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EDITORIAL

Dear Readers,

The Polish Yearbook of International Law (PYIL), in its 43rd volume for 2023, presents a rich tapestry of contemporary legal issues and enduring debates in the field, all against the backdrop of a year dominated by the harsh realities of wars. The ongoing conflicts in Ukraine and Gaza have cast a long shadow over the international legal landscape, highlighting both the fragility of peace and the critical role of international law in navigating times of crisis.

The war between Russia and Ukraine, with its profound legal ramifications, emerges as the central theme of this new volume. The invasion has not only shattered lives and communities but has also shaken the foundations of the international legal order, prompting a renewed examination of its principles, norms, and institutions.

The first part of the present volume (i.e., General Articles) delves into a wide array of topics that reflect the multifaceted nature of international and European law in these turbulent times. The volume opens with a thought-provoking text by Jerzy Kranz on the relationship between European Union (EU) and national law in the context of constitutional review. This is followed by Ernst-Ulrich Petersmann's article, which explores whether EU multilevel constitutionalism could constitute a possible answer to the governance failures of the UN (as reflected in the fiasco of climate change prevention, wars of aggression, or common violations of human rights). Mor Sobol looks at the European Neighbourhood Policy, investigating its origins, while Raquel Cardoso discusses the function and legitimacy of European criminal law. The next article, written by Jakub Kociubiński, addresses state aid for green technologies in the EU.

A subsequent group of articles in this section investigates various legal issues connected with the Russian-Ukraine war. Nikolay Marin and Bilyana Manova explore three cases initiated against Russia before the International Court of Justice, offering a critical analysis of Russia's engagement with international legal mechanisms in the context of its aggression against Georgia and Ukraine. Sevanna Poghosyan's article on Russia's discourse on democracy in international law further illuminates the complexities of the current geopolitical landscape, highlighting the dissonance between rhetoric and reality. The subsequent text by Milan Lipovsky examines the concept of "a certain international criminal court" as articulated by

the International Court of Justice in its Arrest Warrant Judgment of 2002. Liina Lumiste writes about the challenges of regulating war in cyberspace in the context of Russian involvement in the work of the UN Open-ended Working Group. In the last article, Khrystyna Gavrysh deals with the prosecution of individuals for environmental harm in armed conflicts, with a focus on the destruction of the Kakhovka dam.

The second part of the volume includes selected papers presented at the seminar "Universal Jurisdiction and the Crime of Aggression: The Challenges and Opportunities for JIT Member States", organized on 4 December 2023 in an online format by the Center for Research on International Criminal Law at the Institute of Law Studies of the Polish Academy of Sciences in collaboration with Tallinn University and Vrije Universiteit Amsterdam. Gabriele Chlevickaite and Karolina Aksamitowska were both invited to prepare a special section of the PYIL. The contributions to this part offer an analysis of the Lithuania's role in investigating Russian crimes in Ukraine (by Dovile Sagatiene), the legality and legitimacy of domestic prosecutions in third States (by Gabija Grigaite-Daugirde), the inadmissibility of jurisdictional immunity for those responsible for international crimes (by Małgorzata Biszczanik), and practical aspects of investigating core crimes committed in Ukraine (by Hanna Kuczyńska and Michał Nasiłowski). Other seminar papers address the interplay between domestic and international criminal jurisdiction in the context of a special tribunal for the crime of aggression (by Łukasz Kułaga), the implementation and interpretation of international crimes' definitions in Ukraine's national jurisdiction (by Andriy Kosylo and Anastasiia Dmytriv), and the prosecution of the crime of aggression in both international and Ukrainian jurisdictions (by Anton Korynevych, Oksana Senatorova, and Mykhaylo Shepitko). The final article in this part discusses the role of the International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine and the potential of new technologies and justice hubs in the fight against impunity (by Karolina Aksamitowska), underscoring the international community's commitment to accountability for the crimes committed in Ukraine.

The third part of the volume focuses on Polish practice in public international law, specifically examining the promulgation of international agreements concluded between Poland and the USSR from 1944 to 1960 (by Grzegorz Wierczyński and Karolina Wierczyńska). This section provides valuable insights into the historical and legal context of these agreements and their implications for Polish practice, particularly in light of the current geopolitical landscape and the ongoing conflict in Ukraine, which has brought renewed attention to the complex relationship between Poland and Russia.

The final part of the PYIL comprises book reviews, offering critical analyses of recent publications in the field of public international law. The reviews cover a range

of monographs, including a commentary on the WTO Agreement on Sanitary and Phytosanitary Measures by Katalin Sulyok, as well as books on the persuasion and legal reasoning in the ECtHR rulings by Marieta Safta, on the reparations in domestic and international mass claims processes by Aleksandra Mężykowska, on the state succession to responsibility for internationally wrongful acts by Andrzej Jakubowski, and on the international cooperation and competition authorities by Szymon Zaręba.

As far as the journal's development is concerned, we are glad to inform you that the PYIL has a new webpage that can be accessed under our previous address (https://pyil.inp.pan.pl) and which includes all our articles. The journal is currently in the evaluation process by the Italian National Agency for the Evaluation of Universities and Research Institutes, and we hope to receive an A-rating soon. Last but not least, we have successfully applied to be indexed by the Directory of Open Access Journals (DOAJ). DOAJ is a unique and extensive database that provides access to high-quality, open-access, peer-reviewed journals. We strongly believe that the inclusion of PYIL in DOAJ will make the journal even more accessible to our current and future Readers.

Karolina Wierczyńska,
Łukasz Gruszczyński,
Aleksandra Mężykowska

GENERAL ARTICLES

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Jerzy Kranz[*]

SUPREMACY OVER PRIMACY...? REFLECTIONS ON LEGAL CONTROVERSIES BETWEEN POLAND AND THE EUROPEAN UNION (2015–2023)[**]

Abstract: *The violation of the rule of law in Poland (2015–2023) was related to the relationship between national law, especially constitutional law; and international law, especially European Union (EU) law. This article focuses on the issue of constitutional review in the context of concepts such as sovereignty and conferral of competences, as well as the supremacy of the Constitution and the primacy of application of international rules and principles.*

Sovereignty, a qualitative feature of the State, operates within the law, not outside of it. EU (international) law does not limit sovereignty, but the sovereign nature of the State cannot justify violations of the applicable law. Situating the relationship between international (EU) law and the national constitution in the perspective of the supremacy of one order over the other leads in practice to a collision and/or a stalemate. Rather, we should be guided by the principle of primacy as an "existential requirement" for the functioning of the Union, and more broadly, of international law.

The primacy of application does not imply the supremacy of EU law over national law, nor the derogation of national law norms. Constitutional supremacy, on the other hand, is a principle of domestic law which does not have external legal effects and does not exempt a State from its international legal responsibility. The concepts of priority and supremacy coexist, but they fulfil different functions and express different perspectives – primacy does not prejudge supremacy, and supremacy does not exclude primacy.

What is problematic is not so much the review of constitutionality per se, but the scope of that review and its effects. Once a national court has found a conflict between EU law and the national Constitution, should we accept the effect of selective refusal to apply EU law on the grounds of constitutional supremacy and sovereignty? The answer to this question is negative.

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[**] The first version of this text was published as *Nadrzędność nad pierwszeństwem ...? Uwagi na tle kontrowersji prawnych Polska – Unia Europejska (2015–2023)*, 4 Państwo i Prawo 3 (2024).

Keywords: European Union, Poland, sovereignty, primacy, supremacy, constitutional review

INTRODUCTION

Poland's entanglement in disputes with the European Union (EU), with international bodies or structures and with some of its neighbours, as well as questioning the foundations of international law (including EU law), took on a confrontational and exceptionally vivid character in the period between 2015 and 2023.[1] The violation of the rule of law in Poland was associated with a specific perception of the relationship between domestic law (especially constitutional law), and international law (especially EU law).[2]

In the period 2015-2023, as a result of the domination of the law by the politics of one party (specifically one man, the head of this party, who did not even hold the position of prime minister), a phenomenon known as "*Doppelstaat*"[3] appeared in Poland, i.e. the parallel functioning of two political and legal orders.[4] The practice of the Polish authorities amounted not only to a clear violation of the rule of law principle, but at the same time to a disturbance of the state system by the anarchisation of its institutions. Even after the change of government in December 2023, recovery is not just a matter of weeks.

Contrary to the official arguments,[5] the 2015-2023 dispute between the Polish authorities and the European Union was not so much about the conflict between EU law and the Polish Constitution, but about the incompatibility with that Constitution (and also with EU law) of Polish laws related to the so-called "judicial re-

[1] For more on the rule of law in Poland, *see* M. Ziółkowski, M. Zachariasiewicz, *Rule of Law in Poland*, in: A. Kornezov (ed.), *Mutual Trust, Mutual Recognition and the Rule of Law: National report*, Ciela Norma, Sofia: 2023, pp. 492–555; J. Barcz, A. Grzelak, R. Szyndlauer (eds.), *Problem praworządności w Polsce w świetle dokumentów Komisji Europejskiej. Okres „dialogu politycznego" 2016–2017* [The Rule of Law in Poland in the Light of European Commission Documents. The Period of Political Dialogue 2016-2017], Elipsa, Warszawa: 2020; J. Barcz, A. Grzelak, R. Szyndlauer (eds.), *Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości UE (2018–2020)* [The Rule of Law in Poland in the Light of the Case Law of the Court of Justice of the European Union (2018-2020)], Elipsa, Warszawa: 2021; J. Barcz, A. Grzelak, R. Szyndlauer (eds.), *Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości UE (2021)* [The Rule of Law in Poland in the Light of the Case Law of the Court of Justice of the European Union (2021)], Elipsa, Warszawa: 2022; *see also* W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, Oxford: 2019.

[2] *See more broadly* A. Wyrozumska, *Conflict between the Polish Constitutional Tribunal and the CJEU with regard to the reforms of the judiciary*, 60(4) Archiv des Völkerrechts 379 (2022).

[3] E. Fraenkel, *The Dual State. A Contribution to the Theory of Dictatorship*, Oxford University Press, Oxford: 2017.

[4] "Normative state" (*Normenstaat*) and a "prerogative state" (*Maßnahmenstaat*), which used both legal and extralegal violence.

[5] *White Paper on the Reform of the Polish Judiciary*, 7 March 2018, available at: https://tinyurl.com/k9kkbw2x (accessed 30 August 2024); *see also* UNHRC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on His Mission to Poland*, 5 April 2018, A/HRC/38/38/Add.1.

forms". In essence, the dispute was about disagreement over the form and evolution of European integration.[6]

This article is an attempt to explain (necessarily synthetically and selectively) the controversies related to such concepts as sovereignty, conferral of competences, as well as supremacy and the primacy of application of international legal rules and principles.

In this context, the case law of the Polish Constitutional Tribunal (PCT) and the legal doctrine in Poland should be viewed in the perspective of some general legal notions, and of its inspiration from the judgments of the German Federal Constitutional Court (GFCC) and of the deformations of the Polish judicial system after 2015.

Below are some examples illustrating the misunderstandings related to the relationship between international (in this case EU) law and national law:

a) the supremacy of the Polish Constitution resulting from its Art. 8(1) ("The Constitution shall be the supreme law of the Republic of Poland") is in conflict with the principle of the primacy of EU law, providing for the supremacy of its law over the law of the EU Member States (MSs), including the Constitution;
b) the supremacy of the Constitution results in the primacy of its validity and application on the territory of Poland;
c) the supremacy of the Constitution is tantamount to the preservation of the sovereignty of the State; and the sovereignty of Poland is expressed in the non-transferable competences of the State, which determine its constitutional identity; and accession to the EU implies a kind of limitation of the sovereignty of the State;
d) direct effect, direct application, and primacy are not immanent features of EU law, but merely the consequences of a domestic act of ratification, i.e. an emanation of the will of the sovereign;
e) international acts inconsistent with the Polish Constitution are not covered by the principles of primacy and direct applicability.

Also, the assumption that the conferral of competences upon the Union would constitute a premise for an implicit amendment of the Constitution, and that con-

[6] "They will not dictate to us in foreign languages what kind of system we should have in Poland!" (President of the Republic of Poland Andrzej Duda, 17 January 2020); "No one will force us to implement someone else's visions. (...) The rule of law and violations of the rule of law have become a propaganda baton in the European Union" (Prime Minister Mateusz Morawiecki in Sejm, 18 November 2020); "The European Commission operates using the methods of an organized criminal group, using illegal blackmail to force changes in the Polish legal order, contrary to Polish sovereignty" (Zbigniew Ziobro, Minister of Justice, at the press conference, 11 January 2023); "There is already a plan prepared, the implementation of which by the European Union, would lead (...) to the annihilation of the Polish state" (Jarosław Kaczyński, 11 November 2023).

tradictions between the constitutional norm and EU law leads to the invalidity of the constitutional norm, is unfounded.

1. THE STATE IN THE EUROPEAN UNION AND ITS LAW

1.1. The needs of international cooperation, the development of international law, and the entanglement of decision-making processes in the network of international governance pose a challenge to the traditional role of the State. Threats and needs become transboundary in nature, and integration within the EU expands the opportunities of MSs through its joint action. This results in the redistribution of power, influence, and interests between actors on the international scene.

The legal nature of the Union is referred to as supranational. It consists of the following elements:

a) the conferral of competences, which creates a multilevel legal order within which the Union becomes the legislative centre and exercises public authority;
b) a specific balance of diverse institutions (the Commission, the Council and the European Parliament) in the law-making process;
c) direct application of EU law, which leads to direct legal effects for natural and legal persons and involves the primacy of application of EU norms in national law,
d) exclusive jurisdiction of the Court of Justice of the EU (CJEU) with regard to the application and interpretation of EU law by its institutions and the MSs (national courts are at the same time Union courts), and the review of the legality of the acts of EU institutions. The CJEU acts as a constitutional court as well as a supreme court.

The functioning of the Union according to the above scheme is only possible if general principles of law are observed, such as mutual trust, loyal cooperation, rule of law, and primacy of application of EU law.[7]

1.2. EU law is characterized by the dynamics of its competences – it interferes on a formerly unknown scale with matters previously falling within the domestic jurisdiction of the MSs. A feature of the evolution of the Union is based on economic and political pressure to deepen cooperation – each stage of its development enforces specific consequences (spill-over; point of no return).

[7] *See* Art. 4(3) of the Treaty on European Union (TEU).

Entering into international obligations is an expression of a State's political will and the exercise of its competences. However, while the State decides freely at the time of binding itself to an international agreement, its application, interpretation, or termination are subject to restrictions which may diminish or exclude a State's freedom of action in certain areas.

The content of the Union's Treaties depends on the consent of all MSs, and the moment of their entry into force is determined by the Treaties, not by national law. The essence of the act (usually a statute) expressing consent to ratification is nothing other than the content of the treaty previously agreed upon by all parties. As a result, an individual State cannot unilaterally challenge the scope of competences conferred upon the Union (Art. 5 TEU) on the pretext that this scope was not covered by its consent.[8]

1.3. International law and national law coexist, interpenetrate, influence each other and in fact need each other. The nature of the EU is illustrated by the concept of "multilevel constitutionalism", which expresses the multitude of diversified but integrated sources of law.[9] This concept shifts the emphasis to the interdependence and the complementarity of legal norms of various origin. Different legal systems or sources may influence each other and be interrelated (interacting) – this means that achieving the intended goals is impossible without the cooperation of both systems.

EU law and domestic law are autonomous and distinct, but not separate, (competing) systems.[10] The autonomy[11] of a legal system, in short, is its own rules of recognition (legal validity) and of interpretation.

In the case of the EU, a conflict of norms should not be perceived as a classic contradiction between national law and international law, because we are dealing with one

[8] Polish Constitutional Tribunal, judgment of 24 November 2010, K 32/09: "It is not for the Constitutional Court to specify the content of the law giving consent to the ratification of an international agreement referred to in Article 90 of the Constitution, nor to define the rules for the participation of the Parliament and the Government in the implementation of the provisions of the Treaty of Lisbon" (para. III.2.6).

[9] I. Pernice, *Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited*, 36(4) Common Market Law Review 703 (1999); I. Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15(3) The Columbia Journal of European Law 349 (2009); N. MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford University Press, Oxford: 1999.

[10] *See* J. Lindeboom, *The Autonomy of EU Law: A Hartian View*, 13(1) European Journal of Legal Studies 271 (2021); M. Konstantinidis, *Demystifying Autonomy: Tracing the International Law Origins of the EU Principle of Autonomy*, 25 German Law Journal 94 (2024).

[11] "[A]utonomy, which exists with respect both to the law of the Member States and to international law, stems from the essential characteristics of the European Union and its law. (...) That autonomy accordingly resides in the fact that the Union possesses a constitutional framework that is unique to it. That framework encompasses the founding values set out in Article 2 TEU, (...) the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties, which include, inter alia, rules on the conferral and division of powers, rules governing how the EU institutions and its judicial system are to operate, and fundamental rules in specific areas", Opinion 1/17 of the CJEU of 30 April 2019, EU:C:2019:341, paras. 109–110.

integrated system of norms, but which come from different sources and are adopted in different procedures. The supranational character of the Union is essential here.

In light of the case law of the CJEU,[12] EU law is integrated (*intégré*) into the national legal order and is applied directly, regardless of whether in a given country the relationship between international law and national law is defined as dualistic or monistic. In dualistic countries, EU law is applied directly,[13] as in the monistic system, which does not exclude the use of the dualistic method to State's other international obligations. However, the integration of EU law with national law does not mean the supremacy (hierarchy) of one system over the other.

Specific solutions (e.g. monism or dualism) are of a technical nature, since regardless of them a State is obliged to comply with the international law binding upon it, including the application of its domestic law in a manner that does not violate its international obligations. It has become an established general principle in international law that a State may not invoke its domestic law in order to fail to comply with its international obligations.

This principle is expressed, *inter alia*, in Art. 27 of the Vienna Convention on the Law of Treaties (VCLT): "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." According to Art. 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" (*pacta sunt servanda*). This is also reflected in the jurisprudence of the Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ),[14] as well as in EU law[15] and in some national constitutions. The

[12] Case 6/64 *Flaminio Costa v. E.N.E.L.*, EU:C:1964:66, pp. 593–594: "Le Traité de la C.E.E. a institué un ordre juridique propre intégré au système juridique des Etats membres (...) et qui s'impose à leur juridiction. (...) Cette intégration, au droit de chaque pays membre, de dispositions qui proviennent de sources communautaires, et plus généralement les termes et l'esprit du Traité, ont pour corollaire l'impossibilité pour les Etats de faire prévaloir, contre un ordre juridique accepté par eux sur une base de réciprocité, une mesure unilatérale ultérieure qui ne saurait ainsi lui être opposable, le droit né du Traité issu d'une source autonome ne pouvant, en raison de sa nature spécifique originale se voir judiciairement opposer un texte interne quel qu'il soit sans perdre son caractère communautaire et sans que soit mise en cause la base juridique de la Communauté elle-même."

[13] Case 34/73 *Fratelli Variola S.p.A. v. Amministrazione italiana delle Finanze*, EU:C:1973:101.

[14] For a set of judgments of international courts on this issue, *see* International Law Commission (ILC), *Articles on Responsibility of States for Internationally Wrongful Acts with comments* (2001), commentary on Article 3; *see also* R. Kwiecień, *The Permanent Court of International Justice and the Constitutional Dimension of International Law: From Expectation to Reality*, in: C.J. Tams, M. Fitzmaurice (eds.), *Legacies of the Permanent Court of International Justice*, Martinus Nijhoff, Leiden: 2013.

[15] Case 106/77 *Amministrazione delle finanze dello Stato v. Simmenthal SpA*, EU:C:1978:49; Case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)*, EU:C:2022:99 – "It follows from that case-law that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law, including constitutional provisions, being able to prevent that" (para. 51).

principle of primacy of application, especially developed in EU law, is a reflection of the above provisions.

1.4. In practice, conflicts that arise between the norms of EU law and national (including constitutional[16]) law concern, for example, the limits of the competences conferred upon the Union, as well as a MS's constitutional identity or sovereignty. The primacy of application of EU law serves to overcome tensions in this regard.[17] This principle is not expressly formulated in the EU Treaties but has its source in the case law of the CJEU. This jurisprudence was accepted by MSs in the Declaration No. 17 concerning primacy (*Déclaration relative à la primauté*) attached to the Treaty of Lisbon of 2009:

> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States (*priment le droit des Etats members*), under the conditions laid down by the said case law.

Primacy of application means the obligation to apply EU law in good faith and refrain from enacting national law that is inconsistent with EU law, as well as the prohibition to apply national law that is inconsistent with EU law.[18] The principle of primacy is common to both the Union and its MSs as part of an integrated legal order; and without it direct effect and the uniform application of EU law would be impossible. However, primacy does not concern the ranking of legal systems:

> The concept of primacy does not imply that there is a hierarchy between EU and national law. Instead, it means that, in case of a conflict, Member States have the obligation not to apply national law that is contrary to EU law. If the conditions for direct applicability are met, national authorities are obliged to apply the provision of EU law. If not, national authorities are obliged to interpret national law in conformity with EU law.[19]

[16] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, EU:C:1963:1.

[17] For developments in this regard, *see* Fraenkel, *supra* note 3.

[18] Art. 4.2 TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. (...) 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."

[19] European Parliament, Committee on Legal Affairs and Committee on Constitutional Affairs, *Report on the implementation of the principle of primacy of EU law*, 7 November 2023, 2022/2143(INI), *Explanatory Statement* (2b).

The Spanish Constitutional Court rightly commented on the primacy of EU law, stating in 2004 that:

> Primacy is not set forth as a hierarchical superiority but as an 'existential requirement' of the Law of the Union, in order to achieve in practice the direct effect and equal application in all States (II.3). (...) The primacy of Union legislation (...) does not contradict the supremacy of the Constitution. Supremacy and primacy are categories which are developed in differentiated orders. (...) The former, in that of the application of valid regulations; the latter, in that of regulatory procedures. Supremacy is sustained in the higher hierarchical character of a regulation and, therefore, is a source of validity of the lower regulations, leading to the consequent invalidity of the latter if they contravene the provisions set forth imperatively in the former. Primacy, however, is not necessarily sustained on hierarchy, but rather on the distinction between the scopes of application of different regulations, principally valid, of which, however, one or more of them have the capacity for displacing others by virtue of their preferential or prevalent application due to various reasons (II.4).20

2. SOVEREIGNTY

When it comes to the EU's specific legal nature and the relationship between its law and the law of the MSs, references to sovereignty often appear.[21] The rather inconsistent and arbitrary use of this notion sometimes leads to confusion.

Below, for the purposes of further reflection, I formulate my understanding of sovereignty. It consists primarily of the legal definition of that notion, which is not synonymous with the power of the State (*puissance, Herrschaft*), but a qualitative feature of this power: it does not imply some core of state competences, but is situated within the framework of (national and international) law and not outside it; and it does not identify legal capacity with the practical possibilities.

[20] Constitutional Court of Spain, declaration 1/2004 (unofficial translation), DTC 1/2004, 13 December 2004, available at: https://www.tribunalconstitucional.es/ResolucionesTraducidas/Declaration%201-2004.pdf (accessed 30 August 2024).

[21] *See* R. Kwiecień, *Does the State Still Matter? Sovereignty, Legitimacy and International Law*, XXII Polish Yearbook of International Law 45 (2012); J. Kranz, *Pojęcie suwerenności we współczesnym prawie międzynarodowym* [The Concept of Sovereignty in Modern International Law], Elipsa, Warszawa: 2015.

2.1. The essence of the State lies in the ability to perform its functions as a legislative and political centre of governance and management within the scope of its territorial, material. and personal competences, legally independent from other entities, but within the framework defined by law (international or national) and bearing responsibility (constitutional or international) for its actions.

The State, as a legal person, exercises its power (*puissance*) based on its competences. Competence means the ability, defined by law, of a public authority to produce legal effects through its own actions.[22] Competence is essentially a negation of omnipotence and arbitrariness. However, the State is not defined by the quantity (scope) of its competences, but by the qualitative nature of its power, i.e. its sovereignty, which distinguishes it from other subjects of international law.

2.2. The notion "sovereignty" is used today to mean, firstly, the sovereign capacity of the State (so-called internal sovereignty); and secondly, the legal status of the State in the international community (so-called external sovereignty). State power (*puissance*) is often described as supreme in an internal perspective and independent in an external perspective. These two points of view are closely related and together characterize the phenomenon of statehood.

The normative form of the notion of sovereignty is the principle of equal sovereignty of States. It is often referred to as the "sovereign equality" of States, although this phrase is inaccurate since it is not the equality of States that is sovereign, but that their sovereignty is equal. States are unequal in many respects, but equal in terms of sovereignty; that is, in the legal quality of their power (*puissance*) and their legal status.

The State's power is primary in nature, and the formal source of its competences is national law, and less frequently international (EU) law. Defining it as supreme refers to the domestic aspect, as it is obvious that the State does not have such power in external relations, i.e. towards other countries. The power of the State is not absolute and its limits are set by domestic law and international, including EU, law.

The internal aspect of sovereignty concerns the relationship between the people and the State, in particular the freedom of the people to decide their own destiny (self-determination), i.e. the creation of the State, the exercise of State power, and its control. The legitimising factor of State power is the people (referred to in this case as the sovereign – *pouvoir constituant*) and the legitimated object is State power

[22] *See* V. Constantinesco, *Compétences et pouvoirs dans les Communautés européennes*, Librairie générale de droit et de jurisprudence, Paris: 1974, pp. 70 and 83.

(*pouvoir constitué*). In fact, there is a reciprocal interaction – of the people on the State power and vice versa (the constitutional perspective).

The power of the State is characterized by the specific nature of its competences, described as exclusive, complete and autonomous.[23] Exclusive means a unitary and coercive State structure and legal system that creates and protects social order in relation to the territory, entities, and events subject to this power. The full nature of the competence is expressed in the fact that (unlike, for example, the competence of an international organisation) its scope *ratione materiae* is not predetermined. Autonomy implies the freedom of the State to legislate, enter into and meet international obligations, including the voluntary submission to the jurisdiction of international courts (in the case of foreign national courts, State immunity from jurisdiction applies).

In turn, the external aspect of State sovereignty concerns the State's international status and the relationship between domestic law and international law. International law is a creation of States, which gives it both its strength and weakness. It does not create a State but protects it, sets the limits of its activities, allows for resolving conflicts of competences between States, and promotes common values and international cooperation. This law also expresses the convergence of goals and interests. It does not eliminate the differences between States, but it is an element that civilizes international relations and, even if it is violated, it constitutes a framework and criterion for assessing the behaviour of States. Without international law, the existence of States and their cooperation would be based only on a factual power relationship.

International law proclaims the principle of equality of States in terms of their sovereignty, that is the legal status of each of them. From this status derives legal capacity and the ability to act within the international legal order (having rights and duties, and bearing legal responsibility). The consequence of their equal status as sovereigns is the obligation to comply with international law. This is an essential element of protecting of sovereignty and, moreover, promotes cooperation and coexistence of States.

This equal status is often defined as independence.[24] Its essence is that in international relations there is no subordination of the state to the authority of other actors.[25] However, the most common misunderstanding is that independence is wrongly understood as independence from law (both domestic and/or international).

The equality of States formulated in this way is a general principle of law, differing from a rule in that it expresses certain values (similar to the principle of *pacta sunt*

[23] *See* C. Rousseau, *Droit international public*, Editions Sirey, Paris: 1974, pp. 55–95.

[24] PCJI, *Régime douanier entre l'Allemagne et l'Autriche*, avis consultatif du 5 septembre 1931 (Recueil, série A/B, No. 41), opinion individuelle de D. Anzilotti, p. 57: "L'indépendance (...) n'est, au fond, que la condition normale des Etats d'après le droit international: elle peut être aussi qualifiée comme souveraineté (*suprema potestas*) ou souveraineté extérieure, si l'on entend par cela que l'Etat n'a au-dessus de soi aucune autorité, si ce n'est celle du droit international."

[25] J. Combacau, S. Sur, *Droit international public*, LGDJ, Paris: 2010, p. 236: "La souveraineté internationale ne comporte donc par elle-même aucun pouvoir. (...) La notion de souveraineté internationale

servanda). General principles of law[26] have a constitutional function in the sense that they constitute a keystone, allowing one to speak of a system of international (including EU) law.

In other words, international law (i.e. EU law) does not limit State sovereignty,[27] and violation of the law is not an expression of sovereignty, nor is the latter an excuse for its violation.

2.3. The development of international law has resulted in a reduction of State competences. This phenomenon is justified by pragmatic (e.g. trade, transport) and axiological-ideological (e.g. human rights, environmental protection) considerations.

Increasing or decreasing the scope of a State's competences (as well as its territory) is not related to its sovereignty. In some cases, a limitation of the State's "sovereign rights" is invoked. However, this term does not mean anything other than State competences. In turn, the conferral by States of certain competences upon an international organization does not make said organization a sovereign entity, and the transferring State does not become less sovereign.

Opinions about limited or regained (full) sovereignty, or dividing it into economic, cultural or military spheres are inaccurate, because sovereignty is a qualitative (not quantitative) notion and does not come down to a specific sum (or core) of State competences. In particular, it should not be equated with identical possibilities (Macht), since the principle of sovereignty does not determine the scope of a State's actions or the effectiveness of its governance. Governance consists of politically setting goals (policy), but their implementation (politics) depends on a number of considerations and is vulnerable to the international environment. For example, the capacity to conclude treaties or to send diplomatic representatives does not always equate to their real possibilities.

The category of State competences which, at a given moment and for this State, are not part of its international legal obligations, is called domestic jurisdiction (*domaine réservé*).[28] There is no common domestic jurisdiction of all States, because

(...) ne semble en rien différer de la notion d'indépendance, dont on sait qu'elle est une condition de l'apparition de l'Etat sur la scène internationale. Et il est vrai qu'elles ont exactement le même compas; toutefois elles appartiennent à deux ordres différents, l'indépendance à celui du fait, la souveraineté à celui du droit."

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

[27] PCIJ, *The S.S. "Wimbledon"*, judgment, 17 August 1923, PCIJ Series A, No. 1, p. 25: "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing, a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."

[28] "Le domaine réservé est celui des activités étatiques où la compétence de l'Etat n'est pas liée par le droit international. L'étendue de ce domaine dépend du droit international et varie suivant son développement"

its limits vary individually (for a concrete State and at a given time). Nicolas Politis rightly notes that "international law recognizes the existence of a *domaine réservé*", but "it ignores its content."[29] International law serves as the main reference for determining the limits of this domain and what is decisive in this regard is not the nature of a matter, but only the state of international regulations.[30]

An international legal obligation deprives the State of the possibility of invoking the domestic jurisdiction exception. However, the absence of such obligation does not mean that international law excludes a matter from its regulation, but only that at a given moment such regulation does not exist – a situation which may change. As the domestic jurisdiction continues to diminish, a sort of tension is perceptible between the application of international law on the one hand and the invocation of the sovereignty and the domestic jurisdiction of a State on the other.

While there are matters which are rarely the subject of international obligations, there is no catalogue of questions excluded in advance from international regulation. Some aspects of the political, economic and social system may be subject to such regulation, and in this case they are no longer part of domestic jurisdiction.[31] In turn, not every attempt to influence the *domaine réservé* of another State amounts to an unlawful act. Limitations on domestic state competences under international law do not constitute an interference into the domestic jurisdiction of the State (which also applies to relations between the EU and its MSs).[32]

While the notion of *domaine réservé* is one which reflects the sovereignty of States because it emphasizes that the absence of international obligations affirms the freedom of the State in the exercise of its powers, this freedom does not authorize arbitrariness.

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see Institute of International Law, *Annuaire de l'Institut de Droit international*, Bureau de la Revue de droit international, Gand: 1954, p. 293.

[29] N. Politis, *Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*, Martinus Nijhoff Publishers, Leiden: 1925, p. 48.

[30] PCIJ, *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 7 February 1923, PCIJ Series B. No. 4, p. 24: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."

[31] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Rep 1986, para. 258: "A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law."

[32] *See* J. Kranz, *Notion d'intervention en droit international*, in: J. Kranz (ed.), *Entre l'influence et l'intervention. Certains aspects juridiques de l'assistance financière multilatérale*, Peter Lang Verlag, Frankfurt am Main: 1994, pp. 50–104.

2.4. A distinction must be also made between legal restrictions and illegal actions. In this context, the idea of violating or limiting sovereignty is sometimes raised. However, while competencies can be restricted, the question of limiting (violating) sovereignty is more complicated. It depends on its qualification only as a general principle of law or, in some cases also as a primary rule. In the former case, its violation should be preceded by an infringement of a specific legal rule (e.g. the prohibition of using armed force) and this variant seems more appropriate for both theoretical and practical reasons. In the second case, it would be enough to violate sovereignty qualified as a primary rule, which may lead to arbitrary conclusions and even possible abuses. An illustration of such a controversy are the opinions regarding the legal qualification of the so-called cyberattacks.[33]

In practice, this problem also concerns the qualification of the actions of States as lawful or unlawful. These questions, however, require a separate analysis that goes beyond the scope of this article.

2.5. To sum up, the sovereignty of the State as a legal notion results from the law – it does not imply independence from law (national or international); and the law and its observance are instruments for protecting sovereignty. Thus, "sovereignty does not mean freedom from law but freedom within the law."[34]

Contemporary international relations are based not so much on sovereignty per se as on the legal principle of equality of States in terms of sovereignty. Sovereignty is a fundamental organising concept of the international community and should be understood as a regulatory idea, necessary for the existence and functioning of the international legal system[35] from which it evolves.[36] European integration does not

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[33] *See* M.N. Schmitt, *The Law of Cyber Conflict: Quo Vadis 2.0?*, in: M.C. Waxman, T.W. Oakley (eds.), *The Future Law of Armed Conflict*, Oxford University Press, Oxford: 2022, pp. 103–121; M.N. Schmitt, *In Defense of Sovereignty in Cyberspace*, Just Security, 8 May 2018, available at: https://www.justsecurity.org/55876/defense-sovereignty-cyberspace/ (accessed 30 August 2024).

[34] J. Crawford, *Chance, Order, Change: The Course of International Law. General Course on Public International Law*, Martinus Nijhoff Publishers, Leiden: 2014, para. 98.

[35] Kwiecień, *supra* note 21, p. 49: "State sovereignty should therefore be regarded as a regulative idea (in the Kantian sense of the word) of international law: the idea without which it would be impossible for the structure and institutions of this law to exist and be explored"; S. Besson, *Sovereignty*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, Oxford University Press, Oxford: 2011, para. 1: "The principle of sovereignty (...) is a pivotal principle of modern international law. What counts as sovereignty depends on the nature and structure of the international legal order and vice-versa."

[36] N. Walker, *Late Sovereignty in the European Union*, in: N. Walker (ed.), *Sovereignty in Transition*, Oxford University Press, Oxford: 2003, pp. 27–28: "[T]he dynamic of transformation within late sovereignty will involve the continuous evolution rather than the demise of sovereignty"; Besson, *supra* note 35: "[T]he constitutional pluralism which characterizes the European legal order *lato sensu* seems difficult to reconcile with traditional conceptions of unitary sovereignty. This does not mean, however, that sovereignty is lost in Europe nor that we have moved beyond sovereignty and need to redefine it. All it reveals is that paradigms of sovereignty have changed and that new conceptions have emerged that conflict with prior ones."

seem to pose a challenge to the sovereignty of States – however, this view is subject to controversy due to the diversity of definitions of this concept.

2.6. In the Polish Constitution, the term "sovereignty" appears rarely and with not very clear meanings. For example: "the existence and future of our Homeland, which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate" (preamble); Members of Parliament vow "to safeguard the sovereignty and interests of the State" (Art. 104(2)); "The President of the Republic shall (...) safeguard the sovereignty and security of the State" (Art. 126(2)).

The concepts of supreme power and independence also appear: "Supreme power in the Republic of Poland shall be vested in the Nation" (Art. 4(1)); "The Republic of Poland shall safeguard the independence and integrity of its territory" (Art. 5); and "The Constitution shall be the supreme law of the Republic of Poland" (Art. 8(1)).

The references to sovereignty by the PCT do not dispel the ambiguities. For example, in accordance with the judgment of 11 May 2005 (K 18/04), Poland "sovereignly" ratified the EU Treaty or "sovereignly" transferred some competences to the Communities (marginal number 355). Furthermore, the Tribunal stated that Arts. 90(1) and 91(3) of the Constitution "do not authorise the transfer of competences to such an extent that it would signify the inability of the Republic of Poland to continue functioning as a sovereign and democratic State. With regard to this issue, the view of the Constitutional Tribunal remains, in principle, consistent with the position of the Federal Constitutional Court of Germany" [Maastricht-Urteil] (marginal number 289).

In its judgment of 24 November 2010 (K 32/09), the Tribunal found that: "the preservation of the primacy of the Constitution in the context of European integration must be considered tantamount to preservation of the sovereignty of the State" (1.3); "accession to the European Union is perceived as some sort of limitation of sovereignty of a given State, but it does not mean its loss" (2.1); "the sovereignty of the Republic of Poland is expressed in the inalienable competences of the organs of the State, constituting the constitutional identity of the State" (2.1); "The EU Member States retain their sovereignty due to the fact that their constitutions, being manifestations of the State's sovereignty, retain their significance" (2.1).

In turn, in the judgment of 7 October 2021 (K 3/21) the "deformed" PCT – meaning the PCT as reconstructed by the ruling PiS party in a manner widely perceived as both unconstitutional and well as in violation of EU law – emphasized that:

> Article 1, first and second paragraphs, in conjunction with Article 4(3) of the Treaty on European Union – insofar as (...) a) the European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties; b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; c) the Republic of Poland may not function as a sovereign and democratic State – is inconsistent with Article 2, Article 8 and Article 90(1) of the Constitution of the Republic of Poland.

3. BETWEEN PRIMACY AND SUPREMACY

3.1. In an interview on 7 November 2017, the President of the Republic of Poland lamented that "the Polish Constitutional Tribunal has so far never reached such a ruling that (...) in an absolutely unambiguous and absolutely decisive manner" would indicate "the supremacy of the Polish Constitution over EU law – just as the Constitutional Court in Germany did."[37] This opinion forces one to reflect on the meaning of certain concepts, especially *supremacy* and *primacy*.

The Polish legal order consists of norms of national origin and of international origin – it is a monistic system with a multi-component nature. Art. 91 of the Constitution provides as follows:

1. An international agreement that has been ratified, once it has been promulgated in the Journal of Laws of the Republic of Poland, shall form part of the domestic legal order [validity – J.K.] and shall be directly applicable, unless its application depends on the enactment of a statute.
2. An international agreement ratified upon prior consent granted by statute shall take precedence (*pierwszeństwo*) [primacy of application – J.K.] over statutes if a statute cannot be reconciled with the provisions of such agreement.
3. If it results from an agreement ratified by the Republic of Poland constituting an international organisation, the law enacted by it shall be applied directly, taking precedence [primacy of application– J.K.] in the event of a conflict with statutes.

[37] *Profesor Biernat o zawstydzających wypowiedziach doktora Dudy i magister Przyłębskiej* [Professor Biernat about the embarrassing statements of Doctor Duda and Magister Przyłębska], Monitor Konstytucyjny, 14 November 2017, available at: https://monitorkonstytucyjny.eu/archiwa/1894 (accessed 30 August 2024).

Thus, constitutional rules for the validity and application of international (EU) law were established, especially the principle of primacy of application in the event of a conflict with a statute. However, the situation is different in the case of a conflict with the Constitution.

In the Polish system, "[t]he Constitution shall be the supreme law of the Republic of Poland"[38] (Art. 8(1) of the Constitution); while at the same time "[t]he Republic of Poland shall respect international law binding upon it" (Art. 9). The meaning and reconciliation of these two provisions is not obvious. The wording of Art. 9 reaffirms a general principle of international law, i.e. the legal obligation for Poland to comply with its international obligations.

Both the Polish Constitution (Art. 91) and EU law use the term *pierwszeństwo* (primacy, precedence), while the Polish academia and case law of the PCT also refer to the concept of *nadrzędność* (supremacy, superiority), although neither the Constitution nor EU law uses the latter.[39] These are not identical concepts – they fulfil different functions and express different perspectives.[40] The former refers to the primacy of application of a legal norm, while 'supremacy' refers to the norm's validity and to its ranking in the national catalogue of sources of law. Confusion arises against this background, as primacy does not prejudge supremacy and supremacy does not exclude primacy.

3.2. In this context, it is worth taking a look at Art. 8 of the Constitution and the concept of supremacy used in the Polish academia and jurisprudence. In practice, this concept sometimes leads to confusing conclusions, especially in the context of the relationship between Arts. 8 and 9.

First, the conclusion could be drawn from Art. 8 that the adjective *najwyższy* (the highest) is identical with *nadrzędny* (supreme). However, the supremacy of the Constitution does not imply a hierarchy of validity (or superiority) in relation to international (EU) law, and does not concern ranking between legal systems.

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[38] In original: "Konstytucja jest najwyższym prawem Rzeczypospolitej Polskiej."

[39] In French *primauté* and *suprématie*, and in German *Anwendungsvorrang* and *Geltungsvorrang*.

[40] *See* P. Eleftheriadis, *The Primacy of EU Law: Interpretive, not Structural*, 8(3) European Papers 1255 (2023); 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); Lindeboom, *supra* note 10; F. Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, 16(4) German Law Journal 1003 (2015), p. 1014; "The primacy of EU law over opposing claims of the supremacy of national constitutional courts is the *conditio sine qua non* to ensure that all member states remain equal in the EU"; T. Tuominen, *Reconceptualizing the Primacy – Supremacy Debate in EU Law*, 47(3) Legal Issues of Economic Integration 245 (2020), pp. 245–266; M. Avbelj, *Supremacy or Primacy of EU Law – (Why) Does it Matter?*, 17 European Law Journal 744 (2011); R. Kwiecień, *The Primacy of European Union Law Over National Law Under the Constitutional Treaty*, 6(11) German Law Journal 1479 (2005); F.C. Mayer, *Supremacy – Lost? – Comment on Roman Kwiecień*, 6(11) German Law Journal 1497 (2005).

Supremacy should be regarded as a principle that derives from national law and is not binding in the sphere of international (EU) law – something that national parliaments or constitutional courts are unable to change. Other States or international organizations are not bound by Polish law (including the Polish Constitution and judgments of Polish courts), as the (Polish) State does not have supreme authority over them.

What is important is that the supremacy of the Constitution does not derogate or suspend conflicting international rules or principles that remain in force at the international level. In turn, it does not follow from EU (international) law that it is hierarchically superior to national law, including constitutional law. Only the principle of primacy of application operates in this relationship.

Finally, even if the Constitution is the supreme law, not every action of state organs invoking the constitution mean that this action is legal and in accordance with the constitution. In Poland, the essence of the problem in the years 2015-2023 was the obvious inconsistency with the constitution of some statutes or judgments of the constitutional tribunal itself.

The second doubtful conclusion boils down to the fact that the supremacy allegedly deriving from Art. 8 would constitute (as an expression of sovereignty) an instrument for questioning the validity of the norms of EU (international) law and justifying their selective non-application, including the decisions of international courts. However the State bears legal responsibility for violations of EU (international) law, regardless of whether specific actions are deemed constitutional under domestic law.[41] Thus, the European Commission's complaints against Poland are the result of Poland's refusal to implement some CJEU rulings.[42]

A conclusion can and should be drawn that in the event of inconsistency of an international norm with the Constitution, the State is obliged to eliminate this conflict (considering that Art. 8 is not an obstacle to the amendment of the Constitution). Furthermore, Art. 8 does not counterbalance and relativise the obligation formulated in Art. 9, which can be regarded as an expression of the not-explicitly-formulated principle of primacy. According to the principle of primacy, State authorities apply an international norm by disregarding a national norm ("does not see" it) which

[41] ILC, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Art. 3: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." *See also* Art. 27 of the Vienna Convention on the Law of Treaties (signed on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

[42] In July 2023, the Commission, on the basis of Art. 258 of the Treaty on the Functioning of European Union (TFEU), brought an action against Poland (Case C-448/23 *European Commission v. Republic of Poland*, OJ C 304/17). Its subject matter became the interpretation of the Polish Constitution and the composition of the Constitutional Court in relation to the Polish Constitutional Tribunal, judgments of 14 July 2021, P 7/20 and 7 October 2021, K 3/21.

remains in force (no derogation effect). However, primacy of application does not imply (hierarchical) supremacy and, in particular, does not result in the derogation of national norms (including constitutional norms) or national court judgments.[43] In other words, the EU law claims primacy, but not supremacy.

Even if primacy does not create a ranking between specific systems of law, it does refer to general principles of law, associated values and *finalités*. Recognizing the legal and political diversity of the international community, the principle of primacy supports the universalism of international law. Consequently, primacy of application is the premise and foundation of international cooperation, enables the implementation of legal goals, ensures compliance with binding obligations, helps eliminate conflicts of norms, and allows for managing the relationship between autonomous but related legal systems. The principle of supremacy does not serve this function.

3.3. The collision between EU norms and domestic law is a well-known phenomenon. However, the constitution can be amended under the influence of EU (international) law, and in practice this is not an exceptional occurrence. A conflict with the constitution is thus not inevitable and can be resolved.

States shield their most important objectives, values and competences by referring in practice to sovereignty; to so-called constitutional identity or constitutional pluralism; to the observance of the scope of conferred competences (*ultra vires*); and to the national level of human rights protection.[44] Therefore, it is necessary to ask about the limits of the application of the principle of primacy (*inter alia* the question of *Kompetenz-Kompetenz*).

Conflicts in this context should be perceived from two perspectives: the compliance of States' actions with the international law (EU law) binding on them; and the compliance of the norms of this law with national law, especially constitutional law.

In the first case, the burden rests mainly on international courts (bodies), but States rarely submit to their jurisdiction (which consequently does not exclude the jurisdiction of national courts). The Union is a far-reaching exception in this regard, providing for the compulsory and exclusive jurisdiction of the CJEU regarding the legality and application of EU law by its institutions and by the MSs (Art. 19 TEU, Arts. 258-260, 263-269, 344 TFEU).

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[43] Avbelj, *supra* note 40, p. 750: primacy is "a trans-systemic principle, which regulates the relationship between the autonomous legal orders", while supremacy is "the feature of supreme legal acts in the legal orders of the Member States and of the EU."

[44] Constitutional identity concerns the limits of the constitutionally transferable, the *ultra vires* directs to the adherence to the limits of already transferred competences, *see* S. Simon, *Grenzen des Bundesverfassungsgerichts im europäischen Integrationsprozess*, Mohr Siebeck, Tübingen: 2016, p. 90.

In the second case, national authorities and courts, especially constitutional ones, have jurisdiction. The national law sometimes explicitly provides for the primacy of application of international (EU) law over statutes. However, primacy over the provisions of national constitutions is more complicated. What is problematic is not so much the review of constitutionality per se, but the scope of this control and its effects; i.e. the answer to the question of what to do after a national court finds a conflict between an international (EU) norm and the binding national constitution.

In the case of the Union's primary law (the Treaties) and its amendments, national control mechanisms apply, such as ratification and the opinion of the constitutional court. On the other hand, it is up to the CJEU to assess whether the acts of the institutions in the field of secondary law do not exceed the competences conferred upon the Union (*ultra vires*), since it concerns the content of the Treaties and their interpretation. The constitutional courts of the MSs do not have such competence, as this would lead to a differentiated application of EU law.

In exceptional situations, a constitutional court's review of the acts of EU institutions (secondary law) seems conceivable, but only in the context of an obvious and significant non-conformity with the constitution.[45] Nonetheless this review may lead to abuse, in particular when a national court – under the pretext of examining constitutionality – actually assesses and interprets the content of the EU Treaties as agreed upon by all MSs. For this reason, any such review should be preceded by a preliminary question directed to the CJEU.[46]

The concept of "constitutional identity" review has emerged in the practice of constitutional courts. The CJEU questions this referential standard because its content is not identically understood in every State and a unilateral definition of "constitutional identity" poses a threat to the uniform interpretation and application of EU law. Moreover, as a counterbalance the CJEU has formulated the concept of the Union's identity protected by its law.[47]

The concepts of constitutional identity and constitutional pluralism are closely related. Constitutional pluralists accept the constitutional identity review and hope that conflicts between the CJEU and constitutional courts can be resolved through dialogue, sincere cooperation, and mutual accommodation. This path has not worked however, as evidenced by the practice of constitutional courts in

[45] *See* BVerfG, Urteil des Zweiten Senats vom 5 Mai 2020 – 2 BvR 859/15, para. 111.

[46] An example of such manipulation, modelled on the GFCC doctrine, is the Polish Constitutional Tribunal, judgment of the 14 July 2021, P 7/20, para. 147: "When conducting an ultra vires review, the Tribunal assesses not the content of the CJEU decision of 8 April 2020, but only the compliance of the effect of this ruling with the Constitution of the Republic of Poland. (...) In doing so, the Constitutional Tribunal is in a position to assess the constitutionality of the act [statute] authorising the ratification of any international agreement subject to such ratification, including agreements specified in Art. 90 section 1 and Art. 91 section 3 of the Constitution."

[47] Case C-157/21 *Poland v. Parliament and Council*, EU:C:2022:98, paras. 145 and 265.

Poland, Romania and Hungary. Considering and analysing these dangers and abuses, Kelemen and Pech rightly advocate a return to the traditional understanding of the primacy of EU law.[48]

3.4. In this context, the question arises whether, if an EU norm is found to be inconsistent with the constitution, the MS may selectively refuse to apply EU law.

An answer has been outlined by the German Constitutional Court (GFCC).[49] The Court emphasises that the EU law applicable on German territory derives its binding force from German legal acts (*Rechtsanwendungsbefehl*), i.e. from Germany's consent to be bound by the EU Treaties. Consequently, according to the Court, the principle of primacy of application does not imply a renunciation of sovereignty or constitutional identity.[50]

In its jurisprudence, the GFCC has developed some referential standards (fundamental rights, *ultra vires*, constitutional identity) as limits for the principle of primacy. With regard to the effects of its review, the Court considers that an act of EU law found to be inconsistent with the mentioned criteria will be ineffective (inapplicable) in the territory of Germany (*Unanwendbarkeit*).[51] It also acknowledges that unilateral national review of the applicability of EU law norms is risky and may impede the functioning of the Union and its law. Simultaneously, the Court is of the opinion that if a MS gave up this type of control, it would lead to granting the EU freedom to define and expand its competences (*Kompetenz-Kompetenz*).[52]

It follows that a selective refusal to apply EU law seems permissible after a preliminary question has been submitted to the CJEU and only in exceptional and qualified cases; that is, when

> the action of an EU body contrary to its competences is manifest and leads to a structurally significant change in the structure of competences to the detriment of the competences of the Member States. A structurally significant change to the detriment

[48] R.D. Kelemen, L. Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, 21 Cambridge Yearbook of European Legal Studies 59 (2019); *see also* F. Fabbrini, A. Sajó, *The dangers of constitutional identity*, 25(4) European Law Journal 457 (2019).

[49] M. Ludwigs, P. Sikora, *Der Vorrang des Unionsrechts unter Kontrollvorbehalt des BVerfG*, 3 Europäisches Wirtschafts- und Steuerrecht 121 (2016); C. Calliess, *Primacy of Union Law and Control of Competences: Challenges and Reforms in the Light of the German Constitutional Courts PSPP-Ruling and the EU Commission's Treaty Infringement Proceeding*, 133 Berliner Online Beiträge 2 (2021).

[50] BVerfG, Urteil des Zweiten Senats vom 30 Juni 2009 (2 BvE 2/08 – Lissabon), paras. 339 and 343.

[51] *Ibidem*, paras. 241, 339; *see also* BVerfG, Urteil des Zweiten Senats vom 5 Mai 2020 – 2 BvR 859/15, paras. 109, 234.

[52] *Ibidem*, para. 111.

> of the competences of the Member States occurs if the excess of competences has a significant impact on the principle of delegated competences and the rule of law.[53]

At the same time however, such a refusal to apply EU law does not produce legal effects in relation to other MSs and does not affect the binding force of the norm in question on their territory.

The rightly criticized decision of the GFCC of 5 May 2020 violated EU law, but in a quite clever way. The Court based its judgment on the allegation of *ultra vires* (against the European Central Bank and the CJEU), but found no violation of German constitutional identity. By threatening not to enforce the CJEU's judgment (issued in response to a preliminary question), the German court consciously and deliberately left the door open to a compromise solution and closure of the case with both the government and the Bundestag as well as with the European Commission.

The doctrine of the German constitutional court reaches further than just EU law and grants primacy of application of the national constitution in a broader context.

Let us quote excerpts of some parts of the judgments:

> 67. The principle of the Constitution's openness to international law does not entail an unreserved constitutional duty to comply with all international treaties. It primarily serves as a guideline for the interpretation of fundamental rights, the constitutional principles under the rule of law, and ordinary law.
> 68. (...) The Basic Law (...) does not relinquish sovereignty in relation to the final authority that ultimately belongs to the Constitution [! – J.K.].
> 69. It does not follow from the principle of the Constitution's openness to international law that there is an unreserved constitutional duty to comply with all rules of international law.[54]

> 35. The Basic Law (...) does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted.[55]

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[53] *Ibidem*, para. 110.

[54] BVerfG, Order of 15 December 2015 – 2 BvL 1/12 (Treaty overrides by national statutory law are permissible under the Constitution). *See* A. Peters, *New German Constitutional Court Decision on "Treaty Override": Triepelianism Continued,* EJIL: Talk!, 29 February 2016, available at: https://tinyurl.com/2645bnnc (accessed 30 August 2024).

[55] BVerfG, Order of the Second Senate of 14 October 2004 – 2 BvR 1481/04 (*Görgülü* case). *See also* ECtHR, *Görgülü v. Germany* (App. No. 74969/01), 26 February 2004.

Not surprisingly, this line of reasoning finds imitators in autocratic countries. However, situations of this kind occur in democratic states only exceptionally and concern concrete and limited matters of minor importance, and are not part of a frontal and systemic undermining of the foundations of international (EU) law.[56]

Contrary to appearances, the German practice is actually within reasonable limits and the GFCC maintains restraint in its decisions. Referring to this doctrine is, to some extent, an abuse that serves illegitimate (extra-legal) purposes (*détournement*). Thus, the standards of reference used may, in one case, serve to protect certain values, and in another case be used to systematically undermine the structures and foundations of the Union. From a different perspective, in the case of appointing judges of constitutional courts, it is important not only who appoints them, but also from what group of candidates and for what purpose. In the Polish 2015-2023 practice it was about the political availability of these judges. Nevertheless, the question arises – how long and how efficiently can the EU function in the shadow of the German Court's doctrine and its possible effects?[57]

3.5. An illustration of the risks can be found in some of the rulings of the Polish Constitutional Tribunal prior to 2015.[58] In the judgment of 11 May 2005 (K 18/04 – The Accession Treaty), the Court stated that:

> The Constitution remains (...) "the supreme law of the Republic of Poland" in relation to all international agreements binding the Republic of Poland. (...) By virtue of the supremacy of legal force resulting from Article 8(1) of the Constitution, it enjoys primacy of validity and primacy of application on the territory of the Republic of Poland (marginal number 285).[59]

[56] Germany fell into the trap of its own doctrine in the context of the case it won against Italy before the ICJ (2012). Citing non-conformity with the constitution (*controlimiti* doctrine), the Italian constitutional court refused in 2014 to implement the ICJ judgment, *see* Italian Constitutional Court, judgment of 22 October 2014, No. 238/2014, available at: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf (accessed 30 August 2024).

[57] *See* J. Kranz, *Verfassung über alles oder wohin uns die Gralshüter führen...*, 60(4) Archiv des Völkerrechts 410 (2022).

[58] *See e.g.* Polish Constitutional Tribunal, judgments of 27 April 2005, P 1/05; of 11 May 2005, K 18/04; of 24 November 2010, K 32/09 and of 16 November 2011, SK 45/09.

[59] This thesis is repeated in the Polish Constitutional Tribunal, judgments of 16 November 2011. SK 45/09, pt. 2.2; of 24 November 2010, K 32/09, pt. 2.5. and 2.6 and of 7 October 2021, K 3/21.

However, the Tribunal came to the conclusion that in the case of an irreconcilable collision between a norm of the Constitution and a norm of Community law

> [i]t would be up to the Polish legislator to decide either to amend the Constitution, or to introduce changes to Community regulations, or – ultimately – to decide to withdraw from the European Union (marginal number 302).

This did not prevent the Court from concluding that:

> Member States retain the right to assess whether the Community (EU) legislative bodies, in enacting a particular act (legal provision), acted within the framework of the conferred competences and whether they exercised their competences in accordance with the principles of subsidiarity and proportionality. If this framework is exceeded, acts (provisions) issued outside of it are not covered by the principle of primacy of Community law (marginal number 329).

This thread is further developed in the PCT's judgment of 16 November 2011 (SK 45/09):

> It would be difficult to reconcile with this principle [of loyal cooperation – Article 4(3) TEU] if individual States were to be given the competence to decide to render EU law norms inapplicable. (III.2.5) (...) The consequence of this situation could be proceedings against Poland by the European Commission and an action before the Court of Justice against Poland for breach of obligations under the Treaties (Articles 258-260 TFEU). (...) The ruling on the incompatibility of EU law with the Constitution should therefore be of ultima ratio nature and occur only when all other means of resolving the conflict with the norms belonging to the EU legal order have failed. (...) It should be assumed that after the Constitutional Tribunal has ruled on the incompatibility of certain norms of EU secondary law with the Constitution, immediate measures should be taken to eliminate this situation" (III.2.7).

Thus the Polish Tribunal was not entirely satisfied with declaring that an unconstitutional act or EU (international) provision becomes inapplicable (unenforceable) on the territory of Poland. Instead, it expressly provides that it is the duty of the State to seek to eliminate the conflict that has arisen.[60] This seems a more satisfactory view than the doctrine of the *Bundesverfassungsgericht*.

[60] *See comparatively* Art. 218(11) TFEU: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended, or the Treaties are revised."

3.6. After 2015, the deformed Polish Constitutional Tribunal did not hesitate to give effect to the doctrine of the GFCC. Constitutional courts in Romania[61] and Hungary[62] also followed this path.[63]

The PCT has resorted to the so-called "insofar as" concept, according to which, based on the supremacy of the Polish Constitution, a norm (act) of EU law – with its content unilaterally interpreted (or rather invented) by this Tribunal – is partly consistent with the Constitution and partly inconsistent.[64] Applying legal acrobatics, it concluded in such a case that the norm (act) is non-existent and cannot be observed, let alone violated.[65]

Let us cite, for example, the judgment of 7 October 2021 (K 3/21), in which the Tribunal found that certain fundamental provisions of the TEU – Arts. 1, 4(3), 19(1) – are incompatible with the Polish Constitution, but only insofar as (to the extent that) by acting "outside the limits of the competences conferred" on it by Poland (*ultra vires*) the EU creates a situation in which the Constitution "is not the supreme law of the Republic of Poland, having primacy of validity and primacy of application."

In the same spirit the Tribunal emphasized that rules created outside the framework of Arts. 4(2) and 5(1) TEU "are not binding international law for the Republic of Poland, as stated in Article 9 of the Constitution" (III.16). Furthermore, "the judgments of the CJEU do not – in the light of the Treaties – constitute a source of

[61] Constitutional Court of Romania decision of 8 June 2021, No. 390, regarding the exception of unconstitutionality of the provisions of Articles 881 – 889 of Law No. 304/2004 on judicial organization, and of the Government Emergency Ordinance No. 90/2018 on measures to operationalize the Section for the investigation of offences in the Judiciary, paras. 74, 76; *see also* Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Eurobox Promotions and Others*, EU:C:2021:1034; Case C-430/21 *RS (Effet des arrêts d'une cour constitutionnelle)*, EU:C:2022:99.

[62] *See e.g.* B. Bakó, *The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review in Hungary*, 78 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 863 (2018), pp. 863–902.

[63] However, in December 2021 the Hungarian Constitutional Court rejected Prime Minister Viktor Orbán's request for a review of a CJEU ruling, finding that: "the abstract interpretation of the Fundamental Law cannot be aimed at reviewing the judgement of the CJEU, nor does the Constitutional Court's procedure in the present case, by its very nature, extend to the review of the primacy of EU law", *see* Constitutional Court of Hungary decision of 7 December 2021, X/477/2021, available at: https://tinyurl.com/2p248fz3 (accessed 30 August 2024); *see also* Case C-564/19 *IS (Illégalité de l'ordonnance de renvoi)*, EU:C:2021:949 and Case C-808/18 *Commission v. Hungary*, EU:C:2020:1029.

[64] Polish Constitutional Tribunal, judgment of 24 November 2010, K 32/09, III.2.6: the Tribunal "is not called upon to assess a hypothetical application of the Treaty of Lisbon. (...) Conclusions relating to the potential application of the treaty in a manner inconsistent with the treaty go beyond the jurisdiction of the Constitutional Tribunal."

[65] *See* R. Manko, P. Tacik, *Sententia non existens*: *A new remedy under EU law?: Waldemar Zurek (W.Z.) (Case C-487/19)*, 59 Common Market Law Review 1169 (2022); Council of Europe, *Report by the Secretary General under Article 52 of the European Convention on Human Rights on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland*, 9 November 2022, SG/Inf(2022)39.

European Union law" (III.19), and "the values listed in Article 2 of the TEU have only an axiological significance and are not legal principles" (II.13).

In its judgment of 14 July 2021 (P 7/20) the PCT ruled that the adoption by the CJEU without a legal basis of interim measures relating to the system and procedure before Polish courts is inconsistent with the Constitution (Arts. 2, 7, 8(1) and 90(1) in conjunction with Art. 4(1)), and that to this extent is not covered by the principles of primacy and direct application set out in Art. 91(1-3) of the Constitution (III.6.2). The Court also found that "direct effect (direct application) and primacy are not inherent features of EU law, nor the result of EU case law, but are only the result of the national act of ratification, i.e. an emanation of the will of the sovereign acting on the basis of the national constitution" (III.7).

In the PCT's opinion, the suggestion that a conflict of norms could result in a change of the Constitution, a change of European law, or withdrawal from the EU is acceptable "only in academic rhetoric".[66]

According to the judgment of the PCT of 10 March 2022 (K 7/21), exceeding – in the jurisprudential dynamics – the limits of competences of the European Court of Human Rights means an attempt to impose its new content outside the procedure of treaty amendments. The assessment by national or international courts – on the basis of Art. 6(1) first sentence of the European Convention on Human Rights (ECHR) – of the compatibility with the constitution and the ECHR of laws concerning the organisation of the Polish judiciary is inconsistent with the Constitution (*inter alia*, with Art. 8). The effect of this judgment was to refuse to apply four judgments of the European Court of Human Rights (ECtHR).[67]

These examples from the jurisprudence of the deformed PCT prove the intention to openly confront and undermine the treaty foundations of the Union, the ECHR, and international law more broadly. Their importance and scale are incomparably greater than the few judgments of national constitutional courts refusing to apply the judgments of international courts.

3.7. International courts and domestic courts are not in a hierarchical relationship to each other. The constitutional court is sometimes referred to as the court of last resort,[68] but this opinion should be relativised, as it only does so within the frame-

[66] Polish Constitutional Tribunal, judgment of 7 October 2021, K 3/21, PCT communication, pt. IV(21).

[67] The Constitutional Tribunal "cannot allow the Convention norms – derived in the jurisprudential mode and entering into the national system without the ratification procedure – that are contrary to the Constitution to have any effects on Poland, either in the plane of international law or in the plane of national law. This would violate the Constitution and therefore the sovereignty of the Polish state."

[68] *See* R. Kwiecień, *The Court of Justice, the National Courts and the Controversy Over the 'Ultimate Arbiter' of the Constitutionality of Law in the European Union*, 8(1) Polish Review of International and European

work of its own autonomy. However, while a judgment of a national constitutional court has no effect in EU law, a judgment of the CJEU is binding on a State as long as it remains a member of the Union. In other words, the legal effects are not identical in each case.

In the press release following the judgment of the GFCC of 5 May 2020, the CJEU announced:

> In order to ensure that EU law is applied uniformly, the Court of Justice alone (...) has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect.[69]

Let us also note the CJEU decision of 21 December 2021:

> 254. Whilst it is for the national courts and tribunals and the Court to ensure the full application of EU law in all the Member States (...) the Court has exclusive jurisdiction to give the definitive interpretation of that law. (...) It is ultimately for the Court to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of that law; that scope cannot turn on the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with that of the Court. To that end, the preliminary-ruling procedure provided for in Article 267 TFEU, which is the keystone of the judicial system established by the Treaties, sets up a dialogue between one court and another, specifically between the Court of Justice and the courts of the Member States, having the object of securing the uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.[70]

Law 9 (2019); C. Calliess, *Struggling About the Final Say in EU Law: The ECB Ruling of the German Federal Constitutional Court,* Oxford Business Law Blog, 25 June 2020, available at: https://www.law.ox.ac.uk/business-law-blog/blog/2020/06/struggling-about-final-say-eu-law-ecb-ruling-german-federal (accessed 30 August 2024).

[69] Press release CJEU 58 (2020), 8 May 2020, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (accessed 30 August 2024).

[70] Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Criminal proceedings against PM and Others*, EU:C:2021:1034.

Outside the EU, the question of execution of judgments is known in particular from the practice of the ECtHR.[71] "Probably the most sensitive issue when it comes to execution is resistance that derives from reliance on national (constitutional) identity."[72] However the very concept of constitutional identity must be subject to a narrow interpretation.[73]

Past practice shows that conflicts with the constitutional norms of the MSs are not frequent. Such disputes, especially in the context of international court rulings, are inevitable and can be tolerated if they do not lead to the destruction of the foundations and legal forms of international cooperation. Such a path leads inevitably to the Putinisation of international law.[74]

The allegation that, in ruling on the interpretation of EU law, the CJEU acts as a judge in its own case can be refuted with the argument that a national constitutional court, in ruling on the scope of competences conferred upon the Union, acts in a similar capacity. *Quis custodiet ipsos custodes?* If there is no good answer to this question, it does not mean that everything is allowed. "Executive, national and local authorities, national courts and national parliaments bear responsibility for implementing the Convention and complying with the judgments of the Court."[75]

3.8. In this context, it is worth signalling the problem of the relationship between obligations under international law and EU law. As just one example, let us note the case before the EU courts known as *Kadi*.[76]

The case was a delicate one because of the different and difficult to reconcile values – fundamental human rights versus security in the context of (the financing

[71] *See* Council of Europe, *Supervision of the execution of judgments and decisions of the European Court of Human Rights, Annual Reports*. *See also* L.R. Glas, *The European Court of Human Rights supervising the execution of its judgments*, 37(3) Netherlands Quarterly of Human Rights 228 (2019).

[72] S. O'Leary, *Execution of ECHR judgments and the Rule of Law* (Speech at the Conference on the Role of the Judiciary in Execution of Judgments of the ECtHR of 21 September 2023 in Riga), available at: https://www.echr.coe.int/documents/d/echr/speech-20230921-oleary-conference-role-judiciary-execution-riga-eng (accessed 30 August 2024).

[73] *See i.e.* ECtHR, *Savickis and Others v. Latvia* (App. No. 49270/11), 9 June 2022, joint dissenting opinion of Juges O'Leary, Grozev and Lemmens. For a slightly different example, *see* ECtHR, *Valiullina and Others v. Latvia* (App. Nos. 56928/19, 7306/20 and 11937/20), 14 September 2023, para. 208: "The Court considers that the questions pertaining to the need to protect and strengthen the State language go to the heart of the constitutional identity of the State, and it is not the Court's role to question the assessment made by the Constitutional Court in that regard unless it was arbitrary, which the Court does not find in the present case."

[74] *See* L. Mälksoo, *International Law and the 2020 Amendments to the Russian Constitution*, 115(1) American Journal of International Law 78 (2021).

[75] *See* Reykjavík Summit of the Council of Europe: United around our values. Reykjavík Declaration, (16–17 May 2023), Appendix IV, available at: https://rm.coe.int/reykjavik-declaration-en/1680aba1c4 (accessed 30 August 2024).

[76] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, EU:C:2008:461.

of) international terrorism. It concerned Y.A. Kadi and the Al Barakaat Foundation, both of which had been identified by the UN Security Council Sanctions Committee as linked to Osama bin Laden and Al Qaeda. Consequently, the Council of the EU – by way of a regulation and in implementation of the resolution of the Security Council – froze the funds of these entities. They brought an action for annulment of the regulation before the Court of First Instance on the grounds that it infringed their fundamental rights, including the right to property and the right to defence. The action was dismissed because of the binding nature of the resolutions of the Security Council and the primacy of their application.[77]

We are dealing here with a situation in which international law, including universal institutions like the UN, fails to provide adequate protection of human rights. In the discussed case, this concerned the lack of adequate remedies (judicial review) in the UN system. As an appellate instance court, the CJEU annulled the judgment of the Court of First Instance and the EU Council regulation on the grounds, inter alia, of violating the applicants' fundamental rights, which constitute an integral part of the general principles of EU law. According to the Court, its review concerned the compliance with EU law of an EU act (regulation) implementing a Security Council resolution, and not the UN Charter itself (para. 286).

The crux of the dispute concerned the relationship between the autonomous legal system of the EU and the universalist nature of the UN Charter.[78] The CJEU judgment gave primacy of application to EU law. This approach seems precarious.[79] The *Kadi* case demonstrates that some complications are delicate (as seen in the jurisprudence of the CJEU and ECtHR), and that the solution to the dilemmas related to the lack of adequate remedies cannot consist of accepting the risk known as *droit-de-l'hommisme*. Nevertheless, in ruling that the EU Council Regulation was in breach of EU law, the Court sustained reasonable limits on interpretation which should not hamper the fight against terrorism in the future.

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[77] Art. 25 of the UN Charter: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter" and Art. 103 of the UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail" (*prévaudront*).

[78] For a similar, although not identical, problem of the relationship of EU law to the law arising from treaties concluded by its MSs, *see* Case 284/16 *Slovak Republic v. Achmea BV*, EU:C:2018:158.

[79] *E.g.* G. de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 Harvard International Law Journal 1 (2010); B. Simma, *Universality of International Law from the Perspective of a Practitioner*, 20(2) European Journal of International Law 265 (2009), p. 292; B. Simma, D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17(3) European Journal of International Law 483 (2006).

CONCLUSIONS

Sovereignty, a qualitative attribute of the State, functions within the law, not outside it. EU (international) law does not infringe or limit sovereignty, and the sovereign nature of the State cannot justify violations of the applicable law.

Situating the relationship between international (EU) law and the national constitutions of the EU States in the perspective of the supremacy (superiority) of one order over the other leads to a collision or stalemate. Rather, one should be guided by the principle of primacy of application as an "existential requirement" for the functioning of the Union, and international law more broadly.

The principle of primacy of application does not imply the supremacy of EU (international) law over national law, nor the derogation of national law norms. Constitutional supremacy, on the other hand, is a principle of domestic law which does not have external legal effects and does not exempt a state from its international legal responsibility.

The concepts of primacy and supremacy coexist, but have different functions and express different perspectives – primacy does not prejudge supremacy, and supremacy does not exclude primacy.

What is problematic is not so much the review of constitutionality per se, but rather the scope of that review and its consequences. Once a national court has found a conflict between EU law and the national constitution, should we accept a selective refusal to apply EU law justified on the grounds of constitutional supremacy and sovereignty? The answer here is in the negative.

Both States and courts (national and international) should reasonably balance the interests at stake, including the effectiveness of the international judicial system. *Verfassung (Staat) über alles* does not seem to be the only and all-embracing perspective – the State and its constitution do not function in an international vacuum.

The example of Poland – governed from 2015 to 2023 by anti-European circles – and its deliberate politicisation of the judiciary has led to a model called *démocrature*. The decisions of the Polish Constitutional Court during this period demonstrate a far-reaching political servility. Consequently, this Tribunal, which is still functioning with an unchanged composition, should be considered a dummy court.

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HOW TO RESPOND TO UN GOVERNANCE FAILURES? LESSONS FROM EUROPE'S ECONOMIC AND ENVIRONMENTAL CONSTITUTIONALISM

Abstract: *How should citizens respond to UN governance failures with respect to preventing climate change, wars of aggression, global health pandemics, and violations of human rights like access to food and public health protection? Europe's multilevel constitutionalism has enabled the European Union (EU) to exercise a leadership role for realizing the universally agreed "sustainable development goals" (SDGs), including in the external relations of the EU. But democratic constitutionalism – as a political and legal strategy for protecting rights of citizens and supporting rules-based, democratic governance – remains contested by governments prioritizing authoritarian and neo-liberal policies. As an analytical research method, constitutionalism explains "market failures", "governance failures" and "constitutional failures" – as well as related remedies – more convincingly than alternative methods like "realism" and "welfare economics". The more power politics impedes UN and WTO reforms, the more necessary become second-best plurilateral governance reforms which make membership conditional on promoting human rights and rules-based, multilevel private-public partnerships for realizing the SDGs. Europe's economic and "environmental constitutionalism" illustrates how constitutionalism can also facilitate sustainable development reforms in the UN, WTO and the plurilateral governance of global public goods, like climate change mitigation and transnational rule-of-law.*

Keywords: climate change mitigation, constitutional economics, constitutionalism, EU, sustainable development, UN, WTO

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INTRODUCTION

The Global Stocktake Decision, adopted by the Conference of the Parties (COP 28) of the 1992 UN Framework Convention on Climate Change (UNFCCC) on 13 December 2023 at Dubai, recognizes the need for "transitioning away from fossil fuels in energy systems in a just, orderly and equitable manner (...) so as to achieve net zero by 2050 in keeping with the science."[1] Yet the international commitments for reducing production and consumption of fossil fuels and related greenhouse gas (GHG) emissions, and for financial and technical assistance for a "just, orderly and equitable" energy transition, remain insufficient for realizing the universally agreed goal of keeping the temperature rise below 2° C, and ideally at 1.5° C, above preindustrial levels. As the Decision acknowledges the complex interdependencies between climate change mitigation, biodiversity losses, food and health security, and other sustainable development goals (SDGs), UN governance on climate change mitigation needs to be evaluated in the broader context of the UN 2030 Agenda for Sustainable Development, which is aimed at "Transforming our World" in order to "realize the human rights of all"; "to end poverty and hunger everywhere"; and to implement 17 agreed SDGs over the next 15 years with "the participation of all countries, all stakeholders and all people."[2] The Resolution 70/1 recognized that "democracy, good governance and the rule of law (...) are essential for sustainable development" (para. 9). This linking of economic, environmental, and social rules with human rights, rule-of-law and democratic governance responds to the "paradox of freedom", as discussed since Plato (e.g. in his book about *The Laws*); i.e. the historical experience that human freedoms risk destroying themselves unless abuses of public and private power – and the bounded rationality of human beings – are constitutionally restrained by laws and institutions.[3] The suppression of human and democratic rights by authoritarian states (like China and Russia), and the current disruption of the World Trade Organization (WTO) rules on non-discriminatory competition and rule-of-law offer empirical evidence of this paradox of freedom; disregard for human rights remains the main reason for unprovoked wars of aggression and related war crimes (as currently in Ukraine), as well as for UN and WTO governance failures to prevent unnecessary poverty (SDG1); to protect food security (SDG2); public health (SDG3); public education for all (SDG4); gender equality

[1] United Nations Framework Convention on Climate Change, *Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*, 30 November to 12 December 2023, FCCC/PA/CMA/2023/L.17, para. 28.

[2] UNGA resolution of 25 September 2015, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Doc. A/RES/70/1, preamble.

[3] For more on the "paradox of freedom" *see* K. Popper, *The Open Society and its Enemies*, Princeton University Press, Princeton: 1994, pp. 117, 257, 333–339; E.U. Petersmann, *International Economic Law in the 21st Century*, Hart Publishing, Oxford: 2012, pp. 61–74.

(SDG5); access to water and sanitation for all (SDG6); as well as many other SDGs like climate change mitigation (SDG13); the protection of marine and terrestrial ecosystems (SDGs 14–15); and access to justice (SDG16).[4]

These "governance failures" raise the question: Can the SDGs be realized in the absence of more effective legal restraints on transnational governance failures, such as the rapidly increasing number of coal-powered energy plants (e.g. in China and India) as well as the increase in GHG emissions which are accelerating climate change? Can international agreements of a higher legal rank (like the 2015 Paris Agreement on climate change mitigation) overcome the problems with collective action in terms of ensuring global public goods (PGs, like the prevention of global health and of food and climate crises), which no state can protect without international cooperation? As about three-quarters of carbon emissions come from fossil fuel burning as the biggest contributor to climate change and more than 100 countries, including the EU, have pushed for a commitment to phase out fossil fuels: How to overcome the opposition from fossil fuel industries, petrostates and consumers in rich countries against the necessary actions? Are there common lessons to be learned from the increasing UN governance failures to protect international peace, human rights, and the SDGs for the benefit of all citizens?

Section 1 of this paper posits that constitutionalism – as a citizen-driven political strategy and analytical research methodology – more convincingly explains the need for limiting abuses of public and private powers in the multilevel governance of PGs (like the SDGs) than alternative political theories. Section 2 draws political lessons from Europe's multilevel democratic, economic, and environmental constitutionalism for exercising leadership for protecting human rights and the SDGs. Section 3 concludes that the geopolitical rivalries between power-oriented authoritarian states, business-driven neo-liberal states, and Europe's ordoliberal constitutionalism render "constitutional reforms" of UN and WTO governance of PGs unlikely. "Plurilateral club strategies" – as pursued in the European Union (EU) and in its broader European Economic Area (EEA) – offer the best way forward in terms of protecting the SDGs in a multi-polar world, where global PGs are no longer protected by benevolent hegemons (like the US leadership in elaborating the post-WWII UN and Bretton Woods systems). Beyond Europe, the mutual synergies enabled by constitutional politics, constitutional economics, and constitutional law for improving the input- and output-legitimacy of transnational governance and foreign policies (as acknowledged in Arts. 3 and 21 of the Treaty on European

[4] The importance of democratically inclusive "good governance" and of "inclusive institutions" for promoting sustainable development is explained by S. Dercon, *Gambling on Development: Why Some Countries Win and Others Lose*, Hurst & Co., London: 2022; D. Acemoglu, J. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, Profile Books, London: 2013.

Union (TEU)) remain widely neglected. This contribution explains why – even if democratic reforms of UN law and governance are resisted by authoritarian governments – citizen-driven "struggles for justice" remain crucial for protecting the SDGs, for instance by limiting governance failures through human rights and judicial remedies; holding governments and non-governmental organizations more accountable; protecting transnational rule-of-law through third-party adjudication of disputes; responding to global governance crises through private-public partnerships (e.g. for providing vaccines and food aid, carbon emission trading systems and related carbon-border adjustment measures); and promoting climate justice in the needed transition to green and circular economies.

1. CONSTITUTIONALISM AS A GOVERNANCE STRATEGY AND ANALYTICAL RESEARCH METHOD

The COP 28 conference was attended by government representatives from all 198 UNFCCC Member States and carefully prepared by the COP Presidency and interest-based alliances of governments (e.g. from small island states), with leadership from the UNFCCC Secretariat and other international organizations. Yet most of the 85,000 conference participants represented "non-party stakeholders" from civil societies, businesses, cities, and subnational regions. This global inclusivity in the deliberations and decision-making processes – focusing on people and local livelihoods – differs from the intergovernmental negotiations in most other UN bodies. It has long been recognized as enhancing not only the input- and output-legitimacy of COP decisions, which require parties to also "respect, promote and consider their respective obligations with respect to human rights" such as "the right to a clean, healthy and sustainable development; the right to health; the rights of Indigenous Peoples, local communities, migrants, children, and persons with disabilities and people in vulnerable situations"; COP decisions also emphasize "that sustainable and just solutions to the climate crisis must be founded on meaningful and effective social dialogue and participation of all stakeholders."[5] Multi-stakeholder participation also facilitates educating public opinion; strengthening political will; and transforming COP commitments into legally binding "nationally determined contributions" under Art. 4 of the Paris Agreement, as well as implementing the commitments through national legislative, executive, judicial, business and civil society actions. The UN Secretary-General's Common Agenda for responding to the "triple crisis of climate disruption, biodiversity loss and pollution destroying

[5] Decision 19/CMA.5 of 13 December 2023, review of the functions, work programme and modalities of the forum on the impact of the implementation of response measures, midterm review of the workplan and report of the forum, preamble and para. 9.

our planet" emphasizes the need "to renew the social contract between Governments and their people and within societies"; and to view "human rights as a problem-solving measure" for a "renewed social contract anchored in a comprehensive approach to human rights",[6] without which a social contract at the national level anchored in human rights and transnational cooperation across countries cannot remain effective.[7] The UN's inclusive response to the "constitutional question" – how to constitute, limit, regulate and justify governance institutions and rules of a higher legal rank protecting human rights and democratic support for collective protection of the SDGs? – is also justified by Europe's successful experimentation with multilevel human rights and economic and environmental constitutionalism.

1.1. Lessons from Europe's multilevel constitutionalism

All UN Member States have adopted national Constitutions (written or unwritten) aimed at constituting, limiting, regulating, and justifying governance powers for protecting PGs. Globalization and its transformation of *national* into *transnational PGs* also prompt states to participate in treaties of a higher legal rank, protecting transnational PGs like human rights, the rule-of-law, and the SDGs. National Constitutions differ among countries according to their histories, preferences and social, economic, political, and legal systems. For instance, the diverse forms of *democratic constitutionalism* (e.g. since the ancient Athenian democracy), *republican constitutionalism* (e.g. since the ancient Italian city republics), and of *common law constitutionalism* (e.g. in Anglo-Saxon democracies) aim at limiting "governance failures" through commitments to agreed-upon "principles of justice" (like human rights, democratic self-governance, separation of powers) and institutions of a higher legal rank (like democratic and judicial protection of the rule-of-law). Principles of democratic constitutionalism agreed upon since ancient Athens (like citizenship, democratic governance, courts of justice, and "mixed government"); of republican constitutionalism since ancient Rome (like separation of power, rule-of-law, *jus gentium*); and of common law constitutionalism (like judicial and parliamentary protection of equal freedoms and property rights) have become recognized in national Constitutions as well as in UN and regional human rights law (HRL) and in the multilevel governance of PGs. Constitutional rules respond to collective action problems, e.g. that PGs are not spontaneously provided in private markets due to their non-excludable and/or non-exhaustible benefits (like human rights and rule-of-law principles).[8] The collective supply of PGs may be based not only on

[6] *Our Common Agenda. Report of the Secretary-General*, 1 November 2021, A/75/982, paras. 3, 6, 22.

[7] *Ibidem*, para. 10.

[8] For a discussion of the different kinds of (trans)national PGs (like non-rival and non-excludable "pure PGs", excludable "club goods", and exhaustible "common pool resources"), which require diverse policy

written constitutional agreements, but also on "evolutionary constitutionalism", as illustrated by Art. 6:3 TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." However, Europe's multilevel constitutionalism continues to be resisted outside Europe, for instance based on national traditions in Anglo-Saxon "island democracies" (like "Brexit Britain")[9]; "continental democracies" (like Australia, India, the USA); and by authoritarian governments prioritizing national power monopolies (e.g. China's communist party; Russian oligarchs in the Kremlin) suppressing human and democratic rights.

1.2. Constitutionalism as "struggle for justice" and analytical method

All governments seek to justify themselves by some conception of "justice". The Universal Declaration of Human Rights (UDHR) grounds human rights in respect for human reason, conscience and human dignity (Art. 1). Similarly, individual and democratic self-determination (e.g. pursuant to Art. 21) require limited delegation, separation of legislative, executive and judicial governance powers, and judicial remedies aimed at limiting the "bounded rationality" of human beings, and their frequent domination by individual passions, so as to protect "justice" (in the sense of reasonable justification of governance) and prevent "rebellion against tyranny and oppression" (Preamble).[10] The 18th century democratic revolutions created citizen-driven common markets without effective competition rules and human rights guarantees (e.g. for slaves, blacks, and indigenous people in the USA). Europe's "rights revolutions" since the 1950s and EU common market law aim at protecting a "competitive social market economy" (Art. 3 TEU) based on equal common market rights (e.g. including also labor and social rights) and effective competition

responses, *see* E.U. Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods – Methodology Problems in International Law*, Hart Publishing, Oxford: 2017.

[9] *Cf.* M. Loughlin, *Against Constitutionalism*, Harvard University Press, Cambridge: 2022, pp. 124–135, who criticizes the European "rights revolution", "judicial revolution", and "invisible constitutions" for protecting a new "constitutional legality" undermining his conception of Anglo-Saxon democracy represented by "the Crown, the Lords and the Commons". Loughlin claims that the people and their elected representatives, rather than citizens and courts of justice invoking and defending human and constitutional rights, should define the nation's political identity and make its most important policy decisions. His focus on nation states neglects the democratic demand of citizens for protecting transnational PGs as a task of "living democratic constitutionalism"; he also ignores the collective action problems of transnational rule-of-law, which require multilevel protection of human and constitutional rights and transnational constitutional, parliamentary, participatory and deliberative democracy as prescribed in EU law (e.g. Arts. 9–12 TEU).

[10] On the unruly nature of human beings (T. Hobbes: "*homo homini lupus est*") and their "unsocial sociability" (I. Kant) as the main justification of law and struggles for "justice" (*e.g.* in the sense of reasonable justification of law), "social contracts" and for "institutionalizing public reason" (J. Rawls); *see* E.U. Petersmann, *Teaching International Economic Law in the 21st Century*, in: P. Hilpold, G. Nesi (eds.), *Teaching International Law*, Brill–Nijhoff, Leiden: 2023, p. 349.

rules.[11] Beyond Europe, it remains contested to what extent state-capitalist economies without effective legal protection of human, economic and property rights against totalitarian distortions of competition (e.g. by unlimited state subsidies for state-trading enterprises) are (in)consistent with the GATT/WTO legal requirements of protecting non-discriminatory conditions of competition.[12] Inasmuch as neoliberal calculations of "Kaldor-Hicks-efficiencies" disregard the social and environmental costs of production (like GHG emissions contributing to climate change and other environmental pollution), carbon emission trading systems and related carbon border adjustment measures (CBAMs) are justifiable not only on environmental but also on competition and social grounds (like transparent and efficient taxation in conformity with the "polluter pays principle").[13]

As an analytical methodology, European ordoliberalism differs from authoritarian state-capitalism and Anglo-Saxon neoliberalism by its systemic, legal limitations of *market failures* (like restraints on competition, environmental pollution, social injustices, information asymmetries, failures of market and price mechanisms to protect PGs demanded by citizens) and related *governance failures* and *constitutional failures* (e.g. to effectively regulate and limit market and governance failures for the benefit of citizens). Why then is it that – beyond European integration law – the legal practices of many UN Member States remain power-oriented (e.g. prioritizing realism in terms of national security) without effective legal protection of the embedded liberalism underlying UN and WTO law through rights of citizens, competition rules, judicial remedies, and social justice (like the "just, orderly and equitable energy transition" advocated in the 2023 COP Decisions)? Why do civil societies' "struggles for justice" (e.g. by the stakeholder participants at the COP 28 conference) find it so difficult to stop the obvious governance failures, which contribute to climate change, biodiversity losses, pollution of the oceans, global health pandemics, food crises, wars of aggression and related war crimes, and refugee and

[11] *Cf.* E.U. Petersmann, *Neoliberalism, Ordoliberalism and the Future of Economic Governance*, 26(4) Journal of International Economic Law 836 (2023). The emphasis on the need for systemic, multilevel limitations of market failures, governance failures and constitutional failures so as to better protect rule-of-law and social justice in transnational "competitive social market economies" distinguishes European ordoliberalism from neoliberal (*e.g.* Anglo-Saxon) beliefs in business-driven self-regulation with much weaker safeguards of non-discriminatory conditions of competition and other legal restraints on market failures and social injustices.

[12] *Cf.* J. Bacchus, *China's Economic System Isn't 'Incompatible' with WTO Rules*, Cato at Liberty Blog, 13 December 2023, available at: https://www.cato.org/blog/yes-china-violates-wto-rules-doesnt-mean-its-system-incompatible-wto (accessed 30 August 2024).

[13] *See* K. Georgieva, U. von der Leyen, N. Okonjo-Iweala, *No more business as usual: the case for carbon pricing*, Financial Times, 3 December 2023, available at: https://www.ft.com/content/921381a8-48a4-4bb9-9196-b1d49f871bb7#:~:text=Carbon%20pricing%20must%20be%20a%20transparent (accessed 30 August 2024). For more on the need for replacing GDP calculations by a human development index, *see* UN Secretary-General, *supra* note 6, para. 34.

migration crises? The European integration experiences since the 1950s suggest that the "constitutional disconnect" between UN and WTO law and domestic constitutional, political and legal systems is one of the root causes of the failures of UN and WTO governance to protect the SDGs.

1.3. From constitutional politics and constitutional economics to multilevel constitutional law?

In his *Theory of Justice* (1971), the American philosopher Rawls described constitutionalism as a "four-stage sequence", as reflected in the history of the US Constitution: reasonable citizens, after having agreed (1) on their constitutional "principles of justice" (*e.g.* in the 1776 US Declaration of Independence and Virginia Bill of Rights); (2) elaborate national Constitutions (e.g. the US Federal Constitution of 1787) providing for basic rights and legislative, executive and judicial institutions; (3) democratic legislation must progressively implement and protect the constitutional principles of justice for the benefit of all citizens; and (4) the agreed-upon constitutional and legislative rules need to be applied and enforced by administrations and courts of justice in particular cases so as to protect equal rights, the rule of law, and rule-compliance by citizens.[14] The more globalization transforms *national* into *transnational PGs* (like the SDGs), the more it renders national "constitutionalism 1.0" an incomplete system for governing PGs. Some of the 15 UN Specialized Agencies explicitly provide for "treaty constitutions" for multilevel governance of specific PGs, as illustrated by the "constitutions" (*sic*) establishing:

- the International Labor Organization (ILO, e.g. providing for labor rights and tri-partite ILO membership of governments, employer and employee representatives);
- the World Health Organization (WHO, e.g. protecting health rights through international health regulations and conventions);
- the Food and Agriculture Organization (FAO, e.g. protecting food security and related human rights of access to food); and
- the UN Educational, Scientific and Cultural Organization (UNESCO, e.g. protecting rights of access to education).

Yet in contrast to the transformation of the EU treaties into multilevel constitutional systems embedded into the constitutional rights of "EU citizens" and protected by multilevel parliamentary, judicial and executive governance institutions, UN/WTO practices prioritize an "international community of States" (Art. 53 of the Vienna Convention on the Law of Treaties) without effective enforcement of

[14] *Cf.* J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge: 1999, p. 171.

UN HRL inside many UN Member States. Compulsory international adjudication is increasingly challenged, for instance in:

- UN law (e.g. by China's disregard for the arbitration award under the UNCLOS against China's illegal maritime expansion in the South China Sea);
- HRL (e.g. by Russia's disregard for judgments of the European Court of Human Rights on human rights violations inside Russia);
- WTO law (e.g. by the illegal US obstruction of the WTO Appellate Body system);
- and in international investment law (e.g. by withdrawals from the 1994 Energy Charter Treaty and the increasing challenges associated with investor-state arbitration).

The "constitutional economics" underlying the European common market, competition, and environmental rules derives democratic legitimacy from the informed, voluntary consent of individuals ("methodological individualism") through the multilevel protection of civil, political, economic, social and cultural rights and non-discriminatory conditions of competition – rather than only from neoliberal cost-benefit analyses and "welfare economics".[15] Constitutional economics offers more analytically and normatively coherent methodologies for identifying and limiting "governance failures" than *welfare economics*, which aims at promoting the efficient allocation of scarce resources through market competition and trade within a given set of national rules and institutions. Constitutional economics re-directs the focus of economic analysis away from quantitative cost-benefit analyses and towards designing markets and political arenas such that "consumer sovereignty" in economic markets and "citizen sovereignty" in political markets form the analytical and normative benchmarks.[16] In its *normative* dimension, it highlights the synergies between democratic constitutionalism (e.g., protecting civil and political freedoms, voter preferences, limitation of all government powers, and democratic

[15] For more on "constitutional economics" and "economic constitutionalism" *see* S. Voigt, *Constitutional Economics: A Primer*, Cambridge University Press, Cambridge: 2020; E.U. Petersmann, *Transforming World Trade and Investment Law for Sustainable Development*, Oxford University Press, Oxford: 2022, pp. 90–163; E.U. Petersmann, A. Steinbach, *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 75–106. On the EU's economic constitutionalism, *see* G. Grégoire, X. Miny (eds.), *The Idea of Economic Constitution in Europe. Genealogie and Overview*, Brill–Nijhoff, Leiden: 2022.

[16] *Cf.* E.U. Petersmann, A. Steinbach, *Neo-liberalism, State-capitalism and Ordo-liberalism: 'Institutional Economics' and 'Constitutional Choices' in Multilevel Trade Regulation*, 22 Journal of World Investment and Trade 1 (2021); Petersmann, Steinbach, *supra* note 15. Institutional economics explains the need for legal institutions limiting "moral hazards" inside multilevel governance and federal states, with rules on governing bailouts of banks and states (controversially discussed in the Eurozone) as prominent examples. Constitutional economics argues for rules-based, regulatory competition among states and for the "legal ranking" of efficient policy instruments (*e.g.* as in EU law and GATT law).

accountability) and economic constitutionalism (e.g. protecting economic and social rights, consumer preferences, non-discriminatory competition, and legal accountability); and it requires designing rules and institutions with due regard to the political economy environment (e.g. decentralized invention, clinical testing, and production of vaccines by pharmaceutical industries dependent on the protection offered by intellectual property rights, subsidies, and government procurement) – for instance to limit rent-seeking interest group politics and regulatory capture (e.g. when political election campaigns are financed by business). Arguably, analyzing the multilevel governance of PGs in terms of market-, governance-, and constitutional-failures enables more precise policy responses. For example, without taking into account pollution costs in the legal design of markets, the welfare effects of trade governance cannot be known, and corrective measures may not directly target the source of market distortions. Climate policies should target fossil-fuel industries and energy consumption in rich countries by non-discriminatory policy instruments intervening directly at the source of GHG emissions (like carbon taxes, and the prohibition of fossil fuel subsidies and of new coal-powered energy plants).

1.4. Constitutional pluralism and regulatory competition

An analysis of the different kinds of market failures, constitutional failures, and governance failures in policy fields characterized by collective action dilemmas (like international rule-of-law; division of labor through international trade and investments; climate change mitigation, etc.) is influenced by the reality of *constitutional pluralism*, with its diverse governance types for protecting PGs; to wit:

- Anglo-Saxon democracies continue to prioritize civil, political and economic rights in their pursuit of liberalization, deregulation, privatization, and the financialization of international trade and investments based on neoliberal trust in market competition, business-driven self-regulation and military power, complemented by increasing resort to nationalist industrial policies (like the 2022 US Inflation Reduction Act);
- EU and EEA Member States prioritize "social market economies" with multilevel democratic, executive and judicial institutions (like European parliaments, regulatory agencies, courts, and EU citizenship) protecting the civil, political, economic, social and cultural rights more comprehensively (e.g. as codified in the EU Charter of Fundamental Rights, EUCFR), complemented by common market, monetary, competition, environmental, commercial, and foreign policy rules and institutions of a higher legal rank;
- states with authoritarian power monopolies (like China, Iran, North Korea, Russia) increasingly disregard the "embedded liberalism" under-

lying UN HRL and the WTO legal guarantees of non-discriminatory conditions of market competition;

– "third world countries" (like the BRICS members Brazil, India and South Africa) prioritize their national development interests over collective countermeasures against violations of UN law (e.g. Russia's wars against Ukraine and China's military expansion in the South China Sea).

Each of these diverse "value priorities" (like neoliberalism, ordoliberalism, authoritarian power monopolies, and national industrialization) and diverse constitutional contexts give rise to diverse (and sometimes divergent) "international legal policies". For instance:

– In the WTO, the business-driven US insistence on its own interpretations of WTO trade remedy rules, safeguard measures, and security exceptions has led to illegal US blocking of the WTO Appellate Body (AB) system, disrupting the compulsory WTO third-party adjudication and international rule-of-law.
– The EU's constitutional commitment to protecting rule-of-law also in international relations has prompted the EU Commission to initiate voluntary "interim appellate arbitration" – based on Art. 25 of the Dispute Settlement Understanding (DSU) – among more than 50 WTO members.
– Authoritarian WTO members (like China and Russia) started (or threatened to start) unprovoked military aggression against other WTO members (like Ukraine, the Philippines, and Taiwan); and
– Less-developed WTO members insist on special and differential treatment and WTO waivers (e.g. from the WTO Agreement on Trade-Related Intellectual Property Rights) as a response to their particular development needs (like access to vaccines, non-reciprocal preferential treatment).

The "sovereign equality" of States and related legal freedoms foster "regulatory competition", with frequent distortions by subsidies and extra-territorial power politics exercised by the stronger actors. For example, state-capitalist countries distort competition by state subsidies; and the US Trump administration welcomed the adoption by the WTO Dispute Settlement Body of "constructive WTO dispute settlement rulings" supporting US legal complaints vis-à-vis other WTO members, while at the same time rejecting similar WTO dispute settlement findings against the USA on the ground that the rulings create "new obligations" not consented to by their government.[17]

[17] For more on the illegal blocking and contradictory criticism by the United States of the WTO dispute settlement system, *see* Petersmann, *supra* note 15, pp. 90–126.

The diverse constitutional traditions, democratic preferences, and resources (e.g. for subsidies) often entail diverse interpretations and legal implementations of "constitutional principles" (like the judicial administration of justice) among jurisdictions; to wit:

- process-based national constitutionalism prioritizes democratic elections and decisions (e.g. on Brexit), as well as majoritarian institutions (like the US Congress), favoring democratic accountability and unilateral power politics (like illegal US trade restrictions on imports from China) if needed to limit allegedly unfair foreign practices;
- rights-based European constitutionalism makes free trade agreements conditional on human rights protection and environmental conditionalities, authorizing trade restrictions in response to foreign human rights violations (e.g. in foreign supply chains);
- the trade and investment agreements concluded by China with Belt and Road partner countries refrain from including human rights and environmental guarantees; and
- less-developed countries increasingly challenge European import restrictions imposed in response to foreign violations of labor rights and the burning of tropical forests.

These diverse legal perspectives promote diverse legal interpretations of the linking of economic, environmental, and social rules with human rights and rule-of-law requirements in the UN SDGs and in COP decisions. US courts tend to construe human and constitutional rights and delegated, executive powers (e.g. of the US Environmental Protection Agency) narrowly insofar as they relate to "political questions" (like the limitation of GHG emissions caused by fossil fuels), arguing that they are not decided by the US Congress. European courts often interpret their constitutional and judicial mandates more broadly by invoking the more comprehensive human rights and sustainable development obligations in EU law. Authoritarian constitutionalism (e.g. in China and Russia) does not effectively constrain executive power monopolies via independent adjudication.

2. EUROPE'S REPUBLICAN CONSTITUTIONALISM PROMOTING UN AND WTO SUSTAINABLE DEVELOPMENT REFORMS

Constitutionalism emerged as a "political strategy" in response to the failures of alternative modes of human self-ordering (e.g. through sociality, morality, reasonableness, religiosity, and legality) to suppress humans' animal instincts (like violence) and rational egoism (e.g. in anti-competitive agreements) in the collective governance of PGs that are not provided spontaneously in private markets. Democratic consti-

tutionalism can improve the input-legitimacy of inclusive governance in the ordering of societies, economies, and polities;[18] republican constitutionalism aims at enhancing the output-legitimacy of protecting PGs, for instance by commitments in national Constitutions to support international rule-of-law and sustainable development (as in some national Constitutions, like Arts. 20a, 23–26 of the German Basic Law). Even if democratic governance remains contested in worldwide intergovernmental organizations, republican constitutionalism can still strengthen the UN and WTO governance of PGs like the SDGs by means of, e.g., principles of non-discrimination; rule-of-law; judicial remedies; transparency; necessity and proportionality requirements; and the protection of equal freedoms and property rights. The collective action problems of regulating private goods and PGs – including also "club goods" with limited membership; exhaustible common pool resources; and global commons (like outer space, the High Seas, Antarctica, the atmosphere, cyberspace, biodiversity, cultural heritage) - differ among each other. Hence, also the legal design and practices of the 15 UN Specialized Agencies and of the WTO differ accordingly, as illustrated by their diverse approaches to protecting equal individual rights as legal restraints on abuses of power and safeguards of the participatory governance of PGs.[19]

2.1. UN law as global constitutional law?

The universal recognition of human rights, democracy. and rule of law principles in UN HRL has not prevented failures on the part of many governments to protect human and democratic rights and rule of law in their legal practices.[20] In both

[18] The relationship between market competition and state regulation remained highly contested at the Walter Lippmann colloquium at Paris in 1938, where Alexander Rüstow coined the term "neoliberalism" as an alternative to "market anarchy" and economic dictatorship. Today, European constitutionalism and "constitutional economics" are supported by a broad consensus on market, governance and constitutional failures as agreed benchmarks for economic regulation and governance of PGs; *Cf.* Petersmann, *supra* note 15, pp. 6–206.

[19] *See* above section 1.3. *See also* M. Wolf, *The Crisis of Democratic Capitalism*, Penguin Press, New York: 2023, who concludes his criticism of "rentier capitalism" and of speculative financialization of economies undermining modern democracies (*e.g.* through money-driven political campaign financing and lobbying industries influencing legislation, especially in the UK and USA) by his call for a renewed concept of citizenship.

[20] *See e.g.* G. Ziccardi Capaldo, *Facing the Crisis of Global Governance – GCYILJ's Twentieth Anniversary at the Intersection of Continuity and Dynamic Progress*, Global Community Yearbook on International Law and Jurisprudence 5 (2020). G. Ziccardi Capaldo defines the global community as a "universal human society" based on "global constitutional principles". Her view of a "unified/integrated" world system under global principles and procedures developed by the UN global governance model (including the rule of law, protection of human rights, democracy, separation of powers, checks and balances, and judicial review) postulates that UN governance provides the basic constitutional framework for an integrated system of global governance that unifies the different legal systems under constitutional principles and procedures respecting pluralism and overall diversity. The 20 volumes of the GCYILJ edited by Ziccardi Capaldo since 2001 document the empirical evolution of UN law-making, law-enforcement and law-adjudication for an "integrated global governance system" aimed at guaranteeing global PGs.

the practice of political UN institutions (like the UN Security Council) and of the International Court of Justice (ICJ), propositions to interpret and develop the UN Charter as the "constitution of mankind" are avoided.[21] The disconnect between UN/WTO governance institutions and effective parliamentary and judicial accountability mechanisms facilitates intergovernmental power politics and interest group politics, thus undermining the legitimacy and effectiveness of the multilevel governance of PGs. The less citizens control their "principal-agent mandates" for limited, multilevel governance of PGs, the more *legal constitutions* and their underlying *constitutional ideals* (e.g. as reflected in the SDGs) risk becoming replaced by power-based *legal practices* (like the *de facto* incapacitation of the UN Security Council and of the WTO AB), inconsistent with the *law in the books* (like Art. 17 of the DSU). While the inclusive forms of UN climate change governance at COP conferences, with thousands of civil society representatives and non-governmental stakeholders, remain the exception, they nevertheless demonstrate how increased "democratic accountability" can "institutionalize public reason" by counterbalancing power-oriented discourse.

European integration confirms that the political effectiveness of constitutionalism in terms of protecting human and constitutional rights and related PGs depends on the dynamic struggles of citizens for protecting PGs at the national, international, and transnational levels of governance. The citizen-driven transformation of EU treaties into multilevel constitutionalism (e.g. based on direct effects and the direct applicability in national jurisdictions of precise and unconditional EU treaty obligations protecting citizens) has no equivalent in UN legal and judicial treaty practices. The EU's commitment (e.g. in Arts. 3 and 21 TEU) to protect human rights and the rule of law also in external relations has pushed the EU to become the main advocate for introducing compulsory adjudication in UN law (e.g. under the UNCLOS jurisdiction), WTO law, international investment law, and international criminal law. Yet China, Russia and the USA oppose the compulsory jurisdiction of the ICJ and the International Criminal Court (ICC); and adverse judicial findings (e.g. of human rights violations by Russia; violation of the UNCLOS rules on maritime borders by China's military expansion in the South China Sea; and violations of WTO obligations by the USA) are increasingly disregarded. The UN and WTO responses to the global financial, health, food, environmental and security crises since 2008 were considerably less transformative than the EU's responses introducing legislative reforms for more effective EU protection against financial, health, environmental, and security crises, as illustrated in the following sections by the example of EU environmental constitutionalism.

[21] *Cf.* P.M. Dupuy, *The Constitutional Dimension of the UN Charter Revisited: Almost One Quarter of a Century Later*, 25(1) Max Planck Yearbook of United Nations Law 89 (2022).

2.2. EU environmental constitutionalism as driver for UN and WTO sustainable development reforms

The formation of a customs union prompted the EU to join the WTO and some UN agencies (like the FAO) as a full member promoting transformation of state-centered international legal systems by recognizing sub-state actors (like Hong Kong and Macau as WTO members) and supra-national actors (like the EU) as members of international treaties and multilevel governance institutions. The rules-based internal and external EU mandates have pushed the EU to become a leading advocate for compulsory adjudication in international trade law, investment law, international criminal law, and the Law of the Sea. For example, when the WTO AB was rendered dysfunctional in 2019 by the illegal US vetoes of the consensus-based nominations of AB judges, the EU introduced voluntary Multi-Party-Interim Arbitration agreements (based on Art. 25 DSU) providing for compulsory appellate arbitration among WTO members pending the blockage of the WTO AB, thereby limiting the increasing abuses of "appeals into the void of a dysfunctional AB", which prevented the adoption of WTO panel reports.[22] The ongoing bilateral and UN negotiations on transforming investor-state arbitration into more transparent and more accountable investment adjudication were initiated by the EU Court of Justice (CJEU) ruling that investor-state arbitration was inconsistent with EU constitutional law and had to be reformed in both the EU's internal and external relations.[23] EU common market regulations often have global "Brussels effects" if access of foreign goods, services, and investments to the EU market is made conditional on compliance with EU fundamental rights and common market regulations (such as EU product and production standards).[24] The EU's environmental constitutionalism, climate legislation and related climate litigation illustrate how domestic constitutional reforms inside the EU can create incentives for governments and non-governmental organizations outside the EU to also increase their environmental and human rights protection standards.

[22] *Cf.* P. van den Bossche, *Can the WTO Dispute Settlement System be Revived? Options for Addressing a Major Governance Failure of the World Trade Organization*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 308–335.

[23] *Cf.* L. Marceddu, *EU and UN Proposals for Reforming Investor-State Arbitration*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 336–361.

[24] *Cf.* A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press, Oxford: 2020, according to whom it is wrong to cast the EU "as an aging and declining power" (p. xiii) beset by slow growth (p. 267). The most fundamental constraint on EU power – its lack of autonomous capacity to mobilize fiscal and military power to project power in a traditional sense – compelled the EU to mobilize "regulatory power" based on an extensive apparatus of rules to govern the Union's large internal market (pp. 16, 36). In order to access that market, external actors must meet the EU's often stringent regulatory demands, and this generates a broader compliance pull with strong extraterritorial ramifications. The global impact of this regime, as well as its likely durability, demonstrate how the Union is "an influential superpower that shapes the world in its image" (p. xiii).

The Single European Act of 1986 introduced the first treaty provisions for a European Community environmental policy requiring protection of the environment, as now prescribed in detail in Art. 3 TEU as well as in Arts. 191–193 of the Treaty on the Functioning of the EU (TFEU). Art. 3:3 TEU requires the Union to regulate the internal market consonant with "the sustainable development of Europe", based on "a high level of protection and improvement of the quality of the environment." Art. 191 TFEU commits the EU's environmental policy to the principles of precaution, preventive action, proximity and polluter pays. These legal foundations enabled the EU to adopt hundreds of environmental acts on the protection of water, waste management, air quality, climate change, other natural resources and chemicals management. More than 80% of the national environmental legislation in the 27 EU Member States are now based on EU regulations, directives, and other EU environmental policy measures. Moreover, Art. 11 TFEU stipulates that environmental protection requirements must be integrated into the definition and implementation of other Union policies and activities. Hence, protections against pollution of the environment must be internalized also in the EU's internal market, energy, transport, fisheries, and agricultural policies, as well as its fiscal and foreign affairs policies.

The EU's environmental constitutionalisation has evolved from a sectoral policy to a transversal transformation of the EU legal order. The constitutional dimension of environmental protection is reflected in environmental objectives, principles, and rules in both EU primary and secondary law, which have promoted "environmental democracy" and an environmental dimension also in the EUCFR. Environmental transition is particularly visible in EU secondary law, like the adoption of the 2021 European climate law[25] for decarbonizing and greening the EU's economy. The multiple policy tools and mandatory standards aim at a socially just transition with active industrial policies to secure continuing economic growth. Their promotion of "climate change litigation" and of external CBAMs – aimed at reducing GHG emissions; inducing industries to use greener technologies; and at preventing "carbon leakage" (i.e. relocation of production outside EU borders to countries with lower environmental standards) – confirm the transformative nature of the EU's environmental constitutionalism.

The emergence of the Anthropocene, caused by human transgressions of laws of nature provoking climate change, biodiversity losses, and disruption of other ecosystems (like water and land uses), continues to promote support by EU citizens for the regulation of environmental rights, duties, principles and policy goals in the

[25] *Cf.* Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law) [2021] OJ L 243/1.

EUCFR (like Art. 37); in the Lisbon Treaty (e.g. Arts 11, 191–193 TFEU); as well as in national Constitutions and HRL. EU primary and secondary law empowers citizens to complement the constitutional, parliamentary, participatory, and deliberative dimensions of European democracy (*cf*. Arts. 9–12 TEU) by engaging in strategic climate litigation (as discussed below), thereby promoting citizen-driven transformation of agreed-upon environmental principles into democratic legislation, administration, and the judicial protection of rule-of-law, including also international law and multilevel governance of transnational PGs for the benefit of citizens. The multilevel legal and political means for enforcing EU environmental law – for instance, by the EU Commission (Art. 17 TEU) and the CJEU, Member States and citizens resorting to EU and national law enforcement institutions – distinguish EU law from other national and international jurisdictions; they also strengthen the enforcement of UN environmental agreements and legal principles, such as the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[26] Yet, as is apparent from the European Commission's regular reports on monitoring compliance with Union law, considerable gaps between the current statutory requirements and their effective enforcement continue to exist also in EU Member States, notably in areas like waste management, nature protection, and water and air quality. Fossil fuel subsidies also continue to persist in some EU countries.

2.3. Constitutionalization through EU climate change litigation

Ratification of the Aarhus Convention required the EU and its Member States to ensure that citizens are guaranteed rights to access information concerning the environment; rights to participate in certain decisions affecting the environment (like planning and approval of development projects); as well as rights securing effective access to environmental justice (notably by administrative and judicial review of breaches of national environmental laws). The effectiveness of EU environmental legislation is strengthened by its "constitutional embedding" into multilevel judicial remedies, by its democratic constitutionalism promoting civil society participation, and by European and national environmental agencies which ensure the legal implementation and monitoring of EU environmental requirements by the public and private sectors.[27] The environmental regulations, directives, and other EU environ-

[26] The Convention was signed on 25 June 1998 and approved on behalf of the European Community by Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters [2005] OJ L 124/1.

[27] The importance of individual rights and judicial remedies for the decentralized enforcement of EU law is explained in EU Commission, *70 Years of EU Law. A Union for its Citizens*, Publications Office of the European Union, Brussels: 2023, available at https://data.europa.eu/doi/10.2880/543607 (accessed 30 August 2024).

mental acts (like EU decisions and environmental agreements) proposed by the EU Commission and adopted by the EU parliamentary and legislative procedures can ensure higher "democratic input-legitimacy" compared with UN environmental agreements, negotiated among democratic and non-democratic UN Member States alike. The European Green Deal, adopted by the EU Commission in 2019[28], sets out the Commission's strategy for tackling climate and environmental challenges, such as global warming, the changing climate, the risk of extinction for a large number of species, and challenges related to the pollution and destruction of forests and oceans. The EU's ambitious targets to reduce net greenhouse gas emissions (e.g. by at least 55 % by 2030 compared with 1990) are specified in the European Climate Law and in 14 additional implementing regulations and directives in various policy areas, such as climate change, energy, the environment, mobility and the circular economy; and they facilitated similar COP 28 commitments to boost energy efficiency, multiply renewable energy generation capacity, and reduce other GHG emissions.

The principal mechanisms at the disposal of the Commission to ensure the application of EU environmental law – like the powers and infringement procedures laid down in Arts. 258 and 260 TFEU enabling it to take legal action against defaulting Member States – have no equivalent in UN law. The various legal duties to implement and enforce EU law with respect to the Union's environmental policy are enhanced by the requirement in Art. 192(4) TFEU that Member States "shall implement the environmental policy." EU infringement proceedings in the CJEU (pursuant to Art. 258 TFEU) challenging state failures to secure the implementation of EU environmental legal obligations tend to be widely supported by EU citizens. Since the entry into force of the Lisbon Treaty on 1 December 2009, the CJEU has also acquired the power to impose penalty payments not exceeding an amount specified by the Commission in cases which concern failures by Member States to notify the Commission of measures to transpose a legislative EU directive into national law by the deadlines set in the legislative instrument. When a Member State fails to take such steps, Art. 260 TFEU gives the Commission the option of bringing further legal proceedings against the Member State concerned. In practice, several hundred infringement judgments have been handed down by the CJEU concerning breaches of EU environmental law by Member States.

[28] European Commission, *Commission communication – The European Green Deal*, 11 December 2019, COM(2019) 640 final, available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX-:52019DC0640 (accessed 30 August 2024). On the EU's "Green Deal Diplomacy" promoting the EU's GHG reduction and ecological transformation objectives also in the external relations of the EU *see*: *Reinforcing the EU's Green Deal Diplomacy*, 4 College of Europe Policy Brief 1 (2023), pp. 1–7.

The citizen-driven dimension of the EU's environmental constitutionalism, and the contribution of judicial remedies and of citizens to the "constitutionalization" of environmental law, are also illustrated by the increasing climate litigation relying on international human right treaties and environmental commitments originating outside the EU legal order. For example, the Dutch Supreme Court in *Urgenda* relied on the right to life (Art. 2 of the European Convention on Human Rights, ECHR) and the right to respect for private and family life (Art. 8 ECHR) in order to oblige the Dutch government to reduce the overall emissions from its territory.[29] Neither of these provisions directly refer to the environment. While the European Court of Human Rights (ECtHR) had earlier interpreted these rights to cover situations where people's lives were affected by environmental pollution, the courts in *Urgenda* pioneered by interpreting Arts. 2 and 8 ECHR to entail an obligation to mitigate climate change. These legally binding norms are interpreted in light of the political commitments by national and European governments specifying what they consider necessary to mitigate climate change. The judicial reasoning process uses these political commitments to concretize what is meant by open-textured, legally binding norms in an individual case.[30] In this way climate litigation can implement not only the constitutional and legislative, but also the political commitments of governments.

Other successful instances of climate litigation inside the EU include the Irish climate case,[31] the *Neubauer* case in Germany,[32] the *Grand Synthe* and *Notre Affaire à Tous* cases in France,[33] *Klimaatzaak* in Belgium,[34] and the *Net Zero Strategy* case in the UK.[35] While the ultimately unsuccessful cases of *Plan B* in the UK,[36] *Natur og Ungdom* in Norway,[37] the ongoing case of *Klimatická* žaloba *ČR* in Czechia,[38]

[29] *State of the Netherlands v. Stichting Urgenda* [Supreme Court of the Netherlands], judgment of 31 January 2019, NL:HR:2019:2007.

[30] *Cf.* C. Eckes, *Constitutionalising Climate Mitigation Norms in Europe*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 107–144.

[31] *Friends of the Irish Environment CLG v. The Government of Ireland, Ireland and the Attorney General* [Supreme Court of Ireland], judgment of 31 July 2020, Appeal no. 205/19.

[32] *Neubauer and Others v. Germany* [German Federal Constitutional Court], judgment of 24 March 2021, 1 BvR 2656/18, 96/20, 78/20, 288/20, 96/20, 78/20.

[33] *Commune de Grande-Synthe v. France* [Conseil d'Etat], judgment of 1 July 2021, No. 427301; *Notre Affaire à Tous and Others v. France* [Paris Administrative Court], judgment of 3 February 2021, No. 1904967, 1904968, 1904972, 1904976/4-1.

[34] *VZW Klimaatzaak v. Kingdom of Belgium & Others* [Brussels Court of First Instance], judgment of 17 June 2021, 2015/4585/A.

[35] *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy* [England and Wales High Court], decision of 18 July 2022, EWHC 1841.

[36] *Plan B Earth and Others v. Secretary of State for Transport* [Supreme Court], judgment of 16 December 2020, EWCA Civ 214.

[37] *Nature and Youth Norway and others v. Norway* [Supreme Court of Norway], judgment of 22 December 2020, HR-2020-24720P.

[38] *Klimatická žaloba ČR v. Czech Republic* [Supreme Administrative Court in Czech], judgment of 20 February 2023, 9 As 116/2022-166.

the Finnish climate case,[39] and *Klimaseneriorinnen* in Switzerland[40] did not impose emission reduction obligations, they nevertheless contributed to the ongoing climate constitutionalization, for instance by prompting some of these complainants (e.g. in *Klimaseniorinnen*[41] and *Carême/Grande Synthe*[42]) to challenge the national judgments in the ECtHR. This precedent induced new climate litigation (like *Duarte Augustino*[43]) in the ECtHR.[44] Apart from recognizing human rights to the protection of the environment – including climate change mitigation – most of these court cases also refer to states' responsibility for adaptation, as regulated in the 2015 Paris Agreement and progressively specified in COP decisions.

2.4. Development of UN and WTO climate mitigation law through European emission trading and carbon border adjustment systems

The UN climate law regime – based essentially on the 1992 UNFCCC; the 1997 Kyoto Protocol; the 2015 Paris Agreement; and the numerous decisions of the parties to these instruments – aims at "(h)olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change" (Art. 2(a) of the Paris Agreement). As part of their "nationally determined contributions" (NDCs), and in conformity with both WTO law and the Paris Agreement, the EU Member States have adopted the EU Emission Trading System (ETS) as a "cap and trade" scheme intended to lower GHG emissions in the most cost-effective ways without significant government intervention.[45] The CBAM complementing the ETS requires that for all products subject to the relevant legislation (iron and steel, cement, fertiliser, aluminium, hydrogen and electricity) – whether domestic or imported – a carbon price is paid commensurate with the carbon emissions generated during production. Payments under CBAM will begin after a transitional period (2023–25) and be phased in over a decade from 2026 to 2035 in parallel with the

[39] *Greenpeace Nordic and the Finnish Association for Nature Conservation v. Finland* [Supreme Administrative Court of Finland], judgment of 6 June 2023, FI:KHO:2023:62.

[40] *KlimaSeniorinnen Schweiz and Others v. Federal Department of the Environment, Transport, Energy and Communications* [Supreme Court in Switzerland], judgment of 5 May 2020, 1C_37/2019.

[41] ECtHR, *KlimaSeniorinnen Schweiz and Others v. Switzerland* (App. No. 53600/20), 26 November 2020. On the judgments by the ECtHR of 9 April 2024 in favor of the complainants see the critical analysis by K. Schayani, *No Global Climate Justice from this Court*, Völkerrechtsblog, 15 April 2024, available at: https://voelkerrechtsblog.org/no-global-climate-justice-from-this-court/ (accessed 30 August 2024).

[42] ECtHR, *Carême v. France* (App. No. 7189/21), 7 June 2022; *see* Schayani, *supra* note 41.

[43] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Other States* (App. No. 39371/20), 1 December 2020; *see* Schayani, *supra* note 41.

[44] All these climate cases are discussed by Eckes, *supra* note 30.

[45] For an explanation of the ETS, the CBAM and their legislative framework, *see* European Commission ,*EU Emissions Trading System (EU ETS)*, available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en (accessed 30 August 2024).

phasing-out of the free allowances which are currently available under the ETS, thereby ensuring equal treatment between EU and non-EU producers. In conformity with Art. 6 of the Paris Agreement if, for an imported product, the carbon price has been paid in the non-EU country, no adjustment is required upon importation into the EU; if not, an adjustment tariff must be paid equivalent to the carbon price that would have been paid if the product had been made in the EU. As any effective decarbonisation is likely to reduce ETS/CBAM payments, ETS/CBAM systems promote the internalization of the environmental costs of carbon emissions by giving effect to the polluter pays principle. Apart from the EU ETS, national or sub-national emission trading systems are now tested or under development in about 70 countries. The EU ETS legislation provides for the possibility to link the EU ETS – as the world's first major and biggest international carbon market – with other compatible emissions trading systems (e.g. as agreed with EFTA countries). The EU's bilateral and multilateral consultations with exporting countries – e.g. in the OECD, the G7's Climate Club, the WTO, and the UNFCCC – are assisting exporting countries and industries to find WTO-consistent agreements on participation in the ETS, promoting decarbonization of industries in ever more third countries. As the voluntary NDCs under the Paris Agreement fall short of preventing climate change, and emission trading systems outside Europe apply only at the national or sub-national levels of governance, the EU's multilateral ETS/CBAM system promotes EU leadership in the development of additional ETS/CBAM systems and GHG reductions in third countries.[46]

The EU remains committed to regulating and implementing its CBAM in conformity with both UN and WTO law.[47] Even though collecting carbon tariffs at the border as an integral part of the EU ETS could be deemed to violate GATT Arts. II or III, Art. XX GATT justifies the EU's ETS/CBAM system to the extent that it is non-discriminatory and necessary for protecting the human right to protection of the environment (Art. XX, para. a); human, animal and plant life or health (para. b); non-discriminatory internal product and production standards like ETS systems (para. d); or is related to the conservation of exhaustible natural resources "in conjunction with restrictions on domestic production or consumption" (para. g).[48] The EU Commission also initiated bilateral negotiations with third countries (such as India, African countries, the USA) on, *inter alia*, how to define agreed production standards (e.g. for carbon-intensive "dirty steel"); and agreed-

[46] *See* EU Commission, *supra* note 27, pp. 154, 268.

[47] *Ibidem*, p. 268.

[48] For a detailed legal explanation *see* J. Flett, *The EU Carbon Border Adjustment Mechanism. A Transnational Governance Instrument Whose Time Has Come*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 172–205.

on procedures for calculating the carbon content of traded products and services; the mutual recognition of diverse climate change mitigation policies in import and export countries (e.g. environmental taxes and subsidies); and "common but differentiated responsibilities" (e.g. exemptions of least developed countries and of small and medium enterprises from less-developed countries).

2.5. Sustainable development as new regulatory integration paradigm

EU law recognizes (e.g. in Art. 3 TEU) "sustainable development" as a regulatory task of both internal and external EU policies, and EU legal practices integrate trade and environmental policies in mutually coherent ways. The UN Sustainable Development Agenda and the sustainable development objectives of WTO law lack, so far, a similarly coherent interpretation and development of UN and WTO rules and practices. The more UN HRL and democracy are contested by authoritarian governments, the more the universally agreed SDGs and republican constitutionalism could become the new focus of UN governance. In order to assist UN Member States in designing mutually coherent NDCs under Art. 4 of the Paris Agreement, the WTO – during the "Trade Day" at the COP 28 conference at Dubai – recommended using efficient, WTO-consistent trade policy tools for climate change mitigation policies.[49] WTO Director-General Ngozi Okonjo-Iweala also welcomed the "steel standards principles for decarbonization" launched at COP 28 and developed by standard-setting bodies, international organizations, steel producers, and industry associations. Given that non-discriminatory carbon taxes and emission trading systems offer efficient and democratically accountable policy instruments for mitigating climate change by reducing harmful carbon emissions, the EU's CBAMs set incentives for all trading countries to make their NDC commitment under the Paris Agreement more efficient and WTO-consistent.[50] The 2022 WTO agreement on Fisheries Subsidies – which establishes binding prohibitions and rules to ensure that fishery subsidies do not undermine the sustainability of marine resources – is the first WTO agreement prioritizing environmental sustainability. Civil society has

[49] *Cf. Trade Policy Tools for Climate Action*, World Trade Organization, Geneva: 2023, which describes the options as (1) introducing trade facilitation measures to reduce greenhouse gas emissions associated with cumbersome border customs procedures; (2) deploying green government procurement policies; (3) using international standards to avoid fragmentation when upgrading energy efficiency regulations; (4) reviewing regulations and restrictions on providers of climate-related services to support climate mitigation and adaptation efforts; (5) rebalancing import tariffs to increase the uptake of low-carbon technologies; (6) reforming environmentally harmful subsidies to unlock additional resources for climate action; (7) facilitating and increasing trade finance to support the diffusion of climate-related technologies and equipment; (8) improving how food and agricultural markets function to support climate adaptation and mitigation by easing trade in food; (9) strengthening sanitary and phytosanitary systems to protect economies from the spread of disease, pests and other related risks heightened by climate change; and (10) improving the coordination of climate-related internal taxes, including carbon pricing and equivalent policies, to reduce policy fragmentation and compliance costs.

[50] For a detailed legal explanation, *see* Flett, *supra* note 48.

been calling ever more on the WTO Ministerial Conference in February 2024 to adopt WTO Ministerial Declarations clarifying the WTO sustainable development goals and WTO rules (e.g. on environmental subsidies, CBAMs, and process and production standards) in conformity with UN law.[51]

3. CONCLUSIONS: ADVANTAGES AND LIMITS OF CONSTITUTIONALISM

Section 1 explained why political realism (e.g. prioritizing national security) and the embedded liberalism underlying UN and WTO law (such as security exceptions, UN HRL, WTO rules on non-discriminatory trade competition) have not prevented governance failures which are undermining the universally agreed upon SDGs. Yet the reality of constitutional pluralism existing alongside power-oriented legal disintegration among authoritarian and democratic countries does not prevent an "overlapping consensus" on functionally limited, multilevel constitutionalism in areas of common interest (like climate change mitigation and other SDGs). Section 2 illustrated why European integration law, democratic, republican, and common law constitutionalism have enabled greater input- and output-legitimacy in the EU governance of SDGs (like climate change mitigation) than in UN governance and in most UN Member States. Multilevel constitutionalism in internal and external EU relations – based on the ancient insight that *foreign policy* and military powers require no less constitutional restraints than *domestic policy* powers[52] – remains the main driver for defending the international rule of law and protecting human rights (e.g. of millions of refugees from Ukraine fleeing to the EU) in internal and external EU relations.

3.1. The need for transformative constitutional politics

Since the creation of the European economic communities in the 1950s, the democratic input-functions, republican output-functions, and human rights-functions of Europe's transformative, multilevel constitutionalism have succeeded in creating a European society as a sociological reality (as acknowledged in Art. 2 TEU), whose

[51] *See* D. Esty, J.Y. Remy, J. Trachtman, *Villars Framework for a Sustainable Global Trade System*, Remaking Trade for a Sustainable Future, 7 September 2023, available at: https://shridathramphalcentre.com/wp-content/uploads/2024/02/Villars-Framework-2.0.pdf (accessed 30 August 2024).

