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2013

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CONTENTS

ARTICLES 9

Maurizio Arcari
The Creeping Constitutionalization and Fragmentation of International Law: From "Constitutional" to "Consistent" Interpretation 9

Cezary Mik
Jus Cogens in Contemporary International Law 27

Gino J. Naldi, Konstantinos D. Magliveras
Human Rights and the Denunciation of Treaties and Withdrawal from International Organisations 95

Lord Lester of Herne Hill QC
Free Speech Today 129

Dimitry Kochenov
On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed 145

Krystyna Kowalik-Bańczyk
À la recherche d'une cohérence perdue – Possible Arguments for the Non-application of EU Law in Member States 171

Jakub Kociubiński
Consolidation or Fragmentation? European Competition Law in the EU Air Transport Sector: A Policy Analysis 189

COMMENTS ON *JANOWIEC AND OTHERS V. RUSSIA* 205

Ireneusz C. Kamiński
The Katyń Massacre before the European Court of Human Rights: A Personal Account 205

Yaroslav Kozheurov
The Case of *Janowiec and Others v. Russia*: Relinquishment of Jurisdiction in Favour of the Court of History 227

William Schabas OC MRIA
Do the "Underlying Values" of the European Convention on Human Rights Begin in 1950? 247

Susana Sanz-Caballero
How Could It Go So Wrong? *Reformatio in Peius* before the Grand Chamber of the ECtHR in the Case *Janowiec and Others v. Russia* (or Polish Collective Memory Deceived in Strasbourg) 259

Gabriella Citroni
Janowiec and Others v. Russia: A Long History of Justice Delayed Turned into a Permanent Case of Justice Denied 279

Answers to the Questions for the Grand Chamber hearing in the case of *Janowiec and Others v. Russia* 295

POLISH PRACTICE IN INTERNATIONAL LAW 363

Szymon Zaręba
China and Hong Kong: The One Country, Two Systems Principle and Its Practical Implications for Polish Civil Courts 363

BOOK REVIEWS 371

POLISH BIBLIOGRAPHY OF INTERNATIONAL AND EUROPEAN LAW 2013 387

Dear Readers,

The new volume of the Polish Yearbook of International Law is finally out. Due to the high number of submissions this year we were faced with a particularly difficult task in choosing the most interesting and important texts. We hope that we have managed to stand up to this challenge.

The article section of the Yearbook starts with Maurizio Arcari's text on the constitutionalisation and fragmentation of international law, which was presented at the conference "Constitutionalisation and Fragmentation of International Law Revisited", organized in November 2013 by the Institute of Law Studies of the Polish Academy of Sciences. This is followed by the very insightful articles of Cezary Mik on the concept of *jus cogens* in contemporary international law, and Gino Naldi & Konstantinos Magliveras on the denunciation of treaties and withdrawal from international organizations in the field of international human rights. This section also includes this year's Marek Nowicki Memorial Lecture by Lord Lester of Herne Hill QC on the right of free speech. In addition there are three articles on EU law. Dimitry Kochenov, in his very timely piece, critically analyzes two new proposals aimed at ensuring the observance of certain democratic standards by EU Member States, Krystyna Kowalik-Bańczyk writes about the emerging practices of domestic Constitutional Courts in resolving conflicts between EU law and national constitutional law. The section ends with the contribution by Jakub Kociubiński on EU competition law in the air transport sector.

The whole next section is dedicated to the recent judgement of the European Court of Human Rights (Grand Chamber) in *Janowiec and Others v. Russia*. The case, which relates to one of the greatest tragedies in the contemporary history of Poland (the mass-killing of almost twenty-two thousand Polish citizens committed in 1940 on order of the highest Soviet authorities), was closely followed not only by scholars in the region but also by the general public. Considering its importance (not only for Poland but also its systemic significance in terms of European human rights law), we invited a number of internationally recognized scholars to comment on the verdict. Hence we present different voices from the international academic community, who discuss the case from various perspectives and critically assess the reasoning of the court. This group includes Ireneusz Kamiński (Institute of Law Studies of the Polish Academy of Sciences) who was also the principal lawyer for the applicants in the case, Yaroslav Kozheurov (Kutafin Moscow State Law University), William Schabas (Middlesex University London), Susana Sanz Caballero (CEU Cardenal Herrera University) and Gabrielle Citroni (University of Milan Bicocca). Their insightful analyses will no doubt help the readers to form their own views on the outcome and significance of the case. To supplement the

section we have also added the complete set of legal observations submitted to the Grand Chamber on behalf of the applicants.

As usual, the volume also includes our traditional sections: Polish practice in international law, in which Szymon Zaręba analyzes the recent judgment of the Polish Supreme Court on the enforcement of judgments rendered in the Special Administrative Region of Hong Kong, book reviews, and the Polish bibliography in international and European law for 2013.

Łukasz Gruszczyński & Karolina Wierczyńska

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ARTICLES

*Maurizio Arcari**

THE CREEPING CONSTITUTIONALIZATION AND FRAGMENTATION OF INTERNATIONAL LAW: FROM "CONSTITUTIONAL" TO "CONSISTENT" INTERPRETATION

INTRODUCTION

A sketch of contemporary legal writings on international law conveys the impression that constitutionalization and fragmentation stand together as terms representing an odd but inseparable couple. In the words of a prominent author, it may be said that "[i]f anyone were to propose a pairing of phrases to characterize current developments in international law, the smart money would surely be on constitutionalization and fragmentation."[1] Far from being astonishing, this is actually something which is not really new. Assuming that pluralism and normative dispersion have always been present in modern international law,[2] and that they are nothing but an expression of "her infinite variety",[3] "constitutionalism" – together with its operational variation, "consti-

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[1] *See* J. Klabbers, *Constitutionalism Lite*, 1 International Organizations Law Review 31 (2004). For other examples of the parallel treatment of the problems of constitutionalization and fragmentation, *see* J. Klabbers, A. Peters, G. Ulfstein, *The Constitutionalization of International Law*, Oxford University Press, Oxford: 2009, pp. 11-19; A. Paulus, *The International Legal System as a Constitution*, [in:] J.L. Dunoff, J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, Cambridge University Press, Cambridge: 2009, pp. 69-109.

[2] *See* B. Conforti, *Unité et fragmentation du droit international: "Glissez, mortels, n'appuyez pas!"*, 111 Revue Générale de Droit International Public 5 (2007).

[3] R.R. Baxter, *International Law in 'Her Infinite Variety'*, 29 International and Comparative Law Quarterly 549 (1980).

tutionalization" – stand out among the possible responses to ensure the systemic coherence of the international legal order.[4] Indeed, it can be noted that constitutionalization, rather paradoxically, contains within itself the seeds of the very problem it purports to solve, namely "fragmentation". In fact, constitutionalism as a theoretical approach and process has been applied and developed in international law on a fragmented basis, in the context of the institutional settings of diverse international organizations and/or of specific treaty regimes, such as those protecting basic human rights or the natural environment. Inasmuch as the trend towards constitutional pluralism in international law is likely to promote the consolidation of multiple autonomous and competing regimes,[5] the final result of constitutionalization will inescapably be a dispersed international legal landscape.

Considering the very extensive legal literature on the subject, the present contribution does not intend to dwell on the substantive features of the phenomena of constitutionalization and fragmentation in international law. Rather, it purports to explore the dynamics of their reciprocal interaction by considering some of the interpretive methods which can be used by international law practitioners to deal with the above phenomena. Leaving aside for the moment the question whether the interpretive principles included in Art. 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) can be deemed to have a constitutional character or any constitutional implications,[6] it is a matter of record that both constitutionalization and fragmentation have been, and indeed still are, constantly addressed by judges and scholars through the lens of interpretative techniques.

On the one hand, the early attempts at "constitutionalizing" the international legal order have been carried out through a functional and purpose-oriented reading of some constituent treaties of universal international organizations, such as the Covenant of the League of Nations and the United Nations Charter, that were supposed to incorporate the basic values of the international community.[7] Therefore, it can comfortably be said that, at least initially, the process of the constitutionalization of international law developed in a rather "creeping" fashion, through the prism of a "constitutional" interpretation that was nothing but an adaptation of the traditional principles of teleological interpretation and effectiveness enshrined in Art. 31.1 of the VCLT.

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[4] Klabbers (*Constitutionalism Lite*), *supra* note 1, p. 31: "On the one hand, many international lawyers raise worries about fragmentation of international law […]. On the other hand, and partly in response, international law is also heavily engaged in a countermove: many international lawyers propose that treaty regimes be constitutionalized."

[5] The phenomenon labeled as "constitutional pluralism" lies at the origin of the so-called "auto-constitutional regimes" in international law: *see* A. Fischer-Lescano, G. Teubner, *Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Michigan Journal of International Law 999 (2003-2004), pp. 1014-1017.

[6] This question is interestingly addressed in Klabbers, Peters, Ulfstein, *supra* note 1, pp. 24-25.

[7] *See infra*, section 1 and the authorities quoted in note 9. For an early attempt concerning the Covenant of the League of Nations, *see* H. Lauterpacht, *The Covenant as the Higher Law*, 17 British Yearbook of International Law 54 (1936).

On the other hand, the response to the (allegedly) contemporary problem of the fragmentation of international law, exacerbated by the juxtaposition of partial and competing constitutional regimes, has also been elaborated through recourse to interpretive techniques. To this effect, one may recall the emphasis contemporary legal discourse has put on the principle of "systemic integration", drawn from Art. 31.3(c) of the VCLT, which is presented as the legal panacea which would ensure, through mutual coordination rather than antagonism, the coexistence of the different layers of international law.[8]

In fact, while systemic interpretation is based on a presumption of consistency between the different norms and regimes of international law, it is often applied in a constitutional environment, i.e., in the context of "constitutional" regimes, which assume that competing provisions are to be construed in the light of the higher norms, principles and values appertaining to a specific regime. In this perspective, systemic interpretation can be turned into a principle of "consistent interpretation", i.e. one which upholds a constitutional and hierarchically-oriented – rather than conciliatory – outcome of the conflict between the norms and values at stake.

The points above will be developed following a three-step approach. First, some instances of constitutional interpretation will be illustrated with reference to the United Nations (UN) Charter. Second, the difficulties arising from the proliferation of constitutional regimes in international law will be illustrated and the basic features of the principle of systemic interpretation – intended as a tool for reframing this proliferation and solving the consequent fragmentation – will be considered. Third, some egregious examples in which the principle of systemic interpretation has become transformed into a principle of consistent interpretation, with the effect of promoting a constitutional and value-oriented outcome of legal disputes, will be explored.

1. INSTANCES OF "CONSTITUTIONAL" INTERPRETATION IN INTERNATIONAL LAW, AS APPLIED TO THE UN CHARTER

There is no room here for assessing the legal merits and foundations of legal theories that look at the Charter of the United Nations as the proper constitution for the international community (not to mention humankind).[9] Suffice it to say that if one accepts

[8] *See infra*, section 2 and the authorities quoted in notes 28 and 42.

[9] The legal literature on the subject is impressive. Just to list some of the most recent contributions, *see* B. Sloan, *The United Nations Charter as a Constitution*, 1 Pace Yearbook of International Law 61 (1989); P.-M. Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 Max Planck Yearbook of United Nations Law 1 (1997); J. Crawford, *The Charter of the United Nations as a Constitution*, [in:] H. Fox (ed.), *The Changing Constitution of the United Nations*, The British Institute of International and Comparative Law, London: 1997, pp. 3-16; S. Szurek, *La Charte des Nations Unies, Constitution mondiale?*, [in:] J.-P. Cot., A. Pellet, M. Forteau (eds.), *La Charte des Nations Unies* (3rd ed.), Economica, Paris: 2005, vol. I, pp. 29-68; R. Chemain, A. Pellet (dir.), *La Charte des Nations Unies, Constitution mondiale?*, Pédone, Paris: 2006; B. Fassbender, *The United Nations Charter as the Constitution of the International Community*, Martinus Njjhoff Publishers, Leiden/Boston: 2009. An excellent synthesis of the main

that the basic aim of constitutionalization is to subject all types of public power (whatever the medium of their exercise) to the structures, processes, principles and values encapsulated in a basic document called a "constitution",[10] then there is enough in the UN Charter to encourage a constitutionally-oriented construction. Just to mention some elements: the Charter stands out as an instrument of universal reach and vocation, which captures in its Purposes and Principles some of the basic values of the international community;[11] sets forth a framework of organs and institutions endowed with the powers to pursue such values;[12] and – as a final but very relevant factor – also presumes a hierarchical ordering of the sources of international law by proclaiming its priority over conflicting external (treaty) obligations.[13] Considering all these evidentiary elements, it should come as no surprise that the parallelism between domestic constitutions (especially the United States Constitution) and the UN Charter is frequently evoked by scholars, together with the suitability of adopting a constitutionally-oriented approach for the interpretation of the latter instrument.[14] Indeed, the early instances of constitutional interpretation in international law have been construed with reference to the UN Charter and date back to several landmark cases. However, given the fact that the Charter is a treaty – albeit one "having certain special characteristics"[15] – with respect to which one can hardly escape the application of the classic principles of treaty interpretation, the constitutional discourse was initially developed by judges in a rather transversal way.

While not worded in openly constitutional terms, the functional interpretation of UN powers proposed by the International Court of Justice (ICJ) in its 1949 and 1954 advisory opinions concerning, respectively the *Reparation for Injuries Suffered in the Service of the United Nations*,[16] and the *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*,[17] was based on the prominent consideration of the object and purpose of the UN Charter and on privileging the method of teleological

doctrinal opinions can be found in K. Zemanek, *Can International Law Be 'Constitutionalized'?*, [in:] M. Kohen, R. Kolb, D.L. Tehindrazanarivelo (eds.), *Perspectives of International Law in the 21st Century: Liber Amicorum Professor Christian Dominicé*, Leiden/Boston: 2012, pp. 27-33.

[10] *See* M. Loughlin, *What is Constitutionalization?*, [in:] P. Dobner, M. Laughlin (eds.), *The Twilight of Constitutionalism?*, Oxford University Press, Oxford: 2010, p. 49.

[11] *See* Arts. 1 and 2 of the Charter.

[12] *See* especially, with reference to the competences and powers of the Security Council, Arts. 24-25 and 39-42 of the Charter.

[13] *See* Art. 103 of the Charter.

[14] On the analogies between the UN Charter and the US Constitution, *see* in particular Sloan, *supra*, note 9, *passim* and especially pp. 87 ff. for the constitutional interpretation of both instruments. However, for a critical consideration of such analogies, *see* G. Arangio-Ruiz, *The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue*, 1 European Journal of International Law 1 (1997).

[15] As perspicuously pointed out by the ICJ in the case concerning *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory Opinion 20 July 1962) [1962] ICJ Rep, p. 157.

[16] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion 11 April 1949) [1949] ICJ Rep, p. 174.

[17] *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion 13 July 1954) [1954] ICJ Rep, p. 47.

interpretation of treaties. In its hermeneutical construction, the World Court paid special attention to the purposes and principles of the UN Charter, thereby espousing the approach usually reserved for the interpretation of domestic constitutions. If it is true that "when interpreting a constitution one has to keep its principles constantly in mind, because it is in their light that the provisions have to be construed,"[18] this was exactly the course followed by the ICJ in the *Effects of Awards of Compensation* case, when it underscored that it "would hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals" to leave the staff of the Organization without any judicial protection or remedy.[19] This constitutional reasoning was pushed another step forward in the 1962 advisory opinion on *Certain Expenses of the United Nations*, where the World Court ascribed "a primary place" among the purposes of the UN to the maintenance of international peace and justice, thereby suggesting that these purposes, as well as the provisions functional to their attainment, can be ordered hierarchically, according to a constitutional perspective.[20]

More than thirty years later, the World Court reconsidered its earlier constitutional reading of the UN Charter by re-situating it against the broader context of the "system" of UN specialized agencies. In 1996 the ICJ rejected the World Health Organization's (WHO) request for an advisory opinion concerning the legality of the use of nuclear weapons in time of armed conflict, arguing that this question fell outside the scope of the activities of the requesting agency. This conclusion was grounded on the assumption that the competences and powers of the WHO must be interpreted taking into account "not only the general principle of speciality, but also the logic of the overall system contemplated by the Charter." Following this perspective, the Court held that the responsibilities of the WHO should necessarily be confined to the sphere of public health and cannot encroach on "other parts of the United Nations system", in particular on the question of legality of the use of force and of disarmament, lying within the competence of the principal organs of the United Nations.[21] If, as it has been suggested by an author, this reasoning reveals an attempt on the part of the ICJ to infuse a constitutional design into the governance of world affairs,[22] one cannot avoid noting the central place assigned to the UN Charter in this context.

Apart from these early – or at least relatively less recent – examples drawn from the case law of the World Court, the constitutionalist approach towards the interpretation of the constituent instrument of the UN has had its vitality confirmed in more recent case law. Such an approach has been particularly enhanced following the reactivation of

[18] *See* Zemanek, *supra* note 9, p. 29.

[19] ICJ, *Effects of Awards for Compensation*, p. 57.

[20] ICJ, *Certain Expenses of the United Nations*, p. 168.

[21] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion 8 July 1996) [1996] ICJ Rep, p. 80.

[22] J. Klabbers, *Global Governance before the ICJ: Re-reading the WHA Opinion*, 13 Max Planck Yearbook of United Nations Law 1 (2009), pp. 27-28.

the Security Council's (SC) powers following the end of the cold war. Among a number of prominent examples, the 2003 decision of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) in the *Prosecutor v. Milutinovic et al.* case should be recalled. In this decision the principle of effectiveness of the UN system of collective security was evoked to assert the universal reach of SC decisions adopted under Chapter VII and their applicability to non-member States. In elaborating this conclusion, the ICTFY expressly mentioned "the constitutional character of the Charter", and "the critical importance to the international community of the goal of the maintenance of international peace and security", as being among the crucial factors that could render the SC resolution establishing the Tribunal applicable to any country that was a part of the former Yugoslavia, irrespective of its actual membership in the UN.[23]

Indeed, the most far-reaching expression of the constitutional interpretation of the UN Charter and of the powers of UN organs (and especially the SC) under the Charter has been developed with reference to its Art. 103. It is well known that one of the essential features of the constitutional character of a legal text lies in its hierarchical primacy over other (external) normative sources. In the case of the UN Charter, this feature is granted by Art. 103, which however confines the priority effect to the case of a conflict between the obligations arising under the Charter and other treaty obligations assumed by Member States. This principle of primacy is also deemed to apply to SC resolutions adopted under Chapter VII.[24] It is therefore not surprising that Art. 103 has been extensively invoked and applied by courts evaluating the impact of SC targeted sanctions on individuals in order to assert the primacy of SC decisions over conflicting human rights treaty obligations of UN Member States.[25] What is striking, however, are the current attempts to enlarge, by way of interpretation, the scope of Art. 103 of the Charter. On one side it has been suggested that the *primauté* granted by Art. 103 of the Charter cannot be limited to conflicting treaty obligations of UN Member States, but must be extended to any obligations arising under customary international law, because otherwise the primacy effect assigned to SC decisions would be easily

[23] *The Prosecutor v. Milan Milutinovic, Dragoljub Ojdanic, Nikola Sainovic* (IT-99-37-PT), Decision on Motion Challenging Jurisdiction, 6 May 2003, available at http://www.icty.org, paras. 45-63 and especially para. 62.

[24] Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. UK; Libyan Arab Jamahiriya v. US*) (Request for the Indication of Provisional Measures, Orders 14 April 1002), [1992] ICJ Rep, pp. 3 and 114 respectively.

[25] *See*, especially, the judgment rendered by Tribunal of First Instance of the European Communities in the first phase of the *Kadi* affair: case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment 21 September 2005, [2005] ECR II-3706. For an application in domestic case law, *see* Tribunal Fédéral Suisse, A. c. Département Fédéral de l'Economie (2A.783/2006), Judgment 23 January 2008, available at http://www.bger.ch. On this question, *see generally* P. De Sena, C. Vitucci, *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values*, 20(1) European Journal of International Law 193 (2009).

circumvented.[26] On the other side it has been submitted that, in order to ensure the effectiveness of UN action in the field of maintenance of international peace and security, the "authorizations" to use all necessary means granted by the SC to member States must also be considered to be on the same footing as Chapter VII binding "decisions" for the purposes of application of Art. 103 of the UN Charter.[27]

A common feature of the trends outlined above is that the maintenance of international peace and security is constantly considered, according to a constitutional-type perspective, as the primary goal of the international community organized under the UN Charter, and this is the crucial factor legitimizing interpretations aimed at enhancing the effectiveness of the action of UN organs in that field. As such, the above-mentioned instances can be ranked among the most significant and far-reaching emanations of the principle of constitutional interpretation in modern international law.

2. CONFLICTING CONSTITUTIONAL REGIMES IN INTERNATIONAL LAW AND INTERPRETATIVE TOOLS FOR AVOIDING FRAGMENTATION: FROM "CONSTITUTIONAL" TO "SYSTEMIC" INTERPRETATION

As already mentioned, one of the most challenging issues of modern international law is the fragmentation arising from the proliferation of autonomous international regimes, whose different norms may come into conflict and jeopardize the global coherence of the international legal order.[28] For the present purposes, it must be kept in mind that the risks of fragmentation can also stem from the coexistence of different

[26] *See* N. Krisch, *Introduction to Chapter VII: The General Framework*, [in:] B. Simma, D.-E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations. A Commentary* (3rd ed.), Oxford University Press, Oxford: 2012, p. 1262; R. Kolb, *Interprétation et création du droit international*, Bruylant, Bruxelles: 2006, p. 580. The argument that the priority rule of Art. 103 of the Charter applies to both conventional and customary obligations of UN member States was also advanced by the EU Council and Commission in the first phase of the *Kadi* case: ECJ, *Yassin Abdullah Kadi v. Council of the European Union*, para. 156.

[27] For an application in domestic case law, *see R (on application of Al-Jedda) v. Secretary of State for Defence*, Opinions of the Lords of Appeal for Judgment 12 December 2007, [2007] UKHL 58, reprinted in 47 International Legal Materials 607 (2008), paras. 30-34 (Lord Bingham of Cornhill), para. 117 (Lord Rodger of Earlsferry) and paras. 131-135 (Lord Carswell). For a review of the underlying legal arguments, *see* R. Kolb, *Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?*, 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 21 (2004).

[28] Besides the authors cited *supra*, notes 1 to 5, on the problem of fragmentation of international law *see also*: M. Koskenniemi, P. Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15(3) Leiden Journal of International Law 553 (2002); J. Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands*, 25 Michigan Journal of International Law 903 (2003-2004); T. Treves, *Fragmentation of International Law: The Judicial Perspective*, 23 Comunicazioni e Studi 822 (2007); M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation*, Cambridge University Press, Cambridge: 2012.

constitutional regimes and constitutional sub-systems of international law. In fact, apart from the prominent case of the UN Charter, the possibility also exists that a constitutional discourse can be pursued within particular treaty regimes presenting, in a more or less advanced form, typical characteristics of a constitutional order. Examples in international law of partial regimes which are construed and interpreted according to a constitutional perspective range from the World Trade Organization (WTO) – at the universal level – to the European Union (EU) or the European Convention of Human Rights (ECHR) system on a regional scale. While in the context of international trade and economic law the constitutional discourse has mainly been pursued in a theoretical and doctrinal perspective,[29] the case law of regional judicial organs contains a large number of decisions premised on a constitutional interpretation of the basic instruments of their particular regime. This is the case, for example, for the EU Court of Justice (ECJ), which since 1986 has spoken of the Treaty establishing the (then) European Community in terms of "a basic constitutional charter".[30] Albeit more occasionally, the European Court of Human Rights (ECtHR) has also referred in its case law to the ECHR as a "constitutional instrument of European public order", usually to exclude reservations made by a State party that would diminish the effectiveness of the Convention[31] or to affirm the existence of jurisdiction under Art. 1 of the Convention, including outside the territory covered by the Council of Europe Member States.[32]

Recent case law has demonstrated, however, that in some extreme situations, norms reflecting or incorporating the basic values of different constitutional regimes may come into conflict. In those instances, the picture is further complicated by the fact that – with the sole and possible exception of the UN Charter – none of the different "constitutional rules" at stake can usually claim any inherent superior ranking, as they are in principle endowed with equivalent normative force.

A case in point are the intricate legal issues, and the related judicial sagas, stemming from the targeted sanctions ordered by the UN SC against persons included in the blacklist of suspected terrorists. Both the content of the targeted measures and the procedure for compiling the list of targeted persons are deemed to infringe on some basic individual rights, such as the right to property, the right to freedom of movement and (especially) the right to a fair process, all of which are protected under both the EU

[29] *See*, among others, D.Z. Cass, *The Constitutionalization of the World Trade Organization*, Oxford University Press, Oxford: 2005; J.P. Trachtman, *The Constitutions of the WTO*, 17(3) European Journal of International Law 623 (2006).

[30] Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament*, Judgment 23 April 1986, [1986] ECR I-1365, para. 23. It is impossible to review here the vast legal literature existing on the subject of the EU's constitutional dimension. The reader can usefully refer to the synthesis of the debate, carried out from an international law perspective, contained [in:] J. d'Aspremont, F. Dopagne, *Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders*, 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 939 (2008).

[31] *Loizidou v. Turkey (Preliminary Objections)* (15318/89), ECtHR Judgment 23 March 1995, paras. 75 ff.

[32] *Al-Skeini and Others v. the United Kingdom* (55721/07), Grand Chamber, ECtHR Judgment 7 July 2011, paras. 141-142 and ff.

Charter of Fundamental Rights and the ECHR.[33] The developments of the *Kadi* case before the judicial organs of the EU show how unfortunate the attempt to resolve the legal issues involved by following a strict constitutional perspective can be. The initial effort, in 2005, by the (then) Tribunal of First Instance to assign a hierarchical priority to the imperatives of peace maintenance enshrined in the UN Charter over the conflicting human rights,[34] was dramatically reversed in 2008 by the Court of Justice. This Court embraced a rigid "dualistic" approach for resolution of the case, premised on the blunt separation of the two concurring constitutional legal orders at stake, and claimed the need to ensure the full review of the lawfulness of all EU acts in the light of fundamental rights, even when such acts were designed to give effect to SC resolutions adopted under Chapter VII of the UN Charter.[35] This approach led to the annulment of EU regulations implementing UN sanctions, and was substantially confirmed in the judicial decisions concerning the second round of the *Kadi* dispute.[36] Insofar as such an approach can be deemed to promote the fragmentation rather than the coherence of the international legal order, the search for more moderate solutions seems inescapable. In this vein, a more nuanced path appears to have been explored by the ECtHR in the 2011 and 2012 judgements in the *Al-Jedda* and *Nada* cases, both involving similar questions arising from the conflict between the SC resolutions and the protection of fundamental human rights.[37] As will be further examined below, in these cases the ECtHR attempted to strike a balance between the different values at stake by suggesting that a feasible way out of the legal conundrum may consist in taking into account human rights requirements during the implementation of SC decisions by individual States.[38]

The reasoning developed by the ECtHR in the above-mentioned cases reflects a modern approach to the problem of competing regimes in international law, premised on the notion of "systemic" interpretation. This approach is inspired by Art. 31.3(c) of the VCLT, according to which, in interpreting a treaty, account must be taken of "any relevant rules of international law applicable in the relations between the parties." This assumes that international legal norms and obligations included in a certain international regime or sub-system must not be read in "clinical isolation"[39] or in a "legal

[33] On this question, *see generally* A. Ciampi, *Security Council Targeted Sanctions and Human Rights*, [in:] B. Fassbender, *Securing Human Rights? Achievements and Challenges of UN Security Council*, Oxford University Press, Oxford: 2011, pp. 98-140, as well as the authorities quoted *supra* note 25.

[34] *See* references *supra* note 25.

[35] Case C-402/05/P *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment 3 September 2008, [2008] ECR I-06351, especially para. 326.

[36] Case C-584/10/P, *Commission and Others v. Yassin Abdullah Kadi*, Judgment 18 July 2013.

[37] *See respectively, Al-Jedda v. the United Kingdom* (27021/08) Grand Chamber, ECtHR Judgment 7 July 2011 [hereinafter Al-Jedda Judgment] and *Nada v. Switzerland* (10593/08) Grand Chamber, ECtHR Judgment 12 September 2012 [hereinafter Nada judgment].

[38] *Infra*, section 3.2.

[39] WTO, Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2/AB/R), 29 April 1996, reprinted in 35 International Legal Materials 605 (1996),

vacuum",[40] but are to be integrated into the overall framework of international norms, both of conventional and customary origin, that may be relevant and applicable in each case.[41] This corresponds to the notion of "systemic integration" propounded by the UN International Law Commission (ILC) study group on fragmentation as the appropriate legal tool for avoiding the fragmentation of the international legal system and guaranteeing its overall consistency.[42]

One of the basic tenets of the principle of systemic integration is that the harmonization of different legal regimes and norms of international law can be attained by minimizing the possibility of their conflict through interpretive techniques. As explained by the ILC study group on fragmentation, "rules appear to be compatible or in conflict as a result of interpretation", and in an international legal system made up of rules dispersed across different sub-systems but sharing a common "normative environment", an effort must be made to harmonize apparently conflicting rules so as to render them compatible.[43] In other words, it must be presumed that norms belonging to different legal subsystems of international law are mutually consistent and that they can be applied simultaneously, so that normative conflicts will be exceptional and in principle limited to the most extreme cases. In sum, "[i]n international law, there is a strong presumption against normative conflicts."[44]

As will be more closely examined below, this stance was unambiguously endorsed by the ECtHR in the *Nada* case as a premise for assessing the compatibility with the ECHR of the restrictive measures adopted by Switzerland on the basis of SC resolutions:

> Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonized as far as possible so that they produce effects that are fully in accordance with existing law.[45]

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p. 621: "the General Agreement [GATT] is not to be read in clinical isolation from public international law."

[40] *See* Nada Judgment, para. 169 ("The Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law").

[41] *See generally* C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly 279 (2005).

[42] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, UN doc. A/CN.4/L.682, 13 April 2006.

[43] *Ibidem*, paras. 411-412 and 423.

[44] *Ibidem*, para. 37.

[45] *See* Nada Judgement, para. 170, whereby the principle of systemic integration as well as the ILC study group report on fragmentation are both explicitly evoked. For a comprehensive overview and analysis of the application by the ECtHR of the principle of systemic integration, *see* V. P. Tzevelekos, *The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?*, 31 Michigan Journal of International Law 621 (2010).

However, the question can be asked how far this presumption of consistency between international norms and regimes can be pushed when normative conflicts involve rules belonging to a "constitutional" regime or, as a most extreme hypothesis, when a clash between different "constitutional" regimes is at stake. A closer look at the pertinent case law reveals that the answer to this question is far from unequivocal.

3. FROM "SYSTEMIC" TO "CONSISTENT" INTERPRETATION

Based on the premise that normative conflicts in international law must be avoided or conciliated through interpretation, one can infer that the so-called "principle of consistent interpretation" is an essential part of systemic integration and conclude that its role will be critical in promoting the effective harmonization of the international legal order. Indeed, one must not forget the origin and the theoretical underpinnings of the principle of consistent interpretation. Consistent interpretation is an interpretive technique well known in domestic legal systems, where it is extensively used to avoid or resolve conflicts between constitutional principles and subordinate normative sources. Moreover, consistent interpretation also serves, in the context of the international/domestic law dialectic, as a means for enhancing the application of international law within domestic legal orders, insofar as it presupposes that domestic law will be applied and interpreted in conformity with the international legal obligations of the State.[46] In both cases, the interpretive technique called "consistent interpretation" is premised on the assumption that – to avoid normative conflicts at the domestic level, or to avoid breaches of the obligations of States at the international level – the interpretation of one of the rules at stake must be deferential to other rules of the system endowed with a superior normative ranking or force. In other words, the mechanism of consistent interpretation has been conceived to work in a legal environment where rules are coordinated according to some kind of normative hierarchy, with the consequence that the "presumption of conformity" lying behind the concept is often intended to work in a unidirectional mode, rather than on a bilateral and reciprocal basis.

While it is not unusual that consistent interpretation is employed by judges operating in the context of specific regimes of international law to resolve questions relating to their coordination with "external" sources (such as in dialectic between EU/WTO rules or EU/international law rules),[47] one may ask whether the same principle can deploy

[46] For more on this principle and its application in domestic law for dealing with the relationship between domestic and international or EU law, *see especially* G. Betlem, A. Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, 14(3) European Journal of International Law 569 (2003); A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford University Press, Oxford: 2011, pp. 139-165.

[47] *See generally* G. Gattinara, *Consistent Interpretation of WTO Rulings in the EU Legal Order?*, [in:] E. Cannizzaro, P. Palchetti, R.A. Wessel (eds.), *International Law as Law of the European Union*, M. Nijhoff

its intended "conciliatory" effects when normative conflicts involve the higher rules or values belonging to constitutionally-oriented international regimes. The two case-studies below may illustrate some of the unpredictable implications of the principle of consistent interpretation as applied at international law level.

3.1. The relationship between the UN Charter and the secondary norms on international responsibility

The first illustration can be drawn from the relationship between the primary obligations existing under the UN Charter, especially SC decisions adopted under Chapter VII, and the secondary obligations arising in the field of international responsibility from the commission of internationally wrongful acts.[48] As is widely known, such secondary obligations have been codified by the ILC in two sets of Draft articles, devoted respectively to the Responsibility of States and to the Responsibility of International Organizations.[49] Both sets of ILC Draft articles contain the same (rather ambiguous) final clause, devoted to the relationship with the UN Charter, which provides that "these articles are without prejudice to the Charter of the United Nations."[50] The scope of this "non-prejudice clause" is tentatively clarified in the ILC commentaries to the two draft articles, both stressing the key role that Art. 103 of the UN Charter is called on to play in this regard, especially in cases where decisions of political organs of the UN may have a bearing on questions involving the responsibility of States or of International Organizations. On this point, the commentary to Art. 59 of the State Responsibility Draft directly recalls the situation that materialized in the well-known *Lockerbie* case,[51] while the commentary to Art. 67 of the International Organizations Draft specifies that the non-prejudice clause applies not only to obligations directly provided for in the UN Charter, but especially to "those flowing from binding decisions of the Security Council, which according to the International Court of Justice similarly prevail over other obligations under international law on the basis of Article 103 of the United Nations Charter."[52] One may wonder if this insistence on the prevailing effect of Art. 103 of the UN Charter is appropriate in the context of two sets of draft articles that are deemed to reflect, in whole or in part, the general and customary principles of

Publishers, Leiden/Boston: 2012, pp. 269-287; F. Casolari, *Giving Indirect Effect to International Law within EU Legal Order: The Doctrine of Consistent Interpretation*, *ibidem*, pp. 395-415.

[48] On this question, *see generally*, V. Gowlland-Debbas, *Responsibility and the United Nations Charter*, [in:] B. Simma *et al.*, *supra* note 26, pp. 117-138.

[49] *See* General Assembly resolutions 56/83 of 12 December 2001 and 66/100 of 9 December 2011, endorsing respectively the ILC Draft Articles on the Responsibility of States for internationally wrongful acts [hereinafter SR Draft Articles] and the ILC Draft Articles on the Responsibility of International Organizations [hereinafter IOR Draft Articles].

[50] *See,* respectively, Art. 59 of the SR Draft Articles and Art. 67 of IOR Draft Articles.

[51] *See* para. 1 of the commentary to Art. 59 of SR Draft Articles, reproduced in [2001] II(2) Yearbook of the International Law Commission, p. 143.

[52] *See* para. 1 of the commentary to Art. 67 of IOR Draft Articles, [in:] *Report of the International Law Commission, Sixty-third Session*, UN doc. A/66/10 (2011), p. 173.

the law of international responsibility. As already mentioned, Art. 103 is intended to settle the conflicts between Charter obligations and other treaty obligations of UN Member States, and in principle it will be of little or no avail in the hypothetical case of a clash between the Charter obligations and the secondary principles of responsibility embodied in the ILC Draft articles. This conclusion appears to be even stronger when issues concerning the responsibility of International Organizations are involved, insofar as International Organizations are not members of the UN, or parties to the UN Charter, and therefore cannot be bound by the priority rule set forth in Art. 103 of the Charter.[53]

The real implications of the references to Art. 103 of UN Charter in the ILC commentaries are eventually disclosed in the very final phrase of the commentary to Art. 59 of the State Responsibility Draft, which unambiguously refers to the principle of "consistent interpretation", by stating that "[t]he articles are in all respects to be interpreted *in conformity with* the Charter."[54] In fact, to assert that a principle of "consistent interpretation" with the UN Charter must be observed in the application of the rules governing international responsibility amounts to a *petitio principii*, which can hardly be sustained except on the assumption of the higher ranking accorded to the former instrument.

The example at hand seems to reveal the real implications of the principle of consistent interpretation as applied in a "constitutional" environment, i.e., one whose basic principles, rules and values are accompanied by a presumption of a higher hierarchical ranking: in the event of conflict between the "constitutional" principles and other, "external" rules, the latter rules are to be interpreted so as to "bow to" or "defer to" the former, and the presumption of consistency is ultimately meant to work in a unidirectional way. Ultimately, this means that the constitutional principles and rules of the system are deemed to prevail by way of a result-oriented interpretation of any other rules external to the regime that may be applicable in a given case. It is of significance that the ILC, perhaps aware of these unwanted implications, has refrained from inserting into the commentary to Art. 67 the Draft on the Responsibility of International Organizations a statement similar to that appearing in Art. 59 of the Draft on State Responsibility to the effect that the Commission's articles had to be interpreted in conformity with the UN Charter. Instead of this, the final phrase of the commentary to Art. 67 includes a more prudent proviso, warning that "the present article is not intended to exclude the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations."[55]

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[53] For more details on this, *see* M. Arcari, *Parallel Words, Parallel Clauses: Remarks on the Relationship Between the Two Sets of ILC Articles on International Responsibility and the UN Charter*, [in:] M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, M. Nijhoff Publishers, Leiden/Boston: 2013, pp. 101-102.

[54] *See* para. 2 of the commentary to Art. 59 of SR Draft Articles, *supra* note 51 (emphasis added).

[55] *See* para. 3 of the commentary to Art. 67 of IOR Draft Articles, *supra* note 51, p. 172.

3.2. The relationship between the UN Charter and the European Convention on Human Rights

Other insights into the principle of consistent interpretation can be drawn from consideration of the case law of the ECtHR relating to the impact of SC decisions on human rights, namely the *Al-Jedda* and *Nada* cases already referred to.[56]

Al-Jedda concerned the detention of a joint Iraqi/British national – supposedly in breach of Art. 5 of the ECHR – by British forces operating in Iraq under the authority of SC resolution 1546 (2004). Mr. Al-Jedda's complaints were considered and rejected by British Courts, especially by the House of Lords,[57] on the basis that SC resolution 1546 (2004), by authorizing UN member States to take all the necessary measures to contribute to the maintenance of security and stability in Iraq, created an obligation on the part of the United Kingdom to subject the applicant to security internment, and that, under Art. 103 of the UN Charter, this obligation prevailed over the conflicting right to personal liberty provided for in Art. 5 of the ECHR. In its judgment of 2011, the ECtHR reversed this conclusion by interpreting the scope of the authorization delivered by the SC in resolution 1546 (2004) in a very different manner. In fact, the ECtHR deliberately called into question the applicability of Art. 103 of the UN Charter, preliminarily asking itself whether an opposition existed in the case at hand between the SC-authorized measures and the United Kingdom's human rights obligations under the ECHR.[58] In the relevant paragraph, the Court recalled both the purposes of the maintenance of international peace and of the promotion of human rights and fundamental freedoms, as enshrined in Art. 1.1 and 1.3, of the UN Charter, and underscored that, under Art. 24 of the same instrument, the SC, in discharging its responsibilities, shall act in accordance with the above purposes and principles. In this way, the Court apparently suggested that the mentioned purposes must be considered on an equal footing in the assessment of the legality of SC actions. Against this background, the ECtHR argued that "there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights", and added that in the event of any ambiguity in the terms of a SC resolution, "the Court must […] choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations."[59] Eventually, the Court concluded that, absent "clear and explicit language" by which the SC intended to oblige States to take particular measures conflicting with human rights law, no opposition existed in the case at hand between United Kingdom's obligations under

[56] *See* references in note 37.

[57] *See* references in note 27.

[58] Al-Jedda Judgment, para. 101: "Before it can consider whether Article 103 had any application in the present case, the Court must determine whether there was a conflict between the United Kingdom's obligations under United Nations Security Council Resolution 1546 and its obligations under Article 5 § 1 of the Convention. In other words, the key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment".

[59] Al-Jedda Judgment, para. 102.

the UN Charter and under Art. 5 of the ECHR, and held the State to have breached the latter provision.[60]

This is an outstanding example of application of the principle of consistent interpretation, whose immediate effect is to avoid the conflict between concurring obligations and to promote their coordinated application. As perspicuously noted by an author, in the case at hand the ECtHR created a very strong interpretative presumption in favour of the human rights obligations contained in the ECHR, which can be rebutted only by a clear and unequivocal decision by the SC to the effect that specific human rights guarantees must be discarded in a particular instance. However, as the same author points out, it would have been hardly conceivable for the ECtHR to accept that the SC can displace the ECHR, which is "the constitutional instrument of European public order" and of which the Court is the ultimate guardian.[61]

The Court had the occasion to clarify its point in the subsequent *Nada* case. The question at stake in this case was the compatibility with the ECHR of restrictive measures adopted by Switzerland following the inclusion of the applicant in the blacklist of persons associated with Al-Qaida, and his subjection to SC targeted sanctions. In its 2012 judgment, the ECtHR correctly found that the situation at hand was different from that existing in the *Al-Jedda* case, insofar as SC resolution 1390 (2002) used "clear and explicit language" requiring States to adopt measures capable of breaching human rights. As a consequence, the presumption of compatibility between SC decisions and human rights obligations that operated in *Al-Jedda* was rebutted in the present case.[62] Notwithstanding such an unequivocal finding, the ECtHR, in the remainder of its reasoning, underscored the fact that the UN Charter "does not impose a particular model for the implementation of the resolutions adopted by the Security Council" but "leaves to UN member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order." In reliance on the alleged latitude that Switzerland enjoyed in implementing the SC resolutions, the Court eventually found that the Swiss government had not taken all possible measures to adapt the sanctions regime to the applicant's individual situation and therefore breached its obligations under Arts. 8 and 13 of the ECHR.[63]

It is hard to avoid the impression that the *Nada* decision amounts to an over-stretching of the technique of consistent interpretation, built on a distortion of the text of the relevant SC resolutions, the effect of which was to consolidate an almost non-rebuttable

[60] *Ibidem*, paras. 103-110.

[61] *See* M. Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23(1) European Journal of International Law 121 (2012), pp. 137-138.

[62] *See* Nada Judgment, para. 172: "[I]n the present case […], contrary to the situation in *Al-Jedda*, where the wording of the resolution at issue did not specifically mention internment without trial, Resolution 1390 (2002) expressly required States to prevent the individuals on the United Nations list from entering or transiting through their territory. As a result, the above-mentioned presumption is rebutted in the present case, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in that resolution."

[63] *Ibidem*, paras. 175-180 and 195-198.

presumption that the SC did not intend to deviate from human rights standards.[64] In fact, taken together the *Al-Jedda* and *Nada* judgments confirm that the principle of consistent interpretation, when applied in a given "constitutional environment", can be strained so as to create a presumption of priority in favour of the rules reflecting the fundamental values of the system, with the ultimate consequence of promoting a "constitutional oriented" outcome of normative conflicts.[65]

CONCLUSIONS

The above review reveals that the processes of constitutionalization and fragmentation in international law are dealt with through recourse to specific interpretive techniques, borrowed and adapted from the general principles of treaty interpretation enshrined in Art. 31 of the VCLT. While "constitutional interpretation", "systemic integration" and "consistent interpretation" all appear ultimately intended to promote the coherence of the international legal order and the systemic construction of its rules, each interpretive technique pursues the said goals according to different theoretical perspectives, which bring with them different advantages and shortcomings.

On the one hand, the attempt to order hierarchically the entire international legal order under a superior instrument can be pursued only at the price of stretching certain key provisions, such as the priority rule enshrined in Art. 103 of the UN Charter, beyond their scope as provided in the text. In any case, this hierarchical assumption cannot be sustained in the most extreme cases, which involve conflicts between the universal system of the UN Charter and other partial or regional subsystems also endowed with a constitutional vocation, such as the EU or the ECHR. As the *Kadi* saga seems to demonstrate, in such cases the adoption of a rigid constitutional stance can hardly avoid creating an opposition among the different subsystems involved, with the resulting systemic fragmentation.

On the other hand, attempts to conciliate normative conflicts and to avoid fragmentation of international law through the principle of "systemic integration" and its

[64] *See* E. De Wet, *From Kadi to Nada*: *Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions*, 12 Chinese Journal of International Law 787 (2013), p. 806.

[65] The constitutionally-oriented approach followed by the ECtHR in *Al-Jedda* and *Nada* is indirectly confirmed by the outcome of the most recent case concerning SC targeted sanctions, *Al-Dulimi and Montana Management Inc v. Switzerland* (5809/08), ECtHR Judgment 26 November 2013, available at http://www.echr.coe.int. In this case, any discretion of UN member States in the implementation of SC measures was *a priori* excluded by the very explicit language of SC resolution 1483 (2003), which demanded seizure of the funds of persons associated with the former regime of Saddam Hussein in Iraq. After having recognized that there was no room for a presumption of consistency between SC decisions and human rights obligations at stake, the Court held that the system of listing in place at the UN does not provide concerned individuals with a level of protection equivalent to that required by Art. 6 of the ECHR, and concluded that Switzerland, by implementing SC targeted sanctions, violated the right to fair process of the applicants (*ibidem*, paras. 113-121 and 134-135).

corollary, "consistent interpretation", cannot be pushed too far. The pertinent case law suggests that recourse to consistent interpretation at the international level may encompass implications at variance with the intended purposes of systemic integration. While the ordering of international rules according to a hierarchical scale and creating a constitutionally-oriented outcome for normative struggles are goals that lie beyond the scope of systemic integration, it cannot be excluded that such unintended effects may materialize when the principle of consistent interpretation is applied to conflicts involving constitutional regimes or constitutional values. If one considers the different outcomes that recourse to consistent interpretation may generate in diverse constitutionally-oriented subsystems of international law, the question can well be posited whether this interpretive principle is apt to promote the overall coherence of the global legal order, or whether it is rather likely to perpetuate fragmentation by fuelling intersystemic conflicts.

It is submitted here that "constitutional", "systemic" and "consistent" interpretive methods are neither opposed nor complementary. Rather, they appear to be intricately entangled, insofar as their ultimate effect is that of fuelling, in a "creeping" and often unintended fashion, both the constitutionalization and fragmentation of the international legal order. However paradoxical this conclusion may appear, it remains true that constitutionalization and fragmentation still represent two inseparable poles around which the legal pluralism of the international legal order gravitates. In this respect, it can easily be maintained that the inconsistencies and paradoxes accompanying the interpretive techniques used to govern the phenomena of constitutionalization and fragmentation accurately epitomize the complexities of modern international law.

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JUS COGENS IN CONTEMPORARY INTERNATIONAL LAW

INTRODUCTION

The international community, both in the past and nowadays, has been seen as a decentralized and horizontal one. Owing to the lack of any central international authority, it is regarded as a relatively unorganized community rather than a society. Even in such a community however there is room and a need for law. In its application and operation, however, it depends to a great extent on the free will of the subjects of the international community, in particular states.[1] As a consequence, international law is in principle of a dispositive nature (*jus dispositivum*). Its content, irrespective of the form or number of states engaged, can be freely changed or replaced by subsequent norms. *Lex posterior derogat legi priori*.

At the same time, international law is universally, although rather intuitively, regarded as a legal system.[2] However, each legal system has an organized structure, an important element of which is the principle of hierarchy. At the national level this hierarchy is based on a hierarchy of powers. It finds expression in a hierarchical legal system, with a constitution in the superior position. All legal acts that are located below the constitution, and even if they are later in time need to be compatible with it. *Lex*

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[1] *See* R. Müllerson, *Ordering Anarchy: International Law in International Society*, The Hague-Boston-London: 2000, pp. 87-97.

[2] The International Law Commission did not have any serious doubts in characterizing international law as legal system: "*International law as a legal system*. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time" (pt 1). The Commission also held that the basic relations within the system are relationships of interpretation, while relationships of conflict are exceptional. *See* Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (hereinafter: Fragmentation. Conclusions 2006), available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_9_2006.pdf.

inferior posteriori non derogat legi superiori. Moreover, since Roman times it is accepted that norms enacted by a state cannot be changed by the arrangements of private entities (*jus publicum privatorum factis mutari non potest*).[3] In international law, where the creators of law are at the same time its addressees, and where sources of law can have features of both legal acts and contracts, the principle of hierarchy expresses itself not in the hierarchy of the sources of law, but in the existence of certain elements that introduce hierarchy.[4] Two elements are indicated in this context: Art. 103 of the UN Charter (the principle of superiority of obligations arising from the Charter over any other treaty obligations of member states), and the peremptory norms of international law (i.e. *jus cogens*).[5]

Excluding incidental international arbitration awards from the interwar period as well as a part of the doctrine that traces the roots of *jus cogens* back to various naturalist (e.g. *jus necessarium*) or positivist conceptions (e.g. the international public order clause),[6] one may consider that *jus cogens* was introduced into international law by Arts. 53 and 64 of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT),[7] and subsequently repeated in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 26 January 1986 (VCLTIO).[8]

[3] The formula originates from Papinian (D.2.14.38). Roman law did not, however, use the notions "*jus cogens*" or "*jus dispositivum*". *See* W. Wołodkiewicz (ed.), *Prawo rzymskie. Słownik encyklopedyczny* [Roman law: Lexicon], Warszawa: 1986, pp. 82, 84. *See also*, K. Schmalenbach, *Commentary to Art. 53 of the Vienna Convention on the Law of Treaties of 1969*, [in:] O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin-Heidelberg: 2012, pp. 899-900.

[4] R. Kolb labelled international law as law of horizontal cooperation and primitive law (R. Kolb, *Réflexions de philosophie du droit international. Problèmes fondamentaux du droit international public: théorie et philosophie du droit international*, Bruxelles: 2003, pp. 91-95).

[5] This text uses terms of "*jus cogens*" and "peremptory norms" interchangeably. In the latter case, as will be discussed in more details in the context of the analysis of the criteria used for distinguishing *jus cogens*, I will mean norms of general law.

[6] *See* R. Kolb, *Obsérvation sur l'évolution du concept de jus cogens,* 113(4) Revue Générale de Droit International Public 837 (2009). The author presents the following evolutive sequence of conceptual changes (p. 839): "vicaire du droit naturel – vecteur de construction du droit international – traités *contra bonos mores* – validité des traités à raison de leur contenu – super-légalité internationale aux effets chatoyants et multiples". For a broad overview of the different theories of *jus cogens,* see R. Kolb, *Théorie du jus cogens international*, Paris: 2001, p. 54 et. seq.

[7] 1155 UNTS 331, the Convention entered into force on 27 January 1980, and as of 15 March 2014 there are 113 State-Parties. Commentary of the International Law Commission to the Draft Convention of 1966: Draft Articles on the Law of Treaties with commentaries 1966 (hereinafter: Law of treaties between States. Commentaries 1966), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf.

[8] Text of the VCLTIO with commentaries (1982): Draft Articles on the law of treaties between States and international organizations or between international organizations with commentaries 1982 (hereinafter: Law of treaties of international organizations. Commentaries 1982), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_2_1982.pdf. The Convention has not yet entered into force, as of 15 March 2014 there are 42 parties.

Both conventions are the product of works undertaken within the International Law Commission (ILC). However, the Commission has also later, when dealing with other issues of international law, considered the question of peremptory norms. Proposals and comments on *jus cogens* have appeared in the context of the Draft articles on the responsibility of states (2001)[9] and international organizations (2011),[10] the guiding principles applicable to unilateral declarations of states (2006),[11] and guidelines on reservations to treaties and interpretative declarations (2010).[12] The ILC also addressed the problem of peremptory norms within the context of its work on the fragmentation of international law (2006).

The inclusion of *jus cogens* in the VCLT, as well as in the subsequent works of the ILC, combined with the changes and events that have taken place in the international community at the end of the 20th century/beginning of the 21st (in particular the end of the Cold War, massive violations of human rights, humanitarian law in internal and regional conflicts, dissolution and creation of states, and controversial cases of military interventions) have encouraged international and national courts to refer more frequently to this legal concept. Although the practice is still not extensive, the issue of *jus cogens* has appeared in judgements and advisory opinions of the International Court of Justice (ICJ), in international arbitration awards (mainly *ad hoc*), judgements of international criminal courts (particularly, the International Criminal Tribunal for the former Yugoslavia (ICTY)), general comments of the UN Human Rights Committee, as well as in judgements and advisory opinions of some regional courts such as the European Court of Human Rights (ECtHR) and the Inter-American Commission and Inter-American Court of Human Rights (IACHR), as well as the Court of Justice of the European Union (ECJ).

Peremptory norms have also received considerable attention in the doctrine of international law. Today it would be difficult to find a textbook or a general lecture of the Hague Academy that would not touch upon the issue of *jus cogens* (the Hague Academy even dedicated a few specialized lectures solely to the issue of peremptory norms).[13]

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[9] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (hereinafter: Responsibility of States. Commentaries 2001), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[10] Draft Articles on responsibility of international organizations, with commentaries (hereinafter: Responsibility of international organizations. Commentaries 2011). Text together with commentary is available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

[11] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto (hereinafter: Unilateral acts. Commentaries 2006), available at: http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf.

[12] Guidelines constituting the Guide to Practice on Reservations to Treaties, with commentaries (hereinafter: Reservations. Commentaries 2011) adopted by the International Law Commission, available at: http://legal.un.org/ilc/reports/2011/english/addendum.pdf.

[13] L. A. Aleksidze, *Legal Nature of Jus Cogens in Contemporary International Law,* RCADI 1981, vol. 172; G. Gaja, *Jus Cogens beyond the Vienna Convention*, RCADI 1981, vol. 172; A. Gomez-Robledo, *Le jus cogens international: sa genèse, sa nature, ses fonctions,* RCADI 1981, vol. 172.

There are also a number of monographs on *jus cogens* (sometimes being a result of the Hague lectures),[14] as well as numerous smaller studies. In this context, the Polish doctrine of international law is rather limited. Only a few shorter texts are available, and no monograph has yet been published.

The existence of relatively well-developed international regulations and court practice relating to *jus cogens*, as well as the rich literature, has not removed all the legal problems connected with this concept. Even now one may find voices questioning the inclusion of *jus cogens* in international law. Others stress various problems related to its legal force and the operation of peremptory norms in international legal order.

Examination of all relevant aspects, as well as detailed analysis of all the cases that include references to *jus cogens* (together with the corresponding voices in the doctrine of international law) goes well beyond the scope of this article. Nevertheless in the context of a process that is taking place in the contemporary international community and international law, there seems to be a need for reassessment of this issue. This will be done from two perspectives: normative and functional. Within the normative perspective, the analysis will include the issue of the nature of *jus cogens*, its basis, normative character and the catalogue of peremptory norms. Within the functional perspective, I will discuss issues connected with the influence of *jus cogens* on the creation of international law: its application, including enforcement (with the reservation that the relationship between *jus cogens* and the immunity of a state and its officials will only be briefly addressed); the interpretation of international law and the position of *jus cogens* in normative conflicts; as well as its impact on the responsibility of the main subjects of international law (states and international organizations) and individuals.

I. *JUS COGENS* IN A NORMATIVE PERSPECTIVE

1. Problem of the legal substance of *jus cogens*

1.1. Introductory remarks

Our analysis should start from the only provision that defines *jus cogens*, that is Art. 53 of the VCLT. ("Treaties conflicting with a peremptory norm of general international law ('jus cogens')"). It provides that:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and

[14] A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford: 2006; Kolb (*Théorie*), *supra* note 6; L. Hannikainen, *Peremptory Norms in International Law: Historical Development*, *Criteria, Present Status*, Helsinki 1988; L.A. Aleksidze, *Nekotoryje voprosy teorii meždunarodonovo prava. Imperativnyje normy jus cogens*, Tbilisi: 1983; C. Rozakis, *The Concept of Jus Cogens in the Law of Treaties*, Amsterdam: 1976; J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, Vienna: 1974.

which can be modified only by a subsequent norm of general international law having the same character.

Art. 53 of the VCLT explicitly states that its definition of peremptory norms was formulated only "for the purposes of the Convention". Its unclear status and *ad hoc* character also seems to be reinforced by the fact that it was not included in the convention's dictionary, but only in the provision that regulates the nullity of a treaty. However, one should also recall that this definition was repeated literally by Art. 53 of the VCLTIO, and that the ILC in its texts and commentaries frequently refers to Art. 53 of the VCLT. International law doctrine also considers Art. 53 as a basic point of reference in its deliberations.

1.2. Nature of Art. 53 of the VCLT

The first issue that needs to be addressed is the legal character of the conventional regulation of *jus cogens*. In particular, it is important to determine whether Art. 53 is an element that contributes to the development of customary law, or whether it should rather be seen as its codification.[15] In the latter case, this would mean that *jus cogens* already had the status of customary law when the Convention was concluded and belongs to *corpus iuris gentium*. This would also mean that although not all states are bound by the VCLT, they would all be bound by *jus cogens*, as provided in the Convention, on the basis of a parallel norm of customary law.

The idea that lies at the basis of *jus cogens* has been known to the international community for centuries, and the pre-conventional doctrine[16] and practice[17] were not entirely unfamiliar with *jus cogens*. At the same time however, the ILC, in its commentary to the draft Convention, noted that "the emergence of rules having a character of *jus*

[15] There was disagreement on this issue during the Vienna Conference, *see e.g.* S. E. Nahlik, *Kodeks prawa traktatów* [The codex of law of treaties], Warszawa: 1976, pp. 316-317. However, some authors consider this problem to be of secondary importance (*see* M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, Oxford: 1997, p. 45. The author argues that what is important is a growing acceptance for *jus cogens*).

[16] A. Verdross, *Forbidden Treaties in International Law*, 31(4) American Journal of International Law 571 (1937) is conventionally considered to be the first analysis of *jus cogens*. However, sometimes earlier works are mentioned, e.g. K. Zemanek, *How Identify Peremptory Norms of International Law*, [in:] *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat*, P.-M. Dupuy, B. Fassbender, M.N. Shaw, K.-P. Sommermann (eds.), Kiel: 2006, p. 1103, pointing to the PhD thesis of M. Fröhlich, *Die Sittlichkeit in völkerrechtlichen Verträgen,* published in 1924 in Zürich. D. Shelton identifies a work of Q. Wright of 1917, in which he considered the case of illegal treaties against the judgement of the Central American Court of Justice of 30 September 1916, *see* D. Shelton, *Normative Hierarchy in International Law,* 100(2) American Journal of International Law 297 (2006), pp. 297-298.

[17] *See*, especially, the arbitral award of 19 October 1928 in *Pablo Nájera (France) v. United Mexican States*, RIAA vol. V, p. 466 et. seq. The arbitral tribunal held that Art. 18 of the Covenant of the League of Nations (obligation to register treaties concluded before the establishment of the League of Nations otherwise being non-binding) has a peremptory character, with the reservation that this sanction applied only to the members of the League (pt. 7). The assignment of a peremptory character to Art. 18 shows the technical perception of *jus cogens*.

cogens is comparatively recent." The Commission did not refer to any earlier case law, and added that international law is in the process of rapid development (pt. 3).[18]

The VCLT entered into force at the beginning of 1980, following the deposit of the thirty-fifth instrument of ratification (in accordance with Art. 84 of the Convention). Until then, international courts in principle did not refer to the concept of *jus cogens.*[19] Such references appeared only in the 1980s and particularly in the 1990s. This fact has led a part of the cotemporary doctrine of international law to conclude that the norm contained in Art. 53 of the Convention "has gradually acquired a status of customary law."[20] However, it also should be noted that as of today only 111 countries (out of 193) are parties to the VCLT. The Convention is therefore a common, but not universal, treaty. For example, neither the US, India nor France are parties, which may cast some doubt on its representativeness.

International law allows, however, in certain circumstances for the deduction of norms of customary law from treaty norms. Applying the criteria used by the ICJ in the *North Sea Continental Shelf* case (1969) to determine the ability of a multilateral treaty to create customary norms,[21] one has to show that: 1) a treaty norm is of a fundamentally norm-creating character and could be regarded as forming the basis of a general rule of law; 2) participation in a convention should be very widespread and representative; 3) although the passage of any considerable period of time since a convention was signed or entered into force is not necessary element, the state practice (particularly those countries which are not parties to a particular convention) should be both extensive and virtually uniform with respect to the content of the particular norm and should have occurred in such a way as to show a that a general recognition of a rule of law or legal obligation is involved (the ICJ analysed the customary nature of a substantive norm).

Assuming that Art. 53 of the VCLT is a provision which could theoretically acquire the status of a customary international norm in accordance with the formula proposed by the ICJ, it should be noted that while Art. 53 of the VCLT meets the first criterion, and the second one has arguably been met over several dozens of years of its operation (except for the United States and France), showing that the third criterion is met could

[18] *See* Commentary to Art. 50 of the draft Convention [in:] *Law of treaties between States: Commentaries 1966*, p. 248. On the negotiating history of Art. 53, *see also* Schmalenbach, *supra* note 3, pp. 901-907.

[19] *But see* Arbitral award (merits) of 19 January 1977 in the case *Texaco Overseas Petroleum Company v. The Government of Libyan Arab Republic,* [in:] G. Distefano, G.F. Buzzini, *Bréviaire de jurisprudence internationale. Les fondamentaux du droit international public*, Bruxelles: 2005, p. 1220.

[20] *Cf.* E. Suy in his commentary to Art. 53 [in:] O. Corten, P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article*, Bruxelles: 2006 (hereinafter referred to as "Les Conventions de Vienne. Commentaire"), vol. II, p. 1908.

[21] *See* Judgement of the ICJ in *North Sea Continental Shelf* in disputes between *Federal Republic of Germany v. the Netherlands* and *Federal Republic of Germany v. Denmark* cases of 20 February 1969, para. 63, 70-81, ICJ Rep. 1969, pp. 39, paras. 41-45. *See also* Judgement (merits) of the ICJ of 27 June 1986 in *Case concerning military and paramilitary activities in and against Nicaragua* of 27 June 1986, ICJ Rep. 1986, para. 177, p. 95.

be problematical. The difficulties involved are amplified by the fact that international case law is fragmented and rather superficial, and a part of the doctrine of international law still questions the existence and legal nature of *jus cogens*.[22] Consequently, it is difficult to consider Art. 53 of the VCLT as a norm that codifies or crystalizes pre-conventional international law. It is still primarily a treaty norm.[23] On the other hand, it is less controversial to consider Art. 53 as a source of a customary law norm, which is just in the process of gradual formation.

1.3. *Jus cogens* as a norm of international law

1.3.1. *Jus cogens* from the perspective of general theory of international law norms

1. The text of Art. 53 of the VCLT indicates that *jus cogens* should be qualified as a norm of international law. It is worth noting that two official languages of the Convention (i.e. English and French) use the term "norm" and "norme" rather than the notion of "rule" or "règle".

International law doctrine sometimes distinguishes, within international norms, between provisions that determine policies, principles and rules. Provisions concerning policies are set in a general and abstract manner as objectives of required conduct. They do not, however, establish any procedures, means or criteria for achieving those objectives. They place an obligation on states to pursue the objective and to make a good faith effort to reach consensus with respect to that objective. Provisions concerning principles establish abstract norms and serve as guidelines (standards) for states' conduct rather than as the basis for concrete rights and obligations. These provisions do

[22] Criticisms that reject *jus cogens* were present from the very beginning. They were expressed during the Vienna Conference (*see e.g.* Nahlik, *supra* note 15, pp. 314-316; M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden-Boston: 2009, p. 667). In the Polish literature, the concept of *jus cogens* in international law, albeit in the pre-Convention era, was rejected by L. Ehrlich, *Prawo międzynarodowe* [International law], Warszawa: 1958, pp. 20-21, while during the works of the International Law Commission a particularly important article was that of G. Schwarzenberger, *International Jus Cogens?*, 43 Texas Law Review 455 (1965). Rejection of *jus cogens* remains, however, present today, particularly in the French doctrine (*see* S. Sur [in:] J. Combacau, S. Sur, *Droit international public*, Paris: 2006, pp. 50 et. seq.; *de facto* G. Guillaume, *Jus cogens et souveraineté*, [in:] *L'Etat souverain dans le monde d'aujourd'hui. Mélanges en l'honneur de Jean-Pierre Puissochet*, Paris: 2008, p. 127 et. seq.), but not only (*see e.g.* M. J. Glennon, *De absurdité du droit impératif (jus cogens)*, 110(3) Revue générale de droit international public 529 (2006). In the Polish doctrine, Czapliński remains pessimistic, *see* W. Czapliński, *Odpowiedzialność za naruszenia prawa międzynarodowego w związku z konfliktem zbrojnym* [Responsibility for a breach of international law in relation to armed conflict], Warszawa: 2009, pp. 202 et seq. *See also* U. Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences*, 18(5) European Journal of International Law 855 (2008), who observes that the number of critics is decreasing.

[23] *Similarly*, Shelton, *supra* note 16, p. 301. O. Dörr also notes that "to include the provisions on *jus cogens* in the Convention led to considerable progress from the viewpoint of general international law, since a topic discussed in doctrine acquired a 'normative face' in a binding document of law and lively debate about it was instigated, but it is not an undiminished success story, as the acceptance of the Convention as a whole was thereby restricted". *See* O. Dörr, *Codifying and Developing Meta-Rules: The ILC and the Law of Treaties*, 49 German Yearbook of International Law 129 (2006), pp. 150-151.

not always require that a particular objective be the central point; they rather describe "a set of values and the quality of behaviour as such". A provision concerning a principle does not regulate specific conduct; it expresses consensus as to the points of departure, values and means (these are "norms of aspiration" and not "norms of obligation"). In the case of a lack of specific norms that would develop a principle, its consequence usually consists in prohibiting a particular conduct. Last but not least, a provision concerning a rule determines specific conduct, addressees and beneficiaries. It may also happen that a provision designed as a rule is in fact a principle and requires normative development.[24]

Using the above distinction, we can say that provisions that only articulate aims or which are principles of law (i.e. rules that set general standards of conduct) should not be qualified as *jus cogens*. In principle, this category should include rules that determine the conduct of subjects of international law, i.e. indicate their rights and obligations.[25] However, in international law, as mentioned above, we sometimes witness the reinterpretation of provisions. As a consequence, provisions that set aims can be interpreted as principles having regulatory implications. For example, the principles of self-determination and respect for human rights and fundamental freedoms were derived from Art. 1 of the UN Charter, which sets the aims of the organization. Similarly, principles of law may sometimes be not only general determinants of conduct, but they may also serve as a basis from which specific rights and obligations of subjects of international law are derived. This is the case with respect to the prohibition on the use and threat of force as provided by Art. 2.4 of the UN Charter.[26] As a consequence, principles (regarded as such or derived from provisions designed as policies) cannot be *a limine* excluded from the scope of peremptory norms. In such a case however, assigning principles with a *jus cogens* character requires specifying the conditions of their operation, otherwise they may prove to be too general to link them with, for example, the sanction of nullity.

2. *Jus cogens* are rules of conduct. In the doctrine of international law, one may distinguish between norms that directly regulate rights and obligations (substantive and procedural norms) and those which do so in an indirect way (competence norms and conflict of law norms).[27] Only the first category is suitable for *jus cogens*. At the same time, peremptory norms are of a substantive rather than procedural nature. Looking from the perspective of responsibility for a breach of international law, *jus cogens* will

[24] P. van Dijk, *Normative Force and Effectiveness of International Norms*, 30 German Yearbook of International Law 9 (1987), pp. 12-15. He follows a distinction made by R. Dworkin.

[25] An international law norm can be defined as a rule of conduct in international relations, providing a basis for obligations and rights, and aimed at giving a voice to three values: effectiveness, equity and respect. *See* J. Gilas, *Norma prawa międzynarodowego* [A norm of international law], [in:] *Polska i świat. Księga pamiątkowa ku czci prof. H. Olszewskiego* [Poland and the world: A commemorative book for prof. H. Olszewski], Poznań: 1978, p. 130.

[26] Particularly if we interpret this prohibition in the light of the Declaration on Principles of International Law of 24 October 1970, A/RES/46/2625 (XXV).

[27] J. Gilas, *Prawo międzynarodowe* [International law] (2nd ed.), Toruń: 1999, pp. 97-98.

consist of norms of the first rank, not norms that specify or implement responsibility (the second – or if one so distinguishes – the third rank).[28]

1.3.2. *Jus cogens* as norms of international law

1. *Jus cogens* as norms of international law need to have a specific structure. As explained by J. Gilas, the structure of international law norms, as compared to norms of national law, is usually atypical. In particular, it is not always possible to find sanctions, which accompany the whole system of international law, or its specific sections. Hypothesises are frequently implied. As a consequence, the only visible element is disposition.[29] Of course, such a situation does not need to occur in the case of every norm of international law.

If one looks at the definition of Art. 53 from this perspective, it should be noted that *jus cogens* is defined not as a norm – rule of conduct, but in a generic fashion, as a particular matrix with which specific substantive peremptory norms should correspond. The Convention, therefore, only gives criteria for distinguishing *jus cogens*.

Are we able to derive from Art. 53 of the VCLT any elements of the normative structure of *jus cogens*? Considering that *jus cogens* as a general peremptory norm should operate in the international community as whole, this would indirectly mean that such a norm is directed to all its members. Consequently, the addressees, although implied, would be generally known. Moreover, the prohibition of derogation is undoubtedly an element of the disposition. Finally, the norm is supplemented with sanctions, as envisaged by Art. 53 of the VCLT.

2. **Hypothesis of *jus cogens***. As has already been stated, in the case of a majority international law norms, including *jus cogens*, hypothesis is implied. However, one cannot exclude that in the case of a particular norm, an addressee and the circumstances of its operation will be entirely or partially specified. Since peremptory norms are of a general or even universal character, the group of potential addressees includes all subjects of international law, in particular states.[30] What remains problematic is whether individuals can also belong to this group.

3. Disposition of *jus cogens*. Addressees of a peremptory norm cannot derogate or depart from its instruction. At the same time, a conduct resulting from rights and obligations, which cannot be derogated or departed from, is not known until it gets at the moment of recognition of a concrete substantive rule as a peremptory norm.

Looking from the perspective of the content of the disposition, one may distinguish between norms that prohibit, command or permit (i.e. rights) certain conduct.

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[28] *Ibidem*, p. 98.

[29] *Ibidem*, p. 96.

[30] The ICJ, in its advisory opinion of 8 July 1996 on *legality of the threat or use of nuclear weapons*, para. 79, ICJ Rep. 1996, p. 257, stressed that fundamental rules of humanitarian law constitute intrangressible principles of international customary law and have to be observed by all states, whether or not they are bound by a particular convention. The ICJ however did not answer whether such intrangressible principles constitute *jus cogens* (para. 83, p. 258).

In principle, there is nothing wrong with considering each of these norms as having a peremptory character. In practice, however, normally norms that express prohibitions (e.g. prohibition of racial discrimination, prohibition of torture) or permission (e.g. right of nations to self-determination or even all individual rights) are considered as *jus cogens*.[31]

4. Jus cogens and sanction. Sanction seems to be an indispensable element of *jus cogens*. Art. 53 of the VCLT stipulates that the sanction consists in rendering a treaty null and void, while in case of *jus cogens superveniens* (Art. 64 in connection with Art. 71 of the VCLT), it is termination of a treaty. The situation is not so clear when it comes to reservations and interpretative declarations (guideline 4.4.3 of the Guide of the International Law Commission on reservations). Although reservations contrary to *jus cogens* are not permitted, they are not necessary invalid. On the other hand, unilateral declarations which are in conflict with peremptory norms are void (pt. 8, Guiding Principles applicable to unilateral declarations of States). Irrespective of variations in the consequences resulting from a breach of a peremptory norm, one may observe that formal sanctions, as an element of *jus cogens*, appear in the context of formalized acts. As a side note, it should be also added that the sanction of nullity is envisaged not only in the context of *jus cogens*. The VCLT provides that a treaty may also become void in other situations (Art. 46 and subseq.).

However, application of *jus cogens* in international law, unlike in the case of domestic law, is not limited to formalized acts. In order to ensure the practical utility of *jus cogens*, it also concerns factual acts, including failure to act (breaches of peremptory norms can sometimes occur through factual behaviour or through formalized acts in the form of acts of domestic law which are considered in international law as facts[32]).

One may find a confirmation of such influence of *jus cogens* in the regulation of responsibility of states and international organizations. In particular, when it comes to considering national law as a question of fact it should be noted that according to Art. 3 of the Articles on responsibility of states for internationally wrongful acts, an assessment as to whether an act of a state is internationally wrongful is performed on the basis of international and not national law (see also Art. 12). The situation is slightly different in the case of responsibility of international organizations. Pursuant to Art. 1.1 of the draft articles on the responsibility of international organizations, the Articles apply to the international responsibility of international organizations for internationally wrongful acts. However, Art. 10.2 of the Articles provides that a breach of the rules of the organization, and not only its external obligations, may also constitute a breach of international obligations.

[31] *See also*, Linderfalk, *supra* note 22, p. 856, who believes that peremptory norms are regulative and not constitutive norms. At the same time "when a norm is used to identify some behaviour or state of affairs as either prescribed, prohibited, or permitted, it is said to have a regulative character".

[32] Unless international law refers to national law, it is regarded as a mere fact, manifestation of a will and activities of states. *See* judgement of the PCIJ of 25 May 1926 in the case *Certain German interests in Polish Upper Silesia*, Publ. PCIJ, Series A, No. 7, p. 19.

Looking from this perspective, one may ask what sanctions apply to infringements of *jus cogens* as a consequence of factual acts. The sanction of invalidity or ineffectiveness would be relevant only if national law would be a source of a breach. However, a dualistic perception of the relationship between international and domestic law, both in the Articles of the International Law Commission as well as in many constitutional orders, excludes such an effect of *jus cogens* (although from the perspective of the effectiveness of *jus cogens* such a formal sanction would be desirable). With respect to factual acts *sensu stricto*, formal sanction cannot apply. Observance of *jus cogens* is secured within the regime of responsibility for a breach of international law, together with the specific consequences envisaged with respect to the responsibility for violation of peremptory norms.

The above analysis allows for drawing some more general conclusions. First, sanction constitutes an element of *jus cogens*. Second, sanction does not take one form. As far as formalized acts are concerned, sanction may depend on the moment when *jus cogens* was violated. In any case, it is not necessarily and exclusively nullity. Third, sanction is also present with respect to breaches of a factual nature, and it is determined by the regime of responsibility for a breach of international law. Fourth, it would be a mistake to look for *jus cogens* in every case when a formalized act of a subject of international law is considered to be invalid. Nullity may be the result of reasons other than *jus cogens*.

1.4. Identification criteria of peremptory norms

1.4.1. Sociological criterion

1. Art. 53 of the VCLT qualifies as *jus cogens* those norms which meet two criteria: a sociological one and a normative one.[33] Both criteria need to be met simultaneously and both of them should be understood as complementary. The former is connected with the way *jus cogens* is created and modified, while the second one concerns the prohibition of derogation.

According to Art. 53 of the VCLT *jus cogens* is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a norm of the same character (in a sociological and normative sense). In this context, it should be stressed that the requirement of acceptance and recognition by the international community of states as a whole is a necessary condition, but not a sufficient one. The community of states also needs to accept and recognize such a norm as one from which no derogation is permitted.

2. The sociological criterion, which is used in Art. 53 of the VCLT, raises numerous doubts. They are already visible in the heading of the provisions as well as in the first

[33] Sometimes these criteria are even more diversified. *See e.g.*, K. Hossain, *The Concept of Jus Cogens and Obligation under the U.N. Charter*, 3 Santa Clara Journal of International Law 76 (2005), who identifies four criteria for distinguishing *jus cogens*: 1) status as a norm of general international law; 2) acceptance by the international community of states as a whole 3) immunity from derogation; 4) modifiable only by a new norm having the same status.

sentence of Art. 53, both of which stipulate that *jus cogens* is a norm of general international law (French: droit international général).

The doctrine is not particularly clear on this aspect. Although a majority of authors agree that only general norms can qualify as *jus cogens* (at least only those are covered by Art. 53 of the Convention),[34] there also scholars who accept that *jus cogens* can be of a regional character. These authors argue that the definition in the Convention was created only for the purpose of the VCLT.[35]

Part of the doctrine perceives the existence of regional *jus cogens* not as a simple application of the general concept of peremptory norms in regional settings, but as an autonomous concept which differs from the general *jus cogens* with respect to its purpose and roots. For example, R. Hasmath argues that regional peremptory norms assist in accomplishing certain social and political tasks in specific temporal contexts, and are limited to regional groups of states. Such regional *jus cogens* can be replaced by another super-norm or eliminated completely by the expiration of its usefulness. Regional *jus cogens* can also take precedence over general customary law of a dispositive character. Regional peremptory norms can be based on regional customs or treaties. The author gives three examples of regional *jus cogens*: 1) the Brezhnev Doctrine of 1968, operating in the regional grouping of socialist countries; 2) the prohibition against juvenile execution in the OAS; 3) human rights interpreted in accordance with the Qur'an and the Sunnah, as embodied in various declarations on human rights in the Islamic world. He sees a justification for this approach in the heterogeneity of the contemporary international community, which makes a consensus between states difficult. Although Hasmath recognizes that regional *jus cogens* can promote regional divisions and variations in international law, he accepts such norms in limited situations.[36]

It is difficult to agree with this approach. As a matter of fact R. Hasmath talks about a concept which is completely different from *jus cogens*. The criteria used for identification of such norms are not clear. It is also difficult to accept the examples of regional *jus cogens* norms given by the author. The Brezhnev Doctrine was not considered to be a legal norm and in fact constituted a violation of international law, not the expression of *jus cogens*. Seemingly, it would be easier to accept the peremptory character of the prohibition against juvenile execution. However, in fact this prohibition is already included in the general norm that protects the right to life. A regional norm is only a concretization of general law. Finally, Islamic human rights can be considered as an ideological interpretation of individual rights. Overall all, it seems that the author overemphasizes,

[34] E.g. M.E. Villiger in commentary to Art. 53, [in:] Villiger (ed.), *supra* note 22, p. 676. In the Polish literature e.g. Gilas, *supra* note 27, p. 97.

[35] *See* e.g. Suy, *supra* note 20, p. 1911. In the Polish literature, conditionally (with a reservation that such norms do not contradict general *jus cogens*), e.g. T. Jasudowicz, *Normy regionalne w prawie międzynarodowym* [Regional Norms in International Law], Toruń: 1983, pp. 293-296.

[36] *See* R. Hasmath, *The Utility of Regional Jus Cogens in International Law*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366803## (last visited 20 August 2013).

even demonizes to some extent, the heterogeneity of the international community and does not take account of the need for dialogue within it.

Nevertheless, if one accepts the existence of regional peremptory norms, a decisive element in qualifying specific norms as *jus cogens* would be a formal criterion (i.e. prohibition of derogation). This condition would, however, be prone to relativisation as the prohibition of derogation would only operate within the regional community. At the same time, regional *jus cogens* would need to be compatible, or at least not contradictory, with general *jus cogens*.

The issue is debatable. In any case, if one accepts that the definition included in Art. 53 of the VCLT has become general (which also may be questioned, particularly if one considers that references to Art. 53 appear predominantly in the works of the International law Commission), the argument which supports the conclusion that only general norms can constitute *jus cogens* becomes a method, inscribed in their nature, of accepting and modifying peremptory norms.[37]

This conclusion is not undermined by the fact that regional organs (e.g. courts of regional organizations) rule on regional peremptory norms or that some regional norms are recognized as *jus cogens*. Although regional organs may recognize various norms as *jus cogens*, their decisions are not decisive but only constitute an invitation to enter into international judicial dialogue. Confirmation of peremptory norms by general or other regional organs may lead to the recognition of real *jus cogens*. In this sense, regional norms can operate as a source in the formation of real general *jus cogens*. At the same time, it is not necessary that a particular regional norm as such is recognized as *jus cogens* by other international organs. It is sufficient to grant such status to a corresponding norm of a general or regional (i.e. coming from a different region) character. Such confirmation coming from other international organs should be done as to the principle (e.g. prohibition of torture or use of force), and not as to a specific formulation.

3. The generality of peremptory norms undoubtedly should be connected with the mode of their acceptance and recognition. In this context, however, some doubts arise with respect to determination of the subjects that accept and recognize *jus cogens*: "international community of States as a whole" (French: "communauté internationale des Etats dans son ensemble"). During works on the draft Convention, the Drafting Committee explained that it is not necessary to have the acceptance of all existing states. As noted by its chairman, ambassador M.K. Yasseen, it is sufficient to have the acceptance of a great majority of states. Consequently, an objection from a single state or a small group of states would not constitute an obstacle to the formation of *jus cogens*.[38] In the context of customary norms, this would imply the ineffectiveness of actions taken by a persistent objector. However, one may wonder whether, in the case of the presence of

[37] It is also worth noting that in the draft of the Convention of 1966, the sociological criterion was limited to generality of a peremptory norm (then Art. 50 of the Convention). There was no reference to the requirement of its acceptance by the international community of states.

[38] *See* Suy, *supra* note 20, p. 1910.

a superpower in a minority group (alone or with a group of coalition states), *jus cogens* can really be formed.

During the work of the conference on law of the treaties, it was argued (via the US amendment, but a similar position was also held by Finland, Greece and Spain), in the context of the expression "international community of States as a whole", that existence of *jus cogens* should depend on its acceptance in all regions of the world or on its recognition in different national and regional legal systems of the world.[39] Ultimately, this position was rejected since international law could be more advanced than national law (H. Waldock).[40] However, it should also be observed that while, on the one hand, the US amendment reflected a consensual approach under which peremptory norms should not be imposed by a limited group of states which are not of a sufficiently representative character, on the other hand – and this probably had an important impact on the outcome of the voting – its acceptance could block the recognition of norms that are vital for a great majority of states but not accepted in one specific region (e.g. in the Arab world due to Sharia law, or by the United States and its allies).

4. The notion of "international community of states as a whole" highlights the fact that such community is composed of states. Nowadays, however, such a perception of the international community can be criticized, particularly due to the processes of institutionalization and globalization. The process of institutionalization of international relations, which particularly took hold after the end of the WWII, has led to the creation of numerous international organizations with international legal personality. There are those among them which enjoy as much or more extensive powers than states to act at the international level. Last but not least, some argue that other entities, including individuals and transnational companies, can be also regarded as subjects of international law. As a consequence, the international community is perceived as a global community and its law is regarded as global law.

Nonetheless, the International Law Commission, when it proposed a draft of the Convention on the law of treaties between states and international organizations or between international organizations, negatively assessed the possibility of shortening the analysed phrase to "international community as a whole". In its commentary to Art. 53 of the VCLTIO, it observed that "because the most important rules of international law are involved […], in the present state of international law, it is States that are called upon to establish or recognize peremptory norms" (pt. 3).[41] This formulation should not be taken as an indication that the Commission is not taking into account the changes taking place in the international community. For despite such changes, the Commission continues to believe that the predominant role is still played by states, not other entities.

At first glance, a more flexible approach to conceptualizing the international community can be found in the commentary to the Articles on responsibility of states for

[39] *Ibidem*.

[40] Nahlik, *supra* note 15, pp. 320-321.

[41] *See* Law of treaties of international organizations. Commentaries 1982, p. 56.

internationally wrongful acts (2001). Although no definition of *jus cogens* is provided in the relevant provisions, which would have modified the sociological criterion, the Commission consistently, both in the draft and comments, followed the ICJ judgement in *Barcelona Traction*[42] (of 1970) and used the notion of "international community as a whole", formally ignoring states (see Arts. 33, 42, 48). At least theoretically this could open a discussion with respect to the possible extension of the group of subjects that belong to the international community for the purpose of defining *jus cogens*. However, when it comes to determination of subjects which, as belonging to international community, could invoke responsibility, only states are mentioned (see Art. 48 of the draft Articles). Having said this, one also needs to admit that such a formulation results from the subject of the regulation, i.e. responsibility of states (and not generally the general responsibility for a breach of international law).

The work of the ILC on responsibility of international organizations provides a broader view of the international community as a whole. In particular, Art. 49 of the draft Articles on the responsibility of international organizations provides that responsibility can be invoked not only by states, but also by international organizations. At the same time, international organizations are defined more broadly than organizations of states (see Art. 2 lit. a). This means that the international community as a whole is composed not only of states, and it is not only states which can influence the acceptance and recognition of specific norms as *jus cogens*. A similar approach (at least *prima facie*) to the conceptualization of international community is also visible in the Rome Statute of the International Criminal Court of 1998 where, in defining crimes within the jurisdiction of the Court, it was stated that it has jurisdiction with respect to the most serious crimes of concern to the international community as a whole (Art. 5).

5. "The international community as a whole" also means that a norm is valuable for the community and, as a result, that there is a community interest in the protection of the value enshrined in the peremptory norm. As C. Focarelli pointed it out, "The term 'as a whole' seems to hint at an 'organic whole' in a sense similar to a biological organism or a mystical body, and to place emphasis on the fact that the community of states has to be understood as the *indivisible unity* of states, as opposed to a 'mere' arithmetical sum of them taken individually."[43] At the same time the international community as a whole can be perceived as an international *pouvoir constituant*. Consequently, the *jus cogens* norms, which safeguard existing fundamental shared values, are of special importance for the world community. In that sense it is *jus necessarium.*[44]

6. Another element of the sociological criterion, although one that is also connected with normative criterion, is that the modification of a peremptory norm can be done

[42] *See* ICJ judgement in *a dispute between Belgium and Spain Barcelona Traction, Light and Power Company Limited* (new application: 1962; second phase), ICJ Rep. 1970, p. 32, para. 33.

[43] C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice*, Oxford: 2012, p. 151.

[44] *Contra*, *ibidem*, pp. 312-316. The author maintains that *jus cogens* is applied as *jus necessarium*, understood as a law that must be (i.e. it does exist currently, but rather will appear in future). It has a "promotional, provisional, an ultimately deontological function".

only in the same way as its acceptance. This indirectly results from the formulation of Art 53 of the VCLT, which provides that modification of *jus cogens* can be done only by a subsequent norm having the same character, i.e. a peremptory norm of general international law. In this context it is worth noting that the use of the verb "modify' indicates that *jus cogens* can be changed.[45] On the other hand, it is striking that the definition of *jus cogens* does not directly speak about the repeal of such norms.

One may therefore assume that it is tacitly understood that an existing peremptory norm can be replaced by a new norm having, at the time of modification, the same nature as the existing norm. Is it, however, possible that a new norm could have a radically different (opposite) content (complete modification) from the existing norm? One may argue that, due to the special importance of values for states, its nations and humans (see my remarks in section 1.4.2), in practice it is not possible to replace an existing norm with a new one that has an opposite content.[46] This would mean that the international community would become a completely new community (which perhaps cannot be even called a community), probably a totalitarian one. In such a community there will be no room for international law as we have known it for centuries.

Art. 53 does not provide that the (complete) modification of a norm would lead to simple removal of an old norm from the international legal order (without replacement by a new norm), or even its elimination and replacement by a norm of a dispositive character. What is assumed here is the relative continuity of *jus cogens*. Consequently, although theoretically this cannot be excluded, in practice it is questionable to apply the institution of *desuetude* to *jus cogens*.[47]

Since it is not very probable in the contemporary international community that *jus cogens* would be replaced by a new norm of the same character but an opposite content, or that it will degrade into a dispositive norm or be removed entirely from the international legal order, one may ask what changes are possible. It seems that such a change could relate to a partial modification in the objective scope of the norm, in particular with respect to the permissibility of new exceptions (or the broadening of existing ones) from the rule expressed in such a norm.[48]

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[45] This is the position of the ILC in its commentary to the draft articles on the law of treaties, where it observed (pt. 4) that: "it would be clearly wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the future developments". The Commission believes that such modification could particularly occur on the basis of a general multilateral treaty, which however seems to be disputable. *See* Law of treaties between States. Commentaries 1966, p. 248.

[46] *See similarly*, Orakhelashvili, *supra* note 14, pp. 127-130.

[47] *See* two studies on this issue: R. Kolb, *La desuétude en droit international public*, 111 Revue Générale de Droit International Public 577 (2007); G. Le Floch, *La desuétude en droit international public*, 111 Revue Générale de Droit International Public 609 (2007).

[48] According to B.D. Lepard in *Customary International Law: A New Theory with Practical Applications*, Cambridge: 2010, p. 259, a change can occur when "there is overwhelming evidence of a global moral consensus among States in favour of the evolution, and the change better helps to implement 'essential ethical principles'."

It is not particularly difficult to imagine such a situation. The prohibition on the threat or use of force inconsistently with the UN Charter can serve as an example. This prohibition is generally regarded, both in the doctrine and judicature, as *jus cogens*. It is not, however, without exceptions, as the use of force within the doctrine of self-defence, as well as upon authorization of the Security Council, is permissible. In addition, one may wonder whether some additional flexibility has been introduced to the exceptions provided by the UN Charter by the 'preventive self-defence' undertaken by the United States with respect to Iraq. Although the majority of scholars have condemned the conduct of the United States, it should be noted that the UN did not condemn it unequivocally, and the lack of a strong reaction on the part of the international community and lack of clear statement from the Security Council that the peremptory norm was breached may, in the future, lead to the acceptance of such an exception. Another example, which also relates to the prohibition of threat and use of force, is the use of armed force against Serbia, without prior authorization of the Security Council, due to Serbia's serious violations of humanitarian law on the territory of Kosovo. This case is probably even a better candidate for an additional exception to the prohibition against the threat or use of force.[49]

If one accepts the possibility of partial modification of the objective scope of *jus cogens*, one thing needs to be stressed. Such modification cannot lead to rejection of the essence of the substantive peremptory norm in question. No role-reversal is possible, i.e. a situation when a previous norm (e.g. prohibition of torture or prohibition on the use of force) becomes, as a result of acceptance of exceptions, transformed into an exception itself. As was already mentioned, this would amount to a radical (and rather irreversible) modification of the nature of the international community and the law that governs it. Consequently, one may argue that, contrary to some superficial opinions, *jus cogens* consists of norms that cannot be changed as to their essence.

1.4.2. Normative criterion

1. *Jus cogens* under Art. 53 of the VCLT needs to meet not only a sociological but also a normative criterion, i.e. it has to be a norm from which no derogation is permitted.[50] The notion of derogation (French: *dérogation*) requires some explanation. The doctrine indicates that derogation should be understood as encompassing not only

[49] *See also* analysis of Linderfalk, *supra* note 22, pp. 859-867. *See also* J. Kranz, *Między wojną a pokojem: świat współczesny wobec użycia siły zbrojnej* [Between war and peace: The contemporary world and the use of armed force], [in:] J. Kranz (ed.), *Świat współczesny wobec użycia siły zbrojnej. Dylematy prawa i polityki*, Warszawa: 2009, pp. 81 et. seq. The author argues that due to difficulties in maintaining coherence of the prohibition on the threat or use of force, its peremptory character should be rather connected with the prohibition of aggression or armed attack (p. 232). This is however disputable as it equates the non-derogability of a norm with the lack of exception to a norm.

[50] Part of the doctrine has criticized the use of normative criterion as an element that defines *jus cogens*. It is argued that the criterion is a tautology: "a norm that does not admit derogation is just that – a norm that does not admit derogation", *see* F.A. Teson, *A Philosophy of International Law*, Oxford: 1998, p. 93.

rejection of the norm (annulment, deviation, derogation *sensu stricto*), but also as an amendment or partial derogation thereof.[51]

One may go even a step further when analysing the substance of derogation. Derogation can be of a formal or informal character (made through interpretation).[52] As far as the formal source is concerned, it is prohibited to derogate on the basis of international agreements (written or oral, bilateral or multilateral, except for a universal treaty, which however occurs very rarely), unilateral acts, or resolutions of international organizations. It is equally not possible to ascertain dispositive customary law or general principles of law which are incompatible with *jus cogens*.

In principle, it is prohibited to adopt a national measure that includes provisions which conflict with *jus cogens* (even beyond unilateral acts), since *jus cogens* imposes obligations with respect to all subjects belonging to the international community. None of them can invoke its internal law as a justification for its failure to perform such obligations. *Obligationes sunt servanda*. The adoption of such acts will lead to international responsibility.

As far as the prohibited derogation is concerned, this may include modification of the content of a norm, exclusion or limitation of certain consequences (e.g. through reservations), assigning terms used in such a norm with a specific meaning, or modification of the scope of its applicability (e.g. in the context of interpretative declarations). A *jus cogens* norm must be of a peremptory character.

2. An issue that remains controversial is the relationship between prohibition of derogation and the permissibility of exceptions to peremptory norms. At first glance, the principle of non-derogation would seem to exclude any exceptions. However, such an understanding of the prohibition is oversimplified and erroneous, as a peremptory norm can exist together with exceptions. This does not, however, mean that such exceptions always have to occur; for example the prohibition on torture is absolute.[53] What is important is that exceptions need to be precise and not allow for excessive freedom in their interpretation, while the norm as a whole has to meet the sociological criterion (i.e. it is accepted and recognized by the international community of states as a whole as *jus cogens*).[54] A classic example of a situation allowing exceptions is the prohibition

[51] Jasudowicz, *supra* note 35, p. 286. R. Kolb, *Jus cogens, intangibilité, intransgressibilité, dérogation 'positive' et 'negative'*, 109(1) Revue Générale de Droit International Public 305 (2005), pp. 323-324. The author observes, in this context, that *jus cogens* is a legal technique that permits to maintain the unity and integrity of the legal regime, prohibiting its normative fragmentation, in particular when a legislator has envisaged non-derogability due to public interest (*utilitas publica)*. In his understanding, derogation means replacement of more limited *ratione personae* normative regime with a more general regime.

[52] *See* Orakhelashvili, *supra* note 14, pp. 76-77.

[53] In this context some authors propose to distinguish between peremptory norms which allow for exceptions and those which do not so allow.

[54] Lepard, *supra* note 48, pp. 248-250. The author rejects the position that peremptory norms are of an absolute character from which no exception is possible, and observes that limited exceptions are permissible, particularly in the interest of observance of another *jus cogens* norm (e.g. prohibition on the use of force and right to self-determination) (p. 250).

on the threat or use of force, as described above.[55] At the same time, the permissibility of exceptions from peremptory norms should not be equated with permissibility of reservations and interpretative declarations which represent unilateral attempts to modify the content, scope and consequences of peremptory norms and which are incompatible with the principle of the non-derogation of such norms.

3. As has already been explained, *jus cogens* applies not only to formalized acts (where the prohibition against derogation is a pre-condition of the formal legal consequences of violation, e.g. nullity), but also to factual actions in the context of responsibility, as broadly understood, for a breach of international law. However, in the latter case one may ask whether it makes sense to talk about *jus cogens* as a peremptory norm. Maybe it would suffice to say that what we have here is simply the responsibility of subjects of international law. It follows from the Articles on responsibility of states and international organizations for wrongful acts that the character of the norm (including its peremptory character, expressing itself in the prohibition of derogation) does not influence of the degree of responsibility (e.g. Art. 12 of the Articles on responsibility of states; Art. 10.1 of the Articles on the responsibility of international organizations).

In answering this question, one should start with the observation that under international law on responsibility (of states and international organizations) and criminal responsibility of individuals, the character of the norm that was breached is *prima facie* irrelevant. Responsibility arises for breach of any binding norm of international law. However, the consequences of a breach – as determined by the ILC – vary depending the character and scope of the applicable norm. Thus, the question whether a breach (in particular a serious one) concerns a peremptory norm is relevant. The nature of the breach can therefore qualify international responsibility.

4. It is also worth noting that one may look at the prohibition of derogation not only from the formal, or technical, point of view.[56] This criterion was formulated in connection with the sociological criterion (both need to be met together). The prohibition of derogation has an ancillary, consequent function and protects what the international community as a whole considers as requiring special protection.[57] One may therefore come to the conclusion that a proper understanding of the prohibition of derogation requires reconstruction of the justification of such a considerable normative rigour. In

[55] Sometimes, in the context of discussion on the peremptory character of the prohibition on the use of force, it is argued that one should distinguish between regular *jus cogens* (which permits exceptions) and strengthened *jus cogens* (without exceptions). This distinction, although not entirely separable, could be relevant in the context of the analysis of the prohibition on the use of force and the taking of countermeasures or sanctions. *See* Ch. Leben, *Obligations relating to the Use of Force and Arising from Peremptory Norms of International Law*, [in:] J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility*, Oxford: 2010, pp. 1202-1203.

[56] This position (with respect to the law of treaties) was taken by the arbitral tribunal in its award of 31 July 1989 in *Maritime delimitation between Guinea-Bissau and Senegal,* para. 41, RIAA vol. XX, p. 135. It held: "Du point de vue du droit des traités, *le jus cogens* est simplement la caractéristique propre à certaines normes juridiques de ne pas être susceptibles de dérogation par voie conventionnelle."

[57] Ragazzi, *supra* note 15, p. 49.

other words, one may argue that a condition *sine qua non* for recognition of a norm as peremptory is its special content, and more specifically, the special significance of the value it protects, which the international community as a whole considers as precious and requiring special protection. This finds a support in the ILC commentary to Art. 50 of the draft VCLT, which states (pt. 2) that: "[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of jus cogens." [58]

This leads to the conclusion that the criterion of non-derogation implies the existence of an axiological criterion that refers to a special value inscribed in the content of a norm.[59] As a consequence, only a norm that simultaneously meets the sociological, normative and axiological criteria can be recognized as *jus cogens*. It would seem that the axiological criterion is the most important. In any case, this criterion has a particular importance in the context of the effect of *jus cogens* on the assessment of factual actions (i.e. in the context of responsibility for a breach of international law).

This conclusion finds support in the ICTY judgement in the *A. Furundzija* case of 10 December 1998, where the Tribunal found, when analysing the prohibition of torture as a *jus cogens* norm, that it had acquired such a status due to the importance of the values which are protected. A few lines later the Tribunal added that the prohibition of torture constitutes one of the most basic standards for the international community. This prohibition has a deterrence effect, in the sense that it indicates to all members of the international community, as well as individuals subject to their power, that it is an absolute value from which no departure is possible.

One may reach the same conclusion generalizing from the statement of the ILC found in its commentary to Art. 40 of the Articles on responsibility of states (scope of application of chapter III, part II relating to serious breaches of obligations arising under peremptory norms). The ILC found that such obligations "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values" (pt. 3).[60]

Viewed from this perspective, one can say that *jus cogens* includes norms that protect existential values. This, however, does not resolve the problem as to which norms should be included in this group. Under a positivist approach, one can argue that only values that have received a broad inter-civilizational acceptance may qualify as *jus cogens*. In face of the world's cultural diversity, a dialogue between the cultures of the con-

[58] Law of the treaties between States. Commentaries 1966, p. 248. In this context one cannot agree with R. Kolb, who believes that in 1969 *jus cogens* was perceived as an ordinary legal technique expressing itself in the prohibition of derogation (Kolb (*Obsérvation*), *supra* note 6, pp. 841-842).

[59] P.-M. Dupuy, [in:] *L'unité de l'ordre juridique international*, RCADI 2002, vol. 297, p. 281, argues that together with Art. 53 of the VCLT, a principle is formulated that establishes a normative hierarchy of a new type. It is based not on formal criteria, but is a hierarchy which corresponds with the values and priorities of the international community.

[60] Responsibilities of States. Commentaries 2001, p. 112.

temporary world is a desired method for identifying such values.[61] At the same time, one should bear in mind that a number of norms which are declared to be peremptory norms represent values that are important for the Western World, and which are possibly internalized by other cultures. On the other hand, when viewed from the long-term perspective the room for agreement on basic values that would constitute a foundation for the existence of international community as a whole (and as a consequence on the law that regulates its functioning) is rather limited. If the international community as a whole were to decide to establish values that are different from those which are actually fundamental (e.g. relating to the protection of human dignity or basic rights of nations), or to qualify only some of them, this may endanger the existence of the international community, or at least cause serious dysfunctions in its operation.

5. There is disagreement among scholars as to the role of the formal criterion in the identification of *jus cogens* norms. On the one hand, one part of the doctrine repeatedly argues that the prohibition of derogation is an essential element for distinguishing *jus cogens*. On the other hand, there is belief in the practice of international law (as well as among some scholars) that this criterion is definitively not sufficient, and may even be deceptive. This stance is reflected in the works of the ILC as well as in the opinions expressed by some international bodies. The Commission, already in its commentary to Art. 50 of the draft VCLT, rejected the idea that a treaty provision "possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted. […] Such stipulation can be inserted to any treaty with respect to any subject matter for any reasons which may seem good to the parties. […] Breach of the stipulation does not, simply as such, render the treaty void." What is important is the particular nature of the subject matter which the prohibition protects (pt. 2).[62]

A similar stance was taken by the Commission in its guidelines on reservations to treaties and interpretative declarations (2010), where it distinguished between reservations contrary to a rule of *jus cogens* and reservations to provisions relating to the non-derogation of rights (guidelines 3.1.9 and 3.1.10). In doing this it referred, among the other things, to the UN Human Rights Committee's general comment no. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant, or the optional protocols where such a relationship was rejected.[63] In addition, the international law doctrine sometimes holds that the prohibition of derogation constitutes a consequence of *jus cogens* rather than a criterion for singling it out.

This approach presumes that there are two categories of norms prohibiting derogations in the international legal order: *jus cogens* and *jus dispositivum*. There are also two

[61] *See* Zemanek, *supra* note 16, p. 1117, who observes: "In asserting the peremptory character of international norms the differing cultural/religious value systems among the States forming the international community should be kept in mind. Agreement on the formal validity of a certain peremptory norm alone, without a consensus on its content, creates a dangerous illusion."

[62] *See* Law of the treaties between States. Commentaries 1966, p. 248.

[63] *See* Reservations. Commentaries 2010, pp. 469-470.

categories of *jus dispositivum*: those which prohibit derogation and those which permit it. The result is great confusion, which may even have dangerous consequences for protected entities (in particular individuals), as it leads to relativisation of the minimum catalogue of norms that are regarded as non-derogable, even in situations that are particularly dangerous for the functioning of a state, e.g. in case of war.[64]

Irrespective of the assessment of the relationship between the prohibition of derogation and *jus cogens*, the situation discussed above (i.e. *jus cogens* concerns only those norms which are non-derogable and which, at the same time, protect fundamental values of a universal nature) additionally strengthens the argument for apprehension of a close relationship between the formal and sociological criterion, and by implication also a criterion of special content for such norms.

1.4.3. Conditions for applying the criteria of *jus cogens*

1. From the perspective of the criteria used to distinguish *jus cogens*, it is important to ask what are the practical and institutional conditions for its application. This seems to be particularly relevant in the context of the sociological and axiological criteria. Who decides, and on what basis, that a norm has been accepted and recognized by the international community of states as a whole, and that such a norm is of fundamental importance to that community?

Certainly, individual states are not qualified to do this. The same is true for their groupings, especially if they were established on ideological principles. A more important role could be played by universal international organizations, in particular those like the UN. Within the UN, resolutions of the General Assembly are arguably the most important. Although the Assembly does not have executive powers, it is a body where all Members are represented (in practice hence it is a universal international community of states). Resolutions of the Security Council, a body which has an important functions and adequate competences and which assembles the Great Powers, should be seen as a means of control over compliance with *jus cogens*. The Security Council constitutes an important organ of the UN, but at the same time it is a limited club of states.[65]

2. Besides international organizations of a universal character, an important role in the recognition and acceptance of norms of general international law as peremptory norms is (and should be) played by international case law, as broadly understood. International courts and arbitration tribunals are, at least potentially, able to look at the various demands for acceptance and recognition of *jus cogens* in more independent and

[64] *See also* critical remarks by C. Mik, *Ochrona praw człowieka w świetle źródeł prawa międzynarodowego* [Protection of human rights in the light of sources of international law], [in:] C. Mik (ed.), *Prawa człowieka w XXI wieku. Wyzwania dla ochrony prawnej* [Human rights in 21st century: Challenges for legal protection], Toruń: 2005, pp. 60-61.

[65] *See similarly* P. Tavernier, *L'identification des règles fondamentales – un problème résolu?*, [in:] Ch. Tomuschat, J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden: 2006, pp. 3-5.

deeper way. Certainly universal courts should be in a privileged position as compared to regional courts or arbitration tribunals. At the same time, their decisions should be recognized and confirmed in the regional and arbitration case law. In any case, a dialogue among these different organs is surely the preferred method of reaching consensus. One manifestation of this dialogue was the recognition in one of the ICTY judgements of the prohibition of torture as *jus cogens*, which was subsequently accepted in the ECtHR case law. Another example concerns the prohibition of genocide, which was again recognized as a peremptory norm by the ICTY, followed by the ICJ and ECtHR.

International courts and arbitration tribunals should not, however, act in a vacuum or arbitrarily. Their decisions cannot be based solely on their own interpretation or determination of the content of such norms, references to external case law, or determinations made by the ILC or legal doctrine. International organs should consider the positions of states, their groupings, as well as the resolutions and practice of important international organizations.[66] It is advisable that they use relatively objective indicators and evidence; with respect to treaties this should particularly include the number of state-parties (which should be close to the whole international community – in other words one should avoid recognition of the norms of particular treaties as *jus cogens*). They should also take into account the existence of provisions explicitly prohibiting derogations, and those prohibitions should not be relativised in relation to treaties of a universal character. In the case of customs, it would advisable to require showing that a particular custom is really universal.

1.5. Legal basis, general character and effectiveness of *jus cogens*

1. Recognition of certain substantive norms as *jus cogens* raises the problem of identification of a positive legal basis for such norms (not Art. 53 of the VCLT). In the context of theory on the sources of international law, one may look for such legal basis in a treaty, custom or general principles of law. Considering that *jus cogens* are general norms (accepted and recognized by the international community of states as a whole), particular norms, including regional and bilateral ones (even if they prohibit any derogations) should not be accepted as a legal basis for peremptory norms. A difficulty arises in determining when such norms gradually acquire acceptance as a part of customary law, becoming general norms, or if they correspond to treaty provisions of a general character. In such a case, particular norms will only constitute a starting point for the establishment (acceptance and recognition) of *jus cogens*. However, alone they will not form a sufficient basis.

It seems more natural to look for the legal basis of peremptory norms in treaty norms of a general character. However, even here one needs to be careful. Treaty norms should be more than just general (i.e., more than just included in a regular multilateral

[66] *See contra* Tavernier, *supra* note 65, p. 11, who argues that identification of *jus cogens* belongs to international courts and not to states. As such, their role is a consequence of a their special position in the contemporary international community.

treaty). They should rather be universal and representative of the international community of states as a whole. With respect to such rules, one could more easily expect that the criteria for establishment of parallel custom will be met.

However, the most natural basis for *jus cogens* is provided by general customary law. At the same time, and contrary to what one would expect, recognition of a particular customary norm as a peremptory one is not an easy task and may lead to many surprising results. Customary law in its classical understanding (e.g. ICJ case law[67]) is based on two elements: practice (particularly of states) and a belief that such a practice is required as a matter of law (*usus* and *opinio iuris*). On the textual level, Art. 53 of the VCLT does not indicate that the practice of states is relevant in establishing *jus cogens*. The Convention only speaks about the acceptance and recognition of a norm, which may suggest that only legal consciousness is important. However, the preparatory works of the Convention do not confirm the position that *jus cogens* could consist only of a reflection of legal consciousness, a new source of international law or a specific type of "intellectual" custom.[68]

2. If one subscribes to the classical understanding of custom, it would be necessary, in the context of *jus cogens*, to show that there is general, consistent, and uninterrupted and long-lasting practice of states, from which a certain rule of conduct emerges, coupled with a belief that such a rule is binding and of a peremptory character (double *opinio iuris*).[69] However, showing a general, consistent, uninterrupted practice that lasts for some time can prove to be extremely difficult, if possible at all. The position held by the ICJ in the *Nicaraguan case* of 1986, which accepts, as a basis of custom, a practice that is not absolutely consistent is not particularly helpful.[70] Practice, understood as an active attitude of subjects of international law, may simply not exist. To the contrary, there may be only cases finding a breach of important norms.

Treating peremptory norms as traditionally understood norms of customary law raises an immediate question about the permissibility of having a persistent objector at the stage of formation of a norm (in an analysed case, both during the formation of the norm as well as during the process of recognition of its peremptory character, if these two processes take place at different moments of time). If one subscribes to the classical understanding of custom, exclusion of the institution of a persistent objector is questionable.[71] It is always possible to argue that a peremptory norm does not yet exist while there is an objection to prevent its recognition as a customary norm or peremptory norm.

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[67] *See e.g.* Judgement of 13 July 2009 in *Dispute regarding navigational and related rights between Costa Rica and Nicaragua*, paras. 140-143, ICJ Rep. 2009, pp. 48-49; Judgement of 3 June 1985 in *Dispute between Libya and Malta on delimitation of the continental shelf*, para. 27, ICJ Rep. 1985, pp. 29-30.

[68] *See* Hossain, *supra* note 33, pp. 79.

[69] *See* R. Huesa Vinaixa, *Le rôle de l'opinio iuris*, [in:] R. Huesa Vinaixa, K. Wellens (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international*, Bruxelles: 2006, pp. 65-66.

[70] *See* ICJ Judgement (merits) in *Case concerning military and paramilitary activities in and against Nicaragua*, para. 186, p. 98.

[71] *See also* M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge: 2005, p. 443, referring to the principle of sovereign equality.

However from the perspective of Art. 53 of the VCLT (as well as the works of the International Law Commission), acceptance of the objection is not a realistic option. Under the classical approach a persistent objection allows one to avoid to be bound by a specific norm, while the aim of a peremptory norm is just the opposite (i.e. to bind all subjects of international law). It may be therefore argued that Art. 53 requires acceptance and recognition by the international community of states as a whole, but not necessarily by all states. This would mean and the objection of single state or small group of states cannot frustrate the creation of a peremptory norm.[72]

Accepting custom as a basis for *jus cogens* is also connected with various practical (evidentiary) problems. Some of them generally concern customary law, e.g. access to the official practice of states, the relevance of practice of non-democratic states, and the relevance of resolutions of international organizations as an element of practice. Whereas it might be relatively easy to prove the elements that constitute a norm of customary law, showing that such a customary norm is actually accepted and recognized as non-derogable is much more difficult.[73]

3. Today the understating of customary law is subject to reinterpretation.[74] These attempts are connected with the process of marginalization of the importance of practice (i.e. accepting practice that expresses itself only in national legislation or so-called verbal practice, and in particular in the cases of practice by omission or practice based only on the number of ratifications of a treaty), while at the same time placing emphasis on the legal consciousness of the community (particularly if a practice is sparse and not entirely consistent). These attempts are especially visible in the case law of criminal courts, particularly in some judgements of the ICTY.[75] Such a reinterpretation of customary law could favour the recognition of peremptory norms. Under this approach however, custom deviates from its traditional understanding as always being composed

[72] *Similarly*, Lepard, *supra* note 40, pp. 250-252; Ragazzi, *supra* note 15, pp. 67-72. However, the author also acknowledges that in practice a situation can be more complex, while the objection cannot be so easily rejected.

[73] In defence of customary law as a source of peremptory norms, *see* U. Linderfalk, *The Creation of Jus Cogens – Making Sense of Article 53 of the Vienna Convention*, 71 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 359 (2011).

[74] On such reinterpretation, *see more generally* D.P. Fiedler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 German Yearbook of International Law 198 (1996).

[75] *See e.g.* decision of the ICTY of 2 October 1995 in the case *Prosecutor v. Dusko Tadić*, para. 99; Judgement in the case *Prosecutor v. Anto Furundzija* of 10 December 1998, IT-95-17/1-T, para. 138, and particularly the judgement of 14 January 2000 in the case *Prosecutor v. Zoran Kupreskic and others*, paras. 527, 531-534, IT-95-16-T. In the last judgement the ICTY explicitly said that, *opinio iuris* "crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law." *See also* the Special Court for Sierra Leone (Appeals Chamber), Decision on preliminary motion based on lack of jurisdiction of 31 May 2004, paras. 18 and 19, on the high number of ratifications of the Convention on the rights of the child. For the classical approach to customary law, *see* judgement of the ICTY in case *Prosecutor v. Zejnil Delalic and others* of 16 November 1998, para. 302, IT-96-21-T.

of two elements. In this context, one may ask whether we are still talking about custom or rather a completely new source of international law.

Placing an emphasis on legal consciousness (*jus necessarium*) may also lead to abandonment of the positivist approach in favour of natural law.[76] *Jus cogens* as an element of natural law will find its reflection in the consciousness of states as discovered by judges and arbitrators deciding on the existence of peremptory norms.[77] Such an approach may however be subject to a two-fold criticism. First, reference to the consciousness of states would require demonstration of its existence, which in turn would raise the question of *whose* consciousness has to be taken into account – all states or only those which are democratically legitimised? In this context it would be unclear which countries should qualify, who should make such a decision, and what democratic legitimization really means. This argumentation could be refuted by indicating that what is at stake here is not a positivistically formed consciousness that is proved empirically, but rather a deep conviction (essentially an axiom) that certain values are so fundamental for the international community that they are obvious and cannot be morally rejected in the currently existing condition of the human community. These values in a way impose themselves and cannot be rejected.

A second criticism could relate to the risk of judicial imperialism (judicial arbitrariness), i.e. a situation in which a court or courts will impose on states what should be considered as peremptory norm (what is *jus cogens* in the opinion of a court).[78] On the other hand,

[76] *See* Orakhelashvili, *supra* note 14, p. 125, where, after analysing the existing practice, the author rightly observes: "Unlike the traditional framework, the emergence of customary *jus cogens* hardly requires examination of behaviour or attitudes of specific States. Certain norms are there simply because they belong to public order and not because States specifically consented to them through their actual practice. Traditional elements of custom-generation could be useful in explaining the emergence of *jus dispositivum,* which States recognize as suiting their individual interests, but not of *jus cogens,* whose existence and operation serves the fundamental community interests."

[77] Such a possibility was unequivocally rejected by M. Koskenniemi, who believes that disregard of the will of states will lead to violation of the principle of sovereign equality (*see* Koskenniemi, *supra* note 71, pp. 323-324. On the other hand, J. Martin Rochester, *Between Peril and Promise: The Politics of International Law*, Washington DC: 2006, p. 43, indicates that *jus cogens*, as based on the tradition of natural law, is almost incompatible with the idea of state sovereignty. Cançado goes even further. He recalls different statements of the participants of the Vienna conference and stresses the autonomous meaning of universal legal consciousness (pp. 187-188), concluding that the Martens clause belongs to *jus cogens* (p. 192, following S. Miyazaki). He also notes the obvious contradiction between *jus cogens* and the voluntarist theory of international law (p. 339). According to him, *jus cogens* consists of basic principles, which constitute a substrata of legal order and are indispensible (*jus necessarium*), prior to and higher than the will of states. They express the idea of objective justice (proper natural law) and are co-substantial with the international legal order (p. 92) (A.A. Cançado Trindade, *International Law for Humankind: Towards A New Jus Gentium,* RCADI 2005, vol. 316).

[78] T. Meron, *The Humanization of International Law*, Leiden-Boston: 2006, p. 397, when considering a catalogue of peremptory norms, argues against subjectivity and arbitrariness in the process of identification of *jus cogens*. Consequently, he believes that although the customary process does not properly explain the creation of peremptory norms, it is necessary to show that they were accepted and recognized by the international community as a whole. He also adds that a limited number of peremptory norms is not bad thing, as it allows to preserve their value and credibility, which will be endangered by an inflation of such norms.

one may argue that *jus cogens* may become general and accepted though the dialogue between courts, in the course of which it will solidify and acquire real recognition.

4. General principles of law constitute an unquestionable source of international law. Their nature, however, still remains controversial. In particular, it is not clear whether those principles can be derived only from binding international law (e.g. as a generalization of different norms) or rather from the national law of states representing different legal orders. Generally one should not exclude that *jus cogens* can also have a legal basis in general principles of law.[79] Indirectly such a possibility was suggested by the arbitration tribunal in the *Case concerning delimitation of the continental shelf* (1989), in a dispute between Guinea-Bissau and Senegal. The tribunal stated that Guinea-Bissau did not show that a treaty norm on succession with respect to obligations as a consequence of decolonization process had acquired the status of *jus cogens* through custom or as a general principle of law.[80]

One should add however that general principles of law as a source of peremptory norms need to embody substantive rules (which is not very frequent in international law, which is dominated by procedural rules) and be relatively precise, as such general principles would need to regulate the specific conduct of subjects of international law. The prohibition of derogation would also need to be inscribed in the content of such a norm. These conditions make it rare that general principles of law provide a basis for *jus cogens*. It is, however, conceivable that a peremptory norm is at the same time a norm of customary law and a general principle of law.

5. Finally, it can be argued that peremptory norms cannot be based on traditional sources of international law. The only possible solution seems to be acceptance of the idea that there is a new (or rather old) source of international law: the international legal conscience (a kind of natural law[81]), which is common for the international community as a whole as it stands, and which can be called contemporary natural law.[82]

6. A concrete *jus cogens* norm is a substantive legal norm. In this context, however, one may ask what are the effects of such a norm (the problem of so-called opposability), and what are the nature of obligations arising from it? In general, international law

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[79] For criticism concerning this issue, *see* Jasudowicz, *supra* note 35, p. 279.

[80] *See* para. 44 of the award, RIAA vol. XX, p. 136.

[81] G.I. Hernandez wrote that "the very concept of *jus cogens* norms embodies a natural law component" which goes beyond the category of general principles common to civilised nations. In a footnote, however, he added that "The natural law component to rules of *jus cogens* cannot, however, constitute their essence, given how most scholars conceptualise natural law as static, objective rules that pre-date any legal system posited by humans". G.I. Hernandez, *A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community'*, 83 British Yearbook of International Law 1 (2013), p. 39, ft 145.

[82] *See* Schmalenbach, *supra* note 3, pp. 908-909, 912-916, 919-923. The author, however, doubts that a legal basis for *jus cogens* norms is an autonomous source in the form of states' consensus or the international community's acknowledgement of norms. According to her, "In view of the international rules so far acknowledged as *jus cogens,* it is safe to say that all of them belong to the corpus of international customary law" (p. 919), although she rejects the admissibility of persistent objections against customary peremptory norms (p. 923).

doctrine holds that *jus cogens*, as norms accepted and recognized by the international community of states as a whole, gives rise to obligations for each member of this community towards the community as a whole (i.e. *erga omnes*). The relationship between *jus cogens* and obligations *erga omnes* is most frequently presented in the following way: all universal peremptory norms create obligations *erga omnes*, but not all obligations *erga omnes* result from *jus cogens*.[83] This stance was also taken by the Study Group of the International Law Commission in its 2006 Conclusions entitled "Difficulties arising from the Diversification and Expansion of International Law" (para. 38).[84]

If one accepts the existence of regional *jus cogens*, which is however questionable, M. Ragazzi is correct in observing that the sociological criterion would need to be relativized. This would mean that one could qualify as *jus cogens* not only norms other than general ones, but also that they would have *erga omnes* effect only within a specific region and that they could not be invoked against a state from outside the region.[85]

It is sometimes argued that *jus cogens* and obligations *erga omnes* constitute two different legal categories, which should not be confused. In particular, obligations *erga omnes* do not presuppose the superiority of some rules over the others.[86] This idea seems to find support in the general commentary of the International Law Commission to chapter III part II of the Articles on the responsibility of states for internationally wrongful acts, where the overlap between these two concepts is recognized, but at the same time it is also recognized that each of them puts an emphasis on different elements.[87]

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[83] Ch. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge: 2005, pp. 151-156. *Contra* P. Picone, *The Distinction between Jus Cogens and Obligations Erga Omnes*, [in:] E. Cannizarro (ed.), *The Law of Treaties: Beyond the Vienna Convention*, Oxford University Press, Oxford: 2011, pp. 413-416. According to him, *jus cogens* norms do not always generate *erga omnes* obligations (p. 418).

