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XLII POLISH YEARBOOK OF INTERNATIONAL LAW
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EDITORIAL

The war in Ukraine has presented major challenges to the international legal order. In particular, the Russian invasion has violated a number of fundamental principles of international law, including the prohibition on the use of force, the right to self-determination, and the protection of civilians. The war has also led to the commission of international crimes, including war crimes and crimes against humanity. At the same time, it has exposed the weaknesses of the existing international legal order. The UN Security Council has been unable to take effective actions to stop the war, and the International Criminal Court has been hampered by its lack of jurisdiction over Russian aggression. Despite these challenges, the war in Ukraine has also shown the resilience of international law. The international community has imposed significant sanctions on Russia, and there is a growing movement to hold Russian perpetrators of the core crimes criminally responsible. So perhaps international law still has a role to play in the future in preventing and resolving such conflicts.

The Russian aggression is at the centre of this volume with a special dedicated section ("The War in Ukraine"). We begin with an article by Anna Wyrozumska, who analyzes the role of international courts in the conflict in Ukraine, as well as the extent and effects of their interventions, taking into account existing jurisdictional limitations and the inability to enforce judgments. Jerzy Kranz examines the responsibility of Russians as a whole for the crimes committed in Ukraine, and concludes that while not all Russians are guilty of crimes, they all bear some degree of moral and political responsibility. Anastasiia Vorobiova explains how the International Military Tribunal's decision in the Nuremberg Trials is being used as part of Russian propaganda, and attempts to draw lessons for other international tribunals. The fourth article – by Tiina Pajuste and Julia Vassileva – focuses on the lack of inclusion of women in the Ukrainian peace process, highlighting its dissonance with existing international rules and practices. Dominika Pietkun investigates how the European Commission has addressed the existing gaps in the FDI Screening Regulation in response to the Russian aggression against Ukraine. Lastly, Aleksander Gubrynowicz explores the potential impact of the MH-17 judgments, delivered in 2022 by the District Court in The Hague, on the development of relevant international and domestic judicial practices.

Our General Articles section also consists of six texts. Małgosia Fitzmaurice's article delves into the human right to a clean environment and the rights of nature in the Anthropocene era. Joanna Markiewicz-Stanny addresses the issue of age assessment of foreign minors in Poland, evaluating the relevant Polish practices against European Union (EU) and international standards. The remaining texts revolve around EU law. Peter Hilpold and Julia Waibl analyze Ferdinand von Schirach's "Jeder Mensch" in their quest for ideas that could invigorate the discussion on necessary reforms of the EU. Łukasz Gruszczyński and Réka Friedery closely examine the 2016 migration crisis and its aftermath, investigating how the influx of migrants was exploited by populists within the Union. Izabela Jędrzejowska-Schiffauer, along with several other authors, provides a critical examination of the proposed directive on EU-wide human rights and environmental due diligence for businesses. The section concludes with Sylwia Mazur's article on the EU Temporary Protection Directive, in which she explores the complementary position that temporary protection holds within the Common European Asylum System.

The Russian invasion of Ukraine has also resulted in a number of actions by Polish authorities, which are presented in the Polish practice section. Oktawian Kuc discusses the issue of sovereign immunity in the practice of Polish courts with respect to disputes over real estate properties held by the Russian Federation in Warsaw. This is followed by Aleksandra Mężykowska's text on the resolutions of the Polish Parliament, the Parliamentary Assembly of the Council of Europe, and the European Parliament recognizing Russia as a terrorist state. The two resolutions of the Sejm and Senate are also reproduced here. The section concludes with the article of Katarzyna Strąk who analyses selected issues of Polish return law and practice in the light of the EU return policy and against the backdrop of the migration crises of 2015 and 2021-2022.

The final section of the Yearbook contains four reviews of recent publications in the field of public international and EU law. These include the book edited by Gruszczynski et al. on the crisis of the multilateral legal order (reviewed by Michał Kowalski); Kuc's monograph on the dialogue between domestic courts and the International Court of Justice (reviewed by Bartłomiej Krzan); Bernatt's book on the impact of populism on EU competition law (reviewed by Jakub Kociubiński); and Wu's book on law and politics regarding export restrictions (reviewed by Ewa Bujak).

We hope our readers will find all the texts in this new volume of the Yearbook intellectually stimulating.

Karolina Wierczyńska,
Łukasz Gruszczyński,
Aleksandra Mężykowska

SPECIAL SECTION: THE WAR IN UKRAINE

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*Anna Wyrozumska**

THE RUSSIAN "SPECIAL MILITARY OPERATION" IN UKRAINE BEFORE INTERNATIONAL COURTS

Abstract: *Following the so-called "special military operation", which was in fact an open aggression against Ukraine, Russia was expelled from the Council of Europe. This step has significant legal consequences, including for the jurisdiction of the European Court of Human Rights. Meanwhile, many individual applications were filed with the Court, and Ukraine brought an inter-State complaint against Russia. Ukraine has also triggered the International Court of Justice. The Court has already ordered provisional measures. The ICC Prosecutor has launched an investigation into the most serious international crimes, war crimes, crimes against humanity, and genocide in Ukraine and delivered arrest warrants against the Russian President and his Commissioner for Children's Rights. There is a serious discussion going on concerning the establishment of a special tribunal for the crime of aggression. This text deals with some aspects of the Russian "special military operation" cases before international courts. It attempts to identify what role the international courts may play in the new phase of the conflict in Ukraine and the extent and effect of their intervention, given the jurisdictional limitations and the inability to enforce judgments.*

Keywords: use of force, international courts, aggression in Ukraine, Russia and the ECHR, ECtHR, genocide, ICC investigation

INTRODUCTION

On 24 February 2022 Russia invaded Ukraine under the somewhat innocuous title of a "special military operation". However, the Russian aggression against Ukraine began much earlier. It led to the annexation of Crimea in 2014, the occupation of parts of eastern Ukraine, and the establishment of two separatist republics, Donetsk and Lugansk.

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Their independence was spectacularly, and contrary to international law, recognised by Russia (the occupying power) on 21 February 2022,[1] just days before the invasion.

The new brutal Russian armed attack provoked sharp, swift, and clear reactions from the international community.[2] Among others, on the same day the Committee of Ministers of the Council of Europe "condemned in the strongest terms the armed attack on Ukraine by the Russian Federation in violation of international law".[3] The following day, it suspended Russia from the Council of Europe (CoE)[4] and on 16 March 2022 expelled it from the organization.[5] As a consequence, six months later Russia ceased to be a party to the European Convention on Human Rights (ECHR). In the meantime, a number of individual applications have been brought to the European Court of Human Rights (ECtHR) in relation to the Russian aggression, and Ukraine has filed an inter-State complaint against Russia. Ukraine has also triggered the International Court of Justice (ICJ), under the Convention on the Prevention and Punishment of the Crime of Genocide, skilfully using one of Russia's main arguments justifying its "special military operation", i.e. alleging acts of genocide committed on Ukrainian territory. The Court has already managed to indicate provisional measures in the *Allegations of Genocide case (Ukraine v. Russian Federation)*.[6] In parallel, another court, the International Criminal Court (ICC), has become involved in the case.

However, the competence of international courts is limited by the extent to which the parties have consented to their jurisdiction. The ICJ can adjudicate in the *Allegations of genocide case* due to the compromissory clause in the Genocide Convention, to which both States are the parties. This article deals with some aspects of the "special military operation" cases already brought before the ICJ and the ECtHR and the actions taken, as well as those which could be taken by the ICC with regard to, *inter alia*, the crime of aggression. It attempts to show the challenges faced by international courts and examine what role they might play and

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[1] *See e.g.* the statement of the same date by the Secretary General of the Council of Europe, available at: https://www.coe.int/en/web/portal/-/statement-by-council-of-europe-secretary-general-marija-pejcinovic-buric-on-the-recognition-of-the-so-called-people-s-republics-of-donetsk-and-luhan-1 (accessed 30 April 2023).

[2] See in particular the UNGA resolution of 2 March 2022, *Aggression against Ukraine*, Doc. A/RES/ES-11/1, based on the United for Peace mechanism, passed by a vote of 141 States for, with 5 against, and 35 abstentions); Versailles Declaration of the Heads of State or Government of EU Member States, Informal meeting, Versailles, 11 March 2022.

[3] *Situation in Ukraine*, CM/Del/Dec(2022)1426bis/2.3, 24 February 2022.

[4] *Measures to be taken, including under Article 8 of the Statute of the Council of Europe*, 25 February 2022, CM/Del/Dec(2022)1426ter/2.3.

[5] *Resolution on the cessation of the membership of the Russian Federation to the Council of Europe*, 16 March 2022, CM/Res(2022)2.

[6] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, 16 March 2022.

what might be the scope and effect of their intervention, given the limitations on jurisdiction and the difficulties in enforcing their decisions.

1. ICJ – *ALLEGATIONS OF GENOCIDE CASE (UKRAINE V. RUSSIAN FEDERATION)*

The ICJ is the principal judicial organ of the United Nations, resolving disputes between States relating to the application of international law. Its decisions constitute an authoritative statement of the existence of international obligations.

Ukraine has already tried, successfully, to trigger the ICJ's jurisdiction in relation to the annexation of Crimea in 2014 and the situation in Eastern Ukraine. On 16 January 2017, it brought the case against Russia for violations of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. The Court was requested to determine whether the Russian Federation had an obligation to act and cooperate in preventing and combating the financing of terrorism in the context of the events in Eastern Ukraine, and whether it breached the 1965 Convention through discriminatory measures taken against Crimean Tatars and the Ukrainian community in Crimea. On 17 April 2017 the ICJ indicated provisional measures (at Ukraine's request),[7] and on 8 November 2019 delivered its judgment on preliminary objections. The Court concluded that it has jurisdiction to entertain the claims made by Ukraine under both treaties, and that Ukraine's application with regard to those claims is admissible.[8] The Court's decision on the merits is pending.[9]

Ukraine has limited prospects to initiate any proceedings against Russia, both in relation to the 2014 invasion and with respect to the current events, let alone file a complaint directly relating to Russia's aggression. Indeed, neither party made a declaration recognising the Court's compulsory jurisdiction under Art. 36(2) of the ICJ Statute. It was only possible to submit a dispute on the basis of Art. 36(1) of the Statute, indicating the relevant agreement to which both States are parties and which contains their consent to the jurisdiction of the Court. To use ICJ Judge

[7] On the Russian challenge to provisional measures, *see* the ICJ judgment of 8 November 2019, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, Preliminary Objections, ICJ Rep 2019, paras. 9-11.

[8] *Ibidem*.

[9] For more on this subject and on cases brought by Ukraine before other courts, *see, inter alia*, G. Nuridzhanian, *Ukraine v. Russia in International Courts and Tribunals*, EJIL: Talk!, 9 March 2016, available at: https://www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/ (accessed 30 April 2023).

Greenwood's term, in such cases there is a "Cinderella problem". A State has to try forcefully, perhaps clumsily, to squeeze itself into the glass slipper of a jurisdiction clause that is really far too small for the case it wants to bring.[10]

This time however, Cinderella has rather neatly squeezed[11] the issue of the "special military operation" into the framework of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Art. IX of which provides that: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

In its application of 26 February 2022 initiating the proceedings, Ukraine sought a declaration, *inter alia*, that Russia falsely claimed that acts of genocide had taken place in the Lugansk and Donetsk regions of Ukraine. Therefore, it could not take any action to prevent or punish the alleged genocide, recognise the independence of the so-called Donetsk People's Republic and the so-called Luhansk People's Republic, or initiate and conduct a "special military operation" on 24 February 2022 against Ukraine. Ukraine further demanded that full compensation be awarded for the damage caused by Russia as a consequence of it having taken actions on the basis of a false allegation of genocide.

For the time being, the Court has only decided on provisional measures requested by Ukraine. The ICJ ordered Russia to, firstly, immediately suspend the military operations launched on 24 February 2022 on the territory of Ukraine (by a vote of 13:2); secondly, to ensure that no military or irregular armed units that may be directed or supported by it, as well as any organisations or persons that may be subject to its control, direction or influence; or take any steps to support the military operations referred to above (by a vote of 13:2). Thirdly, the ICJ ordered both parties to refrain from any actions that could intensify or extend the conflict (unanimous vote).[12]

The first two measures, adopted over the objections of the Russian and Chinese judges (judges Gevorgian and Xue), essentially correspond to Ukraine's requests. The third measure was modified from the original proposal, as it was to be addressed

[10] Quoted by Nuridzhanian (*ibidem*).

[11] *See* J. Kranz, *Ukraina ma dobre karty w sporze z Rosją przed Międzynarodowym Trybunałem Sprawiedliwości. Zarządzenie Trybunału z 16 marca 2022 r. w sprawie środków tymczasowych* [Ukraine has good cards in its dispute with Russia before the International Court of Justice. Order of the Court of 16 March 2022 on provisional measures], Monitor Konstytucyjny, 18 March 2022, available at: https://monitorkonstytucyjny.eu/archiwa/21401 (accessed 30 April 2023).

[12] ICJ, Order of 16 March 2022. *See e.g.* M. Milanovic, *ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe*, EJIL: Talk!, 16 March 2022, available at: https://bit.ly/3HdfwEa (accessed 30 April 2023).

only to Russia.[13] On the other hand, the request to impose on Russia an obligation to report on the actions taken to implement the provisional measures was rejected by the Court.

Admittedly, the decision on provisional measures does not prejudge the question of the scope of the ICJ's jurisdiction or the decision on the merits, but it does establish that the Court has *prima facie* jurisdiction. First, the ICJ rejected the Russian allegation[14] that the Genocide Convention did not apply because the formal basis for the "special military operation" was the right to self-defence (Art. 51 of the UN Charter and customary law).[15] The Court pointed to a number of statements and actions by the Russian authorities from 2014 onwards that explicitly referred to genocide on the territory of Ukraine and the need to stop it as a goal of the use of force,[16] including a published address by President Putin. Its reading leaves no doubts: "We had to stop this nightmare – a genocide against the millions of people living there who are pinning their hopes only on Russia, on us alon".. And further: "[its] purpose is to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years. And to this end, we will seek the demilitarization and de-Nazification of Ukraine, as well as the prosecution of those who have committed numerous bloody crimes against civilians, including citizens of the Russian Federation".[17]

Second, the ICJ appears to have accepted Ukraine's interpretation of Arts. I and IV of the Genocide Convention, which includes the right not to be subjected to false allegations of genocide that are used to justify the use of force.[18] It is telling that the Court said that it was not presented with evidence substantiating the Russian

[13] Judge ad hoc Daudet considered that this measure should only be addressed to the Russian Federation, which has been explicitly identified by the UNGA as the perpetrator of the aggression against Ukraine, ICJ Order of 16 March 2022, Declaration of Judge ad hoc Daudet.

[14] ICJ, Order of 16 March 2022, paras. 32-34.

[15] Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case, 7 March 2022, para. 15, available at: https://www.icj-cij.org/sites/default/files/case-related/182/182-20220307-OTH-01-00-EN.pdf (accessed 30 April 2023).

[16] ICJ, Order of 16 March 2022, paras. 37-41. *See also* the Separate Opinion of Judge Robinson.

[17] Annex to the letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, *Address by the President of the Russian Federation*, 24 February 2022, Doc. Security Council S/2022/154.

[18] *See* Declaration of Vice-President Gevorgian. Judge Gevorgian found the argument to be of the same nature as the rejected allegations in cases brought by Yugoslavia against several NATO States under the Genocide Convention. In his view, the present dispute concerns the use of force by the Russian Federation on Ukrainian territory. However, the Genocide Convention does not regulate the use of force, nor does the use of force of itself constitute an act of genocide. The Court was clear on this point in the 1999 *Legality of Use of Force cases (Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order, 2 June 1999, ICJ Rep 1999, p. 138, para. 40). Similarly, *see* Declaration of Judge Xue. Differently Declaration of Judge Nolte, which indicates why the present case must be distinguished from the Legality of Use of Force cases. Judge Nolte rightly emphasises that Ukraine's request does not concern the question of whether the "special military operation" constitutes genocide, but whether a military operation to deter and punish those guilty of alleged genocide is compatible with the Convention.

accusation, and moreover that "it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide". Under these circumstances, the Court concluded that "Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine".[19]

The provisional measures indicated by the ICJ under Art. 41 of the Statute are binding on the party to which they are addressed.[20] However, the mechanism for enforcing them is rather weak.[21] Art. 94(2) of the UN Charter does not apply because it refers explicitly to the judgments.[22] Art. 41(2) of the ICJ Statute, on the other hand, provides only that "pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council". Nonetheless, the failure to implement provisional measures gives rise to the international responsibility of the State. This may be assessed by the ICJ in further phases of the proceedings, and the Court may award damages.[23]

Russia has manifestly failed to comply with the Court's orders. Its position was rather clear from the outset; it had already communicated to the Court on 7 March 2022 that it would not participate in the oral proceedings because it believed that the Court had no jurisdiction.[24] According to ICJ case law, the absence of a party does not constitute an obstacle to the proceedings and does not affect the validity

[19] ICJ, Order of 16 March 2022, paras. 59-60.

[20] *Ibidem*, para. 84. The Court reaffirmed the position it took in the *LaGrand case* (*Germany v. United States of America*), Judgment, ICJ Rep 2001, para. 109.

[21] *See* D.S. Borjas, *The ICJ Order in Ukraine v. Russia: Quo Vadis?*, Völkerrechtsblog, 28 March 2022, available at: https://voelkerrechtsblog.org/the-icj-order-in-ukraine-v-russia/ (accessed 30 April 2023). The author specifically considers the possibility for Ukraine to have recourse to the UN Charter to enforce the content of the Order under Chapter VI.

[22] *See* ICJ, Judgment of 24 February 1982, *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, ICJ Rep 1982, para. 29 *in fine*. Art. 94(2) of the UN Charter reads: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary make recommendations or decide upon measures to be taken to give effect to the judgment".

[23] *See e.g.* ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, para. 469.

[24] Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case, *supra* note 15; *see also* ICJ, Order of 16 March 2022, paras. 12 and 15. *Kremlin Rejects Top UN Court's Order to Halt Ukraine Invasion*, The Moscow Times, 17 March 2022, available at: https://www.themoscowtimes.com/2022/03/17/kremlin-rejects-top-un-courts-order-to-halt-ukraine-invasion-a76975 (accessed 30 April 2023) – citing a statement by D. Peskov, spokesman for President Putin.

of the provisional measures ordered.[25] Consequently, the ICJ may pass judgment on the merits despite Russia's non-participation.

However, in an exchange of letters with the ICJ on setting deadlines for the submission of memoranda, Russia claims that the government is still considering the question of further participation in the proceedings. The Court set a date of 23 September 2022 for Ukraine to file its memorandum, and 23 March 2023 for the Russian Federation.[26] These deadlines have been extended. A final decision will therefore have to wait.

In the meantime, declarations for interventions (under Art. 63 of the Statute) to support the Ukrainian arguments have been submitted by thirty-three States parties[27] to the Genocide Convention, including by Poland, which maintained that "[t]he Convention's object to protect the most elementary principles of morality also prohibits any possibility of a State Party abusing its provisions by other means. It would undermine the Convention's credibility as a universal instrument to outlaw the most abhorrent crime of genocide if its authority could be abused by any State Party without giving the victim of such abuse the opportunity of having recourse to the Court".[28] In its conclusion, Poland concurred with the interpretation of the Genocide Convention that invoking a manifestly ill–founded allegation of genocide as justification for the use of force against another State is in clear contravention of Art. I of the Genocide Convention.[29]

Apart from the fact that the ICJ Order of 16 March 2022 has not yet been implemented, Ukraine has achieved its first successes in the case. The Court acknowledged that the use of force by Russia was not only brutal but also raises very serious issues of international law,[30] and took the opportunity to speak out on these matters. Moreover, Ukraine gained significant support from the countries intervening in the proceedings. Judges should not ignore this, just as fake application of the law should not be ignored.

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[25] ICJ, Order of 16 March 2022, para. 23. Pursuant to Art. 53(1) of the Statute: "Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim".

[26] *Ibidem*.

[27] Latvia (21 July 2022); Lithuania, New Zealand, United Kingdom, Germany, United States of America, Sweden, France, Romania, Italy, Poland (15 September 2022); Denmark, Ireland, Finland, Estonia, Spain, Australia, Portugal, Austria, Luxemburg, Greece, Croatia, Czechia, Bulgaria, Malta, Norway, Belgium, Canada and the Netherlands, Slovakia, Slovenia, Cyprus, Liechtenstein (15 December 2022).

[28] Declaration of intervention under Article 63 of the Statute of the Court submitted by the Republic of Poland of 15 September 2022, para. 34.

[29] *Ibidem*, para. 42.

[30] ICJ, Order, 16 March 2022, paras. 18 and 75.

Even if the ICJ's judgment on the merits is also not implemented, its findings may be relevant to international law in general and the assessment of the legal implications of Russia's "special military operation".

2. THE "SPECIAL MILITARY OPERATION" AT THE ECTHR

2.1. Early response

Cases against Russia over "the special military operation" in Ukraine have also been brought to the ECtHR by a number of private parties, and as early as 28 February 2022 by Ukraine itself (*Ukraine v. Russia (X)*[31]).

In turn, the Russian Federation announced its decision to withdraw from the Council of Europe and from the European Convention on Human Rights. The ECtHR granted urgent interim measures and the CoE made the unprecedented decision on the exclusion of the Russian Federation from the organization. Here we will look at the reaction of the CoE and the ECtHR, focusing on, *inter alia*, the developments in its jurisprudence on armed conflicts.

As has already been indicated, the early ECtHR's response to Russia's special military operation was the adoption of urgent interim measures under Rule 39 of the Court.[32] It first did so on 1 March 2022 in the case *Ukraine v. Russia (X)*, in response to the Ukrainian request of 28 February 2022 to indicate interim measures against Russia with regard to "massive human rights violations committed by Russian troops during the military aggression against the sovereign territory of Ukraine".[33] Unlike the ICJ's orders on provisional measures, the ECtHR's orders

[31] *Ukraine v. Russia* (X) (App. No. 11055/22). The Court received the completed application on 23 June 2022. Ukraine alleges, *inter alia*, that Russia has unlawfully invaded Ukraine and that its invasion and occupation of parts of Ukraine is ongoing. Russian military and/or separatist or other irregular paramilitary forces under the control of the Russian authorities at the highest levels, up to and including the President, are carrying out ruthless, inhumane, indiscriminate attacks on civilians and their property (Press Release ECHR 220 (2022), 28 June 2022). On 17 February 2023 the Grand Chamber decided to join the case to the inter-State applications in *Ukraine and the Netherlands v. Russia*, which were already pending before it and which were declared partially admissible. The joined case will be referred to further as *Ukraine and the Netherlands v. Russia* (App. Nos. 8019/16, 43800/14, 28525/20 and 11055/22).

[32] Rule 39 of the Rules of Court reads as follows: "(1) The Chamber or, where appropriate, the President of the Section or the duty judge designated in accordance with paragraph 4 of this Rule may, at the request of a party or other interested person or on his own initiative, indicate to the parties any provisional measure which, in his opinion, should be adopted in the interests of the parties or the proper conduct of the proceedings. (2) If it is considered appropriate, the Committee of Ministers [of the Council of Europe] may be informed urgently of the measure adopted in a particular case. (3) The Chamber or, where appropriate, the President of the Section or the duty judge appointed in accordance with paragraph 4 of this Rule may request information from the parties on any matter relating to the implementation of any of the interim measures indicated. (4) The President of the Tribunal may appoint the Vice-Presidents of the Section as duty judges to decide on applications for interim measures".

[33] Press Release ECHR 068 (2022), 1 March 2022, *The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory*.

on interim measures are not made public. The Court's Press Release announcing the decision of 1 March 2022 informed only that Russia was called upon to refrain from armed attacks on civilians and civilian facilities, including dwellings, emergency vehicles and other specially protected civilian facilities such as schools and hospitals, and to immediately ensure the safety of medical facilities, personnel and emergency vehicles in territory under attack or siege by Russian troops. The Russian government was requested to inform the Court as soon as possible of the measures taken to ensure full compliance with the (ECHR). Finally, the Court decided to give immediate notice of its decision to the Committee of Ministers of the CoE (pursuant to Rule 39 (2) of the Rules of Court).

Secondly, the ECtHR indicated interim measures in relation to a number of individual cases of persons hiding in various types of buildings, fearing for their lives due to the continuous shelling and shooting, without (or with limited) access to food, health care, water, sanitation, electricity and other related services necessary for survival, who were in need of humanitarian assistance and safe evacuation. In the decision of 4 March 2022,[34] referring to the general nature of the measures indicated on 1 March 2022 in the inter-State case, the ECtHR specified that they also cover any complaint brought by the above-mentioned persons who provide sufficient evidence showing that they face a serious and imminent threat of irreparable harm to their physical integrity and/or right to life. In addition, the Court called upon Russia to ensure unimpeded access for civilians to safe evacuation routes, health care, food and other essential supplies, and the rapid and free flow of humanitarian assistance.

The scope of the interim measures has since slightly changed, as Ukraine requested that they be extended in view of the developments in Ukraine.[35]

[34] Press Release ECHR 073 (2022), 4 March 2022, *Decision of the Court on requests for interim measures in individual applications concerning Russian military operations on Ukrainian territory*.

[35] Press Release ECHR 116 (2022), *Expansion of interim measures in relation to Russian military action in Ukraine*, 1 April 2022. The ECtHR decided to suspend the processing of applications against Ukraine as requested by its government (Press Release ECHR 069 (2022), 2 March 2022). In that contest another decision of the Court is also worth noting, although it does not directly concern the "special military operation". On 10 March 2022 the Court imposed interim measures against Russia for its actions blocking independent media in Russia that reported on military actions in Ukraine, in *ANO RID Novaya Gazeta and Others v. Russia* (App. No. 11884/22) – Press Release ECHR 084 (2022), 10 March 2022, *European Court applies urgent interim measure in the case of the Russian daily newspaper Novaya Gazeta*. The complaint was filed by two Russian companies and two Russian citizens, including D.A. Muratov, Nobel laureate and publisher of Novaya Gazeta, who applied for interim measures.

2.2. Binding nature of interim measures imposed by the ECtHR

The ECHR does not contain any provisions on interim measures. They are referred to only in Rule 39 of the Rules of Court[36] but their binding nature has been confirmed in a number of judgments on individual applications. The Court clarified that a failure by a State which had ratified the Convention to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed by Art. 34 ECHR and the State's formal undertaking in Art. 1 ECHR[37] to protect the rights and freedoms in the Convention.[38] Similar reasoning can be applied to inter-State proceedings based on Art. 33 ECHR.[39] However, this does not change the grim picture of the (in)effectiveness of the interim measures.[40]

2.3. Interim measures in proceedings concerning armed conflicts

The Court has already imposed interim measures in proceedings concerning armed conflicts, including in cases relating to the situation in Ukraine (events in Crimea, eastern Ukraine, and the Sea of Azov).

However, their effectiveness is not high, especially when they are formulated in general terms, as can be seen in the case of the Nagorno-Karabakh dispute (*Armenia v. Azerbaijan*[41]). In that case the Court urged the parties to protect the rights under the ECHR and to refrain from military action. Inasmuch as this did not result in a de-escalation of the conflict, the Court identified further measures, equally general. The ECtHR called on all States directly or indirectly involved in the Nagorno-Karabakh conflict to refrain from actions that contribute to violations of the Convention.[42] The general formulation of such measures was much criticised,

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[36] First applied in the dispute *Greece v. United Kingdom,* Commission Decision of 2 June 1956, No. 176/56, at the request of Greece. The practice of the 1960s and 1970s indicated respect for provisional measures, even if they were not mentioned in the ECHR. *See* C. Burbano Herrera, Y. Haeck, *Letting States off the Hook? The Paradox of the Legal Consequences following State Non-compliance with Provisional Measures in the Inter-American and European Human Rights Systems, 2*8(3) Netherlands Quarterly of Human Rights 332 (2010), pp. 336-340. On the discussion related to their binding nature, *see* pp. 345-356.

[37] Art. 1 ECHR reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms set forth in Chapter I of this Convention".

[38] ECtHR (GC), *Mamatkulov and Askarov v. Turkey* (App. Nos. 46827/99 46951/99), 4 February 2005.

[39] Art. 33 ECHR reads: "Any High Contracting Party may bring a complaint before the Court if it considers that another High Contracting Party has violated the provisions of this Convention or its Protocols".

[40] Provisional measures imposed in inter-State proceedings are often not implemented and for this reason are also criticised. *See e.g.* P. Leach, *Ukraine, Russia and Crimea in the European Court of Human Rights,* EJIL: Talk!, 19 March 2014, available at: https://bit.ly/3oUhpiY; V.P. Tzevelekos, *On the value of interim measures by the ECtHR on inter-state disputes*, Strasbourg Observers, 3 February 2021, available at: https://bit.ly/3n51o9j (both accessed 30 April 2023).

[41] *Armenia v. Azerbaijan* (App. No. 42521/20), Press Release ECHR 265 (2020), 30 September 2020.

[42] The Court therefore imposed further measures on 6 October 2020, in relation to the same conflict but between slightly different States, in *Armenia v. Turkey* (App. No. 43517/20), Press Release ECHR 276 (2020), 6 October 2020.

in particular because it was not clear what needed to be done to implement them and, consequently, whether they had been carried out.[43]

This seems to have been the reason why Ukraine's requests for interim measures were detailed and referred to specific features of the successive phases of the conflict.[44]

The ECtHR's response towards most of the requests may seem simplistic. In the decision communicated on 1 April 2022 the Court recalled the interim measures of 1 and 4 March 2022 and emphasised that they must be understood as covering Ukraine's current requests.[45] Although the decision takes the indirect form of listing such interim measures, it is clear what Russia should do.

It is also noteworthy that when Russia started abducting and forcibly deporting large numbers of civilians, including children, to the Russian Federation, Ukraine requested that it be indicated to the Russian Federation, also in case *Ukraine v. Russia (X)*, that it should ensure free access for civilians to safe evacuation routes approved by the Government of Ukraine, and that the said evacuation routes should allow civilians to seek safe refuge in Ukraine or third countries, excluding the Russian Federation or Belarus. The Court answered that the request is covered by the interim measures of 4 March 2022, but emphasized a novelty: the Court specifically obliged Russia to secure evacuation routes for civilians enabling them to take refuge in safer regions of Ukraine. In this way, Russia's "special military operation" resulted in the ECtHR imposing such an obligation on the State for the first time.

2.4. Confirmation of the application of the ECHR in time of armed conflict

Even if the interim measures ordered by the ECtHR in relation to the "special military operation" are not effective, they nevertheless have their importance. They unequivocally illustrate that Russia is committing grave, regular and continuing violations of human rights during an armed conflict that it has started and does not intend to end. Moreover, they augur a departure by the ECtHR from the

[43] K. Istrefi, A. Buyse, *Strasbourg Court issues interim measures against Turkey regarding the Nagorno-Karabakh conflict,* ECHR Blog, 7 October 2020, available at: https://bit.ly/3LC3AOK (accessed 30 April 2023).

[44] In a request dated 16 March 2022, as well as in further letters to the Court, Ukraine demanded, e.g., that Russia not take any steps, whether by further attacking, interrupting the power supply or in any other way, likely to diminish the safety and security of nuclear facilities in Ukraine and to protect the fundamental rights of all workers currently detained at such sites. Ukraine also asked the Court to order Russia to cease all operations by Russian forces or agents aimed at the assassination (or abduction or disappearance) of civilian leaders of Ukraine and other Ukrainian citizens, and to immediately protect the fundamental rights of at least the chairman of the village of Nikolske (Mr. Vasyl Mitko), the Mayor of Dniprorudne (Mr. Yevhen Matveyev) and the Chairman of the Melitopol District Council (Mr. Sergei Pryym), all abducted by Russian agents between 11 and 13 March 2022.

[45] Press release ECHR 116 (2022), 1 April 2022, *Expansion of interim measures in relation to Russian military action in Ukraine*.

much-criticised[46] limitation of the ECtHR's jurisdiction in favour of humanitarian law, presented in its 2021 judgment in *Georgia v. Russia (II)*[47] concerning the 2008 war in South Ossetia and Abkhazia.

In *Georgia v. Russia (II)*, Georgia alleged that Russia had committed a number of serious, systematic violations of the ECHR. In the judgment, the ECtHR exonerated Russia of responsibility for its actions in the conflict territory during the initial, most heated period of the conflict (i.e. 8-12 August 2008) by referring to the concept of *effective control* developed earlier. The ECtHR observed that "in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict, one cannot generally speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area".[48]

Thus, the ECtHR considered that a war zone creates a situation of chaos, in respect of which it cannot be said who has effective control over the territory. On this basis, Russia is not liable for violations of the ECHR by virtue of extraterritorial jurisdiction (for actions outside its territory). The Court noted that "having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date".[49]

This part of the ruling marked a victory for Russia, although the ECtHR acknowledged Russia's responsibility for actions carried out in the later phase of the conflict. But the judgment gave the impression that the ECtHR would seek to refrain from deciding cases involving extensive human rights violations in armed conflicts. This, in turn, was met with a sharp reaction from three judges (Yudkivska, Wojtyczek, Chanyuria) in these proceedings. The dissenting judges specifically referred to paragraph 141 of the judgment, stating that

> [T]he role of this Court consists precisely in dealing in priority with difficult cases characterised by "the large number of alleged victims and contested incidents, the magnitude

[46] I. Risini, *Human Rights in the Line of Fire: Georgia v. Russia (II) Before the European Court of Human Rights*, Verfassungsblog, 28 January 2021, available at: https://verfassungsblog.de/human-rights-in-the-line-of-fire/ (accessed 30 April 2023); K. Dzehtsiarou, *Georgia v. Russia II*, 115(2) American Journal of International Law 288 (2021).

[47] ECtHR, *Georgia v. Russia (II)* (App. No. 38263/08), 21 January 2021.

[48] *Ibidem*, para. 126.

[49] *Ibidem*, para. 141.

> of the evidence produced, and the difficulty in establishing the relevant circumstances". Moreover, "the fact that such situations are predominantly regulated by legal norms other than those of the Convention" should not be an obstacle for the application of the Convention. Furthermore, we are not proposing that the Court should "develop its case-law beyond the understanding of the notion of 'jurisdiction' as established to date" but rather that it should confer more consistency on the general principles established in the case-law and apply those principles in a more coherent way.[50]

The interim measures indicated by the ECtHR against Russia in the context of the "special military operation" are far-reaching and quite detailed. They certainly confirm the application of the ECHR also in the acute phase of an armed conflict. This may mark a shift in the approach to the relationship between human rights and humanitarian law.

2.5. Impact of Russia's exclusion from the Council of Europe on cases before the ECtHR

The Russian Federation was expelled from the Council of Europe for its "special military operation" in Ukraine as early as on 16 March 2022 under Art. 8 of the CoE Statute. This provision was used for the first time in its history, initially to suspend Russia from membership and, after a short time, to remove it from the organisation. It reads as following: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine".

The basic premise for the application of Art. 8 is a serious breach of Art. 3, which obliges Member States to uphold the principle of the rule of law; to ensure respect for human rights for all persons within their jurisdiction; and to cooperate sincerely and effectively to achieve the objectives of the CoE.[51] Thus Russia's expulsion from the CoE implied that its aggression against Ukraine constitutes a serious breach of its obligations under Art. 3 of the Statute,[52] which sets an extremely high threshold for the application of Art. 8.

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[50] *Ibidem*, joined partly dissenting opinion of judges Yudkivska, Wojtyczek, Chanturia, para. 9. *See also* the Concurring opinion of Judge Keller, para. 11.

[51] Art. 3 of the Statute of the CoE of 5 May 1949 states: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I".

[52] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, adopted by the Committee of Ministers on 16 March 2022 at the 1428th meeting of the Ministers' Deputies.

Several important questions arise in connection with these developments, including the definition of the threshold for a "serious violation" of Art. 3 of the Statute; the interpretation of Art. 8; and the relationship between the Art. 8 procedure and the termination of the ECHR with regard to Russia. We will only briefly address the first two issues. However, it is worth emphasising that it was only the aggression against Ukraine that prompted the Committee of Ministers to apply Art. 8 of the Statute. This marks the end of the policy pursued towards Russia from the very beginning of its membership of the CoE. Russia was admitted to the CoE in 1996 notwithstanding its serious human rights violations in Chechnya.[53] Nor was it removed despite its armed involvement in Chechnya since 1999; in Georgia in 2008; its annexation of Crimea in 2014; its actions in the Donbass in 2014; and its failure to comply with ECtHR judgments and the establishment of a special constitutional mechanism for this purpose in 2015.[54]

Legitimate questions therefore arise as to how the CoE will respond to violations of Art. 3 of the Statute, and whether it will maintain the high threshold of a "serious violation" resulting from the Russian precedent, or loosen it; as well as whether this is a turning point marking a crisis for the organisation, or rather an impulse for its increased role in the protection of the rule of law and the prevention of conflicts.[55] This first use of Art. 8 of the Statute comes at a difficult time, when systemic violations of human rights and the rule of law are taking place in several other Member States, including Poland. It makes the threat of suspension and expulsion more credible also for them, especially given that the Council of Europe has been criticised for cautious, late, and weak responses to such violations.[56]

However, let us return here to the Russian precedent. It demonstrated the inadequacy of the provisions of the Statute and the ECHR to meet the new challenges. Art. 8 of the Statute does not provide for the immediate exclusion of the State from the organisation. It specifies that the Committee of Ministers should first request a Member State to withdraw on the basis of Art. 7 of the Statute, and only after a Member State refuses to do so can it be excluded from the organisation.

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[53] P.A. Jordan, *Russia's Accession to the Council of Europe and Compliance with European Human Rights Norms*, Demokratizatsiya 2003, available at: https://demokratizatsiya.pub/archives/11-2_Jordan.PDF (accessed 30 April 2023).

[54] Venice Commission, *Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation,* Opinion No. 832/2015, CDL-REF(2016)006, Strasbourg, 20 January 2016.

[55] A. Forde, *From Grey Zones to Red Lines: Implications of the Ukraine Conflict on Europe's Human Rights System*, Völkerrechtsblog, 1 March 2022, available at: https://voelkerrechtsblog.org/from-grey-zones-to-red-lines/ (accessed 30 April 2023).

[56] E. Demir-Gürsel, *The Council of Europe's Sharp Turn: Russia's Expulsion and its Possible Implications for Other Member States*, Verfassungsblog, 25 March 2022, available at: https://voelkerrechtsblog.org/from-grey-zones-to-red-lines/ (accessed 30 April 2023).

Meanwhile, Russia had already notified its intention to withdraw from the CoE and to denounce the ECHR.[57]

It can therefore be argued that the Committee's decision to immediately expel Russia from the CoE was incompatible with the Statute.[58] Leaving aside the detailed consideration of this issue, the procedure is relevant for determining the date on which Russia ceased to be a member of the Council, and consequently a party to the ECHR. If Art. 7 of the Statute had been applied, according to its wording Russia would have remained a member of the Council until the end of the 2022 financial year,[59] although it would still be suspended.

In a resolution of 16 March 2022 the Committee of Ministers decided that, as of that date, the Russian Federation "ceases to be a member".[60] Does this mean it ceased to be bound by the ECHR on the same date? The ECHR does not contain a provision on the consequences of a State's immediate exclusion from the CoE, but Art. 58(3) ECHR stipulates that a contracting party "which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions".

But what does the term "the same conditions" mean? Did Russia cease to be a party to the Convention on 16 March 2022? In view of these ambiguities the ECtHR adopted a resolution clarifying that the Russian Federation will remain a party to the ECHR until 16 September 2022, i.e. for another six months from the date of its exclusion.[61] The ECtHR did not give reasons for its decision, but nevertheless appears to interpret the phrase "under the same conditions" as referring to

[57] The Resolution of the Committee of Ministers on the exclusion of the Russian Federation acknowledges that Russia "has already informed the Secretary General of its withdrawal", CM/Res(2022)2, 16 March 2022.

[58] M. Blanco, *A Backdoor Exit from the European Convention on Human Rights: Russia, the Council of Europe and Article 58(3) ECHR*, Verfassungsblog, 5 April 2022, available at: https://bit.ly/3AzEBW8 (accessed 30 April 2023).

[59] Art. 7 reads: "Any member of the Council of Europe may withdraw from it by formally notifying the Secretary-General of its intention to withdraw. The withdrawal shall take effect at the end of the financial year in which it is notified, if the notification is made within the first nine months of that financial year. If the notification is made during the last three months of the financial year, it shall take effect at the end of the following financial year".

[60] CM/Res(2022)2, 16 March 2022.

[61] Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, 22 March 2022. In paragraph 1 of the Resolution, the ECtHR declares that: "(1) the Russian Federation ceases to be a High Contracting Party to the Convention on 16 September 2022. (2) the Court shall remain competent to hear complaints against the Russian Federation in respect of acts or omissions which may constitute a violation of the Convention provided that they have occurred by 16 September 2022. (3) The suspension of the consideration of all complaints against the Russian Federation pursuant to the order of the President of the Tribunal of 16 March 2022 is lifted with immediate effect. (4) This Resolution shall be without prejudice to the consideration of any legal issues relating to the effects of the cessation of the Russian Federation's membership in the Council of Europe that may arise in the exercise by the Tribunal of its competence under the Convention to hear cases brought before it".

the conditions provided for in Art. 58(1) and (2) to the voluntary withdrawal from the Convention. Art. 58(1) ECHR reads that "a contracting party may denounce the Convention after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe"; and according to paragraph 2 – a denunciation shall not have the effect of releasing the contracting party from its obligations under the Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

It is also possible to consider that the decision of the ECtHR is incompatible with the Statute or the ECHR.[62] However, the Court's interpretation is both possible and moreover pragmatic.

Accordingly, the ECtHR will consider applications against Russia for any violations of the ECHR occurring until 16 September 2022.[63] Recent judgments and decisions by the ECtHR in two Grand Chamber and two Chamber cases have confirmed this scope of the Court's jurisdiction.[64] In *Svetova and Others v. Russia* of 24 January 2023, the Court specifically addressed the issue of Russia's failure to cooperate in the proceedings, in this case by not submitting written observations. The Court noted that this did not prevent the Court from examining the case, and that even though Russia had ceased to be a party to the Convention, it still had a duty to cooperate and to provide all necessary facilities for the effective examination of applications (Arts. 34 and 38 and Rule 44A of the Rules of Court).

And last but not least, the Court has finally decided on the situation of the Russian judge, which so far has raised some doubts. The Russian judge still sat on the panel deciding the *Fedotova* case (judgment of 17 January 2023).[65] It was different in the two subsequent cases (*Kutayev v. Russia* and *Svetova and Others v. Russia*).

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[62] *See e.g.* Blanco, *supra* note 58.

[63] Press release ECHR 036 (2023), 3 February 2023, *Latest rulings by the European Court set out the procedure for future processing of applications against Russia*.

[64] ECtHR (GC), *Fedotova and Others v. Russia* (App. Nos. 40792/10, 30538/14 and 43439/14), 17 January 2023, paras. 68-73; *Kutayev v. Russia* (App. No. 17912/15), 24 January 2023, paras. 7-9; *Svetova and Others v. Russia* (App. No. 54714/17), 24 January 2023, paras. 10-12; *Ukraine and the Netherlands v. Russia*, 25 January 2023, paras. 34-40.

[65] The participation of Judge M. Lobov in the Fedotova case was not explained in the judgment. Art. 20 of the ECHR provides that the Court shall be composed of judges whose number shall be equal to the number of States Parties to the Convention. It can therefore be interpreted that the Russian judge should only serve until 16 September 2022. Such interpretation could be confirmed by the precedent of Greece's withdrawal from the CoE, under Art. 7 of the Statute, with effect from 31 December 1970. The ECtHR accepted that a Greek judge would also cease to hold office on that date. In its judgment in a case pending before the ECtHR at the time, the Court noted only that the Greek judge "who had participated in the oral hearings could not take part in the consideration of the present case after 31 December 1970, since Greece's withdrawal from the Council of Europe took effect from that date". ECtHR, *De Wilde Ooms and Versyp ("Vagrancy") v. Belgium* (App. Nos. 2832/66; 2835/66; 2899/66), 18 June 1971, para. 11.

They were based on the assumption that the office of the Russian judge ceased to exist after 16 September 2022, and that the list of ad hoc Russian judges ceased to apply. The Court thus decided to appoint an ad hoc judge from among the sitting judges, applying by analogy Rule 29(2)(b). This approach to the appointment of an ad hoc judge in Russian cases was confirmed in the Grand Chamber decision of 25 January 2023 in the inter-State case *Ukraine and the Netherlands v. Russia*.[66]

3. INVESTIGATION INTO THE "SITUATION IN UKRAINE" AT THE ICC

Armed conflict can give rise not only to extensive violations of human rights, but also to violations of humanitarian law. These are subject to two different liability regimes – that of State responsibility, and of individual criminal responsibility.[67] One of the major achievements of international law in the 20th century was the establishment of the ICC to try the perpetrators of the most heinous international crimes – war crimes, crimes against humanity, genocide and aggression.

However, neither Russia nor Ukraine are parties to the Rome Statute establishing the ICC. Despite this, crimes committed on Ukrainian territory may fall within the cognisance of the Court. On 8 September 2015, Ukraine made a declaration recognising the ICC's jurisdiction over two types of crimes – war crimes and crimes against humanity – occurring on its territory after 20 February 2014. Not being a party to the Statute, Ukraine cannot itself bring a case to the ICC. This can be done by the UN Security Council (which should reasonably be ruled out because of the Russian veto), the ICC Prosecutor, or another State Party to the Statute.

ICC Prosecutor Karim Khan was quick to respond to the Russian "special military operation". In a statement of 25 February 2022, he announced that he would monitor the situation in Ukraine with a view to the possible launch of an ICC proceeding,[68] and few days later that he announced that he was determined to open an investigation into the situation in Ukraine as soon as possible.[69] Shortly after this statement, 43 States forwarded a request to the Prosecutor for a preliminary examination of the "Situation in Ukraine" (under Arts. 13 and 14 of the Statute).

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[66] *Ukraine and the Netherlands v. Russia*, paras. 39-40.

[67] C. Kreß, *The Ukraine War and the Prohibition of the Use of Force in International Law, TOAEP*, Occasional Paper Series No. 13 (2022), pp. 21-23.

[68] Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine, 25 February 2022, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following (accessed 30 April 2023).

[69] Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine, 28 February 2022, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening (accessed 30 April 2023).

This made it easier for the Prosecutor to proceed, as in the event he wished to open an investigation on his own motion, under Art. 15(3) of the Statute he would have needed the authorisation of the Pre-Trial Chamber.[70] The investigation was officially opened on 2 March 2022.[71] It covers the period from 21 November 2013 – as it takes into account the first declaration of Ukraine recognising the jurisdiction of the ICC over crimes committed on its territory – until 22 February 2014. The Ukrainian declaration of 2015 extended this period indefinitely.

The investigation is, for the time being, not against specific individuals, but into a case. While we do not go into the issues of cooperation with the ICC Prosecutor in collecting evidence in any depth here, it is worth noting the agreement of 25 April 2022 reached by the ICC Prosecutor and the Chief Prosecutors of Lithuania, Poland and Ukraine to establish a Joint Investigation Team within Eurojust.[72] This move considerably increases the chances of successfully gathering evidence and holding the perpetrators accountable before both domestic courts and/or the ICC.

It must be borne in mind that the ICC's jurisdiction is complementary in nature, which means, *inter alia*, that the Court can only act if a State fails to conduct criminal proceedings or is unable or unwilling to do so (Art. 17 of the Statute). Moreover, the ICC does not issue judgments *in absentia*. Bringing the main perpetrators of the crimes, such as Vladimir Putin, Minister Lavrov or the Russian generals, before the Court may seem unrealistic for now. No doubt they are aware of the sword of Damocles hanging over them. All the more so as things have progressed. On 17 March 2023, the ICC Pre-Trial Chamber II started, albeit limited in extent, criminal proceedings focusing on the crimes against children. It issued two arrest warrants: for Vladimir Putin and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation. Based on the Prosecutor's requests of 22 February 2023, the Pre-Trial Chamber II considered that there are reasonable grounds to believe that each suspect bears responsibility for the war crime of unlawful deportation of the population (children), and that of unlawful transfer of the population (children) from occupied areas of Ukraine to the Russian Federation, to the prejudice of Ukrainian children.[73]

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[70] Statement of ICC Prosecutor, Karim A.A. Khan QC, at the Arria-Formula meeting of the UN Security Council on Ensuring accountability for atrocities committed in Ukraine, 27 April 2022, available at: https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-arria-formula-meeting-un-security-council-ensuring (accessed 30 April 2023).

[71] ICC-01/22 Situation in Ukraine, available at: https://www.icc-cpi.int/situations/ukraine (accessed 30 April 2023).

[72] *See* https://www.eurojust.europa.eu/news/icc-participates-joint-investigation-team-supported-eurojust-alleged-core-international-crimes (accessed 30 April 2023).

[73] ICC, Press Release 17 March 2023, available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed 30 April 2023).

The strategy of the Prosecutor and the Pre-trial Chamber is commendable, as it breaks the silence and points out specific individuals and acts. It has great symbolic significance.

4. SPECIAL TRIBUNAL FOR AGGRESSION AGAINST UKRAINE OR IMPROVEMENT OF THE ICC?

The ICC's jurisdiction over the situation in Ukraine is limited in scope, as it does not cover crimes against peace,[74] which today is the crime of aggression – waging a manifestly illegal war. In case of an act of aggression committed by a State which, as Russia or Belarus, has not acceded to the ICC Statute, the initiation of an investigation by the ICC Prosecutor depends on the UN Security Council referring the relevant situation to the Court pursuant to Art. 15*ter* in conjunction with Art. 13(b) of the ICC Statute. Given the Russian veto power in the UN Security Council, this is almost certainly not going to happen, at least while Putin remains in power. Furthermore, Art. 15*bis* (5) of the Statute clearly states that the ICC has no jurisdiction over third States for the crime of aggression.

Discussion is currently going on about how to fill this gap and to prosecute the Russian and the Belarus political and military leaders. The crime of aggression is, according to the Rome Statute, a "leadership crime" (Art. 8*bis*, para. 1) concerning only leaders who are "in a position to effectively exercise control over or to direct the political or military action of a State". The main problem is the immunity from prosecution that they enjoy. According to ICJ case law, the leaders may not enjoy immunity before international courts.[75] However, they are still entitled to immunity before national courts.

An international court is one based directly on international law, established through the UN Security Council, like the International Criminal Tribunals for the Former Yugoslavia and Rwanda, or created by bilateral agreement between the UN and a country (e.g. the Special Court for Sierra Leone). Another form could be a hybrid court – a national court with some international characteristics, set

[74] First prosecuted by the International Military Tribunal at Nuremberg. The court strongly emphasized that: "War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole" (Nuremberg Trial Proceedings, Vol. 22, 426, 30 September 1946, The Common Plan or Conspiracy and Aggressive War, available at: https://avalon.law.yale.edu/subject_menus/15th.asp (accessed 30 April 2023)).

[75] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, para. 61; Special Court for Sierra Leone, *Prosecutor v. Taylor*, Decision on Immunity from Jurisdiction, paras. 38, 40; Appeals Chamber of the ICC, *Jordan Referral re Al-Bashir Appeal*, Judgment, 6 May 2019, para I. 1: "There is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court".

up within the national system of a country, as was the case with the Extraordinary Chambers in the courts of Cambodia.[76] However, this raises the issue of limitations on domestic law (constitutionality) and immunities.

Three main groups of proposals are on the table:

1. A hybrid court – "integrated into Ukraine's national justice system with international elements" – the UK government proposal;[77] or the proposal of Germany's Minister of Foreign Affairs for a court "deriving its jurisdiction from Ukrainian criminal law".[78] The disadvantage of these solutions is not only the personal immunities enjoyed by heads of States, heads of government, and ministers of foreign affairs before national and hybrid courts, but also Ukrainian constitutional limitations[79] and the much weaker (or even none) authoritative weight of the courts' decisions. The same flaws are present in the US proposal for a national court but "internationalised".[80]

[76] The Extraordinary Chambers were created in the courts of Cambodia upon the UN GA recommendation and the agreement on cooperation (GA Res. 56/169; Res. 57/228; Res. 57/228B).

[77] UK Government Press Release, 20 January 2023, available at: https://www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine (accessed 30 April 2023).

[78] *Strengthening International Law in Times of Crisis, speech by German Foreign Minister Annalena Baerbock in The Hague*, 16 January 2023, available at: https://www.auswaertiges-amt.de/de/newsroom/strengthening-international-law-in-times-of-crisis/25733 (accessed 30 April 2023): "So our idea with some partners is that there is a way to strengthen the International Criminal Court and not weaken it, for a court to derive its jurisdiction from Ukrainian criminal law. It would be important for me, and I believe for many others as well, that this be complemented by an international component. Of course, there must be no special way for an aggressor, but what we create must be supported by as many people in the world as possible. It is therefore important for us that we have an international component, which, for example, with a location outside of Ukraine with financial support from partners and with international prosecutors and judges, underpins the impartiality and legitimacy of this court".

[79] Art. 125 of the Ukrainian Constitution states that: "The establishment of extraordinary and special courts shall not be permitted". Similarly, Art. 3 of the Law on the Judiciary and the Status of Judges. The common understanding is that Art. 125 sets up a prohibition on creating special and extraordinary courts within the system of courts in Ukraine and does not place a limit on international judicial institutions. In the decision on the constitutionality of ratifying the Rome Statute, the Constitutional Court found that this clause does not apply as such to the ICC (case No 1-35/2001, 11 July 2001, para. 2, section 2.1). For details, *see* A. Komarow & O. Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression, Just Security*, 6 April 2022, available at: https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/ (accessed 30 April 2023).

[80] Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression, 27.03.2023: "Again now, at this critical moment in history, I am pleased to announce that the United States supports the development of an internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine. Although a number of models have been under consideration, and these have been analyzed closely, we believe an internationalized court that is rooted in Ukraine's judicial system, but that also includes international elements, will provide the clearest path to establishing a new Tribunal and maximizing our chances of achieving meaningful accountability. We envision such a court having significant international elements – in the form of substantive law, personnel, information sources, and structure. It might also be located elsewhere in Europe, at least at first, to reinforce Ukraine's desired European orientation, lend gravitas to the initiative, and enable international involvement, including through Eurojust" (*see* https://

Currently, Ukraine is against the hybrid court,[81] and strongly supports the idea of an international court created through the UN General Assembly.

2. Special Tribunal on the Crime of Aggression (STCoA), created by the international community as a whole.[82] This form would allow to complement the jurisdiction of the ICC and avoid immunities issues. The proposed STCoA could be created in several steps. Firstly, there must be a request by the Government of Ukraine to the UN General Assembly. Secondly, the UN General Assembly would have to recommend the creation of the tribunal and request the UN Secretary-General to initiate negotiations between the Government of Ukraine and the United Nations. Thirdly, a bilateral treaty would have to be concluded between the Government of Ukraine and the United Nations. This concept, initiated by the proposal of Philip Sands and others,[83] was later developed[84] and supported by Ukraine,[85] and, *inter alia*, by the unanimous Parliamentary Assembly of the Council of Europe resolution.[86] However, the proposal is criticized because of its selectivity. The STCoA would deal only with the situation in Ukraine, while what is needed now is to avoid selective justice and enable broader prosecution and punishment of

www.state.gov/ambassador-van-schaacks-remarks/). *See also* J. Trahan, *Don't be Fooled By U.S. Smoke and Mirrors on the Crime of Aggression, Weak Proposals Carry the Risk of Weak Results,* Just Security, 14 April 2023, available at: https://www.justsecurity.org/85986/dont-be-fooled-by-u-s-smoke-and-mirrors-on-the-crime-of-aggression/ (both accessed 30 April 2023).

[81] *President's Office opposes "hybrid tribunal" on Russia's crime of aggression*, Ukrainska Pravda, 17 February 2023, available at: https://www.pravda.com.ua/eng/news/2023/02/17/7389799/ (accessed 30 April 2023).

[82] It is proposed to create the STCoA along the lines of the Special Court for Sierra Leone, as a freestanding new institution, but not, for obvious reasons, at the request of the UN Security Council, but upon recommendation of the UN General Assembly, as in the case of Cambodia (the Extraordinary Chambers). The Special Court for Sierra Leone was created by an agreement between the UN and Sierra Leone on 16 January 2002. The UN GA could use the "Uniting for Peace" mechanism to request the GA recommendation, or directly call on the Secretary-General to negotiate an agreement with Ukraine on a Special Court.

[83] *Statement calling for the creation of a Special Tribunal for the Punishment of the crime of aggression against Ukraine*, 4 March 2022, available at: https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf (accessed 30 April 2023).

[84] *See e.g.* Proposal for a Resolution by the United Nations General Assembly and Accompanying Proposal for a Statute of a Special Tribunal for Ukraine on the Crime of Aggression, 7 September 2022, made by The Ukraine Task Force of the Global Accountability Network; O. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine, An agreement between the United Nations and Ukraine can pave the way*, Just Security, 20 September 2022, available at: https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/ (accessed 30 April 2023).

[85] Speech by the President of Ukraine at the General Debate of the 77th session of the UN General Assembly, 22 September 2022, available at: https://www.legal-tools.org/doc/wh08nu/ (accessed 30 April 2023); *see also* Kreß, *supra* note 67, p. 23, fn 100.

[86] *Legal and human rights aspects of the Russian Federation's aggression against Ukraine*, Resolution 2482 (2023), 26 January 2023, available at: https://pace.coe.int/en/files/31620/html (accessed 30 April 2023).

the crime of aggression than the scope delineated in the ICC Statute. That is why it is proposed to revise the ICC Rome Statute.

3. Revise the ICC's Statute to remove the obstacle to the Court's jurisdiction over aggression against Ukraine by changing the conditions for the exercise of the ICC's jurisdiction and creating a solution for the future as well. It is proposed to revise the Statute with retroactive effect at least to 17 July 2018, the date of the activation of the Court's jurisdiction over the crime of aggression (the crime as such made part of customary international law). There are three options currently being discussed:[87]
   a) amending the Kampala amendments to align the conditions governing the Court's exercise of jurisdiction over the crime of aggression with those applicable to the other crimes under the ICC's jurisdiction (supported by the majority of African and South American States[88]);
   b) allowing the ICC to proceed with an investigation in case of an alleged act of aggression by a State Party not bound by the Kampala amendments, or by a non-State Party against a State Party bound by the Kampala amendments, or against a non-State Party that has accepted the Court's jurisdiction if the UN General Assembly so recommends;
   c) giving the ICC the power to exercise universal jurisdiction not only in case of a referral of a relevant situation by the UN Security Council, but also if the UN General Assembly makes such a referral in cases where the UN Security Council is prevented from taking action by a permanent member's veto.

The available options differ within the scope of each of the proposed changes. Each of them touches on legal issues of fundamental importance. It is not clear that even at such an unusual historical moment as the war in Ukraine enough States could be brought together to carry out modifications to the ICC Statute. Many countries would need to change their approach to global criminal justice. The option of a Special Court for aggression in Ukraine seems politically easier. However, even if such a court were to be established, it is worth making a parallel effort and using the momentum to expand the ICC's jurisdiction. The two paths are not mutually exclusive.

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[87] *See e.g.* C. Kreß, S. Hobe, A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, Just Security, 23 January 2023, available at: https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/. *Cf e.g.* A.R. Coracini, *Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?* Just Security, 21 March 2023, available at: https://bit.ly/3oI8Bwe (both accessed 30 April 2023).

[88] *See e.g.* Parliamentarians for Global Action, *Buenos Aires Plan of Action on the Universality and Effectiveness of, and political support for, the Rome Statute system against impunity*, 4–5 November 2022, available at: https://www.pgaction.org/pdf/annual-forum/2022/buenos-aires-poa-2022-en.pdf (accessed 30 April 2023).

CONCLUSIONS

Ukraine is defending itself not only by physically resisting the Russian "special military operation", but also fighting against it legally. This significantly differentiates it from Russia, which uses distorted legal arguments and fails to implement court decisions, clearly prioritising the use of force over the law.

Proceedings before international courts, which sometimes last many years, do not usually serve well to resolve armed conflicts. They can only play a complementary role by clarifying legal issues and strengthening the legal and moral position of one of the parties to the dispute, e.g. in future peace negotiations. This was probably one of the intentions behind Ukraine's applications to the ICJ and the ECtHR.

The ICJ's order, although only for provisional measures, is nevertheless significant, as Ukraine has already gained authoritative confirmation of the dubious quality of Russian arguments justifying the use of force.

Russia has challenged the ICJ's jurisdiction and stated that it would not comply with its order. We know very well from recent years behaviours of this type (and not only by Russia), characterized by disrespect for international court decisions. This not only casts a shadow over the reputation of the State, but is becoming increasingly dangerous for the whole international community.

The CoE has for quite a long time allowed Russia to disregard ECtHR rulings, including a special constitutional mechanism to reject inconvenient judgments. Russia's expulsion from the organization is an important signal that there are limits to tolerating violations of the law. For now, the threshold is set quite high, but lowering it in the future is not excluded. This may constitute a warning to a number of other States about the consequences of not respecting the rule of law.

On the other hand, expulsion does not mean that the adjudication of Russia's "special military operation" cases has come to a halt. Judgments in these cases are unlikely to be enforced, but they will nevertheless authoritatively identify the perpetrator and the extent and scale of human rights violations. The Court may also award damages to Ukraine, although even here it is difficult to expect voluntary execution of a judgment. Russia has not yet paid the €10 million that the Court awarded in the *Georgia v. Russia (I)* case.[89]

In turn, the ICC investigation will certainly provide important evidence for criminal cases that may be brought either before domestic courts or the ICC, as well as before a likely new tribunal to try the crime of aggression. The arrest warrants issued in respect of Putin and Lvova-Belova are a significant step forward.

[89] *See* Interim Resolution CM/ResDH(2022)55, *Execution of the judgments of the European Court of Human Rights Georgia v. Russia (I)*, 9 March 2022. Russia argued that Art. 41 ECHR authorises the award of reparations in individual cases, but cannot be the basis for such an award in inter-State cases.

All these proceedings and measures, however weak they may currently appear, have an important symbolic and moral function. They delegitimise "the special military operation", as well as Putin and others. At the very least, they provide an opportunity to gather evidence to create a historical record. They are a reminder that international law works and that there is still a check on compliance and an international responsibility that applies to both the State and individuals. There is no doubt that the sword of Damocles hangs over "the special military operation".

The moment is certainly historic; the only question is how it will be used. Undoubtedly, holding the main authors of "the special military operation" accountable becomes paramount. There is a chance to make accountability for the "crime of crimes", i.e. the crime of aggression, a reality by setting up a special court for the aggression in Ukraine. This does not preclude a parallel amendment of the Rome Statute.

Some hope for progress is offered by the UN General Assembly resolution of 14 November 2022. The resolution recognized that Russia must be held to account for any violations of international law, international humanitarian law, and international human rights law in or against Ukraine. The Assembly further recognized the need for the establishment of an international mechanism for reparations for damage and loss or injury arising from Russian internationally wrongful acts. The resolution was co-sponsored by 56 member States and gathered a significant support (94 votes in favor, 13 against, 74 abstaining).[90]

The international community should go further in this direction by creating workable mechanisms and institutions that send a powerful deterrent message about the unacceptability of blatantly invading a neighboring State.[91] An international court issuing charges for the crime of aggression against Russian leaders should be at the forefront. The "special military operation" has generated quasi-tectonic movements, not only with regard to international adjudication, but also with regard to NATO's actions and the enforcement of reparations. Time will tell whether this is a moment of evolution in international law, but one can assume that it is.

[90] Res. L.6/2022, *Furtherance of Remedy and Reparation for Aggression against Ukraine*.

[91] Trahan, *supra* note 80, rightly concludes that: "States should not sit back and make the mistake of thinking these issues are only ones for NATO member State or European nations, or in being complacent setting weak precedent. No State, from any region, including island nations, is safe if blatant aggression is permitted to go unchecked. Unequivocal precedent must be set, both through the creation of the STCoA and eventual amendment of the ICC's Rome Statute to broaden the Court's jurisdiction over the crime of aggression. Global stability and the rule of law demands no less".

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RUSSIAN CRIMES IN UKRAINE: BETWEEN GUILT AND RESPONSIBILITY

Abstract: *Is the confrontation in Ukraine Putin's war, or also that of the Russian nation? Can the crimes of the Russian state be hidden in the shadows of Tolstoy or Tchaikovsky?*

This article distinguishes between the guilt or responsibility of individuals (criminal, political, moral); the international legal responsibility of states; and finally the political, moral, and historical responsibility of nations. In the legal or moral sense, guilt must be individualized. However, the extralegal (political, moral and historical) responsibility (not regulated by law) affects the whole nation and concerns responsibility both for the past and for the future. Nevertheless, if the nation is deemed entirely responsible for the actions of the state or of some national groups, it is not about attributing guilt to the whole nation, but about the collective recovery of the sense of humanity.

Thus, suggesting the guilt of the entire nation is based on a misunderstanding. But if the responsibility does not imply guilt, neither does the lack of guilt imply the lack of responsibility. By definition, the moral and political responsibility of the nation does not take a legal (judicial) form. Other forms and instruments are applicable here. In this context such terms as regrets, forgiveness, shame, apologies, or reconciliation appear. Such actions, based on fundamental values, require political courage, wisdom, and far-sightedness.

The passivity of the social environment favours the perpetrators of crimes. but does not release the other members of the nation from moral responsibility, and in particular from the obligation to distinguish good from evil. Not all Russians are guilty of crimes, but they all (whether guilty or innocent) bear some moral and political responsibility.

Keywords: Russia, Ukraine, Russian aggression, guilt, responsibility, international responsibility, Germany, German-Polish Relations, forgiveness, reconciliation

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States and nations are responsible for peace and international security, but the results are often far from satisfactory. Russia's aggression against Ukraine is a historic and geostrategic moment, and the reaction of the democratic world must be characterized by courage and political imagination.

Western policy towards Russia was often accompanied by fallacies such as *Wandel durch Annäherung* (change through rapprochement); *Wandel durch Handel* (change through trade); *Frieden schaffen ohne Waffen* (make peace without guns); and *reden statt rüsten* (talk instead of arming). Today the extreme position is expressed in the view that Russia cannot lose this war, and Ukraine cannot win it (in other words, the possession of nuclear weapons is a guarantee of impunity).

After 1990, the appeasement policy (e.g. the Minsk agreements of 2014/2015) was regarded somewhat perversely as an investment in European peace, and was accompanied by tolerance of Russia's sphere of influence.[1] From this perspective, it is easy to conclude that Ukraine's armed resistance threatens peace, but such a view is tantamount to humiliating the victims of Russian imperialism.

It is difficult to understand the cultural disorientation of the West, which for more than 20 years has stubbornly ignored the growth and maturation of the new version of totalitarianism in Russia, as if deliberately repeating all the patterns of behavior from the 1930s that "bred" Hitler.[2] The reflections of *drôle de paix* or *drôle de responabilité* come to mind.

An important aspect of this conflict is not only the unequivocal assessment of the Russian aggression, but also the hesitation regarding the manner and scope of response to obvious and massive international crimes (e.g. is it worth dying for Kyiv?).[3] According to some contemporary politicians (i.e. President Macron), Russia is looking for its own identity, and surviving the period after 1991 – when communism collapsed – has been hard for her. For this reason, the future European security order must take Russia's security needs into account. It should however be recalled that whoever demands security for Russia must first spell out the security guarantees for Ukraine. Who is to ensure security for whom? – Russia for Ukraine or vice versa? This is not just a rhetorical question.

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[1] *See* M. Kundera, *«Un occident kidnappé» ou la tragédie de l'Europe centrale*, 5(27) Le Débat 3 (1983) (English translation: *The Tragedy of Central Europe*, 31(7) New York Review of Books 33 (1984)).

[2] *See* O. Zabuzhko, *No guilty people in the world? Reading Russian literature after the Bucha massacre*, Times Literary Supplement, 22 April 2022, available at: https://www.the-tls.co.uk/articles/russian-literature-bucha-massacre-essay-oksana-zabuzhko/ (accessed 30 April 2023).

[3] *See* J. Kranz, *Russian Aggression in Ukraine: Demons in the War for "Peace" or Crime without Punishment?*, 60(3) Archiv des Völkerrechts 243 (2022).

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In the context of the crimes of the Russian hordes, the German *Fingerspitzengefühl* triumphed recently in the form of demonstrations and appeals against military aid for Ukraine. Pope Francis distinguished himself not only by his (un)diplomatic lack of precision in identifying the perpetrator of the aggression, but also noted: "May the Lord have mercy on us, on each of us. We are all to blame!" Only a few steps separate us from the so-called *Rußlandversteher*. The "*tu quoque*..."[4] argument is also used with pleasure by both Putin and some peace-loving people (i.e. Russia is following in the footsteps of US violations of international law). In this regard, it is worthwhile to quote an aphorism of Stanisław Jerzy Lec's – "Reflect before you think!"

The first part of this text focuses on outlining the essence of Russia's aggression and policy towards Ukraine. In the second part, we present considerations about the extralegal responsibility of the nation. In conclusion, the annex cites selected examples of moral, political, and historical responsibility in Polish-German relations after 1945.

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In the context of the armed conflict in Ukraine, we are confronted with the issue of international crimes (war crimes, crimes against humanity, genocide, aggression). Imposing punishment for the crimes committed by Russia in Ukraine and collecting evidence for them is a civilizational challenge for the democratic world – the failure to punish or the toleration of such crimes encourages their repetition.

On 17 March 2023 the Pre-Trial Chamber II of the International Criminal Court (ICC) issued warrants of arrest for two individuals: Mr. Vladimir Vladimirovich Putin and Ms. Maria Alekseyevna Lvova-Belova, allegedly responsible for the war crime of unlawful deportation or transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under Arts. 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute). *Il faut que la peur change de camp*...

The arrest warrant for the leader of one of the permanent members of the UN Security Council seems to be wise and of significant importance – regardless of the still unknown outcome of the war in Ukraine and the likelihood of Putin's actual appearance before the ICC. This decision counters reports that Russian war crimes are the excesses of individual soldiers. It also proves that this Court is not just prosecuting the leaders of some African countries.

[4] Tu quoque – a fallacy consisting in repelling criticism by pointing out that the other side is not without fault.

The international legal responsibility of states is usually regulated in treaties (e.g. reparations and compensation), while actions by national courts are limited by the jurisdictional immunity of the state (with a few exceptions in US law). The criminal guilt of individuals is in turn subject to the jurisdiction of international courts (if they exist) and national law in this respect is governed by the principle of universal jurisdiction.

We omit these aspects, which already have a wide bibliography, as well as a number of related new ideas which are discussed and developed in connection with the Russian aggression in Ukraine.[5] Instead, we intend to focus on the issue of the extralegal responsibility of the nation for the crimes committed by its state, i.e. responsibility in the political, moral, and historical perspectives. In this case, the criterion of guilt is not of primary importance.

At the beginning one should ask whether the confrontation in Ukraine is Putin's war, or also that of the Russian nation, and whether it is waged against the "Nazi leadership of Ukraine" or against the Ukrainian nation (whose existence is questioned by Putin)? Are the crimes committed by ordinary Russians or also by Putin, Lavrov and Shoigu? Should all Russian citizens be subject to international sanctions? Should Russian citizens have unrestricted entry rights to third countries? Should Russian citizens be allowed to participate in international sports competitions? Should we promote the Russian repertoire and Russian artists under any circumstances? (or can the crimes of the Russian state be hidden in the shadow of Tolstoy or Tchaikovsky?)[6]

The answers to these questions are varied, but their basis is undoubtedly the political and moral responsibility of the nation. Let us quote, for example, the opinion of two Polish intellectuals who remind us that the whole nation cannot be blamed for the crimes:

> Let us help Ukraine and Ukrainians but let us not turn our backs on the Russians. Let us especially remember those brave democrats imprisoned, exiled, and gagged today. [...] It

[5] *See e.g.* various texts available at: https://www.justsecurity.org/tag/crime-of-aggression/ and https://www.justsecurity.org/82513/just-securitys-russia-ukraine-war-archive/ (both accessed 30 April 2023); *see* particularly C. Kreß, S. Hobe, A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, Just Security, 23 January 2023; J. Trahan, *Don't be Fooled By U.S. Smoke and Mirrors on the Crime of Aggression. Weak Proposals Carry the Risk of Weak Results*, Just Security, 14 April 2023; *see also* P. Grzebyk, *Classification of the Conflict between Ukraine and Russia in International Law (Ius ad Bellum and Ius in Bello)*, XXXIV Polish Yearbook of International Law 39 (2014); N. Cwicinskaja, *The Legality and Certain Legal Consequences of the "Accession" of Crimea to the Russian Federation*, XXXIV Polish Yearbook of International Law 61(2014); P. Grzebyk, *Escalation of the Conflict between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law,* XLI Polish Yearbook of International Law 145 (2021).

[6] *See* Zabuzhko, *supra* note 2.

> is a drama of two nations. [...] The Russian government [...] decided to attack Ukraine militarily. This decision resulted in the cruel death of many thousands of people, not only Ukrainians, but also Russians. [...] The world's media repeat [...] that the vast majority of Russians support the shameful invasion of Ukraine. This is a sophisticated lie. The victim of the crimes of the Russian government is not only the Ukrainian people, but also the Russian people. Young Russian citizens are treated like cannon fodder and protesters like criminals. [...] The crimes of Hitler and his gang were to be blamed on Hitler, his collaborators, and zealous executors of their orders, not Germans like the Scholl siblings or Dietrich Bonhoeffer, murdered by the Nazis [...], or great exiles like Thomas Mann or Bertolt Brecht. Declaring that all of Russia is behind Putin is an act of faith in Putin's imperial religion or some bizarre anti-Russian racism. [...]True peace and international brotherhood will not be built on tanks. We believe that the key to real peace is in the hands of the Russian people. That key is not spectacular assassinations of those in power, not a military putsch, nor actions with the use of weapons – but a peaceful struggle "without violence." [7]

This view, however, is not widely shared.
According to the Belarusian Nobel laureate:

> [e]very Russian bears share of responsibility. [...] The fictional idea of a nation oppressed and disgraced by its elites is too easy, it explains nothing. [...] We left the camp fence, but we had no idea what freedom was. Neither does Putin.[8]

In the opinion of the Ukrainian intellectual, the suffering of the victim and the aggressor cannot be equated:

> Would you say – even today, and not in the face of the burning ghetto and dying people – words of sympathy for the "poor" young Germans who shoot the ghetto because they are treated like cannon fodder? For the German (and Austrian) society, whose support for Hitler is just an appearance, because in fact they are against the war he unleashed? [...] Astonishment is also caused by the path of change that you indicate – the path of peaceful opposition. Even embarrassment – pointing out Mahatma Gandhi and Martin Luther King as models for imitation.[9]

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[7] A. Michnik, L. Wiśniewski, *Wybiła godzina sądu przedostatecznego!* [The hour of the penultimate judgment has struck!], Gazeta Wyborcza, 1 March 2023, available at: https://tinyurl.com/4tmjzjda (accessed 30 April 2023).

[8] Svetlana Alexievich (Belarusian Nobel laureate, 2015), Gazeta Wyborcza, 28-29 May 2022.

[9] O. Hnatiuk, *Przekleństwo symetryzmu. Nie można zrównywać cierpień ofiary i agresora* [The curse of symmetry. The suffering of the victim and the aggressor cannot be equated], Gazeta Wyborcza, 20 March 2023, available at: https://tinyurl.com/55jbujt2 (accessed 30 April 2023).

Contemporary Russian writer Viktor Yerofeyev believes that the war in Ukraine is "supported by the majority of the Russian people, who see Putin as their boyfriend, their concept of life. [...] We must spare the 'beautiful Russia of the future', a fiction of our brave liberals".[10]

According to another Russian writer:

> We cannot say that all Russians are guilty – they were dragged into it. At the same time, they are responsible for what is happening. This war is waged by Putin on behalf of the people, the state, and every Russian. So, anyone who does not openly refuse to support is de facto supporting this war. Most Russians meanwhile want to ignore it. They go about their daily lives and hope to wait until the war is over. It's a survival strategy developed over hundreds of years – hide so the state doesn't find you. The fear of it is often passed down from generation to generation.[11]

Suggesting the guilt of the entire nation is based on a misunderstanding and false from the beginning, because it does not distinguish between the nation's guilt and its extralegal responsibility (not regulated by law). The moral, political, and historical responsibility of the whole nation remains to be considered (more on this below).

Unlike the difficult emigrations from fascist Germany, the thousands of Russians who left their country after 24 February 2022 are mostly not victims of political persecution and do not distance themselves from Great Russian nationalism. Broad public support for Putin and the war in Ukraine does not show a downward trend, and it is not only enlightened and liberal Russians who are fleeing Putin's Russia (the Russian secret services are already taking care of this).

Democrats have always been a tiny minority in Russia, and Russian democracy constantly requires a qualifying adjective (socialist, sovereign etc.). The change of power in Russia does not guarantee a change in the falsified consciousness of this nation. Theoretically, such a change is possible in future generations, but until then Russia will still (like autocratic China) remain one of the great threats to international peace and security. In short, it is impossible to expect that the Russian democrats will put an end to Russia's aggressive and imperial policy.

At this point, however, it is advisable to put a stop, because we are entering the realm of political predictions.

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[10] W. Jerofiejew, *Ci irytujący hedoniści Ukraińcy* [Those annoying Ukrainian hedonists], Gazeta Wyborcza, 25 March 2023, available at: https://tinyurl.com/2enj96tb (accessed 30 April 2023).

[11] D. Glukhovsky, *Rosja zamienia się w jeden wielki bunkier* [Russia turns into one big bunker], Polityka, No. 17/2023, pp. 56-57, available at: https://bit.ly/42wLNyE (accessed 30 April 2023).

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Karl Jaspers proposed in 1946 four categories of guilt: (i) criminal guilt on the grounds of breaking obligatory legal norms by an individual; (ii) political guilt coming from the acts of leaders and state organs; (iii) moral guilt based on the framework of carrying out the tasks of state institutions, including obeying orders, and (iv) metaphysical guilt coming from co-responsibility for all evil, especially for crimes committed in the presence of an individual or with his or her knowledge.[12] The proper instance for evaluation and judgment in the first case is the court; in the second, political authorities or organs (for example the victors in the case of war); in the third, one's own conscience; and in the fourth, God.

In Jaspers' categorization, in one or the other case we should replace the term "guilt" with the notion of responsibility, because guilt, in the legal or moral sense, must be individualized, and the responsibility of a nation is not based on guilt. In this context, we distinguish between the guilt, or the responsibility of individuals (criminal, political, moral); the international legal responsibility of states; and finally the political, moral and historical responsibility of nations. The lack of guilt does not imply a lack of responsibility (for both the past and the future), and responsibility does not imply guilt.

Essential for our reflections is the idea of collective moral and political responsibility.

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Crimes are committed by individuals, who undergo punishment.[13] Here it is necessary to determine the extent of their guilt and distinguish, for instance, different levels of intention (*mens rea*), conspiracy, complicity, or incitement. This type of individual attribution is not always easy, especially in the case of mass crimes.

If it is an individual who commits crimes, this does not mean his actions always come only from his personal intention or choice. They may also come from a structure of criminal behaviour organized by the state. In other words, apart from individual criminals, there also exists a state-based system of organized crime (national-socialist, fascist, communist, religious, etc). Thus, the legal responsibility is incumbent on the state, on the direct perpetrators, and on those who organize the system.

[12] K. Jaspers, *Die Schuldfrage*, Lambert Schneider, Heidelberg-Zürich 1946.

[13] *See* C. Kreß, *International Criminal Law*, Max Planck Encyclopedia of Public International Law, 2009, available at: https://tinyurl.com/ypff6vec (accessed 30 April 2023).

In the case of the international legal responsibility of the state, it is essential to attribute to it concrete actions that violate international law.[14] This attribution may result from the (effective or overall) control; from the lack of due diligence; or from strict liability.

The international legal responsibility of states differs from individual criminal responsibility because of the specific character of the perpetrator, which is the state and not an individual (although this does not exclude the criminal responsibility of the latter). According to the principle of state continuity, a change in its political system or its government does not exempt the state from its international responsibility. This responsibility takes the form of reparations, restitution, or satisfaction. It is essentially restitutive, disciplinary, and preventive in nature and is usually reflected in a treaty form.

The consequences of the international legal responsibility of states inevitably affect their population, which shares the fate of the state, both in times of peace and in war. Thus, after losing a war the people suffer because of the destruction of the national infrastructure and at the same time they carry the burden of war reparations,[15] to which both the innocent and the guilty must contribute. States' borders are often changed, which is not without its effect on citizens.[16] International sanctions by states or international organizations also have consequences for private parties. However, this should not be equated with collective guilt (the guilt of individuals remains a separate issue).

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[14] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001): "Article 1. Every internationally wrongful act of a State entails the international responsibility of that State. Article 2. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State. Article 3. The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law. Article 4.1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."

[15] J. Kranz, *Kriegsbedingte Reparationen und individuelle Entschädigungsansprüche im Kontext der deutsch-polnischen Beziehungen*, 80 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 325 (2020); P. d'Argent, *Reparations after World War II*, Max Planck Encyclopedia of Public International Law, 2009, available at: https://tinyurl.com/mr3d8mdd (accessed 30 April 2023).

[16] *See* J. Kranz, *Wollt ihr den totalen Krieg? Political, Moral and Legal Aspects of the Resettlement of German Population After World War II*, 7(2) Polish Review of International and European Law (2018), available also at: https://www.academia.edu/42224936/Wollt_ihr_den_totalen_Krieg_Political_Moral_and_Legal_Aspects_of_the_Resettlement_of_German_Population_After_World_War_II (accessed 30 April 2023).

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In turn, the extralegal (political-moral-historical) responsibility of a nation concerns both its past (sometimes a distant one) and the future; times of war and times of peace; failures and successes. This responsibility relates above all to state's actions or omissions (or in some instances those of some national groups) that are equivalent to violations of international law or merely politically or morally reprehensible (such as refusing financial or military assistance or concluding treaties harmful to third countries). A good example is the appeasement policy that preceded the Second World War, but also the policy of some states towards the Soviet Union and then Russia, which obviously facilitated the Russian aggression against Ukraine in both 2014 and 2022. An individual may be held morally or politically responsible for his or her actions (or omissions), e.g. for his or her own public statements or, as in the case of the resignation of a minister, for the reprehensible actions of subordinates.

Belonging to a particular nation, however, does not allow moral and political responsibility to be treated selectively, according to a subjective choice. In this context the nation is a community which is usually not chosen, and which is bound by the shared history of many generations. It is also irrelevant in this case that only a (small) part of the nation has supported the unworthy or illegal actions of the government or has been aware of its criminal intentions. Individual guilt here does not matter, and the collective aspect comes from the fact that the state authority determines the fate of the nation.

This distinction helps us to avoid confusion resulting from equating guilt with extralegal responsibility. The nation as an entirety is not to blame, because the concept of guilt does not apply to the nation. Nevertheless, the nation (both guilty and innocent persons) is entirely morally and politically responsible for the actions of the state or of some national groups. In this case, however, it is not about attributing guilt to the whole nation, but about the collective sense of responsibility or a collective recovery of the sense of humanity.

The dictatorial nature of state power, ignorance or helplessness, or permanent indoctrination (intoxication) with a specific ideology do not release the nation from collective, moral, and political responsibility. Moreover, the protests or resistance of a handful of opponents of the regime do not absolve the remaining majority from responsibility. Similarly, the so-called "late birth privilege" (*Gnade der späten Geburt*, a concept developed in post-war Germany) does not play an important role here. Thus, the concept of the collective responsibility of the nation does not presuppose arbitrary exceptions.

Every nation must account for its past. There are times in which passivity, and especially "loud" silence, lead to historical and political responsibility for evil deeds.[17] Bertolt Brecht asked: "Was sind das für Zeiten, wo / Ein Gespräch über Bäume fast ein Verbrechen ist / Weil es ein Schweigen über so viele Untaten einschließt!"[18]

Dictators and criminals gladly take advantage of the passivity of the public and also of the so-called *Realpolitik* of democratic countries. It happens that false historical memory is the basis of a nation's existence. Sometimes there is a situation referred to as "the inability to regret".[19] This is why historians are a "threat" to national unity, because their task is to seek to tell the truth, and not only what people say they want to hear and/or remember. Gesine Schwan is right in recognizing that the psychological and moral consequences of silence harm future generations.[20]

Not all Germans supported National Socialism; and certainly not all Poles were supporters of the communist dictatorship. Nevertheless, both nations bear the responsibility for the unworthy or illegal actions of these regimes as organizational and planning structures (the individual guilt is irrelevant here). A nation that is proud to host over a million Ukrainian war refugees on its territory cannot pretend that it is not aware of and is not morally and politically responsible for the deliberately brutal pushbacks carried out by its state on the border with Belarus.[21]

Finally, not all Russians are guilty of crimes, but they all bear the moral and political responsibility for not seeing these crimes. In other words, the passivity of the social environment favors the perpetrators of the crime, but does not release the other members of the nation from moral and political responsibility, and in particular from the obligation to distinguish good from evil, especially evil in its extreme forms.

The extralegal collective responsibility of the nation, however, has nothing to do with the collective responsibility imposed on citizens by totalitarian regimes. In other words, the collective responsibility of the nation is conceivable only in democratic conditions, and unrealistic in autocratic or totalitarian systems. For this reason, the situation in Russia is not optimistic.

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[17] *See* K. Jaspers, *Wohin treibt die Bundesrepublik?*, Tatsachen, Gefahren, Chancen, München: 1966; R. Giordano, *Die zweite Schuld oder von der Last Deutscher zu sein*, Kiepenheuer & Witsch, München: 1990.

[18] What are these times when / Talking about trees is almost a crime / Because it involves silence about so many misdeeds! (B. Brecht, *An die Nachgeborenen*).

[19] A. Mitscherlich, M. Mitscherlich, *Die Unfähigkeit zu trauern. Grundlagen kollektiven Verhaltens*, Pipier, München: 1977.

[20] G. Schwan, *Politik und Schuld. Die zerstörerische Macht des Schweigens*, Fischer, Frankfurt am Main: 1997.

[21] *Situation on the Polish-Belarusian border July-October 2022. The Humanitarian Aid Border Group brief*, available at: https://nomada.info.pl/wp-content/uploads/2022/10/EN_Border_Group_brief_July_October_2022.pdf (accessed 30 April 2023).

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The moral and political responsibility of the nation by definition does not take a legal (judicial) form. Other forms and instruments are applicable here, which however do not exclude individual legal responsibility.

In this context such terms as regrets, forgiveness, shame, apologies, or reconciliation appear.[22] These moral feelings can have both an individual dimension (between the perpetrator and the victim) or a collective one (between states/nations/social groups).[23] In the latter case they are expressed by figures representing the nation in a more or less formal manner, but these feelings do not have to be shared by everyone. Practice shows that such actions are rarely the work of official state authorities, but rather autonomous circles or even individuals. Such actions, based on fundamental values, require political courage, wisdom, and far-sightedness, because they apply not only to the responsibility for the past, but also to the responsibility for the future.

Collective forgiveness applies to wrongs done by one group (nation) to another group, usually assuming that the first group publicly admits wrongdoing and expresses remorse. Reconciliation, in turn, results from a social need and concern for the future. These actions have a moral and political dimension, not financial or material (as in the case of reparations, compensation or restitution).

According to Anna Wolff-Powęska:

> Forgiveness must be preceded by mature reflection [...] and understanding that without forgiveness there is no chance for change. [...] Forgiving is directed toward the past. It means working on memory, which does not mean forgetting but a kind of therapy – freeing oneself from obsessions, hostility, and the desire for revenge. Forgiveness, as Paul Ricoeur says, has a healing value – 'it takes away one's debt.' Reconciliation, meanwhile, is directed towards the future. It is an expression of responsibility for the peaceful coexistence of future generations. It is a departure from focusing on yourself and turning oneself toward the general good.[24]

[22] *See* Ch. Daase, S. Engert, M.-A. Horelt, J. Renner, R. Strassner (eds.), *Apology and Reconciliation in International Relations: The Importance of Being Sorry*, Routledge, New York: 2016; V. Jankélévitch, *Forgiveness*, University of Chicago Press, Chicago: 2005; P. Ricoeur, *La mémoire, l'histoire, l'oubli*, Seuil, Paris: 2000; H. Arendt, J. Kohn, *Responsibility and Judgment*, Shocken Books, New York: 2003; A. Schaap, *Guilty Subjects and Political Responsibility: Arendt, Jaspers and the Resonance of the 'German Question' in Politics of Reconciliation*, 49(4) Political Studies 749 (2001).

[23] *See* K. Bachmann, J. Kranz (eds.), *Verlorene Heimat. Die Vertreibungsdebatte in Polen*, Bouvier, Bonn: 1998.

[24] A. Wolff-Powęska, *Wielki dar przebaczenia* [The great gift of forgiveness], Gazeta Wyborcza, 12–13 November 2005, available at: https://tinyurl.com/3z8rb49x (accessed 30 April 2023).

Nevertheless, answers to some difficult questions remain open. For instance: are there unforgivable crimes?[25] Does asking for forgiveness (and only on the condition of first expressing regret and remorse) have to be a premise for reconciliation? Is reconciliation possible without forgiveness? Does forgiveness always lead to reconciliation? Can forgiveness exclude punishment? Can you forgive on behalf of someone else?

It is necessary to take into consideration that forgiveness and reconciliation will bear fruit only when they have a foundation with a relatively wide social consensus, a dialogue in truth, and when they are accepted by both sides. Otherwise, they will remain only empty slogans.[26]

Finally let us also note that regardless of shame, disgrace, or apology, the collective emotions of an entire nation are often associated with positive attributes. They are expressed against the background of collective pride, glory, a sense of sports victories, the pace of economic development or cultural achievements, etc.

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Mikhail Shishkin, a Russian journalist and writer who since 1995 lives in Switzerland, recently wrote (2023) a letter to an anonymous Ukrainian friend. Here are the relevant passages for our consideration:

> Our conversations and correspondence have so far been conducted in the language of great Russian literature. Today, for the whole world, Russian is the language of people bombing Ukrainian cities, the language of child killers, war criminals and murderers. They will be judged for crimes against humanity. [...]
>
> Does a dictatorship breed a slave society, or does a slave society breed a dictatorship? Ukraine managed to get out of the circle of hell that is our common experience – the monstrous and bloody past of our nations. And that was the reason why the Russian pretender hated her. After all, the tired Russian people might wish to take an example from a free, democratic Ukraine. And that is why it must be destroyed.
>
> In Russia, we had neither de-Stalinization nor the Nuremberg trials. [...] We can all see the result – a new dictatorship. A dictatorship which, by its very nature, cannot exist without enemies, and therefore without war. [...]

[25] *See* S. Wiesenthal, *Die Sonnenblume*, Europa Verlag, Berlin: 2015; *see also* the film Coach to Vienna (Czech: Kočár do Vídně, in USA released as Carriage to Vienna) directed by Karel Kachyňa (1966).

[26] *See Bischöfe, haben Sie endlich den Mut zur Wahrheit! Brief von Prof. em. Dr. Heinrich Missalla an die deutschen katholischen Bischöfe zum 80. Jahrestag des Kriegsbeginns*, available at: https://tinyurl.com/bdfaw89f (accessed 30 April 2023).

> A year ago, when Russian tanks moved towards Kiev, the whole world asked in astonishment – why are there no mass anti-war protests in Russia; why are only single people taking to the streets? At the time, I explained it by fear. Silence is a Russian survival strategy. Those who protested are now in prison. It was through silence that entire generations of Russians ensured their survival. [...] The people remained silent when the aggression against Ukraine began. But in the fall, when mass mobilization was announced and hundreds of thousands of Russians obediently went to kill Ukrainians and die at their hands, this can no longer be explained by fear. It's something deeper and scarier. I can see only one explanation – my country fell out of time. In the 21st century, an individual has a personal responsibility to distinguish good from evil, and if he sees that his country and people have started a vile, shameful war, then he must act against his country and people.
>
> Most Russians still have an archaic mentality. Their identity is closely related to belonging to a tribe. Our tribe is always right, and the other tribes are enemies who want to destroy us. We are not responsible, we do not decide anything – the chief/khan/tsar makes the choices for us. [...]
>
> The rebirth of my country is possible only after the complete destruction of the Putin regime. The Russian should have his empire amputated like a malignant tumor. "Zero Hour" is needed by Russia like oxygen. My homeland has a future only when it experiences a total defeat.[27]

Contemporary Russian writer Viktor Yerofeyev asks:

> Where does this hatred come from? Well, perhaps from [...] the primitive communal system, the division of the world into natives and strangers, from the love of victories in the family yard, in the gym, and then in KGB jobs. [...]
>
> During the period of mobilization, Moscow became sad, but when 200,000 mobilized were sent to the war zone and pardoned convicts were added to them, she became cheerful again. [...]
>
> In order to stop [...] the war, supported by the majority of the Russian people, [...] the new little Khrushchev is a way out of the metaphysical impasse, but it will still require the consent of the Russian elites to a moderate policy; perhaps there will be such an agreement, the world will catch its breath, metaphysics will end. But one way or another, the wounds will last for many generations.[28]

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[27] M. Szyszkin, *Mój kraj wypadł z czasu. List do przyjaciela Ukraińca rok później* [My country has fallen out of time. A letter to a Ukrainian friend a year later], Monitor Konstytucyjny, 23 March 2023, available at: https://monitorkonstytucyjny.eu/archiwa/25067 (accessed 30 April 2023).

[28] Jerofiejew, *supra* note 10.

Let us recall that during Hitler's National Socialist dictatorship, the passivity of the population and obedience to the state, as well as the weak resistance of intellectuals, were striking. As Anna Wolff-Powęska asks: "Did a wave of protests arise when the German officials were defining who is an Aryan?"[29]

Ludwik Hirszfeld, a Polish scholar and a survivor of the Holocaust, wrote:

> Maybe those scholars did not want to murder us and loot our culture. Maybe their sin was only being superficial, vain, and self-aggrandizing. But, for God's sake, why did they not disavow the crimes while the voice of their conscience could shout like a cry of protest. Why did they allow this climate of contempt and hatred, this self-exaltation of their own nation? After losing the war it will be too late to offer one's regrets.[30]

If during the time of National Socialism the expression of patriotism was supposed to be a way of fulfilling one's duties and obeying orders, what should we think about the actions of the Scholl siblings who, putting their lives at the risk, condemned the behaviour of so many of their countrymen, writing that:

> Why are the German people so apathetic in the face of all these most horrid, inhumane crimes? Hardly anyone thinks about it. The fact is accepted as such and put aside *ad acta*. [...] And not only does he [the German] have to feel pity, no, much more: complicity. Because through his apathetic behavior he gives these dark people the opportunity to act in this way, he suffers this government, which has burdened itself with such infinite guilt, yes, it is his own guilt that it was able to come into being in the first place! Everyone wants to absolve themselves of such complicity, everyone does it and then goes back to sleep with a clear conscience. But he cannot acquit himself.[31]
>
> Just punishment draws nearer and nearer! But what is the German people doing? It doesn't see and it doesn't hear. [...] Germans! Do you and your children want to suffer the same fate that befell the Jews? Do you want to be measured with the same standard as your seducers? Shall we forever be the people hated and rejected by the whole world? [...] Decide before it's too late![32]

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[29] A. Wolff-Powęska, *Niemiecki kłopot z niepamięcią* [The German trouble with oblivion], Gazeta Wyborcza, 22 August 2009, available at: https://tinyurl.com/r7wxb9rb (accessed 30 April 2023).

[30] L. Hirszfeld, *Historia jednego życia*, Wydawnictwo Literackie, Warszawa: 2000, p. 523 – first edition 1946 (English translation: *The Story of One Life*, University of Rochester Press, Rochester: 2010).

[31] *Zweites Flugblatt der Weißen Rose. Nach einem Entwurf von Hans Scholl und Alexander Schmorell*, June 1942, available at: https://tinyurl.com/ytrnr3cr (accessed 30 April 2023).

[32] *Fünftes Flugblatt der Weißen Rose. Nach einem Entwurf von Hans Scholl und Alexander Schmorell mit Korrekturen von Kurt Huber*, January 1943, available at: https://tinyurl.com/yh5ppjez (accessed 30 April 2023).

Thomas Mann claimed in 1945: "How different everything would have looked if the Germans on their own had been able to free themselves!"[33]

***

The above examples show that it is not always easy to face the past, not only for states, but also for nations and individuals.

Violence was and is the foundation of Russia's existence as a state. Even disregarding the moment of the end of the war in Ukraine and the forms of legal responsibility, and ignoring the uncertain evolution of Russia's politics and the mentality of its society, it seems that Russia and Russians are faced with a difficult future.

Let us make clear: the entire Russian nation is not guilty of aggression and not to blame for the crimes committed against Ukraine, but it cannot shirk its moral and political responsibility for the actions of its state. This collective responsibility of the nation takes various extralegal forms, but it is not based on the criterion of guilt. In the long term, taking such responsibility is a premise for peace.

Contemporary Russia grotesquely claims to be the victim of an attack by Ukraine and NATO and is far from recognizing its political and moral responsibility. Moreover, in March 2023 Russia concluded an agreement with Belarus on the deployment of tactical nuclear weapons on its territory. Putin's threats related to the possible use of nuclear weapons often lead to appeals to refrain from actions that could provoke him into committing an obvious crime. Thus, paradoxically the West seems to have only a choice between a nuclear Armageddon and accepting Russian aggression. Meanwhile, this is a trap cleverly set by Russia and its allies.

In order not to fall into Putin's trap, it is now time to learn how to not be scared...

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The opinions of Vladimir Vladimirovich and his acolytes (*lux ex oriente*) on the annihilation of Ukraine as a state and nation[34] show a civilizational and cultural gap, and the responsibility of the Russian nation seems left to wander in a desert.

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[33] T. Mann, *Deutsche Hörer! Radiosendungen nach Deutschland aus den Jahres 1940-1945*, Frankfurt am Main: 2004 (4. Auflage), p. 154 (Sendung vom 8. November 1945): "Wie anders hätte alles sich dargestellt, wäre es Deutschland gegeben gewesen, sich selbst zu befreien."

[34] V. Putin, *On the Historical Unity of Russians and Ukrainians*, 12 July 2021, available at: http://en.kremlin.ru/events/president/news/66181; T. Sergejzew, *Что Россия должна сделать с Украиной*, RIA Nowosti, 3 April 2022, available at: https://ria.ru/20220403/ukraina-1781469605.html; R. Veser, *Die Ukraine soll entukrainisiert werden*, FAZ, 4 April 2022, available at: https://tinyurl.com/yfmeh2ax; C. Apt, *Russia's Eliminationist Rhetoric Against Ukraine: A Collection*, Just Security, 1 November 2022, available at: https://www.justsecurity.org/81789/russias-eliminationist-rhetoric-against-ukraine-a-collection/ (all accessed 30 April 2023).

Faith in the effective awakening of this nation is very limited and belongs to the realm of wishful thinking.

In conclusion, it is worth recalling a fragment of the memorandum of German Catholic intellectuals from 1968:

> Those who consciously and light-heartedly violate the international legal order, as Germany (did) in times of Hitler, break not only concrete norms, but also threaten the very existence of such order and thus put themselves in danger of being deprived of the protection of the norms of this order. After such a violation of the peace, peace and mutual respect for law must be restored. This, however, cannot be presumed, taken for granted, and especially used to justify one's own demands. In such a situation peace is possible only under the conditions through which it can be reached.[35]

ANNEX

In modern times, there are examples of the difficulty in implementing moral, political, and historical responsibility. Limiting itself only to Poland, various forms of dialogue have been conducted in recent years, usually with good but time-consuming results, in relation to the difficult parts of Polish-Ukrainian, Polish-Jewish, and Polish-German relations.

By way of illustration, it is worth briefly recalling some aspects of overcoming the past in Polish-German relations after 1945.[36] Let us add that the path to attaining this goal was not always easy. However, it is proof that the moral and political responsibility of the nation is not just theoretical.

In the quoted passages, the word "guilt" is occasionally used instead of (moral and political) "responsibility". It is obvious, however, that this responsibility extends to the nation as a whole, without distinguishing between the guilt or innocence of its individual members. Its forms and consequences are also different than in the case of legal responsibility.

Germany started the Second World War in an intentional and conscious manner, although it was not threatened by any other country (the reasons for Russian aggression against Ukraine are equally absurd, if not paranoid). Every action can have unpredictable, unintended, and unwanted consequences. The world was set on fire in 1939 by National Socialist Germany, and the fire spread gradually and unrelentingly. The commencement of the Second World War was the beginning

[35] B. Kreis, *Ein Memorandum deutscher Katholiken zu den polnisch-deutschen Fragen (Das Bensberger Memorandum) vom 2. März 1968*, Matthias-Grünewald-Verlag, Mainz: 1968, pp. 13-14.

[36] For more on this subject, *see* Kranz, *supra* note 16.

of the end of a historic epoch in Central Europe, which brought about irreversible effects (including for Germany and the Germans).

One of the first expressions of moral responsibility is the statement of the German Evangelical Church of 1945:

> We are [...] with our people not only in a great community of suffering [...], but also in a solidarity of guilt. It causes us great anguish to state that we have brought unending suffering upon many peoples and many countries. What we have often testified to in our communities, we now declare in the name of the whole church: it is true that we fought for many long years against the spirit that found its terrible expression in the violent National Socialist regime; however, we also accuse ourselves of not having professed our faith more courageously, of not having prayed more faithfully, of not having believed more joyfully, and of not having loved more fervently.[37]

Heinrich August Winkler recalled in 2009:

> When the Council of the Evangelical Church in Germany spoke of a 'solidarity of guilt' between church and people in the 'Stuttgart Confession of Guilt' in October 1945, this also met with widespread opposition within the church. The sentence: 'We have brought unending suffering upon many peoples and many countries' was considered as an inappropriate confirmation of the Allied thesis of German 'collective guilt'. The most terrible of all crimes against humanity committed by National Socialism, the murder of around six million European Jews, was not expressly mentioned in the Stuttgart Confession of Guilt.[38]

On 16. October 1960, Cardinal Julius Döpfner, Catholic Bishop of Berlin, preached that:[39]

> The German people can only achieve peace with very great sacrifices. It would be a momentous self-deception to assume that a people do not have to pay too much for a policy such as that which that regime has pursued towards other peoples. [...] For the future, the community of peoples and states is more important than border issues [implicitly,

[37] Erklärung des Rates der Evangelischen Kirche in Deutschland gegenüber den Vertretern des Ökumenischen Rates der Kirchen vom 19. Oktober 1945 (Stuttgarter Schuldbekenntnis).

[38] Ansprache von Professor Dr. Heinrich August Winkler vom 8. Mai 2009 (70. Jahrestag des Endes des Zweiten Weltkrieges in Europa – Gedenkstunde im Plenarsaal des Deutschen Bundestages).

[39] R. Żurek, *Gescheiterter Vorstoß?: die Predigt des Berliner Kardinals Julius Döpfner vom 16. Oktober 1960 und ihre Folgen*, 14(2) Religion, Staat, Gesellschaft 223 (2013); H. Stehle, *Seit 1960: der mühsame katholische Dialog über die Grenze*, in: W. Plum (ed.), *Ungewöhnliche Normalisierung: Beziehungen der Bundesrepublik Deutschland zu Polen*, Verlag Neue Gesellschaft, Bonn: 1984, pp. 155-178.

> the Polish-German border]. A distressed past teaches that in many cases the national borders cannot exactly correspond to the ethnicity.[40]

This sermon took place only three months after Chancellor Konrad Adenauer's speech, who clearly declared: "The annexation of the German eastern territories and the expulsion of the German population are serious violations of international law. [...] The decision on the German eastern territories can only be made in a peace treaty concluded with an all-German government. And until this treaty is concluded, nobody is entitled to decide on this part of Germany."[41]

The Memorandum of the German Evangelical Church (1965) recalls that:

> The Second World War was triggered in the name of the German people and carried to many foreign countries. In the end, all of this destructive power was turned against the originator himself. The expulsion of the German East population and the fate of the German East areas is part of the serious misfortune [*Unglück*] that the German people culpably brought upon themselves and other peoples. [...] But we must hold on to the fact that all the guilt of others cannot explain or erase German guilt. [...]
> Certainly, it must be said that readiness to bear the consequences of guilt and compensation [*Wiedergutmachung*] for injustices [*Unrecht*] committed must be an important part of German policy towards our eastern neighbors too. Based on historical experience and moral insight, we must realize that injustice of the magnitude under consideration here does not remain without historical and political consequences which cannot simply be reversed.[42]

A memorandum of German Catholic intellectuals stated in 1968:

> We Germans have to admit to ourselves that the crimes that were committed in the name of Germany against Poland [...] are of such a nature that any attempt at balancing out the mutual responsibility should not even be attempted. No one can close his eyes to the fact that the nation whose leaders started the war and then lost it has to bear the responsibility, not only in point of fact but also out of a sense of justice. If we seriously want peace, we cannot avoid this responsibility, which burdens the entire German nation. As a consequence we must carry not only the burden of reparations and redress, but also accept the political losses. In this context we also cannot exclude territorial losses.[43]

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[40] Julius Kardinal Döpfner, Bischof von Berlin, Predigt am 16. Oktober 1960 in der St. Eduardkirche.

[41] Bundeskanzler Konrad Adenauer, Ansprache anlässlich des Bundestreffens der Landsmannschaft Ostpreußen in Düsseldorf am 10. Juli 1960.

[42] Die Lage der Vertriebenen und das Verhältnis des deutschen Volkes zu seinen östlichen Nachbarn. Eine evangelische Denkschrift, Hannover, 1. Oktober 1965.

[43] B. Kreis, *Ein Memorandum deutscher Katholiken zu den polnisch-deutschen Fragen (Das Bensberger Memorandum) vom 2. März 1968*, Matthias-Grünewald-Verlag, Mainz: 1968, pp. 13-14.

It is worth recalling the political and moral context when Chancellor Willy Brandt knelt in front of the monument to the ghetto heroes in Warsaw (7 December 1970). But at the same time, a question arose in Germany whether he was allowed to kneel down, as well as accusations of voluntary humiliation. This symbolic gesture by the Chancellor demonstrated his moral and political farsightedness – an element so often missing from politics.

> And then kneels the one who does not have to kneel, on behalf of all those who should but do not kneel, because they do not have the courage, cannot or cannot dare. And then he confesses a guilt that does not burden him and asks for forgiveness that he himself does not need. And so, he is kneeling on behalf of Germany.[44]

The President of the Federal Republic of Germany, Richard von Weizsäcker, stated in his speech of 8 May 1985:

> All of us – the guilty and the innocent, the old and the young – have to accept the heritage of the past. We are all affected by its consequences, for which we are responsible. [...] It is not about overcoming the past, which is in any case impossible. You can't change it or consider that it didn't happen. Whoever closes his eyes to the past becomes blind to the present. Whoever does not want to remember inhuman behaviour, can be infected by new threats. [...] Therefore, we have to understand that memory is a premise of reconciliation.[45]

On the Polish side, an important element was the letter from the Polish Catholic Bishops to the Bishops of Germany on 18 November 1965:

> The Polish border on the Odra and Nysa is, for the Germans, as we well understand, an exceptionally bitter fruit of the last war and of the mass destruction, and similarly bitter is the suffering of the millions of refugees and of the resettled persons. [...] We ask you, Catholic Shepherds of the German Nation, that you celebrate our Christian Millennium together with us. [...] And we ask you to pass on our regards and expressions of gratitude to our German Evangelical brothers who, together with you and us, are making efforts to find a solution to the difficulties between us. In this most Christian and most human spirit, we stretch out our hands to you, sitting in the seats at the Second Vatican Council, which is about to end, we forgive you and ask for forgiveness. If you, German Bishops and Fathers of the Council, take our brotherly outstretched hands, only then could we

[44] H. Schreiber, *Ein Stück Heimkehr*, Der Spiegel, 14 December 1970.

[45] Ansprache des Bundespräsidenten Richard von Weizsäcker zum 40. Jahrestag der Beendigung des Zweiten Weltkrieges am 8. Mai 1985 im Plenarsaal des Deutschen Bundestages.

> celebrate our Millennium with a peaceful conscience and in a way that would be most Christian. We most cordially invite you to Poland for these celebrations.[46]

The response of the German bishops turned out to be distant, and the formula "we forgive and ask for forgiveness" was not fully reciprocated. In fact, the West German episcopate hid behind the legal and political position of the state authorities.

In 1981 Jan Józef Lipski, Polish oppositionist and intellectual, wrote:

> We have taken part in depriving millions of people of their homeland, some of whom were surely guilty of having supported Hitler, others only of passively accepting his crimes, still others were only unable to find the courage for a heroic fight against his monstrous machine of terror – in a situation where their state was at war. The evil that has been done to us, even the greatest evil, is not, however, and cannot be a justification for the evil that we have done ourselves. Removing people from their homes can be at best a lesser evil, never, however, an act of good. It is true without any doubt that it would not be just if a nation attacked by two rogues had to pay all the costs of the attack by itself. The choice of a solution – which as it seems – is less unjust, the choice of a lesser evil, cannot, however, make us insensitive to moral considerations. Evil is evil, and never good, even if it is a lesser and unavoidable evil.[47]

The attitude of Poles to the Holocaust perpetrated by the Germans on Polish lands during the Second World War was examined by Jan Błoński (1987):

> Our fatherland is not a hotel in which it is enough to clean up after a visit by unexpected guests. It is built, above all, out of memories; in other words, we are who we are only thanks to the memories of the past. We are not free to use it in any way we wish, although – as individuals – we are not directly responsible for it. We have to carry it within ourselves, even though it may be sad or painful. [...] In total sincerity and honesty we have to face the question concerning our co-responsibility. We can't hide this: this is one of the most painful questions that we can face. [...] Participation and responsibility are not the same thing. One can share the responsibility for the crime without taking part in it. Our responsibility is for holding back, for insufficient effort to resist. Which

[46] *Orędzie biskupów polskich do ich niemieckich braci w chrystusowym urzędzie pasterskim* [Message of the Polish bishops to their German brothers in Christ's pastoral office], available at: http://www.opoka.org.pl/biblioteka/W/WE/kep/oredzie-niem_18111965.html (accessed 30 April 2023).

[47] J.J. Lipski, *Dwie ojczyzny, dwa patriotyzmy* [Two homelands, two patriotisms], Nowa, No. 144, June 1981 and Kultura, No. 409, 1981). German text was published in Germany in a special issue of the magazine Kontinent (No. 22/1982). Later also in bilingual edition – J.J. Lipski, *Powiedzieć sobie wszystko. Eseje o sąsiedztwie polsko-niemieckim* [Tell yourself everything. Essays on the Polish-German Neighborhood], Wydawnictwo Polsko-Niemieckie, Gliwice-Warszawa: 1996, pp. 192-193.

> of us could claim that there was sufficient resistance in Poland? It is precisely because resistance was so weak that we now honour and pay homage to all those who did have the courage to take this historic risk [during the war]. Although it may sound strange, I do believe that this responsibility through failure to act is less relevant for our question. More significant is the fact that if only we had behaved more humanely in the past, had acted in a wiser, nobler, more Christian way, then genocide would have perhaps been 'less imaginable.' It would probably have been considerably more difficult, and almost certainly would have met with greater resistance. In other words, it would not have infected the society that witnessed it with indifference and moral turpitude.[48]

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Polish-German relations have followed the historical trail from *Ostsiedlung*, *Ostflucht*, *Ostschutz*, *Ostkunde*, *Ostforschung*, *Ostinstitute*, *Generalgouvernement*, *Generalplan Ost*, *Ostfront*, *Ostrausch*, *Ost-Dokumentation*, and *Ostblock* to the time of *Ostpolitik* and *Ostverträge*. And finally to *Osterweiterung* and the totally new situation in which Poland and Germany are members of the same military alliance and of the same community of values.

The Brandenburg Gate remains open, and Europe has taken a new form.

[48] J. Błoński, *Biedni Polacy patrzą na getto* [Poor Poles look at the ghetto], Tygodnik Powszechny, 11 January 1987 – English version available at: https://www.tygodnikpowszechny.pl/the-poor-poles-look-at-the-ghetto-144232; French version available at: https://www.tygodnikpowszechny.pl/les-pauvres-polonais-regardent-le-ghetto-144133 (both accessed 30 April 2023). *See also* A.K. Kunert (ed.), *Polacy – Żydzi. Wybór źródeł. Polen – Juden. Poles – Jews. Quellenauswahl* [Selection of documents], Rytm, Warszawa: 2001.