[52] That foreign policy powers (*e.g.* to conclude peace treaties and military alliances) are among the most dangerous policy powers that must remain subject to domestic constitutional restraints, was already emphasized by D. Giannotti, after the fall of the third Florentine republic (1527–1530) due to alliances concluded by the Medici with the Pope and the German emperor. *Cf.* the critical edition and introduction by G. Silvano, D. Giannotti, *De Republica Fiorentina*, Droz, Geneva: 1990.

ordoliberal governance has become part of European constitutional law and practices; it can be characterized by the following five "ordoliberal principles":

1. The *interdependence of orders* in European economic, political, legal and social integration and policy processes is emphasized in Art. 2 TEU and has promoted social and political support for European solidarity, evidenced in the EU's constructive responses to financial, environmental, health, security, and other recent global crises.
2. The TEU prescribes a "*competitive social market economy*" (Art. 3) with active social policies responding to the social, economic and political pressures caused by economic and democratic competition, for instance by assisting market participants (like workers, consumers, producers, citizens and migrants) to adjust to open competition, and supporting non-discriminatory conditions of competition in both the economic and political markets.
3. The EU's multilevel democratic constitutionalism is supplemented by "*economic*" and *"environmental constitutionalism*" structured by mutually coherent legal, political, economic and social principles for limiting market failures, related governance failures, and constitutional failures (as recognized in Arts. 3–12 TEU).
4. The EU's *foreign policy constitution* prescribes *transnational, rules-based liberal orders* based on respect for human and constitutional rights, transnational rule-of-law, and multilevel constitutionalism (e.g. as recognized in Arts. 3 and 21 TEU).
5. The dynamic evolution of EU constitutional, legislative, administrative, judicial and foreign policy practices is driven by *constitutional politics and constitutional economics*, both inside and beyond the EU and its broader EEA, for instance seeking solutions to new regulatory challenges by balancing the EU constitutional principles in multilevel democratic and judicial decision-making processes focused on citizens' interests – rather than only through state-driven intergovernmentalism as in the UN and WTO governance practices.

Section 2 offered and described examples where the EU's economic and environmental constitutionalism contributed to UN and WTO legal reforms (e.g. with respect to judicial remedies, human rights, and environmental protection). The *factual realities* of power politics do not justify abandoning the universally agreed UN human rights and governance ideals in the never-ending human search for justice (e.g. in the sense of reasonable justification of law and governance). Constitutional democracies must continue to follow their mandates (e.g. in Art. 21 TEU) to promote human rights, democratic self-government, the rule-of-law, and the universally agreed SDGs both at home and abroad. Yet factual realities – like the insufficient NDCs under the Paris Agreement, illegal WTO practices disrupting the WTO dispute settlement system,

and neoliberal biases in the 1994 Energy Charter Treaty and related investor-state arbitration undermining sustainable development – call for *normative consequences*, such as the enhanced use of plurilateral agreements as second-best policies and withdrawal from the Energy Charter Treaty (as approved by the EU Council in May 2024). Reasonable citizens and UN and WTO member governments should support EU leadership for designing ETS/CBAM systems in conformity with UN and WTO law – in contrast to the US Inflation Reduction Act of 2022 with its WTO-inconsistent tax and subsidy discriminations, and to the unwillingness of China and India to accept the COP climate policy commitment of phasing-out fossil fuel electricity and coal subsidies aimed at realizing zero-carbon economies by 2050. Plurilateral climate clubs are more likely to remedy some of the failures of the Paris Agreement (like disagreements on "common but differentiated responsibilities"; financial and technical assistance for GHG reductions in less-developed countries). Reasonable citizens must continue their democratic struggles for sustainable development reforms (e.g. at COP conferences) following the example of the EU's unique, multilevel constitutional, parliamentary, participatory and deliberative democracy (*cf.* Arts. 9–12 TEU).

3.2. Political limits of constitutionalism

Europe's millennia of constitutional traditions facilitated the adoption of the EU's unique "foreign policy constitution" requiring the EU to "support democracy, the rule of law, human rights and the principles of international law", including "strict observance of international law", including in the EU's external policies.[53] Yet Europe's multilevel democratic and republican constitutionalism has no parallel in Africa, the Americas and Asia. Section 1 explained why the incoherencies between neoliberal, ordoliberal, totalitarian and third world approaches to multilevel governance of PGs render constitutional reforms of UN and WTO law increasingly unlikely. The diverse prioritization of values in business-driven internet regulations (e.g. prioritizing self-regulation by American tech companies); in state-driven Chinese internet regulation (e.g. prioritizing censorship and politically imposed localization requirements for data storage); and in European internet regulation (prioritizing e.g. data privacy and other fundamental rights protection);[54] and the

[53] *Cf.* E.U. Petersmann, *The EU's Cosmopolitan Foreign Policy Constitution and its Disregard in Transatlantic Free Trade Agreements*, 21(4) European Foreign Affairs Review 449 (2016), pp. 449–468. For more on the ancient constitutional principles that "the polis should make reason into a law for itself and be guided thereby both internally and in its relations with other poleis" (Plato, *The Laws*, Book I, Harvard University Press, London: 1968, p. 645b, available at: https://topostext.org/work/484 (accessed: 30 August 2024)), and on the constitutional particularities of EU foreign policy, *see* M. Cremona (ed.), *Structural Principles in EU External Relations Law*, Hart Publishing, Oxford: 2018.

[54] *For details see* A. Bradford, *Digital Empires: The Global Battle to Regulate Technology*, Cambridge University Press, Cambridge: 2023. For more on the "telecommunications revolution" enabling the "weaponization" of social media and of political elections through disinformation (*e.g.* through abuses of

refusal by hegemonic countries (like China, Russia and the USA) to accept the jurisdiction of the ICC and to further the non-proliferation treaty's goal of nuclear disarmament; Russia's imperial wars of conquest; and the 2022 exclusion of Russia from the Council of Europe (also terminating Russian membership in the ECHR) confirm the existence of geopolitical rivalries provoking international legal disintegration. They demonstrate the political limits of constitutionalism vis-à-vis authoritarian governments disregarding the most fundamental UN legal principles of human rights, the sovereign equality of UN Member States, and rule-of-law.

If former US President Trump should be re-elected as US President in 2024 and realizes his plan to introduce a protectionist tariff wall around the US market, the world risks a repetition of the retaliatory trade protectionism provoked by the 1930 Smoot-Hawley Tariff Act of the US Congress, leading to further economic disintegration and political conflicts. As decarbonization of economies (e.g. by carbon taxes, border carbon adjustments, limitation of fossil fuel subsidies, GHG emission trading systems) will inevitably create trade, investment and environmental disputes, it is to be welcomed that most WTO members continue opposing the US disruption of the compulsory WTO dispute settlement system. In order for humanity to learn from its past constitutional failures and from Europe's multilevel constitutionalism which has enabled 70 years of unprecedented peace and social welfare among more than 40 democracies cooperating in the Council of Europe, the UN Secretary-General rightly promotes "cosmopolitan human rights values" and private-public partnerships providing PGs (like pharmaceutical industries producing vaccines; environmental technology industries promoting the decarbonization of economies; global internet companies assisting in the protection of cyber security; and the International Chamber of Commerce using its global network of national chambers of commerce and of some 50 million enterprises for carrying out UN food security programs).[55] Such private-public governance partnerships can enhance civil society support and "participatory democracy", thereby legitimizing the multilevel governance of PGs. They render collective responses to global governance crises more effective, for instance by initiating democratic climate protection legislation and climate litigation holding governments more accountable.[56] As European in-

artificial intelligence, internet censorship, China's data-driven surveillance capitalism and social credit systems for individuals and corporations, computer hacking and subversion) *see* M. Galeotti, *The Weaponisation of Everything: A Field Guide to the New Way of War*, Yale University Press, New Haven: 2022.

[55] *See* P. Lamy, *Reforming International Governance: Multilateralism or Polylateralism?*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 238–242; J. Denton, *Transnational Governance Failures – a Business Perspective and Roadmap for Future Action*, in: E.U. Petersmann, A. Steinbach (eds.), *Constitutionalism and Transnational Governance Failures*, Brill–Nijhoff, Leiden: 2024, pp. 243–250

[56] By defining economic welfare in terms of informed, voluntary consent to mutually beneficial rules, rather than only as utilitarian output efficiency (like macro-economic "Kaldor-Hicks efficiency" gains greater

tegration and EU enlargement policies have proven to be the most effective policy tools for protecting human rights, democratic peace, and other PGs since World War II, the EU and UN institutions must continue promoting democratic and republican constitutionalism as policy tools for protecting transnational PGs also beyond Europe.

than related social costs), constitutional economics sets strong incentives for rights-based, participatory and deliberative democratic and economic bottom-up reforms (like enhancing judicial remedies in trade, investment and environmental laws, stakeholder responsibilities of transnational corporations, and their monitoring by civil society). Constitutional economics also justifies the practice in the Athenian democracy 2,500 years ago to use the Greek term "idiot" for denouncing those citizens who pursue only their private self-interests without understanding that PGs require peaceful cooperation among all citizens.

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THE EUROPEAN COMMISSION AND THE ESTABLISHMENT OF THE EUROPEAN NEIGHBOURHOOD POLICY: A CASE-STUDY FOR INSTITUTIONALIST ANALYSIS?

Abstract: *Despite the mushrooming literature on the European Neighbourhood Policy (ENP) and its numerous problems, little attention has been given to the analysis of its origins. Upon examining the scholarship, two contending explanations emerge regarding the policy's formulation stage. While one perspective maintains that the policy was influenced by the European Commission's past experience, the other highlights how the policy was affected by the European Commission's desire to expand its powers vis-à-vis other European Union (EU) actors. Against this backdrop, this paper first seeks to frame both perspectives in theoretical terms. Then, through process-tracing analysis and elite interviews, it aims to determine which theoretical model not only better explains the structure of the Neighbourhood Policy, but also evaluates the nature of the interaction between European Union Member States and the European Commission throughout the policy's formulation stage. In doing so, the paper seeks to expand our knowledge of the ENP's genesis, as well as highlight the efficacy of institutionalist analysis of the European Neighbourhood Policy.*

Keywords: European Commission, delegation, European Neighbourhood Policy, principal-agent, historical institutionalism

INTRODUCTION

The European Neighbourhood Policy (ENP) is one of the most aspiring foreign policy endeavours the EU has ever launched. Its geographical scope includes 16 countries from Eastern Europe, Southern Caucasus, North Africa, and the Middle East,[1] and covers almost every field of cooperation between the EU and a third country –

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[1] Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine.

among which are Political Dialogue, Justice and Home Affairs, Common Foreign and Security Policy, and the Internal Market. The policy's vision "involves a ring of countries, sharing the EU's fundamental values and objectives, drawn into an increasingly close relationship, going beyond co-operation to involve a significant measure of economic and political integration."[2]

Given its ambitious objectives, its significance in defining the EU's role in the neighbourhood, and the fact that it is still a policy "in progress", it comes as little surprise that the ENP has attracted the attention of numerous EU scholars. Still, there is one overarching motif that is present in most ENP studies; that is, the excessive focus on the EU's problems in implementing the policy. Weak incentives, vague objectives, and the strange mixture of partners are just a few problems mentioned so as to describe EU's failed attempts to influence its surroundings. Consequently, policy, legal, and theory-guided ENP contributions typically aim to identify the ENP's flaws, measure its (in)effectiveness, offer solutions, or present future scenarios.[3]

Nonetheless, I argue that despite the ENP's problems playing such a prominent role in the existing literature, it is rather surprising how little attention has been paid to the early days of the ENP's development. Here I do not refer to the reasons behind the creation of the policy[4] but rather to the decision-making process and policy considerations that influenced the way the ENP was designed.

Which considerations guided the European Commission's (Commission) decision to construct the ENP in such a way? To what extent did the Commission and EU Member States (MSs) cooperate during the evolution of the policy? And how can we evaluate the interaction between both actors and its effect on the ENP formulation process? These are important questions that need further elaboration.

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[2] European Commission, *European Neighbourhood Policy – Strategy Paper*, 12 May 2004, COM (2004) 373 final, available at: https://eur-lex.europa.eu/EN/legal-content/summary/neighbourhood-policy-strategy-paper.html#:~:text=This%20document%20maps%20out%20the%20next%20steps%20in (accessed 30 August 2024).

[3] *E.g.* S. Blockmans, *The Obsolescence of the European Neighbourhood Policy*, Centre for European Policy Studies, Brussels: 2017; M. Emerson, G. Noutcheva, N. Popescu, *European Neighbourhood Policy Two Years on: Time indeed for an ENP Plus*, Centre for European Policy Studies, Brussels: 2007; C. Hillion, *The EU neighbourhood competence under Article 8 TEU,* Policy Paper No. 69/2023, available at: https://institutdelors.eu/wp-content/uploads/2020/08/euneighbourhoodart8teu-hillion-ne-jdi-feb13-3.pdf (accessed 30 August 2024); A. Hyde-Price, *A 'tragic actor'? A realist perspective on 'ethical power Europe'*, 84(1) International Affairs 29 (2008); D. Kochenov, *New developments in the European Neighbourhood Policy: Ignoring the problems*, 9 Comparative European Politics 581 (2011); S. Lavenex, *EU external governance in wider Europe*, 11(4) Journal of European Public Policy 680 (2004); M. Leigh, *The European Neighbourhood Policy: A Suitable Case for Treatment*, in: S. Gstohl, E. Lannon (eds.), *The Neighbours of the European Union's Neighbours: Diplomatic and Geopolitical Dimensions Beyond the European Neighbourhood Policy*, Routledge, London: 2015, pp. 203–226; T. Schumacher, *The EU and its Neighbourhood: The Politics of Muddling Through*, 58(1) Journal of Common Market Studies 187 (2020); K. Wolczuk, T. Gamkrelidze, A. Tyushka, T. de Waal, *Formulating Proposals for a More Effective Engagement with Neighbourhood Regions*, ENGAGE, Barcelona: 2024.

[4] In other words, why (for security reasons, substitute for enlargement, etc.) did the EU launch the policy? Essentially, this topic has been covered extensively by the existing literature.

After all, if it is a common practice to criticise the ENP, should we not pay more attention to the time-period in which the policy was planned and to the interaction between the actors responsible for its design?

Principally, the literature on the subject offers two prominent views of the ENP's formulation stage. On the one hand, scholars argue that the way the Commission designed the ENP was based on its previous experience in managing enlargement. On the other hand, others suggest that the ENP was influenced by the Commission's bureaucratic self-interest to strengthen and expand its role vis-à-vis EU actors in the intergovernmental-protected domain of EU foreign policy.

Against this background, this article sets out to conceptualise both standpoints in theoretical terms. Next, based on process-tracing and triangulation of data sources,[5] it seeks to scrutinise the efficacy of both theoretical models in explaining the ENP's design as well as the actors' interaction during the ENP formulation stage. In so doing, the article not only contributes to our understanding of the early days of the initiative, but also to the theoretical body of literature on the ENP, which so far has been dominated by policy-oriented studies – in the words of Kratochvíl and Tulmets: "Only a handful of authors have so far tried to couple the research on the policy to the theoretical debates in the field of international relations and EU studies."[6]

Following this introduction, the remainder of the article is structured as follows. The first part presents the theoretical framework of this article. The second part examines the emergence of the policy and its scope. Thereafter, the third part elaborates on the ENP's design, while the fourth part focuses on the Commission's negotiations with ENP partners. The article ends with some concluding remarks.

1. THEORISING THE ENP FORMULATION STAGE

As aforementioned, the literature surrounding the ENP accentuates two explanations concerning the initiative's formulation stage. For the purpose of this study, the formulation stage begins in January 2002 when the British Secretary of State raised the idea of establishing a policy towards Eastern Europe and triggered the process that led to the launch of the ENP.[7] It subsequently ends in May 2004 when the ENP Strategy Paper was introduced.[8] Now, how can we frame both standpoints in theoretical terms?

[5] The data for this study was collected from official EU Communications, secondary sources, and elite interviews.

[6] P. Kratochvil, E. Tulmets, *Constructivism and Rationalism in EU External Relations. The Case of the European Neighbourhood Policy*, Nomos, Baden-Baden: 2010, p. 9.

[7] J. Straw, *EU's relationship with it future neighbours following enlargement (Ukraine, Belarus and Moldova)*, Letter 7703/02, 2002/04, available at: https://data.consilium.europa.eu/doc/document/ST-7703-2002-INIT/en/pdf#:~:text=Reform%20momentum%20in%20Ukraine%20and%20Moldova%20is%20uncertain (accessed 30 August 2024).

[8] European Commission, *supra* note 2.

1.1. The ENP through a historical institutionalist lens

Various analysts[9] indicate that the ENP's design was inspired by the Commission's vast experience in dealing with enlargement and pre-accession policies. Correspondingly, the ENP's strong resemblance to past policy templates has led scholars to apply Historical Institutionalism (HI) to their analyses. Principally, HI is one school of thought (together with Sociological Institutionalism and Rational Choice Institutionalism) situated under the umbrella of new institutionalism.[10] Generally speaking, new institutionalists emphasise the importance of institutional values and argue that we cannot separate formal institutional rules from their normative context.[11] While placing the analytical focus on the polity, the presumption of new institutionalists is "that the polity structures the inputs of social, economic and political forces and has a consequential impact on the policy outcome."[12] Thus, central to new institutionalism is the belief that institutions, as actors in their own right, affect outcomes and shape actions.[13]

In their attempt to develop explanatory arguments concerning policy outcomes, HI scholars maintain that not only do institutions matter, but that the time factor and macro-context are also of great importance. HI scholars see the relationship between institutions and agents as more than just functional-based interaction, and thus posit that "by shaping not just actors' strategies (as in rational choice), but their goals as well (...) institutions structure political situations and leave their own imprint on political outcomes."[14] Moreover, HI studies are "not just looking at the past, but [are] looking at processes over time."[15]

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[9] C. Gebhard, *The ENP's Strategic Conception and Design. Overstretching the Enlargement Template?*, in: R. Whitman, S. Wolff (eds.), *The European Neighbourhood Policy in Perspective – Context, Implementation and Impact*, Palgrave Macmillan, Hampshire: 2010, pp. 89–109; J. Kelly, *New Wine in Old Wineskins: Policy Adaptation in the European Neighbourhood Policy*, 44(1) Journal of Common Market Studies 29 (2006); A. Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?*, 12(2) The Columbia Journal of European Law 383 (2006).

[10] P. Hall, R. Taylor, *Political Science and the Three New Institutionalisms*, 44(5) Political Studies 936 (1996), p. 936.

[11] S. Bulmer, *The Governance of the European Union: A New Institutionalist Approach*, 13(4) Journal of Public Policy 351 (1998).

[12] *Ibidem*, p. 369.

[13] M. Aspinwall, G. Schneider, *Same menu, separate tables: The institutionalist turn in political science and the study of European integration*, 38(1) European Journal of Political Research 1 (2000). *See also* G.J. March, J.P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78(3) The American Political Science Review 734 (1984), p. 734 .

[14] K. Thelen, S. Steinmo, *Historical Institutionalism in Comparative Politics*, in: S. Steinmo, K. Thelen, F. Longstreth (eds.), *Structuring Politics: Historical Institutionalism in Comparative Analysis*, Cambridge University Press, Cambridge: 1992, p. 9.

[15] P. Pierson, T. Skocpol, *Historical Institutionalism in Contemporary Political Science*, in: I. Katznelson, H.V. Milner (eds.), *Political Science: State of the Discipline*, W.W. Norton, New York: 2002, p. 698.

In the context of continuity, deeply embedded in historical institutionalist thought is the notion that institutions are resistant to change. Therefore, a key concept in HI is path-dependence, whereby "[o]nce actors have ventured far down a particular path (...) they are likely to find it very difficult to reverse course."[16] Path-dependence processes are usually stimulated by self-reinforcing positive feedbacks that create incentives for institutions to stick with existing policies.[17] These positive feedbacks for a particular policy choice are exactly why HI pays so much attention to time, as "[r]elative timing, or sequence, matters because subsequent self-reinforcing processes (...) transform the consequences of later developments."[18]

Finally, concerning institutional change, HI tends to divide historical events "into periods of continuity punctuated by 'critical junctures', i.e., moments when substantial institutional change takes place thereby creating a 'branching point' from which historical development moves onto a new path."[19] Still, some HI scholars posit that it is insufficient to examine institutional change solely through the lens of "critical junctures" and "path-dependence". Instead, it is argued that "[t]here is nothing automatic about institutional stability" as "institutions require active maintenance (...) in response to changes in the political and economic environment in which they are embedded."[20] Accordingly, Streeck and Thelen[21] identify various strategies/mechanisms that institutions and policymakers could utilise in order to generate gradual transformative change in an environment dominated by status-quo bias.

In light of the aforementioned, we need to provide some theoretical predictions concerning the ENP formulation stage. First, we envisage that the formulation stage was affected by path-dependence processes. Therefore, we can predict that the Commission, influenced by positive feedbacks, will create a policy that has a close resemblance to previous successful policies. Moreover, we can expect that path-dependence processes will not only affect the Commission's policy choices, but also its behaviour throughout the formulation process. Still, we can also assume that the Commission, beyond the somewhat passive impact of path-dependence, will be more active in using different strategies in order to adapt to the new realities following the emergence of the new policy.

[16] *Ibidem*, p. 700.

[17] P. Pierson, *Politics in Time: History, Institutions, and Social Analysis*, Princeton University Press, Princeton: 2004.

[18] Pierson, Skocpol, *supra* note 15, p. 701.

[19] Hall, Taylor *supra* note 10, p. 942.

[20] W. Streeck, K. Thelen, *Introduction: Institutional Change in Advanced Political Economies*, in: W. Streeck, K. Thelen (eds.), *Beyond Continuity: Institutional Change in Advanced Political Economies*, Oxford University Press, Oxford: 2005, p. 3.

[21] *Ibidem. See also* J.S. Hacker, P. Pierson, K. Thelen, *Drift and conversion: hidden faces of institutional change*, in: J. Mahoney, K. Thelen (eds.), *Advances in Comparative-Historical Analysis*, Cambridge University Press, Cambridge: 2015, pp. 180–210.

1.2. The ENP through a principal-agent lens

Some ENP scholars[22] posit that the ENP was constructed by the Commission in a way that accords with its interests and aspirations for a greater role in EU foreign policy. Yet, ENP contributions usually do not offer a theoretical framework for this standpoint. Thus, I maintain that Principal-Agent (PA), as an institutional approach with a strong focus on actors' interests and power relations, allows us to evaluate the ENP's development and scrutinise the interaction between the Commission and the MSs.

The PA theory was conceived in the study of economics[23] and was firstly applied to political science to examine American politics.[24] Essentially, PA revolves around the relationship between principals and agents. This relationship is defined as a situation in which "one, designated as the agent, acts for, on behalf of, or as representative for the other, designated the principal, in a particular domain of decision problems."[25] PA, as a theoretical framework strongly associated with the rational choice school of thought, views this relationship as functional. As such, there are various reasons why principals choose to engage in a relationship with an agent, *inter alia* to reduce transaction-costs, enhance the credibility of policy commitment, improve the efficiency of the decision-making process or shift blame for unpopular decisions.[26] For instance, in the context of transaction-costs and decision-making, principals could delegate competences since they lack information or technical expertise. As Mark Thatcher and Alec Sweet[27] explain: "[a]gents are expected to develop and employ expertise in order to produce, or help principals produce appropriate public policy."

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[22] E. Johansson-Nogués, *The EU and its neighbourhood: an overview*, in: K. Weber, M. Smith, M. Baun (eds.), *Governing Europe's Neighbourhood: Partners or Periphery?*, Manchester University Press, Manchester: 2007, pp. 21–35; J. Pelerin, *The ENP in Interinstitutional Competition – An Instrument of Leadership for the Commission?*, in: D. Mahncke, S. Gstöhl (eds.), *Europe's Near Abroad: Promises and Prospects of the EU's Neighbourhood Policy*, Peter Lang, Brussels: 2008, pp. 47–67.

[23] M. Berhold, *A Theory of Linear Profit-Sharing Incentives*, 85(3) Quarterly Journal of Economics 460 (1971), pp. 460–482; S. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63(2) The American Economic Review 134 (1973).

[24] D. Epstein, S. O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38(3) American Journal of Political Science 697 (1994); M.D. McCubbins, R.G. Noll, B.R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3(2) Journal of Law, Economics, & Organization 243 (1987).

[25] Ross, *supra* note 23, p. 134.

[26] M. Pollack, *Delegation, agency, and agenda setting in the European Union*, 51(1) International Organization 99 (1997); J. Tallberg, *Delegation to Supranational Institutions: Why, How, and with What Consequences?*, 25(1) West European Politics 23 (2002); M. Thatcher, A. Stone Sweet, *Theory and practice of delegation to non-majoritarian institutions*, 25(1) West European Politics 1 (2002).

[27] Thatcher, Stone Sweet, *supra* note 26, p. 4.

PA's initial standpoint views the agent as an opportunistic actor that tries to pursue its interests rather than the interests of its masters.[28] In so doing, the agent will attempt to use different strategies and exploit different advantages to achieve its goals. Consequently, the principals might face problems (i.e., "agency losses"), as the agents' shirking could "enact outcomes different from the policies preferred by those who originally delegated power."[29]

With that in mind, the principals try to avoid agency losses by establishing various control mechanisms before (*ex-ante*), during (*ad-locum*) and after (*ex-post*) the act of delegation. First, *ex-ante* control is put in place before the delegation act and associated with matters of agency design and various administrative procedures.[30] Second, *ex-post* control refers to on-going control mechanisms. Following Mathew McCubbins & Thomas Schwarz,[31] *ex-post* mechanisms are usually categorised as "police-patrol oversight" (active and direct monitoring) or "fire-alarm oversight" (third parties' monitoring). Third, the *ad locum* control mechanism is exerted by the principals during the delegated act. Put differently, it is "not deployed before or after the agent executed the delegated task, but simultaneously with the fulfilment of this task."[32]

Now the question arises as to how PA's assumptions can be applied to the ENP. First, I conceptualise the relationship between the Commission and the MSs as a PA relationship, where the Commission is the agent in charge of designing the policy while the MSs act as principals. Second, based on the PA's standpoint concerning agency behaviour, we should expect that during the ENP formulation stage the Commission would attempt to use various strategies while pursuing its own interests. In this context, we also assume that the Commission, as a supranational institution, is not only a competence-maximiser but also an integrationist agent, as it seeks "to increase [its] own competences and more generally the competences of the European Union."[33] In the subsequent parts of the article, I explore whether the analysis verifies both HI and PA's assumptions with respect to the initiative's formulation stage.

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[28] D. Kiewiet, M. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process*, University of Chicago Press, Chicago: 1991.

[29] Epstein, O'Halloran, *supra* note 24, p. 699.

[30] *Ibidem*.

[31] M. McCubbins, T. Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 American Journal of Political Science 165 (1984).

[32] T. Delreux, B. Kerremans, *How Agents Weaken their Principals' Incentives to Control: The Case of EU Negotiators and EU Members in Multilateral Negotiations*, 32(4) Journal of European Integration 357 (2010), p. 361.

[33] M. Pollack, *The Engines of European Integration – Delegation, Agency, and Agenda Setting in the EU*, Oxford University Press, Oxford: 2003, p. 35. *See also* G. Garrett, G. Tsebelis, *An Institutional Critique of Intergovernmentalism*, 50 International Organization 269 (1996).

2. THE ENP AS A COMPETENCE BOOST

The first issue to be inspected is related to the emergence of the initiative and its general scope. Essentially, various studies maintain that the Commission used the ENP to expand its own competences. Rosa Balfour,[34] for example, posits that "[t]he ENP represents an attempt by the Commission to muscle its way into EU foreign policy." Similarly, Dimitry Kochenov argues that the ENP helped the Commission "to justify and consolidate its role in the shaping of EU foreign policy."[35]

Additionally, while the initial discussions regarding the initiative focused on Eastern Europe (Belarus, Moldova and Ukraine[36]), the Commission's President, Romano Prodi, underlined the need "to address the whole band of regions around the Union, stretching from the Maghreb to Russia."[37] As such, Johansson-Nogués[38] contends that it was the Commission that "significantly broadened a previously modest policy into a strategy, insisting on a creation of a 'ring of friends' around the EU-23's outer border." By the same token, Dov Lynch[39] claims that ENP's geographical scope was expanded "at Prodi's insistence, it would seem", whereas Federica Bicchi[40] asserts that "it was apparently him [i.e., Prodi] that took the front of the stage in spearheading the inclusion of the Mediterranean countries."

Finally, several scholars maintain that the Commission managed to take control over the ENP because the MSs were preoccupied with other matters and did not pay much attention to the emerging policy. Johansson-Nogués,[41] for example, posits that the General Affairs and External Relations Council (GAERC) "only gave cursory treatment to the new neighbourhood initiative. Accession negotiations with the Eastern candidate countries were at a decisive stage and took precedent

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[34] R. Balfour, *Promoting human rights and democracy in the EU's neighbourhood: tools, strategies and dilemmas*, in: R. Balfour, A. Missiroli (eds.), *Reassessing the European Neighbourhood Policy*, EPC, Brussels: 2007, p. 15.

[35] D. Kochenov, *The European Neighbourhood Policy: Pre-Accession Mistakes Repeated*, in: E. Tulmets, L. Delcour (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood,* Nomos, Baden-Baden: 2008, p. 12.

[36] *See e.g.*, Straw, *supra* note 7; 2421st Council meeting (General Affairs and External Relations), Luxembourg, 15 April 2002.

[37] R. Prodi, *Europe and the Mediterranean: Time for Action*, Speech at UCL Universite Catholique de Louvain-la-Neuve, EuroMed Report, 26 November 2002. *See also* R. Prodi, *A Wider Europe – A Proximity Policy as the Key to Stability*, Speech at the Sixth ECSA-World Conference, 5 December 2002, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_619 (accessed 30 August 2024).

[38] Johansson-Nogués, *supra* note 22, p. 26.

[39] D. Lynch, *The new Eastern Dimension of the enlarged EU*, in: J. Batt, D. Lynch, A., Missiroli, D. Triantaphyllou (eds.), *Partners and Neighbours: A CFSP for a Wider Europe*, European Union Institute for Security Studies, Brussels: 2003, p. 49.

[40] F. Bicchi, *European Foreign Policy Making toward the Mediterranean*, Palgrave MacMillan, Hampshire: 2007, p. 177.

[41] Johansson-Nogués, *supra* note 22, p. 25.

over most other matters." In the same vein, William Wallace[42] argues that the MSs were "[p]reoccupied with tying up the last elements of the accession package [and] there was little willingness to look beyond."[43]

Against this backdrop, it could be argued that the emergence of the ENP and its broad geographical scope were a result of agency shirking. In other words, as an opportunistic and competence-maximiser agent, the Commission tried to gain a stronger foothold in EU foreign policy by substantially expanding a modest call to engage with some Eastern neighbours, and created a grandiose plan to transform the entire EU's neighbourhood with itself at the centre.

Moreover, the Commission was able to shape the ENP according to its preferences by exploiting the MSs' low level of attention. This argument can be expressed in terms of "political salience", i.e., "the significance, importance and urgency that an actor ascribes to a certain issue on the political agenda."[44] In this respect, one could point out that during the GAERC meeting in April 2002, the policy was not high on the list of priorities (point no. 9), whereas topics like enlargement and illegal immigration were given a higher priority.[45]

Notwithstanding the above, the evidence gathered in this study portrays a rather different picture than what is suggested by PA's assumptions on agency's opportunistic behaviour. What's more, it seems that HI is better suited to offer a more comprehensive account on the Commission's interest in securing a leading role in the ENP. As such, I tend to agree with Simon Hug,[46] who argues that rational choice institutionalism "presents the clearest definition of preferences and the weakest assumptions about preferences."

First, the analysis of EU Communications prior to the ENP formulation stage provides evidence that the topic of the EU's neighbourhood was discussed within the EU long before January 2002, which marks the official beginning of the formulation stage. Referring to the MSs, the significance of the EU's periphery was already acknowledged in the Council of the European Union's report in 1998. In the report, the Council identified Ukraine, Russia, and the Mediterranean region as regions of significance and affirmed that "it is there that the EU has the greatest

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[42] W. Wallace, *Looking After the Neighbourhood: Responsibilities for the EU-25*, Notre Europe, Paris: 2003.

[43] *See also* Bicchi, *supra* note 40; Pelerin, *supra* note 22.

[44] K. Oppermann, *Salience and sanctions: a principal-agent analysis of domestic win-sets in two-level games – The case of British European policy under the Blair government*, 21(2) Cambridge Review of International Affairs 179 (2008).

[45] 2421st Council meeting (General Affairs and External Relations), Luxembourg, 15 April 2002. *See also* European Council and the Council of the European Union, *Copenhagen European Council, Presidency Conclusions*, available at: https://www.consilium.europa.eu/media/21225/72921.pdf#:~:text=The%20European%20Council%20welcomed%20the%20presentation%20by%20President (accessed 30 August 2024).

[46] S. Hug, *Endogenous Preferences and Delegation in the European Union*, 36(1/2) Comparative Political Studies 41 (2003), p. 44.

long-term common interests and the greatest need for coherence and effectiveness."[47] Also, in June 1999 the European Council[48] highlighted "the importance of all these regions to the European Union, not only as partners in its external relations but also for the stability and security of our continent and its immediate neighbourhood." As for the Commission, not only was the idea to combine the Eastern and Southern neighbourhoods on the Commission's agenda before 2002,[49] but EU officials also confirmed that there was pressure from the Southern EU members (and Sweden[50]) to include the Mediterranean countries in the policy.[51]

Therefore, instead of seeing the ENP and its scope as a case of agency shirking, it might be more accurate to view this situation as a case where the agent fulfilled its task. Specifically, since the ENP does not fall under the Commission's exclusive right of initiative (following Arts. 22 and 34(2) of the Treaty on European Union), the Commission performed its duties as a soft/informal agenda-setter that has "the capability to provide policy proposals upon request"[52] and sets the agenda "by constructing 'focal points' for bargaining."[53] Put differently, the Commission offered a solution that was more in line with the aggregated preferences of all principals. What's more, since the Commission needed the unified approval of the Member States, the combination of East and South was the only option available to move the initiative forward. In this regard, one could also refer to Bart Van Vooren's view on the Commission's use of soft instruments during the ENP's conceptualisation phase.[54] He suggests that these instruments aimed to initiate and steer discussions among MSs rather than propose legally-binding instruments/legislation. Furthermore, it could also be argued that the principals' *ex-ante* control mechanisms (i.e., legal and administrative procedures) were

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[47] *Report to the European Council*, *'Common Strategies*, 8 December 1998, document 13943/98.

[48] Cologne European Council, *Conclusions of the Presidency*, p. 27, available at: https://www.europarl.europa.eu/summits/kol1_en.htm#:~:text=The%20European%20Council%20met%20in%20Cologne%20on%203 (accessed 30 August 2024).

[49] *E.g.* European Commission, *Agenda 2000: For a stronger and wider Union*, Brussels, 15 July 1997, COM(1997) 2000 final; European Commission, *The Commission's Work Programme for 2002*, Brussels, 5 December 2001, COM(2001) 620 final.

[50] In March 2002, Sweden expressed the need to re-examine the relations with the entire neighbourhood (Russia and the Mediterranean). *See* A. Lindh, L. Pagrotsky, *EU's relationship with its future neighbours following enlargement*, Letter 7713/02, 8 April 2002.

[51] EU interviews 4 and 9; unless otherwise stated, all statements by EU officials are based on the author's interviews in Brussels which were conducted between June 2012 and February 2013 (all files with the author). *See also* G. Edwards, *The Construction of Ambiguity and the Limits of Attraction: Europe and its Neighbourhood*, 30(1) Journal of European Integration 45 (2008); R. Zaiotti, *Of Friends and Fences: Europe's Neighbourhood Policy and the Gated Community Syndrome*, 29(2) Journal of European Integration 143 (2007).

[52] N. Klein, *European Agents out of Control? Delegation and Agency in the Civil-Military Crisis Management of the European Union 1999–2008*, Nomos, Baden-Baden: 2010, p. 50.

[53] Pollack, *supra* note 33, p. 50.

[54] B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence*, Routledge, London: 2012, pp. 185–191.

effective as the agent was aware that it cannot offer a geographical scope that would be against the will of its principals.

These arguments are supported by EU officials, who explain that "[w]e, as the Commission, didn't take sides and try to offer a solution in the form of a policy for both South and East"[55] and "there was a need to extend the geographical scope in order to have everyone on board";[56] and that "the combination of East and South was just a pragmatic solution."[57]

Moving on to the second point – that is the Commission's interest in expanding its powers – although HI does not entirely reject the assumption that institutions might be competence-maximisers,[58] "[h]istorical institutionalists are typically suspicious of functional explanations."[59] Instead, HI underscores the importance of time, process, and overarching context to the analysis of policy outcomes. Therefore, I posit that HI provides a more comprehensive and context-based view on the Commission's perspective regarding the emergence of the initiative.

Principally, following the key role the Commission played during the accession process, the Commission viewed itself as an important actor in EU foreign policy. Indeed, while the Commission might not possess much power in accession negotiations, it still has a major influence inasmuch as "[u]nlike the Member States, the Commission is engaged in all stages of the enlargement process."[60] Along similar lines, a Commission official clarified that "when it came to 'real' foreign policy impact of the EU in the last decade, the power lay with the Commission."[61]

At this point, the issue of sequence and timing comes into play. John Ikenberry[62] posits that "[w]ithin formal organizations, individuals seek to preserve their mission and responsibilities, often in the face of a radically changed environment." Paul Pierson[63] continues this line of thinking by stating that "political actors must anticipate that their political rivals may soon control the reins of government." Essentially, the time-period when the ENP was designed (i.e., 2002–2004) was a time when

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[55] EU interview 4.

[56] EU interview 1; EU Interview 6.

[57] EU Interview 2.

[58] P. Pierson, *The Path to European Integration: A Historical Institutionalist Analysis*, in: W. Sandholtz, A. Stone Sweet (eds.), *European Integration and Supranational Governance*, Oxford University Press, Oxford: 1998, pp. 27–58.

[59] Pierson, Skocpol, *supra* note 15, p. 708. *See also* K. Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan*, Cambridge University Press, Cambridge: 2004.

[60] U. Diedrichs, W. Wessels, *The Commission and the Council*, in: D. Spence, G. Edwards (eds.), *The European Commission*, John Harper Publishing, London: 2006, p. 231.

[61] Kelly, *supra* note 9, p. 31.

[62] G.J. Ikenberry, *The Rise, Character, and Evolution of International Order*, in: O. Fioretos, G.T Falleti, A. Sheingate (eds.), *The Oxford Handbook of Historical Institutionalism*, Oxford University Press, Oxford: 2016, p. 543.

[63] Pierson, *supra* note 17, p. 43.

the last stages of the 2004 enlargement were finalised. Hence, the timing was right for the Commission as it came about "when the conclusion of accession negotiations threatened to narrow its domain and so undermine its relative institutional strength."[64] What's more, the Commission's Wider Europe Task Force, which was responsible for developing the ENP, consisted of EU officials with a strong enlargement background. This group of experts not only had a cohesive view of how to construct the EU's external relations, but also sought to find new policy areas (as the enlargement was finalised) where they could offer their expertise and enjoy considerable autonomy.[65]

Against this backdrop, "*conversion*" could be used as an effective strategy for institutions to confront new realities (e.g., changes in power relations) that threaten their powers. In the process of conversion, "[i]nstitutions are not so much amended or allowed to decay as they are redirected to new goals, functions, or purposes."[66] In the case explored herein, the emergence of a new policy allowed the Commission "to continue playing a significant, and perhaps even stronger, role in external affairs."[67]

Lastly, with respect to the argument that the Commission exploited the MSs' lack of attention, I posit that this explanation lacks merit. True, the ENP was a relatively low priority on the Council's agenda in 2002. Yet, the situation appears quite different in the later stages of the formulation process, particularly after the publication of the Commission's first Communication on the ENP, the Wider Europe Communication.[68] Clearly, the Communication attracted a wide range of reactions from the MSs and the matter was high on the agenda during the the GAERC meeting in March[69] and April 2003.[70]

Furthermore, according to EU officials the initiative was discussed at great length within Council's Working Groups and on the COREPER level. For example, an EU official asserts that "[t]he MSs were always involved (...) before and during (...)

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[64] Magen, *supra* note 9, p. 396.

[65] *Ibidem*; G. Vobruba, *Expansion without enlargement – Europe's dynamism and the EU's neighbourhood policy,* EUROZINE, 28 Seprember 2007, available at: https://www.eurozine.com/expansion-without-enlargement/ (accessed 30 August 2024).

[66] Streeck, Thelen, *supra* note 20, p. 26.

[67] Kelly, *supra* note 9, p. 32. In her analysis, J. Kelly (*see also* Magen, *supra* note 9) uses organisational management theories to describe the Commission's adaptation abilities. Principally, J. Kelly argues that the Commission, in the face of a threat to its powers, was trying to safeguard (or even expand) its important position in EU foreign policy (i.e., *domain offense*) by replacing existing domains with new ones (i.e., *domain creation*).

[68] European Commission, *Wider Europe: Neighborhood: A New Framework for Relations with our Eastern and Southern Neighbours*, Brussels, 11 May 2003, COM(2003)104 final.

[69] 2496th Council meeting (General Affairs and External Relations), Luxembourg, 19 March 2003, second item.

[70] 2502nd Council meeting (General Affairs and External Relations), Luxembourg, 14 April 2003, first item.

through meetings, working groups, and informal discussions,"[71] while another official recalls that "[t]here were endless discussions in the Council regarding the resolutions and many discussions in the working groups."[72] Thus, also in this context it could be contended that the agent was well aware that it was being closely monitored (i.e., *ex-post* control mechanisms) by its principals.

3. THE COMMISSION AND THE ENP'S INSTITUTIONAL STRUCTURE

The second matter to be examined in this study is the ENP's institutional design. In this case, HI could provide us with rather valuable insights. Essentially, historical institutionalists assume that path-dependence processes will cause institutions to be resilient to change. As such, they "tend to be conservative and find ways of defending existing patterns of policy."[73] Additionally, as a result of self-reinforcing positive feedbacks, "original choices are likely to figure heavily in the current functioning of the institution."[74] Thus, actors seek "to entrench institutional arrangements that perpetuate their advantages into the future."[75]

It is evident that numerous aspects proposed by the Commission originated from its enlargement and pre-accession experience. Among the similar instruments and methodologies, one could draw attention to the conditionality and socialisation principles; the reliance on soft law frameworks such as Action Plans and Progress Reports; the content and structure of the ENP Action Plans; the inclusion of programs like Twinning and TAIEX; and the monitoring procedures.[76] Furthermore, the fact that the Wider Europe Task Force was mostly composed of enlargement experts "led to some direct mechanical borrowing from enlargement experiences."[77] An illuminating example in this regard is that "in the very early in-house ENP drafts, the name of a recent candidate state would sometimes accidentally appear".[78] EU officials also admitted that "they sometimes just 'copied and pasted' the documents

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[71] EU interview 5. *See also* A. Nervi, *The Making of the European Neighbourhood Policy*, Nomos, Baden-Baden: 2011.

[72] EU interview 8.

[73] B.G. Peters, J. Pierre, D.S. King, *The Politics of Path Dependency: Political Conflict in Historical Institutionalism*, 67(4) The Journal of Politics 1275 (2005), p. 1276.

[74] Pierson, Skocpol, *supra* note 15, p. 709.

[75] Ikenberry, *supra* note 62, p. 550.

[76] EU Interview 4; N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis*, Hart Publishing, London: 2014, pp. 34–94; Gebhard, *supra* note 9; Kelly, *supra* note 9; Magen, *supra* note 9.

[77] Kelly, *supra* note 9, p. 32.

[78] *Ibidem*, p. 33.

they had been dealing with in the framework of the enlargement."[79] Given this state of affairs, one could conclude that the ENP's design was extensively affected by the Commission's path-dependence from enlargement, or in the words of an EU official: "[t]here is nothing new in the ENP except packaging."[80] In fact, the Commission's reliance on its previous experience was not only evident in its policy choices but also on a declaratory level, as the Commission's President stated: "I admit that many of the elements which come to my mind are taken from the enlargement process."[81]

This analysis further reveals how the success of enlargement had an overwhelming impact on the decision to structure the ENP following the enlargement template. Accordingly, we can find numerous references to the enlargement success (in HI terms, self-reinforcing positive feedbacks) in EU Communications and official speeches. For instance, Prodi[82] stated that "[l]asting and sustainable stability in the European region, has been the crowning achievement of the European Union", and "[w]e should recognise that this success creates legitimate expectations in the EU's future neighbours." Similarly, in its Wider Europe Communication, the Commission maintained that "enlargement has unarguably been the Union's most successful foreign policy instrument",[83] while the ENP Strategy Paper underlined that "[t]he objective of the ENP is to share the benefits of the EU's 2004 enlargement with neighbouring countries."[84]

Finally, the Commission's aspiration to safeguard the key role it played in enlargement, while copying the enlargement's success to the new policy, could also explain why the Commission decided to design the ENP following the enlargement template and not, for example, following the Euro-Mediterranean Partnership (EMP) template.

Essentially, the EMP is considered to be the main point of reference when discussing EU-Mediterranean relations pre-ENP, since it represented the "first real attempt for the EU to engage in a region as collective actor."[85] The EMP was launched at the Barcelona Conference in November 1995 with the aim of protecting European interests. The enormous economic gap between the Community and the Mediterranean neighbours – with their high unemployment rate, organised crime, and terrorism – were all viewed as sources of instability that could spill-over to Europe.[86] Still, it is rather evident that since its establishment the EMP has

[79] E. Tulmets, *Experimentalist governance in EU's external relations: The cases of enlargement and of the European Neighbourhood Policy*, Conference on "experimentalist governance" University of Madison, Wisconsin, 20–22 April 2007, p. 11.

[80] Kelly, *supra* note 9, p. 41.

[81] Prodi, *supra* note 37, p. 3.

[82] *Ibidem*, p. 2.

[83] European Commission, *supra* note 68, p. 5.

[84] European Commission, *supra* note 2, p. 3.

[85] Nervi, *supra* note 71, p. 61.

[86] R. Hollis, *Europe and the Middle East: Power by Stealth?*, 73(1) International Affairs 15 (1997); C. Spencer, *The EU and Common Strategies: The Revealing Case of the Mediterranean*, 6(1) European Foreign Affairs Review 31 (2001).

failed to reach its objectives.[87] More importantly, since the EMP was mainly based on intergovernmental cooperation, and thus the Commission, in contrast to the MSs (e.g. France and Spain), has never taken the role of a policy entrepreneur in its relations with the Mediterranean countries.[88] According to an EU official, the idea to reformulate the EMP never came up as an option since it was "untouchable" and "although it was obvious that the EMP is a failure, it was protected by the member states as their thing."[89]

Summing up, HI offers strong arguments as to how and why path-dependence processes influenced the way the Commission structured the ENP. Yet, I agree with Guy Peters and others[90] that "[i]t is not sufficient to say that patterns persist; to be effective a theory should be capable of linking outcomes with actors and with the process that produced the outcomes." In the same vein, Thelen[91] maintains that "institutional survival depended not just on positive feedback, but on a process of institutional adjustment." Evidently, beyond the impact of path-dependence on the way the Commission structured the ENP, we can clearly see that the Commission was indeed active while using two kinds of strategies, namely *conversion* and *layering*.

Concerning the strategy of conversion, it was previously mentioned that institutions, while facing a changing environment, will attempt to direct existing policies to serve new ends. This process, however, "requires active reinterpretation"[92] of how those policies, rules, and instruments can be reused or remodelled to fit new purposes. In the context of the ENP, "European policy elites came to perceive enlargement not only as a tremendous success story, but also as a proven instrument of EU foreign policy whose methodologies could be adapted and used again."[93] In this respect, Prodi[94] stated that: "[t]he goal of accession is certainly the most powerful stimulus for reform we can think of. But why should a less ambitious goal [i.e., enlargement reforms without membership perspective] not have some effect?" Finally, a senior EU official recalls that "we really thought that what was working with candidate countries will work with the ENP partners."[95]

In a similar vein, it is also evident that the Commission used the strategy of institutional *layering* while designing the ENP. The strategy of layering "involves the

[87] *E.g.* E. Baracani, *From the EMP to the ENP: New European pressure for democratisation? The case of Morocco*, 1(2) Journal of Contemporary European Research 54 (2005); M. Pace, *Norm Shifting from EMP to ENP: The EU as a Norm Entrepreneur in the South?*, 20(4) Cambridge Review of International Affairs 659 (2007). *See also* European Commission, *supra* note 68.

[88] Bicchi, *supra* note 40, p. 182.

[89] EU Interview 4.

[90] Peters, Pierre, King, *supra* note 73, p. 1284.

[91] Thelen, *supra* note 59, p. 34.

[92] Hacker, Pierson, Thelen, *supra* note 21, p. 185.

[93] Magen, *supra* note 9, p. 398. *See also* Ghazaryan, *supra* note 76, p. 74.

[94] Prodi, *supra* note 37, p. 4.

[95] EU Interview 4.

grafting of new elements onto an otherwise stable institutional framework."[96] Thus, institutions can "sell" the new (and often rather marginal) amendments without creating a strong opposition, as those modifications do not diminish existing policies or substantially change the status-quo.[97] In the case of the ENP, layering is connected to the Commission's proposal to make the ENP Action Plans (APs) the key instrument in the policy. According to the Commission, the APs "should be political documents – drawing together existing and future work in the full range of the EU's relations with its neighbours."[98] Therefore, the APs are structured as political roadmaps guiding the relationship between the EU and ENP countries. Importantly, it was foreseen that the ENP's legal basis would be based on existing rather than new institutional frameworks. Hence, while the focal point of path-dependence and conversion analysis with respect to the EU is enlargement; in the case of layering we need to look at the existing institutional relationship between the EU and ENP partners.

In a nutshell, the ENP does not establish new legal institutional ties between the EU and its neighbours, but relies instead on existing international agreements, i.e., Association Agreements (AAs) for the Southern neighbours and Partnership and Cooperation Agreements (PCAs) for the Eastern neighbours (based on Arts. 216-219 of the Treaty on the functioning of the European Union). As a result, the ENP also does not establish new institutions to govern the initiative, and the policy is being implemented and monitored within the framework of the AAs'/PCAs' institutions (i.e. Councils and Committees). Against this background, we could argue that in order not to destabilise the existing institutional relationship, the Commission proposed that the ENP (and its APs) would function as an additional layer. What's more, this kind of proposal does not require any significant adjustments and thus should not be conceived as a threat to all the shareholders (EU institutions, MSs, and ENP partners).

That said, it is important to mention that while HI provides us with valuable insights concerning the ENP's institutional structure, its analysis focuses to a large extent on the Commission, while little heed is taken of the Commission's relationship with the MSs. In this regard, I agree with Jeandesboz[99] that the extensive focus on the Commission's path-dependence "downplays the variety of agents and games being played around the ENP." Therefore, it is worthwhile to examine how a PA-based account can provide us with complementary explanations.

Essentially, some studies contend that the Commission proposed to structure the ENP in a way that allowed it to situate itself in a pivotal role vis-à-vis other EU

[96] Thelen, *supra* note 59, p. 35.

[97] Streeck, Thelen, *supra* note 20, p. 23.

[98] European Commission, *supra* note 68, p. 16.

[99] J. Jeandesboz, *Labelling the 'Neighbourhood': Towards a Genesis of the European Neighbourhood Policy*, 10(4) Journal of International Relations and Development 387 (2007), p. 404.

actors (the MSs and the European Parliament). In so doing, the policy's cross-pillar characteristics, mechanisms, and procedures are being used as key examples to exhibit and enhance the Commission's actions and competences.

First, the Wider Europe Communication[100] put forward plans for cross-pillar cooperation with neighbouring countries. The proposal's cross-pillar characteristic – i.e., going beyond the Community's exclusive competences – is rather remarkable, even if one considers the preliminary status of the Communication.[101] Furthermore, the Commission has placed first pillar issues ("a stake in the EU's Internal Market") at the forefront of the new initiative. This manoeuvre could be viewed as a way for the Commission to blur the distinction between internal and external policies, thus enabling it to expand its powers in a policy area which has traditionally been dominated by intergovernmental cooperation.[102] As such, it could be argued that the agent tried to use the strategy of "issue-linkage" – a "conscious effort (i.e., a strategy) to connect different issues".[103] In the EU, this strategy is utilised by both the European Parliament[104] and the Commission[105] with the aim of expanding their powers in policy areas where they do not possess formal competences.

Second, as previously mentioned the ENP (and its APs) do not have a legal basis, as the ENP is based on existing legal agreements between the EU and ENP partners. Consequently, the APs' non-legislative characteristic benefits the Commission as the APs are not subject to the co-decision process, thus giving more power to the Commission vis-à-vis other EU Institutions.[106] In this vein, Lior Herman[107] maintains that "the Commission is more powerful and is less dependent (...) as it is negotiating an already-existing and agreed-upon agreement." Moreover, the fact that the APs are based on the Commission's proposals entails an important role for the Commission, since it "becomes the key agenda-setter in the EU's bilateral relationship with each neighbouring country."[108]

Notwithstanding the foregoing, I maintain that the Commission's choice to rely on soft law instruments and formulate the APs as political documents rather than international and legally binding agreements could also be attributed to the fact that "agents like

[100] European Commission, *supra* note 68.

[101] Pelerin, *supra* note 22, p. 51.

[102] *Ibidem*, p. 61.

[103] G. Tsebelis, *The power of the European Parliament as a conditional agenda-setter*, 88(1) The American Political Science Review 128 (1994), p. 138.

[104] *Ibidem*.

[105] A. Krause, *The European Union's Africa Policy: The Commission as Policy Entrepreneur in the CFSP*, 8 European Foreign Affairs Review 221 (2003).

[106] Pelerin, *supra* note 22, pp. 61–62.

[107] L. Herman, *The European Neighbourhood Policy: An Action Plan or Plan for Action?*, 11(3) Mediterranean Politics 371 (2006).

[108] Pelerin, *supra* note 22, p. 51.

the Commission may rationally anticipate the reaction of their principals."[109] In effect, the APs could be viewed as a simple and economical solution, and therefore a very appealing policy instrument not only for the MSs but also for EU institutions and potential partners.

In this context, the scholarly literature focusing on the legal aspects of the ENP could offer further insights into this argument. Specifically, many contributions delve into the legal foundation of ENP norms and principles, as well as the legal evolution of the ENP, considering actors such as the European External Action Service and the European Parliament, upgrades of agreements, and Treaty Articles.[110] A notable example is the debate surrounding the significance of Art. 8 TEU – the "neighbourhood clause". That said, contributions focusing on the ENP's formulation stage and the soft law characteristics of the ENP, particularly regarding the APs, provide concrete explanations for the Commission's decisions regarding the legal status of the APs.

For instance, compared to the long process of negotiating and signing mixed agreements,[111] the APs need only to be approved by a Council decision. In this respect, Ghazaryan[112] adds that "[t]he mixed nature of such agreements would have introduced a major brake on the progress of the policy, as their negotiation, signature and ratification would have required a few years." By the same token, Cremona and Hillion[113] maintain that "the non-legally binding nature of the ENP (...) prevents long competence discussions and 'pillar politics' from stalling and undermining policy development and coherence." Moreover, as no new agreements are being concluded, there is no need to establish new institutions to govern the relationship between the EU and ENP countries. Another advantage is that since the MSs were

[109] Pollack, *supra* note 33, p. 59.

[110] M. Comelli, *Article 8 TEU and the Revision of the European Neighbourhood Policy*, in: L. Rossi, F. Casolari (eds.), *The EU after Lisbon*, Springer, Vienna: 2014, p. 267; C. Hillion, *Anatomy of EU norm export towards the neighbourhood: The impact of Article 8 TEU*, in: R. Petrov, P. Van Elsuwege (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union*, Routledge, London: 2014, p. 13; S. Majkowska-Szulc, K. Wierczyńska, *European Neighbourhood Policy and EU Enlargement*, in: A. van Aaken, P. d'Argent, L. Mälksoo, J.J. Vasel (eds.), *The Oxford Handbook of International Law in Europe*, Oxford Academic, Oxford: 2023; R. Petrov, P. Van Elsuwege, *Article 8 TEU: towards a new generation of agreements with the neighbouring countries of the European Union?*, 36 European Law Review 688 (2011); P. Van Elsuwege, G. Van der Loo, *Continuity and change in the legal relations between the EU and its neighbours: A result of path dependency and spill-over effects*, in: D. Bouris, T. Schumacher (eds.), *The Revised European Neighbourhood Policy: Continuity and Change in EU Foreign Policy*, Palgrave Macmillan, London: 2017, p. 97.

[111] For instance, the negotiation process of mixed agreements involves rather high transaction-costs as the cross-pillar nature of the agreements and the lack of clear negotiation procedures require very close cooperation between and within EU Institutions.

[112] Ghazaryan, *supra* note 76, p. 57.

[113] M. Cremona, C. Hillion, *L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security policy*, European University Institute, San Domenico di Fiesole: 2006, p. 12.

rather indecisive as to the level of integration they were willing to commit to, the AP's non-binding characteristics allow them to agree on high standards for cooperation while eventually deciding in which policy areas they are willing to proceed with.[114] Therefore, the lack of legal basis puts the Commission in an inferior (rather than superior) position, since it does not have the legal competences to force the MSs to implement the APs. Finally, similar to the situation when the Commission had to combine the Southern and Eastern neighbourhoods to attract the support of all MSs, one can also argue that the principals' (*ex-ante)* control over the agent was effective. In the words of a Commission official: "We didn't give the document a legal basis because it will be bureaucratically impossible to pass it."[115]

Viewed against this background, the analysis of ENP's design demonstrates the functional considerations behind the Commission's decision to use the APs as the main instrument of the policy. But at the same time, it questions the PA's assumptions that the key reason for the agent to structure the policy in this way was to gain a better position vis-à-vis its principals.

4. MSS – COMMISSION CONFLICT DURING THE NEGOTIATIONS WITH PARTNER COUNTRIES

The last topic scrutinised in this study is the conflict between the Commission and the MSs during the final months of the ENP formulation stage. The key event mentioned in this context concerns the negotiations on the APs that were held in early 2004 between the partner countries and the Commission. Essentially, the APs are the result of negotiations between the EU and ENP countries. In their analyses, scholars often attribute the growing involvement of the Council in the ENP to the MSs' discontent with the Commission's behaviour during the negotiations – a dissatisfaction that led eventually to the freezing of the negotiations.

Principally, three key issues were unacceptable to the MSs. First, the MSs were agitated because the Commission initiated negotiations without receiving a mandate from the Council. Second, the MSs felt that the Commission was withholding information from them regarding the content of the meetings. Third, once the negotiations' topics became known to the MSs, they accused the Commission of overstepping its competences by discussing second and third pillar (intergovernmental) issues with partner countries. Consequently, the MSs decided to freeze the negotiations and assigned representatives from the High Representative Office and the EU Presidency to be present in the negotiations once they resumed.[116]

[114] Ghazaryan, *supra* note 76, p. 57; Van Vooren *supra* note 54, pp. 193–194.

[115] EU interview 7.

[116] Jeandesboz, *supra* note 99; Nervi, *supra* note 71; Pelerin, *supra* note 22; Zaiotti, *supra* note 51.

Scrutinising this situation through a PA lens, one could argue that the principals suffered from one of the most common problems in PA relationships, that is, informational asymmetries.[117] In the ENP case, it would seem that the agent enjoyed a favourable position concerning informational asymmetries, as it was able to hide that it was negotiating with partners behind the principals' back. In response, the principals decided to establish an *ad locum* control mechanism in the form of MSs' representatives sitting with the Commission in the negotiations.

Still, Commission's personnel had a rather different view regarding the suspension of the negotiations. In fact, "to the Commission, it came as a big surprise (...) we saw our role just like in accession, that we had freedom to be active."[118] Other EU officials support this statement by maintaining that "the Commission thought it could act freely like during the enlargement"[119] and "with enlargement the member states didn't have any problem that the Commission took charge."[120] In this respect, the interviewees might have been referring to the first stage of accession, i.e. the screening process. This process "is carried out jointly by the Commission and each of the candidate countries [and] allows the latter to familiarise themselves with the acquis and, subsequently, to indicate their level of alignment with EU legislation and outline plans for further alignment."[121]

What's more, the Commission did not consider the talks with ENP partners as official negotiations but rather as an "exchange of views."[122] In this context, Van Vooren[123] adds that Commission officials avoided the use of the term "negotiations", with the objective of reinforcing "the idea that the Commission was not negotiating a binding international agreement." To this end, numerous interviewees emphasise that the APs are not subjected to Art. 300 TEC (now Arts. 216 and 218 TFEU).[124] The Commission's standpoint maintained that since the APs do not have the legal status of an international agreement, it did not need MSs' mandate to talk to partners. As explained by Commission's officials: "[t]he member states thought that the Commission needs a mandate although there was no point. It is not an international agreement,[125] and [t]he Commission doesn't have to get a mandate from the member states in order to negotiate something which doesn't have a legal

[117] Pollack, *supra* note 26; Tallberg, *supra* note 26.

[118] EU interview 11.

[119] EU interview 3.

[120] EU interview 1.

[121] European Commission, *Screening of the acquis*, available at https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/screening-acquis_en (accessed 30 August 2024).

[122] EU interview 3.

[123] Van Vooren, *supra* note 54, p. 193.

[124] Art. 300 TEC stated that in case of international agreements, the Commission needs the authorisation of the Council in order to open the negotiations.

[125] EU interview 3.

basis";[126] adding that "the drafting of the action plans was seen as a technical and bureaucratic exercise of the Commission."[127]

In light of the above, it seems that the key problem was not necessarily opportunistic behaviour that caused agency shirking. Instead, the agent's behaviour could be attributed to its extensive path-dependence from previous tasks. In this regard, the Commission's path-dependence is not related to specific choices it made while designing the ENP. The focus here is rather on the fact that during the negotiations, the Commission was operating on "enlargement mode." As a result, its path-dependence might have led to the misunderstanding regarding the exact status of the APs and the role of the Commission and the MSs in the negotiations. In this context, the conflict between the Commission and the MSs could be connected to the Commission's conversion strategy, as "[t]he redirection of institutional resources that we associate with conversion may occur through political contestation over what functions and purposes an existing institution should serve."[128] At any rate, it is evident that despite some tensions between the Commission and the MSs following the freezing of negotiations, not much time elapsed before the negotiations continued; the APs were finalised; and the ENP was officially launched. EU officials elucidate that "the issue was solved fairly quickly"[129] and "we sat with the MSs and clarified the things that needed to be clarified."[130]

Finally, although the MSs exerted *ad locum* control once the negotiations resumed, the quick resolution of the conflict and the launch of the ENP shortly afterwards might suggest that the presence of MSs' representatives in the negotiations did not lead to any changes in the APs. That is to say, if the APs had changed (in scope/content) following the presence of MSs' officials in the negotiations, it could have been argued that the Commission had indeed shirked. In this regard, EU officials confirmed that although MSs' representatives joined the negotiations, it was a matter of being present at the table rather than providing input.[131]

CONCLUSIONS

The objective of this study was to examine two prominent explanations regarding the ENP formulation stage. The first explanation (based on PA) contends that the Commission used its position as the policy designer to increase its powers. It was able to do so by expanding the geographical and institutional scope of the policy, taking advantage of MSs' lack of interest in the policy and hiding information from

[126] EU interview 2; EU interview 8.
[127] EU interview 10; EU interview 6.
[128] Streeck, Thelen, *supra* note 20, p. 26.
[129] EU interview 11.
[130] EU interview 5.
[131] EU interview 2; EU interview 8.

the MSs. Alternatively, the second explanation (based on HI) underscores how the Commission's path-dependence (from enlargement) was *the* key factor influencing the Commission's policy choices and behaviour.

Against this background, this study aimed to evaluate which theoretical framework provides better explanations for the evolution of the policy. Examining the data generated by the process-tracing analysis, some conclusions can be drawn.

First, the research highlights the efficacy of institutional approaches in providing a more comprehensive understanding of the ENP's design and origins. With respect to the issues of the emergence of the policy and its scope, both HI and PA are able to encompass the assumption that the Commission might have had some interest in securing and expanding its role in EU foreign policy. Yet, rather than seeing the Commission as a competence-maximiser agent (like in the case of PA), HI provides a more context-based explanations about the circumstances that influenced the Commission's actions. Moreover, the analysis has demonstrated that to improve our understanding of the ENP's origins, there is a need to move beyond the passive/automatic impact of path-dependence highlighted in the ENP literature and to focus more on the various (active) ways the Commission employed to adapt to the new realities following the emergence of the new policy.

In the case of PA, although the findings do not support PA's arguments that the Commission expanded the ENP's geographical scope for its own benefits as well as exploited MSs' lack of attention, it could still be of use in highlighting the Commission's functional considerations in designing the policy, as well as the effectiveness of MSs' control mechanisms. Specifically, the Commission needed to offer a proposal that would attract the support of all MSs. After all, without the unanimous vote of the Council, the ENP would have never seen the light of day.

Insofar as concerns the institutional structure, HI offers persuasive arguments as to how path-dependence processes influenced the Commission in designing the ENP by following the enlargement template. Furthermore, the analysis shows that apart from path-dependence effects, the Commission used various strategies (i.e., conversion and layering) while designing the ENP. Nonetheless, HI seems to overlook aspects related to the Commission's relations with the MSs. In this respect, PA-based explanations suggest that the Commission structured the policy (e.g., the ENP's lack of a legal basis) in such a way that enhances its influence over the ENP. Still, also in this case the analysis revealed that there were not only control mechanisms in place but also numerous functional reasons for the Commission to design the ENP in a way that would appeal to the MSs.

Finally, regarding the conflict between the MSs and Commission during the APs negotiations, it appears at first sight that this is a classic case of agency shirking, as the Commission used its information asymmetries to hide the negotiations from the MSs. However, the research findings provide evidence that support HI-based

explanations to this event. Specifically, path-dependence processes not only affected how the Commission structured the policy, but also had an impact on how the Commission behaved during the negotiations. In this regard, we could also connect the conflict between the two actors with the conversion strategy, as the Commission used its existing procedures to deal with the new policy.

Given those mixed results, I contend that instead of viewing PA and HI as rival approaches that offer different explanations for the policy development, we should be aware of the weaknesses of each approach, while treating both perspectives as complementary to our understanding of the ENP. Thus, one could argue that the study's mixed results strengthen Mark Pollack's[132] standpoint that rather than viewing HI as a separate approach, we should consider it "as a particular variant of rational-choice theory [and PA] emphasizing the importance of time, feedbacks, sequencing, and path-dependence in the study of politics."

The theoretical implications of this research underline the relevance of functional explanations to explain the ENP's development. Moreover, the research findings question, to some extent, both HI's and PA's assumptions on the Commission's ability, as a single actor, to influence policy outcomes. In addition, this study has also shown that PA's preliminary assumptions on the agency's shirking tendencies were rather inappropriate. Therefore, the research findings largely follow Kassim et al.[133] in calling into question the prominent view in the literature (and also within the public sphere) that the Commission is a competence-maximiser and an integrationist institution. The data gathered in Kassim's[134] seminal study shows that "there is no universal desire for more Europe" and that the Commission's aspiration for more competences is "driven by functional imperatives (...) rather than a generalized or instinctive preference to maximize Commission power."[135]

That said, one could take into consideration another promising path of inquiry that utilises HI's assumptions in order to examine PA relationships; that is integrating the factor of time into PA analysis. Essentially, PA scholars often operate within the broader theoretical framework of rational choice institutionalism while measuring (in quantitative terms) the agent's ability to influence the principals or the principals' ability to control their agent. As such, it could be fruitful to examine (in qualitative terms) how the agent's past experiences with delegated tasks, as well as its previous relationship with the principals, might affect agency behaviour.

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[132] M. Pollack, *The New Institutionalism and European Integration*, Oxford University Press, Oxford: 2008, p. 4.

[133] H. Kassim, J. Peterson, M.W. Bauer, S. Connolly, R. Dehousse, L. Hooghe, A. Thompson, *The European Commission of the Twenty-first Century*, Oxford University Press, Oxford: 2013.

[134] *Ibidem*, p. 122.

[135] *Ibidem*, p. 281.

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NAVIGATING TROUBLED WATERS: EVALUATING THE FUNCTION AND MATERIAL LEGITIMACY OF EUROPEAN CRIMINAL LAW[**]

Abstract: *The question of the function of European criminal law has dominated recent doctrinal thinking. In order to answer that question, a thorough study on the guiding principles of criminalisation and their applicability to the European Union's legislative process was necessary. This article focusses first on the concept of legitimacy and the need for a European criminal policy, and then on some principles that already exist in the EU's legal order and their ability to provide said legitimacy. Following the conclusion that the existing principles are insufficient, it is suggested that the harm principle and the principle of protection of legal goods would be more appropriate to evaluate the material legitimacy of European criminal law. For that purpose, the multiple categories of interests that coexist in the EU will be analysed according to the allocation of responsibility for their protection. That distinction will, in turn, lead to the proposal of a three-step process to assess any given instance of criminalisation stemming from the EU. Finally, the practical consequences of such a process will be mentioned in the conclusion.*

Keywords: criminalisation process, function of criminal law, harm principle, legal good, material legitimacy

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INTRODUCTION

Opting for the adoption of criminal measures is not an evident choice: norms and sanctions as grave as criminal ones inevitably need additional legitimacy. Legitimacy[1] represents the normative conviction that a certain institution or norm must be obeyed; it is therefore a "subjective notion, dependent upon the perceptions (or feelings) of an actor."[2] There are multiple meanings to legitimacy: "input legitimacy" and "output legitimacy",[3] "formal legitimacy"[4] and "material legitimacy". The first pair concerns the evaluation of the law through an *ex ante* and *ex post* perspective: regarding both the possibility of all interested parties participating and the results which the law was expected to achieve and what it accomplished. Formal legitimacy concerns the process of adopting criminal law. Although this aspect was initially contested in the European Union (and it still raises some questions regarding the precise limits of that competence), it is clear, since the Treaty of Lisbon, that there is indeed a competence to produce criminal law.[5] Material legitimacy, however, addresses the question of the specific *content* of the criminal norm: it can be formally legitimate if it follows the correct procedure and respects the whole adoption process, and can still be materially illegitimate if it proposes the adoption or prohibition of behaviour with which the subjects do not agree.[6] Material legitimacy is the aspect I will focus on, as a critical tool to assess criminal law norms.[7]

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[1] Legitimacy must be distinguished from "power" and "authority": these can exist and be illegitimate, J. Klabbers, *Setting the Scene*, in: J. Klabbers, A. Peters, G. Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford University Press, Oxford: 2011, p. 37.

[2] *Ibidem*, p. 38, commenting on the work of I. Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council*, Princeton University Press, Princeton: 2007, p. 7.

[3] Klabbers, *supra* note 1, p. 40.

[4] According to Beetham (D. Beetham, *The Legitimation of Power*, Palgrave Macmillan, Houndmills: 2013, pp. 15 et seq.), legitimacy is first the conformation with certain established rules (legal validity); those rules should in turn correspond to shared beliefs between the one exerting power and their subordinates.

[5] For an extensive analysis of the source of the Union's jurisdictional powers over criminal matters (most recently), *see* P. Caeiro, *Constitution and Development of the European Union's Penal Jurisdiction: Responsibility, Self-Reference and Attribution*, 27(4–6) European Law Journal 441 (2021).

[6] For example, if its content is "odious" or "something substantively unjustifiable" – Klabbers, *supra* note 1, p. 39. In the same vein, C. Mylonopoulos, *Strafrechtsdogmatik in Europa nach dem Vertrag von Lissabon – Zur materiellen Legitimation des Europäisches Strafrechts*, 123(3) Zeitschrift für die gesamte Strafrechtswissenschaft 633 (2011) as well as J. Steffek, *The Legitimation of International Governance: A Discourse Approach*, 9(2) European Journal of International Relations 249 (2003), p. 264.

[7] This concept of legitimacy is thus broader than the presented in I. Wieczorek, *The Legitimacy of EU Criminal Law*, Bloomsbury Publishing, Portland: 2020, p. 12, wherein legitimacy is understood as "coherence with the normative premises for the use of criminal law derived from EU values and general principles." Similarly, but with an emphasis on independence as a premise needed to secure that systemic coherence, L. Mancano, *A Theory of Justice? Securing the Normative Foundations of EU Criminal Law Through an Integrated Approach to Independence*, 27(4–6) European Law Journal 477 (2021).

Acceptance and respect for norms, especially criminal laws, depend not only on the "consent of the subjects"[8] – the adoption of the law through democratic procedures – but also on the legislature's conclusion that these norms are necessary. This necessity is usually based on the fact that an interest or value has such great social significance that it justifies the restriction of the rights and freedoms of citizens that the criminal sanction implies. The *choice* of those interests and values[9] is the core of the matter. When this criminal policy issue is posed in the European setting, the question is whether it can be legitimately handled by the supranational entity instead of the States,[10] that is to say, whether the choice of the values and interests deserving of criminal protection should fall under the supranational entity's remit, *overriding* (and even in some cases, such as in the event of a true European criminal law, *replacing*) the Member States' remit.

1. THE NEED FOR A EUROPEAN CRIMINAL POLICY

In order to determine a function to be fulfilled by European criminal law, we must first know the function of the European Union (EU) itself.[11] There are not many doubts that the EU can roughly be attributed the same functions as a social and democratic state governed by the rule of law: the Union is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and

[8] A. Nieto Martín, *Strafrecht und Verfassung in der Ära des Global Law*, in: S. Reindl-Krauskopf, I. Zerbes, W. Brandstetter, P. Lewisch, A. Tipold (eds.), *Festschrift für Helmut Fuchs*, Verlag Österreich, Wien: 2014, p. 348; A. Nieto Martín, *A Necessary Triangle: The Science of Legislation, the Constitutional Control of Criminal Laws and Experimental Legislation*, in: A. Nieto Martín, M. Muñoz de Morales Romero (eds.), *Towards a Rational Legislative Evaluation in Criminal Law*, Springer, New York: 2016, p. 352.

[9] In the same direction, J. Vervaele, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*, Università degli Studi di Trento, Trento: 2014, p. 53. I am operating under the common notion that criminal law should have an underlying axiological dimension to its norms. In this sense, the legislator is not (or should not be) completely free in its political decision, since not all interests can be considered deserving of the specific protection granted by criminal law – *see* E. Bacigalupo, *Rechtsgutsbegriff und Grenzen des Strafrechts*, in: M. Pawlik, R. Zaczyk (eds.), *Festschrift für* Günther *Jakobs zum 70. Geburtstag am 26. Juli 2007*, Carl Heymanns Verlag, Cologne: 2007, pp. 12–13.

[10] Nieto Martín, *supra* note 8, p. 349. That is why it is essential for the EU to combine the output legitimacy that it has sought since the beginning of its intervention in criminal matters (e.g. the initial wording: "effective, dissuasive and proportional" measures) with the legitimacy that comes from the fact that it is a community protecting certain values and rights of its citizens. It is this dimension that ultimately grants the Union the constitutional legitimacy criminal law needs – I. Wieczorek, N. Vavoula, *The Constitutional Significance of EU Criminal Law*, 6(1) New Journal of European Criminal Law 5 (2015), p. 6.

[11] The function of criminal law "presupposes a chain of functions that condition one another in this order: the function of the State, the function of the criminal law, the function of the criminal theory" – S. Mir Puig, *El sistema del Derecho Penal en la Europa Actual*, in: B. Schünemann, J. Figueiredo Dias, J.M. Silva Sánchez (eds.), *Fundamentos de un Sistema Europeo del Derecho Penal*, José María Bosch Editor, Barcelona: 1995, p. 28. *See also* A. Almeida Costa, *Function of the Criminal Law*, in: P. Caeiro, S. Gless, V. Mitsilegas (eds.), *Elgar Encyclopedia of Crime and Criminal Justice*, Edward Elgar Publishing, Cheltenham: 2024.

respect for human rights" (Art. 2 of the Treaty on the European Union, TEU), and it is also based on a "social market economy" (Art. 3(3) TEU). In this regard, it does not differ much from the constitutional environment in which national criminal law is created.

That being so, the same limits of material legitimacy should apply: European criminal law should protect certain essential interests without neglecting the protection of European citizens against criminal law itself, in a balance between optimal and minimal prevention. This means that it should be the last resort for the protection of fundamental interests (with a transnational dimension[12]) when it is concluded that no other means of social control can adequately protect them.

Two important things can already be concluded from this: firstly, that European criminal law should be primarily linked to the protection of transnational fundamental interests, whether because they are interests of the EU itself or because they are common interests (of the EU and Member States).[13] Secondly, the *ultima ratio* principle should be strictly observed in the European sphere as well, which, because of the principle of subsidiarity, acquires the quality of a *reinforced ultima ratio* principle: one must resort to European criminal law only when the interests at stake justify it, there are no other sanctions capable of protecting them adequately and State action reveals itself to be inadequate or insufficient.[14]

The increase of European intervention in criminal matters makes it progressively more necessary to define a clear criminal policy, for several reasons. First of all, the gradual unification and harmonisation in the EU will inevitably be accompanied by an increase in its punitive power, as the creation of a common space "leads to the emergence of supranational legal goods and actions that are harmful to them."[15] Secondly, it hardly makes sense to continue to develop European criminal cooperation without a corresponding substantive criminal law framework: this would allow for the identification of a general European attitude towards criminality,[16] as

[12] Mainly because of the principle of subsidiarity. Arguing much the same, M. Kettunen, *Legitimizing European Criminal Law: Justification and Restrictions*, Springer, New York: 2020, pp. 188 et seq.

[13] This significantly narrows down the interests that can be legitimately broached by the EU when compared to those available to States: only the crimes that somehow transcend national borders justify a supranational approach. Concluding the same, Caeiro, *supra* note 5; J.W. Ouwerkerk, *Old Wine in a New Bottle: Shaping the Foundations of EU Criminal Law Through the Concept of Legal Interests (Rechtsgüter)*, 27(4–6) European Law Journal 426 (2022).

[14] In great detail about this double subsidiarity, J. Amaral Rodrigues, *O Direito Penal Europeu e a dupla subsidiariedade. Competência Penal da União Europeia, Condições do seu Exercício e Compatibilidade com o Paradigma da Protecção Subsidiária de Bens Jurídicos*, Almedina, Coimbra: 2019.

[15] A. Silva Dias, *De que Direito Penal precisamos nós europeus? Um olhar sobre algumas propostas recentes de constituição de um Direito Penal Comunitário*, in: J. de Faria Costa, M.A. Marques da Silva (eds.), *Direito Penal Especial, Processo Penal e Direitos Fundamentais: Visão Luso-Brasileira*, Almedina, Coimbra: 2006, p. 337.

[16] H. Satzger, *International and European Criminal Law*, C.H. Beck, München: 2012, p. 64: "whether a general 'tough' or 'soft' attitude towards (a certain type of) crime is adopted, what should be the role of criminal law in the resolution of social problems (keyword: decriminalization), etc."

well as the establishment of a scale of values, something that is currently lacking. It would also contribute to greater trust from Member States towards the EU, which would benefit from a clear definition of the way it intends to use its *ius puniendi*.

It would also be crucial in the resolution (or at least mitigation) of some problems that are usually pointed out when it comes to the execution of the penal competence of the EU – such as the *ad hoc* nature of European criminal law measures, which does not allow for coherence, neither in the national legal systems nor in the European criminal law system that is being built.[17]

It thus becomes necessary to define a set of principles capable of guiding the action of the European legislator. Regarding European criminal law in particular, it is important to recognise the double level of penal authority that broadly corresponds to the double system of legal interests coexisting in the Union and, consequently, to embrace that difference and strive for coherence between the multiple legal systems involved.

2. SOME PRINCIPLES OF EUROPEAN CRIMINAL LAW – CAN THEY HELP?

When looking for the function of European criminal law, one must start by assessing whether there is already some principle of EU law capable of guiding the choices of the legislator, or if indeed there is a need to come up with a new criterion. There is a multitude of EU law principles; only those with some reasonable potential to limit the legislator's activity will be mentioned, and only to the extent that they could be used for that purpose.

The principle of legality (Art. 49 Charter of Fundamental Rights of the EU, CFREU), although with some European particularities,[18] is unavoidable in criminal matters. However, it is not useful as a guiding principle to the question of material legitimacy and the function of European criminal law, since it was designed to de-

[17] A. Suominen, *Effectiveness and Functionality of Substantive EU Criminal Law*, 5(3) New Journal of European Criminal Law 388 (2014), p. 400. In fact, it is possible to discern, according to the legislative act under analysis, a myriad of priorities and agendas, action guidelines and strategies – S. Carrera, E. Guild, *The European Council's Guidelines for the Area of Freedom, Security and Justice 2020: Subverting the "Lisbonisation" of Justice and Home Affairs?*, Centre for European Policy Studies, Brussels: 2014, p. 5.

[18] Practically all of the subprinciples are subject to a different interpretation when in the European legal space. For more on this subject, *see* the opinion of the European Commission, *Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law*, Brussels, 20 September 2011, COM(2011) 573 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0573 (accessed 30 August 2024); Caeiro, *supra* note 5; M. Huomo-Kettunen, *EU Criminal Policy at a Crossroads Between Effectiveness and Traditional Restraints for the Use of Criminal Law*, 5(3) New Journal of European Criminal Law 301 (2014), pp. 318 et seq. For more on the important role this principle may have in curbing the recent trend towards preventive justice in the EU, *see* V. Mitsilegas, *The EU External Border as a Site of Preventive (In)justice*, 28(4–6) European Law Journal 263 (2022).

termine the necessary conditions for the application of criminal norms (they must be written, approved by a Parliament, certain, previous to the commission of the crime and so on), but not to address the *content* of those norms.

A second possibility is subsidiarity (Art. 5(3) TEU), which is an essential principle in EU law. In its essence, this principle seeks to determine *if* the Union should intervene in a given matter, and together with the proportionality principle it regulates the division of competences between the EU and Member States, defining if and how much legal harmonisation is needed, as well as its content.[19] In criminal matters, this principle determines that the Union must justify the need to adopt criminal measures (at the EU level) every time it intends to do so,[20] and that no measure of a different nature would be able to attain the desired objective.[21]

As a guide to the legitimate content of an incrimination, however, it is not enough: as it lacks an axiological dimension,[22] it is limited to ascertaining, on the one hand, whether the conditions for the EU to exert its power are met and that national action is indeed insufficient (European subsidiarity), and on the other hand, whether there is no other way than to employ criminal law to achieve the objectives (criminal subsidiarity). In fact, the subsidiarity test must always come *after* the determination that an interest is worthy of criminal protection. Otherwise, criminal law may well be within the EU's competences, and it may well be the only means of preventing some undesirable conduct – but it does not necessarily follow that the interest behind criminalisation is a legitimate one.[23]

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[19] I. Pernice, *Harmonization of Legislation in Federal Systems: Constitutional, Federal and Subsidiarity Aspects*, in: I. Pernice (ed.), *Harmonization of Legislation in Federal Systems: Constitutional, Federal and Subsidiarity Aspects – The European Union and the United States of America Compared*, Nomos, Baden Baden: 1996, pp. 21, 25. With detail about the multiple aspects of subsidiarity in the European sphere, Amaral Rodrigues, *supra* note 14, pp. 171, 190 et seq.

[20] Subsidiarity, in this sense, encompasses two distinct levels of consideration: in the first one (*substantive*), it must be determined which level of authority has the most legitimacy to decide which objectives to pursue; in the second one (*instrumental*), it is determined which would be more efficient in achieving those objectives, *see* P. de Hert, I. Wieczorek, *Testing the Principle of Subsidiarity in EU Criminal Policy: The Omitted Exercise in the Recent EU Documents on Principles for Substantive European Criminal Law*, 3(3–4) New Journal of European Criminal Law 394 (2012), pp. 400–405.

[21] It is nevertheless uncertain who evaluates the necessity of adopting criminal law measures and the methods they employ to do so – V. Mitsilegas, *European Criminal Law and Resistance to Communautarisation after Lisbon*, 1(4) New Journal of European Criminal Law 458 (2010), pp. 477–478.

[22] In recognition of this, de Hert, Wieczorek, *supra* note 20, p. 406: "[a] reshaping of the principle of subsidiarity, which also takes into account moral and normative aspects, would be necessary." What I posit is that it is not really a reshaping of any principle that is necessary, because they are designed to fulfil certain tasks, but rather the formulation of a whole new principle capable of targeting material legitimacy in European criminal law.

[23] The subsidiarity principle is not even capable of determining that *any* interest must be behind a criminal law norm, let alone defining the necessary conditions for those interests to be legitimate. Attempting to assign this task to it would be inadequate and would lead to an improper use of it.

According to the principle of proportionality (Art. 5(4) TEU), criminal law measures must be considered *necessary* (regarding some objective) because there is no other, less burdensome means to attain it; it further verifies whether the prescribed sanctions are *adequate* and *proportional* with regard to that objective and the new infraction. There is an additional European dimension as well: the adopted measures must be proportional to the chosen legislative instrument, meaning that if the EU opts for a Regulation when a Directive would be sufficient to achieve the intended objective, that must be considered disproportionate.[24] Of the three subprinciples of proportionality – proportionality *stricto sensu*, adequacy and necessity – only the last one has the most potential to fulfil a function for European criminal law.[25] However, "necessity" cannot assess the *dignity* of the interest in question, and therefore it cannot provide a criterion for the *choice* of objective; it does not have a value-based critical function in itself.[26]

The *ultima ratio* principle, despite having no written recognition in the Treaties, is still considered an indispensable principle in the EU: the Commission explicitly recognises it,[27] and it is deemed relevant to the evaluation of the "indispensable" character of criminal law concerning the annex competence of Art. 83(2) TFEU.[28] But even if it does offer some sort of guidance with regard to the need to criminalise certain conduct, that guidance is linked with the availability of other, less stringent measures with less impact on the rights and freedom of citizens whilst achieving the same goals. Yet again, this principle cannot inform the legislator as to what

[24] On this specific aspect of proportionality, M. Muñoz de Morales Romero, *El Legislador Penal Europeo: Legitimidad y Racionalidad*, Aranzadi, Navarra: 2011, p. 415. This may not be as relevant in criminal matters yet, since the EU cannot adopt Regulations (at least explicitly); however, in the future, if it can opt for either a Regulation or a Directive, it may become rather necessary to evaluate whether the adoption of the former would be proportional to the criminal measures, the national margin of discretion and the possibility of adjusting to the national legal order.

[25] A. Miranda Rodrigues, *Direito penal europeu pós-Lisboa: um direito penal funcionalista?,* 146(4004) Revista de Legislação e de Jurisprudência 320 (2017), p. 332.

[26] *Similarly*, C. Safferling, *Europe as Transnational Law – A Criminal Law for Europe: Between National Heritage and Transnational Necessities*, 10(10) German Law Journal 1383 (2009), p. 1393; A. Nieto Martín, *Saudade of the Constitution: The Relationship Between Constitutional and Criminal Law in the European Context*, 10(1) New Journal of European Criminal Law 28 (2019), p. 32. Also clearly separating the principle of proportionality from the principle of protection of legal goods, Amaral Rodrigues, *supra* note 14, p. 345–349.

[27] *See* European Commission, *supra* note 18. The European Parliament agrees with this opinion: *see* European Parliament resolution of 22 May 2012 on an EU Approach to Criminal Law (2010/2310(INI), 13 September 2013, OJ C 264E/7.

[28] J. Öberg, *Do We Really Need Criminal Sanctions for the Enforcement of EU Law?*, 5(3) New Journal of European Criminal Law 370 (2014), pp. 384 et seq. *See also* Suominen, *supra* note 17, pp. 413 et seq.; M. Kaiafa-Gbandi, *Approximation of Substantive Criminal Law Provisions in the EU and Fundamental Principles of Criminal Law*, in: F. Galli, A. Weyembergh (eds.), *Approximation of Substantive Criminal Law in the EU: The Way Forward*, Editions de l'Université de Bruxelles, Brussels: 2013, p. 94.

those goals should be or whether they are legitimate, nor the parameters to assess that legitimacy.

Effectiveness is a much-valued principle in EU law, and is somewhat applicable to criminal law: this principle appraises whether criminal law measures are indeed effective, if applied, at attaining a certain goal – namely, to combat illegal activities and prevent loopholes in their sanctioning. There are essentially two perspectives at this juncture: either effectiveness relates to the effective implementation of EU law, or it concerns a real criterion in order to justify the adoption of new criminal law measures. The first perspective should not be deemed legitimate – in that case, European criminal law would be but a functional version of itself, voted to mindlessly ensure compliance with other norms regardless of the legitimacy of their content. As for the second perspective, the only thing effectiveness can state is that criminal law measures are an effective means to reach some predetermined goal; however, it is not in a position to determine if that goal is a legitimate one, if what we aim to achieve with those measures has penal dignity or if it justifies the restriction it will impose on the rights and freedom of citizens.[29] This is not a principle capable of great systematic or dogmatic concerns, and its use as a legitimacy criterion would in time lead to the "demolition of the conceptual building of criminal theory."[30] It would also skew criminal law in what pertains to its symbolism:[31] we cannot *censure* something if that something is not directed at some value (other than effectiveness itself).

The final principle to be approached, respect for fundamental rights, has a long history in the context of the EU, and it has a special connection with criminal law since it acts on two different fronts: it simultaneously acts as a *catalyst* and a *limit* to criminal law measures. It also has a greater potential for effectively limiting the legislator regarding the material legitimacy of its criminal law choices, if it states that only criminal measures directed at protecting fundamental rights would be considered legitimate.[32] However, it is incapable of discerning *which*, among all

[29] There is something that illustrates this quite well, although it was not written with European criminal law in mind: "Even when the criminal law is capable of influencing conduct in one direction or another, it may carry with it other consequences that are sufficiently harmful that we would choose not to have such a law. The law may be efficacious but, on balance, bad". *See* G. Dworkin, *The Limits of the Criminal Law*, in: J. Deigh, D. Dolinko (eds.), *The Oxford Handbook of Philosophy of Criminal Law*, Oxford University Press, Oxford: 2011, p. 3.

[30] L.F. Gomes, *Globalización y Derecho Penal*, in: J. Ripollés, J. Cerezo Mir (eds.), *La Ciencia del Derecho Penal ante el Nuevo Siglo. Libro Homenaje al Profesor Doctor Don José Cerezo Mir*, Tecnos, Madrid: 2002, p. 337. For effectiveness as a normative principle, see the criticism of N. Persak, *Principles of EU Criminalisation and Their Varied Normative Strength: Harm and Effectiveness*, 27(4–6) European Law Journal 463 (2022).

[31] Suominen, *supra* note 17, p. 409. *See* the article by T. Elholm, R. Colson, *The Symbolic Purpose of EU Criminal Law*, in: R. Colson, S. Field (eds.), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice*, Cambridge University Press, Cambridge: 2016, pp. 48 et seq.

[32] This principle, together with that of proportionality, already functioned as a limit to European legislative freedom: *see* Cases C-293/12 and C-594/12 *Digital Rights Ireland*, EU:C:2014:238, paras. 41 et seq. Relating

fundamental rights, need criminal law protection, and so it too appears insufficient to limit the legislator regarding the material legitimacy of criminal law.

3. DIFFERENT LEGAL TRADITIONS

The issues that plague national legal orders are the same as those identified in European criminal law,[33] and the constitutional environment enveloping the latter is not so different from the one existing in Member States. Therefore, there is a real need for some principle of criminal policy to guide the legislator when it comes to the legitimacy of European criminal law measures. But whilst that is true, there are also other concerns at the European level, namely the need to respect the different legal traditions of the Member States.

Although diverse, European legal traditions possess some common traits that allow them to be grouped into three main families:[34] the *German* and *Scandinavian* tradition, the *common law* tradition and the *Napoleonic* tradition. For States that identify themselves with the first of these traditions, the existence of a *legal good* (*Rechtsgut*[35]) subjacent to the criminal norm is an essential condition to assert its material legitimacy – this ensures that criminalisation is directed only at protecting the fundamental interests of a given community, even though it adds little about *how* they are harmed.[36] The common law States, when considering an individual instance of criminalisation, opt to follow the *harm principle*[37] to evaluate its legitimacy. The emphasis is now on the consequence of a given behaviour and the notion that only an individual can actually be harmed (therefore limiting the legitimate circle

criminal law with the protection of fundamental rights, Muñoz de Morales Romero, *supra* note 24, pp. 606–615.

[33] Legislative irrationality (non-assessment of effectiveness, added value of criminal law measures or sufficiency of alternate measures), presumption of the effectiveness of criminal law in general, symbolic content within European criminal law and its functional (or accessory) aspect. *See* Muñoz de Morales Romero, *supra* note 24, pp. 432 et seq.

[34] J. Blomsma, C. Peristeridou, *The Way Forward: A General Part of European Criminal Law*, in: F. Galli, A. Weyembergh (eds.), *Approximation of Substantive Criminal Law in the EU: The Way Forward*, Editions de l'Université de Bruxelles, Brusseles: 2013, p. 126. It must be stressed that this distinction was made bearing in mind the general characteristics of the legal order of the Member States; this does not mean, however, that when a specific Member State belongs to one of the groups, it will automatically ascribe a similar function to its criminal law as all others in the same group.

[35] The legal good can be defined as the "expression of an interest, of the person or community, in the maintenance or integrity of a certain state, object or good that is, in itself, socially relevant and therefore legally recognised as valuable" – J. de Figueiredo Dias, *Direito Penal. Parte Geral. Tomo I*, Coimbra Editora, Coimbra: 2007, p. 114. *See* Ouwerkerk, *supra* note 13, p. 7 for an eloquent summary of the *Rechtsgut* theory.

[36] Recourse to other principles is needed for that; *see e.g.*, F. Sánchez Lázaro, *Evaluation and European Criminal Law: The Evaluation Model of the Commission*, in: A. Nieto Martín, M. Muñoz de Morales Romero (eds.), *Towards a Rational Legislative Evaluation in Criminal Law*, Springer, New York: 2016, p. 215.

[37] Extensively on the harm principle and its foundations, N. Persak, *Criminalizing Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts*, Springer, New York: 2007.

of holders of the interests), with less attention paid to which interests are harmed. Finally, when a Member State belongs to the Napoleonic tradition, criminal law is regarded as necessary when certain conduct threatens the public order (*ordre public*). Since this is a much more fluid and broader concept, it would not be appropriate to limit the legislator's activity, and that is why it will not be considered further.

The European principles mentioned above, albeit paramount for the criminalisation issue, are not capable of providing a full answer to the question of legitimacy. Confronted with the same conclusion, the Commission,[38] Council[39] and Parliament[40] have all tried to come up with an answer.[41] The specialist literature focussing on this question favours the same doctrines that are internally (nationally) adopted, alternatively mentioning the harm principle[42] or the principle of protection of legal goods.[43] In my opinion, a successful European principle of criminalisation should stem from the legal traditions of Member States, but it is also necessary to adjust it to the specificities of the EU. It is with this purpose in mind that I will suggest a new approach to the legitimacy question[44] that combines both of these aspects.

[38] Communication COM(2011) 573 final, mentioning a twofold approach: the verification of the *ultima ratio* principle and effectiveness in the first moment, followed by the assessment of *which* measures should be adopted, according to the principle of proportionality.

[39] 2979th Council meeting (Justice and Home Affairs), Brussels, 30 November 2009, where the significance of *ultima ratio* is underscored, but this time coupled with the need for the criminalised conduct to cause true harm or seriously threaten the right or interest that is being protected; they should, once again, abide by the proportionality principle. The same is flatly repeated on the Note from the Presidency to the Council of 28 May 2019, *The Future of EU Substantive Criminal Law – Policy Debate*, Council document 9726/19, p. 8. This does not provide a criterion for the *choice* of those interests or rights, but there is at least the mention of some axiological dimension in European criminal law.

[40] European Parliament resolution of 22 May 2012 on an EU Approach to Criminal Law (2010/2310(INI), 13 September 2013, OJ C 264E/7, after mentioning some fundamental principles of criminal law, states that European criminal law should be aimed at behaviour that causes harm (pecuniary or non-pecuniary) to society, individuals or groups of individuals.

[41] Emphasizing the lack of inter-institutional coherence, Vervaele, *supra* note 9, p. 55; *see also* C. Harding, J. Öberg, *The Journey of EU Criminal Law on the Ship of Fools: What Are the Implications for Supranational Governance of EU Criminal Justice Agencies?*, 28(2) Maastricht Journal of European and Comparative Law 192 (2021), p. 202. Concluding that none of the European principles offer much help in limiting the content of European criminal law, Ouwerkerk, *supra* note 13, p. 5.

[42] *E.g.* Persak, *supra* note 30.

[43] *E.g.* Ouwerkerk, *supra* note 13.

[44] Thus, departing from the fundamental premise of investigation when compared with two substantial scientific works. The first is that of Wieczorek, *supra* note 7, p. 6, since the author purports to analyse "which legitimacy model of criminal law the EU legal order has embraced and critically assess consistency of EU criminal law with EU constitutional choices", framing "an internal coherence question, rather than a general question asking whether the EU approach to criminalisation is inherently valuable". The second is that of Kettunen, *supra* note 12, p. 1 who seeks to "justify the law as it stands. This is achieved by identifying the appropriate legal basis for the approximation of criminal law", deriving criminalisation principles from the Treaties. My purpose is to propose external criteria that allow for the evaluation and assessment of the fundamental worthiness and material legitimacy of every proposed or existing European criminal law norm.

Since neither the harm principle nor the principle of protection of legal goods is present in the European legal order, it must first be determined if there is a *legal* possibility of adopting either principle at the European level. This seems to be possible and none too problematic *via* Art. 6(3) TEU, given that these principles are part of the "common constitutional traditions" of the Member States.

4. DIFFERENT TYPES OF INTERESTS IN THE EU

There is a common aspect in both criminalisation principles discussed above: criminal law should be directed towards protecting interests. In the legal space of the EU, three types of interests can be identified.[45] The criteria to set them apart rely first of all on their *holdership*: as an entity with its own existence, the Union has its *own*, *proper interests*; as a supranational entity responsible for some aspects that are common to itself and the Member States, there are also *common interests*; and then there are *interests of the Member States* (that exist in the same geographical space).

[45] A brief review of the literature on this topic is in order at this point. G. Grasso (*Comunità europee e diritto penale. I rapporti tra l'ordinamento comunitario e i sistemi penali degli Stati membri*, Giuffré, Milano: 1989, pp. 12 et seq.) made the distinction between "institutional" and "functional" legal interests, as did P. Caeiro (Caeiro, *supra* note 5), who submits that these two categories of interests call for a "differentiated approach regarding the reach of EU intervention and the type of legislative procedure/act adopted". In an earlier work on the topic of "responsibility", the distinction was made between interests that pertained to the EU and interests that "might also be of the Member States' direct concern" – P. Caeiro, *Beyond Competence Issues: Why and How Should the EU Legislate on Criminal Sanctions?*, in: R. Kert, A. Lehner (eds.), *Vielfalt des Strafrechts im internationalen Kontext. Festschrift für Frank Höpfel zum 65. Geburtstag*, Neuer Wissenschaftlicher Verlag, Wein: 2018, p. 652. *Similarly* L. Picotti, *Las Relaciones entre Derecho Penal y Derecho Comunitario: Estado Actual y Perspectivas*, 13 Revista de Derecho Penal y Criminología 151 (2004), pp. 157 et seq. adds a third category (which he then goes on to dismiss and attribute to either the first or second), made up of the Third Pillar's interests: those that were jeopardised by grave forms of transnational delinquency. J. Monar, *Reflections on the Place of Criminal Law in the European Construction*, 27 (4–6) European Law Journal 356 (2022); differentiates between a "functional" and a "constitutional" approach to European criminal law initiatives, based not on the interests that are subjacent to them, but rather on their rationale and purpose. M. Acale Sánchez, *Derecho Penal y Tratado de Lisboa*, 12(30) Revista de Derecho Comunitario Europeo 349 (2008), pp. 358 et seq. apparently sets apart the different interests based on the legislative intervention envisioned in Art. 83 TFEU: those in no. 1 would be truly European legal goods, and those in no. 2 would be "Europeanised" legal goods. A. Bernardi, *Strategie per l'armonizzazione dei sistemi penali europei*, in: S. Canestrari, L. Foffani (eds.), *Il Diritto Penale nella Prospettiva Europea. Quali Politiche Criminali per quale Europa?*, Giuffrè, Milano: 2005, pp. 381 et seq.; adopts the categories of communitarian legal goods, legal goods that have a communitarian relevance, purely national legal goods and, finally, legal goods that are so linked with national culture that their Europeanisation is effectively impeded. A final proposal is the one from C. Safferling, *Europe as Transnational Law – A Criminal Law for Europe: Between National Heritage and Transnational Necessities*, 10(10) German Law Journal 1383 (2009), pp. 1394 et seq., who separates interests directed at protecting the European institutions from those related to essential social values and the protection of the EU's policies. My division will be based on the combination of two different criteria: the holdership of the interest and the attribution of competences.

It should be stressed that this does not correspond to the criteria used in the Treaties to differentiate between the multiple competences of the Union, although this will also be needed in order to set apart the categories of interests ultimately suggested. The EU's competences can be exclusive, shared or accessory without always corresponding to a proper interest of the EU, a common one or a national one, respectively. This means that the natural competence (stemming from holdership) to ensure the protection of a given interest can be altered by the attribution of competences to the EU.

We can draw the first conclusion now: both the holdership *and* the attribution of competences will be relevant, *but not exclusively determinant*, in order to set apart the several categories of interests.

4.1. National interests

National interests are those that have a purely internal relevance: these will typically be present for the majority of criminality, since they only concern the Member State where the conduct occurred and do not have any transnational dimension. These interests should not be interfered with by the EU[46] unless national criminal law affects a European right.[47]

4.2. Common interests

Common interests are those that already existed and first emerged in Member States,[48] and then became shared interests of the EU due to the European project. They are no longer exclusive interests of the Member States because of the emergence of a new dimension that makes them inseparable from the European fact: the existence of common policies (in the domains of labour, health, economy, environment etc.). These interests undergo a *reconfiguration* brought on by the European sphere; the exact measure of division of that interest between the EU and the Member States will then depend on the legislative arrangements regarding the *quantum* of harmonisation, both permitted and exercised.[49] The extent of

[46] *E.g.* Case C-108/80 *Criminal proceedings against René Joseph Kugelmann*, EU:C:1981:36, where national criminal law was allowed to remain, even though there was a more permissive Directive on the matter (in this case, food preservatives).

[47] As in Case C-59/75 *Pubblico Ministero v. Flavia Manghera and others*, EU:C:1976:14, where there was a national interest (import state monopolies) that ceased to exist due to the effects of EU law.

[48] In this vein, Caeiro, *supra* note 45, p. 652: "[the interests] *were already there* before the EU came along, even if they had a different content" (emphasis in the original text).

[49] There are some limits to the exercise of European competences that already stem from the configuration given to them by the Treaties, as is the case with health or the AFSJ. Other limitations emerge from the actual exercise of the EU's legislative competence; that is the case with the shared competences, in which "Member States (...) exercise their competence to the extent that the Union has not exercised its competence" (Art. 2(2) TFEU). If, ultimately, the Union legislates on every aspect of a given subject matter, in practice (and assuming the Union does not cease exercising its competence) it will become an exclusive competence, rather than a shared one.

harmonisation will depend on the pre-emption of the matter as well: the more the Union legislates on a specific subject, the more Member States will be prevented from exercising their competence, which translates to a (gradual) increase in the EU's power of harmonisation and a consequent decrease in the power of Member States within that shared competence. Pre-emption may consequently encompass the power to criminalise conduct.[50]

But the holdership of those interests does not depend on the configuration of the Union's competences:[51] the interest is common because it is effectively shared by all parties, since it cannot be attributed to some Member State or the EU exclusively.[52] Because they are shared interests, a greater respect for the sanctioning options of the multiple Member States is warranted.[53] Concerning interests whose holdership is common but whose competence is solely attributed to the Union, it is doubtful that Member States can exercise their *ius puniendi* unless permitted by the EU.[54]

4.3. Proper interests of the EU

With the creation of the EU, a new political entity, arose new legal goods (or fundamental interests) that were connected to it and belonged exclusively to that entity. These primarily concern its own existence[55] or the proper functioning of its organs and institutions. One example of these new, exclusively European interests can be

[50] Because national measures must be compatible with European objectives, it is not always easy to know when Member States still have a punitive competence to exercise, or the extent of it. Regarding shared competences, consumer law may be a good example: even though some measures, designed to provide a higher level of protection to the consumer, have been implemented in some Member States, they are mostly disapplied, as the EU typically considers these measures to be constraints on the common market. These are the conclusions of a study by V. Mak, *Standards of Protection: In Search of the "Average Consumer" of EU Law in the Proposal for a Consumer Rights Directive*, 18 European Review of Private Law 25 (2010).

[51] This precludes, for example, that an interest may have a mobile nature: holdership demands that the interests be attributed to a subject, regardless of what the *ius puniendi* of that entity may be (at that point in time) in relation to that interest.

[52] Some examples of common interests in criminal law norms include those mentioned in Art. 83(1) TFEU (terrorism, multiple trafficking situations etc.); some interests that, although national, are connected to the common market (corruption, counterfeiting means of payment); or crimes against workers, consumers, the environment and the four fundamental freedoms.

[53] Caeiro, *supra* note 45, p. 657 mentions the need for extra consideration with regard to some fundamental principles such as necessity, proportionality, subsidiarity and coherence.

[54] A clear example is given by competition law: although it is an exclusive competence of the EU, and unfair commercial practices are punished with administrative sanctions in the European legal order, Art. 30(1) of Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1, allows for the existence of criminal sanctions in Member States.

[55] "Si une communauté est légitimée à exister, elle est aussi légitimée à défendre son existence" – C. Sotis, *«Criminaliser sans punir». Réflexions sur le pouvoir d'incrimination (Directe et indirecte) de l'Union européenne prévu par le traité de Lisbonne*, 4 Revue de science criminelle et de droit pénal comparé 773 (2010), p. 780. Regarding the legal goods theory, the political entity may legitimately defend its own existence because it fosters and conditions the existence of other legal goods deemed fundamental to the people or the community, thereby maintaining the integrity of those interests.

the protection of the EU's financial interests. On the one hand, these ensure the very existence of the Union through the protection of its own resources; on the other hand, they provide the opportunity to bestow grants and subventions on Member States and private subjects, wherefore their protection will end up benefitting more than just their holder.[56] Whether regarding revenue or subvention, these are legal goods that exist only in the EU,[57] and their relevance is such that they have always been the target of attempts at legislative unification (or at least greater harmonisation).[58]

Concerning the correct functioning of the European institutions – which naturally conditions the EU's ability to perform its tasks – what is at stake is the very *impartiality* of the EU, its integrity and good administration.[59] Here would be included crimes of corruption committed by EU staff (or misappropriation of money, fraud or the use or disclosure of professional secrets), as well as perjury before the European Court of Justice (ECJ), which can be justified by the need to guarantee trust in public authority[60] and the proper administration of justice in the EU.

As for the execution of European policies, even though some may eventually need penal intervention, these will rarely represent a true legal good of the EU. If there is an interest with penal dignity, it will more often than not be a common one, and its need for criminal protection at the EU level will most certainly spring from some transnational dimension it acquired, be it because of the Union's action or because of the pernicious effects of that conduct.[61] Some examples include competition, transport, consumer protection, the environment, financial services[62] and others in which criminalisation may prove necessary to protect collective fundamental

[56] In this vein, P. Caeiro, *Perspectivas de formação de um Direito Penal da União Europeia*, in: E. Correia (ed.), *Direito Penal Económico e Europeu: Textos Doutrinários*, Coimbra Editora, Coimbra: 1998, p. 529; F. Palumblo, *Studi di Diritto Penale Comunitario*, Giuffrè, Milano: 1999, p. 46.

[57] The "Euro" leads to a more complicated analysis. If it is true that it exists only because of the EU, it is also true that whatever is meant to be protected through the protection of the Euro (the legality of monetary circulation, trust in the currency or even public faith) also belongs to the Member States which use it as their currency. A solution for these cases will be suggested below.

[58] The last attempt was made on the occasion of the first Commission proposal for the PIF Directive: the legislative basis for that proposal was Art. 325 TFEU. If it had been successful, this legal basis could have been progressively used to further harmonise or even unify the legal regime for the protection of these financial interests.

[59] G. Salcuni, *L'Europeizzazione del Diritto Penale: Problemi e Prospettive*, Giuffrè, Milano: 2011, pp. 21 et seq.

[60] Another example where public authority emerges as a proper interest of the EU is the recent European Commission, *Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union*, Brussels, 25 May 2022, COM(2022) 247 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A0247%3AFIN (accessed 30 August 2024). *See also* Caeiro, *supra* note 5.

[61] On the transnational nature of some interests, J. Öberg, *Normative Justifications of EU Criminal Law: European Public Goods and Transnational Interests*, 27(4–6) European Law Journal 408 (2023), pp. 417 et seq.

[62] *Ibidem*, pp. 418–419, aggregates both rationales (holdership of the Union and transnational nature of the interest) into one justification for the intervention of the EU. Although I do not disagree with the end result, I find it necessary to establish to whom the interest belongs first, since that will have consequences regarding the type of measure the Union is legitimised to adopt (*e.g.* in order to completely harmonise or even unify the legal provisions, or opt for a less intrusive harmonisation).

interests. That responsibility will fall under the supranational entity's remit because of the transnational dimension of these interests, and therefore their protection at the national level is impossible, insufficient or unsatisfactory.

Because they are shared, a parallel national policy is most likely to exist; for that reason – and also in accordance with the principle of subsidiarity – it is essential for the EU to intervene only when those interests are considered essential to the existing European project of integration, or when they have some special relevance to the Union.

4.4. Criterion of the responsibility to protect and its relationship with the function of European criminal law (the "first step")

The conclusion that there are several types of interest coexisting in the European space led to the consideration that perhaps one principle of criminalisation would not be enough to respond to all their different necessities without distorting the principle or the true interest behind the need for criminal protection.[63] It is also important to acknowledge the crucial differences in the Union's *ius puniendi* (when compared to that of the Member States), since those interests may need a different legislative intervention according to the harmonisation level they require: the nature of the interest should justify the cases in which it is more favourable to *maintain the difference* among Member States versus those in which a more pressing need for a *unifying* action is identified.

Two criteria were already mentioned to tell those interests apart (holdership and attribution of competence), neither of which was deemed to be singly satisfactory. However, if both are combined, a much more relevant and complete criterion emerges: that of the *correct allocation of responsibility*[64] *for the protection* of the interest.

The first step of my proposed criminalisation process would be to identify the holdership of the interest, so that the degree of harmonisation (permitted or desirable) can be determined. If it is a purely *national* interest, it will not matter to the

[63] Although not referring to the EU, R.A. Duff, *Towards a Theory of Criminal Law?*, 84(1) Aristotelian Society Supplementary 1 (2010), p. 20, had already drawn a similar conclusion: "Rather than search (in vain) for a suitable refined master principle, we should recognize something that is hardly surprising: that we have different reasons for criminalizing different types of conduct (...). The proper task for a theory of criminalization is, rather, to assemble and clarify the different kinds of consideration that should be relevant in different contexts."

[64] The idea that an entity is responsible for the protection of interests is not new. When the EU was created, it became "co-responsible" for the protection of some interests, be it because they were its own, or because it shared some aspect of them with Member States – *see* P. Caeiro, *The Relationship Between European and International Criminal Law (and the Absent(?) Third)*, in: V. Mitsilegas, M. Bergström, T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Edward Elgar Publishing, Cheltenham: 2016, pp. 587 et seq.

issue of European criminalisation, given the fact that the EU is not legitimised to take action, since it is not responsible for its protection in any way.

If it is a *common* interest, two situations can occur. If it is an interest not yet fully harmonised, the EU should opt for measures that approximate criminal law but also leave a greater margin of discretion to the Member States, so as to respect their legal traditions and internal policy choices. If it is an interest whose protection is solely attributed to the EU, or already so harmonised that it has been *pre-empted*, since the autonomous action left for Member States is minimal (or even dependent upon the EU's authorisation), it may require stronger harmonisation or even, if at all possible, unification – precisely because Member States will no longer be able to legislate without incurring the risk of interfering with the Union's objectives.

Finally, if it is a *proper* interest of the EU, there is no doubt that the Union should be the one to define the whole of the criminalisation parameters, resorting even to unifying those norms so as to prevent inconsistencies in its protection across the EU.[65]

Consequently, it can be concluded that there is no substantial difference between proper interests and pre-empted common ones when it comes to the responsibility for their protection: only the EU should, or can, determine its exact contours.[66] This first step ultimately serves the purpose of identifying the interests that could underpin the criminalisation at stake, the entity responsible for their protection and the level of harmonisation they could require.

5. MATERIAL LEGITIMACY AND THE FUNCTION OF EUROPEAN CRIMINAL LAW

As in the national setting, functionalism must be thoroughly rejected, despite certain characteristics of European criminal law that may point to it.[67] Employing criminal law merely to ensure respect for other norms not only does not make sense, but due to the nature of criminal law measures, it would also not restrict the legislator's freedom at all. Trying to limit it with resort to other principles of EU law

[65] Due to being true "original" European legal goods, having come into being *because of* the EU, some authors submit that the Union should be the only one responsible for the definition and extent of their protection – *see* Caeiro, *supra* note 45, pp. 652–655; B. Schünemann, *The Contribution of Scientific Projects to a European Criminal Law: An Alternative Project for a European Criminal Law and Procedure*, in: M. Cherif Bassiouni, V. Militello, H. Satzger (eds.), *European Cooperation in Penal Matters: Issues and Perspectives*, CEDAM, Padova: 2008, p. 126.

[66] Though it must be cautioned that unification requires more careful consideration when pre-empted common interests are at stake, as there is a greater need to respect the previous options of the Member States.

[67] *See e.g.*, the analysis by S. Braum, *Are We Heading Towards a European Form of "Enemy Criminal Law"? On the Compatibility of Jakob's Conception of "an Enemy Criminal Law" and European Criminal Law*, in: F. Galli, A. Weyembergh (eds.), *EU Counter-Terrorism Offences: What Impact on National Legislation and Case-Law?*, Editions de l'Université de Bruxelles, Brusseles: 2012, pp. 237–250.

has been deemed insufficient as well: it is not so much a matter of whether the EU *can* criminalise certain conduct, but rather if it *should* criminalise it. In line with the above arguments, and given the European legal traditions, there are two viable principles for evaluating the material legitimacy of criminal law: the principle of protection of legal goods and the harm principle. What must now be assessed is the *adequacy* of their usage in the EU.

5.1. Protection of legal goods in the EU

Although the concept of legal goods is unknown in several Member States,[68] it does not appear that there are any insurmountable obstacles to its use in the European legal order, since there are interests in need of protection, a constitutional axiological order to be used as a reference and a court with the capability to serve as a constitutional court, in order to determine the compatibility of the criminal norms with the material constitution of the EU.

What is more controversial is the function this legal good would perform within the supranational legal order. Some authors believe one of its main functions would be to vertically delimit the competence of the EU – that is to say, it would help in setting apart those that could bear European intervention from those that should remain in the exclusive remit of the States.[69] It would potentially contribute to the delimitation of Art. 83(2) TFEU: the "necessity" requirement of that article would be evaluated against the legal good, and criminal law would be deemed necessary when the seriousness of the legal good's violation would so stipulate.[70]

This is not, in my opinion, the main function of the legal good in the supranational sphere. I believe the legal good can discharge a much more relevant function in determining the *quantum* of the European intervention: is it an interest that requires more harmonisation or less? Is it so connected to the EU that it warrants a unified regime? This would remain true for the delimitation of Art. 83(2) TFEU: is it a policy so harmonised that it necessitates a more intense intervention from the EU, given that an autonomous action of the Member States is already precluded? Or is it a policy not yet fully harmonised, that can permit a more diverse approach?

To be in line with the principle of protection of legal goods, the identified interest should have a European constitutional standing, meaning that it must derive

[68] Mylonopoulos, *supra* note 6, p. 649.

[69] Muñoz de Morales Romero, *supra* note 24, p. 319; Nieto Martín, *supra* note 8, p. 349; Salcuni, *supra* note 59, p. 34.

[70] Salcuni, *supra* note 59, pp. 74 et seq. (restricting the function of European criminal law to the protection of legal goods). H. Satzger, *Europäische Autopsie – eine Untersuchung der rechtsstaatlichen Leichen im Fundament der europäischen Strafrechtspflege*, in: R. Hefendehl (ed.), *Empirische und dogmatische Fundamente, kriminalpolitischer Impetus. Symposium für Bernd Schünemann zum 60. Geburtstag*, Carl Heymanns Verlag, Cologne: 2005, p. 307; and Ouwerkerk, *supra* note 13, p. 11.

from the EU's Treaties (understood as a material constitution).[71] The use of this principle would have some clear advantages, such as the precise identification of the protected interests in those areas largely removed from Member State competence, the determination of the necessary *quantum* of harmonisation and the mandatory connection to constitutional values of the EU, alongside the possibility of protecting some interests of the EU itself,[72] as long as they are considered legitimate[73] in light of this principle. Beyond conferring greater coherence to the legislative activity, it would also serve as the "constitutional compass"[74] capable of pointing out those interests that deserve penal protection (thereby justifying the restriction of fundamental rights and freedoms of citizens), and those whose protection can be satisfied through a different approach, such as administrative sanctions.

5.2. The harm principle in the EU

The basic idea associated with the harm principle is already recognised in the EU despite the lack of a precise reference to it.[75] The contribution of this principle is centred on its focus on personal interests and the undesired consequence of harm. The practical implications for the EU would be significant since it would limit its legislative action to behaviours that create harm,[76] and would reduce the criminalisation of acts that represent only a remote danger (something that the principle of protection of legal goods cannot do as effectively). It also allows the harms subject to criminalisation to be weighed against those resulting from said criminalisation,[77] which is an extremely important dimension to be considered, especially at the EU

[71] This is in line with the majority of the literature on the subject (*see also* Ouwerkerk, *supra* note 13, pp. 12 et seq.). Consequently, it would be possible for the European "Constitutional Court", the ECJ, to control the legitimacy of criminal law.

[72] Clarification is needed at this point: the principle of the protection of legal goods allows for the protection of collective legal goods when these are fundamental interests of the community. For that reason, it would be legitimate, from the point of view of this principle, for the EU to defend its existence by criminalising certain conduct that jeopardises it.

[73] Questioning precisely the legitimacy of certain interests and the present situation at the EU level, Harding, Öberg, *supra* note 41, pp. 204, 211.

[74] E. Herlin-Karnell, *European Criminal Law as an Exercise in EU "Experimental" Constitutional Law*, 20(3) Maastricht Journal of European and Comparative Law 442 (2013), p. 464.

[75] Writing about "SOCTA", L. Paoli, *How to Tackle (Organized) Crime in Europe? The EU Policy Cycle on Serious and Organized Crime and the New Emphasis on Harm*, 22(1) European Journal of Crime, Criminal Law and Criminal Justice 1 (2014), p. 4. *See also* the analysis by Persak, *supra* note 30.

[76] In reference to international criminal law, but mentioning the same idea, K. Ambos, *The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles*, 9 Criminal Law and Philosophy 301 (2015), pp. 321 et seq.

[77] *Similarly* Paoli, *supra* note 75, p. 5. With a practical example (hate crime and hate speech), N. Persak, *Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes Under Article 83(1) TFEU*, 33(2) Criminal Law Forum 85 (2022), pp. 111–113.

level, because of its particular *ius puniendi* (for example, the current lack of a competence to decriminalise).

There are advantages concerning Art. 83(2) TFEU as well: when a common interest is at stake (and so the need for supranational criminal measures is not evident), the harm principle will effectively channel European criminal law towards a greater consideration of the citizens, since they are the only legitimate holders of the protected interests for this principle. It would therefore contribute to protecting the citizen from criminal law itself – since it focusses on the protection of individual interests, it would limit European action to (transnationally relevant) behaviour that harms those interests, and would restrict penal intervention to harmful conduct, rather than allowing the criminalisation of merely dangerous behaviour.[78]

One of the difficulties in using this principle lies, conversely, in the fact that it would be extremely difficult to justify a new instance of criminalisation when no specific harm to another person can be found,[79] and that would make it impractical for the EU to protect its existential interests relying on this principle alone.

This combination of advantages and disadvantages led to the conclusion that, in parallel to the different types of interests, a differentiated use of these criminalisation principles would be more appropriate, given the particularities of the European legal order.[80]

5.3. The differentiated function of European criminal law ("the second step")

Once the interest to be protected by criminal law is identified (the first step), its nature would determine the legitimacy principle to be applied in the second step. The principle of protection of legal goods would be applied to proper interests and pre-empted common interests (because if they are already so strongly harmonised that an autonomous action in Member States is precluded, the responsibility to protect them will not differ from that which exists regarding proper interests). The

[78] According to Silva Dias, *supra* note 15, p. 349, that would be indispensable to European criminal law, so as not to spread criminalisation to conduct prior to harm, illegitimately anticipating European criminal liability.

[79] N. Boister, *An Introduction to Transnational Criminal Law*, Oxford University Press, Oxford: 2012, p. 7.

[80] It was recently proposed, much in the same vein as the contribution of Ambos, *supra* note 76 for international criminal law, that European criminal law should combine both the harm principle and the legal good in order to assess its legitimacy – S.S. Buisman, *The Future of EU Substantive Criminal Law: Towards a Uniform Set of Criminalisation Principles at the EU Level*, 30 European Journal of Crime, Criminal Law and Criminal Justice 161 (2022). The problem with that proposal is that, by combining the tests of both principles, it would unbearably reduce the legitimate use of criminal law in the EU: for instance, how could it protect its financial interests if there is no harm to "others" (individuals)? There are also some other inconsistencies regarding European and criminal issues (principles) that were not sufficiently considered, namely why some harms are considered EU harms (*Ibidem*, p. 168), exactly why some legal goods make up the "core" of EU criminal law, what is the criterion for differentiating them (environment and financial interests are the examples given) and why they do not appear to need "legitimisation" regarding the use of criminal law for their protection (*Ibidem*, p. 169).

harm principle would be applied to common interests not as strongly harmonised, so as to limit the EU's action to the defence of its citizens, and in order to lessen the impact of a potentially functionalised European criminal law (to the enforcement of European policies and their effectiveness). This distinction would also correspond to the degree of harmonisation that is intended or allowed by those interests: the more limited the Member State's action is, the stronger the tendency towards harmonisation; hence, the legal good to be protected should be specified as well. Conversely, the more legislative latitude remaining with the Member States, the less justification there would be for extensive harmonisation; therefore, it would be enough to follow an analysis of the harms caused by the conduct in question, without it being necessary to precisely determine the legal good affected by it.

This would in turn enable the Member States that adopt the concept of legal goods to transpose European criminal law in a way that entails the minimum possible costs of systematic coherence: as long as the harmonisation minimums of the Directive are met, these Member States can internally opt for the legal good they consider to be affected by that criminalisation (within the margin of appreciation left to them), and likewise adjust it, as best as possible, to the sanctioning levels that exist for conduct that affect that same legal good. The application of the harm principle in these cases would allow Member States to opt for the preventive protection of that interest (such as crimes of concrete or abstract endangerment), as long as such is not prohibited by the Union.

This is therefore a solution that adds flexibility to the minimum criminalisation adopted at the European level, whilst mitigating the criticism regarding the hardening effect European criminal law has on national criminal law. By focussing its attention on European citizens and the conduct that causes them harm when the interest is common, national criminal law will only be harsher (in terms of preventive criminal legislation[81]) if it so chooses (the criticism regarding sanctioning minimums would remain unchanged since it is not a question that can be resolved *in totum* through a principle directed at the material legitimacy of criminal law). With this bifurcated approach, it is possible to combine the most positive aspects of both, respect the multiple legal traditions and allow for the coherence of the European and national legal orders.

The ideal process, now having in mind steps one and two, would be as follows: first, it should be determined if the interest underlying criminalisation is a *proper* interest of the EU, since the responsibility for its protection is attributed entirely to the Union and the degree of harmonisation permitted or required by those interests

[81] On the topic of preventive justice and tendencies in the EU, Mitsilegas, *supra* note 18. *See also* denoting the "move towards the adoption of 'preventive' criminal law by the EU", V. Mitsilegas, *EU Criminal Law*, Hart Publishing, Portland: 2022, p. 628.

interferes the most with Member States' autonomy. If the answer is affirmative, then the European penal norm should be justified using the principle of protection of legal goods, so as to specifically determine what the Union intends to protect and whether, or why, that is a relevant and worthy interest (in light of the Treaties).

If it is not a proper interest, then it must be ascertained whether it is a *pre-empted common* interest. In the case of an affirmative answer, and once again because of the Union's predominant responsibility to protect it and the harmonisation level that may be required, the principle of protection of legal goods should be applied – this would establish, for the same reasons, if that interest is indeed relevant or if it is merely a policy interest that does not require the intervention of criminal law, precisely because it lacks penal dignity.

Finally, if the identified interest is merely *common*, then the European criminalisation should be guided by the harm principle in order to limit the Union's intervention to the protection of its citizens' interests (guaranteeing their maximum freedom) and to behaviours that cause real harm, given the shared responsibility for its protection. This would reduce the functionalisation of European criminal law and the preventive criminalisation in the European sphere, and it would allow for a better integration of supranational law into national legal orders because it grants them the opportunity to determine the legal good they consider to be at stake because of that conduct (again, if they wish to do so) and to adjust the sanctioning levels accordingly, within their margin of discretion.

The intention of this alternate application of both principles is to preserve Member States' freedom where it can be preserved, and at the same time to delimit the Union's penal action in order to attune it to its legal specificities. That is why pinpointing a legal interest in the first two cases is not problematic (even in light of the different legal traditions): the legislative action left to the Member States was already marginal, and a much more substantive justification can be demanded from the EU as to why criminalisation is needed and legitimate in that case.

A) Brief practical consideration – proper interests

Proper interests are those *of* the EU, and they are the ones for which it bears full responsibility to protect. As these are essentially the Union's interests, no Member State can, on its own, legitimately determine the way they must be protected,[82] hence the need for more acute harmonisation or even unification[83] (that is admittedly more

[82] That is true even with regard to the principle of assimilation: the Union determined that its interests should be protected the same way each Member State protects their own – but that was still the will of the EU.

[83] Because unification is the legislative action with the most consequences for Member States' discretion, it would only be justified when there are existential interests of the EU at stake. For more *see* Muñoz de Morales Romero, *supra* note 24, pp. 329 et seq.

of a future perspective). Some examples include the protection of its financial interests, the probity of its staff or the proper administration of its justice.

These interests should be protected equally throughout the EU, and they should benefit from criminal law protection (when necessary) in the same manner that exists for States – that is to say, the Union should be able to determine the criminal norms applicable to individuals, and these should appear in a Regulation.[84] This would ensure that sanctioning conduct that is harmful to the EU itself would not involve discrepancies within its territory, as these norms would not need to be transposed, thereby providing more coherence both for national criminal law systems and the European legal order.

The *ius puniendi* of the Union would thus manifest as either a true supranational criminal law or as a European criminal law that would slowly harmonise internal norms in the domains that do not require a unitary approach. This distinction would also be important in the context of the European Public Prosecutor's Office's (EPPO): when it acts within areas of the Union's exclusive interest, it would be justified and preferable for the EPPO to have at its disposal identical criminal norms in every Member State, instead of having to operate according to the national transposition.[85] As for the crimes that correspond to common interests (if such a responsibility were to be attributed to it), since they may require a different criminal law approach depending on the reality of each Member State, the EPPO could, without many drawbacks, take those differences into account and work with the national transposition laws.[86]

B) Brief practical consideration – pre-empted common interests

This group will comprise the interests that are common regarding their holdership, but their legal protection is for some reason attributed to the Union, either because they belong to an exclusive competence of the EU or because, given the amount of harmonisation measures, an autonomous action of the Member State is completely precluded or extremely unlikely to be accepted by the EU.

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[84] In the same vein, Caeiro, *supra* note 64, p. 596; Caeiro, *supra* note 56, p. 530; and Caeiro, *supra* note 5. *See also* Satzger, *supra* note 70, p. 310; B. Weiβer, *Strafgesetzgebung durch die Europäische Union: Nicht nur ein Recht, sondern auch eine Pflicht?*, 161(8) Goltdammer's Archiv für Strafrecht 433 (2014), p. 83 et seq.; S.R. Malanda, *Un nuevo modelo de Derecho Penal Transnacional: el Derecho Penal de la Unión Europea tras el Tratado de Lisboa*, 32 Estudios Penales y Criminológicos 313 (2012), pp. 381 et seq.

