council of Europe (CoE) also took an action, on the regional level, with respect to the protection of the UCH. This was also motivated to some extent by the slow progress of the UNCLOS negotiations, as well as the low priority given to the UCH.[23]

As a consequence, in 1977 the CoE Parliamentary Assembly (PACE) instructed its Committee on Culture and Education to take up the matter. The resulting famous

[21] On the establishment of the said zone by Poland and some implications for the UCH, see: K.J. Marciniak, *The Polish Baselines and Contiguous Zone: Remarks from the Perspective of the United Nations Convention on the Law of the Sea*, XXXII Prawo Morskie 49 (2016).

[22] *See* UNESCO, *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, doc. 146 EX/27 of 23 March 1995 that concluded, *inter alia*, that UNCLOS provisions are not adequate and universal regulation of UCH at the international level is lacking (*infra*, para. 41).

[23] J. Blake, *The Protection of the Underwater Cultural Heritage*, 45 International and Comparative Law Quarterly 819 (1996), p. 821.

and influential 1978 Roper Report[24] consisted of a very thorough study of the level of legal protection of the UCH at the international and national levels, as well as of an overview of the interests in and threats to underwater cultural heritage. It also set out minimum legal requirements for the effective protection of UCH, in particular proposing that coastal States could extend their jurisdiction up to 200 nautical miles (a "cultural protection zone"), based on a new European treaty that could be adopted. The resulting document was the 1978 PACE recommendation 848 on UCH[25], with its annexed set of "minimum legal requirements,"[26] on the basis of which CoE Member States were urged to revise their legislation. Importantly, the recommendation also instructed the CoE Council of Ministers to "draw up a European convention on the underwater cultural heritage, open to all member states of the Council of Europe and also to all non-member states bordering on seas in the European area." As it turned out, the recommendation (or, more specifically, its annex) became the only international instrument dealing explicitly with the UCH until the adoption of the 2001 UNESCO Convention.

It is nevertheless important to underline that the Council of Ministers did act on recommendation 848 and initiated the process (in 1979) to elaborate a treaty on the UCH. For that purpose an Ad Hoc Committee of Experts (CAHAQ) was established, which held six plenary meetings between 1980 and 1985. Its work culminated in the adoption of the Draft Convention on the Protection of Underwater Cultural Heritage.[27] The draft Convention was, however, never adopted due to an apparent controversy between Greece and Turkey over its territorial scope of application.[28] At the same time, it should be observed that it finally adopted a similar approach in that regard as the UNCLOS – by then already adopted – and was generally restricted to the contiguous zone. It also did not follow the PACE recommendation 848's stance on excluding salvage law, but also in this respect went along the lines of the solution enshrined in Art. 303(3) UNCLOS.

To complete the overview of the CoE's efforts with regard to the matter under consideration, one should note that in the late 1980s it began work on revising the 1969 Convention on the Protection of the Archaeological Heritage.[29] This work was

[24] PACE, *The Underwater Cultural Heritage: Report of the Committee on Culture and Education* (Rapporteur: John Roper), doc. 4200-E, Strasbourg, 1978. This document is not publicly available and references to it in this article are made on the basis of: Blake, *supra* note 23 and Dromgoole, *supra* note 6, p. 53.

[25] PACE Recommendation 848 (1978), *Underwater cultural heritage*, 4 October 1978.

[26] They specified, *inter alia*, that: (a) there should be no loopholes in the legal protection of UCH; (b) protection should cover all objects that have been beneath the water for more than 100 years; (c) national jurisdiction should be extended to 200 nautical miles, based on an international agreement that would also reflect principles of reciprocity; (d) existing salvage and wreck law should not apply to UCH.

[27] *See* CAHAQ, *Final Activity Report: Draft European Convention on the Protection of the Underwater Cultural Heritage*, doc. CAHAQ (85) of 23 April 1985.

[28] Dromgoole, *supra* note 6, p. 5; Blake, *supra* note 23, pp. 824-827.

[29] Convention on the Protection of the Archaeological Heritage (adopted 6 May 1969, entered into force 20 November 1970), ETS No. 066.

finalized in 1992 with the adoption of the European Convention on the Protection of the Archaeological Heritage (Revised).[30] While this treaty takes a broad approach, not focusing on the UCH, its preamble does make reference to PACE recommendation 848 (1978), and its operative text specifies that for the purposes of this treaty "[t]he archaeological heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, *whether situated on land or under water*."[31] The Convention also reflects a new trend in the thinking about the role and protection of archaeological objects in that it prioritizes their protection *in situ*, while excavations should be avoided, and only carried out for scientific purposes.[32]

2.2.3. Non-governmental initiatives: ILA and ICOMOS

Before turning to the 2001 UNESCO Convention, brief mention should be made of two important initiatives which were conducted by expert bodies in their respective fields and which influenced the UNESCO treaty.

The first of these is the action taken on UCH by the International Law Association (ILA) in 1988. The newly established ILA Committee on Cultural Heritage Law undertook to prepare a draft convention on underwater cultural heritage. This work was finalized by the Committee in 1993 and adopted at ILA's 66th Conference in Buenos Aires in 1994[33] (ILA Draft). It was then transmitted to UNESCO for consideration and exerted a significant influence on the final shape and form of the 2001 UNESCO Convention. Overall, one can identify a "legal dialogue" (as well as personal links) between the 1978 Roper Report, the 1985 CoE draft Convention, the ILA Draft and, finally, the 2001 UNESCO Convention.

Suffice it to state at this point that the ILA envisaged the possibility to create (at the discretion of the coastal State) a 200-nautical mile Cultural Heritage Zone,[34] and as well adopted a broad definition of underwater cultural heritage, coupled with a 100-year threshold for it to be submerged under water to enjoy protection (with a possibility

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[30] European Convention on the Protection of the Archaeological Heritage (adopted 16 January 1992, entered into force 20 May 1995), ETS No. 143 (Valetta Convention).

[31] *Ibidem*, Art. 1(3) (emphasis added). This statement shall be read in conjunction with Art. 1(2)(iii) which states that it applies to elements of the archaeological heritage "which are located in any area *within the jurisdiction of the Parties*" (emphasis added). Hence, from the perspective of the law of the sea it would could apply to internal waters and territorial sea (and archipelagic waters), as well as to EEZ and continental shelf.

[32] *Ibidem*, Art. 3. *See also* Explanatory Report, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/143 (accessed 30 May 2021), which states, *inter alia,* that "[e]xcavations made solely for the purpose of finding precious metals or objects with a market value should never be allowed" (p. 4).

[33] *See* P.J. O'Keefe, *Protecting the underwater cultural heritage: The International Law Association Draft Convention*, 20 Marine Policy 297 (1996); O'Keefe, Nafziger, *supra* note 16 (the draft Convention, with commentaries, is reproduced in this article). For a critique of the ILA draft, *see* D. Bederman, *Historic Salvage and the Law of the Sea*, 30 The University of Miami Inter-American Law Review 99 (1998), pp. 112 et seq.

[34] ILA Draft, Art. 5.

for States to afford protection in their national law at an earlier stage). It also disapplied the law of salvage to UCH.[35]

A second and related initiative was the one by International Council on Monuments and Sites (ICOMOS), which in 1996 prepared the Charter on the Protection and Management of Underwater Cultural Heritage (the Charter).[36] This work was also inspired by the ILA report and became an integral part of the ILA Draft (although it was prepared two years later). The Charter details basic principles, approaches, and methodologies with respect to UCH, underlining in particular the need to preserve it, to use the least intrusive methods, as well as fully document the investigative process and secure material conservation, including in the long term.

3. THE 2001 UNESCO CONVENTION

3.1. The UNESCO process leading up to the adoption of 2001 UNESCO Convention

As may be inferred from the above recounting of the development of international and regional rules concerning the protection of underwater cultural heritage, the UNESCO work on the subject had at its disposal a significant body of international documents and standards. Moreover, the UNESCO itself previously had adopted three conventions protecting cultural heritage[37] (although they did not mention explicitly UCH),[38] as well as a number of non-binding instruments.[39] However, while its work did not start in a legal vacuum, it also suffered from similar controversies as in the previous attempts to regulate the UCH.

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[35] *Ibidem*, Arts. 1, 2 and 4.

[36] The Charter was ratified by the 11th ICOMOS General Assembly in Sofia, Bulgaria in October 1996, available at: http://icuch.icomos.org/useful-documents/ (accessed 30 May 2021). The Charter is also devised to serve as a supplement to the earlier ICOMOS 1990 Charter for the Protection and Management of Archaeological Heritage.

[37] These are: the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956), 249 UNTS 215; the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972), 823 UNTS 231; and the Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975), 1037 UNTS 151.

[38] One should remark, though, that under the 1972 World Heritage Convention there are world heritage sites (e.g. Bikini Atoll; Red Bay wrecks) and intangible cultural heritage (Hawaii fish trap veneration; maritime rites; some boat building techniques) that are located under water. Nevertheless, even the UNESCO's *Feasibility Study* (*supra* note 22, para. 42) underscored that this Convention is not apt for the protection of UCH generally.

[39] *See* UNESCO General Conference, 9th Session, New Delhi, 1956, *Recommendation on International Principles Applicable to Archaeological Excavations*. While it is considered as the oldest UNESCO document concerning UCH, it only briefly touches directly on underwater archaeology (*infra*, para. 1).

The decision to elaborate a convention under the auspices of UNESCO was taken by the General Conference of UNESCO in 1997,[40] and was preceded by a preparatory process within the organization.[41] The General Conference also requested the Director-General to prepare a first draft of such a treaty, which he did in 1998.[42] On that basis, the group of government experts[43] negotiated over the course of four meetings that stretched out between 1998 and 2001.[44] Despite holding intensive meetings, formal and informal exchanges, as well as efforts exerted by the Chairmen (C. Lund) and individual States, it was not possible to reach consensus on all issues. Therefore, subsequently the draft text of the Convention was voted upon; first by the groups of government experts (49-4-8),[45] then by the IV Commission of the 31st session of the UNESCO General Conference (94-5-19)[46] and, finally, by the General Conference (87-4-15[47]), and thus the Convention was adopted on 6 November 2001.

3.2. Major controversial issues during the negotiations and main solutions adopted in the 2001 UNESCO Convention

While basically all states (including those that voted against) supported the objectives of the new treaty, they could not reach consensus on some of its provisions. It seems useful here to highlight some of the most controversial aspects of the Convention. Certainly most of these issues were not new and had been identified already in the course of the previous international efforts to address the UCH (notably within the framework of UNCLOS and CoE). Still, the examination of these problematic aspects enables

[40] *Preparation of an international instrument for the protection of the underwater cultural heritage*, doc. 29 C/Resolution 21 (1997).

[41] This included, among others, the preparation of the *Feasibility Study* in 1995 (*supra* note 22) and the organization of a meeting of experts (chaired by Carsten Lund) in May 1996 (summary in *Report by the Director-General on Action Taken Concerning the Desirability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage*, 5 August 1997, doc. 29C/22); as well as a round of written comments on experts' conclusions (which were unanimous that a legally binding instrument concerning the protection of the UCH is needed and that UNESCO is an appropriate forum for its adoption) by UNESCO Member States.

[42] Doc. CLT-96/Conf.202/5 (1998). This document is available and commented upon in: S. Dromgoole, N. Gaskell, *Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998*, 14 International Journal of Marine and Coastal Law 171 (1999).

[43] Before the meeting a small group of experts from six States was established (with Poland among them, represented by dr. Z. Kobyliński) to study the first draft.

[44] These meetings are summarized by Symonides (*Międzynarodowa ochrona*), *supra* note 3, pp. 53-57.

[45] *Draft Convention on the Protection of the Underwater Cultural Heritage*, 3 August 2001, doc. 31 C/24.

[46] UNESCO, *Records of the General Conference. Vol. 1: Resolutions*, 31st Session, 15 October – 3 November 2001 (UNESCO, Paris: 2002), p. 156.

[47] States voting against were: Norway, Russia, Turkey and Venezuela; States that abstained: Brazil, Czech Republic, Colombia, France, Germany, Greece, Iceland, Israel, Guinea-Bissau, Netherlands, Paraguay, Sweden, Switzerland, United Kingdom and Uruguay. *See* UNESCO, *Records of the General Conference.* Vol. 2: *Proceedings*, 31st Session, 15 October – 3 November 2001 (UNESCO, Paris: 2002), pp. 561 et seq.

a more comprehensive understanding of the rules finally adopted in Convention. These non-consensual points included:[48]

1) *The relationship of the 2001 UNESCO Convention with UNCLOS*: This is a multifaceted issue. At the most general level, some states viewed the 2001 UNESCO Convention as the implementation of the Art. 303(4) UNCLOS (non-prejudice clause with respect to other agreements concerning UCH), while some others would rather qualify the 2001 UNESCO Convention under Art. 311(3) UNCLOS, i.e. as an agreement *inter partes*, not affecting the rights and duties of parties to the latter treaty that are not parties to the former. Also, some non-UNCLOS[49] parties could not agree to references in the 2001 UNESCO Convention to UNCLOS, including in particular the potential application of its Part XV containing a dispute settlement mechanism.

Indeed, it should be underlined that the 2001 UNESCO Convention contains both general (Art. 3), as well as more specific rules (Arts. 2(8), 8, 10(2) and (6), as well as Art. 11) that seek to ensure that the 2001 UNESCO Convention does not prejudice the rights and obligations enshrined in the UNCLOS, as well as that it should be applied and interpreted in line with the latter treaty. Nevertheless, these controversies have persisted. They are still visible during, e.g., the annual discussions concerning the UN General Assembly resolution "Oceans and the Law of the Sea,"[50] as well as in the individual positions taken by various States.[51]

2) *The balance of rights and duties of coastal and flag States in the EEZ and the Continental Shelf*. While the 2001 UNESCO Convention does not establish a new maritime zone (such as the Cultural Protection Zone, as postulated in the 1994 ILA Draft, and earlier in the 1978 Roper Report), it nevertheless does apply and contain rules concerning the protection of the UCH in the EEZ and the Continental Shelf, as well as other maritime zones established in the UNCLOS, both within and beyond national jurisdiction. This important development has sometimes been assessed negatively

[48] This overview is mostly based on explanations of votes that states made upon the adoption of the Convention (*see ibidem)*. *See also* Z. Kobyliński, *Konwencja o ochronie podwodnego dziedzictwa kulturowego* [Convention on the Protection of Underwater Cultural Heritage], 55 Ochrona Zabytków 142 (2002); T. Scovazzi, *Convention on the Protection of Underwater Cultural Heritage*, 32 Environmental Policy and Law 152 (2002); R. Garabello, *The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage*, in: R. Garabello, T. Scovazzi (eds), *The Protection of the Underwater Cultural Heritage*, Martinus Nijhoff, Leiden-Boston: 2004, pp. 89 *et seq*.; G. Carducci, *New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, 96 American Journal of International Law 419 (2002).

[49] Turkey and Venezuela.

[50] *See* the recent UN General Assembly resolution "Oceans and the Law of the Sea", 31 December 2020, A/RES/75/239, paras. 8, 9 and 354. It should be observed at this point that in 2011, during the Polish presidency in the Council of the EU, it was Poland which negotiated, on behalf of the EU and its Member States, the said resolution and these controversies manifested themselves there as well. Prof. J. Symonides formed part of the Polish delegation to these meetings.

[51] For example, for a recent overview of the British non-ratification of the 2001 UNESCO Convention *see* H. Roberts, *The British Ratification of the Underwater Heritage Convention: Problems and Prospects*, 67 International & Comparative Law Quarterly 833 (2018).

from both sides: some coastal states felt that their sovereign rights and jurisdiction are not adequately accounted for in the 2001 UNESCO Convention (e.g. Uruguay, Greece); whereas other states (e.g. Russia, Turkey, Norway, or the USA) took the stance that the new treaty affects the delicate balance of rights and duties established in the UNCLOS and is yet another instance of "creeping jurisdiction" of coastal States, to the detriment of the rights of the flag States and the freedoms they enjoy under the UNCLOS.[52]

3) *Status of warships and other State-owned vessels.* While the legal status of "State vessels" is relatively clear, and in particular that they do enjoy immunity,[53] it is less obvious whether the same legal status is to be accorded to such vessels which have sunk.[54] This issue certainly proved very delicate during the negotiations, and some states (e.g. the UK and USA) took the position that sunken warships (and aircraft) retain their status (regardless of how long they have remained under water). Conversely, some other states argued that a general exclusion of warships from the regime of the Convention would be counterproductive and not in line with its objectives to protect the UCH. This issue proved to be one where consensus during negotiations was not attained, despite many attempts.

Ultimately, the 2001 UNESCO Convention – in contrast to its 1998 draft[55] – does *not* contain a general exclusion of state-owned vessels (and aircraft), while dealing with this issue in separate maritime-zone-specific provisions.[56] Even though the Convention contains a saving-clause that it does not affect immunities accorded to state-owned vessels under international law or states' rights with respect to their vessels,[57] some flag states still consider that their rights *vis-à-vis* those of the coastal state are not adequately protected.[58]

4) *Exclusion of salvage law and ownership issues:* As already highlighted in the introductory part of this article, the application of salvage law to UCH had been controversial well before the beginning of the negotiations leading to the 2001 UNESCO Convention. This is also partially linked to the question of ownership of the sunken vessels (and their cargo). In this respect the 1998 draft of the Convention adopted the

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[52] Symonides, *Unresolved issues*, *supra* note 3, pp. 35-36.

[53] *See* Arts. 29-33 and 95-96 of UNCLOS. *See also* ITLOS, *The "ARA Libertad" Case (Argentina v. Ghana)*, *Provisional Measures*, Order, 15 December 2012, ITLOS Rep 2012, p. 332.

[54] *See also,* Institute of International Law, *The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law* (Tallin Session, 2015, Rapporteur: N. Ronzitti).

[55] Dromgoole, Gaskell, *supra* note 42, pp. 183 *et seq*. (draft Art. 2(2)).

[56] *See* Arts. 7(3), 10(7), as well as 9(1)(b) and 9(2) of the 2001 UNESCO Convention.

[57] *Ibidem*, Art. 2(8). Moreover, Art. 3 requires that the 2001 UNESCO Convention shall be interpreted in line with the UNCLOS.

[58] This is particularly the case with respect to: (a) Art. 7(3) concerning internal waters, territorial sea and archipelagic waters, whereby a flag State merely "should be informed" by the coastal State if exercising its sovereignty in the Continental Shelf and EEZ; as well as (b) Art. 10(7), concerning the Continental Shelf and EEZ, whereby the requirement to obtain an agreement of the flag State is qualified by a reference to paras. 2 and 4 of the aforementioned provision.

following solutions: (a) indirect exclusion of the law of salvage[59] (which was certainly a negotiated-down provision in comparison with the outright exclusion proposed in the 1994 ILA Draft); and (b) adoption of a "deemed abandonment" standard with respect to UCH (after the lapse of 25 or 50 years).[60]

Ultimately, the 2001 UNESCO Convention excludes the laws of salvage (Art. 4), although it also contains an exception to this rule (Art. 4, letters a-c), thus diluting the principle. The Convention also bypasses questions of ownership (as well as the controversial "deemed abandonment" standard) and applies to the UCH in general (submerged for at least 100 years).[61] While such an approach proved effective as a negotiating technique, it is less certain whether it provides sufficient legal certainty in terms of its practical implementation. After all, omitting private law issues in the Convention does not make them disappear and they may still come into play, especially when the exception provided in Art. 4 will materialize. Such a situation could, in turn, create tension with respect to other provisions of the Convention that generally prioritize the preservation of the UCH "for the benefit of humanity" and forbid the commercial exploitation of UCH.[62]

5) *The form and content of archaeological standards to be adopted for the purposes of the Convention.* The idea that the Convention should also provide a benchmark for archaeological standards, annexed to the treaty, was not new (in particular, the ILA Draft also consisted of the main treaty and annexed standards). The gist of the content of such standards had also been earlier prepared by the ICOMOS in its 1996 Charter. In the framework of the UNESCO-led negotiations issues arose both as to the form/status of such standards, as well as to their precise content. With regard to the former, it was discussed whether the Convention should refer to such externally-prepared standards (an added value of such a scenario would entail their flexibility and the ease with which they could be updated to reflect new technologies and methods; the downside being that state-parties would, at least partially, have a lesser degree of control over them); or whether the Convention should incorporate them, thus giving them the same legal status as the Convention itself, but at the same time making their amendment much more burdensome.[63]

Finally, the 2001 UNESCO Convention adopted the second approach and incorporated the "Rules concerning activities directed at underwater cultural heritage" (the Rules) as an Annex, constituting an integral part of the Convention (Art. 33). This, in

[59] Art. 12(2) of the 1998 Draft requires the "non-application of any internal law or regulation having the effect of providing for commercial incentives for the excavation and removal of UCH." *See also* Dromgoole, Gaskell, *supra* note 42, p. 188.

[60] Dromgoole, Gaskell, *supra* note 42, p. 195. Art. 1(2) of the 1998 Draft which was closely linked to the scope of application of the draft Convention as a whole.

[61] Art. 1(1)(c) of the 2001 UNESCO Convention.

[62] Art. 2 paras 3 and 7 of the 2001 UNESCO Convention, respectively. *See also* S. Dromgoole, *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 18 International Journal of Marine and Coastal Law 59 (2003), pp. 69-72.

[63] Dromgoole, *supra* note 68, pp. 62-63; O'Keefe, *supra* note 6, pp. 313-315.

turn, meant that the subject-matter of the ICOMOS Charter was also subject to (legal and political) negotiations, which inevitably influenced both the language (making them apt for a treaty – in particular the Rules utilize mandatory "shall" terminology), as well as the content of the Rules that had been previously adopted for the purposes of the Charter.[64] Overall, there are 36 Rules, which are organized into sections following a logical sequence of activities concerning UCH (from "General principles," through to, e.g., "Project design," "Funding," "Project duration," and up to "Reporting").

3.3. Overview of other basic principles of the 2001 UNESCO Convention

It should be stated here at the outset that the 2001 UNESCO Convention, especially when compared with the two UNCLOS provisions concerning UCH, sets out a comprehensive regime for dealing with the underwater cultural heritage. Importantly, it does so with respect to all maritime zones established in the UNCLOS (within and beyond national jurisdiction), without however establishing any new zone (e.g. Cultural Protection Zone). Also, clearly the Convention is an internationally-binding treaty (binding on its state-parties) which again – especially when compared with previous attempts to adopt legally binding rules on the subject – is a success in itself.[65]

Some basic rules and principles of the 2001 UNESCO Convention are enshrined in its Art. 2, which states in particular that: (1) the Convention aims to ensure and strengthen the protection of underwater cultural heritage; (2) state-parties shall cooperate in the protection of UCH; (3) they shall preserve UCH for the benefit of humanity; and (4) they shall also take all appropriate measures in conformity with the Convention and with international law that are necessary to protect UCH (although this is qualified by the clause "in accordance with their capabilities"). Art. 2 further specifies that (5) the preservation *in situ* of UCH shall be considered as the first option before allowing or engaging in any activities directed at this heritage; (6) recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation; as well as (7) that UCH "shall not be commercially exploited." Some of these regulations are further elaborated upon in the Rules.

The Convention defines *what* it is to be protected; namely it contains a definition of UCH.[66] It should be stressed that it only relates to UCH that has been underwater for at least 100 years (hence it will be in some two decades before it will cover, e.g., ships that were sunk during the World War II). It also excludes submarine cables and pipelines, as well as some other installations in use.[67]

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[64] Such as Rule 2 concerning the ban on commercial exploitations of UCH (*see* Dromgoole, *supra* note 68, pp. 62, 66).

[65] Before and during the negotiations of the Convention it was argued that this project would, as a similar effort in the framework of CoE, end in a failure (*see* Dromgoole, *supra* note 68, p. 60).

[66] Art. 1(1)(a) of the 2001 UNESCO Convention states that UCH means "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years."

[67] *Ibidem*, Art. 1(1)(b)-(c).

Attention should also be paid to *what* the UCH is protected *from*. As specified above, the gist of the debates before the adoption of the 2001 UNESCO Convention revolved around the (in)applicability of the laws of salvage; the commercial exploitation of UCH; and the increased threat of looting. This is, indeed, the focus of the Convention, which is evidenced by the fact that it concentrates mostly on "activities directed at"[68] UCH, and less on those that merely "incidentally affect" it[69] (such as, for example, fishing or seabed-mining, not to mention other factors, such as a changing or deteriorating environment[70]).

Finally, the Convention sets out a number of rules with regard to *how* the UCH is to be protected. Some of them are horizontal in character and apply to the protection of UCH in general, notwithstanding the maritime zone it is located in (in particular the basic rule enshrined in Art. 2, discussed above, as well as those contained in the Rules), while some are tailored for specific maritime-zone. Consequently, the Convention provides for regulations in zones where states enjoy sovereignty (internal waters, territorial sea, archipelagic waters),[71] exercise sovereign rights and jurisdiction (the Continental Shelf and EEZ),[72] as well as zones beyond national jurisdiction (the Area).[73] Clearly, the specific rules in these instances vary, taking into account the different jurisdictional basis of the coastal state (if any).

Generally speaking however, the coastal state has the exclusive right to regulate and authorize activities directed at UCH in the first group of maritime zones (as well as to determine the rules to be applied). In the second group of maritime zones, all states shall protect UCH and they need to oblige their nationals or vessels flying their flag to report on any activity directed at, or the discovery of UCH, to the coastal state in question (if the discovery or activity is in its maritime zone, and/or to the other coastal State (if in that state's maritime zone). Moreover, if other states declare their interest in UCH located in other states' EEZ/Continental Shelf,[74] the latter shall act as a "Coordinating State" and consult on how best to protect a particular UCH. Finally, UCH in the Area also needs to be protected, in line with the 2001 UNESCO Convention as well as Art. 149 UNCLOS. To this effect, any discoveries of or activities directed at UCH shall be notified to the Director-General of UNESCO and to the Secretary General of the International Seabed Authority. If need be, the Coordinating State shall also be appointed and shall act "for the benefit of humanity as a whole."[75]

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[68] *See e.g.* the 1998 draft utilized a broader terminology, as it spoke of activities "affecting" UCH.

[69] Art. 1(6) and (7) in conjunction with Art. 5, respectively, of the 2001 UNESCO Convention.

[70] O'Keefe, *supra* note 6, pp. 301-302.

[71] Arts. 7 and 8 (the latter provision dealing with the Contiguous Zone where States enjoy specific functional powers; *cf.* Art. 33 UNCLOS).

[72] Arts. 9-10 of the 2001 UNESCO Convention.

[73] *Ibidem*, Arts. 11-12.

[74] *Ibidem*, Art. 9(5). This should be based on a "verifiable link" (especially of a cultural, historical or archaeological character).

[75] Art. 12(2) and (6) of the 2001 UNESCO Convention.

As may be inferred from the above, the 2001 UNESCO Convention uses both *territorial* (maritime zones where states enjoy sovereignty) and *personal* (EEZ/Continental Shelf and the Area – "nationals," "vessels flying their flag" or "masters of the vessels")[76] links through which the provisions of the Convention are to be given effect. On top of these solutions, the 2001 UNESCO Convention obliges state-parties to take measures to control entry into their territory and to deal with the possession of and trade in UCH illicitly exported and/or recovered, in cases where it took place in contravention with the Convention, as well as to prohibit the use of their territory (including ports) to support any activity directed at UCH which is not in conformity with the Convention.[77]

The Convention also requires state-parties to impose sanctions for violations of measures that they have introduced to implement the Convention,[78] as well as to provide for the seizure of UCH in its territory that was recovered in contravention of the Convention.[79]

Among other solutions which the Convention envisages, one should underline that it mandates that states shall cooperate and assist each other in the protection and management of the UCH, as well as takes into account the important role in the protection of UCH played by awareness-raising and the provision of training in underwater archaeology.[80]

In terms of the *institutional and procedural solutions* that the Convention has adopted, it should be noted that it establishes a regular Meeting of State Parties, to be assisted by a Scientific and Technical Advisory Body, as well as a Secretariat of the Convention.[81] The provision concerning the peaceful settlement of disputes proved contentious. While it envisages a relatively traditional procedure of negotiations between parties to a dispute, as well as provides for a mediation, it also utilizes the peaceful settlement of disputes procedure adopted in Part XV UNCLOS (which, *inter alia*, allows for a dispute to be referred to the International Court of Justice, International Tribunal for the Law of the Sea, or arbitration[82]). It does so not only with respect to the state-parties to the UNCLOS and the 2001 UNESCO Convention, but also, potentially, to state-parties to the latter only.[83]

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[76] *Ibidem*, Art. 16. *See also* A. Petrig, M. Stemmler, *Article 16 UNESCO Convention and the Protection of Underwater Cultural Heritage*, 69 International & Comparative Law Quarterly 397 (2020).

[77] Arts. 14 and 15 of the 2001 UNESCO Convention, respectively.

[78] *Ibidem*, Art. 17. Such sanctions should be "adequate in severity to be effective in securing compliance" (*infra*, para. 2).

[79] *Ibidem*, Art. 18.

[80] *Ibidem*, Arts. 19-21.

[81] *Ibidem*, Arts. 23-24.

[82] *Cf.* Art. 287 UNCLOS.

[83] Art. 25 of the 2001 UNESCO Convention. In particular, the joint reading of Art. 25(3) and (4) leaves uncertainty whether the UNCLOS-established mandatory procedures to settle disputes apply also to non-UNCLOS parties (*see* Dromgoole, *supra* note 68, pp. 89-90).

CONCLUSIONS

Clearly, the 2001 UNESCO Convention is a landmark legal instrument concerning UCH. In contrast to all previous treaties and efforts, it managed to establish a comprehensive system for the protection of underwater cultural heritage; one that applies in all maritime zones. Bearing in mind the large number of delicate political issues as well as legal and jurisdictional problems to be negotiated and resolved in order for the Convention to be adopted and ratified, it is not surprising the conclusion of the Conventions came at the cost of compromises, the use of general language, and/or the bypassing of some issues.

Nevertheless, this should not cast a shadow over the fact that the Convention does oblige states, in unequivocal terms, to cooperate for the protection of the UCH, meaning that all activities directed at UCH have to be reported on and that commercially-oriented activities are generally banned, while protection *in situ* is a priority. As rightly remarked by Prof. Symonides, it also seems natural that the Convention rests on the important principle of cooperation between states, and its implementation in good faith by state-parties will ultimately decide whether the Convention achieves its objectives.[84]

Notwithstanding the legal (and symbolic) importance of the adoption of the Convention, one has to note that it is directly binding only with respect to its state-parties. While it is always difficult and sometimes misleading to assess the "success-rate" of any given treaty by the number of states that have become bound by it, it should be nevertheless be noted that the number of state-parties (69, including Poland) falls short of being able to qualify the Convention as a universally-binding treaty. On the other hand, putting aside the issue of the possible indirect effect of the 2001 UNESCO Convention (e.g. on the regulatory solutions of States that for various reasons did not choose to become bound by the Convention[85]), one should underline that the Convention has attracted a number of important – from the perspective of the protection of UCH – coastal and/or flag states (e.g. France, Italy, Mexico, Portugal, Spain). Clearly there are still a number of important non-ratifying states (such as Australia, China, Greece, the Netherlands, Russia, the United Kingdom, and the United States). Moreover, when looked upon from the regional perspective the level of ratification is certainly uneven. For example, most of the states bordering the Mediterranean Sea have joined the Convention, and many of the Latin American and Caribbean States have become bound by it well. Ratification is less prominent in the African and Asia-Pacific region, and in the Baltic Sea area only Estonia, Lithuania and Poland are parties to the 2001 UNESCO Convention.

While the Polish maritime zones are not yet fully explored and researched from the perspective of their UCH, it seems reasonable to assume, both on the basis of the condi-

[84] Symonides, *Międzynarodowa ochrona*, *supra* note 3, p. 61.

[85] This is particularly the case with respect to the Rules that are supported by many non-State parties to the 2001 Convention (such as the UK) – *see* Roberts, *supra* note 51, p. 883.

tions generally conducive to the preservation of underwater archaeology which prevail in the Baltic Sea, as well as hitherto findings and Polish maritime history,[86] that there is important UCH located in the Baltic Sea.[87] This conclusion, coupled with a conviction that the Polish law is generally in line with the 2001 UNESCO Convention, led at least one commentator to predict already some time ago that Poland would accede to the said Convention.[88]

It seems opportune that Poland decided to accede to the 2001 UNESCO Convention. While this act closes a certain chapter, new challenges emerge as – in line with the conclusions above – the effectiveness of the Convention in protecting UCH[89] lies in its proper implementation and the actual measures taken by state-parties (now including Poland). This issue should be subject to a separate scrutiny in the future.

[86] *See also* activities undertaken by the Polish National Maritime Museum in Gdańsk. For example, there are currently 24 wrecks (from the 19th century or older) that are researched by the museum: available at: https://www.nmm.pl/archeologia-podwodna/wraki-badane-przez-nmm (accessed 30 May 2021).

[87] *See* I. Pomian, *Podmorskie dziedzictwo. Inwestycje morskie a ochrona podwodnego dziedzictwa archeologicznego* [Underwater heritage. Maritime investments and the protection of underwater archaeological heritage], 80-81 Cenne, bezcenne/utracone 58 (2014); I. Pomian, *Archeologia morska w Polsce stan obecny i perspektywy* [Underwater archaeology in Poland: current status and perspectives], 2016, available at: https://www.nmm.pl/archeologia-podwodna/badania (accessed 30 May 2021).

[88] Kowalski, *supra* note 9, pp. 321-323.

[89] This refers to the effectiveness among the 2001 UNESCO Convention's state-parties. The "general" effectiveness of the Convention is naturally also dependant on, *inter alia*, the number of states that become bound by it.

GENERAL ARTICLES

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WHAT DO "CROSS-CURRENTS" MEAN IN INTERNATIONAL LAW: FROM ALBERT VENN DICEY TO LUDWIK EHRLICH. SOME REMARKS ON FRAGMENTATION

Abstract: *This article examines the idea of cross-currents in international law, which was proposed almost a century ago by Ludwik Ehrlich. First the theoretical background of this idea is provided, with the focus on Albert Venn Dicey's assumption that there are fundamental differences in public opinion influencing the legislative process. The development of the cross-currents concept is given through the prism of the evolution of Ehrlich's ideas. The article illustrates some aspects of his legal philosophy, which describe the scholar as broad-minded, innovative, and deep-thinking. Four dimensions of cross-currents in international law are discussed: (1) the existence of norms originating from different periods; (2) variations between states in their recognition and interpretation of them; (3) fulfillment of abstract norms; and (4) inconsistencies of theory and practice. They contribute to approximating a fully coherent international law serving as the ideal in comparison to a heterogeneous, contradictory, fragmented one, as is frequently observed at the present time. The idea of cross-currents might be helpful in accepting the view that some of the incompatibilities between the rules and principles of international law are inevitable and do not cause harm to international legality.*

Keywords: Albert Venn Dicey, cross-currents in international law, differences of public opinion, fragmented international law, Ludwik Ehrlich

INTRODUCTION

In comparing international law with the domestic law of states, one observes that in the latter conflicts of norms are ameliorated by the supreme power whenever possible, thus making them more manageable. We can expect from a state that its government takes on the obligation to build and sustain a logically-consistent legal system. Inter-

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national law is not the same in this regard. In contrast to domestic laws, the system of international law is more decentralized. Nearly two hundred equal states (theoretically), together with many more than two hundred intergovernmental organizations, shape it through their consent. Is it possible to merge all states into a homogeneous legal unity? While this question is rather rhetorical, it is obvious that it might shed some light on the complex nature of international law, which deserves to be studied and understood in order to enhance its effectiveness.

This article is largely dedicated to the problem of the fragmentation of international law, which lies at the crossroads of its theory and practice. The quintessence of the fragmentation is to be found in "a shift (or threatened shift) away from the established basement."[1] Among a great number of papers concerning this topic and published in recent years it is worth mentioning a few books: a practical inquiry into fragmentation and constitutionalisation, in which those two aspects are viewed in a series of articles as being in contradiction in international law, although interconnected;[2] a study introducing the concept of legal dilemma in international law, referring to irresolvable norm conflicts;[3] two monographs on how regionalism is interlinked with international law and vice versa;[4] a research volume about the impact of international and national courts upon the process of fragmentation;[5] and a study on the phenomenon of normative parallelism, caused by the co-existence of treaty and customary rules, regional and global ones, etc.[6] These are followed by a list of works that pertain to particular fields of international law[7] and its comparativeness.[8]

What do all these works have in common? Firstly, they were designed to find and explain the reasons why international law falls short of expectations in terms of its uniformity. Secondly, their authors did not analyze the tendencies in public opinion

[1] J. Cogan, *The Idea of Fragmentation*, 105 Proceedings of the Annual Meeting (American Society of International Law) 123 (2011), p. 123.

[2] A. Jakubowski, K. Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law*, Routledge, Oxon, New York: 2016.

[3] V. Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma*, Oxford University Press, Oxford: 2017.

[4] J. Klučka, L. Elbert, *Regionalism and Its Contribution to General International Law*, UPJŠ in Košice, Košice: 2015; J. Klučka, *Regionalism in International Law*, Routledge, Abingdon: 2018.

[5] O. Fauchald, A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-) Fragmentation of International Law*, Hart Publishing, Oxford: 2014.

[6] T. Broude, Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law*, Hart Publishing, Oxford: 2011.

[7] M. Ajevski, *Fragmentation in International Human Rights Law. Beyond Conflict of Laws*, Routledge, London: 2017; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge University Press, Cambridge: 2009.

[8] A. Roberts et al. (eds.), *Comparative International Law*, Oxford University Press, Oxford: 2018; Y. Shemchushenko, O. Kresin (eds.), Ідея порівняльного міжнародного права: *pro et contra*: Збірник наукових праць на честь іноземного члена НАН України та НАПрН України Уїльяма Елліотта Батлера [The idea of comparative international law: *pro et contra*: Collection of scientific works in honor of William Elliott Butler, a foreign member of the NAS of Ukraine and the National Academy of Legal Sciences of Ukraine], Ліга-прес, Київ-Львів: 2015.

which Albert Venn Dicey described in his 1905 writing. Thirdly, their authors did not look back on the teachings of Ludwik Ehrlich, who investigated conflicts of norms in international law for a quarter of a century. He originally introduced the theory of cross-currents (as he called it) after borrowing the idea of opposite flows in public opinion from Dicey's study published two years before Ehrlich entered university. A short review of the research on the personality of Ehrlich and his achievements was published in the Polish Yearbook of International Law in 2018.[9] To this review may be added a book from last year,[10] which had been expected since the 2018 conference "The force of law instead of the law of force. Ehrlich's school of the science of international relations and international law." That book consists of three parts: "Reception of Ludwik Ehrlich's thoughts in the science of international law;" "Influence of Ludwik Ehrlich's thoughts on the development of the science of international relations;" and "About Ludwik Ehrlich." The first part includes "Ehrlich's theory of international law: ab initio" (in Polish), written by the author of the present article, where the concept of cross-currents is characterised as one of Ehrlich's enduring ideas.[11]

1. THEORETICAL FOUNDATIONS OF THE CROSS-CURRENTS CONCEPT: DICEY, JELLINEK, RENARD

The theoretical background of cross-currents traces back to the heritage of the outstanding British constitutional lawyer Dicey. His *Lectures on the Relation Between Law and Opinion in England, During the Nineteenth Century* (1905),[12] alongside with his *Introduction to the Study of the Law of the Constitution* (1885), are considered to be his major achievements. He perceived the national legal system of England as totally democratic in the then-modern meaning, whereby dominant groups of people (if considering their attitudes toward crucial social issues) have a strong influence on the lawmaking process. He defined public opinion when referring to legislation as follows:

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[9] A. Hachkevych, *The Method of New Positivism as Elaborated by Ludwik Ehrlich*, XXXVIII Polish Yearbook of International Law 99 (2018), pp. 101-103.

[10] P. Grzebyk, R. Tarnogórski (eds.), *Siła prawa zamiast prawa siły. Ludwik Ehrlich i jego wkład w rozwój nauki prawa międzynarodowego oraz nauki o stosunkach międzynarodowych* [The force of law instead of the law of force. Ludwik Ehrlich and his contribution to the development of the science of international law and the science of international relations], Polski Instytut Spraw Międzynarodowych, Warszawa: 2020.

[11] *Ibidem*, pp. 141-142.

[12] "It is safe to say that only one man in England could have written this book. In form it consists of a course of lectures, originally delivered to an American audience; and on every page it gives proof of these qualities - insight and originality in conception, and luminous clearness in exposition – which entitle Mr. Dicey's work on the Constitution to rank as a legal classic. In the hands of a master of style, the rise, the triumph, and the decline of Benthamite Liberalism are as interesting as the story of Napoleon's campaign" (T. Raleigh, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century. By A. V. Dicey, K.C.*, Macmillan & Co. Ltd, London: 1905).

> Merely a short way of describing the belief or conviction prevalent in a given society that particular laws are beneficial, and therefore ought to be maintained, or that they are harmful, and therefore ought to be modified or repealed. And the assertion that public opinion governs legislation in a particular country, means that laws are there maintained or repealed in accordance with the opinion or wishes of its inhabitants. Now this assertion, though it is, if properly understood, true with regard to England at the present day, is clearly not true of all countries, at all times, and indeed has not always been true even of England … public opinion – if by that term be meant speculative views held by the mass of the people as to the alteration or improvement of their institutions.[13]

Dicey made several reservations when clarifying the weight of public opinion. Firstly, it depends on the traditions of particular country, whether it belongs to the Western or Eastern world. Secondly, a state's regime type may be influential – is there a will of a supreme leader (or leaders) to hear the voice of public opinion? Thirdly, the weakness of a parliament or its temporal disability to pass laws may lead to public opinion being misheard.

So what do cross-currents mean in the context of public opinion? Are cross-currents somehow related to counter-currents? To answer these questions, we can resort to etymological roots. The Merriam-Webster online dictionary defines crosscurrents as "a current running counter to the general forward direction" or "a conflicting tendency." "Countercurrent" is explained in the following way: "a current flowing in a direction opposite that of another current."[14] If one converts those meanings to public opinion, they can denote different situations in which a part of the society does not support a particular idea or path. If that part is sufficiently large in quantity, then it influences the democratic lawmaking process. Both terms are close in meaning in that they describe contradicting flows.

Dicey wrote that:

> There exists at any given time a body of beliefs, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together, make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion, and, as regards at any rate the last three or four centuries, and especially the nineteenth century, the influence of this dominant current of opinion has, in England, if we look at the matter broadly, determined, directly or indirectly, the course of legislation (…). The large currents, again, of public opinion which in the main determine legislation, acquire their force and volume only by degrees, and are in their turn liable to be checked or superseded by other and adverse currents, which themselves gain strength only after a considerable lapse of time.[15]

These reflections evidence the complexity of the interaction between public opinion and the acting law. Moreover, they show why democratic systems are self-regulatory

[13] A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, Liberty Fund, Indianapolis: 2008, pp. 4-5.

[14] Merriam-Webster Dictionary, available at: https://www.merriam-webster.com (accessed 30 May 2021).

[15] Dicey, *supra* note 13, pp. 16-17.

and open to inevitable changes, dictated by new tendencies in human nature. Dicey's system of coordinates was oriented towards English political traditions, being very attentive to the general sentiments of the society. When different large groups of people support opposite legal decisions, an important task on the part of a state's officials is to follow their strongest expectations over time. As Dicey suggested, the direction of counter-currents is opposite to that of a prevailing current:

> The reigning legislative opinion of the day has never, at any rate during the nineteenth century, exerted absolute or despotic authority. Its power has always been diminished by the existence of counter-currents or cross-currents of opinion which were not in harmony with the prevalent opinion of the time. A counter-current here means a body of opinion, belief, or sentiment more or less directly opposed to the dominant opinion of a particular era.[16]

Ehrlich called these statements of Dicey "one of the most important statements ever made on what determines law."[17]

There is one more scholar whose teachings contributed to the development of the concept of cross-currents – George Jellinek. He is considered to be "the exponent of public law in Austria."[18] Ehrlich saw the interconnection between Dicey's counter-currents and Jellinek's conflict between two "Rechtsordnungen." Apart from Dicey, who focused on contradictions in publicly-supported ideas, Jellinek investigated conflicts of legal systems. An excerpt from his article[19] on the consequences of the co-existence of two orders within one state was quoted by Ehrlich (in its English translation) as follows:

> It is possible that within one and the same state there should be in conflict with one another, two legal systems (*zwei Rechtsordnungen*) each of which asserts its character of a law actually in force, and not of a law which still requires to be made. But since they are based on conflicting principles and wish to regulate the same fields, therefore they must necessarily come into conflict with one another.[20]

Ehrlich enumerated some of Jellinek's examples, such as the conflict between the *ius quiritium* and *ius honorarium* in ancient Rome, the struggle between church and state etc. He did not fully agree with the statement that two legal systems might co-exist within one state and called it "scientifically anachronistic" ("it uses personification without the slightest need for that antiquated procedure").[21] Perhaps the reason for this is that a legal system consists of a set of rules that are binding on all people in the society. It comes from a state, which possesses its sovereignty in establishing the highest

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[16] *Ibidem*, p. 27.

[17] L. Ehrlich, *Comparative Public Law and the Fundamentals of Its Study*, 21 Columbia Law Review 623 (1921), p. 645.

[18] C. Schönberger*, Ein Liberaler zwischen Staatswille und Volkswille. Georg Jellinek und die Krise des staatsrechtlichen Positivismus um die Jahrhundertwende*, in: S. Paulson, M. Schulte (eds.), *Georg Jellinek. Beiträge zu Leben und Werk*, Mohr Siebeck, Tübingen: 2000, p. 3.

[19] G. Jellinek, *Der Kampf des alten mit dem neuen Recht*, Winter, Heidelberg: 1907.

[20] Ehrlich, *supra* note 17, p. 645.

[21] *Ibidem*.

power within a particular territory. The case of Gdansk demonstrated not a hypothetical conflict between legal orders, but one based on actual facts, about which Ehrlich wrote in his textbook and other works.[22] Meanwhile, a particular social relationship often faces the challenge of selecting the most appropriate legal system, because there may be grounds for taking into account at least two of them. In particular, the Turkish Penal Code of 1926 was applied to the criminal prosecution of the French lieutenant Demons in the *Lotus* case.[23] At the same time the French Penal Code of 1791 might have been applied to punish those responsible for shipwreck and manslaughter. We may conclude that this was not a pure conflict of legal systems, but rather a conflict of legal norms that belonged to different legal systems. Ehrlich expressed his doubts:

> It is not that there are at any time any two Rechtsordnungen, which struggle with one another, but that at all times there are (although in different countries to a varying degree) ideas and sentiments derived from various former ages side by side with those developed recently, and ideas adopted from abroad side by side with those worked out at home. It is precisely the constant interaction of such numerous influences, some of them confined to one or a few persons, others widespread; some due to accidental contact with other people, foreign books, or personal experiences, others the result of a long agitation or a laborious development of thought, that eventually results in the actions of judges, legislators, jurisconsults and of the people at large whose behavior is, after all, the outward manifestation of the existence of such laws.[24]

Furthermore, he made an attempt to distinguish between public and private law in terms of the application of abstract norms. There is one more scholar whose teachings laid at the root of the cross-currents concept. In addition to Dicey from England and Jellinek from Austria (Germany), Ehrlich cited the French Georges Renard's article on the role of abstractions in law,[25] which was reviewed by Ehrlich in 1923.[26] It accommodates two ways of formulating laws, which can be explained from the perspective of today's knowledge as follows: first, an "abstract way – the way of presenting rules of law, when circumstances, facts, features of modelling actions, their conditions and consequences are set out in a text in a generalized form, i.e. in the form of an abstract concept"; and second, a "casuistic way – such is the way of presenting rules of law, when modelling actions, their conditions and consequences are not set out in general, but by determining their individual characteristics, listing certain cases (incidents)."[27] In his review Ehrlich examined Renard's ideas and tailored them to the nature of international law:

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[22] *See* L. Ehrlich, *Gdańsk. Zagadnienia prawno-publiczne* [Gdańsk. Issues of public law], K.S. Jakubowski, Lwów: 1926.

[23] PCIJ, *S.S. Lotus (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Series A, no. 10, ICGJ 248.

[24] Ehrlich, *supra* note 17, p. 645.

[25] G. Renard, *Abstraction et réalités dans l'élaboration du Droit Public*, 32-33 La Nouvelle Journée 3 (1922).

[26] L. Ehrlich, *Renard G.: Abstraction et réalités dans l'èlaboration du droit public*, 1 Przegląd Prawa i Administracji 269 (1923).

[27] Г. Саміло, Актуальні проблеми теорії права: Навчальний посібник [Actual problems of the theory of law: Textbook], Просвіта, Запоріжжя: 2014, p. 93.

> On one hand, jurisprudence explores material and psychological facts that determine social life. On the other hand, it explores moral and political ideals, which serves as an example. It seeks principles contributing to the reconcilement of these findings, lifting reality to the ideal and reliance of the ideal on reality… Abstractions dominate in private law, because there those interests subject to possible violation which are less important than the public interest. This dictates the application of general norms (superficial) established from above and possibly permanent to ensure the strongest guarantees of freedom and security of turnover. In public relations, however, there is less space for abstraction but more for casuistry, so as not to jeopardize the public interest… And in public international law this proportion is even more variable and each case may require a different solution. Private law also lacks the pedagogical value that both public and international have. Public law in some sense is intermediate between private and international.[28]

The next statement of Ehrlich, inspired by Renard, deserves to be specially highlighted as an apt wording to describe his concept of law:

> A form is a necessary brake. A behavioral spirit reinforces progress. Their combination creates the continuity that is necessary for the government, both the legislator and the judge.[29]

In the last edition of his textbook Ehrlich enlarged the list of recommended literature to read for a better understanding of cross-currents in international law. It includes sources published after the first edition of *Law of Nations*. Under the strong influence of Léon Duguit's ideas, Nicolas Politis put forward the idea of solidarity in international law, which was shifting the focus from states to individuals as central figures (1927).[30] His teachings concerned the philosophy of international law in general, and in particular the dimension of inconsistencies between theory and practice, as writers on the subject are responsible for their contributions. In the early 1930s James W. Garner was invited to The Hague Academy of International Law to lecture about the tendencies which he had observed in the international arena. He concluded that the First World War facilitated the emergence of a new international law, the progressive development of which was fostered by codification and adjudication. He also wrote about the change in attitude towards wars,[31] which related to the existence of norms deriving from different periods and the fulfillment of abstract norms. Like Ehrlich's textbook, Charles de Visscher's *Théories et réalités en droit international public*, published after WWII, was reissued four times. The first edition was mentioned in the above list.[32] The title gives hints on the dimension of cross-currents which it covers. The author concentrated on international politics as the reality where theories of international law were confirmed (or not). The book by Philip Jessup introduced the concept of a broad set of rules

[28] Ehrlich, *supra* note 26, p. 270.

[29] *Ibidem.*

[30] N. Politis, *Les nouvelles tendances du droit international*, Librairie Hachette, Paris: 1927.

[31] J. Garner, *Le développement et les tendances récentes du droit international*, 35 Recueil des cours de l'Academie de droit international 605 (1931).

[32] C. Vissher, *Théories et réalités en droit international public*, Editions A. Pedone, Paris: 1953.

intended to regulate transnational relations. These rules might derive not only from international law, but also from national legal systems.[33] Jessup's concept could be useful in understanding such conflicts as the existence of norms deriving from different periods and variations between states in their recognition and interpretation.

2. EVOLUTION OF THE CONCEPT OF CROSS-CURRENTS IN THE WORKS OF EHRLICH

Almost exactly a century ago Ehrlich first wrote about cross-currents in his article *Comparative Public Law and the Fundamentals of Its Study*, issued by an authoritative American journal.[34] There seemed to be good reasons for the growth of comparative public law in the world of those times, where lawmakers faced different challenges which required seeking and adapting foreign solutions. Ehrlich observed that the scope of states bodies' powers in different countries had been enlarged. They were interfering in the sphere of individuals' interests, causing an imbalance between the public and the private ("a tendency to assign to the public organization more and more new duties, and to infringe anon and again upon the domain hitherto left to individuals and to their voluntary associations"[35]). Therefore, the need for studying relevant experience was highlighted, especially with respect to the responsibility of a state. The content of that article followed a logical order – it started with the law and later described comparative public law, its sources, and offered a literature review. Finally, it explained two interrelated questions: (1) theory and practice; and (2) cross-currents.

He distinguished between two sides of law – theoretical and practical. Being under strong influence of the common law system after his stay at Oxford, Ehrlich thought of syllogistic reasoning as opposite to deductions drawn from legal practice. He admitted that lawyers of Continental Europe were eager to look for abstract conclusions, whereas a practical grounding, usually "in the form of a legal decision," was demanded in England.[36] His early suggestions paved the way for the method of new positivism, according to which judicial decisions are important for the determination of international law, in addition to international treaties and customs.[37] He added some other arguments to explain why legal theory and legal practice are distinct from each other:

> Secondly – in expounding the actual law men are likely to give way, in perfectly good faith, to their own wishes, and to assert to be law that which they want to be law. Thirdly – we may distinguish between any books and articles, however scholarly and trustworthy, even if they be "authorities" in the strict English sense of the word – and the actual practice (…).

[33] P. Jessup, *Transnational Law*, Yale University Press, New Haven: 1956.
[34] Ehrlich, *supra* note 17, p. 645.
[35] *Ibidem*, p. 625.
[36] *Ibidem*, p. 643.
[37] *See* Hachkevych, *supra* note 9.

Even within the demesne of law, how many enactments actually modify important theoretical pronouncements of "fundamental statutes." In connection with the last point, there may be pronouncements which in outward appearance are statutory rules, but in the legal system of the country in which they have been laid down, lack any possibility of enforcement, and thus, while they are usually enumerated as part of the legal organization, are in practice only blinders, put on in moments of popular excitement, and really amount to what in the case of an individual would be called a confidence trick.[38]

Acting law, as we understand Ehrlich's conception of it, might be slightly different from written rules. His distinction between theory and practice in the context of public law is not that simple to tackle. However, what he meant by "theory" was not only doctrinal provisions, but also many officially binding rules. Although they had entered into force, some of these norms tended to exist exceptionally on paper and remain distant from their real-life enforcement (he gave the example of the Queen's powers in comparison with the Queen's actual position[39]). His comprehension of "practice" encompassed putting law into action – its implementation, proved by the perceptible impact of a legal norm. A consideration of the law as a phenomenon of practical application hints at "social legal theory" and the concept of "living law," presented by another famous Ehrlich.[40]

Several years later Ludwik Ehrlich finished the article *Chwila obecna w ewolucji prawa narodów* (including part IV "Abstractions in the law of nations" and part V "The law of nations and sovereignty"). It was dedicated exclusively to the study of international law or the law of nations, as described in the title.[41] A brief and scattered overview of his scientific legacy, focused on the titles of his works, might open doors for finding differences in the usage of both terms. He preferred the term "prawo narodów" (the Polish equivalent of "the law of nations") while he worked in Lviv (1923-1939). Such was the title of the first (1927)[42] and second (1932)[43] edition of his legendary textbook. His bibliography of scholar's writings includes even works in the French language, showing his great aptitude for languages. One of them contains the term "du droit des gens" ("the law of nations") in its title. It addresses the problem of collective security and discusses different approaches to the concept of security. It was published along with other articles[44], presented at the 8th International Studies Conferences in London (1935). At the same time, there is evidence of Ehrlich's use of the English-

[38] Ehrlich, *supra* note 17, pp. 643-644.

[39] *Ibidem*, p. 644.

[40] *See* Hachkevych, *supra* note 9, pp. 103, 110.

[41] L. Ehrlich, *Chwila obecna w ewolucji prawa narodów* [The current moment and the evolution of international law], 1 Przegląd Prawa i Administracji 105 (1924).

[42] L. Ehrlich, *Prawo narodów* [Law of nations], K.S. Jakubowski, Lwów: 1927.

[43] L. Ehrlich, *Prawo narodów* [Law of nations], K.S. Jakubowski, Lwów: 1932.

[44] L. Ehrlich, *Le développment du droit des gens et le probléme de la sécurité collective; Le respect des engagements internationaux – la révision des traités et des situations internationales; Le probléme des litiges juridiques et des conflicts d'intérêts*, Un-te Jean-Casimir, Lviv: 1935.

language "international law." For instance, he delivered a lecture on the new positivism in international law in the University of London (1937), explaining the theoretical foundations of his method.[45] A change in his attitude towards both terms occurred after WWII, during the "Kraków period" (1940-1968) of his life. Let us note that Ehrlich, together with Jerzy Langrod, in 1949 published the results of a study on the history of Polish public law, containing valuable conclusions in the areas of the law of nations and political and administrative law.[46] A year before that he released the third edition of his textbook under the name *Prawo narodów*[47]. The next and final edition was titled *Międzynarodowe prawo*,[48] which reflected his transition to the term "international law" in the late 1950s. Alfons Klafkowski has suggested that this change could be explained by the tendencies that existed in the Polish legal science in the middle of the 20th century. They were in part a consequence of the legislative adoption of "international public law" as the name for the academic discipline in accordance with the Order of the Polish Ministry of Education dated December 23, 1949.[49] The term "law of nations" afterwards gradually disappeared from doctrinal works. Ehrlich himself did not clarify the distinctions between the usage of both terms. He perceived them as synonyms, meaning "a set of legal norms that are binding within the relations between states belonging to the international community."[50] It is worth mentioning an addiitonal fact pointed out by him. The term "law of nations" denoted traditional or customary international law, whereas international contractual (treaty-based) law corresponded to "international public law" in the French doctrine.[51]

One may ask what gave Ehrlich an impetus to become interested in international law in the interwar period? As a patriotic person, he sought the means of assertion of the new Polish State's interests on the international arena in accordance with the possibilities given by modern international law. The status of Poland as a State relied on strong international law, and the power of international law depended upon its effectiveness. Therefore, Ehrlich described two ways in which international law could progress. The first was the codification of abstract ideas. This is typical for lawyers who were educated under the strong authority of legislative acts, if we consider lawmaking at the national level. The second way was the deduction of rules on the basis of events and

[45] L. Ehrlich, *The New Positivism in International Law*, Institute of Constitutional and International Law John Casimir University, Lviv: 1938.

[46] L. Ehrlich, J. Langrod, *Zarys historii prawa narodow, prawa politycznego i administracyjnego w Polsce* [Outline on the history of the law of nations, political law and administrative law in Poland], Polska Akademia Umiejętności, Kraków: 1949.

[47] L. Ehrlich, *Prawo narodów* [Law of nations], Wydawnictwo Księgarni Stefana Kamińskiego, Kraków: 1948.

[48] L. Ehrlich, *Międzynarodowe prawo* [International law], Wydawnictwo Prawnicze, Warszawa: 1958.

[49] A. Klafkowski, *Prawo publiczne międzynarodowe* [International public law], Państwowe Wydawnictwo Naukowe, Warszawa: 1969, p. 15.

[50] *See* Ehrlich, *supra* note 42, p. 3.

[51] L. Ehrlich, *Wstęp do nauki o stosunkach międzynarodowych* [Introduction to the science of international relations], Wydawnictwo księgarni Stefana Kamińskiego, Kraków: 1947, p. 52.

relations – for those who were taught to study primarily legal precedents. He went on to say that the application of the latter was difficult for a lawyer who was "brought up on the theory of the omnipotence of the law and the restriction of observing precedents."[52] Ehrlich even faced the threat of being excluded from the circle of specialists in the field of international law unless this difficulty was overcome.[53] He also pondered deeply the issue of abstractions relative to different areas of law:[54]

> Abstractions prevail in the private life, because there the interests that may be violated are less important than the public interest. The latter requires the application of general rules established from above and usually constant to ensure the strongest possible guarantees of freedom and security of turnover. In public relations, on the other hand, there are fewer abstractions but more casuistry so as not to jeopardize the public interest. Finally, in international law these principles are all the more shifting (*malléables*) and each instance should be considered on its own merit. This kind of derivation of rules from cases and relations is particularly easy not only for British and American lawyers, whose common law draws extensively on seeking rules, distinguishing rules etc., but also French ones, because their administrative law developed in a relevant way.[55]

He indicated that the role of international lawmaking treaties was rapidly increasing at that time.[56] In that connection, he recalled Wilson's Fourteen Points, to which he often referred in his textbook and other works (in the first instance on the Free City of Gdansk[57]). He divided these Points into two types: general and particular. He warned that "the more general a principle, the more difficult it is to put it into practice due to the difficulties in the adherence of circumstances in different states of the world to the uniform standard."[58] The refusal of the United States to join the League of Nations was seen by Ehrlich as a conflict between state sovereignty and its limitation by the Covenant of the League of Nations,[59] an observation that makes sense when discussing the various dimensions of cross-currents later in this article. This conflict demonstrated trends vis-à-vis the penetration of international law into internal social, economic. or political relations within an independent state.[60] Moreover, he witnessed the weakening of sovereignty mainly caused by the strengthening of new group-oriented directions in

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[52] *See* Ehrlich, *supra* note 41, p. 105.

[53] *Ibidem.*

[54] All the quotes from Ehrlich's works in Polish were translated to English by the author.

[55] *See* Ehrlich, *supra* note 41, pp. 111-112.

[56] *Ibidem*, pp. 112-114.

[57] To a great extent, this is due to the importance of the XIIIth point for Poland: An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant (C. Hodge, C. Nolan, *U.S. Presidents and Foreign Policy: From 1789 to the Present,* ABC-CLIO, Santa Barbara: 2007, p. 397).

[58] *See* Ehrlich, *supra* note 41, p. 114.

[59] *Ibidem*.