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THE "LESSONS OF NUREMBERG": THEIR USE AND ABUSE IN THE CURRENT RUSSIA-UKRAINE WAR

Abstract: *The Russian aggression against Ukraine is heavily influenced by the memory of World War II (WWII), used by the Russian Federation as a consolidation tool to mobilise Russian society for the fight against a "neo-Nazi Ukraine". Since 2014 Russia has adopted a set of legislative initiatives aiming to preserve a government-prescribed narrative about the exceptionally heroic role of the USSR in WWII and prohibiting any other interpretation under the threat of criminal and administrative sanctions. Both laws are using the decision of the International Military Tribunal (IMT) as a reference point to justify and legally substantiate such an interpretation, as the USSR was one of "victorious" nations which rendered justice against the Nazis in 1946. This article aims to show how the IMT rulings have been turned into an instrument of Russian propaganda and which lessons can be learned for the future of international tribunals, as well as examines the overall Ukrainian quest for Russian accountability.*

Keywords: Russia, memory laws, Nuremberg, IMT, victor's justice

INTRODUCTION

On 24 February 2022 Russian President Vladimir Putin announced the start of the so-called "Special Military Operation" (SMO) against Ukraine, with the purported aims of "demilitarization" and "denazification".[1] The latter term immediately sowed confusion as to what "denazification" could possibly mean in this context, especially bearing in mind that Ukraine is currently headed by a president of Jewish origin.[2]

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[1] *Full text of Vladimir Putin's speech announcing 'special military operation' in Ukraine*, ThePrint, 24 February 2022, available at: https://tinyurl.com/y47fymh9 (accessed 30 April 2023).

[2] G. Beckerman, *How Zelensky Gave the World a Jewish Hero*, The Atlantic, 27 February 2022, available at: https://t.ly/UbVc (accessed 30 April 2023).

Within the same speech Putin referred to the Ukrainian government as a "gang of drug addicts and neo-Nazis",[3] and since then the Russian media have repeatedly called for the "denazification" of the entire population of Ukraine.[4] The infamous Timofey Segeytsev, in his article on "What Russia must do to Ukraine", claims that a "winning state" as a "denazifyer" ought to eliminate the "aggressive nationalist population" and introduce mandatory re-education for the civilians rejecting Russian values and aiming to preserve their "Nazist" (meaning Ukrainian) identity.[5] Hence some researchers claim that "denazification" has nothing to do with Nazism as such. It is a "coded historical term, used to justify the war against the neighbouring country, evoking the memory of the USSR's defence against Nazi Germany".[6] For modern Russia, Hitler and Nazi Germany are part of the "usable past" and represent an "almost universal symbol for an existential threat in the Russian collective memory".[7] According to this line of reasoning, Putin's intention is to draw false parallels between Russia's aggression against Ukraine and the Soviet fight against Nazi Germany.[8]

As noted by Belavusau, Russia is utilizing the narrative of the "Great Patriotic War of 1941–1945" as a purely self-exculpatory rhetoric, for two reasons. First, it aims at positioning the Soviet Union (USSR) as both the major victim and "winner" of the Second World War (WWII). And secondly, it cements "the denial of Russian culpability" by whitewashing the dark pages of Russian history, such as the Molotov-Ribbentrop Pact,[9] the Russian involvement in the occupation of Poland, and the atrocities committed by the Soviet Army.[10]

To secure these narratives, Russia presents itself as a guardian of the "rightful" remembrance of the WWII, which is protected by Russian internal legislation.[11] This legislation includes provisions 1) securing a particular historical narrative (such as Constitutional amendments protecting "historical truth"); and 2) prohibiting expressions denying or questioning this narrative (such as provisions within the

[3] *Vladimir Putin's speech, supra* note 1.

[4] US Department of State, *To Vilify Ukraine, The Kremlin Resorts to Antisemitism*, 11 July 2022, available at: https://t.ly/ScLL (accessed 30 April 2023).

[5] M. Kravchenko, *What should Russia do with Ukraine?* [Translation of a propaganda article by a Russian publication], Medium, 4 April 2022, available at: https://tinyurl.com/5msrtcs8 (accessed 30 April 2023).

[6] D. Freid, *How Zelensky Gave the World a Jewish Hero,* Politico, 1 March 2022, available at: https://t.ly/QMQf (accessed 30 April 2023).

[7] E. Gaufman, *World War II 2.0: Digital Memory of Fascism in Russia in the Aftermath of Euromaidan in Ukraine*, 10 Journal of Regional Security 17 (2015), p. 18.

[8] US Department of State, *supra* note 4.

[9] The 1939 Molotov-Ribbentrop agreement and the non-aggression pact concluded by the USSR and Nazi Germany on 23 August 1939 resulted in the partition of Poland in the aftermath of the German-Soviet invasion following the pact and unleashing WWII.

[10] U. Belavusau, *Mnemonic Constitutionalism and Rule of Law in Hungary and Russia*, 1 Interdisciplinary Journal of Populism 16 (2020), pp. 24-25.

[11] A. Gliszczyńska-Grabias, U. Belavusau, M. Mälksoo, *Memory Laws and Memory Wars in Poland, Russia and Ukraine*, 69(1) Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge 95 (2021).

Criminal Code prohibiting denial of the Nuremberg Tribunal's decision). These provisions, according to the typology introduced by Gliszczyńska-Grabias, can be characterized as "memory laws".[12] Mälksoo also notes that such memory laws contribute to "mnemonical security-seeking", forming a states' stable sense of self and consequently "underpinning and enabling their political agency".[13]

Generally, these legislative memory politics have shaped the ideological justification for the Russian aggression against Ukraine, framing it as a continuation of WWII.[14] The Russian government is consistently posing itself as a victim of an "unprovoked aggression" in the past (referring to WWII) and simultaneously using the word "Nazi" to vilify its political opponents in the present. At the same time, modern Russia is posing as a victorious nation that liberated the world from the "evils of Nazism", and as a defender of the world order.[15] In the case of Ukraine, the Soviet myth[16] is used to validate its invasion and to obscure its true nature as being an attack on Ukrainian identity under the guise of a mission against Nazism.[17] The claim that Russia has to liberate Ukraine from a "Nazi occupation" serves as an "excuse to escalate violence to the level of 80 years ago, when every bit of strength was required to rid Ukraine of [real] Nazis".[18] The Russian war against Ukraine is also bringing a new dimension to the post-Soviet memory politics, employing a new temporality in which elements of the past and present are fused together.[19]

One particularly striking example of current Russian military propaganda is its references to the International Military Tribunal (IMT), or the Nuremberg Trials. Specifically, Russia – is claiming to guard "the legacy of the Nuremberg Trials" – calls for "Nuremberg 2.0" to try Ukrainian leaders and soldiers[20] in order to provide

[12] A. Gliszczynska-Grabias, *Memory Laws or Memory Loss? Europe in Search of Its Historical Identity through the National and International Law*, XXXIV Polish Yearbook of International Law 161 (2015), p. 162.

[13] M. Mälksoo, *Memory Must be Defended: Beyond the Politics of Mnemonical Security*, 6(3) Security Dialogue 221 (2015).

[14] J. Fedor, S. Lewis, T. Zhurzhenko, *Introduction: War and Memory in Russia, Ukraine, and Belarus*, in: J. Fedor et al. (eds.), *War and Memory in Russia, Ukraine and Belarus*, Palgrave Macmillan, Cham: 2017, p. 5.

[15] J. Freidman, I. Burke Friedman, *Russia's Invasion of Ukraine Is the Result of Its Own Failure to 'Denazify'*, Politico, 5 April 2022, available at: https://t.ly/muni (accessed 30 April 2023).

[16] In the Russian discourse the term "Great Patriotic War" (1941-1945) is commonly used to refer to WWII. Even these language choices obscure the nature of Russian involvement in the war prior to 1941, particularly of the Molotov-Ribbentrop Pact and of the Soviet atrocities committed in Poland and the Baltics during that period of non-aggression between the 1939 pact and the 1941 Nazi invasion of the Soviet Union, *see* more N. Koposov, *The Only Possible Ideology: Nationalizing History in Putin's Russia*, 24 Journal of Genocide Research 205 (2022), p. 209.

[17] W. Talley, *Debunking 'denazification'*, Commission on Security and Cooperation in Europe, 21 April 2022, available at: https://t.ly/MPhT (accessed 30 April 2023).

[18] G. Rossoliński-Liebe, B. Willem, *Putin's Abuse of History: Ukrainian "Nazis", "Genocide", and a Fake Threat Scenario*, 35 The Journal of Slavic Military Studies 1 (2022), p. 1.

[19] Fedor et. al., *supra* note 14.

[20] A. Krasov, *На Украине проведем Нюрнберг 2.0* [We'll hold Nuremberg 2.0 in Ukraine], Parliament Union of Russia and Belarus, 11 May 2022, available at: https://cutt.ly/59OOQJw (accessed 30 April 2023).

"a lesson for everyone who has forgotten the lessons of Nuremberg".[21] At the same time, the Ukrainian government is pledging to establish a special tribunal on aggression to prosecute the highest military command of Russia, which is currently not possible under the auspices of the International Criminal Court (ICC) due to jurisdictional difficulties.[22]

Hirsch explains that the "lessons of Nuremberg" in the modern Russian interpretation are based on a patriotic-nationalistic history of WWII, where the Russians cannot organically be perpetrators or fascists as these labels are reserved for the "Nazis". This narrative of WWII is protected by Russian memory laws, which are utilizing "the Nuremberg verdict"[23] to whitewash the ugly past. According to Nuzov, Russia has been at the "forefront of legal innovation with respect to the most nefarious types of memory laws, with at least seven laws that restrict historical debate around Soviet responsibility for international crimes".[24]

That narrative is now directly instrumentalized by the Russian legislation prohibiting any attempt to "deny" or "distort" the findings of the IMT or question the Soviet's role as "the World's liberator from Nazism", under the threat of criminal and administrative sanctions. Moreover, the IMT and its rulings are actively used among the general Russian public – and especially children and youth – as an instrument to instil a specific narrative about the Soviet role in WWII. For example, to quote Russian Foreign minister Sergey Lavrov, "the heritage of the Nuremberg Tribunal is not limited to the sphere of law, but has a colossal political and educational value".[25] Francine Hirsh notes that the memory of Nuremberg has also become "a part of Russia's patriotic education".[26] Hence, the IMT's procedural deficiencies have allowed the USSR to disguise itself as a "victorious nation" judging the most heinous crimes of the 20th century. This narrative has turned into a powerful tool which simultaneously instils a certain pride and instrumentalizes the feeling of self-righteousness this role grants to Russia as the successor of the USSR.

Therefore, this article aims to answer the question: How has a ruling of the IMT become a foundation for memory laws which are now being used as instruments of

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[21] F. Hirsch, *Why Ukraine and Russia Both Look to the Nuremberg Trials*, The Time, 26 May 2022, available at: https://cutt.ly/n9OOE7s (accessed 30 April 2023).

[22] *Україна підтримала ініціативу "Нюрнберг-2" щодо притягнення Росії та її лідерів до відповідальності* [Ukraine supported the "Nuremberg-2" initiative to bring Russia and its leaders to justice], Pryamyy, 6 May 2022, available at: https://tinyurl.com/3y4exbu3 (accessed 30 April 2023).

[23] Hirsch, *supra* note 21.

[24] I. Nuzov, *Legislating Propaganda*, 20(4) Journal of International Criminal Justice 805 (2022), p. 807.

[25] *МИД напомнил Европе о Нюрнбергском трибунале* [The Foreign Ministry reminded Europe of the Nuremberg Tribunal], Pobeda.rf, 20 November 2020), available at: https://cutt.ly/G9OOYII (accessed 30 April 2023).

[26] A. Roth, *Kremlin Mulls Nuremberg-Style Trials Based on Second World War Tribunal*s, The Guardian, 28 May 2022.

modern Russian propaganda? These laws not only restrict freedom of expression but directly affect teaching and the public perception of history. To analyse this question, it is proposed to clarify how the IMT ruling has influenced international jurisprudence and international legal consciousness; what deficiencies in the trial proceedings are now allowing Russia to use it as a legitimisation tool for the ongoing aggression against a sovereign nation; how it influences the debate in Russia; and the broader consequences of inserting history into law and the role of international tribunals in this process. In conclusion, it will discuss which "lessons of Nuremberg" are still haunting the modern international criminal law system and which pitfalls ought to be avoided in a modern quest for international justice.

1. THE SIGNIFICANCE OF THE IMT JUDGMENT WITHIN THE LEGAL PRACTICE

The IMT undoubtedly had a profound effect on the development of the international legal system, especially in relation to the prosecution of war crimes and the international criminal law regime. According to Haftetz, although states had punished war crimes for centuries, it was mostly the case of a victorious state punishing individuals from the vanquished state for war crimes committed against its soldiers. However, the IMT represented a drastic change from the established paradigm, being the first "international trial for crimes against the international legal order".[27]

In fact, the IMT is the first international trial that sentenced the high military command of a government and proclaimed that high state officials cannot hide behind the convenient shield of international immunity. On the contrary, the IMT judgment created an "international legal shield" to guard the whole of humanity, with the right of a humanitarian intervention to put a stop to crimes against humanity, thus invalidating the national sovereignty argument.[28] But with respect to the current case under discussion, the references to Nuremberg from both the Russians and Ukrainians spark a debate on how the legacy of arguably the most prominent international judicial proceedings in history to date are of relevance in the present times.

The Nuremberg trials have become a part of the history and the political scene of early post-war Europe, as its representations of the Nazi past and responsibility

[27] J. Hafetz, *Creating the Template: Nuremberg and the Post-World War II International Prosecutions, Punishing Atrocities through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism,* Cambridge University Press, Cambridge: 2018.

[28] The Influence of the Nuremberg Trial on International Criminal Law, Robert H Jackson Center, available at: https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/ (accessed 30 April 2023).

for that past were incorporated into powerful narratives.[29] The IMT's historical significance was in some ways reflected from the very beginning of the trial.[30] In this regard, two opposing questions arise: Whether the IMT judgment has aged well – and if not, why not.

As history goes, the IMT consisted of prosecutorial and judicial teams from the allied powers: Great Britain, the USA, France, and the USSR – who reviewed the crimes committed by the Axis power states (Germany, Italy, and Japan). Francine Hirsch notes that a full history of the IMT shows that the USSR substantially helped create international legal norms and the Nuremberg model of justice, such as criminalizing "aggressive war", substantiating the ex post facto application of the law, and providing the legal rationale for the charge of "crimes against peace".[31]

At the same time however, the USSR's participation as one of the trial's founders created one of the controversies directly addressed in this article. While the Soviet prosecutors mostly posed themselves as "liberators" who freed the nations from the "menace of Nazism",[32] the role of the USSR in the Molotov-Ribbentrop pact and its partition of Poland in 1939 alongside Hitler strongly suggests that some of the Soviet military command could have (and probably should have) faced charges as defendants. Therefore, despite all the perhaps positive substantive contributions that the USSR brought into proceedings, the mere fact of its participation poses questions as to the trial's credibility.

Some believe that one of the IMT's purposes was an educational one, i.e. providing "a lesson in history" by exposing Nazi crimes and consequently shaming the German people.[33] In this regard, researchers point out that the IMT provided "indelible documentary proof of Nazi guilt", allowing the media to deliver the "historical truth about atrocities" and ensure "the reverberating pedagogical value of the IMT".[34] However, the "historical truth" of Nuremberg was carved out in a complex interplay of national priorities, available evidence, and interpretation, again in many

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[29] D. Bloxham, *From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited*, 98 History 567 (2013), pp. 569-570.

[30] R. Jackson, *Opening Address for the United States*, available at: http://fcit.usf.edu/holocaust/resource/document/docjac01.htm (accessed 30 April 2023)

[31] F. Hirsch, *The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order,* 113 The American Historical Review 701 (2008), p. 710.

[32] Nuremberg Trial Proceedings, Vol. 7, The Avalon Project, available at: https://avalon.law.yale.edu/imt/02-08-46.asp (accessed 30 April 2023).

[33] C. Santry, *The Nuremberg Trial: A Beautiful Idea Murdered by Ugly Facts?*, E-International Relations, 19 August 2013, available at: https://www.e-ir.info/2013/08/19/the-nuremberg-trial-a-beautiful-idea-murdered-by-ugly-facts/ (accessed 30 April 2023).

[34] I. Nuzov, *The Role of Political Elite in Transitional Justice in Russia: From False 'Nurembergs' to Failed Desovietization*, 20 U.C. Davis Journal of International Law & Policy 273 (2014), p. 289.

ways owning to Soviet participation.[35] Thus, the IMT can be characterized both as a "factual history lesson" and a " subjective morality lesson".[36]

Interestingly, the Russian news agency TASS claims that the Soviet journalists in Nuremberg warned the party elite that the defendants intended to explain the German aggression against the USSR as a "preventive war". Hence, in their words, "the Anglo-Saxon prosecution" will definitely try to "publicly condemn the foreign policy of the Soviet Union"[37], possibly hinting at the afore-mentioned 1939 Molotov-Ribbentrop agreement. Notoriously, the Soviet prosecutors also tried to pin the Katyń mass execution of Polish officers in 1940 on Germany, a massacre which in fact had been orchestrated by the USSR itself.[38] Therefore, in some ways the proceedings did not produce the desired results for the USSR, as despite all its deficiencies it had not turned into a Soviet-dictated triumph of an ultimate "show trial".[39] Albeit the truth behind the Katyń massacre had been sacrificed to serve the Soviet propaganda until the 1990s,[40] the allied powers did not allow the USSR to pin it on the Nazis. Still, in the USSR the IMT was presented as a symbol of the Soviet victory over German fascism and the emergence of the USSR as a world power.[41]

Other contra-IMT arguments are that 1) historical aspirations undermined the judicial procedure; and 2) the limits of the legal process did not enable the IMT to deal with the issue of collective trauma, especially in the cases of mass crimes.[42]

To conclude, despite all the above-mentioned controversies, the most popular way in which intellectuals have perceived the IMT is not as a judicial process, but a "neatly delineated symbol" of a moral-didactic "lesson" that varies from party to party.[43] Telford Taylor accurately predicted that "the conclusion of the trials mark the beginning, not the end, of Nuremberg as a force in politics, law, and morals".[44]

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[35] M. Koskenniemi, *Between Impunity and Show Trials*, 6 Max Planck Yearbook of United Nations Law 1 (2002), p. 21.

[36] Santry, *supra* note 33.

[37] *Процесс: История Международного Военного Трибунала в Нюрнберге глазами журналистов* [The process: history of the IMT as told by the journalists], (TASS), available at: https://spec.tass.ru/nurnbergskiy-process/ (accessed 30 April 2023).

[38] ECtHR (GC), *Janowiec and Others v. Russia* (App. Nos. 55508/07 and 29520/09), 21 October 2013.

[39] W. Pomeranz, *Review on Francine Hirsch. Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II* (H-Diplo REVIEW ESSAY 500), available at: https://networks.h-net.org/node/28443/discussions/11582172/h-diplo-review-essay-500-pomeranz-hirsch-soviet-judgment (accessed 30 April 2023).

[40] J. Jackson, *Victors Write the Rules: Hypocrisies and Legacies of the Nuremberg Trials*, 8 Journal of Global Faultlines 265 (2021), p. 267.

[41] Hirsch, *supra* note 31.

[42] Santry, *supra* note 33.

[43] Bloxham, *supra* note 29, pp. 568-569.

[44] Ch.M. Laico, *Telford Taylor and the Precedent of the Nuremberg Trials*, Columbia University Libraries available at: https://blogs.cul.columbia.edu/rbml/2018/01/26/telford-taylor-and-the-precedent-of-the-nuremberg-trials/ (accessed 30 April 2023).

It is hard to disagree with Taylor's statement, because in the contemporary discourse the differing interpretations of the Nuremberg proceedings, outcomes, and controversies form the basis for what is currently called "memory wars" within the European debate. And unfortunately, in some ways the forces of Nuremberg are playing on the wrong side of history, by providing much room for manipulation and placing restrictions on historical debate, such as in the Russian case, which is discussed further below.

Even though it is not intended here to diminish the role of the IMT in terms of establishing important legal principles and starting the path toward international criminal justice, its structural deficiencies allow different persons or states to view its significance today in different lights. In the post-war years the IMT was indeed a symbol of a world justice, even though if viewed through a more modern lens the trial proceedings resembled more of a ritual, purporting to demonstrate the victory "of good against evil". Viewed from today's perspective, the circumstances of WWII and its complex history provide little room for such a simplistic understanding, and when taken too literally can hardly avoid the label of "victor's justice" by providing a very one-dimensional and single truth dictated by the winner. The following part of this article will show how modern Russia, as the self-proclaimed successor of the USSR, is currently exploiting the IMT verdict to establish what it deems to be an "objective historical truth" – not subject to any kind of revisionism or even mere critique – and thus as an instrument to effectively whitewash its past.

2. THE RUSSIAN PERCEPTION OF THE NUREMBERG LEGACY

The modern Russian official interpretation of the war excludes the USSR from complicity in unleashing WWII, and the subsequent Soviet occupation of Eastern Europe is portrayed as "liberation", thus legitimizing modern Russia's neo-imperial ambitions.[45] The IMT reflected the political divisions of the times, with the Soviets treating its trials as "a repeat of their own show trials of the 1930s", and like the show trials the IMT verdicts are used in modern times as a shield against accusations of crimes under Stalin.[46]

Nowadays, any kind of attempts to equate the Nazi and Soviet crimes committed during WWII meet with strong opposition and resentment in Russia. This debate arguably started with the 2008 Prague Declaration on European Conscience and Communism, which called for "recognition that many crimes committed in the name of Communism should be assessed as crimes against humanity [...], in the

[45] N. Koposov, *The Only Possible Ideology: Nationalizing History in Putin's Russia*, 24 Journal of Genocide Research 205 (2022), p. 209.

[46] Roth, *supra* note 26.

same way, Nazi crimes [had been] assessed by the Nuremberg Tribunal".[47] This declaration was very negatively received in Russia, as putting Stalinism and Nazism on the same level undermined the outcomes of the Great Patriotic War and contradicted the government-dictated media.[48]

Further, the European Parliament resolution of 2019 has empathized that the "Molotov-Ribbentrop Pact and its secret protocols signed by the Nazi Germany and the USSR paved the way for the outbreak of the Second World War". The resolution references the dual invasion into Poland by Hitler and Stalin; the USSR's aggressive war against Finland; and the annexation of Romania, Lithuania, Latvia, and Estonia. The resolution also highlights that although the crimes of the Nazi regime were evaluated and punished by the IMT, there is still "an urgent need to raise awareness, carry out moral assessments and conduct legal inquiries into the crimes of Stalinism and other dictatorships".[49]

Of course, this interpretation was not welcomed in Russia. Putin has condemned the resolution as trying to "shift the blame for unleashing WWII from the Nazis to Communists". The Russian Foreign Ministry has claimed that the resolution is nothing more than "historical revisionism",[50] aimed not only at "denigrating modern Russia as the successor of the USSR", but also revising "the universally recognized international legal results of World War II, including the decisions of the Nuremberg Tribunal".[51] In 2020 Putin's address referred to the "lessons of the Nuremberg Tribunal" as upholding the "truth of historical memory" and as an instrument to "convincingly and reasonably oppose deliberate distortions and falsification of the events of WWII".[52]

The Nuremberg narrative – that indeed names only one perpetrator in WWII (in many ways due to its jurisdictional clause limited only to European Axis powers, and

[47] Prague Declaration on European Conscience and Communism, (03 June 2008), available at: https://www.praguedeclaration.eu (accessed 30 April 2023).

[48] Koposov, *supra* note 45, p. 214.

[49] Resolution 2019/2819(RSP) of 19 September 2019 on Importance of European remembrance for the future of Europe [2019].

[50] *Ответ официального представителя МИД России М.В.Захаровой на вопрос агентства «РИА Новости» в связи с принятием Европарламентом резолюции «О важности сохранения исторической памяти для будущего Европы»* [Response of MFA Spokesperson Maria Zakharova to the RIA Novosti agency on the adoption of the European Parliament resolution "On the Importance of Preserving Historical Memory for the Future of Europe"], available at: https://tinyurl.com/2p8vmuy2 (accessed 30 April 2023).

[51] *МИД России продолжит защищать историю* [The Russian Foreign Ministry will continue to defend history], Pobeda.rf, 14 November 2022, available at: https://pobedarf.ru/2022/11/14/mid-rossii-prodolzhit-zashhishhat-istoriyu/ (accessed 30 April 2023).

[52] *Владимир Путин обратился к участникам Международного научно-практического форума «Уроки Нюрнберга»* [Vladimir Putin addressed the participants of the "Nuremberg Lessons" International Scientific and Practical Forum], Russian Bar Association, 20 November 2020, available at: https://alrf.ru/news/vladimir-putin-obratilsya-k-uchastnikam-mezhdunarodnogo-nauchno-prakticheskogo-foruma-uroki-nyurnber/ (accessed 30 April 2023).

not on factual grounds) – is being actively disseminated within the Russian public. For example, the portal "Nazi policy of extermination. Atrocities. Retribution. Memory" aims "to protect historical memory, to recall the atrocities committed during the Great Patriotic War" and references today's crimes "against the civilian population of Donbass and the former Ukrainian SSR".[53] The Russian MPs are also actively exploiting the Nuremberg narrative, calling it "the main weapon in the fight against Nazism",[54] demonstrating what "the real evil is" and calling for "protection from misinterpretation by some Eastern European states".[55] A Russian academic noted that "the verdict of the 'court of nations' was aimed to serve as a formidable warning. The Nuremberg trials are an impartial chronicle to which journalists, lawyers, writers, and historians must turn in search of the truth" and equated the modern Ukrainian state with the Nazis.[56]

Moreover, the "pedagogical" effect of the IMT rulings is most prominent in Russian schools, universities, and even recreational camps. Numerous reconstructions of the Nuremberg trials were held in the Artek Summer Camp for children, beginning in 2017. According to the press release, the event "is aimed at expanding the knowledge of Artek residents about the Great Patriotic War, the losses suffered by the Soviet people, and the decisive role of the USSR in the victory over Nazism".[57] This event is curated by the Prosecutor General's Office of the Russian Federation to "preserve the memory and pass on to the next generations" the Soviet prosecutor's proof of the defendants' guilt.[58] The same event was conducted in 2022 with a scientific conference, where the guests emphasized that "the younger generation around the world should keep the memory of this war in order to prevent similar tragedies in the future".[59] At the same time, this reconstruction should also pass

[53] *Портал Возмездие защитит историческую память* [Portal Retribution will protect historical memory], Pobeda.rf, 19 October 2022, available at: https://pobedarf.ru/2022/10/19/portal-vozmezdie-zashhitit-istoricheskuyu-pamyat/ (accessed 30 April 2023).

[54] *Историческая правда стала оружием* [Historical truth has become a weapon], Pobeda.rf, 19 April 2022, available at: https://pobedarf.ru/2022/04/19/istoricheskaya-pravda-stala-oruzhiem/ (accessed 30 April 2023).

[55] V. Matvienko, *Суд народов. Аксиома Нюрнберга* [Court of Nations. Axiom of Nuremberg], 20 November 2020, available at: http://council.gov.ru/services/discussions/blogs/121555/ (accessed 30 April 2023).

[56] Александр Звягинцев, *На Украине забыли уроки Нюрнбергского процесса* [Ukraine has forgotten Nuremberg lessons], Edinaya Rossiya, 30 March 2022, available at: https://er.ru/activity/news/aleksandr-zvyagincev-na-ukraine-zabyli-uroki-nyurnbergskogo-processa (accessed 30 April 2023).

[57] *В Артеке проведут реконструкцию Нюрнберского процесса* [Reconstruction of the Nuremberg trials will be held in Artek], Radio Azzatyk, 26 November 2022, available at: https://rus.azattyk.org/a/28877488.html (accessed 30 April 2023).

[58] *«Юные правоведы» провели реконструкцию Нюрнберского процесса в «Артеке»* ["Young jurists" conducted re-enactment of the Nuremberg trials in "Artek"], (Artek, 25 November 2022) available at: https://artek.org/press-centr/news/yunye-pravovedy-proveli-rekonstrukciyu-nyurnbergskogo-processa-v-arteke/ (accessed 30 April 2023).

[59] *В «Артеке» состоялась реконструкция Нюрнберского процесса* [Reconstruction of the Nuremberg trials took place in Artek], available at: https://artek.org/press-centr/news/v-arteke-proshla-rekonstrukciya-nyurnbergskogo-processa/ (accessed 30 April 2023).

on "a sense of pride to be part of a great Russia", but does not provide a broader perspective on the complex legacy of Nuremberg.[60]

This "convenient" version of Nuremberg is also being promoted at Russian schools. For example, during a history lesson dedicated to the IMT the teacher emphasized that "the trial of the Nazis was instituted only at the insistence of Stalin", to prevent the "British and the Americans" from falsifying history. In her words, the USSR required documentary proof as a weapon to preserve the "historical truth".[61] Most notoriously, one of the Crimean MPs has claimed that the attempts to criticize or revise the IMT judgment are aimed at weakening the spirit of the Russian people and diminishing their "moral rights as winners" and their "heroic history" in the subsequent fight.[62] The Far Eastern Federal University held a special symposium for its students to commemorate the Nuremberg trials and the importance of such commemoration was deemed to be substantiated by, *inter alia*, the rise of the "banderovtsy"[63] in Ukraine.[64]

Therefore, the memories of the "Great Patriotic War" are used to equate Ukrainian nationalism with German Nazism, thereby positing that Ukraine, like Germany before it, is the embodiment of absolute evil and an existential threat to Russia, which needs to be eliminated at all costs.[65] The narrative that the IMT adopted Russia's position and treated it as a victor in a war of aggression against it is thus a narrative intended to legitimize Russia's eternal struggle against Nazism everywhere, including in Ukraine,[66] and impose a particular understanding of the trial's process and outcomes on Russian students. For example, on 17 April 2023

[60] *Форум «Нюрнбергский процесс: история и современность» состоялся в «Артеке»* [Forum "Nuremberg trials: history and modernity" was held in "Artek"], Russian Bar Association, 5 November 2017, available at: https://alrf.ru/news/forum-nyurnbergskiy-protsess-istoriya-i-sovremennost-sostoyalsya-v-arteke/ (accessed 30 April 2023).

[61] *Нюрнбергский процесс: школьники сложили пазл исторического события* [Nuremberg trials: schoolchildren put together a puzzle of a historical event], Ogni Agideli, 23 November 2022, available at: https://ogni-agideli.ru/news/novosti/2022-11-23/nyurnbergskiy-protsess-shkolniki-slozhili-pazl-istoricheskogo-sobytiya-3042284 (accessed 30 April 2023).

[62] *Нюрнбергский процесс: история и современность* [Nuremberg trials: history and modernity], Krymskie Izvestiya, 18 November 2022, available at: https://new.crimiz.ru/rubriki/101-istoriya/19865-nyurnbergskij-protsess-istoriya-i-sovremennost (accessed 30 April 2023).

[63] This refers to the Ukrainian insurgent army fighters in the 1940s headed by Stepan Bandera. Within the Russian discourse, the term "banderovtsy" is used as a label for Nazi collaborators. For more on this, see A. Walke, *Old and new fault lines in the wake of Russia's assault on Ukraine*, Georgie W. Lewis University, 15 March 2022, available at: https://history.wustl.edu/news/old-and-new-fault-lines-wake-russia's-assault-ukraine (accessed 30 April 2023).

[64] *Семинар-симпозиум «Нюрнбергский трибунал: историческое значение и уроки для современности»* [Seminar-symposium "The Nuremberg Tribunal: Historical Significance and Lessons for the Present"], Far East Federal University, 18 November 2022), available at: https://www.dvfu.ru/schools/school_of_education/news/seminar-simpozium-nyurnbergsky-tribunal-202211/ (accessed 30 April 2023).

[65] Fedor et al., *supra* note 14, p. 15.

[66] Nuzov, *supra* note 24, p. 812.

a mandatory lesson on the "Nazi genocide against the Soviet people" was conducted at Russian schools, wherein a video with Alexander Zvyagintsev, the Honored Lawyer of the Russian Federation and legal historian, was shown to students of all ages. In this video address Zvyagintsev not only highlights the "decisive role of the USSR" in the conclusion of WWII but insists that Stalin was the mastermind behind the Nuremberg proceedings, in order to prevent falsifications of history in the future. He concludes with references to "contemporary Nazism" and the current war with Ukraine as a pretext to preserving "the lessons of Nuremberg".[67] Apart from missing any legal substantiation, Zvyagintsev's speech during this lesson is showing how Russia is blatantly manipulating facts of the IMT to justify the current war. Ukraine has never invaded Russia, and the right to preemptive self-defence is not recognized within international law doctrine. The whole analogy *in casu* is based on *two false premises*: 1) that Ukraine is a fascist/Nazi state (which is simply not true), and 2) that it poses an imminent threat to Russia's existence, just like Nazi Germany to the USSR.

The Russian perception of the IMT judgment is based on three pillars. First, its official position is that the judgment does not merely establish the individual guilt of the Nazi defendants, but in some way acts as a source of undeniable historical truth, subject to no revision. Secondly, the Russian government is effectively instrumentalizing its narrative, both in international and external policies. Internally, it is used as a propaganda tool to instil pride in the current generation for being ancestors of the "great liberators from fascism", and inspire them to take part in the struggle to defend this "historical truth". Externally, the official Russian position is aimed at aggressively defending against any attempt to revise the USSR's heroic role in WWII, and using the threat of "fascism's resurrection" in its neighbouring countries (in this case Ukraine) to justify military action under the guise of "denazification". It should be specifically noted that the occupation of Crimea and military operation against Donbas in 2014 have triggered the adoption of memory laws which reinforce this historical narrative by the threat of criminal and administrative sanctions. The adoption of such laws, based on the above-mentioned interpretation of the outcomes of the Nuremberg judgments is the third pillar of Russian memory politics, and is discussed in further detail below.

[67] *Разговоры о важном, День памяти о геноциде советского народа нацистами и их пособниками* [Conversations about the important, Day of Remembrance of the genocide of the Soviet people by the Nazis and their accomplices], available at: https://razgovor.edsoo.ru/video/2486/ (accessed 30 April 2023).

3. THE ROLE OF THE NUREMBERG JUDGMENT IN RUSSIAN MEMORY LAWS

The Russian memory laws are, according to Belavusau, a perfect illustration of "mnemonic constitutionalism", which places the authority and legitimacy of a state within the boundaries of a certain historical paradigm, which in turn defines current and future attitudes and behaviours of state actors. In this regard, the historical past becomes the foundation for a collective identity prescribed by either the national constitution itself, or by other legal provisions.[68] These legal provisions *in casu* include the Criminal Code, Constitution, and Code on Administrative offences – all of which are in many ways built on the memory of the Nuremberg trial accepted in Russia.

3.1. Amendments to the Criminal Code

Putin's memory politics place a strong emphasis on securitization of the past as a matter of existential importance, which requires special protection and even defence as a matter of national security.[69] Thus, promoting and protecting the Soviet/Russian cult of war remains the main objective of the Russian government's politics of memory, which function as a state ideology and enjoy full legal protection, including by means of criminal law.[70] Punitive measures and sanctions are proscribed to suppress any attempts at a different interpretation – and the usage of the IMT judgment plays a central role in these endeavours.

The 2014 Law "Against the Rehabilitation of Nazism" effectively criminalizes speech regarding Russian involvement in the events leading up to the war prior to 1941, particularly of the Molotov-Ribbentrop Pact, as well as of the Soviet atrocities committed in Poland and the Baltics during the period of mutual non-aggression between Russia and Germany from the time of the 1939 pact until the 1941 Nazi invasion of the Soviet Union.[71] Specifically, Art. 354.1 of the Russian Criminal Code establishes the following:

> The denial of the facts established by the verdict of the International Military Tribunal for the trial and punishment of the main war criminals of the European Axis countries, the approval of the crimes established by the said verdict, as well as the dissemination of knowingly false information about the activities of the USSR during the Second World War, about veterans of the

[68] Belavusau, *supra* note 10, p. 18.

[69] J. Fedor, *Historical Falsification as a Master Trope in the Official Discourse on History Education in Putin's Russia,* 13 Journal of Educational Media, Memory, and Society 107 (2021), p. 110.

[70] Koposov, *supra* note 37, p. 215.

[71] Talley, *supra* note 17.

> Great Patriotic War shall, when committed publicly, be punishable by a fine in the amount of up to three million rubles, or in the amount of the wage or salary, or any other income of the convicted person for a period of up to three years, or by compulsory labour for a term of up to three years, with the deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years, or by deprivation of liberty for the same period with deprivation of the right to hold certain positions or engage in certain activities for up to three years.[72]

Koposov notes that this Law is used almost only against those who accuse the USSR of cooperation in unleashing WWII.[73] To further exploit the Nuremberg narrative, the Deputy Speaker of the State Duma Irina Yarovaya declared that:

> The verdict of the Nuremberg Tribunal has absolute truthfulness and reliability in assessing the facts and events and was initially declared as not subject to revision. Therefore, any attempts to distort and interpret it should be recognized as a crime... In 2014, on my initiative, they adopted a law on responsibility for the rehabilitation of Nazism. I will not hide the fact that I had to resist those who even then began to gradually introduce the ideas of collaborationism. In the example of such countries as Ukraine and the Baltic States, we see the consequences of the introduction of this ideology of justifying Nazism.

She later advocated for amendments to the law, providing even tougher measures to offer protection against possible attempts of Nazism rehabilitation.[74]

Koposov cites the Russian members of the parliament arguing that the formulation of the Law is based on the international consensus on intolerance toward the justification of Nazi crimes "established by the Judgment of the Nuremberg Tribunal".[75] However, he refutes this assumption, arguing that Nazi wrongdoings were

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[72] УК РФ Статья 354.1. Реабилитация нацизма [Criminal Code Article 354.1. Rehabilitation of Nazism] (Consultant Plus), available at: https://www.consultant.ru/document/cons_doc_LAW_10699/be763c1b6a1402144cabfe17a0e2d602d4bb7598/ (accessed 30 April 2023).

[73] Koposov, *supra* note 37, p. 214.

[74] *Интерпретацию итогов Нюрнберга предложили считать преступлением* [The interpretation of the results of Nuremberg was proposed to be considered a crime], Pobeda.rf, 21 October 2022, available at: https://pobedarf.ru/2022/10/21/interpretacziyu-itogov-nyurnberga-predlozhili-schitat-prestupleniem/ (accessed 30 April 2023).

[75] N. Koposov, *Defending Stalinism by Means of Criminal Law: Russia, 1995–2014*, in: U. Belavusau, A. Gliszczyńska-Grabias (eds.), *Law and Memory*, 1st ed, Cambridge University Press, Cambridge: 2017, pp. 307-308.

criminalized "as defined" by the IMT Charter, but not the judgment itself.[76] This difference is significant, because the 1946 Judgment – which was reached through a number of compromises and controversies – can hardly be viewed as a source of an absolute historical truth, if such a thing exists at all.[77] However, Russia even praised the law in its 2019 UPR submission, claiming that the outcomes of the Nuremberg Tribunals are not subject to any revision.[78] The usage of the IMT judgment as a pretext for a memory law is thus a very controversial, even dangerous, endeavour in the present case, as it not only leaves no room for possible historical debate but precludes the mere existence of different views and opinions on the matter.

The adoption and enactment of the above-mentioned laws and amendments have resulted in a number of criminal proceedings being instituted in Russia, and has had questionable implications on the freedom of expression and freedom of historical debate in Russia. The International Federation for Human Rights (FIDH) estimated, in its "Crimes against history report", that in the period of 2015-2019 the enforcement of Art. 354.1 of the Criminal Code resulted in 25 convictions and only one acquittal. The convictions were mostly of those who spoke out about the USSR's international crimes in the years 1939-1945; questioned the official narrative of the USSR in WWII; or invoked history in their critique of the current regime. The first person convicted under Art. 354.1 was a mechanic from a city of Perm, who had shared a link on social media to an online article naming the USSR as an active collaborator with Nazi Germany. In 2016, Russia's Supreme Court ruled that those historical statements contained knowingly false information about the activities of the USSR during WWII, being contrary to the IMT judgment.[79] The Court qualified the actions of the defendant as posing a risk of the revival Nazi ideology and forming strong negative attitudes towards the role of the USSR in WWII.[80] However, as rightly noted by some commentators, with the USSR as one of the victors exerting considerable influence at Nuremberg, it was highly unlikely that Soviet collaboration with the Nazis and its invasions into Eastern Europe would get a mention in the Nuremberg judgment[81] – and thus using this judgment as a marker of historical truth is a dubious move. Hence, the USSR's control over the IMT judgment (albeit an indirect one) is effectively utilized to justify the conviction

[76] *Ibidem.*

[77] *Ibidem.*

[78] The eighth periodic report submitted by the Russian Federation, in accordance with Art. 40 of the Covenant, in 2019, CCPR/C/RUS/8.

[79] FIDH, *Russia: Crimes Against history*, June 2021, para. 16, available at: https://www.fidh.org/IMG/pdf/russie-_pad-uk-web.pdf (accessed 30 April 2023).

[80] *The Case of Vladimir Luzgin*, Global Freedom of Expression, available at: https://globalfreedomofexpression.columbia.edu/cases/case-vladimir-luzgin/ (accessed 30 April 2023).

[81] H. Coynash, *Russia's Supreme Court rules that the USSR did not invade Poland in 1939*, KHPG, 2 September 2016, available at: https://khpg.org/en/1472775460 (accessed 30 April 2023).

of those who merely disseminate materials that contradict government-prescribed narratives.[82]

Such criminalization can even amount to censorship.[83] In commenting on Art. 354.1, it is hard to disagree that the imposition of criminal liability for historical deliberations leads to indirectly labelling anyone who questions the Soviet Union's positive role in the Second World War as a "Nazi" or "Nazi collaborator". Already in 2016, some commentators rightly predicted that the possible outcome of such a law will be an increased revisionism in Russia, which will restrict historical debates and confine them to the courts.[84]

3.2. Constitutional amendments

Art. 67(1) of the Russian Constitution, another element of Russian "mnemonic constitutionalism", aims at protecting "historical truth" and securing respect for the "memory of the defenders of the Fatherland".[85] The amended Russian Constitution clearly reflects the new wave of memory wars in the CEE region, manufacturing new external enemies during this illusionary "defense of the Soviet past".[86]

The notion of "historical truth" in Russia is, insofar as concerns WWII, directly linked to the Nuremberg judgment – which is presented as an undeniable proof of Russia's dictated narrative.[87] However, due to the controversies mentioned above, Lauri Mälksoo poignantly demonstrates that the "historical truth" defended in the Russian constitutional amendments has a "contested context and meaning".[88] The 2020 Constitutional amendments clearly cement the "historical truth" narrative relating to the events of WWII, and even though the amended article itself does not refer to the IMT judgment, it still is relevant *in casu* as being foundation for other Russian memory laws.

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[82] H. Coynash, *Comparing Stalin to Hitler could soon get you prosecuted in Russia, saying they both invaded Poland already has*, KHPG, 7 May 2021, available at: https://khpg.org/en/1608809059 (accessed 30 April 2023).

[83] M. Domańska, *The Religion of Victory, the Cult of Superpower. The Myth of the Great Patriotic War in Contemporary Foreign Policy of the Russian Federation*, 3 Institute of National Remembrance Review 77 (2021–2022), p. 99.

[84] G. Bogush, I. Nuzov, *Russia's Supreme Court Rewrites History of the Second World War*, EJIL: Talk!, 28 October 2016, available at: https://www.ejiltalk.org/russias-supreme-court-rewrites-history-of-the-second-world-war/ (accessed 30 April 2023).

[85] Gliszczyńska-Grabias et al., *supra* note 11, p. 15.

[86] *Ibidem*, p. 26.

[87] A.V. Seregin, *Слово ученых* [The Word of Scientists], available at: https://histrf.ru/uploads/media/default/0001/26/d9e3aaa29073a6dca40b70eb29cf186eacac2395.pdf (accessed 30 April 2023).

[88] *Ibidem*.

3.3. New amendments to the Code of Administrative Offences

Russia's 2022 invasion of Ukraine led to the adoption of other restrictive measures regarding the memory of IMT judgment. They include a prohibition against equating the goals, decisions and actions of the leadership of the USSR and Nazi Germany in WWII, as well as prohibiting any denial of "the decisive role of the Soviet people in the defeat of Nazi Germany and the humanitarian mission of the USSR in the liberation of the countries of Europe". These actions were in fact declared illegal in 2021, but without spelling out the punishment for their violation.[89] On 16 April 2022 Putin enacted new amendments to the Code of Administrative Offences, which prohibit the above- mentioned interpretations and directly refers to the IMT judgment as precluding any possible wrongdoings of the USSR as a "victorious nation".[90]

These amendments are arguably a response to the 2019 European Parliament resolution, and their adoption was directly pushed by the 2022 invasion. Nuzov argues that following the "lawmaker's twisted logic", any attempt to challenge the victorious role of the USSR amounts to a lack of patriotism and discredits the so-called "Special Military Operation" (the reverse is also true, i.e. that discrediting the latter amounts to a slander of the Great Patriotic War).[91]

Russia's Investigative Committee has supported the law, stating that it "should become another effective and timely way of protecting historical memory and the conclusions of the International Military Tribunal at Nuremberg.[92] Memory laws like these aid the perpetration of international crimes, as in the case of Russia's aggression against Ukraine,[93] as they build a militant identity and cast doubt on established historical facts.[94] The law can potentially have a chilling effect on any-

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[89] J. Rofe, *В РФ введен штраф за сравнение СССР и нацистской Германии* [Russia introduced a fine for comparing the USSR and Nazi Germany], Deutsche Welle, 16 April 2022, available at: https://www.dw.com/ru/putin-podpisal-zakon-o-shtrafah-za-sravnenie-sssr-s-nacistskoj-germaniej/a-61494911 (accessed 30 April 2023).

[90] Федеральный закон от 16.04.2022 № 103-ФЗ «*О внесении изменений в Кодекс Российской Федерации об административных правонарушениях*» [Federal Law No. 103-FZ as of 16 April 2022 "On Amendments to the Code of Administrative Offenses of the Russian Federation:], available at: http://publication.pravo.gov.ru/Document/View/0001202204160015?index=3&rangeSize=1 (accessed 30 April 2023).

[91] Nuzov, *supra* note 24, p. 815.

[92] Investigative Committee of the Russian Federation, *СК поддержал проект о запрете отождествления действий СССР и Германии во Второй мировой* [The Investigative Committee supported the project on the prohibition of identification of the actions of the USSR and Germany in the Second World War], 6 May 2021, available at: https://www.pnp.ru/politics/sk-podderzhal-proekt-o-zaprete-otozhdestvleniya-deystviy-sssr-i-germanii-vo-vtoroy-mirovoy.html (accessed 30 April 2023).

[93] Nuzov, *supra* note 24, p. 807.

[94] *Ibidem*, p. 817.

body planning to research or write about the crimes committed by Stalin and the atrocities perpetrated by the NKVD[95] in Western Ukraine and the Baltic states.[96]

Most interestingly, both amendments to the memory laws, which referred to the IMT judgment, were adopted in the upheaval brought about by Russia's own aggression against a sovereign state, under the pretext of the "eternal struggle against fascism" as an existential threat to the entire world order. This explicitly shows how Russia is trying to position itself as a successor to the USSR in this struggle and utilize this status as a shield to cover up the most heinous crimes, such as the Molotov-Ribbentrop pact or the Katyń massacre.

The Russian memory laws utilizing the IMT judgment not only raise the twin issues of freedom of speech or freedom of historical debate, but also pave the way for the commission of international crimes in the face of an "existential Nazi threat". Given Russia's strong emphasis on the spirit of "self-righteousness" – arising from the USSR having been among the judges and the prosecutors at the Nuremberg trial – questions arise concerning the role of international tribunals in history-making and the perils that victors' participation in such tribunals may bring. Therefore, the final part of this article will focus on the phenomena of "victor's justice" and how it is used in memory politics.

4. NUREMBERG JUDGMENT, RUSSIAN MEMORY LAWS AND THE LESSONS OF TODAY

The USSR arguably had a special take on the trial's historiographical agenda, as given the totalitarian record of Stalinism and the invasion of the Baltic States and Eastern Poland Moscow's delegates chose to focus on "fascism" as a common threat.[97] Even though it was posited at the time that the IMT judgment was a failure for the Soviet "propaganda state",[98] the reasoning of today's Russia clearly indicates that the Soviet propaganda has turned out to be quite successful in the long run.

Firstly, it can be argued that the blindness of international justice 75 years ago has partially contributed to the feeling of self-righteousness that Russia is using today to justify its military aggression. This is evident both in Russia's use of the language of the Nuremberg court – which emphasised the absolute "evils of Nazism" – as well as in Russia's justification today that it is necessary to use all means available to defeat fascism in the context of its aggression against Ukraine.

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[95] The abbreviation stands for "People's Commissariat for Internal Affairs".

[96] Coynash, *supra* note 82.

[97] K.C. Priemel, *Historical Reasoning and Judicial Historiography in International Criminal Trials*, in: K. Heller et al. (eds.), *The Oxford Handbook of International Criminal Law*, Oxford University Press, Oxford: 2020.

[98] *Ibidem*, p. 703.

Secondly, the IMT example is used to expand the halo of perpetual impunity surrounding both the USSR (whose war crimes and crimes of aggression never received a due consideration), and today's Russia as its successor.

At the same time, Russia's use of the "language of Nuremberg" provides an opportunity to examine the very nuanced history of WWII and the USSR's complicity in the crimes it so fiercely condemned in 1946. The Russian memory laws passed in 2014 and 2022 – which directly refer to the "trial of the nations" as establishing ultimate historical truth, subject to no question or revision – clearly demonstrate how important it is that international tribunals avoid the pitfalls of "victor's justice". The IMT had not been able to avoid this, and thus its deficiencies are now playing an unfortunate part in the current war against Ukraine. As discussed previously, even though the "victor's justice" considerations do not delegitimize the outcomes of the IMT in terms of individual guilt, the Russian case clearly shows how important it is to take a nuanced approach to establishing history through international tribunals.

4.1. The role of international tribunals in memory narratives

The official Russian narrative of the Nuremberg trial is that its judgment prescribes undeniable "historical truth", as rendered by the "court of the nations". However, questions subsequently arise as to whether international tribunals are indeed designed and capable of prescribing "historical truth", and what perils hide behind such logic.

Moshe Hirsch notes that whereas international tribunals describe a historical event in their decision, the legal decision itself may constitute a "site of memory", and thus construct collective memories in a certain community.[99] Ford lists 'setting a historical record' as being among the functions of international tribunals, although he notes that in and of itself it is often of a quite low value. He argues that it can be useful, but only play some minor role, as a means to achieve some other goal, like fostering a reconciliation.[100] Moreover, international criminal tribunals are prone to the risk of focusing on their historical record-setting role, and thus neglecting their primary role, i.e. to determine individual responsibility in a particular case.[101] The IMT also aimed to influence the historical record, as its founders intended to affect collective memory by assembling an archive useful to future historians, with the judgment serving "as a lesson in history for future generations".[102]

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[99] M. Hirsch, *The Role of International Tribunals in the Development of Historical Narratives,* 20(4) Journal of the History of International Law / Revue d'histoire du Droit International 391 (2019), p. 391.

[100] S. Ford, *A Hierarchy of the Goals of International Criminal Courts*, 27(1) Minnesota Journal of International Law 189 (2018), p. 200.

[101] *Ibidem*.

[102] A. Cassese, *International Criminal Law*, Oxford University Press, Oxford: 2013, p. 256.

As to the objective of "educating" people about "historical truths" through law, Koskenniemi refers to the realists' conclusion that the law cannot be of use *in casu*, as "memory" is not be something that can be authoritatively fixed by a legal process.[103] He notes that even in Germany, the didactic effects of Nuremberg have been obscure due to the Allied policy in occupied Germany; attitudes towards de-Nazification; and the perception of the IMT judgment as "victor's justice".[104] As to the latter point, Koskenniemi emphasizes that in order to convey an unambiguous historical "truth", the trial will inevitably disregard due process by having to silence the accused in order to avoid challenging the "convenient" version of truth presented by the prosecutor, and possibly downplaying the foundations of the tribunal. Such a scenario will ultimately lead to a show trial.[105] This reasoning can also be applied to the IMT and its almost ritualistic nature – that the general public was able to turn a blind eye to the USSR's complicity in unleashing WWII in 1939 in order to serve the "convenient" version of the "truth". That "truth" is now being referred to in the Russian memory laws and used as a pretext to justify the aggression against Ukraine – and Koskenniemi's reservations about "show trials" are gaining a new relevance *in casu*.

The role of international tribunals in memory narratives is a complex and controversial one. On one hand, the key task for any kind of judicial proceedings is to determine individual guilt and issue a verdict in accordance with the established law and facts. On the other hand, in cases like the IMT it is practically impossible for the tribunal to divert itself from the issue of "arbitrating history" and totally isolate itself from the surrounding context of the trial. However, *in casu* the issue is not that of the IMT setting a historical narrative as such, but who dictated and controlled this narrative, and how – it was the victorious nations that issued justice. The USSR history of its involvement in WWII therefore plays a key role in any critique of the Nuremberg trials; in particular its desire to present itself as a victim despite some obvious flaws in such reasoning, and simultaneously use the trial to dictate a narrative that would usefully serve it as "victor".

4.2. Victor's justice and the *tu quoque* defence

One of the most prominent criticisms of Nuremberg was its exclusive focus on Nazi crimes, which prompted the accusations of "victor's justice". The term "victor's justice" was first used by Richard Minear in relation to the Tokyo war crime trials,

[103] Koskenniemi, *supra* note 35, p. 34.
[104] *Ibidem*, p. 5.
[105] *Ibidem*, p. 35.

which had demonstrated "the blindness of Allied justice to the highly charged emotional climate of the early postwar years".[106]

Some dub the IMT as a "victors' court" because it prosecuted the crimes of the Europe-Axis powers, but did not investigate whether any war crimes were committed by the Allied powers during the bombing of civilian targets in Europe, or by the Soviets during their 'liberation' of Eastern Europe.[107] This is relevant in the case of the USSR insisting that only Europe-Axis aggression was covered by the new legal instruments, because otherwise their participation would not be possible in the judicial and prosecutorial teams. However, the Western allies preferred to stay silent on the matter, mainly because it was in their interest to not include the massively destructive bombing campaigns of their own in the IMT agenda.[108]

The USSR's involvement in the IMT proceedings presented a "threat to the legitimacy of Nuremberg and to its legacy".[109] Given the ambiguity of the above-mentioned facts regarding the Soviet Union's and allied powers' dirty laundry, the accused logically raised the defence of *tu quoque* ("you also").[110] The *tu quoque* defense challenged the right of the tribunals to prosecute specific crimes which the Allies had themselves committed.[111] The claims of the defence concerning the Molotov-Ribbentrop pact and the USSR itself waging an aggressive war against were both rejected during the "post-Nuremberg Trials" held by the USA authorities in their occupation zone in Germany after the IMT.[112] Heller claims that the defense was "quintessentially political" and tried to paint the IMT as "victor's justice" by "revealing the (alleged) hypocrisy underlying the entire proceedings".[113]

Although the *tu quoque* defence does at the first glance look like a political ploy aimed at delegitimizing the trial, given the nuanced participation of the USSR in the partition of Poland it is difficult to see how the investigation of "waging an aggressive war" can be seen as legitimate given the complete omission of the USSR's role. The situation is aggravated by the fact that a factual accomplice is seated among the founders of the trial against the defeated former ally. Hence, even though from

[106] R.H. Minear, *Victors' Justice: The Tokyo Trial*, Princeton University Press, Princeton: 1971, p. 229.

[107] V. Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 Journal of Human Rights 213 (2005), p. 214.

[108] R. Overy, *BBC - History – World Wars: Making Justice at Nuremberg, 1945-1946*, BBC, 17 February 2011, available at: https://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml (accessed 30 April 2023).

[109] B. Van Shaack, *Setting the Record Straight on the Soviets at Nuremberg,* War on the Rocks, 17 June 2020, available at: http://warontherocks.com/2020/06/setting-the-record-straight-on-the-soviets-at-nuremberg/ (accessed 30 April 2023).

[110] *Ibidem*.

[111] K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford: 2011, p. 297.

[112] *Ibidem*.

[113] *Ibidem*.

a substantive legal viewpoint it does not fully delegitimize the factual findings of the trials, it clearly raises legitimate concerns regarding the procedural part.

4.2.1. Selectivity of the tribunal

Schabas notes that the "victors' justice" complaint can be divided into three distinct issues, with the third issue being the selectivity of the Tribunal,[114] which in the IMT case covered up crimes and other atrocities perpetrated by the victors and which remained unpunished, ranging from the Soviet war crimes to the dreadful bombings of cities in Germany and Japan.[115] He later refers in to the Russian intervention in *Kononov v. Latvia*, whereby it was argued that only Nazis could commit war crimes – which makes some sense in light of the selectivity of the prosecution during the IMT. Thus, the IMT distorted the "normal level playing field of the law" by hinting that specific crimes were justified or unjustified depending on who committed them.[116] But Schabas does not regard the impunity of war crimes committed by allies as rendering the Nuremberg trials "distorted".[117] In his understanding, some sacrifices can be made in order to bring justice, but the question remains: Will this kind of justice survive in the longer run?

Therefore, international tribunals such as Nuremberg are not the best forum to arbitrate history. The history written by the victors is of an ambiguous nature, falls short on various accounts, and even aims to silence the accused in order to protect the desired truth narrative. The "victor's justice" argument might be insufficient to challenge the whole idea of and outcomes of the trial, especially in terms of the international criminal law developments, but it certainly shows the perils of history-making in courtrooms, with Russia being a notorious example of such a misuse thereof at the present time.

The issue of selectivity is of particular relevance to the current situation in Ukraine and its quest for holding the Russian higher command accountable for the crime of aggression – the task that was fulfilled by the IMT, albeit with the specificities mentioned above. However, is usage of an IMT in reference to the current Russia-Ukraine conflict indeed justified?

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[114] W. Schabas (ed.), *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, Oxford: 2012.

[115] W. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 John Marshall Law Review 535 (2010).

[116] Santry, *supra* note 33.

[117] Schabas, *supra* note 115.

4.3. The lessons of Nuremberg for Russia's accountability

Although the Nuremberg judgment was delivered more than 75 years ago, the events surrounding it – described in the present article – demonstrate how important it is to consider the mistakes of the past when examining the issue of international justice.

In January 2023, the Council of Europe published a note on accountability for the crimes committed against Ukraine and mentioned the establishment of a tribunal to prosecute the crime of aggression, to be created following the precedents of other international criminal tribunals, including the IMT.[118] On 5 April 2023 President Zelensky called for the creation of a special international criminal tribunal with powers to prosecute those responsible for waging an aggressive war.[119] Zelensky's presidential office refers to the IMT as a model for prosecuting Russia's highest political and military leadership.[120]

However, the idea of establishing a separate tribunal *in casu* has not been widely welcomed. Rather than a special tribunal, the ICC is considered to be the best forum to deliver justice on the matter. Moreover, as former ICC President Eboe-Osuji affirmed, the establishment of the ad hoc IMT was a necessity at the time of its creation, while in the present situation, such an approach, driven by "partial interests", would be a "gigantic step backward". According to him, there was at the time no alternative to the IMT's "victor's justice", but today the ICC, established by a wide international consensus, could fill the black hole of the 1940s.[121] However, the main drawback in this reasoning is that the ICC will not be able to prosecute Russia for a crime of aggression[122] due to jurisdictional limitations, and thus the IMT legacy is put forward as the first successful endeavour in prosecuting this crime. However, the concerns already mentioned in relation to the IMT come up in this regard as well, mostly relating to the possible selectivity of such a prosecution.

4.3.1 The selective justice critique

As described above, the critique of selective justice in the context of the Nuremberg trials related to the victorious Allied powers establishing and prosecuting the defeated state, and thus being able to avoid responsibility for their own wrongdoings. This reasoning only partially applies *in casu*, as Ukraine is not an aggressor state,

[118] Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe, 31 January 2023, available at: https://rm.coe.int/accountability-for-human-rights-violations/1680aa086e (accessed 30 April 2023).

[119] A. Macias, *Zelenskyy calls for a Nuremberg-style tribunal to investigate and prosecute Russian war crimes,* CNBC, 5 April 2022, available at: https://tinyurl.com/2myj4j97 (accessed 30 April 2023).

[120] S. Lynch, *Ukraine at UN: We need a Nuremberg-style war crimes trial*, Politico, 20 September 2022, available at: https://www.politico.eu/article/ukraine-un-nuremberg-style-war-crime-trial/ (accessed 30 April 2023).

[121] L. Moreno Ocampo, *A Pragmatic Legal Approach to End Russia's Aggression*, Just Security, 23 February 2023, available at: https://tinyurl.com/53penupb (accessed 30 April 2023).

[122] Lynch, *supra* note 120.

and under its normal jurisdiction the ICC would be able to examine any allegations of possible Ukrainian wrongdoings in relation to the armed conflict with Russia. Nevertheless, the charge of IMT selectivity echoes in the Ukrainian case, and according to McDougal, it is two-pronged: First, the establishment of a singular justice mechanism *vis-à-vis* the Russian aggression against Ukraine would highlight the blindness towards the Middle Eastern problems, such as the situations in Syria and Yemen. Second, if such a tribunal is established and supported by those countries which could potentially be held responsible for past acts of aggression and disables the ICC's jurisdiction with respect to these crimes, its legitimacy will be questionable, similar to the reasoning regarding the Nuremberg trials.[123]

According to the International Crisis Group analysis, the selective justice critique finds support among the Global South countries, who would hardly support the creation of a specific tribunal on the crime of aggression due to their complicated relationships with the Global North. That also relates to the USA's strong resistance to prosecuting the crime of aggression and its history on the use of force, including in the 2003 invasion of Iraq and its defence of Israel's annexation of the Golan Heights.[124] Thus, the establishment of a specific tribunal with a jurisdiction limited exclusively to Russian aggression would raise questions of its legitimacy.

Insofar as concerns the second argument related to the charge of selectivity, countries like France, Great Britain, and the USA, who contributed to the international criminalization of aggression, were totally satisfied with prosecution of this offence being a "legal grey area" – possibly due to their own wrongdoings.[125] According to Kevin Jon Heller, a special tribunal "created and run by the same states that invaded Iraq" and "neutering the crime of aggression at the ICC" would simply be illegitimate.[126]

Hence, to combat these issues Heller proposes that the creation of a new tribunal be permanent and be endowed with the widest jurisdiction possible with respect to future acts of aggression, including those perpetrated by the Western states.[127] Ocampo proposes an even simpler solution, such as implementing a "structural

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[123] C. McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine*, Journal of Conflict and Security Law (2023), DOI: https://doi.org/10.1093/jcsl/krad004.

[124] *A New Court to Prosecute Russia's Illegal War?*, International Crisis Group, 29 March 2023, available at: https://www.crisisgroup.org/global-ukraine/new-court-prosecute-russias-illegal-war (accessed 30 April 2023).

[125] C. Kress, S. Hobe, A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, Just Security, 23 January 2023, available at: https://tinyurl.com/2krtzsaj (accessed 30 April 2023).

[126] K.J. Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, Opinio Juris, 7 March 2022, available at: http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/ (accessed 30 April 2023).

[127] *Ibidem*.

fix" that would allow the ICC to eventually take up the issue.[128] McDougall has completely rejected the selectivity argument on both grounds. First, she notes that treating a particular criminal justice response towards Ukrainian victims as disregarding the plight of people in Syria or Yemen would be an oversimplification. Secondly, dismissing a special tribunal for Russia on selectivity grounds will only further impunity towards serious international crimes globally.[129] She also distinguishes this proposal from the IMT, illustrating the use of law "by powerful States against defeated enemies" and instead mentions 2010 Kampala, where both non-Western and Western governments "underscored the importance of the prohibition of the use of force and the importance of international justice".[130]

Hence, the lessons of Nuremberg with respect to the current Russia-Ukraine war clearly highlight the relevance of the *tu quoque* defence, which has shifted from the "defeated state against victor state" paradigm to encompass more global issues of international justice. The selectivity argument – with respect to prosecuting a particular state for a particular crime in a specific court rather than creating universal working mechanisms – in fact plays well with states' innate desire to create legally grey areas in order to avoid prosecution for their own wrongdoings. Although these concerns do have legitimate grounds and must be treated with care, the situation of the Russia-Ukraine war is clearly different from the case of the USSR (being directly responsible for waging WWII alongside Nazi Germany) trying to create its own version of "historical truth" in the courtroom. The mere fact of creating a special tribunal for the Russian aggression against Ukraine would not be a classic example of a "victor versus loser", but unless it will lead to a more global effort to combat aggression everywhere, it can be viewed as another example of a "show trial" in the eyes of the Global South. Hence, the legitimate goal in prosecuting Russian aggression should not only be holding Russia accountable as such but eventually creating a permanent and effective global mechanism to ensure peace and justice everywhere.

Moreover, Ukraine should also be cautious with its references to the IMT, both in the cases of Russian accountability in the nearest future, and in the longer run, so as not to give in to the temptation of using international courts as a means to pursue historical justice. As for Russian accountability, the idea that the IMT was established by one of the actual perpetrators of the crime sought to be punished, and was used as a show trial for Soviet propaganda purposes, creates "food for thought" vis-à-vis the Ukrainian quest for justice. As for the usage of courts to build the "truth" narrative, the IMT and its misuse by the Russian propaganda makers provide an

[128] L.M. Ocampo, *Ending Selective Justice for the International Crime of Aggression*, Just Security, 31 January 2023, available at: https://tinyurl.com/3dt6zth2 (accessed 30 April 2023).

[129] McDougall, *supra* note 123.

[130] *Ibidem*.

exemplary case as to why the decisions of such tribunals should not form a part of national memory laws, and given Ukraine's own troublesome relations of putting history into law[131] this pitfall should most certainly be avoided.

CONCLUSIONS

Currently the language of "Nazism" and "Fascism" is being actively utilized by Russia (as the USSR's successor), which is following the historiographical agenda conveniently laid down 75 years ago, which forms a perfect basis for restrictive memory laws which rely on arguably the most famous court decision in world history. The "language of Nuremberg" has been used by Russia to "justify the unjustifiable" during the aggression in Ukraine[132] – and even if it is not the fault of the judgment per se, the circumstances related to the establishment and functioning of the trial have made the judgment more vulnerable to speculation and manipulation.

The 2022 Russian invasion into Ukraine has again brought the IMT trials back into the spotlight. As predicted by Telford Taylor, the IMT legacy is alive and ongoing, but he could hardly have predicted that it would resurface in the context of one of the "victorious nations" – assuming that Russia is the continuation of the USSR – utilizing the trials (and its role in them) as a justification for an attack against a sovereign nation.

Notwithstanding the many contributions that the Nuremberg proceedings have made to the development of international criminal law, the old wounds of Nuremberg are now bleeding again. Its ignorance of (or at least silence with respect to) the Molotov-Ribbentrop pact and the partition of Poland between the USSR and Germany; the attempts to ascribe the Katyń massacres to the Germans; and its overall avoidance of the topic of Soviet crimes against the civilian populations of "liberated" territories have turned into a bomb that has given the Russians (as the successor of the Soviet Union) the eternal feeling of self-righteousness vis-à-vis the Soviet (and now Russian) role in WWII. This self-righteousness is now being effectively implemented via Russian memory laws that protect the government-instilled narrative about the "Great victory". The Russian memory laws are utilized to protect the narrative of the "exceptionally heroic role" of the USSR in WWII, and to limit any possible debate thereon, let alone any dissent vis-à-vis the issue of Soviet wrongdoing. The IMT judgment – which on the one hand focused exclusively on

[131] A. Cherviatsova, *On the Frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, 5 European Papers: A Journal on Law and Integration 119 (2020), p. 136.

[132] F. Hirsch, *How the Soviet Union Helped Establish the Crime of Aggressive War*, Just Security, 9 March 2022, available at: https://www.justsecurity.org/80599/how-the-soviet-union-helped-establish-the-crime-of-aggressive-war/ (accessed 30 April 2023).

the wrongdoings of the Europe-Axis powers; and on the other hand was delivered under the auspices of the USSR as a "victorious nation" – is a perfect justification for Russia to instrumentalize the narrative of self-righteousness in its legislation.

It thus comes as no surprise that the first Russian legislation in relation to securing the WWII narrative was passed after its 2014 invasion into Ukraine and included a prohibition of the rehabilitation of Nazism – which was later additionally secured by the 2022 laws prohibiting equating Communism and Nazism. Both laws were substantiated by references to the IMT as the source of "historical truth" – as it conveniently omits the USSR's complicity in unleashing WWII and the war crimes committed against the German POWs and civilians. And most importantly – it lays a perfect foundation to present the USSR as a victim, who turned victor at an "immeasurable sacrifice" in order to free the world from the absolute evil of Nazism. Hence, the Russian memory laws, adopted with reference to the IMT judgment, not only severely limit the freedom of expression and freedom of historical debate in Russia, owing to their single interpretation of history, but these laws also aim to mobilize the Russian general public – as the ancestors of the great-grandfathers who delivered and secured justice in Nuremberg – to actively protect this narrative. The criminal prosecutions initiated in Russia on the grounds of a purported "rehabilitation of Nazism" show the detrimental effect of memory laws based on a singular understanding of the past. But the memory of Nuremberg is also effectively instrumentalized in education, media, and internal/external politics – serving as a pretext to repeat this "great deed" and free the world from Nazism (in its current Ukrainian version) once again.

The Nuremberg trial was in many ways influenced by the victors' narratives. Namely, the "victor's justice" was demonstrated by the balance of powers in the international post-war arena, whereby only the losing side was prosecuted, while the crimes of the winning parties were left unpunished, concealed, and eventually forgotten by the majority of states, *excluding those who have suffered from the Soviet occupation*. The argument of victor's justice *in casu* is not aimed at delegitimizing the material part of the trial as such (i.e. does not question the guilt of the Nazi defendants), but at demonstrating that in some cases which focus on the pursuit of justice – aimed at securing the narrative of the "victory of good over evil" – international tribunals can be turned into instruments of propaganda, not justice. This eventually leads to the "judicialization of history", where the winning side is able to utilize a legal instrument to impose its own narrative on what kind of truth about past events society must recognize.

An international tribunal's primary function should be examining the case at hand and determining individual guilt based on the established facts. As the IMT trials have shown, international tribunals are not appropriate forums to establish

a full and complete historical record, because in many ways such proceedings are heavily influenced by the ongoing tensions in the society; are highly politicized; and in some cases can even deepen existing contradictions. As noted at the beginning of this article, it is not just Russia which is referencing Nuremberg in lieu of the 2022 invasion: Ukraine also tends to use it as a symbol of international justice in its hope to bring the aggressors to trial. However, treating a judicial proceeding as a "symbol" is not an approach that leads to rendering justice as such, but rather aims to show that some particular kind of "justice" has been served.

In light of the recent developments with respect to the establishment of a special tribunal to try the Russian aggression, these concerns also relate to its establishment: its support and promotion by those states who themselves disabled the ICC from the possibility of prosecuting their own wrongdoings can legitimize – in the eyes of the Global South – an opposite reaction. In this way, the reasoning is similar to one described in relation to Nuremberg with respect to the *tu quoque* argument (for example, the USA's invasion of Iraq) and the selectivity of the tribunal, focusing on one particular instance of aggression (Russia against Ukraine), while being unable to scrutinize any other such similar situations. Therefore, even though the reasoning of McDougall provides a reasonable explanation as to why creating a special tribunal for this case is not such a bad idea, as described by Heller, a more sustainable solution should indeed be implemented in the future for an effective prosecution of a crime of aggression.

The lessons of Nuremberg demonstrate the importance of a nuanced and careful approach to adjudicating history; as well as for leaving it out of the courtroom as much as possible. Hence, the legacy of international tribunals should be taken with a pinch of salt, and most definitely should not be implemented into national memory laws as an example of an "objective historical truth". In this regard, Ukraine should be careful to not pursue international justice for the purposes of establishing an historical-record, but instead focus on not only holding Russia for accountable, but also on contributing to ending impunity on a larger scale.

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INCLUSION OF WOMEN IN THE UKRAINIAN PEACE PROCESS – CAN INTERNATIONAL LAW PLAY A BIGGER ROLE IN ENSURING INCLUSION?

Abstract: *The international community has repeatedly committed to the implementation of the Women, Peace and Security Agenda (WPS) initiated by UN Security Council Resolution 1325. Yet progress on the ground has been slow and sporadic, which can also be seen in the Ukrainian peace process starting from 2014. This article looks at the different areas of inclusion of women in both policy and practice, in order to highlight the existing discrepancies and draw attention to the need to improve the international community's approach to inclusion. The role of the different international actors (e.g. UN, EU, NATO, OSCE) is assessed in terms of their contribution to or emphasis on the need for inclusion. The article also aims to illustrate how international law and policy can be utilised by civil society activists in order to implement inclusion in practice, thereby highlighting the potential for international legal norms to positively impact enhancement of the position of women in (post)conflict situations around the world.*

Keywords: women, international law, inclusion, Ukrainian peace process, international involvement

INTRODUCTION

Despite the numerous commitments by international organisations and states to ensure inclusion in peace processes, the exclusion of women remains the norm, even in relation to conflicts taking place in Europe. This has been made painful-

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ly clear by the overwhelmingly male "cast" of the sporadic negotiations taking place in relation to Russia's aggression against Ukraine. The European context of this conflict serves to highlight the problems that the international community is having with the implementation of the concept of inclusion. One would expect inclusion to be facilitated on a continent where the EU, as its leading actor, has declared that "[t]here is no lasting peace if half of society is excluded from it" (EU High Representative Mogherini).[1] Yet the same problems that have arisen in other various contexts and continents have also emerged in relation to Ukraine. However, despite the visible lack of women in the Ukraine-Russia peace process, there are some examples of successful inclusion activities that have taken place since 2014. This article provides an overview of how inclusion has worked (or not worked) in this conflict, analysing the role of different international actors in the process and the potential for international law to play a greater role as a facilitator of inclusion.

1. INCLUSION IN INTERNATIONAL LAW AND POLICY

In order to understand the requirement of inclusion (of women) in peace processes, it is first necessary to elaborate on what a "peace process" is. Although the UN and other organisations consistently refer to "peace processes", there is no formal definition of this term in their documents.[2] Peace processes are generally understood to encompass a multitude of diplomatic and political efforts aimed at resolving conflicts and establishing a lasting peace between opposing parties. A peace process can begin before the parties to the conflict have even demonstrated willingness to end or resolve the conflict (and it should be noted that not all peace processes are successful). Such processes typically involve negotiations, mediation and peacebuilding activities (like reconciliation and dialogue initiatives, economic development programmes, reconstruction efforts, and awareness-raising).[3] A broad understanding of peace processes can also include military actions in the form of peacekeeping operations and security sector reform.

The need for inclusion in peace processes has been highlighted in the UN Guidance for Effective Mediation, which emphasises that an "inclusive process is more likely to identify and address the root causes of conflict and ensure that the needs

[1] European External Action Service (EEAS), *Women, Peace and Security: There is no lasting peace if half of society is excluded from it, Mogherini says*, 3 July 2019, available at: https://www.eeas.europa.eu/node/64969_en (accessed 30 April 2023).

[2] *See e.g.* UNDPO, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, available at: https://peacekeeping.un.org/sites/default/files/capstone_eng_0.pdf (accessed 30 April 2023), which refers to the term "peace process" 30 times without including the term in its annexed glossary of acronyms and terms (which does define, *e.g.* peacebuilding, peacekeeping, and peacemaking).

[3] *See* the UN website section on "Peacebuilding" for more detail regarding specific activities.

of the affected sectors of the population are addressed".[4] That report defines "inclusivity" as "the extent and manner in which the views and needs of parties to a conflict and other stakeholders are represented, heard, and integrated into a peace process".[5] This understanding of inclusivity is closely linked to international law rules regarding participation, representation, and the rights to voice one's opinion and to have it heard.

1.1. Relevant international law rules and principles

One of the foundational principles of international law – self-determination – gives peoples the right to "freely determine their political status and freely pursue their economic, social and cultural development".[6] The internal aspect of self-determination is understood to imply "meaningful participation in the process of government".[7] In the context of peace processes, self-determination has been relied upon by different academics to argue that there is a need to ensure inclusion in all aspects of governance and in the reconstruction process.[8]

The second relevant rule of international law is the right to vote and take part in public affairs.[9] As "public affairs" have been given a broad interpretation, the right to take part in public affairs could encompass the right to partake in peace processes. The Human Rights Committee's (HRC) General Comment on Article 25 defines the conduct of public affairs as "a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels".[10] As peace processes determine many aspects of "public affairs" – both during and after a conflict – the right to participate can be utilised in this context.

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[4] *Peacebuilding in the Aftermath of Conflict. Report of the Secretary-General*, 8 October 2012 A/67/499–S/2012/746, para. 35.

[5] *Ibidem*.

[6] Art. 1 of the International Covenant on Civil and Political Rights (signed on 16 December 1966, entered into force on 23 March 1976), 999 UNTS 171 (ICCPR); Art. 1 of the International Covenant on Economic, Social and Cultural Rights (signed on 16 December 1966, entered into force on 3 January 1976), 993 UNTS 3.

[7] H. Hannum, *Autonomy, Sovereignty, And Self-Determination: The Accommodation of Conflicting Rights*, revised edition, University of Pennsylvania Press, Philadelphia, PA: 1996, p. 30.

[8] M. Saul, *Popular Governance of Post-Conflict Reconstruction*, Cambridge University Press, Cambridge: 2019, p. 38. Saul uses the term "popular involvement" instead of "inclusion"; E. Demir, *The Right to Internal Self-determination in Peacebuilding Processes: A Reinterpretation of the Concept of Local Ownership from a Legal Perspective*, 8 The Age of Human Rights Journal 18 (2017), pp. 35-36.

[9] For a more detailed consideration of the relevant international legal rules regarding inclusion, *see* T. Pajuste, *Inclusion and Women in Peace Processes*, in: M. Weller, M. Retter, A. Varga (eds.), *International Law and Peace Settlements*, Cambridge University Press, Cambridge: 2021, pp. 297-306.

[10] HRC, *General Comment No. 25, Article 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 5.

Thirdly, the fundamental rules of equality and non-discrimination also need to be applied in peace processes. Whenever specific measures or initiatives are planned, they need to be analysed to ensure that they are in accordance with the rule of non-discrimination. Human rights instruments ban discrimination on various grounds.[11] Art. 2 of the Universal Declaration of Human Rights prohibits discrimination on the following grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status. Similar lists are included in other human rights instruments. All these grounds may be of significance in relation to inclusion activities in the post-conflict context. As this article focuses on the inclusion of women, discrimination based on sex is of particular relevance.

The HRC has declared that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant".[12] Accordingly, it is possible to construct inclusion mechanisms that provide specific rights (or even more rights) to groups that have suffered discrimination in the past (e.g. addressing gender-based discrimination).

The most important legal instrument in relation to women's rights – the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – contains some provisions that can be utilised in relation to peace processes. CEDAW obliges states parties to incorporate gender equality into all levels of domestic law and take all appropriate measures to eliminate discrimination against women.[13] The Committee on CEDAW 2013 General Recommendation No. 30 attempts to further state parties' implementation of CEDAW in relation to conflict situations.[14] It outlines the requirements for the application of CEDAW to conflict prevention, the conflicts themselves, and post-conflict situations in and by member states. Among other things, the Committee states that:

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[11] Art. 2 of the Universal Declaration of Human Rights, UNGA Resolution 217 A(III), 10 December 1948; Arts. 2, 26 ICCPR; Art. 2(2) ICESCR; Art. 2 of the Convention on the Rights of the Child (signed on 20 November 1989, entered into force on 2 September 1990), 1577 UNTS 3; Art. 5 of the Convention on the Rights of Persons with Disabilities (signed on 13 December 2006, entered into force on 24 January 2007). There are also treaties that prohibit discrimination on specific grounds, *e.g.* the International Convention on the Elimination of All Forms of Racial Discrimination on the Ground of Race (signed on 21 December 1965, entered into force on 4 January 1969), 660 UNTS 195; and the Convention on the Elimination of All Forms of Discrimination Against Women (signed on 18 December 1979, entered in force on 3 September 1981), 1249 UNTS 13 (CEDAW) on the ground of gender.

[12] HRC, *General Comment No. 18*, para. 10.

[13] Art. 2 CEDAW.

[14] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations*, 18 October 2013, UN Doc. CEDAW/C/GC/30.

> Protecting women's human rights at all times, advancing substantive gender equality before, during and after conflict and ensuring that women's diverse experiences are fully integrated into all peacebuilding, peace-making, and reconstruction processes are important objectives of the Convention. The Committee reiterates that States parties' obligations continue to apply during conflict or states of emergency without discrimination between citizens and non-citizens within their territory or effective control, even if not situated within the territory of the State party.[15]

Although the Committee's recommendations are not binding on the treaty parties, they do provide an authoritative interpretation of CEDAW and can help guide the development of relevant rules.

Art. 3 CEDAW requires that states take "all appropriate measures" to ensure the advancement of women, "in particular in the political, social, economic and cultural fields", to ensure that they can fully enjoy their human rights. Art. 4 clarifies that in order to "accelerat[e] de facto equality", temporary measures can be taken, which will not be considered discrimination and which have to be "discontinued when the objectives of equality of opportunity and treatment have been achieved". Art. 7 obliges states to ensure that women are not discriminated against in the "political and public life of the country" and that they have the same rights as men "to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government". Art. 8 requires member states "to ensure to women, on equal terms with men, and without any discrimination, the opportunity to represent their Governments at the international level".[16] These articles highlight the importance of equal representation at all levels of decision- and policy-making. There is no viable justification to exclude peace processes from the overall public policy and governance processes. Failure to include women in such processes violates the commitments under CEDAW and other human rights instruments.

1.2. Inclusion in international policy

The principle of "inclusion" is reflected in a growing number of policy documents of the UN, as well as in regional or specialised organisations like the EU, NATO and OSCE. On the UN level, such documents include the 2030 Agenda and the Sustainable Development Goals (particularly Goal 16); the sustaining peace and prevention agenda; the work on UNSC Resolution 1325 on Women, Peace and Security; and UNSC Resolution 2250 on Youth, Peace and Security, as well as

[15] *Ibidem*, para. 2.

[16] Arts. 3-4, 7-8 CEDAW.

the study by the World Bank and the UN on Pathways for Peace.[17] Two of the main (and connected) inclusion initiatives are the gender mainstreaming policy and the Women, Peace and Security Agenda (WPS agenda evolving from UNSC Resolution 1325).

Gender mainstreaming made its first appearance in international texts in 1985, following the third UN World Conference on Women held in Nairobi, in relation to the debate within the UN Commission on the Status of Women regarding the role of women in development.[18] The 1993 Vienna Declaration and Programme of Action proclaimed that the "equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity".[19] A few years later, in 1997, the Economic and Social Council defined gender mainstreaming as "the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels... in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated".[20]

This mainstreaming policy was explicitly incorporated into the context of peace processes in October 2000 by UNSC Resolution 1325. This resolution emphasized that the involvement of women in all stages of the peace process is one of the main aims of the gender mainstreaming policy. Resolution 1325 urges member states "to ensure increased representation of women at all decision-making levels in national, regional and international institutions", and calls on all actors involved to adopt measures that "involve women in all of the implementation mechanisms of the peace agreements", as well as emphasises the importance of women's participation in relation to the "constitution, the electoral system, the policy and the judiciary".[21]

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[17] UNGA, *Resolution 70/1: Transforming Our World: The 2030 Agenda for Sustainable Development and Sustainable Development Goals and Targets*, 25 September 2015, UN Doc. A/Res/70/1, Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; UN and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*, World Bank, Washington, DC: 2018, available at: https://www.pathwaysforpeace.org/ (accessed 30 April 2023); UNSC Resolution 2250 (2015), UN Doc. S/RES/2250(2015).

[18] United Nations, *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, 15-26 July 1985, UN Doc. A/CONF.116/28/Rev.1, paras. 30, 44, 66, 274.

[19] World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action,* UN Doc. A/CONF.157/23, 12 July 1993, para. 37.

[20] UN Economic and Social Council, *Report of the Economic and Social Council for 1997*, 18 September 1997, UN Doc. A152/3, 28.

[21] UNSC Resolution 1325 (2000), paras. 1, 8.

There have been several follow-up resolutions that clarify and extend the commitments of Resolution 1325. In particular, Resolution 1889 (2009):

> Urges Member States, international and regional organisations to take further measures to improve women's participation during all stages of peace processes, particularly in conflict resolution, post-conflict planning and peacebuilding, including by enhancing their engagement in political and economic decision-making at early stages of recovery processes, through inter alia promoting women's leadership and capacity to engage in aid management and planning, supporting women's organizations, and countering negative societal attitudes about women's capacity to participate equally.[22]

And in 2013 the Security Council expressed "its intent to employ, as appropriate, all means at its disposal to ensure women's participation in all aspects of mediation, post-conflict recovery and peacebuilding".[23]

The above resolutions emphasize the need to involve women beginning in the first stages of peace-making processes. For example, Resolution 1889 emphasises the "need to improve the participation of women in political and economic decision-making from the earliest stages of the peacebuilding process".[24] The 2015 Report of the High-level Independent Panel on Peace Operations reiterated that the UN "should champion the inclusion of women in mediation processes" and listed some specific actions that should be taken. Special envoys and special representatives of the Secretary-General were given a number of duties, such as ensuring "consistent and systematic consultation with women leaders and those from diverse sectors of society"; spurring "capacity development programmes for women, where required, so that women can credibly participate in peace negotiations and decision-making processes"; and encouraging "parties to the conflict to include specific issues relating to the participation of women in conflict mitigation and prevention, recovery and reconciliation, as well as protection measures, in peace agreements".[25]

The gender mainstreaming policy tries to accomplish the aim of ensuring the equal participation of women in all stages of the peace process by encouraging positive practical measures and inclusion activities. As Chinkin highlights, the

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[22] UNSC Resolution 1889 (2009), UN Doc. S/RES/1325(2009), para. 1.

[23] UNSC Resolution 2106 (2013), UN Doc. S/RES/2106(2013), para. 5 (emphasis added).

[24] UNSC Resolution 1889 (2009), para. 15.

[25] *Report of the High-level Independent Panel on Peace Operations on Uniting Our Strengths for Peace: Politics, Partnership and People*, 17 June 2015, UN Doc. A/70/95–S/2015/446, para. 79.

commitment to gender mainstreaming demands that obstacles to women's participation be identified and removed.[26]

Other international organisations, like the EU, NATO and OSCE, have followed suit and also adopted the gender mainstreaming policy. The EU has tried to position itself as a global leader in relation to implementing the Women, Peace and Security [WPS] Agenda. The EU has consistently emphasised the significance of gender equality as a fundamental value of the Union, which needs to be reflected in all of the EU's actions and policies, both internally and externally. The EU asserts that gender equality and women's meaningful participation are "essential factors to prevent, manage and resolve conflict and crises".[27] The EU Strategic Approach to Women, Peace and Security adopted in December 2018 "aims to ensure that women and girls from diverse and variable backgrounds are entitled to participate equitably and substantially in preventing and resolving conflicts, and in preventing conflict-related violence, including all forms of sexual and gender-based violence".[28] Importantly, the document highlights the universality of the WPS agenda and its binding character, to be implemented by all EU actors and all Member States, as well as in all interactions with non-EU countries.

In January 2022, the Council of the EU adopted Conclusions on Taking the EU-UN Strategic Partnership on Peace Operations and Crisis Management to the Next Level. Among other things, it calls for

> an increased effort to accelerate the operationalisation of this political commitment through strengthening cooperation at field level, ensuring systematic gender mainstreaming in all activities, as well as an increased participation and enhanced role of women in peace operations, peace and political processes, conflict prevention, mediation and peacebuilding.[29]

[26] C. Chinkin, *Gender, Human Rights, and Peace Agreements*, 18(3) Ohio State Journal on Dispute Resolution 867 (2006), p. 871. For more on inclusion and women, *see* S. Aroussi, *Women, Peace and Security: Repositioning Gender in Peace Agreements*, Intersentia, Cambridge: 2015; N.R. Cahn, *Women in Post-Conflict Reconstruction: Dilemmas and Directions*, 12 William and Mary Journal of Women and the Law 335 (2006); M.E. McGuinness, *Women as Architects of Peace: Gender and the Resolution of Armed Conflict*, 15 Michigan State Journal of International Law 63 (2007); C. Bell, C. O'Rourke, *Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements*, 59(4) International and Comparative Law Quarterly 941 (2010); E.M. Grina, *Mainstreaming Gender in Post-Conflict Settings*, 17 William & Mary Journal of Women & the Law 435 (2011).

[27] EEAS, *Women, Peace and Security: There is no lasting peace if half of society is excluded from it, Mogherini says*, 3 July 2019, available at: https://www.eeas.europa.eu/node/64969_en (accessed 30 April 2023).

[28] EEAS, *EU Strategic Approach to Women, Peace and Security*, 2018, Council Doc 15086/18, 10 December 2018.

[29] Council Conclusions on Taking the EU-UN Strategic Partnership on Peace Operations and Crisis Management to the Next Level: Priorities 2022-2024, Council Doc5451/2022, para. 8 (emphasis added).

As can be seen from the UN and EU examples, the inclusion of women in peace processes has become a consistently emphasised requirement in policy documents. However, an analysis of the implementation of this policy reveals that practice is often lagging far behind the promises made on paper.

2. INCLUSION OF WOMEN IN THE UKRAINIAN PEACE PROCESS

Despite the main international focus being on the 2022 escalation of Russian aggressive actions, the conflict in Ukraine has been ongoing since 2014 and, as with all conflicts, has impacted the lives and position of women in many ways. There has been an increase in the number of women who are actively participating in the country's defence.[30] The conflict has also resulted in an increase in gender-based violence and violations of human rights.[31] On the one hand, the Ukrainian government has taken many actions to advance gender equality, and public perceptions on women's roles have shifted. On the other hand, the still limited gender consciousness among the society in general, lack of resources, ongoing military conflict, and the devolution of power to local governments with limited capacity all work against progress on gender equality in Ukraine.[32]

Scholars have pointed to various structural barriers in Ukraine which impede the inclusion of women in peace and security issues, such as the prevalence of lip-service rather than action; social inequalities; funding challenges; and the lack of enforcement mechanisms to name only a few.[33] In addition to this, the case of Ukraine encompasses the specificities of the post-Soviet environment. According to Van Metre and Steiner,[34] the institutionalisation of gender equality has been stagnant due to the belief that equality had already been achieved in Ukraine under the Soviet regime;[35] which implemented a rather traditional understanding of the role of women.[36] Other impediments include patterns of Western NGO funding

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[30] L. Krymets, L. Hrebeniuk, *The NATO Gender Policy: Is That An Issue For The Armed Forces of Ukraine?, Редакційна Колегія* [Editorial board] (2021), p. 111.

[31] *Ibidem*.

[32] L. Van Metre, S. Steiner, *U.S. Civil Society Working Group on Women, Peace, and Security - Building Gender Equality in Ukraine*, U.S. CSWG Policy Brief 2017.

[33] M. Guinan, *Frustrating Anniversaries: International Women's Day and International Action on Women, Peace, and Security*, The Academic Blog of the Department of War Studies, King's College London (2015), available at: https://www.strifeblog.org/author/webmaster_strife/page/22/ (accessed 30 April 2023).

[34] Van Metre, Steiner, *supra* note 32.

[35] A. Hrycak, *The Dilemmas of Civic Revival: Ukrainian Women since Independence*, 26(1–2) Journal of Ukrainian Studies 135 (2001).

[36] M. Rubchak, *Seeing Pink: Searching for Gender Justice through Opposition in Ukraine*, 19(1) European Journal of Women's Studies 55 (2012).

which undermine local activism;[37] economic crises which as per usual significantly affect women negatively;[38] a rise of domestic violence;[39] and a step back on women's rights, which were seen as "European values" under the Yanukovich regime.[40]

2.1. UNSC Resolution 1325 and the Ukrainian National Action Plans

Ukraine has adopted two national action plans (NAPs) to comply with the commitments as stipulated in UNSC Resolution 1325, as well as other Security Council resolutions of the Women, Peace and Security Agenda.[41] The first NAP was adopted in 2016, during active military conflict,[42] and it subsequently (in September 2018) led the Ukrainian parliament to pass legislation that lifted barriers for women to hold positions in the military, resulting in a significant increase of the number of women in the Ukrainian armed forces.[43] The second NAP was adopted on 28 October 2020, in response to the ongoing problem of women being much less involved in the settlement and resolution of the international armed conflict in Ukraine, and the needs of different groups of women and men affected by conflict not being fully taken into account in transitional (restorative) justice.[44] Ukraine is also revising its NAP in the context of the 2022 Russian invasion.[45]

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[37] A. Hrycak, *Foundation Feminism and the Articulation of Hybrid Feminisms in Post-Socialist Ukraine*, 20(1) East European Politics and Societies 69 (2006).

[38] N. Pignatti, *Gender Wage Gap Dynamics in a Changing Ukraine*, 1(1) IZA Journal of Labor & Development, 1 (2012).

[39] B.J. Barrett, N. Habibov, E. Chernyak, *Factors Affecting Prevalence and Extent of Intimate Partner Violence in Ukraine: Evidence from a Nationally Representative Survey*, 18(10) Violence Against Women 1147 (2012).

[40] Van Metre, Steiner, *supra* note 32.

[41] 1820 (2008); 1889 (2009); 1960 (2010); 2106 (2013); 2122 (2013); 2242 (2015); Yet, the question has been raised whether having multiple resolutions but little substantive change might be diluting international commitments. *See further* O. Yarosh, *Ukraine's Strategies of Empowering Women In Peace-Building: Implementation of UN Security Council Resolution 1325 On Women, Peace and Security*, 2 The Copernicus Journal of Political Studies 33 (2020), p. 36.

[42] Yarosh, *supra* note 41, p. 33.

[43] U. Schmidt, *Advancing the Women, Peace and Security Agenda, Draft General Report*, Committee on the Civil Dimension of Security (CDS), NATO (2020), p. 5.

[44] Ukrainian National Action Plan for the implementation of UN Security Council Resolution 1325 on Women, Peace, Security until 2025, Regulation No.1544-p of the Cabinet of Ministers of Ukraine, 28 October 2020, p. 3.

[45] Information available online at the Women's International League for Peace and Freedom website: http://1325naps.peacewomen.org/index.php/ukraine/ (accessed 30 April 2023).

2.1.1. NAP 2016

The adoption of the first Ukrainian NAP took place in 2016. Ukraine was thereby the first country to adopt a NAP during an active military conflict.[46] A draft NAP was created in 2011 by civil society organizations, led by the Women's International League for Peace and Freedom (WILPF). Subsequently, the Ministry of Social Policy took upon itself the task of creating a formal NAP (as it is responsible for gender-related legislation). The Ministry's official NAP differs from the civil society-led plan initiated by WILPF, as instead it incorporated input from UN Women, the OSCE, the United Nations Population Fund, and 15 civil society organisations (including the Women's Information Consultative Center, HealthRight International, UWF, La Strada, and the EOC). The international organisations involved – e.g. UN Women and OSCE – had previously lobbied for the creation of the NAP and for its formulation to be done in an inclusive and accountable manner.[47]

As the NAP was adopted during a time of conflict, scholars have noted the negative consequence that the WPS agenda had become strongly linked to military security and took a "narrow militarized form".[48] The NAP I contained six overarching focus areas (peacekeeping; peacebuilding; prevention; protection; assistance and rehabilitation; and monitoring of the implementation of UNSC Resolution 1325); divided into 10 goals that were broken down into 49 concrete activities and 69 indicators to measure progress.[49] Certain indicators were measured against yearly targets, resulting in legislative acts, materials, and campaigns.[50] At the same time, this led to a formalised top-down approach to develop local, regional, and sectoral action plans on the implementation of UNSC Resolution 1325.[51] Overall, the plan laid out an agenda to increase women's participation in conflict-related processes and to address women's needs in the conflict. Amongst other things, the NAP had

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[46] Y. Dudko, Y. Langenhuizen, *Localisation of the UNSCR 1325 Agenda: Lessons from Post-Maidan Ukraine (2014–2020)*, 17(1) Journal of Regional Security 25 (2022), p. 30; Yarosh, *supra* note 41.

[47] R. Warren et al., *Women's Peacebuilding Strategies Amidst Conflict: Lessons from Myanmar and Ukraine*, Georgetown Institute for Women, Peace and Security 2018, available at: https://giwps.georgetown.edu/wp-content/uploads/2017/01/Womens-Peacebuilding-Strategies-Amidst-Conflict-1.pdf (accessed 30 April 2023), p. 33.

[48] M. O'Sullivan, *"Being Strong Enough to Defend Yourself": Untangling the Women, Peace and Security Agenda amidst the Ukrainian Conflict*, 21(5) International Feminist Journal of Politics 746 (2019).

[49] Dudko, Langenhuizen, *supra* note 46, p. 31.

[50] C. Hamilton, N. Naam, L.J. Shepherd, *Twenty Years of Women, Peace and Security National Action Plans: Analysis and Lessons Learned*, The University of Sidney, Sidney: 2020, p. 19.

[51] Dudko, Langenhuizen, *supra* note 46, p. 26.

components that foresaw the participation of women in negotiations and dialogue and in peacekeeping and peacebuilding.[52]

Ukraine's 2016 NAP has been subjected to the criticism that "the bridging of security and economy is entirely absent in Ukraine's WPS agenda, which has largely prioritized military security while failing to connect it to the austerity policies and the gendered structural inequalities deepened by the ongoing conflict".[53] Various laws limiting women's rights had to be amended or re-developed. Some scholars contend that the issue of discrimination "was not considered as one that requires a detailed solution".[54] While the Ministry of Defence, among other things, "extended the list of military positions available for women, conducted an assessment of women's infrastructural needs in the Armed Forces, introduced gender-sensitivity training" and "developed a new code of conduct for military personnel",[55] two-thirds of military positions remained inaccessible to women.[56] Overall, the NAP focused more on protection against gender-based violence and domestic violence,[57] and on the integration of women in Ukraine's security sector, rather than on peace and dialogue initiatives.[58]

Despite some of its flaws, the 2016 NAP was used to guide the creation of more detailed plans for women, peace, and security in the different Ukrainian ministries, particularly in the Defence and Internal Affairs Ministry, as well as in local administrations in conflict areas.[59] Civil society actors have noted that the 2016 NAP provided a foundation and a structure for their collaboration with various governmental agencies.

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[52] Warren et al., *supra* note 47, p. 31.

[53] M. O'Sullivan, *The Forgotten Lives: Connecting Gender, Security, and Everyday Livelihoods in Ukraine's Conflict*, 16(3) Politics & Gender E13 (2020).

[54] N.A. Bukovynska et al., *Legal Support of Gender Policy and the Correlation with the Concept of "Equality of Rights"*, XIII(1) Avant 1 (2022), p. 8.

[55] T. Martsenyuk, G. Grytsenko, A. Kvit, *The "Invisible Battalion": Women in ATO Military Operations in Ukraine*, Ukrainian Women's Fund, Kiev: 2016, p. 182.

[56] *Ibidem,* p. 183; O. Bryla, *Women Rights Violation During the Military Conflict in Ukraine*, Recommended for printing by the Academic Council of the Institute of UDO of Ukraine KNU named after Taras Shevchenko (Protocol No. 3 dated November 30, 2021), p. 312.

[57] UN Women: "it is important to distinguish measures to ensure UNSCR 1325 implementation in the context of conflict from other gender-related programmes" and "NAP 1325 should maintain its focus on the intended objectives of the WPS agenda, avoiding the mistake of including domestic violence issues that should be covered by independent, adjacent policies".

[58] Dudko, Langenhuizen, *supra* note 46, p. 31; T. Kyselova, *Mapping Civil Society and Peacebuilding in Ukraine: Peacebuilding by Any Other Name*, Inclusive Peace and Transition Initiative & Mediation and Dialogue Research Center, Geneva-Kyiv: 2019; O'Sullivan, *supra* note 48.

[59] Kyselova, *supra* note 58, p. 7.

2.1.2. NAP II 2020

Discussions on the second NAP began in 2018, with the main goals being to overcome discrimination against women and girls; reduce and prevent gender-based violence; and improve women's access to education and various social services.[60] NAP II was subsequently adopted on 28 October 2020. This plan involved several levels, defined by Yarosh as: mega-level (international institutions); macrolevel (national approval institutions of equal rights and opportunities); meso-level (local institutions ensuring gender equality); and microlevel (corporate and individual awareness and consciousness).[61] Nonetheless, the policies of gender equality and gender integration in peace and security issues still face implementation challenges in Ukraine.[62]

The implementation of NAP II has also faced difficulties in integrating proposals from civil society and public organisations, which is partially owing to the fact that the authorities and the government strive for an "international rather than national reputation", something which appears to be "a common feature of all post-Soviet countries that are in the process of democratic transition".[63]

Overall, the adoption of the national action plans can be seen as a positive step, as it requires a systemic review and consideration of gender issues, and ensures that the topic is at least on the agenda of the relevant governmental authorities. The main problem is that the implementation of the formal commitments has not been achieved in many areas.

2.2. Involvement of women in practice

Overall, during the past decades there has been progress in terms of gender equality in Ukraine. Certain domains, such as education, healthcare, and the labour market have seen improved conditions for women, and traditional gender roles have been challenged.[64] Furthermore, between 2014 and 2020 the number of women participating in local and national politics increased substantially.[65] Post-Maidan, women in Ukraine engaged more actively in local and national governance, which also offered them opportunities for further emancipation. Women participated in the 2013 protests against the Yanukovich government and during the period of

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[60] Bukovynska et al., *supra* note 54, p. 8; N. Kaminska, S. Chernyavskyi, O. Perunova, *Legislation and International Standards of Gender Equality*, Ministry of Internal Affairs, Kyiv: 2020, p. 1.

[61] Yarosh, *supra* note 41, pp. 34-35.

[62] *Ibidem*, p. 45.

[63] *Ibidem*, p. 46.

[64] B. Rohwerder, *Priority Gender Issues in Bosnia and Herzegovina; Georgia; Moldova; Serbia; and Ukraine-with Consideration to Gender and Governance*, GSDRC (2016), p. 56.

[65] Dudko, Langenhuizen, *supra* note 46, p. 29; Martsenyuk, Grytsenko, Kvit, *supra* note 55.

the 2014 annexation of Crimea and the military operations in eastern Ukraine.[66] Yet women's political participation and representation is still "lagging far behind", along with the persistence of gender stereotypes and discrimination.[67] In the context of the conflict, women are among the most affected members of society. Most internally displaced persons (IDPs) from Eastern Ukraine, responsible for relatives and children, are women.[68] The conflict has also led to an increase in gender-based violence and violations of women's rights.[69]

In the Rada (parliament of Ukraine), the Equal Opportunities Caucus (EOC) – created in 2011 and comprising over 45 of the Rada's 450 MPs – leads the gender equality effort. Some of these activities grew out of the Euromaidan protests. After working together in that context, MPs Mariia Ionova, Iryna Gerashchenko and Iryna Lutsenko formalised their collaboration in the EOC. Lutsenko has reported that her male colleagues agreed to support women MPs' legislative efforts because of their leadership at Euromaidan, arguing that women MPs "forced [them] to join [the] Equal Opportunity Caucus by [their] activism".[70]

The EOC has led several successful initiatives. In particular, they successfully advocated for the creation of electoral quotas at the local level, opening positions in the military to women, and drafting and monitoring the 2016 NAP. In 2016 the EOC established the Public Council on Gender, which convenes six gender working groups, each of which is co-chaired by an MP and civil society leader. The working groups offer an opportunity for coordinated advocacy efforts on legislative priorities, such as preventing domestic violence, promoting equal pay, and political participation. As an example, the working group on economic empowerment is co-chaired by MP Aliona Babak and Natalia Karbowska of the Ukraine Women's Fund. The working group meets bimonthly to debate possible policy changes and to develop strategies to achieve change.[71] Ukrainian women actively try to influence national legislation related to women's protection, especially on preventing gender-based and domestic violence. The EOC often leads legislative advocacy and aids in mobilising support.

Women's visibility in the Ukrainian armed forces has increased, partly through an advocacy campaign called the "Invisible Battalion".[72] This led to an ending of a gender ban on various professions and opened combat positions to women.[73] However,

[66] Van Metre, Steiner, *supra* note 32, p. 1.

[67] Rohwerder, *supra* note 64, p. 56.

[68] Martsenyuk, Grytsenko, Kvit, *supra* note 55, p. 172.

[69] E. Benigni, *Women, Peace and Security in Ukraine: Women's Hardship and Power from the Maidan to the Conflict*, 27(1–2) Security and Human Rights 59 (2016).

[70] Warren et al., *supra* note 47, p. 33.

[71] *Ibidem*.

[72] Martsenyuk, Grytsenko, Kvit, *supra* note 55.

[73] UN Women, *Rapid Gender Analysis of Ukraine: Secondary Data Review*, 2022, p. 15.

scholars have argued that the increase in female participation in the armed forces is also due to the fact that men are unwilling to take up lower-paid positions.[74] Hence, in the security sector, a gender division of labour and gender-based employment discrimination persists, with women having to face sexist remarks and stereotypes.[75] The "deep-rooted patriarchal culture embedded in Ukrainian society" has been found to be one of the reasons why women face difficulties when trying to pursue a military career.[76] Women take up the majority of "feminized"[77] or "peaceful" positions.[78] While the list of military professions available to women has been increased to more than 100 combat specialities,[79] most women still work in nursing, finance, logistics, communications, etc.[80] Certain military positions are "still inaccessible to women, especially in special units and high-level landing troops".[81] Gender segregation problems persist, the contributions of women are under-recognised, and the "state regulates work conditions of military women via a paternalist (protective) approach".[82] The psychological aspect of women in the military is linked to the association of war with certain gender roles, reinforcing stereotypes and portraying war as a domain of security and "male business".[83] In this context, women's skills and roles in the conflict are often underestimated and there is the perception that they must prove themselves in order for their opinions to be heard and respected.[84]

One of the main areas where the inclusion of women has been most lacking is the process of official peace negotiations between Ukraine and Russia. The CEDAW Committee, in its 2017 review of Ukraine's policies and progress, expressed concern that women have been excluded from the peace process.[85] The Minsk process (talks taking place in Minsk from 2014 with the aim of finding a peaceful solution to the conflict initiated by Russia in Donbas) has been widely criticised

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[74] Martsenyuk, Grytsenko, Kvit, *supra* note 55, pp. 175-176.

[75] *Ibidem*.

[76] I. Fellin, *The Role of Women and Gender Policies in Addressing the Military Conflict in Ukraine*, Instituto Affari Internazionali (IAI), Rome: 2015, pp. 8, 15; Bryla, *supra* note 54, p. 31.

[77] UN Women, *supra* note 73, p. 15.

[78] I. Gritsay, *Principle of Gender Equality in the Armed Forces of Ukraine: Problems and Perspectives*, 2 *Науковий Вісник Дніпропетровського Державного Університету Внутрішніх Справ* [Scientific Bulletin of the Dnipropetrovsk State University of Internal Affairs] 77 (2018), p. 79.

[79] *Ibidem*.

[80] Martsenyuk, Grytsenko, Kvit, *supra* note 55, pp. 175-176.

[81] Gritsay, *supra* note 48.

[82] T. Martsenyuk, G. Grytsenko, *Women and Military in Ukraine: Voices of the Invisible Battalion*, 1(7) Ukraine Analytica 29 (2017), p. 29.

[83] *Ibidem*, p. 34.

[84] *Ibidem*.

[85] Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Eighth Periodic Report of Ukraine*, CEDAW/C/UKR/ CO/8, CEDAW Committee, Geneva: 2017, p. 4.

by international organisations and civil society movements for its lack of inclusion of women.[86] This is illustrative of the general trend (according to scholars and UN reports) of women still being largely excluded from peace negotiations, and their roles in conflict resolution being under-recognised.[87]

3. ROLE OF CIVIL SOCIETY ORGANISATIONS

In general, it has been noted that women's civil society representatives and organisations play an important role in post-Soviet peacebuilding contexts, despite their frequent exclusion from formal peace negotiations by governments.[88] It is argued that inasmuch as in other parts of the world the role of women peace builders and civil society is key to building a lasting peace, their significance and roles should also be recognised in the post-Soviet region.[89]

In the case of Ukraine, the development of the NAPs took place in part because of the strong voices from women's civil society organisations and representatives, to begin the drafting. While certain women's organisations were included in the process of developing the NAPs, scholars such as Dudko and Langenhuizen argue that nevertheless the process "could have been more inclusive, especially with regard to including groups such as internally displaced women".[90] These women's organisations possessed the necessary knowledge and awareness of the specificities of the conflict, and would have been able to voice possible effective solutions.[91]

The Minsk process lacked an official mechanism for civil society's participation, which limited women's access to and participation in the process. Some civil society organisations tried to find ways to participate, but such attempts were rarely successful. For example, the Ukraine Women's Fund (UWF) approached the French embassy with the aim of arranging a formal platform for civil society that would run parallel to the Minsk process, but the plan was not successful. Natalia Karbowska (the director of strategic development at UWF), highlighted the connection between the UWF's local peacebuilding efforts and the Minsk process (as

[86] Benigni, *supra* note 69.

[87] K.A. Sullivan, E. Bjerten-Günther, R. Irwin, *Gender, Security and Development*, SIPRI Yearbook 322 (2015), p. 331.

[88] L.A. Dean, *Women's Organizations Peacebuilding across Conflicts in the Former Soviet Union*, Wilson Center, Kennan Cable, No. 26 (2017).

[89] *Ibidem*.

[90] Dudko, Langenhuizen, *supra* note 46, p. 42.

[91] Dean, *supra* note 88.

both had the overarching aim of achieving peace and stability), but those involved in the formal process did not acknowledge that connection.[92]

Nevertheless, despite the lack of formal recognition and real opportunities, the women in Ukraine have led several informal peacebuilding efforts, hosting and participating in dialogues at the local, national, and international levels. One example is the Regional Women's Dialogue Platform on UNSC Resolution 1325, which brings together female civil society leaders in Ukraine and Russia (as well as other countries in the region), with the aim of bridging cultural divides between the east and west while creating platforms to exchange peacebuilding practices.[93] In addition, many women in government, including in several high-level positions, are advancing peacebuilding efforts in official legislative or military capacities.[94]

In the context of the Russia's act of aggression in 2022, women's grassroot organisations have taken on important roles in their communities, depending on their professional qualifications and/or community needs:[95]

> The majority of women's rights and feminist organizations, including those working with LGBTQIA+ that had been active in advocacy, mobilization and direct engagement with communities, have reoriented their work towards the evacuation of people from occupied or heavily shelled cities, the provision of basic supplies to those who are still in their hometowns, and securing shelters for the evacuated (both in Ukraine and abroad, especially in cases of at-risk groups, such as LGBTQIA+ or people with disabilities).[96]

Regional feminist organisations began to provide legal advice, and the grassroot movement "Women's March" began assisting with issues such as displacement and migration, as well as health matters.[97]

Yet, while women's contributions at the civil society level have been recognised in media, social media, as well as official speeches (among them by President Zelensky), "it has not necessarily led to their inclusion in decision-making at the higher levels".[98] Overall, women and women's organisations have not been included at the decision-making level and in the official negotiations between the Russian Federation and Ukraine.[99]

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[92] Warren et al., *supra* note 47, p. 32.
[93] *Ibidem*, p. 7.
[94] *Ibidem*, p. 32.
[95] UN Women, *supra* note 73, p. 22.
[96] *Ibidem*.
[97] *Ibidem*.
[98] *Ibidem*, p. 24.
[99] *Ibidem*.

4. INTERNATIONAL ACTORS INVOLVED IN THE UKRAINIAN PEACE PROCESS

4.1. United Nations

The most important UN organisation working towards the protection of women's rights and their inclusion in all domains is UN Women. Accordingly, their main goals are the "elimination of discrimination against women and girls, the empowerment of women and the achievement of equality between women and men as partners and beneficiaries of development, human rights, humanitarian action and peace and security".[100] It is them who operate from the UN side to ensure the implementation of UNSC Resolution 1325 and all further resolutions, as well commitments on gender mainstreaming and gender equality.[101]

Since 2015 UN Women has been scaling-up its presence and programme in Ukraine, in order to provide more support. UN Women tries to aid with gender mainstreaming in the assessment of humanitarian needs and planning; as well as provides support for greater engagement of women (with a special focus on those facing compound discrimination due to displacement, age, disability, and ethnic or other backgrounds); and contributes to the recovery and peacebuilding efforts by advocating for and supporting the implementation of the Women, Peace and Security (WPS) Agenda. UN Women is involved in capacity-building of the state institutions focused on inclusive development and the effective implementation of the National Action Plan on Women, Peace and Security.[102]

4.2. NATO

Like other international organisations involved in the context, NATO is committed to implementing the WPS agenda within the organisation itself, in its member states; as well as in partner countries such as Ukraine. Hence, NATO has encouraged the increase of female participation in the Ukrainian army and various conflict-related institutions.[103] When it comes to these efforts, NATO also faced the aforementioned difficult conditions and perceptions with respect to including women in the Ukrainian military.[104] A major challenge here is that "not only quantity, but also quality of inclusion of women is crucial".[105]

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[100] UN Women, *supra* note 73, p. 31.

[101] *Ibidem*.

[102] UN Women, *Ukraine*, available at: https://eca.unwomen.org/en/where-we-are/ukraine (accessed 30 April 2023).

[103] Schmidt, *supra* note 43, p. 5.

[104] Krymets, Hrebeniuk, *supra* note 30, p. 113.

[105] *Ibidem*.