[84] The Study Group indicated that an example of an obligation *erga omnes* not established by *jus cogens* includes obligations under "the principles and rules concerning the basic rights of human persons as well as […] some obligations relating to the global commons." Fragmentation. Conclusions 2006, para. 38.

[85] Ragazzi, *supra* note 15, pp. 194-199.

[86] *Similarly*, Y. Dinstein, *The Interactions between Customary International Law and Treaties*, RCADI 2006, vol. 322, pp. 401-402.

[87] *See* pt. 7: "Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became Article 53 of the 1969 Vienna Convention involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance — i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole." (Responsibility of States. Commentaries 2001, pp. 111-112).

7. The effectiveness of *erga omnes* peremptory norms (and obligations arising from them) is normally conceptualized as effectiveness with respect to all subjects of international law or all states.[88] Once in a while however there is a judgement which goes beyond this understanding. For example, the IACHR, in its advisory opinion of 17 September 2003 on *juridical condition and rights of the undocumented migrants*, held that *jus cogens*, by its definition and development, is not limited to treaty law, but has expanded to encompass general international law, including all legal acts, and has an influence on the basic principles of the international legal order. In particular, the principle of equality and non-discrimination permeates every act of the powers of the state and may be considered as a peremptory norm "inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals."[89]

This expanded effectiveness of *jus cogens* is visible to an even greater extent in the judgements of international criminal courts. As the ICTY held in the case *A. Furundzija* of 10 December 1998, one of the consequences of *jus cogens* at the individual level is an obligation on the part of a state to investigate, prosecute, punish and extradite individuals accused of violation of *jus cogens* norms (in this case the prohibition of torture), who are present in the territory under its jurisdiction. The Tribunal explained that:

> [I]t would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.

The ICTY also added that additional consequences which arise from qualifying the prohibition of torture as *jus cogens* include "the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption."[90]

2. The difficulties in creating a catalogue of peremptory norms

During the VCLT negotiations it was postulated (the British amendment) to create a list of peremptory norms. The proposal envisaged that such a list would be updated

[88] According to O. Quirico, however, "Article 53 of the VCLT literally does not say that a norm of *jus cogens* has necessarily a general scope. The peremptory character of a norm and its scope (general or relative effectiveness) are two different aspects of a norm (right). In fact, the majority of states could manifest their consent about a rule that binds only two or some states and is non-derogable. The scope of a norm cannot be expressed by non-derogability, which relates to the impermissibility of bilaterally modifying a rule." O. Quirico, *Jus cogens*: *A Puzzle*, [in:] M. Szabo (ed.), *State Responsibility and the Law of Treaties*, The Hague: 2010, p. 105 and note 23.

[89] *See* paras. 99, 100, 109, 110, opinion no. OC-18/03, pp. 98-101.

[90] Judgement in case IT-95-17/1-T, paras. 156-157.

from time to time through protocols to the VCLT. Other countries were critical of the idea of an exhaustive list of *jus cogens*, but quite sympathetic to an open-ended list that would be regularly updated. This proposal was never put to a vote as the Great Britain decided to withdraw it.[91] However, the Commission explained in its commentary to the draft Convention that such an approach could have created misunderstandings with respect to the position of other norms not enumerated. In addition, according to the Commission this would have also required exhaustive studies, which would have prolonged the work of the conference and fell outside of its scope (pt. 3).[92] Nevertheless, in the commentary to the draft Convention as well as in subsequent studies, the idea of having a non-exhaustive list of peremptory norms remains in circulation. Moreover, a number of international bodies, in particular international courts and arbitration tribunals, have occasionally considered whether a particular norm could be regarded as *jus cogens*. The table below summarizes the proposals of the International Law Commission and determinations of various international bodies.[93]

International body Norm	ILC 1966[94]	ILC 2001[95]	ILC 2006[96]	UN General Assembly	ICJ	ICTY	HRC[97]	ECtHR	IACHR	ECJ	arbitration
Prohibition of aggression		x	x								
Prohibition on the use of force	x[98]				x[99]						
Right to self-determination		x	x								x (n)[100]
Permanent sovereignty over natural resources											x (n)[101]
Prohibition of genocide	x	x	x		x[102]	x[103]		x[104]			
Basic norms of humanitarian law			x		x[105]	x[106]	x				
Crimes against humanity		x						x (n)[107]			
Individual rights							x[108]				x[109]
Right to life							x				
Prohibition of torture		x	x	x[110]		x[111]	x	x[112]	x[113]		
Prohibition of slavery	x	x	x[114]						x[115]		
Principle of equality/ non-discrimination									x[116]		x[117]

[91] Nahlik, *supra* note 15, pp. 321-322.

[92] *See* Law of treaties between States. Commentaries 1966, p. 248.

[93] This enumeration is not exhaustive, but it is representative. However, it does not include the case law of the Inter-American Commission on Human Rights. For a good overview of the case law of the ECtHR and IACHR concerning *jus cogens*, *see* F. Vanneste, *General International Law Before Human Rights Courts: Assessing the Specialty Claim of International Human Rights Law*, Antwerp-Oxford-Portland: 2010, pp. 419-436.

Prohibition of racial discrimination		x	x								
Right of access to courts							x		x[118]		
Prohibition of piracy	x										

[94] A basic enumeration of cases when a treaty is incompatible with *jus cogens* was included in the commentary of the Commission, as suggested examples. Moreover, the Commission indicated that some of its members felt that it would be undesirable to limit the scope of the article to cases involving acts which constitute crimes under international law. According to them, other examples included human rights, equality of States and the principle of self-determination (pt. 3 of the commentary to Art. 50 of the draft VCLT). Law of treaties between States. Commentaries 1966, p. 248. Art. 53 of the VCLTIO of 1982 does not include an analogous enumeration.

[95] *See* pt. 5 of the commentary to Art. 26 (*jus cogens* as a circumstance precluding wrongfulness). When commenting on Art. 40 (serious breach of an obligation arising under a peremptory norm of general international law), the Commission indicated that, during the Vienna conference, there was an agreement between governments to consider the prohibition against aggression and illegal use of force as *jus cogens*, which was subsequently confirmed by the ICJ. In addition there was a wide-spread agreement with respect to the prohibition against slavery and the slave trade, genocide, and racial discrimination and apartheid. Responsibility of States. Commentaries 2001, pt 4. It is interesting to note that in its commentary to Art. 26 of the draft Articles on the responsibility of international organizations (2011), being the equivalent of Art. 26 of the Articles on responsibility of states, the Commission referred to the same catalogue of norms as previously (pt. 2), while it did not do this in the context of Art. 40 (being the equivalent of Art. 40 of the Articles of 2001).

[96] *See* pt. 33 of the Conclusions of the Study Group. Fragmentation. Conclusions 2006.

[97] Statement of the Human Rights Committee included in the General Comment No. 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 of 31 August 2001. The Committee stated that peremptory norms only partially overlap with the enumeration of non-derogable provisions in Art. 4(2) of the International Pact of Civil and Political Rights. The Committee did not include, for example, debt bondage, or freedom of thought, belief and religion as *jus cogens* (pt. 11).

[98] Besides the prohibition on the use of force in violation of the UN Charter, the Commission also indicated "the performance of any other act criminal under international law".

[99] ICJ judgement (merits) *Case concerning military and paramilitary activities in and against Nicaragua*, para. 190, pp. 100-101. The Court did so very softly, referring to the unanimous position of the parties.

[100] The peremptory character of the right to self-determination was rejected by the arbitral tribunal in its award of 31 July 1989 relating to *Maritime delimitation between Guinea-Bissau and Senegal*, paras. 40-45, RIAA vol. XX, pp. 135-136.

[101] In the case *Government of the State of Kuwait v. The American Independent Oil Company (Aminoil),* the arbitration tribunal in its award of 24 March 1982 rejected the peremptory character of this principle, ILM 1982, vol. 21, p. 976.

[102] E.g. judgement of 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 161, ICJ Rep. 2007, p. 61.

[103] ICTY, in the following judgements: of 14 December 1999 in case *Prosecutor v. Goran Jelisic* of 14 December 1999, para. 60, IT-95-10; of 2 August 2001 in case *Prosecutor v. Radislav Krstic*, para. 541, IT-98-33-T; of 31 July 2003 *Prosecutor v. Milomir Stakic*, para. 500), IT-97-24-T (according to the Tribunal, the whole Convention has a peremptory character).

[104] ECtHR in its judgement of 12 October 2007 in the case *Jorgic v. Germany*, para. 68.

[105] The Court in its advisory opinion of 8 July 1996 on *legality of the threat or use of nuclear weapons*, para. 79, ICJ 1996, p. 257, used the expression "a great many rules of humanitarian law applicable in

In international law doctrine catalogues of peremptory norms have sometimes been proposed. These efforts, however, have not led to satisfactory results, and they still remain very divergent. For example, M. M. Whiteman in his article published in 1977, enumerated 20 different *jus cogens* norms.[119] In particular he included the prohibition of genocide; slavery and slave trade; piracy; political terrorism abroad, including terroristic activities; hijacking of air traffic; recourse to war, except in self-defence; threat or use of force against the territorial integrity or political independence of another State (inter-

armed conflict" and "intrangressible principles of international customary law". Although, the Court did not unequivocally connect these principles with *jus cogens*, the doctrine believes that what the Court had in mind are peremptory norms (*see* Kolb, *supra* note 51, pp. 324-326). While the author indicates that equalizing intrangressible principles with peremptory norms is not certain, if one connects intrangressible norms with negative derogation (prohibition against surpassing the minimum that is protected by a norm), it would be possible to qualify them as a sub-category of *jus cogens*.

[106] ICTY in its judgement of 14 January 2000 in case *Prosecutor v. Zoran Kupreskic and others*, para. 520, IT-95-16-T. The Tribunal included in this group those norms which prohibit war crimes, crimes against humanity and genocide.

[107] Negation of the peremptory character of a norm is indirectly visible in the ECtHR decision of 12 December 2002 on the admissibility of a claim in the case *Kalogeropoulou and others v. Greece and Germany*.

[108] The Human Rights Committee held, in the General Comment No. 29 of 2001, that *jus cogens* includes, *inter alia*, the prohibition on taking hostages, imposition of collective punishments, and arbitrary imprisonment.

[109] E.g. Banditer Arbitration Commission in its opinion no. 1 of 1991, ILM 1992, vol. XXXI, p. 1496, where it mentions peremptory norms of international law and includes in that group "respect for fundamental right of the individual and the rights of peoples and minorities".

[110] *See inter alia*, the recent General Assembly resolution "Torture and other cruel, inhuman or degrading treatment or punishment", A/RES/68/156, preamble (explicitly: peremptory norm), pt. 1 (by implication).

[111] Judgement of 16 November 1998 in the case *Prosecutor v. Zejnil Delalic and others*, para. 454, IT-96-21-T; 10.12.1998 in the case *Prosecutor v. Anto Furundzija*, paras. 144, 153 et. seq., IT-95-17/1-T; of 22 February 2001 in the case *Prosecutor v. Dragoljub Kunarac and others*, para. 466, Case no. IT-96-23-T and IT-96-23/1-T.

[112] Judgement of 21 November 2001 in the case *Al-Adsani*, para. 61.

[113] The IACHR in its judgement of 11 March 2005 in the case *Caesar v. Trinidad-Tobago*, para. 100, held that that the prohibition on inhuman or degrading treatment fell within the right to personal integrity (as provided by Art. 5.2 of the American Convention on Human Rights of 1969) and has a *jus cogens* character

[114] Together with the prohibition on slave trade.

[115] The IACHR in its judgement of 10 September 1993 in the case *Aloeboetoe et al. v. Suriname (reparations and costs)*, para. 57, p. 71.

[116] E.g. Advisory opinion of 17 September 2003 in the case *Juridical condition and rights of the undocumented migrants*, opinion OC-18/03, paras. 100-101, 109. The IACHR held that the principles of legal equality, non-discrimination and the equal and effective protection of the law all have a peremptory character and *erga omnes* effects. The Court confirmed its stance with respect to the peremptory nature of the principle of equality and prohibition of discrimination in advisory opinion of 29 September 2009 in *Case concerning interpretation of art. 55 of the American Convention on Human Rights*, OC-20/09, para. 54.

[117] E.g. NAFTA arbitration tribunal in its award of 3 August 2005 in *Methanex Corporation v. United States* (para. 24). The tribunal did not, however, find a violation of the prohibition of non-discrimination.

[118] E.g. IACHR in its judgement of 22 September 2006, case *Goiburu and others v. Paraguay*, para. 131.

[119] M. M. Whiteman, *Jus Cogens in International Law, with A Projected List*, 7(2) Georgia Journal of International and Comparative Law 609 (1977), pp. 625-626.

vention); armed aggression; recognition of situations brought about by force, including fruits of aggression; acceptance of treaty provisions imposed by force; war crimes; crimes against peace and humanity; offenses against the peace and/or security of mankind; dispersion of germs with a view to harming or extinguishing human life; all methods of mass destruction, including nuclear weapons; contamination of the air, sea, or land with a view to making it harmful or useless to mankind; hostile modification of weather; appropriation of outer space and/or celestial bodies; disruption of international communications with a view to disturbing the peace; economic warfare with the purpose of upsetting the world's banking systems, currencies, or the energy or food supply.

This approach, which is relatively rare, has a maximalist character. In a majority of cases the doctrine formulates more modest catalogues of peremptory norms, which are however not always compatible with existing jurisprudence or the proposals of the International Law Commission. For example, E. Suy argues that *jus cogens* only includes the prohibition on the threat or use of force; prohibition of slavery, genocide, piracy, conclusion of unequal treaties, intervention in the internal affairs of a state, and peaceful settlement of international disputes.[120]

One may also find more systemic approaches in the doctrine. For example, R. Kolb asserts that *jus cogens* does not constitute a homogenous legal category. He identifies four types of peremptory norms: 1) norms of public order (e.g. prohibition against recognizing *inter partes* situations that are a result of a breach of international law), 2) norms contained in the UN Charter and resolutions of the Security Council which are based on the Charter, 3) norms that are non-derogable due to their logical structure (e.g. *pacta sunt servanda*, good faith principle), and last but not least 4) norms qualified as *utilitas publica* and created by international organizations.[121]

In the context of the rather inconsistent international jurisprudence and approach of the International Law Commission, as well as conflicting opinions in the doctrine, one can criticize (although this assessment is ahistorical) the abandonment of the idea of having at least exemplary catalogue of peremptory norms. The current practice shows that apart from problems of an existential nature (related to determination of the substance or criteria of *jus cogens*), the basis obstacle to the effective implementation of this concept is the lack of clarity as to which norms constitute *jus cogens*. Perhaps the international community, despite all the changes taking place, is still not ready to accept a transparent catalogue of peremptory norms.

The analysis of the case law, as well as positions held by the ILC, shows the insufficiently transparent and deep analysis of such norms against the criteria of Art. 53 of the VCLT. Courts and international arbitration tribunals frequently simply conclude that a specific norm is of a peremptory character.[122] On the other hand, the International Law

[120] *See* Suy's commentary to Art. 53 of the VCLT, *supra* note 20, p. 1912.

[121] *See* Kolb (*Théorie*), *supra* note 6, pp. 169 et. seq.; R. Kolb, *Conflits entre normes de jus cogens*, [in:] *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon*, Bruxelles: 2007, pp. 485-488.

[122] *Similarly*, Guillaume, *supra* note 22, pp. 131-132. The author concludes: "en définitive si le jus cogens fait désorais partie du paysage jurisprudentiel, ses contours deumeurent incertains et les choix opérés

Commission merely refers to international jurisprudence. As a consequence, we have a self-perpetuating circular mechanism: the doctrine refers to the work of the International Law Commission, the Commission refers to jurisprudence, while the latter takes into account views expressed by the doctrine and the Commission (which is in any case composed of representatives of both doctrine and practice).

It also should be noted that references in the case law to specific peremptory norms are not very frequent and consistent (e.g. the prohibition of torture is only sporadically labelled as *jus cogens* in the jurisprudence of the ECtHR). This may raise the question whether the recognition of a concrete norm as a *jus cogens* norm is actually undertaken in a serious manner, or rather is done only when, due to some external reasons (e.g. usefulness in judicial reasoning) it is important for an adjudicating body.

It is also surprising that in both the exemplary enumerations of peremptory norms as well as in some case law, some fundamental norms are not perceived (or are perceived only partially) as *jus cogens*. For example, this is case with the principle of sovereignty or equal sovereignty, which remains a basic foundation of contemporary international law. In the context of protection of individual interests, equally rarely is there a reference to the right to life, which has a fundamental importance in the protection of human rights.

II. *JUS COGENS* IN A DYNAMIC APPROACH

1. *Jus cogens* and the establishment of international law

1.1. Introductory remarks

1.1.1. Freedom to undertake international obligations

To simplify the matter, one may distinguish two types of sources of international law: consensual and non-consensual. The first category includes treaties and resolutions adopted on the basis of treaties by international organizations as well as – if one accepts that they also constitute a source of law – unilateral acts. With some reservations, customary law can be also qualified as a consensual source (particularly in the case of general customs, where normally freely expressed will and acceptance are implicit). In all these cases the freely expressed will and consent of the subjects of international law is directly relevant for the creation of legal obligations. When it comes to non-consensual sources, which include general principles of law, individual will and consent is only indirectly relevant. *Jus cogens* is particularly pertinent with respect to consensual sources, as it constitutes a limitation on the freedom to undertake obligations. It acts in a way similar to the national clause of public order. As a result it removes from international legal system all legal actions (and their consequences), which are incompatible with the

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par certains juges ou arbitres semblent relever davantage de la volonté de promouvoir un droit naturel conforme à leurs aspirations que de la constatation d'un droit positif bien établi."

fundamental values protected by peremptory norms (also see below for more in the context of the conflict between norms of international law and *jus cogens*).[123]

The freedom to undertake obligations includes the decision to enter into an undertaking, to determine its form and content, and sometimes even dispute settlement mechanisms or the consequences of its breach. *Jus cogens* as a substantive norm limits that freedom with respect to content. As a consequence, peremptory norms exclude the possibility of undertaking obligations with respect to certain matters (e.g. use of force, slavery or discrimination). However, the form of obligations is also relevant for the operation of *jus cogens*. Peremptory norms have been frequently associated with sanctions applicable to formal legal acts. Consequently, although *jus cogens* does not limit the freedom to undertake obligations as to their form, the sanctions of nullity or termination for its breach concern only formalized acts.[124]

1.1.2. Lack of retroactive effect of *jus cogens* in treaties

Art. 53 of the VCLT, as an integral part of the Convention, does not apply retroactively (Art. 4). Moreover, since *jus cogens* did not enjoy a customary law status when the Convention entered into force, arguably Art. 53 only applies to treaties that have been concluded after that date (*ex nunc*). The second dimension of non-retroactivity is reflected in the fact that only those treaties become void which, at the time of their conclusion, are in conflict with an already-existing peremptory norm. This solution is additionally supported by Art. 64 of the VCLT, which provides that valid treaties concluded before the establishment of a peremptory norm, and which are in conflict with that norm (*jus cogens superveniens*), in principle terminate rather than becoming invalid (see also Art. 71 of the Convention), as the application of the nullity sanction in such a case would mean retroactive effect.[125]

1.2. *Jus cogens* and the freedom to conclude treaties

1.2.1. *Jus cogens* and the conclusion of treaties

1. Art. 53 of the VCLT provides that the conclusion of a treaty which conflicts with *jus cogens* makes it null and void. In particular, the article stipulates that: "[a] treaty is

[123] I agree with the opinion of Meron, *supra* note 78, p. 397, that the *rationale* underlying *jus cogens* and international public order is the same, i.e. the importance of certain norms and values for the international community.

[124] R. Kolb distinguishes between the operation of *jus cogens* in connection with the validity of normative acts and the operation of *jus cogens* as a limitation on competence to act (Kolb (*Obsérvation*), *supra* note 6, pp. 843-848). It is true that the concept of peremptory norms, as included in the VCLT, is connected with possibility of questioning the validity of a treaty. The International Law Commission indicated that this applies *mutatis mutandis* to unilateral acts. However, if subjects of international law know that their formal actions (in the event they are taken) will be invalid, this obviously and objectively limits their freedom to undertake international obligations.

[125] Pt. 6 of the commentary to Art. 50, [in:] Law of treaties between States. Commentaries 1966, pp. 248-249.

void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

This means that the sanction of nullity does not apply to treaties concluded before the formation of *jus cogens*. In such a case Art. 64 applies, which envisages termination of a treaty. *Jus cogens* needs to exist at the time a treaty is concluded. The notion expressed in the term "time of its conclusion" requires some commentary. In the course of the work of the International Law Commission, it was the United States that opted for the inclusion of this condition, and there was no opposition.[126] However, its meaning was not clarified. The "time of [a treaty's] conclusion" should be understood as the moment when a treaty is signed, if it was agreed that the treaty is to be applied provisionally pending its entry into force (a treaty that was simply signed is not in force yet, and as a consequence it would be difficult to make it void, as from the formal point of view such a treaty does not exist in the international legal order, or at least it cannot produce legal effects),[127] or ultimately at the time when a treaty enters into force, independent of the fact whether it has legal effects or whether it was really performed and applied by the parties.[128]

Art. 44.5 of the VCLT also indicates that nullity affects the treaty as a whole (*in toto*). Consequently, one cannot excise those provisions that are incompatible with *jus cogens* and preserve the rest of the treaty. It is assumed that *jus cogens* is of a fundamental nature and should be strictly observed.[129] In this context, it is irrelevant whether such a *jus cogens* norm affects the object and purpose of a treaty or whether it is marginal from the point of view of the whole treaty. A treaty that is void as a consequence of being in conflict with a peremptory norm cannot be validated (see Art. 45 of the Convention).

It is also important to note that the invalidity of a treaty due to violation of *jus cogens* can be invoked by each and every state, and not only by parties to the treaty.[130] A different conclusion would lead to the bilateralization of peremptory norms. All countries are obliged to recognize as invalid a treaty that is incompatible with *jus cogens*.[131]

2. Article 71.1 of the VCLT describes the consequences of a treaty's violation of *jus cogens* and provides that:

In the case of a treaty which is void under Article 53 the parties shall:

a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

b) bring their mutual relations into conformity with the peremptory norm of general international law.

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[126] *See* Nahlik, *supra* note 15, p. 320.

[127] *Contra*, E. Suy in his commentary to Art. 53 of the VCLT. He believes that the relevant moment is the time when a text of the treaty is adopted. However, adoption of the text is merely a form of finishing work on a treaty. In a formal sense such a treaty does not exist and it cannot be even provisionally applied.

[128] *See similarly* Schmalenbach, *supra* note 3, p. 924.

[129] *See* pt. 8 of the commentary to then Art. 41 [in:] Law of treaties between States. Commentaries 1966, p. 239.

[130] *See* Orakhelashvili, *supra* note 14, p. 143.

[131] *Ibidem*.

Art. 71 has not yet been addressed in the jurisprudence. Undoubtedly, and similarly as with Art. 53, it did not have the status of international customary law when the Convention was signed. However, and contrary to Art. 53, the doctrine is consistent in holding that it has *not* acquired such a status over time.[132] This means that the consequences described in the provision are relevant only for the parties to the VCLT. On the other hand, if one thinks about possible consequences of the violation of a peremptory norm, it is hard to imagine what other effects than those mentioned in Art. 71 could be indicated.

The Convention describes the consequences of nullity of a treaty due to its incompatibility with *jus cogens* differently than in the case of other grounds of nullity (*cf.* Art. 69). In other words, this is a special type of nullity.[133] The sanction of nullity applies to such a treaty as of the moment of its conclusion (*ab initio*). The good faith of the parties to a treaty is irrelevant in this context (unlike in Art. 69). The text of Art. 71 shows, however, that the sanction is not formulated very strictly. In particular, although the parties are obliged to eliminate all consequences of any act, this only relates to consequences of an act performed in reliance on a provision which conflicts with the peremptory norm (which is surprising if one recalls the indivisibility of a treaty). This means that Art. 71 does not apply to consequences of acts performed in reliance on other provisions included in the treaty (not incompatible with *jus cogens*). Moreover, the obligation to eliminate consequences is additionally limited by the phrase "as far as possible".[134]

Parties to a treaty that is invalid are obliged to undertake all necessary actions aimed at bringing their mutual relations into conformity with *jus cogens*. These actions can take different forms. Since in many cases *jus cogens* consists of prohibitions, this would include above all actions intended to eliminate the consequences of an act (adopted laws or concluded agreements) prohibited by the peremptory norm. This also means that a national act incompatible with *jus cogens* should be repealed or amended as necessary. This obligation has an absolute character (obligation of the result).

In practice, the impact of peremptory norms on the freedom to conclude treaties is limited.[135] When one considers a catalogue of norms that are qualified as *jus cogens*, it seems improbable that a treaty will be concluded which is incompatible with a peremptory norm. On the other hand, one may expect factual actions that will be incompatible with such norms (e.g. torturing, undertaking an armed attack, committing genocide).

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[132] *See* F. Crépeau, R. Côté, commentary to Art. 71, [in:] Les Conventions de Vienne. Commentaire, vol. III, pp. 2549-2551.

[133] Pt. 1 of the commentary to then Art. 67, [in:] Law of treaties between States. Commentaries 1966, p. 266.

[134] *See* S. Wittich, commentary to Art. 71 of the VCLT, [in:] Dörr & Schmalenbach, *supra* note 3, pp. 1217-1218. The author considers that the elimination of the consequences of a void treaty may be prevented by material or legal impossibility. More radically, but not entirely rightly, *see* Crépeau & Côté, *supra* note 132, pp. 2552-2557, who derives an obligation *restitutio in integrum* from Art. 71(1)(a) of the VCLT. The Convention retains a responsibility regime which differs, however, from absolute nullity.

[135] *Similarly* Suy, *supra* note 20, p. 1922; *see also* Meron, *supra* note 78, p. 392.

1.2.2. Reservations and interpretative declarations

1. The freedom to conclude treaties also includes the possibility of making reservations and issuing interpretative declarations. The Vienna Convention regulates, albeit in a very unsatisfactory manner, only the first issue (Art. 19 et seq.).[136] As a consequence, the International Law Commission decided in 1993 to reconsider the problem of treaty reservations and included interpretative declarations in its work agenda. The aim of the Commission was to develop practical guidelines rather than draft articles or a treaty. In 2011 the Commission presented the Guide to Practice on Reservations with commentaries, which considerably develops the rules of the VCLT.

Reservations and interpretative declarations are important, as they can modify the extent of treaty obligations. Therefore it should not come as a surprise that the Commission saw the connection between this issues and *jus cogens*. In this context, however, one can observe a surprising and significant change between the Commission's draft of 2010 and its final version of 2011. According to the 2010 Draft, the important rule was introduced in guideline 3.1.9, according to which "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law." In addition, the Commission distinguished such reservations from the reservations to provisions relating to non-derogable rights (guideline 3.1.10), which was controversial in the context of the non-derogability of *jus cogens*. The Commission also distinguished between reservations to peremptory norms and reservations to provisions that secure the object and the purpose of the treaty (guideline 3.1.5), indicating that it might be possible that a treaty only marginally refers to *jus cogens*, without it being its object and purpose.[137] The Commission did not, however, give any examples of such a situation. As the Commission highlighted in its commentary, guideline 3.1.9 prohibited not only reservations to peremptory norms included in a treaty, but also covered those instances in which a *jus cogens* norm was not included in a treaty, but a reservation would require applying the treaty in a way that would conflict with *jus cogens*.[138] On the other hand, the Commission did not indicate any sanction (i.e. nullity of the reservation). Moreover, the Commission also accepted that formulating a reservation that conflicts with *jus cogens* does not give rise to international responsibility of the state making the reservation (guideline 3.3.2), which means that such reservation is subject to the law of treaties. However, the consequences of a reservation could give a rise such responsibility.[139] The Draft included also rule 4.4.3 concerning the absence of effect on a peremptory norm of general international law.

The final text of the Guide to Practice contains only two of these guidelines, joining in fact the previous guidelines 3.1.9 and 4.4.3. Ultimately, it states as follows:

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm,

[136] On the jurisprudence under Art. 19 of the VCLT, *see* Orakhelashvili, *supra* note 14, pp. 176-192.
[137] *See* pt. 4 of the commentary to 3.1.9 [in:] Reservations. Commentaries 2010, p. 466.
[138] *Ibidem*, pt. 11 (p. 468).
[139] *See also ibidem*, pt. 7 (p. 510).

which shall continue to apply as such between the reserving State or organization and other States or international organizations.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

Due to the usual customary basis of *jus cogens* (i.e. naturalist universal legal consciousness), the above rule seems to be natural. However, it is still not clear what happens with a reservation which is in conflict with a peremptory norm and has already produced effects. It may be argued that since a treaty provision, with respect to which a reservation was formulated, still has to be applied, such a reservation would be at least ineffective. However, this solution is not fully satisfactory.

2. In the more recent treaty practice, interpretative declarations play an important role. As highlighted by the International Law Commission, each country and international organization may formulate an interpretative declaration. In the 2010 Draft the only limitation was that such a declaration could not be incompatible with a peremptory norm of general international law (guideline 3.5). Similarly as in the case of reservations, the Commission did not indicate any sanction.[140] In the end, the Commission decided to delete this guideline.

1.2.3. *Jus cogens* and the termination of treaties

1. An interesting case in the application of *jus cogens* occurs in a situation when a valid obligation is affected by a newly formed peremptory norm. This problem is regulated only with respect to treaties. Art. 64 of the VCLT provides that: "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." An analysis of the limited practice shows that Art. 64, similarly to Art. 53, has over time acquired the status of a customary norm of international law.[141]

Art. 64 presumes the following sequence: conclusion of a treaty, which is followed by the formation of *jus cogens* (Art. 53 speaks about acceptance and recognition of a norm of general international law as a peremptory norm). From the formal point of view, a particular norm could exist even before or at the moment of the conclusion of a treaty. What is important is the fact that it was not accepted and recognized as *jus cogens* at the time of the treaty's formation, otherwise, Art. 53 of the VCLT would apply. A sanction affects the whole treaty (*in toto*). As a consequence, such a treaty should be eliminated from the international legal order. Similarly as in the case of Art. 53 of the VCLT, every state, not only parties to such a treaty, has the right to invoke its incompatibility with *jus cogens*.[142]

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[140] *See* K. Zemanek, *The Metamorphosis of Jus Cogens*: *From an Institution of Treaty Law to the Bedrock of the International Legal Order?*, [in:] Cannizarro (ed.), *supra* note 83, p. 392. The author doubts that the idea that a conflict of a reservation with a *jus cogens* norm causes the absolute and automatic nullity of the reservation (without a decision of the ICJ) would promote the certainty of the law.

[141] A. Lagerwall in his commentary to Art. 64, [in:] Les Conventions de Vienne. Commentaire, vol. III, pp. 2304-2314.

[142] *See* Orakhelashvili, *supra* note 14, p. 152.

Each state has also the obligation to accept the consequences of this incompatibility.

2. The expression that a treaty, after the emergence of new peremptory norm "becomes void and terminates" is sometimes regarded as an obvious mistake.[143] This is however a result of mixed consequences of the situation, as provided for by Art. 71.2 of the VCLT, and results from the specific nature of *jus cogens*.[144] According to this provision:

In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty:

a) releases the parties from any obligation further to perform the treaty:
b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Art. 71 constitutes *lex specialis* with respect to Art. 70, a provision that indicates the general consequences of termination of a treaty. A principal consequence of incompatibility with *jus cogens superveniens* is that the parties are released from the obligation further to perform the treaty, which closely corresponds with the nature of termination. This consequence applies *ex nunc*, that is from the moment of termination of a treaty, and is of an obligatory character (i.e. parties are not allowed, on the basis of an agreement *inter se,* to agree that a treaty will be still binding or that that the provision in conflict with a new peremptory norm will be binding.[145] This is specific for *jus cogens superveniens*, where the rights, obligations or legal situations of the parties to a treaty created before the emergence of *jus cogens* are incompatible with the new peremptory norm. However, there is no retroactivity in this case.[146]

Jus cogens superveniens is of limited practical importance, with only occasional references thereto by international courts. For example the IACHR, in its judgement of 10 September 1993 in *Aloeboetoe and others* explained, among the other things, that it did not see any need to analyse whether the 1762 treaty guaranteeing autonomy to the Suriname tribe of Saramakas is a treaty of international law. It held, however, that:

> Suffice it to say that even if that were the case, the treaty would today be null and void because it contradicts the norms of *jus cogens superveniens*. In point of fact, under that treaty the Saramakas undertake to, among other things, capture any slaves that have

[143] *See e.g.* A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* [International agreements. Theory and practice], Warszawa 2006, p. 408; S. Wittich, commentary to Art. 71 of the VCLT, [in:] Dörr & Schmalenbach, *supra* note 3, pp. 1214-1215.

[144] A. Langerwall, in his commentary to Art. 64 of the VCLT [in:] Les Conventions de Vienne. Commentaire, pp. 2338-2339. *Similarly* Villiger, *supra* note 22, p. 881, talks about a specific form of nullity which affect only those provisions of a treaty that are incompatible with *jus cogens superveniens* (nullity *ex nunc*).

[145] Villiger, *supra* note 22, p. 881.

[146] Pt. 4 of the commentary to then Art. 67, [in:] Law of treaties between States. Commentaries 1966, p. 267.

> deserted, take them prisoner and return them to the Governor of Suriname, who will pay from 10 to 50 florins per slave, depending on the distance of the place where they were apprehended. Another article empowers the Saramakas to sell to the Dutch any other prisoners they might take, as slaves. No treaty of that nature may be invoked before an international human rights tribunal.[147]

1.2.4. *Jus cogens* and contracts concluded by states

It is clear that when Art. 53 of the VCLT (Art. 53 of the VCLTIO) was drafted, it was not regarded as a rule that could apply to agreements concluded between states and international commercial entities (concession contracts). Considering, however, the tendency to extend the consequences of *jus cogens* to subjects other than states, such a possibility cannot be *a priori* excluded. In this context, it should be noted that an arbitration tribunal, in its award in the *Texaco-Calasiatic v. Governement of Libya* case of 19 January 1977, touched upon this issue when analysing the peremptory character of the principle of permanent sovereignty over natural resources. Although the tribunal did not go into detail, it observed that such an approach seemed to be desirable.[148]

Contracts between states and transnational companies (usually of an investment nature) are not international treaties, even in the broadest sense of the term. Nevertheless, if an international treaty applies to them as a consequence of the treaty under which such contracts are concluded (so-called "umbrella clauses"), or when international law is chosen as applicable law,[149] it is advisable to apply *jus cogens* to such agreements. No one who acts in the contemporary world (a state concluding contract, a transnational corporation) and who is subject to international law should be permitted to violate those few norms which are considered by the international community as a whole as fundamental.

1.2.5. *Jus cogens* and resolutions adopted on the basis of treaties

International law does not unequivocally regulate the issue of the application of *jus cogens* norms to resolutions adopted by international organizations or conferences of state-parties, and the literature on the topic is very limited. However, one may logically infer, *a maiori ad minus*, that if a treaty that constitutes the basis for such resolutions can be subject to a sanction, the same must be true for acts adopted on its basis, even if the treaty as such remains valid (i.e. it does not directly conflict with *jus cogens*).

Both Arts. 53 and 64 of the VCLT should apply, *mutatis mutandis,* to resolutions.[150] In particular, Art. 5 of the Convention cannot be understood as allowing bodies of an

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[147] *See* para. 57 of the judgement, p. 71.

[148] *See* para. 78 of the judgement.

[149] *See* M. Jeżewski, Prawo traktatów wobec umów między państwami a podmiotami prywatnymi [Law of the treaties and contracts between states and private entitites], [in:] Z. Galicki, T. Kamiński, K. Myszona-Kostrzewa (eds.), *40 lat minęło – praktyka i perspektywy Konwencji Wiedeńskiej o prawie traktatów*, Warszawa: 2009, pp. 356-365.

[150] Similarly J. Klabbers permits, although through analogy, the application of *jus cogens* to resolutions of international organizations (J. Kabbers, *An International Institutional Law*, Cambridge University Press, Cambridge: 2002, p. 239). *See also* J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, Cambridge: 2003, p. 324.

organization, acting on the basis of its statute, to adopt rules that would conflict with peremptory norms of general international law.[151] The assessment as to compatibility with *jus cogens* should be made in the first place with respect to binding resolutions. However, it would also be difficult to accept the adoption of non-binding resolutions (so-called soft law resolutions), even in instances where the only existing control is of a political character and is performed by the international organisation which adopted the resolutions, if such would be incompatible with *jus cogens*.

The problem of the compatibility of international organizations' resolutions with peremptory norms has greater practical potential than with respect to treaties. The probability that *jus cogens* will be violated seems higher here, even though this is not a common practice. Possible incompatibility with peremptory norms may particularly appear in the context of the constitutionalization tendencies of certain treaties (e.g. treaties constituting a basis for regional integration processes, in particular the European Union).[152] Resolutions adopted on the basis of such treaties could be an expression of an aspiration to self-sufficiency or emancipation of a legal subsystem, even with the inclination to detach it from international law. *Jus cogens* should be included *ipso iure* into the laws of such an organization. Resolutions of international organizations are not independent from international law, but rather constitute an important part of it. Any claims asserting a breach of a peremptory norm should be submitted in accordance with procedures existing in the particular organization (especially through the review of legality of acts, if such a procedure is available). The consequences of finding a resolution incompatible with *jus cogens* should consist of its invalidity *ab initio* and *in toto*.

1.2.6. *Jus cogens* and the formation and termination of customary norms and general principles of law

The impact of *jus cogens* on the creation of norms of customary law and the determination of general principles of law has not been properly investigated. The problem has never been regulated, while international law practice does not provide any unequivocal position. In any case, it seems correct to conclude that an existing peremptory norm should prevent the emergence of any incompatible customary norm of a dispositive character. Strictly speaking, this could bring about a situation whereby the practice of subjects of international law that would normally lead to the establishment of customary law could be regarded as a breach of *jus cogens*. However, considering the progressive

[151] *See also* C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed.), Cambridge University Press, Cambridge: 2005, p. 214. The author correctly notes that an international organization cannot exercise its competences with the violation of peremptory norms, even when the constitution of such an organization permits this or when its exercise is within the limits of legislative discretion. He gives, as an example of a resolution violating *jus cogens*, a resolution that discriminates due to race or religion.

[152] *See* C. Mik, *Konwencja wiedeńska o prawie traktatów wobec konstytucjonalizacji traktatów* [Vienna Convention on the Law of Treaties in light of the constitutionalization of treaties], [in:] Galicki et al. (eds.), *supra* note 149, pp. 89 et. seq.

limitation of the importance of practice, this may be difficult. The existence of *jus cogens* should also prevent recognition of certain principles as general principles of law.[153]

On the other hand, *jus cogens superveniens* should lead to the termination of binding customary norms of a dispositive character. A recognized general principle of law that conflicts with a new peremptory norm should be rejected, not only in particular circumstances but in general. In practice, however, such a situation would be truly exceptional.

1.2.7. *Jus cogens* and unilateral acts

In contemporary international law there is no doubt that states can undertake obligations in the form of unilateral acts. This problem has been extensively discussed, both in the doctrine and judicature.[154] It was also addressed by the ILC, which started its work in 1996. This led to the adoption of the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" in 2006.

The Guiding principles concern only unilateral acts of states, while unilateral acts of international organizations were excluded from their scope. Unilateral acts as such have not been defined. The preamble to the Guiding principles only provides that they "may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely." The Guiding principles relate only to formal unilateral acts, that is unilateral acts *sensu stricto*. As indicated by pt. 5 of the Guiding Principles, they may be formulated orally or in writing.

The ILC document contains basic principles on the formulation and operation of unilateral acts of states. One of the principles stipulates: "A unilateral declaration which is in conflict with a peremptory norm of general international law is void" (pt. 8).

As observed by the Commission, this principle derives from the rule contained in Art. 53 of the VCLT and applies to unilateral acts.[155] Interestingly, the principle, contrary to Art. 53, does not contain a temporal qualifier that specifies that the conflict needs to occur at the moment of formulation of the unilateral act in question, although such wording was included in the initial version of this principle. Consequently, one could conclude that principle no. 8 equally applies to the situation when *jus cogens* already exists, as well as to cases of *jus cogens superveniens*. However, this would mean that a new peremptory norm more strongly affects unilateral acts than treaties, as it would always make them void. It is clear from the text of principle no. 8 that the sanction of nullity equally applies to oral and written unilateral acts. It is not however clear what the consequences of nullity are, and in particular whether one should consider Art. 71 of the VCLT as a potential model.[156]

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[153] Gilas, *supra* note 27, p. 55, correctly observes that assessing whether a general principle of law is suitable for international regulation requires verification as to whether it is compatible with *jus cogens*.

[154] *See generally* P. Saganek, *Akty jednostronne w prawie międzynarodowym* [Unilateral Acts in International Law], EWSPiA, Warszawa: 2010, *passim*.

[155] Unilateral acts. Commentaries 2006, p. 378.

[156] K. Zemanek, citing A.M. Weisurd, remarks that in fact, even in the case of such a fundamental peremptory principle as the prohibition of force, unilateral transgressions led to changes in its content rather than to the nullity of unilateral acts (Zemanek, *supra* note 140, p. 394).

2. *Jus cogens* and the application of international law

2.1. *Jus cogens* and its enforcement

2.1.1. General considerations

1. From the point of view of the application of *jus cogens*, the most important aspect concerns the procedural opportunities for its enforcement. These issues were addressed only with respect to treaties (arts. 65 and 66 VCLT). Art. 65.3 of the VCLT stipulates that if an objection has been raised against a claim aimed at invalidating a treaty, the parties shall have a recourse to the pacific means of settlement of disputes as provided in Art. 33 of the UN Charter. However, Art. 66(a) if the VCLT provides that if the parties have not reached a solution within 12 months following the date on which the objection was raised, the following procedure should apply:

> a) any one of the parties to a dispute concerning the application or the interpretation of Article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

What we have here is a special and stricter mode (judicial method in the broad sense) than that established for *jus cogens*. This procedure requires the parties to choose between arbitration and the ICJ. In the context of arbitration, based on *ad hoc* tribunals, international law doctrine warns of the danger of contradictory awards relating to *jus cogens*.[157] This in turn may lead to different consequences than one would expect.

As far as the judicial method *sensu stricto* is concerned, it is worth recalling the statement of the ICJ in its jurisdictional judgement of 3 February 2006 in the case *Armed activities on the territory of the Congo* (new application: 2002). The Court examined, *inter alia*, the relationship between the character of obligations arising from the conventional prohibition of genocide and its jurisdiction. It recalled its previous statement in the *East Timor* case and held that the *erga omnes* character of a norm and the rule of consent to Court's jurisdiction are two different things. It also added that:

> [T]he mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.[158]

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[157] *See* Villiger, *supra* note 22, pp. 820-821.

[158] ICJ, Judgement in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and admissibility of the application, ICJ Rep. 2006, p. 32, para. 64.

On the other hand, as stressed by the ICJ in the *Case concerning application of the Convention on the prevention and punishment of the crime of genocide* of 26 February 2007, there is a:

> fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them.[159]

In the currently existing procedural situation (lack of general and obligatory jurisdiction with respect to *jus cogens*), the above statement is of fundamental importance for international law, and as a consequence for the performance of obligations that are based on *jus cogens* and responsibility for its breach.

2. Already during the Vienna Conference, Arts. 65 and 66 provoked a number of controversies.[160] They were reflected, among the others, in the reservations made by states to Art. 66 (8 countries, including Russia and China) and Art. 66(a) (3 countries: Algeria, Saudi Arabia, Tunisia), as well as the so-called counter-reservations (4 countries: Belgium, Denmark, Finland and Tanzania) and objections to those reservations (15 countries, including The Netherlands, United States, Sweden and the United Kingdom).[161] These controversies had an impact on the ultimate rejection of Art. 66 as a potential customary law norm.[162] In practice the significance of Art. 66 of the VCLT is very limited, which however does not preclude its enforcement in accordance with Art. 33 of the UN Charter (procedures other than judicial).

2.1.2. Immunity of a state and its officials and enforcement of *jus cogens*

The effectiveness of peremptory norms is connected to great extent with the possibility of their enforcement through various international and national bodies (includ-

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[159] ICJ, Judgement in the *Dispute between Bosnia and Herzegovina v. Serbia and Montenegro* (merits), para. 148, ICJ Rep. 2007, p. 56.

[160] *See generally* Nahlik, *supra* note 15, pp. 292 et. seq.

[161] *See* Status of the Convention together with reservation of states-parties to Art. 66: http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en. H. Ruis Fabri, commentary to Art. 66 of the VCLT [in:] Les Conventions de Vienne. Commentaire, vol. III, in particular pp. 2421-2427. *See also* J. Verhoeven, *Jus Cogens and Reservations or "Counter-Reservations" to the Jurisdiction of the International Court of Justice*, [in:] K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague-Boston-London: 1998, pp. 195 et. seq. The author believes that counter-reservations aimed at the exclusion of the applicability of Articles 53 and 64 "should be considered null and void, despite the legitimate concerns of many (mostly western) countries to enhance the jurisdiction of the ICJ". The validity of reservations to Art. 66 is not important. States objecting to such reservations cannot prevent *jus cogens* norms from being applicable. *See also* Villiger, *supra* note 22, pp. 822-823.

[162] *See* ICJ, *Armed activities on the territory of the Congo* (new application: 2002), p. 45.

ing domestic courts). The issue is delicate. In particular, states, also some international organizations, as well as international officials frequently raise the defence of jurisdictional immunity. This may include state immunity, immunity of an international organization,[163] or immunity of the most important persons in a state e (e.g. heads of state or governments).

This immunity appears to be a quite effective tool in barring enforcement of claims, even in the case of breaches of peremptory norms.[164] In the context of state immunity before international courts, *Al-Adsani v. United Kingdom* is a particularly interesting case that was decided by the European Court of Human Rights on 21 November 2001. The Court distinguished the case from the immunity of a (former) head of state in criminal matters (case of Pinochet),[165] where indeed the immunity should not apply when a breach of *jus cogens* is alleged. Basing its analysis on the practice of national courts, the ECtHR held that, despite contrary statements of the working group of the International Law Commission related to the draft of the Convention on jurisdictional immunities of states and their property, state immunity can be successfully pleaded in civil proceedings based on allegations of torture (the prohibition of torture was recognized as *jus cogens*).[166]

As indicated, the situation is slightly different when it comes to criminal immunity. In particular, although the judicial practice concerning rejection of claims of immunity by state officials in a criminal proceeding – based on universal jurisdiction and connected with an act that breaches *jus cogens* – shows some positive tendencies, it is not yet stable.[167] As a consequence, immunity can still also successfully pleaded in criminal proceedings.[168]

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[163] *See* C. Focarelli, *Immunité des Etats et jus cogens. La dynamique du droit international et la fonction du jus cogens dans le processus de changement de la règle sur l'immunité juridictionnelle des Etats étrangers*, 112(4) Revue Générale de Droit International Public 761 (2008); Kolb, *supra* note 51; R. Pavoni, S. Beaulac, *Etude croisée Italie/Canada sur l'immunité des Etats et le jus cogens en droit international*, EUI Working Papers. Law 2009, no. 16.

[164] *See* Orakhelashvili, *supra* note 14, pp. 320 et. seq.; Th. Giegerich, *Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?*, [in:] Tomuschat & Thouvenin (eds.), *supra* note 65, pp. 203 et. seq.; I. Pingel, *L'immunité des Etats*, [in:] *ibidem*, pp. 239 et. seq.; T. Stein, *Limits of International Law Immunities for Senior State Officials in Criminal Procedure*, [in:] *ibidem*, pp. 249 et. seq.

[165] *See also* judgement of the ECHR in the case *Jorgic v. Germany* of 12 July 2007, para. 68, where the Court noted that in the course of the work on the Genocide Convention no agreement was reached as to inclusion of the principle of universal jurisdiction over genocide, but also held that Art. I of the Convention provides an *erga omnes* obligation of a state to prevent and punish genocide. Consequently, the exterritorial exercise of jurisdiction was considered to be reasonable. Similarly, with respect to *erga omnes* obligations relating to the right to be heard by a court in the American Convention on Human Rights, *see* the judgement of the IACHR of 22 September 2006 in the case *Goiburu et al. v. Paraguay*.

[166] *See* paras. 57-67.

[167] For a review of domestic case law, *see* T. Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym* [Principle of universal jurisdiction in international law], Warszawa: 2008, pp. 212-223. *See also* A. Zimmermann, *Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters*, [in:] Tomuschat & Thouvenin (eds.), *supra* note 65, pp. 335 et. seq.; M. Cosnard, *La compétence universelle en matière pénale*, [in:] *Fundamental Rules*…, p. 355 et. seq.

[168] *See* ICJ judgement in *Arrest Warrant* of 11 April 2002, ICJ Rep. 2002, p. 24, para. 58, p. 33, para. 78.

In the context of the relationship between *jus cogens* and jurisdictional immunity, the issue of whether immunity is treated as an element of substantive or procedural law is of prime importance.[169] With respect to substance, it would be difficult to argue that in the case of breach of a peremptory norm the immunity of a state or its officials (either criminal or civil) should prevail. However, contrary to those who look for the maximum effectiveness of *jus cogens*, such a perception of the relationship is incorrect. The immunity defence has primarily a procedural dimension, which should be addressed in the context of the possibility of pursuing a claim for a violation of *jus cogens*.[170] As the International Court of Justice rightly stated in a dispute between Germany and Italy:

> Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of jus cogens, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. […] For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.

Of course, it is an entirely different issue whether immunity should be of an absolute character or be restricted due to the particular importance of the value protected by peremptory norm and its universal acceptance.

2.2. *Jus cogens* and the interpretation of international law

2.2.1. General remarks

The ILC, in its commentary on the Draft articles on Responsibility of States for Internationally Wrongful Acts, stated that "peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts."[171] This means that in cases of normative conflicts with peremptory norms that can be resolved through interpretation, one has to rely on such interpretative rules that will support a *jus cogens*-friendly interpretation of dispositive norms.

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[169] *Contra* Orakhelashvili, *supra* note 14, pp. 340-343, who believes that international law does not strictly distinguish between substantive and procedural norms.

[170] *See* ICJ judgement in the *Jurisdictional Immunities of the State* of 3 February 2012, ICJ Rep. 2012, pp. 141-143, paras. 93, 95, 99. *See also* J. Verhoeven, *Sur les relations entre immunités et* jus cogens, *à la lumière de l'arrêt Allemagne-Italie du 3 février 2012*, [in:] D. Alland, V. Chetail, O. De Frouville, J.E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy*, Leiden-Boston 2014, p. 527 et. seq.

[171] *See* pt. 3 of the commentary to Art. 26 (Compliance with peremptory norms), [in:] Responsibility of States. Commentaries 2001, p. 85.

2.2.2. *Jus cogens* and the systemic interpretation of international law

International law, as any other field of law, is subject to interpretation.[172] Only the interpretation of treaties is regulated in codified law (arts. 31-33 of the VCLT). These provisions are conventionally regarded as norms of customary law,[173] albeit of a dispositive character. The International Law Commission has also indicated rules that apply in the interpretation of unilateral acts of states (pt. 7 of the Guiding principles of 2006). Interpretation of the resolutions of international organizations, as well as customary law and general principles, remains an open issue.

It should be also noted that, at least *prima facie*, the interpretation methodology used in the context of treaties is not fully compatible with the methodology used with respect to unilateral acts. While the interpretation of treaties is only focused on their texts, but it open for international law, when it comes to unilateral acts the interpretation focuses on the analysis of a statement, including the author's intention.[174]

Openness of treaty interpretation for international law is guaranteed by Art. 31.3(c) of the VCLT, which provides for systemic interpretation, labelled by the International Law Commission as the "systemic integration method" (Conclusions on the fragmentation of international law). Accordingly, when interpreting treaties one has to take into account "any relevant rules of international law applicable in the relations between the parties." *Jus cogens* undoubtedly falls within this category.[175] Since the majority of peremptory norms are general (universal) customary law, there is no need to show that those rules are applicable between the parties. The only condition necessary for taking *jus cogens* into account in the process of treaty interpretation is the applicability of such a rule in a specific case. Moreover, systemic interpretation also indirectly prohibits any interpretation of a treaty that would lead to a conflict with *jus cogens*. From the perspective of the organ that undertakes interpretation, the consideration of peremptory norms should be obligatory (*ex officio*)

Considering that treaties can serve as a basis for subsequent executive acts, particularly in the case of treaties that serve as statutes of international organizations, on the basis of which their organs adopt resolutions, one may ask whether such executive acts shall be subject to the same systemic interpretation as applied in the context of treaties. The answer is not an easy one, as the VCLT in Art. 5 allows, on the basis of rules of an organization, for a departure from its provisions. This also applies to interpretative rules that may be used in the context of resolutions of such international organizations.

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[172] For a broad understanding of the interpretation of international law, see R. Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public*, Bruxelles: 2006; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford University Press, Oxford: 2008.

[173] *See* C. Mik, *Wykładnia prawa międzynarodowego* [Interpretation of International Law], [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (eds.), *Interpretacja prawa międzynarodowego i unijnego w sprawach karnych* [Interpretation of International and European Law in Criminal Cases], Warszawa: 2006.

[174] Unilateral acts are interpreted in a restrictive manner. *See* Unilateral acts. Commentaries 2006, pp. 377-378.

[175] Mik, *supra* note 173, p. 34.

However, the peremptory character of *jus cogens* suggests that such a departure should not be available here. Consequently, neither the founders of an organization (parties to a treaty) nor the organization as such can "contract out" from *jus cogens*, which also includes a process of interpretation of a founding treaty or rules of organization (executive acts). On the other hand, an international organ adjudicating the case should *ex officio* take into consideration peremptory norms, without regard to the autonomy of the parties within the international proceeding.[176]

2.2.3. Collision between norms of international law and *jus cogens*

1. General remarks. In its Conclusions on fragmentation of international law (2006), the International Law Commission correctly observed that most of international law is dispositive. This means that special laws can be used to apply, clarify, update or modify, or even set aside general law on the basis of the *lex specialis derogat legi generali* principle. This rule, however, is subject to exceptions, as certain categories of general norms cannot be derogated by special laws. *Jus cogens* was correctly included by the Commission in this category.[177]

The Commission also noted in its Conclusions that "[a] rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law" (pt. 32).

The above indicates that in the Commission's opinion *jus cogens* introduces a hierarchical aspect in the international legal order. There are two grounds for its special position in this legal order: 1) particularly important content; 2) universal recognition of its superiority. The first element indicates not only the fundamental character of the values protected by peremptory norms, but also that this fundamental character results from the fact that the value is particularly precious for the international community as a whole. At the same time, the fundamental character of the value does not alone determine the special position occupied by *jus cogens* in the international law system. The second condition – universal recognition of superiority of a norm – also needs to be met. What is important here is that a norm needs to be recognized as superior by the international community as a whole. Such an understanding corresponds with the decentralized character of the international community, and as a consequence with a lack of automatic supremacy of general law over particular earlier and later norms. It is therefore necessary to recognize a norm as superior,[178] and such recognition needs to have a universal character.

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[176] *See e.g.* NAFTA arbitration tribunal in *Methanex Corporation v. United States* holding: "the Tribunal agrees with the implication of Methanex's submission with respect to the obligations of an international tribunal – that as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to parties' choices of law that are inconsistent with such principles" (para. 24).

[177] *See* pts 8 and 10 of the Conclusions, [in:] Fragmentation. Conclusions 2006.

[178] As J. Pauwelyn rightly observed: "[T]he higher value of a norm *jus cogens* is not based on its source, that is, with reference to how it was created or by whom, but, but rather based on its acceptance and

The specific nature of peremptory norms, as established in Arts. 53 and 64 of the VCLT, requires that conflicting norms which do not have such a character will be removed from the international legal system. Conflicts between *jus cogens* and such norms will therefore take place at the validation, not the application, level. As a consequence, this issue could be addressed when discussing the impact of *jus cogens* on the creation of international law (freedom to undertake international obligations). However, some cases are not entirely clear when viewed in this perspective (in particular, possible conflicts between *jus cogens* and the UN Charter). In addition there is the problem of possible conflicts between peremptory norms. This justifies presentation of these issues here.

2. Conflicts between peremptory and dispositive norms

1. Peremptory norms may conflict with dispositive norms. The latter category covers not only norms included in bilateral or "ordinary" multilateral treaties, but also general ones. This issue, although rather straightforward, was not unequivocally addressed in the VCLT. In particular, it was omitted in Art. 30 of the Convention, which provides a basic rule for conflicts of norms. Yet it may be the case that a later treaty conflicts with a peremptory norm included in an earlier treaty or in customary law. In such a situation, the rule contained in Art. 30 will be inapplicable. The earlier treaty still will be in force, while the latter one will be null and void from its conclusion as a consequence of the conflict with a peremptory norm. Art. 53 will not operate as a conflict of law norm but as a validation rule.[179] Similarly, in the case of conclusion of a new treaty containing *jus cogens*, which conflicts with an earlier treaty, no conflict of norms will be involved, but the validation rule provided by Art. 64 of the VCLT that results in the termination of the earlier treaty.

One may therefore say that treaties which contain peremptory norms express greater stability than others. This also means that it is not possible to terminate or make a treaty which contains such norms inapplicable, even in case of a material breach of a treaty in the sense of Art. 60 of the VCLT. Nor does the principle of reciprocity apply here.[180]

2. Similarly, a conflict between peremptory norms and norms of customary law should not, at least *prima facie*, pose any problems, as customary law, including those laws of a universal character, is predominantly *jus dispositivum*. Even though these norms are not purely consensual, they can be changed or even waived *inter partes* on the basis of agreement between the parties. This was clear for the ICTY in the *A. Furundzija* case of 10 December

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recognition as a norm from which no derogation is permitted" (Pauwelyn, *supra* note 150, p. 98). Strictly speaking, however, the creation of a norm and its recognition as a peremptory norm are not completely separate. The norm can exist before its recognition as a *jus cogens* norm, but it is possible to create a norm and recognize it as a peremptory norm at the same time as well. *Contra, see* K. Zemanek, *supra* note 140, pp. 400-405. According to him, *jus cogens* norms neither have higher rank nor constitutional status. He called *jus cogens* an "academic construct" (p. 409).

[179] *See* F. Paolillo in his commentary to Art. 30, [in:] Les Conventions de Vienne. Commentaire, vol. II, pp. 1262-1263.

[180] *See* ICTY in its judgement of 10 December 1998 in the case *Prosecutor v. Anto Furundzija*, para. 150, IT-95-17/1-T.

1998, and for the IACHR in its advisory opinion of 29 September 2009 on *Art. 55 of the American Convention on Human Rights*. The ICTY clearly stated that the prohibition of torture, as *jus cogens*, is placed not only above treaty norms but also above customary law – be it local, particular or general, unless the latter has the status of a peremptory norm.[181] The IACHR added that even if the provisions of Art. 55 would enjoy the status of customary law, it could not have compulsory effects over a peremptory norm (here the principle of equality and non-discrimination).[182] Contrary to appearances, the conflicts that are discussed here need to be resolved on the level of validity, not applicability.

3. Collision of jus cogens with the UN Charter and Security Council resolutions

Distinguishing *jus cogens* among the norms of international law would suggest that a clear normative hierarchy is created: in case of unavoidable conflict *jus cogens* prevails over any dispositive norm. This conclusion, however, is not as obvious as one would expect, particularly if one takes into account the constitutionalization tendencies with respect to some treaties, in particular the UN Charter.[183]

The possibility of a conflict between *jus cogens* and the UN Charter is a delicate issue. Although the Charter, by its nature, is an expression of the freedom to conclude treaties – which gives its provisions a dispositive character – at the same time the parties decided to give it a special position in relation to other obligations by granting priority to its provisions (Art. 103 of the UN Charter; confirmed in Art. 30.1 of the VCLT). The Charter is also a universal treaty, which additionally reinforces its legal position.[184] The International Law Commission, in its Conclusions on the fragmentation of international law, observed that in such circumstances it is difficult to contemplate a conflict between *jus cogens* and the UN Charter (pt. 40).[185] The legal doctrine adds that the Charter entered into force before the VCLT, the latter of which does not have a retroactive effect. Nor is the Vienna Convention universally accepted, as is the case for the Charter.[186] It also seems that, irrespective of intertemporal reservations, the relative generality of the provisions of the Charter would seem to make any conflict rather hypothetical. One may even accept a presumption of conformity of the Charter with

[181] Case IT-95-17/1-T, para. 153.

[182] *See* para. 54, opinion no. OC-20/09, p. 58.

[183] B. Fassbender, *The United Nations Charter as the Constitution of the International Community*, Leiden-Boston 2009. *See also* Mik, *supra* note 152, p. 89 et. seq. Some even talk about the constitutionalization of international law, *see* J. Klabbers, A. Peters, G. Ulfstein, *The Constitutionalization of International Law*, Oxford: 2009.

[184] *See* Mik, *supra* note 152, pp. 101-110.

[185] A different approach was taken by the Study Group chaired by M. Koskenniemi, which stressed that from the perspective of *jus cogens*, the UN Charter does not differ from other treaties. See pts 346 and 360 of the Fragmentation of international law: difficulties arising from the diversification and expansion of International law. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, (hereinafter "Koskenniemi report 2006"), pp. 176 and 181. Text of the report is available here: http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.682.

[186] Hossain, *supra* note 33, p. 86 et. seq.

jus cogens. On the other hand, it is difficult to accept the position that all provisions of the UN Charter enjoy a *jus cogens* status. An inconsistency between the Charter and a subsequent treaty does not result in the invalidity of such a treaty *in toto* and *ab initio*. Neither there is any indication that provisions of the Charter are non-derogable.[187]

And yet, if one considers that the priority of obligations arising from the Charter, which also includes obligations resulting from the binding resolutions of the Security Council,[188] the whole situation becomes murkier.[189] The International Law Commission, in its Conclusions (2006), observed that according to Art. 24.2 of the Charter the Security Council acts in accordance with the purposes and principles of the United Nations, which include norms that have been subsequently treated as *jus cogens* (pt. 40). In this context it was even argued that the Security Council could be regarded as the guardian of *jus cogens*,[190] and could not be its violator. Such a statement can be accepted, but only under certain conditions, including a reservation that resolutions of the Security Council are in principle not excluded from assessment as to their compatibility with *jus cogens*,[191] although they benefit from a presumption of consistency.[192]

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[187] Differently, although not entirely clearly, *see* Fassbender, *supra* note 183, who believes that Art. 53 of the VCLT and Art. 103 of the Charter lead to the same result, in particular the invalidity of a treaty (p. 124), and that peremptory norms can be created and changed through the amendments of the UN Charter (p. 140). At the same time, the author shares the position of A. Paulus that *jus cogens* is a statement of mission rather than a practicable legal instrument (p. 165).

[188] *See* R. Bernhardt in commentary to Art. 103, [in:] B. Simma et al. (eds.), *Charter of the United Nations. A Commentary*, vol. II (2nd ed.), Oxford: 2002, pp. 1295-1296.

[189] *See* K. Zemanek, *The Legal Foundations of the International System*, RCADI 1997, vol. 266, p. 231 ("The concept of *jus cogens* implies that a norm of that character must be respected by *all* actors in the international system, including organs which States may create for common action. The Security Council is thus bound by the norms of *jus cogens* in the same manner as the States composing it, and its decisions are null and void if they conflict with a peremptory norm. It is equally inconceivable that a decision by the Security Council, invoking the duty under Article 25 of the Charter, should oblige members of the United Nations to violate their obligations under human rights conventions. The limits which apply to countermeasures must also restrain the freedom of the Security Council"). Klabbers, *supra* note 150, pp. 248-249, points in this context to the argumentation of Bosnia and Herzegovina in its dispute with Serbia in the ICJ (*order on provisional measures of 13 September 1993*, ICJ Rep. 1993, p. 325), which claimed that resolution of the Security Council contributed to genocide and violated *jus cogens*. Although the ICJ ultimately did not accept this argumentation, judge E. Lauterpacht stated that the Security Council should be bound by peremptory norms (separate opinion, ICJ Rep. 1993, p. 407; the judge observed "it would seem sufficient that the relevance here of *jus cogens* should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court's Order, so that the Security Council may give due weight to it in future reconsideration of the embargo"). Y. Dinstein believes, however, that a conflict between a Security Council resolution and *jus cogens* is difficult to imagine. In any case, only the ICJ would be competent to settle such question. *See* Dinstein, *supra* note 86, p. 426.

[190] Hossain, *supra* note 33, p. 97.

[191] *See* stronger, Schmalenbach, *supra* note 3, p. 929: "Even the UN Security Council acting under Chapter VII has no special position in both political and legal terms in the field of *jus cogens* obligations". About possible conflicts and their consequences, *see generally* Orakhelashvili, *supra* note 14, pp. 423 et seq.

[192] *E.g.* ICTY in its decision of 2 October 1995 in the case *Prosecutor v. Dusko Tadic*, para. 28, where it stated that neither the text nor the spirit of the Charter conceives of the Security Council as unbound by

The Court of the First Instance of the European Union (CFI) has, in a number of its judgements, maintained that it is possible to review resolutions of the Security Council against peremptory norms. In particular, in its judgement in the case *Y.A. Kadi v. Council of the European Union and the Commission of European Communities* of 21 September 2005, it held that in principle resolutions of the Security Council, due to their special status (being an element of the obligations arising from the UN Charter), fall outside the ambit of the Court's judicial review, but that such control is incidentally permissible when an act of secondary Community law is based on a resolution of the Security Council which leaves the Community legislator with no discretion. In such a case *jus cogens*, understood as "a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible",[193] provides a point of reference. The Court also held that its approach was supported by the specific nature of *jus cogens*, as described in Arts. 53 and 64 of the VCLT. Moreover, it observed that the UN Charter itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of human beings. These principles are binding on all UN members, including all the bodies of the organization. This also applies to the Security Council. As a consequence, international law "permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect, namely, that they must observe the fundamental peremptory provisions of *jus cogens*,"[194] including basic human rights.

The judgement of the CFI was appealed to the Court of Justice, and ultimately set it aside, albeit for reasons not related to *jus cogens*. In particular, the Court questioned the findings of the CFI that the national regulation enjoyed immunity from jurisdiction, except for *jus cogens* cases, due to its character as an implementation mechanism with respect to resolutions of the Security Council.[195]

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law. *See also* L. M. Hinojosa Martinez, *Bad Law for Good Reasons: The Contradictions of the Kadi Judgement*, 5 International Organizations Law Review 339 (2008), pp. 348-349.

[193] Case T-315/01, paras. 224-231, ECR 2005, p. II-3649, para. 226.

[194] *Ibidem*, para. 230. The Court also held that the right to property is of mandatory character (para. 242); *A. A. Yusuf and Al. Barakaat International Foundation v. Council of the European Union and the Commission of the European Communities* of 21 September 2005, T-306/01, paras. 276-282, ECR 2005, p. II-3533; *F. Hassan v. Council of the European Union and the Commission of the European Communities* of 12 July 2006, T-49/04, para. 92, ECR 2006, p. II-52; *Ch. Ayadi v. Council of the European Union and the Commission of the European Communities* of 12 July 2006, T-253/02, para. 116, ECR 2006, p. II-2139.

[195] Judgement of 3 September 2008, case C-402/05 P and C-415/05 P, ECR 2008, p. I-6351 (at the same time the judgement in the *Yusuf* case was set aside). *See particularly* para. 329. At the same time, the Court questioned the absolute character of the right to property (para. 355). In the judgement of 3 December 2009, Court of Justice also annulled the judgement in *F. Hassan* case (cases C-399/06 P and C-403/06 P, ECR 2009, p. I-11393). *See* judgement of the Court of 30 September 2010 in *Y. A. Kadi v. Commission of the European Communities*, case T-85/09, ECR 2010, p. II-5177, where it accepted the earlier decisions of the of Court of Justice. For a critical view concerning the silence of the Court on the normative status of individual rights, *see* A. Gattini in his commentary to the Court's judgement in the *Kadi* case, 46(1) Common Market Law Review (2009), pp. 231-232.

The response of the legal doctrine was rather critical.[196] From the dogmatic point of view, one may argue that EU courts are not competent to undertake review/control, even incidental, of Security Council resolutions from the perspective of their compliance with *jus cogens*, as this could undermine the legal force of acts aimed at guaranteeing international peace and security.

On the other hand, it should also be added that currently no court, including the ICJ, enjoys an unequivocal power to control the legality of Security Council resolutions.[197] Moreover, one can also observe a certain tendency toward questioning the legality of Security Council resolutions that impose sanctions not only at the regional, but also at the national level (English, Swiss and Italia courts). In this context, it can be argued that a benefit of such decentralized judicial supervision (which prevails despite the risk to the integrity and effectiveness of the UN system) consists in inducing the Security Council to provide a better protection of individual rights.[198] Beyond judicial control, other permissible reactions to illegal resolutions of the Security Council would include protests and refusals to execute.[199]

4. Collision between *jus cogens* and self-contained regimes

International case law has noted that some legal regimes created on the basis of treaties may aim at greater or lesser autonomy with respect to general international law (i.e. self-contained regimes). Although they were already addressed by the PCIJ,[200] they gained in importance only after World War II,[201] and in particular after the end of the Cold War and collapse of the Soviet bloc. During that time one could witness a dynamic development of international law, including the creation and transformation of international organizations capable of establishing their own legal orders. This has led to the fragmentation of international law and the corresponding problem of its unity.

International law doctrine has since attempted, for some time, to analyse the phenomenon of the emergence and operation of self-contained regimes.[202] The issue was

[196] *See e.g.* D. Simon, F. Mariatte, *Le Tribunal de première instance des Communautés. Professeur de droit international?,* Europe. Revue mensuelle, Décembre 2005, p. 6 et. seq.; J. Klabbers, *Treaty Conflict and the European Union*, Cambridge: 2009, pp. 162-163.

[197] *Similarly* Hinojosa Martinez, *supra* note 192, pp. 352-353. Consequently, the author believes that the competence of EU courts to indirectly control the legality of resolutions of the Security Council should be accepted (at least with respect to compliance with *jus cogens*).

[198] For a review of the practices of international and domestic courts and discussion of the arguments for and against decentralized judicial control, see A. Reinisch, *Should Judges Second-Guess the UN Security Council*, 6(1) International Organization Law Review 257 (2009), particularly pp. 284-290.

[199] *See* Orakhelashvili, *supra* note 14, pp. 471-479.

[200] *See* judgement in the *S.S. Wimbledon* case of 17 August 1923, PCIJ Rep. 1923, Series A, Nr 1, pp. 23-24, as well as advisory opinion of the Court in *Exchange of Greek and Turkish populations case of 1925*, PCIJ Rep. 1925, Series B, Nr 10, p. 20.

[201] *See* ICJ judgement in the *Case concerning United States diplomatic and consular staff in Teheran* of 24 May 1980, ICJ Rep. 1980, p. 41, para. 86; *Case concerning military and paramilitary activities in and against Nicaragua*, p. 134, para. 267.

[202] B. Simma, *Self-contained regimes*, 16 Netherlands Yearbook of International Law 111 (1985);

also addressed by the ILC, first in the context of responsibility of states and later as a part of its work on fragmentation of international law. Eventually the Commission presented its stance, looking at self-contained regimes from the *lex specialis* perspective (this is the reason why the Commission favours the notion of "special regimes"; pts 11-16 of the Conclusions).

Special regimes do not constitute a homogenous category. The International Law Commission distinguished three categories of such regimes: 1) regimes related to special rules concerning breach and reactions to breach (special regimes as *lex specialis* with respect to the general regime of responsibility of states); 2) regimes that are formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (e.g. a regimes relating to the protection of particular rivers or the uses of particular weapon, and they may emerge not only on the basis of a single treaty but also several treaties, and in addition can be accompanied by non-treaty developments); 3) regimes that contain all the rules and principles that regulate a certain problem or branch of law (e.g. law of the sea or humanitarian law; such regimes are considered in their entirety) (pt. 12 of the Conclusions).

The level of autonomy of such regimes differs. As a consequence the degree of their openness to general international law is also different. Nevertheless, the Commission expressed the conviction that even with regard to the most advanced special regimes, general international law could serve two functions (besides the use of international law for establishing a special regime): 1) it could fill the gaps in special regimes; and 2) it could provide solutions in the case of failure of a special regime or institution set up by it (pts 15 and 16 of the Conclusions).

Jus cogens may play a limiting role in the establishment of a special regime, i.e. it will prevent it from being created in a way that conflicts with a peremptory norm, or it will require its abolition if a conflicting *jus cogens* emerges during the course of its operation.[203] In a natural fashion *jus cogens*, functioning as the most evident part of general international law, should be incorporated in a special regime in so far as it corresponds with such a regime, unless it already constitutes a part of it. A systemic interpretation, if permissible within such a regime, should facilitate a reference to peremptory norms. Within a special regime *jus cogens* would constitute an element functioning similar to a public order clause, framing the substantive conditions for the special regime.

In the context of the work of the International Law Commission, one should also draw attention to the fact that some special regimes express such a strong tendency

L.A.N.M. Barnhoorn, K.C. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law*, The Hague-Boston-London: 1995.

[203] *See* arbitral award of 2 July 2003 in a *dispute concerning access to information under article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, para. 100, RIAA vol. XXIII, pp. 90-91. The Tribunal said explicitly: "[a]s long as it is not inconsistent with *jus cogens*, Parties may also instruct a tribunal to apply a *lex specialis* that is not part of general international law at the time". Moreover (para. 103), the tribunal also observed that it must "adjust application of a treaty insofar as one of its provisions proves inconsistent with a *jus cogens* that subsequently emerges". In this case, the OSPAR Convention did not, however, constitute *lex specialis*.

toward self-sufficiency that they claim to be independent from general international law. Treaties that provide a basis for such regimes are conferred with constitutional features, which additionally insulates them from the influence of international law. Such a situation occurs particularly in the context of treaties establishing regional organizations of the European type (i.e. models of progressive integration). These developments cannot be 'neutral' from the perspective of the impact of *jus cogens* on the contemporary international community.

5. Conflicts between peremptory norms

At first glance, the problem of a conflict between peremptory norms might seem to be impossible and artificially created. However, the Study Group of Koskenniemi, in its report on the fragmentation of international law, postulated that such a conflict is not unrealistic. The example given by the Group concerned the right to use force in order to realize the right to self-determination. The Group concluded that at its current stage of development, the doctrine of *jus cogens* would be unable to resolve such a conflict, inasmuch as "there is no hierarchy between *jus cogens* norms *inter se*" (pt. 367).[204]

The problem of conflict between peremptory norms was also addressed by R. Kolb.[205] According to this author, the problem is complex because *jus cogens* does not constitute a homogenous normative category. It is composed of imperative norms of public order, the UN Charter, norms resulting from the logical structure of the legal system, and norms expressing public interest (*utilitas publica*). In this context, Kolb enumerates ten possible situations of conflicts between *jus cogens* norms, both within a specific category as well as between different categories.[206] Ultimately, he concentrates on two examples of such a conflict. First, he analyses the contradiction between peremptory norms of public order, which may occur in the context of the prohibition on the use of force and the protection of basic human rights (in the case of a humanitarian intervention). Second, he considers the conflict between *jus cogens* of public order and *jus cogens* belonging to *utilitas publica*.

With respect to the first type of the conflict, Kolb observes that some authors claim that the use of force without authorization of the Security Council is absolutely illegal. Consequently a peremptory norm prohibiting the use of force prevails over a peremptory norm protecting human rights. However, Kolb points out that other authors believe none of the *jus cogens* norms can prevail *in abstracto* over each other. While the harmonization of peremptory norms should be sought, ultimately the principle of protection of individual rights needs to prevail. The author concludes that in a case of such conflict, what is important is not the solution of the problem, but the adopted approach. Both positions are intellectually acceptable.[207]

As an example of a conflict between peremptory norms of public order and norms of *utilitas publica*, one can give the right of peoples to self-determination and the integrity

[204] Koskenniemi report 2006, p. 185.
[205] Kolb, *supra* note 121, pp. 481 et. seq.
[206] *Ibidem*, p. 492.
[207] *Ibidem*, pp. 495-499.

of the Statute of the ICJ. Kolb labels this as an indirect normative conflict. Norms of public order are expansive, usually of *erga omnes* character, requiring the application of sanctions. The Statute, on the other hand, is a document which the ICJ has to apply. At the same time, the jurisdiction of the Court is based on consent. As a consequence a situation may occur whereby the principle of self-determination would clash with the principle of consent (as happened in the *Case concerning East Timor* of 1995). The conflict can be resolved by either giving priority to the *jus cogens* of public order, which would result in setting aside a procedural rule, or, as held by the ICJ, by blocking the right to self-determination through reference to the principle of consensual jurisdiction.[208]

Irrespective of the correctness (which is disputable) of the distinction between different types of peremptory norms, it seems that real problems could arise in the case of a conflict between substantive peremptory norms (the first case discussed by R. Kolb). The example of inconsistency between the Statute of the ICJ and a substantive norm is in fact not a conflict, but expression of the two phases of examination of a case by the ICJ (and many other courts), i.e. examination of jurisdiction and admissibility of a claim, and assessment of the substance of the case. Conflict is possible within the first and the second phase, but not between them. It is of course another issue that in practice a formal examination may lead to rejection of a case that concerns *jus cogens*.

As far as a conflict between substantive peremptory norms is concerned (conflict *sensu stricto*), analysis of the possibility of harmonious interpretation is of prime importance. At the same time, one should be aware that conflict can occur not only between different categories of peremptory norms (e.g. the case analysed by R. Kolb), but also within one category (e.g. rights of individuals, *vide* prohibition of genocide and the non-retroactivity of criminal sanctions for perpetrators authorising a crime of genocide). The problem arises when it is not possible to reconcile the different norms. In such a case one may adopt different approaches, for example to give preference to the norm that protects the collective interest of the international community to the greatest extent. However, even then it may be not easy to solve the dilemma. One arguably needs to examine which norm better accomplishes generally recognized aims of the contemporary international community.

2.3. *Jus cogens* and compliance with international law

2.3.1. General remarks

From the standpoint of the effective operation of a legal norm, it is important to determine the consequences of its breach. International law establishes a regime for the responsibility of states and international organizations,[209] as well as individuals.[210]

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[208] *Ibidem*, pp. 503-505.

[209] *See* Crawford et al. (eds.), *supra* note 55, *passim*; J. Crawford, *The International Law Commission's Article on State Responsibility: Introduction, Text and Commentaries*, Cambridge: 2002, Introduction.

[210] *See* M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden-Boston: 2005.

However, when it comes to a violation of *jus cogens*, the situation is not so clear. On the one hand, it is frequently argued that *jus cogens* operates only with respect to formalized actions, since otherwise the prohibition of derogation or sanction of invalidity (termination) do not make any sense. On the other hand, it is difficult to accept that the breach of norm which protects values that are particularly important for the international community does not give a rise to responsibility on the part of the breaching party.

The injection of *jus cogens* into the discussion over the responsibility of states and international organizations for internationally wrongful acts did not happen all at once. Initially the emphasis was put on the distinction between international crimes and international delicts (Art. 19 of the draft articles on the responsibility of states, as presented by the International Law Commission in 1996).[211] Although *jus cogens* appeared in the document of the Commission, it was in places of secondary importance.[212] Ultimately, the proposed distinction between crimes and delicts was abandoned in favour of responsibility for a breach of obligations arising under a peremptory norm of general international law. The inclusion of *jus cogens* into international criminal law encountered fewer problems. This occurred thanks to the international criminal courts, particularly the ICTY. What is problematic in both areas, however, is the determination of practical consequences of a breach of *jus cogens*.

2.3.2. Responsibility of states and international organizations for a breach of obligations arising under peremptory norms

1. General remarks

The freedom to conclude treaties also allows subjects of international law to determine specific rules with respect to responsibility for a breach of obligations. The articles of the International Law Commission on both the responsibility of states (Art. 55; hereinafter as ARS) and international organizations (Art. 64; hereinafter as ARIO) confirm this rule. States and international organizations can freely, even in a way that differs from the articles, determine the circumstances whereby responsibility arises, its

[211] The draft of the articles enumerates some examples of international crimes, such as aggression, establishment or maintenance by force of colonial domination, slavery, genocide, apartheid, massive pollution of the atmosphere or of the seas. All those acts were considered as serious breaches of international obligations. Only with respect to acts that breach obligations of fundamental importance for the protection of human beings was there an additional requirement that such a breach must occur on a widespread scale (as in case of slavery, apartheid or genocide).

[212] *See* K. Kawasaki, *International Jus Cogens in the Law of State Responsibility*, 1 International Law 6 (2007), pp. 7-10, who indicates that there were three provisions in the draft of 1996, which were ultimately deleted from the final text, that referred to *jus cogens*. These included a provision relating to the situation when an act constituting a breach was subsequently recognized as compulsory by virtue of *jus cogens* (Art. 18.1 and 2) (e.g. a capture of a trade ship that was involved in slave trade in connection with the recognition that prohibition of slavery has the status of a peremptory norm), *jus cogens* as a circumstance for precluding wrongfulness of an act (Art. 29(a), and later renumbered as Art. 21 of the draft), and restrictions on restitution in the case of a breach of an obligation arising from a peremptory norm of general international law (Art. 43(b)). The author also analyses the reasons that stood behind the decision of the Commission.

content, and its implementation. However, as stressed by the Commission, this does not apply to rules that would lead to a breach of a peremptory norm.[213]

Locating *jus cogens* in the sphere of responsibility of states is of crucial importance. It allows for stigmatizing breaches of *jus cogens* norms not only when they originate from agreements between states, but also in cases of unilateral acts (understood as both as formal and factual acts). Considering that *jus cogens* also includes norms that enter into the sphere of internal actions of states, it may be argued that as a consequence of connecting *jus cogens* with international responsibility it is possible to assess the breach of a peremptory norm not only in the case of typical unilateral acts, but also with respect to internal actions of a state (e.g. specific laws).

As correctly noted by the ICTY judgement in the *A. Furundzija* case of 10 December 1998, one of the consequences of qualifying the prohibition of torture as a peremptory norm at the inter-state level is the international de-legitimisation of any legislative, administrative or judicial acts authorising torture. The Tribunal highlighted that "it would be senseless to argue, on the one hand, that on account of jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law." [214] Such measures should not be accorded international legal recognition.

2. *Jus cogens*, the rise of international responsibility, and the circumstances for its preclusion

It is a principle of international customary law that states and international organizations are responsible for their actions that violate international law. Consequently, an obligation to compensate for damages does not even need to be included in a treaty (or in a unilateral act).[215] Responsibility is a necessary element of the law.[216] Parties are not allowed to opt out from this principle.

The ILC held that the responsibility of a state or international organization in principle arises when two conditions are met: 1) the conduct constitutes a breach of an international legal obligation in force for a relevant state or organization; 2) conduct is attributable to that entity under international law (Art. 2 of the ARS; Art. 4 of the ARIO). In the context of *jus cogens*, this means that each violation of such a norm that can be attributed to a state or international organization will result in international responsibility, together with all the consequences described in the draft, including reparation for damages.

At the same time, the Commission stated that each responsible entity needs to have the possibility to invoke certain (exceptional) circumstances precluding the wrongful-

[213] *See* pt. 2 of the commentary to Art. 55, [in:] Responsibility of States. Commentaries 2001, p. 140.

[214] Case IT-95-17/1-T, para. 155.

[215] PCIJ, in its jurisdictional judgement of 26 July 1927 in *Case concerning the factory in Chorzow (claim for indemnity)*, PCIJ 1927, Series A, No. 9, p. 21.

[216] ICJ, the judgement of 5 February 1970 in the case *Barcelona Traction, Light and Power Company, Ltd.*, ICJ Rep. 1970, p. 33, para. 36.

ness of its act (arts. 20-27 of the ARS; Arts. 20-27 of the ARIO). However, the Articles make clear that none of the circumstances can preclude the wrongfulness of an act of a state or an international organization which is not in conformity with obligations arising under a peremptory norm of general international law (Art. 26 of the ARS, Art. 26 of the ARIO).[217]

This means, in particular, that parties neither can preclude the wrongfulness of such an act on the basis of their common consent (Art. 20 of the ARS, Art. 20 of the ARIO),[218] nor by relying on countermeasures (Art. 22 of the ARS, Art. 22 of the ARIO). The parties equally cannot invoke *force majeure* or necessity (arts. 23 and 25 of the ARS, Arts. 23 and 25 of the ARIO respectively), which results in the objectivisation, or even absolutization, of the responsibility of a state or an organization for a breach of obligations arising from *jus cogens*. In this context, the scale (intensity) or nature of a breach is irrelevant. In other words, according to the Commission a rule of strict responsibility is applicable, even for a single transgression of the obligation.

The solution proposed by the Commission with respect to the relation between *jus cogens* and the circumstances which could preclude the wrongfulness of an act has been criticized in the literature. In particular, K. Kawasaki argues that *jus cogens* concerns consent (draft articles of 1996 only referred to consent and necessity). It does not apply to other circumstances as they relate to factual actions.[219] In assessing the merits of this criticism one has to refer back to Art. 26 of the ARS (Art. 26 of the ARIO). This provision does not permit taking into account the situation when an act of a state (or international organization), incompatible with an obligation arising from a peremptory norm, is otherwise compatible with international law due to reliance on a circumstance that precludes the wrongfulness of the act. Consequently, it is not possible to rely on self-defence to justify aggression in the application of countermeasures as a reaction to a breach of obligations arising from *jus cogens*. This is also true with respect to necessity, if it is outweighed by an obligation arising from a peremptory norm. On the other hand,

[217] *Cf.* M. Ménard, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Compliance with Peremptory Norms*, [in:] Crawford et al. (eds.), *supra* note 55, p. 452 ("This article is based on the idea that, in cases of conflict between two or more obligations, one of which flows from peremptory norm, it would be inconceivable not to have the obligation flowing from *jus cogens* norms prevail over the other obligation(s), considering the hierarchy which has been established between peremptory norms and other norms of general international law", and later: "A circumstance precluding wrongfulness thus cannot be used to justify the non-observance of an obligation by a State imposed upon it by a peremptory norm").

[218] In the commentary to Art. 26, pt. 6, it is stated that "in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility" (Responsibility of States. Commentaries 2001, p. 85). It seems, however, that the example is more concerned with the question of whether we have a breach of a peremptory norm (was the consent expressed freely or it was forced?) rather than whether consent is a basis for precluding responsibility for a breach of such a norm.

[219] Kawasaki, *supra* note 212, pp. 10-15.

it is less clear why it is not permissible to rely on distress or *force majeure*, unless the conditions for their invocation are not met. They do not depend on the will of a state (international organization), and the weighing of values, as in case of necessity, is not relevant here. As a consequence, the fundamental problem is not that the behaviour is factual, but that the circumstances precluding the responsibility are independent from behaviour of the violator.

3. *Jus cogens* and qualification of the conditions of responsibility for a breach of international obligations

1. Initially the Commission divided breaches of international law into international crimes and international delicts. Ultimately however, the Commission decided to abandon this distinction (which found some support in the existing practice and a part of the doctrine) as resembling too much the terminology of criminal law.[220] At the same time, the Commission recognized that there are breaches that go beyond an "ordinary" violation of international law, and decided to connect them with *jus cogens* by introducing the notion of a serious breach of obligations under peremptory norms of general international law. This was ultimately reflected in the Articles on responsibility of states as well as those on responsibility international organizations (as chapter III part II regulating international responsibility of states and specific international organizations, respectively; Arts. 40 and 41 of the ARS, Arts. 41 and 42 of the ARIO). The Commission also decided to specify the notion of a serious breach of an obligation arising from *jus cogens*, as well as the basic legal consequences of such a breach.

Consequently, Art. 40.2 of the ARS (Art. 41.2 ARIO) states that a breach of such obligation "is serious if it involves a gross or systemic failure by the responsible State to fulfil the obligation." The Commission also highlighted that breaches which are referred to in Art. 40 (Art. 41) are intolerable because of the threat they present to the survival of States and their peoples, and to the most basic human values.[221]

The analysis of this provision leads to the conclusion that responsibility on the basis of Arts. 40 and 41 of the ARS (arts. 41 and 42 of the ARIO) only arises when a breach of *jus cogens* obligations has a serious character. A breach that is of lesser weight is subject to general rules. The Commission also explained in the commentary that the term "systemic" indicates that a violation is carried out in an organized and deliberate way. On the other hand, the term "gross" refers to the intensity (scale) or its effects. Consequently, what is meant is a "violation of a flagrant nature amounting to a direct and outright assault on the values protected by the rule". At the same time, the notions are not

[220] Orakhelashvili, *supra* note 14, p. 277, noting that the distinction between crimes and delicts has been criticized both in the doctrine and in the Sixth Committee of the UN General Assembly. *See also*, E. Wyler, *Du "Crime d'Etat" à la responsabilité pour "violations graves d'obligations découlant de normes impératives du droit international général"*, [in:] P.-M. Dupuy (ed.), *Obligations multilatérales, droit impératif et responsabilité internationale des états*, Paris 2003, p. 105 et. seq., in particular pp. 112-113. According to the author, this change is not purely semantic but substantive (it concerns regulation of Art. 54 in connection with Art. 48 of the ARS), although there are not many differences.

[221] *See* pt. 3 of the commentary to Art. 40, [in:] Responsibility of States. Commentaries 2001, p. 112.

mutually exclusive, as a serious breach can frequently be both gross and systemic. The Commission indicated factors that can be helpful in the assessment of the seriousness of a violation. These include the intent to violate the norm, the scope and number of individual violations, and the gravity of their consequences for the victims. It also stressed in this context that some peremptory norms, such as the prohibitions of aggression and genocide, by their nature require an international violation on a large scale.[222]

2. Art. 41 of the ARS (Art. 42 of the ARIO) is a provision which aims at giving Art. 40 a practical meaning. It sets out the basic consequences of a serious breach by indicating the special obligations of entities faced with the commission of such a breach. Simultaneously, as provided in Art. 41.3, this does not exclude other consequences referred to in part III of the Articles, as well as further consequences that a breach may entail under international law. In the first case, this particularly includes an obligation to cease the wrongful act, to continue performance, to give guarantees and assurances of non-repetition, as well as the duty to make reparation.[223] Other consequences may result from the further development of international law.

Following Art. 41.1 and 2 of the ARS, the Commission indicated the most important obligations of entities in reaction to a serious breach. First, there is an obligation to cooperate in order to bring to such serious breach to an end through all lawful means. Second, no entity shall recognize as lawful a situation created by a serious breach. States and international organizations shall not render any aid or assistance in maintaining that situation.[224] In its commentary to Art. 41, the Commission also explained that the prohibition against recognizing as lawful a situation created by a serious breach is of a collective character and relates to the international community as a whole, i.e. to all states (including the responsible state) and concerns both *de jure* and *de facto* recognition.[225]

3. The regulation proposed by the ILC has been criticized by some scholars. According to K. Kawasaki, it is not clear why the reference to *jus cogens* was preferred when the scope of a secondary obligation is at issue. Moreover, Arts. 40 and 41 wrongly relate to legal facts, and not legal acts, (as in Art. 26 of the ARS), although obligations are incumbent upon all states other than the responsible state. He also indicates that the obligation of non-recognition of a situation created by a serious breach cannot relate to factual situations such as occupation, while in the case of national legal acts international law is unable to directly render them invalid. The Security Council is equally unable to invalidate domestic legal acts. According to him, the obligation of non-recognition results from the fact that international *jus cogens* does not apply at the level of national law. The obligation of non-recognition is therefore a substitute for nullity

[222] *Ibidem*, pt. 8, p. 113.

[223] *Ibidem*, pts 13 and 14 of the commentary to Art. 41 (pp. 115-116).

[224] *See* A. Gattini, *Les obligations des Etats en droit d'invoquer la responsabilité d'un autre Etat pour violations graves d'obligations découlant de normes impératives du droit international general*, [in:] P.-M. Dupuy (ed.), *supra* note 220, pp. 145 et. seq. The author labels the first obligation as an obligation of solidarity, while the second is an obligation of isolation.

[225] *Ibidem*, pts. 5, 9 and 10 (pp. 114 and 115).

as a consequence of the breach of peremptory norm, and helps to prevent "the illegal event from spreading outside of the territory of the responsible State".[226] While I share the position that *jus cogens* does not automatically operate in domestic law, it should be added that non-recognition could also concern acts undertaken in international relations. It may be also connected with a factual situation (e.g. refusal to recognize the creation of a state).

The proposed regulation of the Commission is also criticized as being overcautious. For example, P. Gaeta notes that it is not clear why the obligations provided in Art. 41 of the ARS do not apply to all violations of *jus cogens*. In this context, she observes that even 'smaller' violations can concern norms that protect the fundamental interests of the international community as a whole. According to her, extending the obligation of non-recognition, conceptualized as an additional consequence, to cover 'smaller' violations would not disturb in any way the regime of responsibility for serious violations.[227] To some extent one may agree with Gaeta. At the same time, it should be observed that there is a difference between isolated violations of the prohibition of torture and mass torture or acts amounting to genocide or apartheid. A different matter, however, is that the position taken by the Commission is not consistent inasmuch as it does not introduce any strict reparation regime for serious breaches of international law.[228]

4. Implementation of responsibility for a breach of obligations arising from *jus cogens*

1. Part IV of both Articles relates to the implementation of international responsibility. One of its important elements is the question of whether and under what conditions one may take countermeasures. This issue was regulated in chapter II of both Articles (arts. 49-54 of the ARS, Arts. 51-57 of the ARIO). In principle, the Articles permit an injured entity to take countermeasures against the responsible entity (Art. 49 of the ARS, Art. 51 of the ARIO). At the same time, this right is not unlimited. The Commission envisages a number of substantive conditions (e.g. limitations relating to entities that are entitled to take countermeasures and those against whom such measures can be taken, relating to object of countermeasures, and to their intensity – Arts. 49, 51 of the ARS, Arts. 51 and 53 of the ARIO); as well as procedural conditions (e.g.

[226] Kawasaki, *supra* note 212, pp. 17-20. For other critical remarks, *see* S. Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, [in:] Tomuschat & Thouvenin (eds.), *supra* note 65, pp. 99 et. seq.; Th. Christakis, *L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales*, [in:] *ibidem*, pp. 127 et. seq.; M. Toufayan, *A Return to Commutarianism? Reacting to ' Serious Breaches of Obligations Arising under Peremptory Norms of General International Law ' under the Law of State Responsibility and United Nations Law*, 42 Canadian Yearbook of International Law 197 (2004), *passim*. The latter author points out that prevention and an institutional reaction should be emphasized.

[227] *See* P. Gaeta, *The Character of the Breach*, [in:] Crawford et al. (eds.), *supra* note 55, pp. 425-426.

[228] But *see* Orakhelashvili, *supra* note 14, pp. 248-267, where the author attempts to show the impact of *jus cogens* on the question of reparations. However, it may be also argued that this problem was not directly regulated in the articles of the International Law Commission.

relating to the time when a countermeasure is taken, its termination – Arts. 51, 52 of the ARS, Arts. 54, 55 of the ARIO) that need to be met to in order for a countermeasure to be considered legal.

From the perspective of *jus cogens*, most important is a provision that excludes certain obligations from the scope of countermeasures. According to Art. 50.1 of the ARS (Art. 53.1 of the ARIO), countermeasures shall not affect the following obligations:

(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
(b) obligations for the protection of fundamental human rights;
(c) obligations of a humanitarian character prohibiting reprisals;
(d) other obligations under peremptory norms of general international law.

The above obligations may not be impaired by countermeasures. An injured entity is required to continue to respect these obligations and cannot expect that a breach by a responsible entity will excuse it from said obligations.[229]

The text of the above provision (in particular subparagraph d) suggests that first three categories of obligations also constitute an expression of *jus cogens*. The Commission, however, explained that the term "other" used in this subparagraph suggests that the three preceding categories (in particular subparagraphs b and c) do not necessary qualify (although some of them may qualify) as obligations arising from peremptory norms. The open category of obligations as provided in subparagraph d) also allows for qualifying new obligations as *jus cogens*.[230]

It is difficult to accept the position of the Commission without making certain reservations. It should be noted that the prohibition on the use force is generally regarded as *jus cogens*. Part of the case law and literature also holds that the same status is enjoyed by basic human rights and fundamental principles of humanitarian law. It would be therefore advisable to regard the obligations enumerated in subparagraphs (a)-(c) as arising from peremptory norms. In any case, if the intention of the Commission was different, the language it used is very far from that intention.

2. Countermeasures can be taken by an injured State or international organization only against a responsible entity and only to in order to induce that entity to comply with its obligations under Part II of the Articles (Content of the international responsibility of a state). This means that countermeasures are not available to entities that are not injured by the internationally wrongful act. *Prima facie* one could also include in this category entities that are entitled to invoke international responsibility for violation of *erga omnes* obligations (Art. 48 of the ARS, ARIO). Those obligations are generated by, *inter alia*, *jus cogens*. However, as provided by Art. 54 of the ARS (Art. 57 of the ARIO), those entities are entitled to take all lawful measures against a responsible state or international organization to ensure cessation of the breach, in the interest of

[229] *See* pt. 1 of the commentary of the International Law Commission, [in:] Responsibility of States. Commentaries 2001, p. 131. The Commission describes these obligations as sacro-sanct.

[230] *Ibidem*, pt. 9, pp. 132-133.

the injured state or international organization or of the beneficiaries of the obligation breached.[231]

The ILC stressed that the provision covers both individual and group reactions of a state(s), as well as institutional reactions in the framework of international organizations which are entitled to invoke the responsibility for a breach of *erga omnes* obligations, including *jus cogens*. Those reactions would be undertaken in the interests of the injured entities and/or the beneficiaries of the obligations protected by international law. According to the Commission, there is no generally recognized entitlement to act in the collective interest (also understood as the interest of the international community as a whole).[232] The practice is very limited in this respect. Such an action in the collective interest can include the application of measures provided for by the law of treaties (e.g. suspension of treaty rights).[233]

2.3.3. Individual criminal responsibility for violation of *jus cogens*

Besides states or international organizations, individuals can also breach peremptory norms. These individuals may include heads of states, other officials, military commanders or even ordinary soldiers or other persons. If their acts constitute a crime under national law, they should be held liable. However, international law also envisages the possibility of punishing perpetrators of certain crimes by international criminal such as the ICC, the ICTY or the ICTR. Some crimes within the jurisdictions of those courts overlap with some prohibitions which are regarded as *jus cogens* (e.g. prohibitions of aggression, genocide, war crimes or crimes against humanity).

Moreover, as the previous discussion shows, international criminal courts (particularly the ICTY) are bodies that have greatly contributed to the development of the *jus cogens* concept and its introduction into the area of international criminal law. This demonstrates a tendency to extend the operation of *jus cogens* beyond the sphere of treaty law, or even beyond the law on responsibility for internationally wrongful acts. These courts have also derived obligations on the part of states to ensure the prosecution, punishment and extradition of persons responsible for acts covered by the courts' jurisdiction. However, the statutes of these international courts do not directly refer to *jus cogens*. It is also not clear what is the impact on the international criminal responsibility of individuals of a determination that a violated norm is of a peremptory character (e.g. prohibition of torture of genocide), and whether the absence of such a determination

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[231] *See* I. Scobbie, *Invocation de la responsabilité pour la violation d'obligations découlant de normes impératives du droit international général*, [in:] P.-M. Dupuy (ed.), *supra* note 220, pp. 121 et. seq.

[232] A.-L. Vaurs-Chaumette, *The International Community as a Whole*, [in:] Crawford et al. (eds.), *supra* note 55, pp. 1024, 1026, correctly noting that the international community is a separate legal concept, but not an entity injured by a breach. According to her, "[i]n cases of serious breaches of obligations deriving from peremptory norms, it is States collectively who are the holders of the injured interest and who have capacity to act against the author of the breach."

[233] Pts. 2-4, 6 of the commentary to Art. 54 [in:] Responsibility of States. Commentaries 2001, pp. 137-139.

results in different criminal responsibility of an individual. This may lead to the conclusion that, as far the international criminal responsibility of individuals for a breach of *jus cogens* is concerned, international law is still in the early stage of development.

CONCLUSIONS

Contrary to some sceptics, the above analysis shows that *jus cogens* belongs to the contemporary *corpus iuris gentium*. It belongs there not only as a specific normative concept based on Art. 53 of the VCLT, but also, although modest and not entirely stable, as a complex of substantive norms of general international law. This does not mean that *jus cogens* is uncontroversial, even with respect to basic issues such as the criteria used for distinguishing such norms, and their legal basis and effectiveness. However, one may accept, *lege lata*, that these controversies do not undermine the fact that *jus cogens* is a part of international law. In particular, peremptory norms need to meet three criteria: 1) sociological (acceptance and recognition, or modification only by the international community as a whole); 2) normative (prohibition of derogation); 3) axiological (norms which protect universally-recognized values connected with the existence of a state and its nations as well as basic human values, the protection of which are in the interest of the world community).[234] Peremptory norms are not subject to substantial changes and cannot be modified or rejected without a change of the nature of the international community and the foundations of the law that governs it. Obligations that arise from peremptory norms are of an *erga omnes* character, and apply to all main subjects of international law (i.e. states and international organizations). At the same time, there is also a tendency to extend their applicability to non-state entities (corporations and individuals).

The basis for peremptory norms is provided by objective legal consciousness (*jus necessarium*). Neither a treaty nor custom is able to provide a sufficiently satisfactory basis for its binding force. As a consequence, norms that belong to *jus cogens* should be identified by international courts, as broadly understood, through dialogue among them and with the use of objective criteria. Such a dialogue should reveal and manifest the legal consciousness encompassing the existence and nature of peremptory norms, which must be held in common by the dominating majority of the international community of states.

Jus cogens is today entering into the sphere of creation, application (including interpretation), and compliance with and control by international law. This provokes discussions on the relationship between *jus cogens* and UN law, as well as on its impact

[234] J. Verhoeven wrote, however, in this context, that: "the concrete usefulness of *jus cogens* is still limited. And it will remain weak as long as the content of the '*intérêt général*' within the community of nations remains poor". *See* J. Verhoeven, *Invalidity of Treaties: Anything New in/under the Vienna Convention*, [in:] Cannizarro (ed.), *supra* note 83, p. 306. That view is right. On the other hand, *jus cogens* should not be used as a common tool for solving every problem of the international community.

on factual acts in the context of international responsibility for a breach of peremptory norms.

The fundamental problems which render *jus cogens* as a still insufficient influence on the international legal order relate to its enforcement, in particular such possibility by the ICJ or other international courts which continue to declare their lack of jurisdiction, as well as national courts in the context of state immunity. Other problems include the lack of direct effect of *jus cogens* on acts of national law.[235] This loophole can be filled to some extent by the law on state responsibility. Last but not least, the significance of peremptory norms for the international criminal responsibility of individuals is not entirely clear.

Criticism of *jus cogens* frequently results, consciously or subconsciously, from excessive expectations. Although it undoubtedly constitutes a foundation of the civilized international legal order, *jus cogens* operates primarily as a clause of public order, eliminating from international law formalized acts (and their legal consequences) that conflict with it and correcting, to a certain extent, the conduct of subjects of international law. It also allows for qualifying the responsibility of states and international organization for serious breaches of those norms, although the implications of this qualification are not always clear and uncontroversial. On the other hand, peremptory norms do not have an autonomous and positive regulatory capacity, nor do they fill the entire space of the common aims and values that are important for the contemporary international community. In addition, they can only to a limited extent assist in eliminating or limiting the consequences resulting from the fragmentation of international law, e.g. by restraining some particular communities from the creation of self-contained regimes. *Jus cogens* is definitely not an ideal instrument. Nevertheless, it is the right formula for the purposes for which it has been introduced into contemporary international law. It requires both further conceptual elaboration with respect to the consequences of its breach, as well as the development of a more reflexive judicial practice.

[235] The statement of Guillaume, *supra* note 22, p. 135 that "l'on a pu comparer le *jus cogens* à une voiture destinée à ne jamais quitter le garage" seems to be exaggerated.

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HUMAN RIGHTS AND THE DENUNCIATION OF TREATIES AND WITHDRAWAL FROM INTERNATIONAL ORGANISATIONS

INTRODUCTION

Since the 1990s the international community has witnessed an almost discernible trend – the withdrawal from and denunciation of human rights treaties by an increasing number of States, which includes extricating themselves from supervision by international monitoring mechanisms such as the Human Rights Committee (HRC). The latter has particularly been the case with respect to the Optional Protocol to the International Covenant on Civil and Political Rights (OPT),[1] Jamaica was the first to do so in 1997.[2] But it has also occurred with respect to the American Convention on Human Rights (ACHR).[3] More recently, in September 2013, Venezuela's withdrawal from the ACHR took effect.[4] Similarly, the issue has also arisen of terminating membership in international

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[1] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[2] On 23 October 1997, with effect from 23 January 1998, UNCHR, Report of the Human Rights Committee, UN Doc. A/57/40, vol. 1, p. 146. *See* N. Schiffrin, *Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights*, 92 American Journal of International Law 563 (1998). Jamaica was followed by Trinidad and Tobago, twice, on 26 May 1998 with effect from 26 August 1998, when a new instrument of accession was deposited, including a reservation on death penalty cases, and on 27 March 2000, with effect from 27 June 2000, UNCHR, Report of the Human Rights Committee, *ibidem*, and by Guyana, on 5 January 1999, with effect from 5 April 1999, although it re-acceded on the same date with a reservation, UNCHR, Report of the Human Rights Committee, *ibidem*.

[3] Art. 78(1) of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. Trinidad and Tobago gave notice of their withdrawal on 26 May 1998, with effect from 26 May 1999, www.cidh.org/Comunicados/English/1998/Press10-14.htm. *See* N. Parassram Concepcion, *The Legal Implications of Trinidad and Tobago's Withdrawal from the American Convention on Human Rights*, 16 American University International Law Review 847 (2001).

[4] *See* www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Venezuela; Inter-American Commission on Human Rights, *IACHR Deeply Concerned over Result of Venezuela's*

organisations in order to dispense with the sometimes stringent restraints imposed by human rights obligations accompanying membership. There had been speculation that the United Kingdom might withdraw from the Council of Europe in response to the London terrorist bombings in July 2005.[5] In light of the object and nature of human rights treaties, such drastic steps, seemingly motivated by a desire to evade the strictures imposed by international legal obligations or to avoid embarrassing litigation, while still relatively rare, have negative connotations for the effective protection of human rights and arguably constitute a direct challenge to the international protection systems.[6]

The inclusion of denunciation clauses of a diverse nature in multilateral treaties is a common practice.[7] This article focuses on a distinctive category of treaties; those relating to human rights, including the foundational treaties of international organisations with a human rights remit. Prominent in the discussion is the question whether States have the right, under international law, to extricate themselves from such obligations in the absence of explicit permission to do so. We use the term "human rights treaties" to refer to those legally binding documents guaranteeing certain basic freedoms, in addition to those establishing enforcement or monitoring mechanisms. International treaties on humanitarian law, applicable in times of armed conflict, are excluded from our consideration. However, treaties covering specific actions or crimes constituting human rights violations are included. It should be noted that this essay is not meant to be an exhaustive examination of all relevant treaties; the ones mentioned and discussed are illustrative of the issues under consideration.

1. THE TREATIES OF THE INTER-WAR PERIOD

While the international protection of human rights is primarily a post-World War II development, it should be recalled that the question of human rights at the transnation-

Denunciation of the American Convention, Press Release No. 64/13, 10 September 2013, available at: https://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp, both assessed 17 April 2014; D.G. Mejía-Lemos, *Venezuela's Denunciation of the American Convention on Human Rights*, 17(1) ASIL Insights (2013).

[5] The then-Lord Chancellor, Lord Falconer, nevertheless made it plain that the UK would not denounce the European Convention on Human Rights, BBC News, *Human rights law 'may be changed'* (14 May 2006) http://news.bbc.co.uk/1/hi/uk_politics/4768259.stm, accessed 23 March 2014.

[6] *See* the correspondence of the Inter-American Court of Human Rights and the European Court of Human Rights, Annual Report of the Inter-American Court of Human Rights, 1999, Appendix XXXVIII, XXXIX and XL, OEA Series L/V/III 47, Doc. 6. The HRC expressed its 'profound regret' at Trinidad and Tobago's OPT denunciation, UNCHR, Report of the Human Rights Committee, UN Doc. A/56/40, vol. 1, p. 31 para. 7 (26-10-2001). *See also* Y. Tyagi, *The Denunciation of Human Rights Treaties*, 79 British Yearbook of International Law 86 (2008), pp. 184-85. Under customary international law denunciation does not free a State from parallel obligations, *see* Art. 43 of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331. *See* International Law Commission, *Law of Treaties*, A/CN.4/143, YILC, 1966, vol. II p. 237 (ILC).

[7] ILC, *supra* note 6, p. 236; L.R. Helfer, *Exiting Treaties*, 91 Virginia Law Review 1579 (2005) pp. 1582-1583, 1597-1599.

al level had its modern inception in the era of the League of Nations. In the aftermath of the World War I, the victorious Allies accepted the principle of national minority rights as part of the general settlement in Europe, and put into place a multilateral system for their protection, with the League acting as guarantor,[8] at the same time making universal the prohibition of slavery and the slave trade.[9] The International Labour Organisation (ILO) concluded a groundbreaking treaty suppressing forced labour, closely associated with slavery, in all its forms. Given that the effective protection of minorities in the European context has still not been achieved at a satisfactory level and issue of minority protection has often lead to inter-state friction and that manifestations of slavery-related practices have persisted to this day, a brief examination of the relevant regimes of the inter-war years retains much more than historical interest only.

A series of treaties designed to protect certain "elementary rights" of the members of distinct national, religious and linguistic minorities, known as the Minorities Treaties,[10] were signed between, on the one hand, the principal Allied and Associated Powers and, on the other hand, Poland, Czechoslovakia, Bulgaria, Hungary, Yugoslavia and Turkey, establishing an embryonic protection system.[11] The 1919 Treaty with Poland provided a model for similar treaties.[12] A common feature was that the League of Nations played a supervisory role, developing a system for receiving petitions alleging breaches of treaty rights, while any disputes could be referred to the Permanent Court of International Justice for adjudication.[13]

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[8] T.D. Musgrave, *Self-Determination and National Minorities*, Oxford University Press, Oxford: 2000, pp. 37-41.

[9] S. Drescher & P. Finkelman, *Slavery*, [in:] B. Fassbender & A. Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford: 2012, pp. 890, 911.

[10] H. Lauterpacht, *Oppenheim's International Law*, vol. 1, (8th ed.), Longmans, London: 1955, p. 716. In *Minority Schools in Albania* (Advisory Opinion) (1935) PCIJ Rep Series A/B No. 64, the Permanent Court of International Justice stated that the treaty's purpose was not only to secure equality, but also to ensure the preservation of racial peculiarities, traditions and national characteristics.

[11] F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, United Nations, New York: 1991, paras. 93-96; A.H. Robertson & J.G. Merrills, *Human Rights in the World*, (4th ed.), Manchester University Press, Manchester: 1996, pp. 20-23; H. Hannum, *The Rights of Minorities*, [in:] J. Symonides (ed.), *Human Rights: Concepts and Standards*, UNESCO/Ashgate, Aldershot: 2000, pp. 277, 279.

[12] *E.g.* Treaty Concerning the Recognition of the Independence of Poland and the Protection of Minorities between the Principal Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland (signed 28 June 1919, entered unto force 10 January 1920) 225 CTS 412; Treaty Concerning the Recognition of the Independence of Czechoslovakia and the Protection of Minorities (signed 10 September 1919, entered into force 16 July 1920). *See* T.S. Woolsey, *The Rights of Minorities Under the Treaty with Poland*, 14 American Journal of International Law 392 (1920); C. Broelmann, *The PCIJ and International Rights of Groups and Individuals*, [in:] C.J. Tams & M. Fitzmaurice (eds.), *Legacies of the Permanent Court of International Justice*, Martinus Nijhoff, Leiden: 2013, pp. 123, 127-129.

[13] Art. 12 of the Polish Minorities Treaty; Capotorti, *supra* note 11, paras. 108-117, 123-127; F.P. Walters, *A History of the League of the Nations*, Oxford University Press, Oxford: 1960, pp. 173-175; A.P. Fachiri, *The Permanent Court of International Justice*, reprint of the 2nd ed., London: 1932, Scientia Verlag,

During the 1930s, as the international order was disintegrating in the led-up to the Second World War, the minorities' regime was undermined. In September 1934 Poland, despite the lack of a withdrawal clause, denounced the Treaty, drawing protests from some countries that it could not unilaterally discharge itself from its obligations.[14] The prevailing opinion of the time was that, absent a withdrawal clause, denunciation was impermissible.[15] The League system of minorities' protection unravelled and eventually "ceased to exist."[16]

The Slavery Convention was signed under the League's auspices in 1926 and is still in force. Under Art. 10, which has never been applied, the contracting parties have an unfettered right to denounce it at any time, such denunciation to take effect a year after the UN Secretary General has received notification thereof.[17]

The Forced Labour Convention was adopted by the ILO in 1930.[18] It too remains in force.[19] Under its complicated denunciation clause (Art. 30), parties were barred from denouncing it within the first ten years, i.e. before 1 May 1942. Thereafter, the parties had a year to exercise the right of denunciation, following which they remained bound for successive periods of five years. Currently parties are allowed to secede at the expiration of each five-year period. Thus, the application of the denunciation clause does not relate to when the Convention was ratified/acceded to, but only to the expiration of the five-year periods. No party has ever withdrawn from the Convention.

2. HUMAN RIGHTS TREATIES CONTAINING A DENUNCIATION CLAUSE

A number of treaties seeking to protect and promote human rights make express provision for withdrawal and lay down specific, mainly procedural, conditions to be met, primarily a notice period, although these vary. In such cases parties are perfectly within their rights to invoke the denunciation clause, subject to compliance with the specified terms.

The general rules regarding denunciation of a treaty or withdrawal from an international organisation are set out in the Vienna Convention on the Law of Treaties 1969

Aalen: 1980, pp. 86-87. *See e.g.*, *Certain Questions relating to Settlers of German Origin in Poland* (Advisory Opinion) (1926) PCIJ Rep Series B No. 6; *Acquisition of Polish Nationality* (Advisory Opinion) (1923) PCIJ Rep Series B No. 7.

[14] Musgrave, *supra* note 8, pp. 56-57; Walters, *ibidem*, p. 616.

[15] N. Feinberg, *Unilateral Withdrawal from an International Organization*, 39 British Yearbook of International Law 189 (1963), p. 193.

[16] Capotorti, *supra* note 11, para. 140; Musgrave, *supra* note 8, pp. 56-57.

[17] Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253. Recent accessions include Paraguay (2007) and Kazakhstan (2008).

[18] Convention concerning Forced or Compulsory Labour (No. 29) (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55.

[19] Canada acceded in 2011.

(VCLT).[20] According to Art. 42(2) thereof, they may take place only on the basis of the relevant treaty's provisions or in accordance with the VCLT's terms, which are exhaustive and include a material breach or *rebus sic stantibus*.[21] Moreover, Art. 54 VCLT stipulates that a party may withdraw either in conformity with the treaty's provisions or with the consent of all the parties following consultation with them.[22] Art. 56 VCLT seeks to address the problem of treaties which lack denunciation or withdrawal clauses, and this is discussed later in Section 6. Since the VCLT makes no special allowance for human rights treaties, which by their distinctive nature may have a solid claim to special consideration, it is accepted that these rules apply equally to human rights treaties. However, the law of treaties on this issue, especially in relation to withdrawal from international organisations, has been criticized as uncertain.[23] But alternatively it could be said that the VCLT sanctions withdrawal only in the limited circumstances set out therein.[24] It is also important to be mindful of the fact that, first, the VCLT itself does not apply retrospectively,[25] and, secondly, the VCLT as such is inapplicable to non-parties unless they agree to its application or the rules have acquired the status of customary law.

2.1. Universal treaties adopted under UN and ILO auspices

Many universal human rights treaties adopted under the auspices of the United Nations (UN) or the ILO contain clauses expressly providing for a right of denunciation or withdrawal, subject to a defined period of notice. The following treaties, for example, adopted under UN auspices, require a period of one year's notice to withdraw (the prevailing norm): the Convention on Racial Discrimination 1965;[26] the Convention

[20] *Supra* note 6. By virtue of Art. 5 it applies to the constituent instruments of international organisations. Essentially identical provisions are to be found in the Vienna Convention on the Law of Treaties between States and International Organizations (adopted 21 March 1986, not yet in force) International Legal Materials, vol. 25 (1986), p. 543. In *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, pp. 74-75, the International Court of Justice (ICJ) cautioned that the constituent instruments' special nature invites careful interpretation. According to D.W. Greig, *International Law*, (2nd ed.), Butterworths, London: 1976, p. 857, applying the same principles of law to ordinary treaties and to constituent instruments is 'harmful'. *See* further S. Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge University Press, Cambridge: 1989, pp. 181-258.

[21] ILC, *supra* note 6, p. 237; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, para. 100 *et seq*.

[22] *See* ILC, *supra* note 6, p. 249.

[23] M. Akehurst, *Withdrawal from International Organisations*, 32 Current Legal Problems 143 (1979), pp. 144-145.

[24] L. Brilmayer & I.Y. Tesfalidet, *Treaty Denunciation and "Withdrawal" from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 Yale Law Journal Online 217 (2011), pp. 218-219, http://yalelawjournal.org/images/pdfs/935.pdf, accessed 23 March 2014.

[25] Art. 4 VCLT. *See also Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda)* [2005] ICJ Rep 6, para. 125. According to Tyagi, *supra* note 6, p. 148 this dictum means that the VCLT as such is inapplicable to those human rights treaties adopted before its conclusion.

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

Against Torture 1984 (CAT)[27] and the 2002 Optional Protocol;[28] the Convention on Child Rights 1989 (CRC),[29] the Optional Protocol on Sale of Children 2000,[30] and the Optional Protocol on Children in Armed Conflict 2000;[31] the Migrant Workers Convention 1990 (CMW);[32] the Convention against Enforced Disappearances 2006;[33] and the Convention on Disabilities 2006.[34] This same condition applies to the Rome Statute of the International Criminal Court (ICC) 1998.[35]

It is interesting to observe that the period of notice laid down in three UN protocols is shorter than in the primary treaty. Thus the Optional Protocol to the Convention on Discrimination against Women 1999[36] and the Optional Protocol to the Covenant on Economic, Social and Cultural Rights 2008 specify periods of six months' notice,[37] whereas the OPT requires only three months' notice.[38] Moreover, in certain instances

[27] Art. 31(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[28] Art. 33(1) of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237.

[29] Art. 52 of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[30] Art. 15(1) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.

[31] Art. 11(1) of the Optional Protocol to the Convention on Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000, entered into force 12 February 2002) 2173 UNTS 222.

[32] Art. 89(2) of the International Convention on the Protection of the Rights of All Migrant Workers (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

[33] Art. 40(1) of the International Convention for the Protection of All Persons from Enforced Disappearances (adopted 20 December 2006, entered into force 23 December 2010) 2715 UNTS 3.

[34] Art. 48 of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

[35] Art. 127(1) of the Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3. In its ongoing tussle with the ICC over the indictment of Sudanese President al-Bashir and other African leaders, the African Union Assembly met in Extraordinary Summit in October 2013 to reflect on Africa's continued relationship with the ICC, but proposals for *en masse* withdrawal from the Rome Statute lacked the required support, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, AU Doc. Ext/Assembly/AU/Dec. 1 (12 October 2013). In September 2013 Kenyan MPs approved a (yet not realized) motion to leave the ICC in protest against the trials of President Kenyatta and Deputy President Ruto for crimes against humanity, BBC News, *Kenya MPs vote to withdraw from ICC* (12 September 2013) www.bbc.co.uk/news/world-africa-23969316, accessed 23 March 2014.

[36] Art. 19(1) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83.

[37] Art. 20(1) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UNGA Res. 63/117, text A/RES/63/435.