[60] *Ibidem*, p. 115.

science, which gave support to the rights of national, religious and other social groups.[61] Ehrlich wrote that:

> In the law of nations, as in political law, there is nothing special about the coexistence of institutions that come from different periods, as well as provisions that are based on different worldviews and legal systems. It is in the law of nations that the principle of sovereignty will probably coexist for some time with contractual self-restrictions of states concerning their internal affairs, especially when professional, national and religious groups are concerned. However, in the case of ethnic or linguistic groups there is a difficulty that might weaken the authority due to the nature of things. There have been no examples of a powerful state which did not rely on a particular nation. Nevertheless, there exist linguistic, ethnical and other minorities in every strong state.[62]

Above we have examined some aspects of Ehrlich's teachings which were expanded in his early works and provided grounds for elaborating the concept of cross-currents in his textbook a few years later. Now we will analyze them in detail in the third part of this article, having already reviewed the theoretical foundations of cross-currents. Each new edition of his *Law of Nations* (or "International law") brought to light new knowledge to make this concept clearer. And the final result, presented in the last edition, comprises an important complement to the findings that emerged from his 1920s works. In the first edition of his textbook, Ehrlich suggested that:

> Cross-currents theory (A.H. – "sprzeczne prądy" in Polish) explains why provisions originating from different periods of time or different legal systems, or grounded on different types of reasoning, co-exist within a particular legal system. This does not allow us to bring all the norms that are simultaneously binding into a single logical system, and therefore a certain number of exceptions tend to occur during their systematization (…) Although many norms in the law of nations are based on the views expressed in leading states, even between them there are significant variations in the applications of those norms. This fact encompasses the interaction between interpretive and generally-accepted principles. The ideal of the law of nations is the establishment of one set of rules of international relations involving all states. But the implementation of such an ideal will take a long time. The application of the same norm of the law of nations by courts from different states certainly leads to various practical consequences, or acquires different legal significance.[63]

Before the Second World War he extended his suggestions on the expediency of considering cross-currents in the domain of public law:

> The application of the comparative method in public law research always leads to the conclusion that in the public law system of each state there coexist elements that originate from different periods in the development of a particular system, as well as domestic elements and those deriving from foreign countries. Both elements, originating from the past and from abroad, are subject to a substantial evolution. To some extent this is caused

[61] *Ibidem*, p. 116.
[62] *Ibidem*, p. 118.
[63] Ehrlich, *supra* note 42, p. 96.

by a lack of understanding of foreign institutions and by the adaptation of a norm or institution that arose under certain conditions to other conditions.[64]

3. DIMENSIONS OF THE CROSS-CURRENTS IN INTERNATIONAL LAW

Ehrlich distinguished four dimensions of cross-currents in international law, and described them offering examples.

3.1. Norms originating from different periods

Certain situations reveal the feature of historical determinism, which is essential to law. Laws follow the spirit of the time. We may add that the spirit of the time as a rule changes faster than laws. Dicey described the influence of the demonstrations of gender equality and suffrage in the middle of the 19th century on the legislative innovations in the election law, introduced in 1928 (when women achieved the right to vote) and 1958 (when women were allowed to take seats in the House of Lords).[65] In order to confirm these counter-currents in international law, Ehrlich discussed the position of a diplomat. We may match Ehrlich's thoughts with existing theories. One of them – widely held at one time – perceived diplomats as representatives of foreign states, which were governed by monarchs in the Middle Ages and later. The position of a diplomat was thus equated to that of a monarch. Another theory, which approached nearer to the present time, was that of functionality. It was developed in the late 19th century and took into account the expanded competence of a diplomat (i.e. reporting about public opinion in a receiving state[66]). At the beginning of the 20th century they were treated as alter egos of their heads of states, and as officials for whom favourable conditions had to be created so that they could fulfil their responsibilities. There is a third theory, the argumentation for which was not mentioned by Ehrlich in this regard. It is called "extraterritoriality" and, along with "personal representation" and "functional necessity," it serves as a "theoretical justification for diplomatic immunity" in modern studies.[67] There are also two different approaches to the concept of a war, which Ehrlich outlined while describing norms deriving from various epochs. The medieval approach to war emphasized that it was a "population against population" conflict, involving all people belonging to respective nations in war. It made sense to capture ships and cargo at sea if their owners were citizens of the enemy state. The New Age approach was adopted on the assumption that civilians were excluded

[64] L. Ehrlich, *Metoda porównawcza w nauce prawa publicznego* [Comparative method in the science of public law], Drukarnia Uniwersytetu Poznańskiego, Poznań: 1938, p. 71.

[65] A. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan and Co, London: 1915, p. xlii.

[66] Ehrlich, *supra* note 43, pp. 94-95.

[67] V. Maginnis, *Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 Brooklyn Journal of International Law 989 (2003), p. 994.

from being deemed to be taking part in a war unless they were combatants. Since the 18th and 19th centuries wars have been considered as "army against army" conflicts. Does it still make sense to capture the ships and cargo of the enemy's citizens? Ehrlich had strong doubts, however prize cases were observed in 1898 and in the early 20th century.[68]

3.2. Variations between states in the recognition and interpretation of international law

Ehrlich suggested that:

> Dissimilarity among states concerning their mutual relations and national interests in different parts of the world leads to the presence of norms that are recognized only by certain groups of states, as well as special interpretations of generally accepted norms by a state or states. In the latter situation, "a doctrine" is developed, in the former one – a particular international law.[69]

Possibly when he used the word "doctrine" he meant the following: "a stated principle of government policy, mainly in foreign or military affairs."[70] His examples thereof include the American interpretation of the most-favoured-nation clause, the Monroe Doctrine, the British and French practice of application of the law of war prize, as well as of blockades and different approaches to the width of territorial waters. We can look closer at the most-favoured-nation clause, because unlike the other examples it is still relevant today.[71] This clause generalizes the provisions of international commercial treaties "providing that the nationals of the contracting parties will receive treatment in the territories of the other at least as favourable as that granted to third nations."[72] The United States applied it under the condition that a state had a right to receive compensation (a conditional interpretation).[73] Ehrlich did not mention the Harmon Doctrine, but its example is apropos in the context of the present article. It was pronounced by United States Attorney General and is considered to be "perhaps the most notorious theory in all of international natural resources law."[74] The dispute between Mexico and the United States over the usage of the Rio Grande river arose in the 1890s. After American farmers exploited its waters, the level of the river which flowed into Mexican territory was reduced. Harmon claimed that "a state wields absolute sovereignty with regard to that part of a river that lies within its territory."[75]

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[68] A. Knauth, *Prize Law Reconsidered*, 46 Columbia Law Review 69 (1946), p. 69.

[69] Ehrlich, *supra* note 43, p. 95.

[70] Merriam-Webster Dictionary, available at: https://www.merriam-webster.com (accessed 30 May 2021).

[71] *See* M. Kałduński, *Klauzula największego uprzywilejowania* [The most favored nation clause], Dom Organizatora, Toruń: 2006.

[72] E. Conroy, *American Interpretation of the Most Favored Nation Clause*, 12 Cornell Law Review 327 (1927), pp. 327-328.

[73] *Ibidem,* pp. 330-334.

[74] S. Mccaffrey, *The Harmon Doctrine One Hundred Years Later: Burried, Not Praised*, 36(4) Natural Resources Journal 965 (1996), p. 965.

[75] T. Kuokkanen, *Water Security and International Law*, 20 Potchefstroom Electronic Law Journal 1 (2017), p. 6.

Ehrlich raised the question of particular international law and took into consideration the instance of diplomatic asylum in Latin America states: "If several states avoid or modify some generally obligatory norms between subjects of international law, or if they establish or settle norms that are not binding among other states, there exists a particular international law."[76]

He did not perceive it as an alternative international law. It was seen as "the growth or improvement due to the needs of general norms of the law of nations, with detailed comprehension of relations and necessities of America."[77] However, as there is only one international law, accordingly it is more accurate to speak about norms or institutions of particular international law.

3.3. Fulfilment of abstract norms

As was already mentioned above, Ehrlich distinguished two methods of building international law: the codification of abstract ideas; and the deduction of rules from events and relations. He suggested that the latter prevailed in the law of nations before the 19th century, whereas "the quest for the codification of various branches of domestic law in the 19th century was reflected in the works on international law, primarily in the proposals of scholars and private organizations (Fiore, Bluntschli, the Institute of International Law, the International Law Commission), later in the codification of different areas of the law of war, and finally in the establishment of multiple treaty provisions after the First World War."[78] The fulfilment of abstract norms refers to the normativistic approach towards international law, inspired by Hans Kelsen. International treaties tend to state general principles, but they do not provide relevant norms to implement those principles. Ehrlich was convinced that according to the nature of good faith in international relations[79], the recognition of a right brings with it the needed means for its realization.[80]

This dimension exposes a conflict between the generalization and particularization. We mean to say that there is a case for the embodiment of practical benefits to each participating state, alongside with a case for the uniformity that represents the common will of all participating states:

The more states that adopt a norm or create an organization, the stronger this norm or organization becomes separated from an individual state, and the greater becomes the possibility of applying the rules in an abstract way. To ensure the principle of respect for law, it is desirable that the rules of international law should be applied with ever less consideration of the wishes of individual states which are contrary to the rights of others.[81]

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[76] Ehrlich, *supra* note 48, p. 101.

[77] Ehrlich, *supra* note 43, p. 96.

[78] Ehrlich, *supra* note 48, p. 102.

[79] "A Sovereign State is bound in its relations with other States only by its own will, but by its own will it is fully bound" (Ehrlich, *supra* note 45, p. 12).

[80] Ehrlich, *supra* note 42, p. 97.

[81] Ehrlich, *supra* note 48, p. 102.

Bringing states closer together allowed Ehrlich to look to the future with optimism. Due to this, it became possible to switch from the state's strategy of behaving in a way that was based on a decision made by a state in each case, to the states' strategy of a collective solution, prescribing uniform rules.[82] We may add that these strategies are still in place, although the ratio between them has been gradually changing.

3.4. Inconsistencies in theory and practice

Ehrlich indicated four situations when theory and practice did not match: gradual infringement of an established principle; application of a rule considered to be general in some cases but not in others; a practical implementation of a norm serving for a particular purpose in order to achieve another purpose; covering up illegal actions with a veneer of a legal form.[83] He also demonstrated how those situations occurred on the international arena. To his mind, Polish rights to the Free City of Gdańsk, granted by The Treaty of Versailles, were subsequently reduced by imposing a disadvantageous treaty and unfavourable decisions made by the High Commissioner in Gdansk. Moreover, some states had to sign the "minority treaties" after the World War I, while others did not have to. He warned against the abuse of the letter of the law by neglecting its spirit.[84] In modern international relations, inconsistencies between theory and practice are sometimes manifested in the policy of "double standards," whereby different states or international organizations adopt different positions to the same or similar actions, depending on who is involved. Another aspect of this dimension is related to the writings on international law which Ehrlich called "theory." He advised to distinguish political postulates from scientific views on the present state of law.[85]

4. THE CONCEPT OF CROSS-CURRENTS IN THE LIGHT OF THE KOSKENNIEMI REPORT

The importance of the issues discussed above may be proven by the reports of the International Law Commission on the fragmentation of international law, especially the one presented at the 58th session (the Koskenniemi Report).[86] Based on a comparative analysis of Ehrlich's ideas on cross-currents in international law and the theoretical foundations of the fragmentation discussed in the Report, this article tries to evaluate the novelty, consistency, and value of this concept. Moreover, the question is posed whether Erlich's ideas shaped a theory, or were just a set of remarks.

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[82] *Ibidem*, p. 103.

[83] *Ibidem*, p. 104.

[84] Ehrlich, *supra* note 42, p. 98.

[85] Ehrlich, *supra* note 48, p. 105.

[86] Report of the study group on the fragmentation of international law, finalized by Martti Koskenniemi (Geneva, 1 May – 9 June and 3 July – 11 August 2006), 13 April 2006, A/CN.4/L.682.

The cross-currents' explanation of the reasons why conflicts between norms of international law arise rests on the parallel with the influence of large groups of people in the formation of law in England. While the foundations for this explanation seem to be a little simplified because of the different essence of both legal systems, nevertheless it is an innovative and intriguing explanation, not covered by the provisions of the Koskenniemi Report. The latter mentions Wilfred Jenks' statement from his 1953 article *The Conflict of Law-Making Treaties*:

> In the absence of a world legislature with a general mandate, law making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law ... One of the most serious sources of conflict between law-making treaties is the important development of the law governing the revision of multilateral instruments and defining the legal effects of revision.[87]

Ehrlich's parallels reveal certain important features of international law as compared to domestic law: (1) there is no legislative body that "legitimates" the moods prevailing among states; (2) the position of each state in international law is important, while in domestic law the general position of a large group of people matters, which may include the legislators themselves; and (3) there is no intermediary between the population and the adoption of a new law which transforms the expectations of the public into legal changes.

Like the co-authors of the Report, Ehrlich saw the existence of conflicts between norms as being in the very nature of international law. Its logically coherent system serves as a long-term ideal, while there may be intractable contradictions in reality. "A certain number of exceptions" is admitted due to regularities. Some of those conflict situations were thoroughly studied in the Report. Therefore, the coexistence of rules from different periods is examined in "Relations between prior and subsequent law" in section D. The question of interpretation in several contexts pervades the entire report (especially of international treaties). The recognition of the different variations in international law is relevant to regional international law, as considered in section C of the Report, entitled "Conflicts between special law and general law." Ehrlich's abstractions are not so widely discussed in the Report as the topics mentioned above. "Theory and practice" concerns the issue of international law enforcement, and it goes beyond the scope of "fragmentation" in the meaning implied by the co-authors of the Report.

Ehrlich put his ideas on contradicting flows into the theory of cross-currents (as he called it). In order to consider ideas as a theory, they should fulfil some requirements, such as: (1) be based on facts; (2) have a logical interrelation and integrity; and (3) serve to explain real-life situations. In our view, the central points of Ehrlich's cross-currents theory were strongly based on facts. He was taking into account the process of applying international law. A large number of conflicts within its legal system were noted. At

[87] W. Jenks, *The Conflict of Law-Making Treaties*, 30 British Yearbook of International Law 401 (1953), p. 403.

the same time, those conflicts were not restricted to those between two different rules considered to be in effect in a particular situation. They were not identical to international disputes, even if they might have led to them. Due to the content of the Koskenniemi Report, the fragmentation of international law is generally focused on normative and institutional collisions, whereas cross-currents point at some of normative collisions; at the non-fulfilment of abstract norms; at different interpretations by states; and at the gap between what is legally recognized and the reality. Ehrlich's teachings contained several ahead-of-his-time remarks which are useful for the understanding of the fragmentation of international law, and possibly enlarge its scope (e.g. the role of abstractions). While we cannot consider it as the prototypical theory of fragmentation,[88] it nevertheless can be considered as containing the elements of a theory, or even a theory itself, intended to explain deviations from absolute coherence in international law, regarding the latter more widely than as just a group of norms.

CONCLUSIONS

Although the idea of cross-currents was initially developed to study the different situations in domestic English law, Ehrlich applied it to explain contradicting tendencies in international law. His creation and development of cross-currents was grounded in the reality of interstate relations of his time. After the First World War he made an attempt to understand and interpret unwanted conflicts within the system of international law by analogy with Dicey's fundamental differences in public opinion, influencing legislative initiatives. The concept of cross-currents emerged at the beginning of the 1920s in Ehrlich's *Comparative Public Law and the Fundamentals of Its Study* and evolved into a set of ideas a few years later. Cross-currents permeated most of his works on international law, including all editions of his textbook. The last edition of 1958 presented this set of ideas as a theory, and explained its meaning, origin and underlying dimensions. The Report of the study group on the fragmentation of international law, finalized by Martti Koskenniemi and published half a century later, addresses questions, some of which (e.g. conflicts between successive norms) were raised by Ehrlich when he investigated cross-currents. The concept of cross-currents covered a few aspects of fragmentation and dealt with international legitimacy, observed when interstate relations are in full compliance with international law.

At the heart of Dicey's theory of cross-currents lies the belief that there are different expectations of large groups of people about the rules that should (or should not) be in force regarding a particular issue. Such expectations might serve as a guide for the adoption, amendment, or repeal of national laws. It would seem that the analogies to cross-currents in international law would include the different expectations of states about the rules that should (or should not) be applied on the international arena. Several states might be

[88] Rather a set of remarks.

willing to recognize the sovereignty of the equatorial states over the geostationary orbit, while others are likely to consider it beyond the control of all states, like all outer space objects. Several states might support a categorical ban on extraditing their own citizens, being more important than any of the possible preconditions for extradition, while others tend to follow *aut dedere aut judicare*. But differently from domestic law – where individuals standing behind the public opinion are not entitled to choose laws, which are imposed from above – the will of states is crucial in international law. States are both the "addressees" of its norms and their creators. This is the reason why the consequences of a collision between two currents in the domestic law are not the same as in international law. Thus, conflicts within the system of international law are inevitable so long as states remain sovereign. As far as we can see, Ehrlich was eager to contribute to improving the system of international law so as to achieve a higher level of logical consistency in its norms in his times. He tried to look for the reasons for non-compliances in international law, considering it as a complex, holistic and single system.

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SOCIOECONOMIC PRECARIOUSNESS IN TIMES OF COVID-19: A HUMAN RIGHTS QUANDARY UNDER THE ECHR

Abstract: *The COVID-19 pandemic, and pandemics in general, affect socioeconomically disadvantaged people more severely. This is due not only to their precarious living, health, and working conditions, but also to public actions and omissions. However, their plight remains mostly invisible to the public, governments, and legislators, which raises many questions regarding respect of their fundamental rights. In this contribution, I explore these questions in light of the European Convention on Human Rights (ECHR). On the basis of the corpus of literature in the field and the European Court of Human Rights (ECtHR) case law, I show that the Strasbourg Court has developed some protection for people in a precarious situation, especially under the prohibition of inhuman and degrading treatment and the right to private and family life. This case law is likely to be relevant to the protection of socioeconomically underprivileged people during pandemics. However, this protection is limited and imbued with pitfalls. Against this background, I show that there is an urgent need for practitioners and courts to explore an additional tool under the ECHR: the prohibition of discrimination on grounds of socioeconomic status. This tool can be used to tackle issues of misrecognition which particularly affect socioeconomically underprivileged people, who are more severely affected by public actions and omissions in the context of the current pandemic.*

Keywords: COVID-19, discrimination, intersectionality, poverty, stereotypes

INTRODUCTION

In September 2020, as Madrid experienced an upsurge in COVID-19, new quarantine measures were instituted in working-class areas of the city, while sparing affluent areas. The anger of the confined underprivileged neighborhoods of Madrid erupted after Isabel Díaz Ayuso, President of the Community of Madrid, declared that the spike was due to

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the way of life of migrants, who mostly inhabited the areas under lockdown.[1] Many residents from these neighborhoods expressed their sense of injustice and incomprehension towards the treatment they received and the stigma they were subjected to.

This case is just one example among many of how COVID-19 affects socioeconomically disadvantaged people more severely, not only because of the measures taken by governments but also because of the precarious living conditions these people experience, concerning their health and working conditions, etc. Socioeconomically disadvantaged people usually come from particularly vulnerable groups: single parents, people working in the informal sectors, sex workers, homeless people, non-skilled or irregular migrants etc. Various endogenous and exogenous factors linked to structural causes explain why these people are particularly affected by the pandemic (1). However, their plights and precarious situations are barely taken into account by policy makers and legislators, which is evidenced in states' omissions and inappropriate actions in the context of the pandemic regarding categories of socioeconomically underprivileged or precarious people – mainly people living in poverty, but not exclusively. This situation raises many questions in terms of respect for fundamental rights – whether political, civil or socioeconomic – especially in light of the European Convention on Human Rights (Convention or ECHR).

In light of the situation in Europe, I argue that the body and doctrine of fundamental rights is able to respond in part to situations of latent precariousness linked to growing inequalities and exacerbated by the pandemic. Although the Convention's primary objective is not the protection of socioeconomic interests, the European Court of Human Rights (ECtHR) has already to a certain extent operationalised some civil and political rights in the protection of precarious people, including the prohibition of inhuman and degrading treatment and the right to private and family life. This case law is based on the so-called "free-standing rights" (2).[2] Nevertheless, it has its limits. In this regard I argue that Art. 14 of the Convention (to be invoked in combination with another right of the Convention), read to prohibit discrimination on grounds of socioeconomic situation, is an additional tool with the potential to help protect the rights of disadvantaged people during the current pandemic (3).

1. PRECARIOUS PEOPLE ARE HIT THE HARDEST BY THE PANDEMIC

Socioeconomically disadvantaged people are the most affected by COVID-19: they are over-represented among people infected with the virus[3] as well as among people

[1] R. Minder, *In Madrid, Covid-19 Resurgence Divides Rich and Poor*, New York Times, 30 September 2020, available at: https://nyti.ms/3qMacyf (accessed 30 May 2021).

[2] Meaning that they exist independently and do not have to be invoked in combination with another right of the Convention, as opposed to Art. 14 ECHR.

[3] *See generally* B. Burström, W. Tao, *Social Determinants of Health and Inequalities in COVID-19*, 30(4) European Journal of Public Health 617 (2020); J. Patel, *Poverty, Inequality and COVID-19: The Forgotten Vulnerable*, 183 Public Health 110 (2020), pp. 110–111.

who develop complications and die from it.[4] Several studies have shown the same phenomenon in the context of previous pandemics, such as the Spanish flu of 1918, which mainly affected the working classes, whether in India, Norway, or the United States.[5] It was no different with the H1N1 flu of 2009.[6] Various factors explain this and should be highlighted.

First, these people fall within the "at risk" groups because of their over-representation among people suffering from cardiovascular disease, diabetes, cancer and chronic diseases.[7] It has been shown that the risks of serious illness and death during the COVID-19 pandemic are highest among people with poor health, inadequate nutrition, and suffering from chronic conditions.[8] Second, the living conditions of disadvantaged people make them more vulnerable to the virus: they live in more densely populated areas, in particular in urban areas where, by definition, the virus is more likely to circulate. Furthermore, disadvantaged neighborhoods are more likely to contain overcrowded houses, smaller dwellings with little outdoor space, and less access to common green spaces – i.e. in an environment conducive to the spread of the virus.[9] Third, when employed these people are more exposed to the virus because of the nature of their work, especially in the service sector (mass distribution, cleaning, deliveries, care etc.). They are often found among key workers and are therefore forced to travel to work and use public transport, which implies additional exposure to the virus.[10] Fourth, even where healthcare is in principle available, these people have increased difficulty in accessing it, raising the problem of "non-take-up." The non-take-up phenomenon concerns situations where people have rights on paper but do not exercise them or benefit from them in practice, for a variety of reasons: administrative and practical obstacles, linguistic issues, stigma etc.[11] Moreover, this situation is part of a context

[4] *See generally* R. Blundell, *COVID-19 and Inequalities*, 41(2) Fiscal Studies 311 (2020), pp. 311-313; Cl. Bambra et al., *The COVID-19 Pandemic and Health Inequalities*, 74 Journal of Epidemiological Community Health 964 (2020); E. Sydenstricker, *The Incidence of Influenza among Persons of Different Economic Status during the Epidemic of 1918: Commentary*, 36(4) Public Health Reports 154 (1931).

[5] Bambra et al., *supra* note 4, pp. 964-948.

[6] *Ibidem.*

[7] *Ibidem;* Burström, Tao, *supra* note 3, pp. 617-618.

[8] *Ibidem.*

[9] *See generally* Bambra et al., *supra* note 4, pp. 964-948; M. Buheji et al., *The Extent of COVID-19 Pandemic Socioeconomic Impact on Global Poverty. A Global Integrative Multidisciplinary Review,* 10(4) American Journal of Economics 220 (2020).

[10] *See generally* Bambra et al., *supra* note 4, pp. 964-948; K. Pouliakas, J. Branka, *EU Jobs at Highest Risk of Covid-19 Social Distancing: Is the pandemic Exacerbating the Labour Market Divide?* Cedefop Working Paper no. 1 (2020). *See also* L. Gamio, *The Workers Who Face the Greatest Coronavirus Risk*, New York Times, 15 March 2020, available at: https://nyti.ms/3wk545F (accessed 30 May 2021).

[11] V. Hernanz et al., *Take-up of Welfare Benefits in OECD Countries: A Review of the Evidence*, OECD Social, Employment and Migration Working Papers no. 17 (2004); *See also* B. Baumberg, *The Stigma of Claiming Benefits: A Quantitative Study*, 45(2) Journal of Social Policy 181 (2016); M. Fuchs et al., *Falling through the Social Safety Net? Analysing Non-take-up of Minimum Income Benefit and Monetary Social Assistance in Austria*, 54 Social Policy Administration 827 (2020); S. Chareyron, P. Domingues,

wherein public health systems have deteriorated globally since the early 2000s, and even more since the financial crisis of 2008, as underlined in a recent report by the UN Rapporteur on extreme poverty and human rights.[12] Fifth, workers who are undeclared or hired in the informal sectors – overrepresented among irregular migrants – are left without income and social protection. Sixth, the closure of schools involving temporary online teaching has obvious and significant consequences for the most precarious populations. The digital divide is a major obstacle for these people.[13] Seventh, while lockdown measures have been difficult for the entire population at a global level, they have *de facto* hit more severely people who live in cramped, unsanitary, overcrowded housing without green space. They also have an important deterrent impact on people who find themselves in social and human situations of distress, such as women victims of domestic violence, single mothers,[14] or people with mental disorders.[15] Eighth, people in a precarious situation have also been subject to specific measures taken by public authorities, such as the lockdown measures in certain working-class neighborhoods in Madrid. They have also been particularly targeted by the police in comparison to the rest of the population, often in the context of non-compliance with lockdown measures, confirming the studies relating to "facial control" or "ethnic profiling"[16], which reveal latent discrimination against people perceived as belonging to ethnic minorities, which in turn are over-represented among the poor.[17] In addition to the continued stigmatisation of these precarious populations, viewed from a socioeconomic perspective financial penalties are likely to further affect them, especially when

Take-up of Social Assistance Benefits: The Case of the French Homeless, 64(1) Review of Income Wealth 170 (2018).

[12] Special Rapporteur on extreme poverty and human rights, *Looking Back to Look Ahead: A Rights-based Approach to Social Protection in the Post-COVID-19 Economic Recovery*, United Nations, 2020, para. 53.

[13] *See* E. Beaunoyer et al., *COVID-19 and Digital Inequalities: Reciprocal Impacts and Mitigation Strategies* 111 Computer Human Behavior 1 (2020); M.M. Jæger, E.H. Blaabæk, *Inequality in Learning Opportunities during Covid-19: Evidence from Library Takeout*, 68 Research of Social Stratification and Mobility 1 (2020); Special Rapporteur on extreme poverty and human rights, *supra* note 12, para. 44.

[14] *E.g.* S. Hennette-Vauchez, *L'urgence (pas) pour tou(te)s*, La Revue des droits de l'homme 1 (2020).

[15] *E.g.* R. Armitage, L.B. Nellums, *The COVID-19 Response Must be Disability Inclusive,* 5 The Lancet 257 (2020); UN, *Preventing Discrimination against People with Disabilities in COVID-19 response*, 19 March 2020, available at: https://news.un.org/en/story/2020/03/1059762 (accessed 30 May 2021).

[16] *E.g.* S. Body-Gendrot, *Police Marginality, Racial Logics and Discrimination in the Banlieues of France*, 33(4) Ethnic and Racial Studies 656 (2010); F. Jobard et al., *Mesurer les discriminations selon l'apparence: une analyse des contrôles d'identité à Paris*, 3(67) Population 423 (2012).

[17] For instance, an Amnesty International report showed that during the first wave of the pandemic, 10% of fines in France were imposed in Seine Saint Denis, the poorest department in *Ile de France*, where the majority of inhabitants originate from West or North Africa. This figure of 10% – three times higher than in the rest of the country – according to Amnesty International indicates that the department has been controlled disproportionately, not to mention the recurrent illegal use of force by the authorities in these neighborhoods. Amnesty International, *Policing the Pandemic Human Rights Violations in the Enforcement of COVID-19 Measures in Europe*, 24 June 2020, p. 5, available at: https://bit.ly/3hxDAUs (accessed 30 May 2021).

fines reach exorbitant amounts, as they do in Switzerland or the United Kingdom (EUR 10,000).[18]

Even when protection measures toward these groups have been adopted they are far from sufficient, owing to the temporary nature of these programmes, the inadequacy of the grants and support payments provided, the failure to take into account the situation of people working in informal sectors or precarious employment (who represent 61.2% of the global workforce), the lack of measures to support irregular migrants or to tackle gender issues, etc.[19] Moreover, the practical and administrative obstacles to effectively benefiting from these measures constitute a major problem, especially in the Member States of the European Union, where "many programs include conditions that are unsuitable for the realities of people living in poverty or in precarious employment."[20] Indeed, "many schemes include conditions that are maladapted to the realities of people living in poverty or those in precarious employment." According to the Special Rapporteur on extreme poverty and human rights, "applications often include complex procedures and bureaucratic jargon, and are not provided in appropriate languages, despite evidence that these are key obstacles to people's ability to take up benefits."[21]

Finally, the vaccine appears to be of utmost importance to protect the aforementioned poor people mainly affected by the pandemic. However, poor people are among the sections of the population which are the least vaccinated,[22] not only because of practical and administrative obstacles[23] but also because of their higher vaccination hesitancy with respect to both the vaccine and even the health system, which is partly explained by their experiences of long-standing discrimination, as poor people usually belong to minorities and discriminated groups.[24] This is, for instance, the case of the Roma community in Hungary,[25] as well as black people in the UK[26] and the US[27] in the

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[18] *See e.g.* T. Helm, M. Savage, R. McKie, £10,000 *Fines Warning for Failing to Self-isolate as England Covid Infections Soar*, The Guardian, 19 September 2020, available at: https://bit.ly/2TvjdQ9 (accessed 30 May 2021).

[19] Special Rapporteur on extreme poverty and human rights, *supra* note 12, para. 28.

[20] *Ibidem*, para. 28.

[21] *Ibidem*, para. 20.

[22] *E.g.* P. Peretti-Watel et al., *Attitudes toward Vaccination and the H1N1 Vaccine: Poor People's Unfounded Fears or Legitimate Concerns of the Elite?*, 109 Social Science Medicine 10 (2014).

[23] *See* D. Gruener, *Immunity Certificates: If We Must Have Them, We Must Do It Right*, COVID-19 Rapid Response Impact Initiative – White Paper 12 (2020); B. Dreyfus, *Les refus de soins opposés aux bénéficiaires de la CMU-C, de l'ACS et de l'AME*, 46(2) Regards 41 (2014).

[24] *E.g.* V. Gamble, *Under the Shadow of Tuskegee: African Americans and Health Care*, 87 American Journal of Public Health 1773 (1997).

[25] *See* M. Dunai, *Falling Like Flies: Hungary's Roma Community Pleads for COVID Help*, Reuters, 31 March 2021, available at: https://www.reuters.com/article/us-health-coronavirus-hungary-roma-idUSKBN2BN2R7 (accessed 30 May 2021).

[26] *See* M. Razai et al., *Covid-19 Vaccine Hesitancy among Ethnic Minority Groups*, 372 British Medical Journal 513 (2021).

[27] *See* L. Bogart et al., *COVID-19 Related Medical Mistrust, Health Impacts, and Potential Vaccine Hesitancy Among Black Americans Living with HIV*, 86(2) Journal of Acquired Immune Deficiency Syndromes 200 (2021).

context of COVID-19, confirming studies carried out previously according to which low-skilled and poor people tend to be less commonly vaccinated, although they are among the highest "at-risk" groups.[28] Against this background, as the COVID-19 vaccine rollout continues apace and hope slowly returns that we are on our way back to some sort of "normalcy," the aftermath pandemic measures have started being implemented. These include the preparation of vaccination certificates to enable people to travel and access services upon presentation of a certificate showing that its bearer has been vaccinated. This system of certificates is likely to exclude socioeconomically underprivileged people even more, as I have argued elsewhere.[29] Indeed, even if making a vaccination programme widely available is likely to protect the poor, the system of certificates itself is exclusionary: people who are not vaccinated – overrepresented among the poor – will not be able to benefit from such certificates and therefore be unable to access some essential services. [30]

2. THE PROTECTION OF SOCIOECONOMICALLY UNDERPRIVILEGED PEOPLE THROUGH THE FREE-STANDING RIGHTS OF THE ECHR: *TOUR D'HORIZON* AND LIMITS

The situation of precarious people affected by the pandemic for the aforementioned reasons raises important questions with regard to respect of their fundamental rights protected by the ECHR. Many of their rights have been weakened by the pandemic, whether this concerns the fines likely to be imposed on them or their non-take of their social benefits (right to property – Art. 1 of the Protocol 1); the difficulties in attending school at home (right to education – Art. 2 of the Protocol 1); the freedom of movement issues raised by the vaccination "passport" (Art. 2 of the Protocol 4); the exacerbation of the precariousness of their living conditions (right to private and family life – Art. 8); also linked to their poor health condition and their exposure to the virus (prohibition of inhuman and degrading treatment – Art. 3, and the right to live – Art. 2). Consequently the pandemic, which has particularly affected socioeconomically underprivileged people, seems to have dramatically weakened their rights protected by the ECHR.

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[28] *See* E. Paul et al., *Attitudes towards Vaccines and Intention to Vaccinate against COVID-19: Implications for Public Health Communications*, The Lancet Regional Health – Europe 1 (2021); M. Schwarzinger et al., *COVID-19 Vaccine Hesitancy in a representative working-age population in France: A survey experiment based on vaccine characteristics*, 6 Lancet Public Health 210 (2021); A. Schoenfeld Walker, *Pandemic's Racial Disparities Persist in Vaccine Rollout*, New York Times, 5 March 2021, available at: https://nyti.ms/36gvCKm (accessed 30 May 2021).

[29] S. Ganty, *The Veil of the COVID-19 Vaccination Certificates: Ignorance of Poverty, Injustice Towards the Poor*, 12 European Journal of Risk Regulation 1 (2021).

[30] *Ibidem.*

The question I would like to answer in this section is the extent to which the free-standing rights protected by the ECHR have been operationalized by the ECtHR to protect the rights of socioeconomically underprivileged people, and whether this case law is relevant in the specific case of the pandemic. On the basis of the abundant literature related to the protection of the fundamental rights of socioeconomically underprivileged people through the ECHR,[31] and some examples of ECtHR case law (especially with respect to Arts. 3 and 8), I argue that there is room for their increased protection in the context of the pandemic (2.1.), albeit to a limited extent (2.2.).

2.1. *Tour d'horizon*

Certainly the ECHR mainly protects civil and political rights, but in addition the right to education and the right to property are usually classified as socioeconomic rights.[32] At the same time however, socioeconomic interests such as housing rights, social security, and health and health care have also been protected in the Strasbourg system.[33]

As recalled by Françoise Tulkens, the classification between political, civil and socioeconomic rights is porous, especially in the case law of the ECHR,[34] and as explained by Lavrysen the Court is not always consistent in its approach.[35]

As a consequence, civil and political rights are also capable of being applied to protect the interests of socioeconomically underprivileged people, which are intrinsically linked to socioeconomic rights. As explained below, the Court has already ruled against certain member States under the free-standing Convention rights because of their measures – or their lack of measures – to safeguard either the civil or political interests and/or their socioeconomic interests in the case of people in socioeconomically underprivileged situations. A great deal of literature has been published on this specific question,[36] and summarizing it would go beyond the scope of this article. However, it seems useful to mention some examples in this paper which will help explain the extent to which the

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[31] *See e.g.* L. Lavrysen, *Court Fails to Acknowledge Discrimination and Stigmatization of Persons Living in Poverty*, Strasbourg Observers (2016)*;* L. Lavrysen, *Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR*, 33 Netherlands Quarterly of Human Rights 293 (2015); F. Tulkens, *The Contribution of the European Convention on Human Rights to the Poverty Issue in Times of Crisis*, 2(2) Cyprus Human Rights Law Review 127 (2013); A.E.M. Leijten, *Core Rights and the Protection of Socioeconomic Interests by the European Court of Human Rights*, Cambridge University Press, Cambridge: 2018; A. O'Reilly, *The European Convention on Human Rights and the Socioeconomic Rights Claims: A Case for the Protection of Basic Socioeconomic Rights through Article 3*, 15 Hibernian Law Journal 1 (2016); V. David, *Caring, Rescuing or Punishing? Rewriting RMS v. Spain (ECtHR) from an Integrated Approach to the Rights of Women and Children in Poverty*, in: E. Brems, E. Desmet (eds.), *Integrated Human Rights in Practice*, Edward Elgar, Cheltenham: 2017, pp. 174-181.

[32] They are respectively enshrined in Protocol 1, Arts. 1 and 2.

[33] *See e.g.* Leijten, *supra* note 31*,* pp. 233 et seq.

[34] Tulkens, *supra* note 31, p.127.

[35] Lavrysen, *Strengthening the Protection*, *supra* note 31, p. 304.

[36] *See* the literature in note 31.

freestanding Convention rights[37] can be operationalized to protect socioeconomically underprivileged people in the pandemic situation described above in section 1, especially considering the case law of the Court related to Arts. 3 and 8.[38]

For instance, the prohibition of inhuman and degrading treatment enshrined in Art. 3 of the Convention implies not only negative but also positive obligations on the part of Member States, which cannot be derogated from.[39] Indeed, according to settled case law, given the absolute nature of Art. 3[40] even considerable difficulties encountered by States cannot exculpate them from their obligations under this provision.[41] This is *a fortiori* true in the context of a pandemic, which in no way constitutes an excuse to derogate from this absolute fundamental right. The Court considers that inhuman treatment encompasses, *inter alia*, actual bodily injury or intense physical or mental suffering,[42] while a treatment is considered as degrading if it humiliates or degrades an individual; if it implies a lack of respect for human dignity or even diminishes it; or if it arouses feelings of fear, anguish or inferiority capable of breaking a person's moral and physical resistance.[43] Moreover, it is sufficient that the victim is humiliated in her own eyes.[44] However, Art. 3 is applied only when a situation reaches a certain level of seriousness, depending on the circumstances of the case and the victim's characteristics.[45] For example, this provision cannot be interpreted as obliging States to guarantee a right to housing to everyone within their jurisdiction.[46] Nonetheless, this case-by-case approach with respect to Art. 3 ECHR does

[37] I speak only of free-standing Convention rights in this section, because Art. 14 – related to the prohibition of discrimination – has been much less operationalized to protect against discrimination on the grounds of socioeconomic status, as will be analyzed in the last section.

[38] We should bear in mind however that other Convention rights, such as the right to property and the right to education, have already been successfully invoked in the protection of the rights of precarious people. *See* Lavrysen, *Strengthening the Protection*, *supra* note 31, p. 304. *See also* Leijten, *supra* note 31, p. 233.

[39] ECtHR, *Moldovan and others. v. Romania* (App. Nos. 41138/98 and 64320/01), 12 July 2005, para. 98.

[40] Although the Court "does not live up to the promise of such an absolute right" – *see* S. Smet, *The 'Absolute' Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?*, in: E. Brems and J. Gerards (eds.), *Shaping rights in the ECHR: the role of the European Court of Human Rights in determining the scope of Human Rights*, Cambridge University Press, Cambridge: 2013, p. 275.

[41] ECtHR, *M.S.S. v. Belgium and Greece* (App. No. 30696/09), Grand Chamber, 20 January 2011, para. 223.

[42] ECtHR, *Budina v. Russia* (App. No. 45603/05), 18 June 2009; *V. v. United Kingdom* (App. No. 24888/94), Grand Chamber, 16 December 1999, para. 71.

[43] *M.S.S. v. Belgium and Greece*, para. 220; ECtHR, *Pretty v. the United Kingdom* (App. No. 2346/02), 29 April 2002, para. 52. *See also Budina v. Russia*.

[44] *Budina v. Russia*; ECtHR, *Tyrer v. the United Kingdom* (App. No. 5856/72), 25 April 1978, para. 32; *Smith and Grady v. the United Kingdom* (App. Nos. 33985/96 and 33986/96) 27 September 1999, para. 120.

[45] ECtHR, *Ireland v. the United Kingdom* (App. No. 5310/71), 18 January 1978, para. 162.

[46] ECtHR, *Chapman v. Belgium* (App. No. 39619/06), 5 March 2013, para. 99. Thus, as Leijten explains, "there is no single, clear criterion that is decisive for judging whether something counts as 'ill-treat-

not exclude the Court from finding a violation of Art. 3 of the Convention on account of socioeconomic circumstances, and in particular when the applicant is in such a situation of deprivation that it would be incompatible with human dignity.[47] This is the finding reached by the Strasbourg Court in the famous *M.S.S. v. Belgium and Greece* case, which concerned the return of an asylum seeker from Belgium to Greece under the Dublin Regulation. The Court considered that the applicant had been exposed to inhuman and degrading treatment because of the living conditions he had experienced in Greece for months, conditions which included almost total material deprivation, without being able to meet his most basic needs to eat, wash, and find shelter.[48] More generally, the Court considers that the responsibility of a State can be activated for ill-treatment within the meaning of Art. 3 when an applicant, in a situation of total dependence on the support of the State, is confronted with indifference on the part of the authorities vis-à-vis her situation of serious deprivation, or her inability to meet her needs is incompatible with human dignity.[49]

The protection of private and family life enshrined in Art. 8 of the Convention has also been successfully invoked on several occasions before the Strasbourg Court in cases of harmful measures taken by the authorities against socioeconomically disadvantaged people. For instance, in the *Wallova and Walla v. the Czech Republic* case, the Court condemned the Czech Republic for depriving the applicants, parents of five children, of their parental authority because they were unable to provide their children with adequate and stable housing due to their poverty. The Court ruled in favour of the applicants under Art. 8,[50] finding that the placement measure was too radical in light of the reasons given by the authorities. In other words, unsatisfactory living conditions or material deprivation cannot be the only reason for depriving parents of their parental authority and placing their

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ment', and the question whether particular circumstances demand individual protection has to be decided on a case-by-case basis." *See* Leijten, *supra* note 31, p. 50.

[47] *M.S.S. v. Belgium and Greece*, para. 253; *Budina v. Russia*; ECtHR, *Price v. the United Kingdom* (App. No. 33394/96), 10 October 2001, paras. 24-30; *Valašinas v. Lithuania* (App. No. 44558/98), 24 July 2001, para. 117.

[48] *M.S.S. v. Belgium and Greece*, paras. 249-264.

[49] *Budina v. Russia*; ECtHR, *Hudorovič and others v. Slovenia* (App. No. 24816/14 and 25140/14), 10 March 2020, para. 165. *See also Khan v. France* (App. No. 12267/16), 28 February 2019, paras. 93-94. The Court has controversially ruled that an applicant should not be regarded as responsible for her situation, however. In *O'Rourke v. the United Kingdom*, which concerned a person evicted from his home who was left homeless for fourteen months to the detriment of his health, the Court ruled that the applicant's suffering did not reach the required level of severity to engage the responsibility of the British State. According to the Court, he was largely responsible for his own deterioration following his expulsion, since he had refused any of the help which had been offered to him by the authorities, i.e. overnight shelters and temporary accommodation. ECtHR, *O'Rourke v. the United Kingdom* (App. No. 39022/97), 26 June 2001. *See also Nitecki v. Poland* (App. No. 65653/01), 21 March 2002.

[50] ECtHR, *Wallovà and Walla v. the Czech Republic* (App. No. 23848/04), 26 October 2006, para. 47. Two similar cases were decided by the Court in which it reached similar conclusions: ECtHR, *R.M.S. v. Spain* (App. No. 28775/12), 18 June 2013 and *Soares de Melo v. Portugal* (App. No. 72850/14), 16 February 2016.

children into institutional care.[51] The Court made it clear that the Czech authorities should have considered less radical measures and that it was the responsibility of the welfare authorities to take positive steps "to help people in difficulty who do not have the necessary knowledge of the system, to guide them in their efforts and to advise them, among other things, on the different types of social benefits, the possibilities of obtaining social housing or other means of overcoming their difficulties."[52]

More recently, in the unprecedented *Lăcătuş v. Switzerland* judgment, the Court condemned Switzerland for its legislation providing for a general ban on begging in public spaces, punishable by a fine and by imprisonment in the event of non-payment of the fine. The Court conceded that the right to beg is not absolute, but a general prohibition like the one challenged in the case is not permitted. The Court noted that for some, being in a situation of manifest vulnerability, begging was the applicant's only means of survival. According to the Court, the applicant "had the right, inherent to human dignity, to express her distress and to try to remedy to her needs through begging."[53] Therefore, by imposing such sanctions on the applicant – a fine followed by five days imprisonment for not being able to pay it – Switzerland violated the applicant's human dignity and the very essence of her rights protected by Art. 8.[54] As a consequence, Member States are liable, under the Convention, including under Arts. 3 and 8, for their actions and omissions vis-à-vis particularly precarious groups. This is no different in the context of the pandemic. Indeed, in situations similar to the above-ones states are likely to be held responsible for violations of Convention rights towards socioeconomically underprivileged people, namely:

– homeless people who have been threatened with being fined for not respecting the lockdown measures without having the possibility of benefiting from the usual support structures – a situation similar to that of Mrs Lăcătuş;
– asylum seekers unable to submit an asylum application and therefore barred from benefiting from reception – as in Belgium[55] – or without material support – as in France – where the authorities have failed to provide asylum seekers and migrants with the possibility of meeting their basic needs by preventing organisations from providing support to these people;[56]

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[51] *Wallovà and Walla v. Czech Republic*, paras. 72, 74 and 78. *See* V. David, *ECtHR Condemns the Punishment of Women Living in Poverty and the "Rescuing" of Their Children*, available at: https://bit.ly/3xmUAUn (accessed 30 May 2021).

[52] *Wallovà and Walla v. Czech Republic*, para. 74 and *R.M.S. v. Spain*, para. 86. *See* David, *supra* note 51 and David, *supra* note 31.

[53] ECtHR, *Lăcătuş v. Switzerland* (App. No. 14065/15), 19 January 2021, para. 107. Own translation from: "elle avait le droit, inhérent à la dignité humaine, de pouvoir exprimer sa détresse et à essayer de remédier à ses besoins par la mendicité."

[54] *Ibidem*, para. 115.

[55] *E.g.* M. Doutrepont, *La situation des migrant·es en période de confinement: analyse à la lumière des droits fondamentaux* in: I. Andoulsi, S. Huart (eds.), *Continuité de la justice et respect des droits humains en temps de pandémie*, Anthemis, Limal: 2021, pp. 111-130.

[56] *E.g.* Amnesty International, *supra* note 17, p. 5.

– people working in the informal sectors, such as sex workers, who have been cut off from all material resources without any state support;
– poor single-parent families supported mainly by the mother;
– the elderly or seriously ill, isolated and with limited or no outside help;
– vaccination programmes not available to irregular migrants;
– etc.

2.2. Limits

Three pitfalls must however be mentioned in the Strasbourg Court's case law with respect to the protection of fundamental rights of socioeconomically disadvantaged persons under the ECHR, especially in the context of the pandemic: the limitation of protection in cases of extreme vulnerability under Art. 3 ECHR; the "negativist" approach of the Court under Art. 8 ECHR; and the Court's avoidance of tackling and taking into account the socioeconomically underprivileged situation of the applicant(s) in some cases.

Firstly, when it comes to socioeconomic interests the prohibition of inhuman and degrading treatment remains reserved for the most extreme cases, as aforementioned. The living conditions experienced by many people living in deprived parts of Madrid will not necessarily be considered as falling below the threshold of human dignity to the point of violating Art. 3 of the Convention. It is no different for the inhabitants of Seine Saint Denis, who have been controlled and sanctioned for lockdown violations three times more often than in the rest of France.[57] The same is true for the children in these neighbourhoods, who are locked in cramped spaces and lack the tools, the support, the space, and the peace and quiet necessary to be able to attend to their lessons or do their homework online, and for people who are or will be deprived of certain services because they do not have the vaccination certificates. They are clearly victims of their precarious situations and are treated differently on this basis, reflecting the socioeconomic inequalities both nationally and internationally, as has been brilliantly documented.[58] Nevertheless they are not necessarily considered to be in an extremely precarious situation of vulnerability incompatible with human dignity, i.e. one likely to be considered as inhuman or degrading treatment within the meaning of Art. 3 of the Convention. More generally, as Leijten explains concerning the very question of protection of socioeconomic interests under the Convention, the ECtHR has so far only recognised the minimum cores "according to which states are required to guarantee minimum levels of these rights."[59] In other words, if "such minimum levels are absent, socioeconomic rights are not taken seriously.[60]

[57] *Ibidem*, p. 5.

[58] B. Milanovic, *Global Inequality: A New Approach for the Age of Globalization*, Harvard University Press, Cambridge-London: 2018; T. Piketty, *Capital in the Twenty-First Century*, Harvard University Press, Cambridge-London: 2014; T. Piketty, *Capital and Ideology*, Harvard University Press, Cambridge-London: 2020.

[59] Leijten, *supra* note 31, p. 220.

[60] *Ibidem*, 221.

Secondly, the issue of the positive obligations of States towards vulnerable populations under Art. 8 of the Convention in particular remains uncertain: How would the Court assess, under Art. 8, a Member State's failure to meet its positive obligations during a pandemic, especially with regard to social, economic, health, psychological and educational aid, etc., when the situation is not likely to be considered as a degrading or inhuman treatment in the sense of Art. 3 ECHR? Lavrysen rightly explains that the "Court's case law remains predominantly "negativist," such as for example the field of the right to home (Art. 8) and the right to property (Art. 1 of the Protocol 1), meaning that Court restricts itself to protecting 'existing' homes and possessions."[61] The door is not completely closed, however. Indeed, in the recent *Hudorovič and others v. Slovenia* case, which concerned the supply of drinking water to illegal Roma settlements, the Court issued an unprecedented ruling that Art. 8 can impose on States a positive obligation to provide access to drinking water. In other words, access to drinking water is not a right protected by Art. 8 as such, but it can be inferred from this article given that without water a human being cannot survive.[62] However, despite this strong statement the Strasbourg Court concluded in that case that Slovenia had a wide margin of appreciation in matters of housing, considering that the applicants had not shown that they had suffered harmful consequences to their health and human dignity due to the lack of drinking water. This is based on the settled case law of the Court, according to which national authorities are in principle better placed than international judges to assess what is in the public interest for social or economic reasons, by virtue of their direct knowledge of their society and its needs.[63] In this respect, the ECtHR usually respects the political choices of national legislators unless they are manifestly unfounded, a condition which is all the more likely to occur during a crisis such as during the COVID-19 pandemic, although to my knowledge there is no case law on this specific question as yet.

Thirdly and more generally, when the fundamental rights of people living in poverty are affected it is usually by measures neutral on their face, which are not challenged by practitioners or examined by judges from the perspective of their socioeconomic situation vis-à-vis the dimensions of recognition or redistribution.[64] Indeed, when scrutinising the violation of human rights, courts often simply avoid tackling the situation of applicants who are disadvantaged or excluded because of their socioeconomic background; thus it is easy for courts to ignore or undermine this issue in their scrutiny of the violation of rights when discrimination is not invoked. This is regrettable, since it can be a very important feature of the case. In this regard, the ECtHR judgment in

[61] Lavrysen, *Strengthening the Protection*, *supra* note 31, p. 306.

[62] *Hudorovič and others v. Slovenia*, para. 116.; V. David, *The Court's First Ruling on Roma's Access to Safe Water and Sanitation in Hudorovic et al. v. Slovenia: Reasons for Hope and Worry*, Strasbourg Observers, 9 April 2020, available at: https://bit.ly/3xlPtnn (accessed 30 May 2021).

[63] ECtHR, *Stec and others v. the United-Kingdom* (App. Nos. 65731/01 and 65900/01), 12 April 2006, para. 52; *Carson and others v. the United-Kingdom* (App. No. 42184/05), 16 March 2010; *Bah v. the United Kingdom* (App. No. 56328/07), 27 September 2011, para. 47.

[64] For a definition of these concepts, *see infra* section 2.

Garib v. The Netherlands case is a striking example. The case concerned the policy of the city of Rotterdam according to which only people with a certain minimum income were eligible for a housing permit to take up new residence in moderate-cost rental housing in the Rotterdam Metropolitan Region.[65] Only people residing in the Region for at least six years were exempt from such a requirement. The aim of this policy was to reverse the "concentrations of the 'socioeconomically disadvantaged' in distressed inner-city areas."[66] Because of this measure the applicant, a single mother of two living on social benefits, was refused a housing permit to move to the Tarwewijk neighbourhood, a "hotspot" area in Rotterdam, even though she had found housing there which met her family's needs.[67] She claimed that her freedom to choose her residence (Art. 2 of Protocol No. 4) had been violated. Her claim was dismissed by the Chamber of first instance and the Grand Chamber. As summarised by Lavrysen regarding this case, "[p]oor individuals are pushed out of their boroughs and they are thereby rendered invisible, without addressing the roots of their socioeconomic problems, allowing wealthier individuals to replace them."[68] The COVID-19 pandemic has sadly confirmed that many supposedly "neutral" measures affect disadvantaged people more severely and that measures taken directly against those people are commonplace. For example, the situation of people who find themselves confined in disadvantaged neighborhoods is close to that of Ms Garib and is likely to raise issues under Art. 2 of Protocol No. 4. However, as in the situation of Madame Garib, the Court might consider that lockdown measures in poor neighbourhoods are proportionate with regard to Art. 2 Protocol No. 4 or other articles of the Conventions, without tackling the "socioeconomic disadvantaged" aspects of their situation. In other words, it would be easy for the Court to ignore the impact of certain measures (or the lack of measures) towards socioeconomically underprivileged people under the free-standing Convention rights. As aforementioned, the situation with respect to the vaccination certificate system is particularly likely to hinder people in a precarious situation and constitutes such an example, among others. A recent judgment by the ECtHR dealt with the question of proportionality – in light of the right to private and family life (Art. 8 ECHR) – in the context of the compulsory administration of nine different vaccines for children in the Czech Republic. Parents who did not comply were respectively fined and prohibited from benefiting from nursery services for their children.[69] In other words, the case concerned the "indirect obligation" to be vaccinated, i.e. an obligation which did not directly impose an involuntary medical treatment[70]

[65] ECtHR, *Garib v. the Netherlands* (App. No. 43494/09), 23 February 2016; ECtHR, *Garib v. the Netherlands* (App. No. 43494/09), Grand Chamber, 6 November 2017.

[66] *Ibidem*, para. 23.

[67] *Ibidem*, paras. 127-128.

[68] Lavrysen, *Court Fails to Acknowledge Discrimination*, *supra* note 31.

[69] ECtHR, *Vavřička and Others v. the Czech Republic* (App. Nos. 47621/13 and 5 others), Grand Chamber, 8 April 2021.

[70] The margin of appreciation of the state is also wide when it comes to a direct compulsory vaccination: ECtHR, *Solomakhin v. Ukraine* (App. No. 24429/03), 15 March 2012; ECtHR, *Boffa and others v. San-Marino* (App. No. 2653/95 and 13 others), 15 January 1998.

but which, in the case of a vaccination certificate, was likely to exclude people from services. The Court judged that such measures did not violate the right to private and family life, without engaging with the questions raised under the right to education and the freedom of thought, conscience and religion.[71] The ECtHR appears to have left a very wide margin of appreciation to the states. This has given rise to some criticism, especially as to the necessity of the sanctions imposed on parents in light of the aim of public health protection.[72] In this case, the Court did not tackle the flip-side of the social solidarity aspect: i.e. that the parents, owing to their poverty, are likely to be significantly affected by fines; or the fact that nursery care was rendered unavailable to them. Indeed, this issue was unfortunately only marginally raised in the arguments brought by the applicants.[73] As a consequence, the question of conditioning the fundamental rights of the poor through an indirect vaccination obligation remains open before the ECtHR. Nonetheless, in the context of the pandemic if such a question appears before the Court regarding the implementation of the vaccination certificates, there is no guarantee that the Court will take into account the impact of these otherwise neutral measures on socioeconomically underprivileged people. In the next section I will argue that Art. 14 on prohibition of discrimination, invoked in combination with another Convention article, would be a better candidate for protecting socioeconomically underprivileged persons against the indirect differences in treatment to which they are victims of.

3. THE POTENTIAL OF PROHIBITION OF DISCRIMINATION ON GROUNDS OF SOCIOECONOMIC SITUATION IN THE PROTECTION OF PRECARIOUS PEOPLE DURING A PANDEMIC

The prohibition of discrimination under Art. 14 of the Convention constitutes an important tool in the protection of disadvantaged people. This article states that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Some socioeconomically underprivileged applicants have already successfully argued that they have been discriminated against on the basis of "traditional" protected characteristics such as gender, race, or ethnic origin.[74] However, these grounds are not likely to encompass the situation of people who have been

[71] *Vavřička and Others v. the Czech Republic*.

[72] Dissenting opinion of Judge Wojtyczek in ECtHR, *Vavřička and Others v. the Czech Republic*, para. 18; Z. Vikarská, *Is Compulsory Vaccination Compulsory*?, Verfassungsblog, 12 April 2021, available at: https://verfassungsblog.de/is-compulsory-vaccination-compulsory (accessed 30 May 2021).

[73] *Vavřička and Others v. the Czech Republic*, para. 162.

[74] *See* J. Gerards, *The discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13(1) Human Rights Law Review 99 (2013); O.M. Arnardóttir, *The Differences that Make a Difference:*

discriminated against on grounds of their disadvantaged socioeconomic status. In this vein, while there is little in the literature and case law on the question of discrimination based on the grounds of socioeconomic status as a protected characteristic,[75] I argue that it is essential to protect people in a socioeconomic underprivileged situation from both direct and indirect differences in treatment, especially in the context of the pandemic. Indeed, such an approach is likely to overcome some of the troublesome issues explained in the previous section vis-à-vis the free-standing Convention rights, especially the one regarding the silence of the Court on the socioeconomic situation of the applicants in some cases. Below I first explain how antidiscrimination law relates to issues of socioeconomic inequality on the basis of the concepts of recognition and redistribution (3.1.). Secondly, I argue that the protected characteristic of socioeconomic status in antidiscrimination law has a potential utility in the protection of socioeconomically underprivileged people in the context of the pandemic, in particular in light of Art. 14 ECHR (3.2.).

3.1. Articulating the prohibition of discrimination on grounds of socioeconomic situation and the issues of "recognition" and "redistribution"

As some authors have already argued, an approach toward equality which is substantive in nature is all the more important in the protection of socioeconomically underprivileged people.[76] Substantive equality considers the context in which people find themselves,[77] in contrast to formal equality, which is limited to treating likes alike.[78] Taking this concept further, Fredman argues for a multidimensional concept of substantive equality rather than choosing between the various principles of equality of results, of opportunity, and of dignity. She identifies four dimensions to making equality substantive. First, the *redistributive* dimension aims "to correct the cycle of disadvantage associated with status of out-groups" and "to redress disadvantage by removing obstacles to genuine choice."[79] Second, the *recognition* dimension is related to the respect for dignity and combats stereotypes, stigmas, and humiliation on grounds of gender, race, disability, sexual orientation or other statuses.[80] Third, the *transformative* dimension of

Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights, 14 Human Rights Law Review 647 (2014).

[75] *See* J.-C. Benito Sánchez, *Towering Grenfell: Reflections around Socioeconomic Disadvantage in Antidiscrimination Law*, 5(2) Queen Mary Human Rights Law Review 1 (2019); S. Ganty, *Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?*, Human Rights Law Review (2021).

[76] N. Fraser, A. Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange,* Verso, New York: 2004; S. Fredman, *Redistribution and Recognition: Reconciling Inequalities,* 23 South African Journal on Human Rights 214 (2007), p. 216; S. Fredman, *The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty*, 3 Stellenbosch Law Review 567 (2011); S. Atrey, *The Intersectional Case of Poverty in Discrimination* Law, 18 Human Rights Law Review 411 (2018).

[77] Lavrysen, *Strengthening the Protection*, *supra* note 31, p. 314.

[78] S. Fredman, *Discrimination Law*, Oxford University Press, Oxford: 2011, pp. 8 and 25.

[79] *Ibidem*, pp. 25-27.

[80] *Ibidem*, pp. 28-29.

equality accommodates differences and structural change by "removing the detriment but not the difference itself,"[81] and concerns the structural harm, autonomy, and the promotion of substantive freedoms.[82] Finally, the *participative* dimension mainly focuses on social inclusion and political voice.[83] This last dimension not only refers to political participation but also to "the importance of community in the life of individuals" and concerns more specifically social exclusion.[84] In other words, this approach shows that equality and non-discrimination cannot be limited to formal equality (that likes should be treated alike), but must encompass redistribution, recognition, transformation and participation.[85]

This section aims to demonstrate the added value of the prohibition of discrimination on the grounds of socioeconomic situation regarding the *recognition* dimension of equality, especially in the context of the pandemic described in section 1.