Overall, Ukraine aims to meet the NATO and EU standards, as outlined by Martsenyuk et al.,[106] quoting the National Security Strategy of 2015 according to which Ukraine aims "to achieve the full compatibility of the security and defence sector of Ukraine with those of NATO member states" and "foresees changes to the education system, military, and special training for defence sector agencies; the maximization of the compatibility of the Armed Forces of Ukraine with the armed forces of NATO members by introducing NATO standards; the strengthening of military discipline; and other interventions that imply changes favourable for women's integration into the defence and security sector".[107]

4.3. OSCE

Arguably, the OSCE has made considerable efforts to integrate the WPS agenda in its policies and actions in Ukraine. This includes a network of Gender Focal Points around the world, as well as a full-time gender adviser to the OSCE Special Monitoring Mission to Ukraine (2014) "who trains the mission staff on how to address gender issues in their daily work and reaches out to women's organizations in the country".[108]

However, insofar as concerns the Minsk Agreement, when it came to the Contact Groups tasked with the peace plan (consisting of representatives from Ukraine, the Russian Federation, and the OSCE, the Ukrainian delegation of seven contained only two participants who were women – Irina Gerashchenko (First Vice Speaker of the Verkhovna Rada) and Olha Aivazovska (from the NGO OPORA Civic Network)[109] – who in turn were tasked with humanitarian and socioeconomic issues[110] as opposed to the security and political issues, which were handled by the male members of the delegation.[111]

4.4. Council of Europe

The Council of Europe (CoE) has also been active in supporting gender equality activities in Ukraine, and more specifically in promoting the inclusion of women in the Ukrainian peace process. For example, a 2022 CoE Parliamentary Assembly resolution on Justice and security for women in peace reconciliation highlights that:

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[106] Martsenyuk, Grytsenko, Kvit, *supra* note 55, pp. 183-184.

[107] *Ibidem*.

[108] C. Ormhaug, *OSCE Study on National Action Plans on the Implementation of the United Nations Security Council Resolution 1325*, OSCE, 2014, p. 37.

[109] Dean, *supra* note 88.

[110] I. Lukianchenko, *Gender-Responsive Government Transitional Justice Policies-A Path to Sustainable Peace and Post-Conflict Reconstruction*, Law Review of Kyiv University of Law 55 (2021).

[111] *Ibidem*.

> The ongoing war in Ukraine is demonstrating once again that while women and girls are among the first casualties of war, notably as victims of conflict-related sexual violence – among the most systematic and cruel acts of warfare – women are also at the political, military and humanitarian forefront. It is therefore unrealistic and even surreal to see that women are absent from the negotiating table during peace talks.[112]

The CoE Office in Ukraine facilitates the implementation of the CoE mission in the country and plays a coordinating role with regard to measures implementing the CoE Action Plan for Ukraine.[113] The Plan entails measures, based on CoE standards, aimed at accompanying the reconstruction process in Ukraine with support to strengthen the resilience of Ukrainian public institutions; to enhance democratic governance and the rule of law; and to protect citizens' fundamental rights.[114] The Plan includes a section on promoting gender equality and equal rights for women and men, girls and boys in the war and post-war period and providing support to victims of violence against women and girls. It also foresees support to Ukrainian authorities on the implementation of the CoE Gender Equality Strategy 2018-2023 and of the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), which was ratified by Ukraine in 2022 (11 years after signing the instrument, demonstrating the enhanced commitment to gender issues by Ukraine; partially ignited by the promise of joining the EU).[115]

4.5. European Union

Ukraine's relationship with the EU is formally determined by the 2014 Association Agreement. Insofar as regards gender policies and equality, the Agreement foresees the commitment to equal opportunities for men and women in all sectors. This policy is supported through various financial packages and aid. The EU's priorities in this regard are:

> achievement of the equal economic independence of men and women by reducing the pay gap, promoting female entrepreneurship, upgrading of social protection and

[112] CoE Parliamentary Assembly, Resolution 2450(2022), 22 June 2022, available at: https://pace.coe.int/pdf/a206eb74d0194f73268a95af72adb9476343686df919c9139c581ac3b834a572/res.%202450.pdf (accessed 30 April 2023), para. 4.

[113] Information available at the CoE website at: https://www.coe.int/en/web/kyiv#{"7074895":[0]} (accessed 30 April 2023).

[114] CoE Action Plan for Ukraine "Resilience, Recovery and Reconstruction" 2023-2026, approved 14 December 22, available at: https://rm.coe.int/action-plan-ukraine-2023-2026-eng/1680aa8280 (accessed 30 April 2023).

[115] *Ibidem*, section 1.2.

> poverty alleviation, etc.; implementation of measures that would contribute to the harmonious combination of work, personal and family spheres of life, mobility of labour contracts, and an increase in the number of services (state/private property) for the care of children and elderly; providing a family state policy, sensitive to representatives of both sexes; attraction of men and women to equal participation in decision-making in politics, economics and business, science and modern technologies; elimination of gender stereotypes.[116]

The implementation of these policies and achievement of equality is also a prerequisite for the European integration of Ukraine.[117]

Next to its diplomatic mission (EU Delegation to Ukraine), the EU is represented in Ukraine through the EUAM (European Union Advisory Mission). Yet, in the mandate of the mission (Council Decision 2014/486/CFSP, Council Decision (CFSP) 2016/712), there is no reference to WPS or the role of gender equality and gender dimensions for the mission.[118] While the EEAS had called for consideration of gender balance in the mission, its de facto design does not reflect this. The majority of the staff of the mission are men, and despite one gender adviser being included after 2016, the leadership continued to consist of "three middle-aged men, defying the EU's own internal commitments to gender equal representation".[119] Scholars and practitioners have heavily criticised this lack of implementation of the EU's commitments in the mission:[120] "It is thus unsurprising that when CSDP planners request gender advisers and gender-balanced teams from Member States, these are not so forthcoming, and consequently the missions remain gender imbalanced".[121]

5. AFTERMATH OF 24 FEBRUARY 2022

Upon the outbreak of the war in 2022, Ukrainians mobilised quickly, with many women joining the armed forces. According to UN Women in Ukraine, "service-women make up 12 per cent of the AFU, and women constitute 22 per cent of all AFU personnel".[122]

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[116] Y.V. Chystiakova, *Gender Policy and Its Implementation in Ukraine Within The Framework of European Integration*, Baltija Publishing, Riga: 2021, p. 257.

[117] *Ibidem*, p. 263.

[118] N. Ansorg and T. Haastrup, *Gender and the EU's Support for Security Sector Reform in Fragile Contexts*, 56(5) Journal of Common Market Studies 1134 (2018).

[119] *Ibidem*.

[120] *Ibidem*.

[121] *Ibidem*, p. 1139.

[122] *Ibidem*.

The 2022 war in Ukraine caused severe internal displacement and refugees. The majority of those were women and children.[123] This also resulted in an increased risk of trafficking and gender-based violence.[124] The situation has caused a reaction by European institutions, which have expressed concern regarding the risk of trafficking and sexual exploitation in the context, and have stressed the need to support Ukraine in combatting it (2022/2633(RSP)) (European Parliament, 2022).[125] As a signatory of various international conventions on the topic – such as the United Nations Convention against Transnational Organized Crime, the Convention on the Elimination of All Forms of Discrimination against Women, the Council of Europe Convention on Action against Trafficking in Human Beings – Ukraine also has international commitments on this issue.[126]

In particular as regards the WPS agenda, women have been absent from negotiation tables, with images showing settings of men-only from both the Russian as well as the Ukrainian sides. There was no criticism of this from the West, and surprisingly none from the EU, European states, or NATO.[127] Scholars argue that "this appears surprising given that WPS has been a cornerstone of the West's relationship with Ukraine since 2014"[128], and have coined the phrase "gendered silences in Western responses to the war".[129]

While the EU did express some solidarity with the women of Ukraine,[130] NATO, in particular, made no mention of WPS in relation to the context: "Even on International Women's Day just short of two weeks after the Russian invasion – a time that NATO usually uses to showcase its work on the WPS agenda – NATO remained silent on what it was doing to support the WPS agenda except for deploying women as part of NATO's Response Force".[131] NATO's "silence" on WPS has been criticised by feminist scholars as an example of the "disjuncture between the rhetoric and the reality of the global commitment to the WPS agenda", as well as risking to undermine its "wider work on the agenda and put at risk the possibility of a lasting and inclusive peace reflective

[123] *Ibidem*.

[124] S. Garashchenko et al., *Ukraine's International Obligations to Respond to and Address Gender Challenges and Problems Caused by the War*, 10(10) Ukrainian Policymaker 11 (2022).

[125] *Ibidem*, p. 13.

[126] *Ibidem*.

[127] K.A.M. Wright, *Where Is Women, Peace and Security? NATO's Response to the Russia–Ukraine War*, 5(2) European Journal of Politics and Gender 275 (2022).

[128] K.A.M. Wright, *Gendered Silences in Western Responses to the Russia–Ukraine War*, 19 Place Branding and Public Diplomacy 237 (2022).

[129] *Ibidem*.

[130] European External Action Service, *Tribute to Ukrainian Women on International Women's Day*, 2022 available at: https://www.eeas.europa.eu/eeas/tribute-ukrainian-women-international-women%E2%80%99s-day_en (accessed 30 April 2023); Wright, *supra* note 127, p. 2.

[131] Wright, *supra* note 127, p. 275.

of the whole of Ukrainian society".[132] Women and women's civil society organisations and agencies appear overlooked in this context, indeed "almost invisible".[133]

6. INCREASED ROLE FOR INTERNATIONAL LAW

In Section 1.1. we tried to demonstrate that there already exist relevant international legal rules that could be utilised in the context of the inclusion of women in peace processes. Practice has shown that whenever there is a willingness (by states or other international actors), even broad and seemingly unrelated provisions can be interpreted in a creative way to broaden the scope of existing obligations. One mechanism to speed up the expansion of the understanding of certain human rights obligations is the option of human rights treaty bodies publishing their interpretation of the provisions of a respective human rights treaty in the form of "general comments" or "general recommendations". Thus the HRC could adopt a General Comment that would explicitly state that the right to vote and take part in public affairs (or the right to self-determination) should be interpreted in a manner that includes the right to take part in peace processes. Or the Committee on CEDAW could build on its General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations to map out more concrete obligations in relation to the inclusion of women in peace processes designed to resolve conflict situations.[134] However, as such interpretative instruments are not binding on states, their implementation would depend on the willingness of states parties to the relevant treaties to accept such interpretations.

This is related to the main problem with respect to the inclusion of women – the lack of implementation of existing commitments. Some of the reasons behind this may be the formal structure of the peace processes (including only high-level officials, which in many countries are still mostly male), as well as cultural reasons and traditional gender roles and perceptions of efficiency. These factors can decrease the willingness to ensure women's inclusion in peace processes, especially in a situation where the relevant obligations of inclusion are phrased in a general manner and the specific duties would have to be distilled from a multitude of relevant documents and adapted to the circumstances of the situation (be it during conflict or post-conflict).

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[132] *Ibidem*, p. 277.

[133] M. O'Sullivan, *Where Are the Ukrainian Women? Respecting Female Voices Now and in Post-War Times*, Heinrich Böll Stiftung, Prague: 2022.

[134] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations*, 18 October 2013, UN Doc. CEDAW/C/GC/30.

One way to decrease the impact of these negative factors would be to include clear provisions regarding the inclusion of women in peace processes in relevant legal instruments (e.g. CEDAW), and/or framing such obligations in the form of a new treaty. Of course, creating new legal rules or instruments does not automatically result in their application in practice, but it would emphasise the relevance of such commitments for the international community and bring about clarity in relation to what is expected from states (and international organisations) in terms of the inclusion of women.

Looking at conflict situations around the world, practice has demonstrated that women have successfully leveraged regional and international standards and norms to advocate for women's rights and peace. For example, in Myanmar women successfully promoted and utilised frameworks such as CEDAW, UNSC Resolution 1325, and the Beijing Platform for Action. In Ukraine, women have also advocated for standards in line with EU gender equality policies, presenting this as a way for peace process stakeholders to improve their international reputation. Women have tried to leverage Ukraine's desire for European integration – and the associated reforms – to push for more gender-inclusive policies.[135]

This demonstrates the relevance of applicable international legal rules. Perhaps it is time for international law to increase its contribution to the inclusion of women in peace processes? Policy documents have resulted in progress in this matter, but implementation is lagging behind and more detailed legal provisions could provide a valuable tool for women's groups around the world.

CONCLUSIONS

As regards the formal implementation of UNSC Resolution 1325, it is unsurprising that Ukraine's two NAPs have not led to a major policy change and successes. Most NAPs around the world have been criticised for being "all plan and no action"[136], and most measures to implement UNSC Resolution 1325 have focused on protecting women from sexual and gender-based violence during conflicts, rather than actively including them in the peace process and at the decision-making level.[137] Overall, studies have found that NAPs are "not yet fully realising their potential to deliver on women's rights".[138] Ukraine is no different. Despite the progress in

[135] Warren et al., *supra* note 45, pp. 7, 29.

[136] B.A. Reardon, *Peoples' Action Plans: Pursuing Human Security with Local Civil Society Actions to Implement UNSCR 1325*, Openings for Peace: UNSCR 1325, Women and Security in India (2016), p. 247.

[137] *Ibidem*, p. 248.

[138] A. Swaine, *Globalising Women, Peace and Security: Trends in National Action Plans*, Rethinking National Action Plans on Women, Peace and Security, IOS Press: 2017, p. 7.

certain areas described in this article, a systematic enhancement of the position of women is still far from accomplished.

As for the practical aspects of inclusivity and gender-sensitivity, critical scholars frequently state that "at the forefront of all this is the masculinity of war", stressing that it is crucial to understand "how the war is deeply gendered and ensuring that [women's] diverse voices are included now and in post-war times".[139] This has been the case not only following the 2014 Russian unlawful annexation of Crimea, but also during the developments of 2022. The images spread are those of men fighting, negotiating, and making tough decisions, while women and children constitute the majority of refugees "going to safety".[140] Such deep-rooted perceptions are difficult to change and constitute one of the biggest hurdles in relation to the inclusion of women in peace processes. The impact of such perceptions can be decreased by making the commitments regarding the inclusion of women more concrete, detailed, and legally binding. The current provisions – with their general wording and broad obligations – leave a lot to the discretion of the interpreter, which allows for gender stereotypes and traditional perceptions of war and peace processes to impact the way in which inclusion is (or is not) implemented.

The Ukrainian peace process illustrates the multifaceted difficulties in ensuring inclusive peace processes. If European actors are unable to ensure inclusion even on their own continent, what hope is there for inclusion on a global scale? Yet systemic work and reinforced commitments can bring about change. And one way to do this would be to strengthen the legal regulations in this area, so that they match the policy commitments made at both the regional and global levels.

[139] O'Sullivan, *supra* note 133.

[140] *Ibidem*.

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THE EUROPEAN COMMISSION FILING GAPS IN THE FDI SCREENING REGULATION IN THE FACE OF THE WAR IN UKRAINE

Abstract: *On 19 March 2019 the European Union (EU) adopted the Regulation establishing a framework for the screening of foreign direct investments into the EU (the "Regulation"). Four years later, the geopolitical situation changed completely as a result of the Russian aggression against Ukraine. Since February 2022 the EU has successively expanded its sanctions imposed against Russia. In parallel – on 6 April 2022 – the European Commission published the Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions.*

The aim of the article is to draw attention to selected aspects of the Regulation which may be relevant in face of the threats to the European and national security and public order posed by the actions of the regimes of Russia and Belarus, following the invasion of Ukraine. In the perspective of the ongoing war in Ukraine, the issues discussed in this article may be points that are worth considering when amending the Regulation in view of the announced revision of the Regulation in Autumn 2023.

Keywords: war in Ukraine, Russia, sanctions, foreign direct investment, FDI screening, the EU FDI Screening Regulation, European Commission, public security, public order

INTRODUCTION

On 19 March 2019 the European Union (EU) adopted the Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the

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Union (the Regulation).[1] This is the first legislative act concerning this field, introduced at the European level. The EU adopted the mechanism in the face of the then ongoing geopolitical and economic changes, including in particular in response to the concerns of some Member States related to the significant increase in Chinese investments[2] and the influence of Chinese investors on the European market.

Four years later, the geopolitical situation has changed almost completely as a result of the Russian aggression against Ukraine. Above all, the war has changed the history of Ukraine and the lives of its citizens, probably forever. But it has also become one of the biggest challenges in the history of the EU, both for its citizens and politicians/lawmakers. The Russian invasion of Ukraine should be considered as an event which alters the course of history at many levels, including in a global sense. For the EU, above all the war in Ukraine poses challenges that it has never faced in its history, and the way the EU as an organisation will respond to these challenges will fundamentally change the nature and purpose of the Union. For the first time in its history, the EU faces the challenges connected with having a war just beyond its external borders. Moreover, this is a war started by a very strong actor on the global political scene – a state which not only uses natural resources and energy supplies as a weapon, but also an aggressor state which has a large numerical advantage over its opponent in terms of military resources and is, so it claims, prepared for a long war. As pointed out by de Witte, the outbreak of the war in Ukraine has, "highlighted the necessity and increased the willingness of the EU to defend its own values and interests".[3]

Faced with a threat from the East, the EU itself and its Member States have been forced to dramatically increase the attention they pay to safety and public order. Following the unprovoked military actions of Russia, assisted by the actions of the regime in Belarus, the EU and its Member States have become much more vigilant about any possible threats and dangers coming from foreign regimes.

Since February 2022, the EU has successively expanded its sanctions imposed on Russia. Initially, the first EU restrictive measures against Russia were imposed in

[1] Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L 79 I/1.

[2] *See* S. Norrevik, *MEPs are more likely to oppose close EU-Ukraine ties when they represent areas that receive high levels of Russian investment*, LSE Blog, 25 October 2021, available at: https://blogs.lse.ac.uk/europpblog/2021/10/25/meps-are-more-likely-to-oppose-close-eu-ukraine-ties-when-they-represent-areas-that-receive-high-levels-of-russian-investment/ (accessed 30 April 2023). *See also* C. Kao, *The EU's FDI Screening Proposal – Can It Really Work?*, 28(2) European Review 173 (2020).

[3] F. de Witte, *Russia's invasion of Ukraine signals new beginnings and new conflicts for the European Union*, LSE Blog, 14 March 2022, available at: https://blogs.lse.ac.uk/europpblog/2022/03/14/russias-invasion-of-ukraine-signals-new-beginnings-and-new-conflicts-for-the-european-union/ (accessed 30 April 2023).

March 2014,[4] "in response to the illegal annexation of Crimea and Sevastopol and the deliberate destabilisation of Ukraine"[5], with new sanctions added over time. From February 2022 to January 2023, the EU has imposed a total of ten additional packages.[6] In parallel, the EU expanded its sanctions imposed on Belarus, in response to "its involvement in the invasion of Ukraine, and on Iran, in relation to the use of Iranian drones in the Russian aggression against Ukraine".[7] As underlined by de Witte, "by acting decisively, the EU leaders have set a new course for the integration process".[8] The threat from third countries has clearly shown that the EU must prove both that it is a major player on the geopolitical scene, and that there is unity among the Member States. The role of the Union in the face of the war in Ukraine has revealed the premier purpose of the organization – to protect the public interest and the security of the European citizens.[9] Such a revision of the fundamental role of the EU as an organization of states facing threats from third countries as well as from external factors will certainly require profound changes, including changes of an institutional character and probably even changes in the EU Treaties.

The need for changes; the re-evaluation of the current solutions; and probably changes in the division of competences between the EU and its Member States is well illustrated by the area of foreign direct investment (FDI) screening. This is an extremely important area, because it is crucial from the perspective of the protection of security and public order, as well as sensitive in terms of its interactions and integration with third countries. The threats and dangers to the public interest related to direct investments in European companies by foreign investors cooperating with the aggressor, i.e. the Kremlin regime, may be enormous and cause both the European Commission (EC) and the Member States to show increased vigilance in the area of FDI screening.

The conflict in Ukraine has made it necessary to ask the question; Who in the EU has the competence in the protection of security and public order? As mentioned above, this is acknowledged to be a basic function of the Union, but since its inception, and thus also in the Treaties, competences in the field of security and

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[4] *See* Ł. Gruszczyński, M. Menkes, *Legality of the EU trade sanctions imposed on the Russian Federation under WTO law*, in: W. Czapliński, S. Dębski, R. Tarnogórski, K. Wierczyńska (eds.), *The Case of Crimea's Annexation under International Law*, Wydawnictwo Scholar, Warszawa: 2017, pp. 239-242.

[5] European Commission, *Sanctions adopted following Russia's military aggression against Ukraine*, available at: https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en (accessed 30 April 2023).

[6] *Ibidem.*

[7] European Council and Council of the European Union, *EU sanctions against Russia explained*, available at: https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/ (accessed 30 April 2023).

[8] *Ibidem.*

[9] *Ibidem.*

the protection of public order have been assigned to the Member States. It is the Member States that can take measures to limit the freedoms of the internal market – within the limits of the provisions of the Treaty on the functioning of the European Union (TFEU) – on the rights of establishment and capital movements (see Arts. 52 and 65.1(b)). This allows States to implement certain measures deemed necessary on the grounds of public policy or public security.

On 6 April 2022, the European Commission (EC) published its Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions (the Guidance).[10] In its first paragraph, the EC underlined that "[t]he European Union is open to foreign investment, which is essential for our economic growth, competitiveness, employment and innovation. (...) But our openness is not unconditional, and it needs to be balanced by appropriate tools to safeguard our security and public order".[11] The EC expressed the need for greater caution and more careful analysis of the investments originating from Russia and Belarus,[12] while emphasizing that the EU vigilance should go "beyond investments by persons or entities that are subject to sanctions"[13], as threats to the security of both the EU and the Member States may be equally well posed by other entities (i.e. not covered by sanctions).

The aim of this article is to draw attention to selected aspects of the Regulation which may be relevant in face of the threats to the European and national security and public order deriving from the actions of the regimes of Russia and Belarus following the invasion of Ukraine. The article focuses on analysis of the two gaps in the Regulation: (i) gaps in definition of a foreign direct investment; and (ii) gaps in the definition of a foreign investor. These flaws in the current wording of the Regulation were selected based on the analysis of the Guidance. The conflict in Ukraine has highlighted certain gaps in the Regulation, which the EC drew attention to and in respect of which it encouraged the Member States to fill them up through national mechanisms.[14] This shows that the adoption of the Regulation has not really changed the perception of who is responsible for protecting public

[10] European Commission, *Guidance to the Member States concerning foreign direct investment from Russia and Belarus in view of the military aggression against Ukraine and the restrictive measures laid down in recent Council Regulations on sanctions*, 6 April 2022, 2022/C 151 I/01. *See also* Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229 1 (as subsequently amended) and Council Regulation (EC) 765/2006 of 18 May 2006 concerning restrictive measures concerning restrictive measures in view of the situation in Belarus, OJ L 134 1 (as subsequently amended).

[11] European Commission, *supra* note 10, p. 1.

[12] *Ibidem*.

[13] *Ibidem*.

[14] *Ibidem*, p. 2.

security and public order, i.e. that it is the sole competence of the Member States to adopt and maintain certain measures deemed necessary on grounds of public policy or public security.

This article first briefly describes the sanctions that have been imposed by the EU on Russia in connection with the war in Ukraine, with emphasis on the differences between the role of sanctions and the function of FDI regulations in the protection of public order and security. Next, it refers to the definitions of a foreign direct investment and a foreign investor in the Regulation, and then uses them to explain the two above-mentioned gaps in the Regulation. After indicating the gaps in the Regulation, the article presents proposals for potential changes that could be made at the level of the EU in order to patch these areas.

In the perspective of the ongoing war in Ukraine, the issues discussed in this article may be points that would be worth considering when amending the Regulation – particularly in view of the announced revision of the Regulation in Autumn 2023.

1. THE EU SANCTIONS IMPOSED IN RESPONSE TO RUSSIA'S INVASION OF UKRAINE

The official position of EU leaders and institutions is well captured in the following statement: "[T]he EU strongly condemns Russia's unprovoked and unjustified military aggression against Ukraine and the illegal annexation of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions. It also condemns Belarus' involvement in Russia's military aggression".[15] Since February 2022, the EU has firmly supported Ukraine, providing humanitarian, political, financial and military assistance. In addition, the EU significantly extended the scope of sanctions originally imposed on Russia following its illegal annexation of Crimea in 2014. These measures are designed to weaken Russia's economy[16] to such an extent as to make it as difficult as possible for the regime to continue the war, acquire raw materials and technology, and exchange information for the purpose of military operations. As underlined in the Guidance, "the sanctions against Russia are designed to undermine the Kremlin's ability to finance the war, impose clear economic and political costs on those in Russia's political elite responsible for the invasion, and diminish its economic base".[17]

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[15] European Council and Council of the European Union, *EU response to Russia's invasion of Ukraine*, available at: https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/ (accessed 30 April 2023).

[16] European Council and Council of the European Union, *EU restrictive measures against Russia over Ukraine (since 2014)*, available at: https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/ (accessed 30 April 2023).

[17] European Commission, *supra* note 10, p. 1.

On 25 February 2023, the EU adopted its tenth package of sanctions in response to Russia's invasion of Ukraine. Overall, the EU's actions against Russia include: (i) targeted restrictive measures (individual sanctions); (ii) economic sanctions; and (iii) visa measures. The economic sanctions target the financial, trade, energy, transport, technology and defence sectors.[18] The individual sanctions target those persons responsible for supporting, financing or implementing actions which undermine the territorial integrity, sovereignty and independence of Ukraine, or who benefit from these actions.[19] As of the end of January 2023, 1,386 individuals and 171 entities are subject to an asset freeze and/or a travel ban. The above numbers include some Russian controlled entities based in the illegally annexed Crimea or Sevastopol in order to avoid circumvention. With respect to visa measures, in February 2022, "the EU decided that Russian diplomats, other Russian officials and business people may no longer benefit from visa facilitation provisions, which allow privileged access to the EU".[20] Further, in September 2022 "the Council adopted a decision that fully suspend[ed] the visa facilitation agreement between the EU and Russia. Consequently, the general rules of the visa code [started to] apply to Russian citizens".[21] Furthermore, "the EU has suspended the broadcasting activities and licenses of several Kremlin-backed disinformation outlets"[22], including the Russia Today news channel, which is known all over the world. In the opinion of the EU institutions, "these outlets have been used by the Russian government as instruments to manipulate information and promote disinformation about the invasion of Ukraine, including propaganda aimed at destabilising the countries neighbouring Russia, the EU and its member states".[23]

The EU has also adopted sanctions against two other countries, i.e. Belarus, in response to its involvement in the invasion of Ukraine; and Iran in relation to the use and supply of Iranian drones to the Russian army.[24]

Importantly, on 28 November 2022 the Council unanimously adopted a decision to add the violation of restrictive measures (sanctions) to the list of "EU crimes" included in the TFEU.[25] This decision was based on the fact that the Member States have different definitions of what constitutes a violation of restrictive measures

[18] European Council and Council of the European Union, *supra* note 16.
[19] European Council and Council of the European Union, *supra* note 7.
[20] European Council and Council of the European Union, *supra* note 16.
[21] *Ibidem.*
[22] *Ibidem.*
[23] *Ibidem.*
[24] *Ibidem.*
[25] European Council and Council of the European Union, *Sanctions: Council adds the violation of restrictive measures to the list of EU crimes*, available at: https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/sanctions-council-adds-the-violation-of-restrictive-measures-to-the-list-of-eu-crimes/ (accessed 30 April 2023).

and what penalties should be applied in the event of violations.[26] Following this decision of the Council, on 2 December 2022 the EC presented its proposal for a directive providing for minimum rules concerning the definition of criminal offences and penalties for the violation of EU sanctions.[27] The adoption of such a directive will enable harmonized enforcement of sanctions throughout the EU and deter attempts to circumvent or violate them. The timing of the process of adoption of the directive and its subsequent transposition by the Member States remains to be discussed. Given the developments in Ukraine and the continuation of military operations by Russia, this should happen as soon as possible.

2. CONCERNS THAT SANCTIONS MAY NOT BE SUFFICIENT TO PROTECT THE EU'S AND MEMBER STATES' SECURITY AND PUBLIC ORDER

One of the areas where the EU and its Members States have expressed their concerns following the Russian invasion in Ukraine is the activity of the investors – or more generally entities originating from Russia and Belarus – on the European market, including through FDIs.

On 2 September 2022, as the EC published the Second Annual Report on the screening of foreign direct investments into the Union,[28] the Executive Vice-President and Commissioner for Trade, Valdis Dombrovskis, stated that:

> At a time of mounting security challenges, in particular Russia's unprovoked war of aggression in Ukraine, it is crucial to have our strategic trade and investment controls instruments up and running. In cooperation with our international partners, the EU deployed export controls to sanction Russia for its devastating war in Ukraine. The EU remains open to foreign investments, but this openness is not unconditional. It must be balanced. We must continue enhancing our capability to ensure this balance.[29]

Further, in the Guidance the EC stressed that "in the current circumstances, there is a heightened risk that any investment directly or indirectly related to a

[26] European Council and Council of the European Union, *supra* note 16.

[27] European Commission, *Ukraine: Commission proposes to criminalise the violation of EU sanctions*, 28 November 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7371 (accessed 30 April 2023).

[28] European Commission, *Second Annual Report on the screening of foreign direct investments into the Union*, 1 September 2022, COM (2022) 433, available at: https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2022)433&lang=en (accessed 30 April 2023).

[29] European Commission, *EU investment screening and export control rules effectively safeguard EU security*, 2 September 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5286 (accessed 30 April 2023).

person or entity associated with, controlled by or subject to influence by the Russian or Belarusian government into critical assets in the EU may give reasonable grounds to conclude that the investment may pose a threat to security or public order in Member States".[30]

Consequently, although the Regulation and restrictive measures (sanctions) are separate legal instruments, adopted in different procedures and regulating different areas, what they have in common is that they both allow for the control of certain investments coming from abroad, and importantly, they have a significant impact on each other. In the Guidance, the EC pointed out that "EU sanctions apply to any person inside the territory of the Union, to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State, and to any legal person, entity or body in respect of any business done in whole or in part within the Union. Therefore, EU restrictive measures can affect direct investments from Russia and Belarus in several ways".[31] For example, based on entity criteria certain restricted persons or companies on whom individual sanctions are imposed are excluded from transactions, and/or certain assets are frozen and cannot be traded.

Despite certain similarities and their mutual impact on each other, the key difference between FDI screening mechanisms and sanctions is the aim of their adoption. Both the Regulation and various national screening mechanisms adopted by the Member States were introduced as tools to safeguard the EU and/or Member States from foreign direct investments that may affect their security or public order. Although screening mechanisms may take various forms, including *ex-post* or *ex-ante* control, the preventive function of such mechanisms remains paramount in both cases. These mechanisms are primarily intended to prevent situations in which a given investment could pose a threat to public order or security. On the other hand, restrictive measures (sanctions) are generally intended to be severe measures aimed at punishing a given state or entity for its actions that pose a threat to peace or security or constitute violations of fundamental rights, including human rights. In the case of the EU sanctions imposed on Russia in relation to its military actions against Ukraine, the aim of the measures adopted at the EU level is "to impose severe consequences on Russia for its actions and to effectively thwart Russian abilities to continue the aggression".[32] Consequently, even though sanctions are also preventive measures, they differ significantly from the FDI screening mechanisms, primarily due to their targeted nature. Sanctions are always "against"; while most FDI control regulations are general in nature and should be applied "in the

[30] European Commission, *supra* note 10, p. 1.

[31] *Ibidem*, p. 2.

[32] European Council and Council of the European Union, *supra* note 7.

case of". With respect to the Regulation, the EC explicitly underlined that "[n]o specific third country is "targeted". Concerns relating to security and public order can potentially arise from anywhere. Nondiscrimination among foreign (non-EU) investors is a key principle of the Regulation and the sole grounds for screening a foreign investment are the risks – assessed on a case-by-case basis – to security and public order, regardless of the foreign investor's origin".[33]

Considering the role that the FDI screening mechanisms are playing in the protection of public security, the EC called upon the Member States "to urgently set up comprehensive investment screening mechanisms, if they have not done so already. They are also called upon to enforce anti-money laundering rules in order to prevent the misuse of the EU financial system by investors from Russia and Belarus".[34] Furthermore, in the Guidance the EC underlined that:

> In the current circumstances, there is a significantly heightened risk that FDI by Russian and Belarusian investors may pose a threat to security and public order. Therefore, within applicable rules, such FDI should be systematically checked and scrutinized very closely. These risks may be exacerbated by the amount of Russian investments in the EU and the intensity of prior business relations between EU and Russian companies. Moreover, particular attention must be given to the threats posed by investments by persons or entities associated with, controlled by or subject to influence by the two governments because these governments have a strong incentive to interfere with critical activities in the EU and to use their ability to control or direct Russian and Belarusian investors in the EU for that purpose.[35]

3. THE FRAMEWORK INTRODUCED BY THE REGULATION

The Regulation does not impose any obligation on Member States to adopt national screening mechanisms but leaves them the freedom to adopt or maintain such mechanisms in their national legal systems. The Regulation only requires that national FDI control mechanisms are transparent and do not discriminate between different third countries (Art. 3.2 of the Regulation). The above results from the well-established position of the Court of Justice of the European Union (CJEU) regarding permissible restrictions on the freedoms of the internal market, including the free

[33] European Commission, *Frequently asked questions on Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1867 (accessed 30 April 2023).

[34] European Commission, *Investment screening*, available at: https://policy.trade.ec.europa.eu/enforcement-and-protection/investment-screening_en (accessed 30 April 2023).

[35] European Commission, *supra* note 10, p. 2.

movement of capital.[36] If a given entity from a third country considers a national FDI screening regulation to be a discriminatory measure, it may file a complaint and the CJEU will assess whether such national regulation complies with the EU law. As emphasized by the EC, at the stage of the legislative process the Regulation does not determine the compliance of national monitoring mechanisms with the EU law.[37]

However, the Regulation imposes certain information obligations on the Member States regarding the adoption of a new monitoring mechanism or any changes to the national investment control system (Art. 3.7). This information is provided to the EC, which maintains a list of monitoring mechanisms used by the Member States (Art. 3.8). Moreover, pursuant to Art. 5 of the Regulation, the Member States are required to submit annual reports to the EC on foreign direct investments that were carried out on their territory.

The Regulation also provides for the creation of a cooperation mechanism, under which the Member States and the EC should exchange information and voice concerns related to specific investments, in particular those investments which have a European impact. Importantly, the cooperation mechanism set out in Arts. 6 and 7 of the Regulation applies to the screening of: (i) the investments subject to a screening procedure in a given Member State; and/or (ii) the cases where a Member State or the EC considers that a FDI planned or implemented in another Member State, which is not monitored in that Member State, may affect its own security or public order, or where it has information relevant to that FDI. Additionally, the EC has acquired new powers, i.e. to issue an opinion on a given FDI (in cases of both investments undergoing a screening procedure in a Member State, and investments not undergoing screening). Such an opinion is non-binding, but the Member State where a given investment would take place should give "due consideration" to the views expressed by the EC. If such opinion concerns an investment involving funding from an EU programme, then its views must be given "utmost regard" by the recipient Member State. In each case however, a Member State will have to explain if it does not follow the opinion of the EC.

4. THE DEFINITION OF A FOREIGN DIRECT INVESTMENT AND A FOREIGN INVESTOR IN THE REGULATION

The Regulation "establishes a framework for the screening by Member States of foreign direct investments in the Union on the grounds of security or public order,

[36] *See e.g.* Case C-120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECLI:EU:C:1979:42; Case C55/94 *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECLI:EU:C:1995:411; and Case C-367/98 *Commission v. Portugal* [2002] ECLI:EU:C:2002:326.

[37] Proposal for a Regulation of the European Parliament and of The Council establishing a framework for screening of foreign direct investments into the European Union, COM/2017/0487 final – 2017/0224 (COD), p. 2.

and for a mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order. It includes the possibility for the Commission to issue opinions on such investments" (Art. 1).

The Regulation defines FDI as an investment made "by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity" (Art. 2.1). As emphasized by the EC, the definition of an FDI contained in the Regulation covers any kind of such investments.[38] The above definition comes directly from the judgment of the CJEU of 12 December 2006,[39] where the Court underlined that although a foreign direct investment is a concept not defined in the Treaties,[40] it was able to develop a single definition (subsequently copied to the Regulation) based on how the FDI concept was understood in EU law and previous case law.[41] In the same judgment, the CJEU pointed out that an investment consisting in the acquisition of shares in a given company that has not been subscribed for the purpose of establishing or maintaining permanent and direct links between the shareholder and the company and enabling him to actively participate in the management of that company or in exercising control over it cannot be considered as a direct investment[42]. In further judgments the CJEU differentiated a "direct investment" which covers "investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control", from a "portfolio investment" involving an "investment in the form of acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking".[43]

The definition of a foreign direct investment developed by the CJEU and copied to the Regulation mirrors the widely-accepted and used definitions proposed by

[38] European Commission, *supra* note 33.

[39] Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para. 181.

[40] *Ibidem*, para. 177.

[41] *Ibidem*, paras. 178-180.

[42] *Ibidem*, para. 196.

[43] *See e.g.* Case C-171/08 *Commission v. Portugal* [2010] ECR I-06817, para. 49; Joined Cases C282/04 and C-283/04 *European Commission v. Netherlands* [2006] ECR I-09141, para. 19; Case C-367/98 *Commission v. Portugal* [2002] ECLI:EU:C:2002:326; and Case C-741/19 *Republic of Moldova v. Komstroy LLC* [2021] ECLI:EU:C:2021:655.

both the OECD[44] and the International Monetary Fund (IMF).[45] Furthermore, the above definition of a foreign direct investment developed by the CJEU is in line with the economics and investment regimes.[46] However, the concept of investment is vastly complex and "typically consists of several interrelated economic activities", and in legal terms the approaches towards defining the term "investment" are the subject of debate, both in the context of EU law, investment law treaties (including bilateral investment treaties (BITs)), as well as in economic discourse.[47] Bearing in mind the above, it should be emphasized that there is no single universal definition of the term "investment", and the definition adopted in the Regulation is also to some extent a compromise, which may turn out to be imperfect.

Further, the Regulation defines foreign investor as "a natural person of a third country or an undertaking of a third country, intending to make or having made a foreign direct investment" (Art. 2.2), adding that an undertaking of a third country "means an undertaking constituted or otherwise organised under the laws of a third country" (Art. 2.7). This means that the definition of a foreign investor under the Regulation covers both natural persons and legal entities originating from third countries. In addition, the preamble to the Regulation underscores that "[i]t should be possible for Member States to assess risks to security or public order arising from significant changes to the ownership structure or key characteristics of a foreign investor" (Recital 11).

At this point, it should be emphasized that neither the term "foreign direct investment" nor "foreign investor" are defined in any other acts of EU law. However, as noted above these concepts are defined and interpreted in the jurisprudence of the CJEU, and in investment law as broadly understood (including investment law treaties, in particular BITs, international customary law, unilateral statements, or the case law analysed by the tribunals adjudicating investment disputes). But – primarily due to the multitude of definitions of both foreign direct investment and

[44] According to the OECD: "Foreign direct investment (FDI) is a category of cross-border investment in which an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy. Ownership of 10 percent or more of the voting power in an enterprise in one economy by an investor in another economy is evidence of such a relationship" (*see* OECD, *Foreign Direct Investment (FDI)*, available at: https://doi.org/10.1787/9a523b18-en, accessed 30 April 2023).

[45] According to the IMF: "Foreign direct investment (FDI) is an investment in which the objective of a resident in one economy is to obtain a lasting interest in an enterprise in another economy". (*see e.g.* IMF, *Foreign Direct Investment Trends and Statistics: A Summary*, 28 October 2003, available at: https://www.imf.org/external/np/sta/fdi/eng/2003/102803s1.pdf (accessed 30 April 2023).

[46] *See* R. Dolzer, Ch. Schreuer, *Principles of International Investment Law* (3rd ed.), Oxford University Press, Oxford: 2022, p. 60; R. Dolzer, *The notion of investment in recent practice*, in: S. Charnovitz, D.P. Steger, P. van den Bosche (eds.), *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano*, Cambridge University Press, Cambridge: 2005, pp. 261, 263; N. Rubins, *The Notion of "Investment"*, in: N. Horn (ed.), *Arbitrating Foreign Investment Disputes*, Kluwer Law International, The Hague: 2004, p. 283.

[47] Dolzer, Schreuer, *supra* note 46, p. 61.

foreign investor in various sources of international law, as well as in the positions of researchers and economists, and also due to the ongoing debate and search for the best possible definitions for the needs of modern trade – it would be difficult to present in this article all possible solutions and references to the existing definitions of both analysed terms.[48] Furthermore, in relation to EU law the situation became even more complex following the judgment of the CJEU in the *Achmea* case[49] related to intra-EU BITs, and the more recent judgment in *Komstroy* case related to the Energy Charter Treaty and its interpretation. Clearly, all these developments, both in jurisprudence and in investment law as broadly interpreted, cannot be ignored. However, taking into account that sometimes different definitions are adopted even for the purposes of one category of investment treaties (e.g. BITs), for the purposes of this article the author has chosen to limit the analysis only to the discussion of definitions from the EU law, specifically from the Regulation.

5. AREAS OUTSIDE THE SCOPE OF, AND GAPS IN THE REGULATION

The above-described two definitions – of a foreign direct investment and a foreign investor – determine the scope of the Regulation. It is crucial to identify the areas that fall outside the scope of the Regulation, and further to analyse what are the existing gaps. With respect to the latter, the following two aspects will be discussed below: (i) gaps in the definition of a foreign direct investment; and (ii) gaps in definition of a foreign investor. In this context, I present selected flaws in the current wording of the Regulation, together with proposed amendments to the Regulation deemed necessary for a better and more efficient protection of the EU and the Member States against threats related to hostile transactions made by entities from outside the EU, including those controlled or dependent on third countries' governments and state institutions.

5.1. Gaps in the definition of a foreign direct investment

The first issue boils down to the interpretation and scope of the word "control", which appears in the definition of a foreign direct investment in the Regulation. As discussed above, the definition of FDI formulated in the Regulation covers any investment by a foreign investor "aiming to establish or to maintain lasting and direct links between the foreign investor" and the target, "including investments which enable effective participation in the management or *control* of a company carrying out an economic activity" (Art. 2.1, emphasis added). But the Regulation lacks a

[48] See the positions indicated in note 46.

[49] *See* Case C-284/16, *Slowakische Republik v. Achmea BV* [2018] ECLI:EU:C:2018:158.

definition of "control", which consequently causes difficulties in interpreting the whole definition of an FDI. Of course, the fact that a given legal act does not contain a particular definition or a reference to a definition of a given concept in another legal act is not in and of itself a defect. However, considering the area regulated by the Regulation and the definitions of an FDI and a foreign investor, it is crucial to precisely determine the scope and limitations of the definition of "control" for the purposes of the screening of FDI flows in the EU.

One can try to derive a definition of "control" – and thus the scope of application of the Regulation – by starting from a determination of which transactions fall outside the scope of the Regulation. The first such area encompasses portfolio investments. The Regulation explicitly states that it does not apply to portfolio investments (Recital 9), which as a rule do not result in granting an investor full management control rights over a given company. As concluded by Dolzer, the following elements allow us to assess that we are dealing with a direct investment as such type of an investment "involves (a) the transfer of the funds, (b) a longer term project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) a business risk".[50] Therefore, a portfolio investment may not be classified as a direct investment as it lacks "the element of personal management".[51] Furthermore, as established in the CJEU's jurisprudence, portfolio investments are defined as "the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking".[52] However, as underlined by the EC, "while portfolio investments are not part of the scope of the Regulation, the Regulation does not establish quantitative criteria for the delimitation of portfolio investments and FDI".[53] The above sentence actually addresses the key problem discussed in this article, i.e. the lack of a definition of 'control'. Indeed, the Regulation does not introduce quantitative criteria, such as percentage thresholds for the number of shares held by an investor in a given company; but more importantly the Regulation does not allow to clearly determine whether a given investment is still a portfolio investment or should already be considered a transaction covered by the scope of the Regulation and, consequently, the screening procedure.

Another area not covered by the Regulation concerns internal restructurings, as such transactions do not result in a change of control over a given company. As explained by the EC, "investments where the foreign investor and the EU target

[50] Dolzer, Schreuer, *supra* note 46, p. 60.

[51] *Ibidem*.

[52] *See* Joined Cases C-282/04 and C-283/04 *European Commission v. Netherlands*, para. 19.

[53] European Commission, *supra* note 34.

are owned or controlled by the same foreign company may, in principle, not be considered as falling under the scope of the Regulation and should not be notified under the cooperation mechanism".[54] This means that all corporate processes such as mergers, divisions, or transformations remain outside the scope of the Regulation, unless they lead to a change of control over a given company. This case is less controversial than, for example, the portfolio investment discussed above, mainly due to the fact that such internal restructuring processes usually do not involve a third party. But this again does not mean that the lack of a precise definition of control does not cause complications. There may be complex internal restructurings where, for example, management receives more powers and gains some degree of control over the company beyond the scope of standard management control. Of course, in such a case we would be dealing with natural persons, but it is conceivable that indirectly someone else would gain control or at least the possibility of exerting decisive influence over the entity in question. In this case we would most likely be dealing with an attempt to circumvent the law, and such cases are discussed below, but it should be pointed out here that a clear and precise definition of control would make it easier to distinguish whether a given transaction, or even a restructuring process, falls within the scope of the Regulation or not.

Considering the above, it can be assumed that the scope of the Regulation covers all cases of change of control. This is why the cases where the ownership or control over a given company is transferred from one foreign investor to another fall under the scope of the Regulation.[55] The EC underlines that cases of indirect change of control are covered by the Regulation as well. It seems that 'indirect change of control' refers to cases where control over a given company changes because of a change of control or change in ownership in the parent entity. This is quite surprising, as the EC extends the application of the Regulation to a higher level, i.e. to cases of an indirect change of control, while in the Regulation itself it is not clear how to interpret the meaning of "control" (not to mention the distinction between direct or indirect).

In response to the question about an indirect change of control, the EC explains that "the transaction falls under the scope of the cooperation mechanism if the foreign investor has the power to participate effectively in the management or control of the target undertaking even if the foreign investor (i.e. ultimate controlling entity) does not intend to exercise such power".[56] Despite the fact that the above sentence is clear enough, in my opinion its wording is too vague to treat it as a definition of control and to enable a precise determination of the scope of application of the Regulation.

[54] *Ibidem.*

[55] European Commission, *supra* note 34.

[56] *Ibidem.*

Furthermore, considering the above-mentioned cases – which are indications of both exemplary areas that are *outside the scope of*, and exemplary transactions that *are covered by* the Regulation – they do not allow to clearly state what it means to exercise control over a company. However, a clearer answer to this question can be found in two other sources, i.e. in (i) national screening mechanisms and/or (ii) in other acts of EU law.

In order to present how the concept of control can be defined in more detail, the relevant provisions of the Polish Investment Control Act[57] (a national screening mechanism notified by Poland under Art. 3.7 of the Regulation) are briefly discussed below. The Act distinguishes four general types of acquisition of control, i.e.: (i) acquisition of the domination,[58] (ii) acquisition or gaining of significant participation,[59] (iii) indirect acquisition,[60] and (iv) consequential acquisition.[61] Each of these types of transactions is precisely defined. Discussing all the above-mentioned definitions would be of little use for the purpose of this article, but in my opinion it is worth briefly analysing the last one, i.e. consequential acquisition, due to the fact that it is the least acute at first glance. The purpose of introducing the concept of consequential acquisition, as in the case of indirect acquisition, was to specify the scope of the Polish Investment Control Act.[62] The cases covered by the concept of consequential acquisition are related in particular to the situation when the share capital of a company is decreased (e.g. by redemption of the shares of one shareholder), which at the same time results in an increase in the capital share of another shareholder, who is the addressee of the provisions of the Polish Investment Control Act.[63] In other words, this concept covers situations when, even without

[57] Ustawa z dnia 24 lipca 2015 r. o kontroli niektórych inwestycji [Act on control of certain investments], Journal of Laws 2015, no. 1272 as amended.

[58] *See ibidem*, Art. 3.3.

[59] *See ibidem*, Arts. 3.4 and 3.1(4).

[60] *See ibidem*, Arts. 3.5 and Art. 3.6.

[61] *See* Art. 3.7 of the Polish Investment Control Act which defines the "consequential acquisition" as cases when "an entity holds stocks or shares, or rights arising from stocks or shares of a company being an entity subject to protection, including also in cases defined in paragraph 5 [*i.e. indirect acquisition*], in the number providing for reaching or exceeding, respectively, 20%, 25%, 33%, 50% of the total number of votes in the general meeting or meetings of shareholders, or interest in the share capital, or being a parent undertaking towards a company being an entity subject to protection, or acquires significant participation, in the case of:

1) the redemption of shares or stocks of a company being an entity subject to protection, or the acquisition of treasury shares or stocks of such a company,

2) the division of a company being an entity subject to protection, or its merger with other company,

3) the amendments to the company deed or articles of association of a company being an entity subject to protection, in the scope of privileged shares or stocks, establishing or abolishing of entitlements allocated to individual partners or shareholders of such a company,

4) the cancellation of stocks or documents of stocks of a company being an entity subject to protection".

[62] M. Saczywko, *Article 3*, in: M. Mataczyński (ed.), *Ustawa o kontroli niektórych inwestycji. Komentarz* [Investment Control Act. Commentary], Wolters Kluwer, Warszawa: 2016.

[63] *Ibidem*.

active action on the part of an investor, the investor's share may reach or exceed the thresholds provided for in the Polish Investment Control Act, and therefore be subject to the screening procedure. The above example is intended to illustrate the degree of detail by which an act can provide for situations to which the screening procedure will apply. It is worth noting the advantages of such a solution, starting with the certainty of trading from the perspective of a foreign investor, and ending with the clarity of regulations regarding the protection of public safety and order, while not opting for a casuistic approach to creating law.

The above example of Poland is only illustrative, because the definitions of control over and/or further significant participation in a given company are to some extent similar in other national control mechanisms, but they are not identical. The postulate resulting from this part of the article is that it would be more effective to rely on one common EU-wide definition of control for the purposes of the screening of FDI flows in the EU. In particular, such is the case in: (i) in face of changes and increased threats, including from Russia or Belarus; (ii) as well as considering the deepening processes of globalization and integration (which is manifested, for example, in the increase in multi-national investments or the share of global concerns in the European market); and (iii) also taking into account the fact that the cooperation mechanism has been introduced by the Regulation.

At this point, it is worth recalling another national screening mechanism, i.e. the Austrian Investment Control Act.[64] The solution adopted in this Act shows that there is no need to reinvent the wheel and develop a definition from scratch. The act defines "acquisition of a controlling interest" as "the possibility of exercising a decisive influence on the activity of the target undertaking, either individually or jointly, through rights, contracts or other means, taking into account all circumstances".[65] Further, it indicates that

> a contolling interest may be exercised in particular by a) ownership or right of use of all or substantially all of the tangible or intangible assets of a target undertaking or b) rights or contracts which confer a decisive influence within the meaning of *Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (EC Federal Law Gazette I – Issued on 24 July 2020 – No. 87 3 of 1 Merger Regulation), OJ No L 24 from 29 January 2004, p. 1, on the composition, deliberations or decisions of the organs of that undertaking*.[66] (emphasis added)

[64] 87th Federal Act enacting an Investment Control Act and amending the Foreign Trade Act 2011 (Bundesgesetz über die Kontrolle von ausländischen Direktinvestitionen (Investitionskontrollgesetz – InvKG) StF: BGBl. I Nr. 87/2020 (NR: GP XXVII RV 240 AB 276 S. 45. BR: AB 10376 S. 910.)

[65] *See* Chapter 1 Sec. 1 point 7 of the Austrian Investment Control Act.

[66] *Ibidem.*

Here the key is the highlighted part of the provision of the Austrian Investment Control Act, as it is a direct reference to an act of EU law (i.e. to the EU Merger Regulation).[67] This is important because recently (especially after the entry into force of the Regulation), in a given transaction the requirement to report transactions under FDI screening mechanisms has become a requirement treated similarly to the requirement to report merger filings (for example, an FDI notification is often, similarly to a merger filing, treated as a condition precedent to the closing of a transaction). Although the relationship between the Regulation under discussion and merger rules is complex,[68] it is worth noting that the EU Merger Regulation contains a definition of control, which could be used in the Regulation or could constitute a basis for developing such a definition; or the Regulation could simply refer to the definition of control from the EU Merger Regulation. The Merger Regulation defines control as rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking" (Art. 3.2). Furthermore, the Merger Regulation provides that "control is acquired by persons or undertakings which: (a) are holders of the rights or entitled to rights under the contracts concerned; or (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom". (Art. 3.3).

Indeed, this is not the only act of EU law on the basis of which a definition of control could be introduced into the Regulation. It seems to be at least as good an idea to base the definition of control for the purposes of FDI screening on the definition of the "beneficial owner" from the Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AML Directive).[69] A reference to the concept of "beneficial owner" would enable verification of the entity at the end of the structure, i.e. the entity that controls the foreign investor involved in a given transaction subject to the screening procedure. Certainly, analysing who is the ultimate beneficial owner in some cases would be complicated and time consuming, but it should be emphasized that, firstly, if a given

[67] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the Merger Regulation), OJ L 24.

[68] *See* OECD, *The Relationship Between FDI Screening and Merger Control Reviews*, OECD Competition Policy Roundtable Background Note, 2022, available at: www.oecd.org/daf/competition/the-relationship-betweenfdi-screening-and-merger-control-reviews-2022.pdf (accessed 30 April 2023).

[69] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] L 141/73 (AML Directive).

foreign investor successfully completes the transaction, it will still have to report the persons who are the ultimate beneficial owners of the company over which it acquires control; and above all, the referral to the concept of ultimate beneficial owner ensures protection primarily in such sensitive cases as where the investor is ultimately owned or controlled by a third country's authorities or government.

At this point it should be noted that the definition of "beneficial owner" introduced in the AML Directive refers only to a natural person (or persons) who ultimately owns or controls a given entity and/or the natural person(s) on whose behalf a transaction was conducted.[70] Therefore, in the context of the issue under discussion such a definition could not be fully reflected in the definition for the purposes of FDI screening, but in terms of understanding and interpretation of the concept of control it seems to be fairly adequate.

The introduction of one coherent definition of control in the Regulation would have a great advantage, primarily in the case of multi-national transactions, where national screening mechanisms may differ, and the cooperation mechanism should not be limited to the exchange of information and opinions but should ensure consistency in the interpretation of the regulations. While neither the definition from the Merger Regulation nor from the AML Directive is perfect, nonetheless each of them is much simpler than, for example, the concepts defined in the Polish Investment Control Act. In any case, apart from the degree of complexity of the definition of "control", most importantly the introduction to the Regulation of either a definition of control, or a reference to such a definition from another act of the EU law, would make it possible to eliminate, or at least reduce, the number of situations in which there would be an issue with deciding whether a given transaction falls within the scope of the Regulation or not.

5.2. Gaps in the definition of a foreign investor

As explained above, the first issue could be reduced to the word. "control". Similarly, the second aspect, discussed below, can be described by just one word. Here the key word would be the adjective "foreign", and juxtaposing it with the term "domestic", which for the purposes of these considerations should not mean so much national as European. We are dealing here with two opposing concepts – a foreign investor which may potentially pose a threat to security and public order, and a "domestic" target (implicitly an "EU company"), i.e. an object of concern, but above all an object of protection introduced by the Regulation. As concluded by Dolzer and Schreuer, "the decisive criterion for the foreignness of an investment is the nationality of the investor".[71]

[70] *See ibidem*, Art. 3.6.

[71] Dolzer, Schreuer, *supra* note 46, p. 78.

In the context of this analysis of the definition of a "foreign investor", one should start by emphasizing the fact that the Regulation defines the concept of "undertaking of a third country" as "an undertaking constituted or otherwise organized under the laws of a third country" (Art. 2.7). This means that any entity (either a natural or legal person) constituted or otherwise organized under the laws of a state other than the EU Member State is considered as a foreign investor.

As underscored by the EC, "cases where the acquisition of an EU target involves direct investment by one or more entities established outside the Union fall within the scope of the Regulation. Conversely, cases only involving investments by one or more entities established in the Union do not fall within the scope of the Regulation".[72] The last sentence relates to, *inter alia*, the socalled intraEU FDIs. Transactions described as intra-EU FDIs cover cases where a foreign investor uses its existing EU subsidiaries to effect a given transaction.[73] In such situations, a foreign investor is considered as a domestic entity (i.e. an EU company), and therefore such transactions do not fall within the scope of the Regulation. The fact that there are such cases is, on the one hand, a defect in the definition of a foreign investor, but above all the problem arises from the above-discussed lack of definition of 'control' in the Regulation and of a verification procedure about who ultimately exercises control over a given company, and who plays the role of a buyer /investor in a given transaction. It should be noted that in 2021, 8% of the investments (greenfield investments and equities) were originated by EU subsidiaries of ultimate Russian global owners.[74] At the same time, as presented in by the EC, Russia exerts influence or control in over 30,000 companies in the EU (0.12% of all EU companies). It controls about 17,000 EU companies, has potentially controlling stakes in another 7,000 companies, and minority stakes in 4,000 thousand companies. We can also observe an additional 2,000 companies with a reported non-controlling Russian shareholder, for which the amount of the stake is not known.[75]

As underscored by the EC, "there is one exception to this rule. Investments by EU entities may nevertheless come within the scope of the Regulation when they fall under the anti-circumvention clause".[76] The Regulation does not define or give examples of circumvention of FDI screening mechanisms, but one of the most com-

[72] European Commission, *supra* note 34.

[73] European Commission, *Commission Staff Working Document Screening of FDI into the Union and its Member States Accompanying the document Report from the Commission to the European Parliament and the Council Second Annual Report on the screening of foreign direct investments into the Union*, 1 September 2022, COM (2022) 433, available at: https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2022)433&lang=en (accessed 30 April 2023), p. 3.

[74] European Commission, *supra* note 29, p. 3.

[75] *Ibidem*.

[76] European Commission, *supra* note 34.

mon situations which allows to illustrate the meaning of 'circumvention' in the sense of the preamble to the Regulation is the case where a foreign investor incorporates or acquires a "shell company" (also referred to as a "letterbox company" or a "Special Purpose Vehicle" (SPV)) for the sole purpose of finalising a transaction. Such a company is indeed an EU company, but it does not have economic substance,[77] i.e. it does not conduct business activity. The absence of genuine economic activity should be assessed, considering for example the following factors: whether a company employs or engages any employees; whether it has any clients and issues invoices; whether it has a physical office (as opposed to a only a registered office existing on paper), etc. The sole purpose behind the creation of such a company is to serve as a legal vehicle for the investment. However, it should be underlined that the mere use of such a vehicle to carry out a transaction does not constitute a violation or circumvention of the law. However, Recital 10 to the Regulation provides that:

> Member States that have a screening mechanism in place should provide for the necessary measures, in compliance with Union law, to prevent circumvention of their screening mechanisms and screening decisions. This should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country. This is without prejudice to the freedom of establishment and the free movement of capital enshrined in the TFEU.

As emphasized by the EC, the allegation of an attempt to circumvent the rules laid down in screening mechanisms should be assessed "on a case-by-case-basis, having regard to the specific circumstances of each case and on the basis of relevant evidence".[78]

Importantly, the above-quoted Recital 10 refers to the Member States that "have a screening mechanism in place" and to the prevention of "circumvention of their screening mechanisms and screening decisions". Under the current wording of the Regulation, the question of circumvention prevention has been left to the Member States. Similarly, in case of the abovementioned intra-EU FDIs, the EC has emphasised that the fact that transactions involving only EU entities are not covered by the scope of Regulation, "does not mean that such transactions could not fall under the scope of the national screening laws of the Member States".[79]

[77] OECD, *Resumption of application of substantial activities for no or nominal tax jurisdictions – BEPS Action 5,* Paris: 2018.

[78] European Commission, *supra* note 34.

[79] *Ibidem.*

This means that it is the responsibility of the respective Member States to assess and enforce compliance with their national FDI screening legislation.

Consequently, there remain questions about Member States that do not have national FDI screening mechanisms, and about the EU projects for which the EC's assessment is crucial. In the Guidance, the EC called on the Member States that (i) do not have a screening mechanism in force in their national legal framework, or (ii) have a national screening procedure but such national provisions do not cover all relevant transactions or do not allow *ex ante* screening, to "urgently set up a comprehensive FDI screening mechanism and in the meantime to use other suitable legal instruments to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU".[80] However, there still remains the question whether – in the context of potential increasing threats from the East and deepening globalization processes – it would not be more efficient and more consistent to clarify the Regulation and perhaps extend its scope to the circumvention procedure, and to apply the rules laid down by the Regulation to intra-EU FDIs, instead of leaving those areas within the competences of the Member States which have their own national screening mechanisms.

CONCLUSIONS

The war in Ukraine has highlighted certain gaps in the Regulation, which the EC drew attention to in the Guidance. In particular, in this author's opinion two issues in terms of the scope of application of the Regulation are crucial in the current geopolitical situation, i.e.: (i) gaps in the definition of a foreign direct investment as the Regulation lacks a definition of "control"; and (ii) weaknesses in the definition of a foreign investor as the Regulation does not provide for any anti-circumvention procedure. The analysis of the above-mentioned issues leads to the conclusion that there is a clear need for a reevaluation of the approach to the screening of EU FDI flows. In terms of the definition of a foreign direct investment, it is worth considering the addition of a definition of "control" and/or a definition of "ultimate beneficial owner" to the Regulation. Such definitions could be taken from other EU legal acts, such as the Merger Control Regulation or the AML Directive, which have been functioning in the EU legal system for some time. This would greatly facilitate the analysis of whether and when a given transaction falls within the scope of the Regulation, both for the EC and the Member States, as well as for investors from third countries themselves. In addition, taking into account the constantly

[80] European Commission, *supra* note 11, p. 3.

increasing processes of globalization and economic integration, the above change would be extremely useful in the context of multi-national transactions. The Regulation would thus introduce a uniform definition of control, which would avoid discrepancies among the various jurisdictions. Moreover, such a clarification of the regulatory procedures introduced in the Regulation would greatly simplify the process of analysing whether, for example, a given portfolio investment should be covered by the scope of control as it may pose a threat to public security and/or could be used as a possible way of circumvention of the rules laid by the Regulation. Due to the fact that there are many possible ways to circumvent the provisions of the Regulation, it is worth considering whether – apart from adding a definition of "control" and analysing who is actually "the ultimate beneficial owner" of a given entity acting as an investor in a FDI – there should also be added an anticircumvention clause, which would allow for more efficient detection of attempts to circumvent FDI restrictions.

Moreover, the conclusions with respect to the sphere of FDI screening should be viewed in the perspective of the announced changes which will take place in Autumn 2023 in the framework introduced by the Regulation. Furthermore, it should be emphasised that the outbreak of the war in Ukraine is likely to accelerate the growth of FDI controls in the EU, as both the EC and the Member States are increasingly concerned about any possible activity by unfriendly third countries, especially Russia, on the European market.

To conclude, in this author's opinion the Russian military aggression and the outbreak of the war in Ukraine should be considered as a turning point in the history of not only Ukraine, but also the EU. A shift in the role of the EU on the global political scene, as well as deepening integration and increasing the competences of the EU's institutions and its leaders, should be expected. It is the EU institutions which – in the face of war and a sharp increase in threats – must strive to take over leadership in the protection of public order and the security of Europeans, as well as the security of the European economy. In the area of FDI monitoring, it can be expected that changes in the Regulation will go towards the establishment of a single mechanism which will be commonly applied in all Member States, and not only guidelines and frameworks – even if such changes will require changes in the Treaties.

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AT THE CROSSROADS OF INTERNATIONAL CRIMINAL LAW, THE MONTREAL CONVENTION, INTERNATIONAL HUMANITARIAN LAW, AND HUMAN RIGHTS: SOME REMARKS ON THE INTERPRETATION OF INTERNATIONAL LAW BY THE HAGUE DISTRICT COURT IN THE MH-17 JUDGMENTS AND THEIR POTENTIAL LEGACIES

Abstract: *This article seeks to answer the question of how international criminal law (ICL), the 1971 Montreal Convention, and international humanitarian law (IHL) influenced the proceedings in the MH-17 case, with particular emphasis on the Dutch Prosecutors' line of reasoning in proceedings before the District Court in The Hague (DCiTH), as well as on the judgments that the DCiTH delivered on 17 November 2022. Notably, the analysis below aims to establish whether, by refusing to grant combatant status to the defendants, the District Court acted within the limits permissible under international law, even though this Court admitted that at the moment of the MH-17's downing, the nature of the conflict in Eastern Ukraine was an international, not a non-international, one. In conclusion, the article argues that, firstly, even though the DCiTH's interpretation of the IHL is not free of certain flaws, the Court's line of reasoning and the sentences it delivered are a pragmatic attempt to bridge the gap between the proper administration of justice and the efficiency of criminal proceedings in a case where an airplane downing takes place during an international armed conflict. Secondly, although most recently the European Court on Human Rights (ECtHR) took note of the MH-17 judgments, for the reasons explained in this article the scope of their potential impact on the further development of international and domestic jurisprudence is uncertain, and remains to be seen.*

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Keywords: MH-17-Flight, combatant status, combatant immunity, international humanitarian law, international criminal law, war crimes, aviation safety, 1971 Montreal Convention, Tadić case

INTRODUCTION

The literature concerning the Malaysian Boeing flight MH-17 downed by the pro-Russian separatists on 17 July 2014 has already been robust.[1] In the shadow of the Russian Federation (RF) aggression against Ukraine, on 17 November 2022, the District Court in The Hague (DCiTH or the Court) delivered its long-awaited judgments[2] against four persons accused of having played a crucial role in the shooting down of the airplane.[3] As none of the defendants appealed against these judgments, they are now deemed final.[4]

At the moment of submission of the present article, numerous authors have already expressed their opinions or commented on different legal aspects of these

[1] *See generally* M. de Hoon, *Navigating the Legal Horizon: Lawyering the MH17 Disaster*, 33(84) Utrecht Journal of International and European Law 90 (2017); L. Yanev, *Jurisdiction and Combatant's Privilege in the MH17 Trial: Treading the Line Between Domestic and International Criminal Justice*, 68 Netherlands International Law Review 163 (2021); M. Gibney, *The Downing of MH17: Russian Responsibility?*, 15 Human Rights Law Review 169 (2015); S. Williams, *The MH-17 and International Criminal Court: A Suitable Venue?*, 17 Melbourne Journal of International Law 210 (2016). In the Polish literature *see* B. Krzan, *Kilka uwag o pociągnięciu do odpowiedzialności karnej za zestrzelenie samolotu MH17* [Some Remarks on Criminal Responsibility for the Downing of MH17], 12 Wrocławsko-Lwowskie Zeszyty Prawnicze 169 (2021).

[2] Technically, the proceedings against the four accused constituted just one case registered under the same number (Zaaknummer 09-748005/19). Still, on 17 November 2022 the DCiTH (in Dutch: *Rechtbank Den Haag*) delivered not just one but four similarly constructed judgments, each concerning each defendant separately. As the Court noted "the judgements in the four cases are phrased as similarly as possible, both owing to their interrelated nature and in order better to inform the reader about the court's assessment of the cases of all four accused" (*see* Part 1, para. 1.1 common for all judgments listed below). As English is the language of this article, the considerations below take as their reference point English translations, which are registered in the official Dutch jurisprudence database (rechtspraak.nl) under different numbers than the original texts recorded in Dutch. All MH-17 judgments are accessible through the special portal concerning the MH-17 legal proceedings (available at: https://www.courtmh17.com/en/about-the-case/verdict-17-november-2022/, accessed 30 April 2023). Therefore it is recommended to obtain access to them through this portal, which offers direct links to the judgments in question posted at rechtspraak.nl. These are the following: (1) ECLI:NL:RBDHA: 2022:14040 (09/748006-19 English) (defendant *Oleg Pulatov*) (2) ECLI:NL:RBDHA: 2022:14039 (09/748007-19 English) (defendant *Leonid Kharchenko*) (3) ECLI:NL: RBDHA:2022:14036 (09/748005-19 English) (defendant *Sergey Dubinskiy*) (4) ECLI:NL: RBDHA:2022:14037 (09/748004-19 English) (defendant *Igor Girkin*). From now on all these judgments will be collectively referred to as the "MH-17 judgments".

[3] The transcript of the oral delivery of the judgment in English is accessible under the title *Transcript of the MH17 judgment hearing* at: https://www.courtmh17.com/en/insights/news/2022/transcript-of-the-mh17-judgment-hearing/ (accessed 30 April 2023).

[4] *See* J. Trampert, *Possible Implications of the Dutch MH17 Judgment for the Netherlands' Inter-State Case before the ECtHR*, EJIL Talk!, 12 December 2022, available at: https://tinyurl.com/2wt777nw (accessed 30 April 2023).

judgments.[5] The considerations below can be placed in line with these comments. Still, as the question of the MH-17 judgments' possible impact on the development of the human rights regime under the European Convention on Human Rights (ECHR)[6] or its consequences for private international law[7] have already been addressed elsewhere, the present contribution discusses other problems. Specifically, the primary purpose pursued here is to establish to what extent the international criminal law, the Montreal Convention,[8] and international humanitarian law influenced the proceedings in the MH-17 case, with particular emphasis on the Dutch prosecutors' line of reasoning in the proceedings before the DCiTH and the judgements the Court delivered on 17 November 2022. Within this framework, I seek to answer the question if, under the circumstances of this case, the DCiTH accepted as proven that the Court could refuse to grant combatant status to the accused persons and base its sentences on the Dutch Criminal Code's paragraphs implementing the provisions of the Montreal Convention.

In November 2023, the European Court of Human Rights (ECtHR), in its Admissibility Judgment,[9] briefly referred to the main findings of the DCiTH in the MH-17 case. Still, inasmuch as at the moment of the submission of this article the MH-17 case brought by the Netherlands and Ukraine against Russia before the ECtHR is still awaiting its merits stage and the DCiTH barely mentioned the European Convention of Human Rights,[10] the issue of the human rights dimension of the MH-17 judgments is omitted from the present analysis.[11]

This article is structured as follows: Part 1 restates the critical elements of the case's factual background and the international legal and institutional framework determining the scope of the proceedings in the MH-17 case at both the international and domestic levels. Part 2 restates the parts of the Indictment and MH-17

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[5] *See e.g.* G. van Calster, *The Dutch MH17 judgment and the conflict of laws. On civil claims anchored to criminal suits, and the application of Article 4(3) Rome II's escape clause,* 19 November 2022, opinion accessible at GAVC Law (https://tinyurl.com/2mx9u8es); L. Yanev, *The MH17 Judgment: An Interesting Take on the Nature of the Armed Conflict in Eastern Ukraine*, EJIL Talk!, 7 December 2022, available at: https://tinyurl.com/2n4h5zze; Trampert, *supra* note 4; M. Milanovic *The European Court's Admissibility Decision in Ukraine and the Netherlands v. Russia: The Good, the Bad and the Ugly – Part II,* EJIL Talk!, 26 January 2023, available at: https://tinyurl.com/4tbdv9hj (all accessed 30 April 2023).

[6] *See* Milanovic, *supra* note 5; Gibney, *supra* note 1; Trampert, *supra* note 4.

[7] *Cf.* van Calster, *supra* note 5.

[8] *See* Convention for the suppression of unlawful acts against the safety of civil aviation (signed on 23 September 1971, entered into force on 26 January 1973), 974 UNTS 177 (Montreal Convention).

[9] ECtHR (GC), *Ukraine and the Netherlands v. Russia* (App. Nos. 8019/16, 43800/14 and 28525/20), Admissibility Judgment, 30 November 2022.

[10] MH-17 judgments, para. 4.4.4.1.

[11] For the same reasons, the problem of international responsibility of Russia is out of the scope of the present article, even though in the Conclusion, the extent of the DCiTH findings, which the Strasbourg Tribunal took into account in its Admissibility Judgment, is briefly discussed.

judgments where both the Prosecutors and the DCiTH's judges directly referred to the international rules mentioned above. Part 3 provides a critical analysis of the MH-17 judgments in light of the existing rules of international law within the scope delineated above.

In conclusion, I argue that the way the DCiTH applied the IHL rules on combatant status was not fully convincing. Nonetheless, the MH-17 judgments should be very carefully examined as they demonstrate how a domestic court tried, in a pragmatic way, to cut the Gordian Knot – where on the one hand the nature of the armed conflict makes the IHL's application unavoidable; on the other hand the perpetrators may not be too hastily qualified ordinary criminals because of their apparent combatant status. Secondly, although most recently the ECtHR took note of the MH-17 judgments, for the reasons explained in this article, the scope of their potential impact on the further development of both international and domestic jurisprudence remains to be seen.

1. THE MH-17 CASE: FACTUAL BACKGROUND AND LEGAL FRAMEWORK OF THE PROCEEDINGS

The basic facts of this case are undisputed. On 17 July 2014, the Malaysian Airlines' Boeing 777 was downed when flying over the small village of Hrabove near Donieck. In the wake of this event, 298 persons (including the crew) perished, most of them Dutch nationals (193) and the rest nationals of different countries.[12] When the lethal shot was fired, the region of Hrabove was under the effective military control of the pro-Russian separatists fighting against the Ukraine under the guise of the self-proclaimed "Donetsk People's Republic" (DPR), which was never recognized internationally. On 21 July 2014, the Security Council (SC) adopted a Resolution supporting efforts to establish a full, thorough, and independent international investigation into the incident in accordance with international civil aviation guidelines.[13] The same Resolution also recognized the efforts "to institute an international investigation of the incident and called on all States to provide any requested assistance to civil and criminal investigations related to this incident".[14] Finally, the SC demanded, in no uncertain terms, that "those responsible for this incident be held to account and that all States cooperate fully with efforts to establish

[12] Dutch Safety Board, *Crash of Malaysia Airlines flight MH17 Hrabove, Ukraine, 17 July 2014,* Hague October 2015, p. 27 (Report 2015).

[13] Security Council, Resolution 2166/(2014), 21 July 2014, S/RES/2166 (2014), para. 3.

[14] *Ibidem*, para. 4.

accountability,"[15] and also called on "all States and other actors to refrain from acts of violence directed against civilian aircrafts".[16]

Resolution 2166 left two basic questions unanswered. Firstly, it carefully omitted any suggestions determining the nature of the ongoing conflict in Eastern Ukraine. Secondly, as Sarah Williams noted, the Resolution "did not say which form that investigation or any eventual trial should take".[17] Thus, as the IHL does not provide for any specific regime of international cooperation to prosecute and punish war criminals, and the issue of the nature of the conflict remained unsettled,[18] the early stages of the proceedings had to follow the pattern determined by the general rules of international law, and International Civil Aviation Law (ICAL), even though in the first years after the event the ICL constituted the reference point in the the ongoing discussion on qualification of the crime and the choice of the appropriate forum. What concerned the ICAL was that the separatists refused to secure access to the crash site for the investigators[19] and that the Ukrainian authorities could not efficiently fulfil their duties under the Chicago Convention, which stipulates instituting an inquiry into the circumstances of the accident.[20] On 23 July 2014, in accordance with the conclusion of an agreement between the Dutch Safety Board and its relevant Ukrainian counterpart (NBAAII),[21] the investigation into the technical aspects of the crash was transferred to the Dutch Safety Board (DSB).[22] However, forging the international cooperation scheme to prosecute and try the perpetrators responsible for downing the plane was much more complicated. As the Chicago Convention does not provide any institutional and legal framework for criminal accountability,[23] different options

[15] *Ibidem*, para. 11.

[16] *Ibidem*, para. 12.

[17] Williams, *supra* note 1, p. 236; in the similar vein, de Hoon, *supra* note 1, p. 92.

[18] For more on this issue, *see* Part 2.

[19] *See* Resolution 2166 (2014), Motive 5

[20] *See* Art. 26 of the Convention on International Civil Aviation (signed on 7 December 1944, entered into force on 4 April 1947) (Chicago Convention) 15 UNTS 295. *See also* its Appendix XIII.

[21] Agreement between the National Bureau of Air Accidents and Incidents Investigation with Civil Aircraft (NBAAII) of Ukraine and the Dutch Safety Board of Netherlands on Delegation of Investigation in Respect of Aircraft Accident Involving Boeing 777-200, Registration: 9M-MRD "Malaysia Airlines" Flight MH-17. The full text of this Agreement is accessible at the DSB's homepage https://www.onderzoeksraad.nl/en/media/inline/2018/10/11/agreement_nbaai_and_dsb_website.pdf (accessed on 30 April 2023) In its Art. 1.7 the Parties invoked standard 5.1 of the Chicago Convention's Annex XIII, not as a legal basis for the transfer but rather as a rule permitting them to conclude the Agreement. According to it's Art. 1.4 both Parties declared to be bound by the provisions of the said Annex, and agreed to allow Ukrainian experts to take part in the investigation (Art. 1.9). By reference to the standards 5.18, and 5.23 of the Annex, XIII Art. 1.8 of the Agreement allowed the states mentioned in the both these provisions to appoint accredited representatives.

[22] This information was provided by the Ukrainian governmental sources: *Government to transfer MH17 crash investigation to Holland*, available at: https://www.kmu.gov.ua/en/news/247478062 (accessed 30 April 2023) and confirmed in the DSB final report (*see* Report 2015, *supra* note 12, para. 1.1, p. 14).

[23] *See* Williams, *supra* note 1, p. 211; in the similar vein, de Hoon, *supra* note 1, p. 92.

were considered on how to investigate the MH-17 case effectively and – once the investigation was completed – to bring the suspects before a trial court.

On the whole, the states from which most victims originated (Netherlands, Australia, Belgium, and Malaysia) and Ukraine quickly managed to set up the Joint Investigation Team (JIT). This unit, composed of law enforcement functionaries and prosecutors, was tasked with the international investigation of the MH-17 case. Even though its legal architecture was quite complex,[24] JIT played the leading role in collecting the evidence submitted to the Dutch Prosecutors and – later on – to the DCiTH.[25] The task of determining the jurisdiction competent to prosecute and try the suspected persons took much more time, as the governments hesitated to refer the MH-17 case to an international tribunal or to confer the adjudication to a domestic criminal court. Although in theory an *ad hoc* international criminal tribunal could have been established to proceed with such a complicated case,[26] for political reasons (namely, Russia's veto in the SC), this avenue was effectively ruled out[27]. Nor was it possible or convenient to transfer the case before the International Criminal Court (ICC),[28] even though the ICC's Prosecutor Fatou Bensouda kept

[24] As not all states involved in the investigation were EU Member States, the EU Framework Decision 2002/465 could not deliver a sufficient legal basis for the Team. For more on the legal aspects of this problem and the solution eventually adopted, *see* S. Hufnagel, *Policing Global Regions: The Local Context of Enforcement Cooperation*, Routledge, London, New York: 2021, pp. 97 *et seq.*

[25] JIT continued its activities even after the Court had delivered its judgment. The Dutch Prosecutorial Office decided to suspend the proceedings only on 8 February 2023; *see JIT MH17: strong indications that Russian president decided on supplying Buk*, available at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/news/2023/02/08/jit-mh17-strong-indications-that-russian-president-decided-on-supplying-buk (accessed 30 April 2023).

[26] In this context, see the proposal of a group of states that submitted to the SC a draft resolution to this effect; cf. Draft resolution [on establishment of an International Tribunal for the Purpose of Prosecuting Persons responsible for Crimes Connected with the Downing of Malaysia Airlines flight MH17 on 17 July 2014 in Donetsk Oblast, Ukraine], S/2015/562.

[27] Security Council 7498th meeting Wednesday, 29 July 2015, 3 p.m., UN Doc. S/PV.7498. *See also* Krzan, *supra* note 1, p. 181; S. Williams, *supra* note 23, pp. 212 and 217.

[28] In the literature, one can find many arguments as to why the ICC has never been considered the best option for securing the accountability of the perpetrators, and this is neither the time nor place to discuss all of them once again. For the present article, it suffices to state that the requirement of complementarity could not have been fulfilled, as on 17 July 2014 judiciary organs of states from which most of the victims originated (and Ukrainian and Russian judiciary organs as well) launched their own parallel investigations. (Williams, *supra* note 1, p. 221; de Hoon, *supra* note 1, p. 95). Furthermore, inasmuch as Russia was reluctant to undertake sincere cooperation, notably in the apprehension of the suspects and their transfer before the ICC, there was a genuine risk that the proceedings before the ICC would lead nowhere, as the Rome Statute provides for a trial *in absentia* only in highly exceptional situations (*see* Art. 63 of the Rome Statute) (Williams, *supra* note 1, pp. 221 and 224). The issue of the ICC's jurisdiction was also controversial, as according to Arts. 6-8 and 8*bis* of the Rome Statute, it may prosecute and try only the "core crimes". Furthermore, even assuming that the MH-17 downing could have been qualified as a war crime, some authors opined that the high threshold of the proof of perpetrators' intent, which must be established in proceedings before this Court so that they could be found guilty, was another factor making the ICC's option not recommendable (*ibidem*, p. 220; see the next part of this article). Yanev underlined that the issue of competence of the ICC to try the nationals of non-Parties was the object of endless debates.

this channel open.[29] Other options were examined in the literature, exploring the possibility of transferring the proceedings before an international adjudicative organ or examining some other forms of its "internationalization", but since states accepted none of them we can omit them from the present analysis.[30]

Insofar as concerns the Montreal Convention, this treaty imposes the duty to try and punish anyone who, among other things, "destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight".[31] Theoretically, the rule *aut dedere aut iudicare* strengthens the enforceability of this duty.[32] Still, the application of the Convention to the MH-17 case was not without controversy. As the states execute the Convention's norms, and not only Ukraine and Netherlands had a legal interest in bringing the responsible persons before justice, the issue of "which jurisdiction should prosecute" had to be resolved in order to avoid the undesirable effects of concurrent proceedings before different states' domestic judiciaries.[33] This problem was further exacerbated by the fact that the law enforcement organs of the most affected states could not apprehend the suspected persons, and that Russia did not wish to offer any assistance in their apprehension. As the provisions of the Convention do not provide for any specific rules of priority of jurisdiction (silently giving a more significant say to a state with an offender in hand), one could even argue that its provisions were not practicable in this case.[34]

Thus, on 7 July 2017, the Netherlands and Ukraine concluded the Tallinn Agreement laying the legal basis for transferring the prosecution and adjudication of crimes

This issue – in the context of the MH-17 case, in which most suspected persons (and defendants) were Russian citizens – was of crucial significance. (Yanev, *supra* note 1, pp. 171 *et seq*.). It is thus no surprise that Netherlands' Justice Minister Ivo Opstelten was opposed to the ICC's option, also because not every state involved in the case was Party to the Rome Statute (*see "Verantwoordelijken national vervolgen"* Algemeen Dagblad, 25 July 2014, available at: https://tinyurl.com/rja7ymn3 (accessed 30 April 2023)).

[29] *See* Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine, 2020, available at: https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine; *see also* Krzan, *supra* note 1, p. 181. As for the reasons why Prosecutor Bensouda did not want to close down the proceedings (even though as early as in July 2014 the Dutch authorities signaled they didn't wish to refer the MH-17 case before the ICC (*see* A. Deutsch, *Trial over Malaysian plane crash not likely at ICC: Dutch*, Reuters, 30, July 2014, available at: https://tinyurl.com/4rmve5zb) (both accessed 30 April 2023). Williams argues that it appears that the ICC Prosecutor was keeping her options open for the time being, and merely following the outcome of the joint criminal investigation (Williams, *supra* note 1, p. 237). In retrospect, it seems that this view has been correct.

[30] For more on these issues, *see* Williams, *supra* note 1, pp. 227-229. *See also* briefly, de Hoon, *supra* note 1, p. 94.

[31] Art. 1.1(b) of the Montreal Convention.

[32] *Ibidem*, Art. 7.

[33] This terminology refers to the title of the Eurojust guidelines: "Guidelines for deciding "which jurisdiction should prosecute?" Document accessible at: https://tinyurl.com/3967vetv (accessed 30 April 2023).

[34] Moreover, some scholars doubt that the Montreal Convention was applicable to this case, as the passive jurisdiction principle is not expressly mentioned in its provisions (*see* Williams *supra* note 1, p. 230).

connected with the downing of the Malaysian Airlines flight MH-17 before the former's judiciary[35] and supplementing the existing channels of cooperation in criminal matters.[36] The decision to confer the task to prosecute and try to the Dutch judiciary was not surprising. As the Dutch prosecutor noted, the Netherlands was chosen because it was "the country with the most victims, a country without any involvement in the conflict in eastern Ukraine and a country with considerable experience in prosecuting international crimes".[37] It seems, however, that there was more to it than that. Firstly, although under the Dutch law predating 1 July 2014, the effective prosecution of the MH-17 case could have met not trivial hurdles,[38] still, on that day the amendments to the Dutch Criminal Code (DCC) adopted in 2013 entered into force, with the effect of widening the scope of Dutch courts' passive jurisdiction.[39]

[35] *See* Art. 2 of the Agreement between the Kingdom of the Netherlands and Ukraine on international legal cooperation regarding crimes connected with the downing of Malaysia Airlines Flight MH17 on 17 July 2014, UNTS 55449 (not reported in printed form yet). Other states whose citizens perished due to the downing are not parties to this bilateral agreement. Nonetheless, motive 4 of its preamble stipulates the Dutch and Ukraine governments acted under the apparent assumption that other states participating in the JIT approved – at least silently – the Tallin Agreement's provisions. Moreover the DCiTH, when analyzing the jurisdictional issues, accepted the view that this treaty effectively transferred the jurisdiction over the case to all victims of the crash (thus including non-Dutch citizens), even though no other countries but Netherlands and Ukraine were Parties to it (*see* MH-17 judgments, para. 4.4.2).

[36] The European Convention No 73 constituted the agreement's strong reference point. *See* European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73.

[37] *See* Closing speech of the Public Prosecution Service day 1, 20 December 2021, para 2.3. Decisions regarding prosecution, available at: https://tinyurl.com/27a3p4dp (accessed 30 April 2023) (Closing speech, Part I).

[38] The conventional wisdom suggests the prosecutors could have based their indictment on the famous the 2003 International Crimes Act (ICA). However, considering the case-specific features of the Malaysian Airlines Boeing downing, this option was not very promising, as the ICA applies only in cases of core crimes. Considering the MH-17 case-specific facts, had the Dutch prosecutors based their indictment on the ICA they would have had to accuse the perpetrators of a war crime, with all possible consequences of this choice for the final outcome of the proceedings (for more see the analysis on the next page) Moreover, as the ICA does not explicitly allow for proceedings *in absentia* (*see* Yanev, *supra* note 1, p. 171), its application to the MH-17 case was even more problematic. The prosecution of the MH-17 case in the Netherlands based on the provisions implementing the Montreal Convention into the DCC under its version predating 1 July 2014 also posed not trivial difficulties. Although in theory the DCC provided for the extraterritorial jurisdiction of persons accused of committing crimes falling within the scope of this Convention, nonetheless the application of the DCC was permitted only in a case when a serious offense was committed against a Dutch aircraft in service, or a suspected person was present in the territory of the Netherlands. In the MH-17 case, none of these conditions were met.

[39] C. Ryngaert, *Amendment of the Provisions of the Dutch Penal Code Pertaining to the Exercise of Extraterritorial Jurisdiction*, 61(2) Netherlands International Law Review 243 (2014), quoting Act of 27 November 2013 to amend the Penal Code in connection with the review of the regulations on the effect of criminal law outside the Netherlands (review of the regulations concerning extraterritorial jurisdiction in criminal cases), Staatsblad (Bulletin of Acts and Decrees) (Stb.) 2013, 484; According to the new version of Art. 5 of the DCC, the Code is applicable to "any person outside the Netherlands who commits an serious offense against a Dutch national, a Dutch official, a Dutch vehicle, – vessel or aircraft as long as the serious offense is punishable by law with at least 8 years of imprisonment and also punishable by the law of the country where the serious offense was committed. This change should be read together with the new version of Art 6,

By this amendment, inserted at just the right time, the Dutch legislator enabled the judiciary to prosecute and try perpetrators based on domestic legislation targeting not war crimes, but ordinary crimes.[40] Secondly, over time it became evident that none of the suspected persons would appear in person (or be brought) before any judicial organs (whether international or domestic). Thus, it also became apparent that the sole way to empower domestic judicial organs to fulfill their duties would be to authorise proceedings *in absentia*. As the Dutch Code of Criminal Procedure, in its Arts. 278-280, allows for such proceedings to a much greater extent than many other domestic jurisdictions,[41] this factor also militated in favor of conferring the task of prosecuting and trying the perpetrators to the organs of the Netherlands.

2. THE INDICTMENT AND THE JUDGMENTS IN THE MH-17 CASE

Although in the early stages of criminal proceedings in the MH-17 case the discussion among legal scholars and the governments' initiatives at the international level were conducted along the lines of the general *corpus iuris* of international law, as well as the ICAL and ICL,[42] it was clear from the outset that on the day the Malaysian Boeing was downed, the ongoing hostilities in Eastern Ukraine were particularly intense. Therefore the hypothesis that on 17 July 2014, the situation near Hrabove attained the threshold of an international armed conflict (and thus, the downing should have been qualified as a war crime, not as a crime under the Montreal Convention) could not be excluded.[43] As the relevant information on the actual situation in Eastern Ukraine was only partially accessible, the legal qualification of the MH-17 case posed some difficulties for both legal scholars and the governments.[44]

Despite a certain hesitation, the Dutch prosecutors rejected the possibility of relying in their Indictment on the Dutch legal provisions criminalizing war crimes,

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that makes the DCC applicable to anyone (a Dutch or a foreign national) who has committed an offense over which the Netherlands is obliged to establish its jurisdiction pursuant to a treaty or decision of an international organization, while removing all references to specific international legal instruments in the Code" (*see ibidem*, p. 247).

[40] *See* Yanev, *supra* note 1, pp. 168 *et seq*. and 171.

[41] Williams, *supra* note 1, p. 234; but see (more cautiously) de Hoon, *supra* note 1, pp. 98 *et seq*.

[42] *See supra* note 1.

[43] This hypothesis had to be taken into account whenever an author considered the option referring the MH-17 case before the ICC. As this Court is competent only in the cases of crimes enumerated under Arts. 6-8, and 8*bis* of the Rome Statute, the qualification of the MH-17's downing as a war crime was the easiest way to demonstrate that the case fell within the I.C.C. jurisdiction. (*cf.* Williams, *supra* note 1, p. 216; *see also* Krzan, *supra* note 1, p. 177, who also recalls that UN High Commissioner for Human Rights Navi Pillay supported this interpetation).

[44] The hesitation on this issue is clearly demonstrated in the project of the Draft Resolution on the establishment of an International Tribunal for the Purpose of Prosecuting Persons responsible for Crimes Connected with the Downing of Malaysia Airlines flight MH17 on 17 July 2014 in Donetsk Oblast, Ukraine,

for reasons which are easy to identify. As Geert-Jan Alexander Knoops noted "the *mens rea* for an unlawful attack is intention or recklessness; mere negligence will not suffice. This relatively high *mens rea* standard implies that even if the attack is deemed to be unlawful, a prosecution may not be warranted if the attack was committed out of mere negligence".[45]

Therefore, for practical reasons the prosecutors based their Indictment on the Dutch Criminal Code's Art. 168,[46] implementing the Hague and Montreal Conventions.[47] The prosecutors noted that this provision "does not even require any intention to kill those inside the aircraft on the part of the perpetrator, let alone any intention to kill specific categories of people inside (civilian or military)".[48] This is because, "in respect of the evidence for the offenses in the Indictment, it makes no difference whether the defendants intended to shoot down a military or a civilian aircraft".[49] Furthermore, the prosecutors felt the choice of Art. 168 was well-founded in terms of both domestic and international law, as the UN SC Resolution 2166 (2014) interpreted the MH-17 downing along the lines of ICAL and ICL, and not as a case under the IHL.[50] Logically, as the Indictment relied on the anti-terrorist criminal rules (i.e., crimes against civil aviation's safety),[51] the prosecutors' analysis was conducted through the lens of a terrorist attack hypothesis, at the expense of any armed conflict context that was taking place in Eastern Ukraine on 17 July 2014. Put differently, the prosecutors did not deny that an armed conflict was ongoing

(UN Doc. S/2015/562, (*see also* Annex 'Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 (ICTMH17)). According to this proposal, the jurisdiction of the future Tribunal was to encompass not only war crimes but also *crimes against the safety of civil aviation* (*cf.* Art. 1(1)(b) of the Statute's project).

[45] *See* G.-J.A. Knoops, *Mens Rea at the International Criminal Court*, Brill/Nijhoff, Leiden, Boston: 2017, p. 71 (footnotes omitted).

[46] Art. 168 states the following: "Any person who intentionally and unlawfully causes any vessel, vehicle or aircraft to sink, run aground or be wrecked, be destroyed, rendered unusable or damaged, shall be liable to: 1°. a term of imprisonment not exceeding fifteen years or a fine of the fifth category, if such act is likely to endanger the life of another person; 2°. life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fine of the fifth category, if such act is likely to endanger the life of another person and the offence results in the death of a person".

[47] Hague Convention for the Suppression of Unlawful Seizure of Aircraft (drafted and signed 16 December 1970, entered into force 14 October 1971, 860 UNTS [1973]105 and Montreal Convention; *See also Legal framework MH 17,* 16 September 2021, AVT/JU-210916-001, p. 11 para. 4.1, available at: https://www.prosecutionservice.nl/documents/publications/mh17/map/2021/legal-framework-mh17 (accessed 30 April 2023). It is noteworthy, that both Conventions are applicable during peacetime, not during the armed conflict, and both target ordinary crimes – not war crimes.

[48] *See Closing Speech Part I, supra* note 37 (*see* para 2.3.4 *The mistake scenario*).

[49] *Ibidem.*

[50] *Closing speech of the Public Prosecution Service, day 3 (22 December 2021)*, available at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/closing-speech-public-prosecution-service-december-2021/closing-speech-day-3-22-december-2021 (accessed 30 April 2023) (Closing Speech Part III), para. 7.2.1: Applicable provisions of criminal law).

[51] *Ibidem.*

in Southeastern Ukraine, but considering the case's specific circumstances they thought it was in its nature a non-international armed conflict (NIAC), rather than an international armed conflict (IAC).[52] Nobody may claim combatant privilege under the IHL regime regulating a NIAC, and therefore the prosecutors believed Art. 168 could and should be applied to the case at the bar.[53]

Nonetheless, the prosecutorial analysis was not convincing on every point. At the moment of the drafting of the indictment, the discussion on the nature of the conflict had already been ongoing, and the opinions diverged from one another.[54] Later on, Yanev opined that the allegation that the conflict in Ukraine in 2014 was a NIAC should not have been too hastily taken for granted.[55] He counselled to consider the DPR military forces as the RF's *de facto* agents, acting under Moscow's overall control;[56] thus to interpret the case along the same lines as the ICTY adopted in *Tadić* case.[57] He also criticized the prosecutors for their reading of Art. 4(A)2 of the Third Geneva Convention (GC III) and Art. 43 of the Additional Protocol I (AP I), in particular for their opinion that the DPR military forces had to be officially recognized by the RF so that their members could claim combatant

[52] Although the prosecutors did not express their precise opinion on this point, nevertheless some strong indications suggest that in their eyes the conflict in Ukraine fulfilled the criteria of a NIAC at most. For example, they noted that there was no proof that the defendants were regular military personnel operating on behalf of a state (*Closing Speech Part I*, para. 2.3.5: Combatant Immunity). Thus, the prosecutors argued they were self-proclaimed volunteers who took up arms and contributed to the chaos and lawlessness in Eastern Ukraine (*ibidem*). Another argument relied on the rejection by the RF of any responsibility for the acts committed by the separatists in Ukraine. Furthermore, the DPR denied any link between their actions and RF authorities. Finally, the defendants denied that in Eastern Ukraine any armed conflict, whatsoever was taking place (*ibidem*, para 2.3.5: Combatant Immunity). Cf. also *Closing Speech Part III, supra* note 50, para. 7.2.2 (where the prosecutor stated that "In legal terms they (the defendants – added) were ordinary citizens who were not allowed to use any form of force or violence").

[53] *Cf. Closing Speech Part III, supra* note 50, para. 7.2.1.

[54] Originally the ICRC mentioned in one of its communiques the ongoing conflict in Eastern Ukraine as being of a NIAC character (*cf.* ICRC, *Ukraine: ICRC Calls on All Sides to Respect International Humanitarian* Law, 23 July 2014, News Release 14/125, available at: https://www.icrc.org/en/doc/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm (accessed 30 April 2023). *But see e.g.* de Hoon, *supra* note 1, p. 96 (who interpreted the ICRC position as an argument in support of the view that "the situation in Ukraine constitutes, at the very least, a non-international armed conflict"). In a similar vein Grzebyk states that "in the beginning (July-August 2014), this conflict could be classified as a non-international one. Still (...) the internationalization (of the conflict in Eastern Ukraine – added) could even have happened earlier if it were confirmed that the insurgents in Eastern Ukraine were from the very beginning inspired and supported by Russia to the extent that Russia had overall control over the dissident forces" (P. Grzebyk, *Classification of the Conflict between Ukraine and Russia in International Law (Ius ad Bellum and Ius in Bello)*, XXXIV Polish Yearbook of International Law 39 (2014), pp. 55 and 56 respectively).

[55] Yanev, *supra* note 1, p. 176.

[56] *Ibidem*.

[57] *Ibidem* (quoting the Appeals Chamber in *The Prosecutor v. Tadić* Judgment, IT-94–1-A), 15 July 1999, para. 137).

status.[58] Still, despite all those critical remarks Yanev also saw some indisputable advantages of the strategy the prosecutors adopted, namely the avoidance of having to submit the proof of intent obligatory in war-crime cases. By relying on the DCC's Art. 168, the prosecutors automatically placed the burden of the evidence of their alleged combatant status on the defendants' side if they wished to adopt this line of defense.[59]

The Court began its analysis with the jurisdictional issues,[60] then embarked *proprio motu* on the defendants' presumed combatant privilege. Specifically, the Court observed that if "combatant immunity does apply [...], it follows that the Prosecutor does not have the right to prosecute"[61] because as long as the persons participating in hostilities conduct their operations following the IHL's rules, "those persons cannot be prosecuted under criminal law for those acts which in peacetime might be considered a crime. This is combatant immunity".[62] Still, as the latter may arise only during an international armed conflict, the DCiTH felt compelled to establish whether the conflict in Ukraine attained this level on the day the Malaysian Boeing was downed. Once this question was answered in the affirmative, the second step was to determine if the defendants' met the criteria that the IHL prescribed for combatant status.

On the first point, the Court noted that a NIAC could transform itself into an IAC "if another country appears to be so heavily involved with the group with which a given country is fighting, (that) the other country actually has overall control over the group". Furthermore, by referring to the *Tadić* test,[63] the Court concluded that as early as 2014 the conflict in the Donetsk region was international.[64] This conclusion relied on many factors, i.e., the employment in the DPR's apparatus of some RF intelligence officers (the defendants Girkin and Dubinsky);[65] Moscow's direct involvement in appointing the DPR Prime Minister and other high-ranking officials; and the daily contacts undertaken between DPR politicians and Moscow, which was considered as the true centre of political power for all the DPR functionaries.[66]

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[58] *Ibidem*, pp. 179 *et seq*., where the Court stated, *i.a.*, that "the existence of such a relationship between Russia and the DPR forces must be determined on the basis of an assessment of the facts on the ground, irrespective of what public statements the parties concerned have made to this effect".

[59] *Ibidem,* pp. 181 *et seq.*

[60] *See* Part 1, notably *supra* notes 42 and 43 and remarks on the practical effects of Arts. 5 and 6 DCC.

[61] *See* MH-17 judgments (*see* the common para. 4.4.3.1: Combatant immunity).

[62] *Ibidem.*

[63] *Ibidem*, para. 4.4.3.1.2: Was there an armed conflict?.

[64] *Ibidem*, para. 4.4.3.1.3: The nature of the armed conflict; *see also* para 4.4.3.1.1: The situation in Eastern Ukraine in July 2014.

[65] *Ibidem*, para. 4.4.3.1.1: The nature of the armed conflict, The background of members of the DPR.

[66] *Ibidem*. *See also* under the same point 4.4.3.1.1, the part entitled Direct involvement of the Russian Federation.

Based on this evidence, the Court considered the allegation that RF organs offered mass support and military training to the separatists as proven.[67] Finally, the judges also concluded that "R.F. assumed a coordinating role and issued instructions to the DPR,"[68] and "R.F. coordinated military activities by the DPR and the Russian Federation".[69] For all these reasons, the DCiTH stated that on 17 July 2014, Moscow exercised *overall control* over the DPR.[70] Thus, contrary to the prosecutors' position, the conflict in Donieck was an IAC, not a NIAC.

Still, even though the DCiTH classified the conflict as an IAC, it stopped short of granting the defendants combatant status. By relying on Art. 43 AP I, and by underlining that the DPR had never been recognized under international law,[71] the Court concluded the defendants could have claimed their combatant status only had it been established that the DPR military forces actually constituted a part of the armed forces of the RF. The Dutch judges ruled that this was not the case. While they found that Russia exercised *overall control* over the DPR[72] and while this fact was sufficient in itself to internationalize the ongoing conflict, it was insufficient to prove the claim the defendants were members of the same Russian military machinery. "For that" – the Dutch judges stated – "the Russian Federation would also have to accept that the DPR was Part of the Russian Federation and take responsibility for the conduct and actions of the DPR fighters under the DPR's command".[73] Finally, and no less significantly, while examining the function of Art. 4A GC III as a source determining the scope and content of the combatant privilege, the DCiTH stated that although "the literature argues that the criteria of art. 4(A) of the Third Geneva Convention should also be considered when assessing whether the accused are entitled to combatant privilege. The Court finds that this is incorrect. *That article is not concerned with combatants and their privileges and immunities but rather with the status of prisoners of war*".[74] For all these reasons, the Court concluded that the defendants could not claim (even had they wanted

[67] *Ibidem*, para. 4.4.3.1: The nature of the armed conflict, Support.

[68] *Ibidem*, para. 4.4.3.1.3: Coordination and instruction.

[69] *Ibidem*, para. 4.4.3.1.3: Direct involvement of the Russian Federation.

[70] *Ibidem*. The DCiTH noted, among other things, that: "In this case due to the position and/or role of the accused within the DPR – the issue is (...) *whether the Russian Federation was involved in the DPR to such an extent that it can be characterized as having had overall control over the DPR*" (emphasis added).

[71] *See* MH-17 judgments, para. 4.4.3.1.4: Combatant status, cf the part *Member of the armed forces of the DPR – Definition of combatant under Article 43 AP I.*

[72] *Ibidem.*

[73] *Ibidem.*

[74] *Ibidem* (emphasis added).

to) their combatant status because they were not members of the Russian military forces (at least not at the moment of the downing).[75]

3. THE MH-17 CASE: THE INDICTMENT AND THE DCITH'S JUDGMENTS IN THE LIGHT OF INTERNATIONAL LAW – A CRITICAL ANALYSIS

A careful analysis leads to the conclusion that international law was not thoroughly examined in either the Indictment or in the MH-17 judgments. The prosecutors invoked SC Resolution 2166/(2014) seemingly to add muscle to their main argument the MH-17 case should be considered an ordinary crime, not a war crime.[76] The attitude of the Court was also restrained. Although in theory some UN resolutions could buttress the DCiTH's findings that the armed conflict in Eastern Ukraine was an IAC, the Court mentioned none of them.[77] Neither the prosecutors nor the DCiTH referred to the Montreal Convention, even though Art. 168 was added to the DCC to fulfil the duties derived from it. At the same time, this apparent reluctance to dwell on international law is at least partially understandable. Insofar as concerns the prosecutors, they undoubtedly wanted to exclude the proceedings from the ICL and IHL regimes to prove the Dutch domestic criminal law constituted a sufficient legal basis for both the proceedings themselves as well as for the Court's sentence. The DCiTH is a domestic criminal court that adjudicates criminal cases. Thus, although the UN resolutions mentioned above could be read as a strong indication that the tensions and fighting between Russia and Ukraine reached the IAC threshold as early as March 2014,[78] still none of them contain the General Assembly's unambiguous position on the nature of the hostilities in Ukraine, let alone confirm that the IAC threshold was reached precisely on 17 July 2014. The Montreal Convention was not invoked at all. Firstly, as Art. 5 DCC drastically extended the extra-territorial jurisdiction of the Dutch criminal courts, there was no need for the prosecutors or the DCiTH to refer to a non-directly enforceable aviation crimes treaty. Secondly, inasmuch as the Court ruled that the conflict was an IAC, any reference to the Montreal Convention would have been potentially inconsistent with the general rules on treaties' application during an international

[75] *Ibidem.*

[76] *See supra* note 56.

[77] *See* UN GA Resolution ES-11/1 of 2 March 2022, *Aggression against Ukraine*; UN GA Resolution ES-11/2 of 24 March 2022, para. 11, *Humanitarian consequences of the aggression against Ukraine,* para 9; UN GA 68/262, *Territorial integrity of Ukraine*, (paras. 1 and 2). *See also* GA 73/194 adopted by the on 17 December 2018, *Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov* (*cf.* notably paras. 1, 2 and 8).

[78] UN GA 68/262, paras. 1 and 2, read together with the common Art. 2 of 1949 Geneva Conventions.

armed conflict.[79] Overall, the Court's limited tasks determined the scope of its analysis of international law, causing it to not go beyond what was strictly necessary to decide the case at the bar.

Insofar as regards international law (leaving aside jurisdiction over the case), the Dutch judges needed to answer two questions, both regulated under IHL. The first, as previously mentioned, concerned the nature of the armed conflict, and the second (once they concluded it was an IAC) – the defendants' combatant status. Although in theory this was the line of reasoning that the DCiTH precisely adopted, this part of MH-17 Judgments is, perhaps, the most controversial one.

While examining the character of the link between the Donetsk separatists and Russia, the Court used the "overall control" test, echoing the famous *Tadić* judgment.[80] As is generally acknowledged, when articulating this test the ICTY sought to adopt the general criteria of attribution of international responsibility to states for acts of individuals that the International Court of Justice (ICJ) had determined in its famous *Nicaragua* test.[81] Later on, in 2007, the ICJ openly rejected the *Tadić test* as a yardstick of the international responsibility of states;[82] although it did not overtly rule out that a domestic criminal court could apply it to determine the nature of an armed conflict.[83] Although the DCiTH did not address this controversial issue directly,[84] it nonetheless proceeded as if it found it was permitted – under the

[79] *See Draft articles on the effects of armed conflicts on treaties with commentaries*, in: *Report of the International Law Commission on the work of its sixty-third session*, Yearbook of International Criminal Law, 2011, *cf.* commentaries to the Annex *Indicative List of Treaties Referred to in art. 7 lit c) Multilateral law-making treaties and (d) Treaties on international criminal justice.* (pp. 122 *et seq*.), where the latter states explicitly that point d) "does not comprise agreements on issues of international criminal law generally".

[80] *See* ICTY, *Prosecutor v. Dusko Tadic*, IT-94-1-A, 15 July 1999, available at: https://www.refworld.org/cases,ICTY,40277f504.html (accessed 30 April 2023), para. 131, where the Tribunal stated the following: "In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law").

[81] As is generally known, after the ICJ adopted its famous Nicaragua's test (*see* ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment. ICJ Rep 1986, p. 64, paras. 109 *et seq*. and 115, the ICTY sought to gloss over this position by proposing an alternative set of criteria, the effect of which was to lower the threshold which should have been met to establish the responsibility of a state for private individual acts (*see Tadić*, para. 131.) For more on this issue, *see* A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the I.C.J. Judgment on Genocide in Bosnia*, 18(4) European Journal of International Law 651 (2007), p. 663.

[82] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment, ICJ Rep 2007, p. 207, paras. 403 and 406).

[83] *Ibidem*, para. 404. In this same vein *see generally* Grzebyk, *supra* note 54, p. 57.

[84] The DCiTH referred directly to the *Tadić* case, only once, and very briefly (*see* MH-17 judgments, para. 4.4.3.1.2).

existing ICJ jurisprudence – to apply the *Tadić test* as a tool to establish the character of the conflict in Ukraine.

More controversially, the Court denied combatant status to the defendants, using arguments that seem hardly acceptable at the theoretical level. Notably the Court, apparently accepting the prosecutors' arguments (against which Yanev had protested),[85] reasoned that since Russia denied any role in the conflict, and the defendants denied having been combatants, further discussion on their alleged status was unnecessary. Commenting on these fragments of the MH-17 judgments, some scholars have argued that the DCiTH's reading of the IHL rules contradicts the International Committee of the Red Cross (ICRC) Commentary to the GC III and some Red Cross teaching materials and leads to untenable results on practical grounds.[86] Although this criticism is perhaps not entirely persuasive,[87] it is true that the Court seriously erred in its analysis on this point. Firstly, the apparent decoupling of Art. 4A GC III and Art. 43 AP I seems to have been based on the misconception

[85] *See supra* notes 58 and 59.

[86] Yanev, *supra* note 5, who in support of this view quotes the Commentary to the Geneva Convention relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Commentary of 2020 (*cf.* The commentary to art. 4 footnote 1008, available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020#116, accessed 30 April 2023), and N. Melzer, *Interpretative guidance on the notion of Direct participation in hostilities under international humanitarian law*, ICRC, Geneva: 2009, p. 23, and stating the following: "As a result, if e.g. a Ukrainian soldier was captured by the DPR's forces, they will be obliged to treat him as a prisoner of war and afford him all the rights and protections enshrined in Geneva Convention III. Failing to do so would result in, *inter alia*, state responsibility for Russia as the controlling state. By contrast, if a DPR soldier is caught by the Ukrainian army, he could be prosecuted as a common criminal, even for the very use of lethal force against Ukrainian soldiers. This does not seem like a very tenable outcome" (Yanev, *supra* note 5).

[87] The MH-17 judgments may be defended against these criticisms on at least four grounds. Firstly, for the reasons explained below the gist of the Court's reasoning was not based on the GC III but on a (radical) interpretation of Art. 43 AP I. Secondly, the view that once a NIAC becomes internationalized the IHL is automatically applicable to all groups fighting previously against a state seeking to maintain its territorial integrity does not seem to be shared by all authors (*cf. e.g.* Grzebyk, *supra* note 54, p. 57 (and the sources quoted therein). Secondly, the 2020 ICRC *Commentary* to Art. 4A(2) GC III indeed states under its footnote 1008 that "where a Party to a conflict has overall control over the militia, volunteer corps, or organized resistance movement that has a fighting function and fights on the State's behalf, a relationship of belonging for the purposes of Article 4A(2) exists" (para 1008). However, it is not easy to gloss over the chapeau in this fragment, which states that such a link between a group and a State may emerge only *in some cases*. Thus, contrary to the situations determined under paras 1006 *et seq*., the hypothesis invoked in the paragraph under consideration does not suggest an automatic extension of combatant status to all groups under a State's overall control. Consequently, in light of the literal interpretation of this paragraph neither the asymmetric character of the conflict nor the exclusion of the lion's share of pro-Russian separatists fighting against Ukraine in Donetsk and elsewhere from the protection of privileged belligerency (*cf.* Yanev *supra* note 5) should be understood automatically as a breach of the IHL. Actually, under its para. 1008 the Commentary requires the belligerent Parties to conduct a case-by-case analysis, without prejudging its final result. Insofar as concerns Melzer's opinion (who argues that belonging to a Party can "be expressed through tacit agreement or conclusive behavior that makes clear for which Party the group is fighting" – *see supra* note 67), it is not clear whether these conditions were actually met in the realities of Eastern Ukraine in 2014.

that the former relates exclusively to the prisoner of war status, while the latter sets out the eligibility rules for combatant status.[88] Such an audacious position is openly contradicted by the key IHL authorities (not only in the literature[89] (as the Court noted) but also in the jurisprudence, including the ICTY in the *Tadić* case, which the Dutch judges directly referred to.[90] Nevertheless the main problem lies elsewhere; i.e. the reasoning of the Court is based solely upon Art. 43, and the DCiTH interpreted it in complete isolation from other AP I provisions[91]. Even if one accepts this proposition, (i.e. the Court, in its analysis of combatant immunity, could have dispensed with dwelling on other articles of AP I), the *traveaux preparatoire* of the Protocol , and Art. 43's content does not support the Court's reading. One of the main effects of the Protocol's entry into force was the enlargement of the scope of combatant protection beyond the previous limits determined by Art. 4A GC III, and this change concerned precisely irregular combatants.[92] Moreover, as Aldwich once commented on Art. 43, "the key issue for determining whether a person is a member of armed forces under this article is a factual issue, a command link, rather than a political issue, recognition".[93] Thus, if only for these two reasons the Court, by limiting its analysis to accepting the verbal declarations submitted by Russia and the defendants,[94] failed to offer an appropriate reasoning to justify its denial of combatant privilege to the four defendants.

CONCLUSIONS

Although at the early stage of the MH-17 proceedings, international law constituted a significant reference point for the international and domestic organs involved in

[88] *See* MH-17 judgments, common para. 4.4.3.1.4.