[38] Art. 12(1) OPT.

withdrawal is contingent upon the satisfaction of further formal conditions. For example, in the Optional Protocol on Children in Armed Conflict denunciation takes effect only if the State concerned is not involved in an armed conflict at that precise moment,[39] while in the CMW it is possible only after having been in force for the denouncing State for at least five years.[40] Finally, an additional condition is that the decision to withdraw is made publicly. This requirement is satisfied by notifying the UN Secretary-General accordingly.[41]

Following the end of the Second World War, the ILO continued to adopt treaties on a wide range of subjects touching on human rights, such as freedom of association, and child labour.[42] The denunciation clauses in these instruments follow the pattern set by the Forced Labour Convention 1930.[43] Although ILO conventions permit denunciation, a high threshold is set: it is possible only after the first ten years following the relevant Convention's entry into force, and, in the absence thereof, States may not denounce them for further periods of either five years[44] or ten years.[45] These lengthy periods are explicable on the basis that the effect of the conventions could be felt only after the passage of time. Denunciation has been rare: only the Abolition of Forced Labour Convention 1957 has been denounced by Singapore and Malaysia, respectively on 19 April 1979 and 10 January 1990.[46] Denunciation need not be accompanied by stated reasons. However, the Handbook of Procedures on ILO Conventions stipulates that if the notice does not indicate the reasons, the International Labour Office should request the government concerned to provide them, which will then be forwarded to the Governing Body for its information.[47] The latter's stated position is that before a government takes the decision to denounce a Convention, it is desirable to consult fully

[39] Art. 11(1) of the Optional Protocol on children in armed conflict.

[40] Art. 89(1) CMW.

[41] *See e.g.* Art. 3 CAT, Art. 52 CRC.

[42] L. Swepston, *The International Labour Organization's System of Human Rights Protection*, [in:] J. Symonides (ed.), *Human Rights: International Protection, Monitoring, Enforcement*, UNESCO/Ashgate, Aldershot: 2003, p. 91.

[43] Most ILO conventions contain denunciation clauses, K. Widdows, *The Denunciation of International Labour Conventions*, 33 International and Comparative Law Quarterly 1052 (1984).

[44] Art. 5 of the Abolition of Forced Labour Convention (No. 105) (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291.

[45] Art. 16 of the Freedom of Association Convention (No. 87) (adopted 9 July 1948, entered into force 4 July 1950) 68 UNTS 17; Somalia ratified it on 20 March 2014. *See also* Art. 39 of the Indigenous and Tribal Peoples in Independent Countries Convention (No. 169) (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383; Art. 11 of the Worst Forms of Child Labour Convention (No. 182) (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161; Art. 22 of the Convention Concerning Decent Work for Domestic Workers (No. 189) (adopted 16 June 2011, entered into force 5 September 2013), available at: www.ilo.org.

[46] International Labour Conference, 96th Session, 2007, Report III (Part 1B), *General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, ILC96-III(1B)-2007-02-0014-1-En, 12. *See further* Tyagi, *supra* note 6, pp. 136, 178-79.

[47] International Labour Office, International Labour Standards Department, *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, Geneva, Revision edition 2006, p. 47.

with the representative organizations of both employers and workers on the problems encountered and how they may be resolved.[48] Lack of consultation will not, however, invalidate the denunciation.

2.2. Regional treaties

Certain regional instruments also make provision for withdrawal subject to notice.

2.2.1. Americas

In the case of the instruments concluded under the auspices of the Organization of American States (OAS), the preferred period of notice is twelve months. This is the case with the ACHR,[49] the Convention on Torture 1985,[50] the Convention on Forced Disappearance of Persons 1994,[51] the Convention on Prevention of Violence against Women 1994,[52] the Convention on Elimination of Discrimination Against Persons with Disabilities 1999,[53] and the Convention Against Terrorism 2002.[54] These treaties additionally require that instruments of denunciation be deposited with the General Secretariat.

2.2.2. Europe

Different periods of time apply to treaties adopted by the Council of Europe, with notifications of denunciation to be submitted to the Secretary-General. For example, notice period is six months in the case of the European Convention on Human Rights (ECHR),[55] the Convention on Migrant Workers 1977,[56] the Convention on National Minorities 1995,[57] and the European Social Charter (ESC).[58] The ESC is of special

[48] ILO, Minutes of the Governing Body, 184th Session (November 1971) 95 and 210, reproduced *ibidem*, p. 46.

[49] Art. 78(1) ACHR. *See* J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge: 2003, pp. 113-15. The OAS treaties and protocols are available at: www.oas.org/DIL/treaties_subject.htm. For the denunciations of Trinidad and Tobago, as well as Venezuela, *see supra* notes 3 and 4.

[50] Art. 23 of the Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987).

[51] Art. 21 of the Inter-American Convention on the Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996).

[52] Art. 24 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995).

[53] Art. 13 of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (adopted 8 June 1999, entered into force 14 September 2001).

[54] Art. 23(1) of the Inter-American Convention Against Terrorism (adopted 3 June 2002, entered into force 10 July 2003).

[55] Art. 58(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended). The ECHR may be denounced in respect of dependent territories under Art. 58(4) thereof. Council of Europe's treaties are available at http//:conventions.coe.int.

[56] Art. 37(1) of the European Convention on the Legal Status of Migrant Workers.

[57] Art. 31(2) of the Framework Convention for the Protection of National Minorities.

[58] Art. 37(1) ESC.

interest because it contains a unique provision permitting denunciation of individual articles or paragraphs, although subject to conditions ensuring that the contracting parties remain bound by minimum standards.[59] The same structure has been retained in the revised European Social Charter.[60] A twelve-month notice period is specified in the case of the Torture Convention 1987,[61] but only three months in the Convention on Human Rights and Biomedicine 1997.[62] More recently, the Convention on the Prevention of Terrorism 2005 also requires only three months' notice,[63] as does the Convention against Trafficking in Human Beings 2005,[64] the Convention on Protection of Children against Sexual Exploitation 2007,[65] and the Convention on Violence against Women 2011.[66] It should be observed however that under both the ACHR and the ECHR denunciation is possible only where the State in question has already been a party for a minimum period of five years.[67] This is also the case with the ESC, with the added option of denunciation at the end of successive periods of two years.[68]

The Convention on Human Rights adopted by the Commonwealth of Independent States (CIS) in 1995 permits denunciation after six months' notice to the depositary.[69] However, denunciation does not release the relevant Party from its treaty obligations with respect to any act constituting a violation of such obligations which may have been performed by it before the denunciation became effective.[70]

2.2.3. Africa

Treaties relating to human rights adopted under the auspices of the Organization of African Unity (OAU) and its successor the African Union (AU) do not contain a denunciation clause.[71] The only exception is the Kampala Convention on Internally

[59] Art. 37(2) ESC. On 26 June 1987 the United Kingdom denounced Art. 8(4)(a) ESC, *United Kingdom Materials on International Law*, 64 British Yearbook of International Law 641 (1989).

[60] Art. M of the revised European Social Charter.

[61] Art. 22(2) of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.

[62] Art. 37(2) of the Convention for the Protection of Human Beings and Dignity of the Human Being with regard to the Application of Biology and Medicine.

[63] Art. 31(2) of the European Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 1 June 2007).

[64] Art. 46(1) of the Convention on Action against Trafficking Human Beings.

[65] Art. 49(2) of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

[66] Art. 80(2) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

[67] Art. 78(1) ACHR, 58(2) ECHR. *See also* Art. 37(2) of the European Convention on Migrant Workers.

[68] Art. 37(1) ESC.

[69] Art. 37(1) of the Convention on Human Rights and Fundamental Freedoms (adopted 26 May 1995, entered into force 11August 1998), available at: www.unhcr.org/4de4eef19.html, accessed 25 March 2014.

[70] *Ibidem*, Art. 37(2).

[71] Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39; Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3. AU treaties are available at: www.au.int.

Displaced Persons 2009, which has two unusual features: first, it stipulates that denunciation must be reasoned,[72] and secondly, although it requires that a year's notice be given to the Chairperson of the AU Commission, it adds the proviso "unless a subsequent date has been specified."[73] It is not entirely clear why parties would wish to postpone the withdrawal's entry into force; perhaps as a practical measure to enable them to be freed from the complex obligations imposed by the treaty, or as a bargaining tool. Presumably parties to any treaty envisaging withdrawal have the right to determine that its effects will take place only *after* the stipulated period of notice has lapsed.

2.2.4. Sub-regional treaties

Treaties with, *inter alia*, a human rights objective, broadly defined, have been adopted by African sub-regional organisations,[74] such as the Economic Community for West African States[75] (ECOWAS) and the Southern African Development Community (SADC).[76] The ECOWAS Protocol Relating to Conflict Prevention 1999[77] and the Supplementary Protocol on Democracy and Good Governance 2001, adopted by the ECOWAS, provide for withdrawal subject to a year's notice.[78] The same is true of the SADC Protocol on Politics, Defence and Security Co-operation 2001.[79] Moreover, the Pact on Security, Stability and Development in the Great Lakes Region, adopted by the International Conference on the Great Lakes Region (ICGLR) in 2006, includes the Protocol on Democracy and Good Governance among its ten protocols. It commits Member States to setting up institutions promoting the rule of law and respect for human rights through constitutional systems based on the separation of powers.[80] Art. 35 of the Pact allows Members to withdraw at any time after the expiration of ten years from the date on which it entered into force for the withdrawing State; such withdrawal will take effect a year later. Since the various Protocols cannot be ratified separately from

[72] Art. 19(1) of the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009, in force 6 December 2012). Art. 3(l)(d) and 9 oblige parties to ensure respect for the human rights of the internally displaced.

[73] *Ibidem* Art. 19(2).

[74] *See* F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press, Oxford: 2007, pp. 495-500.

[75] On ECOWAS, *see infra*.

[76] On SADC, *see infra*.

[77] Art. 56 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, A/P1/12/99 (adopted 10 December 1999, temporarily entered into force upon signature), reproduced in S. Ebobrah & A. Tanoh (eds.), *Compendium of African Sub-Regional Human Rights Documents*, Pretoria University Law Press, Pretoria: 2010, p. 203.

[78] Art. 48(1) of the Protocol on Democracy and Good Governance, A/SP1/12/01 (adopted 21 December 2001, entered into force 20 February 2008), reproduced in *ibidem*, p. 220.

[79] Art. 14 of the Protocol on Politics, Defence and Security Co-operation (adopted 14 August 2001, entered into force 2 March 2004), reproduced in *ibidem*, p. 407.

[80] Pact on Security, Stability and Development in the Great Lakes Region (adopted December 2006, entered into force June 2008, amended November 2012), available at: www.icglr.org, accessed 25 March 2014.

the Pact, it follows that its denouncing the Pact would result in withdrawal from all Protocols.

Finally, as regards the Common Market of the South (Mercosur), the original Treaty of Asunción 1991 made no references to human rights.[81] However, subsequent instruments, namely the Ushuaia Protocol I 1998,[82] the Protocol of Asunción 2005,[83] and the Ushuaia Protocol II 2011,[84] – which form an integral part of the Treaty – have now firmly embedded fundamental freedoms in the region.[85] As these instruments are silent on denunciation, they are presumably governed by Art. 21 of the Treaty of Asuncion, which permits withdrawal and demands that the withdrawing party informs the other parties "of its intention expressly and formally" and submits the relevant documents within 60 days.

3. PROCEDURAL REQUIREMENTS

For a denunciation to be regarded as lawful the State concerned must comply with all formal conditions laid down in the relevant treaty, as reflected in Art. 54(a) VCLT. As has been seen above, certain periods of time are specified before denunciation can become effective,[86] and invariably notifications must be submitted in writing to a designated Office. Any procedural irregularity will render the attempted denunciation null and void. This point has been stressed by the Inter-American Court of Human Rights (IACHR) in *Ivcher Bronstein v. Peru* and in *Constitutional Court v. Peru*: State Parties had assumed procedural obligations under the ACHR with which they had to comply.[87]

The facts behind the above cases are simple. In 1999 Peru sought to withdraw, with immediate effect, from its 1981 declaration recognizing the IACHR's contentious

[81] Treaty Establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (adopted on 26 March 1991, entered into force 29 November 1991) 2140 UNTS 257.

[82] Ushuaia Protocol on Democratic Commitment in the Mercosur, the Republic of Bolivia and the Republic of Chile (adopted 24 July 1998, entered into force 17 January 2002) 2177 UNTS 375.

[83] Protocol of Asunción on Commitment with Promotion and Protection of Human Rights in Mercosur (adopted 20 June 2005, not yet in force).

[84] Protocol of Montevideo on Commitment with Democracy in Mercosur (adopted 20 December 2011, not yet in force). All instruments are available at: www.mercosur.int.

[85] *See generally* L. Lixinski, *Human Rights in MERCOSUR*, [in:] H.T.F. Filho, L. Lixinski & M.B.O. Giupponi (eds.), *The Law of MERCOSUR*, Hart Publishing, Oxford: 2010, p. 351.

[86] These periods of notice are meant to act as a disincentive for States, E. Bates, *Avoiding Legal Obligations Created by Human Rights Treaties*, 57 International and Comparative Law Quarterly 751 (2008), p. 756.

[87] *Ivcher Bronstein v. Peru* (Competence) Series C No. 54, IACHR 24 September 1999, para. 37; *Constitutional Court v. Peru* (Competence) Series C No. 55, IACHR 24 September 1999, para. 36. *See* D. Cassell, *Peru Withdraws from the Court: Will the Inter-American Human Rights System Meet the Challenge?*, 20 Human Rights Law Journal 167 (1999); K. Sokol, *Ivcher Bronstein*, 95 American Journal of International Law 178 (2001); C. Sandoval, *The Challenge of Impunity in Peru: The Significance of the Inter-American Court of Human Rights*, 5(1) Essex Human Rights Review 1 (2008). IACHR jurisprudence is available at: www.corteidh.or.cr.

jurisdiction under Art. 62(1) ACHR.[88] The IACHR concluded that Peru's withdrawal had no legal effect, because the "[ACHR] contains no provision that would make it possible to withdraw recognition of the Court's contentious jurisdiction, as such a provision would be antithetical to the Convention and have no foundation in law. Even supposing a State could withdraw its jurisdiction of the Court's contentious jurisdiction, formal notification would have to be given one year before the withdrawal could take effect, for the sake of juridical security and continuity."[89]

The IACHR emphasised that the special nature of human rights treaties required their interpretation and application in a manner designed to make them practical and effective.[90] Interpreting the ACHR in accordance with its object and purpose meant preserving the integrity of the IACHR's binding jurisdiction under Art. 62(1). In turn, jurisdiction could not be subordinated to any limitations that a State might seek to add to its recognition of binding jurisdiction, because its efficacy could be adversely affected. Except as provided for in Art. 62(1), no limitations could be imposed on a State's acceptance of the IACHR's contentious jurisdiction.[91] Since the ACHR made no express provision for States to withdraw their recognition of the IACHR's binding jurisdiction, once recognized the ACHR as a whole is binding on the States. Any interpretation allowing contracting parties to withdraw such recognition of jurisdiction would jeopardize the protective nature of the ACHR and would be contrary to its object and purpose.[92]

In keeping with Art. 44 VCLT on the separability of treaty provisions, the IACHR held that preserving the ACHR's integrity meant that denunciation was possible only *vis-à-vis* the treaty as a whole, unless the treaty or the Parties provide otherwise. Moreover, only the ACHR as a whole could be denounced, not parts thereof, which would have the effect of undermining its integrity. Such a partial denunciation does not appear to have been the intention of the contracting parties, nor could it be implied. In light of the object and purpose of the ACHR, the IACHR held that a State can only release itself of its treaty obligations by following the procedures stipulated therein.[93] It continued that: "Even supposing, for the sake of argument, that 'release' was possible – *a hypothetical that this Court rejects* – it could not take effect immediately."[94] Termination with immediate effect was precluded by the law of treaties, which demanded reasonable notice.[95] In conclusion, Peru's purported denunciation of its recognition of the IACHR's binding jurisdiction was inadmissible.[96] In its summary, the IACHR was

[88] Annual Report of the Inter-American Court of Human Rights, 1999, Appendix XVI.
[89] *Ivcher Bronstein v. Peru*, para. 24; *Constitutional Court v. Peru*, para. 24.
[90] *Ivcher Bronstein v. Peru*, paras. 41-48; *Constitutional Court v. Peru*, paras. 41-48.
[91] *Ivcher Bronstein v. Peru*, paras. 35-37; *Constitutional Court v. Peru*, paras. 34-36.
[92] *Ivcher Bronstein v. Peru*, paras. 39-41; *Constitutional Court v. Peru*, paras. 38-40.
[93] *Ivcher Bronstein v. Peru*, paras. 40, 46, 50-51; *Constitutional Court v. Peru*, paras. 39, 45, 49-50.
[94] *Ivcher Bronstein v. Peru*, para. 52; *Constitutional Court v. Peru*, para. 51 (emphasis added).
[95] *Ivcher Bronstein v. Peru*, paras. 52-53; *Constitutional Court v. Peru*, paras. 51-52.
[96] *Ivcher Bronstein v. Peru*, para. 54; *Constitutional Court v. Peru*, para. 53.

persuaded by "the special status of the ACHR, the unitary nature of the Convention embodying both substantive and procedural obligations, the unconditional acceptance of the jurisdictional clause by Peru, the unlimited duration of the acceptance of the jurisdictional clause by that State, and the absence of a provision for withdrawal in the jurisdictional clause."[97] Ultimately, the ACHR could be denounced, but recognition of the IACHR's competence could not be withdrawn.

4. TEMPORAL SCOPE OF TREATIES FOLLOWING DENUNCIATION

A number of treaties allowing denunciation expressly address the question of their temporal scope, or of admissibility *ratione temporis*, stating that denunciation does not release a State from its obligations with respect to acts occurring prior to its taking effect or while it was a Party. In the present context, the State remains accountable for any possible violations of human rights during this period of transition – an immediate release is not possible.[98] This rule seems to be designed to discourage denunciations.[99] Such is the case under Art. 12(2) OPT[100] enabling the HRC to continue to consider communications concerning Jamaica[101] as well as Trinidad and Tobago,[102] notwithstanding that they had denounced the OPT, if such communications were submitted before the withdrawals became effective. The statement below is typical of its approach:

> On becoming a State party to [OPT], Trinidad and Tobago recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Trinidad and Tobago's denunciation of the Optional Protocol became effective on 27 June 2000; in accordance with Art. 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol.[103]

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[97] Tyagi, *supra* note 6, p. 150.

[98] L.-C. Chen, *An Introduction to Contemporary International Law*, (2nd ed.), Yale University Press, New Haven: 2000, p. 370.

[99] *Ibidem*, stating that denunciation clauses "cannot easily be made effective"; Pasqualucci, *supra* note 54, p. 115.

[100] *See also* Art. 20(2) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

[101] *See e.g. Freemantle v. Jamaica* (2000) Communication No. 625/1995, UN Doc. CCPR/C/68/D/625/1995 para. 10; *Robinson v. Jamaica* (2000) Communication No. 731/1996, UN Doc. CCPR/C/68/D/731/1996 para. 13; *Osbourne v. Jamaica* (2000) Communication No. 759/1997 UN Doc. CCPR/C/68/D/759/1997 para. 12; *Reece v. Jamaica* (2003) Communication No. 796/1998 CCPR/C/78/D/796/1998 paras. 6.2, 10.

[102] *See* the cases listed by the HRC in Report of the Human Rights Committee, UN GAOR A/57/40, vol. 1 para. 110 (2002).

[103] *Sextus v. Trinidad and Tobago* (2001) Communication No. 818/1998 UN Doc. CCPR/C/72/D/818/1998 para. 10. *See also Evans v. Trinidad and Tobago* (2003) Communication No. 908/2000, UN Doc. CCPR/C/77/D/908/2000 para. 9.

This is also the situation under Art. 78(2) ACHR and its supervisory organs – the IACHR and the Inter-American Commission on Human Rights – have been particularly zealous in protecting temporal jurisdiction. In a series of cases concerning Trinidad and Tobago they held that it was not relieved from its obligations for alleged violations committed before denunciation (which was submitted on 26 May 1998 and thus took effect on 26 May 1999) and, therefore, the IACHR possessed jurisdiction over all alleged violations before the latter date. In the words of the Inter-American Commission on Human Rights:

> States Parties to [ACHR] have, by the plain terms of Art. 78(2), agreed that a denunciation taken to the Convention by any of them will not release the denouncing state from its obligations under the Convention with respect to acts taken by that state prior to the effective date of the denunciation that may constitute a violation of those obligations. A state party's obligations under the Convention encompass not only those provisions of the Convention relating to the substantive rights and freedoms guaranteed thereunder. They also encompass provisions relating to the Convention's supervisory mechanisms, including those under Chapter VII relating to the jurisdiction, functions and powers of the Inter-American Commission on Human Rights. Notwithstanding Trinidad and Tobago's denunciation of the Convention, therefore, the Commission will retain jurisdiction over complaints of violations of the Convention by Trinidad and Tobago in respect of acts taken by that State prior to May 26, 1999. Consistent with established jurisprudence, this includes acts taken by the State prior to May 26, 1999, even if the effects of those acts continue or are not manifested until after that date.[104]

The IACHR stated in similar terms that "pursuant to Art. 78(2) [ACHR], the denunciation does not have the effect of releasing the State from its obligations with respect to acts occurring, in whole or in part, prior to the effective date of denunciation, which may constitute a violation of the said Convention."[105] Furthermore, it found that "[t]he State's denunciation of the Convention, pursuant to Art. 78 [...] does not affect the jurisdiction of either the Court or the Commission to consider the alleged acts, occurring [...] before May 26, 1999, the day in which the State's de-

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[104] *Ramcharan v. Trinidad and Tobago* (2002) para. 26 (footnotes omitted). *See also Ramlogan v. Trinidad and Tobago* (2002); *Roach and Ramnarace v. Trinidad and Tobago* (2002), available at: www1.umn.edu/humanrts/cases/annual-report2002.html; *Balkissoon v. Trinidad and Tobago* (2001), available at: www1.umn.edu/humanrts/cases/annual-report2001.html, both accessed 24 March 2014. The Inter-American Commission on Human Rights reiterated this point in relation to Venezuela's denunciation, *supra* note 4.

[105] *James et al. v. Trinidad and Tobago* (Provisional Measures) Series E IACHR 2 September 2002, para. 3. *See further e.g. Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits) Series C No. 94 IACHR 21 June 2002, para. 13; *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Compliance with Judgment) 27 November 2003, para. 3. In *Caesar v. Trinidad and Tobago* (Merits) Series C No. 123 IACHR 11 March 2005, para. 6, the IACHR used slightly different words, "According to Art. 78(2) [ACHR], a denunciation will not release the denouncing State from its obligations under the Convention with respect to acts of that State occurring prior to the effective date of the denunciation that may constitute a violation of the Convention."

nunciation of the Convention entered into force."[106] The IACHR justified its stance by declaring that it had the inherent authority to determine the scope of its own jurisdictional competence,[107] and further that it would be unacceptable to subordinate its binding jurisdiction to "restrictions that would render inoperative the Court's jurisdictional role, and consequently, the human rights protection system established in the Convention."[108]

This situation had previously arisen in Europe, where in December 1969 Greece renounced its membership in the Council of Europe, effectively withdrawing from the ECHR.[109] Greece was faced at that time with a highly critical report by the (now defunct) European Commission of Human Rights, which found allegations of, *inter alia*, torture and ill-treatment to be established facts. Its ruling was subsequently endorsed by the Committee of Ministers, and Greece – fearing that it could be expelled – chose to forestall events by withdrawing.[110] Art. 65(2) ECHR provided that it remained applicable for a further six month period, and that any complaints submitted either before or during that period could be considered by the Commission.[111] Consequently, Greece's outstanding obligations before its denunciation became effective could have been considered by the Commission (although in the event it chose not to do so).[112]

The Rome Statute is particularly interesting because a State's withdrawal cannot discharge it from its obligation to co-operate with the ICC in relation to criminal investigations and proceedings commenced prior to the withdrawal becoming effective, nor prevent the ICC from continuing to consider any matter up to that point.[113] Attention was drawn to this fact by the President of the Assembly of States Parties,

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[106] *James et al. v. Trinidad and Tobago* (Provisional Measures) Annual Report of the Inter-American Court of Human Rights 2001, vol. 2, Appendix XLII, p. 1117. *See also e.g. Hilaire et al. v. Trinidad and Tobago* (Preliminary Objections) Annual Report of the Inter-American Court of Human Rights 2001, vol. 2, Appendix XXIII, p. 785; *James et al. v. Trinidad and Tobago* (Provisional Measures) (2003), para. 2.

[107] *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits) paras. 17-18; *Caesar v. Trinidad and Tobago*, para. 8.

[108] *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits) para. 19; *Caesar v. Trinidad and Tobago* para. 9.

[109] *See* Art. 58(3) ECHR (Art. 65(3) at the relevant time): any State "which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention."

[110] Robertson & Merrills, *supra* note 11, pp. 136-38; Tyagi, *supra* note 6, pp. 157-160; K.D. Magliveras, *Exclusion from Participation in International Organisations*, Kluwer Law International, The Hague: 1999, pp. 80-83. Greece gave notice of its intention to withdraw in accordance with Art. 7 of the Statute of the Council of Europe. According to the Committee of Ministers Resolution (70) 34 of 27 November 1970 on the legal and financial consequences of the withdrawal of Greece from the Council of Europe, it ceased to be a Member State and contracting party to the ECHR on 31 December 1970.

[111] Now Art. 58(2) ECHR.

[112] P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, (2nd ed.), Kluwer, The Hague: 1990, p. 11. This onus was clearly spelt out in Resolution (70) 34 para. 1(1) which stated, *inter alia*, that Greece would not "be regarded as bound by any obligation deriving from the Statute of the Council of Europe...subject, however, to the obligations which she has assumed under that Statute in respect of any fact prior to her withdrawal from the Organisation taking effect."

[113] Art. 127(2) Rome Statute. Financial dues must also be met.

Ambassador Intelmann, in response to Kenya's aforementioned threat to denounce the Rome Statute.[114]

The aforementioned treaties adopted by African sub-regional organisations also make it manifest that Member States remain bound by the terms of the respective treaty up to the date the withdrawal becomes effective.[115]

5. PROTOCOLS TO HUMAN RIGHTS TREATIES

Treaties omitting all reference to a denunciation clause should be distinguished from treaty protocols, which do not refer to withdrawal. The latter should be treated as belonging to a special category. The prime example are the substantive protocols which have been attached to the ECHR, specifically Protocol No. 1 (1952), Protocol No. 4 (1963), Protocol No. 6 concerning the Abolition of the Death Penalty (1983), Protocol No. 7 (1984), Protocol No. 12 concerning Non-Discrimination (2002), Protocol No. 13 concerning the Abolition of the Death Penalty in All Circumstances (2002), and Protocol No. 16 (2013). Provisions have been inserted into these protocols subjecting them to the relevant ECHR clauses, including by necessity the denunciation clause in Art. 58 thereof.[116] The question arises whether the individual protocols are capable of denunciation separately, or whether such denunciation amounts to denunciation of the ECHR as a whole.

The answer appears to be the latter. It is important to recognise that these Protocols add provisions to the ECHR and expand the ambit of protected rights; indeed their substantive provisions are stated to be "additional Articles to the Convention". In essence, once each Protocol has entered into force, it becomes an integral part of the ECHR – the latter is amended and revised by the addition of the new provisions. In other words, following the entry into force of each of these Protocols, the text of the ECHR is effectively codified, even though no actual changes are made to the original treaty. Thus, the codified text applies to each of the Member States which has ratified the Protocols in question. It follows that a different codified version may apply *vis-à-vis* different contracting parties, depending on which Protocols they have ratified. If a contracting party sought to extricate itself from a specific Protocol, this would amount to a denunciation of the ECHR as a whole. Had it been the intention to allow denunciation of individual protocols it seems safe to assume that this would have been stated explicitly.

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[114] *President Intelmann on approval of motion in the Parliament of Kenya to start the withdrawal process from the Rome Statute*, ICC-ASP-20130906-PR938, Press Release: 06/09/2013, www.icc-cpi.int/, accessed 20 March 2014.

[115] Art. 91(2) ECOWAS Treaty, Art. 34(3) SADC Treaty.

[116] *See* Art. 5 of Protocol No. 1, Art. 6(1) of Protocol No 4, Art. 6 of Protocol No. 6, Art. 7(1) of Protocol No. 7, Art. 3 of Protocol No. 12, Art. 5 of Protocol No. 13, and Art. 6 of Protocol No. 16 titled "Relationship to the Convention" and stating, *inter alia*, that "all the provisions of the Convention shall apply accordingly" to the Protocol in question. W.A. Schabas, *The Abolition of the Death Penalty in International Law*, (3rd ed.), Cambridge University Press, Cambridge: 2002, pp. 292-293 writes that the drafters of Protocol No. 6 agreed that denunciation could take place, but only in accordance with the ECHR requirements, even though a specific clause was omitted.

6. HUMAN RIGHTS TREATIES CONTAINING NO DENUNCIATION CLAUSE

A number of human rights treaties do not contain any provisions on denunciation. Regarding instruments adopted under UN auspices, these include the International Covenants 1966,[117] the Protocol on the Abolition of the Death Penalty 1989,[118] and the Convention on the Elimination of Discrimination against Women 1979.[119]

Regional human rights treaties with no denunciation clause are more numerous. In the Americas these include the Protocol of San Salvador 1988[120] and the Protocol to Abolish the Death Penalty 1990.[121] As mentioned above, the majority of OAU/AU conventions, namely, the African Charter on Human and Peoples' Rights 1981[122] (African Charter) and the Protocol on Women Rights 2003,[123] the African Charter on the Rights of Child 1990,[124] as well as the African Democracy Charter,[125] do not contain a denunciation clause. This is also true of the following three Protocols: on the Peace and Security Council 2002,[126] on the African Human Rights Court 1998,[127] and on the African Court of Justice and Human Rights 2008.[128] The revised Arab Charter on Human Rights 2004, adopted by the Arab League, also belongs in this category.[129]

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[117] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[118] Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

[119] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[120] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999).

[121] Protocol to the American Convention on Human Rights to Abolish the Death Penalty (adopted 8 June 1990, entered into force 28 August 1991).

[122] African Charter on Human and Peoples' Rights (adopted 17 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

[123] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (adopted 1 July 2003 entered into force 25 November 2005).

[124] African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999).

[125] African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012).

[126] Protocol to the Constitutive Act relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003).

[127] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004).

[128] Protocol to the Constitutive Act on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008, not yet in force). *See generally* G. Naldi & K. Magliveras, *The African Court of Justice and Human Rights: A Judicial Curate's Egg*, 9 International Organizations Law Review 387 (2012).

[129] Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 International Human Rights Reports 893 (2005).

Unlike the ECHR protocols discussed above in Section 5, which refer to the ECHR provision on denunciation, a number of other protocols are wholly silent on denunciation; e.g. Protocol No. 9 (1990), Protocol No. 11 (1994), Protocol No. 14 (2004), and Protocol No. 15 (2013). This is due to their subject matter, which amends and restructures the ECHR's control system, creating a new state of affairs. A change, or reversal, of these institutional changes is possible only through the adoption of a subsequent amending treaty. A State Party wishing to be released from obligations thereunder would be compelled to denounce the ECHR.

7. ANALYSIS AND OBSERVATIONS

The review undertaken above establishes that many human rights treaties contain denunciation clauses, but that a wide variation exists as to the procedural requirements regarding their invocation, such as the periods of notice.[130] Failure to comply with these requirements means that the denouncing State breached its treaty obligations and the attempted denunciation is deemed of no effect. It is also clear that that in general there can be no separability, i.e. all treaty provisions must stand or fall together. The central question that arises concerns the permissibility of unilateral denunciation by State Parties of human rights treaties containing no denunciation clause. Where no specific provision for unilateral denunciation or withdrawal is made, the general rule in Art. 56(1) VCLT, deemed to reflect customary international law,[131] states that the treaty is not subject to denunciation or withdrawal unless (a) it is established that the parties intended to allow the possibility of denunciation or withdrawal, or (b) a right to do so is implied from the treaty's nature.[132] In addition, twelve months' notice is specified under Art. 56(2).[133]

The crucial substantive points therefore are firstly, the intention of the parties as to whether a right to denounce or withdraw is deemed to exist in each specific case, and secondly, the subject matter of the treaty, taking into account all the relevant circumstances.[134] Absent these conditions, the presumption is that the treaty cannot be denounced.[135] This

[130] Helfer, *supra* note 7, p. 1597; Tyagi, *supra* note 6, p. 117.

[131] *Military and Paramilitary Activities in and Against Nicaragua* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, p. 420. According to an authoritative oeuvre on the customary law of treaties, the intention of parties is to be inferred from the treaty, its nature and circumstances, Lord McNair, *The Law of Treaties*, Clarendon Press, Oxford: 1961, pp. 511-513.

[132] *See* ILC, *supra* note 6, pp. 250-51. This provision was criticised as a compromise that confused matters, K. Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, 53 British Yearbook of International 83 (1982), p. 93; Greig, *supra* note 20, p. 497.

[133] ILC, *supra* note 6, p. 251. According to H.W. Briggs, *Unilateral Denunciation of Treaties in the Vienna Convention and the International Court of Justice*, 68 American Journal of International Law 51 (1974), p. 64, it was unwisely adopted.

[134] ILC, *supra* note 6, *ibidem*. *See generally* I. Sinclair, *The Vienna Convention on the Law of Treaties*, (2nd ed.), Manchester University Press, Manchester: 1984, pp. 186-188.

[135] I. Brownlie, *Principles of Public International Law*, (7th ed.), Oxford University Press, Oxford: 2008, p. 621; I.A. Shearer, *Starke's International Law*, (11th ed.), Butterworths, London: 1994, p. 433; Greig, *supra* note 20, p. 498.

rationale stems from the fundamental principle of *pacta sunt servanda*.[136] Ascertaining the parties' intention is not an easy exercise as the *travaux préparatoires* may often be silent on the issue.[137] But as will be seen, the policy of the OAU/AU satisfies the scenario envisaged by subparagraph 1(a). With regard to the second contingency (the nature of the treaty), it appears that the preparatory work of the Conference on the VCLT only acknowledged treaties of alliance and treaties 'intrinsically temporary in character' as falling within the scope of the provision.[138]

A consensus has arisen that a treaty of a clearly non-temporary nature, intended as being of unlimited duration, is a law-making treaty and establishes a regime or system deemed permanent (e.g. treaties of peace or delimiting boundaries, or creating a permanent international organisation). Such treaties cannot be denounced unilaterally at will.[139] While the VCLT makes no specific reference to human rights treaties, it seems beyond question, given the evolution of the law, that they belong to this category.[140] Hence Aust writes, albeit tentatively, that they are probably incapable of withdrawal.[141] However, since a number of them do contain denunciation clauses, such a right could be implied where omitted, States being free to do what is not prohibited. But as Aust observed, "Since it is now very common to include provisions on withdrawal, when a treaty is silent it may be that much harder for a party to establish the grounds for the exception."[142]

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[136] *James et al. v. Trinidad and Tobago* (Provisional Measures), Annual Report of the Inter-American Court of Human Rights 2001, vol. 2, Appendix XLII, 1116; Greig, *supra* note 24, pp. 496, 498.

[137] Tyagi, *supra* note 6, pp. 130-131.

[138] The ILC was opposed to the contention that some treaties could be denounced simply by virtue of their nature, ILC, *supra* note 6, *ibidem*. *See* Briggs, *supra* note 133, p. 64; Greig, *supra* note 20, p. 498; Feinberg, *supra* note 15, pp. 218-219. In the *Fisheries Case* (Jurisdiction) [1973] ICJ Rep 4, paras. 25-26, Iceland argued that treaties not of a permanent nature could be denounced. Treaties of commerce have also been advanced as amenable to denunciation due to their subject matter, J. Brierly, *The Law of Nations*, (5th ed.), Clarendon Press, Oxford: 1955, p. 256.

[139] Lauterpacht, *supra* note 10, p. 938; McNair, *supra* note 131, pp. 493-494, 511; Sinclair, *supra* note 134, *ibidem*; and the authorities cited by Feinberg, *supra* note 15, p. 212, note 2. According to Widdows, *supra* note 132, p. 93, up to that time, few examples existed of States claiming a right to denounce treaties at will, while Briggs, *supra* note 133, *ibidem*, relying on the *Fisheries Jurisdiction Case*, para. 29, argued that claims to a unilateral right to denunciation would be treated with caution. According to the United Kingdom's Foreign and Commonwealth Office, such treaties do not usually contain denunciation clauses, *United Kingdom Materials on International Law*, 64 British Yearbook of International Law (1989), p. 641. While the ILC was of this view in general, it expressed caution in drawing conclusions with respect to law-making treaties, as many expressly permitted denunciation, ILC, *supra* note 6, pp. 250-51.

[140] Human rights courts have emphasised the special nature of these legal orders, *see e.g. Wemhoff v. Germany* [1968] Series A vol. 7; *Ireland v. United Kingdom* [1978] Series A vol. 25; *Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion OC-2/82, Series A No 2, IACHR 24 September 1982. The HRC has thus described the ICCPR rights as being for the benefit of persons within State jurisdiction, UNHCR, General Comment 24, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.3, para. 8 (1997).

[141] A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge: 2000, p. 234.

[142] A. Aust, *Handbook of International Law*, Cambridge University Press, Cambridge: 2005, p. 103.

Chen has stated that omitting denunciation clauses in International Covenants is "highly significant: it signifies that the human rights obligations stipulated in the Covenants are not expected to be unilaterally disregarded. They are *obligatio erga omnes*."[143]

It may certainly be the case that treaties enshrining obligations *erga omnes*, or peremptory norms of international law, whether or not they contain a withdrawal clause may have a deterrent effect on States contemplating denunciation, since they will continue to be bound by those obligations under customary law. It therefore appears safe to conclude that denunciation of or withdrawal from a human rights treaty does not seem possible unless it is evident beyond doubt that the parties intended to permit this, as in the case of the OAU/AU.

The law and practice of the HRC, which has taken an uncompromising position on the ICCPR, reflects this position. Thus the contracting parties to the ICCPR cannot denounce it or withdraw from it.[144] This conclusion was reached on the basis that the ICCPR, as an instrument codifying universal human rights, is not the type of treaty which, by its nature, implies a right of denunciation.[145]

According to the HRC, "the drafters of the ICCPR deliberately intended to exclude the possibility of denunciation" and contracting parties consciously did not admit the possibility of its denunciation,[146] or that of the Second Optional Protocol. If the drafters had intended to allow for denunciation an explicit contingency would have been made, as with the OPT and the Convention on Racial Discrimination, both of which permit denunciation.[147] The stance adopted by the HRC is defended by Chen: "Given the authoritative policy in support of the intense demand for global protection of human rights, and given the absence of explicit provision for denunciation, it would appear that the commitments incorporated in the two covenants were intended neither to admit the possibility of denunciation or withdrawal nor to imply a right of denunciation or withdrawal."[148] But the HRC's standpoint has been criticized as being out of step with other UN human rights organs.[149]

The HRC had been compelled to adopt a position by North Korea's attempted withdrawal from the ICCPR in August 1997, when it submitted to the UN Secretary-

[143] Chen, *supra* note 98, p. 369.

[144] UNHCR, General Comment 26, *Continuity of Obligations*, UN Doc. A/53/40, vol. I, annex VII (1997); *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* HRI/GEN/1/Rev.9, p. 222, para. 5 (27-5-2008); P. Sieghart, *The International Law of Human Rights*, Clarendon Press, Oxford: 1983, pp. 120-21, note 1. However, in considering the third draft of a general comment on reservations in 2004, a member of the HRC, Professor Higgins (as she then was), commented that "the legal effects of the absence of any reference to denunciation in the Covenant were not clear", UN Doc. CCPR/C/SR 1380 para. 5 (2006).

[145] General Comment 26, *ibidem*, para. 3. *See also* E. Evatt, *Democratic People's Republic of Korea and the ICCPR: Denunciation as an exercise of the right of self-defence?*, 5 Australian Journal of Human Rights 215 (1999), pp. 220-221.

[146] But *see* Tyagi, *supra* note 6, pp. 137-38, who maintains that this assertion is factually inaccurate.

[147] General Comment 26, *supra* note 144, para. 2.

[148] Chen, *supra* note 98, p. 370.

[149] Tyagi, *supra* note 6, pp. 138-139.

General a notification of withdrawal.[150] In an aide-memoire, the latter expressed the opinion that it would not be possible unless States parties unanimously approved it.[151] In this regard the HRC and the Secretary-General were not as one. The former adopted an absolutist position denying any possibility of withdrawal and choosing to ignore the North Korean missive, and the latter, reflecting the VCLT position, accepted the possibility of withdrawal subject to onerous conditions. Indeed, each State Party was effectively given the right to veto its withdrawal. North Korea has remained a party to the ICCPR,[152] a fact confirmed by its subsequent behaviour. In 2000 it submitted its second periodic report, which was considered by the HRC in July 2001.[153]

It is highly unlikely that the Protocol to the ACHR to Abolish the Death Penalty can be denounced. This is because the ACHR is abolitionist in outlook and the death penalty, once removed, cannot be reinstated.[154] Thus the IACHR has declared that "a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, *ipso jure*, a final and irrevocable decision."[155]

An example of implied denunciation, by contrast, is the African Charter 1981 which, as has been noted, lacks a denunciation clause. However, the negotiating history indicates that it was the manifest intention of the parties to permit denunciation.[156] The stance, adopted by the African Commission, must therefore be seen in this context, as reflecting the position set out in Art. 56(1) VCLT. In *Civil Liberties Organization v. Nigeria*, the African Commission had to consider decrees passed by Nigeria's military government seeking to nullify the African Charter's domestic effect.[157] By concluding that "[i]f Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice, which it has not done," it found that Nigeria's obligations remained unaffected by the purported revocation of the Charter's domestic

[150] Regarding North Korea's motivation, *see* Evatt, *supra* note 145, pp. 215-216.

[151] UN Doc. C.N.467.1997.TREATIES-10 (12-11-1997); UN Doc. E/CN.4/2000/96, paras. 10-11 (14-12-1999). According to J. Crawford, *The UN Human Rights Monitoring System: A System in Crisis?*, [in:] P. Alston & J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, Cambridge: 2000, pp. 1, 10, this was a conclusion was shared by a number of States.

[152] For information on the status of the ICCPR, *see* http://untreaty.un.org and www.ohchr.org, accessed 24 March 2013.

[153] HRC, *Concluding Observation of the Human Rights Committee: Democratic People's Republic of Korea*, UN Doc. CCPR/CO/72/PRK (27-8-2001). *See also* Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, Marzuki Darusman*, UN Doc. A/HRC/22/57, para. 19 (1-2-2013).

[154] Art. 4(3) ACHR. *See also Restrictions to the Death Penalty Case* (Arts 4(2) and 4(3) of the American Convention on Human Rights), Advisory Opinion OC-3/83, Series A No. 3, IACHR 8 September 1983, para. 52.

[155] *Restrictions to the Death Penalty*, para. 56. *See also International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, Advisory Opinion OC-14/94, Series A No. 14, IACHR 9 December 1994.

[156] International Commission of Jurists, *Human and Peoples' Rights in Africa and the African Charter*, International Commission of Jurists, Geneva: 1986, p. 34.

[157] *Civil Liberties Organization v. Nigeria* Communication No. 129/94, 9th Activity Report 1995-1996, available at www.achpr.org.

effect.[158] The African Commission therefore accepted that denunciation is possible subject to proper notice being given. It may be assumed that this is also the position with respect to the other OAU/AU human rights treaties.

In those situations where denunciation is accepted notwithstanding silence on the matter, customary international law requires notice, although unlike the VCLT, no definite period is indicated. According to the ICJ, the principle of good faith "requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity."[159] Similarly, the IACHR has stated that reasonable notice is required to protect the interests of the other contracting parties.[160] Art. 56(2) VCLT confirms this position but, in order to promote legal certainty, requires notice of no less than twelve months, this being the period usually encountered in multilateral conventions. Both customary international law and the VCLT disallow withdrawal with immediate effect.

It has previously been observed that the American human rights system places emphasis on the States' acceptance of procedural norms which subject them to the authority of supervisory mechanisms. Hence the IACHR has rejected attempts by States to withdraw their recognition of its binding jurisdiction, as it did with Peru.[161] Even so, had Peru proceeded with its denunciation the ACHR, it nevertheless could have chosen to remain an OAS Member, as proven by Trinidad and Tobago and Venezuela. Such a move, however, does not release a State from international scrutiny since it continues to be subject to the jurisdiction of the Inter-American Commission on Human Rights and bound by the OAS Charter and the American Declaration of the Rights and Duties of Man 1948.[162] It should be noted however that this option is not available in the European system. When Greece denounced the ECHR in 1969, it had to withdraw from the Council of Europe.[163] If such a course were contemplated today, significant difficulties would be encountered if the withdrawing State were also a member of the European Union (EU). Denunciation of the ECHR would jeopardise its continued EU membership, since a condition of membership is adherence to the

[158] *Ibidem* para. 12 and para. 17.

[159] *Nicaragua Case*, para. 63; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, pp. 94-96; *Gabčíkovo-Nagymaros Project Case*, para. 109. *See further* Brownlie, *supra* note 135, p. 621.

[160] *Ivcher Bronstein v. Peru*, paras. 52-53; *Constitutional Court v. Peru*, paras. 51-52.

[161] Pasqualucci, *supra* note 54, pp. 115-117. Unlike the ACHR, the IACHR Statute contains no denunciation clause.

[162] As stressed by the Inter-American Commission on Human Rights, *supra* note 4. The American Declaration, available at www.oas.org, is a source of human rights obligations for OAS Member States, especially those not part of the ACHR, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Art. 64 of the American Convention on Human Rights*, (Advisory Opinion) Series A No. 10, IACHR 14 July 1989; T. Buergenthal, *The Inter-American System for the Protection of Human Rights*, [in:] T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Clarendon Press, Oxford: 1985, p. 439, pp. 470-475, 484-487.

[163] Robertson & Merrills, *supra* note 11, p. 118.

ECHR,[164] a fact acknowledged by the United Kingdom's then-Lord Chancellor and Secretary of State for Justice, Jack Straw, in 2008.[165] The president of the European Court of Human Rights, Judge Dean Spielmann, reiterated this position in 2013.[166]

8. INTERNATIONAL INSTITUTIONS WITH A HUMAN RIGHTS REMIT

Many international institutions, including regional organisations, have a human rights dimension to their remit; their foundational treaties, or "constitutions", contain a human rights clause of greater or lesser specificity. Adherence to human rights, the rule of law and democratic values are among their stated guiding principles; some of these have evolved into sophisticated frameworks of laws and systems of supervision and enforcement, whereas others are still in their formative stages. Our discussion in this article is limited to organisations with international legal personality.[167] Free associations of States with no international personality, such as the Commonwealth,[168] are therefore excluded. Once again, this is not meant to be an exhaustive study of international institutions.

As is the case with human rights treaties, there is no uniform practice in relation to constituent instruments but, where the cessation of membership is expressly permitted, the requirements to be met can vary from institution to institution, although certain features, e.g. specifying periods of notice, settling of financial dues, and methods of withdrawal, are often shared.[169]

8.1. International institutions permitting withdrawal

Commencing with the League of Nations, which had a human rights dimension,[170] Art. 1(3) of the Covenant expressly provided for withdrawal subject to two years' notice

[164] *See* the "Copenhagen criteria" on EU accession adopted by the European Council in 1993, [1993] OJ C 230.

[165] *See supra* note 5.

[166] J. Rozenberg, *UK human rights convention exit ‚would be disastrous'* (4 June 2013) www.bbc.co.uk/news/uk-22754866 accessed 25 March 2014.

[167] *See generally* M. Shaw, *International Law* (6th ed.), Cambridge University Press, Cambridge: 2008, pp. 1296-1303.

[168] Despite the adoption of the Charter on 14 December 2012, available at: http://thecommonwealth.org/our-charter, (accessed 25 March 2014), the Commonwealth has not acquired a legal personality.

[169] Greig, *supra* note 20, pp. 849-850.

[170] Art. 22 and 23 of the Covenant of the League of Nations (adopted 28 June 1919, entered into force 1 October 1920), [in:] M.D. Evans (ed.), *International Law Documents*, (9th ed.), Oxford University Press, Oxford: 2009, p. 1. *See International Status of South-West Africa Case* (Advisory Opinion) [1950] ICJ Rep 128, p. 132; *Legal Consequences for States of the Continued Presence of South Africa in Namibia Case* (Advisory Opinion) [1971] ICJ Rep 16, paras. 45-53; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, p. 523, paras. 54-57 (Separate Opinion of Judge Cançado Trindade). *See* Brownlie, *supra* note 134, p. 554; Robertson & Merrills, *supra* note 11, p. 16.

and the withdrawing member fulfilling its obligations.[171] The insertion of a withdrawal clause was considered necessary as otherwise it would not have been legally possible.[172] Sixteen States withdrew from the League, including the Axis countries of Japan, Nazi Germany and Italy.[173]

Similar conditions exist under Art. 1(5) of the ILO Constitution, which was drafted contemporaneously with the League Covenant.[174] In 1977, the USA withdrew from the ILO (to return in 1980).[175]

Many of the constitutions of regional organisations contain withdrawal clauses. The EU's commitment to human and fundamental rights is expressly set out in the Treaty on European Union (TEU).[176] Even though the founding Treaties did not originally make provision for Member States' withdrawal, and the common opinion was that, given the EU's supranational nature, it was not permitted,[177] the amending Treaty of Lisbon allows Member States to withdraw. While such withdrawal is subject to complex negotiations (including the conclusion of an agreement to guide future relations), potentially discouraging Members from pursuing this path, it will usually take effect when said agreement enters into force or, alternatively, two years after formal notification.[178]

Under Art. 7 of the Statute of the Council of Europe any Member State may withdraw by notifying the Secretary General. Such withdrawal takes effect at the end of the

[171] On the latter condition, *see* P.J.N.B., *Termination of Membership of the League of Nations*, 16 British Yearbook of International Law 153 (1935).

[172] J.J. Burns, *Conditions of Withdrawal from the League of Nations*, 29 American Journal of International Law 40 (1935), pp. 40-41; Feinberg, *supra* note 17, pp. 193-94. *See further* K. Magliveras, *Withdrawal from the League of Nations Revisited*, 10 Dickinson Journal of International Law 25 (1991).

[173] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev. ed.), Routledge, London: 1997, p. 25.

[174] The ILO Constitution draws a connection with human rights even if that term is not used as such, Robertson & Merrills, *supra* note 11, p. 282; Swepston, *supra* note 46, pp. 93-95. According to F. Wolf, *Human Rights and the International Labour Organization*, [in:] Meron, *supra* note 162, p. 273, they "lie at the very heart of [the ILO's] mission".

[175] 72 American Journal of International Law 375 (1978). *See* K. Magliveras, *Membership in International Organisations*, [in:] J. Klabbers & A. Wallendahl (eds.), *Research Handbook on International Organisations*, Edward Elgar Publishing, London: 2011, pp. 84, 100.

[176] Art. 6 and 21 TEU, as currently in force. Under Art. 6(1) TEU, the Charter of Fundamental Rights became binding, while Art. 6(2) commits the EU to acceding to the ECHR; *see further* Art. 17(1) of Protocol No. 14 ECHR (adopted 13 May 2004, entered into force 1 June 2010). Adherence to democratic values is a condition precedent for membership, Art. 49 TEU. The European Court of Justice has repeatedly stated that fundamental rights, as set out in international treaties such as the ECHR, form part of EU Law's general principles, *see* A. Arnull et al., *Wyatt and Dashwood's European Union Law* (5th ed.), Sweet & Maxwell, London: 2006, pp. 257-83.

[177] Akehurst, *supra* note 23, p. 151; R.J. Friel, *Secession from the European Union: Checking out of the Proverbial "Cockroach Motel"*, 27 Fordham International Law Journal 590 (2003-2004), pp. 601-609.

[178] Art. 50 TEU. It is common knowledge that the British Conservative Party, part of the governing coalition, is flirting with exiting the EU. In January 2013, the Prime Minister, David Cameron, pledged to renegotiate the terms of EU membership and put the new agreement to a referendum if the Conservatives win the 2015 election, *Q&A: Tory row over an EU referendum* (16 May 2013) www.bbc.co.uk/news/uk-politics-22509588, accessed 23 March 2014.

financial year in which it is notified. As already mentioned, in 1969 Greece renounced its membership in order to pre-empt Art. 8 of the Statute, i.e. having the expulsion clause invoked against it.[179]

Despite doubts as to the international personality of the Commonwealth of Independent States (CIS),[180] one of its stated purposes relates to safeguarding human rights.[181] Membership in the CIS may be terminated with twelve months' notice.[182] In 2008, following an outbreak of hostilities with Russia, Georgia notified its intention to withdraw, which became effective in August 2009.[183]

The OAS Charter 1948 undertakes to adhere to human rights.[184] It permits denunciation upon written notification to the General Secretariat, withdrawal taking effect two years thereafter.[185]

In relation to Africa, the promotion and protection of human rights forms an integral part of the AU's functions.[186] According to Art. 31(1) of the Constitutive Act, withdrawal requires a year's notice, as was the case under Art. 32 of the Charter of OAU, the AU's predecessor. In 1984 Morocco withdrew from the OAU in protest of the admission of the Sahrawi Arab Democratic Republic.[187]

African sub-regional organisations, such as ECOWAS,[188] the Common Market for Eastern and Southern Africa (COMESA),[189] the Inter-Governmental Authority on

[179] *See generally* Magliveras, *supra* note 110, pp. 79-80.

[180] According to Art. 1 and 7 of the CIS Charter, International Legal Materials, vol. 34 (1995), p. 1282, it is not a supranational entity but an institution comprising most of the former USSR republics. Given that it has an institutional structure with organs, the better view argues that it possesses legal personality, P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th ed.), Sweet & Maxwell, London: 2009, p. 161; Shaw, *supra* note 167, p. 241.

[181] Art. 2, 3 and 4 CIS Charter.

[182] *Ibidem*, Art. 9.

[183] Sands & Klein, *supra* note 180, p. 161 note 12; Ministry of Foreign Affairs of Georgia, 'Georgia's withdrawal from CIS', 19 August 2008, at http://georgiamfa.blogspot.gr/2008/08/georgias-withdrawal-from-cis.html. In March 2014 Ukraine said that it would review its CIS membership following Crimea's annexation by Russia, *Ukraine says it could quit Russia-led political bloc*, 19 March 2014, www.reuters.com, both accessed 2 April 2014.

[184] Art. 106 OAS Charter 119 UNTS 3.

[185] *Ibidem*, Art. 143.

[186] *See in particular* Art. 3(h) and 4(m) of the Constitutive Act; E. Baimu, *The African Union: Hope for Better Protection of Human Rights in Africa?*, 1 African Human Rights Law Journal 299 (2001).

[187] K. Magliveras & G. Naldi, *The African Union*, Kluwer Law International, The Hague: 2009, para. 45.

[188] Art. 4(g) of the Revised Treaty on the Economic Community for West African States 1993 International Legal Materials, vol. 35 (1996), p. 660, recognizes the protection of human rights as a fundamental principle. *See Hadijatou Mani Koraou v. Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, ECOWAS Community Court of Justice, 27 October 2008, paras. 41-42, www.chr.up.ac.za, accessed 25 March 2014.

[189] Art. 4(e)-(h) of the Treaty on the Common Market for Eastern and Southern Africa 1994, International Legal Materials, vol. 33 (1994), p. 1067 enshrine the principles of human rights, democracy and the rule of law. Lesotho, Mozambique, Tanzania and Namibia have left COMESA, Sands & Klein, *supra* note 180, p. 262.

Development (IGAD)[190] and the East African Community (EAC)[191] list human rights as a core principle. They all accept withdrawal with one year's notice.[192] This is also the case with the SADC.[193] Recent events in relation to the SADC are of interest. Zimbabwe was reported to have indicated its desire to pull out[194] following the adverse ruling by the SADC Tribunal concerning Zimbabwe's controversial land reform policy.[195] However, in a remarkable setback for the international rule of law, calling into question its very commitment to guiding principles, the SADC suspended *de facto* the operations of the Tribunal at its 2010 Summit over Zimbabwe's refusal to abide by its rulings pending a review of its role. Despite resolving in 2012 to establish a new Tribunal that would not be accessible to individuals, this has still not happened.[196]

The Organization of Islamic Cooperation (OIC) also undertakes to promote human rights in its Charter.[197] The OIC Charter requires one year's notice of withdrawal.[198] The Andean Charter for the Promotion and Protection of Human Rights 2002 commits the Andean Community to observe fundamental freedoms.[199] The Andean Community is noteworthy as denunciation results in the immediate termination of membership.[200] Finally, the South American Union of Nations supports the preservation of democratic

[190] Art. 6A(f) of the Agreement establishing the Inter-Governmental Authority on Development (IGAD) 1996, www.igad.int/etc/agreement_establishing_igad.pdf, accessed 25 March 2014, lists human and peoples' rights as central principles.

[191] Art. 6(d), 7(2) of the East African Community Treaty 1999, www.eac.int, accessed 25 March 2014, lay down the principles of good governance, human rights, democracy and the rule of law.

[192] Art. 91(1) ECOWAS Treaty, Art. 191(1) COMESA Treaty, Art. 22(a) IGAD Agreement, Art. 145(1)(b) EAC Treaty respectively. The latter additionally requires a resolution by the parliament of the withdrawing State. In December 2000 Mauritania's withdrawal from ECOWAS became effective, Sands & Klein, *supra* note 180, p. 258, note 38.

[193] Art. 34(1) of the Treaty on the Southern African Development Community 1992 (as amended 2001), www.sadc.int, accessed 25 March 2014. Seychelles withdrew in 2004, Viljoen, *supra* note 74, p. 492, note 51, only to rejoin in 2008. For the commitment to human rights, democracy and the rule of law, *see* Art. 4(c) SADC Treaty.

[194] *See Fick and Another v. Republic of Zimbabwe* SADC (T) Case No 01/2010 (July 2010), www.saflii.org/sa/cases/SADCT/2010/2.pdf, accessed 25 March 2014.

[195] *Mike Campbell (Pvt) Ltd. et al v. The Republic of Zimbabwe* SADC (T) Case No 2/2007 (November 2008), www.saflii.org/sa/cases/SADCT/2008/2.pdf accessed 25 March 2014. *See* G.J. Naldi, *Mike Campbell (Pvt) Ltd. et al v. The Republic of Zimbabwe: Zimbabwe's Land Reform Programme Held in Breach of the SADC Treaty*, 53 Journal of African Law 305 (2009).

[196] *See* www.sadc.int/about-sadc/sadc-institutions/tribun, accessed 25 March 2014.

[197] Art. 1(14), 2(6), 15 of the Revised Charter of the Organization of Islamic Cooperation 2008, www.oic-oci.org, accessed 25 March 2014. In 2011 the Statute of the Independent Permanent Human Rights Commission was adopted pursuant to Arts. 5 and 15 thereof, International Legal Materials, vol. 50 (2011), p. 1152.

[198] Art. 35(1) OIC Charter. Financial dues must be settled in accordance with Art. 35(2) thereof.

[199] The Charter, a legally non-binding instrument, was signed on 26 July 2002, www.refworld.org, accessed 25 March 2014.

[200] Art. 153 of the Andean Subregional Integration Agreement (Cartagena Agreement codified) approved 25 June 1997, www.worldtradelaw.net/fta/agreements/cartagenafta.pdf, accessed 25 March 2014.

values and the promotion of human rights.[201] Member States may terminate their participation by giving six months' notice.[202]

8.2. International institutions silent on withdrawal

The most prominent international organisation in this category is the United Nations, the Charter of which contains numerous provisions referring to human rights and fundamental freedoms. Their promotion is stated as one of its missions[203] and has been described as a "core purpose".[204] The subsequent development of the expansive UN human rights system, both institutional and normative, is ultimately based on the brief references in the UN Charter.[205]

The UN Charter does not contain an exit clause. It appears that this was a deliberate ploy to emphasize the UN's objective of perpetuity and universality.[206] Moreover, it reflected a conscious decision to avoid one of the pitfalls of the League of Nations, which explicitly provided for cessation of membership. As has been argued, "[i]n practice, the United Nations has studiously avoided validating a right of exit."[207] Nonetheless, certain commentators maintain that withdrawal is possible since it was either the considered intention of the parties[208] or can be implied.[209] No less an authority than Lauterpacht expressed the view that a right of cessation of membership was preserved[210] on the basis of the declaration on withdrawal adopted during the drafting stage, which referred to "withdrawals … becom[ing] inevitable if, deceiving the hopes of humanity, the Organization was revealed to be unable to maintain peace […]"[211] Another authority writes that "despite the absence of a 'withdrawal' clause, it may be assumed that legally a state can withdraw subject to its fulfillment of any outstanding obligations."[212]

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[201] Art. 14 of the Constitutive Treaty of the South American Union of Nations (adopted on 23 May 2008, entered into force on 11 March 2011) www.unasursg.org, accessed 25 March 2014.

[202] *Ibidem*, Art. 24.

[203] Art. 1, 55 and 56 UN Charter. *See* Robertson & Merrills, *supra* note 11, pp. 25-26. In the Namibia Case, p. 57, the ICJ opined that *apartheid* constituted "a denial of fundamental human rights" amounting to "a flagrant violation of the purposes and principles of the Charter."

[204] S. Chesterman, T.M. Franck, D.M. Malone, *Law and Practice of the United Nations: Documents and Commentary*, Oxford University Press, Oxford: 2008, p. 448.

[205] Brownlie, *supra* note 135, pp. 555-58; Shaw, *supra* note 167, p. 278; A. Cassese, *International Law*, (2nd ed.), Oxford University Press, Oxford: 2005, pp. 331-333.

[206] Chesterman, Franck & Malone, *supra* note 204, p. 5.

[207] Akehurst, *supra* note 23, p. 145. However, it seems that the UN Charter's drafters, while wishing to discourage withdrawal, did not wish to proscribe it, Greig, *supra* note 20, pp. 855-856; J. Klabbers, *An Introduction to International Institutional Law*, (2nd ed.), Cambridge University Press, Cambridge: 2009, pp. 84-85.

[208] Feinberg, *supra* note 15, pp. 197-202.

[209] Aust, *supra* note 141, pp. 233-234; Aust, *supra* note 142, pp. 198, 206.

[210] Lauterpacht, *supra* note 10, p. 411.

[211] *See* Documents of the United Nations Conference on International Organizations, vol. 7, 1945, p. 273.

[212] Sands & Klein, *supra* note 180, p. 22. *See also* D.J. Harris, *Cases and Materials on International Law*, (7th ed.), Sweet & Maxwell, London: 2010, p. 699.

However it is difficult to draw lessons from the only existing precedent: Indonesia's purported withdrawal in 1965, only to return the following year.[213] Yet in light of the preponderance of expert opinion the conclusion must be that withdrawal from the UN is permissible only in extreme circumstances.

The Organisation for Security and Cooperation in Europe (OSCE) is an atypical multilateral institution because its foundational documents, such as the Paris Charter, are not in fact treaties.[214] Despite the enduring doubts about its international personality,[215] the plurality of its organs and their wide-ranging activities support the better view that it is a "full-fledged international organisation."[216] The promotion of human rights, democracy and the rule of law is one of the OSCE's essential functions. No provision for withdrawal can be found in its constitutive instruments, which at any rate are not the type to envisage withdrawal. Interestingly enough, the draft OSCE Charter, which was circulated by the Irish Chairmanship in June 2012, is completely silent on secession even though it endows the OSCE with international legal personality and legal capacity.[217]

The Association of South East Asian Nations (ASEAN) constitutes another notable exception in this regard. Under the ASEAN Member States commit themselves to strengthen democracy and the rule of law, and to respect and promote human rights and fundamental freedoms.[218] The ASEAN Charter does not contain a denunciation clause. However, given the "sovereignty-based conception" of international law fiercely adhered to by Asian States it seems likely that such a right is presumed.

9. ANALYSIS AND OBSERVATIONS

The legal position with regard to international institutions can be said to be in all important respects identical to that concerning human rights treaties. Where the constituent instruments permit withdrawal it is clear that Member States are entitled to invoke that right, subject to satisfying any associated conditions. If those conditions are not met the legal validity of the purported withdrawal is open to serious doubt and is

[213] Greig, *supra* note 20, pp. 856-57; Akehurst, *supra* note 23, pp. 146-149. According to E. Schwelb in *Withdrawal from the United Nations: The Indonesian Intermezzo*, 61 American Journal of International Law 661 (1967), Indonesia's withdrawal should properly be considered a temporary measure.

[214] Charter of Paris for a New Europe 1990, International Legal Materials, vol. 30 (1991), p. 190.

[215] M. Sapiro, *Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation*, 89 American Journal of International Law 631(1995).

[216] Sands & Klein, *supra* note 180, p. 203.

[217] *See* CIO.GAL/68/12, 12 June 2012, www.osce.org/mc/97950, accessed 27 March 2014.

[218] Art. 1(7) and 2(i) of the Charter of the Association of South East Asian Nations (adopted 20 November 2007, entered into force on 15 December 2008), available at: www.asean.org/asean/asean-charter. On 19 November 2012, the ASEAN Human Rights Declaration, a hortatory document, was adopted www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration, both accessed on 28 March 2014.

in all likelihood illegal.[219] With respect to constituent instruments which are silent on the issue of withdrawal, a consensus cannot be found among international lawyers with respect to its permissibility. One body of opinion adheres to the belief, based principally on notions of state sovereignty, that it is either an inherent or an implied right:[220] "*Prima facie* a state must be deemed to be free to withdraw unless it has surrendered that right expressly or impliedly."[221]

But it has been counter-argued that, given the constituent treaties' nature of permanence and universality, withdrawal is illegal and void unless it is plain that such a right was intended.[222] Others have sought to steer a middle path. Klabbers has pointed out that withdrawal from international organisations is likely to be more complicated than withdrawal from treaties, and that Art. 56 VCLT may be of limited assistance and should be simply considered a guideline, while negotiations conducted in good faith between the parties offer the least problematical solution.[223]

Ultimately, an invalid termination of membership can be disregarded and the State in question may continue to be considered a member.[224] At such a stage, the dispute is unlikely to be amenable to resolution on solely legal grounds.

10. WHY ARE STATES TURNING AWAY FROM THEIR HUMAN RIGHTS OBLIGATIONS?

At this point an attempt will be made to draw attention, briefly, to the legal and quasi-legal concerns that may be motivating democratic societies – new, limited and established – to consider taking steps as radical as extricating themselves from international human rights obligations. Of course, this is not solely a legal issue but includes other disciplines which are outside the scope of this article.[225] It is certainly partially attributable to a "neo-con" *Weltanschauung*. International supervisory bodies are either perceived as activist, guilty of *excès de pouvoir*, and intervening in areas essentially within the domestic jurisdiction of States; or are considered trivial, lacking in democratic accountability and interfering with democratic choices.

In the United Kingdom, a continued and voluble unhappiness prevalent in the right-of-centre and Europhobic circles at the adverse decisions handed down by the European Court of Human Rights[226] led the Government, when the UK held the rotating

[219] This is an opinion of long-standing, *see* Burns, *supra* note 173; P.J.N.B., *supra* note 172.

[220] For a summary of such views, *see* Feinberg, *supra* note 15, pp. 212-214.

[221] Sands & Klein, *supra* note 180, p. 554.

[222] Akehurst, *supra* note 23, p. 149; Feinberg, *supra* note 15, pp. 215, 218. *See also* Lauterpacht, *supra* note 10, p. 938.

[223] Klabbers, *supra* note 207, pp. 85-86.

[224] Feinberg, *supra* note 15, p. 218.

[225] For an international relations perspective, *see generally* Helfer, *supra* note 7.

[226] *See e.g.* the Report by think-tank Policy Exchange in 2011, *UK should cut links to European Court of Human Rights* (7 February 2011) www.bbc.com/news/uk-12338931; *Ministers angry at European whole-life*

Chair in the Council of Europe's Committee of Ministers (November 2011 – May 2012), to propose the adoption of the Brighton Declaration, calling for reform of the Court.[227] In the Netherlands, the fact that a number of court decisions invalidated domestic legislation because it violated human rights treaties led officials to call for withdrawal from the ICCPR.[228] In the case of Caribbean States, restrictions on imposing the death penalty, in association with the "death row" phenomenon in particular, were at the core of their denunciations.[229] Caribbean countries are among those asserting that matters of criminal and penal policy, including the legality of penalties, are properly internal issues.[230] Peru's denunciation was provoked by its refusal to comply with a ruling of the IACHR.[231] Guyana's denunciation appears to be prompted by similar concerns.[232] Venezuela justified its denunciation on the grounds that the IACHR exceeded its jurisdiction and misapplied the ACHR.[233] Frustration may be exacerbated by the fact that reservations are of limited use with regard to human rights treaties. In

tariffs ruling (9 July 2013) www.bbc.co.uk/news/uk/23245254. Cases particularly infuriating Conservative politicians include *Hirst v. United Kingdom* (No 2) (Application No. 74025/01) Grand Chamber, ECHR 6 October 2005 on the right of prisoners to vote, and *Othman (Abu Qatada) v. United Kingdom* (Application No. 8139/09) Fourth Section, ECHR 17 January 2012 on the deportation of terrorist suspects, both available at: http://hudoc.echr.coe.int; *see further, UK may withdraw from European rights convention over Abu Qatada* (24 April 2013) www.theguardian.com/law/2013/apr/24/european-rights-convention-abu-qatada, all accessed 26 March 2014.

[227] High Level Conference on the Future of the European Court of Human Rights Brighton Declaration, adopted 19-20 April 2012, www.coe.int. *See further* V. Miller & A. Horne, *The UK and Reform of the European Court of Human Rights*, House of Common Library, Standard Note: SN/IA/6277, 27 April 2012, www.parliament.uk, both accessed 25 March 2014.

[228] A.W. Heringa, *Judicial Enforcement of Art. 26 of the International Covenant on Civil and Political Rights in the Netherlands*, 24 Netherlands Yearbook of International Law 139 (1993), p. 170.

[229] *Pratt and Morgan v. Jamaica* (1989) Communication Nos 210/1986 and 225/1987 UN Doc. CCPR/C/35/D/210/1986, and *Kennedy v. Trinidad and Tobago* (2002) Communication No. 845/1999 UN Doc. CCPR/C/74/D/845/1998; see UNCHR, *Report by Special Rapporteur, Asma Jahangir, on Extrajudicial, Summary or Arbitrary Executions, Mission to Jamaica* UN Doc. E/CN.4/2004/7/Add.2 para. 55 (2004). In the case of Trinidad and Tobago the situation appears to have been exacerbated by the HRC decision in *Kennedy v. Trinidad and Tobago, ibidem*, that the reservation to the OPT was incompatible with its object and purpose, and therefore the Court was not precluded from considering the communication; *see* Individual Dissenting Opinion of Messrs Ando, Bhagwati, Klein and Kretzmer, and Individual Opinion of Ms Wedgwood in *Evans v. Trinidad and Tobago* (2003) Communication No. 908/2000, UN Doc. CCPR/C/77/D/908/2000. *See also* R. Goodman, *Human Rights Treaties, Invalid Reservations and State Consent*, 96 American Journal of International Law 531 (2002), p. 532; L.R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 Columbia Law Review 1832 (2002).

[230] Commission on Human Rights, Letter dated 23 April 2003 from Saudi Arabia addressed to the Chairperson of the fifty-ninth session of the Commission on Human Rights, *Promotion and Protection of Human Rights: Status of the International Covenants on Human Rights*, UN Doc. E/CN.4/2003/G/84 (24-4-2003).

[231] Tyagi, *supra* note 6, pp. 148-149.

[232] *Ibidem*, pp. 173-174

[233] *See* Mejía-Lemos, *supra* note 4.

order to preserve the integrity of these treaty regimes it may be necessary to offer States greater room for manoeuvre, or a margin of appreciation.[234]

A final argument deserving some consideration is that withdrawal from human rights treaties and/or from international institutions with a human rights remit and no withdrawal procedure could be permitted when it is sanctioned by the citizenship in a free and fair referendum, or by means of another manifestation of the principle of self-determination of peoples. This argument is based on the supposition that the decision of the executive (government) to participate in such instruments and/or international institutions, subsequently ratified by the legislative (parliament), cannot be binding *ad infinitum*, especially if significant political and/or socio-economic changes have taken place. The population of the withdrawing State should be free to determine, for example, that its Constitution and other relevant domestic legislation afford a better level of protection, that the existing domestic supervisory mechanism is effective and well-respected, and that adequate sanctions can be ordered against those violating fundamental freedoms. To that extent, the population should be allowed to determine that the domestic mechanism is superior to the supervisory system envisaged in the respective international treaty/institution.

CONCLUSIONS

In principle the denunciation of treaties may be considered an exercise of States' sovereign rights, provided the VCLT conditions and the relevant treaty stipulations are met. This right of withdrawal extends to human rights treaties and international institutions if they contain denunciation clauses or if it is evident that denunciation is implied and/or accepted by contracting parties. But as the HRC has observed, human rights treaties are of an exceptional nature and therefore deserve special consideration. They do "not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted" even in the absence of a denunciation clause.[235] The evolution of international human rights law since the VCLT means that its pertinent provisions should now be read in light of the peremptory nature of human rights law.[236] A traditional positivist would no doubt reject such a stance, maintaining that the treaty's nature is immaterial and that the sovereign rights of States cannot be constrained.

The conclusion reached by this article is that, in light of the evidence considered above, the presumption applicable to human rights treaties with no denunciation clause is that they do not permit unilateral withdrawal. This is most evident in relation to treaties

[234] *Cf.* the Brighton Declaration calling for greater prominence for the margin of appreciation and the principle of subsidiarity, both of which have found expression in Art. 1 of Protocol No. 15 ECHR, adding a new recital to the ECHR's preamble.

[235] General Comment 26, *supra* note 144.

[236] According to the ICJ, the meaning of legal concepts "follow the evolution of the law and […] correspond with the meaning attached to the expression by the law in force at any given time", *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] ICJ Rep 3, para. 77; *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Rep 213, paras. 63-66.

effecting institutional changes to the supervisory mechanisms, since a return to the previous situation is a practical impossibility and populations should not be left without mechanisms of oversight.[237] But to remove any ambiguity it would seem best if clauses were inserted expressly disallowing denunciation or withdrawal. This would have the benefit of certainty. Surely it would be preferable to include clauses expressly prohibiting denunciation if that was the parties' intention. The reluctance of States to express a view on this question is to be regretted,[238] and this proposal would overcome this problem. If clauses prohibiting reservations are incorporated, there seems to be no good reason why explicit non-denunciation clauses could not be included. Of course, it must be acknowledged that the final texts of treaties are often the result of compromises and that troublesome issues, e.g. denunciation, are sometimes simply fudged so as not to derail the entire process.

With respect to international organisations the conclusion is the same. Where the issue of termination of membership has not been addressed, in light of the nature of these institutions it should be considered illegal and void unless it is evident that such a right was manifestly intended.

An illegal denunciation will have no validity in law[239] and will entail international responsibility. It must be acknowledged, however, that this raises a practical difficulty. A State with an abiding and deep commitment to the rule of law, and concerned about its international standing, will not take the step of denunciation lightly, particularly the cessation of membership in an international or regional institution, as this would be negatively perceived. It has been said that Greece's withdrawal from the Council of Europe had the effect of isolating it internationally and strengthened the democratic resistance.[240] But it cannot be assumed, even in this day and age, that States will be dissuaded from taking drastic action if they perceive their vital national interests to be at stake or if, as in the Caribbean countries where retention of the death penalty is popular, they claim the full support of public opinion. In the Inter-American system shows of strength have sometimes taken place between States and human rights supervisory organs, giving rise to periods of tension. Such a sensitive state of affairs existed with regard to the IACHR judgments on Peru "when its very institutional fabric appeared threatened."[241] However, the rule of law prevailed. Relations between Peru and the IACHR normalized and its obligations under the Inter-American human rights system were accepted.[242] Despite the

[237] F. Megret, *Nature of Obligations*, [in:] D. Moeckli, S. Shah & S. Sivakumaran (eds.), *International Human Rights Law*, (2nd ed.), Oxford University Press, Oxford: 2014, pp. 96, 114.

[238] Greig, *supra* note 20, p. 498.

[239] *Ibidem*, p. 497.

[240] Robertson & Merrills, *supra* note 11, p. 138.

[241] Address by IACHR President Judge Cançado Trindade, 13 September 2001, Annual Report of the Inter-American Court of Human Rights, 2001, vol. 2, OEA/Ser.L/V/III.54, Appendix LVII, p. 1217 (18-2-2000).

[242] In January 2001 Peru submitted itself to IACHR jurisdiction and competence, while its Justice Minister deplored the previous regime's action purporting to withdraw from international obligations, Annual Report, *ibidem*, Appendices XLIX & L, pp. 1169 & 1171. It appears that withdrawal from the ACHR may have been perceived as too costly politically, Sokol, *supra* note 86, p. 185.

positive outcome in this instance, it may be noted that more recently Venezuela, under eccentric leadership, took the plunge and denounced the ACHR.

Amending the treaty to meet some of the concerns of unhappy States Parties offers a possible solution. Alternatively, a less complex procedurally but politically more sensitive path would be to implement reforms without the need to secure treaty amendment, arguably the basis of the Brighton Declaration. Ultimately, however, it may be in everyone's best interests to discharge recalcitrant States from their obligations.[243] But it is also worth recalling that under customary international law, denunciation does not release States cleanly from all treaty obligations. Given that many such rights have achieved the status of customary law and/or peremptory norms of international law, denunciation in such instances may well be an empty gesture.

Denunciation of a human rights treaty or termination of membership in an international organisation is not a step to be taken lightly, as it is certain to attract deserved hostile criticism.[244] It might at the very least constitute "a political disaster."[245] That States should openly flirt with repudiation of their human rights obligations, particularly for short-term domestic political gain, is highly regrettable. It should call into question their moral standing, weakening their ability to lead by example and project soft power, and undermining diplomatic efforts to inculcate good practice in other less fortunate States, leaving themselves open to charges of hypocritical posturing.[246] As Judge Spielmann has observed, "[a]ny member state who would leave the Council of Europe, who would denounce the Convention, would lose its credibility when it comes to promoting human rights also in different parts of the world."[247]

[243] Greig, *supra* note 20, p. 855; Klabbers, *supra* note 207, p. 84.

[244] Bates, *supra* note 84, pp. 759-761.

[245] *Human rights row: UK quitting would be disaster – ECHR head* (14 January 2014) www.bbc.co.uk/news/uk-politics-25726319, accessed 25 March 2014.

[246] *Cf.* the Memorandum issued on 10 October 2013 by the Council of Europe Commissioner for Human Rights, warning the United Kingdom about, *inter alia*, the possible negative consequences on its reputation and influence were it to withdraw from the ECHR, available at www.coe.int, accessed 3 April 2014.

[247] *See supra* note 166.

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*Lord Lester of Herne Hill QC**

FREE SPEECH TODAY**

INTRODUCTION

It is a great honour to have been invited to give the tenth and final Marek Nowicki Memorial lecture. It is a particular pleasure to do so in the presence of my colleague and friend Professor Wiktor Osiatyński. His study of individual rights and constitutionalism has led him to conclude that the House of Lords is the finest legislative body in the world. I doubt whether that eccentric view is shared by elected British politicians or the British media.

The previous lecturers have been judges, scholars and activists who have worked to protect human rights against the abuse of power. I am proud and honoured to be placed among them. The lecture is a tribute to Marek Nowicki the eminent human rights activist and defender. He co-authored the Polish Charter of Rights and Freedoms and helped shape the Polish Constitution. He supported human rights movements in authoritarian countries and new democracies – especially in Poland and the other post-Soviet states.

Poland's tragic history over the centuries, culminating in the Nazi and Soviet occupations, is happily in the past. But memories of the last World War are still bitter, including the sacrifices of so many during the resistance to Nazi and Soviet occupation, and the destruction and rebirth of this historic city. To remember the heroic contribution of Polish airmen to the Battle of Britain and the Allied cause during the Second World War, the Polish War memorial, near RAF Northolt, designed by a survivor of a Nazi concentration camp, is a reminder, lest we forget, of the brave young Polish airmen who died to defend Europe from barbarous tyranny.

The citizens of my country and of Europe recognize that Poland has been outstandingly successful as a new democracy in giving enlightened leadership in the New Europe, when several former members of the Soviet bloc are succumbing to totalitarian rule, xenophobia and racism.

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I am grateful for the support I have been given by the Helsinki Foundation for Human Rights in Warsaw. The recent decision to establish a Parliamentary Subcommittee on the execution of judgments of the European Court of Human Rights is a matter for celebration. I shall report back about this great advance to the United Kingdom's Joint Parliamentary Committee on Human Rights. I hope its mandate will be broadened to cover human rights in Poland, just as the UK Committee covers human rights in the UK.

In November I gave my other Marek Nowicki lecture in Budapest – on measures to combat racial prejudice and discrimination. Tragically that topic is relevant everywhere, not least in Poland where my wife Katya's Jewish relatives were murdered in Nazi extermination camps.

You have chosen another, happier and equally important subject for this lecture. It is also close to my heart and my life's work – freedom of speech today. I am not an expert in Polish law. If I make mistakes I look forward to being put right. I shall recall basic principles about free speech and its limits, and focus on British experience and European case law of relevance to Poland.

1. THE FUNDAMENTAL RIGHT TO FREE EXPRESSION: A CULTURAL REVOLUTION

Freedom of expression is the touchstone of all human rights. It is the primary right in a democracy, without which effective rule of law is impossible. It is essential to an intellectually healthy society. It promotes individual self-fulfilment and acts as a check on the abuse of power by public officials. It exposes errors in the governance and administration of justice. In the famous words of John Stuart Mill, "the best test of truth is the power of thought to get itself accepted in the competition of the market", though Mill's belief rested on the assumption that the market would not be distorted by the State or media giants.

The UK has a vibrant culture of liberty – a political and philosophical heritage we trace back to British thinkers such as Milton, Wilkes, Paine and Mill. But fifty years ago free speech was not an enforceable right in the UK. From a strictly legal point of view, it was a freedom, not a right. It amounted to what was left over after restraints on free expression had been given effect – the criminal and civil laws regulating defamation, blasphemy, contempt of court, contract, the misuse of private information and official secrets. In the absence of a constitutional code of fundamental rights, our legal system was ethically aimless.

As a result, many judgments of our most senior judges gave too little weight to free speech. I was fortunate to act for the press in successfully challenging unduly restrictive judgments by our then supreme judicial authority – the House of Lords – before the European Commission and Court of Human Rights. Our successes helped to convince a new generation of British judges of the need to take the European Convention and its case law more seriously.

Our legal, cultural and constitutional revolution came when the Convention rights were given direct effect in UK law through the Human Rights Act 1998. Today, freedom of expression is recognised in the UK as a fundamental constitutional right anchored in the Convention and the common law. The right to free expression is – should be – subject only to exceptions that must be prescribed by law; and that must never go further than necessary.

We do not have the benefits or burdens of a written constitution like yours, but our system works well. It is a holistic system because it includes a parliamentary committee of both Houses of Parliament that scrutinises proposed legislation for compatibility with the UK's commitments under human rights treaties. However, the survival of our system is threatened by the politics of Europhobia. Senior members of the ruling Conservative Party have threatened to destroy the Act if they win a majority at the next election. They seek to replace it with a new and weaker British Bill of Rights that will prevent or limit recourse to the Strasbourg Court. That would set a terrible example elsewhere in Europe and would undermine the European rule of law.

With the end of the Cold War, the West no longer competes with Russia as it did, and commitment to the European human rights system has weakened. The Strasbourg Court is overwhelmed and starved of much needed resources. My hope is that you, who have had such tragic experiences of Nazi and Soviet occupation and oppression, will give strong leadership in protecting and building on what we in the West achieved during the first half century of the Convention system.

2. CRIMINALISING OFFENSIVE SPEECH

Until recently, we British were subject to a wide array of ancient common law speech crimes. They included the crimes of defamation, sedition, obscenity and blasphemy. Designed to protect public order and to deter threatening, abusive and insulting speech, they were vague and broad offences and disproportionate in their impact on free speech. Parliament has recently replaced them with carefully tailored and more legally certain provisions.

The UN Human Rights Committee has rightly recommended that states should consider decriminalising defamation to protect free speech.[1] The UK has abolished the offence;[2] and many other countries have decriminalised it.[3] However, the crimes

[1] CCPR/C/GC/34, para 47. Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2). The European Court of Human Rights has recognised that whilst the use of criminal sanctions in defamation cases is not itself disproportionate, the nature and severity of the penalties imposed are factors to be taken into account because they must not be such as to dissuade the press or others who engage in public debate from taking part in matters of legitimate public concern. *See Lewandowska-Malec v. Poland*, App. 39660/07, para. 69.

[2] The UK abolished the criminal offences of seditious, defamatory and obscene libel through the Coroners and Justice Act 2007.

[3] These include New Zealand, Bulgaria, France, Ghana, Sri Lanka and Bosnia and Herzegovina. Of the member states of the Inter-American Commission on Human Rights, the Office of the Special

of harming reputation, or causing offence, are still alive in many other parts of the world – where they are used to suppress or deter dissent and criticism.[4]

In 2012, the European Court of Human Rights ruled that the Polish Courts had not given enough protection to free political debate. The Polish courts had convicted a local councillor of defamation for alleging that the mayor of her municipality[5] had interfered unlawfully with the prosecution service.[6] The Strasbourg Court recalled that politicians acting in their public capacity "inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large."[7] It pointed out that it is "precisely the task of an elected representative to ask awkward questions about those who hold public office and to be hard-hitting in her criticism of fellow politicians responsible for the management of the public purse."[8]

In another Polish case decided in 2012,[9] a journalist and editor-in-chief of TEMI, a local weekly newspaper in Tarnów, complained that their right to freedom of expression had been violated. The paper had published a series of articles alleging that a local councillor had broken the law and been guilty of offensive conduct. The journalist and editor were convicted for defaming the councillor.

The Strasbourg Court once again emphasised the essential role played by the press in a democratic society, and the duty of the press to impart information and ideas on matters of public interest. It recalled that a degree of exaggeration and immoderation is allowed for those taking part in a public debate on matters of general interest. The Court unanimously found a violation of the right to free expression protected by Article 10.

The Polish government paid damages for violating the applicants' right to free expression in both these cases. What is not apparent to me is what general measures have been taken to prevent similar further violations. Despite amendments to the Criminal Code in October 2010, the offence of defamation through the mass media still carries a prison sentence of up to a year.[10] The Criminal Code still punishes those whose publications insult a public official, the Polish Nation or the President.[11] A number of politicians, including the Prime Minister, have expressed support for amending the Criminal

Rapporteur for Freedom of Expression has commended Jamaica in for decriminalising libel in addition to Mexico, Panama, Brazil, Uruguay, Argentina, Costa Rica, El Salvador, Grenada and Bolivia. Source: Press Release, Office of the Special Rapporteur for Freedom of Expression, 11 November 2013, R78/13.

[4] This was recognised by the Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, CCPR/C/GC/34, para. 38.

[5] Świątniki Górne Municipality.

[6] *Lewandowska-Malec v. Poland*, Application No. 39660/07.

[7] *Ibidem*, para. 66.

[8] *Ibidem*, para. 67.

[9] *Jucha and Zak v. Poland,* Application No. 19127/06.

[10] An amendment to the Criminal Code in October 2010 abolished the penalty of imprisonment for the offence of slander and reduced the penalty for defamation committed through the mass media from two years to one year.

[11] Insult of a public official is an offence under Article 226 of the Criminal Code, as are insult of the Polish nation and of the President under Articles 133 and 135. Insult to another person is an offence under Article 216.

Code[12] – but with two prosecutions brought in the last two years against Polish citizens who mocked the President on the web, these provisions remain very much alive.[13]

In Britain, we no longer believe that the judiciary need special protection of the criminal law against ridicule and insult. Parliament has therefore recently abolished the crime of insulting judges – "scandalising the judiciary"[14] – as our Law Commission had recommended.[15]

In contrast, in 2003, the Strasbourg Court found a breach of the Convention involving a Polish prisoner. He had written a letter of complaint to the authorities, referring to various judges as "irresponsible clowns" and "cretins".[16] He was convicted for the crime of preferring insults against a state authority[17] and given a custodial sentence. The Strasbourg Court did not criticise the nature of the offence but ruled that the sentence was disproportionate to the legitimate aim of protecting the authority of the judiciary.

A further Polish case is now pending before the Strasbourg Court concerning criminal defamation proceedings against a journalist who criticised a judge for alleged abuse of office.[18] I hope that it will cause the Court to reconsider its case law. The Court accepts, in principle, the need to protect the judiciary from unwarranted attacks but it is important that the protection is not excessive.

3. HATE SPEECH

In Britain we do not believe in using the criminal law to protect judges against robust criticism, but we do believe in safeguarding vulnerable minorities against hate speech. We strive to maintain a fair balance between freedom of speech, public order and the rights of others. Yet laws against hate speech are difficult to enforce in a way that promotes human dignity and achieves their aims. Consider the supremacist who states that in his opinion, all Jews, or black people, or homosexuals, or women, deserve to die. If the authorities are successful in prosecuting him, the defendant claims that the state has violated his right to free speech. And if the prosecution fails, it is politically

[12] Freedom House Report, Poland, 2013, available at http://www.freedomhouse.org/report/freedom-press/2013/poland.

[13] *Blogger charged with insulting Polish President*, 16 January 2013, Thenews.pl (http://www.thenews.pl/1/9/Artykul/124311,Blogger-charged-with-insulting-Polish-president).

[14] Crime and Courts Act 2013, s. 33 (England and Wales); and Criminal Justice Act (Northern Ireland) 2013, s. 12.

[15] *Contempt of Court: Scandalising the Court*, Law Commission Report No 335, 18 December 2012.

[16] *Skalka v. Poland*, Application no. 43425/98; *contrast* to *Lopuch v. Poland*, Application no 43587/09, where no violation was found.

[17] Article 237 of the Criminal Code of 1969.

[18] *Marzanna Lozowska v. Poland*, Application No. 62716/09. The case of *Maciejewski v. Poland* (Application No. 34447/05) is also pending, which concerns defamation of a prosecutor. The Helsinki Foundation for Human Rights has submitted a third party intervention to the Court in *Lozowska* and will represent the applicant before the Court in *Maciejewski*.

dangerous, as the defendant claims the victory legitimates his hate speech. It is a Catch 22 situation.

The position under the First Amendment to the US Constitution is different. Nothing less than a threat of imminent violence justifies restricting hate speech.[19] Causing gross offence is not enough: life or limb must be at stake.

The European Court of Human Rights, on the other hand is more protective of the right of vulnerable minorities to be protected against hate speech.

British criminal law is unusual in making distinctions between the protection given to different categories of hate speech. Criminalising *race* hate speech is stricter than *religious* hate speech because of their different implications for freedom of debate. We consider that to attack people because they are black is to attack them because of their common humanity, their genetic birthright. To attack the beliefs and practices of a religious organisation and its followers is more similar to attacking a political organisation or politician because of the need to permit freedom of public criticism and debate.

The victims of homophobic hate speech require strong protection. One's sexuality is a characteristic, not a belief – part of an individual's core make-up. However, many people in Britain still refuse to accept this. They view sexuality as a lifestyle choice, ignoring the reality of how little control our hearts have over whom we love. I tried unsuccessfully to argue in the House of Lords that homophobic hate speech should have the same protection as race hate speech. Instead, our legislation treats it as similar to religious hate speech in giving greater scope for public criticism and debate.

Some members of the Strasbourg Court have recently suggested that the old case law on hate speech may be too restrictive of free expression. I agree and hope that it will be reviewed.[20] But that does not mean that there should be no criminal sanctions against extreme forms of hate speech. The UN Human Rights Committee recommended, more than three years ago, that Poland should amend the Criminal Code to include hate speech and hate crimes based on sexual orientation or gender identity.[21] At present, victims of homophobic hate speech can seek redress only on the basis of general laws protecting "personal rights", including reputation, rather than personal safety and public order.[22]

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[19] US law gives much wider protection for hate speech. The public appeal to "return the nigger to Africa and the Jew to Israel" at a political rally was not considered imminent enough to negate the protection of the First Amendment *Brandenburg v. Ohio*, 395 US 444 (1969).

[20] In their concurring opinion in *Vejdeland and others v. Sweden* (Application No. 1813/07), Judge Yudkivska and Judge Villiger expressed regret that the Court had missed an opportunity to consolidate an approach to hate speech against homosexuals (para. 2).

[21] Concluding Observation of the Human Rights Committee, Poland, CCPR/C/POL/CO/6, 27 October 2010, para. 8. At present, protection extends only to hate speech affecting national, ethnic, racial and religious minorities.

[22] A. Bodnar, A. Gliszczynska-Grabias, K. Sekowska-Kozlowska & A. Sledzinska-Simon, *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Thematic Study Poland*, April 2008-March 2010, European Union Agency for Fundamental Rights: 2010, pp. 48-55.

Recent efforts by equality advocates[23] have yet to result in changes to the Criminal Code.

Your government has worked to encourage the police service to be more sensitive to lesbian, gay, bisexual and transgender issues.[24] But well-publicised homophobic remarks by holders of public office indicate that cultural change is yet to permeate other spheres of national life.

In Britain, we do not believe that God needs the protection of the criminal law against blasphemy, insult or ridicule. Blasphemy laws forbidding causing offence to religious feelings are still used in Poland, and would seem unnecessarily to restrict the expression of artists, musicians and writers by encouraging self-censorship.[25] Although the Strasbourg Court grants a wide margin of appreciation in this area, it is not unlimited. Britain has abolished blasphemous libel as an undesirable and practically unworkable offence in a multi-faith society.[26] I hope that the Strasbourg Court would come to a similar conclusion and that blasphemy laws will become a thing of the past across Europe.

4. PROTECTING A GOOD REPUTATION

The Convention requires State parties to balance the right to protect a good reputation, the right of access to justice, and the right to freedom of expression.

The English civil law of defamation used to give too much protection to reputation and too little to freedom of speech. It was the handiwork of the courts, rather than legislators. It unfairly tilted the balance in favour of wealthy public figures. Libel law was used by rich and powerful and their lawyers against those alleging misconduct. Only

[23] In 2008, the official governmental draft of amendments to the Polish Criminal Code, which was approved by the *Sejm*, omitted amendments grafted by LGBTQ rights organisations to extend the scope of protection provided by hate speech. In 2011, a new bill to combat hate speech was also rejected. Three further draft bills amending the scope of hate crimes were submitted to the *Sejm* in 2012 but at the time of writing, none are yet law.

[24] Poland reports in its country submission to the latest Universal Periodic Review that it has introduced monitoring of police reactions and behaviour at large-scale events attended by representatives of the LGBT community; and also organised meetings to about best practice in other countries in protecting LBGT rights. *See National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, 2012 (A/HRC/WG.6/13/POL/1), paras. 141-142.

[25] *Policing Belief: The Impact of Blasphemy Laws on Human Rights – Poland*, Freedom House Report, 2010. The European Court of Human Rights has clearly ruled the right to freedom of religion does not impose a duty of States to enact laws that protect believers from insult or offence. In *Dubowska & Skup v. Poland*, (Application No. 33490/96) which concerned the publication in a newspaper of a picture of Jesus and Mary with a gas mask over their faces, the Commission found that the publication in question had not prevented anyone from exercising their freedom of religion, and that the decision by the authorities not to prosecute anyone did not, in itself, amount to a failure to protect the applicants' rights.

[26] Criminal Justice and Immigration Act 2008, s. 79. This reform is yet to be applied in Northern Ireland.

they could afford the costs of defending these claims; and they used the law to suppress and punish publications that criticised them. If a citizen critic, newspaper or broadcaster could not prove the truth of an allegation, it was no defence that publication was in the public interest. The law's failure to keep pace with rapidly changing technology added to the case for legislative intervention.

The seriously chilling effect of the English common law of libel became notorious. It led to "libel tourism" – wealthy foreign claimants suing in London for libels that had little connection with the United Kingdom.[27] President Obama and the US Congress enacted legislation to bar English libel judgments from being given effect in the USA.[28]

English courts did their best to alleviate these problems if and when suitable cases came before them, but there was a limit to what they could achieve. Judicial reform is slow and piecemeal. Judges are constrained by precedent and the constitutional limits on their powers. Real change required Parliamentary intervention.

Free speech groups campaigned for reform. By the General Election of 2010, all three main political parties were committed to changing the law. The Coalition Government built on my Private Member's Bill to fashion the Defamation Act 2013, after public consultation and careful Parliamentary scrutiny. It came into force in England and Wales on New Year's Day this year.

The new Act is not a charter for irresponsible journalism. It strikes a fair balance between reputation and free expression:

- no one can bring a claim unless they show they have suffered serious harm; that should weed out trivial cases at the outset.
- companies have to prove serious financial loss before they vindicate their business reputations;
- the defences of truth and honest opinion have been brought up to date and widened; and a key defence of publication on a matter of public interest has been made user-friendly;
- because the right to trial by jury has proved to be an unreliable protector of free speech and has impeded the speedy resolution of disputes, the Act creates a presumption in favour of trial by judge alone;
- libel tourism from outside the EU is discouraged; and
- to enable effective access to justice, new rules on costs are being developed to protect the poor and the not so rich from liability for costs if they do not succeed – whether as claimants or defendants.

[27] One well-known victim of libel tourism was Rachel Ehrenfeld, an American author. She wrote a book arguing that a wealthy Arab businessman was funding terrorism. The businessman and his two sons sued in London. They were awarded GDP 10,000 each, plus legal costs. The case provoked outcry in the United States. *See Bin Mafouz v. Ehrenfeld,* [2005] EWHC 1156 (QB).

[28] Securing the Protection of our Established and Enduring Constitutional Heritage Act ("SPEECH Act").

5. PRIVACY AND PRIOR RESTRAINT ON PUBLISHING

As well as free speech, privacy is a fundamental right. Through the Human Rights Act, Strasbourg's case law provides guidance to our courts in striking the balance between these two values when they come into conflict.[29]

One example occurred when a UK newspaper published a covertly filmed sex tape involving a public figure, alleging that the tape exposed him as a sado-masochistic sex pervert. He applied to the Strasbourg Court. He asked the judges to rule that the right to privacy under Article 8 requires the media to give an individual prior notice of an intention to invade private life, to enable the victim to obtain an injunction to prevent publication pending trial.[30] I intervened on behalf of the media to resist his claim. In a previous case, the Strasbourg Court had cautioned that the dangers inherent in such practices "are such that they call for the most careful scrutiny […] This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."[31]

The Strasbourg Court decided that a rule enabling a potential victim to obtain a prior restraint on publication was unnecessary and would unjustifiably interfere with free expression.[32] Poland is one of a small number of European States that has a rule requiring prior notice, to enable a potential victim to seek an order preventing publication of a threatened invasion of privacy.

In its judgment in *Wizerkaniuk v. Poland*,[33] the chief editor and co-owner of a local newspaper, Mr. Wizerkaniuk, published the transcript of an interview with a local MP.

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[29] English courts have particular regard to Strasbourg case law in adjudicating claims of misuse of private information. See *Campbell v. MGN Ltd* [2004] 2 WLR 1232, *McKennitt v. Ash* [2006] 3 WLR 194; *Mosley v. News Group Newspapers Ltd* [2008] EMLR 20; *AAA v. Associated Newspapers Ltd* [2013] EMLR 2. We also protect sensitive personal data, through the Data Protection Act, 1998. This statute was enacted in part to implement Council Directive 95/46/EC, which was concerned with the protection of an individual's Convention rights to privacy. Section 13 of the Act grants an individual a statutory right to compensation for damage (including distress, in certain specified circumstances) against a "data controller" who contravenes any of the requirements of the Act, including those relating to the processing of sensitive personal data (sec. 2 and schedule 3). Sec. 13 is subject to exemptions listed in Part IV, including justification for publication on the basis that a publisher reasonably believed that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest (sec. 32.1b).

[30] *Mosley v. UK*, Application No. 48009/08.

[31] *Sunday Times v. United Kingdom (No 2)*, Application No. 13166/87, para. 51.

[32] *Mosley v. UK*, paras. 126-132. The Court had regard to significant doubts as to the effectiveness of any such pre-notification requirement, as well as the chilling effect to which it would give rise. It reasoned that any such requirement must be subject to a public interest exception to be compatible with Article 10; and that the exception could not be narrowly defined without having a seriously chilling effect on free speech. More importantly, for such a requirement to be effective, a regulatory or civil fine for failure to observe it would need to be set at a punitively high level. However, punitive sanctions would also create a chilling effect, which would be felt in the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the Convention.

[33] Application No. 18990/05.

He did not obtain the MP's consent; and was convicted of a criminal offence under the Press Act 1984. The Strasbourg Court decided that the Polish rule requiring consent was incompatible with Article 10 of the Convention. It said the Press Act gave interviewees *carte blanche* to prevent a journalist from publishing any interview they regard as embarrassing or unflattering – regardless of how truthful or accurate it may be.

The Court also made these significant observations:

> the Press Act was adopted in 1984, twenty-seven years ago. It was adopted before the collapse of the communist system in Poland in 1989. Under that system, all media were subjected to preventive censorship. The Press Act 1984 was extensively amended on twelve occasions […] However, the provisions […] on which the applicant's conviction was based were never subject to any amendments, in spite of the profound political and legal changes occasioned by Poland's transition to democracy. It is not for the Court to speculate about the reasons why the Polish legislature has chosen not to repeal those provisions. However, the Court cannot but note that as applied to the present case, the provisions cannot be said to be compatible with the tenets of a democratic society and with the significance that freedom of expression assumes in the context of such a society.[34]

Poland has submitted an Action Plan to the Committee of Ministers of the Council of Europe that supervises the execution of these judgments,[35] but I gather that the Press Act has yet to be amended.[36]

6. PRESS REGULATION

I turn now to the highly contentious issues about the regulation of the press. It is important to have a fairly balanced legal framework that protects reputation, personal privacy, free speech and access to justice and promotes professional standards of journalism. But law is no panacea. The culture of journalism is vital to a healthy democracy as well. Journalism is, or should be, a profession and not merely a business. The media must maintain high professional standards in communicating information and opinions on matters of public importance. Judges should respect the editorial judgments of publishers, and publishers should do what they can to act fairly and lawfully, so that victims of press misconduct do not need to seek legal redress.

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[34] *Ibidem*, at para. 84.

[35] *Action Plan: Information on measures taken to implement the judgment in Wizerkaniuk v. Poland*, DH-DD(2013)68, 28 January 2013. The Action Plan stated that a draft law repealing the criminal liability of journalists for failure to obtain authorisation had been prepared by a group of Parliamentarians and was under consideration by the Polish Parliament. However, it was not implemented. In 2008, the Polish Constitutional Court ruled that the requirement to obtain prior authorisation complied with the Constitution (Judgement of the Constitutional Court of 29 September 2008, SK 52/05).

[36] At the time of writing, Parliamentarians from the Polskie Stronnictwo Ludowe (Polish People's Party) have prepared a draft law to amend the Press Act 1984, including the abolition of criminal liability for failure to obtain prior authorisation. However, there appears to be an absence of political will to take the bill forward through its legislative stages.

In England, the seventeenth century royal censor, the Court of Star Chamber,[37] was notorious in the way that it licensed the press to suit the Stuart Kings. John Milton famously denounced press licensing as "a dishonour and derogation to the author, to the book, to the privilege and dignity of learning."[38] The failure to renew the Licensing Order[39] has always been regarded as a major triumph for liberty in my country. That view is echoed by the judgement of the Inter-American Court of Human Rights, which decided that licensing of journalists violated the fundamental right to free speech.[40]

In Poland, the criminal offence of failing to register a newspaper or periodical before commencing publication was deemed unconstitutional in 2011.[41] But the registration requirement persists.[42] It remains to be seen whether, as I would expect, the Strasbourg Court will adopt the approach of the Inter-American Court. I understand that the provisions of the Press Act in this regard have caused considerable uncertainty for online publications, unsure of whether they too will face fines for failure to register.

As with compulsory registration, laws that threaten the press with punitive sanctions for bad journalistic conduct chill the free exchange of information and ideas. The provisions of the Polish Press Act reached the Strasbourg Court again in a case decided in 2012.[43] The editor of a local independent weekly newspaper published an article about the local authority's failure to tackle the public health risks of an insanitary sewage system. He was criminally sanctioned for failure to publish the mayor's reply to the article. But Strasbourg ruled the conviction was not necessary in a democratic society. The Court described the Press Act provisions as having an "enormous dissuasive effect" for open and unhindered public debate.[44] The Polish Constitutional Court had by this time also ruled the relevant provisions incompatible with the constitution; and I understand that they are no longer in force.[45]

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[37] Initially a court of appeal, the power of the Court of Star Chamber grew considerably under the Stuarts, and by the time of Charles I it had become a byword for misuse and abuse of power by the king and his circle. It was used to suppress opposition to royal policies. Court sessions were held in secret, with no right of appeal, and punishment was swift and severe to any enemy of the crown. It was eventually abolished in 1641 by the Long Parliament.

[38] *Areopagitica: A speech of Mr. John Milton for the Liberty of Unlicenced Printing, to the Parliament of England*, 1644.

[39] Of 1643.

[40] *Compulsory Membership in an Association Prescribed by law for the practice of journalism,* Advisory Opinion OC-5/85, November 13, 1985, Inter-Am Ct HR (Ser A) No 5 (1985).

[41] Case SK 42/09, 14 December 2011. The ruling was restricted to the registration of printed periodicals.

[42] Failure to register has since been reduced to a minor offence (governed by the Minor Offences Code rather than the criminal code) and the maximum penalty for failure to register has been reduced to a fine.

[43] *Kaperzynski v. Poland*, Application No. 43206/07, 3 April 2012. Provisions setting out a right of reply remain part of the Press Act but are now governed by civil rather than criminal law.

[44] At para. 74.

[45] *See Action Report: Information measures to comply with the judgment in the case of Kaperzynski v. Poland*, DH-DD(2013)1251, 19 November 2013, para. 2.1a, "Legislative Changes".

In Britain, we too have been wrestling with how to improve press regulation without state control. The print media used to regulate itself ineffectively through the Press Complaints Commission (PPC), a voluntary body funded and controlled by the press themselves. It was widely criticised for lacking independence from newspaper proprietors and editors, and for failing to provide effective remedies for victims of press malpractice. In 2009, a disgraceful example of press abuse emerged. *The News of the World* had illegally hacked phones on a huge scale to retrieve private information for news stories. The scandal resulted in prosecutions and one national title being closed down.

Our existing criminal law is adequate to prosecute and convict those involved in such conduct. Several trials are well underway. However, the scale of the scandal – which led to more than 100 arrests – exposed the shortcomings of self-regulation by the toothless PCC. The Prime Minister set up a public inquiry chaired by a judge, Sir Brian Leveson. His report diagnosed the problems of abuse by the media – but his recommendations for a new regulatory system were more controversial. He proposed a voluntary system backed by the threat of punitive damages for newspapers that fail to join the scheme.

The three main parties agreed to create a Royal Charter to give legal recognition to an independent regulator fulfilling Leveson's criteria. The Royal Charter model is a convoluted way of avoiding direct statutory underpinning. It is backed by statutory provisions providing for a punitive regime of costs and damages for newspapers unwilling to comply with the scheme.[46] Punitive damages offend the right to free expression and their use has been criticised across the free world.

The Charter will not become operative unless some or all of the Press agree to join the scheme. Instead of doing so, the newspaper industry has boycotted the scheme by pushing ahead with their own plans for a regulator independent of politics. The government indicated last November that it would suspend its plans for the Charter to give the Press time to establish their own scheme, the Independent Press Standards Organisation (IPSO). The new Chair and Board of IPSO has been appointed; and it is expected that the regulator will become fully operational by the end of the summer.

One radical journalist has observed[47] that the Leveson inquiry into the phone-hacking scandal of the late *News of the World* "has been a pretext for a mission to purge the entire 'popular' press, using high-profile victims as human shields, high-ranking celebrities as voice-over artists, and high-minded talk of 'ethics' as a code for advancing an elitist political and cultural agenda […] Far from needing more regulation and regimentation, what the press needs is greater freedom and openness."

I do not go so far but am closer to his views than to those who support coercive measures to regulate the print media. I believe in independent self-regulation to provide

[46] Enterprise and Regulatory Reform Act 2013, section 96; Crime and Courts Act 2013, sections 34-42. The Crime and Courts Act 2013 provides for a punitive regime of costs and damages for newspapers unwilling to comply with the scheme, and the Enterprise and Regulatory Reform Act provides that any future attempt to amend the Royal Charter must have parliamentary approval.

[47] M. Hume, *There is No Such Thing as a Free Press*, Imprint Academic, Exeter: 2012.

effective remedies and promote professional standards, with the courts intervening only where the press has abused its powers.

7. THE INTERNET

The Internet vastly increases free expression. It allows two billion people to communicate with each other across the world, more rapidly and more frequently than ever before. Mobile phones connect millions more.[48] Previously marginalised voices are now heard and their stories circulated. The web's anonymity provides a cloak for whistle-blowers to publish secrets. New navigation tools, like hyperlinks and RSS feeds, take power away from those who used to set the ranking of the news agenda for everyone else.

But the Internet also creates new problems. Content can be republished easily worldwide. It may cause great harm to the privacy and reputation of others. Publishers may face criminal and civil liability in some 190 countries across the world, each with their own laws regulating privacy, confidentiality and defamation. At the same time, those harmed by the postings of anonymous users may find it impossible to identify them and hold them to account. Law enforcement agencies face new challenges in chasing irresponsible whistle-blowers, paedophile rings, cybercriminals and internet trolls. The web generates a footprint of data about every user, much of it accessible by hugely powerful search engines. This raises questions about how to protect users' privacy from those who would access that data for their own purposes – whether commercial advertising companies or state-employed spies.

Over-centralised regulation brings its own fears, many of them Orwellian. But it is unachievable whilst national governments have such different perspectives on the web. Take the example of the legal liability of internet service providers. At one extreme, there is the United States and the First Amendment, which confers virtual immunity on internet service providers. At the other extreme is China, Russia and Iran, struggling to censor through national intranets and firewalls.[49] In the middle, we have the European position, where the E-Commerce Directive imposes limited liability on internet service providers by means of a so-called 'notice and takedown' system.[50]

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[48] At the end of 2013, 1.5 billion people own smartphones. It is predicted that mobile Internet use will increase at a rate of 66 percent each year over the next five years (source: Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2013–2018, summary available at: http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.html).

[49] They will not succeed because their people already know how to circumvent these restrictions. *See generally* Mei Ling Yan, *The Impact of New Media on Freedom of Expression in China and the Regulatory Responses*, chapter in forthcoming book (on file with the author).

[50] 2000/31/EC. Regrettably, the philosophy underpinning that approach was not given sufficient weight by the Strasbourg Court in the recent judgment of *Delfi v. Estonia* (Application No. 64569/09). An Estonian news website was held liable for defamatory comments posted by its readers underneath an article. The newspaper argued this ruling was incompatible with its right to free expression but the Strasbourg Court found no violation of Article 10. The Court stated the site host should have expected

8. BALANCING PRIVACY AND NATIONAL SECURITY

In January, a two-year inquiry by an independent international commission, headed by the Swedish Foreign Minister, Carl Bildt, was launched.[51] It will focus on state censorship of the internet, as well as issues of privacy and surveillance raised by the Snowden leaks about America's NSA and Britain's GCHQ spy agencies. The European Commission has also undertaken to develop a set of principles for internet governance designed to safeguard the open nature of the Internet.[52]

The Strasbourg Court has the opportunity to consider these issues. After the UK Joint Parliamentary Select Committee on Intelligence and Security concluded that GCHQ had not violated the law,[53] three advocacy groups for privacy and free expression – Big Brother Watch, Open Rights Group and English PEN – complained to the Strasbourg Court. They argue that GCHQ's surveillance activities fail the first test of any interference with a Convention right: they are not "prescribed by law".[54] The Court has given the case priority.[55]

In previous cases, the Strasbourg Court has recognised that the principle of legal certainty, in the context of secret measures of surveillance, cannot require that individual should be able to foresee *when* the authorities are likely to intercept his communications.[56] Threats to national security may vary in character and may be unanticipated or difficult to

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offensive posts given the nature of the article – and taken a more cautious attitude to avoiding liability. This is wrong. The news site took down the two defamatory comments as soon as it received notice of them. That is all it is required to do under the E-Commerce Directive. And that is all it ought to have done. To go further would have involved moderating comments before publication. This takes manpower and resources that many website operators do not have. It would lead them to closing their comment sections to avoid liability. That would deprive Internet users of a valuable means of engaging in public debate. And it would deprive websites of revenue at a time when their business models are threatened. At the time of writing, the Grand Chamber has accepted referral of the judgment. I hope that the ruling will be overturned.

[51] *Independent commission to investigate future of internet after NSA revelations*, The Guardian, 23 January 2014, available at http://www.theguardian.com/world/2014/jan/22/independent-commission-future-internet-nsa-revelations-davos. The investigation will be conducted by a 25-member panel of politicians, academics, former intelligence officials and others from around the world.

[52] Source: *Commission to pursue role as honest broker in future global negotiations on Internet Governance*, Commission Press Release, 12 February 2014, available at: http://europa.eu/rapid/press-release_IP-14-142_en.htm?locale=en.

[53] Intelligence and Security Committee Statement on GCHQ's Alleged Interception of Communications under the US Prism Programme, 17 July 2013, para. 6, available at http://isc.independent.gov.uk/news-archive/17july2013.

[54] Application No. 58170/13. The applicants argue that the legal framework underpinning the surveillance fails to provide a check against the arbitrary use of state power intruding into many aspects of private life and correspondence; and that it does not enable citizens to foresee sufficiently the circumstances under which their communications may be monitored.

[55] The government now has until 2nd May to respond, after which the case will move into the final stages before judgment. Source: *Spying Questioned*, The Guardian, 24 January 2014.

[56] *Weber and Saravia v. Germany*, Application No. 54934/00.

define in advance.[57] However, the Court has acknowledged that it is essential in the context of secret intelligence work that the rules on interception are clear and detailed[58] and it has set out the minimum legal safeguards against abuses of power in secret surveillance.[59] In light of these considerations, there is a strong case for reconsidering the adequacy of the legal framework governing access to private communications in the UK. This debate is relevant to the rest of Europe as well. Last year, Polish Law Enforcement made 70 requests to Microsoft and more than 1,000 requests to Google for data stored about individuals.[60]

9. WHISTLEBLOWING

The Snowden affair also raises important and difficult questions about the limits of free speech. Indiscriminate leaking, of the kind associated with *Wikileaks* and Julian Assange, is unjustifiable. However, one of our national newspapers that broke the story, *The Guardian*, behaved responsibly in its reporting of privacy intrusion in the public interest. The journalists involved were careful to avoid revelations that could give terrorist networks an advantage. *The Guardian* published only general information about the surveillance programs and cooperated with government requests to destroy sensitive material in its possession.

As part of the government's response to *The Guardian's* reporting, GCHQ officials oversaw the destruction of computer hardware in the Paper's offices. I do not regard it as unreasonable that that the government control access to sensitive files in the interests of national security. What undermines the justification for their destruction, however, is that copies of these files were already in the possession of two media outlets across the Atlantic. There was no reasonable expectation of continuing secrecy at the time the files were destroyed.

There are similarities to the *Spycatcher* case in the 1990s,[61] where the UK's ban on publication of a book was held by the Strasbourg Court to be unnecessary in a demo-

[57] *Kennedy v. United Kingdom,* [2011] 52 EHRR 4, para. 159. The applicant business owner was unsuccessful in alleging breach of Article 10 on the basis that the police and security services were continually and unlawfully renewing an interception warrant originally authorised for the criminal proceedings against him – in order to intimidate him and undermine his business activities. In its final judgment, however, the Court expressed the view that the relevant UK legislation did not allow the indiscriminate capturing of vast amounts of information (at para. 160).

[58] *Kennedy v. United Kingdom*, at para. 93. The court also observed that an unfettered power of interception would be contrary to the rule of law (at para. 94).

[59] *Ibidem*, paras. 93-95 – in particular "Legislation must specify the nature of the offences which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed."

[60] Google Transparency Report, Poland, available at http://www.google.com/transparencyreport/removals/government/PL/.

[61] *Sunday Times v. UK* (1992) 14 EHRR 229.

cratic society because the memoir could easily be obtained from abroad; and because the government had made no attempt to impose a ban on importation.

There is an on-going police investigation into whether *The Guardian* has breached anti-terrorism laws by sharing material with the *New York Times*.[62] In addition, in August last year, the Metropolitan Police detained David Miranda, the partner of Glenn Greenwald, who first reported the story. Miranda had assisted Greenwald by agreeing to carry encrypted material leaked by Snowden to another journalist involved in breaking the story, who was based in Berlin. Under broad powers to establish whether a person is involved in terrorism, the police questioned Miranda at Heathrow Airport for nine hours and seized his mobile phone, laptop and DVDs.

Given the chilling effect the events will have on investigative journalism and the public's right to be well informed on matters of legitimate public concern, any such interference requires objective justification in accordance with the principles of necessity and proportionality.[63] If a person travelling as part of journalistic work can be lawfully detained for nine hours on the basis of the protection of national security, without requiring any suspicion of wrongdoing – without a lawyer present, at an interrogation that lead to the confiscation of his equipment – this indicates that the powers conferred need to be matched by adequate safeguards against abuse.

In June 1935, as Hitler became evermore threatening to democracy and human rights, the English novelist, E.M. Forster, spoke at the International Congress of Writers in Paris. His subject was "Liberty in England". His warning should be recalled today. He said this:

> Our danger from Fascism – unless a war starts, when anything may happen – is negligible. We are menaced by something much more insidious – by what I might call Fabio-Fascism,[64] by the dictator-spirit working quietly away behind the façade of constitutional forms, passing a little law […] here, endorsing a departmental tyranny there, emphasising the national need of secrecy everywhere, and whispering and cooing the so-called "news" every evening over the wireless until opposition is tamed and gulled. Fabio-Fascism is what I am afraid of, for it is the traditional method by which liberty has been attacked in England.[65]

For "England", read "Europe and beyond".

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[62] S58A of the Terrorism Act 2000 makes it illegal to "elicit, publish or communicate" information about members of the intelligence services.

[63] However, a few days after I gave this lecture the High Court decided in favour of the government and rejected the claim that the police had used their powers improperly, disproportionately or in breach of the right to free expression: *see R (Miranda) v. Secretary of State for the Home Department [2014] EWHC 255*. At the time of writing, the case has been granted permission for consideration by the Court of Appeal.

[64] Quintus Fabius Maximus Verrucosus, the dictator of the Roman Republic, used a war of attrition to defeat Hannibal during the Second Punic War (218-202 BC).

[65] E.M. Forster, *Abinger Harvest*, Edward Arnold & Co, 1936, pp. 62-78.

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ON POLICING ARTICLE 2 TEU COMPLIANCE – REVERSE *SOLANGE* AND SYSTEMIC INFRINGEMENTS ANALYZED

INTRODUCTION

This article aims to provide a systemic critical analysis of the two most detailed proposals currently available in the academic literature to solve the crisis of the Rule of Law plaguing the Union.[1] The focus is on the Reverse *Solange* proposal by Armin von Bogdandy et al.[2] and on the systemic infringement proposal by Kim Lane Scheppele.[3] It also touches upon Jan-Werner Müller's Copenhagen Commission idea,[4] which is not included in the analysis as a separate Part in its own right only due to the fact that the level of legal elaboration and detail surrounding the Copenhagen Commission proposal is less detailed, if approached with an eye toward immediate possible

* Professor of EU Constitutional Law, University of Groningen, The Netherlands. I am grateful to countless colleagues with whom the key ideas expressed in this article have been discussed, especially to Kim Lane Scheppele and Carlos Closa Montero, as well as to Maximilian Steinbeis, who put up bits and pieces of the story-line contained in what follows on the *Verfassungsblog* over the last two years, and to Łukasz Gruszczyński for his support and infinite patience. The research assistance of Justin Lindeboom is kindly acknowledged.