In philosophy, discrimination is generally linked to the problems of "recognition" which arise "when cultural value patterns constitute some as inferior, excluded or invisible."[86] In other words, recognition refers from "an ideal reciprocal relation between subjects in which each sees the other as its equal and also as separate from it."[87] It usually involves overcoming stigmas, prejudices and stereotypes. As Fredman explains, insofar as regards discrimination the recognition dimension of equality implies that individuals are "defined not by relations of production, but of esteem, respect and prestige enjoyed relative to other groups in society."[88] In this regard, discrimination is not only a cause but also a consequence of socioeconomic disadvantages.[89] As a matter of fact it is widely agreed that "[g]roups which suffer from discrimination on status grounds [gender, race …] are disproportionately represented among people living in poverty,"[90] and it has become clear that "status-based discrimination is frequently closely correlated with socioeconomic disadvantage."[91]

In this sense, poverty is a consequence of the discrimination that vulnerable groups and minorities such as Roma, migrants, black people, single women and persons with disabilities have historically had to endure. Because of the long-standing discrimination against them, these groups have experienced structural socioeconomic disadvantages which are extremely difficult to overcome. In this context, misrecognition is the cause

[81] *Ibidem*, p. 30.
[82] Atrey, *supra* note 76.
[83] Fredman, *supra* note 78, p. 31.
[84] *Ibidem*, p. 32.
[85] Atrey, *supra* note 76, p. 429.
[86] Fredman, *Redistribution and Recognition*, *supra* note 76, p. 216.
[87] Fraser, Honneth, *supra* note 76.
[88] Fredman, *Redistribution and Recognition*, *supra* note 76, p. 216.
[89] Human Rights Council United-Nations General Assembly, *Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*, A/HRC/21/39, 2012, para. 18.
[90] Fredman, *The Potential and Limits*, *supra* note 76.
[91] Fredman, *Redistribution and Recognition*, *supra* note 76, pp. 214-215.

of misdistribution. There is another side to this coin, however. Poor people themselves are subjected to stereotyping, prejudice, stigma and discrimination because of their precarious situations. Their precariousness is thus not only a consequence but also a cause of discrimination, creating a vicious cycle. In other words, misdistribution raises important issues of recognition resulting from a person's socioeconomic status. This question is less well-developed and analysed in the literature, especially from a legal perspective.[92] As Ignatieff puts it, "while inequalities of gender, race, and sexual orientation have been made visible the last forty years, older inequalities of class and income have dropped out of the registers of indignation."[93] Indeed, both antidiscrimination law and human rights law more generally have mainly focused on the status equality of individuals based on traditional discrimination status grounds, rather than issues of misrecognition linked to the "distributive equality of classes."[94]

Although discrimination on the grounds of socioeconomic situation is obviously linked to the issue of misdistribution – which is the root of such discrimination – it is mainly related to the rationale of recognition.[95] Fredman insists on the primary role of recognition on the grounds of socioeconomic situation in antidiscrimination law, which adds to the primary emphasis on redressing economic disadvantage within the welfare state[96] – i.e. the redistributive function.[97] Against this background, I argue that this equality of status constitutes a privileged tool to fight discrimination against socioeconomically disadvantaged people, that is to say, situations in which socioeconomically disadvantaged people are treated differently – either directly or indirectly – because of their precarious situation, and is thus likely to add value to the protection of socioeconomically underprivileged people via the free-standing Convention rights. As will be explained below, this approach is essential in the context of the COVID-19 pandemic, in particular in light of direct differences in treatment – such as measures targeting lower-income neighbourhoods – and indirect neutral measures such as general lockdown measures or the vaccination certificates, which hit socioeconomically disadvantaged people much harder.

From a legal point of view, antidiscrimination clauses are generally open-ended and likely to include grounds such as socioeconomic status, poverty, or social

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[92] Ganty, *Poverty as Misrecognition*, supra note 75.

[93] M. Ignatieff, *The Rights Revolution,* House of Anansi Press, 2000, p. 92.

[94] S. Moyn, *Not Enough. Human Rights in an Unequal World*, Harvard University Press, New Haven: 2018, p. 205.

[95] D. Roman, *La discrimination fondée sur la condition sociale, une catégorie manquante du droit français*, 28 Recueil Dalloz 1911 (2013).

[96] Fredman, *Redistribution and Recognition*, *supra* note 76, p. 229.

[97] Of course it has been rightly argued that antidiscrimination law will not solve the problems of redistribution. Although antidiscrimination law can help, redistribution calls for a much more structural and holistic approach than that developed individually within this body of law. *See* Atrey, *supra* note 76, pp. 411–440; M.A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale Journal of Law and Feminism 1 (2008), p. 1; Fredman, *Redistribution and Recognition*, *supra* note 76.

condition.[98] Moreover, most of them at the international, European, and national levels explicitly provide for the prohibition of discrimination on grounds of wealth, property, or social origin, which to some extent relate to discrimination on the basis of socioeconomic status.[99] This is the case for Art. 14 of the Convention, which provides that the enjoyment of rights and freedoms recognised in the Convention must be secured without discrimination on some status grounds, the list of which is open[100] and explicitly sets out property, social origin, and birth as status grounds. In the following sections, I will use the expressions "socioeconomic situation" and "social condition,"[101] which terms are more encompassing than "property" or "social origin." Their use does not pose a problem *a priori* since, as previously indicated, antidiscrimination clauses are open-ended. It should be noted that other suitable grounds are also likely to describe the socioeconomic situation of individuals when discriminated against on this ground, including class.[102]

3.2. Application of the prohibition of discrimination on grounds of socioeconomic situation in the context of the pandemic

Despite being indisputably available, the protected characteristic of "socioeconomic status" in antidiscrimination law remains largely underused when people in socioeconomically disadvantaged situations need protection from stereotyping, prejudice, and more generally from the direct or indirect differences in treatment they experience on account of their precarious situation. Even when the situation of socioeconomic inequality is recognised, people in precarious situations are often treated as if they were responsible for their own situation.[103] This could explain the reluctance to apply antidiscrimination law to such those situations, which Atrey rightly points out as follows: "Viewed through this individualistic lens, poverty obviously fell beyond the purview of discrimination as concerned with structural disadvantage between groups rather than individual circumstances."[104] This also echoes what Bridges has coined "the moral construction of poverty," referring to the discourse according to which people are poor because there is something wrong with them, refusing to accept the possibility that people are poor because of structural reasons outside their control.[105]

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[98] Ganty, *supra* note 75. On the exception of Art. 19 TFEU and antidiscrimination directives adopted on that basis.

[99] *Ibidem*.

[100] *See* Gerards, *supra* note 74, pp. 6 et seq. *See also* O.M. Arnardóttir, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, 14 Human Rights Law Review 647 (2016).

[101] *See* W. MacKay, N. Kim, *Adding Social Condition to the Canadian Human Rights Act: Canadian Human Rights Condition*s, Canadian Human Rights Commission 2009, p. 37.

[102] *See e.g.* A. Benn, *The Big Gap in Discrimination Law: Class and the Equality Act* 2010, 3(1) Oxford Human Rights Hub Journal 30 (2020).

[103] *See* K. Bridges, *The Poverty of Privacy Rights*, Stanford University Press, Redwood City: 2017, pp. 38-64; Atrey, *supra* note 76, p. 421; Ganty, *Poverty as Misrecognition*, *supra* note 75.

[104] Atrey, *supra* note 76, p. 421.

[105] Bridges, *supra* note 103, pp. 38-64.

In the context of the COVID-19 pandemic, by taking freedom-restricting measures which target only the poorest, or by adopting policies targeting the general population which hit socioeconomically disadvantaged people much more severely, public authorities endorse a particular vision of individual responsibility, to wit: Precarious people bear the consequences of their situations, for which they are regarded as responsible. However, as we have just explained, poverty and precariousness have structural causes and any direct or indirect differentiations based on the situation of poverty, especially when they are marked by stigmas and stereotypes, have to be questioned in light of antidiscrimination law.

The ECtHR thus far appears to have refrained from ruling on discrimination against people in socioeconomic precarious situations on the grounds of Art. 14 of the Convention, avoiding the question through procedural tricks (as will be explained below), or by using other articles of the Convention, with the consequence that there is allegedly no need to rule separately on the discrimination complaint.[106] In most cases, however, this is, a "denial of justice."[107]

In this section I will demonstrate that the operationalisation of the protected characteristic of socioeconomic status in antidiscrimination law is a unique instrument in the protection of socioeconomically disadvantaged people, one that no other fundamental right is able to provide. There are three main reasons for this. It enables taking into consideration the socioeconomic situation when examining compliance with civil and political rights (3.2.1); combating stigmatisation and stereotypes (3.2.2); and considering the situation as a whole through intersectionality (3.2.3).

3.2.1. Considering the socioeconomic situation when examining potential violations of fundamental rights

First, antidiscrimination law provides an opportunity to examine the socioeconomic issues which underlie disputes over civil and political fundamental rights, especially those that have no *direct* link with issues of redistribution. Indeed, the socioeconomic situation of victims of violations of fundamental rights protected by the Convention is sometimes ignored by the Strasbourg Court, even though it lies at the heart of the case.[108] In this regard the above-mentioned ECtHR judgment in *Garib v. The Netherlands* is a striking example and shows that scrutiny via social condition status grounds in antidiscrimination law can be essential to protect people living in poverty. As a reminder, this case concerned a gentrification policy of the city of Rotterdam which conditioned access to housing permits on a minimum income threshold. The applicant claimed that her freedom to choose her residence (Art. 2 of Protocol No. 4) had been violated, but did not invoke Art. 14 ECHR. Her claim was dismissed by the Chamber of first instance. As regards the recognition issue discussed in this section, the chal-

[106] *Lăcătuș v. Switzerland*, para. 123.

[107] *Ibidem*, partly concurring and partly dissenting opinion of Judge Ravarani, para. 23.

[108] *See e.g.* ECtHR, *Emabet Yeshtla v. The Netherlands* (App. No. 37115/11), 15 January 2019; *Van Volsem v. Belgium* (App. No. 14641/89), 9 May 1990; *Bah v. the United Kingdom*; *Garib v. the Netherlands*.

lenged gentrification policy includes an important socioeconomic dimension regarding stigma and stereotypes. The authority justified measures taken to "gentrify" a distressed neighbourhood on the basis that conditions in the area had "serious effects on quality of life owing to unemployment, poverty and social exclusion (…) together with antisocial behaviour, the influx of illegal immigrants and crime."[109] Thus such measures, by their very nature, strongly stereotype poor people. In their joint dissenting opinion before the Chamber, Judges Lopez Huerra and Keller criticized these stereotypes, stating that the "poor do not *per se* pose a threat to public security, nor are they systematically the cause of crime." Such a stereotype is likely to lead to discrimination, especially since "the need to reverse the decline of impoverished inner-city areas (…) can be achieved through other policy measures not tied to personal characteristics."[110] They also underlined that the necessity test under Art. 14 of the Convention should have been applied in this case "since the measure [was] linked to source of income and [was] thus implicitly connected to the social origin and gender of the persons concerned." Although they did not refer to the application of Art. 14 as such, they seem to imply that the ground of poverty should call for strict scrutiny: the poor are a vulnerable group in and of themselves and restrictions applied to this group must be based on a "reasonable relationship of proportionality between the means employed and the aim sought to be realised."[111] Accordingly, the State's margin of appreciation must also be narrower in this context.[112] The argument of discrimination was raised by the applicant and the third party interveners before the Grand Chamber, which dismissed the application without examining the case under Art. 14, based on the procedural "trick" that it was not "open to an applicant, in particular one who has been represented throughout, to change before the Grand Chamber the characterisation he or she gave to the facts complained of before the Chamber," a position which *nota bene* seems to be in contradiction with its own case law.[113] *Garib* constitutes a missed opportunity for the Court to progress on the question of discrimination based on socioeconomic situations, especially in its recognition dimensions and its intersection with other grounds, such as race and gender: "a question particularly compelling in the present case, since the applicant was a single mother living on social welfare."[114] In this context scrutiny under Art. 14 could have changed the outcome of the case, since it would have directly tackled the disadvantages the applicant experienced because of her socioeconomic background.[115] Dissenting Judges Pinto de Albuquerque and Vehabović also stressed the opportunity

[109] *Garib v. the Netherlands*, para. 23.

[110] Joint dissenting opinion of judges Lopez Guerra and Keller in *Garib v. the Netherlands*, para. 1

[111] *Ibidem*, para. 14.

[112] *Ibidem*.

[113] *Garib v. The Netherlands*, para. 101; V. David, S. Ganty, *Strasbourg fails to protect the rights of people living in or at risk of poverty: the disappointing Grand Chamber judgment in Garib v. the Netherlands*, Strasbourg Observers, 16 November 2017, available at: https://bit.ly/2Uufdz7 (accessed 30 May 2021).

[114] *Ibidem*.

[115] Dissenting opinion of Pinto de Albuquerque and Vehabović in *Garib v. the Netherlands*, para 63.

missed by the Grand Chamber to expressly include poverty among the discrimination criteria prohibited under Art. 14.[116]

The Court was probably not ready to take this step. The doors nevertheless remain open, and practitioners should be encouraged to invoke Art. 14 of the Convention, as it is likely to make a difference in disputes involving strong misrecognition elements with respect to people living in precarious circumstances, especially in the context of the pandemic. Indeed, the conclusion of such a case is likely to be different if the Court adopts the perspective of Art. 14 read in conjunction with other Convention articles. Firstly, these "other" free-standing Convention articles do not themselves need to be violated when invoked in conjunction with Art. 14 ECHR, meaning that applicants do not face the above-mentioned pitfalls linked to their protection. Secondly, the proportionality of measures – including those taken during the pandemic – are likely to be evaluated differently under Art. 14 ECHR than under the free-standing Convention rights, since they concern direct or indirect differences in treatment between socioeconomically underprivileged people and the rest of the population. In this respect, in the context of the pandemic it is precisely the proportionality of these measures and the differences in treatment they generate which raise doubts: imposing lockdown measures on poor neighborhoods amounts to ignoring that precarious people are already much more severely affected by the pandemic, for structural reasons beyond their own control or responsibility, and that such lockdown measures – whether neutral or targeted directly at poor people – are likely to have a much greater negative impact on them than on middle or upper classes, as explained in the first part of this paper; a fact with far-reaching consequences in the long term with respect to health, education, psychological and physical wellbeing etc. Finally, as explained in the following sections, Art. 14 ECHR is likely to capture the misrecognition and intersectional issues which are challenging to tackle with other Convention provisions.

Consequently, Art. 14 of the Convention constitutes an additional count to a complaint filed before national courts and the Strasbourg Court in the context of public actions and omissions linked to the pandemic and their effect on precarious people. Socioeconomically disadvantaged people are often victims of both direct and indirect differences in treatment, which potentially raise different questions than under such free-standing Convention rights as Arts. 8 and 3.

3.2.2. Fighting against stigma and stereotyping: a problem of recognition

There are many examples to demonstrate that beyond the material disadvantages that the poor and undereducated face, they are also victims of stereotyping and stigma, which can be defined as "beliefs about the characteristics of groups of people" which are predominantly negative.[117] Stereotypes "serve to maintain existing power relationships; they are control mechanisms. Stereotypes uphold a symbolic and real hierarchy

[116] *Ibidem*.

[117] A. Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 11(4) Human Rights Law Review 714 (2011).

between 'us' and 'them.'"[118] In the 2012 United Nation Guiding Principles on Extreme Poverty and Human Rights, the Special Rapporteur on extreme poverty and human rights underlined that "[p]ersons experiencing extreme poverty live in a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce one another."[119] However, this vicious cycle exists not only for people living in extreme poverty, but more broadly for all socioeconomically underprivileged people. There are many examples in Europe: a family asked to leave a museum because of its "unpleasant" smell;[120] homeless people who are regularly victims of violence;[121] deprivation of parental rights because of poor material living conditions;[122] or refusal of affordable housing to potential tenants who receive social benefits.[123] And these stigma are multiple, as powerfully put by Hershkoof and Cohen regarding the situation of the poor in the US.[124] Against this background, the 2012 UN Guiding Principles expressly state that there is a right to be protected from the negative stigma attached to conditions of poverty, not only by individuals but in particular by public authorities. Therefore, public authorities "must take all appropriate measures to modify sociocultural patterns with a view to eliminating prejudices and stereotypes."[125]

As regards the COVID-19 situation more specifically, several reports have shown that these stereotypes against poor people and minorities are exacerbated in times of pandemic. Indeed, as Earnshaw explains we tend to believe that bad things fall on people who are regarded as "bad," a phenomenon called the "just-world fallacy."[126] In other words, people who suffer more severely from the pandemic than others are considered to have done something wrong and to deserve their suffering. It is also established that many forms of stigma and discrimination have arisen since the identification of COVID-19. The first was xenophobia, directed against people seen as having "brought" the virus to the world.[127] Then populations facing stigma and discrimination previous to the pandemic (e.g. persons with HIV, sexual minorities, sex workers, migrants etc.)

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[118] *Ibidem,* p. 715.

[119] Human Rights Council United-Nations General Assembly, *supra* note 89, pp. 4-8.

[120] C. Rollot, *Une famille pauvre exclue du musée d'Orsay*, Le temps, 31 January 2013, available at: https://www.letemps.ch/culture/une-famille-pauvre-exclue-musee-dorsay (accessed 30 May 2021).

[121] L. Jamet, Ch. Thouilleux, *Davantage de victimes de vol ou d'agression parmi les sans-domicile*, Institut national de la statistique et des études économiques (2012*)*; L. Faragó et al., *Criminalization as a justification for violence against the homeless in Hungary*, The Journal of Social Psychology 14 (2021).

[122] *Soares de Melo v. Portugal*; *Wallovà and Walla v. Czech Republic*.

[123] *E.g.* Centre interfédéral pour l'égalité des chances, *Baromètre de la diversité logement* (2014).

[124] H. Hershkoff, A.S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104(4) Harvard Law Review 896 (1991), p. 912.

[125] Human Rights Council United Nations General Assembly, *supra* note 89*,* p. 21.

[126] V. Earnshaw, *Don't Let Fear of Covid-19 Turn into Stigma*, Harvard Business Review, 6 April 2020, https://bit.ly/3jPDD0O (accessed 30 May 2021); L. Manderson, S. Levine, *COVID-19, Risk, Fear, and Fall-out*, 39(5) Medical Anthropology 367 (2020), pp. 367-370.

[127] *E.g.* Amnesty International, *Mesures prises face à la COVID-19 et obligations des états en matière de droits humains: observations préliminaires* (2020), available at: https://bit.ly/3qNIEs6 (accessed 30 May 2021).

were subjected to further stigma and verbal and physical abuse.[128] Moreover, some lockdown measures were motivated by the belief that these people have a "bad way of life" because they are overrepresented among the infected – as in Madrid – while as previously explained the fact that they are more affected by the pandemic is explained mainly by structural reasons. These stigmatized people are over-represented among socioeconomically disadvantaged populations and their socioeconomic situation contributes to the stereotypes and prejudices to which they fall victim. In fact however, stigma and stereotyping during a pandemic pose a threat to everyone. Research about HIV, Ebola, Hansen's disease and other infectious disease shows that stigma undermines efforts to find and treat diseases. People who fear being socially excluded if they are sick are less likely to get tested or seek treatment if they have symptoms.[129] Prejudice and stereotyping are therefore harmful, in particular for the people who are subjected to them, raising important problems of recognition, as discussed above.

In addition, it has been shown that stigma plays a role in the non-take-up phenomenon, which is particularly relevant with regard to the COVID-19 aftermath measures, and more specifically the vaccination certificates.[130] Indeed, such stigma is likely to be intensified for people who do not have a vaccination certificate – i.e. for people who are not vaccinated (overrepresented among the poor) and likely to find themselves in the situation of "non-take-up."

Stereotypes and stigma against poor and undereducated people are mainly an issue of misrecognition. As such, they can hardly be tackled and grasped through free-standing Convention rights, even when the violation of other rights have been found, such as in the above-mentioned *Wallova and Walla* case.[131] In this context, the social condition status grounds in antidiscrimination law (especially under Art. 14) appear to be the most suitable tool to redress this misrecognition based on someone's socioeconomically underprivileged situation; by acknowledging that in some cases such stigma and prejudice against socioeconomically disadvantaged people is illegal and unacceptable.

Timmer describes this anti-stereotyping analysis in two steps: first, naming stereotypes; and then challenging them.[132] As she rightly puts it, "[t]he goal of a stereotype-

[128] *E.g.* UNAIDS, *Addressing stigma and discrimination in the COVID-19 response* (2020).

[129] Earnshaw, *supra* note 126.

[130] While stigma plays a role, the literature seems divided on the magnitude of its impact. *See* Fuchs et al., *supra* note 11. *See also* H. Kayser, J. Frick, *Take it or Leave it: (Non-)Take-Up Behavior of Social Assistance in Germany*, 121 Journal of Applied Social Sciences 1 (2002), pp. 27–58; J. Stube, K. Kronebusch, *Stigma and Other Determinants of Participation in TANF and Medicaid*, 23(3) Journal of Policy Analysis and Management 509 (2004); Baumberg, *supra* note 12; O. Hümbelin, *Non-Take-Up of Social Assistance: Regional Differences and the Role of Social Norms*, 45 Swiss Journal of Sociology 7 (2019) (claiming that stigma plays an important role) and K. Bruckmeier, J. Wiemers, *A New Targeting: A New Take-Up?*, 43 Empirical Economics 565 (2012); J. Currie, *The Take-Up of Social Benefits*, IZA Discussion Papers No. 1103 (2004) (claiming that stigma plays a role, but a more limited one).

[131] *Wallovà and Walla v. Czech Republic*. On this question *see* David, *supra* note 31, and Ganty (*Poverty as Misrecognition*), supra note 75.

[132] Timmer, *supra* note 117, pp. 718-719. Naming stereotypes implies taking into account the historical context and current impact as well as revealing the stereotypes, *ibidem*, pp. 720-722.

analysis is exposing and contesting the patterns that lead to structural discrimination. Such an analysis aims to render explicit and problematic what society experiences as 'natural'."[133] Such an acknowledgement is essential even when the courts end up ruling in the applicant's favour on the basis of other aspects of the case. Indeed, while recognition is in some instances very symbolic, it is essential to combating structural discrimination and the applicant's sense of humiliation, shame, and unworthiness. It also creates a link with the other dimensions (distribution, participation, and transformation) of the socioeconomic inequalities people experience and which are often the consequences of prejudice and stigma. In other words, denouncing such stigma and stereotypes constitutes a crucial step in tackling issues of misrecognition at a structural level, especially in pandemic times.

3.2.3. Considering the situation as a whole: multiple discrimination

In order to combat all aspects of socioeconomic hardship related to discrimination, discriminatory situations must also be taken into account as a whole, as status grounds – including the socioeconomic status ground – intersect and/or are additive. This is a way to recognise that "privilege and disadvantage migrate across identity categories":[134] single mothers, migrants, "second or third generation" citizens etc. are overrepresented among disadvantaged populations, and when considering discrimination against them the entire situation should be taken into account through the lens of "intersectional" or "additive" discrimination – described under the generic term of "multiple discrimination."[135]

Intersectional discrimination arose from "the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone."[136] This form of multiple discrimination differs from "additive discrimination," "where an individual 'belongs to two different groups, both of which are affected by [discriminatory] practices.'"[137] Over the last few years, the legal literature has paid more attention to intersectional and additive discrimination, even though attention to multiple discrimination is still not widespread in Europe and in European states. Nonetheless, the social condition ground is often neglected in the analysis.[138] This is regrettable, since the "fit" of social condition with other prohibited grounds is not only appropriate, but also vital in recognizing and achieving the ameliorative purposes of human rights."[139] Accordingly, failing to carry out an

[133] *Ibidem*, p. 725.

[134] Fineman, *supra* note 97, p. 21.

[135] *See* S. Hannett, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, 23 Oxford Journal of Legal Studies 65 (2003).

[136] *Ibidem*, p. 68. Kimberley Crenshaw coined the term of "intersectionality": K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 University of Chicago Legal Forum 139 (1989).

[137] Hannett, *supra* note 135.

[138] *Ibidem*.

[139] *See* MacKay, Kim, *supra* note 101, p. 81.

intersectional analysis could result in disadvantaged individuals falling through the gaps of human rights protection. Indeed, when an applicant alleges multiple counts of discrimination, and one of the grounds is left unprotected or not invoked, this can affect the success of the overall discrimination claim.[140] In an extensive report on poverty, *ATD Quart Monde* explains that before the introduction of the economic precariousness ground in French antidiscrimination law, it was very difficult to obtain a comprehensive understanding of the phenomenon of multiple discrimination and to find adequate responses to it.[141] Atrey also rightly emphasises the fact that the dominant framework in antidiscrimination law is "too fixated on grounds or status groups considered independently and in isolation of the poverty which exists within them."[142]

In the context of the pandemic, the intersectional approach in antidiscrimination law – including the ground of social condition – is all the more important as people particularly affected by public actions and omissions can fall into situations of intersectional or additive discrimination. This is the case for irregular migrants, who are excluded from financial aid and the social security system. The same is true of poor neighbourhoods where families "with a migration background" mainly live. A study has shown that the death rate among Bangladeshis in British hospitals is twice that of "white" Britons, while that of Pakistanis and "black" Africans is respectively 2.9 and 3.7 times higher.[143] We therefore do not all have equal access to healthcare systems: race or ethnicity, combined with socioeconomic status, is likely to have a significant impact on these inequalities. The situation of women is also worth mentioning. As Hennette Vauchez reminds us, "it is established that lockdown impacts more heavily the popular and impoverished classes; yet single women and mothers are overexposed to poverty and over-represented in low-payed jobs (the very ones that are now considered essential to the functioning of society)."[144]

The Strasbourg Court recognises certain *groups* living in precarious socioeconomic situations as "vulnerable."[145] It originally used the concept of group-based vulnerability in relation to the Roma minority,[146] but extended it to other groups, such as people

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[140] *See* Hannett, *supra* note 135, p. 72.

[141] J. Ianni et al., *Discrimination et pauvreté. Livre Blanc: analyse, testings et recommandations*, ATD Quart Monde (2013), p. 55.

[142] Atrey, *supra* note 76, p. 424.

[143] L. Platt, R. Warwick, *Are Some Ethnic Groups More Vulnerable to COVID-19 than Others?*, The IFS Deaton Review (2020).

[144] Hennette-Vauchez, *supra* note 14. Own translation from: "il est établi que le confinement pèse plus lourdement sur les classes populaires et paupérisées; or les femmes et mères isolées sont surexposées à la pauvreté et sur-représentées dans les métiers peu rémunérateurs (ceux-là même que l'on juge aujourd'hui essentiels au fonctionnement de la société)."

[145] *See* L. Peroni, A. Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 International Journal of Constitutional Law 1056 (2013).

[146] *E.g.* ECtHR, *D.H. and others v. The Czech Republic* (App. No. 57325/00), 3 November 2007; *Oršuš and others v. Croatia* (App. No. 15766/03), 16 March 2010; *Sampanis and others v. Greece* (App. No. 32526/05), 5 June 2008.

with intellectual disabilities,[147] people living with HIV,[148] and asylum-seekers.[149] Moreover, in some *individual* cases, as in the *B.S.* case,[150] the recognition of discrimination against a vulnerable *person* seems to have been recognised as an instance of intersectional discrimination – regarding a black, female sex worker – although without the Court being explicit on the matter. Despite the many advantages of the concept of "vulnerable groups" and of specific vulnerability where the applicant does not belong to such a group, it might be useful for the Court to explicitly recognise the multiplicity or intersectionality of grounds of discrimination when Art. 14 is invoked, mainly for reasons of "recognition"; especially with respect to stereotyping it is important that courts explicitly name the discrimination ground which constitutes the source and nature of the inequality experienced. Indeed, as Timmer puts it: "[You] cannot change a reality without naming it."[151]

CONCLUSIONS

At the time of this writing, a year after the start of the first lockdown, socioeconomically disadvantaged people seemed more than ever before to have fallen behind the veil of invisibility. Beyond the social, philosophical, and political questions raised by this situation, there is an urgent need to challenge and indict – in light of the law on fundamental rights – the situation of these forgotten people, who are struggling even more to make their voices and plight heard and recognised in the context of the pandemic. In this paper, I have shown that the free-standing Convention rights, including Arts. 8 and 3 ECHR can be operationalized to safeguard the political, civil and socioeconomic interests of socioeconomically underprivileged people. Protection under these articles contains some pitfalls however. In this context, I have demonstrated that the prohibition of discrimination on grounds of one's socioeconomic situation based on Art. 14 ECHR is an important additional tool to protect the rights of people living in precarious situations, especially in times of pandemic. This article supports applicants to challenge disproportionate differences in treatment – both direct and indirect – based on their deprived situation. This is all the more important with regard to issues of recognition grounded in misdistribution. More specifically, I have put forward three main arguments for the importance of invoking the prohibition of discrimination on grounds of socioeconomic situation in times of pandemic. First, such a claim forces courts to deal with this issue directly, making it unavoidable. Second, it is the only efficient way

[147] *E.g.*: ECtHR, *Alajos Kiss v. Hungary* (App. No. 38832/06), 20 May 2010. Peroni, Timmer, *supra* note 145, p. 1057.

[148] *E.g.* ECtHR, *Kiyutin v. Russia* (App. No. 2700/10), 10 March 2011.

[149] *E.g. M.S.S. v. Belgium and Greece*.

[150] ECtHR, *B.S. v. Spain* (App. No. 47159/08), 24 July 2012.

[151] A. Timmer, *Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law*, 63 American Journal of Comparative Law 239 (2015).

to combat the numerous examples of prejudice, stereotyping, and stigma which affect socioeconomically disadvantaged people. Third, the ground of socioeconomic status in antidiscrimination law is often an element of multiple discrimination, and it is necessary to consider a discriminatory situation as a whole. Otherwise, applicants might fall through the gaps.

In a nutshell, the legal tool of discrimination on grounds of socioeconomic status is essential since many of the discriminatory situations that socioeconomically disadvantaged people experience in "normal" times are exacerbated by the COVID-19 pandemic. There is an urgent need for judges, lawyers, organisations, and researchers to use antidiscrimination law to make the invisible visible: the victims of structural and endemic inequalities that the law is struggling to address.

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HUMAN RIGHTS AND THE PROTECTION OF STATELESS PERSONS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *This article analyses the protection of stateless persons under the most recent case law of the European Court of Human Rights (i.e. Hoti v. Croatia and Sudita Keita v. Hungary). The article briefly discusses the phenomenon of statelessness and the basic mechanisms governing it, as well as the general standard for the application of Art. 8 of the European Convention on Human Rights in cases involving foreigners who are stateless. This is followed by a discussion of the aforementioned ECtHR judgments, highlighting their principal findings. Thereafter the impact of UN standards concerning stateless persons on the ECtHR's reasoning is assessed (based on the UNHCR's third-party intervention in Hoti), as well as the differences between the approaches taken by the Strasbourg Court and the UN Refugee Agency. Finally, the treatment of foreigners in the Polish legal system is examined, and the importance of the Hoti and Sudita Keita judgments to the potential improvement of the situation of stateless persons in Poland is assessed.*

Keywords: ECHR, foreigners, migration, statelessness, UNHCR

INTRODUCTION

Statelessness is the condition of a "person who is not considered as a national by any State under the operation of its law."[1] This is an area chiefly regulated by UN conventions. Lately however, the European Court of Human Rights (ECtHR or the Court) has issued its first rulings touching on the special situation of those foreigners who do

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[1] Art. 1(1) of the Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954, 360 UNTS 117.

not hold the citizenship of any state, viewed from the perspective of their rights protected by Art. 8 of the European Convention on Human Rights (ECHR or the Convention). These were the judgments of 26 April 2018 in *Hoti v. Croatia*[2] and 12 August 2020 in *Sudita Keita v. Hungary.*[3] In both cases the Strasbourg Court underscored as an important factual element the circumstance that the applicants were stateless, with their condition having a bearing on the evaluation of the so-called positive obligations of the state as regards regularizing their residence status.

In this article we first identify what statelessness is (Section 1) and then what the basic mechanisms governing it are (Section 2). Subsequently we focus on the general standard concerning the application of Art. 8 of the Convention in cases relating to foreigners (Section 3). This is followed by the analysis of the ECtHR judgments in the *Hoti* and *Sudita Keita* cases (Section 4), and their significance to the status of stateless persons in the state (Section 5). Based on the example of the United Nations High Commissioner for Refugees' (UNHCR) third-party intervention in *Hoti*, we highlight the differences in the ECtHR's approach from the prevailing UN position regarding the protection of stateless persons (Section 6). In the final part we discuss the relevance of the *Hoti* and *Sudita Keita* judgments for the situation of stateless persons in Poland (Section 7).

1. STATELESSNESS: THE PHENOMENON

The number of stateless persons worldwide is estimated at more than 10 million. The plurality, constituting as many as 40%, live in the Asia-Pacific Region. Europe's stateless population is around 600 thousand. Among these, the majority have been made stateless in connection with the respective collapses of the Soviet Union and Yugoslavia in the 1990s. The vast majority of stateless persons living in Europe (80%) inhabit a scarce four countries (Latvia, Russia, Ukraine and Estonia).[4] According to UNHCR data, European countries with the largest stateless population also include Sweden, Germany and Poland.[5] However, the UNHCR estimates might not be reliable because they are based on disparate methodologies. For example, the size of the stateless population in Poland is set at *circa* 10,000, but it is based on the Polish universal census of 2011 which not only relied on declarations but also confounded the categories of "stateless" and "undefined nationality."[6] Whilst the precise size of the constituency does

[2] ECtHR, *Hoti v. Croatia* (App. No. 63311/14), 26 April 2018.

[3] ECtHR, *Sudita Keita v. Hungary* (App. No. 42321/15), 12 May 2020.

[4] *The World's 2017. Stateless and children*, Institute on Statelessness and Inclusion, January 2017, pp. 73–75.

[5] UNHCR, *Global Trends: Forced Displacement in 2015*, 20 June 2016, p. 59.

[6] All told, 2,020 persons declared themselves as stateless and 8,805 persons were declared as being of undefined nationality by the social services, D. Pudzianowska, M. Szczepanik, *Ending childhood statelessness: A study on Poland*, ENS Working Paper 3/15, p. 3, available at: https://bit.ly/3frljsj (accessed 30 April 2021).

not negate the importance of the issue, it should be noted that "[t]he inadequacy of empirical data remains a pertinent and crucial challenge to the protection of stateless persons globally."[7]

The causes of statelessness are complex. Here, it will only be apt to state, by way of a summary, that it can arise from the negative concurrence of citizenship legislation, *i.e.,* lack of synchronization of citizenship law among the various states concerned. It can also be the result of loss of citizenship owing to renunciation by the individual by making the appropriate declaration to this effect before the public authorities. Statelessness can also result from the involuntary loss of citizenship. This may involve loss by operation of the law (*ex lege*) or by a decision of the competent authority (deprivation of citizenship) when legally prescribed grounds are met. In contrast to the above identified grounds relating to individuals, statelessness can also be a collective phenomenon. For example, legislative gaps in provisions adopted to regulate the citizenship situation of persons in relation to state succession is a driver of statelessness on an enormous scale.[8]

The situation of stateless people is unique when viewed against the backdrop of other foreigners, primarily due to the potential for violations of their basic rights. Their access to a lion's share of rights is rendered difficult; including even rights regarded as human rights and thus theoretically not linked to holding the citizenship of any state whatsoever. The stateless person usually has no documents and no practical avenue to regularize residence status, as a result of which access to a number of rights is cut off. Stateless persons usually encounter difficulties moving around, pursuing their private and family lives (e.g. marrying, registering child births), or accessing the courts. There is also a risk of unjustified loss of personal freedom due to a detention order,[9] even when the person concerned comes out before the public authorities on his or her own initiative with the intention of regularizing one's situation.[10] The stateless person often avoids contact with the various institutions and thus becomes particularly vulnerable to all sorts of abuses, such as discrimination or even human trafficking. Stateless persons have no access to diplomatic or consular protection when their rights are being violated.

2. STATELESSNESS AS A REGULATORY PROBLEM

Regulatory issues relating to stateless persons can be addressed on two basic planes. We can distinguish on the one hand treaties against statelessness, such as the 1961

[7] M. Foster, H. Lambert, *Statelessness as a Human Rights Issue: A Concept Whose Time Has Come*, 28(4) International Journal of Refugee Law 564 (2016), p. 569.

[8] For a more extensive treatment of the causes of statelessness see: D. Pudzianowska, *Bezpaństwowość w prawie publicznym* [Statelessness in public law], Wolters Kluwer, Warszawa: 2019, pp. 37–45.

[9] The ECtHR highlighted the extreme exposure of stateless persons in *Kim v. Russia* (App. No. 44260/13), 17 July 2014, para. 54.

[10] Centrum Pomocy Prawnej im. Haliny Nieć, *Ochrona bezpaństwowców przed arbitralną detencją w Polsce* [Protection of stateless persons from arbitrary detention in Poland], 2015.

Convention on the Reduction of Statelessness[11] and – on the regional level – the European Convention on Nationality (ECN).[12] The goal in these treaties is, in a gist, to avert the emergence of new cases of statelessness (prevention) and to bestow citizenship on the stateless persons (reduction). On the other hand, there are instruments for the protection of stateless persons, such as the 1954 Statelessness Convention.[13]

There is a marked tendency in international law to prioritize the instruments of prevention and reduction over those of protection. Since the beginning of the previous century the goal of the international community has remained first and foremost to eliminate statelessness. This is what is happening in the UN system, even though the two mechanisms (counteraction and protection) are regarded as complementary to each other. In turn, the Council of Europe's two basic instruments on statelessness mentioned above, i.e. the ECN and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession[14] do not deal with the protection of stateless persons, but only with the counteraction (*viz.* prevention and reduction) of statelessness. In this connection, the ECtHR's recent case law is all the more interesting as it concerns strengthening the protection of stateless persons.

3. THE ECtHR'S APPLICATION OF ART. 8 ECHR IN CASES OF FOREIGNERS

The ECtHR's case law standard for the protection of stateless persons has been developed as a result of the application of Art. 8 of the Convention to them. This provision has long been applied to cases involving foreigners' residence status. According to ECtHR case law, the Convention does not guarantee to the foreigner a right to reside in any specific state, and the authorities of the latter have a right to regulate foreigners' entry and residence in their territory. Furthermore, the Court has always underscored the principle that states have a wide margin of appreciation in the establishment of rules for foreigners' entry and residence in their territory.[15] Moreover, neither Art. 8 of

[11] Convention on the Reduction of Statelessness, adopted on 30 August 1961 by a Conference of Plenipotentiaries in pursuance of General Assembly resolution no. 896 (IX) of 4 December 1954, 989 UNTS 175.

[12] European Convention on Nationality, signed in Strasbourg on 6 November 1997, Council of Europe, ETS No. 166.

[13] For a more extensive treatment of the regulatory challenges surrounding statelessness, *see* G. Gyulai, *The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime*, in: A. Edwards, L. van Waas (eds.), *Nationality and Statelessness under International Law*, Cambridge University Press, Cambridge: 2014; Pudzianowska, *supra* note 8, Chapters 3 and 4.

[14] Strasbourg, 19 May 2006, Council of Europe, ETS No. 200.

[15] ECtHR, *Chahal v. United Kingdom* (App. No. 22414/93), 15 November 1996, para. 73; Üner *p. Holandii* (App. No. 46410/99), 18 October 2006, para. 54; *Slivenko v. Latvia* (App. No. 48321/99), 9 October 2003, para. 115; *Kurić and Others v. Slovenia* (App. No. 26828/06), 12 March 2014, para. 355; *Abuhmaid v. Ukraine* (App. No. 31183/13), 12 January 2017, para. 101.

the Convention nor any other provision therein guarantees a right to be granted any specific status with regard to one's residence in the territory of a state, provided the solution offered by the state allows the individual to exercise the right to private and family life without hindrance.[16] In other words, it would be *ultra vires* for the ECtHR to rule on whether the individual ought to receive this or that type of residence permit, as the latter decision is left to the discretion of state authorities.[17]

At the same time, the ECtHR's case law stresses that restrictions on a foreigner's residence can in some cases entail a violation of Art. 8 of the Convention. This refers to situations when such restrictions have disproportionate repercussions on the individual's private or family life.[18] The protection stemming from Art. 8 ECHR has undergone a gradual expansion, involving a shift of focus from the protection of family life towards the private life. Particularly in the latter respect the foreigner's links to the respective state's society are given a broad examination. It is already settled case law that this provision also protects the right to form and develop relationships with other persons and the external world, and can sometimes include elements of the individual's social identity. This is of special importance to settled (integrated) migrants.[19] The Court found that the entirety of social links between settled migrants and the societies they live in forms part of the concept of "private life" within the meaning of Art. 8 of the Convention, and accordingly is protected.[20]

Thus, a positive obligation for the state to guarantee the effective enjoyment of private or family life also follows from Art. 8 ECHR. While the concept of negative obligations puts the accent on the state's obligation to refrain from interfering with a right, the essence of a positive obligation – a tradition of long standing with the ECtHR – is to require state authorities to provide effective and accessible means with which to protect the right. This concept of positive obligations of a state under Art. 8 ECHR has supplied the ECtHR with a point of reference for two cases relating to the protection of stateless persons, which are discussed below.

4. RECENT ECtHR CASES INVOLVING THE PROTECTION OF STATELESS PERSONS

In two aforementioned recent cases – *Hoti v. Croatia* and *Sudita Keita v. Hungary* – the ECtHR dealt with the special situation of foreigners not holding the citizenship of

[16] ECtHR, *Aristimuño Mendizabal v. France* (App. No. 51431/99), 17 January 2006, para. 66; *B.A.C. v. Greece* (App. No. 11981/15), 13 October 2016, para. 35.

[17] ECtHR, *Ramadan v. Malta* (App. No. 76136/12), 21 June 2016, para. 91.

[18] ECtHR, *Maslov v. Austria* (App. No. 1638/03), 23 June 2008, para. 100; *Kurić and Others v. Slovenia* (App. No. 26828/06), 12 March 2014, para. 355.

[19] For this category of foreigners, see: D. Pudzianowska, *Obywatelstwo w procesie zmian* [Citizenship in a process of change], Wolters Kluwer, Warszawa: 2013, p. 256.

[20] *See e.g. Maslov v. Austria*, para. 63; *Abuhmaid v. Ukraine*, para. 102.

any state, looking at it from the perspective of their rights under Art. 8 ECHR. In both the judgments the Court stressed that the circumstance of being stateless, giving rise to specific difficulties for the applicants and special obligations owed by the state to them, is an important element of the facts of the case.[21]

4.1. The facts in both cases

4.1.1. *Hoti v. Croatia*

Bedri Hoti was born in Kosovo in 1962 to Albanian parents who had left their home country of Albania and had become recognized as refugees in Yugoslavia. At the time Kosovo was an autonomous province of Serbia within Yugoslavia. In 1979, as a 17-year-old, the applicant left Kosovo to settle in Croatia, which at that time was still part of Yugoslavia. There he received a temporary residence permit (due to the validity of his refugee status throughout Yugoslavia), but his application for permanent residence was refused in 1989 by the minister competent for the interior because of the government's policy of expecting Albanian refugees to apply for Yugoslavian citizenship. The applicant was not interested in becoming a Yugoslavian citizen; he only wanted a permanent residence permit.

Although he had resided in the same town (Novska) ever since arriving in Croatia, his status became complicated after the disintegration of Yugoslavia. In June 1991, after Croatia declared independence, war broke out and the applicant was obliged to render compulsory civil service to the local authority. At that time, he received another temporary residence permit. In June 1992 he applied to become a Croatian citizen, but was unsuccessful as he failed to meet the condition requiring him to resign from his Albanian citizenship.[22] He re-applied in 1995 but was refused again, on that occasion because of his failure to meet the condition of uninterrupted legal residence in Croatia over a period of five years. In May 1996, the administrative court upheld the decision.

In November 2001, the applicant applied to the minister competent for the interior for a permanent residence permit. In July 2003, the minister refused, citing Mr Hoti's failure to meet the statutory grounds and the absence of any state interest, in the minister's view, in granting the permit. The decision was upheld by the administrative court. In October 2008, the Constitutional Court rejected the applicant's constitutional complaint.

Subsequently, from July 2011 to 2013 the applicant's lawful residence was enabled by temporary humanitarian permits (valid for one year). In June 2014, however, upon applying for another such permit he was requested to produce a valid travel document, and because he could not produce one the police authority issued a negative decision. Mr Hoti appealed, but neither the minister, nor the administrative court found any grounds on which to modify or reverse the decision. Nonetheless shortly thereafter, in September 2015, the police in Novska granted him such a permit with the justification

[21] *Hoti v. Croatia*, paras. 24, 110; *Sudita Keita v. Hungary*, paras. 21, 35.

[22] For the sake of brevity, we will not recount the details of Croatian law of citizenship and provisions on foreigners. The ECtHR quotes them on pp. 10–15 in *Hoti*.

that even though Mr Hoti had not produced a travel document the minister had approved the permit. The police issued another such permit in October 2016, also citing ministerial approval.

4.1.2. *Sudita Keita v. Hungary*

The applicant in this case was Michael Sudita Keita, a stateless person (of Somali-Nigerian origin) born in 1985. He entered Hungary illegally in 2002. Thereafter he applied for refugee status, which the Hungarian authorities rejected in the same year. Between 2002 and 2017 he experienced difficulties regularizing his residence in Hungary, except for a period of two years during which he was given a humanitarian permit. Twice (in April 2003 and November 2009) he received decisions ordering his return; decisions which were not enforced. Over several years (2010 to 2017) administrative procedures took place to recognize him as a stateless person. Only in 2017 was he recognized as such.[23] In his application he alleged a violation of the Convention on account of the circumstance that the Hungarian authorities had failed to regularize his residence situation for fifteen years, which violated his dignity and amounted to discrimination. He also asserted that during the period when his residence was irregular, he had no access to unpaid healthcare and could not work legally or marry.

4.2. The pivotal rationale in both cases

In both of the cases the ECtHR first found the applicants' situation to fall within the scope of private life protected under Art. 8 ECHR. The Court noted that Bedri Hoti had resided in Novska for 40 years, worked a variety of jobs there and bonded with the local community. As of the time of the ruling he was 55, had no connection with any other state, nor any contact with relatives residing abroad.[24] Michael Sudita Keita, in turn, had resided in Hungary since 2002, not having residence status in any other state. Since 2009 he had lived with his partner and completed vocational training in Hungary.[25]

Having found the applicants' respective situations to fall within the concept of private life protected under Art. 8 ECHR, the Strasbourg Court went on to consider whether their residence was uncertain and whether such uncertainty in their residential status had a negative bearing on their private lives. In other words, the ECtHR pondered whether an interference with the applicants' respective private lives took place. In *Hoti* the Court stressed that the applicant's residence was indeed uncertain, for it hinged on whether the authorities would grant him a humanitarian permit for yet another

[23] Initially he was refused as not meeting the requirement of legal residence in the country, although the Hungarian Constitutional Court found that requirement to be unconstitutional as a result of the reference made by the court of first instance in the case of Michael Sudita Keital; *see* Hungarian Constitutional Court (6/2015), judgment of 25 February 2015, in English: http://www.refworld.org/cases,HUN_CC,5542301a4.html (accessed 30 April 2021).

[24] *Hoti v. Croatia*, para. 125.

[25] *Sudita Keita v. Hungary*, para. 33.

year. That, in turn, depended on his being able to either produce a travel document – a condition which he was unable to meet because of his statelessness – or receiving the consent of the minister competent for the interior, the nature of which was discretionary. Though the applicant was formally allowed to work, finding employment was difficult on account of his irregular residence situation. The fact of being unemployed and engaged only in off-and-on work negatively reflected on his ability to obtain health insurance and pension rights. In the end, the Court concluded: "(…) particularly in view of the applicant's advanced age and fact that he has lived in Croatia for almost forty years without having any formal or *de facto* link with any other country, (…) the uncertainty of his residence status has adverse repercussions on his private life."[26] It reached the same conclusion in *Sudita Keita*. The ECtHR stressed that the applicant's residence status in Hungary had been uncertain for a period of approximately 15 years. During the time of his entire residence in Hungary, only from 2006 to 2008 did he have a residence permit. That left him without healthcare or employment in Hungary for extended periods of time.[27]

The last step in the analysis of both the cases was for the ECtHR to fit the problems of the regularization of the residence status of stateless persons under the umbrella of positive obligations of the state under Art. 8 ECtHR. The Court held that the states' failure to regularize the applicants' respective residence situations amounted to a violation of Art. 8 of the Convention by virtue of the State's failure to comply with its positive obligation to provide an effective and accessible procedure or combination of procedures enabling the regularization of residence status in a manner respectful of the right to private life.[28]

In *Hoti* the Court emphasized that the state authorities, in rendering their decisions as to residence permits. made no reference whatsoever to matters of the applicant's private life, particularly in the context of his statelessness. Though Croatian authorities had been well familiar with the applicant's situation, and the applicable legislation provided grounds for according him the right of permanent residence on account of his unique personal circumstances, such a permit was never granted. Instead, the lack of any state interest in granting him such a permit was invoked.[29] Similarly, special circumstances relating to the right to private life were not considered by the administrative court. As regards the temporary residence permits on humanitarian grounds, the ECtHR found that they required the applicant to fulfil a condition that he, as a stateless person, was in no position to meet, *viz.* to produce a valid travel document. Moreover, the ECtHR noted that the discretionary nature of the minister's powers with regard to such type of permits reflected negatively on the applicant's situation. Interruption of the continuity of legal residence, owing to the fact that in one year (2014) the minister refused to grant the applicant a residence permit and in subsequent years (2015 and 2016) did grant

[26] *Hoti v. Croatia*, para. 126.
[27] *Sudita Keita v. Hungary*, para. 34.
[28] *Hoti v. Croatia*, para. 141; *Sudita Keita v. Hungary*, para. 41.
[29] *Hoti v. Croatia*, para. 134.

it, frustrated his ability to meet the condition of uninterrupted legal residence in the procedure for a permanent residence permit.[30]

In *Sudita* the ECtHR emphasized that the application considered not the applicant's inability to obtain the status of a stateless person in Hungary,[31] but the inability to have the applicant's residence status regularized over fifteen years. Accordingly, it was not for the Court to decide whether the applicant ought to have been accorded stateless status (as he ultimately was in 2017), but instead to examine whether he had had access to an effective avenue for regularizing his residence in such manner as would have allowed him to live a stable private life in Hungary. The Court found that access to any such procedure had not been available to the applicant, even though the authorities had been aware of the special circumstances of his personal situation. In particular, they were aware of his statelessness, as the Nigerian Embassy in Budapest had in 2006 denied that he was a Nigerian citizen.[32]

5. NEW ELEMENTS IN EACH CASE AND REFERENCE TO UN'S CONVENTION STANDARD

It is of extraordinary significance that in both cases the ECtHR emphasizes that the applicant foreigners are stateless persons.[33] Thus the Court noted the existence of a special category of immigrants who are stateless, and – as it follows later in the Court's rationale – can accordingly be entitled to special rights. In outlining the standard for the protection of stateless persons, the ECtHR referred to the standards of protection of stateless persons set forth in the 1954 Convention relating to the Protection of Stateless Persons.[34] This is understandable given that the protection of stateless persons is not the subject matter of any of the Council of Europe's conventions. Accordingly, the ECtHR filled the gap in the Council of Europe system with its own case law referencing the general provisions of the European Convention on Human Rights (Art. 8) and the 1954 Convention relating to the Protection of Stateless Persons.

5.1. Prohibition of impossible conditions

The Court invoked Art. 6 of the 1954 Convention, which mandates that stateless persons cannot be faced with requirements that they, because of their statelessness, cannot

[30] *Ibidem*, paras. 81, 139–140.

[31] Hungary implemented a procedure to determine stateless status in 2007 (UNCHR, *Establishing Statelessness Determination Procedures for the Protection of Stateless Persons*, Good Practice Papers, July 2020, p. 29).

[32] *Sudita Keita v. Hungary*, paras. 36, 38.

[33] *Hoti v. Croatia*, para. 127; *Sudita Keita v. Hungary*, para. 35.

[34] The Office of the United Nations High Commissioner for Refugees, whose mandate also includes the protection of stateless persons, filed an *amicus* brief in Hoti, recounting UN standards in this matter.

meet.[35] In *Hoti* the Court pointed out that the main obstacles on the applicant's path to citizenship or a residence permit came from being required to renounce his previous citizenship and to produce a valid travel document, each of which (but especially the former) is a condition which stateless persons are not in a position to meet. In *Sudita Keita* the ECtHR also emphasized that the condition of legal residence – required until 2017 for the recognition of the status of a stateless person – was impossible to meet, thus violating the provisions of the 1954 Convention.[36]

This last element of the judgment may be seen as an indication that the ECtHR is now going to take a negative view of any regulations demanding stateless persons to produce a valid travel document, even where such an obligation is not expressly imposed by the provisions of the law but follows indirectly from how prior legal residence must be demonstrated in order to receive a residence permit and how in turn a travel document may be required for that.

5.2. No impact of the voluntary nature of statelessness on entitlement to protection

Another interesting angle in *Hoti* is the voluntary nature of the applicant's statelessness. The ECtHR considered the significance of Bedri Hoti's refusal in 1989 to apply for Yugoslavian citizenship to the evaluation of the authorities' conduct.[37] In the context of this discussion it will be expedient to distinguish the different categories of stateless persons,[38] putting us in a better position to discuss the ECtHR's views expounded in this case.

The category of "voluntary stateless persons" includes two basic categories of statelessness. The former consists of people who have become stateless by their own actions. The source of their statelessness is of crucial importance here. The category of voluntary stateless persons, however, will not always necessarily involve a common "voluntary" source of statelessness. Thus, secondly one has to regard as voluntary stateless persons those who have become so for other reasons, independently of any action on their part (e.g. territorial changes, conflicting legislation) but who subsequently do not wish to obtain (regain) the citizenship of a state with which they have a bond, despite being entitled to do so. The statelessness of such persons – due to their existing ability to regain citizenship – is not a compulsory situation but a result of their informed choice. With

[35] Art. 6 provides: "For the purpose of this Convention, the term 'in the same circumstances' implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a stateless person, must be fulfilled by him, with the exception of requirements which by their nature a stateless person is incapable of fulfilling."

[36] Both Croatia and Hungary are parties to this Treaty — Croatia since 12 October 1992 and Hungary since 21 November 2011; see: https://www.unhcr.org/protection/statelessness/3bbb0abc7/states-parties-1954-convention-relating-status-stateless-persons.html (accessed 30 April 2021).

[37] In 1989 he was encouraged to take Yugoslavian citizenship but was not interested; *Hoti v. Croatia*, paras. 12, 13.

[38] *See* more broadly Pudzianowska, *supra* note 8, Chapter 8.

regard to this group, one could speak of "voluntary statelessness by one's own conduct" (active voluntary statelessness); while with regard to the other group one may speak of "voluntary stateless by inactivity" (passive voluntary statelessness).[39]

B. Hoti's situation could thus be described as one of a "passive voluntary stateless person" (having lost citizenship through no initiative of his own but subsequently preferring to remain stateless). In this context the Court decided that a stateless person, just as any other foreigner, may wish to continue to reside in the territory of a state without becoming its citizen. The ECtHR emphasized that the application did not concern the inability to obtain the citizenship of a given state, but the lack of options to regularize the residence status of the applicant. The principal question up for ruling before the Court therefore came down to whether the applicant, having decided against applying for Yugoslavian citizenship (or not having obtained it), had a right to regularize his residence status so as to "enjoy private life" in Croatia.[40] Thus the Court drew no adverse inference from the applicant's statelessness being attributable to his own conduct.[41]

Interestingly, the UNHCR's soft law[42] formulates a more complex (and more detailed) standard for voluntary statelessness. Albeit the voluntary renunciation of citizenship must not affect the recognition of an individual's stateless status in the light of Art. 1(1) of the 1954 Convention, states are entitled to introduce different rules for the protection of such persons. UNHCR documents include a legal qualification of voluntary statelessness along with specification of the scope in which such persons may receive different (i.e., worse) treatment with regard to protection. According to the UNHCR Handbook, having become stateless voluntarily may affect one's treatment by a state. However, the limitations on the protection of voluntary stateless persons provided for in the UNHCR Handbook apply only to active voluntary stateless persons, especially those having lost their citizenship "for convenience or by choice" (who could thus be regarded as being stateless "in bad faith")[43] and do not extend to passive voluntary stateless persons, i.e. people in a similar situation to Mr B. Hoti. As the ECtHR did not elaborate further on this matter, it is not known whether the Court would have regarded the issue of voluntary statelessness as irrelevant also in the case of loss of citizenship effected through one's own "bad-faith" conduct.

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[39] The terms "active voluntary statelessness" and "passive voluntary statelessness" were first proposed by K. Swider, *A Rights-Based Approach to Statelessness*, unpublished Ph.D. thesis defended at the University of Amsterdam, 2018, p. 160.

[40] *Hoti v. Croatia*, para. 131.

[41] Swider also notes this; see: K. Swider, *Hoti v. Croatia: A Landmark Decision by the European Court of Human Rights on Residence Rights of a Stateless Person*, Statelessness, 3 May 2018, available at: https://bit.ly/3uvYLLk (accessed 30 April 2021).

[42] *See* UNHCR, *Handbook on Protection of Stateless Persons*, Geneva 2014 and UNHCR, *Expert Meeting: The Concept of Stateless Persons under International Law*, May 2010.

[43] According to the UNHCR Handbook, this means persons who: "voluntarily renounce a nationality because they do not wish to be nationals of a particular State or in the belief that this will lead to grant of a protection status in another country," UNHCR (*Handbook*), *supra* note 42, para. 161.

5.3. Liberal standard of proof

Hoti also has an interesting evidentiary aspect with regard to the determination of statelessness. The Court found it "striking"[44] that despite being aware of the applicant's statelessness (as indicated by his birth certificate issued by Kosovar authorities in the procedure for the extension of his residence permit on humanitarian grounds), Croatian authorities held him out be a Kosovar citizen. In this respect the ECtHR invoked the principle of Art. 25(1) of the 1954 Convention concerning administrative support: "When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities." The Court took a negative view of how, despite the applicant's statelessness being obvious from documents known to Croatian authorities, the administration never assisted the applicant to contact the authorities of the other state to resolve his situation.[45] The Court also pointed out that there had been no basis on which to doubt the applicant's assertions that Albanian authorities did not regard him as a citizen (despite the absence of evidence of any such contact with the Albanian administration).[46]

The above line of argument from the ECtHR demonstrates a liberal approach to the standard of proof in determining the status of a stateless person. K. Swider is correct in observing that the ECtHR does not concur with state authorities' view that the applicant bears the burden of proof to demonstrate his statelessness, but rather the Court expects the state to co-operate in the determination of the statelessness of foreigners.[47]

This split burden of proof between the applicant and the administration is also consistent with the recommendations of the UNHCR that the procedures should impose the burden on both the applicant and the authorities. The UNHCR regards it as a sufficient evidentiary threshold if the statelessness is established to a reasonable degree. It is noted that the evidence-gathering and fact-finding requires collaboration between the applicant and the authority. Applicants have a duty to speak the truth and present their personal situation with as much accuracy as possible and submit all the available evidence. The decision-making authority, on the other hand, has a duty to gather and adduce all available evidence (such as it may be reasonably expected to) in order for it to be able to make an objective determination of the applicant's status. It is regarded as a sufficient evidentiary threshold if the statelessness is established to a reasonable degree.

This splitting of the burden of proof, and its moderate weight on the stateless person (essentially required only to demonstrate the probability of being stateless), is of profound importance in this type of cases due to "the difficulties inherent in proving

[44] *Hoti v. Croatia*, para. 138.
[45] *Ibidem*, para. 138.
[46] *Ibidem*, para. 110.
[47] Swider, *supra* note 41.

statelessness (…)."[48] In this type of procedure the subject-matter of the evidentiary efforts is a negative circumstance (*viz.* the lack of citizenship of any state), which in practice is difficult for applicants to prove. Due to the essence of statelessness, individuals are often unable to support their claim with documentary evidence. Many are not in a position to, or do not know they need to, embark on a review of the citizenship legislation of the states they have links with due to having been born in their territory, or the fact of their parents being citizens, or marriage, or habitual residence. Furthermore, liaising with the authorities of other states in order to obtain information about the individual's case or about the citizenship law of a given state and the implementation of that law is of fundamental importance to drawing the ultimate conclusion as to the individual's statelessness. In many cases the authorities of other states only respond to such inquiries from representatives of authorities of other states, and not from individuals.[49]

6. DIFFERENCES BETWEEN THE ECtHR'S AND THE UNHCR'S APPROACHES TO STATELESS ON THE EXAMPLE OF THE THIRD-PARTY INTERVENTION

The ECtHR's approach to statelessness in *Hoti* differs from the position proposed by the UNHCR in its third-party intervention (*amicus* brief) filed in the case.[50] While the ECtHR's judgment took account of the standard developed under the 1954 Convention, a position which doubtless may have been prompted by this *amicus* brief, nevertheless the Court's approach shows significant differences from the UNHCR's position expounded therein. The Office of the UNHCR puts emphasis on stateless persons' right to citizenship and on the Convention provisions referring to the limitations imposed on the states' powers by international law in the area of regulating the acquisition, change, or loss of citizenship.[51] The ECtHR's analysis in *Hoti* was conducted from a different perspective. In that perspective the stateless person ought to have guaranteed access to procedures enabling the regularization of his or her residence status, but not necessarily the acquisition of citizenship.

The UNHCR's position voiced in its third-party intervention, conceding priority to counteracting mechanisms, is also visible more generally in UN documents on statelessness. The UNHCR Handbook notes that the drafters of the 1954 Convention:

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[48] UNHCR (*Handbook*), *supra* note 42, para. 91.

[49] UNHCR, *supra* note 31, pp. 5–6.

[50] Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Bedri Hoti v. Croatia* (App. No. 63311/14). Third-party interventions (also referred to as *amicus curiae*) are pleadings filed under Art. 36(2) ECHR: "The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceeding or any person concerned who is not the applicant to submit written comments or take part in hearings."

[51] *See* paras. 2.3.2 and 2.3.3 of the third-party intervention, available at: https://bit.ly/3fMuYIU (accessed 30 April 2021).

"intended to improve the position of stateless persons by regulating their status. That said, as a general rule, possession of a nationality is preferable to recognition and protection as a stateless person."[52] A different UNHCR document states that the protection of stateless persons does not substitute for citizenship and the 1954 Convention requires the state to facilitate the naturalization of stateless persons.[53] This approach is also manifested in the UNHCR's #IBelong Campaign to End Statelessness campaign, conducted since 2014 with the goal of eradication of statelessness by 2024.[54]

This is a long-standing tradition within the United Nations, as since the time of World War II statelessness has been viewed in its forum as an "evil" that must be eradicated, while the instruments of protection have been presented as transitional solutions until such time as the individual concerned may obtain citizenship from some state.[55] The view of statelessness as an evil to be eliminated has been closely linked to the negative impact of statelessness on the international order, with the latter fact having been the core motivation for the attempts to regulate this problem in international law in the 1920s, and subsequently just after World War II. In the 1990s, with the disintegration of such states as Yugoslavia, Czechoslovakia and the USSR, the potential of statelessness to be a source of regional tensions came to the surface again.[56] It is noteworthy that the potential of statelessness to trigger tensions leading to conflicts between communities provides the basis for the OSCE's mandate in the area.[57]

The ECtHR's position reflects a different outlook – more realistic in our opinion – on statelessness, whereby in some specific situations the unwillingness to become a citizen may be understandable and should not preclude the ability to regularize one's residence status. The ECtHR's position voices a pragmatic approach, according to which the basic rights of stateless persons gain the necessary minimum of protection from safe, i.e. regularized, residence, however non-ideal the situation may be (at least for some stateless persons). The ECtHR does not concern itself with whether statelessness is something to be eliminated. The Court's approach is not inspired by the logic of a global international order, which is closer to the UN, but by the logic of human-rights protection. The Court's position must, of course, have been influenced by the fact that the applicants in *Hoti* and *Sudita* did not allege a lack of access to citizenship.