[89] *See generally* ICRC, *The 1987 Commentary to the API*, p. 514, para. 1676, where the authors stated clearly that the object of Art. 43(1) "is to establish a common denominator applicable to all, supplementing the specific rules of Article 4 of the Third Convention, without however setting them aside, with a view to defining who are members of the armed forces, as opposed to civilians*". See also* M. Sassòli, A.A. Bouvier, A. Quintin, *How does Law protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,* Vol. I: *Outline of International Humanitarian Law* (3rd ed.), ICRC, Part I, Chapter 6, fns 94 and 95, available at: https://www.icrc.org/en/doc/assets/files/publications/icrc-0739-part-i.pdf (accessed 30 April 2023).

[90] *See supra* note 81, para. 92; *cf.* also paras. 94-96, where the ICTY derived from the GC III's Art. 4 the concept of a state control over irregular forces.

[91] Notably, it is unclear how to justify the omission in the analysis of the Court of Art. 44(1) of the AP I. This provision establishes the presumption of the combatant status of anybody who *appears to be entitled to such status,* no matter if a state claims such status for them or they claim to be entitled to the combatant privilege.

[92] For more on the issue, *see* G.H. Aldrich, *Guerrila Combatants and Prisoner of War Status. Prospects for United States Ratification of Additional Protocol I to the Geneva Conventions,* 85 American Journal of International Law 1 (1991), pp. 8 *et seq*.

[93] *Ibidem*, pp. 874 *et seq.*

[94] *See* MH-17 judgments, common para. 4.4.3.1.4.

the inquiry and investigation, its role in the Indictment and MH-17 judgments was limited, even though Dutch judges did examine some problems arising under the IHL. This conclusion seems to be the outcome of many different factors. For one, since the states involved in the proceedings decided not to refer the case before the ICC, the initiative to set up an MH-17 international tribunal was blocked by the Russian veto in the SC. Secondly, the Dutch prosecutors were not inclined to qualify the downing as a war crime, rendering the ILC meaningless to the case under consideration. Thirdly, given its nature and the circumstances of the case, the practical impact of the Montreal Convention – a classic aviation crimes treaty – has been non-existent. Fourthly, as the redrafted Art. 5 broadly extended the passive jurisdiction of Dutch organs. the judicial functionaries had even less incentive to waste time analysing those issues which would not help bring the MH-17 case to its final end. Against this backdrop, the limited analysis concerning the nature of the armed conflict in Eastern Ukraine and the problem of the defendants' combatant status carried out by the DCiTH support the general conclusion that international law only to a limited extent influenced the Indictment's content and the MH-17 Judgments. The mere fact that the Prosecutors and Courts rarely referred to international law does not however warrant any strong criticism. After all, all over the world, judiciary organs are created to resolve practical problems, not to discuss remote issues not directly connected with cases they resolve. Nonetheless, given its shortness and cursory discussion, the Court's analysis concerning the defendants' combatant immunity makes its reasoning – at least at the theoretical level – partially unpersuasive. Put differently, keeping in mind the complex circumstances of the case, the DCiTH should dwell more on this issue to exclude the risk of sentence for an ordinary crime person entitled to the combatant privilege.

However, it would be unfair to assess the enormous work done by the Dutch judiciary organs during the investigation, prosecution, and trial of the MH-17 case exclusively through the prism of just one unconvincing element of the final judgment. Therefore, even having these flaws in mind the issue of the MH-17 judgments' legacies or their potential impact on the development of international jurisprudence is difficult to foresee. As Yanev noted, they were "the first judicial determination that the nature of the armed conflict between Ukraine and the DPR's armed forces is international and has been such since mid-May 2014".[95] Will other tribunals follow this opinion? At this moment it is impossible to answer this question in unambiguous terms. Still, it is noteworthy that the ECtHR, in its Admissibility Judgment, recently stated that this issue would be examined during the proceedings on the merits.[96] Moreover, in the same Judgment the Strasbourg Tribunal directly

[95] Yanev, *supra* note 5.

[96] *See Ukraine and the Netherlands v. Russia*, para. 720.

referred to some of the DCiTH's findings.[97] Restating them together with other evidence, the Strasbourg Tribunal concluded that "it is established beyond any reasonable doubt that from the earliest days of the separatist administrations and over the ensuing months and years, the Russian Federation provided weapons and other military equipment to the separatists in eastern Ukraine on a significant scale". The extent to which the ECtHR's conclusion constitutes a harbinger of the MH-17 judgments' future impact on the ongoing proceedings before the ECtHR in the MH-17-case remains to be seen.

The MH-17 judgments are also of interest because they mirror the theoretical and practical problems which a domestic judiciary must cope with in a case where at the centre of the proceeding is a crime that can be qualified – depending on the nature of a conflict – as a war crime or – alternatively – an ordinary crime. The DCiTH, in its verdict, posits that at least in some circumstances it is legitimate for a domestic court to consider perpetrators as common criminals, not war criminals, even though a grave crime is committed during an international armed conflict. The advantages of the pragmatic approach the Court adopted are numerous at both the theoretical and practical levels. If implemented correctly, it would permit circumventing some of the barriers that the IHL and ICL pose on the road to effective prosecution and punishment – in particular the combatant's privilege and the threshold of the proof needed to establish the intent necessary to find defendants guilty of a war crime[98] and thus avoid perpetrators' impunity. However, the MH-17 judgments should also be seen as a *caveat* that this avenue, although promising, is also challenging on theoretical and practical grounds. Whether, in the years to come, another domestic court tasked with trying criminals in like-circumstances will consider the experiences gathered by the Dutch judiciary in the MH-17 case proceedings, or whether the DCiTH verdict will become an isolated instance, remains to be seen.

[97] *Ibidem*, para. 632, where the Strasbourg Tribunal stated, among other things, that "The evidence (submitted to the DCiTH) demonstrates beyond reasonable doubt that the Buk-TELAR used to shoot down flight MH17 was provided by the Russian Federation in direct response to the separatists' call for anti-aircraft weaponry".

[98] On the latter issue see Grzebyk, who notes that "paradoxically, because in Eastern Ukraine there is an armed conflict, it is much easier to avoid responsibility, inasmuch as if the attack was performed in relation to the conflict, it is sufficient to demonstrate that the perpetrator was convinced that he was targeting a military object (*e.g.* a military transport plane) in order to be found not guilty" (Grzebyk, *supra* note 54, p. 54).

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HUMAN RIGHT TO CLEAN ENVIRONMENT AND THE RIGHTS OF NATURE IN THE ANTHROPOCENE

Abstract: *This article examines the role of environmental human rights and the rights of nature in the era of the Anthropocene. The research question is whether the concept of the Anthropocene itself is a constructive remedy for the ecological destruction.*

The United Nations General Assembly resolution acknowledging a universal human right to clean environment is a ground-breaking event in a long process of the creation of such a right. This article examines the status quo of this right at present, both generally and in regional human rights treaties, as well as in the relevant case law and literature. The rights of nature are also examined, as they have become a very topical issue in light of the recent decision of the Conference of the Parties of the Convention on Biological Diversity, which expressly grants such a right. The question which may be posed is whether the approach adopted by the Anthropocene – which treats all actors equally – reflects the reality. The Western (Global North) approaches to the destruction of the Earth are contested by the Global South. The fractured approaches (by both the Global South and the Global North) to the decline of the environment may render questionable the suitability of the Anthropocene paradigm.

Keywords: The Anthropocene, United Nations, regional human rights treaties, rights of nature, COP CBD Decision, Indigenous Peoples

INTRODUCTION

We are at present in the area of the Anthropocene. In 2004 Professor Crutzen introduced this concept and as a new geological epoch.[1] In broad brushstrokes the

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[1] *See e.g.* P.J. Crutzen, *Geology of mankind*, 415 Nature 23 (2002); *see also* E. Ehlers, T. Krafft (eds.), *Earth System Science in the Anthropocene. Emerging Issues and Problems*, Springer, Berlin: 2006.

theory of the Anthropocene is based on the premise that human beings should, due to their impact on the environment, be considered a major geological and geobiological factor in Earth ecology. However, human beings are also capable of saving the Earth through the sustainable use of its resources and through the advancement of technology and culture. Therefore, the Anthropocene provides a holistic approach to problems concerning both the decline as well as the saving of the environment.

It was stated that:

> Past scientific discoveries have tended to shift perceptions away from a view of humanity as occupying the centre of the Universe. In 1543 Copernicus's observation of the Earth revolving around the Sun demonstrated that this is not the case. The implications of Darwin's 1859 discoveries then established that *Homo sapiens* is simply part of the tree of life, with no special origin. Adopting the Anthropocene may reverse this trend by asserting that humans are not passive observers of Earth's functioning. To a large extent the future of the only place where life is known to exist is being determined by the actions of humans. Yet the power that humans wield is unlike any other force of nature, because it is reflexive and therefore can be used, withdrawn or modified. More widespread recognition that human actions are driving far-reaching changes to the life-supporting infrastructure of Earth may well have increasing philosophical, social, economic and political implications over the coming decades.[2]

It may be said, however, that this theory is not without critique.[3] In particular, the criticism of the concept of the Anthropocene is based on the Marxist account of the planetary crisis linked to capital accumulation – the Anthropocene is limited to a technical and geological focus, excluding a social reading of the idea "developed in terms of the clear increases in scale, scope of synchronicity, and rate/speed of environmental change, driven by capital accumulation".[4] This approach is called "Capitalocene". The approach called "Technocene" takes account of the historical perspective and social science, including a non-anthropocentric perspective, and covers multi-species.[5]

It is argued that the main feature of the Anthropocene is that it reflects the concept that human and non-human elements of the Earth system have become so totally linked together that no modification can occur in one without impacting

[2] S.L. Lewis, M.A. Maslin, *Defining the Anthropocene*, 519 Nature 171 (2015), p. 178; *see generally*, on environmental governance and the Anthropocene, L.J. Kotzé, R. Kim, *Towards Planetary Nexus Governance in the Anthropocene: An Earth System Law Perspective*, 13 Global Policy 86 (2022).

[3] O. Lopez-Corona, G. Magellanos-Guijon, *It is not an Anthropocene: It is Really the Technocene: Names Matter Under Planetary Crisis*, 8 Frontiers in Ecology and Evolution 1 (2020).

[4] *Ibidem*, p. 1.

[5] *Ibidem*, p. 2.

the other. Therefore, if at present every environmental challenge is also a human challenge, it may be that the interests of both humans and non-humans are converging.[6] In light of this premise, it appears that both the human right to a clean environment and the rights of nature must be analysed as one entity, which is the approach adopted in this article. The underlying hypothesis and aim of this article is to examine whether, and in what way, the concept of Anthropocene is relevant to the human right to a clean environment and the rights of nature.

The human right to a clean environment has gained significance in light of the 28 July 2022 United Nations General Assembly (UNGA) Resolution granting the right to a clean and healthy environment as a universal human right.[7] This article will also examine regional approaches to the human right to a clean environment.

The question of the rights of nature has become particularly topical due to the decision of the Conference of the Parties of the Convention on Biological Diversity (CBD) adopted on 19 December 2022, the so-called "Kunming–Montreal Global Biodiversity Framework for the CBD":[8]

> Nature embodies different concepts for different people, including biodiversity, ecosystems, Mother Earth, and systems of life. Nature's contributions to people also embody different concepts, such as ecosystem goods and services and nature's gifts. Both nature and nature's contributions to people are vital for human existence and good quality of life, including human well-being, living in harmony with nature, living well in balance and harmony with Mother Earth. The framework recognizes and considers these diverse value systems and concepts, including, for those countries that recognize them, rights of nature and rights of Mother Earth, as being an integral part of its successful implementation.

1. GENERAL APPROACHES TO THE HUMAN RIGHT TO A CLEAN ENVIRONMENT

The link between the enjoyment of human rights and the environment was noted many years ago and has been evidenced in many soft law documents. The most important is the 1972 Declaration of the Conference (Stockholm Declaration), which recognizes that "man's environment [is] essential to his well-being and to the

[6] For an in-depth analysis, *see* M. Scobie, *Framing Environmental Rights in the Anthropocene*, in: W.F. Barber, J.R. May (eds.), *Environmental Human Rights in the Anthropocene. Concepts, Contexts and Challenges*, Cambridge University Press, Cambridge: 2023, p. 10.

[7] Resolution A/76/L.75; 161 votes in favour, and eight abstentions (i.e. Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Syria and Russia).

[8] CBD/COP/15/L.25, available at: https://tinyurl.com/3m22b6je (accessed 30 April 2023).

enjoyment of basic human rights", such as the right to life. Even before the UNGA Resolution of 28 July 2022, a synergy between the human right to a clean environment and human rights has been debated in numerous UN fora, as evidenced by the examples which are presented below.

The UN Human Rights Council (UNHRC) appointed an Independent Expert (Special Rapporteur) on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. In 2012 the Special Rapporteur held that "all human rights are vulnerable to environmental degradation, in that full enjoyment of all human rights depends on a supportive environment".[9] This was already recognised by the UNGA in 1988, which described climate change as a "common concern of mankind, since climate is an essential condition which sustains life on earth".[10] More recently, in a 2019 Report the UNHRC Special Rapporteur identified several impacts of climate change on human rights, in particular the right to life, adequate food, water and sanitation, and health.[11] The Human Rights Committee (HRC), in its General Comment 36 on the Right to Life, identified environmental degradation as one of the "the most pressing and serious threats to the ability of present and future generations to enjoy the right to life,"[12] where the right to life (Art. 6 of the International Covenant on Civil and Political Rights (ICCPR)) embodies the duty of states to protect the environment. Another body which has considered the interlinkage between environmental degradation and human rights is the Committee of Economic Social and Cultural Rights Covenant (CESCR), consisting of 18 independent experts. Its functions include the monitoring and implementation of the International Covenant on Economic, Social and Cultural Rights (ECOSOC) by its States parties. It was established under the ECOSOC 1985 Resolution in order to carry out the monitoring functions assigned to the United Nations Economic and Social Council in Part IV of the Covenant. In its 2000 General Comment 14,[13] the CESCR observed that action should be taken to protect the right to health and in particular to "improve

[9] *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox*, 24 December 2012, A/HRC/22/43, para. 19.

[10] UNGA, *Protection of global climate for present and future generations of mankind,* 6 December 1988, A/RES/43/53, para. 1.

[11] UNGA, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Note by the Secretary-General*, 15 July 2019, A/74/161, part II.

[12] CCPR/C/GC/36, para. 62. G. Reeh, *Human Rights and the Environment: The UN Human Rights Committee Affirms the Duty to Protect,* EJIL: Talk!, 9 September 2019, available at: https://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/ (accessed 30 April 2023).

[13] "General comment is a treaty body's interpretation of human rights treaty provisions, thematic issues or its methods of work. General comments often seek to clarify the reporting duties of State parties with respect to certain provisions and suggest approaches to implementing treaty provisions", Dag Hammarskjold Library, available at: https://ask.un.org/faq/135547 (accessed 30 April 2023).

all aspects of environmental and industrial hygiene," which requires, for example, measures to ensure adequate water supplies.[14]

Resolution 48/13 adopted on 8 October 2021 by the HRC, recognising for first time that having a clean, healthy and sustainable environment is a human right, paved the way for the UNGA Resolution, which is based on the HRC text.[15] The main value of this non-binding Resolution was that it confirms "the idea that the right to a healthy environment should be universally protected".[16] The main tenets of the UNGA Resolution are as follows: (i) the right to a healthy environment is a human right; (ii) it is related to other rights and existing international law; (iii) the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law; and (iv) States and international organisations should adopt policies to enhance cooperation, to strengthen capacity-building, and continue to share good practices in order to increase efforts to ensure a clean, healthy and sustainable environment for all.[17]

The universal human right to a clean environment is squarely situated within the concept of sustainable development, which includes intergenerational equity. The UNGA Resolution recalls three dimensions of this concept: social, economic and environmental development, including the protection of ecosystems, and states that sustainable development contributes to and promotes "human well-being and the full enjoyment of all human rights, for present and future generations".

The Resolution reaffirms the UNGA 2015 Resolution "Transforming Our World: The 2030 Agenda for Sustainable Development".[18] It may be presumed that the main objective of the Agenda 2030, i.e., combatting and eliminating poverty, will also inform the implementation of the universal right to a clean environment. The Resolution also links climate change, toxic wastes, and degradation of the envi-

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[14] UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, E/C.12/2000/4 (2000), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en (accessed 30 April 2023).

[15] UNHRC, *Resolution: The human right to a clean, healthy and sustainable environment*, 8 October 2021, A/HRC/RES/48/13, available at: https://bit.ly/3LcrMWN; for more on this, *see* A. Savaresi, *The UN HRC recognizes the right to a healthy environment and appoints a new Special Rapporteur on Human Rights and Climate Change. What does it all mean?*, EJIL: Talk!, 12 October 2021, available at: https://tinyurl.com/3c9mnpec (both accessed 30 April 2023).

[16] Savaresi, *supra* note 16.

[17] O. Johnson, C. Lewis, J. Whittaker, *UN General Assembly adopts landmark resolution on right to a healthy environment*, Clifford Chance Blog, 2 August 2022, available at: https://tinyurl.com/5n95ucsc (accessed 30 April 2023).

[18] A/RES/70/1, available at: https://sdgs.un.org/2030agenda (accessed 30 April 2023). *See also* M. Gutmann, D. Gorman (eds.), *Before the UN Sustainable Development Goals: A Historical Companion*, Oxford University Press, Oxford: 2022.

ronment generally as having a negative implication for the enjoyment of all human rights. The Resolution acknowledges that international cooperation is an essential element in assisting developing countries to strengthen their human, institutional, and technological capacities. Surprisingly however, the Resolution does not mention the principle of common but differentiated responsibilities (CBDR), which was first formulated in the Rio Declaration on Environment and Development and which is the fundamental principle of sustainable development and international environmental law.[19] According to the CBDR "States take on different obligations, depending on their socio-economic situation and their historical contribution to the environmental problem at stake".[20] The CBDR is based on a premise of differentiated responsibilities in international environmental law, which translates into a global partnership linked to the duty to cooperate. States' obligations are differentiated depending on their divergent situations, conditioned by "developmental needs, historical contribution to environmental degradation, present contribution to the problem and their access to technological and financial resources".[21] The CBDR has two elements: the responsibility element, which takes into account comprehensive and divergent circumstances; and a capabilities element, which is based on the assessment of economic capacities to contribute to environmental protection.[22] It can be said that the CBDR "has given developing States a basis for claiming that their position is to be taken into account in the formulation of treaty regimes".[23]

The question related to differentiated responsibilities was raised by Brazil, Pakistan, Syria and China (which abstained from voting due to the absence of this principle). Nicaragua raised a corollary point, emphasising that in order to have a right to clean and healthy environment, developed countries must first fulfil their commitments to offer support and developmental assistance to developing countries.[24]

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[19] Principle 7 of the Rio Declaration: "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command". *See also Special Issue Global Solidarity and Common but Differentiated Responsibilities,* 51 Netherlands Yearbook of International Law (2022), and Johnson et al., *supra* note 12.

[20] E. Hey, S. Paulini, *Common but Differentiated Responsibilities,* Max Planck Encyclopedia of Public International Law, October 2021, available at: https://tinyurl.com/yckvunk6 (accessed 30 April 2023), para. 1.

[21] *Ibidem*, para. 5.

[22] *Ibidem*.

[23] *Ibidem*, para. 20

[24] Johnson et al., *supra* note 18.

The reactions of States emphasised the non-binding legal character of the Resolution. It was also observed that certain terms such as "clean", "healthy", "sustainable", "unsustainable" and the right itself lack internationally agreed-upon definitions.[25] The divergent views on the existence of such a right were exemplified by the United Kingdom's statement, which read as follows: "[T]here is no international consensus on the legal basis of the human right to a clean, healthy and sustainable environment and we do not consider that it has yet emerged as a customary right;" as well as: "Our understanding is that the right to a clean, healthy and sustainable environment derives from existing international economic and social rights law – as a component of the right to an adequate standard of living, or the right to the enjoyment of the highest attainable standard of physical and mental health".[26] It was observed in the literature that:

> These statements indicate that while there is a general consensus on the need to recognise the R2HE, there is still a considerable difference in opinion as to how that right should actually be defined, implemented and enforced – particularly on a State-specific basis. Ultimately however, it is likely that any divergence in approach to the R2HE will emerge on the basis of the differences between the rights articulated under domestic laws and policies among States in the future rather than the generality of the UNGA resolution.[27]

2. REGIONAL APPROACHES TO THE RIGHT TO A CLEAN ENVIRONMENT

2.1. The African Commission

The African Charter on Human and Peoples' Rights (ACHPR) includes a right to a clean environment, stating that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development" (Art. 24). In the *Ogoniland* case, the African Commission on Human and Peoples' Rights (African Commission) considered claims that the Nigerian government had adopted oil development practices leading to environmental degradation.[28] The Commission took the view

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[25] *Ibidem*.

[26] UK Mission to the UN, *Explanation of vote on resolution on the right to a clean, healthy and sustainable environment. Statement delivered to the UN General Assembly at the adoption of resolution*, A/76/L.75, available at: https://www.gov.uk/government/speeches/explanation-of-vote-on-resolution-on-the-right-to-a-clean-healthy-and-sustainable-environment (accessed 30 April 2023).

[27] Johnson et al., *supra* note *18.*

[28] *Social and Economic Rights Action Centre & Centre for Economic and Social Rights v. Nigeria*, Case No. ACHPR/COMM/A044/1, Communication 115/96 (*Ogoniland* case). *See also* D. Shelton, *Decision Regarding Communication 155/96* (*Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria). Case No. ACHPR/COMM/A044/1,* 96 American Journal of International Law 937 (2002); F. Fons Coomans, *The Ogoni Case before the African Commission on Human Rights and Peoples' Rights,* 52 International Comparative Law Quarterly 749 (2003).

that States must respect the right to health and should refrain from directly threatening the health and environment of their citizens. Furthermore, States are obliged to adopt measures that would prevent environmental degradation. It concluded that Nigeria, whilst enjoying the right to exploit its natural resources, had breached the human rights of people living in the Ogoni region.[29] Significantly, the Commission concluded that environmental degradation was not only leading to the violation of other rights, but also constituted a human rights violation in itself due to its impact on the quality of life.[30] Whilst this decision confirms the justiciable nature of Art. 24, the African Commission's restricted regulatory powers and the poor record of compliance with its recommendations limited the practical usefulness of its attempts to remedy environmental degradation in Africa.

It should be noted that no express procedural environmental right exists under the African Charter. However, in the *Ogoniland* case the African Commission recognised such a right based on Art. 24 ACHPR, which grants a substantive environmental right, and gave it meaningful content by supporting the right of the public to information and to participate in environmental matters.[31]

2.2. The Inter-American Court of Human Rights

The inter-American human rights institutions have limited powers with respect to the right to a clean environment. They may only receive reports from States on their observance of this right, and there is no right to individual applications to the Inter-American Commission on Human Rights (IACommHR) or the Inter-American Court of Human Rights (IACtHR) concerning breaches of the San Salvador Protocol. Nevertheless, these institutions have – in several cases involving indigenous rights – recognised the interlinkage between environmental degradation and human rights.[32] In *Mayagna (Sumo) Awas Tigni Community v. Nicaragua*,[33] *Maya Indigenous Communities of Toledo District v. Belize,*[34] and *Saramaka People v. Suriname*[35] it was stressed that economic development should be consistent with environmental obligations.

Art. 11 of the San Salvador Protocol has been a basis for environmental cases. *La Oroya* is an unusual case, in that it was not related to indigenous environmental rights, which constitute the majority of cases alleging the breach of human rights on, inter alia, environmental grounds. In the *La Oroya* case *(Community of La*

[29] *Ogoniland*, para. 67.
[30] *Ibidem,* para. 51.
[31] Shelton, *supra* note 29, p. 939.
[32] IACommHR, *Yanomami v. Brazil*, Res 12/85, 5 March 1985.
[33] IACtHR, Ser C No. 79, 31 August 2001.
[34] IACommHR, Report No. 40/04, 12 October 2004.
[35] IACtHR, Ser C No. 172, 28 November 2007.

Oroya v. Peru),[36] the IACommHR considered, for the first time, the responsibility for a breach of human rights of non-indigenous people due to environmental degradation.[37] It was alleged that Peru had violated the rights of La Oroya inhabitants under both the American Convention on Human Rights (ACHR) and the San Salvador Protocol by not preventing environmental damage. In considering the case, the IACommHR granted precautionary measures, requiring Peru to provide medical treatment to the said inhabitants who had suffered health problems related to contamination from a metallurgical complex. Whilst the IACommHR stressed that the alleged violations of the San Salvador Protocol were outside its competence, it nonetheless felt obliged to take the Protocol into account when interpreting the scope and intent of the American Convention.[38]

Without doubt the most important, if not ground-breaking, decision in relation to the human right to a clean environment is the 2018 Advisory Opinion of the IACtHR *on the Environment and Human Rights*.[39] The opinion was issued following a request by Colombia to clarify the extent of state responsibility for environmental harm under the ACHR, in particular within the framework of the Convention for the Protection and Development of Marine Environment of the Wider Caribbean Region and customary international law.[40] The Court reaffirmed the existence of "an undeniable relationship" between human rights and the protection of the environment.[41] Furthermore, it reiterated "the interdependence and indivisibility of the civil and political rights, and economic social, and cultural rights, because they should be understood integrally and comprehensively as human

[36] ACommHR, Report No. 76/09, 5 August 2009.

[37] P. Spieler, *The La Oroya Case: the Relationship Between Environmental Degradation and Human Rights Violations*, 18(1) Human Rights Brief 19 (2010).

[38] *La Oroya*, para. 54 ("Lastly, the Commission is competent ratione materiae, because the petition alleges violations of human rights protected under the American Convention. The Commission notes that the petitioners cited Articles 10 and 11 of the Protocol of San Salvador and Articles 2, 3, 6, 16, and 24 of the Convention on the Rights of the Child. While under Article 29 of the American Convention these provisions can be taken into account in interpreting the scope and intent of the American Convention, the Commission reiterates that it is not competent to render decisions on instruments adopted outside the regional purview of the inter-American system (...). As for the Protocol of San Salvador, the Commission reiterates that Article 19.6 of that treaty provides a limited competence clause allowing organs of the inter-American system to render judgments on individual petitions related to the rights enshrined in Articles 8.a and 13").

[39] IACtHR, Advisory Opinion OC-23/17, Ser A No. 23, 15 November 2017.

[40] Request for Advisory Opinion OC-23, 14 March 2016; see further M.L. Banda, *Inter-American Court of Human Rights Advisory Opinion on the Environment and Human Rights*, 22(6) American Society of International Law Insights (2018); C. Vega-Barbosa, L. Aboagye, *Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights*, EJIL: Talk!, 26 February 2018, available at: https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/ (accessed 30 April 2023).

[41] Advisory Opinion OC-23/17, paras. 47-55.

rights".[42] On this basis, the Court elevated the right to a healthy environment under Art. 11 of the San Salvador Protocol to a justiciable right by interpreting Art. 26 ACHR to also include such a right.[43] The Court found support for its position in Member States' constitutions and international instruments.[44] Significantly, the Court accepted that in the case of transboundary pollution, there existed an extra-territorial breach of the human right to a clean environment.[45] Thus, these human rights obligations are capable of being invoked by individuals or groups against a foreign state. This recognition allows for cross-border human rights claims due to transboundary environmental damage.[46]

The Advisory Opinion was instrumental to the IACtHR Judgment in the 2020 case of *Lhaka Honhat v. Argentina*.[47] The Court applied a direct approach to violations of economic, social and cultural rights and also explicitly included environmental rights, thus treating environmental rights as an autonomous right. In an indirect approach, the Court establishes state responsibility for violation of these environmental rights through existing breaches of related civil and political rights, but not the environmental rights themselves. The Court also for this first time recognised the direct justiciability of the right to a clean environment.[48] However, this judgment is quite contentious, and the judges of the Court were divided regarding direct autonomy and the justiciability of such a right (e.g., based on the argument that under the San Salvador Protocol rights which are derived from Art. 26 of the Inter-American Convention on Human Rights are not justiciable). There is thus the possibility that the judgment in this case may be reversed in the future.[49]

2.3. The European Court of Human Rights and the Right to a Clean Environment

Although the European Convention on Human Rights and Fundamental Freedoms (ECHR) does not contain a direct substantive environmental human right,

[42] *Ibidem*, para. 57.

[43] *Ibidem*.

[44] *Ibidem*, paras. 57-58.

[45] Banda, *supra* note 41.

[46] M. Feria-Tinta, S, Milnes, *The Rise of Environment Law in International Dispute Resolution: Inter-American Court of Human Rights Issues Landmark Advisory Opinion on Environment and Human Rights*, EJIL: Talk!, 26 February 2018, available at: https://www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/ (accessed 30 April 2023).

[47] IACtHR, *Lhaka Honhat (Our Land) Association v. Argentina*, 6 February 2020, Series C No. 420. For more on this, *see:* D. Mejia-Lemos, *The Right to a Healthy Environment and its Justiciability Before the Inter-American Court of Human Rights: A Critical Appraisal of the Lhaka Honhat v. Argentina judgment*, 31(2) Review of European, Comparative & International Environmental Law 317 (2022).

[48] Mejia-Lemos, *supra* note 48, p. 317.

[49] *Ibidem*, p. 323.

the European Court of Human Rights (ECtHR) has determined that a right to a clean and healthy environment emerges out of the civil and political human rights embodied in the ECHR and its Protocols. In particular, the ECtHR has interpreted the protection accorded to rights such as the right to life (Art. 2 ECHR); the right to respect for private and family life (Art. 8 ECHR); the right to freedom from torture (Art. 3 ECHR); and the right to property (Art. 1 of Protocol 1) as giving effect to environmental rights. The majority of such decisions have concerned the application of Art. 8 ECHR, which recognises limitations on the right to respect for private and family life as necessary in a democratic society. This interference must however be relevant and sufficient.[50] In *Powell and Rayner v. the United Kingdom*[51] and *Flamenbaum and Others v. France*,[52] the ECtHR had to balance the violation of inhabitants' quality of life caused by aircraft using the Heathrow and Deauville airports respectively, and the rights of the community at large, including economic stability. In both cases, the Court decided that the disturbances caused to the applicants' quality of life were necessary for the well-being of the community.[53] In these cases the ECtHR has initiated the approach of "balancing of interests" between the environmental needs of an individual and the economic well-being of the community.

More significant progress was made in the landmark judgment in *López Ostra v. Spain*.[54] The applicant in this case claimed that fumes from a tannery waste treatment plant, which was erected 12 meters from her residence, were seriously affecting her and her family's quality of life. The Court recognised that environmental pollution, even if it did not cause serious health damage, could have a negative effect on the well-being of the applicant and hindered the enjoyment of her private and family life. Consequently, the Court decided that Spain had not achieved a proper balance between the applicant's rights and the economic benefits of the plant.[55]

More recently, in *Cordella v. Italy*, the ECtHR considered an alleged violation of Art. 8 as a result of exposure to air pollution from a steel plant in Taranto.[56] Attempts by national authorities to decontaminate the polluted region were unsuccessful. The state allowed the steelworks to continue for years, despite scientific reports which concluded that such activities were adversely affecting the health of the region's population and the environment. Furthermore, inhabitants of the region remained without any information about the progress of the proposed clean-up

[50] ECtHR, *Olsson v. Sweden (No. 1)* (App. No, 10465/83), 24 March 1988, para. 64.

[51] ECtHR, *Powell and Rayner v. the United Kingdom* (App. No. 9310/81), 21 February 1990.

[52] ECtHR, *Flamenbaum and Others v. France* (App. Nos. 3675/04 and 23264/04), 13 December 2012.

[53] *Powell and Rayner*, paras. 41-42 on the economic welfare of the region (*Flamenbaum*, para. 154)

[54] ECtHR, *Lopez Ostra v. Spain* (App. No. 16798/90), 9 December 1994.

[55] *Ibidem*, para. 58.

[56] ECtHR, *Cordella v. Italy* (App. Nos 54414/13 and 54264/15), 24 January 2019.

operations. For these reasons, the Court found there to be a violation of Art. 8, as Italy did not take all necessary measures to protect the right to respect for private and family life, thus failing to ensure an appropriate balance between the interests of the applicants and the society as a whole.[57]

The *Hatton* cases (2001 and 2003) are an excellent illustration of the ECtHR's ambivalent and conflicting attitude vis-à-vis the human right to a clean environment. The first of these cases was decided by the Chamber of the Court and the Grand Chamber. They adopted diametrically different final decisions based on the interpretation of Article 8 of the ECHR and the principle of the balancing of interests between individual interests and those of the community.

These cases concerned night flights to and from Heathrow Airport which, it was argued by the applicants, disturbed their sleep. The UK government had introduced the use of noise quotas in order to minimize the disturbances caused by night flights. The case was first heard by the Chamber of the Court in 2001.[58] Referring to the "fair balance" that must be struck between the competing interests of the individual and the community as a whole, the Chamber first submitted that the State enjoyed a certain margin of appreciation in determining the steps to be taken to ensure compliance with the ECHR. The Chamber found however that despite the margin of appreciation left to the UK government, the implementation of the noise quota scheme failed to strike a fair balance between the country's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and family lives; therefore violating Art. 8 ECHR. The UK government requested the referral of the case to the Grand Chamber. The Grand Chamber stated in no uncertain terms that "there is no explicit right under the Convention to a clean and quiet environment" and that only "where the individual is directly and seriously affected by noise or other pollution" may an issue arise under Art. 8.[59] Finding that there was no violation of Art. 8, the Grand Chamber reiterated the fundamentally subsidiary role of the Court, i.e. that national authorities have direct democratic legitimacy and are better placed than an international tribunal to assess local needs and conditions. In matters of general policy, which may involve different opinions contained within a democratic society, the actions of domestic policy-makers to ensure compliance with the ECHR should be given a wide margin of appreciation. A minority of judges appended a powerful joint dissenting opinion.[60] The dissenting judges argued that the "evolutive" interpretation of the ECHR has led to the construction of an environmental human right on the

[57] *Ibidem*, para. 174.

[58] ECtHR, *Hatton and Others v. United Kingdom* (App. No. 36022/97), 2 October 2001; ECtHR (GC), 8 July 2003.

[59] *Ibidem*, para. 96.

[60] *Ibidem*, Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič, and Steiner.

basis of Art. 8.[61] They asserted that the ECtHR had on several occasions, including in *Lopez Ostra*, confirmed that Art. 8 embraces the right to a healthy environment:

> The Grand Chamber's judgment in the present case, in so far as it concludes, contrary to the Chamber's judgment of 2 October 2001, that there was no violation of Article 8, seems to us to deviate from the above developments in the case-law and even to take a step backwards. It gives precedence to economic considerations over basic health conditions in qualifying the applicants' 'sensitivity to noise' as that of a small minority of people (see paragraph 118 of the judgment). The trend of playing down such sensitivity – and more specifically concerns about noise and disturbed sleep – runs counter to the growing concern over environmental issues all over Europe and the world.[62]

On balance, the Grand Chamber in the 2003 *Hatton* case subsumed the environmental needs of an individual to the economic interests of the community.

Overall, the ECtHR in Hatton adopted a very restrictive and deferential view towards the State's position regarding environmental human rights and the possibility of redressing environmental degradation through Art. 8. The Court took into consideration the fact that the UK government had acted in conformity with national laws concerning night flights. By contrast, in *Lopez Ostra* the authorities had failed to comply with domestic law as there was no license for the tannery. This view was also confirmed by the Court in *Hardy and Maile v. the United Kingdom*.[63]

While on several occasions the Court has held that not every case of environmental degradation would lead to a violation of Art. 8, nonetheless in *Fadeyeva v. Russia* the applicant complained about air pollution from a steel plant built in the Soviet era but subsequently privatised. The Court established a number of requirements for pollution to be deemed to cause a violation under Art. 8. First, it was necessary for the harmful effects of pollution to directly affect the applicant's home, family or private life. Second, the adverse effects must have reached a certain minimum level, which is not a general level but depends on the relevant circumstances of the case such as the intensity and duration of the nuisance. The Court found that the emissions in the case at hand had a detrimental effect on the applicant's health and enjoyment of her home. It stated that the combined negative effects were of a level that was prohibited under Art. 8. The failure of the State to provide the applicant with an effective solution constituted a violation of Art. 8.[64]

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[61] *Ibidem*, para. 2.

[62] *Ibidem,* para. *5.*

[63] ECtHR, *Hardy and Maile v. the United Kingdom* (App. No. 31965/07), 14 February 2012, paras. 218, 231-232.

[64] ECtHR, *Fadeyeva v. Russian Federation* (App. No. 55723/00), 9 June 2005, para. 133.

As mentioned above, the ECtHR has also considered environmental degradation in light of the right to life protected under Art. 2 ECHR. In *Öneryildiz v. Turkey*,[65] *Budayeva and Others v. Russia,*[66] and *Kolyadenko and Others v. Russia,*[67] the Court decided that there was gross negligence attributable to the state, resulting in the loss of life from environmental degradation. In all three cases it concluded that the State had failed to protect the right to life, and held that activities which caused environmental degradation with potentially lethal effects should be regulated to ensure the protection of the lives of citizens, including ensuring the public's right to information. Furthermore, the ECtHR required that the States involved undertake appropriate procedures to identify the level of shortcomings. The Court found that there was an overlap between the positive obligations under Art. 2 and those discussed above under Art. 8 of the ECHR. In *Budayeva*, the State's positive obligations under the Convention were dependent on the origin of the disaster and whether the risks could be mitigated. The Court continued that where the infringement under Art. 2 was not caused intentionally, the positive obligation to provide an effective judicial inquiry did not always require criminal action. It may be sufficient to have impartial civil administrative or disciplinary remedies.

In light of the cases reviewed above, it would appear that despite the omission of environmental rights in the ECHR, the ECtHR has acted in a manner that combats environmental degradation in reliance on other human rights protected under the Convention. Nevertheless, in the light of the numerous requirements imposed to find a violation of the ECHR through environmental degradation, it is not unreasonable to state that environmental rights *per se* are not protected under the Convention unless there is a violation of the rights of individuals.

The ECtHR has also supported in its case law the so-called "procedural right to a clean environment". As was stated above, the peculiarity of the ECHR is that it does not list the right to a clean environment in itself as among its catalogue of protected human rights. However, it has adopted indirect procedural environmental rights based on the Arts. 8 and 10 ECHR. To a large extent, the jurisprudence of the Court supports the approach taken under the Aarhus Convention.[68] In number of decisions the Court has emphasised the duty of the State to provide access to environmental information as well as environmental procedures which are required to initiate projects, such as EIAs.[69] In the *Guerra* case, for example, the ECtHR held

[65] ECtHR (GC), *Öneryildiz v. Turkey* (App no 48939/99), 30 November 2004.

[66] ECtHR, *Budayeva and Others v. Russia* (App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), 20 March 2008.

[67] ECtHR, *Kolyadenko and Others v. Russia* (App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673), 28 February 2012.

[68] *E.g.* in the case *Budayeva, Tătar v. Romania* (App. No. 67021/01), 27 January 2009.

[69] ECtHR (GC), *Guerra and Others v. Italy* (App. No. 116/1996/735/932), 19 February 1998; ECtHR,

that providing relevant information to the applicants who lived in the vicinity of a factory could have a bearing on the rights protected under Art. 8, which includes the protection of private and family life. Furthermore, the Court held that Art. 10 ECHR, protecting the freedom of expression, prohibits a State from restricting a person from receiving information which others wish to give.[70] It should however be noted that the ECtHR's approach was restricted, and cannot be construed as imposing on a State a positive obligation to collect and disseminate information on its own accord.

In several cases, the ECtHR has considered that "whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8".[71] The participation of those affected by environmental issues is necessary in order to comply not only with Art. 8 ECHR, but with Art. 6 of the Aarhus Convention as well.[72] The rights of information and participation guaranteed by the Aarhus Convention were explicitly recognised by the ECtHR in *Tătar*. The Court held that prohibiting interested persons from obtaining information and participating in environmental decision-making would breach such rights. However, it considered this right of participation to be available only to those persons whose rights have been affected, and not to the general public at large.[73] It must also be mentioned that the EU has bolstered the procedural rights to clean environment through the obligation to conduct an Environmental Impact Assessment (EIA) relating to activities which would result in serious environmental harm. The premises on which EIAs are based are environmental information and public participation in environmental decision-making.[74] Any request for development consent and the information supplied must publicised within a reasonable

Taşkin and Others v. Turkey (App. No. 46117/99), 10 November 2004; *Öneryildiz, Giacomelli v. Italy* (App. No. 59909/00), 2 November 2006; *Tătar*.

[70] *Guerra*, para. 53.

[71] *Taşkin*, para. 118; *Giacomelli*, para. 82.

[72] A. Boyle, *Human Rights or Environmental Rights? A Reassessment*, 7 Fordham Environmental Law Review 471 (2007), p. 496.

[73] *Tătar*, para. 97.

[74] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26 1 (recital 16 and 17):

"(16) Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

(17) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public".

time-frame in order to give members of the public concerned the opportunity to express their opinion before the development is allowed.

The above analysis of the various approaches to the existence and content of the human right to a clean environment shows quite significant differences in adhering to the existence of a human right to a clean environment. The regional courts (the IACtHR has to be especially singled out here) have embraced the existence of such a right, linking it with other conventions and fundamental principles underlying international environmental law (such as the precautionary principle), thus fleshing out its content. The ECtHR on the other hand has made only limited use of the possibility of interpreting some of articles of the ECHR to give effect to an environmental right.

It may be said that the recognition of a separate set of rights to a clean environment (both substantive and procedural) has been a gradual process. The initial debate concerning the existence of such a right was focused on the possible use of the existing catalogue of human rights to offer humans protection from environmental degradation.[75] The critique of the human right to a clean environment has been based on several/various premises. It was considered, *inter alia*, vague and nebulous and that its inherent ambiguity might render such a right meaningless and undermine other human rights. Other arguments against such a right was their lack of enforceability, although the existing enforcement mechanisms in relation to other human rights might be applicable to a human right to a clean environment. It was also observed that a human right to a clean environment is in essence anthropocentric, and thus does not take into consideration the rights of nature. However, as the practice has shown, the human right to a clean environment can and has been interpreted in such a way as to consider the interests of nature. Finally, it has been argued that the focus on a "new" right to a clean environment will divert the attention from the consolidation of other human rights to their detriment. However, emphasising the need to consolidate existing human rights cannot halt the evaluation of new ones.[76] The specificity of a separate human right to a clean environment is often established within environmental justice and ethics discourses, inasmuch as they concern environmental stewardship for future generations, and thus from this special perspective merit their own legal existence.

The concept of legal stewardship is also relevant in connection to debates of ecocide and cultural genocide, which is environmental degradation resulting in the deterioration of the way of life and livelihood of a particular ethnic group.[77]

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[75] A. Boyle, *The Role of International Human Rights Law in the Protection of the environment*, in: A. Boyle, M. Anderson (eds.), *Human Rights Approaches to environmental Protection*, Oxford University Press, Oxford: 1996, p. 43.

[76] Scobie, *supra* note 2, pp. 15-16.

[77] *Ibidem*, p. 13.

The UNGA Resolution and the robust judicial practice of international courts and tribunals appear to confirm that a right to a clean environment already exists, although it is without doubt a still developing area of human rights and international environmental law and its legal nature (both substantive and procedural) is somewhat in a state of a flux. However, its legal content is consistently evolving, which is evidenced by the 2018 *Advisory Opinion* of the Inter-American Court of Human Rights, where this right has been accorded a very far-reaching scope of application.

Here the question arises: Is the Anthropocene a proper and effective framework for a human right to a clean environment? Michelle Scobie has persuasively argued that the Anthropocene is an apt, but imprecise, normative context for the contemporary debate concerning environmental rights. Despite the fact that the concept has a certain usefulness for the legal debate (such as removal of global inequality), overreliance on the concept may incorrectly attribute ecological problems to human actions in general, and "thus mask the differentiated rights and responsibilities of those affected by ecological crisis".[78] According to Scobie, there are two main problems with positioning environmental human rights within the Anthropocene. First, this concept places the victims and perpetrators in the same moral space and hides the problem of various universalist approaches to the environmental crisis. The ecological crisis has resulted from actions of a minority, which the Anthropocene ignores by attributing the crisis to all actors. Scobie further argues that the ecological crisis is not so much anthropocentric, but rather due to the Western political and economic system of unfair allocation of environmental goods and services. Thus, within the Anthropocene system human rights place equal obligations on all societies rather than endeavour to reform Western societies which had created exploitative, capitalist, affluent and destructive social systems.[79] Therefore, the Anthropocene should be replaced by Capitalocene or Plantationnocene. The inequality of human rights and the environment has been much debated in the Global South and has become part of an argument put forward by scholars representing Third World Approaches to International Law (TWAIL). Kotzé, one of most prominent scholars of the TWAIL, has observed that the "'drain of wealth' colonial policies, coupled with distorted educational practices, has negatively impacted human capital accumulation, and societies have been generated that, to this day, are characterized by dysfunctional institutions, rent-seeking elites, and ethnic conflict, often leading to grave human rights abuses and unsustainable developmental practices".[80] There are also other issues which distinguish the Global South from the Global North

[78] *Ibidem*, p. 14.

[79] *Ibidem*.

[80] L.J. Kotzé, *Human Rights, the Environment, and the Global South*, in: S. Alam et al. (eds.), *International Environmental Law and the Global South*, Cambridge University Press, Cambridge: 2015, p. 178.

in relation to approaches to the human right to a clean environment. Kotzé refers to a subtle form of neo-colonialism, which means that Global North countries, using foreign-based extraction companies as conduits, exploit the natural resources of the Global South. Therefore, from the viewpoint of the Global South the environment-human rights discourse is more closely related to core issues of "equity, survival, peace and security, human capital development, and defunct governmental practices".[81] Such a complex situation calls for strong environmental human rights. This is dictated by the need to overcome poor socio-economic conditions, which lead to a very restricted access to indispensable natural resources "in societies that are rife with discrimination, exclusion, and marginalisation [...] and they relate to the need to ensure good governance (as a counterpoint to corruption and exclusionary decision-making)".[82]

3. RIGHTS OF NATURE

It is argued that in order to save the Planet Earth from an Anthropocene catastrophe separate rights need to be granted to Nature.[83] Granting them legal personhood and making the rights defendable before courts and tribunals would be a feasible solution to avert the ecological tragedy.[84] The rights of nature are very closely linked to the beliefs of Indigenous Peoples (if not constituting a part thereof).

The ground-breaking international instrument on the rights of nature (including the Indigenous way of thinking) is the 2010 Universal Declaration of the Rights of Mother Earth, adopted in Bolivia and modelled on the Universal Declaration on Human Rights. The Preamble already signals a uniform approach to nature, stating that:

> [T]he Peoples and nations of Earth: considering that we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny; convinced that in an interdependent living community it is not possible to recognize the rights of only human beings without causing an imbalance within Mother Earth; affirming that to guarantee human rights it is necessary to recognize and defend the rights of Mother Earth and all beings in her and that there are existing cultures, practices and laws that do so.

[81] *Ibidem*, p. 179.

[82] *Ibidem.*

[83] L. Viaene, *Can Rights of Nature Save Us from the Anthropocene Catastrophe? Some Critical Reflections from the Field*, 9 Asian Journal of Law and Society 202 (2022).

[84] *Ibidem.*

This all-inclusive approach is further developed in Arts. 1 and 4 of the Declaration. In particular, Art. 1 proclaims, inter alia, that:

> (6) Just as human beings have human rights, all other beings also have rights which are specific to their species or kind and appropriate for their role and function within the communities within which they exist.
> (7) The rights of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the integrity, balance, and health of Mother Earth.

Art. 4 explains that the term "'being' in the Declaration includes ecosystems, natural communities, species, and all other natural entities which exist as part of Mother Earth". Art. 2 states that "each being has the right to a place and to play its role in Mother Earth for her harmonious functioning; every being has the right to wellbeing and to live free from torture or cruel treatment by Human beings".

Finally, Art. 6 enumerates the rights inherent to Mother Earth:

> Mother Earth and all beings of which she is composed have the following inherent rights: the right to life and to exist; the right to be respected; the right to continue their vital cycles and processes free from human disruptions; the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being; the right to water as a source of life; the right to clean air; the right to integral health; the right to be free from contamination, pollution and toxic or radioactive waste; the right to not have its genetic structure modified or disrupted in a manner that threatens it integrity or vital and healthy functioning; the right to full and prompt restoration for the violation of the rights recognized in this Declaration caused by human activities.

At the national level, the acknowledgment and implementation of the Indigenous way of thinking is very complex and may encounter several difficulties based on the very foundations of the political system, which is not pluralistic but rather dominated by States which may assimilate and dominate Indigenous knowledge. This is exemplified by para. 6 of the Preamble to the Kunming–Montreal Global Biodiversity Framework for the CBD, which states as follows:

> The Conference of the Parties [...] reaffirms its expectation that Parties and other Governments will ensure that the rights of Indigenous Peoples and local communities are respected and given effect to in the implementation of the Kunming-Montreal global biodiversity framework.

Thus, the Conference of the Parties takes into account the rights of Indigenous peoples through the prism of States' actions, not as an independent actor.

The idea of rights for non-humans is not new. In 1972 Professor Stone asked whether trees should have standing.[85] Since then there have been numerous developments, in particular in national laws, vesting rights to nature generally or to particular subjects, such as rivers. From the legal perspective, a distinction should be made between general constitutionally granted rights of nature and specific subjects such as rivers, forests, mountains etc., which are granted specific personhoods.

Ecuador is the first State in the world to include the Rights of Nature and recognise *Pachamama* (*Quechua for Mother Earth*) and *Sumak Kawsy* (Buen Vivir, Living Well) in its 2008 Constitution. The Plurinational State of Bolivia enshrines the Aymara Indigenous principle of *Suma Qama~na* (Living Well) in its 2009 Constitution. It adopted a Law on the Rights of Mother Earth (No. 71 of 2010), updated by a Framework Law of Mother Earth and Integral Development for Living Well.[86] The Law has established an autonomous entity – the Plurinational Authority of Mother Earth – under the Ministry of Environment and Water to formulate policies, plan technical management, execute strategies, programmes and projects, and manage financial resources for climate change.[87] The Law has defined an integral development – which combines harmony and equilibrium with Mother Earth for Living Well – to secure the continuity of and the capacity of regeneration of Mother Earth, while at the same time striving to eliminate poverty and inequality. Importantly, the Framework Law acknowledges the role of Indigenous cultures in the definition of "Living Well" and "Integral Development"; however, it provides for mining and hydrocarbon industries (if they use the cleanest technology and are subject to monitoring with the participation of the affected population). Finally, it states that the most important provision is land-use planning, which aims at the management of life in harmony and equilibrium with Mother Earth; and recognises the cosmovision of Indigenous communities, nationalities, and Afro-Bolivian communities.[88]

The rights of nature have been weakened by regulations which allow for the exploitation of natural resources. For example, in Ecuador the Constitutional right of nature has been followed by a 2009 Mining Law (for mining in fragile areas),

[85] C. Stone, *Should Trees Have Standing? Towards Legal Rights of Natural Objects*, 45 South California Law Review 450 (1972).

[86] H. Danzer, *Harmony with Nature: Towards a New Deep Legal Pluralism*, 24 The Journal of Legal Pluralism and Unofficial Law 21 (2021), p. 27.

[87] R. Merino, *Law and Politics of Human/Nature: Exploring the Foundations and Institutions of the Rights of Nature*, in: U. Natarajan, J. Dehm (eds.), *Locating Nature Making and Unmaking International Law*, Cambridge University Press, Cambridge: 2022, p. 321.

[88] *Ibidem*, pp. 321-322.

and the general law of the 2017 Organic Code of Environment, which allows for an exception for extractive activities in protected areas.[89] Indigenous Peoples and environmental activists have criticised the government for twisting the meaning of *Sumak Kawsyto* to fulfil its own agenda.[90] Interestingly, most effective in protecting Nature is the use of other legal mechanisms, such as in 2019 when the Waorani People achieved their landmark legal victory to protect half a million acres of Amazon rainforest based on their Indigenous rights to Free Prior and Informed Consent over oil-drilling in their territory. Danzer has observed that in light of the example of the Waorani People and other similar experiences, "ecosystems have often received greater protection when Indigenous Peoples' rights are recognised".[91]

Ecuador has a general provision of standing for the protection of nature. Any natural or legal person, Peoples, or nationality might initiate legal constitutional and criminal actions before judicial *fora* and use the right of appeal to the proper administrative authority to undertake administrative actions of various kinds. It can be observed that in Ecuador, the rights of nature are located in the centre of the system of administrative protection, in which their explicit recognition has compelled judges and the administration to consider the interests of the environment to a greater extent than in systems of environmental protection based exclusively on the human right to a clean environment.[92] Indigenous movements are very active in initiating court proceedings in relation to various industrial projects. An example is the 2013 case brought (together with environmental and human rights NGOs and affected communities) before the 25th Civil Court in the Pichincha province in relation to suspension of the Condor-Mirador mining project. It was brought against, *inter alia,* the Ministries of Non-Renewable Natural Resources and of the Environment, alleging that mining in this area would affect the right of nature. The claimants have lost the case and appealed to the Inter-American Court of Human Rights (not the national court).[93]

The 2016 decision of the Constitutional Court in Colombia, which accorded personhood to the Atrato River and proclaimed it a legal subject is ground-breaking.[94] The *Atrato* ruling results from a *tutela* filed by the non-governmental organisation Tierra Digna on behalf of various Afro-descendant communities.[95] The river is situated in the department of Choco, with an 87% Afro-descendant

[89] *Ibidem,* p. 318.
[90] Danzer, *supra* note 87, p. 32.
[91] *Ibidem*, p. 33.
[92] Merino, *supra* note 88, p. 319.
[93] *Ibidem*, p. 320.
[94] For a detailed description, *see* P. Weschke, *Rights of Nature in Practice: A Case Study of the Impacts of Colombian Atrato River Decision*, 33 Journal of Environmental Law 531 (2021).
[95] *Ibidem*, p. 535.

population and 10% Indigenous communities. The Court's ruling was a result of illegal gold mining which caused social and environmental issues in the River and the failure of the State to remedy them.[96] The Court recognised the human rights of the Claimants, but in its landmark ruling it also introduced for the first time a non-human natural entity as a subject of rights, and by introducing the concept of biocultural rights of indigenous and Afro-descendant communities it adopted "an explicit ecocentric approach to environmental protection, granting legal personhood to the Atrato River".[97] The ecocentric approach means that Earth does not belong to humans, but rather that humans, along with other species, belong to Earth. Humankind does not own nature; nature is a subject of rights in its own capacity.[98] According to the Court, biocultural rights refer to:

> the rights of ethnic communities to autonomously administer and protect their territories – in accordance with their own laws and customs – as well as the natural resources that constitute their habitat, where their culture, traditions and way of life are developed based on their special relationship with the environment and biodiversity. In effect, these rights result from the recognition of the profound and intrinsic connection that exists between nature, its resources, and the culture of ethnic communities, [...] which are interdependent and cannot be understood in isolation.[99]

According to Weschke, the Court's concept of biocultural rights has not established new rights for Indigenous and Afro-descendant communities, but rather has integrated existing constitutional rights to their natural resources and their culture within one single category, and has acknowledged that multiple forms of life expressed as cultural diversity are inherently linked to the diversity of ecosystems and territories. The Court also emphasised that the relations of the different ancestral cultures with nature, and with the environment in general, actively contribute to biodiversity. Therefore, the Court concluded that the protection of culture (as enshrined in the Constitution of Colombia) implies the protection of biodiversity, and *vice versa*, as they are two sides of the same coin. The Court found that due the organic link between culture and nature, it is necessary for local and Indigenous communities to participate in the framework of management.[100]

As a result of according personhood to the Atrato river, a guardianship body was established, comprising both the Ministry of the Environment and the community

[96] *Ibidem*, p. 538.
[97] *Ibidem*, p. 539.
[98] *Ibidem*.
[99] Cited in Weschke, *supra* note 95, p. 539.
[100] *Ibidem*, pp. 529-540.

guardians.[101] Its work has thus far focused "on the collective and participatory construction of public policies". In addition, the community guardians have invested great efforts in educational and socialisation activities with communities in the territory. In this context, the legal recognition of the river has led to important symbolic effects in terms of enhancing environmental awareness among communities.[102] However, the *locus standi* of the guardians in possible legal proceedings remains a contentious issue.[103]

The most interesting case is that of the Whanganui River in New Zealand. It originated from the Whanganui Iwi Maori Indigenous peoples' claims against the expropriation of the land by the colonial State, rather than asserting the rights of nature to the river.[104] Nonetheless, the 2017 Te Awa Tupua Act has assigned to the river the rights, powers, duties, and liabilities of a legal person and has declared two guardians responsible for maintaining the river's health and well-being: a representative of the New Zealand Government and a representative of the Whanganui Iwi which, based on their genealogical origins, exercise the customary rights and responsibilities in relation to the Whanganui River.[105] The rights of nature can be drawn from the Maori Iwi peoples' beliefs, as they regard all elements of the world as related to each other through *whanaungatanga* kinship ties between living and dead people, nature, and the spiritual world (gods); and that the rights of people and nature are bound together.[106] The Maori people do not recognise anything which "does not recognise any transactional or hierarchical relationship between people and Nature".[107] Subsequently, the Te Urewera forest and Taranaki Maunga (formerly Mount Taranaki) were granted personhood. Nonetheless, the legal framework of these regulations, which are set out within the State's legislative framework, may permit certain extractive activities.[108] However, as Danzer concludes "the outcome of the legal interactions went beyond creating a hybrid concept. The decentring of state dominance in the substance of the legislation is arguably the furthest that a contemporary state has gone to decolonising the relationship between people, the state, and Nature and recognising deep legal pluralism in Earth law".[109]

[101] *Ibidem,* p. 547.

[102] *Ibidem*, p. 548.

[103] *Ibidem*, p. 549.

[104] *See* Danzer, *supra* note 87, p. 34; M. Kramm, *When a River Becomes a Person*, 21 Journal of Human Development and Capabilities 307 (2020). This author has suggested interesting modifications of the existing regulation of the River.

[105] Kramm, *supra* note 105, p. 308.

[106] Danzer, *supra* note 87, p. 34.

[107] *Ibidem.*

[108] *Ibidem*, p. 35.

[109] *Ibidem*.

It may be said that at present, from the points of view of the jurisprudence and States' practice, the rights of nature are not fully recognised in national and international systems, where the dominant approach is still anthropocentric, i.e. that nature is an object (not the subject) and a service provider, regulated by property laws. There is a hierarchical relationship between humanity and nature, with human interests being superior over natural beings. Treating humanity and nature as a single continuum and entity still lies in the future, where human-nature would be the foundation of a new legal order whereby humanity and nature's rights are one category.[110] In order to achieve this, Danzer postulates that a regime of new "deep" legal pluralism (both nationally and internationally) is needed (following New Zealand's example) and must be integrated into a sustainable development concept.[111] "These new global legal developments arrive alongside what appears to be a wholesale re-evaluation of the place of human interests in relation to nature. New Zealand's Te Urewera Act is seen to be novel for its changes to the very nature of property ownership. It is an unequivocal rejection of a human-centred rights regime for protecting nature as property".[112] The rights of nature signal a radical change in our way of thinking, eschewing our anthropocentric legal system.[113]

According to Maloney, "[a] rights-based approach is not just about conferring rights on nature; it is a means of giving legal recognition to nature's inherent worth by recognizing what is already there. In operational terms, it is largely for the purpose of redressing the balance between humans and nature".[114]

The personhood accorded to nature has, however, given rise to a host of questions of a legal nature, which are not yet fully clarified. They have been comprehensively analysed by Pecharroman. For example, what are the legal implications and the meaning of providing legal personhood to nature? This question arises because the definition of legal personhood is not uniform across legal systems. The *locus standi* of nature is also an unresolved issue, which requires that the relevant laws are reconceptualised and reformulated.[115] There is also the issue of enforcement of the rulings concerning the rights to nature, which has proved challenging given the lack of both precedent and of compliance therewith, as evidenced by the ruling concerning Vilcabamba (Ecuador), which has taken many months to be even partially implemented.[116] Finally, Pecharroman raises "the question of how much should we

[110] Merino, *supr*a note 88, p. 331.

[111] Danzer, *supra* note 87, pp. 35-36.

[112] G.J. Gordon, *Environmental Personhood*, 43 Columbia Journal of International Law 50 (2018), p. 52.

[113] M. Maloney, *Australian Earth Laws Alliance. Building an Alternative Jurisprudence for the Earth: The International Rights of Nature Tribunal*, 40 Vermont Law Review 133 (2016).

[114] *Ibidem.*

[115] *Ibidem.*

[116] *Ibidem.*

give up in terms of development in order to respect the rights of nature?" – which means that in practice "establishing the right balance between human development and the respect of nature's rights will prove challenging for the courts".[117]

The identity of Indigenous Peoples is also a very complex matter in international law and human rights law. Without doubt, however, their special relationship with land and natural resources is a part of their spiritual identification with nature. The HRC has contributed greatly to further development of the understanding and the interpretation of Art. 27 of the ICCPR. In its General Comment No. 23, it stated as follows:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[118]

At the same time the 2021 HRC's landmark decision further clarifies the complex issues of Indigenous peoples' identity in relation to cultural identity (and their relation to nature in this respect). The HRC found that Paraguay's failure to prevent and control the toxic contamination of traditional lands of the Ava Guarani peoples due to the intensive use of pesticides by nearby commercial farms violates the Indigenous community's rights and sense of "home". Hélène Tigroudja, a member of the HRC, stated that lands represent home, culture, and the community of Indigenous peoples. Thus serious environmental damages adversely impact Indigenous people's family life and traditions as well as their identity, and can even contribute to the disappearance of their community. It inflicts serious damage on the existence of the culture of the group as a whole. The activities in nearby farms have not only contributed to the destruction of Indigenous community's life stock; affected subsistence crops and fruit trees; impacted hunting, fishing and foraging resources; contaminated the waterways and harmed people's health; but also affected their spiritual identity by the disappearance of the natural resources needed for hunting, fishing, woodland foraging, and Guarani agroecology, and led to the loss of traditional knowledge. The HRC has affirmed for the first time

[117] *Ibidem.*

[118] HRC, *General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, UN Doc CCPR/C/21/Rev.1/Add.5, para. 7. *See also* HRC Communication No. 197/1985 *Ivan Kitok v. Sweden (1988)* UN Doc CCPR/C/33/D/197/1985.

that in the case of indigenous people the notion of "home" should be understood within the context of the special relationship between them and their territories, including their livestock, crops and their way of life such as hunting, foraging, and fishing.[119] This case is an excellent example of how the relationship of Indigenous Peoples with nature is an expression of their identity.

The complex problem of the rights of nature in the Anthropocene still awaits further refinement and clearer legal content and structure, which at the moment remain quite opaque. In many instances (such as New Zealand) the rights of nature have been implemented through indigenous peoples' rights.[120] The concept of biocultural rights is also a possible way forward, as it acknowledges the intrinsic value of nature.

CONCLUDING REFLECTIONS

The issues surrounding the human right to a clean environment and the rights of nature are complex, still developing, and far from being definitively resolved, both in law and philosophy. These areas are still quite nebulous in their content, *locus standi* etc., but it appears that the absolute rejection of their existence is a very harsh and perhaps too far reaching conclusion. For example, Handl, a well-known sceptic of the existence of a substantive human right to a clean environment and the rights of nature, has put forward several arguments in support of his approach.[121] It is correct that the universal human rights treaties do not contain a human right to a clean environment, and in the cases of regional treaties which include it, the enforcement of an environmental human right is very complex. He argues that very often decisions of human rights courts, such as the famous 2018 Advisory Opinion of the IACtHR, are based on vague and nebulous principles of international environmental law. At the same time however, there has been a steady and consistent progress towards the recognition of such a right, culminating in the 2022 Resolution of the UNGA. According to Conclusion 6 of the International Law Commission Draft Conclusions on Identification of Customary International Law, the practice of States can also be inferred from, *inter alia*, resolutions adopted by

[119] HRC, *Paraguay: Failing to prevent contamination violates indigenous people's right to traditional lands*, 14 October 2021, available at: https://www.ohchr.org/en/press-releases/2021/10/paraguay-failing-prevent-contamination-violates-indigenous-peoples-right (accessed 30 April 2023).

[120] P. Gottschalk, *Taking environmental Rights in the Anthropocene Seriously. The Case of Biodiversity and Nagoya Protoco*l, in: W.F. Barber, J.R. May (eds.), *supra* note 2, p. 52. *See also* M. Hulbert, *Environmental Rights through Indigenous Rights*, in: W.F. Barber, J.R. May (eds.), *supra* note 2, p. 132.

[121] G. Handl, *The Human Right to a Clean Environment and the Rights of Nature. Between Advocacy and Reality*, in: A. von Arnauld, K. von der Decken, M. Susi (eds.), *The Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric*, Cambridge University Press, Cambridge: 2020, p. 137.

international organisations.[122] While they should be approached with due caution, the resolutions of the General Assembly and the statements of representatives in the course of debates can nevertheless express the *opinio juris* of States (especially if adopted by consensus),[123] and thus constitute important evidence of a global will on the part of States participating in the adoption of such a resolution.

The UNGA Resolution recognizing the right to a clean, healthy, and sustainable environment as a human right was adopted by vote of 161 in favour, zero against. Only eight Member States – Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, the Russian Federation, and Syria – abstained.

The author of this article is of the view that even considering the weak and ill-defined normative content of such a right and the questions arising in relation to its implementation and enforcement, the practice of States and judicial decisions may justify the suggestion that even if such a right is not yet fully established and developed, it is in its incipient stages of being created. The relationship between human rights and the environment – a question distinct from the protection of the environment *per se* during armed conflict[124] – is nonetheless further strengthened by International Humanitarian Law, which has been developing norms on protection of the environment during armed conflict, culminating with the adoption by the International Law Commission (ILC) in 2022 of Draft Principles on Protection of the Environment in Relation to Armed Conflicts.[125] Its Preamble states that it is: "[a]ware of the importance of the environment for livelihoods, food and water security, maintenance of traditions and cultures, and the enjoyment of human rights".

Historically, a link between human rights and environmental protection during armed conflict could have been inferred from various provisions, such as the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, which states in. Art. 55 that "forests and agricultural estates are to be protected because

[122] Adopted at the 70th session of the ILC, submitted to the UNGA, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf (accessed 30 April 2023).

[123] S.M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law,* Proceedings of the Annual Meeting (American Society of International Law), vol. 73 (26-28 April 1979), pp. 301-309. *See also* T. Treves, *Customary International Law,* Max Planck Encyclopedia of Public International Law, November 2006, available at: https://tinyurl.com/yju8zz4s (accessed 30 April 2023), paras. 44-46, 50.

[124] In this connection Art. 8.2 (b)(IV) of the Rome Statute must be mentioned:

"2. For the purpose of this Statute, 'war crimes' means: [...]

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...]

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".

[125] Adopted by the ILC at 73rd session and submitted to the UNGA, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf (accessed 30 April 2023).

of their indispensable value in supporting human life". This provision was applied after the Second World War in relation to German industrialists with respect to their over-exploiting of Polish forests for timber during the period of occupation.[126]

While judicial practice (both national and international) based on regional human rights treaties is indeed quite scarce and also varied, nonetheless it has greatly contributed (especially within the Latin American context) to the process of developing such a right to a clean environment. However, it must be stated that the ECtHR has evidenced a very restrictive approach towards interpreting the articles of the ECHR to give an effect to an environmental right.

While indeed universal human rights treaties, such as International Covenant on Political and Civil Rights (ICPCR), generally do not contain a right to a clean environment, the HRC, its monitoring body, has dealt with these issues. In 2019, in the *Portillo Cáceres v. Paraguay* case, it analysed the question of the States' duty to protect individuals from environmental degradation under Arts. 6 (right to life) and 17 (protection of the family) of the ICPCR. As was stated above, in 2018 the HRC adopted the General Comment No. 36 on the Right to Life, which stated that: "The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include [...] degradation of the environment" (para. 26). Reeh has commented as follows: "The Committee used strong language, stating that international tribunals have found an 'undeniable link' between environmental protection and human rights, thus following the approach of the IACHR, and called their practice 'established' (paras. 7.3, 7.4)".[127] The HRC has opined that "there is generally an undeniable link between the protection of the environment and the realization of human rights".[128] Therefore, while not unequivocally proclaiming a human right to a clean environment, it did however link existing human rights in the ICPCR to preventing environmental degradation, and substantiated its approach by the practice of regional human rights courts.

The focus on development of the environment is best exemplified by the evolution and practical implementation of the concept of intergenerational equity. When

[126] A. Afriansyah, *The Adequacy of International Legal Obligations for Environmental Protection During Armed Conflict*, 3(1) Indonesia Law Review 55 (2013), p. 57.

[127] G. Reeh, *Human Rights and the Environment: The UN Human Rights Committee Affirms the Duty to Protect*, EJIL: Talk!, 9 September 2019, available at: https://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/ (accessed 30 April 2023); E. Brown-Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, United Nations University, Tokyo: 1988.

[128] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf.

Brown-Weiss published her seminal monograph on this subject in 1988, the views on the practical implementation of such a concept were quite varied. However, at present intergenerational equity has been relied on by both international and national courts, and the institution of an ombudsman for future generations has become an established institution in many States.[129]

Handl is similarly sceptical regarding the rights of nature, hinging his view on a concept of the intrinsic value of nature which, according to him, is the process of ascribing rights to nature which are eminently human-centred. In order to shift from such an approach it is necessary to adopt a pluralistic system of granting rights to nature. As Dancer persuasively observed:

> The New Zealand model offers the closest example to date as to how a loosening of legal hierarchies towards deep legal pluralism may be achieved within a national legal order. However, the impetus for this approach came from the fight for Indigenous Peoples' rights, rather than taking the Rights of Nature as the starting point. In other contexts, states will need to find ways of recognising Nature as a legal subject in a way that decentres the state irrespective of whether Indigenous Peoples' interests are bound with the land in question...[n]ew deep legal pluralism is needed, which recognises Nature as subject and decentres the state in favour of an equitable sharing of power over human-Earth relations. The aim should be to find context-specific power-sharing solutions that protect and respect Nature, human rights and relationships with the Earth, and legal and cultural diversity. This could ultimately lead to radical shifts in legal cultures and hierarchies. The integrity of a move towards Earth law depends on a pluralist approach that recognises and promotes the diversity of worldviews and looks for common ground between them.[130]

Thus, the way forward is to abandon the inherently anthropocentric approaches to nature and shift the focus away from nature as a service provider, acknowledging

[129] E. Brown-Weiss, *Intergenerational Equity,* Max Planck Encyclopedia of Public International Law, April 2021, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1421?print (accessed 30 April 2023).

[130] Dancer, *supra* note 87, pp. 35, 36.

the role of indigenous peoples but granting the intrinsic rights to nature independently of just their interests.[131]

Dancer postulated that at the international level Rights of Nature should be integrated into existing international environmental law such as the CBD.[132] This happened in December 2022 (see above).

In the view of this author, many significant developments relating to the human right to a clean environment and the rights of nature have taken place. There is certainly an evolution toward acknowledging a substantive human right to a clean environment, exemplified by the (non-binding) Resolution of UNGA. At the same time however, it remains undisputedly true that the content of such a right is vague, not very well defined, and difficult to implement and enforce. Even if such a right exists in a catalogue of human rights listed in a human rights treaty, the question arises whether it can be invoked as a self-standing right before an international or national court or tribunal. In the *Ogoni case*, it was just one of the grounds for lodging the case, together with many other rights invoked with an acknowledged normative content.

The same reflections are related to the rights of nature. The question of their locus standi, economic policies, and conflicting interests weaken any imminent world-wide establishment and implementation of such rights. It may be said however that the recent decision of the COP 15 of the CBD is a harbinger of change. Therefore, to play a significant role in the Anthropocene era, many significant social, economic and cultural issues will have to be resolved, such as the differentiation between human actors in remedying the decline in ecology, therefore acknowledging the division between North and South.[133] Thus, the full acknowledgement of such rights – both a human right to a clean environment and the rights of nature – will take many years to be fully established and crystallised.

[131] *Ibidem*, p. 35.

[132] *Ibidem.*

[133] J. Rose, M. Wewerinke-Singh, J. Miranda, *Primal to Anthropocene: Narrative and Myth in International Environmental Law*, 66 Netherlands International Law Review 463 (2019).

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AGE ASSESSMENT: POLISH PRACTICE AND INTERNATIONAL STANDARDS

Abstract: *This article addresses the legal aspects of assessing the age of foreign minors. It is a juxtaposition of the development of international legal standards in this area with the law and practice of the Polish authorities. The basic thesis of this analysis is the statement that Polish law in its current form requires fundamental change with respect to at least three elements. First, it is necessary to extend the methods of age assessment to also include non-medical methods. Secondly, the law should clearly define the legal form in which the age of a foreigner is determined and, at the same time, impose an obligation to provide a foreigner with the results of the assessment. Thirdly, a person concerned should have a direct opportunity to appeal.*

Keywords: age assessment, unaccompanied children, international protection

INTRODUCTION

Currently, Poland is facing two migration-related humanitarian crises. The first, which has been developing since August 2021, is related to the influx of foreigners in an irregular situation from Belarus.[1] The second is related to the armed conflict in Ukraine and the necessary protection of displaced persons. One aspect of these phenomena concerns the situation of undocumented and unaccompanied children. Providing them with adequate protection relies on their proper identification as minors. Therefore, even though it seems to be only one of many elements of migration or international protection procedures, age assessment is of fundamental importance.

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[1] For a legal commentary on the law and the reaction of the Polish authorities to this crisis, see studies in: W. Klaus (ed.), *Beyond the Law. Legal assessment of the Polish state's activities in response to the humanitarian crisis on the Polish-Belarusian border*, ILS PAS, Warsaw: 2022.

The term "age assessment" refers to any activities undertaken by state authorities to establish an individual's chronological age; or the age range of a person; in particular in cases to determine whether an individual is an adult or a child.[2] It should be underlined that age could be assessed by the variety of measures, which include: searching for documents, contacting embassies, verifying specific circumstances in the country of origin, interviewing the foreigner, conducting psychological examinations, and finally a medical examination.[3]

From the legal point of view, the use of age assessment techniques requires the reconciliation of two important circumstances. On the one hand, this term should not be understood as a "determination" of age. If there is no available, credible documentation, it is impossible to establish the exact age of a person and any assessment will be subject to a degree of inaccuracy. On the other hand, in the case of children the individual's age should be estimated as accurately as possible, because many legal solutions are connected with the specific age or maturity of the child.[4]

These considerations give rise to the within analysis of the legal provisions and juridical documents of the Polish Border Guard. They are aimed at determining not only the *content* of the legal norms applied, but also the *practice* of their application in Poland. At the same time, the comparative method also involves the juxtaposition of these elements with a certain desirable state of affairs, which results from international legal standards. At the international level, there are a growing number of soft law documents and rulings of treaty bodies which develop the substantive and procedural standards in this field. A special inspiration for these considerations is the recent judgment of the European Court of Human Rights (ECtHR) in the case of *Darboe and Camara v. Italy*.[5] While this was not the first time that the issue of age assessment appeared in the Strasbourg case law,[6] it deserves particular attention for two reasons. First, in this case the only method used to assess the applicants' age was a wrist X-ray,[7] which largely corresponds to the Polish practice. Secondly,

[2] Parliamentary Assembly, *Resolution 2195(2017) on child-friendly age assessment for unaccompanied migrant children*, 24 November 2017, para. 2.

[3] For a detailed description of these methods together with an indication of the bibliography see, *inter alia*, EASO, *Practical guide on age assessment* (2nd ed.), 2018, pp. 47-51; T. Smith, L. Brownlee, *Age assessment practices: A literature review & annotated bibliography*, Discussion Paper, UNICEF: 2011, pp. 13-18.

[4] For a legal justification of the use of age assessment, *see* J. Markiewicz-Stanny, *Age assessment procedures and the protection of children's rights: an analysis of international standards*, in: M. Półtorak, I. Topa (eds.), *Women Children and (Other) Vulnerable Groups. Standards of Protection and Challenges for International Law*, Peter Lang, Berlin: 2021, pp. 287-290.

[5] ECtHR (GC), *Darboe and Camara v. Italy* (App. No. 5797/17), 21 July 2022.

[6] ECtHR, *Ahmade v. Greece* (App. No. 50520/09), 25 September 2012, paras. 77 and 78; *Mahamed Jama v. Malta* (App. No. 10290/13), 26 November 2015; *Abdullahi Elmi and Aweys Abubakar v. Malta* (App. Nos. 25794/13 and 28151/13), 22 November 2016.

[7] It should be noted that in the time between the lodging of the complaint and its examination by the ECtHR, the Italian system concerning age assessment changed fundamentally. On 7 April 2017 the Italian

the ECtHR set out important procedural safeguards that should apply to the age assessment procedure. As will be explained in more detail below, these rules do not seem to be respected in Poland.

1. POLISH LAW AND PRACTICE

1.1. General remarks

Before discussing the regulations concerning age assessment, it should be pointed out that the legal status of third-country nationals in Poland is subject to two different legal regimes. One of them covers children with Ukrainian citizenship who came from the territory of this country after 24 February 2022. The situation of these minors is regulated by The Act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of that state (Act on Assistance).[8] Pursuant to its provisions, every person who has the citizenship of Ukraine and arrived from the territory of this country after 24 February 2022 has the right to legally stay in Poland (Art. 2(1)) and enjoys temporary protection (Art. 2(6)). It should be noted that this act implements EU law concerning temporary protection, which provides obligations on the part of Member States towards persons enjoying this status.[9]

It is noteworthy that a vast majority of children from Ukraine are documented, hence the legal issues that are identified in their cases are not related to age assessment. Even if there are some deficiencies, it is possible to remove them as a result of cooperation with the consular authorities of Ukraine. In practice, in the cases of Ukrainian children, problems with determining parental authority and the right to custody are most common, because many of them stay in Poland under the care of adults other than their parents. Although Polish law requires this situation to be

Parliament adopted the Law No. 47 entitled "Provisions on Protective Measures for an Unaccompanied Foreign Minor" (the so-called "Zampa Law") [Legge 7 aprile 2017, n. 47, Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati], G.U. Serie Genrale n. 93, del 21-04-2017. *See more* A. Maneggia, *The Principle of the Best Interests of the Child in the Italian System of Protection of Unaccompanied Migrant Children*, in: J. Markiewicz-Stanny, T. Milej, A. Wedeł-Domaradzka (eds.), *Children in Migration: Status and Identity*, Nomos Verlag, Baden-Baden: 2022, pp. 246-253.

[8] Ustawa o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa [The Act on assistance to Ukrainian citizens in connection with armed conflict on the territory of that state], Journal of Laws 2022, item 583.

[9] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212, p. 12-23; Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L 71, p. 1-6.

regulated by the institution of so-called 'temporary guardianship' (Art. 25 of the Act on Assistance), a large group of Ukrainian people have not fulfilled this obligation.[10]

Temporary protection solutions do not cover persons who came from the territory of Ukraine but do not have Ukrainian citizenship. Published studies show that although such minors have documents and their age is known, they still experience issues with regulating their right to stay on the territory of the Republic of Poland.[11]

The problem of a lack of documentation particularly concerns minors crossing the Polish-Belarusian border. This is partly due to passports and other travel documents having been confiscated by smugglers or Belarusian officials. According to the statistics of the Border Guard in Poland, 7,374 people applied for international protection in 2022. In the same year, 207 minors were detained in Guarded Centres, including 45 unaccompanied minors.[12] As of today, there is no data on the number of people subjected to the age assessment procedure. The Border Guard does not collect such information.[13]

The conditions and rules for determining the age of third country nationals are contained in two acts: the Aliens Act (AA),[14] which applies to foreigners in return procedures, and the Act on granting protection to foreigners within the territory of the Republic of Poland (AGP),[15] which applies to asylum seekers. In addition, the Statement of the Board for Foreigners of the Border Guard Head Command of 9 December 2016 on the age assessment of foreigners (Statement of BGHC)[16] is worthy of particular attention here. It is an internal document, one which does not belong to the catalogue of generally applicable regulations in Poland.[17] It is addressed to Border Guard officers and cannot be a source of rights and obligations

[10] *See more broadly* A. Tymińska, *Dzieci z pieczy zastępczej oraz małoletni bez opieki z Ukrainy: ocena ex-post regulacji i praktyki stosowania specustawy ukraińskiej* [Children from foster care and unaccompanied minors from Ukraine: ex-post evaluation of the regulations and practice of applying the Ukrainian Special Act], HFPCz, Warszawa: 2022, available at: https://tinyurl.com/yc87zhxz (accessed 30 April 2023), pp. 46-68.

[11] *Ibidem*, pp. 29-30.

[12] Letter of the Commander-in-Chief of the Border Guard from 17 January 2023, KG –OI-VIII.0180.184.2022, p. 1.

[13] Letter of the Commander-in-Chief of the Border Guard from 9 February 2023, KG-OI-VIII.0180.184.2022.BK, pp. 10-11. This document was obtained by the author from the Helsinki Foundation for Human Rights.

[14] Ustawa o cudzoziemcach [Aliens Act], Journal of Laws 2013, item 1650, consolidated text Journal of Laws 2021, item 2354, as amended.

[15] Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [Act on granting protection to aliens within the territory of the Republic of Poland], Journal of Laws 2003, No. 128, item 1176, consolidated text Journal of Laws 2022, items 1264, 1383 as amended.

[16] It should be noted this is a conventional name chosen by the author, as this document is not officially entitled or described - Document from 16 December 2016, signature FAX-CU-8301- II/IW/16. This document was obtained by author from the Helsinki Foundation for Human Rights.

[17] See the catalogue of sources of law in Art. 87 of the Constitution of Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended.

for anyone else. Nevertheless, it is a very important document, serving as the main point of reference for officers in their daily work.[18] It is also worth mentioning here that this document does not differentiate between the rules for determining age in return procedures and in international protection procedures. This is difficult to understand, given that the Polish legislator clearly differentiated the situation of foreigners in these two procedures and the regulations concerning these two acts differ in this respect.

1.2. Substantive norms

In the Polish legal framework, the general rule is that age assessment should be done only in cases of doubt about the age of an individual claiming to be a minor (Art. 397(4) AA; Art. 32 AGP). In both acts the authority responsible for age assessment is the Border Guard. In the return procedures, age assessment is limited to cases where a foreigner claiming to be a minor is admitted to a guarded centre or arrest for foreigners (Art. 397(4) AA). This is understandable because detention is permissible only if an unaccompanied child is 15 years old or older (Art. 397(3) AA). Additionally, a minor foreigner staying in a guarded centre without a guardian or related adults should be placed in a separate part of the centre (Art. 414(4) AA).[19]

In international protection procedures, age assessment should be done in each and every situation where the Border Guard authority has doubts as to the age of the applicant, either on the basis of the declarations made by the applicant claiming to be an unaccompanied minor or on the basis of other unclear circumstances. According to Art. 32(1) AGP, these procedures are aimed to determine the actual age of the applicant. What is worth noting, in next part of the same article (namely in para. 5) it is stated that the intended result of the medical examinations is to indicate whether the applicant is an adult (Art. 32(5) AGP). Undoubtedly, Polish legislation is inconsistent on this point. There is a fundamental difference between efforts to assess if a person is either 16 or 17 years old, and a general statement about their minority or majority.

Both laws make no mention of a search of documents, and consequently do not indicate that a medical examination should be a last resort. Of course, it can be considered that the stage of checking and searching for documents has been omitted because the obligation to perform these activities results from other regulations. Interestingly however, these elements are present in the Statement of BGHC. Accord-

[18] See the interesting findings on the attitude of Border Guard officers that they tend to assign a hierarchy of norms, and the syndrome of reversal of normative hierarchy, P. Tacik, *Law, Life, Impossibility: Theorising 'Law Application' in Detention Centres for Foreigners*, 4(186) Studia Migracyjne. Przegląd Polonijny 35 (2022), pp. 42-44.

[19] According to Art. 88a(3)(3) AGP detention of unaccompanied children seeking international protection is prohibited.

ing to this document, a medical examination is carried out only when determining the age of a foreigner is not possible on the basis of the collected documentation or checks in the VIS system.[20] It should be postulated that this rule should be worded directly on the level of acts generally applicable in Poland.[21] Additionally, the Statement of BGHC includes the rule that if, as a result of identification activities, a travel document or official correspondence was obtained that contains personal data of the person, including the date of birth, the data in that document are final and binding regardless of the outcome of previous findings. These guidelines appear to be applicable in practice. In 2022, the Polish Border Guard (Odra Border Guard Unit) recorded several cases of minors who claimed to be adults and were detained in the Guarded Centre for Foreigners in Krosno Odrzańskie. This centre is for male adults only. The fact that the foreigners were children was established as a result of identity verification in diplomatic representations of their countries of origin. After obtaining information that the foreigners were minors, actions appropriate to their legal situation were immediately taken. This means that the children were either released or transferred to the Guarded Centre in Kętrzyn (suitable for children), or placed under institutional care.[22]

Polish regulations only generally indicate that foreigners are subject to medical examinations, and is silent about personal reviews and psychological observations, which are based on perceptions of a person's physical appearance, maturity, and psycho-social development. Such assessments are conducted by professionals working within the immigration or care authorities in Germany,[23] Norway,[24] the United Kingdom,[25] and France.[26] Therefore, it can be concluded that Poland belongs to

[20] Regulation (EC) No 767/2008 of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) [2008] OJ L 218, p. 60-81.

[21] *See e.g.* in Austria Art. 13(3) of the Federal Office for Immigration and Asylum Procedures Act; Art. 29(4) of the Settlement and Residence Act; in Croatia *see* Art. 217(5) of the Aliens Act, Art. 18(2) of the Act on International and Temporary Protection.

[22] The Letter of Commander Odra Border Guard Unit, 3 March 2023, NO-OI-II.0180.2.2023, p. 4. Document obtained by the author from the Helsinki Foundation for Human Rights.

[23] *See* para. 42f of the Sozial Gesetzbuch (Achtes Buch), 26 June 1990, recently amended 21 December 2022, Bundesgesetzblatt 2022 Teil I, No. 56, 28.12.2022, p. 2824.

[24] A.T. Sørsveen, M. Ursin, *Constructions of 'the ageless' asylum seekers: An analysis of how age is understood among professionals working within the Norwegian immigration authorities*, 35 Children and Society 198 (2021), p. 203.

[25] *See* Nationality and Borders Act 2022, 2022 Chapter 36, part 4, section 50-52, text available https://www.legislation.gov.uk/ukpga/2022/36/enacted; Guidance as to the requirements of a lawful assessment by a local authority of the age of a young asylum seeker could be found in the so called Merton Case: *B v. London Borough of Merton* [2003] EWHC 1689 (Admin); additionally the Home Office has published *Age assessment joint working guidance,* March 2023, available at: https://tinyurl.com/bdehemv2 (both accessed 30 April 2023).

[26] *See* Art. 222 - R.11 Code de l'action sociale et des familles [Family and Social Code], text available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006074069/; Arrêté du 20 novembre 2019 pris en application de l'article R. 221-11 du code de l'action sociale et des familles relatif aux modalités de l'évaluation

a group of those European countries that do not apply a holistic or multidisciplinary approach to age assessment.[27] Other such countries include Bulgaria, Czech Republic, Hungary, Latvia, Lithuania,[28] Slovakia,[29] and Finland.[30]

Polish provisions on granting international protection mention that medical examinations shall be carried out in a manner that respects the applicant's dignity, using the least invasive examination technique possible (Art. 32(4) AGP). The wording of Art. 397(4) AA provides no details related to the way and methods of performing the medical assessment of age. Findings published in the report of the Polish National Mechanism for the Prevention of Torture (NMPT) deserve attention in this regard.[31] Its representatives examined the files of some foreigners detained in guarded centres in Poland – in particular they analysed the personal documentation of individuals whose age was estimated as 18 or 19 years. They found that the X-ray examination of the wrist was used in most cases.[32] Nevertheless, it should be noted here that other methods are used as well in Poland. For example, cases of dental examination of the mouth and dentition, or pantomographic X-ray examination are recorded. In some cases, two examinations were used even though only one expert was involved.[33]

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des personnes se présentant comme mineures et privées temporairement ou définitivement de la protection de leur famille. *See also*, a guide for services in charge of age assessments published by the authorities in 2019, in order to harmonise current practices: Guide de bonnes pratiques en matiere d'evaluation de la minorite et de l'isolement, des personnes se déclarant comme mineur(e)s et privies temporairement ou définitivement de la protection de leur famille Décembre 2019, text available at: https://sante.gouv.fr/IMG/pdf/guide-de-bonnes-pratiques-en-matiere-d-evaluation-de-la_minorite-et-de-l-isolement.pdf (both accessed 30 April 2023).

[27] According to the European Asylum Office, a multidisciplinary approach for the purpose of age assessment would imply the exploration of different aspects or factors, e.g. of a physical, psychological, developmental, environmental and cultural nature. Conversely, an age assessment process based solely on medical methods cannot be considered multidisciplinary – see EASO, *EASO Age assessment practices in EU+ countries: updated findings,* July 2021, p. 8, ftn 4.

[28] In Lithuania, X-ray examination remains the only method used to assess the age of an unaccompanied minor According to the ruling of the Supreme Court of Lithuania of 14 July 2015 in civil case No e3K-3-412-690/2015, such an age assessment test is considered to be sufficient in legal practice.

[29] See more broadly the European Migration Network (EMN), *Ad hoc query on 2021.10. Unaccompanied minors - age assessment methods used by Member States Requested by EMN NCP Czech Republic on 18 February 2021*, available at: https://tinyurl.com/2sp6kat3 (accessed 30 April 2023).

[30] Dental examination is also used in Finland, but it should only be done by two experts – compare Section 6b, Aliens Act 30.4.2004/301, published in https://www.finlex.fi/fi/laki/ajantasa/2004/20040301 (accessed 30 April 2023).

[31] H. Machińska, M. Kusy, P. Kazimirski (eds.), *Sytuacja cudzoziemców w ośrodkach strzeżonych w dobie kryzysu na granicy Polski i Białorusi Raport z wizytacji Krajowego Mechanizmu Prewencji Tortur* [Condition of foreigners in guarded centers during the period of crisis on the Polish-Belarusian border. Report on the visit of the National Mechanism for the Prevention of Torture], RPO, Warszawa: 2022, available at: https://tinyurl.com/42vwvp38 (accessed 30 April 2023).

[32] *Cf. ibidem*, p. 23.

[33] The Letter of Commander Odra Border Guard Unit, *supra* note 22, p. 3.

There are no specific legal regulations authorising a particular medical institution to perform examinations.[34] In practice, the request is directed to the nearest specialised medical centre.[35] Also, no information is collected on the competence of the physician(s) conducting the examinations.[36]

The representatives of the NMPT reported that in the case of some foreigners, there was no information about the examination conducted, even though their date of birth was marked as 1 January 2003, a date used by the Border Guard to mark persons whose declared date of birth indicated their minority, but who were determined to be adults. This means they were considered to be over 18 years of age, but the basis for such an evaluation is unknown.[37]

Importantly, in Poland there are no specific solutions determining how many examinations should be performed. In practice, one examination made by one expert is usually deemed sufficient. In comparison, some EU countries either use or combine multiple medical examinations.[38] In Austria, for example, a multifactorial examination technique is based on three individual medical examinations: physical, dental, and X-ray examinations.[39]

The Polish Aliens Act states that the results of such an examination should include information about the margin of error (Art. 397(4), last sentence). However, this requirement is not connected to any obligation to take said margin of error into account in favour of a foreigner.[40] In the provisions applicable to international protection, the element of the margin of error is, for unknown reasons, omitted by the legislator. Here, the element of ambiguity inscribed in age assessment is present in a different way. Specifically, Art. 32(5) AGP states that the applicant shall be considered a minor when it is impossible to obtain a clear result from a medical examination.

What deserves special attention is that the condition that reports of medical examinations should include information about the margin of error is included in the Statement of BGHC. Moreover, according to this document a foreigner is considered to be a person at the age defined by the lower limit of the estimated age error. In cases when medical examinations estimate the age to be over 18, and the

[34] In some countries there are dedicated centres: Utrecht Forensic Medical Service, X-ray National Forensic Institute in Netherlands; Medical Institute of the Ministry of Interior in Bulgaria; Estonian Forensic Science Institute; National Board of Forensic Medicine in Sweden.

[35] EMN, *supra* note 29, p. 24.

[36] Letter of the Commander-in-Chief of BG, KG-OI- VIII.0180.184.2022.BK, *supra* note 13, pp. 10-11.

[37] *Cf.* Machińska, *supra* note 31, pp. 24-25.

[38] These are Austria, Belgium and Luxembourg.

[39] Art. 2(1)(25) of the Asylum Act 2005.

[40] *See* para. 6.8. of the CoE Parliamentary Assembly, Resolution 2195 (2017). This provision calls on States to always apply the margin of error in favour of the person, such that the lowest age in the margin determined by the assessment is recorded as the person's age.

margin of error shows that such a person may be under 18, such a person is to be treated as a minor. These norms have protective value, and it may be postulated that they should be included in the context of the generally applicable law. This is all the more justified inasmuch as the visiting team of NMPT found only one description of an examination with an indication of the margin of error. In other cases, only laconic information appeared, for example: "The test result clearly indicates that the subject is over 18 years of age".[41] Due to the lack of complete data, it is difficult to assess whether the described situations revealed irregularities which occurred only occasionally, or whether they reflect to a constant practice of infringement of foreigners' rights.

Finally, it should be mentioned that refusal to undergo a medical examination means automatic recognition of the given person as an adult (Art. 397(5) AA, Art. 32(6) AGP).[42]

1.3. Procedural safeguards

In both acts, medical examinations are subject to the consent of the person concerned or their statutory representative (Art. 397(4) AA, Art. 32(2) AGP). The scope of the Aliens Act is limited to the mere statement of the need to express consent. Again, legislation concerning international protection offers more detailed obligations imposed on the State in this field. Prior to the medical examination, the Border Guard authority is obliged to provide information in a language understandable to the minor about the possibility of determining his or her age, the manner in which it will be carried out, the importance of this examination in the procedure for granting international protection, and the legal consequences of the minor's refusal (Art. 32(3)(1-4) AGP). According to both regulations, the refusal to undergo a medical examination results in the recognition of a given person as an adult (Art. 397(5) AA; Art. 32(6) AGP).

It must be stated that Polish law does not include, i.e. lacks, a number of procedural guarantees. There are no provisions related to the way of communicating the examination results. Most crucially, however, the legal form of recognizing a person as an adult or a minor is not determined. This is not clear as it is not mentioned in either act. The legislator regulated neither the legal form of the examination's result itself, nor the formal activities of the Border Guard confirming on this basis that a given person is of a certain age. As a consequence of this omission, there are no legal provisions offering remedies that enable the results of an age assessment to be

[41] *Cf.* Machińska, *supra* note 31, pp. 24-25.

[42] A similar approach to refusal is in place in Denmark, Hungary, Finland, Netherlands, Slovakia and Slovenia. In other countries refusal is not automatically connected with recognition of having majority age (*see* EASO, *supra* note 27, p. 12).

directly questioned.[43] It seems that the activities of the Border Guard officers in this regard should be classified as actions aimed at establishing the facts in both return proceedings and international proceedings. Thus, the possibility of questioning an age assessment should be sought, for example, by challenging the decision on granting international protection, or by questioning the legality of detention in return procedures.

2. INTERNATIONAL LAW AND EU LAW

2.1. Substantive standards

At the international level, the rules of age assessment are developed on the basis of three groups of legal provisions: general human rights treaties;[44] the Convention on the Rights of the Child (CRC);[45] and international refugee law standards.[46] In the EU law this issue is regulated directly in Art. 25(5) of the Directive on common procedures for granting and withdrawing international protection.[47] However, it should be noted that the scope of these EU solutions is limited to unaccompanied children and medical examination conditions.

An indispensable condition of the lawfulness of an age assessment is the existence of its legal basis as well as its legitimate purpose.[48] From the perspective of children's rights, both of these elements are defined by the overarching point of reference, that is, the best interests of the child.[49] An age assessment should not be used routinely and it is postulated that it be used as a measure of last resort.[50] Therefore, migration management is not a sufficient ground in and of itself for taking such actions.[51]

[43] For example in Italian Law the final decision about the age of the minor is adopted by the Juvenile Court and may be challenged in a judicial manner, see Art. 19bis(10) of the Legislative Decree No. 142 of 18 August 2015 implementing Directive No 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

[44] Arts. 7, 9, 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms,; International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered in force 23 March 1976), 999 UNTS 171 and 1057 UNTS 407.

[45] Convention on the Rights of the Child (signed on 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Arts. 3, 8 and 12.

[46] UN High Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, February 1997.

[47] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ EU L 180/60.

[48] Markiewicz-Stanny, *supra* note 4, p. 291.

[49] Art. 3 CRC; EU Charter of Fundamental Rights and Freedoms Art. 24.2; Asylum Procedure Directive, Recital 33 and Art. 25(6); Reception Conditions Directive, Art. 23(1)(2); *Darboe and Camara v. Italy*, para. 139.

[50] Separated Children in Europe Programme, *SCEP Statement of Good Practice*, March 2010, 4th Revised Edition, available at: https://www.refworld.org/docid/415450694.html (accessed 30 April 2023), para. D5; Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration A/HRC/15/29, 5 July 2010, para. 44.

[51] *Cf.* D. Wenke, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, CoE, Strasbourg: 2017, p. 13.

An immanent component of the criterion of legality is the certainty of law and its content being in compliance with the rule of law. This means, *inter alia*, that the law should be accessible, which is understood primarily as the publication of legal provisions in the relevant official journals.[52] This criterion seems to be not met in Poland, as some elements of age assessment are based on internal regulations that have not been published or otherwise made available.[53]

There is a consensus that the legitimacy of age assessment is conditioned on the existence of a genuine doubt concerning the age of an individual. What is important to note, however, is that the level of such doubt is described in various ways. Some legal instruments – Art. 25(5) of the Directive for example – refer to the existence of age doubt in general terms,[54] while others indicate that the doubt should be reasonable[55] or substantial,[56] and finally some indicate that the doubt should be serious.[57]

Another aspect of the best interest principle is the requirement that the whole process of assessing a person's chronological age should be based on the presumption that the person is a child.[58] Consequently, these procedures are expected to be child-sensitive,[59] multidisciplinary[60] and include interviews of children in a language the child understands.[61]

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[52] ECtHR, *Al - Agha v. Romania* (App. No. 40933/02), 12 January 2010, para. 89.

[53] *See mutatis mutandis,* ECtHR, *Nolan and K. v. Russia* (App. No. 2512/04), 12 February 2009*,* paras. 98-99.

[54] Art. 25 (5) of Directive 2013/32; UNHCR, *Guidelines on International Protection no 8: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, para. 75; CoE Parliamentary Assembly, *Resolution 2136 (2016) on harmonising the protection of unaccompanied minors in Europe*, 13 October 2016, para. 8.2.5.

[55] *See* CoE Parliamentary Assembly, *Resolution 1810 (2011)*, para. 5.10; CoE Committee of Ministers Recommendation 2022, paras. 26-27.

[56] *See* EASO, *supra* note 3, p. 17.

[57] CtRC, *Concluding Observation on the combined fifth and sixth periodic reports of Spain*, CRC/C/ESP/CO/5-6, para. 45(5)(b); UNICEF, *Age Assessment: A Technical Note*, January 2013, standard 2, p. 12, available at: https://www.refworld.org/docid/5130659f2.html (accessed 22 June 2023); CoE Parliamentary Assembly, Resolution 2449 (2022), *Protection and alternative care for unaccompanied and separated migrant and refugee children*, 22 June 2022, para. 6.6; CoE Parliamentary Assembly, Resolution 2195 (2017), para. 6.1.

[58] *See* the presumption of minority in: Art. 10(3) of the Europe Convention on Action against Trafficking in Human Beings (2005); Art.11(2) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25 October 2007 (Lanzarote Convention); ECtHR, *Darboe and Camara v. Italy*, para. 139; CtRC, General Comment No 6, (2005), *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 31 (i); *see also* CoE Parliamentary Assembly Resolutions: 1810(2011), para. 5.10 and 2195 (2017), para. 6.10; CtRC, *N.B.F. v. Spain*, CRC/C/79/D/11/2017, 27 September 2018, para. 12.3; additionally according to Art. 25(5) of the Asylum Procedure Directive, if the results of a medical age assessment are inconclusive, Member States shall assume that the applicant is a minor.

[59] CoE Parliamentary Assembly, Resolution 2195 (2017), para. 6.

[60] CoE Parliamentary Assembly, Resolution 2136 (2016), para. 8.2.5.

[61] CtRC, *A.L. v. Spain*, para. 12.4.

The basic principle should be to avoid arbitrariness. Age assessment should fulfil the standards of science, security, and fairness.[62] The key issue in this regard is to understand the disadvantages and problems associated with a particular method. The inaccuracies and the wide margin of error of dental examinations and X-rays are now quite widely discussed in the literature.[63] In fact, they are serious enough for the skeletal bone and dental age assessment to be described as "an unethical and unprofessional use of science and medicine for procedures that are both inconclusive".[64] Some health care associations have published recommendations that their members not participate in medical age assessment procedures.[65] Others suggest their involvement only on the condition that individuals' chronological age be assessed in a holistic and multifaceted way.[66] Therefore, in Council of Europe soft law standards it is recommended that age assessment should *not be based exclusively on medical assessment*.[67] In cases against Spain, the Committee on the Rights of the Child (CtRC) unequivocally stated that States should refrain from using bone and dental examinations, which may be inaccurate, contain wide margins of error, and can also be traumatic and lead to unnecessary legal procedures.[68]

[62] Human Rights Committee, Concluding observations on the sixth periodic report of Spain, 24 August 2015, CCPR/C/ESP/CO/6, para. 23.

[63] K. Alshramani, F. Messina, A. Offiah, *Is the Greulich and Pyle atlas applicable to all ethnicities? A systematic review and meta-analysis*, 29(6) European Radiology 2910 (2019), p. 2920; F.M. Mansourvar et al., *The applicability of the Greulich and Pyle atlas to assess skeletal age for four ethnic groups*, 22 Journal of Forensic and Legal Medicine 26 (2014); R.T. Loder et al., *Applicability of the Greulich and Pyle skeletal age standards to black and white children of today*, 147(12) American Journal of Diseases of Children 1329 (1993); T. Smith, L. Brownlee, *supra* note 3, p. 20. For other studies discussing the problem of a medical examination's reliability, see Markiewicz-Stanny, *supra* note 4, pp. 298-299; P. Sauer, A. Nicholson, D. Neubauer, *Age determination in asylum seekers: physicians should not be implicated,* 175 European Journal of Pediatrics 299 (2016), pp. 300-301; The position of the French Ombudsman intervening in the case *A.L. v. Spain*, CRC/C/81/D/16/2017, 31 May 2019, para. 8.4.

[64] R. Mishori, *Case Report The Use of Age Assessment in the Context of Child Migration: Imprecise, Inaccurate, Inconclusive and Endangers Children's Rights*, 6 Children 85 (2019), p. 87.

[65] The French Academy of Medicine, the French National Ethic Committee and the Dutch National Society of Physicians, European Academy of Pediatrics – Sauer, Nicholson & Neubauer, *supra* note 63, p. 302; *see also* the position of the Austrian physicians – AIDA, *Country Report: Austria*, 2016, available at: https://www.asyl.at/files/33/05-aida_at_2016update1.pdf (accessed 30 April 2023), p. 51.

[66] *E.g.* Royal College of Pediatrics and Child Health, *Refugee and asylum seeking children and young people - guidance for paediatricians*, published online: https://www.rcpch.ac.uk/resources/refugee-asylum-seeking-children-young-people-guidance-paediatricians#age-assessment (accessed 30 April 2023).

[67] Resolution 1810 (2011), para. 5.10.

[68] CtRC, *A. L. v. Spain*, para. 12.4; *see also M.A.B. v. Spain*, CRC/C/83/D/24/2017, 7 February 2020, para. 10.6; Concluding observations on the fifth periodic report of France, CRC/C/FRA/CO/5, 23 February 2016, para. 73(b); Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child *on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 4. *See also* the findings of the European Committee on Social Rights, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, Decision of 15 June 2018, para. 113.

At the same time non-medical methods, used exclusively or in isolation, are not perfect as well.[69] Scientific research has proven that professional evaluation is often determined by an ethnocentric perception of childhood when it comes to appearance, body language, and narratives of life experiences. The same applies to other than chronological ways of dating birth.[70] For these reasons, the most appropriate approach seems to be to combine non-medical and medical examinations and make a comprehensive assessment of the child's physical and psychological development.[71]

The method of conducting the examination itself should be consistent with the rules of objectivity, independence, and professionalism.[72] As Sauer, Nicholson and Neubauer rightly observed, medical personnel participating in age assessment become part of the legal procedures that affect the fate of asylum seekers. This raises the problem of loyalty and potential violation of the Hippocratic oath. One of the other interesting questions posed by these authors is the unclear scope of physicians' responsibility for the unjustified return of persons mistakenly recognized as adults.[73]

The margin of error inherent in medical examinations should always be taken into account,[74] but it is worth noting that this element is not present in Art. 25(5) of Directive 2013/32. This provision includes another type of safeguard, namely if the results of age assessment do not provide a clear answer as to whether the person is a minor, the benefit of the doubt should apply.[75] The CtRC is of the view that a person should not be declared to be an adult exclusively on the basis of his or her refusal to undergo medical tests.[76]

There is general consensus that States should resort to the least invasive methods available.[77] Therefore, it is preferable that non-medical means be used first, and

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[69] *See e.g.* S.J. Cemlyn, M. Nye, *Asylum seeker young people: Social work value conflict in negotiating age assessment in the UK*, 55(5) International Social Work 675 (2012).

[70] Sørsveen, Ursin, *supra* note 24, pp. 207-208; Cemlyn, Nye, *supra* note 69, p. 688.

[71] *See* CtRC, *A.L. v. Spain*, para. 12.4; General comment No. 6 (2005) stating that it should not be based solely on the physical appearance of the individual, but also on his or her degree of psychological maturity.

[72] It is recommended that professionals assessing age should be familiar with ethnic, cultural and developmental characteristics – *see* CoE Parliamentary Assembly, Resolution 2136 (2016), para. 8.2.5.

[73] *See* Sauer, Nicholson, Neubauer, *supra* note 63, p. 301.

[74] *See* ECtHR, *Darboe and Camara v. Italy*, para. 140. *Cf.* CoE Parliamentary Assembly, Resolution 1810(2011), *Unaccompanied Children in Europe: Issues of arrival, stay and return*, 15 April 2011, para. 5.10.

[75] CoE Parliamentary Assembly, Recommendation 1985 (2011): *Undocumented migrant children in an irregular situation: a real cause of concern*, 7 October 2011, para. 9.4.7; CoE Parliamentary Assembly, Resolution 1996 (2014): *Migrant children: what rights at 18?*, 23 May 2014, para. 10.2.

[76] CtRC, *M.A.B. v. Spain*, para. 13.4.

[77] *See* Art. 25(5) of the Asylum Procedure Directive; CoE Committee of Ministers, Recommendation 2022, The competent authorities should act proportionately and use the least invasive methods available, considering that children should not be exposed to unnecessary radiation or to any medical method which entails risks or detrimental effects to their physical and mental health (para. 37).

X-rays and all other invasive medical procedures be treated as measures of last resort.[78] It should be noted, however, that the same method can be perceived differently in individual cases due to migrants' individual histories.[79] An appropriate standard of conduct in this regard should be established by application the child's fundamental right to be heard (Art. 12 CRC). Another aspect of this right, in the age assessment context, is the States' responsibility not only to interview the child about his or her age, but also take into account the content of his or her statement(s).[80]

All measures used should respect the dignity and intimacy of the child. In view of the above, assessment methods that involve the person subject to the examination getting fully naked, as well as those that assess the development of genitals and other intimate parts of the body, should be considered unacceptable.[81] In the case *R.Y.S. v. Spain* the CtRC stated that these types of examinations should be precluded for the purpose of age assessment, as they constitute an infringement of children's dignity, privacy and bodily integrity protected under Art. 16 CRC.[82]

Still another important issue is the treatment of documents presented by foreigners to authorities. The mere occurrence of doubts as to the authenticity of birth certificates or passports cannot automatically lead to the replacement of documents with medical examinations.[83] Date of birth is an element of a child's identity, which should be preserved by States Parties according to Art. 8 CRC. The rejection as evidence of the documents provided by the interested person, without first clearing up any doubts with the consular authorities, was assessed as contrary to Arts. 3 and 12 CRC.[84] According to the CtRC, assigning a person's date of birth that is inconsistent with submitted documents requires either a prior formal assessment of these data by the competent authority, or their verification with the authorities of the country of origin.[85] In the case *S.E.M.A. v. France* the CtRC stated that States

[78] CoE Parliamentary Assembly, Resolution 2195 (2017), para. 6.5.

[79] *Cf.* EASO, *supra* note 3, p. 31; Markiewicz-Stanny, *supra* note 4, p. 297.

[80] CtRC, *A.L. v. Spain*, para. 12.4.

[81] This method is ruled out at the EU level – *see* EASO, supra note 3, pp. 34, 43, and 55. The practice of gynecological evaluation of sexual maturity can be qualified as an inhuman and degrading treatment; *see also* Parliamentary Assembly Resolution 2195 (2017), para. 6.7, which calls on Member States to prohibit, in all situations, the use of physical sexual maturity examinations for the purpose of determining the age of unaccompanied and separated migrant children; see Resolution 2136 (2016), para. 8.2.5.

[82] CtRC, *R.Y.S. v. Spain*, CRC/C/86/D/76/2019, 4 February 2021, para. 8.8.

[83] For example a problem observed in Spain concerned the use of intrusive age-assessment methods, even in cases where the identification documents appeared to be authentic; particularly in the autonomous cities of Ceuta and Melilla, where they were carried out despite several Supreme Court decisions concerning the illegality of the practice of Spanish authorities - *see* CtRC, CRC/C/ESP/CO/5-6, para. 44; *see also* more recent facts of state in Maltese case *A.M. v. The Principal Immigration Officer*, 5 November 2021, available at: https://tinyurl.com/2p8dhxmc (accessed 30 April 2023).

[84] CtRC, *M.T. v. Spain,* para. 13.6.

[85] CtRC, *A.L. v. Spain,* para. 12.10.

Parties may not act contrary to facts established based on an original and official identity document issued by a sovereign country without having officially challenged its validity.[86] A similar approach can be seen in the most recent Recommendation of the COE Committee of Ministers: "[I]dentity documents should be considered to be determinative of age, unless considered invalid in line with procedures set out in law for verification of a person's identity documents".[87]

2.2. Procedural rights

An incorrect and inadequate assessment of age has a profound impact on the enjoyment of rights arising from the status of a child.[88] Proper classification of persons as younger or older than 18 years of age is intended, among other things, to protect children from being housed with unrelated adults.[89] At the same time, an incorrect recognition of a child as an adult results in their exclusion from the special protection and advantages connected with the status of a minor.

In the case of *Darboe and Camara v. Italy*, the applicant's age was established only by a wrist X-ray based on the Greulich-Pyle method.[90] The medical report stated that his bone age corresponded to that of an eighteen-year-old male, providing no information about the procedure's margin of error. Following the medical examination, the applicant was considered as an adult and placed in an adult reception centre for more than four months. Importantly the applicant was not informed about the type of the age assessment procedure and its possible consequences. In these circumstances, the ECtHR refrained from examining whether such a way of assessing the applicant's age complied with human rights standards, and from establishing the existence or validity of his consent to undergo a medical examination.[91]

Instead, the Strasbourg Court decided to review this case from a different angle – namely from the general principle of the special protection of unaccompanied migrating children. The Court treated this principle as an element of the State's positive obligations under Art. 8 of the European Convention on Human Rights

[86] CtRC, *S.E.M.A v. France*, CRC/C/92/D/130/2020, 25 January 2023, para. 8.5.

[87] Recommendation CM/Rec(2022)22 of the Committee of Ministers to member States on human rights principles and guidelines on age assessment in the context of migration and its Explanatory Memorandum, 14 December 2022, para. 28; *See also* CtRC, *M.T. v. Spain*, CRC/C/82/D/17/2017, 18 September 2019, para. 13.4.; *A.L. v. Spain*, para. 12.4; *M.A.B. v. Spain*, para. 10.4. CtRC, Joint general comment No. 4 and No. 23, *op.cit.,* para. 4.

[88] ECtHR, *Darboe and Camara v. Italy*, paras. 124-125.

[89] *See e.g.* allegations of applicants in case of *Abdullahi Elmi and Aweys Abubakar v. Malta*, paras. 86, 111.

[90] Due to the lack of contact with applicant Moussa Camara, the case was examined only in relation to Ouisinou Darboe (ECtHR, *Darboe and Camara v. Italy*, paras. 5-7).

[91] ECtHR, *Darboe and Camara v. Italy*, para.146. These elements were examined in cases *Mahamed Jama v. Malta*, paras.147,153 and *Abdullahi Elmi and Aweys Abubakar v. Malta*, para. 145. In both cases delays in the age assessment procedure were found to be in violation of Art. 5(1) ECHR.