[1] A. von Bogdandy & P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Hart Publishing, Oxford: 2014; J.-W. Müller, *Safeguarding Democracy inside the EU: Brussels and the Future of the Liberal Order*, Transatlantic Academy Paper Series, 2013; D. Kochenov, *Europe's Crisis of Values*, 48 Revista catalana de dret públic (2014) (forthcoming).

[2] A. von Bogdandy et al., *Reverse* Solange – *Protecting the Essence of Fundamental Rights against EU Member States*, 49 Common Market Law Review 489 (2012).

[3] K.L. Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions* (2013) http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf; for the proposal in brief, *see* K.L. Scheppele, *EU Commission v. Hungary: The Case for the "Systemic Infringement Action"*, Verfassungsblog, 22 November 2013, http://www.verfassungsblog.de/en/the-eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/#.Uzcje6hdUVB. For the discussion, *see* Verfassungsblog, *Hungary – Taking Action, Episode 2: The Systemic Infringement Action*, http://www.verfassungsblog.de/en/category/focus/ungarn-vertragsverletzungsverfahren-scheppele/#.UzcjsqhdUVC.

[4] Müller, *supra* note 1.

deployment, compared to the two proposals chosen for detailed scrutiny.[5] While none of these proposals is likely, if implemented alone, to solve the current crisis for a number of sound reasons analyzed in detail *infra*, both of them make important contributions worthy of most serious study and consideration. Although the Commission has now released its own proposals on what to do,[6] it is clear that the story will not stop here: we are only witnessing the beginning of a long process of contemplation on how to resolve the outstanding issues in the current context. The crisis we are facing is extremely complex, calling for complex solutions, and elements of the proposals considered in this article will certainly make an important addition to the successful roadmap to resolve the problems the Union is facing.

The only point besides the need to reinforce the values' dimension of European integration, which is abundantly clear with regard to the Rule of Law crisis at this stage, is that the crisis is a test of extraordinary importance, and one which the EU will be facing for some time to come.[7] In this context it is not surprising that so many proposals on how to solve it have been tabled during the recent years, besides the ones which this contribution will be scrutinizing in detail.[8] Vice-President Reding suggests granting the EU general human rights jurisdiction,[9] Venice Commission President Gianni Buquicchio[10] advocates entrusting the Venice Commission with the role of guardian of Article 2 of the Treaty on European Union (TEU), and many others could be named. Yet the two proposals chosen for an in-depth analysis here are of particular importance as they are the most detailed, doctrinally-equipped and influential among all those available.

This article starts by introducing the problematic context of the crisis of the Rule of Law in the EU, in which Article 2 TEU values currently operate. Particular emphasis is put on taking democracy and justice into account, providing background for the analysis of the concrete proposals on how such a crisis can be solved (Part II). Among the recent proposals, two stand out due to their detailed character as well as the clear resonance they have produced in the literature and will be analyzed in the two Parts of the article which follow. The first proposal, prepared by Armin von Bogdandy, attempts

[5] For a general overview and brief assessment of all the proposals currently available in the literature, *see* C. Closa, D. Kochenov & J.H.H. Weiler, *Reinforcing Rule of Law Oversight in the European Union*, EUI Working Paper RSCAS 2014/25. For a systemic analysis, *see* von Bogdandy & Sonnevend, *supra* note 1.

[6] European Commission, A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final.

[7] Kochenov, *supra* note 1.

[8] For an overview of the academic proposals, *see* Closa et al., *supra* note 5. Also see the numerous discussions in the "pages" of the *Verfassungsblog* to which a number of leading scholars contributed: *Hungary – Taking Action*, http://www.verfassungsblog.de/en/category/focus/hungary-taking-action/#.Uz8B56h_uVO.

[9] V. Reding, *The EU and the Rule of Law – What Next?*, SPEECH/13/677, Centre for European Policy Studies 2013.

[10] G. Buquicchio, *Speech at the "Assises de la Justice conference"*, European Commission, 21–22 November 2013, http://ec.europa.eu/justice/events/assises-justice-2013/index_en.htm.

to offer a way out of the crisis through reliance on the national courts in the countries facing the problems. When facing a systemic breach of fundamental rights, such courts will then refer the issue to the European Court of Justice (ECJ) which should, according to the proposal, extend the scope of EU law to such particular and systemic cases of infringement (Part III).[11] The second proposal, prepared by Kim Lane Scheppele, adopts a radically different approach, relying instead on the European Commission's power to bring infringement actions under Article 258 of the Treaty on the Functioning of the European Union (TFEU), and proposes to open up the possibility to construe an actionable infringement by bundling a number of national-level developments together. Each of the developments taken by itself can seem harmless, as Kim Scheppele rightly submits, but when considered as a whole they could produce a totally different impression, allowing the Commission to intervene.[12] Coupled with entrusting the Union with the possibility to subtract Article 260 TFEU fines and lump-sums from the EU funds destined for the Member State in breach, the second part of the proposal offers an economic way to enforce compliance (Part IV).

While both Armin von Bogdandy's and Kim Scheppele's proposals for dealing with the crisis of the Rule of Law are of importance, as they provide valuable starting points in thinking about what to do at this troubling moment of EU integration history, neither of the two is likely to solve the crisis.

1. THE RULE OF LAW CRISIS

Besides a wave of successful Eastern enlargements[13] and an economic crisis which triggered a profound rethinking of the Eurozone and the EMU as such,[14] the new

[11] von Bogdandy et al., *supra* note 2.

[12] Scheppele (*What Can the European Commission Do*), *supra* note 3.

[13] C. Hillion (ed.), *EU Enlargement: A Legal Approach*, Hart Publishing, Oxford: 2004; A. Ott & K. Inglis (eds.), *Handbook on European Enlargement*, T.M.C. Asser Press, The Hague: 2002. It has been persuasively suggested that following the enlargements the EU started exercising a strong legal influence in the neighbourhood: R. Petrov & P. Van Elsuwege (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?*, Routledge, London: 2014; N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU*, Hart Publishing, Oxford: 2014. Such suggestions will probably need to be corrected somewhat following the Russian annexation of the Crimean peninsula. Claims that the EU has been really effective in its neighbourhood thus stand to be somewhat corrected. For a critical account, *see e.g.* D. Kochenov, *ENP's New Developments: Imitating Change – Ignoring the Problems*, 9 Comparative European Politics 581 (2011).

[14] F. Amtenbrink, *Europe in Times of Economic Crisis: Bringing Europe's Citizens Closer to One Another?,* [in:] M. Dougan, N. Nic Shuibhne & E. Spaventa (eds.), *Empowerment and Disempowerment of the European Citizens*, Hart Publishing, Oxford: 2012, p. 171; D. Adamski, *Europe's (Misguided) Constitution of Economic Prosperity*, 50 Common Market Law Review 47 (2013); A.J. Menéndez, *Editorial: A European Union in Constitutional Mutation?*, 20 European Law Journal 125 (2014); A.J. Menéndez, *Whose Justice? Which Europe?*, [in:] D. Kochenov, G. de Búrca & A. Williams (eds.), *Europe's Justice Deficit?*, Hart Publishing, Oxford: 2014; D. Nicol, *Swabian Housewives, Suffering Southerners: The Contestability of Justice*

millennium has brought about a new, previously unknown challenge to the European integration project: the EU's crisis of values, which partly originated from the disregard of the most basic essential features of democracy and the Rule of Law at the Member State level: "constitutional revolutions".[15] In part the crisis is due to the EU's own weakness on the values side and, in particular, its total impossibility to ensure that Article 2 TEU is more than just an empty proclamation. The crisis of the Rule of Law[16] is radically different from all the other (numerous) crises in EU history, for at least three reasons.[17]

Firstly, it has demonstrated that the assumption that the EU is and will always be composed of democratic Member States respecting the Rule of Law and other Article 2 TEU values is unfounded – we are not shielded from a possible "Belarusisation"[18] of the EU.

Secondly, it has made it clear that the EU is simply non-operational in a situation where not all the Member States are, on the face of it, "good enough" in terms of adhering to the basics of Article 2 TEU. Mutual recognition, the back-bone of the EU, is profoundly undermined, thus paralyzing not only the future development, but also the day-to-day functioning of the European legal system. This follows automatically from the EU's essence, no matter how you approach interdependence at the Union level theoretically – through the all-affected principle, as a supra-national federation, or through the principle of congruence.[19] With a Belarus (read Hungary) in its midst, the EU simply cannot function successfully, since seemingly all the foundations of integration are undermined.

Thirdly, the Rule of Law crisis has pushed us to realize – and this realization is actually nothing new, but is now more acute[20] – that the EU has overwhelming difficulties not only with policing its values procedurally, but also with supplying them with substantive content.[21] The former is due to the weaknesses of the procedure intended,

as Exemplified by the Eurozone Crisis, [in:] D. Kochenov, G. de Búrca & A. Williams (eds.), *Europe's Justice Deficit?*, Hart Publishing, Oxford: 2014.

[15] M. Bánkuti, G. Halmai & K.L. Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 The Journal of Democracy 138 (2012); K.L. Scheppele, *The Unconstitutional Constitution*, New York Times 02.01.2012; von Bogdandy & Sonnevend, *supra* note 1; Müller, *supra* note 1.

[16] Even the EU bodies call it such: European Union Agency for Fundamental Rights (FRA), *Fundamental Rights: Challenges and Achievements in 2012*, FRA, Wien: 2013, pp. 22–25. On the substance of the crisis, *see* a critically important overview by A. von Bogdandy & M. Ioannidis, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, 51 Common Market Law Review 59 (2014).

[17] Kochenov, *supra* note 1.

[18] U. Belavusau, *Case C-286/12 Commission v. Hungary*, 50 Common Market Law Review 1145 (2013).

[19] For a detailed analysis, *see* Closa et al., *supra* note 5.

[20] A. Williams, *The Ethos of Europe*, Cambridge University Press, Cambridge: 2010; J. Neyer, *The Justification of Europe: A Political Theory of Supranational Integration*, Oxford University Press, Oxford: 2012; G. de Búrca, *Europe's raison d'être*, [in:] D. Kochenov, F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order*, Cambridge University Press, Cambridge: 2013, p. 21; Kochenov et al. (eds.), *supra* note 14.

[21] On the blurred and unclear nature of what the EU actually promotes abroad when it promotes the Rule of Law, *see e.g.* L. Pech, *Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the*

specifically, to police the values, as set forth in Article 7 TEU.[22] The latter, which is much more problematic, concerns the questionable justice credentials of the Union itself, which seems to stand for little more than the Internal Market for the sake of the Internal Market at the moment.[23] A market which stands alone, without a mantle of ideals,[24] cannot – to paraphrase J.H.H. Weiler – aspire to a constitutionalising role, however important the role it plays.[25] In other words, following Andrew Williams' *Ethos of Europe,*[26] we are probably witnessing something akin to a justice deficit in Europe, which the on-going crisis exemplifies.[27]

Put differently, it is abundantly clear at the moment that the crisis of values – of which the Rule of Law crisis is the most troublesome component – is not a mere matter of concern caused by problematic national-level developments in some countries. Its EU-level component is equally as strong and cannot be ignored.[28] Crucially in this regard, the EU cannot possibly pretend that it is in the position of solving the Rule of Law crisis without a profound rethinking of how values are reflected at the supranational plane. J.H.H. Weiler is absolutely right: growing EU involvement might amount to nothing else but "throwing rocks in a glass-house",[29] thus aggravating the crisis rather than solving it. Without any doubt, all the constitutional delicacy is required at this point – something that the European Commission seems to be willing to demonstrate.[30]

1.1. The general context in which EU values operate

In truth, the "values on which the Union is built" are illusory in a number of respects. The famed Article 2 TEU has arguably never been intended to leave the world of high ideas to land on a *prettore*'s desk. Law and non-law at the same time, it is a beautiful declaration, both righteous and self-congratulatory – indeed, these are the values of our Union! – and destined for foreign consumption: look at our

Shaping of an International Understanding of the Rule of Law, [in:] Kochenov & Amtenbrink (eds.), *supra* note 20, p. 108.

[22] W. Sadurski, *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider*, 16 Columbia Journal of European Law 385 (2010).

[23] But *see* D. Kochenov, *The Citizenship Paradigm*, 15 Cambridge Yearbook of European Law and Policy 196 (2013) (for an optimistic account).

[24] J.H.H. Weiler, *Bread and Circus: The State of the European Union*, 4 Columbia Journal of European Law 223 (1998), p. 231.

[25] N. Nic Shuibhne, *The Resilience of EU Market Citizenship*, 47 Common Market Law Review 1597 (2010).

[26] Williams, *supra* note 20; A. Williams, *Taking Values Seriously: Towards a Philosophy of EU Law*, 29 Oxford Journal of Legal Studies 549 (2009); D. Kochenov, *The Issue of Values*, [in:] Petrov& Van Elsuwege, *supra* note 13, p. 46.

[27] Kochenov et al., *supra* note 14.

[28] J.H.H. Weiler, *On the Distinction between Values and Virtues in the Process of European Integration* (unpublished).

[29] Closa et al., *supra* note 5.

[30] European Commission, *supra* note 6.

values![31] But with several Member States presumably failing,[32] everything points in one direction: Sir Isaiah Berlin and numerous other thinkers doubting the inherent kindness and reason of mankind were probably right:[33] human nature might be better described in the *Lord of the Flies*[34] than in a dream of Communism inevitable.[35] Most importantly, unlike what many wished to believe, being part of the EU does *not* make a state immune from the potential problems all states face.[36]

Since "people are not angels",[37] they create institutions to be protected from themselves[38] – from extreme passions,[39] from natural fallacies,[40] emotions,[41] biases,[42] from extreme violence,[43] and from extreme "democracy".[44] Indeed, the EU has traditionally been viewed as one of the most effective among such protections – a radical elitist project *par excellence*.[45] The Union created a broad and appealing programme of supranational restraint of the States in relation to each-other,[46] also showing to the world that a different way of sharing a small continent is possible.[47]

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[31] S. Lucarelli, *Values, Principles, Identity and European Union Foreign Policy*, [in:] S. Lucarelli & I. Manners (eds.), *Values and Principles in European Union Foreign Policy*, Routledge, London: 2006, p. 1; M. Cremona, *Values in EU Foreign Policy*, [in:] M. Evans & P. Koutrakos (ed.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World*, Hart Publishing, Oxford: 2011, p. 275; E. Herlin-Karnell, *EU Values and the Shaping of the International Context*, [in:] Kochenov & Amtenbrink (eds.), *supra* note 20, p. 89.

[32] Müller, *supra* note 1, von Bogdandy & Sonnevend, *supra* note 1.

[33] I. Berlin, *Two Concepts of Liberty* (1958), [in:] I. Berlin, *Four Essays on Liberty*, Oxford University Press, Oxford: 1969, p. 1.

[34] W. Golding, *The Lord of the Flies*, Faber & Faber, London: 1954.

[35] E.L. Tuvelson, *The Millenarian Structure of The Communist Manifesto*, [in:] C.A. Patrides & J. Wittreich (eds.), *The Apocalypse: In English Renaissance Thought and Literature*, Cornell University Press, Ithaca: 1984, p. 339.

[36] Kochenov, *supra* note 26.

[37] Publius (J. Madison), *Federalist No. 51*.

[38] A. Sajó, *Limiting Government: An Introduction to Constitutionalism*, CEU Press, Budapest: 1999.

[39] I.P. Couliano, *Eros and Magic in the Renaissance*, University of Chicago Press, Chicago: 1987.

[40] M.J. Lerner & S. Claton, *Justice and Self-Interest*, Cambridge University Press, Cambridge: 2011; D. Kochenov, *The Just World*, [in:] Kochenov et al. (eds.), *supra* note 14.

[41] A. Sajó, *Constitutional Sentiments*, Yale University Press, New Haven: 2011.

[42] C. Sustein, *Designing Democracy: What Constitutions Do*, Oxford University Press, Oxford: 2001.

[43] S. Roy, *Justice as Europe's Signifier: Towards a More Inclusive Hermeneutics of the European Constitutional Order*, [in:] Kochenov et al. (eds.), *supra* note 14.

[44] M. Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 Law & Ethics of Human Rights 141 (2010).

[45] W. Kymlicka, *Liberal Nationalism and Cosmopolitan Justice*, [in:] S. Benhabib, *Another Cosmopolitanism*, Oxford University Press, Oxford: 2006, p. 128, 134. *See also* G. Davies, *The Humiliation of the State as a Constitutional Tactic*, [in:] F. Amtenbrink & P.A.J. van den Bergh (eds.), *The Constitutional Integrity of the European Union*, T.M.C. Asser Press, The Hague: 2010, p. 147.

[46] P. Allott, *The European Community Is Not the True European Community*, 100 Yale Law Journal 2485 (1991) (*see* especially, his diplomacy–democracy distinction). *See also* D. Kochenov, F. Amtenbrink, *Introduction: The Active Paradigm of the Study of the EU's Place in the World*, [in:] Kochenov & Amtenbrink, *supra* note 20, p. 1.

[47] de Búrca, *supra* note 20, p. 21.

Based on the free choice of the participating states (certainly not the peoples, especially initially[48]), the Union has recently proclaimed all things nice in Article 2 TEU, with no legal enforcement mechanism *sensu stricto*.[49] Now the Union is coming to realize that this is probably not enough; which is the reason behind the emerging line of thinking about turning Article 2 TEU – a bunch of solemn proclamations –into something more akin to black-letter law.

1.2. The "problem" with democracy

In doing this however, a lot of caution is required. It is unquestionable that treating Article 2 TEU as black-letter law will "invite ever more adventurous challenges to different national rules", to agree with Jan Komárek.[50] In fact, it would amount to prohibiting a wide range of democratically viable choices at the national level, effectively barring the Member States from making serious (even fatal) mistakes – or at least from moving in that direction – mistakes which could be characterized as such in light of the prevalent understandings in EU law and constitutional and democratic theory today.[51]

While this "attack on democracy" as such can be legitimately criticized – as has been done, for instance, by Floris de Witte[52] – the ethical starting point for any such criticism (which as such is tactically very sound) could be regarded as deeply problematic: the glorification of democracy should not lead to suffering. Following J.H.H. Weiler, Philippe Van Parijs, and numerous others,[53] glorifying democracy beyond its purely instrumental function in building what we would consider a good society is probably not a valid starting point[54] – especially in the context of the EU.[55] In addition it

[48] J.H.H. Weiler, *The State "über alles": Demos, Telos and the German Maastricht Decision*, [in:] O. Due, M. Lutter & J. Schwarze (eds.), *Festschrift für Ulrich Everling,* Bd. 2, Nomos, Baden-Baden: 1995, p. 1651. For an argument for a legally-accepted way of referring to EU citizens as a "European nation", *see* A. Jakab, *European Constitutional Language* (unpublished book manuscript).

[49] Art. 7 Treaty on European Union is not really a legal, but a political procedure.

[50] J. Komárek, *The EU Is More Than a Constraint on Populist Democracy*, *Verfassungsblog*, 25.03.2013, http://www.verfassungsblog.de/en/the-eu-is-more-than-a-constraint-on-populist-democracy/#.UzasOqhdUVA.

[51] On why moving in such direction might be necessary, *see* A. Badiou, *Ethics: An Essay on the Understanding of Evil*, Verso, New York: 2001.

[52] F. de Witte, *Less Constraint of Popular Democracy, More Empowerment of Citizens*, *Verfassungsblog*, 22.03.2013, http://www.verfassungsblog.de/en/less-constraint-of-popular-democracy-more-empowerment-of-citizens/#.UzatMqhdUVA.

[53] *E.g.* J.H.H. Weiler, *In Defence of the Status Quo: Europe's Constitutional* Sonderweg, [in:] J.H.H. Weiler & M. Wind (eds.), *European Constitutionalism beyond the State*, Cambridge University Press, Cambridge: 2003, pp. 7, 18: "a democracy of vile persons will be vile"; P. Van Parijs, *Just Democracy: The Rawls and Machiavelli Programme*, ECPR, Colchester: 2012.

[54] On this specific point, *see* in particular J. Mueller, *Democracy and Ralph's Pretty Good Grocery: Elections, Equality, and the Minimal Human Being*, 36 American Journal of Political Science 983 (1992).

[55] Neyer, *supra* note 20; J. Neyer, *Justice and the Right to Justification: Conceptual Reflections*, [in:] Kochenov et al. (eds.), *supra* note 14. But *see* R. Forst, *Justice, Democracy and the Right to Justification*, [in:] Kochenov et al. (eds.), *supra* note 14.

does not fly historically. As has already been recalled, the EU's origins and goals are clearly anti-Statist to a great degree[56] and to pretend that the discovery that such is the case should cause surprise would be unsound in the light of the whole history of the European project's development. Supranationalism is about taming the beast of nationalism – and the story of the creation and enforcement of supranational law is of crucial importance here. Indeed, to quote Judge Lenaerts in one convincing example, "the infringement procedure is a distinctive mark of [EU] law, which makes it different from international law."[57]

Viewed in this light, the idea of making Article 2 TEU enforceable law could be regarded as a legitimate – if not *predestined* and *indispensable* – next step in the evolution of the European project. That the thinking in this direction is nothing new is confirmed by the very texts of the Treaties – besides the function of Article 7 TEU (leaving aside its procedure for the moment), the very story of the Member States' courts bullying the ECJ to ensure that the EU moves into human rights protection,[58] the Rule of Law etc.[59] on which the very notion of direct effect and supremacy of EU law was clearly made dependent, is a clear reminder of what is new and what is not. In light of all this, although we know that Article 2 TEU, when applied as black-letter law, will diminish national democratic space, this is a good thing rather than a bad thing, which flows naturally from all the history and the very purpose of EU integration. Having said that, procedural guarantees have to be put in place to ensure that Article 2 TEU does not become a pretext to ruin EU federalism[60] by allowing the EU to randomly overstep the scope of the powers delegated to it.[61]

1.3. A word for justice

Before turning to the detailed analysis of the proposals in question, one more general remark is apt: while both proposals are of great importance and contain a number of potentially usable elements, the Devil, here at least, is *not* in the details. The key

[56] Davies, *supra* note 45.

[57] K. Lenaerts, *The Rule of Law and Coherence of the Judicial System of the European Union*, 44 Common Market Law Review 1639 (2007).

[58] B. de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, [in:] P. Alston (ed.), *The EU and Human Rights*, Oxford University Press, Oxford: 1999, p. 859.

[59] B. Davies, *Resisting the European Court of Justice*, Cambridge University Press, Cambridge: 2012.

[60] On EU federalism, *see especially* K. Lenaerts & K. Gutman, *"Federal Common Law" in the European Union: A Comparative Perspective from the United States*, 54 American Journal of Comparative Law 1 (2006); R. Schütze, *On "Federal" Ground: The European Union as an (Inter)National Phenomenon*, 46 Common Market Law Review 1069 (2009); J.-C. Piris, *L'Union européenne: Vers une nouvelle forme de fédéralisme?*, 41 Revue Trimestrielle de droit *européen 243* (2005); D. Sidjanski, *Actualité et dynamique du fédéralisme européen*, No. 341 Revue du marché communautaire 655 (1990). Judge Pierre Pescatore has been pointing out the "caractère fédérale de la constitution européenne" even before the formulation of the principle of supremacy by the European Court of Justice: P. Pescatore, *La Cour en tant que jurisdiction fédérale et constitutionnelle*, [in:] *Dix ans de jurisprudence de la Cour de justice des Communautés européennes: Congrès européen Cologne, du 24 au 26 avril 1963*, Heymanns Verlag, Köln: 1963, p. 522.

[61] Closa et al., *supra* note 5: Weiler's contribution, p. 25.

weakness of both proposals lies in the attempt which they make to confine the understanding (and, consequently, the solution) of the crisis to the national level, presenting the main problem which the EU is facing in the context of the Rule of Law and other values as expressed in Article 2 TEU as a problem belonging to the *national* level. Yet – and this is fundamentally important – the crisis is particularly acute because of the EU's own inability – *supranationally* – to provide a substantive take on what Article 2 TEU actually requires. The crisis thus stretches far beyond the non-compliance by some of the Member States with the general values provisions in the Treaties. It also exemplifies the justice void, mentioned above, from which the *EU* suffers.

A successful development of European constitutionalism should thus necessarily take *justice*, most broadly conceived, into account.[62] In other words, a successful approach to dealing with the current crisis of EU values will necessarily have two components: a *supranational component*, focusing on the substance of the values underpinning the supranational legal system; and a *national component sensu stricto*, which will then be confined to ensuring that none of the Member States drifts away from the basic principles and values underlying the common project. Thinking strategically, the urgency of the crisis of the Rule of Law definitely requires tackling the latter first, no question about that. Yet, the former, supranational aspect of the story also has to be taken into account, should we have a mid- to long-term perspective in mind. The analysis that follows, which focuses on the most concrete details dealing with the Member States' deficiencies should thus not be read as ignoring, let alone dismissing, the importance of the EU-level justice issues.

2. REVERSE *SOLANGE*

In a nutshell, Reverse *Solange* consists of applying the logic utilised by the Bundesverfassungsgericht in the famous line of cases where it pushed the EU (acting together with Corte Costituzionale) to establish a system of human rights protection at the supranational level. Under the proposal, while there is a general presumption of compliance of the Member States with the values outlined in Article 2 TEU, in some truly exceptional cases (when a Member State ignores a judgment of the ECtHR, for instance) this presumption can be reversed, bringing about a possibility for the EU – via the ECJ – to intervene. Although the EU does not have a general values-competence, the ECJ is invited *de facto* to police the values (in cooperation with the national courts of the troubled Member States sending preliminary references) as long as the Member State in question cannot do it itself. Just like *Solange* was, Reverse *Solange* would thus amount to a threat of intervention, which is to bring about compliance.

* * *

Armin von Bogdandy's proposal, focusing on inter-court cooperation and aimed at blocking the systemic infringements of rights by the Member States' authorities within

[62] Kochenov et al. (eds.), *supra* note 14.

their scope of competence through extending the scope of EU law to cover extraordinary cases, provides a rich soil for critical engagement. While the general line of argument in the proposal is potentially promising, it is submitted here that the proposal is probably not as innovative and not as practical as its authors suggest. Crucially, it comes across as an almost purely theoretical complex of suggestions, not yet ready for practical deployment. This is the fundamental difference between it and Kim Scheppele's proposal (analyzed in the next Part), which is clearly designed having practical deployment in mind. Armin von Bogdandy's proposal, its decipherable theoretical bias notwithstanding, is an important starting point for further scrutiny of the evolution of the interrelation between EU citizenship, fundamental rights, and the division of competences between the EU and the Member States.[63]

The analysis contained in this Part adopts as a starting point an approach to EU federalism (to use the term in the vein of Robert Schütze,[64] putting our simple human needs, joys, and fears above the self-contained aspirations) radically different from the one which would be expected in the context of *Begriffsjurisprudenz*, which starts with the concept and proceeds to fit the richness of the world to it, rather than taking the individual as such as a starting point. In this context it is impossible not to share von Bogdandy's view that "[c]itizenship and fundamental rights are […] two mutually strengthening concepts which essentially pursue the very same objective, i.e. to bring the Union closer to the individual."[65] Such an approach provides a solid starting point for the analysis of the potential of EU citizenship to interact with fundamental rights.

2.1. EU citizenship in the centre of the picture

The proposal takes infringements of rights as a starting point, opening an opportunity for EU citizens, in cases when the Member States fail systemically, to allege a violation of rights with a potential EU significance, as it were, hoping that the local court to which such distressed citizens turn would refer a question to the Court of Justice over the potential systemic breach. This part of the proposal does not seem to contain much innovation, as the proposal seems to be potentially more restrictive than the *actual* EU citizenship case-law of the ECJ.[66]

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[63] M. van den Brink, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously*, 39 Legal Issues of Economic Integration 273 (2012); D. Kochenov, *The Right to Have* What *Rights? EU Citizenship in Need of Clarification*, 19 European Law Journal 502 (2013).

[64] R. Schütze, *From Dual to Cooperative Federalism*, Oxford University Press, Oxford: 2010.

[65] von Bogdandy et al., *supra* note 2, p. 506.

[66] K. Lenaerts, *"Civis europaeus sum": From the Cross-border Link to the Status of Citizen of the Union*, 3 Online Journal on the Free Movement of Workers 6 (2011), especially p. 18; D. Kochenov, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, 18 Columbia Journal of European Law 56 (2011). For an over-arching analysis for EU citizenship's potential to facilitate the enlargement of the scope of EU law, *see* D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge University Press, Cambridge: 2015 (forthcoming).

In a consistent line of case-law, the ECJ has by now formulated a second jurisdiction test, which is an alternative to the classic cross-border situation approach.[67] This new test, first hinted at in *Rottmann*,[68] developed in *Ruiz Zambrano*,[69] and reconfirmed in *McCarthy*,[70] *Dereçi*[71] and *O, S and L*[72] is essentially constructed around a logic identical to that of the von Bogdandy proposal, with one crucial difference: while von Bogdandy requires an overwhelmingly high threshold of a fundamental disruption of rights (such as a refusal to abide by a final judgment of the European Court of Human Rights, for instance)[73] to be met, the ECJ actually places the threshold required for EU law intervention infinitely lower. The test is the "deprivation of the essence of rights"[74] of EU citizenship.[75] The infringement of some essential rights of EU citizens can activate EU law much easier than what von Bogdandy proposes, without any innovations required.[76] In other words, part of what is proposed is not a likely revolution-to-come, but an already important part of

[67] Kochenov (*A Real European Citizenship*), *supra* note 66; S. Iglesias Sánchez, *¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea?*, 37 Revista de derecho comunitario Europeo 933 (2010).

[68] Case C-135/08 Janko Rottmann v. Freistaat Bayern [2010] ECR I-1449. *See also* D. Kochenov, *Annotation, Case C-135/08, Janko Rottmann v. Freistaat Bayern*, 47 Common Market Law Review 1831 (2010); G.-R. de Groot, *Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie*, Asiel & Migrantenrecht 293 (2010); G.N. von Toggenburg, *Zur Unionsbürgerschaft: Inwieweit entzieht sich ihr Entzug der Unionskontrolle?*, European Law Reporter 165 (2010).

[69] Case C-34/09 *Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-1177. *See also* L. Ankersmit & W. Geursen, *Ruiz Zambrano: De interne situatie voorbij*, Asiel- & Migrantenrecht 156 (2011); P. Van Elsuwege, *Shifting Boundaries?: European Union Citizenship and the Scope of Application of EU Law*, 38 Legal Issues of Economic Integration 263 (2011); K. Hailbronner & D. Thym, *Annotation, Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi*, 48 Common Market Law Review 1253 (2011); M. Olivas & D. Kochenov, *Case C-34/09 Ruiz Zambrano: A Respectful Rejoinder*, Public Law and Legal Theory Series Paper 2012/W/1, Olivas: Houston Law Centre, Texas.

[70] Case C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department* [2011] ECR I-3375. *See also* P. Van Elsuwege, *Annotation, Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department: European Union Citizenship and the Purely Internal Rule Revisited*, 7 European Constitutional Law Review 308 (2011); P. Van Elsuwege & D. Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13 European Journal of Migration & Law 443 (2011).

[71] Case C-256/11 *Murat Dereci and Others v. Bundesministerium für Inneres* [2011] ECR I-11315. *See also* S. Adam & P. Van Elsuwege, *Citizenship Rights and the Federal Balance between the European Union and Its Member States: Comment on Dereci*, 37 European Law Review 176 (2012); N. Nic Shuibhne, *Annotation of Case C-434/09 McCarthy and Case C-256/11 Dereci*, 49 Common Market Law Review 349 (2012).

[72] Cases C-356 and 357/11 *O. and S. v. Maahanmuuttovirasto* and *Maahanmuuttovirasto v. L.* [2012] ECR nyr.

[73] von Bogdandy et al., *supra* note 2, p. 513.

[74] Case C-34/09 *Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-1177, para. 42.

[75] For an analysis of the problems stemming from the ECJ's approach, *see* Kochenov, *supra* note 63. For an analysis of the history of the doctrine of the deprivation of the essence of rights, *see* M. van den Brink, *The Origins of the Doctrine of the Deprivation of the Essence of Rights*, [in:] Kochenov (ed.), *EU Citizenship and Federalism*, *supra* note 66.

[76] For the history behind this understanding of EU citizenship, *see* D. Kochenov & R. Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, 37 European Law Review 369 (2012).

the *day-to-day reality* in the European Union. What the proposal comes down to then is to give this new reality a doctrinal face and, also, to polish the rules of the application of the new jurisdiction test, which are far from clear at the moment.[77]

Following the recent case-law, it is possible to state with certainty that the law has undoubtedly moved past the point of "cross-border" orthodoxies;[78] that there are two jurisdiction tests used by the Court side-by-side has emerged in all clarity several years ago.[79] Judge Lenaerts also confirmed the existence of the second, purely rights-based, jurisdiction test for the Court.[80] The very contemporary legal reality in the EU thus shields von Bogdandy's proposal from any possible criticism with respect to its starting assumptions, while demonstrating at the same time that it is probably not as innovative as some scholars seem to believe, as it is fully grounded in a currently established line of case-law. The latter fact undoubtedly reinforces the proposal's appeal. Moving to the doctrinal essence of the proposed innovation, at least six criticisms of the proposal can be outlined. These will be approached one by one.

2.2. Why is *Solange* worth copying?

Firstly, the proposal is essentially based on the assumption that *Solange*[81] is an example worth copying. This seems to imply that *Solange* actually functioned in practice, improving the level of human rights protection in the EU (and also in Germany, of course). While this is presumably self-evident for some lawyers, for others, such as myself, no such examples seem to be anywhere in sight. Approached in a purely practical vein, the truth seems to be that rather than directly improving the level of human rights protection, *Solange*-style thinking allows national courts to save face when they need to give in when faced with the growing importance of supranational courts.

Acting by proxy through instigating a change in approaches to human rights at a supranational level is, admittedly, a different matter. The possible argument that *Solange* helped to create an environment of legal pluralism is shaky. To agree with Gareth

[77] For an analysis of the numerous problems, *see*, Kochenov, *supra* note 63.

[78] For a detailed lament concerning how and why such orthodoxies do not actually work, *see* D. Kochenov, *Citizenship without Respect: The EU's Troubled Equality Ideal*, Jean Monnet Working Paper 08/10 (2010). For the most fundamental treatment of this issue, *see* A. Tryfonidou, *Reverse Discrimination in EC Law*, Kluwer Law International, The Hague: 2009. *See also*, *inter alia*, N. Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*, 39 Common Market Law Review 731 (2002).

[79] Kochenov (*A Real European Citizenship*), *supra* note 66.

[80] Lenaerts, *supra* note 66, pp. 17–18: "link with EU citizenship may exist in the absence of a cross-border element".

[81] BVerfGE 37, 271 (1974); BVerfGE 73, 378 (1986); BVerfGE 89, 155 (1993). For analysis, *see e.g.* Weiler, *supra* note 48; M. Herdegen, *Maastricht Decision and the German Constitutional Court: Constitutional Restraints from an "Ever Closer Union"*, 31 Common Market Law Review 235 (1994). *See also* BVerfGE 63, 2267 (2009). For analysis, *see e.g.* D. Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 Common Market Law Review 1795 (2009); C. Wohlfahrt, *The Lisbon Case: A Critical Summary*, 10 German Law Journal 1277 (2009); A. Steinbach, *The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?*, 11 German Law Journal 367 (2010).

Davies, "where there are multiple sources of apparently constitutional law one always takes precedence and the other is no longer constitutional."[82] As a consequence, such pluralism "is an empty idea."[83] To also agree with J.H.H. Weiler, while ulterior motives should not play an essential role in the legal discourse – "While Jacob and Rachel may make love for sheer carnal pleasure…" – the outcomes most certainly do – "they will not necessarily be bad parents for the eventual offspring."[84] While the intention of the ECJ in going for human rights could be to shield itself from the attacks of the national courts where *Solange* played a rhetorical role, the result was, undoubtedly, the birth of the EU as a human rights organization,[85] in the hands of the ECJ,[86] increasing the level of protection of individual citizens. What *Solange*-minded national courts do, never mind their intentions, amounts, largely, to giving up power. Consequently, it is possible to suggest that *Solange* is probably not the best graft to transplant: its practical usefulness in terms of *actually increasing the level of human rights protection* at the legal level where it emerged can be contested.

2.3. Giving up authority is not the same as claiming power

Secondly, invoking *Solange* comparisons is probably misleading also due to the fact that the whole context of drawing minimal level of protection lines changes entirely once one moves from the national to the supranational level of legal authority. While the main obligation of the BVerfG has always been, undoubtedly, to defend the Basic Law and human rights outlined therein, the ECJ has never had a general human rights jurisdiction.[87] Consequently, the employment of the *Solange* approach by the ECJ comes down to – *de facto* at least – *claiming new power*.[88] Such a claim will then happen without an explicit authorization, thus potentially contradicting the spirit and the wording of Article 4(1) TEU.[89]

It is not clear in this context why allusions to a doctrinal approach, developed in order to be as convincing as possible while gently giving up authority, should necessarily be helpful in the context of enlarging the potential scope of legal intervention within

[82] G. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, Eric Stein Working Paper No. 1/2010, p. 3.

[83] *Ibidem*.

[84] J.H.H. Weiler & N.J.S. Lockhart, *"Taking Rights Seriously": The European Court and Its Fundamental Rights Jurisprudence – Part I*, 32 Common Market Law Review 51 (1995), p. 71.

[85] Alston (ed.), *supra* note 58.

[86] de Witte, *supra* note 58, p. 859.

[87] Notwithstanding the fact that the arguments for such a policy are strong: P. Alston & J.H.H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, 9 European Journal of International Law 658 (1998), pp. 688–695.

[88] This is the only reason why the ECJ is extremely careful with the "substance of rights doctrine". Even in cases when EU citizens clearly suffer systemic injustice in the hands of their own Member State authorities – like in *McCarthy*, for instance – the ECJ is not really prepared to take their side. The values side of EU integration is highly problematic, but the red lines not to be crossed have traditionally been quite clear: Williams (*Taking Values Seriously*), *supra* note 26.

[89] *See* P. Craig, *Ultra Vires and the Foundations of Judicial Review*, 57 Cambridge Law Journal 63 (1998).

the context of a different legal order. Conceptualizing the two contrarian processes separately would most likely be more helpful. Contradictory foundational assumptions seem to be at play here: the BVerfG did not need to prove that it has to protect human rights as stated in the Basic Law, while the legality of the ECJ's intervention based on a similar claim – notwithstanding what one thinks about its desirability and justifiability – is bound to be broadly questioned.[90] Whether the extension of the powers of the Court to cover Article 2 TEU is a sufficient justification for such a move[91] is an open question which can be discussed at length. What is crucial, however, is the fact that the whole context of such a discussion will necessarily be radically different, logically, from the deployment of the *Solange* logic by the BVerfG.

2.4. Why choose abstract over concrete?

Thirdly, to side with J.H.H. Weiler yet again, "the essential characteristic of the system is defined by the quotidian and regular, rather than the exceptional."[92] Not everybody has to be Schmittean:[93] the exceptional, the extraordinary, although important, are clearly not the main aspect of the functioning of the law.[94]

To provide for a new approach which would allow for EU intervention only in the extraordinary and exceptional cases of "*systemic* violation",[95] which is what von Bogdandy suggests, seemingly stops short of actually realizing the full potential of the recent developments in the field of EU citizenship, which are quotidian, mundane, and ordinary in nature.[96] The most pressing question which arises upon reading the proposal is: "Whom will this help?" Arguably, citizens have little use in the shield from the extraordinary, from the "failure to abide by the final judgment of the ECHR."[97] Rather, there seems to be a need to deal with the day-to-day infractions of rights, which are often nonsensical or unjustifiable, especially when regarded from the perspective of EU law, but are tolerated at the national level for a number of reasons ranging from sovereignty-inspired thinking to what is referred to as the "constitutional traditions" of the Member States.[98]

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[90] There are good reasons for such contestation. *See e.g.* J. Bengoetxea, *Reasoning from Consequences from Luxembourg*, [in:] H. Koch et al. (eds.), *Europe: The New Legal Realism: Essays in Honour of Hjalte Rasmussen*, Djøf, Copenhagen: 2010, p. 39.

[91] von Bogdandy et al., *supra* note 2.

[92] J.H.H. Weiler, *Prologue: Global and Pluralist Constitutionalism – Some Doubts*, [in:] G. de Búrca & J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism,* Cambridge University Press, Cambridge: 2012, pp. 8, 11 (note 4).

[93] C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von Souveränität*, Duncker & Humblot, Berlin: 1922, 1934.

[94] It is true, however, that the extraordinary can destroy the law. *See e.g.* A. Zwitter, *The Rule of Law in Times of Crisis : A Legal Theory on the State of Emergency in the Liberal Democracy*, 98 Archives for Philosophy of Law and Social Philosophy 95 (2012).

[95] von Bogdandy et al., *supra* note 2, p. 512 (emphasis added).

[96] Kochenov (ed.) (*EU Citizenship and Federalism*), *supra* note 66.

[97] von Bogdandy et al., *supra* note 2, p. 513.

[98] For a brilliant contribution approaching EU law in this vein, e.g. as undermining the Member States through *helping* people, *see* Davies, *supra* note 45.

Alongside the simple truth that the meta-approach will be extremely difficult to utilize in practice, it is submitted that it will not solve the most important problems which EU citizens are facing. The current constitutional context is provided by the general trend of constitutional development, consisting of a move, in the words of Moshe Cohen-Eliya and Iddo Porat, from the "culture of authority" to the "culture of justification".[99] The main problem, which thousands of EU citizens are facing, is not connected to the systemic meta-violations of rights, but to a myriad of most mundane ones, which are not dealt with by national authorities – particularly so in the "deviant" Member States, like Hungary. These are caused by the attempts of the Member States to use recourse to their "constitutional traditions" as a pretext to avoid rationally justifying their policies, which can be viewed as infringing human rights, including the rights (even if only partly) stemming from the EU legal order. In this sense, by opening up an avenue for EU citizens to contest deeply-engrained assumptions in thousands of ordinary cases involving the violations of rights of the most ordinary EU citizens, Article 267 TFEU[100] turned the ECJ into a powerful source of Socratic contestation, which is essential for democracy.[101]

Consequently, what is most needed to make the tandem of rights and citizenship more effective is thus precisely the shaping of the mundane everyday necessity to justify the actions of authorities in the eyes of, also, EU law, as was the case in *Rottmann*, *Ruiz Zambrano* etc. – *not* the drawing of some highly abstract lines in the sand, which is what von Bogdandy suggests. Once again, such lines were really helpful so as not to lose face when giving up authority in the actual *Solange* case – a context entirely different from claiming authority based on the violations of rights.

2.5. The "rebutting presumptions" problem: Who will be the judge?

Also in purely procedural terms, the idea of the exceptionality of the EU's involvement seems to be losing out compared to the approach of a quotidian engagement with EU citizenship rights, with no regard to cross-border situations which the Court is *actually* demonstrating in *Rottmann* and *Ruiz Zambrano.*[102] The rebuttal of a presumption of equal protection of rights,[103] which is deployed by von Bogdandy as an essential practical element in the operation of his proposal, is unlikely to be functional in practice since in the majority of cases it will clearly be up to the national courts to judge if the presumption is indeed rebutted, thus *de facto* disqualifying the ECJ from interven-

[99] M. Cohen-Eliya & I. Porat, *Proportionality and the Culture of Justification*, 59 American Journal of Comparative Law (2011) 463. *See also* their monograph: M. Cohen-Eliya & I. Porat, *Proportionality and Constitutional Culture*, Cambridge University Press, Cambridge: 2013. V. Perju, *Proportionality and Freedom – An Essay on Method in Constitutional Law*, 1(2) Global Constitutionalism 334 (2012).

[100] For a most detailed analysis, *see* M. Broberg & N. Fenger, *Preliminary References to the European Court of* Justice, 2nd ed., Oxford University Press, Oxford: 2014.

[101] M. Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 Law and Ethics of Human Rights 141 (2010).

[102] Kochenov (*A Real European Citizenship*), *supra* note 66.

[103] von Bogdandy et al., *supra* note 2, p. 491.

ing. When von Bogdandy clarifies that the rebuttal of such a presumption will be the "basis […] to seek redress before national courts and the ECJ",[104] it is clear where EU citizens will actually end-up with their grievances in the majority of cases. This point is directly related to the first drawback of the proposal identified above: rebutting the presumption to justify a grab of power is essentially different from doing the same to give up power. Moreover, in a country failing to live up to Article 2 TEU requirements, the court system will most likely be the first target of a corrupt government attack, with an eye toward destroying courts' independence, as happened in Hungary.[105] The local courts of such a country should thus be viewed as a potential source of the problem rather than a possible solution to it, themselves in need of help in terms of the Rule of Law and independence guarantees.[106]

2.6. The crux of the problem: How does EU law enter the picture?

It is essential to realize that any activation of rights through the concept of citizenship can be conceptually sound only if the principle of equality is safeguarded.[107] The bitterest issues of rights' contestation in the EU are not all related to the deprivation of the universally recognized basic rights – although these also arise, as the example of Hungary tellingly demonstrates – but to the fact that (1) essentially different contents of seemingly identical rights are guaranteed by the Member States and the EU at their respective levels, coupled with (2) a starting assumption that falling within the scope of the law at different levels disqualifies EU citizens from invoking anti-discrimination guarantees in a situation when (3) the citizens are, literally, shared by the two legal orders.

This is nothing else but the essence of reverse discrimination,[108] which thus seriously qualifies the workability of von Bogdandy's suggested starting presumption that the Member States "generally safeguard the essential content of fundamental rights",[109] which in turn undermines the proposal even further.

Not surprisingly, this problem did not arise at all in the original *Solange* context, where the rights under the Basic Law and EU Law could be legitimately compared. Contrary to von Bogdandy's suggested presumption, the starting assumption behind reverse discrimination is the *non-comparability* of rights of EU citizens.[110] The ECJ

[104] *Ibidem*, p. 518.

[105] For a disastrous example (when approached from the Rule of Law angle), *see* Case C-286/12 *Commission v. Hungary* [2012] ECR nyr, as analyzed by K.L. Scheppele, *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age,* Part II, *Verfassungsblog*, 09.08.2012, http://www.verfassungsblog.de/de/how-to-evade-the-constitution-the-hungarian-constitutional-courts-decision-on-judicial-retirement-age-part-ii/#.UzceIKhdUVB.

[106] Closa et al., *supra* note 5.

[107] Kochenov, *supra* note 78.

[108] *Ibidem*, pp. 43–52 (and the literature cited therein).

[109] von Bogdandy et al., *supra* note 2, p. 508.

[110] D. Kochenov, *Equality Across the Legal Orders; Or Voiding EU Citizenship of Content*, [in:] E. Guild et al. (eds.), *The Reconceptualisation of European Citizenship*, Martinus Nijhoff, Leiden: 2014, p. 301.

clearly sensed this when deciding *Rottmann* and *Ruiz Zambrano*. In essence, philosophers concur on the fact that a presumption of equality can be as good as a presumption of the lack thereof as long as meaningful deviations from the initial position are allowed.[111] There is not a word in these cases about any cross-border logic[112] simply because it is antithetical to the logic of citizenship, which gradually emerges in full harmony with the Treaty text.[113] Article 20 TFEU, just as Article 9 TEU, is silent about any cross border movements. We are bound by the text of the Treaty and should not read into Part II TFEU what was not included in it by the drafters (e.g. cross-border requirements), who presumably have conferred sufficient powers on the EU to ensure that the text of Part II TFEU is not meaningless.[114]

2.7. The role for the Charter of Fundamental Rights

While von Bogdandy falls back on the fundamental values of the Union in submitting that there is clearly no vacuum outside the scope of Article 51(1) of the Charter,[115] which is limited to instances of the implementation of EU law, the very case-law of the Court which von Bogdandy uses as a starting point seems to supply an illustration of how ephemeral the borderline established by Article 51(1) of the Charter is.[116] While it restricts the EU's human rights involvement, the ECJ is willing to use unwritten rights and principles – such as equality in *Eman and Sevinger*,[117] or the right not to be forced to leave the territory of the Union in *Ruiz Zambrano*[118]– in situations which are undoubtedly *not covered* by the Charter.[119] The Court has clearly demonstrated that it does not regard the Charter as the only source of fundamental rights[120] and – rightly so – that the Charter is not an insurmountable limiting factor on its own fundamental rights jurisdiction. Such developments had been predicted by, *inter alia,* Allard Knook long ago.[121]

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[111] I. Berlin, *Equality*, 56 Proceedings of the Aristotelian Society 301 (1955–1956); D.A. Lloyd Thomas, *Equality within the Limits of Reason Alone*, 88 Mind 538 (1979).

[112] Notwithstanding the direct suggestions made by AG Poiares Maduro in his Opinion to discover such in Case C-135/08 *Rottmann v. Freistaat Bayern* [2010] ECR I-144, Opinion of AG Poiares Maduro, para. 33.

[113] Kochenov & Plender, *supra* note 76.

[114] Kochenov, *supra* note 23.

[115] von Bogdandy et al., *supra* note 2, pp. 509–510.

[116] *Ibidem* (for a detailed analysis).

[117] Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055, para. 71; D. Kochenov, *EU Citizenship in the Overseas*, [in:] D. Kochenov (ed.), *EU Law of the Overseas,* Kluwer Law International, The Hague: 2011, p. 199; L.F.M. Besselink, *Annotation of Case C-145/04 Spain v. U.K., Case C-300/04 Eman en Sevinger, and ECt.HR Case Sevinger and Eman v. The Netherlands*, 45 Common Market Law Review 787 (2008).

[118] Case C-34/09 *Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-1177, para. 44.

[119] Kochenov, *supra* note 63.

[120] van den Brink, *supra* note 63.

[121] A. Knook, *The Court, the Charter, and the Vertical Division of Powers in the European Union*, 42 Common Market Law Review 367 (2005).

The Charter is not the only, but merely *one of* the documents clarifying the substance and the scope of EU-level human rights protection. Consequently, it is possible to argue that beyond the values of Article 2 TEU there can be numerous other sources of inspiration guiding the Court in discovering and protecting fundamental rights outside the limitations imposed by Article 51(1) CFR. It is noteworthy that the Court has never turned to the Charter in its recent groundbreaking case-law on the scope of its jurisdiction in EU citizenship cases. This is not surprising however: the ECJ opened up the potential for *rights* to play the key role in activating EU law, and the Charter is limited to the scope of this very law, which means that the rights deployed by the Court to enlarge the scope of its own jurisdiction are *bound to be* non-Charter rights.[122] Crucially, however, such non-Charter rights are not confined to Article 2 TEU. The proposal's emphasis on the importance of Article 2 TEU, although interesting, is seemingly not indispensable, as the lack of references to Article 2 TEU in the recent EU citizenship case-law seem to demonstrate. Using the rights of EU citizenship as a paradigm of thinking about EU law activation does not seem to require, *per se*, Article 2 TEU fixations. This is good and bad news: EU citizenship and von Bogdandy's proposal need the violations of *rights*, while Article 2 TEU, very importantly, is not about rights only. One can easily imagine a regime which totally disregards Article 2 TEU requirements, yet is attentive to safeguarding basic human rights – a situation Kim Scheppele has been referring to in her numerous talks about Hungary.[123] In such a context the way to bring it in compliance with EU's values will necessarily imply departing from the safety-net of human rights protection.[124]

3. SYSTEMIC INFRINGEMENT PROCEDURE

What Kim Scheppele proposed is, in essence, to use the existing law-enforcement provisions, including Articles 258 and 260 TFEU to make them 'catch' the cases when EU values are infringed through enabling the Commission: a) to bring cases against the Member States which fall short of complying with Article 2 TEU based on a cumulative analysis of their operation in a number of different fields. The idea is that individual instances of compliance and failure to comply with EU law, when approached together, systemically, can produce valuable insights, forming a convincing case. Otherwise put, a sum can be more important than its parts, pointing in the direction of a systemic infringement. To ensure that the Member States found in breach comply with ECJ's decisions it is proposed b) to deduct their fines and lump-sums (following the application of Article 260 TFEU) directly from the moneys destined for the Member States in

[122] For an analysis, *see* Kochenov, *supra* note 63.

[123] *See e.g.* Scheppele, *supra* note 15. For a discussion, *see* Verfassungsblog's special feature Hungary, which originated in Professor Scheppele's analysis: *Verfassungsblog*, *supra* note 8.

[124] Closa et al., *supra* note 5.

question from the EU budget thereby ensuring that the Member States return into the realm of EU values.

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Kim Scheppele's proposal thus adopts a radically different approach compared to von Bogdandy's. First of all, it seems to be more tailored to practice, aiming to make an impact on the ground, with a lesser bias towards doctrinal approaches than that demonstrated by von Bogdandy's 'Reverse *Solange*' proposal. This becomes particularly obvious if we make the trick (suggested in the proposal itself[125]) of substituting Article 2 TEU with Article 4(3) TEU, which establishes the duty of loyalty – a clearly justiciable and much-used principle of EU law.[126] Secondly, similarly with von Bogdandy's proposal what Kim Scheppele suggests is much less revolutionary than it might seem, which is – again just as with von Bogdandy – also a positive feature. This is particularly so if one has an eye on possible implementation. Unlike Vice-President Reding's suggestion to expand the scope of the Charter of Fundamental Rights beyond what Article 51 CFR now allows[127] or Jan-Werner Müller's idea to create a new institution in charge of monitoring and enforcing Article 2 TEU values,[128] Scheppele's proposal does not require a Treaty change or the creation of new EU organs, either within or outside the Treaty framework, and could thus potentially be deployed swiftly. Lastly, and very importantly, it is not directly dependent on the national judiciaries in the troubled Member States, which distinguishes it positively from what von Bogdandy suggests.

Coming from such an established voice advocating the protection of Rule of Law at the national level, Kim Scheppele's proposal definitely enjoys sufficient legitimacy to be taken very seriously. In what follows, this Part will address what is termed here as the "problem" with bundling infringements, the problem of determining the meaning of "values", and the problem with Article 260 TFEU penalties as the main way to enforce the promise and the presumption of Article 2 TEU. This Part demonstrates that two of the three "problems" are largely fictitious and thus moot, but at least one is potentially very real and will need to be addressed before the eventual deployment of the proposal in question.

All in all, given that Kim Scheppele's idea of systemic infringement proceedings does not require Treaty change while at the same time steering clear of supplying a rhetorical justification for a serious power-grab in the context of EU federalism, and in addition allows the Commission to act in its established capacity of the guardian of the Treaties,[129] the proposal is infinitely stronger than the one analyzed in the previous Part.

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[125] Scheppele (*What Can the European Commission Do*), *supra* note 3, p. 5.

[126] For an analysis of the different combinations of these (and related) Treaty provisions in the context of dealing with the crisis of values, *see* Closa et al., *supra* note 5, pp. 9–10.

[127] Reding, *supra* note 9.

[128] Müller, *supra* note 1.

[129] Art. 17(1) TEU.

3.1. The "problem" with bundling

Kim Scheppele's proposal consists of two components. The first concerns the way to deploy Article 258 TFEU to ensure that the problems with living up to the values of Article 2 TEU are effectively caught by the infringement procedure – by bundling infringements to allow the Commission and the Court to see the bigger picture of a systemic infringement. The second component is about the modalities of the collection of fines and lump-sums from the Member States found to be in breach, thus "perfecting" the way Article 260 TFEU is used. Fining is one thing (and is also a separate procedure and a provision in the Treaty); finding a breach is another. It thus makes sense to start the analysis with the suggested bundling practices proposed for determining whether there is a systemic breach.

How innovative will the bundling of infringements be *per se*? The practice is known to the Court and although the Treaties do not contain any direct references to bundling, there seem to be no reasons why we should not be convinced by the reasoning of the ECJ in *Irish Waste*:[130] "the fact that the deficiencies pointed out in one or other case have been remedied does not necessarily mean that the general and continuous approach of those authorities, to which such specific deficiencies would testify where appropriate, has come to an end."[131] Indeed, the whole story of the Commission's guardianship of the Treaties by bringing non-compliant Member States to Court is a story of seeing the patterns in numerous infringements and, eventually, bundling them together, as brilliantly analyzed by Pål Wennerås.[132]

Plenty of current Commission activities in the context of Article 258 TFEU *de facto* imply bundling. Whether it monitors what the Irish do with their waste for 24 years, breaking the law everywhere all over the country – or observes how for ten years French farmers attack and harass strawberry-bearing Spaniards in full sight and with the full complacency of the French state,[133] what we are dealing with is, it seems, nothing but bundling of numerous tiny infringements, which allows the Commission to see the bigger picture. The latter then constitutes the real infringement of the law.

Importantly, however, bundling goes beyond the mere summing up of infringements – it allows discovering a new type of breach based on the reality of discovery and cumulation. AG Geelhoed in *Irish Waste* added an interesting aspect to the infringement story, which was picked up by the Court, stating that the cumulation as such can result in a finding of a *different* infringement.[134] This does not go so far as to state that the cumulation of seemingly innocent practices (as could be the case in bundling legitimate constitutional developments which can constitute a potential breach of EU

[130] Case C-494/01 *Commission v. Ireland* [2005] ECR I-3331.

[131] *Ibidem*, para. 32.

[132] P. Wennerås, *A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (Gap) Infringements, Lump Sums and Penalty Payments*, 43 Common Market Law Review 31 (2006).

[133] Case C-265/95 *Commission v. France* [1997] ECR I-6959.

[134] Case C-494/01 *Commission v. Ireland* [2005] ECR I-3331, Opinion of AG Geelhoed, para 19.

values only if considered *together*), could produce illegal results, but the "cumulation trend" is clear.

The current practice of the ECJ can be interpreted as pointing in the direction of broadening the utilization of bundling practices in the future. Pal Wennerås, one of the leading legal minds in this field, suggested, based on a most meticulous analysis of the law, the bundling and finding of infringements based on the numerous violations of *different* instruments in one sector of the *acquis*,[135] which would make perfect sense since, understood systemically, the infringement procedures in the Treaties have only one objective: to ensure that the Member States comply with the letter and, crucially, with *the spirit* of the law, the latter coming uniquely to light when a number of concrete practices is analyzed. It is impossible to argue convincingly that Article 258 TFEU can only be utilized when *one* particular provision of the Treaties or secondary law of the EU is breached. In this sense, once bundled infringements based on examples coming, simultaneously, from different areas of the *acquis* are possible, it would be only logical to also extend such cross-sectoral bundling in the way suggested by Kim Scheppele to ensure that the values of the Union are observed and safeguarded.

The innovative nature of Kim Scheppele's proposal is thus not in bundling *as such*, but in the audacity with which the practice of bundling potentially ventures into the murky waters where law and policy meet and nothing is as clear as in the context of the straight-forward internal market *acquis*: the proposal suggests an important move to seriously upgrade the current practice. While innovative, it seems, at the same time, to be fully grounded in the law as interpreted by the ECJ – a logical continuation building on the established current practice.

3.2. Determining the exact meaning of values

Moving bundling beyond the *acquis sensu stricto*, to allow it with the aim of ensuring compliance with Article 2 TEU reveals an acute problem, which is profoundly ideological: who is to decide what is democracy, the rule of law etc.? This is the essential problem which the EU is facing at the moment and which has been touched upon in the Introduction to this piece. Crucially, for an infringement of Article 2 TEU be found directly it will be necessary, as Jan Komárek also suggested,[136] to create an *acquis* on values, which does not exist.[137] While the Copenhagen criteria[138] and their progeny reflect an attempt to mould such an *acquis* in the context of the pre-accession assessment of the candidate countries,[139] the practice left much to be desired – the

[135] Wennerås, *supra* note 132, p. 49.

[136] Komárek, *supra* note 50.

[137] E. Herlin-Karnell, *EU Values and the Shaping of the International Legal Context*, [in:] Kochenov & Amtenbrink, *supra* note 20, p. 89; Kochenov, *supra* note 26.

[138] Bull. EC 6-1993, point I.13.

[139] For analyses, *see e.g.* C. Hillion, *The Copenhagen Criteria and Their Progeny*, [in:] Hillion (ed.), *supra* note 13, p. 19; D. Kochenov, *Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law*, European Integration Online Papers 8(10) (2004), p. 1.

Commission clearly demonstrated that at times it had no clue of what it was actually doing, especially in the medium to long-term perspective – which essentially handed us all the problems we are facing today.[140] The myth of this exercise's success is very puzzling: it has clearly been a failure, which brought Hungary and other countries highly problematic from the point of view of values into the Union, only pretending to solve the outstanding problems, thus preferring Potëmkin villages to solid constructions.[141] While there is no *acquis* on values, the Commission failed to shape substance behind Article 2 TEU, which it clearly could have done – if not was *supposed* to do – in the pre-accession context.[142] This provides a viable source of scepticism in thinking about Jan-Werner Müller's suggestion. Can the Commission (or a Copenhagen Commission) do better this time around? There is no guarantee.

Allowing the Court to shape the essence of the values expressed in Article 2 TEU by turning them into law (which is what Kim Scheppele's proposal comes down to in practice) could be a viable strategy. Indeed, this is exactly what has already happened with one important value – namely, the protection of human rights mentioned above. Uniquely ECJ-made, with recourse to a number of inventive, cautious and ultimately convincing tools, it is now codified in a largely unworkable Charter of the Member States' making, which even the Vice-President of the Commission seems to regard as an *obstacle* on the path to treating Article 2 TEU seriously. In the context of the Member States' and the Commission's performance in this area, both being clearly very poor, the Court is probably the most reliable actor to entrust the law of values to, even if the Commission will likewise play a part.

While this might be desirable, some clearer connections with EU law (read the EU's *acquis* as now understood) are seemingly required, besides the sheer desire to impose militant democracy on all the Member States of the Union. One of such factors could be an ability to demonstrate that the changes in the institutional structures and administrative and legal practices of a particular country have a strong potential to hinder the development of EU law, thereby activating the duty of loyalty, which can now be used as a self-standing instrument. A reference to values could be added, too. It is necessary to be acutely aware of the fact that making values a self-standing tool in the hands of the Commission and the Court could *threaten the vital balance of powers* in the context of European federalism.

Numerous different ways of approaching loyalty could be outlined – from outlining the doubts related to the functionality of the judiciary of the Member State in ques-

[140] E.g. D. Kochenov, *The ENP Conditionality: Pre-Accession Mistakes Repeated*, [in:] L. Delcour & E. Toulmets (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood*, Nomos, Baden-Baden: 2008, p. 105.

[141] The enlargement as such, however, was clearly a success. For a broader picture, *see e.g.* M. Vachudova, *Europe Undivided: Democracy, Leverage and Integration after Communism*, Oxford University Press, Oxford: 2005.

[142] For criticism of the Commission's performance, *see e.g.* D. Kochenov, *EU Enlargement and the Failure of Conditionality*, Kluwer Law International, The Hague: 2008.

tion in the context of EU law, to pointing to overtly hostile acts *vis-à-vis* neighbours by harming their citizens (which is the case with Slovakia today, for instance[143]). Creating a catalogue of possible causes of action which would be firmly in the realm of EU law to connect to Article 2 TEU, and which would be capable of supplying indicators of a Member State's failure to comply based on an array of signs, would be a most useful enterprise – akin to the one in which the Dutch section of FIDE engaged in a search for direct effect before *meester* Stibbe came up with *Van Gend en Loos* and then *Da Costa*.[144]

3.3. The problem with penalties

The second part of the proposal – the one dealing with fines and lump-sums and their collection – arouses much more scepticism than the first one, which is roughly rooted in current practice and boasts a clear potential.

This scepticism is chiefly connected to the main assumption that is entertained in the proposal, namely that fining Member States and making them pay works and improves compliance. Much of the existing literature seems to point to the contrary.[145] So while "how to collect the money?" is definitely a legitimate question, it seems to have very little to do with the enforcement of EU values (or, indeed, EU law) in the Member States. Looking at the numbers of fines assessed and the results this brought about in terms of correcting Member State behaviour during the 20 years of operation of the relevant Treaty provision, it is impossible not to agree with a recent study by Brian Jack: "[the story] clearly suggests that [ECJ's] lump sum penalties have not had dissuasive effects."[146] Moreover, the number of times when the provisions have been used so far (14!)[147] clearly points to its profound deficiency not only in design, but also in application (especially knowing the level of some Member States' compliance). Indeed, Jack looks in the direction of Article 7 TEU for possible help in this context, while all the proposals made to date relating to enforcement of the Rule of Law in the Member States take as a starting point the dysfunctional nature of that specific provision,[148] which seems to be the reason why Kim Scheppele looks at fines and Armin von Bogdandy at Article 267 TFEU in the first place. The fact of the matter is that *both* Article 7 and fines are problematic.

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[143] J.-M. Arraiza, *Good Neighbourliness as a Limit to Extraterritorial Citizenship: The Case of Hungary and Slovakia* (unpublished).

[144] As reported by A. Vauchez, *The Transitional Politics of Judicialization: Van Gend en Loos and the Making of EU Polity*, 16 European Law Journal 1 (2010).

[145] P. Wennerås, *Sanctions against Member States under Article 260 TFEU: Alive, but not Kicking?*, 49 Common Market Law Review 145 (2012); B. Jack, *Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?*, 19 European Law Journal 404 (2013). In the context of international relations the trend is the same – sanctions rarely work: C. Portela, *European Union Sanctions and Foreign Policy*, Routledge, London: 2011.

[146] Jack, *supra* note 145, p. 420.

[147] *Ibidem*.

[148] Sadurski, *supra* note 22.

Most importantly, given that the fines are never high enough to crush the Member State financially (for a very good reason),[149] they will most likely not result in compliance in the countries where the issue is politically sensitive – already in the context of the European Neighbourhood Policy the EU learned hard way that while cosmetic changes are for sale, one cannot buy regime change.[150] What is of overwhelming relevance here is that the Article 2 TEU issues are *the most sensitive imaginable*. Fining a country that is having problems with democracy and the Rule of Law for precisely this state of affairs is overwhelmingly tricky. If the problems with democracy and the Rule of Law are real, this means that we are speaking about a country where the bridge between voters' preference and the people in power is either seriously threatened or broken. Using Article 260 TFEU in such a context produces a picture which is quite different from fining a country which has been failing to transpose a directive because of some technical obstacles or out of sheer sloppiness. Most importantly, the costs of (non-)compliance are radically different in the cases of the two countries in question. When the cost of compliance *de facto* is nothing short of a regime change (i.e. switching to democracy and the Rule of Law with all the accountability mechanisms, judicial independence, and the possibility to lose elections), no fine will work: the country will be paying ever increasing amounts. In this context it matters little whether the money is actually recovered into the budget of the Union or not – an issue which is central to the second part of Kim Scheppele's proposal. The whole point of financial penalties is *to bring about compliance*, not to initiate an internal reallocation of funds within the EU. To quote Brian Jack again, "[t]he Court's financial penalty clearly has not had the intended coercive effect."[151] The fact that fines do not actually increase compliance is great news though, since it means that the problem of passing secondary legislation in order to recover the fines into the EU budget does not even arise, making the proposal (its first part at least) virtually immediately deployable.

CONCLUSIONS

Both proposals analyzed in this article are probably less revolutionary than they might seem at the first glance, yet they illustrate quite clearly the variety of the solutions theoretically in front of the Member States and the institutions of the Union for dealing with the crisis of values, which is plaguing the integration exercise at the moment. Besides, the two proposals unquestionably serve as vital reminders of the limitations faced

[149] Communication from the Commission [SEC(2005) 1658] (as updated).

[150] N. Tocci, *Can the EU Promote Democracy and Human Rights through the ENP? The Case for Refocusing on the Rule of Law*, [in:] M. Cremona & G. Meloni (eds.), *The European Neighbourhood Policy: A Framework for Modernisation?*, EUI Working Paper LAW 2007/21, p. 29; A. Magen, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?*, 12 Columbia Journal of European Law 383 (2006).

[151] For a discussion of numerous *Commission v. Greece* cases, *see e.g.* Jack, *supra* note 145, p. 413.

by any initiative aiming at turning Article 2 TEU into a directly enforceable provision. The EU federalism is at a cross-roads and should tread forward in the most delicate way in dealing with the challenges posed by defiant Member States like Hungary.

Given that bundling is already *de facto* practiced by the Commission, enriching this practice to include key principles and values underlying EU law seems doable. This depends more on the institutions' political will than anything else. The same theoretically concerns the possibilities which EU citizenship and human rights provisions open up in front of those local courts willing to test the limits of the scope of EU law in the context of the preliminary reference procedure. Given the very nature of the problems which the two proposals aim to tackle, however, it seems clear that entrusting the organs (including the judiciary) of the problematic Member States with ensuring compliance with Article 2 TEU can exacerbate the problems rather than solve them. The proposal reinforcing the Commission's role in dealing with the problematic Member States is thus instantly preferable.

At the same time, it has to be kept in mind that the eternal problem of whether we want to give a *carte blanche* to the Court becomes particularly acute in the context of the proposals at issue. While the analogy with the story of making human rights protection part of the *acquis* might convince some, it is perfectly imaginable that the choice of the Court as *the* actor to solve the problems which the EU and the Member States are facing – which is implied in both proposals in question – will necessarily be one of the most difficult elements to sell, should either of the two proposals ever become operational. This is particularly so given the EU's own feeble democracy credentials.[152] It is most telling in this respect that the Commission's own vision – albeit preliminary of course – of what the Union should do in the current situation does not make a strong effect on the ECJ at all.

The Court's augmented role can be presented in a particularly problematic light given the fact that we are not speaking about the EU *acquis* here: what we are speaking about is allowing the ECJ to redesign national democracies of the Member States, possibly without, one has to add, any clear and unquestionable authorization in the Treaties. In an atmosphere where there is no underlying ideal of Justice in sight[153] and the *Ethos* of the whole enterprise is befogged beyond being decipherable at times,[154] critics no doubt will rightly jump on this aspect of both proposals, and this notwithstanding the fact that Article 7 TEU has been consistently criticized precisely for the seemingly insufficient role which it accords to the ECJ to play.

Lastly, the emphasis on the recovery of fines and lump-sums in one of the proposals (the other being entirely silent on the *actual* enforcement) fails to demonstrate a clear and direct connection between financial penalties and the defence of values. Indeed, the whole history of EU external relations seems to illustrate quite clearly that sanctions

[152] Closa et al., *supra* note 5, p. 25.

[153] *See* e.g. G. de Búrca, D. Kochenov & A. Williams (eds.), *Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair*, EUI Working Paper LAW 2013/11.

[154] Williams, *supra* note 20.

(and in the proposal in question we are speaking about penalties of an infinitely smaller, negligible state) do not work. In this sense it is clear that the systemic infringement proposal assumes that a Member State against which the proposal is to be deployed is, *per se*, a Member State actually willing to cooperate. The same problem, alongside numerous others as outlined above, also arises in the context of the Reverse *Solange* proposal: what if the Member State is *not* willing to play along with whatever the ECJ finds? The presumption that the problematic Member States will actually become cooperative Member States is most welcome due to its optimism. Yet in practical terms the EU could very soon find – most regrettably – that such a presumption might actually be untenable in practice. The Greek behaviour in the context of compliance with the *acquis* and the Hungarian behaviour in the context of Article 2 TEU seem to be pointing precisely in the direction of such untenability, which weakens the two proposals even further.

A sober analysis of the alternatives demonstrates, however, that the Member States (via Article 7) or the Commission (via the Copenhagen criteria and their progeny) are likely to deliver still much worse results than either of the two proposals analyzed, however unworkable they might seem in practice. The EU and the compliant Member States find themselves in an increasingly difficult position at the moment. The two proposals are thus merely the starting point in a long array of developments to come, which will be indispensable for the successful survival of the Union as we know it in the face of the mounting challenges, leaning further and further away from the basic principles we all hold dear.

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À LA RECHERCHE D'UNE COHÉRENCE PERDUE – POSSIBLE ARGUMENTS FOR THE NON-APPLICATION OF EU LAW IN MEMBER STATES

INTRODUCTION

The question of scope of competences lies at the heart of the functioning of every international organization. The problem surrounding the delineation and exercise of competences by the European Union (EU) has always been a central question of its functioning. The Treaty of Lisbon addressed this issue and increased the role of national parliaments over the exercise of competences by the EU insofar as the subsidiarity principle is concerned.[1] These legal changes, as well as the broad jurisprudence on the legality of Treaty of Lisbon, have brought back the discussion on the legitimate scope of EU competences back to centre stage. Perhaps these factors have inspired other national actors – in particular the Constitutional Courts of some Member States – to question whether various EU legal provisions and/or judgments issued by the Court of Justice of the European Union (CJEU) are applicable in their territories. The main argument for their non-application is based on the *ultra vires* nature of certain EU actions.[2] A new line of argumentation of some national Constitutional Courts also includes references

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[1] *Cf.* O. Le Bot, *L'application des principes de subsidiarité et de proportionalité dans les relations entre le Parlement européen et le Parlement français* and K. Wójtowicz, *Le Parlement polonais et le respect du principe de subsidiarité*, [in:] J. Auvret-Finck (ed.), *Le Parlement Européen après l'entrée en viguer du Traité de Lisbonne*, Larcier, Lisbonne: 2013, pp. 239-252 and 253-264 resp. *Cf. also* A. Grzelak, J. Łacny, *Kontrola przestrzegania unijnej zasady pomocniczości przez parlamenty narodowe – pierwsze doświadczenia* [Control of compliance with the EU principle of subsidiarity by national parliaments – early experiences], 4 Zeszyty Prawnicze 11 (2011).

[2] A. Dyevre, *Judicial Non Compliance in a Non Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084639.

to another element contained in the Treaty of Lisbon – the notion of national identity (Art. 4.2 of the Treaty on the European Union), which is very often intertwined with the notion of constitutional identity, although the latter does not appear in the Treaty. The national identity clause is perceived by some commentators as a new exception to the principle of the supremacy of EU law over national laws.[3]

There are several reasons for this scepticism shown by national Constitutional Courts within the EU. The main important argument for limiting the scope of EU competences is as old as the first *Solange* judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 29 May 1974,[4] which referred to the lack of protection of fundamental rights in the EU (then the EEC). This problem remains actual, as according to Annelli Albi in the struggle to assure the efficiency of EU law some basic human rights are often lost.[5] Along with this a certain competition between the CJEU and national courts takes place as to who is the efficient guardian of fundamental rights.[6] While this type of collision over fundamental rights is relatively rare, especially after the Charter of Fundamental Rights of EU became a binding legal act, it still can happen. This is clearly illustrated in the judgment of the Polish Constitutional Court in the case concerning the implementation of the Framework Decision on the European Arrest Warrant (P 1/05),[7] where the Polish Constitutional Court found it to be in conflict with Art. 55 of the Polish Constitution, that then forbade the expulsion of any Polish citizen to a foreign country. Apart from this old constitutional argumentation, both the failure to ratify the Constitutional Treaty in 2005 and the economic crisis which commenced in 2008 contributed to the growing euro-scepticism in the Member States. A tendency to legislate in sensitive areas, as for example budgetary discipline, has also left to the Member States another argument for taking a negative attitude towards EU activity. Daniel Sarmiento who wrote on this criticism of excessive EU legislative and judicial activity as often cynical and opportunistic, has come up with the formula "*re-nationalization of powers*".[8]

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[3] A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 Common Market Law Review 1417 (2011); the same authors: *Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs*, 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 701 (2010).

[4] BverfGE, vol. 37, p. 271.

[5] A. Albi, *An Essay on How the Discourse on Sovereignty and on the Co-operativeness of National Courts Has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU*, [in:] M. Claes, M. de Visser, P. Popelier, C. Van de Heyning (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, Intersentia, 2012, pp. 41-70.

[6] By analogy, for instance, to the competition between the Italian Constitutional Court and ordinary national courts as effective guardians of the protection of fundamental rights, *see* O. Pollicino, *The Italian Constitutional Court and the European Court of Justice: A Progressive Overlapping between the Supranational and Domestic Dimensions*, [in:] Claes et al., *supra* note 5, p. 102.

[7] Judgment of the Polish Constitutional Court of 27 April 2005, P 1/05, Z.U. 2005/4A/42, O.J. 2005, No. 77, item 680.

[8] D. Sarmiento, *Half a case at a time: Dealing with judicial minimalism at the European Court of Justice*, [in:] Claes et al., *supra* note 5, p. 34.

The aim of this article is to identify the main arguments, including those already raised by national Constitutional Courts as well as those that might be raised by them in the future, used to justify exclusions to the application of EU legal provisions at the national level. The text also analyzes what the legal consequences might be if these arguments to exclude the application of EU law were implemented. First, however, the traditional CJEU approach to collisions between EU norms and the national Constitutional norms needs to be briefly examined.

1. TRADITIONAL WAYS OF RESOLVING COLLISIONS BETWEEN EU LAW AND NATIONAL CONSTITUTIONAL NORMS IN THE JURISPRUDENCE OF THE CJEU

The problem of the collision of at least some EU law provisions with the constitutional norms of EU Member States is by no means a new one.[9] The CJEU seems to have developed two techniques which allow for the relatively peaceful coexistence of national and EU laws, without radical changes on either side (i.e. the EU's or a Member State's), while still recognizing the principle of the primacy of EU law. Both these techniques allow for retaining the concept of the supremacy of EU law without a direct constitutional collision with national solutions. The first technique might be called an "incorporation technique". The national provisions are included (incorporated) into EU law by reference to the general principles of law. The second technique is to invoke an objective justification for an exception to the Treaty rules ("mandatory requirement technique")[10] and generally occurs in the issues concerning the internal market, in particular involving the four freedoms of movement.

Without going into a broader analysis, one can state that the incorporation technique appeared already in 1960s and 1970s and is still in use based on the formula of "general principles of law" (Art. 6.3 TEU). The reference to the general principles, inspired by the common constitutional traditions of Member States, allows for adding a number of constitutional guarantees for individuals to the European legal order.[11] It has also allowed for formulating an open catalogue of general principles of a constitutional

[9] Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125. On the reception of this jurisprudence by national authorities of the then-Member States, see: P. Craig, G. de Búrca, *EU Law. Text, Cases and Materials*, Oxford University Press, Oxford: 2003, pp. 285-314.

[10] For more on the notion of mandatory requirement, also called imperative reasons, *see* J. Molinier, N. De Grove-Valderyron, *Droit du marché intérieur européen*, LGDJ, Paris: 2011, pp. 68-71.

[11] F. Jacobs, *Human rights in the European Union: The role of the Court of Justice*, 26 European Law Review 337 (2001); A. Tizzano, *The Role of ECJ in the Protection of Fundamental Rights*, [in:] A. Arnull, T. Tridimas (eds.), *Contuinuity and Change in EU Law*, Oxford University Press, Oxford: 2008, p. 125. *Cf.* case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1161.

character that might be perceived as "common" to the EU Member States.[12] Thanks to this "incorporation", the risk of collision between national and European norms is avoided because the conflict between an EU norm and a national norm becomes a conflict between two EU norms, and such a collision is usually adjudicated for the sake of the general principle.

The other technique, designated for the purpose of this text as the "mandatory requirement technique", was first used in the *Cassis de Dijon* case.[13] In this technique, the CJEU has considered some national law provisions as worthy of protection despite the fact that they collided with EU norms. They were considered worth retaining because they protected an important public interest (such as consumer safety, national cultural identity, the right to association etc.). This line of jurisprudence allows for such exceptions mainly in the domain of the internal market, and is applied if three conditions are fulfilled by the national provision in question: 1) the provision protects an important public interest recognized in the Treaties or by the CJEU; 2) the protection is necessary for safeguarding that interest; and 3) the protection is proportional with respect to the protected aim. The most commonly-encountered scenario used in application of this technique is that the exception is deemed *prima facie* acceptable, but its application turns out to be disproportional to the declared aim(s). A good example is the set of cases concerning Luxembourg, in which that country tried to limit access to certain professions to Luxembourg citizens only, invoking the argument of protection of national identity.[14] However, it might also happen that the CJEU finds that an interest is worthy of protection and that this protection is determined to be proportional. The *Omega* judgment constitutes an example of this kind of reasoning. The human dignity protected by the German Constitution (*Grundgesetz*) was found worthy of protection, justifying the acceptance of local norms limiting the sale of games where killing of humans was simulated. The CJEU thus upheld a clear limitation on the free movement of goods and services because there existed sufficient reasons for the particular protection of human dignity in Germany.

These traditional techniques of handling a conflict between the EU and national norms are being gradually replaced by a new line of argumentation appearing in the jurisprudence of some Constitutional Courts in the European Union. While it was developed by the CJEU, the presented arguments come mainly from "below", i.e. from the Constitutional Courts of EU Member States.

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[12] R. Tinière, *L'office du juge communautaire des droits fondamentaux*, Brussels 2008, p. 64. Case 4/73 *J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission*, [1974] ECR 491; case 44/79 *Hauer v. Land Nordrhein Westfalen*, [1979] ECR 3727; case 155/79 *AM&S v. Commission*, [1982] ECR 1575; joint cases 46/87 and 227/88 *Hoechst AG v. Commission*, [1989] ECR 2859.

[13] Case 120/78 *REWE Zentral AG v. Bundesmonopolverwaltung (Cassis de Dijon)*, [1979] ECR 649.

[14] Case C-36/02 *Omega*, [2004] ECR I-9609; case C-112/00 *Schmidberger*, [2003] ECR I-5659; case C-145/04 *Spain* v. *United Kingdom*, [2006] ECR I-7917; case C-244/06 *Dynamic Medien*, [2008] ECR I-505. *Cf.* B. Nabli, *L'identité (constitutionnelle) nationale: limite à l'Union européenne?*, 556 Revue de l'Union européenne 214 (2012); G. Martinico, O. Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws,* Edward Elgar, Cheltenham: 2012, p. 190.

2. THE *ULTRA VIRES* ARGUMENT

According to the principle of conferral of powers, the EU has only those competences transferred to it by its Member States. Thus any action undertaken by the Union outside the scope of its conferred competences may be perceived as an action without a legal basis, and hence void and without legal effect. Literally *ultra vires* means an action beyond competences, outside of competences, or in excess of competences. An *ultra vires* action of the EU might take two forms. It can either consist of: 1) "regulations, directives or decisions that are *ultra vires* to the Treaty articles on which they are based"; or 2) it might take the form of an "*ultra vires* interpretation of the Treaty provisions or rules" by EU courts.[15] Until now it has been mainly the second form of *ultra vires* EU action that has been criticised in the jurisprudence of national Constitutional Courts and in some cases has led to an exclusion of application of such jurisprudence. Both of above mentioned forms of *ultra vires* actions could possibly be scrutinized by the EU courts – the first in an action for annulment (Art. 263 TFEU), and the second via preliminary question proceedings (Art. 267 TFEU). According to Art. 263 TFEU, one of the reasons for invalidity of a legislative act of the EU is lack of competences or an improper legal basis. Since the *Foto-Frost* judgment it is agreed that only EU courts should decide upon the validity of any piece of secondary law.[16] However, the EU courts do not usually invoke the *ultra vires* argument, perhaps due to an excessive reading of EU competences (often described as "competence creep"). This might also be due to the superficial nature of the control over the exercise of competences by the EU.[17] However, it would seem that there are no viable arguments against the control of *ultra vires* actions based on 263 TFEU, therefore this argument might be used in a broader manner by applicants seeking to invalidate the EU secondary acts.

As to the Art. 267 TFEU, theoretically if a question of lack of competences arises, the national courts should make a preliminary reference to the CJEU concerning the validity of the regulation, directive or decision in question. The national courts should not independently adjudicate on the EU competences as defined in the founding Treaties, as this is linked with the question of validity of EU legal acts. This line of reasoning was clearly exposed in the Polish Constitutional Tribunal judgment SK 45/09, where the Tribunal stated that it is the role of the CJEU to verify the validity of secondary acts in accordance with the founding Treaties (at the same time stating firmly that it is a role for the Constitutional Tribunal to verity the conformity of those acts with the Polish Constitution).[18]

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[15] P. Craig, *The ECJ and ultra vires Action: A Conceptual Analysis*, 48 Common Market Law Review 395 (2011). M. Beyer-Katzenberger, *Judicial activism and judicial restraint at the Bundesverfassungsgericht: Was the Mangold judgment of the European Court of Justice an ultra vires act?*, ERA Forum (2010), p. 2

[16] According to Catherine Van de Heyning the control of ultra vires should though be "centralized" – C. Van de Heyning, *The European Perspective: From Lingua Franca to a Common Language*, [in:] Claes et al., *supra* note 5, p. 185.

[17] For more on this issue, see Craig, *supra* note 15, pp. 397-400.

[18] SK 45/09 of 16.11.2011, point 2.2 of the motifs.

On the other hand however, the Member States remain the *Herren der Verträge* and are not respecting this centralization of control. Therefore it might come as no surprise that some EU law issues are analyzed at the level of national courts, including issues of EU competences. The question whether an EU action was *ultra vires* was raised by national constitutional courts long before the Lisbon Treaty. The most renowned example remains the *Maastricht* judgment, where the German Federal Constitutional Court claimed the right to review whether the EU institution which issued the act did so within the limits of its competences.[19] The EU Courts have no jurisdiction to invalidate national provisions that are contrary to EU law, however their assessment as to their lack of compatibility with EU law might lead to their non-application. The developing practice of assessment by national constitutional courts of an EU action as *ultra vires* might lead to a similar result (mirroring this reasoning) – the EU act assessed as *ultra vires* would remain valid, but not be applicable within the national jurisdiction so ruling. The growing practice on the part of the CJEU to avoid answering such questions actually posed by national courts (so-called "silent judgments") might be seen to promote the "nationalist repatriation of EU law."[20] Thus such a development on the part of the CJEU in fact forces national courts to undertake the interpretation of EU law on their own[21] and might be said to have manoeuvred them into their *ultra vires* line of argumentation. This comes back to the oft-raised problem of lack of sufficient dialogue between the national courts and the CJEU.

However, in reaction to the changes in both the division and exercise of EU competences introduced by the Lisbon Treaty, the references to *ultra vires* arguments have multiplied. Again, the first of the constitutional courts to raise the argument of review of EU acts with respect to whether they were issued *ultra vires* was the German Federal Constitutional Court. In the paragraph 240 of its *Lisbon* judgment of 30 June 2009, the German Federal Constitutional Court presented a very radical version of the *ultra vires* argument. It stated that it might assess secondary EU legislation in light of the German Constitution, and more precisely it might question such a legal act if it does not respect the subsidiarity principle, the principle of conferral of competences, or the very heart (*Kerngehalt*) of the German Constitutional identity.[22] It thus returned to the first *Solange* judgment setting the limits on EU activity.[23] In its later *Honeywell* judgment of 6 June 2010 the German Federal Constitutional Court was much more con-

[19] Point 49 of the judgment; D. Thym, *Attack or retreat? Evolving themes and strategies of the judicial dialogue between the German Constitutional Court and the European Court of Justice*, [in:] Claes et al., *supra* note 5, p. 238; Van den Heyning, *supra* note 16, p. 186; Sarmiento, *supra* note 8, p. 14.

[20] Sarmiento, *supra* note 8, p. 33.

[21] As this author puts it: "If all they can expect is a minimalist answer from the ECJ, that leaves the search for a good answer in the hands of national courts anyway" (*ibidem*, p. 34).

[22] Pts. 240 and 241 of the judgment.

[23] J. Barcz, *Wybrane problemy związane z wyrokiem niemieckiego Federalnego Trybunału Konstytucyjnego z 30.06.2009 r. na temat zgodności Traktatu z Lizbony z Ustawą Zasadniczą RFN* [Selected problems connected with the judgment of the German Federal Constitutional Court of 30.06.2009 on the Treaty of Lisbon], 9 Europejski Przegląd Sądowy 13 (2009).

ciliatory.[24] In this case it was asked to verify if a CJEU judgment in case C-144/04 *Mangold* was issued *ultra vires*. The German Federal Constitutional Court referred to the principle of conferral as a basis for reviewing the actions of the CJEU, underlining that this review should always view EU actions in a "favourable" light. It went on to state clearly that a legal act of the EU is *ultra vires* only when it causes a significant modification in the division of competences between the EU and its Member States. Thus the principle of supremacy is not absolute – an excessive exercise of competences or an action undertaken without competence cannot prevail over national law. In the *Honeywell* case, the German Federal Constitutional Court changed the way the *ultra vires* control test is applied (which was not very clearly defined in the *Lisbon* judgment). It requires an obvious *ultra vires* on the substance (that is, the vertical division of competences among different EU institutions is not considered, only the substantial division of who acts: the State or the EU), and such control can only be exercised once the CJEU has pronounced itself on the matter.[25] The "obvious" *ultra vires* action refers by analogy to the conditions of non-contractual liability of Member States for infringements of EU law, as understood in the *Köbler* case.[26] In addition, the EU legal act in question should be "manifestly in violation of competences and [the act] is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law."[27] In this way the German Constitutional Court "allowed the CJEU a margin of error."[28] This margin is certainly to be welcomed, because otherwise it would become very easy to undermine the applicability of various EU legal acts or judgments based only on a presumption of lack of competences.

In addition, the Czech Constitutional Court, in its judgment Pl. ÚS 5/12,[29] ruled that the CJEU judgment in the case C-399/09 *Landtová* was *ultra vires*, finding that the object of the case did not fall within the competences transferred to the EU by the Czech Republic. The Czech Constitutional Court found that the CJEU's *Landtová* judgment (the so-called "Slovak pensions judgment") was *ultra vires* and gave its own interpretation of Regulation 1408/71.[30] The contested CJEU judgment was in the form

[24] Thym, *supra* note 19, p. 239.

[25] M. Claes, *Negotiating Constitutional Identity or Whose Identity Is It Anyway?*, [in:] M in Claes et al., *supra* note 5, p. 212; M. Payandeh, *Constitutional Review of EU Law after Honeywell: Contextualising the Relationship between the German Constitutional Court and the EU Court of Justice*, 48 Common Market Law Review 9 (2011); Thym, *supra* note 19, p. 239.

[26] Thym, *supra* note 19, p. 240.

[27] Para. 61 of the judgment, also cited in Thym, *supra* note 19, p. 240.

[28] Claes, *supra* note 25, p. 212.

[29] Judgment Pl. ÚS 5/12 of 31 January 2012 (Slovak Pensions XVII – application of the Agreement between the CR and the SR on Social Security, obligations in international and EU law), available at: http://www.concourt.cz/view/pl-05-12. For a short comment, *see* T. Salvino, *L'ultra-vires-Kontrolle visto dall'est: l'attuazione "degenerativa" della dottrina tedesca*, 13 December 2012, available at www.diritticomparati.it.

[30] P. Malek, *The Czech Constitutional Court and the Court of Justice: Between Fascination and Securing Autonomy*, [in:] Claes et al., *supra* note 5, p. 137. J. Komárek, *Playing with Matches: The Czech Constitutional Court's Ultra Vires Revolution*, available at: www.verfassungsblog.de.

of a preliminary ruling and concerned an allegedly illegal pension supplement (the supplement was to be paid to persons of Czech origin residing in the Czech Republic who were obtaining Slovak retirement pensions according to an international agreement concluded by the Czech Republic and Slovakia after the split-up of Czechoslovakia). The CJEU judgment was used by the Supreme Administrative Court of the Czech Republic to question the case law of the Czech Constitutional Court.[31] The case was thus more a rivalry between the two Czech supreme jurisdictions that were at the root of the conflict than the contestation of the CJEU jurisprudence. In response to the Supreme Administrative Court's negation of its case law, the Czech Constitutional Court refused to apply the *Landtová* case on the basis that it was *ultra vires ratione temporis* (as it concerned a legal solution that was introduced long before the accession of the Czech Republic to the EU). Not surprisingly, the legal reasoning of the Czech Constitutional Court has been said to be influenced by an "unwise" political idea[32] and "motivated by judicial egoism aiming at the preservation of institutional prerogatives placed at peril by the case law of a rival national court."[33] While it can hardly be considered as illuminating on the issue of how to apply the *ultra vires* doctrine in practice, it is significant for having invoked it.

In its judgment of 16 November 2011 (SK 45/09),[34] the Polish Constitutional Tribunal agreed to verify the conformity of Regulation 44/2001 with the Polish Constitution. It stated that in cases where such nonconformity be found, the legal consequences would consist of non-application of the EU norms, not in their invalidity.[35] The Tribunal clearly stated that the validity of EU norms can only be assessed by EU courts. However, if that Tribunal decided that an EU norm was not in conformity with the Polish Constitution, as it was issued *ultra vires*, it would result in the non-application of that norm in Polish territory. The Polish Constitutional Tribunal underlined that such a result would be difficult to reconcile with the obligations of Poland as a Member State of the EU as it would be against Art. 4.3 TEU. It could as well lead to proceedings instituted against Poland by the European Commission under Art. 258 TFEU. Therefore the Polish Constitutional Tribunal underlined that a judgment finding an act to be *ultra vires* should be an *ultima ratio* and that first all possible interpretations concomitant with EU law should be applied.

The above mentioned Constitutional Courts have thus shown a certain reserved acceptance of the technique of non-application of EU law in cases where such law is perceived as having been issued *ultra vires*. While the Czech Constitutional Court judgment in the Slovak Pensions case seems isolated and unlikely to be influential in other

[31] Broader: G. Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 7 German Law Journal 959 (2013).

[32] *Ibidem*, p. 970.

[33] *Ibidem*.

[34] *Cf. generally* S. Dudzik, N. Półtorak, *The Court of the Last Word: Competences of the Polish Constitutional Tribunal in the Review of European Union Law*, 15 Yearbook of Polish European Studies 235 (2012).

[35] Point 2.7 of the judgment's reasons.

judicial fora, nonetheless it applied for the first time what the German Constitutional Court had proposed as a viable but unused hypothesis. The Polish Constitutional Tribunal also considered this possibility, but it did not apply it in the given case. It listed the reasons for precaution in the use of this doctrine, but did not exclude its application. It should be noted however that the *ultra vires* argument might be strengthened by reference to another concept that has been gaining in importance since the entry into force of Lisbon Treaty – the national identity clause in the TEU.

3. NATIONAL IDENTITY ARGUMENT

The TEU contains a provision (in Art. 4(2)) guaranteeing the protection of the national identity of EU Member States. One can legitimately wonder if the protection of such an identity might constitute a reason for deviating from the general principle of the primacy of the EU law over national law. According to von Bogdandy and Schill, the national identity protection clause might ease the relationship between the CJEU and the national Constitutional Courts, as it codifies the existing practice of questioning the primacy of EU law in the national constitutional courts.[36] Martinico and Pollicino find that the national identity clause turns the principle of primacy from an absolute one into a relative one.[37] Other authors even consider (and this attitude is shared by this author) that the national identity clause allows for a deeper control over the exercise of EU competences.[38] This clause might be perceived as a separate limitation on those competences.[39] There are as well opinions questioning the meaning of this clause. Monica Claes presumes that Art. 4(2) TEU does not allow the national courts to unilaterally refuse to apply EU law and it cannot be perceived as a confirmation of the counter-limits of the case law of national constitutional courts. In her opinion, this article does quite the contrary – it "[e]uropeanizes the position of these courts",[40] in a way forcing them to include the European perspective in their reasoning.

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[36] von Bogdandy & Schill, *supra* note 3, pp. 1417 and 1421.

[37] Martinico & Pollicino, *supra* note 14, p. 194 speak of an "uncompromising version" and a "compromising version". These authors also think that the change of attitude towards the primacy principle is partly due to the new accessions to the European Union in 2004 and 2007.

[38] K. Kowalik-Bańczyk, *Tożsamość narodowa – dopuszczalny wyjątek od zasady prymatu?* [National identity – a permissible exception to the principle of primacy?], [in:] N. Półtorak, S. Dudzik, *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, Wolters Kluwer, Warszawa: 2013, pp. 29-50.

[39] K. Wójtowicz, *Zachowanie tożsamości konstytucyjnej państwa polskiego w ramach UE – uwagi na tle wyroku TK z 24.11.2010 r. (K 32/09)* [Retaining the constitutional identity of the Polish State within the EU – comments on the judgment of the Polish Constitutional Tribunal of 24.11.2010 (K 32/09)], 11 Europejski Przegląd Sądowy 4 (2011); A. Wróbel, *Tożsamość narodowa czyli różnorodność w jednorodności* [National identity or diversity in unity], 8 Europejski Przegląd Sądowy 1 (2012).

[40] Claes, *supra* note 25, p. 221. As she puts it, Article 4.2 contains a "mirroring mechanism": "determining the content of the duty imposed on the EU presupposes an assessment of 'national identity', which can only be provided by the Member States themselves."

It should be noted that national identity is not a new notion in the TEU. It existed in the Treaty since its creation (first in Art. F, then in Art. 6(3) TEU), but it was never been used in its previous forms. The present version of Art. 4(2) TEU is much more developed and mirrors Article I-5 of the Treaty establishing the Constitution for Europe, which was not ratified in 2005. In its Lisbon version, the national identity clause contains a description of what constitutes the identity of Member States. The change in the wording of the Article referring to national identity may be construed as a sign of the will to change the until-then marginal role of this provision. This provision in its new version might be seen as a "communautarisation" of the preceding practice of Constitutional Courts to set some limits on the legislative activity of the EU (the counter-limits doctrine).[41] The modification of the meaning of this clause is illustrated as well by the change in its placement in the Treaty. Article 4(2) TEU is placed next to other fundamental structural principles: the principle of conferral of competences (Art. 4(1) TEU, Art. 5(1) TEU) and principle of loyal cooperation (Art. 4(3) TEU). Thus the principle of protection of national identity has become a principle defining the relationship between the European Union and its Member States. Whereas its previous position in Art. 6 TEU linked it with the question of protection of fundamental rights, its present placement may indicate that it belongs to the EU's structural principles, i.e. to setting the scope of the EU's relationship with its Member States. Such a placement could be an indication that the national identity clause is, along with the principle of conferral and the loyalty clause, a rule both establishing and limiting the activities of the European Union.[42]

Interestingly, in the English version of the TEU, the expression "national identities" is used in the plural form. In the French and Polish versions, the same expression is in the singular (French: *identité nationale;* Polish: *tożsamość narodowa*), whereas in the German version the phrase "relevant national identity" is used (German: *jeweilige nationale Identität*). A comparison of just these three linguistic versions indicates that there are a variety of "national identities", corresponding to the variety of Member States. This might cause problems with establishing a clear definition of "national identity" at the EU level, and it might suggest that there are as many national identities as there are Member States.

The (previously-mentioned) introduction in 1993 of the European Union's obligation to respect the national identity of its Member States was supposed to be a guarantee that the Union would not become a federation of states.[43] In the version binding between 1993-2009, providing only for a general obligation to respect national identity, this provision was never applied in the jurisprudence.[44] This lack of interest

[41] *Cf.* Martinico & Pollicino, *supra* note 14, pp. 14, 88, 128, 132-134; the first to invoke the *controlimiti* doctrine were the Italian Constitutional Court in case 183/73 *Frontini* and the German Constitutional Court in case *Solange I.* Some Member States have this type of clause in their constitutions: Italy, Germany, Finland, pp. 35, 41, 45.

[42] S. Platon, *Le respect de l'indentité nationale des États membres: frein ou recomposition de la gouvernance?*, 556 Revue de l'Union européenne 151 (2012), pp. 152, 153.

[43] Nabli, *supra* note 14, p. 211.

[44] For more on the unused potential of that provision, *see* L. Besselink, *National and Constitutional Identity before and after Lisbon*, 1 Utrecht Law Review 37 (2010). *Cf. also* Wójtowicz, *supra* note 36,

in the provision might be explained by systemic issues – Art. 6 TEU was placed in a Treaty that in the 1990's was not perceived as containing directly effective rules. There was no practice to invoke the provisions of that Treaty in disputes involving individuals (in opposition to the broad jurisprudence on the direct effect of the provisions of the Treaty establishing the European Community). According to the data of Besselink, the CJEU did not even once refer to Art. 6(3) TEU during this period.[45]Any efforts to invoke national identity as a basis for deviating from EU rules (as in the *Omega* case) were not based on Art. 6(3) TEU. While the Advocates General referred a few times to Art. 6(3) TEU, it is symptomatic that they did so mainly after the final version of the Treaty of Lisbon was drafted. The Advocates General generally play an important role in defining the role of the national identity principle as a (claimed) possibly legitimate derogation from the principle of supremacy of EU law. Already in 2004 Advocate General Poiares Maduro referred to the national identity clause in the then-Art.6(3) TEU in his opinion for the case *Spain v. Eurojust*,[46] stating that linguistic diversity constitutes one of the guarantees of respect for the national identities of EU Member States.[47] In Advocate General Juliane Kokott's Opinion of 8 May 2008 in joined cases C-428/6 and C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) v. Juntas Generales del Territorio Histórico de Vizcaya and Others*, she clearly stated that:

> (54) Under Article 6(3) EU the European Union must respect the national identities of its Member States. This means that the Union cannot encroach on the constitutional order of a Member State, whether it is centralist or federal, and does not in principle have any influence on the division of competences within a Member State. The revision of that provision by the Treaty of Lisbon expressly mentions respect for the constitutional structures of the Member States by the Union.

However, she added:

> (55) […] a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law.[48]

In a similar, or even stronger, vein Advocate General Poiares Maduro in his Opinion of 8 October 2008 in case C-C-213/07 *Michaniki AE v. Ethniko Symvoulio Radio tileorasisi* wrote:[49]

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p. 6; Platon, *supra* note 42, p. 156. The same reasoning is visible in the case of 24 May 2011, C-51/08 *Commission v. Luxembourg*, referring to Art. 4.2 TEU.

[45] Besselink, *supra* note 44, p. 41.

[46] Case C-160/03 *Kingdom of Spain v. Eurojust.*

[47] Opinion of 16 December 2004 in the case C-160/03 *Kingdom of Spain v. Eurojust*, pt. 35.

[48] In particular, *cf.* case C-212/06 *Gouvernement de la Communauté française et Gouvernement wallon v. Gouvernement flamand*, [2008] ECR I-1683, pt 58. Similarly, see the opinion of the Advocate General Juliane Kokott in case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA).*

[49] Case C-213/07 *Michaniki AE v. Ethniko Symvoulio Radio tileorasis*, [2008] ECR I-9999. On this issue, *see* Martinico & Pollicino, *supra* note 14, p. 84.

> (33) If respect for the constitutional identity of the Member States can thus constitute a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, it can all the more be relied upon by a Member State to justify its assessment of constitutional measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation. It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. Were that the case, national constitutions could become instruments allowing Member States to avoid Community law in given fields.

After the entry into force of the Treaty of Lisbon, the CJEU itself began to refer to Art. 4(2) TEU. In point 92 of its ruling in case C-208/09 *Sayn-Wittgenstein*,[50] it referred to the national identity of a Member State as including "the status of the State as a Republic". However, the CJEU did not directly apply Art. 4(2) TEU – it only referred to the public order clause as an allowable exception to Art. 21 TFEU.[51] In its judgment C-391/09 *Runevič-Vardyn*[52] the CJEU found that national identity also covers the "protection of a State's official national language" (pt. 86). In the most recent case, C-202/11 *Anton Las v. PSA Antwerp NV,* the CJEU, answering a preliminary question in a dispute between a Belgian employer and a Dutch worker, had to assess if the requirements of the Belgian Decree on Use of Languages were in conformity with Art. 45 TFEU. The CJEU first stated that "the objective of promoting and encouraging the use of Dutch, which is one of the official languages of the Kingdom of Belgium, constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Article 45 TFEU" (pt. 27), and concluded that "in order to satisfy the requirements laid down by European Union law, legislation such as that in issue in the main proceedings must be proportionate to those objectives" (pt. 29), which it found not to be the case in the case before it.

In all three cases the CJEU treated the provisions of national laws (respectively: Austrian, Lithuanian and Belgian) in the way in Section II of this paper with respect to legitimate derogations to the freedoms of the internal market. It justified an infringement on the free movement of persons by the protection of an important interest, and then it assessed the proportionality of that protection.

For the time being one must conclude that national identity is only partly defined in the jurisprudence. On the basis of Art. 4(2) TEU one can easily state that national identity should cover the constitutional structure of any Member State. The European Union cannot impose any form of government or interfere into the division of competences between, for instance, a federation and its parts (in countries with a federal structure).[53] The Union is obliged to be neutral towards such issues. The Member States, on the

[50] Case C-208/09 *Sayn-Wittgenstein*, [2010] ECR I-13693.

[51] *Ibidem*, pt. 94.

[52] Case C-391/09 *Runevič-Vardyn*, [2011] ECR I-03787.

[53] Platon, *supra* note 42, p. 154; this author indicates that the judgment in case C-344/01 *Germany v. Commission* [2004] ECR I-2081 is no longer actual.

basis of Art. 4(2) TEU are thus free to retain their diversity as to the form of their state (unitary, regional, federal), form of governance (kingdom, republic), or as to its political system (presidential, parliamentary or mixed).[54] This would link the notion of national identity mainly to the constitutional order of a Member State and would limit it to questions established in national constitutions as to the form of the state. However, this does not exhaust speculation as to what else may be actually covered by the notion of national identity: e.g. specificities of culture, language,[55] habits, religion, rules setting the relations between the church and the state, principles of social and economic functioning of a country, institutional autonomy of a country, etc.[56] Thus the notion of national identity remains an open question that is defined both by the European Union (being an expression of the Treaty) and by each Member State. In the case *Melloni* Advocate General Bot stated that the notion of national identity certainly includes the notion of "constitutional identity",[57] hence this notion also needs to be explored.

4. CONSTITUTIONAL IDENTITY ARGUMENT

While the Constitutional Courts have not referred much up till now to the notion of national identity, for a number of years they have invoked the "constitutional identity" of their nations as an argument for blocking the primacy of EU law over some Constitutional provisions, mainly with respect to the basic or fundamental principles of those Constitutions.[58] References to constitutional identity appeared first in the judgments of the German Federal Constitutional Court in the 1970s: both in *Solange I*[59] and *Solange II*[60] the Tribunal spoke of the *Verfassungsidentität* of the German state, mainly insofar as the protection of fundamental rights contained in the *Grundgesetz* was concerned. In the EU law doctrine, this notion appeared first in the context of a "counter-limits doctrine". Already in 1973 in the *Frag*[61] case, the Italian Constitutional Court stated

[54] Nabli, *supra* note 14, p. 212.

[55] *Cf.* a series of cases started by the Republic of Italy concerning the lack of publication of competition announcements within the EU in the Italian language. Case T-166/07 *Republic of Italy v. Commission*, [2010] ECR II-193; case T-205/07 *Republic of Italy v. Commission*, [2011] ECR II-15; case T-117/08 *Republic of Italy v. Social Economic Committee*, [2011] ECR II-1463. In these cases only the issue of discrimination was raised; the national identity notion was not invoked (Platon, *supra* note 42, p. 153).

[56] C. Mik, W. Czapliński, *Traktat o Unii Europejskiej. Komentarz* [Treaty on the European Union. Commentary], KiK, Warszawa: 2005, p. 91; P. Filipek, [in:] K. Lankosz (ed.), *Traktat o Unii Europejskiej. Komentarz*, C.H. Beck, Warszawa: 2003, p. 136; Wójtowicz, *supra* note 36, p. 6.

[57] Opinion of AG Bot of 12 October 2012 in case C-399/11 *Criminal proceedings against Stefano Melloni*, pt. 137.

[58] R. Donnarumma Maria, *Intégration européenne et sauvegarde de l'identité nationale dans la jurisprudence de la Cour de justice et des cours constitutionnelles*, 4 RFDC 719 (2010).

[59] Case *Solange I*, BVerfGE 37 271, pt. 316.

[60] *Solange II* BVerfG 22 listopada 1986, BVerfGE 73, 339 (2BvR 197/83).

[61] Corte Costituzionale, Sentenza no. 232/1989 of 21.04.1989; *cf.* A. Oppenheimer (ed.), *The Relationship between European Community and National Law: the Cases*, vol. I, Cambridge University Press, Cambridge: 1994, p. 653.

that an EC Regulation would be applied in Italian territory if it is not in conflict with the unbreakable principles of the Italian constitutional order.[62] The French Constitutional Council also referred to constitutional identity while speaking about the protection of fundamental rights in the EU in a case concerning Directive 2001/29.[63] The German Federal Constitutional Court, in its *Lisbon* judgment, clearly stated that the application of EU law is limited when it might lead to the loosening of the constitutional identity of Member States (Ger. *Verfassungsidentität*). In that case it also referred to Art. 4(2) TEU.[64] It repeated its whole argumentation in the *Honeywell* judgment.[65] It can be presumed that this jurisprudence was an inspiration[66] for the Polish Constitutional Tribunal, which not only also referred to constitutional identity in the case K 32/09,[67] but tried to define it. It stated that some state competences cannot be transferred to any other entity, because they form the constitutional identity of the country. It gave a precise list of the competences that cannot be transferred: 1) basic principles of the Constitution, 2) individual rights that define a country's identity, such as human dignity, the principle of rule of law, principle of solidarity; 3) fulfilment of constitutional values; 4) prohibition against the transfer of constitutional competences allowing for definition of a state's regime; 5) prohibition against the transfer of the competence to define the competences (prohibition against resigning from *Kompetenz*).[68] In order to retain the constitutional identity of Poland, in every case of transfer of state competences the procedure for ratification of international agreements should be applied (not just at the accession).[69] While this judgment shows clearly how the very notion of constitutional identity can be imprecise and unclear, still the constitutional identity is, according to the Constitutional Courts, a limit beyond which the European Union cannot go. And the Constitutional Courts guard that identity. The Polish Constitutional Court is clearly referring in its *Lisbon* judgment to a certain common position taken by the different Constitutional Courts that have taken a stance on this issue.

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[62] Decision no. 183/1973, stated after: O. Pollicino, *The Italian Constitutional Court and the European Court of Justice: A progressive overlapping between the supranational and the domestic dimensions*, [in:] Claes et al., *supra* note 5, p. 105.

[63] Judgment of the Conseil Constitutionnel of 27.07.2006: CC Decision no. 2006-540 DC, pt. 17 – *cf*. Besselink, *supra* note 44, p. 47.

[64] BVerG, Urteil des zweiten Senats of 30 June 2009 (2 be 2/08), pt. 219.

[65] BVerG of 2 March 2010; Payandeh, *supra* note 23, pp. 9-38.

[66] One can say that the Polish Constitutional Tribunal is building a certain coalition with other constitutional courts. For more on this issue, *see* K. Kowalik-Bańczyk, *Sending Smoke Signals to Luxembourg – the Polish Constitutional Tribunal in Dialogue with the ECJ*, [in:] M. de Visser, C. Van De Heyning (eds.), *Constitutional Conversations in Europe*, Intersentia, Antwerp: 2012, p. 267.

[67] Judgment of 24 November 2010 in case K 32/09 (Treaty of Lisbon), Z.U. 2010 / 9A / 108, O.J. 2010, No. 229, item 1506.

[68] Pt. 2.1 of the judgment's motifs. *Cf.* K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym* [Transfer of State Competences to International Organizations], Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków: 2007, p. 284.

[69] Pt. 2.1. of the judgment's motifs.

It is impossible to give a clear definition of what is covered by the notion of constitutional identity. It can, however, be stated that this notion does not cover the entire Constitution of any Member State, but rather it refers to its central issues. So it is not the whole of the Constitution that defines a nation's constitutional identity.

It is also worth stressing that the notion of national identity and constitutional identity are often intermingled. The distinction between these notions is not very visible in the jurisprudence of national Constitutional Courts, and because of this some authors treat them as synonyms. According to Leonard Besselink, the Treaty of Lisbon brought about a transfer from a notion of national identity to the notion of constitutional identity.[70] Krzysztof Wójtowicz finds that constitutional identity is the "heart of sovereignty" and "a substantial border for transferring competences". Paweł Filipek is of the opinion that the constitutional identity consists of "statehood, sovereignty, and constitutional order" and that this identity is included in the broader notion of national identity (which also includes cultural, linguistic, possibly religious issues, etc.). Béligh Nabli, however, finds that the national and constitutional identities are completely different notions as they have different origins. The national identity is set in the TEU and the constitutional identity is identified by each Member State individually in accordance with its constitution. The two notions are like two classes which overlap but do not cover each other. Both notions have, however, the same task – they should constitute a limit for the activity of the European Union.[71] Sébastian Platon also finds that these two notions are distinct concepts. The national identity is broader and it has a purely EU scope as it stems from the treaty on the European Union, while the constitutional identity is defined by the Constitutional Courts only.[72]

Considering the above, it would seem that constitutional identity should be perceived as an integral element of national identity, albeit narrower than national identity. Apart from the natural elements of constitutional identity, like the state regime and guarantees for individuals, national identity is also defined by some objective elements existing next to the Constitution: language, culture, history; as well as by some subjective elements particular to each society: sense of belonging and patriotic feelings.[73]

CONCLUSIONS: CONSEQUENCES OF VARIOUS ARGUMENTS FOR THE NON-APPLICATION OF EU LAW

If a national constitutional court finds an EU action (in any of the two above-mentioned forms, i.e. legislative action or legal interpretation) as *ultra vires* or clashing with either national or constitutional identity, the main consequence might be the refusal to apply the contested EU measure. However, the scope of such a refusal might be

[70] Besselink, *supra* note 44, p. 44.
[71] Nabli, *supra* note 14, p. 210.
[72] Platon, *supra* note 42, p. 158.
[73] Nabli, *supra* note 14, p. 211.

questionable – while it refers to the scope of the Member State whose constitutional court is involved, it leaves open the question if any organ of a different Member State might invoke the same argument (*ultra vires*) to refuse the application of the contested measure.

There is no doubt that the EU as a whole has, under Art. 4(2) TEU, a legal obligation to respect the national identity of its Member States. However, the question of who is to define this identity remains open and might have various consequences. This is mainly important for national courts[74] – is it possible for national courts to question the application of an EU act or a provision of an EU act because it clashes with national identity? Such a hypothesis seems very dangerous but cannot be excluded.[75] However, while it is incontrovertible that national identity as a notion contained in an EU treaty should be construed by the CJEU, on the other hand its content is in fact dependent on the particular national context. National identity is thus an EU treaty notion with a national content. According to Art. 19 TEU, the CJEU is not competent to interpret national law, and particularly national Constitutions. This argument would steer toward a position that the CJEU has no powers to define national identity for any particular Member State, and that such definition should remain in the hands of Member States. But in order to determine whether the national identity has been infringed upon, the CJEU would have to define it at some point.[76] This leads to the practical problem whether a Constitutional Court that presumes there is an infringement of the national identity clause by the EU should refer a preliminary question to the CJEU. The practice of recent years clearly shows that we are in need of a peaceful cohabitation between the CJEU and national Constitutional Courts, not a confrontation.[77] For this reason it seems that the content of "national identity" is different for each Member State and it will be a treaty notion with a "national content" – stemming both from Constitution and jurisprudence of a particular country (thus covering also a state's "constitutional identity") as well as from the total historical and cultural context (or baggage) of a particular country. But even such a broad definition of national identity does not justify the efforts undertaken by some Constitutional Courts (including the Polish one) to limit the legislative activity of the EU by holding that, in cases where EU institutions infringe on a country's constitutional identity (which by the way might well be perceived as *ultra vires*), the Member States should not be bound by the provisions of EU law or by a CJEU judgment. This would give national Constitutional Courts unusually broad possibilities to assess if a given provision of EU law should be

[74] Besselink, *supra* note 44, p. 44.

[75] According to Krzysztof Wójtowicz: "incorporation of constitutional state structures into the notion of national identity [in Art. 4.2 TEU] seems to pass the obligation, or perhaps a privilege of defining this notion to the national constitutional courts" (Wójtowicz, *supra* note 36, p. 6).

[76] Platon, *supra* note 42, p. 158.

[77] In the literature one reads of a *relationship of cooperation*, giving as an example the judgment of German Federal Constitutional Court in case *Brunner*: BVerGE 89, 155, of 12 October 1993, 2 BvR 2134, 2159/92; cf. Besselink, *supra* note 44, p. 45.

applied in a particular national legal system. However, in light of the wording of Art. 4(2) TEU, the CJEU should be the final arbiter. Otherwise the EU law risks losing its coherence. It should be up to the CJEU to assess if a given problem is covered by the notion of national identity and state, and whether it is possible to deviate from the application of EU law. The traditional jurisprudence of the CJEU on resolving collisions with important national provisions shows that such a practice has been in place for years, and that the CJEU has already started to define national identity and elaborate the margin of freedom granted to EU Member States.

Invoking these different arguments might be useful for limiting the effects of EU law at two levels. First, invoking *ultra vires* or national identity might be linked with infringement of the principle of conferral and the possibility that the EU has overstepped its competences. Second, the arguments can be invoked to question the exercise of EU competences and to block the application of EU law that infringes on national identity. In each case, national identity marks a limit on European Union action.[78] Therefore a clear definition of national identity is necessary, but unfortunately at the same time hardly possible.

Using such arguments for blocking the application of EU law or the effects of CJEU judgments might be detrimental to the coherence and unified application of EU law in all Member States. Therefore the developing practice of Constitutional Courts to question – for the time being in a rather limited way – the EU competences to act must be closely observed and assessed in a critical way. Otherwise the coherence of EU law might be called into question.

[78] Nabli, *supra* note 14, pp. 211-212.

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CONSOLIDATION OR FRAGMENTATION? EUROPEAN COMPETITION LAW IN THE EU AIR TRANSPORT SECTOR: A POLICY ANALYSIS

INTRODUCTION

Since the entry into force of the Treaty of Rome in 1958, the air transport sector has undergone significant changes, at both the technical and regulatory levels, in order to adapt to the growth and needs of international trade in an ever-globalizing world.[1] The sector has always been specific in terms of its regulatory regime as it involves the application of territorially-limited legal regimes to the global industry.[2] This is the crucial factor which sets the point of departure of this analysis.

From the European Law standpoint, competition can be perceived in its intra-European dimension as well as at the global level. The key issue can be boiled down to the dilemma of whether to promote fragmentation or consolidation of airlines. In a nutshell, a high number of smaller operators boosts competition on the internal market and thus increases consumer choice on short-haul routes.[3] At the same time, due to their relatively small size these carriers are less effective in competition with non-EU airlines (often highly subsidized). On the other hand, consolidation causes the decline of the overall competitiveness of the sector within the EU, but larger carriers gain a competitive edge in the long haul (transcontinental) routes.[4]

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[1] B. Havel, *Beyond Open Skies: A New Regime for International Aviation*, Kluwer Law International, Alphen aan den Rijn: 2009, pp. 23-96; L. Ortiz Blanco, B. van Houtte, *EC Competition Law in Air Transport Sector*, Oxford University Press, Oxford: 1997, p. 1; M. Stainland, *A Europe of the Air? The Airline Industry and European Integration*, Rowman & Littlefield Publishers, Lanham, Boulder, New York, Plymouth, Toronto: 2008, pp. 3 et seq.

[2] *See* A. Cheng-Jui Lu, *International Airline Alliances: EC Competition Law / US Antitrust Law and International Air Transport*, Kluwer Law International, The Hague, London, New York: 2003, pp. 35-53.

[3] Stainland, *supra* note 1, pp. 108-123.

[4] *Ibidem*.

In the post-Lisbon EU, competition is neither a stand-alone goal nor a value in itself, but a means to an end.[5] The axiological hierarchy of the European economic model (with the embedded concept of a social market economy) has given rise to the development of a unique model of competition law, where the twin objectives of market integration and attainment of economic efficiency enjoy equal standing with the goal of achieving consumer welfare.[6] Therefore, the application of competition rules must depart from purely economic efficiency-oriented considerations and require a fundamental value judgment with respect to contradictory but equally important policy objectives.

1. MARKET TRENDS – LEGAL AND OPERATIONAL FACTORS

The air transport sector is by nature oligopolistic. Regardless of the regulatory approach, its operational characteristics form the main contributing factors.[7] Most legacy carriers (FNSC – Full Service Network Carriers) have their networks organized according to the *hub-and-spoke* model. This distribution paradigm is arranged like a wheel, with a main hub airport at its centre and its various flights arranged like spokes. The consolidation of a carrier's operations at a large hub airport has several operational and cost advantages.[8] The airline requires fewer technical facilities (for aircraft maintenance, crew domicile, etc.), which reduces expenses.[9] In other words the large volume of centralized operations leads to economies of scale.[10] Hub operations also offer scheduling advantages, where fixed connecting bank times at the hub allows for simplified fleet and crew scheduling, at the same time creating the possibility to override "bottlenecks" caused by various delays and cancellations by switching passengers and aircraft between flights.[11] And because all air operations are arranged in so-called "waves", short-haul flights serve as a feeder service for long-haul routes, widening an airport's catchment area and improving the load factor and performance of the latter flights.[12]

[5] The notion of "undistorted competition" has been moved from the main body of the Treaties to Protocol no. 27 ([2010] OJ C83/308), which may be perceived as downgrading. *See*, *inter alia*, A. Riley, *The EU Reform Treaty and the* Competition *Protocol: Undermining EC Competition Law*, 28(12) European Competition Law Review 703 (2007).