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[52] UNHCR (*Handbook*), *supra* note 42, para. 14.

[53] UNHCR, *Introductory Note by the Office of the UNHCR to the 1954 Convention*, Geneva 2014.

[54] *See* https://www.unhcr.org/ibelong-campaign-to-end-statelessness.html (accessed 30 April 2021).

[55] *See* United Nations, *A Study of Statelessness*, Lake Success – New York, August 1949, E/1112; E/1112/Add.1, p. 10: "The two problems — the improvement of the status of stateless persons and the elimination of statelessness — though quite distinct, are complementary. However necessary and urgent, the improvement of the status of the stateless person is only a temporary solution designed to attenuate the evils resulting from statelessness. The elimination of statelessness, on the contrary, would have the advantage of abolishing the evil itself, and is therefore the final goal."

[56] UNHCR, *Citizenship and prevention of statelessness linked to the disintegration of the Socialist Federal Republic of Yugoslavia*, European Series 3(1), Geneva, June 1997.

[57] OSCE & UNHCR, *Handbook on statelessness in the OSCE Area. International standards and good practices*, 28 February 2017, p. 6.

The judgments in *Hoti* and *Sudita Keita* were made with reference to state parties of the 1954 Convention. Nonetheless, the ECtHR's guidelines on the status of stateless persons, contained in both of the cases, are relevant not only to those states and even not only to Council of Europe member states having ratified the Convention. The interpretation of Art. 8 of the Convention in the Court's judgment – in which it expounds on states' positive obligations owed to stateless persons – is pertinent to all Council of Europe member states (the *res interpretata* effect).[58]

7. EXAMPLES OF PROBLEMS WITH THE REGULATION OF STATELESSNESS IN POLAND FROM THE PERSPECTIVE OF ECtHR JUDGMENTS

Poland is a good example by which to illustrate the importance of the ECtHR judgments in question, given that Poland has not ratified the UN conventions on statelessness and the country's legislation on the protection of stateless persons is adventitious and inconsistent.[59]

Poland's legal order does not contain a separate definition of a stateless person. According to the definition in the Act on Foreigners,[60] a foreigner is anyone without Polish citizenship (Art. 3(2)). This is a negative definition that makes it possible to distinguish between Polish citizens and foreigners. The lack of any distinction for stateless persons as a separate category among foreigners results in a sort of "invisibility" of that category, fraught – as highlighted at the beginning of this article – with its own highly specific problems.

There is no effective and accessible procedure or combination of procedures in Poland's legal system to enable stateless persons to regularize their residence situation in the way that the ECtHR demands in *Hoti* and *Sudita Keita*. The obstacle usually lies in not having the appropriate identity documents[61], with the resulting irregularity of residence in Poland. At the same time, there is no provision clearly stipulating statelessness as grounds for a residence permit. Exceptionally, provisions governing residence permits issued in special circumstances, even to foreigners residing in Poland illegally, can apply to stateless persons. This includes the necessity to respect family life (Art. 187(6) of the Foreigners

[58] *See* more broadly A. Bodnar, *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka w Polsce. Wymiar instytucjonalny* [Implementation of the European Court of Human Rights rulings in Poland. Institutional dimension], Wolters Kluwer, Warszawa: 2018, pp. 139–143.

[59] More broadly on this topic see: D. Pudzianowska, *„Opatrzność" czy „nieopatrzność" ustawodawcy? O ochronie bezpaństwowców w prawie polskim* ["Carefulness" or "carelessness" of the legislator? About the protection of stateless persons in Polish law], in: J. Jagielski, M. Wierzbowski (eds.), *Prawo administracyjne dziś i jutro*, Wolters Kluwer, Warszawa: 2018, pp. 683-692.

[60] *Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach* [Act of 12 December 2013 on Foreigners], Official Journal 2013, item 1650.

[61] A stateless person may apply for a "Polish identity document for a foreigner"; however, not every stateless person can obtain such a document – adult stateless persons can obtain it only if "the interests of the Republic of Poland warrants it" (Art. 260.1 (3) of the Foreigners Act).

Act) and protect children's rights (Art. 187(7) of the Act). A discretionary decision with a wide margin of appreciation is enabled by Art. 187(8) of the Act, which provides that a demonstration of circumstances other than those set out in the provisions on temporary residence may justify temporary residence. Temporary permits allow residence in Poland for a period up to 3 years (Art. 98(3)) and offer the hope of a permanent residence permit over a longer time horizon upon the fulfilment of additional conditions. However, for the majority of stateless persons the availability of this avenue is theoretical only.[62]

Another example of problematic legislation from the perspective of the above-described ECtHR standard, where the Strasbourg Court points out the prohibition against creating impossible conditions for stateless persons to meet, is Art. 30 of the Act on Polish Citizenship, providing for a simplified naturalization procedure (recognition of Polish citizenship) for persons with no citizenship whatsoever. In line with this provision, stateless persons having resided in Poland for at least two years without interruption based on one of the types of permanent residence permits may apply to the voivode (provincial governor) to be recognized as Polish citizens. Formally, their acquisition of Polish nationality is facilitated in comparison to the regular category of foreigners,[63] as the required duration of residence under the aforementioned residence permits is shortened by one year and there is no need to demonstrate a stable and regular source of income and legal title to one's dwelling.[64] However, this provision needs to be regarded as another one that confers a right "on paper" only due to the fact that – as mentioned above – stateless persons have very limited options to apply for a residence permit.[65]

The above examples illustrate that the legislation on statelessness in Poland's legal order is not well-thought-out, and that it often confers "rights on paper" that cannot be exercised in practical terms. In this regard the ECtHR's recent case law on stateless persons sends a clear signal as to the direction in which this legislation should be re-ordered and developed so as to provide stateless persons with the required level of protection.

CONCLUSIONS

The protection of stateless persons has for many years remained in the shadows of the problems of counteraction (i.e. prevention and reduction) of statelessness. For this

[62] Centrum Pomocy Prawnej im. Haliny Nieć, *Niewidzialni bezpaństwowcy w Polsce* [Invisible stateless persons in Poland], 2013, pp. 18-19.

[63] Art. 30(1)(1) of *Ustawa z 2 kwietnia 2009 r. o obywatelstwie polskim* [Act of 2 April 2009 on Polish Citizenship], Official Journal 2012, item 161.

[64] *Ibidem*, Art. 30(1)(2b).

[65] Both these problems (limited options to apply for a residence permit and – in consequence – the impossibility to make use of facilitated naturalisation) are illustrated by the case of a 16-year-old stateless girl who was born in Poland and whose foster parents were unable, for over 16 years, to obtain a residence permit for her because the Voivode required them to present her identity documents. They were unable to apply for nationality in the procedure before the Voivode (on the basis of Art. 30 of the Act on Polish Citizenship) due to the lack of a permanent residence permit. For a detailed description of this case see: Pudzianowska, Szczepanik, *supra* note 6.

reason, one should welcome the fact that the ECtHR recognizes in its case law the existence of a special category of migrants who are stateless and the existence of positive obligations on the part of the state with respect to the necessity to create legal mechanisms to regularize their residence situations in a way that is respectful of their private lives. Thus the Court fills the gap left in the Council of Europe's legal system, in which the protection of stateless persons is not the subject-matter of the relevant conventions.

In its formulation of the requirements with respect to an effective and accessible procedure (or combination of procedures) to regularize residence status, the Strasbourg Court took recourse to the standards expressed in the UN system. In doing so the Court took a selective approach to that standard, adapting it to the needs of the Court's own judicial activities, which prioritize the protection of stateless persons and not the safeguarding of avenues to citizenship. Hence, the Court referenced the 1954 Convention relating to the Protection of Stateless Persons but not the 1961 Convention on the Reduction of Statelessness (or the ECN).

In reference to the 1954 Convention the ECtHR stressed the importance of such principles as (1) the prohibition of requirements which are impossible for stateless persons to meet, such as the need to renounce citizenship or produce a travel document; (2) the lack of impact of the voluntary nature of statelessness on the entitlement to protection; and (3) splitting burden of proof and a moderate evidentiary threshold in procedures for the determination of stateless status.

The path taken by the Court should be regarded as praiseworthy, spurring the hope that it may lead Council of Europe member states, including Poland, to realize the unique situation of stateless persons among other foreigners and strengthen the mechanisms for their protection. In addition, a diligent analysis of the judgments in *Hoti* and *Sudita Keita* leads to the conclusion that they may be received as a breath of fresh air in cases relating to foreigners, and an argument in favour of alleviating the complaint of judicial stagnation in cases relating to foreigners.[66]

[66] Jean-Paul Costa, ECtHR President in 2007–2011, had this to say in one of his interviews: "Dans celui du droit des étrangers, et en particulier des migrations, la jurisprudence n'est sans doute pas à la hauteur de ce qu'on pourrait espérer" [In the field of the law of foreigners, and in particular of migration, the jurisprudence is undoubtedly not up to what one would expect], N. Hervieu, *Entretien avec Jean-Paul Costa, juge à la Cour européenne des droits de l'homme*, 18 La Revue des droits de l'homme (2020).

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DE FACTO POWER GRAB IN CONTEXT: UPGRADING RULE OF LAW IN EUROPE IN POPULIST TIMES

Abstract: *Over the last three years European Union (EU) law has experienced a veritable revolution triggered by the Court of Justice's rethinking of the fundamental aspects underpinning both the EU's competence to deal with Rule of Law matters (especially related to the independence and the irremovability of judges at the national level), and the substantive understanding of the key elements of the Rule of Law pertaining to the newly-found competence. An upgraded approach to interim relief in matters related to the Rule of Law completes the picture. As a result, EU law has gone through a profound transformation and the assumptions as to the perceived limits of its reach – insofar as the organization of the national judiciaries is concerned – no longer hold. However, there is also the opposite side to this "Rule of Law revolution." While its effectiveness in terms of bringing recalcitrant Member States back on track has not been proven (and Poland and Hungary stand as valid reasons for doubts); the division of powers between the Member States and the EU has been altered forever. Rule of Law thus emerges as a successful pretext for a supranational power-grab in the context of EU federalism. The picture is further complicated by the fact that the substantive elements of the Rule of Law required by the Court of Justice of the European Union of the Member States' judiciaries are seemingly perceived as inapplicable to the supranational level itself. These include structural independence from other branches of power and safeguards of the guarantees of irremovability and security of tenure of the members of the judiciaries. Taking all these elements into consideration, the glorious revolution appears to have triggered at least as many questions as it has provided answers, while being entirely unable to resolve the outstanding problems on the ground in the Member States experiencing significant backsliding in the areas of democracy and the Rule of Law.*

Keywords: backsliding, Court of Justice, Hungary, judicial independence, Poland, Rule of Law

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INTRODUCTION

The task of this brief engagement is to provide a concise *tour d'horizon* of the developments in European Union (EU or Union) law in the field of the Rule of Law over the recent years – developments which have significantly reinforced the powers of the supranational institutions in domains which previously have never been considered part of the EU's supranational competence/purview of regulation. While the EU has thereby matured, entering a period of new, more credible claims of "constitutionalism," the end solution of the problems which this *de facto* power grab was intended to resolve is nowhere in sight. Delegating contentious issues to "Europe" does not bring about the expected dividends in the populist times, inviting a conversation about alternative approaches and the solutions required.

This article is divided into two parts. The first outlines the core innovations in the area of the Rule of Law brought about by the Court of Justice over the last three years, including a profound reinterpretation (expansion) of the EU's power in this domain; a formulation of EU-level standards applicable to the organization of the judiciaries at the national level; and a rethinking of the ways to enforce the newly-acquired competences and newly-formulated standards. The second part focuses on the implications of the recent developments for the EU itself, as well as offers a view of the progress sketched out in the first part measured against the modest, if not absent, successes on the ground achieved in those countries experiencing Rule of Law backsliding and attacks on the independence of their judiciaries. This analysis sheds new light on the EU's achievements. On the one hand, the Court of Justice (ECJ) does not view itself as bound by the elements of the Rule of Law it has just formulated, and on the other, despite having acquired a vast new competence through a revolutionary reinterpretation of one of the mainstay provisions of the Treaties, the EU has so far failed to attain any successes in that area of the Rule of Law which was used as a reason for explaining the need for the deep reinterpretation in the first place. The resulting picture is mixed: while Rule of Law continues to be undermined in Hungary and Poland as before, the EU is more powerful than ever, even if seemingly oblivious to the values and standards it has just articulated as a pretext for endowing itself with the immense new powers. Both the power-grab and its context matter. As things stand today, the Court of Justice emerges as the only beneficiary of the recent developments, even if not bound by the substance of the values it set out to promote (unsuccessfully for the Rule of Law in Poland – successfully in terms of its own powers).

1. DISCOVERING THE RULE OF LAW – REINVENTING THE UNION

In dealing with the Rule of Law backsliding in the EU, the Court of Justice managed to turn the proclamation-based Rule of Law value of Art. 2 of the Treaty on European

Union (TEU) into an enforceable substantive principle of law, spanning across both the EU and national legal orders. Adherence to the Rule of Law has always been praised as an essential feature of the EU's constitutionalism. At the same time the Union possessed – so it seemed – no competence to intervene in those cases where backsliding occurred at the national level.[1] And of course there is nothing close to the US National Guard in the EU to help restore law and order in the recalcitrant Member States.[2]

This competence lacuna had to be filled sooner or later, allowing the EU to graduate into a true constitutional system that actually stands by its principles[3] – and the case law of the last three years could be interpreted as commencing precisely this kind of transformation. Given its vital importance and combined with its innovative nature, one could characterize it as a welcome power grab – an organic part of the usual incrementalism in the development of EU law, but going further than usual this time. The question thus arises: What are the main aspects of this development? Four interrelated component parts can be identified:

1. The Court has managed, firstly, to turn the presumption of compliance with the rule of law into an enforceable promise backed by the necessary competence to intervene.[4]
2. Moreover, the Court of Justice has also articulated the core substantive elements of the supranational rule of law[5] which it has the competence to enforce, going beyond the circularity of the definition offered in *Les Verts* and focusing predominantly on judicial independence.[6]
3. The Court has moved on to ensure that its newly-found substance of the rule of law, which cuts through the legal orders, is actually effectively enforceable and that this enforcement includes ample possibilities for interim relief, including interventions to reverse the structural changes made by the member states to their judicial systems and, crucially, the empowerment of the *national courts* of the Member States, with the help of EU law, to do the same.[7]
4. As a consequence, lastly, the Court of Justice has joined the emerging trend, observable around the world, whereby international bodies and courts play

[1] *But see* C. Closa, D. Kochenov, J.H.H. Weiler, *Reinforcing the Rule of Law Oversight in the European Union*, EUI RSCAS Research Paper No. 25/2014.

[2] M. Tushnet, *Enforcement of National Law against Sub-National Units in the United States*, in: A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values: Methods against Defiance*, Oxford University Press, Oxford: 2017.

[3] A. Williams, 2009, *Taking Values Seriously: Towards a Philosophy of EU Law*, 29(3) Oxford Journal of Legal Studies 549 (2009).

[4] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, EU:C:2018:117 [GC].

[5] For a now classical account, *see* L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper Series No. 4/2009. Cf. R. Janse, *De renaissance van de Rechtsstaat*, Open Universiteit, Heerlen: 2018.

[6] K. Lenaerts, *New Horizons for the Rule of Law within the EU*, 21(1) German Law Journal 29 (2020).

[7] Case C-441/17 *Commission v. Poland*, Order of the Court of 20 November 2017 [GC]; P. Wennerås, *Saving a Forest and the Rule of Law: Commission v. Poland*, 56 Common Market Law Review 541 (2019).

an increasing role in the structuring and organization of the judiciaries at the national level.[8]

All these changes could not but lead to a significant upgrade of the Rule of Law standards also at the supranational level, as the Court had to take into account the recent significant advances in the understanding of the Rule of Law and apply them to those well-tested areas of EU law, such as the guarantees of independence of those bodies meeting the standards of "court or tribunal" in the context of Art. 267 of the Treaty on the Functioning of the European Union (TFEU), as well as welcoming direct actions by the Commission against the Member States whose courts fail to take a meaningful part in the dialogue with the Court of Justice. This inter-court dialogue, which the Court of Justice is officially striving to protect, is thus no longer a dialogue between equals, as Araceli Turmo has amply demonstrated.[9] This is reflected in the fact that the questionable judicial genre of a press release is at times required to remind the national-level interlocutors of such *status quo*.[10]

1.1. Turning the presumption into an enforceable promise

The most recent case law reinventing the EU's Rule of Law calls for a new way of approaching the Union; moving from a system of "declaratory" Rule of Law[11] – where the adherence of the national authorities to this principle is merely a presumption – to a constitutional system where this presumption is being gradually replaced by the principle of full adherence to the Rule of Law as a fact. This gives rise to the possibility of checking whether this presumption holds true, combined with the possibility to police serious deviations *both* in the political *and* in the legal contexts. The consequence of the most recent case law is the articulation of the rule of law as a workable principle of law applicable across the legal orders in the EU. Indeed, if only an actual – as opposed to a declaratory – Rule of Law system can lend some truth to its "constitutional" characterization, then the EU is only now, before our eyes, becoming a constitutional Rule of Law-based system.

This swift transformation of the law which this fundamental shift entails – both at the supranational and the national levels – is the result of the revolutionary case law handed down over the past three years by the ECJ, beginning with the *Portuguese Judges* ruling, where the Court for the first time in EU history turned to Art. 19(1) para. 2 TEU in order to kill two birds with one stone. Firstly, it gave clear EU law substance to the value of the rule of law in Art. 2 TEU, thus elevating the independence of the judiciary to a new level in both theory and in practice in the context of the EU legal

[8] D. Kosař, J. Baroš, P. Dufek, *The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism*, 15(3) European Constitutional Law Review 427 (2019).

[9] A. Turmo, *A Dialogue of Unequals: The European Court of Justice Reasserts National Courts' Obligations under Article 267(3) TFEU*, 15(2) European Constitutional Law Review 340 (2019).

[10] J. Lindeboom, *Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the PSPP Judgment*, 21(5) German Law Journal 1032 (2020).

[11] D. Kochenov, *Declaratory Rule of Law: Self-Constitution through Unenforceable Promises*, in: J. Přibáň (ed.), *The Self-Constitution of European Society beyond EU Politics, Law and Governance*, Routledge, Abingdon: 2016, p. 159.

system. Secondly, it found a way to articulate EU law jurisdiction in cases involving threats to judicial independence at the *national* level, *de facto* broadening the material scope of EU law to a significant extent.

It goes without saying that such a broadening, the possibility of which was predicted by eminent scholars in the past – from Judge Kakouris to John Usher[12] – is rock-solid in terms of its legal grounding in the texts and the spirit of the Treaties. It can be hypothesized that such Rule of Law developments as those witnessed over the last three years could have occurred much earlier in the history of EU's constitutionalism. Yet, there was probably no overwhelming need for their articulation before now. Indeed, as one recalls from school physics lessons, where there is action – there is reaction. The presumption of compliance by all the Member States' authorities with the Rule of Law – which I have amply criticized on a number of occasions[13] – actually worked well until the moment when the enforcement of the Rule of Law and democratic backsliding became the main headache of the powers that be in Brussels and other capitals. Indeed, should the backsliding continue, the very soul of the Union would be emptied of any content: if it is no longer a club of Rule of Law-abiding democracies, the added value of the whole integration project becomes naturally questionable.[14] The whole point is thus not as much about helping the Polish and the Hungarian people to remain free. The very rationale of the Union as such is at the core of the on-going developments.[15] Tomasz Tadeusz Koncewicz is absolutely right in stating that "undoubtedly, while this emerging rule-of-law case law adds constitutional layers to the community of law, its reformative potential and significance go clearly beyond the courtroom."[16]

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[12] J.A. Usher, *How Limited is the Jurisdiction of European Court of Justice?*, in: J. Dine, S. Douglas-Scott, I. Persaud (eds.), *Procedure and the European Court*, Chancery Law Publishing, London: 1991, p. 77; J.A. Usher, *General Course: The Continuing Development of Law and Institutions*, in: F. Emmert, (ed.), *Collected Courses of the Academy of European Law*, *European Community Law* (vol. II, Book 1), Martinus Nijhoff, The Hague: 1991, p. 122; C.N. Kakouris, *La Cour de Justice des Communautés européennes comme cour constitutionnelle. Trois observations*, in: O. Due, M. Lutter, J. Schwarze (eds.), *Festschrift für Ulrich Everling*, Nomos, Baden Baden: 1995, p. 629; C.N. Kakouris, *La Mission de la Cour de Justice des Communautés européennes et l'ethos du juge*, 4 Revue des affaires européennes 35 (1994).

[13] D. Kochenov, *The EU and the Rule of Law: Naïveté or a Grand Design?*, in: M. Adams et al. (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge University Press, Cambridge: 2017, p. 419. Also, taking into account the fact that this presumption was the core weakness of the failure of conditionality, which marked the pre-accession exercise in this field, *see* D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, Kluwer Law International, The Hague: 2007. This weakness is now being directly remedied by the Court in Case C-896/19 *Repubblika v. Il-Prim Ministru* [2021] ECLI:EU:C:2021:311: M. Leloup, D. Kochenov, A. Dimitrovs, *Non-Regression: Openning the Door to Solving the "Copenhagen Dilemma"? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru*, Reconnect Working Paper No. 15 – June 2021.

[14] T.T. Koncewicz, *Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of the Heart*, 26 Indiana Journal of Global Legal Studies 501 (2019).

[15] C. Closa, *Reinforcing of EU Monitoring of the Rule of Law*, in: C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge: 2016, p. 15.

[16] T.T. Koncewicz, *The Supranational Rule of Law as First Principle of the European Public Space: On the Journey in Ever Closer Union among the Peoples of Europe in Flux*, 5 Palestra 167 (2020).

1.2. Articulating the substance of the EU rule of law: discovering the importance of judicial irremovability and independence

Appealing to the independence of the judiciary – which is one of the least-questioned crucial elements of the rule of law – in order to accomplish the transition from restating presumptions to ensuring compliance is a move of towering importance, especially considered in its simplicity. As explained by President Lenaerts: "It follows that national courts or tribunals, within the meaning of Article 267 TFEU, are, first and foremost, called upon to protect effectively the rights that EU law confers on individuals, thereby providing them with 'supranational justice' and upholding the rule of law within the EU."[17] The revolution at the heart of the EU's constitutionalism has thus seemingly brought about nothing new: all the elements it draws upon – from the on-going dialogue between the national courts acting in their EU-law capacity and the Court of Justice to the need to ensure that individuals can fully draw on their "legal heritage"[18] of rights articulated at the supranational level – have been with us all along.

It is the reshuffling of these elements in the process of reinterpreting the requirements of Art. 19(1) TEU as well as Art. 47 of the Charter of Fundamental Rights of the European Union (CFR) as the basis for both the EU's direct intervention – like in *Commission v. Poland (The Independence of Supreme Court)* where a complete restoration of the *status quo ante* has been ordered by the Court, undoing Poland's so-called "judicial reform" – or its indirect intervention, as in *A.K. (The Independence of the Disciplinary Chamber of the Polish Supreme Court).* In this latter case, the Court has instructed its Polish counterpart to apply a clear test of independence to the questionable body at issue (parading as one of the chambers of the Polish Supreme Court); a test, based on the substantive meaning of judicial independence drawn from the analysis of Art. 47 CFR.[19] This elucidation of the possibility of both direct and indirect intervention, combined with the perception of "nothing new," is precisely the appeal and the strength of the remarkable case law handed down over the last three years.

1.3. Preventing rapid deterioration while empowering the local courts: interim relief

Having learnt from its failures to prevent the successful completion of the attacks against the judiciary in Hungary,[20] the Court of Justice and the Commission paid sig-

[17] K. Lenaerts, *Our Judicial Independence and the Quest for National, Supranational and Transnational Justice*, in: G. Sevik et al. (eds.), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher*, Springer, Berlin: 2019, p. 158.

[18] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

[19] L. Pech, *Article 47(2)*, in: S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (2nd ed.), Hart Publishing, Oxford: 2021.

[20] Case C-286/12 *Commission v. Hungary (Judicial Retirement Age)*, EU:C:2012:687. D. Kochenov, P. Bárd, *The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU*, 1 European Yearbook of Constitutional Law 243 (2019).

nificant attention to ensuring that sufficient interim measures are put in place in order to ensure that the attacks against the rule of law will not continue despite the Commission's victories in court during the process. As with many other cases of relevance, the starting point for the interim relief was seemingly disconnected from the rule of law issues as such, and concerned environmental protection measures. Indeed scholars instantly saw the implications of saving a UNESCO-protected forest from the spruce beetle as the dawn of a new era in the understanding of the interim relief required and authorized by EU law.[21]

Most importantly, the case law on interim relief handed down by the Court of Justice can in fact be viewed as a set of examples for the national courts to follow in enforcing EU law. They are obliged to grant interim relief to ensure that EU law rights are preserved "before it's too late," as President Lenaerts also underlines in his scholarly writings.[22]

The new case law has revolutionized interim relief in reaction to the attacks on whole systems of institutions, as it brought about the requirement of restoration of the *status quo ante*: i.e. the reversal of the attack. As can be seen in the *Polish Forest* case, such developments – combined with newly-discovered monetary tools to influence the authorities (which are particularly persistent in their failure to comply) – bring the system of remedies in EU law to a new level in terms of guaranteeing effective compliance with the principle of the rule of law.

1.4. Supranational consequences: a gradual upgrade of EU law

The most recent rule of law developments have had a direct and unmistakable impact on the supranational level of EU law. From *Commission v. France*, which outlawed the abuse of *CILFIT* and thus solidified, from the ECJ's point of view, the unequal relationship between the courts engaging in the dialogue the Court is striving to protect, to the tightening of the independence requirement and making it applicable to any body aspiring to qualify as a "court or tribunal" of a Member State in the sense of Art. 267 TFEU, the law as it stands draws directly on the saga of the *Portuguese Judges* and the *Commission v. Poland* cases.

Looking at the issue in sector-specific terms, the direction of the development of the law is largely similar, as also the case law on the meaning of "judicial authority" under the EAW FD saw a significant tightening of the notion of the "independence" required in order to be able to send EAW requests. The *Prosecutors* cases make it abundantly clear[23]

[21] Wennerås, *supra* note 7, p. 541.

[22] Lenaerts, *supra* note 17, p. 157 and the references cited therein.

[23] Joined Cases C-508/18 *OG (Public Prosecutor's office of Lübeck)* and C-82/19 PPU *PI (Public Prosecutor's office of Zwickau)* and Case C-509/18, *PF (Prosecutor General of Lithuania)*. *Cf.* Case of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors' Offices, Lyons and Tours)*, C-566/19 PPU and C-626/19 PPU; of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, C-625/19 PPU; and of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU and Case C-510/19 *Openbaar Ministerie and YU and ZV v. AZ*. For more details *see* A.H. Ochnio, *Why Is a Redefinition of the Autonomous Concept of an 'Issuing Judicial Authority' in European Arrest Warrant Proceedings Needed?*, 5(3) European Papers 1305 (2020); M. Böse, *The European*

that the general move in the direction of placing more importance on the requirement of independence is fully aligned in the Area of Freedom, Security and Justice and EU law *sensu lato*, as has been seen in *Banco Santander SA*.[24] All in all, the Union is going through a deep process of rethinking the idea of judicial independence, and this rethinking does not concern only those Member States experiencing rule of law problems or democratic backsliding. Instead, it emerges as a general principle applied equally throughout the EU.

1.5. The Court of Justice joining the global trend

The Court of Justice joined the game of domestic judicial design by international courts,[25] a game which the European Court of Human Rights has been playing for years, especially insofar as the aspects of judicial independence and self-governance go. The Court of Justice could in fact be inspired by its Strasbourg *homologue* in framing the issue – even if the Strasbourg standards of judicial independence appear to go further than what the Court of Justice has articulated so far, and encompass the emerging notion of "internal judicial independence,"[26] including the requirements for judges "to be free from directives of pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in a court."[27] Besides the "fake judges" considerations,[28] Court of Justice's efforts to neutralize the Disciplinary Chamber of the Polish Supreme Court as being not independent and threatening the very fabric of the EU (and Polish) legal order could be viewed as a forceful intervention in support of such "internal judicial independence." The same applies to the requirement of independence and self-governance of the judicial councils.[29] Read in this way, the Court of Justice can be seen as extending the meaning of judicial independence even further, assisting the European Court of Human Rights' (ECtHR's) already significant work in this direction, as Joost Sillen has recently demonstrated.[30] The two standards – of "internal independence" and "established by law" – in fact obviously and necessarily converge, since a court lacking internal independence

Arrest Warrant and the Independence of Public Prosecutors: OG & PI, *PF*, *JR & YC*', 57 Common Market Law Review 1259 (2020).

[24] Case C-274/14 *Banco de Santander SA* ECLI:EU:*C*:2019:802.

[25] D. Kosař, L. Lixinski, *Domestic Judicial Design by International Human Rights Courts*, 109(4) American Journal of International Law 714 (2015). The same criticism could apply to international bodies engaged with the elaboration of "soft law" standards which quickly solidify, guiding day-to-day practice. *Cf.* M. de Visser, *A Critical Assessment of the Rule of the Venice Commission in Processes of Domestic Constitutional Reform*, 63(4) American Journal of Comparative Law 963 (2015).

[26] J. Sillen, *The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights*, 15 European Constitutional Law Review 104 (2019).

[27] ECtHR, *Parlov-Tkalčić v. Croatia* (App. No. 24810/06), 22 December 2009. For a detailed analysis of all the relevant ECtHR case law, *see* Sillen, *supra* note 26.

[28] L. Pech, *Dealing with "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in* Simplon *and* HG, Reconnect Working Paper No. 8/2020.

[29] *See e.g.* ECtHR, *Oleksandr Volkov v. Ukraine* (App. No. 21722/11), 9 January 2013.

[30] Sillen, *supra* note 26.

does not meet the basic requirement of impartiality set out in Art. 6(1) of the European Convention on Human Rights, and thus is not established by law.[31]

2. WHAT ABOUT THE LARGER CONTEXT?

Upon consideration of the broader context of the welcome power grab outlined above, two problematic issues instantly loom large on the horizon. Firstly, the Court of Justice itself is open about the fact that it does not consider itself bound by the fundamental principles of Arts. 2 and 19 TEU, which it has itself formulated insofar as the principles stemming from those provisions could constrain the power of the Member States, acting collectively as *Heren der Verträge* to exercise dominance over the Court of Justice no matter what the law says. The second problematic issue is that, to use a Russian saying, "the cart is still there." All the commotion notwithstanding, Poland and Hungary are still where they were before the power grab inspired by the proclaimed desire to resolve the problems related to democracy and Rule of Law backsliding started. Many a won case aside, the picture has still not changed, leading to allegations that the EU – and especially the Commission – is essentially "losing by winning."[32] Let us consider the two problematic issues in turn.

The first trouble with all the developments described above is that in the *Sharpston* cases the Court of Justice resoundingly failed to apply to ifself the same standards it has been preaching: it clearly did not feel bound by the imperatives of irremovability and security of tenure with respect to its own members. Worse still, by refusing to question outright violations of primary law by the Member States, President Lenaerts' Court has dismissed any possibility of the application of the newly-found principles to itself at all – in a thoughtless gesture of haphazard nonchalance it has dismissed any claims quesitioning its own structural independence from the Masters of the Treaties.[33] Yet, by its own standards a non-structurally independent body is *not a court*. It will take the Union some time to get back on track following such a blow to the system of "integration through law." The Court tells us that everyone – from the Spanish tax tribunals in *Banco Santander SA* to the German prosecutors – have an independence problem, which *de facto* disqualifies them from any participation in the intricate dance of the dialogical rule of law. Yet, continues *the same Court*, the basic rule of law principles applicable to the national judiciaries are not to be expected to bind the Court of Justice itself: the naked Emperor is above the law, undermining its workings and appeal by

[31] *Ibidem*, at 109.

[32] K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, *EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 39 Yearbook of European Law 3 (2020).

[33] For a detailed step-by-step analysis, *see* D. Kochenov, G. Butler, *The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution*, NYU Jean Monnet Paper No. 02/2020.

suggesting that at the supranational level an impeccably lawful composition of the Court is not required. The Commission concurs. When asked, Vice-President Jourová clarifies that she is "aware" of the problem of the potentially unlawful composition of the Court in violation of the principles the Court has been preaching and the requirements of Primary Law, but whatever happens, "the Court has to be regarded as the highest authority, when it comes to EU law."[34]

The problems do not stop here. In fact, a whole new set of issues arises even if one sets aside the Court's supranational assault on the meaning of the core elements of the principle of the Rule of Law which it has just formulated for the national courts. The general question to answer, irrespective of how much independence the Court of Justice actually does command, is – along the lines of Dariusz Adamski's thinking,[35] – how much can the courts actually do in the face of a rising tide of populism? And this is, probably counterintuitively to some, where the EU, rather than the backsliding Member States, seems to be emerging as the winner from the rule of law crisis it is going through. Indeed, the rule of law transformations, which have been briefly outlined above, constitute a very significant turn in the whole history of EU law, and one which will have lasting consequences. The EU is definitely better off and more powerful as a result – even if not more "value based." Even more. the Court of Justice emerges as a particularly strong winner from the whole rule of law upgrade story, particularly given the inability of other EU institutions to act in any more or less consequential, effective, and coherent manner.[36] The Court, even if it is not lawfully composed itself, is "the last soldier standing,"[37] offering a new vision of constitutionalism for the Union which is unmistakably attractive. Moving from the world of proclamations, the core values of the Union are now moving into the realm of the law, turning the Union into a true constitutional system – that is, until it is tested by the likes of the *Sharpston* cases.

The same cannot be said, unfortunately, about the Member States experiencing a decline in democracy and the rule of law. Indeed, the Union can seemingly do very little on the ground, the supranational rule of law revolution notwithstanding. This has nothing to do with any particular set of Member States in question. One may ask: "Is

[34] A question from D. Kochenov to V. Jourová at CEU Democracy Institute discussion *The Future of Democracy in EU Member States* (published on YouTube on 1 March 2021), available at: https://bit.ly/3nPLFXn at 43:37 (accessed 30 May 2021).

[35] D. Adamski, *The Social Contract of Democratic Backsliding in the "New EU" Countries*, 56 Common Market Law Review 623 (2019). A. Sajó, *The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies*, 11 The Hague Journal on the Rule of Law 371 (2019); M. Blauberger, R.D. Kelemen, *Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU*, 24(3) European Journal of Public Policy 321 (2017); P. Blokker, *EU Democratic Oversight and Domestic Deviation from the Rule of Law*, in: C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge: 2016, p. 249.

[36] *See* the special issue of the Journal of Common Market Studies edited by D. Kochenov, A. Magen, L. Pech, *The Great Rule of Law Debate in the EU*, 54 Journal of Common Market Studies 1043 (2016). *Cf. e.g.* A. Schout, M. Luining, *The Missing Dimension in Rule of Law Policy: From EU Policies to Multilevel Capacity Building*, Clingendael Instituut Report, 2018, p. 12.

[37] Kochenov and Bárd, *supra* note 20.

something 'wrong' with Central and Eastern Europe?"[38] While obviously relevant in the context of Hungary and Poland, this is *not* the most important question to consider. What the EU needs is a set of legal-political tools to prevent backsliding in *any* of its regions, and presenting this necessity as region-specific is not helpful. This is particularly so given the awful Brexit populism and numerous other worrying signs coming from all kinds of directions. Populism is not the exception in the world today – it is becoming the rule. In this context, the assaults on the rule of law are bound to intensify since, as Nicola Lacey has pointed out, populism and the attacks on the rule of law are frequently connected.[39] It thus appears that "Autocratic Legalism" is here to stay and the EU needs effective tools to combat it wherever and whenever backsliding occurs.[40]

As the law stands today, once again, it is undeniable that while the EU has received its rule of law upgrade (which is very welcome), the consequences of this upgrade in practice on the ground in the backsliding jurisdictions may be very limited for now. Dariusz Adamski is absolutely right that courts "cannot preclude a social contract of democratic backsliding when a society concludes that an illiberal system is superior to its previously tried liberal alternatives."[41] And this is precisely what seems to be the case in at least two EU Member States at the moment.[42]

While it is undeniable that the supranational judiciary can on some occasions be much more effective than the political institutions in bringing about tangible results in terms of the defense of the rule of law, the bigger picture still remains quite grim, as the populist forces are busy undoing not only judicial independence, but also essentially the idea of legality *as such*, and enjoy a popularity that will not go away on the back of the Court's rule of law case law, however far-reaching it may be. This towering problem has been outlined with particular clarity by David Kosař, Jiří Baroš and Pavel Dufek:

> While the European Court of Justice surely plays an important role, especially in the current developments in Poland, the failure of the Pan-European template shows that a top-down approach to the separation of powers does not work in Central Europe and that any long-term solution must have the broad support of the people (footnotes omitted).[43]

Undoubtedly the supranational transformation of the rule of law into that part of EU law applicable to the national level judiciaries in the EU has been far-reaching, swift, and all-encompassing. Yet at the core of it lies a belief in the centrality and importance of EU law to all the Member States. Justin Lindeboom has justified this belief

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[38] J. Dawson, S. Hanley, *What's Wrong with East-Central Europe? The Fading Mirage of the "Liberal Consensus"*, 27 Journal of Democracy 21 (2016).

[39] N. Lacey, *Populism and the Rule of Law*, 15 Annual Review of Law and Social Science 79 (2019).

[40] K.L. Scheppele, *Autocratic Legalism*, 85 University of Chicago Law Review 545 (2018).

[41] Adamski, *supra* note 35, p. 659.

[42] P. Blokker, *Building Democracy by Legal Means? The Contestation of Human Rights and Constitutionalism in East-Central Europe*, 18(3) Journal of Modern European History 335 (2020); P. Blokker, *Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism*, 15(3) European Constitutional Law Review 519 (2019).

[43] Kosař, Baroš and Dufek, *supra* note 8, p. 461.

very consistently, demonstrating its soundness, especially when viewed from Brussels or *Kirchberg*: any real legal system claims supremacy and *is* self-referential in its own importance. With the latest case law from Danish, Czech, and, crucially, German highest courts, the limited, if not myopic, nature of this picture is clear: not all the "participants in the dialogue" believe that the ECJ is, indeed, the court to lead the pack. In the absence of such a belief, self-referentialism can become dangerous and, indeed, end up denying the very essence of the rule of law.[44] Should this be the case, the foundations of the rule of law that the ECJ is defending are very feeble indeed – and this is the focus of the analysis in the remainder of this work.

3. IS THE POWER GRAB A SUCCESS?

The editors of the *Common Market Law Review* might be right in their analysis of the fundamentals underlying the *Portuguese Judges* ruling.[45] If the Court states that "the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law;"[46] does this not smell of a circular and unhelpful approach to the rule of law, and even a denial of the meaning of the concept? As has been stated: "How can the mundane objective of 'compliance with EU law' be constitutive of 'the essence of the rule of law'?"[47] To ensure that the fundamental developments described above are a success, the Court will need to think very hard and be as convincing as possible in answering this question. What we have at hand at the moment is a rule of law proclamation which is not applicable in its essence to all participants in the articulation of the dialogical rule of law, hinting at the fact that the principle, in all its glory, is delineated with some other ends in mind, rather than serving the law *sensu stricto*. As a result, the glorious new sandcastle of the Rule of Law has not altered the state of the sea of populism in the countries offered as a valid reason for its construction. At the same time however, considering in full its disconnect from the stated goals it is aimed to achieve and cites as its justification, the castle is a nonetheless a success and can last at least until the sea licks it off the shores.

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[44] M. Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in: G. Palombella, N. Walker (eds.), *Re-locating the Rule of Law,* Hart Publishing, Oxford and Portland: 2008, p. 47; G. Palombella, *The Rule of Law as an Institutional Ideal*, in: G. Palombella, L. Morlino (eds.), *Rule of Law and Democracy: Inquiries Into Internal and External Issues*, Brill, Leiden and Boston: 2010, p. 4; G. Palombella, *Beyond Legality – before Democracy: Rule of Law Caveats in the EU Two-Level System*, in: C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge: 2016. *Cf.* D. Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, 34 Yearbook of European Law 82 (2015).

[45] Editorial Comments, *EU Law between Common Values and Collective Feelings*, 55 Common Market Law Review 1 (2018).

[46] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, para. 36.

[47] Editorial Comments, *supra* note 45, p. 1334.

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A NEGATIVE SYNERGY – A REVIEW OF DIRECT SUBSIDIZATION MECHANISMS FOR SCHEDULED AIR SERVICES FOLLOWING THE COVID-19 PANDEMIC IN EU LAW AND PROSPECTS FOR IMPROVEMENT

Abstract: *Hardly any sector has been hit as hard by the COVID-19 pandemic as the air transport industry. As lockdown measures are lifted, a recovery phase begins that will shape the global economic landscape for the years to come. In this context this paper raises the question of whether the pre-existing EU instruments for subsidizing air operations – Start-up aid and the Public Service Obligation – none of which was designed with economic recovery in mind – can be adapted to the new circumstances after the current ad hoc measures under the Temporary Framework have dried up. The hypothesis which is taken as a starting point is that the existing state aid toolbox has built-in deficiencies which are hampering recovery efforts. This paper therefore attempts to determine whether alternatives can be sought within the confines of the EU state aid law, and if so what such alternatives might be.*

Keywords: airlines, airports, air transport, COVID-19, EU law, public service obligation, Start-up aid, state aid

INTRODUCTION

The current coronavirus outbreak has brought the aviation industry, and indeed the whole world, to an unprecedented standstill. Although this sector is generally considered susceptible to Black Swan events, the current crisis is much deeper than anything experienced previously; thus unlike earlier crises it is crippling to both airlines as well as airports. In view of the predicted long-term effects and currently-observed efforts to re-ignite economic growth across all sectors, COVID-19 should be perceived as a distinct phase of instability and uncertainty, and not as a relatively short transitional

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event between two stable periods.[1] Viewed in that wider canvas, the following industry-specific factors provide an additional context for this paper: The inherent economic interdependency between airports and airlines, as well as the existence throughout Europe of oversized and underused "ghost airports."[2] Although the question of their financial viability and the use of public funds has been put forward many times before, this issue has become exacerbated by the current outbreak in the following ways: Firstly, if an economic downturn hits as predicted, state budgets may not be able to provide sufficient funds to continuously support every company in need. Secondly, it can be reasonably assumed that if cash-strapped airlines may be forced to reduce operations, the thinnest routes would be the first to lose service; and thirdly, for the same reason carriers will likely seek additional funding opportunities wherever they may be found. All this underscores the importance of rationalizing and improving the efficiency of government spending.

It is with all these factors in mind that this paper – by taking the perspective of the sector's regulatory model, which involves financing airports through revenues generated by possibly subsidized air operations, raises the question of whether these subsidy instruments are appropriate to tackle the long-term, lingering effects of the COVID-19 downturn, i.e. extending beyond the current *ad hoc* relief efforts. There are only two instruments in European Union (EU) law which allow for the direct subsidization of air operations – Start-up aid and Public Service Obligations (PSOs). Neither of these were ever intended to support economic recovery. But because nothing else is available, by necessity these tools must be adapted to the new realities. Being *de facto* alternatives also makes them interrelated, i.e. changing one may affect both the way in which the other is applied as well as its scope. Even though these instruments may ultimately be supplemented by non-sector specific macroeconomic stimuli, the measures in question seem to remain relevant in the microeconomic perspective, both as the most readily available solutions and as a source of experiences for future lawmaking and policymaking.[3] Consequently, the hypothesis which forms the basis for further discussion in this work may be formulated as follows: The pre-existing European legal framework for subsidizing air operations has built-in structural inefficiencies, resulting in wasteful spending and subsidy races and thus hampering future recovery efforts, to the particular detriment of regional airports. The analysis will begin by describing the existing temporary *ad hoc* aid measures, and then will then move to a review of the legal tools mentioned above, with a particular focus on their inefficiencies, and

[1] M. Babic, *Let's Talk about the Interregnum: Gramsci and the Crisis of the Liberal World Order*, 96(3) International Affairs 767 (2020), p. 769.

[2] *See* European Commission, *Competition policy brief: New State Aid Rules for a Competitive Aviation Industry* (Issue 2, February 2014). *See generally* European Court of Auditors (ECA), *EU Funded Airport Infrastructures: Poor Value for Money*, Special Report no. 21 (2014).

[3] Even more so considering that the recovery plan for Europe lacks a sector-specific focus, instead emphasizing the overall "green and digital" transformation. *See* Council of the EU press release, *EU Recovery Package: Council Adopts Recovery and Resilience Facility*, available at: https://bit.ly/3COtOHs (accessed 30 May 2021).

on how they negatively synergize with the sector's peculiarities in difficult economic realities, which are compounded by the pandemic. The paper will then explore possible alternatives; the nature of the challenges associated with amending start-up aid and PSOs; what improvements can be made in and to each of these instruments; and how feasible such improvements are. The analysis will conclude with *de lege ferenda* recommendations.

1. THE TEMPORARY FRAMEWORK AND BEYOND

Since the initial outbreak of COVID-19 – which resulted in unprecedented lockdowns circa March-April 2020, which in turn immediately led to negative economic impacts – many EU Member States have scrambled to adopt interim compensatory measures for the sectors affected. Initially, the European Commission's (EC, the Commission) reaction was disjointed, but subsequently it has coagulated into the *Temporary Framework to support the economy in the context of the coronavirus outbreak,* which is designed to be a faster and more flexible tool than the existing instruments, i.e. the so-called rescue and restructuring aid authorized under Art. 107(3)(c) Treaty of the Functioning of the European Union (TFEU), and the *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty*, as well as state aid authorized directly under Art. 107(2)(b) TFEU.[4]

The Temporary Framework – which has become the main legal tool for providing urgent relief efforts to COVID-stricken airlines – is based on Art. 107(3)(b) TFEU, which offers high flexibility since it can be granted both to remedy the actual effects of a serious disturbance, i.e. to address urgent liquidity needs, as well as to prevent the worsening of a disturbance in the future.[5] In other words, is not limited to compensation for cancellations of particular flights.[6]

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[4] *Cf.* Temporary Framework for State Aid measures to support the economy in the current COVID-19 outbreak. Originally adopted on 19.03.2020 and subsequently amended on 03.04.2020, on 08.05.2020, on 29.06.2020, on 13.11.2020 and on 28.01.2021. Consolidated version is available at: https://bit.ly/37SqQ6E (accessed 30 May 2021), para. 15 *with* Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, [2014] OJ C249/1; P. Nicolaides, *Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence*, 11(5-6) Journal of European Competition Law & Practice 238 (2020). Following first flight bans, there was initially only a small number of cases utilizing Art. 107(2)b TFEU (notably *see* SA.57539 COVID-19 – Aid to Austrian Airlines [2020] OJ C346/1). But when it became apparent that the crisis would be longer, these were superseded by the Temporary Framework measures. De minimis aid will be omitted because costs in aviation are typically above its threshold.

[5] *See e.g.* SA.57544 COVID-19: Aid to Brussels Airlines [2020] OJ C397/1, section 3.3.2; SA.57410 COVID – recapitalisation of Finnair [2020] OJ C310/1, section 3.3.2. Temporary Framework decisions are following the same assessment template; thus these provide a representative example.

[6] *Cf.* Temporary Framework, *supra* note 4, para. 15bis, *with e.g.* Art.107(2)b TFEU decision SA.32163 Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010 [2012] OJ C135/1, especially section 2.5.2.

Yet there is a fine line between the actual disturbance and the lingering effects of the economic downturn. As Andrea Biondi has put it, there is a concern that a framework devised to tackle an emergency could develop into the new normal.[7] However, one cannot reasonably expect these lifelines to be prolonged indefinitely, especially after travel restrictions are lifted.[8] Firstly, there is a moral hazard, encouraged by the guarantee of financial protection. Such a prolonged support could, for all intents and purposes, morph into morally hazardous and highly distortive operating aid which, for this very reason, is in principle considered to be incompatible with the Internal Market.[9] Secondly, there exists the palpable possibility that fiscally-strapped states will not have sufficient funds during a downturn to subsidize every industry in need. This all is part of the wider problem of rethinking air transport post-COVID-19, but for the purpose of this discussion one can venture an educated guess that should a recession happen as predicted, carriers would be hard pressed to search for any subsidy opportunities.

From a state aid perspective, the situation with respect to airports is somewhat different: Facilities with an average traffic below 3 million passengers per annum may receive operating aid under Art. 107(3)(c) TFEU pursuant to the conditions set out in the *Guidelines on State aid to airports and airlines* (2014 Aviation Guidelines) for a transitional period, to end by 2024.[10] Therefore, the Temporary Framework aid – aimed at helping to weather the storm – is of limited significance in the long run, especially for airports that were previously unprofitable. Because even if their financial situation worsened following the COVID-19 outbreak, the underlying causes of unprofitability had existed before the pandemic began.[11] Whilst urgent liquidity needs could be addressed using the Temporary Framework when the funding needed exceeds the adjustable limit for operating aid, and also assuming that under current circumstances the "grace" period for operating aid may be extended, the core problem of the lack of air traffic/insufficient demand goes beyond short- to medium-term survival, especially considering the EU's policy focus on achieving airports' economic self-sustainability.[12]

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[7] A. Biondi, *Governing the Interregnum: State Aid Rules and the COVID-19 Crisis*, 4(2) Market and Competition Law Review 6 (2020), p. 12.

[8] Implicitly confirmed by the EC's Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak, available at: https://bit.ly/2V-VChZ1 (accessed 30 May 2021). However, this is a preliminary working document, without a number, signature, or even date. Therefore, it cannot be relied upon except as a most rudimentary indication of the EC's policy approach.

[9] *E.g.* K. Bacon (ed.), *European Union Law of State Aid*, Oxford University Press, Oxford: 2017, p. 101.

[10] *Cf.* Temporary Framework, *supra* note 4, para. 20 *with* Guidelines on State aid to airports and airlines [2014] OJ C99/3, paras. 112 and 118.

[11] Particularly, airports with the least amount of traffic were not significantly affected because their commercial revenues had been initially low in comparison with operating costs financed through operating aid. Thus, potentially profitable airports were most heavily affected. *Cf.* decisions SA.58212 Aid scheme for Polish airports [2020] OJ C421/1, traffic data, para. 13 and section 2.8; SA.58299 Aid to the Flemish airports [2020], OJ C421/1, traffic data, paras. 14, 18 and section 2.6.2.

[12] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the

For this reason, alternative direct funding mechanisms for airports' operations are also of negligible significance, and considering them as possible alternatives in a *de lege ferenda* context is a regulatory "dead end" and will be omitted in the subsequent discussion.[13] All these problems are likely to be further compounded by the predicted lasting COVID-19-related impacts on demand for air travel, whereby airlines faced with the need to reduce capacity will be compelled in the first place to cut back their thinnest routes, not those serving major cities (there is also a need to retain slots at major airports).[14] In other words, state aid-wise regional airports live on borrowed time, because the underlying issue is not COVID-related, and one cannot reasonably expect all direct lifelines to be prolonged *ad infinitum*.

In the author's opinion, all the interlinked factors outlined above seem to indicate a potentially perilous synergy. On one hand there is a need for a further stimulus to the economy. Given that such a policy has a clear economic dimension, it may also prove to be more politically acceptable to stimulate air traffic, rather than provide direct financial support for empty or near-empty airports. On the other hand, if the downturn were to prove more prolonged than envisioned, cash-strapped airlines will likely seek additional revenue sources.

The reason why these new economic developments synergize in a potentially detrimental way with the pre-existing legal tools for stimulating air traffic – Start-up aid and Public Service Obligations – is that these tools contribute to an environment conducive to wasteful subsidy races. Owing to the fact that many underused facilities struggle to attract any traffic, point-to-point carriers – being able to relatively easily switch between different airports – can credibly threaten to shift business away in the absence of subsidization or other preferential treatment.[15] While the underlying problem of the economic and regulatory landscape of European aviation is well researched (and thus beyond the scope of this paper), it can be used as a point of departure for an analysis focused on which design features of these mechanisms referred to earlier are responsible for wasteful spending. Regardless of the fact that none of them were designed with

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Functioning of the European Union – consolidated version [2016] OJ L327/19 stipulate that increases in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid (Art. 4).

[13] Smallest airports with less than 200000 passengers per year, which since 2017 can be funded under GBER ([2017] OJ L156/1) even after the transition period is over. *See also* 2014 Aviation Guidelines, *supra* note 10, paras. 74-76 allowing for a PSO for the smallest airports. *See*, inter alia, Decisions SA.43964 SGEI compensation to Kalmar Öland Airport [2017], C51/1; SA.49331 SGEI compensation for Bornholm Airport [2018] C318/1.

[14] The Commission temporarily lifted the "use-it-or-lose-it" rule ([2020] OJ L99/1), but one cannot reasonably expect this suspension to be prolonged *ad infinitum*.

[15] *See e.g.* L. Budd, S. Ison (eds.), *Low Cost Carriers: Emergence, Expansion and Evolution*, Routledge, Abingdon: 2014, pp. 137 et seq.; J. Kociubiński, *Toxic Relationship? Competition Law Scrutiny of Airport–Airline Agreements – Possibilities and Challenges*, 41 European Competition Law Review 5 (2020); Z. Lei, A. Papatheodorou, E. Szivas, *The Effect on Low-Cost Carriers on Regional Airports' Revenue: Evidence from the UK*, in: S. Forsyth et al (eds.), *Airport Competition: The European Experience*, Routledge Abingdon: 2016, pp. 311-320; N. Postorino (ed.), *Regional Airports*, WIT, Southampton: 2011, and references cited therein.

economic recovery in mind, by necessity they must be adapted to the unprecedented economic situation; take into account how these problems may become exacerbated by post-COVID-19 austerity measures; and finally examine how (or rather whether) they can be remedied.

2. THE EXISTING SUBSIDY INSTRUMENTS

2.1. Start-up aid

The *ratio legis* of the Start-up aid stems from the fact that many regional airports struggle to attract an air traffic volume capable of generating sufficient revenue to cover operating costs.[16] By providing Start-up aid to air carriers, the aim is overcome their initial reluctance about entering an untested market and mitigate the risk of incurring sunk costs in case of a failed entry. It should be viewed as an "over-the-counter" alternative to the prevalent practice of airports offering special deals to airlines (discounts, marketing contracts etc.) in exchange for the airline starting flights to/from that airport.[17] Yet for an alternative mechanism to be attractive, it must offer an ease of use and effectiveness at least comparable to those means it seeks to replace. However, the less formalized and more flexible the procedure becomes, the greater is the risk of misuse. Conversely, the more formal safeguards against abuses, the less attractive offered alternatives become. This apparent contradiction between ease of use and level of safeguards has shaped the framework for Start-up aid.

Airlines departing from airports with fewer than 3 million passengers per year (or 3-5 million in undefined "duly substantiated exceptional cases") can receive aid covering up to 50% of the airport charges for up to three years.[18] It is assumed that over this period the subsidized route will reach maturity and ultimately profitability, and the argument thus assumes that airlines should be interested in continuing operations without additional subsidies.[19] In this author's opinion the "exceptional" nature of the COVID-19 outbreak and ensuing fallout and disruptions give Member States "more ammunition" to justify the subsidization of routes linking an airport with 3-5 million passenger per annum. This is important, because expanded eligibility would also cover larger, potentially more attractive markets. While there is no doubt that these larger markets have been hit equally hard by the COVID-19 outbreak, at the same time their commercial potential makes it easier for them to recover. Since there is a correlation between economic growth and air traffic, it can be reasonably assumed that regions with larger airports will also have more resources available to subsidize their air operations, leaving those airports/regions most in need at a disadvantage.

[16] *Ibidem.*

[17] 2014 Policy Brief, *supra* note 2, p. 2.

[18] 2014 Aviation Guidelines, *supra* note 10, paras 142 (Elaborated in footnote 94 therein), 143 and 150.

[19] *Ibidem*, paras 15, 141 and 147. *Cf.* R. Doganis, *Flying Off Course: Airline Economics and Marketing*, Routledge, Abingdon: 2010, pp. 203-226.

Since the aid in question can be authorized on the basis of Art. 107(3)(c) TFEU, compatibility conditions are based on common assessment principles, notably that a measure must contribute to a well-defined "objective of common interest."[20] According to the *2014 Aviation Guidelines*, Start-up aid will be considered to fulfil this criterion if it "increases the mobility of Union citizens and the connectivity of the regions by opening new routes; or facilitates regional development of remote regions."[21] A claim can be made that by definition every new transport link fulfils these criteria, which appears to be *idem per idem.*[22] This finds confirmation in the rather lenient assessments carried out by the Commission, which also provide insights on how the "ghost airports" referred to earlier affect the effectiveness of aid measures.[23] The necessity assessment in practically every Start-up aid decision – all adopted during the relatively good economic climate between 2014-2019 – has been limited to the laconic formula referring to the unlikelihood that new connections will result, without aid, in an increase in passenger traffic.[24] Insofar as an *ex ante* assessment allows, this assertion is correct, and thus sufficient to declare aid compatible with the internal market, but it omits the underlying issue of why no airline was willing to enter that market in the first place.

Consequently, in practice, meaningful assessments are restricted to purely quantitative formal criteria – intensity levels, length etc. – while the other qualitative criteria are *de facto* deemed automatically fulfilled, with the arguable exception of assessing whether there is already a parallel high-speed rail or alternative air routes from another airport in the same catchment area under comparable conditions.[25] However, even though the newer decisions lay greater emphasis on potential overlaps in airport catchment areas, the scrutiny remains rather superficial: The Aviation Guidelines define the catchment area in as a radius that is normally set at around 100 kilometres or around one-hour travelling time by land.[26] While this approach has the merits of ease of use, it still requires a degree of flexibility to avoid arbitrary constraints. In reality, an airport catch-

[20] *See* Bacon, *supra* note 9, p. 100. Aid can also be authorized under Art. 107(3)(a) TFEU, but due to restrictive conditions instances of this are very rare and will be omitted from further analysis.

[21] 2014 Aviation Guidelines, *supra* note 10, para. 139.

[22] *Ibidem*, paras 139-140; Commission decision SA.37121 Promotur (Canarias), [2013] OJ C348/1, para. 57.

[23] *E.g.* 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 (2014), p. 147.

[24] Commission decision SA. 46709 Start-up aid for new routes from/to the airports in the Region of Calabria [2017] OJ C274/1, para 66, also *see e.g.* SA.40605 Start-up aid for flights from regional airports [2016] OJ C323/1, paras 52-54; SA.41815 Start-up aid for new routes from/to the airport of Comiso [2016] C220/1, para. 47, 50; SA.39466 Start-up aid to airlines operating in the United Kingdom, [2015] OJ C292/1, para 53; SA.57002 Start-up aid to new routes from Ancona airport [2020] OJ C228/1, para 61.

[25] *See e.g.* SA.39466 Start-up aid to airlines operating in the United Kingdom (*supra* note 24), section 3.2; SA.48345 Start-up aid scheme for routes from Tulcea Airport [2018] OJ C3/1, paras 13, 45-75; SA.41815 Start-up aid for new routes from/to the airport of Comiso (*supra* note 24), paras 35-45. Yet, it has never resulted in a negative decision.

[26] 2014 Aviation Guidelines, *supra* note 10, para. 12.

ment area is often difficult to define given the complex nature of passengers' choices of routes, types of destinations, passenger profile and so on.[27] Carrying out such a detailed assessment is simply impractical in cases involving few thin routes.[28] Therefore, in the EC's decisions the analysis is limited to *prima facie* available circumstances justifying a departure from the strict qualitative distance/time criteria. As a result, this has never been a decisive "limiting" factor, which illustrates the recurring dilemma between the degree of oversight and the ease of use.[29]

Looking at the mechanism above through the lens of this article's hypothesis, one feature comes especially to the fore: Start-up aid does not include any mechanism ensuring the continuity of operations after the subsidy expires. The system is entirely based on economic incentives. Even assuming a route turns out to be somewhat profitable, it may still be economically rational to switch to another airport – for example if Start-up aid is offered there. In fact, this problem has surfaced earlier, especially considering that the average profitability of regional routes is unlikely to be high enough for these connections to be regarded by airlines as a high priority.[30] At the same time, one cannot blame the carriers involved for acting economically rationally, i.e. for exploiting opportunities presented by the regulatory framework.[31] However, in the downturn following the COVID-19 outbreak, the incentive to switch between airports in search of new subsidies may be even greater for cash-strapped airlines. This poses a twofold risk: Local governments offering Start-up aid have no guarantee that the once-subsided routes will be retained to achieve intervention goals. Another concern is over a possible subsidies "arms race" to attract "footloose" carriers – privileging those with more resources and with a greater commercial base, which is something the EU state aid control system was originally designed to prevent.[32]

2.2. The public service obligation

The problems described above can lead to the somewhat paradoxical conclusion that an alternative for retaining "footloose" carriers at regional airports is continuous subsidization. While such heavy-handed interference with the market mechanism is antithetical to the precepts of a fully liberalized market, this regulatory option – a Public Service Obligation – has always existed since the beginning of the European Economic

[27] *See* Postorino, *supra* note 15, pp. 79 et seq.

[28] Such detailed analyses are only carried out in the largest merger cases *See e.g.* M.5440 Lufthansa/Austrian Airlines, section V.

[29] *See e.g.* SA.40605 Start-up aid for flights from regional airports [2016] C323/1, section 2.4.; SA.47746 Start-up aid to Maastricht-Aachen airport [2017] OJ C336/1, paras. 48-57.