(ECHR).[92] In this regard they consisted of two elements: representation; and the provision of adequate information during the age-assessment process. The ECtHR assessed that, at the time of the facts of the case, under both domestic and EU law[93] the State was obliged to appoint a legal representative or a guardian;[94] to provide access to a lawyer; and to ensure informed participation in the age-assessment procedure of the person whose age was in doubt.[95] It must be noted that the position of the ECtHR in this regard is fully reflected in the jurisprudence of the CtRC. A foreigner should be informed about the existence of the age assessment procedures and the possibilities of conducting them. This is necessary to obtain the free and informed consent of the person involved.[96] The appointment of a guardian or a representative to defend the interests of the individual before or during the age assessment process is an essential guarantee of respect for the best interests of children as well as the right to be heard. Failure to do so implies a violation of Arts. 3 and 12 CRC, while failure to provide a timely representation can result in a substantial injustice.[97]

As the CtRC stated, it is therefore imperative that there be a due process to estimate a person's age, as well as an opportunity to challenge its outcome through an appeals process.[98] In this context, it should be mentioned that in the *Darboe and Camara v. Italy* case the following elements were found to be an infringement of the applicant's rights: the applicant was not provided with the medical report on his age, which also included no information about the margin of error;[99] and there was no possibility to appeal because no judicial decision or administrative measure concluding that the applicant was of adult age was issued in his case.[100]

It is worth noting that the European Asylum Support Office (EASO) recommends that an age assessment decision shall be made separately from and before a

[92] ECtHR, *Darboe and Camara v. Italy*, paras.129, 141.

[93] It should be noted that European Asylum Support Offices prepared practical guidelines which provide that reasons shall be given by the authorities to an applicant against whom a decision refuting minority status has been given, as well as information as to how that decision can be challenged (EASO, *supra* note 3, p. 37).

[94] *See also* CoE Parliamentary Assembly Resolution 2195 (2017), para. 6.3.

[95] ECtHR, *Darboe and Camara v. Italy,* para. 155.

[96] *See* Art. 25 (5)(b) of the Asylum Procedure Directive; CoE Parliamentary Assembly Resolution 2195 (2017), where para. 6.2. includes the standard to "provide unaccompanied migrant children with reliable information about age-assessment procedures in a language that they understand, so that they can fully understand the different stages of the process they are undergoing and its consequences".

[97] *See* CtRC, *A.L. v. Spain*, para. 12.8; *M.T. v. Spain*, para. 13.5.

[98] CtRC, *A.L. v. Spain*, para. 12.3; CoE Parliamentary Assembly, Resolution 2195 (2017), para. 6.4. ("ensure that an unaccompanied migrant child or his or her representative can challenge the age-assessment decision through appropriate administrative or judicial appeal channels").

[99] ECtHR, *Darboe and Camara v. Italy*, para. 147.

[100] *Ibidem*, para. 148. It should be noted that the ECtHR considered the failure to disclose the results of the age determination procedure to the applicant and the lack of a court decision in his case to be a violation of Art. 13 ECHR (para. 186).

decision on international protection. If this requirement is not fulfilled, the possibility of challenging the outcome of age assessment shall be provided either through judicial review or as part of the consideration of the overall protection claim.

CONCLUSIONS

Before juxtaposing Polish law and practice with international standards, a few remarks must first be made from a national perspective. The first objection concerns the legality of some of the rules contained in the Statement of BGHC. In the Polish legal framework, all norms concerning rights and obligations of individuals can only be regulated in generally applicable law. Their catalogue is closed and specified in the provisions of the Polish Constitution. Meanwhile, there are legal solutions in the Statement of BGHC which contain key elements concerning the legal situation of foreigners. This applies, for example, to the obligation to take into account the lower age limit indicated in medical examination results. This solution is so fundamental for the final findings of age assessment that it should doubtless be included not just in an internal document, but in both the AA and AGP instead.

The second reservation concerns the fact that the Statement of BGHC is not published. It is available only by submitting a public information request. It can therefore reasonably be concluded that foreigners and their lawyers have no access to the rules deciding about the status of an individual, and there is no judicial supervision of their application. The content of the Statement of BGHC itself contains a whole range of solutions beneficial to foreigners, which however they cannot refer to because they do not know about their existence and content.

The third problem is a lack of consistency in the Polish legal framework. While the Statement of BGHC establishes uniform rules for age assessment, they are regulated differently in return procedures and international protection procedures. Thus Border Guard officers are bound by a document which is inconsistent with higher-level normative acts. Overall, all of these elements indicate that there is a violation here of Art. 2,[101] and Art. 7 of the Constitution of the Republic of Poland.[102]

The currently established international standards for age assessment contain both substantive and procedural elements. These procedures should be applicable only to the foreigners whose age is in doubt, while such persons should be treated as children until it is established that they are adults. The principle of choosing the least invasive method is also of fundamental importance. In addition, due to

[101] Art. 2 of Constitution of the Republic of Poland: "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice".

[102] Art. 7 provides that "The organs of public authority shall function on the basis of, and within the limits of, the law".

the inaccuracy and large margin of error of the medical examination methods and psychological observations as well, there is growing support for a holistic standard of assessment, performed in a multifaceted manner based on the principle of gradation of the methods used. At the same time, the procedural aspect means that the foreigner should be represented by a lawyer or guardian, and that the State is obliged to provide relevant information to them during the age assessment procedure. The person concerned must be provided with a medical certificate or other document recognizing their age, as well as have the opportunity to challenge the result through the appeal process.

Both the Polish law and the practice of the Border Guard treat age assessment as related only to medical examinations, usually based on a single assessment that is made by a single professional. For this reason, it is reasonable to say that the holistic and multifaceted approach recommended at the international level is absent from the Polish national framework. It can also be concluded that the Polish law in its wording has a limited scope when it comes to the procedural dimension of the rights of individuals. Particularly noteworthy is the lack of specification of the legal form of the examination result, as well as the lack of an obligation to present it to the foreigner. The age of the person concerned is determined in a legally unspecified form, and there is no possibility for the foreigner to directly question the age assessment results. Given how important and fundamental the consequences of an age assessment are, this situation should be changed as soon as possible.

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THE POET, THE LAW AND THE PROTECTION OF INDIVIDUAL RIGHTS: AN EU REFORM PROPOSAL FROM LITERATURE**

Abstract: *The European integration process is currently faced with a notable dilemma: While the need for new impetus and for far-reaching reform is widely felt, there is not only widespread resistance to any meaningful institutional reform but there is also a dearth of really innovative ideas. Europe is in danger of losing out with its citizens, who should have become its very foundation, in contrast to the early years when this integration process was mainly state driven. European institutions have tried to oppose this trend by organizing a grass-roots process for collecting ideas for reform. The results of the "Conference on the Future of Europe" were, however, not really convincing. This contribution attempts to examine the reform impulse coming from literature – in particular Ferdinand von Schirach's "Jeder Mensch" – for its suitability to make a meaningful contribution to this discussion. It will be shown that one of his proposals – contained in Art. 6 of this booklet and proposing a right of the individual to bring fundamental rights claims directly before the Court of Justice of the European Union, deserves particular attention.*

Keywords: fundamental rights in the EU, access to court, state liability, Köbler jurisprudence, reform of the EU Treaties

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** This article is based on P. Hilpold, *"Jeder Mensch" von Ferdinand von Schirach – ein Reformvorschlag zum europäischen Grundrechtsschutz aus österreichischer Perspektive*, in: P. Hilpold, W. Steinmair, A. Raffeiner (eds.), *Österreich und die EU im Umbruch*, Facultas, Wien: 2022, pp. 61-66, which has been updated, extended and re-focussed. Particular attention is given in this context to Austrian and German legislation and jurisprudence.

1. INTRODUCTION

1.1. Reform as a continuing agenda

"Europa semper reformanda" could be seen as the EU's motto if the development of European Union (EU) law is looked at from hindsight. The Lisbon Treaty of 13 December 2007, which entered into force on 1 December 2009. has provided some stability in turbulent times, but in reality if we look at the EU institutional system as a whole, beyond the formal borders of EU primary law we can see that even after 2009 EU law has been in continuous fermentation, adapting flexibly to the most urgent needs. In this regard the developments with respect to the Economic and Monetary Union (EMU) particularly come to mind.[1]

Closely related to the economic crisis – which has accompanied nearly the whole period of the EU's development since the entry into force of the Lisbon Treaty – is the Next Generation EU (NGEU) programme.[2] While the immediate impetus for adopting this programme, built on a series of sub-programmes, was the COVID-19 crisis, the reforms to be financed by this programme refer to structural deficits within the individual Member States (MSs), which long predated the advent of the COVID-19 pandemic.

But what about the individual, democracy, and the rule of law? Generally speaking, the period of the COVID-19 crisis was not a good one in this regard, with the development of programmes and positions related to the above prongs sometimes stalling, and in some sense even regressing. It suffices to refer to the strengthening of the sovereigntist movement; the near breakdown of the European Asylum System in 2015; and the increasing rule of law issues in some MSs,[3] often characterized also by the term "backsliding". The COVID-19 period itself constituted a major challenge for the protection of individual rights, at least in the sense that it laid bare a series of unresolved questions at the borderline between individual and collective rights which most lawyers had not even been aware of before.

[1] *See* P. Hilpold, *Die Europäische Wirtschafts- und Währungsunion – Ihr Umbau im Zeichen der Solidarität*, Springer, Berlin: 2021. Within (or accompanying) the EMU and its Fiscal Compact, new international law was set into force which had to fulfil functions originally pertaining to EU primary law. At the height of the financial and economic crisis, in 2012, a massive number of secondary law acts were adopted which profoundly remodelled the EMU.

[2] NGEU is a multi-tiered reform and aid package adopted by the EU in 2020 in order to counter the COVID-19 pandemic and to overcome, at the same time, the structural deficits within the MSs that made reaction to this challenge, at least initially, so inefficient and cumbersome. As a very consequence thereof, this programme becsme a huge economic aid programme, to be implemented until 2026 and to be financed by debts to be repaid until 2058. See Hilpold, *supra* note 2, B. de Witte, *The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift*, 58(3) Common Market Law Review 635 (2021).

[3] *See* Ch. Hillion, *Poland and Hungary are withdrawing from the EU*, VerfassungsBlog, 27 April 2020, available at: https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/ (accessed 30 April 2023).

In general, when threats to basic EU principles became overwhelming the EU and its MSs have proven be able to react flexibly, and the competence quarrels – which so strongly characterise everyday life in the Union – are usually swiftly pushed into the background. This was the case with the rule of law "backsliding" in some MSs, and also with regard to the sanitary crisis unleashed by the pandemic. As to the latter, the EU has taken over a coordinating role in the effort find a more effective strategy in face of a threat of so far unknown proportions. This happened without enhanced contestations, despite a weak competence basis for such a Union action.[4]

Also in regard to the mounting rule of law challenges the EU and its MSs reacted with considerable determination, even starting Art. 7 procedures,[5] adopting a rule of law conditionality regulation,[6] and with the Court of Justice of the European Union (CJEU) taking a clear stance.[7] In many other areas however, it has to be acknowledged that as of now the legislators and the governments have a long way to go to achieve really satisfactory results.

Great hopes have been placed on a new reform conference. The Commission's White paper on the Future of Europe (2017)[8] was thought by some to prepare the ground for such a reform process, but the proposals contained therein were rather vague and uninspiring and they did not set the sparks flying, neither within the MSs nor with their constituencies.

1.2. The Conference on the Future of Europe

Shortly thereafter, a new endeavour in this direction was commenced, this time however with a grass-roots approach, as it tried to reach out to the people and offer them a direct say as to the content of the specific individual proposals. The "Conference on the Future of Europe"[9] was conceived as an "exercise in transnational participatory democracy"[10] with absolutely innovative instruments designed to sort out a "European common will", such as the use of a Multilingual Digital Platform

[4] *See* Arts. 4(2)(k) and 168 of the Treaty on Functioning of the European Union (TFEU), which provide only a limited space for action. As is well known, the Conference on the Future of Europe issued a recommendation for "health and healthcare" to amend the two above-mentioned articles so to create a full-fledged shared competence in this area. *See* J. Järviniemi, R. Scholz, K. Hoffmeister, *From COVID-19 towards a European Health Union: Proposals for Treaty reform on health*, Young European Federalists, May 2022, available at: https://tinyurl.com/ys5655tk (accessed 30 April 2023).

[5] *See* O. Philipp, *Art. 7 EUV als Rettung für den Rechtsstaat?*, 16 Europäische Zeitschrift für Wirtschaftsrecht 697 (2021), p. 697.

[6] *See* N. Kirst, *Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?*, 6 European Papers 101 (2021).

[7] *See* L.D. Spieker, *Werte, Vorrang, Identität: Der Dreiklang europäischer Justizkonflikte vor dem EuGH – Zugleich Bespr. von EuGH 22.2.2022 – RS (C-430/21)*, 7 Europäische Zeitschrift für Wirtschaftsrecht 326 (2022).

[8] COM(2017)2025.

[9] As to the Conference's terms, *see* the European Council Conclusions of 12 December 2019, paras. 14-16.

[10] *See Editorial Comments*, 59 Common Market Law Review 1583 (2022), p. 1583.

and the creation of "European Citizens' Panels" as well as "National Citizens' Panels".[11] For a certain period of time, the aspiration to build a new Europe based on the needs expressed by the European citizens seemed about to transform into a reality.

The final report, published on 9 May 2022, contained 49 proposals and more than 300 measures to implement the more generic concepts into practice, It is however a rather unwieldy package of ideas that would need, at least in part, treaty reforms in order to be implemented. Some of these proposals (with attached implementing measures) relate to long overdue needs for reform; some can be considered as innovative; and others will probably turn out to be rather controversial if further pursued, such as the proposal to create a "fiscal capacity".

As to the subject matter which is centre stage in this contribution – individual rights and the rule of law – proposal no. 25: "Rule of Law, Democratic values and European identity" could become meaningful if implemented with sufficient determination and coherence. Some of the measures foreseen in this context, as vague as they may currently appear in the text, could have considerable potential in the implementation process. This is particularly the case for measure no. 3:

> The EU Charter of Fundamental Rights should be made universally applicable and enforceable. In addition, annual conferences on the rule of law (following the Commission's Rule of law Report) with delegations from all Member States involving randomly selected and diverse citizens, civil servants, parliamentarians, local authorities, social partners and civil society should be organised. Organisations, including civil society, which promote the rule of law on the ground should also be further supported.

Making the EU Charter of Fundamental Rights "universally applicable and enforceable" could give an enormous boost to human rights protection. As is generally known this Charter has enormous potential, but its inherent substantive strength is considerably dampened by a series of limitations which were inserted into the final version,[12] which make the reach of the respective rights somewhat uncertain and thus contribute further to the aura of mystery and incomprehension surrounding the Charter.

Considerable hidden potential may also lie in the following statement: "the European citizenship should be strengthened [...] through a European citizenship statute providing citizen-specific rights and freedoms [...]".

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[11] *Ibidem*.

[12] *See* in particular, those in Arts. 51 and 41 of the Charter. See the various contributions in: F. Casarosa, M. Moraru (eds.), *The Pratice of Judicial Interaction in the Field of Fundamental Rights – The Added Value of the Charter of Fundamental Rights of the EU*, Edward Elgar, Cheltenham: 2022.

While the intended range and details of this "European citizenship statute" under the term "citizen-specific rights and freedoms" is not clear, it is at least arguable that the position of the individual as a right-holder should be strengthened in such a statute. It may be true that the history of the development of Union citizenship is often seen as an (almost) relentless expansion of the material content of these rights, but the procedural aspects and the issue of "legitimacy to act" need to be further addressed.[13]

It could be argued that such a "European citizenship statute" could constitute the basis for the further empowerment of the individual and initiate a thorough examination, and even rectification, of the legal lacunae which still weakens the ambitious concept of Union citizenship. However, at the moment it is not clear whether such a process of further clarification and "hardening" of these proposals will take place any time soon. While the reform plan will surely remain on the agenda, in the meantime too many unresolved issues in the European integration process which are in urgent need of reform have piled up. As a result, the discussion in the aftermath of the conclusion of the Conference has proven to be rather contentious and no common grounds for consent in this field are in sight, not even between the EU institutions themselves, not to mention the MSs.[14]

At the end of his recently published analysis on the ongoing EU reform discussion, Professor Jean Paul Jacqué asks: "Is there still any Spinelli in the Parliament?"[15] This rhetorical question is, of course, directed at discovering whether there are still politicians in the European Parliament with the strength, idealism, and foresight of a man like Alberto Spinelli (1907-1986), who was one of the fathers of European integration. It is surely true that the European integration process needs, in the view of the formidable challenges it is faced with innovative, heuristic ideas in order to keep moving forward. It is also true that the legislative process since Spinelli's times has profoundly changed, and not in the sense that the European Parliament has gained enormous additional weight in legislation. Instead, its changed role goes hand in hand with a modified nature of norm-setting which has become far more technical than it was in Spinelli's times. Therefore we have to ask: Why not look for inspiration in this process outside the Parliament?

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[13] *See* P. Hilpold, *Nichtdiskriminierung und Unionsbürgerschaft*, in: M. Niedobitek (ed.), *Europarecht: Grundlagen Und Politiken Der Union* (2nd ed.), de Gruyter, Berlin: 2019, pp. 805-886.

[14] *See e.g.* the critical remarks by Jean Paul Jacqué about the controversial role of the European Parliament, which has been accused of a rather self-centred attitude, in this process. *See* J.P. Jacqué, *The European Parliament's Institutional Proposals Following the Conference on the Future of Europe: Much Ado about Nothing?*, 59 Common Market Law Review 129 (2022).

[15] *Ibidem*, p. 141.

When the Conference for the Future of Europe. in its conclusions of 9 May 2022, called for a "more interactive and direct involvement" of Union citizens,[16] this call could be interpreted as a plea to adopt a broader perspective in the search for ideas by original, innovative, and inspiring thinkers. Writers may be among the first to come to mind when such an attempt, which reaches beyond the traditional legislative bodies, is undertaken.[17] Writers-lawyers-philosophers (a rare species, perhaps, but nonetheless in existence) may even be predestined to be chosen as such a source of inspiration. And this leads us to Ferdinand von Schirach.

2. FERDINAND VON SCHIRACH'S "JEDER MENSCH"

2.1. Introduction

The German writer-lawyer Ferdinand von Schirach[18] has attracted considerable attention by a small blue booklet entitled "Jeder Mensch" ("Each man and woman" may be a fitting translation). It contains a proposal for six new articles to be added to the Charter of Fundamental Rights, and also provides some explanations for these proposals in the accompanying notes. This text provoked intense discussions immediately upon its publication. It could be assumed that in our modern reality, saturated with news coming from everywhere, that alone could be qualified as a success. An illustrious team of advisors contributed to this work: Prof. Dr. Remo Klinger, Dr. Ulrich Karpenstein, Dr. Bijan Moini, Prof. Dr. Armin von Bogdandy and Prof. Dr. Jens Kersten. However, anyone expecting a dogmatically sophisticated, erudite, epistemic text from German fundamental rights lawyers would have to be disappointed. The reform project penned in this booklet defies any traditional categorization. This circumstance may perhaps be irritating for lawyers, but on the other hand it also makes this text particularly interesting. As a consequence, the reactions to this publication have been rather variegated. There has been some exuberant praise for the project as a whole, accompanied with the remark that now finally someone is taking the initiative. Others agreed in principle, but added: "Criticism and reform proposals are important – but please not in this form!" And many other reactions fell somewhere in between these positions. Thus it could be said that von Schirach and his team of advisors have probably already achieved an important milestone. At last questions about the future that concern us all, but which we can't seem to come to grips with technically, are being discussed on a very

[16] 25th Proposal, measure 2.

[17] In this regard, reference may be made to, *inter alia*, Robert Menasse, who has published a book – "Die Hauptstadt" (Suhrkamp 2017) – which lays bare the way the "Bruxelles complex" works (or, respectively, does not work).

[18] Born 1964 in Munich (Germany).

accessible level. Unaccustomed as lawyers may be to such a take, if effectiveness is anything to go by the way this proposal has been drafted and presented deserves appreciation.

The space attributed to an article in an academic collective writing does not suffice for a detailed treatment of this proposal's individual articles. Therefore, only a few words can be said concerning single elements of the von Schirach text. As each article refers to pivotal societal questions of our time, there can be no doubt that monographs could be written on each of them.

In what follows, the discussion of these articles is divided in two parts. In the first part, the first five articles are given some summary consideration. Subsequently, Art. 6 is analysed in more detail, as this proposed provision is deemed to be of particular importance.

2.2. The single provisions in Arts. 1–5

Let's begin with the demand for a healthy, protected environment, postulated as a right proper (Art. 1). In view of the almost existential importance of the environment for humanity as a whole and the growing awareness of its fragility, the right to its protection was quite rightly placed at the top of the catalogue. The dramatic developments in the area of climate change, which have recently been the subject ot global attention, have underlined the urgency of measures in this area. A closer look at this topic, however, quickly reveals that a good "clean environment" is the product of a complex social and political decision-making process that extends far beyond national borders, and in many cases assumes a global dimension. In each case a variety of opportunity costs must be considered and externalities taken into account, especially in a cross-border, transcontinental context.

The approach to action must therefore be twofold: on the one hand, a suitable international framework must be created that sets binding standards for the states. On the other hand, national (and in the EU and other integration zones also regional) enforcement instruments are needed. In fact, much has already been done at the international level, where the link between the environment and the protection of fundamental rights was established very early on. The 1972 Declaration of the United Nations Stockholm Conference on the Human Environment clearly set out the direction in its Art. 1:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

However, the process of translating these goals and requirements into "hard law" has been arduous, and the step to creating enforceable law is an even greater ambition. In the area of climate protection, the Paris Agreement of 2015 set an important course with its commitment to limit global warming to well below 2 degrees Celsius compared to pre-industrial levels. The national climate protection plans consolidate these targets.

On 29 April 2021, the German Federal Constitutional Court took a significant step towards a more effective implementation of the climate protection targets by declaring the German Climate Protection Act 2019 to be contrary to the Fundamental Law (*Grundgesetz*) insofar as it lacks sufficient provisions for further emission reductions starting from 2031. The legal argumentation is very interesting and courageous: the complainants, some of whom are still very young, would be disproportionately burdened by the postponement of the necessary climate protection measures into the further future due to the restrictions on freedom that would thus become necessary. Environment and climate protection thus also becomes a generational issue. There are at least signs of approaches worldwide to make environmental concerns actionable.[19] Art. 37 of the Charter of Fundamental Rights is too "conservative" in this respect.[20]

Art. 2 of the von Shirach text calls for "digital self-determination", and Art. 3 sets barriers to the development of artificial intelligence. Again, all these questions arise in an international context, and we have to ask whether it is for the EU to go it alone, and whether it is appropriate or even possible to act unilaterally. "Digital self-determination" is already realised in many respects by the EU's General Data Protection Regulation,[21] but the challenges and dangers that arise in this context are constantly appearing in new guises. Artificial intelligence is seen as a crucial driver for

[19] As is well known, in the *Teitiota* case, the UN Human Rights Committee linked climate protection to the right to life and potentially inferred a right to protection from deportation. *See* MRA: Views of 24 October 2019, *Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016.

[20] This provision is as follows: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". In view of the developments that have taken place since the start of the new millennium, this provision appears to be rather vague and cautious. It is commonly agreed that Art. 37 does "not establish any individually justiciable right to environmental protection of any particular quality". *See* E. Morgera, G.M. Durán, *Article 37*, in: S. Peers et al. (eds.), *The EU Charter of Fundamental Rights* (2nd ed.), Hart, Oxford: 2021, para. 37.01. As Morgera and Marín Durán further point out, "this contrasts with the approach taken in several national constitutions of the Member States, which not only place a responsibility on governmental authorities to protect the environment, but also recognize an autonomous right to a healthy environment" (*ibidem*). In this sense a reform as prospected in "Jeder Mensch" seems overdue and fully in line with the prevailing academic and political discussion in this area.

[21] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, pp. 1-88.

the economy and for technological development – although the dangers associated with it on a global level are well recognised. It makes little sense for Europe to go it alone here. On the other hand, it does make sense for the EU to aspire to be on top of the relevant technological developments and to make sure, at the same time, that all these developments are human-centred and in accordance with the pivotal values on which European integration is based. This was the exactly the way it was pursued by the EU in 2021.[22]

However, simple solutions for resolving the related issues do not readily present themselves here. The digital space and artificial intelligence are increasingly becoming issues of international – economic, political and military – power struggles. If the EU is to be able to have a regulatory effect here, it must make sure that it continues to be one of the leading players in this field, which will require an enormous amount of effort. In a certain sense, Art. 3 of "Jeder Mensch" has anticipated, at least partly, what the EU – starting in the same year – has tried to propose and to implement.[23] There can be no doubt that succeeding in these attempts will require continuing efforts. In order to obtain the funds necessary for such an endeavour every effort which contributes to raising the needed public interest and awareness has to be appreciated. Art. 3 may pinpoint only one element of many as to the relationship between AI and fundamental rights, but it surely constitutes an important impulse for furthering the relevant discussion as a whole.

According to Art. 4 of "Jeder Mensch", everyone has the right to be sure that statements made by public officials correspond to the truth. Those who do not wish to dismiss this demand all too cheaply as an expression of naivete will quickly find areas of application of particular explosiveness. Reminiscences of populist statements by politicians of major powers are common, aa well as of "fake news" and of "alternative facts" that can stir up broad sections of the population and even endanger central democratic achievements (one only has to recall coup-like events such as the "storming of the Capitol" on 6 January 2021 which formed the blueprint for the Congress attack in Brasilia of 8 January 2023).

But one does not necessarily have to look overseas to recognise dangerous tendencies of this kind. It is legitimate and rational for politicians to be guided by the will of their voters. It is also legitimate and rational for politicians to want to pres-

[22] *See* the Communication from the Commission, *Fostering a European approach to Artificial Intelligence*, COM(2021) 205 final, 21.4.2021.

[23] *See* European Commission, *Proposal for a Regulation Laying down harmonized rules on artificial intelligence*, COM(2021) 206 final, 21 March 2021. *See also* the endeavours by the Council of Europe Committee on AI to develop an international convention on AI. For criticism in this regard as to the lack of transparency, *see* M. Hickok, M. Rotenberg, K. Caunes, *The Council of Europe Creates a Black Box for AI Policy*, VerfassungsBlog, 24 January 2023, available at: https://verfassungsblog.de/coe-black-box-ai/ (accessed 30 April 2023).

ent themselves in the best light. However, the path to populism[24] and demagogy is then often not far away, whereby behaviour of this kind in many cases does not even result in political responsibility.

And the questionable handling of truth concerns not only the highest political echelons, but also the state apparatus and the holders of positions of power in general. The arbitrariness of civil servants in the authoritarian state and untruthful statements in court by "dignitaries" without consequences are just two examples. In Austria, this phenomenon has recently acquired a disconcerting, additional topicality through the proposal to release witnesses in Parliamentarian Enquiry Commissions from the obligation to tell the truth. Compliance with the truth obligation is facilitated and promoted by transparency measures. In Austria, the abolition of far-reaching restrictions on "official secrets" (*Amtsgeheimnis*) – an authoritarian relic from the Habsburg era and unique in its backwardness in the whole of Europe – would seem overdue in this context. Such an abolition has been often promised, but regularly discarded after elections, as this instrument is of course a very comfortable tool for those in power. No answer needs to be given on issues declared to be an "official secret". And as this qualification is attributed very generously to many issues surrounding public administrative actions, and furthermore inasmuch as public employees face severe criminal charges if information declared as secret becomes public, public control over many spheres of public actions is heavily restricted.

Truth also means responsibility: Law experts, and of course even more so the victims of the Ischgl case, are looking forward to seeing the outcome of the respective public liability proceedings currently underway, where the responsibility of key decision-makers in the Corona epidemic has to be clarified.[25] So far, it has been widely overlooked that this problem also has a pronounced EU law aspect. After all, tourists (many of the victims in Ischgl were foreign tourists) fall under the passive freedom to provide services and thus the scope of application of the Charter of Fundamental Rights is opened, which in Art. 2 protects the right to life.

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[24] *See* A. Carcano, *The Challenges of Populism: What Role for International Law Scholars?*, 1 Diritti umani e diritto internazionale 5 (2020).

[25] As far as can be seen, one of the two authors of this article, Peter Hilpold, was the first to present this thesis, which was subsequently taken up by the lawyers defending the Ischgl victims. *See* P. Hilpold, *Die Corona-Opfer von Ischgl können sich auf EU-Recht stützen*, Der Standard, 11 October 2021, available at: https://www.derstandard.de/story/2000130324845/die-corona-opfer-von-ischgl-koennen-sich-auf-eu-rechtl (accessed 30 April 2023). As is well-known, in Ischgl, a tourism hotspot in Tyrol (Austria) in Spring 2020 many infection with COVID 19 occurred. Public authorities were accused of having taken preventive measures too late. The accusation was that profit counted more the life of peoples and that authorities did not intervene in time when the pandemic hit this village.

This right is also associated with corresponding duties to protect.[26] It is possible that here, too, the CJEU will ultimately have to clarify the scope of national responsibility.[27] Responsibility is, of course, an important element of the rule of law: all EU Member States must work on this as well.[28]

Art. 5 of "Jeder Mensch" refers to the supply chains in the international production of goods and services and to the need to respect human rights in these processes. While there are many international instruments with similar aims, Art. 5 is special as it thereby suggests that these general obligations be transformed into enforceable individual rights. Approaches to this end already exist. The challenges involved are enormous, but can be overcome.[29] A first step was taken in Germany with the Supply Chain Act of 11 June 2021.[30] In Austria, the discussion on this issue is still lagging far behind.

2.3. Article 6: The proposal to introduce a (limited) individual complaints procedure before European Courts

This proposal is the subject of particular attention herein, as it is deemed to be fundamental and hints at what could constitute a real step forward. Art. 6 of the von Shirach book states that each man or woman may bring an action for a violation of the Charter before European Courts, which presumably refers to the CJEU. Art. 6 is probably closest to the area of traditional fundamental rights protection, even

[26] It has been claimed that the Epidemics Act does not give rise to individual claims. It has been shown, however, that the facts mentioned fall into the scope of application of EU law and therefore this position appears to be hardly tenable.

[27] A referral to the ECJ on the basis of Art. 267(3) TFEU was suggested by the plaintiffs but (after completion of this article) denied by the Austrian Supreme Court ("Oberster Gerichtshof - OGH", 1 Ob 199/22d, 15 May 2023) although the plaintiffs presented a series of convincing arguments why this case would fall into the purview of EU law. For a first critical statement as to this decision see P. Hilpold, Ischgl: Hat wieder wer das Licht ausgemacht?, in: Die Presse 31 Augsut 2023, p. 26. It is hard to see, how the C.I.L.F.I.T-jurisprudence (which exceptionally releases Supreme Courts from the obligation to submit questions to the CJEU) could apply here. Access to the CJEU would still be possible in the context of a state liability procedure or in case of infringement proceedings. While liability procedures have proved to be widely ineffective, infringements proceedings are highly unlikely to be started. Prominent lawyers qualified this situation as a further confirmation of the fact that individuals should be granted direct access to the CJEU.

[28] For more on the situation in Austria, *see* in particular M. Berger, *Zeugnisse für Musterschüler sehen anders aus*, Der Standard, 25 July 2021, available at: https://www.derstandard.at/story/2000128424109/zeugnisse-fuer-musterschueler-sehen-anders-aus; *see also* P. Hilpold, *Eine lustlose Formübung*, Wiener Zeitung, 21 July 2021, available at: https://www.wienerzeitung.at/meinung/gastkommentare/2113597-Eine-lustlose-Formuebung.html (both accessed 30 April 2023).

[29] *See* P. Hilpold, *Maßnahmen zur effektiven Durchsetzung von Menschen- und Arbeitsrechten – Völkerrechtliche Anforderungen*, in: A. Reinisch, S. Hobe, E.-M. Kieninger (eds.), *50 Berichte der Deutschen Gesellschaft für Internationales Recht, Unternehmensverantwortung und Internationales Recht*, C.F. Müller, Heidelberg: 2020, pp. 182-228.

[30] *See* D.F. Berg, M. Kramme (eds.), *Lieferkettensorgfaltspflichtengesetz. Kommentar*, C.H. Beck, München: 2023.

though such a right, as acknowledged in this draft article, does not exist as of yet. The introduction of such a possibility to act would be rather easy to implement and create direct added value for the Charter. Granting the individual a fundamental rights action before the CJEU would at the same time be ground-breaking. While there is some exaggeration elsewhere in the draft articles of "Jeder Mensch", here we find too much caution. Why should this action only be admissible in cases of "systematic violations"? So that – according to the current standard – only the "renegades of the rule of law" (so wonderfully formulated by Ulrich Hufeld) – would be affected by this provision? The lack of individual access of citizens to the CJEU is a real problem in the Union – especially when it occurs in individual MSs where courts of last instance are reluctant to refer politically sensitive cases to Luxembourg. When such courts in the EU MSs decline to even give reasons for this – and improbable as it may seem, such courts exist! – the problem becomes compounded. The Charter of Fundamental Rights thus becomes a chimera; a political document whose relevance depends on whether the competent court or judge is acquainted with EU law and is prepared to apply it.[31]

In his explanations with respect to this fundamental right, Professor Karpenstein emphasizes the importance of a fundamental rights action, putting forth the argument that fundamental rights can only be effective if there is also a possibility to enforce them. In his reflections, he also criticizes the EU's decision not to introduce the possibility of a direct legal action in the Charter and to rely instead on the cooperation of the CJEU with the national courts, and thus on decentralized legal protection.[32]

Furthermore, as already stated the fundamental rights action as proposed in Art. 6 of the "Jeder Mensch draft articles" should be available only in cases of systemic violations of fundamental rights, and not in the case of individual, specific violations ("*im Falle von strukturellen und wiederkehrenden Grundrechtsverletzungen*" ("in the case of structural and recurring fundamental rights violations"). Moreover, it would not be necessary to prove the presence of an individual legal interest,[33]

[31] *See* most recently the CJEU judgment in Case C-546/18 *Adler*, ECLI:EU:C:2021:711. It is astonishing that the lack of effective access to a court in the Takeover Act has not already been earlier stated at the national level, and that the laborious path to Luxembourg had to be taken in this respect first (fortunately, the Federal Administrative Court submitted here a preliminary question to the CJEU). *See also* an important judgment of the CJEU in C-561/19 *Consorzio Italian Management*, ECLI:EU:C:2021:799. In this judgment, the obligation of Courts of last instance to submit questions of EU law interpretation (or validity) to the CJEU was strengthened, and in particular a qualified obligation to state reasons in the case of non-submission in accordance with the C.I.L.F.I.T. criteria was created. It will be interesting to see how the national supreme courts will react to this jurisprudence. *See also* P. Hilpold, *Stärkung der Vorlagepflicht letztinstanzlicher Gerichte*, 45 Neue Juristische Wochenschrift 3290 (2021).

[32] *See* U. Karpenstein, *Ferdinand von Schirach. Jeder Mensch. Comments and Remarks*, Luchterhand, München: 2021, p. 22.

[33] *Ibidem*.

a circumstance which would make a huge difference with respect to the current legal protection situation. Von Schirach also foresees that the introduction of a direct action option in fundamental rights matters would make the Charter better known among the European population. According to him, the German Basic Law so widely popular in Germany only because individuals can invoke it before the Federal Constitutional Court.[34]

Calls for a European fundamental rights action were voiced early on in past EU reform discussions, but such an action was not introduced either in the course of the European Constitutional Treaty – which in the end did not come into being anyway – or in the context of the reform realized by the Treaty of Lisbon. In a note to the members of the then Constitutional Convention, the Working Group II on the Charter pointed out that in the course of its deliberations the group had to deal with the question of whether there was a need to extend or reorganize the possibilities for individuals to bring actions before the European courts.[35]

The Freiburg draft[36] was written by the Franco-German working group for the Constitutional Convention and contained the following formulation for a fundamental rights complaint:

> Any natural or legal person may challenge a legal act of the Union on the grounds that it infringes a right conferred on that person by the Charter of Fundamental Rights of the Union, provided that no other legal remedy is available to challenge the infringement of the fundamental right. Specific conditions may be laid down for the acceptance of a fundamental rights complaint.

However, the attempt to include a fundamental rights complaint ultimately failed. In its final report, the Working Group II on the Charter argued against the introduction of such a complaint option, pointing out that if the Charter were to be incorporated into the Constitutional Treaty, the EU's existing system of legal protection would be available anyway.[37] Both the Working Group on the Court of Justice[38] and the Praesidium of the Convention[39] followed this view, and as a result the integration of a fundamental rights complaint into the draft Constitutional

[34] *See* F. von Schirach, *Interview with Mathias Döpfner*, *Jeder Mensch kann Europa verändern*, Welt 27 September 2022, available at: https://www.welt.de/politik/deutschland/article229697153/Von-Schirach-und-Doepfner-Ein-Gespraech-ueber-neue-Grundrechte-fuer-Europa.html (accessed 30 April 2023).

[35] *See* CONV 72/02, 31.5.2002, pp. 3f.

[36] *See* Freiburg Draft for a European Constitutional Treaty of November 12, 2002, available at: http://www.leforum.de/de/FreiburgerEntwurf.pdf (accessed 30 April 2023).

[37] *See* Final Report of Working Group II "Charter", CONV 354/02, 22.10.2002, p. 15.

[38] *See* Final Report of the Working Group on the Court of Justice, CONV 636/03, no. 19.

[39] *See* CONV 477/03, 10.1.2003, no. 27.

Treaty was omitted. The Treaty of Lisbon also failed to raise the status of individual rights protection in fundamental rights issues.[40] The failure to incorporate a fundamental rights complaint was not due to conflicting opinions within the Convention; In fact the proposal to introduce a separate fundamental rights complaint – which had been made only a few years earlier – was not even discussed.[41]

In general, the effectiveness of the Charter of Fundamental Rights suffers greatly from a low awareness and the lack of effective enforcement instruments. As long as the rights of the Charter are not directly enforceable, the most impressive catalogue of rights is of little use if the content is not perceived or understood by national courts. Much could be achieved in this context through training, education, and awareness-raising measures, but the decisive step towards comprehensive practical relevance will probably only be taken with the enforceability of at least the most essential parts of the Charter.

In Europe, it must also be taken into account that the fundamental rights system of the European Convention on Human Rights (ECHR) has considerably lost importance in recent years due to the fact that complainants rarely have effective access to this court anymore. A reform that was intended to improve access to the court has actually turned into its opposite: formally, the XIth Additional Protocol did grant direct access to the court. However, the systematic declaration of inadmissibility of complaints (over 95% of complaints are declared inadmissible!) has rendered this provision practically obsolete.[42] What experts in both theory and practice in this field emphasise over and over again is that: Whereas in the past national supreme courts had to expect at least a certain number of their judgments to be reviewed, the probability of such a review occurring is now extremely low.

The divergence between the actual fundamental rights situation and the image of their "excellent" protection that exists among the European population is significant here. It is for this reason that the difference between the "law in the books" and the "law in action" is so striking, especially in the legal field of fundamental rights. It was precisely the European Convention on Human Rights that played a pioneering role and demonstrated that – at least in theory – the Universal Declaration of Human Rights, which has no binding effect, can be translated into a binding treaty and then be implemented effectively.

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[40] *See* R. Streinz, Ch. Ohler, Ch. Herrmann, *Der Vertrag von Lissabon zur Reform der EU*, C.H. Beck, München: 2010, p. 126.

[41] *See* M. Knecht, *Präambel zur GRC*, in: U. Becker, A. Hatje, J. Schoo, J. Schwarze (eds.), *EU-Kommentar*, Nomos, Baden-Baden: 2019, no. 17.

[42] *See* P. Hilpold: *Europas Menschenrechte werden 70 – und werfen Licht und Schatten*, Wiener Zeitung, 21 August 2020, p. 11; L. Weh, *Ein Geniestreich mit immer schwächerer Rechtsdurchsetzung*, Wiener Zeitung, 4 September 2020, p. 11; A.E. Hollaender, *Gute Ziele – mangelhafte Durchsetzung*, Wiener Zeitung, 11 September 2020, p. 13.

In purely substantive terms, there is no lack of fundamental rights protection in the EU. Both the European Convention on Human Rights and the Charter of Fundamental Rights, which became binding on EU Member States in 2009, offer sufficient protection *on paper*. The problem here, however, lies in the lack of enforceability of these rights by individuals. As already mentioned, the majority of cases fail at the pre-trial stage before the European Court of Human Rights (ECtHR), i.e. they are not even dealt with in substance. This is due in particular to the system of handling individual complaints before the ECtHR, which allows single judges to decide on their admissibility and accordingly on the further handling of the case. Notes rejecting claims regularly assert only that the claim was "manifestly ill-founded" according to Art. 35.3(a) ECHR.

In this context, it is interesting to note the statements of Professor Steven Greer, a former judge at the ECtHR, who argues that "there is no realistic prospect of justice being systematically delivered to every applicant with a legitimate complaint about a Convention violation. And unless it is systematic, individual justice becomes arbitrary and is, therefore not justice at all".[43] This ultimately leads to a "denial of justice" by the ECtHR.[44] These are strong words that should galvanize human rights lawyers – and not only them!

CONCLUSIONS

As already explained, Art. 6 of the "Jeder Mensch draft articles" has been attributed particular attention in this analysis. Strangely, in the public debate some of the other proposals seem to have garnered more attention, in particular insofar as highly topical issues such as the environment are addressed.

It is argued here, however, that all the issues mentioned in the Arts. 1–5, as important as they may be – and there can be no doubt that they are of essential relevance – are dealt with in appropriate fora with the required attention and expertise. The von Schirach text may act in this regard as a booster to these discussions, and in many ways it emphasizes the primary importance of these topics; and this in itself is surely also a remarkable contribution.

Where the "Jeder Mensch" text really breaks important new ground however is in the procedural area, when it highlights the need to grant direct access to the

[43] *See* J. Gerards, R. Slowe, *Human Rights in the Council of Europe and the European Union*, Cambridge University Press, Cambridge: 2018, p. 111. To believe in the objectivity of this test is, according to Greer, "naïve" (S. Greer, *What's Wrong with the European Convention on Human Rights?*, 30(3) Human Rights Quarterly 680 (2008), p. 686).

[44] *See* P. Mahoney, *The European Court of Human Rights and its Ever-Growing Caseload: Preserving the Mission of the Court While Ensuring the Viability of the Individual Petition*, in: S. Flogiatis, T. Zwart, J. Fraser (eds.), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength*, Edward Elgar, Cheltenham: 2013, pp. 18ff., 25.

CJEU. It is true that these proposals are not fully new, as they have been discussed also before and during EU reform conferences. But the fact that all these initiatives ended in nothing underscores how contentious these issues are and how strongly MSs resist any such attempts to infiltrate one of their last bastions of absolute sovereignty. This is a fight against the Hobbesian Leviathan, which is, in this area, still strong and unaffected by a more Lockean state vision[45] based on a social contract where individuals agree to public authority under the condition that they have access to an impartial judiciary. Growing sensitivity of the need for a more effective protection in the EU in this regard requires that more consideration and care be given to the issue of direct access to the CJEU, without the limits attached in Art. 6 of the Schirach-document, which can hardly be justified.

Some of the reforms proposed in the von Schirach text may touch upon norms of limited justiciability and they may require further extensive consideration. This is the case, for example, concerning the demand for a healthy and protected environment. However, even in this case it has to be remarked that the above-mentioned ruling of the German Federal Constitutional Court on the Climate Protection Act has shown that even such complex issues are amenable to legal justiciability, at least in the longer run. On the other hand, other articles (especially 4, 5 and 6) refer to an immediate need for legal action and also propose a concrete possibility for such action.

There can be no doubt: If any individual proposal of this text finds its way in the next treaty reform proposal as a result of this project, von Schirach and his team of advisors will have earned lasting merits for the European fundamental rights and integration project. For example, a reform leading to the enforceability in Europe of fundamental rights violations committed outside the EU borders would be a success of enormous dimensions. Figuratively speaking, Lafayette would thus return to the USA, where the exact equivalent regulation, the Alien Tort Claims Act, had its teeth pulled out (especially in *Kiobel*[46]). The individual rights complaint before the European courts, on the other hand, is a must if European law is to find its way into the thinking of national lawyers – and not only in the MSs which have joined the EU more recently.[47]

After all, the ability to enforce the law also by direct actions by individuals is an essential component of a functioning rule of law State. We could say that this works in the same way as a craftsman cannot go about his work without the right tools. The need for reform in the EU is demonstrated not least by the criticism frequently voiced in particular about the current system of legal protection for individuals.

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[45] *See* J. Locke, *Two Treaties of Government*, 1690.

[46] 569 U.S. 108, 124–25 (2013).

[47] See P. Hilpold, *Ringen um europäische Werte – Österreich in der EU*, in: P. Hilpold, A. Raffeiner, W. Steinmair (eds.), *Rechtsstaatlichkeit, Grundrechte und Solidarität in Österreich und in Europa – Festgabe zum 85. Geburtstag von Professor Heinrich Neisser, einem europäischen Humanisten*, Facultas, Wien: 2021, pp. 262-298.

Ferdinand von Schirach's initiative, with the modifications and refinements as shown above, could be an important step towards the translation of these requests into applicable norms.

Of course, the provision in Art. 6 of von Schirach's book, like those in the preceding articles, is an expression of requests that have already been voiced before in different fora. There can be no doubt that also in the future new instruments and channels will appear through which or whereby proposals of such a kind can be presented. In the academic world, a myriad of publications has theorized about each of these proposals, albeit often in a somewhat different form. The von Schirach text is therefore not the only text presenting proposals of this kind, und surely it is not a text which is innovative in each and every element.

In its comprehensive structure, however, and in the specific formulation of most of these proposals, originality stands out – an originality that may make an essential contribution to the ongoing reform process.

Lawyers often tend to neglect the importance of literature in undergirding and steering the law-creating process. In the end, both literature and law operate with identical or very similar instruments, and they both try to structure reality in a way that makes life on Earth somewhat more comprehensible and to endows it with sense, meaning and direction. Today it seems that the borders between these two neighbouring and in many ways related fields are becoming porous. Common interests and missions are being discovered. As the European integration projects are in need of ideals and strongly felt values to bring about a new impetus to this process and to carry it forward with renewed energy,[48] it should be ever more be taken into account that the world of art and literature surely harbours spirited idealists whose contributions, even though coming from outside of the epistemic legal community, should no longer be underestimated. On the other hand, literature and the arts, if they want to remain relevant and reflective of the societal reality in Europe, may profit from a closer look at the European integration process as both a political and a legal process. It would seem, taking into account the many unresolved questions still left open in the European integration process, that law as the expression of the pivotal societal rules that govern our daily life is too delicate and important of an issue to be left exclusively to the epistemic community of lawyers. As has recently been said, Europe is a child of literature.[49] In this moment of turmoil, the child may find important guidance if it listens again to its parents.

[48] For more on the role of lawyers as individuals in the further development of international law, *see* P. Hilpold, *Teaching International Law in the 21th Century – Opening up the Hidden Room in the Palace of International Law*, 27 April 2022, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4081412 (accessed 30 April 2023).

[49] *See* A. Platthaus, *Das Geisterkonzil unseres Abendlandes*, FAZ, 10 February 2019, available at: https://www.faz.net/aktuell/feuilleton/debatten/das-geisterkonzil-unseres-abendlandes-kommentar-zu-europa-literatur-16031741.html (accessed 30 April 2023).

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THE POPULIST CHALLENGE OF COMMON EU POLICIES: THE CASE OF (IM)MIGRATION (2015-2018)**

Abstract: *One of the major conflicts between populist and non-populist forces (movements, parties, governments) as well as the European Union (EU) institutions has manifested in the area of immigration policy. This article investigates how the influx of migrants in 2015-2016 was subsequently used by populists as a policy conflict ground within the EU. In this context, it particularly looks at how the problem of migration was framed and map the policy responses in the selected EU Member States. The article covers the 2015-2018 period and includes the following countries: France, Germany, Greece, Italy, Hungary, and Poland.*

The article observes that the 2015-2016 migration crisis and the response to it led to (or reinvigorated existing) politicisation of the topic across the EU, forcing the parties from all sides of the political spectrum to take a position on it. Simultaneously, one may also observe a process of securitisation of migration in the political debate in all analysed countries. Irregular migration was construed as a security threat by many political parties and leaders, requiring emergency measures and justifying actions outside the normal bounds of political and legal procedures. While the securitisation strategy was most visible in the discourse of the right-wing populist parties, its elements were progressively taken by the mainstream parties, arguably in response to increased salience of the issue.

The article also finds a correlation between the ideological profile of the parties and their approach to the migration crisis and the proposed EU response. All the parties located close to the right extreme tended to take a strong anti-immigration and an-

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ti-EU stance. All of them also ranked high in the populist index. On the other hand, the populist parties located on the left side or in the centre of the political spectrum took a moderate stance on this issue.

Keywords: immigration, populism, common EU policies, national policies, migration crisis

INTRODUCTION

One of the major conflicts between populist and non-populist forces (movements, parties, governments) as well as the European Union (EU) institutions has been manifested in the area of immigration policy. This article investigates how the influx of migrants in 2015-2016 was used by populists as a policy conflict ground within the EU. In this context, it particularly looks at how the problem of migration was framed and map the policy responses in the selected EU Member States (MSs). The article covers the 2015-2018 period and includes the following countries: France and Germany (representing two destination countries), Greece and Italy (representing two frontline countries), and Hungary and Poland (representing two new EU Members).[1]

For the purpose of this article, we understand populism as thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, the "pure people" versus the "corrupt elite".[2] In measuring the populist orientation of the parties, we use the populism index provided as part of the Populism and Political Parties Expert Survey (POPPA). The dataset measures positions and attitudes of 250 parties on key attributes related to populism, political style, party ideology, and party organisation in 28 European countries. The index is based on the factor regression scores of the following items: Manichean (i.e. the extent to which a party sees politics as a struggle between good and evil, indivisible (i.e. the extent to which a party considers ordinary people to be indivisible), general will (i.e. the extent to which a party sees the ordinary people's interest to be singular), people centrism (i.e. the extent to which a party believes that sovereignty should lie exclusively with the ordinary people), and anti-elitism.[3]

[1] The article is based on the DEMOS working paper (available at: https://bit.ly/42i8yGe) and (in its descriptive parts) on seven country reports prepared within the H2020 project DEMOS: "Democratic Efficacy and the Varieties of Populism in Europe". They were authored by Rosita Forastiero (EU), Viktor Szep (France), Réka Friedery (Germany), Angeliki Dimitriadi (Greece), Zsolt Kortvelyesi (Hungary), Andrea Crescenzi (Italy), and Katarzyna du Vall (Poland). The working paper also covered Slovakia (by Andrej Školkay), which is however not included here (for the text of this report see https://bit.ly/3LKcSIM) (accessed 30 April 2023).

[2] C. Mudde, *The Populist Zeitgeist*, 39(4) Government and Opposition 541 (2004), p. 543.

[3] M. Meijers, A. Zaslove, *Populism and Political Parties Expert Survey 2018 (POPPA)*, 2020, available at: https://doi.org/10.7910/DVN/8NEL7B (accessed 30 April 2023).

The article has been structured in the following way: Section 1 provides a brief background on the 2015-2016 European migration crisis and the EU response to it. Section 2 summarises statistical data on the size and character of migration in the covered MSs. Section 3 looks at how the problem of migration was framed in the political discourse of the parties, while Section 4 examines how the political postulates were translated into actions, including law. Section 5 connects the previous discussion with the problem of populism. The article ends with some brief conclusions.

1. THE EU LEGAL FRAMEWORK AND THE 2015-2016 MIGRATION CRISIS

The competences of the EU in the field of asylum and immigration for third country nationals date back to the 1992 Maastricht Treaty,[4] when this area was included in the third pillar concerning intergovernmental cooperation in justice and internal affairs. A significant change was introduced by the Treaty of Amsterdam (1997),[5] which moved asylum and immigration policies to the first pillar of the EU and empowered the Council of the European Union to regulate this field. On that basis the EU adopted a series of instruments that have gradually expanded the EU asylum *acquis*.[6] Further reforms were introduced as a consequence of entry into force of the Lisbon Treaty in 2009.[7] In particular, the Treaty on the Functioning of the European Union (TFEU) now outlines a common asylum, immigration and external border control policy, which are based on solidarity between MSs, and fairness to third country nationals. The current system is largely determined by Regulation 604/2013 (Dublin III Regulation)[8] that identifies which MS is responsible for the examination of an application for asylum, submitted by persons seeking international protection within the EU under the 1951 Geneva Refugee Convention[9] and the EU Qualification Directive.[10] Although these initiatives have

[4] Maastricht Treaty (Treaty on European Union), 7 February 1992, OJ C191/1.

[5] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, OJ C340/1.

[6] *See generally* A. Geddes, P. Scholten, *The Politics of Migration & Immigration in Europe* (2nd ed.), Sage, London: 2016.

[7] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, OJ C 306/1.

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

[9] Convention relating to the status of refugees (signed on28 July 1951, entered into force on22 April 1954), 189 UNTS 150.

[10] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection,

brought an increased level of harmonisation in applied standards, there is no "common" or unified European asylum system but rather 27 different asylum systems with common minimum denominators.[11]

The European migration crisis[12] can be traced back to a series of uprisings in the Middle East and North Africa (MENA) region in 2011 (so-called "Arab Spring"), with some of them eventually transforming into civil wars. This resulted in a gradual increase in the migratory flows to Europe, a process that culminated in 2015-2016. Alone in 2015 there were 1.8 million irregular border crossings into the EU, an increase of 546% compared to 2014.[13] Most migrants travelled either through Turkey to Greece or through Libya to Italy.[14] The crisis placed unprecedented pressure on the existing mechanisms, particularly in the frontline MSs, and exposed limits of the Dublin system. For example, in 2015 856,723 irregular arrivals entered through the Greek maritime border, while an additional 153,842 arrived to Italy. Among the measures adopted by the EU was Recommendation 2015/914 of 8 June 2015[15] that defined an EU-wide emergency resettlement scheme to offer 20,000 places for people in need of international protection on the basis of a distribution key and allocations for each MS. In this context, the Council of the EU adopted two decisions,[16] which provided for a temporary and exceptional relocation mechanism from Italy and Greece to other MSs of persons in clear need of international protection. The relocation was based on objective criteria (e.g. a country's population, gross domestic product and unemployment rate). The EU also proposed the creation of a permanent mandatory

for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9.

[11] A good overview of EU immigration and asylum law can be found in S. Peers, *EU Justice and Home Affairs Law. Vol. 4: EU Immigration and Asylum Law* (4th ed.), Oxford University Press, Oxford: 2016; and K. Hailbronner, D. Thym (eds.), *EU Immigration and Asylum Law: Text and Commentary* (2nd ed.), Brill, Leiden: 2015. For more recent account *see* E. Tsourdi, P. De Bruycker (eds.), *Research Handbook on EU Migration and Asylum Law*, Edward Elgar, Cheltenham: 2022.

[12] For a good background reading *see* L. Buonanno, *The European Migration Crisis*, in: D. Dinan, N. Nugent, W.E. Patterson (eds.), *The European Union in Crisis*, Palgrave Macmillan, London: 2017.

[13] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, Brussels, 23 September 2020 COM(2020) 609 final.

[14] H. Crawley et al., *Destination Europe? Understanding the dynamics and drivers of Mediterranean migration in 2015, Unravelling the Mediterranean Migration Crisis*, MEDMIG Final Report 2016, available at: http://www.medmig.info/wp-content/uploads/2016/12/research-brief-destination-europe.pdf (accessed 30 April 2023).

[15] Commission Recommendation (EU) 2015/914 of 8 June 2015 on a European resettlement scheme, OJ L 148/32.

[16] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239/146 and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80.

and automatically triggered relocation system to distribute those in clear need of international protection within the EU.[17]

The relocation system (both the temporary and permanent one) was strongly opposed by the Visegrad countries (i.e. Czech Republic, Hungary, Poland and Slovakia), but many other Members also failed to meet their quotas. This led the EU to relaunch the cooperation with third countries of origin and transit and to make further efforts to implement a policy of containment. In this regard, the agreement with Turkey was signed in 2016 with the aim to stop the flow of irregular migration via Turkey and replace it with legal channels of resettlement of refugees to the EU.[18] In 2017 Italy, acting independently, signed a Memorandum of Understanding with Libya that also concerned cooperation in immigration issues.[19] All these developments, together with a more restrictive approach taken by the EU and MSs as well as some stabilisation in at least some countries of origin, led to a significant decrease in the number of irregular migrants arriving in the EU from 2017 onwards.

2. THE EU MEMBER STATES AND IMMIGRATION

Unlike the Western European countries, all the Central European (CEE) MSs have been historically countries of emigrants rather than immigrants.[20] Their accession to the EU in 2004 initially strengthened this trend with many citizens leaving for Western Europe, but as the time passed a new tendency has emerged as some of them gradually have become an attractive destination for economic migrants, particularly drawing people from the former Soviet republics. For example, between 2014 and 2018 Poland has welcomed approximately 1-2 million Ukrainian citizens, while in 2015 one out of five first residence permits were issued in Poland (541,583; 20.8%).[21] Nevertheless, the size of foreign-born population living in those countries has remained lower than in most of the "old" EU states.

[17] Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM/2015/0286 final.

[18] EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016. For further details *see* C. Costello, *It need not be like this*, Forced Migration Review, January 2016, p. 12.

[19] Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017, available at: shorturl.at/eFLV3 (accessed 30 April 2023).

[20] *See generally* C. Wallace, D. Stola (eds.), *Patterns of Migration in Central Europe*, Palgrave Macmillan, London: 2001.

[21] Eurostat, *Residence permits for non-EU citizens*, Eurostat News Release, 211/2016, available at: shorturl.at/FQVW2 (accessed 30 April 2023).

Table 1: Foreign-born population (as of on 1 January 2018)[22]

Country	Size of foreign-born population	Percentage of population
France	8,156,208	13.06%
Germany	13,745,843	16.6%
Greece	1,277,861	11.91%
Hungary	536,128 (many of them being ethnic Hungarians)	5.48%
Italy	6,175,337	10.23%
Poland	695,850	1.83%

The number of people seeking international protection (i.e. persons who apply for asylum, subsidiary protection or any other form of protection) also differed between Poland and old EU MSs covered by this article. While Hungary witnessed a sharp increase in the applications in 2015, later the numbers returned to their pre-crisis level.

Table 13: Asylum and first-time asylum applications (annual aggregated data)[23]

Country	2015	2016	2017	2018
France	76,165	84,270	99,330	137,665
Germany	476,510	745,160	222,565	184,180
Greece	13,205	51,110	58,650	66,965
Hungary	177,135	29,430	3,390	670
Italy	83,540	122,960	128,850	59,950
Poland	12,190	12,305	5,045	4,110

Another element that differed among the analysed countries was the origin of the applicants. In the case of Poland, they mostly came from Russia, Ukraine and Tajikistan. For Hungary, Greece and Germany the most important countries of origin were Syria, Afghanistan, Pakistan and Iraq. In the case of France these were Sudan, Afghanistan, and Syria, while for Italy the relevant countries included Nigeria, Pakistan and the Gambia.[24]

[22] Eurostat, *Foreign born population*, available at: https://tinyurl.com/y34vhzpm (accessed 30 April 2023).

[23] Eurostat, *Asylum and first time asylum applicants – annual aggregated data*, available at: https://tinyurl.com/y6groeej (accessed 30 April 2023).

[24] For the historical and current data see country reports in Asylum Information Database (AIDA) (https://asylumineurope.org).

3. IMMIGRATION IN THE POLITICAL DISCOURSE OF THE PARTIES

The migration crisis as well as the response to it became one of the leading political themes in all analysed countries in 2015-2018. This section looks at the positions taken by major domestic parties/movements on these two issues. For those countries that held elections during the covered period, the prominence of the topic of immigration and methods of dealing with it is also discussed. For each presented party we provide two indicators: first a party's overall ideology on a scale ranging from 0 (left) to 10 (right) and (ii) second a populism index (between 0 and 10). Both of them were taken from the POPPA dataset.

3.1. France

Since the late 1970s, the question of migration has been a controversial political issue and remains a key policy challenge nowadays.[25] The crisis of 2015-2016 brought it again to the top of the French political agenda. A variety of different positions emerged. *Parti socialiste* (PS, 4.3/1.85), which was in power for most of the covered period (2012-17), took a moderate approach.[26] It was for an active involvement of France in tackling the crisis and supported the EU-wide relocation mechanism. At the same time, its government was constrained by the growing popularity of *Front national* (FN, 8.4/9.0), and eventually decided to opt for limits in the number of migrants to be relocated to France.

Other parties, while taking different positions on migration, shared the critical view of the relocation mechanism. *Parti de gauche* (later transformed to *La France insoumise*: 1.5/8.44) argued that such a mechanism did not tackle the root causes of migration.[27] *Les Républicains* (LR, 7.5/4.43) indicated the limited capacity of France to integrate all migrants.[28] However, the most vocal opponent was FN. It rejected the relocation mechanism, seeing it as encroaching on national sovereignty. Instead, FN called for strengthening the national borders, systematic return of

[25] S. Wolff, *Immigration, a consensual issue in the French presidential campaign?* LSE Blog, 15 April 2017, available at: https://blogs.lse.ac.uk/europpblog/2017/04/15/immigration-a-consensual-issue-in-the-french-presidential-campaign/ (accessed 30 April 2023).

[26] B. Remy, *Case study: Immigration in France and latest reaction to the refugee crisis*, December 2015, a conference paper, available at: shorturl.at/evBMO (accessed 30 April 2023).

[27] J.-L. Mélenchon, *Mélenchon sur les migrants: «Il faut régler les causes du départ»*, YouTube, 12 September 2015, available at: https://www.youtube.com/watch?v=O4zjC0bFRXw (accessed 30 April 2023).

[28] A. Réaux, *Pourquoi les accords de Schengen sont-ils remis en cause?*, Le Monde, 16 June 2015, available at: https://www.lemonde.fr/les-decodeurs/article/2015/06/16/pourquoi-les-accords-schengen-sont-ils-remis-en-cause_4655302_4355770.html (accessed 30 April 2023).

irregular immigrants to their home countries, ending all social incentives for such immigration and drastically reducing legal forms of immigration.[29]

Migration remained a central political topic in the 2017 presidential campaign. It dominated Le Pen's (FN) political message who proposed prohibiting naturalisation of illegal migrants, capping legal immigration and repealing the law of the soil.[30] Fillon (LR), whose position was influenced by the stance taken by FN, also called for capping legal migration, restricting access to social assistance, reforming the Schengen system, and giving French nationality only to those who clearly assimilate.[31] On the other hand, Hamon, supported by PS and the Greens, took a more liberal stance, as he put the emphasis on integration incentives. However, he was also in favour of eliminating the Dublin system given its failure during the crisis.[32] Macron (*La République En Marche*, 6.11/3.51) supported Merkel's open-door policy and concentrated on integration, skilled migration and taking a fair share in welcoming refugees.[33]

3.2. Germany

In 2015, Chancellor Merkel decided to leave the German borders open to irregular migrants coming to Europe as a humanitarian necessity (the assumption was that most of them were either genuine refugees or could be classified for other type of international protection). Her move can also be seen as an emergency gesture reflecting the critical situation in the frontline and transit Members. This decision triggered an increasingly polemic discussion on security, identity and belonging within German society and had an impact on the results of the 2016 regional, and the 2017 federal, elections.[34] In particular, the surge in asylum applications in 2015–16 played a key role in growing popularity of the far-right *Alternative für Deutschland* (AfD, 8.94/9.43) and anti-Islam movement Pegida (*Patriotische Europäer gegen die*

[29] N. Bay, *Immigration massive forcée: L'Union Européenne s'acharne contre les peuples!* RN - Rassemblement National, 2016, available at: https://rassemblementnational.fr/communiques/immigration-massive-forcee-lunion-europeenne-sacharne-contre-les-peuples (accessed 5 January 2022, now inaccessible).

[30] M. Le Pen, *144 engagements présidentiels*, 2017, available at: https://t.ly/AGgJ (accessed 30 April 2023).

[31] F. Fillon, *Mon projet pour la France*, 2017, available at: shorturl.at/aBJTU (accessed 30 April 2023).

[32] Wolff, *supra* note 25.

[33] En Marche, *Le programme d'Emmanuel Macron concernant l'asile et l'immigration*, La République En Marche! 2017, available at: https://en-marche.fr/emmanuel-macron/le-programme/immigration-et-asile (accessed 30 April 2023).

[34] B. Glorius, *Migration to Germany: Structures, processes, and discourses*, 8(1) Regional Statistics 3 (2018). *See also* J. Tjaden, T. Heidland, *Does welcoming refugees attract more migrants? The myth of the 'Merkel effect'*, KIEL Working Paper no. 2194, August 2021.

Islamisierung des Abendlandes), which called for the defence of the Judeo-Christian foundations of Western culture from islamisation.[35]

Eventually, all the parties represented in the Bundestag took a stance on migration, integration and asylum in their electoral programmes. The main issues around which the disagreement arose included: (i) family reunification for beneficiaries of international protection; (ii) limits on the number of immigrants/asylum seekers accepted per year; (iii) deportation of rejected applicants; and (iv) character of the integration policy. There were also serious differences over those matters between Merkel's *Christlich Demokratische Union* (CDU, 5.72/076) and its coalition partner Bavaria-based *Christlich-Soziale Union* (CSU, 7.11/3.24) as the latter demanded a stricter approach and the EU-wide solution to the question of migrants and refugees subject to sanction for non-compliant Members. *Sozialdemokratische Partei Deutschlands* (SPD, 4.11/1.52) – the third coalition partner – took a moderate approach, rejecting limits on the number of accepted refugees and ending the moratorium on family renunciations for subsidiary protection recipients.[36] *Die Linke* was even more liberal, advocating for a right to stay for anyone residing in Germany. All mainstream German parties were in favour of the relocation mechanism and a system of quotas for MSs.[37]

3.3. Greece

Immigration has been politicised in Greece for a long time and the 2015 migration crisis changed little in this regard. At the same time, one also needs to admit that other concerns dominated the political discourse for most of 2015. Greece was in the middle of the financial crisis and the question of the bailout preoccupied everyone. Eventually, the snap election was won again by populist *SYRIZA* (2.84/7.63), which formed a government with the equally populist but right-wing *ANEL* (8.30/8.46)[38] The narrative of *SYRIZA* focused on helping irregular migrants and accusing MSs of a lack of solidarity. *SYRIZA* purposefully linked the Euro crisis with the migration crisis, with the former utilised as a bargaining chip to gain more financial concessions.[39] *ANEL*, while maintaining its anti-immigration rhetoric, in practice followed the policy proposed by its coalition partner.[40]

[35] *See generally* H. Vorländer, M. Herold, S. Schäller, *PEGIDA and New Right-Wing Populism in Germany*, Palgrave Macmillan, Cham: 2016.

[36] M. Bierbach, *Germany's major parties on asylum and migration*, DW, 24 September 2017, available at: shorturl.at/glr25 (accessed 30 April 2023).

[37] *Ibidem*.

[38] P. Aslanidis, C.R. Kaltwasser, *Dealing with populists in government: the SYRIZA-ANEL coalition in Greece*, 23(6) Democratization 1077 (2016).

[39] A. Nestoras, *The Gatekeeper's Gambit: SYRIZA, Left Populism and the European Migration Crisis*, Institute of European Democrats, 2 February 2016.

[40] *Εθνική γραμμή για το προσφυγικό στο συμβούλιο των πολιτικών αρχηγών* [National unity on the refugee

Conservative New Democracy (ND, 7.23/2.59) was the main party in opposition. It put the emphasis on security and advocated for the creation of closed type pre-departure centres for irregular migrants, the strict separation of refugees from economic migrants, and effective border controls.[41] *Potami* (5.5/1.91) had a middle-of-the-road approach as it stressed the need to respect the human and fundamental rights of migrants, but also expressed concern about the possibility of thousands being stranded in Greece. The centre-left coalition of *PASOK* and Democratic Left (*DIMAR*) (4.91/2.86) held a similar position.[42] While most of the opposition parties were in favour of the EU-Turkey agreement, they all criticised, on different grounds, its implementation. Outside the mainstream parties, Golden Dawn (10/9.12) opposed the presence of migrants in Greece, claiming the policies implemented were part of the "plans for the Islamisation of Greece".[43] Communist *KKE* (0.61/7.51) had the most consistent position on migration, criticising both the EU and the Greek government for policies that stood in violation of the 1951 Geneva Refugee Convention.[44]

3.4. Hungary

The anti-immigration rhetoric was first used by *Jobbik* – a Hungarian far-right party (8.38/7.32),[45] but it was quickly adopted in 2015 by the governing party *Fidesz* (8.76/9.01). Since then, immigration and the response to it has become a key political issue, playing an important role not only in two electoral campaigns (general and local), but also in the intervening period. *Fidesz's* decision to prioritise the topic was motivated by shrinking public support for the party and the need to attract the electorate of the growing *Jobbik.*[46] Immigration was used as a polarisation mechanism that facilitated to construe a people-elites dichotomy. "Pro-immigration" and "liberal" forces, including those in the EU (termed "Brussels" in

crisis in the council of political leaders], EfSyn, 4 March 2016, available at: https://www.efsyn.gr/politiki/61057_ethniki-grammi-gia-prosfygiko-sto-symboylio-ton-politikon-arhigon (accessed 30 April 2023).

[41] L.H. Abdou, T. Bale, A.P. Geddes, *Centre-right parties and immigration in an era of politicisation*, 48(2) Journal of Ethnic and Migration Studies 327 (2022).

[42] *Ibidem*.

[43] Συγκέντρωση μίσους από τη Χρυσή Αυγή ενάντια στους πρόσφυγες στον Πειραιά – Αντισυγκέντρωση από αντιφασιστικές οργανώσεις [Rally of hatred organised by Golden Dawn against the refugees in Pireus], ToPontiki, 8 April 2016, available at: http://www.topontiki.gr/article/166246/sygkentrosi-misoys-apo-ti-hrysi-aygi-enantia-stoys-prosfyges-ston-peiraia (accessed 30 April 2023).

[44] *Οι θέσεις του ΚΚΕ για το Προσφυγικό – Μεταναστευτικό* [KKE's positions on the refugee-migration issue], Rizospastis, 6 March 2016, available at: https://www.rizospastis.gr/story.do?id=8807449 (accessed 30 April 2023).

[45] A. Bíró-Nagy, *Politikai lottóötös: A migráció jelentősége a magyar politikában, 2014-2018*, in: B. Böcskei, A. Szabó (eds.), *Várakozások* és *valóságok: Parlamenti választás*, MTATKPTI, Budapest: 2018, p. 272.

[46] G. Tóka, *A centrális erőtér bomlása*, in: B. Böcskei, A. Szabó (eds.), *Várakozások* és *valóságok. Parlamenti választás 2018*, MTATKPTI, Budapest: 2018.

this narrative) were opposed to the genuine representatives of the people. At the same time, immigration was associated by *Fidesz* with criminality and terrorism, and pictured as the existential threat to the European, Hungarian and Christian civilisation.[47] This narrative also allowed *Fidesz* to play on post-socialist ressentiment and talk about the failure of "the West" to integrate and deal with its own post-colonial problems. The concentration of power in Hungary meant that the positions of the government and of the governing party alliance (with *Fidesz* as a leading force) were indistinguishable.

Fidesz's dominance in the political sphere and public discourse, combined with various illiberal (anti-pluralist) measures taken by the government, effectively eliminated any meaningful discussion on this issue. However, the voice of the opposition was weak not only because of this reason. While the party headed by the former socialist Prime Minister Ferenc Gyurcsány (*Demokratikus Koalíció:* 3.92/2.90) questioned *Fidesz's* narrative most vehemently, his former party *Magyar Szocialista Párt* (3.42/2.45) mostly kept a low profile, arguably in the attempt to avoid clashing with generally anti-immigration public opinion. *Magyarország Zöld Pártja* (4.35/3.38) seemed to be torn between a classical human rights-based approach and the opposition to what they saw as globalist pro-immigration positions.[48] This general unwillingness of the opposition parties was visible during the 2014 general election, the 2016 quota referendum (which eventually failed to meet the required threshold) and the 2018 local elections campaigns.

3.5. Italy

Immigration was an important political topic in Italy well before 2015. Due to its location, Italy for a long time played a frontline role in immigration, with immigrants attempting the sea crossings from Albania and North Africa. In the electoral programmes of the right forces – *Forza Italia* (7.31/5.56), and far-right *Lega Nord* (LN, 8.87/8.59) and *Fratelli d'Italia* (FdI, 9.18/7.43) – the issue of immigration was linked to crime and terrorism. Those parties advocated for strict borders controls, mass repatriation of irregular migrants, abolition of humanitarian protection and conclusion of agreements with countries of origin that would allow for readmission of irregular migrants. LN and FdI were the most extreme as they called for creation of regional identification and expulsion centres, and mandatory detention of migrants.[49] With the time, the LN's discourse increasingly employed an Islamophobic

[47] G. Bernáth, V. Messing, *Infiltration of political meaning-production: Security threat or humanitarian crisis? The coverage of the refugee 'crisis' in the Austrian and Hungarian media in early autumn 2015*, CEU School of Public Policy, 2016, available at: https://bit.ly/2HQMHSr (accessed 30 April 2023).

[48] *Ibidem*, p. 11.

[49] *See* J. Dennison, A. Geddes, *The centre no longer holds: the Lega, Matteo Salvini and the remaking of Italian immigration politics*, 48(2) Journal of Ethnic and Migration Studies 441 (2022); F. Brioschi, *Immigration*

repertoire and emphasises the role of Catholicism in the community's history.[50] As the election results showed, these calls resonated well with the Italian electorate.

A different stance was taken by populist *Movimento 5 Stelle* (M5S, 5.63/9.45), which put the emphasis on the management of the EU external borders, with the provision of legal entry channels and the fight against trafficking in human beings. At the same time, M5S proposed a review of the Dublin system and setting up of an automatic and mandatory distribution mechanism of asylum seekers among all MSs.[51] On the centre-left side of the political scene, *Partito Democratico* (PD, 4.37/2.10) argued for better control of the external EU borders. Like M5S, PD intended to review the Dublin system, introducing mandatory redistribution of asylum seekers in the EU with a corresponding sanction system. The new framework included a proposal to sign readmission agreements with the states of origin and transit and the setting up of humanitarian corridors. PD also proposed an improvement of the migrant reception system.[52]

3.6. Poland

Until 2015 the topic of immigration was largely absent in the Polish political discourse, and the problem of migration was only addressed in terms of Polish emigration.[53] It appeared for the first time during the 2015 parliamentary electoral campaign and was used as one of the main political issues. Although the government (at that time controlled by *Platforma Obywatelska*) (PO, 6.4/2.0) was not enthusiastic about relocation of asylum-seekers from Greece and Italy to other MSs, its rhetoric was generally moderate, as reflected in the PO political programme.[54] Its strategy envisaged locating Poland within the European mainstream, by presenting it as a reliable and stable EU Member. On the other hand, conservative and populist *Prawo i Sprawiedliwość* (PiS, 8.8/9.19) took an openly anti-Islamic and anti-immigration stance, taking advantage of people's fears and prejudices. If refugees appeared as subjects rather than objects, the emphasis was given to (undefined) EU/national assistance on the spot, in their countries of origin.[55] A similar approach was also taken by the populistic movement

Policies & Citizenship: Where Do Italy's Parties Stand?, Liberties, 28 February 2018, available at: https://tinyurl.com/4p8bb5ak (accessed 30 April 2023).

[50] G. Bulli, S.C. Soare, *Immigration and the Refugee Crisis in a New Immigration Country: The Case of Italy*, 18(1) Croatian and Comparative Public Administration 127 (2018).

[51] Dennison, Geddes, *supra* note 49.

[52] Brioschi, *supra* note 49.

[53] *See e.g.* PiS, *Zdrowie, praca, rodzina. Program Prawa i Sprawiedliwości* [Health, work, family. Law and Justice Program], 2014, pp. 12-14.

[54] PO, *Polska przyszłości. Program Platformy Obywatelskiej RP* [Poland of the future. Program of the Civic Platform], 2015, available at: http://www.michalstopka.pl/wp-content/uploads/2015/10/Polska-Przyszlosci-Program-PO.pdf (accessed 30 April 2023), pp. 66-67.

[55] P. Cywiński, F. Katner, J. Ziółkowski, *Zarządzanie strachem. Jak prawica wygrywa debatę publiczną w Polsce* [Fear management. How the right wins the public debate in Poland], Fundacja Batorego, Warszawa: 2019, p. 14. Note that this is in sharp contradiction to the public sentiment towards Ukrainian war refugees in 2022-23.

Kukiz'15 (8.3/9.43), the third political force in the new Polish parliament.[56] Although in both cases, this was clearly motivated by strategic pre-election reasons, it also seems that at least part of PiS (as well as *Kukiz'15*) and its electorate shared the vision of the world in which immigrants were primarily seen as a threat to security and traditional Polish culture/values, the fact that is confirmed by the post-election position of PiS as well as the policy implemented by the PiS-led government. The other parties – i.e. *Polskie Stronnictwo Ludowe* (PSL, 5.8/3.49), *Nowoczesna* (5.7/0.94), *Sojusz Lewicy Demokratycznej* (3.2/2.96) – took either moderate or pro-immigration standpoints, although this issue was not at the centre of their campaigns.[57] The anti-immigration stance of various parties resonated well with the general mood in Polish society. For example, the summary survey for the whole of 2016 found that 67% respondents were against accepting refugees from the MENA region as a part of relocation mechanism (with only 26% in favour).[58]

The issue of migration was also raised before the 2018 local election. Independent presidential candidates supported by PO mostly took either a pragmatic approach or put the emphasis on openness and memory of the Polish multicultural past,[59] while PiS remained anti-immigration. Nevertheless, the issue was not as prominent as in 2016.

4. POLICY IN ACTION: GOVERNMENTAL STRATEGIES AND LEGISLATIVE DEVELOPMENTS

4.1. France

Initially the French reaction aimed at reforming its asylum legislation in order to improve the conditions for receiving and dealing with migrants. This reform (2015) envisaged an increase in the rights of asylum seekers and improvements in the efficiency of the procedures, as well as the introduction of administrative measures that would make it easier for migrants to request asylum. The country consistently supported the EU-wide relocation system.[60]

[56] *See e.g.* Kukiz's post on Facebook, available at: https://bit.ly/3NlM3vx (accessed 30 April 2023).

[57] K. Czornik, *Problematyka uchodźców (migrantów) z Bliskiego Wschodu i Afryki Północnej w kampanii parlamentarnej z 2015 roku. Analiza stanowisk* [The issue of refugees (migrants) from the Middle East and North Africa in the parliamentary campaign of 2015. Analysis of the positions], in: M. Kolczyński (ed.), *Polskie wybory 2014-2015: kontekst krajowy i międzynarodowy – przebieg rywalizacji – konsekwencje polityczne*, Vol. 2, Wydawnictwo Uniwersytetu Śląskiego, Katowice: 2017.

[58] CBOS, *Stosunek Polaków do przyjmowania uchodźców* [Attitude of Poles to accepting refugees], Communique for survey, no. 1, 2017, available at: https://www.cbos.pl/SPISKOM.POL/2017/K_001_17.PDF (accessed 30 April 2023).

[59] A. Demczuk et al., *Migranci, uchodźcy i ksenofobia w kampanii wyborczej 2018 – raport z monitoring* [Migrants, refugees and xenophobia in the 2018 election campaign – monitoring report], Helsinki Foundation for Human Rights, 2018, p. 8.

[60] European Migration Network, *Third focused study 2017. The changing influx of asylum seekers in 2014-2016: Responses in France*, 2017.

At the same time, there were attempts, especially after the Marseille attack (2017) committed by an illegal migrant who should have been placed in detention, to increase the number of detention centres. The government also dissolved some migrant camps scattered throughout major cities. There were several cases of police pushbacks of unaccompanied children to Italy that did not comply with French law or international human rights on treatment of unaccompanied children. In six cases between 2012 and 2016, the European Court of Human Rights ruled that France's detention of children violated the prohibition on inhuman treatment or punishment.[61]

The real change of French immigration policy occurred in 2018 (with Macron as the president), when the policymakers decided to introduce drastic reforms due to growing internal political pressure. Despite the criticism of the United Nations High Commissioner for Refugees (UNHCR) and several NGOs, France adopted the Law on migration and asylum (10 September 2018), which radically tightened the rules around asylum.[62] The bill shortened asylum application deadlines (e.g. 90 days, rather than 120, to file an application), doubled the time for which illegal migrants can be detained (from 45 to 90 days), introduced a one-year prison sentence for entering France illegally, and restricted access of asylum seekers to non-urgent health care. The law also envisages (as of 2020) the implementation of annual quotas for skilled immigrants. Overall, the law, which took effect in 2019, made it more difficult to obtain asylum in France.

4.2. Germany

The most important pieces of German law that regulated the situation of migrants included the Immigration Act of 2005, the Asylum Act of 2015 (that replaced the previous Asylum Procedure Act), the Integration Act of 2016 and the Nationality Act of 2000. Two of those acts were adopted in reaction to the migration crisis to facilitate the admission of an increased number of applicants. As mentioned above, Germany decided to open its borders to irregular migrants that reached the EU. However, it quickly turned out that their unprecedent inflow constituted a serious challenge for the German administrative structures, raised concerns over internal security, and negatively affected the political position of CDU and its coalition partner CSU. While the government always saw the European-wide strategy as the only available long-term solution, due to political deadlock at the EU level, it decided to take certain actions nationally and pushed for temporal solutions that could have

[61] For review of these cases see B. Zalar, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law*, European Law Institute, 2017, available at: https://bit.ly/39xlqzU (accessed 30 April 2023).

[62] S. Fine, *The integration of refugees in France (In-Depth Analysis – Requested by the EMPL Committee)*, 2019, available at: https://bit.ly/33vIifp (accessed 30 April 2023).

eased the migration burden. Consequently, one could have seen a turn to the more conservative approach by the governing coalition (e.g. suspension of family reunification, introduction of the residence rule, possibility of pre-removal detention in regular prisons instead of specialized institutions) and use of solutions outside rather than within the EU.[63] In particular, Germany led the negotiations with Turkey over the new migration agreement that would allow the return of irregular migrants to that country.[64] Germany also concluded in 2018 several bilateral Administrative Arrangements with other EU Members regulating the return of asylum seekers as an interim response.[65] Many commentators argued that those arrangements were incompatible with the basic principle of the Schengen Area (as they presupposed the existence of quasi-permanent border controls) as well as with the Dublin system.[66] In July of 2017, stricter regulations for those with exceptional leave to remain and for people classified as "potential dangers" were implemented through the Law for Better Implementation of the Obligation to Leave the Country. As a consequence, it became easier to be detained prior to deportation.[67] Further reforms were proposed in 2018 and eventually a new package of rules on immigration and asylum was adopted a year later. The new measures opened up the labour market to skilled migrant workers on the one hand, but facilitated the return and deportation of rejected asylum seekers on the other.[68]

4.3. Greece

The period 2015-2018 was rich in regulatory activities, focused primarily at improving the functioning of the Asylum Service to deal with an increased number of applications and implementing the EU-Turkey agreement. In 2016 the Greek Parliament adopted a law which partially attempted to regulate the establishment and function of hotspots and the procedures taking place there (L 4375/2016). However, national legislation failed to effectively address the involvement of the EU agencies, for example

[63] Asylum Information Database (AIDA), *Country report: Germany*, 2016 update, available at: https://tinyurl.com/93vkyzux (accessed 30 April 2023).

[64] F. Tassinari, S. Tetzlaff, *What Europe can expect from Germany's changing migration policy*, DIIS Policy Brief, November 2016, available at https://bit.ly/3lBNhBC (accessed 30 April 2023).

[65] European Council on Refugees and Exiles, *Bilateral Agreements: Implementing or Bypassing the Dublin Regulation?*, ECRE Policy Paper no. 5/2018, available at: https://tinyurl.com/mvmb2nfp (accessed 30 April 2023).

[66] S. Poularakis, *The Case of the Administrative Arrangement between Greece and Germany: A tale of "para Dublin activity"?*, EDAL, 5 November 2018, available at: https://bit.ly/2HTuofz (accessed 30 April 2023).

[67] European Council on Refugees and Exiles, *Airport procedures in Germany. Gaps in quality and compliance with guarantees*, 2019, available at: https://tinyurl.com/2p9d4mak (accessed 30 April 2023).

[68] J. Mischke, *Germany passes controversial migration law*, Politico, 7 June 2019, available at: https://www.politico.eu/article/germany-passes-controversial-migration-law/ (accessed 30 April 2023).

Frontex agents.[69] In practice a parallel asylum process also emerged, which was neither prescribed in EU law nor applied elsewhere in the EU, with a fast-track asylum applications on the islands (for asylum seekers arriving after 20 March 2016) and a regular procedure on the mainland.[70] The law establishing the Appeals Authority was amended twice in 2016, following the reported EU pressure relating to the implementation of the EU-Turkey agreement (as some Appeals Committees decided that Turkey was not a safe third country for the appellants).[71] Further amendments to the procedure before the Appeals Committees that were introduced by L 4540/2018, again in response to EU pressure to limit the appeal steps and accelerate the procedure (e.g. the possibility of replacing judicial members of the Appeals Committee in the event of "significant and unjustified delays in the processing of appeals").

4.4. Hungary

All relevant pieces of Hungarian law (e.g. Act No. 80 of 2007 on asylum) witnessed extensive and recurring amendments in the 2015–18 period, which eventually led to several Court of Justice of the European Union rulings.[72] For example, the revised law authorised the government to designate safe third countries. On that basis, Serbia was identified as such. The new law also introduced the concept of "immigration-related emergency". This special legal order allows for extensive restrictions of individual rights (e.g. property rights, freedom of movement) and possibility of using the army in border protection. The amendment of Act No. 140 of 2015 introduced simplified assessment and moved the procedure to the transit zones, with the exception of vulnerable applicants.[73] Although these territories are Hungarian, they are not considered to be falling within the responsibility of the Hungarian authorities.[74] The law also criminalised irregular border crossings.

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[69] Asylum Information Database (AIDA), *Country report: Greece*, 2017 update, available at: https://tinyurl.com/3y7shf3z (accessed 30 April 2023).

[70] Asylum Information Database (AIDA), *Country report: Greece*, 2018 update, available at: https://tinyurl.com/2p9dsf5z (accessed 30 April 2023); A. Dimitriadi, M.-A. Sarantaki, *The refugee 'crisis' in Greece: politicisation and polarisation amidst multiple crises*, CEASEVAL Working Paper no. 11/2018.

[71] *Submission of the Greek Council for Refugees to the Committee of Ministers of the Council of Europe in the case of M.S.S. v. Belgium & Greece* (App. No. 30696/09) and related cases, 24 April 2019, p. 80.

[72] *See e.g.* Case C564/18 *LH v. Bevándorlási és Menekültügyi Hivatal*, ECLI:EU:C:2020:218; Case C-406/18, *PG v. Bevándorlási és Menekültügyi Hivatal*; and Case C-821/19 *Commission v. Hungary*, ECLI:EU:C:2021:930.

[73] Hungarian Helsinki Committee, *A Magyar Helsinki Bizottság észrevételei az egyes migrációs és menekültügyi tárgyú törvények és kormányrendeletek módosításáról*, 7 March 2016, available at: https://www.helsinki.hu/wp-content/uploads/Menekultugyi_modositasra_Helsink_-eszrevetelek_20160307.pdf:9 (accessed 30 April 2023).

[74] Hungarian Helsinki Committee, *13 abszurditás a „röszkei zavargók" elleni bűnperben. Magyar Helsinki Bizottság*, 1 July 2016, available at: https://www.helsinki.hu/13-abszurditas-a-roszkei-zavargok-elleni-bunperben/ (accessed 30 April 2023).

Criminal proceedings followed, including aggravated cases, e.g. damaging the fence, with the statutory sanction of two to eight years of imprisonment.[75] After a 2017 amendment, all applicants, with the exception of those under 14, had to remain in the transit zones throughout the entire administrative procedure, and asylum applications were also moved to the zones. The amendment of Act No. 94 of 2016 introduced pushbacks: apprehended asylum seekers could be pushed back to the Croatian or Serbian side of the zone within 8 km from the borders without the government registering either the applicant or the asylum request. Later the law was expanded to the entire country. The amendment of Act 6 of 2018 established an automatic rejection of requests from those who had arrived through countries where the applicant was not in danger.[76] The same act criminalised "aiding and supporting illegal immigration" (and this included providing information and legal assistance); later, the Constitutional Court found the act to be compatible with the Constitution.[77]

It is worth adding that the Court of Justice found many of these acts incompatible with EU law (e.g. the automatic rejection of applications by asylum seekers arriving from countries where they do not face danger (C564/18); practice of keeping asylum seekers in the transit zones (C924/19); targeting NGOs receiving funding from abroad, including organisations active in the asylum field (C78/18)).[78] The European Commission also initiated a number of other proceedings against Hungary relating, among the other things, to the third country exclusionary rule (C-821/19) and non-provision of food in transit zones.[79]

4.5. Italy

Three decrees, which had the greatest impact on the situation of migrants in Italy, concerned the procedures for examining the applications for international protection, the reception system, and the management of arrivals by sea. In particular, Decree 13/2017 provided for the abolition of the second instance of appeal for those who had their application rejected in the first instance (note that eliminating the appeal is a violation of the right to an effective remedy set out in the The

[75] European Union Agency for Fundamental Rights, *Current migration situation in the EU: Hate crime*, November 2016, available at: https://tinyurl.com/98rcm2c2 (accessed 30 April 2023), p. 12.

[76] Act VI of 2018 to amend certain Laws on measures to combat illegal immigration, Magyar Közlöny, 2018-06-28, vol. 97, pp. 4717-4720.

[77] Decision 3/2019 (III. 7.) of the Constitutional Court of Hungary, 7 March 2019.

[78] UNHCR, *UNHCR Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, available at: https://www.refworld.org/docid/5ef5c0614.html (accessed 30 April 2023).

[79] European Commission, *Hungary: Commission takes next step in the infringement procedure for non-provision of food in transit zones*, Press release, 10 October 2019, available at: https://tinyurl.com/2jzasxs5 (accessed 30 April 2023).

Charter of Fundamental Rights of the European Union (Charter) and the Asylum Procedures Directive). Even though the decree provided a legal basis for hotspots, it neither specified their nature, nor defined how and for how long an applicant may be detained for identification purposes (which is a violation of the Reception Directive). Decree 113/2018 introduced a number of special permits (rather than providing humanitarian protection) and, although the former is not formally provided at the European level, it is advocated in the Qualification Directive. The decree also contained a set of measures limiting personal freedoms: from the detention of asylum seekers in hotspots to the extension of the detention of irregular migrants in pre-removal centres (solution incompatible with the Asylum Procedures and Qualification Directives). Equally troublesome was the lack of exemption for vulnerable persons from accelerated procedure and restrictive rules on subsequent application, both solutions apparently being incompatible with the Asylum Procedures Directive. Similarly as in Greece, there was a problem of ensuring a proper standard of living in regular reception centres and lack of any specific forms of reception for vulnerable asylum seekers (as prescribed by the Reception Directive). The last piece of legislation (Decree 53/2019) gave rights to the Ministry of the Interior to limit or prohibit vessels that violate Italian immigration laws from entering the Italian territorial sea. Removing such vessels is equivalent to collective *refoulement*, which is forbidden by the TFEU, theCharter and the Qualification Directive.

4.6. Poland

The issue of migration is regulated by several laws, the most important being the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland and Act of 12 December 2013 on foreigners.[80] While the government had plans to amend both acts (e.g. a draft law envisaged adding information on party, religious and trade union affiliations, as well as information about sexual life to information that could be processed in proceedings conducted regarding foreigners),[81] eventually no changes were introduced. However, in 2016, the law on counter-terrorism activities was adopted, with controversial provision on secret operations and reconnaissance regarding foreigners who raise concerns of

[80] Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [Law on granting protection to foreigners within the territory of the Republic of Poland], Journal of Laws 2022, item 1264 (consolidated text) and Ustawa o cudzoziemcach [Act on foreigners], Journal of Laws 2021, item 2354 (consolidated text).

[81] Projekt ustawy o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw [Draft act amending the act on granting protection to foreigners within the territory of the Republic of Poland], available at: https://legislacja.rcl.gov.pl/projekt/12294700 (accessed 30 April 2023).

conducting terrorist activities.[82] At the same time, the government put priority to immigration from the East. In this context, the Act on the Polish Charter, aimed at foreigners of Polish origin, was amended to expand the group of people who could take the advantage of its provisions.[83]

The area in which the tension with the EU was the most visible was the relocation mechanism. Initially, the new PiS government agreed to implement the scheme approved by its predecessor (the PO-PSL coalition), but later it suspended the process arguing that the verification procedures were insufficient to guarantee the Polish national security. Poland was not involved in developing a common EU policy apart from suggesting strengthening of EU external borders and advocating for European support of policies adopted individually by MSs. Poland was also a party (together with Czech Republic and Hungary) to the non-compliance proceeding concerning the temporary relocation mechanism for applicants for international protection. Ultimately, all three countries lost the case in the Court of Justice.[84]

5. POPULISM, POLITICISING AND SECURITISING IRREGULAR MIGRATION

The 2015 migration crisis and the response to it led to (or reinvigorated existing) the politicisation of the topic across the EU. For two CEE countries analysed in this article, this was the first time that immigration emerged as a political issue.

Politicisation is understood here as an increase in salience and diversity of opinions on a specific societal topic. Salience can be defined as the importance attributed to an issue, while polarisation indicates that there are different attitudes to the issue and the "solutions" proposed.[85] As discussed above, in all analysed countries, the migration crisis and strategies employed to deal with it became (or returned as) one of the most important political topics, forcing the parties from all sides of the political spectrum to take a position on it. The right-wing populist parties were the ones that were mostly interested in keeping the topic in the centre of the public discussion (see discussion below). The level of polarisation was high, ranging from the fairly liberal approaches (e.g. granting a right to stay for anyone residing in

[82] Ustawa o działaniach antyterrorystycznych [Act on counter-terrorism activities], Journal of Laws 2016, item 904, Art. 9.

[83] M. Pacek, *Polish Migration Policy in the Context of Migration Crisis*, 3 Studies in European Affairs 85 (2020).

[84] Joined Cases C-715/17, C-718/17 and C-719/17 *European Commission v. Republic of Poland and Others*, ECLI:EU:C:2020:257.

[85] P. De Wilde, *No polity for old politics? A framework for analyzing the politicisation of European integration*, 33(5) Journal of European Integration 559 (2011); F. Pasetti, B. Garcés-Mascareñas, *Who is responsible, for what and to whom? Patterns of politicisation on refugees and the European solidarity crisis*, CEASEVAL Working Paper no. 16/2018.

Germany as proposed by *Die Linke*) to the Islamophobic and racist positions (e.g. migration as an element of the broader plan for the Islamisation of Greece as argued by Golden Dawn), with many intermediate views in-between. This variety of views also reflected division in the respective societies (with proponents of closed borders dominating in the CEE region and Italy). It also appears that the importance of the issue of migration does not necessarily relate to the number of arriving asylum seekers. The example of Poland– which did not witness any increase in migration during that period – shows that salience of the issue may depend more on the media exposure and deliberate politicisation of the topic by the parties. At the same time, it should be acknowledged that the silence of the issue faded away with time, reflecting both decreasing number of irregular migrants in Europe and changes in the strategies of those parties that previously exploited the topic.

One can also observe a process of securitisation of migration in the political debate in all analysed countries. Irregular migration was construed as a security threat by many political parties and leaders, "requiring emergency measures and justifying actions outside the normal bounds of political procedure".[86] While the securitisation strategy was most visible in the discourse of the right-wing populist parties, its elements were progressively taken by the mainstream parties, arguably in response to increased salience of the issue (e.g. Germany, Italy, and France). The case of the CEE countries (i.e. Hungary and Poland) is particularly interesting as security constituted one of the main arguments for rejecting the relocation scheme proposed by the European Commission and advocated by other MSs.

It seems that securitisation had mainly instrumental character as it allowed to mobilize the supporters and polarise the political scene, thus politicising the topic further.[87] In this context, it also should be noted that securitisation increased society's interest in this problem, which under the influence of the nature of the political debate was becoming more and more critical and unwilling to accept refugees, particularly if they come from countries with different traditions, cultures and religions.[88]

Immigration was an attractive topic for the right-wing populist parties as it allowed them to construct more easily the opposition between the "people" and the

[86] B. Buzan, O. Waever, J. de Wilde, *Security: A New Framework for Analysis*, Lynne Rienner Publishers, Boulder: 1998, pp. 23-24.

[87] *See e.g.* B. Majtényi, A. Kopper, P. Susánszky, *Constitutional othering, ambiguity and subjective risks of mobilization in Hungary: Examples from the migration crisis*, 26(2) Democratization 173 (2019); H. Wiczanowska, *The Relocation of the Iron Curtain to the Middle East: The Polish and Slovak Position Towards the EU Migration and Asylum Policy*, 46(1) Polish Political Science Yearbook 63 (2017), p. 70 (also citing C. Mudde, *A Slovak Shocker! How Syrian Refugees Kidnapped the Slovak Elections*, Huffington Post, 3 May 2016).

[88] R. Podgórzańska, *The Issue of Securitization of the Refugee Problem in the Polish Political Debate*, 48(1) Polish Political Science Yearbook 67 (2019), p. 68.

"elites". In this narrative, the elites were represented by the domestic governments (only when right-wing parties were in the opposition) and the EU that attempted to reengineer the Christian and national fabric of Europe in order to construct a new type of multicultural polity. On the other hand, in this narrative, the populist right-wing parties were representing the will of the people: silent national majorities that were doomed to lose their subjectivity in this new political arrangement. Highlighting ethnicity and Christianity also allowed them to distinguish the group of people from the others (migrants, Muslims, etc.) Of course, for those countries in which the populist right-wing parties were in power (Poland and Hungary) the main enemy was the EU (particularly after the relocation system was proposed) and the local liberal forces, pictured as the fifth column of Brussels.

At the same time, there appears to be a strong correlation between the ideological profile of the parties and their approach to the migration crisis and the proposed EU response. All the parties located close to the right extreme tended to take a strong anti-immigration and anti-EU stance. All of them also ranked high in the populist index. On the other hand, the populist parties located on the left side or in the centre of the political spectrum (e.g. *SYRIZA* and M5S) took a moderate stance on this issue. They also tended to be in favour of the relocation mechanism, but this might relate to the fact that they were active in the front-line states. Therefore, it seems that a populistic character of a party as such does not pre-determine its position on the issue of migration and the required policy response, as it is rather the ideological orientation of a party (right/left). Consequently, for left-wing populist parties, the construction of the people-elite dichotomy goes along different lines (e.g. the existing political classes, previous governments). This finding fits well to the conceptualisation of populism as a thin ideology. Since populism is defined in negative terms, as "opposition to", it has a limited core set of beliefs and can be combined with a variety of political positions, from nationalism to socialism, so long as the political movement allows for a focus on the needs of the "authentic people" and an antagonism against the "elite".[89]

Despite the existing differences between countries (reflecting the positioning of each country as a "frontline or final destination", or past experiences of hosting migrants), one may identify some common lines of arguments used for and against migration in the political discourse of all analysed countries. Moral obligation ("humanitarian necessity") and general respect for human rights were frequently referred to as a basis for a decision to accept asylum seekers and other people in need of international protection (Germany, France, Greece, Italy and Poland). Interestingly, the legal arguments pertaining to the specific EU and international

[89] L. Gruszczynski, J. Lawrence, *Trump, International Trade and Populism*, 49 Netherlands Yearbook of International Law 19 (2018), p. 22.

law obligations were rarely raised in this context. Equally frequent were the arguments relating to the European solidarity and burden sharing between the MSs (Germany, France, Greece, Italy, and Poland). In some countries, the need for skilled immigrant workers, who could, after integration, contribute to the local economic development, was also highlighted (Germany, Greece, and Italy). Those (rational-type) arguments were, however, rarely made in the CEE region (at least not with respect to MENA migrants).

On the other side of the spectrum, one may find the arguments relating to security, culture, national identity and religion. These arguments were increasingly instrumentalised by right-wing populist parties (both inside and outside of the governments), but as the time passed, they were also absorbed by the mainstream forces. As explained above, the most common argument used in the political discourse relates to the protection of national security. In this narrative, some immigrants were not genuine refugees but rather disguised terrorists who would continue their illegal activities in Europe (all analyzed countries). Those arguments gained traction after the terrorist and sexual attacks in Western cities in 2015-2016. This approach is well captured in the official statement of the Polish Minister of Internal Affairs and Administration, who said (explaining the decision of his government to reject the relocation mechanism); "[t]here would be [now] almost 12,000 refugees [...], then after a few years there are tens of thousands, then several hundred thousands, then several millions. These communities form closed enclaves that constitute a natural terrorist base".[90]

The cultural and identarian narratives were strongly present in Hungary and Poland (arguably due to the homogenous and peripheral character of these societies). In most cases, they were based on simplified statements and focused on abstract issues like "national identity", "ethnic homogeneity", "defending Christian culture", and "liberalism as new totalitarianism". In Poland, failures of the multiculturalism as a form of social policy promoted by the liberal elites were also frequently referred to. This would suggest that culturally grounded arguments for the rejection of migration are particularly pronounced in countries with a low share of foreigners (and hence limited exposure to such contacts).

Poland and Hungary also questioned the European character of the crisis, suggesting it was just a German problem as the country decided to open its borders, attracting the migrants from different parts of the world. In Western Europe one can also find more pragmatic arguments (at least on their face) relating to societal costs of migration in receiving countries. In this context, references were made to

[90] *Imigracyjny kryzys w Europie. Błaszczak o migrantach* [Immigration crisis in Europe. Błaszczak about migrants], TVN24, 13 June 2017.

limited financial resources available to states, potential disruptions in job market, and abuse of the welfare system.

It seems that the anti-immigration rhetoric – based mostly on people's fears and prejudices – met expectations of large segments of the respective societies and eventually was translated into political success of those parties that took a strong anti-immigration stance (Germany, Hungary Poland, and France – in terms of public support for FN).

The countries under investigation reacted to the migration crisis in different ways. The minimum harmonisation approach that functions in the EU made the divergences even easier. While those differences did not disappear, one may observe progressive tightening of the relevant migration rules in most of the investigated countries (Germany, France, Greece, Hungary and Italy), including those which initially took a very open approach. In this context, one can see that the boundaries between detention, restriction on freedom of movement and reception have been unclear in legislations, purposefully bypassing the obligation to ensure access to key procedural safeguards stemming from EU and international law. Many analysed countries also made it harder for rejected asylum seekers to avoid deportation (e.g. Germany, France, and Italy). In some countries, the anti-immigration stance also found its reflection in the adoption of new laws on combating terrorism (e.g. Poland).

Arguably, while some countries took harder regulatory steps on immigration in order to "avoid a radicalisation of public opinion," by dislodging the far right's monopoly on immigration issues (e.g. France), other governments (e.g. Germany) used a mixture of softer measures to tackle issues that the far-right hijacked to attract the public. On the other side of the spectrum are those countries that used immigration issues (i.e. Hungary, Poland and Italy) to polarise the political scene and strengthen their positions. Surprisingly, despite their though rhetoric, Poland has changed very little in its national legal regime.

CONCLUSIONS

The 2015 migration crisis and the response to it led to (or reinvigorated existing) the politicisation of the topic across the EU, forcing the parties from all sides of the political spectrum to take a position on it. Simultaneously, one may also observe a process of securitisation of migration in the political debate in all analysed countries. Irregular migration was construed as a security threat by many political parties and leaders, requiring emergency measures and justifying actions outside the normal bounds of political procedure. While the securitisation strategy was most visible in

the discourse of the right-wing populist parties, its elements were progressively taken by the mainstream parties, arguably in response to increased salience of the issue.

This article also finds a correlation between the ideological profile of the parties and their approach to the migration crisis and the proposed EU response. All the parties located close to the right extreme tended to take a strong anti-immigration and anti-EU stance. All of them also ranked high in the populist index. On the other hand, the populist parties located on the left side or in the centre of the political spectrum took a moderate stance on this issue.

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TOWARDS EU-WIDE MANDATORY HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE FOR BUSINESS: A BREAKTHROUGH IN EUROPE AND BEYOND?

Abstract: *In March 2022, the European Commission presented its long-awaited legislative proposal on the EU-wide human rights and environmental due diligence (HREDD) for business. This article argues that the proposed Directive fails to be an effective and innovative legislation in three respects. Firstly, it does not draw lessons from the shortcomings of the to-date regulatory policy relating to business and human rights. It mainly consolidates at the EU level the status quo of extant due diligence legislation in Europe. Secondly, the proposal falls short of the established international standards and its own objectives insofar as it fails to establish instruments for effectively preventing and remedying human rights and environmental harm. Thirdly, the proposal's normative preference for process- (rather than result-) oriented HREDD risks reducing it to yet another compliance instrument. Beside amending these shortcomings, to achieve a breakthrough, the upcoming legislation should in any case define HREDD as the legal standard of care; the compliance with which does not*

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per se exclude civil liability. The general negotiation approach of the Council is not proposing much improvement in that regard. The stakes for the European Parliament's possible role to raise the bar are thus very high.

Keywords: UN Guiding Principles on Business and Human Rights, human rights due diligence (HRDD), human rights and environmental due diligence, HREDD, corporate accountability

INTRODUCTION

On 23 March 2022, the European Commission (EC) presented its long-awaited proposal for a Directive on Corporate Sustainability Due Diligence (draft Directive).[1] As specified in its recital 14, the draft Directive aims to ensure that companies active in the EU internal market contribute to sustainable development and the sustainable transition of economies and societies. To that end, companies are to establish and exercise *human rights and environmental due diligence* (HREDD) with respect to their own operations, that of their subsidiaries, and their value chains.

A legislative proposal on mandatory HREDD for business was one of the initiatives promised by the EC under the European Green Deal[2] and was announced by the European Commissioner for Justice Didier Reynders in April 2020. Not surprisingly, the burden of the promised green transformation in the EU must also be shared by business actors across all economic sectors. Initially expected in June 2021, the proposal was repeatedly postponed, most notably due to vehement opposition by businesses of the EC's plans to combine in a single legislative act the due diligence initiative together with the envisaged reform of director's duties aimed at countering short-termism.[3] The EC has ultimately relinquished its ambitious plans. The draft Directive only clarifies a director's duty of care with respect to sustainability matters, including human rights, climate change, and the environ-

[1] Proposal for a Directive of the European Parliament (EP) and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

[2] COM(2019) 640 final, notably pt. 2.1.3. The crucial role of business conduct for the Union's successful transition to a climate neutral and green economy is stressed in the explanatory memorandum to the draft Directive, including the need for corporate decision-making to be framed in view of human rights, environmental and climate change concerns. For the analysis of the European Green Deal from a perspective of polycentric governance theory, *see* J. van Zeben, *The European Green Deal: The future of a polycentric Europe?*, 26(5-6) European Law Journal 300 (2020).

[3] Amending company directors' duties to lengthen the time horizon of corporate decision-making was expected to also ensure adequate addressing potential human rights and environmental risks. Arguably, though, a properly constructed mandatory due diligence requirement will significantly change directors' duties in the desired direction. J. Ruggie, *European Commission initiative on mandatory human rights due diligence and directors' duties*, available at: https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf (accessed 30 April 2023).

ment (Art. 25).[4] Directors of EU companies would have the duty to set up and oversee the implementation of corporate sustainability due diligence, as well as to adapt the corporate strategy taking account of actual and potential adverse impacts identified through due diligence processes (Art. 26). However, even the envisaged limited duties remain contentious for national governments. In its general negotiation approach of 1 December 2022, the Council agreed that such duties would potentially undermine "director's duty to act in the best interest of the company".[5]

The expected introduction of a mandatory HREDD for business in the EU is broadly considered to be one of the most important developments in the field of business and human rights. An EU-wide mandatory legislation will provide a strong impetus for regulation at the national level, and very likely other regions of the world.[6] It could also very quickly render inadequate most if not all of the extant national legislation.[7] However, this potentially historic development may easily turn into a missed opportunity if the proposed legislation fails to deliver on its ambitious promise. As the article will demonstrate, the stakes for such a scenario are very high. What transpires from the draft directive is that the EC expects the EU-legislator to be either unwilling or not prepared to learn from the experiences of regulating social aspects of business conduct, be it regarding the EU's own regulatory experience or that gained at national or international (UN, OECD) levels.

This article points to major deficiencies of the EC's draft Directive pertaining to effectively preventing and remedying human rights and environmental harm, and how these deficiencies could be rectified. In particular, the normative structuring of HREDD under the draft Directive creates a risk of HREDD becoming yet another tick-box exercise for Transnational Companies (TNCs),[8] notably where substantive

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[4] These are also classified as "non-financial issues" and may additionally embrace governance (e.g. corruption and bribery) considerations. *Cf.* recital 6 of the Directive 2014/95/EU of 22 October 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1 (also called the Non-Financial Reporting Directive, NFRD). *See also* R. McCorquodale, J. Nolan, *The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses*, 68 Netherlands International Law Review 455 (2021), p. 466.

[5] Council document 15024/1/22 REV 1, p. 10, pt. 31.

[6] *E.g.* J.L. Černič, *The Human Rights Due Diligence Standard-Setting in the European Union: Bridging the Gap Between Ambition and Reality*, 10 Global Business Law Review 1 (2022).

[7] Especially not very ambitious ones, such as the new Swiss transparency legislation. D. Canapa, E. Schmid & E. Cima, *«Entreprises responsables»: limitations et perspectives*, 140(5) Zeitschrift für Schweizerisches Recht 558 (2021), p. 579. Since Swiss companies are active on the EU single market, they (at least the large ones) would be subject to new HREDD duties.

[8] M. Krajewski, K. Tonstad, F. Wohltmann, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, 6(3) Business and Human Rights Journal 550 (2021), p. 558. G. Quijano, C. Lopezi, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6 Business and Human Rights Journal 241 (2021), p. 254. *See also* ECCJ, *European Commission's proposal for a directive on Corporate Sustainability Due Diligence*, ECCJ Legal Brief, April 2022, p. 11.

due diligence obligations fall short of international standards[9] or an enforcement regime is weak or non-existent.[10] We argue that the defined limitations of HREDD are not inherent in the instrument as such, and hence may be amended through appropriate tailoring.

This article proceeds as follows. Section 1 reconstructs the emergence of business and human rights discourse at the UN and OECD levels and how it has influenced the EU policy measures, initially focused on a purely voluntary approach of corporate social responsibility. Against this backdrop, Section 2 clarifies the origin and current perspectives on the core concept of human rights due diligence (HRDD), extended to environmental concerns (HREDD) in both national and the proposed EU legislation. By applying a comparative lens, Section 3 shows how the draft Directive on corporate sustainability due diligence builds on the already existing legislative, soft law, and judicial instruments under national and international law, but concomitantly fails to improve their shortcomings and/or align with international standards. The article concludes by proposing to disentangle corporate civil liability for negative impacts on people and the environment from the issue of whether business actors adhered to HREDD or not. Such a strict (risk) liability would benefit rights-holders by curtailing corporate abuse of the due diligence defence, while at the same time incentivising business actors to apply HREDD as an effective risk-assessment and prevention instrument.

1. BEYOND VOLUNTARISM: *BUSINESS AND HUMAN RIGHTS* ON THE AGENDA AT THE UN, OECD AND EU

The issue of regulation of multinationals, notably the capability of States to control powerful private companies, is not new. Since the 1970s, the increasing influence of multinational enterprises on economic, political and social developments, both in developing and developed countries, has raised concerns about the potential abuse of their powers.[11] At that time the first NGOs specializing in monitoring

[9] *E.g.* the German law narrows general due diligence obligations to the company's own activities and that of its direct suppliers. As rightly pointed out by Krajewski et al., *supra* note 8, p. 556 (this "graduated tier-oriented logic" is at odds with the norms of conduct advanced by the UNGPs).

[10] B. Fasterling, G. Demuijnck, *Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights*, 116 Journal of Business Ethics 799 (2013), p. 808. For example, the existing transparency legislation such as the UK Modern Slavery Act foresees no sanctions for non-compliance.

[11] This initiative was triggered by the interference of the ITT Corporation in the domestic policy in Chile that eventually led to the overthrow of the democratically elected President Salvador Allende and bringing Augusto Pinochet to power in 1973. *See* K.P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned*, 16 Journal of World Investment and Trade 11 (2015), p. 87. In mid 1980s, a number of delegations to the UN Commission on Trade and Development were of the opinion that "the changing economic situation over the past 10 years had shaped the way in

the activities and bad practices of multinationals were created: e.g. La Déclaration de Berne (now Public Eye) in Switzerland and SOMO in the Netherlands. The first initiatives of international institutions (namely the UN and the OECD) also date from this period. The EU's approach to regulation in this area has been significantly shaped by historical developments. The already intertwined national, transnational and global regulatory frameworks were designed to further interact. In fact, all stakeholders were to benefit from the mutually reinforcing frameworks that would provide better legal certainty for markets and individuals. Thus, it is desirable to ensure that the concepts underlying the existing frameworks (such as HRDD) do not offer mutually-exclusive interpretations of business obligations. This article will show that the emerging national and EU standards fall short of the advocated global standard.