[85] For true uniformity, there would have to be some concepts of the general part of criminal law and procedural equality, as well as the same rules regarding the execution of the sentence. A project of such dimensions would still be distant, but it would be important for the EPPO – for now and for the protection of these interests – to be able to carry out its activity whilst working with the same legal norms in every Member State.

[86] Also agreeing with a differentiated approach, U. Sieber, *Die Zukunft des Europäischen Strafrechts*, 121(1) Zeitschrift für die gesamte Strafrechtswissenschaft 1 (2009), p. 8.

In this group, *any area of activity* of the EU can be considered, since it is only through legislative analysis that one will be able to ascertain whether a certain domain is largely excluded from State action.[87] If it is *completely* excluded from independent State action, then the responsibility for the protection of that interest will be wholly attributed to the EU, just as it happens with the proper interests. In that case, an eventual unification could be justified depending on the matter (for instance, crimes connected with the Euro); otherwise, it will only determine a stronger harmonisation, since Member States will already be largely excluded from autonomous regulation.

A simple example of this type of interest is provided by the conservation of marine biological resources, which is an exclusive competence of the EU (Art. 3(1) (d) TFEU) under the common fisheries policy. One cannot say that this is a proper interest of the EU – either because it is an interest that exists at the international scale or because only some of the Member States (the coastal ones) would be in a position to jeopardise (and, correspondingly, protect) that interest. Regardless, the responsibility for its protection lies solely with the Union.[88] Regarding the type of measures, if the goal is to protect marine biological resources, then legislative unification would not be necessary, for multiple reasons,[89] and the option for harmonisation should be considered.

C) Brief practical consideration – common interests

This last group of interests features all the interests that are common, but in which harmonisation does not go so far as to preclude autonomous activity of the Member States; some clear examples are given in Art. 83(1) (§2) TFEU. These are usually interests with some European relevance because of their transnational dimension, or because of the difficulty of combating the conduct that harms them at only the national level. Therefore, it "is not because the European peoples share the same set of values, as an ethical community"[90] that the EU can enact criminal law mea-

[87] For example, the Commission has already identified some areas that would eventually benefit from a criminal law approach, such as fraud, the Euro, transport, data protection, customs and fisheries, among others. These domains, although some may be more difficult to classify, are generally common with regard to their holdership, but their attribution to the Union differs greatly; for example, the regulation of the Euro is removed from Member States' competence, fisheries are one of the most harmonised areas, and so on.

[88] Illustrating this, *Conservation of Marine Biological Resources: Commission Requests Portugal to Respect the Exclusive Competence of the EU Under the Common Fisheries Policy*, European Commission, available at: https://oceans-and-fisheries.ec.europa.eu/news/conservation-marine-biological-resources-commission-requests-portugal-respect-exclusive-competence-2018-01-26_en (accessed 30 August 2024).

[89] On the one hand, this does not have the same impact on all Member States: only those with fishing rights are in a position to harm that interest and have the need to legislate on that. On the other hand, the behaviour in each Member State can vary greatly, which can effectively demand a much more flexible approach.

[90] Caeiro, *supra* note 5, p. 18.

sures to protect some dimensions of these interests, but rather because the EU is "better placed (given its resources, expertise and incentives) than Member States to protect"[91] them.

As a consequence, for this group the interests justify less harmonisation and, in order to curb the functionalisation and progressive expansion of European criminal law (without the possibility to regress and decriminalise), European penal intervention should be limited to the criminalisation of behaviour that causes actual harm to its citizens. This would effectively lead to the reconsideration and revision of multiple norms that criminalise conduct in which no legitimate interest is discernible,[92] that anticipate criminal protection (sometimes incomprehensibly)[93] or that are blatantly wrong in their formulation.[94]

5.4. Who determines which interest?

The answer to this question will once again be a consequence of the preceding steps of this criminalisation process. When there is a proper, or pre-empted common interest at stake, given the fact that the responsibility to protect it is solely the EU's, the Union should be the one to define (using the principle of protection of legal goods) what exactly it aims to protect with European criminalisation. In this case, where the interest is more precisely defined and Member States have no autonomous possibility of protecting that interest, they should not be able to change the interest defined by the EU, thus directing the European criminalisation towards another interest for which it was not envisioned.

This is not as problematic as it may seem. Since the States' discretion was already truly limited, it is not a problem that the interest is defined in the supranational sphere as well – in fact, this is the right place to specify it, since the Union will be the one to determine the whole (if it is able to legislate through Regulations) or the majority of its protection regime. Besides, these interests generally originate predominantly technical norms, so it is unlikely that they will conflict with cultural factors, thus intolerably interfering with national internal coherence. Establishing a true, independent criminal legal order in the EU would also allow for the comparison of crimes and sanctions

[91] Öberg, *supra* note 61, p. 421.

[92] *E.g.* Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335/1, Art. 5 (7).

[93] *E.g.* Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism [2017] OJ L88/6, Art. 13 and Art. 14 (3).

[94] *E.g.* the criminalisation of migrant smuggling that results from the "Facilitators Package": Council Framework Decision 2002/946/JHA of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L 328/1; Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L 328/17.

and the perception of which interests are the most valuable for the EU, which would increase coherence in the EU regarding its own scale of values and constitutional dimension (since the most valuable interests with constitutional standing should correspondingly be attributed the harshest sanctions when disrespected).

When a truly common interest is at stake, Member States should be free to pursue criminal protection for the interests they believe were harmed (with the conduct described in the incriminating norm), as long as their choices do not interfere with the objectives defined at the European level. By making use of the harm principle, supranationally it is enough to establish that certain conduct involves harm to people and should be prevented, and that the most appropriate way to achieve that is through a common approach to criminalisation. The *precise* definition of the legal good or interest affected by such conduct would concern only the States, and they would be able to do so within their margin of discretion, allowing for an easier incorporation of the European policy into the internal legal order (with less disruptive potential).

6. CONSIDERING OTHER FUNDAMENTAL PRINCIPLES (THE "THIRD STEP")

The third and final step in the criminalisation process would be to confront the intended criminalisation with other fundamental principles of criminal law – for example, all of those analysed above (legality, subsidiarity, proportionality, *ultima ratio,* etc.). In this respect, it is imperative for the legitimacy of an European incriminating norm that, in addition to having a legitimate interest, it is also deemed necessary, proportional, non-discriminatory, effective, respectful of fundamental rights and legal traditions of the Member States and mindful of the requirements of the principle of legality.[95] Even if none of these principles is primarily directed at the question of material legitimacy, they are essential for other fundamental aspects of the criminal matter and should be acknowledged by the European legislator at this moment. Only after ascertaining that all of these principles are respected should the EU proceed with the intended criminalisation.[96]

[95] With its European particularities: these requirements will be less demanding in European criminal law than they will be later in the national transposition law, because only the latter will be directly applicable to subjects. If, however, the Union ever legislates through Regulations in the field of criminal law, they will have to obey all of the mandates of this principle, since it will actually be directly applicable law.

[96] There are other principles that should be respected by the criminal legislator, such as the principle of guilt, resocialisation, human dignity, presumption of innocence, respect for the rights of defence etc. – *see e.g.* Satzger, *supra* note 16, pp. 83 et seq.; Mir Puig *supra* note 11, p. 30; S. Moccia, *La politica criminale del Corpus Juris: dal Corpus Juris al Diritto Penale Europeo?*, in: A.S. Franco (ed.), *Escritos em Homenagem a Alberto Silva Franco*, Editora Revista dos Tribunais, São Paulo: 2003, pp. 391 et seq. These principles, although relevant, were not mentioned because they are not primarily directed at the initial criminalisation process and its legitimacy.

7. THE OTHER FUNCTIONS OF EUROPEAN CRIMINAL LAW IN BRIEF

There are other functions (besides the protection of relevant interests) that can be fulfilled by adopting European criminal measures; however, they are *not enough* to justify that adoption *without* the corresponding legitimate interest. Criminal legislation that only fulfils one of these functions without having a legitimate interest behind it will consequently lack material legitimacy.

First, there is the effectiveness component: harmonisation avoids great discrepancy in punitive stances regarding the same facts when applied to different Member States. A harmonised criminal response contributes further to the predictability of criminal law (from the point of view of the subjects), which is paramount given the freedom of movement; it is also important for the simplification of mutual recognition, since more commonalities between the legal orders will improve trust between them.[97]

European criminal law fulfils an important symbolic function as well, seeing that it is a normative field directed at *sanctioning* undesirable conduct (which implies censure). However, this should not be the main reason why criminal law is adopted.[98] This symbolic function furthers (or is expected to favour) the development of a common identity at the EU level, one that is specific to the EU and distinct but complementary to the multiple national identities. This identity is incrementally shaped through the commitment to certain values (protected by criminal law) and the rejection of others (penalised through criminal law).[99]

CONCLUDING THOUGHTS – CONSEQUENCES STEMMING FROM THIS PROCESS

In conclusion, what are the consequences of this process? What if the criminalisation of certain conduct at the European level has no underlying legitimate interest? This question is of even greater concern in the EU legal order, due to its particularities: neither the European nor the national legislator has the competence to decriminalise something that was adopted in the EU, making it all the more important

[97] *See* Malanda, *supra* note 84, pp. 361 et seq. regarding the functions of harmonisation.

[98] Concluding the same, Kettunen, *supra* note 12, p. 188.

[99] There are already some examples of merely symbolic legislation in the EU: *e.g.* the incriminations of racism and xenophobia (Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law [2008] OJ L 328/55); for further analysis, *see* Wieczorek, *supra* note 7, pp. 172 et seq. In such cases, it is important to consider *what type of criminal law* we want for the EU, as the adoption of purely symbolic criminal law can result in the symbolic "labelling" of offenders – E. Herlin-Karnell, *Effectiveness and Constitutional Limits in European Criminal Law*, 5(3) New Journal of European Criminal Law 267 (2014), p. 272.

that every European measure is materially legitimate and necessary. However, the perpetual preservation of crimes in the European criminal circuit is not rationally defensible – *quid iuris* when no-one seems to have enough power to determine its non-exercise (or, more to the point, the *cessation* of its exercise)?[100]

One of the suggested solutions was to use the emergency brake mechanism in order to reject proposals that contain criminal norms that do not protect any fundamental interest, or even the possibility of concluding internally that there is no need to employ criminal law with regard to certain conduct defined in the EU.[101] These solutions do not seem feasible: the first because it would require a fundamental aspect of the Member State's legal order to be violated (and consequently the acknowledgment that the harm principle or the principle of legal good is a fundamental aspect of that legal order), and the second because it is questionable whether a Member State can autonomously determine the lack of a fundamental interest in criminalisation proposed by the EU and conclude that the employment of criminal law is *unnecessary*, since the matter at hand (especially when the interests are proper) is not fully within its legislative competence.

Another solution could be found by comparing the proposed criminal law with fundamental rights: by determining its disproportionate incompatibility with them, that argument could be used to remove the offending norm from the European criminal system.[102] The problem with this, be it with the incompatibility with a fundamental right or even with the proportionality principle, is that it can be difficult to argue the illegitimacy of criminal law when the question is actually centred on the *lack* of an interest worthy of penal protection.

Following the suggestion in States where the principle of protection of legal goods is adopted,[103] it is my opinion that there should be a jurisdictional control of European criminal law norms if their material legitimacy is questioned.[104] The most appropriate forum for this would be the ECJ: this is the court responsible for deciding on the interpretation and validity of European law[105] and assessing

[100] Critically regarding the loss of relative value of the sanction at the European level, Sotis, *supra* note 55, p. 779. The easier path would be to grant the European legislator the competence to decriminalise; this will be much more needed as the Union makes use of its annex competence, when it concludes, sooner or later, that there are crimes which should not be considered crimes.

[101] Both suggestions by Satzger, *supra* note 70, pp. 308 et seq.

[102] Similar to what was suggested by the German Constitutional Court regarding the control it could exercise on the compatibility of European legislation with the principle of guilt (German Constitutional Court, *Lissabon Urteil* 2BvE 2/08, 30 June 2009, para. 364), but in an expanded way, in order to encompass all fundamental rights.

[103] Constitutional Courts are the ones who can determine the illegitimacy of a given norm, since the legal good must be constitutionally founded.

[104] Questioning the sufficiency of the existing system of control by the ECJ (Caeiro, *supra* note 5, p. 17).

[105] This seems to be the constitutional justice model which we are gradually opting for in the EU, with the centralisation of the constitutional questions in the ECJ – Salcuni, *supra* note 59, pp. 453–460.

compatibility with the constitutional order of the EU. The conclusion that there is no fundamental interest in need of criminal law protection would render the criminal norm illegitimate, and it should consequently be removed from the European legal order.[106]

Although at present a *strict* jurisdictional control is not to be expected, given the ECJ's fear of treading on the competence of the legislative power,[107] in future, as the ECJ takes on more constitutional tasks and in light of the genuine need for a critical European criminal law, it may be legitimate to believe that this court will play a leading role in the recognition of a European decriminalising competence. This would maintain the European criminal system in synchrony with the society it intends to regulate, whilst preventing the accumulation of criminal infractions that are (or have always been) unnecessary.

It is thus submitted that these principles of criminalisation and this process, in which due consideration is given to the different interests that coexist in the EU and the special aspects of the European legal order, would substantially contribute to the rationalisation of European criminal law. The differentiated approach to criminalisation would moreover ensure more coherence, maintain Member States' margin of discretion where possible and grant the correct forum the responsibility to protect relevant interests. By providing the legislator with substantial principles, the use of criminal law exclusively for functional motives would finally be prevented and less merely symbolic criminal law would be adopted, making it less subject to deserved criticism.

[106] This removal would have different consequences for Member States depending on the type of legislative act and the moment in time regarding its intended transposition. If the criminal norm was part of a Directive not yet transposed, Member States would not have to transpose it; if, however, it had already been incorporated into the national legal order, it is doubtful that the ECJ's judgment would entail the invalidity of the national criminal norm, because by this point it is real national law. In this case, its elimination would be dependent upon the will of the Member State, and the ECJ would only be able to determine its inapplicability if the question of its compatibility with the European legal order was raised. Should the illegitimate criminal norm be part of a Regulation, the judgment of the ECJ would of course entail its removal from the national legal order as well, as Regulations are not supposed to be transposed.

[107] The reluctance to control the choices of the European legislator can be gleaned from cases regarding the principle of subsidiarity, given the eminently political character of those choices – *see e.g.* E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, Hart Publishing, Portland: 2012, p. 115; Muñoz de Morales Romero, *supra* note 24, pp. 346 et seq.

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STATE AID FOR GREEN TECHNOLOGIES IN THE EUROPEAN UNION: LIMITATIONS AND RISKS

Abstract: *This article analyzes the recently adopted European Union State aid rules designed to facilitate the implementation of "green" technologies. This initiative is in line with European objectives to combat climate change and transition to an emission-free economy. By contextualizing State aid rules within the broader regulatory policy landscape, the author aims to assess the inherent limitations of these tools. Based on this evaluation, the article attempts to determine if and to what extent EU State aid law can be successfully utilized to promote environmental objectives.*

The analysis begins with an overview of the State aid toolbox and its role in regulatory policies, situated on a spectrum between incentive-based and obligation-based approaches. Subsequently, it delves into the evaluation of potential consequences, encompassing risks such as the deepening disparities between wealthier and poorer Member States, inadequate safeguards against offshoring in pursuit of lenient environmental norms, and the peril of fostering subsidy dependence.

Keywords: carbon leakage, environmental aid, EU law, GBER, State aid

INTRODUCTION

The rapidly accelerating degradation of the environment and the swiftly closing window of opportunity to take action and prevent irreversible changes have increasingly penetrated political debates as a primary concern.[1] At the European Union (EU, the Union) level, a noticeable drive is underway to craft policies aimed at establishing a zero-net economy, which entails achieving an emission-free, climate-neutral

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[1] There is an extensive body of research on the subject. The following titles provide a synoptic snapshot, encapsulating the main vectors of the debate: B. Cross, *Climate Change and the Politics of Apocalyptic Redirection*, 21(2) Political Studies Review 223 (2023); R.J. Brulle, *Advocating Inaction: A Historical Analysis of the Global Climate Coalition*, 32(2) Environmental Politics 185 (2023), and sources quoted therein.

economy by 2050.[2] Whilst lofty declarations often draw criticism for creating an impression without meaningful action – described by the trending buzzword "greenwashing" – the Russian invasion of Ukraine served as a catalyst for legislative action. Apparently following the famous adage attributed (probably incorrectly) to Winston Churchill, "never let a good crisis go to waste", the European Commission (EC or the Commission) seized the opportunity. They sought to utilise the increased State aid going to businesses affected by this conflict in order to align the subsidies with environmental objectives, thereby working towards achieving both objectives and decreasing reliance on Russian energy sources simultaneously.[3] At around the same time, following a wave of political momentum embracing greater acceptance towards increased subsidisation and the pursuit of "green policies", a series of new aid instruments (listed in Section 2) were also adopted. These developments, among other things, involve revisions to the General Block Exception Regulation (GBER) and new guidelines for environmental aid. These changes have provided more flexible and streamlined options within the State aid framework, aimed at facilitating the adoption of eco-friendly technologies.

Such advancements finally seem to go beyond the merely superficial policy statements and wishful thinking often associated with greenwashing. In this context, this paper aims to evaluate the implemented strategy of promoting green technologies through the mechanisms embedded in EU State aid law. The analysis adopts a research perspective that positions State aid law as an integral component of broader policies aimed at fostering "green" technologies. Recognising it as a cog in the larger machinery allows us to discern practical, rather than purely dogmatic, interactions with other non-state aid instruments described here in the form of a textbook as incentive-based and obligation-based, and thus to carry out such an evaluation.

To fulfil such research objectives, the paper takes the following avenue of inquiry. The analysis commences by introducing the EU State aid toolbox, which was specifically designed to facilitate the adoption of eco-friendly technologies. Following this introduction is an assessment of how this toolbox aligns with broader environmental policy models. Deliberately avoiding an in-depth exploration of policy intricacies, the author instead opts to present large blocks of the two contrasting models: incentive-based and obligation-based. This approach prevents the primary line of inquiry veering off course by avoiding an in-depth dive into secondary details – especially considering that, fundamentally, all regulatory philosophies can be encapsulated

[2] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, and the Committee of the Regions of 11 December 2019 *The European Green Deal*, COM(2019) 640 final.

[3] *State aid: Commission adopts Temporary Crisis Framework to support the economy in context of Russia's invasion of Ukraine*, European Commission, 23 March 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1949 (accessed 30 August 2024).

within the conceptual framework of these models. Subsequently, the analysis delves into areas identified in the course of the preceding discussion where potentially adverse interactions could undermine State aid's ability to achieve its stated "green" objectives. These areas encompass the risks of widening disparities between richer and poorer Member States, inadequate prevention of offshoring in the pursuit of more lenient environmental norms and the potential creation of subsidy-dependent sectors.

1. THE EU STATE AID TOOLBOX FOR PROMOTING "GREEN" TECHNOLOGIES

Adopted in 2022 in the immediate aftermath of the Russian invasion of Ukraine, and amended twice since then, the Temporary Crisis and Transition Framework (TCTF) is largely based on a formula that was "battle-tested" in the COVID Temporary Framework.[4] However, the TCTF goes beyond short-term relief dictated by exigency and has ultimately evolved into a tool to promote the EU "green" agenda.[5] This is because, in addition to the State aid known from the pandemic temporary framework aimed at compensating losses, granted on the basis of Art. 107(2)(b) TFEU, and aid intended to ensure positive cash flow, granted on the basis of Art. 107(3)(b) TFEU, the new framework includes a package of aid measures permissible under Art. 107(3)(c) TFEU.

The latter measures encompass support for transitioning to green energy, as delineated in the policy document RePowerEU.[6] They include investment and operating aid for initiatives simultaneously serving "green" objectives and reducing reliance on Russian fuel sources, whereas the TCTF allows investment and operating aid for the rollout of renewable energy and energy storage, including the production of renewable hydrogen, electricity and thermal storage and storage for renewable hydrogen, biofuels, bioliquids, biogas and biomass fuels.[7] Additionally, aid is permitted for decarbonising industrial processes, particularly through the adoption of hydrogen-based solutions. This entails investment aid that targets significant reduc-

[4] Communication from the Commission, *Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia* [2022] OJ C 131/1. *Cf.* Communication from the Commission, *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* [2020] OJ C 91/1.

[5] N. Gràcia, I. Lunneryd, A. Papaefthymiou, *The Race Towards a More Sustainable Future: Is Current State Aid Policy Fit for Purpose?,* 8(2) Competition Law & Policy Debate 92 (2023), p. 95.

[6] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, and the Committee of the Regions of 8 March 2022 *on REPowerEU: Joint European Action for more affordable, secure and sustainable energy*, COM(2022) 108 final.

[7] Communication from the Commission, *Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia* [2022] OJ C 131, section 2.6.

tions in greenhouse gas emissions from industrial activities relying on fossil fuels or feedstock, alongside reduced energy consumption within industrial processes.[8] Furthermore, the framework allows Member States to adopt aid schemes – aid measures directed at multiple beneficiaries under transparent eligibility conditions – for undertakings engaged in the production of key equipment such as batteries, solar panels, wind turbines, heat pumps, electrolysers and equipment for carbon usage and storage; the production of key components designed and primarily used as direct input for the production of the aforementioned equipment; and the production or recovery of related critical raw materials for the production of the aforementioned equipment and components.[9]

All aid falling under Art. 107(3)(c) TFEU is notifiable; however, the EC assesses it in an expedited manner.[10] At the time of writing (March 2024), measures providing short-term relief to undertakings affected by the conflict have expired, whilst those aimed at promoting "green" goals are set to remain applicable until the end of 2025.[11]

Another set of tools for supporting "green" objectives within the State aid framework comprises Art. 107(3)(c) TFEU aid set out in the Climate, Energy, and Environmental Aid Guidelines (CEEAG).[12] Adopted at the close of 2021, these guidelines replaced the former Energy and Environmental State Aid guidelines.[13] The new guidelines have retained previous aid measures, which include aid for energy from renewable sources; aid for energy efficiency measures, including cogeneration and district heating and district cooling; aid for resource efficiency and particularly waste management; aid for carbon capture and storage; aid in the form of reductions in or exemptions from environmental taxes and reductions in funding support for electricity from renewable sources; aid for energy infrastructure; aid for so-celled energy adequacy, aiming to increase the share of renewable energy sources and transition from a system of relatively stable continuous supply to one with more numerous, small-scale and variable sources; aid for tradable permit schemes enabling emissions reduction; and aid for relocating pollutants to areas where their operations will create fewer negative externalities.[14]

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[8] *Ibidem*.

[9] *Ibidem*, section 2.8.

[10] Gràcia, Lunneryd, Papaefthymiou, *supra* note 5, p. 96.

[11] *Commission consults Member States on a proposal for a partial adjustment of the phase-out schedule of the State aid Temporary Crisis and Transition Framework in view of the upcoming winter heating period*, European Commission, 6 November 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5525 (accessed 30 August 2024).

[12] Communication from the Commission, *Guidelines on State aid for climate, environmental protection and energy 2022* [2022] OJ C 80/1.

[13] Communication from the Commission, *Guidelines on State aid for environmental protection and energy 2014–2020* [2020] OJ C 200/1.

[14] *Cf. Ibidem*, sections 3.3–3.11; Commission, *supra* note 12, sections 4.1, 4.2, 4.4.

In addition, the CEEAG introduced new categories of Art. 107(3)(c) TFEU aid. These include aid for the reduction and removal of greenhouse gas emissions, including through support for renewable energy and energy efficiency;[15] aid for clean mobility, to reduce or avoid emissions of CO2 and other pollutants from the air, road, rail, waterborne and maritime transport sectors;[16] and aid for resource efficiency and for supporting the transition towards the so-called circular economy, an economic model that emphasises maximal reusability and recycling of materials to minimise wastage.[17] Furthermore, the CEEAG provides a framework for aid aimed at remediating environmental damage, rehabilitating natural habitats and ecosystems, protecting or restoring biodiversity and implementing nature-based solutions for climate change adaptation and mitigation.[18] It also covers aid for the closure of power plants using and mining operations extracting coal, peat or oil shale.[19]

It should be noted, as an aside, that the aid categories specified in the CEEAG somewhat overlap with activities that may receive support under the TCTF.[20] This scenario is not optimal, as it impacts the legal certainty, primarily due to differing formal compatibility criteria – specifically quantitative criteria such as intensity limits – between these two acts (whilst their other qualitative criteria derive from the common assessment principles shared among all Art. 107(3)(c) TFEU forms of aid). Given the high priority of "green" objectives on the EU agenda, it is plausible that the Commission might opt for the more lenient criteria within these overlapping areas.[21] However, since there is no assurance of this approach, this overlap must be acknowledged as a concern, albeit only a potential one, considering the EC practice so far.[22]

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[15] Commission, *supra* note 12, section 4.1.

[16] *Ibidem*, section 4.3.

[17] *Ibidem*, section 4.4.

[18] *Ibidem*, section 4.6.

[19] *Ibidem*, section 4.12.

[20] *Cf. Ibidem*, section 4.1; Communication from the Commission, *Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia* [2022] OJ C 131, sections 2.5, 2.6.

[21] Though the data at this point is not conclusive, a discernible trend of leniency towards "green"-orientated aid is evident. For instance, see measures approved under the TCTF, which could very well have been approved under the CEEAG: Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union – Cases where the Commission raises no objections – SA.110511 [2024] OJ C 1361; TCTF/RRF - Slovakia: Investment support for electricity storage, available at: https://competition-cases.ec.europa.eu/cases/SA.106554 (accessed 30 August 2024); Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union – Cases where the Commission raises no objections – SA.108953 [2023] OJ C 258.

[22] Gràcia, Lunneryd, Papaefthymiou, *supra* note 5, p. 97.

Art. 107(3)(c) TFEU aid, granted under the GBER, provides an additional pathway to promote "green" objectives.[23] The extensive growth in GBER aid measures stands as one of the more visible trends in EU State aid in recent years.[24] The GBER, unlike typical State aid – and thus differing from all other aid measures described in this section – is not subject to *ex ante* control. Instead, it is presumed to be compatible with the internal market and is exempted from notification obligations. The GBER introduces sets of criteria for each type of aid covered, leaving it to the Member States to ensure compliance. Control therefore operates *ex post* and only on a spot-check basis.[25] The architecture facilitates streamlining procedures and relieving the Commission's resources to focus on critical cases, which is effective given that the specified aid categories are generally deemed non-problematic in both their scale and objectives.[26] The system, wherein Member States primarily ensure compliance with the compatibility requirements set out at the EU level, has generally been praised as a success story.[27] Over the years, local officials in Member States have accumulated the necessary experience to fully capitalise on funding opportunities offered by the GBER. Consequently, its usage does not raise any major concerns. This positive trend is further evidenced by the repeated addition of new categories to the GBER. As of 2021, the latest available State Aid Scoreboard data reveals that Block-exempted aid represents 65% of all active measures, compared to 41% in 2014 when the current rules were adopted.[28]

The revised GBER, adopted concurrently with the TCTF (by Regulation 2023/1315) – which at the time of writing is set to remain in effect until the end of 2026 – empowers Member States to establish aid schemes targeted at transitioning

[23] Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version) [2023] OJ L 167/1.

[24] T.E. Stuart, I. Roginska-Green, *Sixty Years of EU State Aid Law and Policy: Analysis and Assessment*, Wolters Kluwer, Alphen aan den Rijn: 2018, pp. 882–885; V. Lemonnier, *The EU Green Deal Industrial Plan*, 22(2) European State Aid Law Quarterly 123 (2023).

[25] *Cf.* Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version) [2023] OJ L 167, Art 12(2); Case C-493/14 *Dilly's Wellnesshotel GmbH v. Finanzamt Linz,* EU:C:2016:577.

[26] This stems from the objectives of the State Aid Modernisation (SAM) reform. *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions of 8 May 2012 *EU State Aid Modernisation*, COM(2012)209 final, especially para. 25.

[27] P. Werner, V. Verouden (eds.), *EU State Aid Control: Law and Economics*, Wolters Kluwer, Alphen aan den Rijn: 2016, pp. 225–226; A. Heimler, *State Aid Control: Recent Developments and Some Remaining Challenges*, in: P.L. Parcu, G. Monti, M. Botta (eds.), *EU State Aid Law: Emerging Trends at the National and EU Levels*, Edward Elgar Publishing, Cheltenham: 2020, pp. 53–54.

[28] *State aid Scoreboard 2023*, European Commission, 9 April 2024, available at: https://competition-policy.ec.europa.eu/document/download/0b2037c5-c43f-4917-b654-f48f74444015_en?filename=state_aid_scoreboard_note_2023.pdf (accessed 30 August 2024), p. 89.

to climate neutrality and achieving a net-zero industry.[29] The updated GBER has broadened safe harbour conditions for energy efficiency projects in buildings and for the development of recharging and refuelling infrastructure for low-emission road vehicles. Furthermore, the new framework introduced additional categories, including investment aid for the acquisition of clean or zero-emission vehicles, retrofitting of vehicles and aid for decarbonisation initiatives, specifically for equipment, machinery using renewable hydrogen and infrastructure for transporting renewable hydrogen. It also encompasses operating aid to encourage the use of electricity generated from renewable sources, investment aid for energy efficiency measures in buildings and aid in the form of reduced environmental taxes or parafiscal levies, allowing intensity ceilings of up to 100%.[30] The allowance of such high intensity levels, which is relatively uncommon under the GBER, underscores the priority the EU gives to objectives associated with these measures.

Finally, there is always an option to grant aid directly under the Treaty, in this instance almost exclusively under Art. 107(3)(c) TFEU.[31] Over the years, the Commission has aimed to enhance transparency in its decision-making process regarding State aid assessment. To achieve this, it has consistently attempted to quasi-codify its approach through several soft-law guidelines, intending to reduce reliance on an ad hoc approach.[32] Consequently, the approval of State aid directly under the Treaty is regarded as a Plan B, accessible in "exceptional circumstances".[33] Nonetheless, in practice, its utilisation is not that uncommon.[34]

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[29] Commission Regulation (EU) No. 2023/1315 of 23 June 2023 amending Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) No. 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty [2023] OJ L 167/1, especially recitals 5 and 15–17.

[30] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version) [2023] OJ L 167, Art. 36(5) and (9), 36a(5), 36b(5)(a), 38(7), 41(10), 45(9)(a), 46(9), 48(6).

[31] In addition, there is the possibility to approve measures as serving the "common European interest" under Art. 107(3)(b) TFEU. However, since this provision applies only to a small number of high-profile, usually one-off projects, it will not be explored further.

[32] O. Ştefan, *Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union*, Wolters Kluwer, Den Haag: 2013, pp. 52–57; A. Bouchagiar, *The Binding Effects of Guidelines on the Compatibility of State Aid: How Hard is the Commission's Soft Law?*, 8(3) Journal of European Competition Law & Practice 157 (2017).

[33] Case C-526/14 *Tadej Kotnik and Others v. Državni zbor Republike Slovenije*, EU:C:2016:570, paras. 41–43, 98; Case C-431/14 P *Greece v. Commission*, EU:C:2016:145, paras. 70–75.

[34] *See e.g.* European Commission, *Commission Staff Working Document Accompanying the Document Report from the Commission Report on Competition Policy 2022*, Brussels, 4 April 2023, COM(2023) 184 final, especially Annex II.

2. IN SEARCH OF AN OPTIMAL REGULATORY MIX: THE ROLE AND INHERENT LIMITATION OF STATE AID LAW

The relationships between State aid and other areas of EU law are generally outlined by the Court's dicta in the C-390/06 *Nuova Agricast* case. The Court stated that the application of State aid provisions must not lead to results contrary to the Treaties, including those that conflict with other European policies.[35] Subsequent jurisprudence, particularly in T-57/11 *Castelnou Energía* and C-594/18 P *Austria v. Commission*, reemphasised the imperative of ensuring consistency across various EU policies.[36] However, in T-228/99 *WestLB* the Court clarified that there is no obligation to directly apply non-State aid rules in State aid cases unless "the aspects of aid are so inextricably linked to the object of the aid that it is impossible to evaluate them separately."[37]

Such an approach, predominant in the *acquis*, with its primary focus on dogmatic and systemic links, is based on a scenario whereby State aid and other EU policies, at least partially overlapping and serving different objectives, require the use of collision rules.[38] In other words, the interaction is negative in nature, resulting in an obligation of non-interference. In contrast, the framework elucidated in Section 2 boasts a clearly defined, explicitly stated positive focus on fulfilling the objectives of non-State aid environmental policies.[39] These rules bear a distinct *ratio legis* in support of the implementation of eco-friendly technologies, whilst the typical State aid-related objectives, linked with maintaining a level playing field, function primarily as safeguards.[40] The analysis of a framework characterised by such a set of

[35] Case C-390/06 *Nuova Agricast Srl v. Ministero delle Attività Produttive*, EU:C:2008:224, para. 50.

[36] Case T-57/11 *Castelnou Energía v. Commission*, EU:T:2014:1021, paras. 181–182; Case C-594/18 P *Austria v. Commission*, EU:C:2020:742, para. 44.

[37] Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission of the European Communities*, EU:T:2003:57, paras. 195–196.

[38] *See* sources quoted on in H. Kassim, B. Lyons, *The New Political Economy of EU State Aid Policy*, 13(1) Journal of Industry, Competition and Trade 1 (2013), pp. 13–14.

[39] Communication from the Commission, Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2022] OJ C 131, recital 30; Communication from the Commission, *Guidelines on State aid for climate, environmental protection and energy 2022* [2022] OJ C 80, recitals 1–4; Commission Regulation (EU) No. 2023/1315 of 23 June 2023 amending Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) No. 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty [2023] OJ L 167, recital 4.

[40] The issue of the objectives of State aid control is extensive and beyond the scope of this paper. The one mentioned in the main body of the text is generally accepted as the broadest description. *See generally* J.L. Piernas López, *The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond*, Oxford University Press, Oxford: 2015, pp. 45–66.

objectives necessitates, in the author's view, a distinct perspective with an emphasis on finistic efficiency – determined by the interaction between various rulesets dictated by different regulatory philosophies, rather than a dogmatic examination of systemic links.

In this context, at a certain level of generality, the choice of a policy approach or regulatory philosophy for promoting "green" technologies can be characterised as a choice between an incentive-based approach and an obligation-based model (sometimes referred to as a command and control model or direct regulation).[41] However, in reality, a comprehensive policy aimed at advancing a specific goal extends beyond a dichotomous choice between these two approaches; it involves a mix of these models (that reaches beyond the scope of State aid alone).[42] In Joseph Raz's words, these are "obligations backed by incentives".[43] The author deliberately employs these two contrasting models in their somewhat simplified form as a point of reference to provide a clear perspective and more visible yardsticks.[44]

Incentive regulation is defined as a means of achieving policy goals by granting some discretion to undertakings.[45] A positive effect is granted when the undertaking's conduct is in line with the authorities' expectations (for example, preferential taxation, financial grants, etc.). If regulators' information about all the important aspects of a given economic activity were as good as that of professional market players, they would be capable of determining, for example, what level of additional burdens is acceptable for businesses, and they could simply create obligations mandating specific behaviour.[46] However, economic history (especially the failure of command economies) attests that such parity in information does not exist. Conversely, an incentive-based system offers a workaround for these limitations, relying on the expertise of professional market players who understand how to optimise their actions to seize available opportunities.[47] In the case under discussion, this condition is fulfilled in principle, as the framework applies to a diverse array of technologies with a wide range of company-specific rollout scenarios.

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[41] P. Agrell, *Incentive Regulation of Networks: Concepts, Definitions and Models*, 54(1) Reflets et perspectives de la vie économique 103 (2015), pp. 104–105.

[42] This realisation builds upon the seminal work of R.H. Coase, *The Problem of Social Cost*, 3 Journal of Law and Economics 1 (1960).

[43] J. Raz, *The Concept of a Legal System*, Oxford University Press, Oxford: 1980.

[44] For more detail, *see* P. Lehmann, *Justifying a Policy Mix for Pollution Control: A Review of Economic Literature*, 26(1) Journal of Economic Surveys 71 (2012) and sources quoted therein.

[45] Agrell, *supra* note 41, p. 107; I. Vogelsang, *Incentive Regulation and Competition in Public Utility Markets: A 20-Year Perspective*, 22(1) Journal of Regulatory Economics 5 (2002), p. 6.

[46] D. Sappington, *Designing Incentive Regulation*, 9(3) Review of Industrial Organization 245 (1994), p. 247.

[47] *Ibidem.*

Moreover, the effectiveness of an incentive-based system relies on the opposing interests pursued by undertakings: the financial interests of shareholders, consumers prioritising their own welfare and the policy objectives of authorities. If these interests were to naturally align, incentives to follow a specific course of action might become redundant.[48] This condition in the case in question is also *prima facie* fulfilled, as the implementation of environmentally friendly technologies is generally considered too costly to be unequivocally economically viable.

The opposing obligation-based, or command and control model has been dominant in environmental regulation ever since these issues shifted from being mere "nice-to-have" additional activities pursued as part of corporate social responsibility.[49] This model can take a variety of forms, the most common of which involves environmental standards imposing uniform requirements (command) and the State apparatus being responsible for enforcement (control).[50] Empirical research indicates that this method can yield significant results when the rules are effectively enforced.[51] Moreover, the system provides a restraint on arbitrariness, ensuring greater legal certainty.[52] However, it is often perceived by businesses as excessively burdensome.[53] Throughout history businesses have consistently, and often successfully, resisted regulations introducing new standards due to the associated additional costs.[54] These costs – so the argument goes – might subsequently be passed on to consumers, resulting in higher prices. Market participants argue the need to reduce profit margins due to increased operating expenses, particularly when demand cannot support substantial price hikes, posing potential challenges to economic sustainability. This argument also highlights the fact that higher costs may undermine competitiveness against foreign enterprises.[55] From a purely economic standpoint, this group of arguments is generally defensible.

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[48] *Ibidem*.

[49] M. Ryznar, K.E. Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 Marquette Law Review 1667 (2015), p. 1670.

[50] N. Gunningham, *Environment Law, Regulation and Governance: Shifting Architectures*, 21(2) Journal of Environmental Law 179 (2009), p. 182.

[51] *See e.g.* S. Cohen, *EPA: A Qualified Success*, in: S. Kamieniecki, R. O'Brien, M. Clarke (eds.), *Controversies in Environmental Policy*, State University of New York Press, Albany: 1986, p. 174; S. Almeida Neves, A. Cardoso Marques, M. Patrício, *Determinants of CO2 Emissions in European Union Countries: Does Environmental Regulation Reduce Environmental Pollution?*, 68 Economic Analysis and Policy 114 (2020).

[52] Gunningham, *supra* note 50, p. 184.

[53] S. Leipold, *Transforming Ecological Modernization "From Within" or Perpetuating It? The Circular Economy as EU Environmental Policy Narrative*, 30(6) Environmental Politics 1045 (2021), p. 1053.

[54] *See e.g.* Brulle, *supra* note 1.

[55] *See generally* A. Dechezleprêtre, M. Sato, *The Impacts of Environmental Regulations on Competitiveness*, 11(2) Review of Environmental Economics and Policy 183 (2017) and sources quoted therein.

Arguably, the most notable drawback of an obligation-based model becomes apparent when the issues it seeks to address surpass isolated point-source problems.[56] A point-source problem exists when, for example, a specific industrial process causes excessive pollution and can be solved by mandating filters. However, in heterogeneous industries, numerous businesses interconnect in production and logistic chains, each producing distinct negative externalities through their respective processes.[57] The effectiveness of the obligation model hinges on the authorities having sufficient information about where and how these negative effects are generated. In reality, this task is often insurmountable, at least in its entirety, as it inevitably involves cases that are highly specific to the company and situation.[58]

When comparing the respective strengths and drawbacks of incentive-based versus obligation-based models, the former provides more flexibility. In our context, it allows for funding solutions that are innovative and untested, though it does not guarantee that entities will actually take advantage of the incentive on offer. On the other hand, the obligation-based solution, whilst simpler and potentially more directly effective, tends to have lacunae and may be overly burdensome. The important conclusion, in the author's opinion, to be drawn from this synoptic comparison is that their relationship resembles the well-known trope of the "carrot and the stick" and that one alone would never be effective.[59]

Aside from the general recommendation that this factor should be considered when creating an optimum policy mix–which is obvious and beyond the scope of this paper–in limiting the analysis to the State aid framework, it can be said that it has a role in each of these regulatory components: incentives and obligations. It can potentially enhance both by mitigating the costs of costly environmental norms and creating financial incentives for the rollout of new "green" technologies. Whilst the above is *prima facie* apparent, the potential second-order consequences are not equally obvious. These transcend simple causal relationships defining the desired effect, and delve into unintended repercussions originating from interactions within the particular configuration of rulesets inherent to policy philosophies. In the author's opinion, these consequences stem from two factors that are inherently embedded in the nature of State aid designed to promote the deployment of new "green" technologies.

The first of these factors relates to the current interpretive standard pertaining to, or rather the very concept of the incentive effect in State aid cases. The incentive effect, a longstanding element within the EU State aid *acquis*, gained prominence

[56] C. Sunstein, *The Paradoxes of the Regulatory State*, 57 University of Chicago Law Review 407 (1990), p. 408.

[57] *Ibidem*.

[58] Gunningham, *supra* note 50, p. 184.

[59] *See* Raz, *supra* note 43.

following the 2012 State Aid Modernisation (SAM) initiative.[60] It now constitutes part of the common assessment principles applied to all aid measures evaluated under Art. 107(3)(c) TFEU.[61]

The incentive effect refers to the expectation that an undertaking will take actions resulting from State aid that it otherwise would not in the absence of such aid.[62] When receiving aid, the beneficiary should be prompted to engage in activities that yield positive effects extending beyond its individual economic interests.[63] Achieving these broader positive outcomes, in alignment with the policy objectives behind the aid measure, thus leads to it being declared compatible under Art. 107(3)(c) TFEU.[64] If, conversely, the support covers activities that a company would have pursued anyway, it falls under the classification of operating aid – a subsidy intended to cover ongoing expenses not associated with any specific project.[65] In principle, such aid cannot be deemed compatible with the internal market under Art. 107(3) TFEU.[66] That is, at least in principle, aid would have an incentive effect if specific environmental standards prove too costly for businesses. For instance, when there is a legal obligation to adopt a certain standard but an absence of aid, the "what if" scenario refers to whether companies will comply or, for example, relocate. Similarly, when the State merely incentivises a desired course of action, it pertains to whether companies would undertake specific actions in the absence of aid. This problematic point will prominently reoccur throughout the subsequent analysis, emerging later as a salient factor in the framework's potential risks.

The second factors previously mentioned, inherent to State aid and with the potential to impact its role in advancing the "green" EU agenda concerns the discretionary competence to grant it. The research on the theory of an incentive-based system and its efficacy is founded on the assumption of a straightforward causal link between companies' actions and positive outcomes. In other words, if a business takes a specific action, a positive effect will inevitably follow.[67] Whereas the decision to grant State aid remains the sole discretionary competence of Member

[60] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions of 8 May 2012, *EU State Aid Modernisation*, COM(2012)209 final, para. 12.

[61] K. Bacon (ed.), *European Union Law of State Aid*, Oxford University Press, Oxford: 2017, p. 100.

[62] P. Nicolaides, *The Incentive Effect of State Aid: Its Meaning, Measurement, Pitfalls and Application*, 4 World Competition 579 (2009).

[63] *E.g.* Case T-162/06 *Kronoply GmbH & Co. KG v. Commission of the European Communities*, EU:T:2009:2, para. 43.

[64] Nicolaides, *supra* note 62, p. 580.

[65] *E.g.* Case C-86/89 *Italian Republic v. Commission of the European Communities*, EU:C:1990:373, para. 18.

[66] *See e.g.* Case T-348/04 *Société internationale de diffusion et d'édition SA (SIDE) v. Commission of the European Communities*, EU:T:2008:109, para. 99. There are some exceptions that, due to their very limited nature, are irrelevant to the discussed issue and thus will be omitted.

[67] *Cf.* Vogelsang, *supra* note 45, p. 6; Sappington, *supra* note 46, p. 247.

States, the CJEU explicitly stated in C-850/19 P *Holýšov* that there is no inherent "right to State aid".[68] The support received by one undertaking does not establish any legal entitlement for other undertakings, even those in comparable situations, to receive similar assistance.[69]

This factor alone should not be criticised, as it goes without saying that any alternative solution amounting to the ability to *de facto* force States to grant aid would have indisputably been overly intrusive. However, when this factor, together with the previously mentioned one, is placed on the wider canvas of the incentive-obligation policy mix aimed at promoting "green" technologies, it may synergise with other components and raise the following concerns. These concerns hold equal validity for predominantly obligation-based and incentive-based approaches, though with a different emphasis balance.

The first concern arises from granting a natural advantage to wealthier nations equipped with more substantial funds for aid measures. This concern is interlinked with another: onerous environmental norms or insufficient subsidisation might render the adoption of "green" technologies economically unviable. Consequently, the system might incentivise undertakings to relocate their operations to countries with more lenient norms. Somewhat conversely, a third concern is that if the amount of State aid is substantial, it may lead to the creation of industries reliant on continuous public funding – a third concern. These concerns underscore an underlying issue of how to ensure the economic viability of green technologies, each of which will be discussed in turn.

3. THE RISK OF DEEPENING DISPARITIES BETWEEN MEMBER STATES

The concern that the framework outlined above might deepen developmental disparities between Member States by favouring those with more substantial resources has been explicitly raised by Competition Commissioner Vestagher in the TCTF context, and prior to that was also raised within the broader scope of EU environmental policy.[70] The argument ran that poorer States may struggle to allocate comparable funds to State aid for green technologies as wealthier ones, resulting in

[68] Case C-850/19 P *FVE Holýšov I s.r.o. and Others v. European Commission*, EU:C:2021:740, para. 142.

[69] Notably, a comparable situation emerged in joined cases C-73/22 P and C-77/22 P *Grupa Azoty S.A. and Others v. European Commission*, EU:C:2023:570, where plaintiffs incorrectly claimed that a system allowing State aid to be granted to prevent carbon leakage to other companies amounts to guarantees that such aid will be granted.

[70] *Remarks by Executive Vice-President Vestager on the proposal for a State aid Temporary Crisis and Transition Framework*, European Commission, 1 February 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_527 (accessed 30 August 2024).

economic disparities.[71] This impact might not be immediate, considering that these technologies still need to mature. However, given the accelerating environmental degradation, these technologies are likely to gain prominence, providing early adopters with a significant head start. This mechanism could be further exacerbated, especially under an obligation-heavy system, creating a scenario where adaptation or abandoning the activity as unviable, or relocation to other countries becomes economically imperative. This, in turn, may subsequently lead to the carbon leakage discussed below.[72]

While the above-mentioned concern is inherent in the entire State aid ruleset, not only that which is related to "green" technologies, the instruments available for State aid offer limited possibilities to address it. The only viable solution is to introduce more generous aid limits in assisted regions (NUTS categories b and c), specifically targeting underdeveloped areas.[73] Generally, these differentiated aid ceilings are derived from the EU imperative of promoting cohesion, which translates into simple quantitative aid criteria embedded in the GBER and in Regional Aid Guidelines (RAG) – the more a region lags behind the EU average, the more aid it is eligible to receive.[74] However, the effectiveness of this mechanism is contingent upon the same factor that prompts the inequality concern. Just because EU law permits more aid does not automatically mean that States will grant it.[75]

In addition, it must be noted that irrespective of geographical preferences for regional aid, granting State aid directly under the Treaty always remains an option. Where wealthier Member States grant aid for rolling out some eco-friendly technology, such a measure will, in principle, fulfil the objectives of Art. 107(3)(c) TFEU, under which it falls.[76] In light of existing case law, there does not seem to be a possibility – because there is definitely no precedent – of an aid measure being

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[71] Gràcia, Lunneryd, Papaefthymiou, *supra* note 5, p. 99. Similar concerns aired earlier: J. Skovgaard, *EU Climate Policy After the Crisis*, 23(1) Environmental Politics 1 (2014).

[72] *See generally* H. Naegele, A. Zaklan, *Does the EU ETS Cause Carbon Leakage in European Manufacturing?*, 93 Journal of Environmental Economics and Management 125 (2019) and sources quoted therein.

[73] Communication from the Commission, *Guidelines on regional State Aid* [2021] OJ C 153/1 recitals 12–14, sections 7.2 and 7.3; Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version) [2023] OJ L 167, Art. 2(27)(48)(55), defining regions eligible for more preferential conditions based on a regional aid map.

[74] *See* K. De Marez, A-M. Pielmus, *Key Elements of the Revised Guidelines on Regional State Aid*, 21(2) European State Aid Law Quarterly 120 (2022), pp. 123–126.

[75] *Cf.* Joined Cases C-73/22 P and C-77/22 P *Grupa Azoty S.A. and Others v. European Commission*, para. 31.

[76] Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union [2022] OJ C 357/1; Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union – Cases where the Commission raises no objections [2021] OJ C 317/1.

declared incompatible with the internal market solely because it distorts competition and trade by deepening inequalities if it also serves the EU environmental goals.[77] It must be noted that the balancing test, where the pros and cons of the measure are weighed for the purpose of Art. 107(3)(c) TFEU, under which all such measures are assessed, does not require the competitive situation to be determined or a relevant market to be established.[78] There is also no need to identify competitors.[79] Thus, neither any known method of legal interpretation nor simple common sense would justify blocking an aid measure, because theoretically some unidentified individual from a poorer country who may or may not be a competitor may or may not receive comparable aid.

In practical terms, the only scenario where aid, clearly aligned with environmental objectives as outlined in the framework or granted directly under the Treaty, might be deemed incompatible with the internal market is when the measure exhibits egregious administrative flaws, for instance, involving overpayment, lacking proper oversight, and so forth. It must be, simply speaking, a blatant case of administrative incompetence, which cannot be completely ruled out from time to time, but in the grand scheme of things is merely a negligible statistical fluke.[80] Therefore, for wealthier States, the option of granting aid directly under the Treaty and bypassing the GBER/RAG remains a viable choice.[81]

This section of the analysis can thus be concluded by stating that when it comes to State aid compatibility criteria in the light of the existing *acquis*, the concern that the discussed framework, especially the TCTF and the CEEAG, may deepen developmental disparities between Member States cannot be satisfactorily addressed. This factor not only casts a shadow on the concerns discussed below, but must also be recognised as an inherent limitation of what State aid can practically achieve.

[77] The balancing test in the *acquis*, pitting distortion of competition and trade against environmental goals, suggests the opposite. *See e.g.* Case T-176/01 *Ferriere Nord SpA v. European Commission*, EU:T:2004:336, paras. 134, 151; Case T-671/14 *Bayerische Motoren Werke AG v. European Commission*, EU:T:2017:599, para. 109.

[78] *E.g.* Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v. Commission of the European Communities*, EU:T:2000:223, para. 102; Case T-58/13 *Club Hotel Loutraki AE and Others v. European Commission*, EU:T:2015:1, paras. 88–89.

[79] *E.g.* Case T-14/96 *Bretagne Angleterre Irlande (BAI) v. Commission of the European Communities*, EU:T:1999:12, para. 78.

[80] *See* rare examples State aid – Hungary – State aid SA.48556 (2019/C) – Regional investment aid to Samsung SDI – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union [2022] OJ C 82/21; Commission Decision of 26 July 2022, No. 2023/1683, on the measure SA.26494 2012/C (ex 2012/NN) implemented by France in favour of the operator of La Rochelle airport and certain airlines operating at that airport [2023] OJ L 217/5.

[81] This has happened before. *See e.g.* Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union [2014] OJ C 280/1; Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union [2016] OJ C 258/1; Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union [2017] OJ C 20/1.

Simultaneously, it underscores the need to supplement State aid tools with other legal instruments, specifically EU funds – which is a separate issue in itself. Only through this supplementation can the underlying issue of disparities in available subsidisation funds across Member States be effectively addressed. Even though the issue of the usage of EU funds lies beyond the scope of this paper, the fact that it naturally emerges as a logical conclusion goes to show, firstly, that State aid should not be seen in isolation from other instruments of EU law, and secondly, that it underscores how State aid, by itself, has certain inherent limitations.[82]

4. THE INSUFFICIENT PREVENTION OF CARBON LEAKAGE

Another concern associated with the framework is the creation of conditions conducive to carbon leakage. Carbon leakage refers to the situation that may occur if, due to the costs related to climate policies, businesses were to transfer production to other countries with laxer emission constraints.[83] Although semantically the term refers to a specific category of emissions, the concept is understood more broadly as an umbrella term to describe pollution increasing as a result of offshoring to avoid costly environmental norms.[84]

It can be said that obligation-based solutions, in principle, tend to stimulate offshoring and carbon leakage (for those companies that are operationally capable of relocating), whereas incentive-based systems are neutral in this regard.[85] EU State aid law, or rather, State aid-adjacent laws, contain relatively limited but nevertheless somewhat viable incentive-based tools to mitigate this phenomenon, which can serve as a general template. Directive 2003/87/EC allows Member States to adopt measures "in favour of sectors or subsectors which are exposed to a genuine risk of carbon leakage due to significant indirect costs that are actually incurred from greenhouse gas emission costs passed on in electricity prices."[86] These measures are

[82] In a similar vein, not in the State aid context, but the broader EU environmental policy context, *see* M. Pianta, M. Lucchese, *Rethinking the European Green Deal: An Industrial Policy for a Just Transition in Europe*, 52(4) Review of Radical Political Economics 633 (2020).

[83] The definition used by the EC is available at: *Carbon leakage*, European Commission, available at: https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets/free-allocation/carbon-leakage_en (accessed 30 August 2024).

[84] The trend itself is not new, as the costs of operating within the EU can be as much as 10–30 times higher than in developing countries (C. Schröder, *Industrielle Arbeitskosten im internationalen Vergleich*, 43(3) IW-Trends – Vierteljahresschrift zur Empirischen Wirtschaftsforsc 39 (2016)). Carbon leakage must thus be seen in the broader context of companies relocating to cheaper countries.

[85] All consequences not linked with the decrease of competitiveness or atrophying of sectors will be omitted as being outside the scope of this paper.

[86] Directive (EU) 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, Directive 2003/87/EC of the European Parliament and of the Council of

designed to offset operational expenses elevated by environmental norms, with the intention of maintaining operations at the unchanged competitive level without the need to relocate.[87]

Considering the relatively stringent European environmental standards and the inherent characteristics of the State aid *instrumentarium* outlined in Section 2, one may question whether State aid is indeed the correct tool to prevent offshoring that leads to carbon leakage. From an economic perspective, this question can be answered by analysing the unique circumstances of particular undertakings – calculating the costs of relocating to specific countries and assessing the potential saving impact on their pre-existing logistics chains.[88] If the assessment indicates that such a move would be economically sound, then the signal for the regulator should be that there is a risk of carbon leakage. Then a company should be eligible to receive aid, and granting it should prevent offshoring by offsetting the cost hike associated with rolling out more eco-friendly technology.[89]

However, the mere theoretical possibility of relocation does not ensure that it will actually occur. This assertion underscores the new framework's primary challenge in preventing carbon leakage, and more broadly, the incentive effect in State aid law. Dogmatically speaking, in the light of the existing *acquis*, a measure will have an incentive effect if an undertaking would have behaved differently in the absence of aid, in other words, the business would choose not to remain in the EU without aid.[90] Yet, this remains unverifiable.

This problem is generally recognised. State aid cases where compatibility relies heavily on the incentive effect require the active participation of undertakings, in addition to the State and the EC. *De facto*, it is the beneficiary, not the State, who should prove that they will behave in expected ways as a result of receiving aid.[91]

13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32.

[87] However, even leaving environmental compliance costs unchanged may still lead to relocation of companies in search of savings in other areas.

[88] *See generally* P. Capik, M. Dej (eds.), *Relocation of Economic Activity: Contemporary Theory and Practice in Local, Regional and Global Perspectives*, Springer, Cham: 2019.

[89] *Cf.* Directive (EU) 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275, Annex II, which adopted an exhaustive catalogue of polluting undertakings in risk of carbon leakage.

[90] Point explicitly stated in *e.g.* Authorisation for State aid pursuant to Articles 107 and 108 of the Treaty on the Functioning of the European Union – Cases where the Commission raises no objections – SA.109500 [2024] OJ C 729/1, para. 61

[91] *See e.g.* Comission Decision of 23 September 2009, No. 2010/54, on the aid which Poland is planning to implement for Dell Products (Poland) Sp. z o.o. C 46/08 [2010] OJ L 132/93, para. 175.

Being aware that the yardstick to assess whether aid has indeed changed undertakings' course would be its typical model of behaviour, the company may be inclined to, for example, pre-emptively alter their business plan or take any actions to convey a signal that certain aid would prevent carbon leakage.[92]

From a practical standpoint, relying on the business plan presented by the beneficiary is the most straightforward method of assessing the incentive effect, making it a tempting approach. However, a significant issue arises because it links State aid compatibility to the existence of future, and therefore uncertain, events. It is highly problematic to *ex ante* assess such a business plan and determine with a satisfactory degree of certainty the likelihood of planned actions.[93] In the dynamically evolving economic landscape (largely sector-dependent, but compounded by the current uncertainty), the need to revise a business plan may become imperative.[94] Such a revision may equally lead a company to take actions previously deemed unfeasible in the absence of aid, as well as to consider previously normal activities unviable without public support.[95]

In light of the above, it must also be pointed out that the incentive effect of State aid cannot be narrowed down to dichotomous possible outcomes, implying that the undertaking will "always" or "never" engage in a particular activity.[96] The only scenario where such a straightforward assessment can be applied is when other entities, for purely commercial reasons, already engage in the activity intended to be funded by State aid. In this context, if the potential beneficiary claims an inability to carry out the activity without aid, as the EC has stated on multiple occasions, this points more to operational inefficiencies rather than a market failure.[97]

Setting aside the relatively uncommon scenario where a similar activity is already carried out commercially – even more uncommon in the case of new technolo-

[92] Nicolaides, *supra* note 62, pp. 584–585.

[93] L. Evans, H. Nyssens, *Economics in State Aid: Soon as Routine as Dentistry?*, in: A.M. Mateus, T. Moreira (eds.), *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America*, Edward Elgar Publishing, Cheltenham: 2010, pp. 372 et seq.

[94] Nicolaides, *supra* note 62, p. 585.

[95] Evans, Nyssens, *supra* note 93, pp. 373–374.

[96] *See e.g.* Commission Decision of 6 July 2010, No. 2011/4, on State aid C 34/08 which Germany is planning to implement in favour of Deutsche Solar AG [2011] OJ L 7/40; Commission Decision of 3 August 2011, No. 2012/466, on the aid SA. 26980 (C 34/09) which Portugal is planning to grant to Petrogal [2012] OJ L 220/1; Commission Decision of 1 October 2014, No. 2015/1072, on the measures implemented by Germany in favour of Propapier PM2 GmbH – State aid SA.23827 (2013/C) [2015] OJ L 179/54.

[97] Interpretation used in *e.g.* Commission Decision of 9 November 2005, No. 2006/513, on the State Aid which the Federal Republic of Germany has implemented for the introduction of digital terrestrial television (DVB-T) in Berlin-Brandenburg [2007] OJ L 200/14; State aid – Germany – State aid C 34/2006 (ex N 29/2005) – Introduction of digital terrestrial television (DVB-T) in North Rhine-Westphalia – Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2007] OJ C 204/9; Commission Decision of 24 January 2007, No. 2007/374, on State aid C 52/2005 implemented by the Italian Republic for the subsidised purchase of digital decoders [2007] OJ L 147/1.

gies – the issue of how the aid's incentive effect may be impacted by the beneficiary's business risk perception is also pertinent. Whilst there is a vast body of research on business risk perception, the key takeaway for this discussion is that risk perception is highly subjective.[98] It is impossible to quantify through hard metrics, making it highly problematic to assess definitively what risk could and should be deemed acceptable for a well-run business. A conservative, risk-averse business plan with a strong emphasis on risk mitigation may be seen as proof positive for the incentive effect for almost any type of State aid. A prospective beneficiary who is cautious about risks could argue that State aid is necessary because – in this instance – the rollout of new, immature eco-friendly technology would be associated with excessive risk.[99] However, an overly cautious risk perception by undertakings that leads to them receiving aid may, somewhat paradoxically, result in funding projects that are unviable. This is because such an assessment bias artificially lowers the threshold for the incentive effect and aid necessity.[100]

This part of the analysis leads to the conclusion that the incentive effect, relying on "what if" scenarios, is inherently susceptible to abuse. Receiving aid to prevent carbon leakage when such a risk never existed is nothing but abuse. However, one could argue that, despite its apparent wastefulness, this situation might be viewed as a necessary cost of achieving urgent environmental objectives. This argument stems from the notion that the environmental goals, pushing companies to adopt cleaner technologies, would still be achieved regardless of the risk of carbon leakage. Paradoxically, from the standpoint of these "green" objectives, the incentive effect becomes irrelevant. In this context, the entire rationale behind introducing the incentive effect as part of the common assessment principle for all measures falling under Art. 107(3)(c) TFEU, as elucidated in the SAM Communication to prevent support for activities that companies would have undertaken anyway, seems unworkable in this context.

5. THE RISKS FROM SUPPORTING ECONOMICALLY UNVIABLE TECHNOLOGIES

The third concern linked to utilising State aid to promote the adoption of "green" technologies arises from their experimental nature, lack of maturity and potential economic unviability. Of course, there is an overriding environmental goal in light of which the cost of the new technologies is simply a price worth paying. Nevertheless,

[98] G.C. Harcourt, P.H. Karmel, R.H. Wallace, *Economic Activity*, Cambridge University Press, New York: 1967, p. 151.

[99] Nicolaides, *supra* note 62, p. 585.

[100] *Ibidem*.; Evans, Nyssens, *supra* note 93, pp. 371–372.

with this approach, a significant nuance is being lost: there is a difference between supporting technological progress and supporting technologies that are inherently unviable. Beyond the ideological conflict with the tenets of a market economy, in this context the framework may thus contribute to a risk of negative incentive, that is, not replacing technologies with better and more viable ones if even non-viable but eco-friendly technologies are still eligible for subsidies, which may ultimately lead to the development of subsidy dependence for whole sectors.[101] In keeping with the optics of policy mix, including incentive and obligation, it can be said that the relations outlined below will be similar under both of these models, but the magnitude will differ. These similarities and differences are further explored below.

The interpretation of the aid compatibility criteria set out in the common assessment criteria for all measures assessed under Art. 107(3)(c) TFEU is the "culprit" of the concern explored here.[102] In conducting a balancing test that weighs the pros and cons of a measure, the evaluation focusses on whether the aid measure facilitates the implementation of a particular technology or investment. This involves scrutinising whether the allocated funds are adequate for completing a given project and whether it aligns with the goals set out in Art. 107 TFEU.[103] This assessment, in principle (although there are exceptions, mainly related to infrastructure construction), does not delve into much detail regarding the prospect of continuing economically viable operations through the use of funded projects or technology.[104]

Moreover, the very reason why State aid instruments are employed is the fact that economic viability is questionable, that there is a market failure.[105] At a certain

[101] *See generally* T. Ergen, L. Schmitz, *The Sunshine Problem: Climate Change and Managed Decline in the European Union*, 23(6) MPIfG Discussion Paper 1 (2023).

[102] *Cf.* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions of 8 May 2012 *EU State Aid Modernisation*, COM(2012)209 final, para. 18(a); Communication from the Commission, *Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia* [2022] OJ C 131, paras. 78, 81, 83 and 85; Communication from the Commission, *Guidelines on State aid for climate, environmental protection and energy 2022* [2022] OJ C 80, section 3. and subsequently fleshed out in the listed categories of aid; Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version) [2023] OJ L 167, section 7.

[103] Bacon, *supra* note 61, p. 100; Werner, Verouden, *supra* note 27, pp. 201–208 and cases quoted therein.

[104] Such a requirement is conspicuously absent in the Communication from the Commission, *Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia* [2022] OJ C 131, sections 2.5.–2.8., and the Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version) [2023] OJ L 167, section 7 (*cf.* Art. 39(9)(e)), whilst only hinted at in the Communication from the Commission, *Guidelines on State aid for climate, environmental protection and energy 2022* [2022] OJ C 80, paras. 23–25, 52–54, 71–73.

[105] *See* Communication from the Commission, *Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia* [2022] OJ C 131/1, paras. 77p, 78o and 79m; Communication from the Commission, *Guidelines on State aid for climate, environmental*

level of generality and in the State aid context, this term describes a situation where market forces alone fail to deliver the desired results as envisioned by policymakers.[106] From a welfare creation standpoint, this involves either a situation where a certain product or its associated negative externalities are too pronounced, or when there is an inadequacy in its availability or the positive externalities it generates. In any case, such circumstances lead to an efficiency loss.[107]

Concerning the discussed aid, the European Commission states that market failure arises from negative externalities – such as pollution – not being adequately priced. Consequently, polluters lack a business incentive to eliminate it since the costs are economically manageable.[108] Positive externalities, as per the Commission's perspective, manifest insufficiently because part of the benefits from an investment accrue to market participants other than the investor, potentially leading to underinvestment. The EC further elaborates that this situation typically arises in markets where there is information disparity between two sides. For instance, external financial investors may lack information about the likely returns and risks of a project. Additionally, market failures, referred to as coordination failures, may impede the development or effective design of a project due to diverging interests and incentives among investors, known as split incentives. Factors such as the costs of contracting, liability insurance arrangements, uncertainty about the collaborative outcome and network effects (e.g. an uninterrupted supply of electricity) contribute to these coordination failures. Such issues can emerge in relationships, such as between a building owner and a tenant concerning energy-efficient solutions.[109]

In attempting to identify the root cause in the Commission's diagnosis of sources of market failures, it can be said that the common denominator for all these subsets of scenarios is the inadequate flow of information. When read together with aid compatibility criteria, especially those set out the TCTF, the CEEAG and the GBER, it rather clearly implies (but only implies) that if State aid were to help kick off a certain activity, such as a new "green" technology, other professional market players would discover its viability, and it would pick up on its own merits.[110] In

protection and energy 2022 [2022] OJ C 80, paras. 10, 34; Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version) [2023] OJ L 167, Arts. 36(4), 36a(10), 36b(3), 38(3), 43 and 47(7).

[106] Werner, Verouden, *supra* note 27, p. 30.

[107] *Ibidem.*

[108] Communication from the Commission, *Guidelines on State aid for climate, environmental protection and energy 2022* [2022] OJ C 80, para. 34.

[109] *Ibidem.* Whilst the CEEAG serves as an illustrative example, the EC adopts this understanding of market failures across the whole spectrum of State aid. *See* Werner, Verouden, *supra* note 27, pp. 30–31.

[110] *See e.g.* Communication from the Commission, *Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia* [2022] OJ C 131, paras. 77p, 78o and 79m; Communication from the Commission, *Guidelines on State aid for climate, environmental*

the author's opinion, this is a crucial factor regarding the interpretation of market failure: its implicit reliance on the assumption that a given activity will ultimately be economically self-sustainable.

The problem with anchoring the understanding of market failure on this assumption is that it tends to obscure the fact that if something is not adequately provided by market forces alone, it does not amount to a market failure by itself.[111] In this case, the Commission itself clearly acknowledges in the TCTF, the CEEAG and the GBER that many "green" technologies are expensive due to their immaturity and experimental nature, among other factors.[112] In some instances, the limited adoption is a result of market forces rather than a manifestation of market failure. Therefore, if certain activities prove economically unviable, it does not necessarily indicate a "bottleneck" stemming from coordination or asymmetry issues that State aid could resolve. In this context, the common assessment principle of Art. 107(3)(c) TFEU aid negatively synergises with this circumstance, as the assessment mostly concludes when a technology is rolled out, and it leaves potentially dysfunctional markets unaddressed.[113]

It must also be noted that one must not associate economic viability with a simple black-and-white scenario where an activity either is profitable or generates losses. Firstly, the cost structure is unique to each undertaking, with numerous factors influencing its financial performance beyond the costs associated with "green" technologies.[114] Consequently, the feasibility of rolling out a specific eco-friendly technology may vary in a company-specific context, which in turn also determines the existence of an incentive effect.

This issue has already emerged in the context of carbon leakage, which, after all, occurs due to the detrimental impact of environmental standards on costs and ultimately on competitiveness. It then stands to reason that if a technology is not

protection and energy 2022 [2022] OJ C 80, paras. 36–38; Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version) [2023] OJ L 167, Arts. 36(10), 36a(10) and especially 39(9)(e).

[111] Werner, Verouden, *supra* note 27, p. 30.

[112] *See* R. Rodrigues, R. Pietzcker, P. Fragkos, J. Price, W. McDowall, P. Siskos, T. Fotiou, G. Luderer, P. Capros, *Narrative-Driven Alternative Roads to Achieve Mid-Century CO2 Net Neutrality in Europe*, 239(A) Energy 1 (2022). *Cf.* R. Leoncini, A. Marzucchi, S. Montresor, F. Rentochini, *"Better Late Than Never": The Interplay Between Green Technology and Age For Firm Growth*, 52(4) Small Business Economics 891 (2019) and sources referred to on p. 891, which notably did not focus on immature technologies.

[113] *Cf.* Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (consolidated version) [2023] OJ L 167, Art. 39(9)(e).

[114] *See generally* S. Baumgärtner, M.F. Quaas, *Ecological-Economic Viability as a Criterion of Strong Sustainability Under Uncertainty*, 68(7) Ecological Economics 2008 (2009).

just costly, but also economically unviable, the loss of competitiveness will be more acute (resulting in a higher risk of offshoring).[115]

However, within the well-established *acquis* for State aid assessment, there is no requirement to determine the relevant market, assess competitive situations or identify competitors.[116] As a result, any negative effect on the beneficiary's competitiveness remains unidentified. It is also noteworthy that the assessment of the aid measure's impact on trade and competition focusses on how the beneficiary, armed with the advantage it is granted, may disrupt the generally understood competitive process.[117] This stands in contrast to the situation here, where the concern lies in how it might diminish the competitiveness of the beneficiary.

The factors mentioned above significantly complicate an unequivocal assessment of the extent to which certain new "green" technologies are economically viable. Nevertheless, it is methodologically possible and, in the author's opinion, necessary to make a generalised (not case-specific) assessment of which technologies may negatively affect competitiveness (due to their costs), or even to identify those that are inherently economically unviable. This is because the absence of such an assessment may result in negative outcomes, which, though not *terra incognita* in economics, have not received sufficient attention in the domain of the discussed State aid: The first possible outcome entails more undertakings being unable to maintain their competitive position, serving as a cautionary note for other enterprises against adopting these technologies.[118] The second potential negative outcome pertains to the risk that a given technology will be abandoned once the subsidies dry out, whilst the third potential negative outcome refers to the possibility of situations relocating offshore – in other words, carbon leakage.

Examining these potential outcomes through the lens of the incentive-obligation policy mix adopted in this paper, it can be asserted that they cannot be ruled out in both models; however, there may be a different emphasis on accents. Obligation-based models will tend to more strongly stimulate offshoring, whilst in incentive-based solutions businesses utilising new but costly technologies may

[115] *Cf.* Ergen, Schmitz, *supra* note 101; Pianta, Lucchese, *supra* note 82.

[116] *E.g.* Case T-14/96 *Bretagne Angleterre Irlande (BAI) v. Commission of the European Communities*, para. 78; T-55/99 *CETM*, para. 102; Case T-58/13 *Club Hotel Loutraki AE and Others v. European Commission*, paras. 88–89.

[117] *E.g.* Joined Cases T-81/07, T-82/07 and T-83/07 *Jan Rudolf Maas and Others v. Commission of the European Communities*, EU:T:2009:237, para. 71; Joined Cases T-226/09 and T-230/09 *British Telecommunications plc (T-226/09) and BT Pension Scheme Trustees Ltd (T-230/09) v. European Commission*, EU:T:2013:466, para. 168.

[118] This would also directly falsify the claim that market failure occurred due to insufficient information flow (as indicated in Communication from the Commission, *Guidelines on State aid for climate, environmental protection and energy 2022* [2022] OJ C 80, para. 34).

gain superior bargaining power over the authorities.[119] This could lead to continued subsidisation by credibly threatening to shift their business away or abandon these technologies.[120]

The fact that these outcomes could potentially occur – clearly stated during legislative work on the framework – underscores a fundamental flaw in the system's architecture. There is a notable regulatory emphasis on the rollout of new technologies, which, despite being convincingly defended by the urgency to address rapidly deteriorating climate conditions, lacks sufficient emphasis on the role of research and development activities.[121] Although outcomes in R&D are never guaranteed, much like any creative works, efforts should be directed towards further maturing "green" technologies and making them commercially viable. It is noteworthy that despite the amendment of the R&D guidelines in 2022, no preferential compatibility assessment has been established to align research and development aid with technologies supported under the discussed ruleset.[122] This adds weight to the accusations of EU greenwashing.

CONCLUSIONS

The analysis presented in this paper unveils another dimension of a seemingly unsolvable conundrum within the framework of enforcing rules to combat environmental deterioration. Currently, no-one can reasonably deny the need to make efforts to reverse climate change, which would take precedence over economic considerations; at the same time, however, only a robust economy can provide enough funds for the government to finance these environmental efforts.

Under these circumstances, it becomes evident that State aid law, given its discretionary nature, is inherently suboptimal in promoting a "green" agenda. One may not need to look further for examples of greenwashing. Irrespective of how lenient the compatibility criteria may be – and thus how eco-friendly they will

[119] *See* M. Ricketts, A. Peacock, *Bargaining and the Regulatory System*, 6(1) International Review of Law and Economics 3 (1986).

[120] A similar mechanism revealed itself in the State aid context concerning Art. 107(3)(c) TFEU aid for opening new air routes from unprofitable regional airports. Research conducted in Spain indicates that carriers were inclined to discontinue routes when aid dried up, even if these routes were not operating at a loss. The prospect of obtaining subsidies elsewhere prompted this behaviour, allowing carriers to essentially coerce authorities into providing aid by threatening relocation. *See* D. Ramos-Pérez, *State Aid to Airlines in Spain: An Assessment of Regional and Local Government Support from 1996 to 2014*, 49 Transport Policy 137 (2014), p. 147.

[121] *See* P. Söderholm, *The Green Economy Transition: The Challenges of Technological Change for Sustainability*, 3(6) Sustainable Earth 1 (2020), pp. 4–5.

[122] *See* Communication from the Commission, *Framework for State aid for research and development and innovation 2022* [2022] OJ C 414/1.

outwardly look – the system will consistently fall short of its goals if only a limited number of authorities decide to utilise them, or if it is predominantly adopted by the wealthiest Member States. This assertion gains support when examining the proportion of aid granted under the CEEAG and the "green" segment of the TCTF across Member States. The issue here is an insufficient incentive – in relation to budgetary constraints – to allocate more funds, especially to immature and thus economically questionable technologies.

In contrast, opting for the simpler, more cost-effective approach of emphasising obligations through environmental norms may seem convenient regulation-wise. However, this strategy could lead to reduced competitiveness and increased offshoring, ultimately resulting in a diminished pool of funds available for "green" policies.

In light of the inherent limitations of State aid law, the conclusion of this paper, serving as both a summary and an opening for new avenues of inquiry, is that solutions must be sought in two intertwined areas: Firstly, a seemingly straightforward solution to address the immaturity and high costs of "green" technologies would be to place a greater emphasis on research and development aid to make them more economically viable. However, relying solely on the tools of State aid law poses challenges, as it depends on whether a Member State has the funds and the willingness to allocate them. Therefore, if the aim is to evenly distribute funding for the rollout of "green" technologies among Member States without deepening disparities, State aid law proves inadequately suited to the task. The second area, where solutions should be simultaneously sought, refers to the need to place more emphasis on European funds.

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PUTIN'S RUSSIA BEFORE THE INTERNATIONAL COURT OF JUSTICE

Abstract: *In the past 15 years, Georgia and Ukraine have both brought cases against Russia before the International Court of Justice (ICJ). Georgia's 2008 application addressed the separatist movements in South Ossetia and Abkhazia. Ukraine's 2017 case (Ukraine v. Russian Federation I) accuses Russia of discriminating against Crimean Tatars, supporting terrorism in Eastern Ukraine and downing Malaysia Airlines flight MH-17. The 2022 case (Allegations of Genocide) claims that Russia's war against Ukraine violates the Genocide Convention. This article examines Russia's role in these disputes, comparing outcomes in Georgia v. Russian Federation and Ukraine v. Russian Federation I, both alleging breaches of the Convention on the Elimination of All Forms of Racial Discrimination. Only the latter reached the merits phase. The article also analyses the controversial judgment on preliminary objections in Allegations of Genocide. It argues that the ICJ's consensual jurisdiction limits its effectiveness, restricting its ability to rule on Russia's actions against Ukraine. Additionally, it assesses Russia's strategies in these proceedings, focussing on the "rhetorical adaptation" of international norms.*

Keywords: admissibility, ICJ, jurisdiction, Russia, Ukraine, war

INTRODUCTION

On 5 July 2023 Poland submitted written observations to the International Court of Justice (ICJ) in a pending case, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, Ukraine v. Russian Federation* (hereinafter *Allegations of Genocide*). Like the other 32 State interven-

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ers – an unprecedented number in the ICJ's history[1] – Poland asserted that the Court should accept its jurisdiction in this case,[2] in which Ukraine claims that Russia has abused and violated Art. 1 of the Genocide Convention[3] by alleging genocide against ethnic Russians in the eastern part of Ukraine and using this accusation as a pretext for invading its neighbour. As a "part of Poland's consistent policy of firmly condemning all unlawful actions by Russia", the intervention before the ICJ is presented as complementing other legal actions, such as referring the Russian invasion of Ukraine to the International Criminal Court (ICC) and intervening in inter-state proceedings before the European Court of Human Rights (ECtHR).[4] This activism positions Poland as "Ukraine's most loyal ally"[5] since the onset of the Russian–Ukrainian War in February 2022. Accordingly, Poland's submission to the ICJ concludes by stating that the Court has "a positive obligation" to offer "a judicial framework for the resolution of legal conflicts, especially one which not only threatens international peace and security but also has escalated to a full-scale military invasion involving enormous human suffering and continuing loss of life."[6]

Allegations of Genocide is only the most recent of several applications launched by Ukraine, and previously by Georgia, against Russia before the ICJ. Whilst it is likely the highest profile case,[7] it can be regarded as part of a wider campaign of strategic litigation against Russian military assertiveness.[8] This article seeks to provide a contextual assessment that describes, links and contrasts the three cases against Russia before the ICJ. Building on our previous work, in which we more generally discussed international courts and their potential to contribute to resolving the Ukrainian–Russian conflicts,[9] here we specifically focus on the ICJ. In concrete

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[1] B. Bonafe, *The Collective Dimension of Bilateral Litigation: The Ukraine v Russia Case Before the ICJ*, 96 Questions of International Law 27 (2022), p. 27.

[2] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Written observations of Poland on the subject-matter of its intervention, 5 July 2023, ICJ Rep. 2023.

[3] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

[4] *Poland filed a declaration of intervention to the International Court of Justice in Ukraine's case against Russia*, Ministry of Foreign Affairs, Republic of Poland, 16 September 2022, available at: https://tinyurl.com/4am3pxaz (accessed 30 August 2024).

[5] W. Konończuk, *The Polish–Ukrainian Bond Is Here to Stay*, Strategic Europe, 3 October 2023, available at: https://carnegieeurope.eu/strategiceurope/90686 (accessed 30 August 2024).

[6] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Written observations of Poland on the subject-matter of its intervention, ICJ Rep. 2023, para. 50.

[7] The 32 submitted interventions by other States are strongest indicator in this regard.

[8] M. Ramsden, *Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention*, 56(1) Vanderbilt Journal of Transnational Law 181 (2023), pp. 181–210.

[9] N. Marin, B. Manova, *The Constraints of International Courts as a Tool for Resolving the Ukrainian–Russian Conflicts*, 62 German Yearbook of International Law 371 (2019).

terms, we look at the previously adjudicated cases of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*)[10] and *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine v. Russian Federation I*),[11] in which the ICJ recently delivered a judgment on the merits, as well as the pending proceedings in *Allegations of Genocide*. Our analysis shows that although one should not expect the Court to act as a significant constraint on Russia's military actions, the cases nonetheless present some opportunities to adjudicate on the (il)legality of Russia's conduct. We examine Russia's involvement in the three cases before the ICJ in the light of the concepts of "bad-faith compliance"[12] and "rhetorical adaptation"[13] of international norms that have recently been introduced in the literature to capture such strategic positioning. Furthermore, Russia's repeated effort to avoid the Court's jurisdiction and its extremely sceptical approach to such proceedings somewhat contradict its continued involvement with the Court – for instance when it comes to the nomination of judges.

The argument that follows is divided into three parts. The first section offers a short summary, in chronological order, of the three ICJ cases that Russia has recently faced. We look closely at the two judgments delivered by the ICJ at the beginning of 2024: the judgment on the merits in *Ukraine v. Russian Federation I* and the judgment on the preliminary objections in *Allegations of Genocide.* With the latter proceedings still pending, we also outline our predictions as to their likely outcome at the merits stage. We then move to the second section, where we evaluate Russia's current and potential compliance with the judgments, drawing particularly on the theory of rhetorical adaptation to explain Russia's conduct and litigation strategy. The concluding section builds on the foregoing discussion to offer some reflections on the future of the ICJ, and specifically on Russia's relation to the Court as the principal court of the United Nations.

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

[11] This case has gone through the preliminary objections phase. *See* ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 8 November 2019, ICJ Rep 2019, p. 558. On 31 January 2024, a judgment on the merits was also delivered. *See* ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 31 January 2024, ICJ Rep 2024.

[12] Z.I. Búzás, *Evading International Law: How Agents Comply with the Letter of the Law but Violate its Purpose*, 23(4) European Journal of International Relations 857 (2017), pp. 857, 858.

[13] J.M. Dixon, *Rhetorical Adaptation and Resistance to International Norms*, 15(1) Perspectives on Politics 83 (2017).

1. THREE PROCEEDINGS AGAINST RUSSIA BEFORE THE ICJ

This section provides an overview of the three proceedings in question, beginning with the 2008 application by Georgia. Since we extensively discussed the first two cases in a previous article,[14] this text limits the factual and legal summaries to those aspects which are the most pertinent to the subsequent analysis. The third case, *Allegations of Genocide*, which was not covered in our earlier work, is given more comprehensive attention here, and the controversial recent judgment on the preliminary objections in these proceedings is critically assessed. Finally, this section offers some thoughts on what the main issues at stake would be at the merits stage of *Allegations of Genocide*, what strategies the parties are likely to employ and what outcomes could be expected.

1.1. *Georgia v. Russian Federation*

The case of *Georgia v. Russian Federation*, initiated by Georgia in 2008, dealt with the issue of the separatist movements in South Ossetia and Abkhazia. These regions had sought unilateral secession from Georgia, leading to a short military conflict that involved Russia as the backer of these breakaway regions. The central allegation in this case pertained to Russia's actions within and around Georgian territory, which Georgia claimed violated the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[15] That said, the core issues at stake extended beyond the question of racial discrimination, which turned out to play a marginal role in this dispute.[16] Instead, the conflict predominantly featured more classic international law questions surrounding the use of force, state recognition and the application of self-determination principles within the context of secession.

The Court concluded the case in 2011 in its judgment on the preliminary objections. It rejected Russia's first objection, which argued that no dispute existed between the parties concerning the CERD at the time of Georgia's application.[17] However, Russia's second preliminary objection, citing the procedural requirements of Art. 22 CERD, was upheld.[18] This provision holds that only disputes regarding the interpretation or application of the CERD which remain unresolved after negotiation or specified procedures may be referred to the ICJ. In this case, the Court

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[14] Marin, Manova, *supra* note 9, pp. 382–387.

[15] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Application Instituting Proceedings, 12 August 2008, ICJ Rep 2008, p. 4.

[16] P. Okowa, *The International Court of Justice and the Georgia/Russia Dispute*, 11 Human Rights Law Review 739 (2011), p. 740.

[17] ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment, 1 April 2011, ICJ Rep 2011, paras. 113–114.

[18] *Ibidem*, paras. 182–184.

found that Georgia had not made use of the dispute resolution mechanisms under the CERD before approaching the ICJ. It took into consideration some prior negotiations between the parties, which dealt with issues such as the status of South Ossetia and Abkhazia and the role of Russian peacekeepers, but determined that these did not address "CERD-related matters".[19] Consequently, the Court concluded that the parties had not sought a negotiated resolution under the terms of Art. 22 CERD, leading to the acceptance of Russia's second preliminary objection.

Our previous article emphasised that this judgment was relevant for the understanding of the subsequent Ukrainian case, not only due to the strong factual similarities but also given Russia's challenge of the jurisdictional basis of the Court.[20] This Russian strategy also clearly continued in *Allegations of Genocide*, and proved to be rather efficient, as the recent judgment on the preliminary objections in that case shows. The judgment in *Georgia v. Russian Federation* serves as a reminder that the ICJ may sometimes be inclined to sidestep the question of merits by adopting a reasoning that has been described as jurisdictionally formalist.[21] However, even though the ICJ did not find jurisdictional basis to rule on the merits of the conflict between Georgia and Russia, the Georgian application has paved the way for more persistent "lawfare" by neighbouring States against Russia before the ICJ and other international courts.[22]

1.2. *Ukraine v. Russian Federation I*

In 2017, Ukraine initiated a case against Russia at the ICJ, grounding its jurisdictional basis in violations of the CERD and the International Convention for the Suppression of the Financing of Terrorism (ICSFT).[23] Since Russia's non-acceptance of the compulsory jurisdiction prevented Ukraine from raising the underlying legal issues at stake, which include the right to self-determination, unilateral secession and the use of force,[24] the claim that was filed focussed instead on discrimination against Crimean Tatars, support of terrorist activities in Eastern Ukraine and the

[19] *Ibidem*, paras. 180–182.

[20] Marin, Manova, *supra* note 9, p. 383.

[21] V.-J. Proulx, *The World Court's Jurisdictional Formalism and its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes*, 30(4) Leiden Journal of International Law 925 (2017).

[22] I. Marchuk, *Powerful States and International Law: Changing Narratives and Power Struggles in International Courts*, 26(1) UC Davis Journal of International Law & Policy 65 (2019), pp. 75–76.

[23] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Application Instituting Proceedings, 16 January 2017, ICJ Rep 2017, paras. 17–23.

[24] I. Marchuk, *Introductory Note to Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation) (Preliminary Objections) (I.C.J.)*, 59(3) International Legal Materials 339 (2020), p. 339.

downing of Malaysia Airlines flight MH-17.[25] The claims under the CERD were specific to Crimea, whilst those under the ICSFT were related to the conflict in Eastern Ukraine, which had already ensued at the time.

In April 2017, the ICJ issued an order on provisional measures, acknowledging its *prima facie* jurisdiction under the CERD.[26] Though only some of Ukraine's requested provisional measures were granted, Russia was indeed instructed to preserve the rights of the Crimean Tatar community and to guarantee Ukrainian-language education.[27] Both parties were also encouraged to find a peaceful resolution to the conflict, particularly by contributing, individually and collectively, towards implementing the "Package of Measures for the Implementation of the Minsk Agreements",[28] a strategy endorsed by the UN Security Council.[29]

The Court delivered a judgment on the preliminary objections in November 2019. In contrast to *Georgia v. Russia*, here it affirmed its jurisdiction under both the CERD and the ICSFT by finding that all necessary preconditions for referring disputes under these conventions had been satisfied.[30] To come to this conclusion, the ICJ specifically scrutinised whether the actions Ukraine contested fell within the ambit of the CERD and the ICSFT, and whether the procedural requirements for seizing the Court under these conventions had been fulfilled.[31] Regarding the ICSFT-related claims, the central issue was whether there was jurisdiction to examine allegations of Russia's failure to cooperate in preventing the financing of terrorism. The Court considered this a factual question to be addressed at the merits phase,[32] though predictions were made that proving the *mens rea* elements of terrorism financing would be "enormously challenging".[33]

Concerning the CERD, the ICJ ruled that Russia's alleged acts fell within the purview of the Convention due to their impact on the rights protected by it.[34] The Court's finding that the actions challenged by Ukraine were "capable of having an

[25] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Application Instituting Proceedings, ICJ Rep 2017, paras. 4–15.

[26] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Order, 19 April 2017, ICJ Rep 2017, 104, para. 62.

[27] *Ibidem*, para. 102.

[28] *Ibidem*, para. 104.

[29] UN Security Council Resolution 2202/(2015), 17 February 2015, S/RES/2202 (2015).

[30] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2019, paras. 64, 77, 97, and 121.

[31] *Ibidem*, paras. 76, 101, 120–121.

[32] *Ibidem*, para. 63.

[33] Marchuk, *supra* note 24, p. 341.

[34] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2019, paras. 96–97.

adverse effect on the enjoyment of certain rights protected under CERD"[35] gave cause for optimism that the CERD claims stood a fair chance of success at the merits phase. Whilst this ICJ pronouncement ultimately did not determine the outcome on the merits, it can be situated within a broader context of the CERD being read in a more purposive and teleological manner, including by international bodies.[36]

Another key aspect of the preliminary objections judgment was the Court's interpretation of the procedural preconditions of Art. 22 CERD; it clarified that the requirements of negotiations and the CERD committee procedure were not cumulative but alternative, since the realisation of CERD's objective and purpose – eliminating racial discrimination "without delay" – would otherwise be hindered.[37] In notable contrast to its finding in *Georgia v. Russian Federation*, the Court found that Ukraine had met the negotiation requirement through diplomatic efforts, including correspondence and attempted meetings with Russia concerning Crimea.[38] Finally, the ICJ also dismissed a preliminary objection based on the non-exhaustion of local remedies, which it deemed inapplicable given that Ukraine's claim pertained to the overall legality of Russia's conduct in Crimea rather than individual cases.[39]

The public hearings in *Ukraine v. Russian Federation I*, expectedly heated given the ongoing war,[40] took place in June 2023, and an eagerly awaited judgment on the merits was delivered on 31 January 2024. The Court rejected all of Ukraine's submissions apart from two, finding that Russia had violated the ICSFT, by failing to investigate the possible terrorism financing to which Ukraine had drawn its attention, and the CERD, by limiting access to Ukrainian-language education in Crimea after 2014.[41] The judgment was a moderate success for Ukraine at best. Even so, it

[35] *Ibidem*, para. 96, as cited in Marchuk, *supra* note 24, p. 340.

[36] D. Keane, *Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument*, 20(2) 2020 Human Rights Law Review 236 (2020).

[37] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2019, paras. 110–111.

[38] *Ibidem*, para. 120. To be sure, this finding has not been without criticism, notably in A. Orakhelashvili, *Adjudicating Racial Discrimination Claims: Issues of Jurisdiction and Admissibility in Ukraine v. Russia*, 1(1) Moscow Journal of International Law 57 (2021), pp. 57–69. For a detailed account of the arguments presented by both parties and another critical assessment of the Court's decision, *see* E. Decaux, *The Potential for Inter-State Conciliation within the Framework of the UN Treaties for the Protection of Human Rights*, in: C. Tomuschat, M. Kohen (eds.), *Flexibility in International Dispute Settlement*, Brill Nijhoff, Leiden: 2020, pp. 65–70.

[39] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2019, para. 130.

[40] M. Corder, *Ukraine Brands Russia "Terrorist State" in Opening Statement at International Court*, PBS News, 6 June 2023, available at: https://www.pbs.org/newshour/world/ukraine-brands-russia-terrorist-state-in-opening-statement-at-international-court-case (accessed 30 August 2024).

[41] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 404.

was not easy for the ICJ judges to arrive at, as is evident from the large number of dissenting (1) and separate opinions (6) and declarations (5) annexed to it.[42] The decision is interesting for several reasons, not least because it is the first in which the Court adjudicated on a State's compliance with the substantive provisions of both the CERD and the ICSFT.[43]

The Court has been criticised for opting for a rather narrow understanding of Russia's obligations under the ICSFT.[44] Its interpretation of the meaning of the term "funds" gave rise to particular controversy. The ICJ held that "funds" within the meaning of the ICSFT only encompass resources of a financial or monetary character, and do "not extend to the means used to commit acts of terrorism", thereby excluding the provision of weapons to separatist movements in Ukraine from the scope of the potential terrorism financing activities covered by the ICSFT.[45] Three judges – Bhandari, Charlesworth and Pocar – expressed in separate opinions their opposing view that weapons were to be deemed "funds".[46]

The Court found that the Russian Federation had breached its obligation under Art. 9(1) ICSFT to investigate terrorism financing, and that none of Ukraine's other claims had been sufficiently established. In reaching this conclusion, the ICJ applied stricter requirements when examining whether obligations – under Art. 8(1) (to freeze and seize funds used to finance terrorism), Art. 10(1) (to prosecute terrorism financing) or Art. 12(1) (to assist other States Parties in their investigations) – had arisen for Russia than in determining whether it was required to investigate possible terrorism financing offences. This approach is logical given that the latter obligation,

[42] *Ibidem*, separate opinion of President Donoghue, Declaration of Judge Tomka, Declaration of Judge Abraham, Declaration of Judge Bennouna, Declaration of Judge Yusuf, Dissenting opinion of Judge Sebutinde, Separate opinion of Judge Bhandari, Separate opinion of Judge Iwasawa, Separate opinion of Judge Charlesworth, Declaration of Judge Brant, Separate opinion of Judge ad hoc Pocar, Separate opinion, partly concurring and partly dissenting of Judge ad hoc Tuzmukhamedov, available at: https://www.icj-cij.org/case/166/judgments (accessed 30 August 2024).

[43] I. Marchuk, *Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in Ukraine v. Russia (CERD and ICSFT)*, EJIL: Talk!, 22 February 2024, available at: https://tinyurl.com/2fvmunp7 (accessed 30 August 2024).

[44] *Ibidem*.

[45] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 49–53.

[46] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, Separate opinion of Judge ad hoc Pocar, ICJ Rep 2019, paras. 2–11; ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, Separate opinion of Judge Charlesworth, ICJ Rep 2024, paras. 2–12; ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, Separate opinion of Judge Bhandari, ICJ Rep 2024, paras. 1–21.

by its very nature, implies a lack of certainty as to whether an offence has been committed.[47] The ICJ concluded that this threshold had been met, as the documents provided by Ukraine "contained sufficiently detailed allegations to give rise to an obligation (...) to undertake investigations", and that Russia had not discharged this duty.[48]

Moving on to Ukraine's claims under the CERD, the Court dismissed the submissions related to alleged acts of racial discrimination consisting in disappearances, murders, abductions and torture of Crimean Tatars and ethnic Ukrainians,[49] discriminatory law enforcement measures, the ban on the Tatar representative institution Mejlis,[50] restrictions on culturally significant gatherings[51] and media organisations[52] and other forms of oppression.[53] The main reason these claims were considered unfounded lies in the Court's rather restrictive interpretation of the term "racial discrimination" under Art. 1(1) CERD. Even though Ukraine argued that this provision prohibits both actions with a discriminatory purpose and effects-based (indirect) discrimination of seemingly neutral measures that have a disproportionate prejudicial effect on a protected group,[54] the ICJ took the stance that for a measure "which is neutral on its face" to constitute discrimination, its effects should demonstrate "that it is 'based on' a prohibited ground."[55] As noted by Escobar, this notion departed from the interpretations adopted by the treaty monitoring body under the CERD: the CERD Committee.[56] The Court set a high and somewhat contradictory bar, as it required a subjective element, akin to an *"intent" to discriminate* on a prohibited ground, to be established even in cases of alleged effects-based discrimination. Moreover, it sufficed for the ICJ to find that the "disparate adverse effect" *could* "be explained in a way that does not relate to the prohibited grounds" to dismiss the claims altogether,[57] and the burden to

[47] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 103.

[48] *Ibidem*, paras. 107, 110–111.

[49] *Ibidem*, paras. 201–221.

[50] *Ibidem*, paras. 252–275.

[51] *Ibidem*, paras. 289–306.

[52] *Ibidem*, paras. 307–323.

[53] *Ibidem*, paras. 324–337, 364–368.

[54] *Ibidem*, para. 188, G.G. Escobar, *ICJ's Judgment in Ukraine v. Russia regarding CERD's Scope of Racial Discrimination: ICJ's Approach to CERD Committee's Views*, EJIL: Talk!, 29 February 2024, available at: https://tinyurl.com/ykjwdf9m (accessed 30 August 2024).

[55] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 196.

[56] Escobar, *supra* note 54.

[57] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 217, 238.

establish that the measures were based on ethnic origin was entirely on Ukraine.[58] For instance, the Court attributed the ban on the Mejlis to considerations related to the political activities of its leaders rather than their ethnicity[59] – an approach that was disputed by Judge Charlesworth.[60]

The only submission upheld was that Russia, by the way in which it implemented its educational system in Crimea after 2014 with regard to school instruction in Ukrainian, violated its obligations under Art. 2(1)(a) CERD to ensure that all public authorities and institutions abstain from discriminatory practices and under Art. 5(e)(v) to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law in the enjoyment of the right to education and training.[61] The ICJ explained that the latter provision does not include a general right to school education in a minority language, but may "under certain circumstances, set limits to changes in the provision of school education in the language of a (...) minority."[62] Considering the steep decline in the number of students instructed in Ukrainian between 2014 and 2016, the Court found that this trend could not be solely attributed to the departure of many ethnic Ukrainians from Crimea following its annexation.[63] Ukraine asserted that parents and children had been subjected to harassment and manipulative conduct so they would opt to study in Russian.[64] The ICJ did not find these allegations sufficiently established, but nonetheless concluded that Russia had not demonstrated that it had complied with its duty to protect the rights of ethnic Ukrainians from a disparate adverse effect by taking measures to mitigate the pressure resulting from the exceptional "reorientation of the Crimean educational system towards Russia."[65]

Serious concern has been expressed in relation to the remedies determined by the ICJ for the ICSFT and CERD violations.[66] Under both conventions, Ukraine

[58] *See e.g. ibidem*, para. 241: "Ukraine has not presented convincing evidence to establish that persons of Crimean Tatar origin were subjected to such law enforcement measures based on their ethnic origin"; para. 267: "However, for the ban to amount to racial discrimination, Ukraine would also need to demonstrate that this exclusion was based on the ethnic origin of the Crimean Tatars as a group or of the members of the Mejlis, and that it had the purpose or effect of nullifying or impairing the enjoyment of their rights"; para. 272: "The Court thus concludes that Ukraine has not provided convincing evidence that the ban of the Mejlis was based on the ethnic origin of its members, rather than its political positions and activities."

[59] *Ibidem*, paras. 270–271.

[60] *Ibidem*, para. 32.

[61] *Ibidem*, para. 370.

[62] *Ibidem*, para. 354.

[63] *Ibidem*, paras. 359–361.

[64] *Ibidem*, para. 362.

[65] *Ibidem*, para. 363.

[66] D. Desierto, *Human Rights Reparations and Fact-Finding Quandaries in the 2024 ICJ Judgments in Ukraine v. Russian Federation*, EJIL: Talk!, 11 March 2024, available at: https://tinyurl.com/5ayd8kss (accessed 30 August 2024).

had requested the Court to order not only cessation, but also full reparation.[67] These requests were not granted. The Court noted that Russia continues to be required "to undertake investigations into sufficiently substantiated allegations of (...) terrorism financing"[68] and to ensure that the system of instruction gives due regard to the needs of ethnic Ukrainians,[69] but that it is not "necessary or appropriate to order any other remedy."[70] Nor did the Court provide any reasoning for these conclusions. We agree with Desierto that what she deems a "significant restraint and judicial parsimony when it comes to articulating the legal consequences of a State's international responsibility for violations of international human rights treaty law" casts doubt upon the effectiveness of this adjudication for the victims.[71]

A final cause for disagreement amongst the judges was the question of whether Russia, by launching a war against Ukraine in February 2022, breached the requirement of the order on provisional measures to refrain from actions which might aggravate or extend the dispute before the Court or make it more difficult to resolve.[72] The ICJ held that Russia's actions amounted to a breach, as they "severely undermined the basis for mutual trust and co-operation and thus made the dispute more difficult to resolve."[73] The Court's reasoning on this point was succinct. It was elaborated on by Judge Charlesworth in a separate opinion and by Judge Sebutinde in a dissenting opinion, who explained that "conduct that is incompatible with the obligation to use peaceful means for the settlement of disputes is in principle likely to aggravate a dispute pending before the Court"[74] and that Russia's conduct also impaired the gathering of evidence and the preparation by Ukraine of its case before the ICJ.[75]

[67] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Application Instituting Proceedings, ICJ Rep 2017, paras. 136(f) and (l) and para. 138(h) in conjunction with para. 138(k).

[68] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 149.

[69] *Ibidem*, para. 373.

[70] *Ibidem*, paras. 150, 374.

[71] Desierto, *supra* note 66.

[72] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Order, 19 April 2017, ICJ Rep 2017, para. 106(2).

[73] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 397–398.

[74] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, Separate Opinion of Judge Charlesworth, ICJ Rep 2024, paras. 37, 39.

[75] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, Dissenting Opinion of Judge Sebutinde, ICJ Rep 2024, para. 36.

However, five judges voted against this finding,[76] and three expressed their disagreement with it in two declarations and one separate opinion.[77] Their main argument is that the recognition of the Donetsk and the Luhansk People's Republics and the launching of military action in Eastern Ukraine are matters that fall outside the scope of the dispute before the ICJ, which concerns alleged violations of obligations under CERD in Crimea.[78]

While we concur with Marchuk that the preliminary ruling decision in *Ukraine v. Russian Federation I* represented "the biggest defeat for Russia thus far",[79] the Court fell short of delivering a consequential judgment on the merits, opting instead for a conservative approach to interpreting the two conventions. We can expect the practical implications of this judgment to be limited due to its narrow subject matter, the lack of reparations awarded, the absence of an effective enforcement mechanism and the ongoing war in Ukraine. Our assessment remains that the strict legal focus of Ukraine's application on the CERD and ICSFT, whilst necessary to establish *any* jurisdiction for the ICJ, significantly limited the potential of the merits judgment to provide a sufficient legal remedy for the underlying conflict.[80] It is in this context of the "disaggregation"[81] of the legal action and the broader dispute that Ukraine's second case, *Allegations of Genocide*, assumes greater importance.

1.3. *Allegations of Genocide*

On 26 February 2022, Ukraine initiated a second set of legal proceedings against Russia in front of the ICJ, alleging a dispute concerning the interpretation and application of the 1948 Genocide Convention.[82] This application specifically targets Russia's claims of genocide in Luhansk and Donetsk, arguing that these assertions underpinning Russia's recognition of the two breakaway republics and the subsequent military actions against Ukraine are not justified. Asserting that no such genocide occurred, Ukraine essentially seeks to prove that Russia lacked legal grounds for its invasion. Jurisdiction is sought under Art. IX of the Genocide Convention, which

[76] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 404(6).

[77] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, Separate Opinion, Partly Concurring and Partly Dissenting, of Judge Ad Hoc Tuzmukhamedov; Declaration of Judge Yusuf; Declaration of Judge Bennouna, ICJ Rep 2024.

[78] *Ibidem*, paras. 6, 11, 5.

[79] Marchuk, *supra* note 24, p. 340.

[80] Marin, Manova, *supra* note 9, p. 388.

[81] A concept introduced in L. Hill-Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68(4) International & Comparative Law Quarterly 779 (2019).

[82] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application Instituting Proceedings, 27 February 2022, ICJ Rep 2022.

became the first point of contention during the preliminary proceedings and the public hearings in September 2023. The involvement of 32 State interveners, all submitting arguments in favour of Ukraine, likely reinforced the political and legal appeal of the Ukrainian side.[83] The Court adopted a careful approach in resolving the procedural complexities created by this unprecedented number of interveners, thus indicating that it is taking the case seriously.[84]

Alongside its application, Ukraine sought provisional measures under Art. 41 of the ICJ Statute and relevant Rules of Court, aiming to prevent irreparable harm to its rights and to mitigate the escalation of the dispute, with such requests being prioritised in the Court's agenda.[85] Moreover, under Art. 74(4) of the Rules of Court, Ukraine requested the Court's intervention, urging Russia to immediately halt all military activities on its territory.[86] On 16 March 2023, the Court issued these provisional measures, affirming *prima facie* jurisdiction, and mandated Russia to suspend all military operations, including those involving military or irregular armed units under its direction or support.[87] The decision, taken by a vote of 13 to 2, received dissent only from Russian Judge Gevorgian, then Vice-President of the Court, and Chinese Judge Xue.[88] Despite Russia's ongoing "special military operation", the Court order has been perceived as a significant message, underscoring the gravity of the allegations and marking a notable victory for Ukraine.[89] The deliberate assertiveness of the measures has also been viewed as potentially encouraging similar future applications.[90]

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[83] Though it has also been argued that subtle nuances and differences in generally comparable interpretations could potentially also be detrimental to the applicant; *see* K. Wigard, O. Pomson, J. McIntyre, *Keeping Score: An Empirical Analysis of the Interventions in Ukraine v Russia*, 14(3) Journal of International Dispute Settlement 305 (2023), pp. 326–327.

[84] J. McIntyre, K. Wigard, O. Pomson, *Goliath v. David (and Friends): A Recap of the Preliminary Objections Hearings in Ukraine v. Russia*, EJIL: Talk!, 2 October 2023, available at: https://tinyurl.com/3nszxrz6 (accessed 30 August 2024).

[85] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Request for the indication of provisional measures submitted by Ukraine, 27 February 2022, ICJ Rep 2022.

[86] *Ibidem*, paras. 1, 4.

[87] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, 16 March 2022, ICJ Rep 2022, paras. 46–49, 81.

[88] *Ibidem*, para. 86.

[89] For commentaries arguing along those lines, *see* A. Sanger, *False Claims of Genocide Have Real Effects: ICJ Indicates Provisional Measures in Ukraine's Proceedings Against Russia*, 81(2) The Cambridge Law Journal 217 (2022), pp. 217–221; M. Milanovic, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, EJIL: Talk!, 16 March 2022, available at: https://tinyurl.com/4vbwushy (accessed 30 August 2024).

[90] A. Kulick, *Provisional Measures after Ukraine v Russia (2022)*, 13(2) Journal of International Dispute Settlement 323 (2022), pp. 336–337.

At the stage of preliminary objections, the case delved into complex legal territory, exploring the interplay between treaty obligations and overarching international law principles, such as good faith and the abuse of rights.[91] Russia raised several such objections, notably disputing the existence of a legal dispute under the Genocide Convention and questioning the Court's jurisdiction under Art. IX thereof.[92] According to the respondent, any dispute between the two parties "is either non-existent or does not concern the prevention and punishment of genocide."[93]

On 2 February 2024, the ICJ ruled on the preliminary objections.[94] It dismissed Russia's first objection that no dispute existed between the parties regarding alleged violations of the Genocide Convention.[95] The Court adopted an unusual approach, taking upon itself to distinguish between two "distinct" aspects of Ukraine's position and examining them separately, even though the application made no such demarcation. The first aspect consisted in the assertion that Ukraine did not commit genocide; the second was the allegation that the Russian Federation itself breached the Genocide Convention by falsely accusing Ukraine of genocide and invading its territory on that basis.[96] This bifurcation of the applicant's submissions proved crucial for the outcome in the case. By 13 votes to 3, the Court deemed as admissible and falling within its jurisdiction on the basis of Art. IX of the Genocide Convention only submission (b) in para. 178 of the Memorial of Ukraine[97] – the "reverse compliance" claim,[98] by which it sought to establish the lack of any "credible evidence that Ukraine is responsible for committing genocide (...) in the Donetsk and Luhansk oblasts."[99] In doing so, the ICJ rejected the "more procedural" preliminary objections raised by Russia (alleged introduction of new claims, lack of practical effect of the judgment, inadmissibility of a reverse compliance request and abuse of process).[100] However, by 12 votes to 4, the Court concluded that Ukraine's more significant claims concerning the use of

[91] McIntyre, Wigard, Pomson, *supra* note 84.

[92] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary objections of the Russian Federation, 1 October 2022, ICJ Rep 2022.

[93] *Ibidem*, para. 138. The reasoning is outlined in section III of the memorial.

[94] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, 2 February 2024, ICJ Rep 2024.

[95] *Ibidem*, para. 51.

[96] *Ibidem*, paras. 53–57.

[97] *Ibidem*, para. 151.

[98] M. Milanovic, *ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects*, EJIL: Talk!, 2 February 2024, available at: https://tinyurl.com/2r43se2a (accessed 30 August 2024).

[99] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Memorial Submitted by Ukraine, 1 July 2022, ICJ Rep 2022, para. 178(b).

[100] Milanovic, *supra* note 98; ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 67–72, 77–80, 92–109, 113–118.

force and Russia's recognition of the independence of the Donetsk and Luhansk People's Republics fell outside the Genocide Convention's scope.[101] Marchuk and Wanigasuriya were proven right in their predictions that "the ICJ is likely to limit itself to (...) ascertaining whether genocide has occurred in Donbas."[102]

The judgment was met with disappointment and perceived as a loss for Ukraine, not least because it stands in sharp contrast to the order on the provisional measures.[103] Even the large number of state interventions in support of Ukraine's submissions did not persuade the ICJ that it was competent to adjudicate on the merits. Indeed, as Weller notes, this ruling provides Russia with the rhetorical means to argue that the provisional measures order which required the immediate suspension of its military operations[104] and initially looked like "a spectacular success of an innovative use of the Genocide Convention" was "not in fact based in a title to jurisdiction enjoyed by the Court."[105] Desierto emphasised the lack of legal reasoning provided in the judgment as to why Ukraine's interrelated claims should be entertained separately.[106] The Court was also criticised for reading the application in such a way as to *de facto* put Ukraine rather than Russia "in the dock".[107] If Ukraine further pursues the case, the merits phase will revolve around the question of whether *it* breached the Genocide Convention, thus turning it into a respondent. At best, Ukraine could obtain a negative declaratory judgment to the effect that it has not violated its obligations. Concern was also voiced that, by dramatically limiting the scope of the questions to be examined at the merits stage, the ICJ deprived Ukraine of the opportunity – even if it wins the case – to attempt to acquire as reparation a "confiscation and transfer of Russian state assets" currently frozen by third states.[108]

Should the case proceed, the distribution of the burden of proof and the applicable evidentiary standard will affect the findings on the substance. The preliminary objections judgment places the parties in an interesting position, raising the question of whether it would be for the applicant, Ukraine, to establish the negative fact that it did not commit genocide, or rather for the respondent, Russia, to prove that the allegations it made outside of the context of the proceedings are well-founded. The Court would

[101] *Ibidem*, para. 151.

[102] I. Marchuk, A. Wanigasuriya, *Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ*, 25(3–4) Journal of Genocide Research 256 (2022), pp. 256–278.

[103] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, ICJ Rep 2022, paras. 46–49.

[104] *Ibidem*, para. 86(1).

[105] M. Weller, *Time for Another Ukrainian Genocide Case?*, EJIL: Talk!, 6 February 2024, available at: https://www.ejiltalk.org/time-for-another-ukrainian-genocide-case/ (accessed 30 August 2024).

[106] Desierto, *supra* note 66.

[107] Weller, *supra* note 105.

[108] Milanovic, *supra* note 98.

have to navigate these issues in a manner that does not violate the general principle of *onus probandi incumbit actori*, that "it is for the party alleging a fact to demonstrate its existence".[109] Judge Tomka drew attention to this question in his Declaration, stating that said principle "is not an absolute one applicable in all circumstances", and that the Court has previously shown flexibility and at times even "reversed or partly reversed the burden of proof" "when faced with a submission or claim concerning a negative fact."[110] As for the standard of proof, given the gravity of the allegations, it is safe to assume that the ICJ would set the bar for finding a violation very high,[111] as in the *Bosnian genocide* case (*Bosnia and Herzegovina v. Serbia and Montenegro*), where it required "evidence that is fully conclusive" with regards to both the existence and the attribution of the acts.[112] It is also improbable that Russia would be able to substantiate its allegations.

Despite the aforementioned legitimate concerns, our assessment of the judgment is nuanced. In dealing with the so-called "second aspect" of Ukraine's submission, the Court laid out some persuasive judicial reasoning. The central point of contention was whether the ICJ had jurisdiction to entertain Ukraine's allegations that Russia's use of force and its recognition of the secession of Donetsk and Luhansk violated Arts I and IV of the Genocide Convention. These provisions create obligations for the States Parties to prevent and punish genocide (Art. I) and, specifically, to punish the perpetrators of the acts enumerated in Art. III (Art. IV).[113] Ukraine's submissions were designed to establish jurisdiction by fitting "a claim within a compromissory clause",[114] namely, Art. IX of the Genocide Convention in this case. This provision, broadly construed by Ukraine,[115] allows the parties to the Genocide Convention to bring to the ICJ any dispute relating to its interpretation, application or fulfilment.[116] The resourcefulness and originality of the application lay in the

[109] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 168. The same principle is also referred to in ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Rep 2010 (I), p. 71, para. 163.

[110] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, Declaration of Judge Tomka, ICJ Rep 2024, paras. 15–17.

[111] Weller, *supra* note 105.

[112] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, para. 209; *see also* ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 81.

[113] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277, Arts. I and IV.

[114] Sanger, *supra* note 89, p. 219.

[115] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Written statement of Ukraine on the preliminary objections raised by the Russian Federation, 3 February 2023, ICJ Rep 2023, paras. 91–95.

[116] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277, Art. IX.

fact that it aimed "to avoid the Court's jurisdictional constraints" by affirming that Russia had violated the Convention *not* by committing genocide itself, but rather by waging war on Ukraine *based on unfounded charges of genocide*.[117] Russia, for its part, argued that actions taken to prevent or punish genocide do not have to comply with other rules of international law.[118] It stated that Ukraine purported to expand the subject matter of the Genocide Convention "by incorporating into its scope of application an unlimited number of international obligations arising under the UN Charter and customary international law".[119] In dissents to the order on provisional measures, Judge Gevorgian had also taken issue with the notion that "*any* purportedly illegal act (...) could be shoehorned into a random treaty",[120] and Judge Bennouna likewise opposed this interpretation despite voting with the majority.[121]

The Court examined the question of whether Russia's alleged actions and omissions, if established, would constitute violations of the provisions invoked by Ukraine.[122] It recalled that the applicant does not assert that Russia "refrained from taking any measure to prevent a genocide or to punish persons who had committed such."[123] Ukraine and some of the intervening States relied on the Court's dictum in the *Bosnian genocide* case, where it had interpreted Art. I of the Genocide Convention.[124] In that case, the ICJ had clarified that the obligation to prevent genocide "is one of conduct and not one of result", meaning that a State Party discharges the obligation if it employs all means of prevention reasonably available to it.[125] A State's "capacity to influence effectively" the commission of genocide depends, inter alia, on legal criteria, since "every State may only act within the limits permitted by international law."[126] According to the ICJ, rather than implying that a breach of the prohibition of the use of force based on false allegations of genocide would violate the duty to prevent genocide, the *Bosnian Genocide* dictum merely signifies that said

[117] Milanovic, *supra* note 98.

[118] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary objections of the Russian Federation, ICJ Rep 2022, paras. 170–215.

[119] *Ibidem*, para. 172.

[120] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, Declaration of Vice-President Gevorgian, ICJ Rep 2022, para. 7 (original emphasis).

[121] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, Declaration of Judge Bennouna, ICJ Rep 2022, paras. 5–6, 11.

[122] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 136, 139.

[123] *Ibidem*, para. 140.

[124] *Ibidem*, para. 145; ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Memorial Submitted by Ukraine, ICJ Rep 2022, paras. 94–96.

[125] ICJ, *Application of the International Convention fon the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep 2007, para. 430.

[126] *Ibidem*.

obligation neither requires a State "to act in disregard of other rules of international law", nor could serve as a justification for such behaviour.[127] The Court maintained that, assuming Russia's military campaign is illegal under international law, it would violate not the Genocide Convention but "the relevant rules of international law applicable to the recognition of States and the use of force."[128] Accordingly, it ruled that Ukraine's claims "fall outside the scope of the compromissory clause" and that it lacks the jurisdictional basis to examine them.[129]

These findings crushed hopes that the ICJ would deliver a historic judgment on the merits condemning Russia's invasion. Still, we have several reasons to believe that the prospects for Ukraine are not all that bleak, and that it is still worthwhile for it to continue the case. The Court's granting of the provisional measures alone already counts as a strategic victory, having endowed Ukraine's plea with the "rule of law imprimatur that an ICJ decision confers."[130] Furthermore, by deeming its "reverse compliance claim" admissible, the Court granted the applicant with an important opportunity to establish once and for all the unfoundedness of Putin's allegations of genocide. The symbolic value of such a finding should not be underestimated, since it would unequivocally deprive Russia, in the eyes of the international community, of the main justification for its invasion.[131] As Weller puts it, this historic inference "will still be drawn", albeit not by the ICJ.[132]

It is also unclear whether it would have been preferable had the Court established its jurisdiction to entertain Ukraine's submissions in their totality. The ICJ remains merely a *judicial* institution called upon to apply specific provisions of international law in a manner consistent with established principles of treaty interpretation, not to infinitely stretch them. The requirements of treaties should have the same meaning, whatever the factual background and the parties to a specific case, and no matter how high the political stakes may be. It is also pertinent to remember that the Genocide Convention has been rather popular lately, with three other high-profile genocide cases currently pending before the Court.[133] Ukraine's interpretation that

[127] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 146.

[128] *Ibidem*.

[129] *Ibidem*, para. 147.

[130] Ramsden, *supra* note 8, p. 190.

[131] For more on symbolism as a purpose of international litigation, *see* J. McIntyre, *Lyophilization and Lawfare in Ukraine v. Russia*, Australian and New Zealand Society of International Law, available at: https://anzsilperspective.com/lyophilization-and-lawfare-in-ukraine-v-russia/ (accessed 30 August 2024).

[132] Weller, *supra* note 105.

[133] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application instituting proceedings and Request for the indication of provisional measures, 29 December 2023, ICJ Rep 2023; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application instituting proceedings and Request for the indication of provisional measures, 11 November 2019, ICJ Rep 2019; ICJ, *Alleged Breaches*

the obligation to take the reasonably available steps to prevent genocide entails a prohibition of the use of force is indeed "creative"[134] – perhaps *too* creative. As Milanovic observed, the Ukrainian case was "non-obvious" as "there is no article in that treaty that clearly applies to false allegations of genocide or to uses of force based upon them."[135] The Court's strict reading of the provisions of the Genocide Convention and of its own previous case law seems logical even though it may also be deemed cautious, and caution is a sin that the Court is often criticised for.[136] By contrast, construing the Convention too broadly and without much apparent support in its wording, object and purpose so as to establish the jurisdiction to examine the Ukrainian case on the merits would have been risky. In the context of the ongoing war and the widespread denouncement of the Russian aggression, such a course of action could have threatened to undermine the long-term belief that international adjudication is unbiased and untainted by double standards.

In our view, rather than revealing an inaccuracy or a lack of courage from the ICJ in construing specific provisions of the Genocide Convention, the outcome in the case once again highlights a far more structural issue, namely that the Court's capacity to provide judicial resolutions to international conflicts is gravely inhibited by its consensual jurisdiction – its "greatest weakness".[137] Unlike national legal systems, where crimes are prosecuted regardless of the consent of the perpetrators, the international legal system does not currently feature any "jurisdictional equivalent" of substantive *jus cogens* norms and *erga omnes* obligations that do not need to be explicitly accepted by States to become binding on all of them. The judges themselves acknowledged the unfortunate discrepancy between the gravity of the dispute and the Court's restricted capacity to intervene in it in the penultimate paragraph of the judgment, by underscoring the "fundamental distinction between the question of the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law."[138] Regarding the application at hand, it appears that this is as close as Ukraine will ever get to obtaining a condemnation of Putin's "special military operation" from the ICJ.

Nevertheless, other avenues are still available to it. To begin with, according to Bonafe, the remarkable third-party interventionism in the case demonstrates a way

of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany), Application instituting proceedings and Request for the indication of provisional measures, 1 March 2024, ICJ Rep 2024.

[134] Milanovic, *supra* note 98.

[135] *Ibidem*.

[136] *E.g.* Marchuk, *supra* note 43.

[137] Marin, Manova, *supra* note 9, p. 387.

[138] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 150.

in which the international community could act united (albeit in a non-institutionalised form) in response to flagrant violations of *erga omnes* obligations,[139] thus compensating to a certain extent for the jurisdictional shortcomings of international courts. Secondly, as Weller argues, Ukraine may deem it worthwhile to bring a new application before the ICJ, alleging that genocide was committed *by Russia* – a plea that would be far more likely to make it to the merits phase.[140] Moreover, the ECtHR will also adjudicate on possible violations of the right to life under the European Convention on Human Rights (ECHR) allegedly committed by the Russian Federation in the joined case *Ukraine and the Netherlands v. Russia*, which features 31 interventions.[141] These applications concern Russian actions committed both prior to and following the outbreak of the war, but before 16 September 2022, the date on which Russia ceased to be a party to the ECHR.

In the context of these several complex, protracted ICJ proceedings involving the Russian Federation in the last 15 years, Russia's conduct and stance towards the Court have been continuously changing. For this reason, we now turn to the question of compliance (or lack thereof) and the theory of rhetorical adaptation.

2. ICJ PROCEEDINGS IN THE CONTEXT OF RUSSIA'S STRATEGY OF "RHETORICAL ADAPTATION"

If we accept that Ukraine and Georgia, through their ICJ applications, are engaging in strategic litigation or even lawfare,[142] it seems appropriate to adopt a strategic lens in assessing Russia's response to these proceedings. The concept of States participating in "sovereignty games" is well-established theoretically; more recent, however, is the idea that the body of international law itself evolves and adapts as States strive to regain sovereign manoeuvrability amidst the increasing legalisation of international relations.[143] In the section that follows, we will employ this framework to explore how the ICJ cases are shaping Russia's behaviour, and vice versa. This perspective allows us to transcend the somewhat stale binary of compliance

[139] Bonafe, *supra* note 1, pp. 27–29.

[140] Weller, *supra* note 105.

[141] ECtHR, *Ukraine and the Netherlands v. Russia* (App. No. 8019/16, 43800/14, 28525/20 and 11055/22), 17 February 2023; ECtHR, *European Court joins inter-State case concerning Russian military operations in Ukraine to inter-State case concerning eastern Ukraine and downing of flight MH17*, Press release, 20 February 2023, available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7575325-10413252%22]} (accessed 30 August 2024).

[142] Marchuk, *supra* note 22; *see also* J.I. Goldenziel, *An Alternative to Zombieing: Lawfare Between Russia and Ukraine and the Future of International Law*, 108(1) Cornell Law Review 1 (2022).

[143] T. Aalberts, T. Gammeltoft-Hansen, *Sovereignty Games, International Law and Politics*, in: T. Aalberts, T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law*, Cambridge University Press, Cambridge: 2018, p. 28.

and non-compliance, delving into the more nuanced understanding of "*what* compliance means in the first place."[144]

The appropriate starting point for our assessment is the first Russian case before the ICJ, *Georgia v. Russian Federation*. During the 2008 conflict and prior to the proceedings, Russia notably invoked emerging legal concepts such as the Responsibility to Protect (R2P) and remedial secession to justify its military actions and recognition of the breakaway republics of South Ossetia and Abkhazia.[145] As Mälksoo suggests, the conflict and strategic deployment of legal arguments might be seen as a response to Kosovo, with Russia seeking to establish "symmetry with the West" in its approach to international law.[146] This perspective also informs Russia's approach to the subsequent ICJ proceedings, where its robust, multi-layered challenge to the Court's jurisdiction, whilst certainly a valid legal strategy, reflected a "deeply-rooted (...) unwillingness to sacrifice its sovereignty by submitting itself to judicial review", as we have previously argued.[147] In its decision on the preliminary objections, the Court then surprisingly adopted a formalist interpretation, particularly concerning the requirement of pursuing dispute settlement under the CERD,[148] leading some to conclude that it was avoiding politically charged disputes.[149] Although *Ukraine v. Russian Federation I* demonstrated that this was not the case, the initial case set the tone for later disputes, with Okowa describing it as the "swift and dramatic end to one of the most bizarre disputes to have come before the International Court."[150]

Moving on to *Ukraine v. Russian Federation I*, Russia sought to replicate its previous success of removing the complaint through preliminary objections. In concrete terms, this meant that it submitted a memorial of ten chapters and almost 250 pages (excluding appendices).[151] After the Court dismissed these objections to allow the case to proceed to the merits stage, Russia delivered two substantial counter-memorials, one for each of the instruments at stake, setting out legal arguments that encompassed 186 pages dealing with the ICSFT[152] and another 157 pages for the

[144] *Ibidem*, p. 34 (original emphasis).

[145] Marchuk, *supra* note 22, p. 69. *See also* R. Allison, *The Russian Case for Military Intervention in Georgia: International Law, Norms and Political Calculation*, 18(2) European Security 173 (2009).

[146] L. Mälksoo, *Russian Approaches to International Law*, Oxford University Press, Oxford: 2015, p. 180.

[147] Marin, Manova, *supra* note 9, p. 382.

[148] Okowa, *supra* note 16, p. 749.

[149] Proulx, *supra* note 21, p. 938. *See also* B.I. Bonafé, *Establishing the Existence of a Dispute Before the International Court of Justice: Drawbacks and Implications*, 45 Questions of International Law 3 (2017), pp. 26–27.

[150] Okowa, *supra* note 16, p. 739.

[151] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary objections submitted by the Russian Federation, 12 September 2018, ICJ Rep 2018.

[152] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Counter-Memorial of the Russian Federation on the case concerning the Application of the International Convention for the Suppression of the Financing of Terrorism, 9 April 2021, ICJ Rep 2021.

CERD (both excluding appendices).[153] It thus remained significantly invested in the proceedings, dispelling worries that its active involvement may come to an end at the merits phase. As others have noted, the Court may have opted to limit its provisional measures to the CERD and to avoid prematurely linking Russia to terrorist activities precisely "out of a concern to keep Russia engaged in the proceedings."[154] Overall, it cannot be claimed that the case has had any significant impact on Russia's conduct outside the proceedings: after all, only a few months passed between the submission of the counter-memorials and the start of overt, full-scale hostilities.

In *Allegations of Genocide*, finally, Russia initially declined to appear in the oral hearing related to the provisional measures in March 2022. If the initial strategy was therefore one of "partial engagement",[155] Russia soon decided to change course, possibly due to the pressure created by the sheer number of States filing Art. 63 declarations with the intent to intervene.[156] Ramsden observes that at this point, Russia has not used the platform provided by the case to expand upon its narrative, for example with regards to the self-defence argument that it has officially marshalled to justify its military operation.[157] This, of course, could now change at the merits phase. Moreover, even if Russia has offered "the barest of justifications"[158] for the actual legal basis of its use of force, it once again delivered a thorough challenge to the Court's jurisdiction, with the memorial including six objections that are set out over 123 pages.[159] With the case now partially proceeding to the merits stage, it will be intriguing to observe what course of action Russia will opt for. As stated, at this phase the roles of applicant and respondent will be somewhat reversed, and the Russian Federation will have to decide whether to provide evidence in support of its allegations of genocide committed by Ukraine.

How does Russia's approach to these three cases align with its overall foreign policy? Whilst a detailed review of the extensive literature on Russia's specific approach to international law is beyond the scope of this article, it is crucial to note that this approach is historically influenced by the legacy of empire and authoritarian rule, a complicated relationship with Europe and the West and the "civilizational idea" of

[153] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Counter-Memorial of the Russian Federation on the case concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination, 9 August 2021, ICJ Rep 2021.

[154] Ramsden, *supra* note 8, p. 196.

[155] *Ibidem*, p. 194.