[30] Ramos-Pérez, *supra* note 23, p. 147; R. Núñez-Sánchez, *Regional Public Support to Airlines and Airports: An Unsolved Puzzle*, 76 Transportation Research Part E: Logistics and Transportation Review 93 (2015), p. 107; X. Fageda, M. Gonzalez-Aregall, *Do All Transport Modes Impact on Industrial Employment? Empirical Evidence from the Spanish Regions*, 55 Transport Policy 70 (2017), p. 78.

[31] Lawmakers must assume that companies are rational actors, which implies a systematic search for business opportunities. *See generally* R. Bork, *The Antitrust Paradox*, Free Press, Boston: 2005, p. 134.

[32] *Cf.* Budd, Ison, *supra* note 15, p. 154 *with* Bacon, *supra* note 9, pp. 9-10.

Community.[33] In this context, it is also worth mentioning that PSO status has been imposed on several routes following the initial launching of those routes through Start-up aid (a separate question is why the PSO was not imposed right from the beginning).[34]

Public Service Obligations in air transport are part of the wider, non-sector-specific concept of a Service of General Economic Interest (SGEI).[35] It provides a regulatory framework for the subsidization of scheduled air services that are both socially necessary and commercially unviable.[36] Unlike the above-described Start-up aid, it assumes routes will be permanently unprofitable. Although it was initially designed to ensure a minimum level "lifeline" service providing connections with the most remote and isolated places, such as islands or mountain areas, over the years it has transformed into a tool for regional development and as a transport alternative of convenience rather than of necessity.[37] The overall number of PSO routes throughout Europe is constantly on the rise, resulting in concerns whether they are indeed limited to clear-cut market failures.[38]

The system works as follows: Member States may impose a Public Service Obligation in respect of scheduled air services on a route between its territory and that of another Member State which is considered vital for the economic and social development of the region which the airport serves.[39] Then, if within three months no airline has commenced or expressed a readiness to promptly commence operations on a PSO route, in accordance with the parameters set by the relevant public authority, the Member State can limit access to this route to only one competitively-selected carrier and can grant a financial compensation.[40] This so-called "public service compensation" is not caught by Art. 107 TFEU, but instead is approved under the derogation provided by Art. 106(2) TFEU according to the requirements set out in Regulation 1008/2008 on common rules for the operation of air services in the Community.[41] In

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[33] *See generally* C. Wehlander, *Services of General Economic Interest as a Constitutional Concept of EU Law*, Kluwer, Alphen aan den Rijn: 2016, pp. 3-9.

[34] Ramos-Pérez, *supra* note 23, pp. 137-147; Fageda, Gonzalez-Aregall, *supra* note 30, pp. 70-78.

[35] Wehlander, *supra* note 33, pp. 171 et seq.

[36] J. Kociubiński, *Between Lifeline Services and Transport of Convenience – Question about the Model of Public Service Obligation in Air Transport*, 3 European Networks Law and Regulation Quarterly 232 (2014), p. 234.

[37] *Ibidem*, pp. 233-234.

[38] The list of all PSO routes (updated quarterly) is available at: https://ec.europa.eu/transport/sites/transport/files/pso_inventory_table.pdf (accessed 30 May 2021).

[39] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3, Art. 16(1); Commission Notice – Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council – Public Service Obligations (PSO), [2017] OJ C194/1, section 3.2.3.

[40] *Ibidem*, Art. 16(9) and 17(8).

[41] Art. 106(2) TFEU does not prevent a measure from being classified as state aid. *E.g.* Cases C-172/03 *Wolfgang Heiser v. Finanzamt Innsbruck* [2005] ECR I-1627, para. 51; T-354/05 *TF1 v. Commission* [2009] ECR II-471, paras 135-140.

principle the amount of compensation must not exceed what is necessary to cover the net cost incurred in discharging the public service obligation(s), including a "reasonable profit."[42]

The primary reason why PSOs *prima facie* constitute a particularly attractive regulatory alternative for the relaunching and sustaining of transport services during the predicted post-COVID-19 downturn lies in its flexibility: Unlike state aid falling under Art. 107 TFEU, the so-called "public service compensation" justifiable under Art. 106(2) TFEU does not, according to the rules set out in Regulation 1008/2008, require prior notification to the Commission within the meaning of Art. 108(3) TFEU. These measures are only subject to *ex post* control by the Commission (in contrast to the *ex ante* state aid control), and then only for "manifest errors of assessment."[43]

Indeed, the Commission has never successfully challenged a PSO imposed for air routes, nor the route designation nor any other parameter thereof. There are no decisions, thus one may only speculate as to what could constitute such a "manifest error."[44] It should therefore come as no surprise that the current EU regulatory framework for the PSO system has often been criticized as for its open-ended nature, giving *carte-blanche* to the Member States.[45] Its ease of use however may, on the one hand, be viewed as a convenient tool for aiding post-COVID-19 recovery – admittedly contrary to its original *ratio legis* – while on the other hand the question remains open whether a proliferation of PSOs could give rise to long-term adverse effects on the market due to the fact that they essentially roll back liberalization.

In the above context, it should be noted that although Regulation 1008/2008, which provides the framework for PSOs on air services, has introduced requirements as regards the designation of routes, these are easily met. In particular, the so-called "guarantee function" of SGEIs requires particular emphasis. The underlying argument runs as follows: even if a route turns out to be profitable, but not enough to consider it important (from the airline's perspective), a carrier may still decide to abandon the route in search of better business opportunities. This may be due to Start-up aid being offered elsewhere. It may also be the case when a route experiences seasonal fluctuation in demand – an issue more pronounced in tourist destinations – that the airline may decide to either reduce capacity during off-peak months or to cease operations entirely. In such a situation, the PSO can guarantee a continuous and regular service in accordance with the requirements in terms of frequency, capacity etc. In reality however, it

[42] Regulation 1008/2008, *supra* note 39, Art.17(8). *See* Case C-280/00 *Altmark* [2003] ECR I-7747, para. 85.

[43] *See* Cases T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, para. 187; T-106/95 *FFSA and Others v. Commission* [1997] ECR II-229, para. 192.

[44] Kociubiński, *supra* note 36, p. 241.

[45] *See also* I. Santana, *Do Public Service Obligations Hamper the Cost Competitiveness of Regional Airlines?* 15(6) Journal of Air Transport Management 344 (2009); G. Williams, *European Experience of Public Service Obligation*, in: S. Bråthen, G. Williams (eds.), *Air Transport Provision in Remoter Regions*, Routledge, Abingdon: 2016.

remains an open question whether the risk of service interruption is real.[46] It will always remain unverifiable.

In light of the above circumstances, the following problems emerge over the applicability of a PSO for post-COVID-19 recovery efforts: Firstly, whether a route requires a subsidy, and thus whether the guarantee function is needed, is entirely dependent upon public authorities since it is up to the administering authority to determine the exact parameters of air services in terms of capacity, frequency, tariffs and so on.[47] If the required service level is set above the route's commercial potential, the connection would be automatically rendered unprofitable.[48] In other words, public authorities can decide on the existence of a market failure. It can therefore be argued that under the current interpretive approach, the predicted economic downturn constitutes, by itself, an unchallengeable justification for invoking the guarantee function, thus substantiating the need for a PSO.

It should also be noted that the ability to subsidize air operations – *de iure* as a tool for regional development, but in the context of the post-COVID-19 recovery *de facto* as a lifeline for ailing airlines and airports – is associated with limiting access to a PSO route to just one carrier.[49] The exclusive rights were put in place to prevent cherry-picking those segments (for instance specific frequencies) that are most profitable, thus resulting in route revenues being dispersed and as a consequence leading to a need for higher public service compensation.[50] Since the existence of a market failure largely depends on public authorities, it may be the case that other carriers may be willing to enter the market, albeit possibly at lower service levels (conceivably still adequate for the region's needs), or be willing to commence operations overtime, as demand gradually picks up again. Thus, a paradoxical situation arises: On the one hand there is an ability to sustain a certain number of routes, which may be crucial for some carriers and especially airports; but on the other hand, exclusive rights are blocking routes' development opportunities. Hence it can be said that when a route has some commercial potential, the imposition of a Public Service Obligation with exclusive rights as an expedient, crisis-driven measure, may hinder post-COVID-19 recovery in the long run, as this will block any chances for a market mechanism to restart.

Moreover, assuming a reduced demand for air services in the aftermath of COVID-19, which would automatically render Start-up aid ineffective, PSOs may prove to be an attractive alternative for airlines because they offer a "reasonable profit."[51] Although Regulation 1008/2008 does not specify what profit can be deemed

[46] Intra-Canarian and intra-Balearic routes can be used as an example of PSOs imposed despite a relatively steady service being offered. X. Fageda, *Liberalization in Aviation: Competition, Cooperation and Public Policy*, in: Forsyth et al. (eds.), *supra* note 15, p. 94-95.

[47] Regulation 1008/2008, *supra* note 39, Art. 16(1).

[48] Kociubiński, *supra* note 36, p. 239.

[49] Regulation 1008/2008, *supra* note 39, Art. 16(9).

[50] *See* the interpretation of the rationale for exclusive rights for SGEIs in Case C-320/91 *Criminal Proceedings against Paul Corbeau* [1993] ECR I-2533.

[51] Regulation 1008/2008, *supra* note 39, Art. 17(8).

"reasonable," further guidance can be sought in the *Altmark* criteria and the Interpretative guidelines on Regulation 1008/2008 adopted by the Commission in 2017.[52] While the general – non-sector-specific – SGEI framework formally does not apply to air transport, the *Altmark* criteria remain applicable.[53] Considering that so far no PSO imposed on air routes has ever been challenged by the Commission (which may be partially due to the vagueness of Regulation 1008/2008 with regard to the oversight mechanism), a compensation for public service obligations may be an attractive option for airlines if similar profits are unobtainable on a crisis-stricken market.[54]

3. PROSPECTS FOR IMPROVEMENT

3.1. A regulatory challenge – quantitative versus qualitative criteria

An extensive body of transport research emphasises that one of the main problems in the European aviation market, casting shadows over the existing legal framework, relates to the significant degree of dependence of an airport on a dominant airline, which results in wasteful interregional competition – "subsidy races" to attract these "footloose" carriers. Any attempts to explore whether easily implementable, evolutionary changes could be accommodated within this framework in order to close identified loopholes by tightening eligibility criteria for Start-ups and for PSOs, must be carried out within this frame of reference.

At a certain level of generality, such tightening could be approached from two angles, i.e. by focusing on either qualitative or quantitative criteria.[55] Since the choice between these two types is part of the broader issue of regulatory policy design – and it is not the purpose of this paper to deal with that question extensively – suffice it to say here that qualitative criteria offer ample interpretive flexibility, but due to their open-ended terminology are highly susceptible to subjective and often arbitrary interpretations. Conversely, quantitative criteria – such as intensity thresholds – *prima facie* permit the achievement of legal certainty and leave little room for arbitrary interpretation, but they may become too rigid, formalistic, and overly detailed, resulting in an

[52] Commission Decision of 20 December 2011 on the application of Art. 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3, paras. 18-22.

[53] *Ibidem*, Art. 2(4); 2017 PSO Interpretative guidelines, *supra* note 39, para. 98.

[54] Even before the outbreak there were claims that in many cases public backing in the guise of compensation were in fact designed to keep regional carriers afloat, *see* R. Merkert, G. Williams, *The Impact of Ownership, Level of Competition and Contractual Determinants on the Efficiency of European Public Service Obligation in Air Transport Operations* (European Transport Conference, Glasgow, 11-13 October 2010).

[55] *See generally* S.K. Shah, K.G. Corley, *Building Better Theory by Bridging the Quantitative–Qualitative Divide*, 43(8) Journal of Management Studies 1821 (2006).

inability to adequately reflect all the specificities of a given situation, thus becoming susceptible to false negatives.[56]

However, using an analysis limited to what can be realistically improved within a reasonable timeframe, the general terminology of qualitative criteria – like for instance the regional development goals of Start-up aid – are often insufficient by themselves to ensure consistent results in the future. At the same time there seems to be no practical way of formulating qualitative eligibility criteria other than by using such general, open-ended terms. They will have to be fleshed out further by the Court in subsequent case law, and by the Commission in its decision practice. This takes time. Therefore, having speedy implementation in mind one must of necessity focus on the more formal, easier to "grasp," quantitative criteria, such as those related to aid intensity or traffic volumes.[57] In other words, the necessity to rely on quantitative criteria for a quick-fix solution appears unavoidable due to the constraints imposed by legislative technique on the one hand, and by the time needed to develop case law on the other.

At the same time, these quantitative criteria are already in place within Start-up aid, alongside qualitative ones arising directly from Art. 107(3)(c) TFEU; and secondly the whole concept of SGEI hinges on the ill-defined needs of society, and according to the existing well-entrenched *acquis* public service obligations can be imposed in order for the services in question to be capable of being performed in economically acceptable conditions, not where they are absolutely indispensable.[58] All this goes to show that in practice, framing a regulatory approach to subsidies' eligibility as involving a choice between quantitative and qualitative criteria, i.e. between certainty and flexibility, is based on a false dichotomy. The question is not whether to rely on quantitative criteria to the exclusion of qualitative ones, or *vice versa*, but rather how to strike an effective balance between them. Therefore, supplementing the existing qualitative criteria (without changing them) with new quantitative ones seems to be the only realistic option available.

3.2. Amending the compatibility criteria for Start-up aid

As regards the changing compatibility criteria for Start-up aid, before beginning this analysis it must be noted that since Start-up aid is granted under Art. 107(3)(c) TFEU, it is appraised as part of the "common assessment principles" applicable to all decisions taken

[56] *See generally* R. Banakar, M. Travers (eds.), *Theory and Method in Socio-Legal Research*, Hart, Portland: 2005.

[57] The Commission enjoys a wide discretion in the application of Art. 107(3) TFEU and is under no obligation to approve aid under this provision. *E.g.* Case C-409/00 *Spain v. Commission* [2003] ECR I-1487, para. 94.

[58] *Corbeau*, *supra* note 50, para. 16; Cases C-67/96 *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paras 108-111; C-437/09 *G2R Prévoyance v. Beaudout Père et Fils SARL* [2011] ECR I-973, paras 77-78. Therefore, Art. 106(2) TFEU is *de facto* not interpreted narrowly. *E.g.* L. Zhu, *Services of General Economic Interest in EU Competition Law: Striking a Balance between Non-economic Values and Market Competition*, Springer, TMC Asser, Den Haag: 2020, p. 97 and the case law quoted therein.

under that provision.[59] For this reason, these relatively vague qualitative criteria cannot be expected to change anytime soon, while at the same time they cannot be dispensed with.[60] Thus realistically speaking improvements must be sought in amending the supplementary, sector-specific criteria set out in the 2014 Aviation Guidelines.[61] Drawing on experience from dealing with state aid assessment criteria in other sectors, and on the understanding of air transport's operational specificity, the following potential solutions can be explored: Operational commitments; limits on the cumulation of aid; and changes in airports' eligibility. These will be discussed in turn below.

Insofar as concerns the proposal to introduce operational commitments, i.e. to continue operations after subsidy payments have ceased, a key question arises as to whether they should depend upon route profitability.[62] In the first place, every entry into new markets carries a risk. Although state aid can help to minimize this risk, it can never eliminate it in a market economy. In other words, even the best business plan can fail, particularly in volatile markets. If therefore said commitments are not profitability-dependent, it can be convincingly argued that the obligation to continue operations at a loss would be grossly disproportionate.[63]

Conversely, if the commitments in questions are profit-dependent, since many costs are common to a number of different operations and are not allocated to particular flights, the beneficiaries of aid would be able to prove the lack of profitability by cost-shifting should they wish to disentangle themselves from the profit-dependent continuity requirements.[64] Such manipulations could be prevented by accounting transparency. While such solutions exist under Directive 111/2006 and are applicable to PSOs, in the field of state aid these standards are merely recommended practices.[65] All this raises a host of associated problems: It remains unclear, *inter alia*, how to come up with the date when the profit should have occurred and for how long the route must remain profitable; whether this profitability must be continuous and uninterrupted; and at what point the continuity obligation should fall due, etc.

Furthermore, a route's profitability depends on many factors, such as the structure of demand, operational costs, aircraft utilization, and so on.[66] It is therefore not beyond the

[59] *E.g.* Bacon, *supra* note 9, p. 100.

[60] In this context the Court, in the *Kotnik* Case (Case C-526/14 *Tadej Kotnik and Others v. Državni zbor Republike Slovenije* [nyr]) confirmed the importance of establishing that state aid is necessary for the attainment of one of the objectives specified in Art. 107(3) TFEU.

[61] The Court has also stated that these common assessment principles are not binding on the EC for decisions not taken under guidelines incorporating these principles (Case T-162/13 *Magic Mountain Kletterhallen and Others v. European Commission* [nyr], paras 56-58).

[62] *Cf.* 2014 Aviation Guidelines, *supra* note 10, para. 147.

[63] It can even be claimed that that it would run contrary to Art. 17 Charter of Fundamental Rights (CFR) setting forth the right to fair compensation.

[64] *See* S. Holloway, *Straight and Level: Practical Airline Economics*, Routledge, Abingdon: 2016, p. 265.

[65] Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L318/17.

[66] *See* Holloway, *supra* note 64, pp. 423 et seq.

realm of possibility that even if a route is profitable (assuming that can be established), it might not fit well into the carrier's route network. i.e. as regards scheduling, fleet/crew allocation etc.[67] Given that all points in the airline's network are interdependent, such restrictive requirements may cause a snowball effect throughout the network.[68] Moreover, airlines' routes are rearranged as part of routine business activities, with low-cost carriers – the primary recipients of Start-up aid – being the most dynamic segment in this respect.[69] Finally, assuming there is a prolonged economic downturn, route profitability predictions may turn out to be overly optimistic, making them subsidy-dependent, thus further incentivizing route changes.

Imposing restrictions either by limiting the maximum number of aid measures available to any one carrier – either throughout the EU or at a specific airport – or by making carriers which withdraw from subsidized routes ineligible for further aid constitutes another option. Because carriers usually operate a number of routes, often between various states given the point-to-point networks of Low-cost carriers – primary recipients of Start-up aid – subsidized routes may be completely economically unrelated. Therefore route switching, potentially resulting in the subsidy races these restrictions seek to prevent, may occur in various geographic configurations. Low-cost carriers' networks contain operational flexibility to accommodate these changes at short notice and over large distances.[70] Yet for these reasons, while any geographic restrictions – such as ineligibility for further aid within a certain radius – would be counterproductive, there really does not seem to be a feasible alternative. It does not appear reasonable for carriers to lose eligibility throughout the EU for withdrawing service on one route. It is unclear what could be achieved through either of these restrictions, because it would primarily penalize regions, especially considering that the number of airlines serving provincial airports – recipients of Start-up aid – is rather limited. Rendering an airline ineligible would not only remove one of the few potential entrants into regional markets, but may also turn out to be disproportionally restrictive for them. For the same reasons, limits on how many subsidised routes a carrier can operate would be counterproductive. Being limited to a specific number of subsidised routes, airlines will likely select the relatively larger, more affluent regions rather than those most in need of new air routes. Thus, it will actually further exacerbate "subsidy wars" rather than reduce them.

A third option concerns changes in route eligibility. Passenger traffic thresholds must allow for economic sustainability, otherwise it would encroach upon the PSO's territory. This leads to a twofold risk. First, by limiting eligibility to those originating from the smallest airports, there is a risk that a route will not become profitable, especially in the

[67] *Ibidem.*

[68] Even for point-to-point airlines, where there are not transfers at a hub routes are operationally connected in terms of aircraft and crew scheduling. *See* Budd, Ison, *supra* note 15, p. 376. It is worth mentioning that similar commitments – so-called "frequency freeze" had been used in merger control, but were ultimately abandoned as ineffective.

[69] *Ibidem*.

[70] *See* Budd, Ison, *supra* note 15.

post-COVID market. This may ultimately require the imposition of a PSO once the initial aid has dried up.[71] Second, the relatively larger regional airports which would fall outside the new eligibility criteria would be deprived of a legal means of stimulating air traffic, which may conceivably cause some to resort to the practice of luring airlines though various incentives, marketing deals etc. – a practice that the EC sought to eliminate through, *inter alia*, Start-up aid.

All these options should be seen in a specific context; i.e. that Start-up aid should have never been seen as an optimal legal solution, but rather as an attempt to provide some framework and a degree of oversight to formalize an already widespread practice of luring airlines to regional airports.[72] Since an alternative, to be deemed viable, must be equally simple and practical as the practices it seeks to replace, adding more requirements is essentially throwing the baby out with the bathwater. In other words, the tighter the restrictions, the greater the risk that semi-legal practices will develop to evade them.

3.3. A PSO package for air transport?

As regards modifications to PSOs, unlike Start-up aid Services of General Economic Interest are directly anchored in the EU Treaties. Moreover, Art. 14 TFEU, Art. 36 CFR, as well as the Protocol on Service of General Interest confirm their places among the shared values of the Union and their role in promoting social and territorial cohesion.[73] Therefore the room for manoeuvre is much more limited, especially considering that providing lifeline services for small, isolated communities is undeniably necessary in principle. In this context, the question arises whether future PSOs can be limited to a necessary minimum.[74]

The primary problem with PSOs in aviation lies in their imposition on potentially self-sustainable routes, and on those with a questionable developmental function.[75] However, neither society's accessibility needs, nor the "vital" nature of regional development, can be unequivocally described by purely quantitative criteria, such as those based on the number of reported/estimated passengers on a given route.[76] These are

[71] This risk has materialized in, inter alia, Spain: *e.g.* Ramos-Pérez, *supra* note 23; Núñez-Sánchez, *supra* note 30.

[72] P.S. Dempsey, R. Jakhu (eds.), *Routledge Handbook of Public Aviation Law*, Routledge Abingdon: 2017, p. 123.

[73] Wehlander, *supra* note 33, p. 67 et seq.

[74] The EC seems aware of this general issue, as the Overview (*supra* note 8) suggests a need for a stricter approach, but how much credence is to be given to such a questionable document remains to be seen.

[75] *E.g.* S. Bråthen, G. Williams (eds.), *Air Transport Provision in Remoter Regions*, Routledge, Abingdon: 2016, p. 111. Surprisingly, the EC's Overview (*supra* note 8) is very scant on this matter (pp. 7-8), which may suggest either a highly improbable lack of foresight or serious difficulties in addressing this issue.

[76] Despite being inherently linked by the functional relationship, airport operations pose completely different economic challenges from the one that occurs with regards to airlines, therefore no analogies can be drawn from PSO airport decisions. *See generally* S. Bråthen, G. Williams, *supra* note 75.

concepts which are difficult, if not impossible, to define. The same holds true, although to a lesser extent, for "market failures," especially with regard to the guarantee function. Although the likelihood of service disruption will always remain unquantifiable, as long as it cannot be completely ruled out the need to guarantee SGEIs provision is likely to be successfully invoked.[77] Therefore, it remains highly doubtful whether it is possible to codify a stricter necessity test. Consequently, the only feasible qualitative "controlling" criterion is a negative one – the existence of viable, guaranteed transport alternatives (mainly railways).[78]

Considering all these limitations, realistically speaking the imposition of minimum quantitative standards with respect to service levels – frequencies, prices, capacity etc. – offers the only somewhat viable avenue for improvement (alongside the existing purely procedural criteria relating to selection procedure). While it can be convincingly argued that, for instance, two rotations per working day is sufficient for accessibility needs without being too excessive, it might be too inflexible to take into account all case specificities (for example differences between the needs of a rural community on an isolated island and an underdeveloped city). The system must therefore have some built-in flexibility for special cases, thus marring the clarity offered by quantitative criteria.

Nevertheless, given the positive experiences with non-sector specific SGEI Packages codifying the so-called *Altmark* criteria – intended to provide guidelines for assessment whether undertakings carrying out PSOs are not subject to the state aid regime – such an approach, combining hard law together with soft law guidance on service levels is, in this author's opinion, generally desirable.[79] However, while the Commission has already taken a modest step in this general direction in 2017, when it adopted Interpretative guidelines on Regulation 1008/2008 indicating a somewhat stricter approach to the existing criteria, it has not been followed in practice.[80] This reflects the general trend observable in other areas of SGEIs, whereby the EC's initial strict approach is tempered over time, in no small measure due to the fairly more lenient, but not entirely coherent, approach taken by the Court.[81]

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[77] The case of Intra-Canarian and intra-Balearic routes serves as an instructive example. Fageda, *supra* note 46, pp. 94-95.

[78] Railway passenger services typically run as PSOs under Art. 93 TFEU, thus guaranteed continuous operations can be assumed. As for other air routes, as long as there is no PSO imposed. their provision is not guaranteed.

[79] The regulatory package currently in force consists of Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3; Communication from the Commission on the application of the European Union state aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4; Communication from the Commission, European Union framework for state aid in the form of public service compensation [2012] OJ C8/15.

[80] There have been no cases concerning PSOs imposed on air routes.

[81] *See* E. Szyszczak (ed.), *Research Handbook on European State Aid Law*, Edward Elgar, Cheltenham: 2016, p. 313 and the case law quoted therein.

This however brings the discussion back full circle to the notion of "manifest error of assessment" – *conditio sine qua non* for successfully overturning an imposed SGEI. Since there is no relevant aviation case law, it remains unclear exactly what parameters, from those mentioned previously, may fall under that category. This author is of the opinion that the route designation is the most important issue, affecting all other aspects of PSOs. However, the wording of Regulation 1008/2008 indicates that the decision hinges on the purely subjective (qualitative) criterion of whether a route is "(…) considered vital for the economic and social development of the region."[82] It is therefore open to debate whether the EC could refuse the state's choice based on the argument that it plays no role in regional development, especially considering the unanswerable question of how such a role could be unequivocally quantified. Moreover, under the current lenient approach to SGEIs, with "economically acceptable conditions" and "conditions of economic equilibrium" as constituting a sufficient basis for compensation, it is unclear what kind of error with regard to the existence of a market failure – either concerning the profitability or the risk of service disruption – could be regarded as "manifest."[83]

Assuming that the criteria pertaining to service levels would be set out in a dedicated regulatory package (similar to a general SGEI package), it can be argued that a breach of quantitative parameters – known *ex ante* – should constitute a "manifest error." While this line of reasoning is not confirmed by the SGEI *acquis* – as fully *Altmark*-compliant cases are rare – the pandemic situation seems to warrant a departure from the previous approach.[84] Such a change, if adopted, would have procedural implications. Since all quantitative criteria must have flexibility built into them, a measure should ideally be notified before being put into effect in the same manner as state aid is in every case where not all the criteria are met. Although a departure from *ex post* control cannot be formally mandated within the existing *acquis*, it can be recommended as a best practice for atypical cases in order to ameliorate concerns over the lack of predictability and give an opportunity to develop the *acquis*. Nevertheless, the impact that the nature of *ex post* assessments may have remains a concern. Based on an analysis of how lenient is the oversight over SGEIs in other sectors, this author is of the opinion that since a negative decision would entail practical problems with respect to the dismantling of ongoing operations, it creates a certain reluctance to exercise a rigorous control.[85] Although this is primarily a question of policy rather than *verba legis*, nevertheless it may derail any attempts to tighten the oversight.

This analysis must thus conclude on a cautionary note: Similarly to Start-up aid, the more stringent are the assessment criteria, the greater is the incentive for evasion. Even if it is agreed as a matter of principle that PSOs in air transport should be subject to stricter control, an overly heavy-handed approach could deprive the authorities

[82] Regulation 1008/2008, *supra* note 39, Art. 16(1) first sentence.

[83] *See e.g.* Corbeau, *supra* note 50, para. 16.

[84] *See* notably C-64/99 *Adriatica and others* [2020] OJ L332/1.

[85] *See* Szyszczak, *supra* note 81.

of an imperfect, but nonetheless viable, legal tool for restarting air operations post-COVID-19, without giving anything back in return.

4. *DE LEGE FERENDA* CONCLUSIONS

Subsidy races leading to waste and excess spending are to an extent unavoidable whenever state funds are being pumped into the economy. Therefore, rather than searching for a perfect legal solution, one must accept the discussed limitations in order to come up with a practically feasible option. Although in this author's opinion certain improvements can be made to PSOs by introducing more detailed guidance on service levels through soft law instruments, fashioned after the general SGEI package, this would provide only a partial solution because such attempts will inevitably suffer from a seemingly irreconcilable dilemma between adaptive flexibility and predictable certainty, so the opportunities for major improvement must be sought elsewhere.

Therefore, while it may seem counterintuitive, in the light of the efforts to restart the economy with stimulus spending, a *de lege ferenda* postulate raised is to repeal Start-up aid due to evident flaws in the design of its framework, exacerbated by dysfunctional regional airports' dependency on airlines. One needs to consider the question whether Start-up aid does indeed serve as a viable alternative to unregulated practices aimed at attracting air carriers. As the analysis in this article has shown, due to its temporary nature Start-up aid incentivizes airlines to switch between airports in search for new funding, thus creating an environment conducive to subsidy races. In other words, the current system cannot be relied upon to achieve the objectives of Art. 107(3)(c) TFEU. The postulate presented above does not however entail the removal of a viable subsidisation mechanism without offering anything in return – PSOs will always remain an option, and also a macroeconomic stimulus may materialise at some point. It is just that Start-up aid creates new problems without solving the existing ones.

In the author's opinion, all steps taken to increase the efficiency of state aid control are only suppressing the symptoms, rather than tackling the real cause. The facilitation of unviable airports' continuing existence has a negative ripple effect on the entire European air transport sector, because the availability of public funds for various incentives changes the airlines' perception of economic rationality, ultimately leading to dysfunctional airline-airport relationships. Assuming local governments will be willing to keep an airport which serves the area afloat – a plausible scenario considering that these airports are often seen as a matter of prestige – the motivation to employ various semi-legal incentives, such as generous discounts or marketing contracts, will remain.

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REAFFIRMATION OF THE DIRECT HORIZONTAL EFFECT OF THE GENERAL PRINCIPLE OF NON-DISCRIMINATION IN EU LAW: COMMENT ON THE CASE C-193/17 *CRESCO INVESTIGATION GMBH V. MARKUS ACHATZI*

Abstract: *The relevant ruling concerns discrimination based on religion, in particular the question of the incompatibility of national legislation with EU Directive 2000/78. Following a short presentation of the factual background, the opinion of the Advocate General, and the judgment of the Court, the article offers comments on questions raised in the judgment, including the direct horizontal effect of the general principle of non-discrimination. In its previous case law the Court confirmed that the principle has "the horizontal exclusion effect." However, in Cresco Investigation the question was whether it can be the source of rights for individuals. The ECJ adopted a firm approach, ruling that the general principle of non-discrimination as enshrined in Art. 21(1) of the Charter is sufficient in itself to confer rights on individuals which can be invoked in disputes with other private parties. This means that the Court recognised "the horizontal substitution effect" of the general principle of non-discrimination, which is connected with both setting aside any discriminatory provision of national law and applying to members of the disadvantaged group the same arrangements as those enjoyed by persons in the privileged category. The possible consequences of this approach are discussed in the article.*

Keywords: Cresco Investigation, direct horizontal effect, discrimination based on religion, EU Charter of Fundamental Rights, general principle of non-discrimination in EU Law

INTRODUCTION

Cresco Investigation is an important case for numerous reasons. However, this article focuses on two aspects that seem to be crucial. The first is connected with the reaffir-

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mation of the direct horizontal effect of the general principle of non-discrimination as enshrined in Art. 21(1) of the EU Charter of Fundamental Rights. It should be noted although that the application of this principle in private disputes is a sensitive issue inasmuch as it raises essential questions regarding the division of competences between the Union and Member States, the internal EU separation of powers between the Court of Justice (further also as the Court) and EU legislator (institutional balance), and the public-private divide.[1] Therefore, it is interesting to analyse the reasons, scope and possible consequences of the approach according to which the general principle of non-discrimination can be relied on directly before national courts also in a horizontal context.

The second important development brought about by the *Cresco Investigation* case can be seen in its confirmation of the meaning of the general principle of non-discrimination on grounds of religion or belief. Undoubtedly, protection from discrimination based on religion has begun to play a significant role in the case law of the Court. The *Achbita*[2] and *Bougnaou*[3] cases concerned the prohibition on wearing an Islamic headscarf as a form of indirect discrimination on grounds of religion. In *Egenberger*[4] and *IR v. JQ*[5] the question of non-discrimination *vis-a-vis* the right to religious autonomy was considered. In both cases the Court of Justice referred to the prohibition of discrimination on grounds of religion or belief as a mandatory general principle of EU law which is sufficient in itself to confer on individuals a right that they may rely on in disputes between them in a field covered by EU law. This novel approach was maintained and even reinforced in the ruling in *Cresco Investigation*.

1. THE *CRESCO INVESTIGATION* CASE

Under paragraph 7(3) of the Austrian Law on Rest Periods and Public Holidays, Good Friday was a paid public holiday, entailing a 24-hour rest period for members of certain Christian churches. If their members nevertheless worked on that day, they were entitled to additional pay in respect of that public holiday. Markus Achatzi was an employee of Cresco, a private detective agency, and was not a member of any of the privileged churches. Consequently, he claimed that he suffered discrimination by being denied public holiday pay for the work he did on Good Friday, and for that reason he sought payment from his employer of EUR 109.09, plus interest.

[1] M. de Mol, *The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?*, 18 Maastricht Journal of European and Comparative Law 109 (2011), p. 110.

[2] Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, EU:C:2017:203.

[3] Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA*, EU:C:2017:204.

[4] Case C-414/16 *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257.

[5] Case C-68/17 *IR v. JQ*, EU:C:2018:696.

The questions asked by the Supreme Court in Austria concerned the interpretation of Art. 21 (1) of the EU Charter of Fundamental Rights in conjunction with Arts. 1, 2 (2a and 5) and 7(1) of the Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[6] The first question addressed the main problem of the case, which was discrimination based on religion. In its second and third questions, the referring court wished to establish whether these national provisions could be treated as a measure which, in a democratic society, was necessary to ensure the protection of the rights and freedoms of others, particularly the freedom to practice a religion (Art. 2(5) of Directive 2000/78), or as a positive action for the benefit of members of the churches covered by Austrian regulations. In other words, whether there was any possibility to justify the national regulations. Finally, the Supreme Court inquired whether, so long as the legislature had not created a non-discriminatory legal situation, a private employer was required to grant the rights and entitlements in respect of Good Friday to all employees, irrespective of their religious affiliation.

In his lengthy opinion of 25 July 2018, Advocate General Bobek considered all these important issues. He had no doubts that the national regulation subject to the proceedings before the Court constituted discrimination directly based on religion. Moreover, he rejected the possibility of its justification under Art. 52(1) of the Charter and Art. 2(5) of the Directive. Notably, the A.G. attributed a fundamental role to a restrictive interpretation of these exceptions to the prohibition on discrimination and to the test of proportionality. He referred to the case law of the Court concerning the assessment of proportionality of a discriminatory national measure, and concluded that the measures in favour of the members of the four churches were disproportionate in the sense that they were inappropriate to achieve the ends of protection of religious freedom. A similar approach was adopted with regard to the question whether those measures fell within the notion of positive action under Art. 7(1) of Directive 2000/78. The A.G. noted that in general "positive action" had no clear definition in either the legislation or in the case law. However, this was not relevant for the facts of the case because national measures were not adopted with the objective of ensuring full equality. Moreover, they were not compatible with the principle of proportionality, and A.G. Bobek had no doubt that, according to the Court, a positive action had to be necessary "to neutralise perceived disadvantage." Consequently, he considered the relevant national law measures disproportionate, and as such not covered by the concept of positive action.

In the most important part of the Opinion, the A.G. referred to the question of how the breach of the prohibition on discrimination should be remedied, more specifically when it occurred in a relationship between private parties. He discussed the previous case law of the Court, but underlined that there was nothing in the judgment in *Egenberger* which could confirm that Art. 21(1) of the Charter was "horizontally directly

[6] [2000] OJ L 303.

effective," and adopted a rather cautious approach that it should not be considered as such. He also excluded the possibility of a remedy against the employer if the latter acted in accordance with a national law incompatible with the EU non-discrimination principle. Thus, A.G. Bobek concluded that Art. 21(1) of the Charter, in conjunction with the appropriate provisions of Directive 2000/78, could not impose obligations on the employer, and a party injured as a result of the application of national law could obtain, if appropriate, compensation from the State for the loss sustained.[7] The Court, however, did not follow this advice, laying a solid ground for the horizontal direct effect of the general principle of non-discrimination as enshrined in Art. 21 of the Charter.

The Grand Chamber of the Court ruled that the national legislation subject to the proceedings before it constituted direct discrimination on grounds of religion. The Court referred to the justification suggested by the national court, that is, to Art. 2(5) of Directive 2000/78. However, it noted that this provision was an exception to the general principle of non-discrimination, and as such had to be interpreted strictly. Moreover, the applied measures had to be necessary for the attainment of one of the objectives mentioned in Art. 2(5), *inter alia* ensuring the protection of the religious freedom of the other employees. With regard to this question, the Court noted that according to the information given by the Austrian Government, "provision was made in Austrian law, for employees not belonging to the churches covered by the Austrian Law on Rest Periods and Public Holidays, to celebrate a religious festival (...) principally by the imposition of a duty of care on employers vis-à-vis their employees, which allowed the latter to obtain, if they so wished, the right to be absent from their work for the amount of time necessary to perform certain religious rites." Therefore, the Court of Justice excluded the possibility to consider the national measures at issue as necessary for the protection of freedom of religion within the meaning of Art. 2(5) of Directive 2000/78.

A similar approach was adopted with regard to the second justification suggested by the referring court. The Court noted that in order to ensure full equality in practice, Member States could retain or adopt specific measures to prevent or compensate for disadvantages linked to any of the grounds covered by Directive 2000/78, but they had to observe the principle of proportionality, which required that derogations remained within the limits of what was appropriate and necessary in order to achieve the aim in view. According to the Court, the national measures at issue went beyond what was necessary to compensate for the alleged disadvantage, as they treated employees in a different way – those who were members of one of the churches covered by the measures were granted a 24-hour rest period on Good Friday, while employees belonging to other religions could be absent from work in order to perform the religious rites associated with their festivals only if they were so authorised by their employer in accordance with the duty of care.[8]

[7] Opinion in case C193/17, EU:C:2018:614, para. 197.

[8] Judgment, paras. 67-68.

Referring to the most important question, i.e. whether Art. 21 (1) of the Charter could be relied on directly before national courts in a horizontal context, the Court noted that a directive could not be relied on in a dispute between individuals. However, Directive 2000/78 did not itself establish the principle of equal treatment in the field of employment and occupation, which originated in various international instruments and the constitutional traditions common to the Member States, adding that "the prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law."[9] Consequently, if national provisions could not be interpreted in a manner consistent with Directive 2000/78, the referring court was obliged to guarantee the full effect of Art. 21(1) of the Charter, which in discrimination cases was connected with granting to persons being at a disadvantage the same advantages as those enjoyed by persons within the favoured category. Therefore, the Court concluded that until the amendment of the national legislation granting the right to a public holiday on Good Friday only to employees who were members of certain Christian churches, a private employer who was subject to such legislation was obliged to grant his other employees the same rights as those enjoyed by the members of certain Christian churches, that is, a public holiday on Good Friday subject to their request and a public holiday pay for work done on that day if the employer had refused to approve such a request.

2. COMMENTS

2.1. The direct horizontal effect of the general principle of non-discrimination in the previous case law

As early as in *Defrenne* the Court of Justice recognised that the general principle of equal pay for equal work contained in Art. 119 of the EEC Treaty (now Art. 157 TFEU) "extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals."[10] In other words, it was accepted that the general principle of non-discrimination based on sex could enjoy horizontal direct effect. A similar approach was adopted in *Anognese*[11] with regard to the prohibition of discrimination based on nationality; and it was underlined that although Art. 48 of the EEC Treaty (now Art. 45 TFEU) was addressed to the Member States, it could be relied on also in disputes between private parties, thus conferring obligations on the latter. As a result, in their respective fields (mainly concerning employment law) Arts. 157 and 45(2) TFEU fully apply directly in private relations.[12]

[9] Judgment, para. 76.

[10] Case C-43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, EU:C:1976:56, para. 39.

[11] Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA.*, EU:C:2000:296.

[12] de Mol, *supra* note 1, p. 115.

A similar approach could be seen in *Mangold*,[13] where the Court referred to the general principle of non-discrimination on grounds of age and stated that the national courts were responsible for the full effectiveness of this principle also in disputes involving two private parties. Although some academics generally accepted the establishment of the general principle of non-discrimination on the grounds of age,[14] this position also attracted criticism. In particular, several Advocates General commented on *Mangold,* suggesting a more restrained interpretation according to which the prohibition of age discrimination identified by the Court constituted a particular expression of the general principle of equality.[15] *Mangold* was also contested by some German courts, which considered it as *ultra vires*. It was underlined that it would be unwise to accept the proposition that the general principle of equality was horizontally directly effective in all its various manifestations and to all situations falling within the scope of Community law.[16] However, "one should not exclude the possibility that a general principle of Community law might, in appropriate circumstances, be applied horizontally."[17] Thus, the main task of the Court was to determine "the scope of horizontality," as it was not clear if the horizontal direct effect was conferred only to the general principle of non-discrimination based on age, or also on other grounds. There were also other unanswered questions, such as the source and the nature of the general principle of equality.[18]

Even though the Court of Justice tried to clarify its earlier approach, these issues were not resolved in *Kücükdeveci*.[19] The Court referred to Art. 21(1) of the Charter as the potential source of the general principle of non-discrimination on grounds of age, but at the same time it underlined that this principle was expressed in Directive 2000/78. Mentioning the Charter in the *Kücükdeveci* case opened up a debate about the potential horizontal applicability of this document, either independently or as an expression of general principles of Union law.[20] With regard to the scope of the general principle of non-discrimination on grounds of age, the Court noted only that it should

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[13] Case C-144/04 *Werner Mangold v. Rüdiger Helm*, EU:C:2005:709.

[14] *See e.g.* D. Schiek, *Constitutional Principles and Horizontal Effect: Kücükdeveci Revisited*, 1 European Labour Law Journal 368 (2010), pp. 370 and 371.

[15] *See, inter alia,* A.G. Sharpston's opinion in case C-227/04 P, *Maria-Luise Lindorfer v Council of the European Union*, EU:C:2006:748, in particular paras. 52-58; or A.G. Mazák's opinion in case C-411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA.,* EU:C:2007:106, in particular paras. 87-97 and 132-138.

[16] D. Wyatt, *Horizontal Effect of Fundamental Freedoms and the Right to Equality After Viking and Mangold, and the Implications for Community Competence*, 4 Croatian Yearbook of European Law and Policy 1 (2008), p. 15.

[17] A.G. Sharpston's opinion in case C-427/06 *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, EU:C:2008:297, para. 85.

[18] *See* further T. Papadopoulos, *Criticizing the Horizontal Direct Effect of the EU General Principle of Equality*, 11 European Human Rights Law Review 438 (2011), p. 447.

[19] Case C-555/07 *Seda Kücükdeveci v. Swedex GmbH & Co. KG.*, EU:C:2010:21.

[20] D. Leczykiewcz, *Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection and State Liability*, in: D. Chalmers, A. Arnull (eds.), *The Oxford Handbook of European Union Law*, Oxford University Press, Oxford: 2015, p. 242.

be applied "within the scope of European Union law." However, the rationale for the horizontal direct effect of this principle was not explained in detail.

Consequently, the Danish Supreme Court refused to apply the given ruling in *Dansk Industri*[21], indicating that the principle of conferral did not allow the Court to apply the general principle of non-discrimination to a litigation between private parties.[22] Such a position could be connected with the fact that in its judgment the Court of Justice underlined the fundamental nature of the general principle of non-discrimination, which according to its previous law "confers on private persons an individual right they may invoke as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle."[23] The refusal of the Danish Supreme Court to apply the given ruling in *Dansk Industri* clearly showed that it was not easy for a national court to accept the far-reaching effects of the general principle of non-discrimination.

Despite this criticism, or even contestation, the approach underlining that general principle of non-discrimination holds a special place within the general principles of the EU has been maintained by the Court. The *Egenberger*[24] and *IR v. JQ*[25] decisions have confirmed and reinforced the direct horizontal effect of the prohibition of discrimination in labour relations, which had evolved in a coherent fashion, starting with *Defrenne* and continuing through *Mangold*, *Kücükdeveci* and *Dansk Industri*.[26] However, these rulings also introduced important new elements with regard to the direct horizontal effect of the general principle of non-discrimination. First of all, the Court referred to the general principle of non-discrimination based on religion or belief, thus confirming that the direct horizontal effect covered not only sex, nationality, or age, but also religion. In this way the Court of Justice dispelled doubts expressed in the literature as to whether its approach was applicable only to discrimination on the ground of age, or also to other grounds mentioned by the Treaties.[27] Moreover, it was underlined that the prohibition of all discrimination on grounds of religion or belief was "sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law" and "as regards its mandatory effect, Art. 21 of the Charter is no different, in principle, from the various provisions of the founding

[21] Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, EU:C:2016:278.

[22] *See further* G. Zaccaroni, *Is the horizontal application of general principles ultra vires? Dialogue and conflict between supreme European courts in Dansk Industri*, 9 Federalismi.it 1 (2010), p. 14.

[23] Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and Others*, EU:C:2014:2, para. 47.

[24] Case C-414/16 *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257.

[25] Case C-68/17 *IR v. JQ*, EU:C:2018:696.

[26] A.C. Ciacchi, *The Direct Horizontal Effect of EU Fundamental Rights. ECJ 17 April 2018, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case C-68/17, IR v JQ*, 15 European Constitutional Law Review 294 (2019), p. 305.

[27] *See e.g.* de Mol, *supra* note 1, p. 24.

Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals."[28] Thus the Court underlined the binding nature of the general principle of non-discrimination, which was not only an unwritten general principle but was also confirmed by the Member States in the Charter. Consequently, a national court is obliged to guarantee its full effectiveness, including by disapplying, if there is such a need, any contrary provision of national law. However, according to the rulings in both *Egenberger* and *IR v. JQ,* the horizontal direct effect of the general principle of non-discrimination should be resorted in situations where it is not possible to interpret the national legislation according to EU law.

2.2. The direct horizontal effect of the general principle of non-discrimination according to the current stance of the Court, and its potential consequences for private parties

Cresco Investigation seems to be the logical continuation of the previous case law of the Court. However, all of the cases discussed above concerned "the horizontal exclusion effect," i.e. the situation where the contract between private parties is based on a national norm which, however, after a review in the light of the general principle of non-discrimination, is declared incompatible with the latter. Thus the provision of EU primary law excludes the application of an inconsistent national norm between individuals.[29] Therefore, some academics refer to such a situation as an example of the application of the primacy of EU law.[30] A similar approach was adopted by A.G. Bobek – in his opinion he referred to "a right not to suffer discrimination" as a consequence of the primacy of EU law, not its direct effect. According to him, the judgment in *Egenberger* confirmed the primacy of EU primary law in the form of Art. 21(1) of the Charter in the specific context of a horizontal dispute. A.G. Bobek also suggested that the Court should not go beyond this basic finding.[31] However, the Court has always referred to such situations/disputes as involving the question of direct horizontal effect, not the primacy of the EU law. This is connected with the fact that the latter concentrates on the issue of which legal norms prevail, but it does not confer any rights on individuals. Only norms which have a direct effect can be invoked by them before a court.

In *Cresco Investigation* the Court of Justice did not hesitate to extend the protection of individual rights, and recognised "the horizontal substitution effect" of the general principle of non-discrimination. It confirmed that Art. 21(1) of the Charter is the source of a right not to suffer discrimination, and can be invoked not only against the Member States and the EU institutions, but also against other individuals in disputes

[28] Case C-414/16, paras. 76 and 77.

[29] S. Sever, *Horizontal Effect and the Charter*, 10 Croatian Yearbook of European Law 39 (2014), p. 42.

[30] *See e.g.* P. Craig, G. de Búrca, *EU Law: Text, Cases and Materials* (6th ed.), Oxford University Press, Oxford: 2015, pp. 184-224.

[31] Opinion in the commented case C-193/17, para. 140.

in a field covered by EU law. Some EU lawyers and Advocates General argue that the latter cannot be directly obligated on the basis of the provisions of the Charter, inasmuch as its Art. 51(1), which refers to the scope of application of the Charter, mentions only the Member States and the EU institutions, not private parties.[32] Other academics underline that horizontality is not excluded by virtue of Art. 51(1) for any part of the Charter.[33] Arguments based on a strict textual interpretation are not convincing in the light of the case law of the Court either. Firstly, in *Defrenne*[34] it was underlined that "the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual (...)." Secondly, in a recent judgment – *Bauer*[35] – the Court of Justice referred directly to the provisions of Art. 51(1) of the Charter and noted that it did not "address the question whether individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility." The main argument given by the Court to support the direct horizontal effect of Art. 21 is that in principle it is not different from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals. The logical consequence of the Charter having the same legal value as that enjoyed by the Treaties is to give its provisions the same effect. In particular, it would be difficult to imagine that some of the Charter's provisions which reproduce horizontally effective Treaty rights, for instance the right to equal pay, are stripped of that feature in respect of the Charter's application alone.[36] Taking this into account, it seems to be justified to accept the direct horizontal effect of Art. 21. However, this does not mean that all the Charter's provisions have horizontal direct effect e.g. in the above-cited case of *Association de médiation sociale* the Court rejected the possibility to invoke Art. 27 of the Charter in disputes between individuals.[37] This confirms that the non-discrimination principle holds a special position within the general principles of the EU.

It should be emphasised however that Art. 21(1) of the Charter can be invoked in disputes between individuals if national provisions cannot be interpreted in a manner consistent with Directive 2000/78. Thus, the Court underlines that the horizontal

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[32] *See e.g.* the opinion of A.G. Trstenjak in case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2011:559, para. 80.

[33] E. Frantziou, (*Most of) the Charter of Fundamental Rights is horizontally applicable: ECJ 6 November 2018, joined cases C-569/16 and C-570/16, Bauer et al.*, 15 European Constitutional Law Review 306 (2019), p. 317.

[34] Case C-43/75, para. 31.

[35] Joined cases C-569/16 and C-570/16 *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn*, EU:C:2018:871, para. 87.

[36] E. Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the European Union: Rediscovering the Reasons for Horizontality*, 21 European Law Journal 657 (2015), p. 660.

[37] *See* further E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis*, Oxford University Press, Oxford: 2019, pp. 91-109.

application of Art. 21(1) of the Charter can be resorted to only in a case where this Directive cannot have "indirect effects." It should be noted that national courts and the Court of Justice refer to both acts in their rulings, as they concentrate on the same problems: non-discrimination. The Court has always underlined that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds.[38] However, the Charter has the status of primary law, while the Directive is an act of secondary law which requires implementation, and according to the established case law of the Court cannot be relied on in a dispute between individuals. Therefore, only Art. 21(1) of the Charter can be invoked in such situations.

The Court also gives directions on how to ensure the full observance of equality – it should be done by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Therefore, the national court is obliged not only to set aside any discriminatory provision of national law (the horizontal exclusion effect) but also to apply to members of the disadvantaged group the same rights as those enjoyed by the persons in the other category (the horizontal substitution effect). The latter obligation can be applied, however, only if there is "a valid point of reference," as the Court puts it in its case law.[39] In other words, there must be a person (or a group of persons, e.g. members of certain churches) that enjoys certain rights (e.g. the right to a public holiday or public holiday pay) and the same benefits should be granted to other persons affected by the discrimination.

As a consequence, the obligation to comply with the general principle of non-discrimination would require that the scope of national rules granting rights to the members of certain churches should be extended so that those protective rules also benefit other persons (non-members of those churches). However, until this amendment of legislation is introduced, a private employer is obliged to ensure the full observance of the general principle of non-discrimination and to grant his other employees the same rights as those enjoyed by the members of the privileged group (certain Christian churches). The Supreme Court in Austria in its judgment of 27 February 2019 confirmed that all employees are entitled to public holiday pay while working on Good Friday but "this right only exists if the employee has previously requested his employer to be dismissed on Good Friday and the employer has not complied with this request."[40]

As a consequence, individuals are bound by the general principle of non-discrimination even if (or in particular if) it is not properly implemented by the Member States. This, however, is connected with the blurring of the public/private divide and the rise of fundamental human rights as general principles of law, thus failure to protect

[38] *See e.g.* Case C-414/16 *Vera Egenberger* and also the commented case.

[39] *See also* Joined Cases C-231/06 to C-233/06 *National Pensions Office v Emilienne Jonkman*, *Hélène Vercheval* and *Noëlle Permesaen v. National Pensions Office*, EU:C:2007:373.

[40] OGH | 9 ObA 11/19m. It should be added that the Supreme Court decided to refer the case to the first court for a new hearing and decision.

individuals from the violation of certain principles on the part of other private parties might frustrate the overall effectiveness of the system of fundamental rights protection set up by the EU.[41] Nevertheless, it can also be said that with the establishment of the horizontal direct effect of the general principle of non-discrimination in EU law, the Court shifts onto individuals a part of the burden connected with the protection of fundamental rights, which have so far rested on the Member States; in cases of their violation both are responsible for ensuring that the fundamental EU rights are granted.[42]

2.3. The confirmation of the meaning of the general principle of non-discrimination on grounds of religion or belief

As was noted in the introduction, in a series of rulings including *Achbita, Bougnaou, Egenberger* and *IR v. JQ,* the Court underlined the meaning of the prohibition of discrimination based on religion or belief, which should be treated as a "mandatory general principle of EU law." Such an approach is maintained in *Cresco Investigation*. It should also be noted that the Court of Justice has no doubts that national regulations according to which Good Friday is a public holiday only for employees who are members of certain Christian churches, and that only those employees are entitled, if required to work on that public holiday, to holiday pay for work done on that day, constituted direct discrimination on the grounds of religion. Indeed, the difference in treatment of employees in a comparable situation, at least with regard to their rights to have a rest on Good Friday and to a public holiday pay if they work on that day, is based directly on their religion or beliefs.

The possibility of justification of direct discrimination in EU law is limited, as generally it has to be provided for in the legal provisions, in particular those of Directive 2000/78. Most of them are subject to the additional requirement of proportionality, which was underlined by A.G. Bobek and the Court. They both rightly rejected the possibility of justification of the Austrian measure based on the provisions of Art. 2(5) of Directive 2000/78. The latter provides that it is to be applied "without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others." The Court has consistently held that as an exception to the principle prohibiting discrimination, this provision must be interpreted strictly,[43] with particular emphasis on the term "necessary."

Referring to the second possible justification suggested by the national court, i.e. Art. 7(1) of Directive 2000/78, which provides for so-called positive action, both A.G. Bobek and the Court underlined that such specific measures should prevent or compensate for disadvantages linked to any of the protected grounds and should be adopted "with the

[41] *See inter alia* F. Fontanelli, *Some Reflections on the General Principles of EU and on Solidarity in the Aftermath of Mangold and Kücükdevec*, 17 European Public Law 225 (2011), p. 233.

[42] *Ibidem*, pp. 238-239.

[43] *See* C-447/09 *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, EU:C:2011:573, para. 56.

objective of ensuring full equality." These general requirements were not met by the national legislation. Moreover, both A.G. Bobek and the Court rightly noted that the national measures "go beyond what is necessary to compensate for disadvantages linked to religion" and therefore should be considered as disproportionate.

This part of the analysed ruling clearly shows that the general principle of non-discrimination on grounds of religion or belief is a fundamental element of EU law which should be strictly observed. Any exceptions to direct discrimination based on those criteria are interpreted in a strict manner, with due regard to proportionality. According to the established case law of the Court, this requires the measures to be both appropriate and necessary in order to achieve the aim in view. The *Cresco Investigation* case can be treated as the continuation of this case law, as it confirms that in order to justify direct discrimination based on religion or belief, the Member States have to give sufficient reasons and the undertaken measure should be compatible with proportionality.

CONCLUSIONS

An especially positive dimension of the *Cresco Investigation* case is its reaffirmation of the special constitutional value of the general principle of non-discrimination, which is sufficient in itself to confer rights on individuals. Art. 21(1) of the Charter is an autonomous source of rights that can be invoked when Directive 2000/78 is not applicable and it is not possible to interpret national provisions in a manner consistent with Art. 21(1). According to the ruling handed down in *Cresco Investigation*, the right not to suffer discrimination can be relied on in disputes in a field covered by EU law not only against the Member States and EU institutions, but also against individuals. Thus, the Court recognises "the horizontal substitution effect" of Art. 21(1) of the Charter, which is connected with both setting aside any discriminatory provision of national law and granting to members of the discriminated group the same rights as those enjoyed by persons in the privileged category. The latter obligation rests on individuals, who are to ensure the full observance of the general principle of non-discrimination until the proper change of any national legislation incompatible with EU law is introduced. Consequently, when the right not to suffer discrimination is invoked, the private defendant will not be able to benefit from his State's default, as is the case when a directive is invoked.[44]

Considering that *Cresco Investigation* is the logical continuation of the previous case law of the Court, it seems that Art. 21 of the Charter can be invoked also in disputes between private parties concerning discrimination based not only on religion, but also on other grounds. However, the question remains whether those criteria should be regulated by the Treaties, or not. This is an important issue given the fact that Art. 21 of the Charter contains an open list of grounds for discrimination. Nevertheless, the

[44] Fontanelli, *supra* note 33, p. 238.

practical consequences of the commented judgment are far-reaching, as it has opened the door to further expansion of the general principle of non-discrimination. If the Court of Justice maintains this line of reasoning in its future case law, individuals will be better protected against various forms of discrimination, regardless of their source.

The analysed ruling also confirms the importance of the general principle of non-discrimination based on religion as a particular expression of the general principle of equality. All exceptions to the prohibition of discrimination linked to this ground should be interpreted in a strict manner. Similarly to discrimination based on other protected criteria, such as nationality, sex, age, disability etc., the proportionality of the applied measures seems to play a decisive role. As a result, Art. 2(5) of Directive 2000/78 can be referred to by the Member States only if it is established that national legislation is really necessary for the protection of the rights and freedoms of others. Likewise, positive actions should be undertaken "with the objective of ensuring full equality," and cannot go beyond what is necessary to compensate for disadvantages linked to any of the protected grounds.

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GERMANY ET AL. V. PHILIPP ET AL.: HUMAN RIGHTS EXCEPTION TO STATE IMMUNITY REJECTED

Abstract: *This article discusses some recent developments in the US jurisprudence concerning state immunity. Some lower courts' decisions handed down earlier suggested a more decisive departure from the rigid interpretation of the Foreign Sovereign Immunity Act (FSIA). If the US Supreme Court had accepted this new jurisprudential trend, it would possibly allow for carving out a partial acceptance of a human rights exception. However, the Supreme Court decided otherwise. In the recently handed-down decision in Germany et al. v. Philipp et al., the Justices rejected any innovations, unequivocally maintained the strict interpretation of FSIA §1603(a)(3), and by their direct reference to the International Court of Justice strengthened the existing status quo in international law as well. This note analyzes this decision's possible consequences at the domestic and international levels. In conclusion, it seeks to place Germany vs. Philipp in a broader context. It suggests that it possibly reflects more general tendencies in the contemporary US jurisprudence, which can impact both the US domestic legal order and international law.*

Keywords: domestic taking, FSIA, jurisdictional immunities, Philipp et al., state immunity

INTRODUCTION

The current stage of development of state immunity at the international level does not suggest that the concept of a so-called "human rights' exception" has found any strong echo in the international or domestic courts practice[1], except in

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[1] *See* ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Rep 2012, p. 99. For more recent analysis *see* A. Peters and V. Volpe, *Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse*, in: V. Volpe, A. Peters, S. Battini (eds.), *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014,* Springer, Berlin: 2021, p. 15. The authors particularly opine that "*the early millennium's momentum towards human-rights-based exceptions to immunity has been slowed down or even cut off."* In the same vein: *cf.* H. Krieger, *Sentenza 238/14: A Good Case for Law-Reform?*, *ibidem*, p. 80.

Italy.[2] Still, over the last 15 years some US courts had seemed to be moving in the opposite direction.[3] This new jurisprudential current was the "last hope" for all those who – *spes contra spem* – believed that the US judiciary would somehow contribute to developing a new trend within the global state immunity jurisprudence, i.e. one warranting the denial of state immunity on the grounds of human rights abuses, at least in cases of serious violations of norms having a peremptory character.[4]

However the US Supreme Court's (sometime referred herein as the SCOTUS) current set of decisions, issued in proceedings against Germany and Hungary, has dashed these hopes. Notably, by taking the side of Germany in *Germany et al. v. Philipp et al.*,[5] the Justices set a precedent precluding a broad reading of § 1605(a)(3) of the Foreign Sovereign Immunity Act (FSIA). In other words, if the Justices had accepted the claimants' arguments, it would have allowed for subsuming many claims arising from "old instances" of the violation of human rights and the law of armed conflicts under the so-called "expropriation exception." The Justices, however, openly and univocally rejected these propositions. Thus, the US Supreme Court's role in maintaining the existing *status quo* has been preeminent.

This note discusses the possible effects this recent decision entails for the US judicial practice concerning state immunity and its potential consequences within international law. It is divided into three parts. Part 1 briefly recapitulates the development of state immunity in US law. Part 2 analyzes the *Philipp* decision. Part 3 considers its effects on US state immunity jurisprudence and the scope of such immunity in international law. In the conclusion, these recent developments in the US practice are placed in the broader context. It appears that the US courts' approach discussed herein plausibly reflects more general tendencies aimed at limiting the number of extraterritorial cases falling within the scope of US jurisdiction. Further, the outcome of this analysis seems to support the claim that the SCOTUS's decision under examination in this note corresponds to some degree with the political realities of the third decade of the 21st century. Still, it remains to be seen whether this latter hypothesis is correct.

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[2] *Cf.* Corte Costituzionale, Judgment, 22 October 2014, No. 238/2014. For the English translation, see https://bit.ly/3gNqraK (accessed 30 May 2021). There are at least 38 pending cases lodged against Germany before Italian courts (for more information *see* Volpe et al., *supra* note 1, p. 14).