[6] J. L. Buendia Sierra, *Writing Straight with Crooked Lines: Competition Policy*, [in:] A. Biondi & P. Eckhout (eds.), *EU Law after Lisbon*, Oxford University Press: Oxford 2012, pp. 355 et seq. *See generally* case C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV* [1999] ECR I-3055, para. 36; C-453/99, *Courage* [2001] ECR I-06297, para. 20. See also the decision Microsoft [2007] OJ L32/23, paras. 693-708.

[7] J.G. Wensveen, A.T. Wells, *Air Transportation: A Management Perspective,* (6th ed.), Ashgate, Aldershot: 2007, pp. 175-200.

[8] G. Burghouwt, *Airline Network Development in Europe and its Implications for Airport Planning*, Ashgate, Aldershot: 2007; G. Dobson, P.L. Lederer, *Airline Scheduling and Routing in a Hub-and-Spoke System*, 23(3) Transportation Science 281 (1993).

[9] Wensveen & Wells, *supra* note 7, p. 178.

[10] *Ibidem*.

[11] *See also* J. Veldhuis, *The Competitive Position of Airline Networks*, (3)4 Journal of Air Transport Management 181 (1997).

[12] Burghouwt, *supra* note 8; Dobson & Lederer, *supra* note 8. It must be noted that the hub-and-

Furthermore one may point to the very high base cost of the industry in question, which in turn makes the barriers to entry very high.[13] As a consequence, there is relatively small number of market players.[14] In such an environment, network carriers are (to a various extent) interdependent. Taking these factors into account, J.G. Wensveen and A.T. Wells concluded that airline industry closely approximates an oligopolistic market structure.[15]

All these factors foster cooperation and promote consolidation, but there is another important "external" factor – the effective control and ownership clauses. These broad-ranging provisions in bilateral air service agreements (as well as in internal law) set out the requirement that a certain percentage of the equity and voting rights remain in the hands of citizens of a particular country, and that a certain percentage of executive management be composed of citizens from that State.[16] In the European Union, this threshold is set at the level of 51% of European control and ownership (without distinguishing between Member States).[17] One may say that the clauses in question effectively prevent cross-border mergers. But at the same time, these restrictions have a paradoxical effect. On one hand they indeed limit mergers on a global scale, but on the other hand they foster them in the regional markets (e.g. intra-EU), at the same time pushing airlines towards different forms of cooperation on the transcontinental routes.[18]

Finally one has to mention that recent market developments reveal attempts to circumvent these EU-imposed restrictions. The rapidly expanding Gulf States carriers are investing heavily in various European airlines (Community carriers), and by the acquisitions of shares between these partially-owned operators could try to encroach on the ownership and control restraints.[19] So far no proceeding concerning this practice has been instigated.[20]

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spoke model is to a certain extent diverse in itself (*e.g.* K. Button, *Wings Across Europe: Towards an Efficient European Air Transport System*, Ashgate, Aldershot: 2004, pp. 31-34).

[13] P.P. Belobaba & A. Odoni, *Introduction and Overview*, [in:] P.P. Belobaba, A. Odoni & C. Barnhart (eds.), *The Global Airline Industry*, Wiley & Sons, Chippenham: 2010, p. 6.

[14] Wensveen & Wells, *supra* note 7, p. 175.

[15] *Ibidem*.

[16] Havel, *supra* note 1, pp. 133 et seq.; Cheng-Jui Lu, *supra* note 2, pp. 16-22. *See generally* I. Lelieur, *Law and Policy of Substantial Ownership and Effective Control*, Ashgate, Aldershot: 2003.

[17] As a result of the Open Skies Judgment (which confirmed the Community's external competences in this field), the nationality clause in bilateral agreements between EU Member States and the US was subsequently replaced by the EU Agreement and the concept of "Community Air Carrier". For the most recent legal notion: Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), [2008] OJ L293/3.

[18] V. Corduant & J.L. van de Wouwer, *One Sky for Europe? World-wide Challenges*, Bruylant-Homes International, Brussels: 2001, p. 88; Havel, *supra* note 1, pp. 133 et seq.; Cheng-Jui Lu, *supra* note 2, p. 54.

[19] Etihad of the United Arab Emirates acquired approx. a 29% stake in Air Berlin. This was followed by the acquisition of minority shares in, *inter alia*, Aer Lingus and Jat Airways (later renamed Air Serbia) and a 33.3% stake in the Swiss carrier Darwin Airline. Darwin will be rebranded as Etihad Regional from March 2014. *See generally* F. Alamdari, *Can Gulf Carriers Sustain Their Current Growth Rate?*, [in:] J. O'Connel & G. Williams (eds.), *Air Transport in the 21st Century: Key Strategic Developments*, Ashgate, Farnham: 2011, pp. 15-18.

[20] Although the European Commission expresses concern regarding the possible control of Air Serbia by the new strategic investor – Etihad (Serbia is not in the EU but it belongs to the European Common Aviation Area).

2. POLICY PRIORITIES – COMPETITION LAW PERSPECTIVE

In order to manage this natural tendency towards concentration, the regulatory authority – namely the European Commission (EC) – has to answer the question that was formulated in the introduction: In terms of objectives, what is more beneficial for the EU – concentration or fragmentation? There are three main competition law areas where one of these adopted paradigms must be practically applied: substantive competition law, merger control, and State aid. Before proceeding with the analysis of these policy areas it is crucial to briefly outline the concept of "relevant market".[21] Every competition case involves extensive forensic work encompassing the identification and assessment of the "relevant market" and analysis of the impact (actual or potential) of practices or proposed actions by one or more actors, i.e. in our analysis, airlines. Therefore an adequate definition of the relevant market greatly contributes to the effectiveness of regulatory actions.[22]

For the purpose of EU competition law, the relevant market in the air transport sector can be divided into two subcategories – product market and geographic market.[23] The former is based on the concept of substitutability – whether one product can be replaced by another.[24] It is based on a demand-side approach with a dichotomist distinction between time-sensitive passengers and non-time-sensitive passengers, which roughly means a division between business and leisure travellers. The latter market refers to every combination of city pairs – each of them forms a separate O&D market (O&D is an acronym for point-of-origin and point-of-destination).[25] This approach has been criticized for not adequately portraying the network effect of hub-and-spoke carriers. The Commission acknowledged the existence of this effect, but remained unconvinced about changing its current approach.[26] Therefore all market assessments, upon which the decisions presented below were based, were carried out in accordance with the above-described methodology.

2.1. Antitrust law – airline alliances involving European carriers

The primary challenge for antitrust law in the air transport sector is linked with the phenomenon of airline alliances. Despite the loosening of ownership and control

[21] "Relevant market" for the purpose of competition law need not be consistent with its counterpart in the field of economics. This is due to the difference in situational contexts and functions that both of these classifications serve.

[22] J. Kociubiński, *Relevant Market in Commercial Aviation in European Union*, 1(1) Wroclaw Review of Law, Administration and Economics 12 (2011), p. 20. "Effectiveness" is here broadly defined as the capability of producing a desired result – policy goals.

[23] Commission Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ C372/5.

[24] This can further be divided into supply-side substitution and demand-side substitution. L. Peeperkorn & V. Verouden, *The Economics of Competition*, [in:] J. Faull, A Nikpay (eds.), *The EC Law of Competition*, Oxford University Press, Oxford: 2007, p. 39.

[25] Commission Notice, *supra* note 23.

[26] *United Airlines/US Airways* [2001] OJ C270/131; *Air France/KLM* [2004] OJ C60/5.

requirements (which by all means still remain an important factor), airlines trying to expand outside the EU are still facing legal barriers, as bilateral air traffic agreements restrict services on international long-haul routes, and cabotage rules stop foreign airlines from operating on domestic routes abroad.[27] In order to tap the foreign market (e.g. EU or US), the "external" airlines have to bypass these restrictions – and if merger or direct investment is not an option, they resort to the "second best" solution – alliances.[28] The evidence reveals a measurable inclination on the part of passengers for large carriers with extensive international networks, which offer better connectivity to more destinations.[29] Furthermore, cooperation within alliances leads in many cases to a reduction of the number of stops required and an increase in frequencies available to reach a destination, with the added value of convenience.[30]

Nevertheless, while alliances between international airlines may bring consumer benefits, such alliances are inherently anti-competitive. They clearly fall within the definition of "concerted practices" and "decisions by associations of undertakings" set forth in Art. 101 of the Treaty of the Functioning of the European Union (TFEU).[31] This is especially true in light of the fact that the provision applies to all collusion between undertakings, in whatever form.[32] It is sufficient to establish that the parties involved had mutually agreed to adopt a particular form of conduct.[33] Such behaviour is generally considered illegal (Article 101(1) TFEU) as long as it has an appreciable, distortive effect on competition and trade. However, the prohibition is not absolute.[34] Under Art.

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[27] B. Allan, M. Furse & B. Sufrin (eds.), *Butterworths Competition Law 3*, LexisNexis, London: 2008; V. Rose & D. Bailey, *Bellamy & Child European Union Law of Competition*, Oxford University Press, Oxford: 2013, pp. 390-391; Stainland, *supra* note 1, p. 245.

[28] Havel, *supra* note 1, pp. 162 et seq.; Cheng-Jui Lu, *supra* note 2, p. 56; Corduant & van de Wouwer, *supra* note 23, pp. 88 et seq.; M. Weber & J. Dinwoodie, *Fifth Freedoms and Airline Alliances: The Role of Fifth Freedom Traffic in an Understanding of Airline Alliances*, 6(1) Journal of Air Transport Management 51 (2000), p. 52.

[29] T.H. Oum & A. Taylor, *Emerging Patterns in Intercontinental Air Linkages and Implications for International Route Allocation Policy*, 34(4) Transportation Journal 5 (1995), p. 6; S.W. Wang, *Do global airline alliances influence the passenger's purchase decision?*, 37 Journal of Air Transport Management 53 (2014).

[30] G. Doy, *The Quality of Service Index and Passengers Attitudes to Airline Service Levels*, Working Paper No. 6, Plymouth Polytechnic, Department of Shipping and Transport, Plymouth, UK: 1985; Weber & Dinwoodie, *supra* note 28, p. 53.

[31] The current numbering of Treaty articles will be used throughout this text.

[32] *E.g. Polypropylene* [1986] OJ L230/1, paras. 86-87; C-49/92 P *Commission of the European Communities v. Anic Partecipazioni SpA* [1999] I-04125, para. 108.

[33] C-74/04 P *Commission of the European Communities v. Volkswagen AG* [2006] ECR I-06585, Opinion of AG Tizzano, para. 48.

[34] *E.g.* C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529, para. 24. A practice not capable of appreciably restricting competition will fall outside the ambit of Article 101(1) TFEU according to the so-called *de minimis* principle. *See generally* 5/69 *Franz Völk v. S.P.R.L. Ets J. Vervaecke* [1969] ECR 00295, paras. 5-7; T-6/89 *Enichem Anic SpA v. Commission of the European Communities* [1991] ECR II-01623, para. 216; T-53/03 *BPB plc v. Commission of the European Communities* [2008] ECR II-01333, para. 90.

101(3) TFEU, the Commission can rule inapplicable a finding under Art. 101(1) (and 102 TFEU, which contains prohibition of abuse of dominant position) of an infringement based on an agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices.[35] In order find the general prohibition inapplicable, the agreement or category of agreements between undertakings must contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits.[36] At the same time these practices must not impose restrictions that are not indispensable to the attainment of the objective benefits and must not lead to elimination of competition.[37] In a nutshell, the application of Art. 101(3) TFEU boils down to an assessment whether the beneficial effects to consumers of an alliance outweigh the negative effects on competition.[38]

Ever since liberalization of the European air transport sector kicked-in in the mid-1990s, the European Commission has taken a generally favourable view of cross-border alliances.[39] The argument ran that these forms of cooperation would facilitate the healthy restructuring of the airline industry in Europe and lead to an improvement in the quality of customer service and better cost control.[40] One must take into account that at that time the bulk of European flag carriers were public and contained structural inefficiencies inherited from their pre-deregulation status, when they had operated in a competition-free environment.[41] In other words, European carriers were faced with an urgent need to adjust to the cut-throat global competition, and it was expected that the creation of alliances would foster this adaptation process.

However, initially there was an inadequate substantive and geographical scope to the application of EU competition law to transatlantic alliances. Insofar as cooperation concerned air operations on intra-EU (then Community) routes, the Commission had jurisdiction by virtue of Regulation 3975/87 to apply Article 101 TFEU directly.[42]

[35] Article 9 and 10 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

[36] This stems from the direct wording of Article 101(3) TFEU that is directly applicable under Article 1(2) of Regulation 1/2003.

[37] *See generally* 71/74 *Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geimporteerd fruit "Frubo" v. Commission of the European Communities and Vereniging de Fruitunie* [1975] ECR 00563 on the indispensability criterion and 6/72 *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities* [1975] ECR 00495; T-7/93 *Langnese Iglo GmbH v. Commission of the European Communities* [1995] ECR II-01533 on the no elimination of competition criterion.

[38] *See generally* V. Bilotkach, K. Hüschelrath, *Airline alliances and antitrust policy: The role of efficiencies*, 21 Journal of Air Transport Management 76 (2012).

[39] European Commission, *25th Report on Competition Policy*, Brussels 1995, para. 76; Allan et al., *supra* note 26, p. IX-215. The Commission has prohibited very few alliances. For a notable example, *see SAS/Maersk* [2001] OJ L265/15.

[40] European Commission, *supra* note 39.

[41] Stainland, *supra* note 1, p. 110.

[42] Allan et al., *supra* note 27, p. IX-216.

However, where the alliance concerned cooperation on third country routes, the Commission had only the limited powers inferred by Article 105 TFEU, and as per Article 104 TFEU national authorities have the final say.[43] Finally, with the entry into force in 2009 of Regulation 487/2009, the EC has been given right to establish whether an alliance falls within the prohibition of Article 101(1) TFEU, or whether it should be deemed acceptable in accordance with the exemptions set forth in Article 101(3) TFEU.[44] The EC's scrutiny may cover: joint planning and coordination of airline schedules; consultation on tariffs on scheduled air services; joint operations on new, less busy scheduled air services; slot allocation and airport scheduling; common purchases; or the development and operation of computer reservations systems.[45]

The Commission's decisions with respect to alliances have usually been accompanied by remedies aimed at facilitating *de novo* entrants into the routes affected, in particular by the surrender of a certain number of slot allocations (scheduled times for take-offs and landings) at a given airport.[46] New entries may also be fostered by the obligation imposed on existing airlines to enter into interlining agreements with new entrants in order to facilitate their access to the market.[47] For example, in the most recent *BA/AA/Iberia* decision, which concerned an agreement between British Airways, American Airways and Iberia to establish a joint-venture on certain routes between the US and EU, involving coordination of schedules and pricing as well as revenue sharing, the EC accepted the commitments to make slots available at the London (Heathrow) airport.[48] In earlier cases, slot divestitures were required in the decisions *Air France/Alitalia* and *bmi/Lufthansa/SAS.*[49] One must note that in the current *communautaire* system of slot allocation, new entrants usually begin their operations from the less favourable slots, which in turn has a negative impact on their overall competitiveness in the market.[50] In other words, the system is prone to anti-competitive behaviours, and these are the circumstances that have to be addressed in the impact assessment of an alliance.

Furthermore, parties are required to establish interlining agreements between alliance members and their competitors.[51] These are agreements to handle passengers

[43] *Ibidem*.

[44] Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [2009] OJ L148/1.

[45] *Ibidem*. However, the Commission adopted a new block exemption providing a short term exemption for agreements concerning slot allocation and tariffs. Commission Regulation (EC) No. 1459/2006 of 28 September 2006 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports [2006] OJ 272/3.

[46] *E.g. Lufthansa/SAS* [1995] OJ C200/10; *Austrian Airlines/Lufthansa* [2002] L242/25; *British Airways/TAT (II)* [1996] OJ C316/11.

[47] Rose & Bailey, *supra* note 27, p. 973.

[48] *BA/AA/Iberia* (Case COMP/39596) – Commitments decision of 14.07.2010. Not published in the Official Journal.

[49] *Air France/Alitalia* [2004] OJ L362/17; *bmi/Lufthansa/SAS* [2001] OJ C83/6.

[50] J. Balfour, *Some Lessons from the European Experience*, XX AASL 497 (1995).

[51] *E.g. BA/AA/Iberia*; *Austrian Airlines/Lufthansa*; *KLM/Alitalia* [2000] C96/5.

on itineraries that require multiple airlines.[52] Also commitments cover the opening of frequent flyer programmes to competitors.[53] It goes without saying that this kind cooperation is at the very core of alliancing behaviour, especially with *hub-and-spoke* carriers involved.[54] Thus by forcing airlines into such agreements, regulators are increasing the level of interdependences in the sector concerned.[55] In this vein, one may argue that managing the dependencies and interdependencies can be perceived as a key consideration for functioning in the alliance environment.[56] So one may draw a conclusion that the aforementioned remedies (commitments), by increasing operational links between networks, are creating mutual dependencies, which would seem to suggest an inclination towards concentration.

2.2. Merger control

Merger Control has always been perceived as a primary tool for maintaining market structure in terms of concentration *versus* fragmentation.[57] The reality is bit more complicated, as Merger Control Regulation (ECMR) covers, under certain conditions, both alliances and full mergers. As a rule of thumb, for the acquisition of non-controlling shares, the EU's antitrust law, namely Article 101 TFEU, is applicable (subsequently, scrutiny under Article 102 TFEU may kick-in).[58] In order to fall within the ambit of ECMR, the alliance must fulfil the criteria for a full-functioning joint venture and exceed the ECMR turnover threshold (the so-called Community dimension).[59] Additionally, the Commission only has jurisdiction to control mergers which are deemed to constitute a "concentration", and then only to those that have a turnover-related "Community dimension".[60] Concentration could be further divided into "mergers" when two or more undertakings amalgamate into a new entity, when one entity is absorbed by another, or when an "acquisition of control" takes place, all of which, broadly speaking, involve one undertaking having decisive influence on all strategic decisions of the other

[52] Wensveen & Wells, *supra* note 7, p. 265.

[53] E.g. *Lufthansa/SAS*; *British Airways/TAT*; *Austrian Airlines/Lufthansa*; *KLM/Alitalia*.

[54] *See* B. Kleymann & H. Seristö, *Managing Strategic Alliances*, Ashgate, Aldershot: 2004, pp. 17-29.

[55] B. Kleymann & H. Seristö, *Levels of Airline Alliance Membership: Balancing Risks and Benefits*, 7(5) Journal of Air Transport Management 303 (2001).

[56] *Ibidem*; *cf.* J. Pfeiffer, G. Salancik, *The External Control of Organizations*, Harper & Row, New York: 1978.

[57] *See generally* E. Navarro Varona, *Merger Control in the European Union: Law, Economics and Practice*, Oxford University Press, Oxford: 2005, p. 215.

[58] The relevance of Article 102 TFEU is limited, as its provision applies to situations of abuse of a dominant position, not to the conditions leading to its creation (*e.g.* R. O'Donoghue, J. Padilla, *The Law and Economics of Article 102 TFEU*, Hart Publishing, Oxford, Portland, OR: 2013). Although in the *British Midlands/Aer Lingus* case ([1992] OJ L96/34), interlining was refused on the grounds of infringement of Article 102 TFEU.

[59] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

[60] *Ibidem*, Article 1(3).

party.[61] It should be noted that the concept of control is a very broad-ranging issue and poses serious interpretational conundrums, but for the sake of this discussion the above-described rudimentary outline should suffice.[62]

At the level of value judgment, the assessment of "concentration/control" bears similarities, under substantive competition law, with the assessment of "concerted practices" described above. It similarly includes an analysis whether the increased efficiency gained by a merger outweighs the anti-competitive effect of market concentration and gains in terms of market shares.[63] This requires not only a quantitative assessment of a merger's effects on consumers' welfare, which is a difficult task impregnated with controversy, but also a weighing of consumers' interests in different markets (product market and geographic market).[64] Also, due to the national interests involved mergers will unavoidably fuel public debate (many European flag carriers are public, or the State is the majority shareholder).[65]

Additionally, the Commission's power in applying ECMR is not limited to European Carriers. There are some very significant cases involving US-based operators, and there is common understanding between the EU and US that cooperation between competition authorities on transatlantic markets (approx. 60% of global air traffic) is absolutely necessary. There are also international agreements in place to adequately increase the territorial scope of competition law for transatlantic mergers.[66] Therefore all markets in which carriers/parties to concentration operate, including routes between the EU and third countries, are within the scope of the ECMR. It goes without saying however that the EC's assessment of such transcontinental alliances does not cover their impact on the global competitiveness of the sector, but is limited to the effects felt in the Internal Market.[67]

In recent years the Commission has taken a rather permissive approach towards mergers, clearing British Airways/Iberia,[68] United Airlines/Continental[69] and US Airways/American Airlines.[70] In its most recent decision, in October 2013, the EC approved the acquisition of Olympic Air by Aegean Airlines.[71] The last merger had been

[61] The ECMR's scope does not overlap with the Control & Ownership Clauses. The former is applied to intra-EU operations where there are no nationality restrictions, while in latter case the influx of foreign capital would never be sufficient to grant effective control.

[62] *See also* Navarro Varona, *supra* note 57.

[63] Cheng-Jui Lu, *supra* note 2, p. 91 et seq. *Cf.* O.E. Williamson, *Economies as An Antitrust Defense: The Welfare Tradeoffs*, 58(1) American Economic Review 18 (1968).

[64] F. Fichert, *Remedies in Airline Merger Control – The European Experience*, [in:] W.Y. Szeto, S.C. Wong & N.N. Sze (eds.), *Transport Dynamics: Proceedings of the 16th International Conference of Hong Kong Society for Transportation Studies*, Hong Kong, p. 367.

[65] *See also* E. von den Steinen, *National Interest and International Aviation*, Kluwer Law International, Alphen aan den Rijn: 2006, pp. 156 et seq.

[66] Air Transport Agreement, [2007] OJ L134/4.

[67] Cheng-Jui Lu, *supra* note 2, p. 123.

[68] *British Airways/Iberia* [2010] OJ C141/1.

[69] *United Airlines/Continental* [2010] OJ C255/1.

[70] *US Airways/American Airlines* [2013] OJ C279/6.

[71] *Aegean Airlines/Olympic Air (II)* [2013] OJ C70/30.

previously rejected (2011) due to possible monopolization risks as the case concerned two Greek carriers based at the same airport. However, under the changing economic conditions following the Greek crisis, the parties notified the transaction again in early 2013.[72] The Commission's investigation showed that Olympic Air would be forced to exit the market due to financial difficulties if not acquired by Aegean. So Aegean would have become a dominant provider in any case, thus there was no real point to opposing the merger. Previously the most notable example of consolidation in the airline industry was the merger of Air France with Dutch KLM.[73] Despite expressing serious competition-related concerns, the Commission cleared the merger, which gave rise to the biggest airline in the world at that time in terms of total operating revenues and international passenger-kilometers.[74] Other significant recent cases include the takeover of Austrian Airlines by Lufthansa, and the earlier cases *Sabena/Swissair*,[75] *SAS/Spanair*,[76] *United Airlines/US Airways*,[77] *British Airways/TAT (I)*,[78] and *Aer Lingus/British Midlands*.[79]

Approximately two thirds of all decisions approving mergers were accompanied by remedies aimed at mitigating the anti-competitive effects of concentration.[80] Quite like in antitrust cases, slot divestitures are an absolute condition to boost competition on a market involving merging carriers.[81] Remedies cover the obligation to transfer slots to both competitors and new entrants – depending on the case – but there is surprisingly little factual information available regarding the criteria for determining which slots should be surrendered and how many.[82] One may argue that slot divestiture is the only fail-proof legal tool in support of market opening in the case of mergers. However, most of the would-be competitors who expressed interest in these markets and could potentially take over surrendered slots were too small to begin effective competition.[83] The sheer size of the newly-created merged entities (most notably Air France/KLM) serves as a deterrent to potential competitors.[84] And there is a convincing body of data that

[72] *Aegean Airlines/Olympic Air (I)* [2011] OJ C195/11.

[73] *Air France/KLM* [2003] OJ C60/5.

[74] Havel, *supra* note 1, pp. 457 et seq.

[75] *Sabena/Swissair* [1995] OJ C96/5.

[76] *SAS/Spanair* [2002] OJ C93/7

[77] *United Airlines/US Airways*.

[78] *British Airways/TAT (I)* [1992] C272/5.

[79] *British Midlands/Aer Lingus*.

[80] Fichert, *supra* note 64, p. 363. European Commission (2008) Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

[81] *Air France/KLM*; *Lufthansa/Swiss* [2005] OJ C66/25; *Lufthansa/Eurowings* [2005] OJ C18/22; *Lufthansa/SN Brussels* [2008] OJ C312/15; *Iberia/Vueling/Clickair* [2009] OJ C72/23; *Lufthansa/Austrian Airlines* [2010] OJ C16.

[82] Fichert, *supra* note 564, p. 364.

[83] L. Bonova, D. Koska, A. Specker, *Consolidation of the EU airline industry: How the Commission kept seatbelts fastened in the 2009 airline merger wave*, Competition Policy Newsletter (2009), pp. 53-57.

[84] *Ibidem*; Fichert, *supra* note 64, pp. 365 et seq.

forfeited slots are more likely to be picked up by the existing competitor(s) and used to increase their frequencies rather than by new entrants.[85] This however is in any case beneficial for competition and most likely for consumers as well, probably even more so than if the were slots taken over by *de novo* entrants which, due to their scarcity and size, would be able to offer only rudimentary service in terms of locations and frequencies.[86] This observation is in full accordance with that of the former competition commissioner, Neelie Kroes, who stated that concentration is the way to achieve consumer welfare.[87] However, there is also sufficient incentive for an incumbent to try to regain its monopoly.[88]

Regulatory remedies are considered necessary where regulations are considered a barrier to entry.[89] They may cover a government commitment to change the regulatory regime by, *inter alia*, abolishing capacity restrictions, changing corporate governance rules for the carriers, or opening up routes for carriers from third countries.[90] Generally the Commission's approach goes in line with the industry's natural tendency towards concentration.

2.3. State aid

At the first glance the State aid issue seems to be marginally important to the discussed subject. However, it is particularly relevant in the case of rescue and restructuring aid (R&R aid). Owing to relatively small profit margins, the financial condition of the air transport sector is to a large extent dependent on the global economic situation.[91] Any slowdown in the economy directly translates into a lower passenger yield. Added to this are rising fuel costs, increased operating costs derived from overcapacity on domestic markets, and elevated security costs at commercial airports. These are the root causes of the industry's condition.[92] Although given the sector's susceptibility to so-called "Black Swan Events", 9/11 is perceived as the triggering factor to its worst economic downturn, in fact it only deepened a problem that had already existed. And

[85] *Ibidem*; Balfour, *supra* note 50, p. 497.

[86] It would still be problematic whether such low frequency service would be economically viable for a network carrier. *See* M. Franke, *Competition Between Network Carriers and Low-Cost Carriers: Retreat Battle or Breakthrough to a New Level of Efficiency*, 10(1) Journal of Air Transport Management 15 (2004), p. 17.

[87] Quoted [in:] B. Rumensdorfer, *If Faced with a Forced Landing, Fly as Far into the Crash as Possible: Remarks on the AUA Case*, 1 European State Aid Law Quarterly 49 (2011), p. 51.

[88] F. Fichert, *Predatory Behaviour in Air Transport Markets: A Perpetual Challenge to Competition Policy?*, [in:] C. Esser & M.H. Stierle (eds.), *Current Issues in Competition Theory and Policy*, VWF, Berlin: 2002, pp. 261-275. Due to insufficient resources, a small operator would not be able to resort to "hoarding" by utilizing loss-generating slots just to keep them under the "use-it-or-lose-it" rule (see *supra* note 78), therefore is highly likely that previously surrendered slots would return to the "pool".

[89] Allan et al., *supra* note 27, pp. IX-268.

[90] *Sabena/Swissair*; *Lufthansa/SAS* [1996] OJ L54/28.

[91] B. Vasigh, K. Fleming & T. Tacker, *Introduction to Air Transport Economics: From Theory to Applications*, Ashgate, Farnham: 2013, p. 2.

[92] *Ibidem*, p. 3.

after economic resurgence returned the industry to profitability in 2006-2007, the global financial crisis caused 2008 to be one of the worst years in the history of commercial aviation, after which the market began a slow stabilization around 2010. All these factors drove many air carriers into dire financial situations, requiring a public lifeline.[93]

While the rescue of ailing, inefficient European operators is certainly not laudable and in addition quite contrary to the Treaties' principles, rescue aid aimed at allowing short-term survival, coupled with restructuring aid to restore long-term financial viability, is acceptable under specific, strict circumstances.[94] The European Commission took the view that by aiding in the restructurisation of inefficient carriers, it was in fact transferring the costs of this operation on its competitors. Additionally, the aid must be granted according to the "one-time last-time" principle, which means only one aid grant is allowed every ten years and must not exceed the minimum required to restore a company's financial viability.

Compensatory measures form an integral part of a restructuring plan.[95] Since it is assumed that every aid measure disrupts competition and thus that certain compensation is required in order to restore sound competitive processes,[96] every beneficiary of aid is obliged to scale down its operations by withdrawing from parts of profitable activities, regardless of the structural overcapacity in the sector.[97] There is no predefined threshold of compensation, but it is stipulated that compensatory measures must be in proportion to the distortive effects of the aid, and must not lead to a deterioration in the structure of the market, for example by having the indirect effect of creating a monopoly or a close-knit oligopolistic situation.[98] In the air transport sector, the measures in question predominantly take the form of fleet reduction, capacity reduction (measured in ASK – available seat per kilometre) and slot divestitures, although they are established on a case-to-case basis.[99] Indeed, analysis of the European Commission's case-law shows a significant disparity between levels of compensation. For instance, medium-sized Austrian Airlines was required to reduce capacity by approximately 15%,

[93] *Ibidem*.

[94] Communication from the Commission, *Community guidelines on State aid for rescuing and restructuring firms in difficulty* [2004] OJ L244/2 (R&R Guidelines). There are also sector-specific guidelines from 1994 (Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector [1994] OJ C350/5) and although not formally amended, due to market changes that took place in the meantime they are not used anymore.

[95] M. Lienemeyer, *State Aid to Companies in Difficulty: The Rescue and Restructuring Guidelines*, [in:] M. Sanchez Rydelski (ed.), *The EC State Aid Regime: Distortive Effect of State Aid on Competition and Trade*, Cameron May, London: 2006, pp. 208 et seq.

[96] *See* joined cases C-278/92, C-279/92 and C-280/92 *Spain v. Commission (Hytasa)* [1994] ECR I-04103.

[97] Lienemeyer, *supra* note 85, p. 208. Lack of compensation would cause aid to be considered incompatible with the Internal Market. See case T-16/96 *Cityflyer Express Ltd v. Commission* [1998] ECR II-00757, para. 55.

[98] R&R Guidelines, *supra* note 94, para. 39.

[99] *Ibidem*, para 40.

while the small CSA Czech Airlines' fleet has been slashed in half, which resulted in a capacity reduction of approximately 30%.[100]

In a naturally oligopolistic sector like commercial aviation, the major network carrier is naturally predisposed to jump into routes where the beneficiary of aid ceases operation due to compensation constraints.[101] These major carriers not only have resources readily available, but in addition (as has been described) the slot allocation system in the EU positions new entrants in an unfavourable position in comparison to incumbents.[102] Hence there seems to be a distinct possibility that as a result of the application of the compensatory measures in question the attainment of a dominant position or, in the worst case scenario, a *de facto* monopoly may be facilitated.

Furthermore, such a scenario would be detrimental to consumers' welfare. Not only would there be a decreased choice of available carriers, but prices would go up. This would happen naturally – as soon as an airline's Revenue Management System would register a lack of competition it would start testing different prices and tariff structures aimed at maximisation of profits.[103] The case of the Polish Airline LOT is particularly relevant here.[104] By withdrawing from international connections from regions, the carrier is abandoning these markets to Lufthansa, which is the only carrier able to fill the vacuum. It goes without saying that in the case of monopolisation of these routes, the rules upon which compensation is determined will be infringed.[105] It is the Commission which has the final say in this matter, therefore it is particularly hazardous to adopt compensatory measures prior to a decision, as it may happen that reversal of the negative market effects would be impossible. Therefore, since the European Commission has adopted a policy of "deep cuts" in terms of the compensatory element of R&R aid, while the beneficiaries are kept afloat it is the major players who are reaping the real profits. Generally a pro-consolidation approach is not necessarily bad, but the question remains open whether this policy should be pursued (albeit most likely unintentionally) through R&R aid.

CONCLUSIONS

Currently the European champions (Air France/KLM, British Airways/Iberia and the Lufthansa group) are approaching a quasi-monopolistic position in their domestic markets.[106] However, in order to enable them to effectively compete on the global

[100] *See Austrian Airlines* [2010] OJ L59/1. *Cf also CSA Czech Airlines* [2013] OJ L92/16 and *Air Malta* [2012] OJ L301/29.

[101] *Cf. Air Malta* and the consequences of divestiture of slots at London (Heathrow).

[102] Balfour, *supra* note 50, p. 497.

[103] *See generally* Vasigh, Fleming & Tacker, *supra* note 90, pp. 347 et seq.

[104] Cases: SA.35900 (Rescue Aid); SA.36874 (Restructuring Aid).

[105] R&R Guidelines, *supra* note 94, para 40.

[106] M. Benacchio, *Consolidation in the Air Transport Sector and Antitrust Enforcement in Europe*, 8(2) European Journal of Transport and Infrastructure Research (2008), p. 114.

markets it is necessary to put more emphasis on gains in efficiency.[107] Otherwise these "complacent giants" might not only fail to deliver a truly competitive product on the global market, but could as well divide the intra-EU market among themselves and lose any incentive for expansion. This is of course the worst case scenario and is raised here just for the sake of discussion (and in addition it is highly unlikely in the short- to medium-term), but its underlying logic is sound and it emphasizes the need to apply tailor-made remedies to reflect major changes and the new equilibriums within the industry.[108]

The traditional remedies are generally route-specific, while effects of alliances, mergers or State aid grants are felt not only on the relevant market, but also on other markets not necessarily linked with the core business of the carriers involved.[109] Furthermore it may have cross-sector impact (i.e. on airports, ground handling services, and maintenance services). Therefore it seems prudent to partially depart from the behavioural remedies prevailing today and put more emphasis on structural ones. However, this basic shift would still not guarantee that "incentives" (upon which structural remedies are based) would suffice. Yet one may argue that if this bait doesn't work, no remedy would be able to boost competition.[110]

As has been said, the air transport sector has a natural tendency toward concentration. Therefore one must recognize that regardless of which regulatory approach is adopted, natural market trends and their dynamics cannot be ignored. There is a common misconception that competition law is a very technicist branch aimed at safeguarding only the competitive process in itself. In fact, competition is primarily a means to an end. It is true that sound economic analysis will always be at the very foundation of every competition law case, but at the end of the day, the final say will be based on a value judgment balancing economic and non-economic priorities, both of which enjoy equal legal status. So the question is not whether one is for or against concentration, but rather the point of focus should be on how to manage and guide the naturally-occurring market dynamics to "squeeze" out the maximum benefits for customers' welfare (with no loss of economic efficiency if possible). The blanket statement that increased competition will bring about consumer welfare is, while true in principle, in itself not sufficient to safeguard economic efficiency at an appropriate level.

The problem that immediately arises here is the stratification of passengers/customers. It goes without saying that the business traveller will have different expectations concerning quality of service, flexibility, and frills than someone going on holiday.[111] The distinction between time-sensitive and non-time-sensitive passengers is, despite

[107] M. Tretheway, *The competition effects of airline mergers and alliances*, IATA, April 2008, p. 3.

[108] Benacchio, *supra* note 96, p. 114.

[109] *Cf.* Button, *supra* note 12, p. 8; G. Burghouwt, J.R. Hakfoort & J.R. Ritsema van Eck, *The Spatial Configuration of Airline Networks in Europe*, 9(5) Journal of Air Transport Management 309 (2003).

[110] Benacchio, *supra* note 96, p. 114.

[111] P.P. Belobaba, *Overview of Airline Economics, Markets and Demand*, [in:] Belobaba et al., *supra* note 13, pp. 46-72.

its shortcomings, a helpful analytical tool. But while the identification of customers' preferences certainly has its merits (as well as its analytical value for economists and managers), the final decision belongs to the regulator – the European Commission and the legislative bodies, the European Parliament with the Council. These bodies are *ex lege* obliged to strike a balance between these preferences as they all fall under the notion of consumer welfare.[112]

[112] *See* H. Vedder, *Competition Law and Consumer Protection: How Competition Law Can Be Used to Protect Consumers Even Better – Or Not?*, 17(1) European Business Law Review 83 (2006).

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COMMENTS ON *JANOWIEC AND OTHERS V. RUSSIA*

*Ireneusz C. Kamiński**

THE KATYŃ MASSACRE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: A PERSONAL ACCOUNT

1. HISTORICAL BACKGROUND

In the spring of 1940, the Soviet People's Commissariat for Internal Affairs (NKVD) executed almost 22,000 Polish citizens held as both prisoners-of-war (POWs) and taken prisoner on other grounds after the Soviet Union had marched in September 1939 into the eastern provinces of pre-war Poland following the conclusion of the Molotov-Ribbentrop pact signed between the Soviet Union and Nazi Germany. The shootings followed a decision taken on 5 March 1940 by the Politburo of the Soviet Union's Communist Party, the highest organ of the Soviet Union. A proposal to approve the executions was submitted by Lavrentiy Beria, head of the NKVD. He specified that Polish prisoners were "enemies of the Soviet authorities and full of hatred towards the Soviet system".

These mass killings of Polish citizens are commonly known as the Katyń massacre, named after the forest near Smolensk where the graves of some of the victims were discovered and excavated by Germans in 1943. In fact, the Katyń forest was only one of the execution and burial sites. Bodies of 4,421 prisoners-of-war from the Kozelsk POW camp are buried there. Prisoners-of-war from the Starobelsk (3,820) and Ostashkov camps (6,311) are buried in Pyatikhatki (near Kharkiv) and Mednoye (near Tver) respectively. The circumstances of the executions of the prisoners

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from the prisons of western Ukraine and Belarus (7,305) remain unknown to date.[1]

The precise numbers of murdered prisoners were given in a note which Alexander Shelepin, Chairman of the State Security Committee (KGB), wrote on 3 March 1959 to Nikita Khrushchev, Secretary General of the USSR Communist Party. It specified that a total of 21,857 people had been executed in 1940. Shelepin also recommended the destruction of all personal records of the persons shot by the NKVD.[2] The remaining documents were to be put into a special file, known as "Package Number One", and sealed. In Soviet times, this package was one of the strictest secrets of the USSR and only the Secretary General of the USSR Communist Party had the right of access to the file.

The Politburo's decision to execute Polish citizens was also accompanied by a mass deportation of the families of the prisoners to remote regions of the Soviet Union. About 59,000 people were deported, a significant percentage of them being children.[3]

Following excavations of the graves in the Katyń Forest in 1943, the Soviet authorities put the blame for the massacre on the Germans. In the course of the trial of German war criminals before the Nuremberg International Military Tribunal, the Soviet prosecutor even attempted to charge the German forces with the shooting of "up to 11,000 Polish prisoners in the autumn of 1941 at Katyń". The tribunal did not refer to this charge in its judgement.[4]

Only on 13 April 1990 did the Soviet Union affirm (a communiqué of the TASS official news agency) that the murders had been perpetrated by the NKVD. Several sets of criminal cases were subsequently commenced, which eventually became investigation no. 159 conducted by the Chief Military Prosecutor's Office in Moscow. In 1992 the contents of "Package Number One" were made public, and the following year cop-

[1] There are dozens of books in English on the Katyń massacre, e.g. J.K. Zawodny, *Death in the Forest: The Story of the Katyń Forest Massacre*, University of Notre Dame Press, Notre Dame: 1962 (several editions); A. Paul, *Katyń: The Untold Story of Stalin's Polish Massacre*, C. Scribner's Sons, New York: 1991; A.M. Cienciala, W. Materski, N.S. Lebedeva (eds.), *Katyń: A Crime Without Punishment*, Yale University Press, New Haven: 2008; L. FitzGibbon, *Katyń Forest Massacre*, Anna Livia Books, New York: 1975; J.H. Lauck, *Katyń Killings: In the Record*, Kingston Press, Clifton: 1988; *The Katyń Forest Massacre: Hearings before the Select Committee to Conduct an Investigation of the Facts, Evidence and Circumstances of the Katyń Forest Massacre*, U.S. Govt. Print. Off. 1952.

[2] However, no documents (such as e.g. commonly used destruction protocols) confirm that the destruction of such records has actually been performed.

[3] A directive on the deportation was issued by Lavrentiy Beria on 7 March 1940, two days after the Politburo's decision on the executions. During the Soviet occupation of eastern Poland there were four waves of forced deportations. Relying only on Soviet data, about 330,000-340,000 were deported.

[4] *See* the indictment published at *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. I, pp. 42-54. In the course of the proceedings before the IMT Mr. R.A. Rudenko, Chief Prosecutor for the USSR, referred to the to the Katyń massacre as "the mass shooting of Polish officers by the Fascist criminals in Katyń Forest", "criminal activity" (vol. XV, p. 289), "mass shooting of Poles", "a link in the chain of many bestial crimes perpetrated by the Hitlerites" (vol. XV, p. 290), "atrocities at Katyń" (vol. IX, p. 28).

ies of the documents were handed over to the Polish side (including Beria's motion of 5 March 1940, the Politburo's decision of the same date, the pages removed from the minutes of the Politburo's meeting, and Shelepin's notes from 3 March 1959).[5]

On 13 June 1994, Anatoly Yablokov, head of the prosecutors conducting the Katyń investigation, filed a motion for a decision to discontinue the investigation due to the deaths of those persons responsible for the crime. He proposed that Stalin and the other members of the Politburo be considered guilty of the Katyń massacre on the basis of Articles 6a and 6b of the Charter of the Nuremberg International Military Tribunal, (i.e. guilty of crimes against peace, against humanity, and war crimes), as well as the crime of genocide aimed at Polish citizens. He also argued that those who had carried out illegal orders were subject to harsh penalties (including the death penalty) according to the Criminal Code of the Russian Federation, and that the Katyń massacre was not subject to the statute of limitations. Yablokov's motion was rejected by the Chief Military Prosecutor's Office. Yablokov himself was then dismissed[6] and the Katyń case was assigned to another investigator.

Criminal case no. 159 was eventually closed on 21 September 2004. On 22 December 2004, the Interagency Commission for the Protection of State Secrets classified 36 volumes of the case file – out of a total of 183 volumes – as "top secret" and a further eight volumes as "for internal use only". The decision to discontinue the investigation was given a "top-secret" classification and its existence was only revealed on 11 March 2005 at a press conference given by Mr. A. Savienkov, Chief Military Prosecutor.

2. LEGAL PREPARATIONS FOR THE SUIT AT STRASBOURG

Following the first unofficial news (August 2004) that the Russian investigation on the Katyń massacre was to be closed, I published an article in the Polish daily newspaper *Rzeczpospolita* suggesting that if the information was true, then the relatives of the victims could bring a case against Russia to the European Court of Human Rights (the Court) and rely on several provisions of the European Convention on Human Rights (ECHR or the Convention).[7] After this publication I was contacted by Ms. Witomiła Wołk-Jezierska, daughter of an officer executed at Katyń, who asked me to turn the hypothesis I had written about into reality.

As any application to the Court at Strasbourg must be preceded by legal steps taken at the national level (i.e. the requirement that all available national legal measures be exhausted), we initiated, together with Russian advocates Ms. Anna Stavitskaya and Mr. Roman Karpinskiy from Moscow, two sets of legal proceedings: 1) challenging the

[5] Key Soviet/Russian documents related to the Katyń massacre are available in English in: Cienciala et al., *supra* note 1.

[6] He currently works as a barrister in Moscow.

[7] The *Rzeczpospolita* daily newspaper has special coloured sections, including a "yellow pages" section focused on legal issues. My article was published on 18-19 September 2004, p. C3.

decision to discontinue Russian case no. 159; and 2) for the rehabilitation of the massacre victims under the statute on rehabilitation of victims of political persecutions (Law no. 1761-I of 18 October 1991). For practical reasons, the number of those represented in the two proceedings was limited to the relatives of 10 POWs.

Our requests were rejected by the Chief Military Prosecutor's Office and the Russian courts. They held that no evidence that the Polish citizens had been executed in 1940 existed. What they could only establish was that some Poles had been kept in POW camps in the spring of 1940, but that they then "had disappeared". As a consequence, the relatives represented in the proceedings did not have the required legal standing since the bodies of their family members had not been identified in the Russian investigation. The Russian organs dismissed all evidence referring to the so-called dispatching lists (containing names of the POWs transported on particular dates "to the disposal of the NKVD") and the results of the German excavation works at the Katyń forest in 1943, when the remains of three people were identified.[8] In the rehabilitation proceedings the Russian courts stated that even if "hypothetically" Polish POWs might have been killed, it was not possible to determine the legal basis for the repression against them. All of these decisions were taken despite the fact that memorials had been erected on the burial sites (with personal commemorative plaques for each victim) and that the Russian authorities had on several occasions paid tribute there to those killed.

My vision of the "Katyń complaint" evolved. The core question was whether it was feasible to rely on Article 2 of the ECHR, which protects the right to life. As the ECHR (signed on 4 November 1950) entered into legal force on 3 September 1953 and was ratified by the Russian Federation only on 5 May 1998, it was clear that it could not apply in its substantive aspect to the killings committed in 1940. But the right to life is not limited only to the prohibition against taking someone's life (unless a few rigorously construed exceptions apply). It also requires Member States to conduct an efficient investigation (the so-called procedural obligation) in all cases of violent (or "suspicious") death. Although the Strasbourg Court treated the procedural obligation as autonomous and detachable from the prohibition against taking someone's life,[9] it was not certain

[8] As already mentioned, in 1943 the Germans discovered only one of the burial sites (Katyń forest). Three soldiers out of the group of 10 were held in Kozelsk POW camp and following the execution were buried in the Katyń forest. The results of the 1943 exhumation, which was conducted with the participation of a group of foreign forensic experts, were published in *Amtliches Material zum Massenmord von Katyń*, Berlin 1943.

[9] Therefore, even though a state (through its functionaries) is not found responsible for a given killing (death), that state can be found in violation of Article 2 if there was no required investigation into the killing. *See* e.g. *Kaya v. Turkey*, Application no. 22729/93, Judgement of 19 February 1998, paras. 74-78 and 86-92; *McKerr v. the United Kingdom*, Application no. 28883/95, Judgement of 4 May 2001, paras. 116-61; *Scavuzzo-Hager and Others v. Switzerland*, Application no. 41773/98, Judgement of 7 February 2006, paras. 53-69 and 80-86; *Ramsahai and Others v. the Netherlands*, Application no. 52391/99, Grand Chamber Judgement of 15 May 2007, paras. 286-89 and 323-57. Sometimes a breach of the procedural obligation under Article 2 has been alleged even in the absence of any complaint as to the substantive aspect of Article 2 (e.g. *Calvelli and Ciglio v. Italy*, Application no. 32967/96, Grand Chamber Judgement of 17 January 2002, paras. 41-57; *Byrzykowski v. Poland*, Application no. 11562/05, Judgement of 27 June 2006, paras. 86 and 94-118; *Brecknell v. the United Kingdom*, Application no. 32457/04, Judgement of 27 November 2007, para. 53.

if the obligation to investigate under the ECHR could be invoked when a killing (or suspicious death) occurred before the ratification of the Convention by a given state. In this regard, the Strasbourg case law was contradictory and the relevant decisions of the Court yielded different answers.[10]

In the first ruling, in the joint cases of *Moldovan and Others v. Romania* and *Rostaş and Others v. Romania*, decided in 2001, the Court unanimously dismissed the complaint raised under Article 2 because the anti-Roma riots in issue, which left several people dead, had occurred prior to the ratification of the ECHR by Romania.[11] But only two years later in another case against Romania *(Bălăşoiu v. Romania)*, the Court, by a unanimous vote, declared itself competent *ratione temporis* to deal with the procedural limb of the application (lack of an efficient investigation), despite the fact that the alleged act of cruel treatment (prohibited as torture, inhuman or denigrating treatment under Article 3) had taken place before the accession date.[12]

Although the second Romanian case, decided unanimously by the same chamber, might suggest that the Court was willing to correct its initial mistake made in the first decision (in its legal observations the Romanian government expressly referred the Court to its decision in *Moldovan/Rostaş*), it was rather risky to rely on assumptions not confirmed clearly in the ruling. The subsequent decisions of the Court seemed to have demonstrated that this cautious approach was justified. First, in *Voroshilov v. Russia* and *Kholodovy v. Russia*, the Court unanimously found the applications inadmissible as, respectively, an act of torture[13] and a fatal bomb attack[14] had occurred prior to the ratification date. Second, in *Blečić v. Croatia* the Court held, while dealing with the issue of its temporal competence, that it must be determined "in relation of the facts constitutive of the alleged interference".[15] Although that case concerned property matters, the construct of the "facts constitutive of the alleged interference" might suggest that, when applied to cases under Article 2 and 3, that construct would refer to killings and acts of maltreatment. In other words, it might be assumed that only due to a killing (maltreatment) being the core event would an accessory and resulting obligation to investigate that killing (maltreatment) arise. When the killing (maltreatment) happens before the critical ratification date, there is no procedural obligation whatsoever under the ECHR in the post-ratification period. The *Blečić* ruling was not a preliminary decision on admissibil-

[10] All those answers were given in decisions on the admissibility/non-admissibility of a case. They were not judgements on merits.

[11] *Moldovan and Others v. Romania*, appl. no. 41138/98; and *Rostaş and Others v. Romania*, Application no. 64320/98, both decisions of 13 March 2001.

[12] *Bălăşoiu v. Romania*, Application no. 37424/97, decision of 2 September 2003.

[13] *Voroshilov v. Russia*, Application no. 21501/02, decision of 6 December 2005. In the decision the Court stated that if it had not declared the case inadmissible it would have had to verify whether the applicant had made "credible assertions" as the facts which were contested by the government. This might suggest that if the government does not question the facts of the alleged violation occurring in the pre-ratification period, the Court becomes competent to hear the case with respect to the obligation to investigate.

[14] *Kholodovy v. Russia*, Application no. 30651/05, decision of 14 September 2006.

[15] *Blečić v. Croatia*, Application no. 59532/00, Judgement of 8 March 2006, ECHR 2006-III, para. 77.

ity but a judgment rendered on the merits. Moreover, the case was decided by the most important judicial formation of the Court, reserved for the most important and difficult cases, i.e. the Grand Chamber composed of a group of 17 judges. Although not a right to life case, the *Blečić* judgment had to be treated as an important precedent.

Following these developments it became all the more reasonable to shift the gist of the "Katyń complaint" towards an ECHR provision other than Article 2 protecting the right to life. Our choice went to Article 8, on the right to private and family life. First, it could be argued that the close relatives of the killed (disappeared) persons were entitled to know the circumstances of their deaths and the burial places. Accordingly, the relatives must be given access to the legal proceedings on the killing(s) as well as to the results thereof. Such knowledge was also needed for the success of the rehabilitation procedure instituted in Russia ('good name' being one of the facets of private life under Article 8). Second, the Strasbourg Court seemed willing to broadly use Article 8 entitlements in different factual contexts. Third, an important hint could be drawn from the *Moldovan/Rostaş* decision. While dismissing the allegations raised under Article 2 as temporally inadmissible, the Court had given the applicants satisfaction in a subsequent judgment, finding that there were violations of Articles 3 and 8 of the ECHR.[16] This illustrated that the Court was open to providing some redress to the victims.

In 2007, when the first legal steps taken by the applicants were underway in Russia, the Court delivered, as a chamber, its judgment in *Šilih v. Slovenia*.[17] The case concerned the lack of an efficient investigation into death of the applicants' son, who had died due to alleged medical malpractice. The fatal event happened prior to the ratification of the ECHR by Slovenia. In a unanimous judgment the Court first declared the application admissible under Article 2 of the ECHR, and then found a violation of the procedural obligation inherent in Article 2 (the procedural limb). In this judgment the Court returned to its position from the *Bălăşoiu* decision, and it repeated that approach several months later in *Teren Aksakal v. Turkey*.[18]

As the Court's case law was conflicting at that point, in order to solve the matter the Court had to set a clear standard, convening as the Grand Chamber.[19] This took place on 9 April 2009 in *Šilih v. Slovenia*, reheard by 17 judges following a request lodged by the government. Happily for us, this judgment closely coincided with our receipt

[16] *Moldovan and Others v. Romania (no. 2)*, Application nos. 41138/98 and 64320/98, Judgement of 12 July 2005, ECHR 2005-VII. The violations resulted from the deplorable living conditions of the applicants after they had left their destroyed houses.

[17] *Šilih v. Slovenia*, Application no. 71463/01, Judgement of 28 June 2005. Making use of new procedural opportunities, the Court did not render a separate decision on admissibility but decided to examine the merits of the application at the same time as its admissibility.

[18] *Teren Aksakal v. Turkey*, Application no. 51967/99, Judgement of 11 September 2007. The chamber vote was 5 to 2.

[19] The two dissenting judges in the *Teren Aksakal* case remarked on the Court's conflicting case law and called on the Court to set the standard in a Grand Chamber judgment. It is worth noting that already in that case the chamber intended to relinquish its jurisdiction in favour of the Grand Chamber, but the Turkish government objected to the motion.

of final decisions in our Russian cases (the two sets of proceedings were finished on 25 November 2008 and 29 January 2009).

In the *Šilih* judgment the Court, aware of the precedential character of its ruling, pointed out some general principles applicable when the issue of the temporal reach of the ECHR is raised under Article 2 (paras. 161-163). Having regard to the principle of legal certainty, the temporal jurisdiction of the Court must not be open-ended. It also made clear that the Court could only deal with procedural acts and omissions which occurred after the critical date of ratification. Then the Court proceeded to the most important part of the principles enunciated in the judgment. It held that the Court would be competent to adjudicate on the efficacy of a national investigation if there exists "a genuine connection" between the death and the entry into force of the ECHR for a particular state. This genuine connection is deemed to exist when "a significant proportion" of procedural steps have been or ought to have been carried out after the ratification date (this can be called "the proportion rule"). But the Court also added that it would not exclude that "in certain circumstances" the required connection could be based "on the need to ensure that the guarantees and the underlying values of the ECHR are protected in a real and effective manner" (later called by the Court "the humanitarian rule" or "the Convention values rule").

The judgment of the Grand Chamber was rendered by a huge majority of 15 votes to two. It formulates an original judicial vision of the test (or rather several tests) to be used for answering the question whether the Court has temporal jurisdiction to verify the quality of a domestic investigation when the triggering act (in this case death, but also acts contrary to Article 3) occurred in the pre-ratification period. At the same time, the proposal of the Court is complex. While I accept the final conclusion confirming the Court's temporal competence, I fully share some criticisms of the judgment. The *Šilih* case could (and should) have been decided in a simpler and clearer way by adhering to the existing international case law on temporal jurisdiction, above all that elaborated by the Permanent Court of International Justice and International Court of Justice.[20] Instead, we were offered an unclear road-map with a plenty of confusing signs.[21] This uncomfortable situation was made even worse by several concurrent opinions appended to the judgment.

3. LODGING THE "KATYŃ COMPLAINT" AT STRASBOURG

The "Katyń complaint", which was lodged with the Court as a preliminary application in May and as a final one in August 2009,[22] made use of the *Šilih* narrative. But

[20] *See* E. Bjorge, *Right for the Wrong Reasons: Silih v. Slovenia and Jurisdiction Ratione Temporis in the European Court of Human Rights*, 83 British Yearbook of International Law 115 (2012).

[21] *See e.g.* UK Supreme Court's judgment of 18 May 2011, *In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)*) [2011] UKSC 20. Justice Lord Phillips called the "genuine connection" factor not an easy one and the referral to the Convention values Delphic.

[22] *Wołk-Jezierska and Others v. Russia*, Application no. 29520/09, which later became the case of *Janowiec and Others v. Russia*, Applications nos. 55508/07 and 29520/09.

first of all I referred to the need for protecting the fundamental Convention values as the justification for the Court's competence to hear the allegations under Article 2, the right to life. If, as the Court specified in its case law on hate speech, expressions denying the reality of crimes against humanity and war crimes contravened the core values of the ECHR,[23] all the more the same rationale should apply to such crimes themselves. I also pointed out the drafting history of the ECHR, which clearly specified that the treaty was a reaction to the atrocities committed by the totalitarian regimes during WWII.

I also drew the Court's attention to the fact that the Katyń massacre constituted a crime under international law, not subject to a statute of limitations. At the same time I also submitted that, alternatively, the Court could adjudicate by relying on "the rule of proportion of procedural steps". Some new important activity must have taken place after 5 May 1998 if the Russian authorities had so radically departed from the established historical facts (the murder of Polish citizens) and had accepted the "disappearance version" as their final one.

The applicants also complained that the Russian Federation had violated Article 3, which prohibits degrading and inhuman treatment (by, *inter alia*, denial of the crime and providing contradictory information on the fate of the applicants' relatives, and suggesting that there may have existed due reasons for the execution, if "hypothetically" conducted, in 1940). Additionally, I did not resign from relying on Article 8 (right to private and family life) as a Convention ground for the applicants' entitlement of access to the Russian Katyń investigation.

In November 2009, the application was granted priority status[24] and the case was communicated to the Russian government for comments. In January 2010 the Polish government decided to join the case as a third party.

In principle, the proceedings before the Court are in written form, with an oral hearing before a chamber reserved only for the most difficult cases. In its submissions, the Russian government never called Katyń a massacre or a crime, but consistently referred to it as the "Katyń events". It insisted that neither under national legislation nor international law did there exist any obligation to conduct the Katyń investigation which, actually, was only started as a political "goodwill gesture" to the Polish side. Moreover, Russia refused to provide the Court with a copy of the decision to discontinue Katyń investigation no. 159 (requested by the Court in the application communication document), alleging in could not do so for reasons of its core national security.

In July 2011 the Court declared the application admissible as to the claim under Article 3 (degrading and inhuman treatment). It further decided to join the issue of the applicability of Article 2 (right to life in its procedural aspect) with the analysis on the merits. Additionally, in August the Court asked the parties whether Russia, by not producing a copy of the decision the Court had asked for, had failed to comply with its obligation to cooperate under Article 38.

[23] *Garaudy v. France*, Application no. 65831/01, decision of 24 June 2003, ECHR 2003-IX.

[24] This status was important, as there were almost 150,000 cases awaiting examination by the Court.

The Court decided to hold an oral hearing on 6 October 2011 in Strasbourg. From the questions prepared for the hearing it clearly transpired that the Court was ready for the first time to make use of the clause of the core values of the Convention as a justification for its competence to examine allegations concerning the lack of an efficient investigation. The parties were asked whether "the mass murder of Polish prisoners can be characterised as a war crime?"[25]

The chamber that examined the case was composed of the following judges: Dean Spielmann (President, Luxembourg), Karel Jungwiert (Czech Republic), Boštjan M. Zupančič (Slovenia), Anatoly Kovler (Russia), Mark Villiger (Swiss representing Liechtenstein), Ganna Yudkivska (Ukraine) and Angelika Nußberger (Germany).

4. CHAMBER JUDGMENT

The Court's judgement was delivered on 16 April 2012 at a public hearing in Strasbourg.[26] Russia was found guilty of violations of Article 3 (by its treatment of the applicants not only in a degrading way, but also a severely inhuman way) and Article 38 (lack of due cooperation with the Court). In giving the reasons for its finding of a violation of Article 3 (declared by a vote of 5 to 2; the Russian and Czech judges dissenting), the Court stated that it was "struck by the apparent reluctance of the Russian authorities to recognize the reality of the Katyń massacre, to which the applicants' relatives had fallen victim"; that "the approach chosen by the Russian military courts which consisted in maintaining, to the applicants' face and contrary to the established historic facts, that the applicants' relatives had somehow vanished in the Soviet camps, demonstrated a callous disregard for the applicants' concerns and deliberate obfuscation of the circumstances of the Katyń massacre" (para. 159); that "a denial of the reality of the mass murder reinforced by the implied proposition that Polish prisoners may have had a criminal charge to answer and had been duly sentenced to capital punishment demonstrated the attitude *vis-à-vis* the applicants that was not just opprobrious but also lacking in humanity" (para. 160); that "the Russian authorities did not provide the applicants with any official information about the circumstances surrounding the death of their relatives or make any earnest attempts to locate their burial sites" (para. 164); and that "by acknowledging that the applicants' relatives had been held prisoners in the Soviet camps but declaring that their subsequent fate could not be elucidated, the Russian courts denied the reality of summary executions that had been carried out in the Katyń forest and at other mass murder sites. The Court considers that such approach chosen by the Russian authorities has been contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering" (para. 165). The Court referred also to the corresponding case law of the UN Human Rights

[25] Answers to the questions submitted on behalf of the applicants were published in XXXI Polish Yearbook of International Law 409 (2011).

[26] This is a rare practice, as the Court's judgments are usually sent by mail to the parties and posted on the Court's website.

Committee.[27] At the same time, the Court made a certain unconvincing distinction among the applicants (paras. 153-154). It considered that those born "after the precipitated departure of their fathers to war had never had a personal contact with them", and thus could not be regarded as victims in the context of Article 3.

By a vote of 4 to 3 the Court also held[28] that the Russian Federation's government had breached its obligation of co-operation with the Court under Article 38 on account of its failure to submit a copy of the decision to discontinue Russian investigation into the Katyń massacre. At no point in the proceedings did Russia explain the exact nature of its current core security concerns that required classification of the document regarding the mass scale murder committed by the totalitarian Soviet regime. Moreover, in 2010 it turned out that the identity of the authority which had made the decision, in 2004, to classify the document was far from clear. When Memorial, a Russian human-rights non-governmental organization, instituted domestic proceedings to declassify the decision to close the Katyń investigation, the Interagency Commission for the Protection of State Secrets, which had allegedly – according to government statements – approved the classified status, informed the Moscow City Court that it had actually made no classification decision. This meant that both the Polish side and the Strasbourg Court had been given untrue information by the Russian government. The Court added that it was not convinced that a public and transparent investigation into the crimes of the previous totalitarian regime could have compromised the national security interests of the contemporary democratic Russian Federation. Moreover, the classification decision appears to have been at variance even with the relevant Russian legislation, that expressly precludes any information about violations of human rights by State officials from being classified (section 7 of the State Secret Act of 21 July 1993). The Court concluded that no substantive grounds could have justified the refusal to produce a copy of the requested decision (para. 109).[29] It is also worth stressing that for

[27] UN Human Rights Committee, *Mariam Sankara et al. v. Burkina Faso*, no. 1159/2003, views of 28 March 2006.

[28] The Russian, Czech and Slovenian judges dissented. They voted for non-violation of Article 38, based on the fact that the Court declared itself not competent to adjudicate on the allegations concerning Article 2 (see below). As a copy of the decision to discontinue the Russian Katyń investigation was needed in the framework of allegations raised under Article 2, finding these allegations inadmissible *ratione temporis* should have automatically led to no violation of the State's obligation to co-operate with the Court. In other words, the dissenting judges treated the procedural co-operation obligation as corollary to (and conditional upon) the Court having jurisdiction to hear any substantive claims under the Convention. On the other hand, the position taken in the judgment treated the obligation to co-operate as absolute and independent on the final decision(s) as to the admissibility of allegations.

[29] The Court also added that "even assuming that the Russian Government had legitimate security considerations for keeping secret the text of the requested decision, those could have been accommodated with appropriate procedural arrangements, including a restricted access to the document in question under Rule 33 of the Rules of Court and, *in extremis*, the holding of a hearing behind closed doors. Although the Russian Government was fully aware of those possibilities, they preferred not to make use of them or seek their application by the Court, which is an additional indication of their reluctance to comply with the Court's request under Article 38 of the Convention" (para. 110).

the first time the Court analysed the obligation to co-operate under Article 38 of the ECHR as read in the light of Article 27 of the 1969 Vienna Convention on the Law of Treaties ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty").

On the other hand, by a narrow majority of 4 votes to 3 the Court ruled, with respect to the claim under Article 2, that it was "unable to take cognisance of the merits of the complaint". Although all the judges agreed that the Katyń massacre was, as a war crime, an imprescriptible crime under international law that contradicted the underlying Convention values, the majority held that this feature alone did not suffice to make the Court competent to verify if an effective investigation had been carried out domestically.

The majority (judges from Russia, Ukraine, Slovenia and the Czech Republic) stated that a second element must additionally occur.[30] Information casting new light on the crime's circumstances must come into the public domain in the post-ratification period in order to "provide a bridge from the distant past into the recent post-ratification period" (para. 140). In the opinion of the Court's majority, in the period after 5 May 1998 no such piece of evidence had been produced or discovered. This new-piece-of-evidence requirement was specified for the first time in the Katyń judgment; it did not exist in the previous case law of the Court identifying the pre-conditions of the Court's jurisdiction *ratione temporis*.[31] Had we been aware of such a requirement prior to the hearing we could have undertaken efforts to demonstrate that important new evidence had been transmitted to the Russian investigation after the ratification date (5 May 1998). It is also puzzling how the majority could have ascertained that there was no new evidence surfacing after the critical date, since the substantive part of the Russian investigation no. 159 remained classified.

[30] Actually, however, this approach was accepted by only two judges (Slovenian and Czech), as the Russian and Ukrainian judges adhered to another view (see their concurrent opinion attached to the judgment). According to their ("realistic") view, as several decades elapsed since the Katyń massacre, there were no prospects of success to conduct the investigation effectively. They also made a distinction between two types of investigations: the first one being instituted by "real legal causes", the second one being conducted only due to political or moral motives (as "a political gesture"). In their view, the Convention standards on effective investigation applied only to the first category. These differences of opinions among the majority judges meant that the important standard set in the *Katyń* judgment (the new element test) was actually shared (and authored) only by two judges of the seven judges chamber.

[31] *Brecknell v. the United Kingdom* (Application no. 32457/04, Judgement of 27 November 2007), on which the Court relied, is not a temporal jurisdiction case where the Convention-values test was to be applied, but an entirely post-ratification case raising the issue of what can renew the procedural obligation under Article 2 when the case was stalled for many years. Of some relevance for the *Katyń* case might be the inadmissibility decision in *Çakir and Others v. Cyprus* (Application no. 7864/06, decision of 29 April 2010), rendered in a case where all the circumstances of a killing committed at the time of Cypriot conflict in 1975 were known from the very beginning, but there was no investigation thereafter. The *Katyń* case differed from the Cypriot one, however, because the circumstances of the Katyń massacre were not known and the Soviet Union denied its involvement, putting the blame on the German side. The *Çakir* decision was not referred to by the Court in the *Katyń* judgment.

The approach taken by the majority was criticised by the three-judge minority (Luxembourg, Liechtenstein and Germany). They wrote, in their joint dissenting opinion appended to the judgement, that the Court's position resulted in narrowing the reference to the underlying Convention values. Due to the scale and magnitude of the Katyń massacre, coupled with the attitude of the Russian authorities after the entry into force of the Convention, the Court should have found the complaint under Article 2 admissible and then should have decided that there was a violation of that provision.

The three dissenting judges went on to stress that even if they had adopted the logic of the majority by introducing a second element (sufficiently important material casting new light on the crime and emerging in the post-ratification period), they would still be satisfied that the Court had jurisdiction to examine the complaint. The sudden swings in the Russian investigation (i.e. "murdered soldiers" turning into "disappeared ones") should be interpreted as a new element relevant for the Court.

The dissenting opinion starts with the statement that the case raises "important questions affecting the application of the Convention as well as serious issues of general importance in respect of Article 2 (procedural limb)" [underlined in the original]. This refers *verbatim* to the wording of Article 43(2) of the ECHR, that specifies when a case should be reheard by the Grand Chamber upon a request of a party to the dispute.

And here I add one more piece of information to make the picture of the judgment complete: we learned about the ruling four days before it was officially pronounced at a hearing at Strasbourg. On 12 April 2012, the Russian daily newspaper „Moskovskiye Novosti" published an article "We are not responsible for Stalin". It gave details of the judgment (with some incorrect information as to the voting results) and heralded that the Poles, all in all, had lost the case. Following subsequent interventions of the Polish government (Ministry of Foreign Affairs) and myself at the Court, the President of the Court conducted an investigation into the leak (among others, it interviewed all the judges involved in the case, and a similar scrutiny took place at the Court Registry). Although the investigation did not identify those responsible, we were informed that the Court had introduced new safeguards to prevent such leaks from occurring in the future.

5. REFERRAL OF THE CASE TO THE GRAND CHAMBER

A request for referring the Katyń case to the Grand Chamber was submitted in June 2012.[32] A panel of five judges granted the request on 24 September 2012.[33] A public

[32] This request was supported by the Polish government, a third party to the proceedings.

[33] Requests for a rehearing must not be confused with traditional domestic appeals motions. At Strasbourg, requests are allowed sporadically only when a panel a five judges has been convinced by the requesting party that a case raises a serious question affecting the interpretation or application of the Convention, or a serious issue of general importance. The text of the request is reproduced in XXXII Polish Yearbook of International Law 327 (2012).

hearing was scheduled for 13 February 2013. The parties were invited to state their final legal positions, and again, prior to the hearing, they were sent questions to be answered. The questions, while generally similar to those posed earlier by the chamber, contained three novelties. First, the parties were asked if the Court had jurisdiction to assess the respondent State's compliance with the procedural obligations arising out of Article 2 of the ECHR relating to an investigation into deaths that occurred before the entry into force of the Convention on 3 September 1953. From this question it clearly transpired that the Court intended to consider whether there is a difference, in legal terms, between situations in which the triggering act (death) occurred before, and those in which such act occurred after the date on which the European Convention came into legal force.[34] Second, the Court asked the opinion of the parties on whether a procedural obligation under Article 2 of the Convention can be said to have arisen by reason of any events which took place in the post-ratification period. Third, the Court inquired if the proximity of family ties can be a factor justifying a distinction between two groups of applicants, as was done in the chamber judgment.

In addressing the question whether the Court had jurisdiction to assess the compliance of Russia with its procedural obligations under Article 2, inasmuch as the Katyń massacre predated the entry into force of the Convention, I broadly referred to the case law of several international courts and bodies which was relevant in the context of determining whether competence *ratione temporis* exists to adjudicate temporally "stretched" cases. The Permanent Court of International Justice and the International Court of Justice made the distinction between situations or facts which constitute a source of the rights claimed by a party to a proceeding, and those being a source of the dispute.[35] Whereas the source of the dispute must relate to situations or facts subsequent to the ratification, the source situation giving rise to the rights of a party to the dispute may originate in the pre-ratification period.[36] Applying this reasoning to the "Katyń case", I argued that the dispute was not about the killings that occurred before the critical date of the Convention's ratification by Russia, but about Russia's subsequent failure to effectively investigate the 1940 massacre. The killings constitute the source of the right claimed by the applicants, i.e. the right to have the killings investigated by the State in a proper and effective manner. Had it not been for the killings, the procedural obligation to investigate would not have arisen. Only in this sense is the dispute related to

[34] After the Grand Chamber's *Šilih* judgment, the Court delivered 21 judgments concerning investigations into deaths that predated the ratification date of the Convention. In all these cases the Court, adjudicating as a chamber, has unanimously found itself to be temporarily competent, and thereby strongly confirmed the position taken in *Šilih*. The Katyń complaint was the first case before the Court in which the deaths as a triggering event took place prior to the Convention's coming into legal force.

[35] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 4 April 1939, PCIJ Rep. Series A/B No. 77, para. 87; *Jurisdictional Immunities of the State: Germany v. Italy*, order of 20 July 2010.

[36] *Phosphates in Morocco*, Judgment of 14 June 1938, Series A/B no. 74, p. 24; *Right of Passage over Indian Territory, Portugal v. India*, Judgment of 12 April 1960, ICJ Reports 1960. p. 33/35); *Electricity Company of Sofia and Bulgaria*, para. 87, and a summary of the PCIJ case law in *Certain Property, Liechtenstein v. Germany* [preliminary objections, judgment], Judgment of 10 February 2005, ICJ Reports 2005, para. 41.

the pre-accession facts. But the source of the actual dispute, i.e. the non-fulfilment of the procedural obligation, is located squarely in the post-ratification period. What is also important is that the obligation to investigate (to establish the circumstances surrounding the killings and to draw the required consequences therefrom) was not a legal novelty introduced upon the entry of the Convention into legal force, but resulted from universally binding international law in effect at the time the massacre had occurred. As is clearly evidenced by the post-war trials, international law, as it existed in 1939, made not only States but also individuals responsible for war crimes.[37]

This procedural obligation under Article 2 is not made conditional upon the possibility of bringing the alleged suspects to criminal responsibility. The parameters of effective investigations are much broader and they encompass, among other obligations, an obligation to determine and reveal the circumstances of tragic events. The obligation to hold an effective investigation has been especially stressed in the case law of the Inter-American Court of Human Rights, which has been confronted with numerous cases involving massacres committed by state agents.[38] The right to truth is of particular and preponderant importance in cases of gross human rights violations.[39]

The attention of the Court was also drawn to the practice of two human rights bodies: the Inter-American Court on Human Rights and the United Nations Committee on Human Rights. The Inter-American Court found itself competent to adjudicate on the obligation to investigate even when the killings occurred before the Inter-American

[37] The International Military Tribunal stated in its main judgment (*Goering and Others Trial*) "[that] international law imposes duties and liabilities upon individuals as well as upon States has long been recognized." It then continued: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced" (*Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg: 1947, vol. I, p. 223). *See also* e.g. *High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*, *Law Reports of Trials of War Criminals*, vol. XII, pp. 60-61. The principle of individual criminal responsibility for war crimes is a long-standing rule of customary international law, already recognized in the Lieber Code of 24 April 1863 (art. 44 and 47) and the Oxford Manual of 9 September 1880 (art. 48), and repeated in many treaties of international humanitarian law since.

[38] In *Velásquez Rodriguez v. Honduras* (Judgment of 29 July 1988), the Court held that "even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains" (para. 181).

[39] The UN Human Rights Council, in Resolutions 9/11 and 12/12: *Right to the Truth* (of 24 September 2008 and 12 October 2009 respectively) referred to "the right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the facts that gave rise to such violations". In the same vein, the Inter-American Court of Human Rights stated, in *Gomes Lund and Others ("Guerrilha Do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], Judgment of 24 November 2010, while summarising the position of this Court, that "all persons, including the next of kin of the victims of gross human rights violations, have the right to know the truth. As a consequence, the next of kin of the victims and society must be informed of all that occurred in regard to said violations" (para. 201).

Convention on Human Rights entered into legal force.[40] Even more interesting is a case from the United Nations Committee on Human Rights, which concerned an enforced disappearance in 1974. The applicant (mother of the disappeared person) relied on the International Covenant on Civil and Political Rights, which entered into force in 1976. The Committee found the communication inadmissible *ratione temporis*, having regard to a declaration the Chilean government made upon the ratification of the Covenant. The declaration stipulated that the Committee would be competent to consider communications only with respect to acts which began after 11 March 1990.[41] The Committee's acceptance of this declaration demonstrates that there exists a legal instrument for States wishing to limit, in temporal terms, the application of a given treaty. The Russian Federation did not make an analogous declaration or reservation when ratifying the European Convention.[42]

With respect to the Grand Chamber's question whether there were any events in the post-ratification period that might have given rise to a procedural obligation under Article 2, the Court's attention was drawn to the so-called "Ukrainian list", recognised by historians as containing the names of 3,435 prisoners held in the prisons of Western Ukraine and executed in 1940 in the Ukrainian part of the Katyń massacre.[43] As late as 2002 the Ukrainian authorities handed over to the Russian side numerous pieces of evidence, the most important of which was a copy of the Ukrainian list discovered in the archives in Ukraine. Some documents contain data indicating that there might have been unknown execution and burial sites. This ample material was included into the case file of the Russian investigation as late as 2 August 2004, hence only forty days before the investigation was discontinued. The Ukrainian *dossier* should be considered as a fresh and important new evidentiary material coming in the post-ratification period.

It was lastly submitted that the test applied by the chamber to establish if a given applicant could be considered a victim (which resulted in dividing the applicants into two

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[40] *Gomes Lund and Others ("Guerrilha Do Araguaia") v. Brazil*, paras. 16-18. See also *Almonacid-Arellano and Others v. Chile* [preliminary objections, merits, reparations and costs], Judgment of 26 September 2006, paras. 46-50. In the same vein, the Appellate Body of the World Trade Organisation has dismissed *ratione temporis* objections based on allegations that the treaty in question was applied retroactively due to the fact the contested measures had preceded the date that the treaty entered into legal force. See: *Banana (III)* case (*European Communities – Regime for the Importation, Sale and Distribution of Bananas*) WT/DS27/AB/R; report of 9 September 1997, paras. 235-237; *Canada – Term of Patent Protection*, WT/DS170/AB/R; report of 18 September 2000, paras. 70-72.

[41] *Norma Yurich v. Chile*, no. 1078/2002, 2 November 2005, UN Doc. CCPR/C/85/D/1078/2002 (2005).

[42] It must be assumed that, unless otherwise expressly stated in the treaty, its provisions apply to situations that do not cease to exist after the treaty's entry into force. Thus a State-party wishing to exclude the application of the treaty to such situations must do so by means of an express reservation. This position is mirrored in the case law of the Permanent Court of International Justice and the International Court of Justice *(Mavrommatis Palestine Concessions, Phosphates in Morocco, Case Concerning Application of the Genocide Convention)*.

[43] The "Ukrainian list" contains the names of persons whose personal files were forwarded on 24 November 1940 by the Ukrainian NKVD to the Soviet NKVD after the execution actions were completed.

distinct groups) is too narrow, as it is limited only to one factor, i.e. family relationship. It does not take into account other circumstances relevant for determining whether an applicant may be treated, in the particular circumstances of a case under consideration, as a victim under Article 3. Instead of the simple one-factor test a more adequate, contextually sensitive and inclusive test should be used by the Court. Moreover, although any feasible test must be based on a family relationship/bond, it should also refer to the behaviour of the applicant. In other words, if personal involvement of a (more distant) relative demonstrates that he/she is attached to the killed/disappeared person, such a relative should be afforded victim status under Article 3. This approach was illustrated by the practice of the Inter-American Court on Human Rights.[44]

In December 2012 the Court allowed six non-governmental organisations to join the case. They all presented *amicus curiae* briefs that supported, in one way or another, the applicants' claims. These organisations were: Amnesty International (London), Open Society Justice Initiative (New York), Public International Law & Policy Group (The Hague), and acting jointly the Human Rights Centre "Memorial" (Moscow), European Human Rights Advocacy Centre (London) and Essex Transitional Justice Network, School of Law, University of Essex, UK.[45]

In its final written submissions, sent to the Court shortly before the Grand Chamber hearing, the Russian government claimed that the ruling taken by the Russian Chief Military Prosecutor's Office on 2 August 2004, by which the documents received from Ukraine had been included in the file of Katyń investigation, was "a procedural mistake". It stated that the ruling "contains a manifestly unsubstantiated conclusion about the fact that those documents concerned the execution of 3,435 Polish citizens in the spring of 1940 in the territory of the Ukrainian Soviet Socialist Republic" (para. 5). The Russian government argued further that the so-called Ukrainian list, forwarded by the Ukrainian authorities to the Russian Chief Military Prosecutor's Office in 2002, was not a list of executed persons or a prisoners' dispatch list. By its submissions the Russian government made an attempt, at the very last moment, to undermine the argument that the Ukrainian documentation should to be treated as an important new element emerging in the post-ratification period, giving the Court temporal competence over the Katyń case (if the 'new element test' used by the chamber was to be applied).[46]

At the hearing held on 13 February 2013, the parties recapitulated their legal positions as expressed in their written submissions. The Polish government made a comprehensive analysis of the Ukrainian material, demonstrating its pertinent role to Katyń investigation. No questions were asked by the Grand Chamber after the parties' statements.

The Grand Chamber was chaired by Josep Casadevall, Vice-president of the Court and judge elected in respect of Andorra. Usually the Grand Chamber cases are headed by President of the Court. On 1 November 2012 this post was taken by Dean Spiel-

[44] *Gomes Lund and Others ("Guerrilha Do Araguaia") v. Brazil*, para. 235-238.

[45] These *amicus curiae* briefs are reproduced in XXXII Polish Yearbook of International Law 334 (2012).

[46] It is puzzling which Russian authority, and on what legal grounds, "excluded" or "disqualified" the material in question from the file when the case had already been closed.

mann. Inasmuch as he headed the chamber's Katyń case (and co-authored the dissenting opinion to the chamber's ruling under Article 2), he preferred to withdraw from sitting in the case pending before the Grand Chamber, even though under the procedural rules of the Court he was not obliged to do so.[47]

6. THE GRAND CHAMBER JUDGMENT

When the Grand Chamber pronounced its Katyń judgment on 21 October 2013, the words most often heard in the Court building at Strasbourg were "unbelievable" and "incredible". The ruling, initiated at the request of the applicants, turned out to be worse for them than the previous chamber judgment. The Grand Chamber concluded that:

• Russia had not duly co-operated with the Court and accordingly violated Article 38 (unanimous ruling);

• the Court was not competent *ratione temporis* to examine, under Article 2, whether the Russian investigation into the Katyń massacre was effective (13 votes to four);

• there was no violation of Article 3's prohibition of inhuman and degrading treatment (12 votes to five).

I consider the Grand Chamber's Katyń judgment as one of the worst rulings of the Court. My highly critical assessment is based on two reasons. One is related to what is *missing* in the judgment; the other touches upon what was *said* in the ruling.

In each judgment the Court, before giving its opinion on particular allegations raised in the application, first makes a summary of the parties' submissions and then addresses them. That is the basic precept of the requirement to hear the case fairly. Nevertheless, in the *Katyń* judgment the Grand Chamber did not answer the applicants arguments submitted under Article 2, nor were these arguments recapitulated by the Court. Readers of the judgment are not aware that the applicants broadly referred to the international case law on temporal jurisdiction from such bodies and courts as the Permanent Court of International Justice, the International Court of Justice, the Inter-American Court on Human Rights, the United Nations Committee on Human Rights, and others. No mention is made of the crucial distinction between the source of right and the source of the dispute, as applied in international judicial practice. No information can be found on the fact that there is a mechanism for legal reservations available to states wishing to limit the temporal application of a given treaty. On the other hand, the Grand Chamber summarizes the applicants' arguments in an accurate and adequate manner and with no omissions when they suit the conclusion reached in the judgment that Russian Federation violated Article 38 (referring to the international

[47] Under Rules of the Court, all judges who rendered a chamber judgment subsequently referred to the Grand Chamber are excluded from the Grand Chamber rehearing of the case with the exception of the chamber's president and a judge elected in respect of the state concerned (Rule 24). Before the chamber the Russia was represented by Anatoly Kovler. His term in office terminated on 31 October 2012, and from 1 November 2012 the new Russian judge is Dmitry Dedov.

case law broadly identified by the applicants in the context of the state's obligation to co-operate and relevant to Article 38).

The omissions in the judgment leave me – I'm trying to use elegant language here – deeply perplexed. Careful readers of Strasbourg judgments may have already earlier come across some instances of such a worrying practice on the part of the Court. I cite here only one example: in a partly dissenting opinion to the Grand Chamber judgment in *Kafkaris v. Cyprus* judge Javier Borrego Borrego specifies those facts pertinent to the case that were mislaid in or vanished from that part of the ruling that provided an account of the factual background of the case.[48] Following my personal and very disappointing experience in the *Katyń* case I have become more inclined to concede, with great regret, that omissions and misrepresentations occur at Strasbourg even in the most important cases decided by the Grand Chamber. This practice is possible because the Court does not make public, as other international courts do, the submissions of the parties. I am strongly convinced that the time has come for the Court to post the parties submissions on the Court's website, along with the decisions made by the Court in particular cases.

I am also unable to accept the reasoning the Grand Chamber applied in finding that it lacked competence to hear the Katyń case on the merits under Article 2. The *Janowiec* case was used by the Court to clarify, as it expressly admitted, its case law with respect to the *Šilih* criteria (paras. 140 and subseq.). Nevertheless, I have serious doubts if this was done in a convincing manner, for the following reasons:

First, the Grand Chamber confirms the 'new element test' (discovery of new and sufficiently important material after the critical date of ratification as triggering a fresh procedural obligation under Article 2), but does not give it an independent status. The application of this test is made conditional upon positively passing through either the "genuine connection" test or the "Convention values" test (para. 144 *in fine*). This approach has huge consequences. In its *Katyń* judgment, the chamber posed the question of the Court's temporal jurisdiction in the following way: did any unknown and sufficiently important material emerge after the ratification date that might cast new light on the case? If the answer is positive, the Court becomes competent *ratione temporis*. The Grand Chamber's position was different. The 'new element test' is not an independent tool and as such cannot open the door to the Court's jurisdiction.

Second, in the *Šilih* judgment the Court pointed out that there must exist a 'genuine connection' between the triggering event (death) and the entry into force of the Convention in respect of a given state. This connection was understood as requiring that much of the investigation into the death took place, or ought to have taken place, in the period following the ratification (the proportion rule). The Grand Chamber in its *Katyń* judgment introduces into the content of the genuine connection requirement a new time factor of specified duration. In the *Šilih* judgment the Court merely stated that its temporal jurisdiction must not be open-ended. I find this approach justified because it allows for taking into account the differing and specific circumstances of particular

[48] *Kafkaris v. Cyprus*, Application no. 21906/04, Judgement of 12 February 2008.

cases. The first and foremost element of this approach is how much of the investigation was carried out after the critical date. In its *Katyń* ruling, the Grand Chamber departed from this assumption. The time factor becomes "the first and most crucial indicator of the 'genuine' nature of the connection". And the duration of that time-span must remain "reasonably short" and should not exceed ten years (para. 146). Why not five years or twenty years? Because ten is the first two-digit number? Although the Court refers to its previous case law, in which the relevant ratification date and the death date was separated by more or less ten years, I consider this "factual justification" to be unconvincing.[49] Already in *Mladenović v. Serbia* the time span was 13 years.[50] Must the applicant in that case consider herself lucky that her judgment preceded by one year the Grand Chamber's ruling in the *Katyń* case, or is the decreed time-span to be treated flexibly? Neither explanation offers consolation to the applicants.

The insertion of the definite time factor corresponds with the view expressed by judge Peer Lorenzen in a concurrent opinion appended to the *Šilih* judgment. His individual view, not joined by any other Grand Chamber judge in *Šilih*, seems to have eventually attained the status of the Court's standard in the Grand Chamber's *Katyń* judgment.

Third, the Grand Chamber confirms that the reference to the underlying Convention values in *Šilih* (Convention values test) means that the required connection for the Court's jurisdiction may be found to exist if the triggering event is of a larger dimension than an ordinary criminal offence, and amounts to the negation of the very foundations of the Convention. This is the case with respect to serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments (para. 150). The Court has stated that the heinous nature and gravity of such crimes prompted the contracting parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that such crimes must be imprescriptible and not subject to any statute of limitations in the domestic legal order (para. 151). But now a dramatic change suddenly appears in the reasoning of the Court. The Grand Chamber considers that the Convention values clause cannot be applied to events which occurred prior to 4 November 1950, i.e. the adoption of the Convention.[51] As a result, a state party cannot be held responsible under the Convention for its failure to investigate even the most serious crimes under international law if such criminal actions predated the Convention.

According to the Grand Chamber, inasmuch as the Katyń massacre was committed in 1940, Article 2 of the Convention cannot be applied to the Russian investigation,

[49] One may argue that had the Court in its previous case law allowed a longer (e.g. twenty years) or a shorter period (e.g. five years), it would have been likely for the Court to adhere to such a time span, according to the position taken by the Grand Chamber in *Katyń*.

[50] *Mladenović v. Serbia*, Application no. 1099/08, Judgement of 22 May 2012.

[51] This date is termed the beginning of the Convention's "existence as an international human rights treaty". In a cursory remark, I wish only to recall that an international treaty begins to exist in the legal sense of the word when it enters into force. In the case of the Convention this date was 4 November 1953.

neither under the genuine connection test (more than ten years separates the date of the crime and Russia's ratification of the Convention in 1998), nor when the Convention values test is evoked (the massacre predates the enactment of the Convention). Having ascertained the existence of these two critical circumstances, which according to the Court rendered it not competent *ratione temporis*, one might expect that the Court would finish its analysis at this point.[52] But to the reader's surprise, the Grand Chamber additionally indulges in verification whether any new important material came to light after the ratification date, causing the case to fall "within the scope of 'procedural acts and omissions' for the purposes of Article 2 of the Convention" (para. 158). The Court concludes that it is not possible to identify any real investigative steps taken after 5 May 1998, nor did any new relevant piece of evidence or substantive information come to light in the period after the critical date. At the same time, the re-evaluation of the evidence, the departure from previous findings, and the decision regarding the classification of the investigation materials are held not to have amounted to the "significant proportion of the procedural steps" which is required for establishing a genuine connection for the purposes of Article 2 of the ECHR (para. 159).

I do not share the Court's conclusion as to the lack of any new important material emerging in the post-ratification period (the Ukrainian list and the accompanying *dossier*). But above all, I cannot grasp the logic that might justify the Grand Chamber's decision to make the analysis whether there were significant novelties in the course of investigation no. 159 after the critical date. The status of the 'new material test' remains uncertain to me. Does this test exist as separate and independent from the genuine connection test (now based on the 'ten years rule') and the Convention values test? Elementary logic answers that this is not possible, yet the reasoning of the Court demonstrates the opposite. Those who are to apply the Convention standards domestically (and perhaps at Strasbourg too) are left confused.

There is another problem with the coherence of the Grand Chamber's reasoning. Imagine that Russia (the Soviet Union) ratified the Convention in 1950. Then the Court would have had jurisdiction to adjudicate on the fulfilment of its procedural obligations because the Katyń massacre was perpetrated only 10 years earlier, hence within the time limits needed to satisfy the genuine connection requirement. But the Court's jurisdiction could not have been founded on the Convention values test as it applies only when the killings in question took place after 3 September 1950. Which component is stronger and matters more: Convention values or the ten year rule? In the Grand Chamber's answer it is not the fundamental and underlying axiology of the Convention values, but the simple arithmetical counting of years. But perhaps the Court simply forgot in its judgment to provide information that the ten-year rule does not extend beyond 3 September 1950, and it will correct the omission on a future occasion.

[52] The Court expressly stated that "if the triggering event lies outside the Court's jurisdiction *ratione temporis*, the discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the 'genuine connection' test or the 'Convention values' test has been met" (para. 144 *in fine*).

Fourth, referring to the notion of "procedural acts", the Court made a distinction between, on the one hand, acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party, and on the other hand, other types of inquiries that may be carried out for other purposes, such as establishing a historical truth (para. 143). The procedural obligations under Article 2 only apply to the first type of proceedings. This distinction is artificial and unfortunate. Only upon the conclusion of some cases dealing with historical events will it be possible to ascertain if there are people who should be accused or victims' interests to protect. Moreover, even accepting this distinction, I see no reasons why the Article 2 procedural obligations should be so sharply differentiated with regard to the two types of proceedings.

My criticisms with respect to the Court's finding under Article 2 are mostly of a legal and logical character. A different kind of criticism relates to the conclusion under Article 3. As already mentioned above, the chamber stated in its *Katyń* judgment that it was struck by a number of individual specific, quoted, or described reactions and statements of the Russian authorities, which it considered tantamount to a denial of the reality of the Katyń massacre, running against the underlying values of the Convention and eventually qualified as acts not only of a degrading nature but also inhuman treatment. On the other hand, the Grand Chamber limits its reasoning to a couple of statements. The applicants knew their close relatives had been murdered, hence there was no uncertainty as to their fate (differently than in disappearance cases). The pronouncements of the Russian courts that withheld acknowledgment of the fact that the applicants' relatives had been killed in 1940 hence did not change the emotional position of the applicants. Thus, it could not be held that "the applicants' suffering reached a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of victims of a serious human rights violation" (para. 188). What was striking to the chamber turned out to be nothing to the Grand Chamber. I write not another word on this…

The four judges who did not agree with the judgment appended a virulent joint dissenting opinion to it (Ineta Ziemele, Latvia; Vincent A. de Gaetano, Malta; Julia Laffranque, Estonia and Helen Keller, Switzerland). As a diligent reader of the Strasbourg rulings, I have read only a few other opinions of such strength and emotion. The joint dissent deserves a fuller description and treatment, but as this article has its space limitations, I limit myself to reproducing only a few selected quotations.

The dissenting judges wrote that the Grand Chamber in the Katyń judgment: "has missed an opportunity to (…) uphold the 'Convention values' clause in the Šilih principles. In doing so, it has deprived that clause of its humanitarian effect in the case at hand and potentially weakened its effect in the event of its future application. This approach is untenable if the Convention system is to fulfil the role for which it was intended: to provide a Court that would act as a 'conscience' for Europe". And further: "We regret the majority's interpretation of the humanitarian clause in the most non-humanitarian way". And still further: "We express our profound disagreement and dissatisfaction with the findings of the majority in this case, a case of most hideous

human rights violations, which turn the applicants' long history of justice delayed into a permanent case of justice denied."

7. IF I HAD KNOWN…

The Grand Chamber judgment came like a bolt from the blue. In my darkest scenario I did not imagine that the seventeen judges might find no violation of Article 3. But it happened. It is also striking that the Grand Chamber found, for the first time in its history, a separate violation of Article 38. The State's obligation of co-operation with the Court is auxiliary to the task of determining if there was a violation of one or more of the substantive provisions of the Convention. Therefore in its previous case law, if a state's failure to submit information or documents to the Court resulted in a finding of a breach of Article 38, the Court also drew inferences as to the well-foundedness of the allegations raised under other provisions of the Convention. In the *Katyń* judgment the Grand Chamber decided differently, while at the same time it made the obligation under Article 38 absolute. Thus, the lesson given by the Strasbourg Court is clear and simple: even if the Court eventually declares it has no jurisdiction to adjudicate on the applicants' substantive grievances, there is a violation of Article 38 if the state does not comply with the Court's order to submit requested information.

The allegation raised under Article 38 was not at heart of the Katyń complaint. In 2004 the relatives of the Katyń victims suddenly heard that the case had been closed and the investigation's findings would not be available as it would compromise Russia's core national security interests. Then came the refusal of rehabilitations and statements denying the reality of the Katyń massacre, even suggesting that the killings, "if they had hypothetically happened", might have been justified. Strasbourg seemed to be the last resort for assistance. Eventually to no avail.

Is the Court prepared to repeat its conclusions if there are analogous acts and statements of state authorities regarding the reality of the Holocaust? If it is to be consequent, it should.

If only I had known what the *Katyń* judgment rendered by the Grand Chamber would be… On many occasions I am asked this question. The European Court of Human Rights was to be a court of conscience. The Convention was enacted in the face of heinous atrocities committed by two totalitarian regimes, and it was to prevent such horrible acts from occurring again. The final *Katyń* judgment does not testify to the truth of this supposition.

The chamber's *Katyń* judgment fell only one step short from giving full satisfaction to the applicants. If I had known the subsequent Grand Chamber judgment, I would have gone with the Katyń complaint to the United Nations Committee of Human Rights. And when asked today by people who have serious grievances related to the way the Russian authorities answer to their "historical inquiries" I answer: think about Geneva rather than Strasbourg.

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THE CASE OF *JANOWIEC AND OTHERS V. RUSSIA*: RELINQUISHMENT OF JURISDICTION IN FAVOUR OF THE COURT OF HISTORY

INTRODUCTION

One can make various speculations about the possible conclusions of the European Court of Human Rights ("ECtHR") on Russia's alleged breach of its obligation to make proper and effective investigation if had recognized its competence to hear the case of *Janowiec and Others v. Russia* under Article 2 (right to life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ("the European Convention"). In my opinion there is little reason to doubt that had it addressed this issue substantively, the decision would have been in favour of the applicants.[1] For despite the promising start and the tremendous work conducted by Russian investigators in cooperation with their Polish colleagues and experts in 1991-1995 (search and mapping of burial sites, including the discovery of several previously unknown sites, exhumation of bodies, questioning of hundreds of witnesses, investigation and publication of a large number of archival documents that shed light on one of the worst crimes of Stalin's totalitarian regime); and despite the political will shown by the new Russian leadership in the early 1990s (they stopped concealing the tragedy, published and handed over to the Polish side the documents from "package no. 1" along with most of files from case no. 159, and President Yeltsin issued an official apology at the Monument to the Victims of Katyń in Warsaw in 1993 and the Russian State Duma issued a statement on November 26, 2010); and despite the occurrence of many obstacles on the way to acknowledgement of this grave crime and full investigation of all its facts and circumstances and the objective difficulties faced by today's investigation due to the long period of time that has elapsed since the crime and the destruction of most of the

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[1] Although, it could hardly have been unanimous – *see* ECtHR [GC], *Janowiec and Others v. Russia*, app. nos. 55508/07 and 29520/09, Judgment of 21 October 2013, concurring opinion of Judge Gyulumyan, available at <http://www.echr.coe.int>.

evidence,[2] I deeply believe – leaving aside for the moment the *ratione temporis* aspects – that the European Convention's high standards for a proper and effective investigation as an element of the procedural obligations of a State under Art. 2 were not met. The factors that would have prevented the conducted investigation from meeting the Convention's standards include: lack of an identified location of the crime and identified remains of most of the victims; the uncertainty as to the exact scope of the crime victims; the Respondent State's refusal to recognize specific people as executed by the NKVD and, as a consequence, refusal to grant their relatives victims' status and the right to rehabilitation; its refusal to allow victims' families to read case materials and their complete exclusion from the investigation process;[3] the contradictory position of the Russian Prosecutor's Office and the courts, which, on the one hand, recognize the fact of execution,[4] and on the other call the executed Polish nationals "missing persons", even going so far as to suggest the possibility that some of them may have been validly executed as punishment for their crimes against the Soviet regime;[5] the characterisation of the Katyń tragedy as "abuse of power"[6] rather than a war crime;[7] and, finally and most importantly, the security classifications assigned to some of the most important files of case no. 159, including the final decision of 21 September 2004 by which the investigation into the Katyń massacre was discontinued. As a result of these factors, it is hard not to agree with Judge Wojtyczek, who wrote: "The paramount question which arises in the present case is the temporal scope of the Convention."[8]

1. INTERCONTINENTAL PARALLELS

In this regard, it is appropriate to draw parallels between the practice of the ECtHR and the Inter-American Court of Human Rights ("Inter-American Court"; "IACtHR"

[2] This factor was referred to by Judges Kovler and Yudkivska – *see* ECtHR, *Janowiec and Others v. Russia*, app. nos. 55508/07 and 29520/09, Judgment of 16 April 2012, joint concurring opinion of Judges Kovler and Yudkivska.

[3] *Ibidem*, joint partly dissenting opinion of Judges Spielman, Villiger and Nussberger, para. 11. ECtHR [GC], *Janowiec and Others v. Russia*, paras. 52, 53, 55, 58, 59, 68, 69, 71.

[4] ECtHR [GC], *Janowiec and Others v. Russia*, paras. 52 and 58.

[5] *Ibidem*, para. 165.

[6] *Ibidem*, paras. 58 and 64.

[7] It should be noted that on 13 July 1994 Senior Military Prosecutor Yablokov, in charge of investigating the "Katyń Case", ordered discontinuation of the criminal proceedings on the case no. 159 in connection with the deaths of the guilty parties. The said guilty parties were considered to be Stalin and other members of the Politburo who made the decision of 5 March 1940. They stood accused of committing crimes under Art. 6 of the Charter of the International Military Tribunal (war crimes and crimes against humanity). The decision was overturned by Yablokov's superiors, ordering only some limited charges of abuse of power under the Criminal Code 1926 (*see* I. Yazhborovskaya, A. Yablokov, V. Parsadanova. *Katyn Syndrome in the Soviet-Polish and Polish-Russian Relations* <http://www.katyn-books.ru/library/katinskiy-sindrom14.html> accessed 15 February 2014).

[8] ECtHR [GC], *Janowiec and Others v. Russia*, partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 4.

in the footnotes). Such a comparative analysis is all the more interesting because in the present case both the applicants[9] and the third parties[10] actively cited the Inter-American Court case law. In addition, the ECtHR frequently refers to the Inter-American Court's practice.[11] Indeed, in its *Šilih v. Slovenia* judgement – which was heavily relied on in the *Janowiec* case and, according to Judge Wojtyczek, "marked a significant departure from the [ECtHR's] case-law"[12] – the Grand Chamber conducted a rather detailed analysis of the applicable precedents of the Inter-American Court,[13] dedicating an entire section of its judgement to them and relying extensively on such precedents when presenting their conclusions. Finally, despite being a "younger court" in comparison with the ECtHR, the Inter-American Court has accumulated considerable experience in cases revolving around tragedies similar to the Katyń massacre – mass extrajudicial executions, massacres, forced disappearances, torture and other cruelties that have bedevilled much of Latin America during the military dictatorships of the 1960-80s. Jo M. Pasqualucci, a renowned researcher into the practice of the Inter-American Court, writes that: "[u]ntil the inclusion of Eastern European States, the European human rights system primarily dealt with isolated instances of human rights abuse, involving arrest and detention guarantees and fair administration of justice. Conversely, for many years the principal cases in the Inter-American system involved forced disappearances and extra-judicial executions resulting from intentional governmental policies."[14]

In the *Šilih* case two Slovenian nationals were claiming inefficient investigation of the death of their son, which occurred a year before the Convention was ratified in Slovenia. The Grand Chamber took the opportunity to issue a ruling in the – until then

[9] *Ibidem*, para. 173.

[10] *Ibidem*, paras. 123-126, 176. See also "Janowiec and Others v. Russia. Written Comments of the Open Society Justice Initiative" <http://www.opensocietyfoundations.org/sites/default/files/echr-janowiec-written-comments-20130116.pdf>; "Janowiec and Others v. Russia. Written observations of Amnesty International" <http://www.amnesty.org/pt-br/library/asset/IOR61/001/2013/en/2f7e3df1-7280-46e7-802a-008885788722/ior610012013en.pdf>; "Victim Recognition and Satisfaction of Reparations. Third Party Intervention in Janowiec and Others v. Russia." Prepared by the Public International Law & Policy Group <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2012/12/12.12.21_KATYN-Amicus_PILPG_FINAL.pdf>; "Janowiec and Others v. Russia. Third Party Intervention by Human Rights Centre 'Memorial'", European Human Rights Advocacy Centre, Essex Transitional Justice Network School of Law, University of Essex <http://www.memo.ru/uploads/files/914.pdf> all accessed 15 February 2014.

[11] According to a ECtHR Research Division Research Report, as of August 2012 the ECtHR has made reference to the Inter-American Court of Human Rights in twenty-five cases (see *References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights*, Research Report. 2012, available at <http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf>).

[12] ECtHR [GC], *Janowiec and Others v. Russia*, partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 6.

[13] ECtHR [GC], *Šilih v. Slovenia*, app. no. 71463/01, Judgment of 9 April 2009, paras. 114-118.

[14] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge: 2003, pp. 4-5 (footnote omitted).

highly controversial – practice of the Chambers with respect to the possibility of applying the Convention to the *consequences* of events that occurred prior to the ratification of the Convention by a State.

Drawing on the practice of the Human Rights Committee, and "*in particular*" of the Inter-American Court, the ECtHR came to the following conclusion:

> 159. […] [T]he Court concludes that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent "interference" within the meaning of the Blečić judgement […]. In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date.
> 160. This approach finds support also in the jurisprudence of the United Nations Human Rights Committee and, *in particular, of the Inter-American Court of Human Rights*, which, *though under different provisions*, accepted jurisdiction *ratione temporis* over the procedural complaints relating to deaths which had taken place outside their temporal jurisdiction (see paragraphs 111-118 above).[15]

A close examination of the approaches used by the Inter-American Court reveals that they are different from those applied by the ECtHR to the *Šilih* case and a number of subsequent cases, including *Janowiec and Others*.

Having reference to Article 28 of the Vienna Convention on the Law of Treaties 1969[16] and general international law, the Inter-American Court in its decisions has repeatedly stressed[17] that its jurisdiction extends only to acts and facts that occurred after the deposit of the instruments of ratification of the American Convention on Human Rights 1969[18] ("the American Convention"), and the deposit of the instrument of recognition of the competence of the Inter-American Court to resolve disputes in accordance with Art. 62 of the American Convention: "[T]he Court cannot exercise its contentious competence to apply the Convention and declare a violation of its provisions when the alleged facts or the conduct of the defendant State that could involve international responsibility took place prior to that State's acceptance of this competence. *Contrario sensu*, the Court is competent to rule on those violations that occurred after the date on which the State accepted the Court's competence or that had not ceased at

[15] ECtHR [GC], *Šilih v. Slovenia*, paras. 159-160 (emphasis added).

[16] Vienna Convention on the Law of Treaties 1969 (signed in Vienna on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

[17] IACtHR, *Cantos v. Argentina*, Preliminary Objections, Merits, Reparation and Costs, Judgment of 7 September 2001, paras. 36-37; IACtHR, the *Serrano-Cruz Sisters v. El Salvador*, Preliminary Objections, Judgment of 23 November 2004, para. 66 (available at <http://www.corteidh.or.cr/).

[18] American Convention on Human Rights (adopted in San José, Costa Rica, 22 November 1969, entered into force 18 July 1978), Basic Documents Pertaining to Human Rights in the Inter-American System (updated to February 2011), Secretariat of the Inter-American Court on Human Rights, San Jose, Costa Rica, 2011, pp. 29-56.

that date."[19] In the *Martín del Campo-Dodd v. Mexico* case, the Inter-American Court admitted the preliminary objection of Mexico that the Court lacked competence *ratione temporis* to examine the applicant's conviction for the crime to which he confessed under torture, as the alleged acts of torture itself, and all judicial criminal proceedings associated with the case, had been completed prior to the date when Mexico recognised the Court's contentious jurisdiction.[20]

At the same time, the Inter-American Court acknowledged that "without infringing the principle of non-retroactivity, it can exercise its competence *ratione temporis* to examine those facts that constitute violations of a continuing or permanent nature; in other words, those that occurred before the date on which the Court's competence was recognized, and that persist after that date."[21] In such cases, "the Court is competent to consider the conducts that occurred after the recognition of its jurisdiction and the effects of the violations."[22]

In the framework of continuing violations, special attention must be given to the concept of forced disappearances, developed thanks to the significant contribution of the Inter-American Court. Several years before the first international instruments on combating this criminal practice, either regional[23] or universal,[24] already in its first case the Court called the concept of forced disappearance "a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee."[25] According to the Court, these rights include Art. 4 (right to life), Art. 5 (right to humane treatment, including the prohibition of torture) and Art. 7 (right to personal integrity).[26] Later Art. 3 (juridical personality) was added to this catalogue.[27]

Further developing its articulated concept of the complex nature of forced disappearances, in the *Blake v. Guatemala* case the Inter-American Court said: "the effects of such infringements – even though some may have been completed, (…) – may be prolonged continuously or permanently until such time as the victim's fate or whereabouts are

[19] IACtHR, *Heliodoro-Portugal v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 12 August 2008, para. 24.

[20] IACtHR, *Alfonso Martín del Campo-Dodd v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 3 September 2004, para. 85.

[21] IACtHR, *Heliodoro-Portugal v. Panama*, para. 25; IACtHR, *Nogueira de Carvalho et al. v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2006, para. 45.

[22] IACtHR, the *Serrano-Cruz Sisters v. El Salvador*, para. 67.

[23] Inter-American Convention on Forced Disappearance of Persons (adopted in Belém do Pará, Brazil on 9 June 1994, entered into force on 28 March 1996), Basic Documents, *supra* note 18, pp. 105-111.

[24] UN Declaration on the Protection of All Persons from Enforced Disappearance, 18 December 1992 (A/RES/47/133), International Convention on the Protection of All Persons from Enforced Disappearance of 2006 (adopted 20 December 2006, entered into force 23 December 2010), 2715 UNTS.

[25] IACtHR, *Velásquez-Rodríguez v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 29 July 1988, para 155.

[26] *Ibidem*, paras. 155-157.

[27] IACtHR, *Anzualdo-Castro v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 22 September 2009, para. 90; IACtHR, *Contreras et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs. Judgment of 31 August 2011.

established."[28] In that case Nicholas Chapman Blake, an American freelance journalist, was kidnapped in 1985 by paramilitaries in Guatemala during an armed conflict and killed. Guatemala recognised the Court's jurisdiction in 1987. Up until Blake's remains were discovered in 1992, the journalist's family had spent years in unsuccessful attempts to establish his fate. Based on the facts of the case, the Court held that it was competent to hear the case insofar as it concerned the consequences or actions that postdated the recognition of the jurisdiction of the Court by Guatemala.[29] Based on this reasoning, in the decision on the merits the Court did not consider alleged violations of Articles 4 and 7 of the American Convention, because the acts surrounding Mr. Blake's deprivation of liberty and of life pre-dated the recognition of the jurisdiction of the Court by Guatemala.[30] Therefore, the Court only went so far as to establish the violations committed between 1987-1992, i.e. violation of Article 8 (right to a fair trial), which was given a "broad interpretation", as well as of Article 5 (inhumane treatment), all in relation to Mr. Blake's next of kin. According to the Inter-American Court, Art. 8 provides for the rights of Nicholas Blake's relatives to an effective investigation into his disappearance and death, to a trial and sentencing of the perpetrators, and to compensation for their loss.[31] The violation of Art. 5 was defined as the continuous attempts aimed at preventing Mr. Blake's family from establishing the fate of Nicholas Blake, inasmuch as it was proved that the government knew about his death from the outset.[32]

The Inter-American Court applied a similar principle in its judgement in *Serrano-Cruz Sisters v. El Salvador*.[33] It refused to consider all alleged facts concerning the violation of Articles 4, 5, and 7 of the American Convention which took place before the Court's jurisdiction was recognised by El Salvador.[34] At the same time, the Court agreed to consider the facts and events associated with the kidnapping of the sisters that occurred after 6 June 1995, namely, the facts and events associated with the court proceedings initiated by their family in order to establish the fate of the children. According to the Court, these facts "constitute *independent facts*" and can be viewed as "*specific and autonomous violations* concerning denial of justice occurring after the recognition

[28] IACtHR, *Blake v. Guatemala*, Preliminary Objections, Merits, Reparation and Costs, Judgment of 2 July 1996, para. 39.

[29] *Ibidem*, para. 40.

[30] IACtHR, *Blake v. Guatemala*, Merits, Judgment of 24 January 1998, paras. 78, 86.

[31] *Ibidem*, paras. 97-98.

[32] *Ibidem*, paras. 114-116.

[33] El Salvador recognised the jurisdiction of the Court in 1995. In the period from 1980 to 1991 El Salvador was in a state of civil war. During that period, and especially in the early years of the war, it was a common practice among the government troops during their counter-insurgency operations against villages supporting the rebels to take away young children and given them to other families. These children had their names changed and often didn't know anything about their previous homes. After the war, through the efforts of non-governmental organisations, the fate of many such children has been established – most of them were found alive and were able to reunite with their biological families. This, unfortunately, was not the case however for sisters Ernestina and Erlinda Serrano Cruz, who had been abducted in 1982, and since then their fate has remained unknown.

[34] IACtHR, the *Serrano-Cruz Sisters v. El Salvador*, paras. 77-78.

of the Court's jurisdiction."[35] The same terminology was used by the ECtHR several years later, in the *Šilih v. Slovenia*. However, the Inter-American Court considered these "autonomous violations" through the prism of Articles 8 and 25 of the American Convention (right to a fair trial and right to judicial protection). It found that the violation of these rights was established both in relation to the two kidnapped sisters and their families,[36] ruling that the domestic procedures were improper, ineffective, and inconsistent with the Convention's standards.

Similarly, in the case of *Moiwana Community v. Suriname,* the Inter-American Court refused to extend its competence to the events[37] which took place a year before Suriname recognised the Court's jurisdiction, but did acknowledge its competence to assess the implementation by the State of its duty to investigate these events in terms of the standards set out in Articles 8 and 25 of the American Convention.[38]

Thus, the obligation to investigate violations of the rights guaranteed by the American Convention is viewed by the Inter-American Court as an autonomous, detached obligation that can be triggered by rights violations that occurred before the date of recognition of the Court's jurisdiction. If a violation of this autonomous obligation continues after the recognition of the jurisdiction of the Court, it may be subject to review on the basis of Articles 8 and 25 of the American Convention (right to a fair trial; right to judicial protection).

In this respect, the Inter-American Court's approach is different than that of the ECtHR. While the latter extends its jurisdiction with respect to the obligation to conduct a proper and effective investigation to rights violations that occurred prior to the ratification of the European Convention, it considers these obligations as *a procedural aspect of the positive obligations to protect the relevant rights* (for example, the right to life).[39] Thus, the ECtHR establishes violations of the relevant articles of the European Convention (Article 2 – the right to life, Article 3 – prohibition of torture) in their so-called "procedural limb", whereas the Inter-American Court views the obligation to investigate violations of the right to life, the right to humane treatment, the right to personal liberty not through the Articles of the American Convention that establish these rights (Articles 4, 5, 7), but rather through the stand-alone Articles 8 and 25 dealing with the right to a fair trial and the right to judicial protection.

At first glance, the difference between these approaches may seem merely technical. However, the method chosen by the Inter-American Court for extending its jurisdiction to the past allows it to avoid the requirement to demonstrate a "genuine connection between the death and the entry into force of the Convention in respect of the

[35] *Ibidem*, paras. 80, 84 (emphasis added).

[36] *Ibidem*, para. 107.

[37] The Surinamese military massacred the village community Moiwana, resulting in more than 40 victims, destruction of the village, and forced displacement of the remaining inhabitants.

[38] IACtHR, *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2005, para. 141.

[39] ECtHR [GC], *Šilih v. Slovenia*, para. 159.

respondent State for the procedural obligations imposed by Article 2 to come into effect",[40] as established by the ECtHR in the *Šilih* case. That was precisely the cornerstone question of the *Janowiec* case.

What's interesting is that this approach is opposed by some judges of the Inter-American Court who claim to be advocating for a more "European approach". In the dissenting opinion on the *Moiwana Community* case, Judge Cecilia Medina-Quiroga disagreed with the majority's position and advocated that the obligation to investigate the Moiwana massacre of 1986 arises from the obligation to guarantee the right to life and personal integrity, and that failure to comply with this obligation constitutes a violation of Articles 4 and 5 of the American Convention, in conjunction with Art. 1(1).[41] Later on, the Inter-American Court practice began to demonstrate the possibility of certain modifications to its approach. For example, in the *Heliodoro-Portugal* case the Court ruled that "the general obligation to ensure the human rights embodied in the Convention, contained in Article 1(1) thereof, gives rise to the obligation to investigate violations of the substantive rights that should be protected, ensured or guaranteed. Thus, in cases of extrajudicial executions, forced disappearance and other grave human rights violations, the Court has found that conducting a prompt, genuine, impartial and effective investigation ex officio is a fundamental and conditioning factor for the protection of certain rights that are affected or annulled by these situations, such as the rights to personal liberty, humane treatment and life."[42] Nevertheless, the procedural aspect of the violation of these rights was again considered by the Inter-American in the light of Articles 8 and 25.

In the case of *Garibaldi*, who was killed by masked armed men just one month before Brazil recognised the jurisdiction of the Inter-American Court, but six years after the ratification of the American Convention, the Court concluded that it had no competence to deal with the question of the State's responsibility for depriving Garibaldi of his life and his inhumane treatment, as understood in the material aspect.[43] At the same time, the Court recognised that it could examine the fulfilment of obligation to investigate this murder, and not only under the Articles 8 and 25 of the American Convention, but also "in light of the procedural obligation derived from the obligation

[40] *Ibidem*, para. 163.

[41] IACtHR, the *Moiwana Community v. Suriname*, concurring opinion of Judge Cecilia Medina, para. 5.

[42] IACtHR, *Heliodoro-Portugal v. Panama*, para. 115. This case concerned the disappearance in 1970 in Nicaragua of a left activist. His remains were discovered in 2000, and forensic examination showed that the death had occurred at least 20 years earlier. Nicaragua recognised the Court's jurisdiction in 1990. As before, the Court did not find itself competent to review the circumstances of the abduction and murder of Mr. Heliodoro-Portugal (i.e. it considered the violations of Articles 4 and 5 of the American Convention), but unexpectedly found that it may, in fact, consider the case in the light of alleged imprisonment of Heliodoro-Portugal (i.e. violation of Art. 7), "since this is related to his alleged forced disappearance, which continued after 1990, and until his remains were identified in 2000" (para. 37).

[43] IACtHR, *Garibaldi v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 23 September 2009, para. 22.

to guarantee rights arising from Article 4 of the Convention, in relation to Article 1(1) thereof." Observing that Brazil ratified the American Convention in 1992, the Court held that, starting from that point in time, it was already bound by "all the obligations arising from the Convention, including the obligation to investigate and, if applicable, punish the deprivation of the right to life, even though the Court would not have competence to prosecute it for alleged violations of this right."[44] However, the Court did not get the chance to speak about the alleged violation of procedural obligations under Article 4 of the American Convention, as the Inter-American Commission on Human Rights, in its submission of the case, limited the alleged victims to only Mrs. Garibaldi and her six children (through the prism of Articles 8 and 25), and excluded the late Mr. Garibaldi himself (on the basis of Art. 4).[45]

2. PRESUMED DEATH OR CONFIRMED DEATH?

In the *Janowiec* case the third parties were actively referring[46] to a recent, and in many ways momentous for the Inter-American system, judgement in the case of *Gomes-Lund et al. v. Brazil*.[47] In that judgement, the Inter-American Court ruled that the State was responsible for forced disappearances and, consequently, for violations of the rights of 62 members of a rebel group provided by the Articles 3, 4, 5 and 7 of the American Convention. These violations had been committed in the early 1970s, i.e. over 20 years before Brazil recognised the Court's jurisdiction. However, the Inter-American Court found itself competent to consider the said violations of their rights, ruling that the violations are of a continuous nature, continuing to this day. In the relevant part of its judgement, dedicated to analysis of the alleged violations, the Court pointed out that "acts which constitute enforced disappearance are of a continuous or permanent nature," and "its consequences involve multi-offensive violations to the human rights recognized in the American Convention while the whereabouts of the victim are not determined or the bodily remains not found, to which States have the corresponding duty to investigate, and eventually, punish those responsible, pursuant to the obligations derived from the American Convention."[48]

However, in the operative part of its judgement the Inter-American Court again qualified the lack of proper investigation, identification and punishment of the perpe-

[44] *Ibidem*, para. 23.

[45] *Ibidem*, para. 24.

[46] *Supra* note 10; ECtHR [GC], *Janowiec and Others v. Russia*, paras. 122, 125.

[47] IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 24 November 24, 2010. This case concerned the slaughter, extrajudicial executions, and forced disappearances of members of the rebel group known as the "Araguaya Partisans" (Guerrilha do Araguaia) in 1970. The group was opposing the military junta that came to power in Brazil as a result of a military coup in 1964. Brazil recognised the jurisdiction of the Court in 1998.