[156] Marchuk, Wanigasuriya, *supra* note 102, p. 4.

[157] Ramsden, *supra* note 8, p. 195.

[158] *Ibidem*.

[159] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary objections of the Russian Federation, ICJ Rep 2022.

a Russian world (*russkyi mir*).[160] Scholars often emphasise Russia's strategic and even instrumental use of international law, particularly regarding the Commonwealth of Independent States region.[161] As Allison points out, this approach is less about attempting to modify international law, which would seem futile from a foreign policy perspective, and more about the selective (and often inconsistent) invocation of existing norms.[162] Building on this, other commentators have argued – specifically with regard to the Russia/Ukraine conflict – that rather than making "a legal argument that would find widespread acceptance", Russia uses international law "to articulate a position that [spells] out Russia's motives, [warn] Western states to respect Russia's expanded borders, and [clarify] conditions for a potential end to hostilities."[163] The fact that these legal claims do not withstand rigorous legal scrutiny, as eminent scholars have argued,[164] is not particularly relevant in such a context.

Against this background, the concept we find most useful to describe Russia's handling of the three cases before the ICJ is Dixon's idea of "rhetorical adaptation". Explicitly mentioning Russia's reliance on humanitarian intervention as a justification for its invasion of Georgia as one example, Dixon argues that States which adopt rhetorical adaptation "draw on a norm's content to resist pressures for compliance or minimize perceptions of violation."[165] The same can also be said about the more recent allegations of genocide that were put forward as motivation for the Russian offensive in Ukraine. In the ICJ proceedings, we can identify two types of rhetorical adaptations as outlined by Dixon. Firstly, Russia has engaged in "norm avoidance" as it applies the various instruments, insisting that its "motivations or actions, or the outcomes of its actions, fall outside the parameters of a given norm."[166] Russia argues that neither the CERD, nor the ICSFT, nor the Genocide Convention apply to the disputes at hand, which rather concern norms that Georgia or Ukraine cannot invoke before the ICJ, such as the right to self-defence, self-determination and remedial secession. Secondly, Russia has adopted a norm-signalling strategy, invoking, for instance, the prohibition of genocide as an explanation for its actions,

[160] Mälksoo, *supra* note 146, pp. 3, 182.

[161] *E.g. ibidem*; Marchuk, *supra* note 22, p. 89; R. Allison, *Russia, the West, and Military Intervention*, Oxford University Press, Oxford: 2013, p. 166. Note that it has been argued that this instrumentalism can be seen a reaction to a similar approach taken by Western States – *see* C. Marxsen, *International Law in Crisis: Russia's Struggle for Recognition*, 58 German Yearbook of International Law 11 (2015).

[162] R. Allison, *Russian Revisionism, Legal Discourse and the "Rules-Based" International Order*, 72(6) Europe-Asia Studies 976 (2020).

[163] F. dos Reis, J. Grzybowski, *Moving "Red Lines": The Russian–Ukrainian War and the Pragmatic (Mis-)Use of International Law*, Cambridge University Press, Cambridge: 2023, p. 12.

[164] *E.g.* E. Wilmshurst, *Ukraine: Debunking Russia's Legal Justifications*, Chatham House, 24 February 2022, available at: https://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications (accessed 30 August 2024).

[165] Dixon, *supra* note 13, p. 83.

[166] *Ibidem*, p. 86.

thus "expressing support for values or practices that are part of a norm, while not changing relevant behaviors."[167] Importantly, however, Russia's strategy is not one of "norm interpretation" in the sense that it would seek to change these norms themselves, which is in line with the literature cited above. The strongest (as obvious) indicator of the lack of such an ambition is that Russia remains the respondent in all cases and that it takes "every chance to dispute the jurisdiction of international courts", as we have pointed out in our previous work.[168]

3. THE UNCERTAIN FUTURE RELATIONS BETWEEN THE ICJ AND RUSSIA

Considering recent developments, Russia's relationship with the ICJ is clearly undergoing a phase of change. This shift is not solely due to the three recent cases, one of which is still pending. Notably, in November 2023, Judge Gevorgian lost his bid for re-election to the bench of the ICJ, marking the first time that Russia (or its predecessor, the Soviet Union) has not been represented at the Court.[169] Though there have been other instances where Russia has recently failed to secure seats in international organisations, either as a State or for its individual candidates, the loss of the ICJ seat represents a striking departure from "the unwritten rule and tradition that the permanent members of the Security Council should always, and necessarily, be represented on the bench of the ICJ."[170] Not having a Russian judge in general, and Judge Gevorgian in particular, will mean that Russia's positions are less represented in the ICJ in future. However, this does not affect the pending *Allegations of Genocide* case, as according to Art. 13(3) of the ICJ Statute, discharged members "shall finish any cases which they may have begun."

This being said, given the current volatility of Russia's legal strategy and geopolitical position, predicting how its relationship with the ICJ will evolve is challenging. On the one hand, Russia routinely challenges the Court's jurisdiction and has so far not complied with the provisional measures ordered by it – most blatantly in *Allegations of Genocide*, where the Court required no less than the immediate suspension of the military operations commenced on 24 February 2022 in Ukraine, yet the war is still ongoing over two and a half years after the delivery of the ICJ order.[171] On

[167] *Ibidem*.

[168] Marin, Manova, *supra* note 9, p. 374.

[169] *In First, Russian Judge Loses UN World Court Seat*, The Moscow Times, 10 November 2023, available at: https://tinyurl.com/3dt27v53 (accessed 30 August 2024).

[170] A. Zimmermann, *Five, Four, Three... and Counting Down? – The Outcome of the Recent Triennial Elections at the International Court of Justice*, EJIL: Talk!, 17 November 2023, available at: https://tinyurl.com/msedv3xu (accessed 30 August 2024).

[171] Regarding the provisional measures of March 2022, Kremlin spokesperson Dmitry Peskov argued that Russia will not comply given that it has not consented to the proceedings – *see* S. Leeson, *Russia Rejects*

the other hand, Russia acknowledges the ICJ's institutional role as the world court and engages in legal proceedings, albeit reluctantly. This contrasts with its overtly hostile relationship with the ICC, evidenced by Russia issuing arrest warrants for ICC officials in retaliation for the arrest warrant issued by the Pre-Trial Chamber a few months earlier.[172] In the case of the ECtHR, Russia ceased all collaboration with the Court following its decision in March 2022 to withdraw from the Council of Europe and to renounce the ECHR.[173] Whilst a pronouncement on the merits that is disadvantageous to Russia's cause in the *Allegations of Genocide* case could well lead to a similar disengagement with the ICJ, this is not an inevitable outcome. Russia's relationship with each of these international courts varies significantly, with the ICJ (and, by implication, the United Nations) being the hardest to abandon if, as we maintain, Russia intends to continue using international law language to justify its actions.

CONCLUSION

The three recent cases examined herein demonstrate that litigation before the ICJ, though frequently resorted to by States in relation to their conflicts with the Russian Federation, seems to be of limited practical impact and ineffective in restraining Russian aggression. At the merits phase of *Allegations of Genocide*, Ukraine would have to defend itself, rather than establish the violations perpetrated by Russia. If it brings a fresh case before the Court accusing Russia of genocide committed on its territory since the outbreak of the war, it would then be caught in another legalistic trap – having to meet an almost unattainably high evidentiary standard in order to prove that the Genocide Convention has been breached.[174] Meanwhile, other far more relevant violations – and easier ones to establish – such as the (il)legality of the use of force against Ukraine or large-scale human rights and humanitarian law breaches, will remain unaddressed for lack of jurisdictional basis. One nota-

International Court Ruling to Stop Invasion of Ukraine, EURActiv, 17 March 2022, available at: https://www.euractiv.com/section/europe-s-east/news/russia-rejects-international-court-ruling-to-stop-invasion-of-ukraine (accessed 30 August 2024).

[172] C. Chiappa, *Russia Puts International Court's Top Leadership on Wanted List*, Politico Europe, 25 September 2023, available at: https://tinyurl.com/utudn4b9 (accessed 30 August 2024).

[173] For a timeline of the developments, *see* T. Lattmann, *From Partner to Pariah: The Changing Position of Russia in Terms of International Law*, in: B. Madlovics, B. Magyar (eds.), *Russia's Imperial Endeavor and its Geopolitical Consequences: The Russia–Ukraine War*, Central European University Press, Budapest: 2023, pp. 189–191.

[174] B. Gehani, *Is the ICJ's Standard of Proof for Genocide Unattainable?*, Conflict Law Centre blog, 16 February 2024, available at: https://rsilpak.org/2024/is-the-icjs-standard-of-proof-for-genocide-unattainable/ (accessed 30 August 2024).

ble exception is the pending ECtHR case *Ukraine and the Netherlands v. Russia*, though it only deals with facts and events occurring prior to 16 September 2022.

The most significant accomplishments of the Ukrainian litigation efforts before the ICJ so far seem to be the provisional measures ordered in both cases, and the two recent findings of violations of the CERD and the ICSFT – especially the one concerning access to Ukrainian-language education in Crimea. Nonetheless, Russia tends to disregard the Court's pronouncements, depriving them of practical impact. Thus, the importance of the legal proceedings manifests itself predominantly in the realm of the symbolic. Whilst this is not a negligeable effect, it seems gravely disproportionate when juxtaposed with the scale of the ongoing human suffering. Even though it could be argued that nobody, least of all Ukraine, hoped that the ICJ cases would significantly influence the course of the conflict with Russia, the well-known structural deficiencies of the existing system of inter-state litigation that these proceedings have once again highlighted are still worth emphasising. They lie in the consensual jurisdiction of the Court and stem from a deeply rooted contradiction inherent to the system of public international law: its hybrid nature that, unlike national legal systems, does not clearly delineate between "private" law, where equal parties freely enter into mutual agreements, and "public" law that contains peremptory norms guaranteeing the very survival of the community and prosecutes and punishes breaches thereof regardless of individual consent. It is unsurprising that Russia makes strategic use of these shortcomings.

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RUSSIA'S DISCOURSE ON DEMOCRACY IN INTERNATIONAL LAW

Abstract: *This article explores Russia's official discourse on democracy in international law, addressing the following questions: When Russia speaks of democracy in the context of international law, what precisely does it mean and what does it advocate for? What do these discussions truly signify regarding Russia's understanding and interpretation of democracy in international law? What are the potential consequences of Russia's interpretation for the discourse on democracy in international law? The central hypothesis of this study suggests that Russia strategically leverages the counter-Western democratic discourse within international law to secure its position as a great power rather than offer a meaningful alternative to the Western "hegemonic" ideas of democracy.*

This study is novel, as Russia's discourses on democracy have received little attention in international legal scholarship. It is relevant in light of Russia's full-scale invasion of Ukraine, which is often framed within the broader context of the struggle between autocracy and democracy. The main analysis is construed around the official discourse of Russia's high-ranking officials. The research highlights that although Russia's discourse is directed against the Western liberal "hegemonic" idea of democracy, it does not offer any substantive alternative to it and aligns with the paradigm of realpolitik. Instead, it inadvertently reinforces the fundamental principles of Western liberal democracy.

Keywords: human rights, international law, sovereignty, democratic entitlement, non-intervention

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INTRODUCTION

The collapse of the Union of Soviet Socialist Republics (USSR) signalled great hopes and promises for the supporters of liberal democracy. With Russia embarking on democratisation based on Western-style liberal democracy, this optimism-turned-euphoria was exhibited in international law by allusions to the possibility of universalising democracy as a legal entitlement.[1] However, the optimism soon gave way to scepticism owing to the global democratic backslide, which started in the early 2000s and is still on the rise.[2] In line with this trend, Russia's evolving internal and external realities over recent decades have solidified its image as an authoritarian state, far removed from the hopes of the early 1990s.[3]

Notwithstanding its turn towards authoritarianism, Russia's elites have maintained a robust discourse on democracy since the collapse of the USSR. Over time, they have become increasingly critical of Western liberal democracy and efforts to promote Western democracy globally. In recent developments, this scepticism has escalated to the point where Sergey Lavrov asserted that "[i]t is of no importance for me to know *who is now a democracy and who is not. The terms have lost their meaning for me.*"[4] Despite such a nihilistic posture, Russia continues to assert its perspective on democracy, seeking to shape its development within international law.[5] This raises questions about the claimed "democratic entitlement" paradigm in international law, and necessitates a careful analysis of Russia's position on the matter.

Thus, this article deals with Russia's understanding of the concept of democracy in international law, with the focus on the period since 2000, and Vladimir Putin's first term of presidency, which has been characterised by a steady authoritarian turn. The study addresses the following questions: When Russia speaks of democracy in the context of international law, what precisely does it mean and what does it advocate for? What do these discussions truly signify regarding Russia's understanding and interpretation of democracy in international law? What are the potential consequences of Russia's interpretation of democracy for the evolution of the dis-

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[1] This thesis was famously proposed by Thomas Franck in his seminal 1992 article; T. Franck, *The Emerging Right to Democratic Governance*, 86 The American Journal of International Law 46 (1992).

[2] For further details, *see* Y. Gorokhovskaia, A. Shahbaz, A. Slipowitz, *Marking 50 Years in the Struggle for Democracy*, at Freedom House, available at: https://freedomhouse.org/report/freedom-world/2023/marking-50-years (accessed 30 August 2024).

[3] For recent developments in Russia, *see Russia: Freedom in the World 2023 Country Report*, Freedom House, available at: https://freedomhouse.org/country/russia/freedom-world/2023 (accessed 30 August 2024).

[4] *Lavrov says the term "democracy" in present world has lost its value*, TASS, 27 December 2021, available at: https://tass.com/politics/1381537 (accessed 30 August 2024).

[5] A quick search of the Ministry of Foreign Affairs and Russian government websites for the keyword "democracy" reveals numerous official documents addressing democracy.

course on democracy in international law? The central hypothesis of this study is that Russia strategically leverages the counter-Western democratic discourse within international law to secure its position as a great power rather than offering a meaningful alternative to what it perceives as Western "hegemonic" ideas of democracy. In this context, Russia heavily emphasises the external facet of democracy within international law, formally focussing on democratic international law-making and shifting attention away from its domestic issues.

The article refrains from providing a conclusive definition of democracy, instead aiming to comprehend and compile Russia's perspective. Tom Ginsburg's definition, however, best informs the author's understanding of the concept; it entails the following three elements: "(1) government characterised by competitive elections, in which the model adult can vote and the losers concede; (2) in which a minimal set of rights to speech, association and the ability to run for office are protected for all on equal basis; and (3) in which the rule of law governs administration."[6] Nevertheless, a detailed analysis of Russia's view on each element of democracy is outside the scope of this article. This article focuses on the "keyword" democracy and examines Russia's discourse on democracy comprehensively, by taking into account the domestic and international political developments.

This study is novel, as Russia's view on democracy in international law has received little attention in the international law literature. Although the literature on democracy in international law is vast, many studies dealing with Russia address only specific elements of democracy.[7] Nevertheless, no conclusive study deals with Russia's stance on democracy in international law by focuing on the "keyword" democracy a gap that this study intends to fill. This analysis is also valuable for understanding the changes and continuities in Russian approaches to international law.

One may question what insights or perspectives Russia might bring to international law regarding democracy, particularly considering its authoritarian style of governance. However, Russia's role in international organisations and its influence on international law is apparent. It contributes to the evolving debates on democracy, providing rich material that merits close examination. Understanding Russia's approach is valuable, as it offers insight into how authoritarian regimes interact with,

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[6] T. Ginsburg, *Democracies and International Law*, Cambridge University Press, Cambridge: 2021, pp. 20–21.

[7] *See generally* B. Bowring, *Russia and Human Rights: Incompatible Opposites?*, 1 Goettingen Journal of International Law 33 (2009); W. Clark, *Boxing Russia: Executive-Legislative Powers and the Categorization of Russia's Regime Type*, 19 Demokratizatsiya 5 (2010); T. Colton, H. Hale, *Putin's Uneasy Return and Hybrid Regime Stability: The 2012 Russian Election Studies Survey*, 61 Problems of Post-Communism 3 (2014); M. Myagkov, P. Ordeshook, *Russian Elections: An Oxymoron of Democracy*, National Council for Eurasian and East European Research Seattle, Washington: 2008; L. Mälksoo, *International Law and the 2020 Amendments to the Russian Constitution*, 115 American Journal of International Law 78 (2021).

interpret or challenge democratic norms and principles within the international legal framework. Also, Russia's invasion of Ukraine has magnified those challenges, carrying the potential of profound implications for security and democracy in Europe. Among many other things, the conflict (particularly if perceived to have a successful outcome for Russia) could serve as a model for other authoritarian regimes to suppress democratic movements in their countries or regions.

The study first outlines the contours of democracy in international law. Furthermore, it specifies the scope of Russia's commitments and legal obligations regarding democratic human rights under regional (European) and international legal frameworks. This section starts with a brief overview of Russia's transition from a Soviet-style socialist democracy to one based on Western liberal values, highlighting the ideological struggle at the core of this process. Alongside outlining Russia's commitments to the international legal framework for democracy, it provides an overview of Russia's complex relationship with the Council of Europe (CoE), the most important regional framework for human rights and democracy, before its expulsion in 2022. This indicates that the issues with human rights and democracy in Russia are systemic, reinforcing the importance of this analysis. The section closes by exploring the limited role of democracy in Russia-led regional integration efforts, underscoring the need to grasp the core values shaping Russia's approach to international law.

Finally, the study analyses Russia's discourse on democracy in international law. When it comes to state practice to establish the positions defended by Russia, the study is limited to analysing the official discourse and evaluating the speeches of high-ranking officials found on the websites of the Ministry of Foreign Affairs (MFA) and the Government of the Russian Federation (RF) touching on international law, alongside other relevant documents. Examining Russia's views on democracy unveil an interesting case of authoritarian use of liberal concepts, with specific stages and patterns of progress. Russia's discourse is undeniably geared towards challenging the dominant Western narrative, yet it fails to present a substantive alternative to the existing hegemonic concept of democracy. Interestingly, Russia's discourse still relies on the language and principles of Western liberal democracy, inadvertently reinforcing its foundational ideas. However, it falls short of qualifying as a true counter-hegemonic force, as Russia appears open to accommodating the premises of Western liberal democracy as long as it can exert equal influence and coexist or potentially replace the current "hegemonic" powers.

1. THE INTERNATIONAL LEGAL FRAMEWORK ON DEMOCRACY

1.1. Overview of the general debates

Following the Second World War, there was an increasing global interest in the idea of democratic governance. This concept was previously considered to be confined solely within the realm of national sovereignty. Significant milestones in international human rights law, such as the adoption of the Universal Declaration of Human Rights (UDHR) and subsequent international treaties, have gradually raised the status of democratic principles worldwide.[8] Since the end of the Cold War, democracy has gained unprecedented attention in international law.[9] Various ideological, geopolitical and intellectual perspectives continue to shape the way that the concept of democracy is integrated into international law. Whilst the liberal perspective views democracy as a universal ideal necessary for realising individual rights, the realist one emphasises state sovereignty and non-interference.[10] Conversely, a cosmopolitan viewpoint advocates for the universalisation of democracy beyond national borders.[11] Moreover, scholars within the TWAIL (Third World Approaches to International Law) perspective, who see international law as sustaining power imbalances, highlight the role of the United States in advancing liberal democracy and capitalism to their advantage.[12]

International legal scholarship on democracy has addressed both its external and internal dimensions. Some scholars have concentrated on the democratic characteristics of the international legal system, emphasising legitimacy, inclusivity, and transparency.[13] Others have explored the international legal framework of democracy on domestic governance, tracing their discussions to Thomas M. Franck's seminal

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[8] J. Crawford, *Democracy in International Law: Inaugural Lecture*, Cambridge University Press, Cambridge: 1994.

[9] *See generally* two of the most important collections of articles on the subject: G. Fox, B. Roth (eds.), *Democratic Governance and International Law*, Cambridge University Press, Cambridge: 2000; R. Burchill, *Democracy and International Law*, Routledge, London: 2006.

[10] For more on the liberal approach, *See generally* M. Fabry, *The Right to Democracy in International Law: A Classical Liberal Reassessment*, 37(3) Millennium 721 (2009), pp. 721–741; R. Buchan, *Developing Democracy Through Liberal International Law*, 4(2) Cambridge International Law Journal 319 (2015). For a realist approach, *see* D. Zolo, *A Cosmopolitan Philosophy of International Law? A Realist Approach*, 12(4) Ratio Juris 429 (1999).

[11] *See generally* C. Pavel, *Law Beyond the State: Dynamic Coordination, State Consent and Binding International Law*, Oxford University Press, New York: 2021; T.W. Pogge, *Cosmopolitanism and Sovereignty*, 103(1) Ethics 48 (1992), pp. 48–75; D. Held, *Democracy and Global Order: From the Modern State to Cosmopolitan Governance*, Stanford University Press, Stanford: 1995.

[12] *See generally* B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches*, Cambridge University Press, Cambridge: 1993; J. Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3(1) Trade Law and Development 26 (2011).

[13] *See generally* S. Wheatley, *The Democratic Legitimacy of International Law*, Bloomsbury Publishing, Oxford: 2010, pp. 211–245; Ginsburg, *supra* note 6; J. Alvarez, *Introducing the Themes*, 38 Victoria University Wellington Law Review 159 (2007).

1992 article, which introduced the concept of a "right to democracy" within the "democratic entitlement" thesis.[14] Much like Francis Fukuyama's "end of history" in its tone, the concept of the "right to democracy" emerged from the belief that Western democratic principles would ultimately prevail, suggesting that democracy would become a universally recognised legal entitlement in international law.[15] Franck's claim of democratic entitlement has been heavily criticised on the grounds of its limited scope and optimistic language, which neglect the complexity and variety of democratic models.[16] Nevertheless, his views have been echoed by a number of American scholars who, albeit with varying degrees of fervour, affirmed the crucial role of democracy in modern international law.[17] Others have challenged his ideas and cautioned against embracing democracy as a means of legitimacy under international law.[18]

This article draws inspiration from inquiries into the extent to which Frank's liberal idea of "democratic entitlement" has been implemented and embraced by various actors around the world. Although Western liberal ideals have profoundly influenced global perceptions of democracy, these values have not been universally embraced as a standard by all members of the international community.[19] This heterogeneity underscores the challenges to Western liberal democracy, calling for a close examination of non-Western approaches to it. To tackle this issue, it is essential to initially explore the established definition of democracy in international law, as the following section does.

1.2. Interpreting democracy – its definition(s) and status in international law

There is no universally accepted legal definition of democracy under international law. The lack of a definition reflects the tension between respect for state sovereignty and the international community's role in promoting democratic governance. It also generates important and legitimate debates and adds to the uncertainty surrounding its status under international law. Thus, debates continue on whether it is a hard right, a soft law norm, a principle or an individual privilege. Moreover,

[14] Franck, *supra* note 1; *See generally* Fox, Roth, *supra* note 9.

[15] F. Fukuyama, *The End of History?*, 16 The National Interest 3 (1989), pp. 3–18; Franck, *supra* note 1.

[16] For more on these discussions, *see* R. Gargarella, *Democracy's Demands,* 112 American Journal of International Law 73 (2018).

[17] *See e.g.* C. Cerna, *Democratic Legitimacy and Respect for Human Rights: The New Gold Standard*, 108 AJIL Unbound 222 (2014), pp. 222–227.

[18] *See e.g.* S. Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22 European Journal of International Law 507 (2011); E. Macdonald, *International Law, Democratic Governance and September the 11th*, 3(9) German Law Journal 1 (2002), pp. 1–10; T. Carothers, *The Backlash Against Democracy Promotion*, 85(2) Foreign Affairs 55 (2006).

[19] S. Poghosyan, *The Idea of Democracy in International Law in Europe*, in: A. van Aaken, P. d'Argent, L. Mälksoo, J.J. Vasel, (eds.), *The Oxford Handbook of International Law in Europe,* Oxford University Press, Oxford: 2023, available at: https://doi.org/10.1093/oxfordhb/9780198865315.013.9.

the sources of this norm are also debatable; it is not entirely clear whether it stems from international treaties, international customary law, general principles or the institutional laws of international organisations. Also, international organisations frequently make declarations stressing the value of democracy without clarifying if they are *lex lata*, *de lege ferenda* or merely political goals.[20]

This lack of clarity can be partially ascribed to the resistance from developing nations, which often perceive democracy as a Western notion and its promotion as an extension of Western interests.[21] Along with the two central tenets of the UN Charter – non-interference in internal affairs and a state's sovereignty to choose its own system of government – the notion that state governmental institutions are subject to reserved domestic jurisdiction also casts doubt on the right to democracy.[22] Also, it is challenging to find the commitment to implement democratic systems of governance within the norms and practices of international law. Nevertheless, international law offers a valuable benchmark to differentiate between "*mala fide* lip service to democracy by authoritarian regimes on the one hand and *bona fide* disagreement about the meaning of democracy on the other."[23]

None of the major human rights treaties explicitly mention the word *democracy*. The UN Charter, for instance, has no provisions on it. Moreover, whilst international law refrains from explicitly endorsing the Western liberal model of democracy, allowing for diverse interpretations based on historical and cultural contexts, it upholds key principles associated with liberal democracy.[24] Thus, international law principles and norms regarding democracy are profoundly shaped by the ethos of Western liberal democracy, even as it eschews explicit endorsement of any single model. To illustrate, the study of the potential status of democracy as a positive human right begins with Art. 21 of the 1948 UDHR, which focusses on elections without explicitly naming the concept of democracy.[25] The provision was later reproduced in a slightly different version in Art. 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR).[26] These documents form the foundation of the electoral (thin) definitions of democracy.

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[20] *See also* A. Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations*, 23 European Journal of International Law 315 (2012).

[21] H. Charlesworth, *Democracy and International Law*, in: H. Charlesworth, *Recueil des Cours 371. Collected Courses of the Hague Academy of International Law*, Brill, Leiden: 2014, p. 108.

[22] G. Fox, *Democracy, Right to, International Protection*, in: A. Peters (ed.), *Max Planck Encyclopedia of International Law*, Oxford University Press, Oxford: 2008, pp. 16–17.

[23] J. Fahner, *Revisiting the Human Right to Democracy: A Positivist Analysis*, 21 The International Journal of Human Rights 321 (2017), p. 323.

[24] Poghosyan, *supra* note 19.

[25] Universal Declaration of Human Rights, Paris, 10 December 1948, Art. 21.

[26] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into Force, 23 March 1976), 1966 UNTS 999, Art. 25.

A more substantive (thick) view is best exemplified by the 1999 resolution "Promotion of the Right to Democracy", which treats human rights and democracy as intertwined in practice.[27] Political participation and government accountability, the central tenets of the procedural view, are regarded as unattainable unless other substantive human rights are rigorously safeguarded.[28] The reading of *democracy* in international law is also bolstered by common Art. 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), by asserting the right to self-determination and encompassing peoples' freedom to decide their political status.[29] Nevertheless, the electoral view is criticised since it cannot explain whether a democratically elected government would still be considered democratic if it routinely violated human rights.[30] Meanwhile, doubts are raised about whether the substantive view adds anything new to the existing international law or is merely an intellectual category rather than a legally significant right.[31]

Even though democracy has not developed into a firm legal right under international law, its value and relevance are undeniable. The influence of democratic principles can be seen in a variety of contexts. Democracy influences international law and governance by setting the standard for proper and lawful administration, shaping peoples' right to political self-determination, establishing a framework for realising human rights and fundamental freedoms and laying the foundation for peaceful and non-violent coexistence.[32] Moreover, regional international law frameworks, especially in Europe, have recognised democracy as a fundamental right. In the post-Cold War period, Europe primarily embraced the liberal democratic model, which was characterised by key elements such as holding free and fair elections, adhering to the rule of law, safeguarding individual rights, etc. When analysing Russia's democracy-related obligations and actions, one ought to consider its association with the European regional framework on democracy, as elaborated upon in the following section.

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[27] UN Commission on Human Rights, *Promotion of the Right to Democracy*, 27 April 1999, E/CN.4/RES/1999/57.

[28] Fox, *supra* note 22, p. 18.

[29] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into Force, 23 March 1976), 1966 UNTS 999, Art. 1.

[30] Fox, *supra* note 22, pp. 18–20.

[31] *Ibidem*, p. 20.

[32] G. Fox, B. Roth, *Introduction: The Spread of Liberal Democracy and Its Implications for International Law*, in: G. Fox, B. Roth (eds.), *Democratic Governance and International Law*, Cambridge University Press, Cambridge: 2000, p. 6.

2. RUSSIA AND THE INTERNATIONAL LEGAL FRAMEWORK ON DEMOCRACY

2.1. A brief overview of Russia's transition from Soviet-style socialism towards a Western-style liberal democracy

Following the fall of the USSR in 1991, Russia began its transition from a Soviet-style socialist democracy to one grounded in Western liberal principles. This complex process involved a commitment to internalising Western liberal democratic norms and values whilst letting go of the full ideological baggage that defined the fundamental Soviet conception of democracy.[33] This difficulty is amplified by the fact that the Soviet socialist concept of democracy was based on the tenets of Marxist-Leninist ideology and counter-Western Soviet socialist international law, differing fundamentally from the Western liberal perspective.

The Cold War-era Soviet rhetoric held that the Western liberal democratic principles "within 'bourgeois' international law" served as a deceptive façade for the self-interests of "imperialist" and "interventionist" powers. In contrast, they viewed the USSR and other socialist states as champions of "true" democratic principles, emphasising the idea of socialist internationalism, which highlighted the solidarity and cooperation among socialist nations, positioning them as proponents of democratic values against "imperialist and capitalist Western states."[34] They also did not hesitate to denounce the West for what they saw as breaching human rights whilst viewing their understanding and application of democracy as morally superior. Domestically, the Soviets argued their democracy to be the best version achieved by humanity, serving the people and driving economic progress, unlike what they saw as a Western "evil" system, which, they argued, served the interests of the "bourgeoisie".[35]

Nevertheless, these views gradually and slowly shifted throughout the latter stages of the history of the USSR. The seeds of liberalisation were sown much earlier, more subtly: Nikita Khrushchev's secret address to a closed session of the 20th Congress of the Communist Party of the Soviet Union on 25 February 1956 might be seen as the earliest point of a new era of relative transparency in the USSR, which expanded significantly throughout the Perestroika era in the 1980s. Under

[33] *See generally* S.L. Henderson, *Building Democracy in Contemporary Russia*, Cornell University Press, New York: 2018; L.R. Klein, M.I. Pomer, *The New Russia: Transition Gone Awry*, Stanford University Press, Stanford: 2001.

[34] D. Kerimov, G. Mal'cev, A. Nedavnij (eds.), *Demokratiya i Pravo v Razvitom Socialisticheskom Obshestve* [Democracy and Law in Developed Socialist Society], Mysl, Moscow: 1975; E. Kuz'min, *Demokratija i Konstitucii dvuh Mirov* [Democracy and Constitutions of Two Worlds], Mezhdunorodnye otnotnenija, Moscow: 1981.

[35] *Ibidem*.

Mikhail Gorbachev's leadership, the USSR proceeded along a path of political liberalisation and transformation embodied by greater economic changes known as restructuring (*perestroika*) and political openness or transparency (*glasnost*). Moscow steadily moved away from the Soviet rhetoric of democracy during this time, realising the necessity for internal political reforms and adjusting to the changing global political environment.[36]

A key political document in this process was the Helsinki Final Act, signed in 1975 as part of the Conference on Security and Co-operation in Europe (CSCE), which cleared the way for democratic reforms in the USSR.[37] Furthermore, the post-Cold War European order and Russia's democratic transition were greatly influenced by the 1990 Charter of Paris for a New Europe (under the Organization for Security and Co-operation in Europe [OSCE]). This significant political declaration formalised the end of the Cold War and emphasised shared principles like democracy, human rights and the rule of law.[38] Generally speaking, Russia formally committed to upholding Western standards of democracy within the framework of the OSCE, which brought Eastern and Western nations together on all essential components of democratic governance. This process also meant that Russia was now formally bound by legal obligations related to the principles that comprise international law's framework governing democracy; these are addressed below.

2.2. Russia's obligations pertaining to democracy under international law

Upon transition, Russia asserted itself as the legal successor or even continuator of the USSR and assumed its international rights and obligations, including its UNSC seat and treaty commitments.[39] Though the legal doctrine of state continuity was debated, the P5 members did not challenge Russia's proposal, as they did not wish to open the Pandora's box that was the Security Council.[40] Accordingly, based on the doctrine of state continuity, Russia also formally accepted the USSR's formal obligations to the core tenets of democratic governance under international law,

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[36] *See generally* K. Drzewicki, A. Eide, *Perestroika and Glasnost – The Changing Profile of the Soviet Union towards International Law and Human Rights*, 6 Mennesker og Rettigheter 3 (1988), p. 3; A. Adamishin, R. Schifter, *Human Rights, Perestroika, and the End of the Cold War*, United States Institute of Peace Press, Washington 2009.

[37] For further details, *see* L. Mälksoo, *The Controversy Over Human Rights, UN Covenants, and the Dissolution of the Soviet Union*, 61 Japanese Yearbook of International Law 260 (2018), p. 261 .

[38] *Charter of Paris for a New Europe*, Organization for Security and Co-operation in Europe, Paris: 1990, available at: https://www.osce.org/mc/39516 (accessed 30 August 2024).

[39] In fact Moscow has claimed the elements of both state succession and continuity under international law. For details, *see* L. Malksoo, *Russian Approaches to International Law*, Oxford University Press, Oxford: 2015, p. 32; For more on Russia's claim to state continuity *see further* S. V. Chernichenko, *Teoria mezhdunarodnoga prava* [Theory of International Law], NIMP, Moscow: 1999, pp. 58–110.

[40] S. Chesterman, I. Johnstone, D.M. Malone, *Law and Practice of the United Nations: Documents and Commentary*, Oxford University Press, Oxford: 2016, p. 215.

subject to new liberal interpretations. This includes the two UN human rights Covenants of 1966, ratified by the Soviet Union in 1973 (entered into force in 1976).[41] Under this treaty, Russia is required to uphold civil and political rights, such as free and fair elections and freedom of expression, assembly and involvement in public affairs. Moreover, Russia signed the First Optional Protocol to the ICCPR on 1 October 1991, allowing individuals in that country to bring complaints about human rights violations directly to the UN Human Rights Committee (HRC).[42]

Moreover, at this stage, these international legal duties were cemented in its domestic legislation. In 1993, Russia adopted a new constitution that laid the legal foundation for a liberal democratic transition, including protecting fundamental human rights, a multiparty system and the separation of powers.[43] It incorporated and reflected the international legal framework on democratic governance.[44] The word *democracy* appears in the constitution twice: first in the preamble – "reviving the sovereign statehood of Russia and asserting its immutable democratic foundations" – and then in Art. 1, stating that "Russia shall be a democratic federal rule-of-law state with the republican form of government."[45] Also, Art. 2 affirms the protection of democratic human rights and liberties.[46] However, the domestic situation proved to diverge significantly from these formal commitments, which failed to materialise in practice.

Since the collapse of the USSR, Russian legal scholars have also engaged with discussions on democracy, though mainly focusing on the domestic law dimension.[47] The lack of attention to the international law aspects, specifically that of "democratic entitlement" thesis, reveals Russia's approach and can also be explained by the relative novelty of the topic in international law discussions. Nonetheless, several scholars have addressed the aspects of international law, providing limited

[41] S. Poghosyan, *The Soviet View on Democracy in International Law*, 21(1) Baltic Yearbook of International Law 182 (2024).

[42] Mälksoo, *supra* note 37.

[43] M. Burawoy, *Transition without Transformation: Russia's Involutionary Road to Capitalism*, 15 East European Politics and Societies 269 (2001).

[44] S. Marochkin, *The Operation of International Law in the Russian Legal System,* Brill Nijhoff, Leiden: 2019, p. 8.

[45] Constitution of the Russian Federation, Preamble, Art. 1, available at: http://www.constitution.ru/en/10003000-01.htm (accessed 30 August 2024).

[46] *Ibidem*, Art. 2.

[47] A survey of PhD dissertations in Law from various Russian universities, available through the "disserCat" portal, shows that although many address the concept of democracy, they largely overlook its international law aspects. An exception is Daduani's dissertation, which seeks to reconcile the Western liberal approach with Russia's unique perspective, *see further* A. Daduani, *Roly Organizatsii Ob'edinyonnykh Natsii v sodeistvii demokratii: mezhdunarodno-pravovye aspekty* [The Role of the United Nations in Promoting Democracy: International Legal Aspects], disserCat, available at: https://dissercat.com/content/rol-organizatsii-obedinennykh-natsii-v-sodeistvii-demokratii-mezhdunarodno-pravovye-aspekty (accessed 30 August 2024).

but valuable insights into Russia's approach. These works reflect differing perspectives: some advocate for integrating democratic principles into international legal frameworks, aligning with the Western liberal approach, while others caution against imposing a singular model, favoring a more particularist view.[48] All agree on the role of contemporary international law in safeguarding human rights, ensuring electoral integrity, and promoting global peace and stability but diverge on how these principles should be universally applied and balanced with respect for diverse political systems.[49] Although these scholars' contributions have limited influence on Russia's state practices in international law, this brief overview indicated that the theme of democracy holds less relevance in Russia's legal scholarship compared to topics like sovereignty and non-intervention.

To continue, the formal commitments and acknowledgement of democracy as an essential principle did not necessarily entail a recognition of democracy as a hard legal right in international law. To illustrate, during the discussions on the 1999 Resolution on the Promotion of Democracy Adopted by the UN HRC, the representative of the RF, Oleg Malguinov, in response to Cuba's proposed amendment to delete the words "the right to" from the title of the declaration presented Russia's position as follows:

> as a country which had had a complicated and difficult road to democracy, Russia would like to express its solidarity with the concept enshrined in L.55. Democracy helped to achieve all human rights, and the realisation of all human rights, including the right to development, strengthened democracy. There were some doubts as to the concept of the right to democracy from a purely legal point of view. It required further discussion at an expert level, and between inter-governmental bodies, as well as in other forums. It would be premature to introduce this concept in intergovernmental documents, and therefore the Cuban amendments were acceptable.[50]

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[48] Interestingly, Vladimir Kartashkin, a prominent Russian legal scholar since the Soviet era, adopted a more liberal stance on the subject, *see further* V.A. Kartashkin, *Prava Cheloveka i Printsip Demokratii* [Human Rights and the Principle of Democracy], 113 Sovremennoe Pravo (2017); Kirill Kozhevnikov's in-depth analysis centers on the democratization of international relations, reflects the flexibility of Russia's official discourse by emphasizing both universalist and particularist perspectives, *see further* K. Kozhevnikov, *Demokratiya i mezhdunarodnoe pravo: illuziya ili real'nost'?* [Democracy and International Law: Illusion or Reality?], Izdatelstvo Yurist, Moscow: 2014; Eduard Kuz'min, a prominent legal scholar since Soviet times like Kartashkin, takes a more critical stance, in contrast to Kartashkin, questioning whether international law should intervene in a state's internal affairs, *see further* E. Kuz'min, *Mezhdunarodnoe Pravo i Demokratiya* [International law and Democracy], in: A Ispolinova, A Batalova (eds.), *Mezhdunarodnaya nauchno-prakticheskaya konferentsiya 'Tunkinskie chteniya' (sbornik dokladov i statey)*, Zertsalo-M, Moscow: 2011.

[49] *Ibidem*.

[50] United Nations, Resolution on Promotion of Democracy adopted by Human Rights Commission, Press Release, 28 April 1999, available at: https://press.un.org/en/1999/19990428.hrcn937.html (accessed 30 August 2024).

Although Russia eventually voted in favor of the declaration, this passage illustrates its early resistance to a 'right' to democracy in international law during its transition. This statement makes one wonder whether the shift from a superpower to a new, weak geopolitical role introduced complexities into Russia's approach to democracy and international law. Russia's hesitation to fully embrace democracy as a hard legal right at that stage can be explained by multiple factors, ranging from deep-seated cultural/historical norms that favour centralised authority through the challenges along the painful socioeconomic transition after the collapse of the USSR to concerns over national sovereignty and the evolving nature of international legal norms on democracy. Be that as it may, this indicates Russia's struggle with internalising liberal democratic norms and values after transitioning from the USSR. Russia's approach was gradually reflected in its shift towards endorsing declarations instead advocating for democratic relations in international law, focusing on the external facet of democracy and aligning with concepts favored by the Global South, such as self-determination, the right to development, solidarity, and environmental sustainability. [51] This shift is further reflected in Russia's time at the Council of Europe, as explored in the following section.

2.3. Russia in the Council of Europe – challenges in internalising liberal democratic norms and values

The CoE was established in 1949 and has played a pivotal role in developing and maintaining democratic standards across European countries.[52] Russia's admission into the CoE in 1996 was primarily a political decision since, upon its entry, it had not met the fundamental requirement for membership in the CoE: democracy.[53] Thus, the main goal of this initiative was to assist Russia and other countries in transitioning from socialism to liberal democracy by progressively internalising Western liberal norms and values.[54]

The early stage of Russia's membership in the CoE was very optimistic, thanks to collaborative efforts and Russia's engagement with CoE reforms and commitments

[51] *See e.g.* UNGA resolution of 16 December 2020, *Promotion of a democratic and equitable international order*, Doc. A/RES/75/178; UNHRC, *Resolution: Promotion of a democratic and equitable international order*, A/HRC/RES/18/6, 13 October 2011.

[52] Statute of the Council of Europe of 5 May 1949.

[53] For more on the CoE's democratic conditionality, *See* R. Kicker, *The Council of Europe: Pioneer and Guarantor for Human Rights and Democracy*, Council of Europe Publishing, Strasbourg: 2010; J. Petaux, *Democracy and Human Rights for Europe: The Council of Europe's Contribution, Council of Europe* Publishing, Strasbourg: 2009. For more on Russia's entry into the CoE, *See* J. Kahn, *The Origins of Russian Membership in the Council of Europe and the Seeds of Russia's Expulsion*, 14(1) Notre Dame Journal of International & Comparative Law 2 (2024); L. Mälksoo, W. Benedek (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge University Press, Cambridge: 2017.

[54] W. Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, 9 Human Rights Law Review 397 (2009). For more on Russia's socialisation within the CoE, *See* K. Malfliet,

to align with European democratic and human rights standards, and it was therefore seen as a significant step forward for the "re-socialising of Russia in Europe's individualist value system."[55] Despite the early atmosphere of optimism, it was explicitly acknowledged from the beginning that Russia's democratic mechanisms were in the early stages of development and were flawed. To illustrate, a 2005 comprehensive general report on human rights in Russia revealed many serious shortcomings.[56] However, despite these shortcomings, throughout this time, the prevailing belief was that having Russia within rather than outside was preferable in order to "teach democracy" to the country.[57] Overall, whilst the influence of the CoE on Russia's democratisation over the years is the subject of ongoing debate – the details of which are beyond the scope of this study – some positive results are evident. To illustrate, Antonov contends that throughout its membership years in the CoE,

> Russia has significantly ameliorated its legislation as far as concerns execution of domestic judgments, pretrial detention and prison conditions, legal capacity, re-registration of religious denominations, and other vital issues. These and a number of other legislative amendments have evidently been triggered by the judgments of the ECtHR against Russia, even if implementation of these judgments – which requires revising Russian laws in the directions suggested by the Strasbourg Court – in each case remains mainly a question of the "political will" of Russia's rulers.[58]

This hope was also prevalent in Russia's early interactions with the European Commission for Democracy through Law, or the Venice Commission, an advisory body of the CoE that provides its members with legal advice on constitutional matters, especially fundamental rights and democratic institution-building.[59] Over the years, Russia has consulted the Commission for legal guidance and expertise on democratisation matters. As a result, there have been abundant exchanges, primarily in the form

S. Parmentier (eds.), *Russia and the Council of Europe: 10 Years After*, Palgrave Macmillan, London: 2010.

[55] L. Mälksoo, *Concluding Observations. Russia and European Human-Rights Law: Margins of the Margin of Appreciation*, in: L. Mälksoo (ed.), *Russia and European Human-Rights Law – The Rise of the Civilizational Argument*, Brill Nijhoff, Leiden: 2014, pp. 226–227.

[56] Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the Russian Federation, 15 to 30 July 2004, 19 to 29 September 2004, 20 April 2005, CommDH(2005)2, available at: https://rm.coe.int/16806db7be (accessed 30 August 2024).

[57] *See generally* Sadurski, *supra* note 54.

[58] P.M. Antonov, *Philosophy Behind Human Rights: Valery Zorkin vs. the West*, in: L. Mälksoo, W. Benedek (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge University Press, Cambridge: 2018, p. 166.

[59] *See generally* A. Nußberger, J. Miklasová, *Council of Europe as the Guardian of Democracy: The Venice Commission*, in: D.E. Khan, E. Lagrange, S. Oeter, Ch. Walter, *Democracy and Sovereignty*, Brill Nijhoff, Leiden: 2022, pp. 269–288.

of advisory opinions.[60] Nevertheless, Russia has been critical of the Commission's stance on a number of laws in some of its advisory opinions dealing with election law, political parties, the law of assembly and combating extremism, accusing the Commission of bias and interference in its internal affairs.[61] Thus, this interaction became gradually tense over time and can be best characterised as complicated.[62]

Whilst it is difficult to measure the CoE's impact on Russia precisely, it is evident that the relationship has grown more tense over time, highlighting a divergence from the initial aspirations of Russia's integration into the family of European democracies and an underlying tension between conservative and liberal values. This has been well-documented, specifically in Russia's interactions with the European Court of Human Rights (ECtHR). During its time as a CoE member, Russia generally had the highest share of pending cases at the ECtHR, which considers allegations of civil and political rights violations outlined in the European Convention on Human Rights (ECHR).[63] Many of the ECtHR cases concerning Russia resulted in rulings against the Russian government for human rights violations. Some notable cases against Russia in the ECtHR are (a) the *Yukos* case, concerning unjust expropriation and violation of the right to a fair trial,[64] (b) *Navalnyy v. Russia*, addressing issues such as arbitrary arrest, detention conditions and the right to peaceful assembly[65] and (c) *Estemirova v. Russia*, which dealt with concerns about the state's obligation to safeguard human rights activists.[66] These examples reflect broader concerns over limitations on political liberties, judicial independence and state accountability in Russia.

When Russia was found to have violated human rights, it often complied by providing compensation without altering its behaviour.[67] This demonstrated Russia's regard for the ECtHR rulings' financial implications and disregard for the

[60] For example, early on (2004), the Commission highlighted in its advisory opinion "a consistent tendency in Russia to strengthen central power without changing the text of the Constitution". *See* Opinion No. 321/2004, CDL-AD(2004)042-e, 6 December 2004.

[61] *Cf.* Opinion No. 657/2011, CDL-AD(2012)002, 19 March 2012; Opinion No. 658/2011, CDL-AD(2012)003, 20 March 2012; Opinion No. 661/2011, CDL-AD(2012)015, 20 June 2012; Opinion No. 660/2011, CDL-AD(2012)016, 20 June 2012.

[62] W. Hoffmann-Riem, *The Venice Commission of the Council of Europe – Standards and Impact*, 25(2) European Journal of International Law 579 (2014), p. 580.

[63] The official statistics indicate that Russia was leading in terms of the total number of applications submitted by each State Party to the ECtHR in 2021. However, following its expulsion, Turkey now leads category; for the latest statistics, *see Pending applications allocated to a judicial formation*, European Court of Human Rights, available at: https://www.echr.coe.int/Documents/Stats_pending_month_2023_BIL.PDF (accessed 30 August 2024).

[64] ECtHR, *OAO Neftyanaya Kompaniya YUKOS v. Russia* (App. No. 14902/04), 20 September 2011.

[65] ECtHR, *Aleksey Anatolyevich Navalnyy v. Russia* (App. No. 36418/20), 21 August 2020.

[66] ECtHR, *Estemirova v. Russia* (App. No. 42705/11), 31 August 2021.

[67] *See e.g.* K. Koroteev, *Non-Execution of Strasbourg Judgments Against Russia: The Case for a Trust Fund*, 9(1) Russian Politics 121 (2024), pp. 121–134; G. Nelaeva, E.A. Khabarova, N. Sidorova, Russia's R*elations with the European Court of Human Rights in the Aftermath of the Markin Decision: Debating the "Backlash"*, 21(1) Human Rights Review 93 (2020).

underlying causes.[68] Well before Russia's expulsion from the CoE, this strategy sparked questions about whether significant legal and structural reforms in Russia could be achieved through ECtHR verdicts. At the national level, Russia's tightening domestic legislation instead reflected a steadily deteriorating human rights situation. Although the RF constitution guarantees fundamental freedoms and rights by international human rights standards and democratic principles, the actual practice of these rights reveals significant restrictions on political opposition and freedom of expression, assembly and the press as instances of how democratic norms are not being respected.[69]

Some of Russia's most notable domestic laws (including relevant amendments) that have been criticised for curtailing human rights and democracy can be broadly defined as (a) the Foreign Agent laws, which label NGOs and media which receive foreign funding as "foreign agents", leading to increased government scrutiny and restrictions,[70] (b) the LGBTQ+ propaganda laws, which prohibit the "promotion" of "non-traditional sexual relationships" to minors and is widely seen as a tool for suppressing LGBTQ+ rights,[71] (c) the internet restriction laws, including regulations that allow the government to block access to specific websites and require companies to store data on Russian servers,[72] (d) extremism laws, which are often used to target

[68] Koroteev, *supra* note 67.

[69] For further details, *see* Mälksoo, Benedek, *supra* note 53.

[70] *See e.g.* Federalny zakon ot 20 iyulya 2012 g. No. 121-FZ "O vnesenii izmeneniy v otdel'nye zakonodatel'nye akty Rossiyskoy Federatsii v chasti regulirovaniya deyatel'nosti nekommercheskikh organizatsiy, vypolnyayushchikh funktsii inostrannogo agenta" [Federal Law of 20 July 2012, No. 121-FZ "On Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Non-Profit Organizations Performing the Functions of a Foreign Agent"]; *See* also M. Malcomson, *"So Whose Agents Are We?" Defining (International) Human Rights in the Shadow of the "Foreign Agents" Law in Russia*, 7 Birkbeck Law Review 122 (2020).

[71] *See e.g.* Federal'nyy zakon No. 135-FZ "O vnesenii izmeneniy v stat'yu 5 Federal'nogo zakona 'O zashchite detey ot informatsii, prichinyayushchey vred ikh zdorov'yu i razvitiyu' i otdel'nye zakonodatel'nye akty Rossiyskoy Federatsii v tselyakh zashchity detey ot informatsii, propagandiruyushchey otritsanie traditsionnykh semeynykh tsennostey" [Federal Law, No. 135-FZ "On Protecting Children from Information Harmful to Their Health and Development' and Certain Legislative Acts of the Russian Federation in Order to Protect Children from Information Promoting the Denial of Traditional Family Values"]; *See also* S. Katsuba, *Russia's "Gay Propaganda Law" and Anti-LGBTQ Violence*, 300 Russian Analytical Digest 5 (2023), pp. 5–8.

[72] *See e.g.* Federal'nyy zakon ot 21 iyulya 2014 g. No. 242-FZ "O vnesenii izmeneniy v otdel'nye zakonodatel'nye akty Rossiyskoy Federatsii v chasti utochneniya poryadka obrabotki personal'nykh dannykh v informatsionno-telekommunikatsionnykh setyakh" [Federal Law of 21 July 2014, No. 242-FZ "On Amendments to Certain Legislative Acts of the Russian Federation Regarding Clarification of the Procedure for Processing Personal Data in Information and Telecommunications Networks"]; *See further* A. Epifanova, *Deciphering Russia's "Sovereign Internet Law": Tightening Control and Accelerating the Splinternet*, Forschungsinstitut der Deutschen Gesellschaft für Auswärtige Politik e.V, Berlin: 2020, available at: https://nbn-resolving.org/urn:nbn:de:0168-ssoar-66221-8 (accessed 30 August 2024).

political dissent and opposition,[73] and (e) protest laws that impose strict regulations and penalties on organising and participating in unauthorised protests.[74]

This trend was further deepened by Russia's 2020 constitutional amendments, demonstrating the country's progressive retreat from its international legal responsibilities. Whilst the 1993 Constitution followed a natural law (non-contractual) approach to human rights, giving international treaties priority over domestic legislation, the 2020 amendments changed this.[75] The 2020 amendments introduced additional checks and limitations regarding the application of international law in Russia. To be more precise, the new Art. 79 now has a clause that states that judgments made by international organisations on the interpretation of provisions of international treaties to which the Russian Federation is a party shall not be implemented in Russia if they are at odds with the Russian Constitution, replicating what had already been established by the Russian Constitutional Court and the Russian State Duma in 2015.[76] Furthermore, Art. 125.5.1(b) tasks the Constitutional Court with checking for the compatibility of international decisions with Russia's constitutional order. These changes allowed Russia to manage and stay in the European Convention but, when needed, to effectively veto the implementation of ECtHR judgments.[77]

Despite these systemic issues, actual causes of major disruptions in the relationship between Russia and the CoE were revealed due to geopolitical tensions, as Russia's actions were at great odds with the values of the CoE. Notably, Russia's actions in Georgia (2008) and later Ukraine (2014), which starkly contrasted with the CoE's principles, set the scene for severe cracks in this relationship. The first turning point at this stage was Russia's annexation of Crimea in 2014; as a result, the Parliamentary Assembly of the CoE suspended Russia's voting rights.[78] Neverthe-

[73] *See e.g.* Federal'nyy zakon ot 25 iyulya 2002 g. No. 114-FZ "O protivodeystvii ekstremistskoy deyatel'nosti" (s izmeneniyami i dopolneniyami) [Federal Law of 25 July 2002, No. 114-FZ "On Combating Extremist Activity"]; *See also* M. Kravchenko, *Russian Anti-Extremism Legislation and Internet Censorship*, 46(2) The Soviet and Post-Soviet Review 158 (2019), pp. 158–186; *See further* A. Trochev, *Anti-Extremism Legislation in Putin's Russia*, 54(5–6) Statutes & Decisions 153 (2020), p. 153.

[74] *See e.g.* Federal'nyy zakon ot 8 iyunya 2012 g. No. 65-FZ "O vnesenii izmeneniy v Kodeks Rossiyskoy Federatsii ob administrativnykh pravonarusheniyakh i Federal'nyy zakon 'O sobraniyakh, mitingakh, demonstratsiyakh, shestviyakh i piketirovaniyakh'" [Federal Law of 8 June 2012, No. 65-FZ "On Amendments to the Code of Administrative Offenses of the Russian Federation and the Federal Law 'On Assemblies, Rallies, Demonstrations, Marches, and Picketing'"]; *See also* A. Salenko, *Evolution of the Public Assembly Law in Russia*, 2(30) Tyumen State University Herald. Social, Economic, and Law Research, 106 (2022), pp. 106–128; *See further* P. Malkova, O. Kudinova, *Exploring the Interplay Between Freedom of Assembly and Freedom of Expression: The Case of Russian Solo Pickets*, 38(3) Netherlands Quarterly of Human Rights 191 (2020).

[75] Mälksoo, *supra* note 7, pp. 78–93.

[76] *Ibidem*, p. 87.

[77] *Ibidem*; *see also* L. Mälksoo, *Markin v. Russia. Application No. 30078/06, ECtHR*, 106(4) American Journal of International Law 836 (2012); Malksoo, *supra* note 39, pp. 111–121.

[78] For more on Crimea, *see* M. Madsen, *From Boom to Backlash? The European Court of Human Rights and the Transformation of Europe*, in: H. Aust, D. Esra (eds.), *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective*, Edward Elgar Publishing, Cheltenham: 2021, pp. 21–42.

less, the country continued with its membership in the CoE. Eventually, following over two decades of a tense relationship with the CoE, Russia was expelled from the organisation on 16 March 2022 and ceased to be a Contracting Party to the ECHR on 16 September 2022 in response to its invasion of Ukraine.[79] The CoE has referred to Russia's aggression against Ukraine and the flagrant human rights violations as an attack on the organisation's values, signalling the final chapter of the country's attempt to become a member of the European family of democracies.[80]

The ongoing situation presents a crucial test for the CoE's relevance and effectiveness in fostering democratic norms and human rights in the face of shifting political landscapes and emerging challenges. Russia's failed internalisation of the democratic norms and values of the CoE also reveals that the concerns are not isolated to individual elements of democracy but indicate more profound and fundamental challenges in Russia's understanding of democratic values and practices. This is also reflected in Russia's regional integration efforts and requires a closer look. This task is the subject of the following section.

2.4. The silence on democracy in Russia's regional integration efforts

The notion of democratic conditionality is significant in the context of regional integration initiatives, specifically in the West.[81] This idea entails making participation in or greater integration within an organisation contingent upon democratic government, observance of human rights and the rule of law.[82] Since the early 1990s, Russia has initiated two major regional integration projects in the post-Soviet Eurasian region: the Eurasian Economic Union (EAEU) and the Collective Security Treaty Organization (CSTO), which merit closer attention in this study. Strict democratic conditionality is noticeably absent from Russia-led regional cooperation projects.[83]

In May 1992, Russia, alongside Armenia, Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan, signed the Collective Security Treaty. Membership in the CSTO is not contingent on any specific regime type. Nevertheless, the organisation's first col-

[79] *The Russian Federation is Excluded from the Council of Europe*, Council of Europe, 16 March 2022, available at: https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe (accessed 30 August 2024).

[80] United around our values, Council of Europe Publishing, Strasbourg: 2023, available at: https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1 (accessed 4 June 2024).

[81] Organisations such as the EU, NATO and the CoE incorporate democratic conditionality into their membership criteria or cooperation frameworks.

[82] *See generally* E. Rubinson, *Flexible Democratic Conditionality? The Role of Democracy and Human Rights Adherence in NATO Enlargement Decisions*, 24(3) Journal of International Relations and Development 696 (2021).

[83] M. Karliuk, *The Eurasian Economic Union: An EU-Inspired Legal Order and Its Limits*, 42 Review of Central and East European Law 50 (2017); M. Lagutina, *Eurasian Economic Union Foundation: Issues of Global Regionalization*, 5 Eurasia Border Review 95 (2014).

lective intervention in the CSTO's 30-year history – in Kazakhstan in response to the January 2022 protests, at the request of Kazakhstan's President Tokayev – indicated a strong willingness to act against any popular uprising and spoke volumes about its implicit aims.[84] The stated purpose for deploying CSTO forces was peacekeeping, but in practice, Russia supported the Kazakh government in quelling the protests. Putin has characterised the intervention as a united endeavour to safeguard regional partners against what he termed "colour revolutions" "provoked by external meddling in the domestic matters of allies."[85] The topic of colour revolutions vividly demonstrates that the organisation's goals align with Russia's regional stability and aspirations for regional hegemony. Thus, Putin perceives any efforts towards democratisation as potentially undermining what is referred to as Russia's "sphere of influence".[86]

To continue, the EAEU has been operating as a customs union since 2011 and as an economic union since 2015.[87] Russia was the key founder of the bloc, and two other co-founders were Belarus and Kazakhstan. Armenia and Kyrgyzstan, the latest members of the EAEU, are relatively democratic but also small and politically weak.[88] The organisation's primary goal is to enhance cooperation and boost economic competitiveness among its members by establishing a unified market for goods, services, capital and labour.[89] Officially, political, cultural and social integration is beyond the organisation's scope, as such provisions are missing from the treaty.[90] Nevertheless, its geopolitical implications are evident as economic integration may be a cover for political ends, even if such intentions remain undeclared.[91] The EAEU integration is often discussed in light of "the puzzle of authoritarian cooperation", which entails that similarity, particularly similar political systems, may be both a push and pull factor for the autocrats.[92]

Although many experts perceived the initiative as an attempt to re-sovietise the area, Putin has stated that the goal is tight integration based on new political and economic

[84] S. Sakhariyev, *Collective Security Treaty Organization (CSTO)*, in: S. Sayapin, R. Atadjanov, U. Kadam, G. Kemp, N. Zambrana-Tévar, N. Quénivet (eds.), *International Conflict and Security Law*, TMC Asser Press, Hague: 2022, p. 617.

[85] M. Seddon, *Vladimir Putin Vows to Stop "Colour Revolutions" after Sending Troops to Kazakhstan*, Financial Times, 10 January 2022, available at: https://www.ft.com/content/ee9005ee-7269-4081-801a-61011b233e78 (accessed 30 August 2024).

[86] F. Kriener, L. Brassat, *Quashing Protests Abroad: The CSTO's Intervention in Kazakhstan*, 10(2) Journal on the Use of Force and International Law 271 (2023).

[87] Karliuk, *supra* note 83, p. 55.

[88] A. Patalakh, *Economic or Geopolitical? Explaining the Motives and Expectations of the Eurasian Economic Union's Member States*, 11 Fudan Journal of the Humanities and Social Sciences 31 (2018), p. 33.

[89] E. Vinokurov, *Eurasian Economic Union: Current State and Preliminary Results*, 3 Russian Journal of Economics 54 (2017), pp. 54–55.

[90] Karliuk, *supra* note 83, p. 53.

[91] Patalakh, *supra* note 88, p. 32.

[92] S. Roberts, *The Eurasian Economic Union: The Geopolitics of Authoritarian Cooperation*, 58 Eurasian Geography and Economics 418 (2017), p. 422.

principles rather than the revival of the USSR.[93] From his perspective, the goal of Eurasian integration is to maintain the social, cultural and historical communities of the people living in the Union's Member States. One may wonder what principles bind these nations with diverse political systems together.[94] Some analysts argue that the EAEU was established to counter the growing influence of the "democratic" European Union and "authoritarian" China in the region, deter regime changes in neighbouring countries, and resist colour revolutions.[95] Nevertheless, the EAEU's legislative framework is exclusively economic, and any support or resistance to any particular regime style should be sought in more subtle spheres of politics.[96]

Art. 3 of the Treaty articulates the Basic Principles of the EAEU and further clarifies this point, stating that the EAEU shall

> respect the commonly recognised principles of the international law, including the principles of sovereign equality of the Member States and their territorial integrity; respect the differences of political structures of the Member States; provide the mutually beneficial cooperation, equality and the national interests of the Parties.[97]

This indicates that the Kremlin officially places a higher value on sovereignty and non-intervention as principles of international law over democracy, considering the latter to be within the exclusive domestic jurisdiction of individual states.

Additionally, the preamble of the EAEU's founding treaty highlights the organisation's dedication to the sovereign equality of states and the essential observance of constitutional rights and freedoms of individuals and citizens, whilst also articulating a desire to bolster unity and enhance cooperation among its peoples, with respect for their historical, cultural and traditional heritage.[98] The document's emphasis on constitutional rights and freedoms suggests an effort to counter an authoritarian image. It also reflects a strategic approach, recognising the role of human rights and democracy in legitimising authority.

Overall, Russia's efforts in shaping regional integration frameworks reflect its ambition to maintain regional dominance and safeguard its strategic interests,

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[93] *V. Putin napisal stat'ju o perspektivah sozdanija Evrazijskogo sojuza* [V. Putin wrote an article on the prospects of creating the Eurasian Union], RBK, 3 October 2011, available at: https://www.rbc.ru/politics/03/10/2011/5703ecf29a79477633d3871b (accessed 30 August 2024).

[94] *Obrashhenie Prezidenta Rossii k glavam gosudarstv – chlenov Evrazijskogo jekonomicheskogo sojuza* [Address by the President of Russia to the heads of state – members of the Eurasian Economic Union], President of Russia, 18 January 2018, available at: http://kremlin.ru/events/president/news/56663 (accessed 30 August 2024).

[95] Roberts, *supra* note 92, pp. 427–429.

[96] A. Libman, A. Obydenkova, *Regional International Organizations as a Strategy of Autocracy: The Eurasian Economic Union and Russian Foreign Policy*, 94 International Affairs 1037 (2018), pp. 1037–1058.

[97] Treaty on the Eurasian Economic Union, Art. 3.

[98] *Ibidem*, preamble.

actively working to prevent the rise of any popular or democratic movements that could challenge its authority. In fact, Moscow values stability over the proliferation of democracy, particularly under circumstances when political leadership in the post-Soviet space leans towards Western alliances.[99]

3. TRACING THE EVOLUTION OF THE DISCOURSE ON DEMOCRACY IN RUSSIA WITHIN THE CONTEXT OF INTERNATIONAL LAW

3.1. Prologue: Russia's early embrace and adaptation of Western liberal democratic ideals

Russia's descent towards authoritarianism is often attributed to Putin's rule, although the nation's democratic trajectory was precarious before his rise to power. Under Yeltsin's leadership, Russia faced severe security and economic challenges that were exacerbated by the absence of institutional legacies and traditions for democratisation.[100] The challenges to democratisation in this period are traced back to 1993 when Yeltsin decided to resort to force in order to dissolve the parliament amid a constitutional crisis brought on by a power struggle within the parliament. This situation caused scepticism about Yeltsin's dedication to the principles of democracy.[101] Nonetheless, there were essential facets of democracy that existed under Yeltsin but have vanished under Putin, the most prominent being freedom of the media and wide-ranging public debate. However, there was no equality or the real rule of law; privatisation amounted to the oligarchs' seizure of public wealth. Overall, the Yeltsin administration's corruption and power dynamics reduced the semblance of democracy to mere pretence.[102] Western nations frequently disregarded these problems, hoping that Russia would eventually embrace Western liberal democratic principles, giving Yeltsin substantial backing as a safeguard against the resurgence of nationalism or the return of communism.[103]

Yeltsin played a key role in facilitating Putin's ascent to power.[104] Following his sudden resignation in 1999, Putin became Russia's acting president and went on to win the presidential election in March 2000. Upon Putin's ascend to power,

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[99] *See also* A. Cordesman, *Russia and the "Color Revolution"*, Center for Strategic and International Studies, 28 May 2014, available at: https://www.csis.org/analysis/russia-and-color-revolution (accessed 30 August 2024).

[100] T. Colton, M. McFaul, *Popular Choice and Managed Democracy: The Russian Elections of 1999 and 2000*, Brookings Institution Press, Washington: 2003.

[101] *Ibidem*.

[102] P. Hassner, *Russia's Transition to Autocracy*, 19(2) Journal of Democracy 5 (2008), p. 9.

[103] *Ibidem*.

[104] Colton, McFaul, *supra* note 100.

Russia's political system met the criteria of an electoral democracy in a minimalist sense.[105] During this time, Putin did not eliminate democratic freedoms outright and his foreign policy appeared to lean towards the West, especially in the context of global anti-terrorism efforts following the 9/11 attacks.[106] This approach was reflected in Putin's early public discussions on democracy, where he strongly endorsed liberal democratic principles and a positive engagement with the West, particularly Europe.[107] Nonetheless, the themes of national security and sovereignty were ever-present, indicating the deep-seated priorities that would guide his rule and shape his approach to Russia's democratic development.[108]

The conversation about democracy at this stage predominantly revolved around and reproduced the Western liberal democratic ideals and principles. Viewed through the lens of international law, this indicated a tacit recognition of the Western liberal concept of democracy as a universally accepted, legitimate and suitable model for Russia. To illustrate, Putin's 2000 inaugural address conveyed optimism for Russia's democratisation and emphasised the significance of democratic elections and peaceful power transitions as being crucial to political stability and the importance of internal political diversity.[109] Such recognition was more explicitly articulated in a 2002 interview with the Polish newspaper Gazeta Wyborcza and the Polish television channel TVP. Providing his view on Russia's democratisation, Putin insisted: "we should not reinvent the wheel, we have to follow the road that all the industrialised democratic countries are following", adding that "for all the uniqueness of Russia, just like of any other country, which we must certainly take into account, there are still some general principles which must be recognised in theory and in practice if we are to build our state. And if we understand these general principles as the main principles of democracy and freedom, then, I repeat, without these universally recognised principles we will never build a normal democratic state."[110]

From the beginning, Putin's understanding of democracy was not confined to domestic matters, as he acknowledged the link between democratic principles,

[105] M. McFaul, *Russia's Road to Autocracy*, 32 Journal of Democracy 11 (2021), p. 17.

[106] *Ibidem*, p. 19.

[107] *See e.g.* V. Putin, *Inauguratsionnaya rech' Vladimira Putina 7 maya 2000 goda* [Inaugural speech of Vladimir Putin on 7 May 2000], Moscow Daily News, 7 May 2000, available at: https://www.mn.ru/blogs/blog_reference/80928 (accessed 30 August 2024); *Interview with the Newspaper Welt am Sonntag (Germany)*, President of Russia, 11 June 2000, available at: http://en.kremlin.ru/events/president/transcripts/24202 (accessed 30 August 2024).

[108] *See e.g.* Putin, *supra* note 107; S. Lavrov, *Speech by Russian Minister of Foreign Affairs Sergey Lavrov at the Third Summit of the Council of Europe, 16 May 2005*, The Ministry of Foreign Affairs of the Russian Federation, 16 May 2005, available at: https://mid.ru/en/foreign_policy/news/1592880/ (accessed 30 August 2024).

[109] Putin, *supra* note 107.

[110] *From an Interview with the Polish Newspaper Gazeta Wyborcza and the Polish TVP Channel*, President of Russia, 15 January 2002, available at: http://en.kremlin.ru/events/president/transcripts/21471 (accessed 30 August 2024).

collective security and international cooperation. When emphasising the unique role of Europe as "the cradle of democracy and civilisation and a natural pole in the emerging multipolar world", he also noted that "Russia sees Europe in the 21st century as a single space of democracy, prosperity and equal security for all its states. This idea of the future of our continent is in line with the multi-lateral agreements under the OSCE, including the European Security Charter."[111] In essence, Putin recognised the significance and value of democracy – particularly in its Western liberal form – for fostering peace and cooperation, which can be cautiously interpreted as recognition of the conceptual foundations of liberal peace theory.

Furthermore, Russia's view on democracy at the time reflected the premises of a substantive/thick approach to democracy and, though Putin mentioned Russia's specificities, this view did not heavily rely on a particular understanding of democracy. In his 2003 interview with The New York Times, Putin reiterated that Russia should not seek any unique standing regarding democracy, adding that "the basic values of democracy should be identical to those that have taken root and established themselves in democratic countries and free market economies. Of course, every country has its own identity. (...) But on the whole, the main principles of humanism, human rights, the freedom of speech remain fundamental for all countries, and Russia has no right to claim any exclusive status in this area."[112] Moreover, he was aware that mere electoralism could become "a veil and a screen for undemocratic principles of a state", stating that true democracy requires more than just "a law-based electoral system (...) unless it is 'built into' the genuine democratic institutions of the whole society."[113]

Despite this positive outlook on liberal values, Putin considered a robust state apparatus a fundamental prerequisite for democratisation. In his 2001 address at a meeting with NGO representatives, he stated: "I am absolutely convinced that an inept state is as serious a threat to freedom and democracy as a despotic rule. No less. Without an effective state there would be no rights, no human or civil freedoms, no civil society to speak of."[114] Elsewhere, he reiterated that strengthening the state and cultivating democracy were not mutually exclusive: "[w]hen we speak about the strengthening of the state we don't mean curtailing democratic freedoms [...], but strengthening state institutions that are able to guarantee compliance with

[111] *Interview with the Newspaper...*, *supra* note 107.

[112] *Interview to The New York Times, Novo-Ogaryovo*, President of Russia, 4 October 2003, available at: https://en.kremlin.ru/events/president/transcripts/22145 (accessed 30 August 2024).

[113] *Speech at an International Conference of the Association of Election Organisers in Central and Eastern Europe*, President of Russia, 26 September 2002, available at: http://en.kremlin.ru/events/president/transcripts/21731 (accessed 30 August 2024).

[114] *Address at a Meeting with NGO Representatives*, President of Russia, 11 June 2001, available at: http://en.kremlin.ru/events/president/transcripts/21259 (accessed 30 August 2024).

the laws the state itself passes."[115] Putin deemed recognition of the Western liberal democracy model to be suitable for Russia and that strengthening state institutions was complementary, not conflicting. He believed that Russia's distinctive historical trajectory necessitated the integration of both aspects.[116]

Overall, Putin's stance at this stage envisioned a version of democracy for Russia founded on the premises of Western liberal democracy. The same principles guided the external dimension of Russia's approach to democracy. Over time, the discourse drifted away or rather diverted from the domestic dimension, focussing more on the external one, revealing more emphasis on sovereignty and non-interference as well as counter-Western narratives.

3.2. Democracy transformed, from liberal ideals to sovereign democracy

During his second term, Putin's democratic rhetoric and Russia's foreign policy posture underwent a notable transformation. His words characterising Russia as "a country strengthening its positions in the international arena and able to peacefully defend its legitimate interests in a rapidly changing world" best encapsulate this shift.[117] This era was marked by a significant consolidation of power and increased control over political institutions and the media, signalling a move towards more centralisation and authoritarian governance.[118] Internationally, Russia's adverse reaction to NATO's intervention in Kosovo in 1999 highlighted the country's apprehensions about its weakened positions and the alliance's expanding influence in areas it considered within its "sphere of influence" – a critical notion in shaping its foreign policy for many years. Such scepticism and concern about Western encroachment intensified, especially following the "colour revolutions" in Georgia, Ukraine and Kyrgyzstan from 2003 to 2005, which led to the overthrow of authoritarian regimes through widespread demonstrations, further solidifying Russia's caution against what it perceived as Western expansion towards its "sphere of influence".[119]

Nevertheless, for Russia, the most critical moment of rupture with the West was the 2003 intervention in Iraq by a coalition of countries led by the USA and the

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[115] *From an Interview with the Canadian CBC and CTV Channels, the Globe and Mail Newspaper and the Russian RTR Television*, President of Russia, 14 December 2000, available at: http://en.kremlin.ru/events/president/transcripts/21139 (accessed 30 August 2024).

[116] *Interview with the French weekly Paris-Match*, President of Russia, 6 July 2000, available at: http://en.kremlin.ru/events/president/transcripts/24166 (accessed 30 August 2024).

[117] Putin, *supra* note 107.

[118] Examples of this trend are the suppression of the Constitutional Court in the subjects of the Federation and the gradual suppression of gubernatorial elections, *See generally* R. Kumar, *"Putin's Legacy and the State of Democracy in Russia"*, 45(2) International Studies 89 (2008).

[119] *See also* M. Suslov, *"Russian World" Concept: Post-Soviet Geopolitical Ideology and the Logic of "Spheres of Influence"*, 23(2) Geopolitics 330 (2018).

UK.[120] From the Russian viewpoint, the Iraq War and Kosovo conflicts signified the erosion of international law, fuelling Russia's scepticism towards the way international law was being manipulated to endorse the USA's unilateral actions. Such a turn aligned with Putin's "sovereign democracy" stance that saw international law as a flexible framework serving hegemonic interests.[121] It also revealed to Russia that it had lost its seat at the table of "superpowers", as Russia felt its voice was disregarded and accumulated a sense of humiliation for the successor of a former great power.[122] These developments also prompted Russia to revisit its internal and external sovereignty. Putin implemented strict measures to thwart similar scenarios in Russia and directed his efforts at reinstating Russia as a great power. He curtailed the activities of the opposition and initiated pro-government groups such as Nashi, interpreting Western support for these revolutions – particularly from the EU and the USA – as direct threats to Russian stability.[123] Consequently, the Kremlin intensified oversight of NGOs, particularly those engaged in political activities or funded from abroad, tying the regime's stability to the broader concept of national security. Putin's words that democracy is not a "street bazaar" best reflect his staunch distaste for public dissent.[124]

The Western liberal discourse, despite Russia's manifest dissatisfaction with Western interventionism, was not abandoned during this period; it just moved down the priority list. For example, in his inauguration speech in 2004, Putin used a more nationalistic and less democratic vocabulary. It placed a higher importance on national security, state-driven development, and economic prosperity while retaining democratic elements such as political pluralism and individual liberties.[125] Internationally, the promotion of Western liberal democracy was increasingly viewed as intrusive, and the discourse placed a greater emphasis on sovereignty in relation to democracy's external dimension alongside a more particularist interpretation of democracy within the domestic context. For example, after meeting with US

[120] *See also* T. Ambrosio, *The Russo-American Dispute Over the Invasion of Iraq: International Status and the Role of Positional Goods*, 57(8) Europe-Asia Studies 1189 (2005).

[121] P.S. Morris, *"Sovereign Democracy" and International Law: Legitimation and Legal Ideology*, in: P.S. Morris (ed.), *Russian Discourses on International Law Sociological and Philosophical Phenomenon*, Routledge, Abingdon: 2018, p. 121.

[122] *Ibidem*.

[123] Nashi is a youth movement in Russia established in 2005 and known for its strong support of the Kremlin. For more, *see* M. Atwal, E. Bacon, *The Youth Movement Nashi: Contentious Politics, Civil Society, and Party Politics*, 28(3) East European Politics 256 (2012), pp. 256–266.

[124] *Transcript of Annual Big Press Conference*, President of Russia, 14 February 2008, available at: http://en.kremlin.ru/events/president/transcripts/24835 (accessed 30 August 2024).

[125] Putin, *supra* note 107.

President George W. Bush in 2005 during the Russian-US summit in Bratislava, Putin stated:

> Russia made its choice in favour of democracy 14 years ago, without any pressure from outside, and the way Russian society thinks and feels today means there can be no return to totalitarianism. Russia is committed to the same basic principles of democracy that are shared throughout the world, but at the same time, its modern institutions should be adapted to the current state of development of Russian society and to its history and traditions. The efforts made to establish and consolidate democracy on Russian soil should not compromise the concept of democracy itself and should not lead to the state's disintegration and reduce the people to poverty.[126]

Furthermore, during his 2005 address at Stanford University, Minister of Foreign Affairs Lavrov articulated a vision of a universal idea of democracy capable of being adapted to each nation's unique cultural, historical and political contexts.[127] He also simultaneously stressed that Russia had full agency in the process of democratisation, not influenced by external pressures: "Each country applies democratic principles in its own way and within its own timeframe [... and] any forced uniformity is harmful and destructive."[128]

The idea of "sovereign democracy", which draws from European intellectual traditions and Hobbesian and Schmittean thought, served as a means for Russia to assert its autonomy, distance itself from Western liberal democracy and counter what it saw as the expansion of Western hegemony.[129] Vladislav Surkov, often credited with conceptualising the term "sovereign democracy", championed this approach to assert Russia's independence from Western influences.[130] Surkov was revealingly referred to by *The Economist* as "the ideologue without ideology" – ultimately capturing the odd nature of the concept.[131] Putin saw "sovereign democracy" as Russia's safeguard against "managed democracy" – which he viewed as external control over democratic processes – and emphasised Russia's autonomy in its internal and

[126] V. Putin, *The Way Democracy is Established and Consolidated Should Not Compromise the Concept of Democracy Itself*, 24 February 2005, available at: http://en.kremlin.ru/events/president/news/32852 (accessed 30 August 2024).

[127] Lavrov, *supra* note 108.

[128] *Main Points of the Address by the Foreign Minister of the Russian Federation S. Lavrov at the Stanford University, San Francisco, 20 September 2005*, The Ministry of Foreign Affairs of the Russian Federation, 24 September 2005, available at: https://mid.ru/en/foreign_policy/news/1636124/ (accessed 30 August 2024).

[129] Morris, *supra* note 121, p. 105.

[130] V. Surkov, *My stroim suverennuyu demokratiyu* [We are building a sovereign democracy], RGRU, 29 June 2006, available at: https://rg.ru/2006/06/29/kreml.html (accessed 30 August 2024).

[131] *An Ideologue's Exit*, The Economist, 11 May 2013, available at: https://www.economist.com/europe/2013/05/11/an-ideologues-exit (accessed 30 August 2024).

external affairs, asserting that "it would not happen in relation to Russia."[132] He also asserted that economically strong nations often leverage globalisation for their benefit in global affairs.[133] Embracing sovereign democracy, in their view, meant Russia could act independently as a sovereign state within the international system.[134]

Domestically, this concept played a crucial role in the political landscape, particularly in facilitating a smooth power transition between the president and prime minister in 2008, a move that solidified United Russia's dominance and hinted at a shift towards a one-party system. It underpinned significant legislative changes that expanded presidential powers.[135] This tactic was in place until the Russian Constitution was amended, enabling Putin to seek a second presidential term in 2012.[136] During this period, "sovereign democracy" effectively reshaped Russia's legal landscape. This transformation involved significant legislative and constitutional changes, widely viewed as Russia's shift towards authoritarianism by restricting civil liberties and other aspects of Western liberalism.[137] Most notably, at this stage there was a marked transition towards centralisation, especially highlighted by a 2004 legislative amendment, which shifted the selection of regional governors from public elections to appointments by the Kremlin.[138] This move, coupled with the creation of federal districts, drastically transformed Russia's federal system and diminished the autonomy of its regions, aligning them more closely with the Federation's sovereignty.[139]

Ironically, in striving to distance itself from Western models and influence, the implementation of "sovereign democracy" in Russia led to a consolidation of power and a reduction in democratic pluralism, thus replicating similar inequalities within its own system that Russia criticised in the West.[140] Nevertheless, the concept of

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[132] V. Putin, *Interview with ZDF Television Channel (Germany)*, President of Russia, 13 July 2006, available at: https://en.kremlin.ru/events/president/transcripts/23703 (accessed 30 August 2024).

[133] *Transcript of Meeting with Participants in the Third Meeting of the Valdai Discussion Club*, President of Russia, 9 September 2006, available at: https://en.kremlin.ru/events/president/transcripts/23789 (accessed 30 August 2024).

[134] Morris, *supra* note 121, p. 16.

[135] *Ibidem*, p. 18.

[136] *Ibidem*.

[137] *Ibidem*, p. 19

[138] Federal'nyi Zakon ot 11 dekabria 2004 g. No. 159-FZ "O vnesenii izmenenii v Federal'nyi Zakon 'Ob obshchikh printsipakh organizatsii zakonodatel'nykh (predstavitel'nykh) i isplonitel'nykh organov gosuderstvennoi vlasti sub''ektov Rossiiskoi Federatsii' i v Federal'nyi Zakon 'Ob osnovnykh garantiyakh izbiratel'nykh prav i prava na uchastie v referendume grazhdan Rossiiskoi Federatsii'" [Federal Law of 11 December 2004, No. 159-FZ "On amendments to the Federal Law 'On the general principles of organization of the legislative (representative) and executive organs of state power of the subjects of the Russian Federation' and to the Federal Law 'On the basic guarantees of electoral rights and the right of citizens of the Russian Federation to participate in a referendum'"].

[139] Morris, *supra* note 121, pp. 19–20.

[140] V. Morozov, *Russia's Postcolonial Identity: A Subaltern Empire in a Eurocentric World*, Palgrave Macmillan, London: 2015, p. 108.

"sovereign democracy" coexisted with discussions on the universality of democracy in Russia, a discourse that evolved notably with Medvedev's presidency beginning in 2008. Medvedev shifted the narrative towards recognising democracy as a universal value, albeit with local nuances, complementing rather than contradicting Putin's perspective.[141] This view was also reinstated in the official document Concept of the Foreign Policy of the Russian Federation.[142]

Medvedev also demonstrated more tolerance to critiques of Russia's democratisation, acknowledging the issues the country faced during that process.[143] In his 2011 World Economic Forum address in Davos, he openly recognised the critiques of Russia's democratic and legal system deficits, affirming that "(w)e are learning and we are willing to listen to friendly advice – but what we do not need is lecturing."[144] Medvedev's stance was best encapsulated in his famous "Go, Russia!" article, where he argued that "Russian democracy will not merely copy foreign models [...]. Only our own experience of democratic endeavour will give us the right to say: we are free, we are responsible, we are successful."[145] Elena Pavlova contends that Medvedev's introspective and critical view of Russia's democratic deficiencies of the time did not conflict with Putin's views but instead extended its appeal to the Western audience.[146] Medvedev's approach made it possible to portray Russian democracy as unique whilst retaining its universal elements.[147]

The evolution from a more insular concept of "sovereign democracy" to one that engages with international norms and audiences reflected a strategic flexibility adapted to the ad hoc needs of the leadership. This adaptation shows an ability to modify discourse to better position Russia on the international stage, responding to both domestic and international pressures and opportunities. This begs the question of whether Russia's discourse was evolving to mirror its realpolitik ambitions

[141] *Interview with Journalists from the G8 Countries*, President of Russia, 3 July 2008, available at: http://en.kremlin.ru/events/president/transcripts/48259 (accessed 30 August 2024).

[142] *See* The Foreign Policy Concept of the Russian Federation (approved by Dmitry A Medvedev, President of the Russian Federation, 12 July 2008), available at: https://www.mid.ru/ns-osndoc.nsf/0e9272befa34209743256c630042dlaa/cef9556065/ (accessed 30 August 2024).

[143] *Meeting with Leading Russian and Foreign Political Analysts*, President of Russia, 10 September 2010, available at: http://en.kremlin.ru/events/president/news/8882 (accessed 30 August 2024).

[144] *Dmitry Medvedev Addressed the World Economic Forum in Davos*, President of Russia, 26 January 2011, available at: http://en.kremlin.ru/events/president/news/10163 (accessed 30 August 2024).

[145] *Dmitry Medvedev's Article, Go Russia!*, President of Russia, 10 September 2019, available at: http://en.kremlin.ru/events/president/news/5413 (accessed 30 August 2024).

[146] E. Pavlova, *The Regional and the Universal: The New Democratic Discourses in the Russian Federation and Latin America*, in: V. Morozov (ed.), *Decentring the West: The Idea of Democracy and the Struggle for Hegemony*, Routledge, London: 2016, p. 90.

[147] *Ibidem*, p. 89.

rather than a sincere desire to confront its perceived Westcentricism and broaden the interpretation of democracy internationally.

3.3. From discourse to dominance: Russia's contestation of Western "hegemonic" ideas of democracy

This escalating dissatisfaction with the West set the stage for Putin's pivotal 2007 Munich speech, where he openly contested Western dominance and unipolarity, which he viewed as harmful, calling for a shift towards multipolarity to prevent global dominance by a single superpower. Putin's critique was primarily directed against the USA for what he perceived to be overstepping its boundaries in its efforts to promote democracy.[148] He later continued to question whether NATO's eastward expansion truly advanced democracy and stability near Russia.[149] The idea of multipolarity gradually became essential to Russia's foreign policy discourse. Like Putin, Lavrov also frequently discussed this, advocating for a foreign policy that enhanced Russia's growth within a multipolar global framework and opposing the enforcement of a uniform democracy model.[150]

The critical issue to examine is how the concept of multipolarity, as proposed by Russia, reshapes or influences the understanding of democracy in international law. As highlighted by Andrey Makarychev, a significant flaw of this model is its negligible concern for the internal political regimes of major power holders.[151] Multipolarity, seen merely as a redistribution of global power among various power centres, tends to sideline the fundamental principles of democracy or place them on the same footing as non-democracies. Thus, one could argue that the notion of multipolarity both directly and indirectly shifts attention away from the domestic dimensions of democracy in terms of its recognition and validation in international discourse and legal structures.[152] It also makes the concept of democracy in international law vague – if democracy is everything, then it is nothing.

Furthermore, the anti-Western narrative in Russia's discourse about democracy often involves critiquing the integrity of Western democracies. For example, at the

[148] *Speech and the Following Discussion at the Munich Conference on Security Policy*, President of Russia, 10 February 2007, available at: http://en.kremlin.ru/events/president/transcripts/24034 (accessed 30 August 2024).

[149] *Press Statement and Answers to Journalists' Questions Following a Meeting of the Russia-NATO Council*, President of Russia, 4 April 2008, available at: http://en.kremlin.ru/events/president/transcripts/24903 (accessed 30 August 2024).

[150] *Speech of the Minister of Foreign Affairs of Russia S. V. Lavrov at the International Parliamentary Forum "Modern Parliamentary and the Future of Democracy"*, The Ministry of Foreign Affairs of the Russian Federation, 10 December 2012, available at: https://mid.ru/en/foreign_policy/news/1654581/ (accessed 30 August 2024).

[151] A. Makarychev, *Russia and 'International Democracy': Unlocking the Concept*, in: V. Morozov (ed.), *Decentring the West: The Idea of Democracy and the Struggle for Hegemony*, Routledge, London: 2013, pp. 45–63.

[152] *Ibidem*.

2013 Valdai meeting, Vladimir Putin pointed out the flaws in democracies such as the United States, where presidents can win without the popular vote, emphasising that democracies have their shortcomings.[153] These criticisms are similar to the Soviet-era discourse on democracy, which was characterised by its anti-Western stance and a tendency to deflect by highlighting the faults of others.[154] The irony in both scenarios is that whilst both the USSR and Russia resisted being critiqued by external parties, viewing it as meddling in their domestic matters, they continuously critiqued others. This contradicts their own proclaimed stance on non-intervention, challenging their self-perceived role as defenders of sovereignty as they conceived it. Such a manner of contestation of norms is whataboutism, a rhetorical tactic that deflects criticism by accusing opponents of similar or different misconduct. Although this strategy can effectively question conventional norms and expose double standards, it implies a reluctance to accept responsibility and adopts a somewhat cynical stance by implying that all parties have their shortcomings.[155]

To continue, Russia presented multipolarity as a commitment to legal and democratic norms in line with the UN Charter, aiming to contribute to the establishment of a just and democratic global order.[156] This invokes some parallels with the postcolonial understanding of democracy. As Andrey Makarychev argues, "to some extent it is based upon the old Soviet argument claiming that it was the period from the 1960s to the 1980s when the democratisation of international relations started with decolonisation, the maturing of the Non-Alignment Movement with its socialist sympathies, and so on."[157] The modern alliances that Russia has formed with countries like India, China, Brazil, South Africa etc. can arguably be rooted in specific postcolonial connecting points, at least partially. This perspective suggests that Russia is perceived to be stepping into the shoes of the USSR, continuing its legacy as a leading figure in these relationships. This viewpoint logically extends the narrative that Russia's engagement with these nations is not merely geopolitical, but also carries historical and ideological underpinnings reminiscent of the USSR's role and influence in the postcolonial world order.[158]

The close collaboration between China and Russia, despite the differences in their internal governance philosophies and practices, as evidenced by their unified statements and declarations to challenge the liberal idea of democracy, lends credi-

[153] *Meeting of the Valdai International Discussion Club*, President of Russia, 19 September 2013, available at: http://en.kremlin.ru/events/president/news/19243 (accessed 30 August 2024).

[154] *See e.g.* B. Babij (ed.), *Demokratija i pravo razvitogo socialisticheskogo obshestva* [Democracy and Law in the Developed Socialist Society], Politizdat Ukrainy, Kyiv: 1979.

[155] E. Lieblich, *Whataboutism in International Law*, 65(2) Harvard International Law Journal 343 (2024).

[156] *Speech of the Minister of Foreign Affairs of Russia S. V. Lavrov...*, *supra* note 150.

[157] Makarychev, *supra* note 151.

[158] *Ibidem*.

bility to this argument.[159] Along with their increased military cooperation, the two countries' cooperation in international organisations and surprisingly frequent high-level interactions demonstrate their growing consensus on the structure of the international order, inter alia reflecting their understanding of what democracy is and is not.[160] To illustrate, following the Russia-China summit in March 2023, Putin stated that "[w]e are working in solidarity on the formation of a more just and democratic multipolar world order, which should be based on the central role of the UN, its Security Council, international law, and the purposes and principles of the UN Charter."[161] This stance may resonate with the Soviet Union's post-1945 discourse on international law self-positioning itself as a leader of a "true democratic bloc".[162] Putin's approach appears to revisit this narrative, conceptualising international democracy through efforts to end or challenge Western "hegemony", thus linking back to the postcolonial theme and Russia's continuation of the USSR's legacy in shaping global democratic discourses.

The joint statement released by Russia and China in February 2022 is important, as it discusses their positions on various issues related to democracy and international law in detail and effectively outlines, captures and expresses their current position.[163] The declaration acknowledges the universal value of democracy construed within the confines of national sovereignty and simultaneously emphasises the lack of a universal model for establishing democracy.[164] The statement further links the promotion of democracy with global peace and stability, linking multipolarity with international law's aims to foster peaceful international relations. In this declaration, Russia and China mainly see Western- and specifically US-led democracy promotion as an attempt to undermine their regimes.[165] Since Russia and China perceive these endeavours, especially American ones, as transparent attempts to expand American influence and topple their regimes, they have sought to fight these efforts and have unified their forces on this front.[166]

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[159] *See e.g. Press statements by President of Russia and President of China*, President of Russia, 21 March 2023, available at: http://en.kremlin.ru/events/president/news/70750 (accessed 30 August 2024); *Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development*, President of Russia, 10 April 2023, available at: http://en.kremlin.ru/supplement/5770 (accessed 30 August 2024); *See generally* S. Malle, *Russia and China in the 21st Century: Moving towards Cooperative Behaviour*, 8 Journal of Eurasian Studies 136 (2017).

[160] A. Lukin, *China and Russia: The New Rapprochement*, Polity Press, Cambridge: 2018.

[161] *Press statements by President of Russia and President of China*..., *supra* note 159.

[162] *See also* Poghosyan, *supra* note 41.

[163] *Joint Statement of the Russian Federation*..., *supra* note 159.

[164] *Ibidem*.

[165] *Ibidem*.

[166] Lukin, *supra* note 160.

The fact that the "democratic multipolarity" rhetoric is popular in countries which lack adequate democratic credentials is also telling.[167] It is reasonable to infer, then, that this alliance and approach are part of a conscious effort to reshape international norms and values to better fit their own geopolitical goals and geopolitical ambitions. As for the conception of multipolarity, Russia is more interested in overthrowing one hegemonic system in favour of another that better fits its interests than in promoting equality as the cornerstone of a new global society.[168] This becomes particularly clear when examining Russia's transition from mere discourse to action, especially in the context of its aggression towards Ukraine.

3.4. Epilogue: The end game of Russia's democracy discourse, from the annexation of Crimea to the full-scale invasion of Ukraine

In line with the intensifying discourse, Russia's foreign policy underwent a dramatic shift starting in 2008 by resorting to the use of aggression in Georgia and, later, Ukraine as an attempt to counter their Western reorientation and the West's encroachment into its "sphere of influence." This shift required new flexibility and a framework for justifying these actions. Russia began basing its actions on instrumentalising the United Nations' non-binding Responsibility to Protect (R2P) principle in order to justify its unlawful acts.[169] This concept was first utilised with respect to the use of force in Georgia (South Ossetia) in 2008.[170] The R2P arguments later resurfaced in the context of Russia's intervention and annexation of Crimea.[171] Finally, Russia resorted to R2P as additional grounds to justify its 2022 full-scale attack in Ukraine by referring to allegations of genocide.[172] This category proved to be particularly flexible, as Russia initially did not object to using the R2P concept in a "thin" sense, as reflected in the 2005 World Summit Outcome.[173] Moreover, it supported a number of relevant UN Security Council resolutions on R2P.[174]

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[167] D. Geldenhuys, *Deviant Conduct in World Politics*, Palgrave Macmillan, New York: 2004, pp. 2–3.

[168] Makarychev, *supra* note 151, p. 77.

[169] R2P is an international principle that seeks to ensure that the international community never again fails to halt the mass atrocity crimes of genocide, war crimes, ethnic cleansing and crimes against humanity.

[170] *See* Security Council, *Security Council Holds Third Emergency Meeting as South Ossetia Conflict Intensifies, Expands to Other Parts of Georgia*, Press release, 10 August 2008, available at: https://press.un.org/en/2008/sc9419.doc.htm (accessed 30 August 2024).

[171] *Address by the President of the Russian Federation*, President of Russia, 18 March 2014, available at: http://en.kremlin.ru/events/president/news/20603 (accessed 30 August 2024).

[172] Ukraine deemed these allegations ungrounded, eventually leading to a new dispute at the ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application, 26 February 2022, ICJ Rep 2022, available at: https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf (accessed 30 August 2024).

[173] UNGA resolution of 24 October 2005, *2005 World Summit Outcome*, Doc. A/RES/60/1, paras. 138–139.

[174] *See e.g.* Resolution 1674 (2006), 28 April 2006, S/RES/1674 (2006); Resolution 1706 (2006), 31 August

However, Russia opposed the use of R2P in its broad sense, specifically in the context of Kosovo's unilateral declaration of independence in 2008. It objected to the claimed legality of the remedial secession of Kosovo, arguing that the situation in Kosovo did not qualify for one.[175]

In the context of its military aggression, Russia has redefined the R2P as a duty to defend its fellow citizens or Russian speakers residing in post-Soviet countries from possible grave human rights violations by the parent state. This has been made possible by portraying ethnic Russians living in post-Soviet countries as vulnerable populations in need of defence against "hostile governments", thus justifying its military interventions in Georgia and Ukraine.[176] This echoed an underlying foreign policy strategy. With the fall of the Soviet Union, more than 25 million Russians found themselves as a minority in the former Soviet countries. One of Russia's main foreign policy objectives after that was to take up the role of protector of fellow citizens abroad. This concept was further solidified by the idea of russkiy mir (Russian world), which defined the geopolitical contours of Russia's sphere of military, political and cultural influence.[177] Such a conceptualisation of R2P reveals another instance of Russia's strategic use of Western normative concepts, which, in this case, ended up becoming a tool in the hands of Russia for countering Western democratisation efforts in the region, albeit in violation of all the central principles and norms of international law.

Russia's annexation of Crimea in 2014 – before its full-scale invasion of Ukraine – is generally seen as the turning point in Russia's defection from respect for international law and the rules-based liberal international order.[178] The justification for the annexation reiterated Putin's anti-Western rhetoric. The speech reflected Moscow's perceived grievances, particularly regarding the colour revolutions, Western encroachment into its domain and Western promotion of democracy that, according to Moscow, failed to take into account the distinct cultural and historical

2006, S/RES/1706 (2006); Resolution 1970 (2011), 26 February 2011, S/RES/1970 (2011); Resolution 1973 (2011), 17 March 2011, S/RES/1973 (2011); Resolution 1975 (2011), 30 March 2011, S/RES/1975 (2011); Resolution 2014 (2011), 21 October 2011, S/RES/2014 (2011); Resolution 1996 (2011), 8 July 2011, S/RES/1996 (2011); Resolution 2121 (2013), 10 October 2013, S/RES/2121 (2013).

[175] Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion), Written Statement by the Russian Federation, 16 April 2009, paras. 31–32, available at: https://www.icj-cij.org/public/files/case-related/141/15628.pdf (accessed 30 August 2024).

[176] C. Ziegler, *Russia on the Rebound: Using and Misusing the Responsibility to Protect*, 30(3) International Relations 346 (2016).

[177] M. Pieper. *Russkiy Mir: The Geopolitics of Russian Compatriots Abroad*, 25(3) Geopolitics 756 (2020), pp. 756–779.

[178] S. Poghosyan, *Russian Approaches to the Right to Peoples to Self-Determination: From the 1966 United Nations Covenants to Crimea*, 30 Juridica International 183 (2021).

backgrounds of other countries.[179] Putin also argued that enforcing Western democratic norms often resulted in adverse effects, frequently culminating in turmoil and conflict – failing to mention that, in this case, it was Russia that started the actual military aggression.[180] The argument rests on Putin's crystalised perception that democratic initiatives inside his "sphere of influence" are not sincere grassroots attempts at democratisation, but rather interventions orchestrated by the West.

In this speech, Putin used the concepts of democracy and self-determination parallelly to justify Russia's annexation of Crimea, claiming that the referendum leading to its incorporation into Russia was "in full compliance with democratic procedures and international norms."[181] The speech further construed democracy as a mechanism to endorse Russia's interests and to counteract Western narratives as needed, highlighting widespread public support within Russia for the actions in Crimea.[182] The annexation, in direct violation of key international law principles like sovereignty, territorial integrity, self-determination, and non-intervention – values that Russia consistently claimed to uphold – revealed a calculated effort to expand geopolitical influence, as Russia deliberately defied these norms to gain recognition.

By the time of Crimea's annexation, Russia's rhetoric on democracy had become deep-seated. Russia continued to advance its own vision of democracy internationally, demonstrating a well-crafted strategy with recurring themes. To illustrate, in a 2015 address at the 13th Annual Session of the World Public Forum, "Dialogue of Civilisations", Lavrov reiterated the critique against the West for what it saw as imposing external democratic models and intervening in other nations' affairs, warning that such actions would only lead to more chaos and heightened tensions.[183] This stance can be seen as a self-fulfilling prophecy, with Russia's cautions mirroring the outcomes it predicted.

Additionally, diverting attention from domestic issues by critiquing Western democracies and employing cultural-relativist justifications became standard.[184] The necessity for Russia to adopt this language underscores a lack of viable alternatives to the Western liberal concept of democracy, thereby once again reinforcing the premises of Western liberal ideas. It also illustrates that Russia's fundamental goal is to utilise this concept to gain and maintain its rank amongst Western major powers

[179] *Address by President of the Russian Federation*..., *supra* note 171.

[180] *Ibidem*.

[181] *Ibidem*.

[182] *Ibidem*.

[183] S. Lavrov, *Foreign Minister Sergey Lavrov's greetings to the participants of the 13th Annual Session of the World Public Forum "Dialogue of Civilizations"*, The Ministry of Foreign Affairs of the Russian Federation, 9 October 2015, available at: https://mid.ru/en/foreign_policy/news/1516524/ (accessed 30 August 2024).

[184] *Interview to German newspaper Bild. Part 2*, President of Russia, 12 January 2016, available at: https://en.kremlin.ru/events/president/news/51155 (accessed 30 August 2024).

rather than to challenge the core of the Western paradigm of democracy genuinely. This further suggests that Russia employs the Western rhetoric of democracy as a tool to influence the West by using its own language of international law. Another notable instance of strategically using the language of international law was in December 2021, when Russia proposed legally binding treaties to NATO and the United States, demanding that NATO cease its eastern expansion and prohibit the deployment of military forces or weaponry in Member States that joined after 1997.[185] Whilst adopting such a legalistic tone indicates a desire to speak to the West on equal footing using its concepts, it simultaneously reveals a realist desire to protect its national interest.

Given these developments, it is unsurprising that Russia invoked democratic rhetoric to justify its invasion of Ukraine. In his 24 February 2022 address, Putin expressed Russia's concerns over NATO expansion and the situation in Ukraine, insisting that it presented threats to Russian security.[186] Even after the full-scale invasion of Ukraine, Russia kept actively pushing the rhetoric of democratisation of international affairs. In his statement at the General Debate of the 78th session of the UN General Assembly in 2023, Lavrov emphasised the opportunity for genuine democratisation of global affairs and criticised the USA and its allies for undermining this process. He accused the West of spawning conflicts and impeding the formation of a multipolar world order, emphasising that their actions prevent the achievement of common goals and a fairer world order.[187]

This story, along with Russia's views against Ukraine, eloquently demonstrates how, by drawing attention to the inadequacies of the West, Russia effectively uses democracy as a tool in the global power struggle, deflecting criticism away from its own shortcomings. Western leaders often depict the Ukrainian conflict as a key front in the worldwide clash between democratic values and autocratic forces, which represents a core conflict of our time.[188] These narrative positions the conflict as a critical moment in the broader struggle between democracy and autocracy, profoundly impacting the next stage of the evolution of democracy in international law.

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[185] For further details, *see NATO-Russia relations*, North Atlantic Treaty Organization, February 2022, available at: https://www.nato.int/nato_static_fl2014/assets/pdf/2022/2/pdf/220214-factsheet_NATO-Russia_Relations_e.pdf (accessed 30 August 2024).

[186] *Address by the President of the Russian Federation*, President of Russia, 24 February 2022, available at: http://en.kremlin.ru/events/president/news/67843 (accessed 30 August 2024).

[187] S. Lavrov, *Foreign Minister Sergey Lavrov's statement at the General Debate at the 78th session of the UN General Assembly*, The Ministry of Foreign Affairs of the Russian Federation, 23 September 2023, available at: https://tinyurl.com/zvynax33 (accessed 30 August 2024).

[188] *See e.g. Remarks by President Biden on Supporting Ukraine, Defending Democratic Values, and Taking Action to Address Global Challenges*, The White House, 12 July 2023, available at: https://tinyurl.com/342kv4n9 (accessed 30 August 2024).

Nevertheless, the true extent of this impact will become clear over time, as history often unfolds slowly but surely.

CONCLUSIONS

The debate over the definition of democracy in international law, revealing deep-seated global discrepancies in its interpretation, has turned into a contentious arena where Western and non-Western views clash. Russia has joined this debate with its own perspective on the topic despite lacking democratic credentials. Under Putin's leadership, Russia's discourse on democracy has been rather flexible, encompassing both particularist and universalist views. It has gradually shifted its focus from democracy's internal aspects to external ones, formally emphasising sovereignty and non-intervention in international law while domestically prioritising an authoritarian style of governance, focusing on centralised authority and a strong state apparatus reminiscent of the Soviet-era approach. This shift aligns with Russia's wider geopolitical ambitions and realpolitik strategies, framed against an anti-Western backdrop and revealing dissatisfaction with growing Western hegemony. Ironically, Russia's practice invertedly reinforces the Western approach, which perpetrates the same inequalities Russia criticises in others. This contradiction is evident both within Russia, through its growing authoritarianism, and abroad, as demonstrated by the annexation of Crimea and the full-scale invasion of Ukraine.

Employing concepts such as "sovereign democracy" and multipolarity, as well as a particularist approach to democracy that reflects cultural-relativist arguments alongside an acceptance of its universal significance – all the while utilising and critiquing the Western liberal democratic vernacular – might appear contradictory and perplexing. Nevertheless, these components harmoniously integrate into Russia's discourse on democracy, effectively explaining Russia's stance. They all stem from Russia's ambition to assert itself as a great power rather than a genuine desire to universalise democracy in international law to include everyone, everywhere. These concepts serve as strategic tools to overcome Russia's internal challenges with democratisation whilst seeking global recognition. Despite outward claims of advocating for a more fair and democratic world order, these strategies aim to secure Russia's place alongside Western powers or replace them as "hegemons" rather than replacing or restructuring their ideas.

Last but not least, this discussion highlights the need for a clear, comprehensive definition of democracy in international law to prevent the kind of broad, strategic interpretations which defeat the whole idea of democracy. Establishing such a definition is crucial for maintaining a consistent democratic governance standard and ensuring democracy remains a viable form of governance committed to human

rights, freedom and equality worldwide. Russia's diplomatic push for democracy, tailored to fit its geopolitical agenda, threatens to erode the universal allure of democratic values by further deepening the emphasis on state sovereignty over individual freedoms. This manoeuvre risks legitimising authoritarian regimes, stymying efforts to maintain global democratic standards and weakening the international legal system's capacity to support authentic democratic practices.

Consequently, Russia's actions may redefine the international dialogue on democracy, making it harder for the international community to champion democratic governance and human rights. In the context of Russia's vision for the international legal order, we are now further than ever from achieving a Franckian version of the "right to democracy". Essentially, the chapter on striving towards a Franckian model of democracy within Russia's approach to international law and foreign relations might be conclusively closed until Russia feels confident that it holds a hegemonic position to master the terms and conditions of exercising such a "right" in international law.

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WHAT IS "A CERTAIN INTERNATIONAL CRIMINAL COURT" AND DOES THE CHOICE OF A FULLY INTERNATIONAL OR INTERNATIONALIZED (HYBRID) COURT/CHAMBERS MATTER FOR THE CRIME OF AGGRESSION COMMITTED AGAINST UKRAINE?

Abstract: *When the International Court of Justice issued its Arrest Warrant Judgment in 2002, it indicated that personal immunities do not prevent proceedings in front of "certain international criminal courts" and provided three demonstrative examples of such courts.*

After the full-scale invasion of Ukraine commenced in February 2022, debates ensued regarding the elements necessary to qualify a court within the meaning of the Arrest Warrant Judgment. They particularly concern two types of tribunals ("fully international" and "hybrid / internationalized"). This article suggests that only fully international courts qualify as "certain international criminal courts", while hybrid tribunals are far too attached to the sovereignty of State(s) to meet its criteria. The determination of a court as hybrid or international is rather fluid however, and the qualification as "a certain international criminal court" depends on various elements (the establishing mechanism; applicable law; and reflection of the will of the international community) in each individual case.

Keywords: certain international criminal court, crime of aggression, fully international, hybrid, immunities

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INTRODUCTION

The debates over establishing a tribunal/chambers to investigate and prosecute the crime of aggression committed against Ukraine by those in leadership positions of the aggressive States (Russian Federation and Belarus) most often consider two options – a fully international tribunal; and hybrid/internationalized chambers.[1] Recently, as a consequence of disagreement between the proponents of these two forms, a third option has appeared, yet it is basically also of a hybrid/internationalized category. A great deal has already been written within (but not limited to) the international blogosphere in favour of both of those forms.[2] Even powerful States have started supporting the establishment of the tribunal.[3] No matter which category of mechanism will be chosen (assuming one eventually will be), the legal consequences of the choice will not only be ground-breaking (in a follow-up of adoption of the definition of the crime of aggression generally), but they will also raise many previously unsettled issues that need to be addressed.

While many international and hybrid/internationalized tribunals/courts and chambers have been created before, ever since the Nuremberg and Tokyo military tribunals, and with the exception of the International Criminal Court (ICC) none of them has had jurisdiction over the crime of aggression. Currently, while the ICC is endowed with jurisdiction over the crime of aggression, it is prevented from exercising it over the situation in Ukraine due to the *ratione personae* and *ratione loci* limits imposed by Art. 15*bis* (5) of the Rome Statute[4] and the lack of political will to trigger jurisdiction by Art. 15*ter*. Thus, there is a need to establish a new court, and as a consequence there are many debates over its nature and competences.

For the purposes of this contribution fully domestic proceedings in front of regular courts are omitted, as they present a whole different set of legal issues. In relation to the hybrid category, it must be stated that the terminology has shifted as the term "internationalized tribunal/chambers" is now preferred as opposed to

[1] *Ministerial side-event by Liechtenstein and Germany on the occasion of the 25th anniversary of the Rome Statute – The ICC and the Crime of Aggression: In Defense of the UN Charter*, UN Web TV, 17 July 2023, available at: https://media.un.org/en/asset/k1m/k1mdo8poz5 (accessed 30 August 2024).

[2] *E.g.* blog series dedicated to the topic of The Crime of Aggression (Just Security), available at: https://www.justsecurity.org/82513/just-securitys-russia-ukraine-war-archive/ (accessed 30 August 2024); or posts reacting to the topic in the section International Criminal Law (Opinio Juris), available at: http://opiniojuris.org/category/topics/international-criminal-law/ (accessed 30 August 2024).

[3] USA: J. Hansler, *US announces it supports creation of special tribunal to prosecute Russia for 'crime of aggression' in Ukraine*, CNN Politics, 28 March 2023, available at: https://tinyurl.com/49kp256n (accessed 30 August 2024); *similarly* the United Kingdom: P. Wintour, *UK offers qualified backing for tribunal to prosecute Russia's leaders*, The Guardian, 20 January 2023, available at: https://tinyurl.com/y5b58fn7 (accessed 30 August 2024).

[4] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

a hybrid one.[5] In order to simplify this text, while purely hybrid tribunals might rather be chambers within a domestic legal system (i.e. not an independent mechanism), this article uses the term tribunal/court as encompassing both a formally independent tribunal as well as chambers within a domestic legal system.

The debates over the establishment of a tribunal for the crime of aggression committed against Ukraine are unfortunately burdened as much by political preferences as by legal obstacles. While the political preferences should not matter, the crime of aggression is perceived by some as so political that they unfortunately matter. The legal issues connected to such a tribunal's establishment and competences are no less complicated though. One of the topics that is not fully settled, is the understanding (definition) of "a certain international criminal court" within the meaning of the International Court of Justice's (ICJ's) *Arrest Warrant* Judgment,[6] or to be precise within the meaning of international law that the ICJ interpreted and applied in the *Arrest Warrant* Judgment. This judgment stated that as opposed to domestic courts, before certain international criminal courts/tribunals (personal)[7] immunities do not apply and thus do not prevent the exercise of jurisdiction.[8] Because the focus of de-

[5] The term "mixed" tribunals has also been used to describe some examples within this heterogenous category. While there are various opinions regarding what a truly hybrid court is, this article treats the hybrid, internationalized, and mixed forms together as denoting various categories outside the definition of a fully international tribunal.

[6] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Rep 2002. This judgment is particularly important in its para. 61: "[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the [ICTY and ICTR] established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'" (emphasis added). This famous paragraph is unfortunately everything that the ICJ (in majority decision reasoning) stated regarding the "certain international criminal courts". Virtually the same term appears e.g. in Art. VI of the Genocide Convention (Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277). It is not however defined there either.

[7] The ICJ did not mention the difference between personal and functional immunities, but it clearly referred to personal ones because the case was about immunities of an incumbent (at the time of issuance of the arrest warrant) minister of foreign affairs (paras. 51 and 55 of the *Arrest Warrant* Judgment).

[8] As a preliminary issue, it must be stated that the author of this article agrees with and develops further upon the opinion that a certain international criminal court is entitled to exercise its jurisdiction and disregard personal immunities regardless of the nature of its relationship to the state of the official to whose benefit the immunities are alleged to exist. This approach stems from the argument that the *ius puniendi* of the international community may be exercised by such court despite lack of agreement from the state concerned (for example when it is a non-state party to the court's statute). While there are of course opposing views stemming from the *nemo plus iuris ad alium transferre potest quam ipso habet* principle (that a treaty establishing a court containing a provision on removal of immunities may not oblige a non-state party when the parties could not remove immunities themselves), the debate over which of those two approaches is correct falls beyond the limits of this contribution. Consequently, the following text develops on the

bates about the new tribunal for the crime of aggression committed against Ukraine logically turns mostly to the highest-ranking state officials, personal immunities (from proceedings as well as particularly from the issuance of arrest warrants[9] that will likely occur in the absence of an accused) will be a significant issue. At the same time, the ICJ has never explained/defined "a certain international criminal court". Consequently, it is unclear how the debated categories of "fully international and/or internationalized tribunals" overlap with "certain international criminal courts" within the meaning of the *Arrest Warrant* Judgment.

The aim of this article is thus to examine and determine the features of the notion of "a certain international criminal court", as well as how that concept overlaps with a "fully international and/or hybrid tribunal." Additionally, it analyses the legal consequences of choosing any of the options with respect to the applicability of personal immunities to the exercise of their jurisdiction, particularly in relation to the situation in Ukraine.[10] Since the term 'hybrid' represents a myriad of possible choices, the goal is also to assess whether any of them are suitable to fit within the term "certain international criminal court/tribunal", although the hypothesis of the author is that only fully international courts/tribunals overlap with "a certain international criminal court". The following text is divided into sections that firstly explain the need for a new mechanism; what are fully international and hybrid tribunals; and what are the elements of "a certain international criminal court." In this chapter, the elements are compared and the hybrid form is in fact found to be incompatible with elements of "a certain international criminal court". As a conclusion, the article briefly discusses the consequences of the various possible choices in the Ukrainian situation.

ius puniendi approach, and only in a limited fashion considers its alternatives where they are relevant. For a detailed analysis on the topic of whether the *ius puniendi* or "delegation" approach is correct, *see* C. Kreß, *Article 98*, in: K. Ambos (ed.), *Rome Statute of the ICC*, Beck/Hart/Nomos, München, Portland, Baden-Baden: 2022, paras. 126–130.

[9] The connection is explained in SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 58.

[10] While the evolution of international law towards the inapplicability of immunities in front of international criminal tribunals falls outside the scope of this article, it is worth reading the analysis in e.g. paras. 76–174 of the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-397-Corr, Appeals Chamber, Judgment, 6 May 2019 (ICC Jordan/al Bashir Referral Appeals Judgment). For analysis of prior 2013 cases, *see* K. Uhlířová, *Head of State Immunity in International Law. The Charles Taylor Case before the Special Court for Sierra Leone*, Masarykova Univerzita, Brno: 2013, pp. 95–126, available at: https://tinyurl.com/4vv34s8c (accessed 30 August 2024).

1. DO WE REALLY NEED A NEW TRIBUNAL FOR THE CRIME OF AGGRESSION?

The question whether we really need a new tribunal has a twofold aspect. Firstly, it must be answered in general – is it necessary to create a special tribunal for the crime of aggression when the (alleged) perpetrators of crimes under international law committed within the territory of Ukraine may be prosecuted for the other three categories of core crimes, i.e. crimes against humanity, crime of genocide, and/or war crimes?[11] In other words, does it matter what, legally speaking, the alleged perpetrators are going to be prosecuted for? The ICC has in fact already issued an arrest warrant even against the highest-ranking official of Russia.[12] So it might be said that the reach of international justice already goes as high as it can get. On the other hand, fulfilling international justice will simply not be complete without prosecuting the crime of aggression as well. Without it, the losses of lives of combatants suffered during the conflict and the losses of civilian lives and civilian infrastructure that keep being inflicted as incidental damage during attacks (conducted in compliance with international humanitarian law) will not be punished because the current ICC's competence to exercise jurisdiction *ratione materiae* does not cover such acts.[13] And the same applies to the barbaric decision of resorting to the war itself. The civilized world must not let such decision go unpunished, otherwise it would be a strong signal to others who might think of doing the same.[14] Not to mention the secondary harm to the victims caused by the failure to provide justice. Consequently, it certainly matters what the perpetrators of crimes under international law are prosecuted and possibly even punished for, because the purpose of

[11] The ICC may exercise jurisdiction over these three crimes under international law and already investigates. For further developments, see Ukraine (ICC webpage), available at: https://www.icc-cpi.int/situations/ukraine (accessed 30 August 2024).

[12] *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova,* ICC, 17 March 2023, available at: https://tinyurl.com/482mc3jt (accessed 30 August 2024).

[13] C. Kreß, S. Hobe, A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System,* Just Security, 23 January 2023, available at: https://tinyurl.com/mtd4fbtd (accessed 30 August 2024).

[14] This was well formulated by Jenifer Trahan: "if the international community does not seize present opportunities for prosecuting the crime of aggression, this could have profound consequences for the preservation of international peace and security and the international legal order. One may well ask regarding the crime of aggression: if it is not prosecuted now, when will it be? The crime is too important to be confined to being a relic on a shelf, incapable of use" (J. Trahan, *The Need for an International Tribunal on the Crime of Aggression regarding the Situation in Ukraine*, 46 Fordham International Law Journal 671 (2023), p. 689).

criminal law is not only to punish, but also to act as a preventive mechanism *pro futuro*. That is what Robert H. Jackson had in mind in 1946 when he stated that:

> the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.[15]

Secondly, the question must also be answered in legal terms. The ICC may not exercise its jurisdiction over the crime of aggression in the Ukrainian situation. The reason is the unfortunate decision taken by the delegates of the Kampala review conference to exclude crimes of aggression committed by those (being citizens) in power of non-state parties or committed within territories of non-state parties in Art. 15*bis*(5) of the Rome Statute. Neither Ukraine nor Russia (or Belarus to be complete) are State-Parties to the Rome Stature and this obstacle may not be circumvented either politically (i.e. by enlarging the competence to exercise jurisdiction by the UN Security Council (UNSC) under Art. 15*ter* of the Rome Statute), nor legally based on Art. 12(3). Use of Art. 15*ter* of the Rome Statute is prevented by the Russian veto power in the UNSC, and while Art. 12(3) was used by Ukraine to accept jurisdiction of the ICC over the other three core crimes, it may not function similarly for the crime of aggression. Hence the need to establish a new mechanism.

2. WHAT IS A (FULLY) INTERNATIONAL TRIBUNAL AND A HYBRID/INTERNATIONALIZED TRIBUNAL AND WHY ARE WE DISCUSSING THE DIFFERENCE?

The reason why we even differentiate between fully international tribunals and hybrid/internationalized tribunals stems from the evolution of international criminal law. At the beginning of its modern era, building upon the legacy of tribunals in Nuremberg and Tokyo, there were only fully international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY)[16] or the International Criminal Tribunal for Rwanda (ICTR).[17] Over time however, new tribunals emerged (e.g. the Extraordinary Chambers in the Courts of Cambodia

[15] *Opening Statement before the International Military Tribunal in Nurembe*rg, Robert H. Jackson center, 21 November 1945, available at: https://tinyurl.com/fvjpxvsp (accessed 30 August 2024).

[16] *Homepage* (ICTY), available at: https://www.icty.org/ (accessed 30 August 2024).

[17] *See* International Residual Mechanism for Criminal Tribunals, available at: https://unictr.irmct.org/ (accessed 30 August 2024).

(ECCC),[18] the Special Court for Sierra Leone (SCSL),[19] the Special Tribunal for Lebanon, the Kosovo Specialist Chambers[20]). Some of these new forms of tribunals began to be called hybrid, mixed, or internationalized.

Based on their assessment, it can be concluded that fully international criminal tribunals are established by a source of international law (often an international treaty, but as in the case of the ICTY and ICTR it may also be a resolution of an intergovernmental organization) and that they exercise international jurisdiction.[21] Unfortunately the use of terminology has not always been precise. In its resolution 1757(2007) establishing the STL, the UNSC repeatedly used the phrase "tribunal of an international character", even though defining that tribunal as (fully) international is incorrect.

The list of elements/definition of a hybrid tribunal is however more complicated. Despite the differences, what they have in common is that they are usually composed of both domestic and international personnel and apply both domestic and international law.[22] A hybrid tribunal in its pure (and rare) form would exercise only domestic jurisdiction.[23] The second element is its establishment by an act of either domestic or international law, but this is not so clearly agreed upon. A court/tribunal exercising domestic jurisdiction (at least in part) can certainly be created by a source of international law (as was the case of the SCSL[24]). However, a mechanism established by a domestic act of law *and* exercising only domestic jurisdiction is simply a domestic body (court/tribunal). Domestic courts may nonetheless be "elevated" by a confirmation through an international body (as it was in case of the

[18] *Homepage* (ECCC), available at: https://www.eccc.gov.kh/en (accessed 30 August 2024).

[19] *Homepage* (Residual SCSL), available at: https://rscsl.org (accessed 30 August 2024).

[20] *Homepage* (Kosovo Specialist Chambers), available at: https://www.scp-ks.org/en (accessed 30 August 2024).

[21] *See* the Statutes of the ICTY (Resolution 827 (1993), 25 May 1993, S/RES/827(1993)), ICTR (Resolution 955 (1994), 8 November 1994, S/RES/955 (1994)), and ICC (the RS).

[22] J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford: 2012, p. 682.

[23] *See* Statutes of the SCSL (Annex to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 August 2002), 2178 UNTS 137) and ECCC (The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/0801/12 and NS/RKM/1004/006, 10 August 2001, available at: https://www.eccc.gov.kh/en/document/legal/law-on-eccc (accessed 30 August 2024). But the SCSL was not a pure hybrid tribunal; it rather partially overlapped with a fully international one, because it exercised both international and domestic substantive law. So do the ECCC, but there is a difference putting it on another edge of the debate – it was created by an act of domestic law. While the domestic way of establishing the ECCC disqualifies it from being "a certain international criminal court/tribunal" (analysis set out below), it does not necessarily disqualify it from the definition of a hybrid tribunal because the point of a hybrid tribunal is not how it was established, but rather lies in what it applies: "the establishment of a tribunal as such cannot be 'hybrid'; a hybrid tribunal is either established under international law or under domestic law." A. Reisinger Coracini, J. Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed against Ukraine. Part VI: On the Non-Applicability of Personal Immunities*, Just Security, 8 November 2022, available at: https://tinyurl.com/275dj58j (accessed 30 August 2024).

[24] It was established by the Agreement between the UN and the Government of Sierra Leone, *supra* note 23.

ECCC[25]). But because it may apply domestic law and be established by a domestic act, such a court is rather closer to the state than to any international feature. For the purposes of this contribution, the differentiation between a truly hybrid and other forms of not-fully international mechanisms, is not that important however, as will be seen below, because even hybrid courts do not fulfil the criteria of a "certain international criminal court", the less those even closer to domestic courts.

Thus, a hybrid/internationalized court is defined by a) the exercise of domestic jurisdiction (although not necessarily only such jurisdiction); and b) its establishing source of law being a source of international law (or even a domestic act confirmed by an international act). It should also be noted that the third currently discussed option for the tribunal for the crime of aggression committed against Ukraine (a form based on Ukraine delegating its jurisdiction to another State[26] that would probably gain some sort of international confirmation) seems no different from a hybrid tribunal based on Ukrainian domestic jurisdiction for the purposes of the non-applicability of personal immunities.

The differentiation between fully international and hybrid tribunals matters particularly (though not only) when such a tribunal is supposed to investigate and prosecute the crime of aggression. The crime of aggression is a "leadership crime". Only those in "a position effectively to exercise control over or to direct the political or military action of a state"[27] can be held responsible for it.[28] While the leadership span of the crime may overcome the list of State representatives endowed with personal immunities,[29] the focus of tribunals endowed with jurisdiction over the crime of aggression is logically going to be primarily directed against the highest ranking officials, including the "troika", i.e. in fact mostly those endowed with

[25] The Law on the Establishment of ECCC (*see supra* note 23) was later confirmed and its existence and jurisdiction recognized by the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (adopted 6 June 2003, entered into force 29 April 2005) 2329 UNTS 117.

[26] P.I. Labuda, *Making Counter-Hegemonic International Law: Should A Special Tribunal for Aggression be International or Hybrid?*, Just Security, 29 September 2023, available at: https://tinyurl.com/56uzpu53 (accessed 30 August 2024).

[27] Art. 8*bis*(1) of the RS.

[28] Indeed, there are definitions of offenses criminalizing participation in a prohibited use of force under some domestic codes that do not include the leadership element. However, as will be proven below, in order to qualify as a "certain international criminal court", the mechanism must apply offenses compliant with customary definitions of core crimes under international law. And, latest with the negotiations of the definition of the crime of aggression, the leadership element has very likely gained the customary nature (*see* A. Reisinger Coracini, P. Wrange, *The Specificity of the Crime of Aggression*, in: C. Kreß, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 310).

[29] There has been a disagreement whether personal immunities extend beyond the "troika", but there is an agreement that "this immunity (...) does not extend to officials on a level lower than members of government with the rank of minister (footnote omitted)." H. Kreicker, *Immunities*, in: C. Kreß, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 684.

personal immunities.[30] Thus, the most important (yet not the only) reason why the difference between a fully international and a hybrid tribunal must be discussed is to find out whether personal immunities apply to the exercise of jurisdiction by these mechanisms.

In the *Arrest Warrant* Judgment, the ICJ did not say anything about hybrid/internationalized tribunals. While one may assume that such an omission hinted that it considered them domestic for the purposes of removal of personal immunities, it should be kept in mind that the hybrid tribunals were not an established category in 2002 when the *Arrest Warrant* Judgment was issued, so the ICJ likely did not consider them domestic because it simply did not consider them at all.

3. WHAT ARE THE FEATURES OF "A CERTAIN INTERNATIONAL CRIMINAL COURT" AND HOW DOES IT OVERLAP WITH FULLY INTERNATIONAL AND/OR HYBRID COURTS/TRIBUNALS?

Before assessing the overlap between fully international or hybrid courts/tribunals and "a certain international criminal court/tribunal", we must first analyse the elements (features) of the latter category. In the *Arrest Warrant* Judgment, the ICJ mentioned two types of courts/tribunals that certainly fit within the "certain international criminal courts/tribunals" category: those established by a resolution of the UNSC adopted under chapter VII of the UN Charter (ICTY and ICTR) and the ICC which was established by a multilateral international treaty. Other courts that are often mentioned alongside with the ICC, ICTY and ICTR as examples of mechanisms of application of international criminal law *largo sensu*, are a mix of categories. Though, the case-law of these mechanisms rarely refers to the features of "a certain international criminal court/tribunal", some comments can be found, as well as their analysis by some authors of doctrine.

To start with the latest, one of the cases in which an international criminal institution dealt with the topic of personal immunities, is the ICC case of former Sudanese President *Al-Bashir*.[31] Following the failure to arrest and surrender him while (at that time) he was an incumbent President of Sudan, during his visit to Jordan, the ICC issued a decision stating non-compliance of Jordan with its obligations under the Rome Statute. While doing so the Appeals Chamber briefly

[30] For confirmation of the categories, *see e.g.* O. Corten, V. Koutroulis, *Tribunal for the crime of aggression against Ukraine – a legal assessment*, Think Tank European Parliament, 14 December 2022, p. 21, available at: https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2022)702574 (accessed 30 August 2024).