1.1. United Nations

The idea of a UN Code of Conduct on Transnational Corporations (Code of Conduct) was initially proposed in 1972, but it was never concluded.[12] Respect for human rights was included in various drafts of the Code of Conduct, albeit limited to the principle of non-discrimination.[13] However, in 1977 the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy regulating the operation of multinationals, which included references to the Universal Declaration of Human Rights (1948) as well as the International Bill of Human Rights (1966).[14] Further revisions incorporated the concept of corporate responsibility to respect human rights according to the more recent developments in this area within the UN framework.

The issue of regulating business activities was taken up again in the late 1990s by the UN Working Group on the Working Methods and Activities of Transnational

which countries viewed transnational corporations and the effects of their activities". UN Commission on Transnational Corporations, *Report on the 11th Session*, 10-19 April 1985, E/C.10/1985/19, p. 12.

[12] Sauvant, *supra* note 11. *See also* S. Deva, *From 'business or human rights' to 'business and human rights': what next?*, in: S. Deva, D. Birchall (eds.), *Research Handbook on Human Rights and Business,* Edward Elgar Publishing, Cheltenham: 2020, pp. 3-4.

[13] Various drafts of the UN Code of Conduct on Transnational Corporations were presented to the UN Economic and Social Council. Art. 13 of 1983 draft included a non-discrimination clause enumerating the following features: race, colour, sex, religion, language, social, national and ethnic origin, and political or other opinion. *See* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2891/download (accessed 30 April 2023). The significant emphasis on the non-discrimination clause was due to the processes of decolonization and combating apartheid in South Africa. One of the recurring issues on the agenda of the UN Commission on Transnational Corporations in 1980s was the collaboration of transnational corporations with racist authorities in South Africa and Namibia. *See* UN Commission on Transnational Corporations, *supra* note 11, pp. 2-4.

[14] ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 16 November 1977.

Corporations. The outcome document, namely the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" (UN Norms), aimed to provide a set of mandatory obligations in the area of human rights for enterprises.[15] For this reason, among others, UN Norms were met with resistance from the business sector, including the International Chamber of Commerce and the International Organisation of Employers,[16] and was ultimately abandoned by the UN Commission on Human Rights in 2005.[17] The difficult task of reaching a consensus between the various stakeholders was delegated to Professor John Ruggie, who was appointed as the UN Special Representative for Business and Human Rights.

In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs),[18] which marked a milestone in developing the international standards for HRDD. Contrary to the UN Norms, the negotiations on the UNGPs led by John Ruggie were backed by an extensive process of consultations and pilot programmes.[19] Therefore, the principles laid down in the UNGPs have become universally accepted norms of conduct[20] and are considered as a turning point in the debate on business and human rights.[21]

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[15] L.C. Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law*, 37 Columbia Human Rights Law Review 101 (2005), p. 111; D. Kinley, R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6(3) Human Rights Law Review 447 (2006); J. Oldenziel, *The added value of the UN Norms. A comparative analysis of the UN Norms for Business with existing international instruments*, SOMO Centre for Research on Multinational Corporations, Amsterdam, 2005.

[16] ECOSOC, *Joint written statement submitted by the International Chamber of Commerce and the International Organization of Employers, non-governmental organizations in general consultative status*, 29 July 2003, E/CN.4/Sub.2/2003/NGO/44. *See also* a position of Shell: E. Rabin, *In the Hot Seat: Shell VP Robin Aram*, GreenBiz, 21 June 2004, available at: https://www.greenbiz.com/article/hot-seat-shell-vp-robin-aram (accessed 30 April 2023).

[17] The Commission declared that the UN Norms had "no legal standing", *see* Deva, *supra* note 12, p. 4.

[18] The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011. For discussion, *see e.g.* M.K. Addo, *The Reality of the United Nations Guiding Principles on Business and Human Rights*, 14(1) Human Rights Law Review 133 (2014).

[19] For multi-stakeholder consultations between 2007-2010, *see* https://tinyurl.com/us5ffjry (accessed 30 April 2023).

[20] J.G. Ruggie, J.F. Sherman, *Adding Human Rights Punch to the New Lex Mercatoria*: *The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice*, 6(3) Journal of International Dispute Settlement 455 (2015), p. 459. The authors construe the UNGPs as "global norms". *Cf. also* J.G. Ruggie, J.F. Sherman, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28(3) European Journal of International Law (2017), p. 923.

[21] A. Sanders, *The Impact of the "Ruggie Framework" and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation*, in: J. Martin, K.E. Bravo (eds.), *The Business and Human Rights Landscape. Moving Forward, Looking Back,* Cambridge University Press, Cambridge: 2015, p. 288.

Despite being merely a soft law instrument, the UNGPs have triggered an impressive uptake in both policy and practice.[22] The norms they concretize, such as the corporate responsibility to respect human rights, may (at least at this stage) be expressed in terms of social rather than legal norms.[23] The perceived limited ambition of the UNGPs to establish new substantive legal standards has been subject to strong criticism in business and human rights scholarship.[24] Moreover the specific obligations that may arise for enterprises from HRDD remain unclear. The interpretation of any such obligations requires a context-specific approach that builds on the developments in international human rights law. Therefore, the UN treaty bodies appear to be the most suitable to spearhead this process. So far, the intersection of business and human rights has been comprehensively assessed by the Committee on the Rights of the Child (CRC Committee) (General Comment No. 16 adopted in 2013) and the Committee on Economic, Social and Cultural Rights (ESCR Committee) (General Comment No. 24 adopted in 2017). These two Committees also formulated a number of recommendations related to the adoption of a binding normative framework on HRDD. Their content is briefly analysed in Section 2 so as to expound the salient elements of the HRDD concept.

1.2. Organisation for Economic Cooperation and Development

As an economic organization of developed countries, the OECD constitutes a geopolitically appropriate forum for initiatives aimed at regulating the operation of multinational enterprises. Generally speaking, companies based in the developed Global North are deemed responsible for the abuses of human rights and the environment in the developing Global South.[25] In 1974, the OECD highlighted the need to systematically address global challenges related to capital movements, competition, and taxation, but was also concerned about the instability of employment and wages as well as the impact of transfers of technology from developed to developing countries.[26] The two latter issues also fall within the scope of the international human rights framework, in particular the UN International Covenant on

[22] Governments are adopting National Action Plans on business and human rights. Some countries, in Europe and beyond, are adopting binding legislation. The UNGPs are said to have achieved the alignment of standards and "facilitated the socialisation of human rights norms among businesses, a prerequisite to ensuring corporate respect as well as corporate accountability for human rights [violations]". Deva, *supra* note 12, p. 4.

[23] Ruggie, Sherman, *supra* note 20.

[24] *See e.g.* Fasterling, Demuijnck, *supra* note 10, p. 800.

[25] C. Bradshaw, *Corporate Liability for Toxic Torts Abroad: Vedanta v. Lungowe in the Supreme Court*, 32(1) Journal of Environmental Law (2020), p. 139.

[26] OECD Observer, no. 69, April 1974.

Economic, Social and Cultural Rights[27] (ICESCR), as well as instruments adopted by the UNESCO[28] and the ILO.[29]

It took only two years for the OECD to negotiate the Declaration on International Investment and Multinational Enterprises (1976), which was accompanied by the Guidelines for Multinational Enterprises[30] (OECD Guidelines). The document was aimed mainly at achieving a transparent environment for international investment and did not make any clear references to human rights standards. In the following decades, mainly due to the developments within the UN system, the OECD Guidelines were widened to include a new chapter on human rights, the provisions of HRDD, and also elevate the protection of workers vis-à-vis the internationally recognized core labour standards.[31] Beside regionally adopted measures (see below), the OECD Guidelines constitute the only multilaterally agreed standards on responsible business conduct which governments have committed to promoting.

Since 2010, the OECD as well as the UN and EU have taken various, mutually reinforcing, initiatives aimed at defining sector-specific standards. The OECD developed six sector-specific due diligence guidebooks relating to: minerals extracted in conflict and high-risk areas (2016); agriculture (2016, developed together with the FAO); the extractive sector (2017); garments and footwear (2017); the worst forms of child labour in mineral supply chains (2017); and the financial sector (2017).[32] This process culminated in the adoption of the cross-sectoral Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence Guidance) in 2018,[33]

[27] Art. 6 ICESCR relates to the right to work, Art. 7 enumerates the right of everyone to the enjoyment of just and favourable conditions of work, and Art. 15 concerns rights in the field of science, in particular the right to benefit from scientific progress and its applications.

[28] *See e.g.* Art. 2 of the Declaration of Principles of International Cultural Co-operation indicates that nations should establish a harmonious balance between technical progress and intellectual advancement, therefore suggesting some form of technology transfer. Concomitantly, Art. 4(4) of the Declaration stressed that peoples from all parts of the world should enjoy the benefits of science. *See*: UNESCO, *Declaration of Principles of International Cultural Co-operation*, 4 November 1966, CFS.67/VII.4/A/F/S/R.

[29] Prior to 1974, the ILO had adopted 51 Conventions related to labour rights, notably unemployment (C002 in 1919), minimum wage-fixing and protection of wages (C026 in 1928, C095 in 1949, C099 in 1951, C131 in 1970), minimum age (C058 in 1936, C138 in 1973), social security (C102 in 1952), discrimination (C111 in 1958), employment policy (C122 in 1964).

[30] OECD, *Declaration on International Investment and Multinational Enterprises*, OECD/LEGAL/0144. For guidelines see Annex I. During the negotiations, some delegations indicated that "they would like this agreement to be the first step towards more binding rules" (OECD Observer, no. 82, July/August 1976, p. 13).

[31] OECD, *The OECD Guidelines for Multinational Enterprises*, June 2001, latest update 2011. The Guidelines highlight that enterprises should respect human rights (section IV, pt. 1), avoid causing or contributing to adverse human rights impacts and address such impacts when they occur (pt. 2), seek ways to prevent or mitigate adverse human rights impacts (pt. 3), adopt a policy commitment to respect human rights (pt. 4), carry out human rights due diligence (pt. 5), and ensure remediation of adverse human rights impacts (pt. 6).

[32] For sector-specific guidebooks, *see* https://www.oecd.org/industry/inv/mne/ (accessed 30 April 2023).

[33] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018.

inspired by the UNGPs. This document was meant to provide more detailed guidance than that which was available at the time of the adoption of the UNGPs (e.g. on the essential elements of HRDD).[34]

The OECD Guidelines are implemented primarily through National Contact Points (NCPs), which are currently established in 50 countries.[35] Their competencies include promotion of the Guidelines as well as providing a grievance mechanism to resolve cases of alleged non-compliance with their provisions. The role of NCPs has been endorsed by the UN Working Group on Business and Human Rights,[36] which perceives them as an important element in strengthening access to remedies.[37] Since 2000, NCPs have handled over 500 cases. Out of this number, 37% were related to human rights[38] and emerged mostly in the following sectors: manufacturing (42 cases); mining and quarrying (33 cases); financial and insurance activities (28 cases); and agriculture/forestry/fishing (21 cases). Nevertheless, the efficiency of this mechanism remains disappointing[39] – for instance, only one out of 14 cases filed in 2020 resulted in an agreement.[40]

1.3. European Union

Due diligence as a legal standard of care for business actors is a well-established concept in EU law and in the jurisprudence of the Court of Justice of the European Union (CJEU).[41] Business enterprises operating within the EU Internal Market are expected to exercise due diligence in multifarious areas of their activities, the most relevant of which – from the perspective of this article – pertain to business-to-consumer relationships under the Unfair Commercial Practices Directive.[42]

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[34] *Ibidem*, pp. 16-19. For UN characteristics *see*: UNGA, *Working Group on the issue of human rights and transnational corporations and other business enterprises*, 16 July 2018, A/73/163, pp. 4-6. The Working Group has indicated that these characteristics correspond with the essential elements included in the OECD Due Diligence Guidance.

[35] OECD, *National Contact Points*, available at: http://mneguidelines.oecd.org/ncps/ (accessed 30 April 2023).

[36] *See* UNGA *supra* note 34.

[37] *Ibidem*, para. 75.

[38] According to the OECD's Database of specific instances (https://mneguidelines.oecd.org/database/), cases dealing with human rights were the third most frequently filed. The only two areas that are more frequently challenged are employment and industrial relations and general policies (both were invoked in 52 per cent of cases).

[39] K. Otteburn, A. Marx, *Seeking remedies for corporate human rights abuses: what is the contribution of OECD National Contact Points?*, in: A. Marx, G. Van Caster, J. Wouters (eds.), *Research Handbook on Global Governance, Business and Human Rights,* Edward Elgar Publishing, Cheltenham: 2022, p. 252.

[40] OECD Watch, *State of Remedy 2020*, OECD Watch Briefing Paper, June 2021.

[41] For discussion, *see* I. Jędrzejowska-Schiffauer, *Business Responsibility for Human Rights Impact under the UN Guiding Principles: At Odds with European Union Law?*, 46 European Law Review 481 (2021).

[42] Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

In response to the developments at the UN and OECD, most recently the concept of HRDD has been endorsed by the EU institutions. Its distinct character from that of corporate due diligence is well acknowledged in legal scholarship and generally concerns risks and responsibilities to rightsholders rather than risks and responsibilities to the business itself.[43] Importantly, unlike the UNGPs, the EU[44] (and OECD[45]) instruments extend business responsibilities to concerns relating to the environment and most recently also climate change.[46] By way of example, under the Environmental Impact Assessment Directive,[47] when a public or private project (i.e. construction work or other interventions in the natural landscape, including mining) is likely to have significant effects on the environment (Art. 1(1, 2a) (Art. 3), a formal impact assessment procedure must be completed prior to its authorisation. Such environmental impact assessment "shall identify, describe and assess [...] the direct and indirect effects of a project on the following factors: (a) human beings, fauna and flora; (b) soil, water, air, climate and the landscape; (c) material assets and the cultural heritage; (d) the interaction between [these] factors" (Art. 3). Environmental concerns have also been endorsed in the draft UN Treaty on business and human rights[48] (currently under negotiation) by reference to *the right to a safe, clean, healthy and sustainable environment* (Art. 1(2)). This corresponds to the growing awareness of the direct link between environmental harm and human rights violations, as evidenced by the increasing number of human rights-based complaints filed against TNCs for environmental harm across multiple jurisdictions.[49] In the same vein, more attention is given to the impact of climate change

[43] R. McCorquodale, *Human rights due diligence instruments: evaluating the current legislative landscape*, in: A. Marx, G. Van Caster, J. Wouters, *supra* note 39, p. 123.

[44] *See* the specific instruments quoted *infra* and Art. 1(2, 3) and Art. 25(1) of the Corporate Sustainability Due Diligence Directive, *supra* note 1.

[45] OECD Guidelines, *supra* note 31, Chapter VI - Environment.

[46] Recent NCP cases have addressed corporate contributions to climate change. *See*, in particular, *Dutch NGOs vs. ING Bank*, filed 8 May 2017, available at: https://www.oecdwatch.org/complaint/dutch-ngos-vs-ing-bank/. In its 2022 "Stocktaking report on the OECD Guidelines for Multinational Enterprises" (available at: https://mneguidelines.oecd.org/stocktaking-exercise-on-the-oecd-guidelines-for-multinational-enterprises.htm) (both accessed 30 April 2023), the OECD noted that "greater clarity and effectiveness might be needed in light of developments since 2011" in relation to "[e]nvironmental impacts of business activities including climate change, biodiversity, and animal welfare. In particular, the Guidelines are seen to lack clear expectations on climate mitigation, adaptation or just transition principles".

[47] Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26, p. 1-21.

[48] OEIGWG, Legally binding instrument to regulate, in International Human Rights Law, the activities of transnational corporations and other business enterprises, 3rd draft of 17 August 2021, available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf (accessed 30 April 2023).

[49] *See e.g.* Case *Vedanta Resources plc v. Lungowe* [2019] UKSC 20, brought before the UK Supreme Court by a group of 1,826 Zambian citizens whose health and livelihoods were destroyed due to repeated discharges of toxic matter from the Nchanga Copper Mine into local watercourses. For discussion, *see* Bradshaw, *supra*

on the enjoyment of human rights,[50] and the emerging trend of climate litigation[51] may be expected to increase in the future.

The EU has already adopted human rights and/or environment-related due diligence legislation for specific sectors. The Timber Regulation[52] seeks to reduce illegal logging by ensuring that no illegally harvested timber or timber products can be traded in the EU. It requires business operators to exercise due diligence when placing timber or timber products on the EU market for the first time, embracing information, risk assessment, and risk mitigation measures (Art. 6). In addition, it requires those who buy or sell timber and timber products already on the EU market to keep records of their suppliers and customers in order to make timber easily traceable (Art. 5). The Conflict Minerals Regulation[53] establishes supply chain due diligence obligations for EU importers of tin, tantalum, tungsten, their ores and gold originating from conflict-affected and high-risk areas. The risk management processes that are to be implemented by EU importers (Art. 5) must be apt to ensure that the minerals they are buying have not been produced in a manner that contributes to funding a conflict or other related illegal practices. The most recent Anti-Torture Regulation[54] prohibits any export, import, transit as well as trading and advertising of goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

Prior to and alongside the aforementioned legislative measures, social and environmental concerns related to business operations have been addressed within the framework of corporate social responsibility (CSR). Despite being a purely voluntary approach on the part of enterprises, CSR has evolved and gained significance for EU regulatory bodies as a supporting tool for business-led initiatives within a

note 25; J. Hartmann, A. Savaresi, *Corporate actors, environmental harms and the Draft UN Treaty on Business and Human Rights: History in the making?*, 83 Questions of International Law, Zoom-in 27 (2021).

[50] Climate change is said to produce negative impact on various rights, including right to life, health, adequate food and water and the right of indigenous peoples to self-determination. Report of the Office of the UN High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61 15 January 2009. *See also* J.H. Knox, *Linking Human Rights and Climate Change at the United Nations,* 33 Harvard Environmental Law Review 477 (2009); A.O. Jegede, *Arguing the Right to a Safe Climate under the UN Human Rights System*, 9 International Human Rights Law Review 184 (2020).

[51] *See* the landmark judgment in case *Milieudefensie v. Royal Dutch Shell*, the Hague District Court (*Rechtbank Den Haag*), ECLI:NL:RBDHA:2021:5339, para. 4.4.13. The Court ordered Royal Dutch Shell to reduce CO2 emissions of the Shell group by net 45% in 2030, compared to 2019 levels, through the Shell group's corporate policy.

[52] Regulation (EU) No 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L 295/23.

[53] Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130/1.

[54] Regulation (EU) 2019/125 of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2019] OJ L 30/1.

"smart mix" policy.[55] In particular, the last decade was marked by intensified CSR legislative and policy measures. In 2011, the European Commission announced its new 3-year EU CSR strategy in accordance with which all national governments were expected to elaborate, implement and update their National Action Plans (NAPs) on business and human rights aimed at implementing the UNGPs into domestic law.[56] The EC invited EU Member States to develop such plans by the end of 2012,[57] which later inspired the UN Guidance on NAPs (2014).[58] A substantive change is also reported with respect to the very concept of CSR under the new EU strategy (conceived as "the *responsibility* of enterprises for their impacts on society" (emphasis added), as well as explicitly acknowledged connections between CSR, business and human rights (BHR, the concept introduced by the UN) and sustainability.[59] This visible alignment with the second pillar of the UNGPs is not surprising insofar as CSR and BHR (and even RBC – responsible business conduct) share the common starting point of recognising that businesses have responsibilities beyond profit-maximizing and wealth creation.[60] Their ultimate objectives remain divergent however, as CSR stands for voluntary, business-led initiatives aimed at promoting socially responsible business practices, whereas BHR has in its immediate horizon mandatory obligations for corporate actors and binding regulation.[61] Hence, BHR is, in many respects, a response to CSR and its perceived failure.[62]

To sum up, in pursuit of noble goals both the EU and the UN have proven to be open to more than just exchanging best practices. Whilst the Timber Regulation predates the endorsement of the UNGPs, the Non-Financial Reporting Directive

[55] It involves both mandatory and voluntary measures, with the latter not being designed to substitute mandatory legislation. EC, *Green paper – Promoting a European framework for Corporate Social Responsibility*, COM/2001/0366 final, point 22. For the recognition of human rights dimension of CSR, *see e.g.* pt. 52. *See also Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights: Overview of Progress*, SWD(2019) 143 final, p. 2.

[56] On the presumed positive duties of states to adopt such legislation, *see* CESCR GC No 24 § 16; E. Schmid, *Exigences internationales de prendre des mesures législatives: La Suisse doit-elle légiférer dans le domaine des "entreprises et droit humains"?*, 8 Actuelle Juristische Praxis 930 (2017).

[57] Communication from the Commission: *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final.

[58] UN Working Group on Business and Human Rights, *Guidance on NAPs on Business and Human Rights*, December 2014, available at: https://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf (accessed 30 April 2023).

[59] C. Navarra, *Corporate due diligence and corporate accountability. European added value assessment*, European Parliamentary Research Service Study, PE 654.191 – October 2020.

[60] Deva, *supra* note 12, p. 1; F. Wettstein, *The History of 'Business and Human Rights' and its Relationship with 'Corporate Social Responsibility*, in: S. Deva, D. Birchall (eds.), *supra* note 12, p. 33.

[61] *Cf.* Wettstein, *supra* note 60, p. 34. The author argues that a more progressive strand of CSR research recognizes limitations of its own approach in terms of weak institutions and governance gaps. Still, the "typical" CSR mindset is more obstructive than complementary to the advancement of BHR and can be counterproductive to the BHR agenda (*ibidem*, p. 23-24).

[62] *Ibidem*, p. 35. *See also* A. Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14(2) Journal of Human Rights 237 (2015).

(NFRD),[63] the Conflict Minerals Regulation, and the Whistleblowing Directive[64] seek to partly implement the UNGPs into the EU legal order. The NFRD does so with respect to transparency and reporting obligations, whereby enterprises with over 500 employees are required to publicly report measures they take to avoid negative environmental, social, and human rights impacts. To further improve the impact of this instrument and address identified deficiencies in the quality of reporting, on 21 April 2021 the EC, following a public consultation, put forth a proposal for a Corporate Sustainability Reporting Directive (CSRD).[65] In force as of 5 January 2023, CSRD has amended the NFRD by extending the scope of entities subject to the reporting obligation and introducing mandatory EU sustainability reporting standards. Also, the Whistleblowing Directive (which was to be implemented by Member States by 17 December 2021), bears resemblance to grievance mechanisms under the UNGPs, notably with regard to its dual external and internal reporting channels, which enable the entity's workers to report information on breaches of EU law (e.g. rules on confidentiality, a reasonable timeframe to provide feedback, diligent follow-up addressing the reported breach, etc.).

The EU regulatory activity aimed at addressing the negative impacts of businesses on human rights and the environment has gained momentum with the latest EC draft Directive proposing cross-sectorial mandatory sustainability due diligence obligations for large companies. Before examining the substance of this draft Directive, we shall first elucidate the conceptual and normative anchoring of HRDD as a central instrument of the EC's proposal.

2. HOW IS *HUMAN RIGHTS DUE DILIGENCE* CONCEPTUALISED?

As a legal standard of care, due diligence relating to human rights has been well-defined in legal writing[66] and court practice[67] with regard to states' obligations. The latter have been specified from the tripartite classification perspective of *respect, protect,* and *fulfil,* including for extraterritorial human rights obligations.[68] In recent

[63] *Supra* note 4.

[64] Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305/17.

[65] COM/2021/189 final, [2022] OJ L 322, p. 15-80.

[66] *See e.g.* N. McDonald, *The Role of Due Diligence in International Law*, 68 International and Comparative Law Quarterly 1041 (2019); R.P. Barnidge, *The Due Diligence Principle Under International Law*, 8 International Community Law Review 81 (2006).

[67] In the EU context, the CJEU's case law bases Member States' obligation of diligence on Art. 4(3) TEU (e.g. Case C587/17 P *Kingdom of Belgium v. Commission,* EU:C:2019:75, para. 67. Earlier case law based on Art. 5 EC or EEC Treaty, inter alia, Case C-34/89 *Italy v. Commission* [1990] ECR I-3603, para. 56; Case C-28/89 *Germany v. Commission,* EU:C:1991:67, para. 31; Case C-277/98 *France v. Commission,* EU:C:2001:603, para. 40.

[68] Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social, and Cultural

years however, the academic and policy discourse on business and human rights contributed to an increased awareness that certain legal loopholes enable enterprises (notably those operating internationally) to avoid liability for human rights violations committed by themselves, their subsidiaries, or their foreign suppliers,[69] as they are claiming not to be duty bearers under public international law and the domestic law of their headquarters.[70] To address such concerns, the concept of HRDD has been introduced to refer to non-state actors' responsibilities to *respect* human rights, notably concerning business enterprises.[71]

The first impulse was set by the UNGPs.[72] Within their framework, HRDD has become the core requirement of business enterprises in meeting their responsibility to respect human rights.[73] Under Guiding Principle 17 of the UNGPs, HRDD is defined as the *process* of identification, mitigation and accounting for adverse human rights impacts by business enterprises. Since human rights risks tend to change over time as a company's operations and operating contexts evolve (Guiding Principle 17c), HRDD is conceived as "an ongoing *management process* that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights"[74] (emphasis added). The HRDD process – which has been recently construed by the UN Working Group as "a bundle of interrelated processes" – should include four core components, namely: 1) identification and assessment of actual or potential adverse human rights impacts; 2) integration of findings from impact assessments across relevant activities of the company; 3) tracking the

Rights (General Principle no 3). For discussion, *see* S. Skogly, *Global human rights obligations*, in: M. Gibney et al. (eds.), *The Routledge Handbook on Extraterritorial Human Rights Obligations,* Routledge, New York: 2021, pp. 25, 100; O. De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,* 34 Human Rights Quarterly 1084 (2012).

[69] G. LeBaron, A. Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8(S3) Global Policy 15 (2017), p. 19; D. Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1(2) Business and Human Rights Journal 179 (2016), pp. 179ff; C. Methven O'Brien, O. Martin-Ortega, *EU human rights due diligence legislation: Monitoring, enforcement and access to justice for victims*, Briefing No 2, PE 603.504-June 2020.

[70] On the attribution of responsibility to multiple duty-bearers (including non-state actors) and its distribution among them in a policentric governance, *see* G.M. Türkelli, *Extraterritorial human rights obligations and responsibility under international law*, in: Gibney et al. (eds.), *supra* note 68, pp. 40, 45ff.

[71] For obligations of transnational corporations going beyond the duty to respect, *see e.g.* E. Pribytkova, *Extraterritorial obligations in the United Nations system: UN treaty bodies*, in: Gibney et al. (eds.), *supra* note 68, pp. 95, 100.

[72] McCorquodale, Nolan, *supra* note 4, p. 458.

[73] C. Methven O'Brien, *Business and Human Rights. A Handbook for legal practitioners,* Council of Europe, 2018, p. 83.

[74] OHCHR, *The Corporate Responsibility to Respect Human Rights. An Interpretative Guide*, HR.PUB.12.2_En 2012, p. 6, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf (accessed 30 April 2023). *See also* McCorquodale, *supra* note 43, pp. 122-123.

effectiveness of measures and processes to address adverse human rights impacts; and 4) communicating, in particular to affected stakeholders, how these impacts are being addressed and what policies are implemented.[75]

Following its endorsement in the UNGPs, HRDD has been integrated into various international soft law documents (i.e. by OECD, ILO, International Finance Organisation (IFC))[76] and national law (see below). Concomitantly, the UN treaty bodies have taken an active role in anchoring HRDD for business in the core international human rights treaties, in particular the ICESCR and the Convention on the Rights of the Child (CRC). In 2017, the ESCR Committee indicated that the state's obligation to protect "entails a positive duty to adopt a legal framework requiring business entities to exercise *human rights due diligence* in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights" (emphasis added).[77] The ESCR Committee emphasised the role of consultations with indigenous populations and cooperation with them in good faith,[78] and encouraged the imposition of criminal or administrative sanctions and penalties for non-compliance with due diligence obligations,[79] as well as incentives to enterprises that adopted robust and effective HRDD mechanisms,[80] and the inclusion of due diligence clauses in public procurement regimes.[81] It is worth noting that the impact of General Comment No. 24 on the ICESCR reporting procedure has been significant, as 16 recommendations related to HRDD have been adopted in Concluding Observations since 2017.[82] Further references to HRDD appeared in General Comment No. 25 on human rights and science, adopted by the ESCR Committee in 2020. According to the Committee, legal frameworks regulating

[75] UNGA, *supra* note 34, para. 10.

[76] For detailed account, *see* McCorquodale, Nolan, *supra* note 4, p. 458ff.

[77] CESCR Committee, General Comment No. 24 (2017) on State obligations under the ICESCR in the context of business activities, 10 August 2017, E/C.12/GC/24, para. 16. For extraterritorial dimension of national legislation in the area of BHR, *see e.g.* E. Schmid, *Le champ d'application spatial des législations nationales en matière de conduite responsable des entreprises*, 128 Revue trimestrielle des droits de l'homme 853 (2021).

[78] CESCR, *supra* note 77, para. 17.

[79] *Ibidem*, para. 15.

[80] *Ibidem*, para. 31.

[81] *Ibidem*, para. 50.

[82] CESCR Committee, *Concluding observations from 2020 to periodic report of Norway* (E/C.12/NOR/CO/6, para. 12), *Switzerland from 2019* (E/C.12/CHE/CO/4, paras. 10 and 11), *Denmark from 2019* (E/C.12/DNK/CO/6, paras. 18 and 19), *Kazakhstan from 2019* (E/C.12/KAZ/CO/2, para. 16), *Germany from 2018* (E/C.12/DEU/CO/6, para. 7), *Spain from 2018* (E/C.12/ESP/CO/6, paras. 8 and 9), *Mexico from 2018* (E/C.12/MEX/CO/5-6, para 10 and 11), *Colombia from 2017* (E/C.12/COL/CO/6, para. 12 and 13), *South Korea from 2017* (E/C.12/KOR/CO/4, paras. 17 and 18).

the operation of big technology companies should include measures that require business to prevent discrimination in the context of artificial intelligence and other related technologies – both at the input (training datasets) and output (decisions taken by algorithms)[83] levels. Furthermore, the ESCR Committee's draft General Comment on land and economic, social and cultural rights highlights that the obligation to protect may imply imposing due diligence obligations on investors to ensure that any land they purchase has not been acquired in violation of international norms.[84] In addition, due diligence regulatory measures should prevent an increased concentration of land ownership.[85]

Generally, the present international landscape shows an inclination to interpret HRDD through the prism of specific business "obligations" (consequently expressed in terms of "responsibilities" in soft law documents[86]). These are either sector-specific (as in the case of OECD[87]) or group-specific (e.g. the CRC Committee focusing on the rights of the child).[88] The CRC Committee recommended introducing the concept of *child-rights due diligence* into the domestic legislation of various countries.[89] Moreover, in the recently adopted General Comment on children's rights in the digital environment, the Committee indicated that States should require businesses to undertake child rights impact assessments when introducing new digital services.[90] To date however, the ESCR Committee appears to be spearheading the process of embedding corporate HRDD in international human rights law. This is not surprising, as its mandate corresponds to the high-risk areas where violations of human rights frequently take place.

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[83] CESCR Committee, General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the ICESCR), 30 April 2020, E/C.12/GC/25, para. 75.

[84] General Comment No. 26 (2021) on land and economic, social and cultural rights (Advance Edited Version), 3 May 2021, E/C.12/69/R.2, para. 42.

[85] *Ibidem*, para. 32.

[86] The discourse of the UNGPs serves as the primary example, with its second pillar specifying the corporate *responsibility* to respect human rights. *See also* OECD Guidance, *supra* note 33, notably p. 17, 75.

[87] These include, inter alia, conflict minerals; extractive, garment and footwear, agricultural and financial sectors. *See* https://www.oecd.org/corporate/mne/due-diligence-guidance-for-responsible-business-conduct.htm (accessed 30 April 2023).

[88] For the concept of *child-rights due diligence, see* CRC Committee, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17 April 2013, CRC/C/GC/16.

[89] CRC Committee, *Concluding observations from 2018 to the periodic report of Argentina* (CRC/C/ARG/CO/5-6), *Spain from 2018* (CRC/C/ESP/CO/5-6), *New Zealand from 2016* (CRC/C/NZL/CO/5), *United Kingdom from 2016* (CRC/C/GBR/CO/5), *France from 2016* (CRC/C/FRA/CO/5), *Monaco from 2013* (CRC/C/MCO/CO/2-3).

[90] Committee on the Rights of the Child, General Comment No. 25 (2021) on children's rights in relation to the digital environment, 2 March 2021, CRC/C/GC/25, para. 38.

The lens of specific business obligations (or, where appropriate, responsibilities) allows for defining corporate HRDD in terms of a norm of (expected) conduct.[91] In the landmark case *Milieudefensie v. Royal Dutch Shell,* the Hague District Court made a direct reference to the substance of corporate responsibility to respect human rights under the UNGPs, explaining that it is *a global standard of expected conduct* for all business enterprises wherever they operate. Its normativity is independent of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. It has primacy over and above compliance with national laws and regulations protecting human rights.[92] As the Court emphasised, "it is not enough for companies to monitor developments and follow the measures states take; they have an individual responsibility [to respect human rights]".[93]

While HRDD is still in the early stages of its development,[94] efforts to shift its focus from soft law to binding legal obligations are multiplying. The methods applied to this end involve the extensive interpretation of existing binding instruments (as observed by the UN Treaty bodies), as well as adopting new legislation (see Section 4), thus opening paths to justiciability of the new standards of care. Judicial recognition of a business duty of care to exercise HRDD is considered as yet another way forward.[95] Such a duty of care could be made enforceable under common law by tort suits for negligence,[96] or corresponding judicial instruments in civil law systems. In civil law countries new or revised substantive rules may be necessary, notably where international law is not directly applied. When applied in this sense, HRDD is evocative of the already established standards of a common law duty of care and analogous concepts in civil law.[97] Arguably this was a deliberate tactic by the UNGPs' drafters, since the concept of HRDD is familiar to public authorities, human rights experts, and business people, although with different meanings for each.[98]

Against this backdrop, concerns are being voiced as to the limitations of the HRDD approach to address serious human rights violations. As indicated above,

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[91] *Cf.* UNGA, *supra* note 34, para 20, 24.

[92] *Cf. supra* note 51.

[93] *Ibidem*.

[94] A. Griffith, L. Smit, R. McCorquodale, *Responsible Business Conduct and State Laws: Addressing Human Rights Conflicts*, 20 Human Rights Law Review 641 (2020), p. 651.

[95] Cassell, *supra* note 69.

[96] *Ibidem*.

[97] *See* in this sense A. Ruehmkorf, L. Walker, *Assessment of the Concept of 'duty of care' in European Legal Systems for Amnesty International*, European Institutions Office, September 2018, as cited by McCorquodale and Nolan, *supra* note 4, p. 459.

[98] McCorquodale, Nolan, *supra* note 4, p. 459. *See also* J. Bonnitcha, R. McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28(3) European Journal of International Law 899 (2017).

the UNGPs endorse a risk management perspective of HRDD.[99] HRDD integrated in the corporate risk management systems is expected to go beyond identifying and managing risks to the company itself and include risks to rightsholders.[100] Thus "the moral commitment of a corporation or lack thereof becomes a decisive factor for the importance and means that a corporation will attribute to its [HRDD] process".[101] Where public enforcement is weak, companies are likely to exercise less care.[102] However, even solid legal pressure may not be sufficient in instances when legislation implementing HRDD conceives it as having exculpatory function.[103] Thus companies will not focus on discharging a duty owed to rightsholders, but on demonstrating that they exercised due diligence so as to avoid risks to their own businesses in the form of civil liability. A question arises, therefore, whether the said limitations are inherent in the concept of HRDD or should rather be attributed to the manner in which HRDD is structured in the emerging national and EU legislation. The following Section will address this question, extending the argumentation to environmental concerns.

3. NORMATIVE SUBSTANCE OF THE COMMISSION'S PROPOSAL

The Commission's draft Directive visibly draws on the extant national legislation and practice, as well as partly on the EP's recommendations. The following sections briefly outline and evaluate those alignments and discrepancies, including from the perspective of the expected HREDD standards. Adherence to the latter would be a way forward in the complex landscape of divergent requirements under various jurisdictions.[104] However, the draft Directive neither delivers on this point, nor does it draw lessons from the shortcomings of the regulatory policies to-date relating to responsible business conduct, including the EU's own ineffective CSR measures.

3.1. Companies Subject to the New Due Diligence Obligations

The draft Directive covers large EU-based companies (more than 500 employees) with a net worldwide turnover of more than EUR 150 million in the previous financial year. These thresholds are lowered (to more than 250 employees and a net

[99] *Ibidem*; *see also* Fasterling and Demuijnck, *supra* note 10, p. 809.

[100] UNGPs, *Commentary to GP 17*.

[101] Fasterling, Demuijnck, *supra* note 10, p. 808.

[102] This has been demonstrated by the weak transparency legislation, such as the UK's Modern Slavery Act and the EU Non-Financial Reporting Directive.

[103] G. Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 Washington & Lee Law Review 1769 (2015), pp. 1828-1830. *See also* Fasterling, Demuijnck, *supra* note 10, p. 809.

[104] *Cf.* Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 550.

worldwide turnover of more than EUR 40 million) for EU enterprises operating in the high-risk sectors, including food, clothing and extractive industries, providing they generate at least 50 per cent of their net worldwide turnover in those sectors (Art. 2(1)). The draft Directive would also apply to third-country companies with a net EU turnover of more than EUR 150 million and those operating in high-risk sectors with a net EU turnover between EUR 40-150 million, provided that at least 50 per cent of their net worldwide turnover is generated in those sectors (Art. 2(2)). Lower thresholds would be introduced gradually, after two years (Art. 30(1)). Thus, in contrast to the 2017 French Corporate Duty of Vigilance Law (French Law)[105] and the 2021 German Law on Supply Chain Due Diligence (German Law),[106] the draft Directive covers not only EU-based companies or subsidiaries of foreign companies in the EU, but all large companies which offer goods or services in the EU internal market, provided that their business operations attain a substantial volume specified in terms of turnover, including in high-risk sectors. This is in line with the EP's recommendations for the draft Directive (Art. 2(1-3)), adopted on 10 March 2021.[107] Corresponding solutions have been adopted in the 2019 Dutch Child Labour Due Diligence Law[108] and the proposed Dutch Responsible and Sustainable International Business Conduct Act (the proposed Dutch RSIBC Act)[109] as well as the Norwegian Transparency Act (Norwegian Act).[110]

While the thresholds set by the draft Directive are lower than that of the German Law[111] and the French Law,[112] they do not correspond to the expected standard under the UNGPs, which stipulate that all enterprises have a responsibility to respect

[105] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074 du 28 mars 2017.

[106] *Lieferkettensorgfaltspflichtengesetz* (*LkSG*), BGBl 2021/I, Nr 46, 22 July 2021, p. 2959.

[107] EP Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, P9_TA-PROV(2021)0073.

[108] *Wet zorgplicht kinderarbeid*, available at: https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vlh0plzezawy (accessed 30 April 2023). It is not yet known when the law will enter into force.

[109] *Wet verantwoord en duurzaam internationaal ondernemen*, available at: parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vlh0plzezawy. It proposes to repeal the Dutch Child Labour Due Diligence Law and introduce broad due diligence legislation encompassing human rights, labour rights and the environment (Art. 4(1)). The aim of the the proposed Dutch RSIBC Act is to set a legal minimum standard for international responsible business conduct, Explanatory Memorandum, p. 1, https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vlh0pgfv1mso (both accessed 30 April 2023).

[110] *See* Section 2 of the Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions, LOV-2021-06-18-99. Unofficial English translation available at: https://lovdata.no/dokument/NLE/lov/2021-06-18-99 (accessed 30 April 2023)

[111] As of 1 January 2023, the law will apply to companies with more than 3,000 employees in Germany (including employees posted abroad) and, as of 2024, to companies with 1,000 employees (§1(1)).

[112] The law applies to French companies that either employ at least 5,000 people themselves and through their French subsidiaries, or companies that employ at least 10,000 people themselves and through their subsidiaries located in France and abroad. French Commercial Code, art. L. 225-102-5, as introduced by the Vigilance Law, available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000035181820/ (accessed 30 April 2023).

human rights, irrespective of their size, sector, operational context, ownership and structure.[113] Since a negative impact on people or the environment may occur irrespective of the size of the business activity, notably in high-risk sectors, the approach adopted in the draft Directive is insufficient,[114] particularly given that small and medium-sized enterprises (SMEs) represent 99% of all businesses in the EU.[115] Therefore, a feasible alternative would be to further lower the employee threshold (e.g. to 50 employees as in the Norwegian Transparency Act[116]) and, as a minimum, impose new HREDD obligations on all enterprises operating in high-risk sectors (as in the EP recommendations, which additionally covered publicly listed SMEs (Art. 2(2, 3)). Since micro and small enterprises may encounter structural and financial difficulties to implement HRDD as required under due diligence legislation, EU legislators could also consider the solution adopted under the proposed Dutch RSIBC Act, which establishes the duty of care for all enterprises (Section 1.2), whereas specific HRDD obligations related to risk management and reporting are imposed exclusively on large enterprises.[117]

It seems that the Commission decided to take a middle path. Based on Art. 14(1, 2) of the draft Directive it can be assumed that SMEs present in the value chains of companies subject to the new due diligence obligations would also be required to fulfill at least some of those duties (e.g. through contractual cascading, Art. 7(2b, d, 4)). This is confirmed by the current praxis of implementing the French Law.[118] Therefore, pursuant to the quoted provisions, Member States should provide necessary information and assistance to SMEs (e.g. through dedicated websites or platforms, and optionally financial support) so that they can fulfill their new due diligence duties.

Scholars have criticised the exclusion of public buyers from the draft Directive's scope. According to this criticism, the draft Directive thereby holds corporations

[113] UNGPs, *GP 14*. *See also* Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 553.

[114] *See e.g.* OHCHR, *Feedback on the draft Directive on Corporate Sustainability Due Diligence of 23 May 2022*, at 3, available at: https://www.ohchr.org/sites/default/files/2022-05/eu-csddd-feedback-ohchr.pdf. Critically also Human Rights Watch, *Commentary of February 28, 2022*, available at: https://www.hrw.org/news/2022/02/28/eu-disappointing-draft-corporate-due-diligence, (both accessed April 2023).

[115] https://ec.europa.eu/growth/smes/sme-definition_pl (accessed 30 April 2023).

[116] *See* Section 3(a) of the Act. Annual turnover or balance sheet total are more suitable thresholds than the number of employees notably for the IT sector.

[117] That is enterprises which fall under two of the following three categories: a balance sheet greater than €20 million, net revenue over €40 million, or an average of 250 employees or more (Art. 2.1).

[118] S. Brabant et al., *Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)*, VerfBlog, 15 March 2022, available at: https://verfassungsblog.de/due-diligence-around-the-world/ (accessed 30 April 2023), p. 1. The authors state that up to 80 per cent of French SMEs (which are not directly subject to the law) are required to implement at least some HREDD measures when they supply to companies covered by the law.

to higher standards than the states.[119] This interpretation appears not well-founded though. Private entities with state capital are covered by the draft Directive. Public buyers are primary duty bearers under, and thus bound by, human rights law. No new legislation at EU level is required to hold them to account. Still, adding explicit references to international human rights and environmental standards to the EU public procurement law could serve as a useful vehicle to better implement state duties.

An aspect which may be of concern, however, are possible exceptions for the financial sector (the Commission's proposal) or even its exclusion from HREDD obligations (the Council's general approach leaves the ultimate decision to Member States).

3.2 Subsidiaries and Value Chains

The Commission's draft Directive lays down obligations for companies regarding negative socio-environmental impacts not only with respect to their own operations, but also that of their subsidiaries as well as business partners within their value chain (Art. 1(1a)). Three aspects of this article require attention.

Firstly, it explicitly covers the activities of subsidiaries, even if they are not part of the supply chain of a parent company. This is vital to adequately challenge the "legal separation principle" under which subsidiaries are regarded as autonomous entities,[120] which hinders the attribution of responsibility for their actions to their parent company, even if it effectively (legally and/or economically) controls them. This principle has long constituted the major obstacle for claimants from abroad to settle their cases before courts in home countries of TNCs.[121] While under the French Law and the Norwegian Act corporate operations encompass the activities of their subsidiaries irrespective of where they are based (thus breaking with the

[119] C. Methven O'Brien, J. Hartmann, *The European Commission's proposal for a directive on corporate sustainability due diligence: two paradoxes*, EJIL: Talk!, May 19, 2022, available at: https://www.ejiltalk.org/the-european-commissions-proposal-for-a-directive-on-corporate-sustainability-due-diligence-two-paradoxes/ (accessed 30 April 2022). Legal scholarship also points to certain incoherence regarding the possibility to use EU public procurement law as a vehicle to promote socially responsible business conduct. *See* L. Ankersmit, *The contribution of EU public procurement law to corporate social responsibility*, 26 European Law Journal 9 (2020).

[120] A. Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 22 Human Rights Review 109 (2021), pp. 110, 117, 122.

[121] The legal impossibility of prosecuting French companies following the Rana Plaza tragedy in 2013 (a collapse of eight-story factory manufacturing for European and American brands and retailers in Dhaka, Bangladesh, with more than 1,130 people killed and 2,500 injured) fuelled the motivation of NGOs to push the Duty of Vigilance law. More recently the legal separation objection was raised by Total in a pending case before the French courts concerning the relocation of rural communities in Uganda by its subsidiary in connection to the expansion of company's oil wells (Schilling-Vacaflor, *supra* note 119, p. 117). On the lawsuit against the company under the Duty of Vigilance Law, *see* https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-climate-change-france/ (accessed 30 April 2023).

separation principle), doubts were raised as to whether the German Law covers activities of subsidiaries outside the supply chain of a parent company.[122]

Secondly, by applying a broader concept of the "value chain" (rather than the "supply chain"),[123] the draft Directive (aligning with the EP's recommendations, Art. 1(1-3), Art. 4(4ii, 7)) goes a notable step further than the initiatives within the ILO, OECD and UN. This could significantly extend the scope of a company's due diligence obligations to downstream activities of actors that purchase, distribute or dispose of its end products or services. In its general negotiation approach, however, the Council agreed to substitute "value chain" with the concept of a "chain of activities" and limit company HREDD obligations to downstream activities of its business partners to the extent that they are performed for or on behalf of that company (Art.1.1a, Art.3g). While corporate due diligence obligations cover the totality of the supply chains under the Norwegian Act (Art. 3d)[124] and the proposed Dutch RSIBC Act (Arts. 1.1(g) and 2.1(2)), the German Law focuses on the first tier of a supply chain (direct contractual partner). It requires companies to systematically identify and address the human rights and environmental risks of their own activities and those of their direct suppliers. Precautionary actions (risk analysis) regarding indirect suppliers will be required only if facts that indicate risks were notified or discovered (§9 (3) speaks of "substantiated knowledge").[125] The French Law is not fully explicit whether the risk assessment under the vigilance obligation refers to the first or additional tiers along the supply chain (it only mentions "the subcontractors or suppliers with whom an established business relationship is maintained".[126] This provision resonates with the approach adopted under the draft Directive, whereby the company's obligations concerning upstream and downstream value chain operations are limited to entities with whom it has an "established business relationship" (Art. 1(1a)).

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[122] *See* Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 556.

[123] A value chain covers the full life cycle of a product or service, including material sourcing, production, use and disposal/recycling processes. *Cf. e.g.* Collaboration, innovation, transformation. Ideas and inspiration to accelerate sustainable growth – A value chain approach. World Business Council for Sustainable Development (WBCSD) 2011, p. 3, https://docs.wbcsd.org/2011/12/CollaborationInnovationTransformation.pdf (accessed 30 April 2023).

[124] Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 556.

[125] *Ibidem*. *See also* G. Holly, C. Methven O'Brien, *Human Rights Due Diligence Laws: Key Considerations*, The Danish Institute for Human Rights 2021, p. 16.

[126] French Commercial Code, Art. L. 225-102-4-I, para. 3. The concept of an "established relationship" appears in the French Code (Art. L. 420-2 and L. 442-1) also relating to breach of contract and has a jurisprudential definition based on three criteria: regularity, significance and stability. The National Assembly's 'information report' points out this notion could be interpreted differently under the Vigilance law. *See* https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b5124_rapport-information# (accessed 30 April 2023).

The proposed definition of an established business relationship is problematic in many respects. It may be expected that in the event of disputes it would be for the courts to determine whether a relationship is "lasting" and whether or not it represents "a negligible or merely ancillary part of the value chain" (Art. 3f). This provision would also give incentive for businesses to manage human rights impacts[127] in their supply chains instead of preventing them, e.g. by stronger reliance on seemingly incidental business partnerships.[128] From the perspective of international standards, it is the very occurrence of – and not necessarily the intensity of – negative impacts that requires an appropriate due diligence response by a company. Finally, the said definition goes against the current understanding of "business relationship" under the UNGPs and OECD Guidelines. The Guidelines broadly define "business relationship" to include "relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services". This definition is much wider than that contained in the draft Directive. This divergence was noted in March 2022 by the OECD, ILO, and OHCHR in their joint response to the draft Directive, in which the three international bodies stated that "[c]oherence with the substantive elements of international standards can help bolster the impact and effectiveness of the EU's efforts".[129] It is therefore welcome that in the aforementioned general approach the Council agreed to give up the concept of "established" business relationships and apply that of "business partners" instead (Art. 3e).

3.3. Substantive Scope of Due Diligence Obligations

Under the draft Directive, corporate sustainability due diligence obligations embrace adverse human rights and environmental impacts. Unlike the EP's recommendations, the draft Directive does not lay down due diligence obligations regarding potential structural impacts that business activities may have on good governance, including the public authorities' capacity to protect human rights and the environment. This is regrettable, as such obligations would constitute one of the few possible innovations that the draft Directive could put forth, thus demonstrating EU's capacity to show leadership in the global efforts to induce socially responsible business conduct. Mandatory good governance measures should in any case

[127] Scholarly input on this approach differs, from seemingly neutral (Brabant et al., *supra* note 118, p. 2; Bonnitcha, McCorquodale, *supra* note 98) to critical (Fasterling, Demuijnck, *supra* note 10, pp. 801, 809f).

[128] Brabant et al., *supra* note 118, p. 5; OHCHR, *supra* note 114, pp. 3-4; M. Flacks, M. Songy, *European Union Releases Draft Mandatory Human Rights and Environmental Due Diligence Directive*, Center for Strategic and International Studies, 11 March 2022, available at: https://www.csis.org/analysis/european-union-releases-draft-mandatory-human-rights-and-environmental-due-diligence (accessed 30 April 2023).

[129] ILO, OECD and OHCHR, *Letter to President von der Leyen*, 7 March 2022, available at: https://mneguidelines.oecd.org/ilo-ohchr-oecd-response-to-eu-commission-proposal.pdf (accessed 30 April 2023).

also address the problem of undue corporate influence on political and regulatory spheres, which is to blame for watering down some national and also the discussed EU due diligence legislation.

The draft introduces a catalogue of negative human rights and environmental impacts through an Annex to the draft Directive.[130] Its Part I lists possible "violations of rights or prohibitions", followed by a record of 22 human rights conventions. Part II enumerates "violations of internationally recognized objectives and prohibitions included in environmental conventions". At first glance, the Commission's approach (possibly inspired by the German Law, §2(2)(3)) may seem conducive of legal certainty.[131] However, the enumerative approach may prove problematic in terms of the justiciability of certain rights before European courts, notably where the Annex fails to refer to the core regional instruments such as the European Convention on Human Rights (applicable in all EU Member States) and the EU Charter of Fundamental Rights. This is arguably a paradox, particularly when adjudication before European courts would concern impacts (whether by EU or foreign-registered companies) occurring inside the EU.[132] Indeed no rational explanation can be given for the said omission of European instruments – not even the limited applicability of the EU Charter (Art. 51) – since not only EU institutions, but also Member States shall apply it when implementing EU law. It is also argued that legal certainty could be better served by a more limited catalogue of rights, and "especially one that is clarified by decades of legal adjudication, rather than multiple instruments [including non-binding ones] which, while overlapping, are not fully aligned in their substantive content".[133]

Interestingly, while due diligence obligations do not explicitly extend to adverse climate impacts,[134] the draft features a "combating climate change" clause under which large companies[135] should adopt a plan to ensure that their business model and strategy are suitable for the transition to a sustainable economy and the limiting of global warming to 1.5°C in accordance with the Paris Agreement. Such plan should also specify "the extent to which climate change is a risk for, or an impact of, the company's operations". Where such risks or impacts occur, the company's plan should specify emissions reduction objectives.

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[130] Annex to the proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

[131] In contrast, the French law refers generally to human rights, fundamental freedoms and environment (Art. 1). Brabant et al, *supra* note 118, p. 2.

[132] Methven O'Brien, Hartmann, *supra* note 119.

[133] *Ibidem*.

[134] *See* recital 70 of the draft Directive.

[135] Over 500 employees and a net worldwide turnover exceeding EUR 150 million for EU companies and the same threshold of net turnover in the EU for third-country companies (Art. 2(1a) and Art. 2(2a)).

The concept of due diligence is instrumental in determining the standard of care owed by companies to rightsholders in a given operational context. HREDD, as laid down in the draft Directive (Arts. 4-11), constitutes a visible effort to endorse the accepted international standards in terms of the processes it encompasses.[136]

Firstly, companies covered would be required to develop a HREDD policy and integrate it into their activities (including by way of a code of conduct for the company's employees and subsidiaries). This policy should be updated annually and describe the processes put in place by the company to implement HREDD, and how it verifies compliance with its code of conduct and extends its application also throughout its established business relationships.

Secondly, companies would need to identify actual and potential adverse human rights and environmental impacts arising from their own operations, those of their subsidiaries, and their value chains, albeit only with regard to their established business relationships. Companies operating in a high-risk sector would be required to identify only *severe* adverse impacts which are *relevant to the sector* (Art. 6(2) – emphasis added). The rationale behind this limitation of HREDD obligations (concerning large companies) is unclear.[137] Its application in practice could prove difficult[138] or even pose additional hurdles for victims in substantiating their claims of a company being in breach of its HREDD obligations, while allowing that company a targeted due diligence defense. Furthermore, contrary to the Norwegian Act (Section 4e), under the draft Directive consultation with potentially or actually affected individuals or groups (workers and other stakeholders) is not mandatory. Art. 7(2) and Art. 8(3b) merely stipulate that companies shall consult "where relevant", which in practice may leave companies considerable leeway over whether to commit to such consultations. This not only neglects the importance of stakeholder participation,[139] but also undermines the correct conduct of HREDD, which should be informed by engagement with stakeholders.[140]

The main purpose of embedding HREDD processes in companies' activities is to prevent negative impacts. To this end, companies would be required to undertake measures appropriate to specific circumstances and the severity and likelihood of negative impacts, including prioritization of actions in complex cases (Art. 3(q)). The mandatory HREDD measures include: (i) developing and implementing (in consultation with affected stakeholders) a prevention action plan specifying a timeline for action and "qualitative and quantitative indicators for measuring improvement";

[136] *Cf.* the six-step process of the OECD Due Diligence Guidance for RBC.

[137] Brabant et al, *supra* note 118, p. 4.

[138] OHCHR, *supra* note 114, p. 3.

[139] *Cf.* Krajewski, Tonstad, Wohltmann, *supra* note 8, p. 555, critically about the German Law. The French and Dutch laws contain no explicit provisions in that regard.

[140] OECD, *supra* note 33, p. 18.

(ii) seeking contractual assurances from business partners, including down the supply chain (contractual cascading), on compliance with the company's code of conduct and (where relevant) its negative impact prevention plan; and (iii) verifying compliance by business partners, including through industry initiatives and private audits.

Impacts that could not be prevented should be mitigated. If the company could neither prevent nor mitigate potential negative impacts arising in its value chain, it should (i) exercise leverage on the business partner linked to that impact by temporarily suspending commercial relations with it, providing improvement may be expected in the short-term; or (ii) terminate the business relationship in question if the impact is severe (Art. 7(5a, b)). However, the obligations to suspend and terminate are made conditional on such options being available under the law governing such business relationship. As a minimum, the company is required "to refrain from entering into new or extending existing relations with the partner in connection with or in the value chain of which the impact has arisen".

Moreover, under HREDD companies would be required to bring identified adverse impacts to an end or, where impossible, to minimise the extent of such impacts, including by offering adequate remedies. The latter may involve the payment of damages to the affected persons and/or financial compensation to the affected communities (Art. 8(3a)). Other action required from companies in cases of actual impacts correspond to those regarding potential impacts, save for the development and implementation of a *corrective* action plan. Companies would also need to enable affected persons, trade unions, and other workers' representatives as well as civil society organisations to submit complaints. Under the complaints procedure, the company should enable the complainants to meet with the company's representatives and provide appropriate follow-up on complaints. When specifying complainants' rights, Art. 9(4b) requires that potential or actual adverse impacts that complainants wish to discuss with the company's representatives are *severe*. Whilst misuse of complaint procedures cannot be excluded, what constitutes a severe impact may be highly disputable and thus result in companies automatically dismissing claims on grounds that they are not well-founded.

In line with the OECD Due Diligence Guidance, the draft Directive also requires companies to monitor the effectiveness of their own due diligence processes, as well as those of their subsidiaries and within their value chains, with respect to their established business relations. Companies' due diligence policy should be updated accordingly to the results of such periodic (at least annual) assessments (Art. 10). Finally, companies would have to publicly communicate on their due diligence policy and action, including by publishing a report on their websites.

At first glance the design of HREDD under the draft Directive may give the impression of a robust process safeguarding qualitative change in the business approach.

But the adoption of codes of conduct by companies, the use of specific contractual clauses with suppliers as well as private audits and industry initiatives are well-known to businesses as CSR-related measures, whose effectiveness has proven limited or even none. Not surprisingly, the reliance of the draft Directive on such measures has met with criticism from civil society organisations[141] and concern by international bodies.[142] The HREDD obligations laid down in the draft Directive are "obligations of means" rather than "obligations of results", which has far-reaching consequences for civil liability under the current regime (see below).[143] Companies are not required "to guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped" (recital 15). They shall, however, take measures that can reasonably be expected of them under the circumstances to prevent or minimise the adverse impacts. This implies that to live up to their HREDD duties companies need to commit to results, not processes. Overreliance on the latter risks maintaining the status quo of companies concentrating on risks to business (notably excluding liability through the due diligence defence[144]) rather than addressing potential or actual risks to people or the environment.

3.4. Enforcement measures

In contrast to some national legislation,[145] the Commission's draft Directive contains only administrative (not penal) enforcement measures. Another enforcement mechanism consists of judicial enforcement through civil liability of companies for breaches of their due diligence obligations.

3.4.1. Administrative sanctions

The mandate and powers of the supervisory authorities (to be designated by Member States) are broadly set out in the draft Directive.[146] They would be tasked with assessing whether companies comply with their new HREDD duties. To that end, the authorities should be empowered to request information, carry out investigations

[141] *See* press release from Sherpa, ActionAid France, Friends of the Earth France, Amnesty International France, CCFD-Terre Solidaire, Collectif Ethique sur l'étiquette, Notre Affaire à Tous, Oxfam France, available at https://www.asso-sherpa.org/directive-on-corporate-sustainability-due-diligence-the-proposal-finally-unveiled-by-the-commission-must-be-improved (accessed 30 April 2023). *See also* ECCJ Legal Brief, *supra* note 8, pp. 11-12.

[142] OHCHR, *supra* note 114, p. 8, ILO, OECD and OHCHR, *supra* note 129.

[143] S. Brabant et al., *Enforcing Due Diligence Obligations: The Draft Directive on Corporate Sustainability Due Diligence* (Part 2), VerfBlog, 16 March 2022, available at: https://verfassungsblog.de/enforcing-due-diligence-obligations/ (accessed 30 April 2023), p. 3.

[144] Methven O'Brien, Hartmann, *supra* note 119.

[145] The Dutch Child Labour Due Diligence Law foresees, apart from high fines (up to 10 per cent of the company's annual turnover (Art. 7(3)), also penal enforcement measures for repeat offenders. Responsible directors of enterprises fined twice within five years, and that contravene the Dutch Law a third time during this period, may be charged with a 'criminal offence' and face penalties such as community service and imprisonment (Art. 9). The punitive sanctions regime was also foreseen in the Dutch proposed RSIBC Act.

[146] OHCHR, *supra* note 114, p. 10.

and, in case of identified breaches of corporate duties, impose pecuniary sanctions, order appropriate action on the part of that company, and adopt interim measures to prevent irreparable harm (Art. 18(1, 5). The draft Directive requires sanctions to be effective, proportionate and dissuasive. The decision on whether to impose sanctions and their severity should take account of the company's commitment to the remedial process, and pecuniary sanctions should be determined based on the company's turnover (Art. 20(1-3)).

Under Art. 19(1) any natural or legal person may submit "substantiated concerns" to the authority when, based on objective circumstances, they have reasons to believe that a company is potentially breaching its HREDD obligations. The authority would have discretion to decide whether or not to act (Art. 18(2)), at least with regard to the assessment of whether the threshold for "substantiated concerns" has been met.[147] While the German Law obliges the authorities to act upon "substantiated concerns" only by the affected individuals (Art. § 14(2)), in practice any natural and legal person may refer a matter to the authority, which in such circumstances acts on due discretion.[148]

Since the enforcement relies on administrative law, where national law does not foresee administrative sanctions the draft Directive provides for the possibility to have sanctions imposed on the motion of a supervisory authority, by a competent national court (Art. 18(6)). By way of example, enforcement by court order has been established under the French Vigilance Law. When a company called upon to comply with its vigilance obligations does not meet them within three months, the competent court may, at the request of any person proving an interest, order the establishment, disclosure, and effective implementation of vigilance measures, including under penalty of payment (Art. L. 225-102-4-II).[149]

Under the draft Directive, it is the role of the public authority to provide effective oversight and enforcement of the new HREDD rules. Ideally, such authority should have expertise in both corporate governance and human rights and additionally "function as an enabler for consumers, civil society, and investors to hold businesses accountable".[150] To avoid fragmentation of the enforcement measures, the draft Directive foresees the establishment of a European Network of Supervisory Au-

[147] Brabant et al., *supra* note 143, p. 2.

[148] For a partly diverging view, *see ibidem*.

[149] Following the publication of the EP resolution of 10 March 2021 recommending similar competences to the authority as that featured in the Commission's draft, the French association Sherpa criticised this idea of administrative sanctions insofar as they could jeopardise the judicial logic of the duty of vigilance. *See* https://www.asso-sherpa.org/wp-content/uploads/2021/05/2021.04-Note-Autorite%CC%81-de-Contro%CC%82le-DV.pdf (accessed 30 April 2023).

[150] R. Chambers, A.Y. Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21(2) Chicago Journal of International Law 323 (2021), p. 327.

thorities. Composed of representatives of the national supervisory authorities, the Network would be tasked to "facilitate the cooperation of the supervisory authorities and the coordination and alignment of regulatory, investigative, sanctioning and supervisory practices of the supervisory authorities and, as appropriate, sharing of information among them" (Art. 21).

3.4.2. Civil liability

Civil liability is the cornerstone of the broader concept of corporate accountability, which in turn is one of the primary objectives of introducing HREDD. The Commission's draft Directive links the civil liability of companies with their failure to "comply with" their due diligence obligations. These consist in preventing adverse human rights and environmental impacts in the operations of the company, its subsidiaries and established business partners or, as the case may be, mitigating and bringing such impacts to an end. Importantly, a causal link between non-compliance with the due diligence obligations and the damage that occurred is required (Art. 22(1)). Exercising due diligence thus has an exculpatory function for the company.[151] It will be exempted from liability for damages caused by adverse impacts providing its actions were adequate in the circumstances of the case (Art 22(2)). Moreover, the due diligence required under the cited provision would be a reasonable diligence, i.e. the diligence that a reasonable and prudent person under given circumstances might be expected to exercise in the examination and evaluation of risks affecting a business transaction.[152] This means that businesses are not expected to deploy exhaustive efforts.[153]

On the one hand, this approach to civil liability is mainstream in both common law and civil law systems. In common law countries, a company will not be liable for a breach of its duty of care if it demonstrates that it reasonably exercised its duties and it was not negligent.[154] Analogous standards are applied in civil law systems. For example, tort attribution under German civil law foresees liability to compensate the injured party for damage caused to their life, health, freedom, property, etc. through intentional or negligent conduct (Bürgerliches Gesetzbuch, Art. 823(1)).[155] Thus,

[151] Generally the thrust of due diligence in legal regimes is excluding liability of the defendant who can demonstrate a requisite standard of care. Fasterling, Demuijnck, *supra* note 10, p. 806-807. *See also* L. Smit et al., *Study on due diligence requirements through the supply chain: Final Report* (EC 2020), p. 262.

[152] Merriam-webster dictionary, available at: https://www.merriam-webster.com/dictionary/due%20diligence#legalDictionary (accessed 30 April 2023).

[153] *Ibidem*. In that sense also the case law of the CJEU, *see e.g.* case C-47/16 *Veloserviss*, ECLI:EU:C:2017:220, para. 39. For further discussion, *see* Jędrzejowska-Schiffauer, *supra* note 41.

[154] The duty of care is judicially enforceable through tort suits for negligence by victims "whose potential injuries were reasonably foreseeable". Cassel, *supra* note 69, pp. 180ff.

[155] Similar solutions can be found under Arts. 1382 and 1383 of the French and Art. 2043 of the Italian Civil Code.

even though in the last stage of the legislative process civil liability provisions were removed from the German *Lieferkettengesetz*[156] (reportedly as a result of pressure from the business sector), this does not exclude such liability under the existing duty to compensate for damages in accordance with the above quoted German civil law. The manner in which civil liability for breaches of HREDD is conceived under the French Law is analogous. The claimant seeking compensation for damage before the court has to demonstrate a breach of the duty of vigilance, the adverse impact (damage) suffered, and a causal link between them.[157] Providing evidence to sustain their claims may thus pose a real challenge for victims seeking remedy.[158] In recognition of such challenges, the initial Duty of Vigilance bill provided for a reversed burden of proof from the victims to companies, but intense business lobbying eliminated this provision from the adopted text.[159]

The experience of tort-based litigation shows that barriers to effective access to justice for victims are not resolved by the very establishment of civil liability.[160] Even good substantive rules and ample remedial orders do not address the problem of lawsuits being expensive and beset by a range of legal and practical limitations.[161] The latter may be related to power and knowledge asymmetries between local communities and TNCs, including "the question of what constitutes a valid evidence and how to prove the causality between the practices of headquarters of TNCs and local impacts in distant places".[162] Collecting conclusive evidence on corporate conduct – like bribery or the division of local communities to undermine their resistance – could amount to an insurmountable hurdle for claimants.[163] The reversed burden

[156] https://www.bundestag.de/dokumente/textarchiv/2021/kw23-de-lieferkettengesetz-845608 (accessed 30 April 2023).

[157] Sherpa, *Vigilance Plans Reference Guidance*, February 2019, available at: https://www.assosherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-ilovepdf-compressed.pdf (accessed 30 April 2023). *See also* the decision of the French Constitutional Council of 23 March 2017, ECLI:FR:CC:2017:2017.750.DC.

[158] Schilling-Vacaflor, *supra* note 120, p. 122.

[159] S. Cossart, J. Chaplier, T. Beau de Lomenie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2(2) Business and Human Rights Journal 317 (2017), p. 317. *See also* G. Delalieux, *La proposition de loi "Devoir de vigilance": vers la fin de l'impunité des firmes multinationales?*, in: M. Hastings, B. Villalba (eds.), *De l'impunité: Tensions, controverses et usages. Villeneuve d'Ascq, Presses universitaires du Septentrion,* Presses universitaires du Septentrion 2017, p. 223.

[160] *See e.g.* P. Hoffman, B. Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3(1) UC Irvine Law Review 9 (2013).

[161] *Cf.* Cassel, *supra* note 69, p. 201.

[162] Schilling-Vacaflor, *supra* note 120, p. 122.

[163] *Ibidem*. Reportedly this is the case of Bolivia's Guaraní communities whose social organizations were weakened by the Total E&P's employees. Neither the company's "divide and rule" tactics in Bolivia, nor the less the causality between such corporate conduct and the breach of the duty of care by the parent company can easily be proved in a litigation.

of proof thus appears to be the only promising instrument to break the unequal power distribution in civil litigation.

Against this backdrop, the Commission's draft Directive brings no breakthrough in addressing the major barriers to rightsholders, such as the burden of proof and causality. The thrust of HREDD as a means to discharge a company that can document and demonstrate a certain standard of care, albeit perfectly adapted to the existing corporate liability regimes,[164] does not meet the expected international standard. Under the UNGPs, the company's responsibility for negative human rights impacts is established independently of whether or not it exercised HRDD,[165] thus being only risk- or impact-based.[166] The function of HRDD is to enable the company "to discover whether and how it may become involved in human rights risks (forward looking) or is already involved in an adverse impact (present). [HRDD] includes using the information so gained to craft an appropriate response".[167] Thus, contrary to views expressed in the literature[168], the limits of HREDD are not inherent in the instrument per se, but a matter of approach and normative structuring. In other words, the standard set by the UNGPs requires that civil law, aside from liability for negligence also provides for strict (risk) liability of corporate actors for at least most severe harms caused to people or the environment.[169]

Civil liability provisions in due diligence laws "seek to establish a duty of care between a company and potential victims of human rights abuses linked to the activities of the company or its business partners, as such a wide-ranging duty of care might not otherwise exist".[170] Viewed through that lens, the EU-wide rules could serve as a catalyst for extraterritorially applicable provisions on legal remedies for victims of human rights abuses, including those relating to environmental harm. Under Art. 22(5) of the draft Directive, national provisions transposing corporate liability rules would be of "*overriding mandatory application* in cases where the law applicable to claims to that effect is not the law of a Member State" (emphasis added). In accordance with the relevant EU legislation on private international law (Art. 16 of the Rome

[164] Fasterling, Demuijnck, *supra* note 10, p. 806; Jędrzejowska-Schiffauer, *supra* note 41.

[165] The UNGPs link a company's responsibility to its involvement with an adverse human rights impact. Such company involvement may consist in a) causing the negative impact; b) contributing to it; or c) the impact being directly linked to the company operations, products or services through its business relationships, without causality or contribution occurring on its part (Commentary to GP 19). *See* Ruggie, Sherman, *supra* note 20, pp. 926-927.

[166] While not mainstream, this type of corporate liability is present in European legal systems. *See* Jędrzejowska-Schiffauer, *supra* note 41, p. 486ff.

[167] Ruggie, Sherman, *supra* note 20, p. 927.

[168] Quijano, Lopezi, *supra* note 8.

[169] In this regard the approach proposed in this article goes further than the ECCJ's urging for adopting a risk-based approach in the draft Directive, i.e. using severity and likelihood as central criteria of HRDD processes, allowing for prioritising negative impacts (*see* ECCJ Legal Brief, *supra* note 8, pp. 5, 10).

[170] Holly, Methven O'Brien, *supra* note 125, p. 16.

II-Regulation[171]), this provision (aligned with the EP's recommendations, Art. 20) would enable victims who are not sufficiently protected by the law of their home country where the harm occurred to bring lawsuits against EU-based parent companies. When combined with Art 1(1a), the provisions in question effectively dismantle the legal separation principle as a possible defense by EU-based parent companies seeking to avoid liability for the operations of their subsidiaries. Concomitantly, precedents on parent company liability under domestic law are present in the Dutch, UK and French jurisdictions. These concern a court decision on the merits of the claim (e.g. a judgment of the District Court of the Hague in the case *Milieudefensie v. Royal Dutch Shell*[172]); decisions determining the threshold for jurisdiction (the UK Supreme Court's landmark decisions on parent company liability under English law for serious environmental damage and related human rights harm, including *Case Okpabi & Others v. Royal Dutch Shell Plc & Another* [2021] UKSC 3[173]); or enabling further action for enforcement (e.g. Nanterre Civil Court decision of 25March 2021, n° 19/06222, in a lawsuit against the Bolloré Group[174]). Incidentally, from 25 June 2023, Member States will need to apply the provisions of Directive 2020/1828 on the protection of the collective interests of consumers.[175] In the event of a prolonged and weary legislative process on EU mandatory HREDD, this EU-wide collective redress instrument should facilitate the enforcement of consumer rights and access to justice in situations involving large-scale damage.

CONCLUSIONS

As a global commercial player, the EU can make a meaningful contribution to the improvement of working conditions, respect of human rights and environmental protection within its own borders, the European Economic Area, and worldwide.

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[171] Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

[172] *Milieudefensie v. Royal Dutch Shell, supra* note 50. For discussion, *see* A. Nollkaemper, *Shell's Responsibility for Climate Change. An International Law Perspective on a Groundbreaking Judgment*, Verfassungsblog 28 May 2021, available at: https://verfassungsblog.de/shells-responsibility-for-climate-change/ (accessed 30 April 2023).

[173] *E.g.* L. Roorda, D. Leader, *Okpabi v. Shell and Four Nigerian Farmers v. Shell: Parent Company Liability Back in Court*, 6(2) Business and Human Rights Journal 368 (2021).

[174] The Court declined the company's claim that an agreement resulting from the mediation process with stakeholders was confidential. Under this agreement Bolloré committed to implement an action plan for the benefit of the local communities and plantation workers of Socapalm, a Cameroonian palm oil company directly linked to the group, but in 2014 withdrew from its commitments. According to Sherpa, this decision means that the agreement in question can be brought to court for enforcement to provide the communities affected with the expected reparations, https://www.asso-sherpa.org/bollore-socapalm-the-judge-rules-in-favor-of-the-ngos (accessed 30 April 2023).

[175] Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers [2020] OJ L 409/1.

Expectations for a broader impact of the EU standard-setting for responsible and sustainable business conduct are widely expressed.[176] Establishing mandatory HREDD as an EU-wide legal standard of care for business is a feasible way forward. Having regard to EU constitutional principles such as subsidiarity,[177] it appears sufficient for the good functioning of the internal market[178] to conceive EU mandatory HREDD as harmonising a minimum standard rather than imposing a "single meta-authoritative standard".[179] This leaves Member States the option to apply stricter rules, including on civil liability, as explicitly provided for in the Commission's draft Directive (Art. 22(4) *in fine)*. The laggard states would be forced to legislate to implement the new rules. Less ambitious national legislation (in Germany and Switzerland, the latter country also participating in the internal market) would need to be adapted accordingly. The adoption of HREDD legislation would also facilitate the EU's restrained engagement in the negotiations of a UN legally-binding instrument by closing gaps in the EU's external competence.[180] Arguably, once mandatory HREDD is established in the EU, it would be an opportune time for EU legislators to ensure that non-EU companies are not enjoying competitive advantages in markets outside the EU. A binding international instrument could reduce such risks, at least with respect to companies based in signatory countries of such a treaty.[181]

The adoption of an EU-wide mandatory HREDD would be an important, but not self-contained, step in addressing business impunity for adverse impacts on people and the environment. HREDD can be efficacious only when appropriately tailored and combined with other measures, notably judicial and non-judicial grievance mechanisms and remedies as well as rigid enforcement involving both public authorities and civil society. The draft Directive as proposed by the Commission is far from delivering on what it promises. It mainly builds on the extant legislative, soft law, and judicial instruments, merely consolidating the status quo at the EU level rather than addressing the shortcomings in existing instruments or practice. It

[176] Brabant et al., *supra* note 118, pp. 1, 5; Černič, *supra* note 6, p. 23; Methven O'Brien, Hartmann, *supra* note 119.

[177] Art. 5(3) TEU [2012] OJ C 326, p. 13-390.

[178] The legal base for the EU to legislate on HREDD (Art. 114 TFEU, in connection with Art. 26 TFEU). Legal certainty and level-playing field are named also by business as important reasons to introduce binding legislation. For public consultation, *see* https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en (accessed on 30 April 2023).

[179] The term borrowed from N. Walker, *Constitutional pluralism revisited*, 23(3) European Law Journal 333 (2016), p. 333, but not with exactly the same meaning.

[180] The EU needs exclusive competence in areas subject to negotiations, otherwise it must be joined by its Member States. M. Krajewski, *BHR Symposium: Aligning Internal and External Policies on Business and Human Rights – Why the EU Should Engage Seriously with the Development of the Legally Binding Instrument*, Opinio Juris 11 September 2020, available at: https://tinyurl.com/5c2m4zas (accessed 30 April 2023).

[181] *Ibidem*.

offers no innovations regarding the requirements for the burden of proof, notably regarding causality. It focuses excessively on the HREDD process rather than its result, thus risking to undeservedly reduce the value of its instruments.[182]

To exert the desired impact on business practice, the expected EU legislation would need to endorse the minimum international standards, notably regarding entities subject to the new obligations, the coverage of supply chains, the involvement of stakeholders in the full cycle of the HREDD process, and linking civil liability to business actors' implication in violations of human rights or environmental harm. The latter tenet is directly linked to the question how HREDD should be normatively structured in order to optimise its corrective capacity with respect to business conduct. Arguably, the most promising avenue to incentivise companies to commit to effective HREDD would be to restrict its function to prevention (rather than exculpation), thus excluding a defence merely on the grounds of compliance with the HREDD process. This would unleash the latent potential of HREDD as a flexible tool allowing enterprises to perfectly shoulder their individual responsibility to respect human rights and the environment. Such arrangement would also be fully in line with the letter of the UNGPs, which link the scope of liability to whether an enterprise has caused, contributed to, or was linked to an adverse impact.[183] It remains to be seen whether the EU Parliament[184] and Council will use the European and international momentum to adopt HREDD legislation able to live up to its own objectives.

[182] *Cf.* OHCHR, *supra* note 114, p. 3, 7.

[183] UNGPs, *Commentary to GP 19*; Ruggie, Sherman, *supra* note 20, pp. 926ff.

[184] The EP adopted its position for negotiations with the Council on 1 June 2023 (adopted text P9_TA(2023)0209). An agreement allowing the adoption of the proposed directive is hoped to be reached before the end of the current Parliament'sterm in spring 2024.

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THE TEMPORARY PROTECTION DIRECTIVE IS DEAD, LONG LIVE THE TEMPORARY PROTECTION DIRECTIVE! INDISPENSABILITY OF THE TEMPORARY PROTECTION SCHEME IN THE EU LEGAL LANDSCAPE

Abstract: *On 24 February 2022 an unprovoked Russia attacked Ukraine, causing a mass movement of displaced persons fleeing Ukraine and in need of international protection. On 4 March 2022, the European Council established the existence of a mass influx of displaced persons, and with that for the first time in the history activated Directive 2001/55/EC, providing quick and effective assistance to people fleeing the war. This action has become an exception in the treatment of forcibly displaced persons arriving at the European Union (EU) borders. The main objective of this study is to explore the complementary position that temporary protection occupies within the Common European Asylum System (CEAS), where it serves not only as a tool to provide protection to persons forcefully displaced en masse, but also to ease the pressure on national asylum systems. What makes the presented research even more interesting is the fact that although temporary protection in the EU had been regulated (at least in theory) for over twenty years, it is still highly politicized and dependent on the will of European leaders. This article combines theoretical considerations (analysis of international law and European law) with a case study of actions taken (and not taken) by the EU during the 2022 migratory pressures.*

Keywords: refugee, crisis, temporary protection, non-refoulement, Common European Asylum System

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INTRODUCTION

Temporary protection is a well-established notion in international refugee law,[1] dating back to at least 1953.[2] Already in the mid-1980s, D. Perluss and J. Hartman made a strong argument that temporary protection had developed into a customary international law.[3] However, progress towards its codification at the international level has been slow.[4]

Although there is no universally accepted definition of temporary protection, nor agreement on its minimum content,[5] it can be generally described as a "short-term emergency response to a significant influx of asylum seekers".[6] It concerns a mass scale displacement that often makes determination of individual refugee status impossible in practice. In the same way as the United Nations High Commissioner for Refugees (UNHCR) ties temporary protection to a humanitarian strategy to mass displacement,[7] so too the European Council on Refugees and Exiles (ECRE) proposes that – apart from the large-scale outflow – the definition should relate to the burden placed on a receiving State or States.[8] Therefore, the aim of temporary protection is twofold: apart from providing immediate group-based protection (the humanitarian component), it is used by receiving states to prevent national asylum systems from being blocked (the operational component). In addition, the UNHCR adds to it a layer of international solidarity, stating that temporary protection is also a burden- sharing mechanism for states receiving large numbers of asylum seekers.[9]

The concept of temporary protection granted by receiving states has various forms, including temporary admission, temporary refuge, and temporary asylum.[10]

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[1] United Nations High Commissioner for Refugees (UNHCR), *Roundtable on Temporary Protection: 19-20 July 2012*, International Institute of Humanitarian Law, San Remo, Italy: Summary Conclusions on Temporary Protection, 20 July 2012.

[2] It was mentioned for the first time in the UNHCR Report, referring to Chinese refugees as "temporarily admitted" to the Benelux States and Hong Kong (UNHCR, *Report of the United Nations High Commissioner for Refugees*, 1 January 1954, A/2394).

[3] D. Perluss, J.F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 Virginia Journal of International Law 551 (1986).

[4] J. Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94(2) The American Journal of International Law 279 (2000), p. 279.

[5] UNHCR, *supra* note 2.

[6] UNHCR, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")*, June 2005, PPLA/2005/02.

[7] Fitzpatrick, *supra* note 4, p. 296.

[8] European Council on Refugees and Exiles (ECRE), *Position of the European Council on Refugees and Exiles on temporary protection in the context of the need for a supplementary refugee definition*, 1 March 1997, available at: https://tinyurl.com/2yyh473r (accessed 30 April 2023).

[9] Executive Committee of the High Commissioner's Programme, *Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) - 1981*, 21 October 1981.

[10] Most notably in Asia and the Middle East (UNHCR, *supra* note 2).

It also serves multiple purposes: from granting protection to a category of persons not covered by the 1951 Convention Relating to the Status of Refugees,[11] through to serving as an emergency tool in situations of mass influx where national determination systems are inoperative; and keeping borders open to being used as a "safety valve".[12] Among the European Union (EU) legislative instruments, the tool for providing temporary protection is established by Directive 2001/55/EC,[13] which addresses situations of mass influx of displaced persons from non-EU countries and who are unable to return to their country of origin.

The migration and asylum policy in the EU is regulated by a mixture of Member States laws, EU law, the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, and other international instruments. Since the main objective of this study is to explore the complementary position that temporary protection occupies within the Common European Asylum System, the focus of the presented research will be on the EU framework (with the exception of the first part, which is dedicated to the protection of refugees and asylum seekers in international law). References to Member States national systems will be made only when necessary in order to better understand the legal situation of the forcefully displaced.

Triggering the mechanism encapsulated in Directive 2001/55/EC allows not only for theoretical reflection, but also for political commentary in the historical context and empirical endeavors to establish comparative frames of reference (mainly by comparing large scale displacements and migratory pressure on the EU external borders caused by them). This is reflected in this article's structure. The first part explores the complementary position that temporary protection occupies within the international refugee protection regime; thus laying the grounds for understanding of the rationale behind the adoption and implementation of the scheme in regional and national asylum systems. The second part is dedicated to the development of the temporary protection scheme at the EU level in the context of the birth of the Common European Asylum System (CEAS). The third part covers the mechanism for activating Directive 2001/55/EC vis-à-vis the unprovoked Russia's aggression on Ukraine. References are also made to previous migratory pressures on the EU borders, when the Directive remained inactive.

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

[12] As was the case in the Kosovo crisis, when the mechanism helped to secure the admission of refugees into Macedonia while evacuating some outside the region on a temporary basis.

[13] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, p. 12-23.

1. INTERNATIONAL REFUGEE PROTECTION AND TEMPORARY PROTECTION

The UNHCR defines temporary protection as a "means, in situations of mass outflow, for providing refuge to groups or categories of people recognized to be in need of international protection, but without recourse, at least initially, to individual refugee status determination".[14] It is therefore considered as a flexible, solution-oriented, and time-limited[15] instrument, complementary to the international refugee protection regime,[16] which is based on two instruments: 1951 Refugee Convention, and the Protocol Relating to the Status of Refugees from 1967.[17] The international system of refugee protection is supplemented by regional arrangements,[18] which allow participating states to provide responsive protection in a more efficient manner.[19]

One of the most critical issues regarding temporary protection is its "unclear relationship" with the above-mentioned 1951 Refugee Convention and the 1967 Protocol. This sometimes leads to confusion, mainly in terms of status and standards of treatment[20] toward "Convention refugees" and beneficiaries of temporary protection. Since temporary protection "is conceived as an emergency protection measure of short duration", it offers a more limited range of rights and benefits

[14] UNHCR, *Note on International Protection*, UN Doc. A/AC.96/830 (1994).

[15] It is widely agreed that the upper limit for temporary protection should not exceed three years (UNHCR, *supra* note 2). ECRE stated that temporary protection should last for a period between six months and two years, sufficient time to manage the consequences of a sudden mass influx (ECRE, *supra* note 9). However, it is also being widely accepted that the 1951 Convention refugee status does not guarantee a right to long-lasting admission to an asylum country, but only protection for the duration of the risk (J. Hathaway, *The Rights of Refugees Under International Law*, Cambridge University Press, New York: 2005, p. 395).

[16] UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014.

[17] Protocol relating to the Status of Refugees (opened for signature 31 January 1967, entered into force 4 October 1967), 606 UNTS 267 (1967 Protocol).

[18] Notably the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa adopted in 1969; the Cartagena Declaration on Refugees adopted in 1984; and the constellation of asylum laws, including the most far-reaching ones developed within the European Union.

[19] *See* K. Jastram, *Regional refugee protection in comparative perspective. Lessons learned from the Asia-Pacific, the Americas, Africa, and Europe*, The Andrew & Renata Kaldor Centre for International Refugee Law, Policy Brief, available at: https://tinyurl.com/2r43bdsr; N. Feith Tan, J. Kienast, *The Right of Asylum in Comparative Regional Perspectives Access, Procedures and Protection*, ASILE, Global Asylum Governance and the European Union's Role, available at: https://www.asileproject.eu/wp-content/uploads/2022/05/ASILE-D3.2-final-clean-19042022.pdf (both accessed 30 April 2023); S. Kneebone, *Comparative regional protection frameworks for refugees: Norms and norm entrepreneurs*, 20(2) The International Journal of Human Rights 153 (2016), pp. 153-172; *cf. also* T. Tubakovic, *The failure of regional refugee protection and responsibility sharing: Policy neglect in the EU and ASEAN*, 28(2) Asian and Pacific Migration Journal 183 (2019), p. 183.

[20] United Nations High Commissioner for Refugees, *Global Consultations on International Protection*, 19 February 2001, EC/GC/01/4, available at: https://www.refworld.org/docid/3bfa83504.html (accessed 30 April 2023).

than would "customarily be accorded to refugees granted asylum under the 1951 Convention and the 1967 Protocol".[21]

Undoubtedly, *non-refoulement*[22] – enshrined in Art. 33 of the 1951 Convention, and non-penalisation, encapsulated in Art. 31 – constitute the most basic rights of refugees[23] and extend to beneficiaries of temporary protection.[24]

Under international human rights law, the principle of *non-refoulement* guarantees that no one should be returned to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants, irrespective of their migration status.[25] Meanwhile, Art. 31 of the 1951 Refugee Convention refers to refugees that entered the country of refuge without authorization; however it does not fully cover aspects of the treatment of asylum seekers in cases of mass influxes.[26] Persons involved in a large-scale displacement are often fleeing armed conflict or general violence, and therefore are unable to prove a risk of individual persecution. Thus, contrary to the 1951 Refugee Convention definition of a refugee,[27] the scope and delimitations of temporary protection are based on "categories, groups or scenarios".[28]

Temporary protection[29] can be treated as alternative form of protection when a state is not able to grant asylum to a person who has a well-founded fear of per-

[21] United Nation High Representative for Refugees, *supra* note 16.

[22] A principle that applies to all migrants, under which no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other harm. *See generally* E. Lauterpacht, D. Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in: D. Bethlehem (ed.), *Refugee Protection in: International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge: 2003; G. Goodwin-Gill, J. McAdam, *The Refugee in International Law*, Oxford University Press, Oxford: 2007, pp. 201-267; W. Kälin, *Article 33, Paragraph 1*, in: A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, Oxford University Press, Oxford: 2011, pp. 1327-1396; United Nation High Representative for Refugees, EXCOM, *Non-refoulement, Conclusion No. 6 (XXVIII)*, 1977.

[23] M. Crock, K. Bones, *Australian Exceptionalism: Temporary Protection and the Rights of Refugees*, 16 Melbourne Journal of International Law 1 (2015), p. 3.

[24] In case of the *non-refoulement* principle: *see* Lauterpacht, Bethlehem, *supra* note 22, p. 120. Regarding the non-penalisation of illegal entry, *see* note 26.

[25] Office of the United Nations High Commissioner for Human Rights, *The principle of non-refoulement under international human rights law*, available at: https://tinyurl.com/y46n3ete (accessed 30 April 2022).

[26] Art. 31 of the 1951 Refugee Convention provides: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

[27] Pursuant to Art. 1(A)(2) of the 1951 Refugee Convention, a refugee is a person who: has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"; is outside the country of his or her nationality; and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country.

[28] UNHCR, *supra* note 16.

[29] But also a temporary refuge.

secution, and when that state is unable to admit asylum-seekers on a durable basis, yet – as previously stated – must provide a solution which does not amount to *refoulement*.[30] The "alternative" dimension of temporary protection is also seen as a critical element by the ECRE, which states that temporary protection is "a reasonable administrative policy only in an emergency situation".[31] Additionally, the scheme proved its relevance in regions where only a few states are parties to the 1951 Refugee Convention and/or 1967 Protocol[32] or other regional protection mechanism; or where those mechanisms are difficult to implement because of the character of the movements.[33] In these situations, a common approach to temporary protection is of significant importance.[34] This form of protection might be also inadequate as a response mechanism in situations rooted in long-standing conflicts, where return to the country of origin is not likely in the short term.

However, there are also critical voices claiming that temporary protection offers a "diluted substitute protection" for 1951 Convention refugee status, and thus it can undermine the international protection regime.[35] For some others, the notion itself is antithetical to the protection granted by the 1951 Convention.[36] Therefore, it is extremely important that policymakers and leaders do not use temporary protection as a substitute for other protection mechanisms that would respond adequately to the situation at hand[37] or be more suitable.[38] Temporary protection should also not be used as an alternative form of protection for individuals whose application for Convention status was rejected, but cannot be returned due to the prohibition of torture contained in Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[39]

Finally, since there is no general agreement whether temporary protection should be limited to mass influx situations,[40] the question arises of if and how to apply the concept beyond situations of large-scale displacements. Based on the UNHCR's

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[30] E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge: 2003, para. 76. According to Lauterpacht and Bethlehem, no other analysis is consistent with the terms of Art. 33(1) of the 1951 Convention (Lauterpacht, Bethlehem, *supra* note 22, p. 113).

[31] ECRE, *supra* note 9.

[32] Most notably Asia and the Middle East (UNHCR, *supra* note 2).

[33] UNHCR, *supra* note 16.

[34] UNHCR, *supra* note 2.

[35] Fitzpatrick, *supra* note 4, pp. 279, 281.

[36] H. Esmaeili, B. Wells, *The "Temporary" Refugees: Australia's Legal Response to the Arrival of Iraqi and Afghan Boat-People*, 23(3) University of New South Wales Law Journal 224 (2000), p. 225.

[37] Like, for example, a *prima facie* mechanism that can be used as a procedural shortcut to the grant of refugee status to entire groups of persons. However, states are usually reluctant to make use of this possibility.

[38] UNHCR, *supra* note 16.

[39] ECRE, *supra* note 9.

[40] Fitzpatrick, *supra* note 4, p. 289.

criticism toward "growing tendency for states to extend the application of temporary protection regimes to asylum-seekers arriving outside the context of mass displacement,"[41] it can be assumed that in the UNHCR's view temporary protection should be applied only in a case of large-scale displacement; otherwise it can lead to malpractice toward asylum seekers.

2. TEMPORARY PROTECTION IN THE EUROPEAN UNION

Before establishing a common scheme, many EU Member States used national forms of temporary protection,[42] notably to protect persons fleeing from war.[43] They were mainly driven by pragmatic considerations, not by principles.[44] As noted by the UNHCR, governments in western Europe have implemented temporary protection schemes mainly due to political circumstances rather than an inability to provide protection under the 1951 Refugee Convention.[45] This lack of a common scheme was a serious regulatory challenge, particularly in the context of the war in former Yugoslavia.[46] The Ministers responsible for immigration expressed their concerns relating to the situation of displaced persons during meetings in London (1992) and Copenhagen (1993). The Maastricht Treaty, which officially came into force on 1 November 1993 – although not a ground-breaking act in the area of asylum[47] – nonetheless brought about some changes. Pursuant to Art. K.1(1) and (3) refugee policy was regarded as a matter of common interest.

Although the Council stated in November 1993 that the transfer of competence on the right of asylum to the Community institutions would be "premature", a number of texts reviewing the admission and reception of displaced persons from Yugoslavia were adopted.[48] In its resolution from 1995,[49] Council acknowledged

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[41] Executive Committee of the High Commissioner's Programme, *Note on International Protection*, A/AC.96/914, 7 July 1999.

[42] For more on disparities between national legislations of the EU Member States, *see* K. Kerber, *Temporary Protection in the European Union: A Chronology*, 14 Georgetown Immigration Law Journal 35 (1999), pp. 36-38.

[43] Among others, temporary protection was granted by Member States to persons fleeing war in Bosnia and Kosovo, but also fleeing conflicts in Iraq and Syria.

[44] Kälin, *supra* note 22, p. 202.

[45] UNHCR, *supra* note 6.

[46] According to the report adopted by the European Council in 1991, in the area of migration and asylum priority was given to the harmonization of rules for the admission of students from third countries.

[47] *See* R. Bank, *The Emergent EU Policy on Asylum and Refugees The New Framework Set by the Treaty of Amsterdam: Landmark or Standstill?*, 68 Nordic Journal of International Law 1 (1999), p. 2.

[48] 1710th Council meeting (Justice and Home Affairs), Brussels, 29 and 30 November 1993.

[49] Council, Council Resolution of 25 September 1995 on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, 95 /C 262 /01.

the need for harmonization of the protection granted by states,[50] stating that it is "desirable" that the conditions for admission and residence in those states should be "arranged in a concerted fashion" and "in a spirit of solidarity between Member States". The work however barely moved forward with the Council Decision from 1996[51] on alert and emergency procedures for burden-sharing.[52] Neither the mechanism on burden-sharing with regards to the admission and residence of displaced persons on a temporary basis (based on Art. K.1 of the Union Treaty) from 1995, nor the alert and emergency procedure for burden-sharing regarding admission and residence of displaced persons on a temporary basis (based on Art. K.3(2)(a)) from 1996 were implemented. Voices calling for work on a common asylum system became more widespread.[53] Work on a new framework was unavoidable.

The Treaty of Amsterdam, signed on 2 October 1997, brought significant changes to the institutional framework, notably in the areas of migration and asylum policy.[54] Pursuant to Art. 63(2)(a) the Council, within five years after the entry into force of the Treaty, had to adopt measures on displaced persons in the area of "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection". Furthermore, Art. 63(2)(b) empowered the Council to adopt measures that promote burden-sharing with respect to receiving refugees and displaced persons between Member States. Accordingly, the Council and Commission Action Plan of 3 December 1998[55] and scoreboard to review progress on the creation of an area of "Freedom, Security and Justice,"[56] set minimum standards for giving temporary protection to displaced persons from third countries, which were to be adopted "as quickly as possible".[57] Insofar as regards the mass displacement caused by

[50] In its resolution, the Council stated that temporary refuge should be given "to people whose lives or health are under threat as a result of armed conflict or civil war in future, if there is no other way of averting danger".

[51] Council Decision of 4 March 1996 on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis [1996] OJ L 63/10.

[52] According to the decision, the Coordinating Committee (referred to in Article K.4 of the Treaty on European Union) *may* be convened. Additionally, arrangements on monitoring, including the admission of displaced persons, were to be decided by each Member State.

[53] ECRE, *supra* note 8.

[54] *See* Bank, *supra* note 47; C. Levy, *European asylum and refugee policy after the Treaty of Amsterdam: the birth of a new regime?,* in: A. Bloch, C. Levy (eds.), *Refugees, Citizenship and Social Policy in Europe*, Palgrave Macmillan, London: 1999, pp. 12-50.

[55] Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33080 (accessed 30 April 2023).

[56] Commission communication of 24 March 2000: Scoreboard to review progress on the creation of an area of "Freedom, Security and Justice" in the European Union (COM(2000) 167 final - not published in the Official Journal), available at: https://tinyurl.com/2b45tt9r (accessed 30 April 2023).

[57] The plan specifies categories of measures to taken in the short term (two years) and long term (five years). According to K. Kerber, the provision on the adoption of measures "as quickly as possible" should be

the Kosovo war, Member States acted independently[58] which led to unwanted secondary movements.[59] The Council called on the Commission and the Member States "to learn the lessons of their response to the Kosovo crisis in order to establish measures in accordance with the Treaty".[60] At its special meeting in Tampere in October 1999, the European Council agreed to work towards establishing the Common European Asylum System (CEAS), acknowledging the need to address the issue of temporary protection on the basis of solidarity between Member States.[61] Finally, in 2000, based on Art. 63(2)(a) and (2) (b) the European Commission – with the strong support of the states affected during the Kosovo crisis[62] – adopted a proposal[63] on temporary protection.[64] On 20 July 2001, the Council of the European Communities adopted the Directive on Temporary Protection.

As is pointed out below, the Common European Asylum System consists of various regulations and directives. In the case of Directive 2001/55/EC, the European Commission explained its choice of a directive as a legal form evoking the principle of proportionality. According to the Commission, the Directive allows for laying down minimum standards, while leaving Member States with the choice of form and methods of transposition.[65] This decision was praised by the UNHCR, which underlined that Member States can adopt more favorable standards and that it does not affect schemes adopted prior to the establishment of the European regime.[66]

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interpreted as encompassing measures that are to be treated with the highest priority, and not like a separate category between two and five years (Kerber, *supra* note 42, p. 47).

[58] Protection granted by Member States differed in terms of the granted status, procedures, duration, rights, and benefits.

[59] Secondary movements occur when refugees or asylum-seekers move from the country in which they first arrived to seek protection or permanent resettlement elsewhere.

[60] 2184th Council meeting – Justice and home affairs, Brussels, 27/28 May 1999.

[61] European Council, *Presidency Conclusions*, Tampere 15-16 October 1999.

[62] European Commission, *Study on the Temporary Protection Directive. Final report*, January 2016, available at: https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf (accessed 30 April 2023).

[63] The proposal was welcomed by the UNHCR. It stated that the proposal provides "a sound basis for establishing a European approach to temporary protection" (UNHCR, *UNHCR Summary Observations on the Commission Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx*, COM (2000) 303, 24 May 2000), 15 September 2000, available at: https://www.refworld.org/docid/437c64b04.html (accessed 30 April 2023).

[64] European Commission, *Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, [2000] OJ C 311E. The proposal was a part of a series of initiatives presented by the European Commission under the Treaty of Amsterdam, including – among others – a draft concerning the Eurodac system; a proposal for a Council Decision establishing a European Refugee Fund; and a proposal for a Council Directive on family reunification.

[65] *Ibidem.*

[66] United Nations High Commissioner for Refugees, *supra* note 63.

At this point it is also worth noting that unlike other regional refugee protection systems, the EU has not developed a definition of "refugee" (which ideally would go beyond the definition from Art. 1 of 1951 Convention). Therefore, the European asylum policy is based "on a full and inclusive application" of the 1951 Refugee Convention. The Stockholm Programme even stated that the "Union should seek accession to the Geneva Convention and its 1967 Protocol".[67] However, this is legally unfeasible since the 1951 Refugee Convention covers refugees' rights which lie within the competence of the Member States, thus it would clearly violate the principle of conferral. Moreover, the 1951 Convention is open only to state parties.[68]

The enaction of the Directive was a part of the first phase of creation of the Common European Asylum System (CEAS). The process itself was not linear. The first phase of the CEAS creation took place between 2000 and 2005 and was relatively successful. In that period, six sources of secondary law in the area of migration and asylum were created. Apart from Directive 2001/55/EC, they included: the Eurodac Regulation;[69] the Dublin II Regulation;[70] the Reception Conditions Directive;[71] the Qualification Directive;[72] and the Asylum Procedures Directive.[73] The regime introduced by Directive 2001/55/EC supplemented the concept of international protection based on refugee status and subsidiary protection – embedded in the Qualification Directive – enabling coverage of "any situation in which a third-country national or a stateless person who cannot obtain protection in his or her country-of-origin requests international protection in the territory of the European Union".[74] Inasmuch as it was touted as being a "system of rules moving

[67] European Council, *The Stockholm Programme - an open and secure Europe serving and protecting citizens*, 2010/C 115/01, C 115/1.

[68] Any attempt to introduce an amendment to 1951 Refugee Convention may open a debate which in the end would lead to debate on its substance.

[69] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L 316/1.

[70] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

[71] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

[72] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] L 304/12.

[73] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] L 326/13.

[74] CJEU, Case C-285/12 *Diakite* [2014], Opinion of Advocate General Mengozzi, 18 July 2013, ECLI:EU:C:2014:39, para. 60.

towards completion,"[75] it was implicitly acknowledged that the next phase of the CEAS development must come quickly.[76]

During the second phase, five out of six key legal instruments were recast. The only one not amended was Directive 2001/55/EC, possibly due to the fact it was perceived as an emergency measure which had not yet been tested. Reform of the CEAS eventually became finalized on the eve of migratory pressure that the national asylum and reception systems faced in 2015. When this "perfect storm"[77] hit the EU, apart from the Temporary Protection Directive, it was Art. 78(3) of the Treaty on the Functioning of the European Union (TFUE)[78] that provided for the adoption of provisional measures in emergency migratory situations in the field of asylum.[79] When read together with Art. 80 TFEU, it offers a legal basis for measures implementing the principle of solidarity.

Promotion of solidarity between the Member States in the event of mass influx is explicit throughout the Directive 2001/55/EC. Although it is unclear what is the required number of member states whose national systems are overburdened, it seems reasonable to trigger temporary protection even if only one Member State is affected.[80] Already in the preamble of the Directive, it is stated that the solidarity mechanism should consist of two components: financial and the actual reception of persons in the Member States based on declared availability (the rule of double voluntarism). The financial component is encapsulated in Art. 24, which allows for access to refugee funding during activation of the Directive. The latter is based on the availability declared by Member States, which must indicate their capacity[81] to receive persons eligible for temporary protection.[82] This information should be included in the Council decision giving the right to temporary protection.

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[75] *Ibidem*.

[76] European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13 December 2004 [2005] OJ C 53/1, p. 3.

[77] T. Spijkerboer, *The Refugee Crisis and European Integration Minimalist Reflections on Europe, Refugees and Law*, European Papers 2016, available at: https://tinyurl.com/3kdxbbmd (accessed 30 April 2023).

[78] Art. 78(3) establishes that "[i]n the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

[79] For more on the emergency measures in the EU asylum policy, *see* S.F. Nicolosi*, Addressing a Crisis through Law: EU Emergency Legislation and its Limits in the Field of Asylum*, 17(4) Utrecht Law Review 19 (2021), pp. 19-30.

[80] D. Gluns, J. Wessels, *Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis"*, 36(2) Refugee Survey Quarterly 57 (2017), p. 63.

[81] The Member States can indicate their capacity either in figures or in general terms.

[82] The declared availability was hailed by the Economic and Social Committee, according to which the mechanism allows for sharing responsibility between member states while respecting the "practical requirements" of Member States and considering the wishes of displaced persons (Economic and Social Committee, *Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive on minimum standards for giving*

Directive 2001/55/EC has two purposes – first, to "establish minimum standards for giving temporary protection in the event of a mass influx[83] of displaced persons from third countries who are unable to return to their country of origin; and secondly, as already mentioned, to "promote a balance of efforts between Member States in receiving and bearing the consequences of receiving such persons" (Art. 1).[84] Temporary protection (immediate in its character) is a unique measure, used in the event of a mass influx or an imminent mass influx.[85] According to the European Commission, it should not be treated as a third form of protection, i.e. alongside 1951 Refugee Convention status and EU-regulated subsidiary status.[86] Furthermore, the European Commission described it in pragmatist terms as "a tool enabling the system to operate smoothly and not collapse under a mass influx", in accordance with the services of the Common European Asylum System and the full operation of the Geneva Convention.[87]

As abovementioned, temporary protection is an exceptional measure,[88] which does not constitute a derogation from the application of the 1951 Refugee Convention.[89] Pursuant to Art. 78 TFEU, the EU must provide a policy for temporary protection[90] "ensuring compliance with the principle of *non-refoulement*". This policy must be in accordance with the 1951 Geneva Convention and its Protocol

temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof", 28 March 2001, OJEU 2001, p. 25).

[83] While mass influx is hard to define, nonetheless according to the UNHCR, mass influx situations may have some of the following features: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption capacity in the hosting state; (iv) overload of the asylum system, which is unable to deal with individual asylum procedures. Executive Committee of the High Commissioner's Programme, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations*, 8 October 2004, No. 100 (LV), para. a.

[84] The Proposal also included the specific aim of avoiding a total blockage in national asylum systems, which would have negative effects not only on the Member States, but also on the persons concerned and others seeking protection outside the context of a mass influx.

[85] The Proposal did not list the case of an "imminent mass influx".

[86] In the European Union, subsidiary protection is regulated by Art. 2(f) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9 and Case C-465/07 *Elgafaji vs. Staatssecreatis van Justitie* [2009], ECR I-00921, paras. 43-44. According to the ECRE, subsidiary protection is a response to the causes of person's flight, whereas temporary protection is a reaction to a mass influx (ECRE, *Position on Complementary Protection*, September 2000, available at: https://tinyurl.com/3ndm5wrv, accessed 30 April 2023).

[87] European Commission, *supra* note 64.

[88] With that, Directive 2001/55/EC reaffirms the primacy of the 1951 Refugee Convention and its 1967 Protocol.

[89] Directive 2001/55/EC also does not set standards relating to the interpretation of the 1951 Refugee Convention.

[90] The same rule applies to the asylum policy and subsidiary protection granted by the EU Member States.

and other relevant treaties".[91] Moreover, the adoption of a "uniform status", as mentioned in Art. 78(2), also extends to a "common system" of temporary protection.

According to Art. 3(1) of Directive 2001/55/EC, temporary protection does not prejudge the recognition of refugee status under the Convention. Moreover, in light of the Directive the beneficiary of temporary protection shall be guaranteed the possibility to lodge an application for asylum at any time. However, a Member State can prohibit persons from simultaneously holding the status of beneficiary of temporary protection and asylum seeker while the applications are under consideration.

With regard to implementation, the temporary protection cannot be resorted to individually by a Member State. A collective decision must be taken by the Council of Ministers. However, one of the most contentious issues regarding the temporary protection in the EU is its triggering mechanism, primarily due to the indetermination of a 'mass influx'. According to the act, a mass influx implies the combination of two phenomena. First, the influx must originate from the same country or geographical area, whether it was spontaneous or aided (for example through an evacuation program). Thus, it excludes cyclical and mixed flows from different countries. Secondly, the number of arriving persons must be substantial.[92] Due to the lack of a pre-determined quantitative criteria for declaring a mass influx[93] (or even more so an "imminent mass influx"), the existence of it is established by a Council decision adopted by a qualified majority,[94] based on the Commission's proposal.[95] The European Parliament must be informed of the Council decision, which has the effect of introducing temporary protection in all Member States. The establishment, implementation, and termination of temporary protection should be consulted with the UNHCR and other relevant international organizations.

[91] The list includes the Convention for the Protection of Human Rights and Fundamental Freedoms; the United Nations Convention on the Rights of the Child; the United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.

[92] In its explanatory memorandum, the European Commission also pointed out that the gradual arrival of displaced persons, asylum-seekers and refugees from a single country or region does not constitute a triggering factor. However, once the gradual movement intensifies to the point of becoming massive and overburdening "the normal asylum system", which is no longer able to absorb the flow, the introduction of temporary protection is justified (European Commission, *supra* note 64).

[93] Even the UNHCR states that what constitutes a "mass large-scale influx" should be defined in the context of the receiving state's resources, not in absolute terms (UNHCR, *supra* note 63).

[94] An unanimity requirement could not only lead to protracted negotiations, but also to a situation in which the veto of a single member state would prevent from the activation of the Directive.

[95] The European Commission has a monopoly in this regard.

Contrary to the "indeterminate legal concept"[96] of a mass influx, the limited duration of the offered protection seems undisputable.[97] During the drafting of the Directive, the Economic and Social Committee even stated that one of its aims is to prepare beneficiaries "for the return to their country of origin,"[98] underlining the temporary nature of the protection. Crucially, the duration of the regime and rights afforded to persons under the scheme should be known from the outset.[99] Pursuant to Art. 4 of the Directive, the duration of temporary protection is one year. It may be extended by six-month periods for a further year. A decision taken by the Council (by qualified majority) on a proposal from the Commission can lead to an extension of up to one year. The temporary protection may be terminated in two ways: at the end of the maximum period, or by the Council's decision at any time during this period. The Council's decision must be based on establishment of the fact that the situation in the country of origin allows for a safe and durable return.[100]

In terms of granted rights, Member States must issue residence permits for beneficiaries of temporary protection. For persons that would normally require a visa, due to the urgency of the situation formalities must be kept to a minimum and visas should be either free of charge, or their cost be reduced to a minimum. The Member States must provide information on the rules governing such protection. Persons enjoying temporary protection should have access to employment on equal terms with refugees.[101] They should also have access to suitable accommodation (or the means to obtain housing) and necessary assistance (including social welfare, means of subsistence, and medical care). Persons under 18 years should receive access to the education system. The right to family unification has been limited due to the "temporary nature of the situation".[102] However, the Directive does not determine the Member State's obligations as to the conditions of reception and residence. Moreover, in the case of temporary protection the Reception Conditions Directive does not apply.

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[96] N. Arenas-Hidalgo, *The eternal question: What does "mass influx" really mean? Reflections after the first activation of the Temporary Protection Directive 2001/55*, Global Asylum Governance and the European Union's Role, available at: https://tinyurl.com/3bmn4772 (accessed 30 April 2023).

[97] According to the Proposal (Annex, recital 14), setting a maximum duration for this type of protection is a complementary measure due to the lack of possibility of setting quantitative criteria in advance as to what constitutes a mass influx.

[98] Economic and Social Committee, *supra* note 82, p. 22. The Proposal for the Directive mentioned access to employment, and access to the general education system and to vocational training in the hosting state as useful during reintegration on their return to country of origin.

[99] ECRE, *supra* note 8.

[100] Although the 'return to the country of origin in safe and durable conditions' is not defined in Directive 2001/55/EC, nor in the Council's Decision, it can be assumed that it implies the cessation of the causes leading to the mass displacement.

[101] It also applies to remuneration, employment-related social security, and other terms of employment.

[102] European Commission, *supra* note 63.

3. TEMPORARY PROTECTION DIRECTIVE – MAIDEN ACTIVATION

On 24 February 2022, an unprovoked Russia attacked Ukraine. The war caused a mass movement of displaced persons fleeing Ukraine and in need of international protection. On 4 March 2022, the European Council of the European Union adopted a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine.[103] The decision was introduced unanimously[104] and with a record speed (it entered into force on the same day[105]). The right to temporary protection was immediate.[106] Member States enacted temporary protection at the national levels through legislative acts, executive acts, decisions of the administrative authorities and, in some cases, without additional formalities. They were also left with flexibility in the application of practical measures, starting with facilitating access to the EU territory and registration.

Temporary protection was granted until 4 March 2023. Pursuant to Art. 4 of the Directive, on 14 October 2022, the European Commission at the Justice and Home Affairs Council announced that it would extend the temporary protection in unchanged form for one year. If the reasons for temporary protection persist, the European Commission may propose to the Council another extension for up to another year. As mentioned in the previous part, the temporary protection will end when the maximum duration will be reached or any time that the Council establishes that the situation in Ukraine allows for a safe and durable return.[107]

Temporary protection was granted to three categories of persons displaced from Ukraine on or after 24 February 2022, who left Ukraine as a result of the Russian invasion: (i) Ukrainian citizens residing in Ukraine before 24 February 2022; (ii) stateless persons and nationals of third countries other than Ukraine, who enjoyed

[103] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] ST/6846/2022/INIT OJ L 71.

[104] This was welcomed by the UNHCR, which called the move "unprecedented" (UNHCR, *UNHCR welcomes EU decision to offer Temporary Protection to Refugees fleeing Ukraine*, Press release, 4 March 2022, available at: https://www.unhcr.org/news/press/2022/3/6221f1c84/news-comment-unhcr-welcomes-eu-decision-offer-temporary-protection-refugees.html (accessed 30 April 2023).

[105] Directive 2001/55/EC applies to all EU Member States except Denmark, which has introduced a national form of temporary protection which reflects the Directive's provisions. Iceland, Norway and Switzerland also introduced national protection measures similar to the Directive.

[106] Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection [2022] 2022/C 126 I/01, C/2022/1806 (Operational guidelines).