[48] IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 110.

trators as a violation of the rights of relatives of the disappeared persons under Articles 8 and 25 of the American Convention, whereas the violations of Articles 3, 4, 5 and 7 were established in relation to the disappeared persons themselves, apparently in their material aspect, as a consequence of the continuing nature of the enforced disappearances. This is evident, in particular, from the fact that the Court accepted as partially justified the objections of the respondent State, which claimed that the Court lacked competence *ratione temporis* with respect to one of the victims, whose remains were discovered in 1996, two years before Brazil recognised the Court's jurisdiction.[49] The Court recognised its lack of such competence by qualifying that person's death as an extrajudicial execution, rather than as a forced disappearance,[50] while at the same time it recognised violations of Articles 8 and 25 with respect to that victim's relatives.[51] Remains of the other victims haven't been discovered to this day. This, evidently, has led the Court to a conclusion that the violations of Articles 3, 4, 5 and 7 of the American Convention, which began in the 1970s, continue to this day.[52]

The ECtHR has also repeatedly faced the problem of enforced disappearances, for example in the cases concerning the events of 1992-1996 in the north-eastern part of Turkey, concerning the consequences of the 1960-1970 Cyprus conflict, the mid-1990s conflict in Bosnia and Herzegovina, as well as events which occurred in the Russian republics of the North Caucasus in 1999-2006.[53]

Making references to international practice, the ECtHR has repeatedly affirmed the lasting nature of enforced disappearance: "A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred. This situation is very often drawn out over time, prolonging the torment of the victim's relatives. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation. This is so, even where death may, eventually, be presumed."[54]

As we know, in the *Janowiec* case, the ECtHR "concluded that the applicants' family members who were taken prisoner in 1939 must be presumed to have been executed by the Soviet authorities in 1940."[55] A little earlier, the Court also recalled that it "has on many occasions made findings of fact to the effect that a missing person can be presumed dead,"[56] and cited several cases of forced disappearance. In this category of

[49] *Ibidem*, para. 16.

[50] *Ibidem*, para. 118, fn 154.

[51] *Ibidem*, para. 180.

[52] *Ibidem*, paras. 121-122.

[53] For a brief overview of the cases and scope of the problem *see* ECtHR, *Aslakhanova and Others v. Russia*, app. nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, Judgment of 18 December 2012, paras. 65-68, 161, 216.

[54] *Ibidem*, para. 122.

[55] ECtHR [GC], *Janowiec and Others v. Russia*, para. 156.

[56] *Ibidem*, para. 154.

cases both the Inter-American[57] and the European Courts use a presumption of death as a special legal (procedural) technique to avoid having to apply the *corpus delicti* principle ("no corpse – no crime") to forced disappearances, and thus deprive the States of the argument that "the person is still alive or has not been shown to have died at the hands of State agents."[58]

However, in the *Janowiec* case the ECtHR used the presumption of death technique to a completely different end. First, the ECtHR referred to the *Varnava and Others v. Turkey* case, in which it had already formulated that, unlike the obligation to investigate a "suspicious death", the obligation to investigate a "suspicious disappearance" is of a continuing nature. Thus the requirement of proximity of the death and the investigative steps connected with it to the date of entry into force of the European Convention, formulated in the *Šilih* case (which was a case of "suspicious death"), cannot be applied here.[59]

The Grand Chamber thus found it necessary to cite the presumption of death in the *Janowiec* case,[60] only this time it used the presumption in order to bolster the Chamber's opinion that "the period of time between the death and the critical date is not only many times longer than those which triggered the coming into effect of the procedural obligation under Article 2 in all previous cases, but also too long in absolute terms for a genuine connection to be established between the death of the applicants' relatives and the entry into force of the Convention in respect of Russia."[61]

Thus the ECtHR evidently classified the Katyń execution by firing squad not as an ongoing, but as an instantaneous act, as an extra-judicial execution, *based on presumption of death* rather then on the fact of discovery and identification of the victims' remains.

Meanwhile, as discussed above, for the Inter-American Court the fact of discovery and identification of the remains is the key point which terminates the situation of enforced disappearance as a continuing violation. In certain cases, as may be inferred, the ECtHR has used a similar approach.[62] In cases of enforced disappearances, a presump-

[57] IACtHR, *Castilio Paez v. Peru*, Merits, Reparations and Costs, Judgment of 3 November 1997, para. 73.

[58] ECtHR, *Aslakhanova and Others v. Russia*, para. 100.

[59] ECtHR [GC], *Varnava and Others v. Turkey*, app. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009, paras. 148-149.

[60] ECtHR [GC], *Janowiec and Others v. Russia*, para. 135.

[61] *Ibidem*, para. 157.

[62] ECtHR [GC], *Varnava and Others v. Turkey*, paras. 86-87; ECtHR, *Aslakhanova and Others v. Russia*, paras. 223, 225; ECtHR, Palic v. Bosnia and Herzegovina, app. no.4704/04, Judgment of 15 February 2011, paras. 50-51. Moreover, in the *Varnava and Others v. Turkey* case the ECtHR especially pointed out that even the discovery of a body does not in and of itself terminate the obligation to investigate a crime: "Where disappearances in life-threatening circumstances are concerned, the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain" (para. 145).

tion of death used to be a necessary condition to establish a violation of the legal right to life. Conversely, in the case presently under our consideration, the presumption of death played a role of the factor severing the link between the substantive and procedural limbs of violation of the right to life, turning the latter aspect into a detachable autonomous obligation.

Further on in the *Janowiec* judgement, this time in the part motivating the application of Article 3 to the case, i.e. in a somewhat different context, the "presumed death" miraculously turned into a "confirmed death": "Having regard to the long lapse of time, to the material that came to light in the intervening period and to the efforts that were deployed by various parties to elucidate the circumstances of the Katyń massacre, the Court finds that, as regards the period after the critical date, the applicants cannot be said to have been in a state of uncertainty as to the fate of their relatives who had been taken prisoner by the Soviet Army in 1939. It necessarily follows that what could initially have been a 'disappearance' case must be considered to be a 'confirmed death' case."[63]

Based on the fact that "in 1990 the USSR officially acknowledged the responsibility of the Soviet leadership for the killing of Polish prisoners of war; in the following years, the surviving documents relating to the massacre were made public and the investigators carried out further partial exhumations at several burial sites; and a round of consultations was held between Polish, Russian, Ukrainian and Belarusian prosecutors,"[64] the Court concluded that "no lingering uncertainty as to the fate of the Polish prisoners of war could be said to have remained. *Even though not all of the bodies have been recovered*, their death was publicly acknowledged by the Soviet and Russian authorities and has become an established historical fact."[65] This finding is inexplicably "undisturbed by the pronouncements of the Russian courts in various domestic proceedings which appeared to withhold explicit acknowledgement of the fact that the applicants' relatives had been killed in the Soviet camps."[66]

The applicants complained that the position of the Russian authorities was causing them moral suffering.[67] It appears that in this part of the decision of the Grand Chamber, the mindset of European judges is not that far removed from their Russian colleagues. In this light, it would be curious to look once again to the facts of *Gomes-Lund et al. v. Brazil* case and its assessment by the Inter-American Court. On December 4, 1995 Brazil passed Law No. 9.140/95, by which it recognised its responsibility for the "murders of the political opposition" in the periods between 1961-1979. This Law "automatically recognised 136 cases of disappeared persons contained in a '[d]ossier' organized by next of kin and human rights defenders after […] years of searches." The Annex to this Law also listed names of 60 members of Guerrilha do Araguaia,[68] and es-

[63] ECtHR [GC], *Janowiec and Others v. Russia*, para. 185.
[64] *Ibidem*, para. 184.
[65] *Ibidem*, para. 186 (emphasis added).
[66] *Ibidem*, para. 185.
[67] *Ibidem*, para. 174.
[68] IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 91.

tablished the Special Commission on Politically Motivated Deaths and Disappearances of Persons, which is responsible, among its other functions, "in carrying out the recognition of the disappeared persons not included in Annex 1 of [said] law."[69] The Final Report of the Special Commission was published. Law No. 9.140/95 also established the possibility to grant a pecuniary remedy to the next of kin of the deceased and those who politically disappeared. On the date of the Inter-American Court's judgement on *Gomes-Lund et al.* case, Brazil had compensated the next of kin of 58 disappeared persons of the Guerrilha do Araguaia indicated as alleged victims in the case, in a total sum equivalent to USD 3,772,000.00.[70] Nevertheless, due to the lack of information about the whereabouts of the victims' remains,[71] the Inter-American Court found a violation of the rights to juridical personality, to life, to personal integrity, and to personal liberty, established in Articles 3, 4, 5, and 7 of the American Convention,[72] as well as violation of the right to humane treatment enshrined in Article 5 of the American Convention with respect to the next of kin of the victims.[73] The Court obliged Brazil to "effectively conduct, within the ordinary jurisdiction, the criminal investigation of the facts of the present case in order to ascertain them, determine those criminally responsible, and effectively apply the punishment and consequences which the law dictates",[74] as well as to "carry out all efforts to determine the whereabouts of the disappeared persons, and where applicable, identify and return the bodily remains to the next of kin."[75]

3. THE RIGHT TO THE TRUTH: MISSING A CHANCE

Having accepted that the death of the Polish prisoners of war "has become an established historical fact", and that there is no "lingering uncertainty as to the fate of the Polish prisoners of war", the ECtHR not only went on to express its opinions regarding the allegedly violated rights of the victims' families, but also closed the "window of opportunity" to contribute to the developing doctrine that the "the right to truth" has both individual and collective dimensions.[76]

According to Principle 2 of the UN's Updated Set of principles for the protection and promotion of human rights through action to combat impunity "every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or

[69] *Ibidem*, para. 92.
[70] *Ibidem*, para. 93.
[71] *Ibidem,* para. 121.
[72] *Ibidem*, para. 325.4.
[73] *Ibidem*, para. 325.7.
[74] *Ibidem*, para. 325.9.
[75] *Ibidem*, para. 325.10.
[76] Extensive consideration of the "right to truth" was given by the Open Society Justice Initiative in its Written Comments to the case of *Janowiec*, *supra,* note 10, paras. 17-46.

systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations."[77]

While the UN authorities view the right to truth as an inalienable and autonomous right,[78] the Inter-American and European Courts derive it from the State's obligation to investigate violations of the rights granted by the relevant Conventions.

The Inter-American Court has issued a large body of judgements (which is understandable in the light of the violence which accompanied the transition period from dictatorship to democracy in the majority of Latin American countries) in which it affirms the peoples' right to know the truth, which "is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention."[79]

In order to establish a procedural obligation to investigate violations, the ECtHR uses a different legal technique. For that reason, in its judgements (by far less numerous than those of the Inter-American Court) the right to truth is viewed as a part of the procedural aspect of the rights protected under Articles 2, 3 and 5 of the European Convention. In a case concerning the obligation to investigate the circumstances of the massacres which occurred during the Romanian revolution in 1989, the ECtHR pointed out "the importance of the right of victims and their families and dependants to know the truth about the circumstances of events involving massive violation of fundamental rights such as the right to life, which implies the right to effective judicial investigation and the possible right to compensation."[80]

In the *Janowiec* case, where the right to truth couldn't be considered under Article 2 due to the Court's determination that it lacked competence, in its Judgement of 16 April 2012 the Chamber referred to the right to know the truth in the context of Article 3: "The Court appreciates that the applicants suffered a double trauma: not only had their relatives perished in the war but they were not allowed, for political reasons, to learn the truth about what had happened and forced to accept the distortion of historical fact by the Soviet and Polish Communist authorities for more than fifty years."[81] However, the Grand Chamber found that since, from the date the Convention was rati-

[77] Commission on Human Rights. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, p. 7.

[78] Human Rights Council. Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council". Right to the truth. Report of the Office of the High Commissioner for Human Rights, A/HRC/5/7, 7 June 2007, para. 85; Commission on Human Rights. Study on the right to the truth. Report of the Office of the United Nations High Commissioner for Human Rights. E/CN.4/2006/91, 8 February 2006, para. 55.

[79] IACtHR, *Bámaca-Velásquez v. Guatemala*, Merits, Judgment of 25 November 2000, para. 201.

[80] ECtHR, *Association 21 December 1989 v. Romania*, app. no. 33810/07, Judgment of 24 May 2011, para. 144 (original: *French*).

[81] ECtHR, *Janowiec and Others v. Russia*, para. 156.

fied by Russia, there has remained no uncertainty about the fate of the Polish prisoners of war – their death had become a "historical fact".

Even if we agree with the highly controversial view that there is no historical ambiguity in the fate of the Polish prisoners, still the question arises whether "historical truth" can substitute for "judicial truth"? According to the Inter-American Court, it cannot. Considering the activities of the various reconciliation and truth commissions to be elements of the transitional justice mechanism, the Court has repeatedly pointed out that "the 'historical truth' included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect truth as a whole."[82]

It appears that the victim-oriented Art. 3 of the European Convention, with the existing broad scope of interpretation developed in the ECtHR's jurisprudence, recognising the practice of withholding information and non-conduct of a proper investigation as inhuman treatment,[83] is not the most convenient instrument for developing the right to truth – especially in its social dimension. Here again, it is appropriate to recall that the Inter-American Court had long refused, despite the views of the Inter-American Commission, to consider the link between the right to truth and the right to receive and disseminate information[84] (Art. 13 of the American Convention, Freedom of Thought and Expression). However, in the *Gomes-Lund* case the Inter-American Court for the first time in its practice did precisely that. It broadened the right to truth and derived this right not only from Articles 8 and 25, but also from Art.13: "the next of kin of the victims and society must be informed of all that occurred in regard to said [gross human rights] violations."[85] The right to truth "is linked to access to justice and to the right to seek and receive information enshrined in Article 13 of the American Convention."[86]

It is regrettable that the events surrounding the Katyń tragedy have not been considered in the context of Art. 10 of the European Convention. The position taken by the victims' families, who focused their efforts in the national and European institutions on the right to rehabilitation, are explainable and understandable. What's interesting is a concomitant attempt to challenge the classification of the decision to discontinue criminal case no. 159 as "top secret" – a document which should contain the main conclusions of the investigation, and thus be of an enormous public interest. The only party dealing with this aspect was the human rights organization "Memorial",[87] and the topic has not been pursued further at the ECtHR.

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[82] IACtHR, *Almonacid-Arellano et al v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, para. 150.

[83] For a summary of the practice *see* ECtHR [GC], *Janowiec and Others v. Russia*, paras. 177-181.

[84] IACtHR, *the Rochela Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of 11 May 2007, para. 147.

[85] IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 202.

[86] *Ibidem*, para. 201.

[87] ECtHR [GC], *Janowiec and Others v. Russia,* paras. 61-65.

The potential of Article 10, in the context of top secret classification of criminal case materials, seems to me quite evident. As the Inter-American Court commented in the *Gomes-Lund et al.* case in the context of the right to information: "in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures. Moreover, when it comes to the investigation of punishable facts, the decision to qualify the information as secretive or to refuse to hand it over cannot stem solely from a State organ whose members are charged with committing the wrongful acts. In the same sense, the final decision on the existence of the requested documentation cannot be left to its discretion."[88]

The ECtHR could have considered this issue, albeit indirectly, through the prism of Russia's failure to implement its procedural obligations to assist the Court. In this sense, the Court's decision to recognise Russia's violation of its obligations under Article 38, expressed in its failure to submit to the Court copies of the classified decision to discontinue the criminal case no. 159, viewed against the background of the Court's failure to consider or recognise the violation of substantive provisions of the Convention, emphasises the importance the Court attached to this issue.

A related question naturally arises out: does a violation of a procedural obligation under Section II of the Convention, as found by the Court, give rise to consequences that, according to the ECtHR's practice, follow from the obligations under Art. 46 of the European Convention to abide by the final judgement of the Court, and namely: "to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects"?[89]

On the one hand, the ECtHR clearly links its Art. 46 rhetoric with Art. 1, which contains the obligation to respect and ensure the rights recognised in Section I of the European Convention on Human Rights. According to the Court, 'appropriate general and/or individual measures' must be aimed at securing "the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicants' position, notably by solving the problems that have led to the Court's findings."[90] Yet a violation of Art. 38 is a violation of the Court's right, not that of the applicants.

On the other hand, the fact that the finding of such violation shall have no consequences in effect deprives this part of the Judgement of all meaning. Having said that, what the precise scope of consequences established by the Court in the *Janowiec* case are remains an open question.

[88] IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 202.

[89] ECtHR [GC], *Scozzari and Giunta v. Italy*, app. nos. 39221/98 and 41963/98, Judgment of 13 July 2000, para. 249.

[90] ECtHR, *Savriddin Dzhurayev v. Russia*, app. no. 71386/10, Judgment of 25 April 2013, para. 247.

4. BETWEEN THE *SCYLLA* OF HUMANITARIAN IDEALS AND THE *CHARYBDIS* OF STATE SOVEREIGNTY

I am far from idealising the Inter-American Court and do not propose the blind application of its experience – experience that often tends more to give an example of how an international court ought not to act than how it should.[91]

The Inter-American human rights system has its advantages, but, naturally it also has its disadvantages, the main of which is the extremely low efficiency of its decisions. While giving the proper due to the contribution of the Inter-American Court's jurisprudence to the protection and promotion of human rights – and not only in the Americas but worldwide – we mustn't lose sight of the fact that States all too frequently manage to sabotage the Court's decisions. And this is true in particular of those concerning "far-reaching measures to reduce impunity and advance human rights (such as prosecuting past violations or changing laws and practices)."[92] For example, in 2007 the Inter-American Court stated that only 12% of its resolved cases have been fully executed and complied with.[93] As of 1 January 2013, out of 162 cases reviewed by the Inter-American Court, 138 (around 85%) were still at the stage of monitoring compliance with judgements.[94] In other words, the Court could not confirm their full execution.

This deplorable situation has many causes, one of which is that the Inter-American Court is not always able to maintain the delicate balance between the promotion and protection of human rights and the scope of its treaty body competence accepted by the States when recognising the Court's jurisdiction.

The uncompromising character of the Inter-American Court, its lack of flexibility and diplomacy (the latter of which is often claimed to be used in excess by the ECtHR, including in the *Janowiec* case) leads very often to the fact that its decisions, while embodying the highest humanistic ideals, remain on paper only. It is difficult to expect effectiveness from an international court's decisions when they impose obligations on States which they could not have reasonably foreseen when accepting the compulsory jurisdiction of the treaty body.

This appears to be precisely the threat referred to by Judge Wojtyczek in his partly concurring and partly dissenting opinion to the decision of the Grand Chamber in the *Janowiec* case. He described the ECtHR's position in the *Šilih* case as "imposing retro-

[91] A textbook example is the Inter-American Court's decision, which caused an uproar in Latin America. The Court obliged Peru to engrave on the monument The Eye That Cry, erected in memory of the victims of civil conflicts, among the names of those killed by terrorists also the names of the very same terrorists, if they had been subjected to ill-treatment, torture and murder in prison – IACtHR, *the Miguel Castro-Castro Prison v. Peru*, merits, reparations and costs, Judgment of 25 November 2006, para. 470.16.

[92] J. Cavallaro & S. Erin Brewer*, Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 American Journal of International Law 768 (2008) 785.

[93] *Ibidem*, p. 786.

[94] Annual Report of the Inter-American Court of Human Rights, 2012, p. 13-17, available at <http://www.corteidh.or.cr/>.

active obligations on the High Contracting Parties that they could not have foreseen at the date of ratification of the Convention"[95] and urged the Court "to agree to return to its initial interpretation of the principle of the non-retroactivity of the Convention",[96] based on Article 28 of the Vienna Convention on the Law of Treaties.

In this connection it is also appropriate to refer to the relatively recent decision of the International Court of Justice ("ICJ") of July 20, 2012 in the case *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, in which ICJ took an extremely strict and conservative stance on the principle of the non-retroactivity of international treaties. In this case, the dispute concerned Senegal's compliance with its obligation to prosecute Mr. Hissène Habré, former President of the Republic of Chad (1982-1990), or to extradite him to Belgium for the purpose of criminal proceedings.[97] Belgium based its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984[98] ("Convention against Torture"), which was ratified by Senegal on 26 June 1987.

With respect to the temporal scope of the obligation to prosecute laid down in Article 7, para. 1 of the Convention against Torture, the question was "namely whether the Convention applies to offences committed before 26 June 1987, Belgium contends that the alleged breach of the obligation *aut dedere aut judicare* occurred after the entry into force of the Convention for Senegal, even though the alleged acts occurred before that date. Belgium further argues that Article 7, paragraph 1, is intended to strengthen the existing law by laying down specific procedural obligations, the purpose of which is to ensure that there will be no impunity and that, in these circumstances, those procedural obligations could apply to crimes committed before the entry into force of the Convention for Senegal. For its part, the latter does not deny that the obligation provided for in Article 7, paragraph 1, can apply to offences allegedly committed before 26 June 1987."[99]

The ICJ, with a reference to Art. 28 of the Vienna Convention on the Law of Treaties, firmly rejected this approach, indicating that "the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned."[100] According to the Court, "nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with

[95] ECtHR [GC], *Janowiec and Others v. Russia*, partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 6.

[96] *Ibidem*.

[97] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Rep. 2012, p. 422, para. 1.

[98] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

[99] ICJ, *Questions relating to the Obligation to Prosecute or Extradite*, para. 98.

[100] *Ibidem*, para. 100.

Article 5. Consequently, in the view of the Court, the obligation to prosecute, under Article 7 paragraph 1 of the Convention does not apply to such acts."[101]

As can be seen, the ECtHR's position on its temporal jurisdiction represents the mean (and one would like to believe that it's a golden mean at that) between the two ends of the spectrum: the conservative approach of the ICJ and the unrestrained "human rights imperialism"[102] of the Inter-American Court. And the European Court of Human Rights is trying to feel its way between the *Scylla* of humanitarian ideals and the *Charybdis* of State sovereignty.

On the one hand, the need to fight impunity with respect to serious and flagrant violations of human rights and to strengthen the existing law through the development of the procedural aspects of human rights protection do not always fit into the Procrustean bed of the non-retroactivity principle. On the other hand, the ECtHR doesn't want to risk gaining a "threatening" image in the eyes of the States, appearing as a supra-national lawmaker and thus seriously compromising the persuasive force and effectiveness of its decisions.[103] Having opened a Pandora's Box in the *Šilih v. Slovenia* case, the ECtHR attempted to pull it closed a little bit in the *Janowiec* case.

The criteria for retroactive effect of the Convention, being a product of the ECtHR's judicial activism (and some might say "over-the-top" activism), were initially themselves contradictory, ambiguous and unclear. This was pointed out in several dissenting opinions of judges in the *Šilih* case, and acknowledged as well by the ECtHR in the *Janowiec* case, where the Court recognised the need for their clarification.[104] However, the methods and the results of such "clarification" leave many questions. In trying to even out the surplus of its activism, the ECtHR went forth with even more activism. Essentially, the Court ended up creating a new "statute of limitations" norm (10 years) regarding the "genuine connection" criterion[105] and, in a decision more based on rule-of-thumb than strict legal reasoning, decided "that the 'Convention values' clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty",[106] – a conclusion which could have easily been the last one in the Judgment, before moving on to the operative paragraphs.

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[101] *Ibidem*.

[102] This expression was used by the representative of the United Kingdom in the *Al-Skeini and Others v. the United Kingdom* case regarding the extension of its jurisdiction by the ECtHR, although not in terms of time, but geographically – ECtHR, *Al-Skeini and Others v. the United Kingdom*, app. 55721/07, Judgment of 7 July 2011, concurring opinion of Judge Bonello, para. 37.

[103] This makes one think of the example of ambiguous practice of pilot judgments, in particular the situation with the electoral rights of prisoners in the UK – ECtHR, *Greens and M. T. v. the United Kingdom,* app. nos. 60041/08 & 60054/08, Judgment of 23 November 2010.

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

[105] *Ibidem*, para. 146.

[106] *Ibidem*, para. 151.

CONCLUSIONS

There is no doubt that the *Janowiec* case ruling is the result of a compromise. How much compromise is possible in cases of massive and flagrant violations of fundamental human rights is a separate question to consider. Most of the ECtHR judges, not wanting to risk the stability of the European system, demonstrated their unwillingness to deal in detail with the black pages of Europe's past, handing this right over to historians.

Judges Kovler and Yudkivska, in their joint concurring opinion to the Grand Chamber's Judgement, expressed their belief that "the European Convention on Human Rights, having arisen out of a bloody chapter of European history in the twentieth century, was drafted 'as part of the process of reconstructing western Europe in the aftermath of the Second World War', and not with the intention of delving into that black chapter."[107]

Judge Wojtyczek follows a similar line: "It seems that the aims of the Convention were solely prospective: regard being had to Europe's painful past, the issue was that of preventing future violations of human rights."[108]

Astonishingly enough, in this case the two most similar opinions come from the judges selected to represent the States that in these proceedings took diametrically opposed positions. Their outlined positions on the case can be characterised as "relinquishment of jurisdiction in favour of the Court of History."

[107] ECtHR, *Janowiec and Others v. Russia*, joint concurring opinion of Judges Kovler and Yudkivska.

[108] ECtHR [GC], *Janowiec and Others v. Russia*, partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 5.

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DO THE "UNDERLYING VALUES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BEGIN IN 1950?

Nearly two decades ago, the European Court of Human Rights recognised that there was a "procedural obligation" associated with the protection of the right to life, a norm enshrined in Article 2 of the European Convention on Human Rights.[1] Thus, in addition to a substantive obligation not to take the life of individuals, States are also under a duty to investigate and bring to justice persons suspected of responsibility for life-threatening attacks. This is "not an obligation of result, but of means."[2]

In *Janowiec and Others v. Russia*, the Grand Chamber of the European Court of Human Rights based its dismissal of the application by victims and survivors of the Katyń massacre upon the temporal scope of the procedural obligation. The Grand Chamber held that it was without jurisdiction to consider any breach of a procedural obligation to the extent that the loss of life with which it is associated took place prior to 4 November 1950, the date when the European Convention on Human Rights was signed at the Barberini Palace in Rome. The Grand Chamber explained that "the events that might have triggered the obligation to investigate under Article 2 took place in early 1940, that is, more than ten years before the Convention came into existence." It said that "there were no elements capable of providing a bridge from the distant past into the recent post-entry into force period."[3]

The first procedural obligation case decided by the Court did not raise any difficulties with respect to temporal jurisdiction. The killings that prompted the obligation to investigate had occurred in 1988, more than 35 years after the respondent State, the United Kingdom, had ratified the Convention.[4] The issue of temporal jurisdiction subsequently presented itself in several procedural obligation cases. Chambers of the

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[1] *McCann and Others v. the United Kingdom,* 27 September 1995, Series A no. 324, paras. 157-164.

[2] *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II, para. 71.

[3] *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, 21 October 2013, para. 160.

[4] *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324, paras. 32-67.

Court reached somewhat varying conclusions. In 2001, an application based upon the procedural obligation was declared inadmissible because the events that had given rise to the duty to investigate occurred prior to entry into force of the Convention for the respondent State.[5] Subsequently, another Chamber of the Court took the view that where judicial proceedings concerning an alleged violation had begun prior to entry into force of the Convention and continued afterwards, it was entitled to exercise jurisdiction with respect to the procedural obligation, despite the fact that the actual killing was outside the scope of its temporal jurisdiction.[6] The subject was therefore ripe for consideration by the Grand Chamber.

In 2009, in *Šilih v. Slovenia*, the Grand Chamber confronted the temporal jurisdiction issue with respect to the procedural obligation in a case dealing with medical malpractice. It opted for the more generous approach by which there was a procedural obligation pursuant to Article 2 of the Convention even if the actual killing took place prior to the entry into force of the Convention for the respondent State. By 15 votes to two, the Grand Chamber held that "the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty" that constitutes "a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date."[7] The "critical date" is the moment when the respondent State has become subject to the right of individual petition before the Court.[8] Nevertheless, the Court said that "having regard to the principle of legal certainty" this extension of the temporal jurisdiction of the Court was "not open-ended".[9] The Grand Chamber explained the limitations it was placing on the procedural obligation:

> 162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.
> 163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.
> Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date.

[5] *Moldovan and Others and Rostaş and Others v. Romania* (dec.), nos. 41138/98 and 64320/01, 13 March 2001. Followed by *Moldovan and Others v. Romania (no. 2),* nos. 41138/98 and 64320/01, ECHR 2005-VII (extracts), para. 102; *Kholodov and Kholodova v. Russia* (dec.), no. 30651/05, 14 September 2006.

[6] *Bălăşoiu v. Romania* (dec.), no. 37424/97, 2 September 2003.

[7] *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009, para. 159.

[8] *Ibidem*, para. 140.

[9] *Ibidem*, para. 161.

> However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.[10]

In this way, the Grand Chamber established an exception within an exception. The Court could only exercise jurisdiction with respect to a violation of the procedural obligation contained in Article 2 if a "significant proportion of the procedural steps" had been undertaken after the "critical date." However, this requirement could be waived if "certain circumstances" required the Court "to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner." This "underlying values" exception has sometimes been called the "humanitarian clause."[11] Judges Bratza and Türmen dissented, contending that the principles set out by the Grand Chamber did not in fact dispel legal uncertainty. They noted that this uncertainty was "further compounded by the concluding statement in paragraph 163 of the judgment that the Court would not exclude that, in certain undefined circumstances, the connection between the death and the entry into force of the Convention could also be based 'on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner'."[12] Concerns about the "underlying values" exception were also expressed in a concurring opinion by five judges who voted with the majority.[13]

The *Šilih* decision transformed an application filed some years earlier by Jerzy Roman Janowiec and Antoni Stanisław Trybowski, a son and grandson respectively of Polish officers who had been murdered at Katyń in 1940. A second application, submitted by several other descendants of victims of the massacre, arrived in Strasbourg barely a month after the judgment in *Šilih* was issued by the Grand Chamber. The two applications were joined in accordance with Rule 42(1) of the Rules of Court.[14] At the admissibility stage, the Chamber took note of the acknowledgement by the parties that there was no jurisdiction *ratione temporis* to examine the mass murder of Polish prisoners of war under the substantive limb of Article 2 of the Convention. In other words, the Court had no authority to rule upon Russia's responsibility for the killings. But the Chamber said that the procedural limb of Article 2 "raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits."[15]

A seven-judge Chamber dismissed the argument based upon Article 2 of the Convention although it granted the application on other grounds. After concluding that

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[10] *Ibidem*, paras. 162-163 (interior reference omitted).

[11] *E.g. Janowiec and Others v. Russia* [GC], Concurring Opinion of Judge Gyulumyan; *Janowiec and Others v. Russia* [GC], Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, paras. 7, 31.

[12] *Šilih v. Slovenia* [GC], Joint Dissenting Opinion of Judges Bratza and Türmen, para. 12.

[13] *Šilih v. Slovenia* [GC], Concurring Opinion of Judge Lorenzen; *Šilih v. Slovenia* [GC], Concurring Opinion of Judge Zagrebelsky Joined by Judges Rozakis, Cabral Barreto, Spielmann and Sajó.

[14] *Janowiec and Others v. Russia* (dec.), nos. 55508/07 and 29520/09, 5 July 2011, para. 79.

[15] *Ibidem*, para. 101.

a significant proportion of the procedural steps had not taken place after entry the "critical date", which for Russia was 5 May 1998,[16] the Court turned to the "underlying values" exception. It said that

> the reference of the underlying values of the Convention indicates that, for such connection to be established, the event in question must be of a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as for instance, war crimes or crimes against humanity. Although such crimes are not subject to a statutory limitation by virtue of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, it does not mean that the States have an unceasing duty to investigate them. Nevertheless, the procedural obligation may be revived if information purportedly casting new light on the circumstances of such crimes comes into the public domain after the critical date. It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further. Should new material come to light in the post-ratification period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have temporal jurisdiction to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law.[17]

Although it appeared to recognise that the murder of the Polish prisoners was a war crime and that this would place it within the "Convention values" category, the Chamber insisted that there must be "new elements in the post-ratification period capable of furnishing the connection between the prisoners' death and the ratification and imposing a fresh obligation to investigate under Article 2 of the Convention." It concluded that there were no such new elements "capable of providing a bridge from the distant past into the recent post-ratification period and that the special circumstances justifying a connection between the death and the ratification have not been shown to exist."[18]

Three members of the Chamber, Judges Spielmann, Villiger and Nußberger, dissented from the judgment. They did not disagree substantially with the approach of the majority although they considered that "the gravity and magnitude of the war crimes committed in 1940 in Katyń, Kharkov and Tver, coupled with the attitude of the Russian authorities *after* the entry into force of the Convention, warrant application of the special-circumstances clause in the last sentence of paragraph 163."[19]

In a concurring opinion that seems to have influenced the Grand Chamber, Judges Kovler and Yudkivska noted that this was the first case before the Court concerning the

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[16] *Janowiec and Others v. Russia* [Chamber], nos. 55508/07 and 29520/09, 16 April 2012, para. 138.

[17] *Ibidem*, para. 139.

[18] *Ibidem*, para. 140.

[19] *Janowiec and Others v. Russia* [Chamber], Joint Partly Dissenting Opinion of Judges Speilmann, Villiger and Nussberger, para. 4.

procedural obligation of Article 2 with respect to "an event which happened not only before ratification of the Convention by the respondent State but before the Convention was even drafted."[20] As is often the case with separate, concurring or dissenting opinions, the position of Judges Kovler and Yudkivska helps to give a sharper focus to the reasoning of the majority judgment. It clarifies the point that the majority was in agreement with the dissenters that the "underlying values" test had been satisfied. The majority only dismissed the claim under Article 2 because it felt there was an absence of new information subsequent to the "critical date" for Russia. The Convention entered into force for Russia on 5 May 1998. As this was prior to the entry into force of Protocol No. 11, necessarily the ratification was accompanied by declarations recognising the right of individual petition and the compulsory jurisdiction of the Court

The applicants applied to have the case heard again by the seventeen-judge Grand Chamber in accordance with Article 43 of the Convention. The Grand Chamber took a position with respect to the "underlying values" test and the procedural obligation under Article 2 that was quite original. According to the Grand Chamber, the Court could not consider the "underlying values" exception if the loss of life had taken place prior to 4 November 1950. Its new rule did not arise out of issues that were addressed directly in the Chamber decision or, for that matter, that were debated in the submissions before either the Chamber or the Grand Chamber. Only a trace of the Grand Chamber's position can be found in the concurring opinion of Judges Kovler and Yudkivska in the Chamber, who noted that this was the first case before the Court concerning the procedural obligation of Article 2 with respect to "an event which happened not only before ratification of the Convention by the respondent State but before the Convention was even drafted."[21] There is no discussion in the judgment about the reasons for the choice of 4 November, as if this is so obvious as not to require further explanation. In effect, the starting point for the procedural obligation under Article 2 when the "underlying values" exception is applied was cut from whole cloth by the Grand Chamber.

The Convention itself does not refer to "underlying values." It is a notion that has emerged from the case law of the Convention organs. The expression "underlying values of the Convention"[22] was first employed by the European Court of Human Rights in the landmark case of *Soering v. the United Kingdom*, a decision that is so important for many other reasons. In *Soering*, the applicant had contested his extradition to the United States where he was at risk of sentence of death and consequently of the "death row phenomenon." The Plenary Court noted that merely because the prohibition of *refoulement* where there was a risk of torture had been codified in the Convention Against Torture did not mean it was not also implied in the European Convention:

[20] *Janowiec and Others v. Russia* [Chamber], Joint Concurring Opinion of Judges Kovler and Yudkivska.

[21] *Ibidem*.

[22] In French, "les valeurs sous-jacentes à la Convention" or "les valeurs qui sous-tendent la Convention".

> It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.[23]

These words in *Soering* have been cited repeatedly in subsequent judgments, almost entirely in the context of statements about the link between political democracy and the Convention.[24]

The "underlying values" concept has also been invoked in some cases involving discrimination. Dealing with an anti-Semitic diatribe, the Court said "[s]uch a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination."[25] In a case that concerned religious discrimination, the Court wrote:

> It would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were it so a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.[26]

These words were repeated in a decision concerning sexual orientation.[27] The Court has spoken of Holocaust denial being contrary to the "Convention's underlying values".[28] Speech that is in this way contrary to the underlying values of the Convention is ex-

[23] *Soering v. the United Kingdom,* 7 July 1989, Series A, no. 161, para. 88. Followed: *Aylor-Davis v. France*, no. 22742/93, Commission decision of 20 January 1994.

[24] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, *Reports of Judgments and Decisions* 1998-I, para. 45; *Refah Partisi (the Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, para. 45, 31 July 2001; *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, ECHR 2002-II, para. 47; *Sadak and Others v. Turkey (no. 2)*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, ECHR 2002-IV, para. 32; *Dicle for the Democratic Party (DEP) of Turkey v. Turkey*, no. 25141/94, 10 December 2002, para. 44; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, para. 86; *Ždanoka v. Latvia*, no. 58278/00, 17 June 2004 para. 78; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, para. 317; *Melnychenko v. Ukraine*, no. 17707/02, ECHR 2004-X, para. 53; *Ždanoka v. Latvia* [GC], no. 58278/00, ECHR 2006-IV, para. 98; *Russian Conservative Party of Entrepreneurs and Others v. Russia*, nos. 55066/00 and 55638/00, 11 January 2007, para. 47; *Kılıçgedik and Others v. Turkey*, nos. 4517/04, 4527/04, 4985/04, 4999/04, 5115/04, 5333/04, 5340/04, 5343/04, 6434/04, 10467/04 and 43956/04, 14 December 2010, para. 44.

[25] *Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007.

[26] *Barankevich v. Russia*, no. 10519/03, 26 July 2007, para. 31.

[27] *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, para. 81.

[28] *Lehideux and Isorni v. France*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, para. 53. Followed: *Garaudy v. France*, (dec.), no. 65831/01, ECHR 2003-IX (extracts); *R.L. v. Switzerland* (dec.), no. 43874/98, 25 November 2003; *Palusiński v. Poland* (dec.), no. 62414/00, 3 October 2006; *Orban v. France*, no. 20985/05, 15 January 2009, para. 34; *Paksas v. Lithuania* [GC], no. 34932/04, ECHR 2011 (extracts), para. 88; *L.Z. v. Slovakia* (dec.), no. 27753/06, 27 September 2011; *Hizb Ut-Tahrir v. Germany* (dec.), 12 June 2012, para. 88.

cluded from the protection of Article 10 by the application of Article 17.[29] In *Janowiec*, the Chamber extended the denialist paradigm to encompass Russian behaviour with respect to the descendants of the Katyń victims: "By acknowledging that the applicants' relatives had been held prisoners in the Soviet camps but declaring that their subsequent fate could not be elucidated, the Russian courts denied the reality of summary executions that had been carried out in the Katyń forest and at other mass murder sites", conduct that "contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering."[30] This conclusion, which supported a finding that Article 3 had been violated, was reversed by the Grand Chamber.[31]

Even before *Soering*, there had been an isolated reference to "the values underpinning the concept of freedom of expression in the Convention" in a report of the European Commission of Human Rights.[32] The Court has also spoken of values "underpinning" the Convention, no doubt a concept entirely synonymous with "underlying values". It has said: "This notion of secularism appears to the Court to be consistent with the values underpinning the Convention and it accepts that upholding that principle may be regarded as necessary for the protection of the democratic system in Turkey."[33]

The reference by the Grand Chamber in *Šilih* to "underlying values of the Convention" with respect to the procedural obligation of Article 2 did not correspond very closely to the use that had been made of the term in earlier decisions, perhaps with the exception of *Soering* where a possible violation of Article 3 in the event of *refoulement* to the United States was the issue. In *Janowiec*, the Chamber of the Court attempted to elaborate upon the meaning of the expression when applied to the procedural obligation comprised in Article 2 of the Convention. It said that the reference to underlying values, "[f]ar from being fortuitous", indicated that "the event in question must be of a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as for instance, war crimes or crimes against humanity."[34]

The Chamber seemed ready to accept that the Katyń massacre was indeed an act contrary to the "underlying values" of the Convention:

> The Court accepts that the mass murder of Polish prisoners by the Soviet secret police had the features of a war crime. Both the Hague Convention IV of 1907 and the Geneva Convention of 1929 prohibited acts of violence and cruelty against war prisoners and the

[29] *Gündüz v. Turkey,* no. 35071/97, ECHR 2003-XI, para. 51.

[30] *Janowiec and Others v. Russia* [Chamber], para. 165.

[31] *Janowiec and Others v. Russia* [GC], para. 189.

[32] *X. and Church of Scientology v. Sweden*, no. 7805/77, DR 16, p. 68.

[33] *Leyla Şahin v. Turkey*, no. 44774/98, 29 June 2004, para. 66. Followed: *Dogru v. France*, no. 27058/05, 4 December 2008, para. 66; *Kervanci v. France*, no. 31645/04, 4 December 2008, para. 72; *Ghazal v. France* (dec.), no. 29134/08, 30 June 2009; *Gamaleddyn v. France* (dec.), no. 18527/08, 39 June 2009; *Jasvir Singh v. France* (dec.), no. 25463/08, 30 June 2009; *Bayrak v. France* (dec.), no. 14308/08, 30 June 2009; *Ranjit Singh v. France* (dec.), no. 27561/08, 30 June 2009; *Aktas v. France* (dec.), no. 43563/08, 30 June 2009.

[34] *Janowiec and Others v. Russia* [Chamber], para. 139.

> murder of prisoners of war constituted a 'war crime' within the meaning of Article 6 (b) of the Nuremberg Charter of 1945. Although the USSR was not a party to the Hague or Geneva Conventions, the obligation to treat prisoners humanely and abstain from killing them clearly formed part of the international customary law which it had a duty to respect. In its declaration of 26 November 2010, the Russian Parliament recognised that the mass extermination of Polish citizens had been "an arbitrary act by the totalitarian State". It is further noted that war crimes are imprescriptible in accordance with Article I (a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, to which Russia is a party. [35]

The dissenting judges were equally explicit on this point: "This was clearly one of the war atrocities that the drafters of the Convention sought to prevent from ever happening in the future. It was obviously an act contrary to the underlying values of the Convention."[36]

But after noting that there was no statutory limitation on war crimes and crimes against humanity, the Chamber said this "does not mean that the States have an unceasing duty to investigate them."[37] It was in this context that it developed its exception to an exception to an exception, adding the requirement that there be some substantial new development subsequent to the "critical date". *Šilih* had viewed the "underlying values" as an exception to the general requirement of some link between a substantive violation of Article 2 prior to the critical date and the procedural dimension in the period subsequent to the critical date. The Chamber in *Janowiec* had in effect restored the requirement of a link in the procedure, if it could be shown that "new material [had] come to light in the post-ratification period" that was "sufficiently weighty and compelling to warrant a new round of proceedings." It seems that the Chamber in *Janowiec* closed the door on the existence of a procedural obligation with respect to a violation of the right to life if no procedural steps had been taken by the State prior to the "critical date." Put simply, a State that had done nothing about past atrocities before the Convention's "critical date" would be in the clear while a State that had done something, albeit minimal and unsatisfactory, might find itself in Strasbourg, a perverse result. The Chamber dismissed the under Article 2 because it said the "new material" requirement had not been satisfied. These findings by the Chamber are left undisturbed by the Grand Chamber decision. The Grand Chamber merely added an additional temporal limitation on the tests that it had set out in *Šilih.*

There cannot be much doubt that many judges of the Court must have been apprehensive about the extraordinary potential of the "underlying values" exception in the *Šilih* judgment of the Grand Chamber. This might have led to claims that the procedural obligation had been breached with respect to many historical atrocities. Possible examples are the Spanish civil war, the Armenian genocide, the Irish famine

[35] *Ibidem*.

[36] *Janowiec and Others v. Russia* [Chamber], Joint Partly Dissenting Opinion of Judges Speilmann, Villiger and Nussberger, para. 5.

[37] *Janowiec and Others v. Russia* [Chamber], para. 140.

and a multitude of abuses associated with European colonialism and the slave trade. Indeed, it is hard to predict just where this might lead, although much the same can be said of many provisions in the European Convention on Human Rights. This did not concern the three dissenting judges in the Chamber. They objected to the majority's new restriction on the exception. Explaining the earlier Grand Chamber ruling, they said: "In *Šilih*, the Court included the last sentence of paragraph 163 precisely to catch exceptional cases like the one at hand and to distinguish this case from cases concerning events that happened so long ago that any investigation would be impossible to carry out and hence pointless."[38] They disagreed with a British judge who had suggested that the "underlying values" exception in *Šilih* was meant to avoid closing the door on an unforeseen connection.[39] Their view was based entirely on principle. The obligation to investigate, once the "underlying values" test had been fulfilled, would depend solely upon whether there was a realistic prospect of a meaningful inquiry, given the relevant lapse of time in any given case.

The views of the dissenters within the Chamber in *Janowiec* resonated in some of the separate and dissenting opinions in the Grand Chamber. For example, Judge Gyulumyan also seemed content to impose no temporal or other restriction on the "underlying values" exception: "The State's obligation to carry out a thorough investigation is engaged when gross human rights violations (genocide, crimes against humanity and war crimes) are at stake. The mere fact that the crimes in question took place before the Convention came into existence is not decisive."[40] However, he voted with the majority in the Grand Chamber because he felt Russia had actually fulfilled the procedural obligation.

The very substantial dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller harshly criticizes the majority for turning a "long history of justice delayed into a permanent case of justice denied."[41] With respect to the "underlying values" exception in *Šilih*, the dissenters note that the majority simply does not apply it. The majority's decision "closes the Court's door to victims of any gross human rights violation that occurred prior to the existence of the Convention", write the dissenters.[42] By failing to implement the "humanitarian clause", the dissenters say that the Court has failed "to fulfil the role for which it was intended: to provide a Court that would act as a 'conscience' for Europe."[43] It is indeed hard to be a 'conscience' if one refuses even to consider the past. Where else does "conscience" come from if not the past?

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[38] *Janowiec and Others v. Russia* [Chamber], Joint Partly Dissenting Opinion of Judges Speilmann, Villiger and Nussberger, para. 5 (internal references omitted).

[39] Referring to Lord Philipps in *In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)*) [2011] UKSC 20, at para. 49.

[40] E.g. *Janowiec and Others v. Russia* [GC], Concurring Opinion of Judge Gyulumyan.

[41] *Janowiec and Others v. Russia* [GC] Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, para. 36.

[42] *Ibidem*, para. 33.

[43] *Ibidem*.

The 4 November 1950 cut-off that the Grand Chamber imposes in *Janowiec* may at first blush seem to have a certain logic, but this is apparent rather than real and does not stand up to any serious scrutiny or analysis. In a purely technical sense, the objection might be made that the Convention did not enter into force for three more years, and that the logic of the Grand Chamber's position dictates that the magic date be 3 September 1953. Indeed, theoretically the Convention, once signed, might never have entered into force, failing sufficient ratifications. It would not be the first time this has happened to a treaty. Thus, from the standpoint of treaty law, entry into force rather than signature appears to make more sense. But this is a pedantic objection

But the real problem is that the European Convention did not spring from the head of Zeus, like Athena. It was the product of a complex historical and political reality, in which the "underlying values" of the Convention are to be found. This is recognised to some extent in the preamble of the Convention. It speaks of "a common heritage of political traditions, ideals, freedom and the rule of law." Indeed, it is to this paragraph in the preamble that the Court turned when it introduced the "underlying values" notion in *Soering v. the United Kingdom*, twenty-five years ago. If the "underlying values" are associated with "a common heritage", logically the heritage was in existence prior to 4 November 1950. The preamble of the Convention also notes that the Convention is intended "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration," further confirmation that the "underlying values" existed prior to 4 November 1950. If the Convention takes steps to implement the Declaration, then the "underlying values" must also be present in the Declaration. The reference to the Universal Declaration in turn directs our attention to its owm preamble where it is explained that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind." Is not the "conscience of mankind" a cognate notion to the "underlying values of the Convention"? Or was the "conscience of mankind", like the "underlying values", invented on 4 November 1950?

The selection of the date of adoption of the European Convention as the starting point for the temporal jurisdiction of the Court with respect to the procedural obligation contained in Article 2 is artificial, contrived, unprincipled and unconvincing. The problem is not really with the choice of the date. The Grand Chamber might also have selected 10 December 1948, the date the *Universal Declaration of Human Rights* was voted by the United Nations General Assembly. Or 1 August 1789, the date that the *Déclaration des droits de l'homme et du citoyen* was adopted by the revolution National Assembly in France. Or 19 June 1215, when King John agreed to the Magna Carta at Runnymede. In reality, no single date can be identified as the starting point of the "underlying values" of the European Convention. That is the fallacy in the approach of the Grand Chamber. Indeed, the whole idea of a precise start date is at odds with the notion of "underlying values". The Grand Chamber's decision to propose 4 November 1950 as the beginning of the Convention's "underlying values" is the human rights equivalent of religious fundamentalists who argue that the world began 6,000 years ago.

It is not necessary to contemplate situations where the Court would be required to enforce the procedural obligation associated with Article 2 dating from the eighteenth or nineteenth centuries in order to acknowledge a strong association between the "underlying values" of the Convention and the atrocities of the Second World War. Some comments from judges in their individual opinions suggest a reluctance to confront Europe's recent past, or at least that part of it that belongs to the first half of the twentieth century. The Russian judge who sat in the Grand Chamber wrote that "the Convention system and *jus cogens* rules in the global context should effectively serve the modern world rather than history."[44] In the earlier ruling of the Chamber, two judges wrote that "the European Convention on Human Rights, having arisen out of a bloody chapter of European history in the twentieth century, was drafted 'as part of the process of *reconstructing* western Europe in the aftermath of the Second World War', and not with the intention of delving into that black chapter."[45] Perhaps this is the heart of the problem. The idea that one can close the door on inquiry into the past at a specific date is utterly at odds with modern views about the importance of accountability for past violations of human rights.

It is true, as the Court constantly reminds us, that the Convention is not retroactive in effect. The reason for this has nothing to do with principles of international law or justice. It is entirely possible for States to agree to treaties that operate in the past, prior to their adoption. The Treaty of Versailles, with its pledge to bring the German Emperor to justice, is one such convention.[46] Similarly, the London Agreement establishing the International Military Tribunal is retroactive in nature to the extent that it defines crimes that have already taken place.[47] The European Convention on Human Rights could well have been designed to deal with previous violations of human rights. The only reason this was excluded is because of the reluctance of the States that drafted the Convention to take responsibility for past abuses. In any case, the procedural obligation relates to the conduct of investigations after entry into force of the Convention, not before, and in this sense it is not retroactive even if it is sparked by events that are themselves outside the Court's temporal jurisdiction.

One apparent justification for the Court's new rule concerning the "humanitarian clause" and the procedural obligation of Article 2 is that it will provide greater legal certainty. But is this really a serious argument? In fact, the Court will still have to establish, on a case-by-case basis, whether "underlying values" are at stake with respect to post-November 1950 events. The fact that the event in question may have taken place on 5 November 1950 rather than 3 November 1950 makes this task no simpler. The

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[44] *Janowiec and Others v. Russia* [GC], Concurring Opinion of Judge Dedov, para. 33.

[45] *Janowiec and Others v. Russia* [Chamber], Joint Concurring Opinion of Judges Kovler and Yudkivska (internal reference omitted).

[46] *Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles*, 28 June 1919, [1919] TS 4, art. 227.

[47] *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (I.M.T.)*, annex, (1951) 82 UNTS 279.

methodology proposed by the Chamber and by the dissenters in the Grand Chamber, whereby serious international atrocity crimes create a presumption that "underlying values" have been engaged, is reasonable and workable. Some also invoke the importance of predictability for States that are now considering ratification of the Convention as a reason to limit the temporal jurisdiction. This is hardly a significant point unless the priority is bringing Belarus into the Council of Europe.

As Poland reminded the Grand Chamber at the oral hearing, the incomplete accountability for the mass killings at Katyń and the other massacre sites in eastern Europe remains a blemish on international justice. At Nuremberg, the Nazi defendants were accused of responsibility for the atrocity upon the insistence of the Soviet prosecution team. The evidence consisted of the unconvincing report of a Soviet inquiry and a half-dozen witnesses, three called by the defence and three by the prosecution. In the final judgment, the entire issue was ignored. Katyń was not mentioned even in the dissenting opinion of the Soviet judge, perhaps the most vivid confirmation of the fact that the bench smelled a rat. Nearly five decades later, the Russians started to acknowledge the truth. But they are still concealing evidence of the crime on the preposterous ground that this involves matters of national security. The European Court of Human Rights missed an historic opportunity to tidy up a piece of the continent's sombre history. It ought to have assumed its responsibility to heal the wound that was left from the inadequate treatment of Katyń by the International Military Tribunal. That would have been a great tribute to the integrity of the "underlying values" of the European Convention on Human Rights. Instead, the "underlying values" have themselves been debased by the cynical imposition of a date when they are said to have begun but for which the only real purpose is to prevent inquiries that some States find inconvenient.

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HOW COULD IT GO SO WRONG? *REFORMATIO IN PEIUS* BEFORE THE GRAND CHAMBER OF THE ECtHR IN THE CASE *JANOWIEC AND OTHERS V. RUSSIA* (OR POLISH COLLECTIVE MEMORY DECEIVED IN STRASBOURG)

INTRODUCTION

By a strange coincidence (or not) on 21 October 2013, the European Court of Human Rights (hereinafter ECtHR) issued two judgments which created social alarm in two European States with a vivid interest in the facts under scrutiny. Both were rulings in cases introduced by individuals *ex* Article 34 of the European Convention on Human Rights[1] (hereinafter ECHR). However, what was behind them was not only a personal situation. Instead, the people of those States, namely, Poland and Spain, were deeply concerned because the applications touched upon very sensitive issues at the national level. When the verdicts were given, most people in Poland and Spain gasped, because they had been expecting a very specific solution from the European Court which did not come. They turned their eyes towards the Strasbourg Court in disbelief.

The ECtHR guarantees the application of the ECHR and its protocols in the territory of those European States that have ratified the treaties, but only with respect to events which occurred after the State's ratification. No more, but no less, than that. Its function is not to heal historical wounds, nor to confirm national authorities' views or policies on sensitive domestic issues such as the fight against terrorism or the search for truth concerning mass crimes committed decades ago.

The ECtHR does not have general jurisdiction to deliver justice for past and present national dramas or grievances irrespective of the content of the ECHR. On the contrary, its

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[1] "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".

powers are of a technical nature and are restricted to the implementation of the articles of the ECHR and its optional Protocols. But societies look for justice and redress, especially for crimes that have affected their histories and left a lasting memory. For this reason it's difficult for the Spanish and Polish people to understand the ECtHR's latest judgments in the highly controversial cases of *del Río Prada v. Spain*,[2] and *Janowiec and Others v. Russia*.[3] The former has forced Spain to release more than sixty ETA terrorists who, according to Spanish law, would have remained in prison for years due to their bloody record. In order to abide by Strasbourg's requirements, Madrid authorities had to overrule Spanish legislation and case law which was deemed to be contrary to the ECHR.

The outrage that this decision has produced in Spanish society is difficult to measure. The Court has been criticized for its insensitivity towards the victims of terrorism. However, the ECtHR is not to blame. The ends do not justify the means, and Article 7 of the ECHR clearly states that no one shall have a heavier penalty imposed on them than the one that was applicable at the time the criminal offence was committed. Article 5 also establishes the right to liberty and security. Thus, no matter how grave and reprehensible the crimes were, Spanish authorities are prevented from applying penalties that are more severe than those that were in force at the time when the perpetrators were convicted.

The factual circumstances of *Janowiec and Others v. Russia* are completely different from those in the case against Spain. However, the Polish people experienced the same outrage at this verdict that Spanish felt on the same date. The Polish public wonders whether the Strasbourg Court has turned its back on them. The result has been astonishment and a feeling of impotence.

The following pages present the facts that were at the source of the case *Janowiec and Others* and explains the reasoning of the ECtHR in its verdict(s), both in Chamber – in its judgment of 16 April 2012[4] – and in the Grand Chamber on 21 October 2013. The applicants' disappointment with the ruling issued by the Chamber led them to refer the case to the Grand Chamber within the three month period established in Article 43 of the ECHR and Rule 73 of the Rules of the Court for doing so. The applicants felt deceived by the first ruling because, on the whole, the Chamber rejected all but one of their claims for relief. But the Grand Chamber's ruling was worse. Not only did it refuse to revise the previous negative rulings against the victims, but further it rejected the only one aspect of the applicants' complaints that had been accepted in Chamber (i.e. a *reformatio in peius* ruling). In this paper we analyze not only those aspects where the

[2] ECtHR, *del Río Prada v. Spain*, Grand Chamber, 21 October 2013, application no. 42750/09. In this judgment the ECtHR found a violation of Article 7 under the principles of no punishment without law, *nulla poena sine lege*, and non-retroactivity.

[3] ECtHR, *Janowiec and Others v. Russia*, Grand Chamber, 21 October 2013, applications nos. 55508/07 and 29520/09.

[4] ECtHR, *Janowiec and Others v. Russia*, Fifth Section, 16 April 2012, applications nos. 55508/07 and 29520/09.

Grand Chamber followed the Chamber's reasoning, but also the grounds upon which the Grand Chamber decided not to follow the Chamber's judgment; in other words, why and how the Grand Chamber ruled *reformatio in peius* for the applicants. We also comment on the alternative judicial options that the Strasbourg Court had before it and could have chosen instead.

1. THE CASE

How do modern societies deal with mass crimes committed in distant times – times of extreme violence and conflict? How can the victims of these massacres obtain redress and rehabilitation when the political elites decide to turn the page and not look back? Is applying *Realpolitik* preferable to doing justice? Should victims forget about their claims in the name of reconciliation? Is oblivion needed in order to recover and build a future of cooperation between States? Does democracy necessarily imply transparency and recognition? What can be the overwhelming national security interests which prevent the disclosure of information about abhorrent facts that happened more than seventy years ago? These are some of the questions that were raised by the 2004 Russian decision to discontinue its investigation, voluntarily undertaken by Moscow authorities at the end of the Cold War, into the Katyń Forest massacre of the early 1940s. And these questions were the grounds and motivation for the applications in the case *Janowiec and others*, introduced before the ECtHR by family members of twelve of those persons who disappeared in the Katyń Forest massacre. *Janowiec* is not about unpunished mass murder, but about the right to know the fate of the loved ones and the right to obtain a thorough State investigation into mass slaughters.

1.1. Historical facts

The Katyń Forest massacre still torments our collective conscience and resists oblivion. In collective memory, it has remained one of the most determinant episodes in modern Polish history.[5] The Second World War began on 1 September 1939 when the Germans invaded Poland. Only a fortnight later, the Soviet Army also marched into Polish territory during the short period of German-Soviet cooperation. The reason given for the Soviet invasion was that Poland could no longer guarantee the security of Ukrainians and Belarusians living in Poland. During the process of annexation of the Eastern part of Poland, some hundred thousand Poles, both members of the military and civilians, were detained by the Soviet Army. Some of them were released. Others were deported to the Soviet Union, where many of them died of cold and hunger in

[5] For more on the massacre, *see* A. Cienciala et al., *Katyń: A crime without punishment,* Yale University Press, New Haven: 2007; F. Miller et al., *Soviet War Crimes*, Alphascript Publishing, Beau Bassin: 2010; J. K. Zawodny, *Death in the Forest: The story of the Katyń Forest massacre,* University of Notre Dame Press, Notre Dame, IL: 2011; M. Tuszynski, *Soviet war crimes against Poland during the Second World War and its aftermath: A review of the factual record and outstanding questions*", 44(2) The Polish Review 183 (1999).

Siberia. Some others were sent to special prisons. The Soviet Secret Police (NKVD) decided to send the Polish officer corps to the camps of Kozelsk and Starobelsk, and some of the most literate Polish government officials, police officers and elites (including landowners, businessmen, professors, doctors, priests, rabbis, judges and settlers) were billeted to the Ostashkov camp.

On 5 March 1940, the head of the NKVD submitted a proposal for shooting some 25,700 Polish prisoners under the pretext that, if released, they would conduct anti-Soviet agitation, sabotage and counter-revolutionary work. On that same day, the Politburo of the Central Committee of the Soviet Communist Party instructed the NKVD to consider the 14,700 remaining prisoners of war held in camps and the 11,000 remaining in prisons in the districts of Ukraine and Belarus to be subject to "a special procedure". The instruction made it clear what this "special procedure" was to consist of: execution by shooting squads without the detainees being summoned, the charges being disclosed, or bills of indictment being issued to them. Stalin himself signed the decision, as well as the rest of the members of the Politburo. Some of the Polish nationals concerned were transferred to the Katyń Forest, where they were massacred. The rest of them were shot in the Kharkov and Kalinin prisons. The killings took place in April and May 1940. The bodies were buried in the Katyń Forest and in the sites of Pyatikhatki and Mednoye.

In 1942 the German Army discovered mass graves in the Katyń Forest, but the Soviet authorities blamed the Nazis for carrying out the killings. The NKVD established a commission to collect evidence and to investigate the burials. On 22 January 1944 this NKVD commission concluded that Germany was responsible for the massacres. During the Nuremberg Trials, the deputy Chief Prosecutor for the USSR maintained the official Soviet version and accused the Nazi defendants of the killings. However, no mention of the Katyń massacre was made in the Tribunal's final judgment. In March 1959, the head of the KGB proposed the destruction of documents relating to the executions on the grounds that these files had neither operational nor historical value for the Soviet Union and, if revealed, they could only lead to undesirable consequences concerning relations between the USSR and the allied communist authorities of Poland. But not all the documents were destroyed. Those remaining were labeled as "package no. 1" and the files kept secret.

Investigations into the mass murders commenced in 1990. During the month of April that year, under the banner of Glasnost and Perestroika, the President of the USSR Mikhail Gorbachev handed over documents on the Katyń massacre to the President of Poland, Wojciech Jaruzelski.[6] That same year, the Soviet Kharkov regional prosecutor's office opened *ex oficio* a criminal investigation into the origins of the mass graves. In 1991 Russian and Polish forensic experts exhumed corpses from the mass burial sites. On 14 October 1992, the Russian President Boris Yeltsin revealed that Stalin and his Politburo had ordered the killings without trial and he paid tribute to

[6] G. Sanford, *Katyn: The whole truth about the Soviet massacre*, Routledge, Abingdon: 2005, p. 12.

the victims during an official visit to Poland. In 1995 Russian, Belarusian and Polish prosecutors worked together for a while in the investigation.

But Poland was unsuccessful in its attempts to obtain access to the files from the Russian Chief Military Prosecutor's Office. On 21 September 2004, the latter decided to discontinue the investigation on the ground that the suspects for the crimes were dead. At the end of that year, the Russian Agency for the Protection of State Secrets classified most of the files as "top secret" and the rest of them "for internal use only". The decision to discontinue the investigation was also classified, and the text of this decision has remained secret to date. However, on 28 April 2010 some of the documents, including the NKVD proposal of 1940 to execute Polish prisoners without trial, the Politburo's decision confirming the executions issued on the same date, and the KGB note on the destruction of records in 1959 were made public. On 26 November 2010, the Russian State Duma adopted a statement on the Katyń tragedy and its victims, whereby it recognized the mass extermination during the Second World War of Polish citizens on the then-USSR territory as an arbitrary act of a totalitarian State and deemed it necessary to continue studying the archives, to verify the lists of victims, restore the names of those who perished in Katyń, and uncover the circumstances of the tragedy. None of this has been done so far.

1.2. Grounds for the application

The ECHR entered into force on 3 September 1953, but Russia was not a party to the treaty until 5 May 1998. The applicants in this case are relatives of Polish nationals whose corpses have been found as well as some still missing in relation to those events. At the beginning of the war, the families knew that their relatives were held prisoner in Russia, but they stopped receiving mail from them in 1940. The lapse of such a long period of time with no news from them makes it clear to them that their relatives are dead. They are also aware that, according to Article 28 of the Vienna Convention on the Law of Treaties[7] (hereinafter VCLT), Russia cannot be held responsible before the ECtHR for facts that happened long before Russia was a party to the ECHR. However, they filed their applications on the premise that Russia violated its international obligations under the ECHR on the following grounds:

1) The discontinuation of the investigation: the investigation into the Katyń massacre began in 1990 but was discontinued in 2004. The text of the decision to discontinue the investigation has remained classified to date and the applicants have not had access to it or to any other documentation, despite their persistent requests.

2) Russia's failure to account for the fate of Polish prisoners executed by the NKVD: The applicants were never informed about the fate of their relatives because they were never given the status of victims and because of them not having Russian nationality.

[7] "Non retroactivity of treaties: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

According to the applicants, the above failures constituted breaches of Articles 2 and 3 of the ECHR. They argue that Article 2 on the right to life, and Article 3 on the prohibition of torture and inhuman or degrading treatment have been violated. As far as Article 2 is concerned, the applicants complained that Russia had not discharged its obligations under the procedural limb of Article 2, because it did not conduct an effective and adequate investigation into the deaths of their relatives following Russia's ratification of the ECHR. As to the alleged violation of Article 3, the applicants claimed that the prolonged rejection of historical fact and memory, the withholding of information about the fate of their relatives, and the denial of rehabilitation for the Katyń victims, together with the dismissive and contradictory replies by Russian authorities to their requests for information, amounted to inhuman and degrading treatment.

1.3. The case before the ECtHR

1.3.1. Chamber

The applicants are fifteen close family members of twelve Polish military officers and civilians who were detained by Soviet troops during the USSR invasion of Eastern Poland in 1939. The applicants include wives, sons, daughters, nephews and grandchildren of those who were taken prisoner by the Red Army. Most of the applicants were born before their relative was captured, but some of them were born later and never had the chance to meet their father, grandfather or uncle. The corpses of some of the applicants' relatives have been identified but others are still missing.

By decision of 24 November 2009, the ECtHR granted priority to their applications under Rule 41 of the Rules of the Court, and by decision of 5 July 2011 it decided to join the applications. It further decided under the procedural limb of Article 2 of the Convention to rule on the merits with respect to Russia's objection to the Court's jurisdiction *rationae temporis*, and declared the applications partially admissible.

On 16 April 2012, a Chamber of seven judges delivered its judgment. It found, by the narrow margin of four votes to three, that it was unable to take cognizance of the merits of the complaint under Article 2 of the Convention. By a margin of five votes to two the Court's Chamber stated that there had been a violation of Article 3 of the Convention with respect to ten of the applicants (those who were already born when the massacre took place), but not with respect to the other five. It also found by four votes to three that the defending State had failed to comply with its procedural obligation under Article 38 of the ECHR[8] because of the Russian authorities' adamant refusal to produce a copy, at the request of the Strasbourg Court, of the decision of 2004 by which the investigation into the Katyń massacre was discontinued. The Chamber held unanimously that the respondent State (Russia) was to pay the costs and expenses of the process, but dismissed the remainder of the applicants' claims for just satisfaction.

[8] "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

1.3.2. Grand Chamber

From the applicants' point of view, to a large extent the Chamber's judgment meant that Russia had not violated the rights of the Katyń victims' relatives. Thus, they referred the case to the Grand Chamber (consisting of seventeen judges). According to Article 26.5 of the ECHR, when a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat from the responding State. This is why a Russian judge sat in both processes before the ECtHR (Judge Anatoly Kovler in the Chamber judgment and the new-elected Russian judge, Dmitry Dedov, in the Grand Chamber judgment[9]).

The Grand Chamber in no small part relied on the legal reasoning of the Chamber, but extended the argumentation in some respects and changed it in others. The Grand Chamber held, by thirteen votes to four, that the Court had no competence to examine the complaint under Article 2 of the ECHR, just as the Chamber had held before. But it also held, by twelve votes to five, that there had been no violation of Article 3 of the Convention with respect to any of the fifteen applicants, regardless of their date of birth. Similar as to the Chamber's ruling, the Grand Chamber held unanimously that Russia, by its failure to hand over copies of the 2004 decision to the ECtHR, had failed to comply with its obligation under Article 38 of the Convention. It dismissed by twelve votes to five the applicants' claims for just satisfaction and did not pronounce itself with respect to the costs and expenses of the trial.

Reformatio in peius is a legal expression meaning that a lower court judgment is amended by a higher court into a worse one for those appealing it. Under some legal systems, this practice is forbidden and an appellant cannot be placed in a worse position as a result of filing an appeal, a referral or a request for revision of the judgment to a higher court or chamber. The ECtHR has in fact sometimes scrutinized the legal order of some European States which allegedly failed to comply with Article 6 of the ECHR – on the right to a fair trial – because of acts of *reformatio in peius* in cases where this practice was forbidden by national law.[10] However, the ECtHR is not itself bound by the doctrine forbidding *reformatio in peius.* Applicants referring cases to the Grand Chamber of the ECtHR should be aware of the fact that the judgment of the Grand Chamber is final and that there is always the possibility that this final judgment will place them in a worse position than they were before the referral. Some cases where the Grand Chamber has ruled for worse – compared to the Chamber's previous verdict – include *Lautsi v. Italy* and *Sindicatul Pastorul v. Romania*.[11]

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[9] Due to the expiration of the former's term of office on 31 October 2012.

[10] Including, among others: ECtHR, *Maktouf and Damjanovic v. Bosnia and Herzegovina*, Grand Chamber, 19 July 2013, applications nos. 2312/08 and 34179/08; *Cani v. Albania*, Fourth Section, 6 March 2012, application no. 11006/06; *Agati and others v. Italy*, Second Section, 7 June 2011, applications 43549/08, 5087/09 and 6107/09.

[11] *Cf.* the judgment of *Lautsi v. Italy*, application no. 30814/06 decided in Chamber on 3 November 2009, and the Grand Chamber's decision of 18 March 2011. Compare also the judgment of *Sindicatul*

In 2013, in *Janowiec and others* there was a clear *reformatio in peius* for those who referred the case to the Grand Chamber, i.e. the applicants. They were deprived of the only claim that the Chamber had partially accepted in 2012, namely the violation by the respondent State, with respect to the ten family members who were born before their relatives' disappearance, of their right to be free from degrading and inhuman treatment.

1.4. Comparison between the judgments of the Chamber and the Grand Chamber

1.4.1. Alleged violation of Article 2 of the ECHR

The Katyń massacre is, by any standard, an act outside the temporal reach of the ECHR. The killings took place in 1940. The ECHR was signed in 1950. It entered into force in 1953. The Convention entered into force in the Russian Federation on 5 May 1998 (which is known in ECtHR doctrine as the "critical date"). Article 28 of the VCLT forbids the retroactivity of treaties unless a different intention appears in the treaty or is otherwise established, which is not the case with the ECHR. So how can the applicants rely on Article 2's right to life if the substantive aspect of the Article (the deaths themselves) cannot be the object of scrutiny or redress before the ECtHR? They do so by maintaining that the procedural aspect of Article 2 was violated, namely, the observance by Russia of the applicants' right to obtain an effective investigation of the deaths of their relatives. They also maintain that the soldiers captured by the Red Army should have been granted the full protection guaranteed to prisoners of war, including the protection against acts of cruelty by the provisions of The Hague Convention IV of 1907 and the Geneva Convention of 1929.[12] Even though the USSR was not a party to these conventions, it had a duty to respect the universally binding principles of international customary law, which had merely been codified in those conventions. According to customary law, the execution of prisoners is a war crime. According to the applicants, such an abhorrent act deserves a proper investigation, and the Court was competent to examine the complaint on account of the fact that a significant part of the investigation had taken place after the critical date, but was unexpectedly and abruptly discontinued.

Russia raised a preliminary objection to the Court's competence *rationae temporis* to deal with the merits of the complaint under the procedural limb of Article 2 of the ECHR. It maintained that the alleged violation of Article 2 under the procedural limb not only fell outside the Court's temporal jurisdiction, but also had not existed at all *de iure* since the Katyń tragedy had preceded the adoption of the ECHR by ten years and its ratification by Russia by 58 years. In the Russian Government's view, this precluded

Pastorulcel bun v. Romania, application no. 2330/09, Chamber, 31 January 2012 with that of the Grand Chamber of 9 July 2013.

[12] The Hague Convention (IV) on the Laws and Customs of War on Land of 28 October 1907 and Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929.

the Court from examining its compliance with any procedural obligation arising under Article 2. Russia added that most investigative actions in the Katyń case took place between 1990 and 1995, that is, during Perestroika, but before the ratification of the Convention by Russia. Also, owing to the destruction of records the investigation could not go on and the authorities were unable to determine the circumstances under which Polish citizens were detained, what the charges were against them, whether they were proved guilty, or who carried out the executions. In Russia's opinion, the perpetrators of the acts are probably dead now and, even if not, they would be exempted from criminal liability. The investigation during Perestroika had been conducted as a goodwill gesture, but no one could reasonably expect to carry out an effective investigation almost 60 years after the events, when the witnesses had died and the basic documents had been destroyed. Moreover, the crimes could not be labeled as war crimes since from the standpoint of international humanitarian law since, at least until 1945, there was no universally binding provision of international law on the definition of war crimes.

Both the Chamber in 2012 and the Grand Chamber in 2013 decided to examine together the applicants' complaint under the procedural limb of Article 2 and the defending State's preliminary objection to the ECtHR's competence *rationae temporis* to deal with the right to life. And both of them reached the same conclusion; namely the ECtHR accepted the Russian Government's objection and concluded that it had no competence to examine the complaint under Article 2 of the Convention. The construction of the ECtHR's reasoning in both the Chamber and the Grand Chamber is based on the doctrine that stems from the case *Šilih v. Slovenia*.[13] However, the Grand Chamber felt itself obliged to clarify the Chamber's interpretation in *Šilih*,[14] as the application of the criteria adopted in *Šilih* has sometimes given rise to uncertainty.[15] The applicants in the *Šilih* case are the parents of a boy who sought medical assistance on 3 May 1993 and who died in a hospital on 19 May 1993 after suffering anaphylactic shock, probably resulting from an allergic reaction to the medication administered for his minor disease. The applicants lodged a criminal complaint for medical negligence. However, the criminal complaint was dismissed by the Slovenian judiciary. On 1 August 1994, after the entry into force of the ECHR in Slovenia, the parents lodged a new request for a criminal investigation. On 26 April 1996 the investigation was reopened but discontinued in 2000. The applicants appealed unsuccessfully and, in the meantime, brought civil proceedings against both the doctor and the hospital. After more than 13 years of proceedings and the attribution of the case to six different judges, the case is still pending before the Slovenian Constitutional Court.

Although the death of the boy happened before the ratification of the ECHR by Slovenia, the ECtHR found a violation of Article 2, not in its substantive aspect but in

[13] ECtHR, *Silih v. Slovenia*, Grand Chamber, 9 April 2009, application 71463/01.

[14] For more on the *Silih* case, *see* E. Bjorge, *Right for the wrong reasons: Silih v. Slovenia and jurisdiction rationae temporis in the European Court of Human Rights*, Law (2013), doi: 10.1093/bybil/brt001. The Grand Chamber's clarification of this doctrine is contained in paras. 140-151 of its judgment.

[15] Grand Chamber judgment, para. 140.

its procedural one. The Court concluded that the procedural obligation to carry out an effective investigation has evolved into a separate and autonomous duty. It can be considered as a detachable obligation arising out of Article 2, capable of binding the State even when the death took place before the critical date. However, in order not to undermine the principle of legal certainty, the Court's temporal jurisdiction with respect to deaths which occurred before the critical date is limited and has to comply with three requirements: 1) only procedural acts or omissions occurring after the critical date can fall within the ECtHR's temporal jurisdiction; 2) there must be a "genuine connection" between the death and the entry into force of the ECHR with respect to the respondent State for the procedural obligations of Article 2 to come into effect – which means that a significant proportion of the procedural steps required by this provision will have been or ought to have been carried out after the critical date; 3) a connection which is not genuine in the sense of the former requirement may nonetheless be sufficient to establish the ECtHR's jurisdiction if it is needed to ensure that the underlying values of the ECHR are protected in a real and effective manner (paras. 159-163).

As mentioned before, in *Janowiec* both the Chamber and Grand Chamber applied the doctrine established in *Šilih* to the point that they both reproduced paragraphs 159-163 of *Šilih* in their judgments. Both ECtHR formations reiterated that the provisions of the Convention do not bind a contracting party in relation to any act or fact that took place, or for omission of a duty which ceased to exist before the entry into force of the ECHR with respect to that party. But the obligation to carry out an effective investigation into unlawful or suspicious deaths binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it.[16] The ECtHR compared the lapse of time between the Katyń murders and Russia's critical date (58 years) with that of Šilih's death and Slovenia's critical date (one year). The Chamber emphasized that the lapse of time between the triggering event and the ratification date must remain reasonably short if it is to comply with the "genuine connection" standard,[17] but it did not specify how short it should be, whereas the Grand Chamber went further and said it should not exceed ten years.[18] In legal terms, setting a concrete number of years seems quite arbitrary or at least, limiting, but the Grand Chamber smoothed out the toughness of this new condition by adding that, in exceptional circumstances, it may be justified to extend the time-limit further into the past if the third requirement of the *Šilih* case is met (the need for ECtHR's jurisdiction to ensure that the underlying values of the ECHR are protected in a real and effective manner).

Although the ECtHR is sensitive to the applicants' submission that the Katyń acts constitute war crimes and that this type of crime is imprescriptible and not subject to limitations, the Chamber also understood that States do not have an unceasing duty to

[16] Chamber judgment, para. 130 and Grand Chamber judgment, para. 142.
[17] Chamber judgment, para. 135.
[18] Grand Chamber judgment, para. 146.

investigate them.[19] Both the Chamber and the Grand Chamber noted that a significant proportion of the Katyń criminal investigation took place before the ratification date (between 1991 and 1995).[20] In fact, after the critical date there were no new forensic developments or investigative work which could revive the procedural obligation of the investigation.[21] Having regard to these considerations, the Court upheld Russia's objection and declared it did not have jurisdiction to examine the merits of the complaint under Article 2 of the ECHR.

1.4.2. Alleged violation of Article 3 of the ECHR

It is with respect to the alleged violation of Article 3 that the legal reasoning of the Chamber and the Grand Chamber differ the most. As a consequence, the verdicts of the ECtHR in these two formations do not coincide either. Whereas the Chamber found that the lack of information about the fate of the applicants' relatives and the Russian authorities' dismissive approach to their requests for information amounted to inhuman and degrading treatment with respect to two-thirds of the applicants, the Grand Chamber dismissed the Chamber's argumentation and found no violation of Article 3 with respect to any of the fifteen applicants.

As a preliminary question, the Chamber wanted to make clear that the authorities' obligation under Article 3 is distinct from the obligation flowing from Article 2, both in substance and in temporal outreach. The procedural obligation under Article 2 requires the authorities to take specific legal action(s) capable of leading to the identification and punishment of those responsible for a violation of the right to life, whereas the obligation under Article 3 is of a more humanitarian character, for it enjoins the authorities to react to the requests of relatives of the dead or unaccounted for in a compassionate way. Moreover, the authorities have to comply with Article 3 irrespective of whether they are responsible for the criminal act.[22] The interesting but also controversial manner employed by the Chamber to solve the complaint under Article 3 was to distinguish two groups of applicants on the basis of the proximity of the family ties that linked them to the Katyń victims, namely, relatives with strong family bonds and relatives with more distant bonds.[23] In the first group, the Chamber placed widows and children born before their father's disappearance, while it placed children born in 1940 or later, nephews and grand-children in the second group. The reasoning was that the first group of applicants had close links with the Katyń victims, especially children that were in their formative years when their fathers went missing. For the remaining five applicants, the anguish experienced on account of their relatives' disappearance was deemed to be more distant and hence not fall within the scope of Article 3. This distinction is controversial. One can question whether the fact of being born after the tragic disappearance

[19] Chamber judgment, paras. 139-140.
[20] Chamber judgment, para. 138 and Grand Chamber judgment, para. 159.
[21] Chamber judgment, para. 140 and Grand Chamber judgment, para. 159.
[22] Chamber judgment, para. 152.
[23] *Ibidem*, para. 153.

of one's father turns this child into someone with "distant" family ties with his or her father. It could be argued that, quite the opposite, this child will be brought up without having the opportunity of knowing his or her father or developing any personal contact with him, which is a double anguish and a handicap in his or her life. Exaggerating the Chamber's reasoning to its limit, it could also be questioned whether the fact of having met one's father always makes for a strong family bond, because there are many individuals with no contact at all with their fathers.

Nonetheless, the Chamber made this distinction and thus the rest of its reasoning only refers to the first group of applicants. It went on to examine the emotional situation of the ten remaining applicants over different periods of time. First, during the Second World War, when they remained in a state of uncertainty as to the fate of their relatives, and especially after 1940 when the sporadic mail they used to receive from them stopped. After the war, they could still nurture hope that at least some of them could have escaped or could have been released and/or gone into hiding. Throughout the communist period, they experienced fear as they were not allowed to ask national authorities about their fate because of political reasons, and were forced to accept the official version that the Germans were to blame for their disappearance. The actions by the authorities must have aggravated their suffering. At the end of the Cold War, they had a spark of hope again with the undertaking and advance of an investigation, but this hope was suddenly frustrated by the 2004 decision to discontinue the inquiry. Importantly, after the ratification by Russia of the ECHR there was a callous disregard for the applicants, consisting of the persistent denial of access to the records on account of their foreign nationality and also due to the Russian authorities' refusal to grant them the status of victims.[24]After due consideration of the previous elements, and despite the Chamber's awareness that 58 years had elapsed after the events, it decided the applicants could not be made to suffering any more the agony of not knowing whether their family member was still alive, hence the Chamber determined that Russia's attitude and actions were inhuman and found a violation of Article 3.

The applicants disagreed with the distinction made between those applicants with strong and those with "loose" family ties. They were victims in an equal measure. This is one of the reasons why they referred the case to the Grand Chamber. They added a new argument, namely, that the moral suffering of all of them could not be classified as inherently arising from the killings themselves, but resulted from the treatment they experienced at the hands of the Russian authorities.

In the referral of the case, Russia objected that there was an absence of "special factors" which would give the applicants' sufferings a dimension and character distinct from the inevitable emotional distress caused to the families of any other victim of human rights' violations.[25] Moreover, in the instant case, they had not witnessed their relatives' deaths and for decades had not asked the authorities for an investigation. As

[24] *Ibidem*, paras. 158 and 159.

[25] Grand Chamber judgment, para. 169.

justification for the Russian authorities' acts, it was contended that the relatives could not be given the status of victims because the destruction of records made it impossible to establish the causal connection between the "Katyń events" and the deaths of their relatives, or to determine whether their detention in 1939 had been lawful.

The Grand Chamber disregarded most of the previous Chamber's judgment with respect to the application of Article 3. It supported Russia's view that there must be special factors in place giving a dimension to the victims' suffering distinct from the emotional distress that stems from the violation itself, as established in the ECtHR's previous case-law.[26] These factors include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family witnessed the events, and the involvement of the applicants in the attempts to obtain information. A finding of a violation on these grounds is not limited to cases where the State is responsible for the disappearance, but it can also result from the failure of authorities to respond to quests for information or placing obstacles in their way. In other words, the Grand Chamber was referring to the doctrine of positive obligations, without naming it. The Court did not question the profound grief that the applicants have suffered as a consequence of the arbitrary execution of their relatives, but it stated that in the interest of legal certainty and equality before the law it could not depart from its own precedents without compelling reasons. In 1990 the USSR officially acknowledged the responsibility of Soviet leadership for the killings of Polish prisoners, and partial exhumations gave evidence of the facts. By the time Russia ratified the ECHR, in consideration to the lengthy period of time that had elapsed, the applicants could not be said to remain in a state of uncertainty as to the fate of the individuals who were detained in 1939 by the Soviet Army and from whom they had not heard since 1940. The Grand Chamber found it could only take into account the anguish and distress suffered by the applicants from the critical date (1998) and, in this respect, there were no special factors or new elements that contributed to extend their suffering. Thus, the death of their relatives has become a historical fact and, from a legal point of view, the missing persons can be considered "confirmed deaths".[27]

1.4.3. As to the observance of Article 38 of the ECHR by the Respondent Government

Article 38 of the ECHR makes it compulsory for State parties to produce, at the Court's request, any document or information. Compliance with this obligation is a condition *sine qua non* for the effective conduct of proceedings and must be enforced regardless of any finding or the final outcome. States have to furnish the evidence from the moment of formulation of the request, in its entirety and within the time-limit fixed by the Court.

[26] *I.e.* in a series of Chechen cases (*Velkhiyev and Others v. Russia*, application no. 34085/06, 5 July 2011; *Sambiyev and Pokayeva v. Russia*, application no. 38693/04, 22 January 2009, *Tangiyeva v. Russia*, application no. 57935/00, 29 November 2007).

[27] Grand Chamber judgment, para. 186.

The ECtHR repeatedly asked Russian authorities to produce a copy of the decision of 21 September 2004 by which the investigation into the Katyń atrocity was discontinued, but the Russians always refused on the grounds that the disclosure of classified documents to an international organization violates domestic law. It maintained that information on intelligence, counterintelligence and operational and search activities constitute state secrets within the meaning of national law. Russia also contended that the 2004 decision is not crucial because it does not mention the applicants' names and does not contain information on their fate or burial sites. However, for the applicants this document was crucial in order to determine whether the Russian investigation was effective. Russia said, before the Grand Chamber, that it would not execute the request because the document was likely to prejudice the sovereignty, security, public order and essential interests of the country. It disagreed that the obligation under Article 38 had to be enforced in all circumstances.[28]

Article 27 of the VCLT[29] establishes that no internal rule, even of a constitutional character, can be invoked as an excuse for the non-observance of international law. This rule is the natural corollary of the principle *pacta sunt servanda* and is also a longstanding principle of customary international law. Taking this principle of international law as the basis for their legal reasoning, both the Chamber and the Grand Chamber reiterated that it is of the utmost importance for the effective operation of the system of individual petitions instituted by Article 34 that States should furnish all necessary facilities to make possible a proper and effective examination of applications.[30] Granting a blanket right to States to withhold documents from proceedings for security reasons would jeopardize the very functioning of the Court.

The texts of the Chamber's and Grand Chamber's judgments are very similar concerning the refusal to hand over the required documentation. Neither were satisfied with the respondent State's excuses. Being a master of its own procedure and its own rules, the Court has complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it. This is why it could not tolerate Russia's response that the documents are not necessary for the conduct of the proceedings. Russia is not entitled to invoke the provisions of its own domestic law to justify the non-observance of an obligation arising from the ECHR. It is noteworthy that at no point in the proceedings did the Russian Government explain the exact nature of the security concerns which required classification of the decision. Neither formation of the Court was convinced that a public and transparent investigation into past crimes committed by a previous totalitarian regime, and whose authors are certainly dead, could compromise the interests of national security of contemporary Russia.[31] *In extremis*, if there were very legitimate security reasons, sensitive passages of

[28] *Ibidem*, para. 195.

[29] "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty [...]".

[30] Chamber judgment, para. 99 and Grand Chamber judgment, para. 202.

[31] Chamber judgment, para. 109 and Grand Chamber judgment, para. 213.

the document could have been suppressed or access to the document could have been restricted.

At the end of its judgment, the Grand Chamber is even tougher in its reasoning, raising the idea that Russia suffers from structural deficiencies in its domestic law and may not be acting in good faith.[32] Documents on human rights violations can never remain secret. In the balancing exercise between the need to protect information owned by secret services and the public interest in a transparent investigation into mass crimes, the latter prevails.

2. THE ROLE OF A STATE'S POSITIVE OBLIGATIONS

Even if not mentioned by the ECtHR using these words, the case *Janowiec and Others* is a clear example of use of the doctrine of a State's positive obligations by the Strasbourg Court.[33]

2.1. The doctrine of positive obligations

Traditionally it was considered that most human rights were protected by a State's mere abstention from prohibited activities, especially in the case of civil and political rights. To be protected, it was sufficient that State agents did not commit forbidden activities (i.e. that they not violate the right to life of individuals, did not torture or inflict inhuman treatment or punishments, did not illegally detain an individual etc.). However, the evolution of the international law of human rights has led many to consider that today States not only have obligations *not* to do forbidden things or *not* to interfere, but also have the positive obligation to prevent abuses of human rights produced by private individuals or by catastrophes or acts that the State could have avoided, or whose effects should have mitigated. In other words, although a State, in principle, is only responsible for what its organs and agents do, it may also be held responsible for their omissions. Human rights have become rights whose enjoyment must be ensured by the State. To enjoy a right does not only mean entitlement to its non-violation by State agents, but also entitlement to demand that States to take measures to protect enjoyment of the right. Human rights now have both a negative dimension (which limits the power of the State) and a positive dimension, which presupposes that States must also ensure the free exercise of the rights.

The legal basis of the doctrine of positive obligations is the assumption that States have the means to fulfill their obligations and to prevent, investigate, report and punish any unlawful act. States have mechanisms to prevent violations (through law enforce-

[32] Grand Chamber judgment, paras. 211-212.

[33] For more on the positive obligations of States, *see* S. Sanz Caballero, *Las obligaciones positivas del Estado en Derecho Internacional Público y Derecho Europeo*, [in:] M. Alvarez, R. Cippitani (eds.), *Diccionario analítico de derechos humanos e integración jurídica*, TEC, Ciudad de México: 2013, pp. 466-473.

ment, social services, the judiciary, the army etc.). States have bodies and mechanisms to inform citizens, investigate and punish, as well as legislative institutions to prevent and alleviate abuses. For this reason, States may be liable when, while being empowered to do so, they do not take appropriate measures to prevent damage or abuse, or when they act with negligence or lack of care, or when they do not properly investigate and repair abuses. States are responsible not only for their actions but also for their omissions (*not* preventing, *not* legislating, *not* investigating, *not* informing, *not* pursuing, *not* punishing, *not* restituting victims' honor).

The ECHR is no stranger to this trend. Positive obligations are also a component of the human rights included in the Convention.[34] In addition to the classical negative obligations of non-violation and non-interference, a State party to the ECHR must actively protect the human rights of individuals within its jurisdiction. Article 1 of the ECHR[35] establishes a general obligation of respect for the rights and freedoms referred to in it. This requires State parties to "ensure" these rights. The ECtHR has understood that States have obligations of prevention, research, reparation and rehabilitation of victims.[36] Article 13 of the ECHR guarantees the right to an effective remedy, also generating positive obligations for States. In the past 30 years the ECtHR has applied the doctrine of positive obligations, contrasting it with other interests at stake. For the ECtHR, when positive obligations are violated, either the State allowed the right's interference – in a conscious or unconscious way – or the violation was facilitated by its inaction, or a combination of the two. The involvement of the State can be in the form of a law, a judicial decision, an administrative order or a combination thereof. The test of effectiveness involves, among other things, administrative measures including a mechanism for investigation and supervision. The State's positive obligations may also include precautionary measures (informing the victims), reactive measures (punishing criminals) or redress measures (rehabilitating or compensating the victims). All rights are likely to engender positive obligations. According to the ECtHR, all public authorities, through their actions or inactions, may be the cause of a breach (police, legislative, government, judges, administration, social services, military etc.).[37]

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[34] F. Sudre, *Les obligations positives dans la jurisprudence européenne des droits de l'homme*, [in:] P. Mahoney, F. Matscher (eds.), *Protecting Human Rights: The European Perspective*, Carl Heymanns Verlag, Köln: 2000, p. 1359.

[35] "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

[36] D. Xenos: *The Positive Obligations of the State under the European Convention of Human Rights*, Routledge, New York: 2012, p. 59.

[37] One of the positive obligations of States under the ECHR is to investigate possible abuses. This obligation extends to all types of agents who perform functions on behalf of the State. In *Jordan* and in *Shanagahan* (ECtHR, *Jordan v. UK*, 4 May 2001, application no. 24746/94 and *Shanaghan v. UK,* 4 May 2001, application no. 37715/97), the respondent State was held to blame for the actions of its police forces. On both verdicts the sentence was not for the death of suspects by police gunfire but because the State did not undertake a quick, official and independent investigation of these deaths. In cases of dysfunctional families, or children under the guardianship of the State, positive obligations soar. In *Z and others* (*Z and*

2.2. The application of the doctrine of positive obligations to *Janowiec and Others*, and how the Court could have resolved the case

It might appear on the surface that the language in the *Janowiec* case is about the non-retroactivity of international treaties –and this is the way Russia approached the application. However, its substance is about the limits of States' positive obligations. Oddly enough, in *Janowiec* the ECtHR did not refer to the doctrine of positive obligations. When the ECtHR declared the admissibility of this case on alleged violations of Articles 2 and 3 of the ECHR related to facts that happened almost sixty years before the Convention's entry into force in Russia, the ECtHR was clearly implying that there were grounds to believe that the respondent State failed to comply with its procedural obligations of investigation, punishment, information, redress and rehabilitation of the victims of those distant events, and that those procedural obligations have not ceased to exist.

Criminal responsibility for the mistreatment or murder of the prisoners may have been extinguished years ago, but States still have the legal and material means to investigate the facts and mitigate the suffering caused by atrocities. And they are obliged to use these means in the name of justice. State authorities cannot contribute, through a disinformation campaign and/or opacity, to increasing the families' distress. The search for truth is inherent in the very conditions surrounding those who lost their relatives in a violent way. The ECtHR has declared that the procedural obligation to carry out an effective investigation has evolved into a separate and autonomous duty. Thus, if a Court takes into consideration that there may have been a violation of the right to life or the right to be free from torture and inhuman treatment with respect to the relatives of those who were massacred, it is only saying that the respondent State may have failed in its international obligations under the ECHR to conduct all the procedural steps necessary to alleviate the families' suffering. However, the ECtHR finally concluded in the Grand Chamber's judgment that the recent date of the entry into force of the ECHR in Russia did not permit it to find any new element in the investigation or, better said, – in the discontinuation of the investigation – that could lead to Russia's responsibility and condemnation.

This is the restrictive way the ECtHR understood its own competence in this case. But the ECtHR could have used *Janowiec* to further extend its interpretation of the

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others v. UK, 10 May 2001, application no. 29392/95) the State breached its positive obligations by the negligence of social services in relation to four brothers subjected to inhuman treatment. And in *Hokkanen* (*Hokkanen v. Finland*, 23 September 1994, application no. 19823/92) Finland was responsible for the repetition of children's sexual abuse in their family environment when the social services knew that this had already happened in the past. To prevent, protect, and repair the victims are positive obligations that intermingle in the case of *Osman (Osman v. UK*, 28 October 1998, application no. 23452/94), in which a harassing teacher killed a student and wounded his father. British police never gave credence to parents' allegations of harassment and therefore did not order protective measures. In *Kilic* and in *Özgür Gündem* Turkey was sentenced because it did nothing to prevent the threats and death of a journalist and did not rehabilitate the memory of the victim (*Kilic v. Turkey*, 28 March 2000, application no. 22492/93 and *Özgür Gündem v. Turkey*, 16 March 2000, application no. 23144/93).

positive obligations of States. Of course the Court should not go as far as to declare its competence to rule on mass crimes committed before the ECHR itself was even concluded. This would go against the principle of legal security.[38] But *Janowiec* was about the unavoidable duty to investigate and prosecute war crimes, which are imprescriptible and not subject to any statutory limitation. Any contrast or juxtaposition between the *Šilih* case concerning the suspicious death of a person allegedly due to medical negligence, and the *Janowiec* case, which concerned the calculated murder of almost 26,000 prisoners on the direct orders of a foreign State, aimed at getting rid of the elites of another State so as to allow a smooth transition to a totalitarian-controlled regime,[39] resists comparison.

The facts of the *Janowiec* case demonstrate a lack of good faith (another basic principle of international law, established in Article 2 of the Charter of the United Nations[40]) on the part of the respondent State with respect to the relatives of those massacred. The files on the circumstances of the 1940 events were either destroyed or kept classified, and the families' requests for information and investigation were ignored. Even if we only take into account the period after the critical date, the positive obligations of the Russian State after that date were the following: 1) to disclose the 2004 decision on the discontinuation of the investigation; 2) to waive the secret character of all records about Polish prisoners; 3) to reinstate the forensic investigation of burial sites. By not doing so, Russians' attitude after the critical date could be interpreted as non-collaborative, or even as obstruction. The positive obligation to investigate and to inform the victims is an obligation of means, not of result. Russia could have proved its goodwill by accepting that documents on gross violations of human rights can never remain secret and by trying to look for the corpses that are still missing. By doing that, it would demonstrate its respect for the principles of international law concerning the imprescriptibility of war crimes and the continuing nature of the crime of disappearance (until the moment the body is found).

Certainly, States cannot be asked to investigate violent acts forever. To give rise to a fresh obligation to investigate, the ECtHR requires the discovery of new evidence or material after the entry into force of the ECHR in the affected State. The application of this rule is fair and logical. But blocking the disclosure of information on human rights violations (including to the ECtHR) after the critical date is not acceptable. Denying the status of injured party to the relatives of the Katyń massacre after the critical date on account of the fact that most of the victims are missing and Russia cannot be sure whether they were killed on Stalin's orders or went into hiding is offensive to the families and also to history. The arbitrary denial of rehabilitation for the Katyń victims after the

[38] However, it should be noted that this is the case with the work of the *ad hoc* international criminal courts of ex Yugoslavia, Rwanda, Sierra Leone, Timor or Cambodia, created after the crimes were perpetrated.

[39] V. Zaslavsky, *Class Cleansing: The Katyń massacre,* Telos Press Publishing, Candor: 2008, *passim.*

[40] "[…] All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter […]".

critical date on the grounds that the destruction of records makes it impossible to know whether they were detained because of illegal acts is untenable. As far as the burials are concerned, after the critical date the development of new technologies such as satellite vision, topographic techniques and advances in forensic medicine can be considered as new means which could be used to locate the mass graves, exhume corpses and identify the remains. Ultimately, the ECtHR could have considered that the duty of the State to investigate was reinstituted in 2010 on account of two facts: the unexpected disclosure of some essential documents that had been classified until that moment (e.g. the 1940 Politburo decision to execute all Polish prisoners), and the highly symbolic declaration of the Russian Parliament acknowledging Soviet responsibility for the "Katyń atrocity" and asserting the need to resume the investigation, which certainly gave the applicants a spark of hope.

CONCLUSIONS

Following decades of denial, at the beginning of the Perestroika era Russian authorities admitted publicly that, during Stalinism, a single order led to the extrajudicial execution of almost 26,000 Polish nationals. In the light of the policy of Glasnost, in 1990 criminal investigations into this massacre were commenced, but they were discontinued and its provisional results were classified in 2004 on the orders of Moscow. No one has ever been convicted in connection with these facts. The families of those who were killed have never learned about the circumstances of their relatives' deaths. After long years of silence under communist Poland, with the beginning of democratic changes these families demanded information from Russia. However, the Russian Government has consistently prevented them from finding out the truth. The files containing the decision to discontinue the investigation remain classified on grounds of security interests. It is difficult to understand why a comprehensive and transparent investigation of a massacre of foreigners committed 58 years ago by an now-extinct totalitarian regime could compromise the security of a State today.

In the debate on the Katyń Forest massacre, which is at the very origins of Second World War, the Grand Chamber of the ECtHR ruled it had no competence over the atrocity itself or over the subsequent improper treatment received from the Russian authorities by the relatives of those who were shot to death in 1940. With this verdict, the Grand Chamber deprived the applicants of the only one of their claims that the previous formation of the ECtHR – the Chamber – had earlier ruled in favor of; namely, that some of the applicants had received improper treatment from the respondent State.

In contrast, the final judgment of the ECtHR unanimously found that Russia, in refusing to submit a key procedural piece of evidence to the Court, had failed to comply with its obligations under the ECHR.

Polish authorities and the Polish people have shown their disappointment with the verdict. Most if not all of them believe that there has always been a conspiracy of silence

over the Katyń tragedy and they cannot understand why Russian authorities are unable to now face up to a killing that happened 70 years ago. What is it so horrible that the information cannot be disclosed today, when both the authors of the massacre and their victims are dead? The applicants thought that the Strasbourg Court would force Russia to acknowledge the mistaken Soviet practices of denial and disinformation. But Russia seems to be still unable to confront its past, and the ECtHR's capacity of action is limited by ECHR provisions, and in the *Janowiec and Others* case it interpreted its own competence in a very restrictive manner.

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JANOWIEC AND OTHERS V. RUSSIA: A LONG HISTORY OF JUSTICE DELAYED TURNED INTO A PERMANENT CASE OF JUSTICE DENIED

INTRODUCTION

Can the Russian Federation be held responsible for violations of its international obligations under the European Convention on Human Rights (hereinafter "European Convention") in relation to the *Katyń* massacre? If so, which violations can be attributed to Russia, taking into account that the massacre was perpetrated before the European Convention had even been drafted? How far does extend the positive obligation of a State to conduct effective investigations into gross human rights violations and to prosecute and sanction those responsible? Which notion of "indirect victim" should be applied when assessing a case of massacre? What are the implications of recognizing the right to truth in its individual and collective dimensions?

These are the main questions that the European Court of Human Rights (hereinafter "ECtHR") was called upon to address when ruling on the case *Janowiec and others v. Russia*, first in its Chamber-formation (judgment issued on 16 April 2012), and then in Grand Chamber (judgment issued on 21 October 2013).[1]

The answers provided by the ECtHR are far from satisfactory in many respects and the legal reasoning is not particularly persuasive. This becomes even more evident when comparing the findings of the ECtHR with those of the Inter-American Court of Human Rights in similar cases. The latter show that a different outcome would have been possible.

1. THE CASE *JANOWIEC AND OTHERS V. RUSSIA*

Between 2007 and 2009 the ECtHR received two applications against Russia lodged by fifteen Polish nationals, who are relatives of twelve of the victims of the *Katyń*

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[1] ECtHR, *Janowiec and Others v. Russia* (55508/07 and 29520/09) Chamber, ECtHR 16 April 2012; and Grand Chamber, ECtHR, 21 October 2013. Judgments of the ECtHR are available at <http://www.ECtHR.coe.int>.

massacre. In April and May 1940 almost 26,000 Polish prisoners of war who were being held in special prison camps established by the Soviet People's Commissariat for Internal Affairs (hereinafter "NKVD") were arbitrarily executed and their bodies were thrown in mass graves. The decision to carry out this mass execution was signed by all members of the *Politburo*. Victims included Polish officers held in detention camps and members of various counter-revolutionary and espionage organizations, former landowners, officials and refugees. Prisoners from the Kozelsk camp were killed at a site near Smolensk, known as the Katyń forest; those from the Starobelsk camp were shot in the Kharkov NKVD prison and their bodies were buried near the village of Pyatikhatki; the police officers from Ostashkov were killed in the Kalinin NKVD prison and buried in Mednoye. The circumstances of the execution of the prisoners held in prisons in western Ukraine and Belarus remain unknown to date.

In 1942 and 1943 common graves were discovered near the Katyń forest and an international commission consisting of forensic experts conducted exhumations from April to June 1943. The remains of 4,243 Polish officers were excavated, and 2,730 were identified. The commission declared that the Soviets were responsible for the massacre. However, Soviet authorities denied any involvement and put the blame on the Germans. In 1959 Russian authorities destroyed the records of the persons shot in 1940 and related documents. Other sensitive files were sealed and their contents were officially made public only in 2010.

In 1991 around 200 bodies were recovered in the Kharkov, Tver and Smolensk regions, and 22 of them were identified. Between 1990 and 2004, Russian authorities opened a criminal investigation into the *Katyń* massacre, but the Chief Military Prosecutor eventually decided to discontinue the case on the grounds that all alleged suspects were dead. On 22 December 2004 the Interagency Commission for the Protection of State Secrets classified 36 volumes of the case file – out of a total of 183 – as "top secret" and another eight volumes "for internal use only". The decision to discontinue the investigation was also given "top secret" classification and its existence was only revealed on 11 March 2005 at a press conference given by the Chief Military Prosecutor. Although requested to do so by the ECtHR in the context of the proceedings, Russia refused to produce a copy of this decision, alleging the need for its secrecy.

The fifteen applicants before the ECtHR were all relatives of twelve of the victims of the *Katyń* massacre, including sons and daughters, wives, and grandchildren. Some of the applicants were born after the massacre took place, but they also devoted their lives to the struggle to unveil the truth and to obtain justice and redress for the harm suffered.

Between 2003 and 2008 the applicants requested documents from the Prosecutor General of the Russian Federation concerning their relatives, and asked the Chief Military Prosecutor's Office to recognize their rights as next-of-kin of the executed Polish officers. However, access to documents was precluded either because the latter had been destroyed in 1959 or because they were classified as secret. The applicants were not formally recognized as victims in the cases before the Russian authorities. In 2007 the Military Court of the Moscow Command noted that although the relatives of some

of the applicants had been listed among the prisoners in the Starobelsk camp, their remains had not been among those identified and therefore "there were no legal grounds to assume that they had died as a result of the offence in question."[2] This reasoning was upheld by the Supreme Court of Russia. In 2008 and 2009 further appeals were submitted, but Russian courts dismissed them, reiterating that although the names of applicants' relatives had been included in the NKVD lists for the Ostashkov, Starobelsk and Kozelsk camps, "the Katyń investigation did not establish the fate of the said individuals. As their bodies had not been identified, there was no proof that the applicants' relatives had lost their lives as a result of the crime of abuse of power."[3]

Applications lodged between 2008 and 2009 by the Russian NGO Memorial requesting declassification of the decision of 2004 to discontinue the investigation were rejected. Between 1998 and 2008 the applicants (i.e., those who filed applications in the ECtHR case) repeatedly applied to different Russian authorities for the rehabilitation of their relatives. Their claims were rejected.

The applicants before the ECtHR alleged a violation by Russia of Art. 2 of the European Convention (right to life) in its "procedural limb", due to the failure to conduct an adequate and effective investigation into the deaths of their relatives. Further, they alleged a violation of Art. 3 of the European Convention (prohibition of torture and inhuman or degrading treatment and punishment), submitting that, owing to the lack of information about the fate of their relatives and the Russian authorities' dismissive approach to their requests for information, they had endured inhuman and degrading treatment.

The ECtHR also considered whether the Russian refusal to produce, at its request, a copy of the decision of 2004 to discontinue the investigation into the *Katyń* massacre amounted to a violation of Art. 38 (examination of the case) of the European Convention. A violation of this provision was declared in both judgments, as the ECtHR did not find substantive grounds which could have justified the respondent State's refusal to produce a copy of the requested decision and the classification of the documents was at variance also with the requirements of domestic legislation, which precluded any information about violations of human rights by State officials from being classified.[4]

The European Convention was adopted on 4 November 1950 (i.e. almost ten years after the *Katyń* massacre) and entered into force on 3 September 1953. Russia ratified it on 5 May 1998.[5]

1.1. The Chamber and Grand Chamber judgments

On 16 April 2012 a Chamber of the ECtHR issued its judgment in the case *Janowiec and others*. The applicants obtained the referral of the case to the Grand Chamber, which on 21 October 2013 rendered its judgment. In the words of Judge Wojtyczek,

[2] ECtHR, *Janowiec and Others* (Chamber), para. 53.

[3] *Ibidem*, para. 56.

[4] Due to the limited space available, this aspect will not be further examined in this contribution.

[5] Pursuant to Art. 59, para. 4, of the European Convention "As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification."

"while the Convention does not set out a prohibition of *reformatio in peius*, the situation is paradoxical, in that a remedy provided for by Article 43 of the Convention and used by the applicants with a view to ensuring protection of human rights has ultimately led to a Grand Chamber judgment which is much less favourable to them than the Chamber judgment."[6]

1.1.1. The ECtHR's competence *ratione temporis*

First, the ECtHR had to assess whether it had the competence *ratione temporis* to examine the merits of the applicants' complaint with regard to Russia's violation of Art. 2 because of its lack of investigation into the *Katyń* massacre.

In previous cases the ECtHR has affirmed its temporal jurisdiction to review States' compliance with the procedural obligations stemming from Art. 2 of the European Convention with regard to deaths which occurred prior to the entry into force of the treaty. In the leading case *Šilih v. Slovenia,* decided by the Grand Chamber in 2009, the ECtHR held that "the procedural obligations arising under Article 2 can be seen as being detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the critical date [date of entry into force of the Convention with respect to the State party or, the date on which the respondent recognized the right of individual petition, when this recognition was still optional]."[7] However, to guarantee the principle of legal certainty, the ECtHR indicated that its competence encompasses only procedural acts or omissions in the period subsequent to the Convention's entry into force. The ECtHR also found that there must be a

> *genuine connection between the death and the entry into force of the Convention in respect of the respondent State* for the procedural obligations imposed by Article 2 to come into effect. Thus *a significant proportion of the procedural steps required by this provision* – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – *will have been or ought to have been carried out after the critical date. However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner*.[8]

In its jurisprudence, the ECtHR clarified that the procedural obligation to investigate under Art. 2 of the European Convention where there has been an unlawful or suspicious death is triggered by, in most cases, the discovery of the body or the occurrence of death, but

> […] the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the

[6] ECHR, *Janowiec and Others* (Grand Chamber), partly concurring and party dissenting opinion of Judge Wojtyczek, para. 10.

[7] ECHR, *Šilih v. Slovenia* (71463/01) Grand Chamber, ECHR 9 April 2009, para. 152. *See also* para. 159.

[8] *Ibidem*, para. 163 (emphasis added).

> missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain.[9]

First, in an attempt to justify its departure from the *Šilih* precedent, in *Janowiec and Others* the Chamber recalled that the period of time passed between deaths and the entry into force of the Convention for the respondent State must be relatively short, and it noted that in its case-law this ranged from one to 13 years.

In the case of *Janowiec and Others* 58 years had passed and this was arguably not short. However, the ECtHR clarified that, to comply with the "genuine connection" standard, a significant portion of the investigative steps to comply with the procedural obligation under Art. 2 must have been carried out after the ratification date (i.e. 5 May 1998). The findings on this aspect of the Chamber in *Janowiec and Others* are rather disappointing. Although in its own summary of the facts the Chamber recalls that the investigation on the *Katyń* massacre was conducted between 1990 and 2004 and that appeals to challenge the decision to discontinue the case were lodged by applicants until 2008, in its judgment the Chamber inexplicably focused only on the excavations performed in 1991, the handing over of historic documents to Polish authorities in 1992, and on a stock-taking meeting held between the Russian, Polish, Belarusian and Ukrainian prosecutors in 1995. After having completely overlooked all the other investigative steps (taken or omitted by Russian authorities) between 1998 and 2008, the Chamber concluded that it was unable to "find any indication in the file or in the parties' submissions that any procedural steps of comparable importance were undertaken in the post-ratification period. […] It follows that the criterion triggering the coming into effect of the procedural obligation imposed by Article 2 has not been fulfilled."[10]

In *Šilih* the ECtHR also held that exceptional circumstances, based on the need to ensure the effective protection of the guarantees and the underlying values of the Convention, can also justify the finding of a connection between the triggering event and the ratification. It would seem that events such as those committed in *Katyń* and the subsequent attitude of Russian authorities are blatantly in conflict with the underlying values of the Convention. The conclusion of the Chamber on this subject is somewhat surprising. The Chamber first affirmed that "far from being fortuitous, the reference of the underlying values of the Convention indicates that, for such connection to be established, the event in question must be of *a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as for instance, war crimes or crimes* against humanity."[11] But it added that the duty to investigate war crimes or crimes against humanity is not unceasing, although

> the procedural obligation may be revived if information purportedly casting new light on the circumstances of such crimes comes into the public domain after the critical date.

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[9] ECtHR, *Varnava and Others v. Turkey* (16064/90 16065/90 16066/90 16068/90 16069/90 16070/90 16071/90 16072/90 16073/90) Grand Chamber, ECtHR 18 September 2009, para. 145.

[10] ECtHR, *Janowiec and Others* (Chamber), para. 138.

[11] *Ibidem*, para. 140 (emphasis added).

> It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. […] Should new material come to light in the post-ratification period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have temporal jurisdiction to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law.

Eventually, the Chamber accepted that the massacre "had the features of a war crime" but, although not having access to the complete investigation file precisely because Russia carefully avoided producing it, the Chamber nonetheless felt confident that there were no "new elements in the post-ratification capable of furnishing the connection between the prisoners' death and the ratification and imposing a fresh obligation to investigate […] the Court is therefore bound to conclude that there were no elements capable of providing a bridge from the distant past into the recent post-ratification period and that the special circumstances justifying a connection between the death and the ratification have not been shown to exist." By a margin of four votes to three the Chamber declared that it lacked the competence to examine the merits of the complaint under Art. 2. In fact the lack of disclosure of the relevant documents was in itself a persistent omission event that corresponded to the persistent violation of the procedural obligation and could alone justify the exercise of the ECtHR's jurisdiction.

The weaknesses in the Chamber's reasoning were highlighted by Judges Spielmann, Villiger and Nußberger in their joint partly dissenting opinion. They declared they had "no doubt that the Court is able to take cognisance of the merits of the complaint under Article 2 and that this Article has been violated."[12] For the dissenting judges the criteria set out in *Šilih* were misinterpreted by the majority. In their view, the "gravity and magnitude of the war crimes committed in *Katyń* […] coupled with the attitude of the Russian authorities after the entry into force of the Convention, warrant application of the special circumstances clause in the last sentence of paragraph 163 [of *Šilih*]",[13] and "this was clearly one of the war atrocities that the drafters of the Convention sought to prevent from ever happening in the future. It was obviously an act contrary to the underlying values of the Convention."[14] They added that the existence of such an act, "which constituted a war crime not subject to a statutory limitation is, as long as investigation is still possible, sufficient in our view to establish the Court's temporal jurisdiction over the investigation into this act"[15] and "even if we were to adopt the logic of the

[12] *Ibidem*, joint partly dissenting opinion of Judges Spielmann, Villiger and Nußberger, para. 1.

[13] *Ibidem,* para. 4.

[14] *Ibidem,* para. 5. This affirmation was rebutted by Judges Kovler and Yudkivska in their joint concurring opinion, arguing that "we believe that the European Convention on Human Rights, having arisen out of a bloody chapter of European history in the twentieth century, was drafted 'as part of the process of *reconstructing* western Europe in the aftermath of the Second World War', and not with the intention of delving into that black chapter". This argument resembles that used to justify amnesty laws or post-dictatorial pardon measures, where the need to "turn the page" is invoked.

[15] *Ibidem,* joint partly dissenting opinion of Judges Spielmann, Villiger and Nussberger, para. 7.

majority qualifying the 'genuine connection test' by introducing a second element (that is, sufficiently important material casting new light on the offence and coming into the public domain in the post-ratification period), we would still be satisfied that the Court has jurisdiction to examine the complaint. Indeed, both the decision of 21 September 2004 to discontinue the investigation and the decision to classify the case file amounted to major developments in the investigation."[16]

For its part, the Grand Chamber noted that the application of the criteria adopted in *Šilih* has sometimes given rise to uncertainty and therefore further clarification was desirable. It first affirmed that the notion of procedural acts "must be understood in the sense inherent in the procedural obligation under Article 2 […] namely acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party. *This definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing a historical truth*."[17] It clarified that

> omissions refers to a situation where no investigation or only insignificant procedural steps have been carried out but where it is alleged that an effective investigation ought to have taken place. Such an obligation on the part of the authorities to take investigative measures may be triggered when a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible. Should new material emerge in the post-entry into force period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law.[18]

With regard to the "genuine connection" test, the Grand Chamber entered into unwarranted arithmetic considerations:

> the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the "genuine connection" standard. *Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed ten years.* Even if, *in exceptional circumstances, it may be justified to extend the time-limit further into the past, it should be done on condition that the requirements of the 'Convention values' test have been met.*[19]

The reasons that led the Grand Chamber to fix the ten-year limitation remain obscure.[20]

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[16] *Ibidem,* para. 10.

[17] ECtHR, *Janowiec and Others* (Grand Chamber), para. 143 (emphasis added).

[18] *Ibidem*, para. 144.

[19] *Ibidem*, para. 146 (emphasis added).

[20] *But see* D. Ruck Keen, *1940 Soviet massacre outside reach of European Convention, rules Strasbourg*, UK Human Rights Blog, 29 October 2013, http://ukhumanrightsblog.com/2013/10/29/1940-soviet-massacre-outside-reach-of-european-convention-rules-strasbourg/#more-20026, accessed 25 January 2014. The author argues that "[t]he inclusion of a specific temporal limb within the 'genuine connection' test is particularly welcome".

The Grand Chamber attempted to better explain the "Convention values test", indicating that "the required connection may be found to exist if *the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity*, in accordance with the definitions given to them in the relevant international instruments."[21] Although the premise is quite sound, the outcome is astonishing. While the Grand Chamber does not go so far as to affirm that the *Katyń* massacre was not of a larger dimension than an ordinary criminal offence, nonetheless without further legal explanations it takes out of the hat a brand new criterion, according to which "the *'Convention values' clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty*."[22] But here the ECtHR ignored the fact that the "triggering event" consists of the event determining the alleged violation of the Convention, that is the lack of investigation, which continued well after the entry into force of the Convention.

It is clear that the Grand Chamber wanted to avoid opening a potential Pandora's box, but a court is called upon to give legal foundations to its decisions, and in this case there does not seem to be one. The Grand Chamber concludes that States parties "cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention. Although the Grand Chamber is sensitive to the argument that even today some countries have successfully tried those responsible for war crimes committed during the Second World War, it emphasises the fundamental difference between having the *possibility* to prosecute an individual for a serious crime under international law where circumstances allow it, and *being obliged to do so by the Convention*."[23] Hence justice is left to the goodwill of State parties and confined to a mere possibility. The dissenting judges riposted that "the interpretation of the humanitarian clause by the majority contradicts this very aim. We regret the majority's interpretation of the humanitarian clause in the most non-humanitarian way."[24]

A few months before delivering this unfortunate judgment, the ECtHR had affirmed for the first time in its jurisprudence the right to know the truth in cases of gross violations of human rights, declaring that "while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in

[21] ECtHR, *Janowiec and Ohers* (Grand Chamber), para. 150 (emphasis added).

[22] *Ibidem*, para. 151 (emphasis added). This criterion has been characterized as "non persuasive" also by judges voting with the majority. *See* concurring opinion of Judge Gyulumyan; and partly concurring and partly dissenting opinion of Judge Wojtyczek, para. 8.

[23] ECtHR, *Janowiec and Others* (Grand Chamber), para. 151 (emphasis added). For a sharp critique of this paragraph of the judgment, see the joint partly dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, para. 33.

[24] *Ibidem*, para. 35.

their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[25] On that occasion, the ECtHR held that the inadequate character of investigations has an impact on the right to the truth, declaring that in cases of gross human rights violations this right pertains not only to the applicant and his or her relatives, but also to other victims of similar cases and the general public, which has the right to know what has happened. The findings of the Grand Chamber in *Janowiec and Others* are at odds with any serious attempt to guarantee the right to know the truth.

1.1.2. The applicants as victims of a violation of Art. 3

With regard to Art. 3, by a margin of five votes to two the Chamber found a violation with respect of ten of the applicants due to the suffering they incurred by the continuous disregard for their situation shown by the Russian authorities. The Chamber recalled that the essence of a violation of Art. 3 "is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention. The relevant factors include the *proximity of the family tie, the particular circumstances of the relationship*, the extent to which the family member witnessed the events in question, *the involvement of the family member in the attempts to obtain information about the disappeared person*."[26]

However, with regard to five of the applicants the Chamber seems to have considered that their family ties were not close enough. In particular, it argued that:

> two of them […] are the children of the victims of the Katyn massacre but they were born after the precipitated departure of their fathers to war and have never had a personal contact with them. Of the other three applicants who were twice removed from the Katyn victims, only Ms. Rodowicz may have had an opportunity to seeing her grandfather before he perished in the NKVD camps, whereas Mr. Trybowski and Mr. Romanowski were born in 1940 and 1953 and had never known their respective grandfather and uncle. While accepting that the fact of being raised without their father must have been a source of continuing distress for Ms. Wołk-Jezierska and Ms. Krzyszkowiak, the Court considers that the mental anguish which those five applicants experienced on account of the disappearance of their fathers or more distant relatives was not such as to fall within the ambit of Article 3.[27]

With respect to the ten 'nearest' applicants, the Chamber concluded that:

> the applicants suffered a long ordeal during the entire post-war Communist era in which political factors put insurmountable obstacles to their quest for information. The institution of Katyn proceedings gave them a spark of hope in the early 1990s but it was gradually extinguished, *in the post-ratification period, when the applicants were confronted with the attitude of official denial and indifference in face of their acute anxiety to know the circumstances of the death of their close family members and their burial sites.* They were excluded from

[25] ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia* (39630/09) Grand Chamber, ECtHR 13 December 2012, para. 192.