[31] ICC, *Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09.

mentioned the difference between international courts and domestic jurisdiction when it stated that

> [w]hile the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole. (footnote omitted).[32]

Consequently, in addition to the internationality of creation and applicable law, another element to be considered, is the expression of will of the establishing power, i.e. either the State(s) or the international community.

Unlike the Appeals Chamber in its majority decision, the joint concurring opinion to the judgment written by Judges Eboe-Osuji, Morrison, Hofmański and Bossa was much more generous (yet a bit systematically confusing due to its surprising jump from "certain international criminal courts" to defining *any* international court and only later specifying certain aspects of international *criminal* courts again) in articulating the characteristics of an international tribunal. According to it, an international court "is an adjudicatory body that exercises jurisdiction at the behest of two or more states."[33] The opinion is further surprising in its benevolent attitude towards the possibility of the international court being in fact of regional character[34] and seemingly also in the substance of jurisdiction it exercises. While it firstly claims that the jurisdiction may even be of civil nature, it later adds that for immunities not to apply in front of such court, it must be exercising jurisdiction over crimes under international law[35] and thus returns back to international *criminal* courts' elements.

The Joint Concurring Opinion thus elaborates upon the internationality of establishing mechanism as well, hints questionably on the need of representation of the will of the international community (by the comment on regionality) and adds the nature of the exercised jurisdiction.

Another court, the SCSL, also dealt with personal immunities inapplicability in its Appeals Chamber's judgment of the *Charles Taylor* case. It indicated, while

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[32] ICC Jordan/al Bashir Referral Appeals Judgment, para. 115.

[33] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to the ICC Jordan/al Bashir Referral Appeals Judgment, para. 56. Such a statement is way too liberal, as will be seen below, in hinting that only two states acting is a sufficient amount. It most certainly is not: O. Svaček, *Al-Bashir and the ICC – Tag, Hide-and-Seek ... or Rather Blind Man's Bluff?*, in: P. Šturma (ed.), *The Rome Statute of the ICC at Its Twentieth Anniversary. Achievements and Perspectives*, Brill/Nijhoff, Leiden /Boston: 2019, pp. 177–190.

[34] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC Jordan/al Bashir Referral Appeals Judgment, para. 57.

[35] *Ibidem*, paras. 57 and 66.

almost verbatim taking over the amicus curiae statement,[36] that there are three requirements for an international criminal court: a) the court is not part of the domestic judicial system, b) it was established by an international treaty and has characteristics of an international organization, and c) its competence and jurisdiction cover crimes under international law (the SCSL formed it as being *broadly* comparable to the ICTY, ICTR and ICC) and disregard immunities.[37]

While also talking about the mechanism of establishing the institution and hinting upon whether it is the representation of a will of a single State (or more actors), it also added the applicable law and the need for a provision removing immunities.

These first three indicated elements are also mentioned by the international doctrine. Although talking more about prevention of its politically motivated abuse by individual States, Claus Kreß has indicated the requirements of an international criminal court that would be above those interests. He distinguished national and international exercise of *ius puniendi* and by doing so, he also pointed out some of the definition requirements of a certain international criminal court/tribunal. Such a court/tribunal must a) represent the international community as a whole, i.e. be its direct embodiment, and b) the court's jurisdiction "transcends the delegation of national criminal jurisdiction by a group of States."[38]

It was also stated by Jennifer Trahan and Astrid Reisinger Coracini that "[t]o qualify as an international criminal court or tribunal, a court must fulfil two conditions: (1) it must be established under international law, and (2) it must sufficiently reflect the will of the international community as a whole to enforce crimes under customary international law."[39]

And since the understanding of crimes under international law means so-called core crimes, i.e. genocide, crimes against humanity, war crimes and crime of aggression, the applicable law of the STL not covering crimes under international law was exactly the reason why William Schabas doubted the tribunal to be "a certain international criminal court."[40]

Consequently, based on the elements of the institutions indicated by the *Arrest Warrant* Judgment, case-law of other judicial bodies, and their judges, as well as

[36] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 76.

[37] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41.

[38] ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 OA2, 18 June 2018, written observations of prof. Claus Kreß as amicus curiae, paras. 13 and 14. In the following sentences, he also adds that this is the case when e.g. the UNSC establishes or endorses the establishment of a court/tribunal, or when such establishment is done by an international treaty that results from truly universal negotiations and must, among others, be jurisdictionally confined to crimes under international law.

[39] Reisinger Coracini, Trahan, *supra* note 23, part 2.

[40] W. Schabas, *The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' Equivalent to an 'International Criminal Court'?*, 21 Leiden Journal of International Law 513 (2008), p. 521.

authors of doctrine, to find the "appreciable level of verticality"[41] that distinguishes courts that may disregard personal immunities from those that cannot, there are three elements most often identified that need to be taken into account in assessing the term "certain international criminal court/tribunal" that will be dealt with in detail below: a) the internationality of the establishing mechanism,[42] b) the kind of jurisdiction to be applied,[43] and c) the will of the international community.[44] While some sources also add an element of formal provision removing immunities in front of the mechanism,[45] it may be considered an inherent part of the third element in case of fully international tribunals (explained below in part on the will of the international community). Nonetheless, in order to distinguish the content of the will of international community from its intentions in relation to hybrid tribunals, it is true that such provision helps evading misunderstandings. Additionally, adherence to standards of human rights protection, the right to fair trial, are also sometimes mentioned[46] as well as the need for international personnel. These additional elements are nonetheless either necessary anyway (human rights compliance) or mostly automatic (international personnel) regardless of the nature of a tribunal (international or internationalized).

Consequently, all three main elements must be fulfilled cumulatively in order for the particular mechanism to be considered "a certain international criminal court" and be entitled to disregard personal immunities. The following sub-chapters analyse those elements one by one.

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[41] The phrase is used by Kreß, *supra* note 8, para. 115.

[42] Also identified *e.g.* in SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 76(2).

[43] Identified *e.g.* by SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41(c); SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 76(3). It was also implicitly demanded by the ICC in above-quoted ICC Jordan/al Bashir Referral Appeals Judgment, para. 115. The ratione materiae jurisdiction covering crimes under international law is demanded in Kreß, *supra* note 8, para. 124.

[44] In its judgment (ICC Jordan/al Bashir Referral Appeals Judgment, para. 115), the ICC mentioned that such courts act on behalf of the entire international community. The term "will of the international community" is used by the SCSL in its Appeals Chamber's Decision on Immunity from Jurisdiction, *Prosecutor v. Charles Ghankay Taylor*, 31 May 2004, SCSL-2003-01-I, para. 38. It is also required by Reisinger Coracini, Trahan, *supra* note 23, part 2. The court being a "direct embodiment of the international community as a whole and thus as an organ qualified to directly enforce the *ius puniendi* of this legal community" (footnote omitted) is a sentence used in Kreß, *supra* note 8, para. 124. Here, the author points out a similar requirement in the ICC Appeals Chamber (fn 366).

[45] Identified *e.g.* by SCSL, *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41(c); SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 76(3).

[46] *E.g.* Kreß, *supra* note 8, para. 124.

3.1. Internationality of the establishing mechanism

The two types of sources of international law that surely can establish "a certain international criminal court" include international treaties and UNSC resolutions adopted under the UN Charter's chapter VII.

Other types of formal sources of international law are unsuitable, either because of their non-binding character (e.g. resolutions of the UNGA *on their own*; nonetheless, the UNGA may play a role in establishing such a mechanism by providing a mandate to negotiate a treaty by the UN Secretary General with a state of jurisdiction; for details, see below) or formal inaptitude (customs, general principles of law). Though the ICJ most likely did not intend the examples of individual courts as creating an exhaustive list, it made no comment as to whether the forms or only the particular examples within them were demonstrative or exhaustive. Demonstrative in terms of examples (and exhaustive in term of forms) is however much more likely, as there can certainly be other examples of tribunals and courts that can disregard personal immunities.[47]

The UNSC resolution path (adopted under chapter VII) is straightforward because Art. 25, in combination with Arts. 41 and 48 UN Charter, establish its binding character. If such a resolution establishes an international criminal institution and obliges States to cooperate with it (including the obligation to disregard immunities), the situation is legally clear. And the internationality of a mechanism established by the UNSC under chapter VII is given by the internationality of the UN itself, i.e. an intergovernmental organization established by an international treaty. Thus, while the UN is a single actor and possesses its own international legal personality, the character of its acts is international by virtue of the very actor adopting them.

However, international treaties as establishing mechanisms may present a challenge. Some of the previously mentioned mechanisms were established by an international treaty,[48] and others were established by a domestic act that was later confirmed by an international treaty. While a mechanism created by one State is (from the perspective of the first element only, i.e. from the perspective of how the mechanism is established) a domestic institution, not an international one, the question arises whether *ex post* confirmation of a domestic tribunal – for example by an international treaty between the State and an intergovernmental organization – qualifies that tribunal/court to fulfil the first element. Such a discussion may be irrelevant, as domestic criminal courts are usually established to investigate and

[47] Reisinger Coracini, Trahan, *supra* note 23, part 1; R. Hamilton, *Ukraine's Push to Prosecute Aggression Implications for Immunity Ratione Personae and the Crime of Aggression*, 55 Case Western Reserve Journal of International Law 39 (2023), p. 46.

[48] None of the treaties were however of a multilateral character, except for the RS. Clearly, this matter is not necessarily an obstacle because the multilateral support can be obtained by other ways (*e.g.* through a confirmation act of an intergovernmental organization).

prosecute domestic crimes, not crimes under international law (which is the second necessary element). However, if a State decides to establish a special court/chamber to investigate and prosecute *crimes under international law*, the question reappears.

Nonetheless, neither a subsequent confirmation by an act of international law (and we are only talking here about a confirmation) of a domestic act establishing a court can change its formal character. Afterall, it never did and it was not even necessary, because the confirmation of a mechanism established by a domestic act by an international treaty serves different purposes than to qualify it as international. Rather, it serves as a tool to help the legitimacy of the domestic mechanism and its financial and/or administrative support, as it typically was in case of the ECCC.

Thus, based on both practical reasons as well as legal principles, chambers established by domestic acts and later confirmed by an international treaty, such as the ECCC, do not fulfil the first condition. "A certain international criminal court" should be established either by a formal source of international law or by an act derived from a formal source of international law (such as a UNSC resolution adopted under chapter VII).[49]

If, however, the *establishing* source is an international treaty, it should be stated that inasmuch as it is irrelevant whether the treaty is multilateral or not, it is similarly irrelevant (purely for the purposes of this element), whether the treaty was concluded between States, or between a State and an intergovernmental organization, such as the UN (and concluded by the Secretary General upon recommendation of the General Assembly[50]). The SCSL was established by a treaty between the UN and Sierra Leone, and it later refused to apply personal immunities in the case of *Charles Taylor*. And as will be seen below, it acted rather as an international court than a hybrid tribunal in that particular case.

On the other hand, the treaty must establish the court/tribunal, not just confirm it. As discussed above, mere confirmation would not be capable of turning a domestic act into an international one. Thus, the conclusion of this element is that the tribunal *must* be established either by international treaty or a resolution of the UNSC adopted under chapter VII of the UN Charter.

3.2. The applicable law

Insofar as regards the applicable substantive law, the basic premise is that for the court/tribunal to qualify as "a certain international criminal court" it must apply

[49] Reisinger Coracini, Trahan, *supra* note 23, part. 2.

[50] Jennifer Trahan summarized the process of negotiation in relation to an *ad hoc* international criminal tribunal (in the Ukrainian situation) as follows: "The proposed STCoA could be created: (1) after a request by the Government of Ukraine; (2) upon a resolution of the UN General Assembly; (3) which would recommend the creation of the STCoA and request the Secretary-General of the UN to initiate negotiations between the Government of Ukraine and the UN; and (4) with the STCoA ultimately created by a bilateral agreement concluded between the Government of Ukraine and the UN" (footnote omitted). Trahan, *supra* note 14, p. 684.

international law, i.e. it must be established with jurisdiction over crimes under international law,[51] and the definitions of those crimes must be in compliance with their customary reflection.[52] Hybrid tribunals, by definition, apply both domestic offenses as well as international ones. At first glance, this could mean that they are automatically disqualified from fulfilling the second element (as opposed to the fully international ones). Nonetheless, this must be properly discussed in order to reach a proper conclusion.

Firstly, a counterargument might be that although exercising domestic jurisdiction, the court may in fact be enforcing international law to the extent that the domestic offenses within its jurisdiction are reflective of definitions of crimes under international law. And secondly, some of the hybrid tribunals (such as the SCSL and the ECCC) have only partially been applying domestic offenses and for the rest, crimes under international law. In fact, Charles Taylor for example was prosecuted for crimes under international law, not for domestic crimes that were also within the jurisdiction of the SCSL.[53] And the SCSL was of course fully aware of the fact that its jurisdiction covered both the crimes under international law as well as domestic crimes, yet it never paid any attention to the latter when it generally concluded that it was an international criminal court that was "not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone."[54] The closest moment where it lightly touched the issue was when it demanded the competences and jurisdiction to "be broadly similar to that of the ICTY and the ICTR and the ICC."[55] Consequently, it might seemingly be the case that as long as the court/tribunal is entitled to investigate and prosecute crimes (even of a domestic nature) reflecting customary elements of crimes under international law, it would fulfil this condition. Yet a significant problem remains.

The reason why in the end hybrid tribunals do not qualify as "certain international criminal courts" for the purposes of the *Arrest Warrant* Judgment (both

[51] As noted by Phillipe Sands and the SCSL, its jurisdiction must be "broadly similar to that of the ICTY and the ICTR and the ICC." SCSL, *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41(c).

[52] ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 OA2, 18 June 2018, Written observations of prof. Claus Kreß as amicus curiae, para. 14. The reason for compliance with customary definitions stems from the customary nature of the inapplicability of personal immunities. The same effects do not apply to treaty-based crimes regulated by a regime of a particular character. Additionally, for interesting suggestions regarding the relationship between regional customary international law and the crime of aggression's prosecution, *see* P. Grzebyk, *Crime of Aggression against Ukraine. The Role of Regional Customary Law*, 21 Journal of International Criminal Justice 435 (2023).

[53] *See* SCSL documents in the *Prosecutor v. Charles Ghankay Taylor*, Indictment, 7 March 2003; and Appeals Chamber's Judgment, 26 September 2013, part XI. Disposition.

[54] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, paras. 35, 40.

[55] *Ibidem*, para. 41(c).

with respect to this element and in general as well), is to be found elsewhere, albeit in the proximity. The reason resides in the sovereign equality of States, i.e. in the disqualification of sovereign unilateral activities that would violate the *par in parem non habet imperium principle*.[56] If the State whose law the tribunal applies possesses the capacity to amend the offenses at its will (which is of course its sovereign right to change its domestic law), such a capacity is problematic and negates the "internationality" of such a tribunal. If the State itself can change the law (even if, in doing so, it remains within the limits of customary definitions of the crimes under international law), there can be no sufficient distance from sovereignty of the State. At the same time however, this is the essence of hybridity – the exercise of domestic jurisdiction accompanied by the right to change domestic law at the will of the individual State concerned. Even if the establishing mechanism was an international treaty, but only referred to the applicable domestic law, the State would remain the sovereign over its changes/amendments. Seemingly, a solution would be possible if the establishing document (an international treaty or a resolution of the UNSC) defined the applicable domestic criminal offenses in detail, i.e. with all their elements, and precluded the sovereign power of the State concerned to change that definition. However, in such a case it would not (in terms of exercising jurisdiction over those crimes), be a hybrid tribunal because it would not apply domestic law as such. Not only would such a way of defining the jurisdiction *ratione materiae* of domestic offenses be unusual for hybrid tribunals,[57] it would materially turn the jurisdiction into quasi-international (if the crimes were not reflection of crimes under international law), or international (if they did reflect crimes under international law) that would copy the domestic legislation.

In conclusion, it must be stated that in order to be "a certain international criminal court", its applicable law must be international, not a reference to domestic offenses (which would make it hybrid). The mere compliance of the domestic offenses with international legal definitions would not suffice. In this regard, the

[56] For a similar point, *see* ICC Jordan/al Bashir Referral Appeals Judgment, para. 115; or SCSL, *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 51. Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to the ICC Jordan/al Bashir Referral Appeals Judgment, para. 54 develops the point: "The matter may also be considered from the perspective that the ICC's exercise of jurisdiction over a Head of State involves no legitimate anxiety whatsoever that the ICC is exercising jurisdiction in order to apply laws made by one sovereign for the exclusive benefit of his or her own domestic interests: that being a legitimate concern that fully justified, as a practical matter, the principle in the *maxim par in parem non habet imperium*. The ICC exercises its jurisdiction in no other circumstance than on behalf of the international community – represented under the Rome Statute or the UN Charter as the case may be – for the purpose of the maintenance of international peace and security according to the rule of international law."

[57] *E.g.*, the Statute of the SCSL referred to the domestic crimes that it had the right to exercise jurisdiction over, in Art. 5 of its Statute. In doing so it referred to the titles of the crimes and the provisions of Sierra Leonean law they were defined in. It did not contain any other details.

Charles Taylor case requires an additional comment. The SCSL was called a hybrid tribunal, yet it disregarded personal immunities. Thus, it seems at first glance to contravene the above-stated conclusion that a hybrid tribunal does not fall within the notion of "a certain international criminal court". But it is not so. In fact, the SCSL was *partially*, but not completely, hybrid, and in the case of *Charles Taylor* it did fulfil the definition of a fully international tribunal (established by an international treaty *and applying international jurisdiction*. Plus, there was the will of the international community, as discussed further). But should there ever be a case whereby an accused endowed with personal immunities is prosecuted in front of a hybrid tribunal (even if generally endowed with jurisdiction over both international and domestic offenses) for the *domestically* defined crimes, the court would have to refrain from exercising such jurisdiction because in such proceedings it would not qualify as "a certain international criminal court" (assuming a refusal to voluntarily waive the immunities). This element may thus be fulfilled in some of the proceedings, while not in others, in front of one particular body. The situation depends on whether such a court acts as an international or as a domestic tribunal in that very individual case. It should also be mentioned however that to qualify as a "certain international criminal court", a third element still remains necessary – the will of the international community (see below).

For the sake of clarity, procedural law needs to be mentioned here as well. The situation is similar, but perhaps even clearer. Because hybrid tribunals are often parts of domestic legal systems, they usually apply domestic procedural law.[58] The domestic procedural law may be qualified by references to (potentially superseding) international law standards set in the establishing sources of law,[59] however the basis remains domestic. As in the case of substantive law, if the State itself is the sovereign to amend the law (even if it still complies with the international standards when such limitations exist), this very fact is by definition of sovereign nature and domestic. The fact that international treaty establishing or recognizing such a tribunal imposes an obligation to consult such changes[60] with other parties is purely a matter of international responsibility.

In conclusion, and in relation to both substantive and procedural law, a hybrid tribunal that is part of a domestic judicial system (and thus applying even domestic

[58] Not always though. There may be a hybrid tribunal (from the viewpoint of substantive law) that applies international procedural law because it acts partially as hybrid and partially as international. Typically, the SCSL was partially a hybrid and partially an international tribunal. And in order to remain international in relevant cases, it logically had its procedural regulation based in international law – Art. 14 of the SCSL Statute that was an annex to the treaty on its establishment.

[59] *E.g.* Arts. 33 new – 37 new of the ECCC Law, *supra* note 23.

[60] *E.g.* Art. 2(3) of the Agreement between the United Nations and the Royal Government of Cambodia, *supra* note 25.

law), is disqualified from fulfilling the second element. Only if such a tribunal is additionally endowed with jurisdiction over crimes under international law (and applies international procedural law at the same time) does it fulfil this second condition in cases where it applies international jurisdiction. By their nature, fully international tribunals fulfil this second condition.

3.3. Reflection of the will of the international community (particularly the will to remove personal immunities)

Even when the previously mentioned two elements are fulfilled, the third is still necessary to fulfil the elements of 'a certain international criminal court.' The reflection of the will of the international community may be to some extent denoted as the material source of "internationality" of the court/tribunal within the meaning of the *Arrest Warrant* Judgment. While an endorsement of a hybrid tribunal by the international community may also serve as a source of internationality of its kind, such an endorsement serves the completely different purpose to enhance the legitimacy of the domestic jurisdiction, at times perhaps coupled with financial and personnel support. In the context of "a certain international criminal court", the purpose is different and specific. It is the will of the international community to punish crimes under international law with the effect of inapplicability of immunities in front of the mechanism in question. That is why the establishing mechanism should contain a provision stating the inapplicability of immunities.[61] This relates to personal immunities, and perhaps more to functional immunities, although in relation to them the argument might be much easier because there are strong suggestions that functional immunities do not prevent even the exercise of domestic jurisdiction for crimes under international law.[62]

Materially speaking, the will of the international community may in general be inherently present in the formal type of source of law that establishes the mechanism, as is the case of a UNSC resolution or in the case of a UNGA resolution giving a mandate to the UN Secretary General to conclude a treaty with a State.[63] When

[61] SCSL, *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41(c).

[62] While there are opposing arguments as well, this discussion is left for other contributions. It suffices to refer for example to the ILC, *Immunity of State officials from foreign criminal jurisdiction. Texts and titles of the draft articles adopted by the Drafting Committee on first reading*, A/CN.4/L.969, 31 May 2022, particularly to Draft Article 7. It does not contain the crime of aggression, however, and this very fact was criticized. For a persuasive critique, *see* the contribution by ILC Member, Charles C. Jalloh in *Ministerial side-event by Liechtenstein and Germany...*, *supra* note 1. On the other hand, for an argument that the customary nature of the inapplicability of functional immunities is questionable, *see* C. McDougall. *Why Ukraine needs an international – not internationalised – tribunal to prosecute the crimes of aggression committed against it*, 12(2) Polish Review of International and European Law 65 (2023), p. 80.

[63] Reisinger Coracini, Trahan, *supra* note 23, part 3.

adopting a measure not involving the use of force under Art. 41 of the UN Charter, the UNSC resolution doing so is binding upon all UN Member States by virtue of their consent to allow the UNSC to obligate them expressed by ratification/accession to the UN Charter. Consequently, when the UNSC acts under (but not only under[64]) Chapter VII, it acts as a representative of the international community and thus reflects its will in the act. Still however, because of the differing purposes of international and hybrid tribunals, the removal of immunities must be present either explicitly or implicitly (in an unquestionable way). That was the case for the SCSL where the UNSC did not explicitly include the removal of procedural immunities in the resolution,[65] nor was it present in the agreement between the UN and Sierra Leone[66] or the Statute that was an annex to the Agreement – it only contained the no-impunity provision and a hint regarding punishment in Art. 6(2). Therefore, the Court was forced to rely on, among others, Art. 6(2) of its Statute and found that "punishment [as a result of a trial] implies a trial."[67] Thus, formalistically speaking the will of the international community to remove the immunities must be explicitly (a preferred way for obvious reasons) or implicitly (in an undoubted way) present within the establishing mechanism in order to qualify the court/tribunal as an international one.[68]

However, when the mechanism is established by an international treaty the will of the *entire* international community is not necessarily automatically present, even if the provision stating the inapplicability of immunities is included. Formally speaking, if two States (or even more, but still to a limited extent) conclude an international treaty establishing a criminal tribunal to prosecute and punish crimes under international law, the first two elements described above are fulfilled, but it will certainly not be "a certain international criminal court/tribunal" within the meaning of the ICJ *Arrest Warrant* Judgment.[69] Something more is necessary. In case of the ICC, it is the object and purpose of the Rome Statute combined with the number of State-Parties that represent more than two thirds of the international community,[70] in combination with factors such as the RS having been negotiated

[64] As was the case with UNSC Resolution 1315 (2000), 14 August 2000, S/RES/1315 (2000), adopted under chapter VI.

[65] *Ibidem*.

[66] Agreement between the UN and the Government of Sierra Leone, *supra* note 23.

[67] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 48.

[68] On the debate whether a UNSC resolution must remove immunities explicitly or can be implied, *see* Kreß, *supra* note 8, paras. 141–148.

[69] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 78.

[70] Although in the *Arrest Warrant* Judgment the ICJ put too much emphasis solely on the object and purpose of the treaty, because when it adopted the judgment, the RS was not yet in force – it had less than 60 state parties, and still the ICJ counted it as a certain international criminal court without hesitation.

in a universal way, being adopted by consensus, and being a treaty opened for universal ratification.[71] Consequently, while the amount of State-Parties to the treaty is not the only factor, it still plays a significant role (in concert with the other factors). Determining the precise number of State-Parties is not an easy task, although it can be "circumvented" to a certain extent. In relation to the discussed tribunal for the crime of aggression committed against Ukraine (and based on the previous example of the SCSL), there were proposals that the international treaty establishing such a tribunal could be concluded between Ukraine and the UN, through the Secretary General (UNSG) acting upon the mandate to do so (owing to the lack of political will within the UNSC); a mandate provided to him by the vote in the General Assembly.[72] While such a treaty would, formally speaking, be bilateral, it would reflect the will of the international community through the consent given by the UNGA vote, which would empower the UNSG to negotiate and conclude such a treaty. As the UNGA is the world's largest and most representative forum, the vote therein would certainly bring about the "most powerful confirmation possible."[73]

When this proposal appeared criticism quickly ensued and now this solution seems improbable. The reasons are political in nature and not necessarily legal, though the legal challenges remain interesting. Firstly, it is of course an open question whether the UNGA would pass such a vote.[74] But even if it did, it has been asserted that the creation of such a criminal tribunal would amount to a coercive action, a power not given to the UNGA under the UN Charter, but only to the UNSC.[75] Thirdly, the debates also revolved around the question whether a vote on any such UNGA resolution should be taken under the two-thirds majority of those present and voting (Art. 18(2) of the UN Charter), or whether a simple majority of those present and voting (Art. 18(3) of the UN Charter) would suffice. While there is strong likelihood that it would be the former case,[76] in each case due to the

[71] Kreß, *supra* note 8, para. 124.

[72] *E.g.* the suggestion by Trahan, *supra* note 50, or O. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I). An agreement between the United Nations and Ukraine can pave the way*, Just Security, 20 September 2022, available at: https://tinyurl.com/c8d3cj5b (accessed 30 August 2024).

[73] Kreß, Hobe, Nußberger, *supra* note 13. *See also* Jennifer Trahan's support of the argument claiming that the UNGA vote "would carry the greatest legitimacy" (Trahan, *supra* note 14, p. 684).

[74] K.J. Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggressio*n, Opinio Juris, 16 March 2022, para. 2, available at: https://tinyurl.com/y9a73nev (accessed 30 August 2024).

[75] On raising the point and debating the options: *see e.g.* C. McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, Opinio Juris, 15 March 2022, available at: https://tinyurl.com/53fnawaa (accessed 30 August 2024).

[76] L.D. Johnson, *United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes,* Just Security, 1 March 2022, available at: https://tinyurl.com/2f69ujx6 (accessed 30 August 2024). Especially if the vote was taken during an emergency special session under Resolution 377(V), 3 November 1950, A/RES/377 (V).

"present and voting" requirement, there is a possibility that there would be a significant number of abstentions and the legitimacy would thus be strongly diminished.

To address these concerns consecutively, it must first be admitted that a vote within the UNGA could fail for purely political reasons.[77] Should that occur, the alternative path to conclude a multilateral treaty among a sufficiently representative number of State-Parties would remain open. There would certainly need to be a high number of State-Parties in order to qualify the mechanism as a "certain international criminal" one. Alternatively, the treaty could be concluded between another intergovernmental organization and Ukraine,[78] though the size of such an organization would certainly play a significant role because the reflection of will must be larger than that of a few States, or a regional group of States only.[79] Should the representation be smaller, it might happen that such tribunal would not qualify as "a certain international criminal one" and would "only" be allowed to prosecute accused endowed with functional immunities. Thus, once again, what is the specific number of State-Parties to a treaty establishing "a certain international criminal court/tribunal", remains unclear. One might wonder whether it is at least 60 (the number of ratifications required by the RS to enter into force) based on the reference by the ICJ to the ICC in *Arrest Warrant*; or whether it is in fact more? Unfortunately, there is no agreed-upon "safe" number yet. In any case, to conclude this examination of criticisms one should ask whether avoidance of the best available avenue was preferrable to seriously trying to pursue it – with the accompanying risk of failing, but also with a chance of success? And one should also ask the question – would a failure to establish an international tribunal via the UNGA vote necessarily result in the impossibility to pursue alternatives? In this author's view, the answer to both these questions is negative. Nonetheless, the current negotiations regarding Ukraine seem to have failed in that regard and the considered alternative is rather a hybrid form.

The second criticism has been based on the premise that the establishment of such a tribunal would be a coercive measure because it would constitute a new jurisdiction including the removal of personal immunities of certain accused persons without the consent of the States they represent. But it needs to be recalled that

[77] For raising a similar concern, *see* the speech of the German Minister of Foreign Affairs Annalena Baerbockin the *Ministerial side-event by Liechtenstein and Germany...*, *supra* note 1. For an interesting analysis challenging the narrative (as a possible reason for the lack of support) regarding the tribunal being another expression of the fight between the Global West and the Global South, *see* P.I. Labuda, *Countering Imperialism in International Law: Examining the Special Tribunal for Aggression against Ukraine through a Post-Colonial Eastern European Lens*, 49 Yale Journal of International Law 272 (2024).

[78] On the topic of a treaty between the Council of Europe or the European Union and Ukraine, *see* e.g. Corten, Koutroulis, *supra* note 30, pp. 18–20 (3.2.2–3.2.3).

[79] Hence the criticism of the ICC – *supra* note 33. *See also* Kreß, *supra* note 8, para. 124.

the UNGA has the power to establish an independent tribunal despite the lack of such explicit entitlement in the UN Charter.[80] Additionally, the creation of an international tribunal is by no means necessarily a coercive action of the kind that the UNGA does not have the capacity to adopt. After all, the SCSL was created based on a resolution adopted by the UNSC under chapter VI that did not include any obligations upon anyone except the UNSG (to negotiate). And last but not least, the argument that it is the removal of (personal) immunities that amounts to a coercive measure entails the outdated vision that personal immunities can only be removed through a waiver or by way of a binding decision to that effect by the Security Council. This approach has already been rejected by the ICJ in the *Arrest Warrant* Judgment, where the Court confirmed that immunities do not apply vis-à-vis "a certain international criminal court" as a matter of customary international law.[81] The vote by the UNGA allowing the UNSG to negotiate an international treaty establishing an international court to prosecute crimes under international law would not subject the home State to a new international legal obligation. Instead, it would simply make possible the exercise of an already existing jurisdiction.

The third criticism would have merit in the event the vote passed by the barest minimum. It could be argued that how many States must actively support the idea in order to express the consent of the entire international community varies depending on which formal path of establishing the mechanism is taken. If the establishing mechanism is a multilateral treaty, it should certainly be no less than 60 (although this might be legitimately criticized as a very small number), the absolute majority of the international community would be much more representative though. If

[80] While confirming that it was legal to establish it, the ICJ stated that the "[UN Administrative] Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions" (ICJ, *Effects of awards of compensation made by the UN Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Rep 1954, p. 10). And because the UN Charter did not contain any provision entitling the UNGA to establish the Tribunal, the ICJ confirmed that the competence of the UNGA is not limited by the explicit text of the Charter. Similar reasoning could have been applied in this case.

[81] Indeed, there are differing opinions. For example, in her inspiring book, Kateřina Uhlířová submits that the "SCSL's [Taylor] decision neither adequately interpreted nor usefully applied the criterion of 'certain international criminal courts'" (Uhlířová, *supra* note 10, p. 137). For the non-applicability of personal immunities she relies, among others, on the binding nature of the respective tribunals' statute upon the state of the official who those immunities are supposed to protect. Nonetheless, while it may seem that the *Arrest Warrant* Judgment left the matter of this binding character of the establishing mechanism (particularly when it is an international treaty) open, it should not be forgotten that the fourth circumstance of para. 61 of the *Arrest Warrant* Judgment (inapplicability of personal immunities in front of certain international criminal courts) only adds something to the second circumstance (when the represented state has waived the immunity) "if the reference to proceedings before the ICC (...) includes those cases, where the ICC, in accordance with Article 12(2)(a) of the ICCS exercises its jurisdiction over officials of States not party to the Statute" (Kreß, *supra* note 8, para. 92). Thus, the ICJ implicitly included situations where the respective tribunal's statute is not binding upon the state of the official.

the vote was taken in the UNGA to empower the UNSG to conclude a treaty establishing the mechanism in the name of the UN, then even if the vote was taken by low numbers of States, it could hardly be argued that mere abstention (not accompanied by opposing reasoning) of those States not casting a vote would be an intentional expression of their will against providing the mechanism with the status of "a certain international criminal court". By abstaining, it should be understood they would express their non-concern in an issue that might in future affect them as well, not necessarily a contrary opinion. It is certainly not an obligation to vote, but by not doing so in a situation of such severity, the lack of active opposition should be understood as (if not approval then) acceptance. While that is another matter, an analogy can be drawn from negative practice (and its relation to *opinio iuris*) in the creation of customary international law. When discussing the alleged custom of inapplicability of immunities from criminal jurisdiction in front of courts of other States, Judge *ad hoc* Van den Wyngaert stated in her dissenting opinion that "[o]nly if this abstention [to institute criminal proceedings] was based on a conscious decision of the States in question can this practice generate customary international law [prohibiting such proceedings due to immunities]."[82] Analogically, a conscious silent abstention in the UNGA vote should be understood as approval/acceptance; certainly when the customary law of non-applicability of personal immunities in front of certain international criminal courts already exists. It would of course be different if the rule was yet to be established. Afterall, the UNSC voting system also allows for abstention (even by the permanent members) and no one doubts the internationality of measures taken by a vote of the UNSC, even with some members abstaining, under the condition that the quorum is fulfilled.

A purely formalistic part of the (certain criminal) internationality of the tribunal element is the demand for the statute/establishing treaty to contain a provision stating the inapplicability of immunities. Most statutes of international criminal courts and tribunals provide a statement similar to both Arts. 27(1) and 27(2) RS. Interestingly, the latter was not present in the Statute of the SCSL, yet the object and purpose of the treaty establishing the tribunal were interpreted in such a way.[83] Given the difference between impunity and immunity, it should be added that the provision on substantive part, i.e. the so-called no-impunity provision (in the Rome Statute Art. 27(1)) should be accompanied by a provision removing immunities (as a procedural issue, in the RS this is reflected in Art. 27(2)).[84] In any case, in order

[82] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002), Dissenting opinion of Judge ad hoc Van den Wyngaert, para. 13.

[83] As seen in SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, paras. 78–102.

[84] For a debate reflecting on the possible problematic consequences arising from the differences of these provisions: *see e.g.* the Dissenting opinion of Judge *ad hoc* Van den Wyngaert, *supra* note 82, paras. 29–33.

to differentiate the will of the international community not to apply immunities from support provided to hybrid tribunals, the statute of such a mechanism should contain a provision comparable to Art. 27 to qualify as "a certain international criminal court".

3.4. Results

Summing up, the elements of "a certain international criminal court" were found to be the three described herein:

a) the crimes within its jurisdiction must be international and grounded in customary international law;
b) the establishing mechanism must be either a UNSC resolution adopted under chapter VII of the UN Charter, or an international treaty; and
c) the mechanism must sufficiently reflect the will of the international community to remove immunities, be it through a vote in the UNSC or in the UNGA or on the basis of a sufficiently representative multilateral representation.

It follows that hybrid/internationalized tribunals (when applying domestic law and/or established domestically) do not fulfil the elements of a "certain international criminal court". In fact, only a mechanism fulfilling the elements of a fully international tribunal (i.e. established internationally, applying international law, and supported by the will of the international community) can be considered to meet the requirements of a "certain international criminal court". Consequently, the as of yet judicially undefined notion of "a certain international criminal court" should be understood to be congruent with the term "a fully international tribunal", as developed in the foregoing considerations.

It is thus no surprise that Ukraine favours the international model.[85] For exactly these reasons, it is unfortunate that the relevant actors now (as of January 2024) seem to have failed in their efforts towards establishing a fully international tribunal.

[85] O.A. Hathaway, M. Mills, H. Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly*, Just Security, 5 March 2023, available at: https://tinyurl.com/ycy85psp (accessed 30 August 2024).

4. TRIBUNAL FOR THE CRIME OF AGGRESSION COMMITTED AGAINST UKRAINE

Based on the conclusions reached above, it is surprising that some States favour a hybrid form of the tribunal for the crime of aggression committed against Ukraine.[86] Should such a tribunal nevertheless be established, it would not have the right to disregard personal immunities for the purposes of proceedings in front of it. It would consequently not even be endowed with the possibility to issue an arrest warrant against such individuals as long as they would hold office entitling them to personal immunities. The same applies to the debated third option, as the information provided suggests it would be hybrid.

Considering the fact that the crime of aggression is a leadership crime, the fact that an internationalized tribunal could prosecute officials holding lower state-positions (i.e. those endowed with functional immunities) is unsatisfactory.

It's true that with regard to the officials belonging among the troika, if they were suspected of having committed the crime of aggression, the situation would change should they ever leave the office. Functional immunities do not prevent States from exercising domestic jurisdiction (for crimes under international law) over another State's representatives (including former ones) endowed with functional immunities.[87] However, waiting till such a theoretical moment is a risk not worth taking.

Had States made the right decision and created a fully international criminal tribunal[88], the particular consequences of such decision would have been that such a court could disregard even personal (the more functional) immunities and issue arrest warrants against the accused otherwise endowed with personal immunities. Should such accused find themselves in hands of the tribunal, there would be nothing preventing it from conducting the trial.

The challenge however (which would equally apply to a hybrid court) would remain to get the accused before the tribunal. Should securing their presence in front of the tribunal appear to be impossible for the time being, despite all the good reasons not to do so a trial *in absentia* comes into mind. Of course, should

[86] *See above*. For pointing out the legal and practical complications related to establishing an internationalized tribunal, *see* McDougall, *supra* note 62, pp. 73, 81.

[87] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 115. On the other hand, it must be admitted that there are currently heated debates about the fact that ILC's Draft Art. 7 (within the topic of Immunity of State officials from foreign criminal jurisdiction) does not include the crime of aggression among crimes under international law to which immunities ratione materiae do not apply (*see supra* note 62).

[88] And additionally, had there been a proper campaign in its favour among states. Unfortunately, the information available indicates that no such effective campaign was even attempted (McDougall, *supra* note 62, p. 74).

the court conduct a trial in absentia, it would likely receive heavy criticisms from some quarters. But this would likely happen in any case, whether the accused were present or not. And should it happen that after the end of the proceedings the accused would in fact find themselves in the hands of States willing to arrest and surrender them, the trial might need to be repeated. That would, however, not be a worse solution than doing nothing at all (after issuing the arrest warrant).

CONCLUSIONS

Building upon the case-law of several international judicial bodies and by comparing the elements of fully international courts (and hybrid tribunals) with the elements of "a certain international criminal court", this article concludes that only fully international criminal courts count as "certain international criminal courts" within the meaning of the *Arrest Warrant* Judgment of the ICJ. Thus, its hypothesis was confirmed.

The elements of "a certain international criminal court" as identified above include, among others: a) the international nature of establishing of the mechanism; and b) applying international law. It is predominantly in the second point that hybrid tribunals differ, because they apply domestic law. Even if, c) the third element of "a certain international criminal court" – i.e. its reflection of the will of the international community – is present, this third element serves different purposes in relation to the distinct categories. In the case of a fully international court (tribunal) it is the source for inapplicability of personal immunities before it. In the case of hybrid tribunals, it is rather a source of support from the international community towards domestic courts in their exercise of their sovereign rights.

Thus, it is surprising that some States favour the hybrid form in the case of establishment of a tribunal for the crime of aggression committed against Ukraine. The detrimental consequences of such decision include setting a dangerous example for other leaders who might be attracted by the idea of an immunity shield against the prosecution of crimes of aggression.

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THERE AND BACK AGAIN? RUSSIA'S QUEST FOR REGULATING WAR IN CYBERSPACE

Abstract: *The divergence between Russia and Western States on the question whether international humanitarian law (IHL) applies to cyber space is still omnipresent in the debates at the UN Open-ended Working Group. Russia has several times submitted a draft or a concept for a binding legal instrument; however, they have not included considerable suggestions on IHL. Furthermore, Russia is actively using cyber means in an aggressive war against Ukraine, which makes its calls sound hollow. How then can one explain Russia's quest for a treaty for cyberspace, especially regarding IHL? This article aims to shed some light on this question in the broader context of Russian approaches to international law-making and its historic role in developing IHL rules.*

Keywords: cyberspace, ICT, international humanitarian law, international law-making, rules-based world order, Russia, United Nations

INTRODUCTION

Russia has not changed its approach towards the applicability of international law to States behavior in cyberspace: principles of international law and the rules of the United Nations (UN) charter do apply, but according to Russia specialized regimes such as international humanitarian law (IHL) cannot be "just applied" and extrapolated to cyberspace.[1] Russia keeps advocating for a new legal instrument for regulating States behavior in cyberspace. In July 2023, the Russian delegation to the UN Open-ended Working Group on security of and in the use of information and communications technologies (OEWG) submitted yet another concept pro-

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[1] *See generally* E. Korzak, *Russia's Cyber Policy Efforts in the United Nations*, 11 Tallinn Papers 4 (2021), pp. 5–10; L. Lumiste, *Russian Approaches to Regulating Use of Force in Cyberspace*, 20(1) Baltic Yearbook of International Law 111 (2022), pp. 112–116.

posal for a convention[2] – a proposition it has tabled several times over the years[3] and which thus far has not fallen on a fertile ground. During the substantive session in December 2023, the Russian delegation tabled a proposal to make the OEWG a permanent decision-making body, whose mandate would also include the development of legally binding rules,[4] demonstrating Russia's intention to remain on its chosen course. It seems that Russia may be trying to repeat the path that led to success with respect to the cybercrime convention process: in addition to submitting a draft convention,[5] it succeeded in establishing a process with a specific mandate through which "a comprehensive international convention on countering the use of information and communications technologies for criminal purposes" would be developed.[6]

What prompts Russia to push for a new legally binding instrument, instead of accepting the applicability of existing international law rules with respect to conduct in cyberspace? In this article, the author argues that the course of action described can, to some extent, be explained by Russia's state-centric approach to international law-making. This approach aims to preserve the status of States as the sole subjects of international law with law-making capacity, as opposed to empowering transnational corporations, international non-governmental organisations (NGOs), or other non-state actors in the law-creation process. The first section will therefore delve into the Russian approach to international law-making and highlight some of

[2] Letter dated 15 May 2023 from the Permanent Representatives of Belarus, the Democratic People's Republic of Korea, Nicaragua, the Russian Federation and the Syrian Arab Republic to the United Nations addressed to the Secretary-General, A/77/894, 16 May 2023.

[3] *Ibidem*; Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, A/66/359, 14 September 2011; Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, A/69/723, 13 January 2015; Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, NY 10065, 7 March 2023, available at: https://tinyurl.com/mtw652m3 (accessed 30 August 2024). *See also* K. Mačák, *From Cyber Norms to Cyber Rules: Re-Engaging States as Law-Makers*, 30 Leiden Journal of International Law 877 (2017), p. 881; Korzak, *supra* note 1, pp. 5–10.

[4] Concept paper on a permanent decision-making Open-ended Working Group on security of and in the use of information and communications technologies, available at: https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/ENG_Concept_paper_on_a__Permanent_Decision-making_OEWG.pdf (accessed 30 August 2024).

[5] Draft on Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes, Draft, 29 June 2021, available at: https://tinyurl.com/yfzzayyu (accessed 30 August 2024).

[6] The UN General Assembly adopted resolution 74/247, establishing the respective committee. The resolution was initially submitted to the Third Committee of the UN by Russian Federation, Belarus, Cambodia, China, Democratic People's Republic of Korea, Myanmar, Nicaragua, and Venezuela. *See* UNGA Resolution of 20 January 2020, *Countering the use of information and communications technologies for criminal purposes*, Doc. A/RES/74/247; UNGA, *Countering the use of information and communications technologies for criminal purposes. Report of the Third Committee*, 25 November 2019, A/74/401; Agenda item 107 of the Seventy-fourth session of the draft resolution on Countering the use of information and communications technologies for criminal purposes, 11 October 2019, A/C.3/74/L.11.

the most relevant aspects, and how the current processes regarding norm-creation for cyberspace have tendencies opposite to the Russian perspective.

However, as will be shown in the second and third sections, the other side of the coin is Russia's pragmatic endeavor to enforce its power-status and to limit its adversaries' capabilities. In the second section, the article will examine accusations made by Russia against the West and, in particular, the United States (US) concerning attempts to replace international law with a "rules-based order" altogether. This suggests that the issue of creating new binding rules to regulate cyberspace fits into the broader philosophical-political disagreements on international law, rather than being merely a question of the specifics of a new domain.

In the third section, the article will delve into the specifics of IHL. It will be argued that Russia's push for a new treaty law on IHL's applicability in cyberspace is guided by historic maneuvers. Historically Russia, including its predecessors the Russian Empire and the Soviet Union, has been an advocate and a major player in establishing the fundamental instruments of IHL, as discussed in section 3.1. However, such activism has been motivated more by a perspective of gaining advantage in future conflicts than by mere humanitarian concerns. The third section thus offers a brief recap of Russia's (including the Russian Empire and the Soviet Union as its predecessors) role in the development of IHL, highlighting the occurrences of the above-discussed tendencies in previous Russian practices. This will be followed by a discussion on how the same tendencies are evident in the discussions on IHL and cyberspace.

The applicability of international law to cyberspace is not a clear-cut case – not all States accept it, nor is there clarity on how the rules apply. Turning to both legal policy and legal history may help to further our understanding of where we stand in this regard. Additionally, the article adopts a degree of the realist approach to international relations, as it explores power politics on a global scale and links this to the processes of international law-making and the history of Russia's contributions to international humanitarian law. By doing so, the author seeks to contribute to a more comprehensive discussion on Moscow's efforts in the field of international law and cyberspace.

1. WHO CAN MAKE INTERNATIONAL LAW, AND HOW?

1.1. Russia's approach to international law-making

In Russian scholarly writings, the approach to creation of rules of international law rests on two fundamental conditions. Firstly, a rule must fit under the categories in Art. 38 of the International Court of Justice (ICJ) Statute. The late Danilenko, a renowned Russian international law scholar, noted regarding the status of Art. 38 of the ICJ Statute that until the community of States stipulates a new "constitutive norm" establishing new forms of law-making, Art. 38 is to be considered as

exhaustive.[7] The binding effect of a rule, and its character as law, is derived from the inter-state process through which it came into existence.[8] The authority of Art. 38 itself is derived from "a complex process of a gradual formalization of the lawmaking process within the community of states."[9] This in turn leaves no room for discussion on whether it is shaped by the commitment of concerned States in a given moment, which would allow leeway for accepting, for example, the UN General Assembly resolutions as law.[10]

Central to the understanding of law-making is also the question of who are considered as subjects of international law, as this determines who has the capacity of law-making. Russian legal discourse concerning the matter is dominantly state-centric.[11] Compared to the views of legal scholarship of the Soviet Union, the change for Russia has only taken place regarding international organisations, which are now also accepted as subjects of international law.[12] Individuals, transnational corporations, or non-governmental organisations cannot "objectively" be considered subjects of international law.[13] The difference is that the Western approach – which traditionally also considers States as the main subject of international law – is to empower or include non-state actors in the international legal processes.[14] For Russia, as will be demonstrated also in the section on informal international law making, this is a stretch.

In general, treaty law takes priority over customary law – a hierarchy that Russia took over from the Soviet Union[15] and is supported by the current Russian state practice. Even though customary law is, in principle, included in the Constitution of the Russian Federation, it stands below international treaty law in the hierarchy. Art. 15(4) of the Russian Constitution – which has remained unchanged since 1993 when the constitution was initially accepted – stipulates the following:

> Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an

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[7] G.M. Danilenko, *Law-making in the international community*, Brill/Nijhoff, Leiden: 1993, p. 40.

[8] *Ibidem*, pp. 16–17.

[9] *Ibidem*, p. 29.

[10] On the approach of "law as a fact", *see generally* E. McWhinney, *Contemporary International Law and Law-Making*, 40(3) International Journal 397 (1985), pp. 417–418.

[11] L. Mälksoo, *Russian Approaches to International Law*, Oxford University Press, Oxford: 2015, pp. 104–110. As Mälksoo points out, there are some authors who are more lenient towards accepting also non-state actors as subjects of international law (p. 106); this however is a minority view and deviates from the state practice.

[12] *Ibidem*, p. 104.

[13] *Ibidem*, pp. 107–108.

[14] *Ibidem*, pp. 105–106.

[15] R.J. Erickson, *Soviet Theory of the Legal Nature of Customary International Law*, 7 Case Western Reserve Journal of International Law 148 (1975).

> international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.[16]

The term "International agreements of the Russian Federation" is to be understood as the treaties Russia has ratified, and "universally recognised principles and norms of international law" entails the customary law rules of international law. The second sentence of the above-mentioned article states that in the case of a collision the rules of "international agreements" shall be applied instead of rules stipulated by domestic law, but leaves out a reference to rules of customary international law.[17] A certain remedy can be found in Art. 17(1), which takes a similar position with respect to "human and civil rights and freedoms" of both a treaty and customary type, as the article foresees that these shall be "recognized and guaranteed according to the universally recognized principles and norms of international law and this Constitution."[18] Yet customary rules of other fields are left aside, as Art. 15(4) refers only to "international agreements". Such a hierarchy in favour of treaties speaks volumes of the importance that is given to States explicit approval.

It is interesting to refer also to Danilenko's criticism towards the ICJ definitions of *opinio juris* as "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[19] He criticises it for referring to a belief towards an already *existing* rule, deviating from the law-making character of custom-creation.[20] He additionally argues that ratification of treaties could not be considered as an expression of *opinio juris*, since a state agrees to be bound by the treaty, but it does not express the acceptance of the treaty rules as customary,[21] thus underlying once again the central importance of States' will to the creation of a certain rule.

Another aspect guiding Russia in international law-making is the perception of international law as a tool for realizing its national interest and its foreign policy goals. The current structure of the international community as described by the

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[16] Opinion No. 992/2020 of the Council of Europe of 4 February 2021, CDL-REF(2021)010.

[17] In its 1995 advisory resolution, the Supreme Court of the Russian Federation did not initially recognize customary international law as being part of Art. 15(4), but merely referred to certain treaty law and the Universal Declaration of Human Rights. In its 2003 resolution, the Supreme Court became somewhat more open towards customary international law. *See* M. Riepl, *Russian Contributions to International Humanitarian Law: A contrastive analysis of Russia's historical role and its current practice*, Nomos, Baden-Baden: 2022, pp. 176–178; W. Burnham, P.B. Maggs, G.M. Danilenko, *Law and legal system of the Russian Federation*, Juris, New York: 2012, p. 29.

[18] Riepl, *supra* note 17, p. 181.

[19] ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Rep 1969, p. 3, 45, para. 77.

[20] Danilenko, *supra* note 7, pp. 100–101.

[21] *Ibidem*, pp. 67, 69–70, 123. However, in the author's view, in the argument on customary law G.M. Danilenko broadens the wording of Art. 38, as it requires "acceptance as law" not acceptance specifically *as customary* law.

UN Charter and formed after the WWII enshrined the power-status of the Security Council's (SC) permanent members, including the Soviet Union. The Soviet Union's endeavour to keep the conservative international law doctrine, under which it gained its initial status as a great power, served its goal to retain that power-status in the then bipolar world order.[22] In the same way, the understanding of the SC system as a manifestation of power-balance, a monopoly of the permanent members over use of force under international law, and the UN as the central venue for any considerable international law-making, is still of central importance for the modern Russian Federation.[23]

1.2. The tormenting informality of cyber-norms

The Russian approach described in the previous section collides with certain tendencies characteristic to Western States, causing frictions which are, among other processes also framing the debate over regulating States' conduct in cyberspace.

There is in general a considerable tendency to deviate from classical treaty-making towards more informal international law-making.[24] In a study on non-binding agreements, Bradley, Goldsmith and Hathaway highlighted that States – both in the North and South Americas and in Europe in general, increasingly opt for instruments that do not have a binding effect in the form of a treaty but are non-binding and concluded by various executive agencies.[25] Informal international law-making (IIL) as a concept has been characterized as omitting certain formalities of traditional international law-making. In a definition suggested by Pauwelyn, such formalities are related with output, process, and actors.[26] Output refers to the form of the outcome – which deviates from the traditional international law sources as listed in

[22] McWhinney, *supra* note 10, p. 400.

[23] *See The Concept of the Foreign Policy of the Russian Federation*, The Ministry of Foreign Affairs of the Russian Federation, 31 March 2023, available at: https://mid.ru/en/foreign_policy/fundamental_documents/1860586/ (accessed 30 August 2024). Russia has expressed several times, with regard to the calls for Security Council reform, that the current prerogatives, including the veto right, are not up for discussion or any reform. *See for example Russia's Position at the Seventy-Fifth Session of the UN General Assembly*, The Ministry of Foreign Affairs of the Russian Federation, 23 July 2020, available at: https://mid.ru/en/foreign_policy/international_organizations/1437475/ (accessed 30 August 2024); and *Russia's Position at the Seventy-Sixth Session of the UN General Assembly*, The Ministry of Foreign Affairs of the Russian Federation, 4 August 2021, available at: https://mid.ru/en/foreign_policy/position_word_order/1770401/ (accessed 30 August 2024).

[24] *See generally* on informal international law-making (IIL) J. Wouters, *International Law, Informal Law- Making, and Global Governance in Times of Anti- Globalism and Populism*, in: H. Krieger, G. Nolte, A. Zimmermann (eds.), *The International Rule of Law: Rise or Decline?*, Oxford University Press, Oxford: 2019, pp. 242–264.

[25] C.A. Bradley, J. Goldsmith, O.A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90(5) University of Chicago Law Review 1281 (2023), pp. 1336–1338.

[26] J. Pauwelyn, *Informal International Lawmaking: Framing the Concept and Research Questions*, in: J. Pauwelyn, R.A. Wessel, J. Wouters (eds.), *Informal International Lawmaking*, Oxford University Press, Oxford: 2012, p. 15.

Art. 38 of the ICJ Statute, mainly treaties – but still has a normative character (with or without a binding nature).[27] Process informality encompasses here the forum where the law-making process takes place, such as loose networks as opposed to international organizations or diplomatic conferences.[28] Finally, informal law-making is characterized by engaging actors other than traditional diplomatic actors with full powers, including private actors.[29] All of these aspects, especially the output and actors, are related to the question of the binding nature of the instrument, or in other words – whether informal international law is *law* as such. As deeper discussion on the matter would go beyond the scope of this article, it will be not tackled here in depth, but it should be noted that there are competing schools or even philosophies: ones that consider there to be a hard line – whether law is binding or not – and the other, considering "legal normativity as a matter of degree with varying scales."[30]

Several international initiatives focusing on cyberspace under international law can be characterised by the above-described features. Firstly, there are academic initiatives that aim to provide interpretation or specify how international law should be applied to States activities in cyberspace. What gives them the informal law-making quality is that the results are spelled out as cyberspace-specific norms – therefore, having the normative character, but in terms of both output and actors lack the characteristics of a traditional source of international law. One such example is the Oxford Process on International Law Protections in Cyberspace (Oxford Process). The Oxford Process is an initiative "aimed at the identification and clarification of rules of international law applicable to cyber operations across a variety of contexts."[31] The initiative convenes international legal experts from different countries. The result of the process are statements on how international law applies to specific objects of protection or specific means, such as ransomware. The second example in the same "category" is the Tallinn Manual project, resulting in two academic studies: Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual) and the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (Tallinn Manual 2.0).[32] The compilation of both manuals was conducted under the auspices of the NATO Cooperative Cyberdefense Centre of Excellence (CCDCOE) by a group of legal experts. They are

[27] *Ibidem*, pp. 15–17.

[28] *Ibidem*, pp. 17–18.

[29] *Ibidem*, pp. 19–20.

[30] J. Pauwelyn, *Is It International Law or Not and Does It Even Matter?*, in: J. Pauwelyn, R.A. Wessel, J. Wouters (eds.), *Informal International Lawmaking*, Oxford University Press, Oxford: 2012, p. 128.

[31] *The Oxford Process on International Law Protections in Cyberspace*, The Oxford Process, available at: https://www.elac.ox.ac.uk/the-oxford-process/ (accessed 30 August 2024).

[32] M.N. Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare*. Cambridge University Press, Cambridge: 2013; M.N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge: 2017.

by their nature academic works, discussing the applicability of existing international law rules on cyberspace, and therefore have no status as a source of international law. However, for example the Tallinn Manual 2.0. has had a considerable impact on the discourse of international law's applicability to cyberspace, as well as to States' positions on the respective field.[33] These two are just few examples of the scholarly work that generally leads – or at least significantly impacts – the discussion on how international law applies to cyberspace.[34]

Secondly, there are initiatives that endorse certain principles or norms and that are open for joining by both States and non-state actors. A prominent example of such an initiative is the 2018 Paris Call, that in its core text endorsed the applicability of international law to cyberspace, as well as the voluntary norms of state behaviour in cyberspace. Furthermore, the Call addressed the roles and obligations of States and non-state actors alike, bringing non-state actors to the forefront of ensuring security in cyberspace.[35]

The UN processes, such as the Group of Governmental Experts Advancing responsible State behaviour in cyberspace in the context of international security (GGE) and the OEWG should be also considered as noteworthy examples of informal law-making. Central to both forums mandates are (voluntary) norms – the work results of both GGE and OEWG are the consensus reports that are presented to the UN General

[33] Within a few years several states have published their official positions of how international law applies to cyberspace. Though the specific issues these statements address vary, as do the depth in which they are addressed, many of them refer affirmatively, but also argue against the Tallinn Manual 2.0. *See Droit international appliqué aux opérations dans le cyberspace*, Ministère des Armées, Paris: 2019, available at: https://tinyurl.com/yeyrn95k; The Federal Government of Germany Position Paper, On the Application of International Law in Cyberspace Position Paper, available at: https://tinyurl.com/bd38r9xs; Letter of 5 July 2019 from the Minister of Foreign Affairs to the President of the House of Representatives on the international legal order in cyberspace. The appendix discusses the main issues relating to international law, 26 September 2019, available at: https://tinyurl.com/mw89c563; *International law and cyberspace. Finland's national positions*, available at: https://tinyurl.com/rvab2yxj; Basic Position of the Government of Japan on International Law Applicable to Cyber Operations, 28 May 2021, available at: https://tinyurl.com/mr4e2c37 (all accessed 30 August 2024). In a compendium of voluntary contributions on international law's applicability to cyberspace, including statements by 15 states, the Tallinn Manual 2.0 is referenced 54 times; see Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States, submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266, 13 July 2021, A/76/136*.

[34] *See* K. Maćak, *On the Shelf, But Close at Hand: The Contribution of Non-State Initiatives to International Cyber Law*, 113 AJIL Unbound 81 (2019), pp. 84–85; L.J.M. Boer, *International law as we know it: Cyberwar discourse and the Construction of knowledge in International Legal Scholarship*, Cambridge University Press, Cambridge: 2021, pp. 37–19.

[35] *Paris Call for Trust and Security in Cyberspace*, Paris Call, 11 December 2018, available at: https://pariscall.international/en/call (accessed 30 August 2024). 81 states have joined the Paris Call, but not Russia.

Assembly, consisting of rules, norms and principles of responsible behaviour of States, without a certain perspective of a subsequent formal law-making process.

These examples are characteristic to a trend whereby the formation of norms addressing state behaviour and traditional matters of international law – such as non-intervention, use of force, or armed conflict – is taking place with the participation of and considerable impact from different non-state actors and resulting in *soft law*. This trend is in clear opposition to the Russian understanding of who should create the normative frameworks for states and how they should be created. While several western states have relied in their statements on the Tallinn Manual 2.0,[36] Russia's official documents and statements have no trace of it. Instead, the Tallinn Manuals were depicted rather as tool for NATO States to impose its own set of rules to other States[37] or as an attempt to be a trendsetter.[38] When commenting on the Paris Call, the Russian Ministry of Foreign Affairs noted the message of the Call is "is in line with the spirit of Russia's approaches", but criticized it for "putting States and non-State actors on an equal footing."[39] The OEWG has brought non-state actors into the process , as it is open – upon accreditation – also to NGO-s as stakeholders, which has given rise to Russia's call that the centrality of states should be manifested in the process[40] and that possible future institutional dialogue bodies

[36] For example, *Droit International Appliqué Aux Opérations Dans Le Cyberespace. Ministére des Armées*, Ministère des Armées, Paris: 2019, available at: https://tinyurl.com/yeyrn95k; The Federal Government of Germany Position Paper, *On the Application of International Law in Cyberspace Position Paper*, available at: https://ccdcoe.org/uploads/2018/10/Germany_on-the-application-of-international-law-in-cyberspace-data_English.pdf; Letter of 5 July 2019 from the Minister of Foreign Affairs to the President of the House of Representatives on the international legal order in cyberspace. The appendix discusses the main issues relating to international law, 26 September 2019, available at: https://tinyurl.com/mw89c563 (all accessed 30 August 2024).

[37] L. Savin, *Tallinskoe rukovodstvo 2.0 i zahvat kiberprostranstva* [Tallinn Manual 2.0 and the takeover of cyberspace], Geopolityka.ru, 6 February 2017, available at: https://www.geopolitika.ru/article/tallinskoe-rukovodstvo-20-i-zahvat-kiberprostranstva (accessed 30 August 2024).

[38] S. Andreev, *Pribaltijskij kiberfront NATO* [NATO's Baltic Cyber Front], Russian International Affairs Council. 6 February 2020, available at: https://russiancouncil.ru/analytics-and-comments/analytics/pribaltiyskiy-kiberfront-nato/?sphrase_id=113402965 (accessed 30 August 2024).

[39] *Comment by the Information and Press Department of the Russian MFA on Russia's Approach to the French Initiative "Paris Call for Trust and Security in Cyberspace"*, The Ministry of Foregin Affairs of the Russian Federation, 20 November 2018, available at: https://mid.ru/en/foreign_policy/news/1578672/ (accessed 30 August 2024).

[40] Statement by Head of the Russian Interagency Delegation to the First Substantive Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, Deputy Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Dr. Vladimir Shin, NY 10065, 13 December 2021, available at: https://documents.unoda.org/wp-content/uploads/2021/12/Russia-statements-OEWG-13-17.12.2021-Eng.pdf. In its feedback to a draft report of the OEWG, the Russian delegation stressed that "we consider the implementation of rules of responsible behavior to be the prerogative of states." *See Statements by Mr. Alexander Radovitskiy, the representative of the Russian interagency delegation, at the Fifth Session of the UN open-ended Working Group on security of and in the use of ICTs 2021–2025*, Permanent Mission of the Russian Federation to the United Nations 24 July 2023, available at: https://russiaun.ru/en/news/i_240723 (both accessed 30 August 2024).

should be limited exclusively to States, while the participation of non-state actors should be only informal and consultative,[41] mirroring Russia's general reluctance towards the concept of including civil society and business representatives in the law-making process. The modern state practice of the Russian Federation therefore not only clearly follows the legal discourse of the state-centric approach regarding subjects of international law as introduced in the previous section, but also reflects Russia's internal practices regarding civil society and the role of NGOs – the only non-state actors which may have a role in Russian society are those which align with the government's political will, are considered as "non-political", and are without foreign connections.[42] In the same manner, asserting the traditional forms and forums of law-making is part of Russia protecting its power-status, not only in relation to other States but also from non-state actors such as transnational (technology) corporations, whose involvement in and impact on international law is clearly increasing.[43]

However, this clash between the approaches to international law-making – one accepting non-state actors as *participants;* the other seeing them as a threat to state authority – is not something that has emerged only in recent years. Already in 1993 Danilenko highlighted how there is a developing opposition between the western policy-oriented approach that prioritizes community policies and human dignity instead of the law-making procedure when considering the validity of rules; and the counterparts in the East who focus more on the "legalistic" considerations of law-making, fully controlled by States and with the need to get the explicit approval of at least the "great powers".[44] Furthermore, he highlighted that there had been an increase in the number of proponents of soft law, which in his view would result in an "unprecedented expansion of the concept of law into areas of normative regulation which have never been considered as belonging to the 'law proper'", which in turn will lead to uncertainty resulting from such obfuscation of what is understood as law-making, and which "will only erode the concept of legal obligation and weaken the authority of law within the international community".[45]

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[41] Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICT-s 2021–2025, NY 10065, 10 March 2023, available at: https://tinyurl.com/4tbf6dtc (accessed 30 August 2024).

[42] K. Stuvøy, *The Foreign Within': State–Civil Society Relations in Russia*, 72(7) Europe-Asia Studies 1103 (2020), pp. 1104, 1106–1110.

[43] For more on technology corporations' involvement, *see* A.S. Tiedeke, *Self-statification of corporate actors? Tracing modes of corporate engagements with Public International Law*, 12 European Society of International Law Paper 1 (2022), pp. 1–24.

[44] Danilenko, *supra* note 7, pp. 17–21.

[45] *Ibidem*.

Therefore, Russia's push for a new treaty law can be considered to be in part encouraged by the state-centric, even purist tradition of international law-making. However, this should be considered as only part of the explanation. As was briefly discussed in section 1.1 and is examined in more depth below, the state's practice underlines reasons related to power-balance rather than legal purity.

2. OPPOSITION TO A "RULES-BASED WORLD ORDER"

Another point of divergence is the concept of a "rules-based world order". The reference to "rules-based world order" may indeed raise some questions, as it is not a legal term of art, nor established in international relations theory or political science. The phrase has been prominently and consistently has been used in the speeches and statements of US high officials. President Biden made several statements on Russia's aggression against Ukraine which omitted referring to a breach of international law, but instead depicted the aggression as threat to the "rules-based world order".[46] So too the 2022 National Security Strategy,[47] published under the name of President Biden, and the 2018 National Defence Strategy[48] also refer only to the "rules-based world order". Even though this strategy has highlighted general principles known from international law – such as sovereignty, territorial integrity, and condemning aggression, coercion, and external interference – the strategy does not make a link with international law.

Other Western leaders, such as heads of European States, have also made occasional references to the concept, but unlike US representatives used it interchangeably with international law.[49] The concept is argued to be on one hand based on the shared values enshrined in international law, but a) go beyond international law, including also soft law and international standards and norms created by international organisations; and b) lack the quality of legal rules in the meaning of their bindingness and enforceability.[50] The current usages and explanations of the concept

[46] J.R. Biden Jr, *What America Will and Will Not Do in Ukraine*, The New York Times, 31 May 2022, available at: https://www.nytimes.com/2022/05/31/opinion/biden-ukraine-strategy.html; *Remarks by President Biden on the United Efforts of the Free World to Support the People of Ukraine*, The White House, Washington, 26 March 2022, available at: https://tinyurl.com/4b9jfz28 (both accessed 30 August 2024).

[47] *National Security Strategy*, The White House, Washington, 12 October 2022, available at: https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf (accessed 30 August 2024).

[48] *Summary of the 2018 National Defense Strategy of the United States of America*, Department of Defence of United States of America, Virginia: 2018, available at: https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf?mod=article_inline (accessed 30 August 2024).

[49] J. Dugard, *The choice before us: International law or a 'rules-based international order'?*, 36(2) Leiden Journal of International Law 223 (2023), pp. 223–224.

[50] *Ibidem*, p. 225.

have not provided a sufficient understanding on its relationship with international law, and left it vulnerable to characterization as being a comfortable alternative for international law[51] and being dependent on the interests of the states upholding it.[52]

As possibly undermining the post-WWII architecture of international affairs, as well as having an ambiguous relation to international law, the reliance on a rules-based order by the US and other Western States has fuelled Russia's efforts to protect the status quo. Its 2023 Foreign Policy Concept considers the rules-based order as destroying the international legal order.[53] Foreign minister Lavrov has, on several occasions, condemned the attempt to create rules outside of the international law remit through enforcing the "rules-based order" concept as a tool to ensure unipolarity and manifest the exceptionality of the Western States, specifically of the US.[54] In his latest statements, Lavrov has dubbed the concept as "neo-colonial", having the aim of dividing the world as "the chosen ones who are viewed as exceptional" and the rest who are expected to "cater to the interests" of the West.[55] More substantial accusations rely on examples where *prima facie* the same situations have been resolved differently, regardless of the existing rules of international law.[56] In

[51] *Ibidem*, p. 226.

[52] N. Wright, *The UK and the international rules-based system*, The Foreign Policy Centre, 8 September 2020, available at: https://fpc.org.uk/the-uk-and-the-international-rules-based-system/ (accessed 30 August 2024).

[53] *The Concept of the Foreign Policy of the Russian Federation*, The Ministry of Foreign Affairs of the Russian Federation, 31 March 2023, available at: https://mid.ru/en/foreign_policy/fundamental_documents/1860586/ (accessed 30 August 2024).

[54] *Foreign Minister Sergey Lavrov's remarks at the Moscow Conference on International Security*, The Ministry of Foreign Affairs of the Russian Federation, 24 April 2019, available at: https://mid.ru/en/foreign_policy/news/1459008/; *Foreign Minister Sergey Lavrov's remarks at Bolshaya Igra (Great Game) talk show on Channel One*, The Ministry of Foreign Affairs of the Russian Federation, 4 September 2018, available at: https://mid.ru/en/foreign_policy/news/1575413/; *Foreign Minister Sergey Lavrov's remarks at the general meeting of the Russian International Affairs Council*, The Ministry of Foreign Affairs of the Russian Federation, 8 December 2020, available at: https://mid.ru/en/foreign_policy/news/1448552/; *Foreign Minister Sergey Lavrov's remarks and answers to media questions at a news conference on the results of Russian diplomacy in 2020*, The Ministry of Foreign Affairs of the Russian Federation, 18 January 2021, available at: https://mid.ru/en/foreign_policy/news/1414102/ (all accessed 30 August 2024).

[55] *Foreign Minister Sergey Lavrov's video address to the participants in the session of the 11th St Petersburg International Legal Forum 'Foundations of the international legal order vs the "rules-based order": The future of international law'*, The Ministry of Foreign Affairs of the Russian Federation, 12 May 2023, available at: https://mid.ru/en/foreign_policy/news/1869816/ (accessed 30 August 2024).

[56] *Ibidem*. As an example, Lavrov laments the reaction of Western states to Kosovo's withdrawal from Serbia without a referendum and points out that the Ukrainian regions of Crimea, Donetsk, Lugansk, the Zaporozhye and Kherson had 'referendums' to join Russia, arguing that Western states are not coherently following international law and apply double standard to the rest of the international community. Similarly, Foreign Ministry Spokesperson Zakharova explained how US Space Force has a task to develop rules and principles of responsible behaviour in space, neglecting the international law rules governing space. *See Briefing by Foreign Ministry Spokeswoman Maria Zakharova*, The Ministry of Foreign Affairs of the Russian Federation, 20 August 2020, available at: https://mid.ru/en/foreign_policy/news/1440076/. In the context of chemical weapons, Lavrov condemned the expansion on the mandate OPCW Technical Secretariat beyond the limits of

addition, this has provided Russia with material to portray itself as the protector of international law and inclusiveness. The latter is gaining more relevance as Russia invests in gaining support among the States of the Global South,[57] which have different interests and understandings on the power-play of Europe and US on one hand and Russia on the other.

The same rhetoric can be seen in the debate over regulating states' behaviour in cyberspace. Russian officials have stated that the main divergence in reaching any substantial agreement on cyberspace regulation is the dichotomy of binding treaty vs the non-binding rules.[58] In the GGE, Russia repeatedly expressed its discontent with the way some members of the group are eager to make statements on international law, extrapolating it arbitrarily with the aim of making its own "tailored rules".[59] Initiatives such as Paris Trust Call[60] and collective attributions by States[61] have been viewed as manifestation of the "rules-based order", as they have not been implemented by the UN nor based on agreed-upon mechanisms between States concerned, thus also being a manifestation of the growing informality in law-making

the Chemical Weapons Convention. *Foreign Minister Sergey Lavrov's remarks and answers to questions during the meeting with members of the Association of European Businesses in Russia*, The Ministry of Foreign Affairs of the Russian Federation, 5 October 2020, available at: https://mid.ru/en/foreign_policy/news/1443521/ (both accessed 30 August 2024).

[57] As an example, Russia has established an annual Russia-Africa Summit in order to foster the cooperation. As minister Lavrov has indicated, such cooperation has significance from the perspective of power-balancing: "(...) our country's independent foreign policy is understood by developing countries, and the efforts of the United States and its allies aimed at isolating Russia internationally have failed". *See Interview of the Minister of Foreign Affairs of the Russian Federation S.V. Lavrov to the magazine "International Affairs"*, The Ministry of Foreign Affairs of the Russian Federation, 19 August 2023, available at: https://tinyurl.com/pwjx3rj6 (accessed 30 August 2024).

[58] *Interview by Acting Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Artur Lyukmanov to the Newsweek magazine*, The Ministry of Foreign Affairs of the Russian Federation, 3 November 2022, available at: https://mid.ru/en/foreign_policy/news/1836804/; *Deputy Foreign Minister Oleg Syromolotov's interview with Rossiya Segodnya on the third session of the Open-ended Working Group on security of and in the use of information and communications technologies 2021–2025*, The Ministry of Foreign Affairs of the Russian Federation, 3 August 2022, available at: https://mid.ru/en/foreign_policy/news/1824845/ (both accessed 30 August 2024).

[59] *See* the discussion in L. Lumiste, *Russian Approaches to Regulating Use of Force in Cyberspace*, 20(1) Baltic Yearbook of International Law Online 109 (2022), pp. 122, 125–126.

[60] *Foreign Minister Sergey Lavrov's answers to questions at Bolshaya Igra (Great Game) talk show on Channel One*, The Ministry of Foreign Affairs of the Russian Federation, 25 April 2020, available at: https://mid.ru/en/foreign_policy/news/1430978/; *Interview by Acting Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Artur Lyukmanov to the Newsweek magazine*, The Ministry of Foreign Affairs of the Russian Federation, 3 November 2022, available at: https://mid.ru/en/foreign_policy/news/1836804/ (both accessed 30 August 2024).

[61] *Foreign Minister Sergey Lavrov's remarks and answers to questions during the online session "Russia and the post-COVID World," held as part of the Primakov Readings international forum*, The Ministry of Foreign Affairs of the Russian Federation, 10 July 2020, available at: https://mid.ru/en/foreign_policy/news/1436807/ (accessed 30 August 2024).

discussed above, and deviating from what Russia would consider legitimate tools to regulate inter-state relations.

Paradoxically, in 2021 Russia itself proposed to the US the conclusion of a treaty that envisaged an obligation on the part of the US to prevent any eastward expansion of NATO and to deny the accession to any former member states of the Soviet Union, as well as to refrain from any military activity on the territory of such states.[62] Similarly, in the draft treaty with NATO, Russia suggested that Member States of the alliance that were members before 1997 should not deploy any military troops or weapons on "the territory of any other States in Europe in addition to the forces stationed on that territory as of 27 May 1997"; nor accept any further accessions.[63] These proposed treaties would have established an international order whereby a handful of states – Russia itself, the US, and NATO members who joined the alliance before 1997 – would have had the exceptional status to decide over the security structure of the international community. As a result, the function of international law to regulate the conduct of all States on an equal basis would have been severely undermined. While Russia was utilising the formal means of international law, its aim appears no different from what it accuses the West of doing, thus making its claims on protecting international law sound hollow, regardless of the domain. Instead, it leads to the conclusion that Russia's efforts are mainly guided by the ambition to ensure the stability of post-WW II security architecture and its' own position as one of the "great powers", as discussed in the section 1.1. While not directly linked to the matter of regulating states behaviour in cyberspace, such manoeuvre leads to suspect similar pattern behind the law-making ambition for cyberspace as a highly strategic domain. In the following section, more specific and nuanced reasons shall be demonstrated based on a specific area of regulation, which for this article is IHL.

[62] *Treaty between the United States of America and the Russian Federation on security guarantees*, The Ministry of Foreign Affairs of the Russian Federation, 17 December 2021, available at: https://mid.ru/ru/foreign_policy/rso/nato/1790818/?lang=en (accessed 30 August 2024).

[63] *Agreement on measures to ensure the security of The Russian Federation and member States of the North Atlantic Treaty Organization*, The Ministry of Foreign Affairs of the Russian Federation, 17 December 2021, available at: https://mid.ru/ru/foreign_policy/rso/nato/1790803/?lang=en (accessed 30 August 2024).

3. NEW RULES FOR WAR IN CYBERSPACE

3.1. Russia's role then and now in IHL development

Russia's role in the development of international humanitarian law is curious and noteworthy of exploration in order to take note of certain tendencies that can be seen in the practice of the modern-day Russian Federation.

Tsarist Russia had an active, or even leading, role in most of the first IHL instruments. Upon the invitation of Tsar Alexandr II, an international conference on prohibiting certain projectiles was convened in 1868, resulting in the St. Petersburg Declaration. Soon thereafter, in 1874, it was followed by the Brussels conference, which adopted a declaration on the laws and customs of war, tabled by the Russian Government. Even though the declaration was not ratified by States, it served as the basis for the Hague Conventions.[64] The 1899 and 1907 Hague Conferences were also convened at the invitation of the Russian tsar, Tsar Nicholas II. Not to mention that one of the fundamental principles of IHL – the Martens clause – was named after the Russian diplomat and international lawyer Fyodor Fyodorovich Martens, who played a major role in sculpting the outcome of the previously-mentioned international conferences.

While the nuances of the 19th century processes go beyond the scope of this article, it is however, worth pointing out that tsarist Russia's efforts to further the development of rules for battlefield may have been motivated by more than mere humanitarian concerns.[65] On one hand, it has been suggested that similarly to other States, Russia sought to enhance control over their military forces going through structural changes.[66] On the other hand, tsarist Russia's turn to international law as a mechanism to regulate the means of warfare in general was an endeavour to limit its neighbours growing military strength.[67]

During the Soviet period, Russia changed its course. As Riepl summarizes, the period was tainted with the shadow of the World War II (WWII), which was waged as ideological war by both Stalin and Hitler and had disastrous effects regarding IHL.[68] Secondly, the Soviet ideology did not pay much tribute to law as such. Its

[64] *Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874*, International Humanitarian Law Databases, 27 August 1874, available at: https://ihl-databases.icrc.org/en/ihl-treaties/brussels-decl-1874 (accessed 30 August 2024).

[65] *See generally* L. Mälksoo, *Review of Michael Riepl, Russian Contributions to International Humanitarian Law: A Contrastive Analysis of Russia's Historical Role and Its Current Practice*, 33(3) European Journal of International Law 1025 (2022), pp. 1026–1027.

[66] E. Benvenisti, A. Cohen, *War is Governance: Explaining the Logic of the Laws of War From a Principal-Agent Perspective*, 112(8) Michigan Law Review 1363 (2014), pp. 1384–1388.

[67] E.B. Pashukanis, *Ocherki po mezhdunarodnomy pravu* [Essays on international law], Sovetskoe zakonodatel'stvo, Moscow: 1935, p. 33.

[68] Riepl, *supra* note 17, p. 83.

central focus was on building the communist society, which was primarily focused on the economic architecture of the community.[69] However, it brought along with it the idea of "socialist international law", which was supposed to apply in relations between socialist states[70] and which did not include IHL.[71] IHL thus fell to the "backseat" in the Soviet Union's agenda in general. In addition to the socialist international law concept, IHL was endangered with the "just war" theory that occasionally caught some attention, the crux of which is whether the war is waged for a just cause, which in turn would justify all kinds of means of war.[72]

Coming now to the Soviet Union's contribution to the development of the most important IHL instruments of the 20th century, the Soviet Union played odd cards. Firstly, the Soviets boycotted the preparatory conference of Government Experts that was to prepare for Diplomatic Conference in 1949. However, Soviet Union decided at the last minute to participate in the Diplomatic Conference itself.[73] The rationale for such a change of heart was, as Mantilla suggests, its aim to shame and moralize the Western States for their hypocrisy in not supporting the progressive developments of humanitarian law. Such a strategy had two main goals. The first was to gain "moral credit" in the global struggle for dominance. The second was the possibility to have binding rules to "tame" the strongly militarized Western States, and in doing so to gain some advantage in future armed conflicts,[74] much in line with similar practice of the tsarist Russia discussed above. Both reasonings are also mirrored in the debate for information and communication technologies (ICTs), as will be discussed below (section 3.2).

The substantive contributions of the Soviet Union were, however, noteworthy. Their role was crucial to the inclusion of common Art. 3 of the Geneva Conventions on armed conflicts of a non-international character. As the article was opposed by several other great powers, Soviet support was rendered crucial.[75] The Soviet delegation contributed immensely to the rules on the protection of civilians from indiscriminate acts and to the Fourth Geneva Convention.[76] They also pushed for weapons control with respect to nuclear and chemical weapons. In this instance the hypocrisy of the Soviet position tainted the endeavour – for while the aim was

[69] *Ibidem*.

[70] *Ibidem*, pp. 85–86.

[71] *Ibidem*, pp. 87–88.

[72] *Ibidem*, pp. 91–93.

[73] G. Mantilla, *The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols*, in: M. Evangelista, N. Tannenwald (eds.), *Do the Geneva Conventions Matter?* Oxford University Press, New York: 2017, p. 43.

[74] *Ibidem*, pp. 42–43; *see also* Riepl, *supra* note 17, pp. 118–120.

[75] Mantilla, *supra* note 75, p. 45; Riepl, *supra* note 17, p. 124.

[76] Riepl, *supra* note 17, pp. 121–122.

to delegitimize the use of nuclear weapons by the Western countries, the Soviet Union was itself developing such weapons.[77]

What downgraded these major contributions was the Soviet Union's strong stance on sovereignty. The Soviet Union opposed several enforcement mechanisms, such as empowering the International Committee of the Red Cross (ICRC) with oversight rights or creating a tribunal for war crimes.[78] The Soviet Union followed the same approach for the Additional Protocols – the attempts to strengthen external monitoring mechanism met with opposition of the Soviet Union and its allies and were, ultimately, subordinated to states' consent.[79] As van Dijk put it while commenting on the Soviet approach in 1949:

The Soviets understood, better than most other imperial powers, that they could accept virtually any text as long as it did not infringe upon their sovereign discretion to refuse outside supervision when waging war against anti-Soviet insurgents.[80]

After the dissolution of the Soviet Union, the newly established Russian Federation, as the successor state for the Soviet Union, inherited the IHL treaty obligations,[81] including the Hague declarations, the Geneva Conventions, and the Additional Protocols of 1977. At the same time it has taken a cautious approach towards accession to any new instruments – for example different weapons control treaties, such as the Anti-Personnel Mine Ban Convention; the Convention on Certain Conventional Weapons; the Convention on Cluster Munitions; or the Arms Trade Treaty. Russia has explained its choice to opt out of these Conventions by the lack of viable alternatives and the utility of the weapons,[82] seeing accession as giving up its military advantage,[83] possibly affecting its economic interests,[84] and/or considering the existing IHL framework as sufficient.[85]

Interestingly, the last reasoning has also been used with respect to lethal autonomous weapon systems (LAWS). One would think that the Russian approach to new technologies such as LAWS would evoke a similar approach to cyber capabilities. This however is not the case. In November 2023, the First Committee of the UN

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[77] Mantilla, *supra* note 75, p. 47.

[78] *Ibidem*. *See also* Riepl, *supra* note 17, p. 125.

[79] Mantilla, *supra* note 75, p. 61.

[80] B. van Dijk, *The Great Humanitarian: The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949*, 37(1) Law and History Review February 209 (2019), p. 233.

[81] Note from the Permanent Mission of the Russian Federation in Geneva transmitted to the ICRC on 15 January 1992, available at: https://casebook.icrc.org/print/pdf/node/20794 (accessed 30 August 2024).

[82] Riepl, *supra* note 17, p. 143.

[83] *Ibidem*, pp. 144–145.

[84] *Ibidem*, p. 149. Riepl explains how Russia considered the Arms Trade Treaty a "weak treaty" with drawbacks, and adds that at the same time Russia is the second largest weapons exporter. Though not expressed as such, the economic consideration is evident.

[85] *Ibidem*, p. 147.

General Assembly approved a draft resolution on lethal autonomous weapons, addressing the negative effect that LAWS may have on international security and stability and seeking the views of the states on the "challenges and concerns they raise from humanitarian, legal, security, technological and ethical perspectives and on the role of humans."[86] Russia voted against the draft resolution and took the position that the discussion was neglecting the positive features of such weapon systems, and opposed the development of any legally-binding international instrument as well as a moratorium on developing and using these systems.[87] It has made several efforts to substantiate its claims. In 2020, 2022 and 2023, Russia submitted Working Papers to the GGE, which gave a substantial overview on how Russia implements the rules and principles of IHL in its domestic regulations regarding LAWS.[88]

Considering the compliance mechanisms for IHL, Russia has pursued the approach taken by Soviet Union during the negotiations of the Geneva Conventions and the Additional Protocols, by avoiding the few that have been called to life[89] and/or opting out as soon as there has been any scrutiny towards itself, as was the case with the ICC.[90]

3.2. New domain, old habits

In several of its statements, the Russian delegation has argued that "[D]iscussions in the OEWG have clearly demonstrated that the majority of States do not share the opinion on the full and automatic applicability of existing international legal

[86] Seventy-eight session of the draft resolution on lethal autonomous weapons systems, 12 October 2023, A/C.1/78/L.56.

[87] *First Committee Approves New Resolution on Lethal Autonomous Weapons, as Speaker Warns 'An Algorithm Must Not Be in Full Control of Decisions Involving Killing'*, United Nations, 1 November 2023, available at: https://press.un.org/en/2023/gadis3731.doc.htm. *See also* Potential opportunities and limitations of military uses of lethal autonomous weapons systems, 15 March 2019, CCW/GGE.1/2019/WP.1, available at: https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_Group_of_Governmental_Experts_(2019)/CCW.GGE.1.2019.WP.1_R%2BE.pdf (both accessed 30 August 2024).

[88] National Implementation of the Guiding Principles on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, available at: https://documents.unoda.org/wp-content/uploads/2020/09/Ru-Commentaries-on-GGE-on-LAWS-guiding-principles1.pdf; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 9 August 2022, CCW/GGE.1/2022/WP.9, available at: https://documents.un.org/doc/undoc/gen/g22/446/61/pdf/g2244661.pdf (both accessed 30 August 2024). Concept of Activities of the Armed Forces of the Russian Federation in the Development and Use of Weapons Systems with Artificial Intelligence Technologies, 7 March 2023, CCW/GGE.1/2023/WP.5.

[89] *See* Riepl, *supra* note 17, pp. 157–162.

[90] Rasporâženie Prezidenta Rossijskoj Federacii ot 16.11.2016 No. 361-rp "O namerenii Rossijskoj Federa" [Order of the President of the Russian Federation dated November 16, 2016 No. 361-rp "On the intention of the Russian Federation not to become a party to the Rome Statute of the International Criminal Court"], available at: http://publication.pravo.gov.ru/Document/View/0001201611160018 (accessed 30 August 2024). Russia withdrew its signature just after the Office of the Prosecutor had concluded there is an international armed conflict between Russia and Ukraine, *see Report on Preliminary Examination Activities 2016*, International Criminal Court, Den Haag 2016, para. 158.

norms to the use of ICTs"[91], and that there is a need to move from voluntary, non-binding rules, norms and principles towards binding rules.[92] In addition to its general state-centrist approach to law-making and its aim to ensure its status as a decision-maker, the previously laid out patterns from history can shed some light on why IHL has become as one of the central issues of divergences.

Considering the rhetoric of the statements made by Russia where it claims to protect the interests of the broader community of states and general international order, the chosen approach can be considered motivated by the possibility to gain, once again, "moral credit". Similarly to the 1949 Soviet Union's rhetoric in Geneva, the Russian Federation today also refers to the hypocrisy of the West for not being willing to agree upon new binding rules. Western states' opposition to a legally binding instrument is depicted as an endeavour to preserve the voluntary nature of rules and norms discussed under the auspices of the UN in order "to keep their hands free in information space."[93] Such scene-setting is also in line with the general appeal towards the Global South, a part of Russia's foreign policy which is discussed in section 2.

Russia has accused the West also for expecting "to take on the role of arbitrators and, in the best traditions of Orwell's ministries of truth and peace, to appoint those responsible for the illegal use of ICTs on a "highly likely" basis."[94] This brings into

[91] Statement by the representative of the Russian Federation at the informal intersessional meeting of the Open-ended Working Group on Security of and in the Use of ICTs 2021-2025, 7 December 2022, available at: https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Russia_-_statement_on_international_law_-_OEWG_intersessionals_07.12.2022.pdf. *See also* Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, NY 10065, 7 March 2023, available at: https://tinyurl.com/mtw652m3; and Statement by the Russian Interagency delegation at the Fifth Session of the UN Open-ended Working Group on Security of and in the Use of ICTS 2021–2025, NY 10065, 25 July 2023, available at: https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Russia_-_OEWG_ICT_security_-_statement_-_CB_25.07.2023_-_ENG.pdf (all accessed 30 August 2024).

[92] Statement by Head of the Russian Interagency Delegation to the First Substantive Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, Deputy Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Dr. Vladimir Shin, NY 10065, 13 December 2021, available at: https://documents.unoda.org/wp-content/uploads/2021/12/Russia-statements-OEWG-13-17.12.2021-Eng.pdf (accessed 30 August 2024).

[93] Statement by the representative of the Russian Federation at the informal intersessional meeting of the Open-ended Working Group on Security of and in the Use of ICTs 2021–2025, 8 December 2022, available at: https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Russia_-_statement_on_rules_norms_and_principles_-_OEWG_intersessionals_08.12.2022.pdf. *See* Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, NY 10065, 7 March 2023, available at: https://tinyurl.com/mtw652m3 (both accessed 30 August 2024).

[94] Statement on Behalf of Mr. Artur Lyukmanov, Director of the Department of International Information Security of the MFA Of Russia, at the Fifth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, NY 10065, 24 July 2023, available at: https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Russia_-_OEWG_ICT_security_-_statement_by_A.Lyukmanov_24.07.2023_-_ENG.pdf (accessed 30 August 2024).

focus also the question of attribution, where Russia deems it necessary to prove and substantiate any attribution of an internationally wrongful act in or through the ICT environment with "undisputable technical facts."[95] If it follows the example of the IHL compliance mechanisms, it is however unlikely that Russia would subject itself to the jurisdiction of such an institution, even if it would agree upon with the creation of it. The goal would rather be to subjugate others to a control mechanism, but preserve its sovereign freedom, following the pattern of the Soviet Union as discussed in the previous section.

Secondly, the situation could be considered similar insofar as regards the perception of a "militarized West" and the need to gain additional advantage for future conflicts, as was the case with both Tsarist Russia and the Soviet Union. More and more states have established cyber commands.[96] Western states with considerable military power are also well known for their cyber capabilities. Additionally, a great proportion of tech giants are located in the US.[97] Even though Russia is highly active in conducting cyber activities itself in and through cyberspace, and the absence of specific rules would be assumably beneficial to it, its strength is in "unpeace"[98] capabilities – cyber activities that *do not* reach the threshold of use of force and take place mainly outside of an armed conflict. Therefore, the ambition to set binding rules may be a pragmatic calculation to enhance its position in the "cyber battlefield" through fixing the "rules of the game" for its adversaries, while not necessarily considering those rules to be binding on itself. This is all the more likely when considering that, similarly to attribution, Russia is likely to carry on the approach of asserting its "sovereign discretion to refuse outside supervision", as concluded by van Dijk.[99]

[95] Statement by Head of the Russian Interagency Delegation to the First Substantive Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, Deputy Director of the Department of International Information Security of the Ministry of Foreign Affairs of the Russian Federation Dr. Vladimir Shin, NY 10065, 13 December 2021, available at: https://documents.unoda.org/wp-content/uploads/2021/12/Russia-statements-OEWG-13-17.12.2021-Eng.pdf. *See also* Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, NY 10065, 7 March 2023, available at: https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/ENG_Russian_statement_How_international_law_applies.pdf (both accessed 30 August 2024).

[96] In 2018, at least 61 nations had established a military cyber force, *see* J. Blessing, *The Global Spread of Cyber Forces, 2000–2018*, in: T. Jančárková, L. Lindström, G. Visky, P. Zotz (eds.), *13th International Conference on Cyber Conflict Going Viral*, NATO CCDCOE Publications, Tallinn: 2021, pp. 233–255.

[97] *E.g.* the five tech-giants Google, Amazon, Facebook, Apple, and Microsoft are US-based companies. The same goes for SpaceX, a company that offered Ukraine internet connection for a period after the Russian aggression against Ukraine, *see* F. Schwaller, *Starlink is crucial to Ukraine – here's why*, Deutsche Welle, 14 October 2022, available at: https://www.dw.com/en/starlink-is-crucial-to-ukrainian-defense-heres-how-it-works/a-63443808 (accessed 30 August 2024).

[98] "Unpeace" is here used as introduced by Lucas Kello "the new range of rivalrous activity that falls between the binary notions of war and peace, which together do not adequately capture the full spectrum of cyber activity". *See* L. Kello, *The Virtual Weapon and International Order*, Yale University Press, New Haven: 2017.

[99] *Ibidem*, p. 14.

Insofar as regards the applicability of the rules of IHL to states activities in the ICT environment, the Russian delegation has argued that "there is no consensus within the international community on the qualification of malicious use of ICTs as armed attack according to Article 51 of the Charter of the United Nations. Therefore, there is no ground to assess the legality of the use of ICTs from the point of view of international humanitarian law."[100] However, it should be pointed out that the applicability of IHL and the classification of a conduct as a prohibited "threat or use of force" or an "armed attack" under the UN Charter are legally distinct questions, falling in separate categories of *jus in bello* and *jus ad bellum*. This occasional blending of *ius ad bellum* and *ius in bello* can be seen as slipping back to the "just war" concept, promoted to a degree by the Soviet Union. IHL applicability is triggered whenever an armed conflict takes place. In the case of an international armed conflict (IAC), this means whenever there is a resort to armed force between States.[101] Therefore, it must be established whether armed force in the meaning of common article 2 of the Geneva Conventions is used. It is under discussion whether a cyber operation alone could amount to such armed force. However, an armed conflict can be established using traditional kinetic operations, which then may be accompanied by cyber operations.

Therefore, Russia's past endeavours in IHL reveal certain plausible patterns and motives of Russia's international law-making, patterns and motives that are more linked to fortifying its own position regarding possible conflict than with a mere positivist approach to international law. The latter in turn helps to untangle its controversial claims and deeds when it comes to IHL and cyberspace.

CONCLUSIONS

Russia's considerable efforts in advocating a binding instrument for States' conduct in cyberspace confirms the importance of the domain for Russia and how Russia sees its potential effect on inter-state relations and modern warfare. It treats the questions that have arisen in the debate on regulating cyberspace as part of a broader

[100] Statement by the representative of the Russian Federation at the informal intersessional meeting of the Open-ended Working Group on Security of and in the Use of ICTs 2021-2025, 7 December 2022, available at: https://docs-library.unoda.org/Open-Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Russia_-_statement_on_international_law_-_OEWG_intersessionals_07.12.2022.pdf. The same wording was used in a Statement by the Representative of the Russian Federation at the Fourth Session of the UN Open-Ended Working Group on Security of and in the Use of ICTS 2021–2025, NY 10065, 7 March 2023, available at: https://tinyurl.com/mtw652m3 (both accessed 30 August 2024).

[101] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 Octobre 1995, para. 70, available at: https://www.icty.org/x/cases/tadic/acdec/en/51002.htm; *Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949*, Unternational Humanitarian Law Databases, commentary on Article 2, para. 218, available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-2/commentary/2020 (both accessed 30 August 2024).

political-philosophical debate on international law and a matter of enforcing the power structure established after WWII. Therefore, its position on the need for a new binding instrument can be explained by its approaches to international law-making in general and its need to assert its position as a decisive authority in the agreement on rules. Agreement with the currently dominant view that international law applies in its entirety, and that instead of a new treaty there is a need to agree on the interpretations of the existing norms, would mean consenting to opening the debate up to non-state actors and informal forums. Furthermore, arguing fiercely for new rules for cyberspace fits into the general paradigm of confrontation between Western exceptionalism and Russia's promotion of international law.

Russia's active use of cyber means in its aggressive war against Ukraine, combined with the fact that the draft concepts it has tabled at the UN are missing suggestions on IHL, rather plainly demonstrate the insincerity of its claims on the need for new rules on the use of cyber means in times of war. Rather, such calls can be explained through law-making patterns known from Soviet Unions' historic experience in the field of IHL. Therefore, instead of heading back towards the progressive development of IHL, which the tsarist Russian Empire is often remembered for, the modern Russian Federation has rather turned to the playbook of the Soviet Union.

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PROSECUTING INDIVIDUALS FOR ENVIRONMENTAL HARM IN THE ARMED CONFLICT BETWEEN RUSSIA AND UKRAINE: THE CASE OF DESTRUCTION OF THE KAKHOVKA DAM

Abstract: *The ongoing conflict between Russia and Ukraine has caused serious harm to the environment, resulting in the destruction of ecosystems, a reduction in biodiversity, and damage to natural reserves and protected ecosystems. This type of damage may fall under the jurisdiction of both the International Criminal Court (ICC) under Art. 8(2)(b)(iv) of the ICC Statute regarding war crimes and the Ukrainian domestic courts under Art. 441 of the Criminal Code of Ukraine (CCU) regarding ecocide. However, while Ukrainian domestic judicial authorities are already conducting investigations under Art. 441 CCU, the prosecution by the ICC for environmental damage should satisfy the high threshold imposed by Art. 8(2)(b)(iv) of the ICC Statute. It would be interesting to see whether the ICC Prosecutor will initiate an investigation into the Kakhovka dam bombing, just like Ukrainian domestic authorities have already done.*

Keywords: armed conflict, International Criminal Court, ecocide, environmental harm, armed aggression against Ukraine

INTRODUCTION

With its high diversity of habitats and species, Ukraine is often referred to as the "Green Heart of Europe".[1] Consequently, since the Revolution of 2014 Ukraine has

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[1] *WWF-CEE Statement Regarding Kakhovka Dam Destruction in Ukraine*, WWF, 9 June 2023, available at: https://www.wwfcee.org/news/wwf-cee-statement-regarding-kakhovka-dam-destruction-in-ukraine (accessed 30 August 2024).

intensified its efforts to address environmental challenges. The country has taken numerous steps to restore and preserve its natural capital, integrate environmental concerns into economic development, and accelerate the transition towards a green and low-carbon economy.

These steps align with Ukraine's commitment to international environmental obligations. Over the years, it has ratified numerous international conventions on this matter, including the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques in 1978 (ENMOD Convention);[2] the Convention on Biological Diversity in 1995;[3] the UN Framework Convention on Climate Change in 1997;[4] the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal in 1999;[5] as well as many others. All these instruments have become part of Ukraine's national legislation pursuant to Art. 9(1) of the Constitution of Ukraine adopted in 1996.[6]

Such progresses have been undermined since the start of the aggression by Russia on 24 February 2022. As recognized by the International Law Commission, "environmental consequences of armed conflicts may be severe and have the potential to exacerbate global environmental challenges, such as climate change and biodiversity loss."[7] In fact, alongside human lives, the environment has also become a silent victim of the war.[8] As of 18 December 2023, the Ukrainian Ministry of Environmental Protection and Natural Resources' EcoZagroza platform claimed to have verified 2643 reports of alleged environmental crimes by the Russian Federation occupiers since the start of the conflict.[9] These crimes primarily involve the chemical pollution of soil and water, leading to longer-term health threats, destruction of ecosystems, reduction of biodiversity, and damage to natural reserves and protected ecosystems, through both the direct impact of the armed activities as well as the

[2] Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (adopted 10 December 1976, entered into force 5 October 1978), 1108 UNTS 151.

[3] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993), 1760 UNTS 79.

[4] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994), 1771 UNTS 107.

[5] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992), 1673 UNTS 57.

[6] Art. 9(1) of Constitution of Ukraine (The Official Bulletin of the Verkhovna Rada of Ukraine (BVR), 1996, No. 30, Article 141) available at: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text (accessed 30 August 2024).

[7] Draft principles on protection of the environment in relation to armed conflicts, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf (accessed 30 August 2024).

[8] *Cf.* S.O. Kharytonov, R.S. Orlovskyi, O. V, T.V. Kurman, O.O. Maslova, *Criminal Legal Protection of the Environment: National Realities and International Standards*, 32(6) European Energy and Environmental Law Review 283 (2023), pp. 283–292.

[9] *See* EcoZagroza, available at: https://ecozagroza.gov.ua/en (accessed 30 August 2024).

increase in waste.[10] Twenty percent of all nature conservation areas in Ukraine have been affected by the war, and due to damage to the water supply infrastructure, an estimated 1.4 million people currently have no access to safe water. Numerous online platforms provide information on environmental harm and hazards resulting from the conflict. Some, like SaveEcoBot,[11] enable users to report instances of environmental damage or suspected environmental crimes.

Moreover, as highlighted recently by the United Nations Office for the Coordination of Humanitarian Affairs, Ukraine is now one of the most mined countries in the world. In territories no longer occupied by Russian troops, experts from the country's emergency services are defusing hundreds of mines daily. This situation also pertains to the Chernobyl Nuclear Power Plant landmines,[12] which are regularly triggered by wild animals, causing forest fires with a significant risk of increasing the radiation background in the Kyiv region.

Individuals accountable for environmental crimes can face prosecution in both international jurisdictions and national criminal jurisdictions within those States provided with jurisdiction. This article examines these legal avenues in the context of the ongoing armed conflict between Russia and Ukraine, with specific regard to the alleged bombing of the Kakhovka hydroelectric dam which occurred on 6 June 2023.

1. INTERNATIONAL JURISDICTION OVER ENVIRONMENTAL HARM IN UKRAINE

Ukraine has ratified the International Criminal Court (ICC) Statute only on 21 August 2024 with law No. 3909-IX.[13] However, it had accepted the jurisdiction of the Court beforehand under Art. 12(3) of the ICC Statute via two declarations deposited respectively on 9 April 2014 concerning any crimes committed on Ukrainian territory between 21 November 2013 and 22 February 2014; as well as on 8 September 2014 regarding all those potentially committed from 20 February 2014, onwards.[14] As a consequence, the ICC opened a criminal proceeding over

[10] J. Zhou, I. Anthony, *Environmental Accountability, Justice and Reconstruction in the Russian War on Ukraine*, Stockholm International Peace Research Institute, 25 January 2023, available at: https://www.sipri.org/commentary/topical-backgrounder/2023/environmental-accountability-justice-and-reconstruction-russian-war-ukraine (accessed 30 August 2024); M. Medvedieva, *Russia's Military Aggression and Damage to Ukraine's Environment*, 2 Ukrainian Journal of International Law 106 (2022), pp. 106–109.

[11] *War crimes against the environment of Ukraine*, SaveEcoBot, available at: https://www.saveecobot.com/en/features/environmental-crimes (accessed 30 August 2024).

[12] On the protection of power plants, *see* E. Weinthal, C. Bruch, *Protecting Nuclear Power Plants during War: Implications from Ukraine*, 53(4) Environmental Law Reporter 10285 (2023), p. 10285.

[13] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3. The text of the law No. 3909-IX is available only in Ukrainian at: https://zakon.rada.gov.ua/laws/show/3909-IX#Text (accessed 30 August 2024).

[14] Declaration No. 61219/35-673-984, Hague, 9 April 2014, available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf

the situation in Ukraine, namely for crimes committed in Ukraine during the invasion by Russia.[15] Within this proceeding, six arrest warrants have already been issued. The first two were delivered on 17 March 2023 against Russian President Vladimir Putin and Russian Commissioner for Children's Rights Maria Lvova-Belova, both charged with the deportation and forced transfer of minors from occupied territories under Arts. 8(2)(a)(vii) and 8(2)(b)(viii) of the ICC Statute.[16] The last two arrest warrants were issued more recently, namely on 25 June 2024, against Sergei Kuzhugetovich Shoigu, Minister of Defence of the Russian Federation at the time of the alleged conduct, and Valery Vasilyevich Gerasimov, Chief of the General Staff of the Russian Federation's Armed Forces, and First Deputy Minister of Defence of the Russian Federation. According to the Pre-Trial Chamber II, there are reasonable grounds to believe that both individuals bear individual criminal responsibility for the war crime of directing attacks against civilian objects (art. 8(2)(b)(ii) of the ICC Statute), the war crime of causing excessive incidental harm to civilians or damage to civilian objects (art. 8(2)(b)(iv) of the ICC Statute) and the crime against humanity of inhumane acts under article 7(1)(k) of the ICC Statute.[17]

Even though there is an open investigation over the situation in Ukraine, no individual action has yet been taken with regard to crimes committed against the environment. However, a few rules of the ICC Statute may well constitute a basis for prosecution of the environmental harms.[18] In particular, Arts. 6(b) and 6(c)

(accessed 30 August 2024); Declaration No. 145-VIII, Hague, 8 September 2014, available at: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf (accessed 30 August 2024).

[15] *Statement of ICC Prosecutor, Karim A.A. Khan QC, following the arrest and transfer of a fourth suspect in the Situation of the Central African Republic*, International Criminal Court, 18 March 2022, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-following-arrest-and-transfer-fourth-suspect (accessed 30 August 2024).

[16] *Statement by Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants against President Vladimir Putin and Ms Maria Lvova-Belova*, International Criminal Court, 17 March 2023, available at: https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin (accessed 30 August 2024); G. della Morte, *I mandati di arresto della Corte penale internazionale nei confronti del Presidente della Federazione russa e del Commissario per i diritti dei fanciulli*, 3 Rivista di diritto internazionale 723 (2023), pp. 723–746; J.J. Sarkin, *Will the International Criminal Court (ICC) Be Able to Secure the Arrest of Vladimir Putin When He Travels?*, 12(1) International Human Rights Law Review 26 (2023).

[17] *Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov*, International Criminal Court, 5 March 2024, available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and (accessed 30 August 2024); F. Capone, *The Wave of Russian Attacks on Ukraine's Power Infrastructures: An Opportunity to Infuse Meaningfulness into the Notion of 'Dual-use Objects'?*, 8(2) European Papers 741 (2023), pp. 741–754; *Statement by Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants in the Situation in Ukraine*, International Criminal Court, 25 June 2024, available at: https://www.icc-cpi.int/news/statement-prosecutor-karim-aa-khan-kc-issuance-arrest-warrants-situation-ukraine-0 (accessed 30 August 2024).

[18] Historical instances of environmental prosecutions can be traced back to the activity of the Nuremberg tribunal. Art. 6(2)(b) of the Nuremberg Charter classified "wanton destruction of cities, towns, or villages,

regarding the crime of genocide; Arts. 7(1)(a), 7(1)(b) and 7(1)(k), regarding crimes against humanity; and most importantly, Art. 8(2)(b)(iv) regarding war crimes are all relevant for this purpose.[19] Provisions on genocide and crimes against humanity do not expressly mention the environment. Nevertheless, it is important to consider them within the present analysis since these crimes can also be committed through environmental destruction. In such instances the environment serves as a tool for inflicting harm on individuals or groups of individuals. Therefore, this analysis will mainly focus on war crimes, which expressly include crimes against the environment.

As mentioned above, environmental harm could potentially meet the elements of specific acts of genocide, such as those provided for in Art. 6(b) and (c) of the ICC Statute, dealing respectively with acts "causing serious bodily or mental harm to members of the group"; as well as with acts "deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part." Concerning the provision outlined in Art. 6(b) of the ICC Statute, environmental destruction can inflict significant harm on communities whose ways of life, cultural practices, and means of sustenance are deeply intertwined with their natural environment. On the other hand, the ICC Elements of Crimes states that with regard to Art. 6(c) of the ICC Statute inflicting conditions of life calculated to bring about the physical destruction of a group in whole or in part "may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes."[20] Besides one of these material elements (*actus reus*), the prosecution of genocide also requires the "specific intent (*dolus specialis*) to destroy, in whole or in part, the targeted group as such." This requirement is particularly difficult to meet and establish, which is the reason why the ICC has never yet convicted anybody for this charge. This deadlock within the ICC may however change in the future, considering that the arrest warrant issued for Omar Al-Bashir also alleges genocide as a consequence of environmental harm; namely of the contamination of the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups which his armed forces attacked.[21]

Secondly, environmental harm may also constitute a crime against humanity if it consists of one of the acts listed in Art. 7 of the ICC Statute and is "committed

or devastation not justified by military necessity" as a war crime. In fact, under this rule the IMT convicted the German General Alfred Jödl for implementing scorched-earth policies in Norway and Russia. *See* Nuremberg Trial Proceedings vol. 22, 30 September 1946, Art. 517, available at: https://avalon.law.yale.edu/imt/09-30-46.asp (accessed 30 August 2024).

[19] *See* M. Gillett, *Prosecuting Environmental Harm before the International Criminal Court*, Cambridge University Press, Cambridge: 2022, pp. 53–133.

[20] *Elements of Crimes*, International Criminal Court, Hague: 2013, Art. 6(c), footnote 4, available at: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf (accessed 30 August 2024).

[21] Case information sheet of the ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09, available at: https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/AlBashirEng.pdf (accessed 30 August 2024).

as part of a widespread or systematic attack against a civilian population, with knowledge of the attack."[22] Relevant underlying acts include: murder under Art. 7(1)(a) of the ICC Statute, due to unlawful chemical usage or improper storage, for instance; extermination under Art. 7(1)(b) of the ICC Statute, perpetrated through environmental destruction for example; and other inhumane acts "intentionally causing great suffering, or serious injury to body or to mental or physical health" under Art. 7(1)(k) of the ICC Statute, such as gross toxic emissions for instance.

Finally, and most importantly, environmental harm is expressly mentioned by Art. 8(b)(iv) of the ICC Statute regarding war crimes.[23] Such a rule criminalizes the intentional launching of an attack with knowledge that such attack will cause widespread, long-term, and severe damage to the natural environment, in a manner not proportionate to the concrete and direct overall military advantage. Contrary to the other options for the prosecution of the environmental harm, Art. 8(b)(iv) of the ICC Statute does not require damage to human lives, as the object of its protection is the environment as such. One of the main elements of this crime is that the conduct has been perpetrated in the context of an armed conflict,[24] and "in particular (...) as part of a plan or policy or as part of a large-scale commission of such crimes" (Art. 8(1) of the ICC Statute). According to Pre-Trial Chamber II, the use of the term "in particular" clarifies that the Court is not mandated to establish the existence of such a plan, policy, or large-scale commission as a prerequisite for exercising jurisdiction over war crimes. Instead, this condition serves as a "practical guideline".[25] Therefore, a single act could be considered a war crime within the Court's jurisdiction if committed in the context of and associated with an armed conflict.[26]

Other conditions provided by the rule find no definition – neither within the Court case law nor in other pertinent instruments. However, there are similar norms in international law, which may be very useful for the interpretation of the terms used by the ICC Statute, and which the ICC shall apply pursuant to Art. 21(1)(b) of the ICC Statute concerning the applicable law. First, Arts. 35(3) and 55 of the Additional Protocol I to Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, adopted in 1977 (API),[27] are relevant for this purpose. On the one

[22] Art. 7(1) of the Rome Statute.

[23] For a comment, *see* K.J. Heller, J.C. Lawrence, *The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime*, 20 Georgetown International Environmental Law Review 1 (2007).

[24] *Elements of Crimes*..., *supra* note 20, Art. 8, Introduction.

[25] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 211; ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 896.

[26] Decision on the confirmation of charges to ICC, *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-465-Red, 16 December 2011, para. 94.

[27] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3.

hand, Art. 35(3) API states that "[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." On the other hand, Art. 55 API provides that: "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage (...)."[28] Secondly, Art. I(1) of the ENMOD Convention, which is designed to address the use of environmental modification techniques as a means of war, provides that "[e]ach State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."[29] While the API is aimed at protecting the natural environment against damage which could be inflicted by any weapon, the ENMOD Convention is directed at preventing the use of environmental modification techniques as a method of warfare.[30] Moreover, ENMOD Convention has a wider application than the API, both in terms of the nature of its requirements and of their interpretation. In fact, while the conditions imposed by the API are cumulative – just like those set forth by Art. 8(b)(iv) of the ICC Statute – the criteria imposed by the ENMOD Convention are alternative, which means that it is sufficient for one or another of these conditions to be fulfilled for the situation to fall under the prohibition provided therein.

As to the specific interpretation of Art. 8(b)(iv) of the ICC Statute, in order to constitute a war crime, the environmental harm must be caused by a specific *actus reus*, namely by an armed attack – not necessarily conducted against the environment as such – causing "widespread, long-term and severe damage to the natural environment." Under the ENMOD Convention, the damage is "widespread" when its geographical scope is of several hundred square kilometers. It is "long-term" when the duration of the negative effects on the environment continues for several months, or approximately a season. Lastly, it is "severe" when it is of such intensity to go beyond the normal military damage.[31] In contrast, under the API the phrase "long-term" was understood by the adopting States to mean decades,[32] which sets a higher threshold to meet.[33]

[28] For a comment, *see* M. Gillett, *Criminalizing Reprisals against the Natural Environment*, 105(924) International Review of the Red Cross 1463 (2023).

[29] J. Lawrence, *Negotiating a Treaty on Environmental Modification Warfare: The Convention on Environmental Warfare and Its Impact upon Arms Control Negotiations*, 32(4) International Organization 975 (1978).

[30] V. Morris, *Protection of the Environment in Wartime: The United Nations General Assembly Considers the Need for a New Convention*, 27(3) International Lawyer 775 (1993).

[31] These Understandings are not incorporated into the Convention but are part of the negotiating record and were included in the report transmitted by the Conference of the Committee on Disarmament to the United Nations General Assembly in September 1976. *See* UNGA, *Report of the Conference of the Committee on Disarmament*, 1 January 1976, A/31/27, pp. 91–92.

[32] Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva: 1987, para. 1452; J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law. Vol. I: Rules*, Cambridge University Press, Cambridge: 2005, p. 151.

[33] Heller, Lawrence, *supra* note 23, p. 15.

Arts. 35 and 55 API seem to be more suitable for the interpretation of Art. 8(b)(iv) of the ICC Statute, as they better reflect the conditions provided therein. Moreover, the ENMOD Convention has not acquired the status of customary international law.[34] In fact, as provided by the Understanding concerning Art. 1 of the ENMOD Convention, "(...) the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connection with any other international agreement."

The prosecution under Art. 8 also depends on the capacity of the Prosecutor to provide evidence of the required *mens rea*. As set forth by the rule, the attack must be launched "intentionally"; the perpetrator must know that the anticipated environmental harm will be widespread, long-term, and severe; and the damage must be clearly excessive in relation to the concrete and direct overall military advantage anticipated from the information known to the perpetrator at the time. These elements can be difficult to meet.

In particular, the most challenging part of such requirements relates to the proportionality test required by the final clause of the rule under discussion, to be interpreted in light of Arts. 51(5)(b) and 85(3)(b) API as the "proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict."[35] According to the ICC Elements of Crimes, a crime arises when the damage to the environment is of such an extent as to be clearly excessive in relation to the foreseeable military advantage by the perpetrator at the relevant time, thus possibly referring to an advantage temporally or geographically related to the object of the attack.[36] The ICC Prosecutor adopted a restrictive approach in this regard, arguing that the intent of the drafters was "that a value judgment within a reasonable margin of appreciation should not be criminalized, nor second guessed by the Court based on hindsight."[37] Hence, the inclusion of the proportionality test, along with the other requirements of Art. 8 of the ICC Statute, tends to reduce the possibilities of its application to real-life cases of the environmental harm. For these reasons, some scholars argue that the ICC "might not be the most effective way to sanction" environmental war crimes.[38]

However, the ICC Elements of Crimes also envisages that "[t]he fact that this crime admits the possibility of lawful incidental injury and collateral damage does

[34] Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge: 2016, p. 247.

[35] W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford: 2016, p. 265.

[36] *Elements of Crimes*..., *supra* note 20, Art. 8(2)(b)(iv), fn 36.

[37] *Situation on Registered Vessels of Comoros, Greece and Cambodia. Article 53(1) Report*, Office of the Prosecutor, Hague: 2014, para. 103.

[38] M. Drumbl, *Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes*, 22 Fordham International Law Journal 122 (1998).

not in any way justify any violation of the law applicable in armed conflict."[39] This last notion encompasses not only customary international law, defined as "rules of international law" by Art. 21(1)(b) of the ICC Statute, but also principles of international law.[40] The necessity to abide by customary rules and principles of international humanitarian law entails the application, in this context, of Rule 44 of the Rules of customary international humanitarian law by the International Committee of the Red Cross of 2005 concerning the "Due regard for the natural environment in military operations."[41] This rule requires that "(...) [i]n the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment (...)." This means that States have a *due diligence* obligation to prevent environmental damages when planning and perpetrating an attack. As the potential effect of an attack on the environment is to be assessed during its planning, the "precautionary principle" may appear to be quite relevant in the evaluation of the proportionality of such attack with due regard to its collateral damage.[42] As a consequence, the ICC might need to analyze whether the accused could have obtained the same military advantage through a military operation with lower collateral damages.

Be that as it may, among the criteria on case selection and prioritization the Office of the Prosecutor (OTP) "give[s] particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment."[43] In cases not selected, "[t]he Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law (...) the destruction of the environment."[44]

2. UKRAINIAN JURISDICTION OVER ENVIRONMENTAL HARM IN UKRAINE

Most importantly, Ukraine has the primary jurisdiction over international crimes committed on its territory. Such jurisdiction, together with its accompanying obligations, falls upon the State parties derived from the complementarity principle set forth in Arts. 1 and 17 of the ICC Statute. According to this principle, "it is the duty of every State to exercise its criminal jurisdiction over those responsible

[39] *Elements of Crimes*..., *supra* note 20, Art. 8(2)(b)(iv), fn 36.

[40] O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden: 1999, p. 707.

[41] Henckaerts, Doswald-Beck, *supra* note 32, p. 147.

[42] M. Bothe, *Precaution in International Environmental Law and Precautions in the Law of Armed Conflict*, 10(1) Goettingen Journal of International Law 267 (2020).

[43] *Policy Paper on Case Selection and Prioritisation*, Office of the Prosecutor, Hague: 2016, para. 41.

[44] *Ibidem*, para. 7.

for international crimes."[45] Thus, during the decision on the admissibility of the case, the ICC shall consider whether the case is being investigated or prosecuted by a willing and able State invested with jurisdiction over the same person and the same incrimination, as envisaged by Art. 17 of the ICC Statute.

Ukrainian jurisdiction also stems from international humanitarian law as such; namely from both its customary rules[46] and from the Geneva Conventions of 1949 (GC) and the API of 1977, to which Ukraine is party.[47] Accordingly, States parties shall bring those responsible of grave breaches of Geneva Conventions before their own courts, or hand them over for trial to another State which has made out a *prima facie* case (*aut dedere aut judicare*) under Art. 49 I GC,[48] Art. 50 II GC,[49] Art. 129 III GC,[50] Art. 146 IV GC[51] and Art. 85(1) API. These rules also introduce the obligation of criminalization of grave breaches of the Geneva Conventions and their additional Protocols. The same is true with regard to violations of the Hague Convention for the protection of cultural property in the event of armed conflict, adopted in 1954[52]; pursuant to Art. 28 of the Ottawa Convention on anti-personnel mines adopted in 1997[53]; pursuant to Art. 9 of the Convention on biological weapons adopted in 1972[54]; and pursuant to Art. IV and Art VIII.1 of the Convention on the prohibition of chemical weapons adopted in 1992[55]. Ukraine ratified all these instruments, either as a federated State of the Ukrainian Soviet Socialist Republic, or as an independent country since

[45] *See* the Rome Statute, Preamble.

[46] *See* Rule 158 of the Rules of customary international humanitarian law by the International Committee of the Red Cross of 2005: "States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects" (Henckaerts, Doswald-Beck, *supra* note 32, p. 607).

[47] For the ratification status, *see* Protocol additional to the Geneva Conventions of 12 August 1949..., *supra* note 27.

[48] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 31.

[49] Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 85.

[50] Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 135.

[51] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287.

[52] 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 216.

[53] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999), 2056 UNTS 211.

[54] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) and Toxin Weapons and on Their Destruction (adopted 10 April 1972, entered into force 26 March 1975), 1015 UNTS 165.

[55] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992, entered into force 29 April 1997), 1975 UNTS 469.

24 August 1991. Moreover, the competence to prosecute foreigners responsible for international crimes is also envisaged in the Ukrainian legal framework – similarly as in those of other States – under the principle of territorial sovereignty. As stated by Art. 6 of the Criminal Code of Ukraine (CCU)[56] on the applicability of the law on criminal liability regarding crimes committed on the territory of Ukraine, any person who has committed a crime on the territory of Ukraine shall be criminally liable under this Code.

As to the Ukrainian jurisdiction *ratione materiae*, the CCU provides for a wide regulation of international crimes. In May 2021, the Ukrainian Parliament passed legislation (Bill 2689) aimed at aligning Ukrainian law more closely with international humanitarian law. This initiative facilitates the Ukrainian authorities' ability to investigate and prosecute violations of international humanitarian law within the country. Additionally, it addresses deficiencies in current national legislation that have hindered the prosecution of international crimes occurring on Ukrainian territory. Currently, the relevant rules are Art. 436 regarding war propaganda; Art. 437 regarding the planning, preparation, and waging of aggressive war; Art. 438 regarding violation of the rules of the warfare; Art. 441 regarding ecocide; and Art. 442 regarding genocide.

In order to better deal with international crimes committed in Ukraine, its authorities have launched an online platform[57] to systematically record war crimes and crimes against humanity perpetrated by the Russian army. The platform encourages individuals who have witnessed international crimes to share videos, photographs, and other pertinent information. The gathered evidence is intended to be used in proceedings against those allegedly responsible for the most heinous international crimes, both in Ukrainian courts and before the ICC. As of 29 September 2023, officials from the Ukrainian Office of the Prosecutor General report that they have documented more than 122,000 potential war crimes attributed to Russian forces.[58]

To specifically address environmental crimes, such conduct may be prosecuted in Ukraine both as ordinary crimes pursuant to the Chapter VIII of the CCU[59] and as criminal offenses against the peace, security of mankind and international legal order under the Chapter XX of the CCU.

As to the crimes under the Chapter VIII of the CCU, their prosecution best fit conduct and actions perpetrated in times of peace, and normally have limited

[56] Criminal Code of the Republic of Ukraine, No. 2314-III, 1 September 2001, Art. 6, available at: https://sherloc.unodc.org/cld/uploads/res/document/ukr/2001/criminal-code-of-the-republic-of-ukraine-en_html/Ukraine_Criminal_Code_as_of_2010_EN.pdf (accessed 30 August 2024).

[57] *See* WarCrimes, available at: www.warcrimes.gov.ua (accessed 30 August 2024).

[58] *Ukraine Probing Over 122,000 Suspected War Crimes, Says Prosecutor*, Reuters, 23 February 2024, available at: https://t.ly/1sdJm (accessed 30 August 2024).

[59] *See* Kharytonov, Orlovskyi, Kurman, Maslova, *supra* note 8, p. 285.

consequences and low penalties.[60] On the other hand, insofar as concerns criminal offenses against the peace, security of mankind, and international legal order we may find two different options for the prosecution of conduct damaging to the environment.

First of all, Art. 438 CCU targets, among other conducts, any other violations of the rules of the warfare provided by international treaties, ratified by the Verkhovna Rada of Ukraine and providing for a term of eight to twelve years of imprisonment. Given that the armed conflict in Ukraine is of an international nature,[61] Arts. 35(3) and 55 API, analyzed above, are applicable in this context.[62]

Therefore, through the blanket reference of Art. 438 CCU to Arts. 35(3) and 55 API, conduct damaging to the environment can be punished under Ukrainian law. Such an assumption is confirmed by sentences already handed down under Art. 438 CCU. Actually, in all the cases of war crimes brought before Ukrainian judicial authorities within the context of the ongoing armed conflict, the accused persons were charged under Art. 438 CCU, mainly for unlawful killing of civilians. Moreover, in some cases the crime was ascertained in connection with the violation of international obligations, as provided by the second paragraph of Art. 438 CCU. This is what happened, for instance, in Judgment No. 760/10742/22 issued on 25 August 2022 by the Criminal Tribunal of Solomiansk.[63] In this decision a deputy to the platoon commander of the Russian armed forces was found guilty of conduct in violation of the prohibition of corporal punishment, torture, etc. under Art. 32 of the IV GC, namely for hooding, handcuffing, stripping, and beating three Ukrainian civilians in the village of Lubyanka (Bucha) on 10 March 2022.

3. ECOCIDE

Invoking the violation of relevant international humanitarian law rules may be not the only option for punishing those responsible for environmental harm. A second option involves verifying whether the crime of ecocide can be introduced in international criminal law, and whether it already exists under Ukrainian law.

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[60] With the exception of destruction or impairment of forests, which is punished by imprisonment for a term of five to ten years in cases where it caused death of people, mass destruction of animals, or any other grave consequences under Art. 245. *See* S.A. Tryzno, Y.M. Kolodii, K.Y. Mykolaivna, *Consequences for the Environment from Russian Aggression in Ukraine*, 99 Journal of Eastern European Law 37 (2022), pp. 37–45.

[61] A. Szpak, *Legal Classification of the Armed Conflict in Ukraine in Light of International Humanitarian Law*, 58(3) Hungarian Journal of Legal Studies 261 (2017).

[62] Which should be understood in the widest sense to cover the biological environment in which a population is living, as highlighted by the Commentary of 1987 by the International Committee of the Red Cross.

[63] Criminal Division of the Tribunal of Solomiansk, Judgment of 25 August 2022, No. 760/10742/22, available at: www./reyestr.court.gov.ua (accessed 30 August 2024).

The term ecocide first emerged in the 1970s, primarily in the context of the Vietnam War, when Professor Falk suggested the need for an International Convention on the Crime of Ecocide in 1973.[64] In fact, the United States military's use of chemical warfare and its impact on the environment in Vietnam prompted discussions on whether such conduct could be qualified as ecocide.[65]

More recently, international law scholars reignited the debate on ecocide. Some authors argued that the solution would be the creation of a special international convention regarding the crime of ecocide, with its own international court dealing with the international criminal liability of individuals.[66] At the same time, however, there also has been a proposal to introduce ecocide into the ICC Statute. In particular, the Stop Ecocide Foundation convened an Independent Expert Panel for the Legal Definition of Ecocide,[67] which delivered its official proposal on the definition of the crime of ecocide to the Assembly of States Parties to the ICC during its 20th Session in June 2021.[68] The proposal consisted mainly of a new Art. 8*ter*, which would add the core crime of ecocide to the ICC Statute. The drafters defined this crime as the commission of "unlawful or wanton acts with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[69] This is very similar to the environmental war crime discussed previously under Art. 8(b)(iv) of the ICC Statute, which however is punishable only if committed during an armed conflict. Hence, the proposal would extend the crime of ecocide to include times of peace.

However, this amendment to the ICC Statute has not been taken into consideration yet,[70] and there is currently no general State practice that univocally con-

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[64] R.A. Falk, *Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals*, 4(1) Bulletin of Peace Proposals 80 (1973).

[65] A. Jain, C. Soni, *Ecocide: A New International Crime*, 2(2) Jus Corpus Law Journal 627 (2021), pp. 627–634; A.M. Hanna, *Killing Our Home: The Case for Creating an International Crime of Ecocide*, 6 Social Justice and Equity Law Journal 2 (2023).