[107] A decision would be made based on the proposal by the European Commission, which keeps the situation in Ukraine under "constant monitoring and review".

refugee status (or equivalent national protection[108]) before the day of attack; and (iii) family members of the above-mentioned categories. Regarding stateless persons and nationals of third countries other than Ukraine, who could prove that they were legally residing[109] in Ukraine before 24 February and were unable to return to their country of origin, Member States were given the option to either grant them temporary protection or "adequate"[110] protection under national law.

Since there is no application process under national systems when applying for a temporary and adequate form of protection, when presenting themselves to the authorities persons concerned must only demonstrate their nationality; international protection or equivalent protection status; and residence in Ukraine or a family link, as appropriate. In the Nansen spirit, the European Commission allowed for proving Ukrainian nationality with documents with expired validity.[111]

Since Ukrainian citizens holding biometric passports are exempted from the requirement to possess a visa,[112] they can move freely within the EU after being admitted into the territory for a 90-day period within a 180-day period, which allows them to choose the Member State in which they wish to be granted temporary protection and join their family members.[113] This act was called an "unexpected renaissance of 'free choice'".[114] Additionally, a significant number of "pendular" movements have been recorded. As of 1 November 2022, UNHCR had registered more than 7 million crossings at the Ukrainian borders.[115]

[108] While announcing Operational guidelines, the Commission was still gathering information from Ukrainian authorities about forms of protections under Ukrainian law and documents issued for beneficiaries of those forms.

[109] Pursuant to Art. 2(2), legal residency is established on the "basis of a valid permanent residence permit issued in accordance with Ukrainian law". This was repeated in the Operational guidelines.

[110] The notion of "adequate" protection was explained in the Operational guidelines. The European Commission stated that this type of protection does not need to entail the same benefits as those attached to temporary protection. Nevertheless, according to the Commission, a member state must respect Charter of Fundamental Rights of the EU and "the spirit of Directive 2001/55/EC".

[111] Operational guidelines, *supra* note 106.

[112] Annex II to Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders, and those whose nationals are exempt from that requirement (codification) [2018] PE/50/2018/REV/1 OJ L 303.

[113] Beneficiaries of temporary protection can also visit Ukraine. Because of that, a high number of pendular movement has been recorded. However, the clear legal provision regulating pendular movement is missing. Different Member States adopted different approaches to those movements, increasing risk for premature suspension of the status. The ECRE has already called for maintaining the temporary protection status as long as directive remains active (ECRE, *Movement to and from Ukraine under the Temporary Protection Directive*, Policy Note 43-2023, available at: https://tinyurl.com/bddas9ap, accessed 30 April 2023).

[114] D. Thym, *Temporary Protection for Ukrainians. The Unexpected Renaissance of 'Free Choice'*, Verfassungs Blog, 5 March 2022, available at: https://verfassungsblog.de/temporary-protection-for-ukrainians/ (accessed 30 April 2023).

[115] UNHCR, *Ukraine Refugee Situation*, available at: https://data2.unhcr.org/en/situations/ukraine (accessed 30 April 2023).

What is particularly interesting in the context of the free movement of beneficiaries is the fact that in order to support Member States who were the main entry points and "to promote a balance of efforts", states agreed not to apply Art. 11 of Directive 2001/55/EC, which obliges Member State granting temporary protection to take back beneficiaries of that protection, if they stay or seek to enter another Member State without authorization.[116]

This move raises a question concerning the core part of Regulation (EU) 604/2013 – aka the Dublin III Regulation[117] – according to which a Member State responsible for processing asylum applications should be determine them on objective criteria,[118] and where none of them can be applied it is a Member State of a first entry. This is especially relevant since beneficiaries of temporary protection (or an adequate form of protection under national law) can lodge an application for international protection in any Member State. In this case Dublin III applies. However, considering that the beneficiary of temporary protection can enjoy their rights in any Member State, the Member State where the application was lodged is encouraged to "take responsibility for examining the application pursuant to the discretionary clause set out in Article 17(1)" of the Dublin III.[119]

Once the Directive 2001/55/EC entered into force, Member states took different approaches toward Dublin transfers. For example, the German Regional Administrative Court of Aachen cancelled a Dublin transfer to Poland in reaction to Poland's request to suspend transfers due to the significant number of arrivals of Ukrainians.[120] In contrast, the Dutch Council of State rejected an appeal regarding a transfer to Romania by an applicant claiming mistreatment by Romanian authorities. The Council of State ruled that the principle of mutual trust still applies to Romania.[121]

The entry into force of the Directive also influenced asylum procedures in other ways. Some member states initially suspended the processing of applications for international protection by Ukrainians. Pursuant to Art. 31(4) of the recast Asylum

[116] General Secretariat of the Council, *Proposal for a Council implementing decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001 and having the effect of introducing temporary protection – Statement of the Member States*, Brussels, 4 March 2022.

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

[118] The objective criteria (in the hierarchical order) are: presence of family members in a Member State, issuance of a visa or a residence permit, irregular entry into the EU, or visa waived entry.

[119] Operational guidelines, *supra* note 106, p. 15.

[120] Verwaltungsgerichte, 6 L 156/22.A, 18 March 2022.

[121] Council of State, ECLI:NL:RVS:2021:1645, 29 July 2021.

Procedure Directive,[122] a procedure can be suspended due to the uncertain situation in the country of origin.[123] Following the outbreak of the war, some Member States also overturned their negative asylum decisions, granting international protection *sur place*, defined under Art. 5 of the recast Qualification Directive.[124] Ukraine was also removed from national lists of safe countries of origin.[125]

By its decision, the Council acknowledged the appropriateness of the temporary protection, underlining, among others, that the balancing of efforts between Member States reduces the pressure on national reception systems. Despite the fact that the Directive does not regulate the establishment of network capacities, pursuant to Art. 3(2) of the Council decision the Commission set up a "Solidarity Platform" collecting information and assessing the needs of Member States in order to coordinate the response to these needs. The Platform is based on the "matching of offers for solidarity with the needs identified and coordinate the transfer of persons" between Member States and third countries.[126] Moreover, it allows for cooperation between the United Nations Refugee Agency and International Organization for Migration.[127]

In the context of the current decisions taken by European leaders, one question remains: Why has the Directive not been used during previous migratory pressures, especially during the 2015/2016 crisis? The answers proffered vary. According to the European Parliament, it was not used due to the vagueness of its terms and tensions between the Member States in the Council over burden-sharing".[128] H. Beirens and others concluded that the underlying reason was Member States' preference to invest its efforts into finding concrete measures, rather than getting involved in long-lasting negotiations with uncertain outcomes.[129] I.M. Ciğer named six reasons

[122] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180.

[123] This is the case of Belgium, Finland, Germany, Latvia, Luxembourg, the Netherlands and Sweden.

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

[125] The notion of a safe country of origin was enshrined in Article 36 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180.

[126] Operational guidelines, *supra* note 106.

[127] IOM UN Migration, *IOM and UNHCR Welcome Flight with Refugees from Ukraine via Republic of Moldova to Germany*, IOM, 25 March 2022, available at: https://www.iom.int/news/iom-and-unhcr-welcome-flight-refugees-ukraine-republic-moldova-germany (accessed 30 April 2023).

[128] European Parliament, *Migration and Asylum: a challenge for Europe (Fact Sheets on the European Union)*, June 2018, available at: https://tinyurl.com/5d5dyjyb (accessed 30 April 2023).

[129] European Commission, *Study on the Temporary Protection Directive. Final report*. January 2016, available at: https://home-affairs.ec.europa.eu/system/files/2020-09/final_report_evaluation_tpd_en.pdf (accessed 30 April 2023).

behind the non-implementation of the Directive,[130] and even claimed that if the state responsible for an ensuing mass influx was a state other than Russia, the EU would not have activated Directive 2001/55/EC.[131] However, it must be pointed out that refugees from Syria were also fleeing from Russian bombings. On the other hand, while explaining the activation of the Directive in 2022, J. van Selm made a "direct neighboring" argument,[132] which according to R.B. Lacy and H. van Houtum is a spatial manifestation of a global apartheid.[133]

Interestingly, during the 2015/16 migration crisis, countries opposing the introduction of provisional measures introduced on the basis of Art. 78(3) claimed that the purpose of Directive 2001/55/EC is in essence "to respond to the same situations of massive inflows of migrants as the contested decision by laying down a procedure for relocating persons".[134] The Slovak Republic, with the support of Poland, maintained that launching Directive 2001/55/EC "would have been less restrictive for Member States" and "impinged less on the 'sovereign' right of each Member State to decide freely upon the admission of nationals of third countries to its territory". due to its rootedness in declared availability.[135] However, considering the then-highly charged political climate in Slovakia and Hungary (applicants) and Poland (intervener), it is highly doubtful that those Member States would have agreed to the introduction of temporary protection.

Despite the Directive being "geographically and historically neutral",[136] and with confirmations by Commissioner Margaritis Schinas that "skin colour is not a criterion for EU policy,"[137] displaced people other than those fleeing from attacked

[130] M.İ. Ciğer, *Temporary Protection in Law and Practice*, Brill/Nijhoff, Leiden: 2015.

[131] M.İ. Ciğer, *5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022*, EU Immigration and Asylum Law and Policy Blog, 7 March 2022, available at: https://tinyurl.com/2c884zy3 (accessed 30 April 2023).

[132] J. van Selm, *Temporary Protection for Ukrainians: learning the lessons of the 1990s?*, Global Asylum Governance and the European Union's Role, available at: https://www.asileproject.eu/temporary-protection-for-ukrainians-learning-the-lessons-of-the-1990s/ (accessed 30 April 2023).

[133] R.B. Lacy, H. van Houtum, *The proximity trap: how geography is misused in the differential treatment of Ukrainian refugees to hide for the underlying global apartheid in the EUropean border regime*, Global Asylum Governance and the European Union's Role, available at: https://tinyurl.com/bddudn52 (accessed 30 April 2023).

[134] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v. Poland, Hungary and the Czech Republic* [2020] ECLI:EU:C:2020:257. *See also* L. Gruszczynski, R. Friedery, *The Populist Challenge of Common EU Policies: The Case of (Im)migration (2015-2018)*, XLII Polish Yearbook of International Law (2022) on the crisis itself.

[135] Another reason for using Directive 2001/55/EC instead of the relocation mechanism was the fact that it confers fewer rights than the status of international protection, and thus imposes less of a burden on the Member State(s).

[136] Economic and Social Committee, *supra* note 82, p. 25. The ESC stated that the Directive is not a "Balkan Directive", thereby unequivocally pointing that out that it should be also used irrespective of the region of origin. The Committee went further, suggesting it might also be used to protect persons displaced by natural disasters.

[137] European Parliament, *Press conference by Margaritis Schinas, EC Vice-President for promoting our European Way of Life, Ylva Johansson, Commissioner for Home Affairs and Janez Lenarčič, Commissioner for*

Ukraine have lower chances of ever becoming beneficiaries of temporary protection.[138] Ylva Johansson, the EU Commissioner for Home Affairs, confirmed that it is unlikely that the Directive would be launched for those who arrive to Europe via the Mediterranean route.[139] The selective activation of Directive 2001/55/EC not only amplified accusations that the EU was creating a "two-tier system" and of institutionalized racism towards non-Ukrainian asylum seekers,[140] but also confirmed that the choice between granting the status of temporary protection and international protection is "essentially a political choice".[141]

CONCLUSIONS

Since 2001, when the Directive 2001/55/EC was introduced, the legal landscape in the areas of migration and asylum has changed significantly. The first generation of the Common European Asylum System (established in 2011) had been adopted and recast, and the European Asylum Support Office transformed into the European Union Agency for Asylum (2022), similarly to how the European Agency for the Management of Operational Cooperation at the External Borders established in 2004 was turned into the fully-fledged European Border and Coast Guard Agency in 2016. And yet during this time the Directive itself remained unchanged and unused, sliding into obsolescence. Its activation after Russia's full-scale war on Ukraine has proven that the Temporary Protection Directive is a vital part of the Common European Asylum System[142] and should not be used to create an alternative system of protection for forcibly displaced persons, but rather to enforce the protection of persons fleeing wars, violence and persecution.

The fact that so far temporary protection has been activated only in 2022 – and even called then "the most appropriate instrument" by the European Commission[143] – highlights that although temporary protection has been regulated within the EU

Crisis Management, Multimedia Center 2022, available at: https://tinyurl.com/2p8xmbdc (access 30 April 2023).

[138] This was confirmed by the EU Commissioner for Home Affairs who stated that it is unlikely to activate the Directive again for those who arrive via the Mediterranean Sea route (E. Vasques, *No Temporary Protection Directive for Mediterranean crisis, Commissioner says*, Euractive, 21 November 2022, available at: https://tinyurl.com/ye23yzuv (accessed 30 April 2023)).

[139] *Ibidem*.

[140] CEPS, *The EU grants temporary protection for people fleeing war in Ukraine*, CEPS Policy Insights, no. 2022-09, p. i.

[141] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v. Poland, Hungary and the Czech Republic*.

[142] C-411-10 and C-493-10, Joined cases of *N.S. v. United Kingdom and M.E. v. Ireland* [2011] 2011 I-13905, para. 12.

[143] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] ST/6846/2022/INIT OJ L 71.

for over twenty years, it still has not fully moved into the realm of law, remaining dependent on the political will of European leaders. This reflects the fact that within the EU, the refugee crisis is first and foremost a political crisis. Considering the above-mentioned comment made by the EU Commissioner for Home Affairs, it is highly probable that Directive 2001/55/EC will remain a single-use measure.[144]

In 2020, the European Commission presented a New Pact on Migration and Asylum.[145] Among nine new instruments, a Proposal for a Migration and Asylum Crisis Regulation[146] sought to repeal Directive 2001/55/EC and change temporary protection to immediate protection. To increase the chances of implementation, changes regarding the activation mechanism and its scope and duration were introduced. To make matters even more complicated, the European Commission introduced a proposal for a regulation addressing situations of instrumentalisation in the field of migration and asylum.[147] The relationship between those two proposals is still hazy.[148] So far, very limited progress has been made on the Pact on Migration and Asylum, despite the "gradual approach" introduced by the French Presidency. This situation is becoming more convoluted since Directive 2001/55/EC is currently being used in order to provide protection for around 5 million persons who have left Ukraine and registered for temporary protection in Europe.[149]

To sum up, as presented above the temporary protection scheme under the EU law is not the remedy for pressing European asylum issues. It does not mitigate push factors in sending states, nor does it provide "full" protection like refugee status. However, it helps to fill the gap left by the international refugee protection system; prohibits states from *refoulement*; encapsulates a solidarity mechanism; and helps to ease the pressure on national asylum systems. The application of the Directive 2001/55/EC as a response to the Russian conflict-induced displacement has proven that the European Union can deal with a large-scale movements with the tools it already possesses, and that in situations of serious pressure is able to use "ready-to-go" solutions created during previous crises.

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[144] S.K. Mazur, *Too Little, Too Slow – an Analysis of 2022's Developments in the EU's Migration and Asylum Policy*, 28(3) Studia Europejskie – Studies in European Affairs (2023, forthcoming).

[145] European Commission, *New Pact on Migration and Asylum*, available at: https://tinyurl.com/3zzxbucz (accessed 30 April 2023).

[146] European Commission, *Proposal for a regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*, COM/2020/613 final.

[147] Proposal for a regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum, COM/2021/890 final.

[148] *See* ECRE, *Quo vadis EU asylum reform? Stuck between gradual approach, (mini)-package deals and "instrumenatlisation" (Analysis)*, available at: https://ecre.org/wp-content/uploads/2022/09/Policy-Parer-Quo-Vadis-EU-asylum-reform-September-2022.pdf (accessed 30 April 2023).

[149] According to the UNHCR, around 5,140,000 refugees from Ukraine registered for temporary protection or similar national protection schemes in Europe (UNHCR, *supra* note 114).

As much as constant discussion on the system of temporary protection is needed – especially in the face of increasing risks of migratory pressures caused by climate change[150] – any and all plans to repeal Directive 2001/55/EC should be paused and deemed unnecessary.

[150] UNHCR, *Summary of Deliberations on Climate Change and Displacement*, available at: https://www.unhcr.org/4da2b5e19.pdf (accessed 30 April 2023).

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RUSSIAN PROPERTIES IN WARSAW. DECADES-LONG POLISH-RUSSIAN DIPLOMATIC AND LEGAL BATTLES FOR PARITY AND THE QUESTIONS OF IMMUNITIES IN POLISH COURTS

Abstract: *The outbreak of the war in Ukraine in 2022 resulted in the revival of long-lasting disagreements in Polish-Russian relations. One aspect concerns numerous Russian properties in Warsaw, many abandoned or used for non-public purposes, and the disparity between both States' properties in the other in this regard. Although the Polish Government has sought to resolve this matter amicably for many years, ultimately several legal proceedings were initiated in Polish courts aimed at recovering some of those premises. Only recently, however, Poland has resolved to employ more decisive steps, including the seizure of the former Soviet residential complex known as Spyville in order to enforce a final judgment. This article sketches the history of the dispute, provides an insight into court proceedings, and discusses the approach of Polish judicial institutions to diplomatic and State immunities.*

Keywords: State immunity, diplomatic immunity, Russian properties, property recovery, *Spyville*, reciprocity, domestic courts, inviolability

INTRODUCTION

On 11 April 2022, the authorities of Warsaw finally recovered the former Soviet residential complex nicknamed *Spyville* (as it is believed to have hosted a nest of spies).

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The forced seizure has echoed in the Polish and foreign press.[1] Although the compound was abandoned for many years, the Russian authorities have not been willing to relinquish it to the City of Warsaw, despite final court rulings in favour of the city, claiming diplomatic status vis-à-vis this and many other properties in Poland. But the seizure of the *Spyville* premises located at 100 Sobieski Street, by a bailiff with the assistance of the police marks a rather new chapter in this long-lasting dispute over the properties occupied by Russia in Poland as a remnant of the old days of "close brotherhood" with the Soviet Union. With the invasion of Ukraine by the Russian Federation in February 2022 and the subsequent extreme cooling – if not freezing – of diplomatic relations between Moscow and Warsaw, the Polish authorities decided to take more decisive steps in line with judicial decisions they have managed to secure. The political dimension of these actions is even more evident owing to the Polish pledge that the recovered complex will be used, should the technical conditions of the buildings allow, by war refugees from Ukraine.[2] In response, the Russian Ambassador in Warsaw protested the occupation of the diplomatic site.

1. ACQUISITION OF RIGHTS TO PROPERTIES BY THE SOVIET UNION IN POLAND

To untie the Gordian knot of international law, history, and politics, a short description is warranted explaining how the Soviet Union came into possession of a disproportionate number of real properties in Poland – and Warsaw in particular – and why they are still occupied by its successor, i.e. the Russian Federation. Rights to these real properties were acquired generally in two main ways, depending on the time of the acquisition. During the first period, until the mid-1960s, the premises were mostly purchased in regular civil transactions. In the second period, the rights to the properties were obtained on the basis of bilateral international instruments.

Initially, between 1946 and 1965, the diplomatic mission of the USSR, including its trade representation, acquired several properties in Warsaw. Most of them were purchased according to the Polish civil law, while a few were transferred or handed over by unilateral acts of the Polish civil or military authorities. In any case, the acquisitions were based on the domestic law of Poland at that time. In 1946, a villa on a 0.5 ha plot of land was purchased at 31 Piłsudski Street in the small but

[1] *See e.g.* A. Higgins, *A Crumbling Russian 'Spyville' Returns to Polish Hands*, The New York Times, 22 May 2022, available at: https://www.nytimes.com/2022/05/04/world/europe/russia-spy-housing-warsaw.html; L. Kurasinska, *Poland To Seize Russian Diplomats' Property And Use It To House Ukrainian Refugees*, Forbes, 6 March 2022, available at: https://www.forbes.com/sites/lidiakurasinska/2022/03/05/poland-to-seize-russian-diplomats-property-and-use-it-to-house-ukrainian-refugees/?sh=455854835f55 (both accessed 30 April 2023).

[2] City of Warsaw, *Warszawa odzyskuje „Szpiegowo"* [Warsaw reclaims "Spyville"], 11 April 2022, available at: https://um.warszawa.pl/-/warszawa-odzyskuje-%E2%80%9Eszpiegowo (accessed 30 April 2023).

very elegant spa town of Konstancin near Warsaw as the Residence of the Soviet Trade Representative. Similarly, the Residence of the Soviet Ambassador at 13 Żeromski Street (0.66 ha) in the same town was bought in 1965. These properties are now held in the ownership of the Russian Federation, and the title to them is not contested in any way by the Polish Government. Their legal status under Polish law is also undisputed.[3]

Within the borders of the post-war City of Warsaw, all private land had been nationalized by the new Polish Communist Government under the so-called 'Bierut's Decree' of October 1945[4], with the purpose of rebuilding the City. The former owners retained title to existing buildings, if they were suitable for habitation, and were entitled to petition the city to establish a perpetual usufruct on the nationalized land they formerly owned. Under these legal conditions, the Soviet Union acquired additional sites in the city centre. The premises at 7 Szucha Avenue were purchased in January 1946 by the Soviet Union Trade Representation, which occupied the building until the 1990s. Subsequently, the property was assigned to Ukraine as one of the successors of the Soviet Union and it now hosts the Embassy of Ukraine in Warsaw and serves as a Residence of the Ukrainian Ambassador. Although after the dissolution of the Soviet Union this property fell to Ukraine, the Russian Federation has also raised its own claims to the premises, particularly recently. They were, however, rejected in a decision of the Mayor of the City of Warsaw on 18 March 2022.[5] A second building, located at 8 Szucha Avenue in the Governmental District, used to be the former headquarters of the Soviet Trade Representative. It was acquired in October 1946 from a private party through a civil transaction, and the Soviet Trade Representative requested the Polish authorities to establish its perpetual usufruct over the land, which was the right of any former owner of nationalized properties under the Bierut Decree. In recent decades the building has not been used for diplomatic or any other official purposes, as the premises have been, for more than 20 years, commercially leased, despite diplomatic protests from the Polish Ministry of Foreign Affairs,[6] and without paying taxes. Formally,

[3] Deputy Head of the Chancellery of the Sejm, Letter, 16 November 2004, available at: https://www.sejm.gov.pl/archiwum/prace/kadencja4/uzup/in86.pdf (accessed 30 April 2023).

[4] Dekret z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m. st. Warszawy [Decree of 26 October 1945 on the ownership and usufruct of land within the City of Warsaw], Journal of Laws 1945, No. 50, item 279, as amended.

[5] Mayor of Warsaw, *Decision no. 106/SD/2022*, 18 March 2022, mark: SD-WS-I.6841.1493.2018.EKL.

[6] *Odpowiedź sekretarza stanu w Ministerstwie Spraw Zagranicznych na interpelację nr 8325 w sprawie nieuregulowanego statusu nieruchomości znajdujących się na terytorium Rzeczypospolitej Polskiej, a będących w posiadaniu Federacji Rosyjskiej* [Response of the Secretary of State in the Polish Ministry of Foreign Affairs to parliamentary question no. 8325 regarding the unregulated status of real estates located on the territory of the Republic of Poland and held in possession by the Russian Federation], 22 June 2007, available at: http://orka2.sejm.gov.pl/IZ5.nsf/main/551A1A56 (accessed 30 April 2023).

the ownership of the land under the building rests with the State Treasury, and any claims relating to the Russian title to the property were rejected by a decision of the Mayor of the City of Warsaw on 29 March 2022[7] concerning Russia's petition to establish its perpetual usufruct.

Another interesting case concerns the property located at 17/19 Szucha Avenue and 1 Litewska Street (0.3 ha). It was nationalized by the new Polish Communist Government after the war and the perpetual usufruct to the property was later acquired in 1960 in a regular civil transaction between the Soviet Union from the Polish Treasury. The existing villa was adapted for a kindergarten for children of Soviet diplomats, and on the remaining plot a residential building was constructed for the staff of the Soviet Embassy. Nevertheless, the pre-war owner, and later his wife and sole heir, pressed their claims to the property, which was expropriated in 1948 through administrative channels, and following change of the regime in Poland (i.e. Poland's rejection of the communist system, which began in 1989) challenged the validity of the deed transferring the title to the Soviet Union by filling a lawsuit against the Russian Federation, the Treasury, and the City of Warsaw. In 2000 the Warsaw Circuit Court dismissed their claims and the appeal was rejected by the Warsaw Court of Appeal in 2002. However, the cassation to the Supreme Court was successful and the challenged judgment was quashed in 2003.[8] The persistence of the private parties paid off as the Warsaw Court of Appeal found in 2004 that the notary deed from 1960 was null and void, and consequently the Russian Federation – as the successor of the Soviet Union – had never acquired title to the property in question.[9] Interestingly, the Russian Federation and its staff abandoned the building, which quickly became one of the biggest squats in Warsaw, hosting up to 50 people daily. Today, the pre-war villa has been refurbished and hosts a luxury restaurant, while the residential building was replaced by a modern office building.

The last property to fall within the first category is a developed plot at 45 Kielecka Street (0.59 ha). In January 1950, the Mayor of the City of Warsaw handed over the land to the Polish Ministry of Defence "for administration and use" to construct a school in accordance with the zoning regulations in place.[10] The buildings erected on the site hosted a high school for children of the employees and officers of the Ministry of Defence. The school was operated by the Ministry of Defence for only a very short time, as it was decided to hand over the school to the Soviet Union. In implementing this decision, on 15 December 1953 an arrangement was made

[7] Mayor of Warsaw, *Decision no. 125/SD/2022*, 29 March 2022, mark: SD-WS-I.6841.375.2019.EKL.

[8] Polish Supreme Court, Judgment of 13 November 2003, I CK 380/02. *See also* Polish Supreme Court, Judgment of 10 August 2005, I CK 760/04.

[9] Warsaw Court of Appeal, Judgment of 14 June 2004, I ACa 1707/03.

[10] Mayor of Warsaw to the Minister of National Defence, 30 January 1950, PB/69/50, available in Warsaw Circuit Court, case no. XXIV C 68/13.

to transfer the property, along with all the equipment, to the USSR Embassy for "perpetual and free use"[11] to manage and run the school (1953 Agreement). This Embassy boarding school has remained on the spot until recently. After the change of the regime in Poland, the Polish authorities officially indicated to the Russian Embassy that the Ministry of Defence had no authority to hand over the facilities to the Soviet Embassy, and insinuated that it was only possible due to the Soviet dominance in the senior positions within the Ministry,[12] including the Minister himself, who at that time was the Soviet Marshal Konstantin Rokossovsky. Furthermore, it was highlighted that the property at 45 Kielecka Street was supposed to be returned to Poland once the Russian School was transferred to a new location – built on yet another plot facilitated by Poland (as is explained later). This obligation on the part of the Soviet Union/Russian Federation was not fulfilled.

In the second period – between 1972 and 1986 – a few bilateral international agreements were concluded between the then Peoples' Republic of Poland and the Soviet Union, with the purpose of mutual exchange of properties for diplomatic, consular, or similar public functions. Generally, Poland fulfilled its obligations by providing its Soviet counterparts with real estates as agreed. The obligations of the Soviet Union, however, as well as its legal successor the Russian Federation, have never been carried out and the situation is the source of the dispute discussed in this article.

The first such agreement was reached on 11 July 1972,[13] under which the Soviet Union received "the free right of perpetual usufruct, free of taxes and other fees" over the 3.14 ha plot of land with buildings of the Embassy already constructed at that time at 49 Belwederska Street. Its location is strategic as the property is adjacent to one of the buildings of the Polish Ministry of National Defence, close to the Chan-

[11] Umowa w sprawie przekazania przez Ministerstwo Obrony Narodowej Polskiej Rzeczypospolitej Ludowej i przejęcia przez Ambasadę ZSRR w PRL w bezterminowe i nieodpłatne użytkowanie szkoły średniej [Agreement concerning the transfer by the Ministry of National Defence of the People's Republic of Poland to the USSR Embassy in Poland of the high school for perpetual and free use], 15 December 1953, available at: https://traktaty.msz.gov.pl/ (accessed 30 April 2023).

[12] Polish Ministry of Foreign Affairs, *Note concerning the return (release) of properties of the Russian Federation forwarded to the Russian Embassy in Warsaw*, DPT/15/3/09/10/AN/165, 12 October 2010 ("there seems to be a probable presumption that the unlawful transfer of this property to the Embassy of the USSR could have taken place due to the special situation in the management of the Polish Ministry of National Defence at that time"). All diplomatic notes cited or referred to in this article are deposited in court cases files discussed in the article.

[13] Porozumienie między Rządem Polskiej Rzeczypospolitej Ludowej a Rządem Związku Socjalistycznych Republik Radzieckich o użytkowaniu działek ziemi, przeznaczonych pod siedziby Ambasad w Warszawie i w Moskwie oraz budowie kompleksu obiektów Ambasady Polskiej Rzeczypospolitej Ludowej w Moskwie [Agreement between the Government of the People's Republic of Poland and the Government of the Union of Soviet Socialist Republics on use of plots of land intended for the headquarters of the Embassies in Warsaw and Moscow and the construction of the complex of the Embassy of the People's Republic of Poland in Moscow], 11 July 1972, available at: https://traktaty.msz.gov.pl/ (accessed 30 April 2023).

cellery of the Prime Minister and one of the residences of the President of Poland. The property still remains occupied today by a huge complex of the Embassy of the Russian Federation in Warsaw. The matter of the title transfer under the Polish law was regulated already in 1973 in a notary deed to this effect. The ownership of the Russian Federation is not contested and its rights are disclosed in the land register. In exchange, the Polish State obtained the right under the same conditions to use the plot in Moscow at Klimaszkina Street for the purposes of constructing the Polish diplomatic mission in the USSR.

The next arrangement of this type was agreed upon on 27 December 1974 (the 1974 Agreement).[14] Under Art. I, the Polish government granted to the Soviet government "the right to free and perpetual usufruct, without any taxes and other fees, of a plot of land free of development of 1.85 ha located in Warsaw between Belwederska and Spacerowa Street, intended for the construction of the residential-office complex of the USSR Trade Representation and the Office of the Economic Advisor of the USSR Embassy". Next, the USSR government committed itself in Art. II to grant the same rights to Poland in relation to plots of land of an aggregated area of 1.85 ha. The location of one of those plots was specified – the leased premises of the Polish Consulate General in Minsk of 0.47 ha. In Section 3 of this article, the parties agreed that other properties of 1.38 ha should be determined within 6 months from an adequate request from Poland and should be located in each city of the Soviet Union where a diplomatic mission or a consular post were or were to be situated. This obligation, however, has never been fulfilled, as only the plot in Minsk was handed over to Poland for official functions.[15] Importantly, according to Art. III of the Agreement, buildings developed on land plots in Warsaw shall be held in the ownership of the Soviet Union under the condition that they shall not be sold or transferred to any third party without the previous consent of the Polish government. Furthermore, in Section 3 of this Article both governments

[14] Porozumienie między Rządem Polskiej Rzeczypospolitej Ludowej a Rządem Związku Socjalistycznych Republik Radzieckich o wzajemnym przyznaniu prawa do wieczystego użytkowania działek gruntu, przeznaczonych w Warszawie – pod budowę kompleksu budynków biurowo-mieszkalnych Przedstawicielstwa Handlowego ZSRR i Biura Radcy do Spraw Ekonomicznych Ambasady Związku Socjalistycznych Republik Radzieckich oraz w Związku Socjalistycznych Republik Radzieckich – pod budowę budynków biurowo-mieszkalnych przedstawicielstw dyplomatycznych i urzędów konsularnych Polskiej Rzeczypospolitej Ludowej [Agreement between the Government of the People's Republic of Poland and the Government of the Union of Soviet Socialist Republics on mutual granting of rights of perpetual usufruct over plots of land intended in Warsaw – for the construction of a complex of offices and residential buildings of the Trade Representation of the USSR and the Office of the Advisor for Economic Affairs of the Embassy of the Union of Soviet Socialist Republics, and in the Union of Soviet Socialist Republics – for the construction of offices and residential buildings of diplomatic missions and consular posts of the People's Republic of Poland], 27 December 1974, available at: https://traktaty.msz.gov.pl/ (accessed 30 April 2023).

[15] Polish Ministry of Foreign Affairs, Note no. DPT.2981.1.2013/99, 14 April 2015.

committed – on the basis of the reciprocity principle – that each shall execute the formalities in accordance with its domestic law.

In accordance with the 1974 Agreement, the Soviet Union secured two additional properties in Warsaw. The first one is located at 25 Belwederska Street (1.31 ha), where the Office of the Economic and Trade Advisor was situated,[16] Today, it hosts the Consular Department of the Russian Embassy and the Russian cultural and educational centre. The second property – the notorious *Spyville* – was developed into a residential complex for diplomats at 100 Sobieski Street (0.62 ha),[17] and was handed over to the Soviet Union in 1977. This compound, consisting of two connected residential buildings with a cascade structure – the highest with eleven floors – is considered an architectural showcase of modernism. It was populated with Soviet diplomats and high officials until the 1990s and the collapse of the USSR itself. During that time, the Polish government recognized that the compound was used for diplomatic-residential purposes, but later it became vacant and has begun to fall into ruin. Today, all the apartments are devasted. The only bright and intriguing chapter of its history was a short-lived Night Club 100, that was allegedly frequented only by guests with Russian passports and closed in 2017. At the time of the seizure of *Spyville*, the only remaining signs suggesting that the complex was not totally abandoned were the presence of a guard and a notice "The premises of the Embassy of the Russian Federation". The lack of control over the premises was highlighted by frequent visits from urban explorers that documented the disastrous technical conditions of the buildings. The legal status of the property was never regulated under Polish law. In particular, the perpetual usufruct over the property was not established. According to the Polish Ministry of Foreign Affairs, the 1974 Agreement did not transfer ownership to the Soviet Union, but only possession for use.[18]

Next, the agreement of 3 October 1978 on mutual exchange of land plots for the construction of technical centres (1978 Agreement)[19] was concluded. Art. 1 envisaged

[16] Urban Planning and Architecture Department, City of Warsaw Office, *Decision no. 308/76*, 3 December 1976 (available in Warsaw Circuit Court, case no. II C 682/22).

[17] Initially, the 1974 Agreement envisaged that the Soviet Union should receive one plot at 25 Belwederska Street. Nevertheless, it quite quickly turned out that part of this 1.85 ha plot needed to be used for communication purposes due to the reorganization of roads in this area. Thus, the plot was decreased in area to 1.3 ha. Under those circumstances, the Polish Government proposed to the Soviet Embassy the additional plot of 0.6 ha at 100 Sobieski Street for residential purposes, located ca. 1 km away, to which the Soviet Embassy agreed. *See* Polish Ministry of Foreign Affairs, Note no. DAO-15-ZP-29-76, 18 May 1976.

[18] Polish Ministry of Foreign Affairs, Note no. DPT 15/3/09/12/AN/71342/59, 9 May 2012.

[19] Porozumienie między Rządem PRL a Rządem ZSRR o wzajemnym przekazaniu działek gruntu dla budowy ośrodków technicznych współdziałających w obsłudze maszyn, urządzeń i aparatury dostarczanych we wzajemnej wymianie handlowej i o warunkach budowy tych ośrodków [Agreement between the Polish Government and the USSR Government on mutual exchange of land plots for the construction of technical centres cooperating in servicing machines, equipment, apparatus, and devices delivered in mutual trade exchange, and on conditions of construction of those centres], 3 October 1978, available at: https://traktaty.msz.gov.pl/ (accessed 30 April 2023).

that the "listed plots are transferred on the basis of reciprocity into free and perpetual usufruct and exempt from taxes" to the Soviet Union for the construction of technical centres by the Trade Representation in the Peoples' Republic of Poland. Their aggregated area amounted to ca. 8.65 ha and included premises at 101 Ostrobramska Street (1.75 ha) for Stankoimport; at 10 Połczyńska Street (1.7 ha) for Avtoexport; at 2B Bobrowiecka Street (1 ha) for a residential complex for staff of the technical centres; and in the town of Karczew (4.2 ha) for Traktoroexport. According to Art. 2, the Peoples' Republic of Poland was to receive, under the same conditions, 8 plots of land with an aggregated area of 8.65 ha within the territory of the (now former) USSR – two in or around Moscow; two in Leningrad (now St. Petersburg); two in Kiev; and two in Minsk. Importantly, Art. 4 provided for limitations on property disposal, as follows: "Although any buildings and other objects erected on the plots shall be held in ownership of the Soviet Union, nevertheless they shall not be sold or transferred to third parties without the consent of Poland". As no property was transferred to Poland, the Polish government asserted that the government of the former USSR – and later of the Russian Federation – had not fulfilled their mutual obligations under this Agreement.[20]

Notwithstanding the above, with the collapse of the Soviet Union all foreign technical centres lost their *raison d'être* and were closed in the early 1990s. In 1990, the Soviet Union Council of Ministers initiated the process of restructuring and transforming those centres into private law companies in Russia and abroad. But the ownership of the plots for the technical centres rested and rests with the Polish Treasury, and any rights to those properties or its buildings have never been transferred to the Soviet Union under Polish law, as no formalities were concluded, including the execution of notary deeds and the effectuation of land register entries. Thus, for example, in 1998 the Polish Treasury concluded a lease agreement of the property occupied by a former technical centre with a private company incorporated in Poland, but controlled by the Russian authorities. The company later attempted to gain title under Polish law and applied to Polish courts for a declaration of usucapion (prescription) of the property. Its claims, however, were rejected in both the main and appeal proceedings.[21]

Subsequently, an arrangement was reached between 1985 and 1986 in the form of a diplomatic note exchange,[22] leading to the handover to the Soviet Union of plots of land at 3 Beethoven Street (together 1.99 ha). Under the arrangement, the Russian

[20] Odpowiedź podsekretarza stanu w Ministerstwie Spraw Zagranicznych na interpelację nr 5313 w sprawie gruntów eksterytorialnych Federacji Rosyjskiej w Warszawie i w Karczewie [Response of the Undersecretary of State in the Ministry of Foreign Affairs to parliamentary question no. 5313 regarding extraterritorial lands of the Russian Federation in Warsaw and Karczew], 23 November 2006, available at: http://orka2.sejm.gov.pl/IZ5.nsf/main/08129054 (accessed 30 April 2023).

[21] Warsaw Circuit Court, Order of 28 October 2015, V Ca 4126/14.

[22] USSR Embassy, Note no. 79-H, 12 December 1985; Polish Ministry of Foreign Affairs, Note no. DAO.15.*ZSRR-79-85*, 13 December 1985; USSR Embassy, Note no. 106-n, 11 September 1986.

counterparty should have constructed a new Russian school, and vacated and returned the premises at 45 Kielecka Street occupied by the Embassy School at that time. Unfortunately, until today the school transfer condition has not been fulfilled by either the Soviet Union or the Russian Federation, and a new school has never been constructed on these plots. Thus, the obligation to return the property at 45 Kielecka Street has not been carried out. Furthermore, as an equivalent Poland was promised a similar property in Moscow for educational purposes, which again has never been transferred. Additionally, the 3 Beethoven Street property was developed as a residential building for the Soviet Embassy officials and their families, together with a playing field, playground, green areas and parking. It is used today for the same purpose, although the Polish authorities have stressed that the objective of the property transfer has not been fully complied with, as no school was erected.[23] Formally, the premises at 3 Beethoven Street are owned by the City of Warsaw and no deed under internal civil law transferring any right to the Russian Federation has been carried out by the parties.

As a side note, other premisses are or were held in possession by the Russian Federation outside Warsaw. For example, in December 1994 the Polish National Forestry Agency leased to the Russian Embassy in Poland a recreational complex of almost 5 hectares in Skubianka, at the Zegrzyński Reservoir. The complex had been used by the Soviet and Russian diplomats and officials much earlier, at least from the end of the 1970s.[24] It consists of hotels, bungalows, villas, and auxiliary buildings and is located in the vicinity of Warsaw, in a forest at a popular place of rest and water sports. Due to the lack of payments from the Russian Federation, the Agency terminated the lease on 13 April 2022 and requested the Russian Embassy multiple times to release the property, but with no effect. Hence the complex was seized by the National Forestry and secured in November 2022.[25] At the time of its

[23] City of Warsaw Office to the Ministry of Foreign Affairs, 14 December 2010, GK-SP-GSP-I-AWO-722-15-62-08, available in Warsaw Circuit Court, case no. II C 1792/19.

[24] Protokół z rozmów pomiędzy delegacjami Ministerstwa Spraw Zagranicznych PRL a UPDK Ministerstwa Spraw Zagranicznych ZSRR o wybranych problemach związanych z realizacją polsko-radzieckiego Międzyrządowego Porozumienia z 27 grudnia 1974 r. o wzajemnym przekazaniu działek dla przedstawicielstw obu stron, a także dotyczących wymiany doświadczeń w zakresie obsługi przedstawicielstw zagranicznych [Minutes of talks between delegations of the Polish Ministry of Foreign Affairs and the USSR Ministry of Foreign Affairs on selected problems relating to the implementation of the Polish-Soviet Intergovernmental Agreement of 17 December 1974 on the mutual exchange of plots for the missions of both Parties, as well as on the exchange of experience in the field of servicing foreign missions], 22-25 April 1987 r. (available in Warsaw Circuit Court, case no. XXIV C 162/16).

[25] State Forests, *Lasy Państwowe odbierają nieruchomość nad Zalewem Zegrzyńskim* [State Forests take over properties at the Zegrzyński Reservoir], 2 November 2022, available at: https://www.lasy.gov.pl/pl/informacje/aktualnosci/lasy-panstwowe-odbieraja-nieruchomosc-nad-zalewem-zegrzynskim; Ministry of Climate and Environment, *Przejęcie nieruchomości dzierżawionej Ambasadzie Federacji Rosyjskiej przez Lasy Państwowe* [Takeover of the property leased to the Embassy of the Russian Federation by the State Forests], 3 November 2022, available at: https://www.gov.pl/web/klimat/przejecie-nieruchomosci-dzierzawionej-ambasadzie-federacji-rosyjskiej-przez-lasy-panstwowe (both accessed 30 April 2023).

seizure, it was in disastrous technical conditions – "broken windows, rotten floors, collapsing roofs, and vandalized appliances and furniture".[26] Additionally, there are also premises of consular posts occupied by the Russian Federation in Cracow and Poznan, but they are leased either from the State Treasury or private entities. The situation in relation to Russian properties in Gdańsk is more complicated, where two properties are held by Russia for its Consulate General without any legal title (as it has refused to conclude a lease agreement claiming that the premises have allegedly been in its possession from the eighteenth century).[27]

2. THE PROBLEM OF DISPARITY, THE LACK OF RECIPROCITY, AND THE POLISH RESPONSE

The Polish government has taken the position that there is a clear and evident disparity in the Polish-Russian relations insofar as properties controlled by each State on the territory of the other are concerned, with the Russian Federation having for its use an incomparably greater number of premises in Warsaw. This situation is rooted in the asymmetry of diplomatic relations between the Soviet Union and Poland – then a vassal state – dating back to the late 1940s, as well as the Russian non-compliance with the agreements and arrangements reached (already discussed). Those agreements obligated the USSR (later the Russian Federation) – on the basis of the principle of reciprocity – to hand over to Poland real properties for purposes of Polish diplomatic missions and consular posts under the same conditions and in exchange for properties provided for the Soviet Union/Russia in Poland. Unfortunately, this reciprocity has never been achieved. Ultimately, the Russian Federation at its creation was in possession of eighteen real estates in Poland – regardless of the title (plus claims to the premises now occupied by the Ukrainian Embassy in Warsaw), but the Republic of Poland held only five properties in Russia, including three premises which are rented – that of the Consulate General in St. Petersburg leased from the Russian authorities together with the Consulate General in Irkutsk and the Consular Agency in Smolensk commercially rented. Already in 1998 this disparity was calculated to amount to circa 112,000 m^2 to the detriment of Poland.[28]

[26] Polish Press Agency, *Ośrodek dzierżawiony przez ambasadę rosyjską przejęty przez Lasy Państwowe* [Complex leased by the Russian Embassy recovered by the State Forests], 2 November 2022, available at: https://www.pap.pl/aktualnosci/news%2C1469275%2Cosrodek-dzierzawiony-przez-ambasade-rosyjska-przejety-przez-lasy-panstwowe (accessed 30 April 2023).

[27] Odpowiedź podsekretarza stanu w Ministerstwie Spraw Zagranicznych na zapytanie nr 5501 w sprawie nieruchomości w m.st. Warszawie przekazanych ZSRR w latach 70. XX w. [Response of the Undersecretary of State in the Ministry of Foreign Affairs to parliamentary question no. 5501 regarding properties in Warsaw transferred to the USSR in the 1970s of the twentieth century], 28 November 2013, available at: https://www.sejm.gov.pl/Sejm7.nsf/InterpelacjaTresc.xsp?key=1E22A9F9 (accessed 30 April 2023).

[28] Odpowiedź podsekretarza stanu w Ministerstwie Spraw Zagranicznych na interpelację nr 709 w sprawie

The Polish Government enumerated the conditions for regulating the legal status of those properties held in possession by the Russian Federation, which under the international bilateral arrangements were only transferred for use, without legal title under the Polish land law. In order to effectively transfer the title to Russia, both parties need to enter into a civil law contract in a form of a notary deed and effectuate an entry into the land registry. But there is also the obligation to comply with the reciprocity principle, which is envisaged not only in all Polish-Russian agreements but also is mandatory under Polish law as a condition for such a transfer of title.[29] This requires that the Russian Federation transfers to the Republic of Poland similar properties under the same conditions. Without such a transfer, the Russian Federation has no title and shall be considered as a possessor without a legal title under domestic civil law, and as such is obliged to pay compensation for use.[30]

Consequently, this disparity also has another aspect. The position of the Polish Government is that the principle of reciprocity shall apply as well to the matter of remuneration for the use of properties for diplomatic and consular purposes. On one hand, all real properties located in Poland that are or were in possession of the Russian Federation (or previously by the Soviet Union) have been used without any consideration, even if occupied without a legal title. The same is also the case in relation to any taxes, including situations when premises are commercially leased to third parties. At the time, Poland was forced to rent for a fee its premisses of the General Consulate in St. Petersburg. In 1994, the amount of rent was increased drastically by the City of St. Petersburg, and Poland refused to sign a new lease,[31] believing that such an increase was in contravention of the principle of reciprocity by the Russian counterparty.

The situation of the Polish School in Moscow was similar. As explained, the Russian School in Warsaw was granted its premises by the Polish Government back in the 1950s, and its new location was secured and transferred to the Soviet counterparty, although no construction works followed. The USSR Embassy declared in its diplomatic note no. 8-I of 24 February 1984 that if Poland "officially requests the Soviet side to grant the Embassy of the People's Republic of Poland in Moscow a school building, this request will be considered by the Soviet side taking into account the friendly nature of relations between our countries". However, despite multiple requests no property was transferred to Poland. Hence, the Polish

nieruchomości rosyjskich w Polsce [Response of the Undersecretary of State in the Ministry of Foreign Affairs to parliamentary question no. 709 regarding Russian properties in Poland], 8 July 1998, available at: https://orka2.sejm.gov.pl/IZ3.nsf/main/406958C6 (accessed 30 April 2023).

[29] Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami [Real Estate Management Act], as amended, consolidated version of 17 September 2021, Journal of Laws 2021, item 1899.

[30] Polish Ministry of Foreign Affairs, *supra* note 18.

[31] *See supra* note 36.

School in Moscow had to rent its premises from the City of Moscow for circa 30 years, and after 1990 moved into the residential building for the employees of the Polish Embassy in Moscow.[32]

The compliance with reciprocity is not only a fundamental principle of international law, but according to the Polish internal law also a rule in international relations with other States, particularly in relation to providing or facilitating the acquisition or use of properties. Hence, for example when in 1985 the Soviet Embassy requested the Polish counterparty to secure for it a plot of land at Beethoven Street for a residential building, the note from the Polish Ministry of Foreign Affairs pointed to the principle of reciprocity.[33] It explained that the Polish Real Estate Management Act of 1985 envisages that "State property may be granted in perpetual usufruct to a foreign State's diplomatic or consular missions (...) if the right to acquire a title to State property is afforded to the Polish missions in that State". Also, the most recent version of the Act contains a direct reference to the principle of reciprocity as a condition for a transfer of ownership or other title.[34]

According to the Polish Ministry of Foreign Affairs,[35] the long-lasting Polish-Russian consultations had not brought about any solution to the problem. First attempts were made in 1992-93, but following bilateral talks did not result in any removal or reduction of the disparity due to "the lack of a constructive position on the Russian site",[36] although the matter was even raised at the highest levels – by the President of Poland, Prime Ministers, and Ministers of Foreign Affairs. Consequently, the dispute has developed over the years, with the general public gaining an interest therein – an interest which has recently accelerated after the Russian invasion of Ukraine in 2022. So far, the Republic of Poland has neither secured the ownership of the promised additional six premises in Russia, including those being rented, nor has been able to enter its rights into the land register in relation to properties it already owns, including the premises of the Polish Embassy in Moscow. By comparison, the Russian ownership of the property occupied by the Russian Embassy in Warsaw is disclosed in the Polish land register.

Due to the lack of any progress, the Polish government resolved to turn to an instrument of diplomatic pressure by denouncing the bilateral agreements, which

[32] *See* Polish Ministry of Foreign Affairs, *supra* note 12.

[33] Polish Ministry of Foreign Affairs, Note no. DAO.15.ZSRR-79-85, 13 December 1985.

[34] Art. 61(1) of the Real Estate Management Act (*supra* note 29): "Real estate of the State Treasury may, on the basis of reciprocity, be sold or transferred for use, lease or rental to diplomatic missions or consular posts of foreign States [...]".

[35] *See* Undersecretary of State in the Ministry of Foreign Affairs, *supra* note 27.

[36] Undersecretary of State in the Ministry of Foreign Affairs, Odpowiedź na interpelację nr 12653 w sprawie bezumownego użytkowania budynków przez Federację Rosyjską [Response to the parliamentary question no. 12653 regarding non-contractual use of buildings by the Russian Federation], 14 June 2017, available at: https://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=32AB98C0&view=null (accessed 30 April 2023).

formed the basis for any property transfer and use under international law. The denunciations were based either on relevant provisions of the selected agreements regarding their termination (withdrawal or denunciation), or on Art. 56(1)(b) of the Vienna Convention on the Law of Treaties.[37] Hence, the Polish Council of Ministers, on the motion of the Minister of Foreign Affairs, on 20 June 2008 adopted a resolution denouncing the 1978 Agreement concerning the properties for technical centres.[38] The Embassy of the Russian Federation was informed in a note of 27 June 2008 about this fact.[39] The document specified that the Polish government would no longer consider itself bound by the Agreement after 12 months from the date of the note, i.e. on 27 June 2009. The Polish position here is well-reasoned – the actual liquidation of technical centres has rendered the subject and purpose of the 1978 Agreement moot and non-existent. As a consequence of the denunciation of the 1978 Agreement, the Russian Federation lost any right – both under international and Polish domestic law – to use the properties of the former USSR technical centres and ultimately the disparity was reduced by one third. Also, another legal argument was advanced by the Polish government pertaining to the lack of actual transfer of the ownership or any other title to those real properties, neither under the Polish civil law nor under international law, in performance of the 1978 Agreement. According to its Art. 5, the title to properties and buildings located on them shall only be transferred under the condition of reciprocity[40] and only after fulfilling all formalities under the laws of the receiving State. As Poland has never been granted properties under the 1978 Agreement, the Russian Federation did not acquire any title under either Polish or international law.

In relation to the property at 45 Kielecka Street, on 12 October 2010 the Polish Minister of Foreign Affairs denounced the 1953 Agreement, indicating 31 July 2011 as the date on which the Agreement would no longer be honoured. Simultaneously, the Russian Embassy was requested to vacant the premises.[41] In its diplomatic

[37] Vienna Convention on the Law of Treaties (signed on 23 May 1969, entered into force on 27 January 1980), 1155 UNTS 331.

[38] Oświadczenie Rządowe z dnia 10 września 2008 r. w sprawie utraty mocy obowiązującej Porozumienia między Rządem Polskiej Rzeczypospolitej Ludowej a Rządem Związku Socjalistycznych Republik Radzieckich o wzajemnym przekazaniu działek gruntu dla budowy ośrodków technicznych współdziałających w obsłudze maszyn, urządzeń i aparatury, dostarczanych we wzajemnej wymianie handlowej i o warunkach budowy tych ośrodków, podpisanego w Warszawie dnia 3 października 1978 r. [Government Statement of 10 September 2008 on the loss of binding force of the Agreement between the Government of the People's Republic of Poland and the Government of the Union of Soviet Socialist Republics on mutual exchange of land plots for the construction of technical centres cooperating in servicing machines, equipment, and apparatus devices delivered in mutual trade exchange, and on the conditions of construction of those centres signed in Warsaw on 3 October 1978], M.P. No. 70, item 632.

[39] Polish Ministry of Foreign Affairs, Note no. DPT 15-3-2007/AN/157, 27 June 2008.

[40] Polish Ministry of Foreign Affairs, Note no. DPT/15/3/09/11/AN/115032/96, 30 June 2011.

[41] *See* Polish Ministry of Foreign Affairs, *supra* note 12.

note, the Minister stressed that the 1953 Agreement "contains a number of formal defects and is not in line with the then Polish and international standards for concluding international agreements". Thus, it should have been rather considered as an undetermined kind of a civil contract of private law. The note also highlighted the non-compliance with the reciprocity principle in relation to the Polish school in Moscow. Under those circumstances, the Polish government announced that it "cannot accept the further unequal treatment in relation to school properties and sees no possibility of extending the use of the premises at 45 Kielecka Street". The Russian Federation has not responded in any way to the diplomatic note.

Having all those considerations in mind, the Polish government settled on liquidating – or at least drastically diminishing – the disparity in properties between the two States. The Russian Federation still claims that all properties shall be afforded diplomatic protection, and that it occupies them with a valid title, and hence that it does not have to pay any taxes or fees relating to their use. The unwillingness of the Russian Federation to settle the issue through bilateral negotiations carried out for more than ten years, led the Polish Ministry of Foreign Affairs – in accord with the Ministry of Internal Affairs, the Ministry of Treasury, the Office of the Prime Minister, the Office of the General Counsel to the Republic and the Mayor of Warsaw – to adopt in 2011 a two-fold strategy.[42]

Its first prong addresses the issue at the international level. Here, the emphasis was put on the continuation of political consultations to resolve the matter, preferably in the form of a bilateral agreement dealing with the status of Russian properties in Poland and the Polish properties in Russia in a comprehensive manner. However, two main conditions were clearly communicated to the Russian counterparty; 1) the matter of the legal title to the land and premises of the Polish Embassy in Moscow should be resolved through disclosing the ownership in the land register; and 2) the premises of the Consulate General in St. Petersburg should be transferred to Poland with the fulfilment of all formalities.

The second element of the Polish strategy, in parallel with actions undertaken at the international plane, requires that the desired parity is achieved by pursuing all possible legal and administrative means aimed at recovering the properties occupied by the Russian Federation without any legal title and diplomatic justification. In this respect, two main categories of lawsuits have been employed and lodged in the competent Polish common courts. The first relates to the recovery of real property. With a judgment for the recovery of property, an owner may take over its property, if necessary with the assistance of bailiffs and other law enforcement officers. The second category of legal actions pursued by the competent Polish authorities against

[42] *See* Undersecretary of State in the Ministry of Foreign Affairs, *supra* note 27.

the Russian Federation concerns the payment of compensation for non-contractual use of real estate, which allows courts to award damage-like remedies for the use of a property without a title or the consent of an owner.

By 2017, the number of Russian properties in the capital of Poland decreased to fourteen as a consequence of the denunciations of the already-discussed agreements by the Polish government and the court proceedings initiated by private parties in relation to the properties at 17/19 Szucha Avenue and Litewska Street.[43] Nevertheless, the implementation of the 2011 strategy for the reduction in the disparity between the properties held by the Russian Federation in Poland and those held by the Republic of Poland in Russia was not a priority. Only after the Russian invasion of Ukraine did the Polish government resolve to proceed with the execution of court judgments for the recovery of selected properties. The seizure of the *Spyville* property at 100 Sobieski Street on 11 April 2022 was the first successful attempt in this regard.

3. PROCEEDINGS BEFORE POLISH COURTS PERTAINING TO RUSSIAN PROPERTIES IN WARSAW

The strategy of the Polish government aimed at reducing the disparity had already earlier moved to Polish courts when relevant lawsuits were filed beginning in January 2013 against the Russian Federation in relation to five properties located in Warsaw. Inasmuch as three of them are used neither for diplomatic nor consular nor any other public purposes by the defendant, the Polish authorities resolved to pursue all available judicial remedies, including the most intrusive one, i.e. in the form of recovery of the property.

The first action for property recovery was filed in January 2013 and concerned the property at 45 Kielecka Street. Only after three years – on 18 January 2016 – did the Circuit Court of Warsaw render a default judgment,[44] which become final on 2 February 2016. Although ultimately the Russian school ceased to operate on the premises, it was not returned to the State Treasury and no execution proceedings have been initiated for a long time. Only after the successful attempt of recovering the property at 100 Sobieskiego Street in April 2022, did the Polish authorities decided to follow these decisive steps. On 29 April 2023, a bailiff acting on a request from the City of Warsaw entered the property and took possession of it.[45]

In parallel to a recovery action, in November 2015 the Polish Treasury sent the final pre-trial request for payment to the Russian Embassy in relation to the com-

[43] *See* Undersecretary of State in the Ministry of Foreign Affairs, *supra* note 36.

[44] Warsaw Circuit Court, case no. XXIV C 68/13.

[45] Polish Press Agency, *Warsaw takes over building 'illegally occupied' by Russian embassy*, 29 April 2023,

pensation for non-contractual use of the premises in preparation for another civil action. The Russian response to this request was returned to the Polish Ministry of Foreign Affairs the same month. The Russian diplomatic note explained that "the Embassy assumes that all matters relating to the Russian diplomatic real estates will be discussed after their legal status is regulated".[46] As a result, in February 2016 court proceedings were initiated before the Warsaw Circuit Court against the Russian Federation for compensation in the amount of PLN 7.66 mln (ca. EUR 1.6 mln), plus statutory interest.[47] Due to the non-participation of the Russian Federation, a default judgment was rendered on 3 April 2017 awarding the amount sought by the Treasury, which become final on 16 May 2017.

In relation to 2B Bobrowiecka Street, it was not until 30 June 2011 that the Polish Ministry of Foreign Affairs requested the release of the property, even though the 1978 Agreement was terminated in 2008. The diplomatic note indicated 31 September 2011 as a final date for the release.[48] It stated that as a result of the termination, the Russian Federation lost any title to properties of the former Soviet technical centres in Poland and was using them without any legal basis. Furthermore, "[r]ecently, it turned out that one of the apartments in the building at 2B Bobrowiecka Street was rented to a citizen of Belarus, against whom an investigation in Poland in a serious criminal case is being conducted". During the police search of the apartment in June 2011, an intervention by the representative of the Russian Embassy in Warsaw took place. Additionally, the note requested the payment of compensation for the non-contractual use of the property. With no response from the Russian side, a legal action against the Russian Federation for the recovery of the property was lodged in February 2013,[49] but the case is still pending. Additionally, a lawsuit for the compensation of PLN 8.9 mln (ca. EUR 1.9 mln) was filed in February 2016 and the default judgment was issued on 8 May 2017, which became final on 6 June 2017.[50]

In 2011, the Polish Ministry of Foreign Affairs requested the Russian Embassy to release the property at 100 Sobieski Street and in 2012 informed the Russian Federation about the obligation to pay for the use of the premises.[51] Nevertheless, the

available at: https://www.pap.pl/en/news/news%2C1567057%2Cwarsaw-takes-over-building-illegally-occupied-russian-embassy.html (accessed 13 July 2023); Polish News, *Warsaw. The town hall took over the building of the Russian school at Kielecka Street*, 29 April 2023, available at: https://polishnews.co.uk/warsaw-the-town-hall-took-over-the-building-of-the-russian-school-at-kielecka-street/ (accessed 13 July 2023).

[46] Available in the case files of Warsaw Circuit Court, case no. XXIV C 200/16.

[47] Warsaw Circuit Court, case no. XXIV C 200/16.

[48] Polish Ministry of Foreign Affairs, *supra* note 40.

[49] Warsaw Circuit Court, case no. XXIV C 184/13.

[50] Warsaw Circuit Court, case no. XXIV C 160/16.

[51] Polish Ministry of Foreign Affairs, Note no. DPT 15/3/09/11/AN/151195, 7 September 2011; Polish Ministry of Foreign Affairs, *supra* note 18.

property was not returned. Subsequently, the State Treasury sent the final pre-trial request for payment to the Russian Embassy in September 2015 in relation to the compensation for non-contractual use of the premises. The request was returned to the Polish Ministry of Foreign Affairs the next month with the identical explanation as in the previous correspondence, i.e. that "the Embassy assumes that all matters relating to the Russian diplomatic real estates will be discussed after their legal status is regulated".[52] Thus, in August 2015 the Treasury filed a lawsuit for the recovery of the property at 100 Sobieski Street.[53] Similarly, in 2016, a legal action seeking PLN 7.88 mln (EUR 1.68 mln) for the non-contractual use of the *Spyville* premises was filed.[54]

During the proceedings, the service of correspondence was conducted through the cooperation mechanism in civil matters as regulated by a bilateral Polish-Russian treaty. The Federal State Unitary Enterprise of the Business Administration of the President of Russian Federation "Enterprise for Administration of Property Abroad" – one of *stationes fisci* of the Russian Federation named in the lawsuits – filed an opposition in a Russian court to the motion of the Warsaw Circuit Court on service of court notices through cooperation mechanisms. Firstly, it explained that the 100 Sobieski property had never been managed by the Enterprise, and that it was not within its competence. Nevertheless, it also raised some challenges concerning the lawsuit itself. Generally, as an agent of the Russian Federation, the Enterprise was of the opinion that all disputes concerning the properties in Warsaw should be resolved through diplomatic channels and under international public law instruments, as they had been transferred to the Soviet Union on the basis of a 1974 Agreement. Consequently, any related matters do not fall within the jurisdiction of either the Polish or Russian courts. It also pointed out that the execution of any application in the proceedings (including the service of the Polish court notices in accordance with the bilateral agreement on the matter) would infringe the sovereignty of the Russian Federation by requiring the Federation to participate as a defendant in a matter regulated by Polish law.[55]

Notwithstanding these challenges, the Warsaw Circuit Court considered that its court notices had been properly served on the defendant, and due to its non-par-

[52] Available in the case files of Warsaw Circuit Court, case no. XXIV C 162/16.

[53] Warsaw Circuit Court, case no. XXIV C 802/15.

[54] Warsaw Circuit Court, case no. XXIV C 162/16.

[55] *Sprzeciw w sprawie wniosku Sądu Okręgowego w Warszawie o doręczenie pism sądowych* [Objection to the motion of the Warsaw Circuit Court on service of court notices], 8 November 2016, Warsaw Circuit Court, case no. XXIV C 162/16. *See also* the Russian response in: *Sprzeciw w sprawie wniosku Sądu Okręgowego w Warszawie o doręczenie pism sądowych* [Objection to the motion of the Warsaw Circuit Court on service of court notices], 4 July 2016, Warsaw Circuit Court, case no. XXIV C 802/15, which contained just a few sentences on the immunity issue: "The Russian Federation, holding the property in question in possession in accordance with rules of international law, did not undertake any action within the realm of private civil law

ticipation in the Polish court proceedings it proceeded with deciding the merits of the matters. In the case of the property recovery, the Court rendered its default judgment on 27 October 2016, which became final on 30 November the same year. The decision "orders the defendant Russian Federation and all persons deriving their rights from it to hand over to the plaintiff, the State Treasury represented by the Mayor of the Capital City of Warsaw, the real estate located in Warsaw at 100 Jana III Sobieski Street [...] with buildings". In relation to the matter of compensation, a default judgment was issued on 9 November 2016 against the Russian Federation, but the Federal State Unitary Enterprise filed an objection to the default judgment. This objection was, however, rejected due to procedural issues,[56] and the judgement become final on 14 March 2017.

Although the final judgments were secured, the representatives of the Russian Federation did not release the property. Thus, the Mayor of the City of Warsaw, acting as an agent for the State Treasury, initiated the execution proceedings, during which the Russian Federation was requested to voluntarily vacate the premises, and to which there was no response. For few years, the Polish counterpart did not wish to stir up the dispute, so it refrained from any form of coercion. The situation changed, when, as the City of Warsaw authorities put it: "Russia brutally attacked Ukraine. There is no more room for indulgence".[57] Consequently, the bailiff entered the premises on 11 April 2022 at 9 o'clock with a force opening the gate and changing the locks. All those actions were carried out with the support of the Polish Ministry of Foreign Affairs, which was determined to regulate the legal status of properties "illegally occupied by the Russian Federation" and to remove the gross disparity in the respective real estates in Polish-Russian relations.[58]

Concerning the premises at 3 Beethoven Street, the situation is a little different, as the formal owner of the property is the City of Warsaw and not the State Treasury. Thus it was the City of Warsaw that filed two lawsuits against the Russian Federation – in November 2019 and December 2021 respectively – for compensation for the non-contractual use, requesting the Warsaw Circuit Court to order the defendant to pay almost PLN 1.8 mln (EUR 0.37 mln) and PLN 0.7 mln PLN (EUR 0.14 mln) in the first and second cases. Both lawsuits are still pending.[59]

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and did not consent to adjudicate the case under the jurisdiction of a Polish court. Due to those reasons, the Russian Federation because of its jurisdictional immunity, cannot act as a defendant in the present case".

[56] Order of the Warsaw Circuit Court, 6 February 2017, XXIV C 162/16.

[57] City of Warsaw, *supra* note 2.

[58] Polish Ministry of Foreign Affairs, *Oświadczenie MSZ w sprawie przejęcia rosyjskiej nieruchomości w Warszawie* [Statement of the Ministry on seizure of the Russian property in Warsaw], 11 April 2022, available at: https://www.gov.pl/web/dyplomacja/oswiadczenie-msz-w-sprawie-przejecia-rosyjskiej-nieruchomosci-w-warszawie (accessed 30 April 2023).

[59] Warsaw Circuit Court, case no. II C 1792/19 and case no. II C 1856/21.

The most recent case was filed in 2022 by the Treasury against the Russian Federation in relation to the property at 25 Belwederska Street. The Polish Government is seeking PLN 55.3 mln (EUR 11.7 mln) compensation for the non-contractual use thereof. The proceeding is still pending.[60] Interestingly, the competent Polish authorities in relation to both 3 Beethoven and 25 Belwederska Street sought only compensation for use, but not the recovery of the premises. The reason for that is that both these locations are used by the Russian Federation for public purposes – the first one houses diplomats and their families; and the second is occupied by the Consular Department of the Embassy – although without any legal title under either international law or the internal law of Poland.

It is worth noting that an important aspect of the proceedings – which has had an enormous impact on their length and success – was a rather petit procedural issue: the effective service of court documents and correspondence. In practise, it took a lot of time and effort on the part of Polish courts to serve the agents of the Russian Federation with copies of lawsuits, information concerning court hearings, and its decisions, including the default judgments rendered. One could not but notice that the Russian Embassy and other Russian authorities adopted the strategy of obstruction in this regard.

In most cases, at the beginning the courts used the regular post services and sent correspondences to the Russian Embassy in Warsaw directly. Next, they resolved to utilize the mutual legal assistance mechanisms, thus relying on the Hague Convention[61] or the Polish-Russian Agreement on Legal Assistance.[62] Under the Convention, each contracting State shall designate a Central Authority, which receives requests for service from other States and carries them out or arranges to have them served. The bilateral agreement specifies that all assistance requests shall be forwarded through central authorities, being the Ministry of Justice and the Attorney General Office as indicated by the Russian Federation. Those attempts were not all successful, as certain requests were returned either "rejected" or "unprocessed".

The Russian Embassy's initial position was that the regular postal delivery was not effective and should be carried out in accordance with the Agreement on Legal Assistance.[63] It later changed its stance, insisting on service through diplomatic

[60] Warsaw Circuit Court, case no. II C 682/22.

[61] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, (signed 15 November 1965, entered into force 10 February 1969), 658 UNTS 163.

[62] Umowa między Rzecząpospolitą Polską a Federacją Rosyjską o pomocy prawnej i stosunkach prawnych w sprawach cywilnych i karnych, sporządzona w Warszawie dnia 16 września 1996 r. [Agreement between the Republic of Poland and the Russian Federation on legal assistance and legal relations in civil and criminal matters, concluded in Warsaw on 16 September 1996], Journal of Laws 2002, No. 83, item 750.

[63] *See e.g.* Russian Embassy in Poland, Note no. 293/H, 5 June 2013.

channels. Notwithstanding, in some cases the Russian Federation was represented by an attorney in Polish courts. For example, in a lawsuit concerning the recovery of the property at 2B Bobrowiecka Street,[64] a Polish attorney presented the court with the power of attorney issued by the Chancellery of the President of the Russian Federation, represented by the Chief of the Chancellery – Vladimir Igorevich Kozhin – "on behalf and in the interest of the Russian Federation" to carry out all procedural acts and "use all range of instruments to protect the rights of ownership of the Russian Federation" in relation to the property. The document was additionally notarized on 25 July 2013. Later on, the same attorney held the power of attorney from the Russian Ambassador in Poland, Sergey Vadimovich Andrieyev, "to represent the Russian Federation before common courts and other authorities of the Republic of Poland in cases concerning the following federal properties located within the Republic of Poland: Warsaw, 2B Beethoven Street (formerly 2B Bobrowiecka) and, Warsaw, 101 Ostrobramska Street".[65] Ultimately, the lawyer informed the Warsaw Circuit Court that despite the submitted powers of attorney he did not represent the Russian Federation and that his mandate came to an end.

Eventually, the Polish courts resolved to serve the correspondence on the Russian Federation through diplomatic channels, through the offices of the Polish Ministry of Foreign Affairs, by directing it to the Russian Embassy in Poland. This, however, did not change the attitude of the Russian counterparty, as all notes and attached court correspondence had been immediately returned by the Embassy, including lawsuits.[66] The only explanation in diplomatic notes repeated the same position of the Russian Federation that "the Embassy assumes that all matters relating to the Russian diplomatic real estates will be discussed after their legal status is regulated". This approach of the Polish courts in relation to the service through diplomatic channels is, however, in line with the general practice in other jurisdictions and the jurisprudence of the Polish Supreme Court. The latter has confirmed that the Polish Code of Civil Procedure does not regulate the matter of delivering court correspondence to foreign States named as a party in a civil action. Nevertheless, the Court stressed that it is, however, possible to deliver correspondence through diplomatic channels through a Polish diplomatic mission in a defendant State or diplomatic mission of the defendant State in Poland.[67]

[64] Warsaw Circuit Court, case no. XXIV C 184/13.

[65] *Ibidem.*

[66] *See e.g.* Polish Ministry of Foreign Affairs to Warsaw Circuit Court, DPT.2981.1.2018/129, 23 December 2019, available in Warsaw Circuit Court, case no. II C 1792/19.

[67] Polish Supreme Court, Judgment of 19 June 2018, I CSK 45/18.

4. THE QUESTION OF IMMUNITIES IN ADDRESSING THE RUSSIAN-POLISH PROPERTY DISPARITY

The Russian Federation has claimed and still claims that all its properties in Poland enjoy special "diplomatic" status, regardless of their use and purpose. This absolute and broad approach is, however, not shared by the Polish government. Thus, the question of immunities, or protection of immovable property owned or utilized in a foreign country by a sending State, remains the cornerstone of the Russian-Polish dispute.

In relation to diplomatic immunities, rights and privileges of diplomatic missions and consular posts are envisaged in the Vienna Conventions on Diplomatic Relations[68] (VCDR) and on Consular Relations[69] (VCCR), as well as by customary international law. This special protection extends not only to the diplomatic staff,[70] including the head of the mission, but also to premisses occupied by the mission, which shall be understood as the buildings or parts of buildings and the appurtenant land "used for the purposes of the mission", and covers as well the residence of the head of the mission.[71] By virtue of Arts. 30(1) and 37(2) VCDR, private residences of diplomatic and administrative staff respectively, with some limitations in relation to the latter group, enjoy the same or analogous status as the residence of the head of the mission. Importantly, the legal definition of the diplomatic premises is rather functional in nature, requiring *de facto* use and occupancy, and applies only to facilities actually used for diplomatic purposes or as a residence of selected diplomatic officers. This means that ceasing to perform diplomatic or consular functions on the premises leads to a voluntary loss of this protection by a sending State. The sole designation as "diplomatic" by a sending State is here irrelevant. At the same time, the functional approach means that the title to the property is also irrelevant when considering the special status and protection of diplomatic properties. Hence, a sending State may own the property utilized for diplomatic purposes, lease it, or use it under another civil law contract, or even occupy it without any title (e.g. when a lease is terminated but the premises are not returned), but that the sole exercise of diplomatic functions justifies the special protection under VCDR.

[68] Vienna Convention on Diplomatic Relations (signed on 18 April 1961, entered into force 24 April 1964), 500 UNTS 95.

[69] Vienna Convention on Consular Relations (signed on 22 April 1963, entry into force 9 March 1967), 596 UNTS 261.

[70] For the sake of clarity, the reference to a diplomatic mission, diplomatic staff and head of the mission shall respectively extend over a consular post, consular staff and head of the post in this article. The immunities and protection envisaged in VCDR are wider than the ones in VCCR, so the relevant provisions of VCDR are discussed here.

[71] Art. 1(i) VCDR.

This is mostly due to the fact that the receiving State had to consent, even tacitly, to the establishment of a diplomatic mission and its localisation on its territory. Furthermore, although the sending State is generally entitled to use the mission premises as it sees fit, this discretion is not absolute, but rather limited by Art. 41(1) VCDR, which specifies that it shall not be used "in any manner incompatible with the functions of the mission [...] or by other rules of general international law or by any special agreements". For example, the commercial use of diplomatic premises is often considered as falling within this limitation. This position was also expressed by the Polish Ministry of Foreign Affairs in its numerous diplomatic notes of protest concerning the commercial lease of premises by the Russian Embassy.[72]

The main aspects of the diplomatic status of the premises of a mission envisage their inviolability and protection by the receiving State. The inviolability requires first and foremost, as per Art. 22(1) VCDR, that agents of the receiving State do not enter the property. The protection aspect requires the receiving State to "take all appropriate steps to protect the premises [...] against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity,"[73] and also specifies certain obligations of the receiving State vis-à-vis private parties. It also provides for immunity from search, requisition, attachment or execution on the premises[74] in any kind of proceedings – court or administrative.

Having these considerations in mind, the strategy of the Polish government had to be carefully designed to navigate through the legal requirements of international law in relation to diplomatic premises and their protection. Hence, the Polish efforts to reclaim the property and the following court proceedings for their recovery have been limited only to properties not used for diplomatic and residential purposes. In the cases of 25 Belwederska and Beethovena (the first of which hosts the Consular Department of the Embassy, and the second is a residence for diplomatic staff of the Russian Embassy), the owners – the State Treasury and the City of Warsaw – sought only compensation for their non-contractual use, but did not move to secure court judgments on recovering the property.

All other properties are not used by the Russian Federation for diplomatic or consular functions, but for other purposes with no legal title under Polish or international law, and thus do not enjoy any special protection under international law. The 45 Kielecka premises were vacant, but previously used to be utilized for educational – including commercial – functions. The *Spyville* at 100 Sobieski Street was also vacant and in ruins before the seizure, with an occasional use for other purposes, including a nightclub. In this regard, already in its diplomatic note

[72] Undersecretary of State in the Ministry of Foreign Affairs, s*upra* note 27.

[73] Art. 22(2) VCDR.

[74] *Ibidem*, Art. 22(3).

of September 2011 to the Embassy of the Russian Federation, the Polish Ministry of Foreign Affairs stressed that these premises had not been used for diplomatic purposes for almost 20 years at that time.[75] Thus, it concluded that the VCDR was not and still is not applicable in relation to those properties. Furthermore, the status of the *Spyville* property and its unsuitable condition was also (probably unintentionally) confirmed by the attorney of the Russian Federation agent – the Federal State Unitary Enterprise of the Business Administration of the President of Russian Federation "Enterprise for Administration of Property Abroad" – in his objection to the default judgment. The brief challenged the property appraisal, stressing that its bad technical condition and that the premises had been totally devasted and certainly were not habitable,[76] which had also rendered the buildings unsuitable for official functions. The non-fulfilment of the definition of 'diplomatic premises' in those two cases paved the way for initiating court and execution proceedings, as diplomatic immunities from seizure did not apply. Ultimately, the bailiff could enter the premises and this did not constitute a violation of the premises under the VCDR.

The Russian response to the seizure of the 100 Sobieski property was rather predictable. The representative of the Russian Embassy was present at the location and protested. In the same vein, the Embassy sent a note of protest to the Ministry of Foreign Affairs.[77] Similarly, on 13 April 2022 Maria Zakharova – the spokeswoman for the Ministry of Foreign Affairs of the Russian Federation – called it illegal and "a flagrant violation of international law", including the VCDR. According to the spokeswoman, the premises should be considered as enjoying diplomatic status. Additionally, with a dose of propaganda and cynicism the spokeswoman added that "the Polish Foreign Ministry resorts to demagoguery as it discusses the elimination of the real estate disparity in Russian-Polish relations. Is this what they call theft nowadays? I did not know that. I will add this term to the diplomatic dictionary".[78] Interestingly, no adequate and proportional response followed, as the Russian authorities have not seized or threatened to seize any Polish property in Russia. All of them are used for diplomatic purposes, but this lack of response may also be interpreted as an indirect or veiled acknowledgement of the existence of the disparity. The Russian reaction to the seizure of the premises at 45 Kielecka

[75] Polish Ministry of Foreign Affairs, *supra* note 51.

[76] *Sprzeciw od wyroku zaocznego* [Objection to the default judgment], 6 December 2016, Warsaw Circuit Court, case no. XXIV C 162/16.

[77] TASS, *Polish authorities in Warsaw occupy Russian diplomatic real estate — Russian ambassador*, 11 April 2022, available at: https://tass.com/politics/1435943 (accessed 30 April 2023).

[78] Russian Ministry of Foreign Affairs, *Briefing by Foreign Ministry Spokeswoman Maria Zakharova, Moscow,* 13 April 2022, available at: https://mid.ru/en/press_service/spokesman/briefings/1809211/#6 (accessed 30 April 2023).

Street was more concise but at the same time took on a threatening tone. The official statement of the Russian Ministry of Foreign Affairs reads that: "Warsaw's arrogant move, which runs contrary to the standards of civilised interstate behaviour, will not remain unanswered and will have consequences for the Polish authorities and Poland's interests in Russia. The architects of such divisive, illegal and incendiary moves should bear this in mind".[79]

Insofar as the State jurisdictional immunity is concerned, the Polish government expressed in its court briefs that the doctrine – as applied by the Polish courts – does not prevent bringing suit against the Russian Federation in common courts in relation to real property in its possession in Poland. Interestingly, the doctrine of State immunity is not regulated in the Polish law.[80] Only Art. 1113 of the Polish Code of Civil Procedure specifies that jurisdictional immunity shall be considered by a court *ex officio* at each stage of a case. It further decrees that once the immunity is acknowledged, a court dismisses a lawsuit or application, as the consideration of a case in violation of jurisdictional immunity results in the invalidity of the proceedings. This provision, however, neither addresses the essence of jurisdictional immunity in the Polish legal system, nor enumerates limitations on the immunity, nor determines persons or subjects protected by it. Consequently, this lacuna has been filed by the judicial practice of Polish courts, developed already in the interwar Poland.[81] The doctrine of limited State immunity, as applied recently in Poland, was probably best summarized in two cases of the Polish Supreme Court which preceded the seizure of the 100 Sobieski property. Already in 2014, the highest Polish court stipulated that:

> At the outset, it is necessary to address doubts arising in the case as to whether a foreign State, as a political organization and a subject of international law, may also be a subject of private law relations, and consequently a party to a litigation concerning the protection of such a private right or entitlement. Hence, the question oscillates around determining the applicant's procedural capacity in this case. In connection with this issue, it is sufficient to stress that both the doctrine and jurisprudence distinguish two spheres of State activity in external relations: one associated with the exercise of sovereign functions of its authorities and officers, and the other undertaken within the framework of commercial transactions. The first realm of State activity, referred

[79] Russian Ministry of Foreign Affairs, *Foreign Ministry Statement on the seizure of the Russian Embassy school in Warsaw*, 29 April 2023, available at: https://mid.ru/en/press_service/spokesman/official_statement/1866256/ (accessed 13 July 2023).

[80] Arts. 1111 and 1112 of the Polish Code of Civil Procedure address only diplomatic and consular immunities and only in relations to members of the staff of the mission and of the consular post.

[81] A good summary of the development of the State immunity doctrine in the Polish jurisprudence is provided in the judgement of the Supreme Court of 13 March 2008, III CSK 293/07.

> to as *acta iure imperii*, is based on the principle of equality and sovereignty of States, which is fundamental in international law, and on the premise that a State shall not be subjected to jurisdiction of courts of other States (State jurisdictional immunity). Actions within the second realm, referred to as *acta iure gestionis*, in which a State acts as a party of civil legal relations, or more broadly of commercial transactions, do not fall within the scope of immunity from jurisdiction, and thus a foreign State has a legal standing within this realm.[82]

A later judgment from 2018 provides an even more comprehensive discussion of the doctrine, and particularly explains the differences between State immunity at the trial level and the enforcement phase:

> State immunity is divided into immunity from jurisdiction and immunity from execution. In the contemporary foreign legal scholarship, as well as in the jurisprudence of foreign courts, the approach to the institution of State immunity is dominated by the concept distinguishing sovereign acts of a State (*de iure imperia*) and civil acts (*de jure gestionis*) [...].
>
> The second sphere of activity of a foreign State refers to the civil and commercial activity, i.e. to ordinary civil and commercial transactions. In particular, it concerns cases having as its subject rights *in rem* to immovable property located in the territory of the forum State (of the court) and claims related to immovable property. According to international law, a State is entitled to adjudicate cases involving another State to the extent that they concern rights to real property, which is justified by the fact that the sovereignty over land may be effectively exercised only by the State whose territory it is part of. In such cases, a foreign State in the State of the court is not entitled to jurisdictional immunity. The Supreme Court has approved the limited (functional) immunity of a foreign State by stating that the immunity does not apply to actions of State authorities in the field of commercial transactions. When evaluating the criterion for distinguishing between the *gestionis* and *imperium* actions of a foreign State, the nature of a specific action should be referred to. Hence, the existence of State jurisdictional immunity is linked, in the circumstances of the case, with an action that can only be performed by a public authority profiting from the State attributes [...].
>
> During trial proceedings, the limitation of State immunity results from applying an objective criterion, which is the nature of the State's activity that is the cause of the dispute. But in enforcement proceedings, the concept of limited immunity is usually implemented by means of a mixed subjective-objective criterion relating to the intended use of the assets against which the enforcement is to be directed. In trial, the considera-

[82] Polish Supreme Court, Order of 13 March 2014, I CSK 47/13.

> tion of jurisdictional immunity focuses on assessing whether the act of a foreign State belongs to the sphere of *imperium* or *gestionis*, while in enforcement proceedings the crucial issue is whether the enforcement may be directed towards certain assets. Hence, enforcement is admissible in relation to State property not intended for public purposes and, of course, if the proceedings concerns acts *de jure gestionis*. [83]

In this case, the Supreme Court confirmed that legal actions may be brought before Polish courts against foreign States in relation to compensation for the use of real properties, even for official and diplomatic purposes, and State immunity shall not bar such causes of action. It also substantiated that diplomatic immunity does not extend to pecuniary claims relating to the use of diplomatic properties, but rather in line with the VCDR is limited to physical violability. *A minore ad maius*, the immunity shall not be a bar in proceedings relating to the use of properties actually not utilized for diplomatic purposes.

In addition to the above, in the case relating to the property at 17/19 Szucha Avenue and the validity of the 1960 land deed, the Supreme Court stressed yet another interesting aspect of State immunity and its limitations. Any disputes over title to land are essentially civil law matters that may only be settled and adjudicated by domestic civil courts, which in such cases have the exclusive jurisdiction. The court added that:

> First of all, one should agree with the view [...] that Polish courts have jurisdiction in this case. The Soviet State, as a party to the real estate exchange agreement of 8 October 1960, did not act as a subject of diplomatic relations, but as a subject of private law (*acta iure gestionis*), which is not entitled to immunity from jurisdiction. The subject-matter of the present case is the assessment of the validity and effectiveness of that contract from the civil law point of view, which may only be decided by a civil court. From the very essence of such a case, which concerns the determination of the legal status of real estate, it follows that the judgment rendered shall not in any way infringe upon the sovereignty of a foreign State (State immunity) [...] nor upon the diplomatic immunity enjoyed by diplomatic premises and diplomatic representatives. Thus, the reference by the defendant State Treasury of the Russian Federation to the diplomatic and jurisdictional immunity protecting the Embassy is inaccurate.[84]

[83] Polish Supreme Court, *supra* note 67.

[84] Polish Supreme Court, Judgment of 13 November 2003, I CK 380/02. *See also* A. Wyrozumska, *Poland*, in: D. Shelton (ed.), *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion*, Oxford University Press, Oxford: 2011, pp. 486-487.

There were also additional arguments presented during the court proceedings relating to Russian properties in Warsaw by the Polish government. International custom specifies that a State cannot invoke immunity from jurisdiction before courts of another State in cases relating to immovable property situated in the forum State, including any right, interest, possession, use or obligation arising thereof. The concrete expression of this rule may be found in the UN Convention on Jurisdictional Immunities,[85] which however has not yet entered into force, as well as in the European Convention on State Immunity.[86] Furthermore, the Polish lawsuit[87] referred to the jurisprudence of national courts from other jurisdictions – including Austria, Germany, Greece, and Italy. In particular, a longer discussion was provided in relation to the *Yugoslav Military Mission* case[88] decided by the German Federal Constitutional Court. The governmental brief acknowledged the German judgment as fundamental case law, playing an essential role in the evolution of diplomatic immunity, including the inviolability of mission premises, and the confirmation of admissibility of litigation in cases concerning rights *in rem*.

Unfortunately, Polish courts considering lawsuits lodged by the Polish government against the Russian Federation for the recovery of property or compensation for their non-contractual use were not in a position to further develop the application of State and diplomatic immunities doctrine, as they rendered default judgments due to the non-participation of the defendant. Although their decisions do not contain detailed motives, the Polish settled line of jurisprudence is rather clear, as evidenced by the cited judgments, which acknowledge the limits of the jurisdictional immunities of foreign States in cases relating to title to real property and compensation for its use.

FINAL REMARKS

The real property disparity between Poland and Russia is a remnant of the Soviet domination over this part of Europe and one of many "hot spots" in the Polish-Russian tense relations. The lack of willingness to address this issue through diplomatic and political means has led to the initiation of several proceedings in Polish courts aimed at recovering occupied real estate. In the process, despite the diplomatic protests of the Russian counterparty, the Polish authorities have achieved partial success by seizing the *Spyville* and Kielecka 45 Street property, and seem to be determined to

[85] Art. 13(b) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (signed on 2 December 2004), UNGA Res. A/59/38.

[86] Art. 9 of the European Convention on State Immunity (signed on 16 May 1972) 1495 UNTS 181.

[87] Warsaw Circuit Court, case no. XXIV C 802/15.

[88] German Federal Constitutional Court, *Yugoslav Military Mission*, BVerfGE 15, 25 2 BvM 1/60, 30 October 1962, 65 ILR 108.

move forward in relation to other premises. While doing so, the Polish government and courts faced with Russian property issues had to manoeuvre through a complex network of international norms and the relations between them, particularly those relating to State immunities and immunities of diplomatic missions. Hence, Poland has implemented a selective approach, adapting its court tactics on a case-by-case basis to avoid any possible infringement of rights and privileges enjoyed by the Russian Federation. This has included securing property recovery judgments in relation to premises long used by the Russian Federation for non-official purposes or factually abandoned due to their inadequate technical conditions.

These actions, despite carrying heavy political burdens, are consistent with the international jurisprudence on the subject and the judicial practise of courts from several other jurisdictions,[89] including Austria,[90] Germany,[91] Israel,[92] Italy,[93] Sweden,[94] and the United States.[95] Insofar as concerns the international case law, the judgment on the merits in the dispute between France and Equatorial Guinea[96] rendered by the International Court of Justice (ICJ)[97], may be of particular interest. The Court sided with France by rejecting the constatation that the designation of premises by a sending State as diplomatic is sufficient to invoke the immunities and protection envisaged in the VCDR. It also observed that a different conclusion would "leave the receiving State vulnerable to a potential misuse of diplomatic privileges and immunities, which the drafters of the Vienna Convention intended to avoid".[98] Moreover, as the ICJ found that the property designated as "diplomatic" by the Applicant was not used for diplomatic purposes, the Respondent's action

[89] All subsequently referred cases concerned the State and diplomatic immunities in relations to property title, property recovery, and damages or compensation for the use of property.

[90] *See e.g.* Austrian Regional Court for Civil Matters (Vienna), *E AG v. S*, Appeal judgment, 40 R7/01b, ILDC 357 (AT 2001), 23 January 2001.

[91] *See e.g.* German Higher Regional Court (Berlin), *State Immunity Case, Anonymous v. Land Registry of Berlin*, Complaint, 1 W 276/09, ILDC 2591 (DE 2010), 14 June 2010.

[92] *See e.g.* Israeli Supreme Court *Her Majesty the Queen in Right of Canada v. Edelson and ors*, Final appeal judgment, PLA 7092/94, 51(1) PD 625, ILDC 577 (IL 1997), 3 June 1997.

[93] *See e.g.* Italian Supreme Court of Cassation, *Ministry of Foreign Affairs v. Immobiliare Villa ai Pini srl and China*, Appeal Judgment, Case No 19600/2008, (2009) 92(2) Riv Dir Int 596, ILDC 1371 (IT 2008), 17th July 2008.

[94] *See e.g.* Swedish Supreme Court, *Sedelmayer v. Russian Federation*, Judgment, ILDC 1673 (SE 2011), NJA 2011 475, 1st July 2011.

[95] *See e.g. Pradhan v. Al-Sabah*, 299 F.Supp.2d 493 (D. Md. 2004), ILDC 718 (US 2004).

[96] ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, 11 December 2020, ICJ Rep 2020, p. 300.

[97] Another interesting decision of the ICJ in the realm of immunities is ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Rep 2012, p. 99, which discusses the doctrine of State immunity and its exceptions. Although the ICJ summarizes in the judgment some general elements of the doctrine, nevertheless the main axis of the dispute concerned acts of armed forces, war crimes committed by those forces, and the possible application of State immunities.

[98] ICJ, *supra* note 96, para. 67.

of searching, attaching and ultimately confiscating the premises were not in violation of international law. But there is yet another aspect of the *France/Equatorial Guinea* dispute which is shared with the Polish-Russian disparity, and this refers to the instrumentalisation of international law for illegitimate reasons. During the proceedings before the ICJ, France even forwarded the argument of abuse of international law, both procedural and material,[99] as the actions undertaken by the Applicant were aimed at shielding the son of the President and his personal assets against ongoing investigation and criminal proceedings in France for money laundering and embezzlement of public funds. Similarly, the Russian Federation puts forward claims of diplomatic privilege and immunities in relation to its properties in Warsaw, even though many of them are not used for those or any other official purposes, and while some are vacated or became inhabitable. But the Russian possession of large complexes in the heart of the Polish capital is a propaganda tool and a sign of former domination and political submission.

That is why the Polish government, with large support of the general public, initiated the process of enforcing judgments and recovering properties held by Russia in Warsaw, also to be able to finally reconcile with its political past and make amends in areas where Russian influences are still present, or at least visible. Notwithstanding the fact that some of these decisive actions were triggered by the Russian invasion of Ukraine, many of the relevant judicial decisions were secured months if not years earlier. This proves that the Polish State is rather sensitive to the imbalance of power in relations with the Russian Federation. Mere legal arguments and methods, even if correct and justified, are not sufficient, but it was the general shift in the political landscape and the European, if not global, politics that facilitated some of these radical moves. In this context, it is interesting to observe that the Polish example in safeguarding parity in real estate matters and ending the Russian dominance in this sphere of bilateral relations has been picked up by other countries in the region as well; e.g., Czechia.[100]

Finally, there are still challenges to finalizing the process of restoring the real estate parity in Polish-Russian relations. The Polish State has secured court judgments for recovery in relation to more premises, but only time will tell whether the deter-

[99] ICJ, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, 6 June 2018, ICJ Rep 2018, p. 292, paras. 139-141.

[100] D. Lazarová, *Foreign minister sets up working group to look into the use of real estate owned by Russian Embassy*, Radio Prague International, 23 May 2022, available at: https://english.radio.cz/foreign-minister-sets-working-group-look-use-real-estate-owned-russian-embassy-8751209; *Czech ministry summons Russian ambassador over diplomatic properties*, Reuters, 31 May 2022, available at: https://www.reuters.com/world/europe/czech-ministry-summons-russian-ambassador-over-diplomatic-property-use-doubts-2022-05-31/; I. Willoughby, *Czechia eyes ending contracts allowing free rental of sites of Russian buildings*, Radio Prague International, 19 February 2023, available at: https://english.radio.cz/czechia-eyes-ending-contracts-allowing-free-rental-sites-russian-buildings-8775481 (all accessed 30 April 2023).

mination to enforce them lasts as well. Then the matter of collecting the ordered compensation for non-contractual use needs to be addressed. It is rather certain that Russia will not pay it voluntarily, and that the options of the Polish authorities are rather significantly limited by the State immunity from execution. Next, Russia still holds at least two real estate premises in Warsaw without any legal title, which are actually used for official purposes – as a consular post and cultural centre and as housing quarters for the Embassy employees. What also remains critical is ensuring the continuous and uninterrupted provision of diplomatic and consular functions of the Polish State within the territory of the Russian Federation. The Russian authorities have refused for decades to disclose the ownership of the land under the Polish Embassy in Moscow in the land registry. Furthermore, consular posts outside the capital are leased, some from the Russian central or local authorities. In St. Petersburg in particular the conflict over the premises has grown over the years. There are currently no prospects for resolving these issues and securing the stability and security of the Polish diplomatic mission and consular posts in Russia.

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RESOLUTIONS OF THE CHAMBERS OF THE POLISH PARLIAMENT (SEJM AND SENATE) ON RECOGNITION OF RUSSIA AS A TERRORIST STATE IN LIGHT OF THE PRACTICE OF PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE AND EUROPEAN PARLIAMENT

Abstract: *The Parliament of the Republic of Poland was one of five European parliaments which – in view of the full-scale aggression by Russia against Ukraine which commenced on 24 February 2022 – adopted resolutions declaring the Russian Federation as a state associated with terrorism. The Polish acts are consistent with resolutions adopted on the same subject by the Parliamentary Assembly of the Council of Europe (PACE) and the European Parliament of the European Union (EP).*

Although not legally binding, the adoption of these resolutions have a large symbolic dimension and may have a negative impact on the perception of and possibilities of Russian participation in the international arena. From the Polish perspective, the national decisions linking Russia with terrorist activities will influence decisions taken within the sanctions regime, as well as with regard to the legal qualification of certain acts under Polish criminal law in the course of proceedings conducted by Polish prosecution authorities in relation to the war. Finally, as long as the war continues and the assessment of Russia as a terrorist state remains in place, it will not be possible to restore and maintain ordinary diplomatic, economic and other relations with that state.

Keywords: the Parliament of the Republic of Poland, resolution, Russia, terrorist state, sanctions regime

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INTRODUCTION

The Parliament of the Republic of Poland was one of five European parliaments which – in view of the full-scale aggression carried out on 24 February 2022 by Russia against Ukraine – adopted resolutions declaring the Russian Federation (RF) as a state associated with terrorism. Accordingly, on 26 October 2022 the Senate (upper chamber of the Polish Parliament) adopted a resolution on recognition of the RF as a terrorist regime; and on 14 December 2022 the Sejm (lower chamber of the Polish Parliament) adopted a resolution on the recognition of the Russian Federation as a state supporting terrorism.[1] Similar resolutions have already been adopted by the Parliaments of Estonia, Lithuania, Latvia and Czechia.[2]

The activities of above-listed national parliaments are consistent with resolutions adopted on the same subject by the Parliamentary Assembly of the Council of Europe (PACE) and the European Parliament of the European Union (EP), and it should be emphasized that Poland is an active member of both bodies and fully supports their activities aimed at condemnation of the aggression against Ukraine.

1. ACTIONS AT THE EUROPEAN LEVEL TO DESIGNATE RUSSIA'S ACTIONS AS OF A TERRORIST CHARACTER

During its Autumn plenary session (10–14 October 2022), the PACE held yet another debate in reaction to Russia's continued war of aggression against Ukraine and the deliberate attacks and atrocities committed by Russian forces and their proxies against civilians in Ukraine. Following the debate, it adopted Resolution 2463, entitled "Further escalation in the Russian Federation's aggression against Ukraine",

[1] Resolution of the Senate of the Republic of Poland of 26 October 2022 on the recognition of the Russian Federation as a terrorist regime, available at: https://www.senat.gov.pl/aktualnoscilista/art,15100,uchwala-senatu-o-uznaniu-wladz-federacji-rosyjskiej-za-rezim-terrorystyczny.html; Resolution of Sejm of the Republic of Poland of 14 December 2022 on the recognition of the Russian Federation as a state supporting terrorism, available at: https://tinyurl.com/v59nr96j (both accessed 30 April 2023).

[2] Seimas (Lithuania), Resolution on the recognition of the actions of the Russian Federation in Ukraine as genocide and the establishment of a special international criminal tribunal to investigate the crime of Russian aggression, 10 May 2022, no. XIV-1070, available at: https://www.lrs.lt/sip/getFile3?p_fid=47002; Statement of the Latvian Parliament of 11 August 2022, available at: https://www.nato-pa.int/document/latvia-statement-declaring-russia-state-sponsor-terrorism-11-august-2022; Statement of the Riigikogu (Parliament of Estonia) on condemning the annexation of the territory of Ukraine and declaring Russian regime a terrorist regime, 11 August 2022, available at: https://www.riigikogu.ee/wpcms/wp-content/uploads/2022/10/Statement-of-the-Riigikogu-18.10.2022-eng.pdf; Resolution of the Czech Chamber of Deputies of 15 November 2022: On Russia's escalating aggression in Ukraine, crimes against the Ukrainian civilian population and support for the establishment of a special international criminal tribunal to investigate war crimes committed by the armed forces and security forces of the Russian Federation (pt. 4 designates, in accordance with the resolution of the PACE, the current Russian regime as terrorist), available at: https://www.psp.cz/sqw/cms.sqw?z=16713, and https://www.rferl.org/a/russia-czech-parliament-terrorist-regime/32133339.html (all accessed 30 April 2023).

which was a new and significant development in the organisation's reaction to the aggression.[3] The PACE equated the intensification of Russia's indiscriminate use of long-range artillery to target towns and cities across Ukraine with a "terrorist policy", the aim of which is to suppress the will of Ukrainians to resist and defend their country and to cause maximum harm to civilians.[4] It should be emphasized that the PACE associated the term "terrorist policy" with the military actions of the Russian Federation, which took the form of "indiscriminate attacks" against the civilian population. Simultaneously, it called for establishment of a comprehensive system to hold the RF and its leadership accountable for this aggression and for the RF's violations of international human rights and international humanitarian law. Contrary to the narrative quite intensively presented by the Ukrainian side,[5] the PACE did not define the Russian Federation as a "terrorist state". It only called on Member States to declare the current Russian regime a terrorist one in view of the policies being conducted.[6] The unequivocal assessment of Russia's actions as advancing a terrorist policy was consistent with the earlier decisive statements of the organs of the Council of Europe (CoE) expressing condemnation of the violations of law and the cruelty of Russian actions and actors.

Another important development at the European level was the resolution of the European Parliament (EP) adopted on 14 November 2022, which directly recognised Russia as a state sponsor of terrorism and as a state which uses means of terrorism.[7] Russia's activities have been equated or linked to acts of terror on many levels. Firstly, the EP considered that the purpose of RF's non-discriminate actions was to terrorize the Ukrainian population (also by the Russian occupation of the Zaporizhzhia power plant[8]) and to suppress their resistance.[9] Indicating the nature of the actions as reflecting a desire to terrorize the population is a basic and most characteristic feature of generally all the definitions of terrorism that have been proposed so far,[10] thus the pronouncement of the EP followed international practice.

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[3] Parliamentary Assembly of the Council of Europe, Resolution 2463 (2022): *Further escalation in the Russian Federation's aggression against Ukraine*.

[4] *Ibidem*, para. 6

[5] *PACE unanimously adopts resolution declaring Russia a terrorist regime*, Ukrinform, 13 October 2022, available at: https://www.ukrinform.net/rubric-polytics/3592527-pace-unanimously-adopts-resolution-declaring-russia-a-terrorist-regime.html (accessed 30 April 2023).

[6] Parliamentary Assembly of the Council of Europe, *supra* note 3, para. 13.7.

[7] European Parliament, *Resolution on recognising the Russian Federation as a state sponsor of terrorism*, 2022/2896(RSP), para. 2.

[8] *Ibidem*, para. 14.

[9] *Ibidem*, pt. (G).

[10] Already Rafał Lemkin, in his article published in 1935 in "Gazeta Sądowa Warszawska", pointed out that terrorist acts consist primarily in intimidating the population, while international terrorism is aimed at harming the interests of the state or is intended to pose a threat to the entire international order. *See* R. Lemkin, *Teroryzm*, 41 Gazeta Sądowa Warszawska 561 (1935). The League of Nations Convention for the Prevention

Furthermore, the EP indicated that Russia supported and financed terrorist regimes and organisations[11] and that actions undertaken by Russian and proxy forces fit the definition of terrorism accepted by the European Union (EU), the UN Security Council and the UN General Assembly, and contained in UN Security Council Resolution 1566 of 2004, UN General Assembly Resolution 49/60 of 9 December 1994, and Council Common Positions 2001/931/CFSP and 2009/468/CFSP6.[12] The final designation of Russia as a state sponsor of terrorism and as a state which uses means of terrorism was based on the assessment that "the deliberate attacks and atrocities carried out by the Russian Federation against the civilian population of Ukraine, the destruction of civilian infrastructure and other serious violations of human rights and international humanitarian law amount to acts of terror against the Ukrainian population and constitute war crimes".[13] Thus once again, like in the resolution of the PACE, the qualification of the Russian activities under the notion of terrorism was linked to the violations of international law protecting individuals. The resolution called for the EU and its Member States to develop an EU legal framework for the designation of states as sponsors of terrorism and states which use means of terrorism, which would trigger a number of significant restrictive measures against those countries and would have profound implications for EU relations with those countries.[14]

Neither the resolution adopted by the PACE nor that adopted by the EP associating Russia with terrorism are of a binding character according to statutory acts of the CoE and EU. Additionally, both organisations do not have a legal framework to designate countries as states sponsoring terrorism (also due to the lack of a legal definition of the notion of terrorism – an issue discussed below) which would entail the direct responsibility of Russia for the perpetrated acts.

The activities of the European parliamentary bodies have to be generally perceived in the light of the fact that international law does not define terms such as "terrorist regime", "state supporting terrorism", "state using terrorist measures/means" or a "terrorist state". Moreover, there is no comprehensive and universal

of Terrorism of 1937, which was the first act of international law concerning the fight against international terrorism, defined terrorism as "a criminal act directed against a state or aimed at inducing a state of terror in the consciousness of specific persons, groups of persons or public opinion," League of Nations, Convention for the Prevention and Punishment of Terrorism, Doc. C.546. M3831937.V (1937). *See* C. Walter, *Defining Terrorism in National and International Law*, in: C. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer, Berlin: 2004, p. 33.

[11] European Parliament, *supra* note 7, pt. (L).

[12] Council Common Position 2009/468/CFSP of 15 June 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2009/67/CFSP, OJ L 151, 16.6.2009, p. 45.

[13] European Parliament, *supra* note 7, para. 2.

[14] *Ibidem*, para. 4.

normative definition of terrorism itself.[15] The debate in this regard has been carried out in the UN and CoE fora for many years, and includes unsuccessful attempts to create a uniform definition. The only points of reference are sectoral definitions as provided in various treaties concluded in recent decades.[16]

Moreover, the current instruments of international law regulating the issue of terrorism do not provide legal mechanisms for recognising a specific state as a "state supporting/sponsoring terrorism", nor any related consequences thereof. The international community's response to a state's involvement in terrorist activities is to recognise that certain such activities threaten international peace and security. In such a situation it is for the United Nations Security Council (UNSC) to act under Chapter VII of the United Nations Charter and take measures to maintain or restore international peace and security, e.g. by imposing targeted sanctions concerning individuals and entities involved in terrorism.[17] Currently, the qualification of terrorism as a threat to international peace and security is beyond doubt.[18]

It has to be underscored that the issue of Russia's denomination as a terrorist state – in the context of the war in Ukraine – has never been under discussion in UNSC, despite the fact that the Ukraine's representatives and politicians appearing at the UN meetings have on numerous occasions expressly accused Russia of being a terrorist state. Especially momentous was the appeal of Ukrainian President Volodymyr Zelensky to adopt a resolution condemning all forms of "energy terror" as Russian strikes on cities across Ukraine decapacitated the country's energy infrastructure.[19] The failure to discuss the issue at the UNSC proves that even on the part of states supporting Ukraine there is lack of will to adopt such a document, not only due to the fear that it will be vetoed by Russia, but also bearing in mind the possible legal and political consequences of such an action. At the same time, a good example of how the

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[15] For an overview of the struggle over the definition, *see* M. Di Filippo, *The Definition(s) of Terrorism in International Law*, in: B. Saul (ed.), *Research Handbook on International Law and Terrorism* (2nd ed.), Edward Elgar, Cheltenham: 2020, pp. 2ff; C.M. Díaz-Barrado, *The Definition of Terrorism and International Law*, in: P.A. Fernández-Sánchez (ed.), *International Legal Dimension of Terrorism*, Brill, Leiden: 2009, p. 27.

[16] A. Gioia, *The UN Conventions on the Prevention and Suppression of International Terrorism*, in: G. Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Routledge, London: 2006.

[17] *See e.g.* Security Council Resolution 1373 (UN Doc. S/RES/1373 (2001)), 28 September 2001; Resolution 1456 (UN Doc. S/RES/1456 (2003)), 20 January 2003; Resolution 1566 (UN Doc. S/RES/1566 (2004)), 8 October 2004; Resolution 2139 (S/RES/2139 (2014)), 22 February 2014. For more about the evolution of the attitude of the Security Council toward denominating terrorism as a threat to peace *see*: B. Krzan, *The UN Security Council and international terrorism*, XL Polish Yearbook of International Law 79 (2020).

[18] Krzan, *supra* note 17, p. 82.

[19] *Ukraine proposes to adopt a resolution condemning energy terror* (speech by President Volodymyr Zelenskyy at the meeting of the UN Security Council convened after the missile strikes of the Russian Federation), available at: https://www.president.gov.ua/en/news/ukrayina-proponuye-uhvalili-rezolyuciyu-pro-zasudzhennya-ene-79381 (accessed 30 April 2023).

veto can be circumvented was the adoption by the General Assembly, following the Russian veto on 30 September 2022 of Security Council resolution (S/2022/720), of a resolution condemning the RF's attempted illegal annexation of Donetsk, Kherson, Luhansk and Zaporizhzhia and demanding the immediate withdrawal of Russian forces from Ukraine, in which it described Russian's attempt to unlawfully annex four regions of Ukraine as "a threat to international peace and security".[20]

2. THE PRACTICE OF THE POLISH PARLIAMENT: RESOLUTIONS OF THE SEJM AND SENATE RECOGNISING RUSSIA AS A TERRORIST STATE AND THEIR POTENTIAL CONSEQUENCES

The failure of a given state (including due to a lack of political will) to recognise a particular state as supporting terrorism under a relevant Security Council resolution does not mean that individual states cannot do so autonomously under national law, where the effects of such a decision are governed by national law, which in turn determines their nature, which may vary from e.g. political, to legal or economic. Such regulations, entailing fierce legal and economic consequences have been adopted by, inter alia, Canada and the US.[21] Although the European countries have not introduced such regulations, they have not remained passive in their reactions.

In correlation with the PACE and EP resolutions, both chambers of the Polish Parliament adopted resolutions recognizing Russia as a terrorist state. In its resolution the Senate qualified as acts of "state terrorism" the Russian activities on the Ukrainian

[20] General Assembly, Resolution A/ES-11/L.5: *Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*.

[21] One of countries that has a comprehensive legal regulation concerning a designation of a state as a sponsor of terrorism is the United States. The countries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism are designated pursuant to three laws: section 6(j) of the Export Administration Act; section 40 of the Arms Export Control Act; and section 620A of the Foreign Assistance Act. Insofar as regards Russia, despite the appropriate legal basis the US has so far not recognised it as a terrorist state, despite considerable pressure from the US Senate and Ukraine (US Senate Resolution of 27 July 2022, "Resolution calling on the Secretary of State to designate the Russian Federation as a state sponsor of terrorism", S.Res.623; This resolution expresses the Senate's view that the actions of the Russian government, at the direction of President Vladimir Putin, are sponsoring acts of terrorism; and calls on the Department of State to designate Russia as a state sponsor of terrorism.). The administration has been sceptical, arguing that such a decision would not add value to the existing sanctions, and could instead cause a number of problems, e.g. in relations with US allies, as well as precluding negotiations that could end the war. The Secretary of State's decision should be seen in the light of the fact that designation of a state as a sponsor of terrorism means restrictions on foreign aid; a ban on defence exports to such governments; controls on exports of technology with potential military use and financial constraints; and also has implications for the states' sovereign immunity in US courts. Should the United States designate Russia as a state sponsor of terrorism, Russia will be stripped of any immunity under the United States Foreign Sovereign Immunities Act, which will result, most importantly, in litigants being able to obtain not just compensatory damages, but punitive damages against Russia. The consequences of the designation would also extend to third countries having relations with the designated state (*see* https://tinyurl.com/funrw299, accessed 30 April 2023).

territory which amounted to: terrorizing the inhabitants of Ukrainian cities; bombing civilian targets; torturing and murdering prisoners of war and civilians; abducting Ukrainian children and transferring Ukrainian citizens to the far periphery of Russia. In conclusion, the Senate called on other states to consider the RF as a terrorist regime.

In turn, the Sejm, in its resolution of 14 December 2022 expressly designated Russia as a state that supports terrorism and uses terrorist measures. It linked Russia with terrorism by indicating that the RF and its subordinate structures and armed formations are committing acts of terror against civilian infrastructure; summary executions and abductions; sexual violence and torture; tearing children from their families to subject them to Russification; conducting mass deportations of the population and forced conscription of Ukrainian citizens into the Russian armed forces; and are violating the rights of prisoners of war and plundering property. The Sejm also stated that the forms of terror used by Russia against Ukrainian citizens constitute crimes against humanity and genocide.

The adoption of these resolutions and their significance should be assessed in light of the entire practice of adopting such non-binding documents. The resolutions of the Sejm (or less often, the Senate) adopted so far which contain a clear recognition of the responsibility of a foreign state for serious violations of international law have concerned only historical events and, in principle – apart from the situation of the Armenian genocide[22] and the Great Famine in Ukraine[23] – have referred to the history of the Republic of Poland, Polish citizens or people of Polish nationality. Among such resolutions are: the 2009 resolution of the Sejm commemorating the victims of crimes committed in the years 1937-1939 against Poles living in the USSR;[24] the 2010 resolution of the Sejm commemorating the 70th anniversary of the Katyn massacre;[25] the 2013 resolution of the Sejm on commemorating the 70th anniversary of the Volhynian Massacre;[26] and the 2007 resolution of the Senate adopted on the 68th anniversary of the Soviet aggression against Poland.[27]

[22] Resolution of the Sejm of the Republic of Poland of 19 April 2005 on the 90th anniversary of the genocide committed against the Armenian population in Turkey during World War, available at: http://orka.sejm.gov.pl/proc4.nsf/uchwaly/3918_u.htm (accessed 30 April 2023).

[23] Resolution of the Sejm of the Republic of Poland of 9 December 2015 on commemorating the 82nd anniversary of the Great Famine in what is now Ukraine and paying homage to its Polish victims, M.P. 2015, item 1270.

[24] Resolution of the Sejm of the Republic of Poland commemorating the victims of crimes committed in the years 1937-1939 against Poles living in the USSR, M.P. 2009, No. 47, item 684.

[25] Resolution of the Sejm of the Republic of Poland of 9 April 2010 commemorating the 70th anniversary of the Katyn massacre, M.P. 2010, no. 21, item 198.

[26] Resolution of the Sejm of the Republic of Poland of 12 July 2013 on commemorating the 70th anniversary of the Volhynian Massacre, M.P. 2013, item 606.

[27] Resolution of the Senate of the Republic of Poland of 14 September 2007 adopted on the 68th anniversary of the Soviet aggression against Poland, M.P. 2007, no. 64, item 723.