[26] ECtHR, *Janowiec and Others* (Chamber), para. 151.

[27] *Ibidem,* para. 154.

> the proceedings on the pretence of their foreign nationality and barred from studying the materials that had been collected. They received curt and uninformative replies from Russian authorities and the findings that had been made in the judicial proceedings were not only contradictory and ambiguous but also contrary to the historic facts which, nonetheless, were officially acknowledged at the highest political level. *The Russian authorities did not provide the applicants with any official information about the circumstances surrounding the death of their relatives or made any earnest attempts to locate their burial sites*.[28]

It is actually difficult to see how these considerations can be limited to only ten of the fifteen applicants.

Judges Jungwiert and Kovler would have gone even further, denying the existence of a violation of Art. 3 with respect to all the applicants. In their view, only relatives of disappeared persons may, in certain circumstances, be considered victims of a violation of Art. 3 because of the lack of information on their relatives. But if it is assumed, as the ECtHR did, that the treatment to be given to the act at stake is that of "death" (instantaneous act) then, a more restrictive approach must be applied and no matter how negligent State's authorities have been, the distress of the applicants would not reach the minimum level of severity which is necessary to consider the treatment as falling within the scope of Art. 3.[29]

Finally, the Chamber justified its finding of a violation of Art. 3 with respect to the ten "nearest" applicants by recalling its jurisprudence, according to which "a *denial* of crimes against humanity, such as the Holocaust, *runs counter to the fundamental values of the Convention and of democracy, namely justice and peace*, and that the same is true of statements pursuing the aim of justifying war crimes such as torture or summary executions."[30] The Chamber considered that the "*approach chosen by the Russian authorities has been contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering*."[31] While the latter is hardly disputable, one may wonder why the Chamber failed to recognize that the lack of investigations into the deaths of the applicants' relatives does not run counter the fundamental values of the Convention.

With regard to the applicants' claims for just satisfaction, the Chamber held that although ten of them "must have suffered anxiety and frustration on account of the Russian authorities' flagrant, continuous and callous disregard for their enquiries […], in the exceptional circumstances of the present case, it considers that the finding of a violation would constitute sufficient just satisfaction."[32] Compensation in the form of pecuniary and non-pecuniary damages in connection with the deaths of the applicants' relatives was rejected as "the complaint about their killing in 1940 falls outside the scope of the instant case."[33]

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[28] *Ibidem,* para. 164 (emphasis added).

[29] *Ibidem*, joint partly dissenting opinion of Judges Jungwiert and Kovler.

[30] ECtHR, *Janowiec and Others* (Chamber), para. 165 (emphasis added).

[31] *Ibidem* (emphasis added).

[32] *Ibidem*, para. 173.

[33] *Ibidem*, para. 174.

The Grand Chamber, in its judgment, denied that any of the applicants was a victim of a violation of Art. 3 of the Convention, because the mental distress provoked by the Russian authorities' attitude did not reach the necessary threshold to be considered inhuman and degrading treatment. The justification put forward by the majority of the judges (by a margin of twelve votes to five) to get to this conclusion was unforeseen. On the one hand, they affirmed that the finding a violation of Art. 3 "is not limited to cases where the respondent State is to be held responsible for a disappearance. It *can also result from the failure of the authorities to respond to the quest for information by the relatives or from the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts*, where this attitude may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the fate of the missing person."[34] On the other hand, the Grand Chamber found that

> the situation which is at the heart of the complaint under Article 3 initially presented the features of a "disappearance" case. […] *By the time the Convention was ratified by the Russian Federation on 5 May 1998, more than fifty-eight years had passed since the execution of the Polish prisoners of war. Having regard to the long lapse of time, to the material that came to light in the intervening period and to the efforts that were deployed by various parties to elucidate the circumstances of the Katyn massacre, the Court finds that, as regards the period after the critical date, the applicants cannot be said to have been in a state of uncertainty as to the fate of their relatives who had been taken prisoner by the Soviet Army in 1939. It necessarily follows that what could initially have been a "disappearance" case must be considered to be a "confirmed death" case.* […] The Court does not question the profound grief and distress that the applicants have experienced as a consequence of the extrajudicial execution of their family members. […] The Court's case-law, as outlined above, has accepted that the suffering of family members of a "disappeared person" who have to go through a long period of alternating hope and despair may justify finding a separate violation of Article 3 on account of the particularly callous attitude of the domestic authorities to their quest for information. As regards the instant case, the Court's jurisdiction extends only to the period starting *on 5 May 1998, the date of entry into force of the Convention in respect of Russia. The Court has found above that as from that date, no lingering uncertainty as to the fate of the Polish prisoners of war could be said to have remained. Even though not all of the bodies have been recovered, their death was publicly acknowledged by the Soviet and Russian authorities and has become an established historical fact. The magnitude of the crime committed in 1940 by the Soviet authorities is a powerful emotional factor, yet, from a purely legal point of view, the Court cannot accept it as a compelling reason for departing from its case-law on the status of the family members of "disappeared persons" as victims of a violation of Article 3 and conferring that status on the applicants, for whom the death of their relatives was a certainty.* The Court further finds no other special circumstances of the kind which have prompted it to find a separate violation of Article 3 in "confirmed death" cases.[35]

[34] ECtHR, *Janowiec and Others* (Grand Chamber), para. 178 (emphasis added).
[35] *Ibidem*, paras. 182, 185-187 (emphasis added).

The Grand Chamber affirmed that the relatives of victims of gross human rights violations other than enforced disappearance could be considered as victims of a violation of Art. 3, but it then concluded that, since the death of the applicants' relatives was certain, there was no suffering that could amount to a violation. The Grand Chamber carefully avoided assessing whether the failure of Russian authorities to respond to the requests for information by the applicants (which lasts to this very day and also affected the ECtHR itself), and the insurmountable obstacles placed in their way (also faced by the ECtHR, which could not obtain from Russia the requested documentation), could be considered as contrary to the provisions of Art. 3.

The findings of the Grand Chamber are a mockery in the face of persons who have been struggling for decades to discover the truth on the fate of their relatives and on the circumstances surrounding the massacre and the progress of the investigation. Earlier the Russian authorities always denied any standing in domestic proceedings to the victims' relatives. Now the ECtHR suggests that they should be satisfied with accepting that their loved ones certainly died.

2. A COMPARISON WITH THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

In its judgment in *Šilih*, the ECtHR expressly invoked the jurisprudence of the Inter-American Court of Human Rights (IACHR) to justify its decision to establish jurisdiction *ratione temporis* over the procedural complaints relating to a death which had taken place prior to the critical date.[36] By contrast, the Chamber completely ignored the very same jurisprudence in its judgment in *Janowiec and Others*. The Grand Chamber also avoided any mention of it, although both the applicants and third parties consistently referred to the Inter-American jurisprudence.[37] Indeed, had the principles set out by the IACHR been applied by its European peer, the outcome of the *Janowiec and Others* case would arguably have been very different.

The IACHR has found international responsibility of respondent States for their lack of investigation into gross human rights violations, including massacres which occurred well before the critical date.[38] The IACHR does not refer to "genuine con-

[36] ECtHR, *Šilih*, paras. 114-118 and 160.

[37] ECtHR, *Janowiec and Others* (Grand Chamber), paras. 123, 125-126, 176 and 196.

[38] *See inter alia*, IACHR, *Massacres of El Mozote and nearby places v. El Salvador*, Judgment of 25 October 2012 (the massacres took place in December 1981, while El Salvador recognized the competence of the IACHR in June 1995); IACHR, *Río Negro Massacres v. Guatemala*, Judgment of 4 September 2012 (the triggering facts occurred between 1980 and 1982 and Guatemala recognized the competence of the IACHR in March 1987); *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Judgment of 24 November 2010 (the violations occurred between 1972 and 1975, while the respondent recognized the competence of the IACHR in December 1998); *Radilla Pacheco v. Mexico*, Judgment of 23 November 2009 (the triggering facts dated back to August 1974, while Mexico adhered to the American Convention in March 1981); and *Heliodoro Portugal v. Panama*, Judgment of 12 August 2008 (the triggering facts occurred in May 1970, while Panama recognized the competence of the IACHR in February 1990). Judgments of the IACHR are

nections" or "humanitarian clauses", nor does it fix random time-spans between the triggering events and the critical date. It neatly holds that it has "competence to examine human rights violations that are continuing or permanent even though the initial act violating them took place before the date on which the Court's contentious jurisdiction was accepted, if the said violations persist after the date of acceptance, because they continue to be committed; thus, the principle of non-retroactivity is not violated."[39] The obligation to investigate and to identify, prosecute and sanction those responsible for gross human rights violations is of a continuous nature. Moreover, an investigation cannot be undertaken "as a simple formality predestined to be unsuccessful". In this regard, the IACHR has established that "every State decision that is part of the investigative process, as well as the investigation as a whole, must be directed at a specific goal, *the determination of the truth and the investigation*, pursuit, capture, prosecution and, as appropriate, punishment of those responsible for the facts."[40]

With regard to massacres that occurred before the critical date, the IACHR held that in cases of serious human rights violations "the *exhumation and identification of the deceased victims forms part of the State's obligation to investigate*. Thus, this is an obligation that must be fulfilled *ex officio*."[41] Also, in cases where some exhumations had been performed which allowed for the identification of the remains of some of the victims of a massacre, the IACHR did not consider it enough to fulfil the respondent's international obligations, because "the State has not continued those exhumations or the investigations that would permit the identification of all the remains. In the IACHR's opinion, this continues to increase the uncertainty of the next-of-kin as regards the whereabouts of the victims, which affects their right to know what happened to the victims."[42] The IACHR emphasized that "the remains of the deceased are evidence of what happened to them and offer details of the treatment received, the way in which they died, and the modus operandi of the perpetrators of their death. In addition, the place where the remains were found can provide valuable information to the authorities in charge of the investigation into those responsible and the institution to which the latter belonged, particularly in the case of State agents."[43] The IACHR concluded that the measures taken by the respondent to recover the remains of people who were executed almost 30 years before were not enough and it ordered, as a measure of reparation, in addition to the investigations and criminal proceedings underway, to "find, exhume and identify the persons who were presumably executed, and to determine the cause of death and possible prior injuries."[44] The IACHR ordered the respondent to set up a genetic data base and spelled out in detail the criteria to be followed to carry out the

available at http://www.corteidh.or.cr/. See also G. Citroni, *La jurisprudencia de la Corte Interamericana de Derechos Humanos en casos de masacres,* XXI Anuario Español de Derecho Internacional 493 (2005).

[39] IACHR, *Río Negro Massacres*, para. 37 (emphasis added).

[40] *Ibidem*, para. 192.

[41] *Ibidem*, para. 217 (emphasis added).

[42] *Ibidem*, para. 220.

[43] *Ibidem*, para. 266.

[44] *Ibidem*, para. 268.

exhumations and to finalize them within four years from the notification of the judgment. The IACHR ordered that "the mortal remains of the victims in this case must be returned to their next-of-kin, following reliable authentication of their identity and relationship, if possible, through DNA testing, as soon as possible, and without any cost to the next-of-kin. In addition, the State must cover the funeral costs, in agreement with the next-of-kin of the deceased person, respecting their beliefs."[45]

The IACHR applies a wide notion of the right to know the truth and the related consequences,[46] encompassing both the individual and societal dimensions. It clarified that "the effective search for the truth is the responsibility of the State and does not depend on the procedural initiative of the victim or their next-of-kin."[47] Furthermore, the IACHR declared that "in the case of violations to human rights, state authorities *cannot hide behind mechanisms such as official secrets or confidentiality of the information or behind reasons of public interest* or national security, to justify not providing the information required by the judicial or administrative authorities in charge of the investigation or pending proceedings."[48] This holds true not only if the respondent invokes state-secrecy before the IACHR, but also if it does so at the domestic level, hampering the right to know the truth for the victims and their relatives.

When the IACHR finds that the respondent has not fulfilled its obligation to investigate gross human rights violations, including those which occurred prior to the critical date, as a measure of reparation it orders the respondent to "remove all obstacles, *de facto* and *de jure*, that maintain impunity […], and initiate, continue, facilitate or re-open the necessary investigations […]. The State must expedite, re-open, direct, continue and conclude, within a reasonable time, the pertinent investigations and proceedings to establish the truth of the facts."[49]

The IACHR found violations of the right to humane treatment in respect of the relatives of direct victims not only in cases of enforced disappearance, but also of massacres.[50] In these cases, the IACHR stressed that "no evidence is required to prove the grave impact on the mental and emotional well-being of the next-of-kin of the

[45] *Ibidem*, para. 270.

[46] For the first judgment of the IACHR where the right to know the truth is analysed, see *Castillo Páez v. Peru*, Judgment of 3 November 1997, para. 86.

[47] IACHR, *Río Negro Massacres*, para. 193.

[48] IACHR, *Tiu Tojín v. Guatemala*, Judgment of 26 November 2008, para. 77 (emphasis added).

[49] IACHR, *Río Negro Massacres*, para. 257.

[50] The interpretation of the IACHR is more in line with the definition of 'victim' contained in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly Resolution 60/147 of 16 December 2005. Principle 8 provides that "victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

victims."[51] The IACHR clarified that "in this type of case, the Court has considered that the right to mental and moral integrity of the next-of-kin of the victims has been violated *owing to the additional suffering and anguish they have experienced as a result of the subsequent acts or omissions of the State authorities in relation to the investigation of the facts and to the absence of effective remedies*. The Court has considered that conducting an effective investigation is a fundamental and determinant element for the protection of certain rights that are affected or annulled by these situations."[52]

The IACHR has gone so far as to also consider relatives of direct victims who were actually born after the time when the violation took place as victims of inhumane treatment, declaring that "regarding the siblings who had not been born at the time of the facts, *it has been determined from the evidence that they also suffered a violation of their moral and mental integrity. The fact of living in an environment of suffering and uncertainty owing to the failure to determine the whereabouts of the disappeared victims, despite the ceaseless efforts of their parents, harmed the mental and moral integrity of the children who were born and lived in that environment."*[53]

All the above suggests that the IACHR seeks an interpretation of the American Convention on Human Rights that is most conducive to the protection of the fundamental rights and freedoms guaranteed therein. This has an impact also on the measures of reparation eventually ordered, which are not limited to pecuniary compensation only.[54] Besides the above-mentioned cases concerning investigations and exhumations, in cases of massacres (including where the triggering events had occurred long before the critical date), the IACHR ordered, among other things, the provision of medical and psychological assistance to survivors and relatives of direct victims;[55] the carrying out of public ceremonies where senior State officials acknowledge international responsibility for the violations and apologize;[56] the making of audio-visual documentaries[57] or the building of monuments devoted to the victims[58] to honour their memory and restore their reputation; the establishment of training and educational programmes for members of the armed forces, police and law enforcement personnel on international human rights and human rights law;[59] the development of initiatives for the systematization and publication of all the information related to the human rights violations perpetrated during a military regime, guaranteeing access to this information;[60] and the

[51] IACHR, *Ituango Massacres v. Colombia*, Judgment of 1 July 2006, para. 262.

[52] IACHR, *Río Negro Massacres*, para. 240 (emphasis added).

[53] IACHR, *Contreras and Others v. El Salvador*, Judgment of 31 August 2011, para. 122 (emphasis added).

[54] G. Citroni, *Measures of Reparation for Victims of Gross Human Rights Violations: Developments and Challenges in the Jurisprudence of Two Regional Human Rights Courts*, 5(1-2) Inter-American and European Human Rights Journal 49 (2012).

[55] IACHR, *Río Negro Massacres*, paras. 287-289.

[56] IACHR, *Contreras and Others*, para. 206.

[57] *Ibidem*, para. 210.

[58] IACHR, *Moiwana Massacre v. Suriname*, Judgment of 15 June 2005, para. 218.

[59] IACHR, *Massacres of El Mozote and nearby places*, para. 369.

[60] IACHR, *Gomes Lund*, para. 292.

strengthening of the normative framework on access to information, pursuant to the Inter-American standards of protection of human rights.[61]

CONCLUSIONS

After more than seventy years of struggle, the applicants in *Janowiec and Others* turned to the ECtHR in search of justice. Unfortunately, as noted by the four judges who attached a joint dissenting opinion to the Grand Chamber judgment, the findings of the majority turned "the applicants' long history of justice delayed into a permanent case of justice denied."[62]

Contrary to the findings of the ECtHR, truth and justice are inextricably related. One without the other would be a notion empty of any concrete content. Under the pretext of legal certainty, the ECtHR limited its competence *ratione temporis* on States' obligation to investigate gross human rights violations, basing itself on obscure calculations and disregarding the most obvious features of the case.

The United Nations Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity affirms that "every person has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the reoccurrence of violations".[63] Principle 4 adds that "irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate".

The ECtHR judgment in *Janowiec and Others* patently disregards these principles, entrusting the carrying out of investigations on gross human rights violations which occurred before 1950 to the goodwill of States, and denying that the applicants are victims of inhuman treatment for the simple reason they know that their loved ones are dead. These conclusions cannot but leave a sense of frustration, deception, and despair.

The Inter-American jurisprudence demonstrates that a different outcome was possible had other interpretative criteria, more favourable to the applicants, victims and also to society as a whole, been applied. As a judge of the ECtHR once affirmed: "What a pity!"[64]

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[61] *Ibidem*, para. 293.

[62] ECtHR, *Janowiec and Others* (Grand Chamber), joint partially dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, para. 36.

[63] Recommended by the Commission on Human Rights, resolution 2005/81 of 21 April 2005, Principle 2.

[64] ECtHR, *Al-Adsani v. United Kingdom* (35763/93), Grand Chamber, ECtHR 21 November 2001, dissenting opinion of Judge Ferrari Bravo.

XXXIII POLISH YEARBOOK OF INTERNATIONAL LAW
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Introduction to the Answers to the questions for the Grand Chamber hearing in the case of *Janowiec and Others v. Russia* (joint cases nos. 55508/07 and 29520/09) Strasbourg, 13 February 2013

On 13 February 2013 the Grand Chamber of the European Court of Human Rights held a public hearing on the "Katyń complaint", which was set against the background of the mass-killing of almost twenty-two thousand Polish citizens in 1940 on order of the highest Soviet authorities. The case was referred to the Grand Chamber at the request of the applicants. In the first Katyń judgment, a chamber of seven judges held (16 April 2012) that:

a) it could not take cognizance of the complaint under Article 2 (right to life in its procedural limb, i.e. the obligation to conduct an effective investigation) – by four votes to three;
b) there was a violation of Article 3 as the reactions of Russian authorities amounted to denigrating and inhuman treatment of some of the applicants – by five votes to two;
c) there was a violation of Article 38 because Russia did not co-operate with the Court.

Prior to the public hearing before the Grand Chamber, the parties to the case were sent questions to answer. Below we publish the legal observations submitted on behalf of the applicants. They were recapitulated at the hearing (each party was allotted 30 minutes).

These legal observations were prepared by Professor Ireneusz C. Kamiński, the principal lawyer for the applicants. His article on the Grand Chamber judgment is also published in this issue of the *Polish Yearbook of International Law*.

ANSWERS TO THE QUESTIONS

for the Grand Chamber hearing in the case of *Janowiec and Others v. Russia* (joint cases nos. 55508/07 and 29520/09) Strasbourg, 13 February 2013

Legal representatives for the applicants: Ireneusz C. Kamiński, Roman Karpinskiy, Roman Nowosielski, Bartłomiej Sochański, Anna Stavitskaya

Article 2 of the Convention

1. ***Does the Court have jurisdiction to assess the respondent State's compliance with the procedural obligation arising out of Article 2 of the Convention relating to an investigation into deaths that occurred before the entry into force of the Convention on 3 September 1953?***
   The parties are invited in particular to comment on:
   (a) ***Whether or not the Court's jurisdiction can be founded on the last subparagraph of paragraph 163 in the Šilih v. Slovenia judgment ([GC], no. 71463/01, 9 April 2009) and, in this connection, whether or not the mass murder of Polish prisoners can be characterised as a „war crime"?***

A. Court's competence *ratione temporis*

1.1. The applicants' counsels acknowledge that the Katyn massacre (mass killings) committed in 1940 is an act laying outside the temporal reach of the Convention and the Court has no competence to deal with the substantive aspect of Article 2. They are, however, of the opinion that the Court is competent *ratione temporis* to examine whether Russia observed its procedural obligation under Article 2 to carry out an effective investigation on the Katyn massacre (procedural aspect of Article 2). The procedural obligation under Article 2 has been consistently examined by the Court as a separate (detached) and autonomous duty capable of binding the State even when the death occurred before the "critical date" (ratification of the Convention).

1.2. As, however, the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths preceding the critical date must not be open-ended, the Court has identified a group of rules on that issue in its Grand Chamber judgment in *Šilih v. Slovenia* (judgment of 6 April 2009, appl. no. 71463/01). In that judgment the Court held that: "162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.

163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.
Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account (Vo, cited above, § 89) – will have been or ought to have been carried out after the critical date.
However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner."

1.3. The applicants' counsels referred in their application only to acts and omissions that occurred in Russian Katyn investigation no. 159 after the Convention had been ratified by the Russian Federation, i.e. after 5 May 1998. They also consistently claimed (application and subsequent submissions to the Court) that the genuine connection necessary to establish the temporal competence of the Court should be based first of all on the need to ensure the effective protection of the guarantees and the underlying values of the Convention (last sentence of paragraph 163 of the *Šilih* judgment).

1.4. Before the *Janowiec* judgment of 16 April 2012 the expression "the underlying values of the Convention" had been invoked by the Court to find that particular instances of hate speech, such as speech denying the Holocaust or justifying war crimes, were incompatible with the values of the Convention.

1.5. In *Lehideux and Isorni v. France [GC]* the Court held that "[t]here is no doubt that, like any other remark directed against the Convention's underlying values […] the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10" (appl. no. 24662/94, judg. of 23 September 1998, RJD 1998-VII, § 53). In this judgement the Court referred to the case of *Jersild v. Denmark [GC]*, where insulting racially motivated speech was deemed not to enjoy the protection of the Convention (appl. no. 15890/89, judg. of 23 September 1994, Series A no. 298, § 35; in this sense also e.g. *Glimmerveen and Hagenbeek v. the Netherlands*, appl. nos. 8348/78 and 8406/78, dec. of 11 October 1979, DR 18, p. 187; and *Kühnen v. Germany*, appl. no. 12194/86, dec. of 12 May 1988 DR 56, p. 205).
In the subsequent decision of *Garaudy v. France* the Court was confronted with a revisionist book that denied the reality of the Holocaust (appl. no. 65831/01, dec. of 24 June 2003, ECHR 2003-IX). The Court declared that "[d]enying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to

public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. […] The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace."

This line of reasoning was repeated in *Witzch v. Germany*, where statements denying Hitler's and the National Socialists' responsibility in the extermination of the Jews were described as showing "disdain towards the victims of the Holocaust" and running "counter to the text and the spirit of the Convention" (appl. no. 7485/03, dec. of 13 December 2005).

In *Orban and Others v. France* the Court noted that "statements pursuing the unequivocal aim of justifying war crimes such as torture or summary executions […] amounted to deflecting Article 10 from its real purpose" (appl. no. 20985/05, judg. of 15 January 2005, § 35).[1]

1.6. Since speech denying the reality of crimes of international law was deemed to contravene the underlying values of the Convention, the same rationale should apply *a fortiori* to the acts themselves that undermined the very sense of justice and peace, which are the fundamental values of the Convention, as expressed in its Preamble. Accordingly, the mention of the underlying values in paragraph 163 of the *Šilih* judgment was a justification for the State's obligation to conduct an effective investigation when the death had preceded the ratification of the Convention by the respondent State.

Conclusion: Crimes of international law radically and drastically contravene the underlying values of the Convention. Therefore the obligation to conduct an effective investigation when the death preceded the ratification of the Convention by the respondent State may be justified by need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.

B. Katyn massacre as a crime of international law

1.7. The Katyn massacre was committed in 1940. In total, at least 21,857 people were killed. The majority of the individuals executed, i.e. 14,552, among them the applicants' relatives, were kept before the killing in three prisoner-of-war camps.

1.8. When the war started in September 1939, its participants had a duty to abide by the rules of military law (humanitarian law). At that time the basic precepts of international humanitarian law were contained in the IV Hague Convention respecting the Laws and Customs of War on Land (and especially its annex:

[1] Original version: "des propos ayant sans équivoque pour but de justifier des crimes de guerre tels que la torture ou des exécutions sommaires sont pareillement caractéristiques d'un détournement de l'article 10 de sa vocation".

Regulations concerning the Laws and Customs of War on Land) of 18 October 1907, and in the Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929.

1.9. The provisions of the Hague and Geneva Conventions set forth fundamental and universal principles regarding the treatment of prisoners of war. Under these principles prisoners of war remained under the power of the hostile State (government), and not that of the individuals and formations who had captured them. Prisoners of war were to be treated humanely at all times and especially, as stated in Article 2 of the Geneva Convention, protected against "acts of violence, from insults and from public curiosity. Measures of reprisal against them [were] forbidden". Prisoners of war were entitled to respect of their persons and honour (Article 3). Also Article 4 of the Hague Rules of Land Warfare stated that "Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated […]".

1.10. The provisions of the two Conventions also regulated the conditions under which prisoners of war were to be held and the possibility of applying penal sanctions against them. Regarding the latter issue, it was generally believed that prisoners of war were subject to the regulations and orders that applied to the army of the country under whose authority they were held (Article 8 of the Hague Convention, Article 45 of the Geneva Convention). Nevertheless, in the application of disciplinary measures, corporal punishment and cruelty in any form was forbidden. Collective punishment for the deeds of an individual was also forbidden (Article 46 of the Geneva Convention).

1.11. Special protection was accorded to the rights of prisoners of war in court proceedings, whereby they were entitled to defence and to the presence of representatives of the caretaker powers in their proceedings. They also had a guaranteed right of appeal against their sentences at the same level as the members of the armed forces of the country in which they were detained (Chapter III of the Geneva Convention).

1.12. Although the two Conventions do not contain a rule that expressly prohibits killings of prisoners of war kept in detention centres, it belongs to the very fundamentals of legal argumentation that from the prohibitions of cruel treatment and of killing in direct post-combat situations also ensued the prohibition of killing those already held in prisoner-of-war camps (*a fortiori* reasoning). Moreover, the preamble to the IV Hague Convention provides that in cases not included in the Regulation "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience."

1.13. The soldiers captured by the Red Army in 1939 were entitled to prisoner-of-war status, and therefore to the full protection reserved for prisoners of war. In

Russian too these soldiers were termed "prisoners of war" (военнопленные) and the Soviet institution set up for the management of detention centres was the Administration for Prisoners' of War and Internees' Affairs (Главное управление по делам военнопленных и интернированных).

1.14. In 1939, the Republic of Poland was party to the two Conventions. However, the fact that the USSR was party neither to the IV Hague Convention (and to the Regulations appended thereto) nor to the Geneva Convention did not release that country from the duty to respect the universally binding principles of international customary law, which existed side by side with treaty obligations.

1.15. The legal status of norms contained in the IV Hague and Geneva Convention was addressed during the post-war trials. In 1946 the Nuremberg International Military Tribunal stated (*Goering and Others Trial*) with regard to the Hague Convention of 1907: "The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter."[2]

In another part of its judgement the Nuremberg Tribunal stated that: "Article 6(b) of the Charter provides that 'ill-treatment […] of civilian population of or in occupied territory […] killing of hostages […] wanton destruction of cities, towns or villages' shall be a war crime. In the main these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention".[3]

The opinion of the International Military Tribunal was subsequently substantially adopted by the United States Military Tribunal in the *High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*[4] and the *Krupp Trial*.[5]

1.16. As far as the Geneva Convention is concerned, in the *High Command Trial* the United States Military Tribunal, while reconstructing the position of the International Military Tribunal in the *Goering and Others Case*, stated that the Geneva Convention "was not binding between Germany and Russia as a contractual agreement, but that the general principles of International Law

[2] The Nuremberg International Military Tribunal judgement (*Goering and Others Trial*), published in: *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. XXII, p. 497.

[3] *Ibidem*, p. 475.

[4] *Law Reports of Trials of War Criminals*, London 1949, vol. XII.

[5] *Ibidem*, vol. X, p. 133.

as outlined in those Conventions were applicable. In other words, it would appear that the International Military Tribunal in the case above cited [Goering and Others], followed the same lines of thought with regards to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of International Law as accepted by the civilised nations of the world, and this Tribunal adopts this viewpoint" (p. 88).

The Tribunal continued that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilised nations and binding […] These concern the treatment of prisoners of war […]" (p. 89).

Subsequently, while enumerating which provisions (or their parts) should be cited "in this category", the Tribunal pointed, among others, to Article 4 of the Hague Rules of Land Warfare ("Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated […]") and Article 2 of the Geneva Convention ("They [prisoners of war] must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity […]") (pp. 89-91).

1.17. A similar position to that of the Nuremberg International Military Tribunal was adopted by the International Military Tribunal for the Far East (Tokyo Tribunal) when it stated that "the [IV Hague] Convention remains good evidence of the customary law of nations."[6]

1.18. The legal characterisation under international law of the Hague Regulations, as applied at the post-war trials, was followed by this Court in the seminal Grand Chamber judgement of *Kononov v. Latvia* (appl. no. 26376/04, judg. of 17 May 2010). The Court stated that the Hague Regulations were, although not ratified by the Soviet Union or Latvia, binding on them, as these rules "were solidly part of international law by 1939" (para. 200).

1.19. In the course of the Nuremberg Trial the Soviet prosecutors sought to charge the German forces with the Katyn massacre. The Katyn massacre was mentioned in the indictment as an instance of a war crime:

"Indictment: Count Three – War Crimes

(Charter, Article 6, especially 6 (b))

[…]

(C) MURDER AND ILL-TREATMENT OF PRISONERS OF WAR, AND OF OTHER MEMBERS OF THE ARMED FORCES OF THE COUNTRIES WITH WHOM GERMANY WAS AT WAR, AND OF PERSONS ON THE HIGH SEAS

[…]

[6] "Digest of Public International Law Cases" 1948, vol. 15, p. 366.

In September 1941, 11,000 Polish officers who were prisoners of war were killed in the Katyn Forest near Smolensk."[7]

During the proceedings before the International Military Tribunal General R.A. Rudenko, Chief Prosecutor for the USSR, referred to the Katyn massacre as "the mass shooting of Polish officers by the Fascist criminals in Katyn Forest", "criminal activity"[8], "mass shooting of Poles", "a link in the chain of many bestial crimes perpetrated by the Hitlerites",[9] "atrocities at Katyn".[10]

Eventually, the charge related to the Katyn massacre, as brought against the Germans accused at Nuremberg, was dismissed by US and British judges for lack of evidence.

1.20. The classification of the Katyn massacre as a war crime, as made by the Nuremberg Tribunal, must be treated in objective terms and is not dependent upon who actually committed the atrocity.

1.21. The Charter of the International Military Tribunal defines war crimes in its Article 6 (b) as, among others, acts consisting in murder or ill-treatment of prisoners of war.

1.22. Examining evidence on charges related to war crimes committed against prisoners of war, the International Military Tribunal at Nuremberg pointed to the executions of:

- members of Allied 'commando' units who, following a directive issued on 18 October 1942 by Adolf Hitler, were to be "slaughtered to the last man", even if they attempted to surrender;
- escaped officers and non-commissioned-officers who, upon recapture, were to be sent, as ordered by the so-called 'Bullet decree' issued in March 1944, to the Mauthausen camp to be shot there;
- 50 officers of the British Royal Force, who escaped from the POW camp at Sagan, but on recapture were shot on the direct orders of Adolf Hitler;
- 'Red commissars' of the Soviet Army, as they were considered by the German forces as not benefiting from the status of prisoners of war;
- those Soviet prisoners of war who, following the Gestapo order of 17 July 1941, were identified as important functionaries of the Soviet State, Jews, political agitators and fanatical communists.[11]

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[7] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. I, pp. 42-54.

[8] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1948, vol. XV, p. 289. In full: "the Soviet Prosecution have several times expressed their view respecting the application of Defense Counsel to call witnesses with regard to the mass shooting of Polish officers by the Fascist criminals in Katyn Forest. Our position is that this episode of criminal activity on the part of the Hitlerites has been fully established by the evidence presented by the Soviet Prosecution."

[9] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1948, vol. XV, p. 290.

[10] *Ibidem*, Nuremberg 1947, vol. IX, p. 28.

[11] *Ibidem*, vol. XXII, pp. 471-475.

1.23. War crimes that were committed against prisoners of war and consisted in their executions or killing were also the subject matter of other post-war trials. Besides the main Nuremberg trial, this kind of war crimes occurred in particular in the *German High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*,[12] before the United States Military Tribunal at Nuremberg (30 December 1947–28 October 1948).

The charges against the accused referred to:

- "Commando" order, and the following war crimes:
  a) on or about 7 July 1944 near Poitiers in France, troops of the LXXX Corps of the 18th Army, under Army Group G, executed 1 American prisoner of war and 30 British prisoners of war;
  b) on or about 22 May 1944 on the island of Alimnia near Greece an English soldier and a Greek sailor were executed;
  c) on or about 16 April1944 a British prisoner of war was turned over by Stalag 7a to the SD for execution;
  d) on or about 10 December 1942· in or near Bordeaux, France, members of the German naval forces executed 2 uniformed British soldiers;
  e) on or about 20 November 1942 near Stavanger, Norway, members of the German armed forces executed 17 uniformed British soldiers;
  f) on or about 22 March 1944 near La Spezia, Italy, members' of the German armed forces executed 15 uniformed US·soldiers;
  g) in January 1945 in the Mauthausen Concentration Camp, Austria, from 12 to 15 American prisoners of war, comprising an American military mission, were executed.
- Eastern Front, and the following war crimes:
  a) on or about 28 July 1941 in the sector of Zwiahel in the USSR troops within the Rear Area of Army Group South, killed 73 surrendered Soviet prisoners of war as "guerrillas";
  b) on or about 25 August 1941, in the USSR, troops of the 18th Army under Army Group North killed 35 wounded prisoners of war;
  c) on or about 9 September 1941 in Djedkowow in the USSR, troops of Panzer Group 3 killed 4 Soviet prisoners of war;
  d) on or about 13 September 1941, troops of the 213th Security Division of the Rear Area Army Group South, executed 13 escaped and recaptured Soviet prisoners of war;
  e) on or about 15 October 1941 in the area of the 24th Infantry Division, more than 1,000 Soviet prisoners of war were shot to death because they were unable to march, or died from exhaustion;
  f) on 16 October 1941 in Nikolayev, troops of the 11th Army delivered 75 Jewish prisoners of war to the SD for execution;

[12] *Law Reports of Trials of War Criminals*, vol. XII.

g) on or about 22 October 1941, 20 Soviet prisoners of war were executed at concentration camp "Gross Rosen"; on or about 15 October 1941, 21 Soviet prisoners of war were executed at Dachau; on or about 22 October 1941, 40 Soviet prisoners of war were executed at Dachau; on or about 8 November 1941, 99 Soviet prisoners, of war were executed at Dachau; on or about 12 November 1941, 135 Soviet prisoners of war were executed at Dachau; between 1 September 1941 and 23 January 1942, 1,082 Soviet prisoners of war were selected by the Gestapo at Regensburg for execution and executed

h) in the month of September 1942 in the rear area of the 2nd Army, 384 prisoners of war died or were shot and 42 others were turned over to the SD for execution;

i) in the period from 1 January 1942 to 6 March 1942 in the rear area of the 11th Army, 2,366 prisoners of war were killed or died of exhaustion, neglect and disease, and 317 prisoners of war were turned over to the SD for execution;

j) from 14 January 1942 to 29 September 1942 in the rear area of Army Group North, 200 captured Soviet prisoners of war were executed;

k) in July 1943 in the rear area of the 4th Panzer Army, 24 prisoners of war were turned over to the SD for execution, and in August 1943, 39 prisoners of war were turned over to the SD for execution;

l) in January 1945 a French prisoner of war, the General Mesney, then under the control of the German Prisoner of War Administration, was murdered, and thereafter false reports of the cause and nature of his death were issued.

• The "Commissar" Order:

a) from 21 June 1941 to about 8 July 1941, troops of the XXXXI Corps in Panzer Group 4 under Army Group North killed 97 "political commissars";

b) from 21 June 1941 to about 19 July 1941, troops of Panzer Group 4, under Army Group North, killed 172 "political commissars";

c) from 21 June 1941 to about 1 August 1941, troops of Panzer Group 3 killed 170 "political commissars";

d) on or about 1 October 1941, troops of the Rear Area of the 11th Army, killed 1 "political commissar";

e) on or about 4 October 1941, troops of the 454th Security Division, of the Rear Area of Army Group South, killed 1 "political commissar";

f) from about 18 October 1941 to 26 October 1941, in the operational area of the XXVIII Corps in the USSR, troops of the 18th Army, under Army Group North, killed 17 "political commissars";

g) on 29 May: 1942, in the operational area of the XXXXIV Corps. troops of the 17th Army, killed 2 "political commissars".

1.24. The other most important post-war cases on war crimes were:

- The case of Anton Dostler, adjudicated by the United States Military Commission (Rome, 8-12 October 1945). Dostler was accused of having ordered the shooting of fifteen American prisoners of war. Two officers and 13 men of a special reconnaissance battalion disembarked from some United States Navy boats and landed on the Italian coast about 250 miles behind the front-line. The 15 members of the United States Army were on a military mission, which was to demolish a railroad tunnel on. After having been captured and interrogated, they were summarily executed on an order of General Dostler (*Law Reports of Trials of War Criminals*, vol. I, p. 22 and subseq.).
- The Almelo Trial (trial of Otto Sandrock and three others), before British Military Court for the Trial of War Criminals (held at the Court House, Almelo, Holland, 24-26 November 1945). The four accused individuals were charged with committing a war crime that consisted in killing of a British prisoner of war who was living in hiding (*Law Reports of Trials of War Criminals*, vol. I, p. 35 and subseq.).
- The Jaluit Atoll Case (trial of Rear-Admiral Nisuke Masuda and four others of the Imperial Japanese Navy), before the United States Military Commission (United States–Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7-13 December 1945). Killing of three America unarmed airmen who were captured and held in custody (*Law Reports of Trials of War Criminals*, vol. I, p. 71 and subseq.).
- The Dreierwalde Case (trial of Karl Amberger), before British Military Court (Wuppertal, 11-14 March 1946). Shooting five allied prisoners of war, allegedly on their attempts to escape, when on the way, under a convoy, to a railway station (*Law Reports of Trials of War Criminals*, vol. I, p. 81 and subseq.).
- The Essen Lynching Case (trial of Erich Heyer and six others, before British Military Court for the Trial of War Criminals (Essen, 18-19 and 21-22 December 1945). Lynching by civilians of three airmen when they were escorted to an interrogation centre. Erich Heyer, who was the commanding officer, gave order to the escort not to interfere if civilians should molest the prisoners of war (*Law Reports of Trials of War Criminals*, vol. I, p. 88 and subseq.).
- Trial of Albert Bury and Wilhelm Hafner, before the United States Military Commission (Freising, Germany, 15 July 1945). Killing of an American airman (*Law Reports of Trials of War Criminals*, vol. III, p. 62 and subseq.).
- The case of Aoki Toshio, by British Military Court (Singapore, 11 February 1946). Toshio was charged with „committing a war crime in that he at Sonkurai Camp in the month of November 1943 in violation of the laws and usages of war by forcing some three hundred British prisoners of war at that time in his custody the majority of whom were sick and injured to enter

a train containing no sufficient or suitable accommodation and by allowing Korean soldiers under his command to beat, kick and otherwise maltreat the prisoners, causing the death of seven of the prisoners and further injured the health of the remainder".

- The trial of Major Karl Rauer and six others before British Military Court (Wuppertal, Germany, 18 February 1946). Rauer and co-accused were charged with committing war crimes in that they were "concerned in" the killing, contrary to the laws and usages of war, of Allied prisoners of war on one or more of three occasions on 22, 24 and 25 March, 1945 (*Law Reports of Trials of War Criminals*, vol. IV, p. 113 and subseq.).
- The trial of Karl Buck and ten others before British Military Court (Wuppertal, Germany, 6-10 May 1946) The accused were charged with committing a war crime, in that they, at Rotenfels Security Camp, Gaggenau, Germany, on 25 November, 1944, in violation of the laws and usages of war, were concerned in the killing of six British prisoners of war, all of No. 2 Special Air Service Regiment, four American prisoners of war, and four French Nationals (*Law Reports of Trials of War Criminals*, vol. V, p. 39 and subseq.).
- The trial of Karl Adam Golkel and thirteen others before British Military Court (Wuppertal, Germany, 15-21 May 1946). The accused were charged with committing a war crime in that they at La Grande Fosse, France, on 15 October 1944, in violation of the laws and usages of war, were concerned in the killing of eight named members of No. 2 Special Air Service Regiment, a British unit, when prisoners of war (*Law Reports of Trials of War Criminals*, vol. V, p. 45 and subseq.).
- The trial of Lieutenant General Harukei Isayama and seven others before the United States Military Commission (Shanghai, 1-25 July 1946). The accused were charged with committing a war crime in that they did each "at Taihoku, Formosa, wilfully, unlawfully and wrongfully, commit cruel, inhuman and brutal atrocities and other offences against certain American prisoners of war, by permitting and participating in an illegal and false trial and unlawful killing of said prisoners of war, in violation of the laws and customs of war" (*Law Reports of Trials of War Criminals*, vol. V, p. 60 and subseq.).
- The trial of Gerhard Friedrich Ernst Flesch, SS OBE Sturmbannführer, Oberregierungsrat before Frostating Lagmannsrett (November–December 1946) and the Supreme Court of Norway (February 1948). The accused was charged with having committed war crimes *inter alia* in that In August-September 1944, he gave orders for the hanging of 15 Russian prisoners of war and supervised himself the execution (*Law Reports of Trials of War Criminals*, vol. VI, p. 111 and subseq.).
- The trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess before the Supreme National Tribunal of Poland (11-29 March 1947). The accused

was the Commandant of the Auschwitz Camp. He was charged with committing a war crimes and crimes against humanity in that from 1 May 1940 till the end of October 1943, as Commandant of the Auschwitz concentration camp set up by him, and thereafter from December 1943, till May 1945, as Head of the D.l. Department of the SS Central Economic and Administrative Office, as well as in June, July and August 1944, as commander of the SS garrison at Auschwitz he *inter alia* acting either himself or through the subordinate camp personnel deliberately deprived of life about 12,000 Soviet prisoners of war (*Law Reports of Trials of War Criminals*, vol. VII, p. 11 and subseq.)

- The trial of Karl Bauer, Ernst Schrameck and Herbert Falten, adjudicated by Permanent Military Tribunal (Dijon, 18 October 1945). The accused were charged with complicity in murder in that, by abusing authority and powers, they had provoked murder in reprisals of three soldiers of the F.F.I. captured as prisoners of war *(Law Reports of Trials of War Criminals*, vol. VIII, p. 28 and subseq.).
- The Dachau concentration camp trial. The trial of Martin Gottfried Weiss and thirty nine others, adjudicated by General Military Government Court of The United States Zone (Dachau, 15 November-13 December 1945). The accused were charged of cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities of prisoners whom app. 10 per cent were prisoners of war. In spring 1942, 6,000-8,000 Russian prisoners of war were killed. Around September 1944, 90 Russian officers were hanged in the camp (*Law Reports of Trials of War Criminals*, vol. XI, p. 17 and subseq.).
- The trial of Generaloberst Nickolaus von Falkenhorst, adjudicated by British Military Court (Brunswick, 29 July – 2 August 1946). He was charged with 9 charges, among them that he was responsible as Commander-in-Chief of Armed Forces, Norway, for the handing over by forces under his command, to the Security Service of, in total, 41 British prisoners of war of different ranks and 7 Norwegian prisoners of war, with the result that said prisoners were killed (*Law Reports of Trials of War Criminals*, vol. XI, p. 30 and subseq.).
- The Stalag Luft III Case. The trial of Max Wielen and 17 others, adjudicated by British Military Court (Hamburg, 1 July-3 September 1947). All the accused were charged with committing a war crime in that they were concerned in the killing in violation of the laws and usages of war of prisoners of war who had escaped from Stalag Luft III (*Law Reports of Trials of War Criminals*, vol. XI, p. 43 and subseq.).
- The trial of Lieutenant-General Baba Masao, adjudicated by Australian Military Court (Rabaul, 28 May-2 June 1947). The accused was charged with failing to discharge his duty as a commander to control the members of his

command whereby certain of members of his command murdered a number of prisoners of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 69 and subseq.).

- The trial of Johannes Oenning and Emil Nix, adjudicated by British Military Court (Borken, Germany, 21-22 December 1945). Oenning and Nix were accused of killing of a named Royal Air Force Officer, a prisoner of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 87 and subseq.).
- The trial of Hans Renoth and three others, adjudicated by British Military Court (Elten, Germany, 8-10 January 1946). All the accused were charged with and found guilty of killing of an unknown Allied airman, a prisoner of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 89 and subseq.).
- The trial of Willi Mackensen, adjudicated by British Military Court (Hannover, 28 January 1946). He was accused of, that as a result of his ill-treatment of prisoners of war, at least 30 prisoners of war died (*Law Reports of Trials of War Criminals*, vol. XI, p. 94 and subseq.).
- The trial of Eberhard Schoengrath and six others, adjudicated by British Military Court (Burgsteinfurt, Germany, 7-11 February 1946). They were charged with the killing of an unknown Allied airman, a prisoner of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 96 and subseq.).
- The trial of Ulrich Greifelt and others, adjudicated by United States Military Tribunal (Nuremberg, 10 October 1947 – 10 March 1948). There were three connected trials.
  a) In the trial of Hans Seibold and two others (5-7 March 1947) the defendants were implicated in the killing of a member of the United States Army, who was surrendered and unarmed prisoner of war in the custody of the then German Reich.
  b) In the trial held from 10 January to 21 March 1947, there were 23 accused with Jurgen Stroop at their head. They were implicated in the ill-treatment, including death, beatings, and torture, of members of armed forces then at war with the then German Reich, who were surrendered and unarmed prisoners of war in the custody of the then Germany Reich (*Law Reports of Trials of War Criminals*, vol. XIII, p. 14 and subseq.).
- United States Military Commission at the Mariana Islands (2-15 August 1946) tried and convicted Tachibana Yochio, a Lieutenant-General in the Japanese Army and 13 others, of murdering 8 prisoners of war.
- Australian Military Court at Rabaul (2 April 1946) sentenced Tomiyasu Tisato, a First Lieutenant in the Japanese Army, after finding him guilty of the murder of an unknown Indian prisoner of war (*Law Reports of Trials of War Criminals*, vol. XIII, p. 164 and subseq.).
- The trial of Takashi Sakai, adjudicated by Chinese War Crimes Military Tribunal of the Ministry of National Defence (Nanking, 29 August 1946). On 17 and 18 December 1941, in Hongkong, thirty prisoners of war were

massacred and twenty four more prisoners were killed at West Point Fortress. Between 24th and 26th December 1941, sixty to seventy wounded prisoners of war were killed (*Law Reports of Trials of War Criminals*, vol. XIV, p. 15 and subseq.).

1.25. A comparison of the post-war trials on executions/killings of prisoners of war with the Katyn massacre reveals a certain striking and differing element. Post-war trials dealt with crimes, however heinous they were, which were either committed in a direct post-combat context or concerned certain groups of prisoners of war which were considered, for different reasons, as stripped of the benefit of prisoner-of-war status (members of 'commando' units or military missions, escaped POWs, 'political commissars', 'terror flyers'). Such particular small groups of military personnel were selected to be killed, in violation of international humanitarian law, from the ranks of all prisoners of war. By contrast, in the case of the Katyn massacre almost all prisoners of war were designated to be killed (14,552) with only a tiny group of 395 individuals chosen to survive. In the context of the Second World War this very feature makes the Katyn massacre unique and exceptional as a war crime perpetrated against prisoners of war.

1.26. As a crime of international law, the Katyn massacre was imprescriptible at the time of its commission. The applicants' counsels rely in this respect on the Court's considerations in *Kononov v. Latvia*. First, the Court declared that in order to adequately qualify under law an act committed in 1944 (and to determine the ensuing legal consequences) the national prosecution authorities and courts were required to make reference to relevant international law, not only as regards the definition of the act, but also as regards the determination of any applicable limitation period (para. 230). Then the Court held that in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes, and neither did developments in international law since 1944 impose any limitation period with respect to war crimes (paras. 231-232).

1.27. In light of the above arguments, the Katyn massacre was clearly defined, at the time of its commission, as an imprescriptible crime of international law.

1.28. While they differed on other legal points, all the judges sitting as a Chamber in the Janowiec case agreed that the Katyn massacre was a war crime. The Chamber accepted that "the mass murder of Polish prisoners […] had the features of a war crime" (para. 149). Judges Anatoly Kovler and Ganna Yudkivskaya stated in their joint concurrent opinion that "the Katyn massacre was a particularly horrific war crime". The three dissenting judges (Dean Spielmann, Mark Villiger and Angelika Nußberger) held that "[t]he killing was a 'war crime'. There is no doubt about that" (para. 6).

1.29. It should be mentioned that the Katyn massacre was classified as having the features jointly of war crime, crime against humanity and genocide by the Russian Commission of Experts (in its report of 2 August 1993 prepared within the framework of investigation no. 159) and by the Polish Institute of

National Remembrance (decision of 30 November 2004 to commence investigation into the Katyn crime). Furthermore, political institutions and bodies in their resolutions called the Katyn massacre "a war crime having the character of genocide": resolution of Polish Parliament of 23 September 2009 and statement of the Delegation to the EU–Russia Parliamentary Co-operation Committee, European Parliament, dated 10 May 2010.

1.30. The qualification of the Katyn massacre as genocide becomes particularly justified when this massacre is treated as the most tragic element of the Soviet policy directed against the Polish population (specifically its elites) after the aggression in September 1939. As already pointed out in the application (point 14.5) there were four waves of forced deportations to remote sections of the Soviet Union. The total number of those subject to these deportations is, relying only on Soviet data, around 330,000-340,000. Another relevant factor is that already in 1937-1938 at least 111,091 Poles (relying again solely on Soviet data) living in the Soviet Union were executed during the so-called Polish operation conducted by the NKVD. This operation is documented in several books by the Russian historian Nikolay Ivanov (especially in *The First Punished Nation*, published in 1991). Worth mentioning are also: N.V. Petrov, A.B. Roginskiy, *The 'Polish Operation' of the NKVD*, *1937-38*, [in:] B. McLoughlin, K. McDermott (eds.), *Stalin's Terror*, Basingstoke, Palgrave Macmillan, London: 2003 [first published in Russian in 1997]; R. Gellately, B. Kiernan, *The Specter of Genocide: Mass murder in historical perspective*, Cambridge University Press, Cambridge: 2003, especially *Polish operation*, p. 233 and subseq.), T. Snyder, *Bloodlands: Europe Between Hitler and Stalin*, Basic Books, New York: 2010.

Conclusion: The Katyn massacre constituted a violation of the prohibitions contained in the IV Hague Convention of 1907 and Geneva Convention of 1929. These prohibitions were recognised, as evidenced by post-war trials, as corresponding by 1939 to the relevant universally binding customary rules of humanitarian law. The Katyn massacre was also classified as a war crime in the indictment to the Nuremberg trial of the main war criminals before the International Military Tribunal. This legal qualification was never questioned, but fully endorsed at the Nuremberg trial by representatives of the Soviet Union, which was the legal predecessor of the Russian Federation. Furthermore the abundant case law from the post-war trials of war criminals demonstrates convincingly and unequivocally that executions of prisoners of war constituted and were treated as war crimes by the international community. Lastly, the Katyn massacre as a crime of international law was imprescriptible at the time of its commission, as it is today. The Katyn massacre may also be treated as a genocide case when analysed in the broader context of the Soviet policy directed against the Polish population (the so-called Polish operation in 1937-1938 and four forced deportations in 1939-1941).

C. The genuine connection requirement

1.31. In the *Šilih* judgment the Court ascertained that "in certain circumstances the [genuine] connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner" (para. 163 *in fine*) – [henceforth we will refer to this construct as either "the underlying values principle" or "the *Šilih* principle".

1.32. In the judgment of *Janowiec and Others v. Russia* the Court referred for the first time, while examining whether the case under consideration falls within the temporal jurisdiction of the Court, to "the underlying values principle". The Chamber asserted that the mass murder of Polish prisoners by the Soviet secret police "had the features of a war crime" which was imprescriptible (para. 140). As such, the Katyn massacre constituted a negation of the very foundation of the Convention and was contrary to the guarantees and the underlying values of the Convention.

1.33. In applying the "the underlying values principle" the Chamber identified two elements that must jointly occur. First, the triggering event (death preceding the ratification) must be of a larger dimension than an ordinary criminal offence. Second, there must be sufficiently important new material that casts new light on the offence and comes into the public domain in the post-ratification period.

1.34. The new element requirement, which significantly restricts the original *Šilih* test based on the effective protection of the guarantees and the underlying values of the Convention, is a novelty introduced by the *Janowiec* judgment. Although this requirement draws on the *Brecknell v. United Kingdom* judgment, it has been applied in *Janowiec* in the specific context of mass scale human rights violations that constitute serious crimes under international law and raise the particular issue of whether the Court is competent to hear the case on the merits due to the specific rationale as enunciated in the *Šilih* principle.

1.35. The Chamber's restrictive reconstruction of the *Šilih* test (introduction of the new information requirement) was contested in the joint dissenting opinion of judges Dean Spielmann, Mark Villiger and Angelika Nußberger. The applicants' counsels agree with that criticism.

1.36. Without determining here whether the *Šilih* principle applies to all crimes of international law or only to some of them, the applicants' counsels are of the opinion that there exist certain instances of acts violating the very foundation of the Convention system and its underlying values whose scale, magnitude and gravity should make the Court competent *ratione temporis* without the new information requirement (provided that all other *rationes* are met).

1.37. Murderous crimes of international law can be committed by "private individuals" or "occasionally" by State functionaries, but sometimes they are also perpetrated as part of a State policy, deliberately planned and realised on the orders of the highest State authorities. It is with regard to this final category

of international crimes that the interrelationship between the procedural obligation of effective investigation and the real and effective protection of the Convention values becomes particularly pertinent.

In other words, if we were to reconstruct a *continuum* of crimes of international law it would starts with crimes committed by private individuals, followed by crimes 'occasionally' committed by State functionaries, and on the extreme edge of this *continuum* would be located crimes that involve States in the strongest possible way: these are mass-scale crimes orchestrated and carried out on the orders of the highest State authorities, such as the Holocaust and the Katyn massacre.

1.38. The applicants' counsels are of the opinion that the last sentence of paragraph 163 of the *Šilih* judgment should be applied in a manner that have regard to the character of acts (i.e. their scale, magnitude and gravity as well as involvement of the State) contravening the guarantees and the underlying values of the Convention. In the alternative, the Convention values clause from the *Šilih* judgment might be understood as applicable, but without the restrictive new information requirement, only to the most serious instances of crimes of international law. This reading seems to have been suggested in the joint dissenting opinion of judges Dean Spielmann, Mark Villiger and Angelika Nußberger.

1.39. The position advocated by the applicants' counsels (differentiated application of the Convention values clause from the *Šilih* judgment) corresponds to the approach of the Inter-American Court of Human Rights which has identified, in the context of human rights violations, a number of aggravating circumstances, leading even subsequently to the concept of aggravated State responsibility applied by the Inter-American Court. Such aggravating circumstances occur when serious human rights violations are perpetrated in pursuance of planned State policies.

Worth stressing is also that the construct of aggravated State responsibility sits closely to another legal notion – that of a State crime. State crime is defined as „a grave violation of peremptory international law (*jus cogens*). State crime becomes even more evident to the extent that it is established by the State's intention (act or omission) or tolerance, acquiescence, negligence or omission in relation to grave violations of human rights and international humanitarian law perpetrated by its agents, even in the name of a State policy" (concurring opinion of Antônio A. Cançado Trindade, para. 35 in the case of *Plan de Sánchez Massacre v. Guatemala*, judgment of 29 April 2004 [merits]). To give another quotation: "Crimes of State take shape, in brief, as especially grave violations of international law entailing an aggravated responsibility (with aggravating circumstances, thus evoking a category of criminal law); the gravity of the violation directly affects the fundamental values of the international community as a whole" (concurring opinion of Antônio A. Cançado

Trindade, para. 28 in the case of *Myrna Mack Chang v. Guatemala*, judgment of 25 November 2003 [merits, reparations and costs]).

1.40. Both concepts of aggravating circumstances and aggravated State responsibility were applied by the Inter-American Court of Human Rights in its case law dealing with State-organised (or supported) massacres, killings and "enforced disappearances", e.g. *Plan de Sánchez Massacre v. Guatemala*, judgment of 29 April 2004 [merits], par. 51; *Gómez-Paquiyauri Brothers v. Peru*, judgment of 8 July 2004 [merits, reparations and costs], para. 76; *Goiburú et al. v. Paraguay* (Operation Condor Case), judgment of 22 September 2006, paras. 86-92; *Myrna Mack Chang v. Guatemala*, judgment of 25 November 2003 [merits, reparations and costs], para. 114; *La Cantuta v. Peru*, judgment of 29 November 2006 [merits, reparations and costs], paras. 115-116; *Serrano-Cruz Sisters v. El Salvador*, judgment of 23 November 2004 [preliminary objections], para. 100; *Molina Theissen v. Guatemala*, judgment of 3 July 2004 [reparations], para. 41. See also the concurring opinions of judge Antônio A. Cançado Trindade appended to these judgements, esp. paras. 24-36 of his concurring opinion in the case of *Plan de Sánchez Massacre v. Guatemala*).

1.41. Although the concepts of aggravating circumstances and aggravated State responsibility were essentially applied by the Inter-American Court of Human Rights with regard to the substantive acts (killings), they were also used in the context of procedural obligations to investigate. Thus, in the case of *Myrna Mack Chang v. Guatemala* the Inter-American Court held that: "since then and still today, there have not been effective judicial mechanisms to investigate the human rights violations nor to punish those responsible, all of which gives rise to an aggravated international responsibility of the respondent State" (para. 139). In the same sense see: *Goiburú et al. v. Paraguay*, quoted above; *"Mapiripán Massacre" v. Colombia*, judgment of 15 September 2005 [merits, reparations, and costs], para. 295.

1.42. The applicants' counsels are aware that in all quoted cases the Inter-American Court was competent to deal with both substantive and procedural obligations relating to the right to life. Therefore the constructs of aggravating circumstances and aggravated State responsibility were referred to by the Inter-American Court especially to determine the question of reparation. However, the applicants' counsels consider that these two constructs may become highly relevant, along with the notion of State crimes, to the interpretation of the clause of Convention values from the *Šilih* judgment.

1.43. Also worth stressing is that in those cases where the Inter-American Court was not competent *ratione temporis* to deal with killings perpetrated by State units or agents, the Court found itself competent to verify if the investigation was effective without referring to any pre-requirements, as e.g. a new element test. See e.g. *Blake v. Guatemala* [preliminary objections], judgment of 2 July 1996, paras. 39 and 40; *Radilla Pacheco v. México* [preliminary objections,

merits, reparations and costs], judgment of 23 November 2009, par. 23; *Ibsen Cárdenas and Ibsen Peña v. Bolivia* [merits, reparations and costs], judgment of 1September 2010, para. 21]; *Serrano-Cruz Sisters v. El Salvador*, judgment of 23 November 2004 [preliminary objections], para. 68; *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], judgment of 24 November 2010, paras. 17-18. Although in its earlier case law the Inter-American Court preferred to combine the obligation to conduct an efficient investigation on killings and enforced disappearances with Article 8 (right to fair trial) and 25 (right to judicial protection) it recently analyses this obligation also under Article 4 (right to life).

1.44. Turning back to the European Convention, two additional factors may corroborate that the Court is competent to adjudicate on the procedural obligations. First, the Council of Europe and the Convention came into being as democratic political and legal alternatives to the two totalitarian regimes, Nazism and Stalinism, which were responsible for horrific mass-scale violations of human dignity. The vision of the founders of the Council of Europe and the Convention was directed towards a system that clearly defines what is just and what unjust. This intention clearly transpires from the *Travaux préparatoires* to the Convention. To give only one example:

"while I was in the Gestapo prisons, while one of my brothers was at Dachau and one of my brothers-in-law was dying at Mauthausen, my father […] was interned at Buchenwand. He told me that on the monumental gate of the camp was this outrageous inscription: 'Just or unjust, the Fatherland'.

I think that from our First Session we can unanimously proclaim that in Europe there will henceforth only be just fatherlands.

I think we can now unanimously confront 'reasons of State' with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded – the sovereignty of justice and law." Speech of Pierre-Henri Teitgen (*Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, The Hague: 1975-1985, vol. I, pp. 48-49).

1.45. The Katyn massacre was committed by a totalitarian regime whose aims and values radically and drastically contradicted those of the Convention. It therefore becomes mandatory, if the Convention values are to be protected in the real and effective manner, that the political successors of the totalitarian States, currently Contracting Parties to the Convention, should conduct an effective investigation into the totalitarian crimes.

1.46. Second, an effective investigation into the Katyn massacre is a prerequisite for the rehabilitation of the murdered persons as victims of political repression. To date, those persons killed are considered, in legal terms, as sentenced and executed in conformity with Soviet legislation.

It is also worth noting the social consequences of the lack of efficient investigation. The fact that the Katyn massacre was committed by the Soviet Union

is broadly denied in Russia, even by members of the Russian Parliament. In a public opinion poll conducted in Russia in 2010 as many as 53 percent of the respondents did not know who committed the Katyn massacre, 28 percent attributed it to the Germans and only 19 percent pointed to the Soviet Union.

Another illustration of the indirect adverse consequences of the lack of efficient investigation is that some Russian towns continue today to bear the names of members of the Politburo of the Communist Party who on 5 March 1940 made the decision to shoot almost 22,000 Polish citizens. Among these towns is Kaliningrad, capital of the region adjacent to the Polish-Russian border.

In the "Operation Condor Case" the Inter-American Court of Human Rights held "the gravity of the facts cannot be separated from the context in which they occurred and it is this Court's duty to emphasize this, for the purpose of preserving the historical memory and the imperative need to ensure that such facts are never repeated" (*Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, para. 93).

1.47. Furthermore, the applicants' counsels are of the opinion that even under the new element (material) test as suggested and applied by the Chamber's majority, the Court may be competent *ratione temporis* to examine whether the procedural obligation of the respondent State has been fulfilled. This test, requiring that there should be sufficiently important new material casting new light on the offence and coming into the public domain in the post-ratification period, draws on the experience of a normally and properly conducted investigation. In such an investigation new evidence and materials are added to and accumulated or confronted with the previous ones in an effort to explain the circumstances of a given death (or deaths). If no relevant material of sufficiently important value becomes known after the "critical date" it can be assumed that there is no element capable of providing a bridge between the death and the ratification. But there may also exist some specific cases in which the State does not take any steps in order to collect or identify the relevant sufficiently important materials (in particular when it is known or highly probable where such materials are to be found or who may testify as a witness). Another specific, although rare, situation is a sudden change in the course of proceedings (investigation) which disregards or denies the previous results and findings of that investigation.

1.48. If the new element (material) test is limited to instances of new sufficiently important evidence becoming known in the post-ratification period, the Court will be competent to deal only with cases in which it is alleged that the respondent State does not attach the necessary weight to such new evidence. Outside the jurisdiction of the Court would remain, however, cases where the State abstains from collecting such evidence, explicitly disregarding or neglecting – in the post-ratification period – the existing information

sources ("abstention/inaction cases"), or where the State adopts (also in the post-ratification period) the conclusions that starkly contradict the findings in the previous stages of the investigation and even the common knowledge and historically established facts ("perversion cases"). The two latter categories of cases constitute more serious instances of non-fulfilment of procedural obligations than the previous ones. Furthermore, the exclusion of these two categories of cases from the scrutiny of the Court would encourage States not to take activities or measures leading to the disclosure of new materials and evidence ("abstention/inaction cases") or would leave unanswered by the Court acts constituting (after the "critical date") denials of the elementary requirements of procedural justice.

1.49. The applicants' counsels are of the opinion that the new element test should not be construed restrictively as relating only to new sufficiently important pieces of evidence, but should be understood more broadly as a new sufficiently important (procedural) fact. The latter interpretation seems to have been adopted by the three dissenting judges when they contemplated, alternatively to their special-circumstances approach, the new element test as a basis for the Court jurisdiction (especially points 10 and 12). Although decisions closing the investigation are not as such new material for the investigation, they may constitute a new important fact relevant in the context of Article 2 of the Convention, especially when they mark a sudden change in the investigation.

Conclusion: In the case of mass-scale crimes of international law prepared and perpetrated by a State, such as the Holocaust and the Katyn massacre, which to an extreme degree contravene the guarantees and the underlying values of the Convention, the Court should be competent ratione temporis to hear the case without any additional requirements, as e.g. new element test. This position is supported by the established case law of the Inter-American Court of Human Rights (especially massacre cases). But even under the new element test the European Court of Human Rights would become competent ratione temporis if the required new element was not limited to new evidence emerging in the post-ratification period but was understood broadly and adequately as a new sufficiently important (procedural) fact.

D. On whether there is a difference, in legal terms, between situations in which a material act (death) occurred before and after the date on which the European Convention came into legal force (3 September 1953)

1.50. In their submissions the Russian government call on the Court to distinguish two situations: when an act of killing happened before the Convention ratification by a State but after the Convention entered into force, and when such an act occurred before 3 September 1953. It is alleged that in the first situation a violation of the Convention in its substantive aspect is beyond the temporal

jurisdiction of the Court whereas in the second situation it does not exist at all (para. 8 of the written submissions dated 30 November 2012).

1.51. The applicants' counsels do not agree with this allegation. Legal rule protecting human life and prohibiting killings is not an invention of the European Convention but a universal moral and legal precept that long preceded the Convention's enactment. Implicit in this prohibition is a procedural obligation to investigate when killings occur.

1.52. But first of all, the applicants' counsels wish to rely on decisions of international bodies that dealt with the legal topic raised on the instant proceedings by the Russian government.

1.53. The Inter-American Court of Human Rights was confronted in *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], Judgment of 24 November 2010), with a case of around 70 members and supporters of the Communist Party of Brazil executed between 1972-1975 during a series of operations conducted by the Brazilian army. The Inter-American Convention Human Rights came into force on 18 July 1978. Brazil recognised the contentious jurisdiction of the Inter-American Court on 10 December 1998. When Brazil raised a *ratione temporis* objection, the Court accepted it in relation to the substantive act (killings) but rejected it as far as there were some continuing obligations, among them an obligation to investigate under Article 4 (right to life) – par. 16-18. See also *Almonacid-Arellano and Others v. Chile* [preliminary objections, merits, reparations and costs], Judgment of 26 September 2006, paras. 46-50. This case concerned a killing by State agents that took place on 17 September 1973.

1.54. In the same vein the appellate bodies of the World Trade Organisation dismissed *ratione temporis* objections based on allegations that the treaty in question was applied retroactively due to the fact the contested measures had preceded the date that the treaty entered into legal force.

1.55. Thus in the so called *Banana (III)* case (*European Communities – regime for the importation, sale and distribution of bananas*; WT/DS27/AB/R; decision/report of 9 September 1997) it was held (footnotes omitted):

"235. The European Communities also raises the question whether the Panel erred in giving retroactive effect to Articles II and XVII of the GATS [General Agreement on Trade in Services – I.C. Kamiński], contrary to the principle stated in Article 28 of the Vienna Convention. Article 28 states the general principle of international law that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to … any situation which ceased to exist before the date of entry into force of the treaty …". The Panel stated in its finding on this issue that:

'… the scope of our legal examination includes only actions which the EC took or continued to take, or measures that remained in force or continued to be applied by the EC, and thus did not cease to exist after the entry into

force of the GATS. Likewise, any finding of consistency or inconsistency with the requirements of Articles II and XVII of GATS would be made with respect to the period after the entry into force of the GATS. [Panel Report, para. 7.308]'

The Panel stated, further, in a footnote to this finding, that 'the EC measures at issue may be considered as continuing measures, which in some cases were enacted before the entry into force of the GATS but which did not cease to exist after that date (the opposite of the situation envisaged in Article 28)'. […]

237. It is […] evident from the terms of its finding that the Panel concluded, as a matter of fact, that the de facto discrimination did continue to exist after the entry into force of the GATS. This factual finding is beyond review by the Appellate Body. Thus, we do not reverse or modify the Panel's conclusion in paragraph 7.308 of the Panel Reports."

Similarly in the case of *Canada – term of patent protection* (WT/DS170/AB/R; decision/report of 18 September 2000) it was stated that:

"70. […] A treaty applies to existing rights, even when those rights result from 'acts which occurred' [in the wording of Article 70.1 of the TRIPS Agreement – Agreement on Trade-Related Aspects of Intellectual Property Rights – I.C. Kamiński] before the treaty entered into force. […]

72. Article 28 of the Vienna Convention covers not only any 'act', but also any 'fact' or 'situation which ceased to exist'. Article 28 establishes that, in the absence of a contrary intention, treaty provisions do not apply to 'any situation which ceased to exist' before the treaty's entry into force for a party to the treaty. Logically, it seems to us that Article 28 also necessarily implies that, absent a contrary intention, treaty obligations do apply to any 'situation' which has not ceased to exist — that is, to any situation that arose in the past, but continues to exist under the new treaty. Indeed, the very use of the word 'situation' suggests something that subsists and continues over time; it would, therefore, include 'subject matter existing […] and which is protected', such as Old Act […] patents at issue in this dispute, even though those patents, and the rights conferred by those patents, arose from 'acts which occurred' before the date of application of the TRIPS Agreement for Canada."

1.56. Highly relevant for the instant case is also the decision (view) of the United Nations Human Rights Committee following the communication of *Norma Yurich v. Chile* (no. 1078/2002, 2 November 2005, U.N. Doc. CCPR/C/85/D/1078/2002 (2005). The case was related to an enforced disappearance in October 1974. The International Covenant on Civil and Political Rights entered into force on 23 March 1976 (same as in Chile), and Chile accepted the Optional Protocol on 28 August 1992. In its decision the Committee found the communication inadmissible *ratione temporis* having regard to a declaration the government made upon the ratification of the Covenant. This

declaration stipulated that "[i]n recognising the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990 (underlined by I.C. Kamiński)."

There are good reasons to hold that States are precluded from making these kinds of declarations in respect to human rights international law treaties[13], but taken at face value, this declaration and the Committee's accepting reaction to it demonstrates that there exists a legal instrument for States wishing to limit, in temporal terms, the application of a given treaty. The Russian Federation has not made an analogous declaration or reservation when ratifying the European Convention.

1.57. Article 28 of the Vienna Convention on the Law of Treaties (VCLT), which codifies a well-established principle of international law, stipulates that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

1.58. But *a contratrio* a treaty applies to a situation that does not cease to exist but persists after entry into force of this treaty. This position is confirmed by the drafting history of the VCLT. In paragraph 3 of its commentary to Article 28 (which was then Article 34, the International Law Commission stated: "If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date."[14]

Article 28 was adopted by 97 votes to none, with 1 abstention.

1.59. Unless otherwise stated in the treaty, its provisions apply to situations that do not cease to exist after the treaty's entry into force. Thus a State-party wishing to exclude the application of the treaty to such situations must do it by means of an express reservation. This position is mirrored in the case law of the Permanent Court of International Justice and International Court of Justice.

In *Mavrommatis Palestine Concessions* (judgment of 30 August 1924, Series B no. 3) the PCIJ held that:

"90. […] The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its

[13] As did five members of the Committee in their joint dissenting opinion appended to the Committee's view in that case.

[14] *Draft Articles on the Law of Treaties with commentaries*, "Yearbook of the International Law Commission" 1966, vol. II, p. 212.

establishment. […] The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above."

Referring to a French government reservation expressing the *ratione temporis* limitation, the PCIJ stated in *Phosphates in Morocco* (Judgment of 14 June 1938, Series A/B no. 74) that:

"30. Not only are the terms [of the French declaration – I.C. Kamiński] expressing the limitation ratione temporis clear, but the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise."

Lastly, the ICJ in *Case Concerning Application of the Genocide Convention* [preliminary objections] (judgment of 11 July 1996, ICJ Reports 1996) deemed that:

"34. […] Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has indeed asserted as a subsidiary argument that, even though the Court might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention – and in particular Article IX – does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction ratione temporis, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina […]"

1.60. The above mentioned rule is accepted by the doctrine of international law. We quote only two eminent international lawyers. Paul Tavernier, a professor of Université Paris XI–Sud and director of the Centre de recherches et d'études sur les droits de l'Homme et le droit humanitaire (CREDHO) wrote that "une limitation ratione temporis devra être expressément prévue dans l'acte attributive de compétence et elle sera interprétée restrictivement" (*Recherches sur l'application dans le temps des actes et des règles en droit international public. Problèmes de droit intertemporel ou de droit transitoire*, LGDJ, Paris: 1970,

p. 217–18). Rosalyn Higgins, a judge and a former President of the International Court of Justice, held that "The broad position of the Court – and its predecessor the Permanent Court of International Justice – has been that acceptance of the jurisdiction of the Court does have retrospective effect […] unless this is specifically excluded by a reservation to the general acceptance of jurisdiction" (*Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, vol. II, OUP, Oxford: 2009, p. 876).

1.61. Furthermore, the applicants' counsels respectfully draw the attention of the Court to the case law of the Permanent Court of International Justice and the International Court of Justice relating to the distinction between the situations or facts which constitute a source of the rights claimed by a party of the proceedings and a source of the dispute.

In *Jurisdictional Immunities of the State. Germany v. Italy* (order of 20 July 2010) the ICJ stated:

"the facts and situations [the Court – I.C. Kamiński] must take into consideration are those with regard to which the dispute has arisen or, in other words, only those which must be considered as being the source of the dispute, those which are its 'real cause' rather than those which are the source of the claimed rights".

In *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 4 April 1939, PCIJ Rep. Series A/B No. 77), the PCIJ held that

"87. […] The only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being the source of the dispute. No such relation exists between the present dispute and the awards of the Mixed Arbitral Tribunal. The latter constitute the source of the rights […] It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute."

1.62. The Permanent Court of International Justice and the International Court of Justice confirmed that whereas the source of the dispute must relate to situations or facts subsequent to the ratification, the rights of a party to the dispute may originate in the pre-ratification period. Thus the PCIJ held in *Phosphates in Morocco* that "[s]ituations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose". In Right of Passage over Indian Territory, Portugal v. India (judgment of 12 April 1960, ICJ Reports 1960) the same court stated that "[t]he Permanent Court thus drew a distinction between the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute. Only the latter are to be taken into account for the purpose of applying the Declaration

accepting the jurisdiction of the Court" (p. 33/35). In *Electricity Company of Sofia and Bulgaria* the PCIJ considered that "a situation of fact in regard to which a dispute is said to have arisen must be the real cause of the dispute. In the present case it is the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities with regard to a particular application of the formula" (para. 87). Summarising the approach of the PCIJ in that case the ICJ said that "[i]n the Electricity Company case, Bulgaria argued that the awards of the Belgo-Bulgarian Mixed Arbitral Tribunal, which predated the critical date, had to be treated as the 'situations' that gave rise to the dispute. The Permanent Court of International Justice rejected this argument and held that, while these awards constituted the source of the rights claimed by Belgium, they were not the source of the dispute" (*Certain Property, Liechtenstein v. Germany* [preliminary objections, judgment], Judgment of 10 February 2005, ICJ Reports 2005, para. 41).

1.63. In the instant case the dispute is not about the killings that occurred before the critical date but about the subsequent failure of the State to effectively investigate these killings. The killings constitute the source of the right claimed by the applicants, i.e. the right to have the killings investigated by the State in a proper and effective manner. Had it not been for the killings, the procedural obligation to investigate would not have arisen. Only in this sense is the dispute related to the pre-accession facts. But the source of the dispute, i.e. the non-fulfilment of the procedural obligation, is located already in the post-ratification period.

Conclusion: the fact that a given death precedes the date on which a certain international instrument entered into legal force does not impede an international organ to verify whether an efficient investigation of these deaths was carried out. The autonomous and continuing obligation to investigate is activated by the death/killing (source of the procedural right), but the non-fulfilment of the procedural obligation (source of the dispute) is located in the post-ratification period. The jurisdiction of controlling international bodies may be limited by means of a State declaration stipulating that that State accepts the jurisdiction in question only in respect to situations beginning after the ratification date or another date. The legal position advanced by the applicants' counsels is supported by the case law of the Inter-American Court on Human Rights, the United Nations Human Rights Committee, the appellate bodies of the World Trade Organisation, as well as the Permanent Court of International Justice and the International Court of Justice.

E. The alleged lack of competence *ratione materiae*

1.64. The Russian government hold that the Court is not competent *ratione materiae* to assess the Katyn massacre ("Katyn events" as the crime is called) as it is a matter of international humanitarian law laying beyond the reach of the

Convention. It is stated that the Chamber assessment was contrary to Article 19 of the Convention (part 3.2 of written submissions dated 30 November 2012).

1.65. The strict separation of international humanitarian law and international human rights law cannot be upheld. First, the Vienna Convention on the Law of Treaties stipulates in Article 31 (3) (c) that a treaty is to be interpreted with due regard to "any relevant rules of international law applicable in the relations between the parties".

1.66. Second, a number of international courts confirmed that international humanitarian law and international human rights are not separate sets of rules but are complementary. The International Court of Justice stated in its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996, ICJ Reports 1996) that:

"25. […] the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

This position was followed in the ICJ's subsequent decisions: advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004] ICJ Reports, par. 106); Judgment in *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda* (19 December 2005, ICJ Reports 2005, para. 216; order in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (15 October 2008, ICJ Reports 2005, para. 112).

1.67. A *ratione materiae* objection of the kind submitted in the instant case by the Russian government was also raised by the respondent State in the case of *Serano-Cruz Sisters v. El Salvador* [preliminary question] before the Inter-American Court of Human Rights (judgment of 23 November 2004). The Court stated that:

"111. […] [the Court – I.C. Kamiński] must refer to the complementarity between international human rights law and international humanitarian law and the applicability of the former in times of peace and during armed conflict, and also repeat that this Court is empowered to interpret the norms of the American Convention in light of other international treaties.

112. Regarding the complementarity of international human rights law and international humanitarian law, the Court considers it should emphasize that all persons, during internal or international armed conflict, are protected by the provisions of international human rights law, such as the American Convention, and by the specific provisions of international humanitarian law. Consequently, there is a convergence of international norms protecting those who are in such situations. In this regard, the Court stresses that the specificity of the provisions of international humanitarian law that protect individuals subject to a situation of armed conflict do not prevent the convergence and application of the provisions of international human rights law embodied in the American Convention and other international treaties."

The Court then concluded that:

"119. […] it has the authority to interpret the provisions of the American Convention in light of other international treaties […] [and – I.C. Kamiński] to use the provisions of international humanitarian law […] to give content and scope to the provisions of the American Convention."

In numerous cases the Inter-American Court of Human Rights found violations of the Inter-American Convention of Human Rights when State actions occurred in the context of non-international armed conflicts (e.g. *Molina Theissen v. Guatemala* [reparations], Judgment of 3 July 2004, par. 15 and 41; *Molina Theissen v. Guatemala*, Judgment of 4 May 2004, para. 40; *Bámaca Velásquez v. Guatemala* [reparations], Judgment of 22 February 2002, para. 85; *Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000, paras. 143, 174, 207, 213 and 214).

1.68. The European Court of Human Rights perceives international humanitarian law and international human rights as complementary areas of law. This Court referred to international humanitarian law to provide interpretation of the Convention provisions. To give only a few examples, in *Varnava and Others v. Turkey* (GC judgment of 18 September 2009, appl. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) the Court stated that:

"185. […] Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict."

In *Jedda v. United Kingdom* (GC judgment of 7 July 2011, appl. no. 27021/08) the Court was looking into international humanitarian law to ascertain if specific rules of international law existed, which allowed States to use indefinite detention without trial (para. 107).

In several Chechen cases the Court applied the Convention in the context of non-international armed conflict: see: *Isayeva v. Russia* (Judgment of 24 February 2005, appl. no. 57950/00; *Khatsiyeva v. Russia* (judgment of 17 January

2008, appl. no. 5108/02; *Mezhidow v. Russia* (Judgment of 25 September 2008, appl. no. 67326/01).

1.69. Third, the inseparability of international human rights law from international humanitarian law is clearly evidenced by the insertion into human rights treaties of special provisions allowing State-Parties to derogate from human rights obligations in time of war or other public emergency. Such derogations are allowed only "to the extent strictly required by the exigencies of the situation" and must not be inconsistent with other obligations under international law (Article 15 of the Convention). Article 27 of the Inter-American Convention of Human Rights and Article 4 of the International Covenant on Civil and Political Rights are written in the same vein.

Conclusion: the relevant case law of several international courts clearly demonstrates that international humanitarian law and international human rights are not treated as separate sets of rules, but rather are complementary. When humanitarian law is applicable, rules of this law are used to establish the scope and content of the rights and freedoms protected under human rights treaties.

F. The alleged lack of obligation under international law to investigate the Katyn massacre

1.70. The Russian government alleges that there is no obligation under international law to investigate the Katyn massacre (part 4.2 of written submissions dated 30 November 2012). It is of the opinion that until 1945 international law did not contain any universally binding rules on the definition of war crime, personal responsibility for them, respective punishment and the statutory limitations for bringing to liability for war crimes. It also argues that even if hypothetically the investigation into the Katyn massacre had been initiated under the criminal law provisions currently in force in Russia, it would have been futile as it would have been terminated due to the death of the suspects.

1.71. The applicants' counsels disagree. First, the requirement to conduct an effective investigation into instances of killings or enforced disappearances is not made conditional upon the possibility of bringing the alleged suspects to criminal responsibility. The parameters of effective investigations are much broader and they encompass, among other obligations, also an obligation to determine and reveal the circumstances of tragic events. This aspect of the obligation to hold an effective investigation has been especially stressed in the case law of the Inter-American Court of Human Rights, which was confronted with numerous massacres committed by State agents. Thus in *Velásquez Rodriguez v. Honduras* (Judgment of 29 July 1988) the Court deemed that "even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains" (para. 181).

1.72. Also in the case law of the European Court on Human Rights the establishment of the truth is considered an inherent aim of the investigation relating to violations of the rights protected under Article 2 and 3. A right to truth for victims and society at large has been recognised by the Court as an element of the duty to investigate. *See* e.g. *Association of "21 December 1989" and Others v. Romania* (appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011, paras. 141, 144 and 194; *El-Masri v. the former Yugoslav Republic of Macedonia* (GC judgment of 13 December 2012, appl. no. 39630/09, para. 191).

1.73. A right to truth is of particular and preponderant importance in cases of gross human rights violations. The UN Human Rights Council in their Resolutions 9/11 and 12/12: Right to the Truth (of 24 September 2008 and 12 October 2009 respectively) referred to "the right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the facts that gave rise to such violations". In the same vein, the Inter-American Court of Human Rights stated in *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], Judgment of 24 November 2010, while summarising the position of this Court, that "all persons, including the next of kin of the victims of gross human rights violations, have the right to know the truth. As a consequence, the next of kin of the victims and society must be informed of all that occurred in regard to said violations" (para. 201). See also e.g. *Case of 19 Tradesmen v. Colombia* [merits, reparations and costs], Judgment of 5 July 2004, para. 261; *Carpio Nicolle and Others v. Guatemala* [merits, reparations and costs], judgment of 22 November 2004, para. 128; *Myrna Mack Chang v. Guatemala* [merits, reparations and costs], Judgment of 25 November 2003, para. 274.

1.74. In Poland, the National Remembrance Institute conducts numerous investigations into Nazi, Soviet and communist crimes (as many as 317 such investigations were pending as of 2010). Only when the facts of a particular event have been duly investigated and established is a given investigation finished by a decision either to prosecute or to discontinue the proceedings due to formal obstacles, as e.g. death of those responsible. The same practice is known in other countries, e.g. in Germany. Such investigations are not an expression of a goodwill gesture but rather fulfil the legal obligation to investigate – one that exists under national and international law, as well as under the European Convention.

1.75. Second, as far as the obligation to prosecute is concerned the applicants' counsels wish to repeat that as evidenced by the post-war trials the features of the war crime consisting in killings of prisoners-of-war have been clearly determined (or defined) by universally binding rules of humanitarian law that existed already before the war started in 1939. Thus, there is no violation of the *nullum crimen sine lege* principle due to the alleged vagueness of the law as

suggested by the Russian government. The post-war trials also unequivocally confirm that international law, as it existed in 1939, made not only States but also individuals responsible for war crimes. Thus the International Military Tribunal stated in its main judgment (*Goering and Others Trial*) that "international law imposes duties and liabilities upon individuals as well as upon States has long been recognized." It then continued: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced."[15]

The principle of individual criminal responsibility for war crimes is a long-standing rule of customary international law already recognized in the Lieber Code of 24 April 1863 (Art. 44 and 47) and the Oxford Manual of 9 September 1880 (Art. 48) and repeated in many treaties of international humanitarian law since then.

1.76. In light of the above, it cannot be accepted, as submitted by the Russian government, that the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, prepared in 1950 by the International Law Commission of the United Nations, were the first universally binding international law instrument that recognised personal responsibility for war crimes. Furthermore, the documents from the drafting history of these Principles expressly confirms that the task of the Commission was "merely to formulate" the Principles as they already existed and had been "affirmed" by the UN General Assembly resolution 95(I) of 11 December 1946.[16]

1.77. Third, the applicants' counsels agree with the Court's position in the *Kononov* case that at the time of Second World War no limitation period was fixed by international law with regards to the prosecution of war crimes, and neither did developments in international law after that war impose any limitation period with respect to war crimes (paras. 231-232). Furthermore, the Convention on the Non-Applicability of Statutory Limitation on War Crimes and Crimes against Humanity, enacted in New York in 1968, stipulated that no statutory limitation applies "irrespective of the date of their commission" to the crimes the Convention refers to. As the killing of innocent prisoners-of-war was in 1939 precisely defined as a war crime, both in terms of its content and the personal liability of individuals, the application of the 1968 Conven-

[15] *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg: 1947, vol. I, p. 223. *See also* e.g. *High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*, *Law Reports of Trials of War Criminals*, vol. XII, p. 60-61.

[16] This conclusion was set forth already in paragraph 26 of the report of the Commission on its first session (approved by the General Assembly in 1949), then in the report of the special *rapporteur*, to be repeated in the final document submitted by the Commission. See: *Formulation of Nurnberg Principles*, „Yearbook of the International Law Commission" 1950, vol. II, p. 189, para. 36; and *Report of the International Law Commission to the General Assembly*, *ibidem*, p. 374, para. 96.

tion, which the Soviet Union, being the legal predecessor of the Russian Federation, ratified, would not amount whatsoever to a violation of the principle of *nullum crimen sine lege*.

Conclusion: killing innocent prisoners-of-war was in 1939 precisely defined as a war crime both in terms of its content and the personal liability of individuals. That crime is not subject to any statute of limitation. But even when there exist obstacles that hinder bringing those responsible to criminal justice, the State is still under the obligation to conduct an effective investigation in cases of gross human rights violations. This obligation is co-related with "a right to truth" belonging both to relatives of victims and the society at large.

G. Other legal issues raised in the instant case

1.78. Lastly, the Russian government questions the Court's competence *ratione temporis* by relying on several pre-*Šilih* inadmissibility decisions (part 4.4 of written submissions dated 30 November 2012).

1.79. The Russian government entirely ignores the coherent post-*Šilih* case law in which the Court found itself competent to adjudicate on the procedural obligation under Article 2 in cases concerning deaths or killings that had occurred before the "critical date". To date, the Court has unanimously applied its position adopted in *Šilih* in 21 subsequent judgments (with many admissibility decisions). These judgments are: *Agache and Others v. Romania* (appl. no. 2712/02, judg. of 20 October 2009); *Trufin v. Romania* (appl. no. 3990/04, judg. of 20 October 2009); *Velcea and Mazăre v. Romania* (appl. no. 64301/01, judg. of 1 December 2009); *Şandru v. Romania* (appl. no. 22465/03, judg. of 8 December 2009), *Tuna and Tuna v. Turkey* (appl. no. 22339/03, judg. of 19 January 2010), *Floarea Pop v. Romania* (appl. no. 63101/00, judg. of 6 April 2010). *Lăpuşan and Others v. Romania*, appl. nos. 29007/06, 30552/06, 31323/06, 31920/06, 34485/06, 38960/06, 38996/06, 39027/06 and 39067/06, judg. of 8 March 2011; *Association of "21 December 1989" and Others v. Romania*, appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011; *Jularić v. Croatia*, appl. no. 20106/06, judg. of 20 January 2011; *Lyobov Efimesto v. Ukraine*, appl. no. 75726/01, judg. of 25 November 2010; *Palić v. Bosnia and Herzegovina*, appl. no. 4704/04, judg. of 15 February 2011; *Merkulova v. Ukraine*, appl. no. 21454/04, judg. of 3 March 2011; *Pastor and Ţiclete v. Romania*, appl. nos. 30911/06 and 40967/06, judg. of 19 April 2011; *Tashukhadzhiyev v. Russia*, appl. no. 33251/04, judg. of 25 October 2011; *Paçacı and Others v. Turkey*, appl. no. 33251/04, judg. of 8 November 2011; *Crăiniceanu and Frumuşanu v. Rumania*, appl. no. 12442/04, judg. of 24 April 2012; *Mladenović v. Serbia*, appl. no. 1099/08, judg. of 22 May 2012; *Dimovi v. Bulgaria*, appl. no. 52744/07, judg. of 6 November 2012; *Anca Mocanu and Others v. Romania*, appl. nos. 10865/09, 45886/07 and

32431/08, judg. of 13 November 2012; *Bajić v. Croatia*, appl. no. 41108/10, judg. of 13 November 2012; *Kudra v. Croatia*, appl. no. 13904/07, judg. of 18 December 2012.

1.80. Furthermore, already in the *Varnava* judgment, when the Turkish Government referred to the *Moldovan* and *Rostaş* as well as *Kholodovy* cases, on which the Russian Government strongly rely in the instant case, the Grand Chamber stated, that the Grand Chamber in *Šilih* had "reviewed the jurisprudence on the question" and as a result the quoted decisions "are not of any assistance" (paras. 138-139).

Conclusion: while questioning the Court's competence ratione temporis, the Russian Government have relied only on several pre-Šilih inadmissibility decisions and ignore altogether the coherent unanimous post-Šilih case law.

(b) ***In the alternative, whether or not a procedural obligation under Article 2 of the Convention can be said to have arisen by reason of any events that took place in the post-ratification period?***

1.81. The Chamber judgment in *Janowiec* established the new element (material) test to identify whether a fresh investigative obligation arises under Article 2 even when the killing in question constitutes a mass-scale crime under international law contrary to "the underlying values of the Convention". Actually, however, the approach based on that test was shared only by two judges (Mr. Karel Jungwiert and Boštjan M. Zupančič) as the two other judges of the narrow majority (Mr. Anatoly Kovler and Ms. Ganna Yudkivska) adhered to the "political goodwill gesture" approach (joint concurrent opinion appended to the judgment).

1.82. The applicants' counsels share the view of the dissenting judges (Dean Spielmann, Mark Villiger and Angelika Nußberger) that the Chamber judgment has restricted the original position of the Court as expressed in the GC *Šilih* judgment (last subparagraph of paragraph 163). But even under the new element (material) test as suggested and applied by the Chamber's majority, the Court may be competent *ratione temporis* to examine whether the procedural obligation of the respondent State has been fulfilled.

1.83. First, at earlier stages of the Russian Katyn investigation the execution of Polish POWs by NKVD squads was not doubted and that position corresponded with historically established facts, whereas later the relevant Russian institutions started repeating that the fate of those prisoners was unknown. On 21 April 1998 the Chief Military Prosecutor's Office of the Russian Federation confirmed in its written answer to Mrs. Ojcumiła Wołk and Witomiła Wołk-Jezierska that Wincenty Wołk, son of Wacław, born 12 May 1909, had been kept as a POW in the special NKVD camp at Kozelsk, and had been shot dead along with others in spring 1940. However, in its responses to further requests filed in 2006 and 2008 by Mrs. Witomiła Wołk-Jezierska, the Chief

Military Prosecutor's Office stated that the whereabouts of Wincenty Wołk remained unknown. This position was then upheld by the Russian courts.

1.84. As the facts established before and after 5 May 1998 differ so profoundly therefore some important, indeed illuminating evidence must have been discovered after the critical date or even a significant part of the procedural steps in the Katyn criminal proceedings must have taken place after the critical date. There was a dramatic change in the investigation. If that change is to be presumed reasonable and justified it must have been accompanied by significant investigation activities and backed up by a solid evidentiary material. Yet, very puzzlingly, the Respondent Party alleges that only "an insignificant number of investigation activities, carried out at the end of the 1990s and after the year 2000, did not lead to any considerable advance and change in the investigation" (para. 32 of the Memorandum dated 19 March 2010).

1.85. It must be also stressed that due to the secrecy clause still imposed on a significant part of the Russian Katyn investigation files (now 35 volumes) it is impossible to determine precisely how many and which legal steps took place before and after the "critical date".

1.86. Second, to the extent that we could become familiar with the case file of the Russian Katyn investigation no 159 (after the Russian authorities handed over some volumes of the case file to the Polish side), we are convinced that new elements capable of imposing a fresh obligation to investigate under Article 2 exist. As late as 2002 the Ukrainian authorities handed over to the Russian side numerous pieces of evidence, the most important of which was a copy of the so-called Ukrainian Katyn list with 3435 names of the Katyn massacre victims held in the prisons of Western Ukraine. This material was included into the case file as recently as 2 August 2004, hence only forty days before the investigation was discontinued.

1.87. In its recent letter of 17 January 2013 the Russian government held that the ruling of 2 August 2004 "contains a manifestly unsubstantiated conclusion about the fact that those documents concern an execution of 3435 Polish citizens in the spring of 1940 in the territory of the Ukrainian Soviet Socialist Republic" (par. 5). They continued that the so-called 'Ukrainian list', forwarded by the Ukrainian authorities to the Russian Chief Military Prosecutor's Office in 2002 was not a list of executed persons or a prisoners' dispatch list (para. 6).

1.88. The "Ukrainian list", which contains names of persons whose personal files were forwarded on 24 November 1940 by the Ukrainian NKVD to the Soviet NKVD, is recognised by historians as referring to the names of prisoners from the prisons in Western Ukraine who were executed following the Politburo decision of 5 March 1940. After the executions the personal files of the executed prisoners were transferred to the central NKVD archives.

1.89. The Shelepin's of 3 March 1959 specifies that besides the three execution sites (for Kozelsk, Starobelsk and Ostashkov prisoners-of-war) "7,305 persons were shot in other camps and prisons in western Ukraine and Belarus". Historians

agree that the "Ukrainian list" is composed of the names of persons executed in western Ukraine. The "Belarus list" with the remaining 3870 names is missing until now.

1.90. With regards to the Russian government's statement that the ruling of 2 August 2004 was unsubstantiated, it must be stressed that a competent investigative organ made this ruling. It is therefore puzzling which authority and on which legal grounds "excludes" or "disqualifies" the material in question from the file when the case is closed.

1.91. The applicants' counsels hold that both the "Ukrainian list" and the 13 volumes of documents presented by the Ukrainian authorities in 2002 are new important evidence relevant for Russian investigation no. 159 and pertinent to the elucidation of the Katyn massacre.

1.92. Third, as already argued above (1.48-1.49), the new element test should not be construed restrictively as relating only to new sufficiently important pieces of evidence, but should be understood more broadly as a new sufficiently important (procedural) fact. The proposed interpretation would adequately address those cases which are not comprised by the new evidence test but which actually constitute more serious instances of non-fulfilment of procedural obligations than omissions of new evidence. These are "abstention/inaction cases", when the existing information sources are explicitly disregarded or neglected – in the post-ratification period, and "perversion cases", where the State adopts (also in the post-ratification period) the conclusions that starkly contradict the findings in the previous stages of the investigation and even the common knowledge and historically established facts.

1.93. The applicants' counsels also respectfully draw the attention of the Court to two adverse implications of the new element test if understood restrictively as new evidence. In order to evade the scrutiny of this Court's national authorities it will be encouraged not to conduct evidentiary proceedings. And even more, access to archives may be closed or seriously hindered to prevent new material from becoming known. These dangers are particularly real in the post-totalitarian States.

1.94. The Russian Katyn investigation must be qualified as a "perversion case". What started in 1990 as a real and public investigation into the mass-scale tragedy covered up by several decades of lies resulted in total secrecy in 2004. Then the Russian courts adopted the view, in sheer denial of the very basic facts, that the applicants' relatives had "disappeared" after having been placed "at the disposal" of the Soviet security organs.

Conclusion: if the Grand Chamber accepted the new element test it should not restrict it to new evidence but rather give this test a broader meaning that would accommodate also "inaction/omission cases" and "perversion cases". It is also submitted that there exist materials, which include new evidence surfacing in the post-ratification period.

2. ***Assuming that the Court has jurisdiction to examine the case from the standpoint of the procedural obligation under Article 2, did the Russian State discharge its duty to carry out an effective investigation in the post-ratification period?***
   (a) ***In particular, was the applicants' right to participate effectively in the investigation adequately secured?***

2.1. The applicants' counsels are fully aware that due to the nature of the investigation on the Katyn massacre committed so long ago as in 1940 and followed by a few decades of hiding the truth and the destruction of evidence, not all the guarantees under the procedural limb of Article 2 may be relevant and secured. Nevertheless, some basic requirements under Article 2 must be met by the investigation to be considered effective.

2.2. Article 2 requires States to conduct an effective investigation in all cases of violent death or allegations that this may have occurred. This duty consists in taking all reasonable steps capable of establishing the circumstances of the death in question, identifying those who were responsible for it and bringing the perpetrators to justice. This is not an obligation of result, but one of means.

The investigation must be transparent to the public, but especially to close relatives of the victim. In all cases, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (e.g. *Hugh Jordan v. the United Kingdom*, appl. no. 24746/94, judg. of. 4 May 2001, para. 109. Therefore the Court found violations of Article 2, e.g. when the family of the victim had no access to the investigation and court documents (*Ögur v. Turkey [GC]*, appl. no. 21954/93, judg. of 20 May 1999, ECHR 1999-III, para. 92) and when the father of the victim was not informed of the decisions not to prosecute (*Güleç v. Turkey*, appl. no. 21593/93, judg. of 27 July 1998, Reports 1998-IV, para. 92).

The obligation to carry out an effective investigation becomes especially pertinent when State functionaries are or may be implicated in the death (e.g. *McCann and Others v. the United Kingdom*, para. 161; *Kaya v. Turkey*, judg. of 19 February 1998, para. 105; *Ilhan v. Turkey* [GC] appl. no. 22277/93, para. 63; *McKerr v. the United Kingdom*, appl. no. 28883/95, para. 121).

2.3. Russian investigation no. 159 does not meet the basic requirements of Article 2. In the proceedings it has not been established whether in 1940 there were any executions of Polish citizens. Responding to the questions formulated by the Court in the document communicating the application, the Russian government stated that, of those who had been detained in the Ostashkov, Starobelsk and Kozelsk camps, 1,803 had "perished", whereas the fate of the others was not known. Only 22 persons were identified during the 1991 exhumation works, none of whom was a relative of the applicants.

2.4. The Russian authorities did not provide any explanation as to the difference between the number of persons killed in Shelepin's note (21,857) and the much lower number of those called "perished" persons (1,803).

2.5. Actually, however, the Russian authorities have not provided any single name of the persons murdered. Illustrative of the Russian authorities' approach is the case of the two persons who were among the 22 bodies identified during the excavation work at Mednoye in 1991. These were Mr. Lucjan Rajchert and Mr. Wacław Słabolepszy. In 2006 the Memorial Association lodged an application for rehabilitation of the 16 POWs held in the special NKVD camps, among them Mr. Lucjan Rajchert and Mr. Wacław Słabolepszy. Despite the identification of these two POWs the Chief Military Prosecutor's Office rejected the rehabilitation request. This decision was confirmed by Khamovniki Circuit Court. When confronted with the results of the Russian exhumation, Judge Igor Kananovitch stated at a court hearing that a bullet hole in the skull proved only that a firearm had been used against a certain person, but not that this person had been shot dead by State functionaries and, all the more, that he was a victim of political repression (the judgements of Khamovniki Circuit Court were attached to the submissions of applicants' counsels of 12 October 2010).

2.6. In its submissions to the Court the Russian Government stated that the Russian authorities had not in any way been obliged to institute and carry out any investigation into the Katyn massacre. This position may justify why, at a certain point, when the authorities started to consider, for whatever reasons, the investigation as "mistakenly" initiated, the investigation was no longer conducted properly. It must be stressed, however, that during the first period the investigation was carried out with the full co-operation of Polish specialists and the prosecutor in charge of it intended to classify the Katyn massacre as a war crime, crime against humanity and genocide (motion of Anatoly Yablokov of 13 June 1994 and the legal opinion of the Russian Commission of Experts on the Katyn Case of 2 August 1993).

2.7. As regards the evidence collected, the Russian authorities did not conduct full-scale excavations at all burial sites. Originally, however, the excavations were to be performed not to assess the number of victims, but only to confirm that Polish citizens had been buried in certain locations. In terms of the number of victims and their names, other evidence was considered pertinent and credible. When, however, the excavation works became crucial for determining the number of victims and their identities, they should have been carried out on a full scale with the aim of identification of the bodies.

2.8. The applicants were not given the status of injured party in the investigation. As a result, they could not participate in the proceedings, present documents and evidence, or submit motions. Their participation became especially pertinent when the Russian authorities began to have doubts as to the number of victims and the fate of those whose names were on the NKVD dispatching lists.

2.9. Deprivation of opportunities to participate in the investigation was particularly detrimental to the applicants' rights as the Russian authorities consistently assured that the investigation was coming to its end without anything suggesting a sudden and dramatic change in the conclusions of the proceedings.

2.10. Irrespective of whether the Russian authorities considered the applicants' relatives as dead or disappeared, the applicants should have access to the case file, as their own legal interests were involved in the proceedings, e.g. knowing the circumstances of the death (or disappearance) of their close relatives and the decision-making process that led to this death (or disappearance).

2.11. In view of the foregoing, investigation no. 159 may not be considered transparent to the applicants.

2.12. The requirement of transparency also applies to the public at large. This requirement should be of particular importance in cases of serious human rights violations, especially those committed by totalitarian regimes in the furtherance of aims contrary to values of the Council of Europe and the Convention. Investigation no. 159 concerned a mass-scale crime of international law perpetrated by the Stalinist regime. There therefore existed, and continues to exist, an important public interest in terms of knowing what circumstances of the Katyn massacre have been established by the prosecutor's office.

2.13. The Russian authorities rely on State security grounds as justification for the secrecy of the case file. There are several reasons for which this argument may not be accepted. Firstly, in a democratic society the public interest in uncovering the mass-scale crimes of totalitarian regimes is so preponderant that hardly may any true and real interest of the State, which pretends to be democratic and follows democratic values, be invoked to justify the secrecy of the investigation files. It is therefore unimaginable that, for example, the democratic Germany might claim security reasons for classifying files concerning Nazi crimes. If a State of the Convention relies on fundamental State interests in the context of crimes committed by its totalitarian predecessor it may be justly perceived as equal to suggesting the continuity between the regimes, and even as an act of approval of the atrocities. Secondly, societies that lived under totalitarian regimes, if these societies are to transform themselves into democratic ones, need knowledge about the atrocities of such regimes. This knowledge is part and parcel of civic and democratic education. Thirdly, the time factor must be taken into account. The applicants' counsels are ready to accept that even in the case of crimes of international law State interests may exceptionally be invoked. Nevertheless such exceptions must be very rigorously and narrowly interpreted, and may justify the classification of only particular sensitive documents relating to military and diplomatic matters. Over time, this exceptional justification ceases to exist.

2.14. The Russian authorities claimed that one of the major obstacles to the investigation into the Katyn massacre was the destruction of the prisoners' personal files. The applicants' counsels have serious doubts as to the indispensability of this material for the success of the investigation. However, in this context let us recall – although it is not a strictly legal argument – the words of Mikhail Bulgakov, the great Russian writer: "archives don't burn". The allegation that

the personal files of prisoners were destroyed has never been substantiated. Reasons therefore exist for doubting the assertion of the Russian authorities. Firstly, the authorities have never shown the routine protocols of destruction of files. Secondly, in the 1990s, when Russian-Polish co-operation with regard to the Katyn massacre was proceeding smoothly, the Russian partners assured their Polish colleagues, albeit unofficially, that the files of Polish prisoners of war – not only those killed in 1940 but all of them – still existed and were divided into four different categories.

2.15. Lastly, effective investigation must be directed, by the use of all available measures, towards the identification of perpetrators and bringing them to justice. As the case file is secret, we do not know who has been declared responsible for the Katyn massacre and on which grounds. However, we know that the Katyn massacre was classified as an abuse of power. This classification entirely disregards the precepts of international law, which in 1940 already treated killing of prisoners of war as a war crime. Moreover, at the time when it was committed this crime was not subject to statute of limitation (we refer in this context to the findings of the Court in the *Kononov* judgement, para. 230).

2.16. If the Katyn massacre had been given the adequate legal classification, i.e. being declared an imprescriptible crime of international law, the Russian authorities should have pursued a criminal prosecution of the key organisers and perpetrators as long as they live. In this context it is worth mentioning that in the 1990s still alive were such persons as Lazar Kaganovitch, member of the Soviet Politburo, who on 5 March 1940 made the decision to execute Polish citizens, and Piotr Soprunienko, in 1940 head of the Administration for Prisoners of War and Internees Affairs.

2.17. The applicants' counsels draw the attention of the Court also to the joint dissenting opinion of judges Dean Spielmann, Mark Villiger and Angelika Nußberger. These judges were of the opinion that the Chamber should have first concluded that it was competent *ratione temporis* to decide on the allegations relating to the procedural limb of Article 2 and then it should have found for the following reasons a violation of Article 2 (points 11-12):

- applicants' right to participate effectively in the investigation was not secured: the applicants were denied victim status and access to the case file;
- the classification of the most important parts of the case file citing national security considerations appears arbitrary;
- the decision to classify the materials of the investigation sits ill with the Russian Government's consistent position that the crime was committed by the totalitarian regime of a different State, the Soviet Union, more than sixty years ago. In these circumstances, the public interest in uncovering the crimes of the totalitarian past should have coincided with the applicants' private interest in finding out the fate of their relatives, and outweighed any national-security considerations;

- the applicants further faced a prolonged denial of information about the fate of their relatives, taken together with the curt and mutually contradictory replies by the Russian authorities and the denial of the established historical facts;
- the Russian authorities adopted the version of the "disappearance" of the applicants' relatives as the official one and refused the applicants any access to the case materials on spurious national-security grounds;
- the Russian courts rejected all applications for rehabilitation, claiming that it was impossible to determine the specific legal provision forming the basis for the execution of the Polish prisoners of war.

The three dissenting judges concluded that "the Russian authorities not only did not comply with the positive obligation arising out of Article 2, but turned the positive obligation into its opposite. In other words, the procedural violation stems not just from culpable inaction, but from a positive intention not to comply with Convention standards." (point 13 *in fine*).

The applicants' counsels fully agree with the position adopted by the dissenting judges.

Conclusion: Russian investigation no. 159 did not meet the very basic requirements for being declared effective. The applicants were not given injured party status, their rights to participate in the investigation were not safeguarded properly, and – a fact which became particularly important when the Russian authorities reversed the original version of the tragic events – evidence was not collected from the applicants, basic evidentiary measures (e.g. excavation works) were not undertaken, and the adequate legal classification was not given to the Katyn massacre.

(b) ***In rendering the decision on classification of the file materials, was due weight given to the public interest in uncovering the circumstances surrounding the massacre of Polish prisoners-of-war and the applicants' private interest in finding out the fate of their relatives?***

2.18. With regards to the decision on the classification of the file materials, the applicants' counsels stress that this decision relates to the investigation on a mass-scale imprescriptible crime of international law, committed more than 70 years ago by the Soviet totalitarian regime whose aims and practice radically contradicted the Convention's values. The Russian Federation declares that it intends to be a democratic state founded on respect for human rights. Classification of the case file does not correspond with such intentions. Furthermore, the decision in question does not concern a single document but applies to 35 volumes of case files.

2.19. The applicants' counsels do not find it reasonable to entertain what national security interests might have justified the decision taken by the Russian authorities. Instead they wish to refer – to assess the Russian decision – to the relevant legal standards established by international law and in the case law of international judicial institutions.

2.20. The Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity ("Updated Principles on Impunity"), adopted by the UN Commission on Human Rights in 2005 (Resolution 2005/81), affirms that the "[f]ull and effective exercise of the right to truth provides a vital safeguard against the recurrence of violations." The same document declares that the right to the truth is inalienable for "[e]very people" (Principle 2). The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UN General Assembly Resolution 60/147 of 16 December 2005, provide that one of the modalities of reparation for gross human rights violations is the "[v]erification of the facts and full and public disclosure of the truth" (Principle 22(b)).

2.21. The right to truth was first recognized as a right of victims and their relatives to know the fate and whereabouts of missing or disappeared persons. But it is now widely accepted that this right extends beyond forced disappearances and includes a State obligation to shed light on all gross human rights violations or serious violations of international humanitarian law, including extra-judicial executions and torture. Examples of this principle or standard are provided by numerous institutions, see e.g. the Inter-American Court on Human Rights (*Moiwana Community v. Suriname* [merits, reparations and costs], judgment of 15 June 2005, para. 204), UN Human Rights Committee (Concluding Observations on Guatemala, 3 April 3 1996, CCPR/C/79/add.63, para. 25), UN Human Rights Council (Resolution 9/11) and Office of the UN High Commissioner of Human Rights (Study on the Right to Truth, 8 February 2006).

2.22. Legal instruments, both domestic and international, also include provisions preventing the classification and requiring the disclosure of information relating to human rights violations. For example, Article 44 of the Model Inter-American Law on Access to Public Information stipulates that the exceptions to the right of access "do not apply in cases of serious violations of human rights or crimes against humanity" (adopted in 201 by the Organization of American States, General Assembly Resolution no. 2607). Also worth mentioning is that the Inter-American Court on Human Rights stated expressly in *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003 [merits, reparations and costs], par. 180) that in the context of human rights violations restrictions on information cannot include classification on the grounds of national security.

2.23. As regards to victims' relatives, the Inter-American Court on Human Rights consistently held that the right to truth (understood, among others, as an entitlement to know the fate or whereabouts of those killed or disappeared as well as their burial sites) is essential to ending or preventing the mental suf-

fering of the relatives of victims of forced disappearances or secret executions (e.g. *Trujillo Oroza v. Bolivia* [reparations and costs], judgment of 27 February 2002, paras. 114-115) In the same vein, the UN Human Rights Committee held the decision/views in *Almeida de Quinteros v. Uruguay* (communication no. 107/1981, views of July 21, 1983 para. 14).

2.24. The Inter-American Commission on Human Rights emphasised that the particular importance of State compliance with the right to truth exists in those cases in which legal or historical developments had made the prosecution, or even identification, of the intellectual and material perpetrators of grave human rights abuses difficult or impossible (e.g. *Lucio Parada Cea and Others v. El Salvador*, report of 27 January 1999).

2.25. In light of the relevant human rights law standards it becomes evident that the Russian authorities classification decision not only did not give due weight to the individual and pubic interest in uncovering the circumstances of the Katyn massacre but also cannot find any justification.

2.26. The applicants' counsels respectfully submit that the instant case offers the Court a special opportunity to declare that under Article 2 of the Convention, read in conjunction with Article 1, there exists the right to truth when human rights have been grossly violated by State agents. In other words, disclosing information on human rights violations is a corollary of the general State duty, under Article 1, to secure the exercise of the Convention rights and freedoms, including by taking measures to prevent their violation.

Conclusion: while classifying the file materials, the Russian authorities did not give due weight to both private and public interests in finding out by the applicants the fate of their relatives and in uncovering by the public the circumstances of the massacre of the Polish prisoners-of-war (right to truth). More, in light of the relevant law and practice there existed no justification for the decision on classification when the investigation concerned an imprescriptible crime of international law.

Article 3 of the Convention

3. ***What is the scope of the State's obligation under Article 3 of the Convention in relation to the quest for information by the relatives of missing persons?***

3.1. The applicants' counsels agree with the position expressed in the Chamber judgment that the obligation under Article 3 is distinct from the obligation flowing from Article 2. That latter provision requires the State to take specific legal actions capable of clarifying circumstances of tragic events and leading to identification and punishment of those responsible. On the other hand, Article 3 is of a more general humanitarian nature as it enjoins the authorities to react to the plight of the relatives of the dead or disappeared person in a humane and compassionate manner. The scope of the Court's analysis under Article 3 is not confined to any specific manifestation of the authorities' attitudes, particular

incidents or procedural acts but the Court gives a global assessment of the way the State reacted or responded to the applicants' enquiries (para. 152 of Chamber judgment). Article 3 requires the State "to exhibit a compassionate and respectful approach to the anxiety of the relatives of the deceased or disappeared person and to assist the relatives in obtaining information and uncovering relevant facts" (para. 163). The Court may also have regard to the facts prior to ratification inasmuch as they may be relevant for the facts occurring after that date (*Broniowski v. Poland* [GC], appl. no. 31443/96, decision of 19 December 2002, para. 74; *Hokkanen v. Finland*, appl. no. 19823/92, judgment of 23 September 1994, para. 53). It means that the acts complained about under Article 3 may be given special weight when they are a prolongation of a State pre-ratification policy or when there is some degree of similarity between such acts and the previous attitude of the State (or its legal predecessor).

3.2. In numerous cases the Court found violations of Article 3 when the authorities of the Respondent State had failed to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, might be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the fate of the missing person (e.g., *Varnava and Others v. Turkey*, appl. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009, para. 200; *Osmanoğlu v. Turkey*, appl. no. 48804/99, Judgment of 24 January 2008, para. 96; *Bazorkina v. Russia*, appl. no. 69481/01, Judgment of 27 July 2006, para. 139; *Imakayeva v. Russia*, appl. no. 7615/02, Judgment of 9 November 2006, para. 164; *Gongadze v. Ukraine*, appl. no. 34056/02, Judgment of 8 November 2005, ECHR 2005-XI, para. 184; *Taniş and Others v. Turkey*, appl. no. 65899/01, Judgment of 2 August 2005, ECHR 2005-VIII, para. 219; *Orhan v. Turkey*, appl. no. 25656/94, Judgment of 18 June 2002, para. 358; *Çakıcı v. Turkey* [GC], appl. no. 23657/94, Judgment of 8 July 1999, ECHR 1999-IV, para. 98; *Timurtaş v. Turkey*, appl. no. 23531/94, Judgment of 13 June 2000, ECHR 2000-VI, para. 95).

3.3. This position of the Court corresponds with the established case law of the Inter-American Court on Human Rights. Below only a few references are given. It stated in *Blanco-Romero and Others v. Venezuela* [merits, reparations and costs] (judgment of 28 November 2005) that:

"59. As regards the violation of Article 5 of the American Convention to the detriment of the victims' next of kin, the Court has held that in cases that involve the forced disappearance of persons, the violation of the right to psychological and moral integrity of the victim's next of kin is, precisely, a direct consequence of the disappearance, which causes them, by the fact itself, serious suffering that is further aggravated by the state authorities' continued refusal to provide information on the victim's whereabouts or to open an effective investigation to find the truth."

It held in *Gómez-Palomino v. Peru* [merits, reparations and costs], (Judgment of 22 November 2005) that:

"61. In cases involving the forced disappearance of persons, the Court has stated that the violation of the mental and moral integrity of the next of kin is, precisely, a direct consequence of such forced disappearance,[17] which inflicts upon them great suffering, compounded by the constant refusal of State authorities to provide information about the victim's whereabouts or to conduct an effective investigation into the facts of the case."

In *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], Judgment of 24 November 2010, the Court, referring to its previous case law and summarising it, deemed:

"239. […] [T]he violation to the right to personal integrity of the next of kin of the victims can be confirmed given the impact that the enforced disappearance of their loved ones has generated for them and for their family nucleus, the failure to ascertain the circumstances of their death, the lack of knowledge regarding their final whereabouts, and the impossibility of properly burying the bodily remains. […]

240. In this regard, the Court recalls that, pursuant to its jurisprudence, the deprivation of access to the truth of the facts of the location of a disappeared person constitutes a form of cruel and inhumane treatment for close relatives.[18] Likewise, the Court has established that ascertaining the final whereabouts of the disappeared victim will permit the next of kin to heal from the anguish and suffering caused by uncertainty of the location of their disappeared family member.[19]

241. Moreover, the Court considered that the violation of the right to integrity of the next of kin is also due to the lack of effective investigations to ascertain the facts, the lack of initiatives to punish those responsible, the lack of information regarding the facts, and in general, in regard to the impunity that remains in the case, which has generated feelings of frustration, impotence, and anguish. In particular, in cases that involve enforced disappearances of persons, it is possible to understand that the violation of the right to psychological and moral integrity of the next of kin of the victims is a direct consequence of this phenomenon that causes severe suffering, which tends to increase, among other factors, given the constant failure of the State authorities to offer information

[17] With further references to *Case of 19 Tradesmen v. Colombia* [merits, reparations and costs], Judgment of 5 July 2004, para. 211; *Bámaca-Velásquez v. Guatemala* [merits], Judgment of 25 November 2000, para. 160; *Case of Blake v. Guatemala* [merits], Judgment of 24 January 1998, para. 114.

[18] With further references to *Trujillo Oroza v. Bolivia* [reparations and costs], Judgment of 27 February 2002, para. 114; *Chitay Nech and Others v. Guatemala* [merits, reparations, and costs], Judgment of 25 May 2010, para. 221; *Ibsen Cárdenas and Ibsen Peña v. Bolivia* [merits, reparations, and costs], Judgment of 1 September 2010, para. 130.

[19] With further references to *Ticona Estrada and Others v. Bolivia* [merits, reparations and costs], Judgment of 27 November 2008, para. 155; *Chitay Nech and Others v. Guatemala*, para. 222.

regarding the whereabouts of the victims or to initiate an effective investigation in order to ascertain information on what occurred.[20]

242. The Court finds that the uncertainty and lack of information from the State about what occurred, which remains to date in a large sense, has been a source of suffering and anguish, and of a feeling of insecurity, frustration, and helplessness for the next of kin, given the failure of the public authorities to investigate the facts.[21] Similarly, the Court noted that before the enforced disappearance of persons, the State has the obligation to guarantee the right to personal integrity of the next of kin also by means of effective investigations. These effects, fully encompassed in the complexity of enforced disappearances, remain in existence while the verified factors of impunity persist.[22]"

3.4. Also the UN Committee of Human Rights consistently held that anguish and distress experienced by direct relatives of the disappeared person, in itself, and – all the more – when combined with the failure of a State party to investigate and clarify the circumstances, result in violations of Article 7 of the International Covenant on Civil and Political Rights. Thus, in *Abubakar Amirov (on his own behalf and on behalf of his deceased wife, Aïzan Amirova) v. Russian Federation* (communication no. 1447/2006, decision/views of 2 April 2009), the Committee stated that

"11.7. […] [T]he Committee recalls its jurisprudence according to which the close family of victims of enforced disappearance may also be victims of a violation of the prohibition of ill-treatment under article 7. This is because of the unique nature of the anxiety, anguish and uncertainty for those to the direct victim. That is the inexorable consequence of an enforced disappearance. Without wishing to spell out all the circumstances of indirect victimisation, the Committee considers that the failure of a State party responsibly to discharge its obligations to investigate and clarify the circumstances of the harm suffered by the direct victim will be usually be a factor […]"

3.5. The European Court is competent to assess the State authorities' compliance with Article 3 obligations even when the original taking of life escapes its scrutiny. In the same vein, the UN Human Rights Committee decided in the case of *Mariam Sankara and Others v. Burkina Faso* (communication no. 1159/2003, decision/view of 28 March 2006) that the State reactions to the death of the applicants' relative constituted a violation of Article 7 of the International Cov-

[20] With further references to *Blake v. Guatemala* [merits], para. 114; *Chitay Nech and Others v. Guatemala*, para. 220; *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, para. 126.