[66] Jain, Soni, *supra* note 65, pp. 633; D.A.B. Neto, T.C.F. Mont' Alverne, *Ecocide: Criminalizing Policy of International Environmental Crimes or a Crime Itself*, 8(1) Brazilian Journal of Public Policy 209 (2018), pp. 209–226; D. Singh Yadav, *Ecocide: The Missing Convention*, 5 International Journal of Law Management & Humanities 445 (2022).

[67] *June 2021: historic moment as Independent Expert Panel launches definition of ecocide*, Stop Ecocide International, 22 June 2021, available at: https://www.stopecocide.earth/legal-definition (accessed 30 August 2024).

[68] For a comment, *see* C.T. Banungana, *Vers l'intégration de l'écocide dans le Statut de Rome*, 59 The Canadian Yearbook of International Law 233 (2021).

[69] K. Ambos, *Protecting the Environment through International Criminal Law?*, EJIL: Talk!, 29 June 2021, available at: https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/ (accessed 30 August 2024).

[70] On the urgency to create an international crime of ecocide *see* M.A. Gray, *The International Crime of Ecocide*, 26(2) California Western International Law Journal 215 (1996).

siders ecocide to be a crime under customary international law.[71] Moreover, there are significant drawbacks associated with focusing attention on the ICC. The Court is presently grappling with an overwhelming caseload and operational challenges related to the existing crimes within its jurisdiction. Also, the ICC Statute sets stringent amendment thresholds, and meeting these thresholds may prove particularly difficult in the current global context. Thus, the likelihood of the ICC addressing ecocide cases in near future is minimal.[72] In any case, considering that the proposal would extend the jurisdiction of the Court over environmental harm to include violations during peacetime, it wouldn't represent a viable option for the environmental crimes committed in Ukraine, since they have been committed during wartime.

On the other hand, the CCU – like the national legislations of Vietnam,[73] Russia,[74] Belgium,[75] India,[76] Georgia,[77] and of many other countries – is more advanced on this matter. In fact, Art. 441 CCU expressly codifies the crime of ecocide, stating that "[m]ass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster shall be punishable by imprisonment for a term of eight to fifteen years."[78]

Evaluation of the conditions required for the assessment of this crime will involve such elements as the vastness of the territory involved; the duration of adverse changes in the environment; substantial negative changes in the ecological system (such as the disappearance of certain species of animals and plants), as well as

[71] J. de Hemptinne, *Ecocide: An Ambiguous Crime?*, EJIL: Talk!, 29 August 2022, available at: https://www.ejiltalk.org/ecocide-an-ambiguous-crime/ (accessed 30 August 2024).

[72] D. Robinson, *Ecocide – Puzzles and Possibilities*, 20 Journal of International Criminal Justice 313 (2022), pp. 313–347; J. Panigaj, E. Bernikova, *Ecocide – A New Crime under International Law?*, 13(1) Juridical Tribune 5 (2023).

[73] Vietnam Criminal Code, No. 100/2015/QH13, 27 November 2015, Art. 278, available at: https://www.wipo.int/edocs/lexdocs/laws/en/vn/vn086en.pdf (accessed 30 August 2024).

[74] O.Y. Grechenkova, *Certain Problems of Fighting Ecocide*, 8(3) Journal of Advanced Research in Law and Economics 821 (2017).

[75] *See Belgium One Step Closer to Ecocide Law*, Stop Ecocide International, 21 July 2023, available at: https://t.ly/p3Uny (accessed 30 August 2024).

[76] I. Liao, T. Pranav, *The Criminalisation of Ecocide – An Indian Perspective*, 7(2) NUJS Journal of Regulatory Studies 52 (2022).

[77] Criminal Code of Georgia, No. 2287, 22 July 1999, Art. 409, available at: https://matsne.gov.ge/en/document/view/16426?publication=262 (accessed 30 August 2024).

[78] For the purposes of this norm, the mass destruction of plant or animal life of the world means their complete or partial extermination on a certain territory of the Earth, and poisoning of the atmosphere or water resources involves spreading in the air or water a high number of poisonous substances of biological, radioactive, or chemical origin, which can cause severe forms of illness and even death in people. Similar norms are also provided for by Art. 169 of the Criminal Code of Kazakhstan (The Criminal Code of Republic of Kazakhstan, No. 167, 16 July 1997, available at: https://www.warnathgroup.com/wp-content/uploads/2015/03/Kazakhstan-Criminal-Code.pdf (accessed 30 August 2024)) and Art. 131 of the Criminal Code of Belarus (Criminal Code of the Republic of Belarus, No. 275-Z, 9 July 1999, available at: https://cis-legislation.com/document.fwx?rgn=1977 (accessed 30 August 2024)).

significant restrictions or exclusions of human activity or the life of plants or animals in a certain territory.[79] Thus, also under this domestic rule the damage should be widespread. However, these conditions have not prevented the opening of more than 15 investigations in Ukraine into ecocide as of 28 November 2023,[80] although these investigations have not been concluded yet. Thus, Ukrainian case-law on the crime of ecocide is currently nonexistent.

4. THE BOMBING OF THE KAKHOVKA DAM

The most large-scale warfare event to consider, either under the category of ecocide or as an international war crime against the environment, is the alleged destruction of the Kakhovka hydroelectric dam on 6 June 2023.[81] The dam was situated across the Dnipro River, serving the dual purpose of generating electricity and storing fresh water, with a portion allocated for supplying Crimea. This incident led to severe flooding of an extended area along the lower Dnipro River and to 58 deaths.[82] As reported by United Nations Environment Programme (UNEP):

> [t]he immense flood caused losses in natural habitats, plant communities and species by washing away specimens, inundating habitats and depositing debris and sediments (...) The event led to the release of hazardous chemical pollutants (...) The total amount of disaster waste is estimated to reach at least two million m3, with the majority generated on the southern side of the river. The breadth of the damage shows that they are massive

[79] V.O. Ukolova, Y.O. Ukolova, *The Problem of Ecocide as an Environmental Crime: Ukrainian and International Experience*, (10) Judicial Scientific Electronic Journal 353 (2021), pp. 353–356. On the interpretation of Art. 441, *see also* O.M. Shumilo, *Prospects of Determining the International Criminal Court Jurisdiction Regarding Ecocide*, 5 Current Issues in Domestic Jurisprudence 106 (2021), pp. 106–112.

[80] *Ukraine Investigates Over 270 War Crimes Against Environment*, Rubryka, 28 November 2023, available at: https://t.ly/r8lwL (accessed 30 August 2024); *International Crimes in Ukraine: an Overview of National Investigation and Judicial Practice*, USAID, Kyiv: 2023, p. 37. *See also*, statements of the Special Advisor on environmental crimes to the Ukrainian Prosecutor – General, Maksym Popov, as reported in the article *Kakhovka Dam: Ukraine Pioneers Prosecution for Ecocide*, JusticeInfo.Net, 10 July 2023, available at: https://www.justiceinfo.net/en/119148-kakhovka-dam-ukraine-pioneers-prosecution-ecocide.html (accessed 30 August 2024); N. Malysheva, *International Environmental Crimes of the Russian Federation on the Territory of Ukraine and the Prospects of Criminal Responsibility for Their Committing*, 1 Law Review of Kyiv University of Law 233 (2022).

[81] L. Poltronieri Rossetti, *Crimini di guerra ambientali e competenza della Corte penale internazionale: quali prospettive di fronte alla distruzione della diga di Nova Kakhovka?*, 4 Rivista di diritto internazionale 1110 (2023), pp. 1110–1119; A. Gurmendi, *Tracking State Reaction to the Destruction of the Kakhovka Dam*, OpinoJuris, 20 June 2023, available at: https://opiniojuris.org/2023/06/20/tracking-state-reactions-to-the-destruction-of-the-kakhovka-dam/ (accessed 30 August 2024).

[82] *Russia's war on Ukraine: High environmental toll*, Think Tank European Parliament, 19 July 2023, available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2023)751427 (accessed 30 August 2024): "The destruction of the Kakhovka Dam further increased the harm inflicted on nature, while bringing international attention to the environmental dimension of the war."

> in size, particularly in the area of ecosystems and habitats, with corresponding impacts on species and biodiversity.[83]

The international community has strongly criticized the Russian armed forces allegedly responsible for the incident under discussion. The Organization for Security and Co-operation in Europe (OSCE) stressed, in its Vancouver declaration adopted on 4 July 2023, that it is:

> [e]xtremely concerned by the destruction of the Nova Kakhovka Dam by the Russian occupying forces (...) and convinced that the Russian Federation should be held accountable and all perpetrators punished (...) [and] denounces this act as a crime of ecocide and calls on the parliaments of OSCE participating States to enshrine this concept in national and international law.[84]

On the other hand, Parliamentary Assembly of the Council of Europe stated in Resolution 2506 on "Political consequences of the Russian Federation's war of aggression against Ukraine", adopted on 22 June 2023, that "[t]his attack, aimed at delaying the Ukrainian counteroffensive, confirms the barbarism of Putin's war machinery and constitutes both a war crime and ecocide."[85] Finally, the European Parliament also adopted a strong position in its resolution "On the Sustainable Reconstruction and Integration of Ukraine into the Euro-Atlantic Community" of 15 June 2023, where it declared that it "[c]ondemns in the strongest possible terms the destruction by Russia of the Kakhovka dam (...) all those responsible for such war crimes, including the destruction of the dam, will be held accountable in line with international law."[86]

Under the API, dams benefit from a special protection, both as objects indispensable to the survival of the civilian population pursuant to Art. 54, and as works and installations containing dangerous forces pursuant to Art. 56.[87] Specifically, under Art. 54(5) API, States may derogate from such protection with regard to objects

[83] *See Flood Rescuers Press On in Southern Ukraine After Dam Disaster*, The New York Times, 7 July 2023, available at: https://www.nytimes.com/live/2023/06/07/world/russia-ukraine-news (accessed 30 August 2024); J. Waterhause, T. Mackintosh, *Ukraine Dam: Dislodged Mines a Major Concern as Residents Flee Kherson*, BBC, 8 June 2023, available at: https://www.bbc.com/news/world-europe-65835742 (accessed 30 August 2024).

[84] Vancouver Declaration and Resolutions adopted by the OSCE Parliamentary Assembly, Vancouver, 30 June–4 July 2023, chapter I, Arts. 7 and 35.

[85] PACE Resolution of 22 June 2023 on Political consequences of the Russian Federation's war of aggression against Ukraine, No. 2506(2023).

[86] European Parliament resolution of 15 June 2023 on the sustainable reconstruction and integration of Ukraine into the Euro-Atlantic community, 2023/2739(RSP), para. H(4).

[87] R. Bartels, *The Relationship between the Law of Armed Conflict and International Criminal Law: With a Focus on the War in Ukraine*, 56(1) Texas Tech Law Review 39 (2023).

located on the territory under their own control only when required by imperative military necessity. Therefore, even if the dam was located on the territory under Russian *de facto* control, which is debated, it appears difficult to envisage an imperative military necessity, considering that the purpose of the attack was to delay the counteroffensive of the Ukrainian military forces. On the other hand, Art. 56 API prohibits targeting dams as military objectives, unless they are "used for other than [their] normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support." This was certainly not the case with the Kakhovka dam, which was presumably located on territory contested between the Russian and Ukrainian armed forces.

Meanwhile in Ukraine – as reported by the Telegram channel of its General Prosecutors' office, Andriy Kostin, on 6 June 2023 – a criminal proceeding under Art. 441 CCU for the bombing of the Kakhovka Dam has been officially opened.[88] At the same time, the application of Art. 8(2)(b)(iv) of the ICC Statute remains more difficult, for several reasons.

First, the conduct that led to the destruction of the dam must be characterized as an "attack" under international humanitarian law, namely under Art. 49(1) API. This rule shall be considered by the ICC in proceedings concerning war crimes, since API – as it has been stated previously – is an "applicable" treaty during international armed conflicts, thus being among the sources the Court shall apply in its decisions under Art. 21(2) of the ICC Statute.[89] Art. 49(1) API states that ""[a]ttacks" means acts of violence against the adversary, whether in offence or in defence", intended as a combat action *strictu sensu*.[90] Moreover, the commentary on the API clarifies that "[i]n addition, it should be noted that destructive acts undertaken by a belligerent in his own territory would not comply with the definition of attack given in paragraph 1, as such acts, though they may be acts of violence, are not mounted "against the adversary"."[91] For the purpose of the application of this rule, the notion of territory concerns those territories that are under the *de facto* control of a party to an armed conflict.[92] If the dam was located within territory under the control of Russian armed forces, it could be difficult to consider its bombing as an attack.[93]

[88] F. Petit, *Kakhovka Dam: Ukraine Pioneers Prosecution for Ecocide*, JusticeInfo.Net, 10 July 2023, available at: https://t.ly/sVmkC (accessed 30 August 2024); A.S. Bowen, M.C. Weed, *War Crimes in Ukraine*, Congressional Research Service Report, 16 October 2023, available at: https://crsreports.congress.gov/product/pdf/R/R47762; *Ecocide in Ukraine Won't Go Unpunished. United for Justice. United for Nature, EUAM-Ukraine*, Washington: 2023, available at: https://shorturl.at/pswHV (accessed 30 August 2024).

[89] Triffterer, *supra* note 40, p. 704.

[90] Sandoz, Swinarski, Zimmermann, *supra* note 32, para. 1880.

[91] *Ibidem*, para. 1890

[92] *Ibidem*, para. 1889.

[93] M. Milanovic, *The Destruction of the Nova Kakhovka Dam and International Humanitarian Law: Some Preliminary Thoughts*, EJIL: Talk!, 6 June 2023, available at: https://shorturl.at/CFITZ (accessed 30 August 2024).

However, as already highlighted, the dam could also be situated in a contested area serving as a frontline.[94] In such a case, considering that for the purpose of application of Art. 8 of the ICC Statute the term "attack" means "combat action",[95] the rule under discussion seems to apply.[96]

Second, the event must have caused widespread, long-term and severe damage to the natural environment. It appears quite undebatable that the damage caused by the destruction of the dam was widespread and severe, as the affected area extends, according to estimates, over several tens of thousands of hectares.[97] Moreover, as detailed in various reports the destruction of the dam caused serious detriment to safety and human life, various categories of property, as well as the integrity of ecosystems and important natural resources.[98] With regard to the duration of the damage, it is necessary to determine whether to use the broader interpretation, i.e. in terms of months or seasons; or the stricter one, in terms of decades, as suggested by Arts. 35 and 55 API. In any case, we can reasonably presume that some consequences of the dam's destruction will have an irreversible environmental impact.[99]

Third, the criminal liability for war crime against the environment, as envisaged by the ICC Statute, can be established only if the attack that caused environmental damage was intentionally launched with knowledge of causing the required type of harm.[100] It is thus necessary to exclude that the destruction of the dam can be attributed to the negligent conduct of those who had control over it; i.e. the perpetrators must have acted intentionally. Considering that the dam's destruction was aimed at impeding the on-field progress of the Ukrainian armed forces, the evidence of this purpose may be helpful to prove the existence of the required *mens rea*.

Finally, the application of Art. 8(2)(b)(iv) of the ICC Statute requires an evaluation of the proportionality between the damage caused by the attack and the anticipated military advantage at the time of the decision to launch it. In particular,

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[94] M. Gillett, *The Kakhovka Dam and Ecocide*, Verfassungsblog, 3 July 2023, available at: https://verfassungsblog.de/the-kakhovka-dam-and-ecocide/ (accessed 30 August 2024).

[95] ICC, *The prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 A A2, 30 March 2021, para. 1164.

[96] Gillett, *supra* note 19.

[97] P. Polityuk, *Ukraine Warns over Impact of Kakhovka Dam Collapse on Farmland*, Reuters, 7 June 2023, available at: https://www.reuters.com/world/europe/ukraine-warns-over-impact-kakhovka-dam-collapse-farmland-2023-06-07/ (accessed 30 August 2024).

[98] *Downstream Impact: Analysing the Environmental Consequences of the Kakhovka Dam Collapse*, Conflict and Environment Observatory, 28 July 2023, available at: https://ceobs.org/analysing-the-environmental-consequences-of-the-kakhovka-dam-collapse/ (accessed 30 August 2024).

[99] *Rapid Environmental Assessment of Kakhovka Dam Breach Ukraine*, UN Environment Programme, Nairobi: 2023, p. 74, available at: https://shorturl.at/mrAJ9; C. Baraniuk, *The Kakhovka Dam Collapse Is an Ecological Disaster*, Wired, 8 June 2023, available at: https://www.wired.com/story/kakhovka-dam-flooding-ukraine/ (accessed 30 August 2024); *Blowing up the Kakhovka Dam: How Russian Terror Will Damage Ukraine's Ecology*, Visit Ukraine, 11 June 2023, available at: https://visitukraine.today/blog/2035/blowing-up-the-kakhovka-dam-how-russian-terror-will-damage-ukraines-ecology (accessed 30 August 2024).

[100] G. Werle, F. Jeßberger, *Principles of International Criminal Law*, Oxford University Press, Oxford: 2020, p. 548.

the rule sets forth the threshold of a clear, or manifest, disproportionality for the international crime to have taken place.[101] Such an assessment is the most difficult one, as it implies consideration of all the factual conditions surrounding the attack in order to evaluate the balance of interests made by the accused actors. As outlined in the Commentary to Art. 51 API regarding the proportionality requirement, "the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations, there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail, as stated above."[102] It is debatable whether the same considerations could be made concerning the protection of the natural environment, given the highly anthropocentric structure of the ICC Statute, and more generally of international criminal law. In any case, it is evident that the destruction of the dam provided a military advantage to Russia, particularly in its effort to impede the Ukrainian offensive. As suggested, the dam's destruction by Russian armed forces was an "instinctive defensive response to the threat of an amphibious attack in the Kherson oblast on the Dnipro",[103] thus making it more challenging for Ukraine to mount an assault in the Kherson region. However, at the same time the catastrophe resulting from the dam's destruction constitutes one of the most significant incidents, both in human and environmental terms, since the beginning of the war in Ukraine,[104] as it caused incalculable damage to the environment.[105] Hence it is highly likely that such damages may be considered as disproportionate to the aforementioned military advantage, especially considering the application of the precautionary principle.[106]

Be that as it may, the representatives of the OTP visited the damaged area soon after the bombing of the dam, thus benefiting from the permanent presence of the OTP on the territory of Ukraine after the establishment of its country office in the

[101] K. Ambos, *Rome Statute of the International Criminal Court*, Bloomsbury Publishing, London: 2022, p. 428; Werle, Jeßberger, *supra* note 100, p. 545 f. *See also*, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, United Nations International Criminal Tribunal for the former Yugoslavia, para. 21, available at: https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal (accessed 30 August 2024).

[102] Sandoz, Swinarski, Zimmermann, *supra* note 32, para. 1979.

[103] D. Sabbagh, A. Mazhulin, J. Borger, *The Disastrous Bursting of Ukraine's Nova Kakhovka Dam – and the Battle that is to Come*, The Guardian, 10 June 2023, available at: https://shorturl.at/mtuE0 (accessed 30 August 2024).

[104] A. Maroonian, *Ukraine Symposium – Destruction of the Kakhovka Dam: Disproportionate and Prohibited*, Lieber Institute West, 29 June 2023, available at: https://lieber.westpoint.edu/destruction-kakhovka-dam-disproportionate-prohibited/ (accessed 30 August 2024).

[105] K. Anderson, *What the Destruction of Kakhovka Dam Means for the Environment*, Greenly Blog, 21 June 2023, available at: https://greenly.earth/en-us/blog/ecology-news/what-the-destruction-of-kakhovka-dam-means-for-the-environment (accessed 30 August 2024).

[106] S. Joubert, *Can Crimes of Ecocide Committed during the Conflict in Ukraine Be Legally Punished?*, 28 Law & World 108 (2023).

agreement signed between the Court and Ukraine on 23 March 2023.[107] However, the OTP has not yet issued any statement concerning the specific proceeding under Art. 8(2)(b)(iv) of the ICC Statute.[108]

Finally, two other options for prosecuting this incident – and environmental harm more generally – also exist; namely prosecution by third States under the principle of universal jurisdiction, and the establishment of an international *ad hoc* tribunal. Even though they fall outside the scope of this article, it is worth briefly mentioning them. As to the first option, not all domestic legal systems provide for universal jurisdiction.[109] Some States are more inclined to exercise it than others. For instance, under Section 1, sentence 1 of the Code of Crimes against International Law of Germany (*Völkerstrafgesetzbuch*), the principle of universal jurisdiction applies to all core crimes outlined in its Sections 6 to 12,[110] even if the offense has no connection to Germany.[111] In reliance on this principle both German and many other[112] judicial authorities have initiated investigations into alleged atrocities committed by Russian forces in Ukraine. However, in carrying out such investigations no mention has been made with regard to environmental harm.[113]

On the other hand, the international special tribunal for Ukraine may in fact offer another avenue for holding accountable those responsible for the destruction of the Kakhovka dam. Currently, this debate primarily revolves around the establishment of the Special Tribunal against the Crime of Aggression,[114] with no mention made of

[107] *See Ukraine and the International Criminal Court sign an agreement on the establishment of a country office*, International Criminal Court, 23 March 2023, available at: https://www.icc-cpi.int/news/ukraine-and-international-criminal-court-sign-agreement-establishment-country-office (accessed 30 August 2024).

[108] B. Babin, O. Plotnikov, A. Prykhodko, *Damage to the Maritime Ecosystems from the Destruction of the Kakhovka Dam and International Mechanisms of Its Assessment*, 9(5) Lex Portus 23 (2023).

[109] Henckaerts, Doswald-Beck, *supra* note 32, p. 607.

[110] Code of Crimes against International Law, No. 255, 26 June 2002, section 1, sentence 1, available at: https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html (accessed 30 August 2024).

[111] *Ibidem*.

[112] *See*, among others, R. Fraňková, *Czech Police Investigating Possible War Crimes in Ukraine*, Radio Prague International, 20 April 2022, available at: https://english.radio.cz/czech-police-investigating-possible-war-crimes-ukraine-8748207 (accessed 30 August 2024); *Statement by Estonia at Security Council Arria-formula Meeting on Ensuring Accountability for Atrocities Committed in Ukraine*, Permanent Mission of Estonia to the UN 27 April 2022, available at: https://un.mfa.ee/statement-by-estonia-at-security-council-arria-formula-meeting-on-ensuring-accountability-for-atrocities-committed-in-ukraine/ (accessed 30 August 2024); *Guerre en Ukraine: la France ouvre trois nouvelles enquêtes pour «crimes de guerre»*, Le Soir, 5 April 2022, available at: https://www.lesoir.be/434351/article/2022-04-05/guerre-en-ukraine-la-france-ouvre-trois-nouvelles-enquetes-pour-crimes-de-guerre (accessed 30 August 2024).

[113] B. Pancevski, *Germany Opens Investigation into Suspected Russian War Crimes in Ukraine*, The Wall Street Journal, 8 March 2022, available at: https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi (accessed 30 August 2024).

[114] O. Corten, V. Koutroulis, *Tribunal for the Crime of Aggression against Ukraine – A Legal Assessment*, European Parliament, Bruxelles: 2022; A. Komarov, O.A. Hathaway, *The Best Path for Accountability for*

its other potential competencies *ratione materiae*. The main reason for this focus is that the crime of aggression is the only international crime for which the ICC lacks jurisdiction in the armed conflict between Ukraine and Russia. In fact, Russia has not ratified the ICC Statute, which is the main requirement for the prosecution of its nationals for aggression under Art. 15*bis*(5) of the ICC Statute. Thus, even though the statute of such tribunal would cover the crime of ecocide, as has been argued previously, the proposed notion of ecocide would simply replicate the notion of the war crime against the environment, set forth in Art. 8(2)(iv) of the ICC Statute. Therefore, establishing an *ad hoc* tribunal with jurisdiction on environmental harm would not only be redundant, but also conflict with the jurisdiction of the ICC.

CONCLUSIONS

Ukraine is the green heart of Europe, and the ongoing armed conflict brought on by the Russian aggression has heavily affected its environment. Therefore, it is of the utmost importance to bring to justice those responsible for crimes against the environment committed in Ukraine, and especially for the bombing of the Kakhovka dam which occurred on 6 June 2023.

There are two main options for the prosecution of those responsible for the environmental crimes committed during the armed conflict between Ukraine and Russia. First, the ICC can bring to justice individuals under Arts. 6(b) and 6(c) regarding genocide; Arts. 7(1)(a), 7(1)(b) and 7(1)(k), regarding crimes against humanity; and most importantly Art. 8(2)(b)(iv) regarding war crimes of the ICC Statute. While genocide and crimes against humanity focus on the harm inflicted on individuals through means of causing environmental damage, the most important option is presented by war crimes committed against the environment under Art. 8(2)(b)(iv) of the ICC Statute. In this case, prosecution is possible if the attack against the natural environment has been committed intentionally and caused widespread, long-term and severe damage, which is disproportionate to the military advantage obtained. This sets a high threshold for prosecution[115], and all these requirements

the Crime of Aggression Under Ukrainian and International Law: a Treaty Between Ukraine and the UN General Assembly Is the Way to Proceed, Just Security, 11 April 2022, available at: https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/ (accessed 30 August 2024); K. Ambos, *A Ukraine Special Tribunal with Legitimacy Problems?*, Verfassungsblog, 6 January 2023, available at: https://verfassungsblog.de/a-ukraine-special-tribunal-with-legitimacy-problems/ (accessed 30 August 2024); C. Stahn, *From "Uniting for Peace" to "Uniting for Justice?": Reflections on the Power of the UN General Assembly to Create Criminal Tribunals or Make Referrals to the ICC*, 55(1) Case Western Reserve Journal of International Law 251 (2023), pp. 251–186; K. Gavrysh, *Tribunale internazionale speciale sul crimine di aggressione contro l'Ucraina: prospettive e criticità*, 1 Rivista di diritto internazionale 209 (2024).

[115] M.O. Medvedieva, *Responsibility for the Environmental Damage Caused During the Armed Conflict*

present serious challenges for the Prosecutor. But at least these requirements seem to be met with regard to the bombing of the Kakhovka dam, considering that the gravity of the consequences deriving from this incident is undebatable, as reported by multiple press articles. In fact, whether the dam was located on the territory under the *de facto* control of Russian armed forces or in a contested area is irrelevant under international humanitarian law. Moreover, as reported by the Ukrainian President Vladimir Zelensky, the ICC should have already opened an investigation into the incident.[116] However, as of now there has been any official communication in this regard from the Court itself.

The second – and perhaps most important – possibility is to initiate domestic proceedings under Ukrainian legislation, either for international war crimes under Art. 438 CCU or ecocide under Art. 441 CCU. Both options are actually viable despite the ongoing conflict. In fact, the domestic courts located outside the occupied territories or areas of active hostilities regularly continue their work, while those situated in occupied territories have been relocated to cities under governmental control. Thus, Ukraine has an intact judicial system: investigators have had nearly immediate access to crime scenes and evidence; and Ukraine is holding several hundred Russian prisoners of war, some of whom are, or probably will be, suspected of the war-crimes under investigation.[117] Also, Ukrainian authorities have opened a web platform to properly document the war crimes and crimes against humanity committed by the Russian army in Ukraine.[118] In fact, the integrity of the Ukrainian judicial system has allowed its authorities to open a proceeding in relation to the destruction of the Kakhovka Dam under the Art. 441 CCU, which enshrines the crime of ecocide, and within which they will probably cooperate with OTP and other countries through the joint investigation team set up concerning the alleged core international crimes committed in Ukraine.[119]

Finally, two other options might be useful – namely the exercise of universal jurisdiction by other States not involved in the armed conflict between Russia and Ukraine, and the establishment of an international *ad hoc* tribunal. However, these

Between Ukraine and the Russian Federation: Opportunities in the Algorithm of Protecting National Interests, 139 Actual Problems of International Relations 58 (2019).

[116] *International Criminal Court Starts Investigation into Destroyed Nova Kakhovka Dam*, Kyiv Independent, 12 June 2023, available at: https://kyivindependent.com/international-criminal-court-starts-investigation-into-destroyed-nova-kakhovka-dam-2/ (accessed 30 August 2024); R. Gigova, *Russia is Accused of "Ecocide" in Ukraine. But What Does That Mean?*, CNN World, 3 July 2023, available at: https://t.ly/rA4iH (accessed 30 August 2024).

[117] M. Gessen, *The Prosecution of Russian War Crimes in Ukraine*, The New Yorker, 1 August 2022, available at: https://www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine (accessed 30 August 2024).

[118] WarCrimes, *supra* note 57.

[119] Gray, *supra* note 70.

avenues currently appear less relevant with regard to the bombing of the Kakhovka dam and, more generally, to environmental crimes.

Therefore, it is reasonable to conclude that all the prerequisites exist – both from a regulatory perspective and in terms of operational capacity – to gather the necessary evidence, and that not only the Ukrainian Prosecutor but also the General Prosecutor of the ICC can investigate the destruction of the Kakhovka dam.[120] It remains to be seen whether this will actually happen, and whether the ICC will declare the case admissible, taking into consideration that a proceeding is already pending before the Ukrainian judicial authorities.[121]

[120] In the same vein, *see* T. Dannenbaum, *What International Humanitarian Law Says About the Nova Kakhovka Dam*, Lawfare, 12 June 2023, available at: https://www.lawfaremedia.org/article/the-destruction-of-the-nova-kakhovka-dam-and-the-heightened-protections-of-additional-protocol-i (accessed 30 August 2024).

[121] It is worth mentioning that it has been reported that the representatives of the ICC visited the flooded areas in June, *see* Petit, *supra* note 88.

SEMINAR:
UNIVERSAL JURISDICTION AND THE CRIME OF AGGRESSION: THE CHALLENGES AND OPPORTUNITIES FOR JIT MEMBER STATES

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CHAMPIONING ACCOUNTABILITY: LITHUANIA'S LEADERSHIP IN INVESTIGATING RUSSIAN CRIMES IN UKRAINE

Abstract: *This article explores the role of Lithuania in seeking accountability for Russia's crimes in Ukraine since 2022. This small Baltic state, being both an EU and NATO member for twenty years now, is advocating on behalf of their Ukrainian colleagues in many international arenas and forums. However, more than two years into the brutal war, some organisational and legal challenges have started to emerge. These include the challenges resulting from the complex international institutional framework, as well as legal ones related to universal jurisdiction and the scope of crimes included under current criminal investigations.*

Keywords: Lithuania, Ukraine, accountability, justice, international crimes, universal jurisdiction, genocide, Russia, Soviet Union

INTRODUCTION

Since 2022, following Russia's invasion in Ukraine, Lithuania has been actively advocating for justice and accountability across several platforms globally.[1] As was noted by Dr. G. Grigaitė-Daugirdė (Deputy Minister of Justice of Lithuania), "Lithuania has repeatedly advocated the need to establish a special tribunal and use legal mechanisms to implement the states' obligations to international law, to

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[1] J.H. Anderon, *Why Lithuania is at the forefront of the Ukrainian lawfare*, JusticeInfo.Net, 9 September 2022, available at: https://www.justiceinfo.net/en/106188-why-lithuania-forefront-ukrainian-lawfare.html (accessed 30 August 2024).

ensure the criminal responsibility of the regimes of Russia and Belarus."[2] Moreover, in 2022 the Lithuanian Parliament adopted a resolution which recognised the actions of the Russian Federation in Ukraine as genocide, and further urged for the establishment of a special international tribunal to investigate the crime of Russian aggression.[3]

After Russia invaded Ukraine, Lithuania led the way in mobilising governments to defend Ukraine through international law: Lithuania first referred the Ukrainian situation to the International Criminal Court (ICC, 2002);[4] it pushed for the establishment of the Joint Investigative Team (JIT) at Eurojust (European Union Agency for Criminal Justice Cooperation),[5] which is gathering evidence for potential war crimes trials; has sent teams of investigators to work with their Ukrainian colleagues;[6] has lobbied for the establishment of a special tribunal to prosecute Russian aggression;[7] and supported Ukraine's case against Russia at the International Court of Justice (ICJ) regarding the false allegations by Russia that Ukraine was engaged in an ongoing genocide against Russian-speaking people in the eastern

[2] *G. Grigaitė-Daugirdė in Kyiv: it's time to move faster to achieve justice for Ukraine*, 15min.Lt, 23 August 2023, available at: https://www.15min.lt/naujiena/aktualu/lietuva/g-grigaite-daugirde-kyjive-laikas-zengti-sparciau-siekiant-teisingumo-ukrainai-56-2099952; *G. Gigaitė-Daugirdė: named principles for ensuring responsibility for aggression against Ukraine*, 15Min.Lt, 12 September 2023, available at: https://www.15min.lt/naujiena/aktualu/lietuva/g-grigaite-daugirde-ivardinti-principai-uztikrinti-atsakomybei-uz-agresija-pries-ukraina-56-2109776 (both accessed 30 August 2024).

[3] Parliament of the Republic of Lithuania Resolution of 5 October 2022 on the Recognition of the actions of the Russian Federation in Ukraine as genocide and the establishment of the Special International Criminal Tribunal to investigate the crime of Russian aggression, XIV-1070, available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/4152dc40d03b11ecb1b39d276e924a5d (accessed 30 August 2024).

[4] AFP, *ICC: Historic state referrals accelerate opening of an investigation on Ukraine*, JusticeInfo.Net, 2 March 2022, available at: https://www.justiceinfo.net/en/88144-icc-historic-state-referrals-accelerates-opening-investigation-ukraine.html (accessed 30 August 2024).

[5] J. Crawford, *Ukraine, ICC and EuroJust: How will that wor*k, JusticeInfo.Net, 5 May 2022, available at: https://www.justiceinfo.net/en/91763-ukraine-icc-eurojust-how-will-that-work.html; *EuroJust, Press conference – Joint investigation team on alleged core intl. crimes in Ukraine*, YouTube, 31 May 2022, available at: https://www.youtube.com/watch?v=_HW9AcF-AxI&t=351s; *Two years on – A timeline of Eurojus's response to the war in Ukraine,* EuroJust, 29 February 2024, available at: https://www.eurojust.europa.eu/sites/default/files/assets/two-years-on-a-timeline-of-eurojust-s-response-to-the-war-in-ukraine-en.pdf; *Agreement to extend the joint investigation team into alleged core international crimes in Ukraine for two years, Press release*, EuroJust, 29 February 2024, available at: https://www.eurojust.europa.eu/news/agreement-extend-joint-investigation-team-alleged-core-international-crimes-ukraine-two-years (all accessed 30 August 2024).

[6] J.H. Anderson, *A Nuremberg for Russia's Crime of Aggression?*, JusticeInfo.Net, 22 April 2022, available at: https://www.justiceinfo.net/en/91135-nuremberg-russia-crime-of-aggression.html (accessed 30 August 2024).

[7] *MEPs back Lithuanian resolution on tribunal for Russia*, LRT.Lt, 19 January 2023, available at: https://www.lrt.lt/en/news-in-english/19/1870870/meps-back-lithuanian-resolution-on-tribunal-for-russia (accessed 30 August 2024).

part of the country.[8] Given that the results from cases in the international legal arena – including the decisions by the ICJ of 2 February 2024 in two cases against Russia initiated by Ukraine regarding terrorism financing and racial discrimination, as well as genocide allegations – are not very encouraging, many challenges remain for Lithuania to continue its legal efforts.[9] The increasing organisational and legal challenges behind these efforts include issues caused by a complex international institutional framework, as well as legal complications related both to universal jurisdiction and the scope of the crimes included under current investigations.

1. THE CHALLENGES OF A COMPLEX INSTITUTIONAL FRAMEWORK

The international institutional framework for the prosecution of international crimes at the moment consists of several different types of institutions; the prime among them being the ICC, the Hague-based tribunal which has itself issued arrest warrants for Putin and Maria Lvova-Belova – Russia's Commissioner for Children's Rights – for deporting Ukrainian children to Russia.[10] War crimes are also prosecuted in Ukraine's own courts.[11] Up until April 2023, approximately 80,000 incidents of potential war crimes have been registered, and to date 31 Russians have been convicted of war crimes in Ukrainian courts.[12] Several countries are conducting their

[8] M. Quell, T. Cruvellier, *The International Court of Justice orders Russia to stop its invasion of Ukraine*, JusticeInfo.Net, 17 March 2022, available at: https://www.justiceinfo.net/en/88936-international-court-of-justice-orders-russia-stop-invasion-ukraine.html; *Readout of Assistant Attorney General Kenneth A. Polite, Jr.'s Trip to Lithuania*, US Department of Justice – Office of Public Affairs, 17 April 2023, available at: https://www.justice.gov/opa/pr/readout-assistant-attorney-general-kenneth-polite-jr-s-trip-lithuania. ICJ, *Allegations of Genocide under the convention on the prevention of punishment of the crime of genocide'* (*Ukraine v. Russian Federation*), Written observations of the Republic of Lithuania, 5 July 2023, ICJ Rep 2023, available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20230705-wri-11-00-en.pdf (all accessed 30 August 2024).

[9] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, 2 February 2024, ICJ Rep 2024.

[10] *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, International Criminal Court, 17 March 2023, available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed 30 August 2024).

[11] G. Nuridzhanian, *Prosecuting war crimes: are Ukrainian courts fit to do it?*, EJIL: Talk!, 11 August 2022, available at: https://www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/ (accessed 30 August 2024).

[12] *Ukraine War Crimes Investigations and Prosecutions: More Support Needed*, American Bar Association, 24 May 2023, available at: https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/may-23-wl/ukraine-0523wl/ (accessed 30 August 2024).

own investigations under universal jurisdiction, namely: Germany,[13] Lithuania,[14] Estonia,[15] and Latvia. By September 2022, Norway, Poland, Slovakia, Spain, Sweden, and Switzerland all declared their intentions of starting similar investigations.[16] Until November 2023, cases have been opened in Spain[17] and Sweden.[18] As of January 2023, the competent authorities of 20 countries have started their own investigations or collections of evidence to investigate Russia's commission of international crimes.[19] There are also ongoing discussions to create an International Criminal Tribunal for the Russian Federation as an *ad hoc* international criminal tribunal aimed at prosecuting the Russian Federation and senior Russian and Belarusian leaders for the Russian invasions of Ukraine for one or more crimes of aggression, as a complement to the existing ICC investigation in Ukraine.[20]

More specific institutional frameworks involve various institutions focusing on investigating Russian crimes in Ukraine. Chronologically, within a month of the start of the war in Ukraine, the following institutions have taken action. including Eurojust, actively supported the setting up of the JIT by the Lithuanian, Polish

[13] B. Pancevski, *Germany Opens Investigation Into Suspected Russian War Crimes in Ukraine*, The Wall Street Journal, 8 March 2022, available at: https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi (accessed 30 August 2024).

[14] *Lithuanian prosecutors to probe filmmaker's killing in Ukraine as war crime*, LRT.Lt, 4 May 2022, available at: https://www.lrt.lt/en/news-in-english/19/1662906/lithuanian-prosecutors-to-probe-filmmaker-s-killing-in-ukraine-as-war-crime; *The Ministry of Justice asks the Prosecutor General's Office to launch a pre-trial investigation against Putin and Lukashenk*o, LRV.Lt, 15 March 2022, available at: https://tm.lrv.lt/en/news/the-ministry-of-justice-asks-the-prosecutor-generals-office-to-launch-a-pre-trial-investigation-against-putin-and-lukashenko (both accessed 30 August 2024).

[15] *Estonia's Internal Security Service also investigating war crimes committed in Ukraine*, The Baltic Times, 30 March 2022, available at: https://tinyurl.com/z4vku4s8 (accessed 30 August 2024).

[16] *Universal Criminal Jurisdiction in Ukraine: Country's legal community is putting public pressure on the prosecutor general, the president's office and the government to incorporate principles*, Institute for War & Peace Reporting, 20 September 2022, available at: https://iwpr.net/global-voices/universal-criminal-jurisdiction-ukraine (accessed 30 August 2024).

[17] *Spain opens probe into 'serious violations' by Russia in Ukraine*, The Local: Spain, 8 March 2022, available at: https://www.thelocal.es/20220308/spain-opens-probe-into-serious-violations-by-russia-in-ukraine (accessed 30 August 2024).

[18] *Sweden launches investigation into Ukraine war crimes*, The Local: Sweden, 5 April 2022, available at: https://www.thelocal.se/20220405/sweden-launches-investigation-into-ukraine-war-crimes (accessed 30 August 2024).

[19] Poland, Estonia, Latvia, Slovakia, Romania, Belgium, Canada, Czech Republic, France, Germany, Ireland, Italy, Netherlands, Norway, Spain, Switzerland, Sweden, Great Britain, USA (K. Latysh, M. Rogers, *Universal Jurisdiction: current situation analysis in Lithuania, Ministry of Justice of the Republic of Lithuania*, Vilnius: 2023, p. 35, available at http://bit.ly/47IJ5YR (accessed 30 August 2024)).

[20] *Ukraine war: MEPs push for special tribunal to punish Russian crimes*, European Parliament News, 19 January 2023, available at: https://www.europarl.europa.eu/news/en/press-room/20230113IPR66653/ukraine-war-meps-push-for-special-tribunal-to-punish-russian-crimes (accessed 30 August 2024).

and Ukrainian authorities on 25 March 2022[21] that now consists of Ukraine, six EU Member States, the ICC and Europol (European Union Agency for Law Enforcement Cooperation).[22] Further, and in line with its mandate, Europol aims to provide analytical and forensic support to the members of the JIT through the collection and analysis of data legally obtained from open sources such as social media and broadcast television and radio – known collectively as open-source intelligence (OSINT).[23] Within the scope of OSINT, in November 2023 a new Operational Taskforce (OTF) was set up by Europol to assist the ongoing investigations[24] and to help identify suspects and their involvement in war crimes, crimes against humanity, or genocide committed in Ukraine.[25] The Office of the Prosecutor at the ICC became a participant in the JIT on 25 April 2022, Estonia, Latvia and Slovakia joined the JIT on 30 May 2022,[26] and Romania became a member on 13 October 2022. In addition, under the scope of Eurojust, a Core International Crimes Evidence Database (CICED) was established in February 2023, thereby recognising and accounting for the specific evidentiary challenges related to these types of investigations, and based on an urgent amendment of Eurojust's mandate.[27]

The International Centre for the Prosecution of the Crime of Aggression Against Ukraine (ICPA), which the ICC cannot prosecute, has also been hosted by Eurojust

[21] S. Maupas, W*ar in Ukraine: Some European prosecutors want to unite in the face of war crim*e, Le Monde, 3 June 2022, available at: https://www.lemonde.fr/en/international/article/2022/06/03/war-in-ukraine-some-european-prosecutors-want-to-unite-in-the-face-of-war-crimes_5985507_4.html (accessed 30 August 2024).

[22] *Eurojust and the war in Ukraine,* EuroJust, available at: https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine; *Europol participates in joint investigation team into alleged core international crimes in Ukraine*, Europol, 5 October 2023, available at: https://www.europol.europa.eu/media-press/newsroom/news/europol-participates-in-joint-investigation-team-alleged-core-international-crimes-in-ukraine (both accessed 30 August 2024).

[23] *Europol's solidarity with Ukraine*, Europol, 16 October 2023, available at: https://www.europol.europa.eu/europol%E2%80%99s-solidarity-ukraine; *Europol participates in joint investigation team into alleged core international crimes in Ukraine*, EuroJust, 5 October 2023, available at: https://www.eurojust.europa.eu/news/europol-participates-joint-investigation-team-alleged-core-international-crimes-ukraine (both accessed 30 August 2024).

[24] *Europol sets up OSINT taskforce to support investigations into war crimes committed in Ukraine*, Europol, 21 November 2023, available at: https://www.europol.europa.eu/media-press/newsroom/news/europol-sets-osint-taskforce-to-support-investigations-war-crimes-committed-in-ukraine (accessed 30 August 2024).

[25] Participating countries: Belgium, France, Germany, Ireland, Italy, Lithuania, The Netherlands, Portugal, Slovak Republic, Slovenia, Spain, Norway, United Kingdom, United States of America.

[26] *Estonia, Latvia, Slovakia join Lithuania-initiated war crime probe team*, LRT.Lt, 31 May 2022, available at: https://www.lrt.lt/en/news-in-english/19/1707622/estonia-latvia-slovakia-join-lithuania-initiated-war-crime-probe-team (accessed 30 August 2024).

[27] *Core International Crimes Evidence Database (CICED)*, EuroJust, 23 February 2023, available at: https://www.eurojust.europa.eu/publication/core-international-crimes-evidence-database-ciced (accessed 30 August 2024).

since February 2023.[28] The ICPA includes prosecutors from Ukraine, the European Union, and the ICC.[29] In addition to Ukraine, five of the JIT members (Lithuania, Latvia, Estonia, Poland and Romania) are participating in the ICPA's start-up phase, which is a unique judicial hub fostering cooperation between national prosecutors, and enabling the exchange of evidence and a common prosecution strategy.[30] The US, which is not an ICC member, is also part of the initiative.

This prolonged engagement with extensive international procedures constitutes a significant strain on resources and manpower, potentially resulting in limited outcomes in the investigations conducted. With Lithuania assuming a leadership position within the JIT, the responsibility for equitable participation becomes particularly challenging due to limited resources, both in terms of cost and workload. On 1 March 2022, the Lithuanian Prosecutor General's Office initiated a pre-trial investigation into aggression, war crimes, and crimes against humanity committed in Ukraine.[31] So far, over 300 witnesses have been interviewed and more than 90 individuals have been officially recognized as victims.[32] Moreover, the work on this pre-trial investigation significantly increases the usual workload of prosecutors. As the Prosecutor General explains: "There is a lot of work here. (...) It is not enough to interview people, you need to communicate with them, you need to convince them to testify. All circumstances are important to us; we have to interview people and help Ukraine collect as much evidence as possible so that they can submit it to the ICC."[33]

Another challenge is the dual role of the selected national prosecutors, necessitating their simultaneous contributions to distinct formats. At the moment, four Lithuanian prosecutors are appointed as European-delegated prosecutors; three prosecutors participate in missions; one prosecutor currently works at the ICC and

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[28] *International Centre for the Prosecution of the Crime of Aggression against Ukraine*, EuroJust, available at: https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine (accessed 30 August 2024).

[29] *The Hague: Center to probe Russia's war in Ukraine opens*, Deutsche Welle, 7 March 2023, available at: https://www.dw.com/en/russia-invasion-ukraine-investigation-the-hague/a-66097700 (accessed 30 August 2024).

[30] *Eurojust and the war in Ukraine*, EuroJust, available at: https://www.eurojust.europa.eu/eurojust-and-the-war-in-ukraine (accessed 30 August 2024).

[31] *The ambassador of Ukraine to Lithuania also urges the witnesses of war crimes in Ukraine to contact the Lithuanian law enforcement,* Lietuvos Respublikos Prokuraturos, 6 May 2022, available at: https://www.prokuraturos.lt/lt/karo-nusikaltimu-ukrainoje-liudytojus-kreiptisilietuvos-teisesauga-ragina-ir-ukrainos-ambasadorius-lietuvoje/8362 (accessed 30 August 2024).

[32] I. Jačauskas, *Lithuania's investigation recognises 90 people as victims of war crimes in Ukraine*, LRT.Lt, 30 March 2023, available at: https://www.lrt.lt/en/news-in-english/19/1950516/lithuania-s-investigation-recognises-90-people-as-victims-of-war-crimes-in-ukraine (accessed 30 August 2024).

[33] E. Kubilius, *Grunskienė apie nepakankamą finansavimą prokuratūrai: kalbėsiu tol, kol valdžia mane išgirs* [Grunskienė on insufficient funding for the prosecutor's office: I will speak until the government hears me], LRT.Lt, 30 March 2023, available at: https://www.lrt.lt/naujienos/lietuvoje/2/1950295/grunskiene-apie-nepakankama-finansavima-prokuraturai-kalbesiu-tol-kol-valdzia-mane-isgirs (accessed 30 August 2024).

helps investigate the Ukraine case; and two prosecutors are delegated to Eurojust.[34] The same persons usually also need to address the tasks required by other institutions, including the ICPA, which "should contribute to the exchange and analysis of evidence",[35] and Eurojust, which should provide operational, legal, financial, and logistical support.

2. THE INVESTIGATIONS OF RUSSIAN CRIMES IN UKRAINE BY LITHUANIAN AUTHORITIES

2.1. Local struggles of universal jurisdiction

Lithuania was among the first states to open domestic investigations, relying on universal jurisdiction to investigate Russian crimes in Ukraine. One case is now open regarding war crimes committed in Ukraine, and another two regard crimes against humanity (specifically, torture) committed in Belarus after the 2020 protests.[36] This case, which now includes 90 victims, may face many challenges based on universal jurisdiction, which were described in detail in a recent project commissioned by the Ministry of Justice of the Republic of Lithuania and authored by Dr. Kateryna Latysh and Dr. Monika Rogers.[37] The list of potential obstacles includes:

- the quality of evidence and the sharing of it;
- the presence and rights of the accused;
- immunities from prosecution and amnesties as means of impunity;
- the lack of specific knowledge about International Criminal Law;
- (Russian) refusal to comply with arrest warrants to extradite;
- not enough focus on the victim-driven perspective;
- financial costs;
- human resources.[38]

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[34] M. Gaučaitė-Znutienė, *Vienam prokurorui – ir 80 bylų, o dėl užsitęsusių tyrimų nukentės žmonės: Grunskienė išdėstė didžiausias prokuratūros bėdas* [One prosecutor has 80 cases, and people will suffer as a result of protracted investigations: Grunskienė outlined the biggest problems of the prosecutor's office], LRT.Lt, 3 July 2023, available at: https://tinyurl.com/mwv5mcd9 (accessed 30 August 2024).

[35] *Ukraine: International Centre for the prosecution of Russia's crime of aggression against Ukraine starts operations today*, European Commission, 3 July 2023, available at: https://tinyurl.com/mpt8buc5 (accessed 30 August 2024).

[36] *Lithuanian prosecutors launch probe into regime violence in Belarus*, LRT.Lt, 12 September 2020, available at: https://www.lrt.lt/en/news-in-english/19/1294884/lithuanian-prosecutors-launch-probe-into-regime-violence-in-belarus; BNS, *Lithuania launches probe after Belarusian border guard enters its territory*, LRT.Lt, 13 April 2023, available at: https://www.lrt.lt/en/news-in-english/19/1961773/lithuania-launches-probe-after-belarusian-border-guard-enters-its-territory (both accessed 30 August 2024).

[37] K Latysh, M. Rogers, *Universal Jurisdiction*, Kurk Lietuvai, 3 March 2023, available at: https://kurklt.lt/projektai/visuotine-universali-jurisdikcija?lang=en (accessed 30 August 2024).

[38] Latysh, Rogers, *supra* note 19, pp. 28–31.

Considering the context given in the previous chapter of this paper, the most pressing challenges now are likely those linked with costs, as well as the presence and rights of the accused. Criminal investigations and prosecutions under universal jurisdiction are expensive, as they require a lot of material resources, i.e. travelling to the location where the crime was committed; building international and trans-institutional connections; hiring experts, etc.[39] The imperative to start including financing for the process of prosecuting war crimes within the funding packages that the European Union and United States provide to Ukraine as support was stressed as early as 2022.[40] So far, only the ICPA, which is focusing on the crime of aggression, is generously funded by the European Commission's Service for Foreign Policy Instruments (within an initial funding amount of EUR 8.3 million).[41] However, it is very unrealistic to expect positive results when the leading member of the JIT (and the ICPA) is struggling to ensure the mobility of national prosecutors to travel to Ukraine. The first group of officers delegated by Lithuanian law enforcement institutions arrived in Ukraine in May 2022[42], but some Lithuanian prosecutors are going to the war zone without any insurance: "We encountered a series of problems when the prosecutor had to go to Ukraine, because we did not receive funding and we did not have the opportunity to properly dress the prosecutor, buy all the supplies and equipment for the war zone. The prosecutor left without insurance, because no insurance company agreed to provide insurance," said Nida Grunskienė.[43]

The present requirements to open an investigation or to seek extradition, and requirements of dual criminality, may also affect the expected results through the use of universal jurisdiction. The scope of universal jurisdiction is conceived in two ways:

– conditional universal jurisdiction, which requires the presence of the accused in the prosecuting state;

– absolute universal jurisdiction, under which the presence of the accused is not mandatory (trial in absentia). As enunciated by the Princeton Principles, absolute universal jurisdiction covers crimes that are committed by non-nationals,

[39] M. Kersten, *Universal Jurisdiction in Ukraine: States should commit to using their own courts to address Russian atrocities*, Justice in Conflict, 17 October 2022 available at: https://tinyurl.com/m52kzjv9 (accessed 30 August 2024).

[40] M. Venneri, *War crimes in Ukraine: Failure to prosecute Russia will damage international security for years to come,* Middle East Institute, 22 November 2022, available at: https://www.mei.edu/publications/war-crimes-ukraine-failure-prosecute-russia-will-damage-international-security-years (accessed 30 August 2024).

[41] *International Centre for the Prosecution..., supra* note 28.

[42] *Į Ukrainą atvyko Lietuvos teisėsaugos institucijų pareigūnai* [Officials of Lithuanian law enforcement institutions arrived in Ukraine], Lietuvos Respublikos Prokuraturos, 5 May 2022, available at: https://www.prokuraturos.lt/lt/naujienos/prokuraturos-aktualijos/i-ukraina-atvyko-lietuvos-teisesaugos-institucijupareigunai/8354 (accessed 30 August 2024).

[43] G. Pankūnas, *Grunskienė: dėl lėšų trūkumo prokuroras į karo zoną Ukrainoje vyko be jokio draudimo* [Grunskienė: due to lack of funds, the prosecutor went to the war zone in Ukraine without any insurance], LRT.Lt, 6 October 2022, available at: https://tinyurl.com/4sa67dbn (accessed 30 August 2024).

against non-nationals on foreign soil where the state exercising jurisdiction does not have a security or other type of interest.[44]

As the Lithuanian "case of January 13" has shown, not only the application of universal jurisdiction, but also use of some procedural elements of it (such as the peculiarities of issuing the arrest warrant for criminals who were not nationals and lived abroad, and/or trials *in absentia*) can be a complicated and dangerous task.[45] During the crackdown of 13 January 1991, after failing to seize control of important institutions in Vilnius, Soviet forces killed 14 individuals and injured hundreds more in a bloody massacre. Only on 30 June 2022 were 12 convicts sentenced following final judgment by the Supreme Court of Lithuania for this crime. However, since Russia and Belarus would not agree to the extradition of the suspects, and since the majority was tried *in absentia*, there is very little chance that their sentences will ever be carried out. Still, Lithuania stands outs from other countries who suffered Soviet violence in the 1990s (for example, the massacres in Baku, Azerbaijan, and in Tbilisi, Georgia) by having managed to deliver a final judicial decision in a criminal case where USSR officials were prosecuted.[46]

As has already been witnessed in the case of the 13 January 1991 crackdown in Vilnius,[47] Russia had intentions to use international arrest warrants and other instruments available through Interpol to crack down on Lithuanian officials working on the aforementioned case. Russia announced publicly in the UN that it intends to launch pre-trial investigations into Lithuanian prosecutors and judges working on the case of 13 January 1991; investigations which were completed in August 2023.[48] This risk might reduce the motivation of the national prosecutors to apply universal jurisdiction. For this reason, the Lithuanian authorities have resorted to taking political sanctions against Belarusian officials, including Lukashenko, for the crimes by the regime after the 2020 protests - rather than initiating criminal cases against them.[49]

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[44] S.D. Roper, *Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations*, 24(1) Global Governance 103 (2018).

[45] Latysh, Rogers, *supra* note 19.

[46] D. Sagatienė, J. Žilinskas, *Gorbachev's Legacy in Lithuania*, Verfassungsblog, 8 September 2022, available at: https://verfassungsblog.de/gorbachevs-legacy-in-lithuania/ (accessed 30 August 2024).

[47] *January 13, 1991: The night when Lithuania faced Soviet troops – through the eyes of ordinary people*, LRT.Lt, 12 January 2021, available at: https://tinyurl.com/mmexyf24; I. Steniulienė, *Vilnius court sends Gorbachev documents of January 1991 crackdown case*, LRT.Lt, 17 May 2022, available at: https://www.lrt.lt/en/news-in-english/19/1696408/vilnius-court-sends-gorbachev-documents-of-january-1991-crackdown-case (both accessed 30 August 2024).

[48] *Russia convicts Lithuanian judges who handed down verdicts in Soviet crackdown case*, LRT.Lt, 28 August 2023, available at: https://tinyurl.com/mwdsuwnw (accessed 30 August 2024).

[49] BNS, *Lithuania sanctions 30 Belarusian officials including Lukashenko*, LRT.Lt, 1 August 2020, available at: https://tinyurl.com/49whxjn3 (accessed 30 August 2024).

2.2. The problem of genocide and the role of Lithuanian historical cases at the ECtHR

In June 2023, Lithuania's Prosecutor General opened a pre-trial investigation into the alleged criminal transfer of Ukrainian children to Belarus, which could also potentially form a key component in investigating the crime of genocide: the accompanying documents indicate that more than 2,000 Ukrainian children, mostly orphans, have been illegally transferred from occupied Ukrainian territories to camps in Belarus, allegedly following orders by the Belarusian regime.[50] However, this investigation is grounded not on the crime of genocide (Art. 99), but on Art. 102 (Deportation or relocation of civilians)[51] and Art. 100[2] (Separation of children).[52]

The main challenge in investigating and prosecuting the acts of genocide in Ukraine is the central hurdle of establishing a genocidal intent; which is a complex and debated aspect of prosecuting such cases within Lithuania's legal framework. Two cases at the European Court of Human Rights (ECtHR, 1959) – namely *Vasiliauskas v. Lithuania* (No. 35343/05),[53] and *Drėlingas v. Lithuania* (No. 28859/16)[54] – have delved into the post-war concept of genocide as defined by the Genocide Convention and succeeded in proving genocidal intent from indirect evidence in the latter case. The genocidal intent of the USSR against Lithuanian partisans was proven predominantly through clarifying the ideological background of the USSR and the structural system for implementing communist ideology; i.e. both the Soviet security institution and its individual officers implemented parts of the Sovietization plan, which was designed to destroy undesirable nationalities using clear methodologies and instructions. In the case of *Drėlingas v Lithuania*, where the ECtHR concluded that national courts brought clarification to the need to establish intent, the Court stated (para. 108), that:

> the annihilation of the participants in the armed national resistance, namely Lithuanian partisans, their connections and supporters, by the occupying power and its repressive bodies, was systematic, consistent, based on a clear methodology and instructions. The acts of repression were directed against the most active and advanced part of the Lithuanian nation as a national, ethnic group. Such extermination had the clear aim of influencing the demographic changes of the Lithuanian nation and its very survival, as well as at facilitating the sovietisation of the occupied Lithuania.[55]

[50] BNS, *Lithuania launches probe into deportation of Ukrainian children to Belarus*, LRT.Lt, 12 June 2023, available at: https://www.lrt.lt/en/news-in-english/19/2011196/lithuania-launches-probe-into-deportation-of-ukrainian-children-to-belarus (accessed 30 August 2024).

[51] *Lietuvos Respublikos baudžiamasis kodeksas* [Criminal code of the Republic of Lithuania], Infolex, Art. 102, available at: https://www.infolex.lt/ta/66150:str102 (accessed 30 August 2024).

[52] *Ibidem*, Art. 100[2].

[53] ECtHR, *Vasiliauskas v. Lithuania* (App. No. 35343/05), 20 October 2015.

[54] ECtHR, *Drėlingas v. Lithuania* (App. No. 28859/16), 12 March 2019.

[55] *Ibidem*, para. 54.

In the context of Russia's crimes in Ukraine, however, a genocidal plan can be observed directly – especially since February 2022. This constitutes a significant difference to the prosecutor when proving genocidal intent. In as much as the established legal doctrine indicates that genocidal declarations are among the most powerful forms of evidence of genocidal intent, it is useful to analyse them in light of recent ECtHR case law dealing with historical cases of Soviet genocide in order to establish a link between the executors of these crimes and the current Russian ideology towards Ukrainians. Perhaps the most notable high-level public declarations which could be considered as genocidal are the following: a) Putin's essay of July 2021;[56] b) Putin's speech before the invasion on 21 February 2022;[57] c) an RIA Novosti editorial entitled "What Russia should do with Ukraine", published on 3 April 2022;[58] and d) a Telegram post by Dmitry Medvedev of 5 April 2022.[59] Each of these can be seen as elements of the Russian genocidal plan. However, the divisions among genocide scholars in establishing a potential genocidal intent in the case of Ukraine remain considerable, with opinions varying significantly, with some scholars more optimistic on this matter[60] than others.[61]

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[56] V. Putin, *On the Historical Unity of Russians and Ukrainians*, President of Russia, 12 July 2021, available at: http://en.kremlin.ru/events/president/news/66181 (accessed 30 August 2024); Putin added that his position is not driven by some short-term considerations or prompted by the current political context.

[57] *Address by the President of the Russian Federation*, President of Russia, 21 February 2022, available at: http://en.kremlin.ru/events/president/news/67828 (accessed 30 August 2024).

[58] T. Sergeytsev, *Čto Rossiâ dolžna sdelat' s Ukrainoj* [What Russia should do with Ukraine], RIA Novosti, 3 April 2022, available at: https://ria.ru/20220403/ukraina-1781469605.html (accessed 30 August 2024).

[59] D. Medvedev, O *fejkah i nastoâšej istorii* [About fake and real history], Telegram, 5 April 2022, available at: https://t.me/medvedev_telegram/34 (accessed 30 August 2024).

[60] T.D Snyder, *Russia's genocide handbook*, Thinking about..., 8 April 2022, available at: https://snyder.substack.com/p/russias-genocide-handbook; E. Finkel, *What's happening in Ukraine is genocide. Period*, The Washington Post, 5 April 2022, available at: https://www.washingtonpost.com/opinions/2022/04/05/russia-is-committing-genocide-in-ukraine/; G.H. Stanton, *The Ten Stages of Genocide*, Genocide Watch, available at: https://www.genocidewatch.com/tenstages; G. Wright, *Ukraine war: Is Russia committing genocide?*, BBC News, 13 April 2022, available at: https://www.bbc.com/news/world-europe-61017352; D. Bilyk, *Expert: Russian actions in Mariupol can be called genocide*, Deutsche Welle, 24 March 2022, available at: https://www.dw.com/ru/nemeckij-jekspert-dejstvija-rf-v-mariupole-mozhno-nazvat-genocidom/a-61247449; Y. Trofimov, J. Marson, *Russian Forces Kill Civilians, Loot for Supplies in Occupied Ukraine, Residents Say*, The Wall Street Journal, 14 March 2022, available at: https://www.wsj.com/articles/russian-forces-kill-civilians-loot-for-supplies-in-occupied-ukraine-residents-say-11647267560 (all accessed 30 August 2024).

[61] W.A. Schabas, *Genocide and Ukraine: Do Words Mean What We Choose them to Mean?*, 20(4) Journal of International Criminal Justice 843 (2022), pp. 843–857; K.J. Heller, *Can International Law Bring a Measure of Justice to Ukraine?*, Russian Matters, 22 March 2023, available at: https://www.russiamatters.org/analysis/can-international-law-bring-measure-justice-ukraine (accessed 30 August 2024); I. Marchuk, A. Wanigasuriya, *Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ*, 25(3–4) Journal of Genocide Research 256 (2022).

CONCLUSIONS

The international institutional framework for addressing Russian crimes in Ukraine since 2022 poses significant challenges, and clear coordination and resource allocation for successful and legitimate investigations by different states, including a leading Lithuania, need to be established. Moreover, the application of universal jurisdiction in the Lithuanian cases against Russia is complicated by numerous resource constraints, as well as by the legal complexities regarding the accused's presence. At the same time, successful results in establishing Russian accountability cannot escape the need to address the potential crime of genocide, in the same way that Lithuania's investigations regarding the transfer of Ukrainian children to Belarus echo historical cases at the ECtHR – all of which emphasise the potential significance of recent Russian declarations towards Ukraine in establishing a current genocidal intent.

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CRIME OF AGGRESSION AGAINST UKRAINE: LEGALITY AND LEGITIMACY OF DOMESTIC PROSECUTIONS IN THIRD STATES

Abstract: *The crime of aggression is an international crime that for various legal, political and practical reasons can be difficult to successfully and legitimately prosecute at the domestic level against nationals of aggressor or third states. This article considers the legality and legitimacy of domestic prosecutions initiated by third states regarding the crime of aggression against Ukraine and the role that the newly established International Centre for the Prosecution of the Crime of Aggression could have in increasing the legitimacy not only of domestic prosecutions by third states, but of the future Special Tribunal as well.*

Keywords: crime of aggression, domestic prosecution, special tribunal, universal jurisdiction

INTRODUCTION

Lithuania was among the first national jurisdictions to start criminal investigations of the crime of aggression according to its national laws.[1] On 3 July 2023 the International Centre for the Prosecution of the Crime of Aggression (ICPA) against Ukraine started functioning within Eurojust, providing coordination and support for prosecutors from joint investigation team (JIT) countries (Lithuania, Latvia, Estonia, Poland and Romania) that have started criminal investigations into the crime of aggression against Ukraine.

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[1] Ukraine, Lithuania, Latvia, Estonia, Poland and Romania have opened criminal investigations into the crime of aggression being committed against Ukraine.

The Preamble of the Rome Statute of the International Criminal (ICC) Court[2] recalls that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. But the Kampala Resolution on the crime of aggression adopted by the Assembly of States Parties to the ICC states that the amendments concerning the definition of the crime of aggression and specific rules for the jurisdiction of the ICC shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.[3] Therefore, concerning the crime of aggression, it is far from clear when domestic jurisdiction exists under domestic or international law,[4] and there are lingering questions over the desirability and possibility of prosecuting crimes of aggression at the domestic level.[5] As a leadership crime involving inter-state conduct, the crime of aggression has traditionally been viewed as more suitable for international rather than domestic prosecution,[6] and it is doubtful that under customary international law aggression is subject to universal jurisdiction.[7]

The objectives of this article are a) to provide a legal framework for the crime of aggression in the criminal code of Lithuania; b) to consider the legality and legitimacy of domestic criminal investigations of the crime of aggression against Ukraine initiated by JIT members on the basis of universal jurisdiction; and c) to explain how the establishment of the ICPA could contribute to the legitimacy of domestic prosecutions into the crime of aggression against Ukraine.

1. THE CRIME OF AGGRESSION IN THE CRIMINAL CODE OF LITHUANIA

At least 20 states, including Lithuania, have implemented aggression as a crime under customary international law, largely mirroring the definitions of crimes against peace in the 1945 London Charter and the 1946 Tokyo Charter.[8] Art. 110 of the

[2] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

[3] *See also* ICC, *Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression*, 4–14 December 2017, ICC-ASP/16/24, appendix 3, understanding 5, available at: ICC-ASP-16-24-ENG.pdf (icc-cpi.int) (accessed 30 August 2024).

[4] P. Wrange, *The Crime of Aggression, Domestic Prosecutions and Complementarity*, in: C. Kress, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 732.

[5] C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge: 2021, p. 375.

[6] *Ibidem*, p. 51.

[7] R.S. Clark, *Complementarity and the Crime of Aggression*, in: C. McDougall (ed.), *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge: 2021, p. 383.

[8] A. Reisinger Coracini, (*Extended) Synopsis: The Crime of Aggression under Domestic Criminal Law*, in: C. Kress, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 1044.

Criminal Code of Lithuania – "Aggression" – states that any person who causes aggression against another state or is in command thereof shall be punished with a custodial sentence of 10 to 20 years or a custodial life sentence. The Criminal Code of the Republic of Lithuania also makes it possible to prosecute a person based on the principle of universal jurisdiction, and even to try such persons *in absentia*.[9]

Comparing the definition of the crime of aggression in the Criminal Code of Lithuania to the definition in the Rome Statute,[10] there is no reference to an act of aggression of a state that by its character, gravity and scale would constitute a manifest violation of the UN Charter. As Astrid Reisinger Coracini indicates, the definition does not list the modes of liability, and it is not clear from the definition whether the state element is understood as an integral part of the collective act underlying the crime of aggression under international law, or whether the domestic code merely limits individual criminal responsibility to participating in state acts.[11]

The Lithuanian courts did provide a certain explanation in the cases concerning international crimes being committed during the events of 13 January 1991, when the civilian population of Lithuania confronted the military forces of the Soviet Union. In 2022 a Supreme Court decision[12] explained that for the issue of individual criminal responsibility for the crime of aggression to be considered, an act of aggression must be committed; furthermore, to conclude that an act of aggression has been committed, it is necessary to state that one state used force against another state. It was also added that for the crime of aggression only persons who could effectively control the political and military actions of a state or who were in command of them could be prosecuted.

The explanation provided by the Supreme Court leads to the conclusion that individual criminal responsibility for the crime of aggression is limited to participating in a state's acts of aggression. And even though the definition of the crime of aggression in the Criminal Code of Lithuania does not directly refer to the UN General Assembly Resolution on the Definition of Aggression, an act of aggression *de jure* will have to be established before proceeding to the issue of individual criminal responsibility for the crime of aggression. As there is no gravity test in Art. 110 of the Criminal Code of Lithuania, theoretically every act of aggression by one state

[9] Lietuvos Respublikos baudžiamasis kodeksas [Criminal Code of the Republic of Lithuania], 26 September 2000, No. VIII-1968, Art. 7 and 110, available at: https://tinyurl.com/4naynsfd (accessed 30 August 2024).

[10] Art. 8*bis*(1) of the Rome Statute: "For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

[11] Reisinger Coracini, *supra* note 8, p. 1061.

[12] Supreme Court decision of 30 June 2022, No. 2K-7-39-1073/2022.

against another could qualify as a crime of aggression for the purpose of individual criminal responsibility in the domestic jurisdiction of Lithuania.

2. LEGALITY AND LEGITIMACY OF DOMESTIC PROSECUTIONS OVER THE CRIME OF AGGRESSION

As mentioned above, the preamble of the Rome Statute declares that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. Therefore, the legality of Ukraine's domestic prosecution of the crime of aggression committed against it can hardly be questioned, as it is being implemented by the appropriate national authorities and under the formal requirements set by national laws. However, the notion of "legitimacy" has underpinned many appraisals of institutions, processes and outcomes of international criminal justice.[13] According to Vasiliev, legitimacy in international criminal justice can be considered from two approaches: legitimacy as a normative category[14] or as a sociological acceptance by an audience. In the international criminal law literature, this duality is illustrated by the use of the term "*perceived* legitimacy".[15] Whilst evaluating the legitimacy of domestic prosecutions of the crime of aggression, performance legitimacy[16] must also be considered, entailing that the whole process of adjudication should be sufficiently fair and just.

Domestic jurisdictions raise no legitimacy concerns when enforcing international criminal law at the national level, prosecuting war crimes, crimes against humanity or genocide on different bases of jurisdiction prescribed by law and according to definitions of international crimes, as well as procedural standards that comply with international law. In the case of the crime of aggression, however, domestic judicial institutions have to establish an act of aggression being committed by a state; this raises concerns in the context of perceived legitimacy, because doubts arise as to whether (1) the domestic institutions of the victim state or of third states can

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13 S. Vasiliev, *Between International Criminal Justice and Injustice: Theorising Legitimacy*, in: N. Hayashi, C.M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, Cambridge: 2017, p. 66.

14 Normative legitimacy is understood as objectively fulfilling normative standards and criteria. *See also* A. Langvatn, T. Squatrito, *Conceptualizing and Measuring the Legitimacy of International Criminal Tribunals*, in: N. Hayashi, C.M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, Cambridge: 2017, p. 43.

15 Vasiliev, *supra* note 13, pp. 77–78.

16 According to Langvatn and Squatrito, process legitimacy is part of the multidimensional conception of legitimacy that is best for assessing the legitimacy of international criminal tribunals (Langvatn, Squatrito, *supra* note 14, p. 51). According to Vasiliev, performance legitimacy may include institutional and judicial independence, impartiality, procedural fairness, quality of judicial decision-making and legal reasoning (Vasiliev, *supra* note 13, p. 86).

be considered to have the necessary mandate to decide on inter-state conduct in non-compliance with international law and (2) these domestic institutions could actually demonstrate institutional and judicial independence, impartiality and objective legal reasoning whilst doing so.

According to Veroff, the crime of aggression could give rise to three types of domestic prosecutions. Firstly, a state could prosecute its own nationals, such as the principals of a former regime. Secondly, a state with no real connection to an act of aggression could prosecute under extraordinary bases of jurisdiction, such as universal jurisdiction. Finally, an aggressed state could prosecute the nationals of an aggressor state.[17]

The common aspect to be considered for all types of domestic prosecutions of the crime of aggression is whether national judicial institutions can be considered to have the necessary mandate and competence to qualify and state that an act of aggression has been committed by one state against another before proceeding to the issue of individual criminal responsibility. Considering that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes,[18] if national institutions are unable to state that an act of aggression has been committed for the purpose of individual criminal responsibility of concrete persons, then states would be unable to implement their primary responsibility for fighting impunity and ensuring accountability for international crimes in national courts.

The least problematic case would be if the state exercises domestic jurisdiction over its own nationals and decides that the act of aggression has been committed by its own state against another state. But this legal possibility of domestic prosecution could turn into a real political and legal challenge if domestic institutions start criminal investigations based on universal jurisdiction into the crime of aggression committed by nationals of third states or an aggressor state. Even though the principle of *par in parem non habet imperium*[19] does not disqualify domestic prosecution of crimes of aggression per se,[20] it does mean that domestic courts hearing aggression cases not involving their own nationals will essentially be sitting in judgment over the acts of a co-equal sovereign[21] and deciding on the legality of the use of force by one state against another.

The legitimacy of such a domestic prosecution of nationals of a third state or an aggressor state could be strengthened if an act of aggression has been acknowledged

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17 *See* J. Veroff, *Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward*, 125 The Yale Law Journal 730 (2015–2016).

18 Rome Statute, preamble.

19 Meaning that an equal has no power over an equal.

20 Wrange, *supra* note 4, p. 714.

21 B. van Schaak, *Par in Parem Imperiun Non Habet*, 10 Journal of International Criminal Justice 133 (2012), p. 149.

and condemned by the international community. As the objective of this article is to consider the legality and legitimacy of domestic criminal investigations begun by third states into the crime of aggression against Ukraine, one should not forget that on 2 March 2022 the UN General Assembly adopted a resolution entitled "Aggression against Ukraine", which denounced in the strongest terms Russia's aggression against Ukraine as being in violation of Art. 2(4) of the UN Charter – prohibition of the use of force – with 141 votes in favour, 5 votes against and 35 abstentions. This means that in this case, domestic prosecutorial or judicial institutions will not have to decide on the legality of the use of force and will be able to refer to this resolution, stating that an act of aggression in manifest violation of the UN Charter has been committed.

In cases when victim states try to prosecute the leaders of an aggressor state, it would be difficult for them to escape "the taint of victor's justice",[22] and such prosecutions could hardly be perceived as ensuring maximum legitimacy and impartiality. Therefore, even though the legality of Ukrainian domestic prosecution of the crime of aggression committed by Russian political and military leadership is undisputed, Ukraine as the victim state has well-grounded expectations for the establishment of a fully-fledged international criminal tribunal, which on behalf of the international community would judge on the crime of aggression being committed against Ukraine and would leave no room for this judgement to be challenged later for lacking legitimacy and impartiality.

Furthermore, personal immunities being applicable under international law before the courts of third states would prevent domestic jurisdictions of third states and Ukraine ensuring that the political and military leadership of Russia are held accountable as long as these individuals remain in power. Taking this into account and referring to the multidimensional concept of the legitimacy of criminal tribunals,[23] the selection of cases and decisions, as well as the deterrent effects, must be sufficiently just and morally justifiable in terms of the results. Understanding that – according to international law as it stands today – personal immunities for political and military leaders of an aggressor state should be applied, serious doubts arise as to whether domestic jurisdictions would be able to meet expectations for the legitimacy of the results of criminal investigations, because even arrest warrants for the crime of aggression committed by Russian political and military leadership could not be issued.

But despite these aspects of legitimacy, serious doubts also arise about the legality of third states prosecuting the crime of aggression based on universal jurisdiction,

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22 McDougall, *supra* note 5, p. 391.

23 *See* Langvatn, Squatrito, *supra* note 14, pp. 14–65.

because the more burning question – as it was named by McDougall[24] – is whether universal jurisdiction applies to the crime of aggression.

Under the principle of universal jurisdiction, each and every state has jurisdiction to try particularly serious offences under international law. The basis for this is that the crimes involved are regarded as particularly offensive to the international community as a whole.[25] Universal jurisdiction according to O'Keefe amounts to an assertation of jurisdiction in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.[26] It enables a state to prosecute certain crimes without regard to where the crime was committed, the nationality of the alleged perpetrator, the nationality of the victim or any other connection to the state exercising such jurisdiction. Broomhall explains the existence of universal jurisdiction in international law, emphasising its pragmatic rationale – because other bases of jurisdiction are insufficient to ensure accountability, "as these acts are often committed by those who act from or flee to a foreign jurisdiction, or by those who act under the protection of the State" – and its normative rationale, because certain crimes are of universal concern, "deserving condemnation in themselves, and deemed to affect the moral and even peace and security interests of the entire international community."[27]

Even though the possibility of universal jurisdiction in international criminal law can ensure accountability for international crimes,[28] Van Schaak, relying on the *par in parem non habet imperium* principle considers that current law does not provide strong support for the exercise of domestic jurisdiction over the crime of aggression, *a fortiori* pursuant to universal jurisdiction.[29] On the other hand, Wrange believes that this principle does not disqualify domestic prosecutions for crimes of aggression as such,[30] but that the most controversial grounds for jurisdiction would undoubtedly be universal jurisdiction by "bystander states".[31] The fact that a particular activity may be seen as an international crime does not of itself

[24] McDougall, *supra* note 5, p. 381.

[25] M. Shaw, *International Law*, Cambridge University Press, New York: 2008, p. 668.

[26] R. O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2(3) Journal of International Criminal Justice 735 (2004), p. 745.

[27] B. Broomhall, *International Justice & The International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, Oxford: 2003, pp. 107–108.

[28] According to Prof. Ryngaert, accountability for gross human rights violations – including the exercise of universal jurisdiction – is a European value, but at the same time the scope of universal jurisdiction and content remains unclear. For example, it is unclear whether universal jurisdiction falls under customary international law (*Workshop "Universal Jurisdiction and International Crimes: Constraint and Best Practices"*, European Parliament, Strasbourg: 2018, available at: https://tinyurl.com/379pczy3 (accessed 30 August 2024).

[29] van Schaak, *supra* note 21, p. 144.

[30] Wrange, *supra* note 5, p. 714.

[31] *Ibidem*, p. 717.

establish universal jurisdiction, and state practice does not appear to have moved beyond war crimes, crimes against peace and crimes against humanity in terms of permitting the exercise of such jurisdiction.[32]

I believe that a bystander state such as Lithuania exercising universal jurisdiction over the crime of aggression touches upon the rules of international law, which are not uniform or universally accepted. For this reason, even though a domestic investigation could be considered a legal option for ending impunity for the crime of aggression in the case of Ukraine, the question remains whether such a legal option could be considered to be founded on the universally accepted international law norms, and would therefore be seen by other states as worth supporting and as a legitimate legal effort ensuring accountability for the international crime where international interest is so eminent because of the *jus cogens* principle of the non-use of force being breached. Differences between national definitions of the crime of aggression and the definition provided in the Rome Statute create less legality and legitimacy risks than grounding domestic prosecution of the crime of aggression in universal jurisdiction. For example, in Lithuania, in relation to the lack of leadership element in the definition of the crime of aggression as well as in Ukraine,[33] national courts interpreted elements of the crime of aggression in compliance with the definition of the crime in the Rome Statute.

Bearing in mind that the investigation into the crime of aggression committed by the political and military leadership of Russia, a permanent member of the UN Security Council, against Ukraine will be an historical investigation on par with the Nuremberg trial, any legality, legitimacy, impartiality or quality deficit should be avoided from the very beginning, because the future political and legal legitimacy of the Special Tribunal will not only derive from the procedure under which the tribunal comes into being, but will also depend on the decisions being taken in domestic jurisdictions before proceedings are taken over by the Special Tribunal.

As Veroff points out, domestic prosecutions into the crime of aggression could encounter justiciability, evidentiary, immunity and other legal roadblocks – for example, the prosecution might need to access information that is classified or a state secret, or otherwise controlled by the putative aggressor state, or that states may also have divergent approaches to the burden of proof.[34] Common evidence standards and procedural rules for the collection, verification and evaluation of

[32] Shaw, *supra* note 25, p. 671.

[33] The Supreme Court of Ukraine stated that the acts defined in Art. 437 of the Criminal Code can be committed by individuals who, due to their official authority or actual social position, are able to exercise effective control over or manage political or military actions and/or significantly influence political, military, economic, financial, informational and other processes in their own state or abroad and/or manage specific areas of political or military actions (Supreme Court decision of 28 February 2024, No. 415/2182/20, para. 45).

[34] Veroff, *supra* note 17.

evidence could enhance the legitimacy of domestic prosecutions and ensure that coherent and just procedures will lead to evidentiary results that will strengthen, not weaken the legitimacy of the trial for the crime of aggression against Ukraine in the future Special Tribunal. For these reasons, the establishment of the ICPA could be considered an important development, not only towards establishing the Special Tribunal, but also towards increasing the legitimacy, impartiality and quality of domestic criminal investigations into the crime of aggression against Ukraine.

3. THE IMPORTANCE OF ICPA FOR THE LEGITIMACY OF DOMESTIC PROSECUTIONS INTO THE CRIME OF AGGRESSION

Lithuania, as other JIT countries, carries out investigations into the crime of aggression against Ukraine according to its national laws and procedures. The main objective of establishing the ICPA is to facilitate case-building for future trials for this crime, that is, to ensure that evidence of the crime being collected in different domestic jurisdictions of JIT countries is preserved and prepared for future trial.[35] The main purposes of the ICPA are to provide a structure to support and enhance the investigations into the crime of aggression against Ukraine by securing evidence and to facilitate the coordination of investigations for the crime of aggression among JIT members, the ICC and other states, even those which are not members of the JIT.

The procedural legitimacy and quality of the criminal investigations into the crime of aggression that have been started in domestic jurisdictions by third states and Ukraine will play its role in ensuring that the future Special Tribunal is seen by the international community as worthy of support. First, the definition of the crime of aggression will have to be agreed upon by the JIT members because, as the example of Lithuania indicates, domestic definitions do not necessarily incorporate all the elements of the definition in the Rome Statute. As there are arguments for considering the definition in the Rome Statute as reflecting international customary law, an agreement to rely on this definition could increase the legitimacy and impartiality of the domestic criminal investigations into the crime of aggression against Ukraine. Furthermore, together with its coordinating roles, the ICPA should take on the responsibility of ensuring that coherent procedural rules are applied for evidence collection, verification and evaluation in order to avoid the risk that different domestic jurisdictions will use different rules and that certain evidence could later be challenged as having been collected or verified under different procedures and standards.

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[35] *See International Centre for the Prosecution of the Crime of Aggression against Ukraine*, EuroJust, available at: https://tinyurl.com/5heknt8w (accessed 30 August 2024).

Since domestic prosecution of the crime of aggression against Ukraine have been started by countries, including Lithuania, that have previously been occupied and annexed by the Soviet Union, broad cross-regional support by other states and international (regional) organisations for domestic prosecutorial efforts of third countries on the basis of universal jurisdiction could minimise the risk of such proceedings being seen as partial, aimed at establishing historical justice and therefore lacking legitimacy from the very outset as being motivated more by self-interest and not the interest of the international community as a whole. Broad support could help internationalise the domestic proceedings of JIT members and enable non-JIT members to contribute to the quality of investigations by sharing confidential information to support the criminal prosecution of the Russian military and political leadership, because otherwise national criminal jurisdictions will face evidentiary problems without the possibility of analysing top-secret documents of the aggressor state.

Taking all these aspects into account, the conclusion can be drawn that various political and practical reasons may result in limited support in the international law doctrine for the right of states to initiate domestic criminal investigations into the crime of aggression based on universal jurisdiction, and that the legitimacy of such domestic prosecutorial efforts could be challenged at the international level. However, if the definition of the crime of aggression being agreed by the ICPA countries complies with that in the Rome Statute, coherent evidentiary standards and standard procedures for the collection and verification of evidence in different domestic jurisdictions are set and broad international support for domestic prosecutorial efforts by third states is ensured, then the legitimacy and quality of such investigations could be greatly enhanced.

CONCLUSIONS

Lithuania has started criminal investigations into the crime of aggression against Ukraine on the basis of universal jurisdiction, as this possibility is provided for in the Criminal Code of Lithuania. Under international law as it stands today and international law doctrine, it is difficult to confirm the possibility of bystander states exercising universal jurisdiction over the crime of aggression being committed by nationals of a third state against another state.

Even though there is no international consensus that universal jurisdiction of third states applies to the crime of aggression, there is no doubt that the national prosecution authorities and domestic courts of third states could manage to perform impartial and objective investigations of the crime of aggression being committed against Ukraine. Nonetheless, the aggression against Ukraine has been committed

by a permanent member of the UN Security Council – Russia – meaning that investigation by JIT members and Ukraine will be under exceptional scrutiny from the international community from the very beginning. This scrutiny proves the importance of establishing a coordinated prosecutorial effort within Eurojust: the ICPA. The definition of the crime of aggression, as well as the standards of evidence, must be decided in an impartial and credible manner from the very beginning; procedures to ensure the quality of the criminal procedures must be respected, so as to leave no possibility of challenging the truth being stated in the form of judgments from the future Special Tribunal.

By fighting back against Russia's aggression for more than 10 years and the full-scale aggression continuing for more than two years, Ukraine is already making history. First after the Nuremberg coordinated prosecution into the crime of aggression against Ukraine in the form of the ICPA has a chance to make the history also if this investigation settles down in the most legitimate and that is a fully-fledged international criminal tribunal established following the recommendation of the UN General Assembly and based on a multilateral treaty signed between the UN Secretary General and Ukraine.

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THE INADMISSIBILITY OF JURISDICTIONAL IMMUNITY OF PERSONS RESPONSIBLE FOR THE COMMISSION OF INTERNATIONAL CRIMES IN TERMS OF DOMESTIC UNIVERSAL JURISDICTION PROCEEDINGS**

Abstract: *This article addresses the complex issue of immunity for State officials from foreign criminal jurisdiction, with a focus on the ILC's role in codifying and ensuring the compatibility of international legal acts. It underscores the calls for exceptions to functional immunity, particularly concerning ius cogens norms, and it highlights how the current framework often impedes accountability for international crimes. However, the ILC's limitation of Art. 7 to immunity ratione materiae, excluding jurisdictional immunities, presents a legislative gap that hampers prosecution under universal jurisdiction. This underscores the need for international codification and progressive development to reconcile immunity doctrines with the imperative of accountability for serious international crimes. The article highlights the lack of a clear international position due to: (1) the absence of uniform definitions for immunity ratione personae, ratione materiae and jurisdictional immunity, (2) the identification of various exceptions limiting the invocation of immunities in domestic and third-State courts and (3) the inconsistent interpretation of immunity exclusions for ius cogens violations. It argues for harmonising legal norms at the international level to adequately initiate and conduct criminal proceedings by specifying the circumstances that exclude jurisdictional, ratione materiae and ratione personae immunities, thus re-establishing criminal accountability for international crimes.*

Keywords: international crimes, limitation of procedural immunity, procedural immunity, ratione materiae immunity, universal jurisdiction

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INTRODUCTION

There is an ongoing debate in international legal and political circles about whether State officials should retain immunity for crimes with international implications. The key issue is whether such immunity should be waived for serious violations of international norms. Retaining immunity may hinder accountability and violate principles of international security, raising concerns about the legal system's effectiveness in enforcing accountability. This raises understandable concerns about the effectiveness of the legal system in holding individuals accountable for such acts.

At the International Law Commission (ILC), there are numerous opinions suggesting that there should be exceptions to the established immunities of State officials in situations where they commit crimes that seriously violate the norms of international law, noting that these offences are *ultra vires*, or beyond official powers. This justifies excluding both immunity *ratione materiae* and jurisdictional immunity. However, there are doubts about limiting the exclusion to immunity *ratione materiae*, which relates to acts performed in an official capacity (so-called "official acts"). The debate includes calls for broader immunity waivers. The current framework of immunity often ensures not being accountable for actions directly related to the fulfilment of officials acts, creating a loophole that hinders accountability for international crimes. This issue requires further attention and potential modification in discussions on State officials' immunity.

1. THE CONCEPT AND NATURE OF IMMUNITIES

The concept of immunity is broadly complex and ambiguous. The term is derived from the Latin term "*immunitas*", meaning exemption from all burdens and obligations imposed on a particular subject of law. It also denotes a negation to the Latin word "*munia*", denoting civic and social obligations.[1] Consequently, immunity constitutes a privilege enjoyed by a certain category of persons, placing them in a different procedural situation to all other persons due to the nature of the functions they perform; this results in limited admissibility or complete inadmissibility of criminal prosecution of these persons, constituting a clear exception to the principle of the universality of criminal proceedings. As the essence of immunities can be examined on several levels, it should be pointed out that the doctrine of international law divides immunities into (1) immunities *ratione personae* (substantive immunities) and (2) immunities *ratione materiae* (functional immunities).

This does not mean that immunity *ratione materiae* is the only form of functional immunity. Functional immunity is granted to public officials performing acts on behalf of their State and is tied to official acts during their term of office.

[1] A.C. Murray, *Immunity, Nobility, and the Edict of Paris*, *69*(1) Speculum 18 (1994), pp. 18–19; X. Yang, *State Immunity in International Law*, Cambridge University Press, Cambridge: 2012, pp. 6–15.

Although broader than immunity *ratione personae*, functional immunity is linked to the nature of the acts rather than the official performing them. Traditionally, these immunities continue even after the official's term ends, so as to ensure State sovereignty and the principle of *par in parem non habet judicium*. However, this immunity should be waived if a State official commits an international crime that (1) prevents full protection of individual rights and (2) violates international security. The ILC, which drafts and codifies international law, rightly points out that legal protection cannot be provided for acts not codified in international or national regulations. Indeed, in the last seven reports submitted by the rapporteur on State officials' immunity from foreign criminal jurisdiction,[2] the opinion was expressed that there should be exceptions to the principle of functional immunity, and that the very nature of immunities cannot determine the scope of application of *ius cogens* norms. As a result, perpetrators of international crimes should be held accountable, especially when safeguarding the legal rights violated by these crimes outweighs upholding the principle of immunity.

This implies that national courts should have universal jurisdiction over such acts. If immunity conflicts with norms like *ius cogens*, which prioritise protecting the legal goods violated by international crimes, then immunity guarantees should not apply, and jurisdictional immunity preventing criminal court jurisdiction should be abolished. This in turn suggests that immunities may either outright prohibit criminal prosecution, preventing the initiation and conduct of criminal proceedings, or impose procedural barriers to prosecution for certain individuals.

Traditional immunity temporarily shields specific actors from criminal liability. However, it is crucial to differentiate between immunity that prevents someone from being held criminally responsible – thus affecting the admissibility of criminal proceedings – and immunity that excludes criminal court jurisdiction. Whilst immunities *ratione personae* and *ratione materiae* are in fact circumstances that exclude criminal punishment – temporarily or permanently – they do not in essence constitute a technical limitation of criminal proceedings. The difference lies in the fact that jurisdictional immunities do not, in their essence, constitute subject and object coverage, but their *ratio legis* is related to the possibility of actualising the sanctioned and sanctioning norm during criminal proceedings. The need to distinguish them is closely linked to the technical possibility of initiating and continuing

[2] During its 59th session in 2007, the ILC added "immunity of State officials from foreign criminal jurisdiction" to its agenda. Mr Roman A. Kolodkin served as Special Rapporteur for the initial reports, with subsequent reports being led by Ms Concepción Escobar Hernández. Twelve draft articles proposed by Ms Hernández, including Art. 7 on immunity from foreign criminal jurisdiction of State officials, were adopted by the ILC. *See* UNGA, *Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Concepción Escobar Hernández, Special Rapporteur*, 12 June 2018, A/CN.4/722 with annexes, available at: https://digitallibrary.un.org/record/1636856?v=pdf (accessed 30 August 2024).

criminal proceedings, although it is pointed out that they do not prevent all stages of criminal proceedings, particularly investigation, the collection of evidence and the service of an indictment.[3] Jurisdictional immunities thus exclude *in concreto* the jurisdiction of national criminal courts (immunity from jurisdiction *sensu stricto*) on the grounds that they constitute a statutory exception to the principle of the universality of the criminal process. Considerable doubts arise in the legal analysis of jurisdictional immunities *sensu largo*, covering the scope of immunities *sensu stricto* and criminal proceedings before international courts and national courts of third countries in the exercise of universal jurisdiction in connection with the commission of an act of an international character by an entitled party. It is pointed out that "the existence of jurisdiction is the starting point for the establishment of immunity, whilst the existence of universal jurisdiction does not distract from the importance of immunity as a means to protect the principle of national sovereignty and equality."[4] It is considered that the content of jurisdictional immunity sensu largo is the inadmissibility or limited admissibility of criminal prosecution of a State's representative. The possibility of holding the perpetrator liable must be preceded by the consent of the competent entity of the State of origin of the perpetrator of an international criminal act.[5] This results in a procedural condition that precludes conducting proceedings against a person with such immunity if jurisdictional immunity has not been waived. Whilst such a meaning may be granted to immunity *ratione personae*, it only has a material scope when it is directly connected with the exercise of a specific State mandate.[6]

2. THE CONCEPT OF JURISDICTIONAL IMMUNITY

Jurisdictional immunity, like immunity *ratione materiae*, should be capable of being limited or excluded, in order to guarantee the proper course of initiating and conducting criminal proceedings. Protection granted in this way is analogous to immunity *ratione materiae*, i.e. of a functional and therefore relative nature, to which limitations and exceptions can only be established by statutory provisions, and in which the practice of individual States also varies. The issue of immunity of State officials from foreign criminal jurisdiction (jurisdictional immunity) must

[3] Case C-3/20 *Criminal Proceedings against AB and Others*, EU:C:2021:969.

[4] H. Ren, Z.X. Jin, *The Limitations and Exceptions to Immunity of States Officials from Foreign Criminal Jurisdiction: On ILC Draft Article 7*, 12 Beijing Law Review 287 (2021), p. 294.

[5] D. Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD, Paris: 2010, p. 32.

[6] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 11 April 2000, ICJ Rep 2002, p. 3.

therefore be codified at the international level; it is also one aspect to be progressively developed within the framework of international law.

The ILC has expressed numerous opinions that there should be exceptions to the established immunities of State officials if they commit a crime that seriously violates the norms of international law. At the same time, these offences constitute *ultra vires* acts – separate from official acts. As a result, the commission of *ultra vires* acts not only warrants excluding immunity *ratione materiae* and jurisdictional immunity, but also justifies holding the State representative criminally liable in proceedings before a third State's court in cases of alleged international crimes. Since jurisdictional immunity creates a negative procedural condition when a criminal act is found to have been committed in connection with the perpetrator's office, the issue of *ultra vires* acts is particularly relevant. If the factual circumstances fail to meet the criteria for an international crime, doubts may arise, necessitating the anticipation of potential procedural obstacles. In such cases, the customary principle of international law that justifies exclusion due to immunity may not be applicable.

The crucial determinant is the legal framework being international law rather than domestic criminal law. It is noteworthy that even if the act is deemed an ordinary, non-international crime under such circumstances, jurisdictional immunity does not impede prosecution. Consequently, general criminal offences stemming from the same act may also be prosecutable when an *ultra vires* act occurs. This approach was also outlined in the most recent judgment of 21 February 2023 of the German Federal Court of Justice,[7] which indicated that functional immunity does not apply to crimes under international law, regardless of the status and rank of the perpetrator, and that its exclusion is clearly part of international ordinary law. The omission of functional immunity for foreign sovereigns in instances of international crimes is an unquestionable aspect of customary international law.

Unlike the broad immunity *ratione personae* afforded by international law to top State officials like heads of state during their tenure, which shields them from prosecution by foreign States without exceptions, this functional immunity lacks such protection even for crimes under international law. In other words, it does not exempt individuals from accountability for acts whose criminal culpability stems directly from established customary international law. The decision follows a judgment of the German Federal Court of Justice of 28 January 2021[8] on the

[7] Bundesgerichtshof [Federal Court of Justice], judgment of 21 February 2024, AK 4/24: "Die allgemeine Funktionsträgerimmunität gilt bei völkerrechtlichen Verbrechen nicht, und zwar unabhängig vom Status und Rang des Täters. Der Ausschluss dieser funktionellen Immunität fremder Hoheitsträger bei Völkerstraftaten gehört zum zweifelsfreien Bestand des Völkergewohnheitsrechts."

[8] Bundesgerichtshof [Federal Court of Justice], judgment of 28 January 2021, 3 StR 564/19: "inwieweit eine funktionelle Immunität einer Strafverfolgung allein wegen allgemeiner Straftaten entgegenstünde, wie sie etwa das Oberlandesgericht hinsichtlich der Misshandlung der Gefangenen angenommen hat." *See also*

issues of (1) whether it is possible to identify a rule under customary international law that prevents national courts from exercising domestic jurisdiction against State officials for crimes of international law and (2) whether a case of this kind can be declared procedurally inadmissible. There is no standard of international law indicating that jurisdictional immunity can be explicitly waived in the case of an international crime (this will be described in the following subsections), but it is worth pointing out that customary international law must respond to real needs for the protection of personal rights. Consequently, the prosecution of war crimes by national authorities before a national court should not be excluded by functional immunity *sensu stricto* – which certainly includes jurisdictional immunity – if the crime was committed by a State official in the exercise of their official function, i.e. in the context of official acts. Thus, there is no serious doubt about excluding immunity from jurisdiction in this respect, if it is assumed that international crimes are *ultra vires* acts.

2.1. Exclusion of jurisdictional immunity based on Art. 7 on immunity from foreign criminal jurisdiction of State officials

Although the question of *ultra vires* acts, when it comes to immunity *ratione personae*, may arise only after the person concerned no longer holds their position, and from the outset (i.e. whilst still in office) under immunity *ratione materiae*, it is important to determine in which situation the question of jurisdictional immunity applies. On the one hand, it is pointed out that international crimes cannot be effectively distinguished from official acts; on the other hand, their scope is closely linked to the due international protection of legally protected goods. As such, however, immunity from international criminal jurisdiction seems to differ fundamentally from immunity from domestic criminal jurisdiction.[9] The widely accepted consensus on functional immunity holds that it does not protect State officials from prosecution under universal jurisdiction. However, this consensus has been questioned on a number of occasions, in particular by the German courts. For example, the Higher Regional Court of Koblenz indicated in the Al-Khatib trial that domestic law does not cover the exclusion of functional immunity in the case of war crimes, and that the absence of international law norms for excluding jurisdictional immunity is a procedural condition precluding the initiation and conduct of criminal proceedings.[10]

Recently, however, this consensus has also been challenged at the international level. It was also related to the lack of a demonstrable difference between official acts

F. Jeßberger, A. Epik, *Immunität für Völkerrechtsverbrechen vor staatlichen Gerichten – zugleich Besprechung BGH*, 2022(1) Juristische Rundschau 10 (2022), pp. 12–15.

[9] UNGA, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur*, 29 May 2008, A/CN.4/601, available at: http://www.legal-tools.org/ doc/97bd3b/ (accessed 30 August 2024).

[10] Oberlandesgericht Koblenz [Higher Regional Court Koblenz], judgment of 13 January 2022, 1 StE 3/21.

and *ultra vires* acts. This issue was recognised by the ILC and included in its work programme in its Sixth Report on immunity of State officials from foreign criminal jurisdiction, indicating the need to provide exceptions only for immunities *ratione materiae*, as opposed to immunities *ratione personae*.[11] The above report was the culmination of the ILC's intensive discussions on the genesis, scope, exceptions and procedures surrounding the issue, including the establishment of the material scope of Art. 7 on State officials' immunity from foreign criminal jurisdiction, confirming the substantive and procedural principles of limitations and exceptions to the granting of jurisdictional immunity. This also represented a kind of culmination of the problems identified by the ILC related to the perceived tendency to consider an international crime an obstacle to the application of jurisdictional immunity.[12] The initial part of the provision delineates six crimes: genocide, crimes against humanity, war crimes, apartheid, torture and enforced disappearances.[13] According to the subsequent section, officials accused of committing these crimes cannot claim immunity *ratione materiae*. However, concerns arise because the provision only addresses immunity *ratione materiae*, which limits the accountability of officials to acts carried out during their tenure (referred to as official acts). This suggests that functional immunities may not extend to crimes under international law. Consequently, domestic courts may be constrained in prosecuting individuals beyond State's authority, enabling those acting within State power to evade punishment. Nonetheless, immunity *ratione materiae* may persist even for international crimes if it is established that the conduct fell within the State's authority and is not covered by international law. An official's immunity does not necessarily cover unlawful acts, and the gravity of the crime should not affect the official nature of the act.

Although the commission of a crime of an international nature constitutes a serious violation of the universal values of the international community, which are protected by universal jurisdiction, the limitation of Art. 7 only to immunity *ratione materiae* constitutes a legislative error. Besides, such a position would also contradict the view of the ICC Pre-Trial Chamber, which indicated that "immunity of either former or sitting heads of state cannot be invoked to oppose a prosecution by an international court."[14] Immunity *ratione materiae* covers acts committed in

[11] Y. Zhong, *Criminal Immunity of State Officials for Core International Crimes Now and in the Future*, 20 Fichl Polity Brief Series 1 (2014), pp. 1–2; UNGA, *Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur*, 10 June 2010, A/CN.4/631, p. 32.

[12] UNGA, *Fifth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction by Concepción Escobar Hernández, Special Rapporteur*, 16 June 2016, A/CN.4/701, pp. 24, 34, available at: https://digitallibrary.un.org/record/863249?v=pdf (accessed 30 August 2024).

[13] UNGA, *Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Concepción Escobar Hernández, Special Rapporteur*, 12 June 2018, A/CN.4/722 with annexes, p. 43, available at: https://digitallibrary.un.org/record/1636856?v=pdf (accessed 30 August 2024).

[14] ICC, Corrigendum of 13 December 2011 to the Decision Pursuant to Article 87(7) of the Rome Statute

the performance of official duties and does not cease with the termination of the function. However, in order for a legally protected good to be protected and for a substantive law to be effective, there must be a corresponding procedural law. It is therefore not surprising that "the absence of any procedural [jurisdictional] immunity (...) is an essential corollary of the absence of any substantive immunity or defence"[15] and that procedural (jurisdictional) immunity serves as the foundation upon which other forms of immunity are based.[16] However, such a limitation of jurisdictional immunity in the case of immunity *ratione materiae* must also have grounds in international law. If the procedure in Art. 7 was to be applied, it would be possible for an official to be held liable during their term of office for the listed offences, but the substance of immunity *ratione materiae* cannot be separated from the scope of application of immunity from jurisdiction. It shall be underlined that any immunity of a functional nature, including precisely jurisdictional immunity, must be taken into account under Art. 7. According to the above provision, although a State official could currently be subject to criminal prosecution, it is not possible to initiate and adequately pursue criminal proceedings before a national or foreign court under universal jurisdiction due to the fact that the ILC limited the scope of Art. 7 only to immunity *ratione materiae*, without taking into account jurisdictional immunities. Thus, Art. 7 greatly reduces the authority of third-country courts under the application of universal jurisdiction.

2.2. Jurisdictional immunity in proceedings applying universal jurisdiction

A practical problem arises when national law enforcement authorities apply universal jurisdiction to initiate proceedings. This is because it appears that acts of national law may provide for a procedural condition that stipulates immunity from jurisdiction when the obliged party possesses immunity exempting a given person or act from the jurisdiction of the criminal courts. The norms of criminal law constitute a *lex generali*, whereas the norms of international law constitute a *lex specialis*, so that the current deficiencies in international law – the failure to indicate exceptions to the possibility of raising functional immunities – prevent the proper conduct of

on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, p. 17, para. 36.

[15] Draft Code of Crimes Against the Peace and Security of Mankind, Art. 7, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf (accessed 30 August 2024).

[16] D.S. Koller, *Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgement as it Pertains to the Security Council and the International Criminal Court*, 20(1) American University International Law Review 7 (2004), p. 24.

criminal proceedings within the framework of universal jurisdiction, apart from Art. 7 being limited to a single functional immunity: immunity *ratione materiae*.

However, it is important to point to exceptional behaviour on the part of national courts, which have limited immunity from jurisdiction, by indicating that it is not possible for internationally criminal acts to be the subject of proper criminal proceedings.[17] Such consideration of immunities led to convictions against two then-incumbent leaders of the Forces Democratiques de Libération du Rwanda.[18] By finding that the acts committed could be classified as *ultra vires*,[19] despite a subject matter scope identical to that of immunity *ratione personae*, the national court had the authority to issue a conviction that did not take jurisdictional immunity into account. Similarly, jurisdictional immunity, as with immunity *ratione personae*, was excluded in the Al-Gharib judgment of aiding and abetting torture and forced imprisonment as crimes against humanity[20] and in the conviction for committing genocide against the Yazidis.[21] Similarly, the German Federal Court of Justice, in its judgment of 28 January 2021, recalled that according to the generally recognised definition reflected in Art. 38(1)(b) of the ICJ Statute, a rule of customary international law is one that is upheld by the uniform practice of a number of States (so-called usus) – so that there must be a consistent State practice and juris opinion indicating the need to exclude functional immunity – also jurisdictional immuni-

[17] R. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106(7) Yale Law Journal 2009 (1997), pp. 2038–2039.

[18] Oberlandesgericht Stuttgart [Higher Regional Court Stuttgart], judgmentof 28 September 2015, 5-3 StE 6/10.

[19] Attributing *ultra vires* acts solely to the State is misguided, given the shift from State culpability to holding individuals accountable. State officials can be held responsible because their actions are distinct from those of the State and because universal jurisdiction provides flexibility. It is questionable to only judge *ultra vires* acts after an official leaves office and faces criminal charges in another State. If the accused claims the acts were official, the other State can challenge this, and the burden of proof falls on the accused. *Ultra vires* acts, not part of official duties, are subject to foreign criminal jurisdiction once the official's immunity ends. Despite Art. 7, the definition of *ultra vires* acts remains unclear, complicating the assessment of whether such acts fall within official duties. Immunity should not shield against legal accountability for *ultra vires* actions, especially when involving international crimes. Legal action is crucial to ensuring accountability. *See* M. Tomonori, *The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct*, 29(3) Denver Journal of International Law & Policy 261 (2001), pp. 261–287; R. Pedretti, *Ultra Vires Action and Individual Criminal Responsibility*, in: R. Pedretti (ed.), *Immunity of Heads of State and State Officials for International Crimes*, Brill, Leiden: 2015, pp. 311–335; P. Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7(2) Journal of International Criminal Justice 315 (2009), pp. 315–332; N. Boschiero, *The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593*, 13(3) Journal of International Criminal Justice 625 (2015), pp. 625–653.

[20] Oberlandesgericht Koblenz [Higher Regional Court Koblenz], judgment of 24 February 2012, 1 StE 3/21; Oberlandesgericht Koblenz [Higher Regional Court Koblenz], judgment of 13 January 2022, 1 StE 9/19.

[21] Oberlandesgericht Frankfurt/Main [Higher Regional Court Frankfurt/Main], judgment of 30 November 2021, 5-3 StE 1/20-4-1/20.

ty – for international crimes.[22] A perpetrator raising jurisdictional immunity to a crime of international significance would be a violation of custom and human dignity due to the possibility of simultaneously raising other immunities granted by international custom or international agreements.[23] After all, there is no doubt that the commission of international crimes is not linked to official acts.

Such a position, moreover, enjoys growing support, as is evident in the joint individual opinion in the Arrest Warrant case.[24] Consequently, it can be pointed out that the exclusion of jurisdictional immunity should be allowed to guarantee that perpetrators do not invoke any deficiencies in proceedings already conducted within universal jurisdiction. In this context, the concern is not the sovereign actions of a foreign State which is not involved in the legal proceedings overall, but rather the personal criminal responsibility of an individual for international crimes committed while representing a foreign State. Without the independent action of national courts in applying universal jurisdiction, this would pose a significant challenge to the justice system. However, the failure to guarantee exemptions from immunity from jurisdiction at the level of international law is currently against the protection of individual rights, and constitutes an abuse of the law.[25] It is contrary to the principles of fairness and justice, which lie at the heart of the legal system.

CONCLUSIONS

There is an urgent need for a comprehensive international framework to address jurisdictional immunity that would ensure consistency and justice globally. This framework should regulate the limitation or waiver of immunity for State officials, especially in cases of serious international law violations that affect human rights. *Ultra vires* acts, separate from official State actions, should also be excluded from immunity. However, current legal gaps make it difficult to hold State officials accountable for international crimes. Robust international regulations must be established to regulate the potential limitation or waiver of immunity for persons exercising State functions. Codified international law should clearly state that criminal liability for international crimes cannot be limited. The lack of clear legal norms hinders criminal proceedings under universal jurisdiction. This issue is

[22] A. Epik, *No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice*, 19(5) Journal of International Criminal Justice 1263 (2021), p. 1269.

[23] *See also* A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 144(10) European Journal of International Law 144 (1999), pp. 164–165.

[24] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Rep 2002, at 79.

[25] Bundesgerichtshof [Federal Court of Justice], judgment of 18 July 2005, 2 BvR 2236/04. *See also* Kassationshof [Court of Appeal], judgment of 6 October 2004, 6S.64/2004.

essentially a legal loophole, and it requires attention and possible modification in order to ensure effective enforcement of liability for serious violations of international law. Excluding functional immunity for international crimes is part of customary international law, and Art. 7 should not impede punishment. A *de lege ferenda* proposal is to clearly establish in codified international law that criminal liability for international crimes cannot be limited. The *ultra vires* nature of such acts precludes any limitation of liability. The absence of clear legal norms leads to a lack of international consensus and can obstruct the initiation and due process of criminal proceedings under universal jurisdiction.

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THE POLISH INVESTIGATION INTO CORE CRIMES COMMITTED IN UKRAINE: PRACTICAL ASPECTS OF THE FUNCTIONING OF THE JIT

Abstract: *This article explains the legal basis and reasons for establishing a Joint Investigation Team by the Polish Prosecutor's Office, investigating crimes committed as a result of the Russian aggression against Ukraine. It analyses the reasons why this investigation is so highly demanding and describes how it requires an unconventional approach to work from investigators, as well as enormous coordination efforts and support from the EU organs. Other states are involved in the JIT on an unprecedented scale, as well as the OTP ICC, and unconventional support has been offered by the EU organs, especially in the area of digitalisation of the exchange of evidence. The article highlights the state and picture of investigations conducted into crimes committed in Ukraine, both in domestic jurisdictions and before the ICC, as well as possibly before an international or internationalised tribunal established to adjudicate the crime of aggression. It explains how the Polish investigation – conducted within the framework of a JIT – has become an important element of 'strategic litigation networks' for serious international crimes.*

Keywords: International Criminal Court; Joint Investigation Team; Polish investigation into core crimes committed in Ukraine; war in Ukraine

1. ESTABLISHMENT OF A JOINT INVESTIGATION TEAM INTO ALLEGED CRIMES COMMITTED IN UKRAINE

On 28 February 2022 the Department for Organized Crime and Corruption of the National Prosecutor's Office in Warsaw opened an investigation "on the crime of ag-

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gression perpetrated on 24 February 2022 by the authorities and functionaries of the Russian Federation, directed against the sovereignty, territorial integrity and political independence of Ukraine; perpetrated jointly and in agreement with the authorities and functionaries of the Republic of Belarus by making available the territory of this country for carrying out acts of armed aggression against Ukraine" – based on a type of criminal act defined as "aggressive war" in the context of Art. 117 § 1 of the Polish Criminal Code (PCC), meaning "initiating or conducting of an aggressive war", whether against Poland or any other state. Due to a reasonable suspicion about Russian forces attacking civilian objects, hospitals, and schools, and killing civilians and causing the destruction of property and cultural assets, the scope of the ongoing investigation was expanded to include war crimes, penalized (among other war crimes defined in the PCC) under Art. 122 (using prohibited types of weapons); Art. 123 (killing of civilians and prisoners); and Art. 125 PCC (destroying or robbery of cultural or material goods).[1]

On 25 March 2022, national authorities of Lithuania, Poland and Ukraine set up a joint investigation team (JIT, the so called "Ukrainian JIT") into alleged core international crimes committed in Ukraine. The JIT agreement was signed by the Prosecutors General of Poland, Ukraine, and Lithuania. The signing took place at the Polish – Ukrainian border crossing in Korczowa-Krakovets,[2] which in itself is unusual and symbolic. The authorities of Estonia, Latvia and Slovakia joined the JIT on 30 May 2022 and Romania became a member on 13 October 2022. On 3 March 2023, the seven national authorities participating in the JIT signed a Memorandum of Understanding (MoU) with the United States Department of Justice.

The present article deals with the legal basis and reasons for establishing a JIT by the Polish Prosecutor's Office, investigating crimes committed as a result of the Russian aggression against Ukraine. The purpose of this text is to analyse the reasons why this investigation is so highly demanding – both legally and practically – and how it requires an unconventional approach to work from investigators, as well as enormous coordination efforts and support from the EU organs and the ICC. The EU Member States (MSs) are involved in the JIT, together with the OTP of the ICC, on a previously unencountered scale, and unconventional support has been offered by the EU organs as well, especially in the area of digitalisation and exchange of evidence. This article highlights the state of cooperation between various actors in the framework of investigations conducted into crimes committed

[1] Mazovian Branch of the Department for Organized Crime and Corruption of the National Prosecutor's Office in Warsaw investigation of 28 February 2022, Case 1001-105.Ds.12.2022.

[2] *Kolejne kraje dołączyły do międzynarodowego zespołu śledczego badającego zbrodnie wojenne na Ukrainie* [Additional countries join the international investigative team investigating war crimes in Ukraine], Prokuratura Krajowa, 30 May 2022, available at: https://tinyurl.com/4x9jxc7b (accessed 30 August 2024).

in Ukraine, both in domestic jurisdictions and before the ICC, and explains how the Polish investigation – conducted within the framework of a JIT – has become an important element of a "strategic litigation network" for core crimes committed in Ukraine. It shows how the practical and legal circumstances of the present investigation are previously unknown and extraordinary and thus require a new approach and newly designed responses. This JIT investigation is highly demanding and requires an unconventional approach to work from investigators, enormous coordination efforts and support from the EU organs, as well as the involvement of the OTP of the ICC.[3]

The possibility to establish a JIT is provided in the Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).[4] The goal of this form of cooperation between MSs is – contrary to the traditional mutual legal assistance as well as the European Investigation Order, which are limited to specific investigation measures – to cooperate during the entire conduct of the investigation taking place in several MSs, where granting representatives of other MSs an unlimited, real-time exchange of information is crucial. In this form of cooperation authorities investigating a specific situation or crimes of a transnational character can directly exchange information and evidence; cooperate in real time; and jointly carry out operations, as this form of cooperation allows for delegated members of a JIT from other MSs to be present during investigative measures on each other's territories.[5] According to Art. 4, MSs were supposed to take the necessary measures to comply with the provisions of this Framework Decision (FD) by 1 January 2003 – meaning that they had an obligation to implement the provisions of the Framework Decision into their national legal orders. The Polish legislator fulfilled this duty by introducing new Arts. 589b to 589f CCP[6] into Chapter 62 ("Mutual legal assistance and delivery of documents in criminal cases") of the Polish Code of Criminal Procedure (CCP). In accordance with the assumptions of this provision, a joint investigation team is one of the forms of mutual legal assistance. A joint investigation team may, in particular, be set up where a MS's investigations into criminal offences require difficult and demanding investigations having links with other MSs, or a number of MSs are conducting investigations into criminal

[3] M. Caianiello, *The Role of the EU in the Investigation of Serious International Crimes Committed in Ukraine. Towards a New Model of Cooperation?*, 3–4(30) European Journal of Crime, Criminal Law and Criminal Justice 219 (2022), pp. 219–237

[4] Council Framework Decision of 13 June 2002 on joint investigation teams [2002] OJ L 162/1.

[5] *See e.g.* C. Riehle, *"20 years of Joint Investigations Teams (JITs) in the EU": An overview of their development, actors and tools*, 24 ERA Forum 163 (2023), pp. 163–167; A. Balcaen, *Law enforcement information exchange in the operational phase of a JIT*, in: G. Vermeulen, C. Rijken (eds.), *Joint Investigation Teams in the European Union: From Theory to Practice*, T.M.C. Asser Press, Hague: 2006, p. 86.

[6] Articles added to the CCP by Art. 2 point 2 of the Act of 16 April 2004 amending the Criminal Code and certain other acts [2004] JoL 93, 889.

offences in which the circumstances of the case necessitate coordinated, concerted action in the MSs involved. A request for the setting up of a joint investigation team may be made by any of the MSs concerned. The team shall be set up in one of the MSs in which the investigations are expected to be carried out (see Art. 1(3) FD).[7]

Also, Art. 13 of the Convention – established by the Council in accordance with Art. 34 of the Treaty on European Union on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000 Convention)[8] – contains a provision on the establishment and activities of joint investigation teams. However, the Convention was not adopted by the MSs for a considerable period of time, so the EU authorities decided to regulate this matter using a more effective method, and thus regulated the same area of cooperation in the legal form of a framework decision, which the MSs are obliged to implement into their own legal orders within a certain period of time. Therefore, this form of legal assistance, i.e. of joint investigation teams – currently operates in the EU law on two legal bases – both the 2000 Convention (in relation to the states that have ratified it) and the provisions of the Framework Decision 2002/465/JHA implemented into the internal law of the MSs.[9] Although in Poland it is customary to apply the provisions of the CCP as a basis for establishing a JIT, the doctrine has repeatedly pointed out that strictly formal adherence to legal rules should lead to the application of the provisions of the EU convention in each case.[10] Art. 615 § 2 CCP leaves no doubt that if an international agreement to which the Republic of Poland is a party provides otherwise, the provisions of Part XIII (including Chapter 62 CCP) regulating international cooperation do not

[7] M. Wróblewski, *Wspólne zespoły dochodzeniowo-śledcze* [Joint Investigation Teams], 9 Prokuratura i Prawo 74 (2006), pp. 74–75; M. Klejnowska, *Praca wspólnego zespołu śledczego w świetle przepisów kodeksu postępowania karnego* [The work of a joint investigation team in the light of the provisions of the Code of Criminal Procedure], 3 Przegląd Policyjny 132 (2005), pp. 134–135; M. Płachta, *Joint Investigation Teams. A New Form of International Cooperation in Criminal Matters*, 13(2) European Journal of Crime, Criminal Law and Criminal Justice 284 (2005), p. 297; A. Lach, *Europejska pomoc prawna w sprawach karnych* [European Mutual Legal Assistance in Criminal Matters], Towarzystwo Naukowe Organizacji i Kierownictwa, Toruń: 2007, p. 281; B. Janusz, A. Żołyńska, *Zasada prawdy a czynności dowodowe polskich zespołów śledczych* [The principle of truth and the evidentiary actions of Polish investigative teams], in: Z. Sobolewski, G. Artymiak (eds.), *Zasada prawdy materialnej* [The principle of material truth], Zakamycze, Kraków: 2006, p. 375; C.P. Kłak, *Zespół śledczy w świetle prawa międzynarodowego* [Investigative team in the light of international law], 6 Prokuratura i Prawo 108 (2008), pp. 108–128.

[8] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C 197, pp. 3–23.

[9] *See* T. Spapens, *Joint Investigation Teams in the European Union: Article 13 JITS and the Alternatives*, 19(3) European Journal of Crime, Criminal Law and Criminal Justice 239 (2011), pp. 239–240.

[10] *See* P. Hofmański, A. Sakowicz, *Reguły kolizyjne w obszarze międzynarodowej współpracy w sprawach karnych* [Conflict of laws rules in the area of international cooperation in criminal matters], 11 Państwo i Prawo 29 (2006), pp. 29–42; H. Kuczyńska, *Kolizje norm prawnych we współpracy w sprawach karnych w ramach Unii Europejskiej* [Conflicts of laws in criminal matters cooperation within the European Union], in: T. Grzegorczyk (ed.), *Funkcje procesu karnego. Księga jubileuszowa Profesora Janusza Tylmana* [Functions of the criminal process. Professor Janusz Tylman's jubilee book], Wolters Kluwer, Warszawa: 2011, p. 775.

apply. Framework Decision 2002/465/JHA itself offers the possibility to remove this conflict, providing in Art. 5 that it shall cease to have effect when the EU Convention on Mutual Assistance in Criminal Matters has entered into force in all MSs. So far, as of 28 February 2024 the Convention has not entered into force in all MSs – as it results from the resources of the European Judicial Network.[11]

On the basis of the national provisions implementing the Framework Decision into the Polish law, both a JIT operating in the territory of Poland may be established, which includes members delegated by the cooperating state(s) (the so-called "Polish JIT"); and a JIT may be established operating in the territory of the cooperating state, which will include Polish delegated (seconded) members (the so-called "foreign JIT"). The basis for establishing this type of JIT is a mutual agreement concluded between the Polish Prosecutor General and the competent authority of another EU MS. This agreement establishes both the specific purpose of the JIT and the specific period of its operation. The time period may be extended by mutual consent. In addition the agreement should also establish the composition of the team (see also Art. 1(1) FD). The team can be established in cooperation with one or more MSs. The number of States that cooperate in a JIT should depend on the circumstances and needs of the specific investigation. A model agreement establishing a joint investigation team was published by the Council of the EU, following the approval of Council resolution 22/12/2021[12], where all the necessary elements of such an agreement were pointed out.

In the present case 1001-105.Ds.12.2022, "the Polish JIT" was established on the basis of Art. 589b CCP. The scope and character of participation of members, seconded by other Member States, is regulated in the agreement pursuant to Art. 589c CCP, which provides for two forms of powers of seconded members: participation in all procedural activities performed, as part of the Polish team (§ 5); or personal performance of a specific investigation activity, excluding the issuance of decisions (§ 6). The content of this JIT agreement is considered an element of the casefile of the preparatory proceedings and access to the content of the agreement is refused pursuant to Art. 156 § 5 *in fine* CCP (which states that "With the consent of the prosecutor, files during preparatory proceedings may, in exceptional cases, be made available to other persons" than the parties to the proceeding).

[11] European Judicial Network, available at: https://www.ejn-crimjust.europa.eu/ejn2021/Home/EN (accessed 30 August 2024).

[12] *Model Agreement for setting up a Joint Investigation Team*, EuroJust, 8 February 2017, available at: https://tinyurl.com/2835z5j4 (accessed 30 August 2024).

2. THE NEW QUALITY OF THE JIT'S COOPERATION AND COORDINATION NETWORK

Up until now, joint investigation teams have usually been established when two or more EU MSs decide that the demanded investigations have links with other MSs and necessitate the coordinated actions of authorities of more MSs. Usually, JITs are created in cases like drug trafficking, money laundering, or the smuggling of migrants – in accordance with the goals for which the Framework Decision 2002/465/JHA was established: "The Council considers that for the purpose of combating international crime as effectively as possible, it is appropriate that at this stage a specific legally-binding instrument on joint investigation teams should be adopted at the level of the Union, which should apply to joint investigations into trafficking in drugs and human beings as well as terrorism" (preamble, recital 6). However, this JIT – established in order to investigate alleged crimes committed in Ukraine – represents a totally different case. In the first place, it was established just three weeks after the war began, when there was very little precise evidence relating to the alleged crimes. Secondly, the practical and legal circumstances of the present investigation were unknown before and extraordinary, and thus required a new attitude and newly designed responses.

The JIT conducting an investigation into core crimes committed in Ukraine thus introduces a new quality to the short history of JITs established in the EU. Firstly, it concerns and includes a non-EU Member State (Ukraine) and operates on the basis of a MoU with the United States. Secondly, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) joined the JIT as a participant on 25 April 2022,[13] after opening its own investigation on 2 March 2022. It is worth noting that it was the OTP that joined the JIT (not the ICC as such). The OTP is an independent organ of the Court and is responsible for examining situations under its jurisdiction; it represents the Court's involvement.[14] Formally, on 15 July 2023 the JITs Network agreed to grant the OTP of the ICC the status of associate partner. The OTP's joining the JIT was preceded by Prosecutor of the ICC Karim A.A. Khan's visit in Poland and Western Ukraine on 16 March 2022. As he stated

[13] *One year on. A timeline of Eurojust's response to the war in Ukraine*, EuroJust, 4 May 2023, available at: https://tinyurl.com/yjv83par (accessed 30 August 2024].

[14] *Office of the Prosecutor*, International Criminal Court, available at: https://www.icc-cpi.int/about/otp (accessed 30 August 2024). JITs are not mentioned in the Rome Statute; however Part IX provides the legal basis for cooperation between the ICC-OTP and national authorities, allowing it to request and receive relevant information, while also providing a legal basis to provide assistance and information/evidence to national authorities upon their request. This part also represents the legal basis for the participation of the ICC-OTP in a JIT – *see Involvement of the Office of the Prosecutor of the International Criminal Court in Joint Investigation Teams*, EuroJust, 13 February 2024), available at: https://tinyurl.com/3zu2hdun (accessed 30 August 2024).

during this visit: "This has allowed me to personally assess the situation on the ground, meet with affected communities and to further accelerate our work by engaging with national counterparts."[15]

Thirdly, on 5 October 2023 Europol also joined the JIT, on the same conditions as the OTP of the ICC.[16] According to its mandate, Europol provides analytical and forensic support to the JIT Member States, in accordance with their Analytical Project on Core International Crimes (AP CIC). Europol also has a wide ability in analysis of data legally obtained from open sources such as social media, broadcast TV or radio – known as Open-Source Intelligence (OSINT).[17] Inasmuch as the setting up of the JIT was also supported by another EU organ – Eurojust – now both of them, during the operational phase of the JIT, provide valuable operational support to the JIT members by offering a wide range of supporting tools, including mobile offices, cross-match and analytical analyses, coordination and operational centres, the coordination of prosecution, and expertise and funding. This wide range of supporting tools could be extremely important in an investigation conducted in such special conditions, i.e. of an ongoing war. In accordance with the opinion expressed by Eurojust: "a joint investigation team (JIT) is one of the most advanced tools used in international cooperation in criminal matters, comprising a legal agreement between competent authorities of two or more States for the purpose of carrying out criminal investigations."[18]

The possibility to include in the procedural activities of a JIT the powers of a representative of an international institution established to combat crime has been provided for in the FD – and subsequently in the domestic legal orders of the MSs. According to Art. 1(12) FD, a JIT agreement may allow for persons other than representatives of the competent authorities of the MSs setting up the JIT to take part in the activities of the team. Such persons may, for example, include officials of bodies set up pursuant to the Treaty – but this indication is not exhaustive and on the basis of this provision it was possible for the OTP of the ICC

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[15] *Statement of ICC Prosecutor, Karim A.A. Khan QC, on his visits to Ukraine and Poland*, International Criminal Court, 16 March 2022, available at: https://tinyurl.com/2vjza2z9 (accessed 30 August 2024).

[16] *Europol participates in joint investigation team into alleged core international crimes in Ukraine*, Europol, 5 October 2023, available at: https://tinyurl.com/yrsc6e7x (accessed 30 August 2024).

[17] *Ibidem*; C. Riehle, *Europol Joins JIT on International Crimes in Ukraine*, Eucrim, 27 November 2023, available at: https://eucrim.eu/news/europol-joins-jit-on-international-crimes-in-ukraine/ (accessed 30 August 2024); J.L. Lopes da Mota, *Eurojust and its role in joint investigation teams*, 3 Eucrim 88 (2009), pp. 88–90.