[3] *See e.g. Simon v. the Republic of Hungary* 812 F.3d 127 (D.C. Cir. 2016) (*Simon II*); *Simon v. the Republic of Hungary*, No. 17-7146 (D. C. Cir. 2018) (*Simon IV*); *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59 (D.D.C. 2017); *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018). In all these cases, the plaintiffs successfully argued against state immunity and won their cases. For other cases belonging to this current, *cf. Abelesz et al. v. Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Davoyan v. Republic Turkey*, 116 F. Supp. 3d 1084 (C.D. Cal. 2013); *Claude Cassirer v. the Kingdom of Spain et al.*, 461 F. Supp. 2D 1157 (2006).

[4] *See* R. Pavoni, *An American anomaly? On the I.C.J.'s selective reading of United States practice in jurisdictional immunities of states*, 21 Italian Yearbook of International Law 143 (2011). Pavoni concedes that the German-Italy dispute outcome probably would have been the same. Still, he strongly criticized the ICJ for its alleged want of a correct analysis of the US court practice, which – according to him – could serve as support for argument on jus cogens immunity exception (pp.144 and 159).

[5] *Germany et al. v. Philipp et al.* 592 US (2021).

1. STATE IMMUNITY DEVELOPMENTS IN US LAW

The origins of the state immunity doctrine in US case law are well known. After the SCOTUS' decision in *Schooner-Exchange*,[6] over the next ca 150 years US courts followed the so-called "absolutist doctrine." This case line was abandoned with the entry into force of the FSIA (1977).[7] This Act is based on the premise that no foreign state may be sued before a US court unless a claim falls within the scope of a carefully drafted exception.[8] The FSIA as such did not explicitly provide for any human rights exception.[9] Still, according to a new body of jurisprudence on the part of some US courts, despite the Act's silence on the matter the FSIA was deemed to sometimes oblige the court to deny state immunity on the grounds of a particularly egregious breach of international law.[10] To be clear, plaintiffs considering their claims to be eligible under this category had to prove that their claims fell somehow within the scope of an exception laid down within the FSIA. This was not an easy task, for the sole FSIA provision which could eventually serve as the legal foundation for the concept of an exception in cases of a *particularly egregious breach* was the "expropriation clause." In effect, only those plaintiffs that could prove their claim(s) fulfilled these statutory clause requirements could expect that the US courts would go beyond a strict interpretation of the term "expropriation."[11] Had this new approach been accepted by the SCOTUS, the consequences would undoubtedly have been numerous. Two of them however had been made clear even before the US Justices had to pronounce themselves on this issue.[12]

Firstly, by seeking to bridge the gap between the statutory provisions and their innovation, the judges following the new approach did not want to "redraft" the FSIA or introduce a "human rights exception" through the back door. They wanted instead to achieve a new interpretation, in the light of which a US court could react, but only in cases of some qualified (most serious) human rights violations. Still, at the theoretical level, the problem arose how to establish that a breach in question is so particularly egregious that it warrants the denial of state immunity. Plausibly, the breach

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[6] *The Schooner Exchange v. McFaddon*, 11 US (7 Cranch) 116 (1812).

[7] US C 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602–1615.

[8] *See* US C 28, § 1605.

[9] *Cf.* F.J. Djoukeng, *Genocidal Takings and the F.S.I.A.: Jurisdictional Limitations*, 106 Georgetown Law Journal 1883 (2018), p. 1903, who points out that this omission was a deliberate political choice of the US legislators.

[10] *Restatement of the Law Fourth, Restatement of the Law, The Foreign Relations Law of The United States, Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity*, The American Law Institute Publishers, Saint Paul: 2018, Part IV, Chapter 5 (Restatement IV) para. 455 point 6, p. 368 et seq.

[11] Strictly speaking, the judges would deny state immunity not solely in cases falling within the international investment law, but they would do the same in situations when the "property taking" met the standard of *an egregious breach*. For the list of judgments following this new approach, *see supra* note 3.

[12] *See* notably *The Restatement IV*, *supra* note 10, p. 369.

of any *jus cogens* norm (notably the prohibition of genocide)[13] would have met this standard, but was there anything else? Inasmuch as courts are rather poorly positioned to answer abstract questions in the US political system, this problem had to remain unresolved. Secondly, and more importantly: the courts accepting the concept of an exception for a *particularly egregious breach* usually reinterpreted the issue of citizenship. Thus, contrary to the previous line of cases (which the SCOTUS confirmed in *Maria Altmann*),[14] in the new approach followers were not interested in whether or not the property was taken from the US nationals. Once they established that all the §1605(a)(3) requirements had been met and that the violation of international law was indeed particularly egregious, they denied state immunity, even if at the moment of taking the property the claimants or their ancestors were nationals of the respondent state.[15]

In hindsight, it seems that both these ambiguities could not go unnoticed. In practical terms, these propositions exposed the US courts to the genuine risk of facing an uncontrollable flood of claims lodged by all victims of human rights violations, no matter whether committed on US territory or abroad. These fears did not seem to be exaggerated. Over the last decade, some plaintiffs successfully argued before the US courts in accordance with this new doctrine.[16] The US Supreme Court – up to

[13] As regards what constitutes the crime of genocide as a peremptory norm *see* ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment (2006) ICJ Rep 64.

[14] *See Republic of Austria v. Altmann,* 41 US 677. In this case, the Holocaust Survivor Maria Altmann, heiress to the late steel-industrial magnate Ferdinand Bloch-Bauer, claimed Gustav Klimt's paintings. The Nazis confiscated these works of art, and then they were illegally appropriated by the Austrian State Gallery. As Mrs. Altmann gained knowledge about all circumstances of the case, she instituted proceedings against Austria before the US court. Even though she was successful in her case, the Supreme Court affirmed the ruling of the Appellate Court based on significantly different reasons than those accepted by the lower instance court. Essentially the Appellate Court sought to decouple Austria's state immunity and take in the framework of the "Aryanization policy" on the grounds of the latter's gravity of the breach. The SCOTUS openly distanced itself from this proposition (*ibidem* 700). Moreover, the fact that Mrs. Altmann had acquired US citizenship as early as in 1945 (that is – even before Austrian State Gallery illegally appropriated the paintings) was not deprived of significance, although the majority did not consider this issue in their opinion (*cf.* however Justice Breyer's concurring opinion *ibidem*, p. 713)

[15] In the erosion of nationality as a factor in state immunity proceedings, the *Cassirer* case played a pioneering role (*see supra* note 3). Still, the lower instance courts handling *Simon et al. v. Hungary* or *Philipp et al. v. Germany et al.* adopted the same line of reasoning.

[16] The most notable case of this kind was the Judge Srinivassan decision in *Simon II*. The plaintiffs, all of them Holocaust Survivors, lodged the putative class action against Hungary for the role its organs had played in Holocaust perpetration, notably in the property confiscation that had preceded deportation to Auschwitz. The plaintiffs argued that having regard to the specific character of Hungarian state involvement in the Nazi genocidal "Final Solution" policy, Hungary could not claim immunity. Judge Srinivasan agreed with the claimants. He directly referred to Art. II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and qualified the property taking that occurred during Holocaust as "genocidal taking" – *cf. Simon II* (*supra* note 3) pp. 142-144. Srinivasan's views have not been isolated (cf. Prof. Dodge's opinion in favor of claimants produced at the later stage of the same proceedings, Dodge, William S., *Brief of Professor William S. Dodge as Amicus Curiae in Support of Plaintiffs-Appellants, Simon*

now – remained silent, but this legal uncertainty has dramatically changed during the last year, and *Philipp* played the pivotal role. Thus we now turn to this particular case.

2. *GERMANY ET AL. V. PHILIPP ET AL.*

The factual background of the case was quite simple. In the 1920s, a consortium owned by Jewish art dealers – all German nationals – acquired an art collection, the so-called *Welffenschatz*. When the Nazis came to power in 1933, they coerced the owners to sell it to them for a third of its actual market value. After World War II, the US Army found the collection, but instead of giving it back to the legitimate proprietors, the US authorities in Germany decided to transfer it to SPK (*Stiftung Preußischer Kulturbesitz*), a German state instrumentality. In 2017, the heirs to the owners of the *Welfenschatz* instituted legal proceedings before the US courts against Germany. They underlined that the taking of the disputed object occurred within the framework of the Nazi's anti-Jewish policies, preceding the main phase of the Holocaust. Arguing along the lines of the new approach discussed above, the plaintiffs demanded a denial of Germany's immunity.[17] Inasmuch as the District Court agreed[18] and the Circuit Court of Appeals upheld this decision,[19] Germany filed a petition for *certiorari* with the US Supreme Court. The following paragraph presents the most important reasoning contained in the opinion, authored by Chief Justice Roberts for the majority.

Contrary to the conviction reflected in the lower instances' judgments quoted above,[20] the SCOTUS openly rejected the new approach *in toto*. In its opinion, the "domestic taking" may not be accepted as a valid ground for a denial of state immunity. This is not possible because historically international law, as the law regulating the relations between states, could protect only aliens' rights against foreign sovereigns, and never the foreign nationals' rights against their own governments' actions.[21] In effect, neither the increase of individuals' international protection nor international criminal law can inform the US courts' reading of FSIA and international law when handling state immunity cases.[22]

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v. Republic of Hungary (February 5, 2018), available at: https://ssrn.com/abstract=3118607, http://dx.doi.org/10.2139/ssrn.3118607 (accessed 30 May 2021).

[17] For a description of the factual background, *see Germany et al. v. Philipp et al.*, Part I, pp. 1-4.

[18] 248 F. Supp. 3d 59, 70–74 (DC 2017).

[19] 894 F. 3d 406 (2018).

[20] *See supra* notes 3 and 19.

[21] *Germany et al. v. Philipp et al.*, Part II A, pp. 5-7.

[22] "We need not decide whether the sale of the consortium's property was an act of genocide because the expropriation exception is best read as referencing the international law of expropriation rather than human rights. We do not look to the law of genocide to determine if we have jurisdiction over the heirs' common law property claims. We look to the law of property" (*ibidem*, Part II B, p. 9).

Interestingly, when analyzing the *Philipp* case, the Justices directly referred to the International Court of Justice's (ICJ) *Jurisdictional immunities* judgment.[23] They quoted a short passage, taken from its point 91, where the ICJ had observed that a state is not deprived of immunity because it is accused of serious violations of international human rights law.[24] The question whether, by this token, the US Supreme Court took the ICJ's reasoning as its own is a complex one. Presumably, by this short reference the Justices wished to add an "international pedigree" to their reasoning and the outcome they reached. Therefore, they found it convenient to refer – albeit very briefly – to some authorities other than the SCOTUS's own jurisprudence. Still, it is difficult to escape the impression that in quoting the relevant ICJ judgment they took a cherry-picking approach based on a cursory reading.

The reasons behind this "judicial tactic" seem to be rather obvious. By avoiding an in-depth analysis of the *Jurisdictional immunities* case and absorbing just one sentence from the long ICJ judgment, the SCOTUS probably wanted to conceal the existing doctrinal differences between the ICJ and its own position in state immunity matters. At the same time, by applying this "user-friendly" interpretation, the Justices could send a pretty strong signal of its partial acceptance of *Jurisdictional immunities* without weakening their position in the ongoing dispute over the sources of state immunity, understood as an institution of international law.[25] Against this backdrop, however, another question arises: whether the interpretative zig-zags led to fulfilment of the presumed goal stated above. An affirmative answer seems to be contradicted by the sentence (ironically, the one immediately following the above-mentioned quotation), wherein the Justices openly called state immunity "a rule" of international law.[26] If in *Philipp* the Supreme Court stopped short of unconditionally joining the general state practice, which usually derives state immunity from custom, nonetheless after *Philipp* the SCOTUS's position seems to be a bit closer to it.[27]

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[23] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pts 99 and 139.

[24] *Germany et al. v. Philipp et al.*, Part II B, p. 11.

[25] The way the Justices made the quotation is open to criticism. They cited only a short fragment of the longer phrase laid down in point 91, apparently omitting the part where the ICJ indicated this institution's source, that is international custom. Therefore, *Germany et al. v. Philipp et al.* cannot be read as a clear backtrack from the Supreme Court's earlier positions wherein state immunity derived from comity, not from the international custom (*see Verlinden B.V. v. Central Bank of Nigeria,* 461 US 480 (1983), pp. 486 et seq.).

[26] "Respondents would overturn that rule whenever a violation of international human rights law is accompanied by a taking of property" (*Germany et al. v. Philipp et al.*, Part II B, p. 11, emphasis added).

[27] It is worth noting that the SCOTUS did not subscribe to the interpretation of the ICJ judgment limiting its practical effects solely to cases of serious human rights violations originating from war crimes committed by armed forces operating on foreign territory (*Germany et al. v. Philipp et al.,* Part II B, pp. 10 et seq.). *Cf. also* W.S. Dodge, *The Meaning of the Supreme Court's Ruling in Germany v. Philipp, Just Security* (8 February 2021), available at: https://bit.ly/3gPnN4o (accessed 30 May 2021). Dodge opines that the Supreme Court erred in its reading of *Jurisdictional Immunities*, considering it as an authority supporting the view in the light of which international state immunity protects all governmental acts,

Thus, despite some incoherence and the lack of consequence, it seems that the SCOTUS is very near to having made an open admission: state immunity protects *acta iure imperii*, even in a case of the gravest human rights violations. This conclusion (still presumed, not declared), and the Supreme Court's position on the current stance of international law, makes it possible to understand the shift in the US Supreme Court's reading of §1605(a)(3) FSIA, which was openly declared "unique" in the sense that no other country has adopted a comparable limitation on sovereign immunity.[28] Moreover, the Justices stated that the German interpretation of this provision is more consistent with the classic division between public and private acts, and declared that it took this classification seriously.[29]

What the practical effect of this shift amounts to is discussed in Part 3 below. However, it is legitimate to think that these fragmentary quotes can be understood as a signal by the Supreme Court that international law may (and perhaps even should) inform the reading of the FSIA, at least whenever US courts apply the *expropriation exception*.

At the end of their analysis, the Supreme Court went on to say that the phrase "rights in property taken in violation of international law," as used in the FSIA's expropriation exception, refers to violations of the international law on expropriation, and thereby incorporates the domestic takings rule.[30] Thus, for the US Supreme Court human rights and property rights protected by investment law are two different realms that do not infringe on each other. Logically, by confirming the correctness of the findings in *Maria Altmann*, the Justices even more strongly conditioned the application of § 1605(a)(3) on the claimants' nationality, and they excluded domestic takings from the scope of the FSIA exceptions.[31]

3. EFFECTS OF THE PHILIPP DECISION ON THE US STATE IMMUNITY JURISPRUDENCE

Undoubtedly, the legacy of *Philipp* will strongly impact the US courts' practice on state immunity, although its effects will not be the same for all state immunity proceedings. On the contrary: in the analyzed case the Justices reconfirmed that if the claim falls within the FSIA's provisions, state immunity is denied according to the previous practice.[32] Moreover, *Philipp*'s bottom line concerned only the extent of the

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even if they have a criminal character. Nonetheless, he concedes that Justices accepted this allegedly erroneous *Jurisdictional Immunities* interpretation as a correct view on the current stage of state immunity development.

[28] *Germany et al. v. Philipp et al.,* Part II B, pp. 11 et seq.

[29] *Ibidem*, p. 12.

[30] *Ibidem*, Part IV, p. 15.

[31] *Ibidem*, Part II A, p. 8; Part III, p. 14.

[32] Notably, the Justices reconfirmed their readiness to waive state immunity in cases of torts (§ 1605(a)(5)) and the artistic exhibition clause (§ 1605(h)(2)(A)). They also maintained the controversial terrorist

expropriation exception. Therefore, plausibly it may not inform the interpretation in cases where the other FSIA exceptions are invoked. Furthermore, as of now it is not fully clear how to read the last part of Part II B, where the Supreme Court underlines the expropriation exception's unique character. Should this be interpreted as a signal to limit the scope of application of §1605(a)(3) to cases when US citizens' interests are at stake? It could be, but even if this hypothesis is correct it means that the Supreme Court will not deem the expropriation exception inadmissible whenever the conditions of §1605(a)(3) are met.[33] After *Philipp*, the SCOTUS's reading of the "exception clause" will be – to put it mildly – strict. This strictness will probably lessen the controversies arising whenever US courts deny state immunity in disputes over governmental acts purported to be expropriation. However, owing to the FSIA's structure these controversies will not be avoided entirely.

Undoubtedly, for pending cases and future litigations originating from violations of international law committed before the enactment of FSIA, such as e.g. Holocaust or colonial crimes, the *Philipp* case is a tremendous blow. The same is true of some future litigations which will arise from some instances of human rights violations. Unless they are/will be covered by the FSIA exceptions discussed above – the claims based on them will be presumably rejected on the ground of state immunity. For while dismissing the *particularly egregious crime* doctrine, by the same token the Justices refuted any attempts to seek additional interpretative guidelines in Holocaust restitution legislation (at least those aiming to inform the reading of §1605(a)(3)).[34] Secondly, one should not forget that according to US law *Philipp* now serves as a precedent controlling other pending state immunity disputes. Thus, even though in its outcome the dispute between the US judiciary and the rest of the world on the sources of actual state immunity has not been fully settled, nonetheless the practical importance of this difference became significantly smaller than it had been before. The doctrine of *stare decisis* makes the theses in *Philipp* binding on lower courts. The approach asserted by this precedent has a good chance to remain in force for the upcoming decades, unless the US Congress decides to introduce some modifications to the FSIA. After *Philipp*, plausibly no interpretation going beyond the strict limits set out in the statute will be accepted by the US Supreme

exception (which encompasses not only acts of terror but also tortures, extrajudicial killings, aircraft sabotage, and hostage-taking) (*cf. Germany et al. v. Philipp et al.,* Part II C, p.12). For more on the terrorist exception, *see* H. Fox, P. Webb, *The Law of State Immunity* (3rd ed.), Oxford University Press, Oxford: 2013, pp. 278, 281et seq., and 466.

[33] It is worth noting that the passage in *Philipp* refers directly to the *Restatement IV* analysis, which takes note of the controversy existing between generally accepted practice, but considers § 1605(a)(3) as being under international law (*Restatement IV* § 455, *Reporters' Note* 15 (2017)).

[34] The Supreme Court rejected any suggestion to seek any clarifications in *the Holocaust Victims Redress Act* of 1998, 112 Stat. 15; *the Holocaust Expropriated Art Recovery Act of 2016*, 130 Stat. 1524*; and the Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. 115–171, 132 Stat. 1288* (*Germany et al. v. Philipp et al.,* Part III, p. 15). For reasons concerning citizenship, the SCOTUS rejected the proposition to interpret the FSIA in light of the *Foreign Cultural Exchange Jurisdictional Immunity Clarification Act* H. R. 4292 (*ibidem*).

Court. In other words, if a serious human rights violation is claimed before a US court as a ground to waive the immunity of a state, and such claim does not fall, beyond any reasonable doubt, within a FSIA exception, then the chances to win the case are almost non-existent.[35] Against this backdrop, it comes as little surprise then that the ruling in the *Philipp* case was handed down on the same day the Supreme Court quashed the Appellate Court's ruling in *Simon et al.* and ordered the case sent back for further proceedings consistent with the *Philipp* theses.[36]

Some commentators have criticized the SCOTUS for failing to address Germany's argument, submitted in the alternative, concerning the US courts' competence to reject a claim directed against a foreign state(s) on the ground of *comity*.[37] Still, placed in the context of the *Philipp* ruling, this allegation is problematic. On the one hand, it is true that in the recent past some US courts abused this doctrine to deny US jurisdiction without solid justification anchored in the American legislation. However, it remains unclear if it would have been prudent to settle this controversy in a state immunity case. For *comity* as a ground for denial of jurisdiction finds its application where the private litigant is a defendant or respondent, so perhaps Justices acted prudently when they decided – at least for now – to leave aside this issue in the proceedings against a foreign state. Such a step does not exclude that the SCOTUS will grant *certiorari* if this problem re-emerges on a larger scale in the future. Secondly, even those who criticized the Justices for their lack of clear stance on this issue admit that the *Philipp* judgment lessens this controversy, even though it does not eliminate it.[38] As *Philipp* strengthens foreign states' position before the US courts, presumably they will be less interested in seeking an alternative ground for denial of jurisdiction in the years to come. Thus, without denying the existence of the "*comity* expansion" problem, it is not excluded that this trend will be effectively hampered in the wake of the *Philipp* ruling.

Assuredly, *Philipp's* impact on state immunity as an institution of international law may be considered non-negligible. It strengthens the existing *status quo* in domestic courts' jurisprudence, which usually rejects any claims based on an alleged human rights exception.[39] Undoubtedly, this current stage in the development of state immunity is beneficial for global peace and the harmonious relations between states. Nonetheless, in the ongoing discussion on effective remedies for serious human rights violations, the case analyzed herein does have its specific dimension. In short, *Philipp* is good news for all those states which operated in a twilight zone where they might be sued before national courts for "dark legacies of the past." At the same time, it is very bad news for

[35] *Germany et al. v. Philipp et al.*, Part II B, pp. 12 et seq.

[36] Supreme Court decision in the *Simon* case (3 February 2021), 592 US (2021), available at: https://bit.ly/3d9bGNd (accessed 30 May 2021).

[37] Dodge, *supra note 28.*

[38] *Ibidem*.

[39] *Cf. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pp. 134 et seq. (point 77).

states seeking remedies for damages or crimes and basing their strategies upon the double sword tactic (that is, conducting diplomatic negotiations coupled with the exertion of additional pressure via the threat of instituting court proceedings).[40] As *Philipp* openly backed the current state of state immunity practice, such a tactic does not seem to have a very promising future. Following this decision, negotiations between the interested states seem to be the sole solution. It is safe to say that by cutting the ground out from under such claimants, *Philipp* indirectly reinforces the position of states from which compensation is sought, and weakens the negotiation positions of states seeking to be compensated.

Moreover, the *Philipp judgment* – albeit indirectly – reinforces the ICJ, whose judgment in *Jurisdictional Immunities* still awaits execution by Italy. At the very least, while deciding in favor of Germany the Justices at the same time sent a clear signal that they do not support those views which could weaken the effectiveness of ICJ judgments. Finally, Germany's success before the SCOTUS is also a sort of double victory for Berlin diplomacy as *Philipp,* to a very considerable extent, confirms Germany's arguments in the ongoing dispute with Italy. After *Philipp,* it becomes more and more complicated to indicate any jurisdiction in the world which could give concrete support for the views expressed in *Sentenza 238/14*, which allowed for the lifting of state immunity in some situations when the claim arises from human rights violations. As of now, the Italian judicial practice remains isolated.

CONCLUSIONS

Philipp is an important milestone in the history US jurisprudence with respect to state immunity. Still, against the background provided above another question arises: How important are these recent developments in the American jurisprudence, given that in some instances their impacts do not go beyond the strict operation of state immunity? Or should we place *Phillip* within a broader context, i.e. consider it as a manifestation of a US backtrack from earlier tendencies extending the American courts' jurisdiction well beyond the limits of the US territory? The answer to these questions is complicated, but the final remark made in Part II C of the *Phillip* opinion, in which the Justices directly referred to *Kiobel*[41] and quoted its famous passage ("United States law governs domestically but does not rule the world") speaks in favor of the latter presumption. If this hypothesis is correct; then not only will claims directed against foreign states allegedly arising from human rights abuses be declared inadmissible by the US judiciary, but the US courts could also deem claims against transnational companies (including those incorporated under the US law) for damages inflicted abroad as falling outside the scope of their jurisdiction. However, the American judiciary's attitude

[40] *See* Pavoni, *supra* note 1, pp. 104 et seq.

[41] *Kiobel v. Royal Dutch Petroleum Co.,* 569 US 108, 115 (2013).

in these matters has not been fully crystallized yet, and the future of Supreme Court jurisprudence in this respect remains to be seen.[42]

Wherever the truth may lie, the approach endorsed in *Philipp* strictly reflects Zeitgeist when rivalry instead of cooperation characterizes international relations.[43] The US-China competition, Russia's aggressive policy, and complicated connections between Washington and Brussels – these are factors which do not favor any courageous court decisions in such a sensitive area as state immunity. Considering the US's diminishing influence in the world, one can understand the Justices. Having in mind the increasing tensions in international relations, they found no other alternative but to follow John Marshall's footsteps[44] and adopted a similarly deferential stance towards the Executive Power when state immunity issues are at stake.[45]

[42] *Cf. Nestlé U.S.A., Inc., Petitioner v. John Doe I, et al.* (17-55435), Docket number: 19-416 and 19-453.

[43] *See* Krieger, *supra* note 1, pp. 78 et seq.

[44] *See The Schooner Exchange v. McFaddon*, p. 146.

[45] This deference is almost openly admitted in Part II C, p. 13 of *Germany et al. v. Philipp et al.*, where the Justices, once against quoting *Kiobel*, declared it their duty to avoid adopting an interpretation of US law that has foreign policy consequences not intended by the political branches.

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INTERNATIONAL TORT LAW IN VIETNAM – TAKING STOCK AND THE CASE FOR REFORM

Abstract: *This article proposes that the current Vietnamese conflict of law rules for tort actions, which presently use the place of damages rule to determine the applicable law (meaning applying the law of the jurisdiction where the damage occurred), should be supplemented with additional conflicts of law rules in order to address the problems presented by specific tort actions such as environmental pollution, product liability, intellectual property rights, and violations of competition rules. It is proposed that for these specific torts, the place of damages rule needs to be either replaced by other connecting factors, such as the place of acting or the rule of closest connection, or it has to be made more concrete. In other types of torts, the rule has to be rebuttable by the foreseeability defense or has to give way to a ubiquity rule granting the plaintiff the choice between the laws of the place of damage and the laws of the place of acting.*

Keywords: applicable law, conflict of law, place of damage, tort, Vietnam

INTRODUCTION

In the past 15 years, the Vietnamese courts have been adjudicating on an increasing number of civil cases with foreign elements. The Ministry of Justice's Explanatory Report of The Civil Code 2015 Project[1] provided data from the Supreme Court that between 2003 and March 2013, the courts at all levels had settled 12,473 civil cases with foreign elements, accounting for 2.42% of all civil cases. Another report by the

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[1] Ministry of Justice (Vietnam), Explanatory Report of the Civil Code 2015 Project, September 2014, available at: https://tinyurl.com/r35kdax (accessed 30 May 2021), at 83.

Supreme Court in 2019[2] showed that in each year between 2014 and 2018 the courts handled between 80 and 151 business and commercial cases with foreign elements, which were mainly concentrated in the provincial courts of Ho Chi Minh City, Hanoi, and Binh Duong.[3]

International tort cases are also increasing, although they usually account for smaller numbers[4] compared to family and commercial cases. In the years 2012-2014, when we wrote the very first book in the English language on contracts and torts in private international law in Vietnam,[5] numerous problems were found related to cross-border discharge and waste transport, imported Chinese products containing toxic chemicals, traffic accidents, and the fraudulent treatment of foreign medical doctors. However, when court judgments were examined, only a few judgments were found.[6]

After five years, more crossborder damage cases in traffic accidents were found,[7] and the spread of environmental pollution appears to be growing and severe.[8] Liability actions against Vietnamese products exported to other countries are also expected to increase.[9] Emerging competition infringements and violations of foreign intellectual

[2] Report by the Vietnamese Supreme Court at a conference for exchanging experiences between Vietnamese and international judges on resolving international commercial disputes and the recognition and enforcement of foreign arbitral awards, held on 22 October 2019. The conference was co-organized by the Vietnamese Supreme Court, UK Government, Cour de Cassation (France) and UNDP.

[3] Ho Chi Minh City is the largest city in Vietnam in terms of its economy. Hanoi is the capital city and the second largest city in terms of its economy, and Binh Duong is a dynamic city and a leading city in attracting foreign investment and the location of many industrial zones.

[4] Data on the number of international tort cases handled by the Vietnamese courts is not available. The judgments of Vietnamese courts have recently been published on the website of the Supreme and local courts, but the published cases are categorized, based on the branches of law, into criminal, civil, commercial, family, etc. International cases have not been counted and reported separately; therefore, they are spread though these categories. Researchers have had to self-screen, and journals, reports and comments specifically concerning private international law cases have not been available.

[5] T. Nguyen, *Private International Law in Vietnam*, Mohr Siebeck, Tübingen: 2016.

[6] *Ibidem*. As I have explained at 154 "this is mainly because Vietnamese community has not been aware of the potential to take actions of this sort."

[7] Traffic accidents involving foreigners increased in the first 8 months of 2019. Information given by the Head of Traffic Safety, Department of Ministry of Traffic and Transport, posted on "Báo Văn hóa điện tử," available at: https://tinyurl.com/tt6odxp (accessed 30 May 2021).

[8] The ten companies causing the most severe pollution in Vietnam were named as Formosa Ha Tinh, Thermal Power Vinh Tan 2, Vedan Vietnam, Mei Sheng Textiles Vietnam, tannery Hao Duong, Sonadezi Long Thanh, ship building Hyundai-Vinashin, weaving and dyeing Pangrim Neotex, Miwon and the sugar company Hoa Binh, according to the investment forum bizlive.vn. Many of these companies are shell companies of Taiwanese and Korean enterprises.

[9] In a presentation in 2015 to AIG (American International Group Inc.), a leading international insurance organization pointed out that recalls of Vietnamese-manufactured goods had been increasing and claimed that trends in the US Consumer Product Safety Commission had switched from China to Vietnam, available at: https://tinyurl.com/ua6wktf (accessed 30 May 2021).

property rights are also expanding.[10] More Vietnamese court judgments resulting from these kinds of tort actions are being published. Based on our observations, the most significant increase has been in cases involving the infringement of intellectual property rights, where the plaintiffs are foreign company rights holders.

Theoretically, when dealing with an international tort case, after assuming international jurisdiction the court will ascertain the applicable law. This step has to be taken before it can handle any substantive law problems. The tool used to find the applicable law is the conflict of law rules in torts. In this article, the current Vietnamese conflict of law rules on torts will be examined to propose a solution to the problems the courts have to cope with when applying these rules to complex torts and specific cases. The article will then prescribe preliminary steps for more modern and appropriate special conflict of law rules for four particular types of torts; namely environmental damage, product liability, intellectual property rights, and competition. It is proposed that for these specific torts, the place of damages rule needs to be either replaced by other connecting factors, such as the place of acting or the rule of closest connection, or it has to be made more concrete. In other types of torts, the rule has to be rebuttable by the foreseeability defense or it has to give way to a ubiquity rule granting the plaintiff the choice between the laws of the place of damage and the laws of the place of acting.

1. VIETNAMESE CONFLICTS OF LAW RULES FOR TORTS

The quality of the Vietnamese conflicts of law rules is of key importance in order for them to work in practice, and they should be suitable to the situation in Vietnam, economically, legally, etc. The first conflict of law rules for torts appeared in Vietnamese law in the Civil Code 1995,[11] and they remained unchanged in the Civil Code 2005,[12] where they provided for the application of the laws of the country where the act causing such damage took place or where the actual consequences arose. The rules also included an exception to the *lex loci delicti* principle in its ubiquity, which provided that where the act causing the damage occurred outside the territory of Vietnam, but where the person who caused the damage and the victim were both Vietnamese citizens/legal persons, in such situations Vietnamese law applied.

The current Civil Code 2015 has made significant changes to the conflict of law rules for torts. Art. 687 reads, with regard to *compensation for non-contractual damages:*

1. Parties may agree to choose the law applicable to the compensation for non-contractual damages, except in the case provided in clause 2 of this article. Where there is no

[10] Increasing numbers of cases of cross-border competition infringements and violations of intellectual property rights handled by Vietnamese courts have been reported by Vietnamese law firms on the website Managing IP (https://www.managingip.com).

[11] *See* Art. 835.

[12] *See* Art. 773.

agreement, the law of the country in which the consequences of the event causing loss and damage arise, shall apply.

2. Where a party having caused loss and damage and an aggrieved party have the places of residence in the case of individuals or the places of establishment in the case of legal entities in the same country, the law of that country shall apply.

This article gives the parties the right to choose the applicable law for compensation for non-contractual damages. However, this right is eliminated in the case where the party having caused loss and damage and the aggrieved party both have their place of residence, in the case of individuals, or their place of establishment, in the case of legal entities, in the same country. In such a situation, the law of that country shall apply.

Where there is no agreement, the article provides for the law of the country in which the consequences of the event causing loss and damage arose. Therefore, the general Vietnamese conflict of law rules for torts opts for the place of damage and not the place of acting or the ubiquity rule. The legislators provided two rationales for this choice.[13] Firstly, when the place of acting and the place of injury were in different countries, it was not clear whether the court or the plaintiff was to choose between the two possible applicable laws. Where the law gave no priority between the two places, they were afraid that different courts may not apply them consistently. Secondly, the place of damage would better protect the victims. However, the Ministry of Justice did not explain anything further with respect to the second rationale. It is supposed that when the Ministry said that choosing the place of damage would better protect the victims, it was referring to conflict of laws justice rather than any substantive fairness. Specifically, the place of damage took into account the expectations of the victims. Since victims often sustain damages in the country in which they reside, the application of the law of that place would satisfy their expectations with respect to the applicable law and provide a level of redress that matches their social and economic backgrounds.

The exception of Art. 687(2) referring to the common residence shall apply where the tortfeasor and the victim have a place of residence in the case of (individuals) or place of establishment (in the case of legal entities) in the same country. In this scenario, the laws of the country of common residency shall apply instead of those of the place of damage.

A notable feature is that where there is no agreement between the parties, Vietnam has only one general rule of place of damage, rebuttable by a common residence exception. This rule would apply to most kinds of torts, except for maritime torts[14] and torts caused by aircraft,[15] which are regulated separately in the Vietnamese Maritime Code 2015 and Law on Aviation 2006.

Another feature is that the article on conflicts of law rules does not provide an escape clause of closer connection to the tort[16] in order to reach justice in individual

[13] Ministry of Justice, *supra* note 1, at 98.

[14] Art. 3 of the Vietnamese Maritime Code 2015.

[15] Art. 4 of the Vietnamese Aviation Law 2006.

[16] *See* S. Symeonides, *Codifying Choice of Law in Tort Conflicts – The Oregon Experience*, 12 Yearbook of Private International Law 201 (2010) (for the three different types of escape clause in worldwide codi-

cases. As such, there is no flexibility provided for in Art. 687 of the rules for conflicts of law. However, there is another possibility, which is to fall back on the principle which was designated for determining the applicable law for the whole of civil relations with foreign elements, which is enshrined in Art. 664(3) of the Civil Code 2015. It provides that the law applicable to civil relations with foreign elements is the law of the country that has the closest connection to the relations. Moreover, the intention of the legislation given in the Ministry of Justice's report confirmed this overall principle. It stated that the connecting factors prescribed in the conflicts of law rules in the Civil Code are, in nature, concretized from the closest connecting laws. The legislation has tried to break down this default principle into presumptive rules for different relations, aiming to identify as far as possible the connecting factors that represent the most closely connected laws.[17]

Therefore for tort actions, if the parties do not agree on the applicable law, the law of the place of damage is believed to be most closely connected to the tort; and where the parties have a common residence, that country is more closely connected and its laws are applicable. The question is whether this default principle, i.e. of applying the law most closely connected, which was given in an article intended for general application, can itself generate the effect of a default clause for conflicts of law rules in tort actions, without having it expressly codified in the wording of the specialized article on conflicts of law for torts. Why is such a default clause, i.e. of a closer connection principle, codified directly in the article on conflicts of law for contracts, but not for tort actions? Arguably, this means that the legislators did not intend the conflicts of law rules for tort actions to have a default clause.

As such, the formula for Vietnamese law involving conflicts of law in tort actions, in the absence of an agreement by the parties, is the place of damage rule, which in turn gives way to the common residence rule, and arguably to the closer connection approach as a last resort.

2. THE APPLICATION OF THE GENERAL CONFLICTS OF LAW RULES FOR TORTS INVOLVING ENVIRONMENTAL DAMAGE

In studying the cases of cross-border environmental damages involving the Vietnamese people, one might think first of the Agent Orange/dioxin case filed before US courts by Vietnamese nationals in 2004 (represented by the Vietnam Association for Victims of Agent Orange – a Vietnam-based organization). The claims were brought under the Alien Tort Statute against the chemical companies that produced the dioxin-contaminated herbicides which were employed by US troops to protect against

fications: general (simple/pure) clause; "pre-existing relationship escape"; and a combined clause incorporating the closer connection principle and a significant pre-existing relationship).

[17] Ministry of Justice, *supra* note 1, at 92.

ambushes in South Vietnam during the Vietnam war. Apart from the claims that the defendants were in violation of international law and had committed war crimes, the plaintiffs also lodged tort claims based on state law. The claims were mainly for product liability, not environmental damages. However, the environmental damage claim would have failed as well, as the court concluded that "the governmental contractor defense operates as a complete bar to plaintiffs' state law claims."[18]

One can imagine a scenario in which a Vietnamese court hears a similar case, and it applies the current conflict of law rules to ascertain the applicable law for the environmental damage tort claim. The rigid place of the damage rule points strictly to Vietnamese law. If the Vietnamese conflict of law rules for tort actions are interpreted strictly, there would be no chance to evoke the US government contractor defense (if the Vietnamese court was to characterize it as substantive), in which case the Vietnamese victims might have a better chance of succeeding in the case. If the stance of favoring the victims and substantive justice is taken, the Vietnamese conflict of law rules may succeed in this example. However, if the aim is at the international harmonization of decisions and conflict justice, the Vietnamese conflict of law rules fail, as they offer no opportunity to take into account the law of the place of acting, even though this law may contribute to the substantive result of the case.

Meanwhile, two contemporary cases of very severe environmental damage concern two companies that were established in Vietnam, but with 100 percent of their shares being held in Taiwan, namely Vedan Vietnam[19] and Formosa Ha Tinh.[20] The two respective companies discharged toxic chemicals and caused severe pollution to the Thi Vai river in 2008 and the ocean coast of central Vietnam in 2016. The damages did not spread to a second country, and the assumed defendants (the two companies) were regarded as Vietnamese legal entities since Vietnamese conflict of law rules use the incorporation theory to determine the nationality of the companies.[21] Therefore, when the Vietnamese victims sued the two companies to seek compensation for the damages to their health and property that they had suffered as a consequence of the discharges of toxic chemicals from the two plants, they filed their complaints in local courts and the cases were considered as domestic civil litigations. Notably, in the *Formosa Ha Tinh* case, the local court of the Ky Anh District (Ha Tinh Province) dismissed 506 petitions from people requesting Formosa Ha Tinh to compensate for damages caused by the

[18] *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 92d Cir. 2008), III, at 16.

[19] The main products of *Vedan Vietnam* are monosodium glutamate and ingredients. The company's website in the Vietnamese language is available at: http://vedan.com.vn/vi-vn/Aboutvedan/CategoryId/28 (accessed 30 May 2021).

[20] According to Wikipedia, Formosa Ha Tinh Steel Corporation (Chinese: **台塑河靜鋼鐵興業責任有限公司**, Vietnamese: Công ty TNHH Gang Thép Hưng Nghiệp Formosa Hà Tĩnh, abbr. FHTS) is a steel plant established in the Vung Ang Economic Zone, Vietnam, by the Hung Nghiep Formosa Ha Tinh Steel Company under the backing of the Taiwanese conglomerate Formosa Plastics Group. Development of the plant began in the 2010s and steel production started in May 2017.

[21] Art. 676(1) of the Civil Code 2015 provides that "the nationality of a legal entity shall be determined in accordance with the law of the country in which the legal entity was established."

company to the sea, resulting in massive fish deaths.[22] The Vietnamese plaintiffs have brought further litigations before a Taiwanese court against the mother company, but the Taipei District Court dismissed the case against Formosa Plastic Group for lack of jurisdiction.[23]

Given such precedents, let us assume a hypothetical situation whereby Vietnamese victims bring an environmental damage claim before a Vietnamese court directly against the controlling company in Taiwan, or in conjunction with its subsidiary, the Vietnamese company. The direct claim would need to succeed first at the jurisdictional level. The separate legal personality of the Vietnamese company could possibly be disregarded and/or the court could accept the theory of *piercing the corporate veil*[24] to allow the direct claim against the mother company.[25] If the victims can successfully overcome these hurdles, in turn the choice of law rules for torts comes into play. The place of damage rule will obviously prescribe Vietnamese law. But what if Taiwanese law, which has successfully been established as the law of the place of acting (the place where the fraudulent decisions were made), is more favorable to the victims, e.g., prescribing a higher level of precautionary principles or, and more possibly, a higher level of redress? From the point of view of the substantive policy considerations of protecting the environment and victims, the application of the law of the place of damage is too rigid; there should be a way for the law of place of acting to prevail. European countries actually employ substantive justice just for environmental damage torts through Art. 7 of the Rome II Regulation, which grants the person seeking compensation due to the damage the right to opt for the law of the country in which the event giving rise to the damage occurred if she/he does not wish the place of damage rule to apply.

What would occur in the case where the damages spread to a second neighboring country, like Thailand's coast, and claims were brought by Thai nationals against the Vietnamese polluters? The jurisdiction of the Vietnamese courts for this case is obvious, but the applicable law would be Thai law. There is no chance for Vietnamese law

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[22] According to the leading news website "Thanhnien.vn," the reason why the Ky Anh Town People's Court dismissed the petitions was that the petitions and documents of the people suing failed to provide the necessary documents and evidence proving the actual damage according to Clause 5, Art. 189 of the Civil Procedure Code 2015, and that the incidents have been settled by the effective decision of the competent State agency under Point C, Clause 1, Art. 192 of the aforementioned Code. Specifically, the Prime Minister issued Decision 1880 on 13 October 2016 regarding the levels of compensation for the victims in the four central provinces damaged by marine environmental incidents, regarding which Formosa Ha Tinh agreed to pay 500 million US dollars as compensation to the victims.

[23] *See* more information at the JFFV-Justice of Formosa Victims website, available at: https://jffv.org/2020/01/17/taipei-times-vietnamese-plaintiffs-to-fight-dismissal-of-fpg-case/ (accessed 30 May 2021).

[24] Vietnamese laws do not contain codified rules employing the *piercing the corporate veil* theory to enable such claims.

[25] *See more* M. Renner, *Companies, transnational groups of*, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Elgar Publishing, Cheltenham: 2017, at 412. Most states have only a few codified rules on *piercing the corporate veil*, mainly in bankruptcy law: "Generally, English and US common law as well as French civil law allow for tort liability of controlling companies only under a narrow set of circumstances, namely when the control over the subsidiary was excessive and used in a fraudulent way."

to intervene, although it is the law of the place of acting and also the *lex fori*. More dramatically, when the conflict involves conduct-regulating rules (if it is assessed in light of US law in The Restatement of the Law Third, Conflict of Laws[26]) the Vietnamese law could produce more favorable results to the victims. What if the Vietnamese national plaintiffs also sue the same defendants and have Vietnamese law applied to the same tort action? Should applying Vietnamese law to both claims promote a solution of better fairness between the different claimants?

Based on the above analysis, it is suggested here that the current Vietnamese conflicts of law rules for torts are not equipped to handle complex cases of cross-border environmental damage. The proposed solution is that a separate conflict of law rule for environmental damage tort actions be enacted; one that would give victims the option to base their claim on the law of the country where the event giving rise to the damage occurred, in order to ensure the highest level of protection for them as well as for the environment. When the victims are given the right to choose between the two different laws, they are likely to choose the law more favorable to them, usually the law giving them a higher level of redress. Thus the Thai victims in the above-mentioned case example would be able to choose Vietnamese law, which may be more favorable to them. The proposed conflict of law rule would treat victims in different jurisdictions with greater fairness, in that in their cases they could resort to the national laws which are better for their claims.

The most difficult scenario involves a cross-border collective redress action, for example, where both Vietnamese and Thai plaintiffs sue the same defendant seeking compensation for private damages to their life, health, and property due to environmental pollution caused by a plaintiff in Vietnamese territory.[27] Indeed, the Vietnamese Civil Procedure Code 2015 does not provide a definition of "collective redress," but it does allow multiple organizations/individuals to sue an agency/organization/individual for one or more related legal relations in order to resolve the same case.[28] However, the suits must be filed individually and the right to join or separate the cases belongs to the court, and court practice with respect to either consolidating or treating such suits separately is inconsistent,[29] and with regard to cross-border litigation the practices

[26] The Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 2 (12 August 2016) makes a distinction between loss-allocating and conduct-regulation rules and prescribes different conflict rules for the two categories. In doing so, the US method is different from the unilateral approach in EU law that aims to ascertain the applicable laws to the entirety of tort relations.

[27] It should be noted that in the field of environmental law (notably in Decree No. 03/2015/ND-CP dated 6 January 2015 providing for the determination of environmental damage), Vietnam only allows the relevant state administrative organizations to act as the plaintiff in claims of ecological damages caused by pollution. This right has not been granted to individuals and civil social organizations. Individuals can however file claims for private damages to health, property, etc., which they have suffered as a result of environmental pollution caused by the alleged tortfeasor.

[28] Clause 2 of Art. 188.

[29] There has been a domestic case wherein the trial court decided to join the cases, but the appeal court cancelled the judgment because of an issue connected with the joining of the cases.

would be even more unpredictable. Given the situation described, Vietnam should have a careful jurisdictional design for cases of collective redress related to environmental damage, especially for those cases with cross-border aspects.[30] In terms of choice of law rules, a similar careful design should also be prepared for this difficult situation, perhaps to allow for a more-defendant-focused connecting factor to enable the same applicable law.[31]

3. THE APPLICATION OF THE GENERAL CONFLICTS OF LAW RULES FOR TORTS INVOLVING PRODUCT LIABILITY

Product liability is another complex type of tort (with the conduct and the injury often taking place in different states), where the place of damage rule cannot properly fulfill its role in designating the applicable law. The major attack on the rule is the lack of provision for a foreseeability defense, by which the producers may argue that they could not be able to foresee the marketing of the product in the place where the damage actually occurred, thus making the application of the law of the place of damage unforeseeable to them. To tackle this problem, EU law has developed a special conflict of law rule[32] for this complex tort. It employs a cascading system of connecting factors, pointing first to the residence of the plaintiff, next to the place of acquisition of the product, and then to the place of damage, provided that each of the three factors coincided with the place of the marketing of the product. The Hague Convention on the law applicable to product liability of 1973 also employs complex rules for determining the applicable law for tort liability.[33] In the US, special rules for product liability were drafted later for The Restatement of the Law Third, Conflict of Laws.[34]

With regard to Vietnam, it is very likely that Vietnamese manufacturers will increasingly be sued by consumers in countries to which their products are exported.[35] Let us examine the case scenario whereby foreign consumers file product liability claims against Vietnamese manufacturers in Vietnamese courts.[36] The applicable law, in accordance with the current Vietnamese conflicts of law rules for tort actions, is the product safety

[30] For collective redress in private international law, *see* H.M. Watt, *Collective redress*, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Elgar Publishing, Cheltenham: 2017, pp. 373-381.

[31] It may be that both a special jurisdictional rule and choice of law rule for collective redress are needed.

[32] Art. 5 of the Rome II Regulation.

[33] Arts. 4-7. *See* more in M. Illmer, *The New European Private International Law of Product Liability: Steering through Trouble Waters*, 73 Rabels Zeitschrift für ausländisches und internationales Privatrecht 269 (2009), p. 271.

[34] S. Symeonides, *The Third Conflicts Restatement's First Draft on Tort Conflicts*, 92 Tulane Law Review 1 (2017), fn 132.

[35] *See supra* note 8.

[36] Although they may usually also sue in the courts of their place of residence, still we should not rule out the possibility of a suit brought in a Vietnamese court.

laws of the foreign countries where the consumers sustained the damages. The current general conflicts of law rules give no possibility for the Vietnamese manufacturers to argue that they could not have foreseen the marketing of the product which caused damage in the foreign state. Neither can they rely on Vietnamese laws on product liability to possibly reduce their responsibilities, as Vietnamese laws on product liability, due to having been newly developed, are considered as rather general and cannot guarantee mechanisms for the enforcement of consumer rights.[37] As such, Vietnam's rigid conflicts of law rule of place of damage, mandating that foreign laws can be applicable to product liability claims against domestic manufacturers, appears not to encourage manufacturing investments. Such a regulation will not be beneficial to a country that wants to attract investment in production like Vietnam.

Moreover, with regard to product liability actions brought by multiple plaintiffs from different countries against Vietnamese manufacturers of the same products before Vietnamese courts, which happens often in US case law,[38] this is a peculiar and difficult scenario which Vietnamese private international law rules should also be prepared for. Given the complex nature of such situations, and the probability of many places of damages, one may propose the adoption of a special choice of law rule for collective redress in product liability cases which may be more defendant-focused, so that the possibility of applying one law to a joint action is advanced. However, it is worth considering that if a defendant-focused choice of law rule is designated for mass product liability actions, the producer might be given an incentive to cause damage to more people so that they can get the laws of their affiliated states applied, instead of the foreign laws of the places where damages were sustained by victims in other countries. While such a concern may seem far-fetched – as normally producers do not want to hurt their consumers by means of their products – the consequences of such a bad intention, if that were ever to happen, is worth contemplating. For cross-border collective redress in product liability actions, if a special choice of law rule is not in place in the future hopefully the courts in Vietnam, when facing such a case, will be able to anchor their decisions on a thoughtful choice of law rule.

The second case scenario for product liability cases in Vietnam would be claims by Vietnamese consumers against imported products or products hand-carried to Vietnam. Art. 687 provides for Vietnamese law to apply, as the place where the damage occurred is in Vietnam. Vietnamese plaintiffs can thus rarely obtain the application of the law of the country where those products were manufactured, even if such laws may provide more plaintiff-friendly rules. Although this scenario may happen less often than the first one, as court filings on consumer product safety in ASEAN countries[39] and Vietnam

[37] Vietnam has not had separate laws on product liability. Product liability is mainly governed by the Civil Code tort provisions and the law on consumer protection.

[38] *See* S. Symeonides, *Choice of law in the American Courts in 2018: Thirty-Second Annual Survey*, 67(1) The American Journal of Comparative Law 1 (2019).

[39] *See* L. Nottage et al., *ASEAN Consumer Law Harmonisation and Cooperation: Achievements and Challenges*, Cambridge University Press, Cambridge: 2019, pp. 122-204.

are still rare, plaintiffs in product liability claims before Vietnamese courts should be able to rebut the application of only the place of damage law. For example, where hand-carried goods were brought to Vietnam, the sales prices to the purchasers of these goods are usually much higher than for the imported goods. While the manufacturers located in many countries, such as the US and Europe, may not reasonably foresee the marketing of their products in Vietnam, it might be that Vietnamese plaintiffs will wish to evoke the law of the place of manufacture to possibly request better levels of redress. Regrettably, the current conflicts of law rules for torts in Vietnam does not provide the possibility for them to do so.

Putting the two scenarios together, it can be seen that the current conflicts of law rules for tort actions may encourage Vietnam to become an importing country rather than an exporting one. Manufacturers located in Vietnam will have to abide by the usually stricter laws of product liability in the countries they export goods to, while many local consumers may not be able to request the laws of the manufacturer's countries to be applied in place of the Vietnamese laws.

When considering the reform of the conflicts of law rules, it is suggested that Vietnam should legislate a separate provision containing a special choice of law rule mechanism for product liability tort actions. As such rules in other jurisdictions and global instruments have been very complex and diverse, it should not be so difficult to make exact proposals for the Vietnamese rules in this paper. However, an important point should be discussed, i.e. whether to keep the place of damage rule as the default rule, or to change to the place of acting rule as the beginning of a presumptive rule. The default rule will certainly contain rebuttal criteria. To begin with the place of acting, Borchers has pointed out that when this connecting factor is set as the default rule, to be challenged by other connecting factors such as place of damage and so on, it leads to the result that the law of the place of conduct will usually apply in product liability case law, as in the US.[40] Although Vietnam has had ineffective laws on product liability, such a default rule of place of acting would be appealing to manufacturers who wish to locate their plants and headquarters and to create manufacturing jobs in the country. However, in our opinion the country should, for its long-term development, encourage manufacturers located in Vietnam to produce the safest products possible, and the applicable legislation should provide incentives for higher rather than lower product standards. Therefore, it is proposed that the special conflicts of law rule on product liability should default to the place of damage rule, which is still in line with the general rule and can make a greater contribution to the international harmony of decisions, rather than change to a new rule which defaults to the place of acting. The place of damage rule at the same time should be rebuttable by certain requirements, which need to be developed.

[40] P.J. Borchers, *How "International" Should a Third Conflicts Restatement be in Tort and Contract?*, 27 Duke Journal of International and Comparative Law 461 (2017), p. 478.

4. THE APPLICATION OF THE GENERAL CONFLICTS OF LAW RULES FOR TORTS INVOLVING INTELLECTUAL PROPERTY

Civil litigation in the intellectual property (IP) field in Vietnam's courts has, in general, been known to be lengthy. There are hurdles for rights holders to overcome. Meanwhile, the damages granted are usually low and gauging the actual damages is still difficult due to a lack of expertise and precedents.

However, in recent years there have been positive developments in the enforcement of IP law in Vietnam, especially with regards to claims against patent infringements. The courts have issued many landmark judgments, influencing and setting good precedents for dealing with claims of damages and compensation.[41]

It can be seen that the plaintiffs in IP cases with foreign elements which have been heard by Vietnamese courts are mainly foreign companies, being the IP rights holders, who seek compensation from Vietnamese companies for producing infringing products. The foreign plaintiffs, as such, have thus brought an action in the defendant's jurisdiction. However, they usually apply to administrative agencies for injunction relief against acts of infringement. As the last resort for claims mainly seeking damages, the courts have been solely applying Vietnamese laws on IP protection and the relevant laws on technology.

It is notable that, apart from the general conflicts of law rules for torts, the Civil Code 2015 provides for a special conflict of law rule for intellectual property rights. Art. 678 of the Civil Code 2015 provides that "Intellectual property rights shall be determined in accordance with the law of the country in which the objects of intellectual property rights are required to be protected." This rule lays down the *lex loci protectionis* rule for claims arising out of infringements of intellectual property rights. As such, Vietnam has adopted a universally acknowledged principle,[42] the principle of territoriality, to design the law applicable to infringement of intellectual property rights claims. Accordingly, the law of the country where the protection is claimed will apply to remedies as well as to questions of the existence and the validity of the alleged infringement rights.

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[41] *See* the website Managing Intellectual Property – The Global IP Resource for Vietnamese cases, https://www.managingip.com/Search-Results.html#?term=Vietnam%20court (accessed 30 May 2021). One judgment rendered by Ho Chi Minh City Court on 28 August 2014 was between the plaintiff – a US company named Videojet and the defendant – a Vietnamese company named Nam Trinh. Nam Trinh traded infringing products bearing Videojet's trademarks. The court ruled in favor of Videojet and awarded, for the first time, the full sought amount of damages and attorney's fees. In another judgment dated 2 February 2015, Ho Chi Minh City Court for the first time enforced an agrochemical patent of a European entity against a local pesticide producer. There is also a judgment of the Da Nang Court dated 22 April 2014, in which a French company was successful in applying for revocation of a domain name registered by a Vietnamese plaintiff (a cross-border online IP infringement case).

[42] *See* D.M. Vicente, *Intellectual Property, Applicable Law*, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham: 2017, pp. 961-969.

In the reported cases of IP infringements in Vietnam, there is no information about whether the issue of the applicable law has been expressly or impliedly addressed. It appears that the court simply assumed that the applicable law was local law.[43]

Notably, most IP cases that the Vietnamese courts have handled so far have not been particularly complex, in the sense that they have not involved the most challenging scenarios of multi-state infringements and damages in IP rights cases. The infringement acts and the place of damages have solely occurred in Vietnam, hence local law has been applied, which is consistent with the principle of territoriality given in Art. 679.

However, the rule should be prepared for those difficult scenarios where the infringement of the IP rights takes place in many countries, for example an unauthorized act of distribution via the internet of works protected by copyright. The localization of the ubiquitous infringements and the application of the *mosaic* principle[44] generate the need for additional provisions that can enable the application of only that law with the closest connection to the dispute. In terms of further examination and suggestions, the legislation should be able to make references to modern developments which have been enshrined in principles such as the ALI Intellectual Property Principles,[45] the *Waseda* Principles,[46] or the CLIP Principles.[47]

Attention should be paid to a study published in 2017, namely Private International Law Principles for Ubiquitous Intellectual Property Infringement – A Solution in Search of a Problem.[48] This study envisaged that an additional rule on ubiquitous IP infringements, especially online infringements, which adopted the closest connection rule as the main connecting factor was unnecessary and constituted "a solution in search of a problem."[49]

The findings provided by this empirical study were striking. However, one of the features of a typical cross-border online IP infringement case like the one given in this

[43] The application of local laws to cases of cross-border IP infringements is common, if not to say nearly absolute. A. Christie, *Private International Law Principles for Ubiquitous Intellectual Property Infringement – A Solution in Search of a Problem?*, 13(1) Journal of Private International Law 152 (2017); the empirical study says that in almost 95% of the evaluated cases local laws were applied.

[44] The court considers the infringement of IP rights and applies the law of each state for which the protection is sought.

[45] American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes*, St Paul: 2008.

[46] The Principles of Private International Law on Intellectual Property Rights drafted by members of the Private International Law Associations of Korea and Japan in a Project coordinated by Waseda University (published in 2010).

[47] Principles on Conflict of Laws in Intellectual Property promoted by the European Max Planck Group on Conflict of Laws in Intellectual Property (published in 2011).

[48] Christie, *supra* note 43, pp. 2, 3. This article "reports the outcome of an empirical study commissioned by, and undertaken with the assistance of, the World Intellectual Property Organization (WIPO). It analyses the factual and legal features of a sample of cases, drawn from a range of jurisdictions, dealing with online IP infringement with cross-border elements. Using the results of that analysis, it draws conclusions about the typical features of such cases, the practical consequences for the interface between PIL and IP law, and the need for special PIL rules dealing with the situation generally regarded as the most problematic from a PIL perspective, namely "ubiquitous infringement."

[49] *See ibidem*.

study is that it is brought by a local plaintiff before its own jurisdiction against a foreign defendant who caused damages to a local IP rights holder. Meanwhile, although a quantitative examination of the cases in Vietnamese jurisdiction is not yet available, most of the reported IP infringement cases up to the present time, whether online or offline, which have been dealt with by Vietnamese courts have been brought by foreign plaintiffs. This creates the impression that the findings in the empirical study mentioned above might be of more relevance for the jurisdictions of more developed countries with more IP rights holders, rather than smaller countries with greater occurrences of infringements by local residents.

5. THE APPLICATION OF THE GENERAL CONFLICTS OF LAW RULES FOR TORTS INVOLVING COMPETITION

Vietnam has recently passed a new law on competition, the Law on Competition 2018 (which entered into force on 1 July 2019). This law regulates competition by restraining agreements, market dominance, economic concentration and unfair practices.[50] With regard to anti-competitive practices that have international dimensions, the new law introduces a provision for extra-territorial jurisdiction. Art. 1 provides for the scope of the application of the law as follows: "This law sets forth anti-competitive practices, economic concentration that causes or may cause anti-competitive effects on the market of Vietnam, unfair competition practices, competition legal proceedings, sanctions against violations of competitive law, and state management of competition."[51] Accordingly, the law expands its provisions to include offshore anti-competitive practices if there is an impact on the domestic market. The law also provides for its application to both domestic and foreign agencies, organizations, and individuals.[52]

Unlike with regard to intellectual property rights, where the Civil Code 2015 provides for a special choice of laws rule ordering the law of the country where the protection is claimed to apply, the Civil Code 2015 does not contain any special conflict of law rule for acts of anti-competition. The Law on Competition instead adopts a unilateral conflicts rule, providing for its application to cross-border competition acts that meet the requirement that they have an anti-competitive effect on the domestic market.

It can be seen that Vietnam has not used the civil law doctrine of providing a multilateral choice of laws system to deal with choice of law issues in the competition field. It rather employs a common law doctrine of unilateral conflict of laws, as the specialized Law on Competition determines its reach to international transactions. This can be explained by the fact that the Competition Law 2018 has taken examples and

[50] In Vietnam, competition law is essentially enforced by administrative authorities.

[51] Translation provided by the Law Firm "Antlawyers," available at: https://www.antlawyers.vn/library/vietnam-competition-law-2018-effective-jul-1st-2019.html (accessed 30 May 2021).

[52] Art. 2(3) of the Vietnamese Law on Competition 2018.

experiences from Australian law.[53] The purpose of the rule is, *prima facie*, not to resolve a choice of laws problem, but to empower the domestic competition authority to rule on deals or transactions conducted outside the territory of Vietnam but which have an adverse effect on competition in the domestic market, so as to allow Vietnamese enterprises and consumers to assert rights and claims for any damages they suffer.

The rule has however produced conflicts of law effects, and it is a market-effects rule,[54] mandating that the Vietnamese market competition law apply to competition acts which are having competitive restraining effects on the Vietnamese market, whether the competition activities are carried out inside or outside the territory of Vietnam.

By prescribing only the law of the market affected, the rule mentioned above is applied equally to both acts of unfair competition and restriction of competition. Indeed, the place of the market affected is not a default from the place of damages rule in the general rules enshrined in Art. 687 of the Civil Code. Rather, it helps to clarify the position in circumstances of unfair competition and restriction of competition, and thereby enhances the foreseeability of the applicable law to tort liability arising from anti-competitive acts.

However, in order to regulate the complicated scenarios of various practices restraining competition, many points need to be clarified. Firstly, how is this special rule related to the general rules for tort conflicts in the Civil Code? If the former is seen as an attempt to clarify the latter, does the exception of the common residence rule in the general rule prevail over the affected market rule where the parties have the same residence in another country? Furthermore, can the clarification rule be superceded by an escape clause of a manifestly closer connection? Can the law of the market's place be derogated from by an agreement to apply another law? The tentative answers to these questions, with reference to EU law, should be that the specific rule should not be subject to the intervention of the parties' agreement or those exception rules due to the concentration on the market functions, on which the rule is based.