[21] With further references to *Blake v. Guatemala* [merits], para. 114; *Heliodoro Portugal v. Panamá* [preliminary objections, merits, reparations, and costs], Judgment of 12 August 2008, para. 174; *Kawas Fernández v. Honduras* [merits, reparations and costs], Judgment of 3 April 2009, para. 139.

[22] With further references to *Goiburú and Others v. Paraguay* [merits, reparations and costs], Judgment of 22 September 2006, para. 103; *Radilla Pacheco v. México* [preliminary objections, merits, reparations and costs], Judgment of 23 November 2009, para. 172; *Chitay Nech v. Guatemala*, para. 226.

enant on Civil and Political Rights even when the death itself occurred outside the temporal reach of the Convention. In this context the applicants' counsels wish to draw the attention of the Court to the fact that already the refusal of the authorities to conduct an investigation into the death amounted to a violation of Article 7 (para. 12.2).

Conclusion: both the established case of the Court and that of other international organs confirm the prohibition of inhuman and degrading treatment while also imposing on the States an positive obligation to adopt a humane and compassionate approach to the relatives of the deceased or disappeared person and to assist the relatives in obtaining information and uncovering relevant facts, i.e. relating to the circumstances of the tragic events and the location of the burial sites.

4. ***Can the proximity of family ties be a factor justifying a distinction between two groups of applicants (the reference is made to paragraphs 153-154 of the Chamber judgment)?***

4.1. In paragraphs 153-154 the Chamber divided the applicants into two distinct groups, relying on the following "Chechen cases": *Taymuskhanovy v. Russia* (judgment of 16 December 2010, appl. no. 11528/07, para. 122) and *Musikhanova and Others v. Russia* (Judgment of 4 December 2008, appl. no. 27243/03, para. 81). The first group was composed of the widows and those children who "had been born at least a few years before the outbreak of the Second World War and were in their formative years when their fathers went missing". The second group encompassed two applicants who are the children of the Katyn victims but "were born after the precipitated departure of their fathers to war and never had personal contact with them" (Mrs. Wołk–Jezierska and Mrs. Krzyszkowiak) as well as three other applicants whom the Court considered "more distant relatives" (grandchildren and a nephew). Only those belonging to the first group were granted the status of victim under Article 3.

4.2. As regards Mrs. Wołk-Jezierska and Mrs. Krzyszkowiak, the applicants' counsels are neither convinced by the distinction made by the Chamber nor found it to correspond with the case law referred to by the Chamber. First, the complaint under Article 3 relates to the manner in which the applicants were treated by the Russian authorities in the 1990s and the first decade of the 21st century. There exist no reasons to make the mental anguish and stress experienced in this context by the children of the Katyn victims dependent on whether they had a chance to meet their fathers or not.

In its analysis of whether there was a violation of Article 3 with regard to the first group of the applicants (10 people) the Chamber referred to the circumstances prevailing in post-war communist Poland, the People's Republic of Poland (para. 156) and then to the events after the Soviet authorities acknowledged

the Soviet Union had committed the Katyn massacre and Russian Katyn investigation no. 159 could started (paras. 157 and subseq.). All these circumstances and events affected Mrs. Wołk-Jezierska and Mrs. Krzyszkowiak in the same manner as they did in the case of the victims' children belonging to the first group.

4.3. Furthermore, one can what is the age limit appropriate for building an emotional relationship with one's father to fall within the ambit of Article 3? One year, two years or three years, as in the case of Mrs. Irena Erchard?

4.4. Second, it may be argued, in opposition to the approach of the Chamber, that there are good reasons to allege that especially those who do not remember their fathers or did not have the opportunity to have any personal contact with them become, psychologically, more sensitive to the tragic fate of their fathers.

4.5. Third, in the judgment of *Taymuskhanovy v. Russia* the Court, while denying victim status to young children of the "disappeared person", referred to the fact that these children had not in any manner participated in the search for their father, and their anguish, resulting from the fact of being raised without a father, was not distinct from the inevitable emotional distress the disappearance entailed. The situation of Mrs. Wołk-Jezierska and Mrs. Krzyszkowiak must be distinguished from that in the case of *Taymuskhanovy*. Both applicants in the instant case actively participated in the proceedings and their complaint under Article 3 concern allegations not relating to their childhood but to the actions and reactions of the Russian authorities after 5 May 1998.

4.6. As regards the three other people belonging to the second group, the applicants' counsels wish to submit that these people, unlike the applicants in the *Musikhanova and Others* case, were actively involved in a range of legal steps as well as other activities relating to the commemoration of their killed relatives.

4.7. First of all, however, the applicants' counsels wish to submit that the test applied by the chamber is too narrow as it is limited only to one factor, i.e. family relationship, and as such does not take into account other circumstances relevant for determining whether a given person may be treated, in the particular circumstances of the case under consideration, as a victim under Article 3. Instead of the simple one-factor test a more adequate contextually sensitive and inclusive test should be used by the Court.

4.8. Without undermining the role of the family relationship/bond test (which should be the first step in determining that victim status has been sufficiently established), the applicants' counsels are of the opinion that the adequate test should also refer to the behaviour of the applicant. In other words, if personal involvement of a (more distant) relative indicates that he/she is attached to the killed/disappeared person such a relative should be afforded victim status under Article 3. Although in its case law (including the two Chechen cases previously quoted) the Court had identified a group of such connecting factors, it did not make use of them in the *Janowiec* judgment.

4.9. Mrs. Wołk-Jezierska is the author of several books dedicated to her father and the Katyn massacre (*Kulisy Zbrodni Katynskiej* [The Inner History of the Katyn Massacre], Nortom, Wrocław: 2005, 312 p.; *Wołyńska i Mazowiecka Szkoła Podchorążych Rezerwy Artylerii* [Volyn and Mazowiecki Artillery Reserve Officer Cadet School], Nortom, Wrocław: 2010, 296 p.; story *Portret wyobraźni* [Portrait of Imagination], awarded in the competition "Mój ojciec" [My Father]; story *Codina*, awarded in the competition "Moje wojenne dzieciństwo" [My wartime childhood]), among them a poetry volume which is a kind of intimate conversation with her late father (*Przychodzisz, gdy myślę Katyn* [You Come when I Think Katyn], Nortom, Wrocław: 2007, 66 p.). She has written numerous articles (in Poland and in the Polish-language press abroad, e.g. in the USA, Canada, Argentina) and initiated a number of activities related to the commemoration of her father and other Katyn victims (for example, planting oaks for the Katyn victims; building the Katyn Pantheon; placing commemorative plaques, naming schools after the Katyn victims, and more). In 1989 she co-founded the Federation of Katyn Families, and in 1993-1996 held the position of secretary in this association. She was a co-founder of the Katyn National Memory Committee, which in 2002 addressed President Putin with a request to declare null the decision of 5 March 1940 on the execution of Polish citizens. As an artist by profession she prepared several items, e.g. a banner of the Warsaw Katyn Family, part of the Federation of Katyn Families.

In 2007 Mrs. Wołk-Jezierska was awarded the "Pro Memoria Medal" and the "Silver Medal of National Memory Sites Guardian" (Srebrny Medal Opiekuna Miejsc Pamięci Narodowej) for her life-long contribution to discovering the truth about the Katyn massacre. She also received the Medal "Overcome Evil with Good" ("Zło Dobrem Zwyciężaj"), granted by the National Remembrance Committee of Rev. Jerzy Popiełuszko (Ogólnopolski Komitet Pamięci ks. Jerzego Popiełuszki) – the priest killed in 1984 by the communist secret police.

4.10. Mrs. Krzyszkowiak set up a publishing house in order to publish materials (booklets in several languages to be distributed free of charge to visitors of the Katyn Museum, Division of the Polish Military Museum in Warsaw) and books on the Katyn massacre (several titles already printed). It is a non-profit activity, financed by profits from other business activities. In 1989 she was one of the founders of the Federation of the Katyn Families (the biggest association of Katyn relatives, with several thousand members), even serving as its president (1993-1996). Active in the Police Katyn Family Association and the Polish Katyn Foundation. She co-initiated the erection of the Katyn Sanctuary in the Holy Cross Church in Warsaw. She participated in various initiatives related to the commemoration of the Katyn massacre victims. For all her achievements and initiatives she received the Medal "Overcome Evil

with Good" ("Zło Dobrem Zwyciężaj"), granted by the National Remembrance Committee of Rev. Jerzy Popiełuszko (Ogólnopolski Komitet Pamięci ks. Jerzego Popiełuszki) and "Pro Memoria Medal" given by the State Office for the Affairs of the Veterans and the Persecuted.

4.11. Mrs. Rodowicz, an artist by profession, created several works dedicated to the Katyn massacre and wrote a book about her grandfather killed in the Katyn forest (*Wanduś córeczko* [Wanduś, My Daughter], Tepis, Warszawa: 1996, 327 p.). She made a mosaic "St. John the Baptist" for a church in Warsaw, which was dedicated to her grandfather. In 1996 she co-initiated the Katyn Sanctuary at the Saint Cross Church in Warsaw. As an artist she has designed the cover of the Mieczysław Welzandt's book *Epitafium Starobielskie* (Starobielsk Epitaph); the author was a prisoner of one of the Soviet camps for POWs and survived (one of very few) the Katyn massacre. In 1998 she arranged a Katyn exhibition and the promotion of Welzand's book in Warsaw. She was the author of the covers for "Piłsudczyk" magazine on the Katyn massacre as well as the cover of Witomiła Wołk-Jezierska's books. Author of various education materials on Katyn history for Polish schools and of the logo for the National Katyn Memorial Committee Currently she has been participating in an initiative commemorating all victims of the Katyn massacre by planting almost 22,000 oaks in different parts of Poland.

4.12. Mr. Romanowski, though the youngest among the applicants, is the oldest relative of Katyn victim Mr. Żołędziowski, who died childless. The task of honouring his killed uncle was „inherited" from his late mother. Mr. Romanowski is an active participant in initiatives related to the commemoration of the Katyn massacre and its victims

4.13. All the applicants from the group of Wołk-Jezierska in the 1990s took on the initiative, pursued until today, to bring the remains of the executed victims to Poland.

4.14. The applicants' counsels also wish to draw the attention of the Court to the fact that Mrs. Wołk-Jezierska and Mrs. Krzyszkowiak were the only two applicants who were present at both the public hearing on 6 October 2011 and the delivery of the judgment on 16 April 2012. Also this fact demonstrates their strong and persistent involvement in the case.

4.15. Until the Katyn massacre finds a solution satisfying the victims' relatives, it will remain an unhealed bleeding wound, and the "Katyn issue" will be handed down from one generation to another. Therefore, the oldest living relatives are the applicants in this case, replacing their relatives who have passed away. The applicants' counsels ask the Court to take into account this specific feature of the case also in the context of Article 3. Until now the Court has not been confronted with a case in which the legal investigation could, due to the previously prevailing political reasons, be started only several decades after the tragic events.

4.16. The legal position advanced by the applicants' counsels (a need for a multi-factor test, instead of the simple test based on date of birth, to ascertain the victim status under Article 3) finds support in the case law of international adjudicating bodies.

4.17. Summarising its jurisprudence on the criteria to be used for ascertaining whether a family member or relative is to be considered as a victim under Article 5, the Inter-American Convention the Inter-American Court held in *Gomes Lund and Others ("Guerrilha do Araguaia") v. Brazil* [preliminary objections, merits, reparations and costs], Judgment of 24 November 2010, as follows:

"235. […] It [the Court – I.C. Kamiński] can presume a harm to the right to mental and moral integrity of direct family members of victims of certain violations of human rights by applying a presumption iuris tantum regarding mothers and fathers, daughters and sons, husbands and wives, and permanent companions (hereinafter "direct family members"). […] Regarding those people whom the Tribunal will not presume a harm to personal integrity for not being a direct family member, the Court will assess, for example, if there is a particularly close connection between said persons and the victims of the case that would allow for the determination of harm to their personal integrity, and as such, a violation of Article 5 of the Convention. This Court may also evaluate if the alleged victims have involved themselves in the search for justice in the specific case, or if they have endured suffering as a consequence of the facts of the case or because of the subsequent actions or omissions of the State authorities in light of the facts."

4.18. The Inter-American Court then identified a group of factors to be taken into account when deciding whether a particular non-direct family member can be considered a victim of inhuman treatment. It must be stressed that already one of these factors is sufficient to lead to a positive conclusion.

These factors are:

"238 […] a) among them [non-direct family members – I.C. Kamiński] and the disappeared victims there was a close connection, and in some cases, together with their parents and other siblings, they formed a single nuclear family;

b) they have involved themselves in several actions such as the search for justice or information regarding the whereabouts via individual actions or via the formation of different groups, which participated in investigation expeditions to the place where the facts occurred, or in the filing of proceedings before the domestic or international jurisdiction;

c) the disappearance of their siblings has caused physical and emotional scars;

d) the facts have affected their social relations, in addition to having caused a breakdown in the family dynamic;

e) the harm they have lived has increased given the State's omission regarding the lack of information and investigation and the denial of access to State archives, and

f) the lack of determination of the whereabouts of their siblings has kept alive the hope of finding them, or the inability to identify their bodily remains has prevented them and their family members from providing a proper burial, disturbing their healing process and perpetrating suffering and uncertainty."

4.19. We wish to respectfully recall that the enforced disappearances and killings that gave rise to the *Gomes Lund* case had occurred before the Inter-American Convention entered into force.

4.20. Also the UN Committee on Human Rights did not make any distinction between the close family members, in the context of grievances under Article 7 of the Covenant, when the indirect victims were adult persons.

4.21. At last, the applicants' counsels draw also the attention of the Court to the data presented in the *amici curiae* briefs of the third party intervenors.

Conclusion: there is no justification for the distinction the Chamber made between the two groups of applicants. The proximity of family ties, understood as the possibility of building personal relations (or perhaps only memory) with the deceased person, is a relevant factor only in cases of children being the applicants or co-applicants. In cases of adult persons another test is needed. Adult direct relatives should be presumed (unless the opposite is demonstrated by the Respondent State) as victims of grievances formulated under Article 3. For non-direct family members a multi-factor test, suitable to demonstrate involvement in the case, is desirable. The approach advanced by the applicants' counsels refers to the standard elaborated and applied by international institutions, most forwardly by the Inter-American Court on Human Rights. All the applicants in this case are either adult direct relatives of the killed persons or indirect relatives who demonstrated their deep, strong and continuous personal involvement through numerous actions (commemorative and legal) relating to the fate of their killed family member.

5. ***Did the Russian authorities subject some or all of the applicants to a form of degrading treatment in breach of Article 3 of the Convention in connection with their attempts to obtain information about the fate of their relatives?***

5.1. The Court emphasised in its case law that the essence of violations of Article 3 does not so much lie in the fact of the "disappearance" or killing of the family member (in "inherent" emotional suffering concomitant with killing or disappearance) but rather concerns the authorities' reactions and attitudes to this situation when it is brought to their attention (e.g. *Çakıcı*, par. 98).

5.2. It sometimes happens that 'disappeared persons' become 'dead persons' when the bodies of those who disappeared are found. The peculiarity of the Katyn case is that the sequence of 'first disappeared, then dead' is reversed. Those who were 'dead' became the 'disappeared'.

5.3. When in the 1990s Mrs. Wołk and her daughter Mrs. Wołk–Jezierska enquired of the Russian Chief Military Prosecutor's Office about the rehabilitation of their

husband and father they were informed that Lieutenant Wołk had been executed by the NKVD and his rehabilitation would be decided when investigation no. 159 was finished. The Russian authorities did not question the fact that Mr. Wołk had been executed in 1940 and that this had taken place during the Katyn massacre.

5.4. In reply to the requests lodged twice (2005 and 2007) by the applicants after investigation no. 159 was discontinued, the Chief Military Prosecutor's Office also confirmed that the death penalty had been carried out on the applicants' relatives.

5.5. In response to the request filed in 2008 by Mrs. Anna Stavitskaya, the Russian advocate for the applicants, the Chief Military Prosecutor's Office stated, among the reasons for rejecting the rehabilitation request, that the applicants' relatives had not been identified in the course of investigation no. 159.

5.6. In the course of the subsequent court proceedings the Moscow Circuit Military Court stated in its judgement of 14 October 2008 (upheld by the Military Division of the Supreme Court on 29 January 2009) that it had not been established what had happened to the applicants' relatives who in 1940 were held in the special POW camps at Kozelsk, Starobelsk and Ostashkov, after they had left those camps and been handed over "to the disposal" of the regional NKVD commissions. Although the transfer of prisoners of war had taken place in pursuance of the decision of the Politburo of the Communist Party to exterminate Polish prisoners and those people had been delivered to the locations where executions were carried out, their fate was declared unknown.

5.7. Such statements, enunciated in sheer denial of the very basic facts and the previous assertions of Chief Military Prosecutor's Office, must be considered as inflicting grave moral pain, anguish and stress on the applicants. By way of comparison, bearing in mind the established legal and historical standards, one could not even imagine that a post-war German public institution might state to a group of relatives of Holocaust victims that such victims must be considered unaccounted-for as their fate could be traced only to the dead-end track of Birkenau. As a result, the competent State authorities are unable to unearth what may subsequently have happened to that group at Auschwitz, insofar as there exist no documents on their whereabouts (or because the documents have been destroyed by the Nazi authorities). Such a statement would clearly amount to an act of degrading and inhuman treatment.

The applicants' counsels are clearly mindful of the differences between the Holocaust and the Katyn massacre. It is important to point out, however, that the destiny of those reaching the dead-end track of Birkenau and that of Gniezdovo (adjacent to Katyn) was equally tragic, with only one exception in the latter case (professor Stanisław Swianiewicz who was transferred at Gniazdovo to the Lubianka Prison for investigation). As the tragic events of the Holocaust and the Katyn massacre are well established, any statement of State authorities denying the reality of these two atrocities must bring about extreme distress, anguish and emotional suffering to relatives of the victims.

5.8. In response to the requests for rehabilitation the applicants were informed that the Chief Military Prosecution Office was unable to establish – as the personal files of prisoners had allegedly been destroyed – "which provision of the Penal Code formed the legal basis for calling the prisoner to account".

5.9. The motives given by the Chief Military Prosecutor's Office to support its decisions, which were upheld by the courts, demonstrate that the Chief Military Prosecution Office assumed that in the case of the victims of the Katyn massacre, who had been murdered in violation of the elementary rules of international humanitarian law and following a special extra-judicial procedure contrary even to Soviet legislation, there might have existed due reasons for the execution. This is tantamount to an allegation that the victims were criminals who deserved capital punishment.

5.10. The applicants' counsels would also like to respectfully draw the Court's attention to certain facts occurring in the proceedings for rehabilitation. Firstly, the Moscow Circuit Court in its judgement of 16 May 2008 stated – while dismissing an appeal against the decision on rehabilitation – that the only persons entitled to institute the appeal action were the victims of the repression themselves, i.e. the executed Polish officers. Secondly, in his submissions before the Moscow Circuit Court of Khamovniki Prosecutor Blizyeyev, acting on behalf of the Chief Military Prosecutor's Office, argued that even if "hypothetically" the Polish officers "may have been killed" by organs of the Soviet state, there existed "due reasons" for the repression, as "some" Polish officers were "spies, terrorists and saboteurs" and the Polish pre-war army "had been trained to fight against the Soviet Union" (court sitting on 24 October 2008).

5.11. There is abundant evidence allowing reconstruction of the circumstances of the Katyn massacre and confirming the death of the applicants' close relatives. The names of the ten prisoners of war have been inscribed on the memorials erected in the burial places. The bodies of the three prisoners of war killed in Katyn – Mr. Wołk, Mr. Rodowicz and Mr. Mielecki – were identified during the excavations in 1943. Despite all that evidence, the applicants heard in 2008 that their relatives had "disappeared" in the spring of 1940. They also heard that if they were executed in 1940 there may have existed "due reasons" for the killing of the POWs.

5.12. The hypothesis of 'disappearance' evoked by the Russian authorities must also bring about anguish and pain to the applicants because it resembles a well-known statement made by Joseph Stalin during a meeting on 3 December 1941 with Władysław Sikorski, Polish Prime Minister of the Government-in-Exile. When asked about the fate of Polish soldiers held by the Soviets in the camps for POWs, Stalin answered that those still unaccounted-for "could have fled to Manchuria" (minutes of talks conducted in the Kremlin on 2 December 1941).

5.13. The anguish, pain and moral suffering of the applicants cannot be classified as simply and inherently accompanying the killings themselves. It resulted from the treatment the applicants experienced from the Russian authorities when the applicants lodged their legal requests. Another factor relevant in the context of Article 3 is the age of the applicants and the fact that for most of the persons executed were fathers whom they do not remember or never had the chance to see.

5.14. In its judgment the Chamber stated that "is struck by the apparent reluctance of the Russian authorities to recognise the reality of the Katyn massacre" and that the approach chosen by the Russian authorities "demonstrated a callous disregard for the applicants' concerns and deliberate obfuscation of the circumstances of the Katyn massacre" (para. 159). In another part of the judgment the Chamber held that this approach denied the reality of summary executions and therefore was „contrary to the fundamental values of the Convention and must have exacerbated the applicants' suffering" (para. 166). Furthermore, the Chamber found that "a denial of the reality of the mass murder reinforced by the implied proposition that Polish prisoners may have had a criminal charge to answer and had been duly sentenced to capital punishment demonstrated the attitude *vis-à-vis* the applicants that was not just opprobrious but also lacking in humanity" (para. 160).

5.15. The applicants' counsels fully agree with this description.

Conclusions: the treatment of the applicants was degrading and inhuman, and amounted to a violation of Article 3. Their anguish and suffering clearly went beyond the emotional distress normally accompanying the killing of a close relative. The source of this anguish and suffering was the way the Russian authorities reacted to the applicants' enquiries about the fate of their close relatives.

Article 38 of the Convention

6. ***As regards the Russian Government's refusal to furnish a copy of the decision of 21 September 2004 which was repeatedly requested by the Court, was their reference to the provisions of national law preventing confidential information from being communicated to international organisations compatible with their obligations under Article 38 of the Convention, read in the light of Article 27 of the 1969 Vienna Convention on the Law of Treaties („A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty")? Moreover, was the classification of this document compatible with the requirements of the Russian law, notably section 7 of the State Secrets Act, which expressly precluded any information about violations of human rights by State officials from being classified?***

6.1. The rule expressed in Article 27 of the Vienna Convention on the Law of Treaties (VCLT) is broadly considered as a reflection of the longstanding principle of customary international law (M. Villiger, *Commentary on the 1969*

Vienna Convention on the Law of Treaties, Brill, Leiden: 2009, p. 375 and further references). In accordance with this principle no internal rule, even of constitutional rank, can be invoked as an excuse for the non-observance of international law. Article 27 VCTL applies only to contractual international obligations and is narrower than the customary principle of precedence of all binding norms of international law over any rule of domestic legal order.

6.2. The principle that, in international terms, the provisions of domestic law may not prevail over international obligations, goes back to the *Alabama Claims Arbitration* of 1872. In the arbitration proceedings that followed the use of a British shipyard by the American Confederates to transform a commercial vessel into a warship that subsequently sank a number of Union vessels, it was ruled that "the government of Her Britannic Majesty cannot justify itself for a failure in due diligence of the plea of insufficiency of the legal means of action which it possessed […] It is plain that to satisfy the exigency of due diligence, and to escape liability, a neutral government must take care […] that its municipal law shall prohibit acts contravening neutrality" (J.B. Moore, *International Arbitration*, New York 1898, vol. 1, p. 653).

6.3. The predominant position of international law *vis-à-vis* domestic legislation was declared in several rulings of the Permanent Court of International Justice (PCIJ).

- In the *Treatment of Polish Nationals* case the PCIJ denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the grounds that:

  "according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted […] [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals and other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig.

  The application of the Danzig Constitution may […] result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law […] However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City."[23]
- *Greco-Bulgarian "Communities"* Case:

[23] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, Series A/B, No. 44, pp. 24-25.

"it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty";[24]

- *Free Zones of Upper Savoy and the District of Gex* Case:
  "it is certain that France cannot rely on her own legislation to limit the scope of her international obligations";[25]
- *Exchange of Greek and Turkish Populations* Case:
  "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken. […] the contracting Parties are obliged to bring their legislation into harmony with the Convention [of Lausanne of 30 January 1923], that that instrument must be construed as implicitly referring to national legislation in so far as that is not contrary to the Convention";[26]
- *Jurisdiction of the Courts of Danzig* Case;[27]
- In the *Wimbledon* case the PCIJ held that conformity with internal law does not preclude State conduct being characterised as wrongful under international law:
  "a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. […] under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the Wimbledon through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article."[28]

6.4. In the post-war period the International Court of Justice referred and applied the same principle in a number of cases:

- *Applicability of the Obligation to Arbitrate* Case (Case of the PLO Mission);
  "It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law";[29]
- In the same sense: *Fisheries* (Judgement, ICJ Reports 1951, p. 132); *Nottebohm* (Preliminary Objection, Judgement, ICJ Reports 1953, p. 123); *Application of the Convention of 1902 Governing the Guardianship of Infants* (Judgement, ICJ Reports 1958, p. 67); also: *Reparation for Injuries* case (*Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, ICJ Reports 1949, p. 184) and *Elettronica Sicula S.p.A.* case

[24] Greco-Bulgarian "Communities", Advisory Opinion, 1930, Series B, No. 17, p. 32.

[25] Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, Series A, No. 24, p. 12; and Judgment, 1932, Series A/B, No. 46, p. 167.

[26] Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, Series B, No. 10, pp. 20-21.

[27] Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, Series B, No. 15, pp. 26–27.

[28] S.S. "Wimbledon", 1923, Series A, No. 1, pp. 29-30.

[29] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, para. 57.

(*Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgement, ICJ Reports 1989, para. 73);

- In the *LaGrand* Case the ECJ held that the US constitutional procedural rule of 'procedural default' may not prevail over the obligations incumbent under Article 36 of the Vienna Convention on Consular Relations;[30] this reasoning was then followed in the *Avena and Other Mexican Nationals* case.[31]

6.5. The principle that internal law may not prevail over international law and domestic provisions may not serve as an excuse for evading international obligations was introduced in the Draft Declaration on Rights and Duties of States prepared by the International Law Commission (1949), "Yearbook of the International Law Commission" 1949, pp. 286-290; the Declaration was prepared in conformity with resolution 178 (II) of the General Assembly (21 November 1947). Article 13 of the Draft Declaration provided that

"Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

Article 13 of the Draft Declaration made the principle in question closely related to another fundamental principle of international law: that of acting in good faith and respecting obligations *(pacta sunt servanda)*.

6.6. The drafting history of Article 27 VCLT shows that it resulted from an amendment proposed by the Pakistani delegation to draft Article 23 on *pacta sunt servanda* and was modelled on Article 13 of the Draft Declaration. Among the States which decidedly supported the amendment was the USSR. After the amendment draft Article 23 provided that:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith, and no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty."

The proposal was accepted on first reading by 55 votes in favour, none against, 30 abstentions (*Vienna Conference: First Session*, p. 158).

6.7. Article 27 was adopted by 73 votes in favour, 2 against, 24 abstentions (*Vienna Conference: Second Session*, p. 54). Only two States – Venezuela and Iran – expressed their opposition, suggesting the primacy of their constitutional law over treaties.

6.8. Only two States – Guatemala and Costa Rica – formulated reservations to Article 27, claiming the primacy of their constitutions. Subsequently several States raised objections to these reservations.

6.9. Article 27 or – more generally – the prohibition to invoke domestic law as an excuse for evading international obligations was referred to and applied in the practice of various international bodies and institutions.

[30] LaGrand Case (Germany v. USA), ICJ Reports 2001, para. 90-91.

[31] Avena and Other Mexican Nationals (Mexico v. USA), ICJ Reports 2004, para. 112.

6.10. Human Rights Committee:

- *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 (2187th meeting):

  4. The obligations of the Covenant in general and Article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although Article 2, Paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of Article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

6.11. Committee on Economic, Social and Cultural Rights

- *General Comment No. 9, The Domestic Application of the Covenant*, adopted on December 1998, E/C.12/1998/24:

  3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in Article 27 of the Vienna Convention on the Law of Treaties, is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations.

6.12. International Criminal Tribunal for the former Yugoslavia

- *Prosecutor v. Blaškić* (IT 95-14-T), decision of 3 April 1996 made by President Antonio Cassese (Application to vary conditions of detention), (paras. 8-11), ILR 1998, vol. 108, p. 69

  "all States have been under an unquestionable obligation to enact any implementing legislation necessary to permit them to execute warrants and requests of the Tribunal."

- *Prosecutor v. Slobodan Milošević*, Decision on preliminary motions, 8 November 2001, para. 47

"47. Article 27 of the Vienna Convention on the Law of Treaties is also relevant. It provides: a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The Statute of the International Tribunal is interpreted as a treaty. The Federal Republic of Yugoslavia has an obligation under the Statute to comply with the request to arrest and transfer the accused and, therefore, cannot rely on its internal law, namely the division of power as between the federal government and its States as a justification for failure to comply."

6.13. Committee Against Torture

- Communication No. 181/2001: Senegal, 19 May 2006

"9.8 The Committee considers that the State party cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with […] obligations under the Convention."

6.14. Inter-American Court on Human Rights:

- Advisory Opinion OC-14/94 of 9 December 1994 on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), requested by the Inter-American Commission on Human Rights [116 ILR 320]. It was stated that:

"35. International obligations and the responsibilities arising from the breach thereof are another matter. Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfilment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions […]. These rules have also been codified in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties."

- Resolution of 17 November 1999 on the compliance by the State of Peru with the judgement on the Court's ruling on the merits of the case *Castillo Petruzzi and Others v. Peru*, points 3-5.

6.15. The African Commission on Human and Peoples' Rights:

- Communication 313/05 – *Kenneth Good v. Republic of Botswana*, 47th Ordinary Session, held from 12-26 May 2010, the Commission stated:

"139. The Respondent State further contends that for the legislative, executive and judicial organs of a State Party, a treaty is infrequently assessed in the hierarchy of legal norms applicable in the domestic legal order and as a consequence, treaties are sometimes deemed inapplicable if they conflict with the constitutional provisions of a state. Thus, in Botswana, treaties do not confer enforceable rights on individuals until passed into law by Parliament. However, they may be used as an aid to construction of laws including the Constitution.

239. It is also a well established principle in international law that a state cannot invoke its domestic laws to avoid its international obligations."

- In Communication 211/98, *Legal Resource Foundation v. Zambia*, 29th Ordinary Session, held from 23 April to 7 May 2001; the Commission reiterated that

"international treaties which are not part of domestic law and which may not be directly enforceable in the national courts nonetheless impose obligations on State Parties" (para. 60).

6.16. The principle in question was also applied by numerous arbitration tribunals.

- *Norwegian Shipowners' Claims (Norway* v. *United States of America)*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 331 (1922); *Aguilar-Amory and Royal Bank of Canada Claims* (*Tinoco* case) *(Great Britain* v. *Costa Rica)*, *ibid.*, p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1098 ("it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject") (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 289 (1956) *(*"one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation"); and *Flegenheimer Case*, *ibid.*, p. 360 (1958);
- International Centre for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States; *Enron Corporation and Ponderosa Assets LP v. Argentina* (ICSID Case No. ARB/01/3), 22 May 2007

208. It must be noted also that the very legal system of the Argentine Republic, like many modern systems, provides for a prominent role of treaties under both Articles 27 and 31 of the Constitution. Treaties are constitutionally recognised among the sources considered "the supreme law of the Nation". It follows that in case of conflict between a treaty rule and an inconsistent rule of domestic law, the former will prevail. This is not just the consequence of the Constitution so providing, but also the solution dictated by Article 27 of the Vienna Convention on the Law of Treaties in that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

6.17. Restatement (Third) of the Foreign Relations Law of the United States para. 111 cmt. a (1987)

"[F]ailure of the United States to carry out an obligation [of international law] on the ground of its unconstitutionality will not relieve the United States of responsibility under international law."

6.18. Article 27 VCLT corresponds to Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, which provides that:

"The characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law".

6.19. The position of international courts summarised above is accepted by the doctrine of international law. E.g. in P. Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, New York: 1997, 7th ed.), it is stated that: "the general rule of international law is that a State cannot plead a rule of or a gap in its own municipal law as a defence to a claim based on international law. […] This is particularly true when […] a treaty or other rule of international law imposes an obligation on States to enact a particular rule as part of their municipal law. A similar rule can be found in Article 27 […] in other words, all that international law says is that States cannot invoke their internal law and procedures as a justification for not complying with their international obligations. States are required to perform their international obligations in good faith, but they are not at liberty to decide on the modalities of such performance within their domestic legal systems. Similarly, there is a general duty for States to bring their domestic law into conformity with obligations under international law" (p. 64).

6.20. Question no. 6 of this Court relates specifically to the refusal of the Russian Government to submit a copy of the decision of 21 September 2004. At the outset it should be stressed that the Respondent Government relies on its ordinary legislation provisions but not on any constitutional rule (a fact which motivated the government of Venezuela and those of Guatemala and Costa Rica to respectively vote against Article 27 and formulate reservations to it).

6.21. State secret privilege is defined as "a long-standing evidentiary privilege that permits governments to resist discovery of evidence if disclosure reasonably could be seen as threat to military or diplomatic interest of nation" (H.C. Black*, Black's Law Dictionary*, West, St. Paul: 1990, 6th ed., p. 1409). Therefore, the refusal must have two features: it must be related to military or diplomatic interests (but not to all security concerns as such) and additionally must be reasonable.

6.22. On several occasions international tribunals were confronted with refusals to submit the requested documents.

6.23. In *Godínez Cruz v. Honduras*, the Inter-American Court of Human Rights requested that the government of Honduras produce evidence concerning the structure of a certain unit of the national armed forces. The government averred that the evidence sought was closely related to the security of the State. Nevertheless, the government did not refuse to produce the evidence and was permitted by the Court, upon request, to present the testimony in a closed session due to "strict security reasons of the State of Honduras" (judg. of 20 January 1989, Ser. C No. 5, paras. 33-35).

6.24. In 1972, in the *Ballo* case before the Administrative Tribunal of the International Labour Organisation UNESCO, as respondent organisation, declined to make some files available to the Tribunal. UNESCO held that the requested documents were either confidential or not relevant to Mr. Ballo's situation. However, when the Tribunal repeated its request the files were submitted by UNESCO and inspected *in camera*. Noting subsequently that the documents were indeed of a confidential character, the Tribunal decided not to communicate them to the complainant and merely informed him of the tentative conclusions which it had drawn from them (ILO Administrative Tribunal, *Ballo v. UNESCO*, judg. No. 191, 15 May 1972, International Labour Office, Official Bulletin, vol. LV, Nos. 2, 3 and 4, 1972, p. 227).
Other cases of this kind, decided in an analogous way by the Administrative Tribunal of the International Labour Organisation, are *Molina*, Judgement No. 440 [1980] (WHO) and *Alikhan*, ILO AT Judgement No. 556 [1983] (ILO).

6.25. The issue of access to confidential information also arose in the so-called *Sabotage* cases in the 1930s (concerning two destructive acts of sabotage committed by German agents during the period of American neutrality in 1916 and 1917), brought before the United States–German Mixed Claims Commission. When the German legal agent requested the inspection of certain files of the United States Department of Justice, the Umpire dismissed the request. Before taking this decision, however, the Umpire had visited the United States Attorney-General and examined the files on his own. Having inspected the files, he was satisfied that they actually contained information pertinent to the State's security.

6.26. On the other hand, the International Court of Justice in the *Corfu Channel* case did not draw any negative inference when the United Kingdom refused to submit the requested evidence, which it considered related to naval secrecy (judgement of 9 April 1949, ICJ Reports 1949, p. 32).

6.27. The objection founded on the *Corfu* judgement was raised by Croatia in the *Prosecutor v. Tihomir Blaškić* case before the International Criminal Tribunal for the Former Yugoslavia. When the Tribunal issued *subpoenae duces tecum*, requesting, among others, some documents and evidence of a military character, the Government of Croatia challenged this decision by referring to the protection of its national security. Croatia alleged that determination of whether national security interests are involved should be left solely to the State concerned.

6.28. The Tribunal dismissed these allegations first as a chamber (Decision of 18 July 1997 on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*) and then as an appeals chamber (Judgement of 29 October 1997 on the request of the Republic of Croatia for Review of the Decision of Trial Chamber of 18 July 1997).

6.29. The Tribunal's rulings were based on three principal grounds. Firstly, reliance on the *Corfu* case was considered inappropriate. Article 49 of the Statute of the International Court of Justice is couched in non-mandatory terms,[32] whereas Article 29 of the Statute of the International Criminal Tribunal for the Former Yugoslavia is worded in strong mandatory language (par. 62 AC). Secondly, the Statute and the Rules of the Yugoslavia Tribunal do not envisage any exceptions to the obligation of States to co-operate with the Tribunal (para. 112 Ch, para. 63 AC). Thirdly, a blanket right of States to withhold, for security reasons, documents necessary for proceedings might jeopardise the very function of the Tribunal (par. 147 Ch, para. 65 AC).

6.30. At the same time the Tribunal stressed that the validity of State security concerns can be scrutinised by procedural arrangements, such as *in camera* proceedings and various modalities related to communicating and recording of documents considered sensitive.

6.31. The applicants' counsels respectfully submit that the reasons enunciated by the Yugoslavia Tribunal apply, *mutatis mutandis*, to this Court. Article 38 of the Convention is worded in mandatory language, does not provide for any exceptions, and a blanket right of States may endanger the very function of the Court. Simultaneously, security concerns of States can be assessed and secured by application of Rule 33 of Rules of the Court and other specific arrangements the Court might find proper.

6.32. In the later case of *Prosecutor v. Dario Kordić and Mario Čerkez* the Yugoslavia Tribunal held that the question of the relevance of the requested documents for the proceedings falls into the full discretion of the Tribunal and cannot be challenged by States. The Tribunal declared that:
"it falls squarely within the discretion of the Trial Chamber to determine whether the documents sought are relevant to the trial. Furthermore, the State from whom the documents are requested does not have locus standi to challenge their relevance" (Decision of 9 September 1999 on the Request of the Republic of Croatia for Review of a Binding Order, para. 40).

6.33. The classification of the decision of 21 September 2004 is also incompatible with section 7 of the State Secrets Act that expressly precludes any information on human rights violations by State officials from being classified. The Katyn massacre was a mass scale violation of the right to life perpetrated on the orders of the highest authorities of the Soviet Union.

6.34. Relying on section 7 of the State Secrets Act, in 2008 Memorial, a Russian human-rights non-governmental organisation, initiated proceedings to declassify the decision of 21 September 2004. As the subsequent court sittings were held *in camera* and a copy of the final decision was not made available to the Euro-

[32] Article 49: "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal."

pean Court, it is not known how the Moscow City Court had addressed the Memorial's allegations and how it found no contradiction between the classification decision and the exclusions provided for in the State Secrets Act.

6.35. On the basis of the above arguments and referred case law, the Russian Government's refusal to furnish a copy of the decision of 21 September 2004 constituted a violation of Article 38 of the European Convention, read in the light of Article 27 VCLT.

6.36. The applicants' counsels agree with the Chamber decision made in the instant case (judgment of 16 April 2012). The Court has absolute discretion to determine what evidence is needed for the examination of the case. Refusal to co-operate with the Court may lead to a violation of Article 38 even when the Court does not find any violation of the material provisions of the Convention or becomes prevented, for whatever reasons, from hearing the case on merits. There is therefore nothing surprising or illogical that the Court starts examination of the case, as it did in other cases, from allegations regarding Article 38.

Conclusion: the applicants' counsels respectfully submit that in the light of the case law of various international tribunals and bodies, as well as the case law of this Court, the refusal of the Russian Government constituted a violation of Article 38 of the Convention as read in the light of Article 27 VCLT.

Miscellaneous issues

7.1. Since, for several cumulatively applicable reasons, the effective investigation into the Katyn massacre is necessary to ensure the real and effective protection of the Convention values, the applicants' counsels respectfully invite the Court to make use of Article 46 of the Convention. In exceptional cases – as this case is exceptional – the Court indicated the type of measure that might, and sometimes should, be taken in order to put an end to the situation it found to exist (e.g. *Abuyeva and Others v. Russia*, appl. no. *27065/05*, judg. of 2 December 2010). The applicants' counsels would wish to rely in particular on the judgement in the case of *Association of "21 December 1989" and Others v. Romania* (appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011). In this judgement the Court declared that:

"l'État défendeur doit mettre un terme à la situation constatée en l'espèce, jugée par elle contraire à la Convention, relevant du droit des nombreuses personnes touchées, comme les requérants individuels, à une enquête effective, qui ne s'achève pas par l'effet de la prescription de la responsabilité pénale, compte tenu également de l'importance pour la société roumaine de savoir la vérité sur les événements de décembre 1989. L'État défendeur doit donc offrir un redressement approprié afin de respecter les exigences de l'article 46 de la Convention, en tenant compte des principes énoncés par la jurisprudence de la Cour" (para. 194).

["The respondent State is to end the situation found in this case, considered by the Court as contrary to the Convention and concerning the rights of many persons affected, as individual applicants, to an effective investigation, which does not end as a result of prescription of criminal responsibility, also taking into account the importance for Romanian society of knowing the truth about the events of December 1989. The respondent State must provide an appropriate remedy to meet the requirements of Article 46 of the Convention, taking into account the principles expressed in the case law of the Court."]

7.2. In the background of the Romanian case were the tragic events that preceded the fall of the Ceausescu regime. The Court held that the effective investigation of the events was necessary because of two principal reasons. Firstly, the persons killed were "many", and it meant several hundred. Secondly, the Court stressed the interest of Romanian society in knowing the truth about the events. This rationale applies all the more to the Katyn massacre, which was an imprescriptible crime under international law and in which 21,857 persons were murdered.

7.3. The applicants counsels also draw the attention of the Court to the practice of the Inter-American Court on Human Rights which consists in indicating, especially in cases of gross human rights abuses, what legal steps should be domestically taken to implement the judgment and to eliminate the consequences of the established violation. We are mindful of the differences between the Inter-American Convention of Human Right and the European Convention of Human Right (under Article 63 of the Inter-American Convention the Inter-American Court is expressly given the right to specify post-judgment remedies). Nevertheless we invite this Court, with all respect deserved, to make use of Article 41 of the Convention. Practice Direction on Claims for Just Satisfaction (issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007) specifies in paragraph 23 that "in extremely rare cases the Court can consider a consequential order aimed at putting an end or remedying the violation in question". As this case is exceptional, we ask the Court to avail itself of this opportunity.

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POLISH PRACTICE IN INTERNATIONAL LAW

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CHINA AND HONG KONG: THE ONE COUNTRY, TWO SYSTEMS PRINCIPLE AND ITS PRACTICAL IMPLICATIONS FOR POLISH CIVIL COURTS

Comment on the decision of the Polish Supreme Court of 11 October 2013, Ref. No. I CSK 451/12 in the case brought by G.T.M. with the participation of V.M.

By order issued on 6 March 2012, the Court of Appeal dismissed the complaint of V.M., filed against the order of the Regional Court in W. declaring the judgment of a District Court of the Special Administrative Region of Hong Kong to be enforceable in Poland. An appeal in cassation was lodged by V. M. with the Supreme Court against the former order.

The appeal was based on two major grounds: violation of Article 16 of the 1987 Agreement on legal assistance in civil and criminal cases concluded between the People's Republic of Poland and the People's Republic of China[1] in conjunction with Articles 27 and 29 of the Vienna Convention on the Law of Treaties;[2] and violation of the relevant provisions of the Polish Code of Civil Procedure[3] relating to the recognition and enforcement of foreign judgments. Whereas the remarks made by the Supreme Court on the former alleged violation deserve attention here, the ones relating to the

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[1] Agreement on legal assistance in civil and criminal cases, 1493 UNTS 180.

[2] Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[3] Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego [Polish Code of Civil Procedure], O.J. 1964, No. 43, item 296, as amended.

latter do not seem interesting from the international law perspective and will not be presented or analysed in this case comment.

The Court began by observing that the signing of the Agreement between Poland and China in 1987, a decade before the incorporation of Hong Kong into China in 1997, raises doubts as to whether the provisions of this Agreement could be applied to judgments of the courts of Hong Kong at all. Pursuant to Article 29 of the Agreement, it referred the issue to the Polish Ministry of Foreign Affairs in order to clarify it through diplomatic channels. As the information obtained proved inconclusive, the Court felt compelled to determine on its own the possibility of applying the 1987 Agreement to the area of Hong Kong.

According to the justices the Hong Kong Special Administrative Region, established upon the transfer of sovereignty over the Hong Kong area from the UK to China in accordance with the 1984 Joint Declaration of the governments of the United Kingdom and the People's Republic of China,[4] enjoys a high degree of autonomy, including its own judicial system, separate from that of China. Annex 1 to the Declaration and Article 153 of the Basic Law of the Hong Kong SAR[5] both provide that the Chinese government decides whether international agreements to which China is or becomes a party will apply to Hong Kong, taking into account the circumstances and the needs of Hong Kong and the views of its own government. A similar view on the matter has also been expressed in a Chinese notification to the UN Secretary General concerning the status of Hong Kong in relation to treaties deposited with the Secretary General on 20 June 1997.[6]

The Supreme Court expressly refused to address the questions of whether and how the Basic Law of the Hong Kong SAR as a national legislative act, the 1984 Joint Declaration as an international agreement between third parties, and the diplomatic note to the UN of 20 June 1997 may affect the legal relations between Poland and China. It held, however, that these documents demonstrate the unwillingness of the Chinese government to extend the territorial scope of application of the 1987 Agreement to the area of Hong Kong. In order to further substantiate its findings, the Court referred to the letter of the Polish Ministry of Foreign Affairs of 3 July 2013 which indicated that, as far as the Polish government was aware, China had made no decision on such an extension.[7] This opinion was confirmed, according to the Court, by the conclusion

[4] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, signed 19 December 1984, 1399 UNTS 61.

[5] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990, effective as of 1 July 1997, available at http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

[6] Letter of notification of treaties applicable to Hong Kong after 1 July 1997, deposited by the Government of the People's Republic of China with the Secretary-General of the United Nations on 20 June 1997, 36(6) International Legal Materials (1997), pp. 1675-1691.

[7] The letter in question is the one received in reply to the Court's request, made pursuant to Article 29 of the 1987 Agreement, available in the case file.

of a separate agreement on mutual legal assistance in criminal matters between Poland and Hong Kong in 2005.[8]

The judges also rejected the appellant's claim that the fact that Hong Kong had so far concluded agreements exclusively on mutual assistance in criminal matters indicated that assistance in civil matters should be provided based on the treaties concluded by China in its own name. They observed that the existence of an unspecified agreement between China and Hong Kong on mutual legal assistance, recognition and enforcement of judgments in civil and criminal matters, which, as its title implies, also covers civil matters, contradicted the appellant's argument. Moreover, as they pointed out, neither the 1984 Joint Declaration nor the Basic Law of the Hong Kong SAR make any distinction as regards the autonomy of Hong Kong in civil and criminal matters,[9] so no restrictions should be presumed. All these factors led them to conclude that the wide-ranging autonomy enjoyed by Hong Kong in legal and judicial matters precluded the Court from applying the 1987 Agreement between Poland and China to the area of Hong Kong absent a clear expression of intent to this effect by the Chinese government.

In the view of the Court, the international law concept of "moving treaty frontiers" – which provides that "in the event of a cession of territory, the territorial scope of a treaty binding the successor State should be extended to that territory" – could not be applied in the case because, as evidenced by the special status of the Hong Kong SAR, the cession of Hong Kong was "not a standard case of a cession" and hence should be treated differently. The Court also rejected the appellant's contention that the refusal to apply the 1987 Agreement by the courts that had heard the case constituted a violation of Article 29 of the 1969 Vienna Convention on the Law of Treaties[10] (VCLT). As it observed, although the provision in question provides, in principle, that a treaty is binding upon each party in respect of its entire territory, this rule does not apply if a different intention appears from the treaty, or is established otherwise. In the case at hand it was amply demonstrated that such intention could have been demonstrated and, therefore, the 1987 Agreement could not be binding upon China in respect of the area of Hong Kong. Surprisingly, the judges were completely silent as to the violation of Article 27 – presumably because the appellant failed to clearly explain what the alleged violation comprised of.

* * *

The reasoning of the Court has some considerable merits. In the light of the circumstances surrounding the incorporation of Hong Kong, there can be no doubt that this area is an autonomous part of China, as repeatedly stated by the Court, and that its status is special, e.g. in that it is internationally guaranteed by the 1984 Joint Declaration, which means that any limitations on the autonomy of Hong Kong in

[8] Agreement between the Government of the Republic of Poland and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning mutual legal assistance in criminal matters, signed in Hong Kong 26 April 2005, O.J. 2007, No. 167, item 1175.

[9] *See supra* notes 4 and 5 respectively.

[10] *See supra* note 2.

violation of the Declaration would incur Chinese responsibility *vis-à-vis* the United Kingdom.

It is also unquestionable that, as a rule, a treaty to which China is or becomes a party does not apply to Hong Kong directly, but only after a decision of the Chinese government in this regard is made.[11] This is a necessary corollary of the principles governing the application of treaties to Hong Kong set out in the Chinese letter to the Secretary General of the UN of 20 June 1997. Although the legal significance of the letter is not entirely clear,[12] the absence of any response from the Polish authorities to it[13] may amount to acquiescence to the position of the Chinese government.[14] This acquiescence would be confirmed by the previously-mentioned letter of the Polish Ministry of Foreign Affairs to the Supreme Court of 3 July 2013 where, instead of arguing that the 1987 Agreement was directly applicable to Hong Kong, or, conversely, denying that any extension of the scope of application of the agreement to Hong Kong could have been possible, the Ministry replied that as far as it was aware China had not decided to extend the scope of application of the treaty.

In this context, the letter of the Ministry and the conclusion of the 2005 agreement between Poland and Hong Kong on mutual assistance in criminal matters, referred to by the Court, indeed provide a strong argument in favour of its position that the 1987 Agreement could not be applied in the case. The view can reasonably be taken that if China had made a decision to apply the 1987 Agreement to the Hong Kong area, it would have informed Poland, the only other party to that bilateral treaty, about its decision, e.g. by a notification.[15] The admitted lack of knowledge of any changes in this regard on the part of the Polish Ministry of Foreign Affairs implies that nothing of that sort took place. Moreover, it seems improbable that China would conclude another treaty partly addressing the same issue, i.e. the 2005 agreement, without providing any explanation of the scope of application of both treaties, if it considered both of

[11] Provided that it is not listed in Annex 1 or Annex 2 to the Letter of notification of treaties applicable to Hong Kong after 1 July 1997 (*supra* note 6) – this is the case of the 1987 Agreement, to which the general rule provided in para. 4 of the Letter applies. However, the 1984 Joint Declaration (*supra* note 4) provides that the basic policies of the People's Republic of China regarding Hong Kong will remain unchanged for 50 years, so the possibility of changes in the future is left open.

[12] *See* R. Maison, *La situation internationale de Hong Kong: quelques questions d'actualité*, 46 Annuaire français de droit international 120 (2000).

[13] Notwithstanding the fact that it was brought to the attention of all UN Member States, including Poland, by the Secretary General, in accordance with the request expressed in the letter, see *supra* note 6.

[14] This is consistent with the ICJ's rulings in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)* Judgment, ICJ Rep. 1984, para. 130 and, more recently, *in Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)* Judgment, ICJ Rep. 2008, para. 121.

[15] This is what China did with respect to a number of international agreements, e.g. on 8 April 2003 the Government of the People's Republic of China notified the Secretary-General of the UN that from that moment on the UN Framework Convention on Climate Change would apply to the Hong Kong SAR, see Status of Ratification of the Kyoto Protocol, available at https://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php.

them applicable to Hong Kong, because such a move could lead to serious difficulties in practice. The latter is also unlikely in light of the recent Chinese practice, which demonstrates that bilateral treaties signed by China with a view to applying them both to the Mainland and Hong Kong contain an express clause to this effect.[16]

In the light of the above, the Court's rejection of the claim regarding the alleged violation of Article 29 of the VCLT is correct, since several different factors indicated that the whole case fell under the exception contained in this provision. Accordingly, it was rightly determined that the 1987 Agreement was not applicable in the case.

Still, the Court's reasoning is not free of drawbacks. What strikes an international lawyer at first sight is that it clearly lacks a more profound international law background. For the sake of clarity, the Court should have evaluated the whole issue of application of the 1987 Agreement to the case in light of the alleged violation of Article 29 of the VCLT. By refusing to engage in such an analysis, it was forced to employ mental shortcuts which severely affect the coherence of the judgment.

To give an example, the opinion of the Court that the 1984 Joint Declaration, the Basic Law of the Hong Kong SAR and the diplomatic note of 20 June 1997 demonstrate the unwillingness of the Chinese government to extend the territorial scope of application of the 1987 Agreement to the area of Hong Kong is in fact plainly wrong, because none of these documents relates to that particular treaty. Essentially, what they indicate is that China is obliged not to apply the majority of the treaties binding it to Hong Kong without a prior decision of its government, and that in the event that it deems it appropriate to apply a treaty belonging to that group to Hong Kong, it will separately carry out the formalities for such application.[17] Having regard to that, the judges should have assessed whether there was any evidence which could prove that Chinese government had decided to extend the territorial scope of the treaty in question. Finally, they should have ascertained whether all these factors were sufficient to establish the existence of a "different intention" and thus trigger the exception provided for in Article 29 of the VCLT, making it possible to consider China as bound by the 1987 Agreement only in respect to some part of its territory and not its entirety. To a certain extent, this is in fact what the Court eventually did, but it did so implicitly rather than explicitly.

Another flaw in the Court's reasoning is its recurring referrals to the "special" or "autonomous" character of the Hong Kong SAR. It is rather curious that the Court on the one hand refused to evaluate whether the 1984 Sino-British declaration or the Basic Law of the Hong Kong SAR might affect the legal relations between Poland and China, and, on the other hand engaged in an analysis of the provisions of both documents in order to compare the scope of autonomy of Hong Kong in civil and criminal matters.

[16] *See* the 2006 Agreement on consular relations between New Zealand and the People's Republic of China, 2523 UNTS 331, Article 22 and the Consular convention between the Socialist Republic of Vietnam and the People's Republic of China, signed in Beijing 19 October 1998, S.S. No. 5 TO Gazette No. 37/2001 E513, Article 54.

[17] *See* particularly para. 4 of the Letter of notification of treaties applicable to Hong Kong…, *supra* note 6.

What is more, the wide-ranging autonomy of the Hong Kong SAR thereby identified was a decisive factor which led the Court to draw its final conclusion, namely that the 1987 Agreement could not be applied to Hong Kong. However, the Court seemed to forget that it is not the autonomy as such which is important here, but the intent of the States-parties to the treaty. Once again, its considerations would have appeared more accurate had they been related to examining whether the conditions for the exception contained in Article 29 of the VCLT had been met.

It is also worth noting in this regard that in order to prove that the autonomy enjoyed by Hong Kong with respect to civil matters does not differ from its autonomy in criminal matters, the Court invoked a non-existent "agreement" between China and Hong Kong on mutual legal assistance, recognition and enforcement of judgments in civil and criminal matters. In fact, according to the information provided by the Department of Justice of the Government of the Hong Kong SAR, there is not one, but three "arrangements" between Hong Kong and China on mutual legal assistance in the broad sense.[18] The material scope of each one of them, and of all of them combined, is much narrower than the scope of the treaties on legal or judicial assistance in civil matters concluded between sovereign States,[19] and the words "assist" or "assistance" do not appear even once in the text of any of these three "arrangements". This is because they relate only to the service of judicial documents and the reciprocal recognition and enforcement of judgments, leaving out some other important aspects of international judicial co-operation, particularly the taking of evidence. The Hong Kong officials admit that the reason why Hong Kong does not conclude any agreements on mutual assistance in civil matters is simply because it considers its own legislation and international conventions on private international law to be more or less sufficient.[20] Besides, setting

[18] Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts, signed in Shenzhen on 14 January 1999; Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, signed in Shenzhen on 21 June 1999; Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, signed in Hong Kong on 14 July 2006, see Department of Justice, The Government of the Hong Kong SAR, Arrangements with the Mainland and the Macao SAR, available at http://www.doj.gov.hk/eng/mainland/intracountry.html.

[19] *See e.g.* Treaty between the United Kingdom of Great Britain and Northern Ireland and the United Arab Emirates on judicial assistance in civil and commercial matters 2588 UNTS 261 or Agreement between the Republic of Cyprus and Ukraine on legal assistance in civil matters 2368 UNTS 95.

[20] "As regards civil matters, eight conventions on private international law afford Hong Kong and its co-signatories the convenience of mutual recognition and benefit", see Speech by the Secretary for Justice, Ms. Elsie Leung at the Seminar on Interregional Legal Issues of China in Beijing on 4 September 2005, http://www.doj.gov.hk/eng/archive/pdf/sj20050904e.pdf, p. 6. Ms. Leung mentions only eight treaties but since 2005 the total number has reached ten (these include the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 and nine Hague Conference on Private International Law conventions, *inter alia* on the taking of evidence abroad in civil or commercial matters). Besides, there are also other conventions containing clauses relating to private international law, *see* M. Zhang, *Application of Private International Law Conventions in Hong Kong of China*, 7(3) Frontiers of Law in China 377 (2012).

the "arrangements" between Hong Kong and China, which are actually acts of national law,[21] and international agreements against one another and comparing them, as did the Court, is a risky endeavor at best. It would have been much better if the Court had not raised the argument at all.

Finally, the observations of the Court on the concept of "moving treaty frontiers" are a little disturbing. Contrary to what it said, the principle in question does not apply only to cession of territory but to all territorial changes.[22] Leaving that aside, the uniqueness of the cession of Hong Kong does not produce any legal effects in itself. Once again its importance is understandable only if it is placed in a wider context by reference to Article 29 of the VCLT. The problem is, however, that the Court failed to recognise that the "moving treaty frontiers" principle is in fact at least implicitly reflected in Article 29 itself,[23] and instead treated it as if it were a separate concept. Although it is argued that it also exists separately, as a general rule of international law, the latter is not without exceptions either.[24] These concerns have been, regrettably, overlooked, although the Court's reluctance to go into a detailed analysis of the principle as a general rule of international law may be justified by the fact that it would pose a challenge even to an international court.

The true importance of the decision of the Supreme Court of 11 October 2013 lies in the fact that it is the first decision of a Polish civil law court regarding the applicability to Hong Kong of a treaty to which China is a party. Although the overall conclusions are correct, the part of the reasoning relating to international law shows that valid conclusions have been reached based on false or not-fully-correct premises. These deficiencies call for a more sophisticated approach.

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[21] *See also* U.G. Schroeter, *The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods*, 16 (2) Pace International Law Review 319 (2004), who argues that the choice of title of "Arrangement" instead of "Agreement" "is a difference that might be supposed to distinguish intra-China instruments from international treaties".

[22] *See e.g.* H. Waldock, *Second Report on Succession in Respect of Treaties*, 2 Yearbook of the International Law Commission 52 (1969).

[23] *See e.g.* K. Odendahl, *Article 29*, [in:] O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer-Verlag, Berlin-Heidelberg: 2012, p. 499.

[24] K. Doehring, *The Scope of the Territorial Application of Treaties*, 27 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 483 (1967), pp. 485, 489-490.

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BOOK REVIEWS

Uladzislau Belavusau: *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies*, Routledge 2013, pp. 304

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Although freedom of speech, and in particular the special case of hate speech, has already been extensively analyzed in the context of the legal doctrine and case law of both US and Western European democracies, the legal landscape of leading Central and Eastern Europe (CEE) states in this regard has remained unexplored. The role of American and European free speech models as a source of inspiration for the young CEE democracies has been, up until now, not well known to outside audiences. Uladzislau Belavusau's book changes this situation in a fundamental way by sharing with readers his extensive knowledge about the legislation and jurisprudence of Hungary, the Czech Republic and Poland. In this way Belavusau joins the discussion on the transformation processes of states in the period of transition – processes which also comprise changes in the areas of freedom of speech or, more precisely, determination of its boundaries in a free and democratic state and society.

In the first chapter of his book Belavusau presents the historical, political and legal conditions, and to some extent also the social conditions, that helped establish Hungary, the Czech Republic and Poland as transitional states. Presentation of the "communist legacy", which the author describes using references to, among others, Wojciech Sadurski, Jiří Přibáň and András Sajó, is particularly important for understanding the specific nature of the legal aspects discussed in the book. Without this context it would be difficult to understand the process of mainstreaming freedom of speech during transition and importing different "free speech models" into CEE countries.

In the next chapter Belavusau takes the reader, in a very effective and interesting way, through the intricacies of the concept of hate speech, which is analyzed from the point of view of the American and European models. Understanding the 'background' of the issues in question is very important, and Belavusau rightly chose to describe the attempts to define hate speech, which he characterises as an "uneasy enterprise". He presents a catalogue of the most important judgments of the US Supreme Court and the European Court of Human Rights (as well as those of the Court of Justice of the European Union) which set the framework for free speech in the context of different forms of hate speech – a framework usually enlarged in the case of the United States and

narrowed in the case of Europe. This very informative discussion emerges as a thorough and refined analysis of the problem he is dealing with, i.e. the judicial epistemology of free speech and speech-act theory in the context of postmodern legal deconstruction (e.g. in his fragment on the "deconstruction via ancient genealogy of free speech", pp. 87-93). One of the most important conclusions reached by Belavusau concerns the new settings in which representatives of various narratives (including feminist jurisprudence, queer legal discourse and critical race theory) suggest "new arrangements for influencing the position of the courts with regard to hate speech and other problematic issues. It is based on the invocation of the performative character of speech, revisiting the discriminatory context of utterances, historical predispositions and stereotypes, as well as personal victim stories" (p. 249). Paradoxically, this also raises the basic dispute over the penalization of hate speech: should the personal perspectives and narratives of the victims of hateful words and their entire social context be adopted in the law-making process and in the courts or, as suggested by Belavusau, should this "post-modern instrumentalisation of the right to freedom of speech" be rather rejected? In this context the lack of reference to the arguments of Jeremy Waldron, one of the best known authors discussing the issue of American and European borders to freedom of speech in the context of hate speech as broadly understood, seems surprising. In *The Harm in Hate Speech*, published in 2012, Waldron presents important and widely-discussed views on the problems which Belavasau critically analyzes and presents the hate speech dilemma from the point of view of its victims.[1] In Waldron's opinion, no member of the society should experience rejection, discrimination and violence by other members of society. Therefore the feeling of safety and belonging to the community, which is based on the inclusion of everybody into the sphere of social and public life, irrespective of racial or ethnic origin or religion, is a value that should be protected by the imposition of a ban on spreading hate speech. Furthermore, the dignity of those persons who become victims of "hateful words" becomes a key issue. As pointed out by Waldron, dignity in such cases is the basis for social legitimisation and of recognition of the unconditional rightful membership of minorities in society. It lays the foundation, both for the majority and for minorities, for the full functioning of minorities in social and public life, and those who voice hate speech undermine this foundation. They want the minorities to constantly feel that they are not wanted, worse, alien, and "not at home."

The third chapter of Belavusau's book consists of an analysis of the models of hate speech bans in the Czech Republic, Hungary and Poland. Undoubtedly, the information and discussion of the most important judgments in hate speech cases reached in the Polish, Czech and Hungarian court rooms constitute the greatest value of the book – Belavusau is the first author who has described the problem so thoroughly in the English-language literature. He rightly points to Hungary as a state which seems to

[1] J. Waldron, *The Harm in Hate Speech*, Harvard University Press, Cambridge: 2012. The arguments expressed in the book were previously presented by Waldron in a series of Holmes Lectures entitled "Dignity and Defamation: The Visibility of Hate" at Harvard Law School in October 2009.

display, to the highest degree, the "First Amendment attitude" towards hate speech, and he describes the fascinating "saga" of constitutional interpretations used in individual attempts to regulate the problem in Hungary. However, the correct conclusion drawn by Belavusau, namely that "[i]n the climate of the constant challenging of the provisions by the Constitutional Court, the lower courts became unwilling to prosecute the virulent haters" (p. 149), should be augmented with another observation. Taking into account the scale and forms of anti-Semitic and anti-Roma hatred present in Hungary, the attempt to combine both the American and European models (resulting in the behaviour of the Hungarian courts described by Belavusau) should rather be seen as an experiment with negative consequences. At the same time, one must agree with the author's observation that the CEE states under analysis have, with respect to defining their attitude towards hate speech, rather followed the "mandatory European model", characterized by its pragmatic and utilitarian attitude. Therefore, it is difficult to completely share Belavusau's conclusion when, referring to the comments on "new avenues of legal deconstruction" (p. 249), he says that "[t]hose strategies articulated within the narratives of the American postmodern movements can be successfully transplanted into the new European context" (p. 250). If this "new European context" also includes Poland, it is difficult to imagine that Polish judges, prosecutors and law-makers today have adopted the victim- and socio-historical-oriented perspective, since it is a problem for them to even find anti-Semitism in the "Gas the Jews!" slogans chanted by football hooligans.[2]

The majority of my polemical comments relate to the next chapter of the book which is devoted to historical revisionism.[3] From the first moment it is clear to the reader that the author subscribes to the *Appel de Blois* initiative, in which eminent intellectuals claim: "History must not be a slave to contemporary politics nor can it be written on the command of competing memories. In a free state, no political authority has the right to define historical truth and to restrain the freedom of the historian with the threat of penal sanctions."[4] I too realize the dangers depicted in the Appeal, and I agree with Belavusau when he says that we cannot "criminalize human narrow-mindedness, apathy, absurdity, and naivety" (p.174). But the best known Holocaust deniers, as well as the entire negationist movement, are not slow-witted simpletons but mostly well educated people, fully aware of what they are doing and saying. They clearly define the aim of their actions – they want to expose the "Jewish swindlers". Therefore, in opposition to Belavusau, I think that the penalization of Holocaust denial should be excluded

[2] P. Żytnicki, *Antysemityzm kiboli to nie grzech* [Soccer fans' anti-Semitism is not a sin], Gazeta Wyborcza 10.01.2014.

[3] It is problematic to use the term "historical revisionism" with reference to Holocaust denial. Although the author renounces the view that Holocaust deniers conduct historical research (p. 170), as a result of which they come to the conclusion that gas chambers could not hold so many Jews, the use of this term throughout the entire chapter can be regarded as misleading.

[4] P. Nora, Président, Liberté pour l'histoire, *Blois Appeal*, http://www.lph-asso.fr/index.php?option=com_content&view=article&id=47&Itemid=14&lang=en (accessed 15 January 2014).

from the category of "history judged by law", and included in the area of hate speech which is worthy of banning.

The argument that Holocaust denial should be treated differently than other cases of negation of historical events is corroborated by the jurisprudence of the European Court of Human Rights (ECtHR), including the recent ruling in the *Perinçek v. Switzerland* case, in which the Court ruled on the penalization of Armenian genocide denial.[5] Moreover, no reference in the book is made to one of the most important ECtHR judgments on Holocaust denial, handed down when Roger Garaudy's complaint was examined.[6] In the process of considering the legitimacy of the complaint, the ECtHR's standpoint with respect to attempts to invoke the European Convention of Human Rights and Fundamental Freedoms by those who disseminate Holocaust denial was articulated with great clarity. In its decision, the Strasbourg Court firmly declared that the negation of the Holocaust is: "one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based […]. Such acts are incompatible with democracy and human rights because they infringe the rights of others."[7]

When Belavusau writes that "[t]he number of historians producing revisionist texts is not great, and they are already socially stigmatized as marginal and ludicrous figures" (p. 179), he seems not to notice the speed and ease with which Holocaust denial has become an official historical doctrine in many Arab and Muslim countries.[8] He also seems to ignore the statistics about the appalling and shameful lack of knowledge about the Holocaust among young people, which leads to the likely prospect that Holocaust denial by future generations may become a legitimate "version" of historical events.[9] Obviously one cannot claim that legal bans will reverse this negative trend. However, if law is treated as a signal given to society and an indication by the legislator of what is a legitimate part of democratic discourse and what constitutes its abuse, then the ban on Holocaust denial certainly seems justified.

There are a few more questions that may be raised with respect to the author's discussion in this part of his book. Belavusau claims – but does not present any convincing evidence – that the decision of the Israeli Supreme Court on the legislation known as the "Nakba Act" is a "perverse cultural denial of historical atrocities" (p. 177). The Act

[5] ECHR judgment, *Perinçek v. Switzerland* (application no. 27510/08) Judgment, ECHR 17 December 2013, available at http://www.echr.coe.int.

[6] ECHR decision, *Roger Garaudy v. France* (application no. 65831/01) Decision, ECHR 24 June 2003, available at http://www.echr.coe.int.

[7] *Ibidem*, p. 22 of the translated extract.

[8] R. S. Wistrich (ed.), *Holocaust Denial: The Politics of Perfidy*, The Hebrew University & Magnes Press & De Gruyter, Jerusalem and Berlin: 2013.

[9] As indicated in a poll commissioned in 2012 by the Forsa Research Institute on January 25, just two days before the International Holocaust Memorial Day, 21 percent of Germans between 18 and 30 years of age, when asked about the most notorious Nazi extermination camp, had never heard of it (http://www.zeit.de/gesellschaft/2012-01/umfrage-Holocaust accessed 15 January 2014).

does not penalize individuals for saying that there were Nakba events: it states that any institution could lose state funding if it was to celebrate its anniversary. Although this decision may be considered a groundless restriction on the autonomy of local authorities, it has nothing to do with the problem of historical revisionism which Belavusau analyses. Furthermore, comparing the fate of other groups persecuted by Nazi Germany with that of Jews is, except for a completely justified comparison of the situation of Roma and Sinti, very questionable. The fate of homosexuals and Jehovah's witnesses is comparable to that of communists; the crimes committed on representatives of these groups qualify as crimes against humanity but not as the crime of genocide. And, finally, comparison of the fate of Slavic and Jewish victims on account of the number of murdered people is evidence of a surprising misunderstanding of what genocide is. It is not the number of those murdered that defines genocide, but the aim and consequences of the crime.

As a minor remark one should note that in his discussion of the Holocaust denial ban in Poland, Belavusau failed to note that the Polish Ombudsman withdrew the application to the Constitutional Tribunal for a ruling that the provision penalizing the publication of Holocaust denial is contrary to the Polish constitutional guarantee of freedom of speech and freedom of research.[10] The Ombudsman decided to withdraw the application because of negative opinions of the Speaker of the Parliament and the Prosecutor General. An analysis of the arguments presented by these two institutions would definitely be interesting material for the author.

In the final chapter, on pornography, Belavusau takes the readers on an extremely interesting journey across the historical, social and religious conditions which, in the author's opinion, have led to the risk that "[t]he ethos of the First Amendment will be inevitably tested *vis-à-vis* the relics of the Second Commandment" (p. 254). He also convincingly proves that the liberal model of legal regulation of pornography has been 'taken seriously' by the CEE states under analysis. It seems, however, that the author has not argued convincingly enough about the position of the "radical feminists" (so designated by Belavusau in contrast to "sex-positive" feminists), who would like pornography to be recognized as a certain form of hate speech against women, primarily in the dimension of its social consequences (i.e., violence against women and the strengthening of stereotypes which are humiliating and degrading for women).

Identifying the themes thought to be absent in a book is usually the reviewer's easiest job. It is not difficult to point out some additional problems that *could* have been analyzed (but which could also ruin the author's intentions and probably go beyond the scope required by the publisher). In the case of Belavusau's book the temptation to indicate topics which have not been discussed is less, because the author has very convincingly justified his choices. However, a few suggestions might still be useful.

In recent years in the CEE states, i.e. in the main geographical setting of the book, many stormy debates have taken place concerning the problems with penalization of

[10] Postanowienie Trybunału Konstytucyjnego (Decision of the Constitutional Tribunal) of 8 March 2011, 14/2/A/2011.

defamation (particularly significant in the context of a free press) and state control over the media. Some references to these problems, even a short overview of their discussion and the legal regulations adopted in Hungary, the Czech Republic and Poland would undoubtedly give the book a more comprehensive and complete character which, after all, is what is promised by its title.

What is also missing – and could be an extremely interesting part of the analysis – is information on how judges from the three CEE states in the ECtHR and the Court of Justice of the EU judges have ruled on cases related to hate speech, pornography and historical revisionism. Are the conditions which, in Belavusau's opinion, shape the law and jurisprudence of Hungary, the Czech Republic and Poland, reflected in the courtrooms of these international tribunals?

Perhaps it would also be interesting to add, in addition to the ECtHR judgments referred to and discussed in the book, the controversial ruling in the *Willem v. France* case on restrictions on the freedom of speech in the context of public encouragement of discrimination (in the form of a boycott) against Israeli products.[11] The controversy over the treatment of such appeals as hate speech has been prevalent in the academic community for a long time, hence its discussion could augment the analysis conducted by Belavusau.

One final remark. There is no doubt that Belavusau is very adept at formulating his arguments in a vivid way, which is a skill not often encountered in legal literature. His comparison of the ban on the presentation of Communist symbols to "Czardas", a traditional Hungarian dance which "starts slowly and ends in a very fast tempo" (p. 141), not only attracts the reader's attention but also perfectly describes the specific nature of the problem and the context in which it is discussed. Equally spectacular linguistic choices can be found elsewhere in the book. For example the author writes about the "Procrustean bed" in the context of defining historical revisionism; about the distinction between "parrhesiacal" (American) and "isegorical" (European) perceptions and interpretations of free speech (p. 91); and by quoting Erik Heinze's description he presents the specific character of international conferences on freedom of speech in a humorous way (pp. 247-248).[12] Sometimes, however, it seems that literary formulae become claims in their own right, which are not supported by proper arguments. In a summary of his views on freedom of speech in the context of pornography, Belavusau writes that pornography "does not exist *per se*. It does not reside in an artwork.

[11] ECHR judgment: *Willem v. France* (application no. 10883/05) Judgment, ECHR 16 July 2009, available at http://www.echr.coe.int.

[12] "European conferences on hate speech follow a similar pattern. A few Americans make impassioned speeches about the values of freedom and democracy. The Europeans dutifully listen and applaud. Then come tea and biscuits, where the pros and cons of various positions are exchanged with tepid enthusiasm. All delegates are then thanked for having attended an event that 'will surely provide food for thought'. The Europeans depart with the same views they held when they arrived; and the Americans leave crestfallen from a missionary venture that failed to convert a single soul." E. Heinze, *Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, [in:] I. Hare & J. Weinstein (eds.), *Extreme Speech and Democracy*, Oxford University Press, Oxford: 2009, p. 182.

The obscene is a fruit of our repressed sexuality" (p. 253), One can wonder whether this observation is not going too far into the sphere of psychology and criticism of art, which the author does refer to in his research but which are arguably not his principal fields of expertise. Some of the arguments are also very categorical in their tenor. When Belavusau mentions the "populist character" of the EU Framework Decision on Racism (p. 188), he sharply and perhaps unjustly makes a judgment about the intentions of the authors of the Decision.[13]

Belavusau has presented a very important and interesting book, written by an impressively erudite scholar in very vivid, sometimes almost poetic, language. *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* is more than a traditional and predictable comparison of "two battlefronts" – European and American. Nor is it a simple analysis of the jurisprudence and legislation of selected CEE states. It shows the interactions and relations between the American system, the model defined by the Council of Europe and the European Union, and the national jurisdictions of Hungary, the Czech Republic and Poland which have been developing for over 25 years since the fall of communism. Belavusau has established many important arguments and the book undoubtedly brings an added value to the comparative legal research on freedom of speech in its particular aspects. It is innovative and thought-provoking. Belavusau, while clear about his general position towards limitations on freedom of speech, does not provide the reader with radical, one-sided arguments, thus leaving space for further considerations on what the freedom of speech laws in CEE countries should look like. Hate speech, historical revisionism and pornography will probably always be at the centre of controversy over the allowable limits on freedom of speech. Belavusau's book is a well-argued position in this discussion, which from now on will constitute mandatory reading for its participants.

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[13] 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.

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Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff Publishers, 2013, pp. 469

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Ten months after a devastating earthquake in January 2010, a cholera outbreak took place in Haiti. As a result thousands of Haitians died and the disease spread to neighbouring countries. From the very beginning, the members of the United Nations peacekeeping operation who came from countries where cholera is an endemic disease (e.g. from Nepal) were blamed for the outbreak of the epidemic.[1] This hypothesis was confirmed by a report of the Independent Panel of four international experts formed by the Secretary-General of the United Nations. Nevertheless, the Panel underlined that the outbreak was not the fault of, nor the result of any deliberate action by any group or individual, but was caused by the confluence of circumstances.[2] Despite the calls some UN high representatives, including Navi Pillay, the High Commissioner for Human Rights,[3] and lawsuits filed against the UN in national courts (e.g. in the US),[4] the Organization has shielded itself from any responsibility by calling on its jurisdictional immunity, and apparently it excludes any possibility of paying compensation to the state or individuals affected.[5] This case has shown that the issue of the responsibility of international organizations is not just a theoretical one, but has been incrementally attracting greater attention and has proved to be of great importance, especially if one has in mind the increasing role of international organizations in international relations and events. Since 1949, when the International Court of Justice issued an advisory opinion on reparation for injuries suffered in the service of the United Nations, no one has questioned the legal personality of IGOs (international governmental organisations). However, despite the fact that legal personality and legal responsibility are flip sides of the same coin, for years there was little discussion about the legal responsibility of international organizations (IOs), in part because of the lack of such a practice.

[1] R. Carroll, *Haitians turn on UN peacekeepers they blame for cholera outbreak*, The Guardian, 16 November 2010, available at: http://www.theguardian.com/world/2010/nov/16/haiti-cholera-united-nations-peacekeepers (accessed 25 March 2014)

[2] Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti, available at: http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf (accessed 25 March 2014).

[3] T. Daniel, *UN Official Makes Rare Case For Compensation For Haiti Cholera Victims*, The Huffington Post, 8 October 2013, available at: http://www.huffingtonpost.com/2013/10/08/un-haiti-compensation-_n_4066697.html (accessed 25 March 2014).

[4] Available at: http://www.ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf (accessed 25 March 2014).

[5] *See* Article 2, Convention on the Privileges and Immunities of the United Nations of 13 February 1946, 1 UNTS 15.

The International Law Commission (ILC) commenced its works on the issue of responsibility of international organizations[6] only when it finished the *Articles on State Responsibility for Internationally Wrongful Acts* in 2001.[7] After just a few years of work (i.e. much more quickly than its previous works on responsibility of states) the ILC concluded its work and the UN General Assembly in 2011 adopted resolution 66/100, in which it took note of the ILC's *Articles on the Responsibility of International Organizations* (hereafter Articles). These Articles have met with a mixed reaction and have provoked lively discussion, which has resulted in valuable publications. One of them is a book entitled *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie,* edited by Maurizio Ragazzi and published in 2013 by Martinus Nijhoff Publishers. This publication is worthy of notice, especially because Ragazzi managed to collect essays from outstanding international jurists, including members of the ICJ's and ILC's "mafia" (as Alain Pellet, citing Ian Brownlie, described the "small world" of lawyers working within these institutions). As a consequence, among the authors contributing to this work we find current or former ICJ judges (Antônio Augusto Cançado Trindade, Kenneth Keith, John Dugard) and ILC members (Alain Pellet, Pemmaraju Sreenivasa, Pavel Šturma, Michael Wood, Chusei Yamada), along with other eminent scholars working for such international organizations as, e.g., the UN or the World Bank. As a result, the quality of the publication is remarkable and deserves to be noticed.

The book is divided into four parts, however as the editor rightly underlined in the preface, some texts on similar topics are put in different parts of the book, which can cause some confusion at times. The first part is entitled *Setting the Stage: International Organizations' Responsibility between Codification and Progressive Development*. It consists of five general introductory essays in which authors discuss, *inter alia*, the issue of the binding nature of *ius cogens* (Antônio Augusto Cançado Trindade), history of the works of the ILC on issues related with international organizations (Kenneth Keith), and the variety of final products in the works of the ILC (Sean D. Murphy). Alain Pellet reveals the way in which the final content of the most controversial norms was drafted and points out the main weaknesses of the ILC's articles. He underlines that the ILC did not pay sufficient attention to the special status of IOs. Furthermore Michael Wood tries to weigh the value of the Articles based on different measures.

The second part, entitled *Assessing the Commission's Approach: State Responsibility and Responsibility of International Organizations*, focuses on one of the most controversial issues related to the ILC's work on the Articles, i.e. a methodology adopted by Special Rapporteur Giorgio Gaja, who decided to rely (too strongly according to his critics) on the Articles on State Responsibility of 2001. Consequently, C.F. Amerasinghe, Dan Sarooshi, Chusei Yamada, Maurizio Arcari, and Vincent-Joël Proulx discuss the relationship between the Articles on State Responsibility and the Articles on IOs'

[6] *See* recommendation of the Working-Group on the long-term programme of work of 2000 (A/55/10), and GA resolutions 55/152 of 12 December 2000, 56/82 of 12 December 2001 and 57/21 of 19 November 2002.

[7] *See* GA resolution 56/83 of 12 December 2001.

Responsibility. Tullio Scovazzi extensively analyzes the *mutatis mutandi* technique used by the ILC. Some other methodological issues are discussed in this part as well, like the role of *lex specialis* (Kristen Boon) and the role of practice (Emmanuel Roucounas) in the codification of the responsibility of IOs. Arnold Pronto, in his essay on the scope of application of the Articles, combines a description of the extent of the Articles' application with a critical analysis of the working methods of the ILC.

International organizations differ widely among themselves because they have different mandates and functions. The strength of Ragazzi's book lies in showing different perspectives on the issue of international organizations' responsibility. The third part of the book – *Particular Perspectives: International Organizations and Other Entities*, is composed of chapters written from the perspective of the UN (Daphna Shraga), European Union (José Manuel Cortés Martin), World Health Organization (Gian Luca Burci, Clemens Feinäugle) and also International Financial Institutions (Laurence Boisson de Chazournes), including the International Monetary Fund (Ross Leckow, Erik Plith) and the World Bank (Maurizio Ragazzi). In addition to these chapters, the third part includes remarks written from the perspective of other participants in international relations i.e. The Holy See (Robert John Araujo) and the Quartet on the Middle East (John Dugard, Annemarieke Vermeer-Künzli). The essay on the Quartet is particularly interesting because the authors successfully apply the rules codified by the ILC to a specific entity such as the Quartet.

Part four, *Special Concerns: Selected Issues Regarding the Articles*, is devoted to the most critical issues related to RIO (responsibility of international organizations), i.e. the relationship between the responsibility of IOs and member states. In this part Sienho Yee demonstrates that the solution adopted in the ILC's proposition is at least immature, and indicates the main gaps in the system. Paolo Palchetti discusses the existence and scope of the obligation of member states to enable the organization to make reparations. Kazuhiro Nakatani focuses on the issue of the responsibility of member states for internationally wrongful acts of the organization, and Pavel Šturma, after summarizing the content of the ILC's articles referring to relation between the responsibility of an organization and its member states, uses the situation of the European Union and its member states as an example of a unique case. In a subsequent division, the problem of justiciability of disputes is discussed (Sergio Puig) and the (non) role of the International Court of Justice with reference to IOR is underlined, in combination with an analysis of all the ICJ's jurisprudence on international organizations (Hugh Thirlway). One of the most interesting chapters of the book are devoted to the possible application by states of countermeasures against IOs (Antonios Tzanakopoulos, Simone Vezzani). The authors indicate measures which can be undertaken by states in the event of an IO's commission of an internationally wrongful act. The last essays in this part of the book are focused on issues related to using the force authorized by an IO and its responsibility for actions of groups controlled by it (Blanca Montejo, P.S. Rao, Francesco Salerno). The appendixes attached to the publication are also very useful, and include the above-mentioned UN General Assembly resolution 66/100 and the ILC's General Commentary on the Articles.

Unfortunately, reading the book leaves a reader with a painful hunger for more. In the editor's preface it is underlined that the authors invited to the project were given a free choice of topics. As a result some essays cover overlapping issues (especially in the first and second parts), but this is not a disadvantage when one takes into account the great importance of the methodology of the ILC's work and the many controversies associated with it (although it must be admitted that the continuous repetitions of the same passage of the Gaja report could be perceived as annoying). The more important consequence of the approach taken by the editor are some remarkable lacunas, especially in the part devoted to the different perspectives on the ILC's Articles. There is no essay written from the point of view of regional organizations. The focus on solely universal organizations is hard to understand if we take into account the scope of application of the ILC's articles, which cover all types of international organizations. Nowadays even the United Nations, in order to achieve its main goal i.e. the preservation of international peace and security, relies heavily on regional organizations, hence their responsibility is deserving of more attention.[8] The book touches upon the problem of the relationship between an organization and its member states, however it does not refer to relations between international organizations, especially in the case where one international organization (to which member states transferred some powers) delegates its functions to another IO. Only the article based on the ICJ's advisory opinion on the Global Mechanism (Silvestre J. Martha) describes the "complexification" of relations between different entities. We do not find in Ragazzi's publication the perspective of highly specialized organizations such as, e.g., international tribunals (some of which were established based on agreements between the UN and states, which would make this example especially interesting from the point of view of responsibility). Excluding the essay on the Quartet, there is no indication if the ILC's Articles can be useful for other entities similar to IOs (e.g. NGOs, international organs or movements), which are in the process of gaining legal personality or already have it (such as the International Committee of the Red Cross).

These gaps do not diminish the value of the book, but rather prove that we are suffering not only from a lack of the practice concerning IOs' responsibility, but also from the fact that there is still only a small amount of literature which touches upon all aspects and perspectives from which the ILC's Articles could be analyzed. Ragazzi's book should be treated as an invitation to further discussion on the responsibility of organizations and perhaps – as Judge Trindade mentioned in his essay – on the whole approach to the subjectivity of the "*ius gentium* of our times".

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[8] *See e.g.* Security Council resolution 2033 of 12 January 2012.

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Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge Research in International Law), Routledge, 2013, pp. 394

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The latest incidents in Crimea (Ukraine) have again focused our minds, together with scientific research and political discussions, on the question of the crime of aggression. Can we speak of aggression in context of the incidents in Kiev, when Russian secret service sabotaged civil demonstrations? Is the annexation of Crimea aggression under international law? Is the threat of aggression a crime in the light of international law? These questions must be raised, especially in that the Ukrainian incidents seem to augur just the beginning of what might subsequently happen in Europe. The peaceful relations lasting for more than 25 years in this part of the world seem to have come to an end, and political relations must be established anew. The question of international responsibility will also need to be eventually taken into account.

According to the amendments of the Rome Statute as adopted (but not yet ratified) in 2010 in Kampala,[1] an act of aggression is connected with the activities of a state; armed force must be used by a state "against the sovereignty, territorial integrity, and political independence of another state", without the authorization of a Security Council resolution and without the justification of self-defence. Consequently, the crime of aggression is linked to the "planning, preparation, initiation, or execution by a person in a position effectively to exercise control over the direct political or military action of a state committing an act of aggression." As can be observed, aggression as so understood can refer both to the responsibility of a state and an individual. Although aggression is perceived as a very old and traditional crime (we can refer to the discussion concerning crimes against peace), the individual responsibility for a crime of aggression is a rather new question in international law, as it may be prosecuted by the International Criminal Court (ICC) if the amendments from Kampala are ratified by 30 states by 2017.

Patrycja Grzebyk's book is not only a pioneering work in this respect, it is also a very good analytical tool, much needed by academics. On the one hand it refers to current questions of international law and international relations, and on the other hand it summarises and analyses the current research, taking into account the traditional roots of codification of the crime of aggression.

The book, entitled *Criminal Responsibility for the Crime of Aggression*, is both a translation and an updated and extended version of the book published in Polish in 2010 under the title *Odpowiedzialność karna za zbrodnię agresji*, which was awarded the prestigious Manfred Lachs award for the best book in public international law in the

[1] See the text of amendments here: https://treaties.un.org/doc/Publication/CN/2010/CN.651.2010-Eng.pdf (accessed 25 April 2014).

category of debut. Indeed it was an extremely good debut. In this review however I will refer to the updated version published in English by the renowned publisher Routledge in its prestigious Research in International Law series.

The book consists of three parts. The first, entitled "Outlawing aggression" includes two chapters: "War as an institution of law" and "The notion of aggression". The second part is devoted to "Criminalization of aggression" and consists of three chapters, namely: "The legal basis for criminalizing aggression", "Trials of individuals charged with the crime of aggression" and "Scope of individual responsibility for the crime of aggression". The third part is titled "Difficulties and risks" and includes two chapters focused on: "Procedural difficulties" and "Impact of aggression trials". Additionally, a Conclusion, Notes, Bibliography, Appendix and Index are added at the end of the book.

In the first part the author presents the historical roots of the discussion concerning the de-legalisation of aggression, starting briefly with the period before the First World War, discussing the legality of war and the first international attempts to eliminate war as a practice in international relations. The status of aggression has dramatically changed in the 20th century from an accepted practice to the absolute ban provided in the United Nations Charter. The definition of aggression, as established in UN General Assembly resolution 3314, is presented in the second chapter, where certain elements of aggression are discussed.

The second part is focused on the question of the criminalization of aggression. This issue reaches deeply into the roots of the international responsibility of individuals, which is why the author starts her considerations from the Treaty of Versailles and the inter-war ideas regarding the establishment of a criminal tribunal to prosecute those guilty of committing international crimes. Further the statutes and judgments of the International Military Tribunals (including the IMT for the Far East) are presented and discussed, accompanied by the attempts concerning formulation of the Nuremberg principles and a Code of crimes against the peace and security of mankind. This chapter ends with a reference to the works concerning the statute of the ICC and the review conference in Kampala. The next chapter is devoted to the trials of individuals. The author first recalls some precedents from ancient history, and subsequently she discusses the Nuremberg and Tokyo trials as well as the related trials that took place before the national courts. This part constitutes a unique contribution, as hardly ever in the literature have the national trials after the Second World War been discussed on the basis of original sources, trial transcripts etc. Interestingly the author rightly points out that during last 70 years no one has so far been tried for a crime against peace, and that the "crime against peace has been constantly ignored in the numerous proceedings concerning war crimes."

After presenting practical questions associated with bringing a charge of the crime of aggression, the next chapter focuses on the scope of individual responsibility for that crime. Dr. Grzebyk presents the difficulties with the precise specification of those criminal acts which would constitute the crime of aggression (*actus reus*), as well as the issues surrounding the *mens rea* element of a crime of aggression, specifically the guilt

of a defendant. It must be perceived that a fundamental part of author's considerations is whether it can be proved that a defendant committed the crime intentionally, being aware that her/his behaviour constitutes the crime of aggression. The author rightly points out the issue of determining the intent and knowledge of a defendant, as provided in Article 30 of the Rome Statute. Taking into account intent and knowledge will lead, in turn, to a situation whereby only the most responsible official leaders will be deemed responsible for the crime of aggression. As a result this could constitute a threat (in the deterrence sense) to a state and encourage it to avoid a policy of aggression. But these preventive effects of the criminalization of aggression may also be debatable, especially in that the conditions for activating the jurisdiction of the ICC make bringing a charge of the crime of aggression before the Court a very complex issue (see Art. 15 *bis*, Rome Statute), and most certainly a very time-consuming procedure. Finally, the last chapter in this part presents the grounds for excluding criminal responsibility based on a finding of lack of guilt, which in this part relates to the question of the *mens rea* of a defendant. Consequently, as discussed, a mistake of law, mistake of fact, or duress can exclude a defendant's guilt.

The last part takes into account problems associated with bringing a charge of the crime of aggression. The author discusses the problems with surrendering/extradition of the person charged with such a crime, the question of immunities (in the context of case of Al-Bashir before the ICC we can observe that the question of immunity can be viewed as an obstacle in all proceedings concerning international crimes), amnesties, statutes of limitations, or the *nullum crimen sine lege* principle. The overall considerations can be applied not only to the crime of aggression, but also (with a few exceptions, such as statutes of limitations or universal jurisdiction, which can be either difficult or impossible to apply in the context of the crime of aggression) to genocide, crimes against humanity or war crimes, as these problems also appear in the context of bringing charges of these crimes before international tribunals. This makes the author's considerations very universal in scope.

The last chapter is focused generally on the impact of aggression trials, taking into account the notion of peace and security, the international criminal justice system, and international humanitarian law, and trying to set the scene for the punishment of aggression. The author does not avoid the difficult questions, proposing also the idea of an alternative reading of the crime, newly "defined" for the purpose of the ICC Statute.

Writing a good book on aggression is a very complex issue, especially if we want the book to be at the same time a historical analysis of the roots of the crime, its elements, and the various perspectives connected with bringing such a charge, as well as describing the analytical research on individual responsibility for aggression. Patrycja Grzebyk has managed to provide a dichotomous analysis, and if anyone would seek to propose an ideal arrangement for the structure of such a book, it could well turn out that the one chosen by the author is such an arrangement. She seems to successfully attain a very difficult task, as she reconciles historical considerations with substantive discussion on the issue.

The only critical remark that can be made with respect to the author is that she did not take advantage of the opportunity to analyze any of the current international incidents in order to make observations or draw any conclusions concerning the current state of the crime of aggression, nor show the relationship between international practice and the theoretical approach to draw some practical lessons out of Security Council hegemony and the weakness of smaller states. The position of the crime of aggression alongside other international crimes prosecuted by the ICC could also have been presented and discussed in more detail.

With respect to the publisher one may be more critical. It should first be noted however that the book is published in a very high quality format, with hard cover, light paper and clear font, which makes it easy to read. In addition, the book is accompanied by an index and appendix presenting short biographies of persons mentioned in the book, which is a very commendable practice. But one somewhat bitter remark must be made (leaving aside the minor typographical errors). The footnotes are presented at the end of the book, and in addition they use continuous numbering of footnotes only within the scope of each chapter, i.e. each chapter starts with new numbering, what makes referencing the footnotes annoying and frustrating, as it is necessary to keep in mind the number of each chapter and then read the footnotes referring to that chapter. This is an extremely bad practice, especially in the context of the highly commendable footnotes compiled by Patrycja Grzebyk. They present a great deal of additional relevant information, and read almost like a second book in themselves. But they should most definitely be inseparably joined with the text. The technique could even be assessed as barbarous, if one may use such vocabulary. I do not know whether it is a common practice of Routledge's to attach footnotes at the end of the book, but if so, I would strongly suggest considering a change of the practice immediately.

Other than that I am extremely satisfied that this book was published by a very prestigious publishing house and will be widely disseminated, as I find it to be highly interesting and well worth reading, analyzing and discussing. It can be helpful not only for academics but also for students seeking to expand their horizons. Last but not least, this book is in line with ongoing international discussions concerning the responsibility of a state and the responsibility of individuals, and once again we get confirmation that international justice is a very important, serious and complex task.

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- Herma Cezary, *Aspekty proceduralne i prawne negocjacji w sprawie Traktatu o unii fiskalnej* [Legal and procedural aspects of negotiations concerning the Fiscal Union Treaty] (pp. 29-63)
- Nowacki Marcin, *Zwykła procedura zmiany (traktat rewizyjny): protokoły hiszpański, czeski i irlandzki* [Basic amendment procedure: Spanish, Czech and Irish Protocols] (pp. 65-94)
- Socha Aleksandra, *Procedura kładki: aspekty proceduralne* [Simplified procedure: procedural aspects] (pp. 95-127)
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- Chruściak Ryszard, *Ratyfikacja w Polsce decyzji Rady Europejskiej w sprawie uzupełnienia art. 136 Traktatu o funkcjonowaniu Unii Europejskiej: spory polityczne i konstytucyjne* [The Polish ratification of the EU decision supplementing Art. 136 of the Treaty on European Union: political and constitutional controversies] (pp. 143-170)

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- Sienkiewicz Tomasz, *Prawne aspekty wywozu zabytków z Polski na Ukrainę* [Legal aspects of moving antiques from Poland to Ukraine] (pp. 335-361)

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- Steinborn Sławomir, *Dostęp obrony do akt postępowania przygotowawczego w związku z procedurą habeas corpus – standard strasburski i jego realizacja w polskim procesie karnym* [Defendant's access to acts of preparatory proceedings under habeas corpus – the Strasbourg standard and its manifestation in Polish law] (pp. 527-544)
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tion and stregthening procedural rights of individuals in EU criminal proceedings] (pp. 787-802)

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- Indecki Krzysztof, *Z problematyki sprawstwa torturowania. Uwagi na tle wybranych statutów Międzynarodowych Trybunałów Karnych* [Perpetration of torture. Comments against the background of selected statutes of international criminal courts] (pp. 835-849)
- Król-Bogomilska Małgorzata, *Pomocnictwo jako forma współdziałania w naruszeniu kartelowym w świetle prawa unijnego* [Power of attorney as a form of cooperation in cartel violations in the light of EU law] (pp. 855-869)
- Kuczyńska Hanna, *Europejskie warunkowe skazanie* [European conditional sentencing] (pp. 870-881)
- Łacny Justyna, Monika Szwarc, *Sankcje w unijnych przepisach rolnych a zasada ne bis in idem – uwagi na tle wyroku Trybunału Sprawiedliwości w sprawie C-489/10 Postępowanie karne against Ł. Bonda* [Sanctions in EU agricultural provisions and the "ne bis in idem" rule – remarks on the judgement of the Court of Justice in the Case C-489/10 Criminal proceeding against Ł. Bonda] (pp. 894-920)
- Redo Sławomir, *What Is "Just" or "Fair" in the World? English as an Intercultural Contribution to a United Nations "Common Language of Justice"* (pp. 938-952)
- Krajewski Krzysztof, *Tendencje rozwoju ustawodawstwa i polityki narkotykowej w Europie* [Trends in the development of law and drug policy in Europe] (pp. 1025-1037)
- Kunicka-Michalska Barbara, *Postulaty przedwojennych międzynarodowych kongresów prawa karnego* [Postulates of pre-war congresses on international criminal law] (pp. 1063-1074)

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- Czubik Paweł, *Pomoc konsularna w razie wypadków turystów w górach poza granicami RP* [Consular assistance in case of tourist accidents in the mountains outside the Republic of Poland] (pp. 42-54)

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- Kaźmierczyk Stanisław, *Standard użycia praw człowieka* [Standards of applying human rights] (pp. 35-50)
- Klima Karel, *Ponadnarodowy konstytucyjny charakter praw człowieka* [Supranational constitutional character of human rights] (pp. 51-58)
- Wróbel Łukasz, *Istota standardów międzynarodowych w dziedzinie demokracji i praw człowieka. Standardy uniwersalne a standardy regionalne (wzajemne oddziaływanie*), [The essence of international standards for democracy and human rights. Universal and regional standards (mutual impact)] (pp. 59-72)
- Ramos Tavares André, *The Borderless Use of Constitutional Courts Decisions in Human Rights: A Dialogical and Restricted Use of Decisions Handed Down by Foreign Constitutional Courts by the National Constitutional Judges* (pp. 73-82)
- Ruczkowski Piotr, *Istota wolności i praw człowieka a prawa ekonomiczne i przyrody (prawa fizyczne)* [The essence of freedom and human rights and economic rights and laws of nature (physics)] (pp. 83-101)
- Rusecki Marian, *Kościół katolicki wobec praw człowieka. Osoba i jej godność podstawą praw człowieka* [The Catholic Church on human rights. Human dignity as the foundation of human rights] (pp. 102-120)
- Tokarczyk Roman, *O konieczności transformacji koncepcji praw człowieka w koncepcję prawa życia* [On the necessity of transforming human rights into the concept of the right to life] (pp. 121-140)
- Filip Jan, *From Standards in Law to "Standardization" of Human Rights* (pp. 141-154)
- Jaskiernia Jerzy, *Proces internacjonalizacji standardów demokratycznych i prawnoczłowieczych we współczesnych stosunkach międzynarodowych (uwarunkowania – aksjologia – perspektywy)* [The process of internationalisation of democratic and human rights standards in contemporary international relations (conditions – axiology – perspectives)] (pp. 155-169)
- Stępień Michał, *Zastrzeżenia do traktatów praw człowieka: świadectwo praworządności czy bezprawia? O swobodzie wyboru standardów praw człowieka* [Reservations to human rights treaties: evidence of rule of law or illegality? On the freedom of choice of standards of human rights] (pp. 170-184)
- Koeck Heribert F., *Common Values and their Protection in a Pluralistic Europe* (pp. 187-199)
- Bień-Kacała Agnieszka, *Suwerenność państwa a nakładanie danin publicznych* [State sovereignty and imposition of public tributes] (pp. 332-344)
- Strzępek Kamil A., *Zasada współdziałania i dialogu społecznego – aspekt administracyjny* [The principle of cooperation and social dialogue – administrative aspects] (pp. 368-375)
- Jarosiński Janusz, *Spory wokół rad zakładowych jako organów samorządu robotniczego* (1944-1946) [Disputes over works councils as organs of labour self-government (1944-1946)] (pp. 376-389)

- Skowron Joanna, *Godność ludzka jako podstawowe prawo każdego człowieka. Standardy regionalne a uniwersalne* [Human dignity as a fundamental human right. Regional and universal standards] (pp. 393-403)
- Kaczmarczyk Hubert, *Prawo do godnej śmierci a prawa człowieka* [The right to dignified death and human rights] (pp. 404-409)
- Konarska Danuta B., *Ewolucja zasady równości (wybrane aspekty)* [The evolution of the principle of equality (selected aspects)] (pp. 410-424)
- Sierakowska Katarzyna, *Równość płci jako koncepcja na rzecz rozwoju* [Gender equality as a concept of development] (pp. 425-436)
- Koryś-Matusiak Agnieszka, *Równość kobiet i mężczyzn w polskim i międzynarodowym prawie pracy* [Gender equality in Polish and international labour law] (pp. 437-449)
- Kałużny Mirosław, *Ochrona prawna mniejszości narodowych i etnicznych w aspekcie ich kultury i tożsamości* [Rights of ethnic and national minorities in the context of their culture and identity] (pp. 464-478)
- Piotrowski Ryszard, *Prawo do tożsamości informacyjnej i jego znaczenie w ustroju demokratycznym* [The right to information identity and its significance in a democratic system] (pp. 479-494)
- Kirpsza Adam, *Biometryczna identyfikacja tożsamości ludzkiej w świetle standardów praw człowieka: przykład paszportu biometrycznego* [Biometric identification of human identity in the light of human rights standards: the case of biometric passports] (pp. 495-511)
- Wójtowicz Marcin, *Prawo do edukacji jako fundamentalna zasada praw człowieka* [The right to education as a fundamental human right] (pp. 528-537)
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- Lisowska Anna, *Wpływ standardów międzynarodowych na ochronę dziecka w sieci przed seksualnym wykorzystywaniem – zagadnienia wybrane* [The influence of international standards on the protection of children against on-line sexual exploitation – selected issues] (pp. 557-568)
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- Frankiewicz Anna, *Czy Rzeczpospolita Polska chroni dziedzictwo kulturowe i dobra kultury zgodnie z ich rozumieniem w prawie międzynarodowym i europejskim* [Does the Republic of Poland protect cultural legacy and cultural goods in accordance with their understanding in international and European law] (pp. 586-600)
- Śliwski Wojciech, *Prawo do własności na tle uniwersalnych oraz regionalnych standardów praw człowieka* [The right to property and the universal and regional standards of human rights] (pp. 601-610)

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- Lubera Bogumiła Z., *Wpływ standardów międzynarodowych na wykonywanie długoterminowej kary izolacyjnej* [The influence of international standards on execution of long-term isolation punishments] (pp. 626-637)
- Papaj Hubert, *Międzynarodowe standardy ochrony praw człowieka a problem skuteczności zwalczania terroryzmu* [International standards of human rights and the problem of effectiveness in the struggle against terrorism] (pp. 664-678)
- Kotowska Anna, *Podejrzani o terroryzm a międzynarodowe standardy ochrony praw człowieka* [Terrorist suspects and international standards of human rights] (pp. 679-685)
- Bobkier Robert, *Finansowanie terroryzmu: nieformalne usługi transferu wartości majątkowych Hawala a standardy Financial Action Task Force (FATF)* [Financing terrorism: informal services of Hawala and the standards of the Financial Action Task Force (FATF)] (pp. 686-706)

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- Svák Ján, *Influence of Decisions of the European Court of Human Rights on the Understanding of "European" Democracy* (pp. 25-31)
- Cymerys Radosław, *Ogólna charakterystyka skargi do Europejskiego Trybunału Praw Człowieka jako narzędzia służącego urzeczywistnieniu idei ochrony praw jednostki* [General characteristics of proceedings in the European Court of Human Rights as means of enforcing the idea of protecting individual rights] (pp. 32-45)
- Budzianowska Dobrosława, *Wpływ orzecznictwa Europejskiego Trybunału Praw Człowieka na standardy ochrony prawa do rzetelnego procesu sądowego w państwach Rady Europy* [The influence of the case law of the European Court of Human Rights on the standards of protecting the right to a fair trial in the states of the Council of Europe] (pp. 46-60)
- Przysucha Marek, *Zasady wyznaczenia sądu w polskim systemie prawnym wobec Konstytucji RP i europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności* [Principles of judicial decision-making in the Polish legal system and the

Constitution of Republic of Poland and the European Convention of Human Rights] (pp. 61-78)

- Opaliński Bartłomiej, *Prawo do wolnych wyborów w świetle standardów Rady Europy* [The right to free elections in the light of the standards of the Council of Europe] (pp. 79-93)
- Medwid-Fidler Marta, *Rola Komisarza Praw Człowieka w upowszechnianiu standardów demokratycznych i prawnoczłowieczych Rady Europy* [The role of the Commissioner of Human Rights in popularizing legal and democratic standards of the Council of Europe] (pp. 94-104)
- Dybowska Agnieszka, *Ochrona praw młodzieży w świetle systemu aksjologicznego Rady Europy* [Protecting teenagers' rights in the light of the axiological system of the Council of Europe] (pp. 105-113)
- Kowalik Janina, *Finanse gminne w Polsce w świetle standardów Europejskiej Karty Samorządu Lokalnego* [Municipal finances in Poland in the light of standards of the European Charter of Local Self-Government] (pp. 114-128)
- Sieńczyło-Chlabicz Joanna, *Rozstrzyganie konfliktu zasad: wolność prasy a ochrona prywatności w orzecznictwie Europejskiego Trybunału Praw Człowieka* [Solving conflicts of principles: freedom of press and privacy protection in the case law of European Court of Human Rights] (pp. 129-147)
- Badźmirowska-Masłowska Katarzyna, *Media a terroryzm w świetle standardów Rady Europy. Współczesne wyzwania* [Media and terrorism in the light of standards of the Council of Europe. Current challenges] (pp. 148-161)
- Kos Agnieszka, *Granice manifestacji przynależności religijnej poprzez ubiór w optyce art. 9 Konwencji o ochronie praw człowieka i podstawowych wolności* [The limits of manifesting religious identity through clothing under art. 9 of the Convention on Human Rights] (pp. 162-174)
- Cichos Katarzyna, *Niepełnosprawność w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka* [Disability in the light of the case law of the European Courts of Human Rights] (pp. 175-189)
- Pieszczek Martyna, *Wpływ Konwencji o ochronie praw człowieka i podstawowych wolności na interpretację znamion obrony koniecznej* [The influence of the Convention on Human Rights on the interpretation of criteria of self-defence] (pp. 190-204)
- Walczak Agata, *Udostępnianie podejrzanemu i jego obrońcy akt postępowania przygotowawczego w związku ze stosowaniem tymczasowego aresztowania – standardy strasburskie a prawo polskie* [Access of suspects and their defence to proceedings in connection with pre-trial detention – Strasbourg standards and Polish law] (pp. 205-213)
- Pałka Karolina, *Standardy Rady Europy a przestrzeganie praw człowieka w Czeczenii* [Standards of the Council of Europe and protection of human rights in Chechnya] (pp. 214-233)
- Fedorova Alla, *Implementation of the European Convention on Human Rights and Fundamental Freedoms in Ukraine* (pp. 234-242)

- Lysenko Olena, *Rol Venecianskoj komissii v obespečenii političeskich prav v Ukraine* (pp. 243-252)
- Kosyło Andrij, *Procedura karna na Ukrainie a standardy Rady Europy* [Criminal procedure in Ukraine and the standards of the Council of Europe] (pp. 253-266)
- Vološinovič Oleg, *Problema realizacii prava na sudebnuju začitu v Ukrainie, Rossii, Belorusi i Respublike Polsza v kontekste reszenij Evropejskogo suda po pravam čeloveka* (pp. 267-285)
- Bielecki Leszek, *Systematyka praw podstawowych w Unii Europejskiej po Traktacie lizbońskim. Zarys zagadnienia* [Taxonomy of fundamental rights in the EU after the Treaty of Lisbon. An outline of the problem] (pp. 289-294)
- Sándor-Szalay Elisabeth, *EU and ECHR – de Facto and Formal Accession of the EU to the European Convention on Human Rights* (pp. 295-307)
- Schambeck Herbert, *Die EU und ihr Beitrag zur Entwicklung der Grundrechte* (pp. 308-315)
- Ciapała Jerzy, *Dylematy wokół pojmowania i wykonywania suwerenności w warunkach członkostwa w Unii Europejskiej* [Dilemmas on the conceptualization and enforcement of sovereignty in the European Union] (pp. 316-328)
- Wąsiewski Grzegorz J., *Suwerenność państw członkowskich Unii Europejskiej – wybrane zagadnienia* [Sovereignty of EU Member States – selected issues] (pp. 329-341)
- Németh Csaba, *Internationalization of Democratic Values and Civil Crisis Management Missions of the EU* (pp. 342-360)
- Karowiec Robert, *Oddziaływanie globalnego kryzysu finansowego na podstawowe wolności i prawa obywateli Unii Europejskiej* [Influence of the global financial crisis on the fundamental freedoms and rights of EU citizens] (pp. 361-369)
- Bsoul Magdalena, *Szanse rozwoju społeczeństwa obywatelskiego w krajach Unii Europejskiej* [Opportunitites for development of civil society in the countries of the European Union] (pp. 370-384)
- Jaskiernia Alicja, *Demokracja deliberatywna a polska debata w sprawie wprowadzenia ACTA* [Deliberative democracy and the Polish debate on implementing ACTA] (pp. 385-396)
- Marczewska-Rytko Maria, *Europejska inicjatywa obywatelska jako wyraz implementacji instytucji demokracji bezpośredniej na poziomie Unii Europejskiej* [European citizens initiative as an expression of implementation of the institution of direct democracy at the EU level] (pp. 397-407)
- Wójcicka Ewa, *Wpływ członkostwa Rzeczypospolitej Polskiej w Unii Europejskiej na prawo głosowania i kandydowania w wyborach lokalnych* [Influence of the membership of the Republic of Poland in the European Union on the voting and standing for local elections] (pp. 408-422)
- Menkes Jerzy, *Charakterystyka prawnicza: protokołu (nr 30) w sprawie stosowania Karty praw podstawowych Unii Europejskiej do Polski i Zjednoczonego Królestwa; 53. deklaracji Republiki Czeskiej i 61. deklaracji Rzeczypospolitej Polskiej w sprawie Karty praw podstawowych Unii Europejskiej; 62. deklaracji Rzeczpospolitej Polskiej*

dotyczącej Protokołu w sprawie stosowania Karty praw podstawowych Unii Europejskiej do Polski i Zjednoczonego Królestwa [Legal characteristics of Protocol (no. 30) on the Application of the Charter of Fundamental Rights to Poland and to the United Kingdom; the 53rd Declaration of the Czech Republic and the 61st Declaration of the Republic of Poland on the Charter of Fundamental Rights of EU; the 62nd Declaration concerning the Protocol on application of the Charter of Fundamental Rights to Poland and to the United Kingdom] (pp. 423-437)

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- Materna Robert, *Rola Agencji Praw Podstawowych w świetle Karty praw podstawowych Unii Europejskiej* [The role of the Agency of Fundamental Rights in the light of the Charter of Fundamental Rights] (pp. 449-457)
- Kasprzyk Wojciech, *Rola Rzecznika Praw Obywatelskich Unii Europejskiej* [The role of the Ombudsman of the European Union] (pp. 458-463)
- Uczkiewicz Jacek, *Europejski Trybunał Obrachunkowy – niezależny strażnik interesów finansowych obywateli Unii Europejskiej* [European Court of Auditors – independent guardian of financial interest of the EU citizens] (pp. 464-475)
- Vlabimirova Elena A., *Rol nacionalnych sudov gosudarstv-czelenov v implementacii prava Evropejskogo Sojuza* (pp. 476-480)
- Sobczak Jacek, *Ochrona danych osobowych – standardy unijne i rzeczywistość polska* [Protection of personal data – European standards and Polish reality] (pp. 481-505)
- Rzeszutko Małgorzata, *Ochrona praw mniejszości narodowych w systemie prawnym Unii Europejskiej* [Protection of national minorities rights in the EU legal system] (pp. 506-529)
- Complak Krystian, *Dyskryminacja wszystkich języków z wyjątkiem angielskiej mowy w świetle krajowych i unijnych standardów praw człowieka* [Discrimination of all languages except for English in the light of national and EU standards of human rights] (pp. 530-539)
- Kapka Marcin, *Prawo petycji do Parlamentu Europejskiego a system ochrony praw człowieka* [Right of petition to the European Parliement and the system of human rights protection] (pp. 550-558)
- Pietrusiński Mateusz, *Europejski Kodeks Dobrej Praktyki Administracyjnej jako wyraz standardów międzynarodowych propagowanych przez Rzecznika Praw Obywatelskich Unii Europejskiej* [European Code of Good Administrative Behaviour as an expression of international standards propagated by the Ombudsman of the European Union] (pp. 559-570)
- Chrobot Michał, *Standardy zawarte w "białej księdze" Unii Europejskiej a realizacja konstytucyjnego prawa do ochrony zdrowia* [Standards included in the "white book" of the European Union and the constitutional right to health protection] (pp. 571-581)
- Kopczyk Renata, *Wpływ standardów unijnych na funkcjonowanie sportu* [Influence of EU standards on the functioning of sport] (pp. 582-596)

- Bazylińska-Nagler Justyna, *Konsumenckie prawo do reprezentacji w Unii Europejskiej i w państwach członkowskich* [Consumer right of representation in the European Union and its Member States] (pp. 597-614)
- Klimas Marta, *Ochrona ofiar handlu ludźmi w regulacjach Unii Europejskiej* [Protection of victims of human trafficking in EU law] (pp. 615-628)
- Falkiewicz Ariel, *Zasada wzajemnego uznawania w sprawach karnych a ochrona praw jednostki. Uwagi na marginesie sprawy C-399/11 postępowanie karne przeciwko Stefano Melloniemu* [The principle of mutual recognition in criminal matters and protection of individual rights. Some comments on case C-399/11 Criminal proceeding against Stefano Melloni] (pp. 629-639)
- Hoc Stanisław, *Organy ochrony informacji niejawnych w państwach Organizacji Traktatu Północnoatlantyckiego i Unii Europejskiej* [Bodies responsible for protection of classified information in the NATO and EU] (pp. 640-647)

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- Gliszczyńska-Grabias Aleksandra, *Powszechny przegląd okresowy jako mechanizm kontrolny przestrzegania praw człowieka w systemie Organizacji Narodów Zjednoczonych* [Universal periodic review as a monitoring mechanism of observing human rights in the United Nations system] (pp. 24-33)
- Spryszak Kamil, *Suwerenność państwa a międzynarodowe obserwowanie wyborów* [State sovereignty and international election monitoring] (pp. 34-43)
- Sadovnikova Galina, *Wlijanie universal'nych i regional'nych mieždunarodnych standartov na izbiratel'nyje prava* (pp. 44-51)
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- Miodek Paweł, *Problem ochrony praw człowieka w korporacjach transnarodowych* [The problem of human rights protection in multinational corporations] (pp. 60-75)
- Menkes Marcin, *Global governance w zakresie praw pracowniczych i bezpieczeństwa socjalnego* [Global governance in the domain of employees' rights and social security] (pp. 76-87)
- Weiss Elżbieta, *Standardy społecznej odpowiedzialności przedsiębiorstwa w zakresie ochrony praw człowieka* [The standards of corporate social responsibility in the domain of human rights] (pp. 88-100)

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- Zieja Anna-Rola, *Znaczenie i metody działania Amnesty International w procesie ochrony praw człowieka na świecie* [The role and methods of actions of Amnesty International in the field of human rights] (pp. 110-123)
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- Wrońska Iwona, *Amerykańska Konwencja Praw Człowieka a stanowisko Kanady* [The American Convention of Human Rights and the Canadian position] (pp. 135-148)
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- Zgiep Luiza, *Wpływ orzecznictwa Trybunału Konstytucyjnego na postrzeganie podstawowych zasad konstytucyjnych w Rzeczypospolitej Polskiej* [The influence of the jurisprudence of the Constitutional Tribunal on the perception of fundamental constitutional principles in the Republic of Poland] (pp. 459- 470)
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- Bugajski Dariusz R., *Żegluga arktyczna w świetle prawa i praktyki międzynarodowej* [Arctic sailing in the light of international law and practice] (pp. 49-64)
- Ciechanowicz-McLean Janina, *Od prawnomiędzynarodowej ochrony środowiska Morza Bałtyckiego do zrównoważonego użytkowania zasobów naturalnych na obszarach morskich, czyli o dorobku Profesora Andrzeja Straburzyńskiego* [From the international legal environmental protection of the Baltic Sea to sustainable use of natural resources on maritime territories – On the heritage of Professor Andrzej Straburzyński] (pp. 65-72)
- Gilas Janusz, *Polski podręcznik prawa międzynarodowego* [Polish handbook of international law] (pp. 73-79)
- Godecki Zbigniew T., *Funkcja Rady Europejskiej w procedurze zmiany Traktatów* [Functioning of the Council of Europe in the process of amending treaties] (pp. 81-88)

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- Makowski Andrzej, *Kazusy M/V "Mavi Marmara" i "Flotylli Wolności" w świetle współczesnego prawa konfliktów zbrojnych na morzu* [The cases of M/V "Mavi Marmar" and "Freedom Flotilla" in the light of the contemporary law of maritime military conflicts] (pp. 127-141)
- Sylwestrzak Andrzej, *Suwerenność zewnętrzna i sprawiedliwość wewnętrzna w doktrynie Bodinusa* [External sovereignty and internal justice in the Bodinus doctrine] (pp. 197-212)
- Symonides Janusz, *Międzynarodowy Trybunał Prawa Morza – specyfika, orzecznictwo, perspektywy* [International Tribunal for the Law of the Sea – specificity, case law, perspectives] (pp. 213-234)
- Wasilewski Tadeusz, *Zasady delimitacji szelfu kontynentalnego – wybrane aspekty* [Rules of delimitation of the continental shelf – selected aspects] (pp. 249-259)
- Wiśniewski Adam, *O symbolach religijnych w orzecznictwie strasburskim* [On religious symbols in Strasbourg case law] (pp. 261-277)
- Zeidler Kamil, *Nowe zobowiązania międzynarodowe Polski w zakresie ochrony dziedzictwa kultury* [New international obligations of Poland concerning protection of cultural heritage] (pp. 333-344)
- Łasak Katarzyna, *Konwencja Europejska chroni prawo do rokowań zbiorowych* [The European Convention protects the right of collective bargaining] (pp. 103-114)
- Koziński Mirosław H., *Miejsce schronienia (Place of Refuge)* [Place of Refuge] (pp. 89-102)
- Pyć Dorota, *Odpowiedzialność za bezpieczeństwo statków i środowiska zgodnie z wymaganiami Kodeksu zarządzania bezpieczeństwem (Kodeksu ISM)* [Liability for the safety of ships and environment according to the International Safety Management Code] (pp. 181-196)
- Zalewski Wojciech, *Lemkinowski "genocyd" (ludobójstwo), czyli o walce idealizmu z Realpolitik* [Lemkin's "Genocide" – on the Conflict between Idealism and Realpolitik] (pp. 313-332)

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