[18] *Joint investigation teams*, EuroJust, available at: https://www.eurojust.europa.eu/judicial-cooperation/instruments/joint-investigation-teams (accessed 30 August 2024)). In 2022 there were 78 newly signed JITs and 187 JITs ongoing from previous years, *see*: *Eurojust services and judicial cooperation instruments*, EuroJust, available at: https://www.eurojust.europa.eu/annual-report-2022/judicial-cooperation-instruments (accessed 30 August 2024).

to join the JIT. While these entities do not have all the rights conferred upon the members or seconded members of the JIT, the agreement may however provide for such a possibility and then the representatives of such authorities enjoy the same rights – the agreement must make it clear whether, and on what conditions, the OTP is invited to engage in the work of the JIT. What is noteworthy in this regard is that this case is the first time in the history of JITs when the OTP of the ICC has joined an EU JIT. Although the OTP of the ICC joins the JIT on conditions other than EU Member States, this is nonetheless a significant step since it makes it possible to facilitate cooperation and the exchange of evidence, or even to take joint actions in a much-simplified way as provided in the FD.[19] For example, it allows for a simplified exchange of evidence between members of a JIT: Art. 1(7) FD provides that where the joint investigation team needs investigative measures to be taken in one of the MSs setting up the team, members seconded to the team by that MS may request their own competent authorities to take those measures.[20] Those measures shall be considered in that MS under the conditions which would apply if they were requested in a national investigation. The seven MSs being parties to the JIT, together with the OTP may – thanks to the involvement and coordinating efforts of Europol – also benefit from special tools of coordination, such as: direct communications; access to an admissible evidence database and financial support; coordination meetings which bring all the persons responsible for conducting investigations in all the JIT MSs together; and generate direct communications among national authorities and the OTP and, increase their field presence.[21] In addition, thanks to the harnessing of new technologies (i.e. artificial intelligence, machine learning systems, and advanced systems with facial and object detection), the OTP has recently significantly strengthened its capacity to share, exchange information and evidence, and respond to requests from the JIT members.[22]

Another new structural element of the JIT that has never been used before is the so-called Core International Crimes Evidence Database (CICED). It was established on 23 February 2023 and is a centralised digital evidence database that was set up by Eurojust. The CICED was designed in order to preserve, store, and analyse evidence of core international crimes in a secure mode. The CICED

[19] *Statement by ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Investigation Team on international crimes committed in Ukraine,* International Criminal Court, 25 April 2022, available at: https://tinyurl.com/m5hrsrth (accessed 30 August 2024).

[20] For practical and legal simplifications regarding the sharing of evidence between JIT Member States and other entities participating in the JIT *see:* Eurojust, *Joint Investigation Teams. Practical Guide*, Publications Office of the European Union, Luxembourg: 2021, available at: https://tinyurl.com/mr48nzh5 (accessed 30 August 2024).

[21] *See Involvement of the Office of the Prosecutor...*, *supra* note 14.

[22] *Delivering Better Together. Office of the Prosecutor Annual Report 2023*, International Criminal Court, Den Haag: 2023, pp. 49–53, available at: https://www.icc-cpi.int/sites/default/files/2023-12/2023-otp-annual-report.pdf (accessed 30 August 2024).

consists of three components: a safe digital data transmission method; secure data storage; and advanced analysis tools. The database also contains a register of information on who submitted the evidence as well as the event and type of crime being referred to. Evidence can only be submitted by competent national authorities from EU MSs and states with Liaison Prosecutors at Eurojust.[23] The CICED became part of a legislative package addressing the digitalisation of justice systems in the EU, where the main legal act is presently Regulation (EU) 2023/969 establishing a collaboration platform to support the functioning of joint investigation teams and amending Regulation (EU) 2018/1726.[24] Practice had shown that JITs faced a number technical difficulties, especially when it came to exchange of evidence and their admissibility before national courts, preventing them from being efficient in their daily work and from fostering their operations, and therefore a "JITs collaboration platform" was established. The two above mentioned instruments allow for the exchange of operational information and evidence, including large files, that should be ensured through an upload/download mechanism designed to store the data centrally only for the limited period of time necessary for the technical transfer of the data. Moreover, the JIT collaboration platform allows for the traceability of exchanges of evidence through an advanced logging and tracking mechanism which allows for keeping track of all evidence exchanged, including its access and processing.

In the framework of the "Ukrainian JIT" another coordinating mechanism was utilised, which although it is not strictly a part of the JIT is closely related to it. It is the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA).[25] Due to the lack of the ICC's jurisdiction to prosecute perpetrators of the crime of aggression, the ICPA was established to help to fill the gap concerning the collection of evidence of this crime and coordinate initiatives aimed at preventing impunity for the perpetrators. It is assumed that the work of the ICPA will effectively prepare and contribute to any future prosecutions of the crime of aggression, irrespective of the jurisdiction before which these will be brought. This initiative of the EU European Commission is intended to provide support for a JIT to which the Centre is linked in its operations. The Centre

[23] C. Riehle, *Eurojust Launches Core International Crimes Evidence Database and Gives Overview of Judicial Support for Ukraine*, Eucrim, 5 May 2023, available at: https://eucrim.eu/news/eurojust-one-year-of-judicial-support-for-ukraine/ (accessed 30 August 2024).

[24] Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No. 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011 [2018] OJ L 132/1.

[25] *International Centre for the Prosecution of the Crime of Aggression against Ukraine*, EuroJust, available at: https://tinyurl.com/4uzh8tm3 (accessed 30 August 2024).

is composed of prosecutors who are already working in the Joint Investigation Team. The ICPA's duty is to prepare materials for future trials before national, internationalized or international courts, including a possible future Tribunal for the Crime of aggression against Ukraine or the ICC.[26] Polish prosecutors are also involved in this project.[27]

3. THE POLISH CONTRIBUTION TO INVESTIGATIONS CONDUCTED IN OTHER STATES AND BY THE OTP ICC

Since the escalation of Russia's aggression against Ukraine on 24 February 2022[28] Poland has played a significant role: both as a safe harbour for refugees and as a natural forum where the potential witnesses' testimonies of core crimes could be secured.[29] In the investigation conducted in case 1001-105.Ds.12.2022, so far close to 2.000 witnesses have been interviewed. The Polish investigation conducted under this case number is so far a structural one, with almost 30 separate events within this framework.[30] A structural investigation is a wide-range investigation into a situation within which more crimes could have been committed, but it is not yet possible to designate the precise elements of the crimes and the potential perpetrators. Several hundreds of testimonies are extremely valuable in terms of evidentiary importance and credibility for proving the elements of core crimes. Procedural activities in this case are conducted by prosecutors as well as the Internal Security Agency and the Police (also in the area of the OSINT-based investigation).[31]

In the case of this investigation an extraordinary approach towards the methods of conducting procedural activities had to be adopted: among other things towards the treatment of witnesses as well as the technical measures employed. The greatest

[26] *Ukraine: International Centre for the prosecution of Russia's crime of aggression against Ukraine starts operations today*, European Commission, 3 July 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3606 (accessed 30 August 2024).

[27] M. Mikowski, *Prokurator Krajowy dla PAP: powstała instytucja, która ma rozliczyć odpowiedzialnych za napaść na Ukrainę* [National Prosecutor for the PPA: an institution was established to prosecute persons responsible for committing crimes of aggression against Ukraine], Polska Agencja Prasowa, 3 July 2023, available at: https://tinyurl.com/bdfptk3w (accessed 30 August 2024).

[28] *See* P. Grzebyk, *Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law*, 41 Polish Yearbook of International Law 145 (2021).

[29] M. Jabłoński, *Polska prokuratura deklaruje pomoc przy wyjaśnianiu zbrodni wojennych w Buczy* [Polish prosecutors office declares help in investigating war crimes in Bucha], Polska Agencja Prasowa, 4 April 2022, available at: https://tinyurl.com/3y7ubw53 (accessed 30 August 2024).

[30] *Ibidem*.

[31] *Briefing w sprawie śledztwa dotyczącego napaści Rosji na Ukrainę* [Briefing on the investigation into Russia's attack on Ukraine], Prokuratura Krajowa, 24 February 2023, available at: https://tinyurl.com/5dj3as5m (accessed 30 August 2024). Due to the fact that the investigation is ongoing, most of the information cannot be publicly shared, but even from this small amount of publicly available information it can be concluded that Poland is actively engaged in activities aimed at bringing war criminals to justice.

difficulty was persuading war refugees to testify. An extensive information campaign was carried out, involving numerous services and offices. For example, Polish investigators carried out, together with the Government Centre for Security, an information campaign based on sending messages to users of Ukrainian SIM cards located in Poland, informing them about the possibility of testifying as witnesses before Polish investigative authorities.[32] Cooperation with non-governmental organizations has also been initiated in this regard. This investigation also had to adopt a specific approach, since witnesses were only interviewed if they consented to become witnesses; and in many cases potential witnesses refused to testify due to the trauma they had experienced.[33] In such cases, because of the need to treat special care for their mental health as a priority, and in order to not compromise the well-being of individuals and the quality of information, interrogations were waived (quite in negation of the norm of Art. 177(1) CCP which obliges every witness, including a victim-witness, to testify, even if the potential perpetrator is not yet known). It is claimed by the Prosecutor's Office that Polish investigators are highly flexible in this investigation, and it is noteworthy that they are conducting actions which are not usually conducted in a typical criminal proceeding, like for example waiving the interrogation of a witness who is unwilling to testify. Also, if a witness is unable to appear at the police or prosecutor's office, interviews may take place in a place and at a time convenient for him/her, including his/her place of residence.[34]

The testimonies obtained in this investigation have concerned many cases of alleged war crimes, which gives rise to the possibility of proving various concrete events: among other cases the shelling of civilian objects. Witnesses described extreme sanitary conditions in besieged cities, for example in Mariupol. They also testified about Russian soldiers committing common crimes such as theft. Among the witnesses are persons forcedly deported from the territory of Ukraine, defenders of the Azovstal Metallurgical Combine, and prisoners of the so-called "filtration camp" in Olenivka. Polish investigators were able to discover and find evidence of a mechanism of forced deportations committed by functionaries of the Russian Federation, including mechanism of granting, to deported people, one-off subsidies by Russian banks, which could prove the systematic operation of the entire Russian

[32] *Alert RCB do ukraińskich świadków zbrodni wojennych* [Information campaign of Government Centre for Security addressed to Ukrainian refugees], Rządowe Centrum Bezpieczeństwa, 6 May 2022, available at: https://tinyurl.com/4t3shp9n (accessed 30 August 2024).

[33] For more on the topic *see e.g.* L. Marschner, *Implications of Trauma on Testimonial Evidence in International Criminal Trials*, in: P. Alston, S. Knuckey (eds.), *The Transformation of Human Rights Fact-Finding*, Oxford University Press, Oxford: 2016, pp. 213–230.

[34] M. Mikowski, *Prokurator Krajowy: są dowody na zabójstwa cywili, kradzieże i tortury w Ukrainie* [National Prosecutor: there is some evidence on killing civilians, thefts, and tortures in Ukraine], Polska Agencja Prasowa, 23 February 2022, available at: https://tinyurl.com/mr3tftzb (accessed 30 August 2024).

state. In some cases it was possible to identify potential suspects, like for example the commander of the so-called filtration camp in Olenivka. Investigators also secured documents confirming the above-mentioned crimes. What is noteworthy, the Polish Prosecutor's Office established cooperation with civil society organisations documenting crimes committed in Ukraine, coordinating efforts in order to secure witness testimonies from the persons first contacted by these NGOs[35].

Another important feature of the present investigation is that the cooperation between the JIT Member States takes many different forms. For example, representatives of the OTP of the ICC worked together with the Polish investigators during their weeklong visit in Warsaw. They had the opportunity to become familiar with the evidence acquired by the Polish investigators so far and to discuss further procedural steps. As a result of this visit, the Polish Prosecutor's Office transferred evidence to the OTP of the ICC. Their mutual assistance was not based on the provisions of the Rome Statute (Part 9 providing for "International cooperation and judicial assistance" and the – coordinated with the Rome Statute in Chapter 66e norms of the CCP), as the procedure for exchanging evidence is facilitated within the JIT.[36]

Cooperation between the JIT Member States also takes on a practical dimension. Polish police officers and prosecutors, together with Ukrainian investigators, inspected sites of war crimes during the ongoing war. The General Prosecutor's Office of Ukraine twice asked Poland for support in carrying out activities at the crime scene. Due to this, Polish specialists have travelled to Ukraine twice so far, in summer 2022 and 2023, to conduct such activities. Polish investigators inspected hospitals, schools, kindergartens, police stations and multi-family buildings which were destroyed as a result of bombings, artillery and rocket fire, and kamikaze drone attacks[37]. They carried out activities in the Kyiv, Mykolaiv, and Sumy regions, sometimes in close distance to the front line. The Polish team consisted not only of prosecutors from the JIT but also of forensic technicians – 3D scanner operators, pyrotechnicians, paramedics and counterterrorist specialists.[38] The evidence was secured using 3D laser scanners, which allow for scanning the object with precise

[35] *Prokuratorzy prowadzący śledztwo dotyczące rosyjskiej agresji na Ukrainę spotkali się z przedstawicielami organizacji społecznych* [Prosecutors investigating the Russian aggression against Ukraine met with representatives of non-governmental organizations], Prokuratura Krajowa, 18 June 2024, available at: https://tinyurl.com/3hy24svs (accessed 30 August 2024).

[36] *Ibidem*.

[37] *Prokuratorzy pionu PZ Prokuratury Krajowej dokumentowali dowody rosyjskich zbrodni na Ukrainie* [Prosecutors form the Organized Crime Department have collected evidence about Russia's war crimes in Ukraine], Prokuratura Krajowa, 23 August 2023, available at: https://tinyurl.com/39us88fz (accessed 30 August 2024).

[38] *Działania polskich policjantów w Ukrainie w ramach zespołu śledczego JIT* [Polish police officers' activities in Ukraine within the JIT], Policja.pl, 23 August 2024, available at: https://tinyurl.com/mpy7yjka (accessed 30 August 2024).

accuracy and then its visualization. The results of their work, from the point of view of potential criminal proceedings, are extremely important as 3D scanners guarantee measurements with an accuracy of up to 1 mm as standard, and in the case of detailed scanning even below 1 mm. Depending on the type of area being scanned, a three-dimensional image is obtained in just a few minutes, registering its actual scale and temperature. The results of the scanning can be later presented in a trial as forensic evidence provided by specialists (Art. 205 § 1 CCP), i.e. as documentation of the scope and character of destruction. The relatively short process of scanning was an obvious advantage to the efficient performance of activities in Ukraine, where combat operations were constantly being carried out.[39]

CONCLUSIONS

The extraordinary character of the "Ukrainian JIT investigation" highlights several problems that appear in connection with the present form in which the Polish investigation operates. The problems result, firstly, from the fact that this is the first investigation into core crimes conducted in Poland – and already on such a scale (with the exception of the so called Nangar Khel case, no WA 16/15 and WA 39/11 decided by the Supreme Court). At the same time, there are appropriate structures and instruments in the Polish legal order for implementation of the obligation to prosecute and punish the perpetrators of core crimes, as well as no practical experience and expertise – beginning with the proper structure of norms of material law and procedural provisions relating to the possibility to adjudicate core crimes before Polish courts. In the case of proceedings conducted by Polish authorities, one has to take into consideration the problem of proceeding in accordance with the principle of *nullum crimen sine lege* and answering the question: whether the definitions of crimes used in the PCC are sufficiently drafted and reflect all the necessary elements of core international crimes.

Another problem that should be pointed out is that the Polish Prosecutor's Office conducts the investigation, according to press releases, on a "subsidiary" basis. This formulation is not in compliance with the fact that the prosecution is based on the protective principle, meaning that the investigation was initiated due to the need to protect the significant interests of the Republic of Poland. Its purported aim is not just to "help" in proceedings pending in Ukraine (or before the ICC), but rather to protect Polish interests, which cannot be treated as a "subsidiary" task. The JIT is a Polish JIT (within the meaning of Art. 1(3) FD – which states that: "A joint investigation team shall operate in the territory of the Member States setting up the

[39] *Ibidem*.

team"); meaning that – as was explained earlier in this text – since it was established in the territory of Poland it is a Polish investigation which must be finished by either issuing an indictment or proclaiming its discontinuation. There is also a possibility to transfer the proceeding on the basis of an international agreement (in which case the Polish investigation is discontinued).[40] Another problem connected with the "subsidiary character" of the Polish investigation is that, as reported by the Ministry of Justice, the actions of the Polish OTP are ancillary (supplementary) to the main investigation initiated by the ICC.[41] This information is imprecise in that only an investigation into war crimes could be eventually complementary, since the ICC cannot in this case prosecute the crime of aggression, lacking jurisdiction under Arts. 15(*bis*) and 15(*ter*) of the Rome Statute of the ICC. Also, the ICC's jurisdiction is always complementary to the actions of states and domestic jurisdiction (*see* Art. 17 of the Rome Statute).

In consequence, there is a clear need to define the crucial goals of the Polish investigation. Basically, when prosecuting international crimes it is possible to set two types of goals. Firstly, it is possible to conduct an investigation in a "subsidiary" manner. This means that the Prosecutor's Office will not bring indictments before Polish courts, because all evidence collected during the proceedings will be transferred to the Ukrainian justice system. Such a procedure is enabled by international agreements providing for the transfer of proceedings (e.g. Art. 54 of the Agreement with Ukraine on legal assistance and legal relations in civil and criminal matters, drawn up in Kyiv on 24 May 1993[42]). It is also possible to conclude a separate agreement for the needs of a given case (as happened in the case of Ukraine handing over to the Dutch authorities the prosecution of the shooting down of a Malaysian Airlines plane over Donbas, i.e. the so-called "Flight MH17"[43]). Another option is to issue arrest warrants in Poland and initiate international searches for the suspects. However, it would then be necessary to solve the problem of the lack of a possibility to conduct trials *in absentia* in the Polish criminal proceedings. It

[40] It is worth mentioning that in addition a JIT may be used as a useful tool to prevent and resolve conflicts of jurisdiction as, in the framework of a JIT, the competent authorities may also agree on which jurisdiction should prosecute and for which offences. Also, the rules of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings may be used.

[41] *Prokurator MTK o wojnie w Ukrainie: Chcemy, żeby sprawiedliwości stało się zadość* [ICC prosecutor on the war in Ukraine: We want justice to be served], Dziennik Gazeta Prawna, 16 March 2022, available at: https://tinyurl.com/56h3y769 (accessed 30 August 2024).

[42] Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters (adopted 24 May 1993, entered into force 14 August 1994), UNTS 57106.

[43] Agreement between the Kingdom of the Netherlands and Ukraine on international legal cooperation regarding crimes connected with the downing of Malaysia Airlines Flight MH17 on 17 July 2014 (adopted 7 July 2017, entered into force 31 October 2018), 3274 UNTS 1.

is also possible to assume that a mixed option could be adopted: e.g. that in cases concerning specific aspects of war crimes the materials obtained during the Polish investigation will be transferred to the Ukrainian authorities for indictments to be brought there arrest warrants in cases of.[44] There is also the possibility that in the future crimes against humanity will be issued in Poland. On the other hand, the practical abilities of the Ukrainian courts to adjudicate all the cases of alleged war crimes (over 130.000 cases have been initiated) must be taken into account.

The last problem (among many others that cannot be described in this text) is that the Polish investigation is not conducted in relation to crimes against humanity. Prosecuting crimes against humanity is of particular importance because the Ukrainian Criminal Code does not penalize this type of crime, so Ukrainian courts have no jurisdiction to adjudicate such a case. (This lacuna has been noted and in 2021 the Ukrainian parliament adopted Bill no. 2689 defining the categories of war crimes and crimes against humanity according to international humanitarian law and the Rome Statute, as well as providing for command responsibility,[45] and Art. 442-1 of the Bill penalizes crimes against humanity.[46] However the Bill is yet to be signed by the President and thus is not yet in force[47]). In this situation it would be advisable to prosecute crimes against humanity in Poland – based on the provisions of the Polish CC and the principle of universal jurisdiction. The investigation into this scope would also require taking into account the specific nature of this type of crime – the need to prove their extensive or systematic nature. The contextual element of crimes against humanity can be best demonstrated by the use of evidence from open sources (OSINT), which involves conducting an analysis of the information and data available on the Internet (e.g. on Facebook, Tik-Tok, YouTube). Such analyses are carried out in the context of the Polish investigation, but there is no practical

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[44] *See more* P. Grzebyk, *Crime of Aggression against Ukraine: The Role of Regional Customary Law*, 21(3) Journal of International Criminal Justice 435 (2023).

[45] *Parliament of Ukraine Adopts Bill to Implement International Criminal and Humanitarian Law*, Parliamentarians for Global Action, 20 May 2021, available at: https://www.pgaction.org/news/ukraine-bill-2689.html (accessed 30 August 2024).

[46] *See* Comparative Table to the Draft Law of Ukraine "On Amendments to Certain Legislative Acts on the Enforcement of International Criminal and Humanitarian Law" (On Amendments to the Criminal and Criminal Procedure Codes of Ukraine concerning the implementation of the norms of International Criminal and Humanitarian Law), BILL No. 2689, available at: https://www.pgaction.org/pdf/2021/en-bill-2689-10-03-2021.pdf (accessed 30 August 2024).

[47] M. O'Brien, *Options for a Peace Settlement for Ukraine: Option Paper XVI – War Crimes, Crimes against Humanity and Genocide*, OpinioJuris, 30 October 2022, available at: https://tinyurl.com/55vhmdcw (accessed 30 August 2024); K. Ambos, *Ukrainian Prosecution of ICC Statute Crimes: Fair, Independent and Impartial?*, EJIL: Talk!, 10 June 2022, available at: https://tinyurl.com/5n6zcpz3 (accessed 30 August 2024).

experience with the use and admissibility of such evidence in a criminal trial – which is another problem that needs to be resolved.

The investigation into crimes committed as a result of the Russian aggression against Ukraine – conducted in the form of the "Ukrainian JIT" – is the first such investigation in history. It is highly demanding and requires an unconventional approach to the task from investigators, as well as enormous coordination efforts and support from the EU organs. Other states are involved in the JIT on an unprecedented scale, together with the OTP ICC. Of course, owing to many legal and practical factors it will not be easy to bring the perpetrators responsible for war crimes or acts of aggression to accountability, the main factors being the unclear character of universal jurisdiction in Poland, the impossibility to successfully extradite suspects from Russia and immunities of highest state officials. In addition, the current state of investigations conducted into crimes committed in Ukraine – both in domestic jurisdictions and before the ICC, as well as possibly before an international or internationalised tribunal established to adjudicate the crime of aggression – is a very complex matter in which international law, domestic legal systems, and international relations are intertwined.[48] Thus the Polish investigation – conducted within the framework of a JIT – has become an important element of a "strategic litigation network" to deal with serious international crimes.[49]

[48] *See e.g.* M. Jędrysiak, *Putting Russia on trial. Ukrainian efforts to establish a tribunal for crimes of aggression*, Center for Eastern Studies, 12 December 2023, available at: https://tinyurl.com/4w9mb9jv (accessed 30 August 2024).

[49] *See* very accurate observations by: B. McGonigle Ley, *Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes*, 16 The International Journal of Transitional Justice 363 (2022), p. 365, who uses this term in order to describe "legal actions that pursue a number of important and varied objectives, from modifying or clarifying existing laws to raising awareness and debate around specific issues." For more on this topic, *see also* W. Kaleck, P. Krock, *Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?*, 16 Journal of International Criminal Justice 165 (2018).

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DOMESTIC AND INTERNATIONAL CRIMINAL JURISDICTION IN THE CONTEXT OF THE INITIATIVE FOR A SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION

Abstract: *Russia's aggression against Ukraine and the efforts to prosecute the perpetrators have renewed the debate regarding domestic and international criminal jurisdiction over the crime of aggression. Given the inter-state nature of this crime and its link to an act of aggression, the existence of which can be determined by the Security Council, the International Law Commission's (ILC) relatively restrictive approach to the exercise of criminal jurisdiction prevailed, at least until 2022. Against this background, the discussion regarding the establishment of a Special Tribunal for the crime of aggression against Ukraine has significantly influenced the trajectory of the understanding of general international law concerning individual criminal responsibility for the crime of aggression. The interpretative paths adopted in the mid-1990s are gradually being abandoned. At the same time, an intense ongoing debate concerning the understanding of the phrase "international criminal courts, where they have jurisdiction" has not led to any conclusive arrangements. Still, what is known is that there is a certain group of states for which such courts can be created through bilateral agreement between the state concerned and the United Nations, on the recommendation of the UN General Assembly.*

Keywords: crime of aggression, criminal jurisdiction, special tribunal, Ukraine

1. INTRODUCTION

Russia's aggression against Ukraine and the efforts to prosecute its perpetrators renewed the debate regarding domestic and international criminal jurisdiction over

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the crime of aggression. Given the inter-state nature of this crime and its link to an act of aggression, the existence of which can be determined by the Security Council according to the UN Charter, the International Law Commission's (ILC) relatively restrictive approach to the exercise of criminal jurisdiction prevailed at least until 2022. The discussion initiated in March 2022 regarding the establishment of a Special Tribunal for the crime of aggression against Ukraine, supported in principle by dozens of states, has necessitated a revision of the existing imperatives. Although the process of reinterpreting international law in this field is still ongoing, some essential elements of it can nonetheless be discerned.

The article consists of three parts. The first part briefly outlines the traditional view of the limited jurisdiction over the crime of aggression. The second part discusses the significance of the conflict in Ukraine on the shift in practice of states concerning domestic jurisdiction over the crime of aggression. Finally, the last section addresses the possibility of exercising international jurisdiction over the crime of aggression against Ukraine.

The article leaves aside the issue of immunities of state representatives before a domestic criminal jurisdiction. The link between the issues of jurisdiction and immunity is of fundamental importance and is currently also being debated in the context of the crime of aggression by the ILC, among others. The limitation is merely a consequence of the intended length of this article. For the same reason, the article does not concern the applicable procedure before the future special tribunal, in particular the question of suitability of in absentia trials.

1. DOMESTIC JURISDICTION FOR THE CRIME OF AGGRESSION

For some time the view existed that domestic jurisdiction for the crime of aggression could only be applied to state nationals. Such a solution removed the question of potential immunity for nationals of other States – perpetrators of the crime in question. This position was presented by the ILC in 1996 and since then has constituted an influential point of reference. The Commission stated in the commentary to its Draft Code of Crimes against the Peace and Security of Mankind that

> [a] court cannot determine the individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question whether another State has committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet* (equals do not have authority over each other). Moreover, the exercise of jurisdiction by the national court of a State which entails

> consideration of the commission by another State would have serious implications for international relations and international peace and security.[1]

This idea has previously appeared in the works of the ILC's Working Group on the question of an international criminal jurisdiction, chaired by Abdul Koroma. Its 1992 report identified, inter alia, that

> it may be very difficult for a national court, which may be a court of a party to the conflict in question, to determine in an impartial manner whether particular conduct constituted aggression, for example. The State against which that charge is made would not itself be a State party to the proceedings, so that the trial of an individual accused could become a surrogate for a broader range of issues arising at the international level. Such circumstances are not conducive to the proper administration of the criminal law.[2]

One of the working group's key members, in the view of its chairman, was James Crawford.[3] In the ILC's discussion he labelled aggression a crime that has never been subjected to a national jurisdiction.[4] Such an approach disregarded the practice of Eastern European states.[5] Still, the conclusion of the Commission significantly influenced the subsequent developments despite the critics.[6] Echoes of this perspective were voiced during the Review Conference of the Rome Statute of the International Criminal Court (ICC) in Kampala in 2010.[7] Finally, it was repeated in 2022 by the

[1] Draft Code of Crimes Against the Peace and Security of Mankind, Art. 8, Commentary, p. 30, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf (accessed 30 August 2024).

[2] *Report of the working group on the question of an international criminal jurisdiction*, 2(2) Yearbook of the International Law Commission 58 (1992), paras. 89–90; *see also* Y. Dinstein, *War Aggression and Self-Defence,* Cambridge University Press, Cambridge: 2005, p. 145.

[3] ILC, Draft code of crimes against the peace and security of mankind (Part II) – including the draft statute for an international criminal court, 14 July 1992, A/CN.4/SR.2284.

[4] *Ibidem*. This assertion was criticised as not being based on existing State practice. According to Pal Wrange, "the ILC was in this particular instance involved in progressive (or perhaps retrogressive) development rather than codification of positive international law" (P. Wrange, *The Crime of Aggression, Domestic Prosecutions and Complementarity*, in: C. Kreß, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2016, p. 716). A different track was also proposed by the authors of The Princeton Principles on Universal Jurisdiction (S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, Princeton, New Jersey: 2001, available at: https://tinyurl.com/jc7yy8m5 (accessed 30 August 2024)), according to which the jurisdictional regime concerning a "crime against peace" is identical to the regime for other fundamental international crimes.

[5] P. Grzebyk, *Crime of Aggression Against Ukraine: The Role of Regional Customary Law*, (21)3 Journal of International Criminal Justice 435 (2023).

[6] N. Strapatsas, *Complementarity and Aggression: A Ticking Time Bomb?*, in: C. Stahn, L. van den Herik (eds.), *Future Perspectives on International Criminal Justice*, TMC Asser Press, Leiden: 2010, p. 454; A. Reisinger Coracini, *Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime*, in: C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, Leiden: 2009, p. 731.

[7] Annex III, Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression: "5. It is understood that the amendments shall not be interpreted as creating the

ILC in its Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, adopted in a first reading, as well as, inter alia, in the opinion of the Dutch Advisory Committee on Issues of Public International Law.[8]

As mentioned above, this approach took as its basic premises the need to protect the powers of the Security Council on the one hand and the principle of the sovereign equality of states as a source for immunities of state officials on the other hand.[9] The result, however, was that the basic idea of criminalising aggression, protecting the peace, was lost in practice. "Proper administration of the criminal law" – to use the ILC's terminology – overshadowed the idea of combating impunity for the international crime in question. In consequence, the adopted interpretations of law privileged potential aggressors over their potential victims. As Japan pointed out in the final part of the negotiations in Kampala, such a jurisdictional regime where a State party is surrounded by non-states parties "unjustifiably solidifies blanket and automatic impunity of nationals of non-State Parties."[10]

Furthermore, such an approach did not distinguish between political and legal implications. Similarly, as in the case of crimes against humanity or genocide, there is no doubt that a determination of the crime of aggression can have important political repercussions for specific inter-state relations. Despite the fact that the findings of criminal courts, whether national or international, may have some evidentiary significance, they do not prejudge the international legal position of States.[11] Determining individual criminal responsibility does not have direct automatic legal bearing on State responsibility.[12]

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right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State." Still taking into account the complementarity principle, Nidal Nabil Jurdi argues that the Kampala Amendments can be interpreted in favour of selective domestic jurisdiction of the crime of aggression (N.N. Jurdi, *The Domestic Prosecution of the Crime of Aggression After the International Criminal Court Review Conference: Possibilities and Alternatives*, 14(2) Melbourne Journal of International Law 1 (2014), pp. 15–19); *see also* C. Kress, L. von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8(5) Journal of International Criminal Justice 1179 (2010), pp. 1216–1217; C. McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge: 2021, pp. 377–378.

[8] *Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities*, The Advisory Committee on Issues of Public International Law, Hague: 2022.

[9] This argument was favoured particularly by US advisors and officials: *e.g.* B. Van Schaack, *Par in Parem Imperium Non Habet Complementarity and the Crime of Aggression*, 10 Journal of International Criminal Justice 133 (2012), pp. 149–150; H. Hongju Koh, T. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 American Journal of International Law 257 (2015), pp. 274–276.

[10] P. Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, Oxon: 2014, p. 127.

[11] *Challenges in Prosecuting the Crime...*, *supra* note 8, p. 16. Contra Dapo Akande, who distinguishes the crime of aggression from the crime of genocide and crime against humanity (D. Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 3 Journal of International Criminal Justice 618 (2003), p. 637).

[12] McDougall, *supra* note 7, pp. 392–393; Wrange, *supra* note 4, pp. 713–714.

2. WAR IN UKRAINE AND A CHANGE OF PARADIGM FOR DOMESTIC PROSECUTION FOR THE CRIME OF AGGRESSION

Against this background, the intense discussion on the criminal responsibility of the perpetrators of crimes of aggression against Ukraine and the practice of the ICC have brought at least two new elements that are worthy of wider reflection. Firstly, there is emerging support among States of the view that domestic jurisdiction may also be exercised over nationals of the aggressor State, including its State representatives, albeit excluding the troika. This position was expressed by States during the discussions in the Sixth Committee of the United Nations General Assembly (UNGA) in 2022 and 2023. One can expect an in-depth discussion on this issue both in the Commission itself and in the Sixth Committee in 2024. This has found been expressed in both individual and multilateral statements from States. On 18 April 2023, the G7 States declared: "We support exploring the creation of an internationalized tribunal based in Ukraine's judicial system to prosecute the crime of aggression against Ukraine."[13] The reference to "Ukraine's judicial system" unequivocally supports the idea of trying the crime of aggression before domestic courts. This position was also presented in a more detailed manner in national statements of, inter alia, the United States,[14] Germany[15] and the United Kingdom.[16]

[13] *G7 Japan 2023 Foreign Ministers' Communiqué*, U.S. Department of State, 18 April 2023, available at: https://www.state.gov/g7-japan-2023-foreign-ministers-communique/ (accessed 30 August 2024).

[14] "United States supports the development of an internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine. Although a number of models have been under consideration, and these have been analyzed closely, we believe an internationalized court that is rooted in Ukraine's judicial system, but that also includes international elements, will provide the clearest path to establishing a new Tribunal and maximizing our chances of achieving meaningful accountability. We envision such a court having significant international elements – in the form of substantive law, personnel, information sources, and structure" (*Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression*, U.S. Department of State, 27 March 2023, available at: https://www.state.gov/ambassador-van-schaacks-remarks/ (accessed 30 August 2024)).

[15] "Our idea, with a number of partners, is therefore that there is a way to strengthen the International Criminal Court rather than weakening it, in the form of a court that derives its jurisdiction from Ukrainian criminal law. What would be important for me and, I believe, for many others would be for this court to be supplemented by an international component. Of course there cannot be a special procedure for one aggressor – what we establish must be supported by as many as possible of the world's states. It is therefore important to us to have an international component, for example with a location outside Ukraine, with financial support from partners and with international prosecutors and judges, to reinforce the impartiality and the legitimacy of this court" (*"Strengthening International Law in Times of Crisis" – Speech by Federal Foreign Minister Annalena Baerbock in The Hague*, Federal Foreign Office, 16 January 2023, available at: https://www.auswaertiges-amt.de/en/newsroom/news/strengthening-international-law-in-times-of-crisis/2573492?view (accessed 30 August 2024)).

[16] "The UK would be willing to explore a 'hybrid' tribunal (a specialised court integrated into Ukraine's national justice system with international elements). Any new tribunal would also need sufficient international support and must not undermine the existing accountability mechanisms" (*UK joins core group dedicated to achieving accountability for Russia's aggression against Ukraine*, Gov.uk, 20 January 2023, available at: https://tinyurl.com/58663e2k (accessed 30 August 2024)).

In addition, Heads of State and Government of the Council of Europe in the Reykjavík Declaration of 17 May 2023 welcomed "international efforts to hold to account the political and military leadership of the Russian Federation for its war of aggression against Ukraine (...). We call on all member States to ensure that perpetrators within their jurisdiction can be tried."[17] The last sentence reflects the support of 46 Council of Europe Member States for judging crimes of aggression based on national jurisdiction. Furthermore, in its Conclusion of 29–30 June 2023, the European Council welcomed "the fact that the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) is ready to start its support operations."[18] The ICPA's purpose is to support national investigations into the crime of aggression.[19] Finally, the Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes, adopted by consensus in Ljubljana on 26 May 2023, provides in its Art. 6 that the Convention can be applied to the crime of aggression.[20] The objective of the Convention is to ensure effective investigation and prosecution of international crimes at the national level by enhancing international cooperation.[21] Fifty-three states took part in the negotiations for the Convention, with another 15 participating as observers.[22]

None of these documents referring to national prosecution of perpetrators of crimes of aggression or criminal cooperation in this regard provide for any exception for exercising domestic jurisdiction by states. Nor do they contain any clause stipulating that only nationals of those states can be subjected to domestic prosecution. On the contrary, as most of them relate to Russia's aggression, they unequivocally stipulate the right to prosecute non-nationals. Thus, they constitute significant evidence supporting the prosecution of the perpetrators of the crime of aggression before domestic courts.[23]

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[17] United around our values – Reykjavik declaration, Council of Europe, London: 2023, p. 5, available at: https://tinyurl.com/57z5a2vb (accessed 30 August 2024).

[18] European Council meeting (29 and 30 June 2023) – Conclusions, EUCO 7/23, 30 June 2023, para. 7, available at: https://data.consilium.europa.eu/doc/document/ST-7-2023-INIT/en/pdf (accessed 30 August 2024).

[19] *See International Centre for the Prosecution of the Crime of Aggression against Ukraine*, EuroJust, available at: https://tinyurl.com/4uzh8tm3 (accessed 30 August 2024).

[20] Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes (signed 26 May 2023), 2024 Tractatenblad 120.

[21] *Ibidem*, Preamble, Art. 1.

[22] List of Participants, MLA Diplomatic Conference, MLA/INF.1, 26 May 2023, MLA/INF.1, available at: https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/List-of-Participants.pdf (accessed 30 August 2024).

[23] *Challenges in Prosecuting the Crime...*, *supra* note 8, p. 8.

The above-mentioned development does not go against the United Nations Charter or the principle of sovereign equality of states. After the proposed Security Council resolution concerning aggression against Ukraine was vetoed by Russia, the UNGA properly took up the issue on its agenda and on 2 March 2022 endorsed the resolution by 141 votes, confirming the fact of Russia's aggression against Ukraine.[24] In accordance with the United Nations Charter, the General Assembly may discuss any questions relating to the maintenance of international peace and security and may make recommendations concerning any such questions (Art. 11).[25]

3. INTERNATIONAL JURISDICTION AND THE CRIME OF AGGRESSION

Theoretical limitations of domestic jurisdiction for the crime of aggression and a lack of political will for a long time also influenced the international jurisdiction. In particular, the precise competence of the ICC for prosecuting the crime of aggression was not established until 22 years after the adoption of its Statute and it has not yet been supported by the majority of States Parties to the Rome Statue yet.[26] Furthermore, the ICC jurisdiction has been limited, in contrast to the other crimes covered by the Statue. In particular, this was expressed in the assumption that the ICC could only try the perpetrator of a crime of aggression if they were a national of a State Party to the Kampala Amendments. To this extent, therefore, the ICC's competence to try crimes of aggression seemed to be consistent with the theory that criminal courts created under international agreements implement the domestic jurisdiction conferred on them by the States Parties.[27] This position could have been influenced by the passage from the Nuremberg Tribunal, in which it was stated that the signatory powers by creating the Tribunal "have done together what any one of them might have done singly."[28] In such a perspective, the scope

[24] "Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" (UNGA resolution of 18 March 2022, *Aggression against Ukraine*, Doc. A/RES/ES-11/1, para. 2).

[25] *Cf.* ICJ, *Certain Expenses of the United Nations*, Advisory Opinion, 20 July 1962, ICJ Rep 1962, p. 163; ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 26 November 1984, ICJ Rep 1984, p. 434; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004, p. 148.

[26] Forty-five States have ratified the Kampala Amendments.

[27] As stated by the Dutch Advisory Committee (*Challenges in Prosecuting the Crime…*, *supra* note 8, p. 6): "An international tribunal can acquire jurisdiction either pursuant to a UN Security Council resolution establishing the tribunal or on the basis of a convention under which the States Parties delegate their jurisdiction to the tribunal."

[28] "The signatory powers created this Tribunal, defined the law it was to administer and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law" (*Nazi Conspiracy and Aggression, Opinion and Judgment*, United States Government Printing Office. Washington: 1947, p. 48).

of the court's jurisdiction corresponds to that of the sum of the domestic criminal jurisdictions recognised under international law.[29]

Against this background, the issuance of an arrest warrant for the President of the Russian Federation by the ICC in March 2023[30] called into question the theory of delegating jurisdiction. Indeed, this theory does not explain the legal basis for this arrest warrant, as no State Party, in principle, had individual jurisdiction to try President Putin – much less to transfer such jurisdiction to the ICC.[31] Nonetheless, the issuance of the arrest warrant was met without protest from the States Parties to the Statute, rather with approval or silence. Significantly, it also found some support from the United States,[32] a non-State Party, which had previously appeared not to recognise even the scope of the ICC's jurisdiction under the concept of transferring competences.[33]

In the opinion of former ICC President Judge Eboe-Osuji, the competence of international criminal tribunals should rather be assessed from the perspective of the theory of international organisations, according to which the organisation is independent of the Member States and the latter "do not act through the international organizations that they establish."[34] A similar position is advocated by Leila Sadat, who recognises that

> States 'confer upon' or 'accept' the jurisdiction of international courts and tribunals not because they are thereby transmitting to those institutions some part of their own sovereignty (...), but precisely because they need and want those courts and tribunals to do things that they cannot do in their national systems.[35]

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[29] Akande, *supra* note 11, p. 637; D. Akande, *International Law Immunities and the International Criminal Court*, 98 American Journal of International Law 407 (2004), p. 417.

[30] *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, International Criminal Court, 17 March 2023, available at: https://tinyurl.com/4ct3y63j (accessed 30 August 2024).

[31] Another example of such an exercise of jurisdiction over leaders of a non-State Party is the International Criminal Tribunals for the Former Yugoslavia (ICTY) towards nationals of the Federal Republic of Yugoslavia, which was only admitted to the UN in 2000 because it was not considered by UN organs to be a continuation of the Socialist Federal Republic of Yugoslavia, which ceased to exist in 1992 (Akande, *supra* note 11, p. 637).

[32] E. Graham-Harrison, P. Sauer, *Joe Biden Hails Decision to Issue ICC Arrest Warrant Against Vladimir Putin*, The Guardian, 18 March 2023, available at: https://tinyurl.com/pj66a8ad (accessed 30 August 2024).

[33] The US Department of Justice signed a Memorandum of Understanding with the Joint Investigation Team on alleged core international crimes committed in Ukraine. The USA is also contributing evidence to the Core International Crimes Evidence Database (CICED), and they have delegated a Special Prosecutor for the Crime of Aggression, who supports the operation of the International Centre for the Prosecution of the Crime of Aggression against Ukraine.

[34] C. Eboe-Osuji, *The Absolute Clarity of International Legal Practice's Rejection of Immunity Before International Criminal Courts*, Just Security, 8 December 2022, available at: https://tinyurl.com/44en7j3d (accessed 30 August 2024).

[35] L.N. Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99(2) Notre Dame Law Review 549 (2024), p. 553.

President Putin's arrest warrant appears to have been based on the assumption that the jurisdiction of an international criminal court is not merely the sum of delegated national jurisdictions. The ICC has been able to support such an approach with its existing jurisprudence – most fully expressed in the Jordanian appeal judgment in the Al-Bashir case of 2019[36] and especially in the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa. It must first be assessed "whether an international court may properly exercise jurisdiction."[37] This would be in line with the ICJ *Arrest Warrant* decision that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."[38] In view of the concurring opinion of the ICC judges, an affirmative answer on jurisdiction leads to the need to evaluate immunities. In this respect, the ICC holds the unequivocal position that "there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court."[39] Such a position was in line with the idea of the functioning the Nuremberg Tribunal, among others. In the discussion on its creation, the non-applicability of immunities of State representatives was explained by its international character and the gravity of the crimes rather than the implicit acceptance by the German State.[40]

Against this background the question – particularly relevant in the context of the initiative to create a Special Tribunal for the Crime of Aggression – emerged as to what criteria a judicial body should meet to be qualified as an international criminal court. Some guidance in this regard is undoubtedly provided by the 2001 judgment of the ICJ in the *Arrest Warrant* case. However, it does not explain which other bodies apart from the examples explicitly mentioned (i.e. tribunals established by the Security Council and the ICC) can be considered an international criminal court before which immunities do not apply. This issue could be crucial in defining the rules of operation of the future Special Tribunal for the Crime of Aggression

[36] ICC, *Jordan Referral v. Al-Bashir*, ICC-02/05-01/09-397, 6 May 2019.

[37] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-397-Corr, 6 May 2019, para. 447. *See also* Eboe-Osuji, *supra* note 34.

[38] "Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention" (ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Rep 2002, para. 61).

[39] ICC, *Jordan Referral v. Al-Bashir*, ICC-02/05-01/09-397, 6 May 2019, para. 113.

[40] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-397-Corr, 6 May 2019, paras. 125–133.

against Ukraine. At the same time, as the positions of States have so far shown, there are divergent views in this regard. The restrictive approach is based on the assumption that an international criminal court should be defined as only the ICC or a body established by a Security Council resolution; it therefore assumes that the examples provided by the ICJ in the *Arrest Warrant* judgment are exhaustive. Still, such an approach is very formalistic, and in principle it restricts the possibility of creating new international criminal courts through means other than those based on Security Council Chapter VII resolutions. As was eloquently stated by Clauss Kress, there can be international criminal courts, which "transcends the delegation of national criminal jurisdiction by a group of States and can instead be convincingly characterized as the direct embodiment of the international community for the purpose of enforcing its *ius puniendi*."[41]

The practice of states after the aggression against Ukraine went in this direction. The above-mentioned Reykjavík Declaration welcomed "international efforts to hold to account the political and military leadership of the Russian Federation for its war of aggression against Ukraine and the progress towards the establishment of a special tribunal for the crime of aggression."[42] More than 30 States supported the Bucha Declaration of 31 March 2023,[43] declaring "that those responsible for planning, masterminding and committing the crime of aggression against Ukraine must not go unpunished."[44] Finally, in its Conclusion of 26–27 October 2023, the European Council stated that

> Russia and its leadership must be held fully accountable for waging a war of aggression against Ukraine (...). The European Council calls for work to continue, including in the Core Group, on efforts to establish a tribunal for the prosecution of the crime of aggression against Ukraine that would enjoy the broadest cross-regional support and legitimacy.[45]

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[41] Written observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-326, 11 December 2017, para. 14.

[42] *United around our values...*, *supra* note 17, p. 5.

[43] *Full Accountability is What Teaches an Aggressor to Live in Peace – Volodymyr Zelenskyy During the Bucha Summit*, President of Ukraine, 31 March 2023, available at: https://tinyurl.com/ycymf98d (accessed 30 August 2024).

[44] *Bucha Declaration on Accountability for the Most Serious Crimes Under International Law Committed on the Territory of Ukraine*, President of Ukraine, 31 March 2023, available at: https://tinyurl.com/4bc7azpc (accessed 30 August 2024).

[45] European Council meeting (29 and 30 June 2023) – Conclusions, EUCO 7/23, 30 June 2023, para. 7, available at: https://data.consilium.europa.eu/doc/document/ST-7-2023-INIT/en/pdf (accessed 30 August 2024).

The above views seem to be based on the assumption that individual criminal responsibility of the perpetrators of the crime of aggression against Ukraine needs to be guaranteed, although it is clear that the ICC has no jurisdiction in this regard, just as it is impossible for the Security Council, due to the Russian veto, to establish a tribunal of this type.

Thus, in the search for broader criteria for the recognition of a judicial body as an international body, a point of reference may be considered the position of the Sierra Leone Tribunal. The Tribunal, when identifying itself as an international court, drew attention to three elements: the lack of a link with the judicial system of Sierra Leone; functioning on the basis of a treaty and having the characteristics associated with international organisations; and the fact that the competence and jurisdiction are broadly similar to those of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the ICC.[46]

However, the issues are certainly not clear-cut. Indeed, the question arises as to what criteria should be applied to the prerequisite of a link with the judicial system of a given State. For example, with respect to the Kosovo Specialist Chambers – *prima facie* considered to be closely connected with the Kosovo judicial system – it is emphasised that it functions beyond the sovereign control of Kosovo.[47] In particular, the Kosovo Specialist Chambers can autonomously engage in international arrangements, its budget is not controlled by Kosovo, it enjoys inviolability and immunity even vis-à-vis Kosovo authorities and termination of its functioning is beyond the Kosovo government decision.[48]

Furthermore, it is emphasised in the context of the discussion on the Special Tribunal for the Crime of Aggression that the international court should act on behalf of the international community and should exercise jurisdiction on behalf of multiple States.[49] This position is in line with ICC Al-Bashir's judgement.[50] As

[46] SCSL, *Prosecutor v. Charles Taylor Decision on Immunity from Jurisdiction*, SCSL-2003-01-I, 31 May 2004, para. 41.

[47] A. Puka, F. Korenica, *The Struggle to Dissolve the Kosovo Specialist Chambers in The Hague: Stuck Between Constitutional Text and Mission to Pursue Justice*, 20 The Law and Practice of International, Courts and Tribunals, 548 (2021), p. 573.

[48] R. Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 Die Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 967 (2016).

[49] J.A. Goldston, A. Khalfaoui, *In Evaluating Immunities Before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters*, Just Security, 1 February 2023, available at: https://tinyurl.com/mpmdehkb (accessed 30 August 2024).

[50] "The Appeals Chamber considers that the absence of a rule of customary international law recognising Head of State immunity vis-à-vis an international court is also explained by the different character of international courts when compared with domestic jurisdiction. While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather,

Astrid Coracini and Jennifer Trahan put it, "the international court or tribunal should be sufficiently detached from national jurisdictions and sufficiently reflect the will of the international community to collectively enforce crimes against customary international law."[51] In opposition, Andre de Hoogh presents the view that a

> special tribunal created by a coalition of the willing will not act on behalf of the international community as a whole, but will in fact be acting on behalf of Ukraine with other (particular) States acting in concert. Such a tribunal will undeniably not qualify as a "truly international" tribunal.[52]

As to what measure would ensure that the court is reflecting the will of the international community, it is considered that this premise could be fulfilled when the special court is created through an agreement between the UN Secretary-General and Ukraine based on a recommendation of the UNGA[53] or of the UN Security Council adopted under Chapter VI of the Charter. Still, additional questions arise in this respect. Would the resolutions of the UN organ also have had a similar effect if they had been enacted after the establishment of the Tribunal? Would the sole enactment of the UNGA resolution be sufficient, or are there any specific numbers of supporting States necessary? If approval by 60 States was required for the entry into force of the ICC Statute – should we consider this criterion a sufficient threshold for identifying a "direct embodiment of the international community"?[54]

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international courts act on behalf of the international community as a whole" (ICC, *Jordan Referral v. Al-Bashir*, ICC-02/05-01/09-397, 6 May 2019, para. 115); *cf.* "The more important consideration remains the seising of the jurisdiction upon an international court, for purposes of greater perceptions of objectivity" (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-397-Corr, 6 May 2019, para. 63).

[51] A. Reisinger Coracini, J. Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, Just Security, 8 November 2022, available at: https://tinyurl.com/4xf9vjdv (accessed 30 August 2024). *See also* J. Trahan, *The Role of the UN Security Council & General Assembly In Responding to the Invasion of Ukraine*, 12(2) Polish Review of International and European Law 23 (2024).

[52] A. de Hoogh, *Personal Immunities Redux Before a Special Tribunal for Prosecuting Russian Crimes of Aggression: Resistance is Futile!*, EJIL: Talk!, 5 January 2024, available at: https://tinyurl.com/y5apej2a (accessed 30 August 2024); *See also* R. O'Keefe, *Taking Putin to Court?*, Bocconi, 21 December 2023, available at: https://tinyurl.com/5t27vwrb (accessed 30 August 2024).

[53] J. Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremberg is Not the Model*, Just Security, 7 March 2022, available at: https://tinyurl.com/38t3w8u6 (accessed 30 August 2024); C. Kress, S. Hobe, A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, Just Security, 23 January 2023, available at: https://tinyurl.com/26hdw6e2 (accessed 30 August 2024); O.A. Hathaway, M. Mills, H. Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly*, Just Security, 5 May 2023, available at: https://tinyurl.com/ycy85psp (accessed 30 August 2024).

[54] According to Andre de Hoogh, even the ICC cannot be considered to represent the international community (de Hoogh, *supra* note 51). Carrie McDougall differentiates between a "broad cross-regional

Would a reflection of the will of the international community also be guaranteed if the agreement was between Ukraine and a regional organisation?[55]

CONCLUSIONS

The discussion regarding the establishment of a Special Tribunal for the Crime of Aggression against Ukraine has significantly influenced the trajectory of the understanding of general international law concerning individual criminal responsibility for the crime of aggression. The interpretative paths adopted in the mid-1990s concerning national jurisdiction over the crime of aggression are gradually being abandoned. Such a shift is certainly warranted from the systemic perspective when also taking into account the norms of *ius ad bellum* and *ius in bello*.

At the same time, an intense ongoing debate concerning the understanding of the term "international criminal courts, where they have jurisdiction" has not led to any conclusive arrangements. What is known is that there is a certain group of States for which such courts can be created through a bilateral agreement between the State concerned and the United Nations, on the recommendation of the UNGA.[56]

group of States" which would suffice with a "small group of States" (C. McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine*, 28(2) Journal of Conflict & Security Law 203 (2023), p. 220).

[55] *Cf.* O. Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, OpinioJuris, 30 March 2022, available at https://tinyurl.com/5bz5vmeu (accessed 30 August 2024).

[56] *FAQs on A Special Tribunal for the Crime of Aggression against Ukraine*, Permanent Mission of Estonia to the UN, 20 January 2023, available at: https://un.mfa.ee/faqs-on-a-special-tribunal-for-the-crime-of-aggression-against-ukraine/ (accessed 30 August 2024).

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IMPLEMENTATION AND INTERPRETATION OF THE DEFINITIONS OF INTERNATIONAL CRIMES IN THE NATIONAL JURISDICTION OF UKRAINE

Abstract: *The article consists of two parts, the first of which discusses the problems associated with implementing the provisions of international law in the Ukrainian legal system regarding the understanding of the concept of "international crimes". It underscores that the different definitions are due to the fact that Ukraine is not a party to the Rome Statute. However, it should be noted that most provisions of international law regarding international crimes regarding war crimes, the crime of aggression and the crime of genocide are part of the Ukrainian legal system. At the same time, there are no crimes against humanity in Ukrainian national criminal law. The second part addresses the issues regarding Ukrainian courts' interpretation of the national criminal law and international treaties on international crimes: interpreting the provisions of United Nations acts and the Rome Statute, applying the principle of "nullum crimen sine lege" in the context of prosecuting the crime of Holodomor, interpreting the provisions of the European Convention on Human Rights in connection with the use of trial in absentia in the case of Russian war criminals and interpreting provisions regarding universal jurisdiction in Ukrainian law.*

Keywords: crime of aggression, international crimes, Ukrainian law, universal jurisdiction, war crimes

INTRODUCTION

In the context of Ukraine, aligning domestic criminal law with international standards regarding crimes such as genocide, war crimes, crimes against humanity and the crime of aggression is essential for ensuring accountability and justice. This

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article aims to examine whether and how the definitions of international crimes in Ukrainian law are implemented and interpreted consistently with international standards. It seeks to show the challenges and potential areas for improvement in ensuring alignment with international standards.

The article consists of two parts. In the first part, we explore the legislative measures taken by Ukraine to incorporate definitions of international crimes into its domestic legal system, and we examine the effectiveness of such measures in practice. In the second part, we address issues surrounding Ukrainian courts' interpretation of these definitions. Additionally, we analyse gaps or discrepancies between Ukrainian law and international standards, considering their implications for justice.

The research methodology for this article is based on the formal-dogmatic method. It encompasses not only the content of national and international legal acts, but also an analysis of doctrine and Ukrainian court rulings as elements of a unified system. Specifically, Ukrainian national law on the application of international law, criminal law regulations on responsibility for crimes defined in international law as international crimes and international law provisions defining international crimes are analysed. Ukrainian doctrine describing issues of implementing and interpreting laws on responsibility for crimes defined as international crimes is also examined. Additionally, Ukrainian court rulings regarding cases of international crimes are dealt with, using resources from the Unified State Register of Court Decisions.[1]

1. PROBLEMS WITH IMPLEMENTING INTERNATIONAL LAW ON INTERNATIONAL CRIMES INTO THE UKRAINIAN LEGAL SYSTEM

Although Ukraine is not a party to the Rome Statute, its criminal legislation is significantly integrated with international humanitarian and international criminal law. According to Art. 3 of the Criminal Code of Ukraine (CCU), the legislation on criminal responsibility is embodied in the CCU, based on the Constitution of Ukraine and universally recognised principles and norms of international law. Ukrainian laws on criminal responsibility are to be consistent with international treaties ratified by the Parliament of Ukraine.[2] International treaties of Ukraine, having been consented to by the Parliament of Ukraine, are part of the national

[1] In accordance with the Law of Ukraine of 22 December 2005 on Access to Court Decisions, No. 3262-IV. This is an automated system for collecting, storing, protecting, accounting, searching for and providing electronic copies of court decisions, available at: https://reyestr.court.gov.ua (accessed 30 August 2024).

[2] Criminal Code of the Republic of Ukraine, No. 2314-III, 1 September 2001, available at: https://sherloc.unodc.org/cld/uploads/res/document/ukr/2001/criminal-code-of-the-republic-of-ukraine-en_html/Ukraine_Criminal_Code_as_of_2010_EN.pdf (accessed 30 August 2024).

law and are applied in accordance with the procedure prescribed for the norms of national law (Art. 19 of the Law on International Treaties of Ukraine[3]). Paragraph 2 of this provision establishes the primacy of international law over national law.[4]

The concept of an international crime can be understood *sensu largo* or *sensu stricto*. *Sensu largo*, it includes actions recognised as crimes under international conventions, such as terrorism,[5] money laundering,[6] drug crimes,[7] piracy,[8] genocide,[9] crimes against humanity, war crimes[10] etc. *Sensu stricto*, it refers to actions prosecuted by international courts. At present, these are "the most serious crimes of concern to the international community as a whole", as provided in the Rome Statute and covering (a) the crime of genocide; (b) crimes against humanity; (c) war crimes and (d) the crime of aggression.[11]

Since Ukraine is not a party to the Rome Statute, the overall structure of international crimes in national law is impacted. There is noticeable discrepancy between the provisions of the Rome Statute and the norms of Ukrainian law on international crimes. The CCU includes Chapter XX – "Crimes Against Peace, Security of Humanity, and International Order." This chapter specifically comprises the following crimes: propaganda of war (Art. 436); production and distribution of communist or Nazi symbols and propaganda of communist and national socialist (Nazi) totalitarian regimes (Art. 436-1); justification, recognition as legitimate or denial of the armed aggression of the Russian Federation against Ukraine or glorification of its participants (Art. 436-2); planning, preparation and waging of an aggressive war (Art. 437); violation of laws and customs of war (Art. 438); use of weapons of mass destruction (Art. 439); development, production, purchasing, storage, distribution or transportation of weapons of mass destruction (Art. 440); ecocide (Art. 441); genocide (Art. 442); crimes against the life of a foreign state

[3] Act of Ukraine of 29 June 2004 on International Treaties of Ukraine, No. 1906-IV.

[4] *Ibidem*.

[5] International Convention for the Suppression of the Financing of Terrorism (adopted on 9 December 1999, entered into force on 10 April 2002), 2178 UNTS 197.

[6] United Nations Convention against Transnational Organized Crime (adopted on 15 November 2000, entered into force on 29 September 2003), 2225 UNTS 209.

[7] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted on 20 December 1988, entered into force on 11 November 1990), 1582 UNTS 95.

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

[9] Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948, entered into force on 12 January 1951), 78 UNTS 277.

[10] Geneva Conventions and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted on 8 June 1977, entered into forve 7 December 1978), 1125 UNTS 609.

[11] Rome Statute of the International Criminal Court (last amended 2010) (signed on 17 July 1998, entered into force on 1 July 2002), 2187 UNTS 3.

representative (Art. 443); criminal offences against internationally protected persons and institutions (Art. 444); illegal use of symbols of the Red Cross, the Red Crescent or the Red Crystal (Art. 445); piracy (Art. 446); and recruiting, financing, supplying and training of mercenaries (Art. 447).

Therefore, we can classify as international crimes *sensu stricto* the following acts proscribed by the CCU:

- crime of aggression (Art. 437 – Planning, preparation and waging of an aggressive war)
- crime of genocide (Art. 442)
- war crimes (Art. 438 – Violation of laws and customs of war and Art. 441 – Ecocide).[12]

1.1. The crime of aggression

The Ukrainian criminal legislation includes terms such as "aggressive war" or "aggressive military actions", whilst in international law the term "aggression" is used.[13] The terms mentioned above were implemented into the CCU in Arts. 436, 436-2 and 437. In our opinion, aggression is explicitly criminalised in Ukraine's domestic criminal code, though the definition of Art. 437 differs significantly from that under international law.[14] Primarily, the Ukrainian legal definition of the crime is not limited to leaders. According to Art. 8*bis* of the Rome Statute, only "a person in a position effectively to exercise control over or to direct the political or military action of a State" may be responsible for the crime of aggression; the CCU does not contain such a norm. Moreover, the provision can be used to prosecute individuals, but can also have legal consequences for organisations, groups or structures that are guilty of the specified actions. This emphasises the importance of countering collective forms of aggression and terrorism.

Regarding the use of terms and their definitions, we can note the following. The definition of "aggressive war" is absent in the CCU, which distinguishes between two concepts: "aggressive war" and "military conflict".[15] In addition, in accordance with the Law on the Defence of Ukraine, armed aggression refers to the use of

[12] Ecocide is covered by the concept of a war crime; in particular, it is mentioned in Art. 8.2.b(IV) of the Rome Statute as: "severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."

[13] S. Denisov, K. Kardash, *Viznačennâ ponâttâ agresivna vìjna u krimìnal'nomu pravì Ukraïni* [Definition of the Concept of Aggressive War in the Criminal Law of Ukraine], 3 Bulletin of Luhansk State University of Internal Affairs named after EO Didorenko 96 (2012).

[14] F. D'Alessandra, *Pursuing Accountability for the Crime of Aggression Against Ukraine*, 5 Revue Européenne du Droit 60 (2023).

[15] Y. Kamardina, S. Kovaliov, *Sutnìst' ponât' "agresivna vìjna" ì "voênnij konflìkt": spìvvìdnošennâta mìžnarodnopravovij aspekt* [The Essence of the Concepts "Aggressive War" and "Military Conflict": Relationship and International Legal Aspect], 15 Bulletin of Mariupol State University, Series: Law 82 (2018).

armed force by another State or group of States against Ukraine. It encompasses several actions: invasion or attack by another State's armed forces, occupation or annexation of Ukrainian territory, blockade of ports, coastline or airspace, violation of communications, attacks on Ukrainian military or civilian fleets, sending armed groups to commit acts of force against Ukraine, allowing one's territory to be used by another State for aggressive actions and misuse of armed forces stationed in Ukraine according to international treaties.[16] This definition corresponds to that in Resolution of the UN General Assembly (UNGA) 3314 (XXIX).

According to the literature, there are several approaches in defining aggression and aggressive war: both terms can be seen as identical, or aggression may be read as a broader term that includes aggressive war as a type.[17] It is also believed that in order to clarify the definition of "aggressive war" in accordance with national law, it is necessary to use the one in international law.[18] This concept is used by national courts when considering cases under Art. 436 CCU. For example: "Aggressive war and military conflict are types of aggression. The definition of aggression is given in the resolution of the XXIX session of the UN General Assembly dated December 14, 1974, namely aggression should be understood as the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other way that is incompatible with the UN Charter."[19] In another cases it was stated that

> [a]ggressive war and military conflict are types of aggression. Aggressive war is determined by the scale of actions, the combination of the use of armed forces with other means of struggle, the formulation and implementation of certain political tasks: the seizure of foreign territory, enslavement, etc.[20]

1.2. The crime of genocide

In contrast to the previous provision, the definition of the crime of genocide (Art. 442 CCU) in Ukrainian criminal law almost fully corresponds to and reproduces the norms of international law. Under Art. 442:

[16] The Act of Ukraine of 6 December 1991 about Defence of Ukraine, No. 1932-XII as amended.

[17] H. Oliynyk, *Ctan teoretičnogo doslìdžennâpitan' krimìnal'noï vìdpovìdal'nostì za propagandu, planuvannâ, pìdgo* [The State of Theoretical Research of the Issues of Criminal Liability for Propaganda, Planning, Preparation and Waging of Aggressive War], 8 Bulletin of LTEU. Legal Sciences 117 (2019).

[18] A.M. Boyko, Y.M. Mazunin, *Scientific and Practical Commentary on the Criminal Code of Ukraine*, Legal Opinion, Kyiv: 2012.

[19] Dissenting Opinion of the Judge of the Slovyanskyi City District Court of the Donetsk Eegion in Case No. 243/4702/17, 1 June 2017.

[20] Dissenting Opinion of the Judge on the Judgment of the Krasnoarmy City and District Court in Case No. 235/9442/15-k, 22 September 2017.

> [g]enocide (...) is a willfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grievous bodily injuries on them, creation of life conditions calculated for total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another.

However, there are lexical differences that can create certain problems in practice. First of all, the national law (i.e. Art. 442 CCU) does not use the term "serious", but "grievous" bodily injuries. We cannot but agree that the concept of serious injuries is a broader category than grievous injuries.[21] Accordingly, in practice such a situation may arise when the injury will not be grievous in accordance with Art. 442 CCU, but will qualify as serious according to the international definition of genocide.[22] Another difference is that the CCU did not include as a way of committing of genocide "causing serious (...) mental harm", which is enshrined in the Genocide Convention and the Rome Statute.[23]

1.3. The problem of criminalising crimes against humanity

A significant issue in Ukrainian legislation is the lack of a category for "crimes against humanity". Consequently, Ukrainian courts often address actions that could be categorised as such under Art. 438 CCU. However, this approach fails to consider the absence of a direct link to armed conflict, neglecting the aspect of crime as a tool to further the objectives of such conflicts.[24] In 2019, the draft Law on Amendments to Certain Legislative Acts of Ukraine Regarding the Implementation of International Criminal and Humanitarian Law No. 2689 dated 27 December 2019 was registered, which proposed adding a provision to Art. 442-1 that would provide for responsibility for crimes against humanity. According to the Explanatory Note, the authors of the draft law justified the importance of the changes by the fact that

> other types of international crimes are committed in the occupied territories of Ukraine – the so-called crimes against humanity. There are thousands of victims of these crimes. However, the perpetrators of most of them currently manage to avoid criminal prosecution, which, among other things, is due to the inconsistency of Ukrainian legislation on criminal responsibility with the provisions of international criminal

[21] *Genocide in Ukraine: Legal Analysis*, Regional Center for Human Rights, available at: https://rchr.org.ua/analytics/genoczyd-v-ukrayini-yurydychnyj-analiz/ (accessed 30 August 2024).

[22] *Ibidem*.

[23] *Ibidem*.

[24] Y. Orlov, *Ctan teoretičnogo doslìdžennâpitan' krimìnal'noï vìdpovìdal'nostì za propagandu, planuvannâ, pìdgo* [Crime and its Counteraction in the Conditions of War: Criminal Law and Criminological Dimensions: A monograph], Pravo, Kharkiv: 2023, p. 100.

> and humanitarian law. In other words, due to the absence of the composition of the relevant crime in the Criminal Code of Ukraine as a basis for criminal liability.[25]

However, in the conclusion to the above-mentioned draft, presented by the Main Scientific and Expert Administration, it was indicated that such acts are already provided for in other articles of the CCU as independent crimes, and that the punishments for them are more severe.[26] In our opinion, we cannot agree with this conclusion since the CCU does not contain special components of crimes against humanity, for which the presence of a special feature is necessary. That is why the Ukrainian legislation is not adapted to effectively prosecute and adjudicate in cases related to the aggression of the Russian Federation against Ukraine.[27]

1.4. War crimes

As for war crimes, it can be noted that the term is absent from the CCU;[28] instead, such socially dangerous actions are criminalised in Art. 438 CCU ("Violation of the laws and customs of war"), which includes

> [c]ruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine, and also giving an order to commit any such actions.

The main problem is the blanket nature of this article, namely the fact that its disposition refers to international treaties on the "laws and customs of war", the consent to the binding nature of which was granted by the Verkhovna Rada of Ukraine.[29] Thus, a specific list of war crimes is not regulated, but it is determined that war crimes are all violations of the laws and customs of war enshrined in the

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[25] Draft Act on Amendments to Certain Legislative Acts of Ukraine Regarding the Implementation of International Criminal and Humanitarian Law of 27 December 2019, No. 2689, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804 (accessed 30 August 2024).

[26] *Ibidem*.

[27] Orlov, *supra* note 24, p. 100.

[28] O. Cherviakova, *Vìdpovìdal'nìst'* za *voênnìzločini: mehanìzmi ta procesi vìdnovlennâ suverenìtetu ta bezpeki Ukraï'n* [Responsibility for War Crimes: Mechanisms and Processes of Recovery of Ukraine's Sovereignty and Security], 61(2) Forum Prava 150 (2020), p. 154.

[29] D. Koval, *Sources of interpretation of Article 438 of the Criminal Code of Ukraine*, Truth Hounds, 22 September 2023, available at: https://truth-hounds.org/en/cases/sources-of-interpretation-of-article-438-of-the-criminal-code-of-ukraine/ (accessed 30 August 2024).

above-mentioned international treaties.[30] The approach needs to be changed because not every violation of the laws and customs of war is considered a war crime in international law. According to Art. 8-2 of the Rome Statute, individuals are only responsible for "grave breaches" or "serious violations". Additionally, it is essential for the court in each case to explicitly point to the treaty clauses that may be deemed criminally punishable under Art. 438. Furthermore, when ruling, it is necessary to find and designate supplementary sources for interpreting the above-mentioned article, such as international treaties or even relevant international case law.[31]

2. PROBLEMS WITH INTERPRETING PROVISIONS OF UKRAINIAN LAW ON INTERNATIONAL CRIMES

During this research, we analysed the judicial practice of Ukraine regarding the application Art. 437 – Planning, preparation and waging of an aggressive war, Art. 442 – Genocide and Art. 438 – Violation of rules of the warfare of the CCU. For this purpose, the information system of the Unified State Register of Court Decisions was used.

In the period 2022–2023, 41 judgments were issued in war crimes cases and one in a case for the crime of genocide (incitement to the crime of genocide). The reasoning in the majority of the judgments in cases of war crimes was largely based on the norms of international law. In particular, whilst defining the status of the Russian aggression, courts referred to it as an international armed conflict. In doing so, the courts invoked:

1. The Charter of the United Nations, signed on 26 June 1945 (emphasising that Ukraine, the Russian Federation and 49 other founding countries, as well as other countries worldwide, are members of the UN).
2. Declaration of the UNGA No. 36/103 of 9 December 1981, on the inadmissibility of intervention and interference in the internal affairs of states.
3. UN Resolutions:
   - No. 2131 (XX) of 21 December 1965, containing the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.
   - No. 2625 (XXV) of 24 October 1970, containing the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

[30] O. Cherviakova, *Voênnì zločini: problemiregulûvannâ v zakonodavstvì Ukraï'ni* [War Crimes: Problems of Regulation in the Legislation of Ukraine], in: A. Hetman, B. Golovkin (eds.), *Digitization and Security*: *Materials of the International Science and Practice Conference*, Yaroslav Mydryi National Law University, Kharkiv: 2020, p. 380.

[31] Koval, *supra* note 29.

- No. 2734 (XXV) of 16 December 1970, and No. 3314 (XXIX) of 14 December 1974, containing the Declaration on Strengthening International Security.
- No. 3314 (XXIX) of 14 December 1974, Definition of Aggression.

Those international documents establish the obligation of States to refrain from armed intervention, subversive activities, military occupation or encouragement of or support for separatist activities, and to prevent training, financing and recruiting mercenaries or sending mercenaries to the territory of another state. The decisions contain conclusions that the conflict between the Russian Federation and Ukraine is an ongoing international armed conflict. References are made to the four 1949 Geneva Conventions, among others.[32]

Moreover, in their decisions Ukrainian courts refer to the provisions of the Rome Statute, although Ukraine has not ratified it. The relevant provisions of the Rome Statute are used to determine which acts should be classified as war crimes or in order to interpret such acts.[33] The case law of international criminal courts, e.g. the International Criminal Tribunal for the former Yugoslavia (ICTY), is also cited by the Ukrainian courts when interpreting international crimes.

2.1. The problem of applying the principle of *nullum crimen sine lege*

When applying the principle of *nullum crimen sine lege* to justify the judgments of Ukrainian courts in cases of international crimes, references are made to Art. 7(2) of the European Convention on Human Rights, according to which this principle shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.[34] In particular, the decision of the Appeal Court of Kyiv of 13 January 2010, in a genocide case (Holodomor), emphasises this point.[35]

[32] Decision of Chernihiv District Court of Chernihiv Region of 10 January 2023, No. 748/2272/22, available at: https://reyestr.court.gov.ua/Review/108302451 (accessed 30 August 2024).

[33] Decision of the Desnyan District Court of Chernihiv of 11 April, 2023, No. 750/6470/22, available at: https://reyestr.court.gov.ua/Review/110135338; Decision of the Ivankiv District Court of the Kyiv Region of 28 June 2023, No. 366/869/23, available at: https://reyestr.court.gov.ua/Review/111894270; Decision of the Saksagan District Court of Kryvyi Rih of 10 October 2023, No. 522/3868/23, available at: https://reyestr.court.gov.ua/Review/111894270 (all accessed 30 August 2024).

[34] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos 11 and 14 (signed on 4 November 1950, entered into force on 3 September 1953), 2889 UNTS 221.

[35] Decision of the Court of Appeal of Kyiv of 13 January 2010, No. 1-33/2010, available at: https://reyestr.court.gov.ua/Review/9470003 (accessed 30 August 2024).

2.2. Trial in absentia

Ukrainian courts in their judgments often refer to Resolution (75)11 of the Committee of Ministers of the Council of Europe "On Criteria Governing the Proceedings held in Absentia" dated 19 January 1973, and the case law of the European Court of Human Rights that justifies the consideration of cases in absentia.

For example, the courts indicate that according to the recommendations of the Committee of Ministers, an important condition for applying special pre-trial investigation and special judicial proceedings is to ensure the procedural rights and guarantees of those participating in criminal proceedings, including the right of the accused to be properly informed of the date of the hearing and the right to legal or other representation in court.[36]

When justifying the need to apply detention in a case held in absentia, the court stated:

> The risk envisaged in Part 1 of Article 177 of the Criminal Procedure Code of Ukraine is justified by the fact that the suspect is a military of the Russian Armed Forces and a citizen of the Russian Federation, a state that: 1) is recognized as an aggressor country according to the Law of Ukraine On the Features of State Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Regions No. 2268-VIII of January 18, 2018; 2) according to Article 12 of the Geneva Convention on the Treatment of Prisoners of War, is responsible for the treatment of prisoners of war, regardless of the responsibility that the suspect may bear; 3) systematically violates the norms of international law (confirmed, in particular, by resolutions of the United Nations General Assembly, for example, A/RES/75/192 "Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine" of December 16, 2020); 4) systematically denies the committed military crimes on the territory of Ukraine by representatives of the units of the armed forces and other law enforcement agencies of the Russian Federation.[37]

2.3. The problem with interpreting provisions regarding universal jurisdiction

The issue of universal jurisdiction is regulated by Art. 6 CCU, according to which foreigners or stateless persons who do not permanently reside in Ukraine and who

[36] Decision of Chernihiv District Court of Chernihiv Region of 17 February 2023, No. 748/1824/22, available at: https://reyestr.court.gov.ua/Review/109074116 (accessed 30 August 2024).

[37] Ruling of the Investigating Judge of the Solomyanskyi District Court of Kyiv of 20 November 2023, No. 760/27024/23, available at: https://reyestr.court.gov.ua/Review/115095136# (accessed 30 August 2024) (emphasis added).

have committed criminal offences outside its borders are subject to responsibility in Ukraine under its Code in cases provided for by international treaties.

Consequently, it follows that Ukraine, as a party to most international treaties in the field of international humanitarian law and international criminal law, can implement the principle of universal jurisdiction concerning foreigners who have committed crimes against the international legal order outside the territory of Ukraine. Among such international treaties, in particular, are the four Geneva Conventions of 1949[38] and the Protocols,[39] as well as other treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948) and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted and opened for signature, ratification and accession by General Assembly Resolution 2391 (XXIII) of 26 November 1968).

In the Ukrainian criminal law doctrine, there are opinions that the content of this article needs to be specified more clearly, prescribing exactly which types of crimes are subject to universal jurisdiction.[40] The following amendments were proposed in the draft law on Amendments to Certain Legislative Acts of Ukraine Regarding the Implementation of International Criminal and Humanitarian Law, which we mentioned earlier in the article.[41] According to the proposed changes to the article establishing the principle of universal jurisdiction:

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[38] The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 970; the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 971; the Third Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 972; and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 973.

[39] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17513; and Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III) (adopted 8 December 2005, entered into force 14 January 2007) 2404 UNTS 43425.

[40] M. I. Paškovs'kij, *Okremì aspekti reglamentacìï ìnstitutu ûrisdikcìï v mìžnarodnomu pravì* [Certain Aspects of the Regulation of the Institution of Jurisdiction in International Law], in: M.I. Paškovs'kij (ed.), Legal life of modern Ukraine: Mater. International of science conf. prof.-lecturer composition (Odessa, 20–21 April 2012), Odessa Law Academy, Odessa: 2012; M. Pashkovsky, *Universal Criminal Jurisdiction in Ukraine*, Institute For War & Peace Reporting, 22 September 2022, available at: https://iwpr.net/global-voices/universal-criminal-jurisdiction-ukraine (accessed 30 August 2024).

[41] Draft Act on Amendments to Certain Legislative Acts of Ukraine Regarding the Implementation of International Criminal and Humanitarian Law of 27 December 2019, No. 2689, available at: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804 (accessed 30 August 2024).

> Foreigners or stateless persons who do not permanently reside in Ukraine, who have committed any of the crimes provided for in Articles 437-438[5], 442, 442[1] of this Code outside of Ukraine, are subject to liability in Ukraine in accordance with this Code, regardless of the cases (conditions) provided for in the first part of this article, if such persons are in the territory of Ukraine and cannot be extradited (transferred) to a foreign state or an international judicial institution for criminal prosecution or if their extradition (transfer) was refused.[42]

However, the changes were not adopted, and the draft law has not been signed by the President of Ukraine.

CONCLUSIONS

1. The following acts stipulated by the CCU can be classified as international crimes *sensu stricto*: crime of aggression (Art. 437 – Planning, preparation and waging of an aggressive war), crime of genocide (Art. 442) and war crimes (Art. 438 – Violation of rules of the warfare and Art. 441 – Ecocide).
2. National legislation establishes definitions which to some extent correspond to the interpretation of international crimes – namely, the crime of aggression, war crimes or genocide – but still require relevant modifications.
3. Ukrainian criminal law lacks the concept of "crimes against humanity" and thus a relevant specialised provision providing for responsibility for such crime. Whilst a draft law has been proposed to address this gap, it has not been adopted. However, without distinct provisions for crimes against humanity, Ukraine's legal framework remains unprepared to address the full scope of atrocities, particularly those related to the Russian aggression against Ukraine. Therefore, there is a pressing need for legislative reform to align Ukrainian law with international standards and effectively prosecute perpetrators of such acts.
4. Whilst the concept of the crime of genocide fully reproduces the definition of genocide found in international conventions, the provision imposing responsibility for war crimes (Art. 438 – Violation of rules of the warfare) contain blanket norms that do not provide a clear list of actions that constitute such a crime. The CCU addresses war crimes under Art. 438, but rather than explicitly list war crimes, it refers to international treaties on the "laws and customs of war", which can lead to ambiguity. To align with international standards, a more precise definition of war crimes is necessary, one that focusses on "grave breaches" or "serious violations", as outlined in the Rome Statute.

[42] *Ibidem*.

5. Aggression is explicitly criminalised in the CCU, though the definition in Art. 437 differs significantly from "aggression" under international law. The analysis of Ukrainian criminal legislation shows discrepancies in terminology and definitions compared to international law standards. Whilst terms like "aggressive war" and "aggressive military actions" are present in the CCU, their definitions diverge from those outlined in international legal frameworks. Moreover, the absence of a specific definition for "aggressive war" in Ukrainian law complicates its interpretation. That is why courts refer in their decisions to the concept of aggression defined in international law. To address these discrepancies, it is recommended that Ukrainian legislation aligns its definitions with international law, facilitating coherence and clarity in legal interpretations.
6. In interpreting the provisions of international law, Ukrainian courts refer to UN acts, particularly the Geneva Conventions (1949) and their Protocols, to substantiate the circumstances of violations of the laws and customs of war. Ukrainian courts also invoke the Rome Statute, even though Ukraine is not a party to it, with the purpose of interpreting certain definitions, such as "plunder" or "war crime", among others. Additionally, there are instances of referring to the jurisprudence of international criminal courts, such as the ICTY.
7. At the moment, there are no decisions from Ukrainian courts in which the CCU provisions regarding universal jurisdiction are interpreted (Art. 6). However, when considering this problem in the context of prosecuting international crimes, attention should be paid to the fact that the principle of universal jurisdiction in Ukrainian law can cover those crimes provided for by international treaties: war crimes are provided for in the Geneva Conventions (1949) and the crime of genocide is in the Convention on the Prevention and Punishment of the Crime of Genocide (1948). Holding foreigners responsible for other international crimes (aggression and crimes against humanity) committed outside the borders of Ukraine will be problematic, as at the moment Ukraine has not ratified international treaties under which it would commit to prosecuting the crime of aggression and crimes against humanity.

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PROSECUTION OF THE CRIME OF AGGRESSION IN INTERNATIONAL AND UKRAINIAN JURISDICTION: CHALLENGES AND PROSPECTS

Abstract: *This article explores the genesis of Russian aggression against Ukraine, tracing its origins from the unprovoked illegal invasion initiated in February 2014 to the full-scale invasion in 2022. Despite initial international responses, the lack of significant sanctions against Russia or efforts to prosecute its leaders for the crime of aggression persisted until the 2022 invasion. The international community's condemnation of the brutality accompanying this invasion underscored the need for accountability mechanisms within the existing international legal framework. However, limitations in prosecuting aggression within the International Criminal Court, coupled with challenges in amending the Rome Statute, have led to proposals for an ad hoc mechanism to address aggression gaining traction. These proposals highlight the urgency of holding aggressors accountable and safeguarding victims' rights. Concurrently, Ukrainian jurisdiction incorporates the concept of the crime of aggression in its Criminal Code but lacks clarity on essential elements necessary for prosecuting such crimes, including the leadership element. An analysis of court verdicts reveals discrepancies in interpreting the crime of aggression, emphasising the necessity of adopting a unified approach that is consistent with international law. The article underscores the critical importance of enhancing legal frameworks, building capacity and encouraging international cooperation to ensure accountability for the crime of aggression and to preserve the rule of law.*

Keywords: crime of aggression, criminal law of Ukraine, domestic jurisdiction, ICC, international criminal law, Russian aggression against Ukraine, Special Tribunal for the Crime of Aggression

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1. THE GENESIS OF RUSSIAN AGGRESSION AGAINST UKRAINE

On 24 February 2022, Russia began an unprovoked, full-scale invasion and shelling of the territory of Ukraine. This was another phase of the international armed conflict that started with the act of Russian aggression against Ukraine in February 2014,[1] leading to the occupation and attempted annexation of the Autonomous Republic of Crimea and the city of Sevastopol, which continued with the occupation of parts of the Donetsk and Luhansk regions. It also ended with the Russian Federation's attempted annexation on the basis of the decisions of 21 February and 29 September 2022 on the status of the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine,[2] which proved to be the largest attempted annexation in Europe since World War II. In fact, the conflicts in Crimea and Donbas between 2014 and 2022 were not separate – it was and still is the armed conflict between Russia and Ukraine, a continuous act of aggression for which the Russian state should be held accountable and its individual leaders held criminally responsible. Since 24 February 2022, Belarus[3] – which allowed its territory to be used in violation of Art. 3(f) of UN General Assembly (UNGA) Resolution 3314 (XXIX)[4] – has also committed the act of aggression against Ukraine.

At the end of March 2014, UN members reaffirmed the territorial integrity of Ukraine in a UNGA resolution,[5] but did not use the term "aggression". European countries reacted more appropriately[6] in 2014, especially those with bitter common historical memories.[7] Nevertheless, the European and global response was "soft":[8] it did not include substantial economic sanctions against Russia or attempts to

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[1] *E.g.* Parliamentary Assembly of the Council of Europe, Resolution 2132 (2016): *Political consequences of the Russian aggression in Ukraine*, available at: https://tinyurl.com/4hppmhxr (accessed 30 August 2024); ECtHR, *Ukraine v. Russia (re Crimea)* (App. No. 20958/14 and 38334/18), 14 December 2020; ECtHR, *Ukraine and the Netherlands v. Russia* (App. No. 43800/14, 8019/16 and 28525/20), 30 November 2022; Report on Preliminary Examination Activities 2020, International Criminal Court, Den Haag: 2020, available at: https://tinyurl.com/54ctx47z (accessed 30 August 2024).

[2] *E.g. Putinpriznal "nezavisimost'" Hersonskoj i Zaporožskoj oblastej Ukrainy. Ètoformal'nost' dlâ ih ann* [Putin recognized the "independence" of the Kherson and Zaporozhye regions of Ukraine. This is a formality for their annexation], BBC News Russia, 29 September 2022, available at: https://www.bbc.com/russian/news-63084494 (accessed 30 August 2024).

[3] UNGA resolution of 2 March 2022, *Aggression against Ukraine*, Doc. A/RES/ES-11/1.

[4] UNGA resolution of 14 December 1974, *Definition of aggression*, Doc. A/RES/3314.

[5] UNGA resolution of 27 March 2014, *Territorial integrity of Ukraine*, Doc. A/RES/68/262.

[6] Resolution 2014/2627(RSP) of 13 March 2014 on the Invasion of Ukraine by Russia.

[7] *See* S. Lau, *"We Told you So!" How the West Didn't Listen to the Countries that Know Russia Best*, Politico, 9 March 2022, available at: https://www.politico.eu/article/western-europe-listen-to-the-baltic-countries-that-know-russia-best-ukraine-poland/ (accessed 30 August 2024).

[8] For more on this subject, *see* K. Kruk, *The Crimean Factor: How the European Union Reacted to Russia's Annexation of Crimea*, Warsaw Institute Review, 7 May 2019, available at: https://warsawinstitute.org/crimean-factor-european-union-reacted-russias-annexation-crimea/ (accessed 30 August 2024).

prosecute Russian leaders for the crime of aggression. It was only after the full-scale invasion of Ukraine in 2022 – accompanied by massive, brutal violations of international humanitarian law and human rights which shocked the international community – that countries responded immediately and used the word "aggression": in March 2022 a UNGA resolution condemning "the aggression by the Russian Federation against Ukraine"[9] was adopted by 141 countries (with 5 votes against and a total of 193). In November 2022 the UNGA also determined that Ukraine is entitled to war reparations[10] and in February 2023 that the need to ensure justice for all victims and to prevent future crimes are the highest priorities.[11] Almost all regional international organisations (the Council of Europe (CoE),[12] European Union (EU),[13] Organization for Security and Co-operation in Europe (OSCE).[14] and North Atlantic Treaty Organization (NATO)[15]) recognised and condemned the Russian aggression, and each of these statements is evidence for future proceedings on the crime of aggression.

2. THE ACCOUNTABILITY GAP IN THE INTERNATIONAL JUSTICE ARCHITECTURE

Since the onset of the Russian invasion in 2014, Ukrainian authorities have diligently pursued legal avenues within various international judicial bodies to seek justice against Russia. These efforts have included engaging institutions such as the International Court of Justice,[16] the European Court of Human Rights (ECtHR),[17] the International Tribunal for the Law of the Sea,[18] the Permanent Court

[9] UNGA resolution of 2 March 2022, *Aggression against Ukraine*, Doc. A/RES/ES-11/1.

[10] UNGA resolution of 14 November 2022, *Furtherance of remedy and reparation for aggression against Ukraine*, Doc. A/RES/ES-11/5.

[11] UNGA resolution of 16 February 2023, *Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine*, Doc. A/RES/ES-11/6.

[12] Parliamentary Assembly of the Council of Europe, Resolution 2433 (2022): *Consequences of the Russian Federation's continued aggression against Ukraine: Role and response of the Council of Europe*.

[13] Joint Motion for a Resolution 2022/3017(RSP) of 18 January 2023 on the Establishment of a Tribunal on the Crime of Aggression Against Ukraine.

[14] Resolution of 2–6 July 2022 on the Russian Federation's War of Aggression Against Ukraine and its People, and its Threat to Security Across the OSCE Region, AS (22) D E.

[15] Declaration on Standing with Ukraine, Vilnius, 30 May 2022.

[16] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 8 November 2019, ICJ Rep 2019; ICJ, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, 2 February 2024, ICJ Rep 2024.

[17] ECtHR, *Ukraine v. Russia (re Crimea)* (App. No. 20958/14 and 38334/18), 14 December 2020; ECtHR, *Ukraine and the Netherlands v. Russia* (App. No. 43800/14, 8019/16 and 28525/20), 30 November 2022.

[18] *E.g.* ITLOS, *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Provisional Measures, No. 26 (2019).

of Arbitration[19] and others. However, none of these courts had the jurisdiction to decide on the act of Russian aggression.

Although not a party to the Rome Statute, Ukraine has accepted the jurisdiction of the International Criminal Court (ICC) on an ad hoc basis for crimes committed since 21 November 2013.[20] Following the commencement of the full-scale invasion, the ICC Prosecutor initiated an investigation. On 17 March 2023, the ICC issued arrest warrants[21] for Russian President Putin and Children's Ombudsman Maria Lvova-Belova, in connection with alleged war crimes committed in Ukraine, particularly the deportation of children.[22] According to Art. 27 of the Rome Statute, Putin does not enjoy immunity from prosecution by the ICC, even as a sitting president.

The issuance of these arrest warrants is of immense significance: it mandates the 124 States Parties to the ICC to arrest the President of Russia. Other states may take similar action, although they are not obliged to do so (Art. 87(5)). Henceforth, President Putin will be in the humiliating position of seeking guarantees against arrest every time he travels abroad, if he dares to leave Russia at all.[23]

The ICC lacks jurisdiction to prosecute the crime of aggression in this particular situation due to a political compromise that limits the ICC's jurisdiction over the crime of aggression compared to other crimes.[24] According to Art. 15*bis*(5), for the ICC to assume jurisdiction over the crime of aggression, either Russia or Belarus must be a party to the Rome Statute, which they are not at present. Furthermore, referral by the UN Security Council is unfeasible as long as Putin maintains his presidency and Russia its veto power.[25]

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[19] *E.g.* PCA, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, No. 2017-06.

[20] *See* ICC, *Situation in Ukraine*, ICC-01/22, 2 March 2022, available at: https://www.icc-cpi.int/situations/ukraine.

[21] *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, International Criminal Court, 17 March 2023, available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed 30 August 2024).

[22] O. Senatorova, *Deportation von Ukrainern seit Beginn der russischen Invasion – völkerrechtliche Einordnung und Empfehlungen*, Ukraine verstehen, Analyse, 17 March 2023, available at: https://tinyurl.com/2nfrdekj (accessed 30 August 2024).

[23] O. Senatorova, *Bringing Aggressors to Justice*, Deutsche Welle, 10 May 2023, available at: https://issuu.com/deutsche-welle/docs/dw-weltzeit_2023 (accessed 30 August 2024).

[24] *See* C. Kreß, *On the Activation of ICC Jurisdiction Over the Crime of Aggression*, 16(1) Journal of International Criminal Justice 1 (2018), pp. 1–17.

[25] *See* T. D. Grant, *Expelling Russia From the UN Security Council – A How-to Guide*, CEPA, 26 September 2022, available at: https://cepa.org/article/expelling-russia-from-the-un-security-council-a-how-to-guide/ (accessed 30 August 2024); L.D. Johnson, *United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes*, Just Security, 1 March 2022, available at: https://tinyurl.com/wfpwa54x (accessed 30 August 2024).

In March 2022, the members of the Global Institute for the Prevention of Aggression (GIPA) proposed[26] a change in the jurisdictional regime of the crime of aggression, and the same call was made by European parliamentarians:[27] to provide effective support to the ICC and to align the jurisdiction on the crime of aggression with the other international crimes.[28] This initiative has garnered strong support from the Court itself. Various proposals[29] have been put forth, such as aligning jurisdiction over the crime of aggression with that of other crimes or allowing the UNGA to refer situations directly to the ICC, bypassing the UN Security Council.

The process of amending the Rome Statute to address these issues is essential, but will be lengthy and will require considerable political will. Under Art. 121(4), seven eighths of the 124 Member States must ratify such amendments. This delay means that the victims of Russian aggression may have to wait decades for justice, with retroactive application likely to be no earlier than 17 July 2018, when jurisdiction over the crime of aggression was activated.

3. REASONS FOR AN INTERNATIONAL *AD HOC* MECHANISM TO FILL THE GAP

Given the challenges outlined above, it is imperative to pursue in parallel with the amendments to the Rome Statute the creation of a functional accountability mechanism to address the crime of aggression committed by Putin and his entourage. Merely prosecuting them for war crimes at the ICC is insufficient for a number of reasons.

Firstly, the crime of aggression, described as "a breeding ground for the most atrocious crimes",[30] is a starting point for a wide range of serious violations, includ-

[26] Statement on Russia's Invasion of Ukraine: A Crime of Aggression of 24 March 2022, *The Need to Amend the Crime of Aggression's Jurisdictional Regime*, available at: https://tinyurl.com/mr3ep8n7 (accessed 30 August 2024).

[27] Appeal of MEPs in support of the ICC Prosecutor to proceed with opening an investigation into the situation in Ukraine and to the States Parties to the Rome Statute of the ICC – including all EU Member States – to provide effective support to the ICC and align the jurisdiction on the crime of aggression to the other international crimes, Brussels, 4 March 2022, available at: https://www.pgaction.org/pdf/2022/mep-ukraine-appeal.pdf (accessed 30 August 2024). *See also Proposal to Amend the Rome Statute Kampala Amendment on the Crime of Aggression*, Parliamentarians for Global Action, 20 February 2023, available at: https://tinyurl.com/3v4unmyd (accessed 30 August 2024).

[28] Appeal of MEPs in support of the ICC Prosecutor to proceed with opening an investigation into the situation in Ukraine and to the States Parties to the Rome Statute of the ICC – including all EU Member States – to provide effective support to the ICC and align the jurisdiction on the crime of aggression to the other international crimes, Brussels, 4 March 2022, available at: https://www.pgaction.org/pdf/2022/mep-ukraine-appeal.pdf (accessed 30 August 2024).

[29] C. Kress, S. Hobe, A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, Just Security, 23 January 2023, available at: https://tinyurl.com/26hdw6e2 (accessed 30 August 2024).

[30] B.B. Ferencz, *Can Aggression Be Deterred by Law?*, 11 Pace International Law Review 341 (1999).

ing conflict-related sexual violence, torture, deportation, war crimes involving starvation and environmental destruction. This crime not only infringes upon the right to life,[31] but also inflicts suffering on nations beyond those directly involved in the conflict.[32] Addressing aggression demands swift action to finally enable both individual and general prevention, signaling an end to the tolerance of impunity for violating the Grundnorm[33] of post-UN international law.

Secondly, without creating special international jurisdiction to prosecute the crime of aggression, the group of Russian leaders who committed the crime of aggression does not necessarily overlap with the circle of war criminals (allegedly, such Troika members as Putin, Lavrov and Mishustin who allegedly committed the crime of aggression but not the war crimes), which means that without a mechanism to prosecute the crime of aggression, its perpetrators may enjoy impunity indefinitely.

Thirdly, the prohibition of aggression is the primary peremptory norm, mentioned first in the list of *jus cogens* violations[34] and binding on all States (obligations *erga omnes*); they are required to respond and hold aggressors accountable.[35] This means that every State has an obligation to hold Russia accountable under international law – to make the country end its violations and ensure reparation, as well as to hold its leaders criminally accountable.[36] If there is both a prohibition

[31] HRC, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 3 September 2019, CCPR/C/GC/36.

[32] *Russian Federation Invasion of Ukraine Bringing New Bloodshed, Suffering, Global Food Insecurity, Instability, Secretary-Tells Global Crisis Response Group*, United Nations, 8 June 2022, available at: https://press.un.org/en/2022/sgsm21314.doc.htm (accessed 30 August 2024).

[33] The term originally comes from Hans Kelsen's concept of "basic norm" or "ground rule" that underpins an international legal system (*see* H. Kelsen, *General Theory of Law and State*, The Lawbook Exchange, Clark: 1999). The term can now be applied to the first in the non-exhaustive list of jus cogens norms of international law – the prohibition of aggression – *see* Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf (accessed 30 August 2024).

[34] Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf (accessed 30 August 2024). *See also Analytical Guide to the Work of the International Law Commission, Peremptory Norms of General International Law (Jus Cogens)*, International Law Commission, available at: https://legal.un.org/ilc/guide/1_14.shtml (accessed 30 August 2024).

[35] *See* A. Hartig, *Making Aggression a Crime Under Domestic Law: On the Legislative Implementation of Article 8bis of the ICC Statute*, T.M.C. Asser Press, Hague: 2023, pp. 376, 379–380, 474. *See also* M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, Oxford: 2010.

[36] *E.g.* Austria and Liechtenstein clarified that it is consistent with the spirit of the UN Charter that the enacted criminal provisions cover acts of aggression against their State and other States. *See* Austrian Government *Erläuterungen der Regierungsvorlage*, ErläutRV 689 BlgNR XXV, 2015, p. 44; Government of Liechtenstein, *Bericht und Antrag an den Landtag des Fürstentums Liechtenstein betreffend die Abänderung des Strafgesetzbuches, der Strafprozessordnung, des Gesetzes über die Zusammenarbeit mit dem Internationalen Strafgerichtshof und anderen Internationalen Gerichten sowie des Naturschutzgesetzes*, No. 90/2018, 9 October 2018, p. 263.

of aggression and an *erga omnes* obligation, but not yet an effective mechanism for prosecuting those who enjoy personal immunities (Troika members[37]), then this mechanism – namely an international tribunal – should be created in lieu of long sophistical discussions about the lack of clear secondary rules for adjudication.

Fourthly, and most importantly, the group of victims of the crime of aggression[38] is by no means the same as that of victims of other international crimes. The aggression destroys the entire human rights architecture of the country against which it is unleashed, causing direct, indirect and cascading damage in all spheres of life: thousands of Ukrainians, both combatants and civilians,[39] have lost their lives and health – sometimes as a result of attacks that are lawful according to international humanitarian law or legitimate retaliatory attacks by the Ukrainian side *(e.g.* air defence) – and millions have lost and continue to lose their jobs, housing, education and other social, economic and environmental rights.

4. TAILORING THE MODEL OF THE SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE

Immediately after the full-scale invasion in 2022, the idea to create a special tribunal to prosecute Russian leadership for the crime of aggression was born.[40] There were many different proposals from outstanding international and Ukrainian lawyers, politicians and non-governmental organisations [41] which were supported by the EU – in particular the European Parliament[42] – and by Parliamentary

[37] *See Immunities and a Special Tribunal for the Crime of Aggression Against Ukraine*, International Renaissance Foundation, Kyiv: 2023, available at: https://tinyurl.com/ax6vbrbh (accessed 30 August 2024).

[38] O. Senatorova, *Welche Rolle ein "Sondertribunal zum Verbrechen der Aggression gegen die Ukraine" für die Opfer des Krieges spielen könnte*, 272 Aus Ukraine-Analysen 7 (2022), pp. 7–12, available at: https://laender-analysen.de/ukraine-analysen/autoren/oksana-senatorova (accessed 30 August 2024).

[39] Ten thousand civilians, including more than 560 children, have been killed and over 18,500 have been injured since Russia launched its a full-scale armed attack against Ukraine on 24 February 2022 (K. Janowski, *Civilian Deaths In Ukraine War Top 10,000, UN Says*, United Nations Ukraine, 21 November 2023, available at: https://ukraine.un.org/en/253322-civilian-deaths-ukraine-war-top-10000-un-says (accessed 30 August 2024)).

[40] P. Sands, *Russian President's Use of Military Force is a Crime of Aggression*, Financial Times, 1 March 2022, available at: https://tinyurl.com/2mstfkwj (accessed 30 August 2024).

[41] *See* D.M. Crane, *Considerations for the Setting Up of the Special Tribunal for Ukraine on the Crime of Aggression*, Global Accountability Network, July 2022, available at: https://tinyurl.com/mwsyd49m (accessed 30 August 2024).

[42] Resolution 2022/3017(RSP) of 19 January 2023 on the Establishment of a Tribunal on the Crime of Aggression Against Ukraine.

Assemblies of the CoE,[43] the OSCE[44] and NATO[45] in their resolutions and in-depth analysis[46] of regional international organisations, and were echoed in the reports of human rights institutions.[47] The coalition of states supporting the idea of establishing a Special Tribunal for the Crime of Aggression against Ukraine (the Core Group[48]) is growing and currently includes 40 states.

On 3 July 2023 the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA),[49] embedded in the Joint Investigative Team, officially started operations in The Hague. Its main purpose is to enhance investigations into the crime of aggression by securing key evidence and facilitating the process of case-building at an early stage.

The Ukrainian President's Office and international partners were considering three models of a special tribunal[50] for the crime of Russian aggression against Ukraine. The first option is to establish it on the basis of an agreement between Ukraine and the UN, with the UNGA adopting a corresponding resolution. The second option for the Tribunal is on the basis of a multilateral, international open agreement between the States – the so-called "Nuremberg model", although it is far from the same, at least because Russia has not yet been defeated, the crime of aggression is already well defined and the jurisdiction is to be complementary to the ICC (not exclusive). The third concept is an internationalised (hybrid) court, i.e. as part of the Ukrainian judicial system, with varying degrees of internationalisation, possibly located in Europe, etc. Supporters for this idea include Germany,[51]

[43] *See* Parliamentary Assembly of the Council of Europe, Resolution 2482 (2023): *Legal and Human Rights Aspects of the Russian Federation's Aggression Against Ukraine*, available at: https://pace.coe.int/en/files/31620/html (accessed 20 August 2024). *See also* Parliamentary Assembly of the Council of Europe, Report 15842 (2023): *Ensuring a just peace in Ukraine and lasting security in Europe*, available at: https://pace.coe.int/en/files/33074/html (accessed 30 August 2024).

[44] Resolution of 2–6 July 2022 on the Russian Federation's War of Aggression Against Ukraine and its People, and its Threat to Security Across the OSCE Region, AS (22) D E.

[45] Declaration on Standing with Ukraine, Vilnius, 30 May 2022.

[46] *See* O. Corten, V. Koutroulis, *Tribunal for the Crime of Aggression Against Ukraine: A Legal Assessment*, European Parliament, Strasbourg: 2022, available at: https://tinyurl.com/2s4awayk (accessed 30 August 2024).

[47] UNHRC, *Report of the Independent International Commission of Inquiry on Ukraine*, 15 March 2023, A/HRC/52/62.

[48] *See Joint Statement on Efforts to Establish a Tribunal on the Crime of Aggression Against Ukraine*, Ministry of Foreign Affairs of Ukraine, 9 May 2023, available at: https://tinyurl.com/mn85w3s8 (accessed 30 August 2024).

[49] *International Centre for the Prosecution of the Crime of Aggression Against Ukraine* (Lectue at EuroJust), available at: https://tinyurl.com/4uzh8tm3 (accessed 30 August 2024).

[50] *See* M. Shashkova, *"Putin and His Doppelgängers Must Be Tried at a War Crimes Tribunal" – Deputy Head of Zelensky's Office*, Kyiv Post, 16 March 2023, available at: https://www.kyivpost.com/post/14386 (accessed 30 August 2024).

[51] *See* M. Ghaedi, R. Romaniec, *Germany's Baerbock calls for special Ukraine tribunal at ICC*, Deutsche Welle, 16 January 2023, available at: https://www.dw.com/en/germanys-baerbock-calls-for-special-ukraine-tribunal-at-icc/a-64408862 (accessed 30 August 2024).

the United Kingdom[52] and the USA.[53] In this regard, Carrie McDougall's points that arguments based on the failure to prosecute earlier acts of aggression fall flat because they do not account for the fact that, until 2010, there was no consensus on the post-Charter definition of the crime, and that "Ukraine (unlike Syria and Yemen) is an enthusiastically cooperative partner."[54] Moreover, many countries are concerned that the hybrid (internationalised) model, which will essentially be a Ukrainian domestic court, will delay or even eliminate the prospect of bringing Russian and Belarusian Troika members to justice, as they will enjoy personal immunity before the domestic hybrid court.[55]

5. PROSECUTION OF THE CRIME OF AGGRESSION UNDER UKRAINIAN JURISDICTION

The Criminal Code of Ukraine (CCU) uses the terms "aggression" or "aggressor" 52 times in its General[56] and Special Parts to define specific criminal offences or their consequences. Most of the articles of the CCU that use the term "aggression" or "aggressor" have been incorporated[57] since the beginning of the full-scale Russian invasion of Ukraine, and in fact have nothing to do with the crime of aggression per se. The one that criminalises aggression is Art. 437 ("Planning, preparation, initiation and waging of an aggressive war"), and its wording suggests that it dates back to the Nuremberg trials:

> 1. Planning, preparing or waging an aggressive war or war conflict, as well as participation in a conspiracy aimed at committing such actions is punishable by imprisonment for a term of seven to twelve years.

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[52] *See UK Joins Core Group Dedicated to Achieving Accountability for Russia's Aggression Against Ukraine,* Gov.UK, 20 January 2023, available at: https://tinyurl.com/58663e2k (accessed 30 August 2024).

[53] *See Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression Remark*s, U.S. Department of State, 27 March 2023, available at: https://www.state.gov/ambassador-van-schaacks-remarks/ (accessed 30 August 2024).

[54] C. McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed Against Ukraine*, 28(2) Journal of Conflict and Security Law 203 (2023), pp. 228, 229.

[55] *See It is Only a Full-Fledged Tribunal That Will Allow Lifting the Immunity of the President, Prime Minister and Foreign Minister of Russia – Andriy Smyrnov*, President of Ukraine, 1 February 2024, available at: https://tinyurl.com/3nmhdpk5 (accessed 30 August 2024).

[56] In the General Part, "aggression" is mentioned in the context of situations that exempt an act from criminal illegality – specifically, according to Art. 43(1) CCU, "the fulfilment of the duty to protect the motherland, independence and territorial integrity of Ukraine", with reference to "an act (...) aimed at repelling and deterring the armed aggression of the Russian Federation or the aggression of another country, if it caused damage to the life or health of the person committing such aggression" (incorporated on 15 March 2022).

[57] *E.g.* Public denial of armed aggression against Ukraine ("Collaborative activity" – Art. 111-1), Justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine or glorification of its participants (Art. 436-2).

> 2. Waging aggressive war or aggressive military operations is punishable by imprisonment for a term of ten to fifteen years.

There have been attempts to amend the CCU to domesticate international crimes since the beginning of the Russian aggression in 2014 (Draft Law No. 2689,[58] 2019) as well as since the full-scale invasion (Draft Law No. 7290,[59] 2022), but neither was enacted. Both proposed amendments to Art. 437, but the first one was to include a definition with the leadership component similar to that in Art. 8*bis* of the Rome Statute, and the last one would have only mentioned that this crime is a gross violation of the UN Charter.

There is no explicit element of leadership in Art. 437 CCU. Patrycja Grzebyk points out that only a few Eastern European nations, such as Croatia and Czechia, have integrated leadership clauses following the Rome Statute's ratification, whereas others allow for the prosecution of a broader range of individuals with control over state actions.[60] Nikola Hajdin noted that "Germany, Poland, Ukraine and other countries do not explicitly include the element of leadership in their criminal codes", but at the same time, he is sure that:

> the crime of aggression is 'reserved' for prosecuting leaders who formulate or execute state policy and despite some states' reluctance to include the leadership element in their domestic legislations explicitly, any future prosecutions have to take the leadership requirement into consideration in line with customary international law.[61]

In our opinion, the phrase "planning, preparing or waging an aggressive war" in Art. 437 CCU is intended to refer to persons who are in a position to control or direct the political or military action of a state, and in no way to all the soldiers of the aggressor state who are not actually waging a war, but are merely participating in it on orders from above. Nevertheless, this formulation, without the concrete

[58] Draft Act on Amendments to Certain Legislative Acts of Ukraine on the Implementation of International Criminal and Humanitarian Law of 27 December 2019, No. 2689, available at: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804 (accessed 30 August 2024).

[59] Draft Act on Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine, of 15 March 2022, No. 7290, available at:_https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=74105 (accessed 30 August 2024).

[60] P. Grzebyk, *Crime of Aggression Against Ukraine: The Role of Regional Customary Law*, 2021 (3) Journal of International Criminal Justice 435 (2023), pp. 435–459.

[61] N. Hajdin, *The Leadership Clause in the Crime of Aggression and its Customary International Law Status*, Just Security, 17 March 2022, available at: https://tinyurl.com/58nnw6vy (accessed 30 August 2024).

element of leadership, opens the possibility of prosecuting a wider circle of those responsible for waging war.

According to the Prosecutor General's Office, 94 such crimes have been registered since the beginning of the large-scale Russian aggression against Ukraine (since 24 February 2002).[62] At present, the "magistral" criminal case under Art. 437 CCU has been opened, involving 687 suspects.[63] The list includes ministers (defence and interior), members of parliament, military commanders, senior officials, heads of law enforcement agencies and instigators of war. Although this list of suspects does not include the leaders of the Troika due to their personal immunities, it demonstrates the *de facto* application of the leadership element.

The Unified State Register of Court Decisions[64] contains 20 verdicts delivered in cases where Art. 437 CCU is one of the elements of the qualification formula for the period from 27 February 2014 to 1 September 2023. The verdicts were delivered between 2015 and 2023. In ten cases there was a trial in which the accused participated and evidence of their guilt was fully examined; four sentences were pronounced in absentia, and six sentences were handed down in so-called "summary trials", where the defendants pleaded guilty (in these cases, it is difficult to say whether there is an *actus reus*, as the evidence was not examined). The texts of all 20 court decisions do not mention a special subject (leadership element).

Overall, an analysis of the verdicts under Art. 437 CCU reveals different interpretations of the crime of aggression between national and international law, and a lack of understanding of the elements of the crime of aggression, rooted in customary international criminal law. For example, on 25 September 2015, the Dzerzhinskyy City Court of the Donetsk region convicted an individual of joining the terrorist organisation "Donetsk People's Republic", acting as the "head of the rocket and artillery armament service" and supplying weapons and ammunition to members of the terrorist organisation. In another verdict of the same court, a convicted person acted as a scout for the reconnaissance company of the DPR terrorist organisation – observing the personnel of the Ukrainian armed forces and gathering information for hostile actions – and thereby committed the crime under Art. 437 CCU and other crimes.

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[62] *See Homepage*, Prosecutor General's Office, available at: https://gp.gov.ua/ (accessed 30 August 2024).

[63] *List of suspects in the main case of "24th February"*, Prosecutor General's Office, available at: https://gp.gov.ua/detectable (accessed 30 August 2024).

[64] *See* Unified State Register of Court Decisions, available at: https://reyestr.court.gov.ua/ (accessed 30 August 2024).

There have also been some high-profile cases, such as the Yanukovych case[65] and the Alexandrov and Yerofeyev case.[66] It was shown in both that there is a need to develop a unified approach to the definition of the crime of aggression, to bring it into line with international criminal law and to develop a consistent judicial practice. It is also essential to improve the knowledge and skills of law enforcement officials and judges in international criminal law and to better domesticate international crimes.

In its decision of 28 February 2024 (case no. 415/2182/20 (proceedings no. 13-15кс22)), the Grand Chamber of the Supreme Court, having considered the criminal proceedings on the cassation appeals of two persons convicted of crimes under Art. 437(2) CCU (planning, preparing, initiating and conducting an aggressive war), concluded that the acts defined in this Article may be committed by persons who, by virtue of their official authority or actual social position, are in a position to exercise effective control over or command political or military actions, and/or to significantly influence political, military, economic, financial, informational and other processes in their own country or abroad and/or to command certain areas of political or military actions. The planning, preparing and waging of an aggressive war or military conflict, participating in a conspiracy to commit such acts and conducting an aggressive war or aggressive military action require that the subjects have the relevant powers, resources in the areas of international relations, domestic policy, defence, industry, economy and finance or such a social position that allows them to influence the relevant decisions of authorised persons.[67] Thus, the Grand Chamber of the Supreme Court established the general practice of using the concept of a special subject in relation to the crime under Art. 437 CCU. Future national court practice will show how these guidelines are applied in specific decisions and whether they require further explanation.

CONCLUSION

The full-scale invasion of Ukrainian territory by Russia in 2022 marked a severe escalation in the ongoing international armed conflict initiated by Russian aggression in 2014. The ICC lacks jurisdiction to prosecute Russian and Belarusian leaders for the crime of aggression. Proposals to amend the Rome Statute would be time-consuming and face political hurdles. In light of these challenges, there is an urgent need to establish an ad hoc international tribunal to address the crime

[65] S. Sayapin, *The Yanukovych Trial in Ukraine: A Revival of the Crime of Aggression?*, 50 Israel Yearbook on Human Rights 63 (2020).

[66] S. Sayapin, *A Curious Aggression Trial in Ukraine: Some Reflections on the Alexandrov and Yerofeyev Case*, 16(5) Journal of International Criminal Justice 1093 (2018).

[67] Postanova VP VS vìd 28 lûtogo 2024 roku u spravì No. 415/2182/20 (provadžennâ No. 13-15x22), available at: https://reyestr.court.gov.ua/Review/117555176 (accessed 30 August 2024).

of aggression. Because of the personal immunities of the Troika leaders, it must be international.

The pursuit of justice under Ukrainian jurisdiction also poses challenges. Whilst the CCU prohibits the crime of aggression, its application lacks clarity, leading to discrepancies in judicial interpretation. There is no explicit element of leadership in Art. 437 CCU, although the list of suspects within the Prosecutor General's Office "Magistral Case on Aggression" demonstrates its de facto application. On the contrary, the jurisprudence to date – 20 existing judgments convicting combatants – reveals a lack of understanding of the customary international law rooted in the crime of aggression.

The ongoing aggression against Ukraine is characterised by attempted annexation, incitement to genocide, widespread deportation of children and egregious violations of international humanitarian law on a scale not seen since World War II.[68] A more pressing concern, however, is that whilst eminent scholars debate the legal justifications for establishing an ad hoc tribunal or question its potential selectivity, the crime of aggression continues unabated. Lives continue to be lost on both sides of the conflict, leaving in its wake the poignant question of how many more must perish as a result of this act of aggression, or which other nations might be invaded by Russia (and Belarus), so that the victims of this aggression may see justice in their lifetime and the international community will finally begin to fulfil its *erga omnes* obligations to hold the perpetrators of this egregious breach of international law accountable.

[68] "Few countries since World War II have experienced this level of devastation (...). The scale is hard to comprehend. More buildings have been destroyed in Ukraine than if every building in Manhattan were to be leveled four times over. Parts of Ukraine hundreds of miles apart look like Dresden or London after World War II, or Gaza after half a year of bombardment" (*Russia's War Crimes site*, War Ukraine, available at: https://war.ukraine.ua/russia-war-crimes (accessed 30 August 2024); M. Hernandez, J. Gettleman, F. O'Reilly, T. Wallace, *What Ukraine Has Lost During Russia's Invasion*, The New York Times, 3 June 2024, available at: https://tinyurl.com/4ys9uawe (accessed 30 August 2024). *Russia's invasion places a generation of Ukrainian children under severe strain*, The UN Refugee Agency Ukraine, 31 May 2024, available at: https://tinyurl.com/56kprmpy (accessed 30 August 2024).

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INTERNATIONAL CENTRE FOR THE PROSECUTION OF RUSSIA'S CRIME OF AGGRESSION AGAINST UKRAINE AND THE ROLE OF NEW TECHNOLOGIES AND JUSTICE HUBS IN THE FIGHT AGAINST IMPUNITY

Abstract: *The accountability response to Russia's 2022 full-scale invasion of Ukraine attests to the growing importance of regional accountability frameworks in the fight against impunity. Many Member States of the European Union have taken active steps towards accountability for core international crimes committed by Russia in Ukraine by initiating domestic criminal investigations. The creation of centralised justice hubs, such as the International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine, can bridge the knowledge gap between different accountability actors involved in international investigations, and additionally contribute towards developing best practices and the universalisation of investigative standards. In this context, new technology infrastructure and expertise play the role of an accelerant, actively contributing to the coordinated fight against impunity and fostering information exchange and collaboration on an increasingly global scale.*

Keywords: digital evidence, International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine, international criminal justice, justice hubs, Ukraine

INTRODUCTION

Historically, international criminal justice has been an *ad hoc* endeavour.[1] The mass atrocities of the Second World War, the war in the former Yugoslavia, and the Rwandan and Cambodian genocides have all motivated accountability initiatives

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[1] M. Sterio, M. Scharf, *The Legacy of Ad Hoc Tribunals in International Criminal Law Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments*, Cambridge University Press, New York: 2019.

which have resulted in the creation of international criminal tribunals. An argument might be put forward that since the establishment of the International Criminal Court (ICC) in the early 2000s, international criminal justice has relinquished its *ad hoc* nature for the pursuit of a more permanent future.[2] However, the impunity for the crimes committed in recent years in Syria, Yemen, and Myanmar, among others, has once again led to an unprecedented proliferation of *ad hoc* accountability initiatives on the domestic, regional, and international levels.[3] Accompanied by tailor-made operational solutions and cooperation frameworks, these accountability initiatives have taken central stage in the investigations into contemporary core international crimes.

The accountability response to the Russia's 2022 full-scale invasion of Ukraine attests to the growing importance of regional accountability frameworks in the fight against impunity. Many Member States of the European Union (EU) have taken active steps towards accountability for the core international crimes committed in Ukraine by initiating domestic criminal investigations.[4] Moreover, through centralised regional frameworks supported by Eurojust, states now have the opportunity to exchange best practices and actively contribute to the coordinated fight against impunity. In the same way that some of the accountability initiatives have already proven successful in relation to past conflicts – such as the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in Syria; Joint Investigation Teams; War Crimes Units; and the Europol Analysis Project in relation to the armed conflicts in Syria and Northern Iraq – the accountability response to the full-scale war in Ukraine has also led to the creation of new centralised accountability "hubs".[5] For instance, the International Centre for the Prosecution of the Crime of Aggression against Ukraine is a unique judicial hub embedded in Eurojust that enables coordination and cooperation between accountability actors such as, among others, the War Crimes Department at Ukraine's Office of the Prosecutor General and Joint Investigation Team members (Lithuania, Latvia, Estonia, Poland and Romania). In addition, through building

[2] C. Stahn, *The ICC in Its Third Decade: Setting the Scene*, in: C. Stahn, R. Braga da Silva (eds.), *The International Criminal Court in Its Third Decade Reflecting on Law and Practices*, Brill, Boston: 2024, p. 4.

[3] B. Van Schaack, *Imagining Justice for Syria*, Oxford University Press, New York: 2021; M. Hasan, S. Mansoob Murshed, P. Pillai, *The Rohingya Crisis Humanitarian and Legal Approaches*, Routledge, New York: 2023.

[4] *Lithuania Prosecutors Launch Ukraine War Crimes Investigation*, Reuters, 3 March 2022, available at: https://www.reuters.com/world/europe/lithuania-prosecutors-launch-ukraine-war-crimes-investigation-2022-03-03/; *Poland Say It Has Collected More Than 300 Witness Statements On War in Ukraine*, Reuters, 16 March 2022, available at: https://www.reuters.com/world/poland-say-it-has-collected-more-than-300-witness-statements-war-ukraine-2022-03-16/ (both accessed 30 August 2024).

[5] *Policy on Complementarity and Cooperation*, International Criminal Court, Den Haag: 2024, p. 4, available at: https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf (accessed 30 August 2024).

expertise in evidence processing and analysis, these accountability "hubs" have the potential to bridge knowledge gaps between different justice actors and institutions and contribute towards norm-sharing.[6]

This article outlines the potential of the International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine to build capacity in the field of digital technology infrastructure and expertise, fostering information exchange and collaboration, contributing towards international criminal investigations and prosecutions and advocating for comprehensive accountability.[7] It does so by closely examining the accomplishments of accountability mechanisms and cooperation networks in advancing analytical capabilities and improving the prospects for accountability, and also highlights the role of new technologies in the growing importance of centralised frameworks.

1. THE ROLE OF CENTRALISED ACCOUNTABILITY FRAMEWORKS IN INTERNATIONAL CRIMINAL INVESTIGATIONS AND PROSECUTIONS

The prevalence of digital evidence in modern armed conflicts (encompassing open source intelligence and information, social media communications, and seized electronic devices, among others),[8] has given rise to a demand for analytical expertise and technological infrastructure. Novel accountability mechanisms and networks – that can offer expertise, technology and logistics support – are playing an increasingly important role in facilitating evidence collection, analysis and processing, and contribute towards international criminal investigations and prosecutions.[9] In the long run, the growing specialised practice of the novel mechanisms has galvanized the need to establish justice hubs with a similar nature of expertise on a more global scale, thereby transforming the future envisaged role the Office of the Prosecutor of the ICC (ICC OTP), and combining technological prowess while serving as a hub for collaboration and coordination of accountability efforts.[10]

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[6] *Ibidem*.

[7] *International Centre for the Prosecution of the Crime of Aggression against Ukraine*, EuroJust, available at: https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine (accessed 30 August 2024).

[8] K. Aksamitowska, *Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons Learned from Germany, Sweden, Finland and The Netherlands*, 19(1) Journal of International Criminal Justice 189 (2021), p. 199; M. de Arcos Tejerizo, *Digital Evidence and Fair Trial Rights at the International Criminal Court*, 36(3) Leiden Journal of International Law 749 (2023), pp. 749–769; M. Gillett, W. Fan, *Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom*, 21(4) Journal of International Criminal Justice 661 (2023).

[9] *Policy on Complementarity...*, *supra* note 5, p. 4.

[10] *Ibidem*, p. 15.

1.1. The contribution of accountability mandates to the fight against impunity for core international crimes

The lack of multilateral justice responses to the atrocities committed in Syria, Northern Iraq, and Myanmar motivated the international community to attempt to take a different approach towards accountability.[11] In response to the paralysis of the UN Security Council on the issue of international criminal accountability in relation to the Syrian war,[12] on 21 December 2016 the UN General Assembly adopted resolution 71/248,[13] establishing the International, Impartial and Independent Mechanism (IIIM) to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011.[14] The mandate of the International, Impartial and Independent Mechanism for Syria is:

> to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.[15]

The IIIM supports competent jurisdictions by sharing information and evidence collected and preserved in its Central Repository, either proactively on its own initiative or upon request by national authorities.[16] The IIIM has had a period of immense growth since its founding, expanding from a small start-up team to a fully operational mechanism supporting 15 jurisdictions,[17] including for instance

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[11] UNHRC, *Resolution: Situation of human rights of Rohingya Muslims and other minorities in Myanmar 39/2*, 3 October 2018, A/HRC/RES/39/2; UNITAD, Terms of Reference, 14 February 2018, S/2018/118.

[12] H. Moodrick-Even Khen, T. Boms, S. Ashraph, *The Syrian War Between Justice and Political Reality*, Cambridge University Press, New York: 2020.

[13] UNGA resolution of 21 December 2016, *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, Doc A/RES/71/248.

[14] I. Elliott, *A Meaningful Step towards Accountability? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria*, 15(2) Journal of International Criminal Justice 239 (2017).

[15] UNGA resolution of 21 December 2016, *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, Doc A/RES/71/248, para. 4.

[16] *Support to Jurisdictions*, International, Impartial and Independent Mechanism, available at: https://iiim.un.org/what-we-do/support-to-jurisdictions/ (accessed 30 August 2024).

[17] *Strategic Plan 2023–2025*, International, Impartial and Independent Mechanism, p. 1, available at: https://iiim.un.org/wp-content/uploads/2023/02/IIIM-Strategic-Plan-2023-2025.pdf (accessed 30 August 2024).

Germany.[18] The prospect of creating a central database containing evidence of international crimes emerged in the early years of the operation of the IIIM when the challenges of handling massive amounts of data became apparent. Since then, the IIIM has developed expertise in evidence storage and processing, and by the end of 2022, "2.3 million records were processed, and the Mechanism had deployed an array of digital information management tools."[19]

With the help of new technologies, IIIM automated the process of language translation, audio analysis, transcription of audio files into text. In addition, machine learning and artificial intelligence assist in performing advanced analysis on geolocation data to draw up patterns and links and to visualise different events, as well as employing conceptual analytics, video deduplication and segmentation of videos "to identify not only copies of the same video file, but also videos which constitute segments of larger videos contained within our collected population."[20]

In addition to its expertise in evidence analysis and processing, according to its Strategic Plan 2023-2025 IIIM aims to provide continued assistance to present and future investigations into core international crimes investigations and subsequent prosecutions, as well as to amplify the voices of the survivors of the most serious crimes. Although the IIIM is not equipped or mandated to conduct prosecutions and trials with respect to core international crimes, its advanced technological and capacity building capabilities attest to its status as a pioneer accountability hub, contributing towards expertise and norm sharing between international and local justice actors within the larger international criminal justice ecosystem. A plan for establishing a hub with expertise of a similar nature has been revealed by the Office of the Prosecutor of the ICC (ICC OTP). The new OTP policy includes the strategy of harnessing digital capabilities to better respond to requests from national jurisdictions, thereby serving as a hub for cooperation and complementarity efforts across States Parties and non-Party States to the Rome Statute.[21]

1.2. The Contribution of Regional Accountability Frameworks to the Fight Against Impunity for Core International Crimes

The regional accountability frameworks in the EU have played a significant role in the fight against impunity as a response to the atrocities committed in Syria and Northern Iraq and, as will be illustrated further below, are key in harnessing new

[18] *IIIM-Syria Welcomes German Court's Crimes Against Humanity Verdict*, International, Impartial and Independent Mechanism, 14 January 2022, available at: https://iiim.un.org/iiim-syria-welcomes-german-courts-crimes-against-humanity-verdict/ (accessed 30 August 2024).

[19] *Strategic Plan 2023-2025*, *supra* note 17, p. 2.

[20] *Bulletin No. 5*, International, Impartial and Independent Mechanism, February 2021, available at: https://iiim.un.org/wp-content/uploads/2021/08/IIIM-Syria-Bulletin-5-ENG-Feb-2021.pdf (accessed 30 August 2024).

[21] *Policy on Complementarity...*, *supra* note 5, p. 29.

technologies and best practices in the context of other core international crimes investigations, for instance in Ukraine. The EU Network for the investigation and prosecution of genocide, crimes against humanity, and war crimes (EU Genocide Network) was established in 2002 by the Council of the European Union to "enable close cooperation between the national authorities when investigating and prosecuting the crime of genocide, crimes against humanity and war crimes, known collectively as core international crimes."[22] With its establishment date correlating with the entry into force of the Rome Statute of the International Criminal Court, the operationalisation of the EU Genocide Network constitutes a significant step towards regional and domestic accountability in Europe. The EU Genocide Network provides assistance to the European war crimes units – through facilitating exchange of best practices and lessons learned – and hence effectively centralises international criminal investigations and prosecutions in Europe. Moreover, it served as a prototype for setting standards for cooperation and coordination frameworks within the broader Rome Statute system. Building upon the important work of the EU Genocide Network, the ICC OTP announced the establishment of the global Complementarity and Cooperation Forum.[23] The Complementarity and Cooperation Forum will provide a "dedicated and continuous space for engagement with national authorities addressing OTP investigations and activities within a wider, global pool of actors. A priority in this respect will be deepening of dialogue with national authorities from Africa, Asia and Latin America and the Caribbean."[24]

Another example of a regional accountability mechanism contributing towards norm sharing and advancing collaboration is the creation of Joint Investigation Teams in the EU. The EU legal framework for setting up Joint Investigation Teams between Member States can be found in Article 13 of the 2000 EU Mutual Legal Assistance Convention and the 2002 Framework Decision on Joint Investigation Teams.[25] They can also be established on the basis of other international instruments, particularly with and between competent authorities of states outside the European

[22] *Genocide Network*, EuroJust, available at: https://www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/genocide-network (accessed 30 August 2024); Council Decision of 13 June 2002, No. 2002/494/JHA, setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes [2002] OJ L 167/1; Council Decision of 8 May 2003, No. 2003/335/JHA, on the investigation and prosecution of genocide, crimes against humanity and war crimes [2003] OJ L 118/12.