The second issue is whether to differentiate between market-related and competitor-related acts, as the EU law does in Art. 6(2) of Rome II, by providing that where an act of competition exclusively affects the interests of a specific competitor, the general rule shall apply, meaning that the common habitual residence and the escape clause retain their functions in this scenario.

The most difficult and complex scenario is where there are multiple damaged states, which is especially relevant for cartels since claims of this sort often involve many affected markets. Consider a situation where a Vietnamese court hears a claim for economic

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[53] T. Van, *Vietnam amends Competition Law to better manage cross-border deals*, Vietnamese Invest, Review, 24 September 2018, available at: https://www.vir.com.vn/vietnam-amends-competition-law-to-better-manage-cross-border-deals-62550.html (accessed 30 May 2021). The project name: "Australia Supports Economic Reform in Vietnam" sponsored by the Australian Department of Foreign Affairs and Trade.

[54] The effect principle nowadays appears to be the prevailing conflict of laws rule in international competition law. *See* more in J. Basedow, *Competition law (Antitrust)*, and T.W. Dornis, *Competition, unfair*, in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham: 2017, pp. 425-432 and 432-441.

loss encountered in many jurisdictions, including the forum, as a result of a violation of a law on economic concentration. Practically speaking, the court would apply Vietnamese law to cover the national part of the entire damage. However, EU law goes further, as Art. 6(3)(b) of Rome II gives the plaintiff(s) the option to base its/their claim on the law of the defendant's country of domicile if the plaintiff chooses to sue there, as long as that country is also one of the countries whose market is directly and substantially affected. As far as it can be ascertained, Vietnamese courts have not yet heard any cases of such consolidated claims. However, if such a hypothetical scenario ever arises, the experiences with such legislation would be useful for Vietnamese judges.

6. METHODOLOGY

It can be seen that when it comes to particular types of torts in Vietnam, such as those of environmental damage, product liability, IP and competition, the general rule of place of damage can no longer fulfill the role of designating the law to which the case at hand is most closely connected. The place of damages rule needs to be either replaced by another connecting factor, such as the place of acting or the rule of closest connection, or it has to be made more concrete and precise. In other scenarios, it has to be rebuttable by the unforeseeability defense or it has to give way to a ubiquity rule granting the plaintiff the choice.

The ultimate question is whether there is a need for separate rules for specific torts, or whether the general rule should be revised so that it is able to cover those special torts and provides reasonable results in terms of the applicable law. The first option has been taken by EU law. Rome II adopted various specific conflict rules to prepare for the various tort scenarios. Another rationale supporting this option is based on the example of France before Rome II, which did not have specific rules for different categories of torts, which in turn resulted in considerable uncertainty with regards to the designation of the law applicable in complex torts.[55]

In finding a method that is learnable and suitable for a developing country, having regard to the experiences in international tort cases decided by average judges it seems more reasonable for Vietnam to follow the path of adopting specific rules for specific torts. Indeed, initial steps have already been taken in this direction with regard to IP rights and competition. Environmental damage is of such major relevance to Vietnam that the country should have a separate rule. Even the US had to develop special and separate rules for product liability in its Third Restatement of Conflict Laws project.[56]

The second question concerning methodology is whether the distinction between conduct-regulating rules and loss-distribution tort rules,[57] a key feature of the tort

[55] T.K. Graziano, *Torts,* in: J. Basedow et al. (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham: 2017, p. 1715.

[56] Symeonides, *supra* note 34.

[57] Prof. Symeonides speaks of this distinction as being one of the major breakthroughs in American conflicts' thought and one of its major contributions to international conflicts torts (Symeonides, *supra* note 34).

chapter of the US Third Conflicts Restatement's Draft, could shed light on Vietnamese conflicts of laws tort rules. EU law has rejected this fully-fledged different treatment of tort rules, but provides for the application of the rules of safety and conduct[58] as an exception with a limited scope of intervention from the main rules. In light of the US experiences, this distinction might be difficult to apply for Vietnamese judges, and might facilitate the resolution of tort conflicts of law instead of producing a unitary approach of identifying the country most closely connected to the tort as a whole. However, it should be borne in mind that this method is rooted in the theory of interest analysis[59] and the consideration of policies of different state laws, while the Vietnamese conflicts law has been established traditionally in line with the continental approach of assigning the legal issues to the jurisdictions with which they have the closest geographical connections. The difficulties in deploying a distinction between conduct-regulating rules and loss-distribution tort rules might outweigh the benefits it might bring to the Vietnamese rules.

CONCLUSIONS

Assuming that infectious diseases will not dominate the future and that globalization continues, torts with international dimensions involving Vietnam will definitely rise in both number and complexity. Vietnamese courts will be increasingly chosen by both foreign plaintiffs, as they just want to ensure a higher chance of enforcing any judgments. The local courts are also the first option for a local plaintiff. Apart from the increase in cases, the quality of the conflicts of law rules contribute to the court's capacity and influence the decisions of the parties as to which forum to sue in. The rules designating the laws applicable to conflicts of law in tort actions therefore should be unambiguous and at the same time be able to ensure certainty and predictability and justice in particular cases. The current conflicts of law rules in Vietnamese legislation are not compatible with the need to regulate the growing variety and complexity of tort cases. The general rules, therefore, must be supplemented with special rules, e.g., for environmental damages, product liability, intellectual property rights and competition torts. The prescriptive principles and rules proposed for each particular tort given in this article should be seen as tentative and initial. Sufficient rules need to be elaborated and further experimented on using possible case scenarios or hypotheticals. Various international experiences should also be taken into consideration, together with paying attention to their founding theories as well as the countries' legal systems and circumstances.

[58] Art. 17 of the Rome II Regulation.

[59] R. Micheals, *The Conflicts Restatement and the World*, Symposium on the Third Restatement of Conflict of Laws, 2016, p. 158.

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THE EXECUTION OF EUROPEAN ARREST WARRANTS ISSUED BY POLISH COURTS IN THE CONTEXT OF THE CJEU RULE OF LAW CASE LAW

Abstract: *The case law of the CJEU dealing with the rule of law touches upon the question of execution of European Arrest Warrants (EAWs) issued by Polish courts. The year 2020 witnessed the second important judgment of the CJEU in this respect (the Dutch case). As in its 2018 predecessor (the Irish case), the CJEU excluded the possibility of overt denial of all EAWs issued by Polish courts. Instead it insists on a two-step examination, comprising not only a general evaluation but also the examination of the individual situation of a requested person. It remains to be seen whether this is a promise of armistice in the CJEU's approach to Poland, although this is not believed by the author of the text.*

Keywords: Court of Justice of the European Union, European Arrest Warrant, EAW, Poland, rule of law

INTRODUCTION

On 17 December 2020 the Court of Justice of the European Union (CJEU) issued a preliminary ruling in joined cases C-354/20 PPU and C-412/20 PPU.[1] It thereby responded to requests from the District Court from Amsterdam relating to the execution of European Arrest Warrants (EAWs) issued by the Polish courts with respect to two Polish nationals, designated as L and P. The Dutch court, taking into account the doubts as to the independence of the Polish judiciary, asked for an interpretation of the EAW Framework Decision as to the influence of alleged systemic deficiencies in the Polish judicial system on the automatic execution of EAWs issued by Polish courts, including even a blanket denial of their execution. This gave the CJEU the second opportunity within the last three years to express itself on the legal effect of

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[1] Joined cases C-354/20 PPU and C-412/20 PPU *Openbaar Ministerie* [2020], ECLI:EU:C:2020:1033.

EAWs issued by Polish courts. The first one was the CJEU judgment in case C-216/18 PPU LM.[2] In that case the CJEU responded to questions asked by the Irish High Court concerning the possible surrender of Mr. A. Celmer on the basis of an EAW issued by a Polish court.[3] In fact the two judgments (referred to as the Irish one and the Dutch one) could be looked at as an element of a wider set of events following the emergence in 2015 of the Polish government headed by the Law and Justice (PiS) party.[4] This wider context deserves to be mentioned. In chronological legal terms, the Irish judgment was the first and the Dutch judgment the fifth one in the "Polish rule of law" cases of the CJEU. This case law is perhaps the greatest challenge for the national and constitutional identity of the EU Member States. Some persons may see in it a safety valve, while others may see in the judgments an intrusion into matters of constitutional law of every Member State and a great step towards a European *de facto* federal state.

Although some persons probably could have expected in this context an overt blanket denial of EAWs issued by Polish courts, this did not happen in either the 2018 or 2020 cases. In both judgments the CJEU was at the same time cautious and conservative. It made the denial of execution of an EAW dependent upon the so-called two-step analysis. In practice this means the necessity of proving an individual danger to the requested person as a result of his or her surrender to Poland. The aim of the present text is to look at these two cases not only from the perspective of the case law connected with EAWs as such, but also as a new and dynamic approach in the CJEU case law on the rule of law in Poland. This article examines, *inter alia*, whether or not there is a gap between the rulings on EAWs and other "Polish" rule of law cases. The stance of the CJEU could be seen as mild in the former instance, and tough in the latter. This article argues that this mildness – even if proved – is meant rather to help the EU than the Polish government, and it does not offer great promise for the latter. It will be also shown that from the perspective of the CJEU case law on EAWs the Polish cases are not revolutionary, but rather are important elements of an evolution toward extending the *possibilities* of denial of execution of an EAW.

The volume constraints of the present text make it impossible to refer to each and every element of the complicated set of events which have taken place over the last five years, as well as each and every element of the few in number but voluminous CJEU judgments. This is why some abbreviated presentations are inevitable.

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[2] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018], ECLI:EU:C:2018:586.

[3] M.A. Simonelli, *How Flagrant is Flagrant? The latest judgment in the Celmer Saga*, Leidenlawblog, 21 October 2018, available at: https://leidenlawblog.nl/articles/how-flagrant-is-flagrant-the-latest-judgment-in-the-celmer-saga (accessed 30 May 2021).

[4] A. von Bogdandy, *Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States*, 57(3) Common Market Law Review 705 (2020), p. 706.

1. THE DISPUTE(S) RELATING TO THE POLISH JUDICIARY

To a great extent the wider context mentioned above could be perceived as a dispute between the Polish government on the one hand and a great number of influential actors (even if not most of the rest of the world) on the other. The latter group would encompass, among others, the Polish opposition, the Polish courts, the Polish mainstream media, several influential Polish and foreign legal experts, some other EU Members, and some EU organs. This dispute has concerned first of all the Polish judiciary.[5] In fact however, there were three autonomous albeit rather interrelated disputes. The first of them was connected with the Constitutional Court.[6] The second dispute related to the National Council of the Judiciary (NCJ). The third one had to do with the changes introduced to the Supreme Court. In fact only the two latter elements are of direct importance for the present text.[7]

It should be recalled that the introduction of the NCJ was one of the achievements of the 1989 Polish transition from socialism to democracy. Art. 187(1) of the 1997 Constitution provides that the NCJ will consist of 25 members.[8] In fact the only object of dispute was the election of 15 members who are to be chosen from amongst the judges of the Supreme Court, common courts, administrative courts, and military courts. The law adopted in December 2017[9] provided that they were to be elected by the Sejm (the lower house of the Polish Parliament), while earlier they had been elected by the judges themselves. This solution was much criticized.[10] The NCJ is of great importance as it not only is charged with safeguarding the independence of the judiciary, but also has the exclusive competence to present candidates for judgeships, who only on the basis of such a proposal could be nominated by the President of the Republic.

[5] Although not exclusively. The dispute also related to such matters as the media law, the term of office of the Ombudsman and many others. They are however of minor importance for the present text.

[6] In more detail: it was connected with the election of judges of the Constitutional Court and publication of two judgments of that court. For more on this dispute, see: *Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework: Question & Answers*, Brussels, 1 June 2016, available at: https://bit.ly/3hBWutq (accessed 30 May 2021). *See also* Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374, OJ EU 2017 22/65.

[7] M. Krajewski, M. Ziólkowski, *Court of Justice EU Judicial Independence Decentralized: A.K.*, 57(4) Common Market Law Review 1107 (2020), pp. 1108 et seq.

[8] Besides 15 judges, it includes: the First President of the Supreme Court; the Minister of Justice; the President of the Supreme Administrative Court and a person appointed by the President of the Republic; four members chosen by the Sejm (the lower house of the Parliament) from amongst its Deputies; and two members chosen by the Senate (the upper house of the Parliament) from amongst its Senators.

[9] Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw [Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts], Journal of Laws of 2018, item 3.

[10] Mainly with respect to the provision providing for the presence of four members of Sejm in the Council. The case was not that easy, taking into consideration the blanket provision of Art. 187(4) of the 1997 Constitution, according to which, *inter alia*, the manner of choosing the members of the NCJ shall be specified by statute.

Another element was connected with the numerous changes introduced in the structure of the Supreme Court. One should start with an attempt by PiS to introduce an act providing for the end of the term of office of all judges of the Supreme Court.[11] In the face of massive protests[12] this draft, while having been accepted by the Parliament, was effectively vetoed by the President of the Republic (Mr. A. Duda) and never entered into force. What was introduced in its stead was a much more modest reform. Suffice to refer here to two elements. The first one was connected with the introduction of two additional chambers of the Supreme Court. They were the so-called the Disciplinary Chamber and the Chamber of Extraordinary Control. The Disciplinary Chamber was perceived by the government as a promise to end the alleged impunity of some dishonest judges, advocates and notaries, the earlier disciplinary proceedings allegedly being a pure fiction. On the other hand, the judges perceived this chamber as a danger to their independence and a tool of political, or even party-policy pressure. In fact the legal provisions provided for a high level of structural autonomy of this new chamber. It needs to be stressed that the new judges of the new chambers needed nominations on the basis of proposals of the new NCJ. Another element was connected with law which lowered from 70 to 65 years the age of compulsory retirement for the then-sitting judges of the Supreme Court, which was perceived as a means of getting rid of "old" judges.

2. THE RULE OF LAW CASE LAW

The Polish reforms gave rise to several critical opinions as well as informal pressure. On 20 December 2017 the European Commission presented the Reasoned Proposal in Accordance with Art. 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland,[13] thereby starting the so-called Art. 7 Procedure (based on Art. 7 of the Treaty on the European Union (TEU)). As of the present time, this procedure has not yet come to an end.

It took a few years for the first cases connected with this crisis to appear on the agenda of the CJEU. There are many commentators who suspect that this crisis had some influence on another important judgment not connected with Poland as such,[14] i.e. the

[11] Ustawa z dnia 20 lipca 2017 r. o Sądzie Najwyższym [Law of 20 July 2017 on the Supreme Court], available at: http://orka.sejm.gov.pl/proc8.nsf/ustawy/1727_u.htm (accessed 30 May 2021).

[12] Demonstracje przeciwko ustawie o Sądzie Najwyższym [Demonstrations against the Law on the Supreme Court], available at: https://wiadomosci.onet.pl/kraj/protesty-w-polsce-przeciwko-ustawie-o-sadzie-najwyzszym/5ctwjny (accessed 30 May 2021).

[13] COM (2017) 835 final.

[14] P. Filipek, *Nieusuwalność sędziów i granice kompetencji państwa członkowskiego do regulowania krajowego wymiaru sprawiedliwości – uwagi w świetle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej* [Irremovability of judges and the limits of a Member State's competence to regulate its domestic judiciary: Remarks in the light of Court of Justice judgment of 24 June 2019, C-619/18, European Commission v. Poland],12 Europejski Przegląd Sądowy 4 (2019); T. von Danwitz, *Values and the Rule of Law: Foundations of the European Union – An Inside*

judgment in case C64/16 *Associação Sindical dos Juízes Portugueses*[15] (the Portuguese judges, or ASJP case). Though it is not a "Polish case" *per se*, no reasoned attempt to speak about rule of law jurisprudence without referring to it seems possible. The case concerned the limitation by Portugal of the salaries of the judges of the Portuguese Court of Auditors. The CJEU ruling pointed out the legality of such a reduction, as it was applied to all public offices and all public companies. All the same the importance of the judgment lies in not that much in this conclusion, but in the justification and reasoning adopted by the CJEU to arrive at it.

The Court took as the point of departure Art. 2 TEU, and stressed that "mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU" (para. 30). However, the CJEU was careful not to treat Art. 2 TEU as an ordinary provision on the obligations of Member States, but preferred to do this using Art. 19(1) TEU. Its second sentence reads that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." The Court described the latter as a provision giving "concrete expression to the value of the rule of law stated in Article 2 TEU," and at the same time entrusting "the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals" (para. 32). The Court referred to the obligation of Member States to ensure the application of and respect for EU law (para. 34). It stressed in particular the importance of the "effective judicial protection of individuals' rights under EU law as a general principle of EU law stemming from the constitutional traditions common to the Member States" (para. 35) and as the "essence of the rule of law" (para. 36). The conclusion which followed was that "every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection" (para. 37). The Court had no problem with finding in its case law the criteria for the presence of a court or tribunal. It had also no doubt that "[i]n order for that protection to be ensured, maintaining such a court or tribunal's independence is essential" (para. 41). In its direct answer to the question of the Portuguese court the CJEU even spoke about "the principle of judicial independence."

The preconditions of this independence of judges were developed in the abovementioned Irish case (C-216/18 PPU *LM*). The CJEU differentiated between external and the internal independence, although acknowledging that both are necessary and equally important. In this context the CJEU referred to such matters as: guarantees against

Perspective from the ECJ, 21(1) PER: Potchefstroom Electronic Law Journal 1 (2018), p. 7; M. Bonelli, M. Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary, ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses*, 14(3) European Constitutional Law Review 622 (2018), p. 630.

[15] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* [2018], ECLI:EU:C:2018:117.

removal from office; appropriate level of remuneration; "objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law"; as well as the rules concerning "the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members"; guarantees "that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions" (paras. 64-67). It is not difficult to find here hints to some of the Polish solutions, although the CJEU did not refer to them directly – neither as such nor in the context of the case.

These elements were referred to in another important "Polish" judgment of the Court, namely the judgment in case C-619/18 *European Commission v. Republic of Poland.*[16] The Commission contested the Polish provisions lowering the compulsory retirement age of the judges of the Supreme Court, invoking Art. 47 of the Charter of Fundamental Rights of the European Union (EU Charter) and Art. 19 TEU. The CJEU ruled that the Polish provisions concerning the retirement age were contrary to Art. 19 TEU. It did the same with respect to the provision allowing the President of the Republic to authorise retiring judges to continue to carry out their duties. What deserves mention was the list of arguments by Poland which were dismissed by the CJEU. They related to: the lack of connection of the contested Polish legal solutions with the EU competences; Protocol 30 excluding the examination of the Polish law as to its conformity with the EU Charter; and references to the national and constitutional identity. The control of the CJEU was extended to the core of the power of sovereign states to regulate the initial and the final moments of the term of office of their judges. The CJEU did not hesitate to look behind the mere letter of the provisions.[17] It looked at the Polish provisions on retirement as an instrument of getting rid of unwelcome judges and replacing them with new ones. At the same time, it perceived the powers of the President as an instrument of pressure on judges.

A kind of extreme was reached in another "Polish" case in the judgment in joined cases C-585/18, C-624/18 and C-625/18, *A.K. v. Krajowa Rada Sądownictwa* (the KRS case).[18] It resulted from three cases brought by the hitherto judges of the Supreme Court affected by the lowered retirement age. The main point of contention was that

[16] Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)* [2019], ECLI:EU:C:2019:531.

[17] Filipek, *supra* note 14, pp. 5 et seq. An interesting interdisciplinary perspective is supplied by: M. Szwed, *Orzekanie przez wadliwie powołanych sędziów jako naruszenie prawa do sądu w świetle wyroku Europejskiego Trybunału Praw Człowieka z 12.03.2019 r., 26374/18, Guðmundur Andri Ástráðsson przeciwko Islandii* [Adjudication by unlawfully appointed judges as a violation of the right to a fair trial in the light of the judgment of the European Court of Human Rights of 12 March 2019, 26374/18, *Guðmundur Andri Ástráðsson v. Iceland*], 7 Europejski Przegląd Sądowy 42 (2019).

[18] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. v. Krajowa Rada Sądownictwa*, *C.P i D.O. v. Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court)* [2019], ECLI:EU:C:2019:982. On this judgment *see* Krajewski, Ziółkowski, *supra* note 7, pp. 1107 et seq.

their cases were to be heard by the newly created Disciplinary Chamber. Inasmuch as up until the moment of its creation one of the "old" chambers of the Supreme Court was sitting in the case (the Labour and Social Insurance Chamber), the questions before the CJEU related to whether the newly-created chamber was or was not a court in the light of Art. 47 of the EU Charter. The CJEU left this evaluation to the referring court. All the same it hinted at the possibility of putting this status into doubt. It pointed to the timing coincidence of the far-reaching changes concerning the age of judges, the changes in the NCJ, and the creation of the Disciplinary Chamber. In the event that the referring court would come to the conclusion that the Disciplinary Chamber was not a court, the CJEU expressed itself in favour of applying the hitherto provisions on the jurisdiction of the old chambers of the Supreme Court which was presented by the CJEU as an application of the principle of the primacy of the EU law. It should be stressed that Art. 47 of the EU Charter was invoked expressly in the CJEU's response given to the Polish court. Another provision was Art. 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

An attempt was apparently made to get a similar "interpretation" putting aside the entire new disciplinary procedures. Two Polish courts made requests for preliminary rulings within criminal proceedings. They wondered whether the new Polish disciplinary procedures were in conformity with EU law. The reasoning was that the judges deciding the cases could be concerned about being punished for possible future sentences that might not be welcomed by the Government. The judgment of the CJEU[19] pointed to the inadmissibility of the questions. This judgment is however important in terms of how much it says about the expectations of some Polish judges, the attitude of the CJEU, as well as some commentators. Platon went as far as to see timidity on the part of the CJEU in its preliminary ruling procedure, and boldness in the infringement proceedings.[20] The case is also important due to an *obiter dictum* stating that any attempt to initiate any disciplinary proceedings to judges because of the fact of their requests for a preliminary ruling would be contrary to the principle of judicial independence.

This rule of law jurisprudence is as young as it is bold. It is a very strong intrusion into matters which could have been perceived as a domain reserved to states. An exhaustive presentation of this jurisprudence is, however, not the task of the present text. It is rather expected to form a point of reference for the two "Polish" EAW cases.

It seems necessary to start their presentation with a few remarks on the EAW as such.

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[19] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v. Skarb Państwa – Wojewoda Łódzki*, *Prokurator Generalny, v. VX, WW, XV (Régime disciplinaire concernant les magistrats)* [2020], ECLI:EU:C:2020:234.

[20] S. Platon, *Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: Miasto Lowicz*, 57(6) Common Market Law Review 1843 (2020), p. 1866.

3. AN EAW

An EAW is perhaps the greatest achievement of the judicial cooperation in criminal matters between the EU Member States. It is regulated in the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.[21] Art.1(1) of that Framework Decision defines an EAW as a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. It is a judicial authority of the requesting state which issues an EAW, and one from the executing state which makes the decision on its execution. The replacement of administrative organs (which hitherto made decisions on extradition) by judicial bodies (one requesting the surrender and the other granting (or not) such surrender of a given person) is presented as one of the main differences of the system resulting from the Framework Decision as compared to the previous system of extradition.[22]

Art. 1(2) of the Framework Decision stipulates that the Member States shall execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision. As a rule, this means an automatic application.[23]As sub-paragraph 6 of the preamble to the Framework Decision puts it: "[t]he European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation."

However, the "automatic" application of such a procedure allows for some exceptions, i.e. grounds for a refusal of execution of an EAW. Such grounds may be mandatory or facultative. Art. 3 of the Framework Decision lists three grounds for the mandatory non-execution of a European arrest warrant.[24] Arts. 4 and 4a of the Framework Decision provide a much longer list of grounds for an optional non-execution of an EAW.[25] Last but not least, Art. 5 of the Framework Decision stipulates two conditions upon which the execution of an EAW may be made dependent. It should be noted

[21] *OJ 2002 L 190, p. 1.* It was amended only once by the means of Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (*OJ 2009 L 81, p. 24).* Framework decisions were adopted in the so-called Third Pillar of the EU since the entry into force of the Treaty of Amsterdam (1 May 1999), and before the entry into force of the Lisbon Treaty (1 December 2009).

[22] L. Mancano, *You'll never work alone: A systemic assessment of the European Arrest Warrant and judicial independence*, 58(3) Common Market Law Review 683 (2021), p. 685.

[23] M. Böse, *The European arrest warrant and the independence of public prosecutors: OG & PI, PF, JR &YC*, 57(4) Common Market Law Review 1259 (2020).

[24] They are, namely, amnesty in the executing state, res judicata in the executing state, and the age of a sought person barring his/her criminal responsibility in the law of the executing state.

[25] There is no need to cite them here at full length. Suffice it here to mention a few examples, such as *lis pendens* in the executing state, res judicata in a third state; by the way of exception with respect to some

that none of those grounds refers to the danger of a breach of fundamental rights of the requested person.[26] As Mancano underlines, "[t]hey do not originate from the fear that the issuing State might be caught in systemic violations, or might be affected by structural problems capable of undermining the EAW mechanism. In this sense, these exceptions are in line with and reinforce the presumptive nature of mutual trust."[27]

Paragraph 10 of the preamble to the Framework Decision reads as follows:

> The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.

At the same time, paragraph 12 provides that:

> This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This element is regulated in Art. 1(3) of the Framework Decision, which states that "[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

4. THE BASIC JUDICIAL DOCTRINES CONNECTED WITH EAWS

While it is impossible to refer here to all the important CJEU statements connected with EAWs, it seems useful to cite the most important ones dealing with mutual recognition and mutual trust, as well as their influence on possible refusals to execute EAWs.

Given that the principle of mutual recognition in the field of EAWs was mentioned directly in the Framework Decision, the CJEU has many times used it as a starting point in its analyses of EAWs. This line of citations was initiated in the judgment in case

crimes – the lack of double criminality (that is of an act being a crime both in the issuing as well as the executing state).

[26] P. Filipek, *Rozproszona europejska kontrola przestrzegania prawa do rzetelnego procesu sądowego w świetle zasady wzajemnego zaufania i wyroku C-216/18 PPU* [Decentralized European judicial review of the right to a fair trial in the light of the principle of mutual trust and the judgment C-216/18 PPU LM], 2 Europejski Przegląd Sądowy14 (2019), p. 16; Mancano, *supra* note 22, p. 685.

[27] Mancano, *supra* note 22, p. 693.

C-303/05 *Advocaten voor de Wereld*[28] and continued in many others.[29] In its judgment in Case C-388/08 PPU *Leymann and Pustovarov*[30] the CJEU called this principle as the "cornerstone" of judicial cooperation. In the same judgment[31] the CJEU noted that the implementation of the mechanism of the EAW requires a high degree of confidence between the Member States.[32]

The consequences of both mutual recognition and mutual trust are very far-reaching. In its judgment in Case C-388/08 PPU *Leymann and Pustovarov*[33] the CJEU noted that the principle of mutual recognition also means that "the Member States are in principle obliged to act upon a European arrest warrant. They must or may refuse to execute a warrant only in the cases listed in Articles 3 and 4." This thesis was also repeated in several other judgments.[34] However, a part of such judgments hints at exceptional situations.[35]

In case C-168/13 PPU *Jeremy F*[36] the Court expressly pointed to Art. 7 TEU as the exclusive grounds for a general denial to execute EAWs. In fact when confronted with requests to postpone or abandon the execution of an EAW in the face of the alleged breaches of human rights in individual cases, the CJEU did not deny such a possibility.[37] What was visible however was a lack of will to frustrate the aims of the Framework Decision.[38] A good example of conciliating between human rights and the aims of the

[28] Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* [2007], ECLI:EU:C:2007:261, para. 28.

[29] Case C-66/08 *Szymon Kozłowski* [2008], ECLI:EU:C:2008:437, para. 31; C-261/09 *Gaetano Mantello* [2010], ECLI:EU:C:2010:683, para. 35; C-396/11 *Ciprian Vasile Radu* [2013], ECLI:EU:C:2013:39, para. 33; C-192/12 PPU *Melvin West* [2012],ECLI:EU:C:2012:404, para. 54; Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru* [2016], ECLI:EU:C:2016:198, para. 75.

[30] Case C-388/08 PPU *Artur Leymann, Aleksei Pustovarov* [2008], ECLI:EU:C:2008:669, para. 49. *See also Melvin West*, para. 55; Case C-237/15 PPU *Minister for Justice and Equality v. Francis Lanigan*, ECLI:EU:C:2015:474, para. 36. As is visible it also did not add much to the very wording of the Framework Decision itself.

[31] *Artur Leymann, Aleksei Pustovarov*, para. 50. *See also Ciprian Vasile Radu***,** para. 33.

[32] For very interesting and stimulating analyses of mutual trust reference should be made to K. Lenaerts, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust*, 54(3) Common Market Law Review 805 (2017), p. 806 and F. Maiani, A. Miglionico, *One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice*, 57(1) Common Market Law Review 7 (2020), p. 9.

[33] *Artur Leymann, Aleksei Pustovarov*, para. 51.

[34] *Gaetano Mantello*, paras. 36-37; *Ciprian Vasile Radu***,** para. 36. In this passage the Court referred to conditions from Art. 5 as well; *Melvin West*, para. 64; *Minister for Justice and Equality v. Francis Lanigan*, para. 36.

[35] Case C-579/15 *Daniel Adam Popławski* [2017], ECLI:EU:C:2017:503, para. 19; Case C-367/16 *Dawid Piotrowski* [2018], ECLI:EU:C:2018:27, paras. 46-48; Case C-452/16 PPU *Krzysztof Marek Półtorak* [2016] ECLI:EU:C:2016:858, paras. 24-27; Case C-453/16 PPU *Halil Ibrahim Özçelik* [2016], ECLI:EU:C:2016:860, paras. 23-26; Case C-477/16PPU *Ruslanas Kovalkovas* [2016], ECLI:EU:C:2016:861, paras. 25-28; Case C-220/18 PPU *ML* [2018], ECLI:EU:C:2018:589, paras. 48-54; Joined Cases C-508/18 and C-82/19 PPU *OG and PI* [2019], ECLI:EU:C:2019:456, paras. 43-45.

[36] Case C-168/13PPU *Jeremy F. v. Premier ministre* [2013], ECLI:EU:C:2013:358, para. 49.

[37] Case C-399/11 *Stefano Melloni v. Ministerio Fiscal* [2013], ECLI:EU:C:2013:107, para. 45.

[38] Which is "to facilitate and accelerate surrenders between the judicial authorities of the Member States in the light of the mutual confidence which must exist between them." As to the interpretation of Arts. 28-29 of the Framework Decision, *see Melvin West*, para. 77.

FD is supplied by the judgment in the case *Jeremy F.*[39] The CJEU confirmed the right of the requested person to bring an appeal with suspensive effect against a decision to execute a EAW (despite the lack of any mention of such in the FD). It stressed however that the time limits provided for in the Framework Decision were to be observed. In its judgment in case C-399/11*Melloni*[40] the Court ruled out the possibility of invoking the state constitution as a basis to justify a refusal to execute an EAW.

The last line of case law which deserves mention here has to do with the validity of EAWs. Its origin lies in the judgment in case C-241/15 *Bob-Dogi*. The CJEU ruled that "those principles are based on the premise that the European arrest warrant concerned has been issued in conformity with the minimum requirements necessary for it to be valid (...)."[41] Though this remark related to an EAW in a simplified form, there are no reasons to doubt that all EAWs should be valid. Case C-452/16 PPU *Półtorak*[42] opens another important line of judgments connected with the validity of EAWs.[43] The case concerned an EAW issued by the National Police Board. The status of this requesting body was the main object of doubt. The CJEU ruled that the term "judicial authority" "cannot be left to the assessment of each Member State" (para. 31). While accepting that the notion "judicial authority" is not limited to judges or courts only, and that it may extend to "the authorities required to participate in administering justice in the legal system concerned," it excluded the possibility that such a notion covers the police services of a Member State (paras. 33-34). In case C-477/16 PPU *Kovalkovas*[44] the Court also excluded the possibility of granting a qualification of "judicial authority" to an organ of the executive of a Member State, such as a ministry (para. 35). In the judgment in joined cases C-508/18 and C-82/19 PPU *OG (Parquet de Lübeck)* the CJEU made the same conclusion with respect to the prosecutor.[45]

5. THE IMPORTANCE OF THE CJEU JUDGMENT IN JOINED CASES *ARANYOSI AND CĂLDĂRARU*

The CJEU judgment in joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*[46] turned out to be the main point of reference with respect to the two Polish EAW cases.[47] The Higher Regional Court of Bremen lodged preliminary questions

[39] *Jeremy F. v. Premier minister*, paras. 37-38.

[40] *Stefano Melloni v. Ministerio Fiscal*, para. 63.

[41] Case C-241/15, *Niculaie Aurel Bob-Dogi* [2016], ECLI:EU:C:2016:385, para. 53. *See also* para. 63.

[42] *Krzysztof Marek Półtorak*, paras. 24-27.

[43] *Ruslanas Kovalkovas*, paras. 31-34; Joined Cases *OG* and *PI*, paras. 46-49.

[44] *Ruslanas Kovalkovas*, paras. 25-28.

[45] Joined Cases *OG and PI*. On the latter case see: Böse, *supra* note 23, pp. 1259 et seq.

[46] Joined Cases *Pál Aranyosi and Robert Căldăraru*.

[47] For more on this importance of this judgment, *see* A. Grzelak, *Wzajemne zaufanie jako podstawa współpracy sądów państw członkowskich UE w sprawach karnych (uwagi na marginesie odesłania prejudycjalnego w sprawie C-216/18 PPU Celmer)* [Mutual trust as the basis for judicial cooperation in criminal matters

concerning the possible denial of execution of the EAWs in issue in the face of strong indications that the detention conditions in the issuing Member States[48] infringed fundamental human rights.

The CJEU took as the point of reference the cited case law on mutual trust/recognition and on the limited grounds for non-execution or the placement of conditions on execution, while at the same time recognizing and explaining an exception to them. The CJEU referred to Opinion 2/13[49] and Art. 1(3) of the Framework Decision in order to justify limitations on the principles of mutual recognition and mutual trust between Member States "in exceptional circumstances" (paras. 82-83). The CJEU had no doubt as to the necessity to comply with Art. 4 of the EU Charter concerning the prohibition of inhuman or degrading treatment or punishment. It stressed that this provision was binding on the Member States and, consequently, on their courts when they are implementing EU law (para. 84). The CJEU emphasized that the prohibition of inhuman or degrading treatment or punishment was absolute, closely linked to respect for human dignity (paras. 85-86).

Turning directly to the execution of the EAWs in question, the CJEU ruled that "where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State," that "judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant" (para. 88). In any case "the consequence of the execution of such a warrant must not be that that an individual suffers inhuman or degrading treatment" (para. 88).

The CJEU ruled that "a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant" (para. 91). In the next passage the CJEU extended this statement to all deficiencies which may be systemic or generalised, or which may affect certain groups of people, or certain places of detention. As the Court ruled, "[w]henever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State" (para. 92). In this way the CJEU established the so-called two-step test.

The CJEU recognized a duty on the part of the executing judicial authority to verify the risks facing the requested person following his/her possible surrender, and to request from the issuing judicial authority all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that

in the EU (reference for a preliminary ruling in case C-216/18 PPU Celmer)], 10 Państwo i Prawo 50 (2018), p. 62.

[48] Hungary with respect to Mr. Aranyosi, and Romania with respect to Mr. Căldăraru.

[49] *See* to that effect Opinion 2/13, EU:C:2014:2454, para. 191.

Member State (para. 94). The CJEU thus found a duty on the part of the issuing judicial authority to provide that information to the executing judicial authority (para. 97).

The CJEU also delineated the result of a negative evaluation of the conditions in the issuing Member State (in the sense that the execution of the EAW might lead to a violation of the human rights of the individual concerned). It is to take form of a postponement, but not abandonment, of the execution of the warrant (para. 98), and must be accompanied by informing Eurojust of the matter (para. 99). The CJEU also referred to the influence of this postponement on the term of deprivation of freedom of the requested person (paras. 100-103).

6. THE IMPORTANCE OF THE IRISH CASE

The judgment in the *LM* case (the Irish case) was the result of doubts expressed by an Irish court as to whether it could execute three EAWs issued by Polish courts in the face of Poland's alleged generalized deficiencies as regards human rights. These deficiencies were identified as a real risk of breach of the right to a fair trial and the lack of independence of the Polish judiciary[50] (para. 34). The CJEU was expressly asked whether the two-step analysis was still required. In fact the referring court wanted to know whether there is, or is not, any possibility of getting rid of the second step, namely the examination of the real dangers facing the person(s) to whom a given EAW refers.

The Irish judgment could be labelled, albeit with some hesitation, as a joint product of "the rule of law" case law as well as the case law on exceptional denials to execute EAWs in light of a lack of respect for fundamental rights in the issuing Member State. The above-mentioned hesitation arises from the fact that the Irish case is just the second in two lines of cases – one starting with the *Portuguese judges* judgment; and the other one starting with the *Aranyosi and Căldăraru* case. In fact the explanatory part of the Irish judgment (paras. 33-79) refers nine times to the *Aranyosi and Căldăraru* case, and eight times to the judgment in the Portuguese judges case.

The CJEU took as a point of departure the principle of mutual trust. In this sense the Irish case is more a "mutual trust-oriented" than a "mutual recognition-oriented" EAW judgment. What's more, the reference to mutual trust was preceded by a symptomatic introduction that:

> [I]t should be recalled that EU law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the

[50] The referring Irish court invoked: the changes introduced in the Constitutional Court; the changes to the constitutional role of the NCJ; the fact that the Minister of Justice had become the Public Prosecutor, as well as his disciplinary role in respect of the presidents of courts; the changes to the Supreme Court (compulsory retirement and future appointments) (para. 21). The Irish court did not explain which of those elements was of decisive importance.

Member States that those values will be recognised, and therefore that the EU law that implements them will be respected (para. 35).

This statement is taken from the Portuguese judges case. In fact however, other EAW cases contained similar references to mutual trust and mutual recognition. In the further part of the judgment the CJEU paraphrased this statement concerning the mutual trust by saying that the high level of trust between Member States on which the EAW mechanism is based is thus founded on "the premise that the criminal courts of the other Member States (...) meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts" (para. 58).[51]

A slight change of accent is also traceable in the reference to the "principle of mutual recognition, which is itself based on the mutual trust" between the Member States (para. 36). In fact the references to the aims of the system of EAWs (paras. 36-39) and the consequences of the principle of mutual trust[52] are similar to the traditional case law referred to in subchapter 5. This relates also to statements on mutual recognition as the "cornerstone" of judicial cooperation in criminal matters; on the limited grounds of non-execution; and on the fact that "while execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly" (para. 41).

What could be seen as a challenge was the fact that the protected value in the *Aranyosi and Căldăraru* case was a human right of an absolute nature, that is the prohibition of degrading treatment and punishment. While the right to a fair trial is not absolute in this sense, the CJEU nevertheless underlined the fundamental character of that right.[53] It stressed that the judicial independence forms part of its essence. This gave the CJEU the chance to recapitulate the basic statements on judicial independence from the *Portuguese judges* case (paras. 49-54)[54] and stress its importance for cooperation in criminal matters in general and in EAW matters in particular (paras. 56-58).

All these arguments led to the conclusion on "permitting the executing judicial authority to refrain, by way of exception, from giving effect" to that EAW on the basis of

[51] On the importance of mutual trust, *see* Grzelak, *supra* note 47, pp. 57 et seq.

[52] With the possibility of the Member States being "required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union" (para. 37).

[53] By calling it "a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Art. 2 TEU, in particular the value of the rule of law, will be safeguarded" (para. 48).

[54] They are more or less the same that were presented in section 3. Suffice to say that they referred to such values as rule of law, the right of individuals to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act, effective judicial review and effective judicial protection, and the independence of courts. The CJEU underlined the importance of that independence for the preliminary ruling mechanism under Art. 267 TFEU, and by analogy to the system of EAWs (paras. 54-55).

Art.1(3) of the Framework Decision (para. 59). It should be underlined that the CJEU spoke about the *possibility* to deny the execution of an EAW rather than an *obligation* to do so. Secondly, it did not refer to the differentiation between postponement and abandonment of the execution of the EAW from the *Aranyosi and Căldăraru* judgment. Thirdly, the reason for the negative decision was presented as "a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial" (para. 59). This "real risk" is the result of the two step-test, and does not result just from one of them.

The reference to the first test (that is examination of the alleged systemic or generalised deficiencies) was very similar to the one from *Aranyosi and Căldăraru*.[55] In fact the Irish High Court never put into question the necessity of the first test. The CJEU went so far as to point out information in a reasoned proposal addressed by the Commission to the Council on the basis of Art. 7(1) TEU as being "particularly relevant for the purposes of that assessment" (para. 61). What's more, the CJEU referred to the *Aranyosi and Căldăraru* judgment to support the thesis that "such an assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter" (para. 62). However, the cited paragraph 88 does not use the very term "standard." In fact the applicable standard was that of the independence of judges and was looked for rather in the Portuguese judges case. This fragment gave the CJEU the chance to refer to the latter and to develop the idea of independence. In this regard reference can be made to subchapter 3.

What was especially emphasized by the CJEU was the necessity of effecting the second step of the analysis. It was taken verbatim from the *Aranyosi and Căldăraru* judgment, by referring to the necessity to "assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run" the risk recognized by the first step of the analysis (para. 68).[56]

The CJEU found it useful to refer to the above-cited recital 10 of the Framework Decision, which provided that only the use of the Art. 7 TEU procedure may lead to the suspension of the implementation of the EAW mechanism with respect to a Member State (paras. 70-72).

The CJEU described in more detail the tasks of the executing judicial authority following the confirmation of systemic or generalised deficiencies. It ruled that the executing judicial authority "must," in particular, examine to what extent the systemic

[55] A verbatim reference to the *Aranyosi and Căldăraru* judgment concerned the material examined as being "objective, reliable, specific and properly updated" (para. 61).

[56] The CJEU found it useful to repeat this conclusion, by stating that it is applicable notwithstanding firstly the "reasoned proposal adopted by the Commission pursuant to Art. 7(1) TEU." Secondly, it is applicable despite the fact that "the executing judicial authority considers that it possesses, on the basis, in particular, of such a proposal, material showing that there are systemic deficiencies, in the light of those values, at the level of that Member State's judiciary."

or generalised deficiencies "are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject" (para. 74). Secondly it must assess, "in the light of the specific concerns expressed by the individual concerned, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal (...) having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant" (para. 75).

The last element of the judgment concerned the exchange of information between the issuing and executing judicial authority. The CJEU, like in the case of *Aranyosi and Căldăraru*, spoke in favour of a duty of the latter (using the term "must") to request from the issuing judicial authority any supplementary information necessary for assessing whether there is such a risk (para. 76). Strangely enough, the CJEU was not so ready to speak about such a duty on the part of the issuing judicial authority. It used the term "may" in this context, while on the contrary the CJEU ruled that if the information of the issuing judicial authority is not satisfactory the executing judicial authority "must" refrain from giving effect to the EAW (para. 78).

7. THE DUTCH CASE

The judgment in the Dutch case is in reality very similar to its Irish predecessor. The underlying question was once again whether the presence of systemic or generalised deficiencies was sufficient to justify the automatic denial of execution of all EAWs, irrespective of the analysis of the personal situation of the person to be surrendered (para. 33). As in the Irish case, the answer of the CJEU was negative in this respect.

What was completely new as compared to the Irish case was the supplementary analysis whether the systemic or generalised deficiencies concerning the independence of the judiciary may lead to denial of the status of an "issuing judicial authority" to all Polish courts (para. 34). One can wonder about the sense of making this element the cornerstone of the analysis. In fact none of four questions the Dutch court asked concerned whether the Polish courts are no longer judicial authorities. On the other hand, these questions adopted a presumption of non-execution of EAWs issued by Polish courts (in complete opposition to the conclusion of Irish judgment). It is also true that references were made to the above-mentioned judgment in joined cases C-508/18 and C-82/19 PPU *OG and PI* (Public Prosecutor's Offices in Lübeck and Zwickau) and the CJEU decided to start by assessing them, despite the *prima facie* lack of similarity of the Polish courts to the German prosecutors or policemen.

The CJEU concluded that an executing judicial authority, even given evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State, "cannot deny the status of 'issuing judicial authority' (...) to all judges or all courts of that Member State acting by their nature entirely independently of

the executive" (para. 41) The CJEU pointed out that "the existence of such deficiencies does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case" (para. 42) and "an interpretation to the contrary would amount to extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond exceptional circumstances (...) by leading to a general exclusion of the application of those principles in the context of European arrest warrants issued by the courts of the Member State concerned by those deficiencies" (para. 43). The CJEU noted that such a conclusion would "mean that no court of that Member State could any longer be regarded as a 'court or tribunal' for the purposes of the application of other provisions of EU law, in particular Art. 267 TFEU" (para. 44).

The remaining part of the judgment referred to Art. 1(3) of the Framework Decision and strictly followed the Irish judgment. The main point of reference was the possibility of denial of execution on the basis of the general situation in the issuing state. The CJEU opened this section of the judgment by citing verbatim the entire answer given to the Irish High Court three years earlier (para. 52). It itself used the notion of a "two-step examination" (para. 53). The first step was to "determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial (...) on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary" (para. 54). This definition is the same as in the two preceding cases. As regards the second step, it must firstly "determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject." Secondly, it must take into consideration the personal situation, the nature of the alleged offence, and the factual context in which the EAW was issued (para. 55). An additional element to be taken into consideration was "statements by public authorities which are liable to interfere with the way in which an individual case is handled" (para. 61). Interestingly enough, the CJEU stressed that "those steps cannot overlap with one another" (para. 56).

Like in the Irish case, the CJEU referred to the Art. 7 procedure and warned that a general denial to execute EAWs would be "a *de facto* suspension" of the implementation of the EAW mechanism in relation to that Member State, without respecting the requirements of Art. 7 TEU (paras. 57-59).

A negative result of the two-step analysis was described in the same way as in the Irish case, by pointing that the executing judicial authority "must" refrain from giving effect to the EAW concerned (para. 61). What was new was an unequivocal statement that "otherwise, it must execute that warrant, in accordance with the obligation of principle laid down in Article 1(2) of that framework decision" (para. 61).

It is worthwhile to note the reference of the CJEU to combating the impunity of a requested person as the objective of the mechanism of the EAW (para. 6). One can read this statement as a very delicate signal to domestic courts referring preliminary questions with the visible will of denying the execution of all Polish EAWs.

The last element concerned intertemporal aspects and their interplay with two kinds of EAWs. It revolved around the question whether the executing judicial authority must take account of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State which may have occurred after the issuance of the EAW in question. The CJEU had no doubt that it is necessary to conduct the entire examination if an EAW is issued for the purposes of conducting a criminal prosecution (para. 66). As regards EAWs issued for the purposes of executing a custodial sentence or detention order, the CJEU was more liberal. It spoke of the necessity of such an examination when, following his or her possible surrender the requested person "will be subject to new court proceedings, on account of the bringing of an action relating to the execution of that custodial sentence or that detention order or of an appeal against the judicial decision the execution of which is the subject of that European arrest warrant, as the case may be" (para. 67).

8. AN ATTEMPT OF EVALUATION

The two Polish EAW judgments must be analysed on two basic levels. The first of them obliges us to look at the Irish and Dutch cases as elements of the case law dealing with EAWs as such. The second level of analysis would look at the Polish EAW judgments as elements of the case law dealing with the rule of law.

The fact of the two judgments belonging to a wider list of EAW cases is a tautology. In fact what is interesting here is a much shorter list of EAW cases dealing with a possible denial of execution in the light of deficiencies in the issuing state. The references to the *Aranyosi and Căldăraru* case are obvious.[57]

There is no doubt as to the great importance of the Irish case. Firstly, it was the second case in which states were given a message that deficiencies in their legal systems may give rise to a denial of execution of EAWs issued by their courts. Secondly, it was the first case concerning a human right which was not absolute in nature. As Filipek notes, in this sense the Irish case was a leading ruling.[58] The Dutch case would be rather in the nature of its confirmation and a promise of a new jurisdictional doctrine. All the same it is the first indication that the automatic denial of the status of "judicial authority" to all courts of a given state is not a proper way of interpretation of the Framework Decision. If the Irish case has influenced and/or was expected to influence all future cases dealing with doubts as to the nature of the issuing authority,[59] this is all the more true with respect to the Dutch case.

[57] W. Lewandowski, *Pomiędzy Scyllą zawieszenia wzajemnego zaufania i Charybdą fragmentaryzacji standardu ochrony prawa podstawowego – dylematy Trybunału Sprawiedliwości w wyroku C-216/18 PPU, LM* [Between the Scylla of suspending mutual trust and Charybdis of fragmenting the standard of protection of a fundamental right – dilemmas of the Court of Justice in judgment C-216/18 PPU, LM] 2 Europejski Przegląd Sądowy 4 (2019), p. 6; Filipek, *supra* note 26, p. 14.

[58] Filipek, *supra* note 26, p. 23.

[59] Böse, *supra* note 23, p. 1264.

The three cases pointing out the necessity of carrying out a two-step test in order to deny the execution of an EAW make it possible speak about a judicial doctrine or line of cases. Interestingly enough, Filipek presents the Irish case in this context not only as a mere confirmation of the *Aranyosi and Căldăraru* judgment, but also as a next step in the evolution of the relevant case law. In this sense while the *Aranyosi and Căldăraru* judgment adopted a two-element test, Filipek posits that the *LM* judgment (the Irish case) would apply a three-element test. This would refer to: the generalized situation in the issuing state (test 1); the situation of the courts hearing the cases of the persons in question (test 2); and the situation of the individual case (test 3).[60] In this sense test 2 would refer to all criminal courts in the issuing state, and test 3 to the court making decisions on the EAW and on the criminal responsibility of the requested person. There is no unanimity in this respect. For Konstadinides what is at stake is simply a two-tier *Aranyosi and Căldăraru* test.[61] As is visible, this is the description of the CJEU in the Dutch case as well. All the same, step two comprises what Filipek identifies as tests 2 and 3.

There is no doubt that the Irish case was seen as one of the leading cases in the rule of law saga.[62] Lewandowski gives it third place after the *Portuguese judges (ASJP)* case and the *Achmea* case.[63] It is not only an important repetition but to a large extent also a new step – both as regards developing some notions used in the case of the Portuguese judges and as a warning of the possible denial of execution of the EAWs issued by the Polish courts. That is why it is impossible to describe the rule of law case law without referring to the Irish case. What is at the core of all these judgments is the central position of the independence of the judiciary and the possible negative consequences for a state introducing restrictions on it. As Konstadinides states, "[t]he judgment also reaffirmed the interrelation between the right to effective judicial protection, judicial independence and the rule of law and allowed the CJEU to draw red lines regarding the protection of European values."[64] Also Mancano notes that:

> [T]he definition of the EAW system as a form of judicial cooperation has significant legal implications. Since it constitutes a mechanism of inter-State surrender of (alleged or "certified") offenders, certain specific safeguards play a particularly prominent role (such as, most obviously, those related to the treatment of detainees). The purely judicial nature of the cooperation places judicial independence right at the centre of the stage as an essential precondition for the healthy functioning of the EAW.[65]

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[60] Filipek, *supra* note 26, p. 20.

[61] T. Konstadinides, *Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: LM,* 56(3) Common Market Law Review 743 (2019), p. 751.

[62] A. von Bogdandy, *Tyrania wartości? Problemy i drogi europejskiej ochrony praworządności krajowej* [Tyranny of Values? Problems and Paths of European Defence of National Rule of Law], 4 Europejski Przegląd Sądowy 4 (2019), p. 6.

[63] Lewandowski, *supra* note 57, pp. 5-6.

[64] Konstadinides, *supra* note 61, p. 744.

[65] Mancano, *supra* note 22, pp. 688-689.

This importance of the independence of the judiciary may be seen as an incentive for a stronger reply. In any case an attempt to evaluate the stance of the CJEU gives rise to the "half full – half empty" dilemma. The CJEU indeed gave a warning, but did not act as a terminator of the right of the Polish courts to issue EAWs. It is difficult not to see that in this respect the attitude of the CJEU may be seen as much softer than the one resulting from other rule of law "Polish" judgments. They may be considered as very strong (i.e. the case on the retirement age in the Polish Supreme Court), or even more than very strong and actually problematic (the KRS case). If we assume that the thesis that the CJEU gave a soft answer is true, or at least plausible, another question seems inevitable, i.e. whether the self-restraint the CJEU apparently expressed in the two Polish EAW cases is a real, and not only apparent, self-restraint, and if the former is true, whether it could be looked at as a promise of some armistice with the Polish government. In fact the chronology is not very promising in that respect. The Irish case predates all other "Polish cases." It makes much more probable the suggestion that the EAWs are treated as a separate topic, with no special promise with respect to the other aspects of the dispute on the rule of law in Poland. As Konstadinides puts it, "LM is, therefore, more of a fair trial case than one that concerns rule of law deficiencies in Poland and whether Member States should generally refuse to extradite suspects as a result of those deficiencies."[66]

There may be many reasons for the CJEU's stance. The EAW cases apparently confirm the above-cited thesis of Platon on the "timidity" of the CJEU, although the *Portuguese judges* case and KRS case are everything but timid. Von Bogdandy expressed the view according to which a denial of judicial cooperation "might resuscitate old spectres of bilateral conflict."[67] It can be counterproductive as well. The mutual nature of the EAW may turn out to act against the courts trying to impose sanctions on their own. It seems that the functioning of the EAW is more valuable for the CJEU than Art. 4(2) TEU, which means that the EAW cases are not necessarily the end of the crusade with respect to Poland. Mancano identifies three reasons underlying the CJEU's self-restraint, as follows:

> First, an interpretation to the contrary would amount to a de facto suspension of the EAW, while the preamble of the EAWFD empowers only the European Council to do so. Second, accepting that the judges or courts of a Member State can no longer be considered independent *en masse* would deprive those courts and judges of the possibility to make use of the preliminary ruling mechanism, while precisely that mechanism has played a key role in relation to resisting the "reforms" of the Polish government. Third, it would entail a high risk of impunity of requested persons present in a territory other than that in which they allegedly committed an offence, thereby undermining a fundamental objective of the EAW and the EU more broadly.[68]

[66] Konstadinides, *supra* note 61, p. 751.
[67] von Bogdandy, *supra* note 4, p. 711.
[68] Mancano, *supra* note 22, p. 701.

It goes without saying that the Dutch case clearly confirms the latter two conclusions, the first one being an element of a long line of cases.

Interestingly enough, Lewandowski gave the title to his text on the Irish judgment "Between the Scylla of suspending mutual trust and Charybdis of fragmenting the standard of protection of a fundamental right." It seems that the CJEU managed to avoid both Scylla and Charybdis.

What deserves special mention is that the CJEU in both Polish EAW cases avoided any hints with respect to its own evaluation of the alleged systemic deficiencies. There is no doubt as to the critical stance of the referring courts however. There is nothing in the case law that forbids them from doing so, but in any case they must supplement this analysis with one on the individual situation of the requested person.

CONCLUDING REMARKS

The 2018 and 2020 preliminary rulings speak against the automatic denial of all EAWs coming from Polish courts. However, they are far from a guarantee that each and every such EAW will be executed, even in the absence of any of the grounds for denial of execution listed in the Framework Decision. What is underlined is the observance of a two-step test for the possible denial of execution. Even if some persons may look at it as a "mild" response, what was protected by it was more a "precious" instrument of EU cooperation than the Polish government. In any case it is difficult to see any kind of armistice in them.

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DOCUMENTS ISSUED BY UNRECOGNISED ENTITIES – THE APPROACH OF THE POLISH COURTS: COMMENT ON THE JUDGMENT OF THE SUPREME COURT OF 25 JUNE 2020, REF. NO. I NSNC 48/19

Abstract: *This article analyses the judgment of the Supreme Court of Poland of 25 June 2020, in which the Court refused to recognise registered mail receipt forms issued by the authorities of the so-called Turkish Republic of Northern Cyprus (TRNC) as foreign official documents, despite the Public Prosecutor General and the claimant arguing to the contrary. The text attempts to show that the ruling is consistent with earlier Polish practice and the majority view in domestic literature. Still, the international jurisprudence shows that there is no clear rule of public international law that would make non-recognition of documents absolutely mandatory in such cases, and some exceptions could even support their recognition under special circumstances. Also, in similar cases foreign national courts do not always refuse recognition.*

Keywords: documents, non-recognition, *Namibia* exception, Northern Cyprus, recognition, regime, statehood

INTRODUCTION

The judgment of the Supreme Court of Poland discussed below is one of the relatively few examples of how the Polish courts approach the question of recognition of documents issued by unrecognised entities. The most contentious aspect of the case concluded by this judgment was whether the absence of recognition, by Poland and the international community, of the entity issuing the documents affected the status of the documents in question and could prevent a Polish court from treating them as official documents issued by a foreign state. The following comment seeks to show that

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the judgment follows an established line of reasoning already present in other similar Polish judgments and conforms with the majority view of domestic legal scholars. At the same time, the text's aim is also to put this dominant view in perspective by demonstrating other ways in which the subject has been approached by other international and national courts. This general overview of the jurisprudence of other courts makes it possible to demonstrate that at least in some jurisdictions the courts make some exceptions for documents issued by unrecognised entities based on the interests of justice, fairness or humanitarian reasons, although whether these exceptions apply to disputes having a business-related character remains largely uncertain.

1. THE FACTS OF THE CASE AND THE JUDGMENT

The case discussed was essentially a business dispute between a Danish company and a Polish one. The former sought to repeal resolutions adopted by the general meeting of shareholders of the latter, arguing that the motions adopted violated its minority shareholder rights provided for in the Commercial Companies Code.[1] The Regional Court repealed the resolutions, sharing the Danish company's plea that it had not been properly informed about the dates when the general meeting of shareholders was to be held. The Polish company tried to overturn this judgment in two subsequent instances (Regional Court, Court of Appeal), but failed. Then it sought to convince the Public Prosecutor General to bring the extraordinary appeal[2] and when he did, it joined the proceedings.[3]

The most important aspect of the case from the point of view of international law was that the letters containing the information on the dates of the meetings at which the contentious resolutions had been adopted were sent to the Danish company by the majority shareholder from one of its offices which was located in Northern Cyprus. The bone of contention was the status of the registered mail receipt forms provided by the Polish company as proof of dispatch of the letters in question: they were certified by an official of the Turkish Republic of Northern Cyprus (TRNC) – a regime unrecognised by the United Nations and all states except Turkey – and then further certified by two Turkish officials, who affixed the apostille.[4] The Public Prosecutor General and the

[1] Art. 402 § 3 in relation with Art. 341 § 1 and Art. 399 § 3 of Kodeks spółek handlowych [The Commercial Companies Code], Journal of Laws 2000, No. 94, item 1037, as amended.

[2] The extraordinary appeal is a measure recently introduced to the Polish legal system, *see* Ustawa o Sądzie Najwyższym [Law on Supreme Court], Journal of Laws 2019, item 825, as amended. Only a few officials – the Public Prosecutor General among them – are entitled to bring it before the Supreme Court. It allows final judgments to be quashed on the grounds that they violate constitutional human and civil rights and freedoms or grossly violate other Polish laws. These far-reaching consequences have raised concerns of a large group of legal scholars as to the constitutionality of the measure. This question however is without pertinence to the subject matter of the article and will not be further addressed.

[3] *See* the history of the proceedings in Judgment of the Supreme Court, 25 June 2020, I NSNc 48/19, LEX no. 3020700.

[4] The apostille is an official certification which serves to certify a document's validity between the state-parties to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign

Polish company argued that when deciding on the status of the forms in question, the lower courts should have taken into account the law of the TRNC, according to which these were valid proof of sending. As a consequence, they claimed that the forms amounted to "foreign official documents" within the meaning of the Polish Code of civil procedure and the Danish company was correctly informed about the dates of the meetings. The courts, on the other hand, maintained that a "foreign document" must be "a document originating from a country recognised by Poland or one with which Poland has established diplomatic and consular relations."[5] They refused to take into account the Turkish Cypriot law and to accept the registered mail receipt forms as a valid proof of dispatch. Consequently, they found that the Polish company did not prove that the Danish company had been informed of the dates of the meetings and that its allegation that its rights were violated was substantiated.

In its judgment of 25 June 2020, the Supreme Court dismissed the extraordinary appeal brought by the Public Prosecutor General against the ruling of the court of last instance, which rejected the appeal made by the Polish company.[6] As it observed, both the Regional Court and the Court of Appeal hearing the case did not grossly violate the law. According to the Supreme Court, in light of the non-recognition of the TRNC by both the international community and Poland, they were right to conclude that a document certified by an official of "an unrecognised state" (the court's own term and in inverted commas) was not a foreign official document within the meaning of Polish civil procedure,[7] since it was not drawn up by an official of a "foreign state." The court shared the opinion of the lower instance courts and the majority view in the Polish legal literature that the "non-recognition of a state" results in non-recognition of the documents "issued by the authorities of such a state" as foreign official documents and entails their treatment as "private documents."[8] This conclusion meant that they

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Public Documents and removes the need for legalisation of the document by the receiving state officials in order for it to have legal effect in that country. *See e.g.* Ł.D. Dąbrowski, *Moc dowodowa zagranicznych dokumentów urzędowych. Wybrane zagadnienia procesowe* [Evidentiary value of foreign official documents. Selected procedural issues], 14 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 120 (2016), pp. 122-123.

[5] This was the view expressed by the Court of Appeal and cited verbatim by the Supreme Court. A part of this statement is confusing, since international law scholars are nearly unanimous that at least the establishment of diplomatic relations always results in recognition of the entity involved as a state.

[6] Judgment of the Supreme Court, *supra* note 3. *See* also the judgment of the lower instance, Judgment of the Court of Appeal in Lublin, 3 August 2016, I ACa 866/15, LEX nr 3020699.