Except for the war in Ukraine, the only currently ongoing conflict which has attracted the attention of Polish parliamentarians due to the scale of human rights violations has been the war in northern Iraq and part of Syria as a result of the occupation of these areas by the ISIS terrorist organization and its creation of a self-proclaimed caliphate there under the name of the Islamic State. In that regard a resolution of September 2014 was adopted by the Sejm expressing solidarity with Christians, Yazidis, Kurds and representatives of other religious and ethnic minorities and recognizing that the actions taken against them by the Islamic State constituted genocide.[28] The classification of the Islamic State as a terrorist organization was in line with the decisions taken in this matter on the international arena by the UNSC.[29] In another resolution of December 2016,[30] the Sejm again classified the persecution of the population living in these areas as genocide, although it assessed that not only the activities of ISIS in Iraq and Syria, but also the activities of radical Islamic groups in other countries of the Middle East and North Africa bear the hallmarks of this crime. When making such a classification of ISIS activities, the Sejm referred to documents adopted by UNSC and the European Parliament, recognizing the activities of ISIS as terrorist acts that pose a threat to international peace and security.[31] In the context of accepting the classification of ISIS activities as terrorist activities, also worth noting is the resolution of the Sejm of November 2015 expressing solidarity with the French nation after the terrorist attacks in Paris,[32] although this resolution, while referring to "victims of terrorist attacks" does not specifically refer to the crime as having been committed by a terrorist organization.

The Polish Parliament has so far not decided to condemn other situations of serious violations of human rights that are currently taking place. For example, unlike the Lithuanian Parliament, which classified the current policy of China towards the Uyghurs as genocide, the Sejm and the Senate have not taken a stance on this issue.[33]

The violations of international law committed during the conflict in Ukraine mark the first time that the Polish Parliament has decided to recognize – in the con-

[28] Resolution of the Sejm of the Republic of Poland of 26 September 2014 on the genocide committed against Christians, Yazidis, Kurds and representatives of other religious and ethnic minorities by the Islamic State terrorist organization in northern Iraq and Syria, M.P. 2014, item 891.

[29] The UN designated the ISIS as a terrorist group pursuant to Resolution 1267 (1999) and Resolution 1989 (2011) concerning Al-Qaida and associated individuals and entities.

[30] Resolution of the Sejm of the Republic of Poland of 2 December 2016 on condemning the mass extermination of religious minorities by the so-called Islamic State, M.P. 2016, item 1191.

[31] Security Council resolution 2249 (2015) on terrorist attacks perpetrated by the Islamic State in Iraq and the Levant (ISIL) also known as Da'esh of 20 November 2015; European Parliament, Resolution on the systematic mass murder of religious minorities by the so-called 'ISIS/Daesh' of 4 February 2016 (2016/2529(RSP)).

[32] Resolution of the Sejm of the Republic of Poland of 19 November 2015 on solidarity with the French nation and commemorating the victims of terrorist attacks in Paris, M.P 2015, item 1157.

[33] It should be emphasized, however, that the resolution of the Lithuanian parliament is in line with the current actions of Lithuania, which has tightened its policy towards China while strengthening relations with

text of an ongoing armed conflict – that a foreign state has committed/is committing acts that constitute violations of international law and attributed to its actions the features of terrorist activity.

The resolutions and statements of the chambers of the Polish Parliament discussed above recognizing Russia as a terrorist state are the culmination of a whole series of documents adopted by these bodies since the beginning of the aggression against Ukraine in 2014. The first resolutions, expressing solidarity with Ukraine and support for its territorial integrity, were adopted at the turn of 2013[34] and 2014.[35] And as the threat of full-scale aggression both approached and was implemented, the Parliament adopted successive positions. Already on 23 February 2022, the Sejm adopted a resolution stating that recognition by the RF of the independence of the two self-proclaimed so-called Luhansk and Donetsk republics constituted aggression directed against the independent state of Ukraine.[36] Subsequently, on 24 February 2022 the Sejm issued a Statement on the aggression of the RF against Ukraine;[37] in April 2022 the Sejm adopted a resolution condemning the crime of genocide in Ukraine;[38] and in September 2022 condemned the illegal referenda held by the Russian authorities in the occupied territories of Ukraine.[39]

3. ASSESSMENT AND CONSEQUENCES OF THE INTERNATIONAL RECOGNITION OF RUSSIA AS A TERRORIST STATE

Although neither the resolutions of the PACE and EP associating Russia with terrorism nor the resolutions adopted by both chambers of the Polish Parliament have a binding character, their adoption significantly exceeds a merely symbolic resolution. Although documents of a soft law character, they may entail consequences on both the international and domestic levels.

Taiwan. *See Sejm Litwy przyjął uchwałę w sprawie Ujgurów. „Chiny dokonują ludobójstwa"*, available at: https://kurierwilenski.lt/2021/05/20/sejm-litwy-przyjal-uchwale-w-sprawie-ujgurow-chiny-dokonuja-ludobojstwa/ (accessed 30 April 2023).

[34] Resolution of Sejm of the Republic of Poland of 3 December 2013 on the situation in Ukraine, M.P. 2013, item 1021.

[35] Resolution of Sejm of the Republic of Poland of 5 March 2014 on solidarity with Ukraine, M.P. 2014, item 186.

[36] Resolution of the Sejm of the Republic of Poland of 23 February 2022 on Russia's aggression against Ukraine, M.P. 2022, item 281.

[37] Statement of the Sejm of the Republic of Poland of 24 February 2022 on the aggression of the Russian Federation against Ukraine, M.P. 2022, item 284.

[38] Resolution of the Sejm of the Republic of Poland of 8 April 2022 on the condemnation of the crime of genocide in Ukraine, M.P. 2022, item 407.

[39] Resolution of the Sejm of the Republic of Poland of 29 September 2022 on the condemnation of illegal referenda conducted by the Russian authorities in the occupied territories of Ukraine and on taking action to stop issuing visas to citizens of the Russian Federation, M.P. 2022, item 976.

By designating Russia as a state pursuing terrorist policy, or simply as a terrorist state, both European organs expressed the international condemnation of the violations of law and of the cruelty of Russian actors, and confirmed their solidarity with the Ukrainian nation. They associated Russia's terrorist activity with serious violations of international humanitarian law, which simultaneously constituted confirmation of the necessity to hold the perpetrators of these violations accountable under law.

Recognition that the current authorities of the RF are conducting a terrorist policy is consistent with the earlier decisive assessments made by both organisations with regard to Russia's actions. Furthermore, insofar as regards the EU the resolution of the EP may constitute a starting point for taking future actions towards establishing a legal framework for the future recognition of the RF as a state sponsoring terrorism.

In addition, the recognition of the RF a terrorist state confirms Russia's international isolation. In this regard, it is the next step following Russia's exclusion from the CoE[40] and after the imposition by the EU of massive and unprecedented sanctions against Russia and its citizens in response to the war of aggression against Ukraine. These resolutions sealed the RF's lack of relations with both organizations, confirming that it is impossible to maintain "business as usual" with a state against which such serious allegations of violations of international law, including human rights and humanitarian law, are made. A very good example confirming the ostracism of Russia in the international arena is the issuance by the ICC of arrest warrants against Vladimir Putin and Maria Lvova-Belova.[41]

Classifying Russian actions as terrorist also has a large symbolic dimension and may have a negative impact on the perception of Russia in the international arena. The firm tone of the resolutions may negatively impact further decisions regarding the international presence of the RF – especially its membership in international institutions and structures and the position of the Russian personnel employed in the secretariats of international organisations. During the ongoing debates about the reform of the UNSC, opinions have been voiced that Russia be removed, or at least suspended, from the body as an aggressor state.[42] The position that Russia should be deprived of its status as a permanent member of the UNSC was also

[40] For more details, *see* S. Zaręba, *The Council of Europe and Russia: Emerging from a Crisis or Heading Towards a New One?*, in: L. Gruszczynski et al. (eds.), *The Crisis of Multilateral Legal Order. Causes, Dynamics and Implications*, Routledge, New York: 2022.

[41] Press release: Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, 17 March 2023, available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and (accessed 30 April 2023).

[42] President of the European Council Charles Michel stated on 23 September 2022, in his speech to the 77th UN General Assembly on the Russian Federation, that "when a permanent member of the Security Council starts an unprovoked, unjustified war which has been condemned by the General Assembly, its suspension from the Security Council should be automatic".

clearly expressed in, e.g., the resolution of the Estonian Parliament. It cannot be ruled out that the ongoing war, as well as Russia's classification as a terrorist state, will intensify further discussions on reforms within the UN.

The recognition of the RF as a terrorist state may also complicate the internal situation in the country. Until now it was the RF that used the argument that the Ukrainian authorities had engaged in activities of a terrorist nature; now it has to face the same formal assessment of its own conduct. In addition, it must be borne in mind that Russians are extremely sensitive to symbolic issues and issues of prestige, which may prove particularly acute when they have to confront the growing opinion that their country is a threat to the international order and security. The adopted resolutions significantly lower the position of Russia in the 'international order' and place it among countries such as North Korea or Iran. This is a particularly painful consequence when one takes into account Russia's policy in recent years of presenting itself as a superpower, aimed at restoring its place among the world's greatest powers. In the long term, the decline in Russia's position in the international arena may change the attitude of the Russian society towards the authorities.[43]

The resolutions adopted by the upper and lower chambers of the Polish Parliament confirm the convergence of opinion among the Polish authorities and international organizations towards Russian aggression. Furthermore, it would not be an exaggeration to conclude that they express the position of the vast majority of the Polish political class and outline not only the current attitude of the Polish authorities towards Russia, but are and will be a firm position for at least the nearest future. The adoption of resolutions is only one of many examples of actions on the part of the Polish authorities aimed at cutting almost all ties between Poland and Russia.[44]

The designation of the RF as a "terrorist state" was associated – in both the resolutions of the Polish Parliament as well as the resolutions of the organs of CoE and EU – with serious violations of international law, including international humanitarian law. This is an issue that can give rise to legal actions in two distinct ways, i.e. via the sanctions regime and[45] the criminal responsibility of the perpetrators.

Insofar as the sanctions regime is concerned, it has to be observed that both in Poland and in the EU one of the grounds for imposing restrictive measures

[43] *Uznanie Rosji za państwo terrorystyczne – pusty gest czy ocenianie kraju bez relatywizowania?* [Recognizing Russia as a terrorist state – an empty gesture or assessing the country without relativizing it?], Podcast, interview with Dr. Agnieszka Bryc, TokFM, 28 November 2022.

[44] However, resolutions cannot be treated as classic unilateral acts of a state, i.e. binding acts at the international level. *See* P. Saganek, *Unilateral Acts of States in Public International Law*, Brill Nijhof, Leiden – Boston: 2015, pp. 34 and 136nn.

[45] The sanctions that can be currently imposed on Russian citizens and enterprises operating on the Polish territory result from decisions taken at the level of the European Union (restrictive measures are laid down in Common Foreign and Security Policy (CFSP) Council decisions) or from decisions of Polish authorities taken pursuant to relevant statutory provisions. In practice, in the case of the sanctions in question the Council

has been the involvement of an individual or individuals in the commission of an international crime or crimes. The regulations condition the possibility of imposing sanctions on recognising certain acts as serious violations of international law. Recognition by the Polish Parliament that a range of Russian activities constitute violations of international law, while at the same time exhibiting the characteristics of terrorist activity, can constitute another argument strengthening the justification of the relevant domestic organ (in case of Poland the Minister of Internal Affairs and Administration) charged with making the decisions on restrictive measures.

Besides the issue of sanctions, the issue of accountability for international crimes may also be influenced by the Parliament's decision designating Russia as a terrorist state. This constitutes an observation relevant both from the international and domestic perspectives.

Firstly, it is generally assumed that certain manifestations of terrorism may be simultaneously classified as crimes against humanity and war crimes, which may be relevant in assuring the accountability of individuals for these crimes under international law. The notions, however, are not equivalent. Considering that terrorism is not a separate international crime (although there exists a possibility of adjudicating acts of terrorism by the International Criminal Court if they fulfil the features of crimes within its jurisdiction), one has to be careful while using such notions as "terrorist regime", "terrorist state" or "state supporting terrorism". It cannot be excluded that the use of such concepts may complicate and dilute otherwise unambiguous legal assessments regarding the legal classification of acts committed by the Russian functionaries as crimes against humanity, war crimes, or genocide. It is therefore of outmost importance to differentiate between the designation of the RF as a "terrorist state" in connection with the violations of international law

Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in connection with Russia's actions destabilizing the situation in Ukraine is of key importance (OJ L 229, 31.7.2014, p. 1-11). From a formal point of view, subsequent packages of sanctions constitute an amendment to this regulation (A summary of the EU restrictive measures in view of Russia's invasion of Ukraine is available at: https://eur-lex.europa.eu/EN/legal-content/summary/eu-restrictive-measures-in-view-of-russia-s-invasion-of-ukraine.html). At the level of domestic legislation, sanctions are introduced in Poland under the Act of 13 April 2022 on special solutions to counteract the support of aggression against Ukraine and to protect national security (Journal of Laws, item 835). It should be observed that the Polish sanctions' regime against Russia is at the initial stage of its creation, hence in practice the sanctions imposed by the EU regulations are of much greater importance. According to Art. 3 points 1 and 6 of the Act of 13 April 2022, the decisions have been taken with regard to persons and entities having financial resources, funds and economic resources which directly or indirectly support: 1) the aggression of the Russian Federation against Ukraine, which commenced on 24 February 2022, or 2) serious violations of human rights or the repression of civil society and democratic opposition, or whose activities constitute another serious threat to democracy or the rule of law in the Russian Federation or in Belarus – or directly related to such persons or entities, in particular due to personal, organizational, economic or financial ties; or in relation to which there is a likelihood of using such funds or economic resources at their disposal for this purpose. See the list of decisions of the Minister of Internal Affairs and Administration (available at: https://www.gov.pl/web/mswia/lista-osob-i-podmiotow-objetych-sankcjami (both accessed 30 April 2023).

(including crimes against humanity and alleged genocide) perpetrated by it, and the legal qualifications under international law of acts perpetrated by the individuals.

Secondly, numerous national prosecution offices have initiated preliminary preparatory proceedings into the war in Ukraine and crimes committed in its course. This was also done by the Polish prosecutor's office, which launched its own investigation in March 2022. The Polish prosecution authorities initiated – under Art. 117 § 1 of the Penal Code (PC) – an investigation into the war of aggression launched on 24 February 2022 by the authorities and officials of the RF and directed against the sovereignty, territorial integrity and political independence of Ukraine, as well as the continuation of the armed attack on Ukraine by the Russian armed forces. The scope of these proceedings also includes the activities of the authorities of the Republic of Belarus in making its territory available for acts of armed aggression against Ukraine. What is interesting, the proceedings were not initiated under the principle of universal jurisdiction but based on the principle of personal jurisdiction resulting from Art. 110 § 1 PC. Pursuant to this provision, Polish criminal provisions apply to foreigners who have committed a prohibited act abroad directed against Polish interests and to a foreigner who has committed a terrorist offense abroad. Thus, the idea behind the legal basis for conducting the proceedings is that the aggression against Ukraine, a country directly neighbouring Poland, is a threat to European and international security, and as such is directed against the interests of the Republic of Poland. It cannot be excluded (indeed is rather certain) that in the course of the proceedings its scope will be extended and the prosecutors will investigate new acts committed by Russian officials. Some of them could be qualified under the provisions of the Polish Criminal Code penalising different kinds of crimes of terrorism (Arts. 65 § 1, 110 § 1, 115 § 20 or 258 § 2 PC). It can be assumed that the position of the legislative authority designating the activities of the RF as terrorist may be taken into account by the court when interpreting the definition of the elements constituting a prohibited act of a terrorist offense.[46]

CONCLUSIONS

The adoption by the parliamentary bodies of the CoE and the EU, as well as by national parliaments (including the Polish ones), of resolutions recognizing Russia as a terrorist state are, although not legally-binding, already having consequences. Designating Russian actions as terrorist has a large symbolic dimension and may have a negative impact on the perception of and possibilities of Russian participa-

[46] For more about the problems with the qualification of certian acts as crimes of terrorism, *see* R. Zgorzały, *Przestępstwo o charakterze terrorystycznym w polskim prawie karnym* [Terrorist crime in Polish criminal law], 7-8 Prokuratura i Prawo 58 (2007).

tion in the international arena. It will certainly intensify further discussions on the reforms of the UNSC – especially in light of the fact that on 1 April 2023 Russia assumed its presidency despite the severe doubts being expressed by several states. A situation in which a permanent member of the UNSC is designated as a terrorist state whose president is subject to an international arrest warrant for alleged war crimes is seen as unacceptable by many countries. While no feasible international legal pathway currently exists to change that reality, in the long term the situation is untenable and may change. From the Polish perspective, the national decisions linking Russia with terrorist activities may have influence on the decisions taken within the sanctions regime, as well as with regard to the legal qualification of certain acts under the Polish PC in the course of proceedings conducted by prosecution authorities in relation to the war. Finally, as long as the war continues and the assessment of Russia as a terrorist state remains valid it will not be possible to restore and maintain ordinary relations with the RF.

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RESOLUTION OF THE SEJM OF THE REPUBLIC OF POLAND of 14 December 2022 on the recognition of the Russian Federation as a state supporting terrorism

The Sejm of the Republic of Poland states that the Russian Federation systematically violates human rights, international law, the Charter of the United Nations, and several other obligations. It carries out the annexation of territories of other states, armed assaults, war crimes and genocides, and undertakes hostile economic activities, particularly in the energy sphere.

The Russian Federation is directly responsible for the downing of the Malaysian Airlines plane (Flight MH17) in July 2014, when 298 passengers and crew members were killed, and for the crash of the Polish Air Force plane (Flight 101) in Smolensk in April 2010, which killed 96 people on board, including the President of the Republic of Poland Lech Kaczynski, Polish government officials, senior Polish and NATO military commanders and members of the Polish Parliament.

The bestial and unlawful aggression of the Russian Federation against Ukraine continues. The Russian military is carrying out attacks throughout the invaded country, in which thousands of people, including many children, have been killed. The Russian Federation and its subordinate structures and armed formations are committing acts of terror against civilian infrastructure, summary executions and abductions, sexual violence and torture, tearing children from their families to subject them to Russification, mass deportations of the population, forced conscription of Ukrainian citizens into the Russian armed forces and the plundering of property. Russia repeatedly violates the Geneva Convention on the Treatment of Prisoners of War.

By militarily blockading Ukrainian ports and paralysing maritime communications on the routes leading to them without a declaration of war, the Russian Federation has committed an act of international piracy. Russia's burning and looting of Ukrainian land and preventing Ukraine from exporting crops for a long time have brought the spectre of famine to many African and Asian countries.

Russia is also using strategically essential facilities, including nuclear power plants, to increase the sense of insecurity and blackmail not only Ukrainians but

also the international community with the spectre of damage to such installations and the resulting massive radioactive contamination.

Russian aggression against Ukraine constitutes a flagrant violation of the prohibition on using force under Article 2(4) of the UN Charter and violates Ukraine's sovereignty, political independence and territorial integrity. According to the UN Charter, changing borders by force is a crime against peace. The forms of terror used by Russia against Ukrainian citizens are a crime against humanity and genocide.

The Sejm of the Republic of Poland supports an independent and sovereign Ukraine within its internationally recognized borders. It views positively the resolution of the Senate of the Republic of Poland of 26 October 2022 on the recognition of the authorities of the Russian Federation as a terrorist regime and the resolution of the European Parliament of 23 November 2022 on the recognition of the Russian Federation as a state sponsoring terrorism. It calls on the European Commission, the other EU institutions and all UN member states to take the same position and take the necessary steps to stop Russian aggression and punish the aggressor. The Russian Federation should be isolated in the international arena.

The Sejm of the Republic of Poland states that all those, directly and indirectly, responsible for the committing of Russian war crimes in Ukraine should be brought to justice. It supports all international mechanisms to get them to justice, including cooperation with the International Criminal Court and the International Court of Justice to find the most effective ways to identify and prosecute the perpetrators.

The Sejm of the Republic of Poland calls on the Council of Ministers to continue and expand its efforts to impose further sanctions packages on the Russian Federation and all persons supporting the criminal regime of Vladimir Putin, as well as further material and political support for Ukraine in its fight against the aggressor.

The Sejm of the Republic of Poland calls on the international community to develop a mechanism for the payment of war reparations to Ukraine, as well as compensation to states, organisations and individuals who suffered losses due to the war caused by the Russian Federation.

The Sejm of the Republic of Poland recognizes the Russian Federation as a state that supports terrorism and uses terrorist measures.

THE MARSHAL OF THE SEJM Elżbieta Witek

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RESOLUTION OF THE SENATE OF THE REPUBLIC OF POLAND from October 26, 2022 on the recognition of the authorities of the Russian Federation as a terrorist regime

On February 24, 2022, the armed forces of the Russian Federation launched a savage war against Ukraine. Its goal is to wipe a sovereign country off the map and annihilate the Ukrainian people.

The heroic defense of Ukraine's independence by its citizens has won the admiration of the entire free world. Today, Ukraine is the focal place which stands in defense of democracy and freedom.

Russian invaders have been terrorizing the populations of Ukrainian cities by shelling civilian targets: kindergartens, schools, theaters and residential estates. Bandits in Russian uniform have been torturing and murdering prisoners of war and civilians in the occupied territories. They abduct Ukrainian children to raise them as janissaries of the regime. They remove, resettle and send Ukrainian citizens to the most remote regions of Russia.

We all know well these acts of state terrorism from the pages of history books. Europeans believed that they would never again be threatened with genocide and war crimes. However, Vladimir Putin and his apparatus of violence have returned to the cruel practices of the Stalinist and Nazi regimes. Russia must then be defeated and prevented from no longer being a threat to its neighbors.

The Senate of the Republic of Poland once more strongly condemns Russian aggression and calls on all countries which support peace, democracy and human rights to recognize the authorities of the Russian Federation as a terrorist regime.

At the same time, the Senate of the Republic of Poland expresses its appreciation to all institutions and organizations that have undertaken to investigate and document the crimes committed against Ukrainian society, and calls on the international community to provide full support to the International Criminal Court which has been prosecuting those who are responsible for these crimes.

The Senate of the Republic of Poland would like to thank all Poles, women and men, governmental and local authorities, non-governmental organizations

and businesses, for the enormous help they have provided since February 24 to Ukrainians fleeing Russian bombs, mostly women and children.

The resolution shall be published in the Official Journal of the Republic of Poland "Monitor Polski".

MARSHAL OF THE SENATE
/-/ Tomasz GRODZKI

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*Katarzyna Strąk**

THE IMPACT OF THE RETURN DIRECTIVE ON POLISH RETURN LAW AND PRACTICE – RECENT DEVELOPMENTS**

Abstract: *This research aims to present and analyse selected issues of Polish return law and practice in the light of the European Union return policy and against the backdrop of the migration crises of 2015 and 2021-2023, with a return decision placed at the heart of the study. The principal research objective is to examine whether the provisions of the 2013 Act on Foreigners follow the standards established in the EU Return Directive as well as in the case-law of the Court of Justice of the European Union. Another objective is to analyse the interaction between the provisions forming the uniform national return policy, but which originate from different legal systems (national and European ones). To this end "anti-terrorism" and "pushback" cases under Polish law will be assessed. The article thus poses several crucial questions, inter alia whether the Polish law and practice comply with standards established at the European level, especially insofar as fundamental rights of individuals are concerned; whether they contribute to the establishment of an effective EU return policy; and what role harmonisation plays in this process.*

Keywords: irregular immigration, EU return policy, harmonisation, national law, judicial scrutiny, fundamental rights.

INTRODUCTION

The objective of this article is to present and assess Polish return policy and practice towards third-country nationals staying illegally on the territory of Poland in the light of the European Union (EU) return policy, in a wider context of migration

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crises faced by the EU in recent years – primarily the 2015 crisis and then the humanitarian crisis of 2021-2023 at the Polish-Belarusian border. The concept of "a return decision" as understood in EU law is placed at the heart of this study and constitutes the starting point for further considerations at the national level. The article seeks to examine whether the Polish 2013 Act on Foreigners[1] (2013 AoF) complies with the standards established in Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals[2] (Return Directive or Directive 2008/115) and in the case-law of the Court of Justice of the European Union (CJEU). The study also poses several crucial questions, *inter alia*, whether Polish law and practice comply with the standards established at the European level, especially insofar as fundamental rights of individuals are concerned; and whether they contribute to the establishment of an effective EU return policy. It is evident that a major shift has been visible in the way Polish migration agencies have been performing their tasks since the migration crisis of 2015, and that the "border crisis" of 2021 witnessed an escalation of restrictive and unfriendly actions towards third-country nationals crossing the Polish-Belarusian border illegally. At the same time, there are examples where the administrative decisions invoking security reasons issued by Polish authorities were disregarded in other EU Member States, despite the fact that decisions issued under the return procedures possess European-wide validity.[3] Also of concern is how the humanitarian crisis on Polish-Belarusian border has been governed since 2021, which is already evidenced by several very recent judgments issued by Polish administrative courts.

At the same time, as a case study this article contributes to the ever-increasing research in the field of the rule of law in general, and with respect to immigration in particular,[4] by emphasising how certain legal and factual activities of the Polish State and its agencies constitute challenges to that principle, which is so deeply rooted in Art. 2 of the Treaty on European Union (TEU); and by analysing them

[1] Ustawa o cudzoziemcach [Act on Foreigners], Journal of Laws 2013, item 1650, as amended.

[2] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348.

[3] For example, the controversial case of Lyudmyla Kozlowska, a Ukrainian national engaged in human rights protection, who was issued an entry ban. Later the ban was disregarded by Germany, Belgium, France, Switzerland and the UK, with Belgium issuing her with a 5-year residence permit. B.T. Wieliński, *Deportowana z Polski Ludmiła Kozłowska z prawem pobytu w Belgii* [Lyudmyla Kozlovska, deported from Poland, with a residence permit in Belgium], Wyborcza.pl, 4 March 2019, available at: https://tinyurl.com/3vdnzxd4 (accessed 30 April 2023).

[4] D. Acosta Arcarazo, A. Geddes, *The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy*, 51(2) Journal of Common Market Studies 179 (2013); I. Goldner Lang, B. Nagy, *External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement*, 17(3) European Constitutional Law Review 442 (2021); E. Tsourdi, *Asylum in the EU: One of the Many Faces of Rule of Law Backsliding*, 17(3) European Constitutional Law Review 471 (2021).

against the backdrop of the principle of human rights' protection arising from the Return Directive. The article highlights the vital role Polish administrative courts have played in safeguarding the rights of affected third-country nationals. It does not, however, deal with the issue of the international protection of third-country nationals.

This article is structured as follows: in the first part (following this introduction) the EU return policy, including the Return Directive, is explored for the purpose of highlighting its validity as a template for national return policies. The second part examines Polish return policy and practice, and is divided into three main sections: section one is devoted to the general principles underlying the Polish return system; and sections two and three present analyses of selected problems resulting from the implementation of the 2013 AoF. In the last part conclusions are drawn.

1. THE EU RETURN POLICY AS A TEMPLATE FOR NATIONAL RETURN POLICIES

The EU has been developing and implementing its common return policy, as part of a broader EU migration policy, since 1999.[5] The principles underlying the EU return policy were developed by the European Commission at the beginning of the 21st century in a series of communications and other forms of soft law. Subsequently, five-year action programmes in the area of freedom, security and justice, starting with the Tampere Programme (1999), witnessed the adoption of further legal instruments and the conclusion of the EU readmission agreements, culminating in 2008 in the adoption of Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals. At the same time, Member States were given a two-year period for its transposition into their national legal systems. However very few Member States – if any – complied with this requirement.[6] At that time Member States faced severe problems in properly transposing the new concepts into their existing well-established national return provisions and practices. These problems did not cease to exist after the transposition deadline, and national courts entered into an active dialogue with the CJEU on the interpretation of various provisions of the Return Directive when deciding in disputes at the national level.[7]

[5] F. Lutz, *Prologue: The Genesis of the EU's Return Policy*, in: M. Moraru, G. Cornelisse, P. de Bruycker (eds.), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, Hart Publishing, Oxford, New York: 2020, p. 3.

[6] National transposition measures communicated by the Member States, *see* at: https://eur-lex.europa.eu/legal-content/EN/NIM/?qid=1544477065620&uri=CELEX%3A32008L0115 (accessed 30 April 2023).

[7] In the framework of the Art. 267 TFEU preliminary rulings procedure.

The common standards and procedures on return – inherent in Directive 2008/115 – are undoubtedly a key element of the EU return policy. They turn the Return Directive into an instrument of a horizontal nature, applicable to all third-country nationals staying illegally in the territory of the Member States,[8] which has resulted in a harmonisation of the Member States' legal systems in the field of returns. At the same time the Directive, when adopted, constituted a follow-up to the instruments already applied in that field,[9] referred to broadly as *acquis return*.[10]

Directive 2008/115 sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of both EU law as well as international law, including refugee protection and human rights obligations. The Directive defines an illegal stay as the presence on the territory of a Member State of a third-country national (neither an EU citizen nor a person enjoying the EU right of free movement) who does not fulfil, or no longer fulfils, the conditions for entry into the Member State, as set out in the Schengen Borders Code,[11] for a stay of no more than 90 days in any 180-day period, or other conditions of entry into, stay, or residence in that Member State. It is initially for the Member States to determine, in accordance with their national law, what those other conditions are, and hence whether a particular person's stay on their territory is legal or illegal.[12] At the same time, as confirmed in *E*,[13] the tight link between the Schengen Border Code and the Return Directive has the effect that all decisions adopted by the Member States on the entry into and residence of third-country nationals, in accordance with the Schengen Borders Code, and all return decisions and entry bans issued by the Member States under the Return Directive, produce European-wide effects for the other Member States. As the CJEU has rightly pointed out in *Achughbabian*[14] and in *Md Sagor*,[15] the Directive only concerns the return of illegally staying third-country nationals in a Member State, and thus it is not designed to harmonise in their entirety the national rules on the stay of foreign nationals. Moreover, it does not envisage a

[8] I. Wróbel, *Wspólnotowe prawo imigracyjne* [Community Immigration Law], Wolters Kluwer, Warszawa: 2008, p. 412.

[9] M. Schieffer, *Directive 2008/115*, in: K. Hailbronner (ed.), *EU Immigration and Asylum Law. Commentary on EU Regulations and Directives*, Beck, München: 2010, p. 1507.

[10] A.M. Kosińska, P. Wojtasik (eds.), *Acquis return. Doświadczenia implementacji i rozwój polityki powrotowej Unii Europejskiej* [Acquis Return. Implementation Experiences and Development of Return Policy], Fundacja Instytut na rzecz Państwa Prawa, Lublin: 2015.

[11] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L 73.

[12] Opinion of Advocate General Sharpston of 18 May 2017 in Case C-225/16 *Criminal proceedings against Mossa Ouhrami*, ECLI:EU:C:2017:398, para. 36.

[13] Case C-240/17 *E*, ECLI:EU:C:2018:8, para. 43.

[14] Case C-329/11 *Alexandre Achughbabian v. Préfet du Val-de-Marne*, ECLI:EU:C:2011:807, para. 28.

[15] Case C-430/11 *Criminal proceedings against Md Sagor,* ECLI:EU:C:2012:777, para. 31.

harmonisation of the *reasons* for ending the legal stay of third-country nationals.[16] The common standards and procedures established by Directive 2008/115 concern only the adoption of return decisions and the implementation of those decisions.[17] Nor is the purpose of the Directive to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and with respect to whom it is not, or has not been, possible to implement a return decision.[18] The content of the Directive thus implies its dual nature. It is a central instrument of the EU return policy, while at the same time offering the necessary safeguards for the protection of persons falling within its scope.[19] This is clearly confirmed in its preamble and invoked in *Arslan*[20] – Directive 2008/115 seeks to introduce an effective return policy based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

To better understand the dual nature of the Return Directive, a short commentary should be made with respect to its Art. 4 in terms of the way it may impact the Member States' legal obligations towards the third-country nationals. Namely, Directive 2008/115 does not allow Member States to apply stricter standards in the area it governs.[21] This is why it is so essential to identify its scope when it comes to the application of national return measures which are *more restrictive*, but which do not fall within the scope of the Directive. Furthermore, Art. 4 provides for the possibility to apply *more favourable* provisions to persons falling within its scope. It thus constitutes an exception to the common standards and procedures laid down by the Return Directive and refers to EU and Member States international agreements with third countries, the Union immigration and asylum *acquis*, and Member States' more favourable provisions, provided they are compatible with the Return Directive. In any case however, the adoption of more favourable clauses of the immigration and asylum *acquis* is grounded in the need to achieve and ensure the consistency of that *acquis*, and consequently in the need to apply a systemic interpretation where that consistency does not exist.[22] This has become particularly important with regard to Directive 2008/115 and its specific horizontal nature. Such clauses preclude the application of *less favourable* provisions towards third-country

[16] Additional opinion of Advocate General Mengozzi of 22 February 2018 in Case C-181/16 *Sadikou Gnandi v. État belge*, ECLI:EU:C:2018:90, fn 8.

[17] Case C-329/11 *Alexandre Achughbabian v. Préfet du Val-de-Marne*, para. 29.

[18] Case C-146/14 PPU *Bashir Mohamed Ali Mahdi*, ECLI:EU:C:2014:1320, para. 87.

[19] Schieffer, *supra* note 9, p. 1509.

[20] Case C-534/11 *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, ECLI:EU:C:2012:343, para. 42.

[21] Case C-61/11 PPU *Hassen El Dridi, alias Soufi Karim*, ECLI:EU:C:2011:268, para. 33.

[22] Wróbel, *supra* note 8, p. 420.

nationals falling under the EU directives adopted in the field of legal migration policy, which provide rules on the return of third-country nationals. In such situations, the legality of a return decision is examined in light of both the purpose and the wording of the respective directives. The same remarks should be made with respect to the *more favourable* provisions of asylum law, whose aim is to strengthen and confirm the rule that a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally in that Member State.

The reasons why the EU return policy has been developed are mainly reflected in its objective to fight against illegal immigration. The EU return policy is thus an important indicator of the credibility of the EU on one hand, on the other a particularly sensitive area given the risk of violation of human rights that may occur in the course of return operations. Thus, within the framework of the EU return policy those activities must respect fundamental rights as general principles of both EU law as well as international law, including refugee protection and human rights obligations. Apart from this general clause, the Return Directive contains several specific provisions referring to, *inter alia*: the principle of *non-refoulement*; the best interests of a child; respect for the family life; taking into account the individual's state of health; procedural safeguards; a fair and transparent return procedure; and the principle of proportionality as an overarching general principle of EU law. Other sets of specific safeguards include safeguards pending return and a minimum level of protection for third-country nationals excluded from the scope of the Directive. Last but not least the EU Charter of Fundamental Rights – encompassing the values underpinning the EU and placing exceptional significance on the right to an effective remedy, the right to asylum, and the protection against removal – must not be forgotten.

Since receiving regular jurisdiction in the field of immigration, the CJEU has significantly contributed to the state of implementation of the EU return policy in the Member States. It thus exerts a major influence over the relationship between the EU return policy and the policies implemented by particular Member States. Acosta Arcarazo and Geddes[23] rightly conclude that the competence of the CJEU constitutes a challenge to EU policies previously considered as purely sovereign, while at the same time the obligation on the part of Member States to apply supranational standards entails a higher level of protection afforded to third-country nationals, as this limits the ability of the Member States to adopt excessive rules. These authors argue that this is due to the EU rule of law, of which access to effective legal remedies, the right to a fair trial, and the idea that any exercise of power may be subject to judicial review are indispensable components. It is said, with good reason, that the

[23] D. Acosta Arcarazo, A. Geddes, *supra* note 4, p. 179.

"Directive of Shame"[24] has now been regarded as the "Directive of Protection",[25] due to the CJEU's interpretation of its provisions, especially those comprising the substantive and procedural safeguards arising from Art. 47 of the Charter of Fundamental Rights.[26]

By adopting the Return Directive, the EU and the Member States have aimed to achieve the effectiveness of the EU return policy, which is reflected in the ending of the illegal stay of third-country nationals. The ending of the illegal stay entails either the departure of a third-country national from the territory of a Member State, or granting that person a permission to stay on that territory. Thus, the total number of return decisions issued by Member States must equal the number of third-country nationals who left the Member States in fact and on a permanent basis. However, the full effectiveness of the EU return policy is ensured only when the illegally staying third-country national leaves not only the territory of the specific Member State, but the territory of the EU as a whole; their departure is without delay; and the fundamental rights and dignity of those persons are fully respected.[27] The effectiveness of the EU return policy thus implies full respect for the fundamental rights of a third-country national. At the same time, Directive 2008/115 establishes a procedure aimed at ensuring that third-country nationals who are not entitled to stay legally on the territory of the Member States no longer remain on that territory. The term "a return procedure", together with its scope and limits, is regarded as a major factor in the assessment of the effectiveness of the EU return policy in its legal dimension. The return procedure consists of two stages and has been clarified by the CJEU, starting with *El Dridi*. The order in which the stages of the return procedure established by the Return Directive are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision – a gradation which starts from the measure which allows the third-country national concerned the widest liberty (granting a period for voluntary departure); to measures which restrict that liberty the most (detention in a specialized facility); all under

[24] A.M. Kosińska, *Has the CJEU Made a First Step to Put a Stop to the Criminalisation of Migration? Commentary to the Judgment in the Case of JZ in the Context of the Covid-19 Pandemic*, 26(6) Białostockie Studia Prawnicze 207 (2021), p. 208.

[25] Lutz, *supra* note 5, p. 2.

[26] Among many: Case C-249/13 *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014 (right to be heard); Case C-112/20 *M. A. v. État belge*, ECLI:EU:C:2021:197 (taking into account the best interests of the child at the time of the adoption of the return decision); Joined Cases C-704/20 and C-39/21 *Staatssecretaris van Justitie en Veiligheid v. C and B and X v. Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2022:858 (fundamental right to liberty, fundamental right to an effective judicial remedy); Case C-69/*21 X v. Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2022:913 (prohibition of inhuman or degrading treatment, respect for private or family life); Case C-528/21 *MD*, ECLI:EU:C:2023:341 (prohibition of refusal to apply certain final court decisions).

[27] K. Strąk, *Polityka Unii Europejskiej w zakresie powrotów. Aspekty prawne* [EU Return Policy. Legal Aspects], Wolters Kluwer, Warszawa: 2019, p. 112.

the condition that the principle of proportionality is fully observed throughout those stages.[28] Seen from this point of view, the Return Directive pursues the dual objective of protecting the fundamental rights of third-country nationals subjected to the return procedures, and accepting the legitimate interest of Member States in speedy and efficient return procedures.[29]

Directive 2008/115 defines a return decision as an administrative decision or a judicial decision (also a judicial decision in a criminal matter) which establishes or declares that a third-country national is staying illegally in a Member State and imposes or declares an obligation to return. It follows from the provisions of Directive 2008/115 as a whole that the return decision may provide a period for voluntary departure - namely voluntary compliance with the obligation resulting from that decision[30] and may be accompanied by an entry ban, understood as an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period. On the other hand, the removal – the enforcement of the obligation to return – namely the physical transportation out of the Member State, may be either an element of the return decision or a separate administrative or judicial decision or act ordering the removal. Return decisions should be taken on a case-by-case basis, in accordance with objective criteria, which means that considerations should go beyond the mere fact of an illegal stay. This principle of individualism and objectivity must also be respected in the context of the use of standard forms for return decisions, entry bans, voluntary departure periods, and removal decisions. In addition, the return decision should be of unlimited duration unless there has been a material change in facts or in law and both the right to be heard and the right to an effective remedy are safeguarded.[31] The return must take place to the person's country of origin, country of transit, or another third country to which the person concerned decides to return voluntarily and in which he or she will be accepted.[32] More precisely, the return decision must identify the country to which the third-country national must return.[33] It is therefore a third country in each case. It is worth noting[34] that it is only necessary to specify to which third country the person is to be returned if the Member State has to take coercive

[28] Case C-61/11 PPU *Hassen El Dridi, alias Soufi Karim*, paras. 34-41.

[29] Lutz, *supra* note 5, p. 5.

[30] Case C-61/11 PPU *Hassen El Dridi, alias Soufi Karim*, para. 36.

[31] Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, 2017, OJ L 339.

[32] Case C-673/19 *M, A, Staatssecretaris van Justitie en Veiligheit v. Staatssecretaris van Justitie en Veiligheit, T*, ECLI:EU:C:2021:127, para. 32.

[33] Case C-69/21 *X v. Staatssecretaris van Justitie en Veiligheit*, ECLI:EU:C:2022:913, para. 53, Case C-663/21 *Bundesamt fuer Fremdenwesen und Asyl v. AA*, ECLI:EU:C:2023:540, para. 46.

[34] Commission Recommendation, *supra* note 31.

measures, whereas there is no such necessity in the case of voluntary departure, as it is the sole responsibility of the third-country national to comply with the obligation to return within the set period.

Although the concept of the effectiveness of the EU return policy seems to be well established in the case-law of CJEU, there still remains an issue worth consideration, namely when exactly the return procedure ends under Directive 2008/115.

In fact the Directive, and the position taken by the CJEU as well, only identifies the respective stages of the procedure and establishes a gradation of measures, of which the final one is detention in a specialized facility. Unfortunately the numbers speak clearly against such an understanding of effectiveness. As has been evidenced, the number of effective returns has followed a downward path since 2016. For example, the return rate within the EU was 45.8% in 2016, but later it fell to 36.6% in 2017, 31.9% in 2018 and 28.9% in 2019,[35] with 29% in the third quarter of 2022,[36] although some Member States, including Poland, approached 100% in 2019. Two main reasons for non-return have remained the same, and these are practical problems in the identification of persons issued with the return decisions, and their documentation, namely obtaining the necessary documents from non-EU authorities.[37] The question that arises in this context is which specific measures a Member State may undertake when – after the completion of the return procedure in accordance with the Return Directive – the person concerned is still present on its territory. There is a well-established case-law whereby the Directive precludes the imprisonment of a third-country national who is staying illegally on the territory of a Member State and is not willing to leave that territory voluntarily, but has still not been subject to removal and has not reached the end of the maximum period of detention. The Directive does not however, as was stated in *Achughbabian*,[38] *Affum*[39] or *Ouhrami*,[40] preclude the imprisonment of the person to whom the return procedure established by that Directive has been applied and who is staying illegally in that territory with no justified grounds for non-return, e.g. when there is no threat to his or her life or freedom. Logically, the return procedure ends when the person leaves the territory of the Member States (or when the Member State legalizes their stay). The same follows from the EU return policy objectives. Yet the

[35] M. Díaz Crego, E. Clarós, *Data on returns of irregular migrants*, European Parliament Briefing, 2021, available at: https://tinyurl.com/2s3wjj43 (accessed 30 April 2023).

[36] Eurostat, *Returns of irregular migrants – quarterly statistics*, 2023, available at: https://tinyurl.com/2m6vm4bs (accessed 1 July 2023).

[37] Communication from the Commission to the Council and the European Parliament of 28 March 2014 on EU Return Policy, COM(2014)199 final.

[38] Case C-329/11 *Alexandre Achughbabian v. Préfet du Val-de-Marne*, ECLI:EU:C:2011:807, para. 50.

[39] Case C-47/15 *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, ECLI:EU:C:2016:408, para. 54.

[40] Case C-225/16 *Criminal proceedings against Mossa Ouhrami*, ECLI:EU:C:2017:590, para. 56.

imprisonment of persons issued with a return decision does not solve the problem of their leaving the EU territory. A solution presented by the European Commission[41] seems to be a satisfactory one in view of the doubts expressed above. In this regard, the European Commission has called for the possibility to impose the less coercive measures after the period of detention has been completed (considered the most severe coercive measure listed in the Directive), as long as and to the extent that these less coercive measures can still be considered necessary to enforce a return. Furthermore, the Commission emphasises that there are no absolute maximum time limits foreseen for the application of such measures, but they are subject to assessment in the light of the principle of proportionality. The views expressed by the Commission are supported by the views expressed by the Advocate General Szpunar in *Celaj*, stating that once a person is staying illegally on the territory of a Member State that person must be returned. The Member States' obligations arising from the 2008/115 Directive are persistent and continuous and apply without interruption in the sense that they arise automatically as soon as the conditions of the Directive are fulfilled.[42] In any case, this element of the EU return policy requires further clarification and specification, as it constitutes a factor which may undermine the effectiveness of this policy.

2. POLISH RETURN POLICY AND PRACTICE

2.1. The Principles Underlying Polish Return Policy

Polish return policy is currently conducted under the 2013 AoF, which entered into force on 1 May 2014 and which has been amended thirty one times since then.[43] Poland thus was not an exception to the common trend among the EU Member States to procrastinate in the transposition of the Return Directive.[44]

Under Polish law, a return decision is issued by the Border Guard. It may subsequently be appealed to the Border Guard Commander-in-Chief. The underlying principle is thus the principle of two instances of administrative proceedings, considered fulfilled when it is proven that not only two decisions of two bodies of different ranks have been issued, but also that these decisions have been preceded

[41] Commission Recommendation, *supra* note 31, p. 146.

[42] Opinion of Advocate General Szpunar of 28 April 2015 in C-290/14 *Criminal proceedings against Skerdjan Celaj*, ECLI:EU:C:2015:285, para. 50.

[43] Upon its adoption, the 2013 AoF consisted of 522 articles and has since been widely regarded as "complicated and difficult for both the authorities and the individuals". J. Chlebny, *Artykuł 1*, in: J. Chlebny (ed.), *Prawo o Cudzoziemcach. Komentarz* [Act on Foreigners. A Commentary], Beck, Warszawa: 2020, p. 5).

[44] It initially decided to introduce only entry ban and voluntary departure provisions, which it did in 2012, upon the threat of being sued by the European Commission before the CJEU, by adopting the required amendments.

by a procedure conducted by each of the bodies in a way that it has been possible to achieve the objectives for which the proceedings are conducted.[45] As the next step, return decisions may be subject to judicial scrutiny by the Regional Administrative Court (RAC), and then the RAC's judgments may be appealed to the Supreme Administrative Court (SAC) in a cassation proceeding. The scope of the control over the activities of public administration has been specified by the 2002 Law on proceedings before administrative courts.[46] As the RAC has put it,[47] administrative courts exercise control over public administration activities, where they verify whether the administrative authority did not infringe the law to a degree likely to affect the outcome of the case. Additionally, a cassation proceeding aims at reviewing the first instance judgment. In proceedings before administrative courts, the principle of *tempus regit actum* is applied, which means that the court takes into account the legal and factual circumstances existing on the day the controlled act was issued.[48] By contrast, decisions on placing a third-country national in detention are issued by penal divisions of District Courts (common courts). They may be then appealed to Regional Courts (second instance common courts).[49]

As has already been highlighted in the first part of this article, the sole purpose of the Return Directive is to regulate issues pertaining to the issuance of return decisions to third-country nationals staying illegally, and the implementation of those decisions. In addition, as the Advocate General Mengozzi has put it,[50] "the *specific assessment* of whether a third-country national is staying legally or illegally on the territory of a Member State may, where appropriate, also depend on the application of domestic rules in that Member State". P. Dąbrowski has clarified that the determination of the grounds for the third-country national's obligation to return remains within the exclusive competence of the Member State, as neither EU law nor international law determine national law on foreigners in that respect.[51] This limitation of the scope of the Return Directive thus gives the Member States a useful tool to diversify the grounds for the stay to be considered illegal. In Poland,

[45] Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 18 May 2021, II OSK 1644/20.

[46] Ustawa Prawo o postępowaniu przed sądami administracyjnymi [Law on Proceedings before Administrative Courts], Journal of Laws 2002, No. 153, item 1270, as amended.

[47] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 29 March 2019, IV SA/Wa 3371/18.

[48] Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 20 December 2018, II OSK 2341/18.

[49] For a compact overview of institutional competence in immigration cases in EU Member States, *see* J. Chlebny, *Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases*, 20(2) European Journal of Migration and Law 115 (2018).

[50] Advocate General Mengozzi, *supra* note 16, para. 18.

[51] P. Dąbrowski, *Artykuł 302*, in: J. Chlebny (ed.), *Prawo o Cudzoziemcach. Komentarz* [Act on Foreigners. A Commentary], Beck, Warszawa: 2020, p. 605.

the grounds to issue a return decision as a consequence of an illegal stay are listed in Art. 302 of the 2013 AoF, with sixteen grounds included in the list. The lack of common standards in this field enables the Member States to end the legal stay on their respective territories on grounds of public order or national security, which is also the Polish case, as evidenced in Art. 302(1)(9). The public order or national security clause was explicitly excluded from the Europe-wide harmonisation of the return policy, at least as the ground for the administrative detention, but, as explained by the European Commission,[52] once the legal stay of a third-country national has been ended for reasons of public order, that person is staying illegally and the Return Directive is then applied to them.

Once the ground for the illegal stay has been identified, the issuance of a return decision is obligatory,[53] in the absence of any negative grounds preventing its issuance.[54]

Polish law specifies five different administrative decisions ending a first instance administrative proceeding. Among them is a return decision, with its eight subtypes. Without entering into details, the most common decision is a return decision specifying a period for voluntary departure and accompanied by an entry ban. Polish law also provides that in situations where a return decision is not issued (e.g. where a third-country national holds a refugee status) or where the return cannot be carried out, a third-country national is granted a residence permit for humanitarian reasons or a permit for a tolerated stay.

In specific situations, a return decision may be subject to forced execution. Subjecting a return decision to forced execution is not considered an administrative decision. It does not concern the rights or obligations of the third-country national, but is a consequence of the finality of the decision which imposes such obligations. Thus the Border Guard, as the authority executing return decisions, is obliged to carry out a forced execution without an additional explanatory procedure. As the Court has put it, there is no other choice but to execute the decision.[55]

Lastly, the 2013 AoF foresees three different forms for the detention of third country nationals: a detention for no longer than 48 hours; placing such persons in a guarded centre; and placing them in a rigorous detention centre.

It follows from the above that in spite of its complicated and lengthy construction, the 2013 AoF reflects the solutions proposed by the Return Directive. How-

[52] European Commission, *Proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, 1 September 2005, COM(2005)391.

[53] Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 10 May 2018, II OSK 392/18.

[54] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 4 February 2019, IV SA/Wa 2781/18.

[55] Postanowienie Wojewódzkiego Sądu Administracyjnego w Rzeszowie [Order of the Regional Administrative Court in Rzeszów], 9 January 2019, II SA/Rz 1153/18.

ever, when it is examined in greater detail, taking into account recent amendments, the picture that emerges is far from clear and does not lay out what is termed the "legitimacy or rationale" behind legal measures.

In this article two controversial measures will be discussed. In particular, they are amendments introduced as a reaction to the 2015 refugee crisis (Section 2.2) and to the 2021-2023 humanitarian crisis ongoing at the Eastern external EU border (Section 2.3). The first one, associated by the Polish government with a terrorist threat, gave rise to the introduction into the 2013 AoF of so-called "anti-terrorism" legislation. The second one was a result of a "hybrid attack" or "hybrid warfare" waged against the EU by Belarus, which assisted third-country nationals in reaching the territory of the EU[56] at its borders with Poland, Lithuania and Latvia. These operations resulted in the adoption in Poland of measures legalizing so-called "pushbacks".

2.2 Fighting a Terrorist Threat – Article 329a

The 2013 AoF allows for return decisions to be issued – at the request of several "security" agencies – by the Minister of Internal Affairs when there is a fear that a third-country national may conduct terrorist or espionage activities or is suspected of committing one of these crimes. Here, a third-country national may lodge a request to the Minister to reconsider their case in the second instance. That regulation[57] was introduced in 2016 under the 2016 Anti-terrorism Act in response to the increased terrorist threat experienced in 2015-2016 in Western European countries such as France and Belgium,[58] and indirectly in response to the migration crisis that peaked in 2015. It was difficult, at least at the beginning, to establish its relationship with other provisions establishing the grounds for issuing a return decision, especially with Art. 302(1)(9) referring to national security grounds.

These doubts were soon clarified by the administrative courts. Initially, the first instance administrative courts accepted the arguments invoked by the administrative authorities.[59] The Minister of Internal Affairs claimed that Art. 329a envisages a spe-

[56] Although a new trend is more and more visible, *see* C. Ciobanu, M. Helobi, *Russian roulette: EU dreams of migrants now come through Moscow*, Balkan Insight, 19 December 2022, available at: https://balkaninsight.com/2022/12/19/russian-roulette-eu-dreams-of-migrants-now-come-through-moscow/ (accessed 30 April 2023).

[57] Art. 329a of the 2013 AoF.

[58] Uzasadnienie do projektu ustawy o działaniach antyterrorystycznych [Explanatory Memorandum to the draft Antiterrorism Act] 2016, available at: https://tinyurl.com/2rb44sae (accessed 30 April 2023).

[59] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 13 April 2017, IV SA/Wa 363/17; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 11 May 2018, IV SA/Wa 358/18; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 13 December 2018, IV SA/Wa 2659/18.

cial return procedure, as opposed to the ordinary procedure, which is reflected, *inter alia*, in different bodies responsible for the issuance of the return decision. It provides for two separate and independent grounds for issuing a return decision, namely the existence of a fear that the person may carry out terrorist or espionage activities, or the finding that a person is suspected of committing one of these offences. It constitutes a *lex specialis* in relation to general grounds for issuing a return decision, such as reasons of defence or state security. Last but not least, it is intended to be an effective and swift administrative measure to prevent threats to public security in the form of espionage or terrorist activities. A return decision issued under this procedure is binding and not left to the discretion of the Minister and is subject to immediate execution.[60]

However, this trend was soon reversed. First and foremost, as stated by the SAC a return decision adopted under Art. 329a with regard to a third-country national residing in Poland on the basis of a temporary residence permit falls within the scope of the Return Directive.[61] This means that it must be interpreted taking into account all the safeguards set out in that Directive. This important conclusion, which is strictly in line with the European Commission's interpretation,[62] is the starting point for further reflections on the nature of return decisions issued on the grounds of a terrorist threat. Firstly, a person concerned may, while filing a complaint before an administrative court, invoke national provisions relating to the suspension of the enforcement of that decision if there is a danger of serious damage or near-irreversible consequences if the person is returned. Secondly, the fact that the decision is subject to an immediate forced execution does not prevent it from being suspended. Thirdly, the court must consider the grounds for the suspension, such as the risk of a person being subjected to torture in their country of origin or having their family life violated. Fourthly, the court must as well consider granting that person a residence permit for humanitarian reasons or a permit for a tolerated stay. Fifthly, the administrative body is obliged to assess and clarify the facts relating to the current situation in the country of origin and the risks presented to the third-country national if they were to return there. The absence of that assessment may lead to the annulment of the return decision.

In conclusion it must be clearly stated that at present, in spite of several controversies,[63] thanks to its judicial interpretation Art. 329a is an integral part of the

[60] *See* Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 17 November 2020, II OSK 744/20.

[61] Postanowienie Naczelnego Sądu Administracyjnego [Order of the Supreme Administrative Court], 19 November 2021, II OZ 1152/20; Postanowienie Naczelnego Sądu Administracyjnego [Order of the Supreme Administrative Court], 16 April 2021, II OZ 163/21; Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 6 September 2022, II OSK 457/21.

[62] European Commission, *supra* note 52.

[63] One of them being the lack of access to classified data considered as not in violation of procedural rights,

return law in Poland, which means that the same rules apply to the issuance of return decisions under this provision as to the issuance of return decisions under Art. 302 of the 2013 AoF.

2.3. Border Cases – Article 303(1)(9a)

Pursuant to the new wording of the 2013 AoF, as amended in October 2021, if a person was apprehended immediately after illegally crossing the external EU border, the Border Guard shall draw up a report on the border crossing and issue an order to leave the territory of the Republic of Poland. That order specifies the obligation to exit Polish territory and the period of the entry ban. It may be appealed against to the Commander in Chief of the Border Guard, which does not, however, suspend the enforcement of the order.

The explanatory memorandum[64] to the draft law states that the new procedure is intended to streamline and accelerate the return procedures. Therefore, it is clear that the new procedure pertains to those who are physically present in the territory of Poland without legal title to stay there, and that their situation should first be examined by reference to the Return Directive and the return procedure laid down therein.[65] The Directive also stipulates that certain exceptions may apply as regards its personal scope. That exception is set out in Art. 2(2)(a) (and labelled as "border cases"), according to which Member States may decide not to apply the Directive to, *inter alia*, third-country nationals who are apprehended or intercepted by the competent authorities in connection with the illegal crossing of the external border of those States and who have not subsequently obtained an authorisation or a right to stay in that State. It cannot be denied that "frontline" Member States are even encouraged by the European Commission to use this exception in situations of significant migratory pressure, "when this can provide for more effective procedures".[66] Indeed, the purpose of this provision, as interpreted in *Affum*, is to permit Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the

see G. Matevžič, *The Right to Know. Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*, Hungarian Helsinki Committee, September 2021, available at: https://helsinki.hu/en/comparative-report-on-access-to-classified-data-in-national-security-immigration-cases/ (accessed 30 April 2023).

[64] Uzasadnienie do projektu ustawy o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [Explanatory memorandum to the draft act on amending the act on foreigners and the act on granting protection on the territory of the Republic of Poland], 2021, available at: https://tinyurl.com/y5fesstx (accessed 30 April 2023).

[65] K. Strąk, *The order to leave the territory of the Republic of Poland in light of Directive 2008/115 (the Return Directive)*, in: W. Klaus (ed.), *Beyond the law. Legal assessment of the Polish state's activities in response to the humanitarian crisis on the Polish-Belarusian border*, Publishing House of ILS PAS, Warszawa: 2022, p. 13-15.

[66] Commission Recommendation, *supra* note 31, p. 95.

Directive, in order to be able to remove more swiftly third-country nationals who have been intercepted when crossing those borders.[67] In other words, according to *Arib*, a Member State may be justified in failing to follow all the procedural stages set out in the Return Directive in order to speed up the return of third-country nationals who are unlawfully present on the territory of that Member State to a third country by immediately returning those persons to the external border that they have crossed illegally.[68]

However, Member States may only invoke that exception under certain conditions set out in the Directive. National law must respect the general principles of international law and the fundamental rights of third-country nationals, as well as the minimum guarantees foreseen in Art. 4(4) of the Directive; namely, they must respect the principle of *non-refoulement* and ensure a sufficient level of protection for third-country nationals excluded from the scope of the Directive which is no less favourable than the level of protection set out in the Directive's provisions on: limitations on the use of coercive measures; postponement of removal; emergency health care and necessary medical treatment in case of illness; as well as detention conditions. As the CJEU has put it, Art, 4(4) is intended to ensure that simplified national procedures observe the minimum guarantees prescribed by the Directive.[69]

During the application of the 2013 AoF, it has already turned out that the boundaries between Arts. 303(1)(9a) and 302 – at least insofar as the grounds for return are concerned – have become blurred. Art. 302(1)(10), referring to persons who have illegally crossed or attempted to cross the border, can serve as an example. Under it – but also in other circumstances listed in Art. 302 – a return decision is issued, which means that a third-country national is subject to the return procedure in accordance with the standards set out in the Return Directive. Under Art. 303(1)(9a), referring to persons who were apprehended immediately after crossing the border, only an order is issued and a third-country national is excluded from the return procedure as set out in the Return Directive. Art. 303(1)(9a) primarily refers to persons crossing the border rivers or climbing the wall at the Polish-Belarusian border. The question raised is whether the Border Guard will be able – or willing – to correctly establish in each case that a particular person has been apprehended immediately after crossing the border. The 2013 AoF, after it was amended, does not at any point refer explicitly to the special minimum guarantees listed in the Directive and applicable to "border cases", which has its effects on how the enforce-

[67] Case C-47/15 *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, para. 74.

[68] Case C 444/17 *Prefet des Pyrenees Orientales v. Abdelaziz Arib and others*, ECLI:EU:C:2019:220, para. 55.

[69] Case C-47/15 *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, para. 74.

ment of "leaving the territory of the Republic of Poland" is carried out in practice against third-country nationals. The orders to leave Polish territory only refer to "bringing a person to the state border line". An answer to one of the parliamentary interpellations by the Minister of Internal Affairs[70] shed some light on that issue, explaining that bringing third-country nationals to the state border line is carried out after prior recognition of the situation and with particular regard to ensuring their safety. Moreover, if the person's well-being allows it, they are brought to the place where they illegally crossed the state border, unless such a place is unknown or not safe. In that situation the nearest place ensuring the person's safe return to the country from which they illegally crossed the Polish border is selected. The reason – as the Minister of Internal Affairs further explained – why the enforcement of the orders is conducted in the way described above is because of the fact that in September 2021 Belarus suspended the readmission agreement with the EU and has refused to accept persons residing on its territory since then. Hence, returning them to the border line remains the only possible way of forcibly enforcing the orders to leave the territory of Poland and preventing their further illegal migration to other Schengen countries. In practice – and this is evidenced by third-country nationals' testimonies – these persons were brought to the gates installed in the wall with the assistance of Border Guard, and no formal border crossing points were used to that end.

The new regulation was highly criticised, first at the stage of legislative work, and then after it came into force. First of all, it still remains doubtful whether the exceptions set out in Art. 2(2)(a) of Directive 2008/115 were correctly implemented into the Polish legal order[71]. Secondly, the concerns – expressed in various reports and publications presented by the Polish Ombudsman[72] or migration researchers,[73] among others – have been confirmed in several judgments of administrative courts[74],

[70] Odpowiedź na interpelację nr 30654 w sprawie sytuacji na granicy polsko-białoruskiej [Response to interpellation 30654 on the situation at Polish-Belarusian border], 2022, available at: https://www.sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=CBPJ2H (accessed 30 April 2023).

[71] Strąk, *supra* note 65, p. 14.

[72] Polish Ombudsman, *Letter to the Marshall of Senate*, 3 October 2021, XI.543.13.2018, available at: https://bip.brpo.gov.pl/sites/default/files/2021-10/Opinia_RPO_cudzoziemcy_3.10.2021.pdf (accessed 30 April 2021).

[73] W. Klaus (ed.), *Beyond the law. Legal assessment of the Polish state's activities in response to the humanitarian crisis on the Polish-Belarusian border*, Publishing House of ILS PAS, Warszawa: 2022; G. Baranowska, *Pushbacks in Poland: Grounding the practice in domestic law in* 2021, XLI Polish Yearbook of International Law 193 (2023). *See also* A. Bodnar, A. Grzelak, *The Polish-Belarusian Border Crisis and the (Lack of) European Union Response*, 28(1) Białostockie Studia Prawnicze 57 (2023).

[74] With one exception: Wyrok Wojewódzkiego Sądu Administracyjnego [Judgment of the Regional Administrative Court in Warsaw], 18 May 2022, IV SA/Wa 609/22, already annulled by the SAC: Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 10 May 2023, II OSK 1735/22.

explicitly pointing out its contradiction with the principle of *non-refoulement*[75] and fundamental principles of Polish administrative procedure.[76] The analysis of the principle of *non-refoulement* deserves special attention, as it is an essential legal basis for the entire system of international protection of third-country nationals, taking precedence over other norms of international law, EU law, and national laws relating to third-country nationals. What's more, it covers not only those who have lawfully submitted an application for international protection, but also those who have not.[77] In the courts' opinion, the principle of *non-refoulement* requires that no person should be subjected to measures such as refusal of admission at the border or, if already in the territory, expulsion or forced return to a country where they may fear persecution or threats to their life or freedom. However, in the cases before the administrative courts, the Border Guard determined in an arbitrary manner that the situation in Belarus was stable and that there were no indications that the applicant, who had come there as a tourist, would face any danger. Thus, a correct application of the principle of *non-refoulement* implies immediate, if only temporary, protection of a third-country national at the border as well as on the territory of a particular state. The migration crisis, especially at the Polish-Belarusian border, cannot exclude the application of this principle, even if a person crosses the Polish border illegally. The interpretation of the content of the principle of *non-refoulement* should lead to a balance between the protection of borders and stopping the influx of foreigners, and the respect for their rights under various provisions of international law. Hence, the application of the 2013 AoF must take into account not only Polish interests, but also Polish international obligations under the law on foreigners. One of them is the Return Directive, prohibiting *refoulement*[78] and safeguarding effective remedies against decisions related to returns.

The above is related to the way in which a report on a border crossing is filled in by the Border Guard officers. This way does not meet the requirements of the evidentiary procedure conducted in accordance with the principle of formality

[75] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 26 April 2022, IV SA/Wa 420/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 27April 2022, IV SA/Wa 471/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 20 May 2022, IV SA/Wa 615/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 27 May 2022, IV SA/Wa 772/22.

[76] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 27 May 2022, IV SA/Wa 772/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 5 October 2022, IV SA/Wa 1031/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Białymstoku [Judgment of the Regional Administrative Court in Białystok], 27 October 2022, II SA/Bk 558/22.

[77] *See* in a similar way Goldner Lang, Nagy, *supra* note 4, p. 444.

[78] Case C-663/21 *Bundesamt fuer Fremdenwesen und Asyl v. AA*, ECLI:EU:C:2023:540, para. 49.

and the principle of objective truth, as it does not serve to clarify the merits of the case, which is one of the pillars of the administrative procedure. In the cases under review, reports on a border crossing contained information limited only to the date and place of apprehension of the third-country nationals on Polish territory, as well as their personal details. There was no evidence that the Border Guard heard the third-country nationals concerned nor information establishing when the third-country nationals crossed the border and under which circumstances (voluntarily or being forced by other persons, alone or in a group,) nor what the purpose of their stay in Poland was (whether to apply for international protection or to use Poland as a transit country to another EU Member State). The above ran counter to the principle that a party was entitled to be heard, and did not allow for a correct determination of the facts of the case, in particular the reasons why the persons concerned entered the territory of Poland illegally, while the correct determination of facts is essential as it provides grounds for the further correct application of the applicable substantive law. As a result, in the cases indicated above the courts annulled the orders issued by the Border Guard.

CONCLUSIONS

This article demonstrates how important it is to provide for a proper level of harmonisation of specific legal solutions at the EU level, so that they result in the effectiveness of the EU return policy in general, and the Return Directive in particular. In the course of the legislative procedure the Commission's proposal was considerably modified, which resulted in the diversification of the implementation patterns. 'Common' standards and procedures have become 'common minimum' standards and procedures, which is particularly visible in the variety of different models that the Member States have developed, with such a diversified personal scope of the Directive at the top. This gives rise to some important consequences – the Directive does not set up a common list of the grounds on which to issue return decisions, and does not refer to returns justified on grounds of public order, national security or terroristic threats. In this way each Member State's return system is composed of legal norms of different origins, although all of them must be compatible with certain fundamental rights.

Polish return law and practice does not differ significantly from other Member States' return systems in this regard. As a whole, and bearing in mind its complexity and detailed nature, it was considered compatible with the EU return policy standards, although some minor deficiencies were identified[79]; and as a response,

[79] Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2019 evaluation of Poland on the application of the Schengen acquis in the field of return, 17 July 2020.

in order to eliminate these deficiencies, specific measures were proposed by the government. However, the major controversies that are discussed in this article are the consequence of the low level of the harmonisation. The first controversy, which refers to the application of the anti-terrorist legislation and which arises from the lack of the harmonisation of the grounds for issuing the return decisions, seems to be already rectified, mainly in the course of the judicial scrutiny carried out in light of the protection of relevant fundamental rights on which the European standards are built. However, it must still be borne in mind that return decisions issued under Art. 329a of the 2013 AoF are immediately executed, with the effect that during the judicial control phase the third-country national is no longer present on Polish territory. The second controversy, i.e. the "border cases" legislation, is undoubtfully the result of how its personal scope was determined in the Directive. The exclusion of certain groups of third-country nationals from that scope in accordance with Article 2(2)(a) results in subjecting them to the simplified national return procedures, with the result that they do not enjoy some of the procedural rights set out in the Directive. While recent judgments annulling orders to leave Polish territory also indicate a tendency to possibly rectify the Border Guard's incorrect practice in executing these orders, nevertheless an order to leave Polish territory is immediately executed and persons subjected to that simplified procedure have little chance to contact and appoint a legal representative.

Pushbacks in particular, and their widespread occurrence throughout Europe, have become a concern of various international bodies, one of them being the Commissioner of Human Rights of the Council of Europe, who interlinks the protection of human rights in the context of carrying out pushbacks with the rule of law. In her recent recommendation,[80] the Commissioner calls upon States to stop disregarding their human rights obligations, as this undermines the rule of law and hard-won human rights protections.

To sum up, in view of the inactivity of the European Commission in bringing Poland before the CJEU under the infringement procedure, the Polish administrative courts now play a special role in safeguarding the rights of individuals in the different return procedures set up under Polish law, either by annulling the administrative acts issued in proceedings that do not fulfil the standards established at the supranational level, or by having recourse to the preliminary ruling procedure before the CJEU.

[80] Council of Europe, *Pushed beyond the limits. Four areas for urgent action to end human rights violations at Europe's borders. Recommendation* 7 April 2022, available at: https://www.coe.int/en/web/commissioner/-/pushed-beyond-the-limits-urgent-action-needed-to-stop-push-back-at-europe-s-borders (accessed 30 April 2023).

BOOK REVIEWS

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Lukasz Gruszczynski, Marcin Menkes, Veronika Bílková and Paolo Davide Farah (eds.), *The Crisis of Multilateral Legal Order. Causes, Dynamics and Implications*, Routledge, London and New York: 2023, pp. 327

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Yet another publication on multilateralism in crisis – this could well be the first, spontaneous, reaction a potential reader may have to the volume under review. Indeed, one may risk saying that the academic literature on the topic testifies to it being nowadays one of trendiest approaches to the modern international legal order. But this fact should not in any way depreciate the volume edited by Lukasz Gruszczynski, Marcin Menkes, Veronika Bílková and Paolo Davide Farah and published in the *Transnational Law and Governance Series* by Routledge. The editors were fully aware of the richness of the pending academic debate (see, e.g., references in the Introduction, pp. 5-10) and clearly intended to contribute to it. The reasons for this were twofold. Firstly, both the editors and the contributors seemed unsatisfied with the state of the debate on the modern multilateralism and chose to go further, as the very subtitle of the book suggests: the research was aimed at unfolding the causes, dynamics, and implications of the crisis. Secondly, the book was written by a group of researchers who initially met during a conference organized in November 2019 in Warsaw, and then transformed into a common project that finally resulted in the collection of the essays under review. And after having read all the contributions, one can have no doubt that the group was very much united in its general approach to the international legal order. This is conspicuous in the very last words of the volume's conclusion, where the editors – and this is definitely valid for all the other contributors as well – pointed to international law

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as "the best instrument we know for working for the common good" (p. 310). And although the group is otherwise diversified on many levels, this common ground is obvious and reflected in the fact that the work includes both experienced and young researchers of different European origins (with a significant representation of Central and Eastern Europe), specializing in a variety of topics. Thus, *The Crisis of Multilateral Legal Order* offers refreshing, thought-provoking, and original insights written by authors with a sincere commitment to – if not a passion for – international law. And this is exactly where the strength of the book lies.

The book is well structured. It begins with the introduction by the editors, entitled *Mapping the crisis of multilateralism*, followed by fourteen concise contributions, divided into two parts. The first part, as its subtitle suggests, consists of four more general texts aimed at conceptualizing the crisis. All four texts – written by Oleksandr Vodiannikov (*The Crisis of Trust in Contemporary Multilateralism: International Order in Times of Perplexity*); Sean Butler (*Believing Is Seeing: Normative Consensus and the Crisis of Institutional Multilateralism*); Maria Varaki (*Revisiting the 'Crisis' of International Law*); and Mary Footer (*The Multilateral International Order – Reports of Its Death Are Greatly Exaggerated*) – reveal individualistic perspectives on exploring the nature of the crisis of multilateralism. As such, they offer different general approaches to the problem which, rather regrettably, resonate with each other only in a limited way.

Part two of the volume includes ten pieces on various specific issues. Their diversity may seem rather discouraging at first glance, but a reader is indeed offered contextualised and in-depth analyses of the questions: "How is the crisis manifested in the specific areas of public international law?; and What are its dynamics?" (p. 10). Hence the title of part two: *Dynamics and implications of the crisis*. These texts are authored by Christopher Lenz (*State Withdrawals of Jurisdiction from an International Adjudicative Body*); Malgosia Fitzmaurice (*Multilateralism, Community Interests, and Environmental Law*); Vassilis Pergantis (*The Advent and Fall of Trust as a Cornerstone of Judicial Cooperation in Multilateral Regimes in Europe: A Cautionary Tale*); Agnieszka Nimark (*The Nuclear Non-Proliferation Regime at 50: A Midlife Crisis and Its Consequences*); Patrycja Grzebyk and Karolina Wierczyńska (*The Crisis of Multilateralism Through the Prism of the Experience of the International Criminal Court*); Ernst-Ulrich Petersmann (*Global Governance Crises and Rule of Law: Lessons from Europe's Multilevel Constitutionalism*); Jessica C. Lawrence (*We have Never Been 'Multilateral': Consensus Discourse in International Trade Law*); Ewa Żelazna (*The EU's Reform of the Investor-State Dispute Resolution System: A Bilateral Path towards a Multilateral Solution*); Margherita Melillo (*Challenges to*

Multilateralism at the World Heath Organization); and Szymon Zaręba (*The Council of Europe and Russia: Emerging from a Crisis or Heading towards a New One?*).

The book ends with a concise conclusion by the editors, where they eloquently comment on the individual contributions and deduce from them seven normative trends, which are referred to below.

The advantage of the editors' approach is the broad understanding of multilateralism as a dominant framework in international relations in the post-Second World War era. They address this phenomenon not only from a traditional, quantitative, perspective (coordination of States' policies in groups of three or more states), but also in a much broader and multifaceted qualitative dimension. The latter allows for considering the characteristics of States' cooperation based on a growing area of common values and interests, as well as on legal norms and institutions aimed to protect them. What's more, this approach takes into account the increasing role of non-state actors, in their vast varieties. Indeed the positive impact of non-state actors on multilateralism is one of the seven normative trends identified in the volume. Still, the editors left it to the contributors to make their own decisions concerning how they precisely understand multilateralism in their individual approaches. What is shared by the editors – as explicitly stated in the introduction (p. 9) – as well as by the contributors, is the general assessment that multilateralism is nowadays in crisis, understood as the erosion of common values and the growing prevalence of individual States' interests. While accepting this assertion as a justifiable starting point for the analysis to be conducted, one may nevertheless ask whether an approach that is not necessarily focused on the "crisis" as a distinct phenomenon, but rather on the constant (indeed turbulent!) evolution of a system of international relations based on international law (from the very beginning being characterised and governed by the competing interests of States and other actors) would not be equally useful. Such an approach is to some extent discussed in Maria Varaki's text. Indeed, as she pronounces in the very beginning: "International law seems to operate in an everlasting aura of crisis, presented either as a force of progress and just rectification, or alternatively as a driver of further inequality and injustice" (p. 62). It may be postulated that the concept of a permanent crisis inevitably loses its denomination as crisis.

Notwithstanding the above, the core of the problem addressed is the same: the changes in the international legal order under pressure. The editors formulated two sets of questions (p. 10). They aim, firstly, at identifying the nature of the crisis and the reasons behind it (which may be domestic political changes, international geopolitical reconfigurations, or some dysfunctionalities); and secondly at examining the dynamics and implications of the crisis (manifested in specific areas of international law and with consequences for both general international law on

the one hand, and its specialised legal regimes on the other). As can be adjudged from the very titles of the contributions listed above, the reader receives a variety of specific problems, answers, and assessments.

Yet one common characteristic of all the texts is that they are more about contributing to the debate than about offering solutions. Hence it should come as no surprise that the book finishes with rather open answers offered by the editors, such as "that the crisis is both present and absent, depending on the perspective of the inquirer and the social world to which one refers" and – as was already mentioned above – "that international law is the best instrument to address the contemporary challenges" (p. 310).

As a reviewer I feel exempted from individually presenting all fourteen contributions, especially as the editors eloquently do so in the introduction and sum them up in the book's conclusion. Instead, I intend to offer here two more general comments inspired by the texts and the time context in which they were written.

It is striking that the project which has been eventually finalised in the volume under review started just before the COVID-19 pandemic; and that the book was published after the commencement of a full-scale aggression of the Russian Federation against Ukraine – both events being of crucial significance when addressing the crisis of multilateralism. Indeed, this scenario of events created an unexpected challenge for the editors, while at the same time offering a useful frame of reference for the views presented. The contributions directly refer only to a limited extent to the pandemic (except for an illuminating text by Margherita Melillo on the World Health Organization), and obviously the authors had no opportunity to refer to the Russian aggression that was unfolding in Ukraine as they were working on the volume. But the editors are fully correct when they state in the introduction that the pandemic highlighted some important aspects of the modern multilateralism. They mention four of them (pp. 4-5). Firstly, the pandemic was further proof that unilateralism has its obvious limits and is insufficient to address global public goods in cases where we are doomed to multilateralism. Secondly, according to the editors the international organisations remained heavily constrained in their activities by the competing Member States and, simultaneously, became easy targets for the Members States accusing them of ineffectiveness in the actions taken, thus highlighting the weaknesses of the existing arrangements. Thirdly, in such an extraordinary situation like the pandemic, States may – contrary to what was stated above on the indispensability of multilateralism – tend to prioritise their individual interests and thus diminish the trust, cooperation, and transparency which form the basis for multilateralism. Fourthly, the challenges inherent in such a scale as the pandemic may turn out to be a catalyst for changes aimed at reconfiguring the existing (im)balances of power in international relations. It seems that all these

mentioned aspects remain fully valid also in the context of the Russian aggression against Ukraine and the international community's responses vis-à-vis this blatant attack on the very basis of the modern international legal order. These responses prove that multilateral arrangements to address such extraordinary challenges – although imperfect – already do exist and may prove to be effective indeed, but rather in the more distant perspective. Yet whether multilateralism will be ultimately strengthened or weakened depends on the determination of both the international community as a whole and individual States and other non-state actors. The most sophisticated legal arrangements cannot replace this need for collaboration. Such determinations – both collective and individual – must be based on mutual trust. As the editors put it in the context of one of the identified normative trends: "Restoring trust is therefore a prerequisite for any successful multilateral reforms" (p. 307).

The other comment is of a more polemic character. I cannot resist an impression that even accepting the volume's broad approach to crisis, some issues discussed in the context of a crisis of multilateralism have not proved relevant. For example, are withdrawals of jurisdiction from international adjudicative bodies symptoms of the crisis, as Christopher Lentz and the editors suggest? I doubt it. Indeed, the examples are rare (especially when one considers the proliferation of international courts and tribunals) and – as Lentz himself points out – they have been rather followed by more States conferring jurisdiction. Is this really – as the editors put it – "the most serious expression of the crisis of multilateralism" (p. 12); or is it maybe an inevitable part of regular legal relations? Indeed, this process could be alarming if it were significantly increasing, but this is not the case. What's more, the problem could also be addressed from a completely different perspective. Is it possible that the adjudicative bodies themselves contribute to the skepticism of States and, in consequence, to potential withdrawals of jurisdiction? The most telling example here is the case of the European Court of Human Rights (ECtHR), which is constantly enlarging its jurisdiction and implicitly distancing itself from the subsidiarity principle and the margin of appreciation doctrine – despite the introduction of references to both of them in the Preamble of the European Convention on Human Rights (ECHR) by Protocol No. 15. And it is this process that is producing tensions among the ECtHR and the State-parties to the ECHR, which can ultimately lead to renunciations of the ECHR, although I do hope that this scenario will never materialize, as the law of the ECHR, based on the case-law of the ECtHR, should be perceived as one of the greatest achievements of the European legal culture after the Second World War. This is, of course, an issue that should be discussed in a manner exceeding the format of a book review, but I mention this example here to suggest that the causes of the crisis of multilateralism may also be rooted in multilateral institutions themselves. And not only in the sense that they

appear ineffective, or do not show a sufficient level of resilience (cf. normative trends 2 and 5 mentioned by the editors in the conclusion; pp. 306-307); but that they may turn out to be "too effective" and thus, in this way, disturb the necessary equilibrium, which also includes respect for States' interests and approaches. In this sense – no matter whether one likes it or not – I find the application of such research approaches to be much closer to the reality of international relations and the process of the development of international law than calls for "rethinking and reconceptualization of the concept of sovereignty, which in turn will entail structural reform of the entire [international] legal system" (p. 307 with references to the texts by Maria Varaki, Ernst-Ulrich Petersmann and Jessica Lawrence). The development of multilateralism under international law is a process, and pushing it unduly and speeding it up may actually be a real hindrance. This important, to my mind, perspective is present in the volume only to a very limited scope (see, however, some criticism on the International Criminal Court and its internal dysfunction as presented by Patrycja Grzebyk and Karolina Wierczyńska). The approach of awaiting more effective institutionalization – accepted by most of the contributors – may be perceived as wishful thinking and as not necessarily productive for the development of an international legal order based on common interests.

Indeed, the book under review is another publication on multilateralism in crisis, albeit one that inspires and stimulates further debates, polemics, and research. Taking into account the variety of specific problems addressed and approached differently by the various contributors, one may say that the volume edited by Gruszczynski, Menkes, Bílková and Farah resembles a fancy box of chocolates in which everybody will be able to choose the one that fully meets their expectations, but also will have a chance to try another one which surprises and enlarges their taste experience.

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*Bartłomiej Krzan**

Oktawian Kuc, *The International Court of Justice and Municipal Courts: An Inter-Judicial Dialogue*, Routledge, London, New York: 2022, pp. 304

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There have been many attempts to strengthen the role of national courts in the application of international law. The Routledge series *Research in International Law* has been recently enriched by a monograph *The International Court of Justice and Municipal Courts: An Inter-Judicial Dialogue* by Oktawian Kuc. The book is a revised doctoral thesis defended at the University of Warsaw.

The goal of the book has not been clearly defined. It is only after almost 4 pages of the introduction that the reader is informed (in a rather unsurprising fashion) that "the main purpose of this book is to examine whether inter-judicial dialogue between the International Court of Justice [ICJ] and municipal courts is in fact taking place". According to the author, the World Court and its domestic counterparts are already engaged in intensifying specific discourses. In the monograph under review he aims at "scrutinising different aspects of this phenomenon and providing some basic data as a further point of reference for future studies". Additionally, the author announces his intention "to address the problem of relationships between the Court and municipal judicial organs in a comprehensive and broad manner by identifying and analysing all aspects of the inter-judicial dialogue between these institutions". Whether the latter task is attainable in the book under review is doubtful, especially given the lack of a theoretical framework on the relationship between the domestic adjudicators/courts and the principal judicial organ of the United Nations. Much more modestly, the author speaks of examining "the main aspects of the inter-judicial dialogue between domestic judicial organs and the ICJ", and such restraint seems very warranted.

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The first chapter examines the problem from the perspective of the ICJ. It does not refrain from quoting a municipal court decision by name, and the author should be commended for examining all the rulings by the ICJ delivered between the years 1946 and 2020. Out of these almost one fifth referred at least once to a municipal judicial ruling.

In the first chapter the author also analyses how municipal courts deal with different sources of international law, following the classic sequence as enshrined in Art. 38 of the ICJ Statute. This is followed by a brief comment on how the World Court reacts to international wrongful acts arising out of municipal courts' decisions. Another important aspect tackled in the reviewed book is the influence of municipal courts' decisions on the ICJ's jurisdiction and the admissibility of cases.

It is of utmost importance to determine the extent to which the ICJ draws (or not) analogies from national procedural rules. To speak in this regard of the influence of municipal courts seems artificial or exaggerated, since the core of international procedural law, necessarily informal, is to leave it for the Court itself to decide. Therefore, the ICJ (as well as most other international judicial institutions) may simply find a decent solution in domestic law, and not in the rulings of the municipal courts themselves.

Firstly, both domestic law and domestic judicial rulings would be considered as facts by the ICJ. The growing importance of this can be seen with regard to provisional measures. Secondly, these rulings may as well manifest the exercise of sovereignty over a disputed territory, i.e. may be an element in proving the title to territory. Some important examples are provided by comparing the findings of fact first made by the domestic courts, and then determined by the ICJ.

Subsequently, the author explains, by means of several examples, the question of the (status of) municipal law before the World Court, which can perhaps serve as a kind of introduction of one of the general and fundamental questions, namely: the ICJ's position towards municipal courts and the latter's role in the ICJ jurisprudence. When examining whether the ICJ is competent to assess municipal judicial decisions in light of international law, the author considers the role of the Hague Court as an ultimate court of appeal for criminal issues, and correctly discards such a role. Instead he rightly asserts that the ICJ performs a merely supervisory function, i.e. to assess the accordance of national judicial decisions with international law and to pronounce on their legal effects on the international plane. The implementing role of municipal courts is also delineated and examined here, despite the matter being dealt with separately in the entire Chapter 2. Between them come some brief (3 pages) suggestions (directives) by the ICJ to municipal courts on how the latter should deal with questions of international law.

All those interactions, including the citation of the municipal rulings by the ICJ, confirm Lauterpacht's approach that international law is administered by both international and municipal courts. Unfortunately, the reader is merely presented with some case law illustrating this overview and is offered only modest comments here by the author.

The two chapters that follow concentrate on the post-adjudicative phase. In Chapter 2, the author scrutinizes the enforcement of ICJ decisions in municipal courts. At times, reference is also made to the respective position by the Iran-United States Claims Tribunal. When analyzing the legal framework of enforcement, the starting point is the binding force of the ICJ's decision. Naturally, reference is made here to Art. 94 of the United Nations Charter and the corresponding role of the Security Council. Yet for unknown reasons the author fails to refer to the Security Council's enforcement function here, and instead refers to it further under the heading "other methods of enforcement," where he rightly refers to the ICAO framework or to the corresponding mechanism enshrined in the Pact of Bogota.

The analysis of the respective practice of the municipal courts starts with a classification, which the author labels as "useful". In this regard, Kuc distinguishes between the domestic enforcement *sensu stricto* (defined at p. 99, where a State entitled under an ICJ decision initiates proceedings before a national court, so that the national system of justice and the coercive apparatus of the State are used to give effect to the ICJ's given decision); and *sensu largo* (where the respective action before a national court is initiated by a private party). Some further sub-categories have also been referred to, but the very distinctions and their respective manifestations are not given in an entirely consistent manner (and at times they intersect). In addition, Kuc also distinguishes "quasi enforcement", whereby judicial protection is sought before a domestic court by a natural or legal person with regard to an analogous or similar breach of international law to that declared by the ICJ.

A separate treatment is offered with respect to the implementation of advisory opinions. The main problem with Chapter 2 is its hidden (indirect) analytical part. The reader could have been presented with more in-depth comments, and instead needs to rely on descriptive parts before arriving at the general overview to find the very interesting, albeit a bit suspended, conclusions.

The third chapter is devoted to the reception of the ICJ jurisprudence by municipal courts. This particular form of inter-judicial dialogue may be translated into the involvement of domestic courts in the development of international law. The author describes, analyses, and then offers conclusions on this method of dialogue. The decisions of the ICJ may be considered as either evidence of international law, or as an authoritative treaty interpretation. The municipal courts may as well shed additional light on the rationale behind the relevant international norms. Thus,

the ICJ jurisprudence may provide assistance to municipal courts in defining the status of, and clarifying the interplay between, the different sources of international law. In this regard, the extent of conformity is crucial, but as rightly observed by the author of the reviewed book, the collision of arguments and attitudes may differ, thus contributing to the development of more comprehensive and widely-accepted answers to legal questions. The Chapter ends with some conclusions on the status of the decisions by the ICJ in the jurisprudence of municipal courts. These are certainly relevant for the entire book under review. Kuc is definitely right when he qualifies the rather infrequent involvement of national adjudicators as "a symptom of the willingness on the part of national courts to become more involved in the inter-judicial dialogue vis-à-vis the Court" (at p. 221).

The "Final Conclusions" deserve a separate comment, since the 23-pages-long text goes well beyond the problems analysed in the main body of the book. The highly interesting remarks introduce several entirely new aspects, no trace of which can be found in the preceding pages. At times, some of the conclusions seem to artificially include municipal courts. Therefore, they cannot be considered a traditional summary of the arguments espoused on the pages of the reviewed monograph, although they offer, *inter alia* a description of the general role to be played by the ICJ, and its role vis-à-vis other international courts and tribunals. This part has been written with great vigor and offers a high quality legal argumentation.

The author should be also congratulated for relying in his analysis on the rich literature and – more importantly – broad base of judicial rulings by different courts. Quite surprisingly however, Kuc does not refer to the seminal examination of the subject, i.e. *Regulating Jurisdictional Relations between National and International Courts* by Yuval Shany. The cursory (at best) reliance on the deliberations of the topic "The Activities of National Judges and the International Relations of their State" within the Institut de Droit International also comes as a surprise.

In sum, despite the (mainly structural) criticisms mentioned above, the book by Oktawian Kuc is certainly worth recommending, not only because of the highly interesting problem it tackles, but first and foremost for being a thought-provoking read which stimulates further consideration of the topic.

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*Jakub Kociubiński**

Maciej Bernatt, *Populism and Antitrust: the Illiberal Influence of Populist Government on the Competition Law System*, Cambridge University Press, Cambridge: 2022, pp. 258

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And those people should not be listened to who keep saying the voice of the people is the voice of God, since the riotousness of the crowd is always very close to madness. – Alcuin, 798 A.D.

Over the years much has been said about rational law-making. It is idealistically assumed that lawmakers are prudent and rational and that the shape of legal frameworks results from careful consideration of the pros and cons, all driven by an overarching obligation to pursue a general public benefit. The importance of a rational, science-based approach is especially seen in the sphere of competition rules, due to their inherent reliance on economic knowledge. In this sense, competition law allows rational lawmakers to rely on objective, verifiable science in order to safeguard the competitive process and ensure consumer welfare. But what if the lawmakers do not subscribe to this vision?

In a perfect world the author of this book, Maciej Bernatt, would have no reason to write *Populism and Antitrust: the Illiberal Influence of Populist Government on the Competition Law System*. The real world, however, is not perfect. In face of the rising tide of populism, the question of how ideas – largely built on fear and on short term emotionally-based public relations gains at the expense of long term planning and a science-based approach can impact the competition law is indeed a "hot topic".

The book is comprised of 7 chapters, divided into 4 parts. In the first part – which aims to build the theoretical foundation upon which the subsequent analysis is based – the author presents the concept of populism and analyses the factors

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responsible for the appearance of illiberal tendencies, which often amount to what Erich Fromm has described as "Escape from Freedom".[1] The factors presented – such as economic insecurity or cultural anxieties – are not country-specific, and their combination and interplay varies across countries and regions. However, they do provide valuable insights into why populism has gained traction in recent years, making the conclusions presented relevant in a non-country specific context.

Maciej Bernatt further analyses the mechanisms by which populist governments can affect markets, where changes in competition rules either directly pursue a populist agenda, or at least remove barriers impeding populist policies. These considerations represent the main building blocks of the book and provide a conceptual backdrop for the subsequent analyses. The research perspective is determined by the following questions:

What characteristics of populism are relevant in analysis of the influence of populism on a competition law system? In what ways does the rule of populists' governments affect the institutional structure and the enforcement of competition law? How relevant are the challenges related to the rule of populists' governments to the regional system of competition law, and what should the regional reaction to these challenges look like? (pp. 13-14).

The substantive discussion is then presented in the subsequent parts. The second part seeks to map the pathways of populists' influence on competition law systems. The author presents a set of possible scenarios, ranging from the minimalization of competition authorities' roles through atrophy, where *verba legis* becomes a dead letter to the complete deconstruction. Bernatt convincingly elucidates how seemingly innocuous factors may have wider knock-on effects in competition law. For example, he shows how relatively small changes in the rules govening appointments, dismissals and reporting procedures in competition and regulatory agencies may chip away at these agencies' independence. Generally, the system of checks and balances can become dismantled or rendered ineffective. These analyses make for a sad read when seen in the light of contemporary developments (the silver lining here is that this goes to show the accuracy of Maciej Bernatt's conclusions). The analysis in the third part moves to the supranational level. It focuses on how the national populistic tendencies can undermine the European competition law and further on how the EU can respond and defend its acquis. The final, fourth part provides a summary and offers conclusions as well as recommendations.

Throughout the book, the author frames the populist influences on the competition law system as a gradual departure from the decades-long adherence to a liberal economy. Even if a "pure" Nozick's liberalist approach is now rejected, even

[1] E. Fromm, *Escape from Freedom*, Farrar & Rinehart, New York: 1941.

in the European ordoliberal-inspired "social market economy" the very idea of a market economy and the role of competition as process was never questioned.[2] Conversely, as the author points out populist rhetoric often revolves around a strategic rejection of the free market economic consensus of the preceding period. In this context Maciej Bernatt points out the process of re-nationalisation, whereby the State is no longer seen as the guarantor of a free market, but rather is replacing markets in providing outcomes that would have been otherwise achieved by market forces. In this context we can see the growth of state-owned enterprises and their increased scope of operation. In addition, Bernatt argues that the redefinition of the role of the State manifests itself through the increased acquiescence towards subsidising (or otherwise supporting) sectors which evoke public sympathy, regardless of whether they have been negatively verified by market mechanisms and regardless of the broader economic implications.

Such an approach is often portrayed by populist discourse as "Economic Patriotism". This overused notion is, to paraphrase Uwe Pörsken, a "plastic word" – a good sounding hollow shell devoid of meaning and substance[3]. Bernatt pays attention to this policy angle and acutely observe that behind the lofty rhetoric, the (economically dubious) strategy of promoting State-owned "national champions" helps to build and maintain the political elite's power base, creating places which can be filled by political appointments and providing a vehicle for various pork barrel contracts. The populist slogan of 'economic patriotism' in reality translates into favouritism, whereby preferential treatment or privileges are given to certain individuals or groups based on personal relationships or other non-meritorious factors, rather than on objective criteria such as qualifications or performance. This process can take many forms, ranging from nepotism through to cronyism and political patronage.

The situation is further exacerbated by the systemic dismantling of checks and balances. This is the crux of the analysis presented in the book. The gradual but observable increase in the role of the state in the economy is not populist *per se*. For example, the recent trend of re-municipalization of certain public services stems from the economically defensible assumption that the marketized model has led to various inequalities and labour violations. All in all, there are many valid, economically defensible reasons for governments to intervene in markets. Even Friedrich von Hayek himself famously wrote that "probably nothing has done so much harm to the liberal cause as a 'wooden insistence' on laissez-faire".[4] Nationalization and

[2] *Cf.* R. Nozick, *Anarchy, State and Utopia*, Basic Books, New York: 1974, pp. 153-156 with W. Röpke, *Jenseits von Angebot und Nachfrage*, Eugen-Rentsch-Verlag, Erlenbach-Zürich-Stuttgart: 1958.

[3] *Cf.* U. Pörsken, *Plastic Words: The Tyranny of a Modular Language*, Penn State University Press: 1995.

[4] F. von Hayek, *The Constitution of Liberty, University of Chicago Press*, Chicago: 1960, p. 205.

increased stateization is not a problem in and by itself. It turns into a problem when populist policies escape the control normally exercised by independent competition/regulatory agencies and by impartial courts.

The author highlights the two main factors responsible for the process whereby competition law systems become either permeated by populistic ideas. or at least vulnerable to populist-driven initiatives: politically-driven appointment processes in seemingly independent agencies; and limited autonomy of non-political decision makers. The replacement of a recognized expert in the field who is chairperson of a competition authority with a political nominee with no prior experience in the field usually heralds this process. This will typically have the knock-on effect of attrition of "Old Guard" – i.e. highly experienced and largely irreplaceable personnel. Further Bernatt focuses his attention on legislative interference into the agencies' decision-making processes. This presents an almost textbook example of indirect influence (so much discussed in the context of Art. 6 ECHR), whereby for instance by simplifying a chairperson's dismissal procedures an organisation can be rendered "toothless" without any actual changes to its competences. This process usually results in the refocusing of enforcement priorities from protecting the competitive process – i.e. scrutiny of dominant State-run undertakings and cooperative relations between public enterprises – towards relatively small consumer-focused cases. At the same time, grassroots consumer advocacy groups are routinely ignored.

The next segment is devoted to the question of undermining the impartiality of the judicial protection system. Bernatt elucidates the role of due process as a safety net against, on the one hand, questionable government policies, and on the other against abuses of powers by otherwise unaccountable agencies. He well illustrates the synergy between the institutional framework of competition law enforcement and an independent, fair and impartial judiciary. Populist steps taken by governments – either directly or through vassalized competition authorities – can only succeed when effective judicial recourse in not available to affected individuals and/or institutions. Although in this context it must be noted that even in the European Union competition law, where neither the impartiality of the Commission nor the Court is in question, there is a salient issue of how meaningful such a judicial oversight really is if the Court's assessment is limited to questions of law and in principle cannot reject the Commission's economic analyses, even though they may be methodologically questionable.

In the final part of the book the author analyses how a regional system – in this case the European Union – can and should respond to a threat to its competition law system from within. Painting in broad strokes, the general thrust of the argument is to replace populist-poisoned domestic mechanisms with those where decisions are taken at the supranational level; for example by monitoring concentrations below

the so-called community thresholds as well as engaging in a search for "a friendly, dialogue-based resolution" (p. 238). In the latter context however, the author is rightly sceptical. A dialogue-based conciliatory approach may not be effective in reining in populist governments. If certain regimes systemically reject European values, one can reasonably expect such governments to keep "an open line of communication" in order to maintain the facade of openness and dialogue without actually reversing their policy courses. It can be said that we are observing a new iteration of a decades-old error made by Western Europe in its contacts with the Soviet Union, wherein all conciliatory approaches were based on the false premise that both parties were equally devoted to the principle of dialogue. Instead, as history has demonstrated, the Soviet side instrumentally exploited the existing goodwill to pursue their own agenda while viewing concessions as a sign of weakness.[5] The picture painted by Maciej Bernatt of how populist governments can maneuver in the international environment also lamentably bears a strong resemblance to challenges associating with treating people with a "criminal personality" where their need for control and power over others can and will cause them to misuse just about anything for their own purposes, including therapy, for example in order to build a false self-image.[6]

The author's conclusions provide therefore food for thought with regards to what to do with such governments. He questions whether there really exists a systemic approach to the protection of European values when a Member State equally systematically rejects them and yet the "offender" enjoys a democratic mandate. The inadequacy of a dead-letter Art. 7 TEU has become apparent in recent years. The infringement procedure, mixed with the rule of law conditionality regulation, has proven somewhat more successful, although far from completely. In light of all this, maybe what Alcuin quoted early was wrong? Maybe *vox populi* is indeed *vox dei?* That is is a scary thought, but if the observable wave toward populism does not subside, we may wind up not focusing on countering populist tendencies, but rather on how the competition law system can be dismantled and replaced with a command economy. This presents a yet-unwritten scenario and would be a continuation of Maciej Bernatt's book.

[5] P. Hassner, *Western European Perceptions of the USSR*, 108(1) Daedalus 113 (1979).

[6] S. Yochelson, S. Samenow, *The Criminal Personality: A Profile for Change*, Rowman & Littlefield Publishers, Lanham, Boulder, New York, Toronto, Oxford: 2004.

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*Ewa Bujak**

Chien-Huei Wu, *Law and Politics on Export Restrictions. WTO and Beyond*, Cambridge University Press, Cambridge: 2021, pp. 300

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At heart of the reviewed book are measures restricting the export of goods. The author aims to systematically examine the role they play within the world trade system, thus the book is centred around the GATT/WTO regime. Considerations are not, however, limited by that framework, as links to public international law as well as to international investment and competition law are also investigated. The author applies a dualistic approach, conducting his analysis not only legally, but also, if not most importantly, politically, with particular emphasis on the international political economy. Consequently, the book provides a multifaceted picture of, firstly, the role the export restrictions theoretically play within the global trade system, and secondly of practical effects and difficulties in their application (and sometimes non-application) beyond the WTO, particularly with respect to their intersection with other regulatory regimes of international law. The book's importance and contribution are reinforced by the fact that disciplines with respect to export restrictions in the GATT/WTO are very limited, and in the scholarship the subject remains largely unexplored. Furthermore, the uniqueness of the adopted measure-specific approach (instead of a sector-specific one) makes the book an even more comprehensive, thought-provoking and fascinating read.

The introductory chapter clearly maps out the crucial pillars of the book and provides clarity with respect to the adopted definitions and approaches. The author establishes a background for the further reflections by providing a definition of export restrictions, a justification for the applied approaches, and most importantly by showing practical examples, which directly correspond with the topics discussed in subsequent sections of the book. Each one illustrates a different challenge brought

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about by a specific export restriction regulation. The chapter is centred around the export sphere of the GATT/WTO international trading system, with its "built-in export bias",[1] almost instantly moving to considerations whether export tariffs can be included in the definition of "*commerce"* under Art. II:1(a) GATT; and thus whether the fundamental Most Favoured Nation treatment obligation (MFN) is applicable to them. The fact that the GATT/WTO system is based on its "built-in export bias" constitutes the core thesis of the book and manifests itself in the abundance of WTO rules on the liberalization of import restrictions, simultaneously with minimal regulation of restrictions relating to exports. Instead of relying on the commonly used terms of "export control" and "export restraint", in his investigations the author uses the term "export restriction", as it is regularly used in the legal texts of WTO agreements. Deriving from the Panel Report in *China – Raw Materials,* an export restriction is defined through its "limiting effect on exportation", regardless of the type of product, as well as through its potentially adverse effect on exportation, which is considered a decisive element of export restrictions.[2] This fundamental term is interpreted broadly in the book, wherein any measures which directly or indirectly limit exportation are subject to investigation.

The author uses a practical approach to describe the regulation of 'export restrictions' under the WTO regime, identifying the challenges in the application of specific export restrictions, each one directly corresponding with an issue investigated in detail later in the book. Firstly two – ultimately not adopted – proposals aimed at disciplining the export restrictions which particularly exacerbated food security are presented in an attempt to illustrate the growing attention of WTO Members to export restrictions.[3] Additionally, the author portrays the challenges and potential consequences of export restrictions by referring to *China – Raw Materials,* where the WTO dispute settlement bodies examined restrictions imposed by China on rare earths' exported to Japan, and examines their consistency, or inconsistency, with related WTO rules, particularly with the general exception provided in Art. XX GATT 1994. A different practical issue, which is highlighted as particularly

[1] Chien-Huei Wu*, Law and Politics on Export Restrictions. WTO and Beyond*, Cambridge University Press, Cambridge: 2021, p. 2.

[2] *Ibidem,* pp. 4, 18.

[3] 1. Draft declaration submitted by the European Union together with other members to the 2011 Ministerial Conference, which regarded the food export barriers which restricted humanitarian aid and thus penalized the most needy. The draft included a proposal to remove food export restrictions or extraordinary taxes for food which was purchased for non-commercial humanitarian purposes by the World Food Programme, together with a declaration not to impose such restrictions in the future. 2. Declaration submitted by the African and Arab groups "WTO Work Programme to Mitigate the Impact of the Food Market Prices and Volatility on WTO Least-Developed and Net-Food Importing Developing Members" for the purpose of exempting the least developed countries (LDCs) and net food importing developing countries (NFIDCs) from export restrictions potentially imposed by the food-exporting WTO members in order to protect the LDCs' and NFIDCs' food supplies.

important in the geopolitical context, concerns the invocation of national security exceptions for the justification of otherwise illegal export restrictions. This kind of states' practice, which is often aimed at achieving geostrategic and geopolitical goals, creates a series of important questions which author strives to answer later in the book. In particular, the relationship between export restrictions under the WTO trade regime and export control measures provided by public international law, as well as WTO adjudicators' potential jurisdiction over cases concerning national security, are investigated. The latter issue, introducing another key part of the book, relates to supply chain security. The Covid-19 crisis pushed many states to rapidly restrict the export of many goods critical for domestic supply, simultaneously endangering the global market.

As was already mentioned above, both international investment and competition law are considered by the author as highly influential on export restrictions, and thus constitute an important context for the presented analysis. Their links with export restrictions, such as instances when an export restriction may lead to an indirect expropriation claim under international investment law and thus result in compensation, as well as their unquestionable blending within the global supply chain, justify the author's decision to incorporate them into his investigations in order to present a comprehensive picture of the role of export restrictions within the global trade system. For that same reason, as was also briefly mentioned above, the book takes a measure-specific approach and the analysis is not limited to the natural resources sectors. This perspective contributes fundamentally to book's value and uniqueness, which further enhances its contribution to the debate; as the sector-oriented approach is commonly applied in works regarding export restrictions.

The book is composed of five chapters. Apart from the introductory one, each chapter focuses on export restrictions, either from a different legal or political perspective or describes a particular practical challenge linked with the application of export restrictions. Chapter 2 is centred around the WTO framework and provides an analysis of the WTO regulation of export restrictions, additionally taking a look at the accession protocols and working party reports, as well as investigates the regional trade agreements in search for provisions of an export-restricting nature. In Chapter 3, which combines a legal analysis with perspectives of political economy, attention is given to the governance-related aspects of export restrictions, particularly the question whether the WTO's exceptions can be applied to and justify the imposition of export restrictions by the states, with particular emphasis on national security. Chapter 4 expands the investigation into different regimes of international law, i.e. investment and competition law and policy, especially in the context of the global supply chain. In Chapter 5, which concludes the book, the author includes the post-Covid 19 perspectives and offers a look into the future of the global supply

chain. All of the chapters combined create a comprehensive and systematic picture of the role that export restrictions play in the global trade system. Each of the practical issues, briefly portrayed in the introductory chapter, are mirrored in an individual chapter, which develops the already-highlighted challenges, constituting at the same time a separate part of the book, as discussed later in this review.

Chapter 2, titled "WTO Rules on Export Restrictions", constitutes a theoretical framework, albeit not without practical insights, for the further and more detailed analyses included in subsequent parts of the book. As the title itself indicates, at the chapter's core are the WTO provisions of the WTO agreements relating to export restrictions. The analysis covers Art. XI of the GATT 1994, including two exceptions provided in Arts. XI:2(a) and XI:2(b), as the presented analysis departs from the two notions underlying the GATT/WTO regime, i.e. the liberalization of import barriers and, as a result, the elimination of quantitative restrictions.[4] Next the author takes a closer look at Art. 12 of the Agreement on Agriculture; Art. 11 of the Agreement on Safeguards (ASG); as well as all the relevant provisions of the Agreement on Subsidies and Countervailing Duties (ASCM). With regard to the latter, the author investigates its premises and argues that the export restrictions constitute subsidies, and potentially may result in anti-subsidy investigations and, consequently, also anti-dumping investigations. Additionally, the regulation of grey-area measures, particularly Voluntary Export Restraints (VERs), is also touched upon. The legal analysis leads the author to the very practical and most interesting part of the chapter, where he illustrates, in general, how WTO Members use the analyzed WTO rules relating to export restrictions to negotiate with acceding countries for their own future benefit; and secondly how the proposals of the WTO Members in the Doha Development Agenda could potentially put a leash on the export sphere of global trade. Based on the example of Russia's and China's accession to the WTO, the author demonstrates that voids in the systematic export restrictions' regulation under the WTO regime are being filled by bilateral rule-making at the stage of accession negotiations. Following Hardeep Basra,[5] the author argues that negotiation processes are not rule-based, but governed by "power politics", as the acceding country has to essentially buy/negotiate itself a "ticket of admission".[6] The price is their commitment, more often than not, to provide a market access that is higher than that which is reciprocally offered by

[4] The analysis relies on WTO dispute cases such as: *Canada – Measure Affecting Exports of Unprocessed Herring and Salmon; India – Quantitative Restrictions; India – Autos; Columbia – Port of Entry; US-COOL; China – Raw Materials.*

[5] H. Basra, *Increased Legalization or Politicalization? A Comparison of Accession under the GATT and WTO?* 46 Journal of World Trade 937 (2012), pp. 937-938.

[6] In the book (p. 64) the quote is cited from J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, The MIT Press, Cambridge, MA: 1994, p. 45.

WTO Members. Using the example of China's Accession Protocol, and following Russia's Working Party Report, the author demonstrates in detail why the WTO-plus obligations challenge the interpretative exercise of the Appellate Body and panels, particularly with regard to the applicability of a general exception. Later in the chapter the analysis focuses on WTO Members' proposals, which can possibly discipline the regulation of export restrictions. With regard to the Non-Agriculture Market Access, the author highlights proposals by Japan and the United States (US) which aim for more transparency in export restrictions, as well as an initiative from European Union (EU). The chapter concludes with the examination of different regulatory frameworks relating to export restrictions, particularly within the EU and NAFTA 2.0.

Chapter 3, "Governing Export Restrictions: National Security and International Political Economy" can be divided into three parts, each one unravelling the complexities of the connections between international political economy and international law with export restrictions. The chapter begins with a historical and evolutionary analysis of export restrictive measures in the post-war liberal international economic order, with a particular emphasis on the political and economic rationales of the Coordinating Committee for Multilateral Export Controls (COCOM). Based on a historical analysis and drawing from political economy and international relations, the author portrays and compares the domestic laws and policies on export control of the EU and United States, as they are considered to be, both historically and currently, key actors in disciplining export restrictions. The second part of the chapter is centred around the challenges of WTO governance, particularly because national security exceptions proliferate. The author investigates whether Art. XXI GATT 1994 provides sufficient controls for preventing the abuse of national security for protectionist reasons, allowing WTO members to adopt protection measures allegedly aimed at protecting essential security interests. In this part of the chapter, the author tackles two important problems: whether the national security exception is a self-interpreting clause; and whether application of a measure for the purpose of a political objective can be justified under the WTO regime. He also links the national security debate with the rather difficult relationship between "sovereign nations as masters of treaties and adjudicators as treaty-interpreters".[7] The third and concluding part of the chapter is devoted to recent cases relating to export restrictions, such as China's tourism embargo against South Korea; the diplomatic crisis in Qatar; as well as the EU's sanctions against Russia.

At heart of Chapter 4, entitled "Export Restrictions in the Global Supply Chain: Investment and Competition", is the global supply chain, its security, and supply

[7] Wu, *supra* note 1, p. 191.

chain risk management (SCRM). As a starting point, the author claims that in the present times, when multiple jurisdictions are part of the production process, export restrictions are a real threat to the security of global supply chains. In this chapter he explores how investment and competition law and policy can serve as a "remedy" to a potential disruption of global supply chains, and how they can effectively minimize the danger the export restrictions pose to production processes. Such export controls are investigated both in the vertical (buyers and suppliers) and horizontal (suppliers and suppliers) contexts.[8] The author points out that export restrictions can result in investment diversion, as countries with an abundance of natural resources may use such measures for the purpose of attracting foreign direct investment, creating a "comparative advantage vis-à-vis domestic downstream processers" through establishing a price differential with regard to specific materials.[9] Simultaneously however, export restrictions may serve the completely opposite purpose of preventing the market access of foreign entities, especially when combined with domestic measures such as the currently widespread foreign investment screening mechanisms. Another important issue highlighted here concerns both intermediate forms between governmental and private restrictions, such as instances when private trade barriers, are "approved, encouraged or tolerated by the government",[10] which may create challenges under competition law. Lastly, the author takes a look at export restrictions, especially export cartels, from the perspective of competition law. US anti-trust law, which is not applied if an export cartel has no adverse effect on the US domestic market, as well as the EU's competition law with respect to vertical agreements, including export bans to third countries with no effect on either trade or competition with internal market, are offered as examples.

In Chapter 5 – "Conclusion. Reconfiguring the Global Supply Chain in the Post-COVID-19 Era" – the author concludes his investigation with reflections on the future of the global supply chain in the new economic reality shaped by the Covid-19 pandemic. He identifies three key elements of fundamental importance to the new world. Firstly, he examines "beggar-thy-neighbour", which exposes the flaws of the WTO's export-biased regime whereby rich or resource-rich countries such as the US or China can impose export restrictions which in the long run endanger global supply chains and serve as means for achieving domestic policy goals, often invoking national security exceptions. Secondly, he focuses on economic security, which is in fact a response to deep economic interdependencies created by years of economic integration and trade liberalization. Thirdly he points out the decoupling of the US-China economy, which will most probably result in continuous efforts

[8] *Ibidem,* p. 203.
[9] *Ibidem*, p. 259.
[10] *Ibidem.*

on the part of the US to create a global supply chain only with its trusted allies and partners.[11] The book ends with the conclusion that in the upcoming years the securitization of international economic relations and dependence on export restrictions will increase even further.

The book presents a vivid and multifaceted picture of the role export restrictions play in a global trade system and does so in innovative, unique and comprehensive ways, which makes it a thought-provoking, intriguing and truly fascinating read. As the author has succeeded in analysing even the most complicated and detailed issues in a clear and easily understandable way, the book is beneficial for a broad category of readers. While undoubtedly practitioners will appreciate both the measure-specific approach and the practice-oriented analyses, at the same time the book can be equally enlightening for anyone interested in barriers to trade, broadly understood, as well as in any of the more specific issues presented in the different chapters. Consequently, this book would be of interest to lawyers, economists, and anyone professionally involved, or simply interested in, the WTO/GATT regime and its governance; investment law; competition law; national security exceptions; and supply chains as well as their risk management, not only from the legal point of view but also from the perspective of political economy. Undoubtedly readers and practitioners with advanced knowledge and understanding of the WTO/GATT system and its legal and political complexities will find the book both insightful and very interesting, while at the same time the author very often provides an introductory background to the more complicated or detailed issues, allowing readers with limited or no knowledge of the WTO regime or international trade law to benefit from reading this innovative and unique position. Additionally, inasmuch as the book offers an abundance of references to both the EU and the US, the book would be of great value to anyone legally or politically interested in their regulatory regimes.

[11] *Ibidem*, p. 262.

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