[23] *Policy on Complementarity...*, *supra* note 5, p. 16.

[24] *Ibidem*, p. 18.

[25] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ C 197/1; Council Framework Decision of 13 June 2002 on joint investigation teams [2002] OJ L 162/1.

Union (third States, such as Ukraine).[26] Providing operational, legal and financial support to Joint Investigation Teams is a key part of Eurojust's mission.[27] An EU Network of National Experts on Joint Investigations Teams (JITs Network) was founded in 2005.[28] The JIT Network develops guidelines and evaluates the use of JITs in the European context. Joint Investigation Teams play an increasing role in facilitating cooperation between EU institutions, third States, international organisations, and civil society actors involved in accountability initiatives in relation to core international crimes. Joint Investigation Teams have been particularly successful in investigations of transnational and core international crimes.[29] For instance, a Joint Investigation Team between Germany and France led to the successful conviction of a high-ranking official of the Syrian regime in the Koblenz trial.[30] Moreover, arrests were carried out in the Netherlands on the basis of the information provided by the German police in relation to alleged crimes committed in Syria.[31] Other examples of successful joint investigative efforts include the Sweden and France JIT targeting crimes against Yazidis in Syria and Iraq,[32] as well as the Joint Team aimed at supporting investigations into crimes against migrants and refugees in Libya.[33] The members of the latter include the ICC OTP as well as national authorities from Italy, the Netherlands, the United Kingdom and Spain. The Joint Team is supported by the European Union Agency for Law Enforcement Cooperation (Europol) and its work has already resulted in arrests and extradition to Italy and The Netherlands of key suspects, with the support of the OTP.[34]

The expertise gained during the investigations related to the core international crimes committed in, among other states, Syria and Northern Iraq, informed the

[26] Council of the Europe, *Joint Investigations Team Practical Guide*, No. 6182/17, 8 February 2017, available at: https://db.eurocrim.org/db/en/doc/2672.pdf (accessed 30 August 2024).

[27] *Joint Investigation Teams*, EuroJust, available at: https://www.eurojust.europa.eu/judicial-cooperation/eurojust-role-facilitating-judicial-cooperation-instruments/joint-investigation-teams (accessed 30 August 2024).

[28] *JITs Network*, EuroJust, available at: www.eurojust.europa.eu/judicial-cooperation/practitioner-networks/jits-network (accessed 30 August 2024).

[29] *Policy on Complementarity...*, *supra* note 5, p. 41.

[30] *Syrian official sentenced to life for crimes against humanity with support of joint investigation team assisted by Eurojust*, EuroJust, 13 January 2012, available at: https://www.eurojust.europa.eu/news/syrian-official-convicted-crimes-against-humanity-with-support-joint-investigation-team (accessed 30 August 2024).

[31] *Suspected commander of Jabhat al-Nusra battalion arrested in the Netherlands*, Politie, 21 May 2019, available at: www.politie.nl/nieuws/2019/mei/20/suspected-commander-of-jabhat-al-nusra-battalion-arrested-in-the-netherlands.html (accessed 30 August 2024).

[32] *Support to joint investigation team of Sweden and France targeting crimes against Yezidi victims in Syria and Iraq*, EuroJust, 7 January 2022, available at: https://www.eurojust.europa.eu/news/support-joint-investigation-team-sweden-and-france-targeting-crimes-against-yezidi-victims (accessed 30 August 2024).

[33] S*tatement of ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Team on crimes against migrants in Libya*, International Criminal Court, 7 September 2022, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-office-prosecutor-joins-national-authorities-joint-0 (accessed 30 August 2024).

[34] *Policy on Complementarity...*, *supra* note 5, p. 42.

choice of accountability responses to Russia's full-scale invasion on the entire territory of Ukraine in 2022. The accountability responses have been characterised by a stronger emphasis on new technologies and reliance on centralised cooperation and information sharing frameworks.

2. CENTRALISATION OF EXPERTISE IN INTERNATIONAL CRIMINAL INVESTIGATIONS RELATED TO THE WAR IN UKRAINE SINCE 2022

Although the armed conflict in Eastern Ukraine has been ongoing since 2014, only the outbreak of the full-scale Russian invasion on the entire territory of Ukraine on 24 February 2022 motivated a substantial accountability response on an international scale.[35] Modelled on the centralised accountability efforts that proved effective in relation to other recent conflicts – namely the establishment of Joint Investigation Teams and *ad hoc* cooperation and collaboration mechanisms – the European Union has taken a leading role in the fight against impunity.

2.1. The Joint Investigation Team into alleged crimes committed in Ukraine

The Joint Investigation Team (JIT) into alleged crimes committed in Ukraine was established on 25 March 2022 by the national authorities of Lithuania, Poland, and Ukraine.[36] The ICC OTP joined the JIT on 25 April 2022, which marked the first time that the ICC Prosecutor has joined a JIT.[37] Four more states have joined the JIT in the following months, including Estonia, Latvia, Slovakia and Romania.[38] Moreover, an advanced technological support system has been created, including setting up a common database to gather, store, and evaluate evidence.[39]

Eurojust, together with the EU Genocide Network and Europol are occupying central space in strengthening international criminal investigations in relation to the full-scale war in Ukraine. For example, the Eurojust's mandate has been expanded to further facilitate evidence-sharing and cooperation. The European Parliament adopted the proposal to reinforce Eurojust's mandate to: (1) preserve, analyse

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[35] *Report on Preliminary Examination Activities 2020*, International Criminal Court, Den Haag: 2020, pp. 68–72.

[36] *Joint investigation team into alleged crimes committed in Ukraine*, EuroJust, available at: https://www.eurojust.europa.eu/joint-investigation-team-alleged-crimes-committed-ukraine (accessed 30 August 2024).

[37] *Policy on Complementarity...*, *supra* note 5, p. 41.

[38] *Estonia, Latvia and Slovakia become members of joint investigation team on alleged core international crimes in Ukraine*, EuroJust, 31 May 2022, available at: https://www.eurojust.europa.eu/news/estonia-latvia-and-slovakia-become-members-joint-investigation-team-alleged-core-international (accessed 30 August 2024).

[39] *Core International Crimes Evidence Database (CICED)*, EuroJust, 23 February 2023, available at: https://www.eurojust.europa.eu/publication/core-international-crimes-evidence-database-ciced (accessed 30 August 2024).

and store evidence centrally; (2) exchange evidence with national authorities, the International Criminal Court and other countries, in full respect of the EU data protection rules and; and (3) process additional types of digital evidence, such as videos, audio-files and satellite images.[40] On 1 June 2022, EU Regulation 2022/838 entered into force, allowing Eurojust to preserve, analyse and store evidence of core international crimes, paving the way for the Core International Crimes Evidence Database. The Database has been set up within Eurojust's secure IT environment and complies with the highest IT security and data protection standards as managed by Eurojust. It combines three elements: advanced analysis tools; safe digital data transfer; and secure data storage. The Core International Crimes Evidence Database will include a record containing details on those who provided the evidence; the occurrence and kind of crime it relates to, in addition to the evidentiary material. Evidence already submitted to the Database in the context of other international crimes (crimes of genocide, crimes against humanity and war crimes) may be equally relevant for the investigation into the crime of aggression. It is also possible to store evidence that is submitted by participants of the International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine for analysis purposes.[41]

The creation of the Core International Crimes Evidence Database marks another step in developing regional expertise in evidence collection, processing, and analysis in Europe and paves the way for the operationalisation of the International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine. Previously, the Europol Analysis Project on Core International Crimes (AP-CIC) and the Yazidi Initiative contributed towards developing best practices in centralised information storage, analysis and cross-checking.[42] With the growing mandate of Eurojust, comes the possibility of increased contributions towards capacity building, norm sharing, and advocating for comprehensive accountability. This attests to its growing role as a regional accountability hub, bringing together different actors and combining innovative approaches towards accountability for core international crimes that serve as a precedent for the creation of a global accountability forum with a similar function.[43]

[40] *Russian War Crimes in Ukraine: Commission Welcomes European Parliament's Adoption of Eurojust's Reinforced Mandate*, European Commission, 19 May 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3180 (accessed 30 August 2024).

[41] *International Centre for the Prosecution...*, *supra* note 7.

[42] Aksamitowska, *supra* note 8, p. 209.

[43] *Policy on Complementarity...*, *supra* note 5, p. 18.

2.2. The Role of the International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine in the Process of Capacity Building and Norm Sharing

Faced with the ongoing impunity for Russia's act of aggression against the territory of Ukraine in 2022, the EU Member States decided to establish an innovative judicial hub embedded in Eurojust to support national investigations into the crime of aggression related to the war in Ukraine, i.e. the International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine (ICPA).[44] The ICPA is supported by the European Commission, Eurojust; and additionally the US Department of State offered to provide the ICPA with $1 million financial assistance.[45] As a part of ICPA's unique infrastructure, 20 prosecutors from different countries, including the JIT members and the US, [46] are able to work together on-site, exchange evidence in a fast and efficient manner, and develop a common prosecutorial strategy.[47] The ICPA allows for the participation of non-JIT Member States and constitutes an important step towards establishing a Special Tribunal for the Crime of Aggression against Ukraine in the future. Building upon the experience of recent accountability mechanisms and frameworks coordinated by European and international accountability actors, the mandate of the ICPA includes: promoting collaboration between national prosecutors; taking advantage of the technological know-how at Eurojust; facilitating information exchange; coordinating the investigative strategies and contributing towards future prosecutions.[48]

The technological advancement and increasing relevance of digital evidence and user-generated content in international criminal investigations and prosecutions has inevitably influenced the increasing roles of various accountability actors, including both state and non-state institutions. It highlights the important capacity-building role of both Eurojust and the International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine. The ICPA has a real chance to change the accountability landscape through its role as a unique justice hub in (i) conducting investigations with a view to gathering information and evidence for potential use in criminal proceedings; and (ii) using the expertise in capacity building to contribute towards existing and future accountability instruments in national jurisdictions or at the Special Tribunal for the Crime of Aggression against Ukraine. Moreover, the evidence gathered by the ICPA may be valuable to the ICC OTP, national

[44] *International Centre for the Prosecution...*, *supra* note 7.

[45] *U.S. Assistance to International Investigation of the Crime of Aggression Against Ukraine*, U.S. Department of State, 14 November 2023, available at: https://www.state.gov/u-s-assistance-to-international-investigation-of-the-crime-of-aggression-against-ukraine/ (accessed 30 August 2024).

[46] *Ibidem*.

[47] *International Centre for the Prosecution...*, *supra* note 7.

[48] *Ibidem*.

jurisdictions prosecuting alleged war crimes, crimes against humanity or genocide, or may be used for the purposes of imposing further sanctions or in determining compensation claims.[49]

Its future potential role lies in its capability to preserve evidence and information important to the survivors' community, engage in a transparent dialogue with all justice actors, manage the expectations of different stakeholders and promote and advocate for comprehensive accountability for the crime of aggression and other international crimes committed in Ukraine. In addition, it may contribute towards developing best practices and the universalisation of standards that will become helpful in future efforts related to accountability for the crime of aggression globally.

CONCLUSIONS

In recent years, regional hubs that enable effective centralisation of accountability efforts and strengthen international criminal investigations in domestic settings have taken central stage in the fight against impunity. This is in line with the strategy of the Office of the Prosecutor of the International Criminal Court, that emphasised the importance of relying on local expertise in international criminal trials, without the need to engage 'The Hague' in all justice matters.[50] The expertise in analysis and processing of digital evidence gained during the Syrian investigations can inform future accountability efforts related to the full-scale war in Ukraine, as well as other conflicts. The know-how and technological infrastructure in place at Eurojust, Europol and the EU Genocide Network can assist the International Centre for the Prosecution of Russia's Crime of Aggression Against Ukraine and the Joint Investigation Team in their work. With its digital technology infrastructure and support of Eurojust; and its dedicated expertise on international criminal law and procedure, the ICPA has a unique potential to advance accountability and contribute towards capacity building and the sharing of best practices globally.

Whilst centralised accountability hubs – including the EU Genocide Network and the International Centre for the Prosecution of the Crime of Aggression against Ukraine – allow for effective cooperation with the OTP, they were not designed in a way to position the ICC at the apex of these frameworks, but rather to enable the ICC to contribute, as an equal participant, to capacity building and norm-sharing activities with the aim of facilitating the investigations and prosecutions that are

[49] *Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression,* U.S. Department of State, 27 March 2023, available at: https://www.state.gov/ambassador-van-schaacks-remarks/ (accessed 30 August 2024).

[50] S. Kendi, *Karim Khan's First Speech as ICC Prosecutor*, Journalists for Justice, 16 June 2021, available at: https://jfjustice.net/karim-khans-first-speech-as-icc-prosecutor (accessed 30 August 2024).

taking place in national jurisdictions. This approach is an inevitable consequence of the role played by centralised cooperation frameworks and national jurisdictions in catalysing innovation and progress in the field of international criminal justice in relation to the core international crimes committed in Syria and Northern Iraq. Embracing the capacity building and norm sharing role can help situate the ICC as an equal, yet indispensable, partner in novel justice hubs, and enable it to respond effectively to the needs of the moment in international criminal investigations and prosecutions without having to commit all its limited resources to selected situations. At the same time, it will allow the ICC OTP to contribute with the state-of-the-art technology and set investigatory standards for future accountability efforts globally.

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POLISH PRACTICE ON PROMULGATION OF INTERNATIONAL AGREEMENTS BETWEEN POLAND AND THE USSR, 1944–1960[**]

Abstract: *This article raises the issue of the proper publication of international treaties and their presence in the Polish legal system. The authors analyze this issue based on research conducted on Polish-Russian treaties from 1944–1960. Their research has shown that, during this period, only 11% of treaties were properly published. The research – conducted on a very limited subject: only bilateral agreements between Poland and the USSR – leads to the pessimistic conclusion that in Poland it is customary practice to refrain from publishing an international agreement in the Journal of Laws and that citizens do not have at their disposal a single official or unofficial source to reconstruct Poland's current obligations, which may indeed directly concern them. Also this finding raises important questions about the accessibility and enforceability of international treaties in the Polish legal system. At the international level, the consequences of failing to publish an act and to ensure official promulgation can be much more serious. In the absence of information about published agreements, it is not possible to sufficiently and completely determine the obligations between states nor to reconstruct the relations binding them. It is also impossible to clearly determine which international agreements are still in force between countries, which are invalid and which have expired.*

Keywords: promulgation, publication, Official Journal, Journal of Laws, international treaties

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INTRODUCTION

The proper promulgation of international agreements in the national legal order is of fundamental importance for their proper application and observance. The promulgation of international agreements is not only a manifestation of the transparency of law, but also an effective way of publicly registering these agreements, allowing for a quick reconstruction of the legal state in the relations between the given states. This is evidenced by the example of the agreement between the Ministries of National Defence of the Republic of Poland and of the Russian Federation on the principles of mutual air traffic of both states' military aircraft in their airspace, drawn up in Moscow on 14 December 1993.[1] From the available information it appears that the individuals serving as the most important state officials were unaware of the existence and validity of this agreement in the first days and even weeks after the Smolensk catastrophe.[2] This situation would not have occurred had the agreement been published in the appropriate official journal.

In this article, we argue that this case was not an isolated incident, but rather an element of (an improper) well-established practice of the Polish government,[3] as a result of which a significant number of international agreements have not been published.[4] Based on available sources, we have attempted to compile a list of bilateral agreements concluded between Poland and the Soviet Union (USSR) between 1944 and 1960. We chose this period because we have a relatively reliable source for it (see below) and because we believe that it was during this period that the practice of publishing international agreements in Poland was shaped.

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[1] They were concluded based on the Agreement between the Ministry of National Defence of the Republic of Poland and the Ministry of Defence of the Russian Federation on bilateral military cooperation (signed on 7 July 1993). Neither of these agreements have been promulgated.

[2] *See* M. Domagalski, T. Pietryga, E. Żemła, *Zapomniana umowa z Rosją?* [Forgotten agreement with Russia?], Rzeczpospolita, 7 May 2010, available at: https://www.rp.pl/wydarzenia/art7215251-zapomniana-umowa-z-rosja (accessed 30 August 2024).

[3] *See generally* J. Juchniewicz, *Polskie uregulowania prawne i praktyka traktatowa w latach 1945–1989* [Polish legal framework and treaty practice, 1945–1989], in: E. Borowska, J. Juchniewicz, J. Krawczyk-Grzesiowska, K.J. Marciniak (eds.), *100-lecie polskiej praktyki traktatowej* [100 years of Polish treaty practice], Ministerstwo Spraw Zagranicznych, Warszawa: 2018, p. 71.

[4] We have already pointed out these difficulties in earlier publications. *See* K. Wierczyńska, G. Wierczyński, *Ogłaszanie umów międzynarodowych jako warunek ich bezpośredniego stosowania – kilka uwag na marginesie polskiej praktyki* [Promulgation of international agreements as the condition of their direct application – some remarks on the margin of Polish practice], 3(181) Studia Prawnicze 5 (2009), G. Wierczyński, *The Polish practice regarding the promulgation of international agreements between 1945 and 2017*, 36 Polish Yearbook of International Law 257 (2017).

1. POLISH REGULATIONS CONCERNING PROMULGATION OF INTERNATIONAL AGREEMENTS BETWEEN 1944 AND 1960

Before the outbreak of World War II, the rules for publishing legal acts in the Journal of Laws of the Republic of Poland were regulated by the Decree of the President of the Republic of Poland of 6 September 1935 on the publication of the Journal of Laws of the Republic of Poland.[5] Art. 1(1)(2) stated that the Journal of Laws shall publish "treaties with other states and treaties with the Free City of Gdańsk approved by way of legislation or concluded on the basis of a legislative act", and Art. 1(1)(7) added that this obligation also extends to "government declarations stating the fulfilment of the conditions on which the binding force of treaties with other states depends, and government declarations on the accession of foreign states to treaties concluded by the Republic of Poland and on ratifications made." These provisions were amended by the Decree of 29 September 1945 on the amendment and supplementation of the provisions on the publication of the Journal of Laws,[6] which removed references to the Free City of Gdańsk from the cited provisions.

On 1 January 1951, the aforementioned decree was replaced by the Act of 30 December 1950 on the publication of the Journal of Laws of the Republic of Poland and the Official Journal of the Republic of Poland "Monitor Polski".[7] Art. 1(1)(3) of this act stated that the Journal of Laws shall publish "treaties concluded by the Polish State with other states, and government declarations on the entry into force of these treaties, their ratification and the participation of other states in them."

The cited provisions were very general; they did not distinguish between types of international agreements based on the way they were concluded. Formally, these provisions treated the publication of international agreements with the same obligation as statutes, and did not provide for any exceptions in this respect.[8] In practice, some agreements were never published, and were even hidden from the public.

More detailed rules on the publication of international agreements were introduced by the Resolution of the Council of State and the Council of Ministers of 28 December 1968 on the conclusion and termination of international agreements.[9] Although this

[5] Decree of the President of the Republic of Poland of 6 September 1935 on the publication of the Journal of Laws of the Republic of Poland [1935] JoL 68, 423.

[6] Decree of 29 September 1945 on the amendment and supplementation of the provisions on the publication of the Journal of Laws [1945] JoL 55, 305.

[7] Act of 30 December 1950 on the publication of the Journal of Laws of the Republic of Poland and the Official Journal of the Republic of Poland "Monitor Polski" [1950] JoL 58, 524.

[8] However, Maria Frankowska points out that the wording of the Act of 30 December 1950 "does not imply an obligation to publish all agreements, or even only certain categories of them" (M. Frankowska, *Umowy międzynarodowe. Wprowadzenie do prawa traktatów* [International agreements: Introduction to the law of treaties], SGPiS, Warszawa: 1977, p. 54).

[9] It was not published in any official publication; its content was published contemporaneously and is available in *Uchwała Rady Państwa i Rady Ministrów z dnia 28 grudnia 1968 r. w sprawie zawierania*

resolution was issued after 1960, it seems to have largely sanctioned the practice that was followed between 1944 and 1960. The resolution treated as mandatory only the publication of ratified international agreements and government declarations on the exchange or deposit of ratification documents or the termination of such agreements. Their publication in the Journal of Laws was to be ordered by the Chairman of the Council of State at the request of the Minister of Foreign Affairs (§ 18(1)). The resolution stated that other international agreements (so-called government agreements) and government declarations concerning them could only be published in the Journal of Laws. The decision in this matter was to be taken by the Prime Minister at the request of the Minister of Foreign Affairs, submitted in agreement with the relevant minister (§ 18(2)).

Furthermore, the resolution added that annexes to agreements published in the Journal of Laws containing detailed specialist or technical provisions which did not regulate matters reserved for statutory regulation, did not contain provisions deviating from the applicable legislation, concerned a small number of entities and did not relate to the rights or obligations of citizens could not be published in the Journal of Laws of the Polish People's Republic (PRL). The decision to waive their publication was to be taken by the Chairman of the Council of State in relation to ratified agreements and by the Prime Minister in relation to annexes to other agreements. This decision was to be taken at the request of the Minister of Foreign Affairs, submitted in agreement with the relevant minister. A government declaration concerning such an annex was to contain information on the location where the text was stored.[10]

These exceptions to the obligation to publish international agreements were inconsistent with the above-cited provisions of the Act of 30 December 1950 on the publication of the Journal of Laws of the Republic of Poland and the Official Journal of the Republic of Poland "Monitor Polski", and the Resolution was of lower rank than the Act. At the same time, anticipating the remarks below, it can be stated that in this respect the Resolution of 1968, although it does not directly refer to the agreements of 1944–1960 – which are the subject of this study – it sanctioned the government practice in force at that time. It is also worth adding that the aforementioned resolution also provided that the Minister of Foreign Affairs shall keep a register of binding departmental agreements (§ 14(3)).

i wypowiadania umów międzynarodowych [Resolution of the Council of State and the Council of Ministers of 28 December 1968 on the conclusion and termination of international agreements], 3(20) Przegląd Sejmowy 65 (1997), pp. 65–71, available at: https://tinyurl.com/bddxesbz (accessed 30 August 2024).

[10] This solution should not be confused with the publication of legal acts as an annex to a given issue of the Journal of Laws. One of the more controversial cases of publishing a legal act by making it an annex to an official journal was the publication of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (Journal of Laws of 1977, No. 38, item 169). In the Journal of Laws No. 38 of 1977, only the act of the Council of State of the Polish People's Republic ratifying the pacts was actually published, with the following information included below: "The text of the Covenant is included in the annex to this issue."

2. SOURCES OF KNOWLEDGE OF INTERNATIONAL AGREEMENTS CONCLUDED BETWEEN POLAND AND THE USSR, 1944–1960

For the purposes of this study, we used the official journals (mainly the Journal of Laws) and the Internet Treaty Base provided by the Polish Ministry of Foreign Affairs at (ITB MFA; traktaty.msz.gov.pl). However, the most important source proved to be the multi-volume publication *Dokumenty i materiały do historii stosunków polsko-radzieckich* [Documents and Materials on the History of Polish–Soviet Relations] (D&M), which is the result of many years of joint research by researchers from the Polish Academy of Sciences and the Academy of Sciences of the USSR.[11] This publication unfortunately ends in December 1960, but for the period it covers it can verify the contents of the Journal of Laws and the ITB MFA. The remaining sources turned out to be secondary to the above-mentioned ones, and we have omitted them from the text. In a few cases, we have included agreements that are not in any of the indicated sources and which we came across during our other research.[12]

[11] This refers to the volumes: E. Basiński, H. Adalińska, T. Kowalski, A. Chrieniow (eds.), *Dokumenty i materiały do historii stosunków polsko-radzieckich. T. 8, styczeń 1944 – grudzień 1945* [Documents and Materials on the History of Polish–Soviet Relations. Vol. 8, January 1944 – December 1945], Książka i Wiedza, Warszawa: 1974; E. Basiński, W.W. Diechtiarienko, T. Kowalski, A. Chrieniow (eds.), *Dokumenty i materiały do historii stosunków polsko-radzieckich. T. 9, styczeń 1946 – grudzień 1949* [Documents and Materials on the History of Polish–Soviet Relations. Vol. 9, January 1946 – December 1949], Książka i Wiedza, Warszawa: 1974; W. Balcerak, W.W. Diechtiarienko, I. Bazylow, I.I. Kostiuszko (eds.), *Dokumenty i materiały do historii stosunków polsko-radzieckich. T. 10, styczeń 1950 – grudzień 1955* [Documents and Materials on the History of Polish–Soviet Relations. Vol. 10, January 1950 – December 1955], Książka i Wiedza, Warszawa: 1982; W. Balcerak, W.W. Diechtiarienko, E. Basiński, I.I. Kostiuszko, P.N. Olsanskij (eds.), *Dokumenty i materiały do historii stosunków polsko-radzieckich. T. 11, styczeń 1956 – grudzień 1960* [Documents and Materials on the History of Polish–Soviet Relations. Vol. 11, January 1956 – December 1960], Książka i Wiedza, Warszawa: 1987.

[12] In this case, no letter annotation is indicated in the columns regarding the place of publication.

3. LIST OF INTERNATIONAL AGREEMENTS CONCLUDED BETWEEN POLAND AND THE USSR, 1944–1960

Table 1. Authors' own analysis

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Porozumienie między PKWN i Rządem ZSRR o stosunkach między Polską Administracją a Radzieckim Wodzem Naczelnym po wkroczeniu wojsk radzieckich na terytorium Polski [Agreement between the Polish Committee of National Liberation (PKWN) and the Government of the USSR on the relations between the Polish Administration and the Supreme Soviet Commander after the entry of Soviet troops into the territory of Poland]	26 July 1944		T[14]	T
Porozumienie między PKWN a Rządem ZSRR o polsko-radzieckiej granicy państwowej [Agreement between the Polish Committee of National Liberation (PKWN) and the Government of the USSR on the Polish–Soviet state border]	27 July 1944		T	T
Umowa między PKWN i Rządem ZSRR odnośnie spraw finansowo - gospodarczych, związanych z pobytem wojsk sowieckich na terytorium Polski, jak również dotyczących polskich sił zbrojnych, formowanych na terytorium ZSRR [Agreement between the Polish Committee of National Liberation (PKWN) and the Government of the USSR regarding financial and economic matters related to the presence of Soviet troops on the territory of Poland, as well as concerning Polish armed forces formed on the territory of the USSR]	4 August 1944		T	T
Układ pomiędzy PKWN a Rządem Ukraińskiej Socjalistycznej Republiki Rad dotyczący ewakuacji obywateli polskich z terytorium U.S.R.R. i ludności ukraińskiej z terytorium Polski [Agreement between the Polish Committee of National Liberation and the Government of the Ukrainian Soviet Socialist Republic concerning the evacuation of Polish citizens from the territory of the Ukrainian SSR and the Ukrainian population from the territory of Poland]	9 September 1944			

[13] All agreements should be published in the Journal of Laws (or other official journals). Here we refer mostly to "Dziennik Ustaw", which in the text is labelled with the abbreviation "Dz.U."; if we refer to another official journal, it is marked separately.

[14] The following letter codes are used in the table: T – for agreements for which the source contains both information about the agreement and its text, and M – for agreements for which the source only contains a mention but not its text.

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Układ pomiędzy PKWN a Rządem Białoruskiej Socjalistycznej Republiki Rad dotyczący ewakuacji obywateli polskich z terytorium B.S.R.R. i ludności białoruskiej z terytorium Polski [Agreement between the Polish Committee of National Liberation and the Government of the Belarusian Soviet Socialist Republic regarding the evacuation of Polish citizens from the territory of the Belarusian SSR and the Belarusian population from the territory of Poland]	9 September 1944			T
Układ pomiędzy PKWN a Rządem Litewskiej Socjalistycznej Republiki Rad dotyczący ewakuacji obywateli polskich z terytorium L.S.R.R. i ludności litewskiej z terytorium Polski [Agreement between the Polish Committee of National Liberation and the Government of the Lithuanian Soviet Socialist Republic regarding the evacuation of Polish citizens from the territory of the Lithuanian SSR and the Lithuanian population from the territory of Poland]	22 September 1944			
Porozumienie między PKWN i Rządem ZSRR w sprawie dostaw towarów i warunków rozliczeń [Agreement between the Polish Committee of National Liberation and the Government of the USSR regarding the supply of goods and terms of settlement]	20 October 1944		T	T
Umowa między PKWN a Rządem ZSRR o trybie eksploatacji i zarządu kolejami Polskimi na czas wojny [Agreement between the Polish Committee of National Liberation and the Government of the USSR on the mode of operation and management of Polish railways during wartime]	5 November 1944		T	T
Umowa o bezprocentowej pożyczce udzielonej Rządowi Tymczasowemu RP przez Rząd ZSRR [Agreement on interest-free loan granted to the Provisional Government of the Republic of Poland by the Government of the USSR]	9 April 1945			T
Układ o przyjaźni, pomocy wzajemnej i współpracy powojennej między RP i ZSRR [Treaty of friendship, mutual assistance and post-war cooperation between the Republic of Poland and the USSR]	21 April 1945	Dz.U. 1945.47.268	T	T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Tymczasowym Rządem Jedności Narodowej RP i Rządem ZSRR o prawie zmiany obywatelstwa radzieckiego osób narodowości polskiej i żydowskiej, mieszkających w ZSRR i o ich ewakuacji do Polski i o prawie zmiany obywatelstwa polskiego osób narodowości rosyjskiej, ukraińskiej, białoruskiej, rusińskiej i litewskiej, mieszkających na terytorium Polski i o ich ewakuacji do ZSRR [Agreement between the Provisional Government of National Unity of the Republic of Poland and the Government of the USSR on the right to change the Soviet citizenship of persons of Polish and Jewish nationality living in the USSR and their evacuation to Poland, and on the right to change the Polish citizenship of persons of Russian, Ukrainian, Belarusian, Ruthenian and Lithuanian nationality living in the territory of Poland and their evacuation to the USSR]	6 July 1945		T	T
Umowa między Polskim Rządem Jedności Narodowej i Rządem ZSRR o wzajemnych dostawach towarów [Agreement between the Polish Government of National Unity and the Government of the USSR on mutual supplies of goods]	7 July 1945		T	T
Protokół do Umowy z dnia 7 lipca 1945 r. w sprawie wzajemnych dostaw towarów w 1952 roku [Protocol to the Agreement of 7 July 1945 regarding mutual supplies of goods in the year 1952]	7 July 1945		M	T
Umowa między Polskim Tymczasowym Rządem Jedności Narodowej i Rządem ZSRR o przekazaniu Ministerstwu Komunikacji RP zarządu nad kolejami żelaznymi w Polsce [Agreement between the Polish Provisional Government of National Unity and the Government of the USSR on transferring the management of railways in Poland to the Ministry of Communications of the Republic of Poland]	11 July 1945		T	T
Umowa między RP i ZSRR o polsko-radzieckiej granicy państwowej [Agreement between the Republic of Poland and the USSR on the Polish–Soviet state border]	16 August 1945	Dz.U. 1947.35.167	T	T
Umowa między Tymczasowym Rządem Jedności Narodowej RP i Rządem ZSRR w sprawie wynagrodzenia szkód wyrządzonych przez okupację niemiecką [Agreement between the Provisional Government of National Unity of the Republic of Poland and the Government of the USSR regarding compensation for damages caused by the German occupation]	16 August 1945		T	T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Protokół do umowy między Tymczasowym Rządem Jedności Narodowej RP i Rządem ZSRR w sprawie wynagrodzenia szkód wyrządzonych przez okupację niemiecką [Protocol to the Agreement between the Provisional Government of National Unity of the Republic of Poland and the Government of the USSR regarding compensation for damages caused by the German occupation]	16 August 1945		T	T
Umowa między Tymczasowym Rządem Jedności Narodowej RP i Rządem ZSRR o przekazaniu Polsce na rachunek reparacji parowozów należących do Związku Radzieckiego i znajdujących się na terytorium Polski [Agreement between the Provisional Government of National Unity of the Republic of Poland and the Government of the USSR regarding the transfer to Poland as part of reparations of locomotives owned by the Soviet Union and located on the territory of Poland]	7 September 1945			T
Umowa między Tymczasowym Rządem Jedności Narodowej RP i Dowództwem Północnej Grupy Wojsk Armii Czerwonej w sprawie przekazania majątków poniemieckich na ziemiach zachodnich i północnych [Agreement between the Provisional Government of National Unity of the Republic of Poland and the Command of the Northern Group of Soviet Forces regarding the transfer of former German assets in the western and northern territories]	8 October 1945			T
Umowa między Ministerstwem Żeglugi i Handlu Zagranicznego RP i Komisariatem Ludowym Marynarki Wojennej ZSRR w sprawie robót ratowniczych i pogłębiarskich w portach polskich [Agreement between the Ministry of Shipping and Foreign Trade of the Republic of Poland and the People's Commissar of the Navy of the USSR regarding rescue and dredging works in Polish ports]	29 October 1945			T
Protokół dodatkowy do umowy z 6 lipca 1945 r. między Tymczasowym Rządem Jedności Narodowej RP i Rządem ZSRR w sprawie przedłużenia terminu zmiany obywatelstwa niektórych kategorii obywateli ZSRR i Polski [Additional Protocol to the Agreement of 6 July 1945 between the Provisional Government of National Unity of the Republic of Poland and the Government of the USSR regarding the extension of the deadline for changing citizenship for certain categories of citizens of the USSR and Poland]	11 November 1945			T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Ministerstwem Komunikacji RP i Komisariatem Ludowym Komunikacji i Łączności ZSRR o polsko-radzieckiej bezpośredniej komunikacji kolejowej [Agreement between the Ministry of Communications of the Republic of Poland and the People's Commissar of Communications and Transportation of the USSR on Polish–Soviet direct railway communication]	23 November 1945		T	M
Protokół dodatkowy do porozumienia z 9 września 1944 r. pomiędzy PKWN a Rządem Białoruskiej Socjalistycznej Republiki Rad dotyczący ewakuacji obywateli polskich z terytorium B.S.R.R. i ludności białoruskiej z terytorium Polski [Additional Protocol to the Agreement of 9 September 1944 between the Polish Committee of National Liberation and the Government of the Belarusian Soviet Socialist Republic regarding the evacuation of Polish citizens from the territory of the Belarusian SSR and the Belarusian population from the territory of Poland]	25 November 1945			T
Protokół uzupełniający do Układu z dnia 22 IX 1944 roku pomiędzy PKWN a Rządem Litewskiej Socjalistycznej Republiki Radzieckiej, dotyczącego ewakuacji obywateli polskich z terytorium Litewskiej SRR i ludności litewskiej z terytorium Polski [Supplementary Protocol to the Agreement of 22 September 1944 between the Polish Committee of National Liberation and the Government of the Lithuanian Soviet Socialist Republic regarding the evacuation of Polish citizens from the territory of the Lithuanian SSR and the Lithuanian population from the territory of Poland]	10 December 1945			
Protokół dodatkowy do układu z 9 IX 1944 r. w sprawie przesiedlenia Ukraińców z Polski i obywateli polskich z USRR podpisany w Warszawie [Additional Protocol to the Agreement of 9 September 1944 regarding the resettlement of Ukrainians from Poland and Polish citizens from the Ukrainian Soviet Socialist Republic, signed in Warsaw]	14 December 1945			
Umowa handlowa między Ministerstwem Żeglugi i Handlu Zagranicznego RP a Zarządem Handlu Zagranicznego Administracji Wojskowej w Niemczech w sprawie wzajemnych dostaw towarów [Trade agreement between the Ministry of Shipping and Foreign Trade of the Republic of Poland and the Foreign Trade Administration Board of the Military Administration in Germany regarding mutual supplies of goods]	2 February 1946		M	

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Tymczasowym Rządem Jedności Narodowej RP i Rządem ZSRR o dostawach zboża z ZSRR dla Polski na poczet umowy o wzajemnych dostawach towarów w 1946 r. [Agreement between the Provisional Government of National Unity of the Republic of Poland and the Government of the USSR on grain supplies from the USSR to Poland as part of the agreement on mutual supplies of goods in 1946]	8 February 1946			T
Umowa między RP i ZSRR w sprawie nawiązania łączności pocztowej i telefoniczno-telegraficznej (+ Protokół końcowy) [Agreement between the Republic of Poland and the USSR regarding the establishment of postal and telegraph/telephone communication (+ Final Protocol)]	20 March 1946		M	T
Umowa między Tymczasowym Rządem Jedności Narodowej RP a Rządem ZSRR o organizacji komunikacji lotniczej (+ Protokół + Protokół dodatkowy) [Agreement between the Provisional Government of National Unity of the Republic of Poland and the Government of the USSR on the organization of air communication (+ Protocol + Additional Protocol)]	21 March 1946		T	T
Umowa między Ministerstwem Komunikacji RP i Ministerstwem Łączności ZSRR w sprawie udzielenia Polsce pomocy w odbudowie zniszczonych środków łączności na kolejach polskich [Agreement between the Ministry of Communications of the Republic of Poland and the Ministry of Communications of the USSR regarding assistance to Poland in the reconstruction of destroyed communication facilities on Polish railways]	22 March 1946			T
Umowa między Tymczasowym Rządem Jedności Narodowej RP i Rządem ZSRR o wzajemnych dostawach towarów [Agreement between the Provisional Government of National Unity of the Republic of Poland and the Government of the USSR on mutual supplies of goods]	12 April 1946		T	T
Protokół dodatkowy do umowy o dostawach towarów i warunkach rozrachunków między PKWN a Rządem ZSRR [Additional Protocol to the Agreement on the supply of goods and settlement terms between the Polish Committee of National Liberation and the Government of the USSR]	12 April 1946		M	

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Rządem RP i Rządem ZSRR w sprawie pożyczki udzielonej Polsce przez ZSRR [Agreement between the Government of the Republic of Poland and the Government of the USSR regarding the loan granted to Poland by the USSR]	18 September 1946			T
Umowa między Tymczasowym Rządem Jedności Narodowej RP i Rządem ZSRR o dostawie 100 tys. ton zboża ze Związku Radzieckiego do Polski [Agreement between the Provisional Government of National Unity of the Republic of Poland and the Government of the USSR on the delivery of 100,000 tonnes of grain from the Soviet Union to Poland]	12 October 1946		M	T
Umowa między Rządem RP i Rządem ZSRR o przekazaniu RP części statków byłej niemieckiej morskiej floty handlowej [Agreement between the Government of the Republic of Poland and the Government of the USSR on the transfer of part of the former German merchant marine fleet to Poland]	5 March 1947		T	
Porozumienie między Rządem RP i Rządem ZSRR o współpracy naukowo-technicznej [Agreement between the Government of the Republic of Poland and the Government of the USSR on scientific and technical cooperation]	5 March 1947		T	T
Protokół do Umowy z 16 August 1945 w sprawie wynagrodzenia szkód wyrządzonych przez okupację niemiecką w Polsce [Protocol to the agreement of 16 August 1945 regarding compensation for damages caused by the German occupation in Poland]	5 March 1947		T	
Umowa między Rządem RP i Rządem ZSRR w sprawie wyrównania należności za zboże dostarczone dla Polski [Agreement between the Government of the Republic of Poland and the Government of the USSR regarding the settlement of liabilities for grain supplied to Poland]	5 March 1947			T
Protokół dotyczący pretensji do Umowy Handlowej z dnia 2.02.1946 r. [Protocol regarding claims to the Trade Agreement of 2 February 1946]	2 July 1947		M	
Umowa między Rządem RP a Rządem ZSRR w sprawie wzajemnych dostawach towarów w okresie 1 IV 1947 - 31 III 1948 [Agreement between the Government of the Republic of Poland and the Government of the USSR on mutual supplies of goods for the period from 1 April 1947 to 31 March 1948]	4 August 1947			T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Rządem RP a Rządem ZSRR o dostawie 300 000 ton zboża radzieckiego do Polski [Agreement between the Government of the Republic of Poland and the Government of the USSR on the delivery of 300,000 tonnes of Soviet grain to Poland]	29 August 1947			T
Porozumienie między Rządem RP i Rządem ZSRR o przekazaniu władzom polskim portu w Szczecinie [Agreement between the Government of the Republic of Poland and the Government of the USSR on the transfer of the port of Szczecin to Polish authorities]	17 September 1947		T	
Umowa w sprawie wymiany paczek pocztowych między RP a ZSRR [Agreement on the exchange of postal parcels between the Republic of Poland and the USSR]	1 October 1947	Dz.Urz. Min. Poczt i Telegrafów z 1947.20.49[15]	T	T
Umowa między Rządem RP a Rządem ZSRR o wzajemnych dostawach towarów w okresie lat 1948-1952 [Agreement between the Government of the Republic of Poland and the Government of the USSR on mutual supplies of goods for the period 1948–1952]	26 January 1948		T	T
Umowa między Rządem RP a Rządem ZSRR o dostawach do Polski sprzętu przemysłowego na kredyt [Agreement between the Government of the Republic of Poland and the Government of the USSR on the supply of industrial equipment to Poland on credit]	26 January 1948			T
Umowa między Rządem RP a Rządem ZSRR o dostawie 200 000 ton zboża z ZSRR do Polski [Agreement between the Government of the Republic of Poland and the Government of the USSR on the delivery of 200,000 tonnes of grain from the USSR to Poland]	26 January 1948			T
Konwencja między Rządem RP a Rządem ZSRR w sprawie kwarantanny i ochrony roślin uprawnych przed szkodnikami i chorobami [Convention between the Government of the Republic of Poland and the Government of the USSR regarding quarantine and the protection of cultivated plants from pests and diseases]	8 April 1948	Dz.U. 1949.2.4	T	T
Protokół o wzajemnych dostawach towarów w 1948 roku [Protocol on mutual supplies of goods in the year 1948]	13 May 1948		M	T

[15] Instead of "Dziennik Ustaw", this agreement was published in the Official Journal of the Ministry of Posts and Telegraphs.

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Rządem RP i Rządem ZSRR o studiach obywateli RP w wyższych cywilnych uczelniach ZSRR i o ich utrzymaniu [Agreement between the Government of the Republic of Poland and the Government of the USSR on the studies of citizens of the Republic of Poland at higher civilian educational institutions in the USSR and their maintenance]	28 May 1948		T	T
Konwencja między Rządem RP i Rządem ZSRR o sposobie regulowania konfliktów granicznych i incydentów (+ Protokół) [Convention between the Government of the Republic of Poland and the Government of the USSR on the method of settling border conflicts and incidents (+ Protocol)]	8 July 1948	Dz.U. 1949.43.325	T	T
Umowa między Rządem RP a Rządem ZSRR o stosunkach prawnych na polsko-radzieckiej granicy państwowej [Agreement between the Government of the Republic of Poland and the Government of the USSR on legal relations at the Polish–Soviet state border]	8 July 1948	Dz.U. 1949.43.323	T	T
Umowa między Rządem RP a Rządem ZSRR o wzajemnym dostarczeniu środków pieniężnych na utrzymanie przedstawicielstw dyplomatycznych i inne wydatki niehandlowe w latach 1948-1949 [Agreement between the Government of the Republic of Poland and the Government of the USSR on the mutual provision of funds for the maintenance of diplomatic missions and other non-trade expenses in the years 1948–1949]	16 November 1948		M	
Protokół o wzajemnych dostawach towarów w 1949 roku [Protocol on mutual supplies of goods in the year 1949]	15 January 1949		M	T
Protokół dodatkowy do Umowy między Rządem RP i Rządem ZSRR o wzajemnych dostawach towarów w okresie lat 1948-1952 z dnia 26 January 1948 [Additional Protocol to the Agreement between the Government of the Republic of Poland and the Government of the USSR on mutual supplies of goods for the period of 1948–1952, dated 26 January 1948]	15 January 1949		M	
Protokół w sprawie zakończenia rozliczeń z Umowy Handlowej zawartej między Rządem RP a Sowiecką Wojskową Administracją w Niemczech z dnia 2.02.1946 [Protocol regarding the conclusion of settlements from the Trade Agreement concluded between the Government of the Republic of Poland and the Soviet Military Administration in Germany on 2 February 1946]	26 February 1949		M	

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Protokół do umowy polsko-radzieckiej z 26 stycznia 1948 o dostawach do Polski sprzętu przemysłowego na kredyt [Protocol to the Polish–Soviet agreement of 26 January 1948 regarding the supply of industrial equipment to Poland on credit]	30 May 1949			T
Porozumienie między Rządem RP a Rządem ZSRR o współpracy w sprawach celnych [Agreement between the Government of the Republic of Poland and the Government of the USSR on cooperation in customs matters]	8 June 1949		M	
Protokół do umowy polsko-radzieckiej z 29 czerwca 1949 r. w sprawie dostaw towarów od 1 lipca 1949 do 30 czerwca 1950 r. [Protocol to the Polish–Soviet Agreement of 29 June 1949 regarding the supply of goods from 1 July 1949 to 30 June 1950]	29 June 1949			T
Umowa między Rządem RP a Rządem ZSRR w sprawie udzielenia Polsce kredytu towarowego [Agreement between the Government of the Republic of Poland and the Government of the USSR regarding the provision of trade credit to Poland]	5 September 1949			T
Umowa między Polskim Radio i Komitetem Informacji Radiowej przy Radzie Ministrów ZSRR o współpracy wzajemnej [Agreement between Polish Radio and the Committee of Radio Information at the Council of Ministers of the USSR on mutual cooperation]	22 October 1949			T
Umowa między Rządem RP a Rządem ZSRR o trybie kompensacji wydatków na utrzymanie i kształcenie żołnierzy Armii Polskiej w wojskowych zakładach naukowych ZSRR [Agreement between the Government of the Republic of Poland and the Government of the USSR on the procedure for compensating for expenses for the maintenance and education of soldiers of the Polish Army in military scientific institutions of the USSR]	14 December 1949			T
Protokół do umowy polsko-radzieckiej z 26 stycznia 1948 r. o dostawach do Polski sprzętu przemysłowego na kredyt [Protocol to the Polish–Soviet Agreement of 26 January 1948 regarding the supply of industrial equipment to Poland on credit]	17 December 1949			T
Umowa między Rządem RP a Rządem ZSRR o warunkach odbywania przez polskich specjalistów produkcyjno-technicznej praktyki w ZSRR [Agreement between the Government of the Republic of Poland and the Government of the USSR on the conditions for Polish specialists to undertake production and technical training in the USSR]	25 January 1950			T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Protokół o zmianie warunków opłaty specjalistów radzieckich delegowanych do Polski dla udzielenia pomocy technicznej [Protocol on the amendment of the terms of payment for Soviet specialists delegated to Poland to provide technical assistance]	25 January 1950			T
Protokół o wzajemnych dostawach towarów w 1950 roku [Protocol on mutual supplies of goods in the year 1950]	25 January 1950		M	T
Protokół w sprawie częściowego pokrycia kredytu i pożyczek udzielonych Polsce na mocy umów z 26 stycznia 1948, 18 września 1946 i 9 kwietnia 1945 r. [Protocol regarding partial coverage of loans granted to Poland under agreements dated 26 January 1948, 18 September 1946 and 9 April 1945]	25 April 1950			T
Protokół do umowy między Rządem RP a Rządem ZSRR z 26 stycznia 1948 r. o wzajemnych dostawach towarów w latach 1948-1952 [Protocol to the agreement between the Government of the Republic of Poland and the Government of the USSR dated 26 January 1948 regarding mutual supplies of goods in the period 1948–1952]	24 June 1950			T
Protokół do umowy z 26 stycznia 1948 r. między Rządem RP a Rządem ZSRR o wzajemnych dostawach towarów w latach 1948-1952 [Protocol to the agreement of 26 January 1948 between the Government of the Republic of Poland and the Government of the USSR regarding mutual supplies of goods in the period 1948–1952]	29 June 1950			T
Protokół o kolejnych płatnościach na spłatę kredytów udzielonych przez Rząd ZSRR Rządowi RP [Protocol on subsequent payments towards repayment of loans granted by the Government of the USSR to the Government of the Republic of Poland]	29 June 1950		M	
Umowa między Rządem RP a Rządem ZSRR o wzajemnych dostawach towarów w okresie 1953-1958 [Agreement between the Government of the Republic of Poland and the Government of the USSR on mutual supplies of goods for the period 1953–1958]	29 June 1950		T	T
Umowa między Rządem RP a Rządem ZSRR o dostawach do Polski sprzętu przemysłowego na kredyt w latach 1951-1958 [Agreement between the Government of the Republic of Poland and the Government of the USSR on the supply of industrial equipment to Poland on credit for the years 1951–1958]	29 June 1950		M	T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Porozumienie o delegowaniu radzieckich specjalistów do pracy w instytucjach, organizacjach i przedsiębiorstwach Rzeczypospolitej Polskiej oraz o warunkach ich wynagradzania [Agreement on the delegation of Soviet specialists to work in institutions, organizations and enterprises of the Republic of Poland, as well as on the conditions of their remuneration]	8 August 1950		M	M
Umowa pomiędzy RP a ZSRR o zamianie odcinków terytoriów państwowych (+ protokół) [Agreement between the Republic of Poland and the USSR on the exchange of sections of state territories (+ protocol)]	15 February 1951	Dz.U. 1952 November 63	T	T
Protokół o wzajemnych dostawach towarów w 1951 roku [Protocol on mutual supplies of goods in the year 1951]	9 March 1951		M	T
Protokół pomiędzy Rządem RP a Rządem ZSRR o wprowadzeniu zmian do Umowy o stosunkach prawnych na polsko-radzieckiej granicy państwowej oraz do Konwencji o sposobie regulowania konfliktów granicznych i incydentów, podpisanych w Moskwie dnia 8 lipca 1948 roku [Protocol between the Government of the Republic of Poland and the Government of the USSR on amendments to the Agreement on legal relations at the Polish–Soviet state border and to the Convention on the method of settling border conflicts and incidents, signed in Moscow on 8 July 1948]	8 December 1951	Dz.U. 1952.23.145	T	
Protokół o dodatkowych wzajemnych dostawach towarów w 1952 roku [Protocol on additional mutual supplies of goods in the year 1952]	29 February 1952		M	T
Protokół dodatkowy do Porozumienia z 17 September 1947 między Rządami RP a ZSRR o przekazaniu władzom polskim portu w Szczecinie [Additional Protocol to the Agreement of 17 September 1947 between the Governments of the Republic of Poland and the USSR on transferring the authority over the port of Szczecin to Polish authorities]	28 March 1952		T	
Umowa między Rządem RP a Rządem ZSRR w sprawie budowy gmachu wysokościowego - Pałacu Kultury i Nauki w Warszawie [Agreement between the Government of the Republic of Poland and the Government of the USSR on the construction of a high-rise building – the Palace of Culture and Science in Warsaw]	5 April 1952			T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Ministerstwem Kolei RP i Ministerstwem Komunikacji ZSRR o utrymaniu i obsłudze mostów kolejowych położonych na polsko-radzieckiej granicy państwowej [Agreement between the Ministry of Railways of the Republic of Poland and the Ministry of Communications of the USSR on the maintenance and servicing of railway bridges located on the Polish–Soviet state border]	10 May 1952			T
Porozumienie między Rządem RP a Rządem ZSRR o studiach obywateli RP na wyższych cywilnych uczelniach w ZSRR [Agreement between the Government of the Republic of Poland and the Government of the USSR on the studies of citizens of the Republic of Poland at higher civilian educational institutions in the USSR]	19 May 1952		T	T
Umowa między Rządem RP z jednej strony a Rządem ZSRR, Rządem Ukraińskiej Socjalistycznej Republiki Radzieckiej, Rządem Białoruskiej Socjalistycznej Republiki Radzieckiej i Rządem Litewskiej Socjalistycznej Republiki Radzieckiej z drugiej strony o wzajemnych rozliczeniach wynikłych w związku z ewakuacją ludności i delimitacją polsko-radzieckiej granicy państwowej [Agreement between the Government of the Republic of Poland on one side and the Government of the USSR, the Government of the Ukrainian Soviet Socialist Republic, the Government of the Belarusian Soviet Socialist Republic and the Government of the Lithuanian Soviet Socialist Republic on the other side on mutual settlements arising from the evacuation of the population and delimitation of the Polish–Soviet state border]	21 July 1952		T	
Protokół w sprawie dostawy przez ZSRR do Polski w latach 1953-1955 sprzętu dla fabryk związków azotowych oraz kwasu siarkowego i cementu [Protocol on the USSR supplying Poland with equipment for factories of nitrogen compounds, sulfuric acid and cement in 1953–1955]	4 August 1952			T
Protokół do Umów z dnia 26 January 1949 i z dnia 29 June 1950 o dostawach do Polski sprzętu przemysłowego na kredyt (Protokół o przekazaniu Polsce przez ZSRR dokumentacji technicznej i rysunków roboczych i o dostawach urządzeń do hut) [Protocol to the Agreements of 26 January 1949 and 29 June 1950 regarding the supply of industrial equipment to Poland on credit (Protocol on the transfer of technical documentation and working drawings to Poland by the USSR and on the supply of equipment for steelworks)]	7 August 1952		M	T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Protokół o kolejnych płatnościach na spłatę kredytów udzielonych przez Rząd ZSRR Rządowi PRL [Protocol on subsequent payments for the repayment of credits granted by the Government of the USSR to the Government of the PRL]	1 April 1953		M	
Protokół o wzajemnych dostawach towarów w 1953 roku [Protocol on mutual supplies of goods in the year 1953]	22 April 1953		M	T
Protokół o wprowadzeniu częściowych zmian do Umów o dostawach do Polski sprzętu przemysłowego na kredyt z dnia 26 January 1948 i 29 June 1950 [Protocol on the introduction of partial changes to the Agreements on the supply of industrial equipment to Poland on credit dated 26 January 1948 and 29 June 1950]	28 August 1953		M	T
Protokół dodatkowy do porozumienia o współpracy między Komitetem do spraw Radia przy Radzie Ministrów ZSRR i Polskim Radiem z dnia 22 października 1949 r. [Additional Protocol to the Agreement on cooperation between the Radio Committee under the Council of Ministers of the USSR and Polish Radio dated 22 October 1949]	5 September 1953			T
Porozumienie w formie wymiany not w sprawie porządku obsługiwania i zaopatrywania w porcie Murmańsk polskich statków rybackich prowadzących połowy na morzu Barentsa [Agreement in the form of exchanging notes regarding the order of servicing and supplying Polish fishing vessels operating in the Barents Sea at the port of Murmansk]	10 October 1953		T	T
Protokół o wygaśnięciu Umowy między Polskim Tymczasowym Rządem Jedności Narodowej i Rządem ZSRR o wynagrodzeniu szkód wyrządzonych przez okupację niemiecką z dnia 16 August 1945 i Protokołu do tej umowy z dnia 05 March 1947 [Protocol on the expiration of the Agreement between the Polish Temporary Government of National Unity and the Government of the USSR regarding compensation for damages caused by the German occupation dated 16 August 1945 and the Protocol to this Agreement dated 5 March 1947]	25 November 1953		T	

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa pomiędzy MON PRL a Ambasadą ZSRR w sprawie przekazania przez MON PRL i przejęcie przez Ambasadę ZSRR w PRL w bezterminowe i nieodpłatne użytkowanie szkoły średniej [Agreement between the Ministry of National Defence of the PRL and the Embassy of the USSR regarding the transfer by the Ministry of National Defence of the PRL and the assumption by the Embassy of the USSR in the PRL of indefinite and gratuitous use of a secondary school]	15 December 1953		T	
Protokół dotyczący Umów o dostawach do Polski sprzętu przemysłowego na kredyt z dnia 26 January 1948 i 29 June 1950 [Protocol concerning the Agreements on the supply of industrial equipment to Poland on credit dated 26 January 1948 and 29 June 1950]	18 December 1953		M	T
Protokół o wzajemnych dostawach towarów w 1954 roku [Protocol on mutual supplies of goods in the year 1954]	11 February 1954			T
Protokół o dostawie do Polski 100 tys. ton pszenicy w pierwszym półroczu 1954 [Protocol on the delivery of 100,000 tonnes of wheat to Poland in the first half of 1954]	11 February 1954			T
Protokół dotyczący „Przepisów o przewozach wojskowych dla wojsk radzieckich na kolejach PRL" [Protocol regarding the "Regulations on military transportation for Soviet Forces on the railways of the PRL"]	17 April 1954		T	
Umowa między Rządem PRL a Rządem ZSRR o dostawach statków z Polski do ZSRR w latach 1956-1960 [Agreement between the Government of the PRL and the Government of the USSR on the supply of ships from Poland to the USSR in the period 1956–1960]	23 September 1954		M	T
Umowa między Rządem PRL a Rządem ZSRR o ustanowieniu regularnej komunikacji lotniczej między Polską a ZSRR (+ Protokół) [Agreement between the Government of the PRL and the Government of the USSR on establishing regular air communication between Poland and the USSR (+ Protocol)]	18 February 1955		T	T
Protokół o wzajemnych dostawach towarów w 1955 roku [Protocol on mutual supplies of goods in the year 1955]	25 February 1955			T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Porozumienie w sprawie udzielenia przez ZSRR pomocy PRL w zakresie rozwoju badań w dziedzinie fizyki jądra atomowego i wykorzystania energii atomowej dla potrzeb gospodarki narodowej [Agreement on the provision of assistance by the USSR to the PRL in the development of research in the field of nuclear physics and the use of atomic energy for the needs of the national economy]	23 April 1955		T	T
Protokół o nieodpłatnym przekazaniu przez rząd ZSRR rządowi PRL Pałacu Kultury i Nauki w Warszawie [Protocol on the gratuitous transfer by the Government of the USSR to the Government of the PRL of the Palace of Culture and Science in Warsaw]	21 July 1955		M	T
Protokół o wzajemnych dostawach towarów w 1956 roku [Protocol on mutual supplies of goods in the year 1956]	8 February 1956			T
Umowa o utworzeniu Zjednoczonego Instytutu Badań Jądrowych, podpisana w Moskwie 26 marca 1956 r. [Agreement on the establishment of the United Institute for Nuclear Research, signed in Moscow on 26 March 1956]	26 March 1956			T
Umowa o współpracy kulturalnej między PRL a ZSRR [Agreement on cultural cooperation between the PRL and the USSR]	30 June 1956	Dz.U. 1957.16.83	M	T
Umowa w sprawie udzielenia Polsce przez ZSRR pomocy technicznej w budowie zakładów przemysłowych [Agreement on the provision of technical assistance by the USSR to Poland in the construction of industrial plants]	11 July 1956			T
Umowa w sprawie udzielenia Polsce przez ZSRR pomocy technicznej w rozbudowie kombinatu „Huta im. Lenina" [Agreement on the provision of technical assistance by the USSR to Poland in the expansion of the Lenin Steelworks complex]	11 July 1956			T
Protokół w sprawie przekazania przez władze radzieckie rządowi PRL dzieł malarstwa, grafiki, rzeźby i sztuki użytkowej pochodzących z polskich muzeów [Protocol regarding the transfer by Soviet authorities to the government of the PRL of paintings, graphics, sculptures and applied art originating from Polish museums]	3 September 1956			T
Protokół w sprawie udzielenia Polsce pomocy gospodarczej przez Związek Radziecki [Protocol on the Soviet Union providing economic assistance to Poland]	18 September 1956			M

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Rządem PRL a Rządem ZSRR o współpracy w budowie zakładów produkcji betonu komórkowego w ZSRR [Agreement between the Government of the PRL and the Government of the USSR on cooperation in the construction of aerated concrete production plants in the USSR]	11 October 1956			T
Porozumienie między Rządem PRL a Rządem NRD i Rządem ZSRR o współpracy w dziedzinie ratowania życia ludzkiego oraz niesienia pomocy statkom morskim i powietrznym potrzebującym pomocy lub ratunku na Morzu Bałtyckim. Protokół między Służbami Ratowniczymi PRL, NRD i ZSRR o utrzymywaniu łączności w związku z ratowaniem życia ludzkiego oraz niesieniem pomocy statkom morskim i powietrznym, potrzebującym pomocy lub ratunku na Morzu Bałtyckim [Agreement between the Government of the PRL, the Government of the German Democratic Republic and the Government of the USSR on cooperation in the field of saving human lives and providing assistance to ships and aircraft in need of assistance or rescue in the Baltic Sea. Protocol between the Rescue Services of the PRL, the GDR and the USSR on maintaining communication in connection with saving human lives and providing assistance to ships and aircraft in need of assistance or rescue in the Baltic Sea]	12 December 1956		T	T
Umowa między Rządem PRL a Rządem ZSRR o statusie prawnym wojsk radzieckich czasowo stacjonowanych w Polsce [Agreement between the Government of the PRL and the Government of the USSR on the legal status of Soviet troops temporarily stationed in Poland]	17 December 1956	Dz.U. 1957.29.127	T	T
Porozumienie o współpracy kulturalnej w 1957 roku [Agreement on cultural cooperation in 1957]	6 February 1957			M
Umowa między PRL a ZSRR o wytyczeniu istniejącej polsko-radzieckiej granicy państwowej w części przylegającej do Morza Bałtyckiego [Agreement between the PRL and the USSR on delineating the existing Polish–Soviet state border in the part adjacent to the Baltic Sea]	5 March 1957	Dz.U. 1958.76.386	T	T
Umowa między Rządem PRL a Rządem ZSRR w sprawie terminu i trybu dalszej repatriacji z ZSRR osób narodowości polskiej [Agreement between the Government of the PRL and the Government of the USSR regarding the timing and procedure for further repatriation from the USSR of persons of Polish nationality]	25 March 1957	Dz.U. 1957.47.222	T	T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Protokół o wzajemnych dostawach towarów w 1957 roku [Protocol on mutual supplies of goods in 1957]	9 April 1957			T
Protokół między PRL, ZSRR i NRD w sprawie rozszerzenia udziału transportu morskiego i przewozu ładunków na drogach wewnętrznych [Protocol between the PRL, the USSR and the GDR regarding the expansion of maritime transport participation and cargo transportation on internal roads]	22 May 1957			M
Umowa o współpracy w dziedzinie radiofonii między Polskim Radio a Komitetem Informacji Radiowej przy Radzie Ministrów ZSRR [Agreement on cooperation in the field of radio broadcasting between Polish Radio and the Committee for Radio Information under the Council of Ministers of the USSR]	22 June 1957		M	T
Protokół dodatkowy do porozumienia o współpracy między Polskim Radio a Komitetem Informacji Radiowej przy Radzie Ministrów ZSRR [Additional Protocol to the Agreement on cooperation between Polish Radio and the Committee for Radio Information under the Council of Ministers of the USSR]	22 June 1957			T
Porozumienie między Rządem PRL a Rządem ZSRR o wzajemnej wymianie studentów i aspirantów wyższych cywilnych uczelni i osób kierowanych na specjalizacje naukowe [Agreement between the Government of the PRL and the Government of the USSR on mutual exchange of students and aspirants of civilian higher educational institutions and individuals following scientific specialisations]	23 August 1957		T	T
Porozumienie między Rządem PRL a Rządem ZSRR o wzajemnej pomocy prawnej w sprawach związanych z czasowym stacjonowaniem wojsk radzieckich w Polsce [Agreement between the Government of the PRL and the Government of the USSR on mutual legal assistance in matters related to the temporary stationing of Soviet troops in Poland]	26 October 1957	Dz.U. 1958.37.167	T	
Umowa o naukowej współpracy między Polską Akademią Nauk i Akademię Nauk ZSRR [Agreement on scientific cooperation between the Polish Academy of Sciences and the Academy of Sciences of the USSR]	21 December 1957		T	T
Umowa między PRL a ZSRR o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, rodzinnych i karnych [Agreement between the PRL and the USSR on legal assistance and legal relations in civil, family and criminal matters]	28 December 1957	Dz.U. 1958.32.147	T	T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Konwencja konsularna między PRL a ZSRR [Consular Convention between the PRL and the USSR]	21 January 1958	Dz.U. 1958.32.145	T	T
Konwencja w sprawie uregulowania obywatelstwa osób o podwójnym obywatelstwie [Convention on the regulation of citizenship for persons with dual citizenship]	21 January 1958	Dz.U. 1958.32.143		T
Umowa między Rządem PRL a Rządem ZSRR o wzajemnych dostawach towarów na lata 1958-1960 [Agreement between the Government of the PRL and the Government of the USSR on mutual supplies of goods for the period 1958–1960]	4 February 1958		T	T
Protokół nr 1 do umowy między Rządem PRL a Rządem ZSRR o wzajemnych dostawach towarów na lata 1958-1960 [Protocol No. 1 to the Agreement between the Government of the PRL and the Government of the USSR on mutual deliveries of goods for the period 1958–1960]	4 February 1958			T
Umowa między Rządem PRL a Rządem ZSRR o warunkach delegowania polskich specjalistów do ZSRR oraz radzieckich specjalistów do PRL w celu udzielania pomocy technicznej oraz innych usług [Agreement between the Government of the PRL and the Government of the USSR on the conditions for the delegation of Polish specialists to the USSR and Soviet specialists to the PRL for the purpose of providing technical assistance and other services]	5 February 1958		T	
Protokół pomiędzy Rządem PRL a Rządem ZSRR o rozgraniczeniu polskich i radzieckich wód terytorialnych w Zatoce Gdańskiej Morza Bałtyckiego [Protocol between the Government of the PRL and the Government of the USSR on the delimitation of Polish and Soviet territorial waters in the Gdańsk Bay of the Baltic Sea]	18 March 1958	Dz.U. 1958.76.386	T	T
Protokół z rokowań miedzy Rządową Delegacją PRL a Rządową Delegacją ZSRR w sprawie wzajemnych dostaw podstawowych towarów w latach 1961-1965 [Protocol of the negotiations between the Government Delegation of the PRL and the Government Delegation of the USSR regarding mutual supplies of basic goods for the period 1961–1965]	9 April 1958		T	M
Porozumienie między Rządem PRL a Rządem ZSRR o trybie i warunkach korzystania przez wojska radzieckie czasowo stacjonowane w Polsce z różnego rodzaju obiektów i usług [Agreement between the Government of the PRL and the Government of the USSR on the procedures and conditions for the use of various facilities and services by temporarily stationed Soviet troops in Poland]	18 June 1958		M	

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Protokół między Rządem PRL a Rządem ZSRR w sprawie wprowadzenia w życie Przepisów o wojskowych przewozach na kolejach PRL dla wojsk radzieckich czasowo stacjonowanych w Polsce [Protocol between the Government of the PRL and the Government of the USSR regarding the implementation of the Regulations on Military Transport on the Railways of the PRL for the Soviet troops temporarily stationed in Poland]	18 June 1958		M	
Protokół w sprawie dodatkowych wzajemnych dostaw podstawowych towarów PRL i ZSRR w latach 1961-65 ponad dostawy towarów przewidzianych w Protokole z 09 April 1958 [Protocol regarding additional mutual supplies of basic goods between the PRL and the USSR for 1961–1965, in addition to the supplies of goods provided for in the Protocol of 9 April 1958]	1 August 1958		T	
Protokół w sprawie dodatkowych wzajemnych dostaw towarów między PRL a ZSRR na rok 1958 [Protocol regarding additional mutual supplies of goods between the PRL and the USSR for the year 1958]	5 August 1958			T
Umowa między Rządem PRL a Rządem ZSRR w sprawie udzielenia Polsce przez Związek Radziecki pomocy technicznej przy budowie zakładu przeróbki ropy naftowej [Agreement between the Government of the PRL and the Government of the USSR on the provision of technical assistance by the Soviet Union to Poland in the construction of an oil refinery]	23 August 1958			T
Protokół nr 2 do umowy między Rządem PRL a Rządem ZSRR o wzajemnych dostawach towarów na lata 1958-1960 [Protocol No. 2 to the Agreement between the Government of the PRL and the Government of the USSR on mutual supplies of goods for the period 1958-1960]	21 November 1958			T
Protokół w sprawie przekazania Polsce przez rząd ZSRR radzieckiej stacji naukowo-badawczej Oaza na Antarktydzie [Protocol on the transfer of the Soviet scientific research station Oaza in Antarctica to Poland by the Government of the USSR]	21 December 1958		M	T
Plan współpracy kulturalnej i naukowej między PRL a ZSRR na rok 1959 [Plan of cultural and scientific cooperation between the PRL and the USSR for the year 1959]	26 January 1959			M

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Rządem PRL a Rządem ZSRR o udzieleniu przez ZSRR pomocy technicznej PRL w rozwoju przemysłu naftowego, gazowego oraz kopalnictwa rud miedzi [Agreement between the Government of the PRL and the Government of the USSR on the provision of technical assistance by the USSR to the PRL in the development of the oil, gas and copper mining industries]	3 March 1959		T	T
Porozumienie między Rządem PRL a Rządem ZSRR w sprawie współdziałania przy budowie linii kablowej w Polsce [Agreement between the Government of the PRL and the Government of the USSR on cooperation in the construction of a cable line in Poland]	3 April 1959			M
Protokół w sprawie dodatkowych dostaw towarów z PRL do ZSRR w roku 1959 [Protocol on additional supplies of goods from the PRL to the USSR in 1959]	6 May 1959			T
Protokół nr 3 do umowy między Rządem PRL a Rządem ZSRR o wzajemnych dostawach towarów na lata 1958-1960 [Protocol No. 3 to the Agreement between the Government of the PRL and the Government of the USSR on mutual supplies of goods for the period 1958–1960]	6 November 1959			T
Umowa między rządami PRL, ZSRR I NRD w sprawie budowy dalekosiężnego rurociągu ze Związku Radzieckiego do Polski i Niemieckiej Republiki Demokratycznej [Agreement between the Governments of the PRL, the USSR and the GDR regarding the construction of a long-distance pipeline from the Soviet Union to Poland and the German Democratic Republic]	18 December 1959			T
Plan współpracy kulturalnej i naukowej między PRL a ZSRR na rok 1960 [Plan of cultural and scientific cooperation between the PRL and the USSR for the year 1960]	11 January 1960			M
Porozumienie między Rządem PRL a Rządem ZSRR o współpracy w sprawach celnych [Agreement between the Government of the PRL and the Government of the USSR on customs cooperation]	19 February 1960		T	T
Umowa między Rządem PRL a Rządem ZSRR o wzajemnych dostawach towarów w latach 1961-1965 [Agreement between the Government of the PRL and the Government of the USSR on mutual supplies of goods for the period 1961–1965]	10 March 1960		T	T

Title	Date	Publication in Official Journal[13]	ITB MFA	D & M
Umowa między Rządem PRL a Rządem ZSRR w sprawie udzielenia przez ZSRR PRL pomocy technicznej w budowie zakładów przemysłowych [Agreement between the Government of the PRL and the Government of the USSR on the Provision of technical assistance by the USSR to the PRL in the construction of industrial plants]	10 March 1960		T	T
Umowa między Rządem PRL a Rządem ZSRR o zwiększeniu dostaw gazu ziemnego z ZSRR do Polski [Agreement between the Government of the PRL and the Government of the USSR on increasing natural gas supplies from the USSR to Poland]	29 September 1960			T
Umowa między PRL, ZSRR i NRD o żegludze towarowej na wodach wewnętrznych [Agreement between the PRL, the USSR and the GDR on inland waterway freight shipping]	28 November 1960			M
Protokół nr 1 do umowy między Rządem PRL a Rządem ZSRR o wzajemnych dostawach towarów na lata 1961-1965 [Protocol No. 1 to the Agreement between the Government of the PRL and the Government of the USSR on mutual supplies of goods for the period 1961–1965]	3 December 1960			T

4. QUANTITATIVE STUDY

As can be observed, information was found during the research on 147 bilateral agreements between Poland and the Soviet Union between 1944 and 1960. This does not mean that there were no other international agreements; the study is limited to those documents which were found in the research. As we indicated above, there is no complete and exhaustive register of all international agreements concluded by Poland. Even the ITB MFA does not offer a comprehensive set of international agreements, even though one would suppose that it is the only ministry with access to all of them.

Out of the 147 agreements covered by the study:

- only 16 agreements were published in the Journal of Laws[16] (this constitutes less than 11% of those covered by the study)
- 54 were available in the ITB MFA in the form of both a mention and a text (slightly over 36%), and an additional 30 are mentioned in the

[16] One agreement was published in the Official Journal of the Ministry of Posts and Telegraphs, which was obviously inconsistent with the applicable regulations.

database but without a text (this gives a total of 57% of the agreements covered by the study)
- 109 agreements were published in the publication "Documents and Materials on the History of Polish–Soviet Relations" (slightly over 74%), and an additional 10 were mentioned in this publication (yielding a total of almost 81% of the agreements covered by the study).

The research indicates that currently there is no complete source of information on bilateral agreements concluded between Poland and the USSR in the period 1944–1960. Considering that the number of agreements published in the Journal of Laws is certain, and that the number of all bilateral agreements concluded with the USSR in the study period was likely higher than we were able to determine, it can be estimated that in the period in question at most 11% of bilateral agreements concluded between Poland and the USSR were published in the manner prescribed by the applicable regulations.

5. RESULTS OF THE LACK OF PUBLICATION

The research indicates that the obligation to publish international agreements in the appropriate official journal was systemically violated during the study period. Negligence in this area largely exists to this day. There are also no official registers or catalogues from which complete information about international agreements can be obtained. In domestic law, such negligence may be assessed as a breach of duty by the government administration. This means that neither citizens nor courts and other bodies applying and creating law are able to properly reproduce the applicable legal status, and that the rights under these agreements cannot be effectively invoked.

The same was true with regard to the rights concerning property left behind by persons displaced under the so-called "republican agreements", i.e. three agreements between the Polish Committee of National Liberation (PKWN) and the Governments of the Ukrainian, Belarusian and Lithuanian Soviet Socialist Republics on the evacuation of Polish citizens from the territory of the USSR in September 1944. These agreements were never published in the Polish Journal of Laws, and for decades interested parties were deprived of the possibility of pursuing claims arising from them. As early as 1961, the Supreme Court stated that "[t]he Agreement between the Government of Poland and the Governments of the Ukrainian SSR and the Belarusian SSR on granting to repatriates who left their property on the territory of these Soviet Republics an appropriate equivalent in Poland, and which

the appellant refers to, cannot constitute a source of the claimant's subjective rights, since this agreement was neither ratified nor published in Poland."[17]

When, 40 years later, the case came before the Polish Constitutional Tribunal, it ruled that "neither the so-called republican agreements nor subsequent unpublished international agreements on the consequences of border changes create per se a basis for the emergence – on the part of persons subject to repatriation – of a subjective right to compensation" precisely because "both in the period preceding the adoption of the 1952 Constitution (1944–1952), in which the provisions of the 1921 March Constitution applied in this respect, and in the period of the 1952 Constitution, finally against the background of the constitutional provisions after 1989 and the new Constitution of 1997, the minimum basis for the application in internal relations of the norms contained in international agreements was their ratification and publication in the Journal of Laws."[18]

At the international level, the consequences of failing to publish an act and to ensure official promulgation can be much more serious. In the absence of information about published agreements, it is not possible to sufficiently and completely determine the obligations between states nor to reconstruct the relations binding them. It is also impossible to clearly determine which international agreements are still in force between countries, which are invalid and which have expired. These are key issues in the event of disasters or other incidents in which existing obligations must be immediately reconstructed, as clearly reflected in the example of the Smolensk catastrophe and the existing but unpublished 1993 agreement.

CONCLUSIONS

The Vienna Convention on the Law of Treaties,[19] to which Poland joined only in 1990, states directly in the preamble that "principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized", confirming that a state which has entered into the agreement will perform it in good faith, and therefore will also effectively publish it. The Convention also mentions the registration and publication of treaties (Art. 80), pointing out that "[t]reaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication." The obligation to register the agreement with the United Nations and its simultaneous publication

[17] Polish Supreme Court, Decision of 12 July 1961, II CZ 70/61.

[18] Polish Constitutional Tribunal, judgment of 19 December 2002, K 33/02. For more, *see* Frankowska, *supra* note 8, pp. 543 et seq.

[19] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

in an official national publication strengthens the chances for properly reproducing the state's obligations as they currently stand. It is therefore necessary to recommend a radical change in the current practice and an attempt to supplement the existing databases as well as the publication of all "overdue" international agreements (even departmental ones). Exceptions to the principle of general publication could apply to contracts with confidentiality clauses alone, although the authors support the general publication and therefore openness of all international agreements. The Ministry of Foreign Affairs should also, as much as possible, supplement the ITB MFA or rebuild it into a tool that will allow for efficient reconstruction of the scope of international agreements binding on Poland. The research – conducted on a very limited subject: only bilateral agreements between Poland and the USSR – leads to the pessimistic conclusion that in Poland it is customary practice to refrain from publishing an international agreement in the Journal of Laws and that citizens do not have at their disposal a single official or unofficial source to reconstruct Poland's current obligations, which may indeed directly concern them.

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The Agreement on the principles of mutual air traffic of military aircraft of the Republic of Poland and the Russian Federation in the airspace of both states, drawn up in Moscow on 14 December 1993, has not been published in any official journal to date.

BOOK REVIEWS

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*Katalin Sulyok**

Lukasz Gruszczynski, Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary, 2nd ed.,* Oxford University Press, Oxford: 2023, pp. 384

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1. INTRODUCTION

This book review provides a brief overview of the comprehensive commentary on the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) written by Lukasz Gruszczynski. The volume was published by Oxford University Press in 2023, and is entitled "The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary." This is the second edition of the commentary, which is based on the first version written by Joanne Scott in 2007.[1] This second edition is a renewed and extended version of its predecessor, which not only comments the numerous SPS-related disputes decided between 2007 and 2023, but also provides new analyses concerning regional SPS agreements outside the scope of the SPS Agreements (Chapter 10), and with regard to provisional measures (Chapter 4).

The adjudicatory practice pertaining to the SPS Agreement that accumulated after 2007 is undoubtedly ripe enough to warrant an updated commentary. Lukasz Gruszczynski navigates his readers through this highly technical field in a clear and concise manner, with an analysis which remains pragmatic while also being richly referenced with theoretical accounts of scholarly works. The depth of the commentary is owing to the author's expertise in WTO law, which is grounded in his working experience at the WTO, and is marked by his numerous scholarly

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[1] J. Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures. A Commentary*, Oxford University Press, Oxford: 2007.

publications not only on the SPS Agreement,[2] but also on further aspects of WTO law[3], as well as other equally science-heavy aspects of international trade law, such as tobacco control regulation,[4] and the wider issue of how international courts set their standards of review in cases involving technical expertise.[5]

The SPS Agreement sets out detailed rules for introducing so-called SPS measures that are specific measures sought to protect human, animal, and plant life.[6] The treaty is in fact a fascinating instrument, which carries some broader lessons also outside its narrow context of WTO law, for many reasons. First, the Agreement sets forth strict procedures and highly technical rules to guard against protectionist measures. Its narrow focus notwithstanding, the regulatory approach of the Agreement and the decade-long adjudicatory practice concerning its potential, as well as the limitations on protecting human, animal, plant life or health against the forces of international trade may provide important lessons for the ever-more resounding voices that recently demand a deep reform of international trade law to better "align with nature and societies"[7] and to adequately facilitate a world-wide transition to a net-zero society.

Second, the SPS Agreement serves as a symbol of permanence at a time when the forces undermining multilateralism have challenged the world of international trade law and paralyzed the functioning of the Appellate Body. Curiously, as Gruszczynski

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[2] L. Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement*, Oxford University Press, Oxford: 2010; L. Gruszczynski, *How Deep Should We Go – Searching for an Appropriate Standard of Review in the SPS Cases*, 2 European Journal of Risk Regulation 111 (2011), pp. 111–114.

[3] L. Gruszczynski, *Science and the Settlement of Trade Disputes in the World Trade Organization*, in: B. Mercurio, N. Kuei-Jung (eds.), *Science and Technology in International Economic Law: Balancing Competing Interests*, Routledge, London: 2014, pp. 11–29; L. Gruszczynski, *Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration*, in: L. Gruszczynski, W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014, pp. 152–172; L. Gruszczynski, *The Role of Experts in Environmental and Health Related Trade Disputes in the WTO: Deconstructing Decision-Making Processes*, in: M. Ambrus et al. (eds.), *Irrelevant, Advisors or Decision-Makers? The Role of 'Experts' in International Decision-Making*, Cambridge University Press, Cambridge: 2014, pp. 1–16.

[4] L. Gruszczynski, *Saving Regulatory Space for States through the Standard of Review: A Case Study of Tobacco Control-Related International Disputes*, in: G. Kajtar, B. Cali, M. Milanovic (eds.), *Secondary Rules of Primary Importance – Attribution, Causality, Standard of Review and Evidentiary Rules in International Law,* Oxford University Press, Oxford: 2021, pp. 65–82; L. Gruszczynski, M. Melillo, *The FCTC Dilemma on Heated Tobacco Products*, 16 Globalization and Health (2020), pp. 1–13; L. Gruszczynski (ed.), *The Regulation of E-Cigarettes: International, European and National Challenges*, Edward Elgar Publishing, Cheltenham: 2019.

[5] L. Gruszczynski, W. Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, Oxford University Press, Oxford: 2014.

[6] For the exact definition of SPS measures, *see* Annex A(1) of SPS Agreement.

[7] E. Cima, D.C. Esty, *Making International Trade Work for Sustainable Development: Toward a New WTO Framework for Subsidies*, 27 Journal of International Economic Law 1 (2024), pp. 1–17.

also highlights, the SPS Agreement has generated abundant case practice even despite these turbulences, and, thus it may be seen as an example of how multilateral treaty regimes can function despite attacks against the very system that created them. Finally, and perhaps most importantly, as will be elaborated on in Section 3 in more detail the SPS case-law stands out as one of the most science-intensive adjudicatory practices in the international arena. Therefore, it provides important lessons on how legally-trained adjudicators can use and interpret the complex technical evidence put before them, which is becoming an imperative for judicial bodies in a growing number of legal contexts, ranging from climate litigation to international criminal law.

Following these introductory points, Section 2 of this review will overview the main contents of the chapters, and Section 3 will comment on the uniquely science-intensive legal architecture of the SPS Agreement and its related adjudicatory practice, which has broader relevance even outside the scope of WTO law.

2. AN OVERVIEW OF THE CHAPTERS

Chapter 1 provides an introductory overview of the SPS Agreement by analysing, *inter alia*, the concept of SPS measures and the interrelationship between the SPS Agreement and the GATT, as well as the provisions regulating the obligation of Members to implement the Agreement under Art. 13, and their right to set their own appropriate level of protection (ALOP).

Chapter 2 concerns the cooperative regulation in the WTO and comments on the multifaceted nature of the SPS Committee, which performs both a dispute resolution and compliance function and enhances the external accountability of Member States. The SPS Committee, thus, has a two-fold task, namely to serve as a platform for information exchange and peer review, and to perform a norm elaboration function. Gruszczynski argues that there is more to WTO law than the widely known WTO panel and Appellate Body case law, and hence alerts both practitioners and scholars to the thus far largely overlooked aspects of the operation of the Agreement. The chapter points out the real life factors that influence the standard setting process in WTO law, and shows the ways in which the institutionalized cooperation makes a difference in achieving compliance.

Chapter 3 examines the inextricable – and legally precisely circumscribed – linkage between rules of the SPS Agreement and natural science evidence. Such a widespread use of science as a benchmark of conformity with the Agreement in fact represents a departure from the approach used under the GATT, which has been focusing on the discriminatory nature of trade measures. Chapter 3 comments on the factual and normative aspects of numerous provisions of the SPS Agreement which incorporate essentially scientific notions in the context of specifying States' obligations under the

Agreement. The legal qualifiers of a "risk assessment", the "sufficiency of scientific evidence" and the "rational relationship between the measure and the risk assessment" are but a few examples. This chapter includes a separate and detailed discussion of the evidentiary issues that arise in SPS disputes, such as the burden of proof, the standard of review, and the modalities of using scientific experts. Notably, WTO panels are explicitly encouraged by the Agreement to seek expert advice and have the power to request an advisory opinion from an expert review group. The chapter also details the reach of relying on minority scientific opinions in SPS disputes.

Chapter 4 is dedicated to dissecting the provisional measures issued under the SPS Agreement. A separate section deals with the reach of the precautionary principle in the context of instituting provisional measures, in light of the disputes the application of this principle has generated before WTO panels and the Appellate Body. Chapter 5 sets out additional obligations, such as consistency, weak proportionality (i.e. requiring least-trade-restrictive means), equivalence, and regionalization, in relation to which the SPS Committee has announced specific guidelines.

Chapter 6 addresses the transparency obligations, which are of fundamental importance for the operation of the SPS Agreement and which place a duty on Members to disseminate information and additionally impose a burden on them to justify their regulatory steps. Chapter 7 comments on control, inspection and approval procedures, including but not limited to procedures for sampling, testing, and certification. The Commentary explains how these procedural requirements also function as a core requirement in checking compliance with the Agreement.

Chapter 8 concerns the role of international standards in setting SPS measures. Notably, the SPS Agreement seeks to promote the harmonization of SPS measures by allowing Members to deviate from international standards, so long as they justify their measures with reference to these standards. Chapter 9 addresses the situation of developing countries when it comes to complying with the Agreement. The chapter reviews the special provisions applicable to developing countries and concludes that despite the often-loud voices of discontent surrounding the Agreement, on balance its rules come across as "a friend to the developing world."

Finally, Chapter 10, which is a new part compared to the first edition, puts the Agreement into a comparative perspective and examines how SPS requirements are provided for under other regional free trade agreements. By dissecting the similarities as well as divergencies between the SPS Agreement and other regional trade regimes, Gruszczynski explains the normative complexity of global SPS governance.

3. SOME ISSUES OF BROADER SIGNIFICANCE ARISING FROM THE SPS AGREEMENT: SCIENCE MEETS ADJUDICATION

The omnipresence of scientific references is one of the hallmark features of SPS law. Scientific requirements in the SPS Agreement function as an express mechanism guarding against those SPS measures that serve as disguised protectionism. The Agreement sets several scientific criteria with the objective of limiting the impact of such measures on international trade. To name just a few, Art. 5.1 of SPS Agreement requires that SPS measures "be based on" a risk assessment which, according to Art. 5.2, shall consider the "available scientific evidence". Art. 5.1 mandates that such measures are to be applied only to the extent that (i) they are necessary to protect human, animal or plant life; (ii) are based on "scientific principles"; and (iii) are not maintained without "sufficient scientific evidence". Art. 5.7 creates a possibility for Members to act even in cases where relevant scientific evidence is insufficient to perform risk assessment, in which cases they may adopt provisional SPS measures on the basis of "available pertinent information."

The interpretation of these science-intensive provisions requires equally science-heavy arguments from litigants and WTO panels alike. It is no wonder then that the WTO dispute settlement system is seen as the most science-intensive among international fora.[8] The role of scientific knowledge in SPS disputes is subject to continuous and sustained attention in the scholarly commentary.[9] Gruszczynski's commentary explores in great detail the interlinkages between scientific knowledge, regulatory autonomy, and the scope of judicial review. It provides an in-depth assessment of various legal situations where the "scientific" is inextricably entangled with the "normative" in risk regulatory decisions. The practice concerning the SPS Agreement, and hence the Commentary under review, are therefore highly useful resources for both scholars and practitioners who are preoccupied with the use of complex technical evidence in socio-legal settings.

Using scientific rationality in a legal context gives rise to a host of complications, which are also featured in this Commentary. The first issue lies in the standard of review, which encapsulates how legal adjudicators balance their inquiry on the law-science interface. Gruszczynski closely examines the nuanced, and changing,

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[8] K. Sulyok, *Science and Judicial Reasoning – The Legitimacy of International Environmental Adjudication*, Cambridge University Press, Cambridge: 2021.

[9] C.-F. Lin, Y. Naiki, *An SPS Dispute without Science? The "Fukushima" Case and the Dichotomy of Science/Non-Science Obligations under the SPS Agreement*, 33 European Journal of International Law 651 (2022), pp. 651–678; E. Reid, *Risk Assessment, Science and Deliberation: Managing Regulatory Diversity under the SPS Agreement*, 4 European Journal of Risk Regulation 535 (2012), pp. 535–544.

standards of review applied to scrutinizing the parties' science-based arguments, and depicts an overall trend shifting towards a less intrusive standard.

The second complication concerns the finality of SPS measures, which is generally challenged by the progress of scientific research, which may render previously prevailing scientific positions outdated. Chapter 3 therefore addresses the issue of temporality and explores to what extent Members have an obligation under the SPS Agreement to keep track of the newest insights from scientific research and update their SPS measures in light of the state-of-the-art scientific evidence.

Finally, Gruszczynski also pays attention to the normative aspects of reviewing SPS measures. Notably, the assessment of a WTO panel is not dictated by science. After all, while risk assessment decisions are informed by scientific evidence, such measures must also answer to a host of societal considerations and, thus, they ultimately constitute value judgments. As the Commentary stresses, WTO panels allow Member States to retain a good measure of regulatory autonomy in setting their policies regarding such sensitive matters.

For all these reasons, Gruszczynski's commentary is a highly recommended reading and would be an essential addition to the libraries of practitioners working with WTO law as well as scholars who are interested in international trade law, or for that matter in any other areas of law where technical expertise is a prerequisite to the proper application of legal rules.

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Aleksandra Mężykowska, Anna Młynarska-Sobaczewska, *Persuasion and Legal Reasoning in the ECtHR Rulings Balancing Impossible Demands,* Routledge, Oxon and New York: 2023, pp. 230

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Legal reasoning is a subject of interest in both the theory and practice of law. Juristocracy – understood as an evolution through which constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries[1] – is accompanied by the constant adaptation of the argumentative tools used by the courts to justify their solutions. The strength of justice depends on how effectively judges convince us of the fairness of the solutions they adopt. This strength is not only based on the constitutional/legal recognition of their authority and competence, but also on the persuasive force of their arguments. However, the tools that judges use in constructing their reasoning are very diverse, and sometimes unconventional – in the sense that they move away from the classic methods of legal interpretation. This is natural, because the judge is not and cannot be imprisoned in an ivory tower, away from the tumult of life reflected in the continuous evolution of the law. But just as the legislator faces permanent challenges in identifying the most appropriate legal "garment" for complex realities, having to reconcile various moral, religious, and historical sensitivities, the same dilemma (perhaps to an even greater extent) faces the judge. The philosopher Plato emphasized the importance of motivating the legislative approach, showing that in all discussions and, in general, wherever the voice intervenes, there are introductions and somewhat preparatory exercises; "the purpose of the legislator in this preamble, which he tries to convince, is to prepare him to whom the law is addressed to willingly receive the prescription, meaning the law itself. Any legislation work must be preceded by the proper pre-

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[1] R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Harvard University Press, New Haven: 2004, p. 1.

lude (exposition of reasons)". Furthermore, the individual who interprets the law and its application must persuade those who approach them that they are the final recourse in the quest for justice.

From the perspective of the importance of legal reasoning, the book by professors Aleksandra Mężykowska and Anna Młynarska-Sobaczewska addresses a crucial theme in itself. What's particularly interesting is their unique perspective, which focuses on a jurisdictional framework and sensitive areas that highlight the challenges judges face in their mission, and the solutions they come up with to make their arguments more convincing. Thus, the authors chose an international court, the European Court of Human Rights (ECHR), i.e. the "flagship" of the guarantee of fundamental rights at the regional level and, insofar as its jurisprudence is concerned, deals in areas that pose fundamental existential questions: the right to medically assisted procreation, abortion, euthanasia. By its very position at the intersection of so many European legislations and existing country profiles in the Council of Europe, the ECHR is a court for which the "art of persuasion" is vital. This being the case, the choices made by the authors are inspired, providing a rich area of analysis. Insofar as concerns the chosen fields, indeed they are among those with the greatest number of "unresolvable" problems in the light of current social and scientific debates. In such cases, the "art of persuasion" meets perhaps its greatest challenges, demonstrating yet again that nothing falls beyond the purview of judicial review and anything and everything is justiciable.[2]

The authors do not intend to "judge" neither the solutions of the Court, nor the methods of argumentation used, but rather provide us with a landscape as complete as possible of the various ways of reasoning. The selected cases serve to formulate answers to the research questions focused on the relationship between the known and frequently described tools and methods of interpretation and ways of reasoning which play the role of convincing all persons involved of the rightness of the issued decisions, and the possible hierarchy between them and/or regularity in their co-application. To answer these questions, an analysis of judicial reasoning in the examined cases was carried in order to determine the arguments the Court used and what patterns and categories can be identified in the reasoning. Since the cases concern goods protected at the highest level by law and follow cultural or religious dictates, and are fundamentally excluded from permissible human interference, it can be observed, as the authors emphasize, that the establishment of boundaries, or even the indication that they will not be drawn, eludes logical inferences based solely on legal norms. Viewed in this light, since "there are no universally successful solutions that can convince everyone", the ECHR's choice of methods and tech-

[2] A. Barak, Chief Justice of the Supreme Court of Israel (*Cf. ibidem*).

niques is fascinating. However, as it follows from the authors' conclusions, "the book also provides insight into something more than just reasoning in the Court's oeuvre", given the consequences of the judgments on the substance of rights and the direction of the development of the jurisprudence.

The book's structure follows the research intentions expressed in the introduction in a tight logic so that, although it is dense in terms of information, the book allows a facile approach. The book includes five chapters, preceded by an introduction and finalised with conclusions. The first chapter depicts the challenges of judicial reasoning and the second the ways of reasoning, thus orienting the reader to follow the analysis, properly structured into fields, in the three subsequent chapters dedicated to the art of argumentation in medically assisted procreation and surrogacy cases; abortion cases; and in end-of-life situations, including a comparative approach of the manner and intensity with which the European judges use the different types of arguments in the targeted areas.

Thus, insofar as regards *the challenges of judicial reasoning*, the authors mention both the nature of the court: "which operates in conditions of pluralism of values, has a composition that is ideologically and politically diverse, and is composed of judges representing various legal traditions and moral and social attitudes; the Court addresses its judgments to a wide range of people from all European States, which are, after all, even more profoundly diverse", as well as the subject of the cases: "the courts in general face a difficult task adjudicating cases that raise moral questions". In the general landscape of specific challenges, a distinct mention and analysis refers to *morality* and the difficulty of using this category by the courts. It is, of course, challenging to balance social, moral, or customary norms with the interests and rights of persons who wish and are (according to their judgment) entitled to decide about their own life or the life of another.

Insofar as the book is focused on the specific nature of certain arguments of an origin and character that transcend the legal order, we consider interesting the identification and characterization by the authors of some "key elements" from the perspective of the effectiveness of argumentation, meaning *recognition of who the reasoning is addressed to (audience)* and *commonplaces (starting points) of argumentation*.

From the perspective of the *audience*, and taking into account the specifics of the ECHR's position, the authors underline the importance of a "diligent and prudent examination of the limits of acceptability of the developments in the meaning of human rights under the Convention, [so] that the Court can avoid the risk that it turns into a purely academic church of human rights believers." With respect to the concept *of commonplaces of argumentation*, understood as "statements or formulations concerning values that are generally accepted and considered worthy of attention and protection", they are characterized as "the foundation which the

author of the reasoning must be aware of to have a chance of successful persuasion." The authors of the book thus distinguish several such commonplaces, but especially emphasise those deriving from the protection of the public interest, which in their opinion deserves particular attention and is problematic to attempt to define. Thus the authors draw attention to the concept of *vulnerable groups*, which is also analysed in the light of the consequences and the concept of *best interest*.

Regarding the *ways of reasonings*, the authors outline the concept of *argumentative tools*, distinguishing between several types of arguments. The first type refers to *authority*, meaning the external entity or environment in which the decision is made; the second category refers to *the interpretation of the text of the Convention*, seeking to demonstrate that the solution adopted derives from its content and the principles it recites; and the third group involves the *consequentialist arguments* (i.e. what consequences the decision will have not only for the parties involved, but also for the entire audience and community). Insofar as concerns the matter analysed, the authors distinguish "three main groups of arguments": referring to *authority* (external law sources; the margin of appreciation; relying on epistemic authority); *deontological* (based on incrementalism, proceduralisation and employing plasticity and the assimilation of concepts); and *teleological* (based on examination and assessment of secondary effects). Each of these types and subtypes of arguments are then characterised distinctly so that their use can then be traced in selected cases in each of the areas of analysis in an attempt to identify "argumentative patterns, devices, instruments or ways of argumentation" and the preference of the Court for one or another. The analysis of the ways of judicial reasoning is particularly relevant since the relationship between interpretative techniques and argumentative tools in ECHR judicial decisions, as well as the rhetoric and the rhetorical functions in its reasoning, are not significantly developed in the specialized literature.

In the chapter dedicated to the *ways of reasoning in medically assisted procreation and surrogacy cases*, the authors have selected cases that reveal, insofar as concerns the arguments referring to *authority*, "the intense search for an applicable standard". Moving on to the *deontological arguments*, it is specified *ab initio* that contrary to the deontological tools identified in the areas of abortion cases and end-of-life situations, in the field of medically assisted procreation the Court does not argue with the tool of plasticity and assimilation of notions. A large space in this regard is dedicated to the analysis of the *incrementalism*, used in this area to define and *de facto* extend the limits of the right to respect for private and family life under Art. 8 of the ECHR (the right to become parents and definition of embryo). Also, according to the authors' analysis, *proceduralisation* takes on various forms in decisions concerning medically assisted procreation, illustrating to some extent "how to avoid substantive review." Finally, insofar as concerns *teleological argumentation*, those based on an

examination and assessment of secondary effects are addressed, regarding the need to protect groups that deserve special attention. The conclusion after the analysis of the selected cases is that the ECHR's justification of interference on grounds other than morality leads to a situation in which the Court has the opportunity to avoid presenting its moral view of the issue under examination straightforwardly.

In the chapter dedicated to *ways of reasoning in abortion cases*, the analysis of the selected cases highlights both the extensive evolution of the arguments used and the use of specific tools of argumentation. Such specificity concerns, inter alia, the arguments referring to *authority.* According to the authors, in this field, the ECHR's argumentation makes extensive use of external assertions, and the instrument of margin of appreciation occupies a special place among them. Although auxiliary references to international law are also included, "this argument is not conclusive and is only used in a supplementary and indirect way." Thus, in arguments based on the authority of the codified law, a "pick and choose strategy" is identified, and arguments based on the margin of appreciation reflect an evolution of deference. Likewise, it is highlighted that the *deontological perspective* is particularly extensive, especially regarding *incrementalism* (rights of fetuses, pregnant women, and potential fathers), *proceduralisation,* and the *plasticity* of notions. Insofar as far as *teleological arguments* are concerned, the conclusion is that they "are completely absent."

The chapter dedicated to *ways of reasoning in end-of-life situations* starts from the idea according to which "dying has been institutionalized and professionalized more than ever before," requiring decisions on the part of both legislators and courts. Regarding the arguments used in the decisions, it is shown that references to external *authorities* play a considerable role. In its reasoning, the Court has often referred to the content of international documents addressing the legal and ethical issues in connection with end-of-life situations (external law sources), building a connection with other argumentative tools, particularly with the margin of appreciation. In the same area, arguments based on epistemic authority, like the patient's best interest, are also included, which involves the strategy of appealing to the expertise of physicians and medical personnel. It is also found that *deontological argumentation* is used by the Court, aiming to demonstrate what is right and proper in light of the rules reproduced in interpreting the norms of the Convention. In the categories of the arguments based on *proceduralisation,* the duties of states to ensure the right to die are mentioned. With respect to *incrementalism*, the jurisprudence that evolves towards the gradual identification of new elements within the framework of the rights protected by the Convention is analysed, concluding, however, that there is still no positive obligation for the State to assist people in anticipating their own death, nor is there a clearly established right for individuals to die. Regarding the *teleological arguments*, the authors argue that the ECHR's decisions in several of

its end-of-life rulings are particularly worthy of attention because of the deliberations they contain regarding the public interest, "which in turn may lead to the crystallization of a certain moral minimum established in these cases in regard to the principle of the protection of life." However, based on the analysis of the selected cases the authors conclude that although there have been many rulings on these issues, it would be difficult to consider them as decisive for the shape of domestic regulations or actions.

The conclusions of the book highlight the importance of argumentation, as well as the fact that in the cases analysed the Court makes the most frequent use of ways of reasoning based on *proceduralisation, incrementalism, and margin of appreciation*, and appeals to the need to look after the interests of vulnerable persons. The Court uses the arguments identified with varying frequency, often interrelating and overlapping. Answering the essential question of *why does the ECtHR opt for certain ways of reasoning*, the authors share the view concerning a *'pick and choose'* approach on the part of the Court, in the sense of selecting the arguments considered helpful in reasoning its judgments. However, the authors argue that "this apparent lack of coherence should be viewed in the context of achieving the primary goal of the reasoning, which is convincing the audience of the correctness of the decision." In correlation with one of the research aims, the authors draw our attention to the conclusions of "the almost complete lack of appeal to moral considerations." However, it is argued that the Court avoids presenting its clear position in relation to the ethical aspects of the decided cases, which would be possible if the legitimacy of introducing limitations to the rights and freedoms of individuals in the analysed areas was examined against the premise of morality. Its position in this respect can be divined indirectly from the arguments used.

In conclusion, it should be said that the book significantly enriches the legal landscape on a topic of wide interest, i.e. that of judicial argumentation, approached from an original perspective and surrounded by areas that raise existential questions and are difficult to frame legally. The authors' conceptualization is inspiring, innovative, and based on a rigorous analysis of a wide selection of causes. Even if, as the authors state, their analysis should not be regarded as a comprehensive presentation of the ECHR's jurisprudence in the area under examination, the selected jurisprudence, including cases considered to be relevant for the reasoning used by the Court to justify its decisions, give us a clear picture of both the challenges that the judge may encounter and the way in which he or she can respond, choosing different ways of argumentation. The authors manage to demonstrate the special character of argumentation in the selected cases, where the instruments as not only targeted to the interpretation of legal norms themselves, but also comprises tools of explanation and justification of the Court's decisions, deviating from pure

deduction and legal syllogisms in order to convince by referring to commonplaces and pragmatic arguments, appealing to basic and neutral criteria: the duty of care; protection of common sense; and recognizing shared community standards. Even if "the book does not focus on what the Court has ruled, but instead addresses the ways in which it seeks to convince audiences of its decisions in cases that are exceptionally complex", the way in which the Court carries out its argumentation must be seen inevitably in the light of the solutions it adopts and the way it influences the normative framework of the member states of the Council of Europe.

The twin perspectives of the acceptance and acceptability of such diverse persuasive tools, including both legal and extra-legal reasoning and sometimes lacking in predictability, gives us some important food for thought. That's why the subtitle, "Balancing impossible demands", can also serve as a conclusion of the research approach embodied in this book, which remains a reference for the perspectives of knowledge and understanding of the argumentative tools it opens up for us. How flexible, open, and unconventional can a judge be to convince his audience while avoiding arbitrariness? Where is the fair balance when sensitive moral issues intervene in the balance of justice? Of course, the analysis, applied in the context of ECHR decisions can also be adapted to other courts, such as constitutional courts for example, which are equally concerned with "capturing" the audience, making it sympathetic to statements of values and to principles which, while often relating to specific undisputed facts, give rise to general and overarching principles such as fairness, equity, good faith or freedom. Through the analysis and explanations of the authors, rulings with a certain bombastic and repetitive profile or unexpected references to legal sources and concepts identified in the reasoning of court decisions appear to us in a different light, gaining a definitive purpose and determining even a kind of empathy with the judge faced with the difficulty of identifying "anchors" for his or her argumentation. This "fresh perspective on the rhetorical tools used in judicial argumentation", as authors characterize it, is in and of itself an invitation to debate.

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Aleksandra Mężykowska[*]

Jason Scott Palmer, *Reparations in Domestic and International Mass Claims Processes: Justice and Money*, Edward Elgar Publishing, Cheltenham: 2023, pp. 200

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Jason Scott Palmer published his book *Reparations in Domestic and International Mass Claims Processes: Justice and Money* in 2023, a year that witnessed at least two conflicts that generated damage, loss and injury requiring reparations: the continuation of Russia's aggression against Ukraine and yet another instalment (another stage) of the Israeli–Palestinian conflict. But it was also a year in which the Register of Damage for Ukraine was established as the first component of a new comprehensive compensation mechanism designed to deal with mass claims resulting from violations of laws committed by Russia. Thus, as Lucy Reed – who became a member of the Board of the Register – noted in her review of the book, it is very timely and "will be more useful than even Professor Palmer could have predicted."

Chapter 1 of the book introduces in general the concept of mass claims processes, both domestically in the United States and internationally. From a national perspective, it briefly presents the development of claims actions and mass actions through the Class Action Fairness Act and multidistrict litigation. It also presents the main assumptions of international mechanisms in which mass claims are involved. As a general introduction, the chapter points out the basic difference between national and international mechanisms: mass claims are a formal litigation tool that provides recourse for losses suffered by large groups of individuals who might be unable to recover damages on their own, whilst international mass claims processes are a substitute for judicial or other dispute resolution, often in the interest of promoting international peace and stability.

Chapters 2 to 5 explore in detail the US practice in judicial and extrajudicial mass claims processes. Chapter 2 explains in detail the history and development of class actions suits, stressing the limitations that affect their availability and utility.

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The Author concludes that the class action lawsuit has not always been used in cases for which it was best suited, paving the way to look beyond the class action to potential extrajudicial mass claims compensation regimes. Two such regimes are discussed in the subsequent chapters.

Chapter 3 is devoted to the Deepwater Horizon Gulf oil spill – thus BP oil spill victims and the legal solutions provided to them. Chapter 4 discusses the 9/11 Compensation Fund, created by Congress as an extrajudicial administrative process to counter thousands of potential lawsuits against the airline industry. Whilst the mechanism is generally perceived as successful, it cannot be treated as a precedent due to certain factors: its unique funding (provided by the US government), the fact that the harm done to individuals was inflicted by terrorist attacks and the underlying political and public pressure to protect the airline industry.

Chapters 5 and 6 present how domestic and international mechanisms can intertwine. They simultaneously discuss the proceedings and settlement agreement concluded in *In re Holocaust Victim Assets Litigation*, a class action suit initiated before the US courts to recover assets of Holocaust victims hidden and denied by Swiss banks, and the creation of the first Claims Resolution Tribunal for Dormant Accounts in Switzerland, being established through an agreement between the World Jewish Restitution Organisation and the World Jewish Congress on one side and the Swiss Bankers Association on the other (CRT). The chapters explain the diverse nature of the bodies established at the international level to deal with claims to dormant bank accounts. They clearly indicate the difference between CRT-I, which was designed as an international arbitration tribunal, and CRT-II, which fulfilled administrative tasks on account of the US district court overseeing the class action settlement reached in domestic proceedings.

Chapter 7 analyses the extrajudicial international mass claims processes of the United Nations Compensation Commission (UNCC), focussing on that body's introduction of an innovative approach to claims processing.

The final chapter of the book assesses the effectiveness and efficiency of these mechanisms and funding implications for future mass claims processes in the Israel – Palestine and Russia – Ukraine conflicts. It replies to the central query of the book: whether the reparation provided by domestic and international mass claims processes achieve the goal of providing adequate, just and effective compensation by presenting some general conclusions. The Author stresses the impact of providing funds for reparations on the effectiveness of the entire compensation programme and the need to ensure that claimants receive their awarded compensation in a just and timely manner.

The main advantage of the book is that it comprehensively explains the creation and functioning of mass claims processing. It is manifested on several levels. Firstly,

it presents mechanisms that are entirely national, international or hybrid in nature. It also shows the relationships that can exist between the various mechanisms. These relationships can be complicated and multi-layered. Therefore, although at first glance it might seem that the reference in the book's title to both domestic and international mechanisms is over the top – because a smaller portion of the book is devoted to international mechanisms – the title is not misleading. Secondly, the book does an excellent job of explaining the origins and forms of the various mechanisms. For a reader from outside the US legal culture, it is particularly interesting to be introduced to issues based on the US legal system, such as mass claims in the form of modern class action and multidistrict litigation, and their effectiveness for large groups of people.

The book is also comprehensive in the sense that it shows how individual claims have become the motivation for political actions that lead to an institution of national and/or international proceedings. The Author thoroughly describes the political and social circumstances in the country, the often initially divergent interests of those who would receive the benefit or the lack of real will to find a solution on the part of those who are ultimately obliged to bear the cost of compensation. These clashing attitudes and expectations were particularly well described in the case of dormant Swiss bank accounts. Likewise, the case of dormant accounts illustrates well the need to exert appropriate pressure on those responsible for causing the damage, since one-sided reparation efforts can often prove ineffective without external pressure and the oversight of an impartial arbiter. The solution to the dormant account issue is also a very good example of the necessary role of political, diplomatic and media pressure applied to the Swiss government and Swiss banks. But this case also illustrates very well that whilst the moral reckoning was rewarding to the individuals, the programme would not have been successful without the ability of Swiss banks to finance reparations.

The book not only delves into domestic and international mechanisms, but more importantly, it illustrates what challenges these mechanisms face when dealing with mass claims. The scale of the claims makes these challenges quite similar. Two of them are treated in particular depth in the book: evidentiary issues and innovative approaches to organising mass claims.

Evidentiary issues have been a challenge for almost all the mechanisms presented in the book. The analysis and discussion of how the evidentiary problems have been overcome provides extremely valuable material for study. This is because evidentiary problems arise not only from the mass nature of the complaints, but also often from the fact that the mechanisms that are invoked involve situations that occurred in the distant past.

This problem is brilliantly illustrated by the example of CRT-II. The tribunal applied a series of presumptions that had been ordered and approved by a US Dis-

trict Court and were then codified in the rules of procedures, introducing certain minimum standards of admissibility based on whether the claimant presented any information that provided a "reasoned and satisfactory basis for further examination of the claim". It is interesting to note that the domestic court justified the use of these presumptions by the need to fill in the evidentiary gaps and in view of the banks' destruction of records and files of the accounts. Also, the UNCC established a minimal evidentiary threshold. This is a path that can certainly be followed in other situations, especially in situations of compensation mechanisms created after armed conflicts, where claimants may naturally encounter difficulties in gathering evidence.

The book also shows how these mechanisms resorted to new technologies, which seems obvious because of the mass complaints. CRT-II used the computerised matching of account holders to claimants. In turn, the UNCC not only used the matching techniques, but also introduced computerised statistical sampling techniques for verification. The commissioners adjudicating the claims entered this "unchartered territory" for this mass claims process, bearing in mind that the traditional method of individualised adjudication would certainly have caused significant delays due to the number of cases.

In the book's concluding chapter, the Author considers the possibility of creating compensation mechanisms for the Israeli–Palestinian conflict and compensating for the losses caused by Russia as a consequence of its aggression against Ukraine. However, these considerations, despite being quite detailed, overlook the most important aspect that distinguishes these situations from examples of mechanisms operating in the past: the fact that one of the parties to the conflict (Israel/Russia) is highly unlikely to agree to such a mechanism.

Consideration of this circumstance should be the starting point for further deliberations. Instead, the Author implicitly assumes that an agreement has been reached between Ukraine and Russia, despite the difficulty of imagining – even when the book was being written – that Russia would admit its international legal responsibility for the damage caused by its unlawful aggression against Ukraine. The Author, perhaps intentionally, avoids discussing the legal basis for the future mechanism, although it is one of the most important and problematic issues. Given the Author's extensive knowledge, it would be interesting to learn his opinion as to whether it is possible to create a compensation mechanism without Russia's consent, and if so, what kind of international decision could constitute a legal basis for the mechanism. Getting to know his opinion, based on the conclusions he drew from the functioning of previous mechanisms, would be consistent with his observation already made in the first chapter of the book, that "the willingness of states to submit to treaties, international agreements, or other international instrumentalities in resolving the disputes between them is the *sine qua non* for the

existence of most international mass claims processes" (emphasis added). To ponder future compensation mechanisms without attempting to elucidate the legal basis for their operation certainly leaves one feeling unsatisfied.

However, regardless of the above issues, which leave some sense of insufficiency, the book is definitely worth reading because it presents both a scientific dimension, as it describes selected national and international compensation mechanisms, and a practical dimension, as it gives an idea of how these mechanisms work. Last but not least, unlike many law books, which are not very approachable despite dealing with interesting matters, Jason Scott Palmer's book simply reads well.

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Grega Pajnkihar, *State Succession to Responsibility for Internationally Wrongful Acts*, Brill-Nijhoff, Boston-Leiden: 2023, pp. xii + 389

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State succession and state responsibility are classic, core topics of public international law. In recent decades, they have also been the subject of codification work undertaken by the International Law Commission (ILC). In particular, at its 68th session (2016) the ILC included the topic "Succession of States in respect of State responsibility" in its long-term programme of work, and at its 69th session (2017) it appointed Mr Pavel Šturma as Special Rapporteur for the topic, who submitted five analytical reports during his mandate. These covered various aspects of state succession in secondary rights and obligations arising from internationally wrongful acts committed prior to the date of succession. In this way the ILC have attempted to address the old, contested question of whether new states are responsible for the wrongs committed by their predecessors. Today, this question has become truly topical in the context of the widely voiced demand for accountability for slavery, colonial exploitation, racism and grave human rights violations. Are all obligations and rights arising from the commission of internationally wrongful acts therefore subject to state succession? What about the "personal" nature of such obligations and rights and their alleged non-transferability?

Given recent developments in state practice and legal doctrine, the ILC has acknowledged that these obligations and rights may in fact be transferable. Whilst the content of the rules of international law in this regard is still debatable, it is increasingly recognised that both obligations and rights stemming from internationally wrongful acts committed by the predecessor state pass to its successor if a special link or connection can be established between the consequences of the wrongful act (i.e. injury) and the successor. Accordingly, the succession of states shall not affect the secondary rights and obligations of the internationally respon-

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sible state, irrespective of the injured state being replaced by its successor(s). In other words, the secondary obligations shall be owed to the successor state(s) if the wrongful act has consequences in its (their) respect. Furthermore, obligations and rights arising from internationally wrongful acts committed prior to the date of state succession that involve a plurality of injured states or the international community as a whole shall not cease by the fact of succession, and can be invoked by any state, even if not directly injured. This particularly concerns grave violations of international law – a breach of an obligation arising from a peremptory norm of general international law (*jus cogens*), including the prohibition of the use of force between states or of slavery, racial discrimination, torture and genocide, as well as peoples' right to self-determination.

The book under review, *State Succession to Responsibility for Internationally Wrongful Acts*, offers the first comprehensive analytical commentary to the aforementioned work of the ILC. It also constitutes one of the very few research monographs on the issue published to date.[1] The author, Grega Pajnkihar (PhD), is a professional diplomat of the Republic of Slovenia. He also served as a Fulbright Scholar at George Washington University in Washington D.C. During his career, he was actively engaged with state succession negotiations in the former Yugoslavia. The book is his revised doctoral thesis, which was defended at the University of Ljubljana in 2020.

In focussing on the ILC's ongoing work,[2] this monograph seeks to answer the fundamental research question of how succession to international responsibility fits into the theory and practice of the law on state succession. To this end, it first (Part 1) reconstructs the UN codification agenda in respect of state succession since the 1960s. Throughout the six chapters, key issues related to the nature of this area of international law are discussed, with a particular focus on cases of the continuation and rupture of international legal personality. Particularly noteworthy here is not only the analysis of sources of a doctrinal nature (with particular focus on works by the Institut de Droit International [IDI]), but also of well-researched international practice.

The author acknowledges that state succession constitutes one of the most complex, challenging and contested areas of international law. In fact, views that law on state succession lacks a consistent set of rules, or that state succession is more a matter of political considerations and dynamics than any legal principles, are not uncommon in the international law scholarship.[3] Unsurprisingly, such approaches

[1] At the time of the publication of this review, a second, expanded edition of the book in question has been published, which also covers the recent work of the ILC; *see* P. Dumberry, *State Succession to International Responsibility*, Brill/Nijhoff, Boston-Leiden: 2024.

[2] *See Succession of States in respect of State responsibility*, International Law Commission, available at: https://legal.un.org/ilc/summaries/3_5.shtml#a15 (accessed 30 August 2024).

[3] *See e.g.* A. Sarvarian, *Codifying the Law of State Succession: A Futile Endeavour?*, 27(3) European Journal of International Law 789 (2016), pp. 789–791.

stem from the experience of decolonisation, which profoundly affected this area of international law. In this latter regard, the core question referred to how the creation of a large number of completely new states would affect the global legal and economic order, particularly the protection of rights acquired during colonialism. Indeed, the establishment of a separate category of newly independent states and a separate legal regime for them has been much discussed and never fully accepted in state practice or legal scholarship.[4] The ILC's codification of succession of states in relation to treaties and economic issues (property, archives and debts) led to the adoption of the Vienna Convention on Succession of States in Respect of Treaties (VCSST)[5] and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (VCSSP).[6] None of them had entered into force at the time of decolonisation. Many provisions of these treaties were considered legal tools destined to achieve certain political goals once colonialism was over, thus belonging "more to the progressive development of law than to the codification of international law."[7] Due to this codification crisis the doctrine of state succession was "pronounced dead (or at least comatose) in the 1980s."[8] However, the author recalls that the fall of the Berlin Wall and the subsequent wave of territorial changes in Central and Eastern Europe gave new impetus to the law on state succession. Indeed, although the VCSST entered into force in 1996, the VCSSP never achieved ratification and yet has been instrumental in designing economic relations of successor states in the post-cold war reality. Moreover, the general definition of "succession of states", i.e. "the replacement of one state by another in the responsibility for the international relations of territory", provided by both treaties seems today to have been fully accepted by both legal scholarship and state practice. Thus, the author offers a detailed summary of rules on state succession in matters of treaties, archives, property and debts. He does not, however, strictly follow the typology of state succession offered by the two Vienna Conventions. Instead, he focusses on the aspects of continuity and identity of states involved in the process of state succession which underlie the core of the ILC's codification endeavour, concerned with the

[4] V.D. Degan, *Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques* en *Europe)*, 279 Recueils des Cours de l'Académie de Droit International de La Haye 195 (1999), pp. 298–299.

[5] Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996), 1946 UNTS 3.

[6] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (adopted 8 April 1983, not in force), UN Doc A/CONF.117/14 (1983).

[7] *See* United Nations Conference on Succession of States in respect of State Property, Archives and Debts, 1 March–8 April 1983, UN Doc. A/CONF.117/*C*.1/SR.44.

[8] M. Koskenniemi, *Report of the Director of Studies of the English-Speaking Section of the Centre*, in: P.M. Eisemann, M. Koskenniemi (eds.), *La succession d'Etats: la codification à l'épreuve des faits*, The Hague Academy of International Law, Den Haag: 2000, p. 66.

legal nexus between territory and the pre-existing legal obligations related to it. In this regard, he explores the principle of "special connection", that is, depending on the matter of succession – e.g. territorial pertinence in the case of state archives – the link between the property and the territory, and between the treaty and the border.

In turn, Part 2 of the book deals with the law of state responsibility. The author skilfully analyses the ILC's parallel codification work in respect of state succession and state responsibility. He also explains how these two areas of international law are interlinked. Whilst referring to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[9] he convincingly explains the differences between attribution of conduct and attribution of responsibility. The considerations regarding succession to responsibility for internationally wrongful acts committed by liberation (insurrectional) movements are particularly valuable due to its practical significance for the law of state succession. In this regard, the author rightly notes (Chapter 12) that whilst the insurgency itself is usually separate from the predecessor state, any acts occurring before the successor state comes into existence might be attributed to that state because of its special link with the insurrectional movement.

This part of the book also broadly deals with secondary rights of injured states, principally, the right to invoke responsibility and a (limited) right to take countermeasures. It also addresses the issues of the rights of states not directly injured to invoke responsibility of the state in the case of violations of international obligations that affect the international community as a whole.

The last part of the book (Part 3) debates how the ILC (and earlier, the IDI) has approached the relationship between normative contexts of state succussion and international responsibility. The author highlights the ILC's view that the object of succession is not international responsibility as such, but the rights and obligations arising therefrom. In other words, the object of succession is the rights and obligations deriving from the secondary rules of international responsibility, that is, secondary rights and obligations. Accordingly, the consequences of an internationally wrongful act do not cease or disappear just because of state succession; thus, the ILC rejects the traditional negative succession rule, which claimed that the obligations and rights arising from the commission of such an act were non-transmissible and non-enforceable.

In this regard, the author (Chapter 15), by referring the ILC's ongoing work, scrutinises four rules based on situating international responsibility within the framework of state succession, considering the ILC's codification works. According to the general rule, "[t]he rights and obligations arising from international responsi-

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

bility remain with the internationally responsible State after the date of succession if it continues to exist, unless they are succeeded to by a successor State in accordance with special rules." The general rule is complemented by three specific principles.

The first special rule provides that a successor state having a special link to the matter of succession (injury) shall fully succeed to the secondary rights and obligations of reparations relating to that matter. Other secondary rights and obligations may only conditionally pass to the successor state as they usually remain entirely with the continuator state. Instead, specific rules two and three refer to the unification or incorporation and dissolution of the predecessor state, respectively. In the former case, the successor state succeeds to all the secondary rights and obligations of the predecessor state(s) stemming from internationally wrongful acts; in the latter one, the secondary rights and obligations of the predecessor are succeeded equitably by all successors, unless it is possible to establish a specific link (injury) with one of them.

The author concludes that although the codification of the law on state responsibility and on state succession has long been undertaken separately, today "it is not reasonable to interpret succession to international responsibility differently from other matters." Arguably, "[i]t is therefore appropriate to apply the rules applicable to succession in general to succession to the rights and obligations arising from international responsibility." This is an important statement, as the law on state succession shall indeed respond – so as to introduce order, justice and stability – to a rupture in international law relations of territory created by often violent, traumatic events.

Having said this, it should be noted that whilst the dogmatic analysis of international law rules deserves full appreciation, the monograph itself could benefit from some refinement and improvement. My main criticism relates to the detachment of this very well-crafted dogmatic analysis of the law from the broader geopolitical context. The work of the ILC has been undertaken in specific political, social and cultural circumstances, and perhaps it would be useful to broaden the analysis to include these elements and the wider background. The ground-breaking work by Matthew Craven can serve as a good example in this regard.[10] My second criticism relates to the internal construction of the book. It is divided into 15 very short chapters. In my opinion, it would have been more advantageous from the rhetorical point of view to reduce their number and to refine the flow of the analysis. However, these critical remarks do not change the unequivocally very positive opinion of this book, which in my view makes highly valuable reading for both scholars and practitioners of international law. Undoubtedly, it is now one of the key studies regarding the topic of state succession in respect of state responsibility.

[10] *See* M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties*, Oxford University Press, Oxford: 2007.

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Szymon Zaręba[*]

Mateusz Błachucki, *International Cooperation, Competition Authorities and Transnational Networks*, Routledge, Oxford-New York: 2023, pp. 296

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In recent decades, the functioning of transnational networks of public administrative bodies and their impact on national legal orders has become an important issue, not only in theory but also in practice. Transcending national borders, the activity of these networks has become one of the key levels of global governance and one of the main driving forces behind the increasing harmonisation of the relevant rules applied in different countries. This phenomenon also applies to competition law and the authorities that monitor its observance, which is the subject of Professor Mateusz Błachucki's latest book.

The book aims to clarify the legal nature of the transnational competition networks (TCNs) that bring together national competition authorities, to establish their typology and to analyse and classify the forms of cooperation between national competition authorities within these networks. The book consists of 11 chapters, which the author himself divides into four main parts in the introduction (unfortunately, this division is not reflected in the table of contents). The first of these (chapter 2) introduces the reader to the concept of transnational competition networks. The second part (chapters 3–5) analyses the different types of networks, both those operating independently and those established within intergovernmental organisations at the global, continental, and regional levels. It provides a careful overview of the current state of affairs in this field, taking into account the reasons for the establishment of each network, its internal organisation, membership, field of activity, and its various forms. In the extensive third part (chapters 6–8), the author classifies the forms of cooperation between national competition authorities within supranational networks. This part of the work, which is perhaps the most comprehensive, appears to be particularly valuable for practitioners, who may find

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in it arguments for protecting their clients against possible infringements of their rights in connection with the activities of public authorities within such networks. Błachucki divides the forms of cooperation of transnational networks into three categories: soft, developed, and enhanced; depending on the level of cooperation and the involvement of national authorities in the activities of a given network. As he points out, soft cooperation involves the exchange of experience and administrative practices, the establishment of common standards of action, and their coordination through the use of soft law instruments such as guidelines or recommendations, as well as the verification of compliance with the standards adopted by the network. Developed cooperation is more advanced and includes, *inter alia*, the exchange of information on the initiation of proceedings, of classified information and of information and evidence to which the parties have consented, as well as mutual legal assistance. Finally, enhanced cooperation consists of the joint conduct of administrative proceedings and determination of the content of administrative decisions, and also the mutual recognition of administrative acts. The fourth part of the book (Chapters 9–11), which may be of most interest to non-lawyers, discusses issues related to the supervision of the activities of transnational competition networks and the prospects for the development of these networks, including the associated benefits and challenges. It also presents the conclusions of the overall analysis.

The author argues that in an increasingly interdependent world, cooperation between national authorities is becoming more and more necessary in order to meet the challenges associated with the enforcement of competition law. He stresses that networks are now an important catalyst for cross-border cooperation in this area, as well as for the development of competition law itself and the convergence of administrative practices. In his view, this is particularly important given the general reluctance of states to formalise such cooperation through, for example, the conclusion of international agreements or the creation of intergovernmental organisations. Błachucki points out that for many national authorities, transnational networks have become a natural area of activity, regardless of whether national laws in their jurisdictions clearly authorise such activity. He also notes a number of interesting processes taking place within the networks themselves and in the interactions between them, including competition for the limited resources allocated by national competition authorities, the mutual cannibalisation of some of them, or the decline of some of them due to the lack of the political support that accompanied their creation.

In addition to the benefits of cooperation within transnational competition networks, the book also discusses the challenges involved. Key among these seems to be the largely opaque nature of the networks' activities, which escape public scrutiny and political control by state authorities, while at the same time there is a lack

of clarity as to who should supervise the networks themselves and the activities of individual competition authorities within the respective networks. Błachucki notes that the current situation may lead to the creation of norms and the harmonisation of standards without any practical oversight by democratically-elected authorities, which may have a negative impact on the legitimacy of the activities of the networks and the national authorities. He also underscores that the voluntary nature of membership and participation in transnational competition networks – while having great advantages – may in some cases, especially politically charged ones, pose problems for real cooperation due to the lack of an institutional framework mandating cooperation in all situations; the difficulties in obtaining political support; and the absence of dispute resolution mechanisms.

One of the strengths of Blachucki's book is that it is highly interdisciplinary. Although it is based on dogmatic and doctrinal legal research, it is not limited to it but takes into account the insights of other disciplines – primarily international relations (especially the views of liberal institutionalists), but also international law, political science and economics. The author repeatedly refers to issues such as the erosion of state sovereignty, global governance, and the interplay of lawmaking and law enforcement processes at the national, supranational and international levels.

The main merits of the analysed work are undoubtedly its topicality; the importance of the issues raised; and the thoroughness and comprehensiveness of the analysis carried out, including the use of a wide range of literature. The book demonstrates the author's in-depth understanding of the issues raised. This is not surprising, as in addition to his theoretical knowledge, the author draws on his extensive experience in the Polish Office of Competition and Consumer Protection (UOKiK), including his personal involvement in the activities of the office within the framework of some of the networks discussed. The book is a valuable position not only for researchers and practitioners dealing with competition law or public administration, but also for those interested in international relations, and especially issues of global governance.

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