[7] There is no legal definition of a "foreign official document" in the Polish Code of Civil Procedure, although the term is present in some provisions, such as Art. 1138. A popular definition by one of the authors states that it is "a document drawn up by an authority of a foreign state acting within the framework of its powers, in a proper form, signed and stamped," *see* T. Demendecki, *Art. 1138 Zagraniczne dokumenty urzędowe* [Foreign official documents], in: A. Jakubecki et al. (eds.), *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom II. Art. 730-1217*, Wolters Kluwer, Warszawa: 2017.

[8] *E.g.* P. Czubik, *Dokumenty z państw nieuznanych w obrocie cywilnoprawnym* [Documents from non-recognized states in the conduct of civil law transactions], 7 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 119 (2009), p. 123; K. Mikša, *Consequences of Non-*

did not enjoy the presumption of truthfulness accorded to official documents,[9] and that a party to proceedings which tried to prove its point using them had to prove the authenticity and veracity of the documents in question.[10] As stated by the Supreme Court, the Polish company failed to satisfy this requirement. Consequently, its claims did not deserve favourable consideration.

2. APPRAISAL IN THE LIGHT OF THE EARLIER PRACTICE OF THE POLISH COURTS

The Supreme Court was correct to conclude that the verdicts of the lower instance courts did not grossly violate the law. In fact the reasoning of the Supreme Court and the other courts involved follows the majority approach of Polish international law scholars, who argue that the laws enacted or documents issued by entities which are not recognised as states by the Polish government should generally be refused recognition by the Polish courts or other bodies exercising state authority – unless there are clear indications that a state which is recognised by the international community as a sovereign over the territory *de facto* controlled by another entity at least tolerates such a practice with respect to that entity's laws or documents. This view is based on an assumption that the existence of the legal order of an unrecognised entity over a territory administered and claimed by that entity must not be recognised because there is another legal order – that of the state universally recognised as enjoying sovereignty over the area – which applies.[11] Because of this missing "sovereignty link," the confirmation of the authenticity and truthfulness of the documents by officials of another universally recognised state (in this case Turkey) also does not affect the status of the documents in question.[12]

Recognition of State in Private International Law from the Polish Perspective, 62(2) Osteuropa Recht 150 (2016), pp. 153-154 (although she differs as to the application of laws of unrecognised entities). It must be underlined that this particular official-private documents distinction applies only to civil proceedings and not to, e.g., customs and tax matters. Still, the general issue of recognition vs. non-recognition remains pertinent also in proceedings before other courts, including administrative ones.

[9] According to Art. 1138 of the Polish Code of Civil Procedure, foreign official documents are of equal evidential value as Polish official documents. This means that the party to the proceedings which questions the authenticity or veracity of the document always has to prove it before the court, *see e.g.* Dąbrowski, *supra* note 4, pp. 124-125 and 129.

[10] The Regional Court hearing the case in first instance even went so far as to assert that the documents of "a state which came into being through illegal Turkish occupation of a part of the territory of the Republic of Cyprus" could not be recognised as "legal," linking the illegality under international law with illegality in the domestic legal order.

[11] P. Czubik, *Nieuznawanie urzędowych dokumentów zagranicznych wystawianych w ramach jurysdykcji tzw. państw nieuznanych – przypadek Tureckiej Republiki Północnego Cypru* [Non-recognition of foreign document issued within the jurisdiction on non-recognized states – the case of the Turkish Republic of Northern Cyprus], 15(1) Państwo i Społeczeństwo 11 (2015), p. 20.

[12] *Ibidem*, pp. 15-18.

This approach has already been followed by the Polish courts in other cases. For example, in a case involving, among others, two companies registered in internationally unrecognised Transnistria, the Court of Appeal in Katowice refused to take into account the provisions of the Civil Code enacted by Transnistrian authorities, because Poland did not recognise the statehood of this entity.[13] On the other hand, numerous courts hearing cases brought by Polish companies engaged in business relations with their Taiwanese counterparts did not object to the submission of documents issued by the authorities in Taiwan. For instance, the Voivodship Administrative Court in Warsaw did not even raise the issue of the status of the documents confirming the registration of a trademark in Taiwan.[14] Also, in a number of cases the Supreme Administrative Court did not question the qualification of certificates of origin of goods issued in Taiwan as documents.[15] As mentioned above, one can find the reason for these differences in the treatment of laws and documents in the attitude of the respective territorial sovereigns. In the case of Transnistria, the acceptance of the laws enacted by the regime and the documents it issues by the Republic of Moldova remains inconsistent and unclear.[16] Conversely, the People's Republic of China is known to tolerate recognition of a number of Taiwanese documents and, as a consequence, in practice these are legalised in an unusual way and treated as valid foreign official documents by the Polish courts.[17]

Seen in this context, in the interest of legal certainty the courts hearing the case in question seemed to have no other choice than to refuse to recognise as official the

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[13] Judgment of the Court of Appeal in Katowice, 17.02.2015, V ACa 579/14, LEX no. 1658891.

[14] Judgment of the Voivodship Administrative Court in Warsaw, 22 November 2012, VI SA/Wa 1177/12, LEX no. 1338687.

[15] Although at the same time the Court refused to qualify as documents the letters issued by Taiwanese authorities confirming the non-authenticity of the certificates. This was, however, due to specific provisions of Polish Customs Code then in force, and the reasoning of the Court did not leave any doubt that the letters sent by, e.g., analogous Malaysian or Chinese authorities would have been treated in a similar way and not treated as official documents. *See e.g.* Judgment of the Supreme Administrative Court, 9 December 2008, I GSK 110/08, LEX no. 538502.

[16] N. Martsenko, *Peculiarities of Recognition of Judgments and other Acts Issued by Unrecognized Authorities: The Example of the Autonomous Republic of Crimea, and Luhansk and Donetsk Oblasts ("LNR" and "DNR")*, 65(2) Osteuropa Recht 223 (2019), p. 235 argues that Moldova recognises a number of acts and documents of the Transnistrian authorities (e.g. certificates of birth, death, and marriages). Still, as proof she relies on the 2001 Transnistrian-Moldovan agreement, which remains largely a dead letter. This position may be confirmed by, *inter alia*, an article by V. Socor, *De-Sovereignization: Testing a Conflict-Resolution Model at Moldova's Expense in Transnistria (Part Two)*, 15(135) Eurasia Daily Monitor 2018, pointing out that it was in practice a 2018 agreement that allowed, albeit only under certain conditions, recognition of drivers' licenses, car registration documents and university diplomas issued by the Transnistrian authorities (which had been previously covered by the 2001 agreement). To the best knowledge of the Author, no case involving the latter group of documents has so far come before a Polish court.

[17] P. Czubik, *Przyjmowanie dokumentów zagranicznych wystawianych w ramach jurysdykcji tzw. państw nieuznanych (uwagi na tle specyficznego przypadku dokumentów z Tajwanu)* [Accepting foreign documents issued within the jurisdiction of so-called non-recognized states (comments on the specific case of documents from Taiwan)], 52(2) Nowy Przegląd Notarialny 43 (2012), pp. 46 and 48-51, and Czubik, *supra* note 8, pp. 124-125.

documents that had been presented, and to treat them only as "private documents" rather than "foreign official documents." This is because the TRNC remains unrecognised by Poland and other states, including the Republic of Cyprus, which is the territorial sovereign over Northern Cyprus, i.e. the area under control of the Turkish Cypriot regime. Moreover, the Republic of Cyprus persistently objects to recognition of the documents issued by the Turkish Cypriot authorities.[18] So, in essence neither of the two requirements – i.e. recognition of the entity in question by the Polish government and/or the acquiescence of the territorial sovereign – had been fulfilled, and thus non-recognition of the documents was a logical consequence. Seen from this perspective, the position of the Public Prosecutor General may appear surprising, particularly since in Poland this post is currently tied with the position of the Minister of Justice. By arguing for the law of an entity unrecognised by his government to be acknowledged as the effective law over the territory concerned (Northern Cyprus) and for the registered mail receipt forms to be recognised as foreign official documents, he could be seen as acting against the non-recognition policy of the government he is a member of.[19] At the same time however, he was trying to protect the rights of a Polish company.

3. THE INTERNATIONAL CONTEXT

One may wonder whether the view of the Polish courts is in conformity with international law, and whether or not this body of law indeed precludes the recognition of documents issued by unrecognised regimes in all circumstances. Seen only in the light of the most fundamental general principles of international law, the approach which makes the acceptance of such documents conditional on the acquiescence of the territorial sovereign may seem reasonable and consistent with universal principles, such as non-interference into internal affairs and respect for the sovereignty and territorial integrity of other states. If the state which the international community recognises as enjoying sovereignty over the territory objects to the recognition of the documents in question, then such recognition may be seen as inconsistent with the policy of non-recognition by the government of the state where the court has its seat.

However, an inquiry into the jurisprudence of international courts suggests that there are exceptions to this general rule in international law.[20] For the sake of brevity, a few major cases will be just outlined here. The first one which touched on these issues was the International Court of Justice's (ICJ) 1971 advisory opinion in the *Namibia* case. Although the case concerned the consequences of non-recognition of the illegal

[18] Czubik, *supra* note 11, p. 13.

[19] Meanwhile, it does not seem correct to treat the Public Prosecutor General's view as the one of the government, since in the end he did not act as the Minister of Justice in the case at hand.

[20] *See also* S. Zaręba, *Skutki braku uznania państwa w* świetle *prawa międzynarodowego* [The consequences of the lack of recognition of a state from the point of view of international law], Instytut Nauk Prawnych PAN, Warszawa: 2020, pp. 401-412.

acquisition of territory, the conclusions reached by the ICJ are widely considered applicable also to unrecognised entities, particularly those which are refused universal recognition on the grounds of the illegality of their creation. In the part of the opinion most pertinent to present considerations, the ICJ held that although the official acts of the illegal administration over Namibia were invalid, an exception had to be made for "those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants" of the territory.[21] This exception is widely referred to in the literature as the "*Namibia* exception."[22] One may imply from the court's quote that also the documents relating to these acts could or even should be recognised despite the non-recognition of the issuing authority. While there was no clear mention of acts relating to corporate activity, neither were these expressly excluded.

Another court, the European Court of Human Rights (ECtHR), was also faced with the question of recognition of various acts adopted by unrecognised regimes, including the TRNC itself. Interestingly, it accepted a much broader range of laws, administrative decisions, and documents issued by this regime than the ICJ. Some of them could hardly be considered as beneficial to the inhabitants of the territory. For example, in *Protopapa v. Turkey*,[23] the Court assessed the conduct of the applicant in the light of the laws in force in the TRNC and a judgment issued by a domestic court established there. The said judgment was in fact rather detrimental to the applicant, as it convicted her for having entered the territory of the TRNC without permission, but nevertheless it was not rejected by the ECtHR and was widely referred to in the merits of ECtHR's judgment.[24] Once again the cases before the ECtHR did not specifically address business relations, but referred to the human rights of individuals. Still, the permissive approach of the ECtHR with regard to the acts of unrecognised regimes seems to be more prone to justifying the acceptance of documents such as the ones involved in the Polish case discussed. As remarked upon in the literature, the

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[21] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep 1971, para. 125.

[22] *See e.g.* Y. Ronen, *Transition from Illegal Regimes under International Law*, Cambridge University Press, Cambridge: 2011, pp. 83 et seq.; T. Christakis, A. Constantinides, *Territorial Disputes in the Context of Secessionist Conflicts*, in: M. Kohen, M. Hebie (eds.), *Research Handbook on Territorial Disputes in International Law*, Edward Elgar Publishing, Cheltenham: 2018, p. 357; M. Arcari, *The UN SC, Unrecognised Subjects and the Obligation of Non-recognition in International Law*, in: W. Czapliński, A. Kleczkowska (eds.), *Unrecognised Subjects in International Law*, Wydawnictwo Naukowe Scholar, Warszawa: 2019, pp. 236-237. The remarks of these authors also testify to the doubts regarding the scope of the exception, i.e. the kinds of acts it covers. Although the exception is often framed as a humanitarian one, it cannot be excluded that the court's verdict was motivated by, e.g., reasons of common sense or reasons of fairness as such – in that case it could be applicable also to legal persons.

[23] *See* ECtHR, *Protopapa v. Turkey* (App. no. 16084/90), 24 February 2009, paras. 23-24 and 90-98.

[24] See a thorough and critical analysis of the evolution of this case and the whole line of reasoning in the ECtHR jurisprudence in: A. Czaplińska, *International Courts, Unrecognised Entities and Individuals: Coherence through Judicial Dialogue?*, XXXIX Polish Yearbook of International Law 61 (2019), pp. 74-77 and 84-86.

ECtHR's jurisprudence "provides such a wide exceptional validity under the *Namibia* exception, that little remains of the obligation of non-recognition insofar as internal acts are concerned."[25]

Finally, one needs to look also to the judgments issued by the Court of Justice of the European Union (CJEU) in the so-called "*Anastasiou* saga," which concerned the movement and phytosanitary certificates issued by the TRNC authorities for a company exporting goods to the European Union. Unlike in the other cases mentioned above, the Court dealt directly with documents used in business practice, not by individuals. It held that the authorities in the areas not under effective control of the Republic of Cyprus could not issue valid certificates and refused to recognise them. To substantiate its opinion, it underlined that the acceptance of certificates requires confidence in the system of verification of origin and cooperation between the authorities of the exporting and importing states to prevent fraud, and these objectives could not be met in a case of authorities unrecognised both by the EU and all its members.[26] Although the CJEU refused recognition, one should take into account that it did not address the issue of possible exceptions derived from general international law or practice, and restricted itself to the examination of the EU law alone.[27]

This overview demonstrates that the international courts differ with respect to the issue of how to treat documents issued by unrecognised regimes, with some accepting them to a wider extent, some to a narrower extent, and some refusing them. While the ICJ and the ECtHR have made exceptions to the general principle of non-recognition of such documents, the CJEU has been very strict in this respect. In sum it is possible to conclude that there is no clear rule in international law that would mandate the non-recognition of all these documents without exception. Unfortunately, in the three courts and cases discussed above, only the CJEU has directly dealt with the issue of non-recognition of the acts of unrecognised entities used in business practice.[28] It is thus unclear whether there should be a difference in the treatment of these acts by the courts (including national courts) depending on whether they are used by private or corporate persons, and whether the interests of enterprises engaged in business relations

[25] Ronen, *supra* note 22, p. 99. In general, the Court believes that the human rights of the applicants can, subject to certain conditions, be effectively protected by TRNC's law and courts, and because of that it does not see the recognition of a large number of acts of the TRNC as detrimental to them. The applicants before the ECtHR may also be legal persons.

[26] Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others* [1994], ECLI:EU:C:1994:277, paras. 37-41 and 62-65. Later, the CJEU also refused to recognise phytosanitary certificates issued for goods originating in the TRNC by the Turkish authorities, *see* Case C-140/02 *Regina on the application of S.P. Anastasiou (Pissouri) Ltd and Others v. Minister of Agriculture, Fisheries and Food* [2003], ECLI:EU:C:2000:360, paras. 17-24 and 69-75.

[27] *See* a very critical appraisal of these CJEU judgments by S. Talmon, *The Cyprus Question before the European Court of Justice*, 12(4) European Journal of International Law 727 (2001).

[28] There have been at least several cases involving companies and the TRNC before the ECtHR, but they concerned the practice of continuous denial of access to these companies' property and did not deal directly with the regime's laws and documents. *See e.g.* ECtHR, *Eugenia Michaelidou Developments Ltd And Michael Tymvios v. Turkey* (App. no. 16163/90), 31 July 2003.

on the territories controlled by unrecognised entities may also be protected by some exceptions similar to the *Namibia* exception.

Finally, it seems appropriate to take a brief look into practice of other states' domestic courts. In fact they greatly vary in their approach to similar cases. The common law courts have usually tended to stick with the approach taken by the executive with regard to the unrecognised entities, but have allowed some exceptions similar to those of the ICJ in the *Namibia* opinion, or even of a wider scope. In the United Kingdom, the question was undecided for a long time,[29] but was ultimately decided and settled by precedent[30] in the *Emin v. Yeldag* case, where an English court approved an earlier opinion[31] that despite non-recognition of the entity which issued an act – such as a document or a judgment – the British courts were allowed to recognise acts relating to "commercial obligations, private law matters involving individuals, and routine administrative activities."[32] The only caveat was that recognition of the acts in question could not be done against the diplomatic stance of the home country – but in that case the British government did not object. The approach of the US courts has been even more liberal, partly due to a long-standing jurisprudence dealing with the treatment of the acts of the Confederate States of America after its defeat. The courts at the time held that the acts of a state or regime unrecognised by the US should be recognised if they served to maintain peace and order or concerned civil matters, as long as they were not in support of the rebellion.[33] This approach was later reflected in a number of cases, such as *Upright v. Mercury Business Machines*. In that case the court of second instance held that an act of an unrecognised entity could be accepted by American courts "if

[29] The starting point of the debate over exceptions to the principle of non-recognition of documents issued by unrecognised entities was the *obiter dictum* of lord Wilberforce in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* that a British court could recognise laws and acts "where private rights, or acts of everyday occurrence, or perfunctory acts of administration" are involved, "in the interests of justice and common sense." *See* England, House of Lords, *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, 18 May 1966, 43 International Law Reports 23, p. 66. Later it was also mentioned with approval by, *inter alia*, lord Denning in England, Court of Appeal, *Hesperides Hotels Ltd. and Another v. Aegean Turkish Holidays Ltd. and Muftizade*, 23 May 1977, 73 International Law Reports 9, pp. 14-15. One needs to note that they focused mostly on recognition of the laws and acts (including documents) which concerned everyday life, such as marriages, divorces, labour matters or leases by private persons.

[30] At least Y. Ronen in *Recognition of Divorce without Recognition of Statehood*, 63(2) Cambridge Law Journal 268 (2004), p. 268, calls it as a precedent, although she admits that "it went almost unnoticed."

[31] *See* England, Special Commissioners, *Caglar v. Billingham (Inspector of Taxes) and Related Appeals*, 7 March 1996, 108 ILR 510, p. 535.

[32] The judge deciding the case declared however that although he did not dissent with the cited opinion, he would not express the exception "in terms as broad" as cited – unfortunately without clarifying what he meant, *see* England, High Court, Family Division, *Emin v. Yeldag (Attorney-General and Secretary of State for Foreign and Commonwealth Affairs Intervening)*, 5 October 2001, 148 ILR 663, particularly pp. 675 and 678–679.

[33] *See* L.L. Jaffe, *Judicial Aspects of Foreign Relations, in Particular of the Recognition of Foreign Powers*, Harvard University Press, Cambridge, MA: 1933, pp. 172–175. The underlying idea was, it seems, that individuals and private entities should not be considered as wrongdoers if they followed the legal rules governing civil matters.

it affected private rights and obligations arising either as a result of activity in, or with persons or corporations" within the territory controlled by that entity, unless it violated the US public policy.[34] Thus effectively both the British and US courts consider it possible to recognise documents issued by unrecognised authorities, not only in cases involving private persons but also those where business entities or commercial relations are concerned (such as in the Polish case discussed above).[35]

The civil law courts have been much more diverse in their approaches. Some follow or have followed a practice similar to that of their Polish counterparts. For instance, Ukrainian courts have been refusing recognition for years of acts and documents from Transnistria on the grounds of its non-recognition by Ukraine.[36] Starting from 2015 however, they have begun to recognise a number of documents used in private law relations (mostly those confirming births, deaths or marriages) issued by the two regimes established on the Ukrainian territory with the help of Russia – the Donetsk People's Republic and the Luhansk People's Republic – based on the *Namibia* exception.[37] There are also a number of jurisdictions where the courts treatment of documents issued by unrecognised regimes is based on the effectiveness of the legal system in a given territory. German courts apply the laws effectively in force in a territory, as long as this is not contrary to public policy.[38] Thus for example in a case relating to Northern Cyprus, a court of Nürnberg-Fürth found it possible to take into account the law adopted by the TRNC since it had been chosen by the parties of a commercial contract, and did not reject it due to the non-recognition of the TRNC by Germany.[39] It seems plausible that it would take a similar approach with respect to documents. As regards the courts in France or Austria, they are not under an obligation to ask the executive for its view regarding the recognition or non-recognition of the law or documents of a given territorial entity, and when deciding on such matters they usually take into account the

[34] United States, Supreme Court of New York, Appellate Division, First Department, *Upright v. Mercury Business Machines Co.*, 11 April 1961, 32 International Law Reports 65 (1966), pp. 65-66.

[35] In order to increase legal certainty some states, such as the US, Australia or the UK, have even gone so far as to pass legislation allowing the recognition of the laws of some or all unrecognised entities, which of course also affects the recognition of documents which are issued pursuant to these laws. For more, *see* T.D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, Praeger, Westport: 1999, pp. 67-71.

[36] *See* H. Stakhyra, *Applicability of Private Law of De-facto Regimes*, 65(2) Osteuropa-Recht 207 (2019), pp. 215-216.

[37] *Ibidem*, p. 216. Interestingly, the courts did it even though the laws adopted by Ukraine expressly considered the acts of both separatist regimes null and void, and provided for a special procedure for the people living there and wishing. e.g., to have their divorce recognised. Unfortunately, the text cited does not give any information on whether any documents related to business relations were involved.

[38] Germany, Landgericht Nürnberg-Fürth, Judgment of 31 March 1999, p. 13, cited by S. Talmon, *Kollektive Nichtanerkennung illegaler Staaten: Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern*, Mohr Siebeck, Tübingen: 2006, p. 475. The text mentions however that non-recognition may be considered by German courts as an argument for the rejection of the acts of a regime in cases of doubt.

[39] *Ibidem*, p. 476.

effectiveness of the legal system.[40] Similarly, the courts in Belgium have been guided mostly by the effectiveness and recognition of public acts concerning the personal status and contracts of private individuals.[41]

To summarise, the jurisprudence on the recognition of the public acts of entities unrecognised by the government of the country of the seat of the court – including documents – varies greatly. This confirms the remark already made that there is no clear rule of international law obliging the courts not to recognise such documents in all circumstances. There may be some exceptions to the rigid rule of non-recognition based on reasons of humanity, justice, or fairness, depending on the jurisdiction and the circumstances of the case. The case law regarding the use of these documents in commercial relations is much more limited, but the courts in some states have also considered them recognisable under certain conditions.

CONCLUSIONS

The judgment of the Supreme Court of Poland discussed in this comment is consistent with the established approach in Poland that a Polish court should not recognise as official the documents issued by a regime unrecognised by Poland (and even more so in cases of non-recognition by virtually the entire international community) unless the sovereign over the territory controlled by that regime at least acquiesces to their recognition. In doing so, it follows the modest previous practice of Polish courts and the mainstream views in Polish literature. The verdict can be viewed positively by legal practitioners as maintaining legal certainty. At the same time however, it makes business relations maintained by Polish companies with entities located or operating in territories controlled by such regimes much riskier compared to companies located in countries where the recognition of such documents is possible.

As demonstrated by the brief comparison with selected approaches of other domestic courts, this view is strict and does not take into account, for example, the effectiveness of the legal system over a given territory. It also does not include any clear exceptions for the benefit of individuals or corporations active within the territory controlled by such an unrecognised entity based on the interests of justice, common sense, or humanitarian reasons (such as those based on the ICJ's *Namibia* exception). It must be noted however that the practice of international domestic courts concerning the recognition of documents in cases relating to business relations – as in the case at hand – is far from uniform and they are not necessarily covered by the exceptions from the principle of non-recognition applied by both national and international courts (reflected for example in the unclear stance of the ICJ in the *Namibia* case and of the ECtHR). Therefore, since international law and jurisprudence do not clearly mandate states to

[40] *See* V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia*, Martinus Nijhoff, Dordrecht-Boston: 1990, p. 305.

[41] D.J. Devine, *Status of Rhodesia in International Law*, Acta Iuridica 109 (1974), p. 172.

exceptionally recognise the documents or other acts of unrecognised entities, particularly in cases involving business entities and not individuals, the approach taken by the Supreme Court may be considered as a correct one.

It needs to be observed that, as regards the grounds for all the verdicts of international courts mentioned above (i.e. of the ICJ, the ECtHR and the CJEU), the Polish judgment discussed, including the judgments of the lower instance courts, were most similar in their treatment of the Turkish Cypriot documents used by respective companies to the judgments issued by the CJEU. Both the Polish and CJEU verdicts considered the absence of recognition of the TRNC as grounds for the strict non-recognition of documents it issued. However, the consequences of non-recognition differed quite significantly. The outcome of the CJEU's rulings was that the certificates issued by the TRNC could not be accepted and used for imports into the EU. In the case of the Supreme Court's ruling, the registered mail receipt forms could be used as evidence, but their accuracy and truthfulness had to be separately proved, thus making them of little practical use. These discrepancies were due to the different aims the documents were used for – judicial review of administrative actions versus commercial litigation. Because of that, different legal rules were applicable: the CJEU cases were based on the rules contained in the EU directives, while the Polish case(s) were based on a domestic legal act – the Commercial Companies Code. As the latter provided for an alternative option in the case of non-recognition of an official document (i.e. its treatment as a "private" one), and there was no comparable solution provided for in the directives, the consequences of non-recognition obviously could not have been the same. Nonetheless, the general compliance of the approach of the Polish courts with that of the CJEU as regards the treatment of documents issued by unrecognised entities should be appreciated, since it is beneficial to the coherence of treatment of similar cases in the EU legal order, at both the national and supranational levels.

BOOK REVIEWS

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Frederic Mégret, Philip Alston (eds.), *The United Nations and Human Rights: A Critical Appraisal*, 2nd ed., Oxford University Press, Oxford: 2020, pp. 752

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Almost three decades have passed since the first edition of this volume.[1] To say that "a lot has changed since then" in the institutional framework of the United Nations' (UN) human rights system would be an understatement. The first edition was published shortly before the Vienna World Conference on Human Rights (1993) and not long after significant political turmoil in Europe in the early 1990s. A major shift came with the replacement of the Commission on Human Rights with the Human Rights Council (HRC) in 2006, but the list of new developments in the universal system of human rights as of 2020, both in the normative and structural senses, is quite longer. The editors of the book were Philip Alston, a well-recognized expert in human rights law and currently a professor at New York University School of Law, and Frédéric Mégret, also a distinguished human rights law scholar, Co-director of Centre for Human Rights and Legal Pluralism and professor at the Faculty of Law, McGill University in Montreal. In the introduction to the book the editors admitted that the idea of a second edition had been in the air soon after the book was first published in the 1990s. This was reiterated by P. Alston during an on-line panel discussion promoting the second edition, organized by the Geneva Academy of International Humanitarian Law and Human Rights in October 2020.[2] Whatever the reasons for this time span between both editions, it is great to see such an in-depth and meticulous analysis of the UN human rights system, evaluated with expertise and up-to-date as of 2020. The list of authors of chapters in the second edition has changed almost completely, but the approach has remained the same: an analysis and critical evaluation of the UN human rights "regime" through institutional lenses.

Even for insiders, the variety of organs, committees, commissions and procedures functioning in the system might seem overwhelming. Thus the effort to critically analyse

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[1] P. Alston (ed.), *United Nations and Human Rights*, Oxford University Press, Oxford: 1992.

[2] The video of the event is available at: https://youtu.be/TbVtXIaQTe8 (accessed 30 May 2021).

the institutional arrangements of the UN human rights system and draw conclusions should be greatly appreciated, especially because it has been done in such an orderly and clear fashion. In the introductory chapter P. Alston and F. Mégret provide a comprehensive reflection on the condition of the system, while highlighting tensions between human rights as a "project" and their institutionalization within the UN. They acknowledge that the system is sometimes accused of being too technocratic and politicised, but they encourage readers to take a broader view and not jump to conclusions. Understanding how human rights are tackled within the UN requires much more than just an overview of the competences of the major bodies with mandates in the human rights sphere. Alston and Mégret discuss the broad "trajectory" of human rights at the UN since the beginning of the organization, and bring to the readers' attention the evolution of the institutional arrangements in subsequent decades. They also introduce the methodological framework, i.e. the criteria of evaluation and relevant benchmarks, which are presumed to guide the further chapters of the book.

The editors have retained the useful and long-established distinction between Charter-based and treaty-based organs. They note that while the former are typically considered as more inter-governmental and policy-oriented, and the latter as expert-focused and legal, these features sometimes blend together. One could even argue that some bodies do not fit into any of these categories. For instance, the special procedures (special rapporteurs and working groups) derive their mandates from the resolutions of the HRC, which itself was founded on the basis of a resolution of the UN General Assembly (60/251). While the UN Charter remains a pivotal point of reference in all the activities of the UN organs and entities, to argue that the special procedures of the HRC are Charter-based might however be a bit of an overstretch.

The first part includes four chapters on the human rights-related activities of the principal organs of the UN (the Security Council, the General Assembly, the Economic and Social Council, and the International Court of Justice). The Trusteeship Council was left out given its contemporary idle status. The second part is focused on subsidiary human rights organs and takes a closer look at the Human Rights Council, the Advisory Committee of the HRC, the Commission on the Status of Women, and the Permanent Forum of Indigenous Rights. Part III covers almost a half of the book (pp. 309-664) and systematically deals with the organs monitoring treaty compliance, i.e. the treaty committees, as well as the issue of the reform of the UN human rights treaty bodies system. The last part of the book includes two final chapters: on the High Commissioner for Human Rights; and the coordination of matters related with human rights within the UN system.

As regards the first part of the book it is noteworthy that a chapter on the Security Council was included, since more often than not the activities and agenda of this principal UN organ are commented upon solely through the prism of its tasks explicitly defined in the UN Charter, in particular the Council's primary responsibility for the maintenance of international peace and security. The chapter, authored by F. Mégret, starts with an observation that "the Security Council may be the least obvious organ

within the United Nations to have a human rights role, yet it may also be one of those that can make a difference – both positive and negative – when it comes to upholding of human rights standards internationally" (p. 39). Be that as it may, there is no doubt that the role of the Security Council was duly included and examined in the context of the UN human rights system. The following chapters of the first part, dealing with the General Assembly, ECOSOC and the International Court of Justice, are also first-rate in that they provide a very informed analysis and overview of how human rights are present in these organs' activities. For a reader interested in general international law, the chapter on the International Court of Justice and its human rights-related case law, authored by Bruno Simma, will be of particular interest.

The second part is entitled "Subsidiary human rights organs," although that is not necessarily an official term used to denote all the bodies examined under this heading. This part starts with a chapter on the HRC, which is obviously central to the UN human rights system as such. The main mechanism of the HRC, i.e. the Universal Periodic Review, and the special procedures, are duly taken into account, although it could be argued that the latter would deserve a bit more space or even a separate chapter, given their multiplicity and roles. The chapters on the Advisory Committee to the HRC, the Commission on the Status of Women, and the Permanent Forum on Indigenous Issues provide many valuable insights. It should be noted however that there are several more subsidiary expert mechanisms of the HRC which were not included, such as the Forum on Business and Human Rights, the Forum on Minority Issues, or the Forum on Human Rights, Democracy and the Rule of Law.

It has been already mentioned that the third part of the book on the organs monitoring treaty compliance is voluminous as compared to the other parts, but this is fully understandable. Skipping any of the nine (or ten when including the Subcommittee for the Prevention of Torture) treaty committees would seem inapposite, and it is no surprise that this part takes every single committee on-board, starting with the oldest, i.e. the Committee on the Elimination of Racial Discrimination, and methodically analysing the activities of the others: the Human Rights Committee; the Committee on the Elimination of Discrimination Against Women; the Committee on Economic, Social and Cultural Rights; the Committee against Torture and the Subcommittee for the Prevention of Torture; the Committee on the Rights of the Child; the Committee on the Rights of Persons with Disabilities; the Committee on Enforced Disappearances; and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The discussion on whether the system needs that many human rights committees is a long one, and so is the debate on how to improve their functioning. These issues are taken up in the last chapter of part III, authored by S. Egan (pp. 645-664). The performance of treaty bodies has been constantly reviewed, both within the UN itself (cf. the reports of the Secretary General submitted in accordance with the General Assembly resolution 68/268) and by external stakeholders. Where these reviews and discussions on reform lead is a complex question and S. Egan concedes that there is no "silver

bullet" to solve the dilemmas around the UN treaty bodies system. One could add that as long as some modifications to the core human rights treaties are off the table (as seems to be the case), the scope of possible improvements to the system is quite restricted. And introducing amendments to the core UN human rights treaties appears to be a diplomatic and legal nightmare. But this does not mean that the situation is hopeless, since much can be done through changes not requiring amendments to the treaties. It remains to be seen however whether the UN member states and the UN itself are sufficiently determined to continue the debate on the reform of the treaty bodies and achieve some tangible results.

The last part of the book under review encompasses just two chapters under a *chapeau* of human rights governance: one on the role of the High Commissioner for Human Rights (A. Clapham) and the other on human rights co-ordination within the UN system (G. Minet). These are very important issues and both chapters facilitate insights into how the human rights agenda is streamlined and managed throughout the Organization.

P. Alston and F. Mégret observed that "there is a tendency for those assessing the UN's human rights record to be either highly congratulatory or entirely dismissive. Many of those who work within the system tend to adopt the former approach and seem never to tire of citing its many institutional and procedural achievements as evidence that there has been great progress in terms of respect for human rights. (…) The opposite approach is sometimes adopted by critics" (p. 34). This observation duly reflects the *status quo* when it comes to evaluation of the UN human rights system. Judging by the number of mechanisms and procedures or the bulk of treaty and non-treaty standards, the system could be considered as a story of success. On the other hand, it is obvious that there have been and are many shortcomings, and the overall picture is far from being perfect. At the end of the day, it is the degree of states' compliance with their human rights obligations, as well as the effectiveness of the monitoring and controlling mechanisms which could serve as more reliable indicators of "where we are" with respect to the UN human rights agenda.

What we learn from this book edited by P. Alston and F. Mégret is that the developments of the last thirty years were significant (if not revolutionary), and that many Charter-based and treaty-based organs used their mandates efficiently to move the cause forward. But there is certainly no reason to consider the UN human rights system as a flawless achievement of the Organization. Much effort has been put into introducing and maintaining the instruments of international monitoring and control as regards human rights obligations. However, the condition of the UN human rights system will inevitably depend on the degree of states' commitment and their readiness to take their obligations seriously.

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Aleksander Orakhelashvili, *International Law and International Politics: Foundations of Interdisciplinary Analysis*, Edward Elgar Publishing, Cheltenham: 2020, pp. 320

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It is hard to imagine a good international law scholar without knowledge of international politics, as this would prevent him/her from being able to explain mechanisms for the creation of norms of international law and their execution. International politics stands behind each treaty norm, as well as behind the practice of states and their statements concerning the meaning of their practice, which are the main elements to be assessed in order to identify norms of customary international law. Judgments of international courts also have their political background, including the International Court of Justice (vide its advisory opinion on the legality of the threat or use of nuclear weapons of 1996 and the statements of Judge Oda in his dissenting opinion). Thus it is obvious that international politics impact international law and international law shapes the framework of international decisions.

Consequently, many international lawyers have been at the same time leading scholars in international relations (IR), or have even helped to establish IR as a separate (sub)discipline of science. In Poland this group particularly includes Ludwik Ehrlich,[1] Remigiusz Bierzanek[2] and Janusz Symonides.[3]

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[1] L. Ehrlich, *Wstęp do nauki o stosunkach międzynarodowych* [Introduction to international relations] (reprint of the first edition from 1947), Scholar, Warszawa: 2018; T. Pugacewicz, *Koncepcja teoretyczna stosunków międzynarodowych w ujęciu Ludwika Ehrlicha z 1947 roku* [Theoretical conception of international relations by Ludwik Ehrlich from 1947], in: P. Grzebyk, R. Tarnogórski (eds.), *Siła prawa zamiast prawa siły. Ludwik Ehrlich i jego wkład w rozwój nauki prawa międzynarodowego oraz nauki o stosunkach międzynarodowych* [The force of law rather than the law of force. Ludwik Ehrlich and his contribution to the development of International Law as well as the science of International Relations], PISM Warszawa: 2020.

[2] R. Bierzanek, *Współczesne stosunki międzynarodowe* [Contemporary international relations], PIW, Warszawa: 1972.

[3] R. Bierzanek, J. Jakubowski, J. Symonides, *Prawo międzynarodowe i stosunki międzynarodowe* [International law and international relations], PWN, Warszawa: 1980; J. Symonides, *Les functions de la*

International lawyers often engage in analyses of international relations, especially concerning security issues – vide Manfred Lachs or Adam Daniel Rotfeld – which are combined with legal analysis;[4] they often work in centres devoted to the analysis of international politics (vide the Graduate Institute of International and Development Studies in Switzerland and several universities in Italy, the US or Poland); or in the programmes combining international law and expertise in international politics (vide e.g. the Harvard Programme on International Law and Armed Conflicts). Nowadays, graduate/LLM programmes which unite both spheres – as in case of the University of Birmingham, where the author of this reviewed work, Orakhelashvili, works – have garnered great interest.

Consequently, the relationship between international law (IL) and international politics (IP) is a very promising topic and Orakhelashvili, as a scholar with an impressive record of publications (including the monographs *Peremptory Norms in International Law* (OUP 2006), *Collective Security* (OUP 2011), and a *Research Handbook on the Theory and History of International Law*, Edward Elgar 2011) seems to have been predestined to author this kind of a research monograph.

In the introduction Orakhelashvili promises that: "This study analyses the impact of international law on international politics from an inter-disciplinary perspective, combining and contrasting the method of international legal reasoning with that of international relations discipline," adding that the "book proceeds to examine the relationship between international law and international politics by addressing the range of central issues that are examined by both disciplines," and emphasizing that "today's thinking and writing focus primarily on current events, without paying sufficient attention to similar events that have happened in the past." Therefore, the expectations of readers of this book could be justifiably high.

The book is composed of six sections (apart from introduction and the single page (!) conclusion, which is surprising taking into account the broadness and complexity of the topic): (i) States as basic units; (ii) Law, power and politics; (iii) The foundational framework; (iv) Models of authority and governance; (v) Law, power and global space; and (vi) Peace and war. Unfortunately, the author does not justify this structure in a convincing way – it does not reflect any classic IL or IR handbooks' divisions. Certainly the structure of a book is always the choice of the author, but in this case a reader might encounter problems in navigating within the content of the book. The

*justice internationale dans les relarions internationales contemporaine*s, Zakład Narodowy im. Ossolińskich, Wrocław: 1990.

[4] *See e.g.* R. Bierzanek, *Załatwianie sporów międzynarodowych 1945-1973: studium prawno-polityczne* [International dispute settlement 1945-1973: a legal and political study], MON, Warszawa: 1974; M. Lachs, *System bezpieczeństwa zbiorowego a sprawa bezpieczeństwa i pokoju* [System of collective security and security and peace], Warszawa: 1955; M. Lachs, *The Polish-German Frontier: Law, Life and the Logic of History*, PWN, Warszawa: 1965; A.D. Rotfeld, *Europejski system bezpieczeństwa in statu nascendi* [The European system of security in statu nascendi], PISM, Warszawa: 1990; A.D. Rotfeld, *Bezpieczeństwo międzynarodowe czasu przemian* [International security in the times of change], Akademia Dyplomatyczna MSZ, Warszawa: 2004.

publishing house can be also blamed for the lack of a detailed Table of Contents and for the unfortunately incomplete Index, as some names of writers/thinkers are missing in the Index (e.g. Ehrlich), and surprisingly there are no references to their works in the bibliography. In addition, many basic notions like war, armed conflict, peace, trade, justice, courts etc. are not mentioned in the Index. Consequently, the issues such as "just war" are discussed in different parts of the monograph without cross-references. Thus a reader must be extremely attentive and read the whole monograph in order to be able to digest and categorize all the information on a particular concept (this problem is of course partly abated if a reader has access to an electronic version).

The author does not explain the criteria of selection of the main thinkers, nor does he indicate what theories of IR he wishes to discuss and whom he considers as the main representatives of a particular IR theory. I believe the author was convinced that only experts in both international relations and international law would read his book, and they would have no problem with identification of theories, main scholars etc. However, this might not be always the case, so the author missed the opportunity to be a guide for less-oriented readers.

The problems and ideas are not presented in chronological order, which would help to trace the development of IL and IR theories and their mutual inspiration. We jump from citation to citation, from Kissinger to Kant and then to Bernard (p. 37), and the author does not explain how their way of thinking is interlinked, thus some parts look like a stream of consciousness on the part of the author. Nevertheless, there are of course numerous brilliant comparisons, like 2003 US interpretation of the UN Charter to justify the invasion of Iraq and Vattel's statements on false interpretations (p. 79).

The way of presenting problems additionally complicates a search of the monograph for information. It is not clear whether the author classifies a particular thinker as a representative of the IL or IR discipline, which makes it extremely difficult to track mutual influences. At the same time, he does not note that in many cases – as he cites works of Aristotle, Kant, Thomas d'Aquin – it is impossible to make such distinctions as even today analysis of doctrines includes analysis of both legal and political doctrines, as they are closely interlinked. The state – the main subject of international law – is a political and legal notion, therefore both disciplines would refer to the same philosophers. Consequently, there is not much innovation in this approach, and I would not dare to announce – as Orakhelashvili did in the title – that his propositions constitute the "foundations of interdisciplinary analysis." Scholars writing about war, for example, would and do refer to Thucydides or Rousseau, but they do not announce this as an achievement, as it is just proof of a good (classic) education.

In addition, nowadays inclusiveness is also expected from scholars. A part which aims to overview ways of thinking about certain notions must present opinions not only from the Western world, but also from other parts of the globe. In my opinion, this monograph is a lost opportunity to include concepts/theories discussed in non-Western cultures, which today is at least a bit bizarre. The same could be said about ignoring the quite vigorously-developed feminist theories of IR.

It was to some extent disappointing to me that there are not many references to historical events (including the adoption of particular legal norms). The author criticizes others for not learning from the past, but he repeats the same mistake by not presenting profound research to show the repetitiveness of some events and the similar approaches to them. The historical facts presented seem to be done so in a random way, without proper comparisons. In principle, we are receiving a compilation of various citations of different authors (making the work rather an analysis of theories/doctrines than of international politics as such), which is hard to follow.

Undoubtedly the author demonstrates his great erudition, and it is visible that he put tremendous effort into the preparation of the monograph. I am convinced that he can surprise every interlocutor with fascinating references to classic writers. However, the flaws in the presentation of problems inevitably impact the final assessment of the value of the book. The monograph does not expose the linkage between international law and international politics – it "just" mixes ideas allegedly assigned to one or another discipline. At the same time however, the monograph can be an inspiration for further research and an incentive to immerse oneself in classic writings, which – as the author aptly proves – are still relevant for today's problems.[5]

[5] The eBook version is priced from £22/$31 from Google Play, ebooks.com and other eBook vendors, while in print the book can be ordered from the Edward Elgar Publishing website.

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*Hanna Schreiber**

Julie Fraser, Brianne McGonnigle Leyh (eds.), *Intersections of Law and Culture at the International Criminal Court*, Edward Elgar Publishing, Cheltenham: 2020, pp. 456

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If we wanted home truths, we should have stayed at home.
Clifford Geertz

This famous quote from one of the most important contemporary anthropologists gives us a good chance to welcome research endeavours which constitute an invitation to understand what the truths are "outside" our homes – including our own home's legal landscapes. The volume edited by Julie Fraser and Brianne McGonnigle Leyh, both from the Netherlands Institute of Human Rights (Utrecht University), responds to this call and constitutes a long-awaited invitation to visit the intersection of law and culture – in the specific arena of the International Criminal Court (ICC or the Court). Being an international truth and justice organ, "with 123 States Parties, staff representing some 100 nationalities and situations being addressed in more than a dozen localities" (p. 8), it unavoidably engages in seeking diverse, culturally grounded "truths" and making decisions on how to deal with this diversity. The volume examines the basis on which the Court accepts, misunderstands, or ignores culturally-specific arguments in its daily work. It brings the leitmotiv and central theme of cultural anthropology – "culture" – into the confines of a legal analysis, and by doing so it lays down the theoretical, methodological, and practical foundations for dialogue between these disciplines. The dialogue between law and anthropology, planned here by the editors themselves (p. 4), is however only the starting point: it turns into a *polilogue* of many more disciplines: political science, criminology, psychology, sociology, history, and linguistics. They all enter into a sophisticated battle of arguments.

The book is composed of 20 chapters divided into four sections: 1) Substantive Crimes and Culture, 2) Proceedings and Culture, 3) Defences, Sentences, Victims and Culture, 4) The ICC's Global Reach and Legitimacy. Each part contains 4 or 5 chapters,

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framed by a thought-provoking introduction and afterword to the whole volume. The volume has been designed by relatively young scholars (PhD in 2011 by Brianne McGonnigle Leyh and in 2018 by Julie Fraser, both dissertations receiving awards and distinctions), who at the same time are professionally engaged and experienced in legal practice in the ICC and in other organizations. They have both been editors of the Netherlands Quarterly of Human Rights, presenting an understanding on the limitations of law extracted from other disciplines. McGonnigle Leyh has been promoting the idea of interdisciplinarity in the series of podcasts titled *Travelling Concepts on Air*. Fraser assisted the UN Committee on the Elimination of Discrimination Against Women with their 65th session in Geneva in 2016, and undertook field research in Java, Indonesia in 2017. They have worked on several research projects together earlier. Thus it is not surprising that they managed to invite or attract (as the open call for papers to this volume was also published) an impressive group of scholars and practitioners, such as Mark Goodale, Justice Teresa Doherty, and Alison Dundes Renteln, among others.

The 25 contributors include junior and senior practitioners and scholars, engaged in their daily work in proceedings pursued in the ICC, other international criminal tribunals, or international special courts (Peta-Louise Bagott, Joshua Isaac Bishay, Michelle Coleman, Cale, Davis, Teresa Doherty, Julie Fraser, Fiona McKay, Andrew Merrylees, Nikhil Narayan, Phoebe Oyugi, Ingrid Roestenburg-Morgan). They include interdisciplinary scholars who pursue their research between the paths of anthropology, general international law, human rights law and heritage studies (Kelly Breemen, Vicky Breemen, Mark Goodale, Barbora Hola, Alison Dundes Renteln, Leigh Swigart), and researchers focused on law (Martyna Fałkowska-Clarys, Noelle Higgins, Lily Martinet, Gregor Maucec, Brianne McGonngle Ley, Adina Loredana-Nistor, Owiso Owiso, Suzanne Schot). Their diverse scholarly backgrounds and experiences bring to the volume the spirit of multidisciplinary additional depth, providing intriguing and novel guidance on how to analyse the intersections of law and culture. An additional interesting advantage arises when one analyses these practical and scholarly paths with the aim of identifying centres of knowledge, expertise, and experience for this particular topic. The group of contributors mainly has either studied in, or pursued an important part of their career in the United Kingdom, Australia, United States of America, The Netherlands, Belgium, Switzerland, France and Luxembourg (English and French speaking countries). In the group of 25 contributors only three (literally only three!) have pursued their studies or career outside these educational power centres. This tells a lot about the long shadow of colonial power structures (and in the case of the USA – the hegemonic position it occupied after the World War II) that led to the creation of powerful academic centres attracting until today ambitious and devoted students. It also tells us a lot about the location of the most powerful centres of international (criminal) law infrastructure.

So what message(s) can one decode while reading twenty chapters?

At least four of them are intentionally made visible, and each might be linked to one of the four parts of the book (but at the same time not be limited to it). The first one is: lawyers need to understand the cultural and social norms in which legal norms

operate and with which they are interlinked, and their impact on both the presentation of evidence as well as on attitudes of what constitutes a crime. These "cultural lenses" are taken for granted when a legal regime operates inside a country with a more or less homogenous cultural background (Foreword by Justice Teresa Doherty). However, the very same "cultural lenses" cannot be used when the cultural context is dramatically different, as is the case when international courts are being established and when nationally-diverse judges come together to decide about international crimes. They have to find a common ground in their diverse educational, cultural and legal backgrounds and at the same time operate in compliance with the Courts Rules of Procedure and Evidence and with international jurisprudence. The same conflation of diverse backgrounds in international courts also appears on the side of prosecutors, counsels, advocates, witnesses, victims, and oppressors. The language interpretation provided during these proceedings is another sphere where cultural sensitivity as well as cultural awareness are needed. The impact of cross-cultural awareness is analysed throughout the entire book in the context of a vast number of actual cases. Thus readers wanting to understand this impact and its meaning can find plenty of useful examples and case studies. The book also makes for wonderful reading for university courses. For example, the book's readers may find examples of beliefs and reliance on sorcery, matters of witchcraft, or spiritual engagement which, according to Western concept of causal effect would be dismissed or disregarded. However, as described in chapter 8 (*Spellbound at the ICC: the intersection of spirituality and international criminal law*), in the case of the trial of Dominic Ongwen, a member of Lord Resistance Army in Northern Uganda who was kidnapped as a child, the inaccuracy of the Western perspective and way of rationalizing the arguments used was perceived to be crucial. One of the victim's representatives, a psychologist and professor at Columbia University, openly admitted: "[For] Western psychologists like me, it's hard for us to get our head around this because our cultural beliefs and identity are different" (p. 159).

The second important message would be: legal analysis and proceedings must adapt to more frequent use of and cooperation with ethnographic methodology (e.g. fieldwork, participant observation, interviews) if it is to remain credible, grounded, and bring about justice. The utility of ethnographic research in creating cultural awareness is visible throughout the entire book. Chapter 2 (*Now you see it, now you don't: culture at the ICC*) offers an interesting example how the ethnographic approach helps to grasp linguistic diversity in the Court: as reported in late 2018 the Court was working with 32 languages over nine situations in Africa, which included three distinct dialects of Arabic and two dialects of Swahili (p. 15). Knowledge and understanding gained "in the field" are undoubtedly a highly demanded resource when bringing abstract "justice" to the ground, or when introducing changes in the proceedings to be able to take such knowledge into account. The understanding of "the field" might be supported by discourse analysis (chapter 11), which helped to analyse how statements by public officials foreground certain "cultural" values while marginalising others, and to recognise the importance of language in the construction of reality (p. 212).

The third important message is: justice is a gender and culturally relative concept. Thus, in order for justice at the ICC to have any significant relevance for the societies in which the crimes ocurred, a transformative approach that adopts elements of dispute resolution from the communities concerned is necessary (see chapters 6, 11, 13 and 14). This would result in making the ICC's practices more relevant and meaningful to those societies. The authors propose, for example, that plea negotiation – which has already been applied in the *Al Mahdi* case – be used more frequently, as it enables perpetrators "to admit to their guilt, disclose the nature and circumstances of their wrongdoing, acknowledge the harm caused to victims, offer apologies and express remorse, serve appropriate and reasonable punishment, provide reparation and participate in the processes of reintegration unique to their societies" (p. 267). This appeal brings the general content of the first message to the ground, by proposing a judicial framework for practically involving cross-cultural awareness in the Court's practice and, as a result, diminish the level of distrust and opposition towards ICC proceedings and sentences (as reported in, e.g., the case of Dominic Ongwen). Taking into account that the Court has wide discretion when determining a sentence (except for the general prohibition of capital punishment), it allows it to create "its own legal culture or to incorporate legal cultures of other jurisdictions" (p. 268). This appeal should however be read strictly as an appeal – the thorough analysis the book provides of the potentiality to address cultural considerations by the Court in many cases (Katanga, Lubanga, Ntaganda, Bemba cases) demonstrates that in numerous instances the Court did not address them in a satisfactory way (pp. 286-7).

The fourth important message, challenging all of the above three, is that there is a fundamental tension between the claims of legal universality and cultural particularity – and there are no easy solutions ready at hand (*see* Afterword, p. 404). This is one of the greatest challenges for the whole international criminal justice system. There is no clarity about the extent to which the ICC judges should take account of cultural factors when ruling on criminal cases (chapter 10: *The power of culture and judicial decision-making at the ICC*, p. 195, *see* also chapter 9: *'Questioned by the Court': The role of judges and sociocultural aspects of testimonial evidence in Katanga*). "Almost in every courtroom (…) there are moments of cultural misconception and miscommunication" (p. 198). It seems that only an awareness by judges of the impossibility to avoid them opens the door for the very much needed cultural expertise – and this has already proved to be an efficient way to bridge the gaps in cultural comprehension. It does not however constitute procedurally obvious and always reliable solutions, as is explained by Gregor Maucec. Another solution is analysed by Suzanne Schot, who underlines awareness and sensitivity on the side of the Court in the case of Katanga. The Court identified the need to understand the concept of fetishes and fetish-priests, the concept of ethnicity and how it influenced the conflict, as well as the role of semantics and spelling (pp. 178-183).

On the basis of what has been said above, the only thing that I found lacking in the book is a (re)construction at some point of what the contributors mean in their usage of various concepts that appear almost at every page of the volume, such as: "cultural

sensitivity," "(cross)cultural awareness," "cultural competence," "cultural understanding," "cultural lenses." These expressions are used very often by contributors discussing the preparation (or incapacity) of judges, prosecutors, advocates and interpreters to understand the cultural context of the case and the culturally-grounded dynamic of proceedings in the courtroom (which is especially important for the victims, who may be traumatised again by the lack of cultural respect within the proceedings, as is aptly described in chapter 15: *A delicate mosaic: the ICC, culture and victims*). These concepts have their own history and a vast literature, which could have been used as a reference and possibly be reflected in a separate chapter or in the form of conclusions with some recommendations.

The greatest strength of the book is the powerful, well-proven message it sends to all lawyers: Never ignore culture! This message is clear and convincing, as this book offers stimulating reflections on the responses to cultural entanglements observed in the Court's legal foundations, operations, and deliberations at all levels, i.e.: micro, where individuals come into contact with the ICC; meso, which applies to the internal, organisational culture of the ICC; and macro, referring to the "global reach and legitimacy of the ICC as it positions itself as an authoritative cultural agent in a world of difference" (*Introduction*, p. 8). The book is thus a must-read for international criminal lawyers, international relations scholars, political scientists, heritage scholars, anthropologists and sociologists of law, as well as practitioners, students, and activists engaged in the international criminal law regime. In addition it creates an appetite for more research in this area, which would offer insights into other international power centres where law and culture go hand in hand and play a crucial role. This volume is – as claimed by its editors – a call to action for researchers and practitioners, and especially for "those working at the Court – from interns to the judges, to the defence victims and prosecution, and others across the board – [that] need to engage in self-reflection and humility in relation to the knowledge they have, what knowledge they need to learn and how they can acquire such knowledge."[1]

Coming back to the quote from the beginning of this review: the home of the ICC is in the Hague (The Netherlands), but this does not tell us any particular truth about it. What is important here is not the ICC's geographical location but the "location of minds" of its international staff, trying to deliver justice to the victims of crimes which are of the greatest concern to humanity: genocide, crimes against humanity, war crimes, and the crime of aggression. We cannot stay at home if we want to understand "outside home" truths – and this means being aware of the victims' trauma, emotions, and the need to find internal as well as societal peace. We have to leave our "mental homes," leave the cultural and legal environments so familiar to us and learn outside them – to come back, reflect, and view ourselves in the mirror as "the Other." This book offers a guide to this difficult path, explaining the main pitfalls and traps along this

[1] Interview with Brianne McGonagle Leyh, Cross Cultural Human Rights Review, undated, available at: https://www.cchrreview.org/featured-brianne-mcgonigle-leyh (accessed 30 May 2021).

challenging journey. Because "culture denotes a set of ideas far more complex than only shared understanding and practices, and laws are more than a means to enforce cultural norms in that they also 'revise and reshape' culture, and are themselves part of culture" (Introduction, p. 1). We could not have imagined a better guidebook for this. The hope is that it will not remain a "guidebook" only, but will also be accepted as "a reflexive manual" for the ICC's judges and staff.[2]

[2] The eBook version is priced from £22/$31 from Google Play, ebooks.com and other eBook vendors, while in print the book can be ordered from the Edward Elgar Publishing website.

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*Agata Helena Winkiel-Skóra**

Emilia Justyna Powell, *Islamic Law and International Law: Peaceful Resolution of Disputes*, Oxford University Press, Oxford: 2020, pp. 328

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The question whether the Western approach to international law dominates in the field of public intentional law is a very current issue. One of the attempts of tackling this problem can be found in the recent Anthea Roberts' book entitled *Is International Law International?*,[1] in which the author concludes that international law is not international to the extent we believe it to be. Even though Roberts' work is comprehensive, the only non-Western countries covered are China and Russia. None of MENA states are taken into account. Therefore, the reviewed monograph by Emilia Justyna Powell has been much anticipated and needed work that fills an important gap in the international law scholarship.

Reading *Islamic Law and International Law* is to immerse oneself in a private quest of the author who very much often uses the pronoun "*I*" when writing about what will be put forward before a reader. This might be a little disconcerting as one is not used to such personal endeavors in the legal scholarship. It might also be regarded as a deviation from objectivity, which is inherent to the legal scholarship. It redirects the attention of a reader towards the author instead of the work that she had undertaken. Fortunately, once a reader gets accustomed to such form of a narrative, the focus is redirected to the research presented. Furthermore, the title of the book suggests much narrower scope, which might discourage some of the readers interested in a broader interaction of Islamic law and international law from picking up the position. While the monograph is devoted to dispute resolution, it also covers more general issues. In addition, Powell also includes a comparative study of non-Islamic states and their behavior when engaged in international disputes.

The book itself has a clear and concise structure. It is divided into eight chapters, including introduction and conclusions. The introduction starts with setting the scene by way of assessing the importance of understanding Islamic law in the context of

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[1] A. Roberts, *Is International Law International?*, Oxford University Press, Oxford: 2017.

international disputes, and introducing Sharia as a law that is interwoven to the different degrees with secular law among Islamic states. Then the author briefly discusses a theory of Islamic peaceful resolution of disputes, highlighting the significance of her project, which relies on empirical analysis. The introduction concludes with two subchapters that every academic book should have. In the first one the author clearly states what the book is not meant to be, while the second one provides a road map of the whole book. Unfortunately, the author has not dedicated any specific part of the introduction to the methodological considerations. While Powell writes about applying empirical research in her study and refers to interviews that she conducted, no further explanation is provided. Fortunately, later on, starting from chapter five, she meticulously explains her methodology in the research design section of the chapters devoted to comparative analysis.

In the second chapter, titled *International Law, Islamic Law, and Islamic Law States*, Powell attempts to define all these three categories. This may seem as a futile exercise, especially when it comes to "Islamic Law" and "Islamic Law States," as defining these concepts is very difficult, if possible at all. This venture is undertaken to introduce a reader who has scarce or non-existing knowledge on the subject matter of Islamic Law. The author shapes ideas carefully, while the review of the sources used by Powell, clearly shows that she relied not only on Western literature but also included Islamic scholarship. Powell introduces here *siyar* – a theoretical concept developed by scholars in the past to deal with outside relations – and implements it as a current idea. When writing about the Islamic Law States she uses comparative method looking at systems of particular states and the overlap between secular law and sharia. These concepts are developed further in the chapters that follow.

The author in the third chapter of the book *Islamic Law and International Law: Similarities and Differences* juxtaposes, as she writes, two "systems." She starts with historical background, then looks at the existing literature and eventually moves on to differences. She divides the different topics into subchapters, first tackling the relation between law and religion, moving on to the sources of law, and ending with religious features in the courtroom with focus on religious affiliation and gender of judges and the use of holy oaths in the court practice. The similarities are also divided into subchapters, and concern the role of scholars in law formation, custom and the rule of law. It is unclear what methodology was used to choose these particular ideas as similar and different. This chapter also serves as a foundation for the next one, that address the theory of peaceful resolution.

The fourth chapter *A Theory of Islamic Peaceful Resolution of Disputes* begins with the discussion of peaceful settlement of disputes in international law. This is followed by the analysis of the phenomenon of dispute settlement forum shopping. The discussion on non-confrontational ways of dispute resolution is followed by the analysis of a third-party dispute settlement. Then, Powell moves on to various aspects of a dispute resolution process and Islamic principles involved in it, as well as resolution methods used by Islamic Law States. The chapter concludes with analysis of application of Islamic law to collectives.

In the fifth chapter, the author discusses the *Islamic Law States and Peaceful Resolution of Territorial Disputes*. In this context, Powell concentrates on territorial disputes, and attempts to identify specific methods embedded in international law used during peaceful resolution processes. The author commences with providing a comparative and statistical background and then moves on to methodology followed by actual analysis of the data. The chapter ends with conclusion which rounds up the undertaken research and provides results gathered from the empirical data.

The sixth chapter *Islamic Law States and the International Court of Justice* is again an empirical analysis of the Islamic Law States attitudes towards the International Court of Justice (ICJ). While author frames the ICJ as a Western court, she looks at the interactions between Islamic Law States and the Court. In particular, the study undertakes the analysis of Islamic Law States practice towards endorsement of International Court of Justice jurisdiction over particular disputes. The chapter finishes with conclusion, somewhat hopeful, that Islamic Law States "seem to be open to international adjudication as embodied by the International Court of Justice."

The next chapter *Legal Schools and Regions* also fills the gap in the scholarship as there are apparently rudimentary systemic studies devoted to how the Islamic school of jurisprudence perceive the international dispute resolution. The author chooses two variables: schools as such and their geographic location. She examines two research questions. The first one seeks to establish whether Islamic schools of jurisprudence have an impact on the approach of Islamic Law States towards international dispute resolution methods, and the second looks for geographical differentiation among the Islamic Law States in how they perceive such methods.

The conclusion covered by the eight chapter encapsulates the findings offered in previous chapters. It is well structured and encompasses comprehensive summary of every issue that was analysed in the book. There is apparent shift in reasoning from the collective thinking about Islamic milieu towards individual regulations of each Islamic Law State and each country separate approach towards application of international law.

Powell's book is a position that fills the gap in the existing scholarship devoted to the Islamic legal tradition and its influence on international law. It does not focus solely on peaceful resolution of disputes, as suggests the subtitle of the book, but covers much wider area of legal research, such as defining the notion of Islamic State and Islamic milieu. It takes a reader on a journey rooted in history both of West and East, enriched by the use of empirical methods including interviews with policy-makers and legislators based in the Middle East. It draws not only from international law and comparative law scholarship but also from international relations. The empirical approach to the study is what makes this book a salient position and a must read for everyone interested in international dispute resolution in the Islamic milieu